LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: Thank you!

August 2018

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NOTE RE: CRIMINAL JUSTICE TRAINING COMMISSION'S "LAW ENFORCEMENT ONLINE TRAINING DIGEST" EDITIONS FOR APRIL, MAY & JUNE 2018

Readers of this Legal Update are no doubt aware of the Law Enforcement Digest Online Training, which was introduced to the Criminal Justice Training Commission's Law Enforcement Digest page with the December 2017 edition. 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, 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 (including this Legal Update). The April, May and June 2018 LED Online Training editions were recently placed on the LED website.

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ANNOUNCEMENT: THE FOLLOWING MATERIALS BY JOHN WASBERG HAVE BEEN UPDATED THROUGH JULY 1, 2018 AND ARE AVAILABLE ON THE CRIMINAL JUSTICE TRAINING COMMISSION'S INTERNET LED PAGE UNDER "SPECIAL TOPICS"

OUTLINE: "Law Enforcement Legal Update Outline: Cases On Arrest, Search, Seizure, And Other Topical Areas Of Interest to Law Enforcement Officers; Plus A Chronology Of Independent Grounds Rulings Under Article I, Section 7 Of The Washington Constitution"

OUTLINE: "Initiation of Contact Rules Under The Fifth Amendment"

ARTICLE: "Eyewitness Identification Procedures: Legal and Practical Aspects"

These documents by John Wasberg (retired Senior Counsel, Office of the Washington State Attorney General) are updated at least once a year.

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NINTH CIRCUIT, UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT CIVIL LIABILITY: ALLEGED BRADY VIOLATION BY DETECTIVE – NOT INFORMING PROSECUTOR OF FELLOW OFFICER'S STATEMENT THAT THE OFFICER'S SISTER, THE KEY GOVERNMENT WITNESS, WAS A HABITUAL LIAR – SUPPORT'S WRONGFULLY CONVICTED PLAINTIFF'S LAWSUIT

In Mellen v. Winn, ___ F.3d ___ , 2018 WL ___ (9th Cir., August 17, 2018), a three-judge Ninth Circuit panel reverses the U.S. District Court's grant of summary judgment in favor of Detective Marcella Winn on qualified immunity grounds in a 42 U.S.C. § 1983 action.

Plaintiff Susan Mellen was wrongly imprisoned for murder for seventeen years before securing habeas relief in October 2014. She and her children then brought this Civil Rights action against Detective Winn based on Detective Winn's failure to disclose material evidence to the prosecutor.

The three-judge panel holds that, taking the factual allegations in the best light for the plaintiff, as required in the reviewing a summary judgment ruling of qualified immunity, the record demonstrates as a matter of law that Detective Winn withheld material impeachment evidence under Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). The record also established that the plaintiff raised a genuine issue of material fact as to whether Detective Winn acted with deliberate indifference or reckless disregard for plaintiff's Due Process rights. The key part of the evidence that was withheld by Detective Winn while the case was being investigated and prosecuted was a statement by a fellow police officer, Laura Patti, that the key witness, Laura's sister Patti, was a habitual liar who was not to be believed.

The panel also holds that the case law at the time of the 1997-98 investigation clearly established that police officers investigating a criminal case were required to disclose material, impeachment evidence to the defense. Because the law was clearly established, qualified

immunity is not available to Detective Winn for not bringing the impeachment evidence to the attention of the prosecutor.

The panel opinion reverses summary judgment that was granted on qualified immunity grounds. The panel's opinion remands the case to the U.S. District Court for trial or other proceedings consistent with the panel's opinion. The panel's discussion of the facts and the law is quite lengthy, as is often required where fact-intensive Brady issues are involved. A relatively small but key portion of the Court's fact-based legal analysis is as follows:

> The undisputed evidence demonstrates that Detective Winn knew that testimony [of the State's star witness, June Patti] was critical to Mellen's prosecution. [June Patti, who testified at the murder trial that plaintiff Mellen confessed to her] was the only witness to incriminate Mellen in the murder. And, as the lead detective who had taken [June Patti's] initial oral and written statements, Detective Winn was aware of the subject of [June Patti's] statements, where [June Patti] claimed to be the only witness to Mellen's confession.
>
> As the lead investigator, Detective Winn also was present during trial, where [June Patti's] credibility was a central issue; [June Patti's] many prior inconsistent statements even forced the prosecution to put Detective Winn on the stand to clarify the testimony. So, Detective Winn no doubt knew that [June Patti's] credibility was of utmost importance.
>
> That the withheld statements [that June Patti was a confirmed habitual liar who was not to be believed] came from a particularly credible source [June Patti's sister, Laura Patti, a police officer] makes Detective Winn's failure to disclose [the withheld statements] to the prosecutor all the more culpable.
>
> Laura Patti was not only an immediate relative who had grown up with June Patti, she was also a law-enforcement officer, aligned with the values of trustworthiness and dependability typically associated with that profession. Because of this, Laura's statements should have carried even more weight with Detective Winn. From the defense's perspective then, a juror could reasonably find that Detective Winn was reckless in withholding a fellow law-enforcement officer's opinion, even if that same juror would conclude that withholding a layperson's opinion was no more than negligent.
>
> Although Detective Winn now disputes that she spoke with Laura Patti before trial, whether this conversation took place should have been a factual question for the jury to resolve at the § 1983 trial; it is not a question that the district court could resolve at summary judgment. If Laura's statements are to be believed, as they must at summary judgment, then Detective Winn called Laura to investigate [her sister June Patti's] credibility before trial.
>
> Laura stated in her deposition that Detective Winn did not inquire further when Laura told Detective Winn that [Laura's sister] Patti was a habitual liar, and it is undisputed that Detective Winn never communicated Laura's statements to the district attorney. A reasonable juror could conclude from these facts that Detective Winn investigated [June Patti's] credibility and communicated only evidence that favored the government, while willingly suppressing unfavorable evidence.

In fact, Detective Winn's decision not to inquire further into Laura's claims is the hallmark of a "deliberate action[] to avoid confirming suspicions" **–** an action tantamount to knowledge under the law. See United States v. Heredia, 483 F.3d 913, 917 (9th Cir. 2007) (en banc). . . . These facts alone, if proven at trial, would have established the mental state necessary to prove a violation of Mellen's due process rights.

But, there is more. At the time of the investigation, Detective Winn was an experienced detective, who had participated in a hundred homicide investigations, and who had the training and experience to know the value of Laura's statements. Detective Winn testified in deposition that she knew she had an obligation "to report and summarize what each witness said," and she claimed, based on this obligation, that if "Laura Patti or anybody told me that June Patti was not credible or she was a liar, I would have communicated that to the district attorney's office."

And Detective Winn's own assessment was supported at summary judgment by Mellen's police practices expert, Roger Clark, who explained that, "[a]ny reasonably trained officer or detective would have vetted the credibility of the key witness in this case." Because Detective Winn acknowledges that she was obligated to disclose Laura's statements, if made, and Clark's report would have demonstrated that any reasonable police officer would have done the same, a reasonable jury could conclude that Detective Winn knowingly suppressed the statements to secure a conviction.

Other evidence suggests that Detective Winn bolstered [June Patti's] credibility in the early stages of the investigation. The discrepancies between [June Patti's] oral statement and the written statement prepared by Detective Winn suggest that Detective Winn modified [June Patti's] written statement to conform to the physical evidence the police had found and to feed [June Patti] information that [June Patti] did not originally offer to investigators.

For example, the written statement added that [the victim's] body had been set on fire in San Pedro, a fact that the coroner's report had suggested but that [June Patti] had not mentioned in her initial oral statement. The written statement [crafted by Detective Winn] also added details about when and where the perpetrators left [the victim's] body in San Pedro that did not appear in Patti's oral statement.

And, remarkably, even June Patti questioned the credibility of her own written statement when she testified at the preliminary hearing that Detective Winn had forced her to alter the statement to implicate a fourth person. But no one followed up to investigate these claims. [Court's footnote 11: *We also question whether LAPD practices at the time, which allowed detectives to file the written statement in the murder book but to file the tape recording of the oral statement elsewhere, facilitated these discrepancies*.]

Detective Winn should have known how important these details were, particularly when she had also collected information from various other sources that indicated three other men had committed the crime. And still other evidence suggests that Detective Winn would have taken any means necessary to secure Mellen's conviction. Mellen's evidence suggests that Detective Winn knowingly exceeded the scope of a search warrant for Kimball's car; suppressed the content of [Detective Winn's] conversation with another detective, Doral Riggs; spoke with a suspect without counsel present; and failed to investigate other credible witness accounts of [the victim's] murder.

> And Detective Winn's willingness to ignore Mellen's requests for counsel during her initial interrogation is indicative of the aggressive police tactics which Detective Winn used to investigate this case. That [police officer Laura Patti] believed that Detective Winn was justified to proceed with [Laura's alleged-liar-sister, June Patti] as a witness is beside the point. It is for a jury to determine whether a reasonable officer in Detective Winn's position acted with deliberate indifference to Mellen's due process rights, taking into account the seriousness of the charges levied against Mellen, what was known to Detective Winn at the time, and evidence about what a reasonable police officer would do in the same position.
>
> We conclude that this evidence raised a genuine dispute of material fact that Detective Winn acted with deliberate indifference or reckless disregard of Mellen's due process rights when she failed to disclose Laura's statements about her sister's reputation for honesty to the prosecutor.

[One citation omitted; some paragraphing revised for readability]

Result: Reversal of Los Angeles U.S. District order of summary judgment for Detective Winn; case remanded for trial or other proceedings.

EXPECTATION OF PRIVACY UNDER FOURTH AMENDMENT: ROBBERY DEFENDANT CANNOT CHALLENGE ENTRY OF RESIDENCE TO ARREST HIM WHERE HE WAS INSIDE THE RESIDENCE IN VIOLATION OF A NO-CONTACT ORDER

In United States v. Schram, ___ F.3d ___ , 2018 WL ___ (9th Cir., August 21, 2018), a three-judge Ninth Circuit panel affirms the Oregon U.S. District Court's denial of a suppression motion, ruling in a robbery prosecution that a person who is prohibited from entering a residence by a court's no-contact order lacks a legitimate expectation of privacy in that residence and therefore may not challenge its search on Fourth Amendment grounds.

The Ninth Circuit panel describes the facts in Schram as follows:

> On September 24, 2014, detectives from the Medford Police Department were called to investigate the robbery of a local U.S. Bank branch. After interviewing eyewitnesses and further police work, the detectives had probable cause to believe that Schram was responsible. A records check showed, among other things, that there was a no-contact order prohibiting Schram from contacting his girlfriend, Zona Satterfield.
>
> The detectives began their search for Schram at Satterfield's residence, as it was the only address the detectives had that was associated with him. Without a warrant (and, for the purposes of this appeal, we assume without Satterfield's consent), the detectives entered the residence, found Schram inside, and arrested him. They then obtained a search warrant and searched Satterfield's home.

The panel explains that Schram's lack of a reasonable expectation of privacy in the residence was not the unlawfulness of his activity in the residence but the unlawfulness of his very presence in the place. The Court also rejects Schram's argument that the consent by the protected person on the no-contact order somehow gave him an expectation of privacy in her residence.

Result: The District Court's suppression ruling is affirmed, but the panel reverses the defendant's robbery conviction in a concurrently filed unpublished opinion that holds that the trial court erred by admitting evidence of prior criminal activity of the defendant.

LEGAL UPDATE EDITORIAL COMMENT: Best practice would be for officers to apply, in the first instance, for a search warrant (probable cause was present, I think) to enter the house and search for the suspect.

Case law from the Washington Supreme Court on "standing" and "automatic standing" is somewhat unclear (to me at least) in cases where possession is an element of the crime, but because the prosecution here was for robbery, the ruling of no-suppression would apparently be the same in the Washington courts under article I, section 7 of the Washington constitution.

Also note the following comment about the Schram decision by WAPA Staff Counsel, Pam Loginsky, in her case notes on the WAPA website for the week ending August 24, 2018:

> **"Editor's note: This opinion is consistent with Washington law. See State v. Jacobs, 101 Wn. App. 80, 2 P.3d 974 (2000) (an individual who has been excluded from a particular building by a judicial domestic violence order will lack a reasonable expectation of privacy in the building)."**

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WASHINGTON STATE COURT OF APPEALS

SEARCH WARRANT APPLICATION FOR EVIDENCE OF CHILD PORNOGRAPHY: STATE WINS AGAINST DEFENDANT'S CONSTITUTIONAL ARGUMENTS CLAIMING (1) STALENESS OF PROBABLE CAUSE ALLEGATIONS IN AFFIDAVIT, (2) INSUFFICIENT PARTICULARITY IN WARRANT'S DESCRIPTION OF THE ITEMS SOUGHT, AND (3) OVERBREADTH AND NON-SEVERABILITY OF WARRANT

State v. Friedrich, ___ Wn. App.2d ___ , 2018 WL ___ (Div. III, August 23, 2018)

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

> On March 30, 2016, Microsoft reported to the National Center for Missing and Exploited Children (NCMEC) that it became aware that a user of Skype, user name "jkf6418," uploaded a media file believed to contain a depiction of a minor engaging in sexually explicit conduct. Microsoft's report indicated that a search of Skype for the username "jkf6418" yielded three results, all belonging to a "Jay Friedrich." The one result identifying "Jay Friedrich['s]" city of residence identified it as Walla Walla, Washington. The NCMEC report indicated that a search of the username "jkf6418" on Spokeo, a people search website that aggregates data from other services, also yielded three results. One, a dating profile on an online dating site, described "jkf6418" as a 51-year-old bisexual single male from Walla Walla and as 6'1" and of average build.
>
> After it was determined that the Internet Protocol (IP) address most likely came from Walla Walla, the information was passed along to the Walla Walla County Sheriff's Department and investigation of the report was referred to [Detective A] on April 12.

[Detective A] viewed the media file, a picture of what appeared to be an approximately 9- to 11-year-old girl engaged in "sexually explicit . . . conduct" as defined by RCW 9.68A.011(4). .

On April 13, [Detective A] obtained a search warrant to locate the subscriber information for the IP address, which was registered to Charter Communications. Charter Communications responded to the warrant on April 21, identifying the service subscriber as Jay Jensen. [Detective A] learned from a search of police records that in 2012 Jay Jensen reported finding child pornography on his roommate's computer. The report listed Mr. Jensen's roommate as Jay Friedrich. Mr. Friedrich was not charged as a result of that report, as the investigation produced insufficient evidence for prosecution. [Detective A] nonetheless reviewed the pictures obtained in the investigation and determined that they were of teenage and preteen girls. [Detective A's] research also revealed that Mr. Friedrich is a registered sex offender.

[Detective A] learned from police records that Mr. Friedrich lived in Walla Walla and was described as 52 years of age, 6'1" in height, and as weighing 155 pounds. His birthdate was recorded as 04/18/1964, which, along with his initials, jkf, correlated to the "jkf6418" account (04/18/1964). A month after NCMEC received the report from Microsoft, on April 27, [Detective A] applied for a warrant to search Mr. Friedrich's residence. In his 24-page supporting affidavit, [Detective A] provided his background and training, the foregoing information, and information on the typical operational practices of electronic and internet service providers (collectively "ISPs"). He testified that pursuant to terms of their user agreements, ISPs "typically monitor their services utilized by subscribers[t]o prevent their communication networks from serving as conduits for illicit activity" and "routinely and systematically attempt to identify suspected child pornography that may be sent through [the ISP's] facilities." He testified that when an image or video file is believed by an ISP to be child pornography as defined by 18 U.S.C. § 2256, a "hash value" of the file can be generated by operation of a mathematical algorithm that is unique to the file—"in essence, the unique fingerprint of that file." A database of hash values for files suspected to be child pornography enables ISPs to automatically detect when files that have been identified as illicit pass through their system. He testified that reports to NCMEC by ISPs are often made solely on the basis of detection of a file's hash value.

In addition to describing these practices (although in more detail), [Detective A's] 2. taffidavit stated that under federal law, an ISP "has a duty to report to NCMEC any apparent child pornography it discovers 'as soon as reasonably possible.'" (quoting 18 U.S.C. § 2258A(a)(1)).

The items that [Detective A] sought to search for and seize were identified in two single-spaced pages of an attachment to his affidavit. They consisted of two categories: 'Records, Documents, and Visual Depictions," and "Digital Evidence." The requested search warrant was issued by District Court Judge Kristian Hedine on April 27. The last, freestanding provision of its digital evidence section authorized the seizure of records and things evidencing the use of nine IP addresses that were unrelated to Microsoft's report to NCMEC. They were not identified or explained by [Detective a's] affidavit or its attachments.

In executing the search warrant the next day, law enforcement seized a Hewlett Packard laptop, a Toshiba laptop, a Micron tower computer, flash drives, compact disks, and

floppy disks—all found in Mr. Friedrich's bedroom. They seized a Samsung smartphone from Mr. Friedrich's person. During an interview with officers, Mr. Friedrich admitted that the electronics seized were his and that they would contain images of underage girls. The Hewlett Packard computer and the Samsung smartphone proved to contain depictions of minors engaged in sexually explicit conduct, including the image Microsoft reported. The Toshiba laptop and Micron tower computer also contained such depictions.

The State eventually charged Mr. Friedrich with one count of second degree dealing in depictions of a minor engaged in sexually explicit conduct, three counts of first degree possession of depictions of a minor engaged in sexually explicit conduct, and one count of second degree possession of depictions of a minor engaged in sexually explicit conduct, all in violation of RCW 9.68A.050 and .070. For simplicity's sake hereafter, and unless indicated otherwise, our references to "child pornography" are to depictions of minors whose possession or dealings with which violate provisions of chapter 9.68A RCW or federal law.

Mr. Friedrich moved the court to suppress all of the State's evidence, arguing that [Detective A's] affidavit supporting his application did not meet the particularity requirement of the Fourth Amendment. The superior court, the Hon. John Lohrmann, denied the motion without a hearing. The parties then proceeded to a stipulated facts trial, with Mr. Friedrich preserving his right to appeal the trial court's suppression decision. Mr. Friedrich was convicted on all remaining counts.

[Footnotes and citations to record omitted]

ISSUES AND RULINGS: (1) The affidavit stated that the March 30, 2016 date of Microsoft's report to the CyberTipline was the date Microsoft "became aware that a user uploaded a media file," not the date of the upload itself. Also, four weeks had passed between Microsoft's report and the detective's application for the search warrant. The detective stated in the affidavit that the evidence would likely still be at Friedrich's residence. He depended for this point on generalizations about the habits of child pornography collectors. Was the probable cause evidence stale at the point.of execution of the search warrant? (ANSWER BY COURT OF APPEALS: No, the probable cause evidence was not stale.

(2) The search warrant in this case consistently qualified the "Records, Documents, and Visual Depictions" to be searched for and seized as ones containing, or pertaining or relating to, "visual depictions of minors engaged in sexually explicit conduct, as defined in RCW 9.68A.011 and Title 18, United States Code, Section 2256." .All items to be searched and seized under the express terms of the warrant were also qualified by introductory language that they be "records, documents, and items that constitute evidence, contraband, fruits, and/or instrumentalities of violations of RCW 9.68A.050, dealing in depictions of minor [sic] engaged in sexually explicit conduct." The isolated phrase "child pornography" appears only once, in authorizing seizure of materials "that show the actual user(s) of the computers or digital devices during any time period in which the device was used to upload, download, store, receive, possess or view child pornography."

In light of the above-quoted introductory language and the consistent use of the detailed statutory definitions elsewhere in the warrant, does the search warrant meet the constitutional particularity requirement? (ANSWER: Yes, rules the Court of Appeals)

Result: Affirmance of Walla Walla Superior Court convictions of Jay Karl Friedrich for one count of dealing in "depictions of a minor engaged in sexually explicit conduct," three counts of first degree possession of such items, and one count of second degree possession of such items.

ANALYSIS:

1. On the **STALENESS ISSUE**, the Court of Appeals explains as follows why the Court concludes that the probable cause evidence was not stale, and why it was reasonable to believe that the sought-after evidence probably was at the premises at the time of the search:

> *Timeliness of Microsoft's detection and report*
>
> A passage of time between an observation of criminal activity and the presentation of a search warrant affidavit may be so prolonged that it is no longer probable that a search will reveal criminal activity or evidence; i.e., the information may be stale. . . . But "the information is not stale for purposes of probable cause if the facts and circumstances in the affidavit support a commonsense determination that there is continuing and contemporaneous possession of the property intended to be seized." State v. Maddox, 152 Wn.2d 499, 506 (2004). [Detective A's] affidavit stated that Microsoft's report indicated that it "became aware" of Mr. Friedrich's upload on March 30. [The affidavit] also informed the magistrate that ISPs such as Microsoft typically monitor their services to prevent their communication networks from serving as conduits for illicit activity, including to systematically attempt to identify suspected child pornography.
>
> He described the generation of hash values for pornographic files that enable ISPs to automatically detect the passage of some pornographic files through their system. [Detective A] also cited federal law under which an ISP "has a duty to report to NCMEC any apparent child pornography it discovers 'as soon as reasonably possible.'" (quoting 18 U.S.C. § 2258A(a)(1)). Mr. Friedrich concedes that "[p]resumably, Microsoft complied with this requirement."
>
> Industry practices exist, can often be determined by outsiders to the industry, and the practices described by [Detective A's] affidavit are matters of which a detective with training in investigating child pornography cases could be expected to be aware. The district court judge was entitled to rely on the detective's knowledge of industry practice. That information and the federal reporting requirement support the magistrate's commonsense conclusion that Microsoft's detection and reporting would be prompt.
>
> *Likelihood that evidence of criminal activity would be located at Mr. Friedrich's residence*
>
> To establish the likelihood that evidence of criminal activity would still be located at Mr. Friedrich's residence, [Detective A's] affidavit relied in part on the fact that digitized information will remain on a computer not only until deleted, but even thereafter, which Mr. Friedrich does not dispute. [The detective's] affidavit also included generalizations about what collectors of child pornography generally do, which, according to the deputy, includes "preferring not to be without their child pornography for any prolonged time period," often maintaining photographs or videos "in computer files or external digital storage devices," and maintaining pornographic materials "in the privacy and security of their home or in some other secure location, such as a private office." Mr. Friedrich challenges these generalizations as support for a determination of probable cause, citing State v. Thein, 138 Wn.2d 133, 977 P.2d 582 (1999)

> In Thein, our Supreme Court held that an officer's asserted understanding of the common habits of drug dealers was insufficient to establish probable cause to search the defendant's residence. The warrant affidavit in Thein presented specific facts providing probable cause that the defendant was a drug dealer, but only generalizations in support of the officer's belief that evidence of his criminal activity could be found at his residence. The court concluded that the generalized statements "in [Thein's] case were, standing alone, insufficient to establish probable cause to search [his] residence." . Although allowing that "common sense and experience inform the inferences reasonably to be drawn from the facts," the Court determined that the type of "broad generalizations" presented by the warrant affidavit for Thein's residence "do not alone establish probable cause."
>
> The Court added a cautionary note, "emphasiz[ing] that the existence of probable cause is to be evaluated on a case-by-case basis" and in each case, "'the facts stated, the inferences to be drawn, and the specificity required must fall within the ambit of reasonableness.'" . . . . More recently, our Supreme Court observed in Maddox that "[i]n evaluating whether the facts underlying a search warrant are stale, the court looks at the totality of circumstances," including "the nature and scope of the suspected criminal activity."
>
> [Detective [A's] generalizations about what possessors of child pornography "generally do" warrant critical examination for the reasons given in Thein. But unlike the generalizations about drug dealers in Thein, [Detective A's] generalizations about possessors of child pornography fall within the ambit of reasonableness, and similar generalizations have survived critical examination in a number of courts. [Here the Court of Appeals discusses decisions from other jurisdictions.]

[Some citations omitted, others revised for style]

2. On the **PARTICULARITY ISSUE**, the Court of Appeals explains as follows why the Court concludes that the search warrant meets the particularity requirement:

> Among the requirements of the Fourth Amendment is that no warrant shall issue without "particularly describing the place to be searched, and the persons or things to be seized." . . . ." The purposes of the search warrant particularity requirement are the prevention of general searches, prevention of the seizure of objects on the mistaken assumption that they fall within the issuing magistrate's authorization, and prevention of the issuance of warrants on loose, vague, or doubtful bases of fact." State v. Perrone, 119 Wn.2d 538, 545 (1992) . . .
>
> The first two purposes are related. The first prevents the sort of general, exploratory rummaging in a person's belongings of the sort "'abhorred by the colonists.'" Id. (quoting Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971)). The second ensures that what is to be seized is determined by a neutral magistrate, eliminating the danger of unlimited discretion in the executing officer. [Coolidge v. New Hampshire] As to these related purposes, "a description is valid if it is as specific as the circumstances and the nature of the activity under investigation permits." Perrone, 119 Wn.2d at 547.
>
> A greater degree of particularity is required when a search warrant authorizes a search for items protected by the First Amendment. Describing the history of this heightened

> requirement in 1965, the U.S. Supreme Court stated that "[T]he most scrupulous exactitude" applies "when the 'things [to be seized]' are books, and the basis for their seizure is the ideas which they contain." Stanford v. Texas, 379 U.S. 476, 485 (1965).
>
> The third purpose of the particularity requirement ties it to the requirement of probable cause. Imprecision in the description of the items to be seized that can be traced to "loose, vague, or doubtful bases of fact" increases the likelihood that probable cause has not been established. Perrone, 119 Wn.2d at 548. . . .
>
> The first infirmity alleged by Mr. Friedrich for his particularity challenge is the search warrant's use of the unqualified term "child pornography" in one instance, in describing items to be seized. Use of the unqualified term proved fatal to the search warrant at issue in Perrone, in which the warrant affidavit repeatedly used the term to describe items to be seized, and our Supreme Court held that the term was "not sufficiently particular to satisfy the Fourth Amendment." . . . The court reasoned that authorizing law enforcement to seize anything it thinks constitutes "child pornography" allows for too much discretion and is not "scrupulous exactitude." The court suggested that a warrant affiant could avoid the particularity problem by using statutory definitions found in RCW 9.68A.011. More recently, the Court reiterated that if a search warrant limiting items to be seized "used the language of RCW 9.68A.011 to describe materials sought, the warrant would likely be sufficiently particular," but that merely identifying the crime under investigation as a violation of RCW 9.68A.070 did not satisfy the particularity requirement. State v. Besola, 184 Wn.2d 605, 614 (2015).
>
> The search warrant in this case consistently qualified the "Records, Documents, and Visual Depictions" to be searched for and seized as ones containing, or pertaining or relating to, "visual depictions of minors engaged in sexually explicit conduct, as defined in RCW 9.68A.011 and Title 18, United States Code, Section 2256." All items to be searched and seized were also qualified by introductory language that they be "records, documents, and items that constitute evidence, contraband, fruits, and/or instrumentalities of violations of RCW 9.68A.050, dealing in depictions of minor [sic] engaged in sexually explicit conduct." The unqualified term "child pornography" appears only once, in authorizing seizure of materials "that show the actual user(s) of the computers or digital devices during any time period in which the device was used to upload, download, store, receive, possess or view child pornography." Given the introductory language and the consistent use of statutory definitions elsewhere, Mr. Friedrich's attack is hypertechnical. The search warrant in this case does not present the infirmity presented by the search warrant in Perrone.

[Some citations omitted, others revised for style; footnote omitted]

3. On the **OVERBREADTH AND SEVERABILITY ISSUES**, the Court of Appeals explains as follows why the Court concludes that Friedrich's challenge fails on these issues:

> Additional and related infirmities alleged by Mr. Friedrich are the breadth of the media to be seized, which includes, e.g., books, magazines, photographs, motion picture films and videos; and the warrant's extension to every digital device found in the residence that is "capable of storing and/or processing data in digital form," as well as "related communications devices," examples of which are provided. He argues that the breadth of both categories authorizes the seizure of items unrelated to the suspected crime, which was a single instance of uploading a digital image. Finally, he points to the fact

that the search warrant authorized seizure of records and things evidencing the use of nine IP addresses having no apparent relation to [Detective A's] evidence.

The State responds that the particularity requirement tolerates ambiguity when the description is as complete as can be reasonably expected, and that the complaint about the breadth of devices whose seizure was authorized fails to consider that "[t]he only way police will know whether digital evidence contains child pornography is by seizing the device and then submitting it to . . . expert examination. This cannot be ascertained at the time of seizure."

The State does not defend the provision of the search warrant dealing with the nine unexplained IP addresses, lending credence to Mr. Friedrich's surmise that it was carryover language from an earlier search warrant. We set aside that provision for now, and address it in our concluding discussion of the severability doctrine.

As to the breadth of the types of media to be seized, "courts evaluating alleged particularity violations have distinguished between property that is inherently innocuous and property that is inherently illegal." State v. Chambers, 88 Wn. App. 640, 644 (1997) "A lesser degree of precision may satisfy the particularity requirement when a warrant authorizes the search for contraband or inherently illicit property." Child pornography is not protected by the First Amendment. . . . The search warrant authorized a search for and seizure of only media containing statutorily-defined child pornography. It was not overbroad as to media whose content could be assessed during the search.

The breadth of digital devices to be seized presents a different issue because, as the State points out, whether they contained child pornography could not be assessed while executing the warrant at the residence. If a magistrate reasonably finds it probable that an individual has engaged in criminal dealings with child pornography, and digital evidence of those dealings is likely to be found in devices located in his or her home, the most reasonable approach would appear to be to authorize seizure of all reasonably suspect devices, but with a particularized protocol for searching the devices following the seizure. See, e.g., United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162, 1177 (9th Cir. 2010) (per curiam) (en banc) (recognizing "the reality that over-seizing is an inherent part of the electronic search process") . . . .

The severability doctrine spares us the task of drawing lines about over-seizing electronic information in this case, because the evidence that was seized and used to convict Mr. Friedrich was seized pursuant to provisions of the warrant that were particularized and supported by probable cause. Under the severability doctrine, which "has been applied [even] where First Amendment considerations exist," "'infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant' but does not require suppression of anything seized pursuant to valid parts of the warrant." Perrone, 119 Wn.2d at 556 . . . . Although the doctrine does not apply to unconstitutional general warrants or where the valid portion of the warrant is "a relatively insignificant part of an otherwise invalid search," . . . . neither of those exceptions to the doctrine apply here.

The warrant was not too vague and did not authorize the seizure of items protected by the First Amendment. Its extension to nine unrelated IP addresses and any other debatable overbreadth did not taint its valid and severable authorization to seize the three computers and one smartphone relied on as evidence against Mr. Friedrich.

[Some citations omitted, others revised for style; footnote omitted]

RESTORATION OF FIREARM RIGHTS: READING THE UNLAWFUL-POSSESSION-OF-FIREARMS STATUTE, RCW 9.41.040, TOGETHER WITH THE JUVENILE SEALING-OF-RECORDS STATUTE, RCW 13.50.060, DIVISION ONE OF COURT OF APPEALS AGREES WITH DIVISION TWO THAT PRIOR CLASS A FELONY JUVENILE ADJUDICATIONS MUST BE TREATED AS IF THEY NEVER HAPPENED IF A SEALING ORDER IS OBTAINED

In Woodward v. State, ___ Wn. App.2d ___ , 2018 WL ___ (Div. I, August 13, 2018), Division One of the Court of Appeals agrees with ruling of Division Two of the Court of Appeals in State v. Barr, 4 Wn. App.2d 85 (2018). Thus, Division One rules that there are no firearms-possession restrictions under RCW 9.41.040 on a man who was adjudicated in juvenile court in 1993 of a class A felony and who in 2016 obtained a juvenile court/superior court order sealing his juvenile records for the 1993 adjudication. Under the sealing statute, RCW 13.50.260, a sealing order requires that the sealed adjudications be "treated as if they never occurred."

Accordingly, Division One rules that when Woodward petitioned the Snohomish County Superior Court, after getting the sealing order, for restoration of his firearm rights, his petition should have been granted. Division One of the Court of Appeals concludes, just as Division Two did in Barr, that the statutory language is clear, and that the result in the case is consistent with the decision in Nelson v. State, 120 Wn. App. 470 (2003). The Woodward Court declares that the facts in Nelson were parallel, as was the prior statutory sealing scheme.

Result: Reversal of Snohomish County Superior Court order declining to grant the petition of Mark A. Woodward; case remanded for issuance of an order granting restoration of firearms rights (this apparently means that Woodward will be able to compel the Snohomish County Sheriff to issue him a concealed pistol license).

WITNESS TAMPERING, SUFFICIENCY OF EVIDENCE: ASKING GIRLFRIEND TO GIVE FALSE STORY TO A DEFENSE INVESTIGATOR OR OTHER INVESTIGATOR WILL SUPPORT WITNESS TAMPERING CONVICTION

In State v. Gonzalez, 2 Wn. App.2d 96 (Div. II, January 17, 2018), the Court of Appeals upholds the conviction of defendant for witness tampering. The Court rejects defendant's arguments that his statements to his girlfriend were not about testimony and were not requests that she testify falsely.

Gonzalez was living with his girlfriend and her mother. He tried to get away from the police by stealing the mother's vehicle and fleeing. He was caught by the pursuing police.

Gonzalez phoned his girlfriend from a recorded line in the jail. He told the girlfriend that someone ("an 'investigator,' or 'somebody'") was going to call her, and she should tell that person that she gave him permission to use the vehicle. The girlfriend replied "that would be hard for her to do." Gonzalez then replied, "well then, don't do it." The girlfriend then said that "[he] knew the deal," referencing her obedience to her mother's rule that he was not to drive the mother's car. After vaguely expressing annoyance, he told her that "she knew what to do." She told Gonzalez that she would miss him, and Gonzalez asked her "whether she'd rather deal with that for 6 or 15 years," apparently a reference to the difference in sentencing depending on the content of her testimony.

After testifying along the lines of the facts above, the girlfriend confirmed that the defendant had asked her to change her story (i.e., to say that she had given him permission to use the car). She did try to support him by claiming that he must have been "just talking" because he would have known that she would not want to "look like a dumbass" by testifying that she had given him permission to take the car.

The witness tampering statute, RCW 9A.72.120 provides in relevant part as follows:

> (1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:
>
> (a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or
> (b) Absent himself or herself from such proceedings; or
> (c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency.

[Emphasis added]

Gonzalez argued on appeal that the evidence was insufficient to support the witness tampering conviction, contending that: (1) he asked Hook only to speak to the defense investigator, not to testify in any way; and (2) even if one concludes that he was trying to influence her testimony, there was no evidence that he was asking Hook to testify falsely. The Gonzalez Court explains as follows why the evidence supports the conviction for witness tampering:

> Gonzalez argues that the State failed to prove that he was attempting to influence Hook to testify falsely because he asked her to tell the defense investigator only something different than she told the police. He asserts that speaking to the defense investigator is not the equivalent of testimony.
>
> But Gonzalez's request that Hook tell the defense investigator a different story than she told the police would have little effect if it did not also imply that Hook needed to also be willing to testify consistently with what she told the defense investigator. Thus, a rational finder of fact could have easily found that Gonzalez was attempting to influence Hook's potential testimony.
>
> . . . .
>
> Gonzalez also argues that there was insufficient evidence to establish that he asked Hook to testify falsely. Again, we disagree.
>
> At no point in her testimony did Hook testify that she had given Gonzalez permission to take the Jeep on September 18. Instead, she testified that she dropped Gonzalez off, drove the Jeep home and parked it, and left the keys near the back door. Although Gonzalez came into her bedroom the next morning, Hook did not testify that he asked for or that she gave him permission to drive the Jeep. Taking this evidence in the light most favorable to the State, the jury could find that Hook's testimony established that Gonzalez took the Jeep without her permission and that Hook's testimony was truthful.

Given that Gonzalez asked Hook to state that she had given him permission, a rational finder of fact could have easily found that Gonzalez was asking Hook to testify falsely.

Accordingly, Gonzalez's insufficient evidence arguments fail, and we affirm his witness tampering conviction.

Result: Affirmance of Pierce County Superior Court convictions of Leonel Gonzales for witness tampering and possession of a controlled substance (his controlled substances conviction is not addressed in the Legal Update).

Status: Defendant's petition for Washington Supreme Court review has been denied.

SUFFICIENCY OF EVIDENCE OF ACCOMPLICE LIABILITY: EVIDENCE OF DEFENDANT'S COMMUNICATIONS WITH PRINCIPALS WHO ATTEMPTED A HOME INVASION ROBBERY IS SUFFICIENT TO SUPPORT HER CONVICTION AS AN ACCOMPLICE TO THE CRIME OF BURGLARY IN THE FIRST DEGREE WHILE ARMED WITH A FIREARM

In State v. Dreewes, 2 Wn. App. 297 (Div. I, January 29, 2018), Division One of the Court of Appeals upholds, based on accomplice liability, defendant Ms. Dreewes' conviction for burglary in the first degree while armed with a firearm. The Court of Appeals concludes that she had knowledge that she was promoting or facilitating that particular crime by her accomplices who did the actual home invasion robbery attempt that was the basis of the charge.

Defendant Dreewes did some of her own investigating of a theft of personal property and credit cards from her truck. A store employee told Dreewes that her credit card had been used by a "skinny white crack-whore-looking girl with pink hair." Dreewes gained more information that convinced her (1) that the "pink-haired girl" was living in a particular residence, and (2) that a friend of Dreewes' nephew had seen some of Dreewes' personal property in the residence. Dreewes enlisted the help of a now-adult woman who she knew from her high school days.

In messages and calls between the woman and defendant, Dreewes offered the woman and the woman's boyfriend $300 in cash if they went to the residence, found the pink-haired girl, gave her two black eyes, transported the girl to a specified barn, and got defendant's property back without police involvement. Dreewes did not want her insurance company, which had already paid off, to learn of the property recovery. The friend accepted this offer, and Dreewes told her that there would be 4 to 5 people in the house, and not to go there unless "packing."

On the morning of January 23, 2014, the woman and her boyfriend went to the home twice. The first time nobody answered their knock, and they left the residence. Dreewes was told of this situation and their plan to return that day. On the return trip, the boyfriend, armed with a rifle, forced his way into the home. The boyfriend threatened to kill the family, struck the husband in the face with the rifle, attempted to shoot the wife, and then tried to flee but was subdued by the residents and held for the police. The invading woman's pistol was taken from her by a resident, and the woman fled.

Defendant was convicted as an accomplice to one count of Burglary in the First Degree while armed with a firearm (**LEGAL UPDATE EDITORIAL NOTE: She was also convicted of Assault in the Second Degree while armed with a firearm, but the Court of Appeals rules that an anomaly in the wording of a jury instruction requires reversal of that conviction; that jury instruction issue is not addressed in the Legal Update**).

One of the alternative ways that the accomplice liability statute, RCW 9A 08.020, makes a person liable for the acts of another is if the would-be accomplice promotes or facilitates the commission of a particular crime by another person (the other person is sometimes referred to as the principal). Washington appellate precedents have established that to prove accomplice liability, it must be established that the accomplice had actual knowledge that he or she was promoting or facilitating the particular crime that is ultimately charged based on the principals' conduct. The Court of Appeals rules that there is sufficient evidence in the record to support the conviction of Dreewes as an accomplice to Burglary in the First Degree while armed with a firearm. The Court explains:

> To convict Dreewes as an accomplice to the crime of burglary in the first degree, the State had the burden of proving beyond a reasonable doubt Dreewes had actual knowledge that she was promoting or facilitating the crime of unlawfully entering with intent to commit a crime against a person or property. . . .
>
> Viewing the evidence in the light most favorable to the State, the evidence and reasonable inferences support finding Dreewes knew Thomas and Parrish would unlawfully enter the residence located at 10501 56th Drive Northeast to commit a crime against a person or property while armed with a firearm. Dreewes solicited and agreed to pay Thomas and Parrish to go to that address to retrieve her property and bring the pink-haired girl to her barn. On January 22, Dreewes confirmed the address of the house was 10501 56th Drive Northeast and told Thomas, "My nephew says my laptop and stuff is 100% in that house." Dreewes said, "If you get my laptop back and cops don't know about it I can keep the $1500 and get you some more $$." Dreewes told Thomas there were four to five people in the house and instructed Thomas and Parrish to go to the house armed with firearms to retrieve her property and "nab" the pink-haired girl. Dreewes told Thomas, "[D]on't go there unless packing." Thomas testified that she and Parrish "needed to know how many people were in the home so we know how many people we were going up against." Dreewes told Thomas, "I want my shit," "I want [the pink-haired girl] to have 2 black eyes," and to bring the pink-haired girl to her barn in Arlington. The undisputed evidence establishes Parrish and Thomas used the firearms Dreewes told them to bring to force their way into the residence to commit a crime against "a person or property therein."
>
> We hold sufficient evidence supports the jury conviction of Dreewes as an accomplice to the crime of burglary in the first degree while armed with a firearm.

Result: Affirmance of Snohomish County Superior Court conviction of Jennifer Cathryn Dreewes for burglary in the first degree while armed with a firearm. Reversal, based on a jury instruction anomaly not addressed in the Legal Update, of her conviction for assault in the second degree while armed with a firearm.

Status: The Washington Supreme Court has granted the State's request for review of the second conviction (not addressed in the Legal Update); the Supreme Court has denied the defendant's request for review of the first conviction that is addressed in this Legal Update entry.

PRIVACY ACT ELECTRONIC COMMUNICATIONS: NO REASONABLE EXPECTATION OF PRIVACY FOR DEFENDANT IN THE TEXT MESSAGES THAT HE UNKNOWINGLY SENT

TO PIMP INSTEAD OF PROSTITUTE; ACCORDINGLY, ADMISSION OF THE TEXTS INTO EVIDENCE DID NOT VIOLATE CHAPTER 9.73 RCW

In In the matter of the Personal Restraint of. Eric Matthew Hopper, __ Wn. App.2d ___ (Div. I, July 2, 2018 unpublished opinion declared published on August 28, 2018), Division One of the Court of Appeals rules for the State in rejecting defendant's Personal Restraint Petition challenge to his 2014 King County Superior Court conviction for commercial sexual abuse of a minor.

Hopper called and sent text messages to the number listed in a Backpage.com advertisement featuring a photograph of an unidentifiable female with the fictitious name of "Whisper." He ultimately paid to have sex with K.H., the 16-year-old girl pictured in the ad. Although he believed that he was communicating with K.H. by text, he was actually communicating with her pimp, Allixzander Park. Hopper argued on appeal that Park violated the Washington Privacy Act (chapter 9.73 RCW) by "intercepting" his "private communications" to K.H.

The Court of Appeals rules, however, that the circumstances show that Hopper did not have a reasonable expectation of privacy in these text messages. Thus, his text messages to K.H. were not "private communications" and therefore there was no violation of the Privacy Act in admitting the recordings

The Court of Appeals discusses four fact-based Washington Supreme Court decisions, two of which found communications in the particular factual context of those particular cases to be private under the Privacy Act (see State v. Roden, 179 Wn.2d 893 (2014) and State v. Townsend, 147 Wn.2d 666 (2002)), and two of which held communications in the particular context of those cases to be not private either under the Washington constitution or under the Privacy Act (State v. Goucher, 124 Wn.2d 778 (1994) and State v. Clark, 129 Wn.2d 211 (1996)).

The Court of Appeals also includes the following footnote regarding Backpage:

> The Department of Justice seized Backpage.com in April 2018. Press Release, U.S. Dep't of Justice, Justice Department Leads Effort to Seize Backpage.Com, the Internet's Leading Forum for Prostitution Ads, and Obtains 93-Count Federal Indictment (April 9, 2018),https://www.justice.gov/opa/pr/justice-department-leads-effort-seize-backpagecom-internet-s-leading-forumprostitution-ads.

Result: Denial of personal restraint petition of Eric Matthew Hopper in which he seeks relief from his King County Superior Court conviction for commercial sexual abuse of a minor.

FIRST DEGREE FELONY MURDER: EVIDENCE HELD SUFFICIENT TO SHOW MURDER WAS DONE IN COURSE OF OR IN FURTHERANCE OF ROBBERY

In State v. Wang, ___ Wn. App.2d ___ (Div. I, August 27, 2018), Division One of the Court of Appeals affirms the first degree murder conviction of Song Wang.

Song Wang argued on appeal that the State presented insufficient evidence that his killing of the victim was done in the course of or in furtherance of the crime of second degree robbery for purposes of the felony murder statute, RCW 9A.32.030(1)(c)(1).

The State presented evidence that Wang: (1) used a phone application to make calls via the Internet rather than a regular cellular service, (2) created the account he used to communicate with the victim on the day of the murder, (3) contacted numerous medium-priced prostitutes who often carry large sums of money and who are less likely to report a robbery, (4) was in financial despair and looking to "make fast money," (5) used force to take the property, (6) was seen on video leaving the victim's ransacked apartment with a full bag, and (7) tried to sell a designer bag which was taken from the victim's apartment the day after the murder.

The Court of Appeals concludes that this evidence was legally sufficient for a rational jury to find him guilty beyond a reasonable doubt of causing the victim's death in the course of or in furtherance of a robbery.

Result: Affirmance of King County Superior Court conviction of Song Wang for felony murder in the first degree.

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

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

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

In July 2018, eight 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. Abdirahman S. Sakawe: On August 6, 2018, Division One rules for the State in rejecting defendant's appeal from his King County Superior Court convictions for *robbery in the second degree, attempted robbery in the second degree and assault in the second degree*. Among other things, the Court of Appeals rules that (1) under the totality of the circumstances, a 17-year-old was not **in custody for *Miranda* purposes** when an officer questioned him as a suspect at the hospital while the youth was waiting for treatment for a bite by a police K-9, even taking into account, based on J.D.B. v. North Carolina, 584 U.S. 261 (2011), the fact that the officer was aware that the defendant was 17 years old (factors in the determination of non-custody were that the youth was not told he was under arrest, was not handcuffed, and was allowed to leave the hospital after the questioning and medical treatment).

2. State v. Abdirauf A. Isse: On August 6, 2018, Division One of the COA rules for the State in rejecting defendant's appeal from his King County Superior Court conviction for *driving under the influence of intoxicating liquor*. Defendant Isse relied on the **corpus delicti** precedent of State v. Hamrick, 19 Wn. App. 417 (1978) and subsequent corpus delicti decisions in arguing that the State failed to prove that he was the driver of the car in a single car accident, and that therefore his admissions to a responding law enforcement officer to having driven the car should not have been admitted at trial. The Court of Appeals notes that in Hamrick the only evidence to support that the defendant was driving, other than his admission to an officer, was his presence at the scene of a one-car accident. The Court says that Isse's case is different:

> Unlike Hamrick, here, the State relies on much more than Isse's presence at the scene to establish corpus delicti. And although Isse was not the registered owner of the vehicle [his cousin was the registered owner], evidence corroborates that he was driving it.
>
> [The investigating officer] found the car keys on-site. And Isse retrieved the vehicle registration without issue, sat in the driver's seat without adjusting it, and negotiated with the tow truck driver about its removal.
>
> In addition, the accident occurred on I-5 around a blind curve where there was no shoulder, was over one-half mile from the nearest entrance and exit ramp, and blocked an entire lane of travel. Because the conditions were not safe for a pedestrian to leave on foot and would likely lead law enforcement to respond quickly, it is unreasonable to infer that Isse's cousin would have been able to flee the scene. The totality of these circumstances supports a logical and reasonable inference that Isse committed the charged crime and is inconsistent with his innocence. The State met its burden of introducing evidence of sufficient circumstances independent of Isse's admission . . . .

3. State v. Dawn Marie Mitchell: On August 9, 2018, Division Three of the COA rules for the State in rejecting defendant's appeal from her Benton County Superior Court conviction for *possession of a controlled substance*. The Court of Appeals holds that a **search incident to arrest** was not delayed too long after the point of arrest. The facts and the trial court procedural circumstances are described by the Court of Appeals as follows:

> [After an officer learning during a traffic stop that Ms. Mitchell, a passenger in the stopped car was the subject of an arrest warrant, the officer] placed Ms. Mitchell under arrest. A purse sat on her lap between her legs. The officer took control of the purse. After looking inside and seeing that there were a lot of small items that might be lost if the purse was searched in the darkness at the scene, the officer decided to search the purse at the jail; he also testified that the weather was very cold. The subsequent search at the jail uncovered the presence of an oxycodone pill.
>
> The prosecutor filed one count of possession of a controlled substance. The defense moved to suppress, arguing that the search of the purse at the jail was untimely and unauthorized. After hearing testimony, the court expressly found that the search occurred within ten minutes of the defendant's arrest and that the entire incident from traffic stop to purse search took no more han 25 minutes. Determining that the search was not unduly delayed and was reasonable under our case law, the court denied the motion.

4. State v. Eleanor Angie Estrada: On August 13, 2018, Division One of the COA rules for the State in rejecting defendant's appeal from his King County Superior Court conviction for *attempted residential burglary*. The Court of Appeals holds that **the trial court did not abuse its discretion in allowing a fingerprint expert to testify that latent fingerprints in the case "matched" the fingerprints of of the defendant**. Defendant loses her argument against fingerprint expert opinion that she based on a 2009 National Research Council of the National Academy of Sciences report (NRC report) that showed: (1) the Federal Bureau of Investigation incorrectly identified a suspect using fingerprint analysis, and (2) that "people make mistakes."

5. State v. Michelle Dawn Nichols: On August 13, 2018, Division One of the COA rules for the State in rejecting defendant's appeal from her Kitsap County Superior Court conviction for *vehicular homicide*. Defendant was unconscious, receiving a transfusion, and heading into surgery at a medical facility when the police authorized a warrantless blood draw. She challenges the constitutionality of this action that took place on the night she drove her car head-on into an oncoming vehicle and killed its driver. The Court of Appeals concludes that (1) there was **probable cause for the blood draw** (her admissions of drinking to a nurse, her odor of intoxicants, a witness to her drinking at a bar that night, her previous DUI, and the circumstances of the accident itself), and (2) exigent circumstances (including poor cell phone reception and the urgent medical circumstances) justified drawing defendant's blood without a search warrant.

6. State v. Joseph Patrick Sullivan: On August 21, 2018, Division Three of the Court of Appeals rules for the State in rejecting defendant's appeal from his Grant County Superior Court convictions for *resisting arrest and third degree assault of a law enforcement officer*. Among other things, the Court of Appeals rules that the trial court's factual determination is supported by substantial evidence of the question of **whether it constituted "interrogation" for a law enforcement officer to make a pre-Miranda statement** to the already-arrested defendant that it was stupid to go to jail over a fish (after which the defendant made multiple apologies to the officer for the defendant's conduct).

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

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

In May of 2011, John Wasberg retired from the Washington State Attorney General's Office. For over 32 years immediately prior to that retirement date, as an Assistant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011) of the Criminal Justice Training Commission's Law Enforcement Digest. From the time of his retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the production of the LED. That arrangement ended in the late fall of 2014 due to variety of concerns, budget constraints and friendly differences regarding the approach of the LED going forward. Among other things, Mr. Wasberg prefers (1) a more expansive treatment of the core-area (e.g., arrest, search and seizure) law enforcement decisions with more cross references to other sources and past precedents and past LED treatment of these core-area cases; and (2) a broader scope of coverage in terms of the types of cases that may be of interest to law

enforcement in Washington (though public disclosure decisions are unlikely to be addressed in depth in the Legal Update). For these reasons, starting with the January 2015 Legal Update, Mr. Wasberg has been presenting a monthly case law update for published decisions from Washington's appellate courts, from the Ninth Circuit of the United States Court of Appeals, and from the United States Supreme Court.

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

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

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

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

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