# LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

## Law Enforcement Officers: Thank you!

**May 2018**

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**NOTE RE: CRIMINAL JUSTICE TRAINING COMMISSION'S "LAW ENFORCEMENT ONLINE TRAINING DIGEST" FOR FEBRUARY & MARCH 2018**

Readers of this Legal Update are probably aware of the Law Enforcement Digest Online Training, which was introduced to the Criminal Justice Training Commission's Law Enforcement Digest page with the December 2017 edition. The CJTC has explained that this refreshed edition of the LED continues the transition to an online training resource created with the Washington law enforcement officer in mind. Select recent court rulings are summarized briefly, arranged by topic, with emphasis placed on the practical application to law enforcement practices. Each cited case includes a hyperlinked title for those who wish to read the court's full opinion. Links are also provided to two additional Washington State prosecutor and law enforcement case law reviews and references (including this Legal Update). The February and March LED Online Training editions were relatively recently placed on the LED website.

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## UNITED STATES SUPREME COURT

**FOURTH AMENDMENT GENERALLY PROVIDES PRIVACY PROTECTION FOR PERSON DRIVING RENTAL CAR WITH PERMISSION OF RENTER OF CAR, EVEN IF THE RENTAL AGREEMENT DOES NOT COVER THE DRIVER**

Byrd v. United States, ___ S.Ct. ___ , 2018 WL 2186175 (May 14, 2018)

Facts and Proceedings below: (Excerpted from U.S. Supreme Court staff summary, which is not part of the Court's opinion)

> Latasha Reed rented a car in New Jersey while petitioner Terrence Byrd waited outside the rental facility. Her signed agreement warned that permitting an unauthorized driver to drive the car would violate the agreement. Reed listed no additional drivers on the form, but she gave the keys to Byrd upon leaving the building. He stored personal belongings in the rental car's trunk and then left alone for Pittsburgh, Pennsylvania.

> After stopping Byrd [the sole occupant of the car at the time] for a traffic infraction, Pennsylvania State Troopers learned that the car was rented, that Byrd was not listed as an authorized driver, and that Byrd had prior drug and weapons convictions. Byrd also stated he had a marijuana cigarette in the car. The troopers proceeded to search the car, discovering body armor and 49 bricks of heroin in the trunk.
>
> The evidence was turned over to federal authorities, who charged Byrd with federal drug and other crimes. The District Court denied Byrd's motion to suppress the evidence as the fruit of an unlawful search, and the Third Circuit affirmed [the suppression ruling and Byrd's conviction based on his conditional guilty plea]. Both courts concluded that, because Byrd was not listed on the rental agreement, he lacked a reasonable expectation of privacy in the car.

[Paragraphing revised for readability]

ISSUE AND RULING: Under the Fourth Amendment of the federal constitution, did Byrd lack a reasonable expectation of privacy in the car for the sole reason that his name was not listed on the rental agreement, which agreement authorized only the person named on the agreement to operate the car? (ANSWER BY UNANIMOUS U.S. SUPREME COURT: No, the mere fact that he was not listed on the rental agreement or otherwise an authorized driver under the agreement does not defeat his claim of a reasonable expectation of privacy)

Result: Reversal of ruling of Third Circuit, U.S. Court of Appeals, which had affirmed the U.S. District Court's (1) denial of Terrence Byrd's motion to suppress, and (2) judgment of conviction based on Byrd's guilty plea that was conditioned on his right to appeal the suppression ruling.

ANALYSIS: (Excerpted from U.S. Supreme Court staff summary, which is not part of the Court's opinion)

> The mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy.
>
> (a) Reference to property concepts is instructive in "determining the presence or absence of the privacy interests protected by [the Fourth] Amendment."
>
> (b) While a person need not always have a recognized common-law property interest in the place searched to be able to claim a reasonable expectation of privacy in it, legitimate presence on the premises, standing alone, is insufficient because it "creates too broad a gauge for measurement of Fourth Amendment rights." The Court has not set forth a single metric or exhaustive list of relevant considerations, but "[legitimation of expectations of privacy must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."
>
> These concepts may be linked. "One of the main rights attaching to property is the right to exclude others," and "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude." This general property-based concept guides resolution of the instant case.

(c) The Government's contention that drivers who are not listed on rental agreements always lack an expectation of privacy in the car rests on too restrictive a view of the Fourth Amendment's protections. But Byrd's proposal that a rental car's sole occupant always has an expectation of privacy based on mere possession and control would, without qualification, include thieves or others who have no reasonable expectation of privacy.

(1) The Government bases its claim that an unauthorized driver has no privacy interest in the vehicle on a misreading of [Rakas v. Illinois, 439 U.S. 128 (1978)]. [In Rakas], the Court disclaimed any intent to hold that passengers cannot have an expectation of privacy in automobiles, but found that the passengers there had not claimed "any legitimate expectation of privacy in the areas of the car which were searched."

Byrd [the driver in this case], in contrast, was the rental car's driver and sole occupant. His situation is similar to the defendant in [Jones v. United States, 362 U.S. 257 (1960) where Jones] had a reasonable expectation of privacy in his friend's apartment because he "had complete dominion and control over the apartment and could exclude others from it." The expectation of privacy that comes from lawful possession and control and the attendant right to exclude should not differ depending on whether a car is rented or owned by someone other than the person currently possessing it, much as it did not seem to matter whether the defendant's friend in Jones owned or leased the apartment he permitted the defendant to use in his absence.

(2) The Government also contends that Byrd had no basis for claiming an expectation of privacy in the rental car because his driving of that car was so serious a breach of Reed's rental agreement that the rental company would have considered the agreement "void" once he took the wheel. But the contract says only that the violation may result in coverage, not the agreement, being void and the renter's being fully responsible for any loss or damage, and the Government fails to explain what bearing this breach of contract, standing alone, has on expectations of privacy in the car. **[LEGAL UPDATE EDITORIAL NOTE: In the Court's Lead Opinion, it is also pointed out: "As anyone who has rented a car knows, car-rental agreements are filled with long lists of restrictions. Examples include prohibitions on driving the car on unpaved roads or driving while using a handheld cellphone. Few would contend that violating provisions like these has anything to do with a driver's reasonable expectation of privacy in the rental car – as even the Government agrees."]**

(3) Central, though, to reasonable expectations of privacy in these circumstances is the concept of lawful possession, for a "wrongful presence at the scene of a search would not enable a defendant to object to the legality of the search." Thus, a car thief would not have a reasonable expectation of privacy in a stolen car no matter the degree of possession and control. **[LEGAL UPDATE EDITORIAL COMMENT: Officers operating under the restrictions of Washington constitutional law must, however, be wary of the somewhat confusing interpretations of "automatic standing" under Washington appellate court interpretations.]**

The Court leaves for remand [and consideration by the lower courts] the Government's argument that one who intentionally uses a third party to procure a rental car by a fraudulent scheme for the purpose of committing a crime is no better situated than a car thief.

> Also left for remand is the Government's argument that, even if Byrd had a right to object to the search, probable cause justified it in any event. The Third Circuit did not reach this question because it concluded, as an initial matter, that Byrd lacked a reasonable expectation of privacy in the rental car. [The Third Circuit] has discretion as to the order in which the remanded questions are best addressed. **[LEGAL UPDATE EDITORIAL COMMENT: Officers operating under the restrictions of Washington constitutional law must, however, be aware that the Washington Supreme Court long ago established without any loopholes that the Washington constitution does not contain any element of the Fourth Amendment Carroll Doctrine (aka the categorical "probable cause car search exception" to the Fourth Amendment search warrant requirement.**]

[Paragraphing revised for readability; some citations omitted, other citations revised for style]

CONCURRING OPINIONS: Justice Thomas writes a short concurring opinion that is joined by Justice Gorsuch. Justice Alito writes an even shorter separate concurring opinion. The concurring opinions suggest that the Lead Opinion should be narrowly read. Only time and future U.S. Supreme Court decisions will tell.

**LEGAL UPDATE EDITORIAL COMMENT: Washington officers must of course follow any restrictions imposed by Fourth Amendment case law, so the holding in Byrd must be adhered to by Washington officers.**

**FOURTH AMENDMENT VEHICLE SEARCH EXCEPTION TO SEARCH WARRANT REQUIREMENT (AN EXCEPTION THAT DOES NOT EXIST UNDER THE WASHINGTON STATE CONSTITUTION) DOES NOT APPLY WHEN VEHICLE IS LOCATED IN ALCOVE-LIKE, HOME-ABUTTING AREA AT THE TOP OF A DRIVEWAY, AN AREA THAT IS WITHIN THE CURTILAGE OF A HOME**

Collins v. Virginia, ___ S.Ct. ___ , 2018 WL 2402551 (May 29, 2018)

**LEGAL UPDATE INTRODUCTORY EDITORIAL COMMENT:**

**In this case, the U.S. Supreme Court rules that the Fourth Amendment's vehicle search exception to the warrant requirement does not apply where a vehicle is located in a part of a driveway that is within the curtilage of a home. As I noted in the above entry regarding the Byrd Supreme Court decision, under article I, section 7 of the Washington Constitution, there is no car search exception to the search warrant exception under any circumstances except in actual exigent circumstances. See State v. Tibbles, 169 Wn.2d 364 (2010) (actual exigency is generally required for a warrantless, non-consenting car search); State v. Ringer, 100 Wn.2d 686 (1983).**

Facts: (Excerpted, with minor edits, from summary by U.S. Supreme Court staff; the summary is not part of the Supreme Court's opinion; paragraphing revised for style)

> During the investigation of two traffic incidents involving an orange and black motorcycle with an extended frame, Officer David Rhodes learned that the motorcycle likely was stolen and in the possession of petitioner Ryan Collins. Officer Rhodes discovered photographs on Collins' Facebook profile of an orange and black motorcycle parked in the driveway of a house. [The officer] drove to the house and parked on the street.

> From there, he could see what appeared to be the motorcycle under a white tarp parked in the same location as the motorcycle in the photograph.
>
> Without a search warrant, Officer Rhodes walked to the top of the driveway [into an alcove-like area bordered on two sides by brick walls and on the third side by the house], removed the tarp, confirmed that the motorcycle was stolen by running the license plate and vehicle identification numbers. [The officer] took a photograph of the uncovered motorcycle, replaced the tarp, and returned to his car to wait for Collins. When Collins returned, Officer Rhodes arrested him.

Supreme Court majority opinion's description of the alcove-like area where the motorcycle was located:

> According to photographs in the record, the driveway runs alongside the front lawn and up a few yards past the front perimeter of the house. The top portion of the driveway that sits behind the front perimeter of the house is enclosed on two sides by a brick wall about the height of a car and on a third side by the house. A side door provides direct access between this partially enclosed section of the driveway and the house. A visitor endeavoring to reach the front door of the house would have to walk partway up the driveway, but would turn off before entering the enclosure and instead proceed up a set of steps leading to the front porch. When Officer Rhodes searched the motorcycle, it was parked inside this partially enclosed [alcove-like] top portion of the driveway that abuts the house

Proceedings below: (Excerpted from summary by U.S. Supreme Court staff; the summary is not part of the Supreme Court's opinion)

> The trial court denied Collins' motion to suppress the evidence on the ground that Officer Rhodes violated the Fourth Amendment when he trespassed on the house's curtilage to conduct a search, and Collins was convicted of receiving stolen property. The Virginia Court of Appeals affirmed. The State Supreme Court also affirmed, holding that the warrantless search was justified under the Fourth Amendment's automobile exception.

ISSUE AND RULING: The motorcycle that was the target of the investigation was located in an alcove-like area at the top of the driveway bordering the home. The alcove provided some privacy protection of a side-entry-door to the home. This location was in the curtilage of the home. Was the officer's removal of a tarp from the motorcycle and scrutiny of the license plate and VIN justified based on the Fourth Amendment probable cause vehicle search exception to the Fourth Amendment? (ANSWER BY SUPREME COURT: No, rules an 8-1 majority)

Result: Reversal of Virginia conviction of Ryan Collins for receiving stolen property.

ANALYSIS BY MAJORITY JUSTICES: (Excerpted from summary by U.S. Supreme Court staff; the summary is not part of the Supreme Court's opinion; paragraphing revised for style)

> The automobile exception does not permit the warrantless entry of a home or its curtilage in order to search a vehicle therein.
>
> (a) This case arises at the intersection of two components of the Court's Fourth Amendment jurisprudence: the automobile exception to the warrant requirement and the protection extended to the curtilage of a home. In announcing each of the automobile

exception's justifications – i.e., the "ready mobility of the automobile" and "the pervasive regulation of vehicles capable of traveling on the public," California v. Carney, 471 U. S. 386, 390, 392 – the Court emphasized that the rationales applied only to automobiles and not to houses, and therefore supported their different treatment as a constitutional matter. When these justifications are present, officers may search an automobile without a warrant [under the Fourth Amendment] so long as they have probable cause.

Curtilage – "the area 'immediately surrounding and associated with the home'" – is considered "part of the home itself for Fourth Amendment purposes." . . . . Thus, when an officer physically intrudes on the curtilage to gather evidence, a Fourth Amendment search has occurred and is presumptively unreasonable absent a warrant. .

(b) As an initial matter, the part of the driveway where Collins' motorcycle was parked and subsequently searched is curtilage. When Officer Rhodes searched the motorcycle, it was parked inside a partially enclosed top portion of the driveway that abuts the house. Just like the front porch, side garden, or area "outside the front window," that enclosure constitutes "an area adjacent to the home and 'to which the activity of home life extends.'" . . . .

Because the scope of the automobile exception extends no further than the automobile itself, it did not justify Officer Rhodes' invasion of the curtilage. Nothing in this Court's case law suggests that the automobile exception gives an officer the right to enter a home or its curtilage to access a vehicle without a warrant. Such an expansion would both undervalue the core Fourth Amendment protection afforded to the home and its curtilage and " 'untether' " the exception " 'from the justifications underlying'" it. . . .

This Court has similarly declined to expand the scope of other exceptions to the warrant requirement. Thus, just as an officer must have a lawful right of access to any contraband he discovers in plain view in order to seize it without a warrant . . . and just as an officer must have a lawful right of access in order to arrest a person in his home . . . . so, too, an officer must have a lawful right of access to a vehicle in order to search it pursuant to the automobile exception.

To allow otherwise would unmoor the exception from its justifications, render hollow the core Fourth Amendment protection the Constitution extends to the house and its curtilage, and transform what was meant to be an exception into a tool with far broader application.

(c) Contrary to Virginia's claim, the automobile exception is not a categorical one that permits the warrantless search of a vehicle anytime, anywhere, including in a home or curtilage. . . . . Also unpersuasive is Virginia's proposed bright line rule for an automobile exception that would not permit warrantless entry only of the house itself or another fixed structure, e.g., a garage, inside the curtilage.

This Court has long been clear that curtilage is afforded constitutional protection, and creating a carve-out for certain types of curtilage seems more likely to create confusion than does uniform application of the Court's doctrine. Virginia's rule also rests on a mistaken premise, for the ability to observe inside curtilage from a lawful vantage point is not the same as the right to enter curtilage without a warrant to search for information not otherwise accessible.

Finally, Virginia's rule automatically would grant constitutional rights to those persons with the financial means to afford residences with garages but deprive those persons without such resources of any individualized consideration as to whether the areas in which they store their vehicles qualify as curtilage.

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## NINTH CIRCUIT, UNITED STATES COURT OF APPEALS

**PRETEXTUAL INVENTORY SEARCH OF LAWFULLY IMPOUNDED CAR VIOLATES FOURTH AMENDMENT: OFFICERS EXPLICITLY ADMITTED THAT THEY SEIZED ITEMS FROM CAR IN EFFORT TO SEEK A SEARCH WARRANT TO FIND EVIDENCE OF CRIMINAL ACTIVITY RELATING TO DRUGS AND DRUG-DEALING**

United States v. Johnson, ___ F.3d ___ , 2018 WL ___ (9th Cir., May 14, 2018)

Facts and Proceedings below:

Defendant Johnson was the subject of an arrest warrant. Officers were aware of Johnson's history of crime involving drugs. They surveilled Johnson. Johnson came out of the residence that they were watching. He got into a car and started driving. Officers stopped Johnson's car, and he came to a stop in a place on the roadway where the car was partially blocking traffic. Johnson could not provide contact information for the car's owner. Both of these latter facts (blocking of traffic, inability to give contact information for owner) supported the officers under local agency policy in impounding the car and towing it to an impound lot.

Prior to the tow of the car, the officers relied on agency policy in conducting an inventory search. However, as is explained below in the Analysis section of this Legal Update entry, the officers admitted in their reports and in a search warrant application and later testimony that the reason for seizing the items that they did – and in not seizing other items – was their pursuit of a criminal investigation of defendant Johnson.

From the interior of the car, the officers collected a combination stun gun and flashlight, a glass pipe with white residue, a jacket, and two cellphones. From the trunk, the officers collected a backpack and a duffel bag. Officer Corona testified that, when he moved the backpack and duffel bag in order to search for other items in the trunk, the bags felt heavy and the backpack made a metallic "clink" when he set it down on the pavement. The officers left behind in the trunk another bag, as well as some electronic equipment in the trunk.

The police agency stored each of the seized pieces of property in a law enforcement property and evidence warehouse. The $7,100 that officers seized in a search of Johnson's person incident to arrest was taken into custody by the County Sherriff's Office. Officer Corona recorded each item seized on an accompanying arrest report; the Sheriff's Office prepared a property receipt for the $7,100 in seized cash.

A week later, Officer Corona submitted an affidavit to secure a warrant to search the seized backpack, duffel bag, and cell phones. The affidavit referred to a 2009 police report (which Corona read after arresting Johnson) stating that Johnson had previously been found with cash, weapons, and drugs in a safe concealed in his vehicle. Officer Corona's affidavit stated that, based on the circumstances of Johnson's recent arrest, he had probable cause to believe the

bags seized from the trunk would contain similar lockboxes, and that the phones would contain evidence of drug dealing.

A warrant was signed by a local magistrate judge, and a search of the backpack revealed a small safe containing two bags of methamphetamine, drug-packaging materials, syringes, and a digital scale. The backpack also contained paperwork with notes on court cases that corresponded to several criminal prosecutions of Johnson. The duffel bag contained Johnson's personal items, and one of the cellphones contained text messages regarding drug trafficking.

**LEGAL UPDATE EDITORIAL NOTE: Much of the description above is taken from the Ninth Circuit panel's Lead Opinion.**

ISSUE AND RULING: Officers admitted – in their reports and in a search warrant application and later testimony – that the reason for seizing the items that they did, and in not seizing other items, was their pursuit of a criminal investigation of defendant Johnson. Do these facts make the seizure of items in the inventory pretextual in violation of the Fourth Amendment law on impound-inventory searches? (ANSWER BY NINTH CIRCUIT PANEL: Yes, and therefore the evidence must be suppressed unless some other exception to the Fourth Amendment warrant requirement justifies the seizure of the items.)

Result: Reversal of Oregon U.S. District Court suppression ruling regarding inventory seizures from car, and reversal of conviction and sentence of Mark Patrick Johnson for possession with intent to distribute methamphetamine. The case is remanded to the District Court for further proceedings that could look at other theories in support of the car search.

ANALYSIS: (Excerpted from Ninth Circuit panel's Lead Opinion)

> Johnson . . . argues that . . . the officers improperly searched the car in an effort to find evidence of criminal activity. Johnson does not dispute that, before impounding the car, the officers were required by [police agency] policy to complete an inventory of the "personal property and contents of open containers" found within it and were authorized to seize the items found for safekeeping. And indeed, we have previously held that [the agency's] inventory-search policies are valid for Fourth Amendment purposes, and that evidence found or seized in compliance with them may be admitted against a criminal defendant. Johnson argues, however, that the officers in fact used this administrative inventory process not to identify and to safeguard his possessions, but instead merely as a pretext to gather evidence of crime.
>
> Johnson raises a number of points in support of his argument, including that the officers' improper motivations are evidenced by their purported failure to comply with various provisions of [the agency's] inventory policy (for example by failing to list items in an appropriate manner and by failing to provide property receipts for all items seized). However, we need not consider the merits of those arguments – or whether any such violations of [the agency's] policy would require suppression of the evidence found – because the officers themselves explicitly admitted that they seized items from the car in an effort to search for evidence of criminal activity.
>
> First, the arrest report prepared by Officer Corona stated that he "believed it likely that the bags [seized from the trunk] contained evidence of restricted weapons and drug possession/sales," that he believed the seized cell phones may have been "used to facilitate criminal activity and evidence [may] be found stored on the phones," and that

all of the seized items "were placed into evidence." The affidavit Officer Corona submitted in support of his application for a search warrant further confirmed that the items had been "seized pending further investigation," rather than for safekeeping. And at the suppression hearing, Officer Corona specifically testified that he seized the two bags from the car's trunk to hold onto them until he could secure a search warrant, because he "believe[d] that likely there was evidence of a crime inside the two bags."

Likewise, Multnomah County Deputy Adam Swail, who prepared the property receipt for the $7,100, testified that he assisted with taking that money "as evidence." He explained that his office held the money to help facilitate any civil forfeiture proceedings against it (presumably because it was believed to be the proceeds of a drug crime).

Indeed, the prosecution's own arguments before the district court emphasized the evidentiary motives behind these seizures. In both its brief in opposition to the motion to suppress and at the accompanying hearing, the government insisted that the money, the bags, and the cell phones were all seized from the car as "evidence" of a suspected crime. Even on appeal, the government continues to state that, during his inventory search, Officer Corona "located evidence of a crime," and that he seized the bags and placed them "in the evidence room" in order to apply for a search warrant. In short, the officers and the government's attorneys have made clear throughout this case that the items taken from Johnson's car were seized and treated specifically as evidence of a crime-not as property held for safekeeping.

Under [Ninth Circuit case law], a suspicionless inventory search does not permit officers to search or to seize items simply because they believe the items might be of evidentiary value. As explained above, the purpose of such a search must be unrelated to criminal investigation; it must function instead to secure and to protect an arrestee's property (and likewise to protect the police department against fraudulent claims of lost or stolen property). . . . . Thus, the officers' statements directly admitting that they searched and seized items from Johnson's car specifically to gather evidence of a suspected crime (and not to further such permissible caretaking motives) are "sufficient to conclude that the warrantless search of the car was unreasonable." . . . .

[Court's footnote: *The officers' statements as to their investigative motivations are further buttressed by comparing the items that were seized and logged on the property inventory form with those that were not. Indeed, there seems to be nothing connecting the items that were seized other than their apparent relevance to Johnson's later drug charges. For example, two bags from the trunk were seized – each of which contained incriminating evidence – while a third bag was left behind. Two cell phones and an accompanying battery pack were seized but other electronics (a GPS device, a DVD player, and a power station for tools) were not*.]

In the face of such evidence, it is clear to us that the officers' decision to seize the money, bags, and cellphones from Johnson and his car would not have occurred without an improper motivation to gather evidence of crime. **[LEGAL UPDATE EDITORIAL COMMENT: Seizure of the money in the search incident to arrest clearly was permissible under the Fourth Amendment; the Ninth Circuit's Lead Opinion gets a little careless or maybe carried away here in mentioning the seizure of the money.]**

In light of our decision in [U.S. v. Orozco, 858 F.3d 1204 (9th Cir. 2017)] we conclude that the officers' search and seizure of such evidence cannot be justified under the

inventory-search doctrine. Because the government has not offered any justification for the seizure of such property other than the inventory-search doctrine, we conclude that the district court erred in denying Johnson's motion to suppress. The evidence gathered from Johnson and his vehicle was inadmissible.

CONCURRING OPINION FOR TWO OF THE THREE JUDGES ON THE THREE-JUDGE PANEL: Two of the three judges on the Ninth Circuit panel join in a concurring opinion that argues that the pretext ruling of the Ninth Circuit last year in U.S. v. Orozco, 858 F.3d 1204 (9th Cir. 2017) is not consistent with the U.S. Supreme Court's most recent rulings regarding the reasonableness construct of the Fourth Amendment. The concurring opinion in Johnson argues that the Ninth Circuit should use this case to overrule the Ninth Circuit ruling in Orozco.

**LEGAL UPDATE EDITORIAL NOTES ABOUT OTHER RESEARCH SOURCES: The Washington Supreme Court has interpreted the Washington constitution as imposing restrictions on impound-inventory searches in addition to those imposed by the Fourth Amendment. For general information on impound-inventory issues for Washington law enforcement officers and prosecutors, see pages 329-336 of "Confessions, Search, Seizure and Arrest: A Guide for Police Officers and Prosecutors," May 2015, a collection of case law by Pamela Loginsky, staff attorney for the Washington Association of Prosecuting Attorneys. The collection of cases is accessible both on the website of WAPA and on the Criminal Justice Training Commission's Internet LED page.**

**Also accessible on the CJTC LED page is the "Law Enforcement Legal Update Outline" by your Legal Update editor with cases on arrest, search, seizure, and other topical areas of interest to Washington law enforcement officers, plus a chronology of independent grounds rulings under Article I, Section 7 of the Washington Constitution. See pages 49-50 for some case citations and brief summaries of rulings in impound-inventory cases.**

**CIVIL RIGHTS ACT CIVIL LIABILITY: APPLICATION OF DEADLY FORCE BY OFFICER HELD OBJECTIVELY REASONABLE UNDER THE FOURTH AMENDMENT BECAUSE A REASONABLE OFFICER COULD HAVE REASONABLY FEARED THAT PLAINTIFF HAD A GUN AND WAS TURNING TO SHOOT THE OFFICER**

Easley v. City of Riverside, ___ F.3d ___ , 2018 WL ___ (9th Cir., May 18, 2018)

Facts: (Excerpted from Ninth Circuit majority opinion]

> On the night of December 22, 2011, at around 8:20 p.m., Macias and his partner, Officer Anthony Watkins ("Watkins"), were on patrol in the 12th Street area of Riverside, California, in their police car. They noticed a pink Chevrolet Monte Carlo with what appeared to be illegally-tinted windows. Macias thought he recognized the driver, Stephania Session ("Session"), from a prior encounter. Easley, her husband, was a passenger in the car. As the Chevrolet passed the police car, Macias shone his flashlight into the car and the passenger leaned back in the seat.
>
> Macias and Watkins began following the Chevrolet, which made a U-turn, sped up, and entered a strip mall parking lot. When the Chevrolet sped across the parking lot, fishtailing and barely avoiding hitting another car, the officers activated the patrol car's lights and sirens. The Chevrolet did not initially heed the lights and sirens, but then it suddenly stopped.

> Easley bolted out of the car and, clutching the waistband of his pants with his right hand, ran away from the patrol car. Macias and Watkins exited their patrol car and Watkins shouted "Gun" or "He's got a gun." [Court's footnote: *The dashboard camera video entered as an exhibit in the trial court records that Watkins shouted these words to Macias*.]
>
> Macias pursued Easley on foot. Easley continued to clutch his waistband with his right hand. However, with his left hand he removed an object, later determined to be a gun, from his right pants' pocket and flung the item to his left. Macias fired three shots, striking Easley twice in the right arm and once in the back. Easley was shot within two to four seconds of throwing the gun.

[Footnote omitted]

Proceedings below:

Easley and Session filed a Civil Rights Act lawsuit under 42 U.S.C. § 1983 alleging, among other claims, the unreasonable and excessive use of force in violation of the Fourth and Fourteenth Amendments under 42 U.S.C. § 1983. The District Court ultimately issued an order determining that there was no genuine issue of material fact for determination by a jury, and that Officer Macias was entitled to qualified immunity and judgment as a matter of law.

ISSUE AND RULING: Viewing the factual allegations in the best light for the plaintiffs, was the application of deadly force by Officer Macias objectively reasonable under the Fourth Amendment because a reasonable officer may have reasonably feared that plaintiff had a gun and was turning to shoot him? (ANSWER BY NINTH CIRCUIT: Yes, rules a 2-1 majority)

Result: Affirmance of ruling of summary judgement for Officer Macias by U.S. District Court (Central District of California).

ANALYSIS: (Excerpted from Ninth Circuit majority opinion)

> Courts engage in a two-pronged analysis to determine whether qualified immunity applies: "[O]fficers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018). The second prong requires us to analyze two discrete sub-elements: "whether the law governing the conduct at issue was clearly established" and "whether the facts as alleged could support a reasonable belief that the conduct in question conformed to the established law." . . . .
>
> On de novo review of a district court's summary judgment ruling, this Court "must view the evidence, including all reasonable inferences, in favor of the nonmoving party." . . . . Consequently, at summary judgment, an officer may be denied qualified immunity in a § 1983 action only if (1) the facts alleged, taken in the light most favorable to the party asserting injury, show that the officer's conduct violated a constitutional right; and (2) the right at issue was clearly established at the time of the incident such that a reasonable officer would have understood his conduct to be unlawful in that situation. . .
>
> . . . .

> Here, taking the facts and allegations in the light most favorable to Easley, Macias' use of deadly force was objectively reasonable. It is an undisputed fact that Macias was concerned about the presence of a gun. Watkins, Macias's partner, had shouted "Gun" or "He's got a gun" when Easley ran away from the Chevrolet and the patrol car. Macias then saw Easley grab his waistband as he ran. It is undisputed that as he ran, Easley pulled an object from his right pants' pocket with his left hand and threw it away from his body.
>
> Macias shot Easley within two to four seconds of the object leaving Easley's hand. Easley stated that he threw the gun in a motion similar to throwing a Frisbee across his body; this would necessarily involve some upper body or shoulder movement. Based on these undisputed facts, a reasonable officer may have reasonably feared that Easley had a gun and was turning to shoot him. Thus, viewing the critical evidence in the light most favorable to Easley, we conclude that Macias is entitled to qualified immunity. We need not, and do not, resolve the remaining disputed issues of fact in Macias' favor to reach this result.
>
> As the Supreme Court noted in [Graham v. Connor, 490 U.S. 386, 397 (1989)] "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." This was just such a situation. Macias' application of deadly force was a proportional response because "the Fourth Amendment does not require" a police officer to be "omniscien[t], and absolute certainty of harm need not precede [an officer's] act of self-protection." . . . .

[Some citations omitted, other citations revised for style; footnote omitted]

DISSENTING OPINION: The dissenting judge argues that the case should be remanded for trial based on what he perceives to be genuine, material factual disputes in the record that the he asserts the U.S. District Court and the majority either ignored or improperly resolved.

**CIVIL RIGHTS ACT CIVIL LIABILITY: PLAINTFF'S ALLEGATIONS HELD SUFFICIENT TO GET TO TRIAL ON HIS CLAIM THAT A SERGEANT: (1) USED A STAGED "SHOW-UP" TO MANIPULATE A WITNESS INTO MISIDENTIFYING HIM AS A MURDERER, (2) FABRICATED AN INCRIMINATING STATEMENT BY PLAINTIFF THAT PUT PLAINTIFF AT THE SCENE OF THE MURDER, AND (3) MEMORIALIZED THE LIE IN FALSIFIED INVESTIGATIVE NOTES**

Caldwell v. City and County of San Francisco, ___ F.3d ___ , 2018 WL ___ (9th Cir., May 11, 2018)

In 2010, the Superior Court of California, County of San Francisco, granted Maurice Caldwell's petition for a writ of habeas corpus and ordered his release after he served nearly 20 years in prison for murder. Caldwell argued that he was entitled to the writ on the grounds of, among other things, ineffective assistance of counsel, actual innocence and newly discovered evidence undermining the prosecution's case. The Superior Court held that Caldwell's trial attorney was ineffective on account of failing to investigate potential alibi and other eyewitnesses that

supported Caldwell's arguments that he was not present and was not the shooter, but did not rule on Caldwell's other grounds in support of his petition.

After his release from prison, Caldwell filed a Civil Rights lawsuit in federal court against law enforcement personnel for the City and County of San Francisco in a federal district court. The district court granted summary judgment to law enforcement, but the Ninth Circuit reversed in part.

A staff summary that is not a part of the Ninth Circuit opinion summarizes the unanimous three-judge panel's opinion as follows:

> The panel affirmed in part and reversed in part the district court's summary judgment and remanded in an action brought pursuant to 42 U.S.C. § 1983 alleging that San Francisco Police Department officials fabricated evidence against plaintiff during his investigation for murder.
>
> Plaintiff spent nearly twenty years in prison as a result of his murder conviction. He brought a § 1983 action after a state court granted his petition for writ of habeas corpus and ordered his release. Plaintiff alleged that a police sergeant deliberately manufactured a "show-up" by exposing him to a witness with the purpose of manipulating that witness into misidentifying plaintiff as the murder suspect. He further alleged that the sergeant deliberately fabricated a statement by plaintiff that placed plaintiff at the site of the shooting. Finally, plaintiff alleged that his interaction with police inspectors during a photo lineup were so coercive that they rose to the level of deliberate fabrication of evidence.
>
> In reversing the district court's grant of summary judgment in favor of the police sergeant, the panel held that drawing all reasonable inferences in favor of plaintiff, he established that the sergeant had a motive to retaliate against him. He further raised a genuine issue as to whether the sergeant arranged the show up, deliberately fabricated the statement and memorialized it in falsified notes. The panel held that plaintiff rebutted any presumption of prosecutorial independence and established a triable issue as to whether the allegedly fabricated identification and falsified statements caused him harm.
>
> In affirming the district court's summary judgment as to the police inspectors, the panel held that their conduct during a photo line-up was not so coercive that it rose to the level of fabricated evidence.

As with all Civil Rights Act lawsuits involving summary judgment rulings for the government on qualified immunity, the factual allegations are viewed in the best light for the plaintiff suing the government. Also, as is often the situation in these type of cases, the factual allegations are complex, conflicting and extensive. With the exception of the next paragraph of this entry, this Legal Update entry does not attempt to describe or excerpt those factual allegations. Readers interested in the Ninth Circuit's Caldwell decision will want to read (1) the Ninth Circuit's opinion discussing those allegations, and (2) the legal ramifications of those allegations viewed in the best light for Mr. Caldwell.

Passages of interest in the Ninth Circuit opinion: "Even if the police sergeant's notes were wrong, the city of San Francisco argued it was likely the result of human error, not an intentional effort to frame Caldwell for murder." The panel appears to disagree, stating: "There is a wide gulf between [1] telling someone you were at your uncle's house nearby when a shooting

occurred and [2] telling someone you were 'present' for a shooting and were 'with the suspects dealing drugs.'"

Result: Reversal in part, affirmance in part of U.S. District Court's summary judgment rulings for the government against plaintiff, Maurice Caldwell; case remanded for trial.

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## WASHINGTON STATE SUPREME COURT

**CONSENT REQUEST TO ENTER RESIDENCE TO INVESTIGATE REPORTED ASSAULT-ROBBERY: OFFICERS DID NOT NEED TO GIVE THE 3-R FERRIER CONSENT WARNINGS, AND SUBSEQUENT SEARCH STAYED WITHIN THE SCOPE OF THE VOLUNTARY CONSENT; ISSUE UNDER "PROTECTIVE SWEEP" DOCTRINE IS AVOIDED, BUT COURT WARNS REGARDING LIMITS OF PROTECTIVE SWEEPING**

State v. Blockman, ___ Wn.2d ___ , 2018 WL ___ (May 10, 2018)

**LEGALUPDATE INTRODUCTORY EDITORIAL COMMENT: Criminal defense and civil libertarian groups filed friend-of-the-court briefs that sought to make this case a means to the end of strictly limiting the officer-protection-based protective sweep doctrine for residential sweeps under Maryland v. Buie, 494 U.S. 325 (1990). They asked the Court to limit protective sweeps to incident-to-arrest circumstances, i.e., where there has been a contemporaneous arrest in or near the residence. The Washington Supreme Court declines to resolve that protective sweep issue.**

**Instead, the Court unanimously concludes that this case should be resolved for the State exclusively under the consent search exception to the search warrant requirement. The Court holds that under the facts of this case (1) the officers obtained voluntary consent from a resident to enter her residence to investigate an assault-robbery complaint, and (2) the full 3-R warnings required under the Washington constitution per State v. Ferrier, 136 Wn.2d 103 (1998)) (requiring advice in knock-and-talks of consent rights to Refuse, Restrict scope, and Retract) were not required for entry to talk to the resident about a possible assault and robbery. The Court holds further that, once inside the residence, the officers obtained further voluntary consent from the resident to conduct a sweep for other persons in the residence. The Court also concludes that the defendant (discovered in a bedroom selling drugs) was not a subtenant of the resident or someone who would have a valid expectation of privacy in the apartment. Therefore, the resident could consent to a search of an area occupied by the defendant.**

**Accordingly, it was not necessary for the Court to determine if the facts independently justified a protective sweep exclusively on an officer-protection rationale. However, both the Lead Opinion and the Concurring Opinion express concerns about law enforcement officers practices expanding the protective sweep doctrine beyond its limited rationale.**

Facts and Proceedings below: (Excerpted from Supreme Court's Lead Opinion)

> Teresa Green contacted police officers, reporting the she was assaulted and robbed while in Burton's apartment. Green identified Burton and James Marlowe as the assailants and notified police that they, along with Blockman, were likely still in the apartment.

Uniformed officers went to Burton's apartment to obtain more information about the alleged robbery and assault [of Green]. Upon hearing why the officers were at her door. Burton invited them into her apartment, saying, "I can't believe [Green] called the cops" and "[y]ou can search everything. I don't have her money." According to the officer's testimony, the police told Burton, "You don't have to let us in." She responded, "'No, come on in." **[LEGAL UDPATE EDITORIAL NOTE: In the analysis excerpted below, the Court concludes that the officers were not required to give the resident the full Ferrier consent search warnings.]**

After entering the apartment and briefly conversing with Burton, the officers asked if there was anyone else in the apartment. Burton responded that two other people were in the back bedroom. Burton did not specify whether the two people were Marlowe and Blockman, as Green had suggested earlier.

As the officers began the sweep, one officer proceeded in the hallway toward an open bedroom, and the officer witnessed a woman placing a $20 bill on a coffee table and Blockman holding a clear plastic bag containing a rock-like substance, which later tested positive for cocaine. As the officer announced he was with Tacoma Police, Blockman allegedly put his hands under the table rapidly. Blockman was seized and removed from the room.

Following his encounter with Blockman, the police officer further questioned Burton about the alleged robbery. The officer testified that he asked Burton, "Are you giving me consent to search?" and told her she could limit the scope of the search and stop the search at any time. Burton then signed a warrantless search consent form. **[LEGAL UPDATE EDITORIAL NOTE: One can assume that this law enforcement agency form provided full Ferrier consent warnings, i.e., warning of right to refuse, right to restrict scope, and right to retract at any time.]**

At trial, Blockman moved to suppress the evidence acquired during his interaction with the officers in Burton's apartment. His argument focused on the officer's failure to provide [the three consent search warnings of State v. Ferrier, 136 Wn.2d 103 (1998)] before entering the house. The trial court denied the motion, ruling that the officer "had concerns for his safety due to report of at least two unknown individuals . . . somewhere in the residence" and "was invited by Ms. Burton to conduct a protective sweep." The trial court found the protective sweep reasonable to ensure no one would ambush the officers while they were questioning Burton.

[Footnote by Washington Supreme Court: *The officer then asked if he could take a look, stating that they "always do a protective sweep" and that it is "standard procedure" for officers to conduct protective sweeps. It is debatable whether the officer's incorrect assertion of the applicability of protective sweeps impaired Burton's consent in any meaningful way. However, no one has challenged the trial court's conclusion of facts regarding Burton's consent*.]

On appeal, Blockman focused mainly on the warrantless protective sweep. The Court of Appeals affirmed, holding that "nothing in the rationale of [Maryland v. Buie, 494 U.S. 325 (1990)] or its progeny suggests that an arrest is an indispensable prerequisite" for conducting a protective sweep. State v. Blockman, 198 Wn. App. 34, 39 (2017).

[One footnote omitted; citations revised for style; emphasis added]

ISSUES AND RULINGS: (1) The officers sought consent to enter the residence of Burton in order to investigate alleged victim Green's report of an assault and robbery that day inside the residence. Was Burton's consent to enter the residence valid even though the officers did not give full Ferrier consent search warnings? (ANSWER BY SUPREME COURT: Yes, rules a unanimous Court: (1) this was a request for entry to talk about a suspected assault and robbery and not a Ferrier knock-and-talk situation seeking consent to enter and search for drugs or contraband, and (2) the consent was voluntary under the totality of the circumstances)

(2) After lawfully obtaining a voluntary consent to enter the residence, the officers sought consent to conduct a protective sweep of the residence for other persons in the residence. Under the totality of the circumstances, was the consent voluntary? (ANSWER BY SUPREME COURT: Yes)

Result: Affirmance (on different grounds) of Court of Appeals decision that affirmed Hollis Blockman's Pierce County Superior Court conviction for unlawful possession of cocaine with intent to deliver within 1,000 feet of a school bus route stop.

ANALYSIS IN SUPREME COURT'S LEAD OPINION:

> 1. *Ferrier did not apply to the initial contact and consent given*
>
> First, warnings [under State v. Ferrier, 136 Wn.2d 103 (1998)] were not required prior to the officers entering Burton's home. In Ferrier, officers went to a suspect's home with the intention of searching it after receiving information regarding a possible marijuana grow operation being conducted in the home. Since the officers thought they would not be able to obtain a search warrant without including the name of their informant, the suspect's son, the officers instead devised a plan where they would do a "knock and talk" in an effort to convince Ferrier to allow them into the home. The officers appeared at Ferrier's house wearing uniforms, black "raid jacket[s]," and vests emblazoned with the word "police." In light of the "knock and talk's sometimes unavoidable, inherently coercive nature, this court held that "article I, section 7 is violated whenever the authorities fail to inform home dwellers of their right to refuse consent to a warrantless search."
>
> Later, in State v. Khounvichai, this court clarified that Ferrier warnings are required only when law enforcement officers seek entry to conduct a consensual search for contraband or evidence of a crime. 149 Wn.2d 557, 566 (2003). These warnings are not required when the police are seeking entry into a home to question a resident in the course of investigating a crime.
>
> Here, the officers approached Burton's apartment as a result of Green's report of a violent robbery and assault committed by three people who were likely still in the apartment. At the time of initial contact, the officers intended only to question Burton about the alleged crime. They did not approach the apartment seeking to enter or intending to conduct a search. After Burton opened the door and saw the officers, she invited them in. The officers assured Burton, '"You don't have to let us in,"' she responded, "No, come on in"'. Accordingly, officers were not required to give Burton Ferrier warnings before entering the apartment since they were intending only to question her, not search her apartment without a warrant.

2. *Burton's unambiguous consent to officers searching her apartment makes it unnecessarv to decide the applicabilitv of Buie in nonarrest situations*

Second, Blockman contends that the protective sweep exception to the warrant requirement set forth in [Maryland v. Buie, 494 U.S. 325 (1990)] is valid only if it occurs incident to arrest. . . . . It is constitutional for law enforcement officers to either conduct a quick-look search of the spaces immediately adjoining the place of arrest without probable cause or reasonable suspicion or conduct a cursory sweep of a home incident to arrest where they have reasonable suspicion to believe the home is harboring a dangerous third person. .

We recognize that Division One's decision in this case created a split among the [Washington] Court of Appeals concerning whether a Buie protective sweep warrant exception extends to nonarrest contexts. . . . . However, because the issue before us is resolved by Burton's unequivocal consent to the officer's search, it is unnecessary for us to decide the split. [Court's footnote: *We also recognize the split among the federal courts*. . . . .]

**We note, however, the officer's declaration to Burton that they "always do a protective sweep" and that it is "standard procedure" to do protective sweeps was erroneous. Despite differing interpretations regarding the scope of Buie, it is clear that protective sweeps are a limited exception to the warrant requirement. In order to conduct a valid protective sweep, officers who have reasonable suspicion to believe a home may harbor a dangerous third person may conduct a cursory sweep of a home. Or, if the officers do not have probable cause or reasonable suspicion, they are permitted to conduct a quick-look search of the spaces immediately adjoining the place of arrest. Here, the officer's indication of protective sweeps being standard procedure was improper and potentially misleading.**

While courts are still undecided as to whether the protective sweep warrant exception explicated in Buie extends beyond arrest situations, this case is not the proper vehicle to reconcile the split. As a result of Burton's unambiguous consent to officers searching her apartment, it is unnecessary for us to decide the applicability of Buie in nonarrest situations.

3. *Consent was given to conduct a valid protective sweep*

Lawful consent is one of the few recognized exceptions to the warrant requirement. Our court has set out three requirements for a valid consensual search: (1) the consent must be voluntary, (2) the consent must be granted by a party having authority to consent, and (3) the search must be limited to the scope of the consent granted. Thus, officers must strictly abide by the scope of the proffered consent. Accordingly, an officer who receives consent to enter the entryway of a home cannot exceed the scope of the consent and begin searching the rest of the home without cause.

Here, the trial court entered undisputed findings of fact. Most notably, finding of fact 8 states:

> [The officer] was invited by Ms. Burton to conduct a protective sweep. [The officer] conducted a protective sweep to make sure no one would jump out and surprise them while he was questioning Ms. Burton. [His] gun was still in its holster when he conducted the protective sweep.
>
> Burton, as the tenant of the apartment, had authority to consent to a search or sweep. Blockman, however, was not described as Burton's tenant or as someone who would have a valid expectation of privacy in the apartment. Knowing the officers came to her apartment to ask questions about the robbery and assault, Burton invited them in, stating, "You can search everything." This presentation of facts, including Burton's consent to the officers' entry and protective sweep, was unchallenged.
>
> There is no testimony or evidence suggesting Burton withdrew her invitation or intended to limit the scope of her consent. Had she withdrawn her consent at any point, the outcome may be different. As mentioned earlier, a search cannot exceed the proffered consent . . . .Blockman's counsel confirmed at oral argument that error was not assigned to the trial court's findings of fact.
>
> Instead of revoking her consent, Burton continued to affirm it. Based on these facts, Burton's consent fits within the consent exception to the warrant requirement.

[Some citations omitted; other citations revised for style; footnote omitted; emphasis added]

CONCURRING OPINION:

As I noted above in my introductory comments, the Concurring Opinion by Justice Gordon McCloud (joined by Justice Wiggins) echoes the concerns of the Lead Opinion about law enforcement officers' expanding the protective sweep doctrine beyond its reasonable scope.

**LEGAL UPDATE EDITORIAL COMMENT: The concurrence also agrees with what in my opinion is an unsupportable argument made in friend-of-the-court briefs. The argument is that the Washington Supreme Court decision in State v. Eserjose, 171 Wn.2d 907 (2011) somehow impliedly decided a protective sweep issue even though that issue was not presented to the Eserjose Court and was not, at least in my reading of Eserjose, by any stretch of reasonable interpretation impliedly resolved by that Court. Unfortunately, the Lead Opinion in Blockman, perhaps out of a combination of efficiency and of politeness, comity and social graciousness among Supreme Court justices, does not address the concurrence's strained claim about Eserjose.**

**LEGAL UPDATE RESEARCH NOTE: For an excellent article on "Protective Sweeps" under the Fourth Amendment, see the article with that title in the Alameda County (CA) District Attorney's excellent Internet publication, Point of View. A natural word search with "Point of View + Alameda" will produce the Point of View Home Page, which has a link to a 2011 article (sufficiently up to date on this doctrine), plus links to a number of other articles on Fourth Amendment subjects. Washington readers must always remember when considering discussions of Fourth Amendment issues that the Washington constitution may provide a greater restriction on law enforcement. But on this issue, the doctrines have remained aligned so far. The Alameda DA's article states as follows on page 1 that the doctrine has three requirements:**

**"The following are the requirements for conducting a protective sweep of a residence, business, or other structure: (1) Lawful entry: Officers must have had a legal right to enter; e.g., arrest warrant, consent, hot or fresh pursuit. (2) Person on premises: Officers must have had reason to believe there was a person on the premises (other than the arrestee) who was hiding or had otherwise not made himself known. (3) Danger: Officers must have had reason to believe [reasonable suspicion] that the person posed a threat to them."**

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## WASHINGTON STATE COURT OF APPEALS

**SCOPE OF AUTHORITY TO SEARCH UNDER SEARCH WARRANT: WARRANT FOR FIREARMS LOCATED IN RESIDENCE ALLOWS OFFICERS TO SEARCH LOCKED GUN SAFE, EVEN WHERE INVESTIGATORS WERE AWARE OF LOCKED GUN CASE ON PREMISES AND DID NOT SPECIFY IN SEARCH WARRANT THAT AUTHORIZATION EXTENDED TO SEARCHING THE LOCKED GUN CASE**

State v. Witkowski, State v. Berven, ___ Wn. App.2d ___ , 2018 WL ___ (Div. II, April 24, 2018)

Facts: (Excerpted from Lead Opinion for Court of Appeals)

On October 27, 2015, Deputy [A] obtained a search warrant to search the [Defendants'] property, including their residence, for evidence of possession of stolen property and utility theft. The search warrant was limited to a stolen power meter and its accessories. An arrest warrant for Witkowski was also issued.

On October 29, officers executed the search and arrest warrants. After this search, [Deputy A] requested an addendum to the search warrant. In his affidavit, [Deputy A] explained that after entering the [Defendants'] residence, police found drug paraphernalia, ammunition, one locked gun safe, one unlocked gun safe, a rifle case, and surveillance cameras. [Deputy A] knew that the [Defendants] were felons and were prohibited from possessing firearms or ammunition.

The search warrant addendum authorized police to search at the [Defendants'] street address for evidence of unlawful possession of a firearm, identity theft, unlawful possession of a controlled substance, and unlawful use of drug paraphernalia. The warrant addendum defined the area to be searched for this evidence as the main residence, a shed, and any vehicles and outbuildings at the street address.

The addendum authorized the seizure of evidence including,

1. [f]irearms, firearms parts, and accessories, including but not limited to rifles, shotguns, handguns, ammunition, scopes, cases, cleaning kits, and holsters.

. . . .

4. Surveillance Systems used or intended to be used in the furtherance of any of the above listed crimes.

. . . .

> Notably, the addendum did not identify either of the gun safes as items to be seized, although [Deputy A] stated in his affidavit as part of his description of the initial search that officers had found two gun safes in the residence.
>
> When executing the warrant addendum, officers opened the locked gun safe. They found firearms inside.
>
> Following the second search, the State charged [Defendants] with numerous counts including first degree unlawful possession of a firearm. Witkowski was additionally charged with seven counts of possession of a stolen firearm.

Proceedings below: The Defendants filed suppression motions arguing that the search warrant and addendum did not support searching the locked gun case. The superior court agreed and granted the motions.

ISSUE AND RULING BY COURT OF APPEALS: Officers were aware of a locked gun case on the premises to be searched, but the search warrant did not expressly state that the gun case was within the scope of the search warrant. The search warrant authorized a search of the premises for firearms, and also authorized a search of "cases." Did the search warrant and addendum support searching the locked gun case? ANSWER BY COURT OF APPEALS: Yes; note that all three judges agree on the result. The Lead Opinion concludes that the warrant justified the search of the locked gun case under both the Fourth Amendment and the Washington Constitution, article I, section 7. In analysis not digested here, the Concurring Opinion agrees with the Fourth Amendment analysis but asserts that the issue was not adequately argued for the Court to reach the issue of whether the search was lawful under article I, section 7 of the Washington Constitution)

Result: Reversal of suppression ruling by Pierce County Superior Court; case against William Howard Witkowski and Tina Dee Berven remanded for trial on many charges, including first degree possession of a firearm and seven counts of possession of a stolen firearm.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The State argues that the locked gun safe was within the warrant's scope because under the Fourth Amendment, when the warrant authorized the search of the premises for evidence of firearms, it authorized the search of the locked gun safe. The [Defendants] argue that the search exceeded the warrant's scope because the warrant excluded the locked gun safe by negative implication and because [Deputy A] was aware of the locked gun safe but did not include it in the search warrant. We agree with the State.
>
> 1. *Principles of Law: Scope of the Warrant*
>
> "A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search." United States v. Ross, 456 U.S. 798, 820-21 (1982). "Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found." Ross. Similarly, one leading treatise summarizes the law as follows:

> A search made under authority of a search warrant may extend to the entire area covered by the warrant's description. . . .
>
> . . . .
>
> Places within the described premises are not excluded merely because some additional act of entry or opening may be required. Thus, in executing a warrant for certain premises the police are entitled to gain entry even into locked rooms on those premises.

2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 4.10(a), at 932-36 (5th ed. 2012) (footnotes omitted).

2. *Analysis*

a. *The Warrant Addendum Authorized the Search of Locked Containers in which the Object of the Search Was Likely To Be Found*

Here, the warrant addendum listed the objects of the search as including firearms and firearm accessories. And [Deputy A] testified that he suspected the close-to-refrigerator-sized, locked safe contained firearms because he had found ammunition in the home. [Deputy A] also testified that in his experience, a tall, upright safe would be used to store guns. Under the rule expressed in Ross, because one object of the search was "f]irearms," the premises search warrant addendum authorized the search of the locked gun safe as an area in which the object of the search was likely to be found.

. . . .

b. *Not Excluded from Scope by Negative Implication*

The [Defendants] argue that because [Deputy A] knew of the locked gun safe when he requested the warrant addendum but the safe was not included in the addendum, the addendum necessarily excluded the locked gun safe. In an argument that conflates the addendum's lists of items to be seized and places to be searched, the [Defendants] also assert that by "describ[ing] the search of containers for surveillance equipment," the warrant addendum "excluded [the] search of containers for guns." The State asserts that [Deputy A]'s knowledge that a locked gun safe was present is immaterial. We reject both of the [Defendants'] arguments.

. . . .

ii. *Gun Safe Not Excluded Because of Affidavit*

[Two prior Washington appellate court decisions] support the [Defendant's] legal argument that a warrant could exclude by negative implication items known to the officer requesting the warrant and listed in a warrant affidavit but intentionally omitted from the warrant itself. However, we disagree that exclusion by negative implication applies to the search warrant addendum at issue here because the affidavit and addendum were identical in their lists of places to be searched and items to be seized. Thus, there is no inference that the locked safe was intentionally excluded.

. . . .

We hold that the warrant addendum affidavit's brief reference to the existence of a locked gun safe as part of a description of the initial search does not give rise to an inference that the locked gun safe was intentionally omitted from the warrant addendum. To the contrary, because the warrant addendum affidavit'' lists did not include a locked gun safe and because the superior court authorized identical lists in the addendum, there is no inference that the addendum intentionally omitted a locked gun safe. Because such an inference is not sensible under the circumstances, exclusion by negative implication does not apply. . . . .

iii. "*Containers for Surveillance Systems" Did Not Exclude "Containers for Guns"*

As for the [Defendants'] argument that by listing "containers for surveillance equipment," the search warrant addendum necessarily excluded "containers for guns," we disagree for three reasons. First, the [Defendants] provide no case law holding that the inclusion of containers for one item necessarily excludes containers for another item. Such a rule improperly ascribes a hyper-technical meaning to a search warrant. .

Second, the [Defendants'] rule is counter to the established rule from Ross: that by authorizing a search for "firearms," the warrant also authorized a search within containers likely to hold firearms.

Third, the [Defendants'] argument conflates the items to be seized with the places to be searched: even if the inclusion of surveillance containers in the list of **items to be seized** necessarily excluded other types of containers, this would not affect the list of **places that could be searched**. Here, the locked safe was a place searched and not an item seized.

In conclusion, we hold that the warrant authorized a search for firearms, and thus, the warrant addendum also authorized a search of the locked gun safe as within the scope of the addendum and under settled Fourth Amendment law.

[Some citations omitted, others revised for style; emphasis added; footnotes omitted]

**LEGAL UPDATE EDITORIAL COMMENT: Of course, it would not have hurt to include explicit reference to the gun cases in the search warrant authorization submitted to the issuing magistrate in this csse.**

**LEGAL UPDATE EDITORIAL NOTE: The Lead Opinion goes on to hold that the same analysis applies under the Washington Constitution, article I, section 7. In doing so, the Witkowski Court distinguishes two Washington appellate court decisions under article I, section 7 because those cases did not involve search warrants, but instead involved categories of warrantless search exceptions. In one of the decisions, a locked container was generally held to be outside the scope of a consent to search a car because consent to search locked containers had not been requested. The other decision involved search of a vehicle incident to arrest, where the Washington Supreme Court has held that locked containers get special protection in car searches incident to arrest. The Witkowski Court explains as follows:**

**In State v. Monaghan, Division One of this court addressed the consent exception to the warrant requirement under article I, section 7. 165 Wn. App. 782, 788 (2012). The Court held that the search of a locked container in a car was not valid under the consent exception because searching the locked container exceeded the scope of the consent to search the car. Similarly, in State v. Stroud, the Supreme Court held that police could not search locked containers in a vehicle when executing a search incident to arrest. 106 Wn.2d 144, 152 (1986) . . . .**

**Not only are Monaghan and Stroud distinguishable because they involve warrant exceptions and the searches of containers in cars, but the underlying rationales are different. In Washington, locked containers in cars are given greater privacy expectations than unlocked containers in cars. . . . . This rule derives from case law concerning searches of vehicles incident to arrest, and the rule's double rationales are that the privacy interest in a locked container in a vehicle outweighs the exigencies of an arrest and that locked containers are less likely to conceal a weapon. . . .**

**The [Defendants] provide no case or argument about how these rationales related to warrantless vehicle searches incident to an arrest apply to a premises search under the authority of a search warrant. Indeed, a home already receives the highest level of protection under our state constitution, so that it makes little sense to extend additional protections to privacy interests in locked containers within a home that are likely to contain an item to be seized under the warrant.**

**We reject the [Defendants'] request to extend the protection of locked containers in warrantless vehicle searches to a premises searched under a warrant. Instead, we hold that under article I, section 7, a premises search warrant authorizes a search of a locked container in the residence where the locked container is a likely repository for evidence specifically targeted by the search warrant. Here, the police acted under authority of law when they executed the search warrant addendum and searched the locked gun safe. Accordingly, we hold that the [Defendants'] article I, section 7 argument fails as an alternative ground upon which to affirm the superior court.**

**LEFT-LANE DRIVING: IT IS A TRAFFIC VIOLATION UNDER RCW 46.61.100 FOR A DRIVER ON A ROADWAY THAT HAS TWO OR MORE LANES FOR TRAFFIC MOVING IN THE SAME DIRECTION TO CONTINUOUSLY DRIVE IN THE LEFT LANE WHEN THERE ARE NO VEHICLES IN SIGHT AHEAD OF THE DRIVER IN A LANE TO THE RIGHT**

State v. Thibert, ___ Wn. App.2d ___ , 2018 WL ___ (Div. III, April 26, 2018)

Facts and Proceedings below:

> [A deputy sheriff] was on routine patrol one morning in July 2013 on westbound Interstate 82 in Benton County. He observed a silver Chevrolet Impala in the left lane pass a vehicle in the right lane, traveling faster than the posted 70 miles per hour speed limit. The Impala continued to travel in the left lane long after passing the vehicle in the right lane, even though no other vehicles were traveling in the unobstructed right lane. The deputy initiated a traffic stop not for the car's speed, but for a violation of RCW 46.61.100(2), captioned "Keep right except when passing, etc."

> On approaching the vehicle, which was being driven by Mr. Thibert, [the deputy] smelled the odor of fresh marijuana. What looked like a smoking device was hanging from Mr. Thibert's neck. Mr. Thibert told the deputy he was a medical marijuana patient and used the smoking device to smoke marijuana oil. [The deputy] noted that Mr. Thibert had difficulty finishing his sentences and that he would sometimes stop speaking and just giggle."
>
> Mr. Thibert agreed to perform field sobriety tests. Based on Mr. Thibert's performance, [the deputy] concluded he was under the influence of marijuana and could not safely operate a motor vehicle. He placed Mr. Thibert under arrest and transported him to the hospital for a blood draw. THC was present in Mr. Thibert's blood at 55 nanograms. He was charged with driving a motor vehicle while under the influence of marijuana.
>
> Mr. Thibert moved on multiple grounds to suppress evidence obtained as a result of the traffic stop and events that followed. The district court denied the motion. It found among other facts that Mr. Thibert's "remaining in the left lane, when one could lawfully and safely return to the right lane[, ] is an infraction and provided [the deputy] [probable cause] to stop." The parties agreed to submit the case to the court for a determination of guilt on stipulated facts. The district court found Mr. Thibert guilty.
>
> Mr. Thibert appealed to the Benton County Superior Court, which affirmed the judgment, dismissed the appeal, and remanded the matter to the district court for sentencing.

Emphasis added]

ISSUE AND RULING: Does it constitute a traffic violation under RCW 46.61.100 for a driver on a roadway that has two or more lanes for traffic moving in the same direction to continuously drive in the left lane when there are no vehicles in sight ahead of the driver in the right lane? (ANSWER BY COURT OF APPEALS: Yes)

ANALYSIS: (Excerpted from Court of Appeals opinion)

> A reasonable articulable suspicion of a traffic infraction, like a reasonable articulable suspicion of criminal activity, will support a warrantless traffic stop under article I, section 7 of the Washington Constitution. State v. Arreola, 176 Wn.2d 284, 292-93, 290 P.3d 983 (2012). At issue is whether RCW 46.61.100(2), on which Deputy Gerry relied in stopping Mr. Thibert, creates a traffic infraction. Mr. Thibert's argument proceeds from the theory that RCW 46.61.100 has one subsection, subsection (2), that addresses the "primary use" of the left lane of a multilane roadway and a different subsection, subsection (4), that identifies the only circumstance when traveling in the left lane is an infraction.
>
> . . . .
>
> Subsection (2) of RCW 46.61.100, which Mr. Williams contends addresses only the "primary use" of the left lane of a multilane highway, states:
>
> > Upon all roadways having two or more lanes for traffic moving in the same direction, all vehicles shall be driven in the right-hand lane then available for traffic, except (a) when overtaking and passing another vehicle proceeding in the

> same direction, (b) when traveling at a speed greater than the traffic flow, (c) when moving left to allow traffic to merge, or (d) when preparing for a left turn at an intersection, exit, or into a private road or driveway when such left turn is legally permitted.
>
> Subsection (4), which he contends identifies the only infraction arising from driving in the left lane, provides:
>
> > It is a traffic infraction to drive continuously in the left lane of a multilane roadway when it impedes the flow of other traffic.

RCW 46.61.100(4).

> There is a lack of parallelism in the two subsections that would support an argument that they are addressed to distinct matters were it not for RCW 46.63.020, which provides in relevant part that "[f]ailure to perform any act required or the performance of any act prohibited by this title . . . is designated as a traffic infraction . . . ."
>
> Plainly read, RCW 46.63.020 and 46.61.100 make it a traffic infraction to travel in the left lane in the four circumstances identified by RCW 46.61.100(2). . . .
>
> . . . .
>
> We also disagree with Mr. Thibert's contention that if each of subsections (2) and (4) of RCW 46.61.100 identify traffic infractions, then they are irreconcilable or cancel each other out. The subsections are reconcilable. An individual is permitted to drive in the left lane when one of the transient exceptions identified in subsection (2) applies, unless the transient exceptions arise so frequently that the individual's continuing travel in the left lane is impeding traffic. Because the conduct that is forbidden by the statute can be understood by ordinary people, we also reject Mr. Thibert's passing argument that the statute is void for vagueness.

[Some citations omitted]

**"FAMILY OR HOUSEHOLD MEMBERS": "PRESUMED PARENT" AND "DE FACTO PARENT" DOCTRINES THAT APPLY IN OTHER LEGAL CONTEXTS DO NOT APPLY UNDER CHAPTERS 10.99 RCW, 26.50 RCW OR 9.94 RCW**

In State v. Shelley, ___ Wn. App.2d ___ , 2018 WL ___ (Div. I, April 9, 2018), Division One of the Court of Appeals rules that a man who is cohabitating with a woman and her child does not, based solely on the cohabitation and interaction with the child, have a "family or household member" relationship to the child for purposes of chapters 10.99 RCW, 26.50 RCW or 9.94A RCW. Neither the "presumed parent" doctrine nor the "de facto parent" doctrine that may apply in certain other legal contexts has any application in cases where these RCW chapters are applicable. Those doctrines require that a civil court proceeding be held to make that determination. The Court of Appeals declares: "It would be incongruous with the statutory scheme and existing case law to allow a parentage determination [under these doctrines] in a criminal proceeding."

Result: Aron Dean Shelley was convicted in Thurston County Superior Court of (1) one count of assault against his girlfriend, Cheri Burgess; (2) one count of assault of a child against A.S., Burgess's son; and (3) one count of felony harassment for threatening to kill A.S. The jury found each count was a crime of domestic violence. Shelley appealed the domestic violence special verdicts as to assault of a child and felony harassment. Because the State failed to establish that Shelley and A.S. are "family or household members" per the relevant sentencing statutory scheme, these special verdicts are invalid. The Court of Appeals affirms the convictions, but the Court rules that those special verdicts are invalid as a matter of law; the Court of Appeals remands the case for resentencing.

**FORGERY UNDER RCW 9A.60.020 INCLUDES ALTERING A CERTIFICATE OF INSURANCE TO MAKE IT APPEAR THAT ONE CAN FINANCIALLY COVER A TRANSACTION**

In State v. Bradshaw, ___ Wn. App.2d ___ , 2018 WL ___ (Div. I, April 9, 2018), Division One of the Court of Appeals affirms an escrow agent's conviction for forgery based on her altering of a certificate of insurance. She made the alteration to make it appear that she had enough liability insurance to cover a transaction that she had been hired to handle. The Bradshaw Court holds that the conviction is supported by sufficient evidence because the certificate of insurance had legal effect for purposes of RCW 9A.60.020 both as a public record and as a foundation for legal liability.

Result: Affirmance of King County Superior Court conviction of Stacy Ann Bradshaw for forgery.

**ELECTRONIC SURVEILLANCE AND RECORDING: CHAPTER 9.73 RCW GENERALLY PROHIBITS RECORDING PRIVATE CONVERSATIONS WITHOUT ALL-PARTY CONSENT, AND VIOLATIVE RECORDINGS MUST BE SUPPRESSED IN THIS CIVIL CASE**

In Larson Motors, Inc. v. Snypp, ___ Wn. App.2d ___ , 2018 WL ___ (Div. II, May 1, 2018), Division Two of the Court of Appeals addresses, in a civil suit over a customer's alleged authorization for car repairs, the tape recording by a car dealership of phone conversations with an irate customer. The dealership's employees made the recordings without the consent or knowledge of the customer.

The Court of Appeals applies the clear terms of chapter 9.73 RCW, which, with certain categorical exceptions, makes inadmissible in both criminal and civil cases tape recordings of private conversations without the consent of all parties to the conversations. The Court rules in this case that the phone conversations were private. No exception of the statute applied, and therefore the recordings must be excluded from the civil suit proceedings under RCW 9.73.050.

Result: Reversal of aspects of Pierce County Superior Court ruling, and remand of case for trial of the civil lawsuit over authorization for car repairs.

**LEGAL UPDATE EDITORIAL NOTE: As noted above, Chapter 9.73's broad exclusionary rule also applies in criminal proceedings. Also note that violating conduct constitutes a gross misdemeanor under RCW 9.73.080.**

**COURT HOLDS THAT, IN A CRAIGSLIST STING TO CATCH A CHILD-SEX CRIME VIOLATOR, DETECTIVE VIOLATED DUE PROCESS PROTECTIONS IN THE DETECTIVE'S EXTENSIVE, PERSISTENT COMMUNICATIONS TO THE CAUTIOUS TARGET**

In State v. Solomon, ___ Wn. App.2d ___ , 2018 WL ___ (Div. I, May 29, 2018), Division One of the Court of Appeals decides against the State in the State's appeal from the Skagit County Superior Court's dismissal of charges relating to attempted sexual exploitation of a minor. The Court of Appeals holds that a detective acted outrageously in violation of constitutional due process protections in a Craigslist sting that ultimately – after the detective's extensive, persistent entreaties to the defendant – caught the target soliciting child sex from a fake-minor who was actually the detective posing as a 14-year-old girl seeking sex. Generally, such stings are permissible, but in this case the detective went too far, the Court holds, where the detective sent the defendant nearly 100 messages seeking sex, and the detective persistently solicited the defendant even after the defendant cautiously rejected the detective's solicitations seven times over four days.

Result: Affirmance of Skagit County Superior Court dismissal of charges against Joshua Joseph Solomon of one count of communication with a minor for immoral purposes, one count of commercial sex abuse of a minor, and one count of attempted rape of a child in the third degree.

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**BRIEF NOTES REGARDING MAY 2018 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).

In May 2018, nine unpublished Court of Appeals opinions fit these 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 case results.

1. State v. Charles Lee Burke: On May 1, 2018, Division Two of the COA decides against the defendant's appeal of his Kitsap County Superior Court convictions for *harassment and for possession of a controlled substance*. Among other things, the Court of Appeals rules that the trial court ruled correctly in denying defendant's motion to suppress. The Court of Appeals concludes that: (1) the complaint for a search warrant for defendant's motorhome (stating that the suspect had threatened that he would get a gun from the motorhome and shoot a man he

was arguing with) established **probable cause to believe that: (a) the defendant was involved in the crime of harassment, and (b) evidence of harassment would be found in his motorhome;** and (2) the deputy lawfully tested suspected methamphetamine that was seized in open view during the warrant search**; the officer was not required to get a separate search warrant to test the seized controlled substances. On the second issue, see State v. Martines, 184 Wn.2d 831 (2015).**

2. State v. Tipasa Lesumi Uiliata: On May 3, 2018, Division Three of the COA decides against the defendant's appeal of his Klickitat County Superior Court convictions for *three counts of first degree unlawful possession of a firearm and two counts of possession of controlled substances with intent to deliver* (with the latter counts enhanced because they occurred within 1,000 feet of a school bus route stop). Among other things, the Court of Appeals agrees with the trial court's denial of defendant's suppression motion. The Court of Appeals rules as to the suppression motion that: (1) stating in an affidavit that controlled buys of methamphetamine took place between March 20 and March 24, 2016 **did not make probable cause information stale** where the warrant was issued on March 24, 2016 and executed on March 25, 2016; (2) descriptions in the search warrant affidavit of controlled buys by the confidential informant **corroborated the confidential informant's credibility for probable cause purposes**; and (3) **firearms observed in plain view during execution of the methamphetamine search warrant were lawfully seized** where the officers were aware at the time of the search that, based on his criminal record, the defendant was barred by law from possessing firearms.

3. State v. Robert Terrance Jackson, Jr.: On May 7, 2018, Division One of the COA decides against defendant's appeal from his King County Superior Court convictions for *vehicular homicide and felony hit and run*. Jackson was intoxicated when he crashed his car and killed a passenger. Among other things, the Court of Appeals rules that, in order to lawfully draw a driver's blood to test for alcohol and drugs, **officers were not required by law to advise the intoxicated defendant about his right to independent blood testing**. On this issue, see State v. Sosa, 198 Wn. App. 176 (2017).

4. State Cindy Lou Caulfield: On May 8, 2018, Division Two of the COA decides against the criminal defendant's appeal and affirms her Clark County Superior Court conviction for *possession of methamphetamine*. Among other things, the Court of Appeals rules that an officer's **investigative stop** of a suspect in a recent burglary on a remote access road to the burgled premises was **supported by reasonable suspicion**, and that the officer was justified by the developing circumstances in his expansion of the stop and ultimately making an arrest after the officer observed, among other things, a considerable amount of "goods"/personal property in open view inside the vehicle.

5. State v. Michael Nelson Peck: On May 8, 2018, Division Three of the COA decides one issue in favor of defendant's appeal from a suppression ruling of the Kittitas County Superior Court and reverses his conviction for *possession of a controlled substance with intent to deliver*. The Court of Appeals affirms, however, his convictions for *first degree burglary, third degree theft, and possession of burglary tools*. On the suppression issue, the Court of Appeals holds that (1) despite not claiming to police at the scene his ownership of a zippered case inside a vehicle, defendant had **automatic standing** to challenge the impound-inventory search of the zippered case, and (2) **a law enforcement search of the contents of the zippered case as part of an inventory search violated the general rule under article I, section 7 of the Washington constitution that closed containers are not to be searched absent a search warrant or exigent circumstances or consent of the owner**. Research Note: For discussion of impound-inventory searches, see pages 329 to 336 of the Washington-focused law

enforcement and prosecutor guide on the Criminal Justice Training Commission's LED internet page: Confessions, Search, Seizure and Arrest: A Guide for Police Officers and Prosecutors, May 2015, b*y* Pamela B. Loginsky, Staff Attorney, Washington Association of Prosecuting Attorneys.

6. State v. Eric Kermit Jacobson: On May 15, 2018, Division Two of the COA decides in favor of the State on defendant's appeal from his Pierce County Superior Court convictions for *one count of attempted rape of a child in the first degree*, and *one count of attempted commercial sexual abuse of a minor*. The Court rejects defendant's argument and holds that **the government task force did not act outrageously** in violation of **constitutional due process protections** in the use of Craigslist in a sting that caught defending soliciting child sex from a fake-mom (offering sex services from her children) who was actually a law enforcement officer.

7. State v. David Zachary Morgan: On May 29, 2018, Division One of the COA decides in favor 7of the defendant in defendant's appeal from his Snohomish County Superior Court convictions for one count of *first degree attempted murder, first degree arson, and first degree assault, all crimes of domestic violence*. The Court of Appeals reverses the convictions and holds that: (1) **a seizure and search of the contents of an opaque hospital bag in defendant's hospital room violated his privacy rights under the Washington constitution; (2) the items in the bag were not in plain view; and (3) the search was not justified under the exigent circumstances exception to the search warrant requirement.** The Court of Appeals rules against the defendant on a Miranda issue, **ruling that defendant was not in custody when officers questioned him in his hospital room without Miranda warnings**. The case is remanded for possible retrial.

8. State v. Leonard F. Davison: On May 31, 2018, Division Three of the COA decides in favor of the State in defendant's appeal from his Spokane County Superior Court convictions for *possession of methamphetamine and possession of a switchblade knife*. The Court of Appeals holds that a law enforcement officer was justified by **reasonable suspicion in continuing to detain vehicle occupants** even though, after lawfully stopping a vehicle because the drivers' license of the registered owner was suspended, the officer learned that the driver of the vehicle was not the registered owner. Suspicious circumstances that justified the continuing detention included the facts that (1) the driver admitted that he had no driver's license. and (2) the vehicle's ignition and steering column appeared to be torn apart.

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## NEXT MONTH

The June 2018 Legal Update will include entries regarding

(1) Felarca v. Birgenau, ___ F.3d ___ , 2018 WL ___ (9th Cir., May 31,0 2018), in which a three-judge Ninth Circuit panel reverses the U.S. District Court's judgment and rules in favor of the government defendants in a Civil Rights Act case where protestors in an Occupy Wall Street demonstration sued University of California officials for the use of batons against protesters by University police officers.

(2) Rodriguez v. Cruz, ___ F.3d ___ , 2018 WL ___ (9th Cir., May 30, 2018), in which a three-judge Ninth Circuit panel affirms the U.S. District Court's judgment in favor of plaintiff-inmates following a jury trial, award of compensatory damages ($740,000) and punitive damages ($210,000), and attorney's fees ($5,378,175) in a 42 U.S.C. § 1983 Civil Rights Act lawsuit

brought by five prisoners who were severely injured during the course of cell extractions at the Los Angeles County Men's Central Jail.

(3) Sluman v. State, ___ Wn. App.2d ___ , ___ P.3d ___ (Div. III, May 22, 2018), in which, among other rulings, the Court of Appeals denies qualified immunity to the State of Washington in a Civil Rights Act excessive force lawsuit where a WSP Trooper in a patrol car used a "door-check" maneuver to stop a speeding motorcyclist by knocking him off the motorcycle as the motorcyclist tried to drive by the Trooper.

(4) State v. Frahm, ___ Wn. App.2d ___, ___ P.3d ___ (Div. II, May 30, 2018), in which, among other rulings, the Court of Appeals rejects defendant's arguments that insufficient evidence supports (1) the legal causation element of his conviction for vehicular homicide, and (2) his conviction for conspiracy to commit perjury.

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## LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

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

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

The Legal Update does not speak for any person other than Mr. Wasberg, nor does it speak for any agency. Officers are urged to discuss issues with their agencies' legal advisors and their local prosecutors. The Legal Update is published as a research source only and does not purport to furnish legal advice. Mr. Wasberg's email address is jrwasberg@comcast.net. His cell phone number is (206) 434-0200. The initial monthly Legal Update was issued for January 2015. Mr. Wasberg will electronically provide back issues on request.

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## INTERNET ACCESS TO COURT RULES & DECISIONS, RCWS AND WAC RULES

The Washington Office of the Administrator for the Courts maintains a website with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http://www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/court_rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at [http://www.supremecourt.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be 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]. The internet address for the Criminal Justice Training Commission (CJTC) Law Enforcement Digest (LED) is [https://fortress.wa.gov/cjtc/www/led/ledpage.html].

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