LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: Thank you!

AUGUST 2019

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WDFW PROSECUTORS' MANUAL FOR FISH AND WILDLIFE VIOLATIONS

The Washington Association of Prosecuting Attorneys has added to WAPA'S internet "Manuals" page (go to WAPA Home Page, click on Publications, then click on Manuals) the updated WDFW Prosecutors' Manual for Fish and Wildlife Violations, as revised by the Washington Office of the Attorney General (Fish, Wildlife and Parks Division). The WDFW Manual is designed to assist prosecutors in appropriately resolving fish and wildlife violations in a manner consistent with the statutory mission of the Fish and Wildlife Commission and the Department of Fish and Wildlife. The Manual is focused on prosecutors, but law enforcement officers also can find much useful information. The Manual is very thorough and includes a section addressing "Off-reservation Indian Treaty Fishing and Hunting Rights in Washington State."

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DHS GUIDE: U.S. CITIZENSHIP AND IMMIGRATION SERVICES & U VISAS

The U.S. Department of Homeland Security recently announced as follows the release of its 2019 guide regarding U visas (find the guide by searching the internet for "U Visa Law Enforcement Resource Guide"):

> The 2019 guide includes an overview of: (1) The U visa certification process; (2) Best practices for certifying agencies and officials; (3) Answers to frequently asked questions from judges, prosecutors, law enforcement agencies and other officials; (4) Department of Homeland Security contact information for certifying agencies on U visa issues; and (5) Training resources and opportunities. A separate T Visa guide will issue shortly.

U Visa Law Enforcement Resource Guide: For Federal, State, Local, Tribal and Territorial Law Enforcement, Prosecutors, Judges, and Other Government Agencies (2019).

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT CIVIL LIABILITY: COMMUNITY CARETAKING FUNCTION EXCEPTION TO FOURTH AMENDMENT SEARCH WARRANT REQUIREMENT SUPPORTS LAW ENFORCEMENT'S SEIZING OF GUNS IN THE HOME OF A MAN WHO WAS A DANGER WHILE EXPERIENCING AN ACUTE MENTAL HEALTH CRISIS

Rodriguez v. City of San Jose, ___ F.3d ___ , 2019 WL ___ (9th Cir., July 23, 2019)

Facts: (Excerpted from Ninth Circuit opinion)

> Late one night in January 2013, Lori called 911 to ask the San Jose Police Department to conduct a welfare check on her husband, Edward. This was not the first time that Lori had made such a call – San Jose police officers had been to the Rodriguez home on prior occasions because of Edward's mental health problems. Before they arrived, Officer Valentine and the other responding officers learned that there were guns in the home.

At the Rodriguez home, Officer Valentine found Edward ranting about the CIA, the army, and people watching him. Edward also mentioned "[s]hooting up schools" and that he had a "gun safe full of guns." When asked if he wanted to hurt himself, Edward attempted to break his own thumb.

Concluding that Edward was in the midst of an acute mental health crisis that made him a danger to himself and others, Officer Valentine and other officers on the scene decided to seize and detain him pursuant to California Welfare & Institutions Code § 5150 for a mental health evaluation. Section 5150 allows an officer, upon probable cause that an individual is a danger to himself or another because of a mental health disorder, to take the person into custody and place him in a medical facility for 72-hour treatment and evaluation. . . . The officers detained Edward and placed him in restraints in an ambulance to travel to a nearby hospital for a psychological evaluation.

[LEGAL UPDATE EDITORIAL NOTE; I am not an expert on whether Washington mental health statutes, see chapter 71.05 RCW as amended in 2019, perfectly parallel the California legislation such that the analysis by the Ninth Circuit in the Rodriguez case is fully instructive for officers in Washington. Washington officers/agencies with questions are advised to check with one of the many law enforcement experts on the issue or with behavioral health experts or with legal advisors.]

After removing Edward from the home, the officers spoke with Lori, who confirmed that there were firearms in the home in a gun safe. Officer Valentine informed her that, pursuant to California Welfare & Institutions Code § 8102, he would have to confiscate the guns. Section 8102(a) requires law enforcement officers to confiscate any firearm or other deadly weapon that is owned, possessed, or otherwise controlled by an individual who has been detained under California Welfare & Institutions Code § 5150.

With Lori providing the keys and the combination code, the officers opened the safe and found twelve firearms, including handguns, shotguns, and semi-automatic rifles. One of the firearms was a personal handgun registered to Lori alone, which she had obtained prior to marrying Edward. The other eleven were either unregistered or registered to Edward.

Lori gathered cases for the guns while the officers packed up and documented them. She specifically objected to the removal of her personal handgun, but the officers confiscated it along with the other eleven firearms.

Meanwhile, in the ambulance, Edward repeatedly broke the restraints holding him to a gurney. Once at the hospital, Edward was evaluated and determined to be a danger to himself, so he was admitted. He was discharged approximately one week later.

Proceedings below: (Excerpted from Ninth Circuit staff summary, which is not part of the Ninth Circuit Opinion):

The City petitioned in California Superior Court to retain the firearms on the ground that the firearms would endanger Edward or another member of the public. Lori objected that the confiscation and retention of the firearms, in which she had ownership interests, violated her Second Amendment rights. The Superior Court granted the City's petition over Lori's objection and the California Court of Appeal affirmed. After Lori re-registered

the firearms in her name alone and obtained gun release clearances from the California Department of Justice, the City still declined to return the guns, and Lori sued in federal court.

ISSUE AND RULING UNDER THE FOURTH AMENDMENT: The responding law enforcement officers had probable cause to detain Mr. Rodriguez involuntarily because he was experiencing an acute mental health episode that made him a danger to himself and others. They justifiably decided to send him for a mental health evaluation. They reasonably expected that he would have access to firearms and present a serious public safety threat if he returned to the home. The officers reasonably did not know how quickly he might return home.

Under these circumstances, did there exist the community caretaking urgency of a significant public safety interest that was a sufficient to outweigh the significant privacy interest in personal property kept in the home to make a warrantless seizure of all of the guns in the home? (ANSWER BY NINTH CIRCUIT: Yes)

Result: Affirmance of order of summary judgment by U.S. District Court (Northern District of California) summary judgment for defendants, i.e., the City of San Jose, the San Jose PD, and a San Jose PD police officer.

LEGAL UPDATE EDITORIAL NOTE REGARDING SECOND AMENDMENT ISSUES: The Ninth Circuit panel also rules under analysis not addressed in this Legal Update entry that Plaintiff was barred from bringing Second Amendment issues in the federal court because those issues had been squarely addressed and fully resolved in the California state courts.

ANALYSIS BY NINTH CIRCUIT OF THE COMMUNITY CARETAKING ISSUE: (Excerpted from Ninth Circuit opinion)

> The Supreme Court has recognized a category of police activity relating to the protection of public health and safety-a category commonly referred to as the "community caretaking function" – that is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Cady v. Dombrowski, 413 U.S. 433, 441 (1973) . . . .
>
> We have previously recognized two types of police action in which an officer may conduct a warrantless search or seizure when acting within the community caretaking function: (1) home entries to investigate safety or medical emergencies, and (2) impoundments of hazardous vehicles.
>
> The first category, termed the "emergency exception," authorizes a warrantless home entry where officers "ha[ve] an objectively reasonable basis for concluding that there [i]s an immediate need to protect others or themselves from serious harm; and [that] the search's scope and manner [a]re reasonable to meet the need." . . .
>
> [Ninth Circuit's footnote: *By contrast, the exigent circumstances exception arises within the police's investigative function.* , . . . *Under that exception to the warrant requirement, police may "enter a home without a warrant if they have both probable cause to believe that a crime has been or is being committed and a reasonable belief that their entry is 'necessary to prevent . . . the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement*

efforts.'" . . . . [The government] Defendants do not attempt to rely on the exigent circumstances exception here, so we need not decide whether it could have applied]

Until now, our case law on seizures under the community caretaking function has related solely to the second category: impounding vehicles that "jeopardize public safety and the efficient movement of vehicular traffic," oftentimes after the driver has been detained or has otherwise become incapacitated. . . . In those cases, to determine whether the seizure was reasonable, we balanced the urgency of the public interest in safe, clear roads against the private interest in preventing the police from interfering with a person's property. . . .

[Ninth Circuit's footnote*: To properly impound a motor vehicle without a warrant, law enforcement must also act "in conformance with the standardized procedures of the local police department*." . . . .]

These vehicle seizure cases are similar to the emergency exception home entry cases because they allow the police to respond to an immediate threat to community safety.

A seizure of a firearm in the possession or control of a person who has been detained because of an acute mental health episode likewise responds to an immediate threat to community safety. We believe the same factors at issue in the context of emergency exception home entries and vehicle impoundments – (1) the public safety interest; (2) the urgency of that public interest; and (3) the individual property, liberty, and privacy interests – must be balanced, based on all of the facts available to an objectively reasonable officer, when asking whether such a seizure of a firearm falls within an exception to the warrant requirement.

Other circuits have looked at precisely such factors in analyzing whether guns could be seized without a warrant to protect the gun owner or those nearby. **[LEGAL UPDATE EDITORIAL NOTE: Here, the Ninth Circuit's Rodriguez Opinion engages in extended discussion of a federal Fourth Circuit decision and a federal D.C. Circuit decision; that discussion is omitted from this Legal Update entry.]**

. . . .

Applying the same analytical framework [as was applied by the Fourth Circuit and the D.C. Circuit], we hold that the warrantless seizure of the Rodriguezes' guns was appropriate. The seizure of the firearms did affect a serious private interest in personal property kept in the home. On the other hand, the public interest at stake here was also very significant.

San Jose police officers had previously been to the home on prior occasions because Edward was acting erratically, and on the day in question, Edward was ranting about the CIA, the army, and other people watching him. He also mentioned "[s]hooting up schools," specifically referencing the guns in the safe.

Edward's threats may not have been as explicit as the threats made in [the Fourth Circuit case], but a reasonable officer would have been deeply concerned by the prospect that Edward might have had access to a firearm in the near future. Consequently, there was a substantial public safety interest in ensuring that the guns would not be available to Edward should he return from the hospital.

With significant private and public interests present on both sides, the urgency of the public safety interest is the key consideration in deciding whether the seizure here was reasonable. We believe that, on this record, the urgency of the situation justified the seizure of the firearms.

Importantly, the officers had no idea when Edward might return from the hospital. Even though California Welfare & Institutions Code § 5150 authorized the detention of Edward for a period of up to 72 hours for treatment and evaluation, he could only be held for that period if the hospital staff actually admitted him. . . . As Lori conceded at oral argument, as far as the officers knew, Edward could have returned to the home at any time – making it uncertain that a warrant could have been obtained quickly enough to prevent the firearms from presenting a serious threat to public safety.

Lori asserts two primary counterarguments to the conclusion that there was sufficient urgency to justify the warrantless seizure of the firearms.

First, she argues that any urgency was diminished because she could change the combination to the gun safe, preventing Edward from accessing the guns. But even assuming Lori could have changed the combination before Edward could have returned, it was reasonable to believe that Edward, who weighed 400 pounds, could have overpowered her to gain access to the guns.

Second, Lori contended at oral argument that telephonic warrants are available in San Jose and that the officers could have obtained such a warrant more quickly than Edward could have returned if the hospital had not admitted him. But she has offered no support for either assertion. And without evidence or other support for her conclusory statements, Lori has not carried her burden in opposing summary judgment.

[Ninth Circuit's footnote: *As noted above, police must act "in conformance" with department procedures when impounding a vehicle without a warrant. . . . We need not decide whether there is an equivalent requirement for the seizure of firearms because Lori has not disputed the officers' compliance with San Jose Police Department procedures here*.]

Our holding that the warrantless seizure of the guns did not violate the Fourth Amendment is limited to the particular circumstances here: the officers had probable cause to detain involuntarily an individual experiencing an acute mental health episode and to send the individual for evaluation, they expected the individual would have access to firearms and present a serious public safety threat if he returned to the home, and they did not know how quickly the individual might return.

Under these circumstances, the urgency of a significant public safety interest was sufficient to outweigh the significant privacy interest in personal property kept in the home, and a warrant was not required.

[Some citations and one footnote omitted; some paragraphing revised for readability]

CIVIL RIGHTS ACT CIVIL LIABILITY: BECAUSE CASE LAW WAS NOT CLEARLY ESTABLISHED AT TIME OF ALLEGED POLICE ACTIONS, OFFICERS ARE ENTITLED TO

QUALIFIED IMMUNITY ON BOTH VOLUNTARINESS-OF-CONSENT AND SCOPE-OF-CONSENT ISSUES IN CASE INVOLVING TEAR-GAS-ASSISTED ENTRY OF HOME TO ARREST WOMAN'S FORMER BOYFRIEND WHO WAS: (1) A VIOLENT CONVICT, (2) WANTED ON A FELONY ARREST WARRANT, AND (3) REPORTED TO BE ARMED AND HIGH ON DRUGS; ONE JUDGE ARGUES THAT SCOPE OF THE WOMAN'S CONSENT TO POLICE ENTRY DID NOT INCLUDE PERMISSION FOR THE LEVEL OF DESTRUCTION OF PROPERTY IN THE PROCESS OF ENTRY AND ARREST

West v. City of Caldwell (ID), ___ F.3d ___ , 2019 WL ___ (9th Cir., July 25, 2019)

Facts and Proceedings below: (Excerpted from Ninth Circuit majority opinion)

> On a summer afternoon in August 2014, Plaintiff's grandmother called 911 to report that: Plaintiff's former boyfriend, Fabian Salinas, was in Plaintiff's house and might be threatening her with a BB gun; Plaintiff's children also were in the house; and Salinas was high on methamphetamine. The grandmother warned the dispatcher that Plaintiff might tell the police that Salinas was not in the house.
>
> The police knew that Salinas was a gang member. At the time, he had outstanding felony arrest warrants for several violent crimes. His criminal record included convictions for rioting, discharging a weapon, aggravated assault, and drug crimes.
>
> In addition, during a recent high-speed car chase, Salinas had driven his vehicle straight at a Caldwell patrol car, forcing the officer to swerve off the road to avoid a collision. The police also had information that Salinas possessed a .32 caliber pistol.
>
> Four officers, including [Officer Richardson], responded to the 911 call. [Officer Richardson] was familiar with Salinas' criminal history. After arriving at Plaintiff's house, [Officer Richardson] called Plaintiff's cell phone several times, but she did not answer. He then called Plaintiff's grandmother, who repeated that Salinas was in Plaintiff's house. She also said that Salinas' sister had been at the house but had left when Salinas arrived.
>
> [Officer Richardson] then called the sister, who confirmed that she had seen Salinas in Plaintiff's house within the last 30 minutes, that he had a firearm that she thought was a BB gun, and that he was high on drugs. [Officer Richardson] knocked on the front door of the house but received no response.
>
> While the officers were discussing how to proceed, Sergeant Joe Hoadley noticed Plaintiff walking down the sidewalk toward her house. [Sergeant] Hoadley and [Officer Richardson] approached Plaintiff. [Officer Richardson] asked Plaintiff where Salinas was; she responded that he "might be" inside her house. [Officer Richardson] followed up: "Might or yes?" He told Plaintiff that Salinas had a felony arrest warrant, so if Salinas was in the house and she did not tell the police, she could "get in trouble" for harboring a felon. "Is he in there?"
>
> At that point, Plaintiff told [Officer Richardson] that Salinas was inside her house, even though she did not know if he was still there; she had let Salinas into the house earlier in the day to retrieve his belongings, but she left the house while he was still there. Plaintiff felt threatened when [Officer Richardson] told her that she could get in trouble if she

were harboring Salinas, because Plaintiff's mother had been arrested previously for harboring him.

After Plaintiff told [Officer Richardson] that Salinas was in the house, [Officer Richardson] walked away to confer with the other officers. They discussed whether to contact the SWAT team, but Plaintiff did not know that the SWAT team might become involved.

[Officer Richardson] returned to Plaintiff about 45 seconds later. He said: "Shaniz, let me ask you this. Do we have permission to get inside your house and apprehend him?" Plaintiff nodded affirmatively and gave [Officer Richardson] the key to her front door.

Plaintiff knew that her key would not open the door because the chain lock was engaged, but it is unclear from the record whether [Officer Richardson] also knew that. After handing over the key, Plaintiff called a friend to pick her up, and she left in the friend's car.

[Sergeant] Hoadley then called the local prosecutor's office and reported to the on-call prosecutor that Plaintiff consented to having officers enter her house to arrest a person who was subject to a felony arrest warrant. The prosecutor told [Sergeant] Hoadley that the officers did not need to obtain a search warrant.

[Sergeant] Hoadley next contacted Seevers, the SWAT Commander, to request assistance in arresting a felon who was barricaded inside a house and who might be armed and on drugs. [Swat Commander] Seevers, in turn, notified Winfield, the SWAT Team Leader, of the request. [Swat Commander] Seevers told [Team Leader] Winfield that Salinas' family reported that he was in Plaintiff's house with a firearm (described as a BB gun) and that he was suicidal.

[Team Leader] Winfield contacted {Sergeant] Hoadley for more information. [Sergeant] Hoadley told him that Salinas had felony arrest warrants, that Salinas was a suspect in a gun theft and that not all the stolen firearms had been recovered, that Salinas was suicidal, and that all signs indicated that Salinas was in Plaintiff's house.

[Sergeant] Hoadley also told [Team Leader] Winfield that Plaintiff had given her consent for officers to enter her house to effect an arrest and that the on-call prosecutor had confirmed that the officers did not need a warrant.

The SWAT team met at the local police station to retrieve their tactical gear and establish a plan. [Team Leader] Winfield, who created the plan, hoped to get Salinas to come out of the house without requiring an entry by members of the SWAT team. The plan had three stages: (1) contain Plaintiff's house and issue oral commands for Salinas to come out; (2) if stage one failed, introduce tear gas into the house to force Salinas out; and (3) if stages one and two failed, enter and search the house for Salinas after the tear gas dissipated. [Swat Commander] Seevers reviewed and approved the plan, which conformed to commonly accepted police practices.

While the SWAT team prepared at the station, the officers at Plaintiff's house continued to watch for Salinas and to update the SWAT team over the radio. One officer reported hearing movement in the house, and another said that he heard the deadbolt latch while he was standing near the front door.

> The SWAT team arrived at Plaintiff's house late in the afternoon. They made repeated announcements telling Salinas to come out of the house, but he did not appear. After waiting about 20 minutes, members of the team used 12-gauge shotguns to inject tear gas into the house through the windows and the garage door.
>
> After deploying the tear gas, the SWAT team continued to make regular announcements directing Salinas to come out of the house, but still he did not appear. After about 90 minutes the team entered the house. They used Plaintiff's key to unlock the deadbolt on the front door, but they could not enter because of the chain lock.
>
> They then moved to the back door, which they opened by reaching through the hole created earlier by shooting the tear gas through the back door's window. The SWAT team searched the entire house without finding Salinas.
>
> Plaintiff and her children could not live in the house for two months because of the damage caused by the search, including broken windows and tear-gas-saturated possessions. The City of Caldwell paid for a hotel for Plaintiff and her children for three weeks and paid her $900 for her damaged personal property. Plaintiff then filed this action, seeking damages and alleging claims for unreasonable search, unreasonable seizure, and conversion.
>
> As relevant here, Defendants moved for summary judgment after the close of discovery, seeking qualified immunity. The district court denied [the summary judgment motions of Swat Commander Seevers and Team Leader Winfield] on the ground that it is "well-established that a search or seizure may be invalid if carried out in an unreasonable fashion." The court denied [Officer Richardson's] motion on the ground that, if he had not obtained Plaintiff's voluntary consent, the need for a warrant was clearly established. Defendants timely appealed.

[Some paragraphing revised for readability]

ISSUE AND RULING: **Viewing the factual allegations in the best light for Plaintiff for purposes of qualified immunity summary judgment analysis, and assuming without deciding that the Fourth Amendment was violated,** should qualified immunity be denied to the City of Caldwell defendants on the rationale that – at the time of their actions – the Fourth Amendment case law was established that: (1) their conversation with the homeowner did not result in voluntary consent, (2) their tear-gas-assisted entry and property-destroying search methods exceeded the scope of any consent to entry and search by the homeowner, and (3) their actions as a whole in the entry and search of the home were unreasonable? (ANSWER BY NINTH CIRCUIT: Two of the three members of the Ninth Circuit panel agree that case law was not established on any of the three Fourth Amendment questions, and therefore that the City of Caldwell defendants are entitled to qualified immunity; the third judge agrees with the other two judges in some respects, but he disagrees on a key point, arguing that the case law was established that the tear-gas-assisted methods used violated the scope of consent)

Result: Reversal of decision of U.S. District Court (Idaho) that denied qualified immunity to the Caldwell PD officers.

ANALYSIS: (Excerpted from Ninth Circuit majority opinion)

Principles Governing Qualified Immunity

Police officers have qualified immunity for their official conduct unless (1) they violate a federal statutory or constitutional right and (2) that right was clearly established at the time of the challenged conduct. . . . "Clearly established" means that existing law "placed the constitutionality of the officer's conduct 'beyond debate.'". . . The Supreme Court has emphasized, especially in the Fourth Amendment context, that we may not "define clearly established law at a high level of generality." . . . Rather, we must locate a controlling case that "squarely governs the specific facts at issue," except in the "rare obvious case" in which a general legal principle makes the unlawfulness of the officer's conduct clear despite a lack of precedent addressing similar circumstances. . . .

We have discretion to decide which prong of the qualified immunity analysis to address first. . . . In our discussion below, we will assume, without deciding, that Defendants violated Plaintiff's rights and will analyze only whether those rights were clearly established as of August 2014. **[LEGAL UPDATE EDITORIAL NOTE: Nothing in the Caldwell majority's analysis suggests that any court decisions issued between August 2014 and the current time made those rights "clearly established."]**

Voluntariness of Consent

Plaintiff contends that her consent was not voluntary because [Officer Richardson] told her that, if Salinas was in the house and she denied it, she could "get in trouble" for harboring a wanted felon. Plaintiff asserts that she felt threatened. As noted, we assume without deciding that her consent for the police to "get inside [her] house" was not voluntary.

The remaining question is whether, in these circumstances, the lack of voluntariness was clearly established such that [Officer Richardson] would have known that Plaintiff's consent was not voluntary. Those circumstances included: time passed between his threat to arrest Plaintiff for concealing Salinas' whereabouts and his request for consent, during which [Officer Richardson] walked away from Plaintiff; Plaintiff nodded her assent when [Officer Richardson] returned and asked her for "permission to get inside [her] house" to arrest Salinas; Plaintiff handed [Officer Richardson] her house key without being asked for it; Plaintiff knew that Salinas was a wanted felon; and [Officer Richardson] did not threaten to arrest Plaintiff for withholding consent for the officers to enter her home.

. . . .

. . . . [Officer Richardson] did not threaten to arrest Plaintiff if she declined consent. Moreover, after Plaintiff confirmed that Salinas was in the house, [Officer Richardson] walked away for nearly a minute before returning to ask for permission to enter the house, clearly signaling a lack of intent to detain Plaintiff. And Plaintiff felt comfortable leaving the scene in her friend's car, indicating that she well understood that she was not threatened with detention. Finally, [Officer Richardson] had probable cause to believe that Salinas was in Plaintiff's house.

Our research has uncovered no controlling Supreme Court or Ninth Circuit decision holding that "an officer acting under similar circumstances as [Defendants] . . . violated the Fourth Amendment." . . . Prior precedent must articulate "a constitutional rule

specific enough to alert *these* deputies *in this case* that *their particular conduct* was unlawful." . . . Given the factors that suggested voluntary consent, we hold that a lack of consent was not clearly established and that a lack of consent was not so obvious that the requirement of similar precedent can be overcome. [Officer Richardson] is, therefore, entitled to qualified immunity on this claim.

Scope of Consent

Plaintiff next argues that, even if she consented voluntarily to entry into her house, [Swat Commander Seevers] and [Team Leader Winfield] exceeded the scope of her consent by having the SWAT team shoot tear gas into the house. As noted, Plaintiff agreed that officers could "get inside [her] house and apprehend" Salinas, and she knew that Salinas was a wanted felon. Other than the limitation concerning the reason for entry – to arrest Salinas – Plaintiff expressed no limitation concerning, for example, when officers could enter or where in her house the officers would be allowed to look.

As with the other alleged constitutional violations, we assume without deciding that Defendants exceeded the scope of consent by employing tear gas canisters for their initial entry, which is the entry that damaged Plaintiff's house. The dissent goes to great lengths to argue that Defendants violated Plaintiff's Fourth Amendment rights because no reasonable person would have understood Plaintiff's consent to encompass shooting tear gas canisters into the house.

But we do not dispute that point here. And, contrary to the dissent's characterization, we do not hold "that a 'typical reasonable person' consenting to an entry to look for a suspect could be understood by a competent police officer as consenting to damage to his or her home so extreme that [it] renders [the home] uninhabitable for months."

Rather, we assume [without deciding] that Defendants exceeded the scope of consent and address only whether clearly established law, defined at an appropriate level of specificity, "placed the constitutionality of the officer's conduct 'beyond debate.'" . . . The dissent never comes to grips with this legal standard.

Once again, we conclude that no Supreme Court or Ninth Circuit case clearly established, as of August 2014, that Defendants exceeded the scope of consent. Defendants did "get inside" Plaintiff's house, first with objects and later with people. Plaintiff never expressed a limitation as to time, place within the house, or manner of entry. [The City of Caldwell Defendants] did not, for instance, enter other buildings, exceed an expressed time limit, or enter for a different purpose than apprehending Salinas. To the extent that handing over the key implied that Plaintiff expected Defendants to enter through the front door, Defendants did attempt to do that.

The dissent argues that Florida v. Jimeno, 500 U.S. 248, 251 (1991), "clearly established that general consent to search is not without its limitations." But in the Fourth Amendment context, the Supreme Court has warned us time and time again that we may not "define clearly established law at a high level of generality." . . .

Jimeno held that it was "reasonable for an officer to consider a suspect's general consent to a search of his car to include consent to examine a paper bag lying on the

floor of the car." The Court also noted that it would be "very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk." That is the phrase on which the dissent hangs its hat. But, outside the context of a vehicle search, Jimeno provides nothing more than a general principle for consent; it does not articulate "a constitutional rule specific enough to alert these deputies in this case that their particular conduct was unlawful."

. . . .

Given that Defendants thought they had permission to enter Plaintiff's house to apprehend a dangerous, potentially armed, and suicidal felon barricaded inside, it is not obvious, in the absence of a controlling precedent, that Defendants exceeded the scope of Plaintiff's consent by causing the tear gas canisters to enter the house in an attempt to flush Salinas out into the open. [Swat Commander Seevers] and [Team Leader Winfield] are, therefore, entitled to qualified immunity on this claim.

The cases that Plaintiff cites in support of her scope-of-consent theory pertain instead to the reasonableness of the search. We turn, next, to that issue.

Reasonableness of Search and Seizure

The pivotal question is whether [the actions of the Swat Commander and Team Leader] were reasonable. We assume without deciding that Defendants used excessive force by shooting tear gas canisters through the windows of Plaintiff's house as the initial means by which they "[got] inside" the house to search for and arrest Salinas. That is the action that caused the damage underlying Plaintiff's complaint. We examine whether the unreasonableness of Defendants' actions was clearly established as of August 2014.

Defendants reasonably believed that Salinas was in the house, that he was high on meth, that he possessed what had been described as a BB gun, that he was suicidal, and that he owned a .32 caliber pistol. They also knew that he was a gang member with outstanding felony arrest warrants for violent crimes and that he had aggressively tried to run down a patrol car during a recent high-speed chase. We have found no Supreme Court or Ninth Circuit case clearly establishing that the procedure Defendants followed, including the use of tear gas and the resulting destruction, is unreasonable in those circumstances.

[Some citations omitted; bolding added; footnotes omitted; some paragraphing revised for readability]

DISSENT:

Among other things, the dissent asserts that five federal circuit courts have addressed the issue of whether a general consent to search permits intentional damage to personal property, and that four of the circuits have answered "no."

CIVIL RIGHTS ACT CIVIL LIABILITY DECISION CONTAINS TWO CONSTITUTIONAL RULINGS ON AN OFFICER'S REQUEST FOR QUALIFIED IMMUNITY: (1) ON FOURTH AMENDMENT CLAIM CHALLENGING LENGTH OF SEIZURE, QUALIFIED IMMUNITY IS DENIED WHERE JUVENILE SUSPECTS WERE ALLEGEDLY HELD IN HANDCUFFS BY

THE OFFICER AND SEVERAL OTHER OFFICERS FOR SEVERAL HOURS AFTER IT WAS CLEAR THAT THERE WAS NO PROBABLE CAUSE TO ARREST THEM; (2) ON FOURTEENTH AMENDMENT DUE PROCESS CLAIM REGARDING OFFICER SHOOTING OF YOUTH HOLDING PLASTIC TOY GUN WITH AN ORANGE TIP, OFFICER'S ALLEGED CONDUCT CANNOT GO TO JURY BECAUSE, WHILE HIS ALLEGED CONDUCT COULD BE FOUND TO SHOCK THE CONSCIENCE, PRIOR CASE LAW HAD NOT ESTABLISHED A CLEAR STANDARD ON ANALOGOUS FACTS

Nicholson v. Gutierrez, ___ F.3d ___ , 2019 WL ___ (9th Cir., August 21, 2019)

Facts: (Excerpted from Ninth Circuit opinion)

> At around 7:15 a.m. on February 10, 2015, J.N.G., J.H., Michael Sanders, and Abdul Wooten met in an alley at the corner of 10th Avenue and Florence Avenue in Los Angeles, CA, a few blocks from their high school. They regularly gathered in that alleyway before and after school to listen to music and freestyle rap.
>
> That morning, as they were rapping and dancing in a circle, Sanders was holding a plastic toy gun with a bright orange tip. J.N.G., J.H., and Wooten maintain that Sanders kept the gun pointed downward around waist-level and did not fire the gun that morning. At approximately 7:40 a.m., the teenagers turned off the music and began preparing to head to school.
>
> Around this time, Officer Everardo Amaral was driving down 10th Avenue in an unmarked car with his partner, Officer Gutierrez. From the passenger seat, Gutierrez "saw a person (later identified as Michael Sanders) pointing . . . a blue steel handgun at another person (later identified as Plaintiff J.H.)."
>
> Gutierrez, believing that J.H. was "being robbed at gun point or was about to be murdered," yelled "Gun, gun, gun!" Amaral stopped the vehicle south of the alley on 10th Avenue. Without conferring with Amaral, Gutierrez immediately jumped out of the car and ran into the alley. Amaral parked the car and followed Gutierrez. Neither officer was in uniform.
>
> Gutierrez claims he identified himself as an LAPD officer and commanded Sanders to drop the gun. However, J.H., J.N.G., and Wooten all contend that Gutierrez did not identify himself or make any verbal commands prior to shooting his weapon. [**LEGAL UPDATE EDITORIAL NOTE: At this stage of review of the police officer's request for qualified immunity, the factual allegations are looked at by the courts in the best light for the suing plaintiffs.**]
>
> A few seconds after he entered the alley, Officer Gutierrez fired at least three shots, one of which hit J.N.G. in the back. J.N.G. and J.H. contend that Gutierrez fired his gun with one hand while running toward them, while Gutierrez stated that he fired only after stopping a few feet away from the group.
>
> When the shots were fired, J.H. was about to put on his school uniform, and J.N.G. was spraying cologne on his face. The four of them had been standing in a tight circle, "within a foot or so of each other." Sanders soon turned and dropped the toy gun, though the parties dispute whether this occurred before or after Gutierrez fired.

> Shortly after Officer Gutierrez fired, Officer Amaral arrived and requested three additional units. Amaral also requested an ambulance when he realized that J.N.G. had been shot.
>
> The officers held the group at gunpoint, face down on the ground. The parties dispute how far the dropped "gun" was from the teenagers when they were on the ground, but neither officer picked it up or moved it away from them.
>
> While on the ground, J.H. shouted that the gun was "not even a real gun" and repeatedly asked why the officers shot at them and "What did we do wrong?" The officers remained silent in response to his questions, with dumbfounded expressions on their faces.
>
> Responding officers soon arrived, and they searched and handcuffed the group. Gutierrez was "involved in the decision to handcuff them." Officer Amaral later explained in his deposition that the detention of the boys was "[f]or [a] weapons violation." Officers Gutierrez and Amaral were separated and monitored soon after additional units arrived on the scene.
>
> J.H. remained in handcuffs throughout the investigation, which lasted until around 1:00 p.m., over five hours after the shooting. J.N.G. also remained in handcuffs for over five hours – through the duration of his hospital examination – until detectives interrogated him.

[Some paragraphing revised for readability]

Proceedings below:

J.N.G. and J.H. filed a lawsuit against the officers, the LAPD, and the City of Los Angeles, alleging violations of the Fourth and Fourteenth Amendments and various state laws. The district court denied qualified immunity to Officer Gutierrez and others on (1) the Fourth Amendment claim that the Plaintiffs were unlawfully arrested based on the prolonged detention in handcuffs after probable cause had dissipated in the investigation; and (2) the Fourteenth Amendment Due Process claim that the shooting was so unjustified that it "shocked the conscience."

This Ninth Circuit decision addresses the appeal of Officer Gutierrez to the Ninth Circuit.

ISSUES AND RULINGS: (1) Viewing the allegations in the best light for Plaintiffs: (A) Would the evidence support a jury verdict that Officer Gutierrez committed a Fourth Amendment violation for unsupported arrest by participating in the five-hour detention in handcuffs of J.N.G. and J.H., where it became clear relatively early in the period that the officers did not have probable cause to arrest the two young men? and (B) At the time of the incident, was there clearly established case law on analogous facts such that Officer Gutierrez is not entitled to qualified immunity? (ANSWER BY NINTH CIRCUIT: Yes, as to both questions, and therefore Officer Gutierrez is not entitled to qualified immunity on the Fourth Amendment claim)

(2) Viewing the allegations in the best light for Plaintiffs: (A) Would the evidence support a jury verdict that Officer Gutierrez committed a shock-the-conscience, Fourteenth Amendment Due Process violation when he shot J.N.G. where J.N.G. was holding a plastic toy gun with an orange tip and was not pointing the toy gun at anyone? and (B) At the time of the shooting, was there clearly established case law on analogous facts such that Officer Gutierrez is not entitled

to qualified immunity? (ANSWER BY NINTH CIRCUIT: Yes, as to the first question, but no as to the second question; therefore, because case law was not established on this point of law, Officer Gutierrez is entitled to qualified immunity on the Due Process claim)

Result: Affirmance of ruling of U.S. District Court (Central District of California) that denied qualified immunity to Officer Gutierrez on the Fourth Amendment claim; reversal of District Court ruling that denied qualified immunity to Officer Gutierrez on the Due Process claim.

ANALYSIS: (Excerpted from the Ninth Circuit's staff summary, which is not part of the Ninth Circuit's opinion; I recommend that interested readers go to the Ninth Circuit opinions website and read the analysis in the Court's actual – and not too lengthy – opinion):

> Fourth Amendment was violated by the five-hour detention in handcuffs
>
> Addressing the Fourth Amendment claim [and considering the factual allegations in the best light for plaintiffs], the panel agreed with the district court that under the circumstances, plaintiffs' continued detention for five hours after the shooting – well after any probable cause would have dissipated – and the use of handcuffs throughout the duration of the detention violated plaintiffs' clearly established Fourth Amendment rights to be free from unlawful arrest and excessive force.
>
> The panel rejected Gutierrez's argument that while he participated in the initial handcuffing and detention, he was not responsible for any subsequent constitutional violation because he played no role in that conduct. The panel held that an officer can be held liable where he is just one participant in a sequence of events that gives rise to a constitutional violation.
>
> Here, viewing the evidence in the light most favorable to plaintiffs, Gutierrez was more than a "mere bystander" in the alleged constitutional violations. The panel affirmed the district court's denial of qualified immunity on the Fourth Amendment violations because, ultimately, a reasonable jury could conclude that Gutierrez played an integral role in the unlawfully prolonged detention and sustained handcuffing of plaintiffs.
>
> Fourteenth Amendment was violated by the shooting but at the time of the shooting there was no on-point case law, so Officer Gutierrez is entitled to qualified immunity
>
> Addressing the Fourteenth Amendment substantive due process claim, the panel held that, viewing the totality of the evidence in the light most favorable to the plaintiffs, the shooting violated plaintiffs' due process rights. Under the circumstances, a rational finder of fact could find that Gutierrez's use of deadly force shocked the conscience and was unconstitutional under the Fourteenth Amendment.
>
> Nevertheless, the panel held that because no analogous case existed at the time of the shooting, the district court erred by denying Gutierrez qualified immunity for this claim. The panel accordingly reversed the district court and remanded for an entry of qualified immunity on the Fourteenth Amendment claim.

[Some paragraphing revised for readability]

EXIGENT CIRCUMSTANCES HELD IN CRIMINAL CASE TO JUSTIFY WARRANTLESS ENTRY OF RESIDENCE BECAUSE IT WAS REASONABLE TO CONCLUDE THAT EVIDENCE DESTRUCTION WAS IMMINENT, BASED ON: (1) CONTROLLED DELIVERY; (2) ACTIVATION OF BEEPER IN PACKAGE; AND (3) AFTER KNOCK AND ANNOUNCE, MOVEMENTS INSIDE CONDO SEEN BY AGENT LOOKING THROUGH PEEPHOLE, AND NOISES HEARD FROM CONDO BY AGENT NEAREST THE DOOR

U.S. v. Iwai, ___ F.3d ___ , 2019 WL ___ (9th Cir., July 23, 2019)

Facts and Proceedings below: (Excerpted from Ninth Circuit majority opinion)

> On August 4, 2015, the United States Postal Inspection Service in Honolulu intercepted a package from Las Vegas, Nevada, that was addressed to Iwai's condominium. After a narcotic detection dog alerted to the presence of a controlled substance in the package, a search warrant was obtained to open the box. Among other incriminating evidence, the box contained roughly six pounds of methamphetamine.
>
> The next day, DEA agents obtained a second judicial authorization to track a controlled delivery of the package to Iwai's condominium building. Agents removed a majority of the methamphetamine and replaced it with a non-narcotic substitute, leaving behind only a small representative sample of the drug. They also placed in the package a GPS tracking device, which identified the location of the package, and contained a sensor, which would activate a rapid beeping signal on their monitoring equipment when the package was subsequently opened.
>
> The agents learned that Iwai's residence was located in a multi-story condominium building that did not permit direct delivery of packages to a particular unit, but rather utilized a central location to which packages were delivered for its residents. Believing that they did not have the requisite probable cause that the package would actually end up in Iwai's unit, the agents did not, as they normally would have, seek an anticipatory search warrant to enter his residence in order to secure the box once the beeper was triggered. The agents testified that at this point in the investigation, they had no way of knowing whether the package would be retrieved in the central mail room and removed from the property and taken somewhere else.
>
> At approximately 11:48 a.m. on August 5, 2015, a United States Postal Inspector posing as a mail carrier went to the condominium building, and from the lobby callbox telephoned Iwai's unit number to notify him that he had received a package. Iwai answered from his cell phone and requested that the package be left at the front desk with the manager. The Inspector complied.
>
> When Iwai returned at approximately 12:56 p.m., the agents observed him pick up the package from the manager and bring it up the elevator and into his unit. Agents maintained surveillance outside to see what might transpire.
>
> At 3:15 p.m., the beeper activated, signaling the package had been opened inside Iwai's unit. The agents went to Iwai's door, and knocked and announced their presence. After no initial response, Agent Richard Jones saw shadowy movements through the peephole, indicating that someone had come to the door, which had yet to open. After announcing their presence again, Agent Jones saw the figure walking away from the door.

> [Agent Jones] knocked and announced again, but received no response. Agent Jones, the only agent directly in front of the door, then heard noises from inside the unit that sounded like plastic and paper rustling. He interpreted these noises to mean that Iwai was destroying evidence, which in his judgment required immediate action to prevent, and the agents forced entry at approximately 3:17 p.m.
>
> When the agents entered, Iwai was in the kitchen area, and the package was lying on the floor in the living room. Apparently, the signaling device had malfunctioned, because the package was still unopened. While securing the residence, the agents observed in plain view on a table in the living room a gun and zip lock bags containing what appeared to be a powder resembling methamphetamine.
>
> After securing the premises, Agent Jones asked Iwai for verbal consent to search the residence; consent was given, and a few minutes later Officer Jennifer Bugarin arrived with a consent-to-search form. Iwai was cooperative and calm, and promptly signed the consent form. After receiving Iwai's consent, in addition to seizing the weapon, "law enforcement officers searched the apartment and found approximately 14 pounds of crystal methamphetamine, more than $32, 000 in United States currency, a digital scale, a ledger, and plastic bags."
>
> Iwai moved to suppress all evidence and statements the government obtained from the controlled delivery operation, and the district court held a multi-day evidentiary hearing on the motion. The court denied Iwai's motion to suppress, holding, in relevant part, that the agents' entry was justified to prevent the imminent destruction of evidence, that the subsequent seizure of objects in plain view was lawful, and that Iwai's consent was voluntary. Following the denial of the suppression motion, Iwai entered a conditional guilty plea to conspiracy to possess and distribute methamphetamine, and possession of a firearm in furtherance of a drug trafficking crime.

[Some paragraphing revised for readability]

ISSUE AND RULING: Did exigent circumstances justify the warrantless entry of defendant's residence based on the possibility of imminent evidence destruction where: (1) the surveilling DEA agents had made a controlled delivery of a package addressed to and picked up by defendant; (2) the package contained six pounds of methamphetamine; (3) the beeper in the package was activated after defendant took the package inside his condo; (4) after knocking and announcing that they were DEA agents seeking admittance into the condo, one of the agents saw, through a front door peephole, movement inside the condo indicating that the occupant was moving about but not likely to soon open the door for them; and (5) one of the agents heard, emanating from inside the condo, noises sounding like paper and plastic rustling? (ANSWER BY NINTH CIRCUIT: Yes, rules a 2-1 majority)

Result: Affirmance of order of U.S. District Court (Hawaii) denying suppression motion of defendant Bryant Iwai in his prosecution and conviction for drug trafficking in violation of federal law.

ANALYSIS: (Excerpted from Ninth Circuit majority opinion)

> [One of the exceptions to the Fourth Amendment warrant requirement is] "when '"the exigencies of the situation" make the needs of law enforcement so compelling that [a]

warrantless search is objectively reasonable under the Fourth Amendment.'" . . . Preventing the imminent destruction of evidence is one such exigency, and exists when "officers, acting on probable cause and in good faith, reasonably believe from the totality of the circumstances that [] evidence or contraband will imminently be destroyed . . . ." . . . . Probable cause exists where, under the totality of the circumstances, there is "a fair probability or substantial chance of criminal activity." . . .

It is undisputed here that, although the agents obtained a warrant to open the package and a second judicial authorization to insert a tracking device and alarm, they did not seek a warrant to subsequently enter Iwai's condominium to retrieve the package. Iwai contends, and the Dissent agrees, that the evidence found in his home should thus be suppressed because the agents could have, and therefore should have, obtained an anticipatory search warrant.

But this disregards the Supreme Court's admonition that officers have no constitutional duty to obtain a warrant as soon as they have probable cause. . . . Rather, the consequence of failing to obtain a warrant is that any entry into a residence is presumptively unreasonable without an applicable exception. . . .

Thus, whether or not the agents could have obtained an anticipatory search warrant in this case is beside the point: The relevant fact is simply that they did not, and any entry into Iwai's residence was presumptively unreasonable.

Because the agents did not have a warrant to enter and retrieve the package, their entry is lawful only if an exception to the warrant requirement such as exigent circumstances existed. Considering the totality of the circumstances on the evidence presented at the hearing, the district court credited the agents' testimony and concluded that they reasonably believed that the imminent destruction of evidence existed to justify the agents' entry. . . .

The court's finding of exigency was based on the following key evidence adduced at the hearing: (1) six pounds of methamphetamine had been intercepted the day before in a package addressed to Iwai; (2) the multi-story condominium complex had a central mail room to which all packages had to be delivered, preventing the agents from sending the package on a sure course to Iwai's unit; (3) the agents observed Iwai take the package up to his unit; (4) the beeper thereafter signaled that the package had been opened; (5) the agents knew that drugs are easily destroyed or disposed of; (6) upon knocking on the door, Agent Jones saw a shadowy figure approach the door and then retreat; and (7) Agent Jones then heard a suspicious rustling noise from inside, which in his experience as a highly trained narcotics investigator, indicated the destruction of evidence was occurring.

The district court believed the agents were testifying truthfully. And no evidence refutes the conclusion that the agents were acting in good faith.

Considering all of these facts together, it was reasonable to conclude that the destruction of incriminating evidence was occurring. Exigency arose at the time Agent Jones heard the suspicious sounds.

But to focus on the noises in isolation from all other factors, as the Dissent does, is not a proper "totality of the circumstances" analysis. Agent Jones did not hear "a rustling of

> papers or plastic or something to that effect" in a vacuum. Six pounds of methamphetamine had been discovered the day before in the package addressed to Iwai. At those quantities, agents were clearly investigating a major drug distributor. The agent heard this noise *after* the beeper had signaled that the package had been opened, and he knew Iwai was inside.
>
> Although the Dissent questions the significance of the noises Agent Jones heard, conduct meaningless "to the untrained eye of an appellate judge . . . may have an entirely different significance to an experienced narcotics officer" like Agent Jones. . . . Agent Jones believed that the noise he heard was Iwai destroying evidence, the trial court found his testimony credible, and there is no evidence in the record to suggest otherwise.

[Citations and footnotes omitted; some paragraphing revised for readability]

IN HABEAS REVIEW, NINTH CIRCUIT PANEL ADDRESSES ADMISSIBILITY FOR IMPEACHMENT PURPOSES OF A DEFENDANT'S VOLUNTARY-BUT-MIRANDA-VIOLATIVE INCULPATORY STATEMENTS TO INTERROGATORS WHO IN 1988 QUESTIONING KNOWINGLY VIOLATED MIRANDA

In Bradford v. Davis, 923 F.3d 599 (9th Cir., May 3, 2019), a three-judge Ninth Circuit panel declines, under the forgiving habeas corpus standard of legal review of state court decisions, to overturn a California Supreme Court decision holding to be admissible for impeachment purposes some of a capital murder defendant's inculpatory (i.e., guilt-revealing) statements that were obtained by Los Angeles PD detectives who knowingly violated Miranda in 1988.

First set of inculpatory statements: In defendant's initial custodial interrogation, he clearly invoked his right to an attorney. An LAPD detective knowingly violated Miranda when he told the suspect at that point that the interrogation would continue "off the record." Questioning then continued, and defendant made inculpatory statements.

Second set of inculpatory statements: Two hours after the initial interrogation, defendant volunteered some inculpatory information while he was being booked.

Third set of inculpatory statements: 11 hours after the initial interrogation, another detective contacted the continuous custody suspect. The detective confirmed with defendant that defendant was continuing to invoke his right to an attorney. This detective then knowingly violated Miranda when he told the suspect that the interrogation would continue "off the record," and defendant made inculpatory statements.

Fourth set of inculpatory statements: About 24 hours later, defendant initiated contact with a detective without any intervening contact by law enforcement. The defendant told the detective that he wanted to talk about the case. The detective fully re-Mirandized defendant and then questioned him. Defendant made additional inculpatory statements.

Some rulings were made by the state trial court (1) as to the voluntariness of the various inculpatory statements, and (2) as to the admissibility of those statements in the prosecution's case-in-chief or for impeachment purposes. This Legal Update entry will not address those rulings or how they impacted the prosecution and defense at trial. After defendant was convicted and sentenced to death for a heinous rape-murder, he appealed in the California

court system. Ultimately in that direct review, the California Supreme Court upheld the conviction. Defendant subsequently sought habeas corpus review in the federal courts, and he won all of his Miranda-based challenges in the U.S. District Court, which ruled that all of the inculpatory statements had been obtained involuntarily. But the State prevailed in this appeal to the Ninth Circuit.

The Ninth Circuit panel rules under the forgiving review standard for habeas corpus cases that the California Supreme Court ruled consistently with clearly established U.S. Supreme Court case law in its rulings on the Miranda questions: while the first and third sets of inculpatory statements would not have been admissible in the State's direct case-in-chief, the statements were admissible for purposes of impeaching defendant And, as to the fourth set of inculpatory statements, the Ninth Circuit panel rules that the California Supreme Court did not commit obvious error in ruling under U.S. Supreme Court case law that, where defendant initiated the fourth conversation with a detective, his inculpatory statements were admissible in the State's direct case-in-chief.

LEGAL UPDATE EDITORIAL COMMENT: Former law enforcement officer and retired San Diego County Deputy District Attorney, Robert C. Phillips, publishes "California Legal Updates" (search for "California Legal Updates") on the internet. In his August 30, 2019 edition, Mr. Phillips made the following comments for California officers, and I think (in my purely personal thinking) that those comments are also food for thought for Washington officers regarding an interrogation practice that apparently was not uncommon in the LAPD in 1988:

> **The Miranda violations in this case were blatant and obvious. Some officers believe that such a tactic done for the purpose of obtaining impeachment evidence is not only okay, but advisable. While advocated by some Miranda experts, I am of the strong opinion that this is simply wrong, and will someday come back to bite us. It is at the very least questionable whether prosecutors, as "officers of the court," should be encouraging police interrogators to intentionally violate Miranda. Although it is true that the results of such an interrogation tactic are in fact admissible in evidence for impeachment purposes should defendant testify and change his story, and there is a definite prosecution tactical advantage to tying a defendant down to a specific description of his crime (often made up at a time when a suspect has yet had time to think up a lie that is supported by the evidence), the practice is still strongly criticized, at least in California.**
>
> **The California Supreme Court has told us several times that a statement purposely elicited from an in-custody suspect who has invoked his right to counsel (or to silence), even though done for the purpose of obtaining admissible impeachment evidence, is still "obtained illegally," and not condoned by the Court. [Discussion of California appellate court decisions omitted] And the Ninth Circuit in this decision, agreeing with the California Supreme Court, described the intentional Miranda violation in this case as "unethical and . . . strongly disapproved." (at p. 620.)**
>
> **Under the theory that "bad facts make for bad case law," it is strongly recommended that Miranda not be intentionally violated despite some prosecutorial advantages to doing so.**

LEGAL UPDATE EDITORIAL RESEARCH NOTE: For an article by John Wasberg on "Initiation of Contact Rules Under the Fifth Amendment," go to the Criminal Justice Training Commission's internet LED page under "Special Topics."

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WASHINGTON STATE SUPREME COURT

TWO HOLDINGS: (1) UNDER "PRIMARY PURPOSE" TEST, THERE WAS NO VIOLATION OF SIXTH AMENDMENT CONFRONTATION RIGHT IN TRIAL COURT'S ADMISSION INTO EVIDENECE OF VICTIM'S TREATMENT-FOCUSED STATEMENTS TO HOSPITAL PERSONNEL; (2) EVIDENCE IS SUFFICIENT TO CONVICT DEFENDANT OF UNLAWFUL IMPRISONMENT WHERE THERE WAS EVIDENCE OF EXTREMELY COERCIVE CONDUCT AND EVIDENCE THAT AN ATTEMPT TO ESCAPE WOULD HAVE PRESENTED SERIOUS DANGER TO THE VICTIM

LEGAL UPDATE EDITORIAL NOTE RE SCANLAN DECISION: The majority opinion of the Washington Supreme Court in Scanlan is detailed, both in describing the facts and in describing the law on the two key issues in the case. This Legal Update entry is, by contrast, relatively brief and summary, particularly in the discussion of facts and law reflating to the Sixth Amendment Confrontation Clause. Readers may wish to read the actual August 1, 2019 opinion on the Washington Courts Opinions webpage.

State v. Scanlan, ___ Wn.2d ___ , 2019 WL ___ (August 1, 2019)

Facts and Proceedings below:

In 2013, Leroy Bagnell, an 82-year-old widower, was living independently in the Federal Way home that he had shared with his late wife of more than 50 years. Sometime in 2013, Bagnell met Scanlan, a woman 30 years his junior. They quickly became friends and about two months later, Scanlan moved in with Bagnell.

In 2014, Bagnell obtained a protection order against Scanlan. About two weeks later, family members checked on Bagnell and found him badly battered. Bagnell reported to them and others that Scanlan had been beating him with various objects (possibly including a candlestick, a broom handle, a hammer, a golf club, and a crowbar) and had kept him confined in the house over a two-day period.

Bagnell was transported to the hospital. There he was treated in the emergency room for his injuries, which included: extensive bruising all over his body, large open wounds on his legs, wounds on his arms, and fractures on both hands. Among other things, Bagnell described to medical providers, including a hospital social worker, Scanlan's causing of his injuries and his home-imprisonment. No law enforcement officers were present during his making of those statements to medical providers.

[LEGAL UPDATE EDITORIAL NOTE: Bagnell also separately talked about the attacks and the imprisonment to law enforcement investigators. The trial court ruled those statements admissible, but the Court of Appeals ruled that the statements violated the Sixth Amendment confrontation clause. The State did not seek review of that ruling in the Supreme Court.]

The State charged Scanlan with assault in the second degree (count 1), felony violation of a court order (count 2), unlawful imprisonment (count 3), and assault in the fourth degree (count 4). All counts contained a domestic violence allegation.

The victim, Bagnell, did not testify at trial. However, the trial court admitted statements that Bagnell made to medical providers in the emergency room, as well as subsequent statements he made to a social worker and his primary care physician and wound care medical team.

The jury found Scanlan guilty of assault in the second degree, felony violation of a court order, and unlawful imprisonment. Scanlan appealed. The Court of Appeals rejected the appeal and ruled that victim Bagnell's statements to hospital personnel (including the hospital social worker) were admissible under Sixth Amendment confrontation clause analysis.

ISSUES AND RULINGS: (1) The U.S. Supreme Court has made clear under its "primary purpose" test that, viewing the context and statements of declarant and any interviewers of the declarant, a non-testifying declarant's statement to an interviewer is inadmissible under the U.S. constitution's Sixth Amendment Confrontation Clause only if the primary purpose of the conversation was to create an out-of-court substitute for trial testimony. Did the trial court's admission of victim Bagnell's hearsay statements to hospital personnel, including the hospital social worker, violate defendant Scanlan's right to confrontation under the "primary purpose test of the Sixth Amendment? (ANSWER BY SUPREME COURT: No)

(2) RCW 9A.40.040's unlawful imprisonment crime prohibits knowingly restraining a person. The statute further provides: "Restrain means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty. Restraint is 'without consent' it is is accomplished by . . . physical force, intimidate or deception."

Is there sufficient evidence in the trial court record of restraint to support Scanlan's conviction of unlawful imprisonment? (ANSWER BY COURT OF APPEALS: Yes)

Result: Affirmance of Washington Court of Appeals decision that affirmed the King County Superior Court convictions of Theresa Gail Scanlan for assault in the second degree and unlawful imprisonment.

ANALYSIS:

1. Sixth Amendment Right To Confrontation Was Not Violated

Statements to medical providers: The Sixth Amendment confrontation clause bars the admission of "testimonial" hearsay unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. See Crawford v. Washington, 541 U.S. 36 (2004) and numerous decisions interpreting Crawford's testimonial hearsay rule. The Supreme Court majority opinion concludes that Bagnell's hearsay statements quoted or described by the medical providers were not "testimonial" under the Crawford line of cases.

That is because, viewing the conversations from the perspectives of both the declarant (Bagnell) and the hospital personnel (including the social worker) the "primary purpose" of the conversations was not to create an out-of-court substitute for trial testimony. Instead the key purposes of the conversations were to protect Bagnell from future attacks and to aid in his treatment.

The Scanlan Court rejects Bagnell's argument that the "medical waivers" that Scanlan signed somehow made the hearsay statements testimonial under the Sixth Amendment. The Scanlan Court points to the U.S. Supreme Court decision in Ohio v. Clark, 135 S.Ct. 2173 (2015), where the Supreme Court held that a three-year-old student's reports to his pre-school teachers were not testimonial under the "primary purpose" test. The Clark Court declared that the teachers' questions were meant to identify the abuser in order to protect the victim from future attacks, and that statutes mandating reporting of child abuse "cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution."

2. Evidence Of Unlawful Imprisonment Is Sufficient to Support The Conviction

The key part of the Scanlan Court's analysis of this issue is as follows:

> "A person is guilty of unlawful imprisonment if he or she knowingly restrains another person." RCW 9A.40.040(1). "'Restrain' means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty. Restraint is 'without consent' if it is accomplished by . . . physical force, intimidation, or deception." RCW 9A.40.010(6).
>
> Bagnell's statements to medical personnel provide sufficient direct evidence to support Scanlan's unlawful imprisonment conviction. Dr. Britt testified that Bagnell told him "that he had been in his home for two days, that he had been imprisoned, or at least held in his home, against his will," that "he hadn't really eaten in a [] couple of days," and that "[h]e wasn't allowed to talk to his family." [Physician Assistant] Friel testified that Bagnell told her "[h]e was living with a girlfriend at the time who had locked him in a room and had beat him with a candlestick, a broom, and a hammer over multiple areas."
>
> The conviction is further supported by circumstantial evidence. Bagnell's children testified that they had been unable to reach him by cell phone or landline for roughly 24 hours before they arrived on November 6, 2014. They testified that his cell phone said it was disconnected or went to voice mail and that his landline either rang indefinitely or went to voice mail. Witnesses testified that in Bagnell's house the police found a cell phone broken in two, a cordless phone missing its battery cover and batteries (which were found in the trash), and a second damaged cordless handset, and that the upstairs bedroom cordless phone did not emit a dial tone.
>
> All four children and multiple police officers testified that there was blood throughout the house, that the wall had been dented and gouged, and that there were broken and weapon-like items throughout the house – including a broken golf club; a broken, bloodstained broom; a hammer; and a crowbar. The nature and extent of Bagnell's injuries were supported by testimonial and photographic evidence and were not in dispute. Scanlan was found hiding on the scene and responded to Bagnell's daughter's accusation by stating that his injuries were "not that bad." Taken together, the circumstantial evidence supports a reasonable inference that Scanlan knowingly restrained Bagnell, restricting his movements to his house by means of physical force or intimidation.
>
> Citing State v. Kinchen, 92 Wn. App. 442, 452 n.l6 (1998), Scanlan asserts that she could not have unlawfully imprisoned Bagnell because there were multiple means of escape. In Kinchen, the Court of Appeals held that evidence that the victims were

locked in their apartment was insufficient to support an unlawful imprisonment conviction when uncontested evidence also showed that the victims regularly entered and exited through a window and that a sliding glass door was sometimes left unlocked. The court reasoned that for an unlawful imprisonment theory to succeed despite a known means of escape, "the known means of escape must present a danger or more than a mere inconvenience." Here, Scanlan argues, "Mr. Bagnell was at his home, with multiple entrances and windows, including a three-car garage."

But the evidence, viewed in the light most favorable to the prosecution, supports a reasonable inference that leaving would have presented more than a mere inconvenience for Bagnell. Multiple witnesses testified that Bagnell was initially in a nonresponsive stupor, unaware of his surroundings. Moreover, Bagnell's injuries, the state of the house, and his prior history with Scanlan support a reasonable inference that leaving presented a danger.

[Some citations omitted; one citation revised for style; some paragraphing revised for readability]

CONCURRING OPINION: Justice Sheryl Gordon McCloud writes an un-joined concurring opinion that points out that the Court's decision in Scanlan does not address the right to confrontation under the Washington constitution, which was interpreted by the Washington Supreme Court in State v. Pugh, 167 Wn.2d 825 (2009) to provide broader protection of the right to confrontation in some respects than does the federal constitution.

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WASHINGTON STATE COURT OF APPEALS

EXIGENT CIRCUMSTANCES HELD TO JUSTIFY ON-SCENE, AFTER-MIDNIGHT WARRANTLESS BLOOD DRAW WHERE, ALONG WITH SEVERAL ADDITIONAL SIGNIFICANT FACTS, ADMITTED DRINKING DRIVER SMELLED OF ALCOHOL AND HAD SUFFERED MULTIPLE SERIOUS INJURIES IN CAR CRASH AT ABOUT 100 MPH AT A CORNER IN A 35 MPH ZONE, KILLING FOUR PASSENGERS

LEGAL UPDATE EDITORIAL NOTE: See the "Issue and Ruling" section below in this report for a more complete listing of the facts supporting the "exigent circumstances" ruling in this case.

State v. Anderson, ___ Wn. App.2d ___ , 2019 WL ___ (Div. I, August 5, 2019)

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

Around 2:00 a.m., [Officer A] responded to a multivictim car crash in Auburn. At the scene, [Officer A] saw an "obliterated" car off the roadway, a path of debris, an uprooted tree with an 18-inch base, uprooted utility boxes, and guy wires that had been supporting a telephone pole torn out of the ground. The speed limit on the road was 35 m.p.h. but, based on the scene, [Officer A] estimated the car was traveling close to 100 m.p.h.

[Officer B] had observed the car earlier traveling at about 90 m.p.h. but could not catch it. He asked dispatch to let the Auburn Police Department know that the car was heading toward Auburn.

> Four of the five passengers in the car, Andrew Tedford, Caleb Graham, Rehlein Stone, and Suzanne McCay, died. They suffered extensive injuries, including amputations and dissected and evulsed organs. Multiple occupants were ejected from the vehicle. The fifth passenger, James Vaccaro, also suffered serious injuries, including traumatic brain injury, that have had lasting effects.
>
> Anderson's injuries included lacerations to his face, liver, and kidney, a collapsed lung, four rib fractures, a wrist fracture, and bleeding around his adrenal gland. [Officer C], a collision investigation officer, responded to the scene and testified, "The scale and the amount of damage and unfortunate loss of life in this case has been unparalleled in my . . . eight years of [investigating collision] scenes."
>
> At the scene, [Officer D] asked Anderson who had been driving the car. Anderson said that he had. Anderson told [Officer A] that he did not "make the turn." . . .
>
> Multiple individuals who responded to the scene smelled alcohol on Anderson. Anderson told [a paramedic] that he had had "a few drinks." [The paramedic] drew Anderson's blood at the scene without a warrant. Test results showed that his blood alcohol content (BAC) was 0.19 grams of alcohol per 100 milliliters of blood and that he had 2.0 nanograms of THC (tetrahydrocannabinol) per milliliter.
>
> Anderson was taken to Harborview Medical Center. [A toxicologist] testified that a second blood draw taken there showed a BAC of 0.18.
>
> The State charged Anderson with four counts of vehicular homicide, one count of vehicular assault, one count of reckless driving, and an aggravator for injury to the victim "substantially exceeding the level of bodily harm necessary to satisfy the elements of [vehicular assault]." A jury convicted Anderson as charged.

ISSUE AND RULING: Immediately after he drove at 100 MPH in a 35 MPH zone and crashed his car, killing four passengers, Anderson had serious injuries that required treatment. These included lacerations to his face and organs, fractures, a collapsed lung, and bleeding around his adrenal gland. Multiple responders smelled alcohol on Anderson, and Anderson admitted that he had been drinking and was the driver. A paramedic told Officer A that the medics would be giving Anderson medication and would be intubating him. Officer A knew from his experience in law enforcement and as a paramedic that this emergency medical treatment could impair the integrity of a blood sample. Officer A estimated that it would take 40 to 90 minutes to obtain a warrant for blood. At 2:10 a.m., 10 minutes after arriving to the scene, Officer A ordered a warrantless blood draw, which medics conducted at 2:14 a.m.

Do these facts establish exigent circumstances for the warrantless blood draw at the scene of the crash? (ANSWER BY COURT OF APPEALS: Yes)

Result: Affirmance of King County Superior Court convictions of Nicholas Windsor Anderson for four counts of vehicular homicide, one count of vehicular assault, one count of reckless driving, and an aggravator for injury to the victim "substantially exceeding the level of bodily harm necessary to satisfy the elements of [vehicular assault]." Sentence reversed on issue(s) addressed in this Legal Update entry, and case remanded to Superior Court to address sentencing.

ANALYSIS:

A recognized exception to the warrant requirement allows a warrantless search or seizure when exigent circumstances exist. Missouri v. McNeely, 569 U.S. 141 (2013)]. A court examines the totality of the circumstances to determine whether they exist. They exist where "the delay necessary to obtain a warrant is not practical because the delay would permit the destruction of evidence." The natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, for example, when delay results from the warrant application process.

Anderson cites City of Seattle v. Pearson, 192 Wn. App. 802 (2016) to support that here, no exigent circumstances existed. There, police arrested Pearson for DUI and vehicular assault after she struck a pedestrian with her car, performed poorly on field sobriety tests, and admitted that she had smoked marijuana earlier in the day. Police transported her to the hospital two hours after the incident. About thirty minutes after Pearson's arrival, a nurse drew her blood without a warrant. This blood draw showed her THC concentration was approximately 20 nanograms.

Pearson asked the court to suppress this evidence. The trial court admitted it, finding that exigent circumstances existed to justify the warrantless blood draw.

This court reversed, holding, "Because the City failed to show by clear and convincing evidence that obtaining a warrant would have significantly delayed collecting a blood sample, the natural dissipation of THC in Pearson's bloodstream alone did not constitute an exigency sufficient to bypass the warrant requirement."

In its analysis of the totality of the circumstances, this court noted an officer's testimony that a warrant usually takes between 60 and 90 minutes, municipal, district, and superior court judges are available to sign warrants, and police can secure warrants by telephone. A toxicologist testified that unless a person is a chronic marijuana user, THC generally dissipates from a person's blood stream within 3 to 5 hours after smoking.

And this court observed that in Missouri v. McNeely the Supreme Court of the United States explained that the presence of other officers weighs against the conclusion that exigent circumstances existed. This court reasoned that because there were nine officers at the scene, one officer could have transported Pearson to the hospital to collect a blood sample while another officer obtained a warrant, so "[t]he delay-if any-would have been minimal."

The State relies on State v. Inman, 2 Wn. App.2d 281 (2018) to show that exigent circumstances existed. In Inman, Inman crashed his motorcycle on a rural road, injuring him and his passenger. "Inman had facial trauma, including bleeding and abrasions on the face, and a deformed helmet." A bystander told police that Inman had been unconscious for five minutes before regaining consciousness. A paramedic administered emergency treatment. A responding officer spoke with Inman and smelled intoxicants on him. Inman admitted that he had been drinking before driving his motorcycle. Responders at the scene conducted a warrantless blood draw.

The State charged Inman with vehicular assault. Inman asked the trial court to suppress evidence of the blood draw, which the court declined to do, finding exigent circumstances existed.

Division Two of this court affirmed the trial court's decision and held that the totality of the circumstances supported that exigent circumstances existed. The court considered that Inman received emergency medical services and treatment for possible spine injuries, helicopters were coming to medevac him to the nearest trauma center at the time of the blood draw, it would have taken at least 45 minutes to prepare and obtain a warrant, and obtaining a warrant by telephone was questionable because the responding officer lacked reliable cell phone coverage in the rural area.

The court stated that "[u]nder the circumstances, obtaining a warrant was not practical" because of delay and because Inman's continued medical treatment could have impacted the integrity of the blood sample. The court distinguished these circumstances from those in Pearson based on the severity of injuries involved, the necessity for the administration of medication and transportation, the time available to obtain a warrant before transport, and the accessibility of a telephonic warrant.

The circumstances here are more like those in Inman. In the trial court's order denying Anderson's request to suppress the blood draw results, the court made a number of undisputed findings that are relevant here. Similar to Inman, the trial court found that Anderson was in a high-impact collision resulting in serious injuries.

Although Anderson was able to respond to [Officer A's] questions at the scene, make eye contact, and walk to the medic station with a firefighter supporting him on either side, he also had serious injuries that required treatment. These included lacerations to his face and organs, fractures, a collapsed lung, and bleeding around his adrenal gland.

In addition, multiple responders smelled alcohol on Anderson. Anderson told [Officer D] that he had been driving, and he told [Officer D] that he had been drinking before driving. And [the] paramedic told first responding officer [A] that the medics would be giving Anderson medication and intubating him. [Officer A] knew from his experience in law enforcement and as a paramedic that this emergency medical treatment could impair the integrity of the blood sample. [Officer A] estimated that it would take 40 to 90 minutes to obtain a warrant for blood. At 2:10 a.m., 10 minutes after arriving to the scene, [Officer A] ordered a warrantless blood draw, which medics conducted at 2:14 a.m. . . .

Anderson contends that similar to Pearson, there were multiple officers at the scene and it was possible to obtain a telephonic warrant, so no exigent circumstances existed. Although a warrant was more readily available here than it was in Inman because the location of the crash was not remote, the carnage at the scene and Anderson's injuries were more severe.

And, unlike in Pearson, officers did not wait an extended period to transfer Anderson to the hospital. Officers were also unable to interact significantly with Anderson before or during transportation to the hospital as a result of his immediate need for medical attention.

Similar to Inman, the trial court's uncontested finding states that medical treatment could have impacted the reliability of the blood draw results. A warrant was not practical because the delay caused by obtaining a warrant would result in the destruction of evidence or postpone Anderson's receipt of necessary medical care. The totality of the

circumstances establish that exigent circumstances existed to justify a warrantless blood draw.

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

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BRIEF NOTES REGARDING AUGUST 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 August 2019, 12 unpublished Court of Appeals opinions fit these categories. I do not promise to be able catch them all, but each month I will make a reasonable effort to find and list all decisions with these issues in unpublished opinions from the Court of Appeals. I hope that readers, particularly attorney-readers, will let me know if they spot any cases that I missed in this endeavor, as well as any errors that I may make in my brief descriptions of issues and case results.

1. In the Matter of the Personal Restraint of Svein Arve Vik: On August 5, 2019, Division One of the COA rejects the defendant's request for relief from his Snohomish County convictions for *one count of residential burglary and one count of second degree possession of stolen property*. Vik argued that his counsel was ineffective when he failed to challenge the warrant used to seize stolen property from his home. Vik argued that the victim's assistance in executing the search warrant demonstrated that the search warrant was insufficiently particular. The Court of Appeals notes that, **common law tradition permits third parties to aid in the execution of a search warrant, and Vik failed to demonstrate that his counsel was ineffective for not challenging the warrant**.

2. State v. Jeffrey Allen Beach: On August 5, 2019, Division One of the COA rejects the State's appeal from the suppression ruling (and dismissal order) by the King County Superior Court in a prosecution for *possession of a stolen vehicle*. The Court of Appeals agrees with the trial court's interpretation of the **community caretaking exception to the search warrant requirement** that officers' discovery of (A) a lost child and (B) an open door to a nearby house (that had a stolen vehicle in the driveway) – but no connection between the child and the house – did not support officers' warrantless entry into the house where they arrested Beach.

3. State v. Antonio Avila-Tamayo: On August 5, 2019, Division One of the COA rejects defendant's appeal from his King County Superior Court convictions *for one count of rape of a*

child in the first degree and one count of child molestation in the first degree. The Court of Appeals holds that a detective's **mispronunciation/misstatement of the Spanish word for "exercise" in Mirandizing** did not require suppression of the Spanish-as-primary-language defendant's admissions to a detective, where the detective also used the correct Spanish word for "exercise" during the Mirandizing process, and where the totality of the circumstances supported the trial court's finding that defendant understood his Miranda rights when he agreed to talk to the detective.

4. State v. Kevin Ray Case: On August 6, 2019, Division Two of the COA rejects defendant's appeal from his Thurston County Superior Court conviction for *felony violation of a no-contact order*. The Court of Appeals rules that the defendant did not receive ineffective assistance of counsel where his attorney did not object to certain testimony by a law enforcement officer. The general rule is that no witness can testify to an opinion that the defendant is guilty, either by direct statement or inference. The officer testified as follows:

> Q: Did [Case] make any statements with regard to his contact with [the victim]?
> A [By officer] : He essentially stated that he denied having any contact with her, and when I pointed out the obvious presence of not only civilian witnesses but security guards and other disinterested parties that would have no basis for, in my opinion, lying or fabricating, he said that they were essentially lying, and at that point I terminated my questioning because I didn't feel we were going to have any sort of meaningful interaction.

Defendant Case argued on appeal that the officer's statement was an opinion that Case's denial was a lie, and that the testimony of the other witnesses was the truth. The Court of Appeals disagrees, stating that **the officer's testimony presented the officer's opinion that the disinterested parties had no basis for lying, and that this did not constitute a comment on Case's guilt**. Instead, the officer merely reported that defendant Case thought the other witnesses were lying, and that there was no point in continuing the interview. The Court of Appeals asserts that the officer's testimony merely reported on his interaction with Case and did not imply that Case was guilty.

5. State v. Lynn Meredith Lewis: On August 6, 2019, Division Two of the COA rejects the defendant's appeal from his Clark County Superior Court convictions for: (1) *one count of possession of a controlled substance with intent to deliver, which included a school bus route stop enhancement; (2) one count of possession of ephedrine or pseudoephedrine with intent to manufacture methamphetamine; and (3) seven counts of unlawful possession of a firearm in the first degree*. The Court of Appeals applies the **Independent Source exception to the Exclusionary Rule**. The State conceded that an officer violated the rights of defendant when the officer made an initial warrantless search of defendant's cell phone. Lewis argued that the trial court erred in denying his motion to suppress evidence collected from his cell phone under a search warrant that was subsequently obtained. The search warrant affidavit included information that was obtained in the initial unlawful search. The Court of Appeals concludes, however, that after deletion of the unlawfully obtained information, the affidavit demonstrates probable cause, and that under the Independent Source exception to the Exclusion Rule, the evidence obtained under the search warrant is admissible.

6. State v. Jason Lee Wilkes: On August 12, 2019, Division One of the COA rejects the appeal of defendant from his Snohomish County Superior Court conviction for *second degree assault*. At trial, the court admitted statements an unavailable witness made to a 911 operator and to police officers who first arrived at the scene. **The Court of Appeals rules that the statements**

meet the Sixth Amendment Confrontation Clause's primary purpose test for non-testimonial hearsay.

7. State v. Howard Eugene Ward, Jr.: On August 12, 2019, Division One of the COA rejects the appeals of defendant from his King County Superior Court conviction for assault in the second degree. At trial, the court admitted statements that an unavailable witness made to a 911 operator and to an emergency room physician. **The Court of Appeals rules that the statements meet the Sixth Amendment Confrontation Clause's primary purpose test for non-testimonial hearsay**.

8. State v Layne Elliott Huber: On August 12, 2019, Division One of the COA gives defendant a partial victory in his appeal from the Thurston County Superior Court order denying *his CrR 2.3(e) motion for the return of property seized during a 2011 search*. Huber has a home-business in which he buys and sells used goods. Although officers seized hundreds of items during a lawful search, the only items at issue in this appeal are items later identified as stolen by burglary victims who attended a property viewing conducted by law enforcement in August 2011. **The Court of Appeals rules that, because Huber failed to prove that he was entitled to possession of those items, the trial court properly denied Huber's CrR 2.3(e) motion. But the Court of Appeals rules further that, because the purpose of the CrR 2.3(e) hearing was to determine the right to possession solely as between Huber and the State, the trial court erred by further concluding that the items at issue could be returned to third party victims.** Therefore, the Court of Appeals remands to the trial court to vacate its conclusion that "[biased on the totality of the evidence, [t]he State has shown sufficient proof that the stolen items can be returned back to the victims." It appears that further hearings must be held at the Superior Court level.

9. State v. Jeffrey Jerome Johnson: On August 15, 2019, Division Three of the COA agrees with the State's appeal of a Clark County Superior Court suppression order in a *prosecution of defendant for child molestation in the second degree*. The Court of Appeals rules that the trial court erred in concluding that, even through defendant was not in custody when an officer questioned him, the officer violated Miranda because, without giving Miranda warnings, the officer asked defendant questions that were likely to elicit incriminating statements. **The Court of Appeals explains that where there is not both custody + interrogation, Miranda warnings are not required.**

10. State v. Josue Manuel Osorio Lopez: On August 15, 2019, Division Three of the COA rejects the appeal of defendant from his Yakima County Superior Court conviction for *possession with intent to deliver a controlled substance*. The Court of Appeals rules that law enforcement surveillance of Lopez in controlled buys provided **reasonable suspicion that supported stopping Lopez's white pickup**, which stop led to the lawful seizure of controlled substances inside the vehicle.

11. State v. Gerald Scott Complita: On August 20, 2019, Division Three of the COA rejects defendant's appeal from his Kitsap County Superior Court convictions for one count each of *attempted second degree rape of a child and communicating with a minor for immoral purposes*. The Division Three panel rules, among other things, that **law enforcement conduct in a Craigslist sting was not outrageous and therefore did not violate Complita's constitutional Due Process rights**.

12. State v. Terry Lee Russell, Jr.: On August 20, 2019, Division Three of the COA rejects defendant's appeal from his Pierce County Superior Court conviction for *residential burglary*. The

Division Three panel rules, among other things, that a **photo montage developed by law enforcement did not violate defendant's constitutional Due Process rights**. The Court also discusses the case of State v. Knight, 46 Wn. App. 57 (1986), which addressed whether the wholly independent actions of a private citizen can affect the Due Process analysis regarding admissibility of eyewitness identifications.

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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 Criminal Justice Training Commission (CJTC) Law Enforcement Digest Online Training can be found on the internet at [cjtc.wa.gov/resources/law-enforcement-digest].

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