LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: Thank you!

April 2018

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WASPC LEGISLATIVE REPORT: 2018 END OF SESSION REPORT

Readers may wish to review the excellent review by staff of the Washington Association of Sheriffs and Police Chiefs (WASPC) of 2018 Washington legislation of interest to law enforcement. Go to WASPC Home Page, click on Programs & Services, scroll down and click on Legislation, and scroll down and click on 2018 End of Session Report.

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UNITED STATES SUPREME COURT

CIVIL RIGHTS ACT CIVIL LIABILITY: 7-2 MAJORITY OF U.S. SUPREME COURT CONCLUDES THAT DEADLY FORCE CASE LAW WAS NOT "CLEARLY ESTABLISHED" AT THE TIME OF OFFICER'S ACTION, AND THEREFORE THE COURT GRANTS QUALIFIED IMMUNITY TO OFFICER WHO SHOT A WOMAN BASED ON THE OFFICER'S PERCEPTION THAT THE WOMAN, WHO WAS CARRYING A LARGE KNIFE AND HAD BEEN REPORTED AS EARLIER ACTING ERRATICALLY BY HACKING AT A TREE WITH A LARGE KNIFE, POSED A SERIOUS RISK OF HARM TO A SECOND WOMAN WHO WAS JUST A FEW FEET FROM THE KNIFE-WIELDING WOMAN

Kisela v. Hughes, 138 S.Ct. 1148 (April 2, 2018)

PRELIMINARY LEGAL UPDATE EDITORIAL COMMENTS:

1. This decision is not approval of the officer's application of deadly force: This decision does not establish that Officer Kisela's decision to shoot the knife-wielder was either reasonable or unreasonable. To me, that means that should a very similar fact pattern arise in the future, the case law will again be deemed not to be clearly established for qualified immunity purposes. Qualified immunity would again apply, I think. However, to belabor the obvious, officers should always be considering whether de-escalation efforts can successfully allow them to avoid the need to use deadly force to protect themselves or others from imminent danger to life.

2. Why no deadly force warning before shooting? I am troubled by one recurring element in the facts when reading court decisions, including this decision, and media accounts regarding law enforcement deadly force cases around the country. It is often reported in media accounts and in court decisions that officers did not warn of the impending use of deadly force before shooting. I do not have much reason to believe that Ms. Hughes, the erratically acting knife-wielder in this case, would have complied with the officers' repeated requests to drop the knife if the officers had added a warning that deadly force was imminent if she did not comply. But I am troubled, in light of the case law, that no such warning was given. Are officers not being taught of their duty to warn under the Fourth Amendment (and, for Washington officers, under Washington statutes)? Where practicable under the circumstances, officers are required to warn, prior to application of deadly force, of the imminence of their use of deadly force. Here, at least twice, the officers ordered the knife-wielder to drop the knife. Why did no officer

also include a warning, before the gunshot, that officers would use deadly force if Hughes did not drop the knife?

3. <u>Common sense and judicial restraint on the U.S. Supreme Court</u>: It is a relief that seven of the nine members of the U.S. Supreme Court demonstrate here that they continue to possess and exercise common sense and restraint in assessing whether officers making split second decisions in life-or-death circumstances violated clearly established case law.

<u>Facts and Proceedings below</u>: (Excerpted from the Supreme Court majority opinion)

> Petitioner Andrew Kisela, a police officer in Tucson, Arizona, shot respondent Amy Hughes. Kisela and two other officers had arrived on the scene after hearing a police radio report that a woman was engaging in erratic behavior with a knife. They had been there but a few minutes, perhaps just a minute. When Kisela fired, Hughes was holding a large kitchen knife, had taken steps toward another woman standing nearby, and had refused to drop the knife after at least two commands to do so. The question is whether at the time of the shooting Kisela's actions violated clearly established law.
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> The record, viewed in the light most favorable to Hughes, shows the following. In May 2010, somebody in Hughes' neighborhood called 911 to report that a woman was hacking a tree with a kitchen knife. Kisela and another police officer, Alex Garcia, heard about the report over the radio in their patrol car and responded. A few minutes later the person who had called 911 flagged down the officers; gave them a description of the woman with the knife; and told them the woman had been acting erratically. About the same time, a third police officer, Lindsay Kunz, arrived on her bicycle.
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> Garcia spotted a woman, later identified as Sharon Chadwick, standing next to a car in the driveway of a nearby house. A chain-link fence with a locked gate separated Chadwick from the officers. The officers then saw another woman, Hughes, emerge from the house carrying a large knife at her side. Hughes matched the description of the woman who had been seen hacking a tree. Hughes walked toward Chadwick and stopped no more than six feet from her.
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> All three officers drew their guns. At least twice they told Hughes to drop the knife. Viewing the record in the light most favorable to Hughes, Chadwick said "take it easy" to both Hughes and the officers. Hughes appeared calm, but she did not acknowledge the officers' presence or drop the knife. The top bar of the chain-link fence blocked Kisela's line of fire, so he dropped to the ground and shot Hughes four times through the fence. Then the officers jumped the fence, handcuffed Hughes, and called paramedics, who transported her to a hospital. There she was treated for non-life-threatening injuries. Less than a minute had transpired from the moment the officers saw Chadwick to the moment Kisela fired shots.
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> All three of the officers later said that at the time of the shooting they subjectively believed Hughes to be a threat to Chadwick. After the shooting, the officers discovered that Chadwick and Hughes were roommates, that Hughes had a history of mental illness, and that Hughes had been upset with Chadwick over a $20 debt. In an affidavit produced during discovery, Chadwick said that a few minutes before the shooting her boyfriend had told her Hughes was threatening to kill Chadwick's dog, named Bunny. Chadwick "came home to find" Hughes "somewhat distressed," and Hughes was in the

> house holding Bunny "in one hand and a kitchen knife in the other." Hughes asked Chadwick if she "wanted [her] to use the knife on the dog." The officers knew none of this, though. Chadwick went outside to get $20 from her car, which is when the officers first saw her. In her affidavit Chadwick said that she did not feel endangered at any time. Based on her experience as Hughes' roommate, Chadwick stated that Hughes "occasionally has episodes in which she acts inappropriately," but "she is only seeking attention."
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> Hughes sued [Officer] Kisela under Rev. Stat. §1979, 42 U.S.C. §1983 [the federal Civil Rights Act], alleging that Kisela had used excessive force in violation of the Fourth Amendment. The District Court granted summary judgment to Kisela, but the Court of Appeals for the Ninth Circuit reversed. 862 F.3d 775 (2016).
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> The Court of Appeals first held that the record, viewed in the light most favorable to Hughes, was sufficient to demonstrate that [Officer] Kisela violated the Fourth Amendment. The court next held that the violation was clearly established because, in its view, the constitutional violation was obvious and because of Circuit precedent that the court perceived to be analogous. Kisela filed a petition for rehearing en banc. Over the dissent of seven judges, the Court of Appeals denied it. Kisela then filed a petition for certiorari in this Court.

[Some citations omitted]

ISSUE AND RULING: Officer Kisela stated that he shot Ms. Hughes because, although the officers themselves were in no apparent danger, he believed Ms. Hughes was a serious threat to Ms. Chadwick. Kisela had mere seconds to assess the potential danger to Ms. Chadwick. He was confronted with a woman who had just been seen hacking a tree with a large kitchen knife and whose behavior was erratic enough to cause a concerned bystander to call 911 and then flag down the two officers. Officer Kisela was separated from Ms. Hughes and Ms. Chadwick by a chain-link fence. Ms. Hughes had moved to within a few feet of Ms. Chadwick. Ms. Hughes failed to acknowledge at least two commands to drop the knife. Those commands were loud enough for Ms. Hughes to hear them.

Qualified immunity is granted under the Fourth Amendment case law except in obvious circumstances, based on controlling case law, in which any competent officer would know that using deadly force violates the Fourth Amendment. Was this an obvious case in which any competent officer would have known that shooting Ms. Hughes to protect Ms. Chadwick would violate the Fourth Amendment? (ANSWER BY U.S. SUPREME COURT: No, rules a 7-2 majority, this was not an obvious case)

Result: Reversal of the decision of the U.S. Court of Appeals Ninth Circuit decision that had reversed the decision of the U.S. District Court for Arizona granting qualified immunity to Officer Kisela. The U.S. Supreme Court ruled summarily in this case. The Court granted qualified immunity to Officer Kisela based on his petition to the U.S. Supreme Court for review and the plaintiff's response. It is unusual for the U.S. Supreme Court to act summarily in this way, rather than waiting for further briefing and oral argument.

ANALSYIS BY SUPREME COURT MAJORITY: (Excerpted from the Supreme Court majority opinion)

In one of the first cases on this general subject, Tennessee v. Garner, 471 U.S. 1 (1985), the Court addressed the constitutionality of the police using force that can be deadly. There, the Court held that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."

In Graham v. Connor, 490 U.S. 386, 396 (1989), the Court held that the question whether an officer has used excessive force "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." And "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." .

Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amendment violation occurred – a proposition that is not at all evident – on these facts Kisela was at least entitled to qualified immunity.

"Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." White v. Pauly, 580 U.S.__, __ (2017). "Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." Brosseau v. Haugen, 543 U.S. 194, 198 (2004)

Although "this Court's case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." White. "In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law." White. This Court has "'repeatedly told courts – and the Ninth Circuit in particular – not to define clearly established law at a high level of generality." City and County of San Francisco v. Sheehan, 575 U.S.__, __ (2015) (slip op., at 13) . . . .

"[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." Mullenix v. Luna, 577 U.S.__, __(2015). Use of excessive force is an area of the law "in which the result depends very much on the facts of each case," and thus police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue. Precedent involving similar facts can help move a case beyond the otherwise "hazy border between excessive and acceptable force" and thereby provide an officer notice that a specific use of force is unlawful.

"Of course, general statements of the law are not inherently incapable of giving fair and clear warning to officers." White. But the general rules set forth in *"Garner* and *Graham* do not by themselves create clearly established law outside an "obvious case." Where

constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." . . . . That is a necessary part of the qualified-immunity standard, and it is a part of the standard that the Court of Appeals here failed to implement in a correct way.

[Officer] Kisela says he shot Hughes because, although the officers themselves were in no apparent danger, he believed she was a threat to Chadwick. Kisela had mere seconds to assess the potential danger to Chadwick. He was confronted with a woman who had just been seen hacking a tree with a large kitchen knife and whose behavior was erratic enough to cause a concerned bystander to call 911 and then flag down Kisela and Garcia. Kisela was separated from Hughes and Chadwick by a chain-link fence; Hughes had moved to within a few feet of Chadwick; and she failed to acknowledge at least two commands to drop the knife. Those commands were loud enough that Chadwick, who was standing next to Hughes, heard them. This is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment.

The Court of Appeals made additional errors in concluding that its own precedent clearly established that Kisela used excessive force. To begin with, "even if a controlling circuit precedent could constitute clearly established law in these circumstances, it does not do so here.". . . .

[Here, in extended discussion, the Supreme Court majority opinion discusses the Ninth Circuit decisions upon which the Ninth Circuit 3-judge panel relied in the decision below.]

For these reasons, the petition for certiorari is granted; the judgment of the Court of Appeals is reversed; and the case is remanded for further proceedings consistent with this opinion.

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

DISSENTING OPINION:

Justice Sotomayor writes a long and impassioned dissent that is joined by Justice Ginsburg. The dissent argues in vain, among other things, that, taking the facts in the light most favorable to the plaintiff Ms. Hughes, including the fact that Officer Kisela did not give a deadly force warning, it is "beyond debate" under the established case law that Officer Kisela's use of deadly force was objectively unreasonable, and therefore, he was not entitled to summary judgment on the basis of qualified immunity.

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NINTH CIRCUIT, UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT CIVIL LIABILITY: NINTH CIRCUIT PANEL CONCLUDES THAT DEADLY FORCE CASE LAW WAS NOT "CLEARLY ESTABLISHED" AT THE TIME OF OFFICER'S

ACTION, AND THEREFORE THE COURT GRANTS QUALIFIED IMMUNITY TO DEPUTY SHERIFF WHO SHOT AN APARTMENT RESIDENT WHO WAS HOLDING A LARGE KNIFE WHEN HE OPENED HIS DOOR IN RESPONSE TO KNOCKING BY TO OFFICERS

In Reese v. County of Sacramento, ___ F.3d ___ , 2018 WL ___ (9th Cir., April 23, 2018), a three-judge Ninth Circuit panel rules in a Civil Rights Act lawsuit that a California deputy sheriff is entitled to qualified immunity. The panel concludes that the jury was sufficiently supported on the trial record in its resolution of fact issues in the case and determination that the deputy violated the Fourth Amendment rights of the plaintiff in the officer's application of deadly force.

The panel concludes, however, that the case law had not established at the time of the application of deadly force that the conduct was unreasonable under the circumstances presented in this case. The panel declares that no appellate decision cited by the plaintiff' squarely governs the fact situation that the deputy confronted such that he would have had clear warning that his use of deadly force was "objectively unreasonable" for purposes of the qualified immunity defense of the Civil Rights Act cases. The panel therefore affirms the district court's ruling that a jury verdict for the plaintiff cannot stand on the Civil Rights Act issue, and that the deputy is entitled to qualified immunity on the Fourth Amendment excessive force claim.

The Reese panel describes the facts of the case as follows:

> Robert Reese, Jr., filed this civil rights claim against the County of Sacramento and two of its Deputy Sheriffs, Duncan Brown and Zachary Rose, following a shooting incident on March 25, 2011. In the hours leading up to the incident, Reese had consumed large quantities of alcohol, marijuana, and cocaine at a neighborhood party. The party ended when Reese and his neighbor Nathan began arguing over whether Reese had taken Nathan's bottle of vodka. Sometime after the party, Nathan's girlfriend went to Reese's apartment to retrieve the vodka. Reese answered the door holding a knife and refused to hand over the bottle. Around 4:30 a.m., Reese and Nathan exchanged several text messages, some containing racial epithets. Shortly thereafter, Reese heard knocking on his apartment door. He assumed it was Nathan. It was not.
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> Deputies Brown and Rose and several other police officers arrived at Reese's apartment complex shortly before 5:00 a.m. They were responding to an anonymous 911 call that an African-American male had exited apartment 144 and fired an automatic gun. The caller also stated that the male was possibly crazy, under the influence of drugs, had a knife, and was back inside apartment 144.
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> Deputy Rose decided that someone should knock on the door of apartment 144 to further investigate the 911 report. The deputies decided that Deputy Brown, who had a rifle, would stand back about 15 feet to cover the doorway while Deputy Rose would knock on the apartment door. Deputy Rose, concealing himself, stood to the side of the door and other deputies lined up behind him. Deputy Rose, while holding his handgun in one hand, knocked on the door with his flashlight.
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> Deputy Brown testified that after Deputy Rose knocked, "the door flew open. I saw a figure coming out, arm up, extended, large knife[.]" Upon seeing the knife, which he describes as being within a foot of Deputy Rose's neck, Deputy Brown fired his rifle at Reese. Deputy Rose, seeing Reese with the knife in his hand, simultaneously backed away from the door of the apartment. The next events occurred in what Deputy Rose describes as a "millisecond."

After the rifle shot, Deputy Rose advanced into the apartment expecting to see Reese shot and incapacitated. Instead he saw Reese standing upright in the apartment. He could not, however, see Reese's hands. Deputy Rose immediately fired his handgun, aiming it at Reese's chest. He was approximately three feet away from Reese. Reese fell backward toward a couch and Deputy Rose saw blood on Reese's clothing and the carpet. At trial, Deputy Rose testified that he was uncertain whether it was his or Deputy Brown's shot that actually hit Reese but believed that it was his. Reese survived the incident and thereafter asserted civil rights claims against the County and Deputies Brown and Rose.

The jury returned a verdict in favor of Deputy Brown, which plaintiff Reese did not challenge on appeal. In separate responses to the judge's questions, the jury determined that Deputy Rose's pistol round, not Deputy Brown's rifle round, hit Reese. The jury also found that Reese had a knife in his hand in an elevated position when he opened the door. The jury answered "no" to the question of whether Reese brandished the knife at Deputy Rose. Another question asked the jury "[a]t the time Deputy Rose fired his shot, did it appear that Plaintiff posed an immediate threat of death or serious physical injury to Deputy Rose?" The jury answered "no."

Result: Affirmance of order of U.S. District Court (Eastern District of California) that set aside a jury verdict against Deputy Rose on the Civil Rights Act issue and granted him qualified immunity (other issues addressed by the District Court judge and jury are not addressed in the Legal Update).

LEGAL UPDATE EDITORIAL NOTE: The Reese panel's discussion of qualified immunity includes discussion of the U.S. Supreme Court decision in Kisela v. Hughes, 138 S.Ct. 1148 (April 2, 2018) that is digested above beginning at page 3 in this April 2018 Legal Update. The Reese panel discusses the legal issues at length; to save space, that discussion has been omitted from this Legal Update entry. Readers may wish to go to the Ninth Circuit Published Opinions web page and review the entire opinion.

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WASHINGTON STATE SUPREME COURT

MANDATORY REPORTER STATUS FOR CHILD ABUSE UNDER RCW 26.44.030 DOES NOT APPLY TO TEACHER WHERE TEACHER OBTAINS CHILD ABUSE INFORMATION OUTSIDE THE COURSE OF TEACHING WORK; SAME REASONING PRESUMABLY WILL APPLY TO OTHER MANDATORY PROFESSIONAL REPORTERS

In State v. James-Buhl, ___ Wn.2d. ___ , 2018 WL ___ (April 19, 2018), an 8-1 majority of the Washington Supreme Court reverses a decision of Division Two of the Court of Appeals and affirms a trial court decision interpreting a K-12 school teacher's mandatory duty to report child abuse or neglect under RCW 26.44.030(1)(a). The statute requires a teacher to report to authorities when the teacher has reasonable cause to believe that a child has suffered abuse or neglect. The Supreme Court Majority Opinion holds that the statute does not apply to information obtained outside the course of the teacher's employment as a teacher.

The State charged Tanya James-Buhl, a junior high school teacher, with three counts of failure to comply with the mandatory reporting law for not reporting to law enforcement that her daughters had disclosed that their stepfather had touched them inappropriately. The trial court

dismissed the charges, ruling that RCW 26.44.030(1)(a) requires teachers to report suspected child abuse only when they obtain information regarding child abuse in the course of their employment. The Court of Appeals reversed the trial court decision as being contrary to legislative intent to protect abused children.

Now, the Washington Supreme Court has held that the language of the statute cannot be stretched to cover the conduct here. After discussing the statutory language and its history and spirit, the Supreme Court Majority Opinion closes as follows:

> Since the statute imposes a mandatory duty on people in various occupational roles, failure to comply with that duty must have at least some connection between the individual's professional identity and the criminal offense. For example, a connection could be established because of the teacher's relationship to the child or relationship to the alleged abuser, or the circumstances in which the teacher gained reasonable cause to believe that a child has been abused. This surely includes the regular course of employment, but it goes beyond that time frame as well. The trial court correctly recognized the need for a connection, explaining that "James-Buhl was not required to make a mandatory report in this case because she did not have a teacher/professional school personnel relationship with [her daughters]."
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> Even though the protection of children is of the utmost importance, we "resist the temptation to rewrite an unambiguous statute to suit our notions of what is [or may be] good public policy." . . . Prosecuting the mother of abused children for failure to report may or may not be the best way to advance child welfare. We need not decide such an important public policy decision because it is not a judicial function.
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> . . . .
>
> We hold that failure to comply with the mandatory reporting duty in ROW 26.44.030(l)(a) requires some connection between the individual's professional identity and the criminal offense. We reverse the Court of Appeals and reinstate the trial court's dismissal of the charges against James-Buhl because the alleged child abuse occurred in her home, and was perpetrated by another family member, with no connection to her professional identity as a teacher. The mandatory reporting law does not impose an unlimited, ever present duty because it refers to people by means of their occupation, not simply as adults or persons.

Result: Reversal of Division Two Court of Appeals decision and affirmance of Pierce County Superior Court order dismissing three counts against Tanya Desiree James-Buhl for violation of RCW 26.44.030(1)(a).

LEGAL UPDATE EDITORIAL COMMMENT: The reasoning of the Court of Appeals applies to all categories of professionals (for example, police officers and medical providers) who have a mandatory reporting duty under RCW 26.44.030 based on their professions.

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WASHINGTON STATE COURT OF APPEALS

SEARCH WARRANT FOR EVIDENCE OF CHILD PORNOGRAPHY AND EXPLOITATION HELD BY COURT OF APPEALS TO FAIL FOURTH AMENDMENT PARTICULARITY

REQUIREMENT; REFERENCE IN WARRANT APPLICATION TO "SEXUAL EXPLOITATION OF A MINOR RCW 9.68A.040" AND "DEALING IN DEPICTIONS OF MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT RCW 9.68A.050" HELD TO BE INSUFFICIENT PARTICULARITY; IF THERE HAD BEEN QUOTING OF KEY RCW LANGUAGE DEFINING THESE CRIMES IN WARRANT'S DESCRIPTION OF WHAT WAS TO BE SEIZED, PLUS A BIT MORE, THAT WOULD LIKELY HAVE SATISFIED PARTICULARITY REQUIREMENT; COURT ALSO DISCUSSES THE OPTION OF INCORPORATING THE AFFIDAVIT IN THE SEARCH WARRANT

State v. McKee, ___ Wn. App.2d ___ , 2018 WL ___ (Div. I, March 26, 2018)

LEGAL UPDATE INTRODUCTORY EDITORIAL NOTE: The facts and Superior Court proceedings in the McKee case occurred before the Washington Supreme Court decided State v. Besola, 184 Wn.2d 605 (2015), which the Court of Appeals determines to be controlling on the Fourth Amendment particularity requirement issue in this case.

LEGAL UPDATE EDITORIAL COMMENT: As always, what I say is not legal advice, and I urge readers to consult their own legal advisors and prosecutors' offices about what appears in this Legal Update. In the November 2015 Legal Update, I suggested that one way to meet the particularity requirement in a warrant to search for child pornography would be to describe the child pornography items sought along the following lines:

> **The crimes under investigation are possession (RCW 9.68A.070) and dealing (RCW 9.68A.050) in depictions of minors (persons under age 18) engaged in sexually explicit conduct. [Note: In the McKee case, another crime under investigation was "sexual exploitation of a minor, RCW 9.68A.040." But because the key focus of investigation in that crime is likewise the statutorily defined phrase, "sexually explicit conduct," the suggestion here applies as well to such warrants/investigations.]**
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> **For purposes of this warrant, "sexually explicit conduct" means, as set forth in RCW 9.68A.011, actual or simulated:**
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> **(a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals;**
>
> **(b) Penetration of the vagina or rectum by any object;**
>
> **(c) Masturbation;**
>
> **(d) Sadomasochistic abuse;**
>
> **(e) Defecation or urination for the purpose of sexual stimulation of the viewer;**
>
> **(f) Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer. For the purposes of this subsection (4)(f), it is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it; and**

(g) Touching of a person's clothed or unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the viewer.

The following evidence is material to the investigation or prosecution of the above-described felonies:

1. Any and all video tapes, CDs, DVDs, or any other visual and or audio recordings depicting minors engaged in sexually explicit conduct;

2. Any and all printed materials depicting minors engaged in sexually explicit conduct;

3. Any photographs of minors engaged in sexually explicit conduct;

4. Any and all computer hard drives or laptop computers and any memory storage devices containing evidence of possession or dealing in depictions of minors engaged in sexually explicit conduct;

5. Any and all documents demonstrating purchase, sale or transfer of materials relating to depictions of minors engaged in sexually explicit conduct.

Facts and Proceedings below in State v. McKee:

In 2012, the then-40-year-old Marc Daniel McKee was trading illegal drugs for sex with underage girls, including A.Z., who was 16. A.Z.'s brother and a man who was a father figure to A.Z. went to a house that McKee and A.Z. were occupying. The two men beat up McKee and took his cell phone. Shortly after that, A.Z.'s mother was in possession of the cell phone and looked on the phone at video clips of (1) her daughter having sex with McKee and (2) nude photos of A.Z. A.Z.'s mother contacted the Mount Vernon Police Department. What happened after that is described by the Court of Appeals as follows:

> [On October 30, 2012], Brickley met with [Detective A]. Brickley described the video clips and photographs she saw on the cell phone. Brickley left the cell phone with [Detective A]. Brickley later contacted [Detective A] to report that J.P. told her that McKee gave J.P. drugs in exchange for sex. Brickley obtained a restraining order prohibiting McKee from contacting A.Z.
>
> *Application for a Search Warrant*
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> On October 31, [Detective B] submitted an application and affidavit (Affidavit) in support of probable cause to obtain a warrant to search McKee's cell phone to investigate the crimes of "Sexual Exploitation of a Minor RCW 9.68A.040" and "Dealing in depictions of minor engaged in sexually explicit conduct RCW 9.68A.050."
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> The Affidavit states, in pertinent part:
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> > On 10/29/12 [Officer C] investigated a pornography call that was reported by Brenda Brickley to the Mount Vernon Police Department. BRICKLEY told [Officer C] that her 16 year old daughter A.M.Z. DOB 11/15/95 has been hanging out with a 41 year old

man named Marc McKee at 1127 S 15th Street in Mount Vernon and she had not returned home. BRICKLEY said that she and her ex-husband, Christopher Seifert went to that residence on 10/28/12 to take A.M.Z. home. BRICKLEY said that they knocked on the door and pounded on the windows before MCKEE came to the door. BRICKLEY said that she was so upset that she "beat him up" and during this physical altercation MCKEE's cell phone fell from his pocket. BRICKLEY said that she then took that cell phone. . . while SEIFERT physically removed A.M.Z. from MCKEE's bedroom. BRICKLEY said that they then left with the phone.

BRICKLEY said that on the morning of 10/29/12 she looked at the phone taken from MCKEE and found many pictures of her daughter completely naked in what she believes is MCKEE's room at 1127 S 15th Street. BRICKLEY described one picture where A.M.Z. is without clothing and tied up on the bed. She said that she found other pictures of young looking girls in various stages of undress. BRICKLEY said that she also viewed videos on the phone and believed some of them depicted MCKEE having sex with A.M.Z. . . .

. . . BRICKLEY further described a phone call she got from J.N.P. who said she had sex and oral sex with MCKEE at Steven EVERSALL's residence in Anacortes on the corner of 6th and Oak in exchange for heroin. She also said that she believed that 15 year old J.W. was possibly involved with him. BRICKLEY provided [Detective A] with MCKEE's cell phone described as a[n] LG with model number VX9100.

I am requesting to search: The cell phone described as a[n] LG cell phone with model VX9100 currently being held at the Mount Vernon Police Department.

For: Images, video, documents, text messages, contacts, audio recordings, call logs, calendars, notes, tasks, data/Internet usage, any and all identifying data, and any other electronic data from the cell phone showing evidence of the above listed crimes. If compatible, the phone content will be copied from the phone using forensic hardware and software that retrieves basic identifier information about the phone and can forensically download images, video, text messages, contacts, audio recordings, and other additional data for the investigator to examine depending on support for that particular phone. It is also possible to conduct a physical dump on some supported phones obtaining all of the memory of the phone for examination. If the cell phone is not supported by any forensic tools, the phone will be examined manually.

Search Warrant

On October 31, the court issued a search warrant. Based on the Affidavit of [Detective B], the district court judge found probable cause to believe McKee committed or was committing the crimes of "Sexual Exploitation of a Minor RCW 9.68A.040" and "Dealing in depictions of minor engaged in sexually explicit conduct RCW 9.68A.050."

The search warrant states:

WHEREAS, [Detective A] has this day signed an affidavit on oath before the undersigned, David A. Svaren Judge, Skagit County District Court, that he believes that a crime has been or is being committed:

> *To wit (Type of Crime)* Sexual Exploitation of a Minor RCW 9.68A.040, Dealing in depictions of minor engaged in sexually explicit conduct RCW 9.68A.050.

The warrant allows the police to obtain evidence from "[t]he cell phone described as a[n] LG cell phone with model VX9100 currently being held at the Mount Vernon Police Department" for the following "Items Wanted":

> Images, video, documents, text messages, contacts, audio recordings, call logs, calendars, notes, tasks, data/Internet usage, any and all identifying data, and any other electronic data from the cell phone showing evidence of the above listed crimes.

The search warrant authorizes the police to conduct a "physical dump" of the memory of the cell phone for examination.

> If compatible, the phone content will be copied from the phone using forensic hardware and software that retrieves basic identifier information about the phone and can forensically download images, video, text messages, contacts, audio recordings, and other additional data for the Investigator to examine depending on support for that particular phone. It is also possible to conduct a physical dump on some supported phones obtaining all of the memory of the phone for examination. If the cell phone is not supported by any forensic tools, the phone will be examined manually.

On November 7, 2012, the court filed a "Receipt of Execution of Search Warrant. The Receipt of Execution of Search Warrant states the police conducted a "Cellebrite Dump" of the cell phone on November 6. Cellebrite software obtains all information saved on the cell phone as well as deleted information and transfers the data from the cell phone to a computer.

Criminal Charges

The State charged McKee with three counts of possession of depictions of minors engaged in sexually explicit conduct in the first degree in violation of RCW 9.68A.070(1) based on the three cell phone video clips, one count of possession of depictions of a minor engaged in sexually explicit conduct of A.Z. in the second degree in violation of RCW 9.68A.070(2) based on the cell phone photographs, one count of commercial sex abuse of J.P. as a minor in violation of RCW 9.68A.100, three counts of distribution of methamphetamine and/or heroin to a person under age 18 in violation of RCW 69.50.406(1) and .401(2), and one count of violation of a no-contact order in violation of RCW 26.50.110(1).

Motion to Suppress

McKee filed a motion to suppress the evidence the police seized from his cell phone. McKee asserted the search warrant violated the Fourth Amendment requirement to describe with particularity the "things to be seized." McKee argued the warrant allowed the police to search an "overbroad list of items" unrelated to the identified crimes under investigation. McKee also argued probable cause did not support issuing a search warrant of the cell phone for the crime of dealing in depictions of a minor engaged in sexually explicit conduct.

The court entered an order denying the motion to suppress. The court found the allegations in the Affidavit support probable cause that McKee committed the crimes of sexual exploitation of a minor and dealing in depictions of minors engaged in sexually explicit conduct. The court concluded the citation to the criminal statutes established particularity and the search warrant was not overbroad. The order states:

> The information came to law enforcement from a known citizen informant who had actually viewed the materials sought on the cell phone. She had observed naked minors, sexual activity, and the [defendant]. There was [probable cause] to investigate the phone to ascertain whether the images had been distributed. It was very clear that some identifiable criminal activity would be found on the phone. The statutes were referenced with particularity. The [search warrant] is not overbroad.

The jury found McKee not guilty of distribution of methamphetamine and/or heroin to M.G. The jury found McKee guilty as charged on all other counts.

ISSUE AND RULING IN STATE V. MCKEE: In the Washington Supreme Court decision in State v. Besola, 184 Wn.2d 605 (2015), the Court ruled that the Fourth Amendment particularity requirement for search warrants was not met under circumstances where: (1) the warrant stated at the beginning of the warrant that **the crime under investigation was "Possession of Child Pornography R.C.W. 9.68A.070;"** and (2) the warrant further stated that "the following evidence is material to the investigation or prosecution of the above-described felony":

> 1. Any and all video tapes, CDs, DVDs, or any other visual and or audio recordings;
>
> 2. Any and all printed pornographic materials;
>
> 3. Any photographs, but particularly of minors;
>
> 4. Any and all computer hard drives or laptop computers and any memory storage devices;
>
> 5. Any and all documents demonstrating purchase, sale or transfer of pornographic material.

In the present case (State v. McKee), a detective submitted an application and affidavit in support of probable cause to obtain a warrant. The warrant application states at the beginning that the **purpose is to search McKee's cell phone to investigate the crimes of "Sexual Exploitation of a Minor RCW 9.68A.040" and "Dealing in depictions of minor engaged in sexually explicit conduct RCW 9.68A.050."** The warrant's authorization to search does not incorporate the affidavit.

The warrant's authorization provides as follows:

> WHEREAS, [Detective A] has this day signed an affidavit on oath before the undersigned, David A. Svaren Judge, Skagit County District Court, that he believes that a crime has been or is being committed:

> **To wit (Type of Crime) Sexual Exploitation of a Minor RCW 9.68A.040, Dealing in depictions of minor engaged in sexually explicit conduct RCW 9.68A.050.**

The warrant allows the police to obtain evidence from "[t]he cell phone described as a[n] LG cell phone with model VX9100 currently being held at the Mount Vernon Police Department" for the following "Items Wanted":

> Images, video, documents, text messages, contacts, audio recordings, call logs, calendars, notes, tasks, data/Internet usage, any and all identifying data, and any other electronic data from the cell phone showing evidence of the **above listed crimes.**

The warrant authorizes the police to conduct a "physical dump" of the memory of the cell phone for examination.

> If compatible, the phone content will be copied from the phone using forensic hardware and software that retrieves basic identifier information about the phone and can forensically download images, video, text messages, contacts, audio recordings, and other additional data for the Investigator to examine depending on support for that particular phone. It is also possible to conduct a physical dump on some supported phones obtaining all of the memory of the phone for examination. If the cell phone is not supported by any forensic tools, the phone will be examined manually.

Is the search warrant in the present case sufficiently particular under the Fourth Amendment? (ANSWER BY COURT OF APPEALS: No; the Court of Appeals is unanimous in concluding that the search warrant fails the particularity requirement)

Result in State v. McKee: Reversal of Skagit County Superior Court convictions of Marc Daniel McKee for four counts of possession of depictions of a minor engaged in sexually explicit conduct. Apparently, the decision of the Court of Appeals does not affect defendant's convictions for: (A) one count of commercial sex abuse of J.P. as a minor in violation of RCW 9.68A.100; (B) two counts of distribution of methamphetamine and/or heroin to a person under age 18 in violation of RCW 69.50.406(1) and .401(2); and (C) one count of violation of a no-contact order in violation of RCW 26.50.110(1).

ANALYSIS IN STATE V. MCKEE: (Excerpted from Court of Appeals opinion)

> The purpose of the [Fourth Amendment] requirement to describe particularly "the place to be searched" and the "things to be seized" is to make a general search "impossible and prevent the seizure of one thing under a warrant describing another." . . . . The other purpose of the particularity requirement is to eliminate "the danger of unlimited discretion in the executing officer's determination of what to seize" and to prevent the issuance of a warrant "on loose, vague, or doubtful bases of fact." . . . .
>
> The Fourth Amendment requires particularity "as to what is to be taken, nothing is left to the discretion of the officer executing the warrant." . . . .
>
> The degree of specificity required varies depending on the circumstances of the case and the types of items. . . . . The advent of devices such as cell phones that store vast

amounts of personal information makes the particularity requirement of the Fourth Amendment that much more important.

In Riley v. California, 134 S. Ct. 2473 (2014), the United States Supreme Court unambiguously held that a warrantless search of a cell phone [generally] violates the Fourth Amendment. The Supreme Court describes cell phones as "minicomputers" that collect in one place many distinct types of private information. . . . "The term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone." Riley. "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life." Riley.

The [U.S. Supreme Court] recognizes that the scope of the search of a cell phone "would typically expose to the government far more than the most exhaustive search of a house." Riley. In addition to the extraordinary amount of information accessible through a cell phone, the Court noted the types of information a cell phone might contain or be used to access. "A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is." Riley.

In State v. Samalia, 186 Wn.2d 262, 269 (2016), our Supreme Court held that "cell phones and the information contained therein are private affairs because they may contain intimate details about individuals' lives, which we have previously held are protected under article 1, section 7" of the Washington Constitution.

"An intrusion upon the occupant's expectation of privacy in those premises should extend no further than is necessary to find particular objects, and this is reflected in the rule that the described premises may only be searched as long and as intensely as is reasonable to find the things described in the warrant." [State v. Perrone, 119 Wn.2d 538 (1992)]. A warrant that implicates materials protected by the First Amendment requires a heightened degree of particularity. Perrone. The particularity requirement in such cases must be "accorded the most scrupulous exactitude."

McKee contends the warrant violates the particularity requirement of the Fourth Amendment by authorizing the police to search broad categories of data stored on the cell phone without limitation. The State claims the warrant meets the particularity requirement by limiting the search to the crimes that are cited on the first page of the warrant, "Sexual Exploitation of a Minor RCW 9.68A.040" and "Dealing in depictions of minor engaged in sexually explicit conduct RCW 9.68A.050," and to "evidence of said crime. . . located" on the "LG cell phone with model VX9100." We disagree with the State.

In Besola, the Washington Supreme Court held the citation to a statute did not "modify or limit the items listed in the warrant" that "contained broad descriptions of the items to be seized." The warrant in Besola identified the crime of ''Possession of Child Pornography R.C.W. 9.68A.070.". . . . The search warrant authorized the police to seize and search broad categories of:

"1. Any and all video tapes, CDs,[91 DVDs,[10] or any other visual and or audio recordings;
2. Any and all printed pornographic materials;

3. Any photographs, but particularly of minors;
4. Any and all computer hard drives or laptop computers and any memory storage devices;
5. Any and all documents demonstrating purchase, sale or transfer of pornographic material."

The [Besola] court rejected the argument that the citation to the statute modified or limited the list of items to be seized or provided guidance to the officers executing the search. The court held, "These descriptions were overbroad because they allowed officers to seize lawfully possessed materials, such as adult pornography, when the descriptions could easily have been made more particular "by using the precise statutory language to describe the materials sought.

Here, as in Besola, the warrant cites and identifies the crimes under investigation but does not use the language in the statutes to describe the data sought from the cell phone. The warrant lists the crimes under investigation on page one but separately lists the "Items Wanted" on page two. As in Besola, the description of the "Items Wanted" is overbroad and allowed the police to search and seize lawful data when the warrant could have been made more particular."

Next, the State claims that because detailed particularity was not possible, use of the general identification of the data to be searched is permissible. "The use of a generic term or a general description is not per se a violation of the particularity requirement." Perrone. Warrants that describe generic categories of items are not invalid "if a more precise description of the items subject to seizure is not possible" and "a more particular description of the items to be seized is not available at the time the warrant issues." . . . .

"[Al description is valid if it is as specific as the circumstances and the nature of the activity under investigation permit." Perrone. We consider "whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued." . . . . In other words, whether the warrant could have been more specific considering the information known to police officers at the time the warrant was issued.

The detailed allegations in the Affidavit submitted in support of the search warrant could easily meet the particularity requirement. The Affidavit described the allegations related to the crimes under investigation, the video clips and photographs located on the phone, and the time frame. **But "an affidavit may only cure an overbroad warrant where the affidavit and the search warrant are physically attached, and the warrant expressly refers to the affidavit and incorporates it with "suitable words of reference."** . . . .

Because the Affidavit was not attached or incorporated by reference, our determination of the particularity requirement is limited to the warrant.

[Court's footnote: ***The State cites a number of cases to argue a generic description of the data to be seized meets the particularity requirement. [citing Federal Circuit Court decisions] But in all of these cases, the warrant attaches and incorporates the affidavit. At oral argument, the State conceded the Affidavit was neither attached nor incorporated by suitable words of reference*****.]**

. . . .

> The warrant in this case was not carefully tailored to the justification to search and was not limited to data for which there was probable cause. The warrant authorized the police to search all images, videos, documents, calendars, text messages, data, Internet usage, and "any other electronic data" and to conduct a "physical dump" of "all of the memory of the phone for examination." The language of the search warrant clearly allows search and seizure of data without regard to whether the data is connected to the crime. The warrant gives the police the right to search the contents of the cell phone and seize private information with no temporal or other limitation. . . . . As in [State v. Keodara, 191 Wn. App. 305 (2015), "there was no limit on the topics of information for which the police could search. Nor did the warrant limit the search to information generated close in time to incidents for which the police had probable cause." Keodara,
>
> The warrant allowed the police to search general categories of data on the cell phone with no objective standard or guidance to the police executing the warrant. The language of the search warrant left to the discretion of the police what to seize. We hold the search warrant violated the particularity requirement of the Fourth Amendment.
>
> [Court's footnote: *Accordingly, we need not address McKee's argument that probable cause did not support issuing the warrant for dealing in depictions of a minor engaged in sexually explicit conduct in violation of RCW 9.68A.050*.]

[Some citations omitted, other citations revised for style; some footnotes omitted]

OFFICERS ACTED REASONABLY IN MAKING FORCED ENTRY INTO HOME WITHOUT A SEARCH WARRANT WHERE THEY HAD REASON TO BELIEVE THAT A DEAD BODY OR DYING PERSON WAS INSIDE, AND THAT AN AGGRESSIVE PIT BULL MIX HAD BEEN ABANDONED INSIDE FOR SEVERAL DAYS AND LIKELY WAS VERY HUNGRY; WARRANTLESS SEARCH UPHELD AS TWO JUDGES RULE THAT SEARCH COMES UNDER "EMERGENCY AID" EXCEPTION THAT IS LINKED TO "COMMUNITY CARETAKING FUNCTION" EXCEPTION, WHILE THE THIRD JUDGE ARGUES THAT THERE WAS NO EMERGENCY BUT THAT THE "COMMUNITY CARETAKING EXCEPTION" NONETHELESS APPLIES

State v. Boisselle, ___ Wn. App.2d ___ , 2018 WL ___ (Div. I, April 16, 2018)

Facts: (Excerpted from Court of Appeals opinion)

> On September 1, 2014, South Sound 911 dispatch received an anonymous telephone call from an individual who reported that "somebody by the name of Mike" stated that he shot someone at 13008 Military Road East, No. B (the duplex). Shortly thereafter, the Puyallup Police Department anonymous tip line received a telephone call from an individual who reported that "Mike" had "shot someone" and "possibly killed him, and it was in self-defense." Deputies [A and B] were dispatched to the scene, arriving at 6:50 p.m. [Sergeant C] arrived shortly thereafter, at approximately 7:13 p.m. [Sergeant D] arrived at the scene at 7:17 p.m.
>
> [Deputies A and B] knocked on the door of the duplex but received no response. There was, however, a dog inside that was barking aggressively. [Court's footnote: *Sergeant*

D described the dog as "a half something mixed between a pit bull and some other breed," and stated that the dog was "[m]edium size, but very aggressive."] The deputies walked around the outside of the duplex and attempted to look inside, but all of the windows were closed and covered with blinds. There was a light on in the upstairs western bedroom. The deputies smelled a foul odor coming from the house and the garage. [Deputy A] thought that 'something about it just seemed off" and was concerned with "trying to figure out if someone, need[ed] help." [Deputies A and B] then contacted the neighbors in order to gather more information. Two neighbors informed the deputies that they had not seen anyone coming or going from the duplex for about "four or five days."

[Sergeant C] listened to the anonymous telephone call made to the Puyallup tip line. Because the anonymous caller provided few details, [Sergeant C] was worried "about whether someone was dead or dying in the house." When he arrived, [Sergeant C] searched for evidence to substantiate the anonymous telephone calls. [Sergeant C] smelled a faint odor coming from the garage that he believed was decaying flesh. [Sergeant C] spoke with a neighbor, who told him that a sex offender named Boisselle lived in the duplex. [Sergeant C] confirmed that information through the sex offender registry. However, several entries in the computer-aided dispatch log indicated that Boisselle did not live at the duplex anymore and that his current location was unknown.

[Sergeant C] directed [Deputy A] to identify and contact the owner of the duplex. [Deputy A] contacted the owner and learned that he had rented the duplex to a woman who had stopped paying rent. The owner believed that there was a man named Michael living in the duplex who may be the son of the woman, but the owner had been unable to get Michael to pay rent. As a result, the owner was forced to file for bankruptcy and no longer owned the house. Based on the owner's statements, [Sergeant C] did not believe that the owner could give valid consent for the police to enter the duplex.

[Deputy B] checked the license plates of the two vehicles parked in the driveway of the duplex through the Department of Licensing and learned that Lola Patterson was the registered owner of both vehicles. [Deputy B] drove to Patterson's last known address and spoke with her personally. [Deputy B] learned that Patterson was Michael's mother. [Court's footnote: *Although [Sergeant C] knew that Michael Boisselle once lived in the duplex, it is not clear that the other officers knew Michael's last name. None of the officers knew whether the individual who presently resided in the duplex was Michael Boisselle, a different Michael, or someone else entirely*.]

And [Sergeant C knew] that Patterson had not seen or heard from Michael in about three days. [Sergeant C] believed that this information "just adds to the concern that we have somebody that is potentially down in the apartment or the duplex" because he could not "account for Mike, or whoever the victim is."

Upon arriving at the duplex, [Sergeant D] also noticed a "really bad odor" that "might be rotting garbage, or something like that" coming from the garage. [Sergeant D] walked around the duplex and attempted to look inside, but the windows were covered. The dog inside the duplex followed [Sergeant D] around, barking and growling. When [Sergeant D] reached the sliding door at the back of the duplex, the dog aggressively charged at the sliding door and pushed the blinds out of the way. [Sergeant D] looked through the sliding door and could see overturned furniture, which he interpreted as "signs of [a] struggle" and an indication that "something bad could have happened in

there." [Sergeant's C and D] agreed to contact animal control in case entry into the duplex was necessary. [Sergeant C] believed that he had an obligation to force entry into the duplex to determine whether someone was dead or dying and for the abandoned dog's safety. [Court's footnote: *An injured or dying person would obviously benefit from assistance. So would a dead person whose body was locked in a duplex unit with a hungry, aggressive carnivore*.]

[Sergeant D] noticed a man standing across the street who seemed interested in the activities of the police. [Sergeant D] went to talk to the man, who identified himself as Christopher Williamson. Williamson stated that he was a friend of Zomalt and that Zomalt had been staying in the duplex with Michael. Williamson had not seen or heard from Zomalt for several weeks. [Sergeant D] ended his conversation with Williamson at around 7:50 p.m., roughly one hour and ten minutes after the first deputy arrived at the duplex. [Court's footnote: *This was 33 minutes after [Sergeant D] first arrived at the duplex*.]

Following his conversation with Williamson, [Sergeant D] received a call from [Auburn PD Detective E]. [Detective E] told [Sergeant D] that Auburn police were investigating a possible missing person and homicide case and that it may be related to [Sergeant D's] welfare check. [Detective D] told [Sergeant D] that the Auburn investigation concerned a roadside carpet burning incident and that he would be interested to know if there was any torn up carpet in the duplex. Faini told [Sergeant D] that the possible victim's name was Zomalt.

[Sergeant D] then contacted [Sergeant C and told him] that Zomalt was associated by DNA evidence with a roadside burning incident in Auburn. [Sergeant C] told [Sergeant D] that he was able to look through the sliding door and see that carpet had been ripped up from the floor.

[Sergeant C and D] did not believe that they had enough time or information to get a search warrant. [Sergeant D] testified,

> A I don't even know how you would write that, two anonymous tips come in, and torn up carpet. I have no idea what crime, or if any crime we are dealing with, it just doesn't look good . . . .
>
> Q What is it in your mind that you thought you were dealing with at that point?
>
> A Dealing with a suspicious welfare check and possibly someone that's down inside, has been hurt or dead, we don't know. So at that point I'm thinking the bottom line is you can't walk away from this. You have got a duty to do something.

With no person apparently able to consent to a police entry of the unit and believing that they did not have a sufficient basis to obtain a search warrant, [Sergeants C and D] made a joint decision to force entry into the duplex. [Sergeant D] broke through the front door. An animal control officer secured the dog. The officers then performed a security sweep of the duplex, looking for anyone who was hurt. [Sergeants C and D] searched the second floor of the duplex while [Deputies A and B] searched the first floor. The officers checked all of the rooms, looking in closets and other large spaces for a person or a body but ignoring drawers and other areas where a person could not fit.

> [Sergeant D] believed that the smell was coming from inside of the garage and was consistent with a dead body. Once all of the rooms inside the duplex had been checked, deputies [A and B] forced entry into the garage from inside of the duplex. Once inside the garage, all four officers could see a large, rolled up carpet with a shoe sticking out and maggots pouring out of the bottom. [Sergeant D] opened the garage door using the automatic door opener and all four officers went around to the outside of the garage for a clear view of the carpet. From outside of the house, the officers saw an arm hanging out of the front end of the carpet. [Sergeant D] told the other officers that "this is a crime scene now," and that "it's time we have to seal this off." None of the officers collected evidence or touched the carpet.

[Paragraphing revised in one place for more readable placement of footnote]

ISSUE AND RULING: Do the circumstances of this case come within the "community caretaking function" exception to the search warrant requirement of article I, section 7 of the Washington constitution, either because of the need for "emergency aid" or because of a less demanding interpretation of the "community caretaking function"? (ANSWER BY COURT OF APPEALS: Yes; all judges on the 3-judge panel agree with this answer. One judge differs in his analysis of the community caretaking function's applicability to the circumstances of this case. The third judge argues that the Majority Opinion erroneously relies on "emergent" circumstances that required immediate action, while the third judge does not agree that the record supports that reliance. But the third judge states that the "community caretaking function" exception to the search warrant requirement is broad enough to encompass what he views as the non-emergent but entry-justifying circumstances of this case.

Result: Affirmance of Pierce County Superior Court judgment on jury verdict against Michael Clifford Boisselle, Jr., finding him guilty of Second Degree Murder and Unlawful Possession of a Firearm (the degree of the firearm crime is not specified in the decision of the Court of Appeals).

ANALYSIS:

There are two Opinions in Boisselle. Two judges join in a Majority Opinion. The third judge writes a Concurring Opinion. Both Opinions agree: (1) that the warrantless search was lawful under article I, section 7 of the Washington constitution; (2) that it is key to the analysis that the officers acted in good faith with a primary purpose to serve a community caretaking function and not to investigate a possible crime; and (3) that the officers had sufficient cause to believe that the area searched was connected to the community caretaking function that they sought to carry out.

The two Opinions appear to disagree, however, on whether the State is required to establish under the community caretaking function that circumstances were emergent and that immediate action was required at the time the warrantless search occurred. The Majority Opinion hedges a bit of this question but appears to conclude that such a requirement must be met.

The Majority Opinion then concludes that the officers acted expeditiously in the face of immediate need in light of their initial exhaustion of efforts to find someone with authority to consent to enter, and their need to wait for an animal control officer to help with the aggressive dog inside the home. And the Majority Opinion concludes that circumstances were emergent because the officers needed to get inside to quickly determine the need for assistance of any

living person inside, as well as to remove any dead body that was at risk of being consumed by a starving dog.

The Concurring Opinion notes that the trial court found as fact that neither an emergency nor a need for immediate action was present. The Concurring Opinion asserts that the record supports that trial court finding, and that under appellate review standards the Majority Opinion should not substitute a different determination on the questions of immediate need and emergency . The Concurring Opinion argues, however, that the community caretaking function exception to the search warrant requirement applies because:

> The trial court applied the proper test and found that the search was divorced from any criminal investigation, the deputies' belief that there was a need for assistance was objectively reasonable, and there was a reasonable basis to associate the need for assistance with the place searched. These findings are supported by substantial evidence. Accordingly, while I disagree with the majority's reliance on the emergency aid exception, I would affirm the trial court on the ground that the search was a valid exercise of law enforcement's community caretaking function.

ALL GOVERNMENT ACTORS MUST RESPECT SIXTH AMENDMENT RIGHT TO CONSULT ATTORNEY IN JAIL CELL SEARCHES: DEFENDANT IS ENTITLED TO A NEW HEARING THAT PLACES HEAVY BURDEN ON THE STATE TO ESTABLISH THAT JAIL OFFICERS DID NOT PREJUDICE DEFENDANT'S CASE WHEN THE OFFICERS VIOLATED THE CONSTITUTION BY READING PAPERS THAT THE JAIL OFFICERS FOUND IN HIS JAIL CELL, AND THAT HE HAD CLEARLY MARKED FOR HIS ATTORNEY'S REVIEW IN HIS CASE

State v. Irby, ___ Wn. App.2d ___ , 2018 WL ___ (Div. I, April 16, 2018)

Facts and Proceedings below:

Proceedings below:

Terrance Irby was convicted by a jury of one count of murder in the first degree and one count of burglary in the first degree. Irby lost a motion to the trial court seeking dismissal of all charges based on the actions of jail guards who unlawfully opened and read written communications that were from Irby to Irby's lawyer and were clearly marked as such.

The trial court recognized that the actions of the jail guards violated Irby's Sixth Amendment right to counsel by violating attorney-client privilege. But the trial court denied the motion because the trial court erroneously believed that the fact that jail guards, not law enforcement officers, had made the violation, the trial court was not required under the Washington Supreme Court decision in State v. Pena Fuentes, 179 Wn.2d 808 (2014) to: (1) presume that the constitutional violation was prejudicial and (2) hold the prosecution to its burden to present evidence sufficient to prove, beyond a reasonable doubt that the presumption of prejudice was overcome.

ISSUE AND RULING: Jail guards read notes that defendant had written for his attorney's attention, and that he had adequately marked such that jail guards should have known that he would be claiming were protected by his Sixth Amendment right to consult his counsel under attorney-client privilege. The trial judge ruled that, while jail officers' conduct violated the Sixth

Amendment protection of the attorney-client privilege, the conduct by the jail officers did not prejudice defendant in his trial and conviction. Under State v. Pena Fuentes, 179 Wn.2d 808 (2014), the State bears the heavy burden of proving beyond a reasonable doubt that a Sixth Amendment violation of the attorney-client privilege did not prejudice that defendant..

In his challenge to his conviction, is defendant entitled to a hearing at in Superior Court to determine whether the State can establish beyond a reasonable doubt that the jail officers' Sixth Amendment violation of his rights was not prejudicial to him? (ANSWER: Yes, Amos is entitled to a hearing)

Result: Reversal of Skagit County Superior Court judgment on jury verdict of guilty of Murder in the First Degree and Burglary in the First Degree. Case remanded for hearing to determine whether the State can show beyond a reasonable doubt that the defendant was not prejudiced by the jail officers' violation of his Sixth Amendment right.

ANALYSIS:

When a defendant claims that his or her Sixth Amendment right to counsel was violated by state actors infringing on his attorney-client privilege, courts proceed under a four-step inquiry:

1. Did a State actor participate in the infringing conduct alleged by the defendant?
2. If so, did the State actor(s) infringe upon a Sixth Amendment right of the defendant?
3. If so, was there prejudice to the defendant? That is, did the State fail to overcome the presumption of prejudice arising from the infringement by not proving the absence of prejudice beyond a reasonable doubt?
4. If so, what is the appropriate remedy to select and apply, considering the totality of the circumstances present, including the degree of prejudice to the defendant's right to a fair trial and the degree of nefariousness of the conduct by the State actor(s)

In this case, the State concedes that the defendant prevails on the first two steps. The Court of Appeals rules further that the trial court erred in not holding the State to its burden of proof under Step 3, and the Court of Appeals therefore remands the case back to the trial court for further proceedings that may or may not result in setting aside the defendant's convictions.

The Court of Appeals explains as follows on what must now happen upon remand:

> On remand, the trial court must commence the hearing by presuming that the violation of Irby's right to counsel has prejudiced him. In addition, the trial court must place on the State the burden to prove "the absence of prejudice beyond a reasonable doubt." Pena Fuentes, 179 Wn.2d at 820. Thereafter, the trial court must marshal all of the evidence and determine whether the State's evidence has overcome the presumption of prejudice and established the absence of prejudice beyond a reasonable doubt.
>
> It is at this stage of the proceeding that a trial court properly – and importantly – considers the role of the State actors who engaged in the misconduct. Indeed, the inquiry of the trial court on remand might involve determining whether the information gleaned by the jail guards was communicated to any member of the prosecution or investigation team and, if so, whether the information was utilized in the State's third prosecution of Irby.

At the conclusion of the evidence, if the trial court determines that the State's evidence overcame the presumption of prejudice, then Irby cannot be said to have been prejudiced by the infringing conduct and no deprivation of his Sixth Amendment right occurred. In that circumstance, denial of Irby's motion is proper and the judgment and sentence may be left undisturbed.

If, however, the State fails to overcome the presumption, then the infringing conduct constituted a deprivation of Irby's Sixth Amendment right. In such a situation, the trial court must fashion a proper remedy that includes vacation of the judgment and sentence previously imposed.

Where State conduct infringes upon a defendant's Sixth Amendment right and prejudice results to the defendant's right to a fair trial, the trial court must select and apply an appropriate remedy and, if necessary, an appropriate sanction.

CrR 8.3(b) sets forth the trial court's discretion in this regard. The rule reads, "The court . . . .may dismiss any criminal prosecution due to . . . governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." (Emphasis added.) Thus, CrR 8.3(b) grants the trial court discretion to "fashion an appropriate remedy, recognizing that dismissal is an extraordinary remedy, appropriate only when other, less severe sanctions will be ineffective." . . . .

If called upon to fashion a remedy on remand, the trial court should consider the totality of the circumstances, evaluating both the degree of prejudice to Irby's right to a fair trial and the degree of nefariousness of the conduct by the State actors. This might Include considering the motivations of the jail guards, Irby's failure to follow Skagit County Jail policies regarding outgoing legal mail, and the extent to which, if at all, Irby's privileged attorney-client communications were utilized by the State in its third prosecution of Irby or could be so utilized in the future.

In the event that the trial court determines that a remedy short of dismissal Is warranted, vacation of the judgment will nevertheless be necessary. In addition, in anticipation of yet another trial, other remedies might include – singularly or in combination – suppression of evidence, disqualification of specific attorneys from Irby's prosecution, disqualification of the Skagit County Prosecuting Attorney's Office from further participation In the case, or exclusion of witnesses tainted by the governmental misconduct.

[Some citations omitted]

VOYEURISM PER CHAPTER 9A.44 RCW: WINDOW-PEEPING DEFENDANT'S STRAINED READING OF THE STATUTE IS REJECTED; UNLAWFUL VIEWING FOR MORE THAN A BRIEF PERIOD OF TIME VIOLATES STATUTE IF DONE EITHER WITHOUT VICTIM'S KNOWLEDGE OR WITHOUT VICTIM'S CONSENT

In State v. Stutzke, ___ Wn. App.2d ___ , ___ P.3d ___ (Div. III, March 22, 2018), Division Three of the Court of Appeals rejects the defendant's argument that the voyeurism statute does not apply unless the alleged violator views the victim both (1) without the victim's knowledge, and (2) without the victim's consent.

The Court of Appeals describes the key facts of the Stutzke case as follows:

> The Stutzke and Townshend families were longtime neighbors. After Mr. Stutzke reached adulthood, he began exhibiting unwanted attention toward Ms. Townshend. Ms. Townshend eventually obtained an antiharassment protection order. The order prohibited Mr. Stutzke from making contact with Ms. Townshend or coming within 50 feet of her property. The order was set to expire in 2015.
>
> Things between Mr. Stutzke and Ms. Townshend came to a head on August 16, 2013. Ms. Townshend awoke around 6:00 a.m. and opened her bedroom blinds and window. She then returned to bed and laid on top of the covers while naked. After briefly dozing off, Ms. Townshend awoke to see Mr. Stutzke standing at the open window, his hands resting on the window sill while he stared at her. Ms. Townshend immediately went to close the blinds but, in her haste and fear, she pulled the blinds from the wall. Ms. Townshend shouted at Mr. Stutzke to leave, but he did not. Mr. Stutzke never turned away or averted his gaze. He did not appear frightened or nervous when Ms. Townshend caught him. Mr. Stutzke remained fixated on Ms. Townshend until she retreated to an area of the room that was out of Mr. Stutzke's range of sight.
>
> Ms. Townshend called the police to report Mr. Stutzke's behavior. Mr. Stutzke was arrested shortly thereafter.

Stutzke was convicted on voyeurism, violation of a protective order, felony stalking, and attempted residential burglary.

The legislature has defined the crime of voyeurism (now first degree voyeurism) through a single sentence, containing several component parts. The controlling sentence at the time of the offense conduct stated:

> (2) A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly views, photographs, or films: (a) Another person **without that person's knowledge and consent** while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy; or (b) The intimate areas of another person **without that person's knowledge and consent** and under circumstances where the person has a reasonable expectation of privacy, whether in a public or private place.

Former RCW 9A.44.115(2) (2003) (emphasis added).

The verb "views," as used in the voyeurism statute, has a special meaning. RCW 9A.44.115(1)(e). It does not include a momentary or casual observation. Instead, in order to "view" something for purposes of voyeurism, a defendant's act of observation must last "for more than a brief period of time."

In Stutzke's appeal to the Court of Appeals, he argued that the voyeurism statute requires that the State prove that the victim both (1) knew of the defendant's unlawful viewing and (2) did not consent to the unlawful viewing. The Court of Appeals disagrees, ruling that either a victim's lack of knowledge of the viewing or lack of consent to the unlawful viewing satisfies the statute. In key part, the Court of Appeals' explanation is as follows:

Based on the wording of the statute, if either knowledge or consent is absent, then the combination is not present and the statute is satisfied. An analogy would be RCW 46.16A.030(2), which prohibits operating a vehicle without proper "registration and displaying license plates." A violation occurs so long as one component of the registration and license plate combination is missing. There is no requirement that both be absent.

Our case law has previously interpreted voyeurism in this manner. In State v. Fleming, 137 Wn. App. 645, 647-48 (2007), we found the defendant committed voyeurism when he was caught peering down at a woman who was seated inside of a bathroom stall. Given the only witnesses were the woman and the defendant, there was no third party evidence of how long the defendant had been looking at the victim prior to being caught. However, the defendant continued to look at the victim as she yelled at him, told him she had a cell phone, yelled for help, and then ran out of the stall. We held that the defendant's conduct, all of which occurred with the victim's knowledge but not consent, was sufficiently prolonged to fall under the verb "views" and thus the statute was met. It did not matter that the State failed to present evidence indicating the defendant viewed the woman for an appreciable period of time without her knowledge.

Here, the State presented more than sufficient evidence to satisfy the plain terms of the voyeurism statute. The evidence showed Mr. Stutzke began watching Ms. Townshend's naked body while she was lying on her bed. Mr. Stutzke then continued to observe Ms. Townshend as she looked up at him, yelled at him to leave, rushed to her window, and tried to close the blinds. The entire episode lasted more than a brief period of time. It was never consensual. Sufficient evidence supports Mr. Stutzke's conviction.

Result: Affirmance of Spokane County Superior Court conviction of Benjamin Eric Stutzke for voyeurism, violation of a protection order, felony stalking, and attempted residential burglary.

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

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

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

In April 2018, ten unpublished Court of Appeals opinions fit these categories. I do not promise to be able catch them all, but I will make a reasonable effort to find and list all decisions with these issues in unpublished opinions from the Court of Appeals. I hope that readers,

particularly attorney-readers, will let me know if they spot any cases that I missed in this endeavor, as well as any errors that I may make in my brief descriptions of case results.

1. State v. Christopher Von Keith Cowan: On April 9, 2018, Division One of the COA decides against the criminal defendant's appeal and affirms his Snohomish County Superior Court convictions for *first degree assault, first degree robbery, and second degree attempted murder*. Among other things, the Court of Appeals rules that **a photo montage was not impermissibly suggestive** where defendant's skin complexion is depicted as somewhat darker than are the complexions of others depicted in the photo montage; a factor in the decision for the State is that the officer advised the person viewing the montage that the lightness or darkness of skin complexions may be darker or lighter than as depicted in the pictures in the montage. The Court of Appeals also notes that, while the witness testified that the officer confirmed his pick from the montage at the time he made it, the officer denied that he did so. Research Note: For discussion of identification procedures, see the article on the subject on the Law Enforcement Digest internet page of the Criminal Justice Training Commission.

2. State v. John K. L. Aylward: On April 10, 2018, Division Two of the COA decides against the criminal defendant's appeal affirms his multiple Pacific County Superior Court convictions stemming from his repetitive sexual abuse of his stepdaughter (*including six counts of rape of a child in the first degree and also counts relating to his possession of child pornography*). Among other things, the Court of Appeals rules that **the search warrant in his case meets the particularity requirement of the Fourth Amendment**; it made a difference to the Court of Appeals on the particularity issue that the warrant's targets included evidence of child sex crimes and did not target only child pornography, which requires greater particularity in the warrant description.

3. State v. Carlos E. Perez Calderon: On April 10, 2018, Division Two of the COA decides against the criminal defendant's appeal and affirms his Pierce County Superior Court conviction for *second degree murder*. Among other things, the Court of Appeals rules that **a Mirandized videotaped custodial interrogation by a detective was not coercive** where (1) the interrogation was conducted in English (defendant appeared on the tape to understand English); (2) it lasted 2.5 hours (this was not too long under the circumstances); and (3) the detective occasionally raised his voice during the course of the interrogation (the trial court reasonably found that this reasonable tactic did not go out of bounds so as to overcome the will of the defendant).

4. State v. Jesus Martinez: On April 12, 2018, Division Three of the COA decides against the criminal defendant's appeal and affirms his Adams County Superior Court convictions for *possession of methamphetamine with intent to deliver and second degree unlawful possession of a firearm*. The Court of Appeals rules that a search warrant affidavit established informant-based probable cause by meeting both the veracity prong and the basis-of-information prong of the **Aguilar-Spinelli test for informant-based probable cause**; the Court notes that admissions that the informant's credibility was bolstered by statements he made to police "against his penal interest" following the informant's arrest for police-witnessed selling of illegal drugs.

5. State v. Megan Cherise Lares-Stormes: On April 17, 2018, Division Three of the Court of Appeals decides against the criminal defendant's appeal and affirms her Walla Walla County Superior Court convictions for *possession of methamphetamine with intent to deliver* and *use of drug paraphernalia*. The Court of Appeals rules that: (1) **police acted lawfully under article I, section 7 of the Washington constitution in using a drug-sniffing dog to do a warrantless**

sniff in the area immediately outside her parked and locked car (while the car was located in a food mart parking lot) after the defendant had been arrested from the car in the food mart parking lot; and (2) defendant's challenge to the **reliability of the drug-sniffing dog** fails.

6. State v. Kevin Dale Best: On April 23, 2018, Division One of the Court of Appeals decides in favor of the State's appeal and reverses the decision of the Snohomish County Superior Court that dismissed, based on lack of substantial evidence, child-sex-sting-related charges of *attempted first degree child rape, attempted second degree child rape* and *first degree child molestation*. The Court of Appeals rules that defendant's words in texts, emails and phone calls evidenced his intent to commit the crimes, and that **his appearance at the arranged time at the sting-arranged sex site bearing gifts for his intended victims was a substantial step toward completion of the crimes**.

7. State v. Charles Jerome Courtney: On April 23, 2018, Division One of the Court of Appeals decides against the criminal defendant's appeal and affirms his Snohomish County Superior Court convictions for *first degree murder* and *possession of heroin with intent to distribute*. The Court of Appeals rules that **the defendant was not in custody for Miranda purposes** when an officer questioned him at the crime scene in the front seat of a patrol car, and the officer informed him, among other things, that he was free to leave at any time; the Court of Appeals rejects an argument (that defense attorneys keep trying) that focus of investigation and development of probable cause to arrest are in themselves triggers to the Miranda warnings requirement.

8. State v. Sean Michael Healy: On April 24, 2018, Division Three of the Court of Appeals decides against the defendant's appeal and affirms his Whitman County Superior Court conviction for *possession of cocaine*. The Court of Appeals rules that an officer had **authority to briefly detain the defendant for an infraction** when the officer saw the defendant outdoors behind a garbage bin in a stance with his head down and hands at his groin consistent with urinating in public, and that the officer then developed **probable cause to arrest** the defendant when the defendant **obstructed** the officer by trying to run away.

9. State v. Laura Jean Taylor: On April 24, 2018, Division Three of the Court of Appeals decides against the defendant's appeal and affirms her Benton County Superior Court conviction for *possession of methamphetamine*. The Court of Appeals rules that the defendant is not entitled to a hearing under Franks v. Delaware, 438 U.S. 154 (1978) to challenge a search warrant based on **alleged reckless or intentional omission of facts from the supporting affidavit**; the Court concludes that even with certain omitted facts added to the affidavit, the affidavit established probable cause to search the defendant's purse as authorized under the search warrant.

10. State v. Cade Grey Hendricks: On April 24, 2018, Division Two of the Court of Appeals decides against the defendant's appeal and affirms his Clallam County Superior Court conviction *for violation of a domestic violence conviction no-contact order*. The Court of Appeals rules that a **patrol officer had authority to stop the defendant's vehicle based on the officer's records check that disclosed a failure to timely transfer title to the vehicle**.

Note also that on April 24, 2018, Division Three of the Court of Appeals issued two unpublished opinions in civil cases involving law enforcement officers that may be of interest to some Legal Update readers.

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NEXT MONTH

The May 2018 Legal Update for Washington Law Enforcement will include entries, among others, digesting the following two published decisions from the Washington Court of Appeals:

(1) **SCOPE OF AUTHORITY TO SEARCH UNDER SEARCH WARRANT** In State v. Witkowski,, Division Two of the Court of Appeals holds in an April 24, 2018 published opinion that a search warrant for firearms located in a residence allows officers to search a locked gun safe, even where the investigators were aware of a locked gun case on the premises and did not specify in the search warrant that the authorization extended to searching the locked gun case.

(2) TRAVELING IN THE LEFT LANE OF A MULTILANE ROADWAY In State v. Thibert, in an April 26, 2018 published opinion, Division Three of the Court of Appeals addresses **RCW 46.61.100**, which makes it a traffic violation to continuously drive in the left lane of a multilane roadway except in four exceptions. The Court of Appeals holds that all of the exceptions listed in RCW 46.61.100(2) are "transient," and that even when one of the four exceptional circumstances exist, it is an infraction to travel continuously in the left lane if the actions of the driver will impede the flow of traffic. The Court declares: "An individual is permitted to drive in the left lane when one of the transient exceptions identified in subsection (2) applies, unless the transient exceptions arise so frequently that the individual's continuing travel in the left lane is impeding traffic."

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

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

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

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

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

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

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

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

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