LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

NOVEMBER 2020

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

OFFICERS MAKING A TRAFFIC STOP MAY NOT OPEN A CAR DOOR AND LEAN INSIDE IF THE OFFICERS DO NOT HAVE A REASONABLE BELIEF OF DANGER POSED BY SOMEONE INSIDE THE CAR

In U.S. v. Ngumezi, ___ F.3d ___ , 2020 WL ___ (9th Cir., November 20, 2020), a three-judge Ninth Circuit panel rules that police officers who have reasonable suspicion sufficient to justify a traffic stop of a car – but who lack a reasonable belief that a person inside the car poses a danger – may not open a door of the car and lean inside to talk to the driver.

The Ninth Circuit panel rules that opening the car door and leaning into the car constitutes a search under the Fourth Amendment and must be supported by a search warrant or a recognized exception to the search warrant requirement. And the panel rules that the Exclusionary Rule applies to the handgun that was found during the subsequent processing of the defendant's car in an inventory search.

The Ninth Circuit Opinion includes relatively lengthy legal analysis of the Fourth Amendment issue. A key part of that analysis is excerpted here:

> The government argues that [the defendant] would have had to speak with [the officer] one way or another, and therefore opening the door and leaning in was "minimally intrusive" because, as a practical matter, it "did not alter [the defendant's] circumstances – it merely facilitated communication." [The Government] analogizes [the officer's] action to that of shining a flashlight into a car, which the Supreme Court has held is not a search. See Texas v. Brown, 460 U.S. 730, 740 (1983) (plurality opinion).
>
> That reasoning is flawed because it ignores that [the officer] entered the interior space of the vehicle when he leaned in across the plane of the door. As several recent Supreme Court decisions have confirmed, that **physical intrusion is constitutionally significant**: "When 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a "search" within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'" Florida v. Jardines, 569 U.S. 1, 5 (2013) (quoting United States v. Jones, 565 U.S. 400, 406 n.3 (2012)); see Jones, 565 U.S. at 408 n.5 (explaining that a physical intrusion "conjoined with . . . an attempt to find something or to obtain information" constitutes a search).
>
> **Although the intrusion here may have been modest, the Supreme Court has never suggested that the magnitude of a physical intrusion is relevant to the Fourth Amendment analysis**. Jones, for example, involved the attachment of a GPS tracker that was "a small, light object that [did] not interfere in any way with the car's operation," yet the Court still held that the attachment effected a search. . . . Nor do we see how

> courts could administer a test that would require them to distinguish between [the officer here] leaning into the passenger-side area of [this defendant's] car and, say, an officer crawling into the back of a car to look under the seats. Instead, we apply a bright-line rule that opening a door and entering the interior space of a vehicle constitutes a Fourth Amendment search. . . .

[Some citations omitted; bolding added; some paragraphing revised for readability]

Result: Reversal of U.S. District Court (San Francisco) conviction of defendant for being a felon in possession of a handgun.

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WASHINGTON STATE SUPREME COURT

CASE-LAW-CREATED "FACT OF THE COMPLAINT" EXCEPTION TO THE EXCLUSION OF HEARSAY TESTIMONY SURVIVES ATTACK THAT THE EXCEPTION IS ANTIQUATED

In State v. Martinez, ___ Wn.2d ___ , 2020 WL ___ (November 19, 2020), the Washington Supreme Court rejects, by an 8-1 vote, the request of defendant Simon Ortiz Martinez that the Court abolish the case-law-created "fact of the complaint" exception to the hearsay rule.

Martinez was charged with first degree rape of a child. At trial, over Martinez's objection, two friends of the alleged victim, plus her mother and a friend's mother were all permitted to testify that Y.M. told them she had been sexually abused. Based on the longstanding, case-law-created "fact of complaint" exception to the hearsay rule, the trial court admitted evidence that the victim had told others that she had been sexually abused. Martinez argued at trial and in his unsuccessful appeal that the "fact of complaint rule" is based on antiquated notions and should be abandoned.

The Martinez Majority Opinion notes two important limitations on the use of such evidence: (1) the rule's hearsay exception allows admission only of the fact that the victim made such a timely complaint regarding an alleged sexual assault, and not any evidence of the alleged attacker's identity or details about the nature of the act; (2) under the rule, the jury is to be advised that the evidence is not being admitted as proof of the truth of the report, but only as proof that the report was made.

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WASHINGTON STATE COURT OF APPEALS

CONSTRUCTIVE POSSESSION: THE FOLLOWING EVIDENCE – (1) DRIVER MADE FURTIVE MOVEMENTS IN A LONG DELAY BEFORE PULLING OVER IN A TRAFFIC STOP, (2) DRIVER WAS FOUND TO BE IN POSSESSION OF METHAMPHETAMINE IN A SEARCH INCIDENT TO ARREST FOLLOWING THE TRAFFIC STOP, AND (3) METHAMPHETAMINE AND OTHER DRUGS WERE FOUND IN A SUBSEQUENT WARRANT SEARCH OF A GROCERY BAG THAT WAS BEHIND THE DRIVER'S SEAT AND THAT ALSO CONTAINED PERISHABLE FOOD – IS SUFFICIENT TO ESTABLISH BEYOND A REASONABLE DOUBT THAT DEFENDANT HAD POSSESSION OF METHAMPHETAMINE AND SUBOXONE THAT WAS DISCOVERED INSIDE THE GROCERY BAG IN THE CAR THAT HE WAS DRIVING

State v. Listoe, ___ Wn. App. 2d ___ , 2020 WL ___ (November 10, 2020),

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

> On May 11, 2018, [Deputy A] of the Kitsap County Sheriff's Office observed a black car parked at a 7-Eleven convenience store. On running the license plate, [Deputy A] discovered that the car's registration had expired. The car pulled out of the 7-Eleven parking lot, [Deputy A] got behind it and pulled it over. Listoe, who was driving the car, did not pull over immediately but traveled for about 1,000 feet first, which [Deputy A] believed was uncommon.
>
> As [Deputy A] approached the car, he could see Listoe making "a bunch of movements with his hands." Listoe opened the door and began to step out, but [Deputy A] ordered him to get back in the car. [Deputy A] observed Listoe making additional "furtive movements" in his lap area. [Deputy A] then ordered Listoe to place his hands on the steering wheel, and Listoe complied. [Deputy A] informed Listoe of the reason for pulling him over, and Listoe responded that the car was not his and that he did not know the registration was expired.
>
> Rhonda Lemon was sitting in the car's passenger seat. After briefly speaking to Lemon, [Deputy A] told Lemon that she was free to leave, and she left. Lemon was not searched during the encounter.
>
> [Deputy A] ordered Listoe out of the vehicle and placed Listoe under arrest.
>
> **[LEGAL UPDATE EDITOR'S COMMENT: Neither the Opinion by the Court of Appeals nor the appellate court briefing by the parties addresses whether the custodial arrest of Listoe was justified. Apparently defendant has not raised that issue, and I will not address it in the Legal Update.]**
>
> During the search incident to Listoe's arrest, [Deputy A] found a plastic bag that contained a white crystalline substance on Listoe's person. The substance appeared to be methamphetamine. Listoe also had $221 in his wallet.
>
> A K-9 unit alerted to the presence of controlled substances in the car Listoe was driving. Due to the K-9 alert, [Deputy A] obtained a search warrant to search the interior of the vehicle for additional evidence of controlled substances. [Deputy A] and [Deputy B] searched the vehicle. Behind the driver's seat, [Deputy A] discovered a black reusable grocery bag that contained a white grocery bag and fruits and vegetables.
>
> The white bag, in turn, contained a black zippered pouch, liquor bottles, and a package of sublingual Suboxone strips. The zippered pouch contained a notepad with a name and phone number, a digital scale, a plastic Tupperware container that had white residue, a factory packaged plastic bag with syringes, and a mint container that contained shards of a white crystalline substance that [Deputy A] believed was methamphetamine. The substance weighed approximately six and a half grams.
>
> [The two deputies] also searched the car for any indication of Listoe's "possession and control" over the vehicle. They did not find any evidence specifically tying Listoe to the vehicle. The deputies did not obtain fingerprints off the zippered pouch or any other

> items in the grocery bags because the nature of the plastics and metals and the condition of the zippered pouch made it unlikely that a good sample could be collected.
>
> The white crystalline substance found on Listoe's person during the search incident to arrest was tested at the crime lab and confirmed to be methamphetamine. The amount, weighing 3.3 grams, was consistent with a personal use quantity. The substance inside the mint container was also confirmed to be methamphetamine. The quantity of methamphetamine in the mint container exceeded the amount typically associated with personal use and was indicative of dealing.

[Some paragraphing revised for readability and for insertion of a comment]

Proceedings below:

Listoe was convicted in a jury trial of (A) one count of possession of methamphetamine with intent to deliver, and (B) one count of possession of a controlled substance (Suboxone).

ISSUE AND RULING: The key facts relating to the constructive possession issue are: (1) Listoe had been observed by an officer making furtive movements while taking an uncommonly long time to pull over in a traffic stop; (2) Listoe had methamphetamine on his person when searched incident to arrest, and that is one of the types of illegal drugs found in a subsequent warrant search of bags located behind the driver's seat; and (3) the illegal drugs were in a bag containing perishable food items.

Is the totality of the evidence – viewing it in the best light for the State as required at this stage of review – sufficient to establish beyond a reasonable doubt that Listoe had constructive possession over the methamphetamine and the Suboxone discovered in the car that he was driving, even though he did not own the vehicle and even though there was a passenger in the front passenger seat when the officer made the traffic stop? (ANSWER BY COURT OF APPEALS: Yes)

Result: Reversal (based on jury selection issue not addressed here) of Kitsap County Superior Court conviction of James Henderson Listoe for (A) possession of methamphetamine with intent to deliver, and (B) possession of a controlled substance (Suboxone). Case remanded for re-trial.

ANALYSIS: (Excerpted from Court of Appeals Opinion)

> Possession can either be actual or constructive. . . . Whereas actual possession requires an individual to have physical custody of a given item, constructive possession may be shown where the individual has "dominion and control" over that item. . . . Control need not be exclusive to establish possession, and more than one person can be in possession of the same item. . . .
>
> [W]e may consider whether the individual could readily convert the items to his or her actual possession. . . . We may also consider the defendant's physical proximity to a given item. . . . However, physical proximity, without more, is insufficient to establish constructive possession.

> Finally, we may also consider whether the defendant had dominion and control over the broader premises in which the item was located. . . . But mere knowledge that an item exists on the premises is insufficient to establish dominion and control.
>
> In cases where the defendant was driving a vehicle that the defendant owned, courts have found sufficient evidence that the defendant had dominion and control over the vehicle's premises and its contents. . . . Conversely, where the appellant was a passenger, rather than a driver, and the passenger did not own the vehicle, some courts have found that the appellant did not have dominion and control over the premises and its contents. . . .
>
> . . . .
>
> Considering the evidence in the light most favorable to the State, a rational trier of fact could have found that Listoe had constructive possession over the items discovered in the back of the car. Even if the items discovered in the car could have belonged to Lemon, the State was not required to prove that Listoe had exclusive control over the items to establish constructive possession. . . .
>
> The fact that Listoe was driving the car weighs in favor of finding that Listoe had dominion and control over the vehicle and its contents. We have found sufficient evidence of dominion and control over a vehicle even where the vehicle did not belong to the driver, but the contraband was in plain sight and within reach. . . . .
>
> The fact that fruits and vegetables, which are perishable items, were discovered in the same reusable black grocery bag as the white bag containing the contraband, shows that these items likely belonged to either Listoe or Lemon. It is unlikely that perishable items were left in the car by a prior driver or passenger. Further, Listoe's furtive hand movements on two occasions, as well the fact that Listoe drove an uncommonly long distance before pulling over, raise an inference that he was handling the contraband at that time, or possibly strategizing about where to hide it. This same fact could also support a reasonable inference that Listoe could convert dominion and control over the items in the vehicle into his actual possession. In addition, because [Officer A] found methamphetamine on Listoe's person during the search incident to arrest, and methamphetamine was also discovered in the back of the vehicle, a rational trier of fact could infer that the methamphetamine in the back of the vehicle belonged to Listoe as well.
>
> While the above facts may not have been sufficient to establish constructive possession in isolation, taken together, they would lead a rational trier of fact to find that Listoe had constructive possession over the items in the back of the vehicle he was driving.

[Citations omitted]

NEGLIGENCE LAWSUIT AGAINST COUNTY IS ALLOWED TO GO FORWARD BASED ON RCW 64.44.020 WHERE HOME PURCHASERS HAVE SUED COUNTY FOR NOT INSPECTING ALLEGED "DRUG HOUSE" FOR HAZARDOUS CHEMICAL CONTAMINATION; RULING IS BASED ON LEGISLATIVE INTENT EXCEPTION TO THE PUBLIC DUTY DOCTRINE

In Perillo v. Island County, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. I, November 30, 2020), Division One of the Court of Appeals rules that a lawsuit against Island County should not have been dismissed on summary judgment by the Snohomish County Superior Court.

The Court of Appeals briefly capsulizes its ruling in the Opinion's first paragraph (which the Legal Update has broken into three paragraphs for readability purposes):

> Diane and Ted Perillo bought a home on Camano Island. As they prepared to move into their new home, neighbors informed them it had a long history as a "drug house." Testing revealed levels of methamphetamine contamination so high that the house was not habitable and needed to be demolished.
>
> The Perillos learned that the Island County Sheriff's Office and Island County Public Health were aware of drug activity at the home for years. The Perillos filed a negligence claim against Island County for failure to inspect the property for hazardous chemical contamination as required under RCW 64.44.020.
>
> The Perillos appeal the trial court's determination that the public duty doctrine barred their claim and the order granting summary judgment for Island County. We conclude that the legislative intent exception to the public duty doctrine applies to the Perillos' negligence claim and that sufficient evidence of a legal duty precludes summary judgment. We reverse and remand.

The Perillo Court's ruling is grounded in RCW 64.44.020, which provides as follows:

> Whenever a law enforcement agency becomes aware that property has been contaminated by hazardous chemicals, that agency shall report the contamination to the local health officer. The local health officer shall cause a posting of a written warning on the premises within one working day of notification of the contamination and shall inspect the property within fourteen days after receiving the notice of contamination. The warning posting for any property that includes a hotel or motel holding a current license under RCW 70.63.220, shall be limited to inside the room or on the door of the contaminated room and no written warning posting shall be posted in the lobby of the facility. The warning shall inform the potential occupants that hazardous chemicals may exist on, or have been removed from, the premises and that entry is unsafe. If a property owner believes that a tenant has contaminated property that was being leased or rented, and the property is vacated or abandoned, then the property owner shall contact the local health officer about the possible contamination. Local health officers or boards may charge property owners reasonable fees for inspections of suspected contaminated property requested by property owners.
>
> A local health officer may enter, inspect, and survey at reasonable times any properties for which there are reasonable grounds to believe that the property has become contaminated. If the property is contaminated, the local health officer shall post a written notice declaring that the officer intends to issue an order prohibiting use of the property as long as the property is contaminated.
>
> If access to the property is denied, a local health officer in consultation with law enforcement may seek a warrant for the purpose of conducting administrative inspections. A superior, district, or municipal court within the jurisdiction of the property

may, based upon probable cause that the property is contaminated, issue warrants for the purpose of conducting administrative inspections.

Local health officers must report all cases of contaminated property to the state department of health. The department may make the list of contaminated properties available to health associations, landlord and realtor organizations, prosecutors, and other interested groups. The department shall promptly update the list of contaminated properties to remove those which have been decontaminated according to provisions of this chapter.

The local health officer may determine when the services of an authorized contractor are necessary.

Result: Case remanded to Snohomish County Superior Court for trial (or settlement of course).

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BRIEF NOTES REGARDING OCTOBER 2020 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 14 entries below address the November 2020 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. Drake Jonathon Nichols: On November 2, 2020, Division One of the COA disagrees with the arguments of defendant Nichols in his challenge to a Snohomish County Superior Court conviction for *second degree burglary.* The Court of Appeals rules that (1) **Nichols did not preserve for appeal his claim that police did not have probable cause (A) to arrest him as a burglary suspect or (B) to impound his pickup truck to obtain a search warrant for the truck**. In addition, the Court rules that, assuming for the sake of argument that Nichols did preserve these claims for appeal, **probable cause for his arrest is established by the information that police obtained while surveilling a previously burgled residence, which surveillance revealed the Nichols was in the process of working together with an**

accomplice who unlawfully entered a building or buildings on the property and brought out stolen items to Nichols, who was waiting in a pickup truck.

2. State v. Jesse Dean Britain: On November 2, 2020, Division One of the COA disagrees with the arguments of defendant Britain in his challenge to Thurston County Superior Court convictions for *possession of methamphetamine with intent to deliver, operating a motor vehicle without an ignition interlock device, and driving with a suspended license*. Defendant Britain was stopped by a patrol officer for violating RCW 46.16A.200 by driving a motorcycle with the rear license plate obscured by some paper. During the stop, Britain unsuccessfully attempted to surreptitiously toss away a Crown Royal bag containing about a pound of methamphetamine. The drugs were observable in plain view in the open bag when the officer bent down to retrieve the bag. The Court of Appeals summarizes as follows (footnote omitted) its rulings on the search and seizure issues:

> An officer may conduct a traffic stop of a vehicle where the officer has a reasonable articulable suspicion that a traffic infraction has been committed. Under article I, section 7 of the Washington Constitution, the scope and duration of a traffic stop are governed by the principles in Terry v. Ohio. A traffic stop is not pretextual if the lawful reason for the stop is actual, conscious, and independent from any unlawful reason. **Because the officer had a reasonable articulable suspicion that Jesse Britain committed a traffic infraction, the stop was lawful. And after Britain threw a bag filled with methamphetamine, the scope and duration of the stop properly expanded so the officer could investigate the criminal activity.**
>
> Britain contends his counsel was ineffective for failing to challenge the search of the methamphetamine bag as an unlawful search incident to arrest. **But even assuming his counsel deficiently failed to dispute a search incident to arrest theory, he fails to establish a reasonable probability that the State could not have prevailed on viable alternative theories of open view or voluntary abandonment.**

3. State v. Byron Charles Koeller: On November 2, 2020, Division One of the COA disagrees with the challenge of defendant Koeller to his Island County Superior Court convictions on *multiple charges, including first degree child molestation*. One of defendant Koeller's theories on appeal was that the charges against him should have been dismissed under CrR 8.3(b) due to governmental misconduct in the form of listening to eight seconds of a jail-tape-recorded phone conversation between defendant and his defense counsel. The recording was made because jail personnel had inadvertently failed to enter counsel's phone number in its automated system so that no recordings would be made of calls to that number. Shortly after the recording was made, a deputy prosecutor listened to the first eight seconds of the call. Immediately upon realizing the error, the deputy prosecutor turned off the recording and notified the defense attorney and jail personnel of the circumstances. **The Court of Appeals upholds the trial court determination that this violation of the attorney-client privilege did not prejudice the defendant, and that therefore the violation does not support Koeller's request for dismissal of the charges.** The Court discusses other Washington appellate court decisions that addressed claims of governmental violations of the attorney-client privilege, noting that "where the government violates this right, it creates a rebuttable presumption of prejudice to the defendant" (citing for this proposition State v. Peña Fuentes, 179 Wn.2d 808, 819-20 (2014); State v. Cory, 62 Wn.2d 371, 373-74 (1963); and State v. Granacki, 90 Wn. App. 598, 602 n.3 (1998)).

4. State v. Jorden D. Knight: On November 9, 2020, Division One of the COA disagrees with the challenge of defendant Knight to his Clark County Superior Court convictions for *five counts of first degree possession of depictions of a minor engaged in sexually explicit conduc*t. The Court of Appeals rejects Knight's argument under the Washington constitution's article I, section 7 in which he contends that City of Vancouver police conducted an unlawful warrantless search of the Dropbox files it received from the National Center for Missing and Exploited Children (NCMEC). **Citing State v. Peppin, 186 Wn. App. 101 (2015) as analogous, the Court of Appeals holds that Vancouver police officers did not need a warrant to review the three Dropbox files they received from NCMEC because Knight did not have a reasonable expectation of privacy in the files after he had previously shared certain Dropbox links with the public through the social media outlet, Kik. The Court of Appeals also rules in the alternative, in somewhat complicated analysis, that the private search doctrine applies to NCME as a federal law enforcement entity, and the Silver Platter Doctrine applies such that the Vancouver PD officers legally viewed the files and the files were properly admitted at trial**.

5. State v. Dale Lane Bradley: On November 9, 2020, Division One of the COA disagrees with the challenge of defendant Koeller to his King County Superior Court convictions for *one count of first degree rape of a child and two counts of first degree child molestation*. At trial, based on the longstanding, case-law-created "fact of the complaint" exception to the hearsay rule, the trial court admitted evidence that the victim had told others that Bradley had assaulted her. **Bradley argued on appeal that the "fact of the complaint" hearsay exception is based on antiquated notions and should be abandoned. The Court of Appeals declines to do so. The Court notes that the rule's hearsay exception allows admission only of the fact that the victim made such a timely complaint regarding an alleged sexual assault, and not any evidence of their attacker's identity or details about the nature of the act. LEGAL UPDATE EDITOR'S CROSS REFERENCE NOTE: The Washington Supreme Court ruled on this issue on November 19, 2020 in State v. Martinez; see the entry above beginning at page 3 of this November 2020 Legal Update. This means that Bradley would not be successful in any request for Washington Supreme Court review of the Court of Appeals ruling on this issue.**

6. State v. Danika Elizabeth Vanway (Case # 80138-4-I): On November 9, 2020, Division One of the COA agrees with the challenge of defendant Vanway to her Snohomish County Superior Court conviction for *possession of a controlled substance (methamphetamine) while on community custody*. The Division One Unpublished Opinion relies on the 2019 Division One Published Opinion in State v. Alexander, 10 Wn. App. 2d 682, 694, 449 P.3d 1070 (2019), review denied, 195 Wn.2d 1002 (2020), in holding that a police search of Vanway's backpack immediately following her arrest does not qualify as a search incident to arrest under article I, section 7 of the Washington constitution. The Vanway Court does not address the federal constitution's Fourth Amendment, which I am confident would allow the search as a search-incident under the circumstances of this case. As noted further below, per my lengthy discussion of the 2019 Division One Alexander decision in the September 2020 Legal Update, I believe (1) that Alexander contains some very incorrect language regarding limits under the Washington constitution (as interpreted by the Washington Supreme Court) on the search of persons incident to arrest, and (2) that Vanway was wrongly decided. I think that at some point, what I believe to be incorrect analysis by Division One in Alexander will need to be addressed in the Washington Supreme Court. Of course, what I think is only my own personal thinking, is not legal advice, and is nothing more than an aid and perhaps a spark to legal research presented to readers of the Legal Update. Officers and agencies are urged to consult their legal advisors and local prosecutors for legal guidance.

Danika Vanway was arrested on a warrant while she was a passenger in the front seat of a parked car. The arrest occurred after an officer making a lawful contact confirmed his suspicion that she was the subject of an arrest warrant. When the arrest process began, the backpack was between Vanway's feet on the floor of the car. Per the arresting officer, the backpack was touching her legs "approximately from her ankles to roughly her kneecaps." Her hands were not on the bag, but as the State pointed out in its brief to the Court of Appeals in Vanway, clutching a bag with one's legs (or at least positioning the bag between and touching legs) arguably is not factually distinguishable from clutching a bag with one's hands. Thus, argued the State, the backpack qualified for search incident to arrest under the Washington Supreme Court's "time of arrest" rule. The Court of Appeals rejects that argument and rules that, regardless of whether the backpack could be deemed to have been on the person of the arrestee at or immediately prior to the time of arrest (a question on the facts not addressed by the Vanway Court), the search incident exception to the warrant requirement of the Washington constitution cannot apply in this case because the State did not establish in the proceedings in the trial court "that Vanway's backpack was an item that necessarily had to go to jail with her."

In the September 2020 Legal Update at pages 19-29, I criticized at length and in depth the right-to-handoff analysis (in dicta/an alternative rationale) by Division One in Alexander in light of the bright line time-of-arrest precedents of the Washington Supreme Court's Opinions on search of the person incident to arrest: see State v. Byrd, 178 Wn.2d 611 (2013), State v. MacDicken, 179 Wn.2d 936 (2014), and State v. Brock, 184 Wn.2d 148 (2015). For the same numerous reasons that I stated in that September 2020 Legal Update discussion, I believe that much of the analysis in the Vanway Unpublished Opinion is way off the mark, though I do not know the factual record in the case, and I concede that there may be good reasons for not seeking Supreme Court review in Vanway.

The September 2020 Legal Update is currently on the WASPC website under "Law Enforcement Resources" and should remain there through early January 2021. Neither Division Two nor Division Three has yet decided a case with the Alexander facts, nor has either division addressed the search incident analysis of Alexander. Also, from my review of the briefs in Vanway and another recent unpublished Division One Opinion (see State v. Burdick, an August 10, 2020 Unpublished Opinion), I believe that not one of the judges of Division One has yet been confronted with a head-on attack in briefing or oral argument on its legal reasoning for the right-to-handoff rule stated in Alexander.

The arrestee Vanway was with a companion at the time of arrest, and neither she nor the companion was asked what they wanted done with the backpack prior to the point in time that the search of the backpack was conducted by the arresting officer. The Division One Unpublished Opinion indicates that under Division One's unique Alexander precedent, the officer was required – prior to and as a pre-condition to any search-incident of the backpack – to explore with Vanway and perhaps also the vehicle's driver whether there were reasonable options for leaving the backpack behind without searching it.

The Vanway Opinion makes much about the officer's testimony that – after a search in such circumstances – the arrestee-possessor of such a bag is usually afforded some choices that would avoid taking an already-searched bag or backpack or other container to the jail. So what? If the search is authorized as a bright line rule under the Washington Supreme Court precedents, then it does not matter what is to happen to the bag after the search.

What happens or is expected to happen administratively or operationally to a lawfully searched container or vehicle or home after a lawful consent search or a lawful search under a warrant is irrelevant to lawfulness of the search. The bright line search incident rule should work the same way. I repeat: if the bright line search incident rule authorizes the search of a container, it should not matter what is to happen to the container after the search.

7. State v. Ezra Danilo Wright: On November 9, 2020, Division One of the COA disagrees with the challenge of defendant Wright to his Thurston County Superior Court conviction for *attempted rape of a child* in a prosecution that followed his arrest in a sting operation conducted by the Missing and Exploited Children's Task Force (MECTF). **The Court of Appeals rules that: (1) the trial court did not err by declining Wright's proffered entrapment instruction because evidence shows that the undercover detective did not improperly induce the defendant to commit the crime and only provided an opportunity to commit it (the Court of Appeals distinguishes factually the decision in State v. Chapman, No. 50089-2-II (Wash. Ct. App. Jan. 23, 2019) (unpublished)); (2) the government did not engage in outrageous conduct in the sting operation such that constitutional Due Process protections would bar sustaining his conviction; and (3) there is no support in law for Wright's argument that the MECTF sting operation's use of very young fictional children improperly caused the imposition of an unfairly long sentence**.

8. State v. Philip Keith Traini: On November 9, 2020, Division One of the COA disagrees with the challenge of defendant Traini to his Island County Superior Court conviction for *felony assault in violation of a no contact order* (the Court of Appeals dismisses on Double Jeopardy grounds a misdemeanor conviction for violation of the no contact order). **The Court of Appeals rules that the trial court did not abuse its discretion on the totality of the circumstances in allowing under Evidence Rule 803(a)(5) the victim's reading of her previous written statement to the police as a recorded recollection.** The Court of Appeals explains as follows regarding assessment of reliability under the test of ER 803(a)(5):

> Because there are sufficient indicia of reliability, the trial court did not abuse its discretion in allowing the statement to be read into evidence. First, the top of the form encouraged accurate reporting: "Please answer the following questions fully and accurately and to the best of your knowledge." Second, K.S. completed the statement herself and [the law enforcement officer] was not in the room as she did so. Third, K.S. identified the handwriting as her own. . . .And fourth, the 911 call during which K.S. cried and said Traini attacked her corroborates the statement. . . .
>
> Traini argues that K.S.'s refusal to sign the written statement constitutes a disavowal of its contents. [The officer] testified that when he had K.S. fill out the statement, he did not notice that the second page, which included a line for a signature affirming the contents as true and correct, did not print and thus the statement was not signed. When a supervisor brought this to his attention a week later, he went to K.S.'s house and requested she sign her statement. She refused. At trial, she explained that she did not sign it because she "didn't want anything to happen." She also said she did not want to be "held to" the report. While Traini argues that her refusal to sign the statement reflects a disavowal of its accuracy, it could also be interpreted to reflect her desire that the State not file charges. And no Washington authority holds that the omission of a signature, or a refusal to sign, is determinative as to accuracy.
>
> Traini also argues that because K.S. recanted some of her prior statements at trial and did not want the State to file charges, the trial court abused its discretion in allowing the

> statement to be read into the record. During trial, the State asked K.S., "[A]t the time you made the statement, you intended to make a truthful statement?" She responded, "Yes." But while questioning K.S. as to why some questions had been left blank, defense counsel asked, "[W]ere you trying to be accurate and truthful when you wrote this?" And she responded, "I suppose not," explaining that she had felt pressured to fill out the form by [the officer]. But shortly after, outside the presence of the jury, the State asked K.S. whether her intention was to truthfully record what happened, to which she replied, "Yes." Though K.S.'s testimony seemed inconsistent at times, she never explicitly disavowed the written statement.

[Footnote omitted; citations omitted]

9. State v. A.S.-M.: On November 16, 2020, Division One of the COA rules in favor of the appeal of A.S.-M. from his conviction for being a *juvenile in possession of a firearm*. The Court of Appeals rules that **officers lacked reasonable suspicion for a Terry stop of the juvenile defendant, and therefore had no authority to arrest him for failing to obey their order to stop.** The Court of Appeals explains on the initial reasonable suspicion question, "given the overly general description of the burglary suspect and the vague testimony about A.S.-M.'s proximity to the reported burglary, the totality of the circumstances do not support a reasonable, articulable, individualized suspicion that A.S.-M. committed or was about to commit a crime at the time [that the officer] seized him.

10. M. Gwyn Myles v. State of Washington: On November 17, 2020, Division Two of the COA rules against the appeal of a plaintiff who sued the Washington State Patrol (among other civil defendants) on a theory that they were responsible for her husband's death that was directly caused by a drunk driver. The Court of Appeals affirms the *summary judgment dismissal of the lawsuit* by the Clark County Superior Court. **The Court of Appeals rules that there is no evidence that the government was a proximate cause of the death, noting "there is simply no evidence, only mere speculation, that establishes that 'but for' the failure to book [the drunk driver on a warrant during a police contact five weeks prior to the collision], Villanueva-Villa would not have caused the accident that killed [the plaintiff's husband] five weeks later."**

11. Gilberto Cantu v. Adams County: On November 17, 2020, Division Three of the COA rules against the appeal of plaintiff Cantu from an Adams County Superior Court order dismissing Cantu's lawsuit. Cantu sued for his injury that occurred while Cantu was fleeing arrest riding his bicycle. He was, trying to get away from an Adams County Deputy Sheriff who was slowly pursuing in a patrol car when Cantu veered in front of the officer in gravel and was injured by the Deputy's vehicle. **The Court of Appeals rules that (1) Cantu did not establish breach of any legal duty by the deputy, and (2) Cantu's act of veering in front of the deputy on gravel made Cantu the superseding cause of his own injury.**

12. State v. Jeannene Lee Ramos: On November 17, 2020, Division One of the COA disagrees with the appeal of defendant from her Snohomish County Superior Court conviction for *one count of possession of a controlled substance*.

(A) The Court of Appeals rules that Ramos was not subjected to a pretextual traffic stop, explaining in key part as follows:

> Here, [the officer] was on routine patrol, watching parking lots for evidence of organized retail theft. While in the Walmart parking lot, he noticed the car with a lone occupant. He

> testified that "[g]enerally[,] people go shopping together," so "[i]t's usually peculiar when people are left in a car." He ran the license plate on the car and discovered that it had been sold but the title had not been transferred. Although the car drew [the officer's] attention as part of his proactive unit duties, the unchallenged findings of fact show that [the officer] decided to stop the car to investigate the crime of failing to transfer the title within 45 days. Once on the public roadway, [the officer] also had reasonable grounds to stop the car for excessive speed. Ramos fails to show that [the officer] subjectively intended to stop her car for any reason other than to investigate those potential law violations or that his actions were objectively unreasonable.

(B) The Court of Appeals also rules that Ramos was timely advised of her Miranda rights, explaining in key part as follows:

> [The officer] had individualized, reasonable, articulable suspicion to detain Ramos to investigate the crime of failure to transfer title. [The officer] questioned Ramos only about whether she owned the car and the status of the car's title. Ramos remained in the car during the conversation. [The officer] did not handcuff her or place her under arrest. [The officer's] questions to Ramos about the purchase of the car and the status of its title fell under a Terry investigation and did not amount to custodial interrogation. A Miranda warning was unnecessary. . . . [The officer] lawfully questioned Ramos about her car title as part of a noncustodial Terry investigation. The discovery of the gun hidden underneath Ramos' leg and her subsequent removal from the car and restraint in handcuffs elevated the seizure to one associated with custodial arrest. [The officer] then immediately read Ramos her Miranda warnings. Ramos said that she understood the warnings and freely answered questions. [The officer's] questions post-Miranda focused on a different topic – the gun and eventually the drug paraphernalia in her car. [The officer] did not deliberately subject Ramos to a two-step procedure to undermine the effectiveness of her Miranda warnings. The trial court did not err in concluding that Ramos' statements both pre- and post-Miranda were admissible.

13. State v. Cameron J. Ellis: On November 23, 2020, Division One of the COA issues a revised Unpublished Opinion after reconsideration of the Court's July 20, 2020 Unpublished Opinion that was digested in the July 2020 Legal Update. Division One's revised Unpublished Opinion does not change the analysis or result on the issue that was addressed in the July 2020 Legal Update.

Thus, the revised Division One November 23, 2020 Unpublished Opinion agrees with the appeal of Ellis from his King County conviction of *one count of felony violation of a no-contact order*, but the Court of Appeals rejects his appeal from convictions on *five other counts of felony violation of a no-contact order*. **The reason for overturning one of the convictions is a prejudicial violation of the defendant's Sixth Amendment right to confront witnesses. The Ellis Court explains as follows that an officer's testimony describing the alleged victim's statements contained "testimonial hearsay" in violation of the Sixth Amendment**:

> The record shows that B.S.'s [B.S. is the alleged victim] January 28, 2018 statements to [the officer] were testimonial because the primary purpose of the interrogation was not to aid an ongoing emergency.
>
> [The officer] testified that he spoke with B.S. for approximately 10 minutes while he was at the scene. The questioning focused on eliciting from B.S. the details of what happened. [The officer] testified B.S. told him that she "unlocked her vehicle" and

"realized that Mr. Ellis was in the vehicle with her." According to [the officer], B.S. told [the defendant] that "he couldn't be there" because of the no-contact order. Then [the defendant] punched her and she "jumped out of the vehicle while it was still moving." [The officer] testified, "[F]rom there, she ran into the Denny's" and a bystander called 911. B.S. gave [the officer] a detailed description of Ellis, including what he was wearing, and denied needing medical attention. [The officer] testified that B.S. did not provide "any sort of written statement" and that he did not "ever try to follow up with her."

A reasonable listener would not believe that the primary purpose of [the officer's] questioning was to meet an ongoing emergency. B.S. had recovered her car and the scene was secure. Although deputies did not locate Ellis in the area, there was no evidence to suggest that he posed "a threat of harm, thereby contributing to an ongoing emergency." State v. Ohlson, 162 Wn.2d 1, 15 (2007). There was no indication that he possessed a weapon or tried to return to the scene. And [the officer] testified that B.S. "did not want any medical attention," and that she was "insisting that she had to go pick up her child and that she had to leave right away because she had to pick them up."

Neither were B.S.'s statements primarily the type necessary to resolve an ongoing emergency. Rather, they were responses to [the officer's] questioning about what happened and whether she needed medical attention. These questions, when viewed objectively, primarily elicited statements that described events that happened in the past and were potentially relevant to a subsequent prosecution.

Finally, although B.S.'s conversation occurred in the informal setting of a Denny's parking lot, the environment was secure with the deputies present. We conclude that B.S.'s January 28 statements were testimonial and that admitting the statements through [the officer] violated Ellis' Sixth Amendment right to confront witnesses.

14. State v. Ronelle Ashton Williams: On November 23, 2020, Division One of the COA disagrees with the appeal of defendant Williams and affirms his King County Superior Court convictions for *(A) assault in the second degree, (B) felony harassment, (C) unlawful possession of a firearm in the first degree, (D) assault in the fourth degree, and (E) witness tampering*. **The Court of Appeals declares that the following facts, as described by the Court of Appeals, establish that defendant's arrest was supported by probable cause**:

The findings by the trial court provide that [the victim] had called 911 "describ[ing] that she had been beaten up by her boyfriend and that he had pointed a handgun at her stomach." [The victim] "identified the suspect as Ronald Ruffin [his actual name is Ronelle Ashton Williams] and described him as a black male, 32 years old, approximately 5'10", medium build, bald, and with a small goatee."

Police arrived on the scene "within about 5 minutes," [and the victim] then ran out of apartment #1 and again provided the same description of the suspect. [Officer A] was directed by [Officer B] to station himself by the southeast corner of the apartment complex. [Officer B] used a PA system to "entice the suspect out of apartment #2." "Officer [A] observed an individual, later identified as the defendant . . . materialize outside of the back of apartment #2." [Officer A] acknowledged that "he did not see the door open but that the individual did leave the back of ap[artmen]t #2."

The individual then "walked away from the apartment but then turned around and headed to the gate in the fence which was near the front of the apartment" with [Pffocer

A] observing the individual "for approximately 15- 20 seconds." At this point, "[Officer A] yelled to the individual that he was under arrest and told him to get on the ground." The "individual opened the gate in the yard and was greeted by [Officer B] and [Officer C]." The individual was then arrested and later identified as Ronelle Williams.

[Bracketed language added; some paragraphing revised for readability]

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

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

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

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

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

The Washington Office of the Administrator for the Courts maintains a website with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http://www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions. The site also includes links to the full text of the RCW, WAC, and many Washington city

and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/court_rules].

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

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

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