LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: Thank you!

MARCH 2020

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UNITED STATES SUPREME COURT

FEDERAL IMMIGRATION STATUTES DO NOT PREEMPT STATE PROSECUTION FOR IDENTITY THEFT FOR USING SOMEONE ELSE'S SOCIAL SECURITY NUMBER TO OBTAIN EMPLOYMENT

In Kansas v. Garcia, ___ S.Ct. ___ , 2020 WL 1016170 (March 3, 2020), the U.S. Supreme Court rules 5-4 that federal immigration statutes and the Supremacy Clause of the U.S. constitution do not expressly or impliedly preclude prosecution under a state's identity theft laws for using another person's social security number to obtain employment.

Three unauthorized aliens (see 8 United States Code, section 1324(a)) were tried in Kansas state courts for identity theft for fraudulently using other persons' Social Security numbers on the federal W-4 forms (for income tax withholding) and Kansas K-4 forms (for Kansas state income tax withholding) that they submitted upon obtaining employment. They had used the same Social Security numbers on their federal I-9 forms (for employment eligibility verification). They were convicted, but the Kansas Supreme Court reversed in a split vote, holding that federal law preempted the prosecutions in state courts. Now, the U.S. Supreme Court has reinstated their Kansas convictions.

The Defendants relied on the U.S. Supreme Court precedent of Arizona v. United States, 567 U. S. 387 (2012), where the Supreme Court ruled that a state law making it a crime for an unauthorized alien to obtain employment conflicted with the Immigration Reform and Control

Act, which makes it a federal crime for an employee to provide false information on an I–9 form or to use fraudulent documents to show work authorization, but which does not make it a federal crime for an alien to work without authorization. Important to the U.S. Supreme Court majority in the Garcia case was that Congress has made no decision that an unauthorized alien who uses a false identity on tax-withholding forms should not face criminal prosecution, and Congress has made using fraudulent information on a W-4 form a federal crime.

Result: Reversal of Kansas Supreme Court decision and reinstatement of Kansas state court convictions of three defendants for identity theft.

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT CIVIL LIABILITY: WHERE DRUNK OFF-DUTY OFFICER RECKLESSLY SHOT A BARTENDER WHILE THE OFFICER WAS ATTEMPTING TO LOAD AN ALREADY-LOADED HANDGUN, NO LIABILITY CAN BE ASSIGNED UNDER THE FOURTEENTH AMENDMENT: (1) TO THE SHOOTER'S TWO OFF-DUTY-OFFICER-COMPANIONS WHO FAILED TO INTERVENE; NOR (2) TO THE POLICE DEPARTMENT BASED ON (A) AGENCY OFF-DUTY-GUN-CARRY POLICY OR (B) ALLEGED "CULTURE OF SILENCE"

In Park v. City and County of Honolulu, ___ F.3d ___ , 2020 WL ___ (March 13, 2020), a three-judge Ninth Circuit panel affirms the U.S. District Court's dismissal of a Civil Rights Act lawsuit brought under 42 U.S.C. § 1983 against (A) two police officers and (B) separately against the City and County of Honolulu. The lawsuit alleged that those parties violated the substantive Due Process right of a plaintiff (Ms. Park, a female bartender) to bodily integrity under the Fourteenth Amendment where Ms. Park was shot by a reckless and drunk off-duty officer who was drinking at a sports bar.

Ms. Part was working at the bar when an off-duty Honolulu PD officer attempted, while intoxicated, to load his already-loaded revolver. The gun accidentally discharged, and Ms. Park was seriously injured. The officer had drunk seven beers over a two-hour period. He had been drinking with two fellow Honolulu PD officers, also off-duty.

Ms. Park brought a lawsuit under the Civil Right Act against (1) the shooter-officer, alleging that the officer's reckless handling of his revolver while drunk violated the Fourteenth Amendment Due Process clause by exhibiting deliberate indifference to her personal safety; (2) the two other off-duty police officers, alleging that, when their companion officer started trying to re-load his loaded revolver, they violated her Due Process rights in that they should have intervened to stop their companion's dangerous conduct; and (3) the Police Department as a separately liable agency under Due Process protections, alleging that policy or custom of the police agency – i.e., (A) a policy that requires off-duty officers to carry a firearm except when they are impaired, and (B) an alleged custom of approving a "culture of silence" among officers – caused her injuries.

Ms. Park settled her claims against the officer who recklessly shot her. The U.S. District Court granted the motions to dismiss filed by the remaining defendants.

1. No liability for the two off-duty officers at the scene because they were not acting under color of state law

The three-judge panel votes 3-0 to hold that, because the two off-duty officers at the scene did not act or purport to act in the performance of their official duties, they were not acting under color of state law, which is a requirement for Civil Rights Act liability. In key part, the panel's analysis is as follows:

> Our circuit has developed a three-part test for determining when a police officer, although not on duty, has acted under color of state law. The officer must have: (1) acted or pretended to act in the performance of his official duties; (2) invoked his status as a law enforcement officer with the purpose and effect of influencing the behavior of others; and (3) engaged in conduct that "related in some meaningful way either to the officer's governmental status or to the performance of his duties." Anderson v. Warner, 451 F.3d 1063, 1068-69 (9th Cir. 2006) (internal quotation marks omitted).
>
> Park's claims against Naki and Omoso fail at the first step. The complaint does not plausibly allege that either officer was exercising, or purporting to exercise, his official responsibilities during the events that led to her injuries. Both officers were off-duty and dressed in plain clothes, drinking and socializing at the bar in their capacity as private citizens. They never identified themselves as officers, displayed their badges, or "specifically associated" their actions with their law enforcement duties. Naffe v. Frey, 789 F.3d 1030, 1038 (9th Cir. 2015). Thus, even accepting Park's allegations as true, there is no sense in which Naki and Omoso performed or purported to perform their official duties on the night in question.
>
> Park alleges that, although Naki and Omoso were off duty and present at the bar in their capacity as private citizens, everything changed when they saw Kimura pull out his firearm. According to the complaint, Naki and Omoso became "effectively on-duty" at that moment, as the Honolulu Police Department requires even its off-duty officers to affirmatively protect the community when a dangerous situation arises in their presence.
>
> But as our cases make clear, the critical question is not whether the officers were technically on or off duty, but instead whether they exhibited sufficient indicia of state authority for us to conclude that they were acting in an official capacity. See, e.g., Van Ort v. Estate of Stanewich, 92 F.3d 831, 838-39 (9th Cir. 1996). For instance, in Van Ort, we held that an officer did not act under color of state law when he robbed a house that he had searched a few days earlier while on duty. We did not rest our decision on the fact that the officer was off-duty when he returned to the house; rather, we emphasized that he was not in uniform, did not identify himself as a policeman, and did not pretend to exercise his official responsibilities in any way.
>
> The same analysis applies here. Because Naki and Omoso did not act or purport to act in the performance of their official duties, they were not acting under color of state law. We accordingly affirm the district court's dismissal of Park's claims against Naki and Omoso.

[Some citations omitted; some paragraphing revised for readability]

2. No police department liability under Monell based on policy regarding carrying guns in off-duty drinking or on alleged custom of "culture of silence"

The three-judge panel votes 2-1 to rule against Park's § 1983 claim against the County, brought pursuant to Monell v. New York City Department of Social Services, 436 U.S. 658 (1978). The

Majority Opinion rejects plaintiff's assertions that the County can be held liable on grounds that the Chief of Police should have amended a Honolulu Police Department policy to prohibit officers from carrying firearms whenever they consume alcohol in any amount. The policy that she challenged states in relevant part:

> All officers . . . shall be in possession of the . . . holstered pistol . . . at all times unless otherwise specified by directive, law, or the situation below:
>
> > Police officers whose physical and/or mental processes are impaired because of consumption or use of alcohol, medication, or any other substance which could impair a person's physical or mental processes, are prohibited from carrying firearms while in such an impaired condition.

The panel also rejects plaintiff's assertion that the Chief of Police should have implemented mandatory whistleblowing policies, which would have rooted out an alleged "culture of silence" relating to off-duty misconduct. The Majority Opinion concludes that plaintiff Park had not plausibly alleged that the Chief of Police had actual or constructive notice that the Chief's inaction would likely result in the deprivation of plaintiff's federally protected rights. In key part, the Majority Opinion's analysis on this issue is as follows:

(A) *Off-duty alcohol consumption and carrying of firearms by officers*

> Park premises her claim against the County on the failure of the relevant policymaker – here, the Chief of Police – to address deficiencies in the two Honolulu Police Department the policy's explicit purpose was to prohibit officers from carrying firearms while in an impaired condition. It in no way directed off-duty officers like Kimura to carry their firearms with them when going to a bar to drink – an activity that could obviously result in one's "physical and/or mental processes" becoming impaired "because of consumption or use of alcohol." Even if Kimura [the officer who recklessly shot the bartender] somehow interpreted the policy to require such action, it is far from obvious that any reasonable officer would have interpreted the policy in that fashion. . . .
>
> Park has not plausibly alleged that the Chief of Police was aware of prior, similar incidents in which off-duty officers mishandled their firearms while drinking. In her complaint, she alleges only that, on two prior occasions, she witnessed Kimura drunkenly brandish his firearm in the presence of Naki and Omoso while drinking at the bar. As Park acknowledges, however, the Chief of Police did not learn of those incidents before her injury, and she alleges no other prior incidents that would have alerted the Chief of Police that officers were interpreting Policy 2.38 to require conduct that endangered members of the public.
>
> Instead, she asserts that the Chief of Police knew or should have known of Policy 2.38's foreseeable consequences because the Honolulu Police Department referenced on its website a Hawaii statute prohibiting individuals with alcohol-abuse disorders from possessing firearms. That allegation falls far short of establishing deliberate indifference.

(B) *Alleged "brotherhood culture of silence"*

> Park's allegations concerning the "brotherhood culture of silence" fare no better. Park asserts that the Chief of Police had actual notice of the foreseeable consequences of his

> inaction because he knew about three prior instances in which officers attempted to conceal each other's misconduct. But Park offers no details about the type of misconduct allegedly committed by these officers or the extent to which their actions implicated community members' federally protected rights.
>
> Without any information about the nature of the prior incidents, we cannot reasonably infer that the Chief of Police knew or should have known that the culture of silence would likely result in the deprivation of Park's constitutional rights. For instance, Park does not even allege that those prior incidents involved the deprivation of an individual's federally protected rights, as opposed to more minor transgressions such as the violation of department overtime policies or the misuse of a police vehicle for personal pursuits.
>
> Unless the Chief of Police had reason to know that the culture of silence extended to concealment of misconduct involving the deprivation of federally protected rights, he cannot be said to have been deliberately indifferent to a foreseeable risk that Park's own rights would be violated. . . .
>
> . . . .
>
> Because Park has not plausibly alleged that the Chief of Police's inaction exhibited deliberate indifference to her federally protected rights, we affirm the district court's dismissal of her § 1983 claim against the County.

[Footnote omitted; subheadings added; some citations omitted; some paragraphing revised for readability]

3. The Dissenting Opinion would have imposed lability on the agency based on Monell

The Dissenting Opinion disagrees with the Majority Opinion on the agency liability question under Monell, agreeing with both of Plaintiff's theories.

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WASHINGTON STATE SUPREME COURT

RCW 9A.16.060(2) DOES NOT ALLOW A DURESS DEFENSE WHERE CHARGE IS MURDER, MANSLAUGHTER OR HOMICIDE BY ABUSE; THEREFORE, IN AGGRAVATED MURDER CASE WHERE AGGRAVATING ELEMENT IS A NON-HOMICIDE CRIME, DEFENDANT IS BARRED FROM PRESENTING A DURESS DEFENSE

In State v. Whitaker, ___ Wn.2d ___ , 2020 WL ___ (March 19, 2020), the Washington Supreme Court is unanimous in rejecting the statutory interpretation argument of defendant that he should have been allowed to argue duress as a defense in his prosecution for aggravated first degree murder. This was the infamous Snohomish County brutal group murder of Rachel Burkheimer.

The first paragraph of the unanimous Opinion for the Court summarizes the ruling as follows:

> Duress generally excuses a person who commits a crime if they are threatened with immediate death or grievous bodily injury. RCW 9A.16.060. Faced with such grave danger, a person may be excused for choosing the lesser evil. But because killing an

> innocent person is never the lesser of two evils, a duress defense is not available when a person is charged with murder. RCW 9A. 16.060(2). John Whitaker was convicted of aggravated first degree murder based on the aggravating circumstance that the murder was committed in the course of a kidnapping. He unsuccessfully sought to argue to the jury that he committed the kidnapping under duress. Because Whitaker was charged with murder, not kidnapping, the Court of Appeals held he was not entitled to assert a duress defense. We affirm.

[Case citations omitted]

RCW 9A.16.060(2) provides as follows:

> (2) The defense of duress is not available if the crime charged is murder, manslaughter, or homicide by abuse.

The Court's Opinion rejects defendant's argument that it does not make sense to read the criminal code as allowing a defendant to argue duress where the only charge is kidnapping, but not to allow a defendant to argue duress where kidnapping (or some other non-homicide crime) is the aggravating element that supports a first degree aggravated murder charge. The Opinion analyzes this issue as follows:

> Whitaker argues that if he would otherwise be excused from kidnapping due to duress, it makes little sense to treat him as if he had no excuse for such conduct in the context of an aggravated murder prosecution. But there is a critical difference between a freestanding kidnapping charge and the kidnapping element in an aggravated first degree murder prosecution. In an aggravated murder prosecution, the State is required to prove that the murder was committed in the course of or in furtherance of the felony. RCW 10.95.020(11). To meet this burden, the State must prove a sufficiently "'intimate connection"' between the killing and the felony. [Case citations omitted]. As a result, the felony aggravating circumstance necessarily involves taking a life. Barring duress as a defense to the felony in this context is consistent with the legislature's policy that duress does not excuse a crime that involves killing an innocent person. [Case citation omitted]

Result: Affirmance of Snohomish County Superior Court conviction of John Alan Whittaker of aggravated first degree murder with kidnapping as the aggravating circumstance.

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WASHINGTON STATE COURT OF APPEALS

OFFICER WHO WAS NOT DRE-CERTIFIED WAS NOT QUALIFIED TO GIVE TESTIMONY THAT DUI ARRESTEE SHOWED SIGNS AND SYMPTOMS CONSISTENT WITH HAVING CONSUMED A CENTRAL NERVOUS SYSTEM STIMULANT; ALSO, OFFICER'S TESTIMONY THAT ARRESTEE WAS "DEFINITELY IMPAIRED" WAS IMPROPER STATEMENT OF OPINION OF DEFENDANT'S GUILT

State v. Levesque, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. I, March 16, 2020)

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

On April 29, 2015, the Seattle Police Department dispatched Officers [A] and [B] to the scene of an automobile accident involving two vehicles. Levesque had failed to stop his vehicle prior to hitting the vehicle in front of him. The accident caused moderate to severe damage, and Levesque's vehicle could not be driven.

[Officer A] placed Levesque under arrest for DUI. [Officer A] later testified that he found probable cause to make the arrest based on

> the manifest driving[,] which [included] the accident while not being able to remember how the accident was caused[; t]he signs and symptoms of possible impairment of under a stimulant which included the perspiring while standing outside of the vehicle on the West Seattle Bridge while it was chilly outside and windy; the inability to recollect the events; and just the overall scene; and the conversation that we had . . . and his mannerisms and his actions

Although [Officer A] had received training in field sobriety tests (FST5), he did not perform any FSTs at the scene because of Levesque's symptoms, the absence of any alcohol smell, and the location of the accident and corresponding impracticability of FSTs. [Officer A] did not perform a horizontal gaze nystagmus (HGN) test for signs of impairment. [Officer A], who is not DRE certified, testified that he attempted to contact a DRE by radio, but no DRE was available.

[Court's footnote 1: *DRE certification involves in-field experience and a series of tests and training. State v. Baity, 140 Wn.2d 1, 4-5 (2000). DRE officers learn to identify whether an individual is under the influence of alcohol or a particular category of drug and whether or not the individual is impaired.*]

After arresting Levesque, [Officer A] transported Levesque to Harborview Medical Center, where he had his blood drawn. The drug analysis results showed that Levesque's blood contained 0.14 milligrams per liter (mg/L) of amphetamine and 0.55 mg/L of methamphetamine. The City charged Levesque with DUI.

Before trial, Levesque moved in limine to, among other things, (1) limit officer testimony to personal observations and (2) exclude any testifying officer's opinion on ultimate issues. The trial court granted the first motion. The trial court also granted the second motion but ruled that an officer could state "in his opinion, based upon the totality of the circumstances, that [Levesque] was impaired." The trial court also granted Levesque's additional motion to exclude officers as experts but declared that an officer – testifying as a lay witness – could "certainly testify to what he [or she] objectively observed during the investigation."

At trial, the City played clips of the dashboard videotape from the incident. Additionally, [Officer A] testified that he approached Levesque at the scene and asked him what happened. Levesque responded that he remembered driving but that "nothing really happened" and that he could not remember the accident. Because Levesque did not have his driver's license, [Officer A] asked Levesque for his address or the last four digits of his social security number to verify his identity. Levesque had difficulty responding and answered inappropriately by stating his birth date many times.

[Officer A] testified that "through [his] training [and] experience" Levesque showed "signs as possibly being impaired by a stimulant." When asked to opine as to whether

> Levesque "was impaired by drugs," [Officer A] testified that his "[o]pinion was that [Levesque] was definitely impaired at the time of the accident." [Officer B] testified that Levesque was "very shaky. . . [and] also very sweaty" and that "[s]weating is indicative of an upper involved in the system." Levesque objected to [Officer A's] testimony – but not [Officer B's] – and requested a mistrial outside the presence of the jury following a lunch recess. The court overruled Levesque's objections.
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> The City also presented testimony from [a captain in] the Seattle Fire Department and forensic scientist Andrew Gingras. [The SFD captain] testified that at the scene of the accident, she determined that Levesque's heart rate and blood pressure were slightly elevated but that Levesque's "pupils were mid, equal, and reactive to light." However, [the SFD captain] also testified that the conversation she had with Levesque "was erratic, [and] he didn't make sense." [The SFD captain's] report from the scene of the accident stated that Levesque "show[ed] behavior consistent with recreational drug use: Short attention span, having to ask questions multiple times, unable to open door without assistance, patient denies being in an accident."
>
> [The forensic scientist] Gingras testified regarding how methamphetamine can impact someone's driving abilities and that "while using methamphetamine . . . , driving tends to be a little faster, so speeding is usually seen, and then excessive lane travel." Gingras also testified regarding the "typical therapeutic range" for methamphetamine levels in the blood and how an individual would react to methamphetamine consumption if prescribed it. Gingras testified, however, that whether a specific level of methamphetamine in the blood impairs an individual's ability to drive "depends on that individual" and agreed that "blood tests . . . [are] insufficient to establish whether someone is impaired or not."
>
> Levesque's defense theory was that he was prescribed medication for injuries which explain his behavior. In support of this defense, Levesque presented testimony from his physician, Dr. Katherine Mayer, about treatment and prescriptions that she provided for Levesque prior to the accident, her diagnoses, and Levesque's symptoms.
>
> The jury convicted Levesque of driving while under the influence. Levesque appealed his conviction to the superior court, which reversed based on the admission of [the testimonies of Officers A and B]. The superior court determined that "[b]ecause neither testifying officer was a qualified [DRE] and the required 12-step DRE protocol was not performed, the foundation for this testimony was insufficient pursuant to State v. Baity, 140 Wn.2d 1] (2000)." The court also held that the errors were preserved for appeal . . . and that the trial court's error admitting the testimony "was not harmless."

[Case citations omitted or revised for style]

ISSUES AND RULINGS: (1) Officer A was not a certified drug recognition expert (DRE). Did he otherwise have sufficient training and experience relating to drug recognition to be qualified to give an expert opinion that Levesque showed signs and symptoms consistent with having consumed a stimulant drug? (ANSWER BY COURT OF APPEALS: No)

(2) Did Officer A's testimony giving his opinion that Levesque was "definitely impaired" constitute an impermissible opinion of Levesque's guilt such that the trial court's admission of that testimony violated Levesque's constitutional right to have the jury determine an ultimate issue? (ANSWER BY COURT OF APPEALS: Yes)

(3) Where Levesque presented testimony from his treating doctor that shock from the accident and previous post-concussion syndrome and a number of underlying medical conditions could have caused the behavior observed by the officers investigating the accident, does this and other evidence in the case, minus the testimony of Officer A, establish harmless error in admitting his testimony, i.e., does the other evidence in the case establish beyond a reasonable doubt that any reasonable jury would have convicted Levesque? (ANSWER BY COURT OF APPEALS: No)

Result: Affirmance of King County Superior Court order that reversed the Seattle Municipal Court DUI conviction of Jeffrey Levesque.

ANALYSIS:

1. Because he was not DRE-certified or otherwise qualified, Officer A should not have been allowed to testify that Levesque showed signs and symptoms of consuming a central nervous system stimulant drug

> We conclude that the City failed to establish that [Officer A] was qualified under ER 702 to opine as an expert. Our Supreme Court's decision in [State v. Baity, 140 Wn.2d 1 (2000)] is instructive in this regard. Baity involved two consolidated DUI cases where DRE officers testified to the defendants' impairment after performing the DRE 12-step protocol. The then-novel DRE protocol is used by law enforcement officers to discern whether an individual is under the influence of one of seven categories of drugs: "(1) [CNS] depressants, (2) inhalants, (3) phencyclidine (PCP), (4) cannabis, (5) CNS stimulants, (6) hallucinogens, and (7) narcotic analgesics." The 12-step DRE protocol involves:
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> > "(1) breath (or blood) alcohol concentration; (2) interview of the arresting officer; (3) preliminary examination; (4) eye examinations; (5) divided attention tests; (6) vital signs examination; (7) darkroom examination of pupil size; (8) examination of muscle tone; (9) examination of injection sites; (10) statements, interrogation; (11) opinion; (12) toxicology analysis."
>
> The [Baity] court addressed whether the DRE protocol satisfied the standard for novel scientific procedures set forth in Frye v. United States, 293 F. 1013 (1923).
>
> The Baity court concluded that the DRE protocol satisfied the Frye standard. In doing so, the court observed that a DRE must complete significant training and education before becoming certified, including . . . [extended discussion omitted by Legal Update Editor]
>
> Our Supreme Court held that a "DRE officer, properly qualified, may express an opinion that a suspect's behavior and physical attributes are or are not consistent with the behavioral and physical signs associated with certain categories of drugs." The [Baity] court stated, however, that "an officer may not testify in a fashion that casts an aura of scientific certainty" and that the DRE protocol does not allow an officer to opine as to "the specific level of drugs present in a suspect." Additionally, the court held that a DRE must still qualify as an expert under ER 702 and present a proper foundation, i.e., "a description of the DRE's training, education, and experience in administering the test, together with a showing that the test was properly administered." . . . .

. . . .

Here, it is undisputed that [Officer A] is not a DRE. Furthermore, he lacked otherwise sufficient qualification to express an opinion that Levesque's behavior was consistent with having ingested a specific category of drug. Specifically, [Officer A] completed only basic training and a 40-hour DUI course. And, at the time of Levesque's arrest, he had completed only 13 DUI investigations, nine of which involved drug related impairment, and most of which involved assisting a lead officer. These experiences may provide a basis for testimony that a person shows signs and symptoms consistent with drug or alcohol consumption generally or what specific symptoms were observed; they do not, however, provide a basis for opining that a person is affected by a particular category of drug or that the effect rises to the level of impairment.

In short, and while not every expert presenting an opinion on the issue must be DRE certified, [Officer A's] lack of DRE certification and minimal police experience are not sufficient to qualify him to give such an opinion. Thus, [Officer A] opinion testimony was not admissible as expert opinion testimony.

[Court's footnote 4: [] "'*P]harmacologists, optometrists, and forensic specialists' may be qualified to testify as to what specific drug impairment looks like or if, in their opinion, behavior was consistent with consumption of a particular category of drug. . . .* "]

The City relies on State v. McPherson for the proposition that an officer may testify about a specialized or scientific matter based on experience and training alone. 111 Wn. App. 747 (2002). In McPherson, [a detective] testified as an expert on meth labs based on police training and experience alone. Division Three concluded the testimony was admissible expert testimony. However, the McPherson court highlighted "that methamphetamine cooking is relatively easy and is done by numerous persons without a higher education."

By contrast, discerning which particular class of drug an individual's behavior is consistent with is a sophisticated and technical matter. Such testimony requires an adequate foundation for expert opinion testimony, which did not exist here. More importantly, [the detective in McPherson] (1) had investigated 40 to 60 meth labs in the previous six to seven months, (2) had completed DEA training and recertification, and (3) "conducted meth lab training for two local police departments." Thus, whereas [the training of the detective in McPherson] provided a sufficient foundation for expert testimony, [Officer A's] did not.

[Some citations omitted, other citations revised for style]

2. Officer A's testimony giving his opinion that Levesque was "definitely impaired" constituted an impermissible opinion of Levesque's guilt and violated Levesque's right to jury trial

In State v. Quaale, 182 Wn.2d 191 (2014), the Washington Supreme Court ruled that an arresting officer's testimony based solely on horizontal gaze nystagmus testing that there was "no doubt" defendant was impaired went beyond limits previously placed by Washington Supreme Court on such testimony based on the right to jury trial. The officer's opinion as to defendant's guilt invaded the fact-finding province of the jury. The Levesque Court rules that

the officer's testimony that Levesque was "definitely impaired" likewise violated the defendant's right to jury trial.

The Court of Appeals rejects the State's argument that is based on City of Seattle v. Heatley, 70 Wn. App. 573 (1993), where an officer was held to have permissibly testified that the defendant was "obviously intoxicated and affected by the alcoholic drink that he'd [consumed], he could not drive a motor vehicle in a safe manner." The Washington Supreme Court in Quaale noted that the Heatley officer's opinion was based on a number of field sobriety tests and longer observation of the Heatley defendant, and was provided in a lay opinion in phrasing that allowed the jury to draw their own inferences.

[LEGAL UPDATE EDITOR'S COMMENT: The distinction between the testimony in the Heatley case and the testimony in Quaale and Levesque cases seems a bit elusive to me. Officers may want to seek guidance on the limits on opining terminology from their local prosecutors' offices.]

3. The trial court's error in admitting Officer A's testimony was not harmless error because the other evidence in the case does not establish beyond a reasonable doubt that any reasonable jury would have convicted Levesque

The Court of Appeals explains that trial court error in admitting evidence is not harmless unless the remaining evidence establishes beyond a reasonable doubt that any reasonable jury would have convicted Levesque. Significant in the Levesque Court's analysis on harmless error is that expert opinion evidence was presented by the defendant's treating doctor that could have resulted in a rational contrary jury finding. The Court explains as follows:

> Levesque's physician, Dr. Mayer, testified that shock can result in symptoms including "[110w blood pressure, rapid heart rate, fear, [and] sweating." Additionally, prior to the accident, Dr. Mayer treated Levesque for neurosyphilis and injuries resulting from earlier car accidents. She testified that neurosyphilis can cause "blurry vision." And Dr. Mayer noticed Levesque did have some word-finding difficulties.
>
> She also diagnosed Levesque with post-concussion syndrome – which can cause memory loss and speech problems – and prescribed amitriptyline, a medication for post-concussion syndrome. Amitriptyline can cause grogginess and mental fogging, and can make an individual drowsy. Dr. Mayer also testified that Levesque has a history of neurosyphilis, which may cause blurry vision and loss of motor functions.
>
> In short, Dr. Mayer's testimony may have persuaded the jury that there was another explanation for Levesque's behavior and that his ability to drive was not lessened to an appreciable degree by the drugs in his system.

The Levesque Court adds in a footnote that

> "Indeed, had the DRE protocol been performed, the DRE may have been able to rule out other medical conditions. See Baity, 140 Wn.2d at 6 ("In theory, the DRE protocol enables the DRE to rule in (or out) many medical conditions, such as illness or injury, contributing to the impairment.")

LEGAL UPDATE EDITORIAL NOTE: Wikipedia currently describes neurosyphilis in part as follows:

> **Neurosyphilis refers to infection of the central nervous system in a patient with syphilis and can occur at any stage. The majority of neurosyphilis cases have been reported in HIV-infected patients. Meningitis is the most common neurological presentation in early syphilis. . . .**

ADMISSIBILITY OF CHARACTER/PRIOR BAD CONDUCT EVIDENCE: IN TELEPHONE HARASSMENT CASE UNDER RCW 9A.46.020, TESTIMONY ABOUT DEFENDANT'S PRIOR ASSAULTS ON HER HUSBAND AND ANGRY OUTBURSTS DIRECTED AT HIM ARE HELD ADMISSIBLE TO PROVE THE REASONABLENESS OF HIS FEAR THAT SHE WOULD CARRY OUT HER PHONE THREATS

In State v. Riley. ___ Wn. App. 2d ___ , 2020 WL ___ (Div. III, March 17, 2020), the Court of Appeals upholds trial court evidentiary rulings in a telephone harassment prosecution under RCW 9A.46.020 of a wife for threats against her husband. The trial court allowed evidence of prior assaults against the husband by the wife but disallowed some evidence purporting to show that the wife had not been known to assault the husband. In the introduction to its Opinion, the Court of Appeals provides the following general observations regarding the limits of the evidence rules on character/prior bad conduct evidence:

> A fundamental tenet of a fair trial is that parties and witnesses are to be judged by what they have said or done, not by who they are. For this reason, the rules of evidence restrain the admissibility of character evidence. Specific instances of a party's or witness's bad conduct ordinarily cannot be introduced as evidence to prove the party or witness acted in conformity therewith. However, bad conduct evidence can be admissible for other reasons. And character evidence is sometimes permissible through reputation testimony or during cross-examination regarding specific instances of dishonest conduct.
>
> The narrow ins and outs of the character evidence rules can pose a considerable challenge for trial judges. This is especially true in emotion-laden cases, such as ones where the involved parties are sorting through a marital dissolution or a family dispute. Here, the trial judge adequately marshaled the admissibility of character evidence in a criminal telephone harassment case involving divorcing spouses. . . .

The Riley Court notes that, in addition to allowing testimony regarding the the trial court allowed testimony from Mr. Pink (the victim-husband) and another witness regarding previous assaults by Ms. Riley (the defendant) on Mr. Pink, as well as extreme anger outbursts by Ms. Riley directed at Mr. Pink. The Riley Court explains in the following part of its legal analysis that the trial court acted within its lawful discretion in admitting the evidence of the prior assaults and threats:

> The breadth of admissible other act evidence depends on what the State is seeking to prove. For example, when other act evidence is proffered to prove identity through modus operandi, "'a high degree of similarity'" is required so "'as to mark [the prior act] as the handiwork of the accused.'" . . . . It is only when a prior act and a charged crime share distinct or unusual characteristics that the prior act is relevant to proving identity.
>
> But other act evidence proffered to prove reasonableness of threatened harm is different. In order to explain why the defendant's words constituted a true threat, which

would reasonably be interpreted as a serious threat of harm, the State must be able to place the defendant's statement in "context." State v. Ragin, 94 Wn. App. 407, 412 (1999). "The jury [is] entitled to know what [the victim] knew at the time" the defendant issued the threat to decide whether it constituted a true threat. [Ragin] The issue of similarity is not part of the analysis.

Here, the crux of the parties' dispute was whether Ms. Riley's telephone statements could reasonably be interpreted as true threats of harm. During closing argument, the defense likened Ms. Riley's words to the taunts of a high school football team: "'We're gonna maul the other team, we're gonna kill 'em, we're gonna murder 'em.'" Ms. Riley characterized Mr. Pink as not really concerned by Ms. Riley's statements and that he would simply call the police "pretty much at the drop of a hat . . . whether he's concerned or not, whether he's worried or not. Whether he's in fear or not."

In light of the parties' competing theories, the State was entitled to present the jury information regarding what Mr. Pink knew at the time of Ms. Riley's calls that gave rise to a reasonable fear of harm. Ms. Riley's criticism of the quality of the State's proof went to the weight of the State's case and provided fodder for argument, but it did not bar admission of the evidence

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

Result: Affirmance of Kittitas County Superior Court convictions of Jamaica Christina Riley on two counts of telephone harassment and one count of violating a protection order.

CO-CONSPIRATOR STATEMENTS IN FURTHERANCE OF THE CONSPIRACY ARE NOT "TESTIMONIAL" AND THEREFORE ARE ADMISSIBLE FOR PURPOSES OF THE SIXTH AMENDMENT RIGHT TO CONFRONTATION

In State v. Richardson, ___ Wn. App.2d ___ , 2020 WL ___ (Div. III, March 10, 2020), Division Three of the Court of Appeals rejects defendant's argument that his right to confrontation of witnesses against him was violated by allowing hearsay evidence of a co-conspirator's statements that were made as the conspirators were planning the conspiracy.

In key part, the explanation of the Court of Appeals on this issue is contained in the published part of the part-published Opinion, and is follows:

[The Sixth Amendment right to confrontation] protects a defendant, charged in a criminal prosecution, from defending against testimony given out of court by witnesses who are unavailable, unless the defendant had the opportunity to cross-examine the witness at another time. Crawford v. Washington, 541 U.S. 36, 53-54 (2004) . . . .

While the confrontation clause protects criminal defendants against testimonial statements from non-testifying defendants, nontestimonial statements are not barred under the clause. Testimonial statements are statements acting in substitute of in court testimony. Affidavits, prior testimony, statements taken under police interrogation, and other pretrial statements that the declarant would reasonably expect to be used in prosecution are all testimonial. Conversely, statements made casually to a friend or acquaintance are not testimonial.

> In [State v. Wilcoxon, 184 Wn. App. 324 (2016)] a codefendant in a burglary case told a friend, after the burglary, that he and another man had discussed burgling a business. The Wilcoxon court held the statements were not testimonial because they were not designed to prove past fact or substitute for live testimony, and were not statements the codefendant would have expected to be used in a prosecution.
>
> Richardson argues statements made by coconspirators are testimonial. He bases his argument on the idea a coconspirator would reasonably believe his out-of-court statements about planning a crime would be used in a prosecution. We disagree.
>
> Apprehension of possible criminal charges is not the test used in determining whether a statement is testimonial. Examples of testimonial statements discussed in Wilcoxon and Crawford are statements made when there is a reasonable belief prosecution is under way or will soon be under way.
>
> Affidavits, testimony, and police interrogation are all given under circumstances leading directly to prosecution and are given in situations where a witness will be on notice of likely prosecution. On the other hand, statements made by a coconspirator planning a crime are not given under circumstances where the declarant is on notice of likely prosecution.
>
> We do not need to delve in specific line drawing here. Statements made by coconspirators in furtherance of a conspiracy are nontestimonial. . . .
>
> The statements made in this case by Freeman were made while the group was on their way to the victim's apartment. They were part of an ongoing discussion about how they would enter Stewart's apartment and take his drugs. These statements, made by a coconspirator in furtherance of the conspiracy, are nontestimonial and are not barred by the confrontation clause.

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

Result: Affirmance of Spokane County Superior Court conviction of Richard John Richardson for conspiracy to commit first degree robbery; reversal (based on a jury instruction issue not addressed in the Legal Update) of a conviction for first degree felony murder, with first degree burglary as the felony component; remand for possible re-trial on charge of conspiracy to commit first degree robbery.

LEGAL UPDATE EDITORIAL NOTE: As noted above, the Richardson Opinion was published only in part. The unpublished part of the Opinion addresses several issues, including a ruling that a confession was not "coerced" through deceptive questioning. The resolution of this interrogation issue is addressed below in this March 2020 Legal Update at pages 19-20.

HAZARDOUS WASTE MANAGEMENT ACT: EVIDENCE HELD SUFFICIENT TO SUPPORT CONVICTION WHERE DEFENDANT KNEW (1) WHAT HE WAS STORING ON HIS PROPERTY AND (2) HOW WATER FLOWED OFF THE PROPERTY

In State v. Pillon, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. I, January 27, 2020 unpublished decision ordered published on March 2, 2020), Division One of the Court of Appeals rejects defendant's challenge to the sufficiency of evidence against him on the knowledge element of the charge against him for violating the Hazardous Waste Management Act, RCW 70.105.085.

The Court of Appeals notes that the State is not required to prove that a defendant actually knew that his actions violated State law to prove a violation of the Act. But the State must prove that the defendant knew there was an imminent danger of harm to natural resources. The Court rules that evidence that – (1) the defendant knew that, without the required permits, he was storing various hazardous and dangerous wastes in decrepit containers in a massive junkyard on his property; and (2) the defendant knew how water flows onto and off of his property – is sufficient to support a conviction for violating RCW 70.105.085.

Result: Affirmance of King County Superior Court convictions of Charles Edwin Pillon for (1) violation of the Hazardous Waste Management Act, RCW 70.105, (2) wrecking vehicles without a license and with a prior conviction in violation of RCW 46.80.020, and (3) unlawful dumping of solid waste without a permit in violation of RCW 70.95.030.

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BRIEF NOTES REGARDING MARCH 2020 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).

The 13 entries below are March 2020 unpublished Court of Appeals opinions that fit the above-described categories. I do not promise to be able catch them all, but each month I will make a reasonable effort to find and list all decisions with these issues in unpublished opinions from the Court of Appeals. I hope that readers, particularly attorney-readers, will let me know if they spot any cases that I missed in this endeavor, as well as any errors that I may make in my brief descriptions of issues and case results.

1. State v. J.J.W.D.: On March 2, 2020, Division One of the COA rejects the cross appeal of a juvenile from his Pierce County Juvenile Court adjudications of guilt of *three counts of rape of a child in the second degree*. J.J.W.D. convinces the Court of Appeals that **under State v. D.R., 84 Wn. App. 832 (1997), a detective was required to Mirandize him during questioning**, but the Court of Appeals rules that the Juvenile Court's error on this issue was harmless. The facts that added up to custodial interrogation in the view of the Court of Appeals were: (1) a detective in plain clothes went to Puyallup High School to talk with the 17-year-old J.J.W.D., who had been directed to go to an Assistant Principal's Office; (2) present with the detective in the office

was a Student Resource Officer (SRO) in full uniform and the Assistant Principal; (3) the detective told J.J.W.D. that he was a detective investigating a case; (4) the detective told J.J.W.D. that J.J.W.D. was not under arrest and did not have to talk with the detective, but the detective did not give Miranda warnings or tell J.J.W.D. that J.J.W.D. was free to leave; (4) the detective then asked J.J.W.D. a question that the detective should have known was likely to produce an incriminating response (and hence was "interrogation"), i.e., the detective asked J.J.W.D. if he knew two persons (the victims), and J.J.W.D. answered initially that he did not.

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

2. State v. I.V.S.-L. (Iran Vladimir Salazar-Leyva): On March 2, 2020, Division One of the COA rejects the appeal of I.V.S.-L. from his Island County Juvenile Court adjudication of *felony harassment under RCW 9A.46.020(1) and (2)(b)(ii)* after a classmate overheard him discussing bringing a gun to "shoot up the school" and saw a Snapchat photograph I.V.S.-L. posted of himself holding what appeared to be a real gun. **I.V.S.-L. loses his argument that he was not proven to have communicated a "true threat" as required to prove the felony harassment charge under the First Amendment to the United States Constitution.**

3. State v. Michael Lonell Matthews: On March 3, 2020, Division Two of the COA agrees with the appeal of defendant after his Cowlitz County Superior Court conviction for *failure to register as a sex offender*. The only relief that defendant sought on appeal was to have the Superior Court orally advise him that his conviction bars him from possession of a firearm. The State acknowledged in the appeal that the trial court erred, but the State argued that because Matthews had six prior felony convictions that terminated his right to possess firearms, he was well aware he had lost the right to possess a firearm. **The Court of Appeals remands the case to the trial court to conduct a hearing to follow RCW 9.41.047(1)(a) by orally advising Matthews of the firearm possession prohibition.**

4. State v. Rachel C. Rawley: On March 3, 2020, Division Two of the COA rejects the appeal of defendant from her Kitsap County Superior Court conviction of *felony DUI* following a head-on vehicle collision. The Court of Appeals relies on State v. Inman, 2 Wn. App. 2d 281 (2018) in ruling, as follows, that **exigent circumstances justified a warrantless blood draw at the scene of the collision**:

> Rawley was in a head-on collision and was trapped inside her vehicle. Her speech was slurred and [the officer] could smell intoxicants on her breath. Rawley admitted to drinking. One of the paramedics told [the officer that] he would be administering IV fluids and then taking Rawley to the hospital. [The officer] was aware that IV fluids are generally administered if there is concern for internal injuries. In [the officer's] experience, a warrant request could take on average up to 45 minutes during the day. The Inman case is similar to the present case and was properly relied upon by the trial court. Accordingly, the trial court's findings of fact support the trial court's conclusion of law that exigent circumstances justified the warrantless blood draw based on Inman.

5. State v. Michael Craig Okler: On March 9, 2020, Division One of the COA rejects defendant's appeal from his Snohomish County Superior Court conviction for *possession of*

methamphetamine. The Court of Appeals rules that the following **facts do not constitute a law enforcement seizure requiring reasonable suspicion of criminal activity under Terry v. Ohio, but instead constitute a "social contact" that the constitution does not require be supported by any level of suspicion:**

> [Officers] responded to a 911 call regarding suspected drug activity in a recreational vehicle (RV) parked on a public street. Upon arrival, [Officer A] parked several blocks away from the RV, but [Officer B] parked 20 or 30 feet away from the RV. The officers did not activate their vehicles' lights or sirens. [Officer B] approached the front of the RV and attempted to have a conversation with a woman seated in the driver's seat. After having difficulty hearing one another, the woman voluntarily exited the vehicle, and [Officer B] learned that there were other individuals in the RV
>
> [Officer B] then stated to people in an RV, "This is Marysville Police, is there anybody else in the vehicle? We'd like to talk to you. Can you come out and talk to us?" [Officer B] later testified that he did not use an "aggressive tone."
>
> Okler exited the RV. . . . [Officer B] "motioned and asked if [Okler] would come up to the front of the vehicle where [Officer Belleme] was at, and . . . asked [Okler] what his name was." Okler provided his name and date of birth, and while dispatch "ran a check on [Okler's] name," [Officer B] and Okler "had casual conversation." [Officer B] advised Okler of the purpose of the officers' visit, namely a report of drug activity. After about one minute, the results from dispatch came through, and Officer Belleme learned that there was an outstanding warrant for Okler's arrest

6. State v. Renard Kevin Benton: On March 9, 2020, Division One of the COA agrees with defendant and reverses his King County Superior Court conviction for *domestic violence assault in the fourth degree*. The Court of Appeals agrees with the State's concession that **officers were not justified in conducting a "protective sweep" of defendant's residence**, and that evidence from the sweep should have been suppressed at trial. The Court of Appeals rules further that **the untainted evidence is not so overwhelming as to support application of the harmless error rule**. The facts relating to the initiation of the "protective sweep" are as follows, as paraphrased from the Court of Appeals Opinion.

In April of 2017, three police officers investigating a male-on-female physical-beating assault complaint went to the suspect's apartment. They knocked and announced "[Name of agency] Police" multiple times before Benton answered the door. Benton appeared disheveled. He wore torn cargo shorts and had a swollen ear with a bleeding cut. An officer asked Benton to stand in the hallway outside the apartment. The police inquired about [the complainant], but Benton denied knowing her. An officer advised Benton of his Miranda rights and detained him in handcuffs.

After further discussion, Benton admitted to knowing [the complainant], explaining he heard banging on his door so she may have come by the apartment while he had been asleep. After handcuffing Benton, two officers went inside the apartment without permission or a court order. The officers made observations of incriminating evidence that they testified to at trial.

LEGAL UPDATE EDITOR'S RESEARCH NOTE ON "PROTECTIVE SWEEPS": For discussion of case law relevant to protective sweeps, see the discussion at page 153 of the Washington-focused law enforcement guide on the Criminal Justice Training Commission's LED Internet page: Confessions, Search, Seizure and Arrest: A Guide for

Police Officers and Prosecutors, May 2015, by Pamela B. Loginsky, Staff Attorney, Washington Association of Prosecuting Attorneys. As explained there (citations revised):

> **To justify a protective sweep beyond immediately adjoining areas, the officers must be able to articulate "facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." The sweep is limited to a cursory inspection of places a person may be found and must last no longer than necessary to dispel the reasonable suspicion of danger or to complete the arrest, whichever occurs sooner. [Maryland v. Buie, 494 U.S. 325, 334 (1990); State v. Boyer, 124 Wn. App. 593 (2004)].**

7. State v. Robert Anderson: On March 9, 2020, Division One of the COA rejects defendant's appeal from his Snohomish County Superior Court convictions for *possession of methamphetamine with intent to deliver and bail jumping*. **The Court of Appeals rules that, under Evidence Rules and the constitutional protection of jury trial right precluding opinion testimony opining on a defendant's guilt, an officer properly testified about differences between drug users and drug dealers where illegal drugs are discovered in the possession of an arrestee.** The officer gave generalized expert witness testimony regarding such distinguishing factors as quantity of drugs possessed, method of packaging, amount of money carried, and possession of measuring equipment.

8. State v. Richard John Richardson: On March 10, 2020, Division Three of the COA issues an Opinion that is part published (see above in this March 2020 Legal Update at pages 14-15 and part unpublished. As noted above at page 15, the Court of Appeals reverses defendant's Spokane County Superior Court conviction for *conspiracy to commit first degree robbery* based on a jury instruction error (and remands for re-trial), but the Court affirms defendant's conviction *for first degree felony murder, with first degree burglary as the felony component*. In the unpublished part of the Opinion, the Court rejects Richardson's argument that his confession should be deemed coerced because the interrogating detective used a ruse. Richardson had told the officer that Richardson had never been inside the apartment where the murder victim was found. The officer then falsely told Richardson that police had found DNA evidence putting Richardson inside the apartment. **The Court of Appeals rules that police deception of this sort, taken alone, does not make interrogation coercive**.

LEGAL UPDATE EDITOR'S COMMENT: I have no disagreement with this ruling under the facts of this case, but I believe that: (1) there are tactical and legal reasons not to become overly reliant on deception in interrogation; (2) some types of deception in interrogation may be held to be coercive; and (3) some particularly mentally-vulnerable suspects or particularly youthful-and-immature suspects may be able to argue coercion-by-deception under circumstances where other types of suspects may not. For an excellent discussion of these concerns, see pages 373-377 of 2019 Miranda Update on the internet at [*sdsheriff.net/legalupdates/*] The website material is provided by Robert C. Phillips, retired San Diego County Deputy Sheriff and retired San Diego County Deputy District Attorney. Click on "2019 Miranda Update," the third item down in the upper right hand corner of the "California Legal Updates" page.

Readers should be aware that Search & Seizure discussions that are found in other material on Mr. Phillips' "California Legal Updates" website address only Fourth Amendment requirements (because that is the federal and state constitutional standard for California officers). Therefore, Washington officers must also consider article I,

section 7 "independent grounds" Search & Seizure rulings by Washington appellate courts. But that concern is generally not present on Miranda and other interrogation and confession issues such as the issue in Richardson. The right against self-incrimination under the Washington constitution has to date been held to be the same as under the federal constitution. See State v. Unga, 165 Wn.2d 95 (2008).

9. City of Richland v. Dean Allen Stenberg, City of Pasco v. Jason Michael Shergur: On March 10, 2020, Division Three of the COA rejects the appeals of defendants from their Richland and Pasco Municipal Court convictions for *DUI*. The Court of Appeals rules that **a law enforcement officer is not required to offer a person suspected of DUI a breath test prior to applying for a search warrant for a blood sample**. The Court of Appeals points to the Implied Consent statute (RCW 46.20.308), which states in subsection (4) that "Nothing in subsection (1), (2), or (3) of this section precludes a law enforcement officer from obtaining a person's blood to test for alcohol, marijuana, or any drug, pursuant to a search warrant, a valid waiver of the warrant requirement, when exigent circumstances exist, or under any other authority of law."

10. State v. Michael W. Withey: On March 10, 2020, Division Three of the COA rejects the appeal of defendant from his Spokane County Superior Court conviction for *attempting to elude a pursuing police vehicle and possession of a stolen vehicle*. Among other rulings, the Court of Appeals rules under complex facts (not addressed in the Legal Update) that **defendant was not entitled to learn the identity of a confidential informant where information about the CI was not relevant to any issue in the case.**

11. State v. Hector Salinas: On March 17, 2020, Division Three of the COA rejects the appeal of defendant from his Benton County Superior Court conviction for *possession of cocaine*. The Court of Appeals rules that under the following circumstances, as described by the Court, **a law enforcement officer had reasonable suspicion to stop a vehicle driven by the defendant**:

> [D]ispatch received a report of a fight at the Gaslight and was advised that someone involved in the fight had a knife. It was not clear whether the knife had been used in the fight, but the person with the knife left the Gaslight in an SUV with partially identified license plates. Dispatch also reported the SUV was headed southbound on George Washington Way. There was little traffic on the road that night. [A law enforcement officer] easily spotted the SUV and performed a traffic stop.
>
> . . . .
>
> The testimony at the suppression hearing indicated that, at the time of the stop, law enforcement knew an occupant of an SUV had recently been involved in a fight and also possessed a knife. This provided an adequate basis of knowledge, linking the SUV and criminal activity. In addition, the officers' testimony was sufficient to support the informants' truthfulness. Although the officers did not specify whether the 911 callers were identified or anonymous, the circumstances indicated the informants were relaying contemporaneous information, as it occurred: the suspect with a knife was seen in a fight, the suspect then left in a white SUV, and the SUV turned southbound onto George Washington Way. [An officer] apprehended the SUV immediately after the events described by the informants, while the SUV was still headed south on George Washington Way. Given the totality of these circumstances, the testimony was sufficient to establish the informants' reliability [despite the fact that the officers' testimony did not specify whether the 911 callers were identified or anonymous].

12. State v. Jose Mario Lopez: On March 17, 2020, Division Three of the COA rejects the appeal of defendant from his Chelan County Superior Court convictions for *first degree child molestation, second degree child molestation, and third degree child rape*. The Court of Appeals rules that **the trial court acted within its lawful discretion in permitting the State's expert witness to testify why sexual abuse victims sometimes delay reporting abuse.**

13. State v. Steven Lester Keza: On March 23, 2020, Division One of the COA rejects the appeal of the State from a Snohomish County Superior Court *order suppressing methamphetamine and cocaine seized in a search incident to arrest*. The trial court ruled that a law enforcement officer unlawfully seized Keza when the officer asked Keza for his name during what had been – up to that point – a social contact not requiring "reasonable suspicion." The Court of Appeals rules that merely asking a person for his name during a social contact does not turn the social contact into a Terry seizure. The Court of Appeals also explains, citing State v. Carriero, 8 Wn. App. 2d 641 (2019), that it is irrelevant that the officer testified that in his view Keza was not free to leave at the point when the officer asked Keza for his name; the subjective intent of the officer is irrelevant to the "seizure" question unless that intent is conveyed to the person being contacted. However, **the Court of Appeals rejects the State's argument and rules that the officer did not have reasonable suspicion to believe that Keza was committing either – (1) the crime of trespass or (2) the crime of theft of electricity – where Keza was sitting on a public sidewalk in a strip mall charging his phone by plugging the phone into an outdoor outlet of a closed restaurant that had a "No Trespassing" sign in the restaurant's window.** The State did not argue that Keza was lawfully seized based on his giving the officer a false name, which was one of two reasons (the other was trespass) for the seizure and arrest that the officer had included in his offense report.

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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 (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 p[Officer B]cutors. 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 a ccessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. Federal statutes are at [http://www.law.cornell.edu/uscode/].

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

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