LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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JANUARY 2021

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

FOURTH AMENDMENT OVERBREADTH RULE IS TIED TO THE PROBABLE-CAUSE-TO-SEARCH STANDARD: A "SOME-MEANS-MORE" INFERENCE DOES NOT ALWAYS APPLY, BUT THE INFERENCE APPLIES TO ALLOW A BROAD SEARCH IN THIS CRIMINAL CASE WHERE THE REPORT WAS THAT THE PREVIOUSLY CONVICTED FELON-TARGET OF THE SEARCH HAD AGREED TO HIDE A GUN FOR A DV SUSPECT: THE FELON-TARGET'S AGREEMENT TO HIDE THE GUN SUPPORTED A SEARCH FOR MORE GUNS IN HIS HOME

In U.S. v. King, ___ F.3d ___ , 2021 WL ___ (9th Cir., January 14, 2021), a 3-judge Ninth Circuit panel rules in favor of the federal government in rejecting a defendant's argument that a search warrant was overbroad under the Fourth Amendment. The King Opinion concludes that the probable cause in a search warrant affidavit supported the breadth of the authorization under the warrant.

The girlfriend of a man uncharged in this case reported to City of Fresno police that her boyfriend had threatened her by pointing at her head a "large silver and gold revolver" of

unknown caliber. She also told police that her boyfriend had asked her to give the revolver to "Dubs." She said that she had complied with her boyfriend's request, and she described Dubs' appearance and phone number, the location of his house, his live-in girlfriend, and his vehicles.

With this information, the police determined that "Dubs" was Sheldon King, the defendant in this case. The police also discovered that King was prohibited from possessing firearms based on two prior felonies. And the officers observed King's car parked at his residence – the place where the victim said she delivered the firearm. Setting out this information in an affidavit, Fresno police obtained a warrant authorizing a search of King's home for "any firearm" and various firearm-related items.

The NInth Circuit panel's Opinion explains that the inference where-there's-some-there's-probably-more applies under some circumstances, but it cannot always be mechanically applied to automatically determine probable cause as to the existence and whereabouts of additional evidence or contraband.

The King Opinion explains as follows, however, why the inference that there would be more firearms in the home does apply to support the search warrant under the circumstances of this case:

> These facts, taken together, provided the judge with a substantial basis to authorize the broader search for "any firearm." That's because there was a "fair probability" that other firearms might be found at King's home and they would constitute evidence of a crime. . . . . The affidavit demonstrated that King took the revolver to hide it from law enforcement for the domestic abuse suspect. By concealing the "silver & gold" firearm, it raised the fair inference that King possessed other firearms. After all, the suspect wouldn't have entrusted the revolver to King if the suspect didn't believe King was willing and able to covertly store firearms. That King seemingly served as a "safe deposit box" for the suspect's firearm made it likely that King did the same for other firearms. Plus, King's criminal history meant that "any firearm" in his possession was contraband and evidence of a crime.

Result: Affirmance of U.S. District Court (Eastern District of California) conviction of Sheldon King for being a felon in possession of a firearm in violation of federal law.

LEGAL UDATE EDITOR'S NOTE: For discussion of some Fourth Amendment case law on the some-may-mean-more probable cause issue, readers may want to look at an article on "Probable Cause To Search" In the Alameda County (CA) District Attorney's website's "Winter 2015 Edition, that appeared" in the website's "Point of View" collection of case notes and articles. Search the Internet for "Point of View: 2015 Editions."

Also, those with access to Professor LaFave's multi-volume treatise on Search & Seizure may want to look at the discussion in 2 Wayne R. LaFave, *Search & Seizure* § 3.7(d) (6th ed. 2020). I do not have access to a recent edition of the treatise, but I assume that the discussion of this topic has not markedly changed.

MIRANDA WARNINGS HELD REQUIRED ON THE RATIONALE THAT QUESTIONING DURING POLICE-SUSPECT MEETING AT SHOPPING MALL PARKING LOT WAS "CUSTODIAL" CONSIDERING ALL OF THE CIRCUMSTANCES (INCLUDING TEMPORARILY SEPARATING SUSPECT FROM HIS SEVEN-YEAR-OLD "SON");

HOWEVER, THE EXCLUSIONARY RULE THAT APPLIES TO MIRANDA VIOLATIONS IN CRIMINAL CASES DOES NOT REQUIRE SUPPRESSION OF PHYSICAL EVIDENCE PRODUCED BY THE QUESTIONING, SO REMAND IS NEEDED IN ORDER TO DETERMINE IF DEFENDANT VOLUNTARILY CONSENTED TO A SEARCH

United States v. Mora-Alcaraz, ___ F.3d ___ , 2021 WL 209168 (9th Cir., January 21, 2021)

[LEGAL UPDATE EDITOR'S INTRODUCTORY NOTE: In the Mora-Alcaraz Opinion that is digested here, a three-judge Ninth Circuit panel describes as follows the standard for determining "custody" for purposes of deciding if Miranda warnings are required for questioning a suspect:

> **The parties agree that the key issue is whether the district court erred in holding that persons in Mora-Alcaraz's position would have felt, under a totality of the circumstances, that they were "not at liberty to terminate the interrogation and leave." United States v. Craighead, 539 F.3d 1073, 1082 (9th Cir. 2008).**

This description of the standard is a bit misleading because under the controlling case law, mere Terry detentions of suspects involving only temporary limiting of freedom of movement do not constitute "custody" for Miranda purposes unless the limitations on movement, as it would be perceived by a reasonable person being questioned under the circumstances, are "of the degree associated with formal arrest." See generally Berkemer v. McCarty, 468 U. S. 420 (1984). However, I think that the analysis overall in Mora-Alcaraz is consistent with the Berkemer standard for Miranda custody. Note that in U.S. v. Saldana, 788 F.3d 956, 980 (9th Cir. 2015), the Ninth Circuit panel explained: "A defendant is in custody if a 'reasonable innocent person in such circumstances would conclude that after brief questioning he or she would not be free to leave.'" (citing U.S. Booth, 669 F.2d 1231, 1235 (9th Cir. 1981)]

In Mora-Alcaraz, a three-judge panel agrees with the U.S. District Court and rules that defendant was in "custody" for Miranda purposes when an officer questioned him during questioning at an agreed meeting in a shopping mall parking lot. Accordingly, where the defendant was not Mirandized prior to making incriminating statements, the panel rules that his statements to the officer were not admissible in evidence.

However, the Ninth Circuit panel rules that the special Exclusionary Rule that applies to Miranda violations does not require suppression of physical evidence that is found solely as a result of a Miranda violation. Accordingly, the panel rules that the District Court erred in suppressing a gun that was found in the trunk of defendant's vehicle as a result of defendant's statements The U.S. District Court should have determined whether consent to search the vehicle was voluntary. The panel remands the case to the U.S. District Court for that court to determine factually if the consent to search by defendant was voluntary.

The facts relating to the "custody" question are described by the Mora-Alcaraz panel as follows:

> The events giving rise to this appeal began with a call to the Reno police department in November 2016 reporting a domestic dispute at the home of Mora-Alcaraz's estranged wife Geneva and their seven-year-old son. When contacted, Geneva reported that Mora-Alcaraz had come to her home to accost her new boyfriend. She stated that, during the argument, and in front of the boy, Mora-Alcaraz brandished a semi-automatic

gun. According to Geneva, the argument eventually settled down, and Mora-Alcaraz spent the night sleeping on the couch in her home.

The next morning, Mora-Alcaraz set off on a trip with the boy to a mall. Although the child was not the defendant's biological son, the district court found the two had a close father-son relationship, something the government does not dispute. Officer Jackins, who had received the report of the domestic disturbance, called Mora-Alcaraz at the mall, asking to speak with him about the events of the previous evening and early morning and do a welfare check on the child. Mora-Alcaraz agreed to meet at the mall, outside of Dick's Sporting Goods store.

Officer Jackins arrived at the mall with three other armed, uniformed officers in two police cars. After Mora-Alcaraz and his son met the officers outside the store, Officer Jackins asked to speak to Mora-Alcaraz away from the boy. MoraAlcaraz acquiesced. Two officers then escorted the boy to the entrance of the store; they eventually took him inside because the boy was cold.

In the meantime, Officer Jackins took what he described as a "kill them with kindness" approach to the interrogation. Mora-Alcaraz cooperated and eventually admitted to being in the United States illegally and having a gun in his truck. He agreed to let Officer Jackins see the gun.

The officer drove Mora-Alcaraz in the patrol car across the parking lot and parked in the travel lane, amber lights flashing. Officer Jackins then entered the truck, seized the firearm, and arrested Mora-Alcaraz for being an alien in possession of a firearm.

The panel's legal analysis of the fact-intensive "custody" question, in key part, is as follows:

We agree with the government that, in determining whether Mora-Alcaraz was free to leave, the factors we identified in United States v. Kim, 292 F.3d 969 (9th Cir. 2002), are certainly relevant, although not exclusive. Mora-Alcaraz agrees that Kim is instructive. These factors are: "(1) the language used to summon the individual; (2) the extent to which the defendant is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the duration of the detention; and (5) the degree of pressure applied to detain the individual."

In Kim, the defendant went with her husband to her shop, from which she was suspected of supplying ingredients for the production of methamphetamine. The reason the two came to the store was that they had not been able to reach their son, who had been left in charge. Upon her arrival, she encountered several officers. The police prevented the husband from entering the shop, surrounded the defendant inside the shop, and prevented her from speaking to her son.

In deciding whether the interrogation was custodial, our court assessed what have since been referred to as the "Kim factors." First, we looked to "the language used to summon the defendant," which, in Kim, and in the case before us, is not telling as to custody. Second, we looked to "the extent to which the defendant [was] confronted with evidence of guilt." The confrontational posture taken by the officer was greater in Kim than in this case. Here, Officer Jackins did confront Mora-Alcaraz with guilt, but neither party contends that Officer Jackins was aggressive, since he deliberately refrained from such tactics, describing his approach instead as intended to "kill them with kindness."

> Third, in Kim, as well as in [United States v. Craighead, 539 F.3d 1073, 1083 (9th Cir. 2008)], a further relevant factor was the assessment of "the physical surroundings of the interrogation," and in both cases we concluded a person is in custody when in a "police-dominated atmosphere." Here, the government argues that such an atmosphere could not have existed because the mall setting was a familiar, public one. The district court correctly concluded, however, that despite the setting, the police created what was undoubtedly a police-dominated atmosphere.
>
> Mora-Alcaraz expected to meet a single police officer and was confronted instead by four armed officers and two police cars; at one point, one of the vehicles was blocking the travel lane and flashing amber lights, creating a major distraction from the otherwise familiar surroundings. The defendant in Kim was in more familiar surroundings – her own shop.
>
> Still, this court observed that "isolating the defendant from the outside world . . . largely neutralizes the familiarity of the location as a factor affirmatively undermining a finding of coercion." The fourth factor is the duration of the detention. Mora-Alcaraz was detained for 36 minutes, which may weigh against custody.
>
> Finally, and most important in this case, as in Kim, we look to "the degree of pressure applied to detain the individual." In Kim, we concluded that the interrogation was custodial for the principal reason that the police had separated the defendant from her husband and grown son. Here, the police took physical custody of Mora-Alcaraz's seven-year-old son and eventually led him inside a large store and out of Mora-Alcaraz's sight. Despite the lack of physical restraints, Mora-Alcaraz was subjected to severe pressure as a result of the police separating him from his son.
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> Although the government argues the situation was relatively benign, because there was no threat of harm to the child, the police were well aware that a father would not walk away from a public place and leave his young son with strangers. No physical restraint of Mora Alcaraz was necessary so long as the police kept him separated from his son. He could not leave.
>
> In sum, the totality of circumstances, including the Kim factors, supports the district court's conclusion that a reasonable person in Mora-Alcaraz's position would not have felt free to end the questioning and leave the mall. The district court properly ordered the statements suppressed because they were the product of a custodial interrogation in which Mora-Alcaraz was not advised of his rights pursuant to Miranda. The order suppressing Mora-Alcaraz's inculpatory statements to Officer Jackins must be affirmed.

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

Result: Reversal of U.S. District Court (Nevada) order suppressing the gun seized from the trunk of defendant's car; case remanded for a determination of whether the defendant's consent to search his car was voluntary.

LEGAL UPDATE EDITOR'S COMMENTS: (1) General comments about "tactical" un-Mirandized questioning: I recognize that officers will sometimes make a considered decision, based on all of the circumstances and on their wealth of experience, that un-Mirandized questioning will be more fruitful. This is a difficult decision for officers,

because the test for "custody" is an unpredictable, totality-of-the-circumstances test that can result in a custody determination. A court may determine that there was custody even where, as in the Mora-Alcaraz case, the questioning method is low-key and the questioning does not occur in the more presumptively custodial setting of the police station.

When officers make the difficult decision to not Mirandize, extra effort should be made to make clear to the suspect that the circumstances of questioning are non-custodial. In that regard, I think that officers greatly help their case if they tell the suspects that the suspects do not have to answer the questions, and that they can stop the conversation and leave at any time. Officers conducting such "tactical" un-Mirandized questioning also should be prepared to allow the suspect to leave after the questioning is completed except where that is unreasonable in light of public safety concerns that develop from what is learned in the questioning (at which point officers should Mirandize before proceeding with any further questioning).

(2) Custody-determination factors

As I have done from time to time in the past in LED entries on cases involving the Miranda custody issue, I close the comments for this LED entry with a non-exhaustive list of some of the things that are considered by courts in determining if Miranda custody exists, with the courts engaging in an informal balancing of all of the objectively evaluated circumstances in their totality –

- **Whether the officers informed the suspect that he or she was not under arrest and was free to leave at any time;**
- **Whether the officers informed the suspect that he or she did not have to answer their questions;**
- **Whether the suspect expressly consented to speak with law enforcement officers;**
- **The place of interrogation (e.g., how private or public was the setting), and, if a police station, the manner in which the suspect was transported to the station;**
- **The announced or objectively obvious purpose of the questioning;**
- **Whether the suspect was involuntarily moved to another area prior to or during the questioning;**
- **Whether there was a threatening presence of several officers, the locking or blocking of a door, and/or a display of weapons or physical force;**
- **Whether the officers deprived the suspect of documents or other things that would be not needed to continue on one's way;**
- **The length of the interrogation;**
- **The manner, tenor and tone of interrogation (e.g., friendly, low key and non-leading vs. accusatory, confrontational and leading);**
- **Whether the officers revealed to the suspect that he or she was the focus of their investigation and/or confronted him or her with incriminating evidence;**
- **Whether the officers used deception in the questioning;**
- **Whether the officers allowed the suspect to leave at the end of the questioning;**
- **Where a juvenile is being questioned, additional considerations look at the age and criminal justice experience of the juvenile, as well whether, during an interrogation, a juvenile suspect was isolated from a parent or other person accompanying him or her.**

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY: THE MERE FAILURE IN A CUSTODIAL INTERROGATION TO GIVE MIRANDA WARNINGS CAN PROVIDE GROUNDS FOR A FIFTH AMENDMENT-BASED CIVIL RIGHTS SUIT WHERE THE UN-MIRANDIZED STATEMENT WAS INTRODUCED AT AN EARLIER CRIMINAL TRIAL, AND THE JURY ACQUITTED IN THE CRIMINAL TRIAL

In Tekoh v. County of Los Angeles, ___ F.3d ___ , 2021 WL 98242 (9th Cir., January 15, 2021), a three-judge Ninth Circuit panel rules that the U.S. District Court judgment on a jury verdict in a Civil Rights Act lawsuit must be set aside and the case re-tried. That is because the U.S. District Court judge did not instruct the jury that the mere failure in a custodial interrogation to give Miranda warnings can be the basis for a Fifth Amendment-based Civil Rights Act action in circumstances where: (1) the un-Mirandized statement was introduced during a criminal trial process (including preliminary proceedings), and (2) the jury acquitted the former criminal defendant who is now the Civil Rights Act plaintiff in this civil lawsuit.

The facts are heavily disputed in this case regarding what happened in the officer's questioning of plaintiff, Mr. Tekoh, who is a hospital worker. The officer was investigating Mr. Tekoh based on a patient's accusation that Mr. Tekoh sexually assaulted her. Mr. Tekoh alleges that the officer engaged in highly coercive actions that (A) would have made the questioning custodial for Miranda purposes, and (2) would have made Mr. Tekoh's confession involuntary. The officer denies the accusations by Mr. Tekoh regarding the allegedly coercive questioning process.

The three-judge Ninth Circuit panel does not suggest answers on the factual question of whether Mr. Tekoh was in custody when the officer questioned him, or the question of whether the officer used coercion in questioning him.

In a synopsis that is not part of the Ninth Circuit panel's Opinion, staff of the Ninth Circuit summarizes as follows the three-judge panel's ruling on the issue noted in the above first paragraph of this Legal Update entry:

> The District Court concluded that the use of the statement alone was insufficient to demonstrate a violation of the right against self-incrimination and, instead, instructed the jury that the plaintiff had to show that the interrogation that procured the statement was unconstitutionally coercive under the totality of the circumstances, with the Miranda violation only one factor to be considered.
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> The panel held that – in light of the Supreme Court's decision in Dickerson v. United States, 530 U.S. 428 (2000), which held that Miranda is a rule of constitutional law that could not be overruled by congressional action – where the un-Mirandized statement has been used against the defendant in the prosecution's case in chief in a prior criminal proceeding, the defendant has been deprived of his Fifth Amendment right against self-incrimination, and he may assert a claim against the state official who deprived him of that right under § 1983.
>
> The panel held that the District Court erred interpreting Chavez v. Martinez, 538 U.S. 760 (2003), to stand for the proposition that a § 1983 claim can never be grounded on a [mere] Miranda violation. The panel stated Justice Thomas's plurality opinion [in Chavez], which reasoned in dicta that damages were unavailable for Miranda violations, did not command support from five Justices and was based on a rationale significantly broader than those of the concurring Justices. Thus, contrary to the district court's

conclusion, the broad principles in Justice Thomas's opinion in Chavez were not binding in this case.

The panel held that while the question of liability was ultimately for the jury to decide, plaintiff sufficiently demonstrated a Fifth Amendment violation caused by Los Angeles Sheriff's Deputy Carlos Vega under § 1983, such that the district court erred by failing to instruct the jury on this claim. Moreover, there was also no question that Deputy Vega [because he took the statements and memorialized them in an incident report and signed a probable cause statement] caused the introduction of the statements at plaintiff's criminal trial even though Vega himself was not the prosecutor.

The panel stated that it was not holding that taking an un-Mirandized statement always gives rise to a § 1983 action. The panel held only that where government officials introduce an un-Mirandized statement to prove a criminal charge at a criminal trial against a defendant [including in preliminary proceedings involving a charged defendant], a § 1983 claim may lie against the officer who took the statement. By contrast, in cases like Chavez, where the suspect was never charged, or where police coerce a statement but do not rely on that statement to file formal charges, the Fifth Amendment is not implicated.

Finally, the panel could not conclude that it was more probable than not that the jury would have reached the same verdict had it been properly instructed. Accordingly, the error was not harmless. The panel thus vacated the judgment on the jury's verdict and remanded the case for a new trial in which the jury must be properly instructed that the introduction of a defendant's un-Mirandized statement at his criminal trial during the prosecution's case-in-chief alone is sufficient to establish a Fifth Amendment violation.

LEGAL UPDATE EDITOR'S NOTES: Plaintiff must of course also establish a Miranda violation to make his prima facie case. Also note that Mr. Tekoh brought his Civil Rights Act section 1983 action after he was acquitted in the earlier criminal prosecution. If he had been convicted, he would not have been allowed to bring a section 1983 lawsuit unless the conviction was set aside. In order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction invalid, a section 1983 plaintiff must prove that the conviction has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. See generally Heck v. Humphrey, 512 U.S. 477 (1994).

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY REGARDING PUBLIC EMPLOYEE FREEDOM OF SPEECH: POLICE OFFICER IS ENTITLED TO A TRIAL ON WHETHER HIS EMPLOYING POLICE AGENCY COULD LAWFULLY DROP HIM FROM SNIPER TEAM FOR HIS COMMENT ON FACEBOOK THAT IT WAS A "SHAME" THAT A SUSPECT DID NOT HAVE ANY "HOLES" IN HIM

In Moser v. Las Vegas Metropolitan Police Department, ___ F.3d ___ , 2021 WL ___ (9th Cir., January 12, 2021), a three-judge Ninth Circuit panel votes 2-1 to reverse the U.S. District Court's order granting summary judgment in favor of the Las Vegas Metropolitan Police Department.

The Ninth Circuit ruling remands the case for trial in an action brought by a former SWAT sniper who alleged that the Department unconstitutionally retaliated against him for his protected speech. The Department dismissed him from the SWAT team (and placed him in patrol duty) after he commented on Facebook that it was a "shame" that a suspect who had shot a police officer did not have any "holes" in him.

The U.S. District Court (and the Ninth Circuit dissenting judge) construed the officer's statement as subject to only one reasonable interpretation, i.e., advocating unlawful violence. The District Court thus asserted that the government's interest in employee discipline clearly outweighed the plaintiff-officer's First Amendment right under the balancing test for speech by government employees. That balancing test is set forth in the leading U.S. Supreme Court First Amendment precedent relating to employee speech, Pickering v. Board of Education, 391 U.S. 563 (1968).

Under the guidelines of Pickering, the Majority Opinion determines that the First Amendment is implicated in this case because (1) the officer's speech addressed an issue of public concern, and (2) he spoke as a private citizen, not a public employee. The Majority Opinion then holds that the Civil Rights Act case must go to trial because there is a factual dispute about the objective meaning of the officer's comment: Was the comment a dramatic political statement seeking sympathy and understanding regarding the tragedy of yet another police officer being shot or injured by a suspect in the line of duty? Or instead, as the government employer interpreted it: Was it a call for unlawful violence against suspects? Among other analysis, the Majority Opinion weighs in as follows on these questions, seeing the questions as debatable:

> Moser, however, offered a different take on his statement. At his interview with internal affairs investigators, he said that he was implying that the police officer who had been ambushed by the suspect – not the police officer who ultimately arrested the suspect – should have fired defensive shots. His statement then takes on a different meaning: He did not advocate unlawful violence, but rather expressed frustration – in an admittedly hyperbolic and inappropriate manner – at the perils of police officers being struck down in the line of duty. Put another way, Moser's comment touches on an important public policy issue that falls within his personal experience.
>
> [Court's footnote: *The FBI reported that in the past decade there have been over 20,000 assaults with firearms against law enforcement officials. See 2019 Law Enforcement Officers Killed & Assaulted, Federal Bureau of Investigation, https://ucr.fbi.gov/leoka/2019/topic-pages/tables/table85.xls (last visited on October 20, 2020*).]

The Majority Opinion also points to another factual dispute under the Pickering guidelines: Was the officer's statement likely to cause disruption in the police department? This is a highly fact-intensive, question that is assessed objectively on the totality of all of the circumstances of the particular case. A key part of the Majority Opinion's analysis on this issue is as follows:

> The question thus is not whether Metro has an abstract interest in avoiding disruption and litigation, but whether, on this record, Metro could reasonably think Moser's speech threatened those interests. . . .
>
> The record here does not support the government's contention that Moser's Facebook comment would have caused disruption. Typically, courts credit the government's claim where the challenged speech is widely known or reported by the press. Here, there was no media coverage of Moser's comment. In fact, the record shows no evidence that

anyone other than the anonymous tipster even saw Moser's Facebook comment. Nor would most people have even known that Moser served as a SWAT sniper because nothing in his Facebook profile confirmed his employment.

[Court's footnote 7: *The district court found that the public could have deduced Moser's position as a SWAT sniper because (1) a local news article had previously discussed his role in shooting a suspect, and (2) his Facebook profile picture featured an "angry sniper" cartoon. But the fact that an inquisitive person could have theoretically searched Moser's name on an Internet search engine does not mean that the public would do so. And Moser's use of a cartoon image of an angry sniper hardly reveals his identity. Many people use avatars unrelated to their profession as their profile pictures, and some may have assumed he was in the military (indeed, Moser was a former Navy SEAL).]*

And importantly, the chance that the public would have seen the Facebook comment remained low because Moser deleted that December 2015 comment by February 2016.

[Court's footnote 8: *This does not mean that the government must wait until the media or a critical mass of people notices the challenged speech. Some statements may be so patently offensive (e.g., racial slurs) that the government can reasonably predict they would cause workforce disruption and erode public trust. But because Moser's statement is ambiguous, it is not clear cut whether it would have caused disruption, and the government had to provide some evidence to support its prediction*.]

Moser's Facebook comment is like that of the plaintiff in [Rankin v. McPherson, 483 U.S. 378 (1987)], who wished that a future assassin would succeed against President Reagan because she opposed his policies. 483 U.S. at 389. Both inflammatory statements touched upon a public issue. In both cases, the public did not see or hear the offending comment, which lessens the potential impact on the agency's reputation or mission.

Metro also has provided no evidence to support its claim that Moser's comment will expose Metro to future legal liability. Metro speculates that [1] if Moser shoots someone in the future, [2] the shooting will lead to a lawsuit, [3] that Moser's deleted Facebook comment would be discovered, [4] that the trial judge would admit that Facebook comment as evidence, and [5] that the jury would rely on the Facebook comment to find Metro liable. But Metro has cited no case in which such a long chain of speculative inferences tipped the Pickering balancing test in the government's favor. . . . .

In sum, material questions of fact remain as to whether Moser's comment would likely disrupt Metro's workforce or its reputation. . . . Put differently, Metro has produced no evidence to establish that its interests in workplace efficiency outweigh Moser's First Amendment interests.

[Some citations omitted, some others revised for style; bracketed numbers added]

Result: Reversal of U.S. District Court summary judgment order for LVPD; case remanded for trial.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY IN CORRECTIONS MEDICAL CONTEXT: NO QUALIFIED IMMUNITY FOR SAN DIEGO COUNTY JAIL OR FOR THREE OF

THE JAIL'S NURSES WHERE THE LEVEL AND NATURE OF MEDICAL MONITORING AND CARE TO AN OVERDOSED, RECENTLY-ARRESTED INMATE WAS OBJECTIVELY UNREASONABLE UNDER THE APPLICABLE CONSTITUTIONAL DUE PROCESS STANDARD FOR PRE-TRIAL DETAINEES

In Sandoval v. County of San Diego, ___ F.3d ___ , 2021 WL ___ (9th Cir., January 13, 2021), a three-judge Ninth Circuit panel votes 2-1 to reverse a U.S. District Court's order granting summary judgment to the County of San Diego and three San Diego County Jail nurses in a Civil Rights Act civil liability lawsuit brought by the widow of a prisoner who died from an overdose of methamphetamine. Unbeknownst to the officers who arrested him at his residence, the man had secretly ingested a fatal amount of methamphetamine (later estimated to be several hundred times the typical recreational dose) as he was being arrested.

The Majority Opinion declares that the constitutional standard for the requirement for medical care to a pre-trial detainee is an objective standard under the Due Process clause. Liability applies, the Opinion declares, if:

> (1) The defendant made an intentional decision with respect to the conditions under which the plaintiff was confined, including a decision with respect to medical treatment; (2) Those conditions put the plaintiff at substantial risk of suffering serious harm; (3) The defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved, thus making the consequences of the defendant's conduct obvious; and (4) By not taking such measures, the defendant caused the plaintiff's injuries.

Viewing the allegations in the best light for the widow, the Majority Opinion states that the prisoner died of a methamphetamine overdose at the San Diego Central Jail after nurses left him essentially unmonitored for eight hours, despite (1) being told early on by a deputy of signs that the new inmate was shaking and disoriented and under the influence of drugs, and (2) then relying on EMTs instead of promptly summoning paramedics (who are better qualified than EMTs for such situations) when staff and the nurses discovered the inmate unresponsive and having a seizure.

The Majority Opinion concludes that the County and nurses are not entitled to qualified immunity for their constitutionally deficient actions because the relevant case law was clearly established at the time as to the unreasonableness of the nurses' conduct. The Majority Opinion thus concludes that reasonable nurses, knowing what the nurses knew, would have understood that failing to call paramedics or failing to check on the prisoner for hours and failing to pass on information about his condition presented such a substantial risk of harm to him that the failure to act was unconstitutional under Due Process analysis.

The Majority Opinion also concludes that – viewing the evidence in the light most favorable to plaintiff, as is required at this point in the review process – there also was a triable issue of fact as to the County's liability based on County "custom or policy" under Monell v. Department of Social Services, 436 U.S. 658, 694 (1978). The Majority Opinion identifies as follows the custom or policy at issue in this case:

> The practice or custom at issue here is the County's use of MOC1 [Medical Observation Cell # 1] as a "mixed use" – sometimes used to hold inmates requiring medical care and other times used as a general holding cell – without adequate safeguards in place to ensure that jail staff were made aware when an individual was placed in MOC1 for

> medical, rather than correctional, reasons. According to Nurse Llamado, unlike with other medical cells at the jail (so-called sobering or safety cells), there was "no standing obligation . . . for a nurse to routinely monitor somebody in [MOC1]." Instead, a nurse would attend to MOC1 only when told by a deputy or another nurse that an inmate there required treatment.
>
> Crucially, this system depended entirely on verbal communication. Unless directly told otherwise, nurses assumed that individuals in MOC1 were being held there for non-medical purposes. And even when deputies verbally passed off responsibility for the cell to one shift of nurses, the relief shift had no way of knowing whether to monitor MOC1 unless specifically told to do so by the nurses they were replacing. Unlike with the jail's sobering and safety cells, there were no written nursing logs for MOC1. And though the nursing unit had a whiteboard listing the names of inmates in the sobering and safety cells, the board had no space to list inmates being held in MOC1. These practices created a substantial risk of turning MOC1 into a veritable no man's land, where deputies believed the cell was being monitored by nurses, and nurses believed it was being monitored by deputies.

In a separate Opinion, one of the judges concurs in the denial of qualified immunity to two of the nurses, but he dissents from the Majority Opinion by arguing that under the trial court record, the Ninth Circuit should (1) grant qualified immunity to the third nurse, and (2) dismiss the plaintiff's claim of Monell "custom or policy" liability for the County of San Diego.

Result: Reversal of U.S. District Court (Southern District of California) order that granted summary judgment to the government defendants; case remanded for trial.

GOVERNMENT WINS DESPITE SOME DUE PROCESS CONCERNS RAISED IN A CRIMINAL CASE: (1) SUGGESTIVE IDENTIFICATION PROCEDURE USING A SINGLE FACEBOOK PICTURE WAS NOT SO SUGGESTIVE AS TO RENDER IN-COURT IDENTIFICATION UNREASONABLE; AND (2) BRADY VIOLATIONS DO NOT REQUIRE REVERSAL OF DRUG-DEALING CORRECTIONS OFFICER'S CONVICTION BECAUSE OF OTHER EVIDENCE IN THE CASE

In U.S. v. Bruce, ___ F.3d ___ , 2021 WL 98242 (9th Cir., January 12, 2021), a three-judge panel unanimously affirms the federal court convictions of a federal corrections officer (now, of course, a former corrections officer) arising out of his involvement in a drug smuggling scheme at a federal prison in California.

Defendant argued that his constitutional Due Process rights were violated in two ways: (1) identification testimony from a key witness should have been barred by the trial court because, during the investigation, federal agents used the admittedly suggestive process of showing a witness a Facebook photo of the defendant to confirm that they were focused on the right suspect; and (2) the government violated Brady v. Maryland, 373 U.S. 83 (1963) by failing to provide to the defense information about another federal corrections officer: (A) who had worked at the same federal prison as Bruce during the time of Bruce's alleged drug smuggling involvement, (B) who had been the subject of numerous inmate complaints, (C) who allegedly pressured some inmates to offer evidence against Bruce during the period of the investigation of Bruce, and (D) who was subsequently a target of an investigation into a similar drug-smuggling ring after being transferred to a different federal prison.

[LEGAL UPDATE EDITOR'S COMMENT: Both of these Due Process issues are highly fact-intensive and complex. They are not digested in the same depth in this Legal Update entry as they are examined in the Ninth Circuit's Opinion. Also note that, even though the government has prevailed – at least at this point in the appeals process – the acts and omissions of the government actors prior to and during the criminal trial in this case leave something to be desired, i.e., the government actors did not follow best practices.]

(1) Identification procedure: The panel held that the district court reasonably concluded that the use of a Facebook photo during an identification procedure may have been suggestive, but it was not so suggestive that it rendered the witness's in-court identification unreliable. The Bruce Court explains in part as follows:

> We are persuaded the district court reasonably concluded the use of the Facebook photo was not so suggestive that it rendered [unreliable the identification of defendant Bruce by Thomas Jones, who became a government informant after being caught trying to smuggle drugs into the prison as a visitor] . . . . Unlike witnesses who are startled by a crime in progress, Jones ventured out to meet with "Officer Johnson" [the fake name that defendant Bruce had given to Jones] on two occasions and voluntarily got into his car both times. The two men were in close proximity and the second meeting took place just 15 days before Jones was stopped and questioned at the checkpoint. The [Atwater Prison] officers testified that Jones identified Bruce from the photo without hesitation, and Jones testified that he was certain of the identification at the time he made it in 2015. Jones explained to the jury that before he was shown the Facebook photo, he accurately described details concerning Officer Johnson's beard, hair color, body type, and clothing. Jones also recalled that Officer Johnson drove a black Jeep Cherokee.
>
> . . . . Even if the Facebook photo was suggestive, our consideration of the totality of the circumstances persuades us that the district court did not err by admitting this identification evidence.

(2) Brady issue: The Bruce Court concludes that there was a Brady violation in the government's failure to disclose to the defense attorney at the time of trial the above-described information about the other corrections officer, who, as noted above (A) was a target of a subsequent investigation into a very similar smuggling ring at a different federal prison (Victorville Prison), (B) had been the subject of numerous inmate complaints, and (C) who allegedly pressured some inmates at the Atwater institution to offer evidence against Bruce.

The Bruce Court, however, concludes that the information was not material given the nature and extent of information about the other corrections officer and the other admissible strong evidence of guilt focused on defendant. The Bruce Court explains in key part as follows:

> To succeed on his Brady claim, Bruce was required to show: (1) the evidence at issue was favorable to him, either because it was exculpatory or impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) that he was prejudiced. . . . Because there is no doubt the government did not disclose the challenged evidence, we consider only whether it was exculpatory and material.
>
> . . . .

Bruce identifies two categories of undisclosed information from the government's motion in limine that he contends are exculpatory: (1) evidence that Hayes was a target of an investigation into a very similar smuggling ring at Victorville; and (2) evidence showing that numerous inmate complaints had been made against Hayes prior to the Bruce investigation. Somewhat more obliquely, Bruce suggests the government should have disclosed that Hayes pressured some inmates to offer evidence against Bruce.

Exculpatory evidence includes evidence that is favorable to the defense, meaning "evidence that tends to prove the innocence of the defendant." . . . .

The obligations imposed by Brady are not limited to evidence prosecutors are aware of, or have in their possession. Rather, individual prosecutors have "the duty to learn of any favorable evidence known to others acting on the government's behalf" as part of their "responsibility to gauge the likely net effect of all such evidence" to the case at hand. [Kyles v. Whitley, 514 U.S. 419, 437 (1995)].

. . . .

The district court was not persuaded the withheld evidence was exculpatory, largely because Hayes was accused of smuggling after Bruce's smuggling had been uncovered and because Hayes was accused of smuggling at Victorville rather than Atwater. Respectfully, we disagree. The responsibility imposed by Brady includes looking beyond evidence in the prosecutor's file; there were striking similarities between the two smuggling operations; Hayes was directly involved in the Atwater investigation that led to Bruce's arrest and had access to some of the witnesses who testified against Bruce; and Bruce's trial theory argued someone else was responsible for the smuggling at Atwater. Under the facts presented, we conclude this evidence was exculpatory within the meaning of Brady and at the very least the government was required to investigate it.

. . . .

We evaluate the trial as a whole to determine whether the "admission of the suppressed evidence would have created a reasonable probability of a different result." United States v. Price, 566 F.3d 900, 911 (9th Cir. 2009) (internal quotation marks omitted). "In considering whether the failure to disclose exculpatory evidence undermines confidence in the outcome, judges must undertake a careful, balanced evaluation of the nature and strength of both the evidence the defense was prevented from presenting and the evidence each side presented at trial." . . . Comstock v. Humphries, 786 F.3d 701, 711–12 (9th Cir. 2015) (reversing conviction where lack of direct evidence combined with suppression of a witness's "expressed doubts and recollections" "substantially diminished, if not defeated" the state's ability to prove guilt beyond a reasonable doubt). Evidence is sometimes considered material if the government's other evidence at trial is circumstantial, or if defense counsel is able to point out significant gaps in the government's case through cross-examination, or if witnesses provided inconsistent and inaccurate testimony. See [Bailey v. Rae, 339 F.3d 1007, 1115–16 9th Cir. 2003)] (granting new trial where suppressed report went "to the heart of [the accused's] defense and without it" the verdict was not "worthy of confidence").

. . . .

> Our task is to compare the evidence against Bruce with the gaps in the evidence presented to the jury to determine whether the undisclosed evidence undermines our confidence in the outcome. . . . We conclude it does not.
>
> . . . .
>
> Because we view the trial as a whole, our confidence in the verdict is not undermined by the government's failure to disclose that Hayes was a subject of an investigation at Victorville, that numerous inmates had complained about him, and the extent of his involvement in the Bruce investigation. The district court did not err by denying Bruce's motion for a new trial.

[Some citations omitted, others revised for style]

Result: Affirmance of U.S. District conviction (Southern District of California) of defendant.

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WASHINGTON STATE SUPREME COURT

SIXTH AMENDMENT RIGHT TO CONFRONTATION: 6-3 MAJORITY RULES THAT ALL BUT ONE OF THE HEARSAY STATEMENTS THAT A NOW-DECEASED VICTIM MADE TO A SEXUAL ASSAULT NURSE EXAMINER (SANE) WERE NOT TESTIMONIAL, AND THEREFORE, THE STATEMENTS ARE ADMISSIBLE UNDER THE SIXTH AMENDMENT; COURT REACHES SIMILAR RESULT UNDER ER 803(a)(4)'S HEARSAY EXCEPTION FOR STATEMENTS MADE FOR MEDICAL DIAGNOSIS OR TREATMENT

State v. Burke, ___ Wn.2d ___ , 2021 WL ___ (January 14, 2021)

Facts:

In the early morning hours, KEH, a homeless woman, arrived at a Tacoma hospital's emergency room and reported a rape. She was very intoxicated from alcohol when she arrived. She was seen over the next several hours by an RN and doctor who focused on medical services. She was also interviewed during that period by a social worker and a law enforcement officer.

About 15 hours after KEH checked into the hospital, she was seen in a mixed medical and forensic exam by a sexual assault nurse examiner (SANE). During the examination, the SANE obtained a history from KEH. The SANE later testified that the history was "like any medical history" and included taking the victim's personal statements about what happened. KEH described the incident to the SANE. The SANE collected samples that could contain deoxyribonucleic acid (DNA) evidence and took KEH's underwear. The DNA evidence taken from KEH's underwear included female DNA that matched KEH and male DNA from sperm that did not match anyone known to law enforcement at that time.

In May 2011, the DNA was reevaluated. The male DNA matched defendant Burke's DNA profile. When officers attempted to contact victim KEH about the DNA match, they learned that KEH had died of an unrelated illness in April 2011.

In September 2014, Tacoma Police Department detectives interviewed defendant Burke, who was in jail in eastern Washington. During this interview, Burke admitted to having lived in

Tacoma in 2009 and to having visited Wright Park. But Burke denied (A) having been to the park without his girlfriend, (B) having had sexual intercourse with anyone in the park, or (C) knowing why his DNA was found at the scene of a sexual assault that occurred in the park in 2009.

Proceedings below:

Burke was charged with second degree rape by forcible compulsion. Prior to trial, hearings were held to determine whether, under the Sixth Amendment Confrontation Clause, the SANE could testify to statements by KEH to the SANE. The SANE gave extensive testimony regarding her mixed functions of medical provider and forensic examiner. The trial court ruled that the SANE's testimony was admissible. At trial, the SANE was an important witness for the State.

Burke did not testify at his trial. His defense attorney conceded in argument that the DNA evidence established that sexual intercourse occurred between Burke and KEH, but the attorney argued that the State could not prove that the sex was not consensual. The jury convicted Burke as charged.

Burke appealed to the Court of Appeals, which reversed in a published opinion. State v. Burke, 6 Wn. App. 2d 950 (Div. II, December 27, 2018). The Court of Appeals ruled that all of the statements by KEH to the SANE were testimonial and therefore inadmissible under the Sixth Amendment confrontation clause. The Court of Appeals also ruled that admission of the statements was prejudicial to defendant and not harmless error.

ISSUES AND RULINGS: (1) Under the rubric of the U.S. Supreme Court case law interpreting the Sixth Amendment Confrontation Clause, are the hearsay statements from the victim to the SANE not "testimonial," such that the victim statements are admissible? (ANSWER BY WASHINGTON SUPREME COURT: Yes, as to all but one of the statements, rules a 6-3 majority; the ruling by the majority Justices is that all but one of the statements by KEH to the SANE were not testimonial, and therefore the testimony from the SANE repeating those statements is admissible for Sixth Amendment purposes; only one of the victim's statements – the victim's description of her assailant – was testimonial)

(2) ER 803(a)(4) provides a hearsay exception as follows:

> (4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Under ER 803(a)(4), are the hearsay statements from the victim to the SANE "statements for purposes of medical diagnosis or treatment," such that the victim's hearsay statements are admissible? (ANSWER BY WASHINGTON SUPREME COURT: Yes, as to all but one of the statements, rules a 6-3 majority; the ruling by the majority Justices is that all but one of the statements by KEH to the SANE qualify as being for "medical diagnosis or treatment" under ER 803(a)(4) and therefore the testimony from the SANE repeating those statements is admissible under the Evidence Rule; one of the statements – the victim's description of her assailant – does not qualify under ER 803(a)(4))

Result: Reversal of Court of Appeals decision that reversed the Pierce County Superior Court conviction of Ronald Delester Burke for second degree rape by forcible compulsion; in other words, the Washington Supreme Court has reinstated the second degree rape conviction.

ANALYSIS:

1. Sixth Amendment Right to Confrontation (Analysis in Majority Opinion)

In Crawford *v.* Washington, 541 U.S. 36 (2004), the U.S. Supreme Court held that the U.S. constitution's Sixth Amendment Confrontation Clause generally prohibits the introduction of "testimonial" hearsay statements by a non-testifying witness, unless the witness is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." A statement qualifies as testimonial if the "primary purpose" of the conversation was to "create an out-of-court substitute for trial testimony." Michigan *v.* Bryant, 562 U.S. 344 (2011).

In making that "primary purpose" determination, courts must consider all of the relevant circumstances, looking at the perspectives of both the questioner and the questioned, as well as looking at the level of formality of the setting. Where no such primary testimonial purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause. But that does not mean that the Confrontation Clause bars every statement that satisfies the "primary purpose" test. The U.S. Supreme Court has recognized in the cases decided since the 2004 Crawford decision that the Confrontation Clause does not prohibit the introduction of out-of-court statements that would have been admissible in a criminal case at the time of the founding of the United States. See Giles *v.* California, 554 U.S. 353 (2008). Thus, the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause.

In Michigan v. Bryant, 562 U.S. 344 (2011), police officers were dispatched to a gas station parking lot, and they found Anthony Covington wounded. Covington told them that he had been shot by Bryant outside Bryant's house. Covington later died. At trial, the officers testified about what Covington said. Bryant was found guilty of murder. The testimony of the officers was challenged as a testimonial hearsay. The U.S. Supreme Court held that the victim's statements were not testimonial, and that they were properly admitted at trial because the primary purpose of the statements was not to aid prosecution but was to deal with the ongoing emergency of finding the assailant.

In Ohio v. Clark, 135 S. Ct. 2173 (2015), the U.S. Supreme Court held that testimonies of pre-school teachers repeating a small child's statements about physical abuse were not testimonial even though an Ohio statute mandated that teachers and certain other categorically specified caregivers report such child abuse. Considering all the relevant circumstances, the U.S. Supreme Court held that the child's statements were not testimonial.

The U.S. Supreme Court declared in Clark that the child's statements were not made with the primary purpose of creating evidence for the defendant's prosecution. The statements instead occurred in the context of an ongoing emergency involving suspected child abuse. The teachers asked questions aimed at identifying and ending a threat. The child was not informed that his answers would be used to arrest or punish his abuser. The child never hinted that he intended his statements to be used by the police or prosecutors. And the conversations with the teachers were informal and spontaneous.

The child's age further confirmed that the statements in Clark were not testimonial because statements by very young children will rarely, if ever, implicate the Confrontation Clause. In addition, in terms of history of the law, there is strong evidence that statements made in circumstances like these were regularly admitted at common law.

The Clark Opinion noted that, although statements to individuals other than law enforcement officers are not categorically outside the Confrontation Clause's reach, the fact that the child victim was speaking to his teachers is highly relevant. Statements to individuals who are not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than those given to law enforcement officers.

Finally, the Clark Court declared that mandatory child-abuse-reporting obligations for teachers and others do not convert a conversation between a concerned teacher and her student into a law enforcement mission aimed at gathering evidence for prosecution. It is irrelevant that the teachers' questions and their duty to report the matter had the natural tendency to result in defendant Clark's prosecution.

The Clark Opinion closed by explaining that the U.S. Supreme Court's Confrontation Clause decisions do not determine whether a statement is testimonial by examining whether a jury would view the statement as the equivalent of in-court testimony. Instead, the test is whether a statement was given with the primary purpose of creating forensic evidence, i.e., an out-of-court substitute for trial testimony. Clark held that the answer was clear: the child's statements to his teachers were not testimonial.

The Burke Majority Opinion concludes, after considering the Confrontation Clause case law and after lengthy and complex fact-intensive analysis, that all but one of the hearsay statements of victim K.E.H. repeated by the SANE were not testimonial and therefore were admissible under Confrontation Clause review. The following quote provides some of the key discussion explaining why the Burke Majority Opinion concludes that those hearsay statements were not testimonial:

> The circumstances and K.E.H.'s statements indicate that nearly all of the statements were made primarily for medical purposes. K.E.H. made these statements in a medical exam room in a hospital. She needed medical treatment specific to her sexual assault, which Nurse Frey provided. Although K.E.H. had been medically cleared from the emergency department, this did not mean that she was no longer in need of any medical treatment. Instead, she was no longer in need of emergency medical treatment and was cleared to go on to the next step for her: the sexual assault exam.
>
> While some patients in this situation may choose to leave the hospital and not attend this exam, it is uncontroverted that this is part of the process of treating a sexual assault patient. This was this patient's next step, and the fact that the hospital did not have the staff to address this step immediately does not mean the statement was nonmedical in purpose. Additionally, while the consent form K.E.H. signed indicated that general medical care would not be provided during the sexual assault exam, Nurse Frey did provide treatment and prescribe medication specific to the sexual assault during her exam. In fact, Nurse Frey discovered the cervical laceration that the emergency physician had not discovered during K.E.H.'s general medical treatment earlier in the day.

Most of K.E.H.'s statements had either two purposes (medical and forensic) or an exclusive medical purpose. For example, questions about contraception and ejaculation indicated whether and where DNA evidence might be collected, but they were also necessary to determine whether the patient needed medication to treat sexually transmitted infections or prevent pregnancy. Additionally, while the possibility of strangulation and the patient's position during the assault indicated the degree of force (which would bear on what crime the perpetrator could be charged with), that information also revealed where the patient had additional injuries that needed treatment.

K.E.H. also talked about missing crutches that she needed to walk (due to arthritis, not due to an injury incurred during the assault) and answered questions about allergies to medications – matters that were certainly relevant to medical treatment but unrelated to the sexual assault. K.E.H.'s account of the assault was part of the patient history, and Nurse Frey testified that she always started with an open-ended question about what happened because patient history is "the most important thing," according to her medical training.

Further, the consent form K.E.H. signed at the beginning of the exam indicated that medical records of the exam, including "photographs, lab results, [and] written documentation" would be kept confidential. K.E.H.'s statements were contained in the written documentation, which would remain confidential; they were not part of the physical evidence, which would be released to police. The patient history that Nurse Frey described as the most important aspect of medical treatment was among the written records that would remain confidential.

Regardless of the forensic purposes for taking swabs and collecting clothing, the primary purpose of eliciting nearly all of the statements K.E.H. made during the course of the exam was to guide the medical exam; the statements were used to create the documentation, which would become part of the highly confidential medical records.

Together, K.E.H.'s and Nurse Frey's statements and actions in the context of a sexual assault exam indicate that the primary purpose of nearly all of K.E.H.'s statements was not to provide an out-of-court substitute for trial testimony but to guide medical treatment for sexual assault. Statements patients make to medical providers "are 'significantly less likely to be testimonial than statements given to law enforcement officers' because medical personnel are 'not principally charged with uncovering and prosecuting criminal behavior.'" State v. Scanlan, 193 Wn.2d 753, 767 (2019) (quoting Clark, 576 U.S. at 249).

It is not the nurse's principal duty to uncover and prosecute criminal behavior, even when they are tasked with collecting evidence as part of their specialized training. The statements were made in a hospital exam room, not a police station. No member of law enforcement was present during the exam, and Nurse Frey did not take any direction from law enforcement. Additionally, Nurse Frey provided medical care specific to sexual assault.

Finally, these statements were elicited for both medical and forensic purposes, if not exclusively medical purposes. Nearly every statement K.E.H. made during the exam was necessary to guide the medical component in the exam, and their primary purpose was not to create an out-of-court substitute for trial testimony.

> Under these circumstances, most of K.E.H.'s statements cannot be characterized as primarily testimonial. With the exception of one statement describing the assailant (discussed below), we hold that the primary purpose of K.E.H.'s statements during the sexual assault exam was to receive medical care. Thus, the statements were non-testimonial and their admission did not violate the confrontation clause.

[Some paragraphing revised for readability; citations to the record omitted; some case citations revised for style]

The Burke Majority Opinion goes on to rule that one of the statements of K.E.H. – her description of her assailant – was testimonial under Sixth Amendment analysis. That is because the primary purpose of the statement was for the purpose of creating forensic evidence that would be an out-of-court substitute for trial testimony. The Majority Opinion distinguishes this case involving an attack by a stranger from a circumstance involving a "closely-related perpetrator" who might cause future injury. In the latter hypothetical circumstance, the statement may be held to be not testimonial.

The Majority Opinion goes on, however, to hold that the admission of the statement describing the attacker in evidence at trial in violation of the Sixth Amendment was harmless error beyond a reasonable doubt in light of the other admissible evidence in the case.

2. Evidence Rule 803(a)(4) (Analysis in Majority Opinion)

The Burke Majority Opinion next turns to the question of admissibility of the testimony under the hearsay provisions of the Rules of Evidence. ER 803(a)(4) provides a hearsay exception as follows:

> (4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

As with the Confrontation Clause issue, the Burke Majority Opinion concludes, though under different analysis, that the trial court did not err, i.e., that the trial court abuse its discretion, in admitting all of K.E.H.'s hearsay statements except her statement describing her assailant. The Burke Majority Opinion rules that all of the other statements had the primary purpose of promoting medical treatment.

As with the Confrontation Clause ruling, the Burke Majority Opinion concludes that K.E.H.'s description of her assailant did not qualify under the ER 803(a)(4) hearsay exception. There is no evidence that the description of her assailant was made to promote medical treatment.

However, also as with the Confrontation Clause ruling, the Majority Opinion concludes that the error under ER 803(a)(4) was harmless in light of the other admissible evidence in the case.

3. Concurring Opinion

The Concurring Opinion signed by three Justices argues that the SANE's testimony must be assessed under the Confrontation Clause as a whole and on an all-or-nothing basis; i.e., either K.E.H.'s statements to the SANE were all testimonial or they were all not testimonial. The

Concurring Opinion concludes, based on its assessment of the general "primary purpose" of the SANE, that the statements should be seen as all "testimonial" under this approach. But the Concurring Opinion concludes that the would-be error in admitting all of the statements was harmless error. The Concurring Opinion does not address the ER 803(a)(4) issue.

WASHINGTON SUPREME COURT ADDRESSES RECALL PETITIONS SEPARATELY DIRECTED AT ELECTED SHERIFFS FOR SNOHOMISH COUNTY AND BENTON COUNTY

Pam Loginsky, Staff Attorney for the Washington Association of Prosecuting Attorneys, included in her "Case Law" "Weekly Roundup for January 15, 2021" on the WAPA website the following descriptions of two sheriff-recall decisions of the Washington Supreme Court issued on January 14, 2021 (she also provided hyperlinks to the decisions):

> **Recall of Sheriff.** Charge that [Snohomish County Sheriff Fortney] incited members of the public to violate the governor's Stay Home-Stay Healthy proclamation is legally and factually sufficient where the sheriff, using a professional Facebook account and the official page of the Snohomish County Sheriff's Office made posts in which he unambiguously declared that the Stay Home-Stay Healthy proclamation was unconstitutional, that the governor's judgment should be questioned, and he advocated that business owners should open up. These statements, coupled with his repeated and public statements refusing to enforce Governor Inslee's proclamation effectively nullified the law.
>
> Charge that the sheriff exercised his discretion in a manifestly unreasonable way by rehiring three deputies previously terminated for misconduct is legally and factually sufficient. The issue for recall is not whether the sheriff was permitted to reinstate the deputies; the issue is whether voters could find that the sheriff abused his discretion by doing so.
>
> Charge that the sheriff failed to investigate an incident regarding a deputy's use of force is factually insufficient. The petitioners did not provide the complaint that the sheriff allegedly failed to investigate. Without this complaint, there are no "identifiable facts" to support the allegations and to assess the sheriff's actions.
>
> In re Recall of Fortney, No. 98683-5 (Jan. 14, 2021). Justices Gordon McCloud, Owens and Montoya-Lewis dissented in part.
>
> **Recall of Sheriff.** Numerous counts of illegal conduct are both legally and factually sufficient to support recall:
>
> In contrast with other elected officials, the elected sheriff possesses law enforcement duties that are inherently affected when he or she commits a crime. As the elected sheriff, [Benton County] Sheriff Hatcher took an oath to "support the laws of the State of Washington." . . . . Under RCW 36.28.010(1), the sheriff "[s]hall arrest and commit to prison all persons who break the peace, or attempt to break it, and all persons guilty of public offenses." Further, under RCW 36.28.011, "[i]n addition to the duties contained in RCW 36.28.010, it shall be the duty of all sheriffs to make complaint of all violations of the criminal law, which shall come to their knowledge, within their respective jurisdictions." Therefore, the sheriff who violates the law puts himself in a position where he must choose between serving his constituents through his law enforcement duties or

acting within his own self-interest. Accordingly, a sheriff's actions in violation of [various criminal statutes], 36.28.010, and 36.28.011, clearly amount to both misfeasance and malfeasance under RCW 29A.56.110.

Counts that sheriff harassed and retaliated against employees, violated the county anti-discrimination policy, and created an intimidating and hostile work environment are also legally and factually sufficient to support a recall.

In re Recall of Hatcher, No. 98968-1 (Jan. 14, 2021).

LEGAL UPDATE EDITOR'S NOTES:

The In re Recall of Fortney Majority Opinion and Dissenting Opinion can be accessed at: http://www.courts.wa.gov/opinions/pdf/986835.pdf

The In re Recall of Hatcher Opinion can be accessed at: http://www.courts.wa.gov/opinions/pdf/989681.pdf

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WASHINGTON STATE COURT OF APPEALS

OFFICERS MUST GO TO CRIMINAL TRIAL ON CHARGES OF THIRD DEGREE CHILD ASSAULT AND OFFICIAL MISCONDUCT BASED ON ALLEGATIONS BY OTHERS THAT THE OFFICERS WERE ACCOMPLICES OR PRINCIPALS IN A GRANDMOTHER'S STRIKING OF HER DISTURBED AND ACTING-UP NINE-YEAR-OLD GRANDCHILD WITH A BELT

In State v. Birge & State v. Jahner, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. II, January 5, 2021), in the introductory five paragraphs of a lengthy Opinion, Division Two of the Court of Appeals describes its ruling. The ruling overturns a trial court's granting two police officer defendants' motions for dismissal of criminal charges in which the trial court considered sharply conflicting accounts of the facts, including the officers' denials of the key allegations against them. The five introductory paragraphs read as follows:

> RC left KJC, her nine-year-old grandchild who had severe psychiatric issues and cognitive disabilities, with two social workers while she ran a brief errand. KJC then locked the social workers out of the house, broke windows, and grabbed kitchen knives. One of the social workers called 911 out of concern for KJC's safety. Before law enforcement arrived, RC returned. She disarmed and calmed KJC.
>
> Two police officers [Birge and Jahner] then arrived and encouraged RC to discipline KJC by striking him with a belt. RC initially resisted but eventually struck KJC more than 20 times with a belt while one of the officers allegedly held the child down. KJC was then transported to the hospital due to cuts on his hand and for psychiatric treatment. The next day, medical staff discovered bruises on KJC's back, sides, and arms, and they notified police.
>
> After the Tacoma Police Department and the Washington State Patrol (WSP) investigated, the State charged Birge and Jahner with third degree assault of a child both as principals and as accomplices. The State also charged them with official

misconduct. Birge and Jahner moved to dismiss the charges under CrR 8.3(c) and State v. Knapstad, 107 Wn.2d 346 (1986) [**LEGAL UPDATE EDITOR'S NOTE: Courts have authority to dismiss a charge under these provisions only if no material facts are disputed and the undisputed facts do not support a prima facie case of guilt for the crime charged.]** The trial court granted their motions and dismissed both charges.

The State appeals, arguing that the evidence, viewed in the light most favorable to the State, was sufficient to proceed to a jury trial on third degree assault and official misconduct. The defendants counter that the trial court properly dismissed the third degree child assault charges because, as a matter of law, the State could not prove that they had the requisite mental state. Defendants also argue that the evidence was insufficient to proceed to trial on the official misconduct charge and, alternatively, the official misconduct statute is unconstitutionally vague and overbroad.

Viewing the evidence in the light most favorable to the State, the State has presented sufficient evidence to establish a prima facie case of guilt of both third degree assault and official misconduct, even if some facts are in dispute. Moreover, the official misconduct statute is not unconstitutionally vague or overbroad. We reverse the trial court's dismissal of both charges and remand for proceedings consistent with this opinion.

Result: Reversal of Pierce County Superior Court order that dismissed the charges against the defendants; case is remanded for trial on the charges of third degree assault and official misconduct.

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BRIEF NOTES REGARDING JANUARY 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 13 entries below address the January 2021 unpublished Court of Appeals opinions that fit the above-described categories. I do not promise to be able catch them all, but each month I will make a reasonable effort to find and list all decisions with these issues in unpublished opinions from the Court of Appeals. I hope that readers, particularly attorney-readers, will let me know if they spot any cases that I missed in this endeavor, as well as any errors that I may make in my brief descriptions of issues and case results. In the entries that address decisions in criminal cases, the crimes of conviction or prosecution are italicized, and brief descriptions or characterizations of the holdings/legal issues are bolded.

1. Bray and Tracy v. Pierce County: On January 5, 2021, Division Two of the COA agrees with the Pierce County Superior Court's denial of Pierce County's motion for summary judgment that requested dismissal of the lawsuits of two former Pierce County Sheriff's Department deputies. *The two former deputies alleged that they were discharged in violation of public policy for whistleblowing activity.* The former deputies allege that they were constructively terminated after they reported that other deputies had returned a firearm to the restrained party under a domestic violence protection order. The restrained party later murdered the protected party with the firearm. The County moved to dismiss the claims of the former deputies, arguing that the deputies had failed to identify a public policy to support their claim. **The Court of Appeals holds that under these circumstances, the former deputies have identified a clear public policy to protect victims of domestic violence and to not affirmatively arm a restrained party when serving a domestic violence protection order.** The case is remanded for further proceedings consistent with the Court of Appeals decision. Part of the explanation of the Court of Appeals is as follows:

> Although we do not dispute that a deputy cannot disarm an individual absent legal authority, here, the deputies who served the domestic violence protective order affirmatively went into the house, located David's firearm, and placed that firearm and a loaded magazine in David's car with him. These actions are a far cry from merely allowing David to retain his firearm. The temporary order in this case gave [protected party] exclusive rights to the residence, and provided that David take only his clothing and "tools of trade." No one here suggests that the firearm fell into either category

2. State v. Gregory Allen Shirato: On July 5, 2020, Division Two of the COA rejects that challenges of defendant's challenge to his Thurston County Superior Court convictions of *second degree rape and first degree burglary*. Among other challenges, Schirato argued that his constitutional rights were violated because the affidavit in support of the State's search warrant application contained (A) materially false statements and (b) omissions made intentionally or with reckless disregard for the truth.

According to the affidavit, the defendant told a detective that the defendant "drove a small silver Mazda SUV;" but defendant points out that the Mazda in fact was a sedan, not an SUV. Schirato also pointed out that the affidavit (1) did not include evidence about other neighborhood men acting suspiciously and the victim's past boyfriends; and (2) did not include all of a next-door neighbor's comments about seeing a possible Toyota Prius, Subaru Outback, and/or Nova style vehicle or vehicles approaching the victim's house in the weeks before the incident. **The Court of Appeals explains as follows that defendant's challenge fails because, despite such incorrect descriptions of the car as an SUV, and despite the omissions, the affidavit established probable cause if the omitted information is included in the affidavit and the other information is corrected**:

> Even without any discussion of vehicles and with the addition of Kirkpatrick's comments about AL's former boyfriends, neighborhood men, and other possible suspicious vehicles, the affidavit contained sufficient evidence connecting Schirato to the charged offenses. The affidavit noted that shoe prints [outside the victim's home] that were consistent with the shoes Schirato wore to the December party were found in AL's yard, circling her house. The affidavit also stated that Schirato had a past sexual relationship with AL, he bought her drinks and encouraged her to drink in excess that night, and she had awoken to him fondling her in her sleep twice before, including inserting his finger into her vagina. In the weeks before the holiday party, Schirato made comments to AL

about her body, asked to see photos of her in a bikini, said he was jealous of her boyfriend, and asked to sleep at her house after he had been drinking. Schirato had been to AL's house before. The affidavit also stated that Schirato had previously been investigated for fondling a 16-year-old girl while she was sleeping. This information supported reasonable inferences that Schirato was involved in criminal activity sufficient to grant the warrant.

3. State v. Austin A. Ciganik: On January 5, 2021, Division Two of the COA rejects the challenge of defendant to his Kitsap County Superior Court conviction for *possession of a controlled substance (heroin*). The Court of Appeals rules on the totality of facts that **an experienced officer had probable cause and lawfully arrested defendant out of his truck based on open view observation of defendant asleep in his truck with heroin observable on foil in the passenger seat**. The Court of Appeals describes the circumstances as follows:

> On May 2, 2018, at approximately 5:40 a.m., [a] Poulsbo police officer responded to a call of a man who had been sleeping in a truck since 4:00 a.m. Upon arriving at the scene, [the officer] noticed that the truck was running, and he observed Ciganik unconscious and slumped forward. On the passenger seat, [the officer] saw a piece of foil with a black substance on it which he believed to be heroin. [The officer's] belief was founded on his training and experience, as well as the size and shape of the foil, the location of the dark substance on the foil, and burn marks, which were all consistent with the substance being heroin. [The officer] knocked on the driver's window, then opened the truck door, and arrested Ciganik. [The officer] peered into the truck through the open door using a flashlight but did not enter any part of the truck. [The officer] impounded Ciganik's truck and obtained a search warrant to search the truck. During the subsequent search, [the officer] found heroin and methamphetamine in the truck.

4. State v. James Walter Clark: On January 6, 2021, Division Two of the COA rejects the challenge of defendant to his Clark County Superior Court convictions for *(A) possession with intent to deliver methamphetamine and (B) bail jumping.* Among other arguments, defendant contended that officers executing a search warrant for his residence exceeded the scope of the warrant by prying open a locked safe after he told officers that "he couldn't remember where the key was." **The Court of Appeals notes that the scope of the warrant authorization included searching for controlled substances, drug paraphernalia, and cash, all of which "can commonly be stored in safes." Under the circumstances, it was reasonably within the scope of the search warrant to pry open the safe.**

5. State v. Marcus Alan Church: On January 12, 2021, Division Two of the COA rejects the challenge of defendant to his Lewis County Superior Court convictions for (A) *violation of his community custody conditions* and (B) *third degree assault under RCW 9A.36.031(1)(a)*. Defendant challenged his third degree assault conviction based on his mistaken interpretation of the relevant language of the third degree assault statute, which provides, in relevant part:

> (1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:
>
> (a) With intent to prevent or resist . . . the lawful apprehension or detention of himself, herself, or another person, assaults another;

While off duty, a deputy sheriff helped an on-duty deputy apprehend defendant, who had an outstanding warrant. Defendant ran, the off-deputy deputy followed defendant, and defendant

assaulted the off-duty deputy. Defendant argued on appeal that he could not be convicted under the above-quoted language of the assault statute because, among other claims: (A) he was not intentionally avoiding arrest or apprehension, but instead believed that he was being attacked; and (B) he did not know that the off-duty deputy was a law enforcement officer (despite conflicting evidence from the deputy on this point). Citing on-point Washington precedents, the Court of Appeals explains that these claims by defendant are irrelevant. **Under the statute and case law, the State was required to and did prove simply that the defendant assaulted another, that the defendant was attempting to avoid apprehension, and that the apprehension was lawful.**

6. State v. Jorden David Knight: On January 19, 2021, Division One of the COA revises its original Unpublished Opinion, but not in material respects – as best as I can determine without placing the two opinions side by side and comparing them in exacting detail (the original is no longer easily accessed). The original Unpublished Opinion was issued on November 9, 2020. The following description from the November 2020 Legal Update accurately describes the January 19, 2021 revised Unpublished Opinion:

. . . . Division One of the COA disagrees with the challenge of defendant Knight to his Clark County Superior Court convictions for *five counts of first degree possession of depictions of a minor engaged in sexually explicit conduc*t. The Court of Appeals rejects Knight's argument under the Washington constitution's article I, section 7 in which he contends that City of Vancouver police conducted an unlawful warrantless search of the Dropbox files it received from the National Center for Missing and Exploited Children (NCMEC). **Citing State v. Peppin, 186 Wn. App. 101 (2015) as analogous, the Court of Appeals holds that Vancouver police officers did not need a warrant to review the three Dropbox files they received from NCMEC because Knight did not have a reasonable expectation of privacy in the files after he had previously shared certain Dropbox links with the public through the social media outlet, Kik. The Court of Appeals also rules in the alternative, in somewhat complicated analysis, that the private search doctrine applies to NCMEC as a federal law enforcement entity, and the Silver Platter Doctrine applies such that the Vancouver PD officers legally viewed the files, and the files were properly admitted at trial**.

7. State v. Antoine R. Mills: On January 19, 2021, Division One of the COA disagrees with the challenge of defendant to his King County Superior Court for (A) *attempting to elude a pursuing police vehicle* and (B) *unlawful possession of a firearm in the first degree*. **The Court of Appeals rejects the defendant's challenges to admission of recordings of his phone calls from jail on his posited evidentiary grounds of hearsay, inadequate authentication and prejudicial impact.**

8. State v. Jorden David Knight: On January 19, 2021, Division One of the COA disagrees with the challenge of defendant to his Snohomish County Superior Court convictions for (A) *felony hit and run injury/accident* and (B) *driving under the influence*. The Court of Appeals rules that the Superior Court correctly denied his motion to suppress evidence obtained after a warrantless Terry stop of his vehicle. **The Court of Appeals declares that specific and articulable facts known to the police officer who stopped Knight supported a reasonable suspicion that Anthony had engaged in criminal activity, i.e., a hit and run injury/accident.** The key facts were the stopping officer's observation of damage to the exterior of Knight's 90's model White Jeep Cherokee consistent with witness reports and with a police-accident-investigator's reported inferences regarding the damages to look for on the hit-and-run vehicle from a recent, nearby accident. The accident had occurred less than five miles away and just over an hour previously.

9. State v. S.R.G.: On January 20, 2021, Division Two of the COA disagrees with the argument of S.R.G. in her appeal from her Cowlitz County Superior Court juvenile adjudication for *being in possession of 40 grams or less of marijuana while under the age of 21*. **The Court of Appeals holds that a high school principal had reasonable suspicion supporting a search of all of SRG's bags under the School Search exception to the search warrant requirement.** Some of the key analysis is as follows:

> It was reasonable for school officials to believe that SRG, a 15-year-old student who had been seen by another student using a vape pen and who stated [to the principal] that she had vape juice [in one of her bags] would still have the vape juice and vape products in her bags. It was reasonable for the school officials to search all of the bags that SRG had in the office. There was a direct nexus between the item sought, the vape juice and vape products, and the infraction under investigation, possessing and using vape products at school. The school officials had reasonable suspicion to search the bags SRG carried with her into the office to discover evidence of the school policy violation. The search in this case was reasonably related in scope to the circumstances that justified the intrusion in the first place.

The Court of Appeals distinguishes factually the School Search decision of Division One of the Court of Appeals in State v. A.S., 6 Wn. App. 2d 264 (2018). The S.R.G. Court notes that the trial court record does not contain evidence supporting the trial court's finding that the "[u]se of vape pens/juice cigarettes, [sic] are a problem in schools," but the Court of Appeals declares that the absence of evidence on this point does not undercut the School Search ruling under the totality of the facts in the case.

10. State v. Dana Noreen Mattson-Graham: On January 20, 2021, Division Two of the COA disagrees with the argument of defendant in her appeal from her Lewis County Superior Court conviction for *third degree assault*. She argued that an officer gave improper opinion-of-guilt testimony violating her jury trial right when the officer gave an affirmative answer to a question asking if she appeared to have engaged in a "purposeful act" when her foot struck another officer in the hip area. In explaining that defendant did not show an error affecting a constitutional right, the Court of Appeals explains as follows:

> [Officer A] did not testify to the ultimate issue in the case, which was whether Mattson-Graham intended to make contact with [Officer B] with her kick. Instead, he testified that Mattson-Graham's act of kicking was intentional. [Officer A] expressed no opinion on Mattson-Graham's intent for the kick to make contact with [Officer B]. **Because [Officer A] did not provide any explicit or nearly explicit opinion testimony on the ultimate issue of Mattson-Graham's guilt, Mattson-Graham fails to show manifest error affecting a constitutional right.** Thus, she has failed to preserve this issue for appeal, and we do not further consider it.

11. State v. Alejandro Cardenas, Jr.: On January 25, 2021, Division One of the COA rules against the challenge of defendant to his Snohomish County Superior Court conviction for *second degree assault*. The Court of Appeals agrees with defendant that **a photomontage used by law enforcement was unnecessarily suggestive under U.S. constitutional Due Process analysis because, among other flaws, (1) the photomontage of six pictures inadvertently had contained four pictures of the same person (as fillers), and (2) defendant was the only person in the photomontage wearing a jail uniform. However,**

because the trial court reasonably concluded – based in significant part on the victim's previous familiarity with his assailants – that there was no substantial likelihood of irreparable misidentification, the Court of Appeals rules that the trial court's admission of the identification did not violate defendant's Due Process rights. The Court of Appeals also rejects defendant's argument that the Washington constitution provides greater protection against suggestive identification procedures than does the U.S. constitution.

12. State v. Troy C. Restvedt: On January 25, 2021, Division Two of the COA rules 2-1 in favor of the defendant's appeal and sets aside his Lewis County Superior Court convictions for (A) *resisting arrest* and (B) *violating a Lewis County burn ban resolution*. On the resisting arrest conviction, the Majority Opinion concludes **that the two Centralia Police Officers who responded to a report of an illegal backyard burn entered the relatively secluded rural backyard of the defendant under an unlawful pretext, rather than lawfully carrying out the emergency aid function of the community caretaking exception to the constitutional search warrant requirement. And, because the entry of the backyard violated defendant's constitutional privacy protection, the resisting arrest conviction based the backyard confrontation must be set aside.** The Dissenting Opinion argues: (1) that the Majority Opinion misreads the Washington Supreme Court Majority Opinion in that Court's 5-4 decision in State v. Boisselle, 194 Wn.2d 1 (2019), and (2) that the entry of the backyard was done consistent with the emergency aid function, even though one of the officers inartfully (or worse) answered a question on cross-examination that he could enter Restvedt's property because "I have the authority to enforce laws and when there's a law being broken I go and investigate it."

[LEGAL UPDATE EDITOR'S COMMENT: I think that the Restvedt Majority Opinion misreads the Boisselle Washington Supreme Court Majority Opinion's discussion of pretext in relation to the community caretaking exception to the search warrant requirement. I think that a close question is presented under the facts of this case and under a correct reading of the "emergency aid function" and pretext analysis in the Majority Opinion in Boisselle.]

The Restvedt Majority Opinion also sets aside the defendant's burn ban conviction **because the prosecutor's charge cited the Lewis County burn ban that covers only unincorporated areas of Lewis County.** The defendant resides in and did his burning within the city limits of Centralia. The Dissenting Opinion does not address this issue.

13. Jojo Deogracia Ejonga v. Michael Obenland: On January 25, 2021, Division One of the COA rules against the appeal of Ejonga from the Snohomish County Superior Court's denial of his habeas corpus petition seeking relief from his *three 2013 King County Superior Court convictions for attempted murder in the first degree while armed with a deadly weapon*. Ejonga is a citizen of the Democratic Republic of the Congo. After his arrest in 2011, he was given a form addressing his rights under the Vienna Convention on Consular Relations. The form provided places for him to sign and to either (A) ask that his consulate be notified of his arrest, or (B) waive his right to have his consulate be so notified. He refused to sign the form. Now, in his habeas corpus request, he is arguing that the government was required after his 2011 arrest to notify his consulate even though he refused to sign the form. **The Court of Appeals rules that nothing in the Vienna Convention required that the government notify the consulate for the Democratic Republic of the Congo where Ejonga refused to sign a request for such notification.**

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NEXT MONTH

The February 2021 Legal Update will include entries regarding the following two recent decisions:

1. 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 jury verdict was supported by evidence, albeit disputed and debatable, that would hypothetically support the jury's general determination of negligence based on the following alternative interpretations of the evidence: (1) that the police breached Ms. Mancini's door with a battering ram unreasonably quickly after knocking and receiving no response; (2) that the police took an unreasonable amount of time after entry to realize that they had the wrong apartment (they were inside a neatly kept apartment instead of the expected messy apartment); (3) that the police unreasonably continued their search of Ms. Mancini's apartment after realizing they had hit the wrong door; or (4) that the police unreasonably left Ms. Mancini handcuffed outside (barefoot and in her nightgown) long after realizing she had no relation to their suspect.

The Majority Opinion declines the plaintiff Ms. Mancini's request that the Court recognize a previously unrecognized civil action against law enforcement on the theory of "negligent investigation," which was the primary theory that plaintiff argued to the jury. Ms. Mancini's negligent-investigation theory was essentially that a negligent investigation caused the police to hit the wrong apartment to search for drugs. Friend-of-the-court briefs were filed addressing both sides of this issue.

The Mancini Majority and Dissenting Opinions are accessible on the Internet at:
http://www.courts.wa.gov/opinions/pdf/975833.pdf

2. In Vallanueva 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 views the strenuously disputed factual allegations in the light most favorable to the plaintiff-parents, which is required by law at this summary judgment stage of the case. The Ninth Circuit panel's Opinion states that the allegations can be read to support the following scenario: at the end of a vehicular pursuit, Villanueva cautiously performed a three-point-turn, at which point his truck (1) was about 15 to 20 feet away from the Officers, (2) was not aimed directly at the officers, and (3) was moving very slowly and was not accelerating when the Officers began shooting and essentially simultaneously shouted warnings. In these circumstances, the Ninth Circuit Opinion concludes, a reasonable jury could conclude that the Officers used excessive force based on the theory that 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.

The Villanueva Opinion is accessible on the Internet at:
https://cdn.ca9.uscourts.gov/datastore/opinions/2021/01/28/19-55225.pdf

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

Beginning with the September 2015 issue, the most recent monthly Legal Update for Washington Law Enforcement is placed under the "LE Resources" link on the Internet Home Page of the Washington Association of Sheriffs and Police Chiefs. As new Legal Updates are issued, the three most recent Legal Updates will be accessible on the site. WASPC will drop the oldest each month as WASPC adds the most recent Legal Update.

In May of 2011, John Wasberg retired from the Washington State Attorney General's Office. For over 32 years immediately prior to that retirement date, as an Assistant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011) of the Criminal Justice Training Commission's Law Enforcement Digest. From the time of his retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the production of the LED. That arrangement ended in the late fall of 2014 due to variety of concerns, budget constraints and friendly differences regarding the approach of the LED going forward. Among other things, Mr. Wasberg prefers (1) a more expansive treatment of the core-area (e.g., arrest, search and seizure) law enforcement decisions with more cross references to other sources and past precedents; and (2) a broader scope of coverage in terms of the types of cases that may be of interest to law enforcement in Washington (though public disclosure decisions are unlikely to be addressed in depth in the Legal Update). For these reasons, starting with the January 2015 Legal Update, Mr. Wasberg has been presenting a monthly case law update for published decisions from Washington's appellate courts, from the Ninth Circuit of the United States Court of Appeals, and from the United States Supreme Court.

The Legal Update does not speak for any person other than Mr. Wasberg, nor does it speak for any agency. Officers are urged to discuss issues with their agencies' legal advisors and their local 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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