LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

MAY 2021

TABLE OF CONTENTS FOR MAY 2021 LEGAL UPDATE

****

UNITED STATES SUPREME COURT

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY: "COMMUNITY CARETAKING EXCEPTION" TO FOURTH AMENDMENT SEARCH WARRANT REQUIREMENT DOES NOT ALLOW FOR WARRANTLESS, NON-CONSENTING ENTRY OF RESIDENCE TO SEARCH FOR AND SEIZE FIREARMS OF POSSIBLY SUICIDAL RESIDENT; RULING BY SUPREME COURT DOES NOT ADDRESS SCOPE OF "EXIGENT CIRCUMSTANCES" OR

"EMERGENCY CIRCUMSTANCES" EXCEPTIONS TO THE WARRANT REQUIREMENT – THE COURT TREATS THOSE EXCEPTIONS, WHICH THE GOVERNMENT DEFENDANTS DID NOT RELY ON IN THIS CASE, AS UNRELATED TO THE COMMUNITY CARETAKING EXCEPTION

LEGAL UPDATE EDITORIAL NOTE: Ordinarily, the Legal Update does not devote much attention to concurring or dissenting opinions. But I think that the three separate Concurring Opinions of Chief Justice Roberts, Justice Kavanaugh and Justice Alito are important to an understanding of the doctrinal limits of the Justice Thomas Lead Opinion. The Lead Opinion is "joined" by all of the Justices, but it is quite brief and does not offer much practical guidance. Some guidance is provided, albeit in limited portions, in the Concurring Opinions. So, I have quoted almost the entirety of the three Concurring Opinions.

LEGAL UPDATE INTRODUCTORY EDITORIAL COMMENTS: In light of the discussion in the Lead and Concurring Opinions in this case, from now on, I am going to do two things differently in my search and seizure thinking: (1) I am going to view "community caretaking" as a more narrow justification than I have viewed it in the past – maybe as a quasi-exigent circumstances exception not applicable to residences – for a warrantless search; and (2) I am going to cease my long-time occasional efforts to distinguish between "exigent circumstances" and "emergency circumstances" as separate exceptions to the constitutional search warrant requirement, and instead I will view "emergency circumstances" as a sub-category of the broader term "exigent circumstances."

If one can still think of "community caretaking" as an exception to the search warrant requirement, maybe it refers to a type of exigent circumstance in which officers reasonably believe that an immediate warrantless non-residential search is necessary because of a threat to a person's (or the general public's) health, safety, or property, but a threat that, while pressing, does not rise to the level of a traditional exigent or emergency circumstances.

An example of a Washington Supreme Court decision invoking "community caretaking" is the ruling in State v. Duncan, 185 Wn.2d 430 (April 28, 2016). In Duncan, following arrest of a car's occupants suspected of committing a drive-by shooting minutes earlier, officers had reasonable suspicion that a gun was in the car, and they had non-investigative and non-pretextual public safety concerns about an accidental gun discharge that might occur during towing of the car. In Duncan, the Washington Supreme Court invoked "community caretaking" as supporting officers looking for a gun in the car and retrieving the gun before the officers impounded the car and had it towed.

Caniglia v. Strom, ___ S.Ct. ___ , 2021 WL 1951784 (May 17, 2021)

Facts: (Excerpted from the U.S. Supreme Court's Lead Opinion in Caniglia)

> During an argument with his wife at their Rhode Island home, Edward Caniglia retrieved a handgun from the bedroom, put it on the dining room table, and asked his wife to "shoot [him] now and get it over with." She declined, and instead left to spend the night at a hotel. The next morning, when [Mr. Caniglia's] wife discovered that she could not reach him by telephone, she called the police to request a welfare check.

> [Police officers] accompanied [Mr. Caniglia's] wife to the home, where they encountered [Mr. Caniglia] on the porch. [Mr. Caniglia] spoke with [the officers] and confirmed his wife's account of the argument, but denied that he was suicidal.
>
> [The police], however, thought that [Mr. Caniglia] posed a risk to himself or others. They called an ambulance, and [Mr. Caniglia] agreed to go to the hospital for a psychiatric evaluation – but only after [the police] allegedly promised not to confiscate his firearms. Once the ambulance had taken [Mr. Caniglia] away, however, [the police] seized the weapons. Guided by [Mr. Caniglia's] wife – whom they allegedly misinformed about his wishes – [the police] entered the home and took two handguns.

[Some paragraphing revised for readability in this format]

Proceedings below: (Excerpted from the U.S. Supreme Court's Lead Opinion)

> [Mr. Caniglia] sued, claiming that [the police] violated the Fourth Amendment when they entered his home and seized him and his firearms without a warrant. The District Court granted summary judgment to [the police], and the First Circuit [of the U.S. Court of Appeals] affirmed solely on the ground that the decision to remove [Mr. Caniglia] and his firearms from the premises fell within a "community caretaking exception" to the warrant requirement. 953 F. 3d 112, 121-123, 131 and nn. 5, 9 (2020).
>
> Citing this Court's statement in [Cady v. Dombrowski, 413 U.S. 433 (1973)] that police officers often have noncriminal reasons to interact with motorists on "public highways," the First Circuit extrapolated a freestanding community-caretaking exception that applies to both cars and homes. 953 F. 3d, at 124 ("Threats to individual and community safety are not confined to the highways").
>
> Accordingly, the First Circuit saw no need to consider whether anyone had consented to [the actions by the police]; whether these actions were justified by "exigent circumstances"; or whether any state law permitted this kind of mental-health intervention. All that mattered was that [the efforts by police] to protect [Mr. Caniglia] and those around him were "distinct from 'the normal work of criminal investigation,'" fell "within the realm of reason," and generally tracked what the court viewed to be "sound police procedure."

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

ISSUE AND RULING BY SUPREME COURT IN CANIGLIA: In Cady v. Dombrowski, 413 U.S. 433 (1973), the U.S. Supreme Court held under the Fourth Amendment search warrant requirement that police officers in a rural Wisconsin jurisdiction were justified in opening of the trunk of a disabled car without a search warrant. The car was reported to be the personal car of an off-duty Chicago police officer. After an accident, the disabled car had been towed to and parked in an unlocked garage with no guard posted on the car. The officers in Cady had probable cause to believe that there was a gun in the trunk because: (A) the car was that of a Chicago police officer; (B) Chicago officers were believed to be required to be armed when off duty; and (C) following a traffic accident involving the car, no gun had been found on the officer or elsewhere in the car. The officers believed that the circumstances posed a danger to the public because the car might be broken into, and the gun might fall into the wrong hands. A "community caretaking" rationale was held in Cady in a 5-4 vote to justify a warrantless search of the car's trunk without the need to establish exigent or emergency circumstances.

In the Canigila case, the government defendants chose to not argue that entry of Caniglia's residence was justified by exigent or emergency circumstances. Does Cady apply here to support the residential entry by police to find and seize the firearms of Mr. Caniglia (A) who was believed by officers to possibly be suicidal, and (B) who officers reasonably believed had a gun in his residence? (ANSWER BY U.S. SUPREME COURT IN CANIGLIA: No, rules a unanimous U.S. Supreme Court in Caniglia, because entry of a residence in this case is significantly different from entry of a vehicle in Cady, and non-exigent, non-emergent entry into a residence cannot be justified by the broad "community caretaking" concerns recognized in Cady)

Result: Reversal of lower federal court decisions that granted judgment to the police as a matter of law in this case. Case remanded for further proceedings, which could include trial in this Civil Rights Act section 1983 civil liability case.

ANALYSIS BY U.S. SUPREME COURT (Excerpted from U.S. Supreme Court's Lead Opinion)

> The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The "'very core'" of this guarantee is "'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" Florida *v.* Jardines, 569 U. S. 1, 6 (2013).
>
> To be sure, the Fourth Amendment does not prohibit all unwelcome intrusions "on private property," . . . – only "unreasonable" ones. We have thus recognized a few permissible invasions of the home and its curtilage. Perhaps most familiar, for example, are searches and seizures pursuant to a valid warrant. . . . **We have also held that law enforcement officers may enter private property without a warrant when certain exigent circumstances exist, including the need to "'render emergency assistance to an injured occupant or to protect an occupant from imminent injury.'"** Kentucky *v.* King, 563 U. S. 452, 460, 470 (2011); see also Brigham City *v.* Stuart, 547 U. S. 398, 403–404 (2006) (listing other examples of exigent circumstances). And, of course, officers may generally take actions that " 'any private citizen might do' " without fear of liability. E.g., Jardines, 569 U. S., at 8 (approaching a home and knocking on the front door).
>
> The First Circuit's "community caretaking" rule, however, goes beyond anything this Court has recognized. The decision below assumed that [the police] lacked a warrant or consent, and it expressly disclaimed the possibility that they were reacting to a crime. The court also declined to consider whether any recognized exigent circumstances were present because [the police] had forfeited the point.
>
> **[LEGAL UPDATE EDITOR'S NOTE: The Opinion of the First Circuit in this case is reported at 953 F.3d 112 (1st Cir. 2020). That First Circuit Opinion explained in footnote 5 that the police did not argue that their actions were supported by the search warrant exceptions of either (1) exigent circumstances or (2) emergency aid circumstances.]**
>
> Nor did [the First Circuit] find that [the actions of the police] were akin to what a private citizen might have had authority to do if [Mr. Canigula's] wife had approached a neighbor for assistance instead of the police.

> Neither the holding nor logic of Cady justified that approach. True, Cady also involved a warrantless search for a firearm. But the location of that search was an impounded vehicle – not a home – "'a constitutional difference' " that the opinion repeatedly stressed. . . . In fact, Cady expressly contrasted its treatment of a vehicle already under police control with a search of a car "parked adjacent to the dwelling place of the owner." . . . .
>
> Cady's unmistakable distinction between vehicles and homes also places into proper context its reference to "community caretaking." This quote comes from a portion of the opinion explaining that the "frequency with which . . . vehicle[s] can become disabled or involved in . . . accident[s] on public highways" often requires police to perform noncriminal "community caretaking functions," such as providing aid to motorists. . . . But, this recognition that police officers perform many civic tasks in modern society was just that – a recognition that these tasks exist, and not an open-ended license to perform them anywhere.
>
> **What is reasonable for vehicles is different from what is reasonable for homes. Cady acknowledged as much, and this Court has repeatedly "declined to expand the scope of . . . exceptions to the warrant requirement to permit warrantless entry into the home."** . . . . We thus vacate the judgment below and remand for further proceedings consistent with this opinion.

[Some citations omitted, other citations revised for style; paragraphing revised for readability in this format; bolding added]

The three Concurring Opinions in Caniglia v. Strom

- *Chief Justice Roberts's concurrence points out that law enforcement may still make warrantless residential entries in some exigent circumstances involving non-investigatory responses to emergencies:*

Chief Justice Roberts is joined by Justice Breyer in a Concurring Opinion that is one paragraph long, reading as follows:

> Fifteen years ago, this Court unanimously recognized that "[t]he role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties." Brigham City *v.* Stuart, 547 U. S. 398, 406 (2006). **A warrant to enter a home is not required, we explained, when there is a "need to assist persons who are seriously injured or threatened with such injury."** . . . see also Michigan *v.* Fisher, 558 U. S. 45, 49 (2009) . . . . (warrantless entry justified where **"there was an objectively reasonable basis for believing that medical assistance was needed, or persons were in danger" . . . . Nothing in today's opinion is to the contrary, and I join it on that basis.**

[Some citations omitted; bolding added]

- *Justice Alito's concurrence argues: (A) that there has never been a "community caretaking" exception to the search warrant requirement (a point that is open to debate and not necessarily supported by the other Opinions in Caniglia); and (B) similarly to the Concurring Opinion of Justice Roberts, suggests that there are a number of categorical exigent*

circumstances where warrantless residential entries are not foreclosed by the Lead Opinion in Caniglia.

Justice Alito writes the following separate Concurring Opinion not joined by any other Justice:

> I join the opinion of the Court but write separately to explain my understanding of the Court's holding and to highlight some important questions that the Court does not decide.
>
> 1. The Court holds – and I entirely agree – that there is no special Fourth Amendment rule for a broad category of cases involving "community caretaking." As I understand the term, it describes the many police tasks that go beyond criminal law enforcement. These tasks vary widely, and there is no clear limit on how far they might extend in the future. The category potentially includes any non-law-enforcement work that a community chooses to assign, and because of the breadth of activities that may be described as community caretaking, we should not assume that the Fourth Amendment's command of reasonableness applies in the same way to everything that might be viewed as falling into this broad category.
>
> The Court's decision in Cady *v.* Dombrowski, 413 U. S. 433 (1973), did not recognize any such "freestanding" Fourth Amendment category. The opinion merely used the phrase "community caretaking" in passing. . . .
>
> 2. **While there is no overarching "community caretaking" doctrine, it does not follow that all searches and seizures conducted for non-law-enforcement purposes must be analyzed under precisely the same Fourth Amendment rules developed in criminal cases. Those rules may or may not be appropriate for use in various non-criminal-law-enforcement contexts. We do not decide that issue today.**
>
> 3. This case falls within one important category of cases that could be viewed as involving community caretaking: conducting a search or seizure for the purpose of preventing a person from committing suicide. Assuming that petitioner did not voluntarily consent to go with the officers for a psychological assessment, he was seized and thus subjected to a serious deprivation of liberty. But was this warrantless seizure "reasonable"? We have addressed the standards required by due process for involuntary commitment to a mental treatment facility, . . but we have not addressed Fourth Amendment restrictions on seizures like the one that we must assume occurred here, *i.e.*, a short-term seizure conducted for the purpose of ascertaining whether a person presents an imminent risk of suicide.
>
> **Every State has laws allowing emergency seizures for psychiatric treatment, observation, or stabilization, but these laws vary in many respects, including the categories of persons who may request the emergency action, the reasons that can justify the action, the necessity of a judicial proceeding, and the nature of the proceeding. Mentioning these laws only in passing, petitioner asked us to render a decision that could call features of these laws into question. The Court appropriately refrains from doing so.**
>
> 4. This case also implicates another body of law that petitioner glossed over: the so-called **"red flag" laws** that some States are now enacting. **These laws enable the**

police to seize guns pursuant to a court order to prevent their use for suicide or the infliction of harm on innocent persons. See, *e.g.,* Cal. Penal Code Ann. §§18125–18148 (West Cum. Supp. 2021); Fla. Stat. §790.401(4) (Cum. Supp. 2021); Mass. Gen. Laws Ann., ch. 140, §131T (2021). They typically specify the standard that must be met and the procedures that must be followed before firearms may be seized. **Provisions of red flag laws may be challenged under the Fourth Amendment, and those cases may come before us. Our decision today does not address those issues.**

5. **One additional category of cases should be noted: those involving warrantless, nonconsensual searches of a home for the purpose of ascertaining whether a resident is in urgent need of medical attention and cannot summon help.** At oral argument, THE CHIEF JUSTICE posed a question that highlighted this problem. He imagined a situation in which neighbors of an elderly woman call the police and express concern because the woman had agreed to come over for dinner at 6 p.m., but by 8 p.m., had not appeared or called even though she was never late for anything.

The woman had not been seen leaving her home, and she was not answering the phone. Nor could the neighbors reach her relatives by phone. If the police entered the home without a warrant to see if she needed help, would that violate the Fourth Amendment? .

Petitioner's answer was that it would. Indeed, he argued, even if 24 hours went by, the police still could not lawfully enter without a warrant. If the situation remained unchanged for several days, he suggested, the police might be able to enter after obtaining "a warrant for a missing person."

THE CHIEF JUSTICE's question concerns an important real-world problem. Today, more than ever, many people, including many elderly persons, live alone. Many elderly men and women fall in their homes, or become incapacitated for other reasons, and unfortunately, there are many cases in which such persons cannot call for assistance. In those cases, the chances for a good recovery may fade with each passing hour.

So in THE CHIEF JUSTICE's imaginary case, if the elderly woman was seriously hurt or sick and the police heeded petitioner's suggestion about what the Fourth Amendment demands, there is a fair chance she would not be found alive. This imaginary woman may have regarded her house as her castle, but it is doubtful that she would have wanted it to be the place where she died alone and in agony.

Our current precedents do not address situations like this. We have held that the police may enter a home without a warrant when there are "exigent circumstances." Payton *v.* New York, 445 U. S. 573, 590 (1980). But circumstances are exigent only when there is not enough time to get a warrant, see Missouri *v.* McNeely, 569 U. S. 141, 149 (2013); Michigan *v.* Tyler, 436 U. S. 499, 509 (1978), and warrants are not typically granted for the purpose of checking on a person's medical condition. Perhaps States should institute procedures for the issuance of such warrants, but in the meantime, courts may be required to grapple with the basic Fourth Amendment question of reasonableness.

6. The three categories of cases discussed above are simply illustrative. Searches and seizures conducted for other non-law-enforcement purposes may arise and may present their own Fourth Amendment issues. Today's decision does not settle those questions.

In sum, the Court properly rejects the broad "community caretaking" theory on which the decision below was based. The Court's decision goes no further, and on that understanding, I join the opinion in full.

[Footnotes omitted; some citations omitted, some other citations revised for style; bolding added some paragraphing revised for readability in this format]

- *Justice Kavanaugh's concurrence argues similarly warrantless entries will sometimes be justified where circumstances are reasonably perceived by officers to be emergencies that are truly "exigent."*

Justice Kavanaugh writes the following Concurring Opinion not joined by any other justice:

I join the Court's opinion in full. I write separately to underscore and elaborate on THE CHIEF JUSTICE's point that the Court's decision does not prevent police officers from taking reasonable steps to assist those who are inside a home and in need of aid. . . . For example, as I will explain, police officers may enter a home without a warrant in circumstances where they are reasonably trying to prevent a potential suicide or to help an elderly person who has been out of contact and may have fallen and suffered a serious injury.

. . . . The Court has said that a warrant supported by probable cause is ordinarily required for law enforcement officers to enter a home. . . . But drawing on common-law analogies and a commonsense appraisal of what is "reasonable," the Court has recognized various situations where a warrant is not required. **For example, the exigent circumstances doctrine allows officers to enter a home without a warrant in certain situations, including: to fight a fire and investigate its cause; to prevent the imminent destruction of evidence; to engage in hot pursuit of a fleeing felon or prevent a suspect's escape; to address a threat to the safety of law enforcement officers or the general public; to render emergency assistance to an injured occupant; or to protect an occupant who is threatened with serious injury**. . . .

[T[he Court's exigency precedents, as I read them, permit warrantless entries when police officers have an objectively reasonable basis to believe that there is a current, ongoing crisis for which it is reason able to act now. . . . The officers do not need to show that the harm has already occurred or is mere moments away, because knowing that will often be difficult if not impossible in cases involving, **for example, a person who is currently suicidal or an elderly person who has been out of contact and may have fallen. If someone is at risk of serious harm and it is reasonable for officers to intervene now, that is enough for the officers to enter.**

Over the years, many courts, like the First Circuit in this case, have relied on what they have labeled a "community caretaking" doctrine to allow warrantless entries into the home for a non-investigatory purpose, such as to prevent a suicide or to conduct a welfare check on an older individual who has been out of contact. But as the Court today explains, any such standalone community caretaking doctrine was primarily devised for searches of cars, not homes. . . .

That said, this Fourth Amendment issue is more labeling than substance. The Court's Fourth Amendment case law already recognizes the exigent circumstances doctrine, which allows an officer to enter a home without a warrant if the "exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." . . . As relevant here, one such recognized "exigency" is the "need to assist persons who are seriously injured or threatened with such injury." [Brigham City v. Stuart, 547 U.S. 398, 400, 403 (2006)] . . . The Fourth Amendment allows officers to enter a home if they have "an objectively reasonable basis for believing" that such help is needed, and if the officers' actions inside the home are reasonable under the circumstances. . . .

This case does not require us to explore all the contours of the exigent circumstances doctrine as applied to emergency-aid situations because the officers here disclaimed reliance on that doctrine. But to avoid any confusion going forward, I think it important to briefly describe how the doctrine applies to some heartland emergency-aid situations.

As Chief Judge Livingston has cogently explained, although this doctrinal area does not draw much attention from courts or scholars, "municipal police spend a good deal of time responding to calls about missing persons, sick neighbors, and premises left open at night." . . . And as she aptly noted, "the responsibility of police officers to search for missing persons, to mediate disputes, and to aid the ill or injured has never been the subject of serious debate; nor has" the "responsibility of police to provide services in an emergency." . . .

Consistent with that reality, the Court's exigency precedents, as I read them, permit warrantless entries when police officers have an objectively reasonable basis to believe that there is a current, ongoing crisis for which it is reason able to act now. . . . The officers do not need to show that the harm has already occurred or is mere moments away, because knowing that will often be difficult if not impossible in cases involving, for example, a person who is currently suicidal or an elderly person who has been out of contact and may have fallen. If someone is at risk of serious harm and it is reasonable for officers to intervene now, that is enough for the officers to enter.

A few (non-exhaustive) examples illustrate the point.

Suppose that a woman calls a healthcare hotline or 911 and says that she is contemplating suicide, that she has firearms in her home, and that she might as well die. The operator alerts the police, and two officers respond by driving to the woman's home. They knock on the door but do not receive a response. May the officers enter the home? Of course.

The exigent circumstances doctrine applies because the officers have an "objectively reasonable basis" for believing that an occupant is "seriously injured or threatened with such injury." . . . . After all, a suicidal individual in such a scenario could kill herself at any moment. The Fourth Amendment does not require officers to stand idly outside as the suicide takes place.

Consider another example. **Suppose that an elderly man is uncharacteristically absent from Sunday church services and repeatedly fails to answer his phone throughout the day and night. A concerned relative calls the police and asks the officers to perform a wellness check. Two officers drive to the man's home. They knock but receive no response. May the officers enter the home? Of course.**

Again, the officers have an "objectively reasonable basis" for believing that an occupant is "seriously injured or threatened with such injury." [Brigham City v. Stuart, 547 U.S. 398, 400, 403 (2006)]. Among other possibilities, the elderly man may have fallen and hurt himself, a common cause of death or serious injury for older individuals. The Fourth Amendment does not prevent the officers from entering the home and checking on the man's well-being.

To be sure, courts, police departments, and police officers alike must take care that officers' actions in those kinds of cases are reasonable under the circumstances. But both of those examples and others as well, such as cases involving unattended young children inside a home, illustrate the kinds of warrantless entries that are perfectly constitutional under the exigent circumstances doctrine, in my view.

With those observations, I join the Court's opinion in full.

[Footnotes and some case citations omitted; other case citations revised for style; bolding added]

****

NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

OFFICER'S TERRY FRISK HELD TO HAVE EXCEEDED SAFETY-BASED SCOPE LIMITS FOR FRISKS WHERE THE OFFICER EXTRACTED AND EXAMINED A BAGGIE OF HEROIN THAT WAS IN THE DETAINEE'S POCKET

In U.S. v. Brown, ___ F.3d ___ , 2021 WL ___ (9th Cir., May 12, 2021), a three-judge Ninth Circuit panel rules that the District Court should have granted the defendant's motion to suppress the fruits of a search of his pocket on grounds that an officer exceeded the scope of a frisk permitted under Terry v. Ohio, 392 U.S. 1 (1968).

The panel holds that the night-time contact of two officers with Brown in a motel parking lot was consensual until the point at which an officer ordered Brown to stand up and turn around. At that point, the officer had seized Brown, but the seizure was justified because the officer had developed reasonable suspicion that Brown had been engaged in a contemporaneous drug transaction. The panel also rules that the officer was justified in conducting a frisk of Brown based on reasonable safety concerns.

But the panel goes on to conclude that, under Sibron v. New York, 392 U.S. 40 (1968), the officer's subsequent search of Brown's pocket exceeded the limited scope of what Terry permits. In purportedly conducting the protective search for weapons that Terry authorizes, the officer did not perform any pat-down or other initial limited intrusion. Instead, the officer immediately removed and examined a plastic baggie that was in Brown's pocket.

The panel's Opinion describes as follows the facts relating to the unlawful extraction of the baggie containing heroin:

> [The officer] noticed that Brown "put his hands down to his sides" and that he then "reach[ed] his index finger into his right pocket." [The officer] walked over to Brown who raised his hands to his sides and said: "Oh, my bad, man, my bad."
>
> [The officer] ordered Brown to stand up and turn around. [The officer] explained, "I saw you reaching in that pocket," and when Brown denied that he had done so, [the officer] said, "Yeah, you were."
>
> Brown complied with [the officer's subsequent] instructions and allowed [the officer] to secure his arms behind his back in a finger hold. Pointing with his free hand to Brown's pants pocket, [the officer] asked, "What's in here?"
>
> Brown responded, "I'm not quite sure." [The officer] then stated "I'm going to check, OK?" Brown grunted a monosyllabic response that is unintelligible on the officers' body camera video.
>
> [The officer] then reached into Brown's pocket and pulled out a plastic bag. Brown claimed that it was coffee, but after inspecting it, [the officer] said "that is not coffee, James, that's heroin." [The officer] conducted a more thorough search of Brown, finding several thousand dollars, a number of unused syringes, and suboxone strips used to treat opioid withdrawal.

[Some paragraphing revised for readability in this format]

The Ninth Circuit panel's legal analysis of the scope-of-the-frisk issue covers over 10 pages.

Result: Reversal of U.S. District Court (Southern District of California) conviction of James Antonio Brown for possession of heroin.

****

WASHINGTON STATE SUPREME COURT

PUBLIC RECORDS ACT: INDIVIDUAL WITH YOUTUBE CHANNEL WHO SOUGHT TO QUALIFY AS "NEWS MEDIA" FOR PURPOSES OF GETTING ACCESS TO PHOTOGRAPHS AND THE MONTH AND YEAR OF BIRTH OF PERSONS WHO WORK IN CRIMINAL JUSTICE AGENCIES HELD TO NOT QUALIFY AS "NEWS MEDIA" BECAUSE HIS CHANNEL DID NOT HAVE A SEPARATE LEGAL IDENTITY

In Green v. Pierce County, ___ Wn.2d ___ , 2021 WL ___ (May 27, 2021), the Washington Supreme Court issues a 7-2 decision interpreting the Public Records Act (chapter 42.56 RCW). The Majority Opinion capsulizes the Supreme Court's ruling as follows in the Opinion's first paragraph:

> The Public Records Act (PRA) was created to inform the people of Washington of the actions of state agencies and to ensure access to the records of the same. RCW 42.56.030. It requires state agencies to produce records at the public's request. Certain records relating to public employment – including photographs and the month and year

of birth of people who work in state criminal justice agencies – are exempt from public request. RCW 42.56.250(8). However, members of the "news media" are entitled to these exempt records. . . . . RCW 5.68.010(5).

In this case, this court must determine whether an individual or 1 Ch. 42.56 RCW. : May 27, 2021 his YouTube channel qualifies as "news media." We conclude that the statutory definition of "news media" requires an entity with a legal identity separate from the individual. Here, Brian Green has not proved that he or the Libertys Champion YouTube channel meets the statutory definition of "news media," and, thus, he is not entitled to the exempt records. Therefore, we reverse the trial court in part . . . .

[Footnote omitted; paragraphing revised for readability in this format]

Result: Reversal in part of Thurston County Superior Court decision that ruled that PRA requester qualifies as "news media."

****

WASHINGTON STATE COURT OF APPEALS

SEIZURE OF SUSPECT IS HELD IN CRIMINAL CASE TO HAVE BEEN AN ARREST, NOT A TERRY SEIZURE, AND THE ARREST IS HELD TO HAVE NOT BEEN SUPPORTED BY AN ARREST WARRANT WHERE OFFICERS HAD NOT RECENTLY VERIFIED THE WARRANT

State v. Pines, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. I, May 17, 2021)

Facts and Proceedings below: (Excerpted from Court of Appeals Opinion)

On March 23, 2018, the anticrime team and gang units of the Seattle Police Department conducted an operation to locate individuals with warrants in the South Precinct and Central District of the city. After a morning briefing on "emphasis patrol" or "hot spot" emphasis, [Officer A] was working plain clothes and conducting surveillance in the 9200 block of Rainier Avenue, South, attempting to locate "wanted subjects."

[Officer A] was in his vehicle when he identified Pines driving a black BMW. [Officer A] recognized Pines and was aware of a February 2018 King County Sheriff's bulletin identifying a warrant for Pines on residential burglary and domestic violence. [Officer A] knew that Pines was previously convicted of a felony. **[LEGAL UPDATE EDITOR'S NOTE: Key to the ruling against the State in this case is that neither Officer A nor anyone involved in the subsequent arrest of defendant Pines checked to verify that the arrest warrant was still valid, which it was.]**

[Officer A] followed Pines to Columbia City, where Pines parked his vehicle and entered a Pagliacci Pizza restaurant. [Officer A] advised the uniformed arrest team that Pines was in the restaurant.

[Officer B] was one of three uniformed officers that entered the restaurant to contact Pines. As the officers entered, Pines began moving toward the other door. The officers tackled Pines to the ground, holding him down by the neck and head, and handcuffed him.

[Officer A], after seeing Pines attempt to leave, entered the restaurant. As the officers were handcuffing Pines, [Officer A] yelled out "you're under arrest for your felony warrant." While handcuffing Pines, [Officer B] saw Pines's hand move towards his waistline, giving him concern that Pines had a weapon. Once cuffed, the following exchange took place:

> [OFFICER A]: Antwaun, do you got anything on you?
> PINES: Yes, sir.
> [OFFICER A]: What do you got?
> PINES: You know what I got.
> [OFFICER A]: Is it dope or do you got a gun?
> PINES: You know that I don't smoke dope.
> [OFFICER A]: Say what now?
> PINES: I don't smoke dope.
> [OFFICER A]: You got a gun on you? Where's it at? Your pocket?
> PINES: Yes, sir.

The officers then frisked Pines and found a handgun in his jacket pocket.

Officers escorted Pines outside and read him his Miranda rights. Thirteen minutes after detaining Pines, the police confirmed that there was a valid warrant for Pines's arrest.

[Some paragraphing revised; footnotes omitted]

Procedures below:

The State charged Pines with unlawful possession of a firearm in the first degree. Pines moved to suppress the handgun recovered during the search on the grounds that police discovered the handgun after arresting him without probable cause. The trial court ruled instead that the handgun was discovered during a Terry seizure that was supported by reasonable suspicion.

ISSUES AND RULINGS: (1) Was the handgun discovered after Pines had been "arrested"? (ANSWER BY THE COURT OF APPEALS: Yes)

(2) Where the officers had not verified the existence of an arrest warrant for Pines within the previous two weeks or more, was the arrest on the warrant supported by probable cause? (ANSWER BY THE COURT OF APPEALS: No)

Result: Reversal of King County Superior Court conviction of Antwaun Deshawn Pines for unlawful possession of a firearm in the first degree.

ANALYSIS BY COURT OF APPEALS: (Excerpted from Court of Appeals Opinion)

A. Terry Stop or Arrest?

. . . .

In Terry v. Ohio, 392 U.S. 1, 10 (1968), the United States Supreme Court carved out an exception to the warrant requirement by allowing officers to detain an individual as part of an investigatory stop. Under this exception, a police officer may stop and detain an

individual for investigation if the officer reasonably suspects the person is engaged or about to be engaged in criminal conduct. . . .

The officer may only frisk the individual for weapons when the officer has grounds to believe the individual is armed and presently dangerous. "For a permissible Terry stop, the State must show that (1) the initial stop is legitimate; (2) a reasonable safety concern exists to justify the protective frisk for weapons; and (3) the scope of the frisk is limited to the protective purposes." State v. Duncan, 146 Wn.2d 166, 172 (2002).

Under Terry, a police officer may temporarily detain a person based on a reasonable suspicion that the person is or has been involved in a crime. In evaluating the reasonableness of an officer's suspicion, we look to the totality of the circumstances known to the officer. . . .

We determine the reasonableness based on an objective view of the known facts, not the officer's subjective belief or ability to correctly articulate his suspicion in reference to a particular crime. State v. Mitchell, 80 Wn. App. 143, 148 (1995). "The detention must not exceed the duration and intensity necessary to dispel the officer's suspicions." Mitchell, 80 Wn. App. at 144.

We also use an objective standard to determine whether an encounter with the police rises to the level of a formal arrest. . . .

The State relies on Mitchell, to support its claim that the officers' tactics of tackling, and handcuffing Pines were legitimate under Terry. In Mitchell, an officer working alone on night patrol observed Mitchell and a companion walking down the street in a Seattle residential neighborhood carrying a semiautomatic handgun. The officer observed Mitchell tuck the handgun into his waistband. . . .

After reporting his observation by radio, the officer turned his vehicle around and approached the two from the rear with his flashers and spotlights on. The officer got out of his vehicle, pulled his gun, and ordered the two to stop and put their hands up. Mitchell tossed a handgun into the bushes as he raised his hands.

The officer ordered the two to lie face down with their legs spread and arms at their sides. The two remained in that position for two to three minutes until other officers arrived. After discovering his identity and criminal record, Mitchell was arrested for being an adjudicated minor in possession of a handgun. . . . The trial court denied Mitchell's motion to suppress the handgun.

On appeal, this court recognized that the detention on Mitchell's liberty was greater than the typical Terry stop, but affirmed the detention. . . . The [Mitchell] court explained:

> The intrusion upon Mitchell's liberty was greater than the typical Terry stop, which normally includes a frisk for weapons and brief questioning. However, under certain circumstances measures such as handcuffing, secluding, and drawing guns on the suspect may be appropriate to accomplish a Terry stop. Such circumstance only exists when the police have a reasonable fear of danger. For example, it is reasonable for an officer to draw a weapon to effect a stop where a suspect is believed to be armed. In addition, an emergency situation may warrant temporary restraint of a suspect without investigation

> We hold that the scope of this stop was within the bounds of a reasonable investigatory detention under the circumstances. . . . [T]he officer in this case had legitimate concern for his safety and the safety of others because Mitchell was carrying a gun. In addition, the officer was justified in restraining Mitchell for a time without investigating his suspicions about criminal activity because the officer was alone, and Mitchell had at least one companion who also may have been armed. Reasonable concern for the officer's own safety warrants the officer waiting for backup before approaching the suspects.

Mitchell, 80 Wn. App. at 145-46 (citing State v. Williams, 102 Wn.2d 733, 689 P.2d 1065 (1984)).

The [Mitchell] court further explained that the stop did not rise to a custodial arrest, stating:

> Mitchell was ordered to stop, raise his hands, and then lie down face first on the ground. Mitchell remained in that position for at least two or three minutes. Mitchell may not have known that the officer had his gun drawn, because the officer approached from behind. Nevertheless, Mitchell obeyed the command to lie down on the sidewalk. This was a grave intrusion upon his liberty. However, it is difficult to imagine a less intrusive means of effecting a stop of an armed suspect with a companion which would not compromise the officer's safety. The officer was clearly justified in trying to avoid an exchange of gun fire. . . .

Here, in stark contrast with Mitchell, the arresting officers did not observe Pines carrying a weapon. Indeed, as [Officer B] testified, they had no reason to contact Pines except for their belief that he might have a warrant.

Further, unlike Mitchell, where the officer was alone at night, there were three uniformed police officers along with [Officer A] at the scene. No officer testified that they feared for their safety prior to Pines's seizure or that they had seen a weapon prior to their search. And finally, unlike Mitchell where the defendant was told to lie down without contact from the officer, the three uniformed officers forcefully took Pines to the ground and handcuffed him, while [Officer A] yelled that Pines was under arrest on a felony warrant.

Viewed objectively, a reasonable person in Pines's situation would consider themselves under custodial arrest. . . . Pines's seizure exceeded the scope of a valid Terry stop. The trial court erred in concluding the search was valid under Terry.

B. Probable cause [as to the existence of a current arrest warrant]?

We turn next to whether the police had probable cause of a valid warrant for Pines's arrest at the time of his arrest**. "The test for 'staleness' is one of common sense; if the facts indicate information is recent and contemporaneous, then it is not 'stale.'" State v. Perea, 85 Wn. App. 339, 343, 932 P.2d 1258 (1997) . . . . In Perea, for example, Division Two of this court held that week-old information was recent enough for the officer to form probable cause to arrest Perea at the moment the officer first saw him**.

The State relied on the testimony of [Officers A and B] to defend against Pines's motion to suppress. While [Officer A] testified that he had attended a briefing on the morning of Pines's arrest, he did not testify that anyone at that briefing discussed there being a valid warrant for Pines.

[Officer A] instead testified that he was aware of a warrant because he "was aware of a King County Sheriff's bulletin that had come out in February of 2018 for assault and residential burglary and for domestic violence." [Officer A] confirmed that Pines's arrest was at least a month after he had seen the bulletin.

While [Officer A] testified that he had been in contact with [Officer C] from the King County Sheriff's Office who told him he was looking for Pines, [Officer A] did not know when this occurred, and had not checked to see if Pines had posted bond.

[Officer A] also confirmed that after observing Pines driving in a BMW on March 23, 2018, he did not radio in and verify the warrant, and he did not know if any other officer had. Thus, in contrast with the one-week-old information approved in Perea, [Officer A's] testimony revealed that his information was a month old.

[Officer B] also testified that he had been at the briefing on March 23, 2018, and presumed, but did not know if anyone had verified a warrant from Pines. He explained that had he been in charge of the operation, he would have started the morning by verifying the warrants, but he was not in charge on March 23, 2018.

[Officer A] testified on direct that he knew there was a warrant for Pines's arrest on March 23, 2018, because he had previously attempted to contact him at his family's address on the warrant. On cross-examination, however, [Officer A] could not recall when he had previously looked for Pines, confirming that it could have been two weeks or a month before. Again, in contrast with the one-week old information approved in Perea, [Officer A's] testimony revealed that his knowledge of a valid warrant was at least two-weeks or a month old.

Here, unlike Perea, common sense dictates that the information on a valid warrant for Pines was stale. [Officer B] testified that, had he been in charge, he would have verified the warrant on the morning before the operation. Yet the State offered no testimony that anyone had done so on March 23, 2018.

[Officer B] also disagreed with [Officer A's] statement during the arrest that Pines was under arrest on the felony warrant, because he believed that verification of the warrant was necessary prior to an arrest on the warrant.

[Court's footnote 6: *We note also that it took only a few minutes for the arresting officers to radio in and verify the warrant after Pines's arrest. Common sense dictates that the arrest team could have verified the warrant after they watched Pines enter the restaurant and before they entered to contact him.*]

Because there was no evidence offered of reasonably contemporaneous verification of an existing warrant, the police lacked probable cause to arrest Pines on the warrant at the time of the arrest. Without probable cause for the arrest, the warrantless search of Pines was invalid and in violation of article I, section 7.

[Some footnotes omitted; some case citations omitted and others revised for style; some paragraphing revised for readability in this format]

PHOTO MONTAGE ID PROCEDURE DECLARED IN CRIMINAL CASE BY TWO MEMBERS OF THREE-JUDGE PANEL NOT TO HAVE BEEN IMPERMISSIBLY SUGGESTIVE, BUT THE THIRD JUDGE MAKES A GOOD ARGUMENT TO THE CONTRARY WHERE PICTURE OF DEFENDANT IN THE MONTAGE WAS THE ONLY PICTURE OF A PERSON WITH A NECK TATTOO

In State v. Derri, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. I, May 11, 2021), Division One of the Court of Appeals affirms convictions of defendant for three counts of robbery in the first degree (all bank robberies), and the Court rejects his challenge to photo montage procedures used by police with bank robbery teller-victims who gave eyewitness testimony that sealed his fate.

In lengthy fact-based legal analysis, two of the three judges on the panel conclude that, on the totality of the circumstances, one cannot conclude that there was an abuse of discretion by the trial judge in finding that the photo montages were not impermissibly suggestive despite the fact that the photo montages included a picture of defendant with a neck tattoo, and none of the other persons in the montages had a neck tattoo. A factor in the analysis was the fact that none of the victims had mentioned seeing a neck tattoo on the defendant.

The third judge on the Division One panel asserts that the tattoo of defendant should have been cropped from his picture in the photo montage. That judge would have liked to see an Opinion from the Court of Appeals declaring that the procedures were impermissibly suggestive. He concurs, however, in the Majority Opinion's ruling that the eyewitness testimony was lawfully admitted. On this point of concession, he concludes that including the neck tattoo in the picture did not create a substantial likelihood of irreparable misidentification in light of all of the circumstances surrounding the eyewitness testimony.

Important to the favorable outcome for the State in this case was the combined effect of the following facts: (1) each of the tellers had an opportunity to observe the bank robber; (2) each interacted with the robber more than momentarily; (3) one teller recalled meeting the defendant on a previous occasion at the bank; (4) the tellers described the defendant, his appearance and his demeanor in sufficient detail to establish that they were paying attention to the robber; (5) all of the descriptions were relatively consistent with the defendant's actual appearance; (6) the tellers' out-of-court identifications were made shortly after the robberies; and (7) the tellers showed high levels of certainty in their identifications.

Result: Affirmance of King County Superior Court convictions of Christopher Lee Derri, a/k/a John Stites, for three counts of robbery in the first degree.

"SAFELY-OFF-THE-ROADWAY" AFFIRMATIVE DEFENSE IS HELD IN PHYSICAL CONTROL PROSECUTION TO APPLY AS A MATTER OF LAW WHERE DEFENDANT HAD PARKED IN A GAS STATION PARKING LOT AND WAS ASLEEP BEHIND THE WHEEL WITH THE CAR IN PARK, ENGINE RUNNING AND LIGHTS ON

In State v. Edgar, ___ Wn. App. 2d ___ , ___ P.3d ___ (Div. III, March 9, 2021 Unpublished Opinion declared published on May 6, 2021), Division Three of the Court of Appeals agrees with

the challenge of defendant to his Kittitas County Superior Court conviction for felony physical control. The Court of Appeals rules that a reasonable jury could not have found that he failed to prove the affirmative defense of "safely-off-the-roadway" by a preponderance of the evidence. In other words, the Court of Appeals rules that defendant proved his defense of safely-off-the-roadway as a matter of law.

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

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

[LEGAL UPDATE EDITOR'S NOTE: Elsewhere in the Edgar Opinion, it is noted that when the police first contacted the defendant, he was asleep in the driver's seat of the parked car with the engine still running and the lights still on.]

In key part, the analysis by the Court of Appeals (after a discussion of some relevant precedents) is as follows:

> The physical control statute protects the public from the threat posed by a person who controls a vehicle while under the influence of alcohol or drugs and could choose to get back on the roadway. See [State v. Votava, 149 Wn.2d 178, 187 (2003)]. The legislature balanced this threat with providing an incentive for intoxicated drivers to get off the roadway. The affirmative defense of "safely off the roadway" only applies when the State can prove every element of the offense. . . .
>
> In this case, the prosecutor argued that Mr. Edgar was not safely off the roadway because he could return to the roadway. By definition, this is true in almost every physical control case: an intoxicated person in physical control of a vehicle is not dangerous in-and-of-itself, but rather poses a danger because they could choose to get back on the roadway.
>
> In rejecting a similar argument, the Votava court noted:
>
> > This argument fails to dispose of the issue. It goes to the elements of the charge, rather than the defense. The very nature of this affirmative defense is

that, although the State can prove every element of the actual physical control charge, acquittal is appropriate if the defendant can show, by a preponderance of the evidence, that the defendant moved the vehicle safely off the roadway.

In this case, the State argued in closing that the defense of safely-off-the-roadway should not be available to Mr. Edgar because he was sleeping in the driver's seat with the engine running. This argument comes dangerously close to shifting the burden of proving an essential element. In other words, if the State argues that the only way a defendant can prove that he is safely off the roadway is by showing that he is no longer in physical control of a vehicle, then the burden has shifted to the defendant to disprove a necessary element.

When he realized that he should not be driving, Mr. Edgar pulled off the roadway, parked in a large parking lot, and fell asleep. While we do not condone the danger he posed to the public by getting behind the wheel in the first place, he did exactly what the legislature asked him to do: he pulled safely off the roadway. Our analysis of the evidence in this case convinces us that a rational trier of fact could not have found that Mr. Edgar failed to prove the defense by a preponderance of the evidence.

Result: Reversal of Kittitas County Superior Court conviction of Kevin Ray Edgar for felony physical control; dismissal of charges with prejudice.

RCW 46.16A.520 PROHIBITION ON ALLOWING AN UNAUTHORIZED PERSON TO DRIVE IS HELD TO INCLUDE A REQUIREMENT THAT THE STATE PROVE THAT DEFENDANT KNOWS THAT THE PERSON DRIVING IS UNAUTHORIZED

In State v. Elwell, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. III, May 4, 2021), Division Three of the Court of Appeals rules that defendant may only be convicted of violating RCW 46.16A.520 if the defendant both (1) knowingly permits another person to drive the vehicle and (2) knows that the person was unauthorized to drive

Result: Affirmance of decision of the Kittitas County Superior Court, which reversed the District Court conviction of Melinda Ann Elwell for violating RCW 46.16A.520.

****

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

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

Every month I will include a separate section that provides very brief issue-spotting notes regarding select categories of unpublished Court of Appeals decisions that month. I will include such decisions where issues relating to the following subject areas are addressed: (1) Arrest, Search and Seizure; (2) Interrogations and Confessions; (3) Implied Consent; and (4) possibly

other issues of interest to law enforcement (though probably not sufficiency-of-evidence-to-convict issues).

The 10 entries below address the May 2021 unpublished Court of Appeals opinions that fit the above-described categories. I do not promise to be able catch them all, but each month I will make a reasonable effort to find and list all decisions with these issues in unpublished opinions from the Court of Appeals. I hope that readers, particularly attorney-readers, will let me know if they spot any cases that I missed in this endeavor, as well as any errors that I may make in my brief descriptions of issues and case results. In the entries that address decisions in criminal cases, the crimes of conviction or prosecution are italicized, and descriptions of the holdings/legal issues are bolded.

1. State v. William Lewis Marion: On May 3, 2021, Division One of the COA issues an unpublished Opinion revising its February 16, 2021 unpublished Opinion. The Court of Appeals again rejects the appeal of defendant from his King County Superior Court convictions for (A) *assault in the first degree* and (B) *assault in the second degree, both with deadly weapon enhancements*. Among other rulings, **the Court of Appeals concludes that under the totality of the circumstances of this case, where identification of the defendant as perpetrator was at issue, the trial court did not abuse its discretion in the jury trial by admitting video evidence of the defendant's lawfully conducted show-up identification**.

2. State v. Michael David Smith: On May 3, 2021, Division One of the COA (A) rejects the appeal of defendant from his King County Superior Court conviction for *domestic violence assault of his former girlfriend*, but (B) agrees with his jury-instruction-based challenge to a conviction for *malicious mischief* (the case is remanded for possible re-trial on the malicious mischief charge). One of the issues in the appeal involves the admission into evidence of incriminating statements that Smith made to his victim (the former girlfriend) in a recorded jail phone call that occurred while he had remained in custody following his invocation of his right to an attorney in a custodial interrogation. The Court of Appeals describes the related facts as follows:

> While [a detective] was at the [victim's] house, Smith called [the victim] from jail. [The detective] instructed her to answer the call and "[a]sk him why he did it." When [the victim asked Smith] "why . . . you broke my Toshiba laptop," Smith responded "because I was pissed." . . . . The jail . . . recorded the call and the court admitted it at trial.

Smith's unsuccessful challenge to the trial court's admission into evidence the phone call recording was based on creative theories under the Fifth Amendment/Miranda, the Sixth Amendment and Criminal Rule 3.1(b)(1). The Court of Appeals provides three pages of analysis in rejecting these arguments challenging admission of the phone call recording.

3. State v. Joseph Anthony Bonomo: On May 18, 2021, Division Two of the COA rejects the appeal of defendant from his Pierce County Superior Court convictions for (A) *unlawful possession of a firearm*, and (B) *unlawful possession of a short-barreled shotgun.* **The Court of Appeals rejects his arguments for suppression of evidence, concluding that, because Bonomo had been subject to community custody restrictions and had been lawfully found by community corrections officers to have heroin on his person, RCW 9.94A.631(1) authorized community corrections officers to search his girlfriend's car that he was driving (she was not at the scene). The Court of Appeals holds further that the search**

allowed under the statute and the constitution lawfully extended to the trunk because it was reasonable to believe that he would have more heroin in the trunk of the car.

Note that, based on the Washington Supreme Court's constitutional ruling in State v. Blake earlier this year striking down Washington's possession of controlled substances crimes, the Court of Appeals reverses Bonomo's conviction for unlawful possession of a controlled substance (heroin).

4. State v. Cashundo Scott Banks, (aka Cashundo S. Banks, Donald Eugene Irving): On May 18, 2021, Division Two of the COA rejects the defendant's challenge to his Pierce County Superior Court conviction for *first degree unlawful possession of a firearm*. The conviction arose from an incident in which a police officer approached Banks to make sure he was okay, because Banks was asleep in a car parked in a Safeway parking lot with the engine running. After confirming that Banks did not need assistance, the officer asked Banks in a very low-key, conversational, non-demanding manner for his name and identification. Banks gave his name but said that he did not have any identification documents on his person. A records check disclosed that there was an outstanding warrant for Banks's arrest. A search incident to arrest led to discovery of a firearm and methamphetamine. **The Court of Appeals holds that the trial court did not err when it denied Banks's motion to suppress. The officer's low-key request for identification did not constitute a Terry seizure under the totality of the circumstances, so reasonable suspicion was not required to justify the officer's actions up to the point of learning of the outstanding warrant for defendant's arrest.**

Note that, based on the Washington Supreme Court's constitutional ruling in State v. Blake earlier this year striking down Washington's possession of controlled substances crimes, the Court of Appeals reverses Banks's conviction for *unlawful possession of a controlled substance* (methamphetamine).

5. State v. Marvin John Tankersley: On May 20, 2021, Division Three of the COA rejects the appeal of defendant from his Skamania County Superior Court convictions for (A) *animal cruelty in the first degree* for stabbing a dog to death, and (B) *malicious mischief in the third degree*. **One of Tankersley's unsuccessful legal arguments on appeal was that the trial court erred in allowing the State to "comment on" his exercise of his Miranda rights.** Defendant received Miranda warnings while in custody, and he elected to remain silent and to request an attorney. Moments later, defendant spontaneously volunteered the following to the deputy who had Mirandized him: "When this is over with and you don't find an animal, then I'm gonna walk, I'm gonna come get my stuff and I'm gonna leave." At trial, Tankersley testified that he accidentally stabbed the dog while trying to protect a cat from the dog, and that he then euthanized the dog to end its suffering from the accidental stabbing.

The Court of Appeals rules under the following analysis (bolding added) that the State was lawfully permitted to use this volunteered statement for two reasons:

> "First, the State may question a defendant's failure to incorporate the events he relates at trial into a statement earlier given police or to challenge inconsistent assertions. State v. Belgarde, 110 Wn.2d 504, 511-12 (1988). A partial silence may, at the time of the initial statement, suggest a fabricated defense, and the silence properly impeaches the later defense. State v. Belgarde, 110 Wn.2d at 511-12. Tankersley's statement that law enforcement would not find a dead body conflicts with his innocent explanation, at trial, regarding Kova's death. **Second, Marvin Tankersley volunteered his remarks without questioning from a law enforcement officer. The law prohibits improper interrogation,**

not casual conversation. State v. Cunningham, 116 Wn. App. 219, 228, 65 P.3d 325 (2003). Once a defendant has asserted his right to counsel, the defendant can waive the right by initiating a conversation with law enforcement. State v. Earls, 116 Wn.2d 364, 382-383, 805 P.2d 211 (1991).

6. State v. Shamarr Derrick Parker: On May 24, 2021, Division One of the COA reverses the defendant's 2018 Pierce County Superior Court convictions for (A) *first degree kidnapping* and (B) *first degree robbery*, and the Court of Appeals **remands the case for the Superior Court to hold a suppression hearing to determine whether the Exclusionary Rule requires suppression of evidence gained by law enforcement's unlawful warrantless use in their 2008 investigation in this case of a cell-site simulator (also known as a "stingray").** The Court of Appeals discusses State v. Mayfield, 192 Wn.2d 871 (2019), the Washington Supreme Court decision holding that the Exclusionary Rule of article I, section 7 of the Washington constitution includes an attenuation exception to exclusion, but that the Washington constitution's exception is narrower than is the attenuation exception under the Fourth Amendment. The Opinion of the Parker Court does not commit one way or the other on the question of whether the attenuation exception to the Exclusionary Rule applies under the facts of this case.

7. State v. Joshua J. Mobley: On May 25, 2021, Division Three of the COA rejects the appeal of defendant from his Spokane County Superior Court conviction for *second degree murder* of a 10-month-old child who was in his care at the time of the killing. Among other rulings, the Court of Appeals determines: (1) **that the DNA-search-element of a search warrant met particularity requirements in authorizing police to "diligently search for and seize . . . DNA evidence to include any body fluids, hair, blood, saliva, vomitus, and/or other bodily fluids**.," and that the search authorization in the warrant was not required to be limited to searching only for DNA of the child victim; (2) that the trial court did not abuse its discretion in finding **that a five-year-old witness (the defendant's child) was competent to testify about her observation of defendant's conduct relating to the death of the victim**; and (3) **that the prosecutor did not improperly comment on defendant's constitutional right to silence** in pointing out to the jury that when police initially contacted him prior to his seizure or arrest and prior to any attempt at interrogation, defendant stated that he was too busy to talk to the police.

8. State v. Alejandro Anaya-Cebrera: On May 25, 2021, Division Two of the COA rejects the appeal of defendant from his Grays Harbor County Superior Court conviction for *carrying a concealed pistol without a license* (but agrees with defendant that his convictions for possession of heroin and methamphetamine must be overturned in light of the Washington Supreme Court decision striking down the former drug possession statutes in State v. Blake, 197 Wn.2d 170 (2021)). **The Court of Appeals holds in relation to the carrying-a-concealed-pistol-without-a-license conviction that reasonable suspicion supported a Terry seizure of defendant, and there was no improper consideration of race by the officer** where: (1) the seizing officer had been dispatched to a disturbance involving criminal activity by a "Latino male" at the reported victim's property; (2) on his way to the property, the officer observed Anaya-Cabrera, a Latino male, about a quarter mile away from the property driving away from the property; (3) the officer knew from his recent encounter with Anaya-Cabrera that Anaya-Cabrera had recently moved from the would-be victim's property, and that there was some recent history of conflict between Anaya-Cabrera and the alleged victim.

9. State v. Donald George IV: On May 25, 2021, Division Two of the COA rejects the appeal of defendant from his Pierce County County Superior Court convictions for his convictions of (A) *second degree unlawful possession of a firearm*, (B) *possession of a stolen firearm*, and (C) *second degree identity theft* (and agrees with defendant that his conviction for possession of a controlled substance must be overturned in light of the Washington Supreme Court decision striking down the former drug possession statutes in State v. Blake, 197 Wn.2d 170 (2021)). **The Court of Appeals rules that the trial court did not err in denying George's motion to suppress because, although the officer making a Terry seizure of George based on an arrest warrant made a mistaken-identity seizure, the deputy had a reasonable, articulable suspicion – based on the very similar appearance of George to the person (who the officer knew) named on an arrest warrant – that teh vehicle passenger (George) who fled from a traffic stop was the person named on the arrest warrant**.

10. State v. Jimmy Dela Castilla-Whitehawk: On May 25, 2021, Division Two of the COA rejects the appeal of defendant from his Thurston County Superior Court convictions for (A) *unlawful possession of a controlled substance (methamphetamine) with intent to deliver*, (B) *unlawful possession of a controlled substance (heroin) with intent to deliver* (but agrees with defendant that his conviction for possession of a controlled substance (alprazolam) must be overturned in light of the Washington Supreme Court decision striking down the former drug possession statutes in State v. Blake, 197 Wn.2d 170 (2021)). **The Court of Appeals declares that, based on a confidential informant's eyewitness observation, the CI provided law enforcement with detailed, non-conclusory information about a planned drug sale by defendant, thus: (1) supporting the basis-of-information requirement for a search warrant affidavit that was grounded in the CI's report: and (2) supporting the requirement for reasonable suspicion for an investigative seizure of defendant.**

****

LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

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

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

law update for published decisions from Washington's appellate courts, from the Ninth Circuit of the United States Court of Appeals, and from the United States Supreme Court.

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

****

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

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

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at [http://www.supremecourt.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. Federal statutes are at [http://www.law.cornell.edu/uscode/].

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's, is at [http://www.leg.wa.gov/legislature]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. For information about access to the Criminal Justice Training Commission's Law Enforcement Digest and for direct access to some articles on and compilations of law enforcement cases, go to [cjtc.wa.gov/resources/law-enforcement-digest].

****