LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

DECEMBER 2020

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

TWO FOURTH AMENDMENT RULINGS: (1) OFFICER'S INVESTIGATORY ACTION OF INSERTION OF A CAR KEY IN A CAR'S DOOR LOCK WAS A "SEARCH" SUBJECT TO THE WARRANT/EXCEPTIONS REQUIREMENT BECAUSE THE OFFICER PHYSICALLY OCCUPIED OR INTRUDED ON PRIVATE PROPERTY FOR THE PURPOSE OF OBTAINING INFORMATION; AND (2) BEFORE CONDUCTING A WARRANTLESS SEARCH OF A VEHICLE BASED ON A PERSON'S SUPERVISED RELEASE CONDITION, LAW

ENFORCEMENT MUST HAVE PROBABLE CAUSE TO BELIEVE THAT THE SUPERVISED PERSON OWNS OR CONTROLS THE VEHICLE

The Dixon Ninth Circuit Opinion can be accessed on the internet at:
https://cdn.ca9.uscourts.gov/datastore/opinions/2020/12/31/19-10112.pdf

In United States. v. Dixon, ___ F.3d ___ , 2020 WL ___ (9th Cir., December 31, 2020), a three-judge Ninth Circuit panel rules under the Fourth Amendment that law enforcement officers lawfully in possession of a suspect's car key may not lawfully insert the key in a car door lock to investigate whether the suspect is associated with the car, unless: (A) the officers have a search warrant, or (B) one of the recognized exceptions to the search warrant applies. That is because use of the car key is an investigatory physical intrusion or common law trespass, and therefore a "search" within the meaning of the U.S. Supreme Court decisions in U.S. v. Jones, 565 U.S. 400 (2012) and Florida v. Jardines, 569 U.S. 1 (2013). The Dixon panel declares that the U.S. Supreme Court decisions in Jones and Jardines control over a 2000 Ninth Circuit decision in a criminal forfeiture case where the Ninth Circuit ruled that such a "minimally intrusive" warrantless investigatory invasion by officers did not constitute a search because the search did not violate a reasonable expectation of privacy.

(1) Issue of whether a "search" occurred in Dixon under the Fourth Amendment

In U.S. v. Jones, 132 S.Ct. 945 (2012), the U.S. Supreme Court held that it was a Fourth Amendment search for law enforcement officers to attach a GPS device to a suspect's vehicle for investigatory purposes. The Majority Opinion in Jones was authored by the late Justice Antonin Scalia. The Majority Opinion recognized that most Supreme Court decisions since the 1960s had focused on reasonable expectation of privacy to determine if government conduct constituted a search under the Fourth Amendment. In Jones, the Majority Opinion took a different and alternative approach to the Fourth Amendment, one with some, but not overwhelming, support in the history of Fourth Amendment decisions. The Jones Majority Opinion declared that the officers' actions were a search (requiring a warrant or an exception to the warrant requirement) because the government had physically occupied or intruded upon private property, i.e., the vehicle, for the purpose of obtaining information.

It did not matter, declared the Jones Court, whether the officers' actions also violated a reasonable expectation of privacy, which would merely be an alternative basis for deeming their actions a search. In other words, there were now two clearly-established alternative ways in which government action would constitute a search subject to the Fourth Amendment warrant requirement: (1) acting in a way that would violate a person's reasonable expectation of privacy, or (2) physically occupying or intruding upon private property for the purpose of obtaining information. The second alternative is sometimes referred to as a "common law trespass" on private property rights by the government for the purpose of obtaining information.

The next year. in Florida v. Jardines, 569 U.S. 1 (2013), the U.S. Supreme Court held that law enforcement officers taking a drug-sniffing dog on a person's front porch to investigate a suspected marijuana grow constituted a "search" subject to the Fourth Amendment. And, because the officers did not have a search warrant or know of facts that would support an exception to the search warrant requirement, the search was held to be unlawful, thus invalidating a search warrant that had been issued by a Florida court based in key part on the dog's alert.

The Jardines ruling was based on a conclusion that a home's resident cannot be deemed to have extended an implied invitation for officers to go into the curtilage of the front porch where the

primary reason for the law enforcement entry into the area is investigation and not to merely contact a person at the residence.

The physical intrusion/trespass-based Fourth Amendment theory in the Jardines Majority Opinion (again authored by the late Justice Scalia) held that police made a search when they exceeded the scope of the home resident's implied invitation for visitors to come onto front porch where an officer and a drug-sniffing K-9 went onto the porch for the primary purpose of conducting a criminal investigation. That was because the entry onto the porch intruded on curtilage and was not for the purpose of merely talking to the resident, but instead was primarily for the objectively-manifested purpose of having the K-9 sniff for evidence of a marijuana grow.

Based on Jones and Jardines, the Ninth Circuit panel in Dixon concludes that inserting the key in the car door's lock was a search.

(2) Issue of whether an exception to the search warrant requirement justified the search of inserting the key in the car's door lock of the suspect

The California law enforcement officers in Dixon did not have a search warrant, and the only search warrant exception posed by the government in the case was the fact that the suspect was on supervised release. Under federal and California law applicable to the search in this case, the law enforcement officers could conduct a warrantless search of any car that the suspect owned or controlled.

But the Dixon panel rules under the Fourth Amendment that, as with a residence search, where a warrantless search of a car is based on the supervised release status of the suspect, the searching officers must get over the initial legal hurdle of establishing probable cause that the car is owned or controlled by the suspect. In this case, because the use of the key was a search of the car, the supervised release status of the suspect could not justify use of the key to determine if the suspect owned or was in control of the car. In other words, the key could be lawfully inserted in the door lock without a search warrant only if the officer had prior probable cause based on other evidence to believe that the suspect owned or was in control of the car.

The Dixon panel rules that the case must be remanded to the U.S. District Court for a determination of whether, just prior to the point when the officer inserted the key in the car's lock, the officer had probable cause – based on other evidence – to believe that the suspect owned or was in control of the vehicle.

(3) More regarding the Dixon Court's discussion of Jones and Jardines

In key part, the Dixon panel's discussion of applicability of the investigatory physical intrusion/ trespass standard of the U.S. Supreme Court's decisions in Jones (2012) and Jardines (2013) is as follows:

> Our holding in [the 2000 criminal forfeiture case] however, is clearly irreconcilable with the Supreme Court's more recent holdings in United States v. Jones, 565 U.S. 400 (2012), and Florida v. Jardines, 569 U.S. 1 (2013). . . . . In the last decade, these cases have confirmed that a search occurs when the government "physically occup[ies] private property for the purpose of obtaining information." Thus, "[the reasonable expectation of privacy test of Katz v. United States, 389 U.S. 347 (1967)] did not narrow the Fourth Amendment's scope." Rather, "the Katz reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test," and a search may

therefore be prohibited under either test. This common-law protection extends to vehicles notwithstanding lesser expectations of privacy, because "[i]t is beyond dispute that a vehicle is an 'effect' as that term is used in the [Fourth] Amendment." [all of the quotations in this paragraph cite Jones]

Applying these principles, the Supreme Court in Jones held that officers could not physically intrude on a Jeep to plant a GPS tracking device. Even if the defendant had no reasonable expectation of privacy in the exterior of his car or its location, the physical intrusion of the vehicle was itself a search under the Fourth Amendment. The Court expressly rejected the notion that the exterior of a car is entitled to less protection under this theory: "[b]y attaching the device to the Jeep, officers encroached on a protected area." [Dixon cites Jones for each of the points and for the quote in this paragraph]

The Court reaffirmed the trespass-based theory underpinning the Fourth Amendment in Jardines, in which it held that officers could not invade the curtilage around a home to gather information without a warrant because they had no explicit or implicit license to physically intrude into that "constitutionally protected area." [citing Jardines]. Jardines reiterated that the "Katz reasonable-expectations test . . . is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas." [Dixon added emphasis and cited Jardines for the quote]

The same principles apply here. When Officer Ochoa inserted the key into the minivan's lock, an "effect," he physically intruded onto a constitutionally protected area. This physical intrusion was done for the express purpose of obtaining information, specifically to learn whether Dixon exercised control over the minivan. Thus, the insertion of the key into the minivan's lock constituted a search within the meaning of the Fourth Amendment.

Our conclusion is in accord with that of our sister circuits, which, post-Jones and Jardines, have similarly concluded that such physical intrusion constitutes a search. See, e.g., United States v. Bain, 874 F.3d 1, 15 (1st Cir. 2017) (holding that testing a key in an apartment door lock to see if it fit constituted a search under Jardines); **cf. Taylor v. City of Saginaw, 922 F.3d 328, 333 (6th Cir. 2019) (finding city's chalking of tires to determine how long a vehicle had been parked in the same location constituted a search under Jones)**; United States v. Richmond, 915 F.3d 352, 357 (5th Cir. 2019) (holding that officer pushing his finger against the defendant's tire to learn what was inside constituted a search under Jones); see also Schmidt v. Stassi, 250 F. Supp. 3d 99, 101 (E.D. La. 2017) (holding that an officer's collection of DNA from the defendant's car door while it was parked was a search under Jones).

[Some citations omitted, others revised for style; footnote omitted; bracketed notes added; bolding added]

LEGAL UPDATE EDITORIAL COMMENTS: Over the past nine years, it has been difficult for me both intellectually and emotionally to accept the full ramifications of the U.S. Supreme Court's investigatory-trespass alternative definition of "search" in Jones (and confirmed a year later in Jardines). Extending the investigatory-trespass rationale of those decisions to a number of minimal-intrusion scenarios (for instance, chalking tires as part of parking regulations – see the bolded cite in the quote above) seems to defy common sense, as well as conflicting with the overall Fourth Amendment common sense philosophy of a majority of the current Justices of the U.S. Supreme Court.

Thus, I offered some support for a non-search conclusion when I was asked several months ago about a circumstance involving a what seemed like a very minimal intrusion. I suggested an expectation-of-privacy argument that it would not constitute a search for officers checking on a person with a record of motorcycle thefts to make the minimal intrusion of lifting the cover of a motorcycle that the suspect was observed to have parked on a public street and covered with a tarp/cover. The lifting of the tarp/cover was limited in scope and carried out only to the extent needed to check the license plate to determine if a motorcycle with that license plate had been reported as stolen.

Now, I must come to grips with this Ninth Circuit decision in Dixon and the federal court decisions that it discusses. Each of those decisions state a broad rationale that does not seem to leave room for de minimis exceptions. I feel that I must concede in light of the decisions discussed here that an investigatory lifting of the cover of a motorcycle or car parked on a public street – even if limited in scope to checking only the license plate to determine if the vehicle is stolen – is a search that requires a search warrant or justification under a recognized exception to the warrant requirement. It appears that any investigation-motivated touching or occupying of an area of a vehicle will be deemed to be a search (touching for balance or inadvertent touching) would not be included).

I hope that the U.S. Supreme Court will at some point revisit and place some common sense limits on the investigatory-intrusion rulings in Jones and Jardines. But until that happens, Dixon's application of Jones and Jardines must be considered in assessing the question of what constitutes a Fourth Amendment search.

Once again, I remind law enforcement readers that what I say in the Legal Update is not offered as legal advice, but instead is submitted only as an aid to research and consultation by law enforcement with legal advisors and local prosecutors.

ASSAULT DURING AIRPLANE FLIGHT: 11-JUDGE NINTH CIRCUIT PANEL RULES 2-1 THAT VENUE IS PROPER IN THE FEDERAL DISTRICT COURT WHERE THE PLANE LANDED EVEN THOUGH NO PART OF THE ASSAULT OCCURRED WITHIN THE TERRITORIAL BOUNDARIES OF THAT DISTRICT COURT

In United States v. Lozoya, ___ F.3d ___ , 2020 WL ___ (9th Cir., December 3, 2020), an "en banc" (i.e., 11-judge) Ninth Circuit panel overrules a 3-judge panel's April 11, 2019 2-1 ruling that had held that the federal court for the Central District of California lacked authority to consider a federal assault prosecution. The prosecution arose from an assault during an interstate flight where no part of the assault occurred in the Central District of California, which is the District where the airplane landed. The Majority Opinion in the 2019 3-judge ruling concluded that a prosecution for an in-flight assault is limited to districts in whose airspace the assault occurred. The 2019 decision was digested in the April 2019 Legal Update.

In the Lozoya case, the assault occurred during an airplane flight from Minneapolis to Los Angeles. The assault was complete before the flight reached the territory covered by the federal Central District for California.

The eight-judge Majority Opinion in the 2020 Lozoya ruling concludes that the Constitution and federal statutes do not limit prosecution for in-flight federal crimes to the district(s) sitting directly below a plane at the time that a crime was being committed. Instead, concludes the Majority

Opinion, federal law allows in-flight crimes to be prosecuted in the flight's landing district, as well as, the Majority Opinion seems to state, any district that the plane traveled from, through or into.

The 3-judge Dissenting and Concurring Opinion argues that venue for prosecution for an assault on a cross-country flight should be limited to only a district where the defendant "is arrested or is first brought," or where the defendant resides. Under this view, the Central District of California is an appropriate district for prosecution, hence the "Concurring" part of the Opinion.

Result: Affirmance of assault conviction of Monique A. Lozoya by the U.S. District Court for the Central District of California.

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WASHINGTON STATE SUPREME COURT

WASHINGTON'S SEX OFFENDER REGISTRATION STATUTE DOES NOT VIOLATE CONSTITUTION IN IMPOSING A DUTY TO REGISTER AS A SEX OFFENDER BASED ON AN OUT-OF-STATE CONVICTION FOR ACTIONS THAT WOULD NOT BE DEFINED AS A SEX OFFENSE IN WASHINGTON

In State v. Batson, ___ Wn.2d ___ , 2020 WL ___ (December 24, 2020), the Washington Supreme Court reverses by a 6-3 vote an August 12, 2019 decision of Division One of the Court of Appeals in State v. Batson, 9 Wn. App. 2d 546 (Div. I, August 12, 2019). The Supreme Court ruling rejects one of the challenges by defendant to a King County Superior Court conviction for failure to register as a sex offender. The Majority Opinion rejects the argument that a provision of the Sex Offender Registration Statute, RCW 9A.44.128(10)(h), is unconstitutional to the extent it imposes a duty to register as a sex offender based on an out-of-state conviction for which there is no comparable Washington crime.

In the Batson case, the defendant was required to register as a sex offender in Washington because he was required to register in Arizona, the state of his conviction. The defendant's Arizona conviction was for consensual sex with a 16-year-old and was not comparable to a Washington offense because the age of consent in Washington is 16 (with some exceptions not relevant to this case: see the exceptions in RCW 9A.44.093 and RCW 9A.44.096 addressing Sexual Misconduct With A Minor).

The Batson Majority Opinion declares that the Court of Appeals incorrectly ruled that the provision is an unconstitutional delegation of the legislative function to another state in violation of Article II, Section 1 of the Washington constitution. The Majority Opinion declares that in the challenged statutory provision the legislature permissibly identified circumstances under which Washington sex offender registration requirements become operative as to individuals with out-of-state convictions

The Washington Supreme Court ruling remands the case to Division One of the Court of Appeals for that Court to address the defendant's alternative constitutional challenges of double jeopardy, ex post facto and equal protection.

Result: Reversal of Division One Court of Appeals decision that reversed a King County Superior Court conviction of Benjamin Batson for failure to register as a sex offender. Remand to the Court of Appeals to address defendant's alternative constitutional arguments.

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WASHINGTON STATE COURT OF APPEALS

TWO KEY RULINGS IN A DECISION OF THE COURT OF APPEALS, DIVISION ONE:

1. *ATTORNEY-CLIENT PRIVILEGE*: WHERE A DEPUTY PROSECUTOR INADVERTENTLY RECEIVED JAIL RECORDING OF DEFENDANT'S CALL TO HIS ATTORNEY, AND THE DEPUTY PROSECUTOR HEARD ONLY EIGHT INSIGNIFICANT SECONDS OF THE CONVERSATION AND THEN QUICKLY NOTIFIED ALL NECESSARY PERSONS, DEFENDANT IS NOT ENTITLED TO RELIEF BASED ON "GOVERNMENT MISCONDUCT"

2. *GOVERNMENT DESTRUCTION OF POSSIBLE FUTURE EVIDENCE*: POLICE DESTRUCTION OF 2007 TAPE RECORDING OF INTERVIEW WITH POSSIBLE CHILD VICTIM OF SEX ABUSE HELD NOT A DUE PROCESS VIOLATION BECAUSE (A) RECORDING WAS NOT MATERIAL EXCULPATORY EVIDENCE, AND (B) ALTERNATIVELY, THE DESTRUCTION OF POTENTIAL EVIDENCE WAS NOT PREJUDICIAL

In State v. Koeller, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. I, November 2, 2020 Unpublished Opinion ordered published on December 14, 2020), Division One of the Court of Appeals rejects the challenges of defendant to his convictions on multiple charges, including first degree child molestation. The Court of Appeals briefly describes its rulings on the two issues addressed here as follows:

> Byron Koeller sexually abused his stepdaughter for years. He was convicted of multiple charges, including first degree child molestation. He contends the charges against him should have been dismissed under CrR 8.3(b) due to governmental misconduct from destroying evidence and from listening to eight seconds of a conversation with defense counsel. Neither the evidence nor the eight seconds of conversation were material to his defense. Because neither act prejudiced him, the court did not abuse its discretion by denying his motions to dismiss. He argues his defense counsels were ineffective for a variety of reasons. Because their decisions were neither deficient nor prejudicial, he fails to show he received ineffective assistance.

1. *Attorney-client Privilege Issue*:

One of defendant Koeller's theories on appeal was that the charges against him should have been dismissed under CrR 8.3(b) due to governmental misconduct in the form of listening to eight seconds of a jail-tape-recorded phone conversation between defendant and his defense counsel. The recording was made because jail personnel had inadvertently failed to enter the phone number of the defendant's defense counsel in its automated system so that no recordings would be made of calls to that number. Shortly after the recording was made, a deputy prosecutor listened to the first eight seconds of the call. The deputy prosecutor later testified that nothing of substance was uttered in those eight seconds. Immediately upon realizing the error, the deputy prosecutor turned off the recording and notified the defense attorney and jail personnel of the circumstances.

The Court of Appeals upholds the trial court determination that this violation of the attorney-client privilege did not prejudice the defendant, and that therefore the violation does not support Koeller's request for dismissal of the charges. The Court discusses other Washington appellate

court decisions that addressed claims of governmental violations of the attorney-client privilege, including State v. Irby, 3 Wn. App. 2d 247 (2018).

In the 2018 Irby decision, correctional officers in a jail opened and read at least a dozen clearly marked items of legal correspondence from a prisoner to his defense attorney. The Irby Court concluded, among other things, that the State had failed to establish lack of prejudice from the violation of attorney-client privilege.

The Koeller Court notes that "where the government violates [the attorney-client privilege], it creates a rebuttable presumption of prejudice to the defendant," citing for this proposition: State v. Peña Fuentes, 179 Wn.2d 808, 819-20 (2014); State v. Cory, 62 Wn.2d 371, 373-74 (1963); and State v. Granacki, 90 Wn. App. 598, 602 n.3 (1998). But the Koeller Court concludes under the following analysis that the rebuttable presumption of prejudice is overcome by the facts of this case:

> Here, the court's findings establish [the deputy prosecutor] heard only eight seconds of the call between Koeller and his attorney. He heard "no substance of the conversation" and no one else "in connection with the State of Washington listened to the conversation." Unlike Irby, the State did not obtain any information material to the defense. Although Koeller argues the court abused its discretion because the State did not prove [that the Jail Chief] did not listen to the call, the trial court found otherwise, and its finding is supported by substantial evidence. Because the [trial] court's findings support its conclusion that Koeller was not prejudiced, the [trial] court did not abuse its discretion by denying the CrR 8.3(b) motion to dismiss.

2. *Government-destruction-of-evidence issue*

Analysis relating to destruction-of-evidence issue (excerpted from Court of Appeals Opinion) includes the following:

> In 2007, A.R.C. [the victim in this case] was interviewed by [a detective] as part of a separate investigation into allegations Koeller sexually abused other children. A.R.C. disclosed no sexual abuse and denied Koeller sexually abused her. The police department recorded and stored the interview on a digital video disc (DVD) until 2012, when it was destroyed pursuant to routine procedures. Koeller contends the recording was materially exculpatory evidence, so its destruction violated his due process rights and warranted dismissal of all charges against him.
>
> To protect a defendant's due process rights, the State has a duty to preserve and disclose exculpatory evidence. But this is not "'an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution.'". The State's duty extends only [1] to material exculpatory evidence and [2] to "potentially useful" evidence destroyed in bad faith by the State. Material exculpatory evidence must possess "'an apparent exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.'" Whether the State acted in bad faith depends upon its knowledge of the exculpatory value of the evidence when it was destroyed.
>
> Koeller fails to show the recording was material exculpatory evidence. The DVD was destroyed in 2012, and A.R.C. did not disclose being abused until 2017. Thus, in 2012,

the recording could not exculpate Koeller from abusing A.R.C. because nothing had inculpated him in her abuse. Even though the police were investigating Koeller for crimes against other children before 2012, "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."

Koeller also asserts we should determine the DVD's exculpatory value "based on when the alleged victim decides to make a report." But he cites no authority for this assertion and, regardless, both the Washington and United States Supreme Courts concluded it is beyond the duty imposed by the state and federal constitutions. Because the DVD had no apparent exculpatory value when it was destroyed, it was not material.

[Court's footnote 13: *Even if the DVD's exculpatory value were apparent in 2012, Koeller was still able to obtain comparable evidence because A.R.C. testified to the contents of the 2007 interview, and [the detective from the 2007 interview] was available to testify to the same*.]

Koeller also fails to show the State destroyed the DVD in bad faith. Koeller contends "delayed reporting is such an inherent and common reality in child abuse cases" that destruction of the 2007 video should be considered evidence of bad faith because it was made when there were concerns Koeller had multiple victims. Whether the State acted in bad faith is a question of fact that a defendant must establish.

The trial court found "there ha[d] been no bad faith on the part of the police or of the State of Washington generally" in destroying the DVD. Koeller does not assign error to this finding. Because the DVD was not material exculpatory evidence or destroyed in bad faith, Koeller fails to show the court abused its discretion by denying his CrR 8.3(b) motion to dismiss.

[Case citations and citations to the record and most footnotes omitted; some paragraphing revised for readability]

Result: Affirmance of Island County Superior Court convictions of Byron Charles Koeller for one count of forcible compulsion, four counts of first degree child molestation, and two counts of second degree child molestation, with findings of aggravating circumstances.

TWO HEARSAY EXCEPTIONS IN THE RULES OF EVIDENCE ARE ADDRESSED IN CIVIL LAWSUIT: WHERE OFFICER ALLEGEDLY MADE OUT-OF-COURT STATEMENTS TO ACQUAINTANCES ASSERTING REMORSE ABOUT PRIOR UNTRUTHFUL TESTIMONY IN A CIVIL SUIT, AND THE OFFICER LATER COMMITTED SUICIDE, THE ALLEGED REMORSEFUL STATEMENTS (1) ARE ADMISSIBLE IN A CHALLENGE TO THE CIVIL VERDICT AS "STATEMENTS OF A PARTY OPPONENT," AND (2) MAY BE ADMISSIBLE AS "STATEMENTS AGAINST INTEREST" IF DETERMINED TO BE RELIABLE

In Hor v. City of Seattle, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. I, December 14, 2020), Division One of the Court of Appeals sets aside a trial court judgment on a jury verdict that cleared the Seattle Police Department of any liability for injuries incurred by a passenger in a car where the car's driver crashed and seriously injured her. The plaintiff's theory for Seattle Police Department liability hinged on her allegation that SPD officers had been involved in a

"pursuit" of the car's driver just prior to the crash. The Court of Appeals summarizes its decision as follows in the opening paragraphs of the Published Opinion:

> Channary Hor was seriously injured in a vehicle accident involving officers from the Seattle Police Department. Hor filed suit against the driver of the vehicle she was riding in, the City of Seattle, and the individual [Seattle Police Department] officers present at the time of the incident. After trial, the jury found the driver solely liable and only awarded damages as to him. One of the key issues at trial was whether the officers were in pursuit of the vehicle, which both officers denied.
>
> Following trial, one of the officers [then employed by another police agency] committed suicide and a local news article attributed it to the officer's feelings of remorse over the accuracy of his trial testimony. Based on statements from individuals the [former Seattle Police Department] officer had spoken with about his testimony, Hor brought a motion for relief from judgment under CR 60(b)(4). The [government] defendants objected and argued the statements Hor sought to admit were inadmissible hearsay. The trial court agreed, denying the admission of the evidence and the CR 60(b)(4) motion.
>
> Hor appeals arguing the evidence was admissible under ER 801(d)(2)(i) or ER 804(b)(3), and that the trial court erred in denying her CR 60(b)(4) motion. We agree that the evidence is admissible, and reverse and remand on that basis, without reaching the CR 60(b)(4) motion.

[Paragraphing revised for readability]

1. *Statements of a party opponent under ER 801(d)(2)(i)*

ER 801(d)(2)(i) states in relevant parts: "(d) Statements Which Are Not Hearsay. A statement is not hearsay if . . . . (2) Admission by Party-Opponent. The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity."

The Court of Appeals concludes that that statements of the deceased former Seattle Police Department officer constituted admissible statements of a party opponent under the quoted Evidence Rule. The Court of Appeals relies on In re Estate of Miller, 134 Wn. App. 885 (2006).

2. *Statements against interest under ER 804(b)(3)*

ER 804(b)(3) provides:

> (3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

The Court of Appeals appears to accept the City's argument that the officer's pecuniary (monetary) interest was not at risk because the City's indemnification responsibility essentially protected the officer from paying for any damages assessed. However, the Court of Appeals

explains, as follows, that the officer had a pecuniary interest that springs from the constitutional disclosure requirements of Brady v. Maryland, 373 U.S. 83 (1963) in criminal cases:

> [Over and above the indemnification argument by the City is] the clear, and separate, pecuniary interest a law enforcement officer has in not having their credibility called into question such that impeachment evidence is available to be used against them in future cases.
>
> If [the now-deceased, former Seattle PD officer] was found by the trial court to have made inconsistent statements under oath, any cases in which he was involved as an arresting or investigating officer could be jeopardized and any prosecuting authority utilizing him as a witness in future cases may be obligated to disclose such information to opposing counsel. It is perhaps axiomatic that one of the key functions of a law enforcement officer is to provide testimony in their official capacity. When testifying under oath, officers, like other witnesses, are subject to impeachment. See ER 608.
>
> Brady v. Maryland makes clear the obligation of a prosecutor to disclose favorable evidence in their possession to the defense. 373 U.S. 83 (1963) . . . Favorable evidence in this context includes impeachment evidence, as well as potentially exculpatory evidence. State v. Davila, 184 Wn.2d 55, 70 (2015). If an officer is found to have possible impeachment evidence associated with them, such that notification must be issued to defense under Brady, this could have tangible consequences as to the officer's pecuniary interests. A determination that one is a "Brady" officer impacts promotions, lateral transfers or change of agencies, and can even result in termination if the underlying impeachment information is sufficiently serious or damaging.
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> **[LEGAL UPDATE EDITOR'S NOTE: in a "Case Note" on the website of the Washington Association of Prosecuting Attorneys, WAPA Staff Attorney Pam Loginsky notes:**
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> > **This opinion erroneously holds that being identified by prosecutors as an officer for whom potential impeachment evidence exists will result in adverse personnel actions. RCW 10.93.150 does not allow a disciplinary action or other adverse personnel action to be based upon Brady disclosures. Such actions can only be taken based upon the underlying acts or omissions.]**
>
> At the time [the now-deceased officer] made these statements to other officers, they were against his pecuniary interest in that they could have subjected him to greater scrutiny of his credibility in future cases, impacting his ability to effectively carry out that essential function of a police officer to credibly testify. Any such findings by the trial court, which could be made during the CR 60 motion (or if perjury charges were later brought), would then obligate the State to provide this information to defense under Brady in any criminal prosecutions in which he was professionally involved as a law enforcement officer. Such a determination can be sufficiently stigmatizing as to have immediate and long-lasting professional impact. If [the now-deceased officer's] purported post-trial statements are to be believed, [the other officer's] declaration indicating that [the now-deceased officer] had characterized his conduct as having "betrayed the badge or something like that" would demonstrate his awareness of the specific implications of inconsistent testimony or perjury for a police officer. We find that the trial court abused its discretion in failing to recognize this clear pecuniary interest for

a witness employed as a law enforcement officer. Given our conclusion that the statements were against [the now-deceased officer's] pecuniary interest, we need not also determine whether the statements subjected him penal or civil liability as any of these bases may result in admission as a hearsay exception under ER 804(b)(4).

Once a determination is made that a statement is against one's interest, then the trial court must determine the reliability of the statement. "Our Supreme Court long ago established that to determine whether a hearsay statement against interest satisfies the requirement of trustworthiness, courts should assess a statement's reliability using a nine-factor reliability test." State v. J.K.T., 11 Wn. App. 2d 544, 566 (2019). The nine-factors are:

1. Was there an apparent motive for declarant to lie?
2. What was the declarant's general character?
3. Did more than one witness hear declarant's statement?
4. Was the statement made spontaneously?
5. Did the timing of the statements and the relationship between declarant and witness suggest trustworthiness?
6. Does the statement contain an express assertion of past facts?
7. Did the declarant have personal knowledge of the identity and role of the crime's other participants?
8. Was the declarant's statement based upon faulty recollection?
9. Was the statement made under circumstances that provide reason to believe the declarant misrepresented defendant's involvement in the crime?

State v. J.K.T., 11 Wn. App. 2d 544, 566 (2019) (citing State v. Roberts, 142 Wn.2d 471, 497-98 (2000)).

As the [trial] court did not find that the statements were such that they subjected [the now-deceased officer] to criminal liability or went against his pecuniary interest, it did not reach the nine factors. The court noted that [the now-deceased officer] had acknowledged his lack of memory and, thereby, the reliability of his statements. Additionally, the record supports that he had provided inconsistent statements such that the credibility of his memory as to a pursuit were already comprehensively raised at trial. This secondary analysis is necessary to determine if reliability is sufficient to admit [the now-deceased officer's] statements into evidence. The trial court is in the best position to weigh such factors in the full context of all of the evidence presented.

Result: Reversal of King County Superior Court judgment on jury verdict and remand to the Superior Court for further proceedings consistent with the Court of Appeals ruling, which requires that the Superior Court make some assessments to determine whether a new trial must be held.

IN CASE INVOLVING CHILD-SEX-CRIME STING, DEFENDANT WINS BY A 2-1 VOTE HIS ARGUMENT REGARDING THE RIGHT TO A JURY INSTRUCTION ON THE STATUTORY AFFIRMATIVE DEFENSE OF ENTRAPMENT

In State v. Arbogast, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. III, December 24, 2020), in a 2-1 decision, Division Three of the Court of Appeals rules that the defendant is entitled to a new trial

and a jury instruction on the statutory affirmative defense of entrapment (RCW 9A.16.070) in a child sex sting case. The first three paragraphs of the lengthy Arbogast Majority Opinion provides the following brief description of the Court's rulings:

> Douglas Arbogast was convicted of attempted child rape after responding to an ad placed by a Washington State Patrol (WSP) task force sting operation. The State persuaded the trial court that Mr. Arbogast was not entitled to an entrapment instruction unless he presented evidence sufficient to permit a reasonable juror to find entrapment by a preponderance of the evidence, citing State v. Trujillo, 75 Wn. App. 913, 917, 883 P.2d 329 (1994). [The State] persuaded the [trial] court that Mr. Arbogast should not be allowed to present evidence of his law-abiding past or argue his lack of criminal predisposition unless he presented evidence sufficient to prove by a preponderance of the evidence that WSP officers used more than a "normal amount of persuasion" in their communications with him.
>
> The procedure [used by the trial court] prevented Mr. Arbogast from presenting evidence and obtaining an entrapment instruction to which he was entitled. In the published portion of this decision, we reject Trujillo's standard, hold that Mr. Arbogast was wrongly prevented from presenting "lack of predisposition" evidence, reaffirm that a trial court's decision whether to instruct on entrapment cannot be based solely on law enforcement's conduct to the exclusion of the defendant's lack of predisposition, and reverse and remand for a new trial.
>
> In the unpublished portion of this decision, we reject Mr. Arbogast's contention that all or some of the charges against him should be dismissed for outrageous government conduct or proof of entrapment as a matter of law. Addressing his pro se statement of additional grounds, we reject a claim of insufficient evidence and address instructional and discovery issues likely to arise in a retrial.

In key part, the Majority Opinion provides the following accounting of the evidence in this sting case that supports the giving of an entrapment instruction:

> Mr. Arbogast testified that he had never had sex with children or any interest in sex with children. There was no dispute that before responding to Brandi's ad, he had not been convicted of, charged with, or even suspected of a sex crime against a child. He responded to what was posted as a "woman for man" ad that [the detective who wrote the ad] admitted was cryptic, might not be recognized as advertising sex with children, and in fact had not been recognized by other responders as advertising sex with children.
>
> Once Mr. Arbogast recognized what was being offered, his immediate response was "Never have done that. . . . Don't know if I could help do kids." He retreated from that position when Brandi made clear that engaging in sex with her children was required to get together with her, but he repeatedly stated he had never engaged in such conduct with children before. [The detective who engaged in the communications with Mr. Arbogast] could have refrained from any suggestion that Brandi's participation was a possibility, but he did not. When Mr. Arbogast arrived at the undercover location, he had not stopped to pick up lube or condoms as Brandi had requested. No incriminating evidence was found on his phone or in his car.

> A final aspect of the inducement that has been found relevant by federal courts is that Brandi was not prostituting her fictional children, but presented as a loving mother who sought to provide something [a male sexual mentor] she had benefitted from as a child. She made clear that whatever Mr. Arbogast did with her precious children would only be under her protective oversight and rules. . . .

Result: Reversal of Benton County Superior Court conviction of Douglas Virgil Arbogast for: (A) one count of attempted rape of a child in the first degree for traveling to the undercover location with the intent to engage in sexual intercourse with the fictional 11-year-old Anna; and (B) one count of attempted rape of a child in the second degree for traveling to the undercover location with the intent to engage in sexual intercourse with the fictional 13-year-old Jake.

BAIL BOND COMPANY LOSES ARGUMENT THAT IT IS ENTITLED TO EXONERATION OF A BAIL BOND ON EQUTABLE GROUNDS

In State v. Adams, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. I, September 21, 2020 Unpublished Opinion ordered published on December 9, 2020), Division One of the Court of Appeals rules that the trial court did not abuse its broad discretion in denying a bail bond company's motion on equitable grounds to exonerate a forfeited bail bond. The bail bond company acknowledged that it was not entitled to exoneration of the bond under the express terms of the governing statute, but the company argued based on Washington case law that the facts of the case entitled the company to equitable relief.

On December 19, 2018, 96 days after the State moved for forfeiture of the bail bond, the police arrested the absconding defendant for a new crime. After the defendant had cut off his ankle monitor, the bail bond company had maintained contact with law enforcement officials, assembled a recovery team, communicated with the defendant's family, triangulated his phone, and administered surveillance at his home and work. However, the bail bond company was not able to make contact with the defendant prior to the police arresting him for the new crime, and the bail bond company did not play a role in that apprehension or arrest. The bail bond company offered no excuse for the defendant's failure to appear for the court hearing that he missed after cutting off the ankle monitor. And the company, as noted above, was not able to remain in contact with the defendant after he failed to appear.

Result: Affirmance of King County Superior Court judgment denying the request of Pacific Northwest Bonding Company for exoneration of the $50,000 bail bond on Joseph C. Adams.

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BRIEF NOTES REGARDING OCTOBER 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 five entries below address the December 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 that address decisions in criminal cases, the crimes of conviction or prosecution are italicized, and descriptions of the holdings/legal issues are bolded.

1. Personal Restraint Petition of Reuben Denis Mulamba: On December 8 , 2020, Division Three of the COA grants the personal restraint petition of Reuben D. Mulamba and grants him a new trial, setting aside his previously affirmed Kittitas County convictions for *two counts of assault of a child and two counts of criminal mistreatment of a child*. **The Court of Appeals holds:** (1) that Mulamba (1) was entitled at trial to a jury unanimity instruction on two of the charges (the analysis on this issue will not be addressed in the Legal Update); **and (2) that the State violated Mulamba's constitutional Due Process rights under Brady v. Maryland when the State failed to disclose jail misconduct records and other behavioral records that Mulamba could have used to impeach the principal witness against him, the witness being the mother of the child victims (note that she also was a co-defendant at trial).**

On the Brady issue, Judge Fearing authors the Majority Opinion, which includes 27 pages of analysis on Brady. On that issue, the Majority Opinion asserts, among other things (in my interpretation and my rough and simplified summary): (1) Federal court decisions with a consensus taking a more expansive view of the requirements of Brady trump any conflicting Washington court decisions because Brady imposes a federal constitutional Due Process standard; (2) jail personnel are part of the law enforcement/criminal justice team and therefore knowledge of impeachment information by jail staff is deemed to be knowledge by the prosecutor's office, regardless of whether the information is shared with the prosecutor by jail staff and regardless of good faith ignorance of the information by the prosecutor's office; (3) it does not matter whether the information could have been easily obtained by defense counsel doing their due diligence; (4) the information about the principal witness' jail conduct was "material" under the Federal test for materiality, which appears to the Mulamba majority to be more inclusive than some Washington appellate decisions suggest; (5) questions as to would-be admissibility of the jail information at trial should be addressed by the trial court on remand; and (6) the exculpatory jail information in this case is not clearly cumulative to evidence that was admitted at trial, and therefore the State's "suppression" of the information was prejudicial to defendant Mulamba.

In a Dissenting Opinion, Judge Korsmo disagrees with key parts of the Majority Opinion's Brady analysis. The Dissenting Opinion contends, among other things, that the Brady claim fails because (1) the jail information could have been easily obtained by defense counsel where the witness at issue was not only a witness but also a co-defendant; and (2) and the jail information was not material under Brady because it was either inadmissible or cumulative or both.

2. State v. Richard Vasquez, Jr.: On December 10, 2020, Division Three of the COA disagrees with the home-invasion robber's challenges to his Yakima County Superior Court

convictions for *one count of first degree burglary, two counts of first degree kidnapping, two counts of first degree robbery, one count of first degree assault, one count of second degree assault, and one count of first degree unlawful possession of a firearm*. Vasquez argued, among other things, that a Terry stop was not justified by reasonable suspicion. **The Court of Appeals explains as follows its reasoning in concluding that reasonable suspicion supported the Terry stop and detention for purposes of conducting a show-up identification procedure with a victim**:

> [One of the victims] "believed that the suspects were Hispanic males in their 30s." The record from the suppression hearing confirms this is what the officers were told. Vasquez is a Hispanic male and was 48 at the time and Crafton-Jones [his accomplice] is a white male and was 38 at the time. One officer testified he immediately recognized Crafton-Jones and knew he was white. He also testified that he was unsure of the second man's race. If their physical descriptions were the only reason the officers stopped the pair, Vasquez's argument would be persuasive. However, additional evidence supported the Terry stop.
>
> Here, the officers knew there was a home robbery committed by two suspects armed with a pistol and that the suspects fled in a van. Dispatch learned the license plate number of the van and advised the officers of the address associated with the van. The officers drove to this address, arrived within 10 minutes of the 911 call, and found the van parked in the driveway, still warm to the touch.
>
> The officers peered into the van and saw an empty gun holster. They then saw two men walking from behind the house about 30 feet away. One officer immediately recognized Crafton-Jones, knew that Jones was white, but was unsure of the second man's race.
>
> . . . .
>
> Faced with the decision of ordering the pair to stop or allowing the two to walk away, the officers made the only reasonable choice. The van had not been parked long and the suspects were likely near. Because the pair emerged from behind the house early in the morning, it was reasonable to believe that the two were associated with the house and thus the van. And even though Crafton-Jones is white, the physical description of the suspects could have been of Vasquez and a second Hispanic man. Crafton-Jones could have been merely the driver and never in the burgled home.
>
> We conclude that the officers had a reasonable articulable suspicion that Vasquez – and perhaps Crafton-Jones, too – was involved in the robbery. Under Terry, the officers were permitted to stop Vasquez and briefly detain him in order to arrange a showup identification.

3. State v. Gustavo Tapia Rodriguez: On December 17, 2020, Division Three of the COA rejects the challenges of the defendant (Tapia Rodriguez) to his Grant County Superior Court conviction and life sentence for *aggravated first degree murder*. The Court of Appeals addresses numerous issues, including the following rulings that are supported by legal analysis:

(A) **The use of a deputy sheriff as an interpreter in a recorded interrogation was lawful** where (i) there is no evidence in the recording of any inaccuracy in interpretation, and (ii) the translating deputy was of course motivated to be accurate by the fact of the recording (the Court of Appeals distinguishes the factually dissimilar circumstances of State v. Cervantes, 62 Wn.

App. 695, 699-700 (1991), where an officer used a co-participant/potential co-defendant to act as an interpreter in an interrogation);

(B) **The cell site location evidence, including a demonstrative map, of the locations of certain cell phones of persons relevant to the murder case, was lawfully admitted under the test for admissibility of scientific evidence and otherwise under the rules of evidence**; and

(C) **The trial court did not abuse its discretion in admitting a "Smith affidavit" taken by a deputy from an at-the-time-confessing co-participant/potential future co-defendant who subsequently recanted both during the investigation and in trial testimony**. In key part, the explanation by the Court of Appeals regarding admissibility is as follows:

> ER 801(d)(1) provides that an out-of-court statement is not hearsay if [t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. (Emphasis added.)
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> . . . .
>
> In State v. Smith, our [Washington] Supreme Court held that a written statement given in a police interview can constitute an "other proceeding" under ER 801(d)(1)(i) if "'minimal guarantees of truthfulness'" are met. 97 Wn.2d 856, 862 (1982) . . . . The Smith court determined that "minimal guarantees of truthfulness" were met because the statement was written by the witness, attested to by a notary, and made under oath subject to penalty of perjury. The court cautioned that "each case depends on its facts with reliability the key."
>
> In State v. Otton, 185 Wn.2d 673 (2016), the Supreme Court cited the following four-part test we developed for applying Smith: "(1) Whether the witness voluntarily made the statement, (2) whether there were minimal guaranties of truthfulness, (3) whether the statement was taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause, and (4) whether the witness was subject to cross examination when giving the subsequent inconsistent statement." . . .
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> . . . .
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> [The deputy] reviewed the written statement with Chivo and asked if he wanted to change anything. Chivo said no, the statement was accurate. [The deputy] explained to Chivo that the statement was made under penalty of perjury, explained that a false statement under penalty of perjury was a crime, and asked Chivo if he understood. Chivo said he did.
>
> Importantly, Chivo and law enforcement knew the interview was recorded. The recording of the interview ensured a clear record of voluntariness and truthfulness. We note that defense counsel had the entire interview transcribed by an independent translator, thus adding to the reliability of the statement. If the translation contained errors, defense counsel could have apprised the court of any errors. At no point did defense counsel contend that the translation contained errors.

> We are satisfied that Chivo's sworn statement from his police interview had substantial guarantees of trustworthiness, and was admissible under Smith and ER 801(d)(1)(i). The trial court did not abuse its discretion when admitting that statement.

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

4. State v. Wayne Hyman Alpert: On December 21, 2020, Division One of the COA rules against defendant's challenge to a Snohomish County Superior Court conviction for *second degree assault with a deadly weapon*, but the Court of Appeals rules in favor of his challenge to a conviction for *second degree murder* relating to a separate incident. On the reversed murder conviction, the Court of Appeals rules that (A) his statements to police were prejudicially tainted by violation of his right to contact counsel under Criminal Rule 3.1; and (B) the trial court committed prejudicial error in not giving a jury instruction on no-duty-to-retreat in an arguable self-defense situation. **On the CrR 3.1 issue, the Court rules that following statement by defendant to officers during a Mirandized interrogation constituted an unequivocal assertion of his CrR 3.1 right to contact counsel: "I'm going to be quiet now, cuz my attorney is Michael J. Longyear. He's at 801 2nd Avenue. 1415 Norton Building."** The interrogating office asked if this meant the defendant was done talking, and the defendant said "Yes, sir." Although the Court of Appeals Opinion is not detailed on the following point, it appears that the Court is holding that all statements made by defendant after that, even volunteered statements (as described in the State's Brief of Respondent, see Washington Courts website collection of briefs for COA # 79147-8-I), are inadmissible under CrR 3.1.

The Court of Appeals also holds that defendant waived at trial his otherwise valid challenge to a recorded interrogation that failed to comply with the requirement of RCW 9.73.090(1)(b)(iii) that a recorded interrogation include, on the recording, the arrested person being "fully informed of his or her constitutional rights."

[LEGAL UPDATE EDITOR'S COMMENT: Officers taping an interrogation should be sure to include Miranda warnings on the recording. I believe that if the suspect has already waived his or her rights in pre-recording questioning, it is permissible for the officer to note that fact on the recording before the officer then re-Mirandizes on the tape recording. As always, I note that what I say is not legal advice, and that officers/agencies should check with their own legal advisors and/or prosecutor offices on legal questions addressed in the Legal Update.]

5. State v. Teresa June York: On December 29, 2020, Division Two of the COA rejects the defendant's challenge to her Pierce County Superior Court conviction for *possession of a controlled substance* (*methamphetamine*) that an officer discovered on her person following a Terry detention. **The Court of Appeals holds that the trial court properly denied York's CrR 3.6 motion to suppress because the officer had reasonable suspicion that York was engaged in criminal activity. The Court of Appeals describes as follows the key facts of the case supporting the Court's conclusion that in light of the officer's experience a nd training, reasonable suspicion of complicity in car prowling justified the Terry seizure of the defendant**:

> At approximately 1:30 a.m., [the officer] was on patrol in a neighborhood that he had patrolled many times before in his 12 years working for the Fircrest Police Department. The area was residential and did not contain any businesses.

[The officer] noticed a Cadillac stopped on the wrong side of the road, facing south in a northbound lane, with its headlights illuminated and its engine running. The Cadillac was blocking the roadway such that someone driving along that road would have to travel into the opposite lane of traffic to avoid the vehicle. A Suzuki was parked on the side of the road about 30 feet away from Cadillac, facing the opposite direction. The two cars were not aligned hood to hood, "or even left headlight to left headlight, the way that two vehicles would be if individuals were attempting to jump start a vehicle." The Suzuki's headlights were also on, but its engine was not running.

Due to the position of the two cars and the late hour, [the officer] immediately became concerned that a car prowl was in progress, as was common for that area and that time of day. When [the officer] pulled up in his marked patrol car, Todd Hanson, "quickly" exited the driver's side of the Suzuki and walked to the passenger side of the Cadillac. Hanson attempted to enter the passenger side of the Cadillac "hurriedly," but the door was locked. [Defendant] York was sitting in the driver's seat.

[The officer] believed, based on his observations and prior experience, that Hanson was prowling vehicles and that York was waiting in the Cadillac to act as a getaway driver. [The officer] had investigated vehicle prowls in the past, and it was "[n]ot uncommon" for two people to act together in this manner. Hanson did not appear to possess a theft tool, and [the officer] did not identify any signs of forced entry on either car, but a majority of car prowls in that area involved cars that were inadvertently left unlocked.

Upon exiting his patrol vehicle, [the officer] trained his spotlight on the general area of the Cadillac. [The officer] then looked towards York in the Cadillac and asked her to place her hands in her lap, and she complied. York and Hanson both stated that the Suzuki stopped in that location earlier in the day and that they returned to jumpstart the car. [The officer] believed that the vehicles were not positioned in a manner consistent with this explanation.

After York provided a verbal identification, [the officer] ran a search on York's name and discovered that York had an active warrant for her arrest for third degree theft. York was arrested on that warrant.

In a search . . . during booking, the booking officer discovered methamphetamine on York's person.

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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 p[Officer B]cutors. 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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