LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

MAY 2023

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

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Smith v. Agdeppa and LAPD:

On May 4, 2023, a 2-1 vote of the current Ninth Circuit panel in Smith v. Agdeppa and LAPD, sets aside an earlier panel 2-1 ruling against law enforcement and sets the case for re-hearing. The change is apparently due to a replacement of one of the judges who voted in the majority in the earlier ruling that denied qualified immunity to a law enforcement officer who used deadly force and caused the death of person.

On December 30, 2022, in a 2-1 ruling in Smith v. Agdeppa and LAPD a Ninth Circuit panel ruled that factual disputes precluded them from granting qualified immunity to an officer in a deadly force case. The majority judges ruled in the December 30, 2022, decision that there is dispute in the factual record as to whether, in addition to other disputed facts, the shooting officer told the now-deceased person to "stop" pummeling a fellow officer who that person was straddling. Thus, the judges in the earlier majority vote concluded that the summary judgment record would allow a jury to conclude in a trial that (1) the shooting officer did not warn that deadly force was about to be used by the officer, and (2) time would have allowed such a warning before shooting.

However, subsequent to the issuance of the December 30, 2022, ruling, one of the three judges on the assigned Ninth Circuit panel resigned from judicial service, and another judge was substituted on the three-judge panel for the Agdeppa case. Now, in a May 4, 2023, decision, the replacement judge has voted with the judge who had dissented from the earlier ruling. Those two judges have decided that the case must be further considered and a new ruling made on the qualified immunity question.

The December 30, 2022, Ninth Circuit Opinion is no longer on the website for the Ninth Circuit. On request to jrwasberg@comcast.net, I am setting forth immediately below the item that appeared in the December 2022 Legal Update regarding the December 30, 2022 Majority Opinion and Dissenting Opinion.

------ Below is the December 2022 Legal Update entry re Smith v. Agdeppa and LAPD ------

CIVIL RIGHTS ACTION SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: IN A 2-1 RULING, PANEL RULES THAT FACTUAL DISPUTES PRECLUDE GRANTING QUALIFIED IMMUNITY TO OFFICER IN DEADLY FORCE CASE WHERE THERE IS DISPUTE IN THE RECORD AS TO WHETHER – IN ADDITION TO SOME OTHER DISPUTED FACTS – THE SHOOTING OFFICER TOLD THE NOW-DECEASED TO "STOP" PUMMELING A STRADDLED FELLOW OFFICER, AND THE SUMMARY JUDGMENT RECORD ALSO WOULD ALLOW A JURY TO CONCLUDE THAT (1) THE SHOOTING OFFICER DID NOT WARN THAT DEADLY FORCE WAS ABOUT TO BE USED BY THE

OFFICER, AND (2) TIME WOULD HAVE ALLOWED SUCH A WARNING BEFORE SHOOTING

In Smith v. Agdeppa and LAPD, ___ F.4th ___ , 2022 WL ___ (9th Cir., December 30, 2022), a three-judge Ninth Circuit panel votes 2-1 to affirm a the U.S. District Court order that denied summary judgment to the LAPD and its Officer Adgeppa on those government defendants' request for a grant of qualified immunity to the officer in a civil action brought under 42 U.S.C. § 1983. As is often the case in section 1983 use-of-force cases brought under the Fourth Amendment, the case is resolved against the officer seeking qualified immunity in a summary judgment motion because the court (in this case a 2-1 majority) concludes that there is conflicting evidence on key issues under the reasonableness balancing test set out by the U.S. Supreme Court in Graham v. Connor, 490 U.S. 386 (1989).

The lawsuit by Plaintiff (a successor in interest to the deceased Mr. Dorsey) alleges that LAPD Officer Adgeppa used unreasonable deadly force when he shot and killed Albert Dorsey during a failed arrest of the naked, large, erratically-acting Mr. Dorsey in the men's locker room of a private gym. In the District Court summary judgment pleadings and depositions and argument, Officer Agdeppa and LAPD maintained that he killed Dorsey because Dorsey, who was larger than the officers, was pummeling Officer Agdeppa's partner while straddling her while she was on the floor in a vulnerable position, and Officer Agdeppa feared Dorsey's next blow would kill her. Officer Agdeppa also claimed that he yelled "stop" before shooting, but no such warning could be heard on the officers' body-cam recordings (note that both of the officers' body-cams were knocked off of them early in the struggle, and only the audio recording element of the body-cams captured any of the key part of the events, and, again, the word "stop" was not on the audio recording).

MAJORITY OPINION

The Majority Opinion (covering about 20 pages) concludes that qualified immunity was properly denied for the following key reasons:

(1) The audio recording did not capture the officer telling Dorsey to "stop fighting" as the Officer Agdeppa contended in pleadings that he had done, and a jury could conclude that no such order or warning was given, and that there was time to give such an order or warning before shooting;

(2) The U.S. Supreme Court in Tennessee v. Garner, 471 U.S. 1 (1985) declared that under the Fourth Amendment, if practicable under the circumstances, a warning should be given that deadly force is going to be used – (A) there is no evidence in the summary judgment record, not even in Officer Agdeppa's pleadings and deposition, that the officer gave a warning that deadly force would be used if Dorsey did not stop fighting; and (B) there is evidence from which a jury could conclude that there was a reasonable amount of time and that it was not impracticable to give such a warning;

(3) Photographs of Officer Agdeppa's partner taken shortly after the event appeared to show no significant injury, thus providing a basis for a jury to reject Officer Agdeppa's claim of imminent danger of death for his partner; and

(4) The autopsy report and an account by one bystander witness contradicted Officer Agdeppa's report of where Officer Agdeppa was located when he did the shooting.

The Majority Opinion also notes that the Los Angeles Board of Police Commissioners' internal investigation of the shooting concluded that "there was no exigency that required the officers to stay physically engaged with [Dorsey]" and stated further as follows:

> Once the officers had initiated physical contact with [Dorsey], it was readily apparent that [Dorsey's] greater size and strength, in concert with his noncompliant behavior, would make it difficult, if not impossible, for the officers to accomplish their goal of handcuffing him. At that time during the incident, there was no exigency that required the officers to stay physically engaged with [Dorsey]. Nevertheless, the officers did not take the opportunity to disengage from their physical struggle and redeploy in order to allow for the assembly of sufficient resources. Rather, the officers stayed engaged as the situation continued to escalate, culminating in injurious assaults on both officers and the ultimate use of deadly force by Officer [Agdeppa].

LEGAL UPDATE EDITOR'S NOTE: The Majority Opinion does not explain how, under the case law relating to section 1983 deadly force lawsuits, the earlier decisions and activity of the officers would be relevant to the officers' subsequent application of deadly force. For a discussion of that issue and the conflicting case law on the issue, see generally, Professor Cynthia Lee, "Officer-Created Jeopardy Broadening the Time Frame for Assessing a Police Officer's Use of Deadly Force," 89 Geo. Wash. L. Rev. 1362 (2021). On January 3, 2023, the article could be accessed on the Internet at:
https://scholarship.law.gwu.edu/faculty_publications/1529/

DISSENTING OPINION

A Ninth Circuit staff summary (which is not part of the Dissenting Opinion) provides the following brief synopsis of the Dissent (covering about 24 pages):

> Dissenting, Judge Bress stated that the two police officers in this case found themselves in a violent confrontation with a large, combative suspect, who ignored their repeated orders to stop resisting and failed to respond to numerous taser deployments. After the suspect's assault on the officers intensified and he wrested one of the officers' tasers into his own hands, one officer shot the suspect to end the aggression. The split-second decision officers made here presented a classic case for qualified immunity. The majority's decision otherwise was contrary to law and requires officers to hesitate in situations in which decisive action, even if leading to the regrettable loss of human life, can be necessary to protect their own.

The Dissent strenuously objects to much of the Majority Opinion's statements about what the summary judgment record reflects and about Fourth Amendment case law on use of deadly force. The Dissent includes a lengthy discussion disagreeing with key parts of the Majority Opinion's discussion of the deadly force warning requirement of Tennessee v. Garner.

Result: Affirmance of denial of qualified immunity by U.S. District Court (Central District of California) to LAPD officer Agdeppa.

----------End of December 2022 Legal Update entry re Smith v. Agdeppa and LAPD--------

----------End of May 2023 Legal Update entry re Smith v. Agdeppa and LAPD--------

CIVIL RIGHTS ACTION SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: IN DEADLY FORCE CASE, "IMMEDIACY OF THE THREAT" OUTWEIGHED OTHER FACTORS UNDER THE BALANCING TEST OF GRAHAM V. CONNOR AND THUS JUSTIFIED SHOOTING A MAN WHO WAS POINTING AT POLICE WHAT TURNED OUT TO BE A REPLICA GUN

In Estate of Strickland v. Nevada County, ___ F.4th ___ , 2023 WL ___ (9th Cir., May 31, 2023) a three-judge Ninth Circuit panel affirms the U.S. District Court's dismissal for failure to state a claim an action brought under 42 U.S.C. § 1983 and state law alleging that police officers used excessive force when they shot and killed Gabriel Strickland. Mr. Strickland was known to the officers to be homeless and mentally ill, and he was shot after he pointed a black toy airsoft rifle in the direction of the police.

A Ninth Circuit staff summary (which is not part of the Ninth Circuit panel's Opinion) provides the following brief summary of the central ruling in the Opinion:

> The panel held that, under the totality of the circumstances, it was objectively reasonable for the officers to believe that Strickland posed an immediate threat. Construing the facts in the light most favorable to Strickland, he was carrying a replica gun, disregarded multiple warnings to drop it, and pointed it at the officers. While the misidentification of the replica gun added to the tragedy of this situation, it did not render the officers' use of force objectively unreasonable.

The Strickland Opinion's legal analysis concludes that the "immediacy of the threat" in this case outweighs any other deadly force factors that would support the lawsuit of the Plaintiffs under the test of Graham v. Connor, 490 U.S. 386, 395 (1989). The Opinion distinguishes factually two relatively recent Ninth Circuit decisions that each denied summary judgment to law enforcement officers who used deadly force against a person carrying a replica gun.

The Strickland panel's Opinion describes the key facts of the case as follows:

> [O]n January 1, 2020, the Nevada County Region Dispatch received reports that a man was walking on a residential road near a neighboring town, Grass Valley, with "what appeared to be a shotgun" slung over his shoulder. A Grass Valley Police Department officer, Officer Conrad Ball, responded to the call and found Strickland on the road. Strickland was carrying a black, plastic airsoft rifle marked with an orange tip, which signified that it was a replica, not a real firearm.
>
> Along with Officer Ball, Grass Valley Police Department Officers Brian Hooper and Denis Grube and Nevada County Sheriff's Officers Taylor King and Brandon Tripp arrived on scene. They recognized Strickland and knew he was homeless with mental health issues and had been released from custody days before. As a result, the officers would have known that Strickland was likely suffering from a mental health episode and would not likely respond to their commands in a "normal or expected manner."
>
> The officers maneuvered their patrol vehicles around Strickland and surrounded him with guns drawn. They immediately began yelling at Strickland to "drop the gun!" and "drop the fucking gun!" Strickland held the gun away from his body and said, "It's a BB gun." Strickland then slapped the gun with his hand, making a noise that sounded more like plastic than metal.

> One of the officers reported to dispatch: "He's saying it's a BB gun." The officers continued to yell commands to "drop the fucking gun, now" and told Strickland "we don't know that's a fake gun." Strickland pointed to the orange tip on the barrel. Officer Tripp responded, "you could have painted that . . . . We don't want to kill you." Strickland replied, "I'm not doing nothing wrong." Until then, Strickland stood with the barrel pointing at the ground.
>
> The officers did not contact their supervisors for advice or request assistance from other officers with crisis training. They also did not attempt to bring a professional negotiator, crisis de-escalator, or mental health provider to engage with Strickland.
>
> Instead, Officer Tripp asked the other officers to cover him and started approaching Strickland with Officers Hooper and Ball. Officers Tripp and Ball had their firearms drawn, and Officer Hooper was armed with a taser. Officer Tripp then told dispatch to "tell Grass Valley [Police Department] units to get out of [the] cross-fire." As the officers approached, Strickland dropped down to his knees.
>
> At this point, Strickland stopped pointing the BB gun at the ground. Strickland began pointing the BB gun in the direction of Officers Tripp, Hooper, and Ball. At other times, he pointed it up toward the sky. In response, Officer Hooper deployed the taser, but it failed to attach and disarm Strickland. Seconds later, after Strickland lowered the barrel toward the officers, Officers Tripp, King, and Hooper opened fire, striking Strickland several times. Strickland was taken to a nearby hospital, where he was pronounced dead.

[Some paragraphing revised for readability]

Result: Affirmance of U.S. District Court (Eastern District of California) ruling that dismissed the section 1983 lawsuit by the Estate of Strickland.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: FIRST AMENDMENT FREE SPEECH RIGHTS OF A GOVERNMENT EMPLOYEE WERE NOT VIOLATED BY AN ORDER FROM HIS EMPLOYER RESTRICTING HIM FROM SPEAKING WITH POTENTIAL WITNESSES ABOUT A MATTER OF AN INTERNAL INVESTIGATION INTO THE PLAINTIFF'S ALLEGED MISCONDUCT

In Roberts v. Springfield Utility Board, ___ F.4th ___ , 2023 WL ___ (9th Cir., May 12, 2023), a 3-judge panel rules in a Civil Rights Act lawsuit under 42 U.S.C. § 1983, that the Springfield, Oregon, Utility Board did not violate First Amendment protections when the Board restricted him from speaking with potential witnesses and other employees in relation to an internal investigation into plaintiff's alleged misconduct.

After discussing the facts that we have not provided in detail in this Legal Update entry, the panel provides the following legal analysis of the First Amendment issue:

> The limited speech restrictions that SUB placed on Roberts during the pendency of its internal investigation into his alleged misconduct did not violate the First Amendment. A public employer "may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large." . . . When

evaluating such government employer restraints, we apply the two-step balancing test derived from Pickering v. Board of Education, 391 U.S. 563 (1968), and its progeny.

We first look to "whether the employee spoke as a citizen on a matter of public concern." See Garcetti v. Ceballos, 547 U.S. 410, 418 (2006). If so, we then consider "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." If, on the other hand, the speech did not address a matter of public concern, the employee simply has no First Amendment cause of action under Pickering. . . .

"Speech involves matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." . . . . "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." . . . "Speech that deals with 'individual personnel disputes and grievances' and that would be of 'no relevance to the public's evaluation of the performance of governmental agencies' is generally not of 'public concern.'" . . . .

Where, as here, a public employer instructs an employee not to communicate with potential witnesses regarding a workplace misconduct investigation during the pendency of that investigation, the impacted speech generally is not on a matter of public concern under Pickering. Here, the communication restriction affected Roberts' personal ability to discuss only the investigation into his own alleged violation of SUB personnel policies governing time off and employee dishonesty.

Further undercutting Roberts' claim, his attorney was not restricted from contacting any SUB employees about Roberts' alleged actions during the pendency of the investigation. Any speech impacted by SUB's instruction concerned a quintessential "individual personnel dispute[]" that is of "no relevance to the public's evaluation of [SUB's] performance." . . . .

Roberts resists this conclusion by arguing that the communication restriction was "[not] limited to topics relating to the investigation" and "covered all speech" with "his co-employees," including speech regarding the "abuse of employees by management, mismanagement of funds, and hostilities in the workplace created by management." But this mischaracterizes the record.

Contrary to Roberts' assertions, nothing in Defendants' instructions barred him from speaking about any alleged mismanagement at SUB or other topics that would potentially relate to a matter of public concern. Instead, the restriction placed on Roberts' speech pertained only to communication with SUB employees or other potential witnesses regarding the ongoing investigation into his alleged misconduct. Roberts was free to speak with fellow employees—or anyone else—regarding SUB's "performance" of its duties had he wished to do so. . . . Accordingly, his First Amendment claim fails.

[Footnote omitted; some case citations omitted; some paragraphing revised for readability]

Result: Affirmance of U.S. District Court (Oregon) grant of summary judgment to the Springfield (Oregon) Utility Board.

CHILD PORNOGRAPHY UNDER FEDERAL LAW: EVIDENCE RELATING TO DEFENDANT'S SECRET FILMING OF HIS STEPDAUGHTER IN A BATHROOM HELD TO BE SUFFICIENT UNDER DOST STANDARDS TO SUPPORT CONVICTION UNDER 18 U.S.C. § 2252A(a)(5)(B)

In United States v. Boam, ___ F.4th ___ , 2023 WL ___ (9th Cir., May 30, 2023), a 3-judge Ninth Circuit panel affirms the conviction of Idaho U.S. District Court of Tel James Boam for attempted sexual exploitation of a minor under 18 U.S.C. § 2251(a) and possession of child pornography under 18 U.S.C. § 2252A(a)(5)(B).

A Ninth Circuit staff summary (which is not part of the Court's Opinion) provides the following synopsis of the trial court procedural background and the Boam Court's Opinion as follows:

> At trial, the jury heard extensive evidence that Boam placed a hidden camera in his bathroom with the purpose of secretly recording and amassing a collection of nude videos of his then fourteen-year-old stepdaughter, T.A.
>
> Boam asserted [on appeal] that there was insufficient evidence to support his convictions.
>
> He argued that he did not attempt to employ, use, persuade, induce, or entice T.A. in a manner that violates § 2251(a). Based on a review of the evidence in the light most favorable to the government, the panel concluded under this court's caselaw that there was sufficient evidence for a rational jury to find that Boam attempted to "use" T.A. in violation of § 2251(a).
>
> Boam also argued [on appeal] that there was insufficient evidence from which a reasonable jury could conclude that the videos meet the statutory requirement of "sexually explicit conduct," as defined by 18 U.S.C. § 2256(2)(A)(v), which applies to both §§ 2251(a) and 2252A. Under both statutes of conviction, "sexually explicit conduct" is defined, in relevant part, as a "lascivious exhibition" of a person's "genitals" or "pubic area."
>
> Boam mainly contended that the videos are not lascivious exhibitions of T.A.'s genitals or pubic area because the videos are "strictly hygienic" and "not sexual in nature." Based on its review of the videos, and using as guideposts the factors set forth in United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986) . . . , the panel concluded that the district court did not clearly err in finding that the videos reasonably fell within the definition of sexually explicit conduct.
>
> The panel wrote that the district court did not clearly err in determining that a reasonable jury could find (1) that the focal point of the videos was on T.A.'s genitals or pubic area, (2) that T.A. is fully nude in the videos, and (3) that the videos were intended or designed to elicit a sexual response in the viewer. The panel reached the same result under a de novo review of the sufficiency of the evidence.

[One case citation omitted; some paragraphing revised for readability]

This Legal Update entry will not address the extensive facts regarding defendant's actions. Nor will this Legal Update excerpt from or summarize the sufficiency-of-the-evidence legal analysis by the Ninth Circuit panel, other than to set forth the six Dost factors that were stated in United

States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986) and have been adopted by the Ninth Circuit in subsequent decisions. The six Dost factors are:

1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;

2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;

3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;

4) whether the child is fully or partially clothed, or nude;

5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;

6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

The Boam Opinion explains in detailed analysis why the evidence supports the conviction under the Dost factors.

Result: Affirmance of Idaho U.S. District Court conviction of Tel James Boam for attempted sexual exploitation of a minor under 18 U.S.C. § 2251(a) and possession of child pornography under 18 U.S.C. § 2252A(a)(5)(B).

LEGAL UPDATE EDITORIAL NOTE: See chapter 9.68A RCW for Washington State crimes relating to "Sexual Exploitation of Children." Included in that RCW chapter is RCW 9.68A.050 prohibiting "Dealing in Depictions of Minor Engaged in Sexually Explicit Conduct."

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WASHINGTON STATE COURT OF APPEALS

THREE SEARCH ISSUES DECIDED AGAINST THE STATE: (1) DRIVER OF CAR LACKED THIRD PARTY AUTHORITY TO CONSENT TO A SEARCH OF BACKPACKS THAT A PASSENGER HAD LEFT IN THE CAR WHILE ATTEMPTING TO ESCAPE FROM A TRAFFIC STOP ON FOOT; (2) THE MERE FACT OF AN ESCAPE ATTEMPT DOES NOT SUPPORT THE STATE'S "ABANDONMENT" THEORY REGARDING THE BACKPACKS; AND (3) "INEVITABLE DISCOVERY" IS NOT APPLICABLE AS AN EXCEPTION TO THE EXCLUSIONARY RULE UNDER THE WASHINGTON CONSTITUTION

In State v. Garner, ___ Wn. App. 2d ___ , 2023 WL ___ (Div. II, May 31, 2023), Division Two of the Court of Appeals reverses the drug convictions of defendant based on his constitutional search law arguments that: (1) the driver of a car in which he was a passenger at the time of a traffic stop lacked third party authority to consent to a search of backpacks that defendant had left behind in the car while attempting to escape from law enforcement; (2) the mere fact of the passenger's escape attempt does not support the state's "abandonment" theory (this issue is decided by a 2-1 vote in the Court of Appeals); and (3) "inevitable discovery" is not applicable as an exception to the Exclusionary Rule under the Washington constitution, article I, section 7.

The first and third issues are readily resolved by the three-judge Division Two panel.

Issue 1 (Third Party Consent): The three members of Division Two of the Court of Appeals panel in Garner agree that a driver who permits a passenger to ride in the driver's car does not have authority to consent to a search of a container belonging to the passenger, even if the passenger is not present at the time of law enforcement's request for consent, and even if the passenger has left the scene to evade arrest by the police.

Issue 3 (The Inevitable Discovery Exception to Exclusion of Evidence)

The State argued in Garner that, under the "Inevitable Discovery" exception to the Exclusionary Rule of the Fourth Amendment, the contents of the backpacks should be admissible because, even if the consent search had not occurred, the backpacks would have been searched in an impound-inventory search of the car. The three members of the Court of Appeals panel in Garner agree that this argument by the State is precluded under the Washington Supreme Court decision in State v. Winterstein, 167 Wn.2d 620 (2009), which held that the more restrictive Exclusionary Rule of the Washington constitution, article 1, section 7, does not provide an "inevitable discovery" exception to the Exclusionary Rule.

Issue 2 (Abandonment Theory)

The Garner panel votes 2-1 to reject the State's argument that defendant Garner abandoned the backpacks when he left them behind when he fled from the car to avoid arrest by the police. In key part, the legal analysis on the abandonment theory in the Garner Majority Opinion is as follows:

> Police "'officers may retrieve and search voluntarily abandoned property without implicating an individual's rights under the Fourth Amendment or under article I, section 7 of our state constitution.'" . . . A person voluntarily abandons property where, in leaving the property, they relinquish their reasonable expectation of privacy in it. . . .
>
> In determining whether relinquishment occurred, we consider "the status of the area where the searched item was located." Id. at 885. As explained above, a person has a reasonable expectation of privacy in their bag. . . . Moreover, we generally decline to find abandonment if the defendant left the item in an area where they had a privacy interest, such as the interior or the hood of their car. . . . This is true even if the defendant disclaimed ownership of the item. . . .
>
> Conversely, we generally find abandonment if the defendant had "no privacy interest in the area where the searched item [was] located." . . . For example, in [State v. Reynolds, 144 Wn.2d 282 (2001)} the Washington Supreme Court held that a passenger voluntarily abandoned his coat when, after an officer arrested the car's driver, the officer found the passenger's coat on the ground and "'stuffed underneath the passenger side of the vehicle.'" And in [State v. Samalia, 186 Wn.2d 262 (2016)], the court found that a defendant abandoned his cell phone where he left it in a stolen vehicle while fleeing from a police officer.
>
> We also consider whether the defendant showed an intent to recover the property, generally finding no relinquishment of a reasonable expectation of privacy where they displayed that intent. . . . For example, in State v. Kealey, we held that a defendant

mislaid, rather than abandoned, her purse when she left it on a department store couch and returned to the store five minutes later to look for it. 80 Wn. App. 162 (1995). In contrast, in Samalia, the Washington Supreme Court held that the defendant did not show an intent to recover his cell phone when he left it behind while fleeing a stolen vehicle despite an officer's commands. And in United States v. Nowak, a federal case with factual similarities to this one, the Eighth Circuit held that a passenger who left his backpack in a friend's car had abandoned it, reasoning that the passenger never "gave any indication—verbal or otherwise—that he" wanted his friend to safeguard the backpack and that the circumstances did not "lend themselves to such a conclusion." 825 F.3d 946, 949 (8th Cir. 2016).

Garner had a reasonable expectation of privacy in his backpacks. And while Washington case law does not squarely address whether a passenger has a reasonable expectation of privacy in items left in another's car, our cases point to the conclusion that Garner did not relinquish his expectation of privacy when he left his backpacks in the driver's car. Unlike the defendant in Samalia, Garner did not leave his backpacks in a stolen car.

He left them in a car he had occupied with the driver's permission. And unlike the defendant in Reynolds, he did not remove the backpacks from the car and leave them on the road. Rather, Garner, who lacked housing, left his belongings with a person he knew. Moreover, Garner never disclaimed ownership of the backpacks. He took the time to put two of the backpacks on the vehicle's rear floorboard and tried stowing the third backpack under the driver's seat. The circumstances lend themselves to the conclusion that he intended to safeguard the backpacks until he could recover them.

The dissent focuses on the fact that Garner was fleeing law enforcement. But in determining whether a person relinquished their reasonable expectation of privacy in their property, Washington case law directs us to focus primarily on where the item was located and whether the defendant showed an intent to recover it. . . . It does not direct us to heavily weigh a person's reason for leaving the item behind.

Thus, the Samalia court noted the defendant's flight from law enforcement only while discussing the defendant's lack of a privacy interest in the stolen car and the unlikelihood that a person in his position would have gone back to retrieve his phone. The Samalia court did not rely exclusively on the fact that Samalia was fleeing the police.

In contrast, Garner left his belongings in a place he reasonably expected they would remain private, in the driver's car, and he showed an intent to recover his backpacks by attempting to conceal them. Under these circumstances, we hold that the abandoned property exception to article I, section 7, does not apply. Our holding accords with case law emphasizing that exceptions to the warrant requirement should remain "carefully drawn and jealously guarded." . . .

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

Result: Reversal of Cowlitz County Superior Court for convictions of Jerome Isaiah Garner on two counts of possession of controlled substances with intent to deliver.

CRIMINAL DEFENSES OF EXCUSABLE HOMICIDE AND JUSTIFIABLE HOMICIDE ARE HELD TO APPLY TO ALL FORMS OF ILLEGAL HOMICIDE, INCLUDING MANSLAUGHTER IN THE FIRST DEGREE OR SECOND DEGREE

In State v. Moreno, ___ Wn. App. 2d ___ , 2023 WL ___ (Div. III, May 18, 2023), Division Three of the Court of Appeals, rules that defendant's first degree manslaughter conviction is invalid because his attorney constitutionally ineffective. The defense attorney should have requested that the jury be instructed that excusable homicide and justifiable homicide are viable defenses to manslaughter to the same extent that those defenses are viable defenses to first degree murder or second degree murder.

The Moreno Court summarizes the procedural background and the Court's ruling as follows:

> Leslie Moreno was charged with first degree premediated murder but was convicted at trial of the lesser offense of first degree manslaughter. Ms. Moreno asserted a claim of self-defense based on a theory of either excusable or justifiable homicide. The jury was instructed on justifiable and excusable homicide as to first degree murder and two other lesser offenses.
>
> But Ms. Moreno's attorney failed to request similar instructions as to first degree manslaughter. Ms. Moreno's trial attorney repeatedly admitted on the record that they did not make this request based on their belief that the defenses of excusable and justifiable homicide did not apply to first degree manslaughter.
>
> On appeal, Ms. Moreno argues her trial attorney provided constitutionally ineffective representation when the attorney failed to seek self-defense instructions applicable to first degree manslaughter. We agree.
>
> Trial counsel failed to recognize the defenses of excusable and justifiable homicide can apply to all forms of illegal homicide. As a result, the court's jury instructions improperly suggested Ms. Moreno's defenses did not apply to the offense of first degree manslaughter, of which she was ultimately convicted. Because counsel's error sufficiently undermines our confidence in the outcome, we must reverse Ms. Moreno's conviction.

[Some paragraphing revised for readability]

The Moreno Court summarizes the applicable law as follows:

> The legislature has identified four types of homicide: "(1) murder, (2) homicide by abuse, (3) manslaughter, (4) excusable homicide, [and] (5) justifiable homicide." RCW 9A.32.010. Only the first three types of homicide are crimes. . . . An accidental or intentional killing in the course of self-defense falls under the fourth or fifth type: excusable homicide or justifiable homicide. . . . Because neither excusable nor justifiable homicide is a criminal act, they are both available defenses to a charge of illegal homicide, including a charge of manslaughter. . . . Thus, contrary to what Ms. Moreno's attorney asserted during trial, the defenses falling under the rubric of self-defense were legally available in Ms. Moreno's case as to first degree manslaughter.

https://www.courts.wa.gov/opinions/pdf/384250_pub.pdf

Result: Reversal of Walla Walla County Superior Court conviction of Leslie Melgar Moreno for first degree manslaughter; case remanded for re-trial.

"ATTENUATION" EXCEPTION TO THE EXCLUSIONARY RULE OF ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION IS HELD TO NOT APPLY UNDER THE FACTS OF CASE WHERE INFORMATION OBTAINED IN AN UNLAWFUL SEIZURE IN A DRUG INVESTIGATION WAS USED IN A SEARCH WARRANT IN A MURDER INVESTIGATION

In State v. McGee, ___ Wn. App. 2d ___ , 2023 WL ___ (Div. I, May 30, 2023), Division One of the Court of Appeals reverses defendant's conviction for second degree murder.

The State conceded in the case that, during a drug investigation, a sheriff's deputy unconstitutionally seized Malcolm McGee, questioned him, searched him, and collected his phone number and other information. In a later murder investigation, the State relied on the evidence that the deputy had unconstitutionally gathered in the earlier unlawful seizure. The evidence was used to connect McGee to the murder and to obtain at least four warrants for his phone records, cell site location information, and, among other things, his arrest. These fruits of the unlawful seizure led to McGee's conviction for second degree murder.

In the trial court, the State successfully argued to the trial court that the "attenuation" exception (referred to as the "Attenuation Doctrine") to the Exclusionary Rule of the Washington constitution (article I, section 7) applies in this case because the murder occurred after the unlawful seizure occurred. The Court of Appeals rules in McGee that the trial court was mistaken in applying the attenuation exception. In lengthy analysis (not otherwise summarized or excerpted in this Legal Update entry), the McGee Court explains its view that the attenuation exception does not apply because the homicide was not a cause of the discovery of evidence that was the fruit of original unlawful stop. Thus, the fact of the subsequent occurrence of the murder does not qualify as an attenuating circumstance. The murder was not an intervening act amounting to a superseding cause of discovery of evidence.

Result: Reversal of King County Superior Court conviction of Macolm Otha McGee for second degree murder; case remanded to Superior Court for possible re-trial where the evidence that is the fruit of the unlawful seizure will be inadmissible.

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

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

Every month I will include a separate section that provides brief issue-spotting notes regarding select categories of unpublished Court of Appeals decisions that month. I will include such decisions where issues relating to the following subject areas are addressed: (1) Arrest, Search and Seizure; (2) Interrogations and Confessions; (3) Implied Consent; and (4) possibly other

issues of interest to law enforcement (though generally not sufficiency-of-evidence-to-convict issues).

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

1. Chin Fu Chen and My Tieu Lao v. Clark County Sheriff's Office: On May 9, 2023, Division Two of the COA rejects the probable cause staleness challenge by Chen and Lao to a search warrant for seizure of the challengers' bank accounts that were allegedly generated by an illegal cannabis grow operation. *The Court of Appeals affirms successive rulings upholding forfeiture by the Clark County District Court and Superior Court.*

Key analysis by the Court of Appeals rejecting the staleness argument is as follows:

> **The issue here is whether the facts stated in the warrant affidavit supported the determination that some of the proceeds Chen and Lao accumulated from their illegal activities between 2016 and January 2020 remained in their bank accounts in December 2020. . . . We conclude that the common sense inference from the information in the December 2020 affidavit is that illegal proceeds remained in the bank accounts at the time of the search and seizure.**
>
> First, the affidavit [of the financial officer for the Clark County Sheriff's Office] supports the commonsense conclusion that proceeds from illegal activities were in Chen and Lao's bank accounts in January 2020. [The affidavit] stated that from 2016 through 2019, Chen and Lao had $225,000 in unreported income, spent $72,000 more than their legitimate income on living expenses, and had $154,000 in increased cash on hand and asset acquisitions. Although Luciano did not specify the amount of increased cash on hand, he clearly concluded that there was some amount of cash on hand in the bank accounts that related to illegal activities.
>
> Chen and Lao repeatedly claim that [the] affidavit established that any illegal proceeds already had been spent by the end of 2019. But the affidavit language does not support this claim – [the affidavit] did not state that Chen and Lao had spent all the illegal proceeds. In fact, [the affiant] opined in the affidavit that "[a]ny bank balance represents illegal proceeds."
>
> Second, [the] affidavit supports the commonsense conclusion that at least some proceeds from illegal activities remained in Chen and Lao's bank accounts in December 2020. The parties debate whether Chen and Lao would have used the illegal proceeds or the legitimate income in the bank accounts to pay expenses during 2020. But this issue is immaterial because it is undisputed that Chen and Lao commingled the illegal proceeds and the legitimate income. As noted in [State v. Maddox, 152 Wn.2d 499, 506 (2004)], the type of property to be seized is an important factor regarding staleness. Once money is commingled in a bank account, it is impossible to determine the source of any particular amount. Because there was no practical distinction between Chen and

> Lao's legitimate income and their illegal proceeds once they were commingled, the common sense inference is that the money was spent on a pro rata basis. Therefore, unless the account balances went to zero at some point after January 2020, some of the illegal proceeds necessarily remained in those accounts.
>
> We conclude that the information in the warrant affidavit supported a commonsense determination that Chen and Lao had "continuing and contemporaneous possession" of at least some illegal proceeds in their bank accounts in December 2020. . . . . Therefore, we hold that the district court and the superior court did not err in concluding that the information supporting the December 2020 search and seizure warrant was not stale.

[Record citations omitted and most case citations omitted]

The Opinion by the Court of Appeals in Chin Fu Chen and My Tieu Lao v. Clark County Sheriff's Office can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2057002-5-II%20Unpublished%20Opinion.pdf

2. State v. Rick Alan Johnson: On May 16, 2023, Division Two of the COA rejects the challenge by defendant to his Pierce County Superior Court convictions for (A) *residential burglary* and (B) *harassment (bodily injury)*.

The convictions arose out of an incident where Johnson climbed through his former girlfriend's window and threatened her. The former girlfriend called 911. The trial court admitted a recording of the 911 call into evidence even though the former girlfriend had subsequently recanted her statements that she had made to the dispatcher during the phone call. At trial, the former girlfriend was deemed not available to testify, but her written statement recanting the phone call statements was admitted into evidence, and her recanting statement was read to the jury by the defendant's attorney.

The Court of Appeals holds that (1) the statements by the former girlfriend in the 911 call were admissible under the excited utterance exception to the hearsay rule, and (2) admitting the 911 call into evidence did not violate Johnson's right to confront witnesses against him because the statements that the former girlfriend made in the call were not "testimonial" within the meaning of the case law on the Sixth Amendment right of confrontation.

The Court's legal analysis of the ***excited utterance hearsay exception*** includes the following:

> First, Jackson experienced a startling event. Jackson woke up to find Johnson at her window, and he then climbed through the window. Johnson told her, "I'm gonna f**k you up" when he entered through the window. Ex. 5C at 3:20 to 3:31.
>
> Second, Jackson's conversation with the 911 operator was made under the stress of excitement of that event. Jackson ran to her upstairs neighbor's apartment to call 911 immediately after Johnson entered through her window. Johnson followed Jackson to her neighbor's apartment.
>
> Johnson was standing outside the door, knocking and trying to open the door during the 911 call. Jackson said that Johnson wanted to hurt her. This means that the "event" still was ongoing when Jackson talked with the 911 operator. The circumstances

surrounding the call support the conclusion that Jackson still was under the stress of excitement when she made her statements to the 911 operator.

Johnson argues that there is no indication that Jackson was excited during the call. She spoke in the past tense, her demeanor was calm throughout the call, and she did not cry or scream. However, Jackson spoke in a hushed voice, and whispered when she approached the door where Johnson was standing outside.

And Jackson was audibly startled when law enforcement knocked on the door and exclaimed "He's knocking!" even though the operator had just informed Jackson that law enforcement had arrived. Jackson's quiet tone of voice and heightened reaction to the knock at the door are consistent with someone hiding from a perceived threat. These facts indicate that Jackson still was under the stress of excitement when she made her statements to the 911 operator.

[A responding officer's] trial testimony supports a conclusion that Jackson was still under the stress of the event. [The officer] testified that when he spoke to Jackson in the moments immediately after she made the 911 call, "[s]he appeared highly distraught. She was crying. She appeared scared to me. She was physically shaking." Because Jackson was distressed immediately after the 911 call, it is reasonable to conclude that she also was distressed during the 911 call.

Third, Jackson's statements related to the startling event. Jackson told the 911 operator what had happened. And her description of Johnson and other details were directly related to the event.

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

The Court's legal analysis of the ***Sixth Amendment Right of Confrontation issue*** includes the following:

The confrontation clause prohibits the admission of "testimonial statements" made by an unavailable declarant when the defendant has not had a prior opportunity to cross-examine the declarant. [State v. Burke, 196 Wn2d 712 (2021)] We use the primary purpose test to determine whether an out-of-court statement is testimonial. We consider the circumstances under which the statement was made in determining the primary purpose of a statement. [State v. Burke].

"Statements are testimonial when they are made to establish past facts in order to investigate or prosecute a crime." [State v. Burke] However, statements made for another primary purpose are nontestimonial. [State v. Burke]. The Supreme Court in Burke stated,

Statements made to assist police in addressing an ongoing emergency is a well-established nontestimonial purpose. For example, frantic statements to a 911 emergency operator describing the identity of an assailant in a domestic disturbance in progress were nontestimonial because the declarant was seeking help in the face of immediate danger.

In addition, statements made to persons other than law enforcement officers are less likely to be deemed testimonial. [State v. Burke]

> The recording and circumstances of the 911 call support a conclusion that Jackson made her statements to the 911 operator during an ongoing emergency for the purpose of receiving help. Jackson was not merely providing information to assist in the investigation of a crime.
>
> She was urgently seeking assistance in an ongoing situation. As Jackson spoke with the 911 operator, Johnson was knocking and trying to open the door. Jackson stated that "he wants to hurt me." All of Jackson's statements were made for the purpose of enabling law enforcement to respond to an ongoing emergency.

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

The Opinion in State v. Rick Alan Johnson can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2056682-6-II%20Unpublished%20Opinion.pdf

3. State v. William Phillip, Jr.: On May 30, 2023, Division One of the COA rejects the *challenge by a first degree murder defendant to a King County Superior Court ruling that denied his motion for suppression of evidence that law enforcement obtained from his cell phone provider under a 2020 search warrant.* This Legal Update entry will not address the extensive facts or the highly fact-based analysis of **legal issues that were unsuccessfully raised by defendant under defendant's arguments: (1) against application of the Independent Source exception to the Exclusionary Rule under the facts of this case; (2) that the warrant affidavit improperly relies on generalities regarding cell phone usage, and that the warrant's authorization to obtain a two-month span of cell phone is somehow violative of nexus and scope requirements for search warrants; and (3) that the search warrant affidavit contains material misrepresentations and material omissions.** The case is remanded for trial on the charge of first degree murder.

The Opinion in State v. William Phillip, Jr. can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinion&filename=827481MAJ

4. State v. Mickey Pine.: On May 31, 2023, Division Two of the COA rejects the challenge by defendant to his conviction in Pacific County Superior Court of *vehicular homicide*. **Among other things, the Court of Appeals rules that (1) defense counsel did not provide ineffective assistance in the trial court when the defense counsel did not raise a challenge under Franks v. Delaware, 438 U.S. 154 (1978) to a warrant for a blood draw** (the Court of Appeals opines on this issue that the evidence does not support the defendant's theory that in the affidavit by the WSP Trooper in support of the blood draw warrant the WSP Trooper knowingly or recklessly made false statements); **and (2) the trial court did not abuse its discretion in admitting into evidence the WSP Trooper's testimony about her observations at a hospital of Pine's eye movements as a doctor performed a horizontal and vertical gaze nystagmus tes**t.

The Opinion in State v. Mickey S. Pine can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2056439-4-II%20Unpublished%20Opinion.pdf

5. State v. Robert Howard Cone: On May 31, 2023, Division Two of the COA rejects the challenge by defendant to his conviction in Clark County Superior Court of *fourth degree assault.* Among other things, **the Court of Appeals rules that Cone was not in custody and therefore Miranda warnings were not required when a police officer who responded to a**

possible DV call questioned the defendant outside of the defendant's home. In key part, the Cone Opinion's analysis of the Miranda custody issue is as follows:

> If a state agent subjects a suspect to a routine Terry stop, the suspect is not in custody. . . . To that end, an agent "may ask a moderate number of questions during a Terry stop to determine the identity of the suspect and to confirm or dispel the [agent]'s suspicions without rendering the suspect 'in custody'" . . . . In State v. Hilliard, the court held that the suspect was not in custody even though they would not have been allowed to leave until he answered questions. 89 Wn.2d 430 (1977).
>
> But where a state agent interrogates a suspect in their own home and the circumstances of the interrogation turn the home into a "police-dominated atmosphere," the suspect is in custody. State v. Rosas-Miranda, 176 Wn. App. 773 (2013)] (citing United States v. Craighead, 539 F.3d 1073, 1084 (9th Cir. 2008)). In Craighead, the Ninth Circuit determined that the following factors were relevant to whether the home turned into such an environment:
>
> > (1) the number of law enforcement personnel and whether they were armed; (2) whether the suspect was at any point restrained, either by physical force or by threats; (3) whether the suspect was isolated from others; and (4) whether the suspect was informed that he was free to leave or terminate the interview, and the context in which any such statements were made.
>
> That list is not exhaustive. Indeed, the duration and character of the questioning are also relevant to whether the suspect is in custody. . . .
>
> In Craighead, eight armed law enforcement officers executed a search warrant on Craighead's residence, and some of the officers unholstered their weapons near Craighead. The officer in charge informed Craighead that he was free to leave but then directed him to a storage room at the back of his house for a private interview without informing him of his Miranda rights. The interview lasted twenty to thirty minutes. During the interview, another officer leaned against the wall near the only exit in the storage room, and the door to exit the room was closed. The officers did not make threats or promises to induce Craighead to speak. Craighead made incriminating statements during the interview.
>
> Under the aforementioned factors, the Ninth Circuit held that Craighead was in custody as the law enforcement officers turned the residence into a police-dominated environment, like being in formal custody. The Ninth Circuit emphasized that Craighead reasonably believed he could not leave when he was escorted to the storage room with an armed officer standing by the only exit.
>
> In contrast, in Rosas-Miranda, three officers knocked on Angel Rosas-Miranda's door. The lead officer asked if they could search Angel's apartment, which he and his sister, Elvia, eventually consented to. Eight or nine officers searched the apartment for about ninety minutes. The lead officer stayed in the living room with Angel and Elvia during the search. The lead officer did not tell them they had to stay there or otherwise restrict their movement.
>
> Eventually, the officers found drugs and firearms. The lead officer asked Elvia about residue near a toilet that the officers suspected was heroin; this conversation occurred

within earshot of Angel. Elvia divulged that she was frightened when the officers arrived and decided to flush the heroin that Angel brought to the apartment down the toilet. Under these circumstances, we held that Elvia was not in custody.

Here, even if we assume without deciding that the Craighead factors apply, we hold that Cone was not in custody at the time of his statements.

First, [the officer here] was the only officer present when Cone made his incriminating statement—a far cry from the eight officers in Craighead. [The officer] was uniformed and armed but did not unholster his firearm. While another officer arrived during [the first officer's] contact with Cone, the statements at issue were made when only [the first officer] was on the scene making the additional officer irrelevant for purposes of this analysis. Consequently, the number of officers factor weighs against finding that there was a police-dominated atmosphere.

Second, [the officer] did not restrain, threaten, or promise anything to Cone to induce his statements. Cone was not restrained during [the officer]'s contact.

> [Court's Footnote 4: *Cone emphasizes that [the officer] did not intend to let him go based on a statement the officer made during his cross-examination in the CrR 3.5 hearing. But this intent was not conveyed to Cone during the initial contact. And the officer's unstated intent is irrelevant to the custody determination. [State v. Lorenz, 152 Wn.2d 22, 37 (2004)*.]]

Cone sat on a bench outside his home, five feet away from [the officer], during the initial contact. The bench was located in an open area of the residence that was not enclosed in any way, wholly unlike the cluttered storage room in Craighead, which had one closed exit with an armed officer standing nearby while Craighead was questioned by another officer. Consequently, the restraint factor also weighs against finding that there was a police-dominated atmosphere.

Third, Cone was alone outside. Although we recognize that isolated interrogation without the moral support of others can encourage the divulgence of inculpatory statements, [the officer] did not isolate Cone from friends or family. Rather, [the officer] merely approached Cone where he was located, outside his home sitting on a bench. This factor is neutral as to whether there was a police-dominated atmosphere.

Fourth, [the officer] did not tell Cone that he was free to leave or terminate the three-to-four-minute contact. While the initial contact was short, not advising Cone that he was free to leave or terminate the contact weighs in favor of finding that there was a police-dominated atmosphere.

Under these circumstances, we hold that Cone was not in custody, Miranda warnings were not required, and Cone's statement and related demonstration to [the officer] were admissible as evidence. Thus, the trial court did not err in admitting Cone's pre-Miranda statements and demonstration.

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

The Opinion in State v. Robert Howard Cone may be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2056525-1-II%20Unpublished%20Opinion.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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