LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

APRIL 2021

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TASER-HANDGUN CONFUSION ARTICLE FROM AELE (AMERICANS FOR EFFECTIVE LAW ENFORCEMENT)

As one of many on an e-mail list, your Legal Update editor recently received the following message from John G. Peters, Jr., Executive Director of AELE (Americans for Effective Law Enforcement). AELE is a highly reputable public safety educational and training organization founded in 1966.

> Hello everyone,
>
> The recent and tragic events in Minnesota where a veteran training officer confused her handgun for a TASER electronic control weapon (ECW) that resulted in her shooting and killing a Black person who was stopped for a traffic violation is not the first time this confusion has happened. The first such confusion case happened in 2002, with one of the most visible incidents happening in 2009 on the Bay Area Rapid Transportation (BART) train platform in Oakland, CA when then-BART Officer Johannes Mehserle shot and killed Oscar Grant, Jr. after confusing his handgun for his TASER ECW.
>
> AELE had published a legal article on such "confusion" issues in 2012. Its insights are still relevant today. Enjoy the article: http://www.aele.org/law/2012all06/2012-06MLJ101.pdf
>
> Stay safe and healthy,
>
> John
> **John G. Peters, Jr., CLS, Ph.D.**
> Executive Director

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UNITED STATES SUPREME COURT

REVISITING THE MARCH 2021 FOURTH AMENDMENT U.S. SUPREME COURT RULING IN TORRES V. MADRID: THE SUPREME COURT RULED THAT AN OFFICER'S SHOOTING OF A PERSON IS A "SEIZURE" – EVEN IF THAT PERSON THEN IMMEDIATELY FLEES – IF IT IS REASONABLE TO CONCLUDE FROM ALL OF THE CIRCUMSTANCES THAT THE OFFICER'S INTENT WAS TO RESTRAIN THE PERSON

Torres v. Madrid, 141 S.Ct. 899 (March 26, 2021)

In the March Legal Update, I promised to revisit in the April 2021 Legal Update the U.S. Supreme Court's Fourth Amendment "seizure" ruling in Torres v. Madrid. This revisiting will provide some hypothetical fact patterns to illustrate how the Fourth Amendment "seizure" definition and the article I, section 7 definition of "seizure" apply in cases. The differences between the Fourth Amendment definition of "seizure" and the Washington constitutional definition may make a difference in, among other legal applications, (1) possible exposure to section 1983 lawsuits for Fourth Amendment violations, and (2) decisions by Washington prosecutors whether to request federal prosecution where state court suppression of evidence otherwise looms.

Thirty years ago, in California v. Hodari D., 499 U.S. 621 (1991), the U.S. Supreme Court ruled that no seizure occurs under the Fourth Amendment if a suspect flees from or otherwise does not acquiesce in a law enforcement show of authority that, taking an objective view of the facts, seeks to restrain or detain the suspect. Seven years later, the Washington Supreme Court ruled in State v. Young, 135 Wn.2d 498 (1998), that under the Washington constitution, article I, section 7, the definition of "seizure" includes a law enforcement show of authority that, taking an objective view of the facts, seeks to restrain or detain the suspect. It does not matter if the suspect does not comply.

Last month, in Torres v. Madrid, the U.S. Supreme Court supplemented its Hodari D. ruling (which remains as solid Fourth Amendment precedent after Torres) by holding that an application of force (including shooting a person) that involves a touching of a person with objectively manifested intent to restrain the person (as opposed to application of force by accident or for some other purpose) constitutes a Fourth Amendment seizure even if the person that the officer is attempting to restrain does not comply and instead flees. I think that any law enforcement action that comes within the Fourth Amendment definition of seizure would also come within the Washington constitutional definition under Young. More importantly, because the Washington constitution cannot allow law enforcement action that is barred by the Fourth Amendment, the Torres definition of seizure will come into play in suppression issues in Washington court.

Now for a few scenarios based fairly closely on the facts of these precedents and my best guesses as to whether the actions would be held to be "seizures" under the Washington constitution or the federal constitution (note that I am not addressing whether such actions might have adverse legal consequences for the officer or agency under some other legal standard):

- Show of Authority: An officer in a patrol car turns on lights that signal a driver to stop, but the driver instead flees and tries to elude the officer. Or an officer on foot shouts at a pedestrian suspect to halt and show his hands, but the pedestrian does not comply and walks or runs away. Under the Fourth Amendment, no seizure has occurred, per Hodari D, and therefore no section 1983 lawsuit can be based on the officer's action, and no suppression of evidence can be based on the officer's alleged lack of reasonable suspicion of a violation of a traffic law or criminal law.

The suppression issue has arisen in a number of federal cases where fleeing suspects have tossed or otherwise abandoned guns or contraband as they fled. These defendants lost their "fruit of the unlawful seizure" arguments based on Hodari D. On the other hand, under the Washington's article 1, section 7, per State v. Young, the officer's action can be challenged as not supported by reasonable suspicion and fruit-of-the-unlawful-seizure arguments can be raised in the Washington courts (this can have suppression of evidence results, but because Washington State does not have a statutory cause of action for a constitutional violation, no state-law civil action can be based solely on the absence of reasonable suspicion for the seizure).

- Forcible seizure: An officer on foot attempts to contact a person who is behind the wheel of a parked car, and that person starts and maneuvers the car in such a way that the officer finds herself in front of the suspect's car that is barreling toward the officer at a high rate of speed, and the officer uses a handgun to shoot the driver in self-defense and in defense of a fellow officer (this is close to what the officers alleged were the facts in Torres). The officer's shot hits the driver, but the driver continues to flee. Under the Fourth Amendment, per Torres, the officer seized the driver by shooting the driver.

  The Torres Opinion states, however, that "a seizure by force **–** absent submission **–** lasts only as long as the application of force." This may mean that if an officer shoots or otherwise uses physical force to restrain a suspect, and that suspect flees from the temporary restraint, the Fourth Amendment Exclusionary Rule would not require suppression of evidence (guns, contraband, etc.) that the suspect tosses while fleeing. No doubt, the suppression question will be hashed out in future cases, along with the question of whether the application of force by bullet is deemed to continue so long as a bullet remain in the body of the suspect. Also, I would not be surprised if the Washington Supreme Court were to rule on this question of first impression in Washington that a seizure by force continues under the Washington constitution after the application of force, such as to have suppression-of-evidence consequences.

- Attempted forcible seizure by officer that inadvertently injures or kills a third person: Interesting issues are presented by scenarios where an office's intentional application of force makes physical contact with a person other than the intended target (see, for example, Villanueva v. Cleveland, ___ F.3d ___ , 2021 WL ___ (9th Cir., January 28, 2021) (where officer shot at driver but missed and hit a passenger, the Court held that it was a seizure of the passenger); Nelson v. City of Davis, 685 F.3d 867, 876 (9th Cir., 2012) (where officers shot pepperballs into a rioting crowd, the officers were held to have seized a person who was struck)). The Legal Update will not explore those issues.

- Officers' use of pepper spray, flash-bang grenades, lasers, and more: The Torres Majority Opinion states that the Opinion declines to address questions raised by the Dissent regarding matters not presented in Torres: "pepper spray, flash-bang grenades, lasers, and more." I will not try to predict whether federal courts will ultimately treat use of these weapons as seizures. But I note here the questions raised by the Dissent:

  > Imagine that, with an objective intent to detain a suspect, officers deploy pepper spray that enters a suspect's lungs as he sprints away. Does the application of the pepper spray count [as a seizure]? Suppose that, intending to capture a fleeing suspect, officers detonate flash-bang grenades that are so loud they damage the suspect's eardrum, even though he manages to run off. Or imagine an officer shines

a laser into a suspect's eyes to get him to stop, but the suspect is able to drive away with now-damaged retinas. Are these "touchings"? What about an officer's bullet that shatters the driver's windshield, a piece of which cuts her as she speeds away? Maybe the officer didn't touch the suspect, but he set in motion a series of events that yielded a touching. Does that count? While assuring us that its new rule will prove easy to administer, the majority refuses to confront its certain complications. Lower courts and law enforcement won't have that luxury.

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT SECTION 1983 LAW ENFORCEMENT CIVIL LIABILITY: THREE RULINGS AGAINST LAW ENFORCEMENT IN A FALSE CONFESSION CASE INVOLVING AN INNOCENT JUVENILE SUSPECT – (1) "COULD I HAVE AN ATTORNEY? BECAUSE THAT'S NOT ME" WAS AN UNAMBIGUOUS REQUEST FOR AN ATTORNEY, AND DETECTIVES' IGNORING OF THE REQUEST SUPPORTS A SECTION 1983 FIFTH AMENDMENT CLAIM; (2) FIFTH AMENDMENT WAS VIOLATED BY COERCIVE QUESTIONING OF 13-YEAR-OLD BOY WITH REPEATED ASSERTIONS THAT IF THE BOY DID NOT CONFESS, THE COURTS MIGHT "THROW THE BOOK AT HIM"; AND (3) IF OTHER DETECTIVES WERE REMOTELY WATCHING ANOTHER DETECTIVE ENGAGING IN COERCIVE QUESTIONING, THEY MAY BE HELD LIABLE FOR NOT INTERVENING

Tobias v. Arteaga, ___ F.3d ___ , 2021 WL ___ (9th Cir., April 27, 2021)

Facts and Proceedings below:

A 13-year-old murder suspect was arrested based primarily on identification from a security video. The Ninth Circuit Opinion in Tobias describes the interrogation process (apparently it was videotaped), including the suspect's invocation of his right to an attorney, as follows:

> At the station, Tobias was brought into an interview room with Detectives Pere and Jeff Cortina. After several background questions, the detectives began asking Tobias whether he was affiliated with a gang. Tobias admitted that his previous school "had [him] on gang file" for MS-13, but explained that he was not actually in the gang. The detectives then asked Tobias a series of questions to determine whether he was sufficiently mature to differentiate right from wrong . . . . It was not until after these questions, roughly 20 minutes into the interrogation, that Detective Cortina read Tobias his Miranda rights. Tobias stated that he understood his rights.
>
> The detectives then showed Tobias the security camera video of the shooter. Tobias asked, "Who is that?" and Detective Pere responded, "That, my friend, would be you." Tobias immediately and repeatedly denied that he was the person in the video. When the officers told him that the shooting had taken place near downtown Los Angeles around midnight, Tobias explained that he had been miles away in Arcadia with a friend that night and that his friend's mother had dropped him off at home before midnight. The detectives persisted in accusing Tobias of the shooting, falsely telling him, "somebody gave you up."
>
> Then the following exchange took place:

Det. Pere: Okay. Well, I, you know what? We're here to speak to you to get your statement. Now, if your statement is that that's not you, don't worry. We're going to write it down just the way you said. That's not

Tobias: Could I have an attorney? Because that's not me.

Det. Pere: But,okay. No, don't worry. You'll have the opportunity.

Detective Cortina quickly jumped in with another question and the interrogation continued with no further acknowledgement of Tobias's request for an attorney, even though the detectives had previously told him that he "ha[d] the right to the presence of an attorney before and during any questioning." Tobias adamantly continued to deny he was the shooter.

About 35 minutes into the interview, Detective Pere told Tobias: "[R]ight now, man, you're looking at murder. Looks like you're going to get booked today for murder." Detectives Pere and Cortina then left the room, assuring Tobias that his mother would be in to talk to him shortly.

But instead of Tobias's mother, Detective Arteaga entered the room two minutes later. [In a footnote, the Court notes that the record is unclear as to whether the other two detectives watched the continued interrogation remotely.] Arteaga immediately pulled his chair close to Tobias and began questioning him in an aggressive tone. In an interrogation that lasted roughly 40 minutes, Arteaga lied to Tobias that somebody had given him up as the murderer, cursed at Tobias, told Tobias that by failing to confess he looked like a "cold-blooded killer," and brought up Tobias's "mom" multiple times.

Arteaga opened the interview by telling the 13-year-old, "I just talked to your mom right now, okay? She's in there crying her eyes off. . . . and later informed him, "Your mom's gone. She-she left crying." He also told Tobias that his mother had identified him from the video, calling it "fucked up" and "fucking pitiful" that Tobias was going to "drag [his] mom into this" by forcing her to take the stand to testify against him. [Court's footnote 4: *Tobias's mother had in fact identified him as the person on the video, but she later recanted the identification*.]

Over the course of this extended interrogation, Arteaga repeatedly told Tobias that the court would "take into consideration" his young age, but that he would lose that goodwill and likely receive a harsher punishment if he continued to "lie" about not being the person on the video. As Arteaga framed it, "[y]ou're 13 years of age. Do you think they're going to throw away the key on you? No. They're going to try to get you some help. . . . But we can't help you if you're going to sit here and lie and-and just be a cold-blooded killer."

As the interview went on, Arteaga pressed this point harder, insisting, "You're full of shit. And when this case is presented to a district attorney's office, they're going to see you're a cold blooded killer," and, "Okay, but I'm telling you man, we have a lot more evidence than you think, and right now when we take the case to court they're going to think you're a big time gang killer who didn't want to tell the truth, who is down for the hood.

It's going to look like you're down – you're so down for the hood that you didn't want to speak. So they might throw the book at you." After Arteaga repeated that Tobias's lack

of confession made him look like a "cold blooded killer" nine separate times, Tobias finally confessed.

After securing his confession, the detectives put Tobias in a room alone with his mother. Tobias immediately told her, "I'll be straight with you. I wasn't there. I was with Joshua . . . . They have a guy that looks like me on the-on the camera. That's not me." When Tobias's mother asked why he had confessed if it was not him, Tobias explained, "they forced me to. They said if I – if I keep lying to them in their face that they're going to tell the judge that I'm a cold blooded killer and that they're going to give me – they're going to – they're going to just throw the book at me and give me a lot of time. So I don't know what to do. I'm like panicking."

Tobias's mother went to Detective Arteaga and told him that Tobias only confessed because "you guys told him that if he didn't confess . . . you guys were going to tell the judge who knows what the hell, okay, that he's a cold-blooded murderer." She insisted that Tobias was "crying" and "scared to shit." Arteaga responded by telling her "[w]e're done with you."

[Some footnotes omitted; some paragraphing revised for readability]

State and Federal Court Proceedings Below:

Tobias was convicted in juvenile court for the Castenada murder after losing a Miranda-based motion to suppress his confession. He was sentenced to 25 years. The California Court of Appeal reversed the trial court's ruling on his suppression motion, concluding that the detectives failed to respect his unambiguous request for an attorney. On remand, the charges were dismissed, and all parties, including the arresting officers, now agree that Tobias was not involved in the Castaneda murder.

Tobias then brought this 42 U.S.C. § 1983 action in federal district court against the LAPD detectives, including others from the LAPD. The LAPD Detectives filed a motion for summary judgment, arguing that they were entitled to qualified immunity. The district court denied the motion, finding disputed issues of material fact on all claims, and denying qualified immunity because the "rights in the context of this case are so well-established that law enforcement officers must be deemed to have knowledge of them."

SELECT ISSUES AND RULINGS: (1) Viewing the factual allegations in the best light for the plaintiff Tobias, was it clearly established at the time of Tobias's interrogation that the statement "Could I have an attorney? Because that's not me," was an unambiguous request for an attorney, such that continuing the interrogation after that point constituted a Fifth Amendment violation that is actionable under section 1983 of the Civil Rights Act? (Note that Tobias's confession was subsequently used against him in a criminal prosecution, and the criminal prosecution was subsequently dismissed based on a determination that Tobias is innocent of the crime charged) (ANSWER BY NINTH CIRCUIT PANEL: Yes, the detectives violated Miranda by ignoring the invocation of counsel right, a reasonable officer would have known better, and therefore the lawsuit can go forward to a jury)

(2) Viewing the factual allegations in the best light for the plaintiff Tobias, was it clearly established at the time of Tobias's interrogation that the interrogators' repeatedly telling a 13-year-old custodial suspect that the courts might throw the book at him if he does not confess constitutes a Fifth Amendment violation that is actionable under section 1983 of the Civil Rights

Act in this case? (ANSWER BY NINTH CIRCUIT PANEL: Yes, rules a 2-1 majority, the detectives violated the Fifth Amendment by telling the suspect repeatedly that the courts might throw the book at him if he did not confess, and a reasonable officer would have known better, and therefore the lawsuit can go forward to a jury)

(3) May the detectives who were not in the interrogation room during Detective Arteaga's coercive questioning be held liable if they observed the interrogation remotely and did nothing to stop the constitutional violation? (ANSWER BY NINTH CIRCUIT PANEL: Yes)

Result: Affirmance in part and reversal in part the order of the U.S. District Court (Central District of California) relating to request of Los Angeles Police Department detectives for qualified immunity in an action brought pursuant to 42 U.S.C. § 1983 alleging that the detectives coerced plaintiff's confession, when he was thirteen years old, for a murder he did not commit.

ANALYSIS BY NINTH CIRCUIT PANEL:

1. The Fifth Amendment was violated by not honoring Tobias's request for an attorney

The Majority Opinion in Tobias explains as follows the view that Tobias's request for an attorney was unambiguous:

> The district court correctly denied qualified immunity on Tobias's claim that the LAPD Detectives violated his Fifth Amendment right to counsel by continuing his custodial interrogation after he requested an attorney and then using the resulting confession against him in his criminal case. See Davis v. United States, 512 U.S. 452, 458-59 (1994); Edwards v. Arizona, 451 U.S. 477, 484-85 (1981). If a suspect requests an attorney during a custodial interrogation, "he is not subject to further questioning until a lawyer has been made available." Davis, 512 U.S. at 458. This request for counsel must be "unambiguous[]." Davis. "Although a suspect need not speak with the discrimination of an Oxford don, he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Davis. Whether a suspect unambiguously requested an attorney is an objective question. Davis.
>
> Tobias's statement – "Could I have an attorney? Because that's not me" – was an unequivocal invocation of his right to counsel under clearly established law. . . . In modern usage, "Can I" and "Could I" are both well understood ways of asking a direct question – the only distinction is that "could" is considered a more polite form of request than "can." . . . The second half of Tobias's statement, "Because that's not me," does nothing to undermine his initial question, making his request, when taken as a whole . . .
>
> The LAPD detectives suggest that Tobias's question was not clearly established as unambiguous because we have found statements such as "I think I would like to talk to a lawyer," "Maybe he ought to see an attorney," and "[I] might want to talk to a lawyer," ambiguous. . . .
>
> But no one disputes that the police may continue questioning "when the suspect" expresses only that he "might want a lawyer. Davis, 512 U.S. at 462. In Davis, the Supreme Court found the use of "maybe" rendered a request for an attorney equivocal. . . . Similarly, in [Clark v. Murphy, 331 F.3d 1063 (9th Cir. 2003)] a habeas appeal, we found that it was not "contrary to or an unreasonable application of clearly established

federal law" for the Arizona Supreme Court to determine that "I think I would like to talk to a lawyer" was ambiguous, because "I think" is – like "maybe" – "equivocal to some degree." . . . .

Because it was clearly established at the time of Tobias's interrogation that the statement "Could I have an attorney? Because that's not me," was an unambiguous request for an attorney, we affirm the district court's denial of qualified immunity on this claim.

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

2. The Fifth Amendment was violated by repeatedly telling Tobias coercively that the courts might throw the book at him if he did not confess

The Majority Opinion in Tobias explains as follows the view that Detective Arteaga violated the Fifth Amendment by telling Tobias coercively that the courts might throw the book at him if he did not confess:

> It was established at the time of Tobias's interrogation that "[a] coercive interrogation exists when the totality of the circumstances shows that the officer's tactics undermined the suspect's ability to exercise his free will," rendering his statements involuntary. . . . In determining whether a statement was involuntary, "[c]ourts . . . often consider the following factors: the youth of the accused, his intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep." United States v. Haswood, 350 F.3d 1024, 1027 (9th Cir. 2003). Any suggestion by a law enforcement officer "that a suspect's exercise of the right to remain silent may result in harsher treatment by a court or prosecutor" is unconstitutionally coercive. United States v. Harrison, 34 F.3d 886, 891-92 (9th Cir. 1994).
>
> In Harrison, we concluded that a single question during interrogation – asking if defendant Sonja Harrison "thought it would be better if the judge were told that she had cooperated or had not cooperated"? – was unconstitutionally coercive, rendering Harrison's subsequent confession involuntary. . . . The core of the "improper" and unduly coercive conduct in Harrison "was the suggestion that [agents] might inform the court that [Harrison] had not cooperated." Harrison at 891. . . . **United States v. Tingle, 658 F.2d 1332, 1336 n.5 (9th Cir. 1981) ("Although it is permissible for an interrogating officer to represent, under some circumstances, that the fact that the defendant cooperates will be communicated to the proper authorities, the same cannot be said of a representation that a defendant's failure to cooperate will be communicated to a prosecutor.").**
>
> The LAPD detectives attempt to distinguish Harrison by arguing that Tobias was told he would be treated more harshly for affirmatively lying about his involvement in the murder rather than for failure to cooperate. But anyone in Tobias's shoes would have understood that Detective Arteaga considered anything less than a confession to the murder a "lie," because all of Tobias's attempts to deny the accusation were met with statements such as "you're full of shit" and "the bottom line, whatever you said, you were there." In other words, in the context of this particular interrogation, any threat that Tobias would be treated harshly for "lying" was no different than a threat that he would

be treated harshly for refusing to cooperate by confessing – exactly the type of threat we have previously held to be categorically impermissible. . . .

Detective Arteaga also directly commented on Tobias's silence – and thus his right to remain silent – when he told Tobias, "It's going to look like you're down – you're so down for the hood that you didn't want to speak. So they might throw the book at you." (emphasis added). This type of comment is clearly unconstitutionally coercive as established by Harrison.

. . . .

What the detectives and dissent implicitly appear to be suggesting is that Tobias's case is distinguishable from Harrison because he affirmatively denied his guilt, rather than initially remaining silent. To accept this argument, we would have to conclude that it is less coercive to threaten a defendant for failing to cooperate when he has denied an allegation than when he has not yet been asked any questions or has simply stood silent when faced with accusations. This is not a tenable position, as Tobias's case illustrates. Tobias did not initially remain silent like the defendant in Harrison. Instead, he tried – desperately – to explain to the detectives that he had nothing to do with the murder.

It was only after the detectives showed little interest in his explanation and repeatedly accused him of lying that Tobias concluded that he had no choice but to falsely confess, out of fear of the harsh treatment that Detective Arteaga threatened. If it is unconstitutionally coercive to threaten a defendant who has yet to say anything that harsh consequences could follow from a lack of cooperation, . . . the same must clearly be true when a defendant tries to cooperate – as Tobias did here, by telling the truth – but the police continue to demand cooperation until the suspect confesses.

[Some citations omitted, some other citations revised for style; footnotes omitted; bolding added; some paragraphing revised for readability]

3. The detectives who were not in the interrogation room during Detective Arteaga's coercive questioning may be held liable if they observed the interrogation remotely and did nothing to stop the constitutional violation

The Majority Opinion in Tobias explains as follows the view that the detectives who were not in the room when Detective Arteaga engaged in unconstitutionally coercive questioning may be held liable if they observed the interrogation remotely and did nothing to stop the constitutional violation:

Unlike [Detective] Arteaga, who made the threats against Tobias, Detectives Cortina and Pere did not directly violate Harrison during Tobias's interrogation because they did not make threats of harsher punishment based on lack of cooperation. However, to the extent they were aware of the violation as it happened, they may have had a duty to intercede to stop the constitutional violation and would not be entitled to qualified immunity.

By 2013, we had clearly established that "police officers have a duty to intercede when their fellow officers violate the constitutional rights of a suspect or other citizen." Cunningham v. Gates, 229 F.3d 1271, 1289 (9th Cir. 2000) . . . . If an officer fails to intercede, "the constitutional right violated by the passive defendant is analytically the

same as the right violated by the person who" performed the offending action. . . . For example, "an officer who failed to intercede when his colleagues were depriving a victim of his Fourth Amendment right to be free from unreasonable force in the course of an arrest would, like his colleagues, be responsible for subjecting the victim to a deprivation of his Fourth Amendment rights." [United States. v. Koon, 34 F3d 1416, 144 (9th Cir., 1994)]

"[H]owever, officers can be held liable for failing to intercede only if they had an opportunity to intercede." [citations omitted]

Tobias submitted evidence that there was a viewing room "just down the hallway" from the interrogation room, where officers could watch a video feed of the interrogation. Detective Pere also re-entered the interrogation room after Tobias confessed, without being called in.

It is plausible that Cortina and Pere watched Arteaga's questioning and were aware of his violation of Tobias's Fifth Amendment rights as it occurred. Because neither side presented evidence as to Cortina and Pere's involvement in this interrogation, we remand for the district court to consider in the first instance whether there are material facts in dispute as to Cortina and Pere's liability for Arteaga's actions.

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

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WASHINGTON STATE COURT OF APPEALS

ELECTRONIC INTERCEPT-AND-RECORD COURT ORDER UNDER FELONY-INVESTIGATIONS PROVISIONS OF PRIVACY ACT (RCW 9.73.090(2) AND RCW 9.73.130) WAS SUPPORTED BY A SHOWING OF NECESSITY, I.E., A SHOWING THAT OTHER NORMAL INVESTIGATIVE PROCEDURES WOULD BE "UNLIKELY TO SUCCEED"

In State v. Gonzalez, __ Wn. App. 2d ___ , 2021 WL ___ (Div. III, April 6, 2021), Division Three of the Court of Appeals rejects defendant's challenge to court-authorized use of a body wire on a consenting confidential informant to monitor and record conversations with a suspected drug dealer.

Many requirements are imposed by RCW 9.73.090, .120, .130 and .140 for court-authorized monitoring and recording in felony investigations where at least one party to private conversations has consented to the recording. The only requirement under chapter 9.73 RCW that was at issue in this case is the requirement in RCW 9.73.130(3)(f) that the application to the court include "A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ."

This requirement is sometimes referred to as the "necessity" requirement or "particularity" requirement. The Gonzalez Court explains as follows why the Court has concluded that the application for interception and recording in this case meets the requirement of RCW 9.73.(3)(f):

While the privacy act's particularity requirement is not onerous, it still must consist of something more than a "boilerplate" showing of need. [State v. Manning, 81 Wn. App. 714, 720 (1996)]. Evidence obtained through an intercept order will invariably be helpful to the State in securing a conviction. But mere helpfulness is insufficient. To meet the terms of the privacy act, an intercept application must make a case-specific showing of need, so as to guard against orders being made available in all cases as a matter of course.

The totality of the facts alleged here were sufficient to meet the privacy act's particularity requirement. The intercept applications did not simply contain standard, boilerplate information. Law enforcement did not merely recite the truism that testimony from a CI would be enhanced by corroboration.

Instead, the applications made clear safety was also a significant concern. The facts set forth in the intercept applications reveal the CI reported seeing firearms in Mr. Gonzalez's home, including a sawed-off shotgun.

Given the undercover purchases were to take place inside of the home, standard law enforcement surveillance methods were insufficient to address the CI's safety. Officers needed an intercept order to "listen and be prepared to move in if necessary." State v. Knight, 54 Wn. App. 143 (1989). The issuing judge therefore had a tenable factual basis to issue the intercept orders.

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

Result: Affirmance of Chelan County Superior Court conviction of Modesto Bravo Gonzalez, Jr., for two counts of unlawful delivery of a controlled substance (for undercover sales), two counts of first degree unlawful possession of a firearm, one count of possession of an unlawful firearm (a sawed-off shotgun), one count of unlawful possession of heroin with intent to deliver, and one count of maintaining a drug property (the Opinion of the Court of Appeals is ambiguous as to whether the above list of convictions is exhaustive of the total of convictions).

LEGAL UPDATE EDITOR'S REMINDER RE RESEARCH TOOL: ELECTRONIC SURVEILLANCE AND DIGITAL EVIDENCE MANUAL FROM THE KING COUNTY PROSECUTOR'S OFFICE

Over the past several years, I have on a few occasions included notes in the Legal Update stating that readers are likely to find useful on Privacy Act issues the 2017 update of one of the research sources on the home page of the website of the Washington Association of Prosecuting Attorneys (WAPA): Electronic Surveillance and Digital Evidence in Washington State, 2017, by the King County Prosecuting Attorney's Office, Special Operations. Although the publication generally is focused on prosecutors, there is much that is practical and useful for Washington law enforcement officers in the comprehensive and well-indexed compilation.

IN MIRANDA/CONSTITUTION-BASED RULING, COURT OF APPEALS PANEL RULES THAT PROSECUTOR SHOULD NOT HAVE ASKED DETECTIVE OR DEFENDANT AT TRIAL ABOUT DEFENDANT'S POST-ARREST SILENCE

In State v. Cook, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. III, April 6, 2021), Division Three of the Court of Appeals agrees with defendant's challenges based on prosecutorial misconduct in his appeals from multiple convictions for sex crimes against children.

One of the items of misconduct listed by the Cook Court was the circumstance of the prosecutor eliciting testimony from the lead detective and from the defendant that after arrest the defendant, in a custodial interrogation circumstance, invoked his right to an attorney and declined to talk to the detective. The Cook Court cites the U.S. Supreme Court's decision in Doyle v. Ohio, 426 U.S. 610, 618 (1976) for the proposition that the government, in reading the albeit-required Miranda rights to an arrestee, implicitly assures the accused that he may assert his rights without penalty, and for the government to renege on this promise, violates constitutional Due Process protections.

Result: Reversal of Douglas County Superior Court convictions of James William Cook for two counts of child molestation in the first degree committed against one step-granddaughter, and three counts of child molestation in the second degree against another step-granddaughter. The case is remanded for re-trial.

DISMISSAL FROM EMPLOYMENT IS HELD ON GROUNDS OF PUBLIC POLICY TO BE THE ONLY APPROPRIATE PUNISHMENT WHERE AN OFFICER – WHO WAS KICKED IN THE FACE WITH A DOC MARTENS BOOT BY A HANDCUFFED WOMAN – (1) ALMOST IMMEDIATELY RETALIATED BY PUNCHING HER FACE AND CAUSED AN ORBITAL FRACTURE, AND (2) WAS FIRED BY SEATTLE PD

In Seattle Police Department v. Seattle Police Officers' Guild, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. I, April 5, 2021), Division One of the Court of Appeals summarizes as follows the ruling that the Court makes in its 45+ page unanimous Opinion:

> This appeal arises from an arbitration panel's decision to reinstate [a] former Seattle Police Department (SPD) officer, who was terminated by the City of Seattle for violating SPD's use-of-force policies. The panel, consisting of a three-member disciplinary review board (DRB), concluded that [the officer] violated SPD's policy restricting the use of force on handcuffed subjects when he punched a handcuffed woman in the face hard enough to cause an orbital fracture despite having had time to consider and execute other alternatives.
>
> The DRB also found that the policy [the officer] violated was clear and specific even though it was recently revised, and that [the officer] had been adequately trained on the basics of the prior policy, which was carried forward into the new policy and required officers to use only what force was reasonable, necessary, and proportional. And, the DRB acknowledged that the penalty should send a clear message that alternatives to the use of force on a handcuffed person should be utilized when circumstances permit.
>
> Nevertheless, the DRB reinstated [the officer] with a 15-day suspension and duty modifications, finding that the seriousness of [the officer's] offense was mitigated by the fact that [the officer] used force "perhaps reflexively" after the woman kicked him [in the face with a boot] two seconds earlier causing "stinging pain" and that [the officer's] "patience was being tried." The DRB also observed that [the officer] was insistent he did nothing wrong, and several of his co-workers agreed with him.

> The DRB's decision reinstating [the officer] is so lenient it violates the explicit, well-defined, and dominant public policy against the excessive use of force in policing. Indeed, the DRB's decision sends a message to officers that a violation of a clear and specific policy is not that serious if the officer is dealing with a difficult subject, losing patience, or passionate in believing that he or she did nothing wrong – however mistaken that belief may be. Such a message cannot be squared with the public policy against the excessive use of force in policing, which we hold imposes on the City an affirmative duty to sufficiently discipline officers. Thus, the superior court did not err when it vacated the DRB's decision reinstating [the officer].

[Some paragraphing revised for readability]

Result: Affirmance of King County Superior Court decision that vacated the Disciplinary Review Board's reinstatement of the officer.

RAPE DEFENDANT WINS NEW TRIAL BASED ON SUCCESSFUL EVIDENCE-LAW CHALLENGES ON ISSUES OF: (1) RAPE SHIELD STATUTE'S LIMITS; (2) RELEVANCY OF WOULD-BE VICTIM'S ALLEGEDLY DRUNKEN AND FLIRTATIOUS BEHAVIOR WITH HIM (INCLUDING SITTING ON HIS LAP) AND OTHERS EARLIER DURING THE EVENING OF THE ALLEGED RAPE; (3) ALLOWABLE SCOPE OF QUESTIONING OF STATE'S EXPERTS; AND (4) ADMISSIBILITY OF REPUTATION EVIDENCE OF DEFENDANT'S REPUTATION FOR SEXUAL MORALITY

In State v. Cox, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. III, April 20, 2021), Division Three of the Court of Appeals rules that the trial court in defendant's prosecution for second degree rape erred on several evidence-law issues by excluding evidence proffered by the defense and limiting questioning of a prosecution expert witness. The Court of Appeals orders a new trial.

J.R., the female alleged victim in the case, testified that the male defendant, an acquaintance, digitally penetrated her after she had gone to bed drunk during a party that she hosted at her residence. Already sleeping on the bed when she lay down was a female acquaintance, the fiancé of the defendant.

The defendant admitted that he did lie down next to J.R. on the bed that evening, but he testified that he did not do as J.R. claims. Defendant testified that instead J.R. came on to him and touched him around his hips, and that this was the only touching between them on the bed. He testified that J.R. left the bed in a huff when he spurned her advances.

The most crucial evidence in the case is DNA of the defendant that was found on J.R.'s undergarments. The defendant contends that his DNA could have been transferred to J.R.'s undergarments earlier in the evening when, while wearing a party dress, she drunkenly and flirtatiously sat on his lap during her party. He alleges that she also engaged in drunken and flirtatious behavior with others at the party. Based on the Rape Shield Statute (RCW 9A.44.020) and on the Rules of Evidence that allow for discretionary preclusion of relevant-but-highly-prejudicial evidence, the trial court did not allow defendant to present the evidence of the lap-sitting by J.R. or her other drunken and flirtatious behavior at her party.

Defendant argues that the lap-sitting evidence is relevant for two main reasons. First, the lap-sitting provides an innocent explanation for how his DNA was found on J.R.'s underwear. In addition, since J.R. did not remember the incident, but it was corroborated by other witnesses, it

is evidence that J.R. was so intoxicated that she was acting out of character and could not recall her actions the night of the party.

As noted above, based on the Rape Shield Statute, as well as evidence-law standards relating to irrelevant and prejudicial evidence, the trial court excluded the lap-siting and other evidence of J.R.'s allegedly flirtatious and drunken behavior at the party. The trial court also significantly limited the scope of questioning of the State's DNA expert as being speculative and implicating the Rape Shield Statute. And the trial court also rejected a proffer of evidence by defendant of his good reputation for sexual morality.

RULINGS BY THE COURT OF APPEALS

1. Rape Shield Statute (RCW 9A.44.020)

The Cox Court rules that the Rape Shield Statute: (A) does not apply to behavior that is contemporaneous with the alleged rape, as opposed to past behavior; and (B) does not apply to the evidence here that was offered to explain how the victim's intoxication may have affected her behavior and memory of that night, as well as helping explain how there may have been an innocent explanation for the DNA transfer.

2. Relevancy and Prejudice Issues

The Cox Court rules that the evidence that defendant sought to present was relevant and not impermissibly prejudicial in that it reasonably helped to explain (1) how the victim's intoxication may have affected her behavior and memory of that night, and (2) how there may have been an innocent explanation for the DNA transfer.

3. Scope of Questioning of State's Expert Witnesses

In fact-based legal analysis that the Legal Update will not quote or paraphrase, the Court of Appeals explains that questioning of expert witnesses is subject to different restrictions from questioning of fact witnesses, and that the trial court should have allowed the defense attorney more latitude in the questioning of the State's DNA expert.

4. Admissibility of Evidence of Defendant's Reputation for Sexual Morality

The Cox Court provides almost four pages of analysis of the relevant facts and case law related to the Evidence Rules in explaining the Court's view that, while generally character evidence is not relevant and therefore is inadmissible, there is an exception that allows a "pertinent [character] trait" to be proven by reputation. The Court of Appeals concludes that the defendant should have been allowed to present the testimony of four witnesses (who are present or former co-workers and friends of defendant) who would testify that they had never heard anything negative about his sexual morality.

Result: Reversal of Walla Walla County Superior Court conviction of Jacob Nathaniel Cox for second degree rape.

CHILD WITNESS COMPETENCY: TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RULING THE 7-YEAR-OLD SEX ABUSE VICTIM WAS COMPETENT TO TESTIFY EVEN

THOUGH SHE COULD NOT REMEMEBER THE IDENTITY OF THE ALLEGED ABUSER OR THE DETAILS OF THE ABUSE

In State v. Hancock, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. III, April 8, 2021), Division Three of the Court of Appeals makes a ruling on an Evidence Law issue that is addressed by Washington Association of Prosecuting Attorneys Staff Attorney Pam Loginsky as follows in her Case Law Weekly Roundup for April 9, 2021 on the WAPA website:

> **Witness Competency.** The trial court did not abuse its discretion in finding the 7-year-old victim competent to testify. While the child victim had memory problems regarding the identity of the abuser and the details of the abuse, she retained the ability to detail events occurring contemporaneously to the incidents of abuse. . . . [WAPA Editor's note**:** The confrontation clause is not violated when hearsay evidence is admitted from a testifying witness who is unable, whether from injury, medical condition, extreme youth or advanced age, from recalling the attack or the attacker. The confrontation clause is satisfied by the defendant's opportunity to question the witness at trial. See generally United States v.Owens, 484 U.S. 554 (1988); State v. Clark, 139 Wn.2d 152 (1999).]

Result: Affirmance of Spokane County Superior Convictions of Johnathon James Hancock for first degree child rape and first degree child molestation.

SECOND AMENDMENT AND WASHINGTON CONSTITUTIONAL RIGHT-TO-BEAR ARMS: MAN WHO WAS PROSECUTED FOR CARRYING A SWORD IN A SEATTLE PUBLIC PARK LOSES AN AS-APPLIED CONSTITUTIONAL CHALLENGE TO THE CITY OF SEATTLE'S "DANGEROUS KNIFE" ORDINANCE

In Zaitzeff v. City of Seattle, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. I, April 5, 2021), Division One of the Court of Appeals rejects defendant's state and federal constitutional right-to-bear arms arguments in his appeal from a conviction for violating a City of Seattle ordinance that the Court of Appeals summarizes and excerpts as follows:

> SMC 12A.14.080 provides, "It is unlawful for a person to: . . . B. Knowingly carry concealed or unconcealed on such person any dangerous knife, or carry concealed on such person any deadly weapon other than a firearm." A dangerous knife is "any fixed-blade knife and any other knife having a blade more than 3 ½ inches in length." SMC 12A.14.010. Exceptions apply to SMC 12A.14.080(B) for using a knife for fishing, hunting, or occupational purposes, and carrying a knife to one's home or work in a secure wrapper. SMC 12A.14.100.

The Division One panel declares that a sword is constitutionally protected by article I, section 24 of the Washington Constitution and the Second Amendment as an "arm." However, the panel rules that the defendant's conviction for violating Seattle Municipal Code (SMC) 12A.14.080(b) for carrying a dangerous weapon – by wearing the sheathed sword openly hanging from his neck while walking around Green Lake Park – did not violate either the state or federal right to bear arms.

The panel asserts that the ordinance is reasonably necessary to protect public safety and welfare and is substantially related to the goal of preventing sword-related injuries and violence. The Zaitzeff Court explains that the ordinance does not apply to conduct inside one's own

home, and it allows the defendant to purchase a sword, and, in a secure wrapper: (1) carry it home, (2) carry it to be repaired, and (3) carry it to abodes or places of business.

The Zaitzeff Court also rejects the defendant's argument that he should have been allowed to assert a common law necessity defense based on his claim he had been assaulted in the past. The defendant conceded that "[t]here was no one imminently threatening me that particular day. The Court of Appeals concludes that this concession prevents the defendant from meeting his initial burden of showing that he would likely be able to submit a sufficient quantum of evidence on each of the four elements of the common law necessity defense.

Result: Affirmance King County Superior Court order that affirmed the Seattle Municipal Court finding of guilt for David Zaitzeff under SMC 12A.14.080.

FIVE-YEAR DEFERRED PROSECUTION MEANS FIVE YEARS; THE DEFERMENT PERIOD DOES NOT EXPIRE AT THE POINT WHEN A TREATMENT PROGRAM IS COMPLETED

In State v. Skrobo, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. II, April 20, 2021), Division Two of the Court of Appeals rules that a defendant's five-year deferred prosecution period did not expire at the point when he successfully completed a treatment program.

On October 28, 2013, the Clark County District Court entered an order for deferred prosecution on defendant Skrobo's charges of DUI and reckless driving. The Court's order included a two-year treatment plan, plus imposing abstinence and law-abiding requirements during the deferred prosecution period, and directed that "the prosecution of the Defendant in this matter is hereby deferred for a five-year period from this date." In January 2018, the State filed a motion to revoke Skrobo's deferred prosecution based on new charges of hit and run, DUI, and reckless endangerment.

On September 24, the District Court entered an order revoking Skrobo's deferred prosecution. He appealed to the Superior Court, which reversed, concluding that the deferment expired once Skrobo successfully completed the treatment plan. Now, the Court of Appeals has reversed the Superior Court, summarizing the Court's reasoning as follows:

> Interpreting the deferred prosecution statutes as limiting the court's authority to revoke a deferred prosecution to the two-year period of required treatment renders large portions of the statutory scheme meaningless and leads to an absurd result. Such an interpretation creates a situation in which the courts are powerless to impose consequences for a violation of the deferred prosecution order during the three years after the required two-year treatment period while the deferred prosecution is still in effect. Therefore, we reverse the superior court's order.

Result: Reversal of Clark County Superior Court order that reversed the Clark County District Court's revocation of Alem Skrobo's deferred prosecution.

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BRIEF NOTES REGARDING MARCH 2021 UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS ON SELECT LAW ENFORCEMENT ISSUES

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

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

The nine entries below address the April 2021 unpublished Court of Appeals opinions that fit the above-described categories. I do not promise to be able catch them all, but each month I will make a reasonable effort to find and list all decisions with these issues in unpublished opinions from the Court of Appeals. I hope that readers, particularly attorney-readers, will let me know if they spot any cases that I missed in this endeavor, as well as any errors that I may make in my brief descriptions of issues and case results. In the entries that address decisions in criminal cases, the crimes of conviction or prosecution are italicized, and brief descriptions of the holdings/legal issues are bolded.

1. State v. William Howard Witkowski: On April 6, 2021, Division Two of the COA agrees with the challenge of the defendant to his Pierce County Superior Court convictions *for (A) one count of unlawful possession of a controlled substance with intent to deliver (heroin); (B) one count of unlawful possession of a controlled substance with intent to deliver (methamphetamine); (C) twelve counts of first degree unlawful possession of a firearm; (D) one count of unlawful possession of a controlled substance (oxycodone); and (E) seven counts of unlawful possession of a stolen firearm* (Witkowski did not appeal his conviction for *one count of third degree defrauding a public utility*). The Court of Appeals agrees with defendant that when officers went to the defendant's residence to talk to the residents about a stolen power meter and possible power theft, **the three special warnings for obtaining consent to entry of a residence of State v. Ferrier, 136 Wn. 2d 103 (1998) were required when officers sought entry into a fenced and gated area adjacent to the residence.** This enclosed area was part of the curtilage of the residence, and Ferrier applies to seeking admittance to such an enclosed area, the Witkowski Court declares. The Court of Appeals remands the case for the trial court to determine which portions of a search warrant affidavit should be excised to delete information obtained in the initial warrantless, un-consenting entry of the curtilage, and whether sufficient probable cause exists for the search warrant following that excision. In a footnote, the Court of Appeals notes that on remand defendant must be allowed to challenge his conviction for unlawful possession of a controlled substance (oxycodone) in light of the Washington Supreme Court decision in State v. Blake, No. 96873-0, 2021 WL 728382 (Wash. Feb. 25, 2021): http://www.courts.wa.gov/opinions/pdf/968730.pdf

2. State v. Wesley Burgess Young: On April 12, 2021, Division One of the COA rejects the challenge of the defendant to his King County Superior Court conviction *for (A) malicious harassment and (B) assault in the third degree.* **The Court of Appeals rejects defendant's creative constitutional arguments grounded in privileges and immunities (Washington constitution) and equal protection (federal constitution) challenging the admission into evidence of a tape recording of his jailhouse phone conversation with his sister.** Defendant conceded that the King County Jail's system for recording phone calls by inmates

complies with the requirements of chapter 9.73 RCW (see State v. Modica, 164 Wn.2d 83 (2008)). His constitutional arguments are both essentially grounded in his claim that he was in jail pre-trial because he is indigent, and if he were not indigent he would have been released on bail prior to his trial. He argued that it is unfair to indigent defendants that the phone conversations of non-indigent defendants are not monitored by the government without a warrant and are not introduced against non-indigent defendants at trial.

3. State v. Michael Andrew Williams: On April 13, 2021, Division Two of the COA rejects the challenge of the defendant to his Pierce County Superior Court conviction for *second degree rape* for an alcohol-fueled attack on his temporary male housemate. **The Court of Appeals rules that the trial court did not err in admitting – under ER 803(a)(4), the hearsay exception for statements made for medical diagnosis or treatment – many statements describing the events of the evening of the attack that the victim made to a nurse in a sexual assault examination**. The Court of Appeals does rule that one of the statements that the victim made to the nurse regarding a friend's post-assault solicitude did not qualify under the hearsay exception, but that the trial court error in admitting that statement was harmless in light of the abundance of admissible evidence in the case.

4. State v. Palla Sum: On April 13, 2021, Division One of the COA rejects the challenge of the defendant to his Pierce County Superior Court conviction for *making a false or misleading statement to a public servant*. Defendant unsuccessfully argued that he was unlawfully seized in a Terry detention without reasonable suspicion, and therefore that a statement that he made during the would-be unlawful detention is inadmissible. **The Court of Appeals concludes that defendant had not been seized at the point when he lied to an officer about his identity.** In key part, the analysis of the constitutional "seizure" issue by the Court of Appeals is as follows (case citations and record citations omitted; emphasis added):

> [The officer] parked his patrol car so that he did not block Sum from leaving. In addition, [the officer] was alone, he did not illuminate the interior of Sum's vehicle, he initially encountered Sum while checking on Sum's well-being, and he did not repeatedly question whether the car belonged to someone other than Sum.
>
> Absent an additional display of authority, the fact that [the officer] explained that he requested Sum's identification because Sum and his passenger "were sitting in an area known for stolen vehicles" and Sum "did not appear to know to whom the vehicle he was sitting in belonged," does not alone transform the social contact into a seizure. . . . Instead, [the officer's] conduct more closely mirrors those cases in which an officer does nothing more than request identification. Courts have repeatedly held that merely asking for identification is properly characterized as a social contact as opposed a seizure. . . .

Note: Defendant Palla Sum was also convicted in the same case of *attempting to elude a pursuing police vehicle and first degree unlawful possession of a firearm*. He did not appeal from those convictions.

5. State v. Tommy Lee Cook, Sr.: On April 12, 2021, Division One of the COA rejects the challenge of the defendant to his Clallam County Superior Court conviction for *possession of a controlled substance with intent to deliver, with a related school bus stop enhancement*. The Court of Appeals rules that **the trial court did not err in allowing a long-time drug-detective's testimony as an expert under ER 702 regarding the purposes of the paraphernalia, including foil, syringes, and spoons found in a search under a warrant**. The Court of Appeals also rules that **the trial court did not violate the rule against allowing a**

witness to give an opinion on the credibility of a witness in allowing the detective to provide rebuttal testimony. The rebuttal testimony came after defendant testified that the scales found in the search were for measuring his personal usage of heroin. The detective's rebuttal testimony was **that in his history of interviewing drug users, the detective had never been told by a user that the user weighed out his or her own dosage**.

6. Holly Thrasher v. Tod Thrasher: On April 19, 2021, Division One of the COA rejects the challenge of the civil case defendant, Todd Thrasher, to a King County Superior Court domestic violence protection order (DVPO) protecting his teenage children and his ex-wife, Holly Thrasher. The ex-wife's petition stemmed from an incident during which Todd punched their teenage son and from subsequent telephonic threats Todd made to Holly which she recorded without Todd's consent. **The Court of Appeals rejects Todd's argument that the recorded conversation was inadmissible under chapter 9.73 RCW, Washington's Privacy Act. With relatively detailed legal analytical support, the Court of Appeals concludes that, even though Holly initiated the recorded call, the recorded conversation falls within the exception to the statute's all-party consent requirement for conversations that "convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands" per RCW 9.73.030(2)(b)**. The same analysis should apply in criminal cases.

7. Soeun Am and Kheam Cheam v. Estate of Dillon K. O"Brien and WSP: On April 19, 2021, Division One of the COA rejects the challenge of the civil plaintiffs (Am and Cheam) to a King County Superior Court order granting judgment as a matter of law to the Washington State Patrol. The plaintiff's primary theory is that WSP negligently failed to cause the activation of a message on highway reader boards to warn oncoming traffic of a wrong-way driver before that driver collided with Am's vehicle. **In fact-based legal analysis, the Court of Appeals rules that the evidence does not support the plaintiffs' theory that there was sufficient time from the point that WSP was informed of the wrong-way driver for the highway reader boards to be programmed and activated to help prevent the crash**.

8. State v. Hazen Graham Shopbell: On April 19, 2021, Division One of the COA agrees with the appeal of the Washington Department of Fish and Wildlife (WDFW) from a Skagit County Superior Court order suppressing evidence of a seizure of clams after WDFW destroyed the clams. The Court of Appeals summarizes its holding in the second paragraph of its opinion, as follows:

> **We hold that the destroyed clams did not constitute material exculpatory evidence and were only potentially useful to the defense. The State's destruction of evidence that is only potentially useful does not violate due process unless the State destroyed the evidence in bad faith. Because the trial court did not determine whether WDFW officers destroyed the clams in bad faith, we reverse and remand to the trial court to make that determination.** On remand, the trial court may determine whether to take additional evidence on the issue of bad faith, and the court shall enter new findings of fact and conclusions of law.

9. State v. Alphonson Curtis Brownlee: On April 20, 2021, Division Two of the COA rejects the challenge of defendant to his Kitsap County Superior Court convictions for *(A) two counts of residential burglary, (B) two counts of assault in the second degree, (C) two counts of violation of a no contact order, and (D) two counts of tampering with a witness*. The Court of Appeals rules on a key issue in the case that, **because of defendant's pre-trial communications asking others to encourage the victim not to testify or further cooperate, the "forfeiture by wrongdoing" equitable exception to the Sixth Amendment Right to Confrontation was**

correctly applied by the trial court. Thus, a prior sworn written statement by the victim was admissible at trial even though the State failed after diligent efforts to produce the victim as a witness at trial.

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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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