LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: Thank you!

JULY 2019

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ANNOUNCEMENT: THE FOLLOWING MATERIALS BY JOHN WASBERG HAVE BEEN UPDATED THROUGH JULY 1, 2019 AND ARE AVAILABLE ON THE CRIMINAL JUSTICE TRAINING COMMISSION'S INTERNET LED PAGE UNDER "SPECIAL TOPICS"

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

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

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

These documents by John Wasberg (retired Senior Counsel, Office of the Washington State Attorney General) are updated at least once a year. Several 2019 court decisions were added to the "Law Enforcement Legal Update Outline" (the first item), but it was not necessary to add any 2019 court decisions to the second and third items, nor was it necessary to make any material changes in those items.

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT CIVIL LIABILITY: TRIAL IS NEEDED IN CASE INVOLVING OFFICER'S FATAL SHOOTING OF AN APPROACHING MAN WHO HAD BEEN REPORTED AS BRANDISHING A KNIFE AND MAKING THREATS: THERE ARE DISPUTED FACTS OVER SEVERAL OF THE GRAHAM FACTORS AND OTHER FACTORS (SUCH AS DANGER POSED, SEVERITY OF SUSPECTED CRIME, OFFICER CREDIBILITY AND WHETHER OFFICER SAW A POSSIBLE WEAPON), PLUS THERE IS THE UNDISPUTED FACT THAT THE OFFICER DID NOT IDENTIFY HIMSELF AS AN OFFICER OR WARN OF IMPENDING USE OF DEADLY FORCE DURING THE FIVE SECONDS OF THE ENCOUNTER PRIOR TO THE SHOOTING

Nehad v. Browder, ___ F.3d ___ , 2019 WL ___ (9th Cir., July 11, 2019)

Facts: (Excerpted from Ninth Circuit opinion; some paragraphing revised for readability)

> Shortly after midnight on April 30, 2015, Andrew Yoon encountered Fridoon Nehad outside the bookstore where Yoon worked. Nehad showed Yoon an unsheathed knife and said that he wanted to hurt people. Nehad was incoherent and "didn't seem like he knew what was going on[,]" so Yoon returned to work inside the store.

A few minutes later, Nehad entered the store without a knife in hand, again said he wanted to harm people, then left the store via a side door into an adjoining alley. Yoon called 911 and told the emergency dispatcher that Nehad had threatened him with a knife.

Around 12:06 a.m., the police dispatcher put out a "Priority 1" call for a "417 (Threatening w[ith] weapon)," and indicated that a male in a back lot was threatening people with a knife. San Diego Police Department Officer Neal [Officer Browder] volunteered to respond to the call and drove to the scene in his police cruiser.

Surveillance camera footage shows that Nehad was walking down the alley behind the bookstore toward the street before [Officer Browder] arrived. [Officer Browder] turned his car from the street into the alley and turned on his car's high headlight beams. [Officer Browder] did not activate his car's siren or police lights.

[Officer Browder] saw two people in a parking lot adjoining the alley and, soon after turning into the alley from the street, saw Nehad in the alley. [Officer Browder] confirmed with dispatch that Nehad matched the description of the person brandishing a knife.

Once in the alley, [Officer Browder] brought his vehicle to a halt and opened the driver's side door. Nehad continued to walk down the alley toward [Officer Browder] and the street. [Officer Browder's] vehicle advanced a short distance with the driver's door open before again coming to a stop. Nehad continued to walk toward [Officer Browder] at a steady pace.

[Officer Browder] did not hear Nehad say anything, and did not see Nehad change his pace or make any sudden movements. Approximately twenty-eight seconds after pulling into the alley and eighteen seconds after opening his car door, [Officer Browder] exited his vehicle. [Officer Browder] did not activate his body camera.

Eyewitness accounts of what happened next differ.

One witness, Andre Nelson, testified that Nehad was stumbling forward at a "drunken pace" in a non-aggressive manner, "like he wasn't all there," while "fiddling with something in his midsection." Nelson could not recall [Officer Browder] audibly identifying himself as a police officer, giving any type of warning, or saying anything at all. Nelson did recall [Officer Browder] extending his left hand in a "stop" motion. No such motion is clearly visible on the surveillance video.

Another witness, Albert Gallindo, testified that he heard [Officer Browder] say, "Stop, drop it" two or three times. Yoon, who was still on the phone with the emergency dispatcher when [Officer Browder] arrived, recalled hearing [Officer Browder] say "Stop, drop it" one time, no more than a "couple seconds" after [Officer Browder] got out of the police car.

[Officer Browder] did not recall identifying himself or saying anything to Nehad.

> Video surveillance shows Nehad slowed down a few moments after [Officer Browder] exited his vehicle, although it is unclear whether [Officer Browder] perceived or could have perceived Nehad's change of pace.
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> Less than five seconds after exiting his vehicle, [Officer Browder] fired a single shot at Nehad, fatally striking him in the chest. Nehad was approximately seventeen feet away at the time [Officer Browder] shot him.
>
> A few hours later, after police investigators arrived at the scene, they asked [Officer Browder] whether he saw any weapons and where in the alley they might be. [Officer Browder] told the investigators that he had not seen any weapons.
>
> [Officer Browder]'s attorney would not allow investigators to ask [Officer Browder] any more questions that night. The investigators did not find any weapons in the alley, and determined that Nehad had been carrying a metallic blue pen when [Officer Browder] shot him.
>
> On May 5, five days after the shooting, [Officer Browder] and his attorney met with homicide investigators at a police station. Police officials provided [Officer Browder] and his attorney with surveillance video of the shooting, which [Officer Browder] and his attorney reviewed in a police lieutenant's office for approximately twenty minutes before an interview commenced.
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> During the interview, [Officer Browder] stated that he first saw Nehad when Nehad was twenty-five to thirty feet from [Officer Browder]'s car and that Nehad was "aggressing" the car and "walking at a fast pace . . . right towards [the] car." [Officer Browder] also stated, for the first time, that he had thought Nehad was carrying a knife, and that he had fired on Nehad because he thought Nehad was going to stab him.

[Some paragraphing revised for readability; footnotes omitted]

Proceedings below: (Excerpted from Ninth Circuit opinion)

> [Plaintiffs], Nehad's parents and estate, filed suit against [Officer Browder], the City of San Diego, and San Diego Chief of Police Shelley Zimmerman (collectively, "[the government parties]"). In the operative Second Amended Complaint ("SAC"), [Plaintiffs] allege 42 U.S.C. § 1983 claims for Fourth and Fourteenth Amendment violations and Monell [agency-policy-implementation liability] and supervisory liability, two civil rights claims under state statutes, and common law claims for assault and battery, negligence, and wrongful death. [The government parties] filed a motion for summary judgment on seven of the nine claims, excluding the SAC's common law claims for negligence and wrongful death.
>
> The district court granted [the government parties'] motion. The court granted summary judgment on [Plaintiffs'] Fourth Amendment claim because, according to the district court, [Officer Browder's] use of force was objectively reasonable. The court granted summary judgment on Nehad's parents' Fourteenth Amendment claim because there was no evidence that [Officer Browder] acted with a purpose to harm unrelated to legitimate law enforcement objectives. The court further concluded that [Officer Browder] was entitled to qualified immunity because there was no clear precedent establishing that [Officer Browder's] use of deadly force would be considered excessive.

> The court also, in light of its determination that no constitutional violation had occurred, dismissed the Monell and supervisory liability claims against all [The government parties].
>
> Lastly, the court concluded that, because [Officer Browder]'s use of force was objectively reasonable, [the government parties] were entitled to summary judgment on "all" state law claims. [**LEGAL UPDATE EDITORIAL NOTE: The Ninth Circuit panel reverses the District Court on the state law claims. The Ninth Circuit's framing of the issue and analysis of those claims is not addressed in this Legal Update entry.]**

[Paragraphing revised for readability]

ISSUES AND RULINGS: 1. There are genuine disputes of material fact regarding the Plaintffs' Fourth Amendment claim as to the following fact questions relevant to the reasonableness of Officer Browder's use of deadly force: (A) Officer Browder's credibility; (B) whether Nehad posed a significant, if any, danger to anyone; (C) whether the severity of Nehad's alleged crime warranted the use of deadly force; (D) whether Officer Browder gave or Nehad resisted any commands; and (E) the availability of less intrusive means of subduing Nehad. Also, it is undisputed that Officer Browder did not identify himself as a police officer or warn Nehad of the impending use of deadly force during the five seconds of the encounter prior to the shooting.

Do these disputed and undisputed facts preclude granting summary judgment to Officer Browder on the Plaintiffs' claim of unlawful use of deadly force? (ANSWER BY NINTH CIRCUIT: Yes, a trial is needed to determine factual reasonableness)

2. Do the above-noted disputed facts also preclude a grant of summary judgment on qualified immunity grounds, on the rationale that the case law was well-established at the time of the shooting that the use of deadly force under the factual circumstances here, viewed in the light most favorable to Plaintiffs, was objectively unreasonable? (ANSWER BY NINTH CIRCUIT: Yes, the case law was well-established at the time of the shooting)

3. Have Plaintiffs also presented sufficient evidence of police department customs, practices, and supervisory conduct to support a finding of entity liability (see Monell v. Dep't of Soc. Services, 436 U.S. 658 (1978) establishing the standard for agency-policy-based liability)) and supervisory liability? (ANSWER BY NINTH CIRCUIT: Yes, a trial is needed to determine factual reasonableness)

4. Did the District Court unjustifiably deny Plaintiffs an opportunity to be heard before granting summary judgment on the state common law negligence and wrongful death claims? (ANSWER BY NINTH CIRCUIT: Yes, the District Court erred in this respect)

5. Do the above-noted disputed facts and undisputed facts also preclude granting the government parties summary judgment on the Plaintiffs' 14th Amendment Due Process claims for a shocking-of-the-conscience violation of the interest of Nehad's parents in the companionship of their child? (ANSWER BY NINTH CIRCUIT: No, summary judgment must be granted the government parties because there is no evidence that Officer Browder was motivated by anything other than self-defense, albeit arguably perceived by him unreasonably, in his use of deadly force)

Result: Reversal of U.S. District Court (Southern District of California) grant of summary judgment on Plaintiffs' Fourth Amendment and state law claims. Affirmance of District Court

grant of summary judgment to the government parties on Plaintiffs' Fourteenth Amendment Due Process claims.

STANDARD OF REVIEW OF FACTUAL ALLEGATIONS:

Because the District Court granted summary judgment to the government parties, the Ninth Circuit views the factual allegations in the best light for the Plaintiffs.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

> A. *Whether a Jury Could Conclude that [Officer Browder's] Use of Force Was Unreasonable*
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> In Fourth Amendment excessive force cases, we examine whether police officers' actions are objectively reasonable given the totality of the circumstances. . . . Our analysis must balance the nature of the intrusion upon an individual's rights against the countervailing government interests at stake, without regard for the officers' underlying intent or motivations. Graham v. Connor, 490 U.S. 386, 396-97 (1989). **Whether a use of force was reasonable will depend on the facts of the particular case, including, but not limited to, whether the suspect posed an immediate threat to anyone, whether the suspect resisted or attempted to evade arrest, and the severity of the crime at issue. [Graham]. Only information known to the officer at the time the conduct occurred is relevant**. . . .
>
> 1. *Whether Nehad Posed a Danger*
>
> **The most important Graham factor is whether the suspect posed an immediate threat to anyone's safety. . . . The use of deadly force is only reasonable if a suspect "poses a significant threat of death or serious physical injury to the officer or others."** . . .
>
> Here, there is a genuine dispute as to whether Nehad posed a significant threat to [Officer Browder]'s safety. To be sure, there is some evidence in the record that Nehad did pose a threat to [Officer Browder]. [Officer Browder] stated that he thought Nehad had a knife, and two witnesses heard [Officer Browder] say some variant of, "Stop, drop it." [Officer Browder] further testified that Nehad was "aggressing" [Officer Browder's] vehicle, and that [Officer Browder] thought Nehad was going to stab him. The question on summary judgment, however, is not whether some version of the facts supports [the government parties'] position, but rather whether a trier of fact, viewing the evidence in the light most favorable to [Plaintiffs], could find in [Plaintiffs'] favor. . . . We therefore proceed by viewing the evidence in the record through that lens.
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> a. *[Officer Browder's] Credibility*
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> As an initial matter, "summary judgment is not appropriate in § 1983 deadly force cases that turn on the officer's credibility that is genuinely in doubt." . . . . Here, approximately three hours after the shooting, [Officer Browder] told homicide investigators that he did not see any weapons, and made no mention of feeling threatened by Nehad. Five days later, however, after consulting with his attorney and reviewing surveillance footage inside a police station, [Officer Browder] claimed that he thought Nehad had a knife, that Nehad was "aggressing" the car, and that he thought Nehad was going to stab him.

These possible inconsistencies, along with video, eyewitness, and expert evidence that belies [Officer Browder]'s claim that Nehad was "aggressing," are sufficient to give rise to genuine doubts about [Officer Browder]'s credibility.

b. *The Reasonableness of [Officer Browder's] Beliefs*

[The government parties] assert that it was not unreasonable for [Officer Browder] to mistake a pen for a knife because [Officer Browder] knew that someone matching Nehad's description had been reported as carrying a knife and there is evidence that Nehad was "fiddling with something" as he walked down the alley. A reasonable trier of fact could, however, conclude that [Officer Browder's] mistake was not reasonable. [Plaintiffs'] police practices expert opined that officers are trained to recognize what suspects are carrying and to distinguish pens from knives, and that [Officer Browder] had "very sufficient time to determine that it was not a knife in Nehad's hand and, in fact was a pen . . . ." Furthermore, one of the homicide investigators testified that the lighting in the alley was sufficient to enable an observer to identify the color blue in the pen, even taking into account the distance between [Officer Browder] and Nehad. Whether [Officer Browder] reasonably mistook the pen for a knife is therefore a triable question of fact.

c. *Whether, Even if Armed, Nehad Posed a Threat*

Even if it were established that [Officer Browder] reasonably believed Nehad was carrying a knife, or even if Nehad had actually been carrying a knife, [Officer Browder's] use of lethal force was not necessarily reasonable as a matter of law. That a person is armed does not end the reasonableness inquiry. . . . Indeed, we have often denied summary judgment in excessive force cases to police officers who use force against armed individuals. . . .

Here, an eyewitness testified that Nehad "wasn't aggressive in nature" and "didn't make any offensive motions." [Officer Browder] himself testified that Nehad did not say anything, make any sudden movements, or move the supposed knife in any way. [Officer Browder] further testified that he did not believe anyone else was under threat of immediate bodily harm when he shot Nehad. When [Officer Browder] fired on Nehad, Nehad was seventeen feet away from [Officer Browder] and walking at what

The government parties'] own expert described as a "relatively slow pace." [Plaintiffs'] expert, Roger Clark, explicitly opined that Nehad "was actually not a lethal threat" to [Officer Browder]. Under these facts, even if [Officer Browder] had reasonably perceived Nehad as holding a knife, a reasonable factfinder could conclude that Nehad did not pose a danger to anyone.

d. *[Officer Browder's] Role in Creating the Danger*

[The government parties] make much of the (asserted) fact that [Officer Browder] had less than five seconds between the time he exited his vehicle and the moment he shot Nehad. We recognize, as we have often done before, that officers must act "without the benefit of 20/20 hindsight," and must often make "split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." . . . . Sometimes, however, officers themselves may "unnecessarily creat[e] [their] own sense of urgency." . . . . Reasonable triers of fact can, taking the totality of the circumstances into account, conclude that an

officer's poor judgment or lack of preparedness caused him or her to act unreasonably, "with undue haste."

Here, evidence in the record could support such a determination. As described above, Nehad was walking down the alley at a relatively slow pace without saying anything or threatening anyone. The lighting was sufficient to allow an observer to identify the color of a pen at a distance of seventeen feet, yet [Officer Browder], responding to a call about a man brandishing a knife, drove his car several car lengths into the alley, opened his door, then drove further toward Nehad before exiting his vehicle.

Although [Officer Browder] himself testified that it is important that police officers identify themselves because people may respond differently once they know they are interacting with a police officer, it is undisputed that [Officer Browder] never identified himself as a police officer or warned Nehad that he was going to shoot. Two witnesses, including [Officer Browder] himself, could not recall [Officer Browder] giving any verbal command or saying anything at all. Video surveillance shows that as Nehad continued to walk toward [Officer Browder], [Officer Browder] stepped out sideways from the protection of his vehicle door, closed the door, and, less than two seconds later, fired.

[Plaintiffs'] expert emphasized that [Officer Browder] had "a lot of time" to determine what to do before shooting Nehad, but "squandered all the opportunities tactically." [Plaintiffs'] expert further elaborated, "It is not a five second decision[,]" and, "[[Officer Browder]] had all the time he wanted to take . . . ." Given such evidence, a reasonable factfinder could conclude that any sense of urgency was of [Officer Browder]'s own making.

> [Court's footnote 9: *[**The government parties] make several references to the "21-foot rule that a suspect can close a 21-foot distance before an officer can react." Although a suspect's distance from an officer is undoubtedly a relevant factor in a reasonableness analysis, there is evidence in the record calling into question the applicability of the "21-foot rule" here. As [the government parties]' expert, Geoffrey T. Desmoulin, acknowledged, [Officer Browder] had more time than average to react because, although the average time for an officer to remove his gun, aim, and shoot is 1.5 seconds, [Officer Browder] had already unholstered his weapon, and took only 0.83 seconds to raise his weapon, aim, and fire. Furthermore, even if the "rule" were applicable, that fact would have to be balanced against [Officer Browder's] potential role in creating the urgent circumstances that made the rule applicable. . . .* **]**

2. *The Severity of the Crime at Issue*

Also relevant to the reasonableness inquiry is the severity of the crime at issue. Graham, 490 U.S. at 396. We have applied this factor in two slightly different ways. In Miller v. Clark County, 340 F.3d 959 (9th Cir. 2003), for example, we emphasized the government's interest in apprehending criminals, and particularly felons, as a factor "strongly" favoring the use of force. . . . Under our logic in Miller, a particular use of force would be more reasonable, all other things being equal, when applied against a felony suspect than when applied against a person suspected of only a misdemeanor. Here, police dispatch records suggest that [Officer Browder] was assigned a "Priority 1" call

regarding a "417 (Threatening w[ith] weapon)" offense. Because brandishing a knife in violation of California Penal Code § 417 is only a misdemeanor, a strict application of Miller's reasoning would provide little, if any, basis for a use of deadly force.

. . . . [The government parties] argue that the police dispatcher's decision to characterize Yoon's 911 call as a "417" misdemeanor should not be dispositive because Nehad's reported conduct "posed a serious threat" and could have been characterized as felonious. This argument reflects the second way in which we have sometimes applied the severity of the crime factor. Although the danger a suspect posed is a separate *Graham* consideration, courts, including this one, have used the severity of the crime at issue as a proxy for the danger a suspect poses at the time force is applied. . . .

This severity-of-crime as proxy-for-danger approach, however, does little to support [the government parties'] arguments here. Even if Nehad had made felonious threats or committed a serious crime prior to [Officer Browder's] arrival, he was indisputably not engaged in any such conduct when [Officer Browder] arrived, let alone when [Officer Browder] fired his weapon. A jury could, therefore, conclude that the severity of Nehad's crimes, whether characterized as a misdemeanor or an already completed felony, did not render [Officer Browder's] use of deadly force reasonable. . . .

3. *Whether Nehad Was Resisting or Seeking to Evade Arrest*

In analyzing whether a use of force was reasonable, we also look to whether the suspect was resisting arrest. Graham, 490 U.S. at 396. Here, video of the incident clearly shows that Nehad made no attempt to flee from [Officer Browder]. [The government parties] argue, nevertheless, that Nehad resisted by failing to obey [Officer Browder's] command to, "Stop, drop it." As discussed above, although two witnesses heard [Officer Browder] give a command a few seconds before firing, neither Nelson nor [Officer Browder] himself had any such recollection. Thus, whether Nehad resisted arrest by ignoring [Officer Browder's] command is, at best, a disputed issue of fact.

4. *Other Factors*

Other factors, in addition to the three Graham factors, may be pertinent in deciding whether a use of force was reasonable under the totality of the circumstances. . . . Here, we consider whether [Officer Browder] provided Nehad appropriate warnings and whether less intrusive alternatives to deadly force were available.

a. *Failures to Warn*

i. Failure to Order to Halt

In some cases, the absence of a warning or order to halt prior to deploying forceful measures against a suspect may suggest that the use of force was unreasonable. . . . . We recognize, of course, that it may not always be feasible for an officer to warn a suspect prior to deploying force.

Here, however, as discussed above, there is evidence that . . . **Nehad was walking toward [Officer Browder] at a slow, steady pace, with no indication of violent intent. And here . . . there is evidence that [Officer Browder] never ordered Nehad**

to halt or to drop whatever he was carrying. Such facts could support a conclusion that [Officer Browder's] decision to shoot Nehad was unreasonable.

ii. Failure to Warn that Failure to Comply Would Result in the Use of Deadly Force

Whether an officer warned a suspect that failure to comply with the officer's commands would result in the use of force is another relevant factor in an excessive force analysis. . . . The seemingly obvious principle that police should, if possible, give warnings prior to using force is not novel, and is well known to law enforcement officers. Indeed, it was already common police practice to warn recalcitrant suspects of imminent forceful measures when we decided [Deorle v. Rutherford, 272 F3d 1272 (9th Cir. 2001)] nearly two decades ago. . . .

A prior warning is all the more important where, as here, the use of lethal force is contemplated. Even assuming [Officer Browder] did command Nehad to "Stop, drop it," there is no dispute that [Officer Browder] never warned Nehad that a failure to comply would result in the use of force, let alone deadly force. A jury could consider [Officer Browder's] failure to provide such a warning as evidence of objective unreasonableness.

iii. Failure to Identify as a Police Officer

Although not specifically discussed by the parties, we have also considered as relevant a police officer's failure to identify himself or herself as such. . . . Here, [Officer Browder] acknowledged he was trained to identify himself as a police officer and that it is important to do so, particularly before using force.

However, it is undisputed that [Officer Browder] never verbally identified himself as a police officer or activated his police lights or siren. A jury could consider those failures in assessing Nehad's response to [Officer Browder] and in determining whether [Officer Browder's] use of force was reasonable.

b. *Failure to Use Less Intrusive Alternatives*

Another relevant factor is "the availability of alternative methods of capturing or subduing a suspect." . . . Police need not employ the least intrusive means available; they need only act within the range of reasonable conduct. . . ."However, 'police are required to consider [w]hat other tactics if any were available,' and if there were 'clear, reasonable and less intrusive alternatives' to the force employed, that 'militate against finding [the] use of force reasonable.'" . . .

Here, [Officer Browder] carried a taser, mace, and a collapsible baton in addition to his firearm. [Plaintiffs'] expert described these less-lethal alternatives as "obvious," and it is undisputed that, at the time of the shooting, Nehad was within the taser's effective range. However, [Officer Browder] admitted he never considered any of the available alternatives. Although [The government parties] contend the alternatives were not practical for various reasons, that is a question of fact best resolved by a jury. . . .

5. *Conclusion [On Fourth Amendment Deadly-force Issue]*

Viewing the evidence in the light most favorable to [Plaintiffs], we conclude that a rational trier of fact could find that [Officer Browder]'s use of deadly force was objectively unreasonable.

B. *Fourteenth Amendment [Due Process Issue]*

Nehad's parents also assert a claim for violation of their Fourteenth Amendment interest in the companionship of their child. Police action sufficiently shocks the conscience, and therefore violates substantive due process, if it is taken with either "(1) deliberate indifference or (2) a purpose to harm unrelated to legitimate law enforcement objectives." A.D. v. California Highway Patrol, 712 F.3d 446, 453 (9th Cir. 2013). Here, [Plaintiffs] argue [Officer Browder's] shooting satisfies the purpose to harm standard because Nehad assertedly posed no danger to [Officer Browder] or anyone else.

"The purpose to harm standard is a subjective standard of culpability." . . . It is well established that a use of force intended to "teach a suspect a lesson" or "get even" meets this standard. For example, in A.D., we affirmed the denial of the defendant officer's motion for judgment as a matter of law in light of evidence that the decedent posed no danger to anyone and repeatedly insulted the officer before the officer shot her twelve times, even though no other officer opened fire and a supervisor had ordered the officer to stop. We have also reversed a grant of summary judgment where a police officer, who had reasonably fired eighteen shots at a suspect who had just stabbed another officer, walked in a circle around the suspect and then took a running start before stomping on the suspect's head three times. Zion v. County of Orange, 874 F.3d 1072, 1077 (9th Cir. 2017).

The circumstances here are distinguishable from those in A.D. and the like. While those cases, like this case, did involve some evidence that a suspect posed no danger, they also involved some additional element suggesting an improper motive on the part of the shooting officer. **Here, there is no evidence that [Officer Browder] fired on Nehad for any purpose other than self-defense, notwithstanding the evidence that the use of force was unreasonable.**

Although "[o]bjective reasonableness is one means of assessing whether" conduct meets the "shocks the conscience" standard, an unreasonable use of force does not necessarily constitute a Fourteenth Amendment substantive due process violation. . . .

We acknowledge that some district courts have indeed denied summary judgment on Fourteenth Amendment claims in the absence of evidence of bad intent separate and apart from evidence of an objectively unreasonable use of force. . . .

Thus, although most meritorious purpose to harm claims will involve evidence of ulterior motive or bad intent separate and apart from evidence of an unreasonable use of force, we decline to hold that such evidence is required as a matter of law. In some cases, a use of force might be so grossly and unreasonably excessive that it alone could evidence a subjective purpose to harm. Here, [Officer Browder]'s use of force, even if unreasonable, does not present such a case. We therefore affirm the district court's grant of summary judgment on the Fourteenth Amendment claim.

C. *Qualified Immunity*

A government official's entitlement to qualified immunity depends on "(1) whether there has been a violation of a constitutional right; and (2) whether that right was clearly established at the time of the officer's alleged misconduct." . . . . Courts may examine either prong first, depending on the relevant circumstances. Here, the district court granted [Officer Browder] qualified immunity on the second prong.

. . . .

[The government parties] argue that even if, under the [Plaintiffs'] version of the facts, a constitutional right was violated, that right was not clearly established at the time of the shooting. That argument is unconvincing. In determining whether [Officer Browder]'s mistake as to what the law requires was reasonable, and thus whether he is entitled to qualified immunity under the clearly-established prong, we "assume he correctly perceived all of the relevant facts and ask whether an officer could have reasonably believed at the time that the force actually used was lawful under the circumstances." . . . This analysis must be made "in light of the specific context of the case, not as a broad general proposition." . . . There need not be a prior case "directly on point," so long as there is precedent "placing the statutory or constitutional question beyond debate.". . . .

Under [Plaintiffs'] version of the facts, [Officer Browder] responded to a misdemeanor call, pulled his car into a well-lit alley with his high beam headlights shining into Nehad's face, never identified himself as a police officer, gave no commands or warnings, and then shot Nehad within a matter of seconds, even though Nehad was unarmed, had not said anything, was not threatening anyone, and posed little to no danger to [Officer Browder] or anyone else. [The government parties] cannot credibly argue that the prohibition on the use of deadly force under these circumstances was not clearly established in 2015. . . . **Indeed, nearly twenty years ago, we explained that it was sufficiently established that a police officer could not reasonably use a beanbag round on "an unarmed man who: [1] has committed no serious offense, . . . [2] has been given no warning of the imminent use of such a significant degree of force, [3] poses no risk of flight, and [4] presents no objectively reasonable threat to the safety of the officer or other individuals."** Deorle, 272 F.3d at 1285.

Although [the government parties] attempt to distinguish Deorle because the suspect there was suicidal and officers took several minutes to observe him before using less than lethal force, those facts, to the extent they are distinguishing, weigh against qualified immunity in this case. Here, there is no evidence that any eyewitness to the shooting considered Nehad to be a threat.

In light of the evidence that [Officer Browder] could have taken more time to evaluate the situation, [Officer Browder's] brief observation of Nehad before using lethal force only makes [Officer Browder's] conduct less reasonable. [Officer Browder] is therefore not entitled to qualified immunity under the clearly established prong.

D. *Monell and Supervisory Liability*

The district court granted summary judgment in favor of [San Diego Police Chief Zimmerman] and the City on [Plaintiffs'] Monell claim and in favor of [Chief Zimmerman] on [Plaintiffs'] supervisory liability claim on the grounds that (1) there was no constitutional violation, and (2) [Plaintiffs] presented no evidence that "any policy or deficient training was a 'moving force' behind the shooting. As discussed above, there

are genuine disputes of material fact regarding the first basis for the district court's decision.

The record also belies the district court's second conclusion. As an initial matter, [Plaintiffs] need not show evidence of a policy or deficient training; evidence of an informal practice or custom will suffice. . . . **[Plaintiffs] submitted evidence that: (1) 75% of the San Diego Police Department's officer-involved shootings were avoidable; (2) the Nehad shooting was approved by the department, which took no action against [Officer Browder]; and (3) the department looks the other way when officers use lethal force.**

Indeed, Chief Zimmerman explicitly affirmed that [Officer Browder's] shooting of Nehad "was the right thing to do," and the department identified [Officer Browder] as the victim of the incident and conducted his interview several days after the shooting, once [Officer Browder] had watched the surveillance video with his lawyer. This evidence is sufficient to create a triable issue at least as to the existence of an informal practice or policy and, thus, Monell and supervisory liability.

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

CITY OF EVERETT PREVAILS AGAINST LAWSUIT BY HILLBILLY HOTTIES' BIKINI BARISTAS AGAINST CITY'S ENFORCEMENT OF ORDINANCE; FREE SPEECH AND DUE PROCESS/VAGUENESS CHALLENGES REJECTED

In Edge v. City of Everett, ___ F.3d ___ , 2019 WL ___ (9th Cir., July 3, 2019), a three-judge Ninth Circuit panel rules 3-0 against the owner and five bikini baristas at Hillbilly Hotties, a chain of drive-up coffee stands, lifting a federal district court injunction against the City's enforcement of a Dress Code Ordinance and a Lewd Conduct Ordinance. The Ninth Circuit's staff provides a synopsis that is not part of the Court's opinion. Staff summarizes the ruling as follows:

The panel vacated the district court's preliminary injunction against enforcement of the City of Everett, Washington's Dress Code Ordinance – requiring that the dress of employees, owners, and operators of Quick-Service facilities cover "minimum body areas" – and the amendments to the Lewd Conduct Ordinances. Plaintiffs are owners and employees of a bikini barista stand in Everett, Washington.

The panel held that plaintiffs did not show a likelihood of success on the merits of their two Fourteenth Amendment void-for-vagueness challenges (based on constitutional due process protection), nor on their First Amendment free expression claim.

Concerning the Lewd Conduct Ordinances, which expanded the definition of "lewd act" and also created the misdemeanor offense of Facilitating Lewd Conduct, the panel held that the activity the Lewd Contact Amendments prohibited was reasonably ascertainable to a person of ordinary intelligence. The panel also held that the Amendments were not amenable to unchecked law enforcement discretion. The panel concluded that the district court abused its discretion by holding that the plaintiffs were likely to succeed on the merits of their void-for-vagueness (Due Process-based) challenge to the Amendments.

Concerning enjoinment of the enforcement of the Dress Code Ordinance, the panel held that the vagueness principles governing the panel's analysis of the Lewd Conduct Amendments applied with equal force to the Dress Code Ordinance. The panel concluded that the vagueness doctrine did not warrant an injunction prohibiting enforcement of the Dress Code Ordinance.

As to plaintiffs' First Amendment contention that the act of wearing almost no clothing while serving coffee in a retail establishment constituted speech, the panel held that plaintiffs had not demonstrated a "great likelihood" that their intended messages related to empowerment and confidence would be understood by those who view them. The panel concluded that the mode of dress at issue in this case was not sufficiently communicative to merit First Amendment protection.

The panel also held that the district court's application of intermediate scrutiny under the "secondary effects" line of authority was inapposite, and the City need only demonstrate that the Dress Code Ordinance promoted a substantial government interest that would be achieved less effectively absent the regulation. Because the district court did not analyze the ordinance under this framework, the panel vacated the preliminary injunction and remanded for further proceedings.

[Some paragraphing revised for readability; bolding added]

Result: Reversal of U.S. District Court (Seattle) order that granted a preliminary injunction against the Everett Dress Code Ordinance; case remanded for further proceedings.

FEDERAL CRIMINAL DEFENDANTS CANNOT STOP THEIR FEDERAL PROSECUTION FOR VIOLATIONS OF FEDERAL CONTROLLED SUBSTANCES ACT WHERE THEY CANNOT PROVE THAT THEIR ACTIONS WERE IN STRICT COMPLIANCE WITH WASHINGTON'S MEDICAL USE OF CANNABIS ACT

U.S. v. Evans, ___ F.3d ___ , 2019 WL ___ (July 9, 2019), a three-judge Ninth Circuit panel rules under the circumstances of the case that two "trimmers" in a marijuana grow operation cannot escape federal prosecution by invoking Washington's Medical Marijuana Law. A Ninth Circuit staff synopsis (which is not part of the Ninth Circuit opinion) summarizes the background of the case and the ruling as follows:

The panel affirmed the district court's judgment on remand denying a motion by two medical marijuana growers to enjoin [i.e., prohibit] their federal prosecutions for violations of the [Federal] Controlled Substances Act.

In the prior appeal, the panel held that a [Federal] congressional appropriations rider prohibited the Department of Justice from spending appropriated funds to prosecute individuals who engaged in conduct permitted by state medical marijuana laws; and remanded to the district court with instructions to hold an evidentiary hearing to determine whether the defendants' conduct was completely authorized by state law. On remand, the district court found that the defendants were not in strict compliance with Washington's Medical Use of Cannabis Act (MUCA).

> In this appeal, the panel held that because the [Federal Congressional] appropriations rider authorizes the defendants to seek to enjoin prosecution, the defendants – not the Government – bear the burden of proof regarding whether the state's medical-marijuana laws completely authorized the defendants' conduct. Explaining that [the Ninth Circuit] looks to the state law's substantive authorizations but not to the state's procedural rules that give practical effect to its medical-marijuana regime, the panel rejected the defendants' contention that the Government must procure a jury verdict of noncompliance in Washington State Court before it can prosecute them for their federal crimes.
>
> The panel held that the district court correctly refused to allow the defendants to assert "common law affirmative defenses," and correctly focused on the defendants' compliance with MUCA itself.
>
> Affirming the district court's factual finding that the defendants did not strictly comply with MUCA, the panel held that the district court did not clearly err in finding that the defendants, neither of whom claimed to be a "designated provider," were likewise not "qualified patients."

Result: Affirmance of U.S. District Court (Spokane) ruling against the motion of defendant's Jayde Dillon Evans and Brice Christian Davis; case remanded for trial.

CIVIL RIGHTS ACT CORRECTIONS CIVIL LIABILITY UNDER EIGHTH AMENDMENT: FACTUAL ALLEGATIONS OF MALTREATMENT OF MENTALLY ILL PRISONERS ARE SUFFICIENT FOR CASE TO GO TO TRIAL IN LAWSUIT AGAINST MONTANA STATE PRISON

In Disability Rights Montana v. Batista, ___ F.3d ___ , 2019 WL ___ (9th Cir., July 19, 2019), a three-judge Ninth Circuit panel rules that allegations by and on behalf of mentally ill prisoners in the Montana State Prison are sufficient to require that the facts of the case be resolved by a fact-finder. In a synopsis that is not part of the panel's opinion, Ninth Circuit staff summarizes the ruling in the case as follows:

> The panel reversed the district court's dismissal of a prisoner civil rights complaint, remanded for further proceedings, and reassigned the case to a different district court judge.
>
> Plaintiff, Disability Rights Montana, alleged pursuant to 42 U.S.C. § 1983 that the Director of the Montana Department of Corrections and the Warden of the Montana State Prison violated the Eighth Amendment rights of "all prisoners with serious mental illness who are confined to the Montana State Prison." The district court dismissed the complaint for failing to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). The panel held that the complaint, which described the horrific treatment of prisoners, was supported by factual allegations more than sufficient to "state a claim to relief that was plausible on its face" under [the controlling U.S. Supreme Court precedents (citations omitted)].
>
> The panel noted that the complaint alleged that prisoners with serious mental illness were denied diagnosis and treatment of their conditions, described a distressing pattern of placing mentally ill prisoners in solitary confinement for "weeks and months at a time"

without significant mental health care, alleged the frequent, improper use of this punishment for behavior arising from mental illness, marshalled relevant quotations from national prison health organizations about the unacceptability of subjecting prisoners to extensive solitary confinement, and alleged that the defendants did not respond appropriately to threats of suicide by mentally ill prisoners, increasing the risk of suicide. With respect to the subjective prong of the Eighth Amendment claim, the complaint also included more than sufficient allegations that defendants knew that prisoners with serious mental illness were being exposed to a substantial risk of serious harm and were indifferent to that risk.

The panel held that reassignment to a different district court judge was required to preserve the appearance of justice. The panel noted that the district court had mistaken this case for another case brought by plaintiff against a different defendant and upon being advised of its mistake, had declined to revisit its decision, thereby letting an obviously incorrect decision stand.

Result: Reversal of decision of the U.S. District Court (Montana) that dismissed the lawsuit; case remanded for trial.

FEDERAL CRIMINAL STATUTE THAT PROHIBITS ILLICIT SEXUAL CONDUCT WITH MINORS IN FOREIGN PLACES IS UPHELD AGAINST CONSTITUTIONAL COMMERCE CLAUSE ATTACK

In U.S. v. Lindsay, ___ F.3d ___ , 2019 WL ___ (9th Cir., July 23, 2019), a three-judge Ninth Circuit panel upholds the conviction of a U.S. citizen for having sex with a minor in the Philippines. The panel agrees with the analysis of the Fourth and Tenth Circuits in holding that 18 U.S.C. § 2423(c), which prohibits engaging in illicit sexual conduct in foreign places, did not exceed Congress's authority under the Foreign Commerce Clause, as applied to the criminalization of non-commercial sexual abuse of a minor.

Result: Affirmance of U.S. District Court (Northern District of California) conviction of Michael Lindsay for violation of 18 U.S.C. § 2423(c),

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WASHINGTON STATE SUPREME COURT

SUFFICIENT EVIDENCE OF CAUSATION IN PROSECUTION FOR VEHICULAR HOMICIDE UNDER RCW 46.61.520: CONVICTION FOR VEHICULAR HOMICIDE HELD SUPPORTED IN FATAL CHAIN-REACTION CRASH CASE, EVEN THOUGH A THIRD VEHICLE WAS THE DIRECT CAUSE OF DEATH WHEN IT CAME UPON THE SCENE AND PROPELLED A VEHICLE ORIGINALLY REAR-ENDED BY THE DUI-HIT-AND-RUN DEFENDANT INTO A GOOD SAMARITAN WHO HAD STOPPED TO RENDER ASSISTANCE

In State v. Frahm, ___ Wn.2d ___, 2019 WL ___ (July 11, 2019), the Washington Supreme Court rules 7-2 that the causation evidence supports a jury's verdict of vehicular homicide. The majority opinion concludes that the defendant's combined acts of rear-ending a vehicle while intoxicated and fleeing the scene were the proximate cause of the death of a Good Samaritan who was killed while attempting to help the occupant of the vehicle the defendant struck.

The majority opinion explains that the common law, tort-law-derived reasonable foreseeability standard applicable in negligence-based damages lawsuits is properly applied in vehicular homicide cases to distinguish between a superseding cause and a mere intervening event. The factual question of foreseeability is to be decided by the jury when reasonable minds can differ on the question of foreseeability.

The facts of the case are described in the majority opinion as follows:

> Shortly before 6:00 a.m. on Sunday, December 7, 2014, Joshua Cane Frahm was intoxicated and drove his truck erratically at a high rate of speed on several freeways in Vancouver, Washington. Two different motorists called 911 to report Frahm's dangerous driving, which included cutting off a vehicle and nearly rear-ending several others. Frahm was going 85 m.p.h. when he rear-ended a vehicle driven by Steven Klase. The impact propelled Klase's vehicle into the median barrier and caused it to spin and ricochet, leaving it disabled across the left and middle lanes. Frahm fled the scene without stopping to render aid to Klase, who was seriously injured in the collision.
>
> Richard Irvine was driving the same direction on the same freeway that morning and witnessed the collision. Irvine pulled his sedan over onto the right shoulder of the freeway, activated his emergency flashers, exited his sedan, and crossed the freeway on foot to render aid to Klase, who remained trapped inside his vehicle. Irvine called 911 from his cell phone and was on the line with emergency dispatchers when Klase's vehicle was struck a second time by a minivan.
>
> The driver of the minivan had shifted into the left lane when he saw the flashers of Irvine's car on the right shoulder, but the driver did not notice Klase's disabled vehicle in the still-dark morning until it was too late to avoid hitting it. The second impact to Klase's vehicle from the minivan propelled Klase's vehicle into Irvine, throwing Irvine approximately 20 feet across the roadway and causing him to sustain severe brain and spinal injuries. Irvine died 12 days later as a result of his injuries and pneumonia.

[Paragraphing revised for readability]

Resul: Affirmance of Division Two Court of Appeals decision that affirmed the Clark County Superior Court convictions of Joshua Cane Frahm for vehicular homicide, vehicular assault, hit and run, false reporting, and conspiracy to commit perjury.

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WASHINGTON STATE COURT OF APPEALS

COMMUNITY CARETAKING FUNCTION DOES NOT SUPPORT OFFICERS' MID-DAY WARRANTLESS ENTRY OF CAR IN WHICH OFFICERS SAW TWO MEN SLEEPING AND OFFICERS SUSPECTED – BASED ON THE OFFICERS' EXPERIENCE BUT LITTLE ELSE – THAT THE MEN HAD PASSED OUT FROM HEROIN USE; COURT'S DECISION LIKELY WOULD HAVE DIFFERED IF OFFICERS FIRST HAD KNOCKED OR SHOUTED AND UNSUCCESSFULLY TRIED TO ROUSE CAR'S OCCUPANTS

State v. Harris, ___ Wn. App. 2d ___ , 2019 WL ___ (Div. I, July 23, (2019)

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

> In the middle of the day in December 2016, a civilian flagged down [two city police officers]. The civilian said there were two people passed out in a car and asked the officers to check on them. The officers found the driver and the defendant, Matthew Harris, either asleep or unconscious.
>
> The officers offered conflicting testimony regarding how long they observed the occupants of the vehicle before making contact. Both officers testified that they looked through the window and observed that the occupants were not awake. The occupants were slumped over in their seats and, based on their training and experience, the officers suspected the occupants had used heroin.
>
> The officers initiated contact because of concerns that the occupants had potentially overdosed on heroin. The officers did not observe anything else inside the vehicle that suggested drug use or any other crime. Before contacting the occupants of the vehicle, the officers did not make any attempt to rouse them.
>
> The officers opened the doors to the vehicle and woke up the occupants. After they opened the doors, the officers observed drug paraphernalia consistent with the use of heroin.
>
> The officers arrested Harris for possession of drug paraphernalia. Based on evidence found during and subsequent to the arrest, Harris was later charged with and convicted of possession of stolen property, identity theft, and making a false statement to a public servant.

[Some paragraphing revised for readability]

ISSUE AND RULING: Two city police officers observed two men sleeping inside a car at mid-day in a public parking lot. The officers' experience led them to believe that the two men were passed out from use of heroin. The officers did not try to rouse the car's occupants by knocking in the window or shouting at the men. The officers did not see any evidence of drug use in open view in the car.

Were the officers justified under the constitutional search warrant exception for Community Caretaking Function in opening the car doors and thus entering the constitutionally protected space of the car? (ANSWER BY COURT OF APPEALS: No, the Community Caretaking Function exception to the warrant requirement did not justify that intrusion)

Result: Reversal of King County Superior Court convictions of Matthew Alex Harris for possession of stolen property, identity theft, and making a false statement to a public servant.

ANALYSIS:

The Harris Court discusses at length several Washington appellate court decisions addressing the Community Caretaking Function exception to the warrant requirement. The exception has been applied both in situations requiring emergency aid and in routine checks on health and

safety. The Court in essence combines two lines of cases to concludes for purposes of this case that the essence of the previous Washington Supreme Court decisions boils down to requirements that (1) an officer has a subjective belief of the need for assistance and is not primarily motivated by an intent to arrest or seek evidence of a crime, (2) a reasonable person would also believe there is an immediate need for assistance, (3) the area searched matches the justification for the search.

The Harris Court then applies the law to the facts, concluding under the following analysis that there was no reasonable objective basis for concluding that the men sleeping in the car were in need of immediate assistance:

> [A] concerned citizen had flagged down the officers to check on the occupants of the vehicle, the vehicle was in a public parking lot, the occupants were sleeping or unconscious and slumped in their seats, it was midday, and there was an opioid epidemic in the community at large. Harris argues that those facts are insufficient to establish a reasonable objective belief that he was in need of immediate assistance. State v. Hos illustrates why he is correct. 154 Wn. App. 238 (2010).
>
> In Hos, law enforcement accompanied a CPS caseworker to the defendant's residence. The officer knocked loudly on the defendant's door, but received no response. The officer looked through a window near the front door and saw the defendant sitting on the couch with her eyes closed and her head resting on her chest. The officer could not tell if the defendant was breathing.
>
> After the officer pounded on the door again, he saw that the defendant had not moved or responded. The officer opened the unlocked front door and entered the defendant's house. After remaining in the defendant's house, the officer observed some drug paraphernalia on the defendant's person.
>
> At trial, both the officer and the caseworker expressed their concern for the defendant's health. On appeal, the defendant argued that the officer did not use the least intrusive means to execute his community caretaking function. The court held that officers were not required to use the least intrusive means, and that the paraphernalia were admissible under the community caretaking exception.
>
> The facts known to the officer in Hos are very similar to the facts here. The defendant in Hos was sitting on a couch, unconscious, during hours when people are usually awake. Similarly, Harris was sitting in a car, unconscious or asleep, during hours when people are usually awake. While those are not the usual locations or times for people to sleep, neither are those locations and times outlandish. Those facts, without more, do not give rise to a reasonable belief that the person needs immediate assistance.
>
> The officer in Hos had one crucial fact that the officers here lacked: the defendant in was unresponsive. A person that fails to wake up or respond to attempts to rouse them would cause a reasonable, objective person to believe that intervention was necessary. We recognize the need for officers to act quickly when there is a reasonable basis to believe that they have encountered an emergency.
>
> But that need must be balanced against the privacy interests each of us holds. It is not unreasonable to expect law enforcement to take at least some minimum step to identify

a specific basis to support their belief that the person whose privacy interests are at issue needs emergency assistance.

Here, the officers had a reasonable, objective basis to contact Harris as a routine health and safety check, and inquire if he needed assistance. But because the officers could not distinguish whether Harris was unconscious or asleep, and no other facts suggested an emergency situation, the officers lacked a reasonable, objective basis to justify an intrusion into the vehicle.

We note that the officers here took enough time to observe the inside of the vehicle such that they were able to later testify as to the position of the occupants and describe items located inside the vehicle. Knocking on the window during their visual sweep of the scene would not have meaningfully slowed down the officers' response if this had actually been an emergency situation. Without verifying that Harris and the other passenger a person sleeping in a car during the day, without any accompanying observations of a possible medical issue or drug use, would not lead a reasonable person to believe that an emergency existed.

Some additional details consistent with suspected drug overdose could satisfy the emergency aid exception, such as observations about unusual breathing patterns, skin appearance (e.g. extreme pallor, lesions or wounds consistent with intravenous drug abuse), evidence of vomiting or other physical irregularities. But merely being asleep or unconscious while slumped down in a parked car at midday, even in a community with an opioid epidemic, is inadequate to justify an officer opening a car door without first briefly attempting to speak to or otherwise rouse the suspected overdose victim.

Because the limited facts available to law enforcement did not support a reasonable objective belief that Harris or his companion required immediate assistance at the time the officers invaded his privacy, we reverse Harris's conviction, grant his motion to suppress evidence gathered from the unlawful search of the vehicle, and remand to the trial court for further proceedings.

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

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CONSTITUTIONAL PARTICULARITY REQUIREMENT MET BY SEARCH WARRANT FOR EVIDENCE OF THE CRIME(S) OF: RCW 9.68A.050, DEALING IN DEPICTIONS OF A MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT; AND RCW 9.68A.070, POSSESSION OF DEPICTIONS OF A MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT; COURT NOTES THAT WARRANT'S PARTICULARITY WOULD HAVE BEEN IMPROVED BY ADDING THE STATUTORY DEFINITION OF "SEXUALLY EXPLICIT CONDUCT"

State v. Vance, ___ Wn. App. 2d ___ , 2019 WL ___ (Div. II, July 2, 2019)

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

On August 26, 2010, FBI Special Agent Alfred Burney, working undercover in Detroit, Michigan, used a peer-to-peer file sharing program to download 35 files from a software user with an IP address subscribed to Comcast. At least 20 of those files appeared to be pictures of children engaged in sexually explicit activity. Burney then submitted an administrative subpoena to Comcast requesting all subscriber information for the person

using that IP address. Comcast responded that the IP address belonged to Vance. Burney sent this information and the downloaded files to the FBI's Seattle office.

The Seattle FBI office obtained and confirmed Vance's street address and sent the information and files it received to Investigator [A] of the Vancouver Police Department and the Clark County Sheriff's Office Digital Evidence Cybercrime Unit.

At the time of Burney's investigation, the FBI was part of an interagency, multijurisdictional initiative involving the Department of Justice, the Department of Homeland Security's United States Immigration and Customs Enforcement, and the Internet Crimes Against Children task forces. The sheriff's office's Cybercrime Unit was a local Internet Crimes Against Children task force, and [Investigator A] was the local liaison. Burney was not involved with the task force himself

Using the information received from the FBI, [Detective B] of the Vancouver Police Department and Special Agent Julie Peay of Immigration and Customs Enforcement independently verified Vance's home address. [Detective B] then obtained a search warrant for Vance's home. **The warrant first authorized a search for "evidence of the crime(s) of: RCW 9.68A.050 dealing in depictions of a minor engaged in sexually explicit conduct and RCW 9.68A.070 Possession of depictions of a minor engaged in sexually explicit conduct."** The warrant then described the items to be seized, **including a list of specific types of el ectronic devices and media "capable of being used to commit or further the crimes outlined above, or to create, access, or store the types of evidence, contraband, fruits, or instrumentalities of such crimes."**

The warrant also identified for seizure the accompanying records, documents, and information necessary to operate and access those devices and data. This description of the goods authorized for seizure concluded with authorization to transfer any and/or all seized items to the Cybercrime Unit:

> [F]or the examination, analysis, and recovery of data from any seized items to include: graphic/image files in common formats such as JPG, GIF, PNG or in any other data format in which they might be stored, pictures, movie[] files, emails, spreadsheets, databases, word processing documents, Internet history, Internet web pages, newsgroup information, passwords encrypted files, documents, software programs, or any other data files, whether in allocated or unallocated space on the media, whether fully or partially intact or deleted, that are related to the production, creation, collection, trade, sale, distribution, or retention of files depicting minors engaged in sexually explicit acts/child pornography.

The Cybercrime Unit executed the warrant on Vance's home and seized several electronic devices. The resulting forensic examination revealed at least 20 images and videos depicting minors engaged in sexually explicit conduct.

The State charged Vance with seven counts of first degree possession of depictions of a minor engaged in sexually explicit conduct and three counts of first degree dealing in depictions of a minor engaged in sexually explicit conduct. The trial court redacted from the search warrant affidavit information obtained by federal agents, found probable cause for the search warrant no longer existed, granted the suppression motion, and dismissed the charges against Vance. Vance then moved to suppress the evidence

seized from his home and dismiss the case. The trial court granted the motion. The State appealed and we reversed.

On remand, Vance filed a new motion to suppress the evidence seized from his home arguing in part that the warrant was not sufficiently particular. The trial court denied the motion to suppress, and the parties proceeded to a bench trial. Just before trial, the State filed an amended information dismissing the distribution charges and instead charged Vance with a total of 10 counts of possession of depictions of minors engaged in explicit sexual conduct. After a bench trial, the court found Vance guilty on all 10 counts. Vance requested an exceptional sentence downward, but the court imposed a standard range sentence of 77 months of confinement.

[Citations to the record omitted]

ISSUE AND RULING: The search warrant in this case authorized a search of the residence of Vance's home for evidence of the crime(s) of: RCW 9.68A.050, dealing in depictions of a minor engaged in sexually explicit conduct, and RCW 9.68A.070, possession of depictions of a minor engaged in sexually explicit conduct." Does the search warrant meet the particularity requirement of the Fourth Amendment? (Answer by Court of Appeals: Yes, though the warrant's particularity would have been improved by adding the statutory definition of "sexually explicit conduct")

Result: Affirmance of Clark County Superior Court convictions of Darin Richard Vance for 10 counts of possession of depictions of minors engaged in explicit sexual conduct.

ANALYSIS: (Excerpted from Court of Appeals opinion)

A search warrant's description of the place to be searched and property to be seized is sufficiently particular if "it is as specific as the circumstances and the nature of the activity under investigation permit." . . . A generic or general description of the things to be seized may be sufficient if probable cause is shown and "a more specific description is impossible" with the information known to law enforcement at the time. Search warrants must be "tested and interpreted in a common sense, practical manner, rather than in a hypertechnical sense."

Vance relies on recent case law specifically addressing warrants authorizing searches for and seizures of evidence related to sexually explicit depictions of minors. He analogizes this case to State v. McKee, 3 Wn. App. 2d 11 (2018) (reversed and remanded on other grounds by Washington Supreme Court).

The search warrant in McKee listed the alleged crimes as "Sexual Exploitation of a Minor RCW 9.68A.040," "Dealing in depictions of minor engaged in sexually explicit conduct RCW 9.68A.050." The warrant authorized the police to conduct a "physical dump" of "all of the memory of the phone for examination." The warrant then identified certain "Items Wanted" to be seized from the defendant's cell phone amounting essentially to any "electronic data from the cell phone showing evidence of the above listed crimes."

In McKee, Division One of our court held that the warrant lacked the requisite particularity because it "was not carefully tailored to the justification to search and was not limited to data for which there was probable cause." In other words, "the search warrant clearly allow[ed] search and seizure of data without regard to whether the data

[was] connected to the crime." "The language of the search warrant left to the discretion of the police what to seize."

The McKee court relied on State v. Besola, in which our Supreme Court held that a mere citation to the child pornography statute at the top of the warrant did nothing to make it more particular. 184 Wn.2d 605, 615 (2015). The warrant in Besola identified the crime of "Possession of Child Pornography R.C.W. 9.68A.070," and authorized the police to seize:

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

The warrant's rote citation to the statute failed to add information, such as the definition of "child pornography" that would have modified or limited the evidence that officers could seize. Nor did the warrant include specific language using the citation to the statute "to describe the materials sought." The omission of such limiting information created the "primary defect" in the warrant – it covered lawfully possessed materials, such as adult pornography and photographs of minors that did not depict them engaged in sexually explicit acts.

The State argues this case more closely resembles State v. Martinez, 2 Wn. App. 2d 55, (2018). There, Division One upheld a warrant that authorized seizure of any "photographs, pictures, albums of photographs, books, newspapers, magazines and other writings on the subject of sexual activities involving children. The warrant also authorized the seizure of "pictures and/or drawings depicting children under the age of eighteen years who may be victims of the aforementioned offenses, and photographs and/or pictures depicting minors under the age of eighteen years engaged in sexually explicit conduct as defined in RCW 9.68A.011(3)."

The Martinez court held the warrant was sufficiently particular because rather than merely cite to the statute, "it use[d] the language 'sexually explicit conduct as defined in RCW 9.68A.011(3).'" The court also reasoned that, unlike in [State v. Perrone, 119 Wn.2d 538 (1992), where the warrant contained the overbroad term "child pornography," the Martinez warrant used the statutory language "sexually explicit conduct." Finally, while the warrant in Martinez also authorized the seizure of some materials that could be lawfully possessed, that alone did "not automatically make the warrant overbroad." "[P]ossession of materials about sexuality involving children [was] relevant to the charged offense." The warrant was not overbroad for authorizing the seizure of relevant materials. For these reasons, the court concluded the warrant provided law enforcement with an objective standard to determine what should be seized.

We conclude that the warrant in this case is more analogous to the one upheld in Martinez than the warrants lacking particularity struck down in McKee, Perrone, and Besola. The warrant in this case explained that there was probable cause to search for "evidence of the crime(s) of: RCW 9.68.050 Dealing in depictions of a minor engaged in sexually explicit conduct and RCW 9.68A.070 Possession of depictions of a minor engaged in sexually explicit conduct." Then throughout, the warrant authorizes a search for computers or various devices "capable of being used to commit or further the crimes outlined above, or to create, access, or store the types of evidence, contraband, fruits, or instrumentalities of such crimes," connecting the search to depictions of minors engaged in sexually explicit conduct in a manner that was absent in Besola.

Furthermore, the final paragraph of the warrant permits the Cybercrime Unit to transfer the electronic and related devices and to search them for "graphic/image files in common formats . . . pictures, movie[] files, emails, spreadsheets, databases, word processing documents, Internet history, . . . newsgroup information, . . . encrypted files" and other similar files "that are related to the production, creation, collection, trade, sale, distribution, or retention of files depicting minors engaged in sexually explicit acts/child pornography."

Unlike the warrants in Besola and McKee, the warrant here regularly referred back to the statutory language limiting the evidence that officers could seize and so was sufficiently particular to cover only data and items connected to the crime. Unlike the warrant in McKee, which merely identified the crime of "Sexual exploitation of a minor," or Perrone, which only used the overbroad term, "child pornography," **here the warrant used the more specific language, "Possession of depictions of a minor engaged in sexually explicit conduct." The warrant here used sufficiently specific language to authorize the seizure of only illegal materials.**

Vance argues that the warrant should have included the definition of "sexually explicit conduct" in RCW 9.68A.011(3). To be sure, adding a reference to that definition would have made this warrant even more precise.

[LEGAL UPDATE EDITORIAL COMMENT: Best practice is to include the definition of "sexually explicit conduct" in the warrant in these types of cases.]

But the warrant taken as a whole makes it clear to the executing officer what specific items are authorized for search and seizure. And it does not appear that this warrant authorized law enforcement to search for and seize adult pornography or depictions of children more generally. While the warrant contemplates that law enforcement would retain Vance's devices for a period of time to search them for the files to seize, allowing law enforcement some amount of time to search electronic devices for this specifically identified evidence to seize does not undermine the validity of the warrant.

Accordingly, we hold that the search warrant was sufficiently particular. To the extent McKee contradicts our conclusion, we disagree with McKee. We affirm Vance's convictions and his sentence.

[Some case citations omitted, others revised for style; bolding added; some paragraphing revised for readability and for insertion of a Legal Update editor's comment]

In an unpublished portion of the Vance Court's opinion, the Court rejects defendant's challenges to the application of the constitution-based Silver Platter Doctrine exception to the Exclusionary Rule. This exception to exclusion allowed the federal government investigators to provide information that they independently and lawfully gathered under federal law to Clark County Sheriff's Office investigators, who, under Washington law, would not have been allowed to use some of the investigative techniques used by the federal investigators.

SEARCH WARRANT, NOT SUBPOENA, IS REQUIRED FOR OBTAINING HISTORICAL CELL-SITE LOCATION INFORMATION IN NON-EXIGENT CIRCUMSTANCES

In State v. Phillip, ___ Wn. App. 2d ___ , 2019 WL ___ (Div. I, August 5, 2019) (revision to July 1, 2019 opinion), the Court of Appeals rules that the superior court failed to comply with the federal and state constitutional privacy protections in approving of the State's use a subpoena – instead of a search warrant – to request historical cell-site location information (CSLI).

Result: Reversal of King County Superior Court order approving a CSLI subpoena in the investigation of William L. Phillip, Jr., for murder.

SEX OFFENDER REGISTRATION FOR TRANSIENTS: EVIDENCE HELD INSUFFICIENT UNDER RCW 9A.44.130(B)(6) TO SUPPORT CONVICTION WHERE THE STATE, THROUGH THE SHERIFF'S OFFICE, DID NOT PROVE FOR CERTAIN WEEKS THAT THE SHEFIFF'S OFFICE MADE REQUEST TO TRANSIENT OFFENDER FOR AN ACCOUNTING OF RESIDENCES FOR THE PREVIOUS WEEKS

State v. Dollarhyde, ___ Wn. App. 2d ___ , ___ P.3d ___ (Div. III, July 2, 2019)

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

> In 2013, Dollarhyde was convicted as a juvenile for first degree child molestation. As a result, Dollarhyde is subject to the registration requirements of RCW 9A.44.130.
>
> *Stay at jail*
>
> In January 2018, Dollarhyde was under supervision by the Department of Corrections (DOC). On January 2, Dollarhyde underwent a urinalysis pursuant to his community custody conditions and tested positive for tetrahydrocannabinol (THC), the principal active constituent of cannabis. This violated the terms of Dollarhyde's community custody. The DOC detained Dollarhyde and imposed a sanction of two days' confinement.
>
> *Stay at the Larson residence*
>
> On January 7, Julie Larson moved to an apartment at 102 East 21st Street in the city of Goldendale. Julie's daughter, Melissa Larson, knew Dollarhyde through mutual friends, and Dollarhyde assisted the family with moving into the apartment. Dollarhyde slept on the floor of the apartment one to four nights that week.
>
> *Registering with the sheriff's office*

Dollarhyde had not had a fixed place of residence since sometime in 2015. As a transient, he was required to report weekly to the sheriff's office. See RCW 9A.44.130(6)(b).

Dollarhyde completed weekly forms for January 2018. The forms requested information, including Dollarhyde's last registered address and new address. On the forms dated January 2, 2018, January 8, 2018, January 16, 2018, and January 22, 2018, Dollarhyde wrote "homless." On the blank backside of the forms, Dollarhyde wrote: 315 West Allyn, ABC Bridge, and Singing Bridge. On the January 16 and January 22 forms, he indicated the number of nights he stayed in each location that week.

Dollarhyde failed to indicate on the January 8, 2018 form that he had stayed two nights at the jail that week. He also failed to indicate on the January 16, 2018 form that he had stayed at Ms. Larson's apartment that week. For these reasons, the State charged Dollarhyde with failure to register as a sex offender. Prior to trial, Dollarhyde waived his right to a jury.

Trial

A sheriff's employee testified that transient sex offenders must report weekly and are required to provide a list of addresses where they stayed that week. When asked if she ever met with Dollarhyde to go over the registration requirements, she testified she met with him in 2015, when he first began registering. It was at this time she provided him a copy of the registration laws and requested that he disclose on each weekly form where he stayed that week.

A second employee testified she had asked Dollarhyde to provide an accounting of his whereabouts on the weekly forms, but did not know whether she had made any such request in January 2018.

The trial court found Dollarhyde guilty of failing to register as a sex offender and sentenced him to 50 months of confinement.

ISSUE AND RULING: There is no evidence that the Klickitat County Sheriff's Office asked Dollarhyde to provide an accounting of where he stayed for the weeks of January 8, 2018 or January 16, 2018. Is there sufficient evidence that transient sex offender Dollarhyde violated the requirements of RCW 9A.44.130(6)(b) for those weeks? (ANSWER BY COURT OF APPEALS: No)

Result: Reversal of Klickitat County Superior Court conviction of James Nathen Dollarhyde for failing to register as a sex offender.

ANALYSIS: (Excerpted from Court of Appeals opinion)

RCW 9A.44.130(6)(b) outlines the registration requirements for transient sex offenders; it provides:

> A person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. The person must keep an accurate accounting of where he or she stays

during the week and provide it to the county sheriff upon request. (Emphasis added.)

Statutes establishing procedures leading to a loss of liberty are construed strictly. In re Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983). If a transient is to be incarcerated for failing to provide an accurate accounting of where he or she stayed the prior week, a strict reading of RCW 9A.44.130(6)(b) requires the sheriff's office to make a clear and specific request each week for that accounting.

The forms Dollarhyde completed on January 8 and January 16 did not request him to provide an accounting of where he stayed that week. The State argues there is sufficient evidence it requested an accounting because Dollarhyde consistently wrote on the back of the forms where he stayed. The State's argument assumes it is sufficient to make a continuing request once, perhaps years earlier. As noted above, a strict reading of RCW 9A.44.130(6)(b) requires a specific request for the week in question.

Here, the evidence was insufficient for a trier of fact to find beyond a reasonable doubt that the sheriff's office – on January 8, 2018 or January 16, 2018 – requested Dollarhyde to provide an accounting of where he stayed for either of those weeks.

[Court's footnote: *This could have been avoided by using a form that explicitly requests transients to list all places stayed that week.]*

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

1. State v. Benjamin Allen Martin: On July 1, 2019, Division One of the COA rules for the State in rejecting defendant's appeal from his Snohomish County Superior Court conviction for possession of a controlled substance with intent to deliver while on community custody. The Court of Appeals rules that a warrantless "probationer search" of the defendant's cell phone was

lawful in its inception and its scope. The Court explains the term "probationer search" as follows:

> "Probationer search" refers to the exception to the warrant requirement codified in ROW 9.94A.631(1), which provides:
>
> > If an offender violates any condition or requirement of a sentence, a community corrections officer may arrest or cause the arrest of the offender without a warrant, pending a determination by the court or by the department. If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.

2. State v. Simon Ortiz Martinez: On July 1, 2019, Division One of the COA rules for the State in rejecting defendant's appeal from his King County Superior Court conviction for first degree child rape. The Court of Appeals rules that the trial court did not err in admitting reasonably contemporaneous statements that the victim made to friends and her mother under the "fact of the complaint" (or "hue and cry") common law exception to the hearsay exception.

3. State v. Larry Jay French: On July 2, 2019, Division Three of the COA rules for the State in rejecting defendant's appeal from his Grays Harbor County Superior conviction for one count of first degree child molestation. The Court of Appeals rules that the trial court did not err in admitting hearsay statements from a ten-year-old victim as: (1) excited utterances (statements to the victim's mother), see ER 803(a))2); and (2) statements made for purposes of medical diagnosis and treatment (statements to a sexual assault nurse), see ER 803(a)(4).

4. State v. J.C.F.: On July 2, 2019, Division Two of the COA reverses the ruling of the Clark County Superior Court (Juvenile Court) that restored the right of J.C.F. (now an adult) to own or possess a firearm. J.C.F was prohibited from possessing or owning a firearm as a result of an adjudication of first degree child molestation many years ago in juvenile court. The Court of Appeals holds that the Juvenile Court erred in granting J.C.F.'s petition because RCW 9.41.040(4)(a) generally prohibits a person convicted of a sex offense from petitioning for the restoration of firearm rights and no exception to that prohibition applies here.

5. State v. Charles Carroll Hartzell: On July 9, 2019, Division Two of the COA rejects most of the defendant's arguments but agrees to his claim of prosecutor overreaching in cross examination. Thus, the Court of Appeals affirms defendant's Jefferson County Superior Court convictions for (1) attempting to elude a pursuing police vehicle, (2) hit and run property damage, (3) possession of methamphetamine, and (4) (5) two counts of unlawful possession of a payment instrument. However, concluding that the trial prosecutor committed prejudicial misconduct in cross examination of a defense witness, the Court of Appeals reverses defendant's conviction for possession of heroin with intent to deliver. The defendant loses his challenges (1) to an impound of his vehicle, and (2) to an inventory performed following the impound.

Defendant's challenge to the impound was that the officers should have considered reasonable alternatives to impound. The Court of Appeals describes the facts that support the Court's conclusion that such consideration was not necessary under the special facts of this case:

> [The defendant] did not own the vehicle, it was not drivable, it had to be removed from a tree which first had to be cut, it was on private property, and the crash took place late at

> night when it would have been difficult to reach the registered owner. In addition, no passengers were present who might have been able to take the vehicle, Hartzell had fled the scene, and officers were searching for him while [another officer] dealt with extracting the vehicle from the tree.

Defendant's challenge to the inventory asserted that the inventory search was pretextual as evidenced by the officers' failure to follow agency inventory procedures by doing a complete inventory. The Court of Appeals explains that the officers' actions acted lawfully in stopping the inventory when they transitioned from inventory to pursuit of a search warrant:

> The deputies' actions in this case are consistent with a lawful inventory search that rapidly became investigatory when they discovered incriminating evidence. Upon finding drugs in the vehicle, items of evidentiary value, they immediately stopped their inventory search and sealed the vehicle to get a warrant. Given that the discovery of this evidence transformed their motive from inventory to investigation, the deputies followed proper protocol when they discovered the drugs.

6. State v. John Michael Brooks: On July 9, 2019, Division Two of the COA rejects the appeal of defendant from his Cowlitz County Superior Court convictions for two counts of first degree rape of a child. Among other rulings, the Court of Appeals rules that under RCW 2.28.150 the trial court had the authority to permit an adult witness to testify at a State v. Ryan child-hearsay hearing via Skype.

7. State v. Patricia Joanne Lewis: On July 9, 2019, Division Two of the COA agrees with defendant's appeal and reverses her Grays Harbor County Superior Court conviction of unlawful possession of methamphetamine. The Court agrees with her argument that evidence in the case was the fruit of an unlawful search and should have been suppressed. The Court rules that an officer was not justified under the community caretaking function exception to the search warrant requirement. During a nighttime burglary investigation, an officer opened the door of a lawfully parked, unoccupied car with fogged-up windows after the officer (1) was unable to see through the windows and (2) did not get a response to his attempts to get the attention of any person (there was no one) who might be inside the car and might be in need of assistance.

8. State v. Jason E. Slotemaker: On July 15, 2019, Division One of the COA accepts the State's concession and rules for the defendant in his appeal from his Skagit County Superior Court conviction for cyberstalking in violation of RCW 9.61.260. Defendant argued that the cyberstalking statute is unconstitutionally overbroad in violation of the Washington State and United States Constitutions.

9. State v. Long Pham: On July 16, 2019, Division Two of the COA rejects defendant's appeal from his Clark County Superior Court convictions for (1) unlawful possession of a controlled substance (heroin) with intent to deliver; (2) unlawful possession of a controlled substance (methamphetamine); and (3) unlawful possession of a controlled substance (buprenorphine). The Court of Appeals rules that an officer's contact with defendant was a social contact, not a Terry stop, explaining:

> Here, the trial court's unchallenged findings of fact do not show that [the officer] displayed his weapon, physically touched Pham, blocked Pham's path, or attempted to prevent Pham from leaving. The trial court also found that [the officer] "used a normal speaking tone when questioning" Pham. These factors weigh in favor of concluding that the detective's contact with Pham was a social contact, at least until the point Pham fled.

> Pham argues, however, that [the officer's] statement that he "wanted to talk to [Pham] about the vehicle and whether it was stolen," taken in context, "carried the implication that compliance with [the officer's] request might be compelled." We disagree. Asking a question about possible illicit activity does not amount to a seizure unless the question was asked in a coercive manner. . . . Here, the trial court found that [the officer] told Pham that "he wanted to talk to [Pham] about the vehicle and whether it was stolen." But the trial court did not find that the [officer] commanded Pham to speak to him, told Pham that he could not leave, used an authoritative tone of voice, displayed a weapon, touched Pham, asked for permission to search Pham, or physically blocked Pham from leaving. Nor did the trial court find that any other officers were present. A reasonable person would have felt free to end the encounter and walk away.

10. State v. Scott Eugene Ridgley: On July 18, 2019, Division Three of the COA rejects the appeal of defendant from his Lewis County Superior Court convictions for possession of methamphetamine with intent to deliver, possession of Oxycodone with intent to deliver, and possession of Hydromorphone. The Court of Appeals rules that a search by a community corrections officer was lawful where

> Here, CCO Shirer had received a report that someone at Ridgley's address was dealing drugs and that Ridgley had not reported for drug treatment. Random urinalysis testing was a condition of Ridgley's supervision. Under these facts, Shirer had a reason to ask Ridgley to provide a urine sample for testing. When the test result was positive, Ridgley admitted to having recently used methamphetamine, a violation of his community supervision. On these facts, Shirer had reasonable grounds to search Ridgley's residence to see if more controlled substances might be found. The tip that the safe might contain drugs and cash justified the search of that object. The search was justified by RCW 9.94A.631 and [the Washington Supreme Court decision in State v. Cornwell, 190 Wn.2d 296 (2018)].

11. State v. Breanna Thorne: On July 29, 2019, Division One of the COA rejects defendant's appeal from her Snohomish County Superior Court convictions for one count of possession of a controlled substance, methamphetamine, and one count of possession of a controlled substance, heroin. The Court of Appeals summarizes the facts that support the Court's conclusion that the arresting officer lawfully searched the defendant's purse incident to her arrest:

> An officer may search personal articles in an arrestee's actual and exclusive possession at or immediately preceding the time of arrest. Immediately before the officer arrested Thorne, she was holding her purse in her lap or in her hands.

12. Personal Restraint of Allixzander Devell Harris: On July 31, 2019, Division Two of the COA rejects defendant's Personal Restraint Petition seeking relief from his Kitsap County Superior Court convictions for six counts of promoting commercial sexual abuse of a minor with aggravating factors, one count of tampering with a witness, and one count of second degree promoting prostitution. Harris loses on each of his multiple constitutional theories claiming that there was (1) a pretextual traffic stop, (2) a prolonged or unlawful detention, (3) a coerced consent to search, (4) an illegal search, and (5) a tainted probable cause affidavit.

13. State v. M.A.G.: On July 31, 2019, Division Two of the COA rejects the appeal of the juvenile defendant from a Pierce County Superior Court juvenile disposition order finding him guilty of attempted first degree rape of a child and first degree child molestation. The Court of

Appeals rules that, in light RCW 9A.44.120 and the multi-factor test of State v. Ryan, 103 Wn.2d 165 (1984), the trial court did not err in admitting the hearsay statements of the child victim.

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NEXT MONTH

The August 2019 Legal Update will include entries (likely condensed in form) on three Ninth Circuit decisions issued in July 2019. Those decisions are:

1. Rodriguez v. City of San Jose, ___ F.3d ___ , 2019 WL ___ (9th Cir., July 23, 2019) (in a Civil Rights Act lawsuit, the Court rules that the Community Caretaking Function exception to Fourth Amendment search warrant requirement supports law enforcement's seizing of guns in the home of a man who was a danger while experiencing an acute mental health crisis)

2. West v. City of Caldwell (ID), ___ F.3d ___ , 2019 WL ___ (9th Cir., July 25, 2019) (in a Civil Rights Act lawsuit, a majority of the three-judge panel rules that, because case law was not clearly established at the time of police actions, officers are entitled to qualified immunity on both voluntariness-of-consent and scope-of-consent issues in a case involving tear-gas assisted, destructive entry of a home to arrest a woman's former boyfriend who was a violent convict, was wanted on a felony arrest warrant, and was reported to be armed and high on drugs; one of the judges disagrees with the majority of the qualified immunity question of whether the scope of the woman's consent to police entry included permission to destroy property in the process of entry and arrest)

3. U.S. v. Iwai, ___ F.3d ___ , 2019 WL ___ (9th Cir., July 23, 2019) (in a criminal case, the Court rules 2-1 that exigent circumstances justified warrantless entry of a suspected drug dealer's condominium because it was reasonable to conclude that evidence was being destroyed, based on: (1) controlled delivery of an intercepted package of a large amount of methamphetamine; (2) activation of the package's beeper inside the condo; (3) police observations of movements inside the condo as they looked through an entry door's peephole after they knocked and announced their presence, and no one responded; and (4) noises that police heard inside the condo after they knocked and announced).

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

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

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

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

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

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

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

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

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

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

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