LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

MARCH 2022

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT CIVIL LIABILITY FOR LAW ENFORCEMENT UNDER SECTION 1983: VIEWING THE ALLEGATIONS OF SIDEWALK-CHALKING PLAINTIFFS IN THE BEST LIGHT FOR THEM, COURT DENIES QUALIFIED IMMUNITY TO LAS VEGAS POLICE OFFICER WHO THE SIDEWALK-CHALKERS SUED FOR VIOLATING THEIR FIRST AMENDMENT FREE SPEECH RIGHTS TO CHALK SIDEWALKS

In Ballentine v. Tucker, ___ F.3d ___ , 2022 WL ___ (9th Cir., March 8, 2022), a Ninth Circuit staff summary (which is not part of the Ninth Circuit panel's Opinion) summarizes the key freedom-of-speech parts of the panel's Opinion as follows:

> The panel affirmed in part and reversed in part the district court's summary judgment, on qualified immunity grounds, for Las Vegas Metropolitan Police Department Detective Christopher Tucker in an action brought pursuant to 42 U.S.C. § 1983 alleging, in part, that Tucker violated plaintiffs' First Amendment rights when he arrested them in retaliation for their chalking anti-police messages on sidewalks.

The panel held that Detective Tucker was not entitled to qualified immunity because it was clearly established at the time of plaintiffs' arrests that an arrest supported by probable cause but made in retaliation for protected speech violates the First Amendment.

Citing Nieves v. Bartlett, 139 S. Ct. 1715 (2019), the panel first recognized that plaintiffs bringing First Amendment retaliatory arrest claims must generally plead and prove the absence of probable cause because the presence of probable cause generally speaks to the objective reasonableness of an arrest and suggests that the officer's animus is not what caused the arrest. However, the Supreme Court has also carved out a narrow exception for cases where officers have probable cause to make arrests, but typically exercise their discretion not to do so.

Here, plaintiffs presented objective evidence showing that they were arrested while others who chalked and did not engage in anti-police speech were not arrested. Given that plaintiffs had shown differential treatment of similarly situated individuals, the district court correctly concluded that a reasonable jury could find that the anti-police content of plaintiffs' chalkings was a substantial or motivating factor for Detective Tucker's declarations of arrest. Accordingly, the panel agreed with the district court that a reasonable factfinder could conclude from the evidence that Detective Tucker violated plaintiffs' First Amendment rights.

The panel held that at the time of Detective Tucker's conduct in July 2013, binding Ninth Circuit precedent gave fair notice that it would be unlawful to arrest plaintiffs in retaliation for their First Amendment activity, notwithstanding the existence of probable cause. A reasonable officer in Detective Tucker's position had fair notice that the First Amendment prohibited arresting plaintiffs. Accordingly, the district court erred in granting qualified immunity to Detective Tucker.

Result: Reversal of the ruling of the U.S. District Court (Nevada) summary judgment ruling for Detective Tucker; case remanded for trial.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY REGARDING LAW ENFORCEMENT EMPLOYMENT: ON RECONSIDERATION, PANEL AGAIN CONCLUDES THAT PLAINTIFF-OFFICER IS ENTITLED TO TRIAL (AND POLICE CHIEF IS NOT ENTITLED TO QUALIFIED IMMUNITY) BASED ON HER ALLEGATION THAT POLICE CHIEF COMMITTED GENDER-DISCRIMINATION AGAINST HER BY PRETEXTUALLY SUBJECTING HER TO INTERNAL AFFAIRS INVESTIGATION IN ORDER TO PRECLUDE HER ELIGIBILITY FOR PROMOTION

In Ballou v. McElvain, ___ F.3d ___ , 2022 WL ___ (9th Cir., March 24, 2022), a three-judge Ninth Circuit panel again rules, after reconsidering the panel's September 28, 2021, ruling in the case and making minor amendments to the panel's September 28, 2021, Opinion, that an employee-police officer's allegations of gender-discrimination are sufficient to allow her Civil Rights Act section 1983 lawsuit go to a jury. At this summary judgment motion stage of the proceedings, the plaintiff's allegations are viewed in the best light for the plaintiff.

The Ninth Circuit staff summary (which is not part of the Ninth Circuit's Opinion) summarizes the key parts of the Opinion as follows:

The panel affirmed the district court's order denying, on summary judgment, qualified immunity to Police Chief James McElvain on [a police officer] plaintiff's First Amendment and Equal Protection disparate treatment claim; and held that it lacked jurisdiction under the collateral order doctrine to resolve the question of whether [the Chief] was entitled to qualified immunity on [the officer's] claim that she was retaliated against, in violation of the Equal Protection Clause of the Fourteenth Amendment, in an action brought pursuant to 42 U.S.C. § 1983 alleging retaliation and employment discrimination.

[The officer] asserted that [the Chief] discriminated against her because of her gender by intentionally subjecting her to internal affairs investigations to preclude her eligibility for promotion and then declining to promote her to sergeant even though she was the most qualified candidate. The [Ninth Circuit] panel held that, construing all facts and inferences in her favor, [the officer] sufficiently alleged unconstitutional sex discrimination in violation of the Equal Protection Cause of the Fourteenth Amendment.

[The officer] established a prima facie claim for disparate treatment and the record supported the conclusion that [the Chief's] articulated reasons for not promoting [the officer] were pretextual. The panel rejected, as profoundly mistaken, [the argument by the Chief's attorneys] that to state an equal protection claim, proof of discriminatory animus alone was insufficient, and [a hypothetical] plaintiff must show that defendants treated plaintiff differently from other similarly situated individuals. The panel stated that the existence of a comparator [i.e., another employee's comparative circumstances] is not a prerequisite to stating a disparate treatment claim under the Fourteenth Amendment.

The panel held that the actions alleged here were so closely analogous to those identified in Lindsey v. Shalmy, 29 F.3d 1382, 1385-86 (9th Cir. 1994), and so clearly covered by the focus on promotion in Bator v. State of Hawai'i, 39 F.3d 1021, 1028 (9th Cir. 1994), that any reasonable officer would recognize that discriminatorily conducting an investigation to stall a promotion as unconstitutional under the two cases, read in combination.

[The Chief] was therefore not entitled to qualified immunity on the claim that he encouraged and sustained discriminatory investigations into [the officer's] workplace performance and thereby denied her promotion at least in part on the basis of sex. As [the officer's] disparate treatment claim alleged that [the Chief] violated her clearly established rights under the Equal Protection Clause, [the Chief] was not entitled to qualified immunity on that claim.

The panel next addressed the question of whether [the Chief] was entitled to qualified immunity on the claim that he violated [the officer's] rights under the Equal Protection Clause of the Fourteenth Amendment by retaliating against her for opposing [the agency's alleged] sex discrimination. Because the panel's jurisdiction under the collateral order doctrine was limited to reviewing the denial of qualified immunity, and because the panel could not discern from the district court's order whether it granted, denied, or did not address [the Chief's] assertion of qualified immunity as to [the officer's] Fourteenth Amendment Equal Protection retaliation claim, the panel remanded to the district court to clarify its order as to that claim.

Finally, the panel affirmed the denial of qualified immunity to [the Chief] on [the officer's] First Amendment retaliation claim. The panel held that [the officer's] speech opposing

> sex discrimination in the workplace was inherently speech on a matter of public concern and was clearly protected by the First Amendment. Whether [the officer's] protected expression actually was the but-for cause of the adverse employment actions went to the ultimate question of liability and needed to be resolved by the jury at trial. But it did not bear on the question before the panel now—whether retaliating against [the officer] for that expression would, as a matter of law [viewing her allegations in the best light for plaintiff], violate her clearly established constitutional rights.
>
> Because [the officer's] factual account was not "blatantly contradicted by the record," the panel would not disturb the district court's determination that [the officer's] retaliation claims were sufficiently supported to survive summary judgment.

[Some paragraphing revised for readability]

Result: Affirmance of U.S. District Court (Western Washington) order denying, on summary judgment, qualified immunity to the police chief on plaintiff's First Amendment and Equal Protection disparate treatment claim.

CIVIL RIGHTS ACT CIVIL LIABILITY FOR LAW ENFORCEMENT UNDER SECTION 1983: VIEWING THE ALLEGATIONS IN THE BEST LIGHT FOR THE LEGAL REPRESENTATIVES OF THE PERSON FATALLY SHOT BY A POLICE OFFICER, COURT DENIES QUALIFIED IMMUNITY ON EXCESSIVE FORCE CLAIM TO COUNTY OF RIVERSIDE (CA) OFFICER WHO FIRED THE FATAL SHOTS WITHOUT ANY PRIOR WARNING

In Estate of Najera Aguirre v. County of Riverside, ___ F.3d ___ , 2022 WL ___ (9th Cir., March 24, 2022), a Ninth Circuit staff summary (which is not part of the Ninth Circuit panel's Opinion) summarizes the key parts of the panel's Opinion as follows:

> The panel affirmed the district court's denial of qualified immunity to Sergeant Dan Ponder of the Riverside County Sheriff's Department in an action brought pursuant to 42 U.S.C. § 1983 alleging, among other things, that Ponder used excessive force in violation of the Fourth Amendment when he shot Clemente Najera-Aguirre six times without warning and killed him.
>
> . . . .
>
> The panel stated that police shootings, like all Fourth Amendment seizures, must be objectively reasonable—and when a suspect poses no immediate threat to an officer or others, killing the suspect violates his Fourth Amendment rights.
>
> Here, in dispute was the level of threat Najera posed immediately before he died. A key disputed fact was whether Najera was facing the officer and coming "on the attack," as [Officer] Ponder contended, or whether Najera was turned away from the officer, as indicated by the coroner's report.
>
> Additionally, although eyewitnesses agreed that Najera was holding at least one bat-like object when he was shot, it was disputed how he held that object. Nothing in the record suggested that Najera was threatening bystanders or advancing toward them when he was killed. Based on Najera's facts, he presented no threat at all to the officer— or anyone else—in that moment.

> The panel concluded that on interlocutory appeal, construing the evidence in favor of nonmovant Najera, [Officer] Ponder's conduct was not objectively reasonable, and his use of excessive force violated the Fourth Amendment.
>
> Because Najera's estate presented facts sufficient to establish a Fourth Amendment violation, the panel considered the second prong of qualified immunity: whether the law was clearly established. The panel held that although no body of relevant case law was necessary in an "obvious case" like this one, this Circuit's precedent also put [Officer] Ponder on notice that his specific conduct was unlawful.

[Some paragraphing revised for readability]

The Ninth Circuit panel's Opinion describes the factual allegations in the case as follows:

> On April 15, 2016, Sergeant Dan Ponder of the Riverside County Sheriff's Department received radio reports that someone in Lake Elsinore, California, was destroying property with a bat-like object, and had threatened a woman with a baby. Crucially, key facts are disputed in this summary judgment record: whether the officer saw bystanders bleeding; how close Najera stood to the bystanders; whether Najera was retreating from the property; and whether, as he interacted with observers and the police, Najera was holding his stick upright in a batter's position in an ostensibly threatening manner, or with the tip pointed down in a way that did not pose a threat.
>
> Upon arriving, Ponder exited the patrol car with his gun drawn and confronted Najera. Ponder motioned for Najera to back away and demanded that he drop the stick. Najera did not drop it, and by some accounts verbally refused to do so.
>
> Ponder next tried to pepper-spray Najera, but the spray blew back in Ponder's face, and Najera appeared largely unaffected. Ponder pointed his gun at Najera and again ordered him to drop the stick, but Najera did not comply.
>
> By some eyewitness accounts, Najera next retrieved a baseball bat from nearby bushes and advanced quickly toward Ponder with at least one weapon raised; other witnesses say Najera stood still, holding a single stick pointed down. Whichever the case, Ponder, without issuing a warning, shot Najera six times from no more than fifteen feet away. Najera died.
>
> Ponder contends that Najera stood facing him during all six shots, but the coroner's report found that Najera died from two shots to his back. The bullet paths suggested that Najera had turned away from the officer and was falling to the ground when the bullets struck.

[Some paragraphing revised for readability]

Result: Affirmance of U.S. District Court (Central District of California) order denying, on a motion for summary judgment, qualified immunity to the police officer who fatally shot Najera.

SEARCH WARRANT AFFIDAVIT ESTABLISHED NEXUS TO CYBERCRIME DEFENDANT'S HOME WHERE THE AFFIDAVIT SET FORTH FACTUAL ALLEGATIONS SHOWING THAT

DIGITAL DEVICES WERE USED TO COMMIT HIS FRAUD SCHEME, AND THE AFFIDAVIT (A) EXPLAINED THAT "MANY PEOPLE GENERALLY KEEP THEIR CELL PHONES AND OTHER DIGITAL DEVICES . . . IN THEIR HOME" AND (B) PROVIDED "EXTENSIVE EVIDENCE" THAT DEFENDANT DID SO IN THIS CASE; DEFENDANT'S STALENESS ATTACK ON THE AFFIDAVIT'S PROBABLE CAUSE IS ALSO REJECTED

In U.S. v. Kvashuk, ___ F.3d ___ , 2022 WL ___ (9th Cir., March 28, 2022), a three-judge Ninth Circuit panel affirms a former Microsoft employee's federal court conviction on 18 fraud-related counts in a case in which Kvashuk stole $10 million in digital gift cards from Microsoft, using login credentials he stole from his coworkers. The Ninth Circuit panel rejects Kvashuk's challenge to the denial of his motion to suppress evidence seized from his house under a search warrant.

Kvashuk argued that the search warrant lacked probable cause, asserting that the warrant affidavit failed to establish a nexus between (A) his alleged cybercrime activities involving digital devices and (B) the search of his home and digital devices in his home. Considering the totality of the circumstances, the Ninth Circuit panel concluded that the search warrant affidavit showed a fair probability that evidence of Kvashuk's crimes would be found on a computer at his residence, and that there was therefore an adequate nexus between the unlawful activities and the place to be searched. The Ninth Circuit panel also rejected Kvashuk's argument that the evidence supporting the application was stale.

PROBABLE CAUSE NEXUS ISSUE

In key part, the Ninth Circuit panel's analysis of the probable cause nexus-to-the-house issue is as follows:

> It is true that "[p]robable cause to believe that a suspect has committed a crime is not by itself adequate to secure a search warrant for the suspect's home." . . . . But "the nexus between the items to be seized and the place to be searched" can rest on "normal inferences as to where a criminal would be likely to hide" evidence of his crimes. . . .
>
> While we have not directly addressed the nexus issue, our cases confirm that the nature of cybercrime— specifically, its reliance on computers and personal electronic devices— is relevant to probable cause for searching the suspect's residence. . . . United States v. Gourde, 440 F.3d 1065, 1071 (9th Cir. 2006) (en banc) (holding that evidence the suspect maintained membership in a website with child pornography supported search of the computer at his residence); . . . .
>
> Here, the warrant affidavit explained in detail how Kvashuk committed the suspected crimes "almost entirely via digital devices." Such devices "were used to access . . . Microsoft's online store, set up and access email accounts, conduct online research in furtherance of the scheme, purchase and redeem CSV, communicate with one or more tax preparers, and conduct bitcoin transactions." **The affidavit also pointed out that "many people generally keep their cell phones and other digital devices . . . in their home" and provided extensive evidence that Kvashuk did so here.**
>
> **For example, the affidavit noted that (1) Kvashuk was a software engineer; (2) his house had internet service; (3) the IP address assigned to his house was used in 2018 and 2019 to access his Coinbase and Gmail accounts, both of which were involved in his scheme; (4) he emailed his tax preparer in February 2019 regarding**

> **the preparation of his false 2018 return; and (5) based on the affiant's training and experience, "people often keep personal, financial, and tax records in their home," including Bitcoin private keys (essentially, passwords necessary to control their Bitcoin). All of this evidence, taken together, was enough to reasonably establish a nexus between the digital devices to be seized and Kvashuk's home.**
>
> Kvashuk argues that "it is chronologically impossible for the theft at issue to be committed by way of a digital device inside the [lakefront] house" given that Microsoft disabled the test accounts before he moved there in April 2018. But this is irrelevant. "[P]robable cause to believe that a person conducts illegal activities in the place where he is to be searched is not necessary; the proper inquiry is whether there was probable cause to believe that evidence of illegal activity would be found in the search." . . . .
>
> The affidavit contained evidence that the house had internet service and that the IP address associated with the house was used to access Kvashuk's Gmail and Coinbase accounts. It was thus reasonable for the magistrate to infer that Kvashuk brought his digital devices with him— including those used to perpetrate the theft—when he moved from the apartment to the house. See United States v. Richardson, 607 F.3d 357, 371 (4th Cir. 2010) (rejecting contention that "that there must be some 'specific' allegation that [the suspect] . . . was using the same computer at the new residence"). Moreover, Kvashuk's use of the test accounts to order digital gift cards was only the first step of his scheme, which continued until he transferred the proceeds from his Coinbase account into his Wells Fargo bank account. According to the affidavit, Kvashuk continued making these transfers through May 2018.
>
> Considering "the totality of [the] circumstances," . . . , the search warrant affidavit shows a fair probability that evidence of Kvashuk's crimes would be found on a computer at his residence. Therefore, there was an adequate nexus between the unlawful activities and the place to be searched.

[Some citations omitted; footnote omitted; bolding added; some paragraphing revised for readability]

PROBABLE CAUSE STALENESS ISSUE

In key part, the Ninth Circuit panel's analysis of the probable cause staleness issue is as follows:

> Kvashuk asserts that the information in the search warrant affidavit was mostly stale, and thus did not support probable cause, because it involved events that occurred more than a year before the search warrant was presented to the magistrate in July 2019. His staleness argument does not withstand scrutiny.
>
> To be sure, "[t]he most convincing proof that [evidence of a crime] was in the possession of the person or upon the premises at some remote time in the past will not justify a present invasion of privacy." . . . . But the "mere passage 'of substantial amounts of time is not controlling in a question of staleness.'" . . .
>
> "That is particularly true with electronic evidence." . . . . Given "the long memory of computers," evidence of a crime typically remains on a computer even if the defendant attempts to delete it. Id. (quoting [United States v. Gourde, 440 F.3d 1065, 1071 (9th Cir.

2006)]; see Gourde, 440 F.3d at 1068 (explaining that deleted files "were not actually erased but were kept in the computer's 'slack space' until randomly overwritten, making [them] retrievable by computer forensic experts").

> Court's footnote 8: "Of course, at some point 'after a very long time' the likelihood that certain digital information will be recoverable from a specific device 'drops to a level at which probable cause to search the suspect's home for the computer can no longer be established.'" . . . . The timeframes in this case present no such issue.

Here, as in Gourde, the affidavit supporting the search warrant explained that "computer files . . . can be preserved (and consequently also then recovered) for months or even years after they have been downloaded onto a storage medium, deleted, or accessed or viewed via the Internet," and that even after deletion, files often still reside in the computer's "slack space." Although most of the evidence of the CSV theft was 15–20 months old at the time of the warrant application, a temporal gap of that magnitude is not extreme relative to the lifespan of a computer. See, e.g., United States v. Schesso, 730 F.3d 1040, 1047 (9th Cir. 2013) (holding that "a mere 20 months" was not too long to expect data to remain recoverable).

Kvashuk was unaware of the criminal investigation into his theft, so he had no reason to delete or encrypt any incriminating files. In fact, the warrant served on Google just two months earlier had yielded relevant evidence from Kvashuk's Gmail account and browser history. And the search warrant application sought not only evidence of the theft, but also evidence of Kvashuk's suspected false tax returns. He had communicated with his tax preparer in February 2019—five months before the search warrant application. The evidence supporting the application was not stale.

[Some citations omitted, bolding added]

Result: Affirmance of U.S. District Court (Western District of Washington) conviction of Volodymyr Kvashuk for 18 fraud-related counts in a case in which Kvashuk stole $10 million in digital gift cards from his employer, Microsoft, using login credentials that he stole from his coworkers.

LEGAL UPDATE EDITOR'S COMMENTS ON PROBABLE CAUSE NEXUS ISSUE IN LIGHT OF WASHINGTON SUPREME COURT'S 1999 THEIN DECISION: In State v. Thein, 138 Wn.2d 133 (1999), relying on the Fourth Amendment, the Washington Supreme Court rejected the theory that, taken alone, a probable cause nexus to a drug-dealer's residence is established by conclusory language in an affidavit about the general habits of drug dealers of keeping some evidence of their drug-dealing activity in their homes. Thein may not be dictated by Fourth Amendment case law, but after 20-plus years of Thein standing unquestioned by the Washington appellate courts (including in State v. Denham, ___ Wn.2d ___ , 2021 WL ___ (July 1, 2021), where a 5-4 Washington Supreme Court majority found a way to distinguish Thein on a nexus question posed as to a search warrant to get evidence of cell phone location), I have long since conceded that Washington law enforcement is stuck with Thein. Based on Thein, law enforcement in Washington must gather case-specific evidence beyond generic statements about drug-dealers' habits for an affidavit to establish a nexus between (A) a drug-dealer's sales activity away from his residence and (B) the drug-dealer's residence.

I note that in the July 2021 Legal Update, I noted regarding the Denham ruling that an email listserv advisory from King County Senior Deputy Prosecuting Attorney Kristin Relyea addressed the Denham decision. As always in her advisories, Sr. DPA Relyea cautioned the "purpose of [such advisories] is to provide information to our law enforcement partners about recent court decisions . . . [and that the advisories are] not intended as legal advice. Sr. DPA Relyea followed her brief summary of the Denham decision with the following "Note:"

> ***Sr. DPA Gary Ernsdorff offered this helpful advice in the wake of Denham, "[W]hen reviewing applications for warrants for cell phone records, please make sure you include every bit of information you can that connects the phone number to the suspect. Be very clear and precise. Consistent use and possession over time, and/or use and possession close in time to the crime, should be considered a necessity. Simply relying on the fact that a number is associated with the suspect to get CSLI will lead to trouble (although will likely still get approved by many judges). If you have questions on a specific set of facts, feel free to reach out to the Special Operations Unit.)***

Similar caution is advisable when trying to establish a nexus to a suspect's home when seeking a search warrant for the home in a cybercrime investigation.

If there is possible federal law enforcement and prosecutorial authority in a particular case where nexus questions are posed for a search warrant, as there was in the Kvashuk case, it may be useful to explore whether the federal agency wishes to pursue a search warrant and prosecution in the federal courts. On the Fourth Amendment probable cause nexus test, Federal courts seem to be more open to common sense-based probable cause logic than the Washington Supreme Court.

It may be that Washington appellate courts would readily find to be factually distinguishable from Thein the nexus question posed in the Kvashuk case. I am trying to do a little more research and checking of sources to see if I might add more thoughts on this point. I may revisit the issue in a future Legal Update.

Meanwhile, as always, I note that what I say in the Legal Update is not advice but is only my personal thinking to possibly trigger readers' own research. I urge law enforcement personnel to seek guidance from their agencies' legal advisors and guidance from the offices of their local prosecuting attorneys. This cautionary note applies to all that I include in the Legal Update, which includes my comments in the next Legal Update entry, which digests the Washington State Supreme Court decision in State v. Elwell.

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WASHINGTON STATE SUPREME COURT

FOURTH AMENDMENT "OPEN VIEW" (OR IS IT "PLAIN VIEW"?) DOCTRINE'S "IMMEDIATELY APPARENT" REQUIREMENT: PROBABLE CAUSE THAT ITEM BEING PUSHED DOWN THE STREET ON A DOLLY WAS STOLEN PROPERTY DID NOT JUSTIFY OFFICER IN REMOVING A BLANKET FROM THE ITEM TO CONFIRM THE OFFICER'S SUSPICION; REMOVING THE BLANKET WAS UNLAWFUL BECAUSE THE IDENTITY OF THE OBJECT UNDER THE BLANKET WAS AMBIGUOUS

In State v. Elwell, ___ Wn.2d ___ , 2022 WL ___ (March 3, 2022), the Washington State Supreme Court rules (relying on what the Majority Opinion and Concurring Opinion label as the "open view" doctrine) that an officer was not supported by the Fourth Amendment where – without a search warrant or consent or exigent circumstances – the officer removed a blanket and plastic wrapping from an item in possession of defendant Elwell under the following circumstances:

(A) About two hours before contacting Elwell on the street, a law enforcement officer watched a surveillance video taken the previous evening of the unmasked Elwell stealing a large, Pac-man arcade machine and a large dolly, and wheeling the dolly and machine out of the burgled premises;

(B) When the officer contacted Elwell on the street several hours later about a mile from the burgled premises, the suspect was a very close match in facial appearance and clothing to the thief on the video, and he was pushing on a dolly a large object about the size of a Pac-man machine covered by a large red blanket; and

(C) The officer asked, "There wouldn't happen to be a [Pac-Man] machine in there, would there be?" and Elwell responded that he found it "in the garbage," and the officer pulled off the blanket and some plastic wrapping, uncovering the Pac-Man machine.

The Court of Appeals had ruled by unpublished Opinion in Elwell that "open view" justified the officer's actions, but the Washington Supreme Court's ruling is that the officer made an unlawful search when he removed the blanket and wrapping from the Pac-Man. However, the Supreme Court concludes that the trial court's error in admitting the evidence was harmless error in light of the other evidence in the case.

The Majority Opinion concludes its analysis of the search issue as follows:

> Removing the blanket and the plastic wrapping to reveal what was beneath it was a search.
>
> Thus, for the open view doctrine to apply, there must be no ambiguity on the basic question of the identity of the object in question. In other words, the officer must be able to determine what the object is with certainty, without manipulating the object and using only their senses. In addition, the object's evidentiary value must be "immediately apparent," but that is a separate inquiry from the object's identity.

A Concurring Opinion signed by two Justices in Elwell agrees with much of the analysis in the Majority Opinion but asserts that the Majority Opinion should have overruled a prior decision in State v. Morgan, 193 Wn.2d 365 (2019), instead of distinguishing Morgan factually.

Result: Affirmance in result of Division One Court of Appeals decision that affirmed the King County Superior Court conviction of residential burglary.

LEGAL UPDATE EDITOR'S COMMENTARY: The Supreme Court's Majority Opinion and Concurring Opinion in Elwell are confusing (or maybe my word is "confused") in their explanation of the Fourth Amendment concepts of "open view" and "plain view." This Legal Update entry is going to address what I see as confusion. My assessment is based on this Legal Update Editor's understanding of the Fourth Amendment case law. Maybe

the ship has sailed on my complaint, because this is not the first time that a Washington appellate court has failed to show a complete grasp of the breadth of the Fourth Amendment concept of "plain view."

Viewing the situation practically, my commentary is more about semantics than the substance of the rules, because Washington officers are stuck with the rule of Elwell that probable cause that an item under a blanket or other opaque cover is evidence or contraband does not itself justify removing the blanket or cover unless the officer is able to establish that the identity of the object under the cover was unambiguous before the covering was removed. In most circumstances, as in Elwell, it is not possible to meet this test, and therefore a search warrant must be obtained, or it must be established that an exception to the warrant requirement was present before the covering was removed.

The newly minted search rule from the Washington Supreme Court is that for certain purposes of uncovering a covered object is not in open view or plain view unless there exists (1) probable cause regarding the object's evidentiary value, plus (2) no ambiguity as to the identity of the object.

The Fourth Amendment concept of "open view" (which, in my memory of 40+ years of reading U.S. Supreme Court decisions, is not a term used in U.S. Supreme Court Fourth Amendment discussion) is generally used by some courts to describe the situation where an officer makes a lawful observation from outside a constitutionally protected area. For instance, assume that during a traffic stop, from outside the stopped car, an officer recognizes looking through a passenger window as unmistakable evidence of a crime an uncovered item lying on the back seat of a car. The observation itself is lawful because the item is in "open view," but the open view itself does not justify going inside the vehicle to seize the item. A search warrant or an exception to search warrant requirement is required to justify entering the vehicle to seize the item that is in open view.

On the other hand, the Fourth Amendment concept of "plain view" is used to describe the situation where an officer is "lawfully present" in an area. Lawful presence can be based on presence under the authority a search warrant or an exception to the warrant requirement (for instance, under the impound-inventory search warrant exception, an officer is "lawfully present" inside a vehicle in making a lawful inventory of the contents of a lawfully impounded car). Alternatively, lawful presence for purposes of he plain view doctrine can also be based on the different circumstance that the area in question is not constitutionally protected (for instance, an officer is lawfully present, as in the circumstances of the Elwell case, when the officer contacts a person on a public street, a place that is not constitutionally protected against the presence of government actors).

Thus, I think that the Elwell Majority Opinion used the term "open view" to address what the U.S. Supreme Court would call a "plain view" situation. The officer was lawfully present on the street in the contact with the suspect. Regardless of one uses the phrase "open view" or "plain view," however, the rule of Elwell must be followed by Washington officers. That rule for Washington officers is that when officers are lawfully situated in an area such as in Elwell, and they come across an item where the evidentiary value of the object is immediately apparent (i.e., probable cause is present), but the identity of the covered object is ambiguous, they may not search the item or remove an opaque covering to determine with certainty what the object is. To conclude that the identity of the covered object is unambiguous, an officer must be able to determine what the object

is with certainty without manipulating the object and only using the officer's senses. In most circumstances, as I noted above, this test cannot be met, so a search warrant or an exception to the warrant requirement is necessary to justify removing the cover.

This two-part "open view" standard of Elwell (i.e., (1) probable cause of evidentiary value plus (2) no ambiguity of the identity of the item) is, in my view, probably not how the U.S. Supreme Court would articulate the rule on this Fourth Amendment "plain view" question, but Washington officers and the State's litigators in criminal cases do not have a choice as to how to label, articulate or apply the test in light of the Elwell decision.

Note that the Majority Opinion in Elwell expressly declines to address whether the Washington constitution, article I, section 7, imposes greater restrictions than the Fourth Amendment in the circumstances presented in this case. The Elwell Majority Opinion of course also expressly states that the Court does not foreclose the idea of addressing the independent grounds question in a future case with adequate briefing of the issue.

Note that in Elwell, before the officer uncovered the item, the suspect refused the officer's request for consent to uncover it. Nothing in the Elwell Opinion would preclude an officer in this situation from at that point impounding the item based on probable cause, keeping the item covered, and then seeking a warrant to search under the blanket based in the same probable cause that supported the seizure of the item and its cover. The issue in Elwell was whether an unlawful "search" occurred, not whether an unlawful seizure occurred.

IN CASE INVOLVING ONLINE CHILD-SEX-CRIME STING, DEFENDANT WINS BY A 7-2 VOTE HIS ARGUMENT REGARDING THE RIGHT TO A JURY INSTRUCTION ON THE STATUTORY AFFIRMATIVE DEFENSE OF ENTRAPMENT

In State v. Arbogast, ___ Wn.2d ___ , 2022 WL ___ (March 31, 2022), the Washington Supreme Court votes 7-2 in ruling that the defendant who was convicted of attempt crimes in a child-sex-crime sting should have been allowed by the trial court to argue entrapment to the jury under the statutory defense in RCW 9A.16.070.

Defendant Arbogast testified that he had never had sex with children or any interest in sex with children. There was no dispute that before responding to the ad from the undercover detective (portraying a woman named Brandi), he had not been convicted of, charged with, or even suspected of a sex crime against a child. He responded to what was posted as a "woman for man" ad that the detective who wrote the ad admitted was cryptic and might not be recognized as advertising sex with children. He later showed no deception on a polygraph examination when asked if he had previous sexual contact with a person under age 16.

Once Mr. Arbogast recognized what was being offered, his immediate response in text messages to Brandi was "Never have done that. . . . Don't know if I could help do kids." He retreated from that position when Brandi made clear that engaging in sex with her children was required to get together with her, but he repeatedly stated he had never engaged in such conduct with children before. When Arbogast arrived at the undercover location, he had not stopped to pick up lube or condoms as Brandi had requested. No incriminating evidence was found on his phone or in his car.

Brandi's communications with Arbogast did not directly prostitute her fictional children. Instead, she presented herself as a loving mother who sought to provide a male sexual mentor for her children. She claimed in her communications with Arbogast to have benefitted from a male sexual mentor when she was a child. She made clear that whatever Mr. Arbogast did with her beloved children would only be under her rules and her protective oversight.

The Supreme Court Majority Opinion summarizes the ruling as follows in the introduction to the Opinion:

> We hold that to obtain an entrapment instruction, defendants must make a prima facie showing that (1) the crime originated in the mind of the police or an informant and (2) the defendant is induced to commit a crime that he or she was not predisposed to commit. RCW 9A.16.070(1). The measure of a prima facie showing is whether the evidence offered, considered in a light most favorable to the defendant, is sufficient to permit a reasonable juror to find entrapment by a preponderance of the evidence. Here, Arbogast offered sufficient evidence to justify an instruction. Whether he can establish the defense is ultimately a decision for the jury. We affirm the Court of Appeals.

The Majority Opinion provides a lengthy explanation of the case law and the concepts of "burden of production" and "burden of proof" of the statutory affirmative defense of entrapment. Along the way, the Majority Opinion asserts that in some cases, such as this case, a defendant must be allowed, as part of the entrapment defense, to present to the jury evidence of the defendant's lack of criminal history.

The Dissenting Opinion argues that defendant Arbogast did not present a prima facie case of inducement by the police, and that he therefore should not be allowed to present an entrapment theory to the jury.

Result: Affirmance of Division Three Court of Appeals decision that reversed the Benton County Superior Court conviction by jury trial of Douglas Virgil Arbogast for: (A) one count of attempted rape of a child in the first degree for traveling to the undercover location with the intent to engage in sexual intercourse with the fictional 11-year-old Anna; and (B) one count of attempted rape of a child in the second degree for traveling to the undercover location with the intent to engage in sexual intercourse with the fictional 13-year-old Jake. The case is remanded for a new trial in which the jury will be instructed on entrapment.

IN CASE INVOLVING SEX CRIMES AGAINST CHILDEN, WASHINGTON SUPREME COURT REJECTS "LUSTFUL DISPOSITION" LABEL FOR JUSTIFYING ADMITTING PRIOR-BAD-ACTS EVIDENCE, BUT THE COURT DETERMINES UNDER THE FACTS OF THIS CASE THAT THE DEFENDANT'S PRIOR ACTS OF SEXUAL ASSAULT WERE LAWFULLY ADMITTED BY THE TRIAL COURT BASED ON EVIDENCE RULE 404(b)

In State v. Crossguns, ___ Wn.2d ___ , 2022 WL ___ (March 10, 2022), the Washington Supreme Court disapproves of the "archaic" term and "outdated" rationale behind the common law "lustful disposition" doctrine as a rationale for admitting evidence of a person's previous uncharged sexual assault crimes. However, the seven Justices who sign the Majority Opinion agree that under the totality of the facts of this case, Evidence Rule 404(b) – which allows evidence of other crimes, wrongs, or acts to be admitted as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident – supports the trial

court's admission of defendant's uncharged acts of sexual assault. Therefore, the trial court's reference to evidence of "lustful disposition" in its decision admitting the evidence was harmless.

The Majority Opinion's explanation of the reasoning behind admitting the uncharged sex crimes evidence under ER 4040(b) is as follows:

> Sometimes, evidence that might have been erroneously admitted under the "lustful disposition" label is nevertheless admissible because it is necessary to demonstrate the dynamics between the offender and their victim or victims. "Two necessary components" for the commission of sex crimes "are access and control," and developing trust is necessary to the "'grooming process.'"
>
> "Manipulating relationships of trust with children for purposes of gratifying the abuser" is a major component to the crime of child sexual assault. . . .
>
> Evidence of such manipulation shows the planning and intent involved in building a relationship with the child victim in order to obtain the access and opportunity to commit the acts of sexual assault, as we see in this case, which stands in contradiction with the idea that "lust" is an overwhelming motivator and almost impervious to planning. Therefore, evidence of prior sexual misconduct may be relevant and admissible in cases such as this that involve sexual abuse in the context of a relationship with unequal power dynamics. And, of course, the fact that a case involves crimes of sexual violence does not preclude the admission of evidence for permissible ER 404(b) purposes.
>
> In this case, although Crossguns was charged with only two counts, the trial court admitted evidence of uncharged sexual misconduct from over a year of his abusing R.G.M. The trial court erred in admitting the evidence, in part, under the anachronistic term of "lustful disposition," but any error in admitting the evidence was harmless because the evidence was properly admitted for other, permissible purposes, including "intent, plan, motive, opportunity, absence of mistake or accident, . . . and as res gestae in the case to show [R.G.M.]'s state of mind for her delayed disclosure." . . . .
>
> The evidence of prior bad acts was also admitted to prove the aggravating factors that Crossguns used a position of trust to commit the crimes, and that the offenses were part of an ongoing pattern of sexual abuse of the same victim. [W]e find [that the evidence] was admissible under ER 404 and conclude that any error was harmless.

[Footnote and case, record and article citations omitted; some paragraphing revised for readability]

Two Supreme Court justices sign an Opinion that disagrees with the Majority Opinion's conclusion that ER 404(b) justifies admission of the evidence of defendant's prior sex crimes involving the victim.

Result: Affirmance in part and reversal in part of Division Three Court of Appeals decision that reversed (on prosecutorial misconduct grounds not addressed in this Legal Update entry) defendant's Spokane County Superior Court convictions for one count of second degree rape of a child and one count of second degree child molestation. The Supreme Court remands that case to the Court of Appeals for that Court to address some issues that the Court of Appeals did not address.

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WASHINGTON STATE COURT OF APPEALS

DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS NOT VIOLATED BY ALLOWING TWO OUT-OF-STATE WITNESSES TO TESTIFY BY VIDEO BASED ON HEALTH CONCERNS REGARDING EXPOSURE TO COVID-19 IN AIR TRAVEL

In State v. Milko, ___ Wn. App. 3d ___ , 2022 WL ___ (Div. II, March 15, 2022), the Court of Appeals summarizes the Court's ruling as follows in the opening paragraphs of the Opinion:

> Navin Milko appeals his multiple convictions arising from five incidents in which he accosted paid escorts he had arranged to meet. Specifically, he challenges on confrontation clause grounds the trial court's ruling allowing two out-of-state witnesses to testify by video because of COVID-19 concerns. In a statement of additional grounds (SAG), Milko challenges his convictions and his exceptional sentence.
>
> A criminal defendant's right to have witnesses physically present at trial is meaningful and important. But it is not an indispensable element of the constitutional right of confrontation, and [it] may be overridden when (1) "excusing the physical presence of the particular witness is necessary to further an important public policy" and (2) "the reliability of the testimony is otherwise assured." State v. Foster, 135 Wn.2d 441, 466, 957 P.2d 712 (1998).
>
> The trial court entered findings supporting both prongs of this test with regard to the two witnesses. We hold that the trial court did not err when it allowed the two out-of-state witnesses to testify by video based on necessity for public policy reasons because they both had significant health-related concerns about contracting COVID-19 if forced to travel to Washington by air.
>
> In the unpublished portion of this opinion, we reject Milko's SAG claims. Accordingly, we affirm Milko's convictions and sentence.

[Some paragraphing revised for readability]

Result: Affirmance of Pierce County Superior Court convictions of Navin Avery Milko for 10 felony offenses related to five incidents and five victims: one count of first degree rape of BP, two counts of second degree burglary of BP and a woman named AQ, two counts of attempted first degree rape of AQ and a woman named CD, one count of first degree burglary of a woman named AB, two counts of attempted first degree kidnapping of AB and a woman named KT, one count of attempted first degree burglary of KT, and one count of felony harassment of AB.

RESTITUTION AMOUNT IN ASSAULT CASE PROPERLY INCLUDED COMPENSATING THE VICTIM FOR PAID VACATION AND SICK LEAVE THAT SHE NEEDED TO USE DUE TO HER INJURIES IN THE ASSAULT

In State v. Long, ___ Wn. App. 2d ___ , 2022 WL ___ (Div. I, March 7, 2022), Division One of the Court of Appeals rules as lawful the portion of the trial court's order of restitution that was compensation to the victim of second degree domestic violence for the paid vacation and sick

leave she utilized due to her injuries. The Court of Appeals rejects defendant's argument that the restitution was based upon only a speculative future benefit which does not fall within the scope of the statute, RCW 9.94A.753, which in relevant part provides:

> [R]estitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury.

The Court of Appeals explains in footnote 2 that the decision is in part grounded in the fact that the defendant did not raise certain contentions regarding the leave time facts:

> Here, Long does not challenge the truth of Zebley's claimed utilization of 240 hours of paid vacation and sick time, nor does he argue to this court that the State failed to meet its burden in proving this portion of restitution amount. However, we can conceive of fact patterns that would call for more proof than submitted by the State here as variances among employer leave policies necessarily impact the value of different types of leave. For example, some technology companies in our state provide their employees with unlimited leave time such that time taken by a victim with that sort of benefit may not be properly claimed as a loss on a request for restitution in a criminal case. But, these nuances are a question for another time.

Result: Affirmance of King County Superior Court award of restitution against Marcus Ladon Long.

PROPERTY OWNER LOSES CONSTITUTIONAL DUE PROCESS CHALLENGES TO REAL PROPERTY FORFEITURE UNDER WASHINGTON DRUG LAWS (RCW 69.50.505) OF PREMISES USED FOR ILLEGAL MARIJUANA GROW OPERATION

In Pastor v. Real Property Commonly described As 713 SW 353rd Place, Federal Way, King County, Washington, ___ Wn. App. 2d ___ , 2022 WL ___ (Div. I, March 21, 2022), Division One of the Court of Appeals rejects a variety of statutory and constitutional challenges by a property owner to seizure and forfeiture of her property. The seizure and forfeiture came after the Pierce County Sheriff served a search warrant there and discovered a sophisticated illegal marijuana grow operation.

After Mei Xia Huang backed out of a settlement offer that she had proposed, the trial court ultimately granted summary judgment in favor of forfeiture for the Pierce County Sheriff. On appeal the three-judge Division One panel rules that, contrary to the contentions of Huang:

(1) the statutory drug law forfeiture scheme does not exclusively require personal notice to a property owner within 15 days of seizure;

(2) the statutory scheme for notice, including notice by publication in some circumstances, does not violate constitutional Due Process protections;

(3) Huang's conduct in relation to the agency's attempts at service of notice constituted waiver of her notice argument by evasion of service;

(4) the statutory forfeiture scheme does violate constitutional Equal Protection protections on Huang's stated grounds that marijuana "is not so dangerous that it can't be safely manufactured, sold, possess and consumed by adults in Washington;" and

(5) seizure and forfeiture of her property under the circumstances of this case did not violate the prohibition of "excessive fines" in the Eighth Amendment to the United States Constitution (the Court of Appeals notes that as to this final ground for challenge, Huang did not offer an adequate framework for her challenge to give it serious consideration).

Result: Affirmance of King County Superior Court summary judgment and forfeiture order in favor of the Pierce County Sheriff.

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BRIEF NOTES REGARDING MARCH 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 six entries below address the March 2022 unpublished Court of Appeals opinions that fit the above-described categories. I do not promise to be able catch them all, but each month I will make a reasonable effort to find and list all decisions with these issues in unpublished opinions from the Court of Appeals. I hope that readers, particularly attorney-readers, will let me know if they spot any cases that I missed in this endeavor, as well as any errors that I may make in my brief descriptions of issues and case results. In the entries that address decisions in criminal cases, the crimes of conviction or prosecution are italicized, and descriptions of the holdings/legal issues are bolded.

1. Personal Restraint Petition of Jerome Lionel Pleasant: On March 8, 2022, Division Three of the COA rejects the defendant's challenge to his 2017 Franklin County Superior Court conviction for *unlawful possession of a controlled substance (cocaine) with intent to deliver.* **The Court of Appeals in Pleasant upholds a 2016 search warrant for defendant's car based on probable cause from both an officer's sense of smell (of marijuana) and a drug dog's alert that the car contained narcotics. The Court of Appeals rules that the search warrant remains valid even though the Washington Supreme Court in a 2021 ruling in State v. Blake struck down the former statute prohibiting the simple possession of controlled substances for absence of a mental state element.** The Pleasant Opinion asserts that the general rule is that, while a conviction based on an unconstitutional statute will not stand on review, the validity of a prior arrest that was based on a statute that is subsequently declared unconstitutional remains unaffected by the declaration of unconstitutionality of the statute. There is a narrow exception to this general rule, but the Pleasant Opinion declares that the narrow exception does not apply in this case.

The Pleasant Opinion can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/379051_unp.pdf

2. State v. David Charles Maier: On March 8, 2022, Division Three of the COA rejects defendant's challenges to his Chelan County Superior Court convictions for (A) *theft of a motor vehicle*, (B) *taking a motor vehicle without permission*, and (C) *attempting to elude a police vehicle*. While Maier was in the hospital under police guard, an officer questioned Maier without giving Maier Miranda warnings. At trial, Maier cross-examined the officer in a way that indicated that the officer had not tried to get Maier's side of the story. **The State then asserted to the trial judge – and the trial judge agreed – that Maier's line of questioning had "opened the door" to the State asking the officer about the content of the interrogation that had occurred without Miranda warnings. The Court of Appeals agrees with the trial judge's ruling**.

The Maier Opinion can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/379973_unp.pdf

3. State v. Lewis Anthony Scheinost: On March 8, 2022, a 2-1 majority of a three-judge panel of Division Two of the COA agrees with defendant's challenge to his Mason County Superior Court conviction for *obstructing a law enforcement officer*. Relying on the Washington State Supreme Court decision in State v. E.J.J., 183 Wn.2d 497 (2015), the **Majority Opinion concludes that the brief delay caused by defendant's evasion of an officer during a Terry stop for shoplifting was not sufficient to constitute obstructing.** The Majority Opinion notes that (1) Scheinost failed to follow the officer's directions to stop his bicycle; (2) Scheinost increased his bicycle's speed after the officer gave another order to stop; and (3) after a very brief, 20-foot chase, the officer caught up to Mr. Scheinost and removed him from the bicycle. The Dissenting Opinion by Judge Eric Price argues (persuasively in my personal view) that the Majority Opinion has misread the 2015 Washington Supreme Court opinion in E.J.J., which Judge Price asserts was focused on First Amendment free speech rights of the defendant in that case, not on the isolated factual element of the brevity of the delay of law enforcement actions caused by the defendant's evasion of a Terry detention.

The Scheinost Opinion can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2055334-1-II%20Unpublished%20Opinion.pdf

4. State v. I.J.S.: On March 14, 2022, Division One of the COA rejects the challenge by I.J.S. to his adjudication as a juvenile of *assault in the third degree* by the Snohomish County Superior Court. The Court of Appeals declines to address claims by I.J.S. that officers unlawfully entered the apartment: (1) in which he lived, and (2) in which, after officers entered, he assaulted officers by pulling them to the floor and spitting at them. **The Court of Appeals explains as follows why I.J.S. is not allowed raise the argument of unlawful entry by police to suppress evidence of his assaults on police:**

> Here, the evidence I.J.S. sought to suppress is evidence of his own behavior after officers entered the apartment. But such evidence is not subject to the exclusionary rule. "Even if the entry or arrest by law enforcement officers was unlawful, the exclusionary rule does not foreclose admission of evidence of the assaults where the officers are identified as such, are performing official duties in good faith, and there was no exploitation of any constitutional violation." State v. Mierz, 127 Wn.2d 460, 475, 901 P.2d 286 (1995).

The Court of Appeals also notes in a footnote that the Washington Supreme Court in State v. Valentine, 132 Wn.2d 1 (1997) held that individuals "faced only with a loss of freedom" may not use force to resist merely unsupported police seizures or arrests.

The I.J.S. Opinion can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/825593.pdf

5. State v. Heath C. Vandine: On March 17, 2022, Division Three of the COA rejects the challenge of defendant to his Spokane County Superior Court convictions for *rape of a child in the first and second degree*, along with statutory aggravators.

14-year-old A.D.V. told her aunt that defendant (A.D.V.'s father) had been engaging in sex with A.D.V. The aunt took A.D.V. to the police, and the aunt later reported that someone in that police contact told the aunt to go to help A.D.V. complete a rape kit. The aunt took A.D.V. to a walk-in appointment with a physician assistant (PA) at the aunt's clinic.

The PA was not trained to administer a rape kit and did not do so. Instead, the PA performed a physical examination, checking for injuries, pregnancy and sexually transmitted diseases. The examination did not uncover any positive test results or physical signs of abuse. During the examination, the PA asked A.D.V. questions regarding her allegations of assault. At defendant's trial, the PA gave testimony regarding A.D.V.'s responses to those questions.

The Court of Appeals rules that the testimony was admissible under Evidence Rule 803(a)(4), which provides:

> **Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. ER 803(a)(4).**

In key part, the Court's explanation for this ruling is as follows:

> For a statement to be "reasonably pertinent" to medical diagnosis or treatment under ER 803(a)(4), the declarant's motive in making the statement must be to promote treatment and the medical professional must have relied on it for the purposes of treatment. . . . In most instances, statements about the cause of a patient's injuries are not pertinent to treatment or diagnosis. . . . But when the injuries are attributed to child abuse, an exception applies. In such circumstances, adequate treatment and injury prevention requires not only identifying the nature of the child's injuries, but also the source of the injury and risk of further abuse. . . .
>
> The record here shows the motive behind A.D.V.'s consultation with the PA was to receive medical treatment. The PA was not trained in forensic investigation and did not purport to administer a rape kit. The only examination the PA was equipped to perform was a normal gynecological exam. As part of the exam, it was appropriate for the PA to ask A.D.V. questions about her ongoing safety, as well as the possibility of pregnancy or sexually transmitted diseases. **Given these circumstances, the examination properly included questions regarding A.D.V.'s allegations of assault. The testimony was correctly admitted under ER 803(a)(4). . . .**

[Case citations omitted]

The Vandine Opinion can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/374939_unp.pdf

6. State v. Jasper Levi Phillips: On March 21, 2022, Division One of the COA rejects defendant's challenges to his Skamania County Superior Court convictions for (A) *two counts of theft of a motor vehicle*, *and* (B) *one count each of* (i) *assault in the first degree,* (ii) *robbery in the first degree,* (iii) *kidnapping in the first degree,* (iv) *burglary in the first degree, and* (v) *identity theft in the first degree*. The Court of Appeals agrees, however, with defendant's challenge to an aggravated sentence for the kidnapping, ruling that evidence (jailhouse notes) that the State offered in order to show the defendant's lack of remorse was not properly authenticated.

The State prevails against defendant's claim that his admissions in a custodial interrogation came after he had purportedly revoked his Miranda waiver mid-interrogation. The Court of Appeals rules that the following circumstances do not establish that defendant made an unequivocal mid-interrogation revocation of his earlier Miranda waiver:

> The detective testified that he took Phillips to an interview room and read his Miranda warnings. Phillips said that he understood his rights and began talking about the car chase and accident. When the detective asked about the events at [the victim's] house, Phillips asked something similar to, "You mean you could go get me an attorney right now if I wanted one?" The detective responded that Phillips had the right to an attorney if he wished. Phillips then went on to describe the incident at Pullman's house.

After discussing the Miranda-based case law that requires an unequivocal assertion of the right to silence or to an attorney in these circumstances, the Court of Appeals explains as follows that the circumstances do not present an unequivocal request for an attorney:

> Phillips contends the trial court erred in the finding of fact that he "asked if the Detective would be able to find an attorney for him" and the conclusion of law that it "was not a clear and unequivocal invocation of his rights." Phillips claims he demonstrated his intent to have representation by an attorney. But, the detective's testimony shows that Phillips posed a question along the lines of "'If I wanted an attorney right now, you could you go get me one?'" or "'Could you get me an attorney right now if I wanted one.'" The detective stated that he did not believe Phillips was requesting an attorney: "I don't believe that that was his intentions at that point, that he wanted an attorney right now. He was simply asking me if I could reach out to one." According to the detective, Phillips "didn't imply that he was wishing to speak with an attorney."
>
> Phillips did not demand an attorney. Rather, he posed a question or hypothetical to the detective. This was not a clear and unequivocal request for counsel. The trial court did not err in concluding that Phillips properly waived his right to counsel and did not subsequently invoke it.

LEGAL UPDATE EDITOR'S NOTE: For an article by John Wasberg on the Miranda-based issue discussed in the Phillips case, see "Initiation of Contact Rules Under the Fifth Amendment," the Criminal Justice Training Commission's internet LED page under "Special Topics." The CJTC LED page can be accessed on the Internet at:

https://www.cjtc.wa.gov/resources/law-enforcement-digest

The Phillips Opinion can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/834339.pdf

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

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

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

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

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

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

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

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

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

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