LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

MARCH 2025

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Here is a link to the Opinion in State v. Sochirca:
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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT CIVIL LIABILITY UNDER SECTION 1983 FOR LAW ENFORCEMENT: VIEWING THE ALLEGATIONS IN THE BEST LIGHT FOR THE LEGAL REPRESENTATIVES OF THE MAN FATALLY SHOT BY POLICE OFFICERS IN THE HALLWAY OF HIS APARTMENT, 3-JUDGE PANEL DENIES SEATTLE PD OFFICERS QUALIFIED IMMUNITY WHERE THE OFFICERS SHOT A MAN ARMED WITH A POCKET KNIFE WHO HAD TRIGGERED A 911 CALL BY THREATENING TO KILL HIMSELF AND HIS GIRLFRIEND (AT THE POINT WHEN THE SHOOTING BEGAN, THE MAN WAS 4.5 FEET AWAY FROM ONE OF THE OFFICERS, 5.87 SECONDS HAD PASSED SINCE THE FIRST CONTACT, AND NO WARNING HAD BEEN GIVEN AS TO THE IMMINENCE OF USE OF DEADLY FORCE)

In Johnson v. Myers, ___ F.4th ___ , 2025 WL ___ (March 3, 2025), a three-judge Ninth Circuit panel is unanimous in denying qualified immunity to two Seattle PD officers who shot and killed a man during a confrontation in a hallway.

The following summary of the decision is adapted relatively closely (not quoted verbatim) from a Ninth Circuit staff summary:

> The three-judge Ninth Circuit panel affirmed the district court's denial, on a motion for partial summary judgment, of qualified immunity to Seattle police officers in an action alleging the officers used excessive force when they shot and killed Ryan Smith during a response to a 911 call.
>
> [Officers A and B] responded to a 911 call from Smith's girlfriend that Smith was threatening to kill both himself and her with a knife. After demanding entry into the apartment, [Officer B] kicked in the door, revealing Smith standing in the hallway with an open pocketknife in his right hand.
>
> The officers shouted a number of overlapping commands, but they did not give a warning of the possibility that he would be shot. The officers began shooting Smith at the point when he raised his right arm across his chest and took a step forward to bring him to a point 4.5 feet from the nearest officer. Between the moment when [Officer B] kicked

in the door and the moment when [Officer A] began firing his weapon, 5.87 seconds elapsed.

The panel first held that it had jurisdiction over this interlocutory appeal because the panel did not need to resolve any disputed questions of fact in order to decide whether summary judgment was warranted.

The panel next determined that, viewing the evidence in the light most favorable to the Plaintiffs, the law requires at this stage of the litigation, [Officers A and B] were not entitled to qualified immunity on a motion for summary judgment. The panel ruled that the relevant case law on use of force had clearly established at the time of the fatal shooting that using deadly force under these circumstances violated the Fourth Amendment.

The panel thus determined that a reasonable juror could conclude that Smith did not pose such an immediate threat to the safety of the officers or others that the immediate use of deadly force was justified.

The evidence in the case would support a reasonable juror's determinations (1) that Smith did not brandish or threaten the officers with a knife but instead was raising his right hand in compliance with the officers' commands that he raise his right hand; (2) that he was not actively resisting arrest; (3) that Smith may not have comprehended the officers' commands which were shouted at the same time and inconsistent; and (4) the use of a taser might have been available and a reasonable alternative.

Also, the evidence is clear that the officers gave no warnings.

Given the Ninth Circuit's case law, the panel asserts, a reasonable officer should have been on notice that it was unreasonable to use deadly force solely because Smith was holding a knife in his right hand and raised that hand across his chest.

Factual and Procedural Background (Excerpted from Ninth Circuit Opinion)

On April 14, 2019, several Seattle police officers responded to a 911 call made by Katy Nolan. In the call, Nolan said that her boyfriend, Ryan Smith, was being "abusive." When the officers arrived at the apartment building, Nolan was outside. Smith was in an upstairs apartment. In response to a telephone call from the officers, he came downstairs and spoke to the officers outside the building. He was unarmed.

[Officer C] later recalled in a sworn declaration that Smith spoke with [Officer B], and that "[Officer B] built an awesome rapport with him." Smith told the officers that he suffered from depression, that he took medication, and that he was not suicidal. Nolan and Smith told the officers that there was "just an argument." Nolan left to spend "a few nights" at a friend's house. The officers did not arrest Smith.

Almost four weeks later, on May 8, 2019, Nolan again called 911, telling the operator that Smith was threatening to kill both himself and her with a knife. She said, "Please get him out. I've been trying to get him to leave and he won't leave." She said that Smith said that blood was everywhere, but that she did not know if Smith was actually hurt.

She said that she was bolting herself in the bathroom. Nolan said that she did not need any medical attention, but that Smith "needs help." She reported that Smith was using his fingernails to scrape on the bathroom door.

[A] 911 Communications Dispatcher, spoke with Nolan. [The dispatcher] documented the call in the Computer Aided Dispatch system that appears in officer terminals, writing "SUSP IS SAYING THERE IS BLOOD EVERYWHERE, RP IS INSIDE BATHROOM, HAS NO VISUAL." As officers were dispatched, an inaccurate message was transmitted via radio stating, "caller is now saying there's blood everywhere inside the bathroom."

[Officers A and C] arrived at Smith's apartment building at 7:22 pm. [Officers B and D] arrived about one minute later. All four officers wore activated body cameras. When Nolan heard police sirens and officers outside of the apartment, she told the dispatcher, "I can hear the cops. No, please don't shoot. No."

The officers entered the building and approached Smith's apartment. All four officers wore protective vests. [Officers A, C, and D] carried tasers. The apartment was located at the end of a hallway, opening to the left off the hallway. After demanding entry, [Officer A] began to kick the door. [Officer C] announced "Seattle Police." [Officer A] directed [Officer B] to kick in the door. [Officer B] kicked in the door, revealing Smith standing in the hallway of the apartment. His hands were down at his side. He held an open pocketknife in his right hand.

Over the span of approximately five seconds, the officers shouted overlapping commands: "Put your hands up"; "Let me see your hands"; "Get on the f***ing ground" "Drop the knife"; "Get on the f***ing ground"; and "Drop the knife!"

Smith was 5'7" and weighed 143 pounds. He took several steps forward. As Smith stepped forward, [Officers A and B] retreated down the outer hallway, resulting in an estimated distance of 4.5 feet between themselves and Smith. Smith never stepped through the doorframe into the outer hallway. All of the officers remained in the outer hallway at a right angle to Smith.

Smith raised his right arm across his chest as he took a step forward. [Plaintiffs] contend that in so doing Smith could have been complying with the command to put his hands up. The parties dispute whether Smith was still moving toward the officers when he was shot. [Plaintiffs] contend Smith had come to a complete stop. None of the officers warned Smith that they were about to shoot or to use force against him.

[Officer A] shot first, shooting eight rounds. [Officer B] began shooting after [Officer A] began to shoot, shooting two rounds. Between the moment [Officer B] kicked in the door and the moment [Officer A] began firing his weapon, 5.87 seconds had elapsed. Smith died from the gunshot wounds.

Rose Johnson, Smith's mother, and others filed a complaint in district court against [Officers A and B], [a named dispatcher], and the City of Seattle. In their first amended complaint, [Plaintiffs] allege claims under 42 U.S.C. § 1983 and state law. [Officers A and B], moved for partial summary judgment on [Plaintiffs'] § 1983 claims on the ground of qualified immunity.

> The district court denied the motion for summary judgment. The court wrote that "before May 8, 2019, when Smith was fatally shot, the law has been 'clearly established' that law enforcement personnel 'may not kill suspects who do not pose an immediate threat to their safety or to the safety of others simply because [the suspects] are armed.'" The court found that "factual disputes exist concerning (i) whether a reasonable officer in the same situation as [Officers A and B] would have believed Smith posed an immediate threat to the safety of the officers or others at the scene; and (ii) whether the use of less drastic measures was feasible."

[Some paragraphing revised for readability]

LEGAL ANALYSIS BY THE NINTH CIRCUIT PANEL IN JOHNSON V. MYERS

1. Viewing the factual allegations in the best light for Plaintiffs, a jury could reasonably determine reasonably determine that excessive force occurred.

In key part, the Opinion in Johnson v. Myers explains in the following brief analysis why the panel concluded, viewing the evidence in the best light for the Plaintiffs, that a jury could have reasonably determined that a constitutional violation occurred:

> We analyze claims of constitutionally excessive force "under the Fourth Amendment's 'objective reasonableness standard.'" Saucier v. Katz, 533 U.S. 194, 204 (quoting Graham v. Connor, 490 U.S. 386, 388, 394 (1989)). We judge reasonableness "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Graham, 490 U.S. at 396. The "use of deadly force is reasonable only if 'the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.'" Gonzalez v. City of Anaheim, 747 F.3d 789, 793 (9th Cir. 2014).
>
> It is undisputed that Nolan had barricaded herself in the bathroom. Thus, she was not in immediate danger. The only dispute is whether the officers were in such immediate danger that [Officers A and B] were justified in shooting Smith without warning within seconds of breaking down the door.
>
> We consider "the availability of alternative methods of capturing or subduing a suspect" to determine whether a use of force was objectively reasonable. Smith v. City of Hemet, 394 F.3d 689, 703 (9th Cir. 2005) (en banc).
>
> Officers [B and C] had encountered Smith when they responded to the call by Nolan less than four weeks earlier. [Officer C] recounted that during this encounter, Smith had come out of the apartment, and that [Officer B] had had a peaceful conversation with him, "buil[ding] an awesome rapport."
>
> This time, however, [Officer B] made no attempt to establish a rapport with Smith. Instead, as soon as [Officer B] kicked down the door, all of the officers immediately shouted overlapping commands. Viewing the evidence in the light most favorable to [Plaintiffs], Smith stopped after taking a few steps forward and began to comply with the command to put his hands up.

> None of the officers deployed their tasers. None of the officers warned Smith that they were about to use deadly force. [Officer A] began shooting a little less than six seconds after [Officer B] kicked down the door.
>
> Viewing the evidence in the light most favorable to [Plaintiffs], we conclude that a reasonable juror could conclude that Smith did not pose such "an immediate threat to the safety of the officers or others" that the use of deadly force was justified. Lal v. California, 746 F.3d 1112, 1117 (9th Cir. 2014)

[Some citations omitted; some paragraphing revised for readability]

Later in the Opinion, in the next-to-last paragraph of the Opinion, the Court adds the following in relation to the question of the review standard in a court's determination of whether a jury should make the determination of whether the officers used excessive force:

> At trial, a reasonable jury could perhaps conclude that [Officers A and B] were justified in using deadly force. But a reasonable jury could equally well conclude that they acted unconstitutionally in using deadly force without warning less than six seconds after kicking down the apartment door, when Smith was standing still in his own hallway and raising his right hand in compliance with the officers' command to raise his hands.

2. Was the constitutional standard clearly established at the time of the use of deadly force?

The second prong of the two-pronged test for qualified immunity looks at whether the relevant case law had established the constitutional standard at the time that officer acted. The Ninth Circuit panel in Johnson v. Myers explains that a constitutional standard law is deemed to be clearly established when prior case law is "clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." D.C. v. Wesby, 583 U.S. 48, 63 (2018). The panel in Johnson v. Myers concludes that the case law, as discussed at length in the Opinion, was clear in that sense, and therefore that the officers are not entitled to qualified immunity under the second prong of the test.

Result: Affirmance of U.S. District Court (Western Washington) summary judgment order denying qualified immunity to the Seattle police officers.

CIVIL RIGHTS ACT CIVIL LIABILITY UNDER SECTION 1983 FOR LAW ENFORCEMENT: VIEWING THE JURY VERDICT AND THE EVIDENCE IN THE BEST LIGHT FOR THE LEGAL REPRESENTATIVES OF THE MAN FATALLY SHOT BY A POLICE OFFICER, COURT DENIES QUALIFIED IMMUNITY ON EXCESSIVE FORCE CLAIM FOR OFFICER WHO FIRED THE FATAL SHOTS WITHOUT A WARNING AS TO THE IMMINENCE OF THE USE OF DEADLY FORCE

In Estate of Najera Aguirre v. County of Riverside, ___ F.4th ___ , 2025 WL ___ (9th Cir., March 11, 2025), a three-judge Ninth Circuit panel is unanimous in denying qualified immunity to a law enforcement officer in his motion for judgment as a matter of law following a jury decision in favor of Plaintiffs in a section 1983 Civil Rights Act case alleging excessive force by the officer in a fatal shooting.

The following SUMMARY of the decision is adapted relatively closely (but not quoted verbatim) from a Ninth Circuit staff summary:

> The panel affirmed the district court's order denying Riverside County Sergeant Dan Ponder's renewed motion, following a jury verdict, for judgment as a matter of law based on qualified immunity in a 42 U.S.C. § 1983 action alleging that Ponder used excessive force when he shot and killed Clemente Najera-Aguirre.
>
> Ponder arrived at the scene after responding to a call about someone destroying property with a bat or club-like object. He commanded Najera, who matched the suspect description, to drop the bat he was holding. Najera refused and approached Ponder.
>
> When [Najera] was approximately 10-15 feet away, Ponder pepper sprayed Najera twice, but the pepper spray blew away and was ineffective. Ponder then fired six shots in three successive volleys. An autopsy suggested Najera was turned away when he was struck by the final two bullets, which were the fatal shots.
>
> Following a five-day trial, a jury returned a verdict for Plaintiffs and awarded $10 million in damages.
>
> . . . .
>
> The panel held that Ponder was not entitled to qualified immunity on the merits. The jury unanimously found for Plaintiffs on their claim for excessive force in violation of the Fourth Amendment.
>
> Drawing all inferences in favor of Plaintiffs, the facts at trial showed that Ponder violated clearly established law that deadly force is not justified where the suspect poses no immediate threat. The evidence demonstrated that Najera was not an immediate threat to Ponder or to others.

Factual Background: (As described in the panel's Opinion)

> On April 15, 2016, Sergeant Dan Ponder of the Riverside County Sheriff's Department responded to a call in Lake Elsinore, California, about someone destroying property with a bat or club-like object. When he arrived on scene, Ponder observed that Najera, who was standing in the driveway of a house near the sidewalk, matched the suspect description. Ponder also noticed shattered glass around the house and people standing approximately 15–20 feet from Najera.
>
> Ponder began issuing commands for Najera to drop the bat—which an eyewitness testified was resting on Najera's shoulders—and get on the ground; Najera turned his attention to Ponder but did not comply with his instructions. Najera then exited the gate of the house and moved toward the street where Ponder stood. Despite Ponder's repeated orders, Najera did not drop the bat.
>
> When Najera was approximately 10–15 feet away, Ponder pepper sprayed Najera twice, but the pepper spray blew away and was ineffective. Najera then turned toward Ponder, still holding the bat. Ponder and Najera stood face-to-face, where they remained roughly 10–15 feet apart, with Ponder now pointing his gun at Najera.

Within seconds of facing each other, Ponder began shooting Najera without warning. Ponder fired six shots. Ponder fired the shots in two volleys; there was a pause between five and thirty seconds between Ponder's initial shots and the next round of shots that took Najera down. Witnesses stated that Najera collapsed face down—falling "like a tree" where he had been shot—with his feet closer to and his head farther from Ponder. Najera was killed. His body was found on the sidewalk approximately ten feet from where Ponder had been standing.

An autopsy showed that four bullets struck Najera: one in the right upper chest, one in the left elbow, and two in the back, which were the fatal shots. The bullet paths of the shot to the elbow and the two fatal shots to the back suggested Najera was turned away, with his back to Ponder, when he was struck.

[Some paragraphing revised for readability]

PANEL'S LEGAL ANALYSIS OF WHETHER QUALIFIED IMMUNITY WAS PROPERLY DENIED:

The following passages are excerpted from the panel's legal analysis of the qualified immunity issue:

II. Qualified Immunity Was Properly Denied

Although we review de novo the district court's denial of qualified immunity as raised in a renewed motion for JMOL, we "give significant deference to the jury's verdict and to the nonmoving parties (here, Plaintiffs) when deciding whether that decision was correct." A.D. v. Cal. Highway Patrol, 712 F.3d 446, 453 (9th Cir. 2013). We "draw all reasonable inferences in" the nonmoving party's favor, . . . we "must disregard all evidence favorable to the moving party that the jury is not required to believe." . . . . This is a highly deferential standard.

Ponder is not entitled to qualified immunity on the merits. The jury unanimously found for the Najeras on their "section 1983 claim for excessive force in violation of the Fourth Amendment." Drawing all inferences in favor of the Najeras, the facts at trial show Ponder violated clearly established law that holds deadly force is not justified where the suspect poses no immediate threat. [See Tennessee v. Garner, 471 U.S. 1, 11 (1985)].

A. Constitutional Violation

A police officer "will receive qualified immunity from suit under 42 U.S.C. § 1983 . . . if the plaintiff has not 'alleged' or 'shown' facts that would make out a constitutional violation," or a violation is shown but "the constitutional right allegedly violated was not 'clearly established' at the time of defendant's alleged misconduct." . . . . When, as here, "a jury has found (with reasonable support in the evidence)" a constitutional violation by a police officer, we view the jury's verdict as "sufficient to deny him qualified immunity" on the first prong of the analysis. . . . The jury's finding in favor of the Najeras establishes that Ponder violated Najera's Fourth Amendment right to be free from excessive force.

B. Clearly Established Law

> Assessing qualified immunity after a jury verdict turns on the second, "clearly established" prong, which requires deference to the jury's view of the facts. . . Conduct violates a clearly established right if the unlawfulness of the action in question [is] apparent in light of some pre-existing law." . . . .
>
> As we held on interlocutory appeal, caselaw from this circuit and the Supreme Court, published before the incident, clearly establishes that "[d]eadly force is not justified '[w]here the suspect poses no immediate threat to the officer and no threat to others.'" [Estate of Aguirre v. Cnty. of Riverside ("Aguirre I"), 29 F.4th 624, 626 (9th Cir. 2022) (quoting Garner, 471 U.S. at 11)].

[Some case citations omitted]

Result: Affirmance of U.S. District Court (Central District of California) order denying a motion by Sergeant Ponder for judgment notwithstanding a jury verdict for Plaintiffs.

CIVIL RIGHTS ACT CIVIL LIABILITY UNDER SECTION 1983 FOR LAW ENFORCEMENT: VIEWING THE ALLEGATIONS IN THE BEST LIGHT FOR PLAINTIFF, 3-JUDGE PANEL IS UNANIMOUS IN CONCLUSION THAT THAT CHP OFFICER VIOLATED THE CONSTITUTIONAL RIGHT TO ADEQUATE MEDICAL CARE OF A PERSON HAVING A STROKE; THE OFFICER ARRESTED THE MAN AFTER HIS ONE-VEHICLE ACCIDENT DUE TO THE OFFICER MISTAKENLY THINKING THAT THE MAN WAS ON DRUGS; ONE OF THE JUDGES ARGUES THAT CASE LAW WAS NOT CLEARLY ESTABLISHED, AND THUS THAT QUALIFIED IMMUNITY SHOULD HAVE BEEN GRANTED

In D'Braunstein v. California Highway Patrol, ___ F.4th ___ , 2025 WL ___ (9th Cir., March 12, 2025), a Ninth Circuit 3-judge panel rules for Plaintiff in his section 1983 Civil Rights Act lawsuit alleging that his constitutional rights were violated by a CHP officer who did not timely provide him medical care. The officer made an unsupported arrest when she did not realize that what she thought were signs of ingestion of drugs by Plaintiff were actually symptoms of stroke.

Some of the following analysis has been adapted by the Legal Update Editor from the Ninth Circuit staff summary, which is not part of the Ninth Circuit Opinion.

D'Braunstein was involved in a serious single-vehicle accident. CHP Officer Durazo arrived at the scene of the accident and found D'Braunstein disoriented and in physical distress. Officer Durazo did not call medical personnel. Instead, roughly 45 minutes after arriving on the scene, she decided that D'Braunsein was on drugs. So, she arrested him for driving under the influence of drugs. She took him to jail.

When a nurse at the jail refused to admit D'Braunstein due to his medical condition, Durazo transported him to the hospital. It turned out that D'Braunstein had suffered a stroke.

The Fourth and Fourteenth Amendments require state actors to provide adequate medical care in certain circumstances when the government confines a person or otherwise restricts his liberty. The key question in assessing an alleged violation is whether the officer's provision (or deprivation) of medical care was objectively unreasonable.

The three Ninth Circuit panel judges are all in agreement that, construing the facts in the light most favorable to D'Braunstein, a reasonable jury could find that CHP Officer Durazo violated

D'Braunstein's constitutional rights by failing to summon prompt medical care, considering the serious nature of the collision and his evident symptoms of distress. The panel concluded that a jury could find that Durazo's apparent belief that D'Braunstein did not need medical attention was based on an unreasonable mistake of fact or judgment.

Two members of the panel further conclude that if that is true, then the CHP officer's failure to summon prompt medical care was a violation of clearly established law, which provides that officers must seek to provide an injured detainee or arrestee with objectively reasonable medical care in the face of medical necessity creating a substantial and obvious risk of serious harm, including by summoning medical assistance.

One of the three judges dissents on the question of whether the case law was established. Judge Lee argues that CHP Officer Durazo was entitled to qualified immunity because there was no clearly established case law requiring her to call for emergency medical help when there were no obvious and clear signs of an urgent medical necessity.

In the lead Opinion, the Court includes the following criticism of the conclusion reached by the CHP officer that D'Baunstein was under the influence of drugs (the Court notes in another passage that the officer is not a drug recognition expert and did not call one of the CHP's drug recognition experts to the scene):

> In this case, Durazo encountered D'Braunstein soon after he was involved in a major collision that destroyed his car and caused the airbag to deploy. D'Braunstein was disoriented, sweating profusely, had poor balance, his pupils were constricted, and his speech was slurred and extremely slow. He had difficulty answering standard questions and could not perform the field sobriety tests as directed. Durazo herself told D'Braunstein at the scene that he had "a serious condition." And yet for reasons that are difficult to understand, Durazo did not call medical personnel to the site of the crash. She instead took D'Braunstein to jail. And she did not bring D'Braunstein to the hospital until hours later, and, even then, not until a nurse at the jail refused to admit D'Braunstein due to his medical condition.

Result: Reversal of U.S. District Court order that granted qualified immunity to Officer Durazo.

FEDERAL STATUTORY-DISABILITY-RIGHTS-BASED CIVIL LIABILITY EXPOSURE FOR LAW ENFORCEMENT: VIEWING THE ALLEGATIONS IN THE BEST LIGHT FOR DEAF PLAINTIFF, 3-JUDGE PANEL IS UNANIMOUS IN CONCLUDING UNDER THE TOTALITY OF THE CIRCUMSTANCES THAT PLAINTIFF CANNOT ESTABLISH THAT POLICE OFFICERS VIOLATED HER FEDERAL STATUTORY DISABILITY RIGHTS IN FAILING TO PROVIDE AN ASL INTERPRETER DURING THE EXIGENT CIRCUMSTANCES OF A DUI STOP AND SUBSEQUENT DUI BLOODDRAW

In Mayfield v. City of Mesa, ___ F.4th ___ , 2025 WL ___ (9th Cir., March 24, 2025), in a highly fact-based ruling that considers the totality of the circumstances, a three-judge Ninth Circuit panel rejects the arguments of a Plaintiff who is pursuing a lawsuit grounded in Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 et seq., and § 504 of the Rehabilitation Act ("RA"), 29 U.S.C. § 794.

A Ninth Circuit staff summary, which is not part of the Ninth Circuit Opinion, summarizes the merits portion of the lengthy, fact-based Opinion as follows:

> The panel affirmed the district court's dismissal of an action brought by Alison Mayfield, who is deaf and communicates primarily through American Sign Language ("ASL"), alleging that she was denied a "reasonable accommodation" in violation of Title II of the Americans with Disabilities Act ("ADA") and the Rehabilitation Act ("RA") when officers from the City of Mesa's Police Department ("MPD") failed to provide her with an ASL interpreter during a traffic stop and subsequent blooddrawing procedure at a DUI facility.
>
> . . . .
>
> Turning to the merits, the panel held that the relevant question here was whether, in light of the exigent circumstances applicable in the context of the stop and arrest of a deaf motorist, the means of communication used were sufficient to allow the detained motorist to effectively exchange information with the officer so as to accomplish the various tasks entailed in the stop and arrest. Applying that standard, the panel held that plaintiff failed to plead sufficient facts to establish that MPD discriminated against her by failing to provide a reasonable accommodation during her arrest and blood testing. Because plaintiff would be unable to amend her complaint to overcome the indisputable evidence in the incorporated body camera footage, the district court properly dismissed her complaint without leave to amend.

Result: Affirmance of U.S. District Court (Arizona) dismissal of lawsuit by Plaintiff that is grounded in Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 et seq., and § 504 of the Rehabilitation Act ("RA"), 29 U.S.C. § 794.

SECOND AMENDMENT AND LARGE-CAPACITY AMMUNITION MAGAZINES: OVER THREE YEARS LATER IN THE SAME CASE, ON REMAND OF THE CASE BY THE U.S. SUPREME COURT FOR FURTHER REVIEW IN LIGHT OF U.S. SUPREME COURT DECISION IN NYSRPA V. BRUEN, A 7-4 VOTE BY AN EN BANC NINTH CIRCUIT PANEL AGAIN HOLDS THAT THE SECOND AMENDMENT IS NOT VIOLATED BY CALIFORNIA STATUTES BANNING POSSESSION OF LARGE-CAPACITY MAGAZINES THAT HOLD MORE THAN 10 ROUNDS OF AMMUNITION

In Duncan v. Bonta, ___ F.3d ___ , 2025 WL ___ (9th Cir., March 20, 2025), an eleven-judge Ninth Circuit panel votes 7-4 to uphold against a Second Amendment challenge California statutes that ban possession of large-capacity ammunition magazines that hold more than ten rounds of ammunition.

This is the second ruling by an 11-judge Ninth Circuit panel in the case. In 2020, a three-judge Ninth Circuit panel ruled that the statutes violate the Second Amendment, but the Ninth Circuit then set aside that decision for review by the 11-judge panel. Then, in 2021, an 11-judge Ninth Circuity panel voted 7-4 to reverse the three-judge panel's decision.

Review of that 11-judge panel's decision was sought in the U.S. Supreme Court, which remanded the case, directing the Ninth Circuit to reconsider this case light of the U.S. Supreme Court's decision in New York State Rifle & Pistol Association v. Bruen, 142 S.Ct. 1211 (June 23, 2022) (NYSRPA v. Bruen).

Now, an 11-judge panel has once again ruled by 7-4 vote that the statutory scheme is consistent with the Second Amendment. Five Opinions are issued, covering over 130 total

pages. The three Dissenting Opinions are impassioned in arguing that the legislation violates the Second Amendment and fails to follow the U.S. Supreme Court direction for Second Amendment analysis in NYSRPA v. Bruen.

A staff summary (which is not part of the Ninth Circuit Opinions) summarizes as follows the interpretation of the Second Amendment issue by the seven judges in the majority:

> Employing the methodology announced in New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022), the en banc court concluded that California's law comported with the Second Amendment for two independent reasons.
>
> First, the text of the Second Amendment does not encompass the right to possess large-capacity magazines because large-capacity magazines are neither "arms" nor protected accessories.
>
> Second, even assuming that the text of the Second Amendment encompasses the possession of optional accessories like large-capacity magazines, California's ban on large-capacity magazines falls within the Nation's tradition of protecting innocent persons by prohibiting especially dangerous uses of weapons and by regulating components necessary to the firing of a firearm.

[Paragraphing revised for readability]

Result: Reversal of U.S. District Court order that granted summary judgment to the plaintiffs; thus, the Majority Opinion of the 11-judge panel rules that California's legislation banning LCMs does not violate the Second Amendment of the U.S. Constitution.

LEGAL UPDATE EDITOR'S NOTES/COMMENTS: Numerous friend-of-the-court briefs have been filed by governmental agencies and private organizations. It seems likely that the challengers to the legislation will again seek U.S. Supreme Court review. It could be a long while before this case is finally resolved. The Washington Attorney General was one of the listed friends of the court participating in briefing in Duncan v. Becerra. I have not seen any of the briefs.

The State of Washington has a magazine-capacity-restricting statute, but the statute does not prohibit mere possession. See RCW 9.41.370 and RCW 9.41.375.

Many questions regarding Washington firearms laws (including RCW 9.41.370 and RCW 9.41.375), are addressed on a "Firearms FAQ" page on the Washington Attorney General's Office website; here is the link:

https://www.atg.wa.gov/ConcealedWeapons/FAQ.aspx#:~:text=However%2C%20you%20may%20need%20to,is%20prohibited%20under%20RCW%209.41.

FOURTH AMENDMENT PARTICULARITY AND OVERBREADTH STANDARDS REQUIRED THAT, UNDER THE FACTS OF THIS CASE, A WARRANT TO SEARCH A COMPUTER FOR EVIDENCE OF RAPE OF A CHILD REQUIRED A TEMPORAL LIMIT ON A PROVISION IN THE WARRANT THAT AUTHORIZED A SEARCH FOR EVIDENCE OF DOMINION AND CONTROL OF THE COMPUTER

In U.S. v. Holcomb, ___ F.4th ___ , 2025 WL ___ (9th Cir., March 20, 2025), a three-judge Ninth Circuit panel reverses (A) a U.S. District Court conviction of defendant for production of child pornography; and (B) a ruling by the U.S. District Court that denied suppression of evidence that was found in the computer search. The case began as an investigation of a suspected child sex crime by a local law enforcement agency in Washington state, and it turned into a child pornography case referred to the FBI.

The Ninth Circuit panel rules that a search warrant to search a man's computer for video evidence of the crime of sexual assault of a child was fatally flawed because a "dominion and control" provision in the warrant did not contain any temporal limitation even though other search authorizations in the warrant did include temporal limitations.

The warrant under review in Holcomb specifically authorized a search for the following five categories of evidence:

> (1) Evidence of communications to or from J.J. and/or between JOHN HOLCOMB. [] This communication includes but is not limited to voicemails/audio recordings, SMS, MMS, emails, chats, social media posts/online forums, contact lists and call logs from June 1, 2019 to current.
>
> (2) Surveillance video or images depicting JJ or JOHN HOLCOMB and any other surveillance video or images from Jan[uary] 26th 2020 to current.
>
> (3) Any location data including GPS coordinates from Jan[uary] 26th 2020 to current.
>
> (4) User search history from the devices to include but not limited to searched words, items, phrases, names, places, or images from Jan[uary] 26[th] 2020 to current.
>
> (5) Files[,] artifacts or information including but not limited to[] documents, photographs, videos, e-mails, social media posts, chats and internet cache that would show dominion and control for the devices.

[Underlining added by Legal Update Editor]

This Legal Update entry will not address in detail the facts, procedural background, or legal analysis in Holcomb. Officers and attorneys who expect to be involved in working on warrants to search computers will want to study the Opinion. In addition, the analysis in Holcomb extends beyond computers search warrants, so consideration should be given by officers and attorneys to the question generally of whether "dominion and control" provisions in search warrants for homes and other targets should be temporally limited in some circumstances.

I will just note here that the Opinion includes the following explanation from the Ninth Circuit panel:

> In holding that the dominion and control provision transformed the second warrant into a general warrant, we do not mean to suggest that dominion and control provisions must always contain temporal limitations. As we have explained, "[t]he specificity required in a warrant varies depending on the circumstances of the case and the type of items involved." United States v. Spilotro, 800 F.2d 959, 963 (9th Cir. 1986).

> As indicated above, we have stated that warrants describing "generic categories of items" are "not necessarily invalid if a more precise description of the items subject to seizure is not possible." . . . Consistent with these principles, we have upheld search warrants, including search warrants for computers, that contained broad provisions lacking temporal limitations. See, e.g., United States v. Schesso, 730 F.3d 1040, 1046–47 (9th Cir. 2013); Adjani, 452 F.3d at 1147–50; United States v. Lacy, 119 F.3d 742, 746 (9th Cir. 1997).
>
> However, on the facts of this case, where the Government has failed to establish that evidence of dominion and control was relevant to its search, where the Government knew the exact time period surrounding the incident it sought to investigate, where the affidavit did not establish probable cause to search for evidence outside that period, and where every other warrant provision sought to limit the scope of the warrant to that period, the unlimited dominion and control provision plainly violated the Fourth Amendment's specificity requirement. Any other holding would allow any warrant with a dominion and control.

Result: Reversal of conviction by U.S. District Court (Western District of Washington) of John Holcomb for producing child pornography in violation of federal law.

LEGAL UPDATE EDITOR'S NOTE: The WAPA case law note at (https://waprosecutors.org/caselaw/) for this March 20, 2025 decision reads as follows:

"Search warrants – A search warrant for an electronic device that includes a provision to search for evidence of dominion and control must establish probable cause that the evidence of dominion and control is relevant and follow the same particularity requirement for the dominion and control provision as any other evidence."

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WASHINGTON STATE SUPREME COURT

SPLINTERED WASHINGTON SUPREME COURT PRODUCES THREE OPINIONS THAT CONCLUDE FOR DIFFERENT REASONS THAT THE THREE FERRIER WARNINGS WERE NOT REQUIRED IN ORDER TO OBTAIN CONSENT WHERE: (1) ANIMAL SERVICES OFFICERS WERE PERMITTED BY A HORSE RANCH LANDOWNER TO ACCOMPANY HER ONTO HER PASTURE IN ORDER TO CHECK ON THE HEALTH OF HER HORSES, AND (2) THE OFFICERS DID NOT SEEK ENTRY INTO DEFENDANT'S HOME OR CURTILAGE ON THE RANCH; CASE IS REMANDED FOR A NEW FACTUAL DETERMINATION ON THE CONSENT QUESTION

[LEGAL UPDATE EDITOR'S INTRODUCTORY NOTE: In State v. Mercedes, ___ Wn.3d ___ , 2025 WL ___ (March 3, 2025), the Washington Supreme Court addresses issues relating to the requirements for consent searches on outdoor private property. Three Opinions were issued collectively by the Supreme Court justices in the Mercedes case. Four Justices signed one Opinion; four Justices signed a second Opinion (with one of the Justices signing both of those Opinions); and two Justices signed a third Opinion.

The three Opinions agree that the special warnings requirement of the 1998 independent grounds Washington Supreme Court decision in State v. Ferrier, 136 Wn.2d 103 (1998)

does not apply to the circumstances in this case. However, (1) because each of the Opinions has a different view of the application, or not, of Ferrier in relation to various circumstances; and (2) because no Opinion garners five votes, some murkiness regarding the scope of Ferrier remains to be addressed in future cases involving issues of consent to enter ranch or farm property, as well as other-non-residential private property.]

Background regarding the 1998 Washington Supreme Court Ferrier decision and three of the Washington Supreme Court's subsequent decisions interpreting Ferrier in cases where law enforcement officers have requested consent to search or enter a residence (these four precedents are discussed in the lead Opinion and first concurring Opinion in Mercedes)

In the 1998 decision in State v. Ferrier, 136 Wn.2d 103 (1998), the Washington Supreme Court held that in order to obtain consent to search a home for a grow operation, the officers in that case were required, before entering the home, to ask for consent with prior warnings of what some refer to the "three R" rights: (1) right to Refuse consent; (2) right to Restrict the scope of the search; and (3) right to Retract the consent at any time.

In State v. Khounvichai, 149 Wn.2d 557 (2003), the Washington Supreme Court ruled that the special Ferrier warnings were **not** required to obtain consent where an officer requested consent from an apartment resident to come inside her apartment to speak with her grandson who was living there.

In State v. Ruem, 179 Wn.2d 195 (2013), the Washington Supreme Court ruled that the special Ferrier warnings were not required to obtain consent where an officer requested consent from a home resident to search his home for a person who was the subject of a current arrest warrant.

In State v. Budd, 185 Wn.2d 566 (2016), the Washington Supreme Court ruled that the special Ferrier warnings were required to obtain consent where an officer requested consent to search a man's residence for a computer suspected of containing contraband. In Budd, the officer gave the special Ferrier warnings only after getting the resident-suspect to let that officer into the residence. The Supreme Court ruled in Budd that the consent was invalid.

Factual and Procedural Background in Mercedes

In early 2018, officers from Snohomish County Animal Services made some contacts with defendant Mercedes on her 2.8 acre horse ranch. The officers met defendant outdoors on every visit to her ranch, and they did not seek entrance into her home. Rather they met her outdoors, and, without any apparent resistance from her, she accompanied the officers into the pasture to inspect the horses there.

The SCS Animal Services Officers did not, on any of the visits, give Mercedes any of the three Ferrier warnings (thus, they did advise the defendant before going into the pasture from her driveway, that she had a right to refuse entry, a right to restrict the scope of any search, or a right to retract consent at any time). After several visits involving checking on the conditions of the horses and counseling of the defendant regarding required care for her horses, the SCS Animal Services officers obtained a search warrant supported by an affidavit. The affidavit was primarily supported by the evidence that had been obtained in the earlier warrantless visits.

The horses were seized in the execution of the warrant. Defendant was charged with two counts of animal cruelty. She filed a motion in Superior Court seeking suppression of (1) any evidence

obtained in the warrantless visits to the property, and (2) any evidence obtained in the execution of the search warrant. Her suppression motion exclusively hinged on her argument to the effect that the officers had been required to give her the three Ferrier warnings to get her consent prior to setting foot off her driveway onto the pastureland.

The Superior Court judge determined that Ferrier applied to this situation of requests by Animal Services Officers for consent to enter fenced private pastureland. Therefore, the Superior Court ruled that any consent given by the defendant was invalid (this statement in the Legal Update reflects that the unpublished November 6, 2023, Court of Appeals decision in this case referenced "consent" being given by the defendant).

The State appealed to the Court of Appeals. On November 6, 2023, Division One issued an unpublished Opinion in which the Court, by a 2-1 vote, ruled that Ferrier does not apply to these circumstances. The Court of Appeals ordered that the case be remanded to the Superior Court in order for the Superior Court to determine whether, viewing the totality of the circumstances, the defendant consented to the officers' entry onto her pasture.

The Dissenting Opinion in the Court of Appeals argued essentially that Ferrier applies broadly to any entry by government officers onto any private land.

The defendant sought and obtained Washington Supreme Court review.

Brief notes about the three separate Opinions in Mercedes as to why Ferrier does not apply to the circumstances in this case

- Opinion authored by Justice Johnson and concurred in by Justices Yu, Madsen, and Whitener

This Johnson Opinion includes the following discussion: (note that the Johnson Opinion does not provide a definition of what the Opinion means by the term "investigative purposes" that I have bolded in the excerpt that follows this parenthetical):

> The officers asked for consent to look at the animals from the outside of the enclosure and not from inside the home. Further, the purpose of [Officer A's] initial visit was to investigate a report of animal cruelty and determine if circumstances existed to seize the animals, not to search for contraband or evidence of a crime. The purpose of [Officer A's] follow-up visits was to monitor Ms. Mercedes's compliance with the feeding and care recommendations given by the veterinarian to determine if further action would be needed. The purpose of [Officer B's] visit was to investigate another complaint, which included determining if the animals had access to food and drinking water. Because the visits were for **investigative purposes** and were conducted outside of the home, these circumstances do not trigger Ferrier requirements.

- Opinion authored by Chief Justice Stephens and concurred in by Justices Yu, Gordon Mcloud, and Montoya-Lewis

The Opinion by Justice Stephens includes the following discussion:

> While these cases [Ferrier, Khounvichai, Ruem, and Budd] all involved a residence with four walls, a roof, and a front door (including a mobile home in Ruem), our holdings did not turn on the physical qualities of the structure but, rather, the police officers' method

and purpose for seeking entry to the home. This is because in Ferrier, we recognized the inherently coercive nature of the knock and talk procedure in which police confront a person they already suspect to be guilty of a crime at the threshold of the place where they are entitled to heightened constitutional protection. . . . We have never suggested that this inherent coercion disappears when police confront a person at the gate of a fence and seek consent to search for evidence in an outdoor part of their home.

Washingtonians live in a variety of settings. There are many types of homes, ranging from apartments and accessory dwelling units in urban and suburban areas to parcels in rural areas that may contain multiple structures. People typically sleep inside a building or structure (though not always), and they often use the space in and around that structure to eat, talk, exercise, play, store belongings, or raise plants and animals. However they live, they have a reasonable expectation of privacy in the objects and activities in their home, except for what they knowingly expose to the plain view of outsiders.

People can shield the outdoor parts of their home from the public view in a number of ways, including with a fence or awning, or by locating objects and activities far from fence lines or a public road. The determination of what constitutes a person's home is highly fact specific and must account for the diverse ways that people in Washington live their lives.

I would not limit the heightened constitutional protection Ferrier recognizes in the home solely to the inside of dwelling, as Justice Pro Tempore Melnick's concurrence suggests.

This case does not require the court to define the boundaries of the home for purposes of article I, section 7 because the officers' actions here did not implicate the need for Ferrier warnings. Each time the officers visited Mercedes's home and sought entry into her horse pasture, their purpose was to follow up on allegations of animal cruelty and monitor Mercedes's compliance with the veterinarian's horse care recommendations, not to seize evidence of a crime they had already determined to be committed by Mercedes.

The officers' actions here do not resemble the show of authority and inherent coercion that rendered Ferrier's consent invalid without a warning of her right to refuse consent.

[Some paragraphing revised for readability; bolding added by Legal Update Editor]

- Opinion authored by Justice Pro Tem Melnick and Justice González

The Opinion by Justice Pro Tem Melnick essentially opines that Ferrier does not apply outside of requests for consent to search a home or its curtilage.

Result: Affirmance of Court of Appeals decision that reversed the suppression ruling of the Snohomish County Superior Court; the case is remanded to the Superior Court for a hearing to determine whether, in light of the totality of the circumstances, the defendant consented to the entry of the officers onto her pasture.

LEGAL UPDATE NOTE/COMMENT: The following are five additional Washington appellate court decisions interpreting Ferrier. They were not discussed or cited in any of

the Supreme Court Mercedes Opinions, and I believe that the holdings in these five Opinions are not undercut by any of the views expressed in the three Mercedes Opinions:

- **State v. Witherrite, 184 Wn. App. 859 (Div. III, Dec. 9, 2014) (Court of Appeals held that Ferrier "knock and talk" warnings were not required to obtain single-party consent to search a vehicle, but the Court of Appeals suggested that giving such warnings whenever seeking consent is the "best practice")**

- **State v. Bustamonte-Davila, 138 Wn.2d 964 (1999) (Supreme Court held that the Ferrier rule does not apply to request for residential entry where officer's intent is to make arrest on INS order, not to search)**

- **State v. Williams (Harlan M.), 142 Wn.2d 17 (2000) (Supreme Court held that request to a homeowner to search residence for a felon-guest wanted on an arrest warrant was not subject to the Ferrier rule)**

- **State v. Tagas, 121 Wn. App. 872 (Div. I, 2004) (Court of Appeals held Ferrier warnings were not required to obtain consent to search the purse of a person to whom officer had offered a ride from the freeway to a nearby restaurant)**

- **State v. Witherrite, 184 Wn. App. 859 (Div. III, Dec. 9, 2014) (Court of Appeals held that Ferrier "knock and talk" warnings were not required to obtain single-party consent to search a vehicle, but the Court of Appeals suggested that giving such warnings whenever seeking consent is the "best practice")**

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WASHINGTON STATE COURT OF APPEALS

SECOND AMENDMENT: DEFENDANT LOSES HIS CONSTITUTIONAL ARGUMENT THAT HIS FELONY CONVICTION FOR VEHICULAR HOMICIDE SHOULD NOT HAVE THE CONSEQUENCE OF RESTRICTING HIS FIREARMS RIGHTS

In State v. Hamilton, ___ Wn. App. 2d ___ , 2025 WL ___ (Div. I, March 17, 2025), Division One of the Court of Appeals rejects the argument of defendant that his conviction in this case should not result in a loss of his firearms rights. He was convicted of vehicular homicide on the basis of driving with disregard for the safety of others and proximately causing a death.

The statutory scheme in chapter 9.41 RCW imposes a bar to firearms rights as to all felony convictions, and the trial judge in this case advised the defendant of this consequence during the sentencing process. Defendant's argument is that for some types of felonies and circumstances (including the circumstances here), the loss of firearms rights is contrary to the historical focus of recent U.S. Supreme Court Second Amendment interpretation.

Defendant thus contended in Hamilton that his Second Amendment challenge is supported by the history-based analysis in two relatively recent U.S. Supreme Court decisions: (1) New York State Rifle & Pistol Association v. Bruen, 142 S.Ct. 1211 (June 23, 2022) (holding that a history-based interpretation of the Second Amendment precludes application of New York's "have and

carry" licensing statute that requires a showing of "proper cause" by any person who wishes to possess a handgun outside of the home); and (2) U.S. v. Rahimi, 144 S.Ct. 1889 (June 21, 2024) (holding that a Federal statute that bars a person subject to a domestic violence restraining order with danger-related wording does not violate the person's constitutional gun rights.)

In lengthy discussion, the Hamilton Opinion discusses (A) these two recent U.S. Supreme Court decisions, and (B) decisions of lower federal courts and the Washington State Court of Appeals where arguments have been raised similar to that posited by Hamilton, i.e., that a given defendant's particular felony conviction and the circumstances of the crime do not, in his or her particular circumstances, support disarming that previously convicted person. The Hamiliton Opinion notes that the Washington Supreme Court has not yet addressed a Second Amendment argument along the lines raised by the defendant in Hamilton.

The Hamilton Opinion notes that the Court of Appeals rejected a similar argument in State v. Ross, 28 Wn. App. 2d 644, 537 P.3d 1114 (2023), review denied by the Washington Supreme Court, 2 Wn.3d 1026 (2024), where the defendant in that case argued that his prior conviction for second degree burglary did not justify taking away his Second Amendment rights. However, the Hamilton Opinion notes that the Ross Opinion did not engage in the "textual-historical" analysis followed in the U.S. Supreme Court majority opinion in deciding New York State Rifle & Pistol Association v. Bruen and U.S. v. Rahimi.

The Hamilton Opinion engages in such analysis and then rejects the defendant's argument under the circumstances of this case, i.e., where the disqualifying felony is vehicular homicide. Thus, the Hamilton Opinion appears to acknowledge that such an argument may have some support where a felony conviction is a type of felony that does not involve danger to others. The Hamilton Opinion explains in the following passage that the circumstances in Hamilton do not support the defendant's Second Amendment argument:

> In Range v. Attorney General United States, the Third Circuit concluded that the federal felon-in-possession statute was unconstitutional as applied to an individual who was convicted of making a false statement to obtain food stamp assistance more than two decades prior. 124 F.4th 218 [3rd Cir. 2024], vacated and remanded sub nom. Garland v. Range, 144 S. Ct. 1706 (2024). But the Range court noted that its decision was "narrow" and emphasized that "the record contains no evidence that Range poses a physical danger to others." Id. at 232. Here, in contrast, Hamilton's actions [killing a person by vehicular homicide] undisputedly caused the death of another person.

Result: Affirmance of the King County Superior Court conviction and sentence of Christopher Ellis Hamiliton for vehicular homicide on the basis of disregard for the safety of others.

LEGAL UPDATE EDITOR'S NOTE AND COMMENT: The Hamiliton Court's analysis of the Second Amendment issue is more nuanced than is the analysis in the Division Three Olson Opinion that is digested in the entry immediately below in this month's Legal Update. This Second Amendment issue is percolating in the courts and appears to be headed ultimately to the U.S. Supreme Court from one of the state or federal courts in the U.S.

DIVISION THREE REJECTS CRIMINAL DEFENDANT'S ARGUMENTS AND HOLDS THAT: (1) HE WAS NOT SUBJECTED TO A PRETEXT STOP BUT INSTEAD WAS SUBJECTED TO A LAWFUL "MIXED MOTIVE" STOP; (2) THE SECOND AMENDMENT DOES NOT PRECLUDE RCW 9.41.040'S BAR TO FIREARMS POSSESSION FOR HIS NON-VIOLENT FELONY CONVICTION FOR ESCAPE FROM COMMUNITY CUSTODY; AND (3) THE BLAKE DECISION DOES NOT SUPER-RETROACTIVELY APPLY SUCH AS TO INVALIDATE THE PREVIOUS ESCAPE-FROM-COMMUNITY-CUSTODY FELONY CONVICTION THAT WAS TIED TO DEFENDANT'S EVEN EARLIER DRUG POSSESSION CONVICTION (HE WAS ON COMMUNITY CUSTODY FOR THE DRUG POSSESION CONVICTION WHEN HE ESCAPED FROM CUSTODY)

In State v. Olson, ___ Wn. App. 2d ___ , 2025 WL ___ (Div. III, March 11, 2025), Division Three of the Court of Appeals affirms the Stevens County Superior Court convictions of Chad Olson for (A) unlawful possession of a firearm in the second degree (RCW 9.41.040(2); (B) possession with intent to deliver methamphetamine; and (C) use of drug paraphernalia.

The Court of Appeals rejects Olson's arguments in which he claims: (1) that he was subjected to a pretext stop; (2) that the U.S. constitution's Second Amendment bars RCW 9.41.040's bar to firearms possession for convictions for non-violent felonies; and (3) that the 2021 Washington Supreme Court decision in State v. Blake, 197 Wn.2d 170 (2021) (which invalidated the former RCW criminally prohibiting simple possession of drugs) must be super-retroactively applied such as to invalidate a previous escape-from-community-custody conviction of over a decade ago. He was on community custody for the prior drug possession conviction when he "escaped from community custody."

I. PRETEXT STOP AND MIXED MOTIVE STOP:

In State v. Chacon Arreola, 176 Wn.2d 284 (2012), the Washington Supreme Court clarified the Court's independent-constitutional-grounds ruling in State v. Ladson, 138 Wn.2d 343 (1999) prohibiting pretextual stops. In Chacon Arreola, the Supreme Court ruled, under the particular circumstances of that case, that a stop with mixed motives (i.e., traffic safety motive and criminal-investigation motive) was lawful.

The Olson Court describes as follows what the Court believes to be the core relevant facts in the Olson case in relation to the pretext stop issue:

> [The officer] worked as a correctional officer for approximately six years. During that time, he first became familiar with Olson because of the times Olson had spent in jail. [The officer] learned of Olson's involvement in the Colville drug scene.
>
> When [the officer] subsequently became a police officer, he continued to be aware of Olson's involvement with controlled substances. [The officer] knew Olson normally drove a white pickup that belonged to either Olson's father or his father-in-law. [The officer] never saw anybody but Olson drive the vehicle. [The officer] had heard from other officers that Olson possessed a firearm and drove around with it.
>
> On the evening of Olson's arrest, [the officer] was on patrol, which partly involved parking in problem or high-crime neighborhoods, or near known drug houses. He also looked for law violators and monitored traffic speed in neighborhoods where children were present.

> [The officer] first saw Olson's vehicle parked near the home of a person who was known to be involved with drugs. It was not the only home in the neighborhood that had such involvement. When he first saw Olson's vehicle, [the officer] did not know with certainty who had parked it. When the vehicle began moving, [the officer] did not know who was driving it. **[LEGAL UPDATE EDITOR'S NOTE: The Olson Opinion contains discussion in other passages indicating that the police officer (with previous experience and previous contacts with Olson in the officer's prior role as a local jail correctional officer) knew that Olson had a history of drug-involvement and was known to drive a vehicle of the same description.]** When Olson's vehicle drove by him, [the officer] made a U-turn, got behind the vehicle, and stopped it.
>
> [The officer] stopped Olson for three infractions: failing to signal; having an obstructed license plate; and having a malfunctioning license plate light. Olson had not been speeding or driving recklessly.
>
> Since becoming a patrol officer approximately two years earlier, [the officer] performed traffic stops on numerous individuals for the same violations that he stopped Olson. No department policy prohibited [the officer] from stopping vehicles for the noted violations. [the officer], per his common practice, did not cite Olson for the traffic infractions, and let him off with a warning. When [the officer] approached the vehicle, he most likely knew Olson would be the driver.

The Olson Opinion concludes as follows that the stop was a mixed-motive stop under Chacon Arreola:

> In this case, the trial court considered both [the officer]'s illegitimate reasons or motivations as well as his legitimate and independent reasons for the stop of Olson. In making factual findings, the court made credibility determinations. The trial court's factual finding that [the officer] stopped Olson for legitimate reasons is supported by substantial evidence. [The officer] has, on numerous occasions, stopped individuals for the same infractions Olson committed. Although there were mixed motives, we conclude that the trial court's factual findings support its conclusions of law. The trial court did not err by denying the motion to suppress.

II. SECOND AMENDMENT ISSUE: As noted above, the Olson Opinion rejects defendant's argument that statutes that take away firearms rights based on convictions for non-violent felonies violate the Second Amendment. The Olson Opinion rejects this argument and notes as follows:

> In State v. Bonaparte, 32 Wn. App. 2d 266, 554 P.3d 1245 (2024), we affirmed the defendant's conviction for [unlawful possession of a firearm]. Although the predicate offense that prohibited the defendant from legally possessing a firearm was a crime of violence, [the Bonaparte decision] points out that other courts have "upheld prohibitions on the possession of firearms by nonviolent felons." Bonaparte, 32 Wn. App. 2d at 277-79.

LED EDITOR'S NOTE/COMMENT: This is an issue that is percolating in state and federal courts around the U.S., and it likely will need to be finally resolved by the U.S. Supreme Court.

III. DEFENDANT'S CLAIM OF SUPER-RETROACTIVITY OF THE 2021 WASHINGTON SUPREME COUR DECISION IN BLAKE:

As noted above, the Olson Opinion rejects defendant's argument for super-retroactivity of the 2021 Blake decision. The Olson Opinion cites cases for the proposition that if a person believes that he or she has been convicted under an unconstitutional law, essentially the person's only recourse for that person to set aside the conviction is to timely file an appeal or personal restraint petition to directly challenge the conviction. The law does not allow a person to escape from custody, and then later argue that the escape was justified based on the unconstitutionality of the law on which the original conviction and custody status was based.

Result: Affirmance of Stevens County Superior Court conviction of Chad Dray Olson for (A) unlawful possession of a firearm in the second degree (RCW 9.41.040(2); (B) possession with intent to deliver methamphetamine; and (C) use of drug paraphernalia.

DEFENDANT IN PROSECUTION FOR CANNABIS GROW OPERATIONS AT FOUR HOMES LOSES HER PROBABLE CAUSE CHALLENGE TO SEARCH WARRANTS FOR THE HOMES, INCLUDING HER ARGUMENTS THAT: (1) PC WAS NOT ESTABLISHED BECAUSE THE AFFIDAVIT IN SUPPORT OF THE WARRANTS DID NOT ESTABLISH THAT LAW ENFORCEMENT CHECKED TO SEE IF THE GROWS WERE LEGAL UNDER WASHINGTON'S LIMITED LEGALIZATION SCHEME; AND (2) ALLEGATIONS IN A WARRANT AFFIDAVIT CANNOT BE CONSIDERED IF IN ISOLATION THEY COULD HAVE AN INNOCUOUS EXPLANATION

In State v. Trang My Le, __ Wn. App. 2d __, 2025 WL __ (Div. II, March 11, 2025), Division Two of the Court of Appeals rejects the probable cause arguments of the defendant, who was prosecuted for overseeing grow operations in four homes, and who was convicted of (A) unlawful possession of a controlled substance with intent to deliver, and (B) unlawful manufacture of a controlled substance.

This Legal Update entry will address the Court's rejection of defendant's two primary legal theories attacking the probable cause for search warrants for the grow houses. The Court holds that (1) the affidavit was not fatally flawed in not alleging that a check of records was done to establish that the grow operations were not legal under Washington law; and (2) factual allegations in an affidavit can add up to probable cause even if most of the allegations have possible innocuous explanations when considered in isolation.

FACTS RELEVANT TO THE PROBABLE CAUSE ISSUES IN THIS CASE

The Court of Appeals summarizes as follows (A) some elements of the affidavit that was presented to the magistrate to support the request for warrants to search the four grow house, and (B) the facts relating to probable cause:

> In his affidavit and application for a search warrant, [the affiant officer] outlined numerous facts to establish probable cause. Among other facts, the affidavit described vehicle movements between the four properties and travel patterns consistent with marijuana grow operations; the detection of the odor of fresh marijuana at two of the four properties; significant and above average power consumption; utility accounts registered under names of individuals not living at the properties (consistent with obfuscation efforts to avoid detection); and no reported income for the four primary individuals involved for

> the three years leading up to the search, despite the fact that during that time, these individuals purchased multiple homes, paid expensive power bills, made home improvements, and drove six vehicles, some of which are considered to be luxury brands. Additionally, [the affiant officer] noted in the affidavit that detectives observed the following: loud humming sounds, consistent with the equipment needed to operate marijuana grow operations; transportation of supplies commonly used for growing marijuana; and frequent traffic of individuals not believed to be living at the residences.

The next five lengthy paragraphs of the Opinion describe details regarding these and other facts alleged in the affidavit to show that grow operations were occurring at four properties. The final paragraph in this part of the Opinion explains as follows that income checks were done which supported the proposition that is was probable that the main suspects were deriving their support from grow operations:

> Finally, the affidavit discusses the results of an Employment Security Department search and a Department of Employment Security check of income for the four Le, Dang, Lu, and David Le. The search revealed that none of these four individuals reported any income for the three years prior to the investigation. Despite no reported income, the affidavit noted that the four individuals purchased multiple homes, paid significantly high energy bills, made home improvements, and purchased multiple vehicles. [The affiant-officer] explained that "marijuana-grow operations are a high cash business wherein an outside source hires on multiple local employees to tend to grows in homes that have been converted specifically for that purpose and whom are then paid regularly in cash for their efforts."

The searches yielded a total of 1,000 plants among three of the houses, along with other evidence related to the four-house operation.

LEGAL ANALYSIS REJECTING DEFENDANT'S THEORY THAT THE AFFIDAVIT WAS REQUIRED TO INCUDE A STATEMENT ABOUT A RECORDS CHECK

The Court of Appeals rejects in lengthy analysis the defendant's argument that the affidavit in this case failed to establish probable cause because nothing in the affidavit established that a records check was done to eliminate the possibility that the grow houses were being operated lawfully under Washington law's limited legalization of commercially growing cannabis. That issue will not be further addressed in the Legal Update. Note that in a note on the WAPA year-to-date case law update, link at https://waprosecutors.org/caselaw/, the WAPA editor comments that "*It's still a good idea to include this information.*")

LEGAL ANALYSIS OF DEFENDANT'S "INNOCUOUS FACTS" ARGUMENT:

The Court of Appeals explains that Fourth Amendment case law is clear that in determining whether probable cause supports a search warrant, affidavits are not to be assessed in a hyper-technical, non-commonsense manner. The Le Court declares that with her "innocuous facts" argument, defendant is asking for a hyper-technical, non-commonsense assessment of the affidavit in this case. The Opinion goes on to explain as follows:

> Here, while the facts outlined in the affidavit when viewed individually may not have been sufficient to establish probable cause, the law requires us to examine whether the facts and circumstances presented, when viewed as a whole, amount to probable cause.

The affidavit outlined numerous facts to support an inference that the defendants were involved in criminal activity, including: vehicle movement and travel patterns; significantly high energy consumption; the odor of fresh marijuana at two of the properties; signs of operating a high cash business; and behavior indicating obfuscation efforts, such as registering utility accounts under the names of individuals who do not appear to live at, or even visit the properties.

According to the affidavit, the vehicle movements and travel patterns observed by officers were "consistent with individuals involved in the manufacture of marijuana." The box truck was observed backing up at the utility building at the Old Highway 99 property, departing eight minutes later, and then arriving and backing up to the utility building at the 101st Ave property. The same vehicles were observed traveling repeatedly to each of the four properties.

The affidavit also outlined unusually high energy consumption at all four properties. At the Old Highway 99 property in the residence, for example, the energy costs per month under a previous owner ranged from $38.05 to $83.86. Under the owner of the account at the time of the search, the energy costs per month jumped from $555.37 to $1,448.31.

The utility building at the Old Highway 99 property began consuming power in 2017, and showed monthly energy costs as high as nearly $3,000. Likewise, the utility building at the 101st Ave location showed energy consumption above the average commercial account. The Capitol Ridge location and the Downey Lane utility building also showed significant increase in power usage and unusually high consumption.

Moreover, the affidavit outlined the fact that utility accounts were registered to individuals who did not appear to live at the properties, and were registered to other people in what appeared to be an effort to "help avoid detection." For example, while the Capitol Ridge property was owned by Dang and Le, the power account for that property is registered to someone named Nguyen Giang, "despite there being no observation of [Giang] or any vehicle registered to him at this location."

While lawful explanations may exist for each of these facts on their own, when viewed together, it is reasonable to infer from these facts that Le and her codefendants were involved in criminal activity.

Even excluding the presence of the odor of marijuana at two of the properties, we are still left with unusual travel patterns, exceptionally high power consumption, what appears to be obfuscation efforts, and evidence of spending significant amounts of money despite no reported income. When viewing the facts contained within the affidavit in this case, even absent the odor of marijuana, it is reasonable to infer that Le and her codefendants were engaged in Criminal activity and that evidence of such activity would be found at the four properties. The trial court did not err in concluding that the affidavit sufficiently established probable cause to search all four properties.

> *Court's footnote 5*: *With respect to Le's argument that if the odor of marijuana contributed to the finding of probable cause, then probable cause is necessarily absent for the two residences where no odor was detected, we disagree. Again, when looking at all of the information provided by law enforcement in the affidavit as a whole, which we must, it provides more than sufficient evidence to support probable cause. All four residences were connected based on the evidence set*

forth in the affidavit. That the odor of marijuana was present at only two of the residences does not erase all of the evidence supporting an inference that these residences were connected in a sophisticated marijuana manufacturing operation.

[Some paragraphing revised for readability]

Result: Affirmance of Thurston County Superior Court convictions of Trang My Le for (A) unlawful possession of a controlled substance with intent to deliver, and (B) unlawful manufacture of a controlled substance.

ANIMAL CRUELTY CONVICTION UNDER RCW 16.08.020 IS UPHELD: ALTHOUGH THE STATUTE WOULD HAVE ALLOWED DEFENDANT TO KILL A NEIGHBOR'S DOG THAT HAD KILLED THE DEFENDANT'S CHICKENS, ATTACKING THE DOG IN A MANNER THAT INFLICTED "UNDUE SUFFERING" WAS ANIMAL CRUELTY

In State v. Sochirca, ___ Wn. App. 2d ___ , 2025 WL ___ (Div. III, March 13, 2025), a three-judge panel Division Three of the Court of Appeals affirms the conviction of defendant for animal cruelty in violation of RCW 16.08.020.

[LEGAL UPDATE EDITOR'S NOTE: One of the three judges on the panel disagrees with the other two judges on an issue not addressed in the Legal Update. The dissenting judge, who did not opine on the issue regarding interpretation of the animal cruelty statute, argued that defendant should not have been allowed to represent himself at trial.]

Facts: (Excerpted from the Majority Opinion):

> Sochirca was at his home when the neighbor's dog, Millie, got into his chicken coop. Millie had on previous occasions gotten into the coop and killed Sochirca's chickens. When Sochirca saw Millie, he got his BB gun, went into the coop, and shot dozens of steel BBs into Millie's head, including her eyes.
>
> Sochirca left the coop, thinking Millie would die. Later, Sochirca checked on Millie and saw she was not dead. He put Millie on a lead and led her away from the coop, onto a pile of snow to die.
>
> Millie's owner, Christopher Buchmann, noticed his dog was missing. Buchmann followed her tracks in the snow to Sochirca's house and asked Sochirca if he had seen Millie. Sochirca told Buchmann he had shot her and took Buchmann to Millie, who was bleeding, but still alive.
>
> Buchmann carried Millie home and drove her to a nearby veterinarian. An X-ray showed there were at least 40 BBs in her head. Millie underwent surgery, survived, but is now blind.

Proceedings below: Defendant was tried in a non-jury trial and convicted of first degree animal cruelty.

LEGAL ANALYIS BY THE COURT OF APPEALS: (Excerpted from the majority Opinion)

A person commits animal cruelty in the first degree "when, except as authorized in law, he or she intentionally (a) inflicts substantial pain on, (b) causes physical injury to, or (c) kills an animal by a means causing undue suffering or while manifesting an extreme indifference to life." RCW 16.52.205(1).

Emphasizing "except as authorized in law," Sochirca argues that his actions were lawful because RCW 16.08.020 makes it lawful to kill a dog when it is seen injuring domestic animals, including chickens. We agree that Sochirca had a right to kill Millie when he saw her attacking his chickens. But RCW 16.08.020 does not allow one to attempt to kill an animal by a means causing undue suffering, such as shooting over 40 steel BBs into a dog's head.

Result: Affirmance of Grant County Superior Court conviction of Savelin Sava Sochirca for first degree animal cruelty.

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NONE OF THE MARCH-2025-ISSUED UNPUBLISHED COURT OF APPEALS OPINIONS MET OUR CRITERIA FOR INCLUSION IN OUR USUAL MONTHLY BRIEF NOTES REGARDING 2025 UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS ON SELECT LAW ENFORCEMENT ISSUES

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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 Assist ant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011) of the Criminal Justice Training Commission's Law Enforcement Digest. From the time of his retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the production of the LED. That arrangement ended in the late fall of 2014. 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.

The Criminal Justice Training Commission continues to publish monthly issues of the Law Enforcement Digest (LED). Monthly LEDs going back to 2009 can be found on the CTJC's website at https://www.cjtc.wa.gov/resources/law-enforcement-digests.

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

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

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

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

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