LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: Thank you!

JUNE 2019

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CRIMINAL JUSTICE TRAINING COMMISSION'S "LAW ENFORCEMENT ONLINE TRAINING DIGEST" EDITION FOR APRIL 2019

The April 2019 LED Online Training edition was recently placed on the CJTC LED web page.

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UNITED STATES SUPREME COURT

EXIGENT CIRCUMSTANCES EXCEPTION TO SEARCH WARRANT REQUIREMENT FOR BLOOD DRAW WAS ALMOST CERTAINLY MET WHERE DRUNK DRIVER WAS UNCONSCIOUS AT THE HOSPITAL, BUT DEFENDANT IS GIVEN A SLIM CHANCE TO PROVE THAT THE EXCEPTION DOES NOT APPLY IN HIS CASE

Mitchell v. Wisconsin, ___ S.Ct. ___ , 2019 WL 2619471 (June 27, 2019)

LEGAL UPDATE INTRODUCTORY EDITORIAL COMMENT: Despite the pro-law enforcement exigent circumstances ruling in this case involving an unconscious drunk driver, Washington officers should always strongly consider applying for a blood search warrant when time appears to reasonably permit that step. Not only did the U.S. Supreme Court leave a sliver of room for this defendant to show that the circumstances in his case were not exigent, but also, the Washington Supreme Court could at some point in the future make a restrictive independent grounds constitutional ruling on the exigency issue. Officers and agencies are urged to consult their legal advisors and local prosecutors on the issues addressed in the Legal Update.

Facts and Proceedings below: (Excerpted from summary by Supreme Court staff; the summary is not part of Supreme Court's decision; paragraphing revised for readability, bracketed text added)

> Petitioner Gerald Mitchell was arrested for operating a vehicle while intoxicated after a preliminary breath test registered a blood alcohol concentration (BAC) [0.24] that was triple Wisconsin's legal limit for driving. As is standard practice, the arresting officer drove Mitchell to a police station for a more reliable breath test using evidence-grade equipment. By the time Mitchell reached the station, he was too lethargic for a breath test, so the officer drove him to a nearby hospital for a blood test.
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> Mitchell was unconscious by the time he arrived at the hospital, but his blood was drawn anyway under a state law that presumes that a person incapable of withdrawing implied consent to BAC testing has not done so. The blood analysis showed Mitchell's BAC [0.222] to be above the legal limit, and he was charged with violating two drunk-driving laws.
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> Mitchell moved to suppress the results of the blood test on the ground that it violated his Fourth Amendment right against "unreasonable searches" because it was conducted without a warrant. The trial court denied the motion, and Mitchell was convicted.
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> On certification from the intermediate appellate court, the Wisconsin Supreme Court affirmed the lawfulness of Mitchell's blood test.

ISSUE AND RULING: Was the exigent circumstances exception to the Fourth Amendment search warrant requirement met where the drunk driver was unconscious at the point when police arrived at the hospital with him in custody? (ANSWER IN SUPREME COURT LEAD OPINION: Yes, almost certainly (and a drunken stupor condition at the hospital would also so qualify as exigency), except that defendant is given the opportunity on remand to the Wisconsin

court to try to prove the very difficult contention that both (1) his blood would not have been drawn by hospital staff for medical reasons if police had not been seeking" blood-alcohol information, and (2) police did not have any reason to believe that, in light of other pressing needs or duties and of accessibility to a warrant-reviewing magistrate, they could not have have gotten a warrant in a reasonable amount of time to accommodate the purpose of testing BAC.

Result: Wisconsin Supreme Court ruling vacated and case remanded to the Wisconsin state courts to give defendant the opportunity to prove the very difficult-to-prove contention that is noted in the immediately preceding paragraph of this Legal Update entry.

ANALYSIS IN LEAD OPINION AUTHORED BY JUSTICE ALITO: Excerpted from summary by Supreme Court staff; the summary is not part of the Supreme Court's decision; some paragraphing revised for readability; bracketed text added)

> [The lead opinion concludes] that when a driver is unconscious and cannot be given a breath test, the exigent-circumstances doctrine generally permits a blood test without a warrant.
>
> (a) ["Search" definition and exigency rulings in McNeely (2013) and Schmerber (1966)]
>
> BAC tests are Fourth Amendment searches. See Birchfield v. North Dakota, [136 S.Ct. 2160 (2016)]. A warrant is normally required for a lawful search, but there are well-defined exceptions to this rule, including the "exigent circumstances" exception, which allows warrantless less searches "to prevent the imminent destruction of evidence." Missouri v. McNeely, 569 U. S. 141, 149 [(2013)]. In McNeely, this Court held that the fleeting nature of blood-alcohol evidence alone was not enough to bring BAC testing within the exigency exception.
>
> But in Schmerber v. California, 384 U. S. 757 [(1966)], the dissipation of BAC did justify a blood test of a drunk driver whose accident gave police other pressing duties [i.e., investigating an accident involving the drunk driver], for then the further delay caused by a warrant application [under the circumstances of 1966] would indeed have threatened the destruction of evidence. Like Schmerber, unconscious-driver cases will involve a heightened degree of urgency for several reasons. And when the driver's stupor or unconsciousness deprives officials of a reasonable opportunity to administer a breath test using evidence-grade equipment, a blood test will be essential for achieving the goals of BAC testing.
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> (b) [Assessing exigency in this case in light of McNeely and Schmerber]
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> Under the exigent circumstances exception, a warrantless search is allowed when "'there is compelling need for official action and no time to secure a warrant." McNeely, 569 U. S., at 149.
>
> (1) [Compelling need for blood test where breath test not possible]
>
> There is clearly a "compelling need" for a blood test of drunk-driving suspects whose condition deprives officials of a reasonable opportunity to conduct a breath test.
>
> First, highway safety is a vital public interest – a "compelling" and "paramount" interest.

> Second, when it comes to promoting that interest, federal and state lawmakers have long been convinced that legal limits on a driver's BAC make a big difference. And there is good reason to think that such laws have worked. Birchfield
>
> Third, enforcing BAC limits obviously requires a test that is accurate enough to stand up in court. And such testing must be prompt because it is "a biological certainty" that [a]lcohol dissipates from the blood stream," "literally disappearing by the minute." McNeely.
>
> Finally, when a breath test is unavailable to promote the interests served by legal BAC limits, "a blood draw becomes necessary." McNeely
>
> (2) [Exigency where drunk driver is unconscious]
>
> Schmerber demonstrates that an exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. Because both conditions are met when a drunk-driving suspect is unconscious, Schmerber controls. A driver's unconsciousness does not just create pressing needs; it is itself a medical emergency. In such a case, as in Schmerber, an officer could "reasonably have believed that he was confronted with an emergency."
>
> And in many unconscious-driver cases, the exigency will be especially acute. A driver so drunk as to lose consciousness is quite likely to crash, giving officers a slew of urgent tasks beyond that of securing medical care for the suspect – tasks that would require them to put off applying for a warrant. The time needed to secure a warrant may have shrunk over the years, but it has not disappeared; and forcing police to put off other urgent tasks for even a relatively short period of time may have terrible collateral costs.
>
> (c) [Possible exception to exigency in this case defendant can prove two things]
>
> On remand, Mitchell may attempt to show that his was an unusual case, in which his blood would not have been drawn had police not been seeking BAC information an d police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties.

Justice Alito's lead opinion explains as follows what remains to be determined factually in this case on the exigent circumstances question if defendant want to pursue the issue further:

> When police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness **or stupor** requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment. We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties.

[Bolding added]

CONCURRING OPINION AUTHORED BY JUSTICE THOMAS

Justice Thomas concurs in rejecting Mitchell's theory and argues that the 2013 McNeely decision made exigency issue regarding BAC testing too complicated. He aruges that the lead opinion in Mitchell continues that mistake. He argues, as he did in McNeely, that he would apply a per se rule (no exceptions), under which the natural metabolization of alcohol in the blood stream "creates an exigency once police have probable cause to believe the driver is drunk," regardless of whether the driver is conscious, and regardless of other circumstances.

DISSENTING OPINION AUTHORED BY JUSTICE SOTOMAYOR

Justice Sotomayor writes a dissent that is joined by Justices Ginsburg and Kagan. The Sotomayor dissent argues that the lead opinion makes an unwisse constitutional choice in making the circumstance involving unconscious drunk-driving suspects and those in a drunken stupor almost per se exigent.

DISSENTING OPINION AUTHORED BY JUSTICE GORSUCH

Justice Gorsuch writes a one-paragraph dissent that is not joined by any other justice. Like Justice Sotomayor's dissent, his dissent criticizes those in the majority for addressing the exigent circumstances issue where the State of Wisconsin waived that issue and argued that Wisconsin's implied consent law constitutionally supported the admissibility of the blood test under the circumstances of this case. Justice Gorsuch argues that the Court should have dismissed the case on grounds that review had been improvidently granted.

CIVIL RIGHTS ACT CIVIL LIABILITY: WITH ONE EXCEPTION, PROBABLE CAUSE TO ARREST BARS A CIVIL RIGHTS ACT LAWSUIT THAT CLAIMS THAT LAW ENFORCEMENT ACTED IN RETALIATION FOR EXERCISE OF FREE SPEECH RIGHT; EXCEPTION IS WHERE PLAINTIFF WAS ARRESTED UNDER CIRCUMSTANCES WHERE OTHERWISE SIMILARLY SITUATED PERSONS HAD NOT BEEN ARRESTED

Nieves v. Bartlett, 139 S.Ct. 1715 (May 28, 2019)

Facts and Proceedings below:

In a summary that is not a part of the opinion of the Supreme Court, the Court's staff summarizes as follows the facts and lower court proceedings in the case:

> Respondent [plaintiff] Russell Bartlett was arrested by police officers Luis Nieves and Bryce Weight for disorderly conduct and resisting arrest during "Arctic Man," a raucous winter sports festival held in a remote part of Alaska. According to Sergeant Nieves, he was speaking with a group of attendees when a seemingly intoxicated Bartlett started shouting at them not to talk to the police. When Nieves approached him, Bartlett began yelling at the officer to leave.
>
> Rather than escalate the situation, [Sergeant] Nieves left. Bartlett disputes that account, claiming that he was not drunk at that time and did not yell at [Sergeant] Nieves. Minutes later, Trooper Weight says, Bartlett approached him in an aggressive manner while he was questioning a minor, stood between [Trooper] Weight and the teenager, and yelled with slurred speech that [Trooper] Weight should not speak with the minor. When Bartlett stepped toward [Trooper] Weight, the officer pushed him back.

> [Sergeant] Nieves saw the confrontation and initiated an arrest. When Bartlett was slow to comply, the officers forced him to the ground. Bartlett denies being aggressive and claims that he was slow to comply because of a back injury. **After he was handcuffed, Bartlett claims that [Sergeant] Nieves said "bet you wish you would have talked to me now."**
>
> Bartlett sued under 42 U.S.C. §1983, claiming that the officers violated his First Amendment rights by arresting him in retaliation for his speech – *i.e.*, his initial refusal to speak with [Sergeant] Nieves and his intervention in [Trooper] Weight's discussion with the minor.
>
> The District Court granted summary judgment for the officers, holding that the existence of probable cause to arrest Bartlett precluded his claim. The Ninth Circuit reversed. It held that probable cause does not defeat a retaliatory arrest claim and concluded that Bartlett's affidavit about what [Sergeant] Nieves allegedly said after the arrest could enable Bartlett to prove that the officers' desire to chill his speech was a but-for cause of the arrest.

[Some paragraphing revised for readability; bolding added]

ISSUE AND RULING: For purposes of the standard for Civil Rights Act civil liability for law enforcement officer retaliatory arrest for a civilian's exercise of Free Speech rights, does probable cause preclude a lawsuit if officers have probable cause for the arrest? (ANSWER BY SUPREME COURT: Yes, rules the majority, with the exception of the circumstance where plaintiff was arrested under circumstances, viewed objectively, where otherwise similarly situated persons had not been arrested.)

Result: Reversal of decision of Ninth Circuit of the U.S. Court of Appeals, which had reversed the U.S. District Court (Alaska) grant of summary judgment to the officers.

ANALYSIS IN SUPPORT OF MAJORITY OPINION:

In a synopsis that is not a part of the opinions of the Supreme Court, the Court's staff summarizes as follows the analysis in the majority opinion authored by Chief Justice Roberts:

> Because there was probable cause to arrest Bartlett, his retaliatory arrest claim fails as a matter of law.
>
> (a) To prevail on a claim such as Bartlett's, the plaintiff must show not only that the official acted with a retaliatory motive and that the plaintiff was injured, but also that the motive was a "but-for" cause of the injury. Hartman v. Moore, 547 U.S. 250, 259-260 (2006). Establishing that causal connection may be straightforward in some cases, . . . other times it is not so simple. In retaliatory prosecution cases, for example, the causal inquiry is particularly complex because the official alleged to have the retaliatory motive does not carry out the retaliatory action himself.
>
> Instead, the decision to bring charges is made by a prosecutor – who is generally immune from suit and whose decisions receive a presumption of regularity. To account for that "problem of causation," plaintiffs in retaliatory prosecution cases must prove as a

threshold matter that the decision to press charges was objectively unreasonable because it was not supported by probable cause. Hartman, 547 U.S., at 263.

(b) Because First Amendment retaliatory arrest claims involve causal complexities akin to those identified in Hartman . . . the same no-probable-cause requirement generally should apply. The causal inquiry is complex because protected speech is often a "wholly legitimate consideration" for officers when deciding whether to make an arrest. . . . . In addition, "evidence of the presence or absence of probable cause for the arrest will be available in virtually every retaliatory arrest case." Its absence will generally provide weighty evidence that the officers' animus caused the arrest, whereas its presence will suggest the opposite. While retaliatory arrest cases do not implicate the presumption of prosecutorial regularity or necessarily involve multiple government actors, the ultimate problem remains the same: For both claims, it is particularly difficult to determine whether the adverse government action was caused by the officers' malice or by the plaintiff's potentially criminal conduct.

Bartlett's proposed approach disregards the causal complexity involved in these cases and dismisses the need for any threshold objective showing, moving directly to consideration of the officers' subjective intent. In the Fourth Amendment context, however, this Court has "almost uniformly rejected invitations to probe [officers'] subjective intent," Ashcroft v. al-Kidd, 563 U.S. 731, 737 (2011). A purely subjective approach would undermine that precedent, would "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties," . . .and would compromise evenhanded application of the law by making the constitutionality of an arrest "vary from place to place and from time to time" depending on the personal motives of individual officers, Devenpeck v. Alford, 543 U.S. 146, 154 (2004), and would encourage officers to minimize communication during arrests to avoid having their words scrutinized for hints of improper motive.

(c) When defining the contours of a §1983 claim, this Court looks to "common-law principles that were well settled at the time of its enactment." . . . When §1983 was enacted, there was no common law tort for retaliatory arrest based on protected speech. Turning to the "closest analog[s]," . . . false imprisonment and malicious prosecution suggest the same result: The presence of probable cause should generally defeat a First Amendment retaliatory arrest claim.

(d) Because States today permit warrantless misdemeanor arrests for minor criminal offenses in a wide range of situations – whereas such arrests were privileged only in limited circumstances when §1983 was adopted – a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so. An unyielding requirement to show the absence of probable cause in such cases could pose "a risk that some police officers may exploit the arrest power as a means of suppressing speech." Lozman v. Riviera Beach, 585 U.S., at __ (2018). Thus, the no-probable-cause requirement should not apply when a plaintiff presents **objective evidence** that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been. . . . [The majority opinion suggests that jaywalking enforcement might be subject to such proof.] **Because this inquiry is objective, the statements and motivations of the particular arresting officer are irrelevant at this stage**. After making the required showing, the plaintiff's claim may proceed in the same manner as claims where the plaintiff has met the threshold showing of the absence of probable cause.

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

Justice Thomas writes a concurring opinion in which he argues that the Court should have ruled that, without any exception, probable cause to arrest absolutely precludes a Free Speech retaliatory arrest Civil Rights Act lawsuit.

Justices Gorsuch and Ginsburg write separate dissenting opinions. Justice Gorsuch appears to suggest that admissions as to usual enforcement practices from an individual officer might be sufficient to meet the majority opinion's objective evidence standard for establishing that a person was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been arrested. This seems to be a stretch and may be wishful thinking or a strained sowing of seeds for future plaintiffs' Civil Rights lawsuits. .

Justice Ginsburg's dissent includes the following passage regarding the majority opinion's "objective evidence" standard:

> I do not mean to overstate the clarity of today's holding. What exactly the Court means by "objective evidence," "otherwise similarly situated," and "the same sort of protected speech" is far from clear. I hope that courts approach this new standard commonsensically. It is hard to see what point is served by requiring a journalist arrested for jaywalking to point to specific other jaywalkers who got a free pass, for example, if statistics or common sense confirm that jaywalking arrests are extremely rare. Otherwise, there will be little daylight between the comparison-based standard the Court adopts and the absolute bar it ostensibly rejects.

[Citation to majority opinion omitted; two lengthy explanatory footnotes omitted]

DOUBLE JEOPARDY: DUAL-SOVEREIGNTY DOCTRINE RETAINED IN 7-2 HIGH COURT VOTE THAT UPHOLDS BOTH STATE AND FEDERAL FIREARM CONVICTIONS FOR FELON-IN-POSSESSION BASED ON THE SAME CONDUCT

In Gamble v. U.S., ___ S.Ct. ___ , 2019 WL 2493923 (June 17, 2019), the U.S. Supreme Court votes 7-2 to retain the dual-sovereignty doctrine (an exception to the constitutional double jeopardy bar) that allows both state and federal prosecutions for the same underlying criminal conduct.

Terance Gamble, who previously had been convicted of second degree robbery, was stopped for a defective headlight. The stop led to a police officer's lawful discovery of a loaded handgun in Gamble's car. After Gamble pleaded guilty in an Alabama state court of being a felon in possession of a firearm in violation of Alabama law, he was indicted in an Alabama federal district court and convicted – based on the same conduct – of the parallel federal crime.

The 11th Circuit Court of Appeals rejected Gamble's argument that the U.S. Constitution's protection against double jeopardy does not support this result. He argued that the federal courts should abandon what is known as the dual-sovereignty doctrine. The U.S. Supreme Court affirms by a 7-2 vote. Justice Alito writes the majority opinion that is signed by five other Justices. Justice Thomas writes a concurring opinion. Justices Ginsburg and Gorsuch write separate dissenting opinions.

The introduction to Justice Alito's majority opinion summarizes the majority's ruling as follows:

> We consider in this case whether to overrule a longstanding interpretation of the Double Jeopardy Clause of the Fifth Amendment. That Clause provides that no person may be "twice put in jeopardy" "for the same offence." Our double jeopardy case law is complex, but at its core, the Clause means that those acquitted or convicted of a particular "offence " cannot be tried a second time for the same "offence." But what does the Clause mean by an "offence"?
>
> We have long held that a crime under one sovereign's laws is not "the same offence" as a crime under the laws of another sovereign. Under this "dual-sovereignty" doctrine, a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute.
>
> Or the reverse may happen, as it did here. Terance Gamble, convicted by Alabama for possessing a firearm as a felon, now faces prosecution by the United States under its own felon-in-possession law. Attacking this second prosecution on double jeopardy grounds, Gamble asks us to overrule the dual-sovereignty doctrine. He contends that it departs from the founding-era understanding of the right enshrined by the Double Jeopardy Clause. But the historical evidence assembled by Gamble is feeble; pointing the other way are the Clause's text, other historical evidence, and 170 years of precedent. Today we affirm that precedent, and with it the decision below.

Result: Affirmance of 11th Circuit Court of Appeals decision that affirmed the U.S. District Court (Alabama) conviction of Terance Gamble for being a felon in possession of a firearm in violation of a federal statute.

"KNOWINGLY" ELEMENT OF FEDERAL CRIME OF UNAUTHORIZED IMMIGRANT UNLAWFULLY IN U.S. IN POSSESSION OF A FIREARM REQUIRES PROOF DEFENDANT KNEW HE WAS NOT AUTHORIZED TO BE IN THE U.S.; THE LOGICAL EXTENSION OF THE RULING IS THAT TO PROSECUTE FELONS IN POSSESSION UNDER THE FEDERAL STATUTE, THE GOVERNMENT MUST SHOW THEY THEY KNEW OF FELON STATUS

Rehaif v. U.S., ___ S.Ct. ___ , 2019 WL 25523487 (June 21, 2019)

INTRODUCTORY LEGAL UPDATE INTRODUCTORY COMMENT ABOUT SOME ELEMENTS OF WASHINGTON'S FIREARMS STATUTES: In the Rehaif decision digested immediately below, the U.S. Supreme Court focuses on the knowingly requirement of a federal statute. The Court apparently rules across the board that, for the federal prosecutor to prosecute under the federal statute that bars various categories of persons from possessing a firearm, the defendant must have known that he or she was in the status for the firearm prohibition (for instance, an unauthorized immigrant or a convicted felon). This ruling will have a direct impact on some Washington law enforcement officers, because occasionally the federal government will prosecute firearms possession cases and other cases where Washington state or local or tribal officers performed the stop, frisk or search that produced the contraband or key evidence in the case.

Now a few paragraphs about some of the Washington statutes that address possession of firearms. Washington state statutes addressing possession of firearms by aliens are RCW 9.41.171, .173 and .175. These provisions are materially different from the wording of the federal statutes that were at issue in the Rehaif case, as well as materially different from the Washington RCW provisions that address possession of firearms by felons. The RCW provisions relating to alien firearm possession are complicated and will not be further addressed in this June 2019 Legal Update.

RCW 9.41.040, Washington's statute that bars felons from possessing a firearm, does not contain the "knowingly" element that is contained in the federal felon-in-possession statute. However, it is important to note that the Washington statute's RCW 9.41.047(1)(a) states, as follows, that a person whose conviction bar the possession of firearms must be given a warning about the bar to possession of firearms:

> **At the time a person is convicted . . . the convicting or committing court shall notify the person, orally and in writing, that the person must immediately surrender any concealed pistol license and that the person may not possess a firearm unless his or her right to do so is restored by a court of record.**

RCW 9.41.047(1) has been interpreted by Washington appellate courts as requiring proof in a felon-in-possession prosecution either (1) that the defendant was notified of the firearms prohibition per the provisions of RCW 9.41.047(1) at the time of the earlier, predicate conviction; or (2) the defendant "otherwise acquired actual knowledge" that RCW 9.41.040's bar applied to the defendant. In State v. Garcia, 191 Wn.2d 96 (2018), the Washington Supreme Court majority declared that the "otherwise acquired actual knowledge" requirement is met by later-acquired information "that is communicated by or derived from an authorized source, such as a judge, a probation officer, a member of the court staff, or defense counsel." The Washington Supreme Court in Garcia did not include a law enforcement officer in its list of "authorized sources," though *maybe* that could be argued by a Washington prosecutor willing to take the issue on appeal.

THE U.S. SUPREME COURT RULING IN REHAIF

In Rehaif v. U.S., ___ S.Ct. ___ , 2019 WL ___ (June 21, 2019), a 7-2 majority of the U.S. Supreme Court rules that in a prosecution under 18 U. S. C. §922(g) and §924(a)(2) for knowingly being in possession of a firearm while in the status of being an alien unlawfully in the United States, the government must prove both (1) that the defendant knew he possessed a firearm and (2) that he knew he belonged to the relevant category of persons (unauthorized immigrants, aka illegal aliens) barred from possessing a firearm.

Justice Breyer writes the majority opinion that is signed by six other Justices. Justice Alito writes a dissenting opinion that is joined by Justice Thomas. Section 922(g) is the same statute that is relied on in federal court to criminalize gun possession by convicted felons. In his dissent, Justice Samuel Alito argues that the decision is contrary to rulings in the federal circuit courts of appeal, and that the decision will lead to many challenges by current federal prisoners who were convicted under Section 922(g), most of them in the felon-in-possession category.
The majority opinion expressly recognizes that prosecutors may prove the "knowingly" element through circumstantial evidence, but the opinion does not give a recipe for prosecution, stating, "We express no view . . . about what precisely the Government must prove to establish a defendant's knowledge of status in respect to other Section 922(g) provisions not at issue here."

The majority opinion does mention two hypothetical fact scenarios in which there could be reasonable doubt that the defendant knew that he was in unauthorized immigrant status. First, the majority opinion points out that a failure to require knowledge would criminalize firearm possession by "an alien who was brought to the United States unlawfully as a small child and was therefore unaware of his unlawful status." Second, the majority opinion points to a hypothetical felon-in-possession case involving "person who was convicted of a prior crime but sentenced only to probation, who does not know that the crime is 'punishable by imprisonment for a term exceeding one year."

Result: Reversal of 11th Circuit decision that affirmed the U.S. District Court (Florida) firearm conviction of Hamid Mohamed Ahmed Ali Rehaif.

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NINTH CIRCUIT, UNITED STATES COURT OF APPEALS

TERRY V. OHIO'S REASONABLE SUSPICION STANDARD: NINTH CIRCUIT PANEL RULES THAT TWO FACT ELEMENTS – (1) ANONYMOUS TIP DESCRIBING A BLACK MAN WALKING IN SEATTLE "WITH A GUN," PLUS (2) FLIGHT BY THE MAN WHEN THE MAN SAW THAT KING COUNTY METRO OFFICERS WERE FOLLOWING HIM WITH THEIR EMERGENCY FLASHERS ACTIVATED – DID NOT ADD UP TO REASONABLE SUSPICION TO STOP THE MAN UNDER TERRY

U.S. v. Brown, ___ F.3d ___ , 2019 WL ___ (9th Cir., June 5, 2019)

INTRODUCTORY LEGAL UPDATE EDITORIAL COMMENTS: 1. Washington state "seizure" standard: In the Brown case, because the case was tried in the federal courts, the Fourth Amendment applies, and therefore assessment of whether officers had reasonable suspicion for a Terry stop includes the fact that Brown tried to flee when the officers first turned on their flashers to try to seize him. Under the Fourth Amendment case law from the U.S. Supreme Court, an order to stop or a show of authority by an officer signaling a person to stop is never a "seizure" of the suspect if the suspect does not comply. Thus, the reasonable suspicion facts involved: (1) an anonymous report of a black man with a gun, (2) police sighting of a man meeting the report's other descriptors of the man, and (3) the man's flight when officers signaled him to stop walking away from them.

If instead this were a case to be tried in the Washington courts under the Washington constitution (article I, section 7) the Washington courts would not include in their assessment of reasonable suspicion the fact that Brown ran when officers gave him a signal to stop (I speculate that this may be the reason this case was prosecuted in federal court). The stop/seizure would instead be deemed to have occurred at the point when the officers turned on their flashers, i.e., before defendant Brown tried to flee. In State v. Young, 135 Wn.2d 498 (1998), the Washington Supreme Court held under article I, section 7 of the Washington constitution that an officer's command to stop – or an officer's show of authority that reasonably would be construed an order to stop – is a "seizure," thus avoiding having courts consider on the "seizure" issue what Young considered to be the "subjective" fact that the suspect tried to flee. In Brown, the only other information that officers had was an anonymous report of a man with a gun and a sighting of a man meeting other descriptors provided by the informant. Clearly, that information does not constitute reasonable suspicion that would support a Terry seizure.

2. <u>The "reasonable suspicion" standard under state and federal constitutions</u>: To date, Washington appellate courts have not issued an "independent grounds" ruling making the Washington constitution's "reasonable suspicion" standard different from the Fourth Amendment's standard. On the other hand, under the Supremacy Clause of the U.S. constitution, the Washington constitution cannot impose a search and seizure standard that is less protective of liberty and privacy than the Fourth Amendment. Therefore, when the Ninth Circuit rules as it does in <u>Brown</u>, i.e., that the fact that Brown ran from the officer is given limited weight in assessing reasonable suspicion, Washington officers and their legal advisors and local prosecutors should consider, among other things, how flight factors into determining probable cause to arrest. As always officers and agencies are urged to consult their local prosecutor and legal advisors.

<u>Facts and Proceedings below</u>: (Excerpted from Ninth Circuit opinion)

> This case began with a 911 call reporting that an unidentified resident at the YWCA claimed "they saw someone with a gun." On January 11, 2016, around 7:20 p.m., Sandra Katowitz – an employee at the YWCA in the Belltown neighborhood of Seattle – called 911, which dispatched the information to the Seattle Police Department ("Seattle Police"). Katowitz stated that "[o]ne of [her] residents just came in and said they saw someone with a gun." Katowitz never saw the gun herself. Through Katowitz, the resident described the man as a young, black man of medium build with dreadlocks, a camouflage jacket, and red shoes. The 911 dispatcher asked Katowitz specific questions about what Brown was doing with the gun. Katowitz answered that all her resident said was that "he has a gun."
>
> Katowitz did not indicate that the resident yelled or shouted, was visibly upset by seeing the gun, or was otherwise alarmed by the gun's presence. Also, there was no indication that the man was loitering at the residence, was known at the YWCA, was harassing or threatening any residents there, or had done anything other than be seen by the resident. The resident remained in the lobby while Katowitz called 911, but on the call the resident can only be heard stating that she did not want to provide a firsthand report because she "[does not] like the police." The resident did not speak to the 911 dispatcher or the officers who responded to the call, nor did she provide her name.
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> While Seattle Police officers were speaking to Katowitz, two King County Sheriff's Office Metro Transit Unit ("Metro") officers heard and responded to the 911 call.
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> [<u>Court's footnote</u>: *After speaking to Katowitz, the Seattle Police officers who responded to the call at the YWCA updated the dispatcher, saying that "we have no victim of any crime." The record is at best ambiguous as to whether the Seattle Police officers updated dispatch that there was "no victim of any crime" before [the two Metro officers] stopped Brown at gunpoint.*}
>
> From his patrol car, [Metro Officer A] spotted Brown, who was on foot and matched the 911 description. [Metro Officer A] called his partner, [Metro Officer B]. Then [Metro Officer A] began the pursuit, driving behind Brown slowly for several blocks before turning on his patrol lights [**<u>Legal Update Editorial Note</u>: I assume that the Court is using the phrase "patrol lights" to refer to emergency flashers**.]. and driving the wrong direction down a one-way street to follow Brown. Seeing the lights and patrol car coming from behind him, Brown ran. [The two Metro officers] pursued Brown for one block before stopping him and ordering him to the ground at gunpoint. The officers

placed Brown in handcuffs and found a firearm in his waistband. A further search revealed drugs, cash, and other items.

Brown moved to suppress the evidence from the searches, arguing that the officers lacked reasonable suspicion to stop him under *Terry v. Ohio*, 392 U.S. 1 (1968). The district court disagreed and denied the motion.

ISSUE AND RULING: King County Metro officers received a report from a self-identified source at the YWCA. The caller reported that an unidentified YWCA resident had told the YWCA employee that a short while earlier the resident had come into the YWCA and told the YWCA employee that the resident had seen a young man who was "armed with a gun." The man with a gun had been described by the unidentified/anonymous source as being black and of medium build with dreadlocks, and wearing a camouflage jacket and red shoes. When officers saw a man meeting the description, they began following him and then turned on their emergency flashers. When the man saw the activated emergency lights of the patrol car, the man tried to run away. The officers got the man under control and eventually arrested him, first finding a firearm in his waistband, and then finding drugs, cash and other items.

Under the Fourth Amendment, did the officers have reasonable suspicion justifying a stop where they: (1) received a report from an unidentified source describing a man "armed with a gun," (but not telling how the gun was carried), and (2) saw a man who met the description and who ran when officers attempted to stop him? (ANSWER BY NINTH CIRCUIT PANEL: No)

Result: Reversal of U.S. District Court (Western Washington) order that denied the motion of Daniel Derek Brown for an order suppressing the evidence that officer seized in the stop)

ANALYSIS: (Excerpted from lead opinion for the Ninth Circuit panel)

Here, the lack of facts indicating criminal activity or a known high crime area drives our conclusion. The Metro officers who stopped Brown took an anonymous tip that a young, black man "had a gun" – which is presumptively lawful in Washington – and jumped to an unreasonable conclusion that Brown's later flight indicated criminal activity. At best, the officers had nothing more than an unsupported hunch of wrongdoing. The government's effort to rest reasonable suspicion on the tip and Brown's flight fails to satisfy the standard established by Terry and Wardlow. The combination of almost no suspicion from the tip and Brown's flight does not equal reasonable suspicion.

The tip suffers from two key infirmities – an unknown, anonymous tipster and the absence of any presumptively unlawful activity.

It is well established that an anonymous tip that identifies an individual but lacks "moderate indicia of reliability" provides little support for a finding of reasonable suspicion. See Florida v. J.L., 529 U.S. 266, 270-71 (2000). As the Supreme Court has observed: "Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity."

Even though Katowitz identified herself, the actual source of the tip – the resident – remained anonymous. Nor did the tip provide any predictive information that might have served as indicia of reliability. . . . The Supreme Court has found a virtually identical anonymous tip insufficiently reliable to create reasonable suspicion. [Florida v. J.L., 529

U.S. 266 (2000)] (holding an anonymous tip that a young black man in a plaid shirt was carrying a gun insufficient to create reasonable suspicion).

The Court was clear in J.L. that "a tip [must] be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." None of the officers who responded to the 911 call articulated what crime they suspected Brown of committing. They stated only that they knew he had a firearm, testifying at the suppression hearing: "I heard them dispatch a call to a subject with a gun . . . ," and "I heard a call of a subject with a gun at - - in the Belltown area." These statements are illustrative for what is not said. Although an officer is not required to identify the exact crime he suspects, he must articulate suspicion as to some criminality, not simply "an 'inchoate and un-particularized suspicion or hunch' of criminal activity." . . .

In Washington State, it is presumptively lawful to carry a gun. It is true that carrying a concealed pistol without a license is a misdemeanor offense in Washington. See RCW §§ 9.41.050(1)(a) ("[A] person shall not carry a pistol concealed on his or her person without a license to carry a concealed pistol . . . ."), 9.41.810 (explaining that any violation of the subchapter is a misdemeanor "except as otherwise provided"). However, the failure to carry the license is simply a civil infraction. Id. § 9.41.050(1)(b) ("Every licensee shall have his or her concealed pistol license in his or her immediate possession at all times . . . . Any violation of this subsection . . . shall be a class 1 civil infraction . . . ."). Notably, Washington is a "shall issue state," meaning that local law enforcement must issue a concealed weapons license if the applicant meets certain qualifications. Id. § 9.41.070(1).

The anonymous tip that Brown had a gun thus created at most a very weak inference that he was unlawfully carrying the gun without a license, and certainly not enough to alone support a Terry stop. Cf. Delaware v. Prouse, 440 U.S. 648, 663 (1979) (holding that unless there is a particularized suspicion that the driver is unlicensed, officers are prohibited from stopping drivers solely to ensure compliance with licensing and registration laws).

Faced with this reality, the government now argues that the officers suspected that the manner in which Brown was carrying his gun was unlawful: it is "unlawful for any person to carry, exhibit, display, or draw any firearm . . . in a manner, under circumstances, . . . that warrants alarm for the safety of other persons." RCW § 9.41.270. Never mind that nothing in the record could support such a finding. No evidence shows that the resident was alarmed at the time she reported seeing the gun. There is no report that she yelled, screamed, ran, was upset, or otherwise acted as though she was distressed. Instead, the 911 call reported only that the resident "walked in" and stated "that guy has a gun." The 911 dispatcher followed up trying to learn more about how Brown was displaying the gun, other than simply possessing it. But Katowitz simply reiterated, "[u]h, she just came in and said he has a gun." Both of the officers that stopped Brown testified they were responding to a call about a "subject with a gun." Considering the tipster's anonymity and the presumptive legality of carrying a concealed firearm in Washington, the "tip" alone did not create reasonable suspicion that Brown was engaged in any criminal activity.

The government also offers a post hoc rationale, namely that the call coming from the YWCA – a women's shelter – was part of the whole picture considered by the officers. Nothing in the record suggests that Brown was in the shelter, loitering in front of the

shelter, or harassing or threatening anyone around the shelter. To the contrary, Brown was walking away from the shelter at the time of the stop. While we do not take lightly the possibility of violence at a women's shelter, such a threat was not part of the totality of circumstances confronting the officers who ultimately stopped Brown. In the end, the 911 call revealed nothing more than an unreliable anonymous tip reporting presumptively lawful behavior. That is not to say that the tip has no weight, but under the totality of circumstances, it is worth little. . . .

We next consider Brown's flight from the Metro officers. No one disputes that once the Metro officer activated his patrol car lights, Brown fled. But the Supreme Court has never endorsed a per se rule that flight establishes reasonable suspicion. Instead, the Court has treated flight as just one factor in the reasonable suspicion analysis, if an admittedly significant one. [Illinois v. Wardlow, 528 U.S. 119, 124 (2000)] ("Headlong flight – wherever it occurs – is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."). Nonetheless, the Court has a long history of recognizing that innocent people may reasonably flee from the police:

> [I]t is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.' Innocent men sometimes hesitate to confront a jury; not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves.

Alberty v. United States, 162 U.S. 499, 511 (1896).

Notably, the officers did not communicate with Brown, use their speaker to talk with him, or tell him to stop before they flashed their lights and then detained him. Under these circumstances, Brown had no obligation to stop and speak to an officer. See Florida v. Royer, 460 U.S. 491, 497-98 (1983) (holding that an individual has no obligation to respond when police approach and ask questions).

The situation was far different in United States v. Smith, where the officer activated his siren twice, pulled over, and exited his vehicle before commanding Smith to stop. 633 F.3d 889, 891 (9th Cir. 2011). Smith, who was in a high crime area, turned around and questioned whether the officer was talking to him. The officer clarified he was and again commanded Smith to stop. After a very pointed back and forth with the officer, who made it clear that Smith should stop, Smith suddenly broke out into a headlong run, which the court found to be for "no other reason than to evade." As the officer approached, Smith said that he had a handgun in his pocket.

The circumstances here are also very distinguishable from what law enforcement faced in Wardlow. There, the officers specifically "converg[ed] on an area known for heavy narcotics trafficking in order to investigate drug transactions" and discovered the suspect holding an opaque bag, who immediately ran after looking in the direction of the officers. Assessing the situation from the officers' reasonable perspective, the totality of the

circumstances – the baggie, the high crime area, and the known heavy narcotics trafficking in that area – put Wardlow's flight from the officers in an extremely suspicious light. ("It was in this context [of the officers anticipating encountering various people involved in drug crimes and seeing Wardlow holding an item consistent with drug trafficking] that [the officer] decided to investigate Wardlow after observing him flee.").

By contrast, in the face of a weak tip, this case presents little more than a black man walking down the street in Belltown, which the government does not argue is a "high crime" area. There is no evidence that Brown was in an area known for unlawful gun possession, unlike the "heavy narcotics trafficking area" in Wardlow, nor did the officers observe Brown holding something or walking in a particular way that would corroborate the information that he might be carrying a gun. Brown did not refuse to speak with the officers after verbal request. Although Brown's flight might be suggestive of wrongdoing, it did not corroborate any reliable suspicion of criminal behavior.

In evaluating flight as a basis for reasonable suspicion, we cannot totally discount the issue of race. In explaining his understanding of the limits of the Court's opinion in Wardlow, Justice Stevens recognized that flight can be a problematic factor in the reasonable suspicion analysis because some citizens may flee from police for their safety. See Wardlow, 528 U.S. at 126-140 (Stevens, J., concurring in part and dissenting in part). Several years before Justice Stevens' concurrence, our court addressed at length "the burden of aggressive and intrusive police action [that] falls disproportionately on African-American, and sometimes Latino, males" and observed that "as a practical matter neither society nor our enforcement of the laws is yet colorblind." Washington v. Lambert, 98 F.3d 1181, 1187-88 (9th Cir. 1996). There is little doubt that uneven policing may reasonably affect the reaction of certain individuals – including those who are innocent – to law enforcement.

In the almost twenty years since Justice Stevens wrote his concurrence in Wardlow, the coverage of racial disparities in policing has increased, amplifying awareness of these issues. This uptick in reporting is partly attributable to the availability of information and data on police practices.

> [Court's footnote: *For example, relevant to this case, in 2011 the U.S. Department of Justice investigated the Seattle Police Department and released a report finding "a pattern or practice of using unnecessary or excessive force" and "serious concerns" about racially discriminatory policing. . . . .Since this report, the Department has been subject to a Consent Decree focused on eliminating the identified constitutional violations. See United States v. City of Seattle, No. C12- 1282JLR, 2018 WL 6304761, at *1 (W.D. Wash. Dec. 3, 2018). Two years after Brown's arrest, in January 2018, a federal judge determined the Seattle Police Department was fully compliant with phase one of the Consent Decree, although review under the decree continues. See id. at *1–2.]*

Although such data cannot replace the "commonsense judgments and inferences about human behavior" underlying the reasonable suspicion analysis, it can inform the inferences to be drawn from an individual who decides to step away, run, or flee from police without a clear reason to do otherwise. . . . Given that racial dynamics in our society – along with a simple desire not to interact with police – offer an "innocent" explanation of flight, when every other fact posited by the government weighs so weakly

> in support of reasonable suspicion, we are particularly hesitant to allow flight to carry the day in authorizing a stop.
>
> Even under Wardlow, flight itself – the "consummate act of evasion" – is not tantamount to guilt. Although flight may be suggestive of wrongdoing, the absence of other factors here, when considered alongside a tip that is entitled to little weight, underscores the lack of reasonable suspicion.

[Some citations omitted, others revised for style]

CONCURRING OPINION:

A summary by staff for the Ninth Circuit (note that a staff summary is not part of the opinion) summarizes the concurring opinion of Judge Friedland as follows:

> Concurring, Judge Friedland wrote separately to elaborate on three points: (1) the presumptive legality of carrying a concealed firearm in Washington makes this case distinguishable from Foster v. City of Indio, 908 F.3d 1204 (9th Cir. 2018) [which noted an opposite presumption of **il**legality of carrying a concealed firearm in California]; (2) to help explain why the result here is different from that in Illinois v. Wardlow, it is helpful to think of justification for a Terry stop as a calculus in which the factors raising suspicion must, after aggregating their relative weights, add up to reasonable suspicion; and (3) nothing in the record supports the conclusion that the officers were stopping Brown simply because he was black.

The text of Judge Friedland's concurring opinion is as follows:

> I agree that [the Metro officer] did not have a reasonable suspicion that Brown was engaged in a crime when they stopped him, so I concur in the majority opinion. I write separately to elaborate on a few points.
>
> First, the presumptive legality of carrying a concealed firearm in Washington makes this case distinguishable from our recent decision in Foster v. City of Indio, 908 F.3d 1204, 1215–16 (9th Cir. 2018), in which we held that an officer could have reasonably believed that an anonymous tip alleging that an individual had a gun created reasonable suspicion. There, even though the tip did not state that the person was carrying the gun illegally or was about to commit a crime, we held that a reasonable officer "could have concluded that the tip . . . provided information on potential illegal activity" because it is presumptively unlawful to carry a concealed weapon without a permit in California, which issues concealed carry permits to only 0.2 percent of its adult population. . . .In comparison, Washington is not only a "shall issue state," as the majority opinion emphasizes; it is also a state in which almost ten percent of citizens have concealed carry permits. See John R. Lott, Jr., Concealed Carry Permit Holders Across the United States: 2016, Crime Prevention Research Center, July 26, 2016, at 20. Especially following our holding in Foster, I believe that statistic weighs in favor of concluding that there was no reasonable suspicion to stop Brown.
>
> Second, to help explain why the result here is different from that in Illinois v. Wardlow, 528 U.S. 119 (2000), I believe it is helpful to think of justification for a Terry stop as a calculus in which the factors raising suspicion must, after aggregating their relative weights, add up to reasonable suspicion. Under this framing, the Supreme Court in

Wardlow may be interpreted as suggesting that flight affords officers most of the reasonable suspicion needed to conduct a Terry stop. In Wardlow, the suspect's presence in the narcotics trafficking area while holding an object consistent with drug trafficking activity provided enough additional suspicion that, taken together with the suspect's flight, there was reasonable suspicion to support a Terry stop. By contrast, the tip here was so unreliable that it added less suspicion to Brown's flight than Wardlow's presence and actions in a drug trafficking area did to his. Without more than this tip, even if Brown's flight created a significant amount of suspicion, the Metro officers lacked sufficient suspicion overall to stop and frisk him.

In my view, however, the Metro officers may have been able to stop Brown in a constitutional manner if they had approached the situation differently. Because Washington law requires an individual to "have his or her concealed pistol license in his or her immediate possession at all times" and punishes the failure to produce the license on request as a civil infraction, Wash. Rev. Code § 9.41.050(1)(b), I believe the Metro officers could have approached Brown to ask him to show his concealed carry license. The officers would not have "seized" Brown, and therefore would not have required reasonable suspicion for the interaction, as long as a reasonable person in Brown's position would "feel free 'to disregard the police and go about his business.'" See Florida v. Bostick, 501 U.S. 429, 434 (1991) (quoting California v. Hodari D., 499 U.S. 621, 628 (1991)).

And if Brown had failed to produce the license, he would have committed a civil infraction at minimum. See Wash. Rev. Code § 9.41.050(1)(b). Washington law would then have permitted the officers to ask Brown for his name and, if he refused, to detain him "for a period of time not longer than is reasonably necessary to identify the person for purposes of issuing" the infraction. Id. § 7.80.060; see id. § 7.80.050, see also State v. Duncan, 146 Wn.2d 166 (2002). Depending on Brown's responses and reactions, the officers might even have obtained reasonable suspicion that Brown did not have a license at all, which would have made his gun possession a misdemeanor offense under § 9.41.050(1)(a). Once they had such suspicion, the officers could have conducted a full Terry stop and frisk.

We are not reviewing the constitutionality of such a hypothetical stop here, however, because the Metro officers did far more than approach Brown and ask him for his concealed carry license. As soon as Brown ran, the officers cornered him with guns drawn, handcuffed him, and frisked him, transforming the stop immediately into a detention that could have only been supported by reasonable suspicion existing prior to the detention.

Third, to the extent the majority opinion, particularly its reference to the Seattle Police Department's current consent decree with the U.S. Department of Justice . . . could be read as suggesting that race explains why the Metro officers initiated the encounter in the first place, I want to emphasize that this is not my understanding.

Nothing in the record supports the conclusion that the officers were stopping Brown simply because he was black. In other words, I see no reason to believe the officers were using the tip as some pretext to stop Brown and that this stop therefore fits into a longer history of Seattle law enforcement engaging in racially discriminatory policing.1

[Judge Friedland's footnote: *Race might help explain why Brown ran. As the majority opinion notes, potentially "innocent" explanations of flight include fears based on racial disparities in policing. But race is not the only innocent explanation that can explain flight – fear of the police for any reason can. And our consideration of these innocent explanations does not mean that the level of suspicion caused by flight is necessarily reduced when the individual fleeing is black. Here, it is the lack of additional facts suggesting Brown's flight was borne out of an effort to hide criminal behavior, such as a reliable tip or police observations suggesting illicit activity, and not Brown's race, that drives our analysis*.]

The concern that Brown had a gun, regardless of race, was something worth investigating, even if the circumstances ultimately fell shy of giving the officers reasonable suspicion.

Given the serious public safety threat that firearms present, we should not discourage law enforcement from investigating whether an individual carrying a gun in public is legally allowed to do so. But law enforcement must do so in accordance with the protections of the Fourth Amendment. Because the Metro officers here did not have reasonable suspicion when they conducted a Terry stop of Brown, the stop cannot stand under the Fourth Amendment.

[Some citations omitted, others revised for style]

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WASHINGTON STATE SUPREME COURT

COMMON LAW NEGLIGENCE CLAIMS AGAINST LAW ENFORCEMENT: MENTALLY ILL PLAINTIFF MAY SUE LAW ENFORCEMENT OFFICER FOR INTENTIONAL USE OF FORCE BASED ON PLAINTIFF'S NEGLIGENCE-BASED THEORY THAT THE OFFICER DID NOT FOLLOW ACCEPTED DE-ESCALATION PRACTICES IN INTERACTIONS WITH PLAINTIFF THAT LED UP TO THE OFFICER'S USE OF DEADLY FORCE ON THE PLAINTIFF

Beltran-Serrano v. City of Tacoma, ___ Wn.2d ___ , 2019 WL ___ (June 13, 2019)

Facts: (Excerpted from Washington Supreme Court majority opinion)

Beltran-Serrano suffers from mental illness and has limited English language proficiency. On June 29, 2013, he was homeless when [Officer A] noticed him standing on the corner of East 28th Street, an area of Tacoma where the police had received multiple complaints about panhandlers. [Officer A] parked her patrol vehicle near Beltran-Serrano and approached him with the goal of educating him about the City's panhandling laws. She did not have reasonable suspicion or probable cause to believe he was committing a crime.

As [Officer A] approached Beltran-Serrano, he laid down on his stomach and started digging in a hole. [Officer A] greeted Beltran-Serrano, but he looked up at her blankly and kept digging in the hole. Noticing that the hole contained mainly garbage, [Officer A] observed Beltran-Serrano pull out an old soda container, take a drink, and throw it back in the hole. When [Officer A] asked Beltran-Serrano if he understood English, he shook

his head no. [Officer A] then radioed for a Spanish-speaking officer. [Officer B], who spoke Spanish, was within one and a half to five minutes away.

Instead of waiting for [Officer B] to arrive, [Officer A] attempted to engage Beltran-Serrano in conversation; he was nonresponsive. She attempted to get Beltran-Serrano to produce identification, gesturing to indicate she wanted to see an ID card. Beltran-Serrano began to pat his pockets as if to look for identification, but then he bent down and reached back into the hole. When [Officer B] moved closer to Beltran-Serrano and continued to address him in English, he became scared and started to run away. [Officer A] shot him in the back with a stun gun as he ran across the street. The stun gun did not have the desired effect, and Beltran-Serrano continued to run away. [Officer A] then pulled out her duty weapon and fired multiple shots until Beltran-Serrano fell to the ground. The total time between when [Officer A] called for a Spanish-speaking officer and the shooting was 37 seconds.

Majority Opinion Footnote:

> *The City offers a different view of the facts. According to [Officer A's] statement, after Beltran-Serrano reached back into the hole, he grabbed what appeared to be a piece of construction pipe that was bent into an oval shape. Beltran-Serrano swung the object at [Officer A's] upper body, and she blocked the strike with her left forearm before giving chase to Beltran-Serrano as he ran into the street. As Beltran-Serrano was running away, [Officer A] discharged her stun gun, hitting Beltran-Serrano in the back, at a distance of approximately seven yards. After the stun gun appeared to have no effect, [Officer A] maintains that Beltran-Serrano turned toward her, raised the object above his head as if to strike, and began to move in her direction. [Officer A] then drew her firearm and fired until Beltran-Serrano "dropped the pipe and fell to the ground."*

Proceedings below:

Beltran-Serrano and persons acting in his behalf sued the City of Tacoma and Officer A. The Pierce County Superior Court ruled that Beltran-Serrano could not pursue his negligence-based claims, and that he was limited to pursuing his claim for wrongful application of deadly force.

ISSUE AND RULING: May the mentally ill plaintiff may sue Officer A for intentional use of force based on plaintiff's negligence-based theory that the officer did not follow accepted de-escalation practices in interactions with plaintiff that led up to the officer's use of deadly force on the plaintiff? (ANSWER BY WASHINGTON SUPREME COURT: Yes, rules a 5-4 majority)

Result: Reversal of Pierce County Superior Court order dismissing negligence claims in lawsuit brought by Cesar Beltran-Serrano and others on his behalf.

ANALYSIS:

The majority opinion is authored by Justice Stephens, who is joined by Justices Fairhurst, Gonzalez, Yu and Gordon McLoud. The second paragraph of the majority opinion summarizes the majority's ruling as follows:

> The fact that [Officer A's] conduct may constitute assault and battery does not preclude a negligence claim premised on her alleged failure to use ordinary care to avoid

> unreasonably escalating the encounter to the use of deadly force. Under well-established negligence principles, police officers owe a duty of reasonable care in situations such as this. Beltran-Serrano has presented evidence to allow a jury to find that the City failed to follow accepted practices in [Officer A's] interactions with him leading up to the shooting and that this negligence resulted in his injuries.

The majority opinion also rejects the City's argument that Officer A and the City are protected from liability under the "public duty doctrine" – a doctrine that is (1) common law, (2) ever-shrinking, (3) seemingly ever-more-vaguely described, and (4) legislatively-revisable – that was historically created to prevent suits based on the government's failure to carry out a generalized public duty. Among other things, the majority opinion explains on this issue:

> Beltran-Serrano's negligence claims arise out of [Officer A's] direct interaction with him, not the breach of a generalized public duty. The City therefore owed Beltran-Serrano a duty in tort to exercise reasonable care. Recognizing such a duty does not open the door to potential tort liability for a city's statutorily imposed obligation to provide police services, enforce the law, and keep the peace. These statutory duties have always been, and will continue to be, nonactionable duties owed to the public at large. In this case, however, the specific tort duty owed to Beltran-Serrano arises from [Officer A's] affirmative interaction with him. The public duty doctrine does not apply to prevent the City from being found liable in tort.

Dissents are authored by Justice Madsen (joined by Justices Johnson and Owens) and Justice Wiggins. The dissents do not address the public duty doctrine issue.

……..……Legal Update Editor's Flashback to 2017..……

LEGAL UPDATE EDITORIAL COMMENT NOTING: Compare the Beltran-Serrano decision to the U.S. Supreme Court decision in the Mendez decision. The Mendez decision precludes a Civil Rights Act claim based on law enforcement's "negligence" or "provocation" (the Ninth Circuit's word) in events leading up to the use of deadly force. I repeat here, immediately below, the entry on Mendez that appeared in the May 2017 Legal Update. Of course, the U.S. Supreme Court in Mendez was analyzing a different mix of public policy considerations (relating to the scope of the federal Civil Rights Act) than was the Washington Supreme Court in analyzing in Beltran-Serrano the mix of public policy considerations relating to common law negligence claims against the government.

CIVIL RIGHTS ACT CIVIL LIABILITY: UNITED STATES SUPREME COURT REJECTS THE NINTH CIRCUIT'S "PROVOCATION RULE" FOR EXCESSIVE FORCE CASES

In County of Los Angeles v. Mendez, 137 S.Ct. 11539 (May 30, 2017), the U.S. Supreme Court rules 8-0 in rejecting the "provocation rule" created by the Ninth Circuit of the U.S. Court of Appeals. The Ninth Circuit's rejected provocation rule would allow courts to hold law enforcement officers liable for an otherwise reasonable defensive use of deadly force if the officers had earlier violated the constitution in some other way. In Mendez the earlier violation was a "knock and announce" violation at a makeshift shack/residence. Under the Ninth Circuit approach, officers could be deemed to have thereby "provoked" the violent encounter by ending up, in simplistic terms, in the wrong place at the wrong time.

The Mendez opinion declares that officers cannot be held liable for excessive force under the Fourth Amendment solely due to an earlier "different Fourth Amendment violation." Such an

earlier violation "cannot [automatically] transform a later, reasonable use of force into an unreasonable seizure."

The Fourth Amendment prohibits "unreasonable searches and seizures." The Supreme Court opinion declares that the problem with the provocation rule is that it instructs courts to look back in time to see if there was a different Fourth Amendment violation that is somehow tied to the eventual use of force. Under that approach, the separate earlier violation, rather than the forceful seizure itself, can be the sole basis of the plaintiff's excessive force claim. This approach mistakenly combines distinct Fourth Amendment claims rather than applying objective reasonableness analysis separately for each search or seizure that is alleged to be unconstitutional.

Result: Case remanded to the lower federal courts for further proceedings consistent with the U.S. Supreme Court ruling; the U.S. Supreme Court may not have seen the last of the Mendez case.

LEGAL UPDATE EDITORIAL COMMENT: The Mendez opinion contains language that leaves some room for the plaintiffs to argue on remand to the trial court that the earlier Fourth Amendment violation was a "proximate cause" of the later use of force. But I am doubtful that a majority of the U.S. Supreme Court will ultimately allow that approach to bring the provocation rule in through a side door. Only time will tell, of course. No doubt, plaintiffs' attorneys and a number of federal judges will have an interest in undercutting the Mendez Court's elimination of the Ninth Circuit's provocation rule.

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WASHINGTON STATE COURT OF APPEALS

FOUR SEARCH WARRANT RULINGS: (1) PROBABLE CAUSE SUPPORTS SEARCH WARRANT FOR HOUSE WHERE AFFIDAVIT SETS FORTH SUFFICIENT FACTS FROM WHICH REASONABLE PERSON COULD CONCLUDE THAT DEFENDANT WAS CRIMINALLY INVOLVED IN DISAPPEARANCE OF HIS HOUSEMATE-SISTER, AND THAT RELATED EVIDENCE WOULD BE FOUIND IN THE HOUSE; (2) WARRANT PROVIDES GENERIC CLASSIFICATIONS OF SOME ITEMS TO BE SEIZED BUT NONETHELESS PROVIDES SUFFICIENT GUIDANCE (PARTICULARITY) TO PREVENT A GENERAL RUMMAGING SEARCH; (3) A COMPLAINED-OF OMISSION FROM THE AFFIDAVIT WAS MERELY NEGLIGENT, NOT RECKLESS; AND (4) RECORDING OF SERIAL NUMBER IN PLAIN VIEW ON A POSSIBLY STOLEN WELDER DID NOT EXCEED SCOPE OF SEARCH PERMITTED UNDER WARRANT

State v. Haggard, ___ Wn. App. 2d ___ , 2019 WL ___ (Div. I, June 3, 2019)

Facts relating to search warrant issues: (Excerpted from Court of Appeals opinion; subheadings added)

Application and affidavit for search warrant

> In July 2016, [Detective A, suspecting that defendant Haggard was responsible for the disappearance of his sister] applied for a warrant to search the property where [defendant] Haggard and his sister, Jamie, had been living before Jamie's disappearance. During the execution of that warrant on July 15, 2016, officers

discovered evidence of the crimes [second degree arson and second degree burglary] with which Haggard was later charged in this case.

. . . .

In the affidavit, [Detective A] states that Jamie; her half-brother, Haggard; his girlfriend, Carlee Chew; and Jason Nolte lived together in the Kenmore house. Jamie disappeared without notice to anyone, including the person with whom she had plans the day after her disappearance. She had been involved in a physical altercation with Haggard the day before she disappeared. Haggard filled in a hole at the property soon after her disappearance and impersonated Jamie in a text message to their sister. Additionally, Haggard's accounts of the events leading up to Jamie's disappearance changed multiple times over the course of his contacts with police.

. . . .

[Detective A's] affidavit said that she believed that evidence of Jamie's murder could be found at the Kenmore house, in Haggard's truck, in Nolte's car, and in the phone records of the relevant parties. The affidavit listed a specific date range for the cell phone data and position information to be searched. The affidavit also listed examples of items in the house that would help to establish whether Jamie was missing voluntarily, including "clothes, phones, belongings, medications, prescriptions (given her abuse of narcotic pain pills), purses, suitcases, documents, diaries, etc." Haggard had stated to officers that Jamie had driven Nolte's car the night before she disappeared and he believed she had been in his truck since her disappearance. The trial court did not see any problems with the particularity of the warrant because the items listed were related to the suspected homicide.

. . . .

Haggard argues that [Detective A] recklessly omitted from her affidavit the fact that Nolte was in jail at the time of Jamie's disappearance, knowing "that the court would draw unfair inferences as to the likelihood of [Nolte's] involvement in criminal activity." . . .

. . . .

Scope of search at the Kenmore house

[Detective B] testified at the CrR 3.6 hearing that she participated in the search of the Kenmore house on July 15, 2016. She oversaw the search-and-rescue personnel and took photographs of the scene. During the search, she noticed a large metal arc welder located in the breezeway between the residence and the garage. She was asked to photograph the welder and she did so. She testified that, although the welder was moved slightly while being photographed, she was able to see the front of the welder without moving it and that the serial number was printed on the front of the welder. [Detective A] had told her that the welder was suspected stolen property, and [Detective B] knew that the purpose of photographing the welder was to document the serial number to research whether it was stolen.

Proceedings below:

Haggard lost a motion to suppress evidence seized in a search of the Kenmore house. He was convicted of second degree arson and second degree burglary under factual circumstances not detailed in Court of Appeals opinion.

ISSUES AND RULINGS: (1) Does probable cause support the search warrant for the Kenmore home where the affidavit sets forth sufficient facts from which a reasonable person could conclude that defendant was criminally involved in the disappearance of his sister, and that evidence of the crime would be found in the home? (ANSWER BY COURT OF APPEALS: Yes)

(2) The search warrant for the Kenmore home provides some generic classifications of some of the items to be seized; does the search warrant nonetheless provide sufficient guidance to prevent a general rummaging search by officers executing the search warrant? (ANSWER BY COURT OF APPEALS: Yes)

(3) Is **a** complained-of omission of information (regarding incarcerated status during a relevant period of one possible player) from the search warrant affidavit merely negligent, not reckless, such that the omission does not require a revised look at probable cause for the search warrant? (ANSWER BY COURT OF APPEALS: Yes, the omission was merely negligent)

(4) Was the recording of a serial number that was in plain view on a possibly stolen welder lawful and not outside the scope of the search permitted under the warrant? (ANSWER BY COURT OF APPEALS: Yes)

Result: Affirmance of King County Superior Court convictions of David Brent Haggard for second degree arson and second degree burglary.

ANALYSIS: (Excerpted from Court of Appeals opinion; subheadings added or revised)

1. Affidavit provided probable cause that evidence of crime would be found in residence

> First, Haggard argues that the affidavit in support of the search warrant did not establish probable cause to believe that evidence of specific criminal activity would be found in his residence. Haggard contends that there was no probable cause to believe that Jamie was murdered or that there would be evidence of criminal activity in the place to be searched or items to be seized. The trial court found that there was sufficient probable cause detailed in the affidavit to allow a search of the premises.
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> A magistrate may only issue a search warrant after a showing of probable cause. . . . Probable cause requires only a probability of criminal activity, not a prima facie showing. . . . If the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that a person is probably involved in criminal activity and the evidence of the crime could be found in the place to be searched, probable cause exists. . . .
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> . . . .
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> Because the affidavit sets forth [the facts described above], which are sufficient for a reasonable person to conclude that Haggard was involved in criminal activity and evidence of that activity could be found in the residence, probable cause existed to issue the warrant.

2. Warrant provided sufficient particularity to prevent a general rummaging search

> Haggard also argues that the warrant was overbroad because it lacked sufficient particularity as to the items to be seized. Specifically, Haggard contends that the warrant allowed property belonging to other residents of the house to be seized because it did not provide objective standards for distinguishing between Jamie's belongings and the belongings of the other residents.
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> . . . .
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> "A warrant is overbroad if it fails to describe with particularity items for which probable cause exists to search." State v. Keodara, 191 Wn. App. 305, 312 (2015) A warrant is not necessarily impermissibly broad solely because it lists generic classifications. . . . Washington courts have upheld such general descriptions as "specific items plus any other evidence of the homicide . . . any and all evidence of assault and rape included but not limited to . . . specified items," and "trace evidence from the victim in the van." . . . . However, "blanket inferences and generalities cannot substitute for the required showing of 'reasonably specific "underlying circumstances" that establish evidence of illegal activity will likely be found in the place to be searched in any particular case.'" Keodara, 191 Wn.App. at 313 . . .
>
> Here, although the warrant contains generic classifications of the items to be searched and seized, it gives sufficient guidance to officers to prevent them from "mak[ing] the search a 'general, exploratory rummaging in a person's belongings.". . . The listed items were all related to the disappearance and suspected homicide of Jamie Haggard. The warrant was not impermissibly broad.

3. Complained-of omission from affidavit was not intentional or reckless

> Haggard also argues that the warrant was overbroad because it lacked sufficient particularity as to the items to be seized. Specifically, Haggard contends that the warrant allowed property belonging to other residents of the house to be seized because it did not provide objective standards for distinguishing between Jamie's belongings and the belongings of the other residents.
>
> . . . .
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> "A warrant is overbroad if it fails to describe with particularity items for which probable cause exists to search." State v. Keodara, 191 Wn. App. 305, 312 (2015). . . . A warrant is not necessarily impermissibly broad solely because it lists generic classifications. . . . Washington courts have upheld such general descriptions as "specific items plus any other evidence of the homicide ... any and all evidence of assault and rape included but not limited to . . . specified items," and "trace evidence from the victim in the van." . . However, "blanket inferences and generalities cannot substitute for the required showing of 'reasonably specific "underlying circumstances" that establish evidence of illegal activity will likely be found in the place to be searched in any particular case.'" . . .
>
> Here, although the warrant contains generic classifications of the items to be searched and seized, it gives sufficient guidance to officers to prevent them from "mak[ing] the search a 'general, exploratory rummaging in a person's belongings." . . . . The listed

items were all related to the disappearance and suspected homicide of Jamie Haggard. The warrant was not impermissibly broad.

4. Recording of a serial number that was in plain sight on a welder did not go beyond the scope of the warrant

> Next, Haggard argues that the law enforcement officers who executed the warrant exceeded its scope by searching and seizing property unrelated to the target of the search warrant. Haggard contends that moving a welder to locate its serial number constituted a warrantless search and seizure because the warrant did not authorize them to move the welder. The trial court found it "very clear" that the serial number was in plain view because it was on the front of the welder and exposed. Therefore, the court found that there was no warrantless search or seizure of the welder when the serial number was in plain sight on the front of the equipment. In its written findings, the [trial] court concluded that the welder was in plain view in a common area of the house, and taking a picture of an object in plain view at a scene violates neither Article I, Section [7] of the Washington State Constitution nor the Fourth Amendment to the United States Constitution. . . .
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> . . . .
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> Recording serial numbers that are in plain view does not constitute a search or seizure. Arizona v. Hicks, 480 U.S. 321, 324-25 (1987). In Hicks, a police officer searching an apartment for evidence of a shooting noticed expensive stereo equipment that seemed out of place in the "squalid and otherwise ill-appointed four-room apartment." . . . . He recorded the serial numbers to check if the equipment was stolen, but had to move components of the equipment to find the numbers. . . . The Court found that moving suspected stolen property in order to locate the serial number constituted a search that must be supported by authority of law. . . .
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> Unlike the serial numbers on the equipment in Hicks, the serial number on the welder was clearly visible before it was moved. Because the serial number was in plain view, photographing that number did not constitute a separate search or seizure. The trial court did not err in finding that recording this information did not violate Haggard's constitutional rights.

[Some citations omitted, others revised for style. Note that the Court of Appeals wove the facts into the legal analysis, issue by issue; I have instead separated out the facts to present them in one section of this entry; I believe that this approach is easier to understand, and I do not believe that I have distorted the Court analysis in doing so.]

FELONY ELUDING STATUTE UPHELD AGAINST VAGUENESS CHALLENGE

In State v. Schilling, ___ Wn. App. 2d ___ , 2019 WL ___ (Div. III, June 4 2019), the Court of Appeals rejects defendant's argument that the "reckless manner" language in RCW 46.61.024, Washington's felony eluding statute is unconstitutionally vague in violation of federal constitutional due process protections.

Result: Affirmance of Spokane County Superior Court conviction of Derek W. Schilling for attempt to elude a pursuing police vehicle.

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BRIEF NOTES REGARDING JUNE 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 June 2019, seven 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. Joseph Mackner Eldridge: On June 3, 2019, Division One of the COA rules for the defendant in his appeal from his Snohomish County Superior Court conviction for fourth degree assault-domestic violence. The Court of Appeals rules that Eldridge's Sixth Amendment right to confrontation of witnesses against him was prejudicially violated by the trial court's admission into evidence the "non-testimonial" statements of the victim-wife to a law enforcement officer investigating at the scene of the alleged assault. The Court of Appeals discusses, among other Right of Confrontation precedents, the U.S. Supreme Court decisions in Crawford v. Washington, 541 U.S. 36, 53-54, (2004); Davis v. Washington, 547 U.S. 813 (2006) and Michigan v. Bryant, 562 U.S. 344, 359, (2011). The Court of Appeals remands for a new trial.

2. State v. Kevin Lee Forler: On June 10, 2019, Division One of the COA rules for the State in rejecting defendant's appeal from his Kitsap County Superior Court conviction for attempted rape of a child and attempted commercial abuse of a child. The Division One panel rules, among other things, that law enforcement conduct in a Craigslist sting was not outrageous in violation of Forler's constitutional due process rights. On this issue, the panel factually distinguishes the appellate decision in State v. Solomon, 3 Wn. App. 2d 895 (2018) where it was held that an officer went too far in (1) using graphic and sexualized language, and (2) persisting relentlessly in trying to lure the target despite the target's repeated attempts to discontinue the communications.

3. State v. Clarissa Alisha Lopez: On June 11, 2019, Division Two of the COA rules for the State in rejecting defendant's appeal from her Lewis County Superior Court convictions for (A) one count of possession of a controlled substance, (B) two counts of possession of a controlled substance with intent to deliver, and (C) one count of bail jumping. The Division Two panel rules that the defendant was not unlawfully seized (the trial court rejected the defendant's factual claim that officers ordered her out of a car; and the trial court instead found, consistent with officer testimony, that there was no "seizure" in a contact by law enforcement officers with

persons who arrived a house where a search warrant was being executed). The Division Two panel also rules that the defendant voluntarily consented to a search of bags (the trial court apparently rejected the defendant's factual claims that officers first manipulated the exterior of her bag, then repeatedly asked her to consent to a search of the bag, and also threatened to "get" a search warrant for the bag; and the trial court instead found, consistent with officer testimony, that her consent was voluntary).

4. State v. Rachael Manelle Star Crettol: On June 11, 2019, Division Two of the COA rules for the defendant (consistent with the State's concession) in her appeal from her Kitsap County Superior Court conviction for unlawful possession of methamphetamine. The State conceded on appeal that officers exceeded the permissible scope of a Terry frisk when they removed baggies from the defendant's pocket during a Terry stop.

5. State v. Terence Franklin Hopwood: On June 11, 2019, Division Two of the COA rules for the State in rejecting defendant's appeal from his Clark County Superior Court convictions for promoting commercial sex abuse of a minor (GSW) and second degree unlawful possession of a firearm. Among other things, the Court of Appeals rejects defendant's arguments that he was arrested without probable cause. The Court explains why this argument fails:

> Detective {A} testified that Hopwood drove [the juvenile prostitute] to McDonald's where [she] had just agreed by text to meet him for a "date" to provide [Detective A] sexual services in exchange for a fee. After GSW arrived at the McDonald's, undercover Detective [A] picked her up and drove to the motel room that he had rented for their "date." Detective [B] testified that he observed Hopwood drop GSW off at McDonald's and that he approached Hopwood and asked him why he dropped a female off at McDonald's. Hopwood first claimed that he dropped off a friend, but later claimed he was an Uber driver and had given GSW a ride. Hopwood did not explain why he was waiting for GSW after dropping her off. . . .
>
> Based on the evidence presented, the trial court correctly concluded that the police had probable cause to arrest Hopwood.

6. State v. Tammy Jo Stewart: On June 18, 2019, Division Two of the COA rules for the State in rejecting defendant's appeal from her Grays Harbor County Superior Court convictions for (A) six counts of first degree unlawful possession of a firearm, (B) five counts of possession of a stolen firearm, and (C) one count of possession of a controlled substance. The Court rules that a search warrant affidavit established probable cause to search Stewart's car, explaining in key part as follows:

> The affidavit stated that an unfired bullet, indicia of firearm possession, was found just outside the driver's side of Stewart's car, which was parked in front of the house in which firearms were found in Stewart's bedroom.

7. State v. Bradley Leith Merson: On June 18, 2019, Division Three of the COA rules for the State in rejecting defendant's appeal from multiple Yakima County Superior Court convictions relating to defendant's sexual involvement with underage girls. Among other things, the Court of Appeals rejects defendant's claim of a privacy right in the contents of a cell phone that the man in his late 40s bought and gave as a gift to a 14-year-old girlfriend and on which phone he paid the monthly service plan.

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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 internet address for the Criminal Justice Training Commission (CJTC) Law Enforcement Digest Online Training is [https://fortress.wa.gov/cjtc/www/led/ledpage.html].

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