LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: Thank you!

JANUARY 2019

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UNITED STATES SUPREME COURT

CIVIL RIGHTS ACT CIVIL LIABILITY FOR EXCESSIVE FORCE: IN REVERSING A NINTH CIRCUIT RULING THAT DENIED QUALIFIED IMMUNITY TO AN OFFICER WHO WRESTLED A MAN TO THE GROUND DURING A DV CALL, THE U.S. SUPREME COURT ONCE AGAIN CHIDES THE NINTH CIRCUIT FOR DETERMINING UNDER TOO GENERAL A COMPARISON THE QUESTION OF WHETHER CASE LAW WAS "CLEARLY ESTABLISHED" ON AN EXCESSIVE FORCE LAWSUIT

City of Escondido v. Emmons, ___ S. Ct. ___ , 2018 WL ___ (January 7, 2019)

Facts: (Excerpted from U.S. Supreme Court per curiam opinion)

> The record, viewed in the light most favorable to the plaintiff, shows the following. In April 2013, Escondido police received a 911 call from Maggie Emmons about a domestic violence incident at her apartment. Emmons lived at the apartment with her husband, her two children, and a roommate, Ametria Douglas. Officer Jake Houchin responded to the scene and eventually helped take a domestic violence report from Emmons about injuries caused by her husband. The officers arrested her husband. He was later released.
>
> A few weeks later, on May 27, 2013, at about 2:30 p.m., Escondido police received a 911 call about another possible domestic disturbance at Emmons' apartment. That 911 call came from Ametria Douglas' mother, Trina Douglas. Trina Douglas was not at the apartment, but she was on the phone with her daughter Ametria, who was at the apartment. Trina heard her daughter Ametria and Maggie Emmons yelling at each other and heard her daughter screaming for help. The call then disconnected, and Trina Douglas called 911.

Officer Houchin again responded, along with Officer Robert Craig. The dispatcher informed the officers that two children could be in the residence and that calls to the apartment had gone unanswered.

Police body-camera video of the officers' actions at the apartment is in the record.

The officers knocked on the door of the apartment. No one answered. But a side window was open, and the officers spoke with Emmons through that window, attempting to convince her to open the door to the apartment so that they could conduct a welfare check. A man in the apartment also told Emmons to back away from the window, but the officers said they could not identify the man. At some point during this exchange, Sergeant Kevin Toth, Officer Joseph Leffingwell, and Officer Huy Quach arrived as backup.

A few minutes later, a man opened the apartment door and came outside. At that point, Officer Craig was standing alone just outside the door. Officer Craig told the man not to close the door, but the man closed the door and tried to brush past Officer Craig. Officer Craig stopped the man, took him quickly to the ground, and handcuffed him. Officer Craig did not hit the man or display any weapon. The video shows that the man was not in any visible or audible pain as a result of the takedown or while on the ground. Within a few minutes, officers helped the man up and arrested him for a misdemeanor offense of resisting and delaying a police officer.

<u>Proceedings below</u>: (Excerpted from U.S. Supreme Court per curiam opinion)

The man turned out to be Maggie Emmons' father, Marty Emmons. Marty Emmons later sued Officer Craig and Sergeant Toth, among others, under Rev. Stat. §1979, 42 U. S. C. §1983. He raised several claims, including, as relevant here, a claim of excessive force in violation of the Fourth Amendment. The suit sought money damages for which Officer Craig and Sergeant Toth would be personally liable. The District Court held that the officers had probable cause to arrest Marty Emmons for the misdemeanor offense. The Ninth Circuit did not disturb that finding, and there is no claim presently before us that the officers lacked probable cause to arrest Marty Emmons. The only claim before us is that the officers used excessive force in effectuating the arrest.

The District Court rejected the claim of excessive force. The District Court stated that the "video shows that the officers acted professionally and respectfully in their encounter" at the apartment. Because only Officer Craig used any force at all, the District Court granted summary judgment to Sergeant Toth on the excessive force claim.

Applying this Court's precedents on qualified immunity, the District Court also granted summary judgment to Officer Craig. According to the District Court, the law did not clearly establish that Officer Craig could not take down an arrestee in these circumstances. The court explained that the officers were responding to a domestic dispute, and that the encounter had escalated when the officers could not enter the apartment to conduct a welfare check. The District Court also noted that when Marty Emmons exited the apartment, none of the officers knew whether he was armed or dangerous, or whether he had injured any individuals inside the apartment.

The Court of Appeals [by unpublished Ninth Circuit opinion] reversed and remanded for trial on the excessive force claims against both Officer Craig and Sergeant Toth. The Ninth Circuit's entire relevant analysis of the qualified immunity question consisted of the following: "The right to be free of excessive force was clearly established at the time of the events in question. Gravelet-Blondin v. Shelton, 728 F. 3d 1086, 1093 (9th Cir. 2013)."

ISSUE AND RULING: Did the Ninth Circuit apply too general a comparison standard in determining that under the totality of the circumstances Officer Craig used excessive force in wrestling the plaintiff to the ground? (ANSWER BY U.S. SUPREME COURT: Yes, the Ninth Circuit made its "clearly established" ruling by making far too general a comparison to past court decisions)

Result: Reversal of the judgment of the Court of Appeals denying qualified immunity to Sergeant Toth, and Officer Craig; qualified immunity is granted to Sergeant Toth; case is remanded to the lower courts for a proper assessment of case law to determination of whether Office Craig is entitled to qualified immunity.

ANALYSIS: (Excerpted from U.S. Supreme Court per curiam opinion)

With respect to Sergeant Toth, the Ninth Circuit offered no explanation for its decision. The court's unexplained reinstatement of the excessive force claim against Sergeant Toth was erroneous – and quite puzzling in light of the District Court's conclusion that "only Defendant Craig was involved in the excessive force claim" and that Emmons "fail[ed] to identify contrary evidence."

As to Officer Craig, the Ninth Circuit also erred. As we have explained many times: "Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Kisela v. Hughes, 138 S. Ct. 1148 (2018) (per curiam) (slip op., at 4) (internal quotation marks omitted); see District of Columbia v. Wesby, 138 S. Ct. 577 (2018); White v. Pauly, 137 S. Ct. 548 (2017) (per curiam); Mullenix v. Luna, 136 S.Ct. 305 (2015) (per curiam).

Under our cases, the clearly established right must be defined with specificity. "This Court has repeatedly told courts . . . not to define clearly established law at a high level of generality." Kisela. That is particularly important in excessive force cases, as we have explained:

> "Specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue. . . .
>
> "[I]t does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer cannot be said to have violated a clearly established right unless the right's contours were

> sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." [Kisela].

In this case, the Court of Appeals [Ninth Circuit] contravened those settled principles. The Court of Appeals should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances. Instead, the Court of Appeals defined the clearly established right at a high level of generality by saying only that the "right to be free of excessive force" was clearly established. With the right defined at that high level of generality, the Court of Appeals then denied qualified immunity to the officers and remanded the case for trial.

Under our precedents, the Court of Appeals' formulation of the clearly established right was far too general. To be sure, the Court of Appeals cited the Gravelet-Blondin case from that Circuit, which described a right to be "free from the application of non-trivial force for engaging in mere passive resistance. . . ." Assuming without deciding that a court of appeals decision may constitute clearly established law for purposes of qualified immunity, see City and County of San Francisco v. Sheehan, 136 S.Ct. 1765 (2015), the Ninth Circuit's Gravelet-Blondin case law involved police force against individuals engaged in passive resistance. The Court of Appeals made no effort to explain how that case law prohibited Officer Craig's actions in this case. That is a problem under our precedents:

> "[W]e have stressed the need to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment. . . . While there does not have to be a case directly on point, existing precedent must place the lawfulness of the particular [action] beyond debate. . . . Of course, there can be the rare obvious case, where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances. . . . But a body of relevant case law is usually necessary to clearly establish the answer . . . ." Wesby.

The Court of Appeals failed to properly analyze whether clearly established law barred Officer Craig from stopping and taking down Marty Emmons in this manner as Emmons exited the apartment. Therefore, we remand the case for the Court of Appeals to conduct the analysis required by our precedents with respect to whether Officer Craig is entitled to qualified immunity. The petition for certiorari is granted, the judgment of the Court of Appeals is reversed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

[Some citations omitted, others revised for style]

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NINTH CIRCUIT, UNITED STATES COURT OF APPEALS

GOVERNMENT WINS ON MULTIPLE FOURTH AMENDMENT ISSUES (INCLUDING PROBABLE CAUSE TO ARREST AND PROBABLE CAUSE TO SEARCH SUSPECT'S HOME) IN CRIMINAL PROSECUTION INVOLVING A DRUG TRAFFICKER; STATE OF WASHINGTON CONSTITUTIONAL ANALYSIS UNDER ARTICLE I, SECTION 7 WOULD DIFFER ON SOME OF THE ISSUES

U.S. v. Johnson, ___ F.3d ___ , 2018 WL ___ (9th Cir., January 9, 2019)

LEGAL UPDATE EDITOR'S PRELIMINARY NOTE AND COMMENT: In this case, the three-judge Ninth Circuit panel reject's a drug-dealer's multi-issued appeal from his northern California U.S. District Court conviction for seven counts of federal drug and firearms offenses. The panel rules that California city law enforcement officers did not violate Fourth Amendment search and seizure protections when the officers arrested Johnson during a traffic stop, searched him and his car incident to arrest, and, in an investigation one year later, searched his home under a search warrant. I will note below in the "Facts" and "Analysis" sections the areas where analysis would differ if the facts were assessed under "independent grounds" rulings of the Washington courts under article I, section 7 of the Washington constitution.

Facts and Proceedings below: (Excerpted from Ninth Circuit's lead opinion)

Facts relating to justification for initial arrest, warrantless search of person incident to arrest, and warrantless search of car incident to arrest from the car
:

> On August 7, 2015, Lamar Johnson was stopped while driving by Sergeant Clint Simmont of the East Palo Alto Police Department. As Simmont spoke with Johnson, he smelled a combination of burnt and fresh marijuana, which he recognized through his work patrolling East Palo Alto and on the San Mateo County Narcotics Task Force. Simmont asked Johnson for his registration and proof of insurance, to which Johnson responded that he was borrowing the car and did not have registration or insurance information.
>
> Simmont asked if Johnson was sure, and Johnson opened the glove box as if to check. Simmont observed empty plastic bags and pill bottles in the glove box and noticed that Johnson "moved his hand around on the few items that were in there, but he didn't actually manipulate any items." This manner was "inconsistent with the way someone would genuinely search for paperwork." Simmont then learned from a police dispatch agent that Johnson had been arrested for parole violations, which indicated to Simmont that Johnson had been convicted of a felony.
>
> Simmont asked Johnson to step out of the vehicle and searched his person. Simmont discovered that Johnson was wearing a bulletproof vest and arrested him for being a felon in possession of body armor.
>
> After backup police units arrived, Simmont and the other officers searched Johnson's car and discovered a loaded handgun, a pill bottle containing acetaminophen/hydrocodone pills, plastic bags, scales, and concentrated cannabis. Johnson was transported to a police station, where a second search of his person revealed additional controlled substances.

Facts relating to developments one year later leading to issuance of a search warrant for Lamar Johnson's home

> The following year, a separate investigation in San Mateo County linked Johnson to controlled substance distribution. On March 16, 2016, a judge in San Mateo Superior Court issued a warrant to search Johnson, a vehicle allegedly belonging to him, and a

residence in East Palo Alto allegedly belonging to him. Detective Christopher Sample subscribed and swore to an affidavit in support of the warrant.

According to his affidavit, Sample met with a confidential informant (CI) who purportedly could call a man named "Lamar" at a specific phone number and arrange a sale of cocaine base. The CI called the number and a male voice answered the phone and gave a location to meet. Police observed the CI meet Johnson at that location and exchange items.

[Detective] Sample then tested the substance the CI received from Johnson and identified it as cocaine. Sample followed Johnson from the exchange and stopped him in front of a house for a minor traffic violation.

[LEGAL UPDATE EDITOR'S NOTE REGARDING "PRETEXT": The U.S. Supreme Court has ruled that the Fourth Amendment does not have a "pretext stop" rule. See Whren v. U.S., 517 U.S. 806 (1996). For that reason, no pretext issue was analyzed in the Lamar Johnson case. On the other hand, the Washington Supreme Court ruled in State v. Ladson, 138 Wn.2d 343 (1999) that the Washington constitution's article I, section 7 does have a pretext doctrine. However, the stop under the facts of the Johnson case would probably be upheld under Ladson analysis because the officer had probable cause to arrest Johnson for a drug crime at the point when the officer stopped him and released him. See State v. Quezadas-Gomez, 165 Wn. App. 593 (2011) (Pretext prohibition does not apply where there was probable cause for the greater intrusion of an arrest, because probable cause to arrest encompasses the legal justification, i.e., reasonable suspicion, for the lesser intrusion of a mere stop.)]

Johnson's driver license stated he lived at the house where they had stopped, and Johnson told [Detective] Sample that it was his house. Sample then observed Johnson entering the house before he drove away.

[Detective] Sample then arranged a second buy through the same CI. Again, the CI called the phone number, the man provided a location to meet, and the CI exchanged items with Johnson after they met at that location.

[Detective] Sample tested the substance the CI received from Johnson and it again tested positive as cocaine. Again, police followed Johnson and observed him return to the same home. The first buy occurred within the 20 days preceding the affidavit, and the second buy within 10 days.

[Detective] Sample's affidavit also provided information about his training and experience. [Detective] Sample averred that drug traffickers who sold cocaine base often purchased it in bulk quantities and stored it in their cars and homes. Based on the factual information recited above and Sample's description of his training and experience, the superior court issued a search warrant. The search of Johnson's home recovered a firearm, ammunition, scales, plastic bags, pills in bottles, and cocaine base.

Procedural background at the trial court level

Johnson was indicted on nine counts of drug and firearm offenses. Before trial, Johnson moved to suppress all evidence recovered from the warrantless search of his person

and car and the warrant search of his house. The district court denied the motion in two separate orders.

Johnson then stipulated to certain facts and the district court held a bench trial. The government dismissed two counts and the district court convicted Johnson on the remaining seven. At sentencing, the district court increased Johnson's offense level by four levels because he had used body armor during the commission of a drug trafficking crime.

[Subheadings added; some paragraphing broken up for readability]

ISSUES AND RULINGS UNDER THE FOURTH AMENDMENT: (1) Sergeant Symmont arrested Johnson after a traffic stop. The sergeant based the arrest on the sergeant's belief that he had probable cause to arrest Johnson for being a felon in possession of body armor. The Ninth Circuit opinion in this case implies that the sergeant did not have probable cause to arrest for that crime. May the arrest be justified under the Fourth Amendment based on facts known to the sergeant that added up to probable cause to arrest for possession of marijuana, even if the sergeant did not subjectively base the arrest on that theory? (ANSWER BY NINTH CIRCUIT: Yes)

(2) During the traffic stop, Sergeant Symmont smelled a combination of burnt and fresh marijuana coming from within the car of Lamar Johnson. When Lamar Johnson purported to be looking in his glove box for papers relating to car registration and car insurance, the sergeant observed empty plastic bags and pill bottles in the glove box, and the sergeant also noticed that Johnson "moved his hand around on the few items that were in there, but he didn't actually manipulate any items." The sergeant concluded that this behavior was inconsistent with the way someone would genuinely search for paperwork relating to car registration and insurance, Do the sergeant's sensory observations (smell and sight) and his experience add up to probable cause to arrest Johnson for possession of marijuana? (ANSWER BY NINTH CIRCUIT: Yes)

(3) Sergeant Symmont searched the person of Johnson before (A) telling Johnson that Johnson was under arrest or (B) otherwise manifesting to Johnson that he was under arrest. Where Sergeant Symmont had probable cause to make a custodial arrest of Johnson, and the arrest occurred reasonably contemporaneously with the arrest (i.e., shortly after), was the search of Johnson justified by the search incident to arrest exception to the search warrant requirement? (ANSWER BY NINTH CIRCUIT: Yes; note that one of the three panel judges, Judge Watford, argues that the Ninth Circuit should overrule its precedent that allows a search to precede formal arrest in circumstances such as these; **note also that the Washington constitution requires arrest to precede search under the search incident to arrest theory: see further Legal Update editor's comment below**).

(4) Was the car search justified under the Fourth Amendment Carroll Doctrine (aka the mobile vehicle probable cause search exception) allowing a warrantless vehicle search based on probable cause to search a mobile car for evidence? (ANSWER by NINTH CIRCUIT: Yes; **note that the Washington Supreme Court has held that article I, section 7 of the Washington constitution does not include the Carroll Doctrine; see further Legal Update editor's comment below**)

(5) Do (A) the circumstances noted in the above issue statements and for the most part described in the search warrant affidavit in this case, plus (B) the subsequent observations by Detective Sample and the CI, along with (C) Detective Sample's experience and training that

supported the belief that cocaine dealer Johnson would have a supply of cocaine in his home, likewise detailed in the search warrant affidavit, add up to probable cause to search Johnson's home for cocaine, among other items described in the warrant? (ANSWER BY NINTH CIRCUIT: Yes; **note that there could be a problem if these facts were to arise in a Washington case in connecting Johnson's drug sales to justifying a search of his home; see further Legal Update editor's comment below**)

(6) Does the search warrant affidavit establish the credibility of the CI? (ANSWER BY NINTH CIRCUIT: Yes, but in any event the CI's credibility does not matter in light of the other information in the affidavit)

(7) Does the failure of the affidavit to specify the quantity of cocaine involved in the controlled drug buys invalidate the search warrant on the theory that the magistrate may have been misled into believing that Johnson was a major distributor of cocaine, as opposed to being a small-time cocaine dealer? (ANSWER BY NINTH CIRCUIT: No, it was clear enough in the affidavit that only small quantities of cocaine were purchased in the controlled buys)

Result: Affirmance of U.S. District Court (North District) convictions of Lamar Johnson for federal drug and weapons crimes.

ANALYSIS:

Issue 1 Ruling: *An arrest may be justified based on probable cause facts known at the time of arrest to an officer, even if the officer has a different offense and/or somewhat different facts in mind when the officer makes the arrest*

Issue 2 Ruling: *Sergeant Symmont's sensory observations plus his experience and training add up to probable cause to arrest Lamar Johnson for possession of marijuana.*

Issue 3 Ruling: *The fact that Sergeant Symmont searched Lamar Johnson before searching Johnson's person does not invalidate the search as a search incident to arrest where the search occurred reasonably contemporaneously with the arrest.*

The Ninth Circuit panel's lead Opinion analyzes the first three issues as follows:

> The search incident to a lawful arrest exception to the warrant requirement allows a police officer to search an arrestee's person and the area within the arrestee's immediate control. Arizona v. Gant, 556 U.S. 332, 339 (2009). It is well-established in this circuit that a search, incident to a lawful arrest, does not necessarily need to follow the arrest to comport with the Fourth Amendment. United States v. Smith, 389 F.3d 944, 951 (9th Cir. 2004) . . . . Instead, probable cause to arrest must exist at the time of the search, and the arrest must follow "during a continuous sequence of events." If these conditions are satisfied, the fact that the arrest occurred shortly after the search does not affect the search's legality.
>
> It is also well-established that the mindset of an arresting officer is usually irrelevant to a seizure's legality. See Devenpeck v. Alford, 543 U.S. 146, 153 (2004) . . . . Instead, the officer's state of mind matters only to the extent that probable cause must be based on "the facts known to the arresting officer at the time of the arrest." Devenpeck, 543 U.S. at 152. Thus, when the officer's known facts provide probable cause to arrest for an

offense, the officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause."

The question presented in this case is whether these two well-established principles may coincide without violating the Fourth Amendment. Johnson contends that to do so would create a "search incident to probable cause" rule, allowing officers to search a person whenever probable cause to arrest exists. Johnson argues that the existence of such a rule will cause widespread fishing expeditions that are pre-textual and discriminatory.

We conclude that the search of Johnson's person was constitutional. The search incident to a lawful arrest exception is "based upon the need to disarm and to discover evidence," but it "does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." United States v. Robinson, 414 U.S. 218, 235 (1973). Thus, we do not balance Johnson's interests in not being searched against Sergeant Simmont's interest in searching him. Instead we evaluate whether, as a general matter, the justifications for the search incident to lawful arrest exception retain force in the context of a search performed by an officer who has probable cause to arrest and shortly thereafter does arrest.. . . .

The justifications, including officer safety, for the [automatic authority to search the person under this] exception do not lose any of their force in this context. . . .

Johnson's alternative argument is that, even applying this standard, the search of his person was unconstitutional because Simmont did not have probable cause to arrest. We disagree. . . . The smell of fresh and burnt marijuana in Johnson's car, along with the plastic baggies in the glove compartment, and Johnson's unusual search of the glove compartment, indicated a "fair probability" that Johnson had committed, was committing, or was about to commit the offense of marijuana transportation. *See* Cal. Health & Safety Code § 11360. The search prior to Johnson's arrest was therefore supported by probable cause.

[Some citations omitted, others revised for style]

LEGAL UPDATE EDITOR'S COMMENT ABOUT SEARCHING BEFORE ARRESTING: The Washington Supreme Court held in State v. O'Neill, 148 Wn2d 564 (2003) that under article I, section 7 of the Washington constitution an actual custodial arrest must occur prior to a search of the person if an officer's warrantless search is to be deemed a search incident to arrest. See also State v. Radka, 120 Wn. App. 43 (Div. III, 2004) March '04 LED:11 (Putting suspended driver in back seat of patrol car and telling him he is under arrest held not a "custodial arrest" for "search incident" purposes where he was not frisked, searched, or handcuffed, and he was allowed to use his cell phone while sitting in the patrol car). Thus, if the facts of this case had arisen in Washington involving an officer subject to the Washington constitution, the warrantless search would have been deemed unlawful by a Washington court. Note also that a concurring judge in this case urges the Ninth Circuit to overrule its case law under the Fourth Amendment that allows a search on probable cause to be considered a search incident to arrest even if the search precedes the arrest.

Issue 4 Ruling:. *The car search was justified under the Fourth Amendment Carroll Doctrine.*

The Ninth Circuit's lead Opinion in Johnson analyzes the "Carroll Doctrine" issue as follows:

> When an arrestee is the recent occupant of a vehicle, the arresting officer may search that vehicle if the arrestee is unsecured and within reaching distance of the passenger compartment, or if it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." Arizona v. Gant, 556 U.S. 343 (quoting Thornton v. United States, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in the judgment)). Additionally, under the automobile exception [i.e., the Carroll doctrine], a police officer may conduct a warrantless search of a vehicle if there is probable cause to believe the vehicle contains evidence of a crime. United States v. Faagai, 869 F.3d 1145, 1150 (9th Cir. 2017). The district court relied on both the search incident-to-lawful-arrest exception and the automobile exception to uphold the warrantless search of Johnson's car.
>
> We conclude that the search was justified under the automobile exception [also known as the "Carroll Doctrine," per U.S. v. Carroll, 267 U.S. 132 (1925)], and therefore do not reach whether the search was also justified as incident to Johnson's arrest. When Simmont approached Johnson's car, he immediately smelled a combination of burnt and fresh marijuana. This provided probable cause for Simmont to search the vehicle. *See* United States v. Barron, 472 F.2d 1215, 1217 (9th Cir. 1973) ("Further, the fact that an agent familiar with the odor of marijuana, smelled such an odor emanating from the automobile when he jumped in to stop it, alone was sufficient to constitute probable cause for a subsequent search for marijuana"). Johnson argues that the search of his car was nonetheless illegal because it was the fruit of the illegal search of his person. But, as we have already explained, that search comported with the Fourth Amendment. There being no poisonous tree, the search of Johnson's car cannot have been the fruit of an illegal search.

[LEGAL UPDATE EDITOR'S COMMENTS ABOUT WARRANTLESS SEARCHING OF THE CAR: The warrantless, non-consenting, non-exigent search of the car in this case would have been unconstitutional if the facts were tested under the Washington constitution.

***Carroll Doctrine/automobile exception*: As noted above, the Washington Supreme Court has held that the Washington constitution, article I, section 7, does not include the Carroll Doctrine for car searches, so any warrantless, non-consenting search of a vehicle for evidence based on probable cause to search it generally must be based on actual exigent circumstances, not merely assumptions about mobile vehicles. See State v. Ringer, 100 Wn.2d 686 (1983); State v. Tibbles, 169 Wn.2d 364 (2010).**

***Search of vehicle incident to arrest*: The Ninth Circuit lead opinion declines to address the question of whether the search incident rule authorizes a search based on the search-for-evidence-of-the-crime-of-arrest exception to the limiting rule of Arizona v. Gant 556 U.S. 332 (2009). Note that the Washington Supreme Court has ruled that the Washington constitution does not include Gant's search-for-evidence-of-the-crime-of-arrest exception for car searches incident to arrest. See State v. Snapp, 174 Wn.2d 177 (2012)].**

Issue 5 Ruling: *The facts set out in the search warrant affidavit add up to probable cause to search the home of Lamar Johnson for cocaine and other items specified in the search warrant.*

Issue 6 Ruling: *The CI is shown in the search warrant affidavit to be credible, and, in any event, credibility of the CI is irrelevant in light of the other allegations in the search warrant affidavit.*

Issue 7 Ruling: The *failure of the affidavit to describe the quantity of cocaine involved in the controlled drug buys does not invalidate the search warrant because the affidavit makes clear that the purchases were of small amounts of cocaine.*

The Ninth Circuit's lead Opinion in Johnson analyzes the final three issues as follows:

> Johnson attacks the warrant on three grounds. First, he argues that Sample's affidavit did not establish probable cause that contraband would be found in his home. Second, he argues that the affidavit did not establish the CI's reliability. Third, he argues that the affidavit omitted the quantity of cocaine involved in the controlled buys, misleading the magistrate into issuing the warrant. We disagree with these arguments.
>
> As to probable cause, this case is controlled by United States v. Terry, 911 F.2d 272 (9th Cir. 1990). In that case, we held that an officer's "first hand knowledge" of the defendant's possession of controlled substances, combined with the officer's "experience with other drug dealers," provided the "substantial basis" for the magistrate to determine that probable cause existed. The same holds true here. Sample averred that he had twice observed Johnson distribute cocaine in the 20 days preceding the warrant, including once within 10 days. He also averred that, after the buys, he observed Johnson return to the address listed on the warrant application, which Johnson entered and told police was "his house." These facts – combined with Sample's description of how drug traffickers buy cocaine in bulk, sell in small amounts, and use their homes as store caches for the remainder – provided a substantial basis for the San Mateo Superior Court to issue the warrant.

[LEGAL UPDATE EDITOR'S COMMENT: In State v. Thein, 138 Wn.2d 133 (1999), the Washington Supreme Court held that an officer's statement about the general habits and practices of drug dealers was not sufficient alone to link defendant's residence to his sale of a large quantity of marijuana at a location away from his residence. In a case with the Johnson facts, officers in the State of Washington would want to either: (1) make an observation of the drug-dealer leaving his residence to make the sale (and, ideally, return home right after – see State v. G.M.V., 135 Wn. App. 366 (2006)), or (2) otherwise present something in the affidavit in addition to relying on officer experience and training to link the sales by the drug-dealer to his residence.]

> As to the CI's reliability, this argument is largely beside the point. As we have just explained, the basis for probable cause in the affidavit was Sample's "first hand knowledge" of Johnson's drug dealing and his "experience with other drug dealers" in how and where a confirmed drug dealer might store contraband. The warrant was not issued, unlike in other cases where informant credibility is crucial, based on the CI's tip that drugs would be found in Johnson's home, but on Sample's observations of the controlled buys and Johnson's actions thereafter. The CI's only role in establishing probable cause was therefore to effectuate the controlled buys, and the CI did establish reliability in this regard because police observed the buys, corroborating the CI's information. [**LEGAL UPDATE EDITOR'S COMMENT: Note that the Washington appellate courts have clearly held that a CI's participation in controlled buys can establish credibility of the CI. See State v. Davis, 176 Wn. App. 385 (2013)].**
>
> Finally, as to the omission of the size of the cocaine rocks sold, we conclude that any omission was immaterial to the magistrate's decision. A defendant challenging

omissions from a warrant must make a substantial showing that "the affiant intentionally or recklessly omitted facts required to prevent technically true statements in the affidavit from being misleading." United States v. Stanert, 762 F.2d 775, 781 (9th Cir. 1985). Johnson has not met that standard here. Assuming arguendo that Sample's omission of the precise sizes of the cocaine rocks was intentional or reckless, it was clear from the affidavit that the controlled buys involved small amounts of cocaine. Therefore, inclusion of those facts would not have changed the meaning of any statement in the affidavit.

[Some citations omitted, others revised for style]

LAW ENFORCEMENT OFFICERS VIOLATED THE FOURTH AMENDMENT WHERE (1) THEY EXTENDED A LAWFULLY INITIATED VEHICLE STOP MERELY BECAUSE A PASSENGER REFUSED TO IDENTIFY HIMSELF, AND (2) THEY LACKED REASONABLE SUSPICION THAT HE HAD COMMITTED AN OFFENSE

U.S. v. Landeros, ___ F.3d ___ , 2018 WL ___ (9th Cir., January 11, 2019)

[LEGAL UPDATE EDITOR'S PRELIMINARY COMMENT: Under State v. Rankin, 151 Wn.2d 689 (2004) Aug 04 LED:07, and State v. Brown, 154 Wn.2d 787 (2005) Sept 05 LED:18, officers are not allowed under article I, section 7 of the Washington state constitution to routinely seek identification documents or even identification information from a passenger during a traffic stop. Instead, officers must have reasonable suspicion that the passenger has violated the law, such as violating the open alcohol container statute or the seat belt statute, or they must have a reasonable community caretaking or emergency justification for directing such questions to a non-violator passenger. There is not such a restriction on such inquiries under the federal constitution's Fourth Amendment, except where the questions extend the duration of the stop beyond the time required for an ordinary processing of a traffic stop, which may include some records checks and warrant checks. Accordingly, the Landeros case digested below, which was resolved against the government under Fourth Amendment analysis, likewise would have been resolved against the government in a Washington state court prosecution under similar facts, but under an additional state constitutional theory.]

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

Early in the morning of February 9, 2016, police officer Clinton Baker pulled over a car driving 11 miles over the speed limit. The stop occurred on a road near the Pascua Yaqui Indian reservation. Alfredo Landeros sat in the front passenger seat next to the driver. Two young women were in the back seat. The driver apologized to Officer Baker for speeding and provided identification.

Officer Baker wrote in his incident report and testified that he smelled alcohol in the car. The two women in the backseat appeared to him to be minors, and therefore subject to both the underage drinking laws and the 10:00 p.m. Pascua Yaqui curfew.[2] According to the two women's testimony, Officer Baker requested their identification and explained that he was asking because they looked younger than 18 years old "and it was past a curfew." The two women-who were 21 and 19 years old-complied.

As he stated at the suppression hearing, Officer Baker did not believe that Landeros was underage, and he was not. Nonetheless, Officer Baker, in his own words, "commanded"

Landeros to provide identification. Later, Officer Baker explained it was "standard for [law enforcement] to identify everybody in the vehicle." Landeros refused to identify himself, and informed Officer Baker-correctly, as we shall explain, that he was not required to do so. Officer Baker then repeated his "demand[] to see [Landeros's] ID." Landeros again refused. As a result, Officer Baker called for back-up, prolonging the stop. Officer Frank Romero then arrived, and he too asked for Landeros's identification. The two officers also repeatedly "commanded" Landeros to exit the car because he was not being "compliant."
Landeros eventually did leave the car. At least several minutes passed between Officer Baker's initial request for Landeros's identification and his exit from the car, although the record does not reflect the exact length of time.

Officer Baker testified that, as Landeros exited the car, he saw for the first time pocketknives, a machete, and two open beer bottles on the floorboards by the front passenger seat. Arizona prohibits open containers of alcohol in cars on public highways, Ariz. Rev. Stat. Ann. § 4-251. Officer Baker then placed Landeros under arrest. Consistent with Officer Baker's testimony, the government represented in its district court briefing that Landeros was arrested both for possessing an open container[3] and for "failure to provide his true full name and refusal to comply with directions of police officers." See Ariz. Rev. Stat. Ann. § 13-2412(A) ("It is unlawful for a person, after being advised that the person's refusal to answer is unlawful, to fail or refuse to state the person's true full name on request of a peace officer who has lawfully detained the person based on reasonable suspicion that the person has committed, is committing or is about to commit a crime."); *id.* § 28-622(A) ("A person shall not willfully fail or refuse to comply with any lawful order or direction of a police officer invested by law with authority to direct, control or regulate traffic.").

The officers handcuffed Landeros as soon as he exited the car. Officer Romero asked Landeros if he had any weapons; Landeros confirmed that he had a knife in a pocket. Officer Romero requested consent to search Landeros's pockets, and Landeros agreed. During that search, Officer Romero found a smoking pipe and six bullets in Landeros's pockets.

Two and a half months later, Landeros was indicted for possession of ammunition by a convicted felon, 18 U.S.C. §§ 922(g)(1), 924(a)(2). He moved to suppress the evidence based on the circumstances of the stop, and also to dismiss the indictment based on alleged abuse by the police officers after the search. The magistrate judge recommended the district court deny both motions, and it did so in a single sentence order. Landeros then entered into a plea agreement that preserved his right to appeal the denials of the two motions. The district court accepted the agreement and sentenced Landeros to 405 days in prison and three years of supervised release.

ANALYSIS:

The three-judge Ninth Circuit panel holds that the law enforcement officers violated the Fourth Amendment where (1) they extended a lawfully initiated vehicle stop merely because the passenger refused to identify himself, and (2) they lacked reasonable suspicion that the individual had committed an offense.

In Rodriguez v. United States, 135 S.Ct. 1609 (April 21, 2015), the U.S. Supreme Court held that there is a duration limit on traffic stops under the Fourth Amendment. A traffic stop must be

limited to the time reasonably needed to process the traffic matter, including running standard records checks, unless there is reasonable suspicion of an additional violation of law.

The panel in this case recognized that Rodriguez partially overturned a Ninth Circuit decision, United States v. Turvin, 517 F.3d 1097 (9th Cir. 2008), which held that an officer did not transform a lawful traffic stop into an unlawful one when, without reasonable suspicion, he took a relatively brief break from writing a traffic citation, but did extend the duration of the traffic stop, when he asked the driver about a methamphetamine laboratory and asked for the driver's consent to search the his truck. The Ninth Circuit panel in Landeros held that because the district court's approval of the duration of the stop in this case was based on Turvin and disregarded Rodriguez, the lower court's decision was premised on legal error.

Because the record in Landeros does not demonstrate that the officer had a reasonable suspicion that the defendant was out past his curfew or was drinking underage or was committing some other offense, the Ninth Circuit panel holds that the extension of the traffic stop to investigate was an unlawful seizure.

Also, based on the plain language of an Arizona statute requiring persons to identify themselves to police in certain circumstances, the panel rejected the government's contention that the defendant's refusal to identify himself provided reasonable suspicion of the additional offenses of failure to provide identification and failure to comply with law enforcement orders. Because the police could not lawfully order the defendant to identify himself, the defendant's repeated refusal to do so did not constitute a failure to comply with an officer's lawful order under the Arizona statute. The panel concluded that there was therefore no justification for the extension of the detention to allow the officers to press the defendant further for his identity.

The panel held that the bullets the defendant was convicted of possessing were the fruit of an unlawful seizure. The bullets were discovered only because he was ordered from the car as part of the unlawfully extended seizure and subsequently consented to a search of his pockets. The panel writes that because the stop was no longer lawful by the time the officers ordered the defendant to leave the car, the validity or not of the exit order does not matter.

LEGAL UPDATE EDITOR'S NOTE: Some of the wording of the "Analysis" section of this entry was borrowed from the Ninth Circuit staff's summary of the ruling in the case.

SECOND AMENDMENT: FEDERAL STATUTE BARRING FIREARMS POSSESSION BY ALIENS WHO ARE UNLAWFULLY PRESENT IN THE U.S. IS UPHELD UNDER SECOND AMENDMENT ANALYSIS

In United State v. Torres, ___ F.3d ___, 2018 WL ___ (9th Cir., January 9, 2019), a three-judge Ninth Circuit panel affirms a conviction for possessing a firearm while being an alien unlawfully in the United States in violation of the federal statute at 18 U.S.C. § 922(g)(5)(A). Assuming without deciding that unlawful aliens in the United States hold some degree of rights under the Second Amendment, the panel holds that the gun possession prohibition against aliens of § 922(g)(5) is constitutional under intermediate constitutional scrutiny.

Result: Affirmance of conviction by U.S. District Court (Northern District of California) of Victor Manuel Torres for for possessing a firearm while being an alien unlawfully in the United States in violation of the federal statute.

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WASHINGTON STATE COURT OF APPEALS

OPEN CARRY OF FIREARMS AND INVESTIGATORY STOPS: POLICE RECEIVED A REPORT FROM A RELIABLE CITIZEN INFORMANT THAT HE HAD A FEW MINUTES EARLIER SEEN A MAN SITTING IN A CAR WITH A HANDGUN IN HIS HAND; THE HAND WAS RESTING ON THE GUN HOLDER'S THIGH; THIS CIRCUMSTANCE ALONE WAS NOT REASONABLE SUSPICION TO SUPPORT A TERRY STOP OF THE CAR OR THE MAN

State v. Tarango, ___ Wn. App. 2d ___ , 2019 WL ___ (January 31, 2019)

Facts: (Excerpted from Court of Appeals opinion)

> At around 2:00 in the afternoon on a winter day in 2016, Carlos Matthews drove to a neighborhood grocery store in Spokane, parking his car next to a Chevrolet Suburban in which music was playing loudly. A man was sitting in the passenger seat of the Suburban, next to its female driver. When Mr. Matthews stepped out of his car and got a better look at the passenger, who turned out to be Ismael Tarango, he noticed that Mr. Tarango was holding a gun in his right hand, resting it on his thigh. Mr. Matthews would later describe it as a semiautomatic, Glock-style gun.
>
> As he headed into the store, Mr. Matthews called 911 to report what he had seen, providing the 911 operator with his name and telephone number. . . . .
>
> The first officer to respond saw a vehicle meeting Mr. Matthews's description parked on the east side of the store. He called in the license plate number and waited for backup to arrive. Before other officers could arrive, however, the Suburban left the parking area, traveling west.
>
> The Suburban was followed by an officer and once several other officers reached the vicinity, they conducted a felony stop. According to one of the officers, the driver, Lacey Hutchinson, claimed to be the vehicle's owner. When told why she had been pulled over, she denied having firearms in the vehicle and gave consent to search it. After officers obtained Mr. Tarango's identification, however, they realized he was under Department of Corrections (DOC) supervision and decided to call DOC officers to perform the search.
>
> In searching the area within reach of where Mr. Tarango had been seated, a DOC officer observed what appeared to be the grip of a firearm located behind the passenger seat, covered by a canvas bag. When the officer moved the bag to get a better view of the visible firearm – the visible firearm turned out to be a black semiautomatic – a second firearm, a revolver, fell out. Moving the bag also revealed a couple of boxes of ammunition. At that point, officers decided to terminate the search, seal the vehicle, and obtain a search warrant. A loaded Glock Model 22 and a Colt Frontier Scout revolver were recovered when the vehicle was later searched.

Proceedings below:

Mr. Tarango, who had prior felony convictions. The State charged him with two counts of first degree unlawful possession of a firearm. Because Mr. Tarango had recently failed to report to

his community custody officer as ordered, he was also charged with escape from community custody. The trial court denied Mr. Tarango's suppression motion, and a jury found Mr. Tarango guilty as charged.

ISSUE AND RULING: The only supporting information that officers had prior to making an investigatory stop of the vehicle containing Mr. Tarango was a reliable citizen informant's report that he had seen Mr. Tarango sitting in a car holding a handgun on his thigh, did officers have reasonable suspicion that justified a stop of the vehicle to investigate the citizen's report? (ANSWER BY COURT OF APPEALS: No)

Result: Reversal of Spokane Superior Court suppression order and of Ismael M. Tarango's two convictions for unlawfully possessing a firearm; case remanded to Superior Court for further proceedings.

ANALYSIS:

The Court of Appeals writes a lengthy opinion, but the analysis appears to boil down very simply. Citing RCW 9.41.050 and a legislative committee report, the Court reports that under the constitutional, statutory and common law open carry scheme in Washington, "it is legal in Washington to carry an unconcealed firearm unless the circumstances manifest an intent to intimidate another or warrant alarm for the safety of other persons. . . . "

Officers did not learn until after stopping Mr. Tarango that his criminal record disqualified him from possessing firearms. And, because Mr Tarango was not doing anything (1) that could reasonably be viewed as manifesting an intent to intimidate another, or (2) that could reasonably be viewed as warranting alarm for the safety of other persons, there was no basis for an investigatory stop to investigate possible criminal conduct.

Accordingly, the investigatory stop was unlawful and the evidence seized as the fruit of that stop must be suppressed.

RCW 46.61.305(2): WHERE NO PEDESTRIANS OR OTHER DRIVERS WERE PUT AT RISK, DRIVER MET TURN SIGNAL REQUIREMENT BY SIGNALING BEFORE MOVING INTO LEFT-TURN-ONLY LANE AND NOT REACTIVATING LEFT TURN SIGNAL BEFORE TURNING LEFT WHEN THE STOPLIGHT TURNED GREEN

State v. Brown, ___ Wn. App. 2d ___ , 2019 WL ___ (Div. III, January 17, 2019)

The majority opinion for the Division Three three-judge panel summarizes the ruling in this case as follows:

> RCW 46.61.305(2) declares that a driver must, "when required," continuously signal an intention to turn or cross lanes during at least the last one hundred feet traveled before turning or moving lanes. This appeal asks if this statute compels a driver, who moved left from a middle lane to a dedicated left turn lane while signaling his intention to change lanes, to reactivate his turn signal before turning left from the reserved turn lane. We hold that the statute only requires use of a signal in circumstances that implicate public safety. Because the circumstances surrounding David Brown's left-hand turn from a left-turn-only lane did not jeopardize public safety, we hold that [the law enforcement officer following him] lacked grounds to stop David Brown's vehicle. We affirm the district

court's ruling that suppressed evidence resulting from the stop of Brown and reverse the superior court's reversal of the district court's decision. In doing so, we educate ourselves in turn signal technology.

[Emphasis added by Legal Update Editor]

Facts: (Excerpted from majority opinion for Court of Appeals)

We borrow most facts from the district court's findings of fact. On the evening of March 22, 2015, [a law enforcement officer] patrolled the streets of Kennewick. At 10:15 p.m., while traveling eastbound on Clearwater Avenue, [the officer] saw appellant, David Brown, driving a Toyota Tundra, turn right from Huntington Street onto Clearwater Avenue, a four-lane arterial. . . .

Shortly after entering Clearwater Avenue, David Brown signaled his intent to change lanes, and to move to the left or inner eastbound lane, by activating his left turn signal that blinked numerous times. Brown entered the inner lane of the two lanes.

Soon David Brown approached the intersection of Clearwater Avenue and Highway 395, where the eastbound lanes widen to three lanes. The innermost of the three lanes becomes a designated left turn only lane. Brown again wished to change lanes so he could turn left. Brown signaled his intent to move left into the dedicated turn lane. Brown maneuvered his vehicle into the dedicated turn lane, at which point the left turn signal cycled-off.

The parties employ and the district court incorporated the term "cycle off," a term with which we were not familiar, before this appeal, in the context of vehicle signal lights. The turn signal for most cars includes a self-cancelling feature that returns the horizontal signal lever to the neutral, or no signal, position as the steering wheel approaches the straight forward position after completion of a turn. We assume "cycle off" refers to the activation of the self-cancelling feature. Most cars now incorporate the additional turn signal feature of a spring-loaded momentary signal position activated when the driver partially depresses or raises the horizontal stalk. The signal then operates however long the driver holds the lever partway toward the left or right turn signal detent. A driver typically lowers or raises the spring-loaded momentary signal feature when changing lanes as opposed to executing a turn from one street to another. The parties' nomenclature and the district court's findings of fact suggest David Brown did not employ the momentary signal when changing lanes on the second occasion while traveling east on Clearwater Avenue.

David Brown stopped his vehicle in the dedicated left turn lane while awaiting the light to turn green. He did not reactivate his turn signal. [The officer] pulled behind Brown. No other traffic was present on eastbound Clearwater Avenue. When the light turned green, Brown turned left onto northbound Highway 395. [The officer] then actuated his patrol vehicle's emergency light and stopped Brown.

[The officer] stopped David Brown based on Brown's crossing the eastbound lanes' divider line during his turn from Huntington Street onto Clearwater Avenue. . . . After stopping Brown, [the officer] investigated Brown for suspicion of driving under the influence of intoxicants. [the officer] arrested Brown for driving under the influence.

[Emphasis added by Legal Update Editor]

Proceedings below:

The State charged Brown with DUI. Brown filed a motion to suppress evidence garnered from the stop of his car. He argued that the officer lacked cause to stop his vehicle. After a hearing, the District Court granted the motion. The State sought review in the Superior Court, and that court reversed.

ISSUES AND RULINGS: (1) Under RCW 46.61.305(2), where no pedestrians or other drivers were put at risk, did Brown meet the turn signal requirement by signaling before moving into the left-turn-only lane and not reactivating left turn signal before turning left when the stoplight turned to green? (ANSWER BY COURT OF APPEALS: Yes, rules a 2-1 majority)

(2) Assuming for the sake of argument that the answer to question 1 is "No," does the officer's mistake of law in interpreting RCW 46.61.305(2) justify his stop of Brown's car? (ANSWER BY COURT OF APPEALS: No)

Result: Reversal of Benton County Superior Court decision that reversed a Benton County District Court decision; the result of the decision of the Court of Appeals is suppression of evidence of DUI and dismissal of DUI charge against David Joseph Brown.

ANALYSIS: (Excerpted from Court of Appeals majority opinion; subheadings revised by Legal Update Editor)

1. Brown did not violate RCW 46.61.305(2)

> The primary issue on appeal is whether, under RCW 46.61.305, a driver must reinitiate his turn signal after he signals to enter a left-turn-only lane, enters the lane, and the turn signal cancels before the turn from the lane. Subsections one and two of RCW 46.61.305 declare:
>
> > When signals required-Improper use prohibited.
> >
> > (1) No person shall turn a vehicle or move right or left upon a roadway unless and until such movement can be made with reasonable safety nor without giving an appropriate signal in the manner hereinafter provided.
> >
> > (2) A signal of intention to turn or move right or left when required shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning.
>
> [Emphasis added by Court of Appeals]
>
> The issue on appeal demands that we indirectly determine what constitutes an appropriate signal "in the manner hereinafter provided" under subsection 1 of the statute and directly assess "when" a signal is "required" under subsection 2 of the statute.
>
> David Brown contends that the statute did not require him to reactivate his left turn signal as he had already indicated his intent to turn left when he signaled to enter the dedicated

turn lane and entered the lane. Brown emphasizes that [the officer] knew where Brown intended to travel, and Brown executed the turn with reasonable safety.

The State argues that the heading of RCW 46.61.305 and the language in subsection 1 of the statute define the phrase “when required” found in subsection 2. The heading contains the phrase “when signals required.” In turn, subsection 1 demands that a signal be given before any person turning a vehicle or moving right or left on a roadway. Subsection 1 also reads that the signal should be given “in the manner hereinafter provided.” According to the State, subsection 2 establishes “the manner hereinafter provided” by demanding signaling for one hundred consecutive feet before the turn. The State observes that RCW 46.61.305 does not read that an intent to turn may be signaled solely by traveling in an earmarked turn lane. According to the State, drivers traveling from the other three directions to the intersection are not apprised of the driver’s intent to turn absent a signal.

. . . .

When interpreting statutory provisions, this court primarily seeks to effectuate the intent of the legislature. . . . In attempting to discern the legislative intent behind RCW 46.61.305, at least within the context of this appeal, we first review the history behind the traffic signal statute. Second, we examine case law from other jurisdictions that interprets the meaning of “when required” contained in code provisions similar to that of Washington’s RCW 46.61.305. Third, we parse the wording of RCW 46.61.305.

[LEGAL UPDATE EDITOR’S NOTE: Here, the Court discusses at length (1) relevant legislative history, (2) decisions from other states under similar statutes, and (3) the words and structure of the statute. That discussion is omitted from this Legal Update entry.]

. . . .

We cannot ignore the words “when required,” found in RCW 46.61.305(2). The legislature’s decision to retain the words “when required” in the statute suggests some circumstances exist, during which a turn signal is not required. Otherwise, the term “when required” would bear no meaning. . . . .

In addition, continuous use of a turn signal prior to a turn is not always feasible, given the mechanical nature of turn signal devices. We note that David Brown might have encountered difficulty in continuously signaling when he moved to the left-turn-only lane. When he moved into the left turn lane from what became the middle lane and thereafter straightened his car, his turn signal “cycled off or ended. He would have needed to activate his signal again, but some time, no matter how short, would have elapsed between the ending of the signal and its recommencement. The district court noted this phenomenon in its ruling. Of course, Brown could have employed the momentary blinker function as he moved from lane to lane and immediately depressed the standard signal function once in the dedicated turn lane without significant cessation in the signaling. We doubt, however, that the legislature wished to distinguish between the momentary spring-loaded function and the standard function of the turn signal when determining the need to signal or that the legislature investigated the length in the pause of continuous signaling resulting from the driver employing the different functions. We doubt the legislature expected the driver to know that he or she should use the

momentary function when moving into the dedicated turn lane and then switch to the standard function once in the turn lane.

RCW 46.61.305, entitled "When signals required-Improper use prohibited," opens with a mandate that drivers execute turns in a manner consistent with public safety. This link between the required use of a turn signal and public safety informs our interpretation of the statute. A driver generally cannot safely change directions on a roadway "unless" he or she notifies others in the area of this intent by use of a signaling device. Even when a driver attempts a turn from a dedicated turn lane, a turn signal may be necessary in order to alert other drivers and pedestrians, who may not be in a position to discern the nature of the dedicated lane. Given that vehicular turns are often made in the vicinity of other traffic, the public safety requirement of RCW 46.61.305(1) contemplates a general requirement that a driver use a turn signal prior to changing the direction of travel. Because public safety is the only true requirement that can be gleaned from RCW 46.61.305(1), we hold that a turn signal is only "required" as contemplated by subsection 2 when public safety is implicated, as indicated in subsection 1. In safety-related circumstances, a turn signal must "be given continuously during not less than the last one hundred feet traveled by the vehicle before turning." RCW 46.61.305(2). However, if a left- or right-hand turn can be made safely without the use of a signal, no signal is required.

The facts on appeal establish that no traffic, other than the trailing [officer] state trooper, was on the roadway when David Brown used a designated left-hand turn lane to travel from Clearwater Avenue onto Highway 395. His execution of a turn without signaling caused no possible concern for public safety. Given this circumstance, Brown's failure to utilize a turn signal did not violate the plain terms of RCW 46.61.305 and did not justify [the officer's] traffic stop.

2. <u>A Washington officer's mistake of fact or law does not justify a traffic stop</u>

The State argues that, even if we rule that David Brown did not violate RCW 46.61.305(2), [the officer reasonably believed that Brown breached the statute and a law enforcement officer's reasonable belief creates probable cause. Stated differently, [the officer in this case] may have made a mistake of law, but he made a reasonable mistake of law. In <u>Heien v. North Carolina</u>, ___U.S.___, 135 S.Ct. 530 (2014), the nation's high Court held that a mistake in law, if reasonable, can create reasonable suspicion for purposes of a traffic stop. In so ruling, the [United States Supreme] Court characterized a mistake of law as being the same as a mistake of fact for purposes of the officer forming a reasonable suspicion. Under United States Supreme Court Fourth Amendment jurisprudence, an officer's mistake of fact does not negate reasonable suspicion for an investigation.

David Brown relies on article I, section 7 of the Washington Constitution, in addition to the Fourth Amendment of the United States Constitution. The Washington Supreme Court has never incorporated an officer's innocent mistake of fact or good faith into the reasonable suspicion analysis for purposes of the state constitution. . . . The United States Constitution prohibits unreasonable searches and seizures; whereas, our state constitution goes further and requires actual authority of law before the State may disturb the individual's private affairs. <u>State v. Day</u>, 161 Wn.2d 889 (2007). Therefore, we conclude that the Washington Supreme Court would not permit a mistake of law to

be grounds for reasonable suspicion and rule accordingly. The State provides no case law to the contrary.

[Some citations omitted, others revised for style]

SIXTH AMENDMENT CONFRONTATION RIGHT: HEARSAY STATEMENTS OF NOW-DECEASED VICTIM TO SEXUAL ASSAULT NURSE EXAMINER (SANE) HELD TO BE TESTIMONIAL AND THEREFORE INADMISSIBLE

State v. Burke, ___ Wn. App. 2d ___ , 2018 WL ___ (Div. II, December 27, 2018)

Facts:

In the early morning hours, KEH, a homeless woman, arrived at a Tacoma hospital's emergency room and reported a rape. She was very intoxicated from alcohol when she arrived. She was seen a few times over the next several hours by an RN and doctor who focused on medical services. She was also interviewed during that period by a social worker and a law enforcement officer.

About 15 hours after KEH checked into the hospital, she was seen in a mixed medical and forensic exam by a sexual assault nurse examiner (SANE). During the examination, the SANE obtained a history from KEH. The SANE later testified that the history was "like any medical history" and was a personal statement about what happened. KEH described the incident to the SANE. And the SANE collected samples that could contain deoxyribonucleic acid (DNA) evidence and took KEH's underwear. The DNA evidence taken from KEH's underwear included female DNA that matched KEH and male DNA from sperm that did not match anyone known to law enforcement at that time.

In May 2011, the DNA was reevaluated and the male DNA matched defendant Burke's DNA profile. When officers attempted to contact victim KEH about the DNA match, they learned that KEH had died of an unrelated illness in April 2011.

In September 2014, Tacoma Police Department detectives interviewed defendant Burke, who was in jail in eastern Washington. During this interview, Burke admitted to having lived in Tacoma in 2009 and to having visited Wright Park. But Burke denied having been to the park without his girlfriend, having had sexual intercourse with anyone in the park, or knowing why his DNA would be found at the scene of a sexual assault that occurred in the park in 2009.

Burke was charged with second degree rape by forcible compulsion. Prior to trial, hearings were held to determine whether, under the Sixth Amendment Confrontation Clause the SANE could testify to statements by KEH to the SANE. Extensive testimony was heard from the SANE regarding her mixed functions of medical provider and forensic examiner. The trial court ruled that the SANE's testimony was admissible. At trial, the SANE was an important witness for the State.

Burke did not testify at his trial, but his attorney conceded that the DNA evidence established that sexual intercourse occurred between Burke and KEH. But the attorney argued that the State could not prove that the sex was not consensual. The jury convicted Burke as charged.

ISSUE AND RULING: Under the Sixth Amendment confrontation clause, is the hearsay from the victim to the SANE "testimonial" such that the victim statements are inadmissible? (ANSWER BY COURT OF APPEALS: Yes, the statements to the SANE are testimonial and therefore the testimony from the SANE repeating those statements is inadmissible)

Result: Reversal of Pierce County Superior Court conviction of Ronald Delester Burke for second degree rape by forcible compulsion; case remanded for possible re-trial.

ANALYSIS:

In Crawford *v.* Washington, 541 U.S. 36 (2004), the U.S. Supreme Court held that the U.S. constitution's Sixth Amendment Confrontation Clause generally prohibits the introduction of "testimonial" hearsay statements by a non-testifying witness, unless the witness is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." A statement qualifies as testimonial if the "primary purpose" of the conversation was to "create an out-of-court substitute for trial testimony." Michigan *v.* Bryant, 562 U.S. 344 (2011).

In making that "primary purpose" determination, courts must consider all of the relevant circumstances. Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause. But that does not mean that the Confrontation Clause bars every statement that satisfies the "primary purpose" test. The Court has recognized that the Confrontation Clause does not prohibit the introduction of out-of-court statements that would have been admissible in a criminal case at the time of the founding of the United States. See Giles *v.* California, 554 U.S. 353 (2008). Thus, the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause.

In Ohio v. Clark, 135 S. Ct. 2173 (2015), the U.S. Supreme Court held that testimony of pre-school teachers repeating a small child's statements about physical abuse was not testimonial even though an Ohio statute mandated that teachers and certain other categorically specified caregivers report such child abuse. Considering all the relevant circumstances, the U.S. Supreme Court held that the child's statements were not testimonial.

The Supreme Court declared in Clark that the child's statements were not made with the primary purpose of creating evidence for the defendant's prosecution. The statements instead occurred in the context of an ongoing emergency involving suspected child abuse. The teachers asked questions aimed at identifying and ending a threat. The child was not informed that his answers would be used to arrest or punish his abuser. The child never hinted that he intended his statements to be used by the police or prosecutors. And the conversations with the teachers were informal and spontaneous.

The child's age further confirmed that the statements in Clark were not testimonial because statements by very young children will rarely, if ever, implicate the Confrontation Clause. Also, down through history, statements made in circumstances like these were regularly admitted at common law.

The Clark Opinion noted that, although statements to individuals other than law enforcement officers are not categorically outside the Confrontation Clause's reach, the fact that the child victim was speaking to his teachers is highly relevant. Statements to individuals who are not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than those given to law enforcement officers.

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Finally, the Clark Court declared that mandatory child abuse reporting obligations for teachers and others do not convert a conversation between a concerned teacher and her student into a law enforcement mission aimed at gathering evidence for prosecution. It is irrelevant that the teachers' questions and their duty to report the matter had the natural tendency to result in Clark's prosecution.

The Clark Opinion closed by explaining that the U.S. Supreme Court's Confrontation Clause decisions do not determine whether a statement is testimonial by examining whether a jury would view the statement as the equivalent of in-court testimony. Instead, the test is whether a statement was given with the primary purpose of creating an out-of-court substitute for trial testimony. Clark held that the answer was clear: the child's statements to his teachers were not testimonial.

The Burke Court's key analysis in light of Ohio v. Clark is as follows:

> Here, even presuming that [the SANE} was not directly acting for law enforcement, the record shows that KEH's statements were made under circumstances that objectively demonstrate that the primary purpose of the exam was to provide evidence for a criminal prosecution.
>
> First, the examination had a forensic component and would be used as evidence even though [the SANE's] examination had a medical treatment and diagnosis component. Not only did [the SANE] testify that the exam and questioning had a forensic component, the consent form that KEH signed stated that the exam was a "forensic evaluation" that would "include *documentation of the assault* [and] collection of evidence." And since the case had been reported to law enforcement, the consent form authorized the SANE to talk to the investigating officers about the case.
>
> Second, the record does not show that [the SANE] was gathering this information in response to an ongoing emergency. The exam took place several hours after KEH's emergency room treatment was complete and after KEH was safely in the hospital and had already spoken to law enforcement officers. In fact, KEH was medically cleared from the emergency room several hours before [the SANE] started her exam.
>
> Third, even though [the SANE] did not work directly for law enforcement and was paid by the hospital, her role, unlike the teachers in Clark, clearly had a law enforcement component because part of [the SANE's] job was to collect evidence that would potentially be used by law enforcement. In fact, [The SANE] testified that the forensic testing was paid for by government funds related to crime victim support.
>
> Finally, there was evidence that KEH understood that the information she gave [the SANE] would be used by law enforcement. In fact, KEH agreed to stay in the hospital for several hours specifically so [the SANE] could examine her because KEH did not want her attacker "'to be out there doing this to someone else." Although KEH's subjective intent is not relevant to the primary purposes test, KEH's understanding that the exam could assist in preventing further harm corroborates the other objective evidence that the primary purpose of the exam was to establish or to prove past events potentially relevant to later criminal prosecution.

> Despite [the SANE's] exam having a medical treatment and diagnosis component, the objective facts demonstrate that the primary purpose of the examination was to provide evidence. Because the circumstances objectively suggest that the primary purpose of the exam and KEH's statements during the exam was to provide evidence, we hold that the State fails to establish that KEH's statements to [the SANE] were nontestimonial.
>
> We must next address whether the statements were the type of out-of-court statement that would have been admissible at the time of the founding. Clark, 135 S.Ct. at 2180-81. It is the State's burden to establish that KEH's statements were not testimonial. . . . The State does not address this factor. Thus, the State does not carry its burden on this factor.
>
> Because the State fails to show that KEH's statements were nontestimonial and the State does not show that KEH's statements were the type of out-of-court statement that would have been admissible at the time of our country's founding, we hold that the admission of KEH's statements to Frey violated the confrontation clause.

[Footnotes omitted; some citations omitted, other citations revised for style]

The Burke Court goes on to rule that the admission of the hearsay statements of KEH was not harmless error beyond a reasonable doubt, and therefore that the conviction must be reversed.

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

1. State v. Danny Ray Potts: On January 3, 2019, Division Two of the COA rules for the State in rejecting the defendant's appeal from his Cowlitz County Superior Court convictions for *possession of methamphetamine and heroin with intent to deliver and possession of MDMA (ecstasy) and benzodiazepine.* The Court of Appeals rules, among other things: (1) that facts stated in the affidavit supporting the search warrant in the case **were not stale** (the warrant was

executed six to nine days after the confidential informant saw methamphetamine in Potts' possession in the home); (2) that the affidavit established **probable cause to search** Potts' home for methamphetamine and various drug paraphernalia (the confidential informant meets two-pronged test for veracity and basis of knowledge); and (3) that the officers complied with **the knock and announce rule** when they executed the search warrant (officers knocked and announced three times over at least a 15-second period before using force to attempt to open the door).

2. State v. Marvin Emile Branham: On January 3, 2019, Division Two of the COA rules for the Sate in rejecting the appeal of defendant from his Clallam County Superior Court conviction for *possession of methamphetamine with intent to deliver*. The Court of Appeals rules, among other things: (1) that the trial court did not err when it determined that the **probable cause information in a warrant to search defendant's vehicle was not stale** (confidential informant's information that defendant had been selling meth for at least three years and had been replenishing his supply of meth with weekly purchases of large quantities were significant factors the rejection by the Court of Appeals of defendant's staleness argument); and (2) the search warrant affidavit's **probable cause information established a nexus between the evidence sought and the white Cadillac searched** (nexus was established with combination of (A) the confidential informant's information that defendant made weekly trips to replenish his meth supply, and (B) the fact that defendant was currently using the white Cadillac for his transportation.

3. State v. Abraham Castorena Gonzalez: On January 7, 2019, Division One of the COA rejects the defendant's appeal from his Snohomish County Superior Court conviction for *possession of heroin with intent to deliver*. The Court of Appeals rules that **officers were justified under the search incident to arrest rule in seizing items immediately associated with the arrestee,** as that rule was interpreted by the Washington Supreme Court in State v. Brock, 184 Wn.2d 148 (2015). The officers searched a backpack that had been located between defendant's feet at the time of his arrest, and the search was valid and timely as a search incident to arrest even though the search did not occur until after the arrestee-defendant had been secured in a patrol car.

4. State v. Daniel Herbert Dunbar: On January 8, 2019, Division Three of the COA rules for the State in rejecting the defendant's appeal from his Spokane County Superior Court conviction for *unlawful possession of methamphetamine*. The Court of Appeals rules, among other things:

(1) **Officers did not make an unconstitutional entry onto private property when they contacted Dunbar in a home's driveway**:

> "The three houses on South Sundown Drive shared a single driveway. It was therefore foreseeable that a variety of unknown visitors and business persons would access the area. [The deputy] did not deviate from what would reasonably be expected of a business invitee or some other visitor. He did not deploy subterfuge to enter the property. He was at the property during daylight hours and did not breach any closed gates or fences."

(2) **Officers did not seize Dunbar in their initial contact with him, and therefore did not need justification for the contact**:

> "Prior to his arrest on outstanding warrants, Mr. Dunbar's contact with the law enforcement officers was very limited. His vehicle had been flagged down by the initial

officer at the scene. However, law enforcement did not signal that Mr. Dunbar was required to stop his car by using a siren or overhead lights. . . . In fact, the two patrol cars on the scene were located a considerable distance from Mr. Dunbar's vehicle. . . . In addition, the evidence at the suppression hearings did not show that, prior to the arrest, law enforcement officers ever directed Mr. Dunbar's movements or sought to control the scene. . . . . Nor did officers engage in threatening conduct, such as physically touching Mr. Dunbar, displaying their weapons, requesting a frisk, or using strong language. . . . The only pre-arrest circumstances that could have been indicative of a seizure, as opposed to a social contact, were the presence of two officers and [the deputy's] question regarding warrants. These were not sufficiently intrusive to convert Dunbar's exchange with [the deputy] into a nonconsensual seizure."

5. In the Matter of the Personal Restraint Petition of Hailu Dagnew Mandefero: On January 14, 2019, Division One of the COA rejects the personal restraint petition of defendant from his King County Superior Court convictions f*or first degree assault, second degree assault, and second degree unlawful possession of a firearm*. The Court of Appeals rules that **defendant was not in "custody" for purposes of Miranda** under circumstances where (1) defendant agreed to voluntarily answer a deputy's questions while (2) defendant and the deputy were standing near the exit doors of a hospital, (3) the setting was not otherwise coercive, and (4) the questions were presented by the deputy in a low-key, conversational manner.

6. State v. Robert Daniel Smith, Jr.: On January 14, 2019, Division One of the COA rejects the appeal of defendant from his Snohomish County Superior Court conviction for *third degree assault of a law enforcement officer*. The Court of Appeals rules, among other things, that, where defendant asserted his right to silence in a custodial interrogation by Deputy A, **Deputy A did not engage in the functional equivalent of further interrogation** by telling Deputy B (the primary investigating officer), while in the presence of the defendant a short while later, that Deputy B should include in his report the fact that defendant had told Deputy A that the defendant "could have killed" Deputy C. The Court of Appeals declares that nothing in the trial court record supports the defendant's argument that Deputy B's statement was reasonably likely to elicit an incriminating response from the defendant.

LEGAL UPDATE EDITOR'S RESEARCH NOTES: For discussion of case law relevant to Confessions and Interrogations, including the issues addressed in items 5 and 6 here, see the discussion at pages 1-65 of the Washington-focused law enforcement guide on the Criminal Justice Training Commission's LED Internet page: Confessions, Search, Seizure and Arrest: A Guide for Police Officers and Prosecutors, May 2015, by Pamela B. Loginsky, Staff Attorney, Washington Association of Prosecuting Attorneys.

For discussion focused on case law relating to law enforcement initiation of contact with persons who have asserted their Miranda rights and have remained in continuous custody, see the article: "Initiation of Contact Rules Under The Fifth Amendment" an article by John Wasberg on the Law Enforcement Digest internet page of the Criminal Justice Training Commission.

7. State v. Theotis Lendell Moore: On January 15, 2019, Division Two of the COA rejects the appeal of defendant from his Pierce County Superior Court convictions for *unlawful possession of a controlled substance with intent to deliver while armed with a firearm (count 1), unlawful possession of methamphetamine with intent to deliver while armed with a firearm (count 2), and*

first degree unlawful possession of a firearm (count 3). The Court of Appeals rules, among other things, that **a search warrant affidavit established a sufficient nexus between defendant's behavior and his home to support the search warrant for his home for unlawful drugs**. In State v. Thein, 138 Wn.2d 133 (1999), the Washington Supreme Court held that an officer-affiant's statement about the general habits and practices of drug dealers was not sufficient, taken alone, to link defendant's residence to his sale of a large quantity of marijuana at a location away from his residence. In a case with the drug sales made away from a suspect's residence, officers in the State of Washington would want to: (1) make an observation of the drug-dealer leaving his residence to make the sale (and, ideally, return home right after – see State v. G.M.V., 135 Wn. App. 366 (2006)); or (2) otherwise present something in the affidavit beyond officer experience and training to link the sales by the drug-dealer to his residence.]

8. State v. Eric Leon Olsen: On January 17, 2019, Division Three of the COAA rejects the appeal of defendant from his Walla Walla County Superior Court conviction for *possession of heroin*. The Court holds that **no pretext stop occurred** under the following facts:

> Officer [A] of the Walla Walla Police Department was on patrol October 29, 2016 along with a drug detection dog. One of [Officer A's] duties was to patrol areas known for drug activities. He routinely conducted surveillance of the house of Donnie Demaray. On the 29th, he saw an unknown, and unoccupied, Subaru Outback outside of Demaray's residence.
>
> Upon running the license plate number, [Officer A] learned that the license tabs were expired. He later drove past Demaray's house and observed that the Subaru had departed. Through his computer, [Officer A] asked other officers if they were familiar with the car and also advised them that the car's tabs were expired. He did not request a traffic stop of the vehicle.
>
> About 1:30 p.m. that day, Walla Walla Officer [B] saw the Subaru driving and realized that it had both 2016 and 2017 tabs on its plates, but had no month tab displaying. He ran a records check and discovered that the vehicle's registration had expired. He then effected a stop of the vehicle, which was driven by Eric Olsen. Olsen did not have his driver's license with him.
>
> Upon hearing of the traffic stop, Officer [A] went to the scene and talked to Olsen while [Officer B] was writing traffic tickets. He engaged Olsen in conversation concerning his visit to Demaray's house. [Officer A] expressed disbelief at Olsen's story that he had smoked marijuana with Demaray, a known heroin user. [Officer A] asked Olsen for consent to search the car, indicating that he would deploy his drug detection dog if there was no consent. Olsen told the officer that he had heroin and a syringe in the car. He consented to a search of the car after first being told that he did not need to consent and could limit or revoke his consent.

Evidence also supported the trial court's findings (1) that Officer B would have conducted the traffic stop even without knowing where the car earlier had been seen by Officer A, and (2) that Officer A's contact with Olsen did not extend the time Officer B took to conduct his investigation and issue the traffic tickets.\\

9. State v. Nicholas Brandon Van Duren (DOB 9/08/1990): On January 22, 2019, Division One of the COA rejected the appeal of defendant from his Snohomish County Superior Court conviction for *residential burglary while on community custody*. The Court of Appeals rules that on the totality of the circumstances **an officer investigating a confirmed burglary had reasonable suspicion for a vehicle stop** of a red Toyota Corolla in the area of the burglary (based on reports and a cell phone picture by unidentified citizen informants, plus some information from a fellow officer and corroborating contemporaneous observations by the officer making the vehicle stop).

10. State v. Kenneth Wesley Chapman, Jr.: On January 23, 2019, Division Three of the COA (1) grants relief (re-trial) to the defendant from his Kitsap County Superior Court jury convictions for *attempted first degree rape of a child and attempted commercial sex abuse of a minor*. This ruling is based on evidence supporting his **entrapment defense**. The Court agrees with defendant that jury should have been instructed on entrapment. There is evidence supporting his claim that he was improperly induced by the undercover officer to commit a crime he did not otherwise intend to commit. But the Court of Appeals denies relief from his conviction for communicating with a minor for immoral purposes, concluding that he cannot support an entrapment defense based on the evidence. The Court of Appeals also rules that **officers had probable cause at the point when they arrested him**. The case is remanded for possible re-trial on the charges underlying the overturned convictions.

11. State v. Thomas Charles Babb: On January 28, 2019, Division One of the COA revises some elements of its November 13, 2018 unpublished opinion that rejected defendant's appeal from his Snohomish County Superior Court conviction for *possession of heroin*. But the Court of Appeals does not change the result of its November 13, 2018 opinion. The Court of Appeals relies on State v. Cormier, 100 Wn. App. 457 (2000) and rules under the Exclusionary Rule that, although **an officer unlawfully seized defendant, the causal chain of the Exclusionary Rule was broken when the defendant then assaulted the officer. Therefore, the officer acted lawfully in making a search incident to the arrest of defendant for assaulting the officer**, and the heroin found in the search is admissible. The Court of Appeals explains that the Court need not address the argument of defendant regarding the "attenuation doctrine" and article I, section 7 of the Washington constitution. That is because Cormier does not depend on the attenuation doctrine.

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

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

In May of 2011, John Wasberg retired from the Washington State Attorney General's Office. For over 32 years immediately prior to that retirement date, as an Assistant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011) of the Criminal Justice Training Commission's Law Enforcement Digest. From the time of his retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the production of the LED. That arrangement ended in the late fall of 2014 due to variety of concerns, budget constraints and friendly differences regarding the approach of the LED going

forward. Among other things, Mr. Wasberg prefers (1) a more expansive treatment of the core-area (e.g., arrest, search and seizure) law enforcement decisions with more cross references to other sources and past precedents and past LED treatment of these core-area cases; and (2) a broader scope of coverage in terms of the types of cases that may be of interest to law enforcement in Washington (though public disclosure decisions are unlikely to be addressed in depth in the Legal Update). For these reasons, starting with the January 2015 Legal Update, Mr. Wasberg has been presenting a monthly case law update for published decisions from Washington's appellate courts, from the Ninth Circuit of the United States Court of Appeals, and from the United States Supreme Court.

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

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

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

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

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's, is at [http://www.leg.wa.gov/legislature]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state

government information can be accessed at [http://access.wa.gov]. The internet address for the Criminal Justice Training Commission (CJTC) Law Enforcement Digest Online Training is [https://fortress.wa.gov/cjtc/www/led/ledpage.html].

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