LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

JANUARY 2025

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

SECOND AMENDMENT: 11-JUDGE NINTH CIRCUIT PANEL (I.E., EN BANC PANEL) SETS ASIDE A 3-JUDGE PANEL'S RULING; THE EN BANC PANEL RULES, IN LIGHT OF RECENT AMENDMENT TO A CHALLENGED HAWAII STATUTE, TO BE "MOOT" A LAWSUIT THAT CHALLENGED HAWAII'S FORMER BROAD STATUTORY BAN ON POSSESSING BUTTERFLY KNIVES THAT PROHIBITED EVEN OPEN CARRY

In Teter v. Lopez, ___ F.4th ___ (9th Cir., January 22, 2025), an 11-judge Ninth Circuit rules to be moot and dismisses a lawsuit that contended that a broad Hawaii statutory prohibition on possessing butterfly knives violated the Second Amendment. A three-judge Ninth Circuit panel ruled in 2023 that the statutory ban that did not even allow for open carry of such knives did indeed violate the Second Amendment.

However, while the lawsuit was pending on review of a request to the Ninth Circuit by the State of Hawaii for further Ninth Circuit review, the Hawaii Legislature amended the statute to allow for open carry of butterfly knives, among other changes. The Opinion that was signed by a majority of the 11-judge panel concludes that the lawsuit was rendered moot by the legislative amendment. The Majority Opinion does not analyze the Second Amendment issue that was presented under the prior version of the statute that was ruled unconstitutional by the 3-judge panel in 2023.

LEGAL UPDATE EDITOR'S NOTE:

The August 2023 Legal Update addressing the 3-judge panel's decision in Teter v. Lopez, noted that the Washington statute at RCW 9.41.250 contains language that is similar to the broad provisions (not even allowing open carry of butterfly knives) in the former Hawaii statute that was determined to be unconstitutional by the 3-judge panel in 2023. RCW 9.41.250's definition of "spring blade knife" appears to include a "butterfly knife" (or balisong knife), providing as follows:

> **(1) Every person who:**
>
> **(a) Manufactures, sells, or disposes of or possesses any instrument or weapon of the kind usually known as slungshot, sand club, or metal knuckles, or spring blade knife;**
> **(b) Furtively carries with intent to conceal any dagger, dirk, pistol, or other dangerous weapon; or**

(c) Uses any contrivance or device for suppressing the noise of any firearm unless the suppressor is legally registered and possessed in accordance with federal law,
is guilty of a gross misdemeanor punishable under chapter 9A.20 RCW.

(2) "Spring blade knife" means any knife, including a prototype, model, or other sample, with a blade that is automatically released by a spring mechanism or other mechanical device, or any knife having a blade which opens, or falls, or is ejected into position by the force of gravity, or by an outward, downward, or centrifugal thrust or movement. A knife that contains a spring, detent, or other mechanism designed to create a bias toward closure of the blade and that requires physical exertion applied to the blade by hand, wrist, or arm to overcome the bias toward closure to assist in opening the knife is not a spring blade knife.

[Emphasis added]

NINTH CIRCUIT PANEL REJECTS DUE PROCESS CHALLENGE TO PROCEDURES FOLLOWED BY THE CITY OF PORTLAND IN GIVING A CAR OWNER NOTICE THAT HIS UNLAWFULLY PARKED CAR WOULD BE TOWED

In Grimm v. City of Portland, ___ F.4th ___ , 2025 WL ___ (January 3, 2025), a three-judge Ninth Circuit panel affirmed the U.S. District Court's grant of summary judgment for the City of Portland in an action brought by Andrew Grimm alleging that the City's procedures for notifying him that his car would be towed were deficient under the Fourteenth Amendment's Due Process Clause. A Ninth Circuit staff summary (which is not part of the Ninth Circuit panel's Opinion) summarizes the ruling as follows:

> Grimm parked a car on the side of a downtown street, paid for an hour and 19 minutes of parking through a mobile app, and then left the car on the street for seven days. During that time, City parking enforcement officers issued multiple parking citations, which they placed on the car's windshield. After the car sat on the street for five days, a parking enforcement officer added a red slip warning that the car would be towed. Grimm did not move the car, and, two days after the warning slip was placed on the windshield, the car was towed.
>
> The panel held that the City conformed with the requirements of the Fourteenth Amendment by providing notice reasonably calculated to alert Grimm of the impending tow. The warning slip placed on the car's windshield five days after Grimm had parked the car and two days before the car was towed, which explicitly stated that the car would be towed if it were not moved, was reasonably calculated to inform Grimm of the impending tow.
>
> The panel further held that Grimm's failure to remove the citations and warning slip from the windshield did not provide the City with actual knowledge that its attempt to provide notice had failed.

NINTH CIRCUIT PANEL HOLDS THAT EVIDENCE OF THE RETAIL VALUE OF THE FENTANYL IN DEFENDANT'S CAR WAS RELEVANT EVEN THOUGH RETAIL VALUE WAS

NOT AN ELEMENT OF THE IMPORTATION CHARGE; AMONG OTHER THINGS, THE HIGH RETAIL VALUE TENDED TO DISPROVE UNWITTING POSSESSION

In U.S. v. Velazquez, ___F.4th ___ , 2025 WL ___ (9th Cir., January 21, 2025), a 3-judge Ninth Circuit panel affirms a defendant's conviction in federal court for violating a federal crime prohibiting importing more than 400 grams of a mixture containing fentanyl. In a search of his car, federal agents had seized 4.53 pounds of fentanyl from the car. According to testimony of a federal agent at trial, the retail value of the fentanyl ranged anywhere from $405,888 to $608,832.

The 3-judge Ninth Circuit panel rules that the U.S. District Court did not abuse its discretion in admitting of the federal agent's testimony regarding the retail value of seized fentanyl. The Ninth Circuit panel declares that the retail value of the narcotics was relevant even though the retail value of the drugs was not an element of the criminal charges. One of the panel's stated reasons for the ruling was that the presence in the car of such a high value of the drugs tends to disprove unwitting possession of the drugs.

Result: Affirmance of U.S. District Court (Southern District of California) conviction of Alfred Velazquez a federal statute prohibiting importation of a fentanyl mixture.

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WASHINGTON STATE SUPREME COURT

WASHINGTON SUPREME COURT RULES THAT THE CRIME VICTIMS' COMPENSATION ACT (CVCA) DOES NOT ALLOW A TRIAL COURT DISCRETION TO MODIFY THE AMOUNT OF RESTITUTION THAT IS REQUIRED TO BE PAID TO REIMBURSE THE DEPARTLEMENT OF LABOR & INDUSTRIES FOR CVCA BENEFITS PAID

In State v. Morgan, ___ Wn.3d ___ , 2025 WL ____ (January 23, 2025), the Washington Supreme Court affirms rulings of Division One of the Court of Appeals and the King County Superior Court that determined that trial courts have no discretion to reduce restitution requirements that are mandated by the Washington Crime Victims' Compensation Act.

> Washington's crime victims compensation act (CVCA), chapter 7.68 RCW, provides benefits to crime victims and their families for expenses resulting from criminal acts. Payments are administered by the Department of Labor and Industries (L&I), which is authorized to seek a court order of restitution for benefits paid. The restitution statute, RCW 9.94A.753, governs court orders of restitution in criminal cases as part of a responsible defendant's judgment and sentence. Under RCW 9.94A.753(7), a court must hold a hearing and enter a restitution order whenever a victim is entitled to CVCA benefits. The issue in this case is whether the restitution statute affords the court any discretion to modify the amount owed to L&I as reimbursement for CVCA benefits paid.
>
> Montreal Morgan pleaded guilty to crimes that resulted in Fabian Alvarez's death. At his restitution hearing, the State requested $10,480 in restitution for CVCA benefits paid by L&I toward Alvarez's medical and funeral expenses. Morgan asked the trial court to reduce the amount of restitution due to mitigating factors, including his youth and role in the crime, but the court believed RCW 9.94A.753(7) limited its discretion. The trial court ordered the full amount of restitution requested for CVCA benefits, and the Court of Appeals affirmed. We granted review.

> Applying settled principles of statutory construction, we hold that RCW 9.94A.753 does not allow a trial court discretion to modify the amount of restitution owed to L&I for CVCA benefits. Accordingly, we affirm the Court of Appeals and uphold Morgan's order of restitution.

Pro tempore Justice John Knodell does not disagree with the legal analysis of the CVCA in the Majority Opinion, and he thus concurs in the result. But he argues in vain that the defendant would have prevailed on his challenge to the restitution order if he had argued at the trial court level that he was being "improperly ordered to pay restitution in this case. Pro Tem Justice Knodell argues that the victim's medical and funeral expenses were not incurred as a result of the crime of conviction, which was conspiracy to commit murder."

Result: Affirmance of rulings by the King County and Division One Court of Appeals that defendant's restitution obligation under the CVCA cannot be reduced.

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WASHINGTON STATE COURT OF APPEALS

DEFENDANT LOSES ARGUMENT CONTENDING THAT THE 2009 U.S. SUPREME COURT DECISION IN ARIZONA V. GANT RESTRICTING SEARCH INCIDENT TO ARREST SOMEHOW ALSO RESTRICTS OFFICER-SAFETY-BASED CAR FRISKS WITHOUT EXCEPTION AFTER THE POINT WHEN OCCUPANTS OF THE CAR HAVE BEEN REMOVED FROM THE CAR

State v. Howard, ___ Wn. App. 2d ___ , 2025 WL ___ (Div. III, January 28, 2025)

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

> [Sheriff's Deputy A] responded to a trespassing report at a farm. As he entered the farm's long dirt driveway, the deputy saw a Pontiac sedan turn around and head toward him from the house. As the vehicles reached each other, the deputy lowered his window and asked the Pontiac's driver if everything was all right. The driver, later identified as Leno Howard, responded that he had just picked up his two passengers, a man and a woman, and they were now leaving.
>
> Around this time, [Deputy A] heard from dispatch that the 911 caller who had reported the trespass claimed to be at the house, and that shots had been fired. When the deputy asked Howard if he was aware of any shooting, Howard attributed the shots to nearby hunters. Dispatch then reported that the 911 caller could see the deputy speaking with the driver. The caller claimed that the driver had fired the shots.
>
> [Deputy A] immediately exited his vehicle and directed the Pontiac's three occupants to put their hands in the air. They complied. The deputy asked if there was a firearm in the car, and Howard said no. [Deputy A] looked inside the car and did not see any firearms, but did see a large axe. The occupants kept their hands raised, and the deputy waited with his hand on his holstered gun until a second deputy arrived.

> [Deputy A] then explained to Howard and his passengers that someone had reported that they were involved in a shooting. Howard and the male passenger were directed, one at a time, to get out of the Pontiac to be frisked. The female passenger was directed to get out of the car, and all three individuals stood beside the second deputy, about 10 feet from the Pontiac. At the time, three of the four Pontiac doors were open, and none of the detainees were handcuffed.
>
> [Deputy A] believed that a gun could be easily concealed in the car and, if produced during a confrontation, would present a mortal threat. He decided to check the Pontiac for a concealed gun. After about one minute, he found a handgun in the backseat, hidden under a shirt and case of soda pop. [Deputy A] did not touch or move the gun, and left it on the back seat. Around this time, a third deputy arrived. Howard and the other male detainee were handcuffed due to safety concerns. [Deputy A] then left the group and drove up the driveway to obtain information from the 911 caller. The investigation led to Howard's arrest.
>
> The State charged Howard with two counts of assault, one count of drive-by shooting, and one count of unlawful possession of a firearm in the first degree. Before trial, Howard filed a CrR 3.6 motion to suppress evidence of the gun. After an evidentiary hearing, the trial court denied Howard's motion, and upheld the warrantless search of his Pontiac under the officer safety exception applicable to Terry investigations.
>
> A jury acquitted Howard of both assault charges, but convicted him of the remaining charges.

ISSUE AND RULING; Does the 2009 U.S. Supreme Court decision in Arizona v. Gant that restricts law enforcement search incident to arrest also restricts officer-safety-based car frisks in circumstances where – at the point in time when officers conduct the car frisk – all occupants of the car have been removed from the car? (ANSWER BY COURT OF APPEALS: No, because the U.S. Supreme Court's 2009 decision in Arizona v. Gant dd not overrule the U.S. Supreme Court's 1983 decision in Michigan v. Long that allows officer-safety-based car frisks)

Result: Affirmance of Yakima County Superior Court convictions of Leno Sabalsa Howard of one count of drive-by shooting, and one count of unlawful possession of a firearm in the first degree.

LEGAL ANALYSIS: (Excerpted from Court of Appeals Opinion)

> When an officer conducts an investigative stop of a vehicle, that officer may, under certain circumstances, frisk the driver of the vehicle to ensure officer safety. [Terry v. Ohio, 392 1, 30 (1968)]. "Less than probable cause is required because the stop is significantly less intrusive than an arrest." [State v. Kennedy, 107 Wn.2d 1 1086) (1986)]. In Michigan v. Long, 463 U.S 1032, 1051-52 (1983), the United States Supreme Court extended Terry searches of a person to searches of the vehicle itself
>
> > During any investigative detention, the suspect is in the control of the officers in the sense that he may be briefly detained against his will. Just as a Terry suspect on the street may, despite being under the brief control of a police officer, reach into his clothing and retrieve a weapon, so might a Terry suspect in [the defendant]'s position break away from police control and retrieve a weapon from his automobile. In addition, if the suspect is not placed under arrest, he will be

> permitted to reenter his automobile, and he will then have access to any weapons inside. Or, as here, the suspect may be permitted to reenter the vehicle before the Terry investigation is over, and again, may have access to weapons. In any event, we stress that a Terry investigation, such as the one that occurred here, involves a police investigation at close range, when the officer remains particularly vulnerable in part because a full custodial arrest has not been effected, and the officer must make a quick decision as to how to protect himself and others from possible danger.

(Internal quotation marks and citations omitted.) Because of these considerations, "A police officer may extend his 'frisk' for weapons into the passenger compartment of the vehicle if he has a 'reasonable suspicion that the suspect is dangerous and may gain access to a weapon in the vehicle.'" State v. Smith, 115 Wn.2d 775, 785 (1990) (quoting State v. Williams, 102 Wn.2d 733, 738-39 (1984)).

These same considerations may sometimes permit a frisk of a vehicle even if the driver and passengers have been temporarily removed from it:

> [Our precedent does] not limit an officer's ability to search the passenger compartment of a vehicle based on officer safety concerns only to situations in which either the driver or passenger remain in the vehicle. Instead, a court should evaluate the entire circumstances of the traffic stop in determining whether the search was reasonably based on officer safety concerns.

State v. Glossbrener, 146 Wn.2d 670, 679, 49 P.3d 128 (2002).

Here, once Howard and his passengers exited the Pontiac, the next step of [Deputy A's] investigation was to talk with the 911 caller, who was near the house at the end of the long driveway. The 911 caller had reported that the Pontiac's driver had shot at him, and, if this was true, the gun almost certainly remained in the car. [Deputy A] knew that once he drove down the driveway to speak with the caller, the second deputy would be left alone with a reported shooter and two trespassers likely in close proximity to a gun. Given this context, we conclude that [Deputy A]'s warrantless car frisk was reasonably based on officer safety concerns.

Howard argues that [Arizona v. Gant, 556 U.S. 332 (2009)] casts doubt on Long and authorities citing it, and that warrantless car searches no longer are permitted once a suspect and their passengers have been removed from the car. We disagree.

In Gant, the vehicle frisk occurred after the defendant was arrested, handcuffed, and locked in the back of a patrol car. The court held that the search violated the Fourth Amendment and reaffirmed that "police may search incident to arrest only the space within an arrestee's 'immediate control,' meaning 'the area from within which he might gain possession of a weapon or destructible evidence.'" . . . In reaffirming this rule, the court expressly confirmed it was not altering the rule in Long:

> Other established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand. For instance, Michigan v. Long, 463 U.S. 1032 (1983), permits an officer to search a vehicle's passenger compartment when he has reasonable

> suspicion that an individual, whether or not the arrestee, is "dangerous" and might access the vehicle to "gain immediate control of weapons." . . .
>
> In his concurring opinion [in Gant] Justice Scalia also emphasized that the court had not altered the rule in Long:
>
> > It must be borne in mind that we are speaking here only of a rule automatically permitting a search when the driver or an occupant is arrested. Where no arrest is made, we have held that officers may search the car if they reasonably believe "the suspect is dangerous and . . . may gain immediate control of weapons." [Michigan v. Long, 463 U.S. 1032, 1049 (1983)]. In the no-arrest case, the possibility of access to weapons in the vehicle always exists, since the driver or passenger will be allowed to return to the vehicle when the interrogation is completed. The rule of Michigan v. Long is not at issue here.
>
> [Gant] at 352 (Scalia, J., concurring).
>
> In short, Gant did not alter Long. An officer may still conduct a warrantless frisk of an unoccupied vehicle when there are reasonable officer safety concerns due to the possibility that an occupant will return to the vehicle.

[Some citations omitted; others revised for style]

KANTA OPINION ON "EXPIRED VIALS" IS ORDERED PUBLISHED: DIVISION TWO HOLDS THAT USE OF EXPIRED VIALS FOR STORING BLOOD PRIOR TO TESTING DID NOT VOID TESTING, AND TEST RESULTS WERE LAWFULLY ADMITTED BY DOL HEARING EXAMINER WHERE BLOOD TESTING COMPLIED WITH ALL CRITERIA REQUIRED BY STATE TOXICOLOGIST AND WAC CODE

In Kanta v. DOL, ___ Wn. App. 2d ___ , 2025 WL ___ (Div. II, October 1, 2024), ordered published on January 14, 2025, Division Two of the COA rejects the arguments of a driver who challenged suspension of her driver's license by Washington DOL. The Kanta Court summarizes the ruling as follows in the introduction of the Opinion:

> Barbara Kanta was arrested for driving under the influence in July 2021. Shortly after her arrest, a phlebotomist drew a sample of Kanta's blood which was sent to a laboratory for analysis. The laboratory tested Kanta's blood for alcohol in May 2022, and issued a report in September 2022 stating that Kanta's blood sample contained 0.18% alcohol.
>
> In November 2022, the Department of Licensing (the department) suspended Kanta's driving license. Kanta contested the suspension, arguing that because the vial used to store her blood expired in November 2021 (according to the manufacturer's certificate of compliance), the blood was not properly preserved and therefore did not comply with the Washington Administrative Code (WAC).
>
> A hearing examiner rejected Kanta's argument and affirmed the suspension. Kanta appealed to the superior court. The superior court found that substantial evidence supported the hearing examiner's conclusion that the blood test complied with the necessary criteria, and was therefore properly admitted.

Kanta appeals to this court, arguing that the hearing examiner erred in admitting the results of her blood test into evidence because the vials were expired at the time of testing. As such, Kanta argues, the superior court erred in affirming the suspension of her license.

The department [Washington Department of Licensing] responds that the blood test complied with all necessary criteria as designated by the state toxicologist and the administrative code, and therefore, the hearing examiner did not err in admitting the test. We agree with the department.

[Paragraphing revised for readability]

Result: Affirmance of decision of Kitsap County Superior Court that ruled that the Department of Licensing hearing examiner did not err in admitting the blood test at issue in a hearing on Barbara Kanta's challenge to DOL's suspension of her driver's license.

FELONY HARASSMENT UNDER RCW 9A.36.020: THREATS BY DEFENDANT TO KILL HIS INFANT CHILD WERE SUFFICIENT TO SUPPORT HIS CONVICTION WHERE (1) THE THREATS WERE UTTERED IN THE PRESENCE OF OFFICERS AND THE INFANT, AND (2) THE OFFICERS REASONABLY BELIEVED THAT THE DEFENDANT WOULD CARRY OUT THE DEATH THREATS AGAINST THE INFANT

In State v. Johal, ___ Wn. App. 2d ___ , 2025 WL (Div. II, January 14, 2025), the Court of Appeals affirms the felony harassment conviction of defendant based on his threats to kill his infant in law enforcement officers' presence under circumstances where they reasonably believed that he would carry out the threats.

The only persons present when the defendant made his threats to kill the infant were the defendant, infant child, and the officers. The officers had responded to a report of domestic violence committed by Johal against his former romantic partner, who had exited Johal's apartment shortly after the officers arrived. The Johal Court describes the key facts as follows:

> Several officers entered the apartment. Johal was holding SJ [his six-month old child], and using profanity he yelled for the officers to leave his apartment. Johal then picked up a hammer, drew his arm back, and said that he was going to kill SJ. Johal eventually put down the hammer, but he then started walking toward the balcony and yelled that he was going to throw SJ off the balcony. Officers stopped him from getting to the balcony and eventually removed SJ from Johal's arms.

Johal was charged with multiple crimes, including felony harassment threats. The prosecutor's information identified both the child and the responding officers as victims of the harassment. After a bench trial, the trial court convicted Johal of felony harassment and other charges. The trial court found as to the criminal harassment charge that Johal's threat to kill his child placed the officers on the scene in reasonable fear that the threat would be carried out against the child. The Court of Appeals states that the trial court also convicted Johal of other crimes (not specified by the Court of Appeals), but that he did not appeal from those convictions.

On appeal, Johal argued that the evidence is insufficient to support his felony harassment conviction, contending that as a matter of law, the criminal harassment statute requires the

State to show that Johal's child, not the officers, reasonably feared the threat would be carried out. Johal did not appeal his other convictions.

Some of the key legal analysis in the Johal Opinion regarding the sufficiency of the evidence in support of the criminal harassment is as follows:

> To sustain a conviction for harassment, "RCW 9A.46.020 requires that the State prove that the person threatened was placed in reasonable fear that the threat to kill would be carried out." State v. C.G., 150 Wn.2d 604, 612 (2003). The question here is who constitutes the "victim" of harassment for purposes of RCW 9A.46.020(1).
>
> . . . .
>
> Johal argues that the victim of the harassment must be the person the defendant threatens to injure or kill, and that third parties who are not threatened with injury or death cannot be victims of harassment. He claims that the person threatened with injury or death – here, SJ [his infant child] – must be placed in reasonable fear that the threat will be carried out to support a harassment conviction.
>
> The statutory language does not support this interpretation. RCW 9A.46.020(1)(a) expressly states that a person is guilty of harassment if they threaten to cause bodily injury to "the person threatened or to any other person." (Emphasis added.) This language establishes that the harassment victim and the person threatened with bodily injury need not be the same person. In other words, a defendant may harass one person by threatening to injure another person.
>
> The Supreme Court confirmed this understanding in State v. J.M.: "The statute also contemplates that a person may be threatened by harm to another. An example that comes readily to mind is a communication of intent to harm the child of the person threatened." 144 Wn.2d 472, 488, (2001).
>
> The court in State v. Morales, 174 Wn. App. 370 (2013), reached the same conclusion. The 2013 [Morales] court quoted the above passage from J.M. and then noted that a person threatened under RCW 9A.46.020(1)(a) is someone who is the target of coercion, intimidation or humiliation. . . . The court stated, "As the court's hypothetical [in J.M.] points out, the target of coercion or intimidation when a parent is threatened with bodily injury to a child can clearly be the parent. If so, the second element of the State's case would require proof that the parent, not the child, was reasonably placed in fear."
>
> . . . .
>
> Here, a rational trier of fact could determine that Johal's threats to kill SJ were both directed at and an attempt to coerce or intimidate the officers on the scene. He wanted the officers to leave his apartment and to abandon their attempt to arrest him, and threatening to kill SJ was his way of accomplishing that end. Therefore . . . the officers were the "person[s] threatened" under RCW 9A.46.020(1)(a)

[Some citations omitted, others revised for style]

LEGAL UPDATE EDITOR'S NOTES:

1. In a footnote, the Court of Appeals states the Opinion does not address the issue of whether the 2023 U.S. Supreme Court decision in Counterman requires a different result:

> **After Johal was convicted but during this appeal, the United States Supreme Court decided Counterman v. Colorado, 600 U.S. 66 (2023). The Court held that the First Amendment requires that in order to establish a "true threat," the State must prove the defendant had a subjective understanding of the threatening nature of his statements with mental state of recklessness. . . . Johal cites Counterman in his reply brief, but only to argue that affirming his conviction may cause a "chilling effect." Therefore, we do not address whether Johal's statements were "true threats" under Counterman.**

2. An entry on the internet site of the Washington Association of Prosecuting Attorneys (Weekly Roundup for the week of January 13, 2025, see https://waprosecutors.org/caselaw/) provides the following summary of the holding in the Johal case:

> **The victim of harassment is the person who is the target of the coercion, intimidation or humiliation caused by the threat. A person may harass someone by threatening to injure another. Therefore, the victim of harassment need not be the person who was threatened. Here, the officers who witnessed the defendant threaten to kill the infant in his arms were properly pled and proven to be the victims of felony harassment because his threats were to coerce or intimidate the officers into leaving the scene.**

Result: Affirmance of Clark County Superior Court conviction of Aarondeep Singh Johal for felony harassment.

"WRONGLY CONVICTED PERSONS ACT" AT CHAPTER 4.100 RCW: MAN LOSES APPEAL FROM A 2022 SUPERIOR COURT DECISION THAT DENIED HIM RELIEF UNDER CHAPTER 4.100 RCW FROM A 1995 CHILD MOLESTATION CONVICTION BASED ON A FACT-BASED RULING THAT THE MAN HAD NOT PROVIDED CLEAR AND CONVINCING EVIDENCE OF ACTUAL INNOCENCE IN LIGHT OF ALL OF THE EVIDENCE; THE DETERMINATION INCLUDED AN ASSESSMENT OF THE CREDIBILITY OF A RECANTING ALLEGED VICTIM

In State v. Brock, ___ Wn. App. 2d ___ , 2025 WL ___ (Div. I, January 13, 2024), the Court of Appeals affirms the decision of a Thurston County Superior Court decision that denied him, based on the totality of the evidence, relief from his request for relief from a 1995 child molestation conviction. He seeks relief from his conviction under the Wrongly Convicted Persons Act at chapter 4.100 RCW.

The introduction to Brock Opinion summarizes the statutory and procedural context, as well as the ultimate ruling of the Court of Appeals as follows:

> In July 2013, the Washington Legislature enacted the wrongly convicted persons act (WCPA), chapter 4.100 RCW, in an attempt to remedy the unique harm suffered by wrongly convicted persons. It recognized that those who have been wrongly convicted

not only lose years of their lives, but also have lost opportunities and experiences impossible to recover after their release from imprisonment.

Then, upon their release, they suffer further by the stigmatization of being labeled a felon. So, the legislature provided an avenue for them to seek compensation after their exoneration. To receive such compensation, the claimant must establish actual innocence by clear and convincing evidence.

In 1995, Jerry Brock was convicted of child molestation in the first degree and sentenced to life without parole. In 2012, Brock's victim recanted her allegations against him, stating that she lied and Brock never touched her.

In 2013, Brock initiated a personal restraint petition seeking a new trial. The trial court found that the recantation was credible, vacated the conviction, and ordered a new trial. The State moved to dismiss the case, which was granted. Brock then initiated a claim under the WCPA, seeking compensation. That case proceeded to trial in 2022 and Brock's claim was ultimately denied.

Brock appeals, asserting the trial court erred in determining that he did not show actual innocence by clear and convincing evidence, in failing to give due consideration to the difficulties of proof not caused by Brock, and in imposing an impossible legal burden contrary to the purpose of the WCPA.

We disagree and affirm.

Legal Update Note: The Legal Update will not excerpt from or attempt to summarize the lengthy fact-and-evidence-based discussion of the law in the Brock Opinion, which looks at the totality of the circumstances from the prior trial and from the hearing on the request for relief under the Wrongly Convicted Persons Act. An entry on the internet site of the Washington Association of Prosecuting Attorneys (Weekly Roundup for the week of January 13, 2025 (see https://waprosecutors.org/caselaw/), notes the following regarding principles underlying the ruling of the Court of Appeals in the Brock Opinion:

> **A recantation by a victim alone is not necessarily enough to prove actual innocence by clear and convincing evidence. Determining which story to credit requires a careful examination of the retracting victim's credibility and the circumstances surrounding the recantation.**

Result: Affirmance of Thurston County Superior decision to deny relief to Jerry Lee Brock under the Wrongfully Convicted Persons Act.

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BRIEF NOTES REGARDING JANUARY 2025 UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS ON SELECT LAW ENFORCEMENT ISSUES

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

Every month, I will include a separate section that provides brief issue-spotting notes regarding select categories of unpublished Court of Appeals decisions that month. I will include such decisions where issues relating to the following subject areas are addressed: (1) Arrest, Search and Seizure; (2) Interrogations and Confessions; (3) Implied Consent; and (4) possibly other issues of interest to law enforcement (though generally not sufficiency-of-evidence-to-convict issues).

The seven entries below address the January 2025 unpublished Court of Appeals opinions that fit the above-described categories. I do not promise to be able catch them all, but each month I will make a reasonable effort to find and list all decisions with these issues in unpublished opinions from the Court of Appeals. I hope that readers, particularly attorney-readers, will let me know if they spot any cases that I missed in this endeavor, as well as any errors that I may make in my brief descriptions of issues and case results. In the entries that address decisions in criminal cases, the crimes of conviction or prosecution are italicized, and brief descriptions of the holdings/legal issues are bolded.

1. State v. Stephen Rian Price: On January 7, 2025, Division Two of the COA rejects the arguments of defendant in his appeal from Clark County Superior Court convictions for (A) *five counts of first degree rape of a child, (B) one count of first degree child molestation*, (B) *three counts of first degree dealing in depictions of a minor engaged in sexually explicit conduct*, (C) *four counts of sexual exploitation of a minor*, and (D) *four counts of first degree possession of depictions of a minor engaged in sexually explicit conduct, with the jury finding aggravating circumstances on several counts*.

The criminal charges were based on Price raping and molesting his infant daughter and his neighbor's young son and uploading videos of his actions to the internet. Private internet service providers (ISPs) submitted CyberTips reporting suspected child abuse and child sexual abuse materials to the National Center for Missing and Exploited Children (NCMEC). NCMEC then forwarded the tips to the regional Internet Crimes Against Children (ICAC) agency, which in turn forwarded the information to local law enforcement.

Defendant loses his argument that, in light of the following circumstances, as described in the Price Opinion, the actions of the internet service providers constituted governmental action, and that their actions in forwarding the evidence violated his right to privacy:

> **Federal law mandates that internet service providers (ISPs) such as Google, Discord, AOL, and Skype report suspected child sex abuse that appears on the ISP's platform to the NCMEC. 18 U.S.C. § 2258A. ISPs often employ hashing technology to rapidly and automatically identify suspected child sexual abuse materials. Hash values are short, distinctive identifiers that enable the rapid comparison of one file to another. The NCMEC analyzes these "CyberTips" and forwards them to the regional Internet Crimes Against Children (ICAC) agency who then forwards them to local law enforcement.**

In six pages of legal analysis, the Price Opinion explains why this legal argument fails. Among the cases discussed is State v. Harrier, 14 Wn. App. 2d 17 (2020).

Here is a link to the Opinion in State v. Price:
https://www.courts.wa.gov/opinions/pdf/D2%2058094-2-II%20Unpublished%20Opinion.pdf

2. State v. I.A.C.-C: On January 7, 2025, Division Three of the COA rejects the arguments of defendant in his appeal from Douglas County Superior Court juvenile court adjudications of guilt for (A) *second degree burglary,* (B) *second degree malicious mischief,* (C) *third degree theft, and* (D) *minor in possession of alcohol*.

The criminal charges were based on defendant and two accomplices breaking into a closed convenience store and stealing tobacco products and a case of beer**. One of the arguments of I.A.A.-C. was that the trial court committed reversible error by overruling his objection to the testimony of a detective, in response to a question from the deputy prosecutor, that another participant in the crime identified I.A.C.-C as a fellow participant in the crime. The I.A.C.-C. Opinion rejects each of the State's arguments for admission of this hearsay. However, the I.A.C.-C. Opinion concludes that the error was harmless in light of the admissible evidence in the case.**

Here is a link to the Opinion in State v. I.A.C.-C.:
https://www.courts.wa.gov/opinions/pdf/396614_unp.pdf

3. State v. Ellen Barksdale Loe: On January 14, 2025, Division One of the COA rejects the arguments of defendant in his appeal from King County Superior Court convictions for (A) *two counts of theft from a vulnerable adult in the first degree*, and (B) *two counts of securities fraud*.

One question on appeal was whether trial court acted contrary to the Washington Privacy Act, chapter 9.73 RCW, in admitting into evidence a tape recording (after making some redactions) of a "kitchen table conversation" involving (1) the 97-year-old victim, (2) his son, (3) the defendant (who was caretaker of the victim), and (4) the defendants' mother (who was a former caretaker of the victim). This was a difficult question that required the Court of Appeals to consider balancing tests under Washington appellate case law, as well as the complicated circumstances relating to the facts and the evidence bearing on the fact findings by the trial court. This Legal Update will provide only a rough overview of the analysis by the Court of Appeals.

The Opinion by the Court of Appeals states that there is not sufficient evidence in the record to establish that each of the four persons involved in the "kitchen table conversation" were made aware that they were being recorded, so consent was not a basis for finding the recording to be admissible under chapter 9.73 RCW.

Then the Loe Opinion turns to the question of whether the recording is admissible under the Privacy Act on the rationale the "kitchen table conversation" was not private under the totality of the circumstances. The Loe Opinion notes that during argument on the pretrial motion, the State "properly cited" the factors under [the Washington Supreme Court Opinion in State v. Clark, 129 Wn.2d 211, 224-227 (1996)] that are used to answer whether a person had an expectation of privacy under the Privacy Act and whether that expectation was reasonable: (1) the subject and duration of the communication; (2) location of the communication; (3) presence of third parties; and (4) the role of a nonconsenting party in relation to a consenting party. Considering and weighing these factors, the Loe Opinion concludes that there was not sufficient evidence in the record to establish that the "kitchen table conversation" was private under the circumstances of this case.

Here is a link to the Opinion in State v. Loe:
https://www.courts.wa.gov/opinions/pdf/847457.pdf

4. State v. Michael Lee Summa: On January 7, 2025, Division Three of the COA rejects the arguments of defendant in his appeal from Spokane County Superior Court convictions for (A) *unlawful possession of a firearm*, and (B) *possession of a controlled substance with intent to distribute*.

One of the legal issues addressed by the Court of Appeals is whether probable cause supported a search warrant for a car from which defendant Summa ran on foot to evade a police contact. **In short, the Summa Opinion concludes that the following facts alleged in the affidavit – (1) Summa's observed flight from his Chevrolet Cobalt after he saw that officers had noticed him standing next to the driver's side of the car; (2) his past criminal history; and (3) a firearm and gun paraphernalia that officers saw in open view immediately after they saw him run away – would lead a prudent and reasonable officer to believe a firearm to be inside the vehicle and to have been in the possession of Summa immediately before his departure. In light of Summa's past felony convictions and thus his prohibition from possessing firearms, as well as some other facts set forth in the search warrant affidavit, the Summa Opinion concludes that this would lead a reasonable officer to conclude Summa committed a crime and that evidence of the crime rested inside the car.**

The Summa Opinion sets the following declarations from the affidavit (text formatted by the Legal Update Editor):

> Your affiant, [Officer A] is a fully commissioned Police Officer employed by the Spokane Police Department since 2021. . . .
>
> *Crime being investigated*: RCW 9.41.040: Unlawful Possession of Firearm 1st Degree
>
> *Circumstances supporting probable cause*:
>
> [Officer A] can attest to the following:
>
> I am a commissioned police officer in the State of Washington and I am employed by the City of Spokane Police Department in that capacity[.] I was working uniformed patrol on 04/15/2022 wearing a uniform bearing two patches and a badge identifying me as a Spokane Police Officer. I was driving a marked police vehicle with overhead emergency lights and "Spokane Police" emblazoned on the side.
>
> I was in the alley behind 1619 E Bridgeport Ave when I drove past a black Chevrolet Cobalt with two individuals standing at either side of the vehicle. The doors of this vehicle were open.
>
> The individual on the driver side of the vehicle immediately took off running in the opposite direction of my patrol car. This implied to me that this individual may be committing a criminal act and did not want to be caught by Law Enforcement as flight at the mere presence of police is very abnormal behavior.
>
> The individual that took off running was later identified as Michael L. Summa. Another officer advised me that he was known to be in the area and I matched his likeness with his most recent booking photo.

> Michael L. Summa has a Department of Corrections Warrant for Homicide, is a convicted felon and is noted in local history as being an armed career criminal.
>
> Dispatch ran a iii (criminal history check) on him showing 6 felony convictions to include Drive by shooting, Manslaughter 1st, and Assault 2nd.
>
> The second individual next to the car that did not run was Sidney J[.] Gleave[.] Gleave stated that the car belongs to his friend that ran off and Gleave was here to buy it.
>
> While looking through the windows of the vehicle, I was able to see a firearm holster and handgun ammunition (a single cartridge that appeared to be .45 caliber). The holster is inside a box of miscellaneous items in the back seat and is positioned for the driver to easily draw a handgun out of it while in the driver seat[.] The handgun ammunition was in the handrail of the rear left side passenger door. I was able to see a black cell phone charging in the center console of the vehicle. It appeared to have been abandoned by Summa when he fled the scene.
>
> Summa's behavior (flight away from the vehicle), past criminal history, and items visible inside the car, would lead a prudent and reasonable officer to believe that there may be a firearm inside the vehicle.
>
> I seized the Chevrolet for a search warrant, as I know Summa to be a convicted felon and is not allowed to own a firearm[.] The Chevrolet was then towed to the Spokane Property Facility where it was placed in a locked garage bay and sealed with evidence tape.
>
> WHEREFORE, declarant requests that a Search Warrant be issued for the purpose of searching (X) VEHICLE(S), upon or in the vehicle described as follows: A black 2010 Chevrolet Cobalt, WA-BXS6147, VIN 1G1AFSF55A7219394.

The Summa Opinion describes as follows the results of the search:

> They seized a black handbag on the passenger seat containing a hand grenade, a handgun, a magazine with ammunition, 801 blue fentanyl pills, and $1,161 in cash. A black plastic container labeled "Summa" with a purple marker lay next to the handbag. The center console held an electronic device containing three photos of Michael Summa and a female companion. In the backseat, officers found the holster they previously saw. [Officer A] noticed that the holster lay on a box in a manner that would allow the driver to reach it.

Here is a link to the Opinion in State v. Summa:
https://www.courts.wa.gov/opinions/pdf/398897_unp.pdf

5. State v. D.D.H.: On January 21, 2025, Division One of the COA affirms the Clark County Superior Court order that followed conviction of defendant for *second degree unlawful possession of a firearm.* The trial court ordered that D.D.H. register as a felony firearm offender pursuant to RCW 9.41.330. **The D.D.H. Court rejects the defendant's argument that the Court should hold to be void-for-vagueness RCW 9.41.330, which provides that when a defendant is convicted of a felony firearm offense, a sentencing court must consider whether to order the defendant to register as a felony firearm offender based upon "all**

relevant factors," including, among other things, "[e]vidence of the person's propensity for violence that would likely endanger other persons." RCW 9.41.330(2)(c).

Here is a link to the Opinion in State v. D.D.H.:
https://www.courts.wa.gov/opinions/pdf/870688.pdf

6. State v. William Victor Golyshevsky: On January 22, 2025, Division Two of the COA agrees with the sufficiency-of-evidence arguments of defendant in his appeal from a Clark County Superior Court conviction for *second degree theft.* The second degree theft statute, RCW 9A.56.040, requires that the State prove that the "market value" of items stolen is more than $750. The Golyshevsky Opinion includes the following explanation for the Court's ruling that the evidence in the trial court record is insufficient to support the conviction:

> **Here, the only evidence of market value that the State introduced at trial was [the victim's] testimony that the total value of all the property stolen was approximately $1,500. On its face, this testimony fails to establish market value as required by the theft statutes because there is no indication how [the victim] determined this approximate amount—whether it was based on retail price, the price she paid for the items, what she believed the items would sell for, or replacement cost. And even if it would be reasonable for the jury to infer that [the victim] based her estimate on the price paid for each item, there was no evidence establishing when the items were purchased or whether there were changes to the property that could change its value. Without additional evidence regarding the basis for [the victim's] estimated value of the stolen property of approximately $1,500, there is not sufficient evidence for the jury to find beyond a reasonable doubt that the market value of the property was more than $750. Accordingly, there was insufficient evidence to support the jury's verdict finding Golyshevsky guilty of second degree theft.**

Here is a link to the Opinion in State v. Golyshevsky:
https://www.courts.wa.gov/opinions/pdf/D2%2058335-6-II%20Unpublished%20Opinion.pdf

7. State v. Michael Shawn Adams: On January 27, 2025, Division One of the COA denies the request of defendant for reversal of his Spokane County Superior Court convictions for (A) *unlawful possession of a firearm*, and (B) *possession of a controlled substance with intent to distribute*.

The Adams Opinion agrees with defendant's argument that the facts surrounding a law enforcement officer's taking of what the officer characterized as a "voluntary" written statement of the defendant was not in fact voluntary. The Opinion explains that the officer asked the defendant to amend his original written statement three times during initial questioning at the defendant's home. The Opinion concludes that the wording and manner in which the officer asked the defendant to amend his statement three times made the ultimate amended statement involuntary. However, the Opinion concludes that the trial court's error in admitting the thrice-amended statement was harmless error in light of the totality of the lawfully admitted evidence in the case.

Also, the Adams Opinion rejects defendant's argument that he was not adequately advised by a detective in a subsequent custodial interrogation of his right to an attorney under Criminal Rule 3.1, which requires that an arrestee be advised that on request before questioning an attorney will be provided at public expense. The Adams Opinion rules that

the Washington Supreme Court recognized in State v. Templeton, 148 Wn.2d 193, 210-11 (2002) that this requirement of CrR 3.1 is satisfied by an agency's standard Miranda warning that includes, as in the Adams case, the underlined phrase in the following warning:

> **You have the right to remain silent. Anything you say can be used against you in a court of law. You have a right at this time to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements**

Here is a link to the Opinion in State v. Adams:
https://www.courts.wa.gov/opinions/pdf/868411.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 U pdate for Washington Law Enforcement is placed under the "LE Resources" link on the Internet Home Page of the Washington Association of Sheriffs and Police Chiefs. As new Legal Updates are issued, the three most recent Legal Updates will be accessible on the site. WASPC will drop the oldest each month as WASPC adds the most recent Legal Update.

In May of 2011, John Wasberg retired from the Washington State Attorney General's Office. For over 32 years immediately prior to that retirement date, as an Assist ant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011) of the Criminal Justice Training Commission's Law Enforcement Digest. From the time of his retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the production of the LED. That arrangement ended in the late fall of 2014 due to variety of concerns, budget constraints, and friendly differences of opinions 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 https://www.cjtc.wa.gov/resources/law-enforcement-digests

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