LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

APRIL 2023

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

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In Porter v. Martinez, ___ F.3d ___ , 2023 WL ___ (9th Cir., April 7, 2023), a three-judge Ninth Circuit panel votes 2-1 to affirm a district court's summary judgment order of dismissal in favor of the State of California in an action challenging a California law that prohibits honking a vehicle's horn except when reasonably necessary to warn of a safety hazard. Cal. Veh. Code § 27001.

Plaintiff was cited for misuse of a vehicle horn under Section 27001 after she honked in support of protestors gathered outside a government official's office. After the citation was dismissed at the local level, Porter filed suit in a California federal district court under section 1983 of the Civil Rights Act to block future enforcement of 27001 against any expressive horn use—including honks not only to "support candidates or causes" but also to "greet friends or neighbors, summon children or co-workers, or celebrate weddings or victories."

Porter argued in her federal court lawsuit that Section 27001 violates the First and Fourteenth Amendments as a content-based regulation that is not narrowly tailored to further a compelling government interest. Alternatively, she argued that even if the law is not content-based, it burdens substantially more speech than necessary to protect legitimate government interests.

A staff synopsis (which is not part of the Ninth Circuit Opinion) summarizes the Ninth Circuit panel's Majority Opinion and Dissenting Opinion as follows:

[*Majority Opinion*]

> The panel [i.e., the Majority Opinion] first held that plaintiff had standing to challenge the law because, ever since she received a citation for impermissible horn use, she has refrained from honking in support of political protests to avoid being cited again.
>
> Addressing the merits, the panel determined that at least in some circumstances, a honk can carry a message that is intended to be communicative and that, in context, would reasonably be understood by the listener to be communicative.
>
> The panel next held that because section 27001 applies evenhandedly to all who wish to use a horn when a safety hazard is not present, it draws a line based on the surrounding factual situation, not based on the content of expression. The panel therefore evaluated Section 27001 as a content-neutral law and applied intermediate scrutiny. The panel concluded that Section 27001 was narrowly tailored to further California's substantial interest in traffic safety, and therefore that it passed intermediate scrutiny.
>
> The panel noted that plaintiff had not alleged that the State has a policy or practice of improper selective enforcement of Section 27001, so the panel had no occasion to address that possibility here.

[Dissenting Opinion]

> Dissenting, Judge Berzon would hold that Section 27001 does not withstand intermediate scrutiny insofar as it prohibits core expressive conduct, and is therefore unconstitutional in that respect. The majority's fundamental error [according to the Dissenting Opinion] was that it failed to sufficiently focus on the specific type of enforcement at the core of this case—enforcement against honking in response to a political protest.
>
> The Dissenting Opinion argues in vain that] honking at a political protest is a core form of expressive conduct that merits the most stringent constitutional protection, and is, in that respect, qualitatively different from warning honks and other forms of vehicle horn use. Section 27001 [thus] violates the First Amendment because defendants have not shown that the statute furthers a significant government interest as applied to political protest honking, and because the statute is not narrowly tailored to exclude such honking.

[The Dissenting Opinion] would grant an injunction prohibiting the enforcement of Section 27001 against political protest honking.

[Subheadings inserted; some paragraphing revised for readability]

LEGAL UPDATE EDITOR'S NOTES

1. **The Ninth Circuit Majority Opinion in Porter notes that the relevant provision of the California Vehicle Code provides:**

> **(a) The driver of a motor vehicle when reasonably necessary to insure safe operation shall give audible warning with his horn.**
>
> **(b) The horn shall not otherwise be used, except as a theft alarm system.**

Cal. Veh. Code § 27001 ("Section 27001").

The Majority Opinion in Porter also notes that under the California statutes, section 27001 "applies to all vehicles whether publicly or privately owned when upon the highways." See § 24001. "Highway" is defined as "a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel"— in other words, "[h]ighway includes street." See § 360. And the Majority Opinion notes that forty other states and the Uniform Vehicle Code provide similar limitations on the use of vehicle horns. The Majority Opinion includes an Appendix listing all forty states (including Washington State), with citations to the applicable code sections.

2. The relevant Washington State statute is RCW 46.37.380 (addressing horns, warning devices, and theft alarms), which provides as follows:

> **(1) Every motor vehicle when operated upon a highway shall be equipped with a horn in good working order and capable of emitting sound audible under normal conditions from a distance of not less than two hundred feet, but no horn or other warning device may emit an unreasonably loud or harsh sound or a whistle. The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with his or her horn but shall not otherwise use such horn when upon a highway.**
>
> **(2) No vehicle may be equipped with nor may any person use upon a vehicle any siren, whistle, or bell, except as otherwise permitted in this section.**
>
> **(3) It is permissible for any vehicle to be equipped with a theft alarm signal device so long as it is so arranged that it cannot be used by the driver as an ordinary warning signal. Such a theft alarm signal device may use a whistle, bell, horn, or other audible signal but shall not use a siren.**
>
> **(4) Any authorized emergency vehicle may be equipped with a siren, whistle, or bell capable of emitting sound audible under normal conditions from a distance of not less than five hundred feet and of a type conforming to rules adopted by the state patrol, but the siren shall not be used except when the vehicle is operated in response to an emergency call or in the immediate pursuit of an actual or**

suspected violator of the law, in which latter events the driver of the vehicle shall sound the siren when reasonably necessary to warn pedestrians and other drivers of its approach.

See also Seattle Municipal Code section 11.84.320 - Horns and warning devices.

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WASHINGTON STATE COURT OF APPEALS

PERSON WHO WAS BOTH THE SOLE REGISTERED GUEST AND THE SOLE RESIDING OCCUPANT OF MOTEL ROOM DID NOT HAVE AUTHORITY TO CONSENT TO A SEARCH OF PLASTIC GROCERY BAGS BELONGING TO A VISITOR TO THE ROOM

State v. Giberson, ___ Wn. App. 2d ___ , 2023 WL ___ (Div. II, April 4, 2023)

Facts: (Excerpted from Court of Appeals Opinion)

> On May 30, 2020, the Grays Harbor County Sheriff's Department received a tip from a confidential informant that Giberson and Ricky Dunlap, Jr., were at a motel in [Montesano] for a planned drug deal. [Detective A] detained Dunlap and Kenneth Goedker after they left the motel. Goedker stated that he was the sole occupant of motel room 106, and had been residing there for approximately 10 days.
>
> [Goedker] stated that Giberson and Dunlap had stopped by earlier that day. [Goedker stated that when [Goedker] and Dunlap left, Giberson and a person named Ashley Hopkins remained in the room. Goedker said that there were bags in the motel room belonging to Giberson and Dunlap.
>
> Goedker provided written consent to search room 106 at the motel. [Detective B] obtained the key to the room from the motel manager, who confirmed that Goedker was the only occupant in room 106 and showed [Detective B] the room rental agreement.
>
> [The detectives] opened the door to room 106, and they saw Giberson and Hopkins sitting at a table. Both Giberson and Hopkins were detained and removed from the room, and Goedker was brought into the room. The detectives searched a bag with a shoulder strap sitting on a bed and found controlled substances and drug paraphernalia. Goedker acknowledged ownership of the bag.
>
> The detectives then searched two plastic grocery bags on the floor next to the door. Inside one of the grocery bags, they found a digital scale and two baggies containing heroin. After searching the bags, [Detective B] asked Goedker if they belonged to him. Goedker denied ownership and stated that the bags belonged to Giberson and Dunlap.

Proceedings below: (Excerpted from Court of Appeals Opinion)

> The State charged Giberson with possession of heroin with the intent to deliver. Before trial, Giberson moved to suppress the evidence found in the warrantless search of the plastic grocery bags. He argued that the search was unlawful because Goedker could not give consent to search his possessions.

The State countered that Goedker had authority to consent to the search of the room and that the detectives did not need Giberson's consent because he was merely a guest in the room and had no expectation of privacy.

The trial court denied the suppression motion. The court entered findings of fact as recited above. The [trial] court concluded that because Giberson was a casual guest in room 106, he did not have a legitimate expectation of privacy that would confer standing to challenge the search.

And the court concluded that because Giberson was a guest, the detectives did not need his consent to search the room. Instead, [the trial court ruled that] Goedker had dominion and control over the property as the host of the room and could consent to the search.

The trial court tried the case on stipulated facts. The court found Giberson guilty of unlawful possession of heroin with intent to deliver.

ISSUES ADDRESSED BY THE COURT OF APPEALS:

(1) Does defendant Giberson have automatic standing to challenge the search of his plastic grocery bags? (ANSWER BY THE COURT OF APPEALS: Yes) Note that the State did not expressly argue that Giberson lacked automatic standing, but instead, the State indicated that the trial court had confused standing to challenge the search with the authority to consent or object to the search. This Legal Update entry will not further address the "automatic standing" ruling by the Court of Appeals.

(2) Did Goedker, the sole registered guest and sole residing occupant of the motel room, have authority to consent to a search of the plastic grocery bags that a visitor to the room had brought to the room and had the sole right to possession of at the time of the search? (ANSWER BY THE COURT OF APPEALS: No)

(3) Did Giberson have a reasonable expectation of privacy in the contents of his grocery bags where there was no evidence and no findings by the trial court that the opening at the top of the bag that contained contraband had allowed a plain view or open view of the bag's contents? (ANSWER BY THE COURT OF APPEALS: Yes, Giberson had a reasonable expectation of privacy in the contents of the bag)

Result: Reversal of Grays Harbor Superior Court conviction of Bradley Ryan Giberson for possession of heroin with intent to deliver.

ANALYSIS BY THE COURT OF APPEALS: (Excerpted from the Court of Appeals Opinion; subheadings have been revised by the Legal Update Editor)

1. [*While Goedker had authority to consent to a search of the motel room, he did not have authority to consent to a search of the grocery bags that belonged to a visitor.]*

   [A. *Goedker had authority to consent to a search of the motel room*]

   Under the common authority rule, a person with equal control over premises shared with another person has authority to grant consent for law enforcement to search the premises as long as the other person is absent. State v. Morse, 156 Wn.2d 1 (2005). If

the other person with equal control is present, law enforcement must obtain that person's consent to search as well.

The rule that law enforcement must also obtain the consent of a person who is present does not apply to a person who does not possess common authority over the premises. . . . Specifically, "consent to search by a host is always effective against a guest within the common areas of the premises." State v. Thang, 145 Wn.2d 630 (2002) . . . .

Under these rules, an apartment tenant has the authority to consent to a search of the apartment even if guests are present. State v. Rison, 116 Wn. App. 955 (2003). The same rule necessarily applies to the tenant of a motel room. Compare State v. Davis, 86 Wn. App. 414 (1997) (treating a motel guest the same as a renter of a private residence with regard to the expectation of privacy).

Here, Giberson was a guest in Goedker's motel room. As a result, Goedker as the person renting the room had authority to give consent for law enforcement to search the room. . . . And even though Giberson was present, because he was a guest and not a co-occupant, law enforcement was not required to obtain his consent to search the room. . . .

[B. However, *Goedker did not have authority to consent to a search of Giberson's grocery bag*]

Giberson argues that even though the officers received Goedker's consent to search the motel room, Goedker could not consent to search Giberson's grocery bags inside the room. We agree.

Consent to search an area does not necessarily provide authorization to search belongings of a third person inside the area. See Rison, 116 Wn. App. at 960-61. In Rison, the court held that an apartment tenant does not have authority to consent to the search of a guest's closed container inside the apartment. . . .

In [Rison], law enforcement searched the eyeglass case of a guest after the tenant gave permission to search the apartment and after the guest was required to leave. The court held that the tenant did not have actual authority to consent to the search of the eyeglass case because the tenant "did not jointly own, use, possess, or control" the case.

This court addressed a similar issue in State v. Hamilton, 179 Wn. App. 870 (2014). In that case, a husband gave consent for officers to search a purse that his estranged wife had brought into their house. The court held that the husband had no authority to consent to the search, particularly when the wife was present, because he "had no ownership or possessory interest in the purse, other than the fact that it had been left in his house."

Here, Goedker did not own, possess, or control Giberson's grocery bags. Therefore, under Rison and Hamilton, he did not have authority to consent to the search of those bags.

The State argues that the grocery bags were not readily identifiable as belonging to someone other than Goedker such that the scope of Goedker's consent would be

limited. But the trial court entered an unchallenged finding of fact that when Goedker was first detained, he told [Detective A] that "there were bags in the room" that belonged to Giberson and Dunlap.

Therefore, [the detectives] had reason to know that Giberson owned the grocery bags before they searched them. At the very least, the knowledge that Giberson owned "bags in the room" required them to inquire with Goedker – who was present – about ownership of the bags before searching it. See State v. Holmes, 108 Wn. App. 511 (2001) (requiring officers to inquire further when it was unclear that a person giving consent to search had authority to do so).

[LEGAL UPDATE EDITOR'S NOTE OF CAUTION THAT THE FOURTH AMENDMENT "APPARENT AUTHORITY" RULE DOES NOT APPLY UNDER THE WASHINGTON CONSTITUTION, ARTICLE I, SECTION 7: The immediately preceding paragraph of the Giberson Opinion seems to imply that the Fourth Amendment "apparent authority" rule for third party consent to applies searches by Washington officers for cases prosecuted in the Washington courts. That is not so.

In Illinois v. Rodriguez, 497 U.S. 177 (1990) the U.S. Supreme Court held under that Fourth Amendment that "apparent authority" of a third party allows police to act on that person's consent to search. However, the Washington Supreme Court rejected the "apparent authority" rule under article I, section 7 in State v. Morse, 156 Wn.2d 1 (2005). The Washington Supreme Court in Morse addressed circumstances where a leaseholder of an apartment was in a bedroom and officers obtained consent to search the apartment only from a houseguest who answered their knock on the apartment's entry door. As noted, the Washington Supreme Court held in Morse that the Washington constitution does not recognize the "apparent authority" rules followed under the federal constitution's Fourth Amendment).]

. . . .

We conclude that the officers did not have consent to search Giberson's grocery bags.

2. [Giberson had a reasonable expectation of privacy in the contents of the grocery bags]

Even if the officers did not have consent to search Giberson's grocery bags, a search is not unconstitutional unless the defendant demonstrates that they had a reasonable expectation of privacy in the item searched. . . .

Here, Giberson clearly sought to preserve as private the drugs and digital scale by placing them in his grocery bag. The question is whether that expectation of privacy was reasonable.

Courts have found a reasonable expectation of privacy of various "traditional repositories of personal belongings." . . . Such items include a purse, . . .; a closed eyeglass case . . .a zipped shaving kit bag . . . . a closed and locked briefcase . . . and luggage . . . More generally, an expectation of privacy may exist for " 'closed packages, bags, and containers.'" . . . .

The court in [State v. Rison, 116 Wn. App. 955 (1997)] addressed whether a guest in an apartment has a reasonable expectation of privacy in their eyeglass case when the apartment tenant has consented to a search of the premises. . . . The court noted that the guest could reasonably expect that others w ould not open his closed container without his consent. . . . Therefore, the guest's eyeglass case was associated with the expectation of privacy and was protected by the Fourth Amendment. . . . .

The question here is whether Giberson had a reasonable expectation of privacy in his grocery bags. The grocery bags cannot be characterized as closed containers like some of the types of containers discussed above, which were found to encompass a reasonable expectation of privacy. There is no indication that Giberson tied the bags shut. Therefore, cases like Rison and [State v. Wisdom, 187 Wn. App. (2015 (search of a zipped shaving kit)] are not directly controlling.

However, the fact that the grocery bags were not completely "closed" is not dispositive. Grocery bags can be characterized as "traditional repositories of personal belongings." [State v. Kealey, 80 Wn. App. 163.(1995)] People certainly put personal grocery items and other personal items obtained in a grocery store like prescription medications in such bags. And common experience tells us that people also use grocery bags to carry other personal items. For example, this may be true for people such as those experiencing homelessness who may not have space for their personal items.

As in Rison, Giberson reasonably could expect that others would not search his grocery bags without his consent. . . . Therefore, we conclude that Giberson had a reasonable expectation of privacy in his grocery bags.

Finally, we note that because grocery bags are not completely closed, officers may be able to seize drugs or other contraband that is in plain view in grocery bags. See State v. Morgan, 193 Wn.2d 365, 370-71 (2019) (stating the elements of the plain view doctrine). But there was no finding that the drugs and digital scale that the officers discovered in their search of Giberson's grocery bags was in plain view.

3. [Conclusion]

We conclude that Goedker's authority to give consent to search his hotel room did not extend to the search of Giberson's grocery bags and that Giberson had a reasonable expectation of privacy in those bags. Therefore, we hold that the trial court erred in failing to suppress the heroin and digital scale found in the search of the grocery bags.

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

RESTORATION UNDER RCW 9.41.040(4) OF RIGHT TO POSSESS FIREARMS FOR PERSON PREVIOUSLY CONVICTED OF 4TH DEGREE ASSAULT DOMESTIC VIOLENCE: PETITIONER IS ENTITLED TO RESTORATION OF HIS RIGHT, BUT WITH THE COURT'S UNDERSTANDING THAT: (1) HE CANNOT FORCE ISSUANCE OF A CONCEALED PISTOL LICENSE UNDER WASHINGTON LAW; (2) HIS POSSESSION OF A FIREARM MAY VIOLATE FEDERAL LAW; AND (3) HE MAY NOT BE ABLE TO DEMAND THAT HE BE SOLD A FIREARM

Kincer v. State of Washington, ___ Wn. App. 2d ___ , 2023 WL ___ (Div. II, April 18, 2023)

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

> In 1997, Kincer was convicted of fourth degree assault domestic violence, a gross misdemeanor. As a result, he was prohibited from possessing firearms under Washington law.
>
> In March 2022, Kincer petitioned the trial court for an order restoring his right to possess a firearm under RCW 9.41.040(4). In the petition, Kincer declared,
>
> > I have spent at least . . . three consecutive years in the community without being convicted or found not guilty by reason of insanity in any jurisdiction of any felony, gross misdemeanor, or misdemeanor. I have never been convicted or found not guilty by reason of insanity in any jurisdiction of any felony sex offense, class A felony, or any felony with a maximum sentence of at least twenty years. I am not currently charged in any jurisdiction with any felony, gross misdemeanor, or misdemeanor. I have no prior felony convictions that count as part of my offender score under RCW 9.94A.525. I have never been involuntarily committed for mental health treatment. . . . I have completed all conditions of my misdemeanor sentence(s).
>
> The State opposed Kincer's petition, arguing that 18 U.S.C. § 922(g)(9) precluded him from possessing firearms. The State claimed that this federal law preempted state law, and therefore Kincer was prohibited from having his right to possess a firearm restored.
>
> The trial court denied Kincer's request for restoration of his right to possess a firearm under RCW 9.41.040(4). The court ruled that conflict preemption applied because it was not possible to apply both RCW 9.41.040(4) and 18 U.S.C. § 922(g)(9). And because federal law preempted Washington law, Kincer could not have his right to possess a firearm restored under RCW 9.41.040(4).

ISSUE AND RULING BY COURT OF APPEALS: Under RCW 9.41.040(2)(a)(i), a person is guilty of second degree unlawful possession of a firearm if the person owns, possesses, or controls any firearm, and the person previously was convicted (or found not guilty by reason of insanity) of fourth degree assault involving domestic violence. Under RCW 9.41.040(4), a person whose conviction has subjected the person to the prohibition under RCW 9.41.040(2)(a)(i) can, under certain circumstances, petition for and obtain a court order restoring the person's right under Washington law to possess a firearm.

Does the Federal statute that prohibits possession of a firearm for persons convicted of certain crimes, 18 U.S.C. § 922(g)(9), preempt RCW 9.41.040(4) on the rationale that restoring a person's right to possess a firearm under Washington law conflicts with the federal prohibition on possessing a firearm?

(ANSWER BY COURT OF APPEALS: No, the federal statute does not preempt RCW 9.41.040(4), but it must be noted that a person who obtains an order of restoration of Washington firearms possession rights in these circumstances (1) cannot force issuance of a concealed pistol license under Washington law; (2) may be deemed to be continuing to violate federal law when possessing a firearm; and (3) may not be able to demand that he or she be sold a firearm)

LEGAL UPDATE EDITOR'S COMMENT REGARDING FEDERAL LAW: I have been told that there may be some question about how the FBI-operated NICS (National Instant Criminal Background Check System) and how federal prosecutors may deal with Washington convictions for fourth degree assault domestic violence, as well as with restorations of firearms possession rights by Washington state courts for that offense. Nothing in this April 2023 Legal Update entry on the Kincer Opinion is intended to provide information about federal agency interpretations and applications in that regard.

[LEGAL UPDATE EDITOR'S NOTE ABOUT RCW REFERENCES IN THE KINCER OPINION: Footnote 1 of the Kincer Opinion states that RCW 9.41.040 was amended after defendant Kincer filed his petition for restoration of firearms rights in Jefferson County Superior Court in March 2022, but that the amendments are not material to this case, and therefore the Opinion cites to the current version of the statute.]

Result: Reversal of Jefferson County Superior Court order that denied the petition of Terry Kincer for an order restoring his right to possess a firearm under RCW 9.41.040(4)

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

A. RESTORATION OF RIGHT TO POSSESS A FIREARM

Kincer argues that he is entitled to the restoration of his right to possess a firearm under RCW 9.41.040(4). We agree.

Under RCW 9.41.040(2)(a)(i), a person is guilty of second degree unlawful possession of a firearm if they own, possess, or control any firearm and the person previously was convicted (or found not guilty by reason of insanity) of fourth degree assault involving domestic violence.

However, RCW 9.41.040(4)(a) states that a person who has been prohibited from possessing a firearm under subsection (2) "may petition a court of record to have his or her right to possess a firearm restored." The petitioner must not previously have been convicted (or found not guilty by reason of insanity) of a sex offense, a class A felony, or a felony with a maximum sentence of at least 20 years. RCW 9.41.040(4)(a).

In addition, the petitioner must have (1) gone three or more consecutive years with no convictions or findings of not guilty by reason of insanity; (2) no current felony, gross misdemeanor, or misdemeanor charges; (3) no prior felony convictions that prohibit the possession of a firearm counted as part of their offender score under RCW 9.94A.525; and (4) completed all conditions of their sentence. RCW 9.41.040(4)(a)(ii)(B).

Significantly here, there is no requirement under RCW 9.41.040(4)(a) that the petitioner's possession of a firearm be lawful under federal law in order to obtain an order restoring the petitioner's right to possess a firearm under Washington law.

If the petitioner has satisfied the statutory requirements, the trial court is required to enter an order restoring the petitioner's right to possess a firearm. State v. Swanson, 116 Wn. App. 67, 75 (2003). "On its face, RCW 9.41.040(4) gives no discretion to the restoring court once the enumerated, threshold requirements are met." Swanson. If the

petitioner has met the statutory requirements, the court merely performs a ministerial function to restore the petitioner's right to possess a firearm. Swanson.

Here, Kincer declared, and the State has not contested, that he had satisfied all the requirements of RCW 9.41.040(4)(a). Because Kincer has met these requirements, we hold that he is entitled to the restoration of his right to possess a firearm under Washington law.

B. FEDERAL PREEMPTION OF RCW 9.41.040(4)

Kincer argues that federal law does not preempt RCW 9.41.040(4) and does not preclude him from having his right to possess a firearm restored under Washington law. We agree.

1. Legal Principles

The Supremacy Clause of the United States Constitution, article VI, clause 2, gives the federal government the power to preempt state law. . . . Conflict preemption occurs when federal and state laws conflict because compliance with both is impossible or state law operates as an obstacle to accomplishing the purpose of federal law. . . . "Compliance is impossible when a federal law forbids an action that state law requires." . . .

However, there is a strong presumption against federal preemption of state law. . . . .

. . . .

2. Federal Law

Under 18 U.S.C. § 922(g)(9), it is unlawful for anyone "who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport . . . or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." This provision is known as the Lautenberg Amendment. . . .

A "misdemeanor crime of domestic violence" is defined as "a misdemeanor under Federal, State, Tribal, or local law" and

> has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, by a person similarly situated to a spouse, parent, or guardian of the victim, or by a person who has a current or recent former dating relationship with the victim.

18 U.S.C. § 921(33)(A).

3. Preemption Analysis

The issue here is whether conflict preemption applies. We conclude that RCW 9.41.040(4) does not conflict with 18 U.S.C. § 922(g)(9).

Washington law – RCW 9.41.040(2)(a)(i) – prohibits a person convicted of fourth degree assault domestic violence from possessing a firearm. RCW 9.41.040(4) removes that prohibition if certain requirements are satisfied. In other words, once the statutory requirements are satisfied and the court enters an appropriate order, it no longer is unlawful under Washington law for a person convicted of fourth degree assault domestic violence to possess a firearm.

Federal law – 18 U.S.C. § 922(g)(9) – prohibits a person convicted of fourth degree assault domestic violence from possessing a firearm in or affecting commerce. Like RCW 9.41.040(4), 18 U.S.C. § 921(33)(B)(ii) allows a person convicted of fourth degree assault domestic violence to possess a firearm if certain requirements are satisfied.

These provisions do not conflict for at least four reasons. First, RCW 9.41.040(4) and 18 U.S.C. § 922(g)(9) do not conflict with one another because they address different bodies of law. 18 U.S.C. § 922(g)(9) states that it is unlawful for a person convicted of fourth degree assault domestic violence to possess a firearm under federal law. RCW 9.41.040(4) states when it no longer is unlawful for a person convicted of fourth degree assault domestic violence to possess a firearm under Washington law.

Second, one way in which it would be impossible to comply with both state and federal law is when state law requires what federal law prohibits. . . . RCW 9.41.040(4) does not require a person convicted of fourth degree assault domestic violence to possess a firearm. Such a statute would be preempted because that requirement would be prohibited under federal law. Instead, RCW 9.41.040(4) merely allows a person convicted of fourth degree assault domestic violence to possess a firearm under certain circumstances.

Similarly, 18 U.S.C. § 922(g)(9) does not require a state to deny a request to restore the right of a person convicted of fourth degree assault domestic violence to possess a firearm under state law. Such a statute would trigger conflict preemption because the Washington requirement would be prohibited under federal law. Instead, 18 U.S.C. § 922(g)(9) does not address the restoration of a right to possess a firearm by state courts.

Third, the fact that possession of a firearm may be lawful under RCW 9.41.040(4) does not interfere with the application of 18 U.S.C. § 922(g)(9). Under the Supremacy Clause, 18 U.S.C. § 922(g)(9) still controls. . . . Therefore, it may be unlawful under federal law for a person convicted in Washington of fourth degree assault domestic violence to possess a firearm regardless of whether that person's right to possess a firearm has been restored under Washington law. RCW 9.41.040(4) has no effect on a person's ability to actually possess a firearm under federal law.

Fourth, the result would be different if Kincer was demanding that he be allowed to possess a firearm. That was the situation in Barr v. Snohomish County Sheriff, 193 Wn.2d 330 (2019). In that case, an applicant for a concealed pistol license (CPL) who had prior felony convictions filed a petition for writ of mandamus to compel the county sheriff to issue him a license. . . . The court held that the sheriff was not required to issue the applicant a CPL based on 18 U.S.C. § 922(g). . . . But the court stated that it

> "express[ed] no opinion on [the applicant's] right to possess firearms as a matter of state law." . . .
>
> Barr stands for the proposition that federal law would prevent Kincer from demanding that he be issued a license to possess a firearm or demanding that he be sold a firearm. But Kincer is making no such demands. He merely is petitioning for an order restoring his right to possess a firearm under Washington law.
>
> The State cites to several cases from other jurisdictions to argue that 18 U.S.C. § 922(g)(9) preempts RCW 9.41.040(4). **[LEGAL UPDATE EDITOR'S NOTE: Here, the Kincer Opinion includes in footnote 2 some citations to court decisions from appellate courts in other states.]** However, these cases either do not deal with the issue of restoring a state right to possess firearms or the relevant state law for restoration of a right to possess firearms in those cases specifically reference federal law, unlike RCW 9.41.040(4). And none of these cases address preemption.
>
> We hold that 18 U.S.C. § 922(g)(9) does not preempt RCW 9.41.040(4). Therefore, Kincer is entitled to have his right to possess a firearm restored under RCW 9.41.040(4).

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

EVIDENCE IS HELD TO BE INSUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION FOR "FACTORING OF A CREDIT CARD OR PAYMENT CARD TRANSACTION" UNDER RCW 9A.56.290 BECAUSE "FACTORING" CAN ONLY BE COMMITTED BY A PERSON OR ENTITY ACTING OR TRANSACTING BUSINESS ON BEHALF OF ANOTHER

In State v. Restvedt, ___ Wn. App. 2d ___ , 2023 WL ___ (April 11, 2023), Division Two of the Court of Appeals rules that under the evidence in the case, defendant did not act as a "factor" within the meaning of the factoring prohibition of RCW 9A.56.290, and therefore his conviction for "factoring of a credit card or payment card transaction" lacks sufficient support in the evidence.

Over a considerable period of time, without his girlfriend's permission, the defendant regularly took possession of her debit card and got cash or made purchases using the card. She occasionally got a new debit card with a different access code, but he somehow continued to unlawfully get cash and make purchases on her replaced cards.

The Restvedt Opinion describes the statutory language of the factoring offense as follows:

> The State charged Restvedt under RCW 9A.56.290, which defines the crime of unlawful factoring of transactions. Under RCW 9A.56.290(1)(a), a person commits unlawful factoring of a credit card or payment card transaction if that person "[u]ses a scanning device to access, read, obtain, memorize, or store . . . information encoded on a payment card without the permission of the authorized user of the payment card or with the intent to defraud the authorized user, another person, or a financial institution."
>
> A "credit card or payment card transaction" means "a sale or other transaction in which a credit card or payment card is used to pay for, or to obtain on credit, goods or services." RCW 9A.56.280(4). "Person" is defined as an "individual, partnership, corporation, trust, or unincorporated association, but does not include a financial institution or its

authorized employees, representatives, or agents." RCW 9A.56.280(12). A "scanning device" is any "scanner, reader, or any other electronic device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on a payment card." RCW 9A.56.280(15). A "payment card" includes credit cards and debit cards. RCW 9A.56.280(11).

In key part, the legal analysis of the Restvedt Opinion is as follows:

> Restvedt argues that RCW 9A.56.290(1)(a) does not apply to his alleged conduct because he is not a "'merchant'" or "'commercial agent.'" He asserts that the purpose of the statute under which he was charged is to "criminalize[] unlawful transactions by merchants" and "money laundering." Restvedt also asserts there is insufficient evidence in the record that he used a scanning device to access information encoded on Stirling's debit card without her authorization.
>
> The State argues that RCW 9A.56.290(1)(a) applies to Restvedt's alleged conduct because Restvedt's interpretation that the statute applies only to "merchants and others within the financial realm is not supported by the plain language of the statute." Specifically, the State asserts that any individual's fraudulent conduct, not just those of merchants, is captured by the statutory language. We agree with Restvedt that RCW 9A.56.290(1)(a) does not apply to his alleged conduct.
>
> . . . .
>
> RCW 9A.56.290 does not use the term "factor" in defining who can commit the crime of unlawful factoring of a credit card or payment card transaction. Instead, the statute states that "[a] person commits the crime of unlawful factoring of a credit card or payment card transaction" under delineated circumstances. RCW 9A.56.290(1).
>
> However, a "person" is statutorily defined as not only an individual, but also a "partnership, corporation, trust, or unincorporated association." RCW 9A.56.280(12). The statutory definition of "person" is in keeping with the notion that RCW 9A.56.290 pertains to businesses, business conduct, and business accounts—in other words, the individual or entity conducting the business for another is the factor.
>
> Here, the record shows that Restvedt was not regularly employed during the months at issue. During the trial, Restvedt testified, "I was doing small contracting jobs for neighbors and friends and those types of things." Even if Restvedt put himself forward as self-employed or as an independent contractor conducting business, there is no evidence that he, at any point, acted or transacted business for another.
>
> Therefore, there is insufficient evidence that Restvedt was a "factor." Because there is insufficient evidence that Restvedt was a factor, his alleged conduct, by definition, cannot fall within the definition of "unlawful factoring."

[Some paragraphing revised for readability]

The Restvedt Opinion also asserts that the above analysis is supported by the legislative history of the bill in a description in a legislative report. The Restvedt Opinion thus asserts:

The legislature defined "unlawful factoring" in 1993 when it first introduced the bill containing the unlawful factoring statute:

> A business that wishes to accept credit cards from its customers must first enter into a merchant agreement with a financial institution. Credit card factoring occurs when a business that has a merchant agreement (the factor) processes the credit card transactions of a second business that has been unable or unwilling to obtain its own merchant agreement. In return, the second business pays a fee to the factor, which often is based on a percentage of the credit sales processed.
>
> It has been reported that certain "disreputable" operators use factoring in connection with schemes to defraud or deceive consumers. These deceptive transactions can produce significant losses to consumers who do not receive bargained-for products or services, and to financial institutions who must reimburse injured consumers.
>
> It has been suggested that criminalizing factoring used to facilitate unfair or deceptive trade practices would help to reduce the operations of "disreputable" businesses in this state.

Also, the Restvedt Opinion cites some authority for its assertion that courts in other jurisdictions treat as the crime of factoring the "practice of a merchant sending in credit card drafts for a sale made by someone else."

Result: Reversal of Lewis County Superior Court convictions of Troy C. Restvedt for six counts of factoring a credit card or payment card transaction. The Court of Appeals affirms his conviction for second degree theft.

DEFENDANT'S ALLEGED CONFESSIONS ARE HELD TO PROVIDE SUFFICIENT EVIDENCE TO SUPPORT HIS CONVICTIONS FOR SECOND DEGREE IDENTITY THEFT AND FOR FORGERY, BUT HIS CONVICTIONS ARE REVERSED BECAUSE, AMONG OTHER THINGS, THE PROSECUTOR COMMITTED IMPROPER VOUCHING BY ARGUING THAT, IN LIGHT OF BRADY, OFFICERS WOULD NOT RISK THEIR CAREERS BY TESTIFYING FALSELY ABOUT THE ALLEGED CONFESSIONS

In State v. Stotts, ___ Wn. App. 2d ___ , 2023 WL ___ (Div. III, April 20, 2023), Division Three of the Court of Appeals rules that there is sufficient evidence to support defendant's convictions for second degree identity theft and forgery where two officers testified that defendant confessed to them that defendant had cashed checks that defendant knew belonging to persons who had not authorized their issuance. Defendant's main strategy at trial was his contention that he had not confessed to the officers, and that the officers were lying in that regard.

To counter the defendant's contention that the officers were lying, the trial prosecutor presented rebuttal testimony from one of the officers that the names of law enforcement officers who are deemed to be untrustworthy are put on a "Brady list" that essentially results in destroying a law enforcement officer's career. In closing argument, the prosecutor also asserted this point about the impact of Maryland v. Brady, 373 U.S. 83 (1963) on law enforcement officers.

The Opinion of the Court of Appeals explains as follows why the panel concludes that this approach by the prosecutor was improper "vouching" for the testimony of the officers:

> A prosecutor commits misconduct when they vouch for a witness's credibility. . . . "Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony." State v. Coleman, 155 Wn. App. 951, 957 (2010). A prosecutor places the prestige of the office behind a witness when they express a personal belief in the veracity of testimony. . . .
>
> > Two concerns are raised when a prosecutor vouches for a witness:
> >
> > [S]uch comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.
>
> United States v. Young, 470 U.S. 1, 18-19 (1985).
>
> The State contends that the prosecutor's comments merely pointed out the bias and lack of bias for each witness. We disagree. The prosecutor elicited testimony that officers who were "deemed untrustworthy" were placed on a Brady list that effectively ended their career and then circled back to this evidence in closing by suggesting that this officer would not destroy his career by being untrustworthy. The prosecutor's reference to the Brady list as an external lie detector suggested to the jury that some unknown government entity monitors officers for their truthfulness. If this unknown entity determines that an officer is untruthful based on unknown factors, then the officer loses their job and would not be testifying at trial.
>
> In reality, the prosecutor's office determines which officers are placed on the Brady list. . . . So, arguing that the Brady list is evidence of or motivation for truthfulness is another way of saying that the prosecutor's office has vetted the witness and vouches for the officer's credibility. If the jury knows that the prosecutor maintains the Brady list, then it is direct evidence of vouching. If they are unaware of this, then the argument suggests that evidence outside the record is monitoring the credibility of witnesses. Either way, it constitutes improper vouching. For this reason, "[i]t is . . . impermissible for a prosecutor to ask a jury to consider whether law enforcement agents would risk their careers to commit perjury." 6 WAYNE R. LAFAVE, ET AL., Criminal Procedure § 24.7(e) at 602 & n.67 (4th ed. 2015).
>
> Although there are no published Washington cases that hold it is improper for a prosecutor to argue that a police officer risks their career by providing false testimony, there are two unpublished Washington cases and several federal cases that reach this result. [Citations omitted by Legal Update editor]
>
> While there are no Washington cases directly on point, Washington courts have found improper vouching under similar circumstances when the prosecutor advises the jury that the State is monitoring a witness's testimony for truthfulness. In State v. Ish, 170 Wn.2d 189, 196 (2010), the court found improper vouching when a prosecutor

> introduced evidence on direct examination that a witness had reached a plea agreement with the prosecutor's office to testify truthfully. . . .
>
> In light of this history and precedent, we take this opportunity to make it clear that it is improper vouching for a prosecutor to argue that law enforcement witnesses would not risk their career by testifying untruthfully.

[Some citations omitted, others revised for style]

Result: Reversal of Stevens County Superior Court conviction of Steven David Stotts for second degree identity theft and forgery.

EIGHTH AMENDMENT CHALLENGE TO SEX OFFENDER REGISTRATION FOR JUVENILE OFFENDERS IS REJECTED BECAUSE THE REQUIREMENT IS NOT PUNISHMENT

In State v. Domingo-Cornelio, ___ Wn. App. 2d ___ , 2023 WL ___ (Div. II, April 25, 2023), Division Two of the Court of Appeals rejects the argument by Endy Domingo-Cornelio that mandatory sex offender registration for juveniles constitutes punishment, and that – in light of recent studies showing that the brains of juvenile offenders generally are not fully developed, and thus juvenile offenders are more amenable to rehabilitation and less likely to reoffend than adults – this punishment violates the federal constitution's Eighth Amendment prohibition against cruel and unusual punishment.

The Court of Appeals disagrees with the argument of the defendant and holds (1) that the sex offender registration statute for juveniles is not punitive and, therefore, the Eighth Amendment does not apply; and (2) that, because the Eighth Amendment does not apply, Domingo-Cornelio's argument that the sentencing court had discretion to waive sex offender registration also fails.

The Domingo-Cornelio Opinion relies in significant part on the Washington Supreme Court decision in State v. Ward, 123 Wn.2d 488 (1994), which held that the Eighth Amendment does not apply to sex offender registration for adults because the requirement is not punishment for purposes of Eighth Amendment analysis. And the Domingo-Cornelio Opinion explains further that the analysis regarding sex offender registration requirements for adults under State v. Ward is not changed by the analysis in State v. Houston-Sconiers, 188 Wn.2d 1 (2017), where the Washington Supreme Court held that application to juveniles of sentencing laws must be calibrated to take into account that juvenile brains are not fully developed, and therefore juvenile offenders are more amenable to rehabilitation and less likely to reoffend than adults

The Domingo-Cornelio Opinion provides the following explanation as to this latter point:

> Domingo-Cornelio's most compelling arguments are solely relevant to the fourth factor—whether registration is excessive in relation to its regulatory purpose. For this factor, Domingo-Cornelio argues the statutory scheme is excessive with respect to juveniles because recent studies show juvenile offenders are more amenable to rehabilitation and less likely to reoffend than adults. Domingo-Cornelio is correct that Ward did not consider the now-extensive body of scientific literature and case law regarding juvenile offenders. . . . Therefore, we now consider whether Domingo-Cornelio has shown that mandatory sex offender registration requirements are excessive in light of the developments in scientific literature and case law regarding juvenile offenders.

This consideration leads to the conclusion that the statue is not excessive for juveniles in relation to its nonpunitive purpose. Although juveniles may have been recognized as generally more amenable to rehabilitation and less likely to reoffend than adults, the statute includes important features that provide leniency to juveniles compared to adults. Whereas adult offenders must wait either 10 or 15 years, depending on the crime, to petition the court for relief from the registration requirement and must carry a high burden of clear and convincing evidence, juvenile offenders may only have to wait two or five years to petition the court, and must only meet the lowest standard of a preponderance of the evidence. RCW 9A.44.143(2)(a)-(c), (3)(a)-(c). Given these deliberate differences between adult and juvenile offenders, the legislature clearly considered youth and age when it calibrated the registration requirements. By incorporating accommodations for differences between juveniles and adults, the statute is not excessive in relation to its nonpunitive purpose.

Result: Affirmance of Pierce County Superior Court ruling rejecting the request of Endy Domingo-Cornelio for waiver of the sex offender registration requirement previously imposed for crimes committed as a juvenile of (A) one count of first degree rape of a child and (B) three counts of first degree child molestation.

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

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

Every month I will include a separate section that provides brief issue-spotting notes regarding select categories of unpublished Court of Appeals decisions that month. I will include such decisions where issues relating to the following subject areas are addressed: (1) Arrest, Search and Seizure; (2) Interrogations and Confessions; (3) Implied Consent; and (4) possibly other issues of interest to law enforcement (though generally no[t sufficiency-of-evidence-to-convict issues).

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

1. State v. Jamel Lewis Alexander: On April 3, 2023, Division One of the COA issues a modified unpublished Opinion that replaces the unpublished Opinion issued by the Court on January 30, 2023. The earlier Opinion was addressed in the January 2023 Legal Update. The

key analysis and rulings in the January 30, 2023, Opinion by the Court are not changed, so the Legal Update will repeat what was provided in the January 2023 Legal Update. Thus, Division One of the COA reverses defendant's Snohomish County Superior Court conviction for *first degree murder* and remands the case for a new trial. **Among other errors found by the Court of Appeals was the failure of the trial court to conclude that police exceeded the scope of a search warrant by looking at photographs on defendant's phone outside the warrant's specified date range**. The Court of Appeals rules that the police should have first obtained judicial permission to conduct such a broader search.

The Court of Appeals provides a necessarily complicated explanation covering over four pages regarding the technical difficulties encountered by the police in trying to stay within date limitations in searching the defendant's phone using software for such searching of defendant's particular type of phone. That complex explanation of the software difficulties encountered by the police is not summarized or excerpted in this Legal Update entry.

The Court of Appeals ultimately concludes as follows:

> We conclude that a warrant to search a cell phone is analogous to a warrant to search a person's computer. As the Ninth Circuit held in United States v. Hill, 459 F.3d 966, 975 (9th Cir. 2006), "the government [does not have] an automatic blank check when seeking or executing warrants in computer-related searches. Although computer technology may in theory justify blanket seizures . . . , the government must still demonstrate to the magistrate factually why such a broad search and seizure authority is reasonable in the case at hand."
>
> **Here, the police could have explained to the issuing magistrate why they needed to conduct a broad search of all photographs stored on Alexander's device to find those that would fit within the specified date range. They did not do so. The warrant itself permitted seizure only of photographs falling within a specified date range. The police exceeded the permissible scope of the search by looking at all photographs on the cell phone."**

The substitute unpublished Court of Appeals Opinion in State v. Alexander can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/827031%20Order%20and%20Opinion.pdf

2. State v. Michael Steven Abbott: On April 10, 2023, Division One of the COA affirms the King County Superior Court convictions of defendant for *(A) assault in the second degree and (B) tampering with a witness, both with domestic violence designations*. Defendant's prosecution arose from an incident in which he beat, strangled, and threatened to kill his girlfriend, Elizabeth Pyper. Ms. Pyper made an audio recording as her victimization was occurring. The defendant's mother was also a party to the recorded conversation. Included on the recording was a statement by Abbott to Ms. Pyper (the girlfriend) that he "should end [her] fucking life now." When his mother attempted to intervene, defendant continued to make statements proposing violent acts toward Pyper, saying to his mother that he was "about to stomp [the girlfriend's] fucking head in," and "about to just kill her and fucking bury her."

Defendant Abbott argued on appeal that the trial court's admitting into evidence of the audio recording violated the Washington Privacy Act, chapter 9.73. **In rejecting his argument, the Abbott Court's Opinion explains that the recording is admissible under RCW 9.73.030(2)(b), which permits one-party-consent recording of conversations "which**

convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands." The Court of Appeals rejects Abbott's arguments that his mother was also a party to the conversation and therefore her rights were somehow violated under the statute. The Court also rejects his argument that the Free Speech-based concept of a "true threat" should be applied under the exception in RCW 9.73.030(2)(b). The Abbbot Court rules that the concept does not apply under the Privacy Act, and, alternatively, even if the Free Speech concept of "true threat" does apply under the Privacy Act, the defendant's statements were "true threats."

The Opinion in State v. Abbott can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/835581.pdf

3. State v. Nicolette Jacquelyn Stewart, aka Nicolette Defillipo: On April 10, 2023, Division One of the COA reverses the King County Superior Court conviction of defendant for *one count of possession of a stolen vehicle*. The Court of Appeals overturns the ruling of the Superior Court on a suppression motion of the defendant seeking to exclude statements that she made to the police after her arrest on a warrant. The trial court had ruled that a Terry seizure of the defendant had not been supported by reasonable suspicion, but that the discovery immediately following the seizure (while she remained in police control) of an outstanding arrest warrant and of DOL information that supported an arrest was "attenuated" (i.e., not strongly connected to the initial unlawfulness of the initial seizure). Under that reasoning, the trial court applied the "attenuation doctrine" exception to the Exclusionary Rule and admitted the fruits of the arrest.

Relying on a Washington State Supreme Court Independent Grounds interpretation of the Washington Constitution in State v. Mayfield, 192 Wn.2d 871 (February 7, 2019), the Stewart Court rules that the "attenuation doctrine" of the Washington Constitution does not allow for an attenuation exception to exclusion in the circumstances of the Stewart case. The Court of Appeals Opinion in Stewart notes that in State v. Mayfield the Washington Supreme Court rejected the Fourth Amendment analysis on attenuation by the U.S. Supreme Court in Utah v. Strieff, 136 S.Ct. 2056 (June 20, 2016).

LEGAL UPDATE EDITOR'S COMMENT: In cases where the "attenuation" distinction would make a difference to the issue of admissibility in evidence of a firearm that is possessed by a felon, a handoff of a case to a federal prosecutor can be considered.

The Opinion in State v. Stewart can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/835335.pdf

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

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

In May of 2011, John Wasberg retired from the Washington State Attorney General's Office. For over 32 years immediately prior to that retirement date, as an Assistant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011) of the Criminal Justice Training Commission's Law Enforcement Digest. From the time of his

retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the production of the LED. That arrangement ended in the late fall of 2014 due to variety of concerns, budget constraints and friendly differences regarding the approach of the LED going forward. Among other things, Mr. Wasberg prefers (1) a more expansive treatment of the core-area (e.g., arrest, search and seizure) law enforcement decisions with more cross references to other sources and past precedents; and (2) a broader scope of coverage in terms of the types of cases that may be of interest to law enforcement in Washington (though public disclosure decisions are unlikely to be addressed in depth in the Legal Update). For these reasons, starting with the January 2015 Legal Update, Mr. Wasberg has been presenting a monthly case law update for published decisions from Washington's appellate courts, from the Ninth Circuit of the United States Court of Appeals, and from the United States Supreme Court.

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

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

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

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

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's, is at [http://www.leg.wa.gov/legislature]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill

numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. For information about access to the Criminal Justice Training Commission's Law Enforcement Digest and for direct access to some articles on and compilations of law enforcement cases, go to [cjtc.wa.gov/resources/law-enforcement-digest].

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