LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

SEPTEMBER 2020

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(2) ADDITIONAL LANGUAGE (NOT FOCUSED ON IN THE OCTOBER 2019 LEGAL UPDATE) IN THE COURT'S OPINION APPEARS TO INDICATE THAT, EVEN IF THE BACKPACK HAD INSTEAD BEEN ON THE PERSON OF THE ARRESTEE, SUPPRESSION WOULD HAVE BEEN JUSTIFIED BECAUSE THE ARRESTING OFFICER DENIED THE ARRESTEE'S REQUEST TO HAND OFF HER BACKPACK TO HER NEARBY BOYFRIEND – THE LEGAL UPDATE EDITOR CONTENDS THAT THE ADDITIONAL LANGUAGE IS DICTA (DISCUSSION UNNECESSARY TO SUPPORT THE RESULT) THAT IS INCONSISTENT WITH THE WASHINGTON SUPREME COURT'S BRIGHT LINE SEARCH INCIDENT RULE
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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT CIVIL LIABILITY FOR LAW ENFORCEMENT: NO QUALIFIED IMMUNITY FOR CALIFORNIA OFFICER WHO TWICE SHOT A MENTALLY DISTURBED MAN IN THE MAN'S HOME, THE SECOND TIME FATALLY, WHERE SOME EVIDENCE SUPPORTS THE JURY'S FINDING THAT, DURING THE PERIOD BETWEEN THE FIRST AND SECOND SHOT, THE CIRCUMSTANCES HAD CHANGED SUCH THAT THE MAN NO LONGER WAS ARMED OR POSED AN IMMEDIATE THREAT TO THE OFFICER

In Lam v. Acosta, ___ F.3d ___ , 2020 WL ___ (9th Cir., September 25, 2020), a three-judge Ninth Circuit panel votes 2-1 to deny qualified immunity to a law enforcement officer and to uphold a jury verdict for the 80-year-old father ("the father") of a 42-year-old mentally disturbed man ("the son") who was fatally shot by a law enforcement officer in the son's home. Important to the ruling is that the jury made a finding along the lines that: (1) [the son] stabbed the officer in the forearm with a pair of scissors prior to a first gunshot by the officer, (2) the officer retreated after firing the first shot, and (3) the son was no longer armed with scissors when the officer fired a fatal second shot.

LEGAL UPDATE EDITOR'S NOTE: The jury also ruled against the officer on California common law claims, which the officer did not challenge on appeal, other than indirectly in a challenge to admission of evidence that is not addressed in this Legal Update entry.

Fourth Amendment Claim By The Father

In appellate review of the jury verdict and the trial court's denial of qualified immunity on the Fourth Amendment issue, the evidence (as well as the jury's special factual findings) must be viewed in the best light for the plaintiff, i.e., the father. The Ninth Circuit Majority Opinion concludes that there is sufficient evidence in the record to support the jury's verdict and special findings that concluded that, in an engagement within the home, the officer used excessive force under the Fourth Amendment. Important to this ruling was the above-noted specific finding by the jury that the son was not armed with scissors at the point when the officer fired the fatal second shot.

The Majority Opinion also denies qualified immunity to the officer on the Fourth Amendment claim. This ruling is based on a conclusion that case law was well-established at the time of the 2013 incident to the effect that shooting a person who does not pose an immediate threat to the officer violates the Fourth Amendment.

The Majority Opinion in Lam provides the following summary of the facts:

> At the time of the incident, [the father] – then 80 years old – lived with his 42-year-old son at [the son's] home in Los Banos, California. [The son] had Type 2 diabetes and a history of mental health issues that included symptoms such as "hearing voices." In the past, [the son] generally managed these mental health issues with medication, but he

had stopped taking his medications, which caused his mental and physical health to deteriorate.

At the time of this incident, [the son] was 5' 8", weighed 136 pounds, and was very frail. In the afternoon of September 2, 2013, [the son] became agitated, swearing at and unsuccessfully attempting to hit [the father], so [the father] drove to a neighbor's house and asked her to call 911. [the father] was under the impression that the police would make [the son] take his medication, and [the father] testified that he had been advised by "an agency specialized in mental health" that the police could take [the son] to a "specialized hospital for treatment."

Officer Jairo Acosta was dispatched to investigate the call as a possible assault, and he met [the father] outside [the son's] home. [The father] told Acosta that [the son] had "lost his mind" before the two entered the home through the garage.

[Court's footnote: *The layout of [the son's] home is relevant to putting the events at issue in context. The home was set up with an entrance through the garage, which opened into a laundry room. The laundry room opened into the main hallway, with [the son's] room immediately on the right. The main hallway stretched 16 feet before it turned at a 90-degree angle to the left, then continued into the kitchen and living room area*.]

When [the father] and Acosta arrived outside [the son]'s bedroom, Acosta pushed open the bedroom door and found [the son] sitting at his desk, unarmed and wearing nothing but basketball shorts. [The son] immediately started yelling at Acosta and [the father] to get out of the room.

Acosta approached [the son] and grabbed [the son's] shoulder to get [the son] to leave the room with him. [The father] testified that when [the son] refused to leave his room, Acosta challenged [the son], saying, "Beat me, beat me," as [the son] yelled, "No, no, no" and made punching motions through the air.

[The son] then stood up and began pushing Acosta out of his room, forcing both [the father] and Acosta into the main hallway. [The father] retreated down the hallway into the turning point so that he was behind Acosta and could no longer see [the son]. Acosta radioed dispatch with a non-urgent request for back-up. [The son] did not have any weapon in his hands at this point.

According to Acosta, [the son] then went to a desk drawer and grabbed what Acosta thought was a knife, but turned out to be a pair of scissors. Acosta testified that he then pulled out his gun and took a step back as [the son] approached him with the scissors, and that he told [the son] to drop the scissors. [The father] testified he did not hear Acosta give a warning. [The son] stabbed Acosta in the left forearm with the scissors, and Acosta then shot [the son] in the right calf, with the bullet passing through his leg.

After Acosta fired the first shot, [the father] ran to Acosta and asked him why he shot [the son], and Acosta replied that [the son] had a knife. [The father] testified that he could not see any weapon, but Acosta yelled, "Go back, go back." Acosta retreated down the hall, and took the time to clear his handgun, which had jammed, using a "tap, rack[,] and roll" technique.

> Acosta continued backing down the hallway so that [the father] was behind him. When Acosta was positioned near the turn of the hallway, he fired the second shot at [the son], who was still in the main hallway. It is undisputed that Acosta did not provide a warning to [the son] before firing the second shot. The second shot hit [the son] in the chest at a downward angle, and he fell to the ground.
>
> [The father] rushed to [the son], who was lying face-up on the floor, bleeding and screaming. Backup arrived shortly thereafter, and [the son] was handcuffed before being placed on a stretcher and taken outside while [the father] was told to wait in the living room.
>
> Officer Teresa Provencio was the first officer to arrive after the shooting, entering through the garage and walking past [the son] and down the hallway. She did not see any scissors or other weapon near [the son], nor did Acosta warn her that [the son] had been armed or that he had stabbed Acosta with the scissors.
>
> Officer Christopher Borchardt was the next to arrive on-scene, and Acosta reported to Borchardt that [the son] had stabbed him with scissors, and Acosta revealed a small puncture wound on his forearm. Borchardt testified that he observed a pair of scissors under [the son's] thigh, but the position of the scissors was never confirmed by photograph because Borchardt testified that he slid the scissors away from [the son] and that the scissors were then moved to a different room.
>
> [The son] was taken to the hospital, where he died during surgery.

[Some paragraphing revised for readability]

The Ninth Circuit describes as follows the evidence that supports the jury's factual finding that the son was not armed with scissors when the officer shot him with the fatal second shot:

> *First*, [the father] was present for the events in question as a percipient witness. According to [the father] when Acosta and [the son] started struggling in the bedroom, he backed away three to four meters outside the bedroom. [The father] testified that, after he heard the first shot, he ran to Acosta and asked him why he shot [the son]. Acosta told him that [the son] had a knife.
>
> [The father] then tried to run over to see what happened, but Acosta told him to go back. [The father] was standing behind Acosta when Acosta fired the second shot, and after that shot [the father] ran to [the son] and saw him lying face up. Crucially, [the father] testified that he saw police "turn[] [the son] upside down, face down, and . . . handcuff[] him" – but that he did not see a pair of scissors near [the son]. In fact, [the father] did not see a pair of scissors until after police had left the home.
>
> *Second*, consistent with [the father's] testimony that he did not observe a pair of scissors near [the son] after the second shot, Officer Provencio – who was the first officer to arrive on the scene and walked right past [the son] – testified that she did not observe a pair of scissors near [the son]. The testimony from [the father] Lam and [Officer] Provencio is sufficient to support the jury's finding that [the son] did not have scissors prior to the second shot.

> *Third*, [Officer] Acosta gave inconsistent accounts of whether [the son] advanced on him with the scissors, and the jury was entitled to take those inconsistencies into consideration. At trial, Acosta gave two different versions of which hand [the son] used to hold the scissors. His officer-involved-shooting interview, conducted just a few hours after the event, contradicted his trial testimony. In addition, he told the interviewers that [the son] had dropped the scissors after the first shot.
>
> At trial, [Officer Acosta] testified that [the son] had never dropped the scissors. He told interviewers that [the son] had fallen to the ground after the first shot, but at trial he claimed [the son] did not fall after the first shot. At trial, he had difficulty remembering what he said to arriving officers or the sequence of events. In short, Acosta's testimony was significantly impeached by his prior inconsistent statements and his inconsistent testimony at trial.

[Footnote omitted; emphasis added; some paragraphing revised for readability]

The Majority Opinion also provides the following further explanation for the Opinion's assertions that there is evidence supporting the jury's determination of unreasonableness of the use of deadly force:

> It is undisputed (and the jury so found) that Acosta backed down the hallway after the first shot. Additionally, Acosta not only had time to speak to [the father], but also had time to clear his jammed handgun using a "tap, rack[,] and roll" technique. Further, there was testimony about the bullet trajectory that suggested that [the son] was not fully upright when he was shot the second time.
>
> . . . .
>
> . . . . When Acosta fired the second shot, [the son] no longer posed an immediate threat: [The son] was injured and was not approaching Acosta with scissors, and Acosta was retreating from [the son]. Acosta could have retreated further, even out of the house, and waited for backup. Indeed, he had already radioed for backup, which was on the way.
>
> . . . . Less intrusive alternatives to the deadly force were available to Acosta. He had a baton and pepper spray on his person, and he could have held his fire "unless and until [the son] showed signs of danger." See Zion v. County of Orange, 874 F.3d 1072, 1076 (9th Cir. 2017). . . .
>
> Finally, though the parties dispute whether Acosta warned [the son] before the first shot, it is undisputed that he did not warn [the son] before firing the second shot. Between the first and the second shot, Acosta was able to tell [the father] that [the son] "had a knife," direct [the father] to "go back," retreat down the hallway, and clear his gun. Thus, "there was 'ample time to give that order or warning and no reason whatsoever not to do so.'" . . . .

[Some citations omitted]

Fourteenth Amendment Issue

The Majority Opinion reverses the jury's verdict in favor of the father on his separate Fourteenth Amendment Due Process claim for loss of a familial relationship. The Majority Opinion concludes that there is insufficient evidence to meet the very high standard of proof for a Due Process claim, which standard requires a showing that an officer acted with a purpose to harm unrelated to any legitimate law enforcement objective. There was no such evidence in the record. The jury found only that Acosta acted "with a purpose to harm," and not a purpose to harm unrelated to a legitimate law enforcement objective.

DISSENTING OPINION

The Dissent argues that the officer should have been ruled to have qualified immunity on the rationale that, contrary to the assertions in the Majority Opinion, no previous decision by a relevant appellate court is on point factually with the Lam case.

Result: Affirmance of U.S. District Court (Eastern District of California) judgment on jury verdict for plaintiff on Civil Rights Act Fourth Amendment claim of excessive deadly force against Officer Acosta. Reversal of verdict for plaintiff on Civil Rights Act claim of a Fourteenth Amendment violation by Officer Acosta. Case remanded to District Court for determination of whether the amount of the jury verdict of must be reduced in light of the appellate ruling against Fourteenth Amendment liability.

IN FOURTH AMENDMENT RULING IN A CRIMINAL CASE, A 2-1 MAJORITY OF A NINTH CIRCUIT PANEL CONDEMNS FAKE-HOME-BURGLARY-INVESTIGATION RUSE BY FBI AGENTS WHO WERE EXECUTING A CHILD PORNOGRAPHY SEARCH WARRANT WHERE: (1) THEY LIED TO THEIR SUSPECT IN ORDER TO LURE HIM HOME FROM WORK, AND (2) THUS MAKE HIM SUBJECT TO SEIZURE IN HIS HOME UNDER U.S. SUPREME COURT PRECEDENT OF MICHIGAN V. SUMMERS, 452 U.S. 692 (1981), AS WELL AS TO MAKE HIS CAR SUBJECT TO SEARCH UNDER THE WARRANT

In U.S. v. Ramirez, ___ S.Ct. ___ , 2020 WL ___ (9th Cir., September 25, 2020), a three-judge Ninth Circuit panel votes 2-1 to suppress evidence under the Fourth Amendment based on the Majority judges' disapproval of a ruse used by officers who were executing a search warrant and lured the suspect home from work by falsely telling him that there a burglary at his home had just occurred.

The purpose of the ruse was to induce the suspect to drive home from work and thus bring (1) the suspect's car within the terms of a search warrant that authorized a search of his residence and of any vehicle on the premises registered to him; and (2) the suspect himself within the law enforcement authority provided by Michigan v. Summers, 452 U.S. 692 (1981). Michigan v. Summers is a 1981 U.S. Supreme Court precedent that held that a search warrant automatically authorizes officers executing a search warrant to seize (though not search) occupants of a residence during the reasonable period of execution of the warrant where those occupants are in the immediate vicinity of the residence during the period of execution of the warrant.

The Majority Opinion suppresses Ramirez's phone, wallet, keys, electronic equipment, and statements to FBI agents. It is not totally clear from the Majority Opinion or Dissenting Opinion whether any evidence was lawfully seized under the search warrant (i.e., seized from the home) such that evidence remains for prosecution in remand in the case, though the Dissenting Opinion implies that no evidence remains admissible.

The Majority Opinion's introductory paragraphs summarize the ruling condemning the ruse as follows:

> This appeal concerns the Fourth Amendment's limits on the government's use of deceit when executing a valid search warrant. Agents with the Federal Bureau of Investigation (FBI) investigating child pornography offenses obtained a warrant to search the residence of Stefan Ramirez and any vehicle registered to Ramirez located at or near the residence.
>
> Under the warrant and the law established by Michigan v. Summers, 452 U.S. 692 (1981), the agents had no authority to seize Ramirez or search his car when they arrived to execute the warrant, because neither was at the residence. The agents manufactured the authority to seize them by falsely claiming to be police officers responding to a burglary to lure Ramirez home.
>
> By luring Ramirez home, the agents' successful deceit enabled them to obtain incriminating statements from Ramirez and evidence from his car and person. The district court denied Ramirez's motion to suppress the statements and evidence, and Ramirez thereafter pleaded guilty to receipt and distribution of material involving the sexual exploitation of minors.
>
> We hold that, under the particular facts of this case, the agents' use of deceit to seize and search Ramirez violated the Fourth Amendment. Accordingly, we reverse the suppression order and remand for further proceedings.

[Some paragraphing revised for readability]

The Majority Opinion extensively discusses the case law on ruses. The Opinion attempts to provide clarity on when ruses are permitted and when they are not. In key part, the Majority Opinion states in that regard:

> Although the propriety of a ruse search or seizure depends on the particular facts of each case, our precedent draws a clear line between two categories of deception. Law enforcement's use of deception is generally lawful when the chosen ruse hides the officer's identity as law enforcement and facilitates a search or seizure that is within its lawful authority, such as pursuant to a valid search warrant. Deception is unlawful when the government makes its identity as law enforcement known to the target of the ruse and exploits the target's trust and cooperation to conduct searches or seizures beyond that which is authorized by the warrant or other legal authority, such as probable cause.
>
> Undercover operations are a classic example of permissible deception. . . . "
>
> Similarly, we have found no Fourth Amendment violation when members of law enforcement conceal their identities to persuade the subject of a valid arrest warrant to open his door to facilitate the arrest. . . .
>
> . . . .
>
> However, when the government agent is known to the suspect as such, and invokes the trust or cooperation of an individual to search or seize items outside what is lawfully authorized, such a ruse is unreasonable under Fourth Amendment. "We take a closer

look" at the reasonableness of the government's use of deception "when agents identify themselves as government officials but mislead suspects as to their purpose and authority." . . . .

"This concern is at its zenith when government officials lie in order to gain access to places and things they would otherwise have no legal authority to reach." . . . "We think it clearly improper for a government agent to gain access to [places and things] which would otherwise be unavailable to him by invoking the private individual's trust in his government." . . . . That is, government agents violate the Fourth Amendment if their authority to access the evidence in question was obtained by "misrepresenting the scope, nature or purpose of a government investigation." . . . .

. . . .

Under these well-established principles, the ruse used here was not a permissible means to effect the search and seizure of Ramirez. The FBI agents posed as police officers and played on Ramirez's trust and reliance on their story that his home had been burglarized to bring Ramirez and his car within the ambit of the warrant, when they were not otherwise within its ambit. The FBI had no acceptable government interest in using this ruse. Thus, balancing the strong Fourth Amendment interest against the non-existent government interest, the FBI's conduct was plainly unreasonable under the Fourth Amendment.

The Fourth Amendment interest in this case is near its zenith because the agents' chosen ruse both revealed the agents' identities as law enforcement and created authority to search items and seize Ramirez that otherwise exceeded the strict bounds of the warrant. . . .

The search warrant gave the FBI only limited authority to conduct searches and seizures. The warrant authorized the agents to search the Archie Avenue residence, where Ramirez and others were known to reside, and any vehicles located at or near the premises that fall under the dominion and control of Ramirez or any other occupant of the premises. By the plain terms of the warrant, the agents had no authority to search any vehicle located away from the residence.

The warrant did not authorize the agents to seize Ramirez, and the Government does not argue that it had reasonable suspicion or probable cause to do so. In fact, the Government concedes that at the time the agents seized Ramirez, the agents knew only that child pornography had been shared from the Archie Avenue residence; it did not know who was responsible. The Government conceded at oral argument that the agents' authority to pat down Ramirez when he arrived home rested solely on the Summers rule, which permits officers executing a valid search warrant to detain occupants within the immediate vicinity of the premises during the search. See Bailey v. United States, 568 U.S. 186, 195–96 (2013) (discussing Summers, 452 U.S. at 702–03). . . .

. . . .

Permitting the agents' conduct would eviscerate the limitations implemented by the Summers rule, allowing law enforcement to seize people located away from the premises to be searched. "Conducting a Summers seizure incident to the execution of a

> warrant is not the Government's right; it is an exception – justified by necessity – to a rule that would otherwise render the [seizure] unlawful." . . . . It also risks subverting the particularity requirements of the Fourth Amendment in future cases. Law enforcement could turn a warrant to search a home into a warrant to search any number of items outside the home, so long as they could trick a resident into bringing those items to the home to be searched before the warrant was executed. The deceit employed in this case opens a loophole that the Fourth Amendment does not condone.

[Footnote, some citations omitted]

The Majority Opinion includes discussion of Whalen v. McMullen, 907 F.3d 1139 (9th Cir. 2018), in which a Ninth Circuit 3-judge panel held that a law enforcement officer's ruse as to the purpose of his investigation was not lawful and therefore precluded valid consent to entry of the home of a suspect. The investigator in Whalen was looking at the suspect for social security disability civil fraud. In order to gain consent to entry into the suspect's home, the investigator in Whalen falsely told her that he was investigating an identity theft case in which she was not a suspect nor in danger of having her identity compromised.

DISSENTING OPINION

The Ramirez Dissent argues that the ruse should have been ruled permissible, based on the rationales that (1) the ruse affected only the manner of execution of the lawfully issued and supported search warrant, and (2) this Fourth Amendment interest is "insubstantial."

Result: Reversal of U.S. District Court (Eastern District of California) denial of suppression motion in federal child pornography prosecution of Stefan Ramirez; remand of case for further proceedings. **LEGAL UPDATE EDITOR'S NOTE: As noted above, neither the Majority Opinion nor the Dissenting Opinion in the Ramirez case makes totally clear what evidence, if any, remains admissible in this case. The Dissent does indicate that a child pornography criminal will go free, thus implying that no evidence remains admissible.**

LEGAL UPDATE EDITOR'S COMMENT: Better practice would have been to have a search warrant that authorized a search of Ramirez's car wherever it might be located, not limited, as here, to his vehicles located at his home.

CIVIL RIGHTS ACT CIVIL LIABILITY FOR CORRECTIONS: UNDER A DO-NOT-DO-THIS-AGAIN RULING, (1) AN UNCONSENTED STRIP SEARCH BY A CORRECTIONAL OFFICER OF A PRISON VISITOR IS HELD TO HAVE VIOLATED THE VISITOR'S FOURTH AMENDMENT RIGHTS BECAUSE SHE WAS NOT GIVEN THE OPTION OF LEAVING THE FACILITY, (2) BUT QUALIFIED IMMUNITY IS HELD TO PROTECT THE CORRECTIONAL OFFICER BECAUSE THE LAW ON THIS POINT WAS NOT CLEARLY ESTABLISHED IN PREVIOUS RELEVANT CASE LAW

In Cates v. Stroud, ___ F.3d ___ , 2020 WL ___ (9th Cir., September 25, 2020), a three-judge Ninth Circuit panel rules in a Civil Rights Act lawsuit under the Fourth Amendment: (1) that a prison visitor suspected of trying to smuggle illegal drugs to a prisoner should have been given the choice of leaving the prison rather than being subjected to an unconsented same-gender strip search (thus, this ruling appears to establish a constitutional standard in the Ninth Circuit for purposes of future prison-visitor searches); but (2) that the case law in the Ninth Circuit and other jurisdictions had not established, as of the time of the search, a clear standard against a

strip search under these circumstances, and therefore qualified immunity must be given to the correctional officer who performed the search.

Ninth Circuit staff provides the following summary of the Ninth Circuit's Opinion (the summary is not part of the Opinion of the Ninth Circuit panel):

> The panel held that plaintiff's unconsented strip search was unreasonable under the Fourth Amendment. The panel held that even if there was a reasonable suspicion that plaintiff was seeking to bring drugs into the prison (a question the panel did not reach), the criminal investigator who performed the search violated plaintiff's rights under the Fourth Amendment by subjecting her to the search without first giving plaintiff the option of leaving the prison.
>
> The panel held that prior to the panel's decision in this case, there had been no controlling precedent in this circuit, or a sufficiently robust consensus of persuasive authority in other circuits, holding that prior to a strip search a prison visitor – even a visitor as to whom there is reasonable suspicion – must be given an opportunity to leave the prison rather than be subjected to the strip search. Accordingly, because at the time of the violation, plaintiff did not have a clearly established Fourth Amendment right to leave without being subjected to the search, defendant was entitled to qualified immunity. The panel held that plaintiff's other causes of action, which included additional Fourth Amendment and due process claims, failed.

Result: Affirmance of U.S. District Court (Nevada) summary judgment ruling for the government defendants in an action brought pursuant to 42 U.S.C. § 1983.

LEGAL UPDATE EDITOR'S NOTES: The facts in Cates are extensive and complicated, and the legal analysis is nuanced. Readers wanting to analyze the case will of course want to read the full Opinion that is accessible on the Ninth Circuit website.

Also note that the Ninth Circuit Opinion factually distinguishes the circumstances of U.S. v. Aukai, 497 F.3d 955, 960 (9th Cir. 2007) (en banc), which held that a would-be airplane passenger could be subjected to a pat-down, empty-your-pockets search once he had entered the security area, even though, when confronted, he expressed a desire to leave rather than be subjected to the search. The Cates Opinion notes that (1) such airport searches involve significantly greater security interests, and (2) strip searches are much more intrusive that the limited type of search involved in the airport search in Aukai. The Cates Opinion also distinguishes factually (and appears to disagree with some of the rationale of) a ruling by the 11th Circuit in U.S. v. Prevo, 435 F.3d 1343 (11th Cir. 2006) upholding a search of a visitor's car in a correctional institution visitor parking lot even though the visitor asked to be allowed to leave prior to the search.

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WASHINGTON STATE COURT OF APPEALS

WASHINGTON CONSTITUTION, ARTICLE I, SECTION 7, HELD, BASED ON WASHINGTON SUPREME COURT'S 2014 HINTON DECISION, TO BE VIOLATED WHERE AN OFFICER PERFORMED A STING BY COMMUNICATING THROUGH TEXT MESSAGES BETWEEN AN UNDERCOVER PHONE AND THE PHONE OF A SUSPECTED DRUG DEALER, AND THE OFFICER (1) CLAIMED TO BE A NAMED RECENT CUSTOMER OF

THE SUSPECT, (2) CLAIMED THAT HE WAS USING A REPLACEMENT PHONE, AND (3) MADE A DEAL TO BUY METHAMPHETAMINE

State v. Bowman, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. I, September 8, 2020)

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

> On February 21, 2017, Reece Bowman received text messages from an unfamiliar number claiming to be an associate of his named Mike Schabell and asking to buy drugs. Unbeknownst to Bowman, the individual sending the text messages was [a law enforcement officer]. **[LEGAL UPDATE EDITOR'S NOTE: The officer is a federal agent.]**
>
> A month earlier, Schabell had been arrested and offered an opportunity to cooperate with law enforcement. Law enforcement wanted to know who his drug suppliers were. Schabell identified Bowman as one of his suppliers.
>
> When he was arrested again on February 21, [Schabell] gave law enforcement permission to search his cell phone. Law enforcement looked through his text messages and discovered a conversation with Bowman, from which they learned Bowman's cell phone number and that Bowman had sold Schabell methamphetamine earlier that day.
>
> [An officer] texted Bowman from his undercover phone. They had the following exchange:
>
> Officer: Hey Reese, it's [M]ike. I got a burner [phone] [be]cause my old school phone went to shit. . . . You avail[able]?
>
> Bowman: Yes.
>
> Officer: Got cash. . . . I could meet you in Ballard? . . . . Lemme know please.
>
> Bowman: Yeah what Mike is this[?]
>
> Officer: Schabell. Dude from today.
>
> Officer: Serious? . . . . I just wanna know if I can get some. Lemme know please. . . . I need 300 more at least. . . . Can I meet you back at the 7-11?. . . . I finally have a good buyer and I need help. Please let me know where to meet you and I'll come wherever. How much do I have to buy to get you to come? I have cash.
>
> Bowman: Mike come on then. Didn't realize who this was. . . . "thumbs up" emoji . . . Call me.
>
> Officer: I'm with my old lady. Can you come meet or no? . . . . I just need to know if I should drop her off and come meet you or no.
>
> Bowman: Yes.
>
> Officer: Where at? Ballard?

Bowman: I[']m up on Queen Ann[]e . . . .

Officer: K. I can head over there. Where [do] you want to meet?

Bowman: Where are you at?

Officer: You have clear? . . . . Coming from Snohomish . . . . I can drop her off to meet her girlfriend around Green Lake so.

Bowman: Bring her too.

Dkane: Where do you want me to come to? . . . . And haha btw [(by the way)].

Officer: 7-11 same one. . . . Ok I can be there by 10. Can I get [$]500 of clear?

Bowman: Sure.

Officer: Thanks. . . . See you at 7-11. . . . On my way.

Bowman arrived at the 7-11 in Queen Anne with his girlfriend and two year old daughter. [The officer] was waiting there with an arrest team. [The officer] confirmed Bowman's identity and the team arrested him.

Officers read Bowman his Miranda rights. Bowman indicated he understood his rights. He did not ask for a lawyer or indicate that he wished to remain silent. During the search incident to arrest, officers found 3.5 grams of methamphetamine on his person.

Officers then asked Bowman for consent to search his vehicle, indicating that if he refused the vehicle would be impounded and his girlfriend and daughter would be removed and without transportation. Bowman agreed and signed a consent to search form. During the search, police recovered 55.2 grams of methamphetamine, digital scales, and $610 in cash from the vehicle.

Police then transported Bowman to the Seattle Police Department West Precinct. At the precinct, [the officer who did the texting] and [another officer] interviewed Bowman. Bowman admitted during the interview that he had six to seven drug customers, there were two ounces of methamphetamine in his car that belonged to him, and his girlfriend was not involved.

The State charged Bowman with violation of the Uniform Controlled Substances Act, RCW 69.50.401(1), (2)(c). Bowman moved to suppress all evidence against him. He argued that [the officer's] text message conversation with him violated his privacy rights. The trial court denied that motion, finding that his privacy rights had not been violated.

A jury found Bowman guilty as charged. Bowman appeals.

[Footnotes omitted]

ISSUE AND RULING: In State v. Hinton, 179 Wn.2d 862, 876-77 (2014), the Washington Supreme Court held under article I, section 7 of the Washington constitution that the sender of

an unopened text message has a State constitutional expectation of privacy in the communication, such that where a law enforcement officer – rather than the non-law enforcement intended recipient – opens the text message and communicates with the sender, this law enforcement action violates the right of privacy of the person sending the message.

Was article I, section 7 of the Washington constitution, as interpreted in Hinton, violated in the present case where an officer performed a sting by using an undercover cell phone to communicate through text messages with a suspected drug dealer, and the officer (1) claimed to be a named recent customer of the suspect, (2) claimed to be using a replacement phone, and (3) made a deal to buy methamphetamine? (ANSWER BY COURT OF APPEALS: Yes)

Result: Reversal of King County Superior Court conviction of Reece William Bowman for possession of methamphetamine with intent to deliver.

ANALYSIS: (Excerpted from Court of Appeals Opinion)

> Under article I, section 7 of the Washington Constitution, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Interpretation of this article requires a two part analysis. . . .First, we must determine whether the action complained of constitutes a disturbance of "private affairs." . . . If we determine that a valid private affair has been disturbed, we then must determine whether the intrusion is justified by "authority of law." . . . .
>
> Our first inquiry is whether the text message conversation constituted a private affair. "Private affairs" are those privacy interests which citizens of this state have held, and should be entitled to hold, safe from government trespass without a warrant. State v. Myrick, 102 Wn.2d 506, 511 (1984). In State v. Hinton, 179 Wn.2d 862, 876-77 (2014), the principal case upon which Bowman relies, our Supreme Court found that individuals have a privacy interest in text message conversations with known contacts. There, police arrested Daniel Lee and seized his phone.
>
> While the phone was in their possession, it received a text message from a contact named "Z-Shawn Hinton." The text message contained drug terminology. A police detective responded to the text message on Lee's phone, posing as Lee, and set up a meeting with the sender to buy drugs. When the sender, Hinton, arrived, police arrested him.
>
> Our Supreme Court held that Hinton's right to privacy had been violated. It held that Hinton retained a privacy interest in the conversation because he "reasonably believed" he was texting with a "known contact." It differentiated text message communication from a phone call because "unlike a phone call, where a caller hears the recipient's voice and has an opportunity to detect deception, there was no indication that anyone other than Lee possessed the phone."
>
> The State argues that because Bowman responded to messages from an unfamiliar number, he "knowingly converse[d] with a stranger," and therefore had no privacy interest. It relies on State v. Goucher, 124 Wn.2d 778 (1994).
>
> [In Goucher], police executed a search warrant on the home of Garcia-Lopez, a drug dealer known to sell drugs out of his house. While at the residence, the phone rang. An officer answered the phone and the caller requested to speak to "Luis." The officer

responded that Luis had "gone on a run," but that the officer was "handling business" until he returned.

The caller and officer proceeded to arrange a deal to buy drugs at the home. When the caller [Goucher] arrived, officers arrested him. Our Supreme Court held that the caller's privacy rights had not been violated because he had voluntarily conversed with someone he did not know.

Here, Bowman did not converse with someone he knew to be a stranger. Rather, he conversed with a person who represented himself as someone that Bowman knew. This case differs from Hinton in that the unfamiliar phone number gave some indication that the other party to the conversation might be someone other than Schabell.

But, [the officer] affirmatively identified himself as Schabell. His explanation for the changed number was reasonable: that his previous phone had broken. He provided details that Schabell would have known. For example, posing as Schabell, [the officer] sent a text message to Bowman stating that he had met him earlier in the day and that they had done business in the past.

Based on these facts, Bowman reasonably believed he was texting with a known contact. Therefore, as in Hinton, Bowman had a reasonable expectation of privacy for that conversation. [the officer] invaded that right of privacy.

Our next inquiry is whether [the officer] operated with "'authority of law.'" Miles, 160 Wn.2d at 243. The State does not claim that [the officer] had a warrant. Rather, it claims that authority came from Schabell's consent to the search of his cell phone.

The State points out that this case differs from Hinton, because Schabell gave police permission to "use his phone for investigatory purposes." Consent can provide authority of law required by article I, section 7 if the State can show (1) that the consent was voluntary, (2) that the person giving consent had authority to do so, and (3) that any search did not exceed the scope of the grantor's consent. State v. Monaghan, 165 Wn. App. 782, 788-89 (2012). Here, the State is unable to show that either elements (2) or (3) are satisfied.

First, the State has not explained why Schabell, who was not a party to the conversation between Bowman and [the officer], would have any authority to consent to the State's invasion of Bowman's privacy interest in the conversation. Hinton recognized that one in Bowman's situation risked that a contact like Schabell would betray him to police. For example, he could do so verbally. He could do so by surrendering his phone or computer. He could do so by sharing text messages or e-mails with law enforcement. He could consent to the State listening in on or recording his phone conversation. See State v. Corliss, 67 Wn. App. 708, 713 (1992) (expectation of privacy is destroyed when one party consents to the recording), aff'd, 123 Wn. 2d 656, (1994). **[LEGAL UPDATE EDITOR'S NOTE: Corliss is sometimes referred to in law enforcement circles as "the tipped phone" case.]**

Schabell betrayed Bowman verbally and by surrendering the phone and text messages. But, unlike in Corliss, Schabell was not a party to the subsequent text conversation between the police and Bowman. Schabell had no privacy interest

in that conversation, and had no authority to consent to invasion of the privacy interest that under Hinton was held by Bowman.

Second, the search exceeded the scope of the consent that was given. The State points out that "a private relationship loses its constitutional significance if the other person involved chooses to cooperate with police and share their secrets."

[The State] points to the following language from Hinton: "Hinton certainly assumed the risk that Lee would betray him to the police, but Lee did not consent to the officer's conduct." Schabell consented to the search of his phone. However, even if Schabell had authority to consent to [the officer] impersonating him, the record does not indicate that Schabell consented to being impersonated.

Therefore, [the officer] was not acting under authority of law, and violated Bowman's right of privacy. The trial court erred by failing to suppress the evidence obtained by that violation of privacy

[Bolding added; underlining in original; some citations omitted, others revised for style; some paragraphing revised for readability]

LEGAL UPDATE EDITOR'S COMMENTS: The 2014 Washington Supreme Court privacy ruling in Hinton has always troubled me, but it stands as an unambiguous, independent grounds interpretation of article I, section 7 of the Washington constitution. It does not matter whether the crime under investigation is a drug crime or instead is the pimping a 12-year-old or the selling of child pornography. Hinton's privacy protection of the sender of a text appears to support, by logical extension, the constitutional ruling in Bowman. Law enforcement officers should seek legal advice in planning legal strategy in this tortuous area of Washington constitutional privacy law. But I do think that nothing in Hinton or Bowman precludes having the cooperating arrestee (in this case, that would have been defendant Bowman's earlier customer, Schabell) do the texting to make the deal that stings the drug dealer.

CRIMINAL IMPERSONATION CONVICTION UPHELD AGAINST DEFENDANT'S SUFFICIENCY-OF-EVIDENCE CHALLENGE; CONVICTION IS SUPPORTED BECAUSE, ALTHOUGH DEFENDANT PROVIDED HIS TRUE NAME TO ANNUITY ENTITY, HE FALSELY CLAIMED TO BE THE NEPHEW OF HIS VICTIM

In State v. Miller, ___ Wn. App. 2d ___, 2020 WL ___ (Div. II, September 1, 2020), the Court of Appeals issues an Opinion that is part published and part unpublished. The Court affirms the convictions of defendant for first degree theft, first degree criminal impersonation, and attempted first degree theft. One of the issues addressed in the published part of the Opinion concludes that the evidence is sufficient to support defendant's conviction for criminal impersonation under RCW 9A.60.040(1)(a) even though, in communications with an annuity entity purportedly on behalf of an elderly woman (the victim in the case), the defendant was truthful in providing his name and lied in regard to his identity only in claiming that he was the nephew of the woman, to whom he was not related.

The Miller Court explains as follows that the criminal impersonation statute applies to the defendant's conduct:

> Mr. Miller was charged with criminal impersonation in the first degree under RCW 9A.60.040(1)(a). A person is guilty of the crime under that provision if the person "[a]ssumes a false identity and does an act in his or her assumed character with intent to defraud another or for any other unlawful purpose." Mr. Miller argues that in contacting the Standard, he provided his true name, and making a false representation that he was Ms. Meador's nephew does not constitute assuming a false identity within the meaning of the statute. . . .
>
> The fact that Mr. Miller provided his true name does not take him outside the operation of the statute. This court has previously held that "the assumption of a false identity" is not the same as using a false name. State v. Donald, 68 Wn. App. 543, 550 (1993). [This court] has further held that "assuming a false identity" does not require assuming the identity of an actual person, as is required for identity theft. State v. Presba, 131 Wn. App. 47, 55 (2005).
>
> The statutory terms "false identity" and "assumed character" are not defined, but dictionary definitions support their application to someone who misrepresents his relationship to another. . . . RCW 9A.60.040(1)(a) speaks of a person who "act[s] in his or her assumed character," and one definition of "character" is [position, rank, capacity, status] RANK, CAPACITY, STATUS . . . For purposes of construing the statute's reference to "[a]ssum[ing] a false identity," among the definitions of identity are "[2]b : the role an individual holds in a social group of society" and "3 : the condition of being the same with something described, claimed or asserted or of possessing a character claimed."
>
> Not only does the plain language of the statute encompass falsely asserting a family relationship, but it is easy to foresee that falsely claiming to be someone's spouse, parent, child, or other family member could be used to facilitate a fraud or advance some other unlawful purpose. It is consistent with the legislature's purpose to apply the statute to Mr. Miller's misrepresentation of his relationship to [the elderly victim].

[Some citations omitted; some citations revised for style]

Result: Affirmance of Clark County Superior Court convictions of Mark Allan Miller for first degree theft, first degree criminal impersonation, and attempted first degree theft.

CIVIL LIABILITY RELATED TO CHILD ABUSE INVESTIGATIONS ADDRESSED IN TWO RULINGS: (1) UNDER THE UNDISPUTED FACTS OF THIS CASE, NO NEGLIGENCE LIABILITY CAN BE ASSIGNED TO THE CITY OF TACOMA WHERE LAW ENFORCEMENT ACTIONS DID NOT RESULT IN HARMFUL PLACEMENT DECISIONS; AND (2) UNDER TORTS LAW FOR WASHINGTON, THE SPECIAL RELATIONSHIP THAT GIVES DSHS A RECOGNIZED SPECIAL DUTY TO PROTECT AGAINST CRIMINAL ACTS OF THIRD PARTIES DOES NOT APPLY TO LAW ENFORCEMENT AGENCIES

In M.E. and J.E. v. City of Tacoma, ___ Wn. App. 2d ___, 2020 WL ___ (Div. II, September 1, 2020), Division Two of the Court of Appeals affirms a Pierce County summary judgment ruling that the City of Tacoma cannot be held liable for the actions of Tacoma Police Department officers who investigated child abuse allegations relating to two young children.

The Court of Appeals rules that (1) under the undisputed facts, a negligence lawsuit cannot be brought because nothing that the investigators did resulted in any harmful placement decision; and (2) under the Torts law of Washington, the special exposure to lawsuits in this subject area for the State's Department of Social and Health Services (DSHS) does not apply to law enforcement agencies.

(1) <u>Negligence theory of plaintiffs</u>: RCW 26.44.050 creates a statutory cause of action for negligent investigation against both law enforcement and DSHS. RCW 26.44.050 provides:

> Except as provided in RCW 26.44.030(11), upon the receipt of a report concerning the possible occurrence of abuse or neglect, the law enforcement agency or the department [of social and health services] must investigate and provide the protective services section with a report in accordance with chapter 74.13 RCW, and where necessary to refer such report to the court.
>
> A law enforcement officer may take, or cause to be taken, a child into custody without a court order if there is probable cause to believe that the child is abused or neglected and that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order pursuant to RCW 13.34.050. The law enforcement agency or the department investigating such a report is hereby authorized to photograph such a child for the purpose of providing documentary evidence of the physical condition of the child.

Under well-established Washington case law, a cause of action for negligent investigation under RCW 26.44.050 is supported when there are supported factual allegations that failure to adequately investigate resulted in (1) a placement decision to remove a child from a non-abusive home, (2) let a child remain in an abusive home, or (3) place a child in an abusive home. To succeed in a negligent investigation lawsuit, the plaintiff must prove that the faulty investigation was a proximate cause of one of these harms, collectively referred to as a harmful placement. The Court of Appeals rules there is no material factual dispute in this case. That is because there is no evidence that any alleged faulty investigation by the law enforcement officers caused a harmful placement of the children on whose behalf the lawsuit was brought.

(2) <u>Special relationship theory of plaintiffs</u>:

In <u>H.B.H. v. State</u>, 192 Wn.2d 154, 178 (2018), the Washington Supreme Court held that there is a common law duty requiring DSHS to protect foster children from abuse. The special duty for DSHS is based on a special-relationship exception to the general rule of Torts case law that a party is not required to protect against the criminal acts of a third party. The plaintiffs in the <u>M.E. and J.E.</u> case contended that under <u>H.B.H.</u>, a law enforcement agency (in this case, Tacoma P.D.) has the same special relationship as DSHS with allegedly abused children such that a special duty to protect against criminal acts of third parties rests in this case with Tacoma P.D.

The Court of Appeals rejects the argument, distinguishing the special role of DSHS with that of law enforcement agencies. The <u>M.E. and J.E.</u> Court quotes as follows from the <u>H.B.H.</u> Majority Opinion's description of the circumstances that were held there to justify assigning DSHS a special duty to protect the victim of child abuse from the criminal conduct of third parties:

> In sum, the establishment of a dependency imposes essential rights and duties on the State to care for dependent children. See, e.g., RCW 74.13.010 (duty to protect and

> care for dependent children), .031(3) (duty to investigate complaints of neglect, abuse, or abandonment of children), (6) (duty to monitor foster care placements), (7) (duty to provide child welfare services to dependent children), (9) (DSHS authorized to purchase care for dependent children). The State becomes the legal custodian of the dependent child, and the State alone controls the services provided to the child and determines where the child will reside. See JuCR. 3.8(e); RCW 13.34.130(1)(b)(ii); RCW 74.13.031(7). It is against this statutory backdrop that we consider whether DSHS's relationship with dependent foster children creates a special relationship supporting a common law duty in this case.

The M.E. and J.E. Court then explains as follows that H.B.H. does not support extending the DSHS special duty to law enforcement agencies:

> [N]one of the justifications for finding a special relationship between DSHS and foster children applies to law enforcement. The Supreme Court's holding analyzed the unique relationship between DSHS and foster children based on the fact that DSHS becomes the legal custodian of foster children once they are the subject of a dependency action. . . . No such relationship exists between law enforcement and a child that may be involved in an investigation. Even when law enforcement officers take a child into protective custody, the law enforcement officer transfers that child to care and custody of DSHS. See RCW 26.44.056. And here, M.E. and J.E. were not dependent children. Therefore, the legal relationship that H.B.H. recognized between DSHS and foster children does not exist in this case.

Result: Affirmance of Pierce County Superior Court orders granting the City of Tacoma summary judgment.

REVISITING THE HOLDING AND ADDRESSING THE DICTA IN THE OCTOBER 7, 2019 DIVISION ONE DECISION IN STATE V. ALEXANDER INTERPRETING WASHINGTON'S SEARCH INCIDENT TO ARREST RULE:

(1) THE HOLDING OF THE COURT IN THE 2019 ALEXANDER OPINION IS THAT A BACKPACK WAS NOT LAWFULLY SEARCHED INCIDENT TO ARREST BECAUSE, AT OR IMMEDIATELY PRECEDING THE POINT OF ARREST, ALTHOUGH THE BACKPACK WAS IN CONSTRUCTIVE POSSESSION OF THE ARRESTEE, THE BACKPACK WAS NOT OBSERVED TO BE OR REPORTED TO OFFICERS TO HAVE BEEN IN ACTUAL AND EXCLUSIVE POSSESSION OF THE ARRESTEE;

(2) ADDITIONAL LANGUAGE (NOT FOCUSED ON IN THE OCTOBER 2019 LEGAL UPDATE) IN THE COURT'S OPINION APPEARS TO INDICATE THAT, EVEN IF THE BACKPACK HAD INSTEAD BEEN ON THE PERSON OF THE ARRESTEE, SUPPRESSION WOULD HAVE BEEN JUSTIFIED FOR AN UNLAWFUL SEARCH BECAUSE THE ARRESTING OFFICER DENIED THE ARRESTEE'S REQUEST TO HAND OFF HER BACKPACK TO HER NEARBY BOYFRIEND – THE LEGAL UPDATE EDITOR CONTENDS THAT THE ADDITIONAL LANGUAGE IS DICTA (DISCUSSION UNNECESSARY TO SUPPORT THE RESULT) THAT IS INCONSISTENT WITH THE WASHINGTON SUPREME COURT'S BRIGHT LINE SEARCH INCIDENT RULE

State v. Alexander, 10 Wn. App. 2d 682 (Div. I, October 7, 2019)

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LEGAL UPDATE EDITOR'S PRELIMINARY NOTES/COMMENTS: In the August 2020 Legal Update at page 21, I provided two paragraphs regarding an August 10, 2020 unpublished Opinion in State v. Burdick. In the first paragraph of that entry, I described the ruling of the Court as follows:

> **State v. Dominique Nathanial Burdick: On August 10, 2020, Division One of the COA disagrees with the appeal of the State and affirms a Skagit County Superior Court suppression order in a case charging *possession of a controlled substance (heroin)*. The Court of Appeals addresses a law enforcement officer's search of a backpack that was being worn by Burdick at the point of his contact by law enforcement officers as a car-prowl suspect. The Court of Appeals holds that the search was not justified by the search incident to arrest exception to the search warrant requirement because: prior to the point that Burdick was seized by officers, Burdick's mother – as to whom the officers apparently had no safety concerns – was nearby and was willing, at the express request of Burdick, to take possession of the backpack, rather than officers taking the backpack and searching it in anticipation of taking the backpack to the stationhouse or jail.**

In the second paragraph of my entry last month regarding Burdick, I noted that I would be following up in the September 2020 Legal Update with a discussion of some language in Burdick about language that I consider to be dicta (language not necessary to support the result in the case) in State v. Alexander, 10 Wn. App. 2d 682 (2019) plus Alexander's reference to some language about search incident to arrest in State v. Brock, 184 Wn.2d 148 (2015), language which I also consider to be dicta.

In this month's entry re-visiting Alexander, I will not further discuss last month's Unpublished Opinion by Division One of the Court of Appeals in Burdick. This month, I will first present the Alexander facts, issues and result with essentially the same quotes and descriptions that I provided in the October 2019 Legal Update. But this time, I then will (A) add an editor's note regarding the Washington Supreme Court's rulings that car-search-incident limitations do not apply to searches of persons incident to arrest; and (B) separate out and emphasize in bold some troubling dicta from Brock that was included in the Alexander analysis. I did not emphasize or discuss the Alexander and Brock dicta in the October 2019 Legal Update or in any other previous Legal Update.

Finally in this month's re-visiting of Alexander, I will then present my Editor's Comments criticizing the dicta in State v. Alexander and State v. Brock. As always, I note that my comments are not legal advice, and I urge law enforcement readers to consult their own legal advisors and local prosecutors on issues addressed in the Legal Update.

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Facts and Proceedings below in Alexander: (Excerpted from Court of Appeals decision)

> On July 15, 2017, [a law enforcement officer] responded to a trespass report at 901 West Casino Road in Everett. There, he observed a man and a woman, later identified as Delane Slater later and Heather Alexander, sitting in an undeveloped field marked with "no trespass" signs.

> [The officer] identified himself as law enforcement at some distance and observed Slater and Alexander manipulating some unknown items on the ground. [The officer] approached Slater and Alexander, who remained seated by a log approximately three or four feet apart from each other.
>
> [The officer] informed Slater and Alexander that they were trespassing and obtained their identification. When [the officer] conducted a records check on Alexander, he learned that she had an active Department of Corrections (DOC) warrant. A records check on Slater yielded no results.
>
> While interacting with Alexander, [the officer] observed a pink backpack sitting directly behind Alexander. The backpack was close enough to Alexander that it appeared to be touching her back. When [the officer] asked Alexander whether the backpack belonged to her, she indicated that it did.
>
> [The officer] confirmed the DOC warrant and placed Alexander under arrest. At this point, [the officer] did not believe that he had probable cause for any other offense. Because Alexander was being arrested, Slater later offered to take Alexander's backpack with him. Alexander indicated to [the officer] that it was her desire for Slater to take the backpack.
>
> [The officer] informed Slater that Alexander's personal property would be searched incident to arrest and that it would remain with her at that time. He asked Slater to leave the scene and indicated that "Slater did not do anything to cause [the officer] safety concern." Slater left without incident.
>
> [The officer] took Alexander into custody and walked Alexander and her backpack to his patrol vehicle. Alexander was cooperative throughout this course of action. [The officer] seated Alexander in his patrol vehicle and placed her backpack on top of the trunk.
>
> [The officer] then searched the backpack and located items containing what he believed to be a controlled substance. [The officer] informed Alexander that he was additionally arresting her for possession of a controlled substance and advised her of her Miranda rights.
>
> The State charged Alexander with possession of a controlled substance, committed while on community custody. Prior to trial, Alexander moved to suppress the evidence found during [the officer's] warrantless search of her backpack, arguing that the search did not fall within any valid exception to the warrant requirement. The trial court denied Alexander's motion and entered findings of fact and conclusions of law.
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> A jury later found Alexander guilty as charged.

[Some paragraphing revised for readability]

ISSUE AND RULING: The Washington Supreme Court has established under article I, section 7 of the Washington constitution that the bright line rule for automatic search of a person's effects incident to arrest is limited, as to containers, to containers in *actual and exclusive possession* of the arrestee at or immediately preceding the point of arrest. For containers that are in only *constructive possession* of the arrestee at or immediately prior to arrest, search of

the contents is permitted only if there is reasonable and articulable suspicion that the arrestee could destroy evidence or obtain a weapon from the container.

In this case, officers did not observe and did not have evidence that Alexander had been in possession of the backpack at or immediately prior to the point when they arrested her. They did observe that the backpack was sitting immediately behind her and appeared to be touching her. There was no evidence presented in this case that the officer had an articulable and reasonable suspicion that the arrestee could obtain a weapon from or destroy evidence in the backpack. Was the backpack subject to a lawful, bright line, automatic search of the container that was taken from behind the arrestee incident to her arrest? (ANSWER BY COURT OF APPEALS: No)

Result: Reversal of Snohomish County Superior Court conviction of Heather Anne Alexander for possession of a controlled substance, committed while on community custody.

Status: On March 4, 2020, the Washington Supreme Court denied the petition for review filed by the State. See 195 Wn.2d 1002 (2020).

ANALYSIS:

The Court of Appeals begins its analysis with a lengthy discussion of three Washington Supreme Court decisions issued from 2013 to 2015. This Legal Update entry summarizes those three Washington Supreme Court decisions in the next four paragraphs.

In State v. Byrd, 178 Wn.2d 611 (Oct. 10, 2013), the Washington Supreme Court determined to be lawful a contemporaneous warrantless search of a purse simply, and automatically as a bright line time-of-arrest rule, because the purse was in the actual possession of the arrestee at the time of the arrest.

The Bryd Court warned that Washington's constitution does not authorize search incident as a bright line, per se rule where the arrestee has only constructive (not actual) possession of an item. In other words, where the person arrested is merely in constructive possession of an item that is located in the reach-area or lunge-area at the time of arrest, something more is required to justify a search of the item. Where constructive possession is the circumstance, the Washington rule for search-incident of the item is that there must be evidence that there was a reasonable and articulable concern that the arrestee could access a weapon or destroy evidence.

The Washington Supreme Court confirmed its Byrd ruling in State v. MacDicken, 179 Wn.2d 936 (February 27, 2014) when the Court held that immediately after officers arrested and handcuffed a suspect in a parking lot, a bright line, time-of-arrest rule authorized the officers, incident to the arrest, to search a bag that was taken from his actual possession at the time of arrest. Under this bright line rule, the Court deemed it irrelevant whether the arrestee, who had not yet been fully secured by placement in a patrol car at the time of the search of the bag, could or could not have broken free and accessed the bag to obtain a weapon or destroy evidence.

And in State v. Brock, 184 Wn.2d 148 (Sept. 3, 2015), an 8-1 majority of the Washington Supreme Court held that a backpack taken from a suspect at the beginning of a Terry stop automatically became subject to search incident to arrest under the time-of-arrest rule when the Terry stop then ripened into a lawful arrest over a period of ten minutes.

[LEGAL UPDATE EDITOR'S NOTE REGARDING ARIZONA V. GANT: As the Washington Supreme Court had declared in Byrd and MacDicken, the Brock Majority Opinion declared that the special restrictions on car searches incident to arrest do not require a limiting of searches of items that are taken from the actual possession of the person of an arrestee incident to arrest. See State v. Brock, 184 Wn.2d at 156 (distinguishing the search-of-the-person circumstances there from the circumstances in the car-search-incident-to-arrest decisions in Arizona v. Gant, 556 U.S. 332 (2009) and State v. Valdez, 167 Wn.2d 761 (2009) where circumstances at the time of the search, not circumstances at the time of arrest, generally limit car searches incident to arrest). Since 2009, there have been a a mix of outcomes in decisions from other jurisdictions on whether the U.S. Supreme Court's Fourth Amendment Gant limits on car searches should be applied to searches of the person incident to arrest. This question has not yet been squarely presented to the U.S. Supreme Court. Until that happens, it seems reasonable for Washington officers to assume that Byrd, MacDicken and Brock were correctly decided under both the Fourth Amendment and the Washington constitution.]

The Court of Appeals then explains in Alexander that this search-of-the-person case is not like Byrd, MacDicken and Brock because defendant Alexander was merely in constructive possession, not in actual possession, of the backpack at or immediately prior to the time of arrest:

> This case is readily distinguishable from Byrd, MacDicken, and Brock. Unlike in Byrd (where the defendant's purse was in her lap at the time of arrest), MacDicken (where the defendant was carrying a laptop bag and pushing a rolling duffle bag when officers saw him), and Brock (where the defendant was wearing his backpack when he was stopped), Alexander's backpack was merely sitting behind her at the time of her arrest.
>
> The State points to no evidence that Alexander was holding, wearing, or carrying the backpack at any time during her contact with [the officer], and [the officer] himself testified that no one had reported seeing Alexander carrying the backpack at any earlier time. Indeed, the trial court made no finding that Alexander had actual and exclusive possession of her backpack at the time of or immediately preceding her arrest. The absence of such a finding is not surprising given that the backpack only "appeared" to be touching Alexander, and Slater was seated just a few feet away.
>
> Put another way, the trial court's findings establish, at most, that Alexander could immediately have reduced the backpack to her actual possession, i.e., that Alexander had dominion and control – and thus constructive possession – over the backpack. . . . But actual and exclusive possession, not merely constructive possession, is required under the time-of-arrest rule. . . . And in the absence of a finding that Alexander had actual and exclusive possession of her backpack at the time of or immediately preceding her arrest, we must indulge the presumption that the State, which bore the "heavy burden" of proof on this issue, failed to sustain its burden. . . .

Next, in mostly dicta (language unnecessary to support the decision) that I think is inconsistent with the bright line nature of the search incident to arrest rule of Byrd, MacDicken, and Brock, the Alexander Court seems to suggest that no search incident to arrest is justified, even of items actually on the person of the arrestee, in circumstances where an arrestee wishes to hand off an item to another civilian that is nearby (I call this

suggestion "the Alexander handoff dicta" but I recognize that some analysts will characterize the language as an authoritative second rationale, not as dicta):

> **Furthermore, as our Supreme Court has explained, the scope of a warrant exception "must track its underlying justification." Brock, 184 Wn.2d at 158. To this end, the justification for warrantless searches of an arrestee's person (which require no justification beyond the validity of the arrest) – as distinct from grab area searches (which require "some articulable concern that the arrestee can access the item in order to draw a weapon or destroy evidence") – is that "there are presumptive safety and evidence preservation concerns associated with police taking custody of those personal items immediately associated with the arrestee, which will necessarily travel with the arrestee to jail." Brock, 184 Wn.2d at 155 (emphasis added).**
>
> **Here, as discussed, the State failed to establish that Alexander's backpack was in her actual and exclusive possession at or immediately preceding the time of her arrest. Furthermore, Slater, about whom [the officer] expressed no safety concerns, offered to take the backpack, and Alexander desired that Slater take it. Under these circumstances, Alexander's backpack was not an item immediately associated with her person that would necessarily travel to jail with her.**
>
> **Rather, the only reason the backpack traveled to jail with Alexander was because [the officer] decided that it would. But the scope of the arrestee's person is determined by what must necessarily travel with an arrestee to jail, not what an officer decides to take to jail.**

[Some citations omitted, others revised for style; some paragraphing revised for readability; bolding added; underlining substituted for italics that were used in the original]

LEGAL UPDATE EDITOR'S COMMENTS:

A. Three Washington Supreme Court decisions in the past decade allow search incident to arrest of a person's items that are on or near the person, and a bright line, automatic-search standard governs searches of items that are actually on the person of the arrestee at the time of arrest

As noted above in the description of the analysis in Alexander, the Washington Supreme Court, in a series of three decisions (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)): (1) has apparently rejected the proposition that the special constitutional limits on car searches incident to arrest have application to searches of the person incident to arrest; and (2) has made a distinction (not present in the Fourth Amendment search-of-the-person-incident-to-arrest case law) between:

(A) items actually possessed by the arrestee at or immediately preceding the point of arrest (my reading of the three decisions is that there is a conclusive presumption of the need for either (1) evidence preservation or (2) officer safety – or both – such that items actually possessed at the time of – or immediately preceding the point of – arrest are always contemporaneously searchable, even after fully securing the arrestee in handcuffs in a patrol car, under a "bright line" rule; again, the bright line rule is based on

the mere fact of the custodial arrest, without need for any justification for evidence preservation or dangerousness other than the mere fact of a custodial arrest);

and (B) items located within the reach or lunge area but only constructively, not actually, possessed by the arrestee at or immediately preceding the point of arrest (under the three decisions, such items in the lunge area are not searchable under the conclusive presumption that is followed under the Fourth Amendment, and the items are searchable under the Washington constitutional standard only if there exists the actual, articulable fact-based exigency of preventing the arrestee's access to weapons or destructible evidence).

I believe that – contrary to the above-addressed dicta in the 2019 Alexander Opinion – under the "time of arrest" rule applied in Byrd, MacDicken and Brock, there is no handoff rule for items actually possessed that are subject to automatic search under (A), as well as for items constructively possessed under (B) for which search is justified by the facts as to danger/evidence preservation. I believe that for other items constructively possessed under (B), an officer would have to allow handoff to a nearby person who did not appear to pose a threat (to the extent that would be safe).

Note also that in State v. Brock, 184 Wn.2d 148 (2015), a backpack that was lawfully taken from the person of a suspect for safety reasons as part of a justified frisking process automatically became subject to search incident to arrest under the "time of arrest" rule when the Terry stop ripened into a lawful arrest over a period of about 10 minutes. There was no one else present in Brock other than the officer and defendant Brock during the ten minutes of Terry detention preceding his arrest. So, arrestee Brock did not have an opportunity to ask to hand off his backpack during the 10 minutes of detention. But, for purposes of my discussion below regarding what I call the Alexander handoff dicta, I believe that, under the "time of arrest" rule applied in Byrd, MacDicken and Brock the officer in Brock would not have been required to allow a handoff during that 10 minutes even if there had been a nearby person for detainee-requested handoff.

I note that there are two alternative justifications for temporarily taking (though not probing or searching unless separately justified) a suspect's backpack, briefcase or other container from his or her person during a Terry detention. First, as in Brock, temporary seizure of the backpack or other container can be a safety measure justified under the circumstances to prevent the frisk-able detainee's access to a possible weapon. Second, officers with reasonable suspicion to search personal property may take such items from persons in possession and secure such items briefly (under time limits similar to those under Terry) to diligently investigate. See generally United States v. Place, 462 U.S. 696 (1983). And officers with probable cause to search such items may take such items from persons in possession and secure the items for a longer period, but still only for a period that is objectively reasonable in duration, while the officers expeditiously seek a search warrant. See State v. Huff, 64 Wn. App. 641 (Div. II, 1992) (Vehicle may be seized based on probable cause to search and towed to a secure location while officers are expeditiously seeking a search warrant)

I think that a different answer must be given in the hypothetical circumstance where a Terry detainee would make a request for handoff of a backpack or other item where the detaining officers have no articulable, objective basis for separating the detainee from the item. In that circumstance, the handoff request apparently could not be lawfully denied.

As another side note, I note that, in addition to the bright line search incident rule of Byrd, MacDicken, and Brock, a few other examples of bright line search and seizure rules governing Washington officers are: (1) State v. Kennedy, 107 Wn.2d 1 (1986) (recognizing that officers have constitutional authority, without need for particularized factual justification, to direct drivers of vehicle in traffic stops to either stay in or get out of the vehicle); and (2) Michigan v. Summers, 452 U.S. 692 (1980) (recognizing that officers have authority, without need for particularized factual justification, to seize for a reasonable period all of a residence's occupants who are found in the immediate vicinity of premises when execution of a search warrant begins). These bright line rules, just like the bright line "time of arrest" rule for search incident to arrest rule for items on the person, relieve officers of trying to make hair-splitting, fact-based decisions, particularly as to dangerousness, in difficult circumstances that are fraught with danger.

As yet another side note, it must be remembered that the Byrd-MacDicken-Brock rule for automatic search of items on the person of an arrestee does not allow warrantless, non-consenting, non-exigent searches of: (1) cell phones and similar electronic devices, see Riley v. California, 134 S.Ct. 2473 (2014); or (2) locked, not merely closed, containers, see State v. VanNess, 186 Wn. App. 148 (Div. I, 2015).

B. I believe that the handoff dicta in Alexander is not consistent with the bright line time of arrest rule, but I recognize that dicta in Brock may provide support against my view

As noted, I disagree with the handoff dicta in Alexander that appears to indicate that, even if the backpack had been on the person of arrestee Alexander at the time of arrest, the search of the backpack would have been barred based on (1) dicta in State v. Brock, 184 Wn.2d 148 (2015), and (2) the factual presence of a "non-dangerous" person to whom the already-arrested Alexander could have simply handed her backpack. I believe that this Alexander handoff dicta is in conflict with the bright line "time of arrest" rule for search of the person incident to arrest, as stated by the Washington Supreme Court in the three above-noted decisions.

Admittedly, however, the Alexander Court based its handoff dicta on language (which I also characterize as dicta) in a single sentence in the Washington Supreme Court Majority Opinion in State v. Brock, 184 Wn.2d 148, 155 (2015). In that sentence, the Brock Majority Opinion stated that "having no other place to safely stow [the backpack taken from him, who was alone when arrested] Brock would have to bring the backpack along with him into custody." (Bracketed language added). I do not think that the eight Justices signing on to the Brock Opinion all intended that language to create a handoff restriction to its bright line "time of arrest" rule allowing automatic searches of items on the person of the arrestee at the time of arrest. I think the statement was just a stray, unsupported thought that the author of the Opinion probably would have deleted upon careful consideration of the possible ramifications. But maybe that is only wishful thinking on my part. Only time will tell. Ultimately, the Washington Supreme Court will need to resolve this.

C. Some prosecutors and others may reasonably disagree with my criticism of the Alexander handoff dicta based on search and seizure law in other sub-areas

It has been suggested to me that there is some support for Alexander handoff dicta in two lines of search and seizure cases in other sub-areas:

- **1.** ***the Washington independent grounds constitutional rule, intended primarily to preclude pretextual impounds, for administrative (non-investigative) vehicle impounds requiring consideration of alternatives to impound, including allowing other persons to take control of the vehicle*** **(note, however, that (a) no reported decision allows, where there is no reasonable alternative to impound, an operator-requested thinning-out-by-handoff of the contents of a vehicle prior to inventory; (b) the vehicle impound-inventory circumstance does not provide a good parallel to search incident to arrest because impound-inventory is by definition not part of the criminal investigative process, though it <u>may</u> arise ancillary to the criminal investigatory process, and I think that the reasonable alternatives requirement in the impound-inventory context has developed to provide an extra safeguard against pretextual impound-inventory; and (c) impoundment circumstances arise much less often than search incident to arrest circumstances).**

- **2.** ***the rule on residential consent searches that does not allow officers to take a co-habitant away from the scene in order to get a consent to search from a cooperative co-habitant*** **(note, however, that (a) the all-party-consent rule for fixed premises does not apply to vehicles, <u>see State v. Cantrell</u>, 124 Wn.2d 183 (1994) and by logical extension would not extend to personal property); and (b) unlike the co-habitant situation, the nearby-handoff-person under the <u>Alexander</u> dicta presumably would have had no property interest in the items until <u>afte</u>r the arrest occurs, when the arrestee asks to make the handoff).**

I think that these rules in other sub-compartments of search and seizure law do not provide strong logical support for the <u>Alexander</u> dicta that is embraced in the unpublished August 10, 2020 <u>Burdick</u> Opinion that I addressed in the August 2020 <u>Legal Update</u>. I was tempted to leave <u>Burdick</u> alone because it is unpublished. But I do not think it can be ignored because some may point to <u>Burdick</u> as showing that what I characterize as dicta in the published Opinion in <u>Alexander</u> is actually an alternative rationale supporting a "handoff" rule, or even worse, an expansive "reasonable alternative to searching" rule.

I am concerned that in our current climate of resistance by some in the civilian population to even the most reasonable law enforcement actions, word will get around through a variety of organizations and individuals that, when arrested, arrestees should immediately look about for (or maybe have someone make a quick call to) persons willing to take handoff <u>of items that have not already been searched by officers</u>.

Note the underlined phrase in the previous paragraph. I would hope (1) that the <u>Alexander</u> dicta would not allow <u>retroactive</u> requests for handoff after a search has already occurred, and (2) that such a handoff rule, if it were to become an exception to the bright line search incident rule, would not require officers to initiate discussion of a handoff possibility. An <u>Alexander</u> dicta handoff rule would provide an incentive for officers to search items taken from the person of the arrestee as soon as that can be done safely and practicably. Of course, I also note that whenever probable cause supports a search of a container, securing the item and applying for a search warrant is a legally safer route than reliance upon an exception to the search warrant requirement.

C. <u>A point about the doctrinal/temporal illogic of having a handoff exception to a time-of-arrest standard</u>

As noted above, the Washington Supreme Court has declared in the three key precedents (Byrd-MacDicken-Brock) that automatic search applies to all items actually possessed by the arrestee at or immediately preceding the point of arrest. But the Alexander dicta's handoff restriction on the search-incident warrant exception would turn on what is learned from nearby persons communicating with the arrestee *after* the point of arrest. This is probably not a dispositive flaw of logic, but I think that looking at facts arising after the point of arrest does undercut the concept and purpose of having a bright line time-of-arrest rule.

D. My concerns about the practicalities of a handoff rule for search incident to arrest

Some of my concerns about the troubling practical ramifications of a handoff rule are:

- **How are officers to determine whether the nearby person, often a person unknown to the officer, might pose a danger? Neither Alexander nor Burdick offers any guidance in that regard. Admittedly, officers must deal with assessing danger relating to all civilians 24-7, but what is the danger level set by this new rule? Is it maybe the "reasonable suspicion" standard or is it maybe the lower standard of "heightened awareness of danger" of the Washington independent grounds constitutional standard of State v. Mendez, 137 Wn.2d 208 (1999) that provides for only limited, fact-based control by officers of non-violator passengers during traffic stops?) What is the authority of the officer in relation to this handoff person to ask questions, check for record and warrants, ask for consent to search or frisk, etc.? Should a written release be obtained from the arrestee prior to an officer authorizing the handoff? What if it appears to the officer that the person designated for handoff of items is possibly being intimidated by the arrestee into the role (maybe the handoff candidate is a domestic violence victim of the arrestee)? What if a shoplifting arrestee asks a nearby store clerk or shopper to take the arrestee's purse, wallet, backpack, briefcase etc. for safekeeping? What if the designated person is, unknown to the officer, a felon who might be the recipient of a firearm if a firearm happens to be inside a backpack taken from the person of the arrestee?**

- **Are there any limits on what items on the person of the arrestee might be handed off? The Alexander handoff dicta would appear to extend to wallets, purses and anything else that the arrestee wants to dispose of. Is the officer required to allow the arrestee to strip naked and hand off clothes and all personal items to the nearby "non-dangerous" person? If so, are officers required under the handoff rule to allow arrestees to go through their own coat pockets and pants pockets and strip off their own clothing? This seems an absurd situation to me, but it may be what the Alexander handoff dicta rule would require.**

- **Will the Alexander handoff dicta lead to a "reasonable alternatives" rule? The rationale of the Alexander handoff dicta seems to extend logically (in my mind, illogically) to requiring that officers consider, upon hearing a request by the arrestee, a suggested "reasonable alternative" to taking and searching items that are taken from the person of the arrestee during arrest. What if the arrestee is arrested in his or her residence, office, motorhome and even motel room? Even if there is no "non-dangerous" person available for handoff, what if the arrestee in such circumstances asks the officer simply to leave in the premises the purse,**

wallet, backpack or other item that is taken from the person of the arrestee? Or, what if a person arrested out of or near the arrestee's lawfully and safely parked car asks the officer simply to put a wallet or purse or backpack or other item in the lockable trunk of the car? I do not believe that prior case law in Washington and other jurisdictions on search incident to arrest has required consideration of such "reasonable alternatives," but could that become the Washington rule by extending the rationale of the <u>Alexander</u> ruling?

- **Finally, a more general question: What is the benefit to society from requiring of officers this additional risk assessment and hair-splitting decision-making on top of all else that must be dealt with in the process of arrest and control of the scene? Illustrative of my concern is the occasionally cited observation in favor of clear bright-line rules by Professor Wayne LaFave in "Case-by-Case Adjudication versus Standardized Procedures: The Robinson Dilemma," 1974 S.Ct.Rev. 127 at 141: "A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be literally impossible of application by the officer in the field." (Internal quotation marks and case citation omitted)**

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BRIEF NOTES REGARDING SEPTEMBER 2020 <u>UNPUBLISHED</u> 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 <u>very brief</u> 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 three entries below are the three September 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. <u>State v. Alejandro Anaya-Cebrera</u>: On September 1, 2020, Division Two of the COA rejects the appeal of defendant from his Grays Harbor County Superior Court convictions for (A) *unlawful possession of methamphetamine*, (B) *unlawful possession of heroin*, and (C) *carrying a concealed pistol without a license*, *plus a jury finding that he was armed with a firearm during*

the commission of his possession crimes. The Court of Appeals rules that **an officer's stop of Anaya-Cebrera was supported by reasonable suspicion** under the following circumstances: (1) the officer had been dispatched moments earlier to a disturbance at the Hagara property involving a Latino male allegedly committing a possible burglary or holding someone against their will; (2) on his way to the property, the officer observed Anaya-Cabrera, a Latino male, about a quarter mile away from the property driving away from the property; (3) the officer knew from an encounter with Anaya-Cabrera a few weeks prior that the suspect had recently moved from the Hagara property and that there was some recent history of conflict between the suspect and Mr. Hagara. The Court of Appeals rejects the defendant's claim that the officer based the stop in part on illegitimate consideration of race where dispatch specifically described the person involved in the disturbance as a Latino male.

2. Fort Discovery Corporation v. Jefferson County: On September 22, 2020, Division Two of the COA affirms a Clallam County Superior Court ruling upholding a Jefferson County ordinance imposing requirements on commercial shooting facilities. Based in part on the November 2017 Division Two ruling in Kitsap County v. Kitsap Rifle and Revolver Club, 1 Wn. App. 2d 393 (2017), the Court of Appeals rules in the Jefferson County case that: (1) RCW 9.41.290 does not preempt the entire ordinance, but the provision restricting shooting after dark regulates the discharge of firearms within the scope of RCW 9.41.290, and thus must be addressed under that statutory provision; (2) the entire ordinance, including the restriction on shooting after dark, is valid because this restriction falls within the exception to preemption under RCW 9.41.300(2)(a); (3) the ordinance does not violate the firearms rights provisions of article I, section 24 of the Washington Constitution; and (4) the ordinance does not violate the firearms rights provisions of the Second Amendment of the United States Constitution.

3. Gerard v. Pierce County: On September 22, 2020, Division Two of the COA affirms a Thurston County ruling upholding a notice of violation and abatement by Pierce County Code Enforcement in a land use case. One of the rulings is that the County's Code Enforcement officer did not violate the petitioner's right of privacy under the Fourth Amendment or under the Washington constitution, article I, section 7, because the officer's viewing of the petitioner's property from a neighbor's property constituted "open view," which is not constitutionally prohibited.

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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 (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].

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