LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: Thank you!

APRIL 2019

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CRIMINAL JUSTICE TRAINING COMMISSION'S "LAW ENFORCEMENT ONLINE TRAINING DIGEST" EDITIONS FOR DECEMBER 2018 & JANUARY 2019

Readers of this Legal Update are no doubt aware that the Law Enforcement Digest Online Training, which was introduced to the Criminal Justice Training Commission's Law Enforcement Digest page over a year ago. The CJTC has explained that this refreshed edition of the LED continues the transition to an online training resource created with the Washington law enforcement officer in mind. Select recent court rulings are summarized briefly and arranged by topic, with emphasis placed on the practical application to law enforcement practices. Each cited case includes a hyperlinked title for those who wish to read the court's full opinion. Links are also provided to two additional Washington State prosecutor and law enforcement case law reviews and references (one of which is this Legal Update). The December 2018 LED Online Training edition was recently placed on the LED website, so there are now editions for each month of 2018. An edition for January 2019 also has been recently placed on the website.

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UNITED STATES SUPREME COURT

COURT WILL DECIDE IF VEHICLE STOP BASED ON DRIVER'S LICENSE SUSPENSION STATUS OF REGISTERED OWNER IS LAWFUL WHERE OFFICER DOES NOT HAVE INFORMATION THAT SOMEONE ELSE IS OPERATING THE VEHICLE

In Kansas v. Glover, Docket No. 18-556, the United States Supreme Court has granted the request of the State of Kansas for review of a Kansas Supreme Court decision. The U.S. Supreme Court describes the Fourth Amendment issue in the case as follows:

> Whether, for purposes of an investigative stop under the Fourth Amendment, it is reasonable for an officer to suspect that the registered owner of a vehicle is the one driving the vehicle absent any information to the contrary.

Oral argument in Glover likely will be held in November 2019. The U.S. Supreme Court is expected to rule by June 30, 2020.

Washington appellate courts and the appellate courts in a number of other jurisdictions have made decisions that conflict with the anti-state Kansas Supreme Court decision in this case. Squarely on point is State v. Phillips, 126 Wn. App. 584 (2005). In State v. Penfield, 108 Wn. App 157 (2001), the Court of Appeals likewise declared that an vehicle stop was lawful in this circumstance, but that once the officer determined that the operator of the stopped vehicle was not the registered owner, then the Terry stop should have ended without further investigation of the operator.

LEGAL UPDATE EDITOR'S HANDICAPPING NOTE: I have never had any substantial doubts about the correctness of Phillips/Penfield rule under the Fourth Amendment in light of the relatively low bar of Terry's "reasonable suspicion" standard. Balanced against the relatively minimal nature of the intrusion of a vehicle stop, it is reasonable to

assume, absent contrary information, that the driver of a vehicle is the registered owner. I will bet anyone a quarter/25 cent (my standard bet) that if the U.S. Supreme Court reaches the merits of the case, the Court will rule (though not unanimously) for the State of Kansas in the Glover case.

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NINTH CIRCUIT, UNITED STATES COURT OF APPEALS

SEIZURE OF MOLESTER ON AIRPLANE WAS AN ARREST, BUT THE ARREST WAS SUPPORTED BY PROBABLE CAUSE; ALSO, THE ARRESTEE UNDERSTOOD THE MIRANDA WARNINGS, AND BOTH HIS WAIVER AND HIS STATEMENTS TO INTERROGATORS WERE VOLUNTARY

U.S. v. Price, ___ F.3d ___ , 2019 WL ___ (April 12, 2019)

Facts and Proceedings below:

During an overnight flight from Tokyo, Japan to Los Angeles, California, Juan Pablo Price, a forty-six-year-old man, moved from his assigned seat to an open seat adjacent to that of a sleeping twenty-one-year-old female Japanese student, where he fondled her breast and slipped his hand into her underwear, touching her vagina.

Two LAPDX officers and a Customs officer were dispatched and they met the plane on the tarmac. Collectively, the officers were aware that a female passenger had reported that Price had perpetrated a sexual offense. The pilot had sent an advance message asking LAXPD to meet the airplane, stating "WE HAVE A MOLESTER/FONDLER ON BOARD." The actions of the flight crew demonstrated that they viewed the allegations as credible as they sought law enforcement assistance. Before contacting Price, the officers spoke directly with the purser, lead flight attendant Zidan, who reported that a female passenger had complained about a male passenger touching her and gave details about where both individuals were sitting on the plane.

While the other passengers remained seated, Price was contacted by the three armed law enforcement officers. The officers escorted Price off the plane at a remote gate. One of the officers performed a pat-down search and another officer handcuffed him. The officers kept Price in handcuffs until an FBI agent interviewed him over two hours later.

Before the agent interviewed Price, he removed the handcuffs. Price asked for clarification that he was not under arrest, and the agent confirmed that Price was not under arrest. The agent then recited the Miranda rights, as Price read along and responded "Mm-hmm" at various points. At the end, Price asked once again whether or not he was under arrest, noting that in movies, when you hear Miranda rights, "you know that somebody is being arrested." The agent again assured Price that he was not under arrest. Price signed the "Advice of Rights" form. At the end of the interview, the agent cited Price with simple assault and allowed him to leave.

Price was charged with a federal crime under 18 U.S.C. § 2244(b) for knowingly engaging in sexual contact with another person without that other person's permission on an international flight. The U.S. District Court denied his motions to suppress his statements, and he was convicted in a jury trial.

ISSUES AND RULINGS: 1. Officers met Price on the plane, escorted him off the plane at a remote gate while other passengers remained seated, patted him down, handcuffed him and kept him in handcuffs for over two hours until he was interrogated by an FBI agent. Was Price arrested by the officers who took him off the plane such that probable cause is required to support the officers' actions? (ANSWER BY NINTH CIRCUIT PANEL: Yes, he was arrested by the officers)

2. The officers who took Price off the plane had information from the pilot and flight crew that the pilot and flight crew had found credible a female passenger's report that Price – who had changed seats without permission – had molested her while she slept. Did the officers have probable cause to arrest Price? (ANSWER BY NINTH CIRCUIT PANEL: Yes, probable cause supported the arrest)

3. Is there substantial evidence to support the trial court's finding that Price understood the Miranda warnings given by the FBI interrogator? (ANSWER BY NINTH CIRCUIT PANEL: Yes)

4. Is there substantial evidence to support the trial court's finding that Price's Miranda waiver was voluntary? (ANSWER BY NINTH CIRCUIT PANEL: Yes)

5. Is there substantial evidence to support the trial court's finding that Price's statements to the interrogator were voluntary? (ANSWER BY NINTH CIRCUIT PANEL: Yes)

Result: Affirmance of conviction by U.S. District Court (Central District) of Juan Pablo Price for violation of U.S.C. § 2244(b) by knowingly engaging in sexual contact with another person without that other person's permission on an international flight.

ANALYSIS:

1. Price was arrested by the officers who took him off the plane

The Ninth Circuit Opinion explains as follows the conclusion that Price was arrested:

> In the context of an international border, an arrest occurs when "a reasonable person would believe that he is being subjected to more than the temporary detention occasioned by border crossing formalities." United States v. Bravo, 295 F.3d 1002, 1009 (9th Cir. 2002) We ask, considering the totality of the circumstances, "whether a reasonable innocent person in such circumstances would conclude that after brief questioning he or she would not be free to leave." "[H]andcuffing is a substantial factor in determining whether an individual has been arrested" – although it "alone is not determinative." see also United States v. Guzman-Padilla, 573 F.3d 865, 884 (9th Cir. 2009) ("[O]fficers with a particularized basis to believe that a situation may pose safety risks may handcuff or point a gun at an individual without converting an investigative detention into an arrest.").
>
> Price was escorted by three armed law enforcement officers off the plane at a remote gate, while the rest of the passengers remained seated. Officer Faytol performed a patdown search and Officer Lee handcuffed him. This was not a routine border airport screening and search process, as the district court found. Although the officers cited safety justifications for handcuffing Price, including the fear that Price might become aggressive as other passengers deplaned, the officers kept Price in handcuffs until the FBI interviewed him – from the time Price deplaned at approximately 9:08 AM, until after

S.A. Gates arrived at around 11:30 AM. This was not a "temporary detention occasioned by border crossing formalities"; this was an arrest.

[Some citations omitted, others revised for style]

2. Probable cause supported the arrest by the officers who took Price off the plane

Police may arrest a suspect if "under the totality of circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that the defendant had committed a crime." . . . We must "consider the nature and trustworthiness of the evidence of criminal conduct available to the police." The police need not know, however, precisely what offense has been committed. See United States v. Chatman, 573 F.2d 565, 567 (9th Cir. 1977) (per curiam) (finding probable cause where officers believed only that the defendant was "clandestinely engaging in illegal business of some kind").

Here, the officers had "reasonably trustworthy information" to arrest Price as he deplaned. They knew that a female passenger had reported that Price had perpetrated a sexual offense. The pilot had sent an advance message asking LAXPD to meet the airplane, stating "WE HAVE A MOLESTER/FONDLER ON BOARD." The actions of the flight crew demonstrated that they viewed the allegations as credible as they sought law enforcement assistance.

We reject Price's argument that the officers lacked probable cause because the information available to the officers was not trustworthy. We acknowledge the minor differences in the officers' recollections of the event at the suppression hearing – [one officer] recalled that the incident was a "290," the code for sexual battery, while [another officer] recalled that the incident was a "311," the code for indecent exposure. However, these differences did not render the information untrustworthy.

Price also points to [the FBI agent's] testimony that mid-flight reports can be unreliable because they involve a series of messengers. Although we disagree that mid-flight reports are categorically so untrustworthy that they can never establish probable cause, we need not address these concerns here because before arresting Price, the officers spoke directly with the purser, lead flight attendant Zidan, who reported that a female passenger had complained about a male passenger touching her and gave details about where both individuals were sitting on the plane. Based on purser Zidan's report, "a prudent person would have concluded that there was a fair probability that the defendant had committed a crime."

[Some citations omitted, others revised for style]

3.4.5. Price understood the Miranda warnings, he voluntarily waived his rights, and he voluntarily talked to the interrogator

Before [the FBI agent] interviewed Price, he removed the handcuffs. [The agent] then explained to Price his Miranda rights, describing it as "just like you see on T.V." Price first sought clarification that he was not arrested, which [the agent] confirmed, and [the agent] then recited the Miranda rights, as Price read along and responded "Mm-hmm" at various points.

At the end, Price asked once again whether or not he was under arrest, noting that in movies, when you hear Miranda rights, "you know that somebody is being arrested." [The FBI agent] again assured Price that he was not under arrest. Price signed the "Advice of Rights" form. At the end of the interview, [the agent] cited Price with simple assault and allowed him to leave.

"To admit an inculpatory statement made by a defendant during custodial interrogation, the defendant's waiver of Miranda rights must be voluntary, knowing, and intelligent." . . . In determining the knowing and intelligent nature of the waiver, we consider the totality of the circumstances, including

> (i) the defendant's mental capacity; (ii) whether the defendant signed a written waiver; (iii) whether the defendant was advised in his native tongue or had a translator; (iv) whether the defendant appeared to understand his rights; (v) whether the defendant's rights were individually and repeatedly explained to him; and (vi) whether the defendant had prior experience with the criminal justice system.

United States v. Crews, 502 F.3d 1130, 1140 (9th Cir. 2007) (citation omitted).

Price disputes only the fourth factor – whether he understood his rights. Price argues that his questions to [the agent] showed that he did not understand that he could exercise his Miranda rights. However, Price's questions were all directed towards clarifying whether or not he was actually under arrest. As the district court found, Price "was not confused as to the nature and extent of his rights" but rather "was confused about why ('the reason') he was being read his rights given that [the FBI agent] had told him only moments earlier that he was not under arrest."

We must also find that both Price's waiver and the statements themselves were voluntary. A Miranda "waiver is voluntary if, under the totality of the circumstances, the confession was the product of a free and deliberate choice rather than coercion or improper inducement." . . . . We find the confession voluntary unless, "considering the totality of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne." . . . .

We agree with the district court that both Price's waiver and his statements were voluntary. Price mischaracterizes the record of the interview. [The agent] never threatened Price with his power to detain him unless he answered [the agent's] questions. It is evident from the record that [the agent] stated in a jocular manner that he could find a reason to arrest Price if Price wanted – a joke that elicited Price's laughter – and [the agent] explained that it was his expectation that Price would "walk out of here" that day**. [LEGAL UPDATE EDITOR'S COMMENT: Beware of jokes of this nature during an interrogation. Not all reviewing courts will choose to view the circumstances in the same reasonable manner as this Court did.]**

The interview does not reveal any sign of coercion: Price was not in handcuffs or otherwise physically restrained, and the FBI agents asked Price if he was doing okay and if he needed water or to use the bathroom.

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

CIVIL RIGHTS ACT CIVIL LIABILTIY: ON REMAND FROM U.S. SUPREME COURT REVERSAL, NINTH CIRCUIT PANEL CONCLUDES THAT THE CASE LAW IS NOT CLEARLY ESTABLISHED ON POINT, AND THEREFORE GRANTS QUALIFIED IMMUNITY TO OFFICER WHO WRESTLED A SUSPECT TO THE GROUND DURING A DV CALL

City of Escondido v. Emmons, ___ F.3d ___ , 2019 WL ___ (9th Cir., April 25, 2019)

Facts: (Excerpted from Ninth Circuit Opinion)

> At the time this action was filed, Maggie Emmons lived in Escondido, California, with her husband, their two children, and a roommate, Ametria Douglas. In April 2013, Maggie called 911, accusing her husband of domestic violence. Escondido police arrested the husband, but he was never prosecuted.
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> In May 2013, Douglas was on the phone with her mother. After the call dropped, Douglas's mother called 911 to report what she believed was an on-going fight at the apartment. The Escondido police were asked to conduct a welfare check. Officer Craig was one of the responding officers.
>
> When the Escondido officers arrived on the scene, they found Douglas with the Emmons children at the swimming pool complex of the apartment. Douglas told the officers that everything was fine and that they were not needed. The officers proceeded to the apartment nonetheless. Maggie and her father, Marty Emmons, were watching television. Although Marty urged her to cooperate, Maggie refused to allow the officers to enter the apartment despite their repeated requests.
>
> Marty then emerged from the apartment, and the physical encounter with [Officer] Craig that is the subject of this case ensued. The parties dispute what happened and, on this appeal from an adverse summary judgment, we must take the facts in the light most favorable to Marty. Tolan v. Cotton, 572 U.S. 650, 655–57 (2014) (per curiam). Marty testified that he stepped out of the apartment with his back to the exterior hallway and began to close the door. He could not see any officers by the door and did not hear anyone telling him to keep the door open. He first knew that [Officer] Craig was there when [Officer] Craig grabbed him and threw him to the ground. Douglas, who was watching from the pool, described the interaction as one in which "Mr. Emmons was pulled out of the door," and "tackled to the ground."
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> The police body cameras recorded [Officer] Craig saying the following: "Hi. How you doing sir? Don't close the door. Get your hands behind your back. Get on the ground, get on the ground, get on the ground." The physical interaction with Marty occurs as [Officer] Craig is speaking.

Prior and Current Proceedings:

Marty filed a Civil Rights Act lawsuit in a federal district court in California against the City of Escondido and against Officer Craig, among other officers. The district court granted qualified immunity to the City and all of the named officers. In an unpublished Opinion, a three-judge Ninth Circuit panel reversed as to Officer Craig and held that the case law was established that the alleged level of force was excessive in violation of the Fourth Amendment. On the City's

petition to the U.S. Supreme Court, the Supreme Court reversed on grounds that the Ninth Circuit had not properly analyzed whether the case law is "established" on these facts. The U.S. Supreme Court essentially directed the Ninth Circuit to either identify controlling case law against the City closely on point factually or to grant Officer Craig qualified immunity.

Now, on remand, the three-judge Ninth Circuit panel has ruled that Craig is entitled to qualified immunity because the case law is not established against the actions of Officer Craig in wrestling Marty to the ground. Note that the panel does not decide one way or the other whether the use of force was excessive, deciding only that even if the use of force could be deemed excessive, the case law has not clearly established that point.

ISSUE AND RULING BY NINTH CIRCUIT ON REMAND: For purposes of qualified immunity analysis under the Civil Rights Act, did Officer Craig violate the clearly established right of plaintiff under the Fourth Amendment when Officer Craig wrestled him to the ground under the reasonable perception that plaintiff was a possible suspect in a domestic violence incident? (ANSWER BY COURT OF APPEALS: No, Officer Craig did not violate a "clearly established" constitutional right of the plaintiff to be free from the use of force by law enforcement)

Result: Affirmance of U.S. District Court ruling that granted qualified immunity to Officer Craig.

ANALYSIS: (Excerpted from Ninth Circuit Opinion)

> Qualified immunity shields government officials from liability for civil damages when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." . . . . In this context, "clearly established" means that, "at the time of the officer's conduct, the law was 'sufficiently clear that every reasonable official would understand that what he is doing' is unlawful." . . . . . Courts must "define the 'clearly established' right at issue on the basis of the 'specific context of the case.'" . . . . Thus, liability will not attach unless there exists "a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment." . . . . A plaintiff "bears the burden of showing that the right at issue was clearly established." . . . .
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> Marty cited several cases that he believes clearly establish that Craig used excessive force. . . . Those cases, however, do not present sufficiently similar factual circumstances to have "placed the . . . constitutional question beyond debate." . . . . In several of the cases, the force used was significantly greater than the force used in this case or involved differently situated plaintiffs. . . .
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> . . . .
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> The case closest to this one that we have discovered is Hansen v. Black, 885 F.2d 642 (9th Cir. 1989). Investigating a gas station robbery, police officers went to the plaintiff's residence, suspecting that her son may have been involved. They found the plaintiff outside, taking out her trash, and we held that that the officers used excessive force in handcuffing her "in an abusive manner" after she refused to comply with an officer's order to put the trash down. But here, the officers were investigating an incident that occurred inside the Emmons home, and Marty had not been ruled out as a possible suspect.

> Although Marty posed no apparent danger to [Officer] Craig, we are mindful of the Supreme Court's conclusion that a case involving police force employed in response to mere "passive resistance" to police is not sufficiently on point to constitute clearly established law. . . . The Court therefore must have concluded implicitly that Marty's actions involved more than passive resistance. Otherwise, the Court would not have vacated our decision . . . Given the Court's admonition, we are unable to find a case so precisely on point with this one as to satisfy the Court's demand for specificity. Officer Craig is therefore entitled to qualified immunity.
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> [Court's Footnote: *Because we hold that [Officer] Craig is entitled to qualified immunity, we do not address whether he violated Mr. Emmons's constitutional rights. . . . The [United States] Supreme Court has advised that "lower courts 'should think hard, and then think hard again,' before addressing both qualified immunity and the merits of an underlying constitutional claim*." . . . .

[Most citations omitted]

CIVIL RIGHTS ACT CIVIL LIABILITY: NINTH CIRCUIT PANEL MAINTAINS ITS 2018 RULING THAT EIGHTH AMENDMENT'S PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT PRECLUDES – AT ALL TIMES WHEN PUBLIC SHELTER IS NOT AVAILABLE – ENFORCEMENT OF CITY OF BOISE ORDINANCE PROHIBITING CAMPING/SLEEPING ON PUBLIC PROPERTY; STAGE MAY BE SET FOR U.S. SUPREME COURT REVIEW OF THIS CASE IN 2020

In Martin v. City of Boise, ___ F.3d ___ , 2019 WL ___ (9th Cir., April 1, 2019), a three-judge panel of the Ninth Circuit makes minor amendments but no material changes to the lead opinion issued by the same three-judge panel in Martin v. City of Boise, 902 F.3d 1031 (9th Cir., September 4, 2018). Thus, in an April 1, 2019 ruling, the three-judge Ninth Circuit panel maintains its 2018 ruling that the Cruel and Unusual Punishment clause of the Eighth Amendment precludes, when no public shelter is available, the enforcement of a Boise ordinance prohibiting camping or sleeping on public property. .

A slim majority of a larger group of Ninth Circuit judges also rules on April 1, 2019 that the matter should not be reconsidered by an 11-judge Ninth Circuit panel. This could set the stage for this controversial, ground-breaking decision by the Ninth Circuit to be reviewed in the U.S. Supreme Court in 2020, though that possible eventuality is very hard to predict, and the answer will not be known until many months have passed.

This decision has sparked extensive discussion in a variety of media outlets. Interested readers may want to Google the case title, Martin v. City of Boise.

The lead Opinion for the Ninth Circuit panel explains (as did the Opinion that was originally issued on September 4, 2018) that it is not a simple matter for the City of Boise to show that shelter is available for the homeless. Thus, the Court explains as follows:

> In dismissing Martin and Anderson's claims for declaratory relief for lack of standing, the district court emphasized that Boise's ordinances, as amended in 2014, preclude the City from issuing a citation when there is no available space at a shelter, and there is consequently no risk that either Martin or Anderson will be cited under such

circumstances in the future. Viewing the record in the light most favorable to the plaintiffs, we cannot agree.

Although the 2014 amendments preclude the City from enforcing the ordinances when there is no room available at any shelter, the record demonstrates that the City is wholly reliant on the shelters to self-report when they are full. It is undisputed that Sanctuary is full as to men on a substantial percentage of nights, perhaps as high as 50%. The City nevertheless emphasizes that since the adoption of the Shelter Protocol in 2010, the BRM facilities, River of Life and City Light, have never reported that they are full, and BRM states that it will never turn people away due to lack space.

The plaintiffs have pointed to substantial evidence in the record, however, indicating that whether or not the BRM facilities are ever full or turn homeless individuals away *for lack of space*, they *do* refuse to shelter homeless people who exhaust the number of days allotted by the facilities. Specifically, the plaintiffs allege, and the City does not dispute, that it is BRM's policy to limit men to 17 consecutive days in the Emergency Services Program, after which they cannot return to River of Life for 30 days; City Light has a similar 30-day limit for women and children. Anderson testified that BRM has enforced this policy against him in the past, forcing him to sleep outdoors.

The plaintiffs have adduced further evidence indicating that River of Life permits individuals to remain at the shelter after 17 days in the Emergency Services Program only on the condition that they become part of the New Life Discipleship program, which has a mandatory religious focus. For example, there is evidence that participants in the New Life Program are not allowed to spend days at Corpus Christi, a local Catholic program, "because it's . . . a different sect." There are also facts in dispute concerning whether the Emergency Services Program itself has a religious component. Although the City argues strenuously that the Emergency Services Program is secular, Anderson testified to the contrary; he stated that he was once required to attend chapel before being permitted to eat dinner at the River of Life shelter. Both Martin and Anderson have objected to the overall religious atmosphere of the River of Life shelter, including the Christian messaging on the shelter's intake form and the Christian iconography on the shelter walls. A city cannot, via the threat of prosecution, coerce an individual to attend religion-based treatment programs consistently with the Establishment Clause of the First Amendment. Inouye v. Kemna, 504 F.3d 705, 712-13 (9th Cir. 2007). Yet at the conclusion of a 17-day stay at River of Life, or a 30-day stay at City Light, an individual may be forced to choose between sleeping outside on nights when Sanctuary is full (and risking arrest under the ordinances), or enrolling in BRM programming that is antithetical to his or her religious beliefs.

The 17-day and 30-day limits are not the only BRM policies which functionally limit access to BRM facilities even when space is nominally available. River of Life also turns individuals away if they voluntarily leave the shelter before the 17-day limit and then attempt to return within 30 days. An individual who voluntarily leaves a BRM facility for any reason – perhaps because temporary shelter is available at Sanctuary, or with friends or family, or in a hotel – cannot immediately return to the shelter if circumstances change. Moreover, BRM's facilities may deny shelter to any individual who arrives after 5:30 pm, and generally will deny shelter to anyone arriving after 8:00 pm. Sanctuary, however, does not assign beds to persons on its waiting list until 9:00 pm. Thus, by the time a homeless individual on the Sanctuary waiting list discovers that the shelter has no room available, it may be too late to seek shelter at either BRM facility.

> So, even if we credit the City's evidence that BRM's facilities have never been "full," and that the City has never cited any person under the ordinances who could not obtain shelter "due to a lack of shelter capacity," there remains a genuine issue of material fact as to whether homeless individuals in Boise run a credible risk of being issued a citation on a night when Sanctuary is full and they have been denied entry to a BRM facility for reasons other than shelter capacity. If so, then as a practical matter, no shelter is available. We note that despite the Shelter Protocol and the amendments to both ordinances, the City continues regularly to issue citations for violating both ordinances; during the first three months of 2015, the Boise Police Department issued over 175 such citations.
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> . . . .
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> We conclude that both Martin and Anderson have demonstrated a genuine issue of material fact regarding whether they face a credible risk of prosecution under the ordinances in the future on a night when they have been denied access to Boise's homeless shelters; both plaintiffs therefore have standing to seek prospective relief.

Result: Three-judge panel reverses in part and affirms in part the order of U.S. District Court (Idaho) that granted summary judgment to the City of Boise on all issues; a larger panel of Ninth Circuit judges denies, in a close vote, a rehearing of this matter by an 11-judge Ninth Circuit panel.

ASSAULT DURING AIRPLANE FLIGHT: NINTH CIRCUIT PANEL RULES 2-1 THAT VENUE IS NOT PROPER IN A FEDERAL DISTRICT COURT WHERE NO PART OF THE ASSAULT OCCURRED WITHIN THE TERRITORIAL BOUNDARIES OF THAT DISTRICT COURT

In United States v. Lozoya, ___ F.3d ___ , 2019 WL ___ (9th Cir., April 11, 2019), a three judge Ninth Circuit panel reverses a federal assault conviction, ruling 2-1 that the federal court for the Central District of California lacked authority (venue) to consider a federal assault prosecution where no part of the assault occurred in the Central District of California. The assault occurred during an airplane flight from Minneapolis to Los Angeles. The assault was complete before the flight reached the territory covered by the federal Central District for California.

A staff summary (which is not part of the Court's Opinions), describes the venue analysis in the Majority Opinion and Dissenting Opinion as follows:

> The panel reversed for improper venue a conviction for assaulting a fellow passenger on a commercial flight from Minneapolis to Los Angeles, and remanded.
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> . . . .
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> The panel held that venue was not proper in the Central District of California in this case in which there is no doubt that the assault occurred before the flight entered the Central District's airspace. The panel held that the first paragraph of 18 U.S.C. § 3237(a), which concerns continuing offenses that occur in multiple districts, does not confer venue. The panel held that the second paragraph of § 3237(a), which pertains to offenses involving transportation in interstate commerce or foreign commerce, does not confer venue. The panel held that because the assault occurred entirely within the jurisdiction of a particular [different] district, 18 U.S.C. § 3238 – which pertains to offenses begun or committed on

the high seas, or elsewhere out of the jurisdiction of any particular state or district – does not confer venue.

The panel directed the district court, on remand, to dismiss the charge without prejudice, unless the defendant consents to transfer the case to the proper district. The panel held that the proper venue for an assault on a commercial aircraft is the district in whose airspace the alleged offense occurred. The panel wrote that it seems wholly reasonable, using testimony and flight data, for the government to determine where exactly the assault occurred by the preponderance of the evidence necessary to establish venue.

Concurring in part and dissenting in part, Judge Owens wrote that while he agrees with much of the majority opinion, he disagrees with its ultimate holding on venue, which creates a circuit split and makes prosecuting crimes on aircraft (including cases far more serious than this one) extremely difficult. Judge Owens wrote that he agrees with the Tenth and Eleventh Circuits that the "transportation in interstate . . . commerce" language in § 3237(a) covers the conduct in this case.

Result: Reversal of conviction and remand for further proceedings, which presumably could include a change of venue.

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WASHINGTON STATE SUPREME COURT

"OBSTRUCTION" RULING: 4-4 SPLIT OF WASHINGTON SUPREME COURT LEAVES STANDING AN OBSTRUCTION CONVICTION FOR REFUSAL BY HOME'S OCCUPANT TO OPEN THE DOOR TO OFFICERS WHO WERE SEEKING ENTRY WHILE THEY WERE LAWFULLY EXERCISING COMMUNITY CARETAKING RESPONSIBILITY TO INVESTIGATE SUSPECTED DOMESTIC VIOLENCE; THE 4-4 SPLIT MEANS THAT THE LAW IS UNSETTLED ON THE INTERPRETATION OF THE OBSTRUCTION STATUTE AT ISSUE IN THE CASE

In City of Shoreline v. Solomon Dion McLemore, ___ Wn.2d ___ , 2019 WL ___ (as amended on April 19, 2019), the Washington Supreme Court is unable to resolve an issue of interpretation of the obstruction statute at RCW 9A.76.020. The appealing party was a man who was convicted at trial of obstruction for mostly passive inaction in relation to requests by police for entry of his residence in order to investigate possible domestic violence. The Court is split 4-4 in a case in which Justice Madsen recused herself and thus left only eight Justices to decide the case.

Justice González is joined by Justices Fairhurst, Johnson and Gordon McCloud in an Opinion that asserts that the facts involved only passive resistance by the defendant. With that view of the facts, the González Opinion in McLemore argues, based on constitutional privacy and free speech protections that impact case law interpretation of the Washington's obstruction statute, that the Court should hold that a person cannot be convicted of obstructing for refusing to open the door to officers even where the officers have a lawful right to make a warrantless entry pursuant to the community caretaking exception to the warrant requirement.

These four justices argue that a person has no duty to comply with the police demands to open the door under these circumstances, and they argue that conduct that amounts to merely passive delay will not sustain an obstruction charge.

The competing Opinion by Justice Stephens in McLemore is signed by Justices Wiggins, Owens and Yu. Except for discussion in a footnote noted below in this Legal Update entry, the Stephens Opinion in McLemore assumes for the sake of argument that the facts are as described in the Lead Opinion. The Stephens Opinion argues that the Court should hold that a person's merely passive refusal to obey lawful commands to take a specific action is conduct sufficient to support an obstruction conviction. The Opinion notes that, as conceded in the González Opinion, the officers' orders to open the door in this case were lawful under the community caretaking exception to the warrant requirement. The Stephens Opinion in McLemore argues that no constitutional privacy right or free speech rights allowed the defendant to refuse the officers' demands to open the door under the facts of this case.

In a footnote, the Stephens Opinion in McLemore points out that the facts actually are different than presented in the González Opinion and reflect active obstruction, not just a passive refusal to police entry.

The description of the facts in the González Opinion in McLemore is as follows:

> Late one night, a bystander heard a disturbance and called 911. Three Shoreline police officers responded and heard the sounds of an argument coming from an apartment above a dry cleaner's shop. Police heard a woman shouting, "[Y]ou can't leave me out here," "I'm going to call the police," and "something along the lines of I'm reconsidering our relationship." The officers knocked on the door of the apartment, rang the doorbell, announced they were Shoreline police, and demanded to be let in. No one in the apartment replied, but the sounds of the argument stopped. Using amplification and much profanity, the officers insisted they would break down the door if they were not let in.
> McLemore told them to leave. After several minutes of this, police heard the sound of breaking glass. The officers started to break down the door.
>
> McLemore and Lisa lived together with their six-month-old son in that apartment. The couple had had a difficult night. McLemore had accidentally broken a window, and Lisa was upset about having to repair it. McLemore had told Lisa he would clean up the glass but instead went to play pool with a friend. When he came home at about one o'clock in the morning, he and Lisa argued. Since their child was asleep, they took their argument outside to a balcony. McLemore claimed he accidentally locked Lisa outside on that balcony when he came in.
>
> Minutes after he let Lisa back in, the police started banging on their door. McLemore told the officers that they were okay, that he was recording the incident, and that they should leave. At McLemore's insistence, Lisa confirmed that she was fine and that she also wanted the officers to leave. Instead, rightfully concerned about domestic violence, the officers broke down her door.
>
> After the door was "completely destroyed," the officers entered with their guns drawn, handcuffed McLemore, and put Lisa and McLemore into separate police cars. Officers determined Lisa was not injured. Lisa told the officers that the couple had not opened the door because they were afraid one of them would be arrested if they did. Officers arrested McLemore for obstruction of a law enforcement officer under ROW 9A.76.020. No other charges were filed.

As noted above, the Stephens Opinion in McLemore points out, as follows, that the facts actually are different than presented in the González Opinion in McLemore, and that the actual facts demonstrate much more than a passive refusal to police entry.

> The lead opinion downplays the fact that McLemore told Lisa how to respond, ("At McLemore's insistence, Lisa confirmed that she was fine and that she also wanted the officers to leave."), ultimately concluding there is "no evidence" he did anything to prevent her from opening the door. The testimony and a recording of the incident support a different conclusion. [One of the officers] testified that Lisa "sounded like she had been crying. . . . [I]t didn't sound like a calm, normal individual." He explained, "[McLemore] saying tell them you're okay seemed very coercive"; officers "have the legal obligation to investigate to make sure that someone who needs help isn't being prevented from getting help because of various reasons."
>
> On cross-examination, McLemore grudgingly acknowledged that he told Lisa she needed to talk to the police and she needed to act mad [at the police]. He also told her that if she opened the door and went outside, he was going to jail. Given this evidence, even if McLemore's own refusal to open the door might be characterized as mere "inaction" – a dubious characterization under our case law – evidence that he directed Lisa's response to the officers' commands plainly supports the jury's finding of obstruction.

For reasons unknown, the González Opinion in McLemore does not respond to the argument in the above-quoted footnote of the Stephens Opinion in McLemore that these additional facts support the obstruction conviction regardless of one's viewpoint as to the assumed facts of mere passive refusal to cooperate by McLemore.

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WASHINGTON STATE COURT OF APPEALS

"SEIZURE" OF PERSON AND "REASONABLE SUSPICION": DIVISION THREE RULES 2-1 THAT (1) FACT THAT PARKED POLICE CARS BLOCKED A CONTACTED PERSON'S CAR FROM LEAVING DEAD-END ALLEY PROVIDES THE PRIMARY BASIS FOR RULING THAT THE CAR'S DRIVER WAS "SEIZED" WHEN OFFICERS MADE CONTACT WITH HIM AND BEGAN ASKING HIM QUESTIONS; AND (2) COMBINATION OF FACTS INCLUDING – (A) LATE HOUR AND HIGH CRIME NATURE OF AREA OF CITY, AND (B) 911 CALL AT 2:00 A.M. FROM APARTMENT RESIDENT THAT AN UNRECOGNIZED CAR WAS PARKED IN AN ALLEY – DID NOT PROVIDE REASONABLE SUSPICION FOR SEIZURE

State v. Carriero, ___ Wn. App. 2d ___ , 2019 WL ___ (April 25, 2019)

Facts: Excerpted from Court of Appeals majority opinion)

> At 2:00 a.m. on a summer morning, the Yakima Police Department received a phone call from a resident who lived adjacent to the alleyway between the 1500 block of Roosevelt Avenue and Cherry Avenue. The State presented no testimony that the caller identified himself or herself. The reporting party called 911 to report a suspicious vehicle, with lights off, parked at the dead end of the alley. The caller did not recognize the car. Law enforcement knows the neighborhood as plagued with burglaries, vehicle prowling, and gang violence.

Yakima Police Officers [A and B], in their respective marked patrol cars, responded to the call. Officer [A] drove down the dim, block-long, narrow alleyway, followed by Officer [B]. Neither officer activated his car's emergency lights or sirens, but each car's headlights illuminated the Monte Carlo. Officer [B] activated his directional rear lights, which flash yellow to oncoming traffic. At the end of the alleyway, the officers saw a red Chevrolet Monte Carlo facing their direction, occupied by two individuals, later identified as Otoniel Carriero and Amber Rodriguez. According to Officer [B], the two officers endangered themselves by driving down the narrow alley facing Carriero's vehicle, but the two lacked a safe way to approach the Monte Carlo. The unlit Monte Carlo had its engine off.

Officer [A] stopped his patrol vehicle one car length away from Otoniel Carriero's Monte Carlo, and Officer [B] parked his car behind Officer [A's] car. By stopping their patrol vehicles in the narrow alley, the officers' patrol cars blocked Carriero's egress. Officer [A] testified at the suppression hearing:

> Q. And the alleyway, is it a narrow or wide alleyway?
>
> A. It's not the widest one I've been in, but there is space to actually get two cars down the alleyway.

Officer [B] testified:

> Every situation is different, I guess, but in this case it's a pretty narrow alley. I believe when Officer [A] ended up having to turn around, he had to do a five or six-point turn. I think I had to move my side mirror in so he could fit by me. So it's a very narrow alley. I believe, to memory, Officer [A] parked more on the north.

Officer [A] further testified at the suppression hearing:

> Q. (By Mr. Hintze) When you first made contact with the defendant and his vehicle and the passenger, were there any concerns that a crime might be being committed?
>
> A. There is always a potential. I never know for sure until we actually talk and have done an investigation.

Officers [A and B] exited their respective vehicles with flashlights in hand and approached the stationary Monte Carlo. The officers noticed Otoniel Carriero seated in the driver's seat and Amber Rodriguez seated in the front passenger seat. Neither officer observed any suspicious behavior or furtive movements from either occupant. Officer [B] ambled to the driver's side door and positioned himself adjacent to the door. Officer [A] walked to the passenger side door.

Officer [A] greeted the pair with "[h]i guys" and spoke with a casual and friendly tone of voice. Officer [A] questioned whether either lived in the neighborhood, and Carriero responded that neither did. Carriero told the officers that the two wanted to be alone together. Carriero added that he owned the Monte Carlo.

Officer [A] explained that a concerned neighbor called 911 and reported an unfamiliar car in the alley. [Officer A] asked Otoniel Carriero and Amber Rodriguez if either possessed identification. Neither Officer [B] nor Officer [A] told the two that they were free to leave. Rodriguez handed [Officer A] her identification card, while Carriero handed [Officer B} his card. During cross-examination at the suppression hearing, [Officer B] declared:

> Q. (By Ms. Holman) Is it possible, had he [Carriero] grabbed the license out of your hands and took off, that you would have eventually charged him, you personally, with assault or obstruction?
>
> A. It is possible, yes.

Officer [B] read Otoniel Carriero's name and date of birth to dispatch over his radio while standing by the vehicle. In turn, dispatch informed [B] that Carriero was a convicted felon, who bore a conviction for unlawful possession of a firearm, but had no outstanding warrants. Officer [B] returned the identification card to Carriero.

Officer [A] read Amber Rodriguez's information to dispatch and restored her identification card to her. Dispatch informed Officer [A] of outstanding arrest warrants for Rodriguez. At Officer [A's] order, Rodriguez exited the Monte Carlo. [Officer A] placed Rodriguez in handcuffs and sat her near the rear of the car.

Officer [B] remained standing on the driver's side of the car and shined his flashlight into Otoniel Carriero's vehicle. [Officer B] espied a silver and black handgun in a pouch behind the driver's seat. [Officer B] told Carriero to keep his hands on the steering wheel. Both officers directed Carriero to exit the vehicle, and the pair placed Carriero in custody. Law enforcement later procured a search warrant for the Monte Carlo and retrieved a loaded semiautomatic pistol from the seat pouch.

Proceedings: (Excerpted from the Court of Appeals majority opinion)

The State of Washington charged Otoniel Carriero with first degree unlawful possession of a firearm. Carriero moved to suppress all evidence and his statements based on an unlawful seizure. The trial court conducted a CrR 3.6 hearing, during which the court viewed a video of the interaction between Otoniel Carriero and Officers [A and B]. Officers [A and B] testified.

Following the suppression hearing, the trial court entered twenty-seven findings of fact, all consistent with the hearing testimony except a finding that the officers knew the identity of the caller. We repeat the critical findings:

> 3. The caller's identity was known to police. The caller reported to dispatch that there was a darkened occupied vehicle parked at the end of the dead-end alley, that the vehicle was not associated with any of his neighbors, and that he was very concerned that criminal activity or violence would be committed. . . . .
>
> 9. Officer [A] stopped his vehicle about one car length away from the Defendant's vehicle. Officer [B] stopped his vehicle right behind officer [A's].

> 10. Due to the narrowness of the alley, two vehicles could not have driven past each other where the officers stopped their vehicles. . . . .
>
> 12. Although their headlights illuminated the scene in front of their patrol vehicles, the officers never activated their emergency lights or sirens.
>
> 13. The two officers exited their vehicles with flashlights in their hands and approached the Defendant's parked vehicle. The Defendant was seated in the driver's seat and a female passenger was seated in the front passenger seat.
>
> 14. The COBAN video of the encounter from the beginning to end did not show any indication of the two occupants ever readjusting their clothing.
>
> 15. Officer [B] walked around the rear of the vehicle and up to the driver's side door.
>
> 16. Officer [A] went up to the passenger side door and began speaking to the Defendant and the passenger. . . . .
>
> 25. After spotting what appeared to be a firearm, Officer [B] told the Defendant to keep his hands on the vehicle's steering wheel. The Defendant had never been ordered to do anything or been told that he was detained prior to this point. . . . .
>
> The trial court concluded, founded on the totality of the circumstances, that the Yakima Police Department officers based their conduct on a reasonable articulable suspicion of criminal activity. The trial court upheld the seizure of the pistol confiscated from the Monte Carlo pouch. The prosecution proceeded to trial. The jury convicted Otoniel Carriero as charged . . . .

ISSUES AND RULINGS: (1) Two officers responded to a 2:00 a.m. 911 call from an apartment resident expressing vague concerns about an unrecognized car that was parked at the end of a dead-end alley in the caller's neighborhood. Uniformed officers parked their marked patrol cars in single file in the alley. This method of parking did not appear to be intended to block egress for the car of concern, but the alley was so narrow that it would have been very difficult for the subject car to drive out of the alley while the officers were so parked. With their headlights on (but not their flashers on), the officers then contacted the car's occupants in a low-key manner, though the officers did not tell the car's occupants that they did not need to talk to the officers, or that they were free to leave at any time. The officers explained to the occupants the dispatch-based reason for the contact, and the officers requested identification. The identification information led to discovery of an arrest warrant on the passenger (and her arrest) and to discovery that the person in the driver's seat, defendant Carriero, had a prior conviction for unlawful possession of a firearm. One of the officers then saw a handgun in open view behind the driver's seat, and the officers then arrested the driver for unlawful possession of a firearm.

Was the person in the driver's seat seized at the point in time when the officers began asking questions of the car's occupants after having parked their patrol cars in the alley, effectively blocking, whether intentionally or not, the car of interest from leaving the alley? (ANSWER BY COURT OF APPEALS: Yes, rules a 2-1 majority, he was seized at that point)

(2) The car of interest was parked at 2:00 a.m. in a high-crime area of the City of Yakima. A resident of the neighborhood called to express her concerns about the presence of the

unrecognized car in her neighborhood. Do these facts add up to reasonable suspicion to seize the person in the driver's seat of the car? (ANSWER BY COURT OF APPEALS: No, rules a 2-1 majority)

Result: Reversal of Yakima County Superior Court conviction of Ontoniel Carriero for unlawful possession of a firearm; case remanded for further proceedings (presumably, the suppression ruling would result in the prosecutor dismissing the charge for lack of evidence, unless the prosecutor were to seek Washington State Supreme Court review).

ANALYSIS:

Three opinions are issued in Carriero. It appears from my review of internet sources that Judge Fearing does something highly unusual in appellate decision-writing, and that he writes both:

(A) the Majority Opinion (this is a lengthy, essentially-standard-analysis, opinion signed by himself and Judge Pennell; and

(B) a shorter Concurring Opinion (this is a shorter opinion, signed only by himself, that focuses exclusively on the "seizure" question. The concurrence appears to suggest that the standard for what constitutes a "seizure" should somehow be revised by all appellate judges to take into account the "jittering heart" and "pressure in the hollow of the stomach" of one "who inhabits an inner city neighborhood labeled by law enforcement as a high-crime area." **(LEGAL UPDATE BRIEF EDITORIAL COMMENT: !)**.

Judge Korsmo writes a relatively short dissent that disagrees on both main issues, but focuses primarily on his view that on the "seizure" question, which he says is a "close" question. He argues that the Court should have deferred to the trial court's fact-based ruling of "no seizure." He asserts that any "blocking" of Carriero's car was due exclusively to the geography of the narrow, dead-end alley, and that a reasonable person in Carriero's situation would not necessarily perceive being purposely blocked by police in this situation where the officers had parked straight-ahead in single file.

1. The Majority Opinion concludes that the officers seized Carriero

The Majority Opinion begins its analysis of the "seizure" question by explaining that the Washington constitution and federal constitution have been interpreted similarly on the "seizure" issue, except that under the Washington constitution, if a a person does not yield to the seizure-level assertion of authority by an officer (non-cooperation was not involved in this case), the person is nonetheless deemed to have been "seized."

The Majority Opinion notes that the question does not look at the subjective intent of the officer or at the subjective thinking of the object of police attention. Instead, the test is an objective, reasonable person, test. Case law has established that police contact with members of the public constitutes a seizure only if, due to an officer's use of physical force or display of authority, a reasonable person would not feel free to leave, terminate the encounter, refuse to answer the officer's question, decline a request, or otherwise freely go about his business.

The key part of the Majority Opinion's analysis in support of its "seizure" conclusion is as follows:

> In Otoniel Carriero's appeal, the State contends that the degree of officer intrusion amounted only to social contact because, when the officers approached the Monte Carlo, they did not draw weapons, did not raise their voices, cordially asked the car occupants about their activities, politely asked for identification, did not insist on Carriero showing his hands, and did not touch the person of Carriero. We agree with the State that all of these factors lean in favor of social contact. Nevertheless, the State fails to observe other focal facts.
>
> The two Yakima Police Department patrol cars blocked the exit of Otoniel Carriero's Monte Carlo. We do not understand how the dissent can conclude that the two patrol cars did not block the exit of the Monte Carlo when the trial court found, in finding of fact 10 that, due to the narrowness of the alley, two vehicles could not pass each other. After leaving Carriero no path for his car, the two uniformed officers, with guns in holsters, stood immediately adjacent to the car doors. Officers learn the concept of "command presence," which entails always capturing control of the situation for their safety. When Officer [B] stood next to the driver's door, [Officer B] blocked Carriero's egress from the car. If Carriero opened the door, the door would likely strike Officer [B]. [Officer B] testified he might charge Carriero with assault if Carriero opened the door. Thus, the dissent misunderstands the circumstances when highlighting the fact that Carriero never sought to leave his car. Anyway, an attempt to escape the presence of law enforcement has never been a predicate to a seizure.
>
> The two Yakima Police Department officers asked to view identification of Carriero and his companion. The officers never suggested to Carriero or his friend that either might ignore the instruction or leave the scene. We expect that the officers would have remained next to the car doors until Carriero and his friend cooperated. The totality of the circumstances compelled Otoniel Carriero to remain in his car, cooperate with law enforcement, and obey the direction to deliver his identification. No reasonable person would have deemed himself free to ignore the officers. No reasonable person would have ignited his car's engine and sought to maneuver out of a tight alleyway to evade speaking with the officers. Thus, the officers seized Carriero.

2. The Majority Opinion concludes that reasonable suspicion did not support the seizure

The Majority Opinion points out that under Terry v. Ohio, 392 U.S. 1 (1968), an officer, without a warrant may briefly detain an individual for questioning if the officer has a reasonable and articulable suspicion that the person is or is about to be engaged in criminal activity. A valid Terry stop requires that, on the totality of the circumstances, the officer have a well-founded, reasonable suspicion that criminal activity is afoot. The suspicion must be based on specific and articulable facts. The courts look at the totality of the circumstances known to the officer at the time of the stop when evaluating the reasonableness of the officer's suspicion. A person's mere presence in a high-crime area late at night does not, by itself, give rise to a reasonable suspicion to detain that person.

In this case, the Majority Opinion concludes, the reasonable suspicion standard is not met. As the Majority Opinion explains, the officers contacted Carriero and his passenger simply because (1) Carriero's car was parked in a high-crime area during early morning hours, and (2) a caller indicated the car did not belong in the neighborhood. Neither officer testified to any other facts that would lead a reasonable person to believe that criminal activity was taking place or about to take place at the dead-end of the alley. The Majority Opinion thus concludes that the facts at the point of police contact with the car's occupants do not add up to reasonable suspicion.

1999 SUFFICIENCY-OF-EVIDENCE RULING IN STATE V. SCHLOREDT IS STILL GOOD LAW: CRIME OF POSSESSION OF STOLEN ACCESS DEVICE REQUIRES ONLY THAT DEVICE HAVE BEEN OPERATIONAL WHEN STOLEN; THE STATUTE DOES NOT REQUIRE THAT THE DEVICE HAVE BEEN OPERATIONAL AT TIME OF ARREST

State v. Sandoval, ___ Wn. App. 2d ___, 2019 WL ___ (Div. II, April 2, 2019)

Facts: (Excerpted from Court of Appeals opinion)

> On March 6, Sandoval entered into an agreement with a car dealership. The agreement allowed Sandoval to take home and use a vehicle for three days to determine whether she wanted to purchase it.
>
> After three days, the dealership lost contact with Sandoval and made unsuccessful attempts to retrieve the vehicle. The dealership reported the vehicle stolen.
>
> On April 2, the police found Sandoval and her husband in the stolen vehicle at the address listed in the agreement. The police arrested Sandoval for possession of a stolen vehicle and searched her incident to that arrest. In Sandoval's purse, the police found a credit card with somebody else's name on it, Sandoval's sister's birth certificate, and a pipe with methamphetamine residue.
>
> The credit card had been stolen in early February. At that time, the card was active and could have been used to buy goods. Shortly thereafter, the card's owner cancelled the card.
>
> The State charged Sandoval with possession of a stolen vehicle, possession of stolen property in the second degree, identity theft in the second degree, and possession of a controlled substance.

Proceedings below:

Sandoval was convicted in a jury trial of for possession of stolen property in the second degree and possession of a controlled substance.

ISSUE AND RULING: In State v. Schloredt, 97 Wn. App. 789 (Div. I, 1999), the Court of Appeals ruled that the crime of possession of possession of a stolen access device requires only that the device have been operational at the time of the theft, and that the crime does not require that the device also have been operational at the point when the suspect was caught with the device. Is the ruling in Schloredt still good law and does it control in this case? (ANSWER BY COURT OF APPEALS: Yes and Yes)

Result: Affirmance of Clark County Superior Court conviction of Mary E. Sandoval for possession of stolen property in the second degree and possession of a controlled substance.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> RCW 9A.56.010(1) defines "access device" as
>
> > any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain

> money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument.

(Emphasis added.)

In Schloredt, the court affirmed the defendant's convictions for possession of stolen property in the second degree based on his possession of four stolen credit cards. Schloredt made the same argument that Sandoval makes. He argued that because the term "can be used" in RCW 9A.56.0101(1) is written in the present tense, the state must show that an access device can be used at the time the device is found on a defendant. Thus, Schloredt argued that insufficient evidence supported his convictions because the state "failed to prove [that the cards] were 'operational' on the date [he] possessed them." He argued that cancelled cards cannot be used to obtain something of value and therefore cancelled cards are not "access devices" under the statute.

The [Schloredt] court rejected the argument. It concluded that the language "can be used" referred "to the status of the access device when last in possession of its lawful owner." The court looked to the legislative history and intent of RCW 9A.56.010(1), and reasoned that whether a victim cancelled his or her account prior to a defendant's arrest was irrelevant in determining whether stolen credit cards were "access devices" under the statute. The court concluded that a contrary result would be an absurdity and would contravene the legislature's intent to broadly construe the term "access device." "It begs reason to assume the legislature intended that a defendant could not be charged with possessing a stolen credit card or other access device solely because the victim discovered the theft and cancelled the account on the stolen card before the defendant was apprehended." We agree that Sandoval's interpretation leads to an absurd result.

Since Schloredt was decided in 1999, the legislature has amended RCW 9A.56.010 four times. Not once has the legislature amended the definition of "access device."

We conclude that Schloredt accurately interpreted the phrase "can be used" as that phrase is used in the definition of "access device." Moreover, we conclude that the legislature's inaction following Schloredt indicates its acquiescence in Schloredt's interpretation of the phrase "can be used."

Sandoval next argues that [State v. Rose, 175 Wn.2d 10 (2012) overruled Schloredt. In Rose, the victim testified that she received a credit card offer which included an unactivated credit card in her name. The victim never activated the card and threw it away. Because she never activated the card, no account was associated with it. The card, later found in the defendant's possession, led to the state charging him with possession of stolen property in the second degree.

The [Rose] court concluded that because the "card was not linked to an existing, active account," and had not been signed, "[i]t stretche[d] the inference beyond the evidence to conclude that th[e] card could be used to obtain something of value." The court also noted that although the state may have been able to prove the card could have been used to obtain goods or services, it did not.

In coming to its conclusion, Rose discussed Schloredt but did not conclude or even hint that the case had been wrongly decided. Instead, Rose factually distinguished

> Schloredt. In Rose, the card was never activated, was never linked to an existing account, and required a $30 payment to activate. The [Rose] court therefore recognized that, unlike in Schloredt, the card could not have been used to obtain something of value when it was last in the possession of its lawful owner. In fact, because the state failed to prove that the card in Rose was ever able to be used to obtain something of value, there was no need for the court to examine the appropriate point in time for determining when something "can be used."
>
> Sandoval further argues that Rose overruled Schloredt because Rose "held that if the access device in question is not tied to an existing, active account, the State must present affirmative evidence that the card can be used to obtain something of value." This language from Rose, however, does not advance Sandoval's argument because it was used to distinguish State v. Clay, 144 Wn. App. 894 (2008).
>
> **Clay involved an unactivated card linked to an already existing account. In Rose, the court distinguished its facts recognizing that, unlike in Clay, the unactivated card was not linked to an existing account. Here, the facts are more analogous to Clay because, as evidenced by the card owner's ability to purchase items using the credit card, the card was linked to an active account.**
>
> **Based on the foregoing, we conclude that Rose did not overrule Schloredt and that Schloredt correctly interpreted the phrase "can be used" in RCW 9A.56.010(1).**
>
> . . . .
>
> To determine whether sufficient evidence supports a conviction, we view the evidence in the light most favorable to the State and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. In determining insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it."
>
> Sufficient evidence supports Sandoval's conviction. As discussed above, Sandoval possessed a stolen access device. A reasonable jury could have concluded, when viewing the evidence in the light most favorable to the State, that sufficient evidence supports Sandoval's conviction.

[Some citations omitted, others revised for style; bolding added]

NECESSITY DEFENSE: CLIMATE-CHANGE, ANTI-OIL PROTESTER IS ALLOWED TO ARGUE NECESSITY IN SECOND DEGREE BURGLARY PROSECUTION WHERE DEFENDANT BROKE INTO OIL FACILITY AND SHUT OFF A VALVE

In State v. Ward, ___ Wn. App. 2d ___ , 2019 WL ___ (Div. I, April 8, 2019), the Court of Appeals reverses defendant's second degree burglary conviction, ruling that the trial court erred by not allowing the defendant to present a common law (non-statutory, case-law developed) necessity defense to the jury.

The Court of Appeals notes that the courts of the State of Washington recognize a common law necessity defense. The defense may be raised when a defendant can demonstrate all four of

the following propositions: (1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law; (3) the threatened harm was not brought about by the defendant; and (4) no reasonable legal alternative existed.

Defendant Ward broke into a Kinder Morgan pipeline facility and turned off a valve. His action stopped the flow of Canadian tar sands oil to refineries in Skagit and Whatcom Counties. Ward intended to protest (1) the continued use of tar sands oil, which he contends significantly contributes to climate change, and (2) the inaction by governments to meaningfully address the crisis of climate change. Ward argues that he was deprived of his Sixth Amendment right to present his only defense – necessity – after the trial court granted the State's motion to exclude all testimony and evidence of necessity.

The Court of Appeals Opinion explains the view of the Court that there is sufficient evidence supporting all four elements of the defense for Ward to present his factual question of necessity to a jury.

Result: Reversal of Skagit County Superior Court conviction of Kenneth A. Ward for second degree burglary; case remanded for re-trial.

LEGAL UPDATE EDITOR'S COMMENT: The Court of Appeals provides extended analysis (not set forth or summarized in this Legal Update entry), but the Court does not directly respond to the several conflicting federal court decisions discussed in the State's brief. While the legal question is one of state, not federal law, It conflicts with my mind's view of common sense that the Court concludes that defendant provided any acceptable support for his position that, under the fourth element of the defense, "no reasonable alternative existed" for expressing his world view to the option of breaking into an oil plant and turning off the machinery.

I do not know whether the prosecutor will seek discretionary review in the Washington Supreme Court.

PROFILE TESTIMONY: COURT OF APPEALS RULES 2-1 THAT TRIAL COURT ALLOWED IMPERMISSIBLE "PROFILE" TESTIMONY ABOUT THE LIKELIHOOD THAT A FIREARM IN POSSESSION OF A CONVICTED FELON IS STOLEN

In State v. Crow, ___ Wn. App. 2d ___ , 2019 WL ___ (Div. III, April 9, 2019), Division Three of the Court of Appeals votes 2-1 to reverse defendant's conviction for unlawful possession of a stolen firearm, holding that the trial court erred admitting "profile" testimony by law enforcement about the likelihood that a firearm in possession of a convicted felon is stolen. The Majority Opinion in Crow summarizes its ruling in part as follows;

> The evidentiary categories are:
>
> 1. No one could lawfully sell, gift, or transfer a gun to Bryan Crow.
>
> 2. Bryan Crow could not have lawfully obtained a firearm because a background check would have established Crow to be disallowed to possess a gun.

3. A disqualified person will obtain a firearm by stealing it or buying it unlawfully on the street.

4. Illegally obtained firearms are typically stolen during burglaries and vehicle prowls.

5. A person who knows he possesses a stolen firearm commonly discards the gun and flees when approached by a law enforcement officer.

6. The majority of disqualified people apprehended with a firearm have a stolen firearm.

7. Most or a high percentage of firearms in the hands of a disqualified person are stolen firearms.

We hold that the statements in categories one and two do not constitute inadmissible evidence. One might argue that the State attempted to lump Bryan Crow into a category of people unable to legally possess a gun. Nevertheless, the statement focuses on Bryan Crow, not people like Bryan Crow. The comment is a straightforward statement that Bryan Crow could not legally purchase a gun. Crow essentially admitted this legal fact when he stipulated to a felony that disqualified him from ownership or possession of a gun. Comments in category two merely reiterated the contents of category one.

We hold the remaining categories of Yakima police officer testimony to be inadmissible. The testimony sought to convict Bryan Crow of a crime based on what others do.

Category three told jurors that most, if not all, disqualified persons obtain a firearm by stealing the gun or buying it unlawfully on the street. This testimony informs the jury that, because Crow falls into the profile of a disqualified person, he likely stole the gun or purchased it unlawfully on the street such that he should have known the gun was stolen.

Category four states the obvious that illegally obtained firearms are typically stolen during burglaries and vehicle prowls. We suppose the only other way to steal a gun would be to grab a gun in the outdoors. The evidence probably has no relevance to charges against Bryan Crow and any relevance would be unduly prejudicial.

Categories five, six, and seven also attempt to convict Bryan Crow based on characteristics of him in common with others. The State needed to prove that Crow knew the Ruger handgun to be stolen. The State presented testimony that, when accosted, Crow fled and threw his gun to the ground. The State linked this behavior of Crow with the testimony that a person who knows he possesses a stolen firearm commonly discards the gun and flees when approached by a law enforcement officer.

In his Dissenting Opinion, Judge Kevin Korsmo asserts that the Majority Opinion misinterprets the evidentiary restriction on profile evidence, and that the profile evidentiary restriction was not violated in this case.

Result: Reversal of Yakima County Superior Court conviction of Bryan Jack Ross Crow for unlawful possession of a stolen firearm; remand for re-trial on that charge; Crow did not seek

review of his separate conviction for unlawful possession of a firearm; reversal of sentence and remand on sentencing issue not addressed in the Legal Update.

LEGAL UPDATE EDITORIAL NOTES: The analysis of the profile testimony issue in the Majority Opinion and the Dissenting Opinion is fact-based and lengthy. The issue is more directly a concern of prosecutors, not law enforcement officers. Interested readers looking for details in the legal analysis will want to read the opinions, which are accessible on the Washington Courts website (easy to find if one knows the date of the decision). Although I have not reached out to the prosecutor, I would not be surprised to see this case end up in the Washington Supreme Court.

In a "Case Note" on the website of the Washington Association of Prosecuting Attorneys, WAPA Staff Attorney Pamela Loginsky summarizes the Crow majority's "profile testimony" ruling and makes a brief comment as follows:

> **While the State may admit evidence about the inability of a felon to lawfully obtain a gun, evidence of the high probability that any gun possessed by a felon is stolen or that one possessing a stolen firearm is likely to flee and discard the firearm when approached by a law enforcement officer constitutes improper "profile testimony" that implicates ER 402, 403, 404(b), and 702. . . . Editor's note [by Ms. Loginsky]: The majority's ruling conflicts with Division II's opinion in State v. Avendano-Lopez, 79 Wn. App. 706 (1995).**

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BRIEF NOTES REGARDING April 2019 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 2019, 13 unpublished Court of Appeals opinions fit these categories. I do not promise to be able catch them all, but each month I will make a reasonable effort to find and list all decisions with these issues in unpublished opinions from the Court of Appeals. I hope that readers, particularly attorney-readers, will let me know if they spot any cases that I missed in this endeavor, as well as any errors that I may make in my brief descriptions of case results.

1. State v. Christopher William Olsen (and also ruling on his Personal Restraint Petition): On April 3, 2019, Division Two of the COA rules for the State in rejecting defendant's appeal from his Pierce County Superior Court convictions of *two counts of first degree murder and one count*

of second degree murder (one of the three judges would have given Olsen a new trial based on analysis of an issue not addressed in this Legal Update entry).

The Court of Appeals rules, among other things, as follows: (1) by a 2-1 vote, the Court rules that **defendant Olsen lacks standing to contest the use of a cell-site simulator** (a "Stingray") to locate a co-participant in the crime; that is because Olsen failed to show that Olsen's right to privacy was invaded by the part of the investigation that was focused on the co-participant (the lead opinion does not squarely respond to the argument in the dissent-in-part, which argues that "fruit of the poisonous tree" principles overcome the "standing" argument of the State); and (2) Olsen's challenge to "trap and trace" order related to his phone is assumed for the sake of argument to be correct, but **the Court concludes that the admission of evidence relating to this assumed violation of his rights was harmless error in light of the overwhelming evidence of his guilt. LEGAL UPDATE RESEARCH NOTE: Readers of the Legal Update studying the above electronic surveillance issues should find useful on the Home Page of the website of the Washington Association of Prosecuting Attorneys (WAPA) a comprehensive 223-page compilation, Electronic Surveillance and Digital Evidence in Washington State, 2017, updated by Ms. Susan K. Storey, Sr. Deputy Prosecuting Attorney, Retired, King County.**

2. State v. Troy Darrin Meyers: On April 8, 2019, Division One of the COA issues an Unpublished Opinion that amends the Court's Unpublished Opinion of September 4, 2018 in relation to the convicted criminal defendant's obligation to pay certain criminal fees in relation to an issue not addressed here. But the amended Opinion maintains the Court's September 4, 2018 ruling for the State in rejecting defendant's appeal from his Clark County Superior Court convictions for *possession of methamphetamine with intent to deliver and unlawful possession of cocaine*. The defendant's central **unsuccessful arguments on appeal were: (1) that an affidavit for a search warrant did not** – in its description of a CI and her drug history and motivation, the CI's observations inside the defendant's house, and the CI's participation in a controlled buy – **support probable cause for the warrant to search his house for evidence of possession of a controlled substance with intent to deliver; and (2) that the affidavit contained material misrepresentations of fact.**

3. State v. Shawn James Fitzpatrick: On April 9, 2019, Division Two of the COA rejects the defendant's appeal from his Cowlitz County Superior Court conviction for *possession of methamphetamine*. The three-judge panel summarizes its ruling as follows in the first two paragraphs of the Opinion:

> Shawn Fitzpatrick appeals his conviction of possession of a controlled substance – methamphetamine – which arose out of a traffic stop and subsequent search of the car he was driving. A law enforcement officer pulled over Fitzpatrick for speeding on Interstate 5. After a controlled substance detection dog alerted to the odor of controlled substances, an officer obtained a search warrant for the car. During the search the officers discovered methamphetamine.
>
> **We hold that the trial court did not err in denying Fitzpatrick's motion to suppress evidence obtained during the search because (1) the controlled substance detection dog's sniff around the car for controlled substance odors was not a "search" because Fitzpatrick did not have a reasonable expectation of privacy in the air outside the car; (2) the search warrant was supported by probable cause because the statements in the search warrant affidavit that the officer/handler and the controlled substance detection dog had extensive training and were certified**

as a canine team established the reliability of the dog's alert to the odor of controlled substances; and (3) even assuming that substantial evidence does not support the trial court's finding of fact that there can be air flow between the trunk and passenger compartments of a car, such an error was harmless because the search warrant authorized a search of the entire vehicle including the trunk.

On the first issue – whether the dog sniff was a "search" – the Fitzpatrick Court discusses State v. Dearman, 92 Wn. App. 630 (1998) (under article I, section 7 of the Washington constitution dog sniff near a residence was a search because of the heightened protection for residences) and State v. Hartzell, 156 Wn.App.918 (2010) (sniff near but outside a vehicle was not a search).

4. State v. Ebrima Darboe; On April 15, 2019, Division One of the COA rejects the appeal by defendant from his Snohomish County Superior Court convictions for *identity theft in the second degree, theft in the second degree – access device, vehicle prowling, and bail jumping*. Ebrima Darboe broke into a car and stole credit cards and other personal items of value. A bystander eyewitness watched him do it, and recorded the license plate number of the getaway car. The bystander eyewitness failed to honor a subpoena at the time of trial. Hearsay statements by the eyewitness to an officer at the time of the crime were offered in evidence, not to prove the truth of the assertions, but merely to show why the officer took the subsequent successful investigative steps that were taken. The Court of Appeals rules that because the purpose of the State's offering of the hearsay statements was not to prove the guilt of the defendant, **the admission of the hearsay testimony did not violate the Sixth Amendment Confrontation Clause**.

5. State v. Robert Guy Osborn: On April 15, 2019, Division One of the COA rejects the appeal of defendant from his Snohomish County Superior Court conviction for *possession of a controlled substance – heroin*. A firefighter responded to a radio call about a man possibly passed out behind the wheel of a car. The firefighter made contact with a law enforcement officer after the man in the car awoke and handed the firefighter a plastic bag containing heroin and drug paraphernalia. The defendant argued for immunity under subsection (2) of RCW 69.50.315, which provides immunity from prosecution for possession of drugs in some overdose situations:

> A person who experiences a drug-related overdose and is in need of medical assistance shall not be charged or prosecuted for possession of a controlled substance pursuant to RCW 69.50.4013, or penalized under RCW 69.50.4014, if the evidence for the charge of possession of a controlled substance was obtained as a result of the overdose and the need for medical assistance.

The Court of Appeals concludes that the immunity statute does not apply because there is no evidence that Osborn experienced an overdose or that he needed medical assistance.

6. State v Tacey Lynn Smith: On April 15, 2019, Division One of the COA rejects defendant's appeal from her Snohomish County Superior Court conviction for *vehicular assault*. The Court of Appeals concludes that probable cause supports a search warrant authorizing a blood draw following defendant's involvement in a three car wreck. **In key part, the Court of Appeals explains as follows why the Court rejects defendant's argument that the officer's sworn declaration in support of the warrant does not establish that she had been driving:**

> The declaration in this case provided details of the motor vehicle accident underlying the search warrant. It specified Smith had been driving and lost control of her vehicle, resulting in the collisions. [The affiant-officer] further stated that he based the facts stated in the declaration "upon information acquired through personal interviews with witnesses and other law enforcement officers, review of reports and personal observations." That this line constituted part of a pre-printed form does not render it insufficient as an explanation of the basis of [the affiant-officer's] statements. . . . The information enabled the judge to independently determine whether probable cause existed and we will not engage in a "microscopic examination" of the warrant to invalidate it. . . . The trial court did not err in upholding the warrant.

7. State v. Mathew R. Morasch: On April 16, 2019, Division Two of the COA grants defendant some relief on the high school teacher's appeal by reversing two out of three of defendant's Clark County Superior Court convictions (*reversing convictions for one count of voyeurism and one count of attempted voyeurism; and affirming a conviction for one count of attempted voyeurism*). The basis for granting relief to defendant from the two convictions is that **the authorization provisions of a warrant to search defendant's phone was too broadly written**. The Court of Appeals describes the overbroad warrant authorization as follows:

> The warrant authorized the search and seizure of all evidence of "alleged violation of Voyeurism (RCW 9A.44.115)" regarding the following property: The analysis of the cellular phone belonging to Matthew R. Morasch (dob 03/23/1975). This is further described as a gray in color Apple iPhone 5S cell phone, model number A1533, serial number 3569650608794. This is to include all stored or removable memory cards stored within the device for photographs, videos, and metadata.

The Court of Appeals rejects defendant's argument that he underwent a coercive interrogation by a school resource officer (SRO) who was following up a student's contemporaneous report that she had been the victim of his secretive up-skirt filming. The alleged coercive elements of the interrogation were the facts that (1) defendant's job was at risk, and (2) the dean of students had brought the SRO to defendant's classroom. The Court of Appeals explains as follows the reasons for its rejection of defendant's coercion argument:

> Evergreen's dean of students testified that he accompanied [the SRO] to Morasch's classroom, not to signal an administrative investigation into the incident, but to supervise Morasch's students while Morasch spoke with [the SRO]. At no point did [the SRO] tell Morasch that the interview had anything to do with potential disciplinary action related to his employment. . . .
>
> The trial court concluded that Morasch had failed to establish that any direct or implied threat to his employment existed during his interview with [the SRO], or that the criminal and administrative investigations into the incident were somehow co-mingled.

8. State v. Daniel Herbert Dunbar: On April 18, 2019, Division Three of the COA rejects defendant's appeal from his Spokane County Superior Court conviction for *possession of a stolen vehicle*. The Court of Appeals rules under the following analysis that **an officer was not required to Mirandize defendant during investigative questioning, because the defendant could not reasonably believe (an objective test) that his freedom was curtailed analogous to an arrest**:

> Here, like [State v. Heritage, 152 Wn.2d 210 (2014)], an officer, in the presence of another officer, asked questions to confirm or dispel the officer's suspicions whether the defendant was engaged in criminal activity. Mr. Dunbar voluntarily came out of the residence and hollered at the officers. He also agreed to sit on the porch steps when asked by [the lead officer]. He then answered a series of questions designed to confirm or dispel [the officer's] suspicions that Mr. Dunbar drove the pickup truck knowing it to be stolen. Under the objective evidence test, a reasonable person in Mr. Dunbar's position would not have believed his freedom was curtailed analogous to an arrest.
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> Mr. Dunbar emphasizes [the officer's] testimony during the CrR 3.5 hearing, that he would have stopped and handcuffed Mr. Dunbar if he tried to leave. But [the officer] did not express this thought to Mr. Dunbar. [The officer's] unexpressed thought is irrelevant to an objective test analysis. We conclude the trial court did not err in when it determined that Mr. Dunbar's statements were not custodial . . . .

9. State v. Jonathan Brooks Hawkins: On April 23, 2019, Division Three of the COA rejects the defendant's appeal from his Grant County Superior Court convictions for *two counts of first degree child rape and one count of first degree child molestation*. The Opinion is lengthy. Among the many rulings by the three-judge panel are the following: (1) **a several-hour delay between defendant's arrest and Mirandizing him to initiate interrogation did not render defendant's waiver of rights involuntary** in light of the totality of the non-coercive circumstances; (2) the affidavit for a search warrant to search Facebook could have provided more factual details and the search warrant authorization could have been more explicit, but **the affidavit and search warrant pass constitutional muster**; (3) a **child victim was competent to testify**; (4) the **child victim's hearsay statements to a government forensic interviewer and to her foster parent were sufficiently reliable to be admissible at trial**; (5) defendant's **spousal privilege argument challenging his wife's testimony fails** based on the crime-against-one's-child exception in RCW 5.60.060(1).

10. State v. Darian Demetrius Livingston: On April 23, 2019, Division Two of the COA rules in favor of the appeal of defendant from his Pierce County Superior Court convictions for *two counts of unlawful possession of a controlled substance and one count of unlawful possession of a firearm in the first degree*. Livingston previously appealed these convictions. In his first appeal, the Court of Appeals ruled in a published decision that in the original proceedings the trial court failed to assess whether a nexus existed between Livingston's probation violation of failure to report and the search of the vehicle in his possession. State v. Livingston (Livingston I), 197 Wn. App. 590 (2017**). The Court of Appeals concludes in Livingston II that no nexus existed between (A) the probation violation of merely failing to report and (B) the vehicle searched.**

11. State v. Caleb Joseph Perikins: On April 29, 2019, Division One of the COA rejects the defendant's appeal from his King County Superior Court conviction for *resisting arrest*. The Court of Appeals rules that at the point when defendant resisted an officer's efforts to forcibly take defendant out of a suspected stolen car, **a reasonable person would have known he or she was under arrest, even though the arresting officer told the defendant that he was being "detained [because he was] in a stolen vehicle," not that he was being "arrested [because he was] in a stolen vehicle."**

12. State v. M.B.-M.: On April 29, 2019, Division One of the COA rejects the appeal of a juvenile from his conviction/adjudication of *attempted first degree child molestation.*" The Court rules that, under the totality of the circumstances, the then-13-year old "knowingly and intelligently" waived

his Miranda rights, even though his parents were not in the interrogation room when he waived his rigths. See State v. Dutil, 93 Wn.2d 84 (1980) (waiver of Miranda rights by juvenile 12 years of age or older is tested under a totality of the circumstances test).

13. State v. Brian David Martin: On April 29, 2019, Division One of the COA rejects the appeal by defendant from his Snohomish County Superior Court convictions *for possession of a controlled substance and for DUI*. The Court of Appeals rules that **substantial evidence** (including, but not limited to (A) the arresting officer's knowledge of reports by several witnesses of observations of defendant's erratic pre-crash driving and erratic post-crash conduct, and (B) the arresting officer's observations of erratic post-crash conduct and slurred and erratic speech**) supports the trial court's findings of fact showing that the arresting officer had probable cause when the officer arrested defendant**.

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

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

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

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

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

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

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

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

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