LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: Thank you!

October 2018

TABLE OF CONTENTS FOR OCTOBER 2018 LEGAL UPDATE

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NINTH CIRCUIT, UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT CIVIL LIABILITY: UNDER THE FEDERAL CONSTITUTION'S FOURTH AMENDMENT, LAW ENFORCEMENT OFFICER'S RUSE AS TO THE PURPOSE OF HIS INVESTIGATION PRECLUDED VALID CONSENT TO ENTRY OF SOCIAL SECURITY DISABILITY CIVIL FRAUD SUSPECT'S HOME, BUT THE OFFICER'S UNLAWFUL, SECRETLY VIDEOTAPED SEARCH GETS QUALIFIED IMMUNITY BECAUSE CASE LAW HAD NOT ESTABLISHED THE UNLAWFULNESS OF THE CONDUCT AS OF THE TIME OF THE SEARCH

Whalen v. [Officer A], ___ F.3d ___ , 2018 WL ___ (9th Cir., October 30, 2018)

Facts and Proceedings below:

> In 2011, Kathleen Whalen applied for Social Security Disability and Supplemental Security Income benefits for cervical dystonia, a neurological disorder that causes tremors. DDS referred Whalen's application to the Cooperative Disability Investigations Unit ("CDIU"), a joint task force that investigates potential social security fraud, for investigation due to "inconsistencies" between Whalen's allegations of severe functional impairments and her medical records. [Court's footnote: *CDIU includes members from*

the Washington State Patrol, the Office of the Inspector General of the Social Security Administration ("SSA"), the SSA regional office, and DDS.]

Whalen claimed difficulties with standing and walking, and she reported severe memory loss, weakness, and loss of motor skills. The referral to CDIU noted that Whalen's medical evidence did not support her reported diagnoses, including Parkinson's disorder, and that she appeared to use a wheelchair inconsistently. According to CDIU's report, the referral noted that Whalen's primary care physician prescribed her an electric wheelchair, "so there will be wheelchairs in the household," and asked for investigation of "how wheelchair accessible the house was, were the wheelchairs used, [were] clothes on them, etc."

[Law Enforcement Officer A] is a detective with the Washington State Patrol who was, at the relevant time, detailed to CDIU. CDIU investigations may lead to criminal fraud prosecutions or to civil or administrative penalties. [Officer A] explained that from the outset, CDIU designates investigations as either criminal, civil, or administrative, and the CDIU team leader informs the assigned investigator of the designation when the case is assigned.

He testified that criminal investigations are "approached differently" – CDIU does not seek warrants before conducting civil or administrative investigations, but it may seek warrants for criminal investigations. [Officer A] further testified that he believed that if evidence from a civil investigation triggered a criminal investigation, the evidence gathered during the civil investigation would be inadmissible as "fruits of the poisonous tree."

[Officer A] declared, "When conducting investigations, I do not enter a person's home in order to conduct a search of the residence. The purpose of my communication with any individual is to speak with and observe them in order to obtain information regarding their physical, mental and emotional faculties/responses." To do so, [Officer A] and other CDIU investigators commonly employ a ruse: they introduce themselves as law enforcement officers but conceal the purpose of their encounter from the benefits claimant.

[Officer A] testified that CDIU investigators use this ruse to engage with the subject of their investigation "the majority of times" and that it is "[v]ery seldom" they do not. He also testified that he enters a claimant's home "a lot," estimating that he did so in "70, 80 percent" of the investigations. CDIU investigators conceal the purpose of the investigation to observe the subject's "functioning outside of the clinical and/or examination setting" while she is "not aware that . . . functioning [is] actually being scrutinized."

CDIU assigned Whalen's case to [Officer A] on October 11, 2012, and he visited her home that same day to observe her functional abilities. Because the investigation was not designated a criminal investigation, [Officer A] did not obtain a warrant. Wearing his state patrol badge, [Officer A] knocked on Whalen's door, and her mother answered. He identified himself as a detective with the Washington State Patrol. [Officer A] was equipped with two hidden cameras, which recorded video (but not audio) of the encounter.

After Whalen came to the door, [Officer A] invited her to speak with him outside. [Court's footnote: *[Officer A] testified that he generally prefers not to enter the home and explained that, in Whalen's case, "I wanted to have her perform physical tasks (including walking to my vehicle) in order to complete my observation*."]

Whalen agreed and walked out to [Officer A]'s truck. [Officer A] told Whalen that he was investigating a potential identity theft ring, but he assured her that she was neither under suspicion nor in danger of having her identity compromised. There was no identity theft investigation or case; rather, this was a typical "identity theft ruse" the officers use to engage subjects in conversation. An officer would tell the subject that he found her name and address "handwritten on a piece of paper" and was looking for further information.

[Officer A] used the ruse to engage Whalen in conversation, asking her to complete a questionnaire and look through some photographs of "suspects." Whalen informed [Officer A] that she was, in fact, a recent victim of identity theft. [Officer A] stated in his declaration that he informed Whalen he was not investigating the theft of her identity. He designed the conversation and physical tasks, which included walking to the truck, writing, and turning over the photographs, "to observe her responses and bodily movements" in light of the referral's information about Whalen's medical claims.

During the conversation, Whalen discussed her daily activities, which included occasionally driving or using an Access bus, shopping, cooking, and caring for her child and home. She also mentioned her recent application for a shipping, receiving, and stocking job on a loading dock.

The conversation then continued inside Whalen's home. According to [Officer A], Whalen wanted to provide him with the contact information for the friend she suspected of committing identity theft, which she had on her cellphone. He stated that Whalen suggested going inside and that he entered the home "only to continue the conversation and not to conduct a search of Ms. Whalen's home."

According to Whalen, after she thought she recognized one of the individuals in the photo array, [Officer A] requested the individual's contact information, which was inside on her cellphone. The parties agree that Whalen gave [Officer A] permission to enter her home.

[Officer A] continued to speak with Whalen and her family inside the home for approximately fifteen minutes, during which time Whalen provided the contact information from her cellphone. He observed a wheelchair inside the home, which held folded blankets. [Officer A] did not think a warrant was necessary to enter the home because he "was only going to Ms. Whalen's home to speak with and observe her" and "did not intend to search her home, or anything else, nor did [he] actually conduct a search of Ms. Whalen or her home."

[Officer A] did not look through Whalen's "personal effects" or leave her presence; he "simply recorded what [he] was otherwise able to observe." The entire encounter lasted approximately one hour.

Although one of the hidden cameras only captured the first forty-five minutes of the interview, the other camera recorded the entire visit. At no time was Whalen aware that

> [Officer A] was videotaping her. CDIU sent a summary report of [Officer A]'s investigation to DDS for review and adjudication. The report focused on Whalen's abilities and comfort with walking, standing, sitting, reaching, and grasping, and it included [Officer A]'s observations of Whalen's speech patterns, focus, finger dexterity, and writing ability.
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> The report noted [Officer A's] observations inside Whalen's home, including that Whalen's wheelchair was "being used as a blanket holder," that "[t]he arms on the chair were not creased or indented from frequent use," and that "[i]t did not appear that the machine was used very often." According to the report, Whalen limped inconsistently and exhibited "no obvious pain related behaviors . . . unless she had a chance to think."
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> "[Officer A] found her posturing to be very antiquated and [it] came across as an act. At no time during this investigation did [Whalen] ever exhibit any kind of debilitating behavior."
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> CDIU reported that Whalen "was much more active than she alleged to SSA/DDS and her own personal medical care providers" and that "[n]either the medical records, nor the investigation found [her] to suffer from any significantly limiting mental or physical functional impairments." DDS denied Whalen's benefits claims in part but determined that she did not commit fraud.
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> The government never prosecuted Whalen for criminal fraud, nor did she face any civil or administrative action. She became aware of the surveillance tapes and [Officer A's] deception during the appeal of her denial of benefits.
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> Whalen filed this 42 U.S.C. § 1983 action for damages and injunctive relief against [Officer A] . . . . The parties filed cross-motions for summary judgment. The district court denied Whalen's motion and granted [Officer A's] motion, holding that [Officer A] was entitled to qualified immunity because as a matter of law it was not clearly established prior to this incident that [Officer A's] conduct amounted to a Fourth Amendment violation. The district court dismissed Whalen's related state-law claims, declining to exercise supplemental jurisdiction.

[Paragraphing revised for readability; one footnote omitted]

ISSUES AND RULINGS; (1) Officer A's entry into Ms. Whalen's home in order to gather evidence, including videotaping, even though only for a civil investigation, was clearly a search under the Fourth Amendment. Officer A identified himself as a law enforcement officer pursuing an investigation, but in seeking consent for the home entry, he told Ms. Whalen that he was investigating whether she had been a victim of identity theft. In truth, he was investigating whether she was committing civil fraud in her claim for Social Security Disability benefits, and he was seeking opportunities to observe and film her physical actions. Where Officer A intentionally misrepresented the purpose of the investigation in the manner described, did Officer A's ruse as to his purpose negate the validity of the consent by Ms. Whalen? (ANSWER BY NINTH CIRCUIT PANEL: Yes, the ruse as to purpose negated the consent to entry given by Whalen)

(2) Was the controlling Fourth Amendment case law well-established at the time of Officer A's actions in pursuit of a civil fraud investigation such that he must be denied qualified immunity

under the Civil Rights Act? (ANSWER BY NINTH CIRCUIT: No, the case law was not well-established; therefore, Officer A is entitled to qualified immunity)

Result: Affirmance of order of U.S. District Court (Western Washington) granting qualified immunity to Officer A.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

OFFICER A VIOLATED THE FOURTH AMENDMENT

> Officer A engaged in a search of Ms. Whalen's home, and he did not have valid consent to enter Ms. Whalen's home because Officer A used a ruse as to the purpose of entry and as to the nature of the crime under investigation
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> A Fourth Amendment "search" occurs when a government agent "obtains information by physically intruding on a constitutionally protected area," United States v. Jones, 565 U.S. 400, 406 n.3 (2012), or infringes upon a "reasonable expectation of privacy," Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). As we have explained, following Jones, "when the government 'physically occupie[s] private property for the purpose of obtaining information,' a Fourth Amendment search occurs, regardless whether the intrusion violated any reasonable expectation of privacy. Only where the search did not involve a physical trespass do courts need to consult Katz's reasonable-expectation-of-privacy test." . . . .
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> [Officer A] entered Whalen's home with her permission, which he obtained after he identified himself as a law enforcement officer but misrepresented the purpose of his investigation. In a physical intrusion case like this one, whether a "search" occurred depends on whether the investigation (1) "took place in a constitutionally protected area" and (2) was "unlicensed" or without consent. . . . Because the interior of a home is unquestionably a constitutionally protected area, our analysis is limited to the second question.
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> In determining whether a person consented to an intrusion into her home, we distinguish between "undercover" entries, where a person invites a government agent who is concealing that he is a government agent into her home, and "ruse" entries, where a known government agent misrepresents his purpose in seeking entry. United States v. Bosse, 898 F.2d 113, 115 (9th Cir. 1990) (per curiam). The former does not violate the Fourth Amendment, as long as the undercover agent does not exceed the scope of his invitation while inside the home. But "[a] ruse entry when the suspect is informed that the person seeking entry is a government agent but is misinformed as to the purpose for which the agent seeks entry cannot be justified by consent."
>
> In this case, [Officer A] identified himself as a law enforcement officer and requested Whalen's assistance in a fictitious investigation, gaining entry into her home using this ruse. The concern we identified in Bosse—that the government would gain access to evidence "which would otherwise be unavailable to him by invoking the private individual's trust in his government, only to betray that trust"—is clearly implicated here. . . . [Officer A] appealed to Whalen's trust in law enforcement and her sense of civic duty to assist him in his "identity theft" investigation. [Officer A]'s description of an identity theft investigation was perfectly plausible, and Whalen readily agreed to cooperate. But there was no identity theft investigation underway. [Officer A] lied to Whalen about his

real purpose—to investigate her for possible social security fraud. Whalen's consent to [Officer A's] entry into her home is vitiated by his deception.

. . . .

So far, this appears to be an "easy" case like [Florida v. Jardines, 569 U.S. 1, 11 (2013)]: a government agent entered into a home to gather evidence without license to do so because he gained "consent" using a ruse. But [Officer A] also argues that his entry into Whalen's home was not a "search" within the meaning of the Fourth Amendment because it was for a "civil investigation[] done to determine eligibility for government welfare benefits." He relies on two cases: Wyman v. James, 400 U.S. 309 (1971), and Sanchez v. County of San Diego, 464 F.3d 916 (9th Cir. 2006).

[The Ninth Circuit panel goes on in lengthy discussion (omitted here) to analyze and resolve this question against the government defendant.]

Once we add to [the facts of the misrepresentation as to purpose] the fact that [Officer A] videotaped his entire visit, any illusion that this was not a Fourth Amendment search evaporates. [Officer A] had two cameras running while he was talking with Whalen, and at least one of the cameras captured his entire visit inside her home. Of course it was a search: not only was [Officer A] there to observe Whalen, but he had also been asked specifically to seek evidence concerning Whalen's use of an electric wheelchair, "how wheelchair accessible the house was, were the wheelchairs used, [were] clothes on them, etc." [Officer A's] report faithfully fulfilled his charge from CDIU. He reported that the wheelchair was "being used as a blanket holder" and that "[t]he arms on the chair were not creased or indented from frequent use." This evidence could only have been obtained inside Whalen's house, and [Officer A] secured it through an unconsented, warrantless search.

. . .

Officer A's warrantless search was not reasonable

"[W]hether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." . . . . "It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable."

[The Ninth Circuit goes on in lengthy discussion (omitted here) and concludes that the search was not reasonable.]

CASE LAW WAS NOT "CLEARLY ESTABLISHED" AT THE TIME OF THE SEARCH

This conclusion [as to unreasonableness] does not end our inquiry. To hold [Officer A] personally liable under § 1983, Whalen's right to be free from a search in this context must have been clearly established. To be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." . . . . "The dispositive inquiry is 'whether it would be clear to a reasonable [official] that his conduct was unlawful in the situation he confronted.'" . . . .

> The Supreme Court has "repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." . . . . "Qualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures." . . . .
>
> Although we conclude that [Officer A]'s warrantless ruse entry into Whalen's home was an unreasonable search, we cannot say it was clearly established that his conduct, in the context of a civil or administrative investigation related to a determination of benefits eligibility, was a search or was unreasonable. Whalen does not have to identify a controlling case finding a constitutional violation on the exact facts of her case for her asserted right to be clearly established, but she relies only on [the Ninth Circuit's decision in Bosse] and other criminal ruse entry cases.
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> In light of Wyman and Sanchez, Bosse would not have provided [Officer A] with notice that his actions—which were common practice for CDIU investigators—violated the Fourth Amendment. [Officer A] knew he was conducting a civil investigation, not a criminal investigation, and that it was related to Whalen's eligibility for social security benefits. Additionally, [Officer A] did not initially seek to enter Whalen's home but rather to engage her in front of her house; Whalen limited her constitutional challenge to [Officer A]'s actions once he crossed the threshold.
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> As the district court noted, there was no authority "requiring [Officer A] to retreat from [Whalen's] home" as the conversation moved inside, nor was there authority "clearly proscribing [Officer A]'s conduct in this situation." We agree that it would not have been clear to a reasonable officer that his conduct, in the context of this civil investigation related to a determination of benefits eligibility, was unlawful. The right Whalen asserts was not clearly established, and [Officer A] is entitled to qualified immunity from this suit.

[Some citations omitted, other citations revised for readability; footnote omitted; some paragraphing revised for readability; subheadings omitted or revised or added]

LEGAL UPDATE EDITOR'S COMMENT REGARDING CONSENT SEARCH RUSES: As the Ninth Circuit opinion in the Whalen case points out, courts are more open to law enforcement consent-to-enter/consent-to-search ruses: (1) as to identity in an undercover investigation, than (B) as to purpose by an identified law enforcement officer. Courts look to an unpredictable totality-of-circumstances test and their own subjective sense of fairness when looking at ruse consents.

Where the ruse goes to the purpose of an identified officer seeking consent to entry or search, some ruses will obviously shock the conscience and not be permitted, e.g., falsely telling a homeowner that officers are there to investigate a report of a gas leak or a report of an back-window intruder. On the other hand, deceiving a person as to the seriousness of a crime under investigation (e.g., not telling an assault suspect that the victim has died) may be accepted, depending on the totality of the circumstances, so long as the officers do not exceed the scope of the consent under the ruse. But in Whalen, the ruse was to tell a person that she might be a victim, when in fact she was the target of investigation. That seems to be categorically unfair.

Readers with access to a well-stocked law library may want to look at Section 8.2 of LaFave's multi-volume treatise on Search and Seizure, addressing Factors Bearing Upon Validity of Consent, including "deception aa to identity" and "deception as to purpose."

As always, I urge law enforcement officers to consult their agency legal advisors and local prosecutors for guidance on issues addressed in the Legal Update.

CIVIL RIGHTS ACT CRIMINAL LIABILITY: MULTI-OFFICER BEATING OF HANDCUFFED VISITOR WHO VIOLATED JAIL RULES AND THE OFFICERS' COVERUP OF THE BEATING RESULT IN FEDERAL FELONY CRIMINAL CIVIL RIGHTS ACT CRIMINAL CONVICTIONS FOR THREE LOS ANGELES COUNTY JAIL CORRECTIONS OFFICERS

United States v. Gonzalez, ___ F.3d ___ , 2018 WL ___ (9th Cir., October 10, 2018)

LEGAL UPDATE EDITOR'S NOTE: I have included the Gonzalez entry in the Legal Update because of the facts of the case. It is difficult to believe that officers would do the things that are described in this case, not only in the beating of the victim, but also in the cover-up. I have not digested the Court's legal analysis on sufficiency-of-the-evidence because the resulting convictions do not seem that remarkable to me, considering the facts as described in the Ninth Circuit Opinion.

The Ninth Circuit three-judge panel rejects the sufficiency-of-the-evidence appeals of three Los Angeles County Deputy Sheriffs/Corrections Officers from their federal court convictions for (charge 1) violating a jail visitor's civil rights by beating him, and (charge 2) falsifying reports of the beating. The panel concludes that the trial court factual record supports the jury's verdict that, based on a conspiracy of the corrections officers, they all were guilty of willfully depriving the victim of his civil rights through application of excessive force. The panel also concludes that the trial court factual record supports the jury's verdict that, based on the conspiracy of the corrections officers, all of the defendant corrections officers contemplated an investigation into their use of excessive force and intentionally created false reports in order to obstruct or impede such an investigation.

The facts leading up to the beating were described in the Los Angeles Times along the following lines: A 23-year-old male Gabriel Carillo was severely beaten and pepper sprayed by a deputy in the Los Angeles County Men's Central Jail on Saturday, February 26, 2012. Carillo was there with his girlfriend, Grace Torres, to visit his younger brother. Both Torres and Carillo brought their cell phones into the jail and were caught having the phones on them. Torres, out of fear of being fired from her job where she must remain on call, hid her cell phone in her boot and snuck it into the visitor's lobby despite signs prohibiting doing so, while Carillo forgot to remove his cellphone from his pocket. The Los Angeles County Deputy Sheriffs, acting as Corrections Officers, confiscated both phones shortly after, handcuffed Carillo, took both Carillo and Torres into the break room, and assaulted Carillo.

The Ninth Circuit opinion describes the facts and the trial court proceedings as follows:

> On the day of the beating, Carrillo and his girlfriend, Griselda Torres, were visiting Carrillo's brother at the jail. [Deputy Sheriffs/Corrections Officers] Gonzalez and Ayala were standing in an employee break room when another deputy, Pantamitr Zunggeemoge, brought Torres into the room to determine whether she had smuggled a cell phone into the facility in violation of jail regulations. After a search confirmed that she had, Torres told the officers that her boyfriend also had a cell phone. Gonzalez ordered Zunggeemoge, who cooperated with the government [in the federal court criminal prosecution] and testified against the defendants [i.e., the LA County Jail

corrections officers], to get Carrillo from the visitors' lobby and bring him to the break room.

[Corrections Officer Zunggeemoge, later the Federal Prosecutor's star witness against the other corrections officers] located Carrillo, cuffed his hands behind his back, and brought him to the break room. Once inside, Zunggeemoge pushed Carrillo face-first against a refrigerator and proceeded to search him while Gonzalez, Ayala, and Torres looked on. When Carrillo questioned the purpose of the search, Zunggeemoge lifted Carrillo's arms "all the way up so he could feel some pain." After Zunggeemoge finished the search, Carrillo said to Torres, "If I wasn't in handcuffs, this would be a different situation." Ayala walked over to Carrillo and demanded, "What did you say, what did you say?" Carrillo told Ayala that he had not been speaking to her.

At that point, Ayala summoned additional officers over her radio. Luviano and at least two other deputies responded to the call and entered the break room. As they surrounded Carrillo, Ayala told them, "You want to know what this homeboy said? He said that if he wasn't in handcuffs, he'd take flight on us," meaning Carrillo would fight the officers. One officer proposed removing Carrillo's handcuffs to "see how tough he is," while another suggested that they remove Torres from the break room.

After Torres was escorted out, Luviano punched the still-handcuffed Carrillo in the right side of his face. Luviano and Zunggeemoge then knocked Carrillo to the ground. Unable to break his fall, Carrillo landed on his face and stomach. Luviano and Zunggeemoge began punching Carrillo in the head, back, ribs, and thighs as he lay on the floor. Blood from Carrillo's facial wounds soon covered the floor.

Sergeant Gonzalez, who had been watching these events unfold, summoned additional officers over his radio using the code "415," a call indicating that a deputy is involved in a fight with an inmate. Two more deputies arrived and joined in punching and kicking Carrillo. At one point Carrillo lost consciousness; he testified at trial that when he came to, his head was "bouncing off the floor from the punches." To add insult to injury, Luviano pepper-sprayed Carrillo in the face, aggravating his wounds and making it difficult for him to breathe.

In all, the beating lasted about 45 seconds. Throughout, Carrillo remained handcuffed and unable to pose any resistance. As a result of the beating, he suffered bone fractures, trauma to the head and face, a broken nose, and multiple lacerations. Carrillo's face was so disfigured by the beating that Torres could not recognize him when she saw him a few days later.

After Carrillo was carried out of the break room to receive medical attention, the officers huddled up to concoct a story that would justify their use of force. Sergeant Gonzalez, as the ranking officer, led the effort. He directed Zunggeemoge to prepare the primary incident report and largely dictated its contents. The report truthfully stated that Carrillo had been detained for possessing a cell phone and had been knocked to the floor, punched in the face, and pepper-sprayed. But the report falsely stated that Carrillo had attacked the officers and attempted to escape from their custody. According to the report, only one of Carrillo's hands had been handcuffed during the incident, and he had used the handcuff dangling from his hand as a weapon by wildly swinging it at the officers. The officers' use of force, under this telling, had been necessary to subdue a combative and resistant suspect.

Each of the three defendants prepared their own use-of-force reports repeating the agreed-upon cover story and describing their involvement in the incident. Of particular note, Gonzalez's report stated that he had summoned additional officers to the scene and directed them to use force against Carrillo. Ayala's report stated that she had helped Luviano and Zunggeemoge knock Carrillo to the floor. None of the witnesses who testified at trial corroborated Gonzalez's claim that he had directed officers to use force or Ayala's claim that she had used force against Carrillo.

Gonzalez also directed Zunggeemoge to prepare a probable cause declaration for use in prosecuting Carrillo. The account in the declaration tracked the false narrative contained in the officers' reports. Based on the declaration, the district attorney's office charged Carrillo with assaulting and resisting an officer and attempting to escape from custody.

Prosecutors dropped the charges against Carrillo after incriminating text messages between Gonzalez and another deputy surfaced, triggering an investigation into the circumstances leading up to the beating. The other deputy, who had arrested Carrillo's brother two days before the beating, sent Gonzalez a text message attaching the booking photo of Carrillo's brother showing his face cut and bruised. Gonzalez responded by sending the deputy Carrillo's booking photo, which showed even more extensive injuries to Carrillo's face. Gonzalez joked, "Looks like we did a better job . . . . Where's my beer big homie."

The federal government charged Gonzalez, Luviano, and Ayala with violating Carrillo's civil rights and falsifying reports of the beating. Count One of the indictment charged Gonzalez and Ayala with conspiring to deprive Carrillo of his civil rights, in violation of 18 U.S.C. § 241. Count Two charged all three defendants with willfully depriving Carrillo of his right to be free from the use of excessive force, in violation of 18 U.S.C. § 242. And Count Three charged each defendant with falsifying reports to obstruct an investigation, in violation of 18 U.S.C. § 1519.

After a five-day trial, the jury found the defendants guilty on all counts. The district court denied the defendants' post-trial motions for judgment of acquittal or, in the alternative, a new trial. The court sentenced Gonzalez to 96 months of imprisonment, Luviano to 84 months, and Ayala to 72 months.

CIVIL RIGHTS ACT CIVIL LIABILITY: SAN DIEGO COUNTY SOCIAL WORKERS WITH SUSPICION OF CHILD SEXUAL ABUSE VIOLATED CONSTITUTION IN HAVING CHILDREN, WITHOUT PARENTAL CONSENT OR A COURT ORDER, SUBJECTED TO INVASIVE MEDICAL EXAMS, INCLUDING GYNECOLOGICAL AND RECTAL EXAMS

In Mann v. County of San Diego, ___ F.3d ___ , 2018 WL ___ (9th Cir., October 31, 2018), a three-judge Ninth Circuit panel rules against the County of San Diego in a case where County social workers with suspicion that very young children were being sexually abused subjected the children to invasive medical exams without the knowledge or consent of the parents and without a court order. The following is a Ninth Circuit staff summary of the ruling (the summary is not part of the Court's opinion; paragraphing has been revised for readability):

The panel affirmed in part and reversed in the part the district court's summary judgment in an action alleging that the County of San Diego acted unconstitutionally when it

removed children from their family home under a suspicion of child abuse, took them to a temporary shelter, and subjected them to invasive medical examinations, including a gynecological and rectal exam, without their parents' knowledge or consent and without a court order authorizing the examinations.

The panel held that the County violated the parents' Fourteenth Amendment substantive due process rights when it performed the medical examinations without notifying the parents and without obtaining either the parents' consent or judicial authorization. The panel stated that in an emergency medical situation or when there is a reasonable concern that material physical evidence might dissipate, the County may proceed with medically necessary procedures without parental notice or consent. Neither exception applied in this case.

The panel held that the County's failure to provide parental notice or to obtain consent violated the parents' Fourteenth Amendment rights and the constitutional rights of other Southern California parents whose children were subjected to similar medical examinations without due process. The panel further held that the County violated the children's Fourth Amendment rights by failing to obtain a warrant or to provide these constitutional safeguards before subjecting the children to these invasive medical examinations.

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WASHINGTON STATE SUPREME COURT

WASHINGTON DEATH PENALTY STATUTE, AS APPLIED, HELD TO VIOLATE THE WASHINGTON CONSTITUTION'S "CRUEL PUNISHMENT" PROHIBITION

In State v. Gregory, ___ Wn.2d ___ , 2018 WL ___ (October 11, 2018), the Washington Supreme Court is unanimous in striking down the current version of the Washington State death penalty statute. Five justices join in a Lead Opinion, and four justices join in a Concurring Opinion, but all nine justices agree that the current Washington death penalty, as it has been applied, is unconstitutional.

The Lead Opinion that is signed by five justices declares that Washington's death penalty statute is invalid as unconstitutionally "cruel punishment" because the death penalty historically has been imposed in an arbitrary and racially biased manner. The Lead Opinion relies on academic studies concluding that the use of the death penalty is unequally applied in Washington – by where the crime took place, by the county of residence, by the available budgetary resources at any given point in time, or by the race of the defendant. For these reasons the Lead Opinion concludes that the death penalty, as administered in our state, fails to serve any legitimate penological goal. Thus, the Washington death penalty statute violates the prohibition against "cruel punishment" in article I, section 14 of the Washington constitution.

The Court's conclusion "that race has a meaningful impact on imposition of the death penalty" is based in large part on academic research, but was made, asserts the Opinion, "by way of legal analysis, not pure science." The Lead Opinion leaves open the possibility that the Legislature may enact a statute that will be constitutional.

Justices Johnson, Owens, Stephens and Madsen join in a concurring Opinion asserting that additional Washington constitutional principles compel the ruling of unconstitutionality of the Washington death penalty statute.

Result: Reversal of Pierce County Superior Court death penalty judgment against Allen Eugene Gregory for a vicious 1996 rape, robbery and murder in Tacoma. Presumably, Gregory will now be sentenced to life imprisonment without parole.

LEGAL UPDATE EDITOR'S COMMENTS: The prosecutor's final brief to the Supreme Court argues cogently, albeit in vain, that, for several reasons, the academic studies that were eventually relied on by the Supreme Court are statistically flawed.

As the Lead Opinion in Gregory indicates, the values-based nature of constitutional interpretation is not scientific. One of my favorite characterizations of the lack of science behind constitutional interpretation is the following story that is attributed to Chief Justice John Roberts of the United States Supreme Court.

> **I think my first boss out of law school, Judge Henry Friendly really hit the nail on the head when he described what judging was like. He said it was like the practice in the old English villages of trying to guess the weight of a hog. What they would do is get a large plank, balance it on a rock, put the hog on one end and then load stones on the other end until the plank was perfectly balanced. Then they would try to guess the weight of the stones.**

SENTENCING A PERSON TO LIFE WITHOUT PAROLE FOR AGGRAVATED FIRST DEGREE MURDERS THAT HE COMMITTED PRIOR TO HIS 18TH BIRTHDAY HELD TO VIOLATE THE WASHINGTON CONSTITUTION'S "CRUEL PUNISHMENT" PROHIBITION

In State v. Bassett, ___ Wn.2d ___ , 2018 WL ___ (October 18, 2018), the Washington Supreme Court rules 5-4 the Court holds that sentencing an individual to life without parole or early release for aggravated first degree murders committed prior to the person's eighteenth birthday is unconstitutional as "cruel punishment" under article I, section 14 of the Washington Constitution.

Justice Stephens authors a Dissenting Opinion that is joined by three other justices. The dissent's opening paragraph criticizes the Majority Opinion as follows:

> The majority's decision to invalidate a provision of our Miller-fix statute, RCW 10.95.030(3)(a)(ii), and to categorically bar the imposition of a juvenile life without parole (LWOP) sentence purports to rest on article I, section 14 of the Washington State Constitution. However, it offers no basis in state law but is simply a reinterpretation of [the U.S. Supreme Court decision in} Miller v. Alabama, 567 U.S. 460, (2012). More precisely, the majority takes Miller's federal constitutional requirement – that a sentencing court consider youth and its attendant characteristics as mitigating factors in exercising sentencing discretion to impose LWOP – and uses it to categorically bar the exercise of such discretion under the state constitution. Not only is this contrary to the holding in Miller itself, which does not categorically bar LWOP sentences for juvenile homicide offenders, it also departs from state precedent rejecting similar constitutional challenges and upholding judicial sentencing discretion.

The Dissent concludes by stating in the final paragraph that defendant's LWOP sentence should be affirmed:

> I would conclude that RCW 10.95.030(3)(a)(ii) is constitutional and would therefore uphold the sentencing court's discretionary decision to impose LWOP on Bassett for the murders of his parents and brother.

Result: Reversal of Gray Harbor County sentence of Brian M. Bassett to life in prison without parole; case remanded to the trial court for resentencing.

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WASHINGTON STATE COURT OF APPEALS

"FELLOW OFFICER RULE" (AKA "POLICE TEAM RULE") APPLIES TO DETERMINATION OF PROBABLE CAUSE FOR ARREST FOR MISDEMEANOR THEFT; RECORD SUPPORTS ARREST UNDER THE RULE AND RCW 10.31.100

State v. Perez, ___ Wn. App.2d ___ , 2018 WL ___ (Div. I, October 29, 2018)

> On December 14, 2016, dispatch advised [Law Enforcement Officer A] that loss prevention officers at a nearby Target were "struggling" with a woman suspected of theft. As [Officer A] approached the store entrance, an unidentified passerby pointed to a black vehicle pulling out of a parking stall and stated,"There goes the suspect's partner." She also stated that there was drug paraphernalia in the vehicle.
>
> [Officer A] used dispatch to inform other officers that another suspect may be in the vehicle described by the unidentified civilian. **[LEGAL UPDATE EDITOR'S NOTE: The Court of Appeals opinion is not clearly written on this point, but the briefing by defendant in this case makes clear that defendant's "fellow officer" argument is focused on the fact that the suspect vehicle was stopped by other officers and he was arrested by other officers *who were relying almost entirely on Officer A's message to dispatch*.]**
>
> [Officer A] then handcuffed the female suspect later identified as Brandy Williams. From the time that [Officer A] arrived, it took him approximately 30 seconds to one minute to physically take Williams into custody. By this time, the unknown passerby had left.
>
> As [Officer A] walked Williams to his patrol car, he talked with Target's loss prevention officer, Monico Valencia. [Officer A] "deal[s] with Mr. Valencia almost on a daily basis when [he's] working" because of the "high level of theft" at that Target. Valencia told [Officer A] that Williams arrived in a vehicle with two adult males, one of whom was later identified as Perez [the defendant in this appeal]. Valencia identified the same vehicle as being involved in the theft that the passerby had identified. He stated that Perez and Williams entered the store separately but met inside. They took gift bags from inside the store and put merchandise in them.
>
> [Valencia told Officer A that] Perez stood at the entrance of the store with four unpaid items and watched Williams leave. When loss prevention officers confronted Williams, Perez discarded the items he was holding, left the store, and entered a black vehicle.

> Based on this information [from the loss prevention officer] and the civilian's tip, [Officer A] suspected that Perez had either shoplifted or attempted to shoplift. After [Officer A's] conversation with Valencia, [Officer A] saw that [other law enforcement officers] had detained the suspect vehicle in the parking lot.
>
> Once [Officer A] secured Williams in his patrol car, he approached the suspect vehicle. By then, the officers who had stopped Perez had taken him into custody. All three passengers consented to [Officer A's] request to search the vehicle. **[LEGAL UPDATE EDITOR'S NOTE: Perez's appeal did not raise any issue relating to the voluntariness or consent authority relating to the consent search of the suspect vehicle.]** [Officer A] found three "baggies" of narcotics in the vehicle. Two contained heroin. While in custody, Perez told [Officer A] that the heroin was his.
>
> After a hearing, the court denied Perez's request to suppress this evidence. At a stipulated bench trial, the court found Perez guilty of possession of a controlled substance (heroin).

[Footnotes omitted; paragraphing revised for readability]

ISSUE AND RULING: (1) Under the fellow officer rule and RCW 10.31.100, a law enforcement officer generally may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor if the offense was committed in the presence of **any** officer.

Here, Officer A learned from Target loss prevention officers (1) that the defendant had been observed with his suspected theft partner concealing items in gift bags while inside the store, (2) that the defendant saw his partner being detained and discarded his stolen items near the exit, (3) that the defendant then fled from the store and got in a particular vehicle. Officer A was also contemporaneously told by an unidentified passerby that "there goes the suspect's partner" and that there was drug paraphernalia in a possible getaway car that was pointed out by the passerby. Officer A informed dispatch that the theft suspects may be inside the particular vehicle, and other officers then stopped the suspect vehicle and arrested defendant from the vehicle.

Does the fellow officer rule apply to arrests for misdemeanor theft, and was the misdemeanor arrest by the other officers in this case supported by the fellow officer rule and RCW 10.31.100? ANSWER BY COURT OF APPEALS: Yes, Officer A had probable cause to arrest the defendant for theft or attempted theft, and the arrest by the other officers is supported by that probable cause and the fellow officer rule and RCW 10.31.100)

Result: Affirmance of Snohomish County Superior Court conviction of Blayne Michael Perez for possession of heroin.

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

> RCW 10.31.100 describes when police officers have authority to arrest, without a warrant, individuals committing misdemeanors or gross misdemeanors: "A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of **an** officer, except as provided in subsections (1) through (11) of this section." (Emphasis added.) RCW 10.31.100(1) authorizes an individual's arrest for non-felony theft offenses committed outside the officer's presence: "Any police officer having probable cause to believe that a

person has committed or is committing a misdemeanor or gross misdemeanor, involving . . . . the unlawful taking of property . . . . , shall have the authority to arrest the person."

Our Supreme Court has held that RCW 10.31.100(1) is constitutional. Here, the parties dispute the information a court can consider to decide whether an officer making a non-felony theft arrest had probable cause to make the arrest. Perez asserts that the court may consider only the information known to the arresting officer. The State contends that the court may consider all information allowed by the fellow officer rule.

"The fellow officer rule, also known as the police team rule, allows a court to consider the cumulative knowledge of police officers in determining whether there was probable cause to arrest a suspect." The arresting officer has probable cause to arrest a suspect when an officer directing or communicating with him has probable cause, regardless of whether he personally possesses sufficient information to constitute probable cause.

Perez relies on State v. Bravo Ortega, 177 Wn.2d 116 (2013). to support his claim that the fellow officer rule does not apply to arrests for non-felony offenses authorized by RCW 10.31.100. In Bravo Ortega, our Supreme Court interpreted an earlier version of RCW 10.31.100.

This former statute stated, "A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer." In Bravo Ortega, an officer stationed on the second floor of a building witnessed Ortega participate in drug transactions. Believing that he had probable cause to arrest Ortega for drug-traffic loitering, the officer radioed this information to other officers on the ground, who then arrested Ortega. Our Supreme Court held that Ortega's arrest was unlawful because under the plain language of the statute, only an officer who is present during the offense may arrest a suspect for a misdemeanor or a gross misdemeanor."

To support its holding, the court applied a rule of statutory construction, expressio unius est exclusio alterius. This means "to express or include one thing implies the exclusion of another." The court explained that RCW 10.31.100(7) provides express authority for an officer to rely on the request of another officer in making an arrest for a traffic infraction.

[Court's Footnote 21: *The statutory provision the court examined in Bravo Ortega was RCW 10.31.100(6). In 2013, the legislature renumbered this provision as RCW 10.31.100(7). LAWS OF 2013, Reg. Sess., ch. 278 § 4. We use the current numeration*.]

[The Supreme Court] stated that this provision did not apply to drug traffic loitering. The court reasoned that the expressio unius est exclusio alterius doctrine supported its decision because RCW 10.31.100(7) expressly authorized an officer to rely on the request of another officer when making an arrest for a traffic infraction while the other subdivisions of RCW 10.31.100 authorizing warrantless arrests did not. The court concluded that this meant that the legislature intended for the fellow officer rule to apply only to arrests for traffic infractions.

Perez acknowledges that the amendment to RCW 10.31.100 removed the requirement that a non-felony offense be committed in the presence of the arresting officer. But he maintains that the expressio unius est exclusio alterius doctrine still applies to this case.

He claims that similar to the provision about drug-traffic loitering considered in Bravo Ortega, RCW 10.31.100(1), authorizing a warrantless arrest for a non-felony theft offense, does not expressly authorize the arresting officer to rely on the request of another officer. He cites the principle that criminal statutes should be literally and strictly construed. He also relies on the rule of lenity, which, in the face of statutory ambiguity, requires the court "to adopt the interpretation most favorable to the defendant." We reject Perez's argument on two grounds.

[LEGAL UPDATE EDITOR'S COMMENT: I have never seen applied to interpretation of a procedural statute or a procedural Court Rule the "rule of lenity" that applies to substantive criminal statutes. The Court of Appeals does not express an opinion one way or the other whether that rule of interpretation applies in this context as contended by defendant.]

First, Bravo Ortega does not apply because, unlike the situation there, RCW 10.31.100(1) specifically states that the requirement that the offense be committed in the presence of an officer does not apply to arrests for non-felony theft offenses. RCW 10.31.100(1) authorizes "**any** police officer" with probable cause to arrest an individual for select non-felony offenses, including theft. (Emphasis added) The statute does not require that the arresting officer make the probable cause determination. And under the fellow officer rule, probable cause is established when an involved officer has probable cause even if the arresting officer does not personally have probable cause. Thus, the plain language of RCW 10.31.100(1) allows for application of the fellow officer rule to arrests for select non-felony offenses, including the theft offense at issue here.

Even if Bravo Ortega were relevant, RCW 10.31.100 also permits application of the fellow officer rule. The doctrine of expressio unius est exclusio alterius is a canon of statutory construction that does not apply where, as here, the plain language of the statute is unambiguous. . . .

In Bravo Ortega, our Supreme Court held that the plain language of former RCW 10.31.100 did not permit application of the fellow officer rule. . . . The plain language of the amended statute before this court is also unambiguous. It authorizes a police officer to conduct a warrantless arrest for a non-felony "when the offense is committed in the presence of an officer." "An officer" means any officer, whereas "the officer," used in the former statute, means the arresting officer. Thus, the plain language of RCW 10.31.100 allows a police officer to arrest a suspect for a non-felony if any officer was present during the offense. Perez provides no persuasive explanation for how an officer authorized to arrest a person for a crime committed outside his presence could ever have probable cause without relying on the knowledge of others. The trial court correctly concluded that the fellow officer rule applies to arrests for non-felony offenses authorized by RCW 10.31.100.

[Most footnotes and most case citations omitted]

USING ANOTHER PERSON'S FOOD STAMP BENEFITS TO BUY FOOD AT A GROCERY STORE DOES NOT VIOLATE RCW 9.91.144

In State v. Gray, ___ Wn. App.2d ___ , 2018 WL ___ (Div. III, October 16, 2018), the Court of Appeals for Division Three rules that RCW 9.91.144, which makes it a class C felony to redeem food stamps in violation of 7 U.S.C. sec. 2024(c) (a federal statute) or RCW 74.04.500, applies only to merchants and others who seek reimbursement by the government for food stamp benefits previously used by a consumer. Here, the defendant improperly used another person's food stamp benefits to purchase food at a grocery store. That conduct is not covered by RCW 9.91.144.

Result: Affirmance of Ferry County Superior Court's dismissal of charge against Duane Edward Gray.

RCW 70.48.100'S PROTECTION AGAINST DISCLOSURE OF "RECORDS OF A PERSON CONFINED IN JAIL" PRECLUDES DISCLOSURE UNDER PUBLIC RECORDS ACT OF PHONE CONVERSATION RECORDINGS AND COUNTY RECORDS RELATING TO THE RECORDINGS

Zabala v. Okanogan County, ___ Wn. App.2d ___ , 2018 WL ___ (Div. III, October 2, 2018, revising an Opinion issued on April 3, 2018)

LEGAL UPDATE EDITOR'S NOTE: I do not usually include Public Records Act decisions in the Legal Update, leaving the reporting in that arcane area of law to the expert public and private attorneys who advise State and local government agencies on that subject. But this decision seemed worthy of a brief mention. Readers of the Legal Update are advised to consult experts on the implications of the Zavala decision.

With numerous exceptions, RCW 70.48.100 provides that "the records of a person confined in jail shall be held in confidence and shall be made available only to criminal justice agencies as defined in RCW 43.43.705." In Zavala, a three-judge panel of Division Three of the Court of Appeals rules that RCW 70.48.100 shields from Washington Public Records Act disclosure the phone conversation recordings of jail inmates, as well as records relating to the recordings. The Zavala Court also rules that the exemption extends to jail records that have been forwarded to other government agencies, including the prosecuting attorney's office.

Result: Affirmance of Douglas County Superior Court dismissal of lawsuit brought under the Public Records Act.

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BRIEF NOTES REGARDING OCTOBER 2018 UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS ON SELECT LAW ENFORCEMENT ISSUES

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

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

In October 2018, 12 unpublished Court of Appeals opinions fit these categories. I do not promise to be able catch them all, but each month I will make a reasonable effort to find and list all decisions with these issues in unpublished opinions from the Court of Appeals. I hope that readers, particularly attorney-readers, will let me know if they spot any cases that I missed in this endeavor, as well as any errors that I may make in my brief descriptions of case results.

1. State v. Paul Anthony Carson: On October 2, 2018, Division Three of the COA rules for the State in rejecting defendant's appeal from his Pierce County Superior Court conviction for *attempted rape of a minor*. The defendant's central unsuccessful argument was that he should have been allowed by the trial court to argue to the jury that he was **entrapped** by members of a task force that was established to address sexually exploited children, and that used a Craigslist sting with pretense of a mother offering her young children for sex. The Court of Appeals declares that the evidence was incontrovertible that he had a predisposition to have sex with the minor children, so the defense of entrapment was not available to him. The Court of Appeals also holds that substantial evidence in the record supports his conviction for attempted rape of a minor. Intent plus substantial step elements of the crime of attempted rape of a minor are supported by the evidence.

2. State v. Larry Eugene Smith, Jr.: On October 2, 2018, Division Two of the COA rules for the State in rejecting defendant's appeal from his Pierce County Superior Court conviction for *possession of a stolen vehicle*. The three-judge panel of the Court of Appeals rules in a 2-1 vote that a police officer's **investigative stop** of Smith – a seizure that was based primarily on a corroborated citizen's report to 911 where the caller's phone number and location were verified at the time of the call, but it later turned out that the caller gave a false name – **was supported by reasonable suspicion**. The Majority Opinion for the Court of Appeals also indicates in a footnote that the encounter with Smith may qualify as a "social contact" up to the point when the officer learned that the operator of the vehicle had a suspended license and was driving a vehicle that had been reported as stolen, and therefore that reasonable suspicion may not be required for the contact. For discussion of the reasonable suspicion standard, see the discussion at pages 114-128 of the following Washington-focused law enforcement guide on the Criminal Justice Training Commission's LED Internet page: Confessions, Search, Seizure and Arrest: A Guide for Police Officers and Prosecutors, May 2015, b*y* Pamela B. Loginsky, Staff Attorney, Washington Association of Prosecuting Attorneys.

3. State v. Anthony Lewis Box: On October 8, 2018, Division One of the COA rules for the State in rejecting defendant's appeal from his Snohomish County Superior Court convictions for *one count of vehicular homicide and three counts of vehicular assault*. The three-judge panel of the Court of Appeals rules that:

(1) **probable cause** ((a) the facts and circumstances of the one-car, high-speed crash; (b) the observations of Box's signs of intoxication after the crash, and (c) the finding multiple cans of Dust Off at the crash site) **supports the search warrant** that was issued to obtain a blood sample to test for, among other substances, difluoroethane; and

(2) **defendant is not entitled hearing under Franks v. Delaware, 438 U.S. 154 (1978)** to question the WSP Trooper's omission from the search warrant affidavit of any information about a possible concussion of the defendant (in his investigation, the responding Trooper had not observed any evidence of a concussion, such as evidence of unequal pupil sizes or head-injury complaints or behavior of the defendant).

4. State v. I.H. (Birth Date July 9, 2002): On October 8, 2018, Division One of the COA rules for the State in rejecting the defendant's appeal from his King County Juvenile Court adjudication of guilt of *Assault in the First Degree* in violation of RCW 9A.36.011(1)(a). The three-judge panel of the Court of Appeals rules that substantial evidence supports the Juvenile Court's determination that the **Miranda waiver by the 14-year-old juvenile suspect was knowing, intelligent and voluntary**. The Court of Appeals also rejects the juvenile's argument, which was contrary to Washington Supreme Court precedent, that Miranda waiver should not be allowed for any juvenile without the presence of a parent, guardian or advocate. The Court of Appeals notes in a footnote: "I.H. also cites King County Code (KCC) 2.62.020(A). [However] KCC 2.62.020(A) prohibits only the "department of adult and juvenile detention . . . from allowing custodial interrogation and the waiver of any Miranda rights until after a juvenile consults with an attorney."

5. State v. Charles William Jones, Jr.: On October 9, 2018, Division Two of the COA rejects the appeal by defendant of his Pierce County Superior Court convictions for *four counts of first degree unlawful possession of a firearm, two counts of unlawful possession of a short-barreled shotgun, and one count of unlawful possession of a short-barreled rifle*. The Court of Appeals rules that the **defendant did not make an adequate case for holding a veracity hearing under State v Casal, 103 Wn.2d 812 (1985)** where the defendant attacked the truthfulness of the confidential informant, not the truthfulness of the officer-affiant for the search warrant application.

6. State v. Tammy Rush: On October 9, 2018, Division Two of the COA rejects an appeal by defendant from his Clark County Superior Court convictions for *two counts of unlawful possession of a controlled substance with intent to deliver, one count of unlawful possession of a controlled substance, and one count of bail jumping*. Rush appealed from her conviction for unlawful possession of a controlled substance and from one of her two convictions of unlawful possession of a controlled substance with intent to deliver, asserting as to these convictions that the trial court's exclusion of certain testimony from her husband, Keith Rush, violated her **due process right to raise the defense of entrapment by estoppel** (the argument is rejected because Rush was not aware of a cooperation agreement between Oregon authorities and her husband prior to engaging in her criminal conduct in Washington on January 30, 2015, and because her husband's testimony during an offer of proof did not otherwise tend to show that Rush engaged in her criminal conduct in reliance on any assurance from any governmental official).

7. State v. Romeen Ahmad Sabahi: On October 16, 2018, Division Two of the COA rejects an appeal by defendant of his Clark County Superior Court convictions for *two courts of first degree assault*. The Court of Appeals rules that the trial court correctly ruled that **statements that defendant made to officers were not coerced**. The Court of Appeals explains as follows:

> Sabahi argues that the statements were coerced because it was reasonable for Sabahi to believe that he was required to answer the questions in order to obtain any necessary medical attention. Sabahi relies exclusively on [the Washington State Supreme Court decision in] State v. Juarez DeLeon to support his argument. In Juarez DeLeon, the

> defendants disclosed information about their gang affiliations as part of the jail booking process**. 185 Wn.2d at 484, 486 (2016)**. The jail staff collects this information to ensure that all inmates are safely housed. Because the defendants made the statements to protect themselves from the "very real risk of violence" that could result from being housed with certain individuals, the statements were not voluntary.
>
> Here, however, there was no credible threat to Sabahi's safety that necessitated answering the questions. In fact, when [the officer] asked Sabahi if he was injured in order to determine whether medical assistance was necessary, Sabahi responded only by saying that his handcuffs were too tight. Later, without any questioning from [the officer], Sabahi stated that he could not breathe because he had asthma. Then [the officer] summoned medical personnel. The record shows there was no coercive action taken by [the officer] and there was no credible threat that medical treatment would have been withheld. . . .

8. State v. Darcy Dean Racus: On October 23, 2018, Division Two of the COA rejects an appeal by defendant for his Pierce County Superior Court convictions for *attempted first degree rape of a child and communicating with a minor for immoral purposes*. The Court of Appeals concludes that (1) defendant **impliedly consented by his behavior to recording of communications** he had with an undercover WSP detective; and (2) there was **probable cause to believe that Racus was engaging in the commercial exploitation of a minor to have sex for a fee**, as required by RCW 9.73.230.

9. State v. Curtis Charles Anderson: On October 25, 2018, Division Three of the COA rules in favor of the appeal of defendant from his Spokane County Superior Court conviction of one count of *violation of a no-contact order, committed against a family or household member*. The State conceded on appeal that evidence (seemingly a comedy of errors) at a CrR 3.5 hearing was **insufficient to support the trial court's finding that Mr. Anderson was properly Mirandized** before he made incriminating statements to police while in custody. The Court of Appeals rules that the trial court error was not harmless, and that a new trial is required.

10. State v. Kassandra Mae Jeffers: On October 31, 2018, Division Two of the COA rejects defendant's appeal from a Lewis County Superior Court conviction for *unlawful possession of methamphetamine*. The Court of Appeals concludes that a search of defendant's purse was a permissible **search incident to arrest** under standards set in the Washington Supreme Court decisions in State v. Byrd, 178 Wn.2d 611 (2013) and State v. Brock, 184 Wn.2d 148 (2015). The Court of Appeals notes that "Jeffers was within inches of her purse inside of her minivan and she also grabbed her identification out of her wallet that was on top of her purse when [the officer] seized her . . . that . . . . Jeffers's purse was "'in such immediate physical relation to [her] as to be in a fair sense a projection of h[er] person' at the time of the seizure" under Byrd.

11. State v. LeShaun Ayatta Alexander, Jr.: On October 31, 2018, Division Two of the COA rejects defendant's appeal from his Pierce County Superior Court convictions for *first degree assault and first degree unlawful possession of a firearm*. The Court of Appeals rules that (1) an **officer had a sufficient factual basis to justify an investigatory Terry stop, and (2) the officer's actions did not exceed the permissible scope of a Terry stop.**

12. State v. W.F.: On October 31, 2018, Division Two of the COA rejects the defendant's appeal from a Clark County Superior Court juvenile court adjudication of guilty of *first degree child molestation*. The case arose from W.F.'s interaction with a six-year-old girl, GKJ, in WF's

backyard. The Court of Appeals notes that GKJ told three people – her mother, a forensic interviewer, and a medical doctor – that WF reached inside her pants and touched her vagina. The Court holds that (1) the trial court did not err in ruling that **GKJ was competent to testify**, (2) the trial court did not err in admitting **GKJ's hearsay statements**, and (3) the State presented sufficient evidence to prove that WF touched GKJ.

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

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

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

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

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

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

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

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

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

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