LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

MARCH 2021

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UNITED STATES SUPREME COURT

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AMENDMENT SEIZURE OCCURRED WHEN AN OFFICER SHOT A FLEEING SUSPECT WITH INTENT TO RESTRAIN HER, EVEN THOUGH SHE DID NOT STOP AFTER BEING HIT

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

LEGAL UPDATE EDITOR'S COMMENT: Thirty years ago, the U.S. Supreme Court ruled in California v. Hodari D., 499 U.S. 621 (1991) that no seizure occurs under the Fourth Amendment if a suspect flees from or otherwise does not acquiesce in a law enforcement show of authority that, taking an objective view of the facts, seeks to restrain or detain the suspect. In the Washington Supreme Court decision in State v. Young, 135 Wn.2d 498 (1998), the Majority Opinion mischaracterized the Fourth Amendment test as being partially subjective, and the Washington Supreme Court's ruling was that under the Washington constitution, article I, section 7, the definition of "seizure" is an objective test that is broader than that of the Fourth Amendment in relation to suspects who flee law enforcement attempts at making a seizure of the person.

Young held that a law enforcement officer's show of authority that a reasonable person in the shoes of the suspect would believe seeks to stop or detain a suspect is a seizure under the Washington constitution, even if there is no compliance by the suspect. The Majority Opinion in Young went on, however, to rule that the use of a police car spotlight to illuminate a person who is in an open public area is not, by itself, a seizure. That is because use of the spotlight is not different from shining a flashlight in this circumstance. A reasonable person would not believe that the mere shining of a spotlight or flashlight in this situation is an attempt to make a seizure.

Now, in Torres v. Madrid, ___ S.Ct. ___ (March 25, 2021), the U.S. Supreme Court has clarified that a seizure also will be deemed to have occurred under the Fourth Amendment's "mere touch" rule where an officer shoots a fleeing suspect with the objectively manifested "intent to restrain" the suspect. The shooting is a seizure even if the fleeing suspect continues to flee after being shot. The Majority Opinion in Torres makes clear, however, that under a continuing element of the 1991 Hodari D ruling, there will be no Fourth Amendment seizure if the officer's shot misses the suspect.

Also, the Torres Majority Opinion makes clear that its physical-touching-is-a-seizure ruling does not make a mere tap on the shoulder or similar touching that a reasonable person would perceive is merely intended, for example, to get a person's attention or keep the person from stepping into traffic, will not generally be a seizure because – objectively viewed – the physical touching does not manifest an attempt at restraint. Also, the Torres Majority Opinion expressly declines to address whether the Opinion's physical-touching-is-a-seizure ruling does or does not apply broadly to law enforcement application of pepper spray, flash-bang grenades, lasers or other such law enforcement agency tools.

Further, the Majority Opinion indicates that the Torres mere-touching ruling does not apply to make the physical touching of an inanimate object a seizure of the object. Thus, a vehicle, house or item of personal property will not necessarily be deemed to have been seized merely because law enforcement bullet strikes it.

I plan to revisit, maybe only briefly, Torres v. Madrid in the April 2021 Legal Update to provide some hypothetical fact patters to illustrate how the Fourth Amendment "seizure" definition and the article I, section 7 definition of "seizure" apply in cases arising in factual contexts relevant to the discussion above. The differences between the Fourth Amendment

definition of "seizure" and the Washington constitutional definition may make a difference in, among other legal applications, (1) possible exposure to section 1983 lawsuits for Fourth Amendment violations, and (2) decisions by Washington prosecutors whether to request federal prosecution where state court suppression of evidence otherwise looms.

Facts and proceedings below in Torres: (Excerpted from summary by the U.S. Supreme Court's Reporter of Decisions; such summaries are not part of the Court's Opinions)

> Janice Madrid and Richard Williamson, officers with the New Mexico State Police, arrived at an Albuquerque apartment complex to execute an arrest warrant and approached petitioner Roxanne Torres, then standing near a Toyota FJ Cruiser. The officers attempted to speak with her as she got into the driver's seat. Believing the officers to be carjackers, Torres hit the gas to escape. **[LEGAL UPDATE EDITOR'S NOTE: The factual allegations of this case must be viewed in the best light for plaintiff because a summary judgment for the government actors is at issue, and the circumstances were not captured on videotape. The facts of the case are strenuously disputed by the officers. Among many other things, the officers claim that they shot to protect themselves from Ms. Torres hitting them with her car. For some of the facts from the officers' perspective, see the dissent in the case, and see also the Amicus Brief filed by the United States in this case. The brief can be found on the Internet at: https://www.justice.gov/crt/case-document/torres-v-madrid-brief-amicus.]**
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> The officers fired their service pistols 13 times to stop Torres, striking her twice. Torres managed to escape and drove to a hospital 75 miles away, only to be airlifted back to a hospital in Albuquerque, where the police arrested her the next day.
>
> Torres later sought damages from the officers under 42 U. S. C. §1983. She claimed that the officers used excessive force against her and that the shooting constituted an unreasonable seizure under the Fourth Amendment. Affirming the [United States] District Court's grant of summary judgment to the officers, the Tenth Circuit [of the United States Court of Appeals] held that "a suspect's continued flight after being shot by police negates a Fourth Amendment excessive-force claim.

[Case citation omitted; paragraphing revised for readability]

ISSUE AND RULING: Is the application by law enforcement of physical force to the body of a person with objectively manifested intent to restrain the person a seizure even if the person does not submit and is not subdued by the application of force? (ANSWER BY SUPREME COURT: Yes, rules a 5-3 majority)

Result: Reversal of decision of the 10th Circuit Court of Appeals; cases remanded to the U.S. District Court for trial on the heavily disputed facts, as well as other proceedings, which may include an assessment of whether prior case law on this issue was not clearly established such that the officers are entitled to qualified immunity.

HOLDING AND ANALYSIS IN SUPREME COURT MAJORITY OPINION: (Excerpted from summary of Majority Opinion by the U.S. Supreme Court's Reporter of Decisions; the summary is not part of the Court's Opinion)

Held: The application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued.

(a) The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." This Court's precedents have interpreted the term "seizure" by consulting the common law of arrest, the "quintessential" seizure of the person. Payton *v.* New York, 445 U. S. 573, 585 (1980); California *v.* Hodari D., 499 U. S. 621, 624 (1991). In Hodari D., this Court explained that the common law considered the **application of physical force to the body of a person with the intent to restrain** to be an arrest – not an attempted arrest – even if the person does not yield. A review of the pertinent English and American decisions confirms that the slightest touching was a constructive detention that would complete the arrest. . . . [the Majority Opinion refers to this as the "mere touch" rule]

The analysis does not change because the officers used force from a distance to restrain Torres. The required "corporal seising or touching the defendant's body," 3 W. Blackstone, Commentaries on the Laws of England 288 (1768), can be as readily accomplished by a bullet as by the end of a finger. The focus of the Fourth Amendment is "the privacy and security of individuals," not the particular form of governmental intrusion. . . .

The application of force, standing alone, does not satisfy the rule recognized in this decision. **A seizure requires the use of force with intent to restrain, as opposed to force applied by accident or for some other purpose**. County of Sacramento *v.* Lewis, 523 U. S. 833, 844 (1998). The appropriate inquiry is whether the challenged conduct objectively manifests an intent to restrain. Michigan *v.* Chesternut, 486 U. S. 567, 574 (1988). This test does not depend on either the subjective motivation of the officer or the subjective perception of the suspect. Finally, a seizure by force lasts only as long as the application of force unless the suspect submits. *Hodari D.*, 499 U. S., at 625.

(b) In place of the rule that the application of force completes an arrest, the officers [who are defending against this lawsuit] would assess all seizures under one test: intentional acquisition of control. This alternative approach finds support in neither the history of the Fourth Amendment nor this Court's precedents.

(1) The officers attempt to recast the common law doctrine recognized in Hodari D. as a rule applicable only to civil arrests. But the common law did not define the arrest of a debtor any differently from the arrest of a felon. Treatises and courts discussing criminal arrests articulated a rule indistinguishable from the one applied to civil arrests at common law.

(2) The officers' contrary test would limit seizures of a person to "an intentional acquisition of physical control." Brower *v.* County of Inyo, 489 U. S. 593, 596 (1989). While that test properly describes seizures by control, seizures by force enjoy a separate common law pedigree that gives rise to a separate rule. A seizure by acquisition of control involves either voluntary submission to a show of authority or the termination of freedom of movement.

> But as common law courts recognized, any such requirement of control would be difficult to apply to seizures by force. The [test suggested by the officers defending against this lawsuit] will often yield uncertainty about whether an officer succeeded in gaining control over a suspect. For centuries, the rule recognized in this opinion has avoided such line-drawing problems.
>
> (c) **The officers seized Torres by shooting her with the intent to restrain her movement**. This Court does not address the reasonableness of the seizure, the damages caused by the seizure, or the officers' entitlement to qualified immunity.

[Bolding added by Legal Update Editor]

DISSENTING OPINION: Justice Gorsuch writes a dissent that is joined by Justices Thomas and Alito. The dissent argues in vain that the Majority Opinion goes against common sense and against precedent.

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY: QUALIFIED IMMUNITY IS ORDERED FOR OFFICERS IN LAWSUIT CHALLENGING (1) THEIR DEPLOYMENT OF A POLICE K-9 (AFTER OTHER LESS-LETHAL CONTROL TECHNIQUES HAD FAILED), AND (2) THE DURATION OF THE DOG'S BITE IN ARREST OF A RESISTING DUI SUSPECT; CONSISTENT WITH U.S. SUPREME COURT GUIDANCE IN 2007 SCOTT V. HARRIS DECISION, PANEL'S OPINION RELIES ON AUDIO-VIDEO-RECORDINGS RATHER THAN SIMPLY FAVORING ALL OF THE PLAINTIFF'S ALLEGATIONS

In Hernandez v. Town of Gilbert, ___ F.3d ___ , 2021 WL 821943 (9th Cir., March 4, 2021), a three-judge Ninth Circuit panel grants qualified immunity to law enforcement defendants in a section 1983 Civil Rights Act lawsuit on the rationale that case law was not clearly established that the deployment and manner of use of a police K-9 to deal with a DUI suspect resisting arrest out of his car was excessive force under the circumstances of the case.

The panel does not expressly state that the law enforcement actions did or did not comply with the Fourth Amendment. Instead, the panel chooses to grant immunity under the alternative rationale that the law was not clearly established at the time of the incident. Nothing in the panel's Opinion indicates that the law enforcement actions would be deemed unreasonable under current case law, but the Opinion cannot be persuasively cited for that proposition.

In a footnote at the outset of the panel's Opinion, the panel notes that the encounter between Hernandez and the law enforcement officer was audio- and video-recorded by department-issued body cameras, and that the recordings are part of the record. The Opinion notes that the panel reviewed the video evidence carefully, following the lead of the United States Supreme Court lead in section 1983 decision in Scott v. Harris, 550 U.S. 372, 378–81 (2007). Accordingly, per the approach taken by the U.S. Supreme Court in Scott v. Harris, the usual review standard that requires that an appellate court view the allegations in the best light for Plaintiff does not apply.

A Ninth Circuit staff synopsis (which is not part of the panel's Opinion) summarizes the Opinion as follows:

The panel affirmed the district court's grant, on summary judgment, of qualified immunity to a police officer in an action brought pursuant to 42 U.S.C. § 1983 alleging that the officer used excessive force when he deployed his police dog in effecting plaintiff's arrest for driving under the influence and resisting arrest.

Following a brief police chase, plaintiff fled to his home where he activated the remote-controlled garage door opener, remained in control of his car inside the garage for eight minutes, refused multiple commands to get out of the car, and resisted lesser force employed by officers without effect while he continued resisting. [Eight minutes transpired during which an officer gave many verbal orders to cooperate, used a variety of body control holds, applied pepper spray, and gave five warnings about the imminence of application of a police K-9.]

To force compliance, defendant then released his police dog. But even after the dog bit him, plaintiff continued to resist. The officers eventually managed to get plaintiff out of the car and completed the arrest.

In affirming the district court's grant of qualified immunity to defendant on plaintiff's excessive force claim, the panel held that no clearly established law governed the reasonableness of using a canine to subdue a noncompliant suspect who resisted other types of force and refused to surrender. The panel held that neither the initial deployment of the canine nor the duration of the bite violated clearly established law.

The panel noted that officers employed an escalating array of control techniques, none of which were effective in getting plaintiff to surrender, before deciding to release the police dog. The panel further held that plaintiff's claim that the duration of the bite was unreasonable because he had surrendered was belied by the video evidence captured on the police officers' body cameras.

[Some paragraphing revised for readability; bracketed text added by Legal Update Editor]

Result: Affirmance of order of U.S. District Court (Arizona) granting summary judgment and qualified immunity to the law enforcement defendants.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY: VIEWING THE ALLEGATIONS IN THE BEST LIGHT FOR PLAINTIFF, INTH CIRCUIT PANEL HOLDS THAT WHERE PLAINTIFF WAS GIVING OFFICERS ONLY PASSIVE RESISTANCE, OFFICERS USED EXCESSIVE FORCE WHEN THEY EXECUTED A TAKE-DOWN MANEUVER WHILE HOLDING PLAINTIFF IN A "POLICE LEAD" POSITION; THAT IS, THEY TRIPPED PLAINTIFF SO THAT HE WOULD FALL FACE FIRST ONTO THE PAVEMENT AS THEY HELD HIS ARMS BACK

In Rice v. Morehouse, 989 F.3d 1112 (9th Cir., March 8, 2021), a three-judge Ninth Circuit panel denies qualified immunity to law enforcement defendants based on the panel's view that, viewing the allegations in the case in the best light for the Plaintiff, officers used excessive force against a passively resisting man who was taken from his car after refusing to cooperate in a traffic stop or to get out of his car.

The key facts concern whether the officers used excessive force under the Fourth Amendment when, after getting the arrestee out of his car, they allegedly purposely tripped him while physically controlling his body in such a way that it was inevitable that he would land face first on the pavement without the ability to break his fall with his arms. The panel's Opinion describes the circumstances as follows:

> After [Officers] Murakami and Morehouse pulled Rice from the car, they attempted to hold Rice in a "police lead" position, grabbing his wrist with one hand and triceps with the other. Morehouse grabbed Rice's right arm, while Murakami grabbed his left. When Murakami was unable to grip Rice's arm, [Officer] Shaffer stepped in, took Rice's left arm, and assumed the police lead position. Rice again maintains that he did not resist the officers. Nonetheless, as they approached the rear of the car, Shaffer and Morehouse tripped Rice and forcibly threw him to the ground using a "take-down" maneuver. Rice landed face-first on the pavement and suffered extreme pain.

The panel Opinion characterizes this use of force as "substantial" and "aggressive." A key part of the panel Opinion's extended analysis under the balancing test of Graham v. Connor, 490 U.S. 386 (1989) is as follows regarding the State's interest in using this type of force under the circumstances:

> Once they walked Rice to the back of his car, [Officers] Morehouse and Shaffer were among six officers surrounding Rice. And by the time Morehouse and Shaffer implemented the take-down, more than a minute had passed since they had first met [Officer] Murakami at her car. During that brief period, although Rice refused to cooperate, [Officers] Morehouse and Shaffer did not observe Rice yell or use profanity, attempt to flee or to harm the officers, or reach for any sort of weapon. Thus, a reasonable jury could find that an officer standing in their shoes would have known that they were not facing an emergency situation.
>
> Absent an emergency, the state's interests here are insubstantial. Rice's purported traffic offense – failing to signal for a full five seconds before changing lanes – was minor. . . . Nor was the offense that Murakami suspected him of – driving under the influence – particularly severe. . . . . In any event, Morehouse and Shaffer only knew what they were told, which included [Officer] Murakami's explanations that Rice was "just not wanting to comply with my instructions" and that "[a]ll I wanted was his license." Given the circumstances and Murakami's explanations, a reasonable jury could find that Morehouse and Shaffer could not reasonably have believed that Rice had committed a serious crime.
>
> Similarly, a reasonable jury could find that Rice did not present an immediate threat to the safety of the officers or others, the most important factor under Graham. Murakami even turned her back to Rice's car and briefly walked backward as she reapproached the vehicle to arrest him, undermining any suggestion that she believed Rice might have a firearm.
>
> Moreover, despite more than a dozen officers arriving at the scene, Murakami then explained she needed only one unit to help remove Rice from his car. That explanation dispelled any notion that Rice was dangerous or that his family warranted additional safety precautions. In addition, Murakami explained that she needed that limited assistance because Rice would not give her his license and was not following instructions. That Murakami did not say or suggest another reason for needing

> assistance strongly undermines Morehouse's and Shaffer's assertion that they reasonably believed Rice posed an immediate threat to them or others.
>
> Finally, although there is conflicting summary-judgment evidence, a jury could find that Rice was not "actively resisting arrest or attempting to evade arrest by flight." . . . . According to Rice's version of the events, he "was not resisting in any way" until after he was taken down.
>
> Because the dash-cam video does not clearly contradict Rice's account, we must accept it. . . . We have long distinguished between passive and active resistance . . , and Rice's refusals to exit his car are far closer to "the purely passive protestor who simply refuses to stand" than to the "minor" or even "truly active" forms of resistance that we have considered in other cases.

[Case citations omitted; footnote omitted; some paragraphing revised for readability]

Result: Reversal of U.S. District Court (Idaho) order that granted summary judgment and qualified immunity to the law enforcement defendants; case remanded for trial.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY: IN CASE INVOLVING ARREST OF VIOLENT SUSPECT REPORTED TO BE SUFFERING FROM AN EPILEPTIC SEIZURE, PANEL VOTES TO 2-1 TO GRANT QUALIFIED IMMUNITY TO LAW ENFORCEMENT DEFENDANTS ON ISSUES RELATING TO (A) EXCESSIVE FORCE, (B) AMERICANS WITH DISABILITIES ACT, (C) PROBABLE CAUSE TO ARREST AND (D) ALLEGEDLY FABRICATED POLICE REPORT

In O'Doan v. Sanford, ___ F.3d ___ , 2021 WL 1048573 (9th Cir., March 19, 2021), a three-judge Ninth Circuit panel votes 2-1 to affirm a Nevada U.S. District Court order granting summary judgment in a federal section 1983 and Americans with Disabilities Act civil suit alleging that police officers used excessive force against plaintiff, lacked probable cause to arrest him, and prepared deliberately fabricated police reports. The Majority Opinion expressly declines to address whether there was a constitutional or statutory violation by the law enforcement officers sued in the case, choosing to decide all issues in favor of the government defendants solely on the rationale that, viewing the factual allegations in the best light for plaintiff, the case law on the issues in the case was not clearly established against the actions by the government defendants.

A staff summary, which is not part of the very lengthy Majority and Dissenting Opinions that see the law and factual allegations through very different lenses, provides the following synopsis of the Majority Opinion and Dissenting Opinion:

> Police officers responded to a 911 call reporting that plaintiff had experienced an epileptic seizure, was trying to break windows, and had fled his home naked. In apprehending plaintiff on a sidewalk after he refused to comply with commands to stop, officers struggled physically with plaintiff and used a "reverse reap throw" to bring plaintiff to the ground. Plaintiff was transported to the hospital and, after being treated and discharged, he was released into police custody and charged with indecent exposure and resisting a police officer. Plaintiff was booked into the county jail overnight and released on bail the next day. Charges were later dismissed.

The [Majority Opinion] held that plaintiff's § 1983 claims failed because the police officers were entitled to qualified immunity. Addressing first the claim that the use of the **reverse reap throw** amounted to excessive force, the panel evaluated the facts of this case against the applicable body of Fourth Amendment law, and concluded, at the very least, did not violate clearly established law when he executed the maneuver on plaintiff [**LEGAL UPDATE EDITOR'S NOTE: The Majority Opinion describes a "reverse reap throw" as follows: "This maneuver essentially involves tripping the subject from behind to throw him off balance and then "guiding" him to the ground with both hands."]**

The [Majority Opinion] noted that officers were called in to a "Code 3" situation, a request for immediate police assistance for a "violent" individual. They arrived to find plaintiff naked and moving quickly on a busy street. Plaintiff repeatedly resisted officers' commands to stop and then turned to the officers in a threatening manner, with his fists clenched. Plaintiff identified no precedent that would suggest the force used here was excessive, much less that excessiveness was clearly established on these facts.

The [Majority Opinion] held that the district court correctly granted summary judgment on plaintiff's Americans with Disabilities Act ("ADA") claim that officers failed to make a reasonable accommodation when detaining him. The [Majority Opinion] held that plaintiff had not shown that a lesser amount of force would have been reasonable under the circumstances, or how personnel with different training would have acted differently given the exigencies of the situation.

Addressing plaintiff's unlawful arrest claim, the [Majority Opinion] could not say that the officers violated clearly established law in determining they had probable cause to arrest plaintiff after witnessing him engage in conduct that indisputably violated Nevada law. **[LEGAL UPDATE EDITOR'S NOTE: Plaintiff's challenge to probable cause was tied to his allegation that his mental state precluded him from forming the required mental state for the crimes of arrest. The Majority Opinion asserts, among other things, that officers are not required to evaluate mental state when trying to determine if they have probable cause to arrest.]**

Nor did any clearly established law require the officers to conclude that probable cause had dissipated once plaintiff was discharged from the hospital. Nothing that happened in the emergency room could or did change the fact that plaintiff had, without doubt, engaged in illegal conduct – which the officers had personally observed and experienced firsthand. Assuming plaintiff could assert a parallel ADA wrongful arrest claim against the City, that claim likewise failed.

The [Majority Opinion] lastly considered plaintiff's § 1983 claim that the officers violated Due Process because they did not discuss plaintiff's reported epileptic seizure in their police report and affidavit supporting probable cause. While the [Majority Opinion] could agree that more information is usually better than less, and that including more specific information about reports of plaintiff's possible seizure would have been preferable, the question here was whether officers violated clearly established law. The [Majority Opinion] concluded that they plainly did not.

Dissenting in part, Judge Block stated that the problem with the Majority's Opinion was that there were clearly material factual disputes and credibility determinations that were for a jury – not judges – to resolve. Judge Block dissented from those parts of the

opinion granting summary judgment for the police officers on plaintiff's § 1983 false arrest and due process claims, as well as on his ADA claim. Judge Block concurred in those parts of the majority's opinion upholding the district court's grant of summary judgment on the excessive force and failure to train claims.

[Bracketed information supplied by Legal Update Editor; some paragraphing revised for readability]

Result: Affirmance of order of U.S. District Court (Nevada) granting qualified immunity to the law enforcement defendants.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY: 11-JUDGE PANEL VOTES 7-4 IN RULING THAT THE SECOND AMENDMENT DOES NOT PROVIDE A RIGHT TO OPENLY CARRY A HANDGUN IN PUBLIC

In Young v. State of Hawaii, ___ F.3d ___ , 2021 WL 1114180 (9th Cir., March 24, 2021), in a decision reported by a wide variety of media, an 11-judge Ninth Circuit panel rules 7-4 that the Second Amendment of the U.S. Constitution does not provide a right to carry a firearm openly in public. This 11-judge decision on "en banc review" comes 32 months after a 3-judge Ninth Circuit panel ruled the opposite way in the case.

The plaintiff George Young applied in Hawaii for a firearm-carry license twice in 2011, but he failed to identify "the urgency or the need" to openly carry a firearm in public. Instead, he relied upon his general desire to carry a firearm for self-defense. After his two applications were denied. Young brought a challenge to the Hawaii firearm-licensing law under the Second Amendment and under the Due Process Clause of the Fourteenth Amendment.

The March 24, 2021 Majority Opinion affirms the U.S. District Court's dismissal of the lawsuit and upholds the Hawaii firearm licensing law, which requires that residents obtain a license to openly carry a firearm in public (even if the firearm is unloaded). The Hawaii law further requires that, in order to obtain a carry-license, the applicant must demonstrate "the urgency or the need" to carry a firearm, must be of good moral character, and must be "engaged in the protection of life and property."

The Majority Opinion is over 100 pages long and has a table of contents. The two dissenting opinions cover over 85 pages total. The court's listing of parties filing friend-of-the-court briefs is over five pages long.

Result: Affirmance of Hawaii U.S. District Court's order dismissing plaintiff's Civil Rights Act lawsuit.

LEGAL UPDATE EDITOR'S NOTE: The plaintiff is likely to seek (and I think has a reasonable chance of obtaining) U.S. Supreme Court review of the Ninth Circuit decision.

LEGAL UPDATE EDITOR'S COMMENT: It is generally recognized that the Washington constitution, article I, section 24, provides a qualified right to openly carry a loaded firearm in public. In the interplay between the power to grant individual rights under state constitutions and the federal constitution, the Washington constitution lawfully is authorized to grant greater open-carry rights than does the Second Amendment.

EYEWITNESS IDENTIFICATION PROCEDURES: NINTH CIRCUIT PANEL RULES AGAINST MURDERER IN ADDRESSING ID PROCEDURE ISSUES IN HABEAS CORPUS CASE, INCLUDING CIRCUMSTANCES OF OFFICERS PROVIDING CONFIRMATION INFORMATION TO EYEWITNESSES IMMEDIATELY AFTER PHOTO MONTAGES

In Walden v. Shinn, ___ F.3d ___ , 2021 WL ___ (9th Cir., March 12, 2021), a three-judge Ninth Circuit affirms a U.S. District Court's denial of a habeas corpus petition of a defendant challenging his Arizona state conviction for rape and murder and his death sentence.

Among the issues was the issue of whether the state court ruled inconsistently with clearly established federal law when it determined that the police did not taint two victims' identifications by providing confirmation information to the victims/eyewitnesses after they had chosen Walden's photo: (A) as to one of the victims, the confirmation information supplied was that the police had a man in custody; and (B) as to the other victim, the confirmation information supplied was an article concerning Walden's arrest for another assault and a homicide. The Ninth Circuit panel declares that the state court was did not contradict clearly established federal law in concluding that these actions after the photo montage procedures were not impermissibly suggestive.

LEGAL UPDATE EDITOR'S COMMENT: The discussion in the Walden Opinion is a bit troubling. It is inconsistent with some Washington state appellate decisions and with some national and Washington best-practice guidelines and model policies. For instance, the WASPC and WAPA Model Policies "Eyewitness Identification: Minimum Standards" include the following admonition:

> **"Part E Witness Contamination**
>
> **'Administrators should not provide any feedback to a victim/witness regarding their decision in an identification procedure.'"**

Also, in an article by your Legal Update Editor (John Wasberg) that is posted on the Criminal Justice Training Commission's Law Enforcement Digest Internet site, "EYEWITNESS IDENTIFICATION PROCEDURES: LEGAL AND PRACTICAL ASPECTS," the following statement is provided:

> **"Part III. C. Avoid suggestiveness after the identification**
>
> **The officer must be very careful to avoid suggestive words or actions after the identification procedure has been conducted. Telling a witness that he or she picked the "right" or "wrong" person out of a live lineup or photo lineup can jeopardize admissibility of a later in-court identification.**
>
> **See State v. McDonald, 40 Wn. App. 743 (Div. I, 1985) (where witness picked one person from live lineup and detective told witness immediately afterward that the person arrested was a different person participating in the lineup, this fact, combined with the weakness of the identification on the other identification-reliability factors discussed elsewhere in this article, made the in-court identification of the arrestee/defendant inadmissible).**

In State v. Courtney, 137 Wn. App. 376 (Div. III, 2007) May 2007 LED:08, the Court of Appeals' analysis suggests that undue suggestiveness likely occurred where, after each of the two victims identified the defendant in a photo lineup as the person who murdered their friend, officers (1) told each victim that the other victim had picked the same person, and (2) told one of the victims that the person picked was in custody. But the Court of Appeals upheld the identifications as being nonetheless sufficiently reliable because the trial court had found that each of the victims had a long, clear look at the perpetrator at the time of the crime."

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WASHINGTON STATE COURT OF APPEALS

REASONABLE SUSPICION STANDARD HELD NOT MET FOR TERRY STOP OF SUSPECTED DRUG-DEALER WHERE AN ARRESTEE SPONTANEOUSLY TOLD POLICE THE NAME OF HER DRUG-DEALER, BUT POLICE DID NOT – AT LEAST TO THE SATISFACTION OF THE COURT OF APPEALS PANEL – SUFFICIENTLY CORROBORATE HER ALLEGATION

State v. Morrell, ___ Wn. App. 2d ___ (Div. III, March 9, 2021)

Facts:

Late in the evening of August 9, 2017, Spokane Police Department officers, including [Officer A], arrested a woman named Ashley Ansbaugh on an outstanding warrant. During a search incident to arrest, officers discovered methamphetamine and heroin on Ms. Ansbaugh's person. Unsolicited, Ms. Ansbaugh told the officers she had just purchased the drugs from Christopher Morrell, who used the nickname "Duffles."

Ms. Ansbaugh said Mr. Morell drove a maroon Chevrolet Monte Carlo, he still had drugs on him, and he would be driving to her hotel room with more drugs. [Officer A] was familiar with Mr. Morrell and his nickname from prior contacts, including a past drug investigation.

[LEGAL UPDATE EDITOR'S NOTE/COMMENT ON A FACTUAL POINT: The State's excellent Brief of Respondent in this case provides the following fuller explanation regarding Officer A's prior knowledge of Morrell (the State's explanation is not disputed in the briefing of the defendant): "[Officer A] was familiar with the nickname Ms. Ansbaugh referenced and knew from a previous investigation at The Apple Tree Hotel that "Duffles" was Christopher Morrell. During that prior investigation, police were able to attribute possession of drugs and at least one firearm to Mr. Morrell. [Officer A] also knew that Mr. Morrell's name had a gang caution tag designation in the police database."]

[Officer A] remained on patrol the morning after Ms. Ansbaugh's arrest. At some point, he saw Mr. Morrell driving a maroon Monte Carlo near a gas station. There is no indication the gas station was near a hotel. Intending to investigate Ms. Ansbaugh's tip, Officer Lesser performed a traffic stop after following Mr. Morrell for several miles. . . .

> [After that, one lawful process (if one assumes that the initial traffic stop of Morrell was lawfully grounded in reasonable suspicion) led to other lawful processes, including two searches under warrants leading to evidence of drug-dealing by Morrell.]

Proceedings:

Morell was charged with four counts of possessing a controlled substance with intent to deliver. After he lost a suppression motion, a jury convicted him.

ISSUE AND RULING: Did [Officer A] have reasonable suspicion of drug-dealing to make a traffic stop of Morrell to investigate possible drug-dealing based (A) on the spontaneously volunteered information that the arrestee-turned-informant Ms. Ansbaugh provided regarding the person she bought her drugs from, and (B) on other information possessed by Officer A – including his intelligence on Morell and his observation later in his shift of Morrell driving a car meeting the description given by Ms. Ansbaugh? (ANSWER BY COURT OF APPEALS: No, Officer A did not have reasonable suspicion of drug-dealing that would support a Terry stop of Morrell)

Result: Reversal of Spokane County Superior Court conviction of Christopher R. Morrell on four counts of possession of possession of a controlled substance with intent to deliver.

ANALYSIS:

An exception to the constitutional warrant requirement is a brief investigatory detention known as a Terry stop. See Terry v. Ohio, 392 U.S. 1 (1968). For a Terry stop to be permissible, the State must show that the officer had a reasonable suspicion that the detained person was, or was about to be, involved in a crime. Reasonable suspicion requires that an investigating officer have specific and articulable facts based on the totality of the circumstances. A factor not mentioned in the Morrell Opinion is that, when relevant under the facts, an officer's training and experience is considered in the determination of whether reasonable suspicion supports a Terry stop.

The Morrell Opinion explains as follows the panel's view that Officer A lacked reasonable suspicion to make a Terry stop of defendant Morrell, which the Opinion asserts turns on informant Ms. Ansbaugh's credibility:

> Several factors can enhance an informant's credibility. A named informant is deemed more reliable than an anonymous one. The reasoning is that a named informant risks criminal prosecution for supplying false information, but an anonymous informant does not take this gamble. . . . Additionally, our case law holds an informant is more credible if they make a statement against penal interest. State v. Jackson, 102 Wn.2d 432, 437 (1984). "Since one who admits criminal activity to a police officer faces possible prosecution, it is generally held to be a reasonable inference that a statement raising such a possibility is a credible one." State v. Lair, 95 Wn.2d 706, 710 (1981).
>
> While Ms. Ansbaugh was a named informant and she made a statement implicating her penal interests, her credibility remained suspect because she was a criminal informant. Unlike a citizen informant calling 911, a criminal informant is not presumed to be acting out of civic responsibility. See 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 3.3 at 129 n.6 (6th ed. 2020) (quoting Michael A. Rebell, The Undisclosed Informant and the

Fourth Amendment: A Search for Meaningful Standards, 81 Yale L.J. 703, 712-13 (1972)).

Instead, the criminal informant's motives may "include offers of immunity or sentence reduction in exchange for cooperation, promises of money payments . . . and such perverse motives as revenge or the hope of eliminating criminal competition." 2 LAFAVE, supra. Experience and common sense dictate that a criminal informant cannot be deemed equally credible as a citizen informant. Additional indicia of veracity are required.

A statement against interest can help establish a criminal informant's credibility, but not always. "It must be remembered . . . that the admission against penal interest is used to determine the trustworthiness of the informant's information." Lair, 95 Wn.2d at 711. Not all statements against interest are equal. The real question is not whether the informant has technically made a statement against interest, but whether the statement against interest was made under circumstances suggestive of reliability. See 2 LAFAVE, supra, § 3.3(c) at 167 ("Courts thus should not utilize the admission-against-penal interest concept in a blunderbuss fashion, but instead should assess in a more careful fashion, preferably upon a full disclosure by the police of all relevant circumstances, what the significance of that admission is in the context of the particular case.").

For example, an informant's statement to law enforcement that can be readily verified or refuted may be deemed credible on the theory that lying would only deepen the informant's criminal troubles. State v. O'Connor, 39 Wn. App. 113, 121, 692 P.2d 208 (1984). But a statement that largely defies the possibility of contradiction carries little weight. "For example, if the police apprehended a person for possession of drugs and [they] were then to admit to purchases from various named sources in the recent past, there would be cause for skepticism." 2 LAFAVE, supra, § 3.3(c) at 175.

Ms. Ansbaugh's statement to police was not the type of statement against interest that carried an aura of reliability. Given she was caught red-handed, Ms. Ansbaugh's willingness to admit to drug possession was not particularly impressive. In addition, the information supplied by Ms. Ansbaugh was not amenable to being either refuted or verified. Had [Officer A] stopped Mr. Morrell and not found drugs, this would not mean Ms. Ansbaugh was lying.

As someone involved in drug activity, Ms. Ansbaugh likely knew of various individuals involved in drugs. When caught, rather than give up the name of her true supplier, Ms. Ansbaugh could just as easily (if not more likely) have thrown out the name of someone she believed was involved in drugs through rumor or reputation**. [LEGAL UPDATE EDITOR'S COMMENT: Maybe I am naïve, but I have some doubt about this speculation by the Court of Appeals panel about the likelihood that a drug possession arrestee would have no qualms about telling such a lie to the officer. I have to admit, however, that the State would have had a significantly better argument for reasonable suspicion if Ms. Ansbaugh had given officers a phone number for Mr. Morrell and a detailed description of the transaction in which she purchased the drugs from him.]**

Because Ms. Ansbaugh's tip was not sufficiently robust to carry an aura of reliability, law enforcement was required to corroborate her claims prior to conducting a warrantless stop. . . .

> The facts here do not show corroboration. The only information verified by police was Ms. Ansbaugh's knowledge of Mr. Morrell's nickname and car and the general allegation that he was involved with drugs. These are facts that would be known to anyone familiar with Mr. Morrell through rumor or reputation. . . .
>
> The police could have tried to corroborate Ms. Ansbaugh's specific information by following up on her claim that he would be returning to her hotel with drugs, but they did not do so. Instead, [Officer A] simply stopped Mr. Morrell after he saw him driving near a gas station. At that point in time, [Officer A] lacked sufficient basis for an investigative stop.
>
> All the drug evidence used against Mr. Morrell at trial was proximately connected to [Officer A's] initial traffic stop. This is obviously true for the search of the Monte Carlo, which was based on contraband observed by [Officer A] during the stop. But the later stop and search of the Yukon also had a direct causal connection. That stop was based on a warrant issued against Mr. Morrell for the drugs seized from the Monte Carlo. No separate, unforeseeable act, severed the causal connection between Mr. Morrell's initial unlawful detention and the two vehicle searches. As a result, evidence seized in the searches must be suppressed. State v. Mayfield, 192 Wn.2d 871, 898, 434 P.3d 58 (2019).

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

LEGAL UPDATE EDITOR'S COMMENTS: I am troubled by this Court of Appeals ruling. I recommend reading the excellent State's Brief of Respondent in this case. Go to the Washington Courts website, then Click on "Courts" on the top bar, then scroll down to "Division Three Briefs" on the right column, then click on "Look for briefs in case number order" and scroll down to briefs under # 37160-3, the docket number for this appeal. See also the collection of Washington cases on "criminal informants . . . working off a beef" at pages 238-239 of "Confessions, Search, Seizure, and Arrest: A Guide for Police Officers," May 2015, by Pam Loginsky, Staff Attorney, Washington Association of Prosecuting Attorneys.

My main three criticisms of the Morrell Opinion are (1) that the panel has relied heavily on the philosophical views of treatise author LaFave about informant-based "probable cause" (as opposed to the lower "reasonable suspicion" standard) and has made debatable readings of the Washington case law that the panel discusses and distinguishes on the legal question of what constitutes a "statement against penal interest;" (2) that the panel appears to give no weight to the corroborative fact that, later in Officer A's shift, the officer spotted drug-dealer-suspect Morrell in the informant-described maroon Chevrolet Monte Carlo; and (3) that the panel fails to substantively address the point made in the State's Brief of Respondent that Officer A was able to in part corroborate the informant's identification of Morrell as her drug dealer based on Officer A's past experience with Morrell's drug-involved activity. In regard to this third point, the following is a quote from the State's Brief of Respondent:

> **[Officer A] was familiar with the nickname Ms. Ansbaugh referenced and knew from a previous investigation at The Apple Tree Hotel that "Duffles" was Christopher Morrell. During that prior investigation, police were able to attribute**

possession of drugs and at least one firearm to Mr. Morrell. [Officer A] also knew that Mr. Morrell's name had a gang caution tag designation in the police database.

As I commented above, officers in this situation who are trying to develop reasonable suspicion or probable cause should try to get the criminal informant working off a drug possession beef (assuming for this discussion purposes that simple drug possession becomes a crime again in Washington) to provide as much information as possible about the extent of his or her own involvement in drugs (beyond what officers know already), as well as about the fingered suspect's involvement in dealing drugs, as well as getting as many details as possible about the particular transaction that resulted in his or her possession of drugs. And, as noted above, it would have been helpful to the prosecution's argument for reasonable suspicion if the informant had shown the officer her "dealer's number" (even if the number was not verified before the stop) on her phone.

SHOWUP IDENTIFICATION PROCEDURE: IN A 2-1 RULING, APPEALS COURT RULES UNDER DUE PROCESS ANALYSIS THAT EVIDENCE OF A CAR THEFT VICTIM'S EYEWITNESS IDENTIFICATION OF SUSPECT IN A SHOWUP CONDUCTED SHORTLY AFTER THE CRIME OCCURRED (1) WAS NOT IMPERMISSIBLY SUGGESTIVE, AND (2) DID NOT RESULT IN A SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION

State v. Scabbyrobe, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. III, March 18, 2021)

Facts: (Excerpted from Court of Appeals Opinion)

> Jeffery Huff left his car running in his driveway early one mid-November morning. From inside his house, he saw his car backing away. Huff hurried outside and saw a woman inside his car. The woman backed into a telephone pole and large rock, the latter interfered with her driving away.
>
> Huff was able to get into his car through the front passenger door and yelled for the woman to get out. She said she was unable to, and Huff noticed that a mailbox blocked the driver's side door from opening. He also noticed a dark tattoo on the top of her left hand. Huff directed the woman to crawl over him. Once out, she began to dig in her pockets. Huff thought she might be looking for a weapon, so he told her if she pulled out anything he would knock her out. The woman then left, walking very fast down the road, then turning down a second road and out of sight.
>
> Huff called 911 and [Sergeant A] responded within one or two minutes. Huff described the woman as a Hispanic female with long dark hair, wearing a black coat, and carrying two backpacks. [Sergeant A] forwarded this description to other officers, including [Officer B], who was in the area.
>
> A few minutes later, [Officer B] saw a woman running and looking behind her. She was wearing basketball-style shorts, no coat, and open toe sandals. Because she was not properly clothed for the near freezing temperature and because her shoes did not suggest she was exercising, [Officer B] stopped her and alerted [Sergeant A] that he had a woman who might be the suspect.

Huff accompanied [Sergeant A] to [Officer A's] location. While en route, [Sergeant A] said, "just because [you are] going to look at a female suspect, it doesn't necessarily mean it [is your] suspect."

When they arrived, Huff saw a woman in handcuffs standing next to an officer, both about 30 to 40 feet away. Huff noticed that the woman was not wearing the same clothes, did not have any backpack, and her hair was up instead of down. Nevertheless, he identified the woman with "100 percent" confidence as the one who had tried to steal his car. Huff also said the woman should have a tattoo on the top of her hand. [Officer A] looked at the woman's hand and said she did have a tattoo on the top of her hand.

The woman, Scabbyrobe, identifies as Native American, not Hispanic. She also had a smaller-than-pupil-sized green heart tattoo under her right eye, and a nearby small mark that might have been an old tattoo.

Proceedings below: [Excerpted from Court of Appeals Opinion]

The State charged Scabbyrobe with theft of a motor vehicle. During the State's case-in-chief, Huff again identified Scabbyrobe as the woman who tried to steal his car. Defense counsel elicited from Huff that he had not noticed anything distinctive about the thief's face.

During closing, defense counsel argued Scabbyrobe was not the same woman Huff had seen in his car. The defense emphasized that Scabbyrobe was wearing different clothes than the thief, she was not carrying two backpacks, and she had a distinctive tattoo on her face. The State argued that Scabbyrobe, trying not to be caught, may have discarded or hidden her coat, pants, and backpacks before she was seen by [Officer A].

The jury deliberated for two to three hours and declared they were at an impasse. The trial court directed them to continue deliberating. Eventually, they returned a guilty verdict. . . .

ISSUE AND RULING: In light of the totality of the circumstances, was the showup identification procedure impermissibly suggestive or was there a substantial likelihood of irreparable misidentification? (ANSWER BY 2-1 MAJORITY OF COURT OF APPEALS: The showup identification procedure was not impermissibly suggestive, and there was not a substantial likelihood of irreparable misidentification under the circumstances)

Note: The challenge on appeal was that defense counsel provided ineffective assistance by failing to file a motion to suppress the showup identification evidence. The Court of Appeals determines that the trial record is sufficient for reviewing the question of whether the defendant's Due Process rights were violated by allowing evidence of the showup identification procedure.

Result: Affirmance of Yakima County Superior Court conviction of Haven Mary Scabbyrobe for theft of a motor vehicle.

ANALYSIS IN MAJORITY OPINION OF COURT OF APPEALS: (Excerpted from Majority Opinion)

A due process challenge to a pretrial identification procedure is a two-step inquiry. A defendant asserting that a police identification procedure denied him or her due process

must first show that the procedure was unnecessarily suggestive. . . . If such a showing is made, the court will consider the totality of the circumstances to determine whether the suggestiveness created a substantial likelihood of irreparable misidentification. . . .

First step—not unnecessarily suggestive

The procedure used here did not run afoul of what courts have generally recognized to be impermissibly suggestive procedures. "Generally, courts have found lineups or montages to be impermissibly suggestive solely when the defendant is the only possible choice given the witness's earlier description." . . . Here, had police told Huff the suspect was stopped because she was running in open toe sandals, this detail could have impermissibly suggested she was the thief. Instead, police suggested the opposite by telling Huff, "just because [you are] going to look at a female suspect, it doesn't necessarily mean it [is your] suspect."

We have previously recognized a "prompt identification procedure frequently demonstrates good police procedure [because it] best guarantees freedom for innocent subjects." State v. Bockman, 37 Wn. App. 474, 482 (1984). Here, had [Officer B] arrested Scabbyrobe prior to Huff positively identifying her, this would have been an unconstitutional seizure. For all [Officer B] knew, the woman he stopped may not have been the thief. A showup identification was a proper procedure to protect Scabbyrobe's constitutional right from an unconstitutional seizure and to ensure her prompt release had Huff not identified her as the thief.

Scabbyrobe argues that [Officer A] could have taken her picture, released her, and sometime later shown Huff her picture in a photomontage with other women. We agree that [Officer A] could have done that. But simply because a different procedure could have been used does not mean the procedure actually used was impermissibly suggestive. The "admission of evidence of a showup without more does not violate due process." Neil v. Biggers, 409 U.S. 188, 198 (1972).

We conclude that the showup procedure used here was not unnecessarily suggestive. For this reason, the trial court likely would have denied a motion to suppress and defense counsel was not ineffective for failing to bring such a motion.

Second step—no substantial likelihood of irreparable misidentification

. . . .

In [Manson v. Brathwaite, 432 U.S. 98, 104 (1977)] the U.S. Supreme Court] eliminated a line of federal case law that required the per se exclusion of pretrial identification through unnecessarily suggestive identification procedures. . . . The Brathwaite court held that reliability was the linchpin for admissibility and required that the corrupting effect of the suggestive identification be balanced against certain factors indicating reliability. These factors, often referred to as the Biggers factors, are (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation. [Neil v. Biggers, 409 U.S. 188, 199-200 (1972)].

Application of the Biggers factors

First, Huff had the opportunity to view the thief up close during the crime. One does not need to see a person for longer than one minute to recognize the person 10 minutes later. This factor weighs in favor of admissibility.

Second, Huff paid attention to the thief. He focused on her and only her for a couple of minutes. This factor also weighs in favor of admissibility.

Third, Huff's description of the thief differed somewhat from Scabbyrobe. He identified her as Hispanic, but Scabbyrobe identifies as Native American. He said she would have a tattoo on the top of her hand and she did; but he did not notice the very small tattoo under her right eye or the nearby small faded mark. With respect to clothes, this is not determinative. Although Scabbyrobe was not wearing pants and a coat, she was wearing shorts and open toe sandals – inappropriate clothes for running in the cold.

This suggests, as the State argued below, that Scabbyrobe discarded her coat and pants. It is unlikely that Scabbyrobe was running for exercise, given that she was looking behind her as she ran and was running in open toe sandals. It is also unlikely there would be two women in the same area moving quickly on foot with a tattoo on the top of their hand. If one believes that Scabbyrobe had discarded her pants and coat, a belief presumably favored by the unanimous jury, this factor weighs in favor of admissibility.

Fourth, Huff identified Scabbyrobe as the thief and was 100 percent sure. This factor weighs in favor of admissibility.

Finally, less than 10 minutes passed between the time of the crime and the confrontation. This factor also weighs in favor of admissibility.

In all, the Biggers factors support admitting the showup identification. We conclude the trial court likely would have denied a motion to suppress had one been filed, and, therefore, reject Scabbyrobe's ineffective assistance of counsel claim.

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

ANIMAL CRUELTY: EVIDENCE IS HELD TO BE SUFFICIENT TO SUPPORT CONVICTION, BUT RE-TRIAL IS REQUIRED DUE TO JURY-INSTRUCTION ERROR

In State v. Jallow, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. I, March 8, 2021), Division One of the Court of Appeals rules that: (1) the evidence in the trial court record is sufficient to support defendant's convictions of two counts of animal cruelty in the first degree; but (2) that the trial court did not properly instruct the jury on the causation element of the crime and therefore the case must be remanded for re-trial. This Legal Update entry will not address the jury instruction issue.

The Jallow Opinion explains as follows why the evidence supports the defendant's first degree animal cruelty convictions:

The State charged Jallow with animal cruelty in the first degree:

> A person is guilty of animal cruelty in the first degree when . . . he or she, with criminal negligence, starves, dehydrates, or suffocates an animal, or exposes an animal to excessive heat or cold and as a result causes: (i) Substantial and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering; or (ii) death.

RCW 16.52.205(2).

A person acts with criminal negligence when they fail "to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(d).

Jallow contends that he was not criminally negligent because he arranged to have [his cousin] care for the animals. However, his lack of communication with [his cousin] demonstrated direct criminal negligence. Although Jallow could have initially believed that [his cousin] was properly caring for the animals, once [the animal control officer] and [Jallow's] wife notified [Jallow] that one sheep was deceased, and another was in need of immediate medical attention, Jallow was on notice that [his cousin] was not properly caring for the animals.

However, Jallow continued to rely on [his cousin]. Even after Jallow was notified by [the animal control officer] that another one of his sheep was euthanized, Jallow continued to rely on [his cousin] to sell the animals, which [his cousin] failed to do. Posting an advertisement that the animals were free to take did not allow Jallow to escape fault.

He did not follow up with [his cousin], his wife, or [the animal control officer] to ensure that the animals had actually been claimed, or were receiving food and water. A reasonable person in this situation would have found an alternative caretaker for the animals.

Jallow was also directly negligent when he failed to immediately attend to the animals upon his return home. While Jallow testified that he cut his trip short out of concern for his animals, his actions do not reflect this sentiment. Although Jallow returned home on December 8, 2016, he did not check on the animals until the next evening. By that point, the small brown sheep that had been alive on December 8, 2016, had died, and [the animal control officer] had seized the remaining animals.

Jallow argues that because the animals were not in his exclusive care, he was not negligent. . . . Jallow ignores that as the owner of the animals, he was still responsible for their care in his absence. Although Jallow himself was not neglecting to feed and water the animals, he was directly responsible for not ensuring that his animals were properly cared for. Because any rational trier of fact could have found that Jallow acted with criminal negligence, sufficient evidence supported his conviction.

[Case citations omitted]

Result: Reversal of Snohomish County Superior Court conviction of Abdoul Aziz Jallow on two counts of animal cruelty in the first degree; case remanded for re-trial.

CYBERSTALKING: EVIDENCE IS HELD TO BE SUFFICIENT TO SUPPORT CONVICTION

State v. Mireles, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. I, March 8, 2021)

Facts: (Excerpted from Court of Appeals decision)

> On March 10, 2018 [after the victim in this case had terminated a tumultuous relationship with defendant Mireles over his angry outbursts in their face-to-face contacts], the victim was out to dinner with a longtime friend. That evening, she began to receive text messages from Mireles. The messages continued for roughly 24 hours. In the messages, Mireles threatens violence, tells her he is waiting at her home, threatens to "ruin her job" by sharing messages with co-workers, makes demeaning comments about having anal sex with her, threatens to kill her, and threatens to kill himself.
>
> A corresponding call log shows a four second call from the victim's phone to Mireles's the next day. After the call, the next text message in the text thread received by the victim was Mireles asking, "You called?"

Proceedings below:

Mireles was charged and convicted in a jury trial of (1) felony harassment-domestic violence, and (2) felony cyberstalking.

ISSUE AND RULING: Do the facts described above support, under the beyond-a-reasonable-doubt proof standard, the defendant's conviction for felony cyberstalking? (ANSWER BY COURT OF APPEALS: Yes)

Result: Affirmance of King County Superior Court convictions of Ricardo Mireles, Jr., for cyberstalking and for felony harassment-domestic violence (the defendant's appeal challenged only the cyberstalking conviction).

Text of Cyberstalking Statute:

RCW 9.61.260 provides, in pertinent part as follows (bolding added):

> (1) A person is guilty of cyberstalking if he or she, **with intent to harass, intimidate, torment, or embarrass any other person**, and under circumstances not constituting telephonic harassment, makes an electronic communication to such other person or a third party:
>
> (a) Using any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act;
>
> (b) Anonymously or repeatedly whether or not conversation occurs; or
>
> (c) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household. . . . .
>
> (5) For the purposes of this section "electronic communication" means the transmission of information by wire, radio, optical cable, electromagnetic, or other similar means.

> "Electronic communication" includes, but is not limited to, electronic mail, internet-based communications, pager service, and electronic text messaging.

ANALYSIS OF ISSUE REGARDING SUFFICIENCY OF CYBERSTALKING EVIDENCE: (Excerpted from Court of Appeals Opinion)

> The State introduced the text messages wherein Mireles threatens violence, tells her he is waiting at her home, threatens to "ruin her job" by sharing messages with co-workers, makes demeaning comments about having anal sex with her, threatens to kill her, and threatens to kill himself. The victim testified to receiving the messages. A police officer testified that the text messages were from Mireles.
>
> When a defendant challenges the sufficiency of the evidence, they admit the truth of all the state's evidence. . . . Viewing this evidence in the light most favorable to the State, a rational trier of fact could have found that Mireles sent text messages threatening to injure the victim with the intent to harass, intimidate, or torment her beyond a reasonable doubt. The evidence is sufficient to support his conviction.

[Case citation omitted]

The Court of Appeals also rejects defendant's arguments that the cyberstalking statute is unconstitutionally overbroad under Free Speech analysis. The Court of Appeal opines that, although the word "embarrass" in the first sentence of the statute makes the statute overbroad, the word can and must be stricken from the statute to preserve the constitutionality of the statute.

PROMOTING PROSTITUTION: EVIDENCE IS HELD TO BE SUFFICIENT TO SUPPORT CONVICTIONS WHERE DEFENDANT'S CONDUCT WENT BEYOND THE ACTS OF A MERE CUSTOMER, WHICH IS HOW HE TRIED IN VAIN TO PORTRAY HIMSELF IN HIS DEFENSE AGAINST PROSECUTION

In State v. Peters, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. I, February 22, 2021), Division One of the Court of Appeals rules that evidence in the case is sufficient to support a jury verdict of promoting prostitution under the beyond-a-reasonable-doubt standard.

RCW 9A.88.080(1)(b) provides that "[a] person is guilty of promoting prostitution in the second degree if he or she knowingly . . . [a]dvances prostitution."

"Advances prostitution" is defined by RCW 9A.88.060(1) as follows:

> A person "advances prostitution" if, acting other than as a prostitute or as a customer thereof, he or she causes or aids a person to commit or engage in prostitution, procures or solicits customers for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.

In key part, the analysis by the Peters' Court on the sufficiency-of-evidence issue is as follows:

> Peters contends that a constitutionally insufficient quantum of evidence was adduced at trial to support his convictions for promoting prostitution in the second degree. This is so, he claims, because the State failed to prove that Peters was not acting as a customer. Because a rational trier of fact could have found that Peters' actions were beyond those of a customer, sufficient evidence supports Peters' convictions
>
> At trial, evidence was presented that Peters referred sex buyers to specific sex workers and agencies, scheduled appointments for sex buyers, vouched for would-be customers, and gave them detailed instructions about how to get through screening processes. Peters also advised enterprise owners with regard to specific apartment complexes to use and connected individual sex workers with bookers and agencies.
>
> In addition, Peters created and ran a website on which agencies and individual sex workers could post advertisements. From this evidence, a reasonable finder of fact could determine that Peters knowingly advanced prostitution, regardless of his personal sex-purchasing behaviors.
>
> These acts could be determined by a rational finder of fact to advance prostitution even if Peters had never personally purchased sexual activity, and they are not immunized under the law merely because he was also a customer. Accordingly, sufficient evidence supports the jury's determinations that Peters advanced prostitution.

[Some paragraphing revised for readability]

The Peters' Court also rejects defendant's constitutional arguments. The Court rules that defendant's reviews of and referrals to specific sex workers were not protected speech under the First Amendment because they were intended and likely to produce unlawful activity. And the Court rules that the definition of "advances prostitution," set forth in RCW 9A.88.060 and .080, is not unconstitutionally vague.

Result: Affirmance of King County Superior Court convictions of Charles T. Peters of nine counts of promoting prostitution in the second degree.

UNDER RCW 7.69.030(7), A DECEASED CRIME VICTIM'S PERSONAL PROPERTY MUST BE RETURNED TO A FAMILY MEMBER EVEN IF CRIME REMAINS UNDER INVESTIGATION UNLESS THE STATUTE'S STANDARD FOR KEEPING THE PROPERTY IS MET

In Burton v. City of Spokane, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. III, March 18, 2021), Division Three of the Court of Appeals makes a ruling that the Court summarizes as follows in the introduction to its Opinion:

> The City of Spokane refused to release crime victim property belonging to Cecilia Burton, claiming an ongoing investigation. Ms. Burton sued for conversion and her complaint was dismissed on the pleadings. We reverse.
>
> The mere fact that a crime is under investigation does not excuse law enforcement's refusal to return crime victim property. The applicable standard is more exacting. Law enforcement may retain crime victim property only if the item of property is needed as evidence and if a photograph cannot serve as a sufficient evidentiary substitute.

> Because the facts alleged in Ms. Burton's complaint suggest the City has retained at least some of her property in violation of this standard, she should be allowed to pursue a claim for conversion.

[Paragraphing revised for readability]

The ruling is made based on RCW 7.69.030(7) which provides a right for victims, survivors of victims, and witnesses of crimes:

> To have any stolen or other personal property expeditiously returned by law enforcement agencies or the superior court when no longer needed as evidence. When feasible, all such property, except weapons, currency, contraband, property subject to evidentiary analysis, and property of which ownership is disputed, shall be photographed and returned to the owner within ten days of being taken; . . . .

Result: Reversal of Spokane County Superior Court order dismissing Ms. Burton's lawsuit; case remanded for hearings to determine whether some of the personal property of the deceased must be returned to his mother despite the fact that the crime remains under investigation.

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

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

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

The 19 entries below address the March 2021 unpublished Court of Appeals opinions that fit the above-described categories. I do not promise to be able catch them all, but each month I will make a reasonable effort to find and list all decisions with these issues in unpublished opinions from the Court of Appeals. I hope that readers, particularly attorney-readers, will let me know if they spot any cases that I missed in this endeavor, as well as any errors that I may make in my brief descriptions of issues and case results. In the entries that address decisions in criminal cases, the crimes of conviction or prosecution are italicized, and descriptions of the holdings/legal issues are bolded.

1. State v. Justin Allen Carlberg (Case No. 80416-2-I): On March 8, 2021, Division One of the COA rejects defendant's challenge to his Snohomish County Superior Court conviction for *possessing a controlled substance with intent to manufacture or deliver*. The Court of Appeals rules that **the totality of circumstances support the conclusion that an officer had a**

reasonable, articulable suspicion justifying a September 17, 2016 Terry seizure and detention of Carlberg as a trespassing suspect. Defendant's presence with others late at night and next to a closed, secluded building known for very recent trespassing activity, coupled with defendant's furtive behavior of trying t o avoid the investigating deputy, supported the deputy's suspicion of criminal trespass activity.

2. State v. Justin Allen Carlberg (Case No. 80417-1-I): On March 8, 2021, Division One of the COA rejects the challenge of defendant to his Snohomish County conviction for *possessing a controlled substance with intent to manufacture or deliver*. The Court of Appeals rules that **the totality of circumstances support the conclusion that officers had a reasonable, articulable suspicion justifying a February 2, 2017 seizure and detention of Carlberg as a trespass suspect.** The Court of Appeals describes the facts supporting the Terry seizure as follows:

> Here, deputies responded to a 911 call of a suspicious male who locked himself inside the Rite Aid bathroom for 20 minutes and "would not comply with [the manager's] multiple requests to leave." Whether the manager "demanded," "requested," or "told" him to leave is immaterial because all are communications to Carlberg that his presence is unwanted. And when deputies saw Carlberg, they recognized him as someone they had trespassed from various local businesses.

3. State v. Rebecca Loan Johnson: On March 8, 2021, Division One of the COA rejects the challenge of defendant to her Snohomish County Superior Court conviction for *driving under the influence*. At defendant's trial, a deputy testified that, during FSTs, defendant showed many signs of intoxication. He also testified that FSTs are "scientifically validated to be able to detect impairment" and that, based on his observations and experience, Johnson had driven while impaired. **The unpublished Opinion of the Court of Appeals states that it was improper opinion testimony for the deputy to opine that the FSTs are "scientifically validated," but that the deputy's further testimony that defendant was impaired was based on his observations and therefore was not improper.** The Court of Appeals rules that the evidence presented at trial was so overwhelming that the jury would have found defendant guilty without the testimony regarding the scientific validity of the FSTs.

4. State v. Sarah Jane Adams: On March 8, 2021, Division One of the COA rejects the challenge of defendant to her King County Superior Court conviction for *vehicular homicide*. The Court of Appeals rules that **under the totality of the complicated facts of this case exigent circumstances justified a warrantless blood draw**. Included in the facts was the fact that, just before the investigatory blood draw, the injured defendant was complaining to emergency room staff that she was in pain, and that the administering of pain medication by ER personnel reasonably appeared to the officer to be imminent. Note that the Court of Appeals reverses the defendant's conviction for simple possession of heroin based on the Washington Supreme Court's February 25, 2021 decision in State v. Blake, which held that the possession of controlled substances unconstitutional because the statute does not have a mental state element.

5. State v. Todd Kyle Walker: On March 8, 2021, Division One of the COA rejects the challenge of defendant to his Grays Harbor County Superior Court conviction for *felony harassment*. The conviction was based on threats that defendant made from the back seat of a patrol car to an officer who was transporting him to jail for violation of a no-contact order. Defendant Walker made the threats after an officer pepper-sprayed Walker in order to subdue Walker after Walker had bloodied himself beating his own head against the patrol car's partition

between the front and back seat. **The Court of Appeals rejects defendant's argument that the officer's use of pepper spray under the circumstances was "outrageous" in violation of Walker's constitutional Due Process rights**.

6. State v. Benjamin Batson: On March 8, 2021, Division One of the COA rejects a variety of constitutional challenges of defendant to his King County Superior Court conviction under RCW 9A.44.128(10)(h) for *failure to register as a sex offender* based on an out-of-state conviction. In the Batson case, the defendant was required to register as a sex offender in Washington because he was required to register in Arizona, the state of his conviction. The defendant's Arizona conviction was for consensual sex with a 16-year-old and was not comparable to a Washington offense because the age of consent in Washington is 16 (with some exceptions not relevant to this case: see the exceptions in RCW 9A.44.093 and RCW 9A.44.096 addressing Sexual Misconduct With A Minor). The Washington Supreme Court ruled on December 24, 2020 that this statutory scheme was not an unlawful delegation of legislative function by the Washington Legislature. **The Court of Appeals rules (after remand from the Washington Supreme Court) against, as noted, a variety-pack of constitutional issues raised by the defendant.**

7. State v. Eliud M. Wambugu: On March 8, 2021, Division One of the COA agrees with the argument of defendant that he is entitled to a new trial because the jury in his King County Superior Court *DUI prosecution* should have been given an instruction on the safely-off-the-roadway defense in relation to the lesser included offense of physical control. The "physical control" statute provides that "[n]o person may be convicted under this section . . . if, prior to being pursued by a law enforcement officer, the person has moved the vehicle safely off the roadway." RCW 46.61.504(2).

The Court of Appeals Opinion describes as follows the relevant facts on the safely-off-the-roadway issue in the Wambugu case:

> **[The defendant's car] was stopped as far right on the shoulder as possible, had its hazard lights activated, and had a flat tire on the rear driver's side. The trunk of the car was open, a spare tire was outside the trunk, and Eliud Wambugu was standing at the rear of the car with both hands in the trunk. When [the WSP trooper] approached and asked what was happening, Wambugu said that he had a flat tire.**

The case is remanded to the Superior Court, apparently for re-trial.

8. State v. Kevin Ray Edgar: On March 9, 2021, Division Three of the Court of Appeals agrees with the challenge of defendant to his Kittitas County Superior Court conviction for *felony physical control*. **The Court of Appeals rules that a reasonable jury could not have found that he failed to prove the affirmative defense of "safely-off-the-roadway" by a preponderance of the evidence. In other words, the Court of Appeals rules that defendant proved his defense of safely-off-the-roadway as a matter of law.**

The "physical control" statute provides that "[n]o person may be convicted under this section . . . if, prior to being pursued by a law enforcement officer, the person has moved the vehicle safely off the roadway." RCW 46.61.504(2). The Court of Appeals declares that under the controlling Washington precedents, the following facts meet the "safely off the roadway" affirmative defense of RCW 46.61.504(2):

> Mr. Edgar testified that he pulled off the road into a gas station in Ellensburg between 2:00 and 3:00 am on August 16, 2018. He testified that he was on his way to help his son when he realized that he should not be driving. A gas station employee initially saw Mr. Edgar's truck parked at the gas pumps. A few minutes later, the employee realized that the truck had pulled forward about 20 feet and stopped in the parking lot. While the truck was not in a parking stall, it was not blocking traffic. Instead, Mr. Edgar had put his truck in park and had fallen asleep with the engine running and the lights on while parked inside a nearly empty five-acre parking lot.
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> Approximately 20 minutes later, the gas station employee called law enforcement after a customer mentioned that someone was sleeping in the truck. The employee estimated that Mr. Edgar sat in his car 25 to 30 minutes before law enforcement arrived.

9. State v. K.L.O.: On March 9, 2021, Division Two of the COA rejects the challenge of a juvenile to being adjudicated by the Cowlitz County Superior (Juvenile) Court of guilty of *possession of 40 grams of less of marijuana while under 21 years of age*. The Court of Appeals rules that **the mother of K.L.O. acted on her own and not as a government agent when she conducted a private search of her daughter's backpack in the presence of police**.

10. State v. Chaun T. Herkimer: On March 11, 2021, Division Three of the COA rejects defendant's challenge to his Spokane County Superior Court convictions for *(A) residential burglary, (B) second degree burglary, and (C) third degree malicious mischief.* The Court of Appeals rules that, **under the totality of the circumstances, reasonable suspicion supported a Terry seizure of the defendant**, and therefore that defendant's attorney did not render ineffective assistance in not challenging the seizure during the trial court proceedings. The Court of Appeals explains as follows:

> [At 3:34 a.m. on a January morning, Deputy A] arrived at the burgled house and saw shoeprints [in the snow] belonging to the reported burglar. At the same time, he noticed a Jeep speed by from the direction the shoeprints had led. [The Court notes earlier in the Opinion that the Deputy observed that the Jeep was driving very fast for the snowy conditions."]
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> There is little question that the Jeep the deputy saw was the same Jeep he later found parked in a driveway. Further, the driver and passenger of the Jeep remained inside the Jeep, which created the reasonable impression that they parked there to blend in rather than because they had arrived at their destination. Based on all of this, the trial court likely would have rejected the argument that the deputy lacked an individualized, reasonable suspicion that Herkimer was involved in the burglary. Rather, the trial court likely would have concluded that the investigative Terry stop was appropriate.

[Paragraphing revised for readability]

11. State v. Paul Charles Tlusty, Jr.: On March 15, 2021, Division One of the COA rejects the challenge of defendant to his Pierce County Superior Court convictions for *(A) residential burglary, (B) third degree theft, and (C) bail jumping*. Among the questions addressed by the Court of Appeals is whether testimony about a showup identification procedure involving two eyewitnesses should have been excluded as the product of a procedure that was impermissibly suggestive. **In key part, the Court's analysis of the facts supporting the lawfulness of the showup identification procedure is as follows**:

First, the witnesses had a good opportunity to observe the man in their neighbor's house. According to their testimony, they had between 15 and 20 seconds to view the suspect from about 30 feet away with a light shining directly on the intruder's face. Madeline testified that she had a "clear view" into the house and David indicated that he got a "really good view." Furthermore, the circumstances suggest that David was paying strong attention to the intruder. He was standing outside using a flashlight to look into his neighbor's house because he knew an intruder was inside. He moved to a different area to get a better view into the house.

Next, the witness descriptions of Tlusty were substantially, though not entirely, accurate. Both testified that the person they saw was a light-skinned male wearing all black clothes and a black hat and carrying a dark-colored duffel bag. Officers responding to the scene had this description when searching the area. Tlusty matched that description, with the one exception that he was wearing a different shirt. [The Court notes in the facts section of the Opinion that one of the eyewitnesses "testified that although Tlusty was wearing a plaid button up shirt, the shirt was over a long-sleeved black shi rt and he was wearing the same hat."] Moreover, David, who had a brief verbal exchange with the intruder behind the house, heard Tlusty talking to officers and testified that he recognized the voice.

Neither witness expressed any uncertainty in Tlusty's identity as the man they had seen in Morrison's house. David demonstrated a high level of certainty when he testified he was "positive" Tlusty was the man from the house. Finally, the witness identification occurred shortly after [the eyewitnesses] David and Madeline saw the intruder inside Morrison's house.

12. In re Personal Restraint of Thomasdinh Bowman: On March 22, 2021, Division One of the COA rejects the appeal of Bowman from the King County Superior Court's denial of his personal restraint petition to overturn his conviction for *murder in the first degree*. Among other rulings, the Court of Appeals rules that **officers did not exceed the scope of a search warrant for the hard drive of Bowman's computer**, explaining in part as follows:

The warrant specifically provided that detectives sought "any evidence relevant to the homicide of Yancy Noll [the victim]," from Bowman's cell phone, laptop, and iPad. The warrant specifically authorized the search and seizure of any computers or hard drives. Even if, as Bowman contends, officers were limited to discovery relating to the BMW repairs on the hard drive, our Supreme Court has recognized that officers who are executing a search warrant for documents relating to specific transactions must by necessity examine documents not specifically listed in the warrant to determine whether they are among documents to be seized.

13. State v. David Darrell Sykes: On March 22, 2021, Division One of the COA rejects the arguments of defendant challenging his King County Superior Court conviction for one count of a*ssault in the third degree* for spitting on an officer who had lawfully arrested the defendant. Among defendant's arguments was a claim that an officer violated the Washington Privacy Act, RCW 9.73.090(1)(b) by not following the procedural requirements of the statute for recording the questioning of arrested persons. **The Court of Appeals rules that the statutory provisions are focused on the custodial interrogation process, and where the recording was made prior to any questioning while the officer was in the process of trying to Mirandize the defendant, the statute does not apply.**

14. State v. Donald William Bango: On March 22, 2021, Division One of the COA rejects defendant's challenges to his Pierce County Superior Court convictions for *(A) second degree murder, (B) criminal impersonation in the first degree, and (C) tampering with a witness*. **Among his unsuccessful arguments was a claim that his Miranda rights were violated by coercing him into withdrawing a request for counsel.** Defendant argued that at the point when he asserted his right to an attorney during a custodial interrogation, the detective who was questioning him not only told defendant at that point that defendant was going to be arrested (which is permissible), but also told the defendant that the SWAT team would have to search his house, and that there "could be implications for [his] wife and children" which could involve DSHS if evidence of drug use or sales was found in the house. Defendant asserted in his Miranda challenge that when he heard these things, he became frightened for his family, and that coercion was the reason that he withdrew his invocation of his right to counsel. At the subsequent trial court 3.5 hearing, the detective denied saying anything after the invocation, other than that the defendant would be arrested. The trial court found the detective to be credible, and the Court of Appeals does not question that finding. Also, in rejecting defendant's Miranda argument, the Court of Appeals notes with approval that the detective re-Mirandized the defendant on tape before proceeding with further questioning.

15. State v. Keith Rawlins: On March 22, 2021, Division One of the COA agrees with defendant that he is entitled to a Skagit County Superior Court hearing on **whether jail staff intercepted his attorney-client communications in a way that would constitute a violation of his Sixth Amendment right to privately confer with counsel**. If the trial court finds that his attorney-client communications were NOT unlawfully intercepted, then defendant's convictions for *(A) drive by shooting, (B) two counts of assault in the first degree, (C) three counts of unlawful possession of a firearm, (D) hit and run, and (E) possession of methamphetamine with intent to deliver* will stand. The Court of Appeals also directs the trial court to consider what effect, if any, the Supreme Court's recent decision in State v. Blake, has on defendant's two simple-possession convictions for possessing methamphetamine and heroin.

16. State v. Russell Arthur Martin: On March 23, 2021, Division Two of the COA rejects the challenges of defendant to his Pierce County Superior Court conviction for *two counts of unlawful possession of a controlled substance with intent to deliver and five counts of unlawful possession of a firearm in the second degree, all with aggravating factors*. The Court of Appeals rules that **a deputy sheriff** participating in execution of a search warrant for an illegal drug operation **was justified by exigent circumstances (officer danger and destruction of evidence), when the deputy entered an unanticipated occupied fifth wheeler trailer that was not described on the warrant as one of the places to be searched on the target property**.

17. State v. Dotson Letheory Earlacosie: On March 29, 2021, Division One of the COA rejects the challenge of defendant to his Snohomish County Superior Court conviction of *second degree burglary*. The Court of Appeals rules that **a law enforcement officer had reasonable suspicion justifying a Terry stop of defendant** based on Dotson facial appearance and clothing as compared to a videotape of an early-morning burglary committed one hour earlier about four blocks away.

18. State v. Roger Allen Hills: On March 29, 2021, Division One of the COA rules in favor of defendant's challenge to his challenges to a suppression ruling, and by logical extension, his Snohomish County Superior Court convictions for (*A) two counts of possession of a controlled substance with intent to deliver, and (B) two counts of possession of a controlled substance,*

and (C) one count of violation of community custody. **The Court of Appeals rules that a stop of defendant's vehicle for a non-functioning license plate light was a pretextual stop in violation of article I, section 7 of the Washington constitution.** The officers in the case were on patrol in a "high-drug" area of their city that evening pursuant to their assignment to an "Anti-Crime Team," which is tasked with proactive patrol of "problem places and problem people." The officers testified that, and the trial court found that, the officers were motivated to make the stop only by the fact of the license-plate-light violation. The Court of Appeals declares that the trial court finding is not supported by substantial evidence. Instead, the Court of Appeals concludes – despite the absence of any concessions in the officers' express testimony – that the stop was pretextual because: (1) the officers somehow impliedly admitted, by way of their testimony about their assignment to the Anti-Crime Team, to mixed motives that included proactive patrol in a high-drug area; (2) the officers could clearly see the license plate at the time of the stop despite the non-functioning light, and hence the officers did not have a viable traffic-law or public safety reason to make the stop; and (3) "a third officer felt the need to respond to the scene almost immediately when he heard a traffic stop was being made by the pair of officers."

19. State v. Ira Leo Frank: On March 30, 2021, Division Three of the COA rejects the challenge of defendant to his Okanogan County Superior Court convictions for *(A) second degree burglary, and (B) second degree malicious mischief*. **The Court of Appeals rules that, where one officer fully Mirandized the defendant shortly after arrest and got a valid waiver and a statement, two other officers were not required to re-Mirandize the defendant when they sequentially questioned the defendant about the same crime within the time frame of all three officers' overlapping shifts on the same day (at least my passage-of-time-description is how I read the Court's rendition of the facts**). **LEGAL UPDATE EDITOR'S NOTE/COMMENT: Where a suspect has waived his or her right during a custodial interrogation and has remained in continuous custody after the waiver, and then an officer contacts the suspect again to resume questioning, to determine on the totality of the circumstances whether the prior waiver remains in effect, courts look primarily at three factors: (A) the length of time that elapsed since the fully Mirandized questioning ended, (B) whether a different officer from the original officer makes the re-contact, and (C) whether the crime under investigation in the questioning changes. In close cases, it can help the government's case for continuing waiver if the re-contacting officer reminds the suspect of the earlier warnings and decision by the suspect to talk.**

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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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