LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

AUGUST 2020

TABLE OF CONTENTS FOR AUGUST 2020 LEGAL UPDATE

BRIEF NOTES REGARDING AUGUST 2020 UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS ON SELECT LAW ENFORCEMENT ISSUES……17

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

BRADY VIOLATION REQUIRES DISMISSAL OF CHARGES IN INFAMOUS CASE INVOLVING STANDOFF OF LAW ENFORCEMENT VERSUS CATTLE RANCHER BUNDY AND FAMILY AND SUPPORTERS; EVEN THOUGH LAW ENFORCEMENT AGENCIES, NOT THE PROSECUTORS THEMSELVES, WERE GUILTY OF NOT TIMELY FORWARDING THE EXCULPATORY INFORMATION, THE DISMISSAL IS HELD JUSTIFIED BASED ON THE "FLAGRANT NATURE" OF THE BRADY VIOLATION

In United States v. Bundy, ___ F.3d ___ , 2020 WL 4517572 (9th Cir., August 6, 2020), a three-judge Ninth Circuit panel unanimously votes – based on the prosecution's disclosure obligations under Brady v. Maryland, 373 U.S. 83 (1963) – to affirm the Nevada U.S. District Court's order that dismissed, with prejudice to re-filing, a federal indictment charging Cliven Bundy, two of his sons, and one associate with obstructing federal law enforcement officials carrying out lawful court orders. The dismissal is upheld even though the federal law enforcement agencies were responsible for the federal prosecutor's failure to know about and timely disclose the exculpatory information to the defense.

A Ninth Circuit staff summary, which is not part of the Court's decision, provides the following synopsis of the Court's unanimous Opinion:

> The indictment followed a well-publicized effort by the Bureau of Land Management to impound Cliven Bundy's cattle for a twenty-year failure to pay federal grazing fees [for Bundy's cattle graving on over a half-million acres of federal lands surrounding Bundy's 160-acre ranch]. Cliven Bundy and hundreds of armed supporters from around the United States forced federal officials to abandon the impoundment plan.
>
> Days into the defendants' trial, the government began disclosing information in its possession that, under [Brady v. Maryland, 373 U.S. 83 (1963)], was arguably useful to the defense and should have been produced to the defendants well before trial. As additional documents came forth, the [United States District Court] held a series of hearings, eventually deciding that the trial could not go forward and that the indictment must be dismissed with prejudice.
>
> Reviewing whether the district court properly dismissed the indictment under its supervisory powers, the panel considered the evidence cited by the district court to decide whether substantial prejudice resulted from the Brady violations, whether flagrant misconduct occurred, and whether alternative remedies could have redressed the injury here.
>
> Central to the government's case were allegations that the defendants intentionally lied about being surrounded by snipers as a ploy to gather armed supporters. Had the defendants been able to proffer a basis for genuinely believing that government snipers surrounded the Bundy Ranch, they potentially could have negated the government's

> scienter theory [i.e., the government's mental-state theory that the defendants' fabricated their claim in recruiting help from various militia groups because of the defendants' alleged fear of government snipers].
>
> Surveying all of the withheld evidence – including surveillance-camera evidence, FBI "302" investigative reports regarding snipers, Tactical Operations Center (TOC) log records, and threat assessments – the [Ninth Circuit] panel held that the record amply supports the district court's conclusion that the defendants suffered substantial prejudice in not being able to prepare their case fully, refine their voir dire [jury questioning and picking] strategy, and make stronger opening statements.
>
> Regarding the question of flagrant misconduct, the panel wrote that to the extent any government agencies or actors, through their own flagrant misconduct, failed to make known exculpatory information, the flagrant nature of such conduct will be imputed to the prosecution [even if the prosecution was not aware of the withholding of the information]. The panel explained that flagrant misconduct need not be intentional; reckless disregard for the prosecution's constitutional obligations is sufficient.
>
> Although it saw only negligence in the withholding of the TOC log records, the panel found no clear error in the district court's conclusion that the withholding of the surveillance-camera evidence, the 302s, and the threat assessments crossed the threshold from negligence to recklessness. The panel observed that the prosecution withheld facially exculpatory evidence that directly negated the government's theory that the defendants lied about fearing snipers, and that the deliberate choices to withhold those documents were not cases of simple misjudgment.
>
> The panel wrote that although dismissal with prejudice requires a district court to find that "no lesser remedial action is available," the panel understands by this phrase that a district court must conclude that no lesser remedy will fully address the damage caused by the government's misconduct. The panel concluded that the district court, which thoroughly considered the prejudicial effects, did not abuse its discretion in dismissing the indictment with prejudice.
>
> The panel wrote that lesser sanctions would have given the government an opportunity to strengthen its case at the defendants' expense, and noted the related need to impose a sanction that will serve to deter future prosecutions from engaging in the same misconduct as occurred here.

[Some paragraphing of Staff Summary revised for readability; bracketed language added]

The Ninth Circuit's Opinion itself contains the following Brady-based analysis imputing to the prosecutor's office both (1) the knowledge of exculpatory information held by law enforcement agencies, and (2) the degree of culpability of the law enforcement agencies for not disclosing the information:

> The government candidly admitted at oral argument that "in light of the district court's findings of materiality, what is clear is that we fell short." But it forcefully contends that it was not guilty of flagrant misbehavior because it did not willfully withhold exculpatory evidence from the defense.

> The government points out that many of the documents at issue were in the hands of other federal agencies, such as the FBI, and not the prosecution team. For that reason, the government decries the possibility of turning the flagrant misconduct requirement into a strict-liability standard where any Brady violation caused by the actions of another government agency can lead to dismissal of an indictment.
>
> Indeed, the district court itself believed that the nondisclosures were the fault of "other government agencies; not in the U.S. Attorney's Office." We are sensitive to the government's concern and agree that dismissal of an indictment is not an appropriate remedy for an ordinary Brady violation. . . . But both the factual record and the law belie the government's concerns here.
>
> As a matter of law, the prosecution is "deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant." United States v. Bryan, 868 F.2d 1032, 1036 (9th Cir. 1989). The government's attempts to absolve itself of wrongdoing for other agencies' failures therefore fall flat.
>
> To the extent that any government agencies or actors, through their own flagrant misconduct, failed to make known exculpatory information, the flagrant nature of such conduct will be imputed to the prosecution – just as the agencies' or actors' Brady violations are imputed to the prosecution. See Youngblood v. West Virginia, 547 U.S. 867, 869–70 (2006) (per curiam) (holding that a Brady violation occurs "when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor'"); United States v. Cano, 934 F.3d 1002, 1023 (9th Cir. 2019) (explaining that prosecutors are responsible for turning over "information known to other agents of the government" of which the prosecutor did "not know but could have learned" (citation omitted)), petition for rehearing en banc docketed, No. 17-50151 (9th Cir. Jan. 2, 2020).

[Some paragraphing of this excerpt from the Ninth Circuit Opinion is revised for readability]

Result: Affirmance of U.S. District Court (Nevada) order dismissing an indictment charging Cliven Bundy; two of his sons, Ryan and Ammon Bundy; and Ryan Payne with obstructing federal law enforcement officials carrying out lawful court orders.

CIVIL RIGHTS ACT CIVIL LIABILITY: NO QUALIFIED IMMUNITY FOR DEPUTY SHERIFF WHO, AT THE DIRECTION OF A JUSTICE OF THE PEACE, STOPPED AND ARRESTED PLAINTIFF FOR HIS ILLEGAL PRESENCE IN THE U.S.; NO QUALIFIED IMMUNITY FOR THE JUSTICE OF THE PEACE, EITHER; UNLIKE ILLEGAL ENTRY, ILLEGAL PRESENCE IN THE U.S. IS NOT A CRIME

In Reynaga Hernandez v. Skinner, ___ F.3d ___ , 2020 WL 4579494 (9th Cir., August 10, 2020), a three-judge Ninth Circuit panel is unanimous in an Opinion affirming the Montana U.S. District Court's order denying qualified immunity to a Montana deputy sheriff and a Montana Justice of the Peace. The Opinion agrees with Plaintiff's position that he was unlawfully stopped without reasonable suspicion and arrested without probable cause. A Ninth Circuit staff summary, which is not part of the Court's Opinion, synopsizes the decision of the Court as follows:

Plaintiff was arrested after a witness in a courtroom testified that plaintiff, who had accompanied his wife to the hearing to serve as a witness, was not a legal citizen. On the basis of this statement, [one of the two defendants in this civil case] Pedro Hernandez, the Justice of the Peace presiding over the hearing, requested that plaintiff be "picked up" by the local Sheriff's Office.

Defendant, Deputy Sheriff Derrek Skinner, subsequently detained plaintiff to question him regarding his immigration status, placed plaintiff in handcuffs, searched his person, and escorted him to a patrol car outside the courthouse.

The [three-judge panel's Opinion] first noted that, unlike illegal entry into the United States – which is a crime under 8 U.S.C. § 1325 – illegal presence is not a crime. See Martinez-Medina v. Holder, 673 F.3d 1029, 1036 (9th Cir. 2011). Therefore, "because mere unauthorized presence is not a criminal matter, suspicion of unauthorized presence alone does not give rise to an inference that criminal activity is afoot." Melendres v. Arpaio, 695 F.3d 990, 1001 (9th Cir. 2012).

Because Melendres and Martinez-Medina controlled and defendant Skinner failed to demonstrate that he had a particularized and objective basis for believing criminal activity was afoot, the panel affirmed the district court's holding that Skinner violated the Fourth Amendment when he seized plaintiff by Terry-stopping and then arresting him without reasonable suspicion or probable cause, respectively.

The [panel's Opinion] further held that under either the proximate or the but-for standard of causation, defendant Hernandez [the Justice of the Peace who ordered that plaintiff be "picked up"] was an integral participant in the violation of plaintiff's constitutional rights. The panel held that plaintiff's right to be free from unlawful stops in this circumstance had been established since at least 2012, by which time both Melendres and Martinez-Medina were law of the circuit. [Therefore, because the plaintiff's right to be free from such a stop and arrest were "established" as the time of his stop and arrest in late 2017, the deputy sheriff and the three-judge panel denies qualified immunity to the deputy sheriff and the Justice of the Peace.]

[Some paragraphing revised for readability; bracket text added]

Result: Affirmance of U.S. District Court (Montana) order denying qualified immunity to a Montana deputy sheriff and a Montana Justice of the Peace.

LEGAL UPDATE EDITOR'S COMMENT: State and local officers in Washington of course must also comply with limitations imposed by any agency policies and local ordinances. As always, I urge officers and agencies to consult their own legal advisors and local prosecutors on this and other legal matters addressed in the LED.

SECOND AMENDMENT HELD IN 2-1 VOTE TO BE VIOLATED BY CALIFORNIA STATUTE BANNING POSSESION OF LARGE-CAPACITY MAGAZINES (LCMs) THAT HOLD MORE THAN 10 ROUNDS OF AMMUNITION

In Duncan v. Becerra, ___ F.3d ___ , 2020 WL ___ (9th Cir., August 14, 2020), a three-judge Ninth Circuit panel votes 2-1 to affirm a U.S. District Court summary judgment ruling in favor of plaintiffs who challenged California Government Code § 31310, which bans possession of large-

capacity magazines ("LCMs") that hold more than ten rounds of ammunition. The three-judge panel holds that the California legislative ban violates the Second Amendment.

In key part, a Ninth Circuit staff summary, which is not part of the Court's Opinion, synopsizes the decision of the Court as follows:

> The Ninth Circuit employs a two-prong inquiry to determine whether firearm regulations violate the Second Amendment: (1) whether the law burdens conduct protected by the Second Amendment; and (2) if so, what level of scrutiny to apply to the regulation. United States v. Chovan, 735 F.3d 1127, 1136 (9th Cir. 2013).
>
> The panel held that under the first prong of the test, Cal. Penal Code § 32310 burdened protected conduct. First, the panel held that firearm magazines are protected arms under the Second Amendment. Second, the panel held that LCMs are commonly owned and typically used for lawful purposes, and are not "unusual arms" that would fall outside the scope of the Second Amendment. Third, the panel held that LCM prohibitions are not longstanding regulations and do not enjoy a presumption of lawfulness. Fourth, the panel held that there was no persuasive historical evidence in the record showing LCM possession fell outside the ambit of Second Amendment protection.
>
> Proceeding to prong two of the inquiry, the panel held that strict scrutiny was the appropriate standard to apply. First, the panel held that Cal. Penal Code § 32310 struck at the core right of law-abiding citizens to self-defend by banning LCM possession within the home. Second, the panel held that Section 32310's near-categorical ban of LCMs substantially burdened core Second Amendment rights. Third, the panel held that decisions in other circuits were distinguishable. Fourth, the panel held that this circuit's decision in Fyock v. City of Sunnyvale, 779 F.3d 991 (9th Cir. 2015), did not obligate the panel to apply intermediate scrutiny.
>
> The panel held that Cal. Penal Code § 32310 did not survive strict scrutiny review. First, the panel held that the state interests advanced here were compelling: preventing and mitigating gun violence. Second, the panel held that Section 32310 was not narrowly tailored to achieve the compelling state interests it purported to serve because the state's chosen method – a statewide blanket ban on possession everywhere and for nearly everyone – was not the least restrictive means of achieving the compelling interests.
>
> The panel held that even if intermediate scrutiny were to apply, Cal. Penal Code § 32310 would still fail. The panel held that while the interests expressed by the state qualified as "important," the means chosen to advance those interests were not substantially related to their service.
>
> Chief District Judge Lynn dissented, and would reverse the district court's grant of summary judgment. Judge Lynn wrote that the majority opinion conflicted with this Circuit's precedent in Fyock, and with decisions in all the six sister Circuits that addressed the Second Amendment issue presented here. Judge Lynn would hold that intermediate scrutiny applies, and Cal. Penal Code § 32310 satisfies that standard.

Result: Affirmance of U.S. District Court order granting summary judgment to plaintiffs with a ruling that California's legislation banning LCMs violates the Second Amendment of the U.S. Constitution.

LEGAL UPDATE EDITOR'S NOTES/COMMENTS: The Majority Opinion in this case covers 65 pages in the Internet format. Numerous friend-of-the-court briefs were filed by governmental agencies and private organizations. It seems likely that the California Attorney General will seek review by an 11-judge Ninth Circuit panel. And is my guess that whichever party loses ultimately in the Ninth Circuit review will seek U.S. Supreme Court review. It could be a long while before this case is finally resolved.

The State of Washington does not have a similar magazine-capacity-restricting statute, though similar legislation has been proposed in the recent past. The Washington Attorney General was one of the listed friends of the court participating in briefing in Duncan v. Becerra. I have not seen any of the briefs.

PORTLAND'S PARKING ENFORCEMENT PRE-TOWING NOTICE AND PRACTICE NEED TO BE REVIEWED UNDER DUE PROCESS STANDARD THAT LOOKS AT WHETHER NOTICE: (1) APPRISES OF PENDENCY OF ACTION AND (2) AFFORDS VIOLATOR AN OPPORTUNITY TO PRESENT OBJECTIONS

In Grimm v. City of Portland (OR), ___ F.3d ___ , 2020 WL ___ (9th Cir., August 21, 2020), a three-judge Ninth Circuit panel reverses the U.S. District Court's summary judgment ruling in favor of the City of Portland in a Civil Rights Act lawsuit alleging that the City's pre-towing notice is inadequate under the Fourteenth Amendment's Due Process Clause. The panel rules that further fact-finding proceedings are required to resolve the Due Process issue.

The Ninth Circuit Opinion describes the facts and procedural background of the case as follows:

> Grimm parked his car on a public street in Portland on December 14, 2017 and paid for parking via Portland's mobile phone parking app. Grimm was required to pay for parking again as of 8:00 am on December 15. Grimm neither paid for parking nor moved his car.
>
> Over the next seven days, Portland officers left on Grimm's car windshield four citations for parking illegally and two citations for displaying expired registration stickers. On December 21, the day Grimm's car was towed, the officer issuing Grimm's sixth and final citation also placed a "separate red tow slip" on Grimm's windshield. The slip had the word "TOW" on one side and an order to tow the vehicle on the other.
>
> The officer then contacted Retriever Towing, which "promptly" – how promptly the record does not disclose – towed Grimm's car. Grimm learned that his car had been towed when he looked for it on December 24.
>
> Grimm, an attorney, filed a pro se lawsuit against Retriever Towing, Portland, and the Portland officers who issued his citations. . . . [The U.S. District Court ultimately granted summary judgment to the towing company and the Portland officers on motions filed by those parties.]

[Court's footnote omitted]

A Ninth Circuit staff summary, which is not part of the Court's decision, provides the following synopsis of the Court's unanimous Opinion that reverses the District Court ruling and remands

the case for further factual presentations and legal argument regarding the Due Process issue. In key part, the staff summary provides as follows:

> The panel first reiterated a settled principle: Due process requires that individualized notice be given before an illegally parked car is towed unless the state has a "strong justification" for not doing so. . . . The panel held that the district court erred by relying on a 2017 unpublished [Ninth Circuit decision] . . . .
>
> The panel held that Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), rather than [the decisions relied upon by the District Court], sets forth the appropriate standard for analyzing the adequacy of a pre-towing notice claim. Under Mullane, the government is required to provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.
>
> Because the district court applied an incorrect legal standard in determining whether the pre-towing notice was sufficient, and the record was not fully developed, the panel remanded this case to the district court. On remand, the panel instructed the district court to consider, among other questions: (1) Is putting citations on a car that do not explicitly warn that the car will be towed reasonably calculated to give notice of a tow to the owner?; (2) Did the red tow slip placed on plaintiff's car shortly before the tow provide adequate notice?; and (3) Was Portland required under Jones v. Flowers, 547 U.S. 220 (2006) to provide supplemental notice if it had reason to suspect that the notice provided by leaving citations and the tow slip on Grimm's windshield was ineffective?

[Some citations omitted]

In footnote 5, the Ninth Circuit's Opinion explains why the Ninth Circuit is not considering a contrary factual contention by the City of Portland in the context of this review of the summary judgment ruling in Portland's favor by the District Court (presumably, the City of Portland will be able to present this relevant evidence on remand):

> Portland maintains that an officer also left a red warning slip with the December 19th citation [issued two days before the car was towed]. The slip "had the word 'WARNING' in large print on one side and on the back side . . . provided a warning and notice stating, 'Your vehicle will be subject to tow/citation if it is not moved.'" Grimm submitted contrary evidence in support of his contention that no warning slip was placed on the windshield. The photographs taken by the officers issuing Grimm's citations do not reflect a warning placard, and Retriever Towing did not provide Grimm with a warning placard, even though it gave him the citations and showed him the red TOW placard left on his car. "[D]raw[ing] all inferences in the light most favorable to the nonmoving party," Gravelet-Blondin v. Shelton, 728 F.3d 1086, 1090 (9th Cir. 2013) (citation and quotation marks omitted), we assume for present purposes that there was no such warning.

Result: Reversal of U.S. District Court (Oregon) summary judgment order for the City of Portland and remand for further proceedings.

LEGAL UPDATE EDITORIAL NOTE: Because I do not know whether the factual allegations and summary judgment posture of this case are essentially unique to this case, I do not know whether this is a worrisome case to any governmental agencies other than the City of Portland. I have included the decision just in case legal advisors

and law enforcement agencies may want to check their notice procedures related to parking violations and towing.

CIVIL RIGHTS ACT CIVIL LIABILITY, CORRECTIONS: PRISON'S DIFFERENT RULES, DEPENDING ON PRISONER GENDER, FOR ACCESS TO VENDOR PRODUCTS MUST BE REVIEWED UNDER EQUAL PROTECTION ANALYSIS THAT CONSIDERS WHETHER THERE HAS BEEN REASONED ANALYSIS BY POLICYMAKERS, RATHER THAN THE MECHANICAL APPLICATION OF TRADITIONAL, OFTEN INACCURATE ASSUMPTIONS ABOUT GENDER

In Harrison v. Kernan, ___ F.3d ___ , 2020 WL ___ (9th Cir., August 21, 2020), a three-judge Ninth Circuit panel votes unanimously to reverse a U.S. District Court ruling that had granted summary judgment to State of California prison officials in a Civil Rights Act lawsuit by a California prisoner who alleged that prison officials discriminated against him based on his male gender by not allowing him to purchase certain prison vendor products that are available only to female inmates.

The Ninth Circuit Opinion describes as follows the key facts in the case regarding property schedules for various categories of inmates:

> [Since 2014, each property schedule] corresponds to a security-driven categorization of inmates: 1) male reception center inmates; 2) Level I, II, and III male inmates in general population; 3) Level IV male inmates in general population; 4) male inmates in Administrative Segregation, Secure Housing, or Psychiatric Service Units; and 5) female inmates. Within each schedule, the type and amount of property an inmate is permitted is further determined by the inmate's privilege group.
>
> Items whose availability depends at least in part on inmate gender include, inter alia: products that contain small metal pieces or otherwise may be used as a weapon, such as hair dryers and electric curling irons, as well as bath robes, scarves, kimonos, and bath towels, which could be used for strangulation; clothing, such as denim jeans, that "would allow [inmates] to blend in with the general public" and thus could be used to disguise escaped prisoners; sugary foods that could be used to make an alcoholic beverage known as "pruno"; and items which the Department claims could give rise to disputes over gambling or money, such as necklaces and bracelets, as well as the card game Uno. For the purpose of this appeal, it is undisputed that under the current property regulation female inmates of the highest security classification housed in general population have access to more personal property than male inmates in the lowest security classification housed in general population.

[Footnote omitted]

In key part, a Ninth Circuit staff summary, which is not part of the Court's decision, provides the following synopsis of the Court's unanimous Opinion:

> [After determining that the prisoner/plaintiff has standing to bring his lawsuit, the Ninth Circuit Opinion] held, following the lead of at least two sister circuits, and mindful of the deference owed to prison officials in light of the special difficulties that arise in the prison context, that intermediate scrutiny applies to claims challenging prison regulations which facially discriminate on the basis of gender. In vacating the district court's summary

judgment, the panel noted that this Circuit had not yet established intermediate scrutiny as the applicable standard at the time the district court reviewed the regulation at issue in this case.

The panel therefore remanded so that the district court could determine in the first instance whether the Department's regulation survived intermediate scrutiny, bearing in mind that gender-based distinctions must be rooted in reasoned analysis by policymakers, rather than the mechanical application of traditional, often inaccurate assumptions about gender.

The Ninth Circuit Opinion itself provides some guidance to the State of California regarding the justification evidence the State must provide in the District Court remand proceedings:

> In closing, we note that at oral argument the Department assured us that it has access to more data it can proffer in support of its current personal property schedules. It is not enough, under intermediate scrutiny, for the Department only to demonstrate "empirical relationships" between gender and the various propensities against which it seeks to protect – in this instance, alleged male propensities towards violence, gang membership, and escape attempts. Rather, the Department must show that those relationships "adequately justify the salient features of" the challenged regulation. [Craig v. Boren, 429 U.S. 190, 200-03 (1976)] (holding that data showing, for example, that "18–20-year-old male arrests for 'driving under the influence' and 'drunkenness' substantially exceeded female arrests for that same age period" was inadequate to justify a law differentiating between males and females aged 18 to 21 for the purchase of 3.2% beer because the data failed to "measure the use and dangerousness of 3.2% beer as opposed to alcohol generally," and made "no effort to relate [those] findings to age-sex differentials as involved here").
>
> Perhaps the Department can successfully justify its property regulation by comparing the number of violent incidents at lower security male facilities or by lower security male prisoners with the number of violent incidents at female prisons or by higher security female prisoners.
>
> [Court's footnote: Instead, the COMPSTAT data attached to Captain Bickham's declaration shows only that in 2015, the total number of violent incidents across all categories was higher in male prisons than in female prisons.]
>
> Such a comparison may well demonstrate that the Department is justified in allowing women of the highest security classification in general population to possess items that men at the lowest security classification in general population cannot. This determination will be for the district court to make, bearing in mind that gender-based distinctions must be rooted in reasoned analysis by policymakers, rather than the mechanical application of traditional, often inaccurate assumptions about gender. [See Mississippi University for Women, 458 U.S. 718 (1982)]

[Some paragraphing revised for readability; some citations revised for style]

Result: Reversal of U.S. District Court (Northern District of California) summary judgment order for the State of California prison officials, and remand for further proceedings.

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WASHINGTON STATE COURT OF APPEALS

CHILD PORNOGRAPHY DEFENDANT HELD TO NOT HAVE CONSTITUTIONAL PRIVACY PROTECTION IN CHILD PORN THAT WAS DETECTED IN A "HASH VALUES" CHECK BY AN INTERNET CLOUD STORAGE SERVICE PROVIDER AND SENT TO LAW ENFORCEMENT; NO WARRANT WAS REQUIRED FOR DETECTIVE TO OPEN AND VIEW THE IMAGES SENT BY THE PRIVATE SERVICE PROVIDER

In State v. Aaron Mark Harrier, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. II, June 23, 2020), Division Two unpublished Opinion ordered published on August 18, 2020), Division Two of the Court of Appeals rules against the appeal of defendant Harrier from his Clark County Superior Court convictions for possession of child pornography. The Court of Appeals summarizes its Opinion as follows in the three introductory paragraphs of the Opinion:

> An internet cloud storage service provider, Synchronoss Technologies, Inc., ran a cursory search of all stored digital files and found six digital images with hash values matching those of known instances of child pornography. Synchronoss reported this information via CyberTip to the National Center for Missing and Exploited Children (NCMEC) who forwarded the information to local police for investigation.
>
> Harrier argues that the police, by opening and viewing the images from NCMEC, exceeded the scope of Synchronoss' lawful search of the images and thus, the opening and viewing of the images was unlawful, and the trial court erred by denying his motion to suppress. Harrier relies on the Fourth Amendment to the United States Constitution and argues that the police's opening of the files was an expansion of the lawful search. Whether the police expanded a lawful search is a factor that is considered under the private search doctrine, but the private search doctrine is applicable under the Fourth Amendment. Because Article 1, section 7 of the Washington Constitution is more narrow than the Fourth Amendment, we resolve this matter under our state constitution.
>
> We hold that Harrier has no privacy interest in the images obtained by Synchronoss and delivered to the police. Therefore, the police's opening and viewing of the digital images [without a search warrant] was not an unlawful search. Thus, the trial court did not err by denying Harrier's motion to suppress. Accordingly, we affirm Harrier's convictions.

Thus, under the federal constitution's "private search doctrine," a warrantless search by a state actor that does not expand the scope of a truly private search does not offend the Fourth Amendment even if the prior private search would have violated the Fourth Amendment if conducted by a government officer or the officer's agent. In State v. Eisfeldt, 163 Wn.2d 628, 636 (2008), the Washington Supreme Court ruled that the private search doctrine does not apply under article I, section 7 of the Washington Constitution. The Harrier case did not, however, require that the State rely on the "private search doctrine" because Harrier had no constitutional privacy protection for the digital images as issue.

The Harrier Court supports as follows its conclusion that defendant had no privacy protection in the contraband images of child pornography detected by the internet cloud service provider:

> [T]here is no privacy interest in contraband. State v. Carter, 151 Wn.2d 118, 126-27 (2004). And child pornography is contraband. State v. Garbaccio, 151 Wn. App. 716, 729 (2009).

> Here, it is undisputed that Synchronoss, a private party, conducted the initial lawful search using the "hashing" technique [the Court explains the "hashing" technique earlier in the Opinion]. The hash value of images from Harrier's cell phone was identical to the hash value of images previously identified as child pornography by law enforcement. It is also undisputed that Synchronoss then made a legally required CyberTip to NCMEC, who forwarded the information and tip to the police for investigation.
>
> We know from the hash values that the files Synchronoss found were child pornography and that this information, the images, and the CyberTip are reliable. See Millette v. U.S., __ F. Supp. 2d __, slip op. at 6, 2018 WL 3478891 (D. Me. 2018). Because a private party conducted the search and the images are contraband, Harrier did not have a privacy interest in them. Thus the police's opening and viewing the images from a private party was not unlawful. See Carter, 151 Wn.2d at 126-27.

[Some citations revised for the sake of brevity]

Result: Affirmance of Clark County Superior Court convictions of Aaron Mark Harrier for (A) two counts of first degree possession of depictions of a minor engaged in sexually explicit conduct, and (B) three counts of second degree possession of depictions of a minor engaged in sexually explicit conduct.

DIVISION ONE OF THE COURT OF APPEALS CONFIRMS ITS JUNE 2020 RULING THAT NEITHER TERRY AUTHORITY NOR COMMUNITY CARETAKING EXCEPTION SUPPORTED OFFICER IN REMOVING SPOON FROM SLEEPING MAN'S COAT POCKET, RATHER THAN PATTING THE POCKET

In State v. Martin, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. I, August 31, 2020), Division One of the Court of Appeals issues an Opinion that reconsiders and revises the Court's June 15, 2020 Opinion without material change in the rulings of the Court on the issues that were addressed in the June 2020 Legal Update. Thus, the Court of Appeals adheres to the framing of issues and the rulings that were described as follows in that earlier Legal Update (**LEGAL UPDATE EDITOR'S NOTE: I hope that I have not overlooked any material change from the June 15, 2020 version of the Court's Opinion; readers should please let me know if I have erred in this regard**):

ISSUES AND RULINGS: (1) Did the officer's removal of the spoon from Martin's coat pocket fail to qualify as a protective frisk under Terry v. Ohio for three separate reasons: (A) There was no reasonable suspicion that a crime (i.e., trespass) had been committed, (B) There was not a reasonable safety concern under the circumstances, and (C) The search exceeded the lawful scope of a frisk? (ANSWER BY COURT OF APPEALS: Yes, for all three reasons, the removal of the spoon from Martin's pocket was not justified under Terry v. Ohio)

(2) Was removal of the spoon from Martin's coat pocket justified under the community caretaking exception to the search warrant requirement? (ANSWER BY COURT OF APPEALS: No, because the officer did not subjectively believe that an emergency existed, nor would a reasonable person have believed that an emergency existed; also, removal of the spoon was not necessary even if the community caretaking exception were applicable to the facts of this case)

Result: Reversal of Snohomish County Superior Court conviction of Kristopher Charles Martin for possession of a controlled substance.

RULE AGAINST TESTIMONY AS TO CRIMINAL DEFENDANT'S GUILT WAS VIOLATED BY TRIAL COURT ALLOWING AN OFFICER TO ANSWER A DEPUTY PROSECUTOR'S QUESTIONS TO THE OFFICER ASKING IF THE OFFICER WOULD HAVE MADE AN ARREST IF THE STATE'S LONE WITNESS WAS NOT CREDIBLE

In State v. Hawkins, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. I, August 17, 2020), Division One of the Court of Appeals rules that a trial court judge should not have admitted into evidence an officer's answer to a deputy prosecutor's questions that in effect asked if the officer found to be credible the State's lone witness accusing the defendant.

The Court of Appeals introduces its Opinion with the following thumbnail sketch of the Court's ruling and rationale:

> A prosecutor functions as the representative of the people in the search for justice. The prosecutor also owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. It is inappropriate in a criminal trial for the prosecutor to seek opinion testimony as to the guilt of the defendant, the intent of the accused, or the credibility of witnesses. This is particularly true where the opinion sought is that of a law enforcement officer. [Later in the Opinion, the Court cites State v. Demery, 144 Wn.2d 753, 763, 30 P.3d 1278 (2001) for this proposition].
>
> Willie Hawkins appeals his conviction for assault in the third degree. Hawkins argues that the prosecutor committed misconduct by eliciting improper opinion testimony from the arresting officer concerning the credibility of the State's only witness to the alleged assault. We agree and reverse Hawkins's conviction and remand for a new trial.

[Paragraphing revised for readability]

Despite repeated sustained objections by defense counsel, the deputy prosecutor in the Hawkins case continued to question the arresting officer as to whether the officer would have made an arrest if the officer did not have a credible witness to support probable cause to arrest. The trial judge eventually allowed the officer to answer the question. The officer answered that he needed a credible witness in a case like this one in order to make an arrest.

This Court of Appeals rules: (1) that the officer's answer improperly implied to the jury that the officer believed the alleged victim over the defendant; and (2) that the deputy prosecutor's repeated emphasis on the officers' inadmissible and irrelevant credibility opinion prejudiced Hawkins's right to a fair trial.

Result: Reversal of King County Superior Court conviction of Willie Jauan Hawkins for assault in the third degree; case remanded for retrial.

DENIAL OF DEFERRED PROSECUTION BASED ON OUT-OF-STATE RESIDENCY IS UPHELD AGAINST EQUAL PROTECTION CHALLENGE

In Thornock v. Hon. Michael Lambo, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. I, August 3, 2020), a three-judge panel of the Washington Court of Appeals rules against a DUI defendant in his appeal from denial of a deferred prosecution based solely on his out-of-state residency.

Kirkland Municipal Court Judge Michael Lambo denied deferred prosecution status to defendant Thornock, an Idaho resident. The denial was based on a concern that the Washington courts would have difficulty monitoring and enforcing the terms of the deferred prosecution for an out-of-state resident.

The King County Superior Court upheld the Municipal Court ruling, and now the Court of Appeals has affirmed the Superior Court, rejecting defendant's equal protection and abuse-of-discretion challenges. The Court of Appeals rules that the Municipal Court decision serves "a legitimate State interest in ensuring compliance with the deferred prosecution program."

Result: Affirmance of King County Superior Court decision that upheld the Kirkland Municipal Court's decision to reject deferred prosecution status to Cody C. Thornock. Case remanded for trial on charge for an alleged 2012 DUI event.

DEFENDANT'S REQUEST FOR SELF-DEFENSE JURY INSTRUCTION WAS NOT SUPPORTED WHERE THERE WAS NO EVIDENCE THAT DEFENDANT SUBJECTIVELY FEARED THAT HE WAS IN IMMINENT DANGER OF DEATH OR GREAT BODILY HARM

In State v. Moreno, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. I, August 17, 2020), the Court of Appeals rejects defendant's argument, among others, that the trial court violated his right to present a defense where the trial court refused to instruct the jury on self-defense. In key part, the analysis by the Court of Appeals is as follows:

> Generally, a defendant is entitled to a self-defense instruction if there is some evidence demonstrating self-defense. . . . . To prove self-defense, there must be evidence that (1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm, (2) this belief was objectively reasonable, and (3) the defendant exercised no greater force than reasonably necessary. . . .
>
> Moreno points to his testimony that when he turned on the light in Vollmar's house, she threw his phone at him. He also cites his testimony that he and Vollmar ended up "kind of wrestling" over his wallet. Based on this evidence, he contends that the jury could have found any touching was in response to Vollmar throwing the phone at him, or him trying to retrieve his wallet from her hands.
>
> Even if we were to assume that any nonconsensual touching took place in response to Vollmar throwing his phone or taking his wallet, Moreno's testimony does not demonstrate that he subjectively feared he was in imminent danger of death or great bodily harm. Nor does he point to other evidence suggesting that he feared Vollmar.
>
> There must be some evidence that a defendant subjectively feared he was in imminent danger of death or great bodily harm to receive a self-defense instruction. . . . Moreno was not entitled to a self-defense instruction, and the trial court did not err in refusing to give one.

[Some paragraphing revised for readability]

Result: Affirmance of Snohomish County Superior Court convictions of Francisco Ruben Moreno for first degree burglary, fourth degree assault, and interfering with domestic violence reporting.

FIREARM RIGHTS MAY BE RESTORED BY SUPERIOR COURT OF EITHER (1) COURT OF CONVICTION OR (2) COURT OF PETITIONER'S CURRENT RESIDENCE

In State v. Manuel, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. I, August 31, 2020), Division One of the Court of Appeals agrees with the appeal of James Manuel in his challenge to a King County Superior Court order that (A) restored his right to possess a firearm under RCW 9.41.040(4) as to his King County Superior Court conviction, but (B) refused to restore his firearm rightS as to convictions from Pierce County Superior Court and Lakewood Municipal Court.

The Court of Appeals holds that RCW 9.41.040(4)(b) is not a jurisdictional limit on a superior court's authority to restore a defendant's firearm rights. The statute gives a petitioner two venue options, one of which is any superior court of conviction and the other is the superior court in the county of the petitioner's residence. Thus, King County Superior Court, as a superior court of conviction, was an appropriate venue for Manuel to obtain a full restoration of his firearm rights as to King County Superior Court convictions, Pierce County Superior Court convictions, and City of Lakewood convictions.

Result: Reversal of King County Superior Court order denying restoration of firearm rights and remand of case for that court to restore the firearm rights of James H. Manuel.

UNLAWFUL POSSESSION OF A FIREARM BY CONVICTED PERSON DOES NOT INCLUDE AN ELEMENT OF INTENT TO UNLAWFULLY POSSESS

In State v. Nielsen, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. I, August 31, 2020), Division One of the Court of Appeals disagrees with the appeal of defendant Nielsen from his King County Superior Court conviction for attempted unlawful possession of a firearm in the first degree.

He argued on appeal that the jury instructions given by the trial court were in error because they failed to instruct the jury that the State needed to prove that Nielsen had the intent to unlawfully possess a firearm. The Court of Appeals explains as follows that intent to unlawfully possess a firearm is not an element of that crime:

> There are two elements of the crime of unlawful possession of a firearm: (1) the person knowingly possesses a firearm, (2) after having been previously convicted of a serious offense. RCW 9.41.040(1). The crime of unlawful possession of a firearm does not require that the defendant have actual knowledge of the illegality of firearm possession. State v. Minor, 162 Wn.2d 796, 802 (2008). By arguing that he is entitled to an instruction on his unlawful intent, Nielsen is asking for an instruction that adds an additional element to the crime of attempt or unlawful possession of a firearm. He conceded that he committed a prior serious offense, which made his possession of a firearm illegal. Nielsen asks this court to add a third step to the analysis of the crime of attempt, which would require the State to prove that (1) Nielsen had the intent to

knowingly possess a firearm, (2) he took a substantial step, and (3) Nielsen knew that it was illegal for him to possess a firearm. There is no case law to support this interpretation.

[Citation revised for style]

Result: Affirmance of King County Superior Court conviction of Madison Anthony Nielsen for attempted unlawful possession of a firearm in the first degree.

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BRIEF NOTES REGARDING AUGUST 2020 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 19 entries below are August 2020 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, the crimes of conviction or prosecution are italicized, and descriptions of the holdings/legal issues are bolded.

1. State v. John Frederick Budig II: On August 3, 2020, Division One of the COA agrees with the appeal of the State from a suppression ruling of the Snohomish County Superior Court in a prosecution for *possession of heroin*. The Court of Appeals rules in lengthy fact-intensive legal analysis that a law enforcement officer: (1) **had reasonable suspicion for a Terry seizure** when the officer responded to a 911 report and followed up a citizen's in-person identification of a person reported to be shining a laser in the eyes of passing drivers; and (2) **had justification for a frisk** in the nighttime contact where the fidgety, sweating suspect continued to put his hands in his pockets despite the officer directing him to continue to show his hands and not put them in his pockets. The Budig Court remands the case for trial.

2. State v. Aaron Lee Kinley: On August 3, 2020, Division One of the COA rejects the appeal of Kinley from his Whatcom County Superior Court convictions for one count each of (A) *attempted rape of a child in the second degree* and (B) *communicating with a minor for immoral purposes*. Among other rulings, the Court of Appeals rejects Kinley's claim of outrageous government conduct regarding the nature of the interactions between law enforcement and the defendant in a Craigslist sting directed at sex predators preying on children. **The Court thus**

rejects his Due Process-based claims of outrageous government conduct. The Court's analysis distinguishes the facts of this case from those in State v. Solomon, 3 Wn. App. 2d 895 (2018), where the Court of Appeals concluded that the undercover officer went too far in the officer's communications with the defendant drawing him into criminal behavior.

3. State v. Alberto L. Diaz-Barrientos: On August 3, 2020, Division One of the COA rejects the appeal of defendant from his King County Superior Court conviction for *domestic violence felony violation of a no-contact order*. The Court of Appeals relies on State v. Clayton, 11 Wn. App. 2d 172 (2019), review denied, No. 97991-0 (Wash. July 10, 2020), 2020 WL 3888316, in rejecting defendant's argument under the Washington Privacy Act (WPA). As in Clayton, the Diaz-Barrientos Court concludes that **the authorization/exception at RCW 9.73.090(1)(c) for body-camera recordings means that conversations captured by body cameras are generally not "private" under the WPA**.

In another ruling, the Court of Appeals accepts the State's concession that a search of the defendant's apartment was unlawful because **the State did not establish either (1) that the defendant's father had authority to give third party consent, or (2) that the defendant's father (assuming for the sake of argument that he did have authority to give such consent) was told by officers that he had a right to refuse such consent such that the consent to the residential search could have been voluntary**. However, the Court of Appeals rules that **the trial court error on this issue was harmless** in light of the overwhelming untainted evidence of defendant's guilt.

4. State v. Anthony Lee Robert Davis: On August 3, 2020, Division One of the COA rejects the appeal of Davis from his Snohomish County Superior Court convictions for (A) *robbery in the first degree* and (B) *kidnapping in the first degree*. **The Court of Appeals rules in lengthy legal analysis that a search qualifies as a lawful search incident to arrest under the "time of arrest" standard of State v. Byrd, 178 Wn.2d 611 (2013) and State v. Brock, 184 Wn.2d 148 (2015).** When police officers contacted and detained Anthony Davis, he was holding a backpack. Formal arrest was delayed until the victim was brought to the scene for a showup identification. Shortly after Davis was formally arrested and taken from the scene, an officer at the scene searched Davis's backpack. **The Court of Appeals rules that this was a valid "time of arrest" search incident to Davis's arrest even though Davis was no longer at the scene**.

5. State v. Brandon Lee Ryan: On August 3, 2020, Division One of the COA rejects the appeal of Ryan from his Pierce County Superior Court convictions for (A) *unlawful possession of a controlled substance with intent to deliver, with special enhancements alleged for being armed and in a school zone at the time of this offense*, and (B) *unlawful possession of a firearm in the irst degree*. **One issue on appeal was whether the trial court abused its discretion in allowing a detective to give expert testimony about the general practices of drug dealers. The Court of Appeals rejects defendant's argument** and explains:

> It is unlikely that a trier of fact unfamiliar with methamphetamine transactions would know how much of the drug a person would carry for personal consumption (as opposed to the amount carried for business purposes), or that methamphetamine dealers use safes or lock boxes to hold their inventory, or the methods by which such dealers make hand-to-hand transactions.

6. State v. Raymond Linus Sage: On August 3, 2020, Division One of the COA rules against Sage in his appeal from his Snohomish County Superior Court convictions for (A) *failure to register as a sex offender*, and (B) *felony bail jumping*. **The Court of Appeals rules that an officer's statement to Sage at the point of arrest, per RCW 10.31.040, that Sage's arrest was authorized by an arrest warrant, was not "interrogation" for Miranda purposes. Therefore, Sage's subsequent custodial statements while resisting arrest were "spontaneous and voluntary" statements not subject to exclusion under Miranda. I think that the Court of Appeals uses the word "spontaneous" to be synonymous with "volunteered."**

7. State v. Daryl Rogers II, a/k/a Daryl Craig Rogers: On August 3, 2020, Division One of the COA rules against the appeal of Rogers from his Clark County Superior Court convictions for (A) *three counts of first degree rape of a child*, and (B) *one count of first degree child molestation*. **The Court of Appeals rules that a mental health counselor's expert testimony regarding assessment of the alleged victim did not cross the line against vouching for a victim's credibility or testifying that a defendant is guilty.**

8. State v. Jacob Michael Duenas: On August 4, 2020, Division Three of the COA rules against the appeal of Duenas from his Pierce County Superior Court convictions for (A) *two counts of first degree child rape*, (B) *two counts of first degree child molestation*, and (C) *one count of attempted first degree child rape*. The Court of Appeals notes that there is ambiguity in Title 9A RCW regarding the statute of limitations for attempts of the crimes prosecuted in this case. But the Court rules that **the statute of limitations, even if only the default three-year period for felonies, per defendant's theory, had not run at the point of charging the defendant because, per RCW 9A.04.080(2), the statute of limitations did not run during the period when defendant was "not usually and publicly resident within [the State of Washington**]."

9. State v. Rico Odell Davis: On August 4, 2020, Division Three of the COA rules against the appeal of Rico Odell Davis from his Spokane County Superior Court conviction for *possession of methamphetamine*. The Court of Appeals rules (perhaps I am over-simplifying or I have missed a nuance or two) that: **(1) defendant was lawfully detained in an apartment by officers who were responding to three 911 calls and who had reasonable suspicion that he was trespassing in the apartment; (2) continuing detention of the defendant was lawful based on his false statement to officers regarding his identity; (3) the strip search statute at RCW 10.79.130 justified his strip search upon booking at the jail both because he was (A) arrested based in part on a burglary warrant, and (B) because he was arrested based in part on a on a DOC warrant; (4) the strip search was not a body cavity search because, under State v. Jones, 76 Wn. App. 592, 598 (1995), "[r]emoving an item protruding from the anus during a strip search is not a body cavity search, even if the protruding item is touching a body cavity . . . . [and an] officer does not touch or probe the rectum when retrieving an item that touches the rectum."; and (5) the categorical statutory authorization of strip searches as applied in this case is constitutional under both the federal and Washington constitutions, which are identical in their protections relating to strip searches**.

10. State v. Tomás Manuel Gaspar: On August 4, 2020, Division Two of the COA rules against the appeal of Gaspar from his Mason County Superior Court convictions for (A) *three counts of fist degree incest*, (B) *two counts of second degree child rape*, and (C) *one count of first degree child rape*. The prosecution was based on sexual abuse by defendant of one of his daughters and two of his granddaughters. **The Court of Appeals agrees with the defendant that a nurse was allowed to go too far with her expert testimony in which she connected**

grooming behavior by the defendant to his child's symptoms (PTSD, including self-harm by cutting), but the Court rules that the admission of the testimony was harmless error.

11. State v. Staycey Darrell Collins: On August 4, 2020, Division Tow of the COA rules against the appeal of Collins from his Kitsap County Superior Court convictions for (A) *two counts of delivery of a controlled substance* and (B) *one count of possession with intent to manufacture or deliver*. **The Court of Appeals rules that probable cause supported a search warrant for the residence of Collins where the search warrant affidavit included the fact that a surveilling officer directly observed Collins (1) go from his residence to meet in a controlled-buy transaction with a confidential informant, and (2) then go back to his residence.**

The Court also rules that the trial court did not err in denying defendant's a Franks hearing (see Franks v. Delaware, 438 U.S. 154 (1978)) regarding an omission from the search warrant affidavit. Defendant argued that the affiant-officer should have included in the affidavit that the defendant was observed making a brief stop and contact with another person on the way to the controlled buy with the CI. **The Court of Appeals rules on the Franks issue that the stop information is immaterial to the probable cause determination, because the affidavit would have established probable cause even if the information about the stop had been included in the affidavit.**

LEGAL UPDATE EDITOR'S COMMENT: On the face of the facts as described by the Collins Court, I think that best practice would have been to include the detour and additional contact by the CI.

12. State v. Ricky Ray Sexton: On August 4, 2020, Division Two of the COA rejects the appeal of Sexton from his Pierce County Superior Court convictions for (A) *possession of methamphetamine with intent to deliver*, (B) *possession of methylphenidate with intent to deliver, (C) possession of oxycodone*, and (D) *unlawful possession of a firearm*. In introductory paragraphs (followed later by lengthy analysis of each of the search and seizure issues), the Court of Appeals summarizes the Court's search and seizure rulings in the case (i.e., rulings on (1) lawful residential entry based on exigency, (2) compliance with knock-and-announce rule, and (3) non-stale probable cause) as follows:

> **A confidential informant told police that Ricky Ray Sexton was selling methamphetamine out of his home. The police obtained a warrant to search the home for any evidence related to the sale of methamphetamine. As the police arrived to execute the warrant, a man on the porch of the home saw them and ran inside. The police then announced their presence and the fact that they had a warrant over a loudspeaker as they rushed to and breached the door [with an approximately 15-second delay between the announcement and entry of the residence].**
>
> **The police seized methamphetamine and other drugs, as well as a firearm and several items typically used for packaging methamphetamine for sale. The trial court denied Sexton's motions to suppress the evidence from the search . . . .**
>
> **The police's actions satisfied the knock and announce rule and were independently justified by exigent circumstances. Probable cause had not become stale [the Sexton Court rules that a nine-day delay between the**

informant's visit and the entry of the premises did not make the PC stale in light of the evidence of ongoing drug-dealing in the residence].

[Bracketed language added]

13, State v. Baron Del Ashley, Jr.. aka Mike J. Allen, Michael Jones Ashley, Baron D. Edington, Baron Dale Edington: On August 10, 2020, Division One of the COA rules against the appeal of defendant from his Clark County Superior Court convictions *for four counts of felony violation of a domestic violence no contact order* protecting Lorrie Marie Brookshire. **The Court of Appeals rules that the government's warrantless monitoring and recording of calls that defendant placed from the Clark County Jail, which uses a Telmate system with posted signing, as well as a recorded message for both callers and call-receivers, did not violate defendant's right of privacy under Article I, section 7 of the Washington State Constitution. The Court of Appeals rules, consistent with State v. Archie, 148 Wn. App. 198 (2009): (1) that the calls were not private; and (2) that, by going forward with the calls after getting the warnings, defendant consented to the monitoring and recording of the calls.**

14. State v. Dominique Nathanial Burdick: On August 10, 2020, Division One of the COA disagrees with the appeal of the State and affirms a Skagit County Superior Court suppression order in a case charging *possession of a controlled substance (heroin)*. The Court of Appeals addresses a law enforcement officer's search of a backpack that was being worn by Burdick at the point of his contact by law enforcement officers as a car-prowl suspect. **The Court of Appeals holds that the search was not justified by the search incident to arrest exception to the search warrant requirement because: prior to the point that Burdick was seized by officers, Burdick's mother – as to whom the officers apparently had no safety concerns – was nearby and was willing, at the express request of Burdick, to take possession of the backpack, rather than officers taking the backpack and searching it in anticipation of taking the backpack to the stationhouse or jail.**

LEGAL UPDATE EDITOR'S NOTE: I am working on an article for the September 2020 Legal Update (next month's issue) that will discuss some language of concern in the Burdick Opinion. While I do not question the correctness of the ruling in Burdick in light of the facts described by the Court, the article will address some concerns about the search-incident-to-arrest discussion in Burdick regarding (1) the Washington Supreme Court majority Opinion in State v. Brock, 184 Wn.2d 148 (2015), and (2) the Division One Court of Appeals published Opinion in State v. Alexander, 10 Wn. App. 2d 682 (2019).

15. State v. Bethany B. Wallace-Corff: On August 18, 2020, Division Three of the COA rules against the appeal of Ms. Wallace-Corff from her Yakima County Superior Court conviction for *first degree assault with a firearm (domestic violence)*. **The Court of Appeals rules under the following analysis that the defendant's confession was voluntary**:

> Ms. Wallace-Corff contends that she only confessed to the crime so that her ex-husband would not be arrested and leave their children to be placed in foster care. The police did nothing to create a coercive environment.
>
> Prior to conducting a custodial interrogation, police must first advise a suspect of her rights, including the right to remain silent and the right to consult with an attorney prior to answering any questions. . . . . In addition to whether a defendant properly waived her right to remain silent, a confession can still be involuntary due to the process by which it

> was obtained. . . . . The question of voluntariness only arises when there has been coercion by the police. Colorado v. Connelly, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986).
>
> This appeal fails due to that last observation. The detective did nothing to coerce the confession. He did not threaten to arrest the ex-husband or investigate him for a crime merely by asking her about the ex-husband's guns. Only in Ms. Wallace-Corff's imagination could that be viewed as an implied threat. Additionally, as the trial court properly noted, nothing in the recorded interview suggested that some factor was at work other than the defendant's voluntary decision to set forth an exculpatory theory of the case.

[Some citations omitted; emphasis added]

16. State v. Jeremiah James Petlig: On August 24, 2020, Division One of the COA rules against defendant's appeal from his King County Superior Court conviction for *second degree assault with domestic violence allegations*. One of the rulings of the Court of Appeals is that **the arresting officer fully complied with Miranda, and did not conduct an unlawful "two-step" Mirandizing process (i.e., the officer did not conduct unMirandized questioning in Step 1 followed by Mirandized questioning in Step 2) in violation of the U.S. Supreme Court ruling in Missouri v. Seibert, 542 U.S. 600 (2004).** In key part, the Court's analysis on this issue is as follows:

> Since [the officer] conducted both the pre- and post-warning interviews in the back of his patrol vehicle, the questionings had continuity of setting and personnel. But as to whether their content overlapped . . . , [the officer] did not ask substantially the same questions.
>
> In the pre-warning custodial interrogation, [the officer] asked Petlig only how he had hurt his arm. After giving warnings, [the officer] conducted a more complete interview: he asked how [the alleged victim] had hurt her arm, whether Petlig had hit her, how Petlig had grabbed her, and asked about their relationship.
>
> As to the timing of the interviews, the post-warning custodial interrogation took place more than 30 minutes after the prewarning custodial interrogation, and not right after as in [State v. Rhoden, 189 Wn.2d 193 (2015)]. And no subjective evidence, such as testimony by [the officer], suggests that he deliberately conducted a two-step interview process.
>
> Given the above, we cannot conclude that the trial court abused its discretion in admitting Petlig's postwarning statements.

[Some paragraphing revised for readability]

17. State v. Stephen Mark Shellabarger: On August 24, 2020, Division One of the COA rules in favor of defendant's appeal from his Lewis County Superior Court conviction for *unlawful possession of methamphetamine*. **The Court of Appeals holds that a drug dog sniff of defendant's vehicle during a traffic stop unreasonably prolonged the traffic stop, because (1) the sniffing process took longer than it took to complete processing the traffic stop (the officer and the defendant "discussed no further details of the citation after the dog sniff began"), and (2) the initiation of the drug-dog sniffing process was not**

supported by reasonable suspicion that would support doing a dog sniff that prolonged the traffic stop. See Illinois v. Caballes, 543 U.S. 405 (2005).

18. State v. Shelby Leigh Gibson: On August 25, 2020, Division Three of the COA rules in favor of the State's appeal from a Stevens County Superior Court order that affirmed the District Court's dismissal of a charge of *fourth degree assault*. The reason why the District Court and Superior Court dismissed the citation was that the law enforcement officer-authored citation charging fourth degree assault did not expressly state that Gibson committed the assault with "intent." The lower courts concluded that the citation did not meet the notice requirement for charging documents, which must include all essential elements of the crime charged. The Court of Appeals summarizes the reason for its contrary, pro-law enforcement ruling as follows:

> In all of the Supreme Court decisions [discussed previously in the Gibson Opinion], the court ruled that the word "assault" conveyed the element "intent" in the context of describing the act done by the accused. **Although the citation against Shelby Gibson gives no description of conduct, it is not required to do so provided all the elements of the charge are present. Gibson's citation states that she violated 9A.36.041 and committed the offense of "ASSAULT 4TH DEGREE." The element of intent is conveyed by the term assault.**

19. Rose Davis v. King County: On August 31, 2020, Division One of the COA rules against the appeal of the plaintiffs/estate from a King County Superior Court *summary judgment order dismissing the wrongful death suit brought by the estate of a woman who was shot by King County law enforcement officers*. The woman was apparently experiencing a mental health crisis in which she was suicidal. She pointed a gun at officers after they told her to drop the gun, and they shot and killed her. **The Court of Appeals rules as a matter of law that Washington's felony bar statute, RCW 4.24.420, creates a complete defense to the estate's action for damages for wrongful death because (1) the woman was engaged in the commission of a felony at the time of the shooting, and (2) the felony was a proximate cause of her death. On its face, the statute applies even if the defendant officers were negligent or unreasonable. Among other things, the Court also rejects the estate's argument that the felony bar statute requires a criminal conviction or admission to felonious conduct before it can bar a wrongful death action.**

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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 current and 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 a ccessed (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]. The Criminal Justice

Training Commission (CJTC) Law Enforcement Digest Online Training can be found on the internet at [cjtc.wa.gov/resources/law-enforcement-digest].

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