LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: Thank you!

November 2018

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Foster v. City of Indio, ___ F.3d ___ , 2018 WL ___ (9th Cir., November 20, 2018)

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

> Because this case arises from the denial of Officer Hellawell's motion for summary judgment, we view the facts in the light most favorable to the nonmoving party, here, Foster's father and minor children (collectively, the "plaintiffs"). On July 4, 2013, at around 1:30 p.m., the City of Indio Police Department received an anonymous 911 call reporting an individual carrying a gun. The caller stated that a man "with a brown hat, aqua shirt, a blue aqua shirt, [and] black blue jeans" was "walking down Highway 111 toward subways and smoke shops with a handgun, with a . . . gun in his right side

pocket." The caller also described the man as a "55-year-old African-American gentleman weighing about 250 pounds with a hand gun in his right side pocket" and a "baby brown or beige ball cap." The caller further stated that the man did not point the gun at him, but "walked out of the liquor store" and "just opened the gun." The caller further stated that the man "was no stress to me, but . . . he wants to let people know who he is."

The information provided by the caller was immediately dispatched over the police radio. Officer Hellawell received information that "a Black male wearing a tan hat, a[n] aqua-colored shirt, and dark-colored pants with a handgun in his pocket" was "last seen going towards Subway." Hellawell, who was wearing his police uniform, drove to the Indio Shopping Plaza near Highway 111, where the Subway was located. Because the Subway and Payday Advance Money Store had been robbed in the past, Hellawell's first thoughts were that the tip might indicate a robbery was about to occur. Hellawell did not use his patrol car sirens on the way to the plaza and did not believe he was in danger "at that moment."

As Hellawell pulled into the parking lot near the Subway, he saw "a Black male wearing a[n] aqua-green shirt, wearing a tan hat and dark-colored pants" near the Subway. The man matched the description of the 911 call and, according to Hellawell, appeared nervous. The man, Ernest Foster, was standing against the wall next to the smoke shop adjacent to Subway.

Hellawell exited his vehicle about ten feet from Foster. Hellawell did not see a gun in Foster's hands or on his person. Hellawell identified himself as a police officer and stated: "Let me see your hands. Keep your hands where I can see them. I just need to talk to you for a minute."

At that point, Foster started running away from Hellawell. Hellawell gave chase. According to Hellawell, he might have drawn his gun either when Foster made a movement or started to run.

[Court's footnote: *Although one witness leaving Subway, Jose Flores, stated that he saw something in Hellawell's hands during the chase, no witness testified that Hellawell drew his gun as he approached Foster.*]

Hellawell subsequently re-holstered the gun, because he would not run with a gun in his hand.

Hellawell chased Foster through the shopping plaza then down an alley between two stores. According to Hellawell, throughout the pursuit, Hellawell told Foster to "stop," and to "show me your hands." Hellawell yelled: "I believe you have a gun. Stop or I am going to shoot." Hellawell testified that Foster's left hand was visible, but his right hand appeared to be holding something against his body. Hellawell did not see Foster holding a gun. At one point, Hellawell shot Foster with his taser; although one dart hit Foster, the taser did not affect him because, according to Hellawell, the other dart was dragging along the ground.

As the chase went on, Hellawell shot Foster with his service firearm either just before or shortly after Foster rounded the corner of a nearby store. According to Hellawell, he shot Foster when he was turning toward him with a gun in his hand.

This account was corroborated by Officer Felipe Escalante and a civilian witness, Daniel Kelley. Escalante had driven to the shopping center in response to Hellawells report of foot pursuit. He testified that he saw Foster turn towards Hellawell and that Foster might have had "something" in his hands, but Escalante could not tell for sure. In a March 31, 2016 declaration, Kelley testified that he was smoking a cigarette outside of the Jack-in-the-Box, and saw Hellawell chase Foster behind the restaurant. He stated that as Foster ran by him, he saw Foster holding something in his hand. Kelley followed Hellawell, and saw Foster lying on the ground with a gun next to him.

Other witnesses offered differing accounts. Jaime Perez, who was waiting in his car in the parking lot, stated in his initial declaration on April 1, 2016, that he "saw a male running around the northeast corner of the AutoZone grasping an object up against his chest." He "watched the man go down" and he "noticed an object fall from his hand and land on the ground two feet in front of him."

[Perez] stated that the object was a handgun. But in a second declaration on August 31, 2016, he stated that he had previously testified that he saw a gun fall from Foster's hands only because the police officers who interviewed him said they had found a gun and he was scared and nervous during his interview. In the August 31st declaration, Perez stated, "I did not see a gun. Mr Foster did not point a gun at anyone, nor did I see a gun in his hand." Rather, according to Perez, Hellawell shot Foster in the back "for no reason," and Perez "did not see [] Foster bend, shift, twist, or make any sudden movements before [Hellawell] shot him."

A third witness, John-David Vallesillo, witnessed the chase from his car. In his interview with the police on the day of the shooting, Vallesillo stated that he heard a volley of shots, after which he turned his head and saw Foster "facing away from [Hellawell], falling forward onto his face onto the ground." Vallesillo further explained that from his perspective, "I didn't see a gun in [Foster's] hands at any point and it looked like he was, he got shot in the back."

In a later declaration, dated August 31, 2016, Vallesillo again explained:""I heard a volley of shots coming from [the] general direction [of the police chase]. I also saw Mr. Foster fall face down onto the concrete." Vallesillo added that he "did not see Mr. Foster turn or bend towards the police officer" before the gunshots, "did not see Mr. Foster with a gun in his hand," and "did not see a gun on the sidewalk after the police officer shot him in the back."

Finally, Jose Flores, who observed the chase from his mother's car, testified that Foster did not turn toward Hellawell during the chase. Flores saw Foster "lying face down on the concrete," but "did not see a gun in [Foster's] hands or on the ground."

Foster was treated on the scene and later died at the hospital. The plaintiffs brought suit under 42 U.S.C. § 1983 against Hellawell, the City of Indio, the Indio Police Department, and Chief of Police Richard Twiss. They claimed violations of Foster's right to be free from excessive force under the Fourth Amendment; violations of the family's right to familial association under the Fourteenth Amendment; and unconstitutional municipal customs, practices, and policies, see Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

The plaintiffs alleged that Hellawell (1) conducted an unlawful investigatory stop without reasonable suspicion; (2) used excessive force by drawing his firearm in conjunction with the investigatory stop; (3) used excessive force by shooting Foster with his taser during the foot chase; and (4) used excessive force by shooting Foster three times and killing him. The defendants moved for summary judgment on all claims, arguing that qualified immunity applied and no violation occurred.

The [District Court] denied Hellawell's summary judgment motion on the majority of plaintiffs' Fourth and Fourteenth Amendment claims. The court concluded that a genuine issue of material fact existed as to (1) whether Hellawell violated Foster's Fourth Amendment rights in making the investigative stop without reasonable suspicion; (2) whether Hellawell violated Foster's Fourth Amendment right to be free from excessive force by drawing his firearm during the investigatory stop; (3) whether Hellawell violated Foster's Fourth Amendment right to be free from excessive force by fatally shooting him; and (4) whether Hellawell violated the plaintiffs' Fourteenth Amendment rights because a reasonable jury could find that Hellawell shot Foster with a purpose to harm him without regard to legitimate law enforcement objectives.

[Court's footnote: *The district court granted summary judgment in favor of Hellawell on plaintiffs' claim that Hellawell's use of a taser constituted excessive force. The court also granted summary judgment in favor of the City of Indio on plaintiffs' municipal liability claim, and in favor of Chief Twiss on plaintiffs' claim of supervisory liability.*]

[Some paragraphing revised for readability]

ISSUES AND RULINGS:

(1) An officer shot and killed a suspect who was fleeing the officer's attempted stop of the man for carrying a handgun concealed possibly in violation of California law. Some witnesses alleged that the officer shot the fleeing suspect without the suspect having turned back toward the officer and without the suspect having anything in his hand resembling a gun. Other witnesses sharply disagreed and supported the officer on both questions of fact. Plaintiffs contend that the officer used excessive force in violation of the Fourth Amendment and violated Fourteenth Amendment Due Process protections that prohibit use of force with "'purpose to harm for reasons unrelated to legitimate law enforcement objectives."

Is the officer entitled to qualified immunity on the survivor-plaintiffs' Fourth and/or Fourteenth Amendment theories based on the officer's contention of greater credibility of the favorable allegations of some of the witnesses? (ANSWER BY NINTH CIRCUIT PANEL: No, the constitutional excessive force and Due Process issues must go to a jury because the facts are disputed on key questions. Case law is clear that law enforcement application of deadly force by shooting a fleeing suspect in the back is not justified where the suspect does not pose a danger to the officer or others. Factual dispute on this issue must go to the fact-finder at trial. Note that one of the three judges on the panel argues that the officer should be granted qualified immunity on the Due Process issue, because, in that dissenting judge's view, there is no evidence of an improper motive of the officer)

(2) The evidence is undisputed that an anonymous caller gave to 911 a detailed description of a man and stated that the caller had just observed the described man as having taken a handgun out of his pocket and then put the handgun back in his pocket. The caller also reported the gun-possessor's direction of travel. A law enforcement officer learned from the

police radio "a Black male wearing a tan hat, an aqua-colored shrt and dark-colored pants with a handgun in his pocket" was "last seen going towards [the nearby] Subway." The officer was aware of past armed robberies in the nearby mall where the Subway was located. The officer drove to the mall and saw near the Subway a man closely meeting the description. The officer exited his police vehicle about 10 feet from the suspect and told the suspect (1) to show his hands and (2) that the officer wanted to talk to him. The Ninth Circuit Opinion in this case appears to assume that this directive from the officer constituted a seizure of the suspect.

Is the officer entitled to qualified immunity on the issue of whether the officer had reasonable suspicion of criminal activity to justify the officer's seizure of the suspect at the point in time of the officer's initial directive to the suspect, just before the suspect began to run away from the officer? (ANSWER BY NINTH CIRCUIT PANEL: Yes, the case law does not clearly preclude making a seizure in this circumstance based on reasonable suspicion of a violation of California law prohibiting carrying a handgun concealed on one's person without a license)

(3) The evidence is undisputed that the officer un-holstered and re-holstered his handgun shortly after the suspect either (A) made a movement or (B) turned and began to flee. There is no evidence that the officer pointed his handgun at the suspect before re-holstering it at the start of the chase.

Is the officer entitled to qualified immunity from the plaintiffs' claim that the officer made an unlawful seizure of the suspect by a show of deadly force in un-holstering his handgun as the suspect started to run away from the officer? (ANSWER BY NINTH CIRCUIT PANEL: Yes, the case law does not clearly treat as application or show of deadly force law enforcement pulling of a handgun, as opposed to law enforcement pointing of a handgun, in this circumstance)

Result: Reversal in part and affirmance in part of ruling of U.S. District Court (Central District of California) that denied qualified immunity to a police officer on all issues; denial of qualified immunity to officer on Fourth and Fourteenth Amendment issues that turn on allegations by plaintiffs and some witnesses that the fleeing suspect was shot in the back by the officer without having turned around after the suspect started fleeing.

ANALYSIS: (Excerpted from Ninth Circuit lead opinion)

1. No Qualified Immunity under 4th & 14th Amendments for using deadly force

> We turn first to Hellawell's appeal of the district court's denial of summary judgment on plaintiffs' claims that the fatal shooting of Foster violated his Fourth Amendment rights and plaintiffs' Fourteenth Amendment rights. The district court here concluded that genuine issues of material fact precluded summary judgment on both the Fourth and Fourteenth Amendment claims, because a reasonable jury could find that Hellawell shot Foster in the back while Foster was running away from him; that Foster was unarmed; and that Foster did not turn, bend, or look back at Hellawell in a manner that could make a reasonable officer fear being shot.
>
> The legal standards for plaintiffs' Fourth and Fourteenth Amendment claims are not in dispute. It is clearly established law that shooting a fleeing suspect in the back violates the suspect's Fourth Amendment rights. "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead." Tennessee v. Garner, 471

U.S. 1, 11 (1985) . . . . By contrast, "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." Garner, 471 U.S. at 11. "Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." Garner, 471 U.S. at 11-12.

In the Fourteenth Amendment context, it has been clearly established since 1998 "that a police officer violates the Fourteenth Amendment due process clause if he kills a suspect when acting with the purpose to harm, unrelated to a legitimate law enforcement objective." A.D. v. Cal. Highway Patrol, 712 F.3d 446, 450 (9th Cir. 2013). Legitimate law enforcement objectives include, among others, arrest, self-protection, and protection of the public. . . . . A police officer lacks such legitimate law enforcement objectives when the officer "had any ulterior motives for using force against" the suspect, . . . such as "to bully a suspect or 'get even,'" . . . . or when an officer uses force against a clearly harmless or subdued suspect, . . .

Rather than claim that an officer in Hellawell's position could have reasonably thought it was lawful to shoot a fleeing, unarmed suspect in the back, Hellawell argues that the evidence was insufficient to create a genuine issue of material fact regarding the plaintiffs' Fourth and Fourteenth Amendment claims. [Here, the Ninth Circuit discusses the officer's argument that the stories of witnesses in his favor are much more credible than the stories of witnesses against him.]

. . . .

We decline review of Hellawell's arguments . . . . Hellawell challenges the sufficiency of the plaintiffs' evidence; he argues that plaintiffs will not be able to prove at trial that he shot an unarmed suspect in the back without any provocation in violation of the Fourth and Fourteenth Amendments. But this sort of "evidence sufficiency" claim does not raise a legal question. We may not reweigh the evidence to evaluate whether the district court properly determined there was a genuine issue of material fact, and therefore may "neither credit [Hellawell's] testimony that [Foster] turned and pointed his gun at [Hellawell], nor assume that [Foster] took other actions that would have been objectively threatening." And even if we could consider Hellawell's sham affidavit argument on interlocutory review, we would reject it as meritless because the sham affidavit rule applies only to declarations by the parties, not to declarations by non-party witnesses like Perez and Vallesillo. . . .

Therefore, . . . we lack jurisdiction to consider Hellawell's argument that we should reverse the district court's determination that there was a genuine issue of material fact regarding plaintiffs' Fourth and Fourteenth Amendment claims relating to Hellawell's fatal shooting of Foster. We therefore dismiss Hellawell's appeal of these claims.

2. Qualified immunity granted for initial seizure before the suspect fled

We now turn to the plaintiffs' claims that Hellawell violated Foster's Fourth Amendment rights by making an investigative stop of Foster . . . .

A law enforcement officer may, consistent with the Fourth Amendment, conduct a "brief investigatory stop" of a suspect when the officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." United States v. Cortez, 449 U.S. 411, 417–18 (1981); see also Terry v. Ohio, 392 U.S. 1, 21–22 (1968). The "reasonable suspicion" necessary to justify such a Terry stop depends "upon both the content of information possessed by police and its degree of reliability." Alabama v. White, 496 U.S. 325, 330 (1990). In applying this standard, we take into account the "totality of the circumstances." . . . .

For an anonymous tip to provide reasonable suspicion, the tip must contain "sufficient indicia of reliability," . . . . that "criminal activity may be afoot." Thus, we must consider, based on the undisputed facts, whether it was clearly established at the time of the incident that the tip in this case: (1) was not sufficiently reliable and (2) did not provide information on potential illegal activity.

a. Reliability of tip plus corroboration

First, a reasonable officer in Hellawell's position could have concluded that the 911 call in this case demonstrated "sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop." . . . One factor supporting the reliability of a tip is that the tipster claims eyewitness knowledge, coupled with sufficient detail in his description. . . .

A second factor supporting the reliability of the tip is that it predicts a suspect's future actions. Thus, White held that an anonymous tip had sufficient indicia of reliability to support reasonable suspicion in part because "the anonymous [tip] contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted." White differentiated between a caller's description of a car parked in front of an apartment building, which anyone could have "predicted" because it was existing at the time of the call, and a caller's ability to predict that the suspect would drive along a particular route.

Because the tipster correctly predicted the suspect's movement, a police officer could reasonably conclude that there was some degree of reliability to the tipster's claim that the suspect was engaged in criminal activity. Finally, a caller's use of a 911 number makes the tip more credible because a 911 call can be recorded and callers can be traced. See Florida v. J.L., 529 U.S. 266, 275-76 (2000) . . . . In addition, 911 calls are more credible "because the police must take 911 emergency calls seriously and respond with dispatch," when compared to non-emergency tips concerning "general criminality."

The tip in this case had several indicia of reliability. First, the tipster made a recorded 911 call. . . . The tipster also claimed eyewitness knowledge of the concealed handgun and provided explicit detail about his observations, including that he personally observed the suspect taking out his gun in a manner "let[ting] people know who he is." Finally, the tipster stated that the suspect was walking down Highway 111 in the direction of the Subway and the smoke shops. Whether this was a prediction or merely an observation is unclear, but Hellawell corroborated this statement when he encountered the suspect at the specified location. . . . .

The plaintiffs argue that Florida v. J.L. clearly establishes that a reasonable officer should not have relied on the 911 call in this case because it lacked the necessary

indicia of reliability. In J.L., the police received an anonymous tip that "a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun." An officer arrived at the bus stop, frisked J.L., and seized a gun from his pocket. The Court held that the tip lacked "the moderate indicia of reliability" necessary to give rise to reasonable suspicion. In reaching this conclusion, the Court noted that "[a]ll the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L." Moreover, the tip itself consisted merely of "[a]n accurate description of a subject's readily observable location and appearance" and did not "show that the tipster has knowledge of concealed criminal activity."

Given the body of Supreme Court case law in existence at the time of the incident here, we cannot say that J.L. would have made it clear to a reasonable officer in Hellawell's position that the 911 call regarding Foster lacked sufficient indicia of reliability or placed this question "beyond debate." J.L. emphasized that the tipster in that case had not indicated the basis for his tip and had reported mere observations.

But here the tipster explained the basis of his knowledge, predicted the suspect's route, and made the tip via a recorded 911 call. A reasonable officer could rely on these facts when assessing the tip's reliability. . . . Further, in J.L. "the record did not indicate how long the police waited before responding to the tip," . . ; in contrast, here Hellawell responded within minutes.

Accordingly, although the facts in J.L.. are similar to the facts in this case, they are not identical, and other Supreme Court decisions provide a basis for a reasonable officer to conclude that the 911 call in this case had sufficient indicia of reliability. This conclusion is confirmed by the Supreme Court's subsequent determination in Navarette v. California, which distinguished J.L. on similar grounds to the ones at issue here. 572 U.S. 393, 397-400 (2014). In Navarette, the Court held that an anonymous tip has sufficient indicia of reliability to provide reasonable suspicion when the tipster accurately predicts a direction of travel, the tip is made "contemporaneous[ly] with the observation of criminal activity," and the tip is made on the 911 system.

b. Possible crime of carrying handgun concealed without a license in violation of California law; officers generally have authority to make a Terry seizure to investigate if they have reasonable suspicion that a person has a handgun concealed on his person

Second, a reasonable officer in Hellawell's position could have concluded that the tip in this case provided information on potential illegal activity. Where state law makes it generally unlawful to carry a concealed weapon without a permit, a tip that a person is carrying a concealed firearm raises a reasonable suspicion of potential criminal activity, even if the tip does not state that the person is carrying the firearm illegally or is about to commit a crime. See United States v. Woods, 747 F.3d 552, 556 (8th Cir. 2014) ("Considering Missouri law, and based on the call that there was an individual carrying a concealed weapon that had exited the bus, the officers had reason to believe criminal activity was afoot."); United States v. Gatllin, 613 F.3d 374, 378 (3rd Cir. 2010) ("[W]e hold that reasonable suspicion existed in this case based solely on the reliable tip from a known informant because carrying a concealed handgun is presumptively a crime in Delaware."). **[LEGAL UPDATE EDITOR'S NOTE: Here, the Ninth Circuit's Foster Opinion cites and briefly discusses two unpublished opinions in support of the point that the Ninth Circuit puts forward in this paragraph.]**

Here, California law "generally prohibits carrying concealed firearms in public, whether loaded or unloaded." Peruta v. Cty. of San Diego, 824 F.3d 919, 925 (9th Cir. 2016) (en banc); *see also* Cal. Penal Code § 25400 (crime of carrying a concealed firearm), § 25850 (crime of carrying a loaded firearm in public). Although "the prohibition of § 25400 does not apply to those who have been issued licenses to carry concealed weapons," Peruta, 824 F.3d at 926, California officials strictly limit the issuance of concealed carry permits, Cal. Penal Code § 26150(a). As of December 2015, California had issued concealed carry permits to approximately .2% of its adult population of 29.9 million. John R. Lott, Jr., Concealed Carry Permit Holders Across the United States*: 2016*, 17, 21, Crime Prevention Research Center (July 26, 2016), https://ssrn.com/abstract=2814691. Given the insignificant number of concealed carry permits issued in California, a reasonable officer could conclude that there is a high probability that a person identified in a 911 call as carrying a concealed handgun is violating California's gun laws.

Moreover, the Supreme Court has long held that even factors consistent with innocent conduct may give rise to reasonable suspicion. See United States v. Arvizu, 534 U.S. 266, 274 (2002); United States v. Sokolow, 490 U.S. 1, 9 (1989). For instance, although there is a small possibility that a person transporting cocaine has lawfully obtained it from the National Institute on Drug Abuse for research purposes, a reasonable officer can nevertheless have a reasonable suspicion of illegal activity when told that a person has been spotted transporting cocaine. Likewise, other circuits have rejected the argument that the possibility a person is lawfully carrying a firearm precludes reasonable suspicion. See Woods, 747 F.3d at 556; Gatlin, 613 F.3d at 378-79.

Accordingly, although a person exiting a liquor store with a concealed handgun in his right-hand pocket, walking in the direction of stores that had previously been robbed, may have had a concealed carry permit and been engaged in innocent activities, it would not violate clearly established law for a reasonable officer in Hellawell's position to conclude that the tip, corroborated by his own observations, gave rise to a reasonable suspicion that the man was engaged in criminal conduct.

[Court's footnote: *We further note that "the existence of a statute or ordinance authorizing particular conduct" favors "the conclusion that a reasonable official would find that conduct constitutional." . . . . Here, § 25850(b) of the California Penal Code authorizes police officers "to examine any firearm carried by anyone on the person or in a vehicle while in any public place or on any public street in an incorporated city or prohibited area of an unincorporated territory." Therefore, an officer in Hellawell's situation could reasonably believe he had authority to examine any firearm Foster might be carrying and could reasonably rely on § 25850(b) in stopping Foster.*]

Therefore, we determine that Hellawell did not violate clearly established law when he concluded, based on the 911 call, that he had reasonable suspicion to stop and investigate Foster. . . . We reverse the district court's conclusion that Hellawell was not entitled to qualified immunity with respect to the stop.

[LEGAL UPDATE EDITOR'S COMMENT REGARDING LAWFULNESS OF STOPPING A PERSON BASED ON REASONABLE SUSPICION THAT THE PERSON IS CARRYING A CONCEALED HANDGUN: Under RCW 9.41.050(1)(a) and RCW 9.41.810, it is a misdemeanor for a person to carry a handgun concealed on the person unless that

person has a concealed pistol license. There is no case law directly on point to the question of whether Washington officers applying Washington law on concealed pistol licenses are authorized to make Terry seizures consistent with the analysis by the Ninth Circuit in Foster regarding actions of a California officer applying California law on concealed pistol licenses.

In other words:

(A) The Ninth Circuit has ruled in Foster that reasonable suspicion that a person in California is carrying a pistol concealed while in public justifies a Terry stop by a California officer to investigate whether the person has a license under California law to carry the pistol concealed (I assume that this rule applies only where the officer does not already have knowledge that the suspect has a license to carry a concealed pistol).

(B) No published appellate court decision to date involving a stop by a Washington officer has determined whether reasonable suspicion that a person in Washington is carrying a pistol concealed while in public justifies a Terry stop by a Washington officer to investigate whether the person has a license under Washington law to carry the pistol concealed (again, I assume that the officer does not already know that the person has a concealed pistol license).

Even though a part of the rationale of the Ninth Circuit turns on the laws of California (1) making concealed pistol licenses more rare because CPLs are harder to obtain under California law, and (2) expressly authorizing intrusions to check firearms, those differing provisions of California law are not the sole reasons for the Ninth Circuit's ruling on this issue in Foster.

As always, I urge law enforcement readers of the Legal Update for Washington Law Enforcement to consult their legal advisors and local prosecutors on legal issues addressed in the Update.]

Now, I resume the excerpt from the Analysis in the Ninth Circuit Opinion in Foster:

> 3. Qualified immunity granted where evidence is undisputed that officer un-holstered his gun at the point when the suspect first made a movement or started to flee, but the officer then re-holstered his handgun and did not point it at the suspect until the officer decided later in the chase to use deadly force.
>
> We next turn to the plaintiffs' claim that Hellawell violated Foster's Fourth Amendment rights in approaching him with a drawn gun.
>
> In his deposition, Hellawell testified as follows:
>
> > I don't recall drawing my gun, but I do remember fumbling with my holster as I ran behind Jack in the Box or on the side of Jack in the Box. I honestly can't sit there and tell you when I drew it. . . . Whether I drew it when he started to run or when he made some type of a movement as he began to run, I might have. I don't remember. But I do remember – as we ran along the west side of Jack in the Box, I remember fumbling with my holster because I will not run with my gun in my hand. So that's all I can recall on that subject.

Similarly, in his initial interview with the police investigator, Hellawell stated that "I initially had my gun out when he first started running because I believed he had a gun – and because I don't like to run with my gun in my hand, I ended up holstering my gun." There is no other evidence in the record on this issue. Although the plaintiffs argue in their brief on appeal that Hellawell approached Foster "with his police firearm drawn," and pointed his firearm at Foster, no evidence in the record supports this claim. In addition to Hellawell's statements, the plaintiffs cite Flores's declaration, which states only that he saw Hellawell with something in his hand during the chase. Flores did not see Hellawell draw his firearm as he approached Foster.

Based on this record, the district court erred in finding a genuine dispute as to whether Hellawell approached Foster with his gun drawn. The bare allegation alone, without any evidence in the record, is insufficient to conclude that Hellawell did anything more than unholster his gun during the initial encounter with Foster. The parties have not cited any case holding that merely unholstering a gun without pointing it at the suspect constitutes excessive force.

We have held only that "pointing a loaded gun at a suspect, employing the threat of deadly force" may constitute excessive force. Espinosa v. City & Cty. of San Francisco, 598 F.3d 528, 537 (9th Cir. 2010) (emphasis added); *see also* Tekle v. United States, 511 F.3d 839, 845 (9th Cir. 2007) ("We have held that the pointing of a gun at someone may constitute excessive force, even if it does not cause physical injury."); Robinson v. Solano Cty., 278 F.3d 1007, 1015 (9th Cir. 2002) (en banc) (recognizing "as a general principle that pointing a gun to the head of an apparently unarmed suspect during an investigation can be a violation of the Fourth Amendment, especially where the individual poses no particular danger"). Neither we nor the Supreme Court have held that merely unholstering a firearm, without more, constitutes excessive force. The plaintiffs' reliance on Espinosa, Robinson, and similar decisions is unpersuasive because each of those cases focuses on whether a gun was pointed at the suspect. . . .

Because a reasonable officer in Hellawell's position could reasonably conclude that unholstering a gun during the stop did not constitute a violation of Foster's right to be free from excessive force, we reverse the district court's conclusion that Hellawell was not entitled to qualified immunity on this point.

[Paragraphing revised for readability; some citations omitted, others revised for style; some footnotes omitted; subheadings added]

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WASHINGTON STATE SUPREME COURT

MURDERER LOSES ARGUMENTS UNDER (1) HEALTH CARE ACT, (2) SEARCH WARRANT OVERBREADTH STANDARDS, (3) SEARCH WARRANT PARTICULARITY STANDARDS, (4) COURT RULE RIGHT TO COUNSEL, (5) COURT RULE RIGHT TO SPEEDY COURT APPEARANCE, AND (6) RCW 72.68.050 REGARDING COUNTY JAILS HOUSING DOC PRISONERS

LEGAL UPDATE PRELIMINARY EDITOR'S NOTES: Most of the issues in this case are tied to the factual context of investigation of a murder committed by an inmate in a prison. The Legal Update entry below does not fully address either (1) the extensive

facts or (2) the complex fact-bound issues. The Supreme Court's Majority Opinion falls a little short in its organization of the facts.

Note also that the Supreme Court is unanimous in upholding the aggravated first degree murder conviction of Scherf, and thus the Supreme Court is unanimous on all of the issues discussed in this Legal Update entry. Justice Gonzalez writes a short concurring opinion that is joined by Justice Yu, but his only concern with the Majority Opinion is his continuing concern about the Supreme Court's October 11, 2018 decision in State v. Gregory rejecting application of the death penalty.

In State v. Scherf, ___ Wn.2d ___ , 2018 WL ___ (November 8, 2018), the Washington Supreme Court is unanimous in affirming Scherf's Snohomish County Superior Court conviction for aggravated first degree murder as defined in RCW 9A.32.030(1)(a) and RCW 10.95.020. The Court reverses defendant's death sentence based on the Court's October 11, 2018 invalidating Washington's death penalty.

Among the rulings by the Court against defendant in upholding his conviction are the following rulings, as summarized by the Legal Update.

1. Uniform Health Care Information Act Does Not Protect The Medical Records In Scherf's Cell

Scherf murdered a Washington DOC Corrections Officer in the prison chapel. A detective obtained a search warrant (Search Warrant 1) for a search of Scherf's jail cell. During the search of the cell, the detective saw some medical records that the detective thought might be outside the scope of the authorization under Search Warrant 1, so the detective obtained Search Warrant 2.

One of Scherf's subsequent challenges to the searches under the warrants is that, while a prisoner has no constitutional privacy interest in the contents of his jail cell, looking at medical records in his cell violated his *statutory* privacy rights under the Uniform Health Care Information Act, chapter 70.02 RCW. The Washington Supreme Court rules that the statute does not place a duty on non-health care providers, such as corrections officers and law enforcement personnel, to protect the privacy of a patient's health care information. Accordingly, DOC was not required to obtain authorization from Scherf before medical records were removed from his cell and reviewed.

2. A Search Warrant Affidavit Provides Probable Cause That "Evidence Of The Crime" Of Aggravated First Degree Murder, As Broadly Construed, Would Be Found

Search Warrant 2 authorized seizure of, among other specified items, "evidence of the crime of aggravated first degree murder." The Supreme Court discusses the concept of probable cause and asserts that "evidence of the crime" is not limited to evidence proving that a crime was committed, but also includes evidence related to intent elements of the crime and relevant to sentencing. The Supreme Court asserts that in an aggravated murder investigation under the former capital sentencing statutes, "evidence of the crime of aggravated murder in the first degree" includes evidence that goes to all elements of the crime, as well as evidence that goes to any sentencing issue (including evidence that might mitigate against a death sentence. **[LEGAL UPDATE EDITOR'S NOTE: I am not certain whether this remains a valid point in light of the Washington Supreme Court's death penalty ruling last month in State v. Gregory.]**

The Supreme Court appears to assert that description in affidavits of the nature of the crime in this case was probable cause for a broad search warrant provision authorizing search for evidence of the crime of aggravated murder in the first degree. This includes items that might go toward a mitigation argument of the defendant at sentencing. **[LEGAL UPDATE EDITORIAL COMMENT: I found to be confusing the discussion in this portion of the Opinion, as well as in the briefing. In my thinking about the law relating to search warrants, any attack on the warrant's broad language of "evidence of the crime of aggravated murder in the first degree" goes to the issues of whether the warrant authorization (1) was too broadly or vaguely stated to provide adequate focused guidance to the officers, and/or (2) was supported by probable cause. It seems to me that the search warrant authorization meets both requirements under the circumstances of this murder case.]**

3. The Search Warrant Particularity Requirement Is Met By Search Warrant 2

Search Warrant 2 authorized the search and seizure of Scherf's property and storage area, the prison's administration building and any and all records of Scherf. Search Warrant 2's affidavit was attached and expressly incorporated by reference. The Supreme Court rules that Search Warrant 2 authorized the search of a medical records room located in the prison and adequately described the items to be seized.

4. CrR 3.1 Right To Consult An Attorney Was Satisfied By Law Enforcement

Under Washington Court Rule CrR 3.1, subsection (c)(2) provides:

> At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer.

In State v. Kirkpatrick, 89 Wn. App. 407 (Div. II, 1998), the Court of Appeals held that a Lewis County detective interrogating an arrestee at the Port Angeles Police Station violated this rule on providing attorney access on request. After a 90-minute interrogation at the Port Angeles Police station, the arrestee stopped the interrogation by stating that he wanted an attorney. The detective did not try to place Kirkpatrick in contact with an attorney at that point; instead the detective simply followed **constitutional** requirements by terminating the interrogation. The detective then transported Kirkpatrick back to Lewis County.

On the trip to Lewis County, Kirkpatrick initiated contact with the detective, and, despite the detective's reminder to Kirkpatrick had asserted his right to an attorney, Kirkpatrick then volunteered some incriminating information as the road trip continued. The Court of Appeals held in Kirkpatrick that, because there was a phone available at the Port Angeles police station, the detective violated CrR 3.1(c)(2) by failing, while still at the Port Angeles stationhouse, to ask the arrestee whether he wanted to make a phone call *at that time* to a specific attorney or to a public defender. Accordingly, when the arrestee later initiated conversation with the detective during transport, his volunteered admissions were poisoned by the earlier violation of the rule, the Court of Appeals held.

The Scherf Majority Opinion distinguishes Kirkpatrick (and the circumstances in State v. Pierce, 169 Wn. App. 553 (Div. II, 2012), and holds that statements made by Scherf before he was charged with a crime are not subject to suppression under CrR 3.1. Scherf was placed in face-

to-face contact with a defense attorney at 9 a.m. the morning following his 9 p.m. arrest shortly he was arrested for murdering the correctional officer.

The Supreme Court rules that the delay in putting Scherf in contact with an attorney during a period of almost 12 hours after Scherf asked for an attorney was justified by the special circumstances of the case: (1) detectives were justified in prioritizing preparing a search warrant (where, according to the State's briefing, it appeared that defendant was licking his fingers to possibly destroy evidence); (2) there was a risk to prison security and lockdown of other inmates while waiting to do searches under a warrant; (3) there was concern for the safety of Scherf due to animosity of other inmates angry over the lockdown that Scherf had caused; and (4) restrictions were placed on the prison facility due to the lockdown that Scherf had caused, thus making it difficult to more quickly put Scherf in contact with an attorney.

5. Detention In A Jail Instead Of The DOC Facility May Have Been Contrary To Statute, But That Does Not Require Suppression Of Statements Scherf Made At The Jail

Because of the need to get Scherf out of the DOC facility for a variety of reasons (including fellow-inmate animosity because Scherf's actions had caused a lockdown), Scherf was moved to the Snohomish County Jail shortly after the murder. Under RCW 72.68.040 and .050, prison inmates are not to be housed in county jails without a contract between DOC and the county. The Supreme Court states that there was an oral agreement for the transfer, and that, in any event, no statutory remedy exists for a violation of this statute, and Scherf provided no justification based on the statutes for suppression of his statements.

6. Criminal Rule 3.2.1(d)(1) Requires Prompt Appearance Before A Judge But Does Not Automatically Require Suppression Of Statements For Violation But The Court Rule Does Not Require Suppression Of Scherf's Statements To Law Enforcement

Under Washington Court Rule 3.2.1, subsection (d)(1) requires that a person be brought before a judge "as soon as practicable" following a warrantless arrest and being placed in custody, However, over 50 years ago in State v. Hoffman, 64 Wn.2d 445 (1964), the Washington Supreme Court held that under the court rule, any unnecessary delay in the preliminary appearance is merely one factor to consider when determining whether a confession is involuntary. The Scherf Majority Opinion concludes, based on Hoffman, that the rule does not provide an automatic basis for suppression.

Also, the defendant was not in "custody" for purposes of the rule. Scherf was already in prison serving a life sentence for another crime. In light of his prisoner status, Scherf cannot be deemed to have been in "custody" under the rule. For all of these reasons, the Scherf Majority Opinion concludes that CrR 3.2.1(d)(1) does not support Scherf's challenge to his conviction.

7. Harsh Conditions Present In The Jail Do Not Make Scherf's Statements Involuntary

Scherf and the defense psychiatrist complained about harsh conditions that existed at the jail during his solitary confinement after he murdered the correctional officer. They argued that these conditions made his videotaped confessions involuntary.

The Supreme Court disagrees. The Court notes that (1) Scherf was repeatedly advised of his Miranda rights; (2) he met with attorneys twice before he was even interviewed for the first time by officers, (3) he met with an attorney before his third police interview, (4) he appeared to be calm and cooperative during the videotaped interview; (5) he selectively answered questions

during the police interview; and (6) he admitted at one point he admitted that he was confessing because of intolerable feelings of guilt.

Result: Affirmance of Snohomish County Superior Court conviction of Byron Eugene Scherf for aggravated first degree murder; reversal of sentence of death.

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WASHINGTON STATE COURT OF APPEALS

SUFFICIENCY OF EVIDENCE THAT HOUSE IS A "DWELLING" UNDER RESIDENTIAL BURGLARY STATUTE: EVEN THOUGH ELDERLY OWNER OF HOME HAD NOT LIVED IN HER HOME FOR OVER A YEAR, THE EVIDENCE, INCLUDING THE FACT THAT SHE KEPT THE HOME FULLY FURNISHED AND REGULARLY VISITED IT, IS SUFFICIENT TO SUPPORT JURY'S DETERMINATION THAT BURGLARIZED HOME WAS A DWELLING

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

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

> In October 2014, Lloyd Fredson moved his elderly mother Myrtle Fredson from her home in Puyallup to Port Orchard to live near him because she had been having health problems. Myrtle had lived in the house since 1986, but by 2014 had difficulty managing her affairs.
>
> When Myrtle went to live in Port Orchard, she left furniture throughout the house, beds in each bedroom, appliances, clothes, and personal belongings in the Puyallup home. However, nobody lived in the house. After Myrtle went to live in Port Orchard, Lloyd and Myrtle tried to visit the Puyallup house once or twice a week.
>
> Over time, unknown people broke windows and broke down doors in order to get inside the house. Lloyd eventually boarded up the windows and secured the broken front door to keep people out. He also posted no trespassing and warning signs throughout the property.
>
> On February 2, 2016, Lloyd and Myrtle went to her home to check on it. Lloyd suspected that someone was inside the house and called the sheriff. Officers responded and arrested Hall as he came out of the house. Hall was carrying a backpack that contained items that Lloyd and Myrtle identified as possessions that she had left in the house.
>
> The State charged Hall with residential burglary, third degree theft, and making or having burglary tools. A jury found him guilty of all three counts. Hall appeals his residential burglary conviction.

ISSUE AND RULING: Is the evidence sufficient to support the jury's verdict that the home was a dwelling at the time of the burglary such that the jury's verdict of residential burglary is supported by the evidence? (ANSWER BY COURT OF APPEALS: Yes, rules a unanimous court)

Result: Affirmance of Pierce County Superior Court residential burglary conviction of Nathaniel John Hall (Hall did not appeal from his convictions for third degree theft and making or having burglary tools).

ANALYSIS: (Excerpted from Court of Appeals opinion)

1. *Legal Principles*

Under RCW 9A.52.025, a person commits residential burglary "if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling." RCW 9A.04.110(7) defines "dwelling" as "any building or structure . . . which is used or ordinarily used by a person for lodging."

Whether a building is a dwelling "turns on all relevant factors and is generally a matter for the jury to decide." State v. McDonald, 123 Wn. App. 85, 91 (2004). As a result, whether a building is a dwelling cannot always be decided as a matter of law. . . .

No published Washington case has discussed in detail the factors relevant to determining whether an unoccupied house constitutes a dwelling. In McDonald, a house's owners had not lived there for two or three months while they were remodeling it. This court in a footnote identified several relevant factors stated in cases from other jurisdictions and a secondary source. These factors were (1) whether the occupant deemed the house his or her abode and treated it as such, (2) whether the house was furnished and rented out periodically, (3) whether the occupant intended to return, (4) whether the house usually was occupied by someone lodging there at night, (5) whether the house was maintained as a dwelling, and (6) how long the house had been vacant. But the court did not expressly adopt these factors nor apply them in summarily holding that the evidence in that case presented a jury question.

2. *Analysis*

Here, Hall points to several factors suggesting that Myrtle's house did not constitute a dwelling at the time of the burglary. Nobody had lived in the house for over 15 months. All the windows had been boarded up and the broken front door had been secured. And there was no evidence that Lloyd or Myrtle planned for Myrtle to resume living in the house or for anyone else to live in the house.

However, other factors support a finding that the house constituted a dwelling even through it had been unoccupied for some time. First, Myrtle had used the house for lodging for almost 30 years. There is no indication that the house had been used for anything other than lodging during that time. As a result, at least before Myrtle ceased living there, the house ordinarily had been used for lodging. And the nature and character of the house and its contents had not changed even though it was unoccupied.

Second, the house remained fully furnished. There was furniture in every room, including beds in all the bedrooms. Appliances were present. With regard to furnishings, the house was immediately available to be used for lodging.

Third, Myrtle left clothing and personal belongings in the house. In fact, Lloyd admitted that his mother was somewhat of a hoarder and that a large number of her possessions

remained in the house. Myrtle may not have been living in the house, but she had not formally moved out.

Fourth, although Myrtle did not testify, a reasonable inference from the evidence is that she continued to regard the house as her abode. She had not abandoned her house. Myrtle, along with Lloyd, visited the house once or twice a week. They took steps to prevent people from damaging or entering the house so that the house would remain habitable.

Finally, Myrtle did not "voluntarily" cease to occupy her house. She essentially was forced to leave because of her age-related health problems. Although there is no evidence that there was a plan for Myrtle to return, a reasonable inference from the evidence is that she would return if she was able to take care of herself.

Because there are competing factors, we hold that there was sufficient evidence for a rational jury to determine that the house Hall burglarized was a dwelling. The jury properly was allowed to consider all the relevant factors in making this determination.

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

CRIMINAL CONVICTION FOR UNLAWFUL PRACTICE OF LAW (RCW 2.48.180) UPHELD AGAINST SUFFICIENCY OF EVIDENCE CHALLENGE IN CASE INVOLVING ADVERSE POSSESSION SCHEME

In State v. Yishmael, ___ Wn. App. 2d ___ , 2018 WL ___ (Div. I, November 26, 2018), a three-judge panel of Division One of the Court of Appeals affirms the conviction of defendant for unlawful practice of law. The Court of Appeals concludes that (1) the statute defining the crime, RCW 2.48.180, is not void for vagueness, (2) the jury was properly instructed, (3) the crime is a strict liability offense, and (4) the evidence is sufficient to support the conviction.

The Yishmael Opinion describes the facts and trial court proceedings in the case as follows:

Before the real estate crash of the late 2000s, Yishmael worked as a realtor. After the downturn, he founded an association and recruited members by offering free seminars with PowerPoint presentations focusing on the legal doctrine of adverse possession. He encouraged members to believe that they could legally enter vacant homes, claim them as their own, and secure legal title after 7 to 10 years of occupation.

Yishmael charged $7,000 to $8,000 for membership in his association. Members were entitled to receive his advice on adverse possession, including statutes and case law; listings of homes that were apparently abandoned or that had "foreclosure" issues; and legal forms to aid them in making claims of adverse possession. Yishmael promised to stand by and offer guidance if any legal difficulties should arise.

Yishmael was not a lawyer. The advice he provided to association members was largely erroneous, and the legal documents were effectively meaningless.

Yishmael was arrested in April 2016. The State charged him with one count of unlawful practice of law and several counts of theft, attempted theft, conspiracy to commit theft, and offering false instruments for filing or record.

During the course of Yishmael's five-day trial, the State presented the testimony of three former members of his association. When these individuals met Yishmael, they were struggling to pay their monthly rent. Swayed by Yishmael's explanation of adverse possession, they agreed to join his association. They worked out installment plans with Yishmael and began paying membership dues.

The three testified similarly about using a list provided by Yishmael to identify vacant homes they were interested in owning. Yishmael in some cases arranged to have a locksmith change the locks on the selected homes. The members moved into the homes they had decided to possess. On Yishmaels's advice, they posted "no trespassing" signs, filed documents with the recorder's office, and paid for landscaping, repairs, and new appliances. All three testified that they were visited by police officers. Two were arrested. One of them had been offered $1,000 to move out; Yishmael offered to draft a counter-offer for $3, 000. Yishmael also advised him on how to deal with the criminal proceedings.

Yishmael's defense focused on challenging the theft charges. The facts supporting the charge of unlawful practice went largely uncontested. The jury convicted Yishmael of the unlawful practice of law and acquitted him on the other charges. He was given a sentence of 364 days in jail, suspended on condition that he spend five days in jail and report for 30 days of a community work program.

Result: Affirmance of King County Superior Court conviction of Naziyr Yishmael for unlawful practice of law.

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

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

Every month I will include a separate section that provides very brief issue-spotting notes regarding select categories of unpublished Court of Appeals decisions that month. I will include such decisions where issues relating to the following subject areas are addressed: (1) Arrest, Search and Seizure; (2) Interrogations and Confessions; (3) Implied Consent; and (4) possibly other issues of interest to law enforcement (though probably not sufficiency-of-evidence-to-convict issues).

In November 2018, six 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. Kelly Alice Peters: On November 6, 2018, Division Two of the COA rules for the State in rejecting defendant's appeal from her Clark County Superior Court conviction for *possession of methamphetamine*. The Court of Appeals rules that two 911 calls two minutes apart reporting an assault were corroborated by a responding officer such that the officer had **reasonable suspicion to seize the defendant** by telling her to sit down and requesting identification from her.

2. State v. Steven M. Sommer: On November 6, 2018, Division Two of the COA rules for the State in rejecting defendant's appeal from his Pierce County Superior Court conviction for f*elony violation of a no contact order and for making a false or misleading statement to a public servant* (defendant falsely claimed to a law enforcement officer to be the defendant's brother). Defendant argued that he was being unlawfully detained at the point when he made the false statement to the officer. The Court of Appeals explains why this assertion fails:

> Here, [the deputy's] duties that day were to provide security for the county health department at a property subject to abatement, and to remove people from the residence, sheds, or vehicles from the property. Sommer did not have permission to be on the property. Based on this record**, [the deputy] could reasonably have suspected that Sommer was involved in criminal activity by being on the property without permission. Therefore, [the deputy] could have lawfully stopped and detained Sommer for investigation without a warrant.**

3. State v. Thomas Charles Babb: On November 13, 2018, Division One of the COA rejects defendant's appeal from his Snohomish County Superior Court conviction for *possession of heroin*. The Court of Appeals relies on State v. Cormier, 100 Wn. App. 457 (2000) and rules under the Exclusionary Rule that, although **an officer unlawfully seized defendant, the causal chain of the Exclusionary Rule was broken when the defendant then assaulted the officer. Therefore, the officer acted lawfully in making a search incident to the arrest of defendant for assaulting the officer**, and the heroin found in the search is admissible.

4. State v. Jeannette Tara Demmon: On November 13, 2018, Division One of the COA rules in favor of defendant's appeal and reverses her conviction by the Snohomish County Superior Court for *possession of a controlled substance* (heroin and methamphetamine) while in community custody status. The Court of Appeals rules that **an officer violated the Article 1, Section 7 Washington constitutional seizure rule of State v. Rankin, 151 Wn.2d 689 (2004) by repetitively asking a reluctant passenger in a stopped car for her identity and for her identification** in an attempt to determine if she was the person protected from the stopped vehicle's driver under a no-contact order.

5. State v. Raul Cortes-Mendez: On November 13, 2018, Division One of the COA rejects defendant's appeal from his King County Superior Court conviction for *attempting to elude a pursuing police vehicle*. The Court of Appeals rejects defendant's challenge to an officer's identification of him out of court and later in court as the driver of the car that got away when the officer terminated pursuit because of danger to the public. The officer's **initial out-of-court identification was credibly based on a booking photo and the officer's reliance on his memory of his observations of the driver at the time of the encounter and pursuit.**

6. State v. Oscar Luis Urbina: On November 13, 2018, Division One of the COA rejects defendant's appeal from his King County Superior Court convictions for *rape and unlawful imprisonment*. Two related challenges by defendant were that, despite the fact that he has lived in the U.S. for the past 20 years, he has such limited English language fluency that, where no

interpreter was provided at the interrogation: (1) he was not adequately Mirandized, and (2) the subsequent interrogation in English inside of a small interrogation room was coercive. **The Court of Appeals concludes that the trial court ruling on the Miranda waiver is supported by substantial evidence that defendant knowingly, voluntarily and intelligently waived his rights**:

> Here, police officers advised Urbina of his rights under Miranda upon his arrest and before interviewing him at the police station. He was advised in both languages, both orally and in writing. He signed written acknowledgments of his rights in both languages. The court found that Urbina is able to read Spanish. The court further found, based on the record, that Urbina's English skills are functional.

And the defendant's involuntariness-of-confession claim fails as well in light of the evidence of defendant's working use of English and the high standard for proving involuntariness. The Court of Appeals also points out that defendant was able to testify to the jury regarding his claim that the interrogation evidence was subject to doubt because of his alleged failure to understand the officers' questions.

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

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

In May of 2011, John Wasberg retired from the Washington State Attorney General's Office. For over 32 years immediately prior to that retirement date, as an Assistant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011) of the Criminal Justice Training Commission's Law Enforcement Digest. From the time of his retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the production of the LED. That arrangement ended in the late fall of 2014 due to variety of concerns, budget constraints and friendly differences regarding the approach of the LED going forward. Among other things, Mr. Wasberg prefers (1) a more expansive treatment of the core-area (e.g., arrest, search and seizure) law enforcement decisions with more cross references to other sources and past precedents and past LED treatment of these core-area cases; and (2) a broader scope of coverage in terms of the types of cases that may be of interest to law enforcement in Washington (though public disclosure decisions are unlikely to be addressed in depth in the Legal Update). For these reasons, starting with the January 2015 Legal Update, Mr. Wasberg has been presenting a monthly case law update for published decisions from Washington's appellate courts, from the Ninth Circuit of the United States Court of Appeals, and from the United States Supreme Court.

The Legal Update does not speak for any person other than Mr. Wasberg, nor does it speak for any agency. Officers are urged to discuss issues with their agencies' legal advisors and their local prosecutors. The Legal Update is published as a research source only and does not purport to furnish legal advice. Mr. Wasberg's email address is jrwasberg@comcast.net. His

cell phone number is (206) 434-0200. The initial monthly Legal Update was issued for January 2015. Mr. Wasberg will electronically provide back issues on request.

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

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

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

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

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