LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: Thank you!

June 2018

TABLE OF CONTENTS FOR JUNE 2018 LEGAL UPDATE

****

CORRECTION OF MAY 2018 LEGAL UPDATE REGARDING STATE V. SOLOMON

On page 30 of the version of the May 2018 Legal Update that I distributed to an email list, I listed as an unpublished opinion the following decision that actually was a *published* opinion:

> State Joshua Joseph Solomon: On May 29, 2018, Division One of the COA decides against the State in the State's appeal from the Skagit County Superior Court's dismissal of charges relating *to attempted sexual exploitation of a minor*. The Court if Appeals holds that a detective **acted outrageously** in violation of **constitutional due process protections** in the use of Craigslist in a sting that ultimately, after the detective's extensive, persistent entreaties to the defendant, caught defending soliciting child sex from a fake-minor who was actually the detective.

Within a few days of making the email distribution, I corrected the entry on Solomon in the final corrected version of the May 2018 Legal Update ("final second corrected") that is posted on the website of the Washington Association of Sheriffs and Police Chiefs.

****

2018 WASHINGTON LEGISLATIVE SUMMARIES FROM THE WASHINGTON ADMINISTRATIVE OFFICE OF THE COURTS

Readers may be interested in the 2018 legislative summaries by staff of the Administrative Office of the Courts. Go to Washington Courts Home Page. Click on Resources at the top right, scroll down to Legislative Summaries on the left column, and click on 2018 Legislative Summary. The April 2018 Legal Update noted that the 2018 End of Session Report of the Washington Association of Sheriffs and Police Chiefs (WASPC) can be found on the WASPC website.

****

UNITED STATES SUPREME COURT

FOURTH AMENDMENT RIGHT OF PRIVACY: CELL SITE LOCATION INFORMATION (CSLI), AT LEAST WHERE SUCH INFORMATION RELATES TO EXTENDED PERIOD OF TIME, IS GENERALLY SUBJECT TO THE SEARCH WARRANT REQUIREMENT

Carpenter v. United States, ___ S.Ct. ___ , 2018 WL 3073916 (June 22, 2018)

LEGAL UPDATE INTRODUCTORY COMMENT: In its Carpenter decision that was widely reported nationally, the U.S. Supreme Court ruled 5-4 that a search warrant based on probable cause is generally required under the federal constitution's Fourth Amendment for the non-exigent, non-emergent, non-consenting obtaining of CSLI, at least where the CSLI shows the location of a person over an extended period of time. The Majority Opinion (Opinion) by Justice Roberts is joined by five other justices.

The Opinion declares that the ruling "is a narrow one." But what does that mean?

The Opinion points out that the ruling does not "express a view on" other privacy issues, such as obtaining cell-site location records "in real time," or getting information about all of the phones "that connected to a particular cell site during a particular [shorter] interval." The Opinion also suggests that law-enforcement officials might sometimes still be able to obtain otherwise private cell-site location records without a warrant to deal with exigent and emergency circumstances such as "bomb threats, active shootings, and child abductions." The Opinion also leaves open the possibility that law-enforcement officials might not need a warrant to obtain cell-site location records for a shorter period of time than the lengthy period (at least seven days, and maybe 100+ days, depending on how you read the Opinion) involved in Carpenter's case. For example, that might allow law enforcement to proceed without a warrant or warrant exception to generally get information about where someone was on the day of a single criminal event.

Officers in Washington are subject to the often tighter restrictions of the Washington State Constitution, article I, section 7, as construed by the Washington appellate courts. My guess is that under both the Fourth Amendment and the Washington constitution, warrantless obtaining of CSLI will be allowed under exigent circumstances and emergency and consenting circumstances

As for other limits of Carpenter regarding warrantless obtaining of CSLI for shorter periods of time, I hesitate to venture a guess where lines might be drawn under the Fourth Amendment. I will be checking resources in Washington and elsewhere to see what is being advised by others regarding the reach of Carpenter (but I note that one of my favorite places for checking on Fourth Amendment interpretations, California, likely is negligibly affected by Carpenter because that state passed electronic privacy legislation in 2016 that generally requires a search warrant for gathering CSLI). But I have a relatively strong feeling that the Washington appellate courts will interpret article I, section 7 of the Washington constitution as requiring a search warrant for non-exigent, non-emergency, non-consenting circumstances.

As always, I urge that law enforcement folks consult their own agency legal advisors and local prosecutors. Many of them will likely consult the experts in the Special Operations Unit of the King County Prosecutor's Office.

Facts and Proceedings below: (Excerpted from Supreme Court majority opinion)

> In 2011, police officers arrested four men suspected of robbing a series of Radio Shack and (ironically enough) T-Mobile stores in Detroit. One of the men confessed that, over the previous four months, the group (along with a rotating cast of getaway drivers and

lookouts) had robbed nine different stores in Michigan and Ohio. The suspect identified 15 accomplices who had participated in the heists and gave the FBI some of their cell phone numbers; the FBI then reviewed his call records to identify additional numbers that he had called around the time of the robberies.

Based on that information, the prosecutors applied for court orders under the Stored Communications Act to obtain cell phone records for petitioner Timothy Carpenter and several other suspects. . . . . Altogether the Government obtained 12,898 location points cataloging Carpenter's movements – an average of 101 data points per day.

Carpenter was charged with six counts of robbery and an additional six counts of carrying a firearm during a federal crime of violence. Prior to trial, Carpenter moved to suppress the cell-site data provided by the wireless carriers. He argued that the Government's seizure of the records violated the Fourth Amendment because they had been obtained without a warrant supported by probable cause. The District Court denied the motion.

At trial, seven of Carpenter's confederates pegged him as the leader of the operation. In addition, FBI agent Christopher Hess offered expert testimony about the cell site data. Hess explained that each time a cell phone taps into the wireless network, the carrier logs a time-stamped record of the cell site and particular sector that were used. With this information, Hess produced maps that placed Carpenter's phone near four of the charged robberies. In the Government's view, the location records clinched the case: They confirmed that Carpenter was "right where the . . . robbery was at the exact time of the robbery." Carpenter was convicted on all but one of the firearm counts and sentenced to more than 100 years in prison.

The Court of Appeals for the Sixth Circuit affirmed.

ISSUE AND RULING: In the robbery investigation, were the federal officers required to obtain a search warrant to obtain from providers Metro PCS and Spring the cell-site location information? (ANSWER BY SUPREME COURT: Yes, rules a 5-4 majority)

Chief Justice Roberts authors the Majority Opinion that is joined by Justices Ginsburg, Breyer, Sotomayor and Kagan. Justice Kennedy writes a dissent that is joined by Justices Thomas and Alito. Justice Thomas writes a dissent that Justice Alito joins. Justice Alito writes a dissent that Justice Thomas joins. Justice Gorsuch writes a dissent that is not joined by any other justice.

Result: Reversal of U.S. Sixth Circuit Court of Appeals decision that affirmed the District Court conviction and the District Court rejection of the suppression motion; case remanded for possible re-trial.

ANALYSIS BY MAJORITY JUSTICES: (Excerpted from syllabus/summary by staff of the Supreme Court; the summary is not part of the Supreme Court's opinion; some of the paragraphing has been revised for ease of reading)

The Government's acquisition of Carpenter's cell-site records was a Fourth Amendment search.

(a) The Fourth Amendment protects not only property interests but certain expectations of privacy as well. Katz v. United States, 389 U. S. 347, 351 (1967). Thus, when an

individual "seeks to preserve something as private," and his expectation of privacy is "one that society is prepared to recognize as reasonable," official intrusion into that sphere generally qualifies as a search and requires a warrant supported by probable cause. Smith v. Maryland, 442 U. S. 735, 740 (1979). [Smith is a pen register case that places certain phone company customer records outside Fourth Amendment protection.]

The analysis regarding which expectations of privacy are entitled to protection is informed by historical understandings "of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted." Carroll v. United States, 267 U. S. 132, 149 (1925). These Founding-era understandings continue to inform this Court when applying the Fourth Amendment to innovations in surveillance tools. See, e.g., Kyllo v. United States, 533 U. S. 27 (2001) [Kyllo generally required a search warrant to use a thermal imaging device at a residence.]

(b) The digital data at issue – personal location information maintained by a third party – does not fit neatly under existing precedents but lies at the intersection of two lines of cases. One set addresses a person's expectation of privacy in his physical location and movements. See, e.g., United States v. Jones, 565 U. S. 400 (2012) (five Justices concluding that privacy concerns would be raised by GPS tracking). The other addresses a person's expectation of privacy in information voluntarily turned over to third parties. See United States v. Miller, 425 U. S. 435 (1976) (no expectation of privacy in financial records held by a bank), and Smith v. Maryland, 442 U. S. 735 (1979) (no expectation of privacy in records of dialed telephone numbers conveyed to telephone company).

(c) Tracking a person's past movements through CSLI partakes of many of the qualities of GPS monitoring considered in Jones – it is detailed, encyclopedic, and effortlessly compiled. At the same time, however, the fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principle of Smith and Miller. Given the unique nature of cell-site records, this Court declines to extend Smith [phone company customer records] and Miller [bank customer records] to cover them.

(1) A majority of the Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. Allowing government access to cell-site records – which "hold for many Americans the 'privacies of life,' " Riley v. California, 134 S.Ct. 2473 (2014) – contravenes that expectation. [Riley precluded automatic cell phone searches incident to arrest.]

In fact, historical cell-site records present even greater privacy concerns than the GPS monitoring considered in Jones: They give the Government near perfect surveillance and allow it to travel back in time to retrace a person's whereabouts, subject only to the five-year retention policies of most wireless carriers.

The Government contends that CSLI data is less precise than GPS information, but it thought the data accurate enough here to highlight it during closing argument in Carpenter's trial. At any rate, the rule the Court adopts "must take account of more sophisticated systems that are already in use or in development," Kyllo, 533 U. S., at 36, and the accuracy of CSLI is rapidly approaching GPS-level precision.

(2) The Government contends that the third-party doctrine governs this case, because cell-site records, like the records in Smith and Miller, are "business records," created and

maintained by wireless carriers. But there is a world of difference between the limited types of personal information addressed in Smith and Miller and the exhaustive chronicle of location information casually collected by wireless carriers.

The third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. Smith and Miller, however, did not rely solely on the act of sharing.

They also considered "the nature of the particular documents sought" and limitations on any "legitimate 'expectation of privacy' concerning their contents." Miller, 425 U. S., at 442. In mechanically applying the third-party doctrine to this case the Government fails to appreciate the lack of comparable limitations on the revealing nature of CSLI.

Nor does the second rationale for the third-party doctrine – voluntary exposure – hold up when it comes to CSLI. Cell phone location information is not truly "shared" as the term is normally understood.

First, cell phones and the services they provide are "such a pervasive and insistent part of daily life" that carrying one is indispensable to participation in modern society. Riley, 573 U. S., at ___. Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the user's part beyond powering up.

(d) This decision is narrow. It does not express a view on matters not before the Court; does not disturb the application of Smith and Miller or call into question conventional surveillance techniques and tools, such as security cameras; does not address other business records that might incidentally reveal location information; and does not consider other collection techniques involving foreign affairs or national security.

2. The Government did not obtain a warrant supported by probable cause before acquiring Carpenter's cell-site records. It acquired those records pursuant to a court order under the Stored Communications Act, which required the Government to show "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation." 18 U. S. C. §2703(d). That showing falls well short of the probable cause required for a warrant. Consequently, an order issued under §2703(d) is not a permissible mechanism for accessing historical cell-site records.

Not all orders compelling the production of documents will require a showing of probable cause. A warrant is required only in the rare case where the suspect has a legitimate privacy interest in records held by a third party. And even though the Government will generally need a warrant to access CSLI, case-specific exceptions – e.g., exigent circumstances – may support a warrantless search.

[Some citations omitted; other citations revised for style; bracket explanatory material re citations inserted by Legal Update editor]

CIVIL RIGHTS ACT CIVIL LIABILITY: HIGH COURT AVOIDS BROAD QUESTION OF WHETHER PROBABLE CAUSE TO ARREST GENERALLY DEFEATS A CLAIM THAT RETALIATION FOR FREE SPEECH MOTIVATED THE ARREST

In Lozman v. Riviera Beach, ___ S.Ct. ___ , 2018 WL ___ (June 18, 2018), the U.S. Supreme Court avoids the broad issue on which the parties in the case sought resolution. That broad issue asked: Does probable cause to arrest always defeat a plaintiff's claim under the Civil Rights Act that the arrest was motivated by retaliation against the plaintiff for exercising First Amendment Free Speech rights? Only Justice Thomas in dissent wanted to decide that broad issue. His dissent states that he would have ruled in favor of the government.

Plaintiff was arrested at a city council meeting when he refused to leave the podium after admittedly violating the council's reasonable rules for the subject matter to be discussed by speakers. The undiplomatic plaintiff sued based on his theory that the real reason for his arrest was not his admitted violation of the rules for council presentations, but instead was a longstanding plan among council members to intimidate him because of his political views.

Justice Thomas criticizes the eight majority Justices for finding a way for the lawsuit to continue, albeit only on very narrow grounds. Justice Thomas argues as follows that the majority ruling allows the Free Speech retaliation suit to overcome probable cause to arrest only if the plaintiff can prove five special circumstances:

> By my count, the Court has identified five conditions that are necessary to trigger its new rule. First, there must be "an 'official municipal policy" of intimidation." Second, the policy must be "premeditated" and formed well before the arrest—here, for example, the policy was formed "months earlier." Third, there must be "objective evidence" of such a policy. Fourth, there must be "little relation" between the "protected speech" that prompted the retaliatory policy and "the criminal offense for which the arrest is made." Finally, the protected speech that provoked the retaliatory policy must be "high in the hierarchy of First Amendment values." Where all these features are present, the Court explains, there is not the same "causation problem" that exists for other retaliatory-arrest claims.

[Citations omitted]

Result: Vacation of Eleventh Circuit's summary judgment ruling for the City of Riviera Beach; remand of case for the Eleventh Circuit to decide whether the circumstances qualify for a retaliation lawsuit under the Supreme Court's standards. The Supreme Court majority opinion states that the Eleventh Circuit "may wish to consider (1) whether any reasonable juror could find that the City actually formed a retaliatory policy to intimidate Lozman during its June 2006 closed-door session; (2) whether any reasonable juror could find that the November 2006 arrest constituted an official act by the City; and (3) whether . . . the City has proved that it would have arrested Lozman regardless of any retaliatory animus – for example, if Lozman's conduct during prior city council meetings had also violated valid rules as to proper subjects of discussion, thus explaining his arrest here."

****

NINTH CIRCUIT, UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT CIVIL LIABILITY: QUALIFIED IMMUNITY GRANTED TO OFFICERS WHO USED THEIR HANDS AND BATONS IN DEALING WITH PROTESTORS IN AN "OCCUPY WALL STREET" DEMONSTRATION IN NOVEMBER 2011; ALSO, QUALIFIED IMMUNITY GRANTED TO SUPERVISORS

In Felarca v. Birgenau, ___ F.3d ___ , 2018 WL ___ (9th Cir., May 31, 2018), a three-judge Ninth Circuit panel reverses the U.S. District Court's judgment and rules in favor of the government defendants in a Civil Rights Act case where protestors in an Occupy Wall Street demonstration sued University of California officials and officers for the officers' use of batons against protesters.

The Ninth Circuit panel's Majority Opinion describes the facts and procedural background in the case as follows:

> Thousands of protestors, inspired by the Occupy Wall Street movement, held a rally at the University of California, Berkeley on November 9, 2011. The protestors planned in advance to construct an encampment during the rally in violation of university policy. Berkeley administrators became aware of the plan weeks before when protest organizers distributed flyers seeking tents and other camping supplies.
>
> Driven by a concern over the health and safety risks that might accompany a long-term encampment, a team of university administrators preemptively developed an operational plan to deal with the protests and asked campus police to be ready to enforce the university's existing no-camping policy. Two days before the rally, university administrators warned students in a campus-wide email that the no-camping policy would be enforced.
>
> At noon on November 9, some protestors engaged in a peaceful rally without incident. A few hours later, however, the protestors erected tents. After reading a dispersal order to the protestors, police took the tents down when the protestors refused to do so. Soon, the protestors began setting up more tents in the same area.
>
> The police returned wearing riot gear. Many of the protestors formed a human chain to block officers from reaching the tents. Police gave several bullhorn warnings ordering the protestors to take down the tents and disperse, although some protestors could not understand the warnings.
>
> When the warnings had no effect, officers then used their hands and batons to move the crowd, gain access to the tents, and maintain a perimeter while dismantling the encampment. Some protestors attempted to grab the officers' batons, shouted, and pushed against them.
>
> At least one protestor ended up in the hospital. Following the afternoon's events, university administrators tried to compromise with the protestors, agreeing to round-the-clock protests so long as the protestors did not set up encampments. The protestors rejected the offer, shouting profanities.
>
> That evening police made a coordinated effort to take down additional tents protestors had set up. Police again gave bullhorn warnings to take down the tents and disperse, but again some protestors could not understand the warnings. When the protestors continued to block the police, the police again used their hands and batons to access and remove the tents.

> The police arrested at least thirty-six protestors throughout the day for obstructing the officers and resisting arrest. At least one more protestor ended up in the hospital following the evening's events.
>
> Subsequent to the November 9 protests, some of the protestors filed the instant action against university administrators and police officers, alleging the officers used excessive force against them while removing the tents. Defendants moved for summary judgment on the ground of qualified immunity.
>
> The district court denied summary judgment motions by two University of California Police Department (UCPD) officers as to direct excessive force claims, and by five university administrators and three UCPD officers as to supervisory excessive force claims. In denying the motions, the district court concluded that triable issues of fact existed as to the reasonableness of defendants' actions.

[Paragraphing revised to enhance readability]

ISSUE AND RULING: Are the officers and their supervisors entitled to qualified immunity on the rationale that the force used, viewing the factual allegations in the best light for the protestor-plaintiffs, was reasonable under the circumstances? (ANSWER BY NINTH CIRCUIT: Yes)

Result: Reversal of U.S. District Court order denying qualified immunity to University of California police officers.

ANALYSIS/RULING:

A staff summary (which is not part of the panel's decision) summarizes the Ninth Circuit panel's ruling as follows:

> Addressing first the claims of direct excessive force brought by plaintiffs [the protesters] against Officer Lachler and Sergeant Tucker, the panel noted that none of the plaintiffs who brought these claims suffered injuries from defendants' blows that required medical treatment or kept them from returning to the protest. Thus, the panel concluded that, even if the force used was of a type that is generally intrusive, the amount of force applied here was minimal.
>
> The panel held that the government had a legitimate interest in applying minimal force to maintain order and enforce University policy. On balance, the panel concluded that Officer Lachler and Sergeant Tucker did not use excessive force, and reversed the district court's summary judgment and remanded for the district court to grant summary judgment in their favor.
>
> The panel next addressed plaintiffs' claims that the supervisory defendants planned the police response and failed to stop assaults by the police. The panel held that the district court erred by denying summary judgment to Vice Chancellor Le Grande, Associate Chancellor Williams, and Associate Vice Chancellor Holmes, who were not in the police chain of command, and had no supervisory authority over the police who allegedly committed the violations. The panel then held that Chancellor Birgeneau, Executive Vice Chancellor Breslauer, and Police Chief Celaya, who were in the police chain of command, did not have sufficient personal involvement in the alleged acts of force. The

panel held that summary judgment should have been granted by the district court on these claims, and the panel reversed and remanded for the district court to do so.

Addressing supervisory force claims against University of California Police Lieutenant DeCoulode and Sergeant Tucker, the panel noted that a number of the plaintiffs had failed to identify the police officers who used excessive force against them and failed to show that these unnamed officers were among those in Lieutenant DeCoulode or Sergeant Tucker's chain of command. Nor had these plaintiffs provided evidence that Lieutenant DeCoulode or Sergeant Tucker ordered or failed to stop any action that they knew or reasonably should have known would cause the officer to use excessive force.

As to the supervisory force claims brought by plaintiffs that had identified the subordinate officers, the panel held that even assuming, without deciding, that the named subordinate officers used excessive force against each plaintiff, plaintiffs had not met their required burden to show the law was clearly established at the time that the officers' baton strikes violated their constitutional rights**.** Because plaintiffs had not shown a violation of a clearly established right, it necessarily followed that Lieutenant DeCoulode and Sergeant Tucker could not have violated a clearly established right by supervising the officers who allegedly used force against plaintiffs.

Concurring, Judge Watford joined all but [one section] of the court's opinion. In his view, the officers used excessive force when they struck plaintiffs with batons solely for the purpose of dispersing the crowd. Nonetheless, he believed that the officers were entitled to qualified immunity because the law at the time they acted did not clearly establish the illegality of their conduct. He would rule for the defendants on the direct force claims solely on that basis.

[Some paragraphing revised to enhance readability]

CIVIL RIGHTS ACT CIVIL LIABILITY: UNDER EIGHTH AMENDMENT ANALYSIS, LARGE JURY-TRIAL JUDGMENT AGAINST LOS ANGELES COUNTY JAIL PERSONNEL UPHELD FOR PRISONERS WHO WERE SEVERELY INJURED DURING CELL EXTRACTIONS THAT TURNED VIOLENT

In Rodriguez v. Cruz, ___ F.3d ___ , 2018 WL ___ (9th Cir., May 30, 2018), a three-judge Ninth Circuit panel affirms the U.S. District Court's judgment in favor of plaintiff-inmates following a jury trial, in a Civil Rights Act lawsuit brought by five prisoners who were severely injured during the course of cell extractions at the Los Angeles County Men's Central Jail. The Ninth Circuit panel concludes that the Eighth Amendment rights of the prisoners against cruel and unusual punishment were violated by correctional officers, that supervisors are liable too, that the agency is liable as well for municipal liability, and that qualified immunity does not apply because the law on point was clearly established at the time of the actions at issue.

A staff summary (which is not part of the panel's decision) summarizes the Ninth Circuit panel's ruling in key parts as follows:

The panel held that the district court did not err by denying appellants' Fed.R.Civ.P. 50(b) motion, based on qualified immunity, for judgment as a matter of law. The panel held that there was abundant evidence presented to the jury that appellants inflicted

severe injuries on [the prisoners] while they were not resisting, and even while they were unconscious.

A jury could reasonably reject [the government defendants'] argument that they acted reasonably and instead determine that the force was not part of a good-faith effort to maintain or restore discipline. The panel therefore rejected appellants' sufficiency of the evidence challenge to the jury's finding of a constitutional violation.

The panel also found unpersuasive [the government] appellants' arguments that the law regarding their conduct was not clearly established [for purposes of qualified immunity analysis]. Addressing the liability of the deputy appellants, the panel held that no reasonable deputy in appellants' position would have believed that beating a prisoner to the point of serious injury, unconsciousness, or hospitalization solely to cause him pain was constitutionally permissible.

The panel rejected the argument that the limits on the proper use of tasers were still unclear as of 2008, stating that once a jury has determined on the basis of sufficient evidence that prison officials maliciously and sadistically used more than *de minimis* [minimal] force to cause harm, contemporary standards of decency, and thus the Eighth Amendment, always are violated.

The panel held that the supervisor appellants – the sergeants who directed the extraction teams and their superiors – were not entitled to qualified immunity. The panel held that to the extent that these appellants stood by and observed the extractions but knowingly refused to terminate the deputies' unconstitutional acts, they were individually liable.

The panel determined that ample evidence – including [the correctional supervisors'] own testimony – supported the conclusion that appellants directed and observed most of the extraction teams. The panel held that although it was unclear whether Captain Cruz directly observed all of the extractions, a jury could reasonably find the requisite causal connection to hold Cruz liable for his own culpable action or inaction in the training, supervision, or control of his subordinates.

. . . .

The panel [also] held that the record amply supported the jury's verdict and the district court's ruling of municipal liability under Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 694 (1978). The panel held that there was substantial evidence of repeated constitutional violations [in the past], of the Los Angeles County Sheriff's Department awareness of those violations, and of its failure to take any remedial action.

The panel concluded that legal precedent permitted the jury to infer that the Sheriff's Department had adopted a custom or practice of condoning excessive force and that this culture of violence and impunity proximately caused the injuries inflicted on appellees.

Result: Affirmance of U.S. District Court judgment in favor of plaintiff-inmates following a jury trial, with award of compensatory damages ($740,000) and award of punitive damages ($210,000), and award of attorney fees ($5,378,175).

****

WASHINGTON STATE COURT OF APPEALS

SUFFICIENT EVIDENCE HELD TO SUPPORT TWO CONVICTIONS: (1) CONVICTION FOR VEHICULAR HOMICIDE IN CHAIN-REACTION CRASH CASE, EVEN THOUGH ANOTHER VEHICLE WAS THE DIRECT CAUSE OF DEATH WHEN IT CAME UPON THE SCENE AND PROPELLED AN ORIGINALLY REAR-ENDED VEHICLE INTO A GOOD SAMARITAN VICTIM; AND (2) CONVICTION FOR CONSPIRACY TO COMMIT PERJURY, EVEN THOUGH CO-CONSPIRATOR (A) TESTIFIED THAT HE LIED ON HIS OWN AND (B) NEVER FINGERED THE HIT-AND-RUN DRIVER AS PUTTING HIM UP TO THE LIE

State v. Frahm, ___ Wn. App.2d ___, ___ P.3d ___ (Div. II, May 30, 2018)

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

> Shortly before dawn on December 7, 2014, a Ford F-150 truck driven by Frahm rear-ended a Honda CR-V sport utility vehicle (SUV) driven by Steven Klase. The impact caused the SUV to spin out of control, strike a concrete barrier in the freeway median, and come to rest partially blocking the left and middle lanes of I-205. Klase sustained serious injuries and remained in his vehicle. Frahm fled the scene.
>
> An eyewitness, Richard Irvine, stopped his vehicle on the right shoulder. Irvine activated his vehicle's emergency flashers, exited his vehicle, and crossed the freeway on foot. Seeing Klase's injuries, Irvine called 911. While Irvine spoke with a 911 dispatcher, a Honda Odyssey minivan driven by Fredy Dela Cruz-Moreno approached in the left lane. Cruz-Moreno's minivan struck Klase's vehicle and propelled it into Irvine. As a result, Irvine died.
>
> Later that same day, Frahm, the registered owner of the F-150, contacted police to report his vehicle as stolen. When the police later recovered Frahm's truck, it had front end damage.
>
> The police processed the vehicle, and Frahm's DNA (deoxyribonucleic acid) matched DNA taken from the deployed airbag. The police interrogated Frahm, and he maintained both that his truck had been stolen and that he had not been driving at the time of the accident.
>
> In February 2015, a witness, Dusty Nielsen, contacted the police. Nielsen provided an alibi for Frahm for the time of the accident. Nielsen lied. Frahm had not been with Nielsen the night of the accident. The two men did not know each other until they met in jail, after the accident. When questioned by police about discrepancies in his story, Nielsen recanted. He insisted that he alone came up with the idea to provide the false alibi.
>
> The State charged Frahm with six crimes: vehicular homicide, manslaughter in the first degree, vehicular assault, hit and run, false reporting, and conspiracy to commit perjury in the first degree.
>
> . . . .
>
> The jury convicted Frahm of vehicular homicide, vehicular assault, hit and run, false reporting, and conspiracy to commit perjury. . . . .

ISSUES AND RULINGS: (1) Frahm was drunk when he rear-ended another vehicle. A Good Samaritan saw the crash, stopped and got out of his vehicle to help. Another vehicle came along and struck the originally rear-ended vehicle, propelling it into the Good Samaritan. Does evidence in the trial court record support Frahm's conviction for vehicular homicide? (ANSWER BY COURT OF APPEALS: Yes)

(2) The alleged co-conspirator in a perjury scheme admitted that he lied to police about being the driver of a hit-and-run truck in a fatal accident, but (A) he insisted that he came up with the lie by himself, and (B) he never fingered the actual driver as putting him up to the lie. Does evidence in the trial court record support Frahm's conviction for conspiracy to commit perjury? (ANSWER BY COURT OF APPEALS: Yes, there is sufficient evidence that (A) Nielsen and Frahm met in jail, (B) they hatched the plan to provide Frahm with a false alibi, (C) Frahm provided Nielsen with the details necessary to make the lie appear more credible, including a description of his truck's interior on the night of the accident.

Result: Affirmance of Clark County Superior Court convictions of Joshua Cane Frahm for vehicular homicide, vehicular assault, hit and run, false reporting, and conspiracy to commit perjury.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) Sufficient Evidence Supports the Vehicular Homicide Conviction

> Frahm argues that the evidence did not support the jury's finding that his actions proximately caused Irvine's death. Frahm asserts that Irvine's acts of stopping his car and crossing the freeway to render aid to Klase constituted a superseding, intervening cause. In a separate [brief], Frahm also argues that the secondary collision between Cruz-Moreno's minivan and Klase's disabled SUV also broke the causal chain as a superseding cause. We disagree.
>
> A driver is guilty of vehicular homicide "[w]hen the death of any person ensues within three years as a proximate result of injury proximately caused by the driving of any vehicle by any person." RCW 46.61.520(1).
>
> Legal causation, "involves a determination of whether liability *should* attach as a matter of law given the existence of cause in fact. If the factual elements of the tort are proved, determination of legal liability will be dependent on 'mixed considerations of logic, common sense, justice, policy, and precedent.'" . . .
>
> A defendant's conduct is a "'proximate cause' of harm to another if, in direct sequence, unbroken by any new independent cause, it produces the harm, and without it the harm would not have happened.". . . A defendant need not be the sole cause of the harm to be held responsible. However, a defendant's conduct will not be considered a proximate cause of the harm if a superseding cause intervenes.
>
> . . . .
>
> A superseding cause "is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another." . . . A superseding cause

relieves the defendant of liability even if the defendant's actions helped bring about the harm. . . .

"An intervening cause is a force that operates to produce harm *after* the defendant has committed the act or omission." State v. Roggenkamp, 115 Wn. App. 927, 945 (2003) affirmed, 153 Wn.2d 614 (2005). "A force set in motion at an earlier time is an intervening force if it first operates after the actor has lost control of a situation and the actor neither knew nor should have known of its existence at the time of his negligent conduct." Roggenkamp, 115 Wn. App. at 945 (quoting Restatement (Second) of Torts § 441(1), cmt. a (1965)).

An intervening act will not relieve a defendant from culpability unless the act is not reasonably foreseeable. Roggenkamp. "In determining whether an intervening act is a superseding cause, we consider whether the intervening act (1) created a different type of harm, (2) constituted an extraordinary act, and (3) operated independently of the defendant's actions. Roggenkamp.

. . . .

Roggenkamp is similar to this case. In Roggenkamp, the defendant drove on a two-lane county road that had a posted 35 miles per hour speed limit. He entered the oncoming traffic lane to pass another vehicle and reached a speed of roughly 70 miles per hour. While Roggenkamp was still in the oncoming lane, a vehicle turned into that lane from an intersection. Roggenkamp collided with that vehicle, seriously injuring three passengers and killing another. The driver of the vehicle Roggenkamp hit had a blood alcohol content over the legal limit for driving.

Roggenkamp held that the drunk driver's actions were not a superseding cause of the accident for two reasons. First, the drunk driver's action of turning left onto a two-lane residential roadway was reasonably foreseeable. Second, Roggenkamp's recklessness was ongoing when the drunk driver pulled out of the intersection. Here, as in Roggenkamp, the acts of the driver and a passerby were foreseeable.

. . . .

Here, there is nothing "so highly extraordinary or unexpected" to compel us to review this issue as a matter of law. Instead we review whether any rational jury could find the essential elements of the crime beyond a reasonable doubt. Although this specific victim may not have been foreseeable, the general field of danger was clearly foreseeable. And the record as a whole supports that a reasonable jury could find beyond a reasonable doubt that Frahm's rear-ending Klase's vehicle proximately caused Irvine's death.

(2) Sufficient Evidence Supports Conspiracy to Commit Perjury

Frahm next argues that insufficient evidence supports his conviction for conspiracy to commit perjury in the first degree because there is no evidence of an agreement. Nielsen testified that no agreement existed because the plan to secure Frahm's freedom by providing the police with a false alibi was his and his alone. We disagree that the evidence is insufficient.

The State charged Frahm of reaching an agreement with Nielson to "make a materially false statement which he knows to be false under oath," and asserted that either Frahm or Nielson took a substantial step in pursuance of the agreement.

A person is guilty of conspiracy if, with the intent to commit a crime, "he or she agrees with one or more persons to engage in or cause the performance of such [criminal] conduct, and any one of them takes a substantial step in pursuance of such agreement." RCW 9A.28.040(1). In an official proceeding, making "materially false" statements to police is a crime. RCW 9A.72.020(1). . . .

In this case, Nielsen testified that the plan to secure Frahm's freedom by providing police with a false alibi was his and his alone. Frahm argues Nielsen's testimony proves there was no agreement between the parties, and thus there can be no conspiracy.

Frahm relies heavily on State v. Pacheco, which reversed the defendant's conviction for conspiracy to commit murder in the first degree. 125 Wn.2d 150, 151 (1994). Pacheco, a Clark County Sheriff's Deputy, provided security for a man he believed to be a drug dealer. Pacheco agreed to murder a purported drug buyer who had allegedly cheated the drug dealer. However, the "drug dealer" was actually an undercover police informant and part of a joint FBI and Clark County Sheriff's investigation. [The Court of Appeals in Pacheco] concluded that because the defendant's "coconspirator" never actually intended an actual murder, no agreement existed; therefore, no conspiracy existed. "A conspiratorial agreement necessarily requires more than one to agree because it is impossible to conspire with oneself. We conclude that . . . the Legislature intended to retain the requirement of a genuine or bilateral agreement." .

Frahm's reliance on Pacheco is unpersuasive. Although the crime of conspiracy does require proof of agreement, that proof may come in the form of circumstantial evidence. . . . "A formal agreement is not necessary." . . .

Nielsen and Frahm met in jail. They hatched the plan to provide Frahm with a false alibi. Frahm provided Nielsen with the details necessary to make the lie appear more credible, including a description of his truck's interior on the night of the accident.

When viewing the evidence and its reasonable inferences in a light most favorable to the State, sufficient evidence supports Frahm's conspiracy conviction.

[Some citations omitted, other citations revised for style; footnotes omitted]

CIVIL RIGHTS ACT CIVIL LIABILITY: NO QUALIFIED IMMUNITY WHERE WSP TROOPER USED A "DOOR CHECK" MANEUVER TO STOP A SPEEDING MOTORCYCLIST BY KNOCKING HIM OFF THE CYCLE AND OFF A BRIDGE AS SPEEDER TRIED TO GO BY TROOPER'S CAR

In Sluman v. State, ___ Wn. App.2d ___ , ___ P.3d ___ (Div. III, May 22, 2018), in which, among other rulings, the Court of Appeals denies qualified immunity to the State of Washington defendants in a Civil Rights Act excessive force lawsuit. At issue was whether a WSP Trooper in a patrol car used excessive force under the Fourth Amendment when he used a "door-check" maneuver by opening his driver's door in order to stop a speeding motorcyclist by knocking the

speeder off the motorcycle (and, incidentally, off a 30-foot-high bridge) as the speeder tried to drive by the Trooper.

The three-judge panel is in agreement that law enforcement's "door-checking," the opening of a patrol car door so that the door strikes and stops a speeding motorcyclist, is a Fourth Amendment "seizure." The Court states that door-checking is considered by the WSP to be lethal force. And the Court holds in reasonableness balancing under Graham v. Connor, 490 U.S. 386 (1989), was excessive where, viewing the facts in the best light for the plaintiff speeder: (1) the trooper lacked probable cause to believe that the plaintiff had committed a crime involving serious physical harm to another, and (2) at the time of the door-check the plaintiff was obeying all traffic laws except the speed limit. The judges agree that the officer is not entitled to qualified immunity even though the judges have "some difficulty in discerning clearly established law" in light of the court's inability to find a prior case involving a door check.

A key part of the lead opinion's analysis of the excessive force piece is as follows:

> The balancing process applied in excessive force cases demonstrates that, notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. Tennessee v. Garner, 471 U.S. at 9 (1985). As a subset of excessive force claims, the United States Supreme Court has held that police use of "deadly force" violates the Fourth Amendment unless the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others. . . .
>
> . . . . [T[he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. On the other hand, if the suspect threatens the officer with a weapon or probable cause exists to believe that he committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, when feasible, some warning has been given. Tennessee v. Garner, 471 U.S. at 11-12. Under Thomas Sluman's version of the facts, he received no warning.
>
> Even under the State's version of the facts, Thomas Sluman did not commit a crime involving serious physical harm to another. Law enforcement sought to stop Sluman for speeding. Washington State Patrol officers did not even seek to capture Sluman because of a crime. Sluman was not armed. No officer knew that Sluman discerned he was being pursued. According to [one of the testifying troopers], Sluman never looked in his direction. Thus, no officer knew that Sluman sought to elude the police.
>
> [The trooper who used the door check maneuver] asserts that he held a governmental interest in protecting the public from injury or death when stopping Thomas Sluman. [The trooper] emphasizes that the motorcycle's high speed posed a risk to persons in the immediate area.
>
> . . . . [T]he government's interest in ending a high-speed chase of an unarmed perpetrator does not justify deadly force. Accordingly, the Fourth Amendment's right to be free from unreasonable seizure prohibits the use of lethal force to apprehend a fleeing felon in the absence of an immediate threat of serious physical harm or death. . .
>
> . . . .

> The facts viewed in the light most favorable to Thomas Sluman distinguish this appeal from [Mullenix v. Luna, 136 S.Ct. 305, (2015); Scott v. Harris, 550 U.S. 372, 374-75 (2007) Plumhoff v. Rickard, 134 S.Ct. 2012 (2014); and Brosseau v. Haugen, 543 U.S. at 200 (2004)]. Thomas Sluman drove on a two-lane highway, not in a residential neighborhood. An unpopulated South Thorp Highway lacked turns into business parking lots. Sluman did not endanger the public by driving erratically through a parking lot. Officers formed the intent to stop Sluman after witnessing him speeding on the highway. Sluman bore no arms, did not appear armed, and communicated no threats to police officers or anyone else. Sluman did not weave through traffic and did not aggressively pass cars in an attempt to elude the police. Sluman also did not act as a threat by hitting police cars in an attempt to escape. Sluman only struck [the door-checking trooper's] car when Olson door-checked Sluman and sent him careening over the edge of the bridge to the ground below.
>
> Thomas Sluman obeyed all traffic laws except the speed limit. The one hundred miles per hour speed reached in Plumhoff was not disputed. Sluman disputes [the trooper's] claim that Sluman exceeded one hundred miles per hour, and Sluman provides a sound reason to discount the plane operator's estimate of the speed.
>
> . . . . [The trooper] asserts that he acted, as part of a team, to protect citizens at a well-traveled intersection from a motorcyclist traveling at speeds over 120 miles per hour. [The trooper] did not act as a team. Instead, the undisputed facts show he performed as a rogue officer who violated numerous Washington State Patrol regulations. [The trooper] forwards no evidence of the number of travelers, if any, near the point of impact on South Thorp Highway. Sluman traveled between 30 and 40 m.p.h. when [the trooper] door-checked him.
>
> . . . .
>
> Based on the United States Supreme Court decision in Scott v. Harris, 550 U.S. 372 (2007), [the trooper] argues that Thomas Sluman cannot testify or present testimony of witnesses contrary to the videotape that recorded Sluman's collision of [the trooper's] patrol car door. We accept this argument but observe that the video supports Sluman's version of the facts, not the State's description of the facts.

Result: Reversal of Kittitas County Superior Court summary judgment grants (1) of qualified immunity to law enforcement defendants on federal Civil Rights Act claim for excessive force, and (2) of a felony bar to being sued on state law theory.

CAR STOP HELD LAWFUL BASED ON REASONABLE SUSPICION THAT THE DRIVER HAD RECENTLY COMMITTED A MURDER; ALSO, PINGING A CELL PHONE IN ORDER TO LOCATE AND ARREST A MURDER SUSPECT UPHELD BASED ON EXIGENT CIRCUMSTANCES EXCEPTION TO SEARCH WARRANT REQUIREMENT

In State v. Muhammad, ___ Wn. App.2d ___ , 2018 WL ___ (Div. III, June 7, 2018), Division Three of the Court of Appeals rejects the defendant's constitutional challenge to a Terry stop of his car during a rape-murder investigation, as well as rejecting his constitutional challenge to the pinging of his cell phone later in the investigation in order to locate him for purposes of arrest..

Terry stop:

The victim's body was found near a park in Clarkston, WA. She clearly had been the victim of a brutal rape-murder. Officers concluded based on the scene where the body was found that she had been transported to that location after her murder. Investigators reviewed security videos of multiple businesses in a Clarkston shopping area where the victim had last been seen the night before asking people for a ride. A distinctive-looking car (an older boxy, maroon American model car exhibiting a discolored front driver's side rim, a chrome strip, and a light on the side between the front and rear doors) was observed on the video moving in a manner and at times and with varying occupancies (one and two) that gave investigators reasonable suspicion to believe that the operator of the vehicle may have been involved in the rape-murder.

Three days after the murder, the distinctive looking car was seen on a Clarkston street by an officer with knowledge of the investigation. The officer stopped the car and confirmed that the driver was the registered owner, Bisir Muhammad, as a license plate check had indicated just prior to the stop. The Court of Appeals describes as follows what occurred during the stop:

> [The officer] told Bisir Muhammad of a crime that occurred in the Albertsons parking lot on November 6 and of a car matching Muhammad's car being in the lot. [The officer] asked Muhammad whether he parked in the parking lot that night, and Muhammad said no. Muhammad commented that, to his recollection, he drove directly home after finishing his work shift at the Quality Inn that night. Muhammad asked [the officer] what crime occurred, and [the officer] responded by inquiring of Muhammad if he read the paper. Muhammad answered no. Muhammad asked [the officer] if someone robbed McDonalds, and [the officer] again answered in the negative. To our knowledge, [the officer] did not disclose the nature of the crime. [The officer] gained Muhammad's phone number from Muhammad. [The officer] thanked Muhammad for his time, apologized for any inconvenience, and released him.

Identifying Muhammad, a registered sex offender, as the driver of the suspect vehicle, and extracting a lie from him were big steps in the investigation.

Muhammad subsequently challenged the stop, arguing, among other things, that Terry stops are not allowed based on reasonable suspicion of previously committed crimes. The Court of Appeals notes that the case law clearly establishes the authority of law enforcement to make investigatory stops based on reasonable suspicion that a person (1) previously engaged in, (2) is presently engageD in, or (3) is about to engage in, a crime.

Lawfulness of the warrantless pinging under exigent circumstances warrant exception:

On the pinging issue, the key part of the analysis of the Court of Appeals upholding the pinging is as follows:

> Bisir Muhammad next contends the Clarkston Police Department violated his constitutional right to privacy when gathering from the phone carrier information as to the current location of Muhammad's cell phone. Thus, Muhammad seeks suppression of all evidence and information gathered after the warrantless, surreptitious ping. We decline to decide the important question of whether a warrantless employment of a cell phone ping infringes on the phone owner's privacy rights under article I, section 7 of the Washington State Constitution. We instead affirm the trial court's ruling that exigent circumstances warranted the ping.

Exigent circumstances exist to excuse the warrant requirement if demand for immediate investigatory action renders it impracticable for the police to obtain a warrant. . . . Exigent circumstances excuse the requirement to obtain a warrant prior to conducting a search when obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape, or permit the destruction of evidence. . . . Five [alternative] circumstances [may independently] qualify as exigent circumstances: (1) a hot pursuit, (2) a fleeing suspect, (3) danger to the arresting officer or to the public, (4) the mobility of a vehicle, and (5) the mobility or destruction of evidence. . . .

Six nonexclusive factors guide the analysis of whether exigent circumstances exist under the law of search and seizure: (1) the gravity or violent nature of the offense with which the suspect is to be charged, (2) whether the suspect is reasonably believed to be armed, (3) whether there is reasonably trustworthy information that the suspect is guilty, (4) there is strong reason to believe that the suspect is on the premises, (5) a likelihood that the suspect will escape if not swiftly apprehended, and (6) the entry is made peaceably. . . . While every factor need not be present to establish exigency, in the aggregate the factors must establish the need to act quickly. . . . The mere suspicion of flight or destruction of evidence does not satisfy a "particularity" requirement of exigent circumstances. . . .

All but one of the six exigent circumstances factors militate in favor of a finding of exigent circumstances in this appeal. Although officers knew Ina Richardson experienced a violent death, officers did not know Bisir Muhammad to bear arms. Nevertheless, the nature of the crime rises to the zenith in terms of an individual victim. Bisir Muhammad's driving of and ownership of the distinctive car found in the video, his employment near the site of the crime, and his previous encounters with Ina Richardson that could have led Richardson to trust him engendered a reasonable belief of his being a suspect. Muhammad already knew that law enforcement knew of his car's proximity to the crime and Muhammad would suspect that law enforcement considered him a suspect. Therefore, a wise Muhammad would have fled the region, but surprisingly failed to do so. Perhaps he thought he could hide from law enforcement in an orchard located in another state. Law enforcement peacefully entered the orchard where Muhammad reposed. Although such evidence could likely not be introduced at trial, officers also knew Muhammad to be a registered sex offender with a previous rape conviction under another name. Use of the ping would reasonably identify the location of Muhammad.

Bisir Muhammad promotes the lack of exigent circumstances due to the fact that Ina Richardson's murder occurred three days earlier. He also emphasizes that [the officer who made the investigatory stop] made no mention of a homicide when stopping Muhammad earlier that day. Muhammad underscores that he had not fled by the time [the officer] stopped him. Finally, Muhammad highlights the fact that [the officer] abandoned [a subsequent] surveillance of Muhammad at the latter's apartment. Nevertheless, none of the exigent circumstances factors depend on whether an officer earlier disclosed the nature of a crime to the suspect. While the crime occurred three days before officers pinged Muhammad's phone, the ping, as the trial court noted, occurred only hours after [the officer made the investigatory stop] encountered Muhammad and commented that police knew of the crime and knew of the presence of the maroon car in the location of the crime. **[<u>LEGAL UPDATE EDITORIAL COMMENT</u>: It appears to me that this misstates what the officer disclosed, but this would be irrelevant under the analysis by the Court of Appeals.]** Muhammad had not earlier

fled, but he lacked knowledge that officers knew of the connection of the maroon car to the crime. Officers could reasonably deduce that the window of time for collection of evidence rapidly closed. Like Muhammad, we question [the officer's] abandonment of the surveillance, but the abandonment could be the result of another emergency or simple neglect. Neglectful conduct does not dissipate exigent circumstances.

We question, as does Bisir Muhammad, the validity of the exigent circumstances exception to the warrant requirement now that law enforcement may promptly gain a search warrant through telephone calls to a judge at nearly any time of day. Nevertheless, any abrogation or restriction of the exigent circumstances doctrine should come from our state Supreme Court. We also cannot preclude the possibility that some circumstances, such as immediate unavailability of a magistrate, prevented law enforcement from quickly gaining a search warrant for the ping on November 10.

Result: Affirmance of Asotin County Superior Court conviction of Bisir Bilal Muhammad for first degree murder and first degree rape.

LEGAL UPDATE EDITORIAL COMMENT: Note the following comment about the Muhammad decision by King County Deputy Prosecuting Attorney, Kristin Relyea:

> **Note: Washington's Privacy Act, RCW 9.73.260, governs when investigators initiate a ping of a suspect's phone, and requires investigators to obtain prosecutorial approval and to present a nunc pro tunc order approving the ping no more than 48 hours after the ping. Although the court [in Muhammad] did not discuss the State Privacy Act in any detail, any ping performed by law enforcement officers will likely be subject to the Privacy Act requirements, and you will be risking your evidence if you do not meet those requirements. If you have any questions, please contact our Special Operations Unit, Sr DPA Gary Ernsdorff at (206) 477-1989 and Sr DPA David Seaver at (206) 477-9496))****

PETITION TO GET CONCEALED PISTOL LICENSE: READING THE UNLAWFUL-POSSESSION-OF-FIREARMS LAW AT RCW 9.41.040 TOGETHER WITH THE JUVENILE SEALING-OF-RECORDS STATUTE, COURT OF APPEALS RULES THAT RCW 13.50.260 REQUIRES THAT PRIOR CLASS A FELONY ADJUDICATIONS BE TREATED AS IF THEY NEVER HAPPENED IF A SEALING ORDER IS OBTAINED

In State v. Barr, ___ Wn. App.2d ___ , 2018 WL ___ (Div. II, June 12, 2018), Division Two of the Court of Appeals rules that there are no firearms-possession restrictions under RCW 9.41.040 on a man who was convicted in juvenile court in December 1992 of two class A felonies and who in 2016 obtained a juvenile court/superior court order sealing his juvenile records for the two adjudications. Under the sealing statute, RCW 13.50.260, a sealing order requires that the sealed adjudications be "treated as if they never occurred."

Accordingly, the Court of Appeals rules that when Barr applied, after getting the sealing order, for a concealed pistol license (CPL) through the Snohomish County Sheriff's Office (Sheriff), the Sheriff was required to grant the CPL. The Court of Appeals concludes that the statutory language is clear, and that the result in the case is consistent with the decision in Nelson v. State, 120 Wn. App. 470 (2003) under parallel facts and an earlier sealing statutory scheme that in relevant aspects has not changed.

The Barr Court also asserts that the sealing order obtained by Barr likewise restored Barr's federal firearms rights under the federal statutory bar on certain categories of convicted persons possessing firearms. The Court points to the U.S. District Court decision for the Western District of Washington in Siperek v. United States, 270 F. Supp. 3d 1242, 1251 (W.D. Wash. 2017).

Result: Reversal of Thurston County Superior Court order declining to order the Snohomish County Sherriff to grant the CPL; case remanded for issuance of the CPL.

PETITION FOR RESTORATION OF FIREARM RIGHTS UNDER RCW 9.41.040: PETITIONER PREVAILS IN ARGUMENTS THAT: (1) SECOND DEGREE ROBBERY CONVICTION IS NOT AN AUTOMATIC DISQUALIFIER, AND (2) WHERE MULTIPLE CRIME CONVICTIONS ARE ENTERED AND SENTENCED ON THE SAME DAY, NONE OF THOSE CONVICTIONS CONSTITUTES A PRIOR CONVICTION

State v. Benson, ___ Wn. App.2d ___ , 2018 WL ___ (Div. II, June 5, 2018)

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

> On May 28, 2008, Benson was convicted of one count of unlawful possession of a controlled substance (a class C felony) and one count of second degree robbery (a class B felony). Although these offenses were committed on different dates and charged under different cause numbers, he was convicted and sentenced for both convictions on the same date. Both of these convictions were disabling offenses that prohibited him from owning, possessing, using, or controlling a firearm. RCW 9.41.040(1), (2).
>
> On March 2, 2017, Benson petitioned for restoration of his firearm rights. In addition to acknowledging the convictions described above, he stated that on August 21, 2009, he had also been convicted of third degree driving with a suspended or revoked license, a misdemeanor. He further alleged that (1) he had been in the community for more than five years without being convicted of any felony, gross misdemeanor, or misdemeanor crimes, and (2) no charges were pending against him in any court. [The superior court denied Benson's petition.]

ISSUES AND RULINGS: (1) Is petitioner Benson correct that his 2008 conviction for second degree robbery is not an automatic bar to restoration of firearm rights under RCW 9.41.040? (ANSWER BY COURT OF APPEALS: Yes)

(2) Is petitioner Benson correct that, because his two disabling felonies were entered and sentenced on the same day, he does not have any prior felony convictions that are part of his offender score and that would prevent restoration of his firearm rights under RCW 9.41.040? (ANSWER BY COURT OF APPEALS: Yes)

Result: Reversal of Pacific County Superior Court ruling that denied the petition of Austin J. Benson to have his firearm rights restored.

ANALYSIS:

The Court of Appeals summarizes the key issues before the Court as follows:

> Benson argues that (1) his 2008 conviction for second degree robbery is not an automatic bar to restoration of firearm rights, and (2) because his two disabling felonies were entered and sentenced on the same day, he does not have any prior felony convictions that are part of his offender score and that would prevent restoration of his firearm rights. We agree with Benson.

The Court of Appeals explains as follows its reasoning in concluding that Benson's second degree robbery conviction is not an automatic disqualifier from restoration of firearm rights:

> RCW 9.41.040(4)(a) provides:
>
> > Notwithstanding subsection (1) or (2) of this section, a person convicted . . . of an offense prohibiting the possession of a firearm under this section other than . . . robbery, . . . who received a probationary sentence under RCW 9.95.200, and who received a dismissal of the charge under RCW 9.95.240, shall not be precluded from possession of a firearm as a result of the conviction or finding of not guilty by reason of insanity. Notwithstanding any other provisions of this section, if a person is prohibited from possession of a firearm under subsection (1) or (2) of this section and has not previously been convicted or found not guilty by reason of insanity of a sex offense prohibiting firearm ownership under subsection (1) or (2) of this section and/or any felony defined under any law as a class A felony or with a maximum sentence of at least twenty years, or both, the individual may petition a court of record to have his or her right to possess a firearm restored:
>
> (Emphasis added).
>
> The first sentence of RCW 9.41.040(4)(a) excludes certain offenses for which a defendant received a probationary sentence under RCW 9.95.200 and dismissal of the charge under RCW 9.95.240 from the firearm prohibition. RCW 9.41.040(4)(a). The first sentence does not say that those convicted of robbery cannot petition to restore their firearm rights.
>
> Instead, it is the second sentence of RCW 9.41.040(4)(a) that addresses the restoration of firearm rights. This second sentence allows for the restoration of firearm rights for persons who have been convicted of some felonies, but it does not allow for the restoration of for persons who have been convicted of a class A felony, a sex offense, or who have had a maximum sentence of at least 20 years. The second sentence does not exclude all robberies from restoration of firearm rights. Thus, the trial court erred when it concluded that the class B second degree robbery was an automatic bar to restoration.

[Footnote omitted]

The issue of whether Benson had any prior convictions that would prevent restoration of his firearm rights is more complicated. In key part, the Benson Court's analysis is as follows:

> RCW 9.41.040(4)(a)(ii)(A) allows for restoration of firearm rights if (1) the defendant has spent "five or more consecutive years in the community without being convicted or found not guilty by reason of insanity or currently charged with any felony, gross misdemeanor, or misdemeanor crimes," and (2) "the individual has no prior felony

convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525." (Emphasis added). The State does not dispute that Benson has spent five or more consecutive years in the community without other convictions or dispute that he is not currently charged with any crimes.

Thus, the sole issue here is whether "prior felony convictions" that "counted as part of the offender score under RCW 9.94A.525" includes other concurrent convictions that were entered or sentenced on the same day. See RCW 9.41.040(4)(a)(ii)(A). We hold that "prior felony convictions" that "counted as part of the offender score under RCW 9.94A.525" do not include other current convictions that were entered or sentenced on the same day.

OPINION TESTIMONY AS TO DEFENDANT'S GUILT THAT INVADES JURY'S PROVINCE AS FACT-FINDER: OFFICERS' USE OF WORDS "RECKLESSLY" AND "ELUDING" IN FELONY-ELUDING CASE HELD TO VIOLATE DEFENDANT'S RIGHT TO HAVE JURY DETERMINE GUILT

State v. Winborne, ___ Wn. App.2d ___ , 2018 WL ___ (Div. III, June 26, 2018)

Proceedings below: (Excerpted from Court of Appeals opinion)

The State of Washington charged Tishawn Winborne with theft of a motor vehicle {subsequently dismissed by the Superior Court in an order the State accepted], two counts of attempting to elude a police vehicle, one count of second degree assault, and one count of third degree assault. The assault charges arise from his resisting of police officers.

At the start of trial, Tishawn Winborne moved in limine to preclude the State's witnesses from testifying regarding ultimate factual issues such as whether Winborne "eluded" or drove "recklessly." The trial court denied the motion.

. . . .

During trial, State witnesses repeatedly testified to Tishawn Winborne's driving "recklessly" or "eluding" law enforcement. One officer testified, "[o]bviously he [Winborne] was eluding me." . . . .

. . . .

The jury found Tishawn Winborne guilty of both counts of attempting to elude a police vehicle, but acquitted Winborne of both assault charges.

ISSUE AND RULING: Did the trial court's order allowing the officers to testify using the words "reckless" and "eluding" in the felony-eluding prosecution violate defendant's rights on the ground that the words reflected statements of opinion that invaded the province of the jury to find facts and determine guilt? (ANSWER BY COURT OF APPEALS: Yes)

Result: Reversal of Spokane County Superior Court convictions of Tishawn Marqueis Winborne for felony eluding; case remanded for retrial.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> No witness, lay or expert, may testify to his or her opinion as to the guilt of a defendant, whether by direct statement or inference. . . . The State, however, may present testimony that does not directly comment on the defendant's guilt or if otherwise helpful to the jury and based on inferences from the evidence. . . . . Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. ER 704.
>
> Whether testimony provides an improper opinion turns on the circumstances of the case, including (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. . . . Testimony in Tishawn Winborne's trial came from police officers. A law enforcement officer's improper opinion testimony may be particularly prejudicial because it carries "a special aura of reliability." State v. King, 167 Wn.2d 324, 331 (2009) (quoting State v. Kirkman, 159 Wn.2d 918, 928 (2007)). A trial court's decision to admit evidence is reviewed for an abuse of discretion. . . .
>
> We deem State v. Farr-Lenzini, 93 Wn. App. 453 (1999) controlling. Lisa Farr-Lenzini appealed a criminal conviction for attempting to elude. This court reversed because the officer's opinion testimony as to Farr-Lenzini's state of mind constituted harmful error. A state trooper testified he followed Farr-Lenzini's vehicle with siren and overhead lights on, while she drove at speeds up to one hundred miles per hour. In response to a question asking him for his opinion as to what defendant's driving exhibited to him, the trooper testified "it exhibited to me that the person driving that vehicle was attempting to get away from me and knew I was back there and refusing to stop." Farr-Lenzini testified she did not realize the trooper followed her and she pulled over as soon as she saw him.
>
> This court, in State v. Farr-Lenzini, held the trooper's opinion, either as an expert or as a lay person, unhelpful to the jury. We reasoned that a lay jury holds the capability to decide whether a driver attempted to elude by relying on its common experience and without the aid of an expert. This court further held the officer's testimony improper because the remarks commented on Farr-Lenzini's guilt since the officer's opinion or impression addressed the major contested question for the jury-whether Farr-Lenzini eluded the officer.
>
> The state trooper in State v. Farr-Lenzini did not employ the word "reckless" in his testimony as did officers in Tishawn Winborne's trial. Nevertheless, the same reasoning behind excluding the testimony applies. An officer can testify to his observations of the driving of the defendant without drawing conclusions assigned to the jury. Also, in civil suits, courts have precluded witnesses from testifying that one of the parties to a highway accident drove "recklessly." . . . .
>
> The trial court abused its discretion by denying Tishawn Winborne's motion in limine. Whether Tishawn Winborne drove "recklessly" or "eluded" the officer is an element of attempting to elude a police vehicle. RCW 46.61.024(1). The State's witnesses testified by direct statements to Tishawn Winborne's guilt.

[Some citations omitted; other citations revised for style]

CITIZEN CRIMINAL PETITIONS: NO ABUSE OF DISCRETION IN LEWIS COUNTY COURTS' DENIALS OF CITIZEN EFFORTS TO FORCE CRIMINAL PROSECUTION IN A LOCALLY CONTROVERSIAL ANIMAL ABUSE CASE

In the Matter of the Petition of Barnes Michael Ware to Convene a Grand Jury & In the Matter of the Application of Erika Johnson for a Citizen's Complaint, ___ Wn. App.2d ___ , 2018 WL ___ (Div. II, June 26, 2018) is a case arising out of an animal abuse incident that became highly controversial locally in Lewis County. In the introductory paragraphs of its Opinion, the three-judge panel of the Court of Appeals summarizes the issues and the Court's rulings as follows:

> Following the Lewis County Prosecuting Attorney's Office's decision to not file charges in an animal abuse case, two private citizens separately sought to independently initiate criminal charges. In the first case, Erika Johnson filed a petition in district court, requesting authorization to file a citizen's complaint. After the district court denied Johnson's petition, Barnes Michael Ware filed a petition to summon a grand jury in superior court, based on the same set of facts underlying Johnson's petition. The superior court similarly denied Ware's petition. In these consolidated appeals, the appellants argue that the lower courts erred in finding that granting their petitions would unconstitutionally violate the separation of powers. Johnson also argues that the superior court, on review of the district court's decision, erred in finding that the prosecutorial standards did not warrant the filing of criminal charges through her petition.
>
> We hold that the district court did not abuse its discretion in denying Johnson's petition. We also hold that the superior court did not abuse its discretion in denying Ware's petition. Accordingly, we affirm the district court's dismissal of Johnson's petition for issuance of a citizen's complaint, and we affirm the superior court's dismissal of Ware's petition to summon a grand jury.

Result: Affirmance of Lewis County District Court and Lewis County Superior Court rulings that denied citizen filings attempting to force criminal prosecution in an animal abuse case.

LEGAL UPDATE EDITORIAL NOTE: I have provided only this brief entry on this case because, while the issue is interesting and certainly of relevance to Washington law enforcement agencies, I think that the issues: (1) are more prosecutors' issues; and (2) the issues are highly fact-specific, and the trial court rulings are tested under the very forgiving abuse-of-discretion standard of review.

****

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

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

Every month I will include a separate section that provides very brief issue-spotting notes regarding select categories of unpublished Court of Appeals decisions that month. I will include such decisions where issues relating to the following subject areas are addressed: (1) Arrest,

Search and Seizure; (2) Interrogations and Confessions; (3) Implied Consent; and (4) possibly other issues of interest to law enforcement (though probably not sufficiency-of-evidence-to-convict issues).

In June 2018, 10 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. Raul Lopez-Ramos: On June 5, 2018, Division Two of the COA decides against the State's appeal from *a Cowlitz County Superior Court order granting the defendant's motion to suppress methamphetamine that was seized in a wallet search incident to a DUI arrest*. Suppression was based on lack of probable cause to arrest defendant for DUI. The arresting officer conceded, and the trial court found, that the arresting officer was not able to communicate in Spanish sufficiently to make a PBT test voluntary. Also, the officer testified that he had concluded that he had probable cause to arrest defendant for DUI only after seeing the result of the PBT test. The Court of Appeals concludes that under these combined circumstances **the DUI arrest was not supported by probable cause**, and the methamphetamine must be suppressed.

2. State v. Christopher Lee Cobb: On June 5, 2018, Division Two of the COA decides against the defendant's appeal from his Pierce County Superior Court convictions for *two counts of unlawful possession of a controlled substance with intent to deliver and one count of first degree unlawful possession of a firearm*. Among other unsuccessful theories on appeal, defendant argued that a search warrant to search his car: (1) lacked probable cause due to **staleness** (based on the search warrant affidavit's description of the timing of a controlled buy), and (2) failed to establish a **nexus**, i.e., connection, between the described illegal drug activity and the car to be searched.

3. State v. Richard Everett Haley: On June 12, 2018, Division Two of the COA decides against defendant's appeal from his Jefferson County Superior Court *convictions for three courts of first degree child rape and three counts of first degree incest*. On one of the several issues on appeal, the Court of Appeals agrees with the defendant that **the trial court record does not support a finding that a detective read all of the Miranda warnings in Mirandizing him**. However, the Court of Appeals rules that in light of the other admissible evidence in the case, the trial court's failure to suppress the custodial statements of the defendant was not prejudicial. The Court of Appeals also determines that a sentencing error was made and remands the case to the trial court to resentence Haley.

4. State v. Clark Allen Tellvik: On June 14, 2018, Division Three of the COA decides one issue in favor of defendant's appeal from a suppression ruling of the Kittitas County Superior Court and reverses his conviction for *possession of a controlled substance with intent to deliver*. The Court of Appeals affirms, however, his convictions for *possession of a stolen vehicle*, *making or having burglary tools*, *possession of a stolen firearm*, and *second degree possession of a firearm*. On the suppression issue, the Court of Appeals holds (as the Court had held in its May 8, 2018 unpublished opinion addressing the same facts in State v. Peck) that (1) despite not claiming to police at the scene his ownership of a zippered case inside a vehicle, defendant had **automatic standing** to challenge the impound-inventory search of the zippered case, and (2) **a law enforcement search of the contents of the zippered case as part of an inventory search violated the general rule under article I, section 7 of the Washington constitution**

that closed containers are not to be searched absent a search warrant or exigent circumstances or consent of the owner. Research Note: For discussion of impound-inventory searches, see pages 329 to 336 of the Washington-focused law enforcement and prosecutor guide on the Criminal Justice Training Commission's LED internet page: Confessions, Search, Seizure and Arrest: A Guide for Police Officers and Prosecutors, May 2015, by Pamela B. Loginsky, Staff Attorney, Washington Association of Prosecuting Attorneys.

5. State v. Jonathan Stephen Wood: On June 18, 2018, Division One of the COA rules in favor of the defendant's appeal and reverses his Snohomish County Superior Court conviction for *possession of a controlled substance with intent to deliver*. The Court of Appeals rules that officers **failed to consider reasonable alternatives to impounding the vehicle** of a hit-and-run driver at the point when he was arrested. The Court finds guidance in the Division Two Court of Appeals decision in State v. Froehlich, 197 Wn. App. 831 (2017).

6. State v. Edward Francis Waller: On June 18, 2018, Division One of the COA rules in favor of the State in defendant's appeal from his Whatcom County Superior Court conviction for *unlawful possession of a firearm in the second degree*. The Court of Appeals concludes that the trial court factual record supports the trial court's findings that defendant, who was somewhat under the influence of drugs during his contact with officers, had **the capacity to (1) give voluntary consent to a search of his bedroom, and (2) waive his Miranda rights.**

7. State v. James Edward Boyd: On June 19, 2018, Division Three of the COA rules against the appeal of the defendant from his Spokane County Superior Court conviction for *possession of methamphetamine*. The Court of Appeals rules that police officers were continuing to act in their **community caretaking function** during the 10 seconds that passed after EMTs left the motel room of Mr. Boyd after dealing with his temporary medical problem, and that therefore the arrest of Mr. Boyd that officers made at the 10-second mark immediately after learning by radio of an arrest warrant was not the fruit of an unlawful seizure.

8. State v. James Edward Raney: On June 19, 2018, Division Three of the COA rules against the appeal of the defendant from his Spokane County Superior Court conviction for *possession of methamphetamine*. The Court of Appeals rules that an officer stayed within the **scope of a driver's voluntary consent to search** a vehicle for registration paperwork. The driver told the officer that the registration papers probably were located in the glovebox or on the passenger-side visor, but the driver also told the officer that he could search the entire vehicle. After the officer search in those two specified areas, the officer then searched the cluttered floorboards, spotted a suspect plastic bag containing a crystalline substance, and made a plain view seizure of a substance that field-tested positive as methamphetamine.

9. State v. Michael Scott Perry: On June 26, 2018, Division Three of the COA rules against the appeal of the defendant from his Stevens County Superior Court convictions for *possession of a stolen motor vehicle, possession of stolen property, possession of methamphetamine, possession of drug paraphernalia, and identity theft*. The Court of Appeals rules, among other things, that an officer did not violate **the Washington' constitution's heightened constitutional search & seizure restrictions on asking questions of a passenger in a vehicle stop** because in this case the driver told the officer that the passenger owned a towed trailer that was without a license plate or brake lights, thus giving the officer a lawful reason to question the passenger about the trailer.

10. State v. Robert Joseph Garcia Salinas: On June 26, 2018, Division Three of the COA rejects the defendant's appeal from his Adams County Superior Court conviction for *possession*

of methamphetamine. The Court of Appeals rules, among other things, that an officer did not violate **the Washington' constitution's heightened constitutional search & seizure restrictions on asking questions of a passenger in a vehicle stop** because in this case the 22-year-old passenger spontaneously showed the officer a previously opened baggie of marijuana in the passenger's possession, which gave the officer reasonable suspicion that the passenger was in violation for the open container law for marijuana. Research Note: For discussion of restrictions on investigating passengers in vehicle stops, see pages 146-147 of the Washington-focused law enforcement and prosecutor guide on the Criminal Justice Training Commission's LED internet page: Confessions, Search, Seizure and Arrest: A Guide for Police Officers and Prosecutors, May 2015, b*y* Pamela B. Loginsky, Staff Attorney, Washington Association of Prosecuting Attorneys.

****

NEXT MONTH

The July 2018 Legal Update will include an entry regarding State v. Jameison, ___ Wn. App.2d ___ , 2018 WL ___ (Div. III, June 28, 2018), where the Court of Appeals rules against the State in holding that : (1) the defendant's actions of arming himself with a gun and taking cover behind a car near a dance club, after an argument among others arose shortly after 2 a.m. closing, did not support charging him with *accomplice liability for criminal homicide* in a shooting death in the area, where the defendant's actions of arming himself and taking cover were triggered by seeing the eventual shooter angrily go to a nearby car, retrieve a gun and return to the club; and (2) the defendant could not be charged with *drive-by shooting* in light of, at the time of the shooting, (A) the extent of his distance from the car that had brought him to the dance club, and (B) the fact of his separation from his car by an intervening car and telephone pole.

****

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.

****

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

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

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

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

****