LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

JUNE 2022

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https://www.courts.wa.gov/opinions/pdf/997306.pdf
The overturned unpublished Court of Appeals April 13, 2021, Opinion in State v. Sum can be accessed on the Internet at:
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UNITED STATES SUPREME COURT

SECOND AMENDMENT PRECLUDES APPLICATION OF NEW YORK'S "HAVE AND CARRY" LICENSING STATUTE TO REQUIRE A SHOWING OF "PROPER CAUSE" BY ANY PERSON WHO WISHES TO POSSESS A HANDGUN OUTSIDE OF THE HOME

In New York State Rifle & Pistol Association v. Bruen, ___ S.Ct. ___ , 2022 WL ___ (June 23, 2022), a 5-4 majority of the U.S. Supreme Court addresses the constitutionality under the Second Amendment the application of a State of New York statute. The statute requires that in order to carry a firearm outside of the home, a person must have a license, and, in order to obtain the license, a person must establish "proper cause" over and above the general wish for self-protection. The Majority Opinion declares that this type of "proper cause" requirement violates the Second Amendment.

A staff syllabus (which is not part of the Court's Opinion) provides a lengthy summary of the Majority Opinion. The first few paragraphs of the staff syllabus state as follows:

> The State of New York makes it a crime to possess a firearm without a license, whether inside or outside the home. An individual who wants to carry a firearm outside his home may obtain an unrestricted license to "have and carry" a concealed "pistol or revolver" if

he can prove that "proper cause exists" for doing so. N. Y. Penal Law Ann. §400.00(2)(f). An applicant satisfies the "proper cause" requirement only if he can "demonstrate a special need for self-protection distinguishable from that of the general community." E.g., In re Klenosky, 75 App. Div. 2d 793, 428 N. Y. S. 2d 256, 257.

Petitioners Brandon Koch and Robert Nash are adult, law-abiding New York residents who both applied for unrestricted licenses to carry a handgun in public based on their generalized interest in self-defense. The State denied both of their applications for unrestricted licenses, allegedly because Koch and Nash failed to satisfy the "proper cause" requirement. Petitioners then sued respondents – state officials who oversee the processing of licensing applications – for declaratory and injunctive relief, alleging that respondents violated their Second and Fourteenth Amendment rights by denying their unrestricted-license applications for failure to demonstrate a unique need for self-defense.

The District Court dismissed petitioners' complaint and the Court of Appeals affirmed. Both courts relied on the Second Circuit's prior decision in Kachalsky *v.* County of Westchester, 701 F. 3d 81, which had sustained New York's proper-cause standard, holding that the requirement was "substantially related to the achievement of an important governmental interest." Id., at 96.

HELD: New York's proper-cause requirement violates the Fourteenth Amendment by preventing law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms in public for self-defense.

Result: Reversal of Second Circuit U.S. Court of Appeals ruling that erroneously held that the New York statutory scheme does not violate the Second Amendment; case remanded to grant relief to the Petitioners, Brandon Koch and Robert Nash.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: THE MERE FAILURE IN A CUSTODIAL INTERROGATION TO GIVE MIRANDA WARNINGS DOES NOT PROVIDE GROUNDS FOR A FIFTH AMENDMENT-BASED CIVIL RIGHTS LAWSUIT, EVEN WHERE THE UN-MIRANDIZED STATEMENT WAS INTRODUCED AT SOME STAGE OF AN EARLIER CRIMINAL PROSECUTION, AND THE JURY ACQUITTED IN THE CRIMINAL TRIAL

In Vega v. Tekoh, ___ S.Ct. ___ , 2022 WL ___ (June 23, 2022), a 6-3 majority of the Supreme Court reverses a Ninth Circuit Court of Appeals decision and rules that a U.S. District Court judge correctly instructed the jury in a Civil Rights Act section 1983 lawsuit. The judge rejected Plaintiff's request that the judge instruct the jury that the mere failure by an officer in a custodial interrogation to give Miranda warnings can be the basis for a Fifth Amendment-based Civil Rights Act action.

The facts are disputed in this case regarding what happened in the officer's questioning of Plaintiff, Mr. Tekoh, who was a hospital worker. The officer was investigating Mr. Tekoh based on a patient's accusation that Mr. Tekoh sexually assaulted her. Mr. Tekoh testified that the officer engaged in coercive actions that would have made the questioning custodial for Miranda purposes. The officer denies the accusations by Mr. Tekoh regarding the allegedly coercive questioning process. But it was undisputed that the officer did not give Miranda warnings.

In complex analysis, the Majority Opinion explains that, although the Miranda warnings requirement is a prophylactic rule that derives from the Fifth Amendment and binds all of U.S. law enforcement, as a prophylactic rule, it should be applied only when the benefits of the rule outweigh the costs of the rule. The Vega Majority Opinion notes, for instance, the Supreme Court's past rulings limiting full application of the Exclusionary Rule to Miranda violations. In this case, the Majority Opinion indicates that the costs of allowing plaintiffs to sue officers for merely failing to give a Miranda warning outweigh the benefits of the warnings rule.

As part of the complex analysis, the Vega Majority Opinion distinguishes as follows the Court's 2000 decision in Dickerson v. United States, which held that Congress lacked the authority to adopt a statute overruling the Miranda warnings requirement:

> Contrary to the decision below [by the Ninth Circuit] and Tekoh's argument here, our decision in [Dickerson v. United States, 530 U. S. 428 (2000)] did not upset the firmly established prior understanding of Miranda as a prophylactic decision. Dickerson involved a federal statute, 18 U. S. C. §3501, that effectively overruled Miranda by making the admissibility of a statement given during custodial interrogation turn solely on whether it was made voluntarily. The Court held that Congress could not abrogate Miranda by statute because Miranda was a "constitutional decision" that adopted a "constitutional rule," and the Court noted that these rules could not have been made applicable to the States if it did not have that status.
>
> At the same time, however, the Court made it clear that it was not equating a violation of the Miranda rules with an outright Fifth Amendment violation. For one thing, it reiterated Miranda's observation that "the Constitution would not preclude legislative solutions that differed from the prescribed Miranda warnings, but which were 'at least as effective in apprising accused persons'" of their rights.
>
> Even more to the point, the Court rejected the dissent's argument that §3501 could not be held unconstitutional unless "Miranda warnings are required by the Constitution, in the sense that nothing else will suffice to satisfy constitutional requirements." The Court's answer, in substance, was that the Miranda rules, though not an explication of the meaning of the Fifth Amendment right, are rules that are necessary to protect that right (at least until a better alternative is found and adopted). Thus, in the words of the Dickerson Court, the Miranda rules are "constitutionally based" and have "constitutional underpinnings." But the obvious point of these formulations was to avoid saying that a Miranda violation is the same as a violation of the Fifth Amendment right.
>
> What all this boils down to is basically as follows. The Miranda rules are prophylactic rules that the Court found to be necessary to protect the Fifth Amendment right against compelled self-incrimination. In that sense, Miranda was a "constitutional decision" and it adopted a "constitutional rule" because the decision was based on the Court's judgment about what is required to safeguard that constitutional right.
>
> And when the Court adopts a constitutional prophylactic rule of this nature, Dickerson concluded, the rule has the status of a "La[w] of the United States" that is binding on the States under the Supremacy Clause . . . . and the rule cannot be altered by ordinary legislation.

> This was a bold and controversial claim of authority [by the U.S. Supreme Court], but we do not think that Dickerson can be understood any other way without (1) taking the insupportable position that a Miranda violation is tantamount to a violation of the Fifth Amendment, (2) calling into question the prior decisions that were predicated on the proposition that a Miranda violation is not the same as a constitutional violation, and (3) excising from the United States Reports a mountain of statements describing the Miranda rules as prophylactic. Subsequent cases confirm that Dickerson did not upend the Court's understanding of the Miranda rules as prophylactic. [Referencing an earlier passage in the Vega Majority Opinion that collected post-Dickerson cases].

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

Result: Reversal of Ninth Circuit decision and remand of the case to reinstate the judgment for the government civil defendants.

IN A 5-4 RULING, THE U.S. SUPREME COURT CONCLUDES THAT STATES HAVE BROAD CONCURRENT POWER TO PROSECUTE CRIMES ON RESERVATIONS COMMITTED BY NON-INDIANS AGAINST INDIANS

In Oklahoma v. Castro-Huerta, ___ S.Ct. ___ , 2022 WL ____ (June 29, 2022), A 5-4 majority of the U.S. Supreme Court rules that the Federal Government and the states have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country

A staff syllabus (which is not part of the Court's Opinion) provides a lengthy summary of the Majority Opinion. The first few paragraphs of the staff syllabus state as follows:

> In 2015, respondent Victor Manuel Castro-Huerta was charged by the State of Oklahoma for child neglect. Castro-Huerta was convicted in state court and sentenced to 35 years of imprisonment. While Castro-Huerta's state-court appeal was pending, this Court decided [McGirt *v.* Oklahoma, 140 S.Ct. 2452 (2020)]. There, the Court held that the Creek Nation's reservation in eastern Oklahoma had never been properly disestablished and therefore remained "Indian country."
>
> In light of McGirt, the eastern part of Oklahoma, including Tulsa, is recognized as Indian country. Following this development, Castro-Huerta argued that the Federal Government had exclusive jurisdiction to prosecute him (a non-Indian) for a crime committed against his stepdaughter (a Cherokee Indian) in Tulsa (Indian country), and that the State therefore lacked jurisdiction to prosecute him.
>
> The Oklahoma Court of Criminal Appeals agreed and vacated his conviction. This Court granted certiorari to determine the extent of a State's jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.
>
> Held: The Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.

Result: Reversal of ruling of Oklahoma Court of Criminal Appeals and remand to the Oklahoma courts; this will result in reinstatement of the conviction of Castro-Huerta.

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: ACCEPTING PLAINTIFF'S ALLEGATIONS AS TRUE FOR PURPOSES OF ADDRESSING THE SUMMARY JUDGMENT QUESTION, NINTH CIRCUIT RULES THAT OFFICER'S USE OF HIS VEHICLE AS A ROADBLOCK TO STOP A BICYCLIST TRAFFIC LAW VIOLATOR WAS EXCESSIVE FORCE, BUT THAT QUALIFIED IMMUNITY APPLIES BECAUSE THERE IS NO CONTROLLING CASE LAW ON POINT FACTUALLY

In Seidner v. de Vries, ___ F.4th ___ , 2022 WL ___ (June 30, 2022), a 3-judge Ninth Circuit panel rules that a law enforcement officer who was sued for excessive force is entitled to qualified immunity.

The Plaintiff suffered a dislocated wrist and sprained forearm when he drove his brake-less bicycle into the side of a police car that the officer used to block the bicyclist's getaway route. A Ninth Circuit staff summary (which is not part of the panel's Opinion) summarizes the Majority Opinion and Concurring Opinion as follows:

> [The action was] brought pursuant to 42 U.S.C. § 1983 alleging excessive force when the officer used a roadblock to stop plaintiff, who was suspected of committing a minor traffic violation, from fleeing on a bicycle.
>
> The panel held that the question of whether Officer Jonathan de Vries used excessive force against Plaintiff Preston Seidner would be a question for a factfinder. The roadblock was a use of intermediate force that was capable of inflicting significant pain and causing serious injury. Given the circumstances, a jury could conclude that de Vries should have taken additional steps to stop Seidner before using an intermediate level of force given Seidner's minor offense and the lack of any safety risk to de Vries or anyone else.
>
> However, even if de Vries did use excessive force, the [caselaw] as it existed at the time of the incident did not clearly establish that his actions violated the Fourth Amendment. Therefore, de Vries was entitled to qualified immunity.
>
> Concurring in the judgment, Judge Christen agreed with the majority that no case law addressed the use of a police car to stop a bicycle, and that de Vries was entitled to qualified immunity. Judge Christen dissented from the majority's Fourth Amendment excessive force analysis, stating that effectuating a traffic stop by sharply swerving a police vehicle into the path of Seidner's bicycle constituted the use of deadly force and given the surrounding circumstances, was constitutionally excessive as a matter of law

[Some paragraphing revised for readability]

Result: Reversal of order of U.S. District Court (Arizona) that denied qualified immunity to the officer who used his car as a roadblock against the fleeing bicyclist.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: ACCEPTING PLAINTIFF'S ALLEGATIONS AS TRUE FOR PURPOSES OF ADDRESSING

THE SUMMARY JUDGMENT QUESTION, THE DISTRICT COURT SHOULD NOT HAVE DISMISSED A WRONGFULLY CONVICTED PERSON'S LAWSUIT CLAIMING THAT A DETECTIVE'S FABRICATION OF EVIDENCE CONSTITUTED A CIVIL RIGHTS VIOLATION

In Richards v. County of San Bernardino, ___ F.4th ___ , 2022 WL ___ (9th Cir., June 24, 2022), a three-judge Ninth Circuit panel reversed the District Court's grant of summary judgment for the County of San Bernardino and the County's criminalist, Daniel Gregonis, in an action brought pursuant to 42 U.S.C. § 1983 alleging that the defendants violated Plaintiff's constitutional rights during his murder investigation and prosecution, resulting in his erroneous conviction for the murder of his wife, Pamela Richards.

The opening paragraph of the Ninth Circuit Opinion provides the following description of some of the procedural circumstances that triggered defendant's lawsuit:

> In 1997, after four trials and two hung juries, . . . William Richards was convicted of the first degree murder of his wife, Pamela. In 2016, the California Supreme Court vacated Richards's conviction, finding that it was based on "false evidence" as characterized in subsequently enacted legislation defining the term, Cal. Penal Code § 1473(e)(1), and Richards has since been exonerated of Pamela's murder . . . .

A Ninth Circuit staff summary (which is not part of the panel's Opinion) summarizes the panel's unanimous Opinion as follows:

> Plaintiff alleged that [the criminalist] fabricated evidence against him by planting, on Pamela's body, blue fibers from a shirt that plaintiff was wearing on the night of the murder. Plaintiff further alleged claims for municipal liability pursuant to Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978), against the County, arguing that the County's customs and policies, and the absence of better customs and policies, resulted in the alleged constitutional violations.
>
> As a preliminary matter, the panel determined that the district court incorrectly held that plaintiff was required to show that [the criminalist] had a motive to manipulate the evidence. Plaintiff did not need to rely on motive evidence because he supported his claim with direct evidence of fabrication.
>
> Viewing the facts in the light most favorable to the nonmoving party, plaintiff raised a triable issue as to whether [the criminalist] deliberately planted the blue fibers under Pamela's fingernail. A jury could reasonably draw the inference that the blue fibers were not under Pamela's fingernail at the time of the autopsy and were planted on Pamela's body later after the autopsy was performed. Because [the criminalist] was the only person who accessed plaintiff's shirt and Pamela's severed fingers before the fibers were discovered, a reasonable jury could conclude that [the criminalist] was the person who planted the blue fibers.
>
> The panel further held that the very same rationale motivating the materiality causation standard for claims brought under Brady v. Maryland, 373 U.S. 83 (1963), is also present in § 1983 claims for deliberate fabrication of evidence, which implicate a plaintiff's fundamental right to a fair trial. The panel held that because the district court erred by failing to find potential civil rights liability as to [the criminalist], its derivative ruling as to potential County liability under Monell should also be reversed.

> The panel further held that the district court erred by not addressing whether plaintiff could show that he suffered a constitutional injury by the County unrelated to the individual officers' liability under § 1983. Plaintiff put forth at least two Monell claims [against the government employer] that were not premised on a theory of liability that first required a finding of liability on the part of the individual officers: (1) that the County's policy of prohibiting coroner investigators from entering a crime scene until cleared by homicide detectives resulted in the loss of exculpatory time-of-death evidence, and (2) that the lack of any training or policy on Brady by the Sheriff's Department resulted in critical exculpatory evidence being withheld by the prosecution.
>
> The panel therefore remanded to the district court to consider these claims against [the criminalist] and the County in the first instance. In a concurrently filed memorandum disposition, the panel affirmed the district court's dismissal of plaintiff's remaining claims.

[Some paragraphing revised for readability]

Result: Reversal of order of U.S. District Court (Central District of California) that dismissed the Plaintiff's lawsuit.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR CORRECTIONS RELATING TO RELIGIOUS FREEDOM: NINTH CIRCUIT RULES THAT MUSLIM PRISON INMATE WAS LAWFULLY DENIED A REQUEST TO BE HOUSED WITH OTHER RELIGIOUS MUSLIMS SO THAT NON-MUSLIM PRISONERS WOULD NOT HARASS HIM AS HE PRAYS; IT WOULD BE DISCRIMINATORY TO GRANT SUCH A REQUEST

In Al Saud v. Days, ___ F.4th ___ , 2022 WL ___ (9th Cir., June 8, 2022), a three-judge Ninth Circuit panel rejects the constitutional and statutory religious freedom arguments of a state prisoner who argued that he should be housed only with other practicing Muslims so that he would not be harassed by other prisoners in his prayers.

A Ninth Circuit staff summary (which is not part of the panel's Opinion) explains as follows that the panel rejected the argument because such a housing arrangement would violate the rights of other prisoners:

> The panel affirmed the district court's judgment on the pleadings in an action brought by Shaykh Muhammad Al Saud, a Muslim inmate who alleged that he is unable to pray five times a day, as the Qur'an requires, because he is housed with people who harass him as he prays; and who had asked the prison to accommodate his religious practice by housing him exclusively with other prisoners based on their religious beliefs and practices.
>
> Al Saud brought suit pursuant to the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc et seq., the Free Exercise Clause of the First Amendment, and Arizona state law.
>
> The panel held that Al Saud's RLUIPA claim failed because denying his request to be housed only with Muslims was the least restrictive means of furthering a compelling governmental interest. The panel concluded that the outcome of this case was largely controlled by Walker v. Beard, 789 F.3d 1125 (9th Cir. 2015), which held that a prison

could deny a prisoner's religious accommodation when he sought to be housed with only white people.

Because both race and religion are suspect classes, the likelihood that equal protection liability would flow from housing prisoners based on religion was substantially identical to the likelihood of liability for housing prisoners based on race and, therefore, was sufficient to serve as a compelling interest. Defendants had no alternative but to deny Al Saud's request because he requested only one thing: to be housed exclusively with Muslims.

The panel held that defendants did not violate Al Saud's First Amendment free exercise rights because denying Al Saud's request was also reasonably related to a legitimate penological interest – avoiding the potential legal liability of housing inmates based on their religious beliefs and practices. Denying the request was rationally related to avoiding liability because by denying Al Saud's requested accommodation, the Arizona Department of Corrections Rehabilitation and Reentry completely eliminated its risk of litigation from other prisoners based on that claim.

[Some paragraphing revised for readability]

Result: Affirmance of U.S. District Court (Arizona) ruling dismissing the lawsuit by Al Saud.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: ACCEPTING PLAINTIFF'S ALLEGATIONS AS TRUE FOR PURPOSES OF ADDRESSING THE SUMMARY JUDGMENT QUESTION, NINTH CIRUCIT HOLDS THAT GOVERNMENT DEFENDANT IS NOT ENTITLED TO QUALIFIED IMMUNITY ON PLAINTIFF'S CLAIM AGAINST POLICE DEPARTMENT EMPLOYEE FOR ALLEGEDLY: (1) CONSPIRING WITH NON-CUSTODIAL PARENT, (2) TO DECEIVE FAMILY COURT TO GET RESTRAINING ORDER AGAINST PLAINTIFF, AND (3) TO REMOVE CHILD FROM CUSTODIAL PARENT'S CONTROL

In David v. Kaulukukui, ___ F.4th ___ , 2022 WL ___ (9th Cir., June 27, 2022), a three-judge Ninth Circuit panel affirms the U.S. District Court's denial of the motion of the government defendant (Kaulukukui) to dismiss, on the basis of qualified immunity, an action brought pursuant to 42 U.S.C. § 1983 alleging violations of Plaintiff's right to familial association.

The opening paragraph of the Ninth Circuit Opinion provides the following description of some of the circumstances alleged by Plaintiff:

> If what Plaintiff Hannah David alleges is true, she and her daughter suffered a blatant abuse of government power. David claims that Defendant Gina Kaulukukui, an employee of the Kauai County Police Department, deceived the Hawaii family court when she assisted the non-custodial father of David's daughter in obtaining a temporary restraining order (TRO) that prevented David, the sole custodial parent, from having any contact with her daughter. David further claims that Kaulukukui conspired with the father (who works for the Kauai County Fire Department) and other state officials to extract the daughter from her school and place her in the father's custody on a different island – all without David's knowledge or a court order – and then prevented David and her daughter from having any contact for 21 days.

A Ninth Circuit staff summary (which is not part of the panel's Opinion) summarizes the panel's unanimous Opinion as follows:

> The panel stated that although Kaulukukui may ultimately prove that plaintiff's allegations were false, at the pleading stage, the panel must accept all well-pleaded factual allegations as true.
>
> When the alleged events in this case occurred, the law clearly established that a parent and child's constitutional right to familial association is violated when a state official interferes with a parent's lawful custody through judicial deception. The law also clearly established that a state official cannot remove a child from a lawful custodial parent without consent or a court order unless the official has reasonable cause to believe that the child is in imminent danger and, even then, the scope and duration of the removal must be reasonable.
>
> Here, plaintiff plausibly alleged that Kaulukukui violated these rights by deliberately failing to inform the family court of a custody order when assisting the non-custodial father in obtaining a temporary restraining order that prevented contact between plaintiff and her daughter, and by assisting the other defendants in removing plaintiff's daughter from plaintiff's custody and separating them for 21 days.
>
> As such, Kaulukukui was not entitled to qualified immunity at this early stage.

Result: Affirmance of U.S. District Court (Hawaii) ruling denying qualified immunity to Kaulukukui.

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WASHINGTON STATE SUPREME COURT

AFFIRMATIVE ACTION IMPACTS ANALYSIS OF THE ISSUE OF "SEIZURE" OF THE PERSON BY LAW ENFORCEMENT: IN A UNANIMOUS INDEPENDENT GROUNDS RULING UNDER ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION, THE WASHINGTON SUPREME COURT DEPARTS FROM THE FOURTH AMENDMENT'S APPROACH TO OBJECTIVE STANDARDS IN RULING THAT THE POSSIBILITY OF "IMPLICIT BIAS" MUST BE PART OF THE TOTALITY-OF-THE-CIRCUMSTANCES "OBJECTIVE" TEST FOR DETERMINING IF A PERSON WHO IS BLACK, INDIGENOUS, OR OTHERWISE A PERSON OF COLOR (BIPOC) HAS BEEN "SEIZED" BY LAW ENFORCEMENT –

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State v. Sum, ___ Wn.2d ___ , 2022 WL ___ (June 9, 2022)

LEGAL UPDATE EDITOR'S PRELIMINARY COMMENT:

The Washington Supreme Court's Opinion in the Sum case creates a blurry standard for determining "seizure" of a person who is Black, Indigenous, or otherwise a Person of Color. The new rule calls to mind one of my favorite quotes from Professor LaFave's treatise on Search and Seizure (Second Edition, subsection 5.2(c), page 449 of Volume 2):

> **"If the rules are impossible of application by the police, the result may be the sustaining of motions to suppress under the Fourth Amendment with some regularity, but this can hardly be taken as proof that 'the people' are 'secure in their persons, house, papers, and effects, against unreasonable searches and seizures.' Rather, that security can only be realized if the police are acting under a set of rules which, in most instances, make it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement. In short, we must resist 'the understandable temptation to be responsive to every relevant shading of every relevant variation of relevant complexity' lest we end up with 'a Fourth Amendment with all of the character and consistency of a Rorschach blot.'"**

[Emphasis in original; internal citations omitted]

Facts in Sum case: (Excerpted from the Supreme Court Opinion)

> On April 9, 2019, Pierce County Sheriff's Deputy [A] was on patrol, driving an unmarked police vehicle through an area where there were "some problem houses" that Deputy [A] liked to "keep an eye on." At 9:15 a.m., the deputy noticed a Honda Civic parked near the entry gate to a church parking lot.
>
> The Honda was not blocking the entry gate, and there is no indication that it was parked illegally. Nevertheless, the car attracted the deputy's attention because "it was parked there." The location was significant to Deputy [A] because "four or five months before . . . another deputy in [his] unit arrested another subject there in a stolen vehicle." Within that same four-to-five-month time frame, an unnamed person approached Deputy [A] in a nearby grocery store parking lot to tell the deputy that they were "concerned about all the vehicles that were parking there that didn't belong in the area."
>
> As Deputy [A] observed the Honda, he saw Sum, who "was slumped over and appeared to be unconscious in the driver's seat." At that point, the deputy decided to conduct "a social contact" and parked nearby, "making sure to leave enough room so as not to block the Honda Civic or prevent it from leaving." Before getting out of his police vehicle, Deputy [A] conducted a records check of the Honda's license plate and discovered a report of sale, although it was not clear when the sale had occurred. The records check also showed that the car had not been reported stolen, but the records did not state the name of the current owner. Deputy [A] noted the last four digits of the Vehicle Identification Number (VIN) associated with the Honda's license plate, then approached the driver's side of the car on foot, wearing his full uniform.
>
> As he approached, Deputy [A] noticed another man in the car, who was in the front passenger seat. Both Sum and the passenger "appeared to be unconscious and did not notice [Deputy A] approach." Before attempting to wake them, Deputy [A] checked the Honda's public VIN to confirm that it matched the license plates. The deputy then

knocked on the driver's side window. After "seven to eight seconds," Sum "slowly woke up" and "rolled the window down slightly."

Deputy [A] asked Sum what he and his passenger were doing there, and Sum responded that they "were waiting for a friend." The deputy then asked Sum who owned the Honda. Sum said the Honda was not his, and he identified the owner "with the given name, but not the surname, of an individual." At the suppression hearing, Deputy [A] could not recall the name Sum provided.

Deputy [A] next asked Sum and his passenger for identification, and Sum "asked him why he wanted it." The deputy responded "that the two men were sitting in an area known for stolen vehicles and that [Sum] did not appear to know to whom the vehicle he was sitting in belonged." Sum provided a false name and date of birth. The passenger gave his true name and birth date.

Deputy [A] walked back to his patrol vehicle to check the names Sum and his passenger provided. While the deputy was in his vehicle, Sum started the Honda's engine, "backed up quickly, and then took off," driving partially on the sidewalk and over some grass. Deputy [A] activated his emergency lights and started pursuing the Honda, soon joined by another deputy in a separate vehicle. Sum drove at a high rate of speed through a stop sign and multiple red lights before ultimately crashing in someone's front yard. Deputy [A] handcuffed Sum and read him [warnings under Miranda v. Arizona, 384 U.S. 436 (1966)].

A search of Sum's person incident to arrest turned up the Honda's title and registration, which showed that the car did, in fact, belong to Palla Sum. He had purchased it two weeks earlier. The search of Sum's person also uncovered a small holster in his pants, and when the Honda was later searched pursuant to a warrant, police discovered a pistol.

Proceedings below:

Sum was charged with unlawful possession of a firearm in the first degree, attempting to elude a pursuing police vehicle, and making a false or misleading statement to a public servant. See RCW 9.41.040(1)(a); RCW 46.61.024(1); RCW 9A.76.175. The trial court rejected Sum's suppression motion, and he was convicted on all three charges by a jury. He appealed to Division Two of the Court of Appeals to challenge only the conviction for making a false of misleading statement to a public servant, and that Court affirmed his conviction.

ISSUE AND RULING: Under the totality of the circumstances, including the fact that Sum is a "person of color," had Deputy A "seized" Sum – for purposes of the Washington State Constitution, article I, section 7 – as of the point when Deputy A had asked for Sum's identification because, as the deputy explained to Sum at the time (1) defendant was one of two men were sitting in a car in an area known for stolen vehicles, and (2) Sum did not appear to know to whom the vehicle he was sitting in belonged? (ANSWER BY THE WASHINGTON SUPREME COURT: Yes, because an objective observer could conclude that Sum was not free (1) to leave (2) to refuse Deputy A's request or (3) otherwise terminate the encounter.)

Result: Reversal of Court of Appeals ruling that affirmed the Pierce County Superior Court conviction of Palla Sum, a/k/a Pallo Sum, a/k/a San Kim Sum, for making a false or misleading statement to a public servant in violation of RCW 9A.76.175. In defendant Sum's appeal to the

Court of Appeals, he did not challenge his convictions for unlawful possession of a firearm in the first degree and attempting to elude a pursuing police vehicle, See RCW 9.41.040(1)(a); RCW 46.61.024(1); RCW 9A.76.175. Therefore, those convictions are not overturned by the Washington Supreme Court ruling in Sum.

The Washington Supreme Court holds "that Sum was unlawfully seized before he provided a false name and birth date to the deputy, so his false statement must be suppressed," and the Court remands the case to Pierce County Superior Court for further proceedings consistent with the Supreme Court's ruling. As noted in the first paragraph of this description of the "result," Sum's other convictions stand.

ANALYSIS BY WASHINGTON STATE SUPREME COURT**:**

In 2018, the Washington Supreme Court adopted General Rule 37 expanding restrictions on peremptory (as of right) challenges to jurors. The rule declares that "an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State." The rule provides that the parties or the trial court judge may question peremptory challenges by a party, and "if the [trial] court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied." (Emphasis added). Note that this standard uses a "could view" standard, not a "would view" standard, arguably making it considerably more difficult for the party making a peremptory challenge to support the challenge.

General Rule 37 goes on to list the following "presumptively invalid" reasons for peremptory challenges to potential jurors" (i) having prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; and (vii) not being a native English speaker.

In one of the introductory paragraphs of the Sum Opinion, the Supreme Court explains that guidance is being taken from General Rule 37 in defining "seizure" under article I, section 7 and in imposing a "could view" standard in assessing whether a BIPOC person could reasonably believe that the person was being seized. In the following paragraph of the Opinion's introduction, the Court explains, albeit vaguely, how the approach of General Rule 37 is being incorporated in the purportedly objective "seizure" standard under article 1, section 7:

> As set forth in this court's precedent, the seizure inquiry is an objective test in which the allegedly seized person has the burden to show that a seizure occurred. To aid courts in the application of this test, we now clarify that a person is seized for purposes of article I, section 7 if, based on the totality of the circumstances, an objective observer could conclude that the person was not free to leave, to refuse a request, or to otherwise terminate the encounter due to law enforcement's display of authority or use of physical force. For purposes of this analysis, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in disproportionate police contacts, investigative seizures, and uses of force against Black, Indigenous, and other People of Color (BIPOC) in Washington. Finally, in accordance with our precedent, if the person shows there was a seizure, then the

> burden shifts to the State to prove that the seizure was lawfully justified by a warrant or an applicable exception to the warrant requirement.

[Emphasis added]

[LEGAL UPDATE EDITOR'S COMMENT ON THE USE OF GR 37 AS A GUIDE TO SEIZURE ANALYSIS: For what little my thoughts in this regard are worth, I see logical gaps in the Sum Opinion's use of GR 37's jury selection rule that looks for possible bias in actions of an attorney to exclude a prospective BIPOC juror as a guide to "seizure" analysis – which looks at what a reasonable BIPOC person who is being acted upon by a government actor could reasonably perceive to be a governmental actor's significant restriction upon the person.]

Much of the Sum Opinion's "seizure" analysis discusses reporting of disproportionate police contacts, investigative seizures, and uses of force against BIPOC persons in Washington and elsewhere. The Sum Opinion does not give a clear explanation as to how this information is to be used in the Sum case or other cases in analyzing whether a seizure occurred, but the Opinion provides the following analysis that underlies the Opinion's conclusion that defendant Sum was seized as of the point when Deputy A explained to Sum that Deputy A had asked for Sum's identification because (1) the two men were sitting in an area known for stolen vehicles, and (2) Sum did not appear to know to whom the vehicle he was sitting in belonged:

> Given the totality of the circumstances, we hold that [Deputy A] seized Sum before Sum identified himself with a false name and birth date.
>
> As discussed above, although Sum's race is relevant to the seizure inquiry, it is certainly not dispositive. We must instead consider all of the circumstances to determine whether an objective observer could conclude that Sum was not free to refuse [Deputy A's] request for identification based on the deputy's display of authority. The answer is yes.
>
> The circumstances, as found by the trial court, were as follows. Sum, a person of color, was asleep in his car, which was parked on a public street in a "high-crime area." At 9:15 in the morning, Sum was awoken by a sheriff's deputy in full uniform knocking on the car window next to where Sum was sleeping. [Deputy A] did not ask about Sum's health or safety, and he did not ask if Sum and his passenger required assistance. Instead, the deputy asked what Sum and his passenger were doing, clearly implying that they did not belong there.
>
> Sum answered that "they were visiting a friend across the street." This answer proved insufficient to satisfy the deputy's interest in Sum and his passenger because [Deputy A] next asked "to whom the Honda Civic belonged." Sum provided a name, but this also failed to satisfy the deputy because he then requested Sum's identification. When Sum "asked him why he wanted" identification, the deputy "explained that the two men were sitting in an area known for stolen vehicles and that [Sum] did not appear to know to whom the vehicle he was sitting in belonged."
>
> Assuming, without deciding, that Sum was not already seized, then [Deputy A's] explanation was certainly "the tipping point at which the weight of the circumstances transformed a simple encounter into a seizure." . . . . At that point, it would have been clear to any reasonable person that [Deputy A] wanted Sum's identification because he suspected Sum of car theft. Indeed, the deputy stated as much, and we have

recognized that law enforcement's subjective intent is relevant if "it is conveyed to the defendant." . . . . "[T]he number and types" of [Deputy A's] questions and requests further indicated his investigative purpose, despite the lack of reasonable suspicion. GR 37(g)(i). It is also "no secret" that "suspicionless stop[s]" are "disproportionately associated" with people of color. . . . GR 37(g)(iv).

Thus, this case is not like others in which we have held that a seizure does not occur "merely because a police officer engages [a person] in conversation in a public place and asks for identification." . . . . There were far more circumstances at play here.

Based on the totality of the circumstances, an objective observer could easily conclude that if Sum had refused to identify himself and requested to be left alone, [Deputy A] would have failed to honor Sum's request because the deputy was investigating Sum for car theft. In other words, an objective observer could conclude that Sum was not free to refuse [Deputy A's] request due to the deputy's display of authority. At that point, Sum was seized. As the State correctly concedes, this seizure was not supported by a warrant, reasonable suspicion, or any other authority of law.

Thus, the false name and birth date that Sum gave to [Deputy A] was the product of an unlawful seizure. Sum's false statement must be suppressed because "[o]ur state exclusionary rule requires the suppression of evidence obtained in violation of article I, section 7." . . . .

[Emphasis added; case citations and citations to the trial court record omitted; footnote omitted]

LEGAL UPDATE EDITOR'S NOTES ON FACTORS IN THE SUM SEIZURE ANALYSIS:

The following are some totality-of-the circumstances "objective" factors that may support, in some undefinable combination, a person's claim that the person was "seized" by law enforcement under article I, section 7:

- **Is the person contacted a BIPOC person?**
- **Is the officer not a BIPOC person who is contacting a BIPOC person?**
- **Were no assurances offered by the officer that the subject of the contact (1) was free to go on his or her way or (2) did not need to answer the officer's questions?**
- **Were no assurances offered by the officer that the activation of a patrol car's flashers in a night-time contact was for the sole purpose of safety for the subject and the officer and others in relation to traffic?**
- **Did the officer more than momentarily keep the license or other items requested of the subject?**
- **Were multiple officers surrounding the subject?**
- **Did the officer use a harsh or loud tone or words?**
- **Did the officer use leading or accusatory questions?**
- **Did the officer engage in lengthy questioning?**
- **Did the officer make any physical contact with the person?**
- **Was the officer much larger than the person being contacted?**
- **Was the officer obviously armed and in uniform with badge displayed (as opposed to a plain clothes officer not displaying a weapon)?**
- **Was the setting unfamiliar to the person contacted by the officer?**

- **Did the officer invite, even politely, the subject to have a seat in the patrol car to talk?**
- **Did officers temporarily separate the subject of the contact from his or her child?**
- **Were the officer and the subject of the contact not familiar with each other?**
- **Was the subject of the contact a teenager or younger?**
- **Did the subject have an observable mental, intellectual, or emotional deficiency?**

Note that nothing in the Sum ruling undercuts the past appellate rulings that the reasonable person test for "seizure" assumes an innocent person. See Florida v. Bostick, 501 U.S.429 (1991) (U.S. Supreme Court); State v. Thorn, 129 Wn.2d 347 (1996) (Washington Supreme Court)

Note also that General Rule 37 of the Washington State Court Rules can be found at https://www.courts.wa.gov/court_rules/pdf/GR/GA_GR_37_00_00.pdf

EYEWITNESS IDENTIFICATION DUE PROCESS ANALYSIS: WASHINGTON SUPREME COURT DECLARES THAT IN APPLYING THE U.S. SUPREME COURT'S TWO-PART TEST FOR ADMISSIBILITY OF EYEWITNESS TESTIMONY, WASHINGTON TRIAL COURTS MUST CONSIDER WIDELY ACCEPTED MODERN SCIENTIFIC EVIDENCE IN ASSESSING BOTH THE PART I QUESTION (WERE THE LAW ENFORCEMENT ID PROCEDURES IMPERMISSIBLY SUGGESTIVE?) AND THE PART II QUESTION (IF THE ANSWER TO THE PART I QUESITON IS "YES," IS THE IN-COURT IDENTIFICATION TESTIMONY NONETHELESS RELIABLE UNDER ALL RELEVANT CIRCUMSTANCES?)

In State v. Derri, ___ Wn.2d ___ , 2022 WL ___ (June 23, 2022), the Washington Supreme Court is unanimous in ruling – based upon the totality of the circumstances in U.S. constitutional Due Process analysis – that: (1) the photo montage identification procedures that were used by law enforcement in the case were impermissibly suggestive, but (2) the suggestive identification procedures did not create a substantial likelihood of unreliability and irreparable misidentification in the eyewitness testimony.

The Derri Opinion adds a gloss to U.S. Supreme Court Due Process precedents relating to both the question of suggestiveness of ID procedures and the question of ultimate reliability of eyewitness testimony in light at any suggestiveness. Thus, under Derri, the Washington courts must consider new, relevant, widely-accepted scientific research when determining both (1) the suggestiveness of ID procedures and (2) reliability of eyewitness identifications that were impacted by impermissibly suggestive procedures.

The Derri Opinion declares that modern, widely-accepted scientific research has shown that eyewitness ID procedures using photographs are less suggestive if (1) a double-blind process is used to create and administer a photo montage; (2) the suspect's photo is not used in more than one presentation to a given witness; and (3) the suspect's photo is not the only photo shown to the witness. The photo ID processes used by the detective with the various witnesses in the Derri case failed in some way to uniformly adhere to these advisable processes, at least in some respect, as to each witness. The Opinion concludes that under all the circumstancesin the case, the ID processes were impermissibly suggestive. **[LEGAL UPDATE EDITOR'S NOTE: The analysis of suggestiveness by the Derri Opinion is not provided here, is more involved than is reflected in this paragraph; readers are encouraged to read the Opinion.]**

Next, however, the Derri Opinion concludes that the impermissibly suggestive conducting of photo identification did not result in unreliable eyewitness testimony. Important to the favorable outcome for the State in this case was the combined effect of the following facts: (1) each of the teller-witnesses had a much more than momentary opportunity to observe the bank robber; (2) two tellers recalled meeting the defendant on a previous occasion at the bank to discuss a banking question; (3) one of those two tellers remembered the previous occasion involved an in-depth conversation and writing down the defendant's name; (4) the other of those two tellers watched and heard the in-depth conversation on that occasion, and that teller remembered the defendant's voice and "stuttering" manner of speaking: (5) all of the tellers described, prior to looking at photos with the detective, the defendant, his appearance, and his demeanor in sufficient detail to establish that they were paying attention to the robber; (6) all of the descriptions were relatively consistent with the defendant's actual appearance; (7) two of the tellers' out-of-court identifications were made within one day of the robberies; and (8) the tellers showed high levels of certainty in their identifications.

Result: Affirmance of ruling of Division One of the Court of Appeals that affirmed the King County Superior Court convictions of Christopher Lee Derri, a/k/a John Stites, for three counts of robbery in the first degree.

LEGAL UPDATE EDITOR'S NOTES:

1. Independent Grounds and Evidence Rules theories are not considered by the Derri Court: In footnote 3, the Derri Opinion states that the Court is declining for procedural reasons to address the defendant's alternative arguments that the Washington State Due Process clause and/or the Washington Rules of Evidence rules provide more protection than the federal constitution's Due Process clause.

2. CJTC LED page article on ID procedures will be updated: My article, *Eyewitness Identification Procedures: Legal & Practical Aspects*, will be updated on the CJTC LED page < https://www.cjtc.wa.gov/resources/law-enforcement-digest > by the end of this month, July 2022. The only substantive change in the article will be the adding of a brief discussion of the Derri decision in the first section of the article. Note regarding the article that the Appendix to the article is, in its entirety, the 2015 "Model Policy of Sheriffs and Police Chiefs [on] Eyewitness Identification: Minimum Standards," which is identical to the model policy of the Washington Association of Prosecuting Attorneys.

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WASHINGTON STATE COURT OF APPEALS

2021 BLAKE DECISION INVALIDATING WASHINGTON'S FORMER STATUTE THAT PROHIBITED SIMPLE POSSESSION OF CONTROLLED SUBSTANCES DID NOT RETROACTIVELY INVALIDATE A 2017 WARRANT TO SEARCH FOR CONTROLLED SUBSTANCES

In State v. Moses, ___ Wn. App.2d ___ , 2022 WL ___ (Div. II, June 27, 2022), Division One of the Washington Court of Appeals agrees with the State's challenge to a trial court ruling suppressing a handgun seized by police during a search for controlled substances and drug paraphernalia authorized by a warrant.

The trial court determined that probable cause did not support the 2017 search warrant (in an investigation of the crimes of possession of controlled substances and possession of drug paraphernalia) because the Washington Supreme Court later voided the crime of possession of controlled substances in State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021). The trial court also found that the crimes of possession of controlled substances and possession of drug paraphernalia were so intertwined that the courts could not sever the drug possession elements of the warrant from the drug paraphernalia elements of the warrant. Therefore, the trial court dismissed the charge of unlawful possession of a firearm.

The Court of Appeals concludes that the 2021 Blake ruling is not relevant to the issues of whether (1) probable cause supported the 2017 warrant to search for controlled substances: and (2) the two objectives of the search warrant are severable, and that probable cause also supported the 2017 warrant to search for drug paraphernalia (alternative bases for rejecting defendant's challenge to his conviction.

The Moses Opinion discusses the U.S. Supreme Court and Washington appellate court precedents that establish that a ruling of unconstitutionality of a statute does not retroactively invalidate prior searches where there was probable cause at the time of the searches to believe that the statute had been violated (and other procedural constitutional requirements were met). Then, the Court of Appeals concludes as follows:

> Because (1) Blake's 2021 determination that former RCW 69.50.4013 was unconstitutional did not invalidate the 2017 finding of probable cause to believe that Moses unlawfully possessed controlled substances and (2) the former statute was not grossly and flagrantly unconstitutional at the time [the officer] determined probable cause existed, the trial court erroneously suppressed the firearm evidence. And even if probable cause did not support the search for evidence of unlawful possession of drugs, because probable cause supported the search for evidence of unlawful use or possession of drug paraphernalia, and the search warrant was severable, officers would have lawfully found the same handgun. We reverse the order dismissing the charge of unlawful possession of a firearm and remand.

Result: Reversal of Snohomish County Superior Court suppression ruling that dismissed a charge about Sean Albert Speedy Moses (DOB 4/04/1988) for unlawful possession of a firearm.

FIRST DEGREE FELONY MURDER: EVIDENCE HELD SUFFICIENT TO SUPPORT JURY VERDICT THAT VICTIM WAS KILLED "IN THE FURTHERANCE OF" A KIDNAPPING

In State v. Meza, ___ Wn. App.2d ___ , 2022 WL ___ (Div. I, June 27, 2022), Division One of the Court of Appeals rules that the evidence in the case was sufficient to establish that defendant (who was also convicted of two counts of first degree murder) was guilty of felony murder based on the homicide occurring "in the furtherance" of a kidnapping. Ms. Meza was the driver in relation to two separate alleged abductions and shootings.

The Meza Opinion provides the following highly-fact-intensive analysis of this issue

> Meza was convicted of the first degree felony murder of Adan, predicated on the felony of first degree kidnapping. To prove the offense, the State carried the burden of showing that "the defendant or an accomplice caused the death of Mohamed Adan in the course of or in furtherance of [Kidnapping in the First Degree] or in immediate flight from such

crime." RCW 9A.32.030(1)(c). The State only needed to prove the "defendant caused a victim's death either in the course of or in furtherance of the commission of another felony." State v. Bass, 18 Wn. App. 2d 790 (2021).

Kidnapping is a continuing course of conduct crime. The crime of kidnapping continues until the person abducted reaches safety. Thus, a killing that occurs before the victim reaches safety is "in the course of" the kidnapping. The Washington Supreme Court determined a homicide is "in furtherance of" a crime "if the homicide [was] within the 'res gestae' of the felony, i.e., if there was a close proximity in terms of time and distance between the felony and the homicide." Bass, 18 Wn. App. 2d at 790 (quoting State v. Leech, 114 Wn.2d 700, 706, 790 P.2d 160 (1990)).

At 5:19 a.m., a camera at a fire station shows the red Saturn [defendant Meza's car, which the evidence establishes she was driving at the time of the killings] traveling on a dead-end road towards Blue Stilly Park, where Adan was shot and killed. A photograph shows Adan outside of the car with Cano and the park's "Discover Pass Required" sign in the background. Cano beat Adan with a baseball bat, shot Adan twice in the leg, and then left him there. Video from the fire station shows the red Saturn leaving the park at 5:33 a.m.

At 5:38 a.m., video from the fire station shows the red Saturn returning to the park. A picture shows Cano standing with a gun pointed to the ground, in the same area where Adan's body was found. Cano told police he went back and shot Adan multiple times. Video from the fire station shows the red Saturn leaving the area at 5:43 a.m. for a final time. Meza argues that, because the group left Adan at the park for a period of time before returning and killing him, the kidnapping ended before Adan was killed. Conversely, the State argues that a reasonable jury could conclude that the killing of Adan occurred both "in the course of" and "in furtherance of" the kidnapping. We agree with the State.

First, Adan did not reach a place of safety. Adan was left in a park after being beaten and shot twice in the foot. Adan's abductors left him there for less than 10 minutes before returning to the same place Adan was left and killed him. Any rational trier of fact could determine being left in a park for just 10 minutes after being shot in the foot is not a place of safety. Thus, because a reasonable juror could decide Adan never reached a place of safety before he was killed, his death occurred in the course of the kidnapping.

Further, a reasonable juror could conclude that Adan was still abducted when he was killed. A person is abducted when he is restrained by being held in secret or in a place not likely to be found. RCW 9A.40.010(1). To restrain means "to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty." RCW 9A.40.010(6). A person can be abducted in a public setting if it is unlikely that he will be found by persons concerned with his welfare. State v. Stubsjoen, 48 Wn. App. 139 (1987).

Cano drove Adan to a park in the early hours of the morning. A juror could reasonably infer that no one with any intentions to help Adan would likely find him at that time. Especially not in the 10 minutes he was alone. Thus, a reasonable juror could conclude that Adan was killed in the course of kidnapping.

> In addition, the jury could conclude that the killing of Adan occurred "in furtherance" of the kidnapping. A killing is "in furtherance of" a crime if there is a close proximity in time and distance. Even if the kidnapping ended when Cano left Adan at the park, because Adan was killed at the same location he was left when kidnapped, and the killing occurred within 10 minutes of the kidnapping, a reasonable jury could conclude the time and location were sufficiently close in time and proximity to render the killing "in furtherance of" the kidnapping.
>
> Meza cites State v. Diebold, 152 Wash. 68 (1929), to argue that liability for felony murder ends the moment that the felony is completed. In Diebold, the defendant stole a car, drove around, and stopped for a meal. After eating, he decided to return the car and accidentally struck and killed a pedestrian. There, under the Criminal Code, the court held that the defendant was no longer engaged in committing or withdrawing from the scene of a felony.
>
> This case does not establish a rigid requirement. In State v. Ryan, 192 Wash. 160 (1937), a defendant committed a burglary and then shot an officer around 40 miles away when the police tried to stop him. The court directly rejected the idea that the holding in Diebold created a "definite rule." "Each case must depend upon its own facts and circumstances, and, as a rule, presents a question for the jury." Ryan, 192 Wash. at 166. Thus, under the relevant statute, a reasonable juror could conclude that the killing was so close in time and proximity to the kidnapping that the killing occurred in furtherance of the kidnapping.
>
> Any reasonable juror could conclude that the killing of Adan in count 1 occurred "in the course of "kidnapping because the kidnapping was ongoing, or that the killing occurred "in furtherance of" a kidnapping because the killing occurred close in time and proximity to the kidnapping. We conclude the evidence in count 1 was sufficient

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

Result: Affirmance of Snohomish County Superior Court conviction of Lendsay Leshly Meza of two counts of first degree murder with firearm enhancements.

COURT OF APPEALS UPHOLDS DISMISSAL OF STAFFING-LEVEL-BASED WRONGFUL DEATH LAWSUIT THAT FAMILY BROUGHT AGAINST PIERCE COUNTY SHERIFF'S OFFICE FOLLOWING DEPUTY'S LINE-OF DUTY DEATH

In Estate of Daniel McCartney v. Pierce County, ___ Wn. App. 2d ___ , 2022 WL ___ (Div. II, June 28, 2022), Division Two of the Court of Appeals rules against the Estate of Daniel McCartney (the McCartneys), appeal from the Pierce County Superior Court's dismissal of their complaint for wrongful death and for a writ of mandamus.

The opening two paragraphs of the Opinion summarizes the Opinion as follows:

> Daniel McCartney, a Pierce County sheriff's deputy, was killed in the line of duty. The McCartneys filed a wrongful death lawsuit against Pierce County (County), seeking damages for alleged failures of the County to properly staff and train the Pierce County Sheriff's Department (Sheriff's Department). The McCartneys further sought a writ of mandamus ordering the County to provide the Sheriff's Department with "sufficient

staffing." The County moved for judgment on the pleadings, seeking dismissal under CR 12(c), arguing discretionary governmental immunity, the professional rescuer doctrine, and that a writ of mandamus was not proper. The trial court granted the motion.

We hold that (1) the trial court properly took judicial notice of public records, (2) discretionary immunity bars the McCartneys' suit, (3) the professional rescuer doctrine also bars the McCartneys from recovering, (4) a writ of mandamus is inappropriate because the County's decisions on staffing are discretionary, and (5) the public records did not create a genuine issue of material fact. Thus, we hold that the trial court did not err when it entered judgment on the pleadings.

Result: Affirmance of Pierce County Superior Court order dismissing the lawsuit.

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BRIEF NOTES REGARDING JUNE 2022 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 very 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 probably not sufficiency-of-evidence-to-convict issues).

The entry below addresses the single June 2022 unpublished Court of Appeals opinion that fits 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 entry below, the crime of conviction is italicized, and the descriptions of the rulings are bolded.

State v. Juan Antonio Valdivia Soto: On June 28, 2022, Division Two of the COA affirmed the defendant's Cowlitz County Superior Court conviction of defendant for *possession of methamphetamine with intent to deliver*. The Court of Appeals rejects defendant's challenge to a residential search warrant, concluding that the search warrant affidavit established the confidential informant's Basis of Knowledge and Veracity under the Aguilar-Spinelli test that Washington courts apply under the Washington constitution, article I, section 7.

On (A) **the *Basis of Knowledge* prong, the *Soto* Court concludes that this prong was satisfied** because the affidavit stated that the CI: (1) reported personally observing methamphetamine and packaging and a drug transaction in the residence; (2) was able to recognize methamphetamine because the CI had previously used various controlled

substances, including methamphetamine; and (3) accurately described what methamphetamine looks like, the types of materials typically used to package it, and the standard prices for purchasing it in the area (all of which further demonstrated the basis of the informant's knowledge).

On (B) **the *Veracity* prong, the Soto Court concludes that this prong was satisfied** because the affidavit stated that the CI: (1) "provided information [to law enforcement] that was found to corroborate with law enforcement findings during an investigation;" (2) had engaged in "several conversations" with officers, implying that there was an established and ongoing relationship with the officers; and (3) provided information that incriminated the CI and thus provided information against the CI's penal interest.

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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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