LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

FEBRUARY 2021

TABLE OF CONTENTS FOR FEBRUARY 2021 LEGAL UPDATE

GUN OWNERS WIN, SO FAR, IN ACTION CHALLENGING ON GROUNDS OF STATUTORY PREEMPTION (RCW 9.41.290) A CITY OF EDMONDS ORDINANCE THAT MAKES IT AN INFRACTION TO STORE UNLOCKED ANY FIREARM AND TO ALLOW ACCESS TO SUCH A FIREARM BY OTHERS NOT PERMITTED BY LAW TO POSSESS A FIREARM

In City of Edmonds and others v. Brett Bass and others, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. I, February 22, 2021)……16

The City of Edmonds Opinion is accessible on the Internet at:
https://www.courts.wa.gov/opinions/pdf/807552.pdf

WASHINGTON STATE'S INNOCENT-EXPLANATION INTERPRETATION OF THE COURT-MADE CORPUS DELICTI RULE: THE RULE WAS NOT SATISFIED IN A PROSECUTION FOR POSSESSION OF METHAMPHETAMINE WITH INTENT TO DELIVER WHERE POLICE DISCOVERED IN DEFENDANT'S LIVING ROOM 10 GRAMS OF METHAMPHETAMINE, A SCALE, UNTORN PLASTIC GROCERY STORE BAGS, AND A DRUG PIPE; THEREFORE, A 2-1 MAJORITY HOLDS THAT HIS VOLUNTARY CONFESSION TO BEING A DRUG DEALER IS NOT ADMISSIBLE; HOWEVER, THE COURT IS UNANIMOUS THAT THIS EVIDENCE SUPPORTS HIS CONVICTION FOR POSSESSION WITH INTENT TO DELIVER

State v. Sprague, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. II, Feb. 9, 2021)……..16

The Sprague Majority and Concurring Opinions can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2053370-7-II%20Published%20Opinion.pdf

BRIEF NOTES REGARDING FEBRUARY 2021 UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS ON SELECT LAW ENFORCEMENT ISSUES……19

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

SECOND AMENDMENT: 11-JUDGE PANEL WILL REVIEW A CASE IN WHICH A THREE-JUDGE PANEL'S AUGUST 2020 DECISION HELD UNCONSTITUTIONAL A CALIFORNIA STATUTE THAT BANS POSSESSION OF LARGE-CAPACITY AMMUNITION MAGAZINES

On February 25, 2021, the Ninth Circuit announced that an 11-judge panel will review the case of Duncan v. Becerra. This determination for "en banc" review sets aside a three-judge Ninth Circuit panel's 2-1 August 14, 2020 decision that held unconstitutional under the Second Amendment California's statutory ban on large-capacity ammunition magazines that hold more than 10 rounds of ammunition.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY: NO QUALIFIED IMMUNITY FOR OFFICERS IN CASE WHERE, AT THE CLOSE OF A CAR PURSUIT, OFFICERS SHOT THE DRIVER AND HIS PASSENGER WHO THEY HAD BOXED IN ON A DEAD-END STREET – THE APPELLATE PANEL CONCLUDES THAT A JURY COULD REASONABLY FIND ON THE FACTS VIEWED IN THE BEST LIGHT FOR PLAINTIFFS THAT THE DRIVER DID NOT POSE SUFFICIENT RISK TO THE OFFICERS TO JUSTIFY THEIR USE OF DEADLY FORCE

In Villanueva v. Cleveland, ___ F.3d ___ , 2021 WL ___ (9th Cir., January 28, 2021), a three-judge Ninth Circuit panel unanimously rules that two officers of a California law enforcement agency are not entitled to qualified immunity in a Civil Rights Act section 1983 lawsuit brought: (1) by the parents of Pedro Villanueva, a car's driver, who officers shot and killed as a perceived threat to them at the end of a vehicular pursuit; and (2) by Francisco Orozco, the car's passenger, who was injured in the police shooting.

The panel concludes that the officers violated the Fourth Amendment by using excessive force, and that the relevant case law was clearly established at the point in time when they took their actions.

FACTUAL ALLEGATIONS VIEWED IN THE BEST LIGHT FOR THE PLAINTIFFS

The strenuously disputed factual allegations in the case must be viewed in the light most favorable to the plaintiffs. This is required by law at this summary judgment stage of the case.

The Ninth Circuit's Opinion states that two officers began a pursuit of Villanueva as a traffic law violator who they observed doing a reckless "maneuver" in a large parking lot at a "sideshow" that involved about twenty cars. The Ninth Circuit Opinion describes as follows how the siren-activated chase along city surface streets – which began as Villanueva was leaving the parking lot – came to its fatal end:

> After several minutes of [a pursuit during which Villanueva drove 50 to 70 miles per hour on surface streets and ran through at least three red lights], Villanueva turned north onto North Pritchard Avenue, which dead-ends, and then right onto MacArthur Avenue, which also dead-ends. The Officers continued their pursuit, turning onto North Pritchard and then approaching the intersection with MacArthur, where they saw the Silverado stopped on MacArthur.
>
> All parties agree on the barebones of what happened next. The Officers immediately exited their vehicle and drew their firearms. [Officer] Cleveland stood near the open driver's side door of the police car and [Officer] Henderson stood near the open passenger's door. At the same time, Villanueva attempted to reverse out of MacArthur in a three-point turn that resulted in the rear of his vehicle pointing toward the Pritchard dead-end and the front generally facing the Officers, who were approximately 15 to 20 feet away.
>
> The Officers then opened fire on the vehicle and shouted a warning of some kind at the same time or within a second of firing. The shots killed Villanueva and injured Orozco. The Silverado then slowly rolled forward, ultimately colliding with the Officers' car at a very low speed.
>
> A photo of the intersection . . . .is reproduced below. **[LEGAL UPDATE EDITOR'S NOTE: The photo and the Ninth Circuit Opinion can be accessed on the Internet at** https://cdn.ca9.uscourts.gov/datastore/opinions/2021/01/28/19-55225.pdf **.]**
>
> . . . .
>
> The Officers claim Villanueva was driving "recklessly" during the three-point turn, to the point that he hit a car behind him, and that he faced their direction and hit the gas before

shots were fired. But witness testimony suggests that Villanueva's three-point turn was controlled, that he did not crash into another car, and that he never accelerated toward the police vehicle or the Officers.

Orozco [the passenger, a Plaintiff] attested that Villanueva was driving below the speed limit while making the turn, and that Orozco did not feel the Silverado collide with another vehicle behind it. He also attested that the Silverado was not moving directly toward the police vehicle at the time of the shooting, and that he did not see either officer "in the path of the truck" at any point before or during the shooting.

Witness Lino Mendez testified that he did not hear the Silverado collide with another vehicle, the engine rev, or the tires screech, and that he was very confident that the Silverado did not accelerate toward the police vehicle.

Witness Abel Orozco (no relation) testified that the turn "wasn't fast" and that he "didn't hear no revving or no burning tires or anything like that."

Witness Thomas Hinkle, Jr., testified that the Silverado tried to make a U-turn at a "very slow" speed and was not rushing. He never heard the engine rev and did not see the Silverado accelerate forward toward the police sedan.

[Some paragraphing revised for readability purposes; some of the quoted factual allegations are taken from the legal analysis section of the Court's Opinion and are repeated below in the Legal Analysis section of this Legal Update entry.]

LEGAL ANALYSIS BY NINTH CIRCUIT PANEL

The Villanueva panel Opinion's key case-specific, fact-intensive analysis – in support of its conclusion that the case must go to a jury on the excessive force issue – includes the following:

The Officers argue that their use of deadly force did not violate the Fourth Amendment as a matter of law because Villanueva threatened them with a deadly weapon – his truck – and any reasonable officer in their positions would have believed that Villanueva posed an immediate threat of serious harm or death to Sergeant Cleveland.

But in this case, the key facts demarcating the line between reasonable and unreasonable force are in dispute. Because we must construe these facts and the reasonable inferences that arise from them in favor of the plaintiffs, ... we cannot agree that the Officers' actions were reasonable as a matter of law.

"A moving vehicle can of course pose a threat of serious physical harm, but only if someone is at risk of being struck by it." . . . Use of deadly force to stop a recklessly speeding vehicle during a car chase is therefore ordinarily reasonable under the Fourth Amendment. See, e.g., Mullenix v. Luna, 577 U.S. 7, 15 (2015) ("The [United States Supreme] Court has thus never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment."); Scott v. Harris, 550 U.S. 372, 386 (2007). ("A police officer's attempt to terminate a dangerous highspeed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment.").

But this case does not involve a shooting during a highspeed chase. It is undisputed that Villanueva slowed to below the speed limit on Pritchard and came to a stop on MacArthur before performing the three-point turn. Even under the Officers' view of the facts, "the truck was moving forward at a speed of up to five miles an hour" when they shot at it.

We have consistently found use of deadly force to stop a slow-moving vehicle unreasonable when the officers could have easily stepped out of the vehicle's path to avoid danger. See [Orn v. City of Tacoma, 949 F.3d 1167, 1175 (2020) ("Orn's vehicle was moving at just five miles per hour. [The officer] could therefore have avoided any risk of being struck by simply taking a step back."); Acosta v. City & Cnty. of S. F., 83 F.3d 1143, 1146 (9th Cir. 1996), as amended (June 18, 1996), ... (finding that a reasonable officer "would have recognized that he could avoid being injured when the car moved slowly, by simply stepping to the side").

In contrast, we have found use of deadly force against a stopped or slow-moving vehicle reasonable only when the driver was trying to evade arrest in an aggressive manner involving attempted or actual acceleration of the vehicle. See Monzon v. City of Murrieta, 978 F.3d 1150, 1161 (9th Cir. 2020) (finding use of deadly force reasonable when "the van's event data recorder, or 'black box,' shows that the van's acceleration pedal was repeatedly pressed down between 80 and 99 percent during the very short 4.5 seconds from start to impact, and the van reached a speed of over 17 mph before hitting [the officer]'s cruiser"); Wilkinson v. Torres, 610 F.3d 546, 551–53 (9th Cir. 2010) (finding deadly force reasonable where the officer "was standing in a slippery yard with a minivan accelerating around him"); see also [Plumhoff v. Rickard, 572 U.S. 765, 776 (2014)] (finding deadly force reasonable where "the front bumper of [the driver's] car was flush with that of one of the police cruisers, [the driver] was obviously pushing down on the accelerator because the car's wheels were spinning, and then [the driver] threw the car into reverse 'in an attempt to escape.'").

The key question, then, is whether Villanueva accelerated or attempted to accelerate toward the Officers before the Officers shot at the Silverado and its occupants. See Monzon, 978 F.3d at 1163; Wilkinson, 610 F.3d at 551– 53.

The Officers claim Villanueva was driving "recklessly" during the three-point turn, to the point that he hit a car behind him, and that he faced their direction and hit the gas before shots were fired. But witness testimony suggests that Villanueva's three-point turn was controlled, that he did not crash into another car, and that he never accelerated toward the police vehicle or the Officers.

Orozco [the passenger, a Plaintiff] attested that Villanueva was driving below the speed limit while making the turn, and that Orozco did not feel the Silverado collide with another vehicle behind it. He also attested that the Silverado was not moving directly toward the police vehicle at the time of the shooting, and that he did not see either officer "in the path of the truck" at any point before or during the shooting.

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Taking the facts in the light most favorable to the plaintiffs, then, the three-point-turn was performed cautiously, the truck – which was 15 to 20 feet away from the Officers – was not aimed directly at Sergeant Cleveland and was moving very slowly and not accelerating when the Officers began shooting. In these circumstances, a reasonable jury could conclude that the Officers used excessive force, because they "lacked an objectively reasonable basis to fear for [their] own safety, as [they] could simply have stepped back [or to the side] to avoid being injured." . . .

[Some paragraphing revised for readability purposes; footnote omitted; some case citations omitted, other case citations revised for style]

Result: Affirmance of U.S. District Court (Central District of California) order denying summary judgment to the law enforcement officers.

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WASHINGTON STATE SUPREME COURT

WASHINGTON STATE'S STRICT LIABILITY STATUTE PROHIBITING DRUG POSSESSION HELD: (1) TO VIOLATE STATE AND FEDERAL CONSTITUTIONAL DUE PROCESS PROTECTIONS; AND (2) TO BE INVALID BECAUSE THE STATUTE PROHIBITS UNINTENTIONAL, UNKNOWING POSSESSION OF A CONTROLLED SUBSTANCE

In State v. Blake, ___ Wn.2d ___ , 2021 WL ___ (February 25, 2021), a five-Justice majority of the Washington Supreme Court invalidates Washington's strict liability drug possession statute, RCW 69.50.4013, which makes possession of a controlled substance a felony. The Majority Opinion concludes that the statute exceeds the State's police power and violates the Due Process clauses of the state and federal constitutions because it prohibits unintentional, unknowing possession of a controlled substance. The Majority Opinion rejects the State's argument that Washington case law providing an affirmative defense of "unwitting possession," is insufficient to save the statute from Due Process attack.

Justice Stephens writes a separate Concurring Opinion arguing that the Majority Opinion errs by not inferring a mental state requirement in the statute. Justices Johnson, Madsen, and Owens sign a Dissenting Opinion that argues against the Due Process analysis in the Majority Opinion.

Result: Reversal and vacation of Spokane County Superior Court conviction of Shannon B. Blake for possession of a controlled substance.

LEGAL UPDATE EDITOR'S NOTES: I assume that readers of the Legal Update are all aware that the Blake decision has far-reaching impact. I will not repeat or try to summarize guidance that is being provided from a variety of knowledgeable sources, including from the Washington Association of Sheriffs and Police Chiefs. I note here only that:

(1) the Blake Majority Opinion is grounded in the constitutional Due Process protections of both the state and the federal constitutions, and, because the Washington Supreme Court's interpretations of heightened constitutional protection in the Washington constitution are insulated from U.S. Supreme Court review, an appeal to the U.S. Supreme Court would not be accepted by that Court (even though, in my view, a majority U.S. Supreme Court would not agree with the Blake Majority Opinion's interpretation of the federal constitution); and

(2) the Washington Legislature could "fix" the statute by inserting a knowledge element in the statute, but any such change would be only prospective in effect.

CIVIL LIABILITY AGAINST LAW ENFORCEMENT BASED ON NEGLIGENCE THEORY: JURY VERDICT AGAINST CITY OF TACOMA IS UPHELD IN WRONG-APARTMENT SEARCH WARRANT CASE BASED ON THEORY OF NEGLIGENT EXECUTION OF THE WARRANT; ALSO, WASHINGTON SUPREME COURT DECLINES TO RECOGNIZE A "NEGLIGENT INVESTIGATION" THEORY

In Mancini v. City of Tacoma, ___ Wn.2d ___ , 2021 WL ___ (January 28, 2021), the Washington Supreme Court (with eight of the nine Justices signing the Majority Opinion) upholds a jury verdict against the City of Tacoma on grounds that the verdict is supported by substantial evidence that City of Tacoma law enforcement officers were negligent in their execution of a search warrant. The Majority Opinion declines the Plaintiff's request that the Court recognize a previously unrecognized civil action against law enforcement for "negligent investigation."

Plaintiff's negligent investigation theory focused on alleged flaws in investigation of a drug-dealer that led officers to the wrong apartment as the target identified in the search warrant and its supporting affidavit. Negligent investigation (not negligent execution of the search warrant) was the primary theory that plaintiff argued to the jury.

[LEGAL UPDATE EDITOR'S NOTE: This Legal Update entry will not address the legal arguments in this case for and against creating/recognizing a "negligent investigation" cause of action. Those argument are articulated in the briefs of the parties and in the friend-of-the-court briefs of the ACLU and governmental organization representatives (amici briefs). The briefing can be accessed by going to the "Washington Courts" Internet site and clicking on "Courts" on the top bar, then "Supreme Courts Briefs" under "Supreme Court" and then clicking on "Look for Briefs in Case Number Order," and then scrolling down to Supreme Court Case Number 97583-3. In the remainder of this Legal Update entry on Mancini, I will provide my understanding of what the Supreme Court Majority Opinion and Dissenting Opinion appeared to perceive as the factual support in the record for the "negligent investigation" theory and the "negligent execution of the warrant" theory. And then I will present the Mancini Majority Opinion's theoretical rationale for concluding that the jury verdict in this case was supported based on a theory of negligent execution of the search warrant.]

Facts/Evidence Relating to Negligent-Investigation Theory of Plaintiff

The Mancini Majority Opinion describes the investigation facts as follows:

> A confidential informant (CI) advised Tacoma Police Officer {A} that she had seen a dealer-sized quantity of drugs at Logstrom's apartment in Federal Way. The CI identified one of four identical buildings and said she had seen those drugs in apartment B1. She was sure it was that building because Logstrom's car was in front of it. The CI also told Officer Smith that Logstrom rented his apartment in his mother's name.
>
> [Officer A] performed an online public record check of Logstrom and apartment B1. Specifically, [Officer A] used "Accurint," a site that provides personal information for a fee. Accurint produced 150 pages of information. From that information, [Officer A] learned that Mancini resided at apartment B1 and that Logstrom was not associated with that apartment.
>
> **[Officer A] did not recall learning that Mancini had rented apartment B1 since 2006, that Mancini paid the utilities for apartment B1, that a Group Health landline was associated with apartment B1 for Mancini's work, or any details of the Accurint search beyond Mancini's age and race. Based on Mancini's age and race, [Officer A] believed Mancini could be Logstrom's mother.**
>
> **[Officer A] testified that he ordinarily performed surveillance and conducted a controlled buy in a target apartment in 95 percent of similar investigations. But he took neither step in this case. He provided numerous reasons for skipping these steps, including the limited relationship between the CI and Logstrom, Smith's hesitance about interacting with the King County Prosecutor's Office, and limited officer availability due to the holidays and hunting season.**
>
> Instead, [Officer A] applied for a search warrant for apartment B1 with only the information he already possessed. He attributed all the information about Logstrom to the CI's observations of Logstrom selling methamphetamine from both his apartment and his vehicle. A judge issued a search warrant for Logstrom's person and vehicle, and for apartment B1.

[Footnotes omitted; record cites omitted; some paragraphing revised for readability; bolding added to highlight the facts supporting Plaintiff's theory of negligent investigation]

Facts/Evidence Relating to Negligent-Execution-of-Warrant Theory of Plaintiff

The Mancini Majority Opinion describes the negligent-execution-of-warrant facts as follows:

> At about 9:45 a.m. on January 5, 2011, eight police officers arrived in a van to execute the warrant at apartment B1. Police rated Logstrom a "medium threat" because he had been seen with a handgun in the past.
>
> An officer knocked on the door and announced their presence. They received no response for 20 to 30 seconds. The police then broke open the door with a battering ram. They entered the apartment with guns drawn. Logstrom lived in apartment A1 in a different building.
>
> Mancini, the occupant of B1, was awakened by a "terrible shake and a loud boom"; at first, she thought it was an earthquake. She came out of her bedroom in a nightgown to a "sea of black, men in black" with guns pointed at her. They screamed at her to get down and asked, "Where's Matt?" and "Are you Kathleen?"

> One officer pushed Mancini onto the floor and cuffed her hands behind her back. Police then "dragged" or "'passed'" her outside of the apartment and denied her request to put on shoes.
>
> Outside, an officer questioned Mancini about Logstrom. The officer took Mancini, still in a nightgown, handcuffed and unshod, up two flights of stairs toward the parking lot and asked her about a vehicle that belonged to Logstrom. She told the officer it was associated with the neighboring building.
>
> Eventually, the police uncuffed Mancini and told her they had the wrong apartment. Mancini estimated she was cuffed for about 15 minutes. She acknowledged that she had given inconsistent accounts but clearly stated that it "seemed like forever."
>
> [Officer A] testified that he knew immediately after entering that they had the wrong apartment. [Officer A] did not enter the apartment until police had already taken Mancini into custody; he uncuffed her after what he testified was 1 to 2 minutes.
>
> Other officers estimated that the amount of time they spent at Mancini's apartment was between 2 and 8 minutes. One officer testified that he performed two "sweeps," which likely took 7.5 to 10 minutes, then he learned they had the wrong apartment another 5 to 7 minutes later.
>
> Eventually, the police left Mancini's apartment B1. They then approached Logstrom's apartment A1. The police report omitted the time they left Mancini and the time they first contacted Logstrom.
>
> But the police had no warrant for apartment A1, so they "had to approach it differently." The officers knocked on Logstrom's door, and he came out. Logstrom then consented to a search, and the officers found marijuana plants growing in his apartment.
>
> Unlike at Mancini's apartment, they did not use weapons or a battering ram. Police seized drugs and other items from Logstrom's apartment and took him to the station for questioning. They did not, however, detain him; they released him pending further investigation.

[Record cites omitted; some paragraphing revised for readability]

<u>Mancini Majority Opinion's Rationale for Concluding that Jury Verdict was Supported Based on Negligent Execution of the Search Warrant</u>

> At trial, Mancini introduced evidence that the police raided her apartment, pointed guns at her, forced her to the ground, handcuffed her, took her outside barefoot in a nightgown, in January, and left her handcuffed for up to 15 minutes. She also presented contrasting evidence of the peaceful manner by which police contacted Logstrom's actual apartment, despite justifying their initial raid by rating Logstrom a potentially armed "medium threat."
>
> The evidence, taken in the light most favorable to Mancini, offered the jury multiple avenues to find that police breached their duty of care. **A rational juror could have**

found that police breached the door unreasonably quickly after knocking and receiving no response,

> [Court's footnote 12: *In the criminal context, "[w]hether an officer waited a reasonable time before entering a residence is a factual determination . . . and depends upon the circumstances of the case." . . . . Police must wait long enough to serve the purposes of the "knock and announce" rule, which include "(1) reduction of potential violence to both occupants and police arising from an unannounced entry, (2) prevention of unnecessary property damage, and (3) protection of an occupant's right to privacy." . . . What constitutes a reasonable waiting period depends on the facts of the particular case, but the Court of Appeals has found 6 to 9 seconds insufficient where police knocked at hours when occupants would likely be asleep. . . . A reasonable jury could have concluded that 20 to 30 seconds in the context of this case was unreasonable.*]

that police took an unreasonable amount of time to realize they had the wrong apartment, that the police unreasonably continued their search of Mancini's apartment after realizing they had hit the wrong door, or that the police unreasonably left Mancini handcuffed long after realizing she had no relation to their suspect – or any combination of these facts. Given the general claim of negligence and the general verdict form on this claim, any of the above would support the trial court's decision.

> There was certainly evidence that contradicted Mancini's story. . . . But the jury is the sole judge of the credibility of witnesses, . . . and whether the overall conduct of the police was reasonable was an ultimate fact to be decided by the jury.
>
> It is also certainly true that Mancini argued her case to the jury as a negligent investigation case, not a negligent warrant execution case. This was true of both her legal arguments in response to the City's CR 50 motion and her arguments and slide show to the jury in closing. But arguments are not evidence. . . . When reviewing a CR 50 motion, we must affirm the jury's verdict if substantial evidence supports it. . . .. Where a general verdict makes it "impossible to know whether the jury found liability" on either of two possible theories, we decline to "dissect the jury's general verdict" and, instead, we let it stand. . . . Substantial evidence supported the jury's negligence verdict in this case.

[One footnote omitted; case and record citations omitted; some paragraphing revised for readability; bolding added to highlight Majority Opinion's core statement of its rationale]

Result: Reversal of pro-City decision (by Unpublished Opinion) of the Court of Appeals, Division One, and reinstatement of King County Superior Court judgment on jury verdict for Kathleen Mancini.

WHERE DEATH IS THE RESULT OF A LABOR SAFETY REGULATION VIOLATION, AND THE FACTS SUPPORT A CRIMINAL CHARGE UNDER THE WORKPLACE SAFETY STATUTE (RCW 49.17.190(3)), THE SPECIFIC-CONTROLS-OVER-THE-GENERAL RULE DOES NOT PRECLUDE CHARGING THE EMPLOYER UNDER THE SECOND DEGREE MURDER STATUTE (RCW 9A.32.050)

In State v. Numrich, ___ Wn.2d ___ , 2021 WL ___ (February 4, 2021), the Washington Supreme Court rules that where death is the result of a labor safety regulation violation, and the facts support a criminal charge under the workplace safety statute (chapter 49.17 RCW or WISHA), the specific-statute-controls-over-the-general-statute rule that guides interpretation of criminal statutes does not preclude charging the employer under the second degree murder statute if the facts also support a charge under the latter statute.

The specific-statute-controls-over-the-general-statute rule is a well-established rule of statutory construction that generally provides, with some exceptions and qualifiers, that if a special statute punishes the same conduct that is punished under a general statute, the special statute applies and the accused can be charged only under that statute. In this case, the employer of an employee who died in a workplace trench-cave-in challenged his charge under Washington's manslaughter statutes in chapter 9A.32 RCW, instead of the WISHA homicide statute, RCW 49.17.190(3).

Result: Affirmance of King County Superior Court rulings on the above-noted issue; case remanded to Superior Court for trial.

WASHINGTON SUPREME COURT ADDRESSES RECALL PETITION DIRECTED AT ELECTED SHERIFF FOR THURSTON COUNTY; COURT RULES FOR THE SHERIFF
In re Recall of John Snaza, ___ Wn.2d ___ , 2021 WL ___ (February 11, 2021)

Pam Loginsky, Staff Attorney for the Washington Association of Prosecuting Attorneys, included in her "Case Law" "Weekly Roundup for February 12, 2021" on the WAPA website the following description of a sheriff-recall decision of the Washington Supreme Court issued on February 11, 2021 (she also provided a hyperlink to the decision):

> **Recall Election.** A sheriff has discretion in how to enforce Governor Inslee's mask order. A sheriff who exercises that discretion to not criminally enforce the mask mandate, while encouraging everyone to comply with the mandate, is not subject to recall unless his exercise of discretion is "manifestly unreasonable." Sheriff Snaza's exercise of discretion was not manifestly unreasonable as he did not announce a blanket refusal to enforce the order, nor did he denounce the mask mandate and encourage people to violate the order. In re Recall of Snaza, No. 98918-4 (Feb. 11, 2021).

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WASHINGTON STATE COURT OF APPEALS

FELONY BAR STATUTE, RCW 4.24.420: IN A WRONGFUL DEATH LAWSUIT AGAINST KING COUNTY LAW ENFORCEMENT DEFENDANTS BY THE ESTATE OF RENEE DAVIS, THE JURY MUST RESOLVE SOME FACT QUESTIONS, IN LIGHT OF HER MENTAL HEALTH IMPAIRMENT, ABOUT THE INTENT OF THE ARMED MS. DAVIS, AT THE TIME OF THE SHOOTING

Davis v. King County, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. I, February 1, 2021)

Factual Allegations and Proceedings below:

In October 2016, two King County deputies responded to a man's request for help regarding his girlfriend, Ms. Renee Davis. The boyfriend reported that Ms. Davis had a history of mental health crises and of a past suicide attempt. The boyfriend reported that Ms. Davis was currently expressing suicidal thoughts, and that she had in her care two of her young children. After the deputies arrived at the home of Ms. Davis, they learned from her two young children that she was in one of two bedrooms down a hall.

As to what happened after the two deputies went down the hall, entered one of the bedrooms and contacted Ms. Davis, the February 1, 2021 Opinion of the Court of Appeals describes as follows what can be drawn from the factual allegations (A) by the two deputies (the only living witnesses to the shooting) and (B) by one city police officer who responded after the shooting:

> The deputies entered Davis's bedroom and observed her lying in her bed, covered in a blanket up to her neck, staring blankly at the door. The deputies instructed Davis to show her hands; [Deputy A] recalled that Davis did not respond, while [Deputy B] recalled that Davis said "no." [Deputy A] pointed his weapon at Davis while [Deputy B] pulled the blanket off Davis.
>
> Both deputies testified that they saw a gun. [Deputy A] recalled that Davis's right hand was over the top of or below the gun, with the muzzle facing the foot of the bed, while [Deputy B] recalled that the gun was in Davis's right hand resting on her legs. Both deputies observed a magazine in Davis's left hand, but could not tell whether the gun was loaded or unloaded.
>
> [Deputy A] ordered Davis to "drop the gun," while [Deputy B] yelled "gun." [Deputy B] attempted to move back toward the door. Both officers testified that she raised the gun and pointed it directly at them – apparently at the same time. Both [deputies] fired their weapons. Three bullets hit Davis. [Deputy B] announced "shots fired" over the air. Davis slumped over, fell off the bed, and stated "It's not even loaded."
>
> [Deputy A] heard the children screaming and left [Deputy B] alone in the bedroom with Davis. [Deputy A] encountered [an Auburn Police Officer, Officer C], as he took the children outside. After removing the children from the home, [Officer C] and [Deputy A] went back to Davis's bedroom. According to [Officer C] he saw the gun in Davis's hand while she was lying on the floor and one of the deputies took it out of her hand.
>
> [Deputy B] testified that he told [Deputy A] that they needed to make the scene safe and asked [Deputy A] to cover him while he got the gun. [Deputy B] claimed he recovered the gun from the bed, checked it, and confirmed that it did not have a magazine nor round in the chamber. He then put the gun in his belt. [Deputy A] testified that he was watching Davis and did not see [Deputy B] remove the gun from the bed.
>
> [Officer A] moved the bed away from Davis so that medical personnel could provide treatment. [Deputy B] called for aid and moved Davis to a location where aid could be provided. Fire department medics, who had been waiting outside entered and performed lifesaving measures. Medics were unable to revive Davis.

[Some paragraphing revised for readability]

<u>Proceedings below</u>:

The Estate of Ms. Davis filed a wrongful death action against King County, the sheriff and sheriff's replacement, and the two deputies, asserting theories of negligence, battery, negligent use of excessive force, and outrage. King County moved for summary judgment to dismiss all of the estate's claims based on the felony bar statute. The trial court granted the motion.

ISSUES AND RULINGS: 1. RCW 4.24.420, the Felony Bar Statute, creates a complete defense to, among other lawsuits, a wrongful death lawsuit if (1) the person killed was engaged in the commission of a felony at the time of the death, and (2) the felony was a proximate cause of the death. The statute applies even if the defendant (here, the King County parties) was negligent or unreasonable. Evidence produced in the summary judgment proceedings in this case includes: (A) Davis's history of mental illness and attempted suicide; (B) conflicting testimony from the two deputies about where the gun and magazine were located just moments before the shooting; (C) the testimony from the two deputies that she pointed the gun at each of them – apparently (and seemingly inconsistently) at the same time; (D) Davis's dying statement that "it's not even loaded;" and (E) the conflicting testimony among the three law enforcement officers whether, after the shooting, the gun was found (i) in Davis's hand, (ii) on the floor, or (iii) on the bed.

Are material questions of fact presented by the evidence on the question under the Felony Bar Statute of whether Davis acted intentionally in her handling of the gun such that she committed felony assault on the officers before they shot her? (ANSWER BY COURT OF APPEALS: Yes, questions of fact are presented on the intent question, and those fact questions must be resolved by a trial)

2. Does the felony bar statute require a criminal conviction or admission to felonious conduct before it can bar a wrongful death action? (ANSWER BY COURT OF APPEALS: No)

Result: Reversal of King County Superior Court summary judgment order that dismissed the lawsuit against the King County law enforcement defendants; case remanded for trial.

ANALYSIS BY THE COURT OF APPEALS:

1. There are questions of fact as to whether Ms. Davis acted intentionally in her handling of the handgun and thus committed felony assault on the deputies before they shot her.

On August 31, 2020, a 3-judge Division One Court of Appeals panel issued a unanimous Unpublished Opinion holding that the wrongful death lawsuit by the Estate of Renee Davis against two King County sheriff's deputies must be dismissed based on RCW 4.24.420, the Felony Bar Statute. As noted above, the statute creates a complete defense to, among other lawsuits, a wrongful death lawsuit if (1) the person killed was engaged in the commission of a felony at the time of the death, and (2) the felony was a proximate cause of the death. If these two elements are met, the statute applies even if the defendant was negligent or unreasonable.

The August 31, 2020 Unpublished Opinion concluded that the deceased was armed and engaged in a felony assault of law enforcement officers by pointing a gun at the officers just moments before the officers responded by shooting her.

On February 1, 2021, the same 3-judge panel responded to the Plaintiff-Estate's motion for reconsideration by unanimously reversing itself and issuing a Published Opinion in favor of the Estate**. [LEGAL UPDATE EDITOR'S COMMENT: This self-reversal with unanimity is**

extremely rare. In fact, in my 45 + years as an attorney in Washington, I do not remember ever seeing this happen before.]

The key part of the legal analysis in the February 1, 2021 Published Opinion is as follows:

> In granting summary judgment, the trial court relied on the testimony of Deputies [A and B], that Davis pointed a weapon at them, to infer her intent to commit felony assault. This was error. As the estate argues, the evidence in the record before us raises numerous questions of fact over whether Davis intended to commit an assault. This evidence includes [1] Davis's history of mental illness and attempted suicide,
>
> > [Court's footnote 4: *Evidence of diminished capacity is admissible to prove or disprove that a defendant was capable of forming the requisite specific intent to commit a crime. State v. Poulsen, 45 Wn. App. 706, 708, 726 P.2d 1036 (1986)*.]
>
> [2] the deputies' conflicting testimony about where the gun and clip were located, [3] their testimony that she pointed the gun at each of them – apparently at the same time, [4] Davis's dying statement that "Its not even loaded," and [5] the conflicting testimony whether the gun was found in Davis's hand on the floor, or still on the bed. While a jury might find the officers' testimony credible and Davis's act of pointing the gun demonstrates her intent to commit an assault, it might also conclude to the contrary. The trial court erred in concluding Davis had the requisite specific intent to commit assault.

[Bracketed numbers added to highlight five areas where the Court of Appeals found conflict in the evidence]

2. The felony bar statute does not require a criminal conviction or admission to felonious conduct before it can bar a wrongful death action

In the following analysis, the Court of Appeal rejects the alternative argument of the Estate:

> Here, the statute's language is unambiguous. The plain language of the statute does not require that a person be convicted of a felony or admit to felonious conduct before RCW 4.24.420 is a complete defense to a civil action. Instead, the language states "[i]t is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony." RCW 4.24.420 (emphasis added). A wrongful death action will likely never involve a conviction or admission to felonious conduct because the death would [precede] any possible trial or admission. . . . The argument advanced by the estate reads the language "wrongful death" out of the statute by making the defense unavailable in almost all wrongful death actions. . . .

CIVIL LIABILITY FOR ALLEGED WRONGFUL DEATH: IN LAWSUIT BY THE ESTATE OF CHARLEENA LYLES, THE JURY/FACTFINDER MUST RESOLVE SOME FACT QUESTIONS ON (1) WHETHER OFFICERS WERE REASONABLE IN RESORTING TO USE OF LETHAL FORCE, AND (2) WHETHER, FOR PURPOSES OF THE FELONY-BAR STATUTE (RCW 4.24.420), THE KNIFE-WIELDING MS. LYLES, IN LIGHT OF HER MENTAL HEALTH PROBLEMS, HAD THE REQUISITE INTENT UNDER THAT STATUTE

Commissioner Eric Watness and others v. City of Seattle and others, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. I, Feb. 16, 2021)

In the Watness v. City of Seattle case, Division One of the Court of Appeals concludes, among other rulings, that the lawsuit brought by the estate of Charleena Lyles alleging her wrongful death by shooting by two Seattle officers poses fact questions that must be resolved in a trial by a fact-finder on the following issues:

(1) whether officers should have been armed with and used a taser instead of firearms, despite the fact that the deceased was wearing a heavy coat and was in close proximity to one of the officers; and

(2) whether the wrongful death lawsuit is barred under the felony-bar statute, RCW 4.24.420, in light of mental health problems (as alleged by the Estate) that precluded Ms. Lyles from having the requisite intent under Washington's relevant assault statute. **[LEGAL UPDATE EDITOR'S NOTE: On this second issue, see the immediately preceding entry in this month's Legal Update, Davis v. King County, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. I, February 1, 2021).]**

Result: Reversal of King County Superior Court order granting summary judgment to the King County Sheriff's Office civil defendants; case remanded to Superior Court for further proceedings.

GUN OWNERS WIN, SO FAR, IN ACTION CHALLENGING ON GROUNDS OF STATUTORY PREEMPTION (RCW 9.41.290) A CITY OF EDMONDS ORDINANCE THAT MAKES IT AN INFRACTION TO STORE UNLOCKED ANY FIREARM AND TO ALLOW ACCESS TO SUCH A FIREARM BY OTHERS NOT PERMITTED BY LAW TO POSSESS A FIREARM

In City of Edmonds and others v. Brett Bass and others, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. I, February 22, 2021), Division One of the Court of Appeals makes a ruling that the Court summarizes as follows in the first section of its Opinion:

> Three individual gun owners (the Gun Owners) challenge an Edmonds ordinance making it a civil infraction to store unlocked any firearm and to allow access to such a firearm by children or others not permitted by law to possess it. They contend the ordinance is a firearm regulation preempted by state law. We conclude the Gun Owners have standing to raise their pre-enforcement challenge and hold that the ordinance is, regardless of its arguable benefits to public safety, preempted by RCW 9.41.290.

Result: Affirmance of Snohomish County Superior Court order permanently enjoining the City of Edmonds from enforcing the City's locked storage requirement for guns.

Status: Time remained as of March 8, 2021 for the City of Edmonds to seek discretionary review in the Washington Supreme Court.

WASHINGTON STATE'S INNOCENT-EXPLANATION INTERPRETATION OF THE COURT-MADE CORPUS DELICTI RULE: THE RULE WAS NOT SATISFIED IN A PROSECUTION FOR POSSESSION OF METHAMPHETAMINE WITH INTENT TO DELIVER WHERE POLICE DISCOVERED IN DEFENDANT'S LIVING ROOM 10 GRAMS OF METHAMPHETAMINE, A SCALE, UNTORN PLASTIC GROCERY STORE BAGS, AND A DRUG PIPE; THEREFORE,

A 2-1 MAJORITY HOLDS THAT HIS VOLUNTARY CONFESSION TO BEING A DRUG DEALER IS NOT ADMISSIBLE; HOWEVER, THE COURT IS UNANIMOUS THAT THIS EVIDENCE SUPPORTS HIS CONVICTION FOR POSSESSION WITH INTENT TO DELIVER

State v. Sprague, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. II, Feb. 9, 2021)

In Sprague, Division Two of the Court of Appeals affirms the conviction of the defendant Sprague for possessing methamphetamine with intent to deliver, although the Court rules that Sprague's admissions of guilt to officers are inadmissible under the corpus delicti rule.

Facts and Proceedings below:

Officers executed a search warrant for illegal narcotics and related contraband at Sprague's apartment. Officers discovered in his living room: two small bags of methamphetamine weighing a total of just over 10 grams, a digital scale with methamphetamine residue, a bundle of intact plastic grocery bags that were not torn into smaller units, a "homemade meth pipe," "scrapings" from the pipe, and a metal container with methamphetamine residue.

The officers did not find any cash, safes, pay/owe sheets, or weapons. After receiving Miranda warnings, Sprague admitted that the methamphetamine belonged to him, and that he had been selling small amounts of methamphetamine both (1) from inside his apartment and (2) outside in the alley behind his apartment. Sprague admitted that he typically tears off pieces of plastic grocery bags to package the methamphetamine.

Sprague was charged with one count of possession of methamphetamine with intent to deliver. The trial court denied his motion under the corpus delicti rule to suppress his admissions to the officers. A jury convicted Sprague as charged.

ISSUES AND RULINGS: (1) Under the evidence as described above, does the court-made corpus delicti rule permit the fact-finder to consider evidence of Sprague's admissions to the officers in the prosecution of Sprague for possession with intent to deliver methamphetamine? (ANSWER BY COURT OF APPEALS: No, rules a 2-1 majority, because all of the facts described could be consistent with mere possession; drug users who are not drug dealers commonly have scales and intact grocery bags and smoking pipes)

(2) Under the evidence as described above, is there sufficient evidence (not considering Sprague's admissions of drug-dealing to the officers) to support Sprague's conviction for possession of methamphetamine with intent to deliver? (ANSWER BY COURT OF APPEALS: Yes, rules the panel by 3-0 vote)

Result: Affirmance of Cowlitz County Superior Court conviction of Victor Wayne Sprague for possession of methamphetamine with intent to deliver within 1000 feet of a school bus route stop.

ANALYSIS:

1. The Corpus Delicti rule for possession-with-intent cases is not satisfied by the evidence

The common law/court-created corpus delicti rule was developed in order to preclude persons from being convicted based solely on their incriminating statements. In prosecutions in federal courts and in the majority of states other than Washington, the rule has been relaxed somewhat

to require only that the evidence meet a "trustworthiness" standard, but the Washington Supreme Court has expressly declined to follow that approach.

The Majority Opinion in Sprague states that under the Washington Supreme Court's framing of the Washington corpus delicti rule, there are three specific requirements for establishing corpus delicti: (1) the evidence must independently corroborate, or confirm, the fact of a defendant's incriminating statement; (2) the independent evidence must be consistent with guilt and inconsistent with a hypothesis of innocence; and (3) the evidence must corroborate not just a crime but the specific crime, here possession with intent to deliver methamphetamine, with which the defendant has been charged. Also, the Majority Opinion in Sprague indicates that under the Washington corpus delicti precedents, the quantity or volume of drugs possessed generally does not help establish corpus delicti despite the common sense observation that possessing a large amount of illegal drugs tends – at some high level of quantity or volume – to suggest a purpose other than mere use.

The Majority Opinion in Sprague holds that the 10 grams of methamphetamine, the digital scale, the intact plastic grocery store bags, and the pipe in the defendant's living room provide only sufficient corroborating evidence for defendant's statements related to mere possession. This is because it is not uncommon for drug users or addicts to have a scale, a pipe and intact grocery store bags.

The Majority Opinion in Sprague distinguishes the facts in the following possession-with-intent cases where the corpus delicti rule was held to be satisfied: (1) In State v. Brockob, 159 Wn.2d 311 (2007), an officer found coffee filters of varying sizes next to ephedrine in a defendant's car, and established that defendant was collaborating with another suspect to procure more than the lawful amount of ephedrine; and (2) in State v. Hotchkiss, 1 Wn. App. 2d 275 (Div. II, 2017), the State presented evidence that defendant Hotchkiss stored over $2,000 in cash in a locked safe alongside methamphetamine, the logical and reasonable inference was that the cash and methamphetamine were connected.

2. The same evidence that fails to establish intent-to-deliver corpus delicti does independently support the intent-to-deliver conviction without the defendant's confession

On the sufficiency-of-the-evidence to convict issue, the Sprague Majority Opinion explains as follows its ruling that the evidence supports the conviction without the defendant's confession:

> "Mere possession of a controlled substance, including quantities greater than needed for personal use, is not sufficient to support an inference of intent to deliver." State v. O'Connor, 155 Wn. App. 282, 290 (2010). Further, an officer's opinion on what quantity of a controlled substance is "normal for personal use" cannot alone support an inference of intent to deliver. State v. Hutchins, 73 Wn. App. 211, 217 (1994). In reviewing the evidence necessary to convict in possession with intent cases, the Brockob court affirmed that "'at least one additional factor, suggestive of intent, must be present.'" 159 Wn.2d at 337 . . . .
>
> The presence of a scale is relevant circumstantial evidence suggesting an intent to deliver, although it is usually considered in conjunction with other circumstantial evidence that is similarly suggestive of such intent. For example, in O'Connor, Division Three relied on a large amount of marijuana, the presence of a scale, and "the sophistication of the [defendant's] grow operation" in holding that the evidence was sufficient to sustain a conviction for possession with intent to deliver. . . . Similarly, in

State v. Lane, 56 Wn. App. 286, 297-98 (1989), Division Three affirmed a conviction for possession with intent to deliver based on evidence of a large amount of cocaine, the presence of a scale, and the presence of a large amount of cash.

The presence of packaging material is also relevant circumstantial evidence suggesting an intent to deliver. In State v. Simpson, 22 Wn. App. 572, 575 (1979), Division One relied, in part, on evidence that balloons were found on the defendant's person and under the defendant's bed because "[b]alloons are commonly used for the packaging, transportation and sale of heroin." And in [State v. Hutchins, 73 Wn. App. 211 (1994] Division Three noted the fact that "[t]here was no packaging material" as one factor influencing the court's decision to reverse a conviction for possession with intent to deliver.

Here, the officers testified that Sprague possessed a total of between 9 and 10 grams of methamphetamine, a significant amount. Based on the officers' testimony about typical doses being between one tenth of a gram and one half of a gram, Sprague possessed between 18 and 100 doses. That amount supports an inference of an intent to deliver, but "'at least one additional factor'" must be present. Brockob, 159 Wn.2d at 337 (emphasis omitted) . . . .

Even when the influence of Sprague's confession is removed, the presence of a scale and plastic grocery bags are additional factors that courts have held suggest an intent to deliver. . . . And unlike the corpus delicti analysis, the sufficiency of the evidence analysis does not involve evaluation of hypotheses of innocence. Here, we must resolve all inferences in favor of the State without considering hypotheses supporting mere possession. The scale and the packaging materials were located in the same room as an amount of drugs that exceeded an amount for personal use. Thus, despite the insufficient evidence under the corpus delicti test, there was sufficient evidence to support Sprague's conviction under the sufficiency of the evidence test without Sprague's incriminating statements.

[Some citations omitted, other citations revised for style]

LEGAL UPDATE EDITOR'S COMMENT: To me, this case illustrates why the corpus delicti rule in federal courts and in most other states uses a relaxed "trustworthiness" standard. It seems nonsensical that the same evidence that is deemed to be insufficient to support admission of an incriminating statement regarding intent to deliver under the corpus delicti rule can be held to be sufficient to support a conviction for the crime of possession of illegal drugs with intent to sell or deliver.

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

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

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

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

1. State v. Daniel Ethan Elwell: On February 1, 2021, Division One of the COA disagrees with the arguments of defendant and affirms his King County Superior Court conviction for *residential burglary*. The Court of Appeals rules that **defendant's constitutional privacy rights under the state and federal constitutions were not violated where: (A) about two hours before contacting Elwell on the street, a law enforcement officer watched a surveillance video taken the previous evening of the unmasked Elwell stealing a large, Pac-man arcade machine and a large dolly, and wheeling the dolly and machine out of the burgled premises (the Court of Appeals Opinion includes pictures of the thief in action); (B) when the officer contacted Elwell on the street several hours later about a mile from the burgled premises, the suspect was a very close match in facial appearance and clothing to the thief on the video, and he was pushing on a dolly a large object about the size of a Pac-man machine covered by a large red blanket; and (C) the officer asked, "There wouldn't happen to be a [Pac-Man] machine in there[,] would there be?" and Elwell responded that he found it "in the garbage," and the officer pulled off the blanket and some plastic wrapping underneath it, uncovering the Pac-Man machine. The Court of Appeals rules that "open view" justified the officer's actions.**

Defendant also argued that his rights were violated by the arresting officer's failure to notify him on tape at the outset of the contact that a body camera was in operation. The analysis by the Court of Appeals on this issue is as follows:

> Elwell points to RCW 10.109.010(1)(d), which requires law enforcement agencies to develop policies on when officers will inform members of the public that they are being recorded. He also points to the Seattle Police Department Manual, which requires officers to give such a notification. Finally, he points to Lewis v. Department of Licensing, in which, based on Washington's privacy act, chapter 9.73 RCW, the court ruled that recordings between officers and individuals in traffic stops were inadmissible because the officers did not inform the individuals that they were recording them. 157 Wn.2d 446, 451–52, 139 P.3d 1078 (2006).
>
> Neither RCW 10.109.010(1)(d) nor any police manual requires a court to suppress evidence where an officer gave no notification, so Peale did not perform deficiently on these grounds. And although the Lewis court ruled as inadmissible certain videos where officers did not notify the defendants that they were being recorded, here, Elwell does not argue what the effect of the video's exclusion would have been, and he bears the

> burden of showing prejudice in an [Ineffective Assistance of Counsel] claim. . . . And showing prejudice would be difficult, given the security camera footage and [the officer's] testimony that he discovered the Pac-Man machine in Elwell's possession. Elwell has not shown prejudice on any ground.

In other words, two of defendant's three bases for the body camera evidence challenge have no support in law, and the third basis for his theory – the holding under chapter 9.73 RCW in the Lewis precedent – fails because even if the special Exclusionary Rule of chapter 9.73 RCW applies and requires suppression of the body camera recording, the remaining admissible evidence clearly supports the conviction.

LEGAL UPDATE EDITOR'S NOTE: Of course, best practice is to give the notification of the recording as required by law.

2. State v. Edwin Espejo: On February 2, 2021, Division Three of the COA disagrees with the arguments of defendant and affirms his Franklin County Superior Court convictions for (A) *three counts of attempted first degree murder*, and (B) *one count of unlawful possession of a firearm in the second degree*.

The Court rules that the "emergency action" subcategory of the "community caretaking function" exception to the search warrant requirement justified entry of his home and follow-up action by law enforcement officers at whom he fired a handgun in the ensuing encounter. The Court of Appeals describes as follows the facts relating to the initial residential entry:

> Law enforcement officers were dispatched to Mr. Espejo's home in response to a domestic violence call. When the first officer arrived, he encountered several children outside. The children were crying and yelling "'he is hitting her'" while motioning their fists to their eyes. The children said the incident was taking place inside the house. The officer called for backup and asked to be taken into the home. A child took the officer inside to the top of the basement stairs and told the officer that the assailant, named "Edwin," was downstairs. The officer waited at the top of the stairs for backup to arrive. While waiting, the officer could hear the sounds of children downstairs, whimpering and crying.

In key part, the legal analysis by the Court of Appeals is as follows:

> Law enforcement officers generally need a warrant to enter a private residence; however, an exception exists for emergency actions taken as part of the officers' community caretaking responsibilities. The community caretaking exception applies when officers are not acting under an investigative pretext and three factors are met: (1) the officer[s] subjectively believed that an emergency existed requiring that [they] provide immediate assistance to protect or preserve life or property, or to prevent serious injury, (2) a reasonable person in the same situation would similarly believe that there was a need for assistance, and (3) there was a reasonable basis to associate the need for assistance with the place searched. State v. Boisselle, 194 Wn.2d 1, 14, 448 P.3d 19 (2019).
>
> The record here supports all components of the community caretaking exception. There was no evidence of pretext; at the time of entry, the sole objective was to respond to an ongoing domestic disturbance. In addition: (1) officers made plain their subjective

concern was to protect the individuals in Mr. Espejo's home from further injuries, (2) this concern was reasonable, particularly given the dangers posed by domestic violence, and (3) it was abundantly clear the ongoing danger was occurring in Mr. Espejo's basement. Given the information available to law enforcement, it would have been irresponsible for officers to ignore the cries and distress of the children and decline entry into Mr. Espejo's home. Once inside, the officers appropriately continued their response to the ongoing emergency. No warrant was necessary under these circumstances.

[Court's footnote 2: *Even if the emergency exception did not apply, Mr. Espejo's arguments would fail because the exclusionary rule does not apply to evidence of an assault against law enforcement officers. State v. Mierz, 127 Wn.2d 460, 473-74, 901 P.2d 286 (1995)*].

3. State v. Camron Nick Fichtner: On February 8, 2021, Division One of the COA rejects the arguments of defendant in his appeal from a Snohomish County Superior Court conviction for *felony violation of a court order*. **The Court of Appeals rules that:**

(1) an officer investigating a domestic violence call had reasonable safety concerns and thus did not transform a Terry seizure of a suspect into an arrest when he used handcuffs and placed the suspect in a patrol car while the officer went inside a residence to investigate the circumstances, including the circumstance of the sound of a woman's screaming coming from the house of interest; and

(2) the trial court did not abuse its discretion in admitting the recanting victim's prior "Smith affidavit" procured by an officer (see State v. Smith, 97 Wn.2d 856 (1982)) in light of the following four-factor test under Smith that looks at: (i) whether the witness voluntarily made the statement; (ii) whether there were minimal guaranties of truthfulness; (iii) whether the statement was taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause (including a statement made with proper statutory reference to being made under "penalty of perjury"); and (iv) whether the witness was subject to cross examination when giving the subsequent inconsistent statement.

4. State v. Teklemariam Daniel Hagos: On February 8, 2021, Division One of the COA agrees with defendant's challenges to admission of one of the items of evidence at his trial (his alleged conduct of spitting at a postal worker), but the Court of Appeals concludes that admission of this evidence was harmless error; the Court thus affirms defendant's King County Superior Court conviction for *assault in the third degree for spitting on a police officer*. **The Court of Appeals concludes, among other rulings, that the trial court did not abuse its discretion in admitting testimony from the spit-upon officer that she "went to the hospital for treatment" after Hagos spit on her, and that she would continue to be treated until she found out whether or not she was sick.**

5. Estate of Heather Durham v. Pierce County and the State of Washington Department of Corrections: On February 9, 2021, Division Two of the COA rules in favor of the Estate and *reverses the Pierce County Superior Court order that dismissed the Estate's lawsuit against Pierce County*. Heather Durham was severely beaten by her estranged husband, Abel Robinson, at a time when he was under court order for electronic home monitoring (EHM), but he was not actually being monitored by Pierce County. Assuming for the sake of argument that the Estate's factual allegations are true, the Court of Appeals rules that **the negligence-based lawsuit against Peirce County can go forward based on her theories that (1) the County**

had a special relationship with Robinson, and (2) the County also had a take-charge duty. The case against the County is remanded for further proceedings. The lawsuit against DOC is not addressed in the February 9, 2021 ruling.

6. State v. Cashundo Scott Banks, aka Cashundo S. Banks, aka Donald Eugene Irving: On February 9, 2021, Division Two of the COA rejects the challenges of defendant to his Pierce County Superior Court convictions for (A) *first degree unlawful possession of a firearm* and (B) *unlawful possession of a controlled substance – methamphetamine*. **The Court of Appeals rules that an officer did not seize defendant when the officer made a social contact with him and consensually obtained his name and identification**. The officer initiated a low-key consensual contact with Banks in following up a request from a Safeway security guard who reported that a man was asleep in a car parked in a Safeway parking lot with the engine running. The officer's patrol car was not positioned to block Banks' car in. After confirming that Banks did not need assistance, the officer asked Banks for his name and identification. Her request was uttered in a conversational tone and not stated as a demand. Banks gave his name to her, but Banks claimed that he did not have identification. The officer then conducted a records check using the information that Banks provided. The officer learned that there was an outstanding warrant for Banks's arrest, and the officer discovered during the subsequent arrest process that he had a firearm in his waistband and methamphetamine in a bag that Banks asked the officer to retrieve from his car.

7. State v. Aurora Lillian Anderson: On February 16, 2021, Division One of the COA rejects the challenge of defendant to her Snohomish County Superior Court convictions for (A) *criminal impersonation* (by claiming to an officer to be someone else, not the person named in a DOC warrant) and (B) *second degree assault* (by using her moving car to free herself from the officer's grasp while his arm was pinned inside her car). On appeal, defendant argued, among other arguments, that the officer who stopped Anderson lacked authority to stop her. **The Court of Appeals rules that the officer was justified in seizing her based on a reliable report that the DOC had issued a warrant for her arrest.**

8. State v. William Lewis Marion: On February 16, 2021, Division One of the COA rejects the appeal of defendant from his King County Superior Court convictions for (A) *assault in the first degree* and (B) *assault in the second degree, both with deadly weapon enhancements*. Among other rulings, **the Court of Appeals concludes that under the totality of the circumstances of this case, where identification of the defendant as perpetrator was at issue, the trial court did not abuse its discretion in the jury trial by admitting video evidence of the defendant's lawfully conducted show-up identification**.

9. State v. Jason Richard Matson: On February 17, 2021, Division Two of the COA rejects the challenges of defendant to his Pierce County Superior Court conviction for *unlawful possession of a firearm* (the Court of Appeals and the parties' briefing does not specify which degree of RCW 9.41.040 that he was convicted under). After a lawful traffic stop for a violation, officers directed Matson to get out of his car, and after Matson obeyed the directive and took a seat in the patrol car, an officer observed a gun handle sticking out from under the driver's seat of Matson's car. The officers then got a search warrant for the car. One of Matson's arguments on appeal was that articulable suspicion of dangerousness was required in order for an officer to order a mere traffic violator to get out of his car. Citing State v. O'Neill, 148 Wn.2d 564 (2003) and State v. Mecham, 186 Wn.2d 128 (2016), **the Court of Appeals holds that the officer had automatic discretion – based simply on the fact that the traffic stop was lawful – to order Matson to get out of his car**.

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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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