LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: Thank you!

NOVEMBER 2019

TABLE OF CONTENTS FOR NOVEMBER 2019 LEGAL UPDATE

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

In U.S. v. Norris, ___ F.3d ___ , 2019 WL ___ (9th Cir, November 4, 2019), a three-judge Ninth Circuit panel rejects a child pornography defendant's challenge to the FBI's use of a Moocherhunter device to catch him.

[LEGAL UPDATE EDITOR'S NOTE AND COMMENT: I am not an IT guy, so my attempt to very briefly summarize the technology-oriented facts in this case might not be accurate. Interested readers will want to look at the Ninth Circuit's actual opinion, which is accessible by date of issuance on the Ninth Circuit's webpage for published opinions. Also, I have only very briefly noted some of the Fourth Amendment legal analysis in the case. Again, interested Washington officers will want to read the opinion, and they may also wish to consult legal advisors or prosecutors regarding how Washington appellate courts might deal with the constitutional issues under article I, section 7. I do not think that any published Washington appellate court decision to date has addressed similar facts.

The closest fact pattern that I can think of is the use of thermal detection devices to conduct infrared surveillance of the exterior of a home. In State v. Young, 123 Wn.2d 173 (1994), the Washington Supreme Court ruled under article I, section 7 of the Washington constitution that this is a search requiring a search warrant or a recognized exception to the warrant requirement. In Kyllo v. U.S., 533 U.S. 27 (2001), the U.S. Supreme Court made the same general ruling under the Fourth Amendment of the federal constitution. In Norris, the Ninth Circuit panel addresses Kyllo as follows:

> **We agree with the district court that Kyllo does not dictate the conclusion that a Fourth Amendment search occurred in this case. . . . Unlike in Kyllo, where the defendant confined his illegal activities to the interior of his home and relied on the privacy protections of the home to shield these activities from public observation, Norris's activities reached beyond the confines of his home, thereby negating any expectation of privacy.**

Whether the U.S. Supreme Court would agree with that limiting reading of Kyllo remains to be seen. Also remaining to be seen is whether, even if the U.S. Supreme Court to so limit Kyllo under the Fourth Amendment, the Washington Supreme Court would interpret the Washington constitution's privacy protection, per State v. Young, as being so limited.]

Facts and Proceedings below in Norris:

FBI agents were investigating the distribution of child pornography through a file sharing computer network. The agents could not determine the physical address for the source of the pornography, which was "boysforboys1." A search of an apartment linked to this address revealed no evidence of child pornography.

The FBI agents used "Moocherhunter" software to trace the suspected signal that – without permission from the apartment's occupant – had logged onto the apartment's router. The signal strength of the child-porn addresses suggested that they originated in a different nearby apartment. The agents got a search warrant for this second apartment and found child porn.

Norris was charged under the federal child pornography statutes. He filed a motion to suppress, alleging that use of the Moocherhunter software violated the Fourth Amendment. The trial court denied his motion, and he was convicted.

On appeal, the Ninth Circuit panel affirms his conviction, concluding that no Fourth Amendment search occurred: (1) because there was no intrusion into property of Norris, and (2) because he did not have either a subjective or objective expectation of privacy that was violated. The Ninth Circuit panel's analysis in Norris includes the following:

> Although physically located in his home, Norris's wireless signal reached outside his residence to connect to the wireless router in Apartment 242. The FBI captured Norris's wireless signal strength outside Norris's residence to determine the source of the signal.
>
> The FBI's actions may be likened to locating the source of loud music by standing and listening in the common area of an apartment complex. Although the music is produced within the apartment, the sound carries outside the apartment. Just as no physical intrusion "on constitutionally protected areas" would be required to determine the source of the loud music, no physical intrusion into Norris's residence was required to determine the strength of the wireless signal emanating from the devices in his apartment.
>
> We conclude that no subjective expectation of privacy exists under these circumstances, where information is openly available to third parties. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."
>
> . . . .
>
> "[I]t strains credulity to suggest that society would be prepared to recognize an expectation of privacy as reasonable when an individual gains access to the internet through the unauthorized use of a third-party's password-protected router located outside his residence."

Result: Affirmance of U.S. District Court (Eastern District of California) conviction of Alexander Nathan Norris for distribution and possession of material involving the sexual exploitation of minors in violation of federal law.

ENTERING RESIDENCE OF VIOLATOR TO ARREST FOR VIOLATION OF COMMUNITY CUSTODAY CONDITIONS: CALIFORNIA OFFICERS SEEKING TO ARREST FOR A PROBATION VIOLATION HAD PROBABLE CAUSE TO BELIEVE THAT THE HOME WAS THE CURRENT RESIDENCE OF THE PROBATIONER DESPITE THE FACTS THAT (1) THE PROBATION OFFICER'S RESIDENCE LIST WAS THREE MONTHS OLD (BUT HAD RECENTLY BEEN CORROBORATED), AND (2) OTHER OCCUPANTS OF THE HOME WHO ANSWERED A KNOCK AT THE DOOR TOLD THE OFFICERS THAT THE PROBATIONER NO LONGER LIVED AT THE HOME

U.S. v. Ped, ___ F.3d ___ , 2019 WL ___ (November 15, 2019)

> **[LEGAL UPDATE EDITOR'S INTRODUCTORY NOTE: Unlike Washington statutes, California statutes grant broad authority to law enforcement officers to act independently of community corrections officers to investigate those on community custody (probation or parole). It is my understanding that if the facts of this case had occurred in Washington, the law enforcement officers who entered a residence to arrest a violator of community custody conditions would**

have needed to be acting in support of community corrections officers who had probable cause to believe (1) that the violator had committed a crime or a violation of conditions, and (2) that the parolee/probationer currently resided there (case law in Washington has not yet addressed whether there must also be probable cause to believe that the violator is currently present).

But, the principle of the case regarding the limited privacy rights of those who reside with persons on conditions of community custody apply equally in Washington and California. As to searches in common areas or areas controlled by the parolee/probationer, others residing in the premises have no viable legal challenge to entry and search by community corrections officers and any supporting law enforcement officers.]

Facts: (Excerpted from Ninth Circuit Opinion)

In April 2016, Ped's brother, Nick Wilson, was released from the custody of the California Department of Corrections and placed on post-release community supervision, a status similar to parole. The terms of that supervision permitted officers to search Wilson's "residence and any other property under [his] control . . . without a warrant day or night."

Upon his release, Wilson informed his probation officer that he lived at his family's home – which is also Ped's home – on Eliot Street in Santa Paula, California. Soon thereafter, officers conducted a warrantless search of the house.

Although Wilson was not present that day, officers spoke with his mother and confirmed that he lived there. Later, officers went to the Eliot Street address in response to a family disturbance call. During that visit, they met Ped and his mother, and they again confirmed that Wilson lived there.

In June 2016, Wilson's probation officer provided the Santa Paula Police Department with a list of names and addresses of persons living in Santa Paula who were subject to supervision. The list included Wilson and the Eliot Street address. The next day, however, Wilson was arrested on unrelated charges and held at the Ventura County Jail, where he remained for three months.

Upon his release, he told the probation officer that he would be living in Newbury Park, California. The probation officer did not independently verify that new address, nor did he update the list he had previously given the Santa Paula Police Department.

About ten days after Wilson's release, officers of the Santa Paula Police Department – including one of the officers involved in the response to the earlier family disturbance call – randomly selected Wilson for a routine search of individuals on supervised release. **[LEGAL UPDATE EDITOR'S NOTE/COMMENT: Random searches of persons on community custody (probation/parole) are not authorized under Washington law, so the entry and search in Ped would not have been lawful if the circumstances had arisen in Washington.]**

Not knowing of Wilson's move to Newbury Park, the officers went to the Eliot Street address. As they approached the house, they heard a commotion inside, pushed open the door, and saw Ped holding a methamphetamine pipe. Both Ped and his mother told

> the officers that Wilson no longer lived there, but the officers disbelieved them and searched the residence anyway.
>
> The search turned up seven firearms; under questioning, Ped admitted that the weapons were his and that he had previously been convicted of a felony.

[Some paragraphing revised for readability]

Proceedings below:

Ped lost a suppression motion challenging the search on grounds that officers did not have probable cause to believe that probationer Wilson lived in the house. Ped then pleaded guilty to the federal crime of being a felon in possession of a firearm, reserving his right to appeal the suppression ruling.

ISSUE AND RULING: Officers believed that Ped's brother, probationer Nick Wilson, lived at Ped's house, most significantly because Wilson's probation officer had provided to the police a list stating that Wilson had reported living at that address. The list was three months old, but there was nothing in the information about Wilson's reported address suggesting that it was likely to be transitory, and there was substantial subsequently developed information corroborating the listed address. When the officers arrived at the house on the day of the search here at issue, Ped and his mother, residing in the home at that time, told officers that Wilson no longer lived with them. The officers proceeded to search the house and found a firearm that led to charging Ped for being a felon in possession of a firearm.

At the time when the officers searched Ped's house, did the officers have probable cause to believe that Wilson was currently living at Ped's house such that entry of the house to search for the probationer was justified even though other persons also resided in the home? (ANSWER BY NINTH CIRCUIT: Yes)

Result: Affirmance of U.S. District Court (Central District of California) conviction of Anthony Ped for being a felon in possession of a firearm.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

> Parolees, however, "have severely diminished expectations of privacy by virtue of their status," Samso*n v.* California, 547 U.S. 843, 852 (2006), and they may be subject to warrantless searches of their homes without a warrant or suspicion of wrongdoing. That is true even if other people also live there. . . . But the police must "be reasonably sure that they are at the right house." . . . a parolee's diminished expectation of privacy cannot "justif[y] the entry into and search of a third person's house to search for the parolee." . . . To protect the interests of third parties, "officers must have probable cause to believe that the parolee is a resident of the house to be searched." . . . .
>
> This case therefore turns on whether the officers had probable cause to believe that Wilson lived at Ped's house. "[P]robable cause as to residence exists if an officer of 'reasonable caution' would believe, 'based on the totality of [the] circumstances,' that the parolee lives at a particular residence." . . . In this case, the most significant circumstance establishing probable cause was the list provided to the police by the probation officer, which stated that Wilson had reported living at the Eliot Street address.

In [Motley v. Parks, 432 F.3d 1072, 1080-82 (9th Cir. 2005)], we held that officers acted reasonably when they relied on a similar list. . . . The same is true here.

Ped emphasizes that the list in this case was three months old, while the one in Motley was only one month old. We do not question that at a certain point, a reported address would become so old that it would no longer be reasonable for officers to rely on it.

But nothing about Wilson's reported address suggested that it was likely to be transitory, and although a person living in a house with family members might move away in less than three months, it would be reasonable to expect that he would still live there. See United States v. Harper, 928 F.2d 894, 896-97 (9th Cir. 1991) (holding that officers had probable cause to believe that the parolee lived in a particular house because, among other factors, the parolee's family rented the house and two of his brothers lived there).

In addition, the staleness of information establishing probable cause must be evaluated "in light of the particular facts of the case," and here those facts include substantial information corroborating the listed address. . . . Specifically, the officers reasonably relied on their previous visits to the Eliot Street address, in which they had learned that Wilson lived there. Those facts supported the reasonableness of their belief that they were at the right house.

Ped points out that, just days before the search, Wilson had told his probation officer that he would be living in Newbury Park. The officers who conducted the search did not know that, however, so it is not relevant to the assessment of probable cause, which takes into account "the totality of the circumstances known to the officers at the time of the search." . . . .

To be sure, the officers could have conducted additional inquiries to confirm that Wilson still lived at Ped's house. But because the officers had a reasonable basis for believing that Wilson lived there, they were not required to take further steps to verify his last reported address. . . .

We have held that officers must conduct further inquiries before searching residences that were not previously reported by the parolee. . . .Indeed, in [U.S. v. Grandberry, 730 F.3d 968, 980 (9th Cir., 2013)] we faulted officers for searching a residence different from that reported on a six-month-old list, explaining that "there was no basis for doubting that Grandberry lived where he had reported he did." Here, too, the officers conducting the search at Eliot Street had no basis for doubting that Wilson lived there.

Ped argues that even if the officers had probable cause when they arrived at the house, it became unreasonable for them to proceed with a search once Ped and his mother told them that Wilson no longer lived there. We rejected just such an argument in Motley, reasoning that as long as the officers had information establishing probable cause, they were entitled to proceed unless "presented with convincing evidence that the information they had relied upon was incorrect."

Ped's and his mother's statements were hardly "convincing evidence" – neither Ped nor his mother provided an alternate address for Wilson, and Ped's effort to discourage the search came just moments after he had been seen with a methamphetamine pipe.

> Those statements, coming from "less-than-disinterested source[s], did not undermine the information the officers previously had received." . . . .

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

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REMINDER RE RESEARCH TOOL: ELECTRONIC SURVEILLANCE AND DIGITAL EVIDENCE MANUAL FROM THE KING COUNTY PROSECUTOR'S OFFICE

Two years ago, I included in the January 2018 Legal Update a note stating that readers should find useful the 2017 update of one of the research sources on the home page of the website of the Washington Association of Prosecuting Attorneys (WAPA). This is a reminder. Although the publication generally is focused on prosecutors, there is much that is practical and useful for Washington law enforcement officers in a comprehensive and well-indexed compilation, Electronic Surveillance and Digital Evidence in Washington State, 2017, by Susan K. Storey, Sr. Deputy Prosecuting Attorney, Retired, King County.

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WASHINGTON STATE SUPREME COURT

WARRANTLESS PINGING OF A CELL PHONE IN ORDER TO LOCATE AND ARREST A MURDER SUSPECT: SEVEN OF THE NINE WASHINGTON SUPREME COURT JUSTICES CONCLUDE THAT REAL-TIME PINGING IS A "SEARCH" UNDER BOTH THE WASHINGTON AND FEDERAL CONSTITUTIONS; SIX JUSTICES CONCLUDE THAT WARRANTLESS PINGING WAS LAWFUL, EITHER BECAUSE EXIGENT CIRCUMSTANCES SUPPORTED THE PINGING (AT LEAST FOUR JUSTICES, MAYBE SIX, AGREE) OR BECAUSE THE LEGAL CONCLUSION THAT A "SEARCH" OCCURRED IS WRONG (TWO JUSTICES AGREE)

State v. Muhammad, ___ Wn.2d ___ (November 7, 2019)

Lead Opinion's Introduction Reporting The Voting Breakdown Among The Justices

> Bisir Bilal Muhammad was convicted of first degree rape and felony murder. Principally at issue is whether the trial court erred in denying Muhammad's motion to suppress the physical evidence collected from his vehicle after police located it via a warrantless cell phone "ping." Muhammad contends the location information provided by a cell phone ping is protected from a warrantless search under article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution.
>
> We agree. Seven members of the court agree that a ping is a search under article I, section 7 and the Fourth Amendment. See lead opinion of Wiggins, J.; opinion of Gordon McCloud, J.
>
> Although the ping was a search conducted without a warrant, the ping was not impermissible. Rather, as six members of the court agree, the ping *was* permissible. See lead opinion of Wiggins, J. (concluding that the exigent circumstances exception justified the search); concurrence/dissent (Madsen, J.) (concluding that the ping was not a search and therefore was permissible).

Finally, five members of the court, in agreement with Muhammad, hold that imposing convictions for both felony murder predicated on rape and first degree rape violates double jeopardy. See concurrence/dissent (Madsen, J.); opinion of Gordon McCloud, J.

In light of the above, we therefore affirm the Court of Appeals in part and reverse in part. By a vote of six to three we agree the ping was permissible. See lead opinion of Wiggins, J.; concurrence/dissent (Madsen, J.). By a vote of five to four, this court holds that the felony murder and rape convictions violate double jeopardy and remands to the trial court to dismiss the lesser-included offense. See concurrence/dissent (Madsen, J.); opinion of Gordon McCloud, J.

Facts and Proceedings below: (Excerpted from Supreme Court's lead opinion)

On a cold November morning, 69-year-old Ina Claire Richardson was found raped and strangled on a deserted road in Clarkston, Washington. Richardson's face, neck, and wrists displayed contusions and cuts; there were marks on her neck consistent with strangulation and debris on her hands, indicating she struggled with her attacker. Her genital area was bloodied and bruised. An autopsy later revealed that Richardson's vaginal canal had been lacerated and torn by the forcible insertion of a blunt object.

The night she was killed, November 6, 2014, Richardson had shopped at a local grocery store. After Richardson had unsuccessfully asked multiple people for a ride home, external security cameras recorded her walking through the parking lot toward a distinctive maroon sedan. Minutes later, the vehicle's headlights switched on, and the vehicle exited the parking lot, drove onto an access road behind a nearby hotel, and parked near the service entrance. Two individuals appeared in the car, which remained parked for approximately one hour outside the service entrance. Police officers later discovered a condom wrapper at this location.

On November 10, 2014, a law enforcement officer recognized the unique features of the maroon sedan from the security footage and conducted a traffic stop. The driver was Bisir Muhammad. During the stop, the officer asked Muhammad about his vehicle, asked him whether he had gone to the grocery store or had been in the area on the night of the murder, and obtained Muhammad's cell phone number before letting him go. The police also learned that Muhammad's criminal history included a rape outside the state.

After this encounter, law enforcement sought and obtained a search warrant for Muhammad's car. While processing the warrant request, an officer was dispatched to surveil Muhammad. The officer observed Muhammad assist a woman, later determined to be his wife, into his car, drive to a local store, go inside, and then return home. For reasons unknown, this officer suspended surveillance and left Muhammad's apartment complex. When the officer returned, Muhammad's vehicle was gone.

In response, the police "pinged" Muhammad's cell phone without a warrant. The ping placed Muhammad in an orchard in Lewiston, Idaho. Washington and Idaho police arrived, seized Muhammad's cell phone, and impounded his car.

[LEAD OPINION FOOTNOTE ONE: *"Pinging" is the "sending of a signal to identify the current location of a cell phone. The phone carrier can discern the location through cell-site locations [(CSL)] .... The carrier detects a general, not specified, area of the phone*

by CSL when the cell phone connects with a cell tower in order to initiate or receive a call. GPS [(global positioning system)] data reveals the exact location of the phone by revealing the phone's latitude and longitude coordinates." State v. Muhammad, 4 Wn. App. 2d 31, 42 (2018).]

During his subsequent interview with police, Muhammad repeatedly changed his statements about the night of Richardson's murder. First, Muhammad said that he worked his usual dishwashing shift and drove straight home. When confronted with security camera footage contradicting this story, Muhammad eventually told the officer that he may have driven to a nearby store to cash a check but the store refused to cash it. The story again changed when Muhammad was told security footage showed he neither left his car nor entered the store. He then said he may have visited a friend at a nearby motel to smoke. The police confirmed with Muhammad's friend that the two did not meet that night.

Muhammad similarly denied seeing Richardson or that he had any contact with her on the night she died. While he admitted knowing of Richardson, having briefly worked at the grocery store where she shopped, Muhammad said he spoke to her only once while in a group of other people. Video surveillance contradicted this statement. The footage shows that he exited the grocery store with Richardson, proceeded to speak with her alone, and leaned in and attempted to kiss her – an action that Richardson rebuffed.

Muhammad denied any involvement in the rape and murder and eventually asked for legal counsel.

Police later searched Muhammad's car. They discovered blood on the passenger seat; in the trunk, they found latex gloves, personal lubricant, and pornography. One witness testified at trial that Muhammad informed her that he and his disabled wife did not have sex. The police also discovered condoms in the trunk of the sedan. These condoms matched the condom wrapper found by the hotel service entrance. The blood was matched to that of Ina Richardson. Autopsy swabs of Richardson's vagina and fingernails revealed a limited amount of DNA (deoxyribonucleic acid) matching Muhammad's profile.

The police obtained a search warrant for Muhammad's cell phone records. The records showed multiple calls to Muhammad's wife on the night Richardson was murdered. These calls connected to multiple cell towers, indicating that Muhammad was moving. One such cell tower placed Muhammad in the location where Richardson's body was found. Muhammad was arrested and charged with rape and felony murder.

At trial, Muhammad moved to suppress all physical evidence collected as a result of the warrantless ping of his cell phone. After a CrR 3.6 hearing, the trial court issued a written order denying the motion based in part on exigent circumstances. A jury convicted Muhammad of first degree felony murder and first degree rape. The jury also found that Muhammad knew or should have known Richardson was particularly vulnerable. The court imposed an exceptional sentence of two terms totaling 866 months, to be served consecutively.

Muhammad appealed his convictions. State v. Muhammad, 4 Wn. App. 2d 31 (2018). Among other things, he argued that cell phone location data is a privacy interest protected by article I, section 7 and the Fourth Amendment and that the warrantless cell

> phone ping was improper. He also argued that exigent circumstances did not exist and that his convictions violated double jeopardy. The Court of Appeals declined to review the constitutional question [of whether pinging is a "search"], concluding that exigent circumstances justified the warrantless search. The court affirmed both convictions in a published decision.

[One footnote omitted; citation revised for style]

ISSUES AND RULINGS: (1) Does the real-time pinging of a cell phone by law enforcement always constitute a "search" under the Washington and federal constitutions such that the pinging must be supported by a search warrant or a recognized exception to the search warrant requirement? (ANSWER BY WASHINGTON SUPREME COURT: Yes, vote 7 of the 9 justices)

(2) Was the real-time pinging of Muhammad's phone constitutional, either because such pinging is not a "search" or because, under the totality of the circumstances of this particular case, exigent circumstances existed to support the warrantless pinging of the cell phone of suspected murderer Muhammad? (ANSWER BY WASHINGTON SUPREME COURT: 2 justices conclude that the pinging was not a search and 4 justices conclude that the pinging was a search that was justified by exigent circumstances, thus yielding a 6-3 vote that the pinging was constitutionally permissible)

LEGAL UPDATE EDITOR'S NOTE REGARDING VOTE ON EXIGENT CIRCUMSTANCES

Justice Wiggins writes the Lead Opinion (joined by Justices Gonzalez, Fairhurst and Owens) that analyzes the both of the constitutional search issues in depth and concludes that: (1) pinging is a search under the Washington constitution and the Fourth Amendment, but (2) exigent circumstances justified the warrantless pinging. Justice Gordon McCloud writes a separate opinion (joined by Justices Yu and Stephens) that agrees conclusorily with the Lead Opinion that pinging is a constitutional search, but disagrees with the Lead Opinion in detailed analysis on the exigent circumstances issue. Justice Gordon McCloud argues that the officers did not have a reasonable basis for concluding that Muhammad was about to escape, to destroy evidence or to flee. Justice Madsen writes a separate opinion (joined by Justice Johnson) that, with respect to the search and seizure issues, focuses on the question of whether pinging is a search. She argues in vain that real-time pinging in these circumstances is not a search.

It can be argued that six justices agree that the circumstances provided exigent circumstances for the warrantless pinging. That is because, in Justice Madsen's opinion concurring with the result in Justice Wiggins' Lead Opinion, Justice Madsen begins her opinion by saying in paragraph one the following about the exigent circumstances question:

> **Since exigent circumstances existed in the present case, the lead opinion argues the "ping" was justified. While I agree that the "ping" was justified, I disagree that a warrant was required here, regardless of exigency. (Emphasis added)**

Justice Madsen's opinion says nothing more about the exigent circumstances issue. Because exigent circumstances is always a highly fact-based issue, it probably will not make much difference in the future of Washington appellate jurisprudence whether one views the Madsen opinion as (A) agreeing that exigent circumstances were present, or

(B) instead as not addressing that issue despite her above-underlined clause ("Since exigent circumstances existed in the present case").

Result: Affirmance in part and reversal in part of Court of Appeals decision; affirmance of Asotin County Superior Court conviction of Bisir Bilal Muhammad for first degree felony murder; reversal of Superior Court conviction of Muhammad for first degree rape.

The reversal of Muhammad's conviction for first degree rape is based on the Supreme Court's 5-4 vote that it violates constitutional double jeopardy protections to impose convictions for both (1) felony murder predicated on rape (first or second degree) and (2) first degree rape. The Legal Update will not address the analysis in Muhammad regarding the double jeopardy issue.

ANALYSIS OF CONSTITUTIONAL ISSUES RELATING TO CELL PHONE PINGING

1. *Real-Time Cell Phone Pinging Always Constitutes A Search Under Both The Washington Constitution And The Federal Constitution*

Cell phones are square pegs in the round holes of search and seizure case law developed in the 20th century. Cell phones are amazing devices that contain and otherwise yield vast amounts of personal information about their owners and users. In his Lead Opinion, Justice Wiggins relies on several key 21st century precedents involving cell phones to support his conclusion that real-time pinging is a search that must be supported by a warrant or a recognized exception to the constitutional search warrant requirement.

In the consolidated cases of Riley v. California, 134 S.Ct. 2473 (June 25, 2014) and United States v. Wurie, 134 S.Ct. 2473 (June 25, 2014), the United States Supreme Court held that the Fourth Amendment's doctrine on search incident to arrest does not permit a contemporaneous search of the contents of a cell phone that is seized from the person of an arrestee. The Court explained that cell phones and similar devices are repositories of considerable private information and therefore are distinguishable from essentially all other types of personal property that is seized from the person of an arrestee.

In Carpenter v. United States, 138 S.Ct. 2206 (June 22, 2018), the United States Supreme Court ruled under the Fourth Amendment that cell-site location information (CSLI), at least where such information relates to an extended period of time, per the facts of that particular case, is subject to the search warrant requirement. The Wiggins Lead Opinion relies primarily on extension of the reasoning of Carpenter to conclude that even a single real-time pinging of a cell phone to locate its user is a Fourth Amendment search that requires a search warrant or a recognized exception to the search warrant requirement.

In State v. Hinton, 179 Wn.2d 893 (Feb. 27, 2014) and State v. Roden, 179 Wn.2d 862 (Feb. 27, 2014) the Washington State Supreme Court held that warrantless monitoring of an iPhone previously seized from a suspected drug dealer and setting up sting drug deals with senders of messages to the iPhone violated the statutory rights (Roden) and the article I, section 7 Washington constitutional rights (Hinton) of the senders of the messages.

The Lead Opinion of Justice Wiggins also relies in part for its Washington constitutional analysis on two key precedents involving other relatively modern technology. In State v. Jackson, 150 Wn.2d 521 (2003), the Washington Supreme Court ruled under article I, section 7 of the Washington constitution that a search warrant is generally required for installation and/or tracking of a global position system (GPS) tracking device on a suspect's vehicle. And in State v. Young,

123 Wn.2d 173 (1994), the Washington Supreme Court ruled under article I, section 7 of the Washington constitution that it is a search to use a thermal detection device to determine thermal activity emanating from within a suspect's residence, and that this usage therefore requires a search warrant or a recognized exception to the warrant requirement.

Synthesizing these U.S. Supreme Court and Washington Supreme Court decisions, the Wiggins Lead Opinion concludes, as noted above, that real-time pinging of a cell phone is a search for purposes of both the Washington and federal constitutions, and therefore that the pinging requires a search warrant or a recognized exception to the warrant requirement.

Justice Gordon McCloud's opinion conclusorily states that it agrees with the Wiggins Lead Opinion's conclusion that pinging is a search, and the Gordon McCloud opinion does not add any additional analysis on that issue.

Justice Madsen's opinion disagrees with the other two opinions on the issue of whether real-time pinging of a phone to locate a suspect is a constitutional search under either the Fourth Amendment or the Washington constitution. Her opinion presents detailed analysis of her losing argument that is not excerpted or summarized in the Legal Update.

2. *The Wiggins Lead Opinion Concludes That, Under The Totality Of The Circumstances Of This Case, Exigent Circumstances Support The Warrantless Real-Time Pinging Of Muhammad's Phone*

In key part, the analysis in the Wiggins Lead Opinion is as follows:

> The warrant requirements must yield when exigent circumstances demand that police act immediately. Exigency exists when obtaining a warrant is impractical because delay inherent in securing a warrant would compromise officer safety, facilitate escape, or permit destruction of evidence.
>
> We have identified five circumstances that could be termed exigent: hot pursuit, fleeing suspect, danger to arresting officer or the public, mobility of a vehicle to be searched, and mobility or destruction of evidence. State v. Tibbles, 169 Wn.2d 364, 370 (2010). The presence of one or more of these factors does not necessarily establish exigent circumstances, and a court looks to the totality of the circumstances.
>
> Six factors further guide our analysis of whether exigent circumstances exist: (1) the gravity or violent nature of the offense with which the suspect is to be charged, (2) whether the suspect is reasonably believed to be armed, (3) whether there is reasonably trustworthy information that the suspect is guilty, (4) a strong reason to believe the suspect is on the premises, (5) a likelihood that the suspect will escape if not quickly apprehended, and (6) entry is made peaceably. [State v. Cuevas Cardenas, 146 Wn.2d 400, 406 (2002)]. Every factor need not be present, but the totality of the factors must show that officers needed to act quickly.
>
> To prove exigent circumstances, the State must "'point to specific, articulable facts and the reasonable inferences therefrom which justify the intrusion.'" The mere suspicion of flight or destruction of evidence does not satisfy this particularity requirement.
>
> Under the facts of this case, the State has proved exigent circumstances – specifically that Muhammad was in flight, that he might have been in the process of destroying

evidence, that the evidence sought was in a mobile vehicle, and that the suspected crimes (murder and rape) were grave and violent charges.

Muhammad contends that the State fails to prove exigency for three reasons. First, the facts do not indicate any need for police to act quickly: if Muhammad actually intended to flee, he would have done so immediately and not lingered in the area for three days. Second, police created the exigency by alerting him to their interest in his car. Third, the particularity requirement is not satisfied because police merely suspected Muhammad fled his apartment. An officer had earlier observed Muhammad leave his home, travel to a local store, and return. Considering this behavior, the reasonable inference was not that Muhammad absconded but, rather, that he had gone to the local shops.

These arguments do not show that the police's reasonable inferences were mistaken. First, it does not follow that the individual who killed Richardson would necessarily and immediately leave the area. Until alerted otherwise, a perpetrator may believe he or she successfully committed a crime and may feel no pressure to escape police scrutiny. Here, Muhammad learned of the police's interest in his car after the November 10, 2014 traffic stop. Muhammad left the area when police focused their investigation on a vehicle like his. That this knowledge was a point of interest for the police also supports the concern that Muhammad might destroy any evidence contained in the sedan.

Nor did law enforcement purposely create exigent circumstances. Nothing in the record indicates police purposely asked Muhammad about his car to manufacture urgency. An officer noticed the sedan's distinctive features from the security camera footage and stopped Muhammad to inquire further. In fact, officers later obtained a search warrant for the car partially based on evidence collected from the traffic stop. Little incentive existed for officers to encourage Muhammad to flee and frustrate execution of that warrant.

Finally, it was reasonable to conclude Muhammad had fled. Muhammad's claim that his prior behavior indicated that he merely went shopping must be evaluated against the critical fact that Muhammad's vehicle disappeared only after police discontinued surveillance. Thus, officers reasonably inferred that Muhammad knew he was a suspect and had fled the area. As the preceding factors demonstrate, circumstances were exigent. Law enforcement reasonably believed that they needed to act quickly to apprehend Muhammad and prevent destruction of evidence contained in a mobile vehicle. The State provided articulable facts and reasonable inferences drawn therefrom supporting these concerns. Six members of the court therefore agree that the ping was permissible. *See* lead opinion of Wiggins, J. (exigency); concurrence/dissent (Madsen, J.) (ping not a search and therefore no exception to the warrant requirement necessary).

[Footnote omitted; some citations omitted, one citation revised for style)

As quoted above in its entirety in this entry, the exigent circumstances discussion in Justice Madsen's opinion (joined by Justice Johnson), indicates that she may agree that exigent circumstances supported the real-time pinging ("Since exigent circumstances existed in the present case, the lead opinion argues the "ping" was justified.") Also as noted above, Justice Gordon McCloud's opinion (joined by Justices Yu and Stephens) provides detailed analysis explaining her view that the circumstances faced by the officers did not constitute exigent circumstances. Her argument on exigent circumstances is not excerpted or summarized in the Legal Update, other than the note above that Justice Gordon McCloud argues that the officers

did not have a reasonable basis for concluding that Muhammad was about to escape, to destroy evidence or to flee.

LEGAL UPDATE EDITOR'S COMMENT: In the State's Supplemental Brief to the Washington Supreme Court, the State included the following footnote:

> **For the first time in the Court of Appeals, Muhammad also asserted that the ping violated state law, citing RCW 9.73.260, which requires a court order before law enforcement may utilize a cell site simulator device to locate a communications device. The Court of Appeals did not address the claim, and Muhammad did not mention it in his petition for review.**

Not one of the three opinions in Muhammad in the Washington Supreme Court mentions RCW 9.73.260, presumably because the defendant did not preserve argument regarding the statutory provision. Legal Update readers are urged, however, to consider the following comment in 2018 by King County Deputy Prosecuting Attorney, Kristin Relyea, shortly after the Court of Appeals issued its decision in Muhammad:

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

****

WASHINGTON STATE COURT OF APPEALS

MUPTIPLE RULINGS FOR THE STATE IN MURDER CASE: SEARCH UNDER WARRANT MEETS CONSTITUTIONAL PARTICULARITY REQUIREMENTS (FOR PLACE TO BE SEARCHED, ITEMS SOUGHT, AND CRIME UNDER INVESTIGATION); ALSO, SCOPE OF SEARCH WAS COVERED BY WARRANT

State v. Hatt, ___ Wn. App. 2d ___ (Div. I, November 18, 2019)

LEGAL UPDATE INTRODUCTORY EDITORIAL NOTE: Pam Loginsky, Staff Attorney for the Washington Association of Prosecuting Attorneys, in a Case Note on the WAPA website, summarized the rulings in the Hatt case as follows:

> **Police officers did not exceed the scope of a search warrant by digging into the ground on real property to exhume a body from a location where detectives found what they believed might be skin and dark hair. The search warrant for the .083-acre property extended to the fire pit located on the property; the fire pit did not need to be separately designated. The warrant, which authorized the seizure of trace evidence of the crimes of first degree and/or second degree murder was not overbroad.**

Facts and Proceedings below:

Most of lengthy description of facts in the Hatt Opinion is devoted to the circumstances of (1) the killing of Andrew Spencer by defendant Hatt, and (2) Hatt's burning of and other attempts using corrosive materials to destroy the body of Spencer in a large fire pit on property in Granite Falls, Washington occupied by Hatt.

Based in large part on an eyewitness account regarding the killing and Hatt's alleged attempts to destroy the body, law enforcement officers obtained a search warrant. The Hatt Opinion does not describe in great detail the affidavit for the search warrant. Defendant did not challenge the probable cause for a warrant, but he did challenge the particularity of the warrant in regard to describing the crime allegedly committed, the place to be searched and the items to be searched for. The defendant also argued that the officers went beyond the scope of the warrant when they thoroughly searched the fire pit on his property.

The Court of Appeals in Hatt describes some elements of the search warrant as follows:

> The warrant authorizes the search of the .083-acre property where Hatt resided, which contained "a single family residence and numerous detached sheds, outbuildings and various operable and apparently inoperable recreation vehicles or like items used by 'squatters.'" Officers were instructed to seize, among other things:
>
> > Any and all firearms in their various forms . . . .
> >
> > All ammunition, bullets, bb's, pellets or cartridges both fired and unfired which is identified as a projectile whose purpose is to be fired from a firearm or similarly styled item . . .
> >
> > Trace evidence to include: blood, skin, fingerprints, tissue or other biological material located for the collection and comparison to the victim and/or suspect and ANY items containing the same.
> >
> > Rags, clothes, towels, containers and/or like items commonly utilized to clean, conceal, destroy or otherwise alter blood, tissue or other biological material or items such as lye, lime, acids or other chemicals or items of similar substance and their respective containers. Digging equipment or other tools which could be used to disturb soil, excavate soil or disrupt soil or vegetation.
>
> The warrant specified that "[t]he authorization extends to all locked, sealed or otherwise located items that may require damaging in order to gain access."

ISSUES AND RULINGS: (1) Did the search warrant describe the place to be searched with sufficient particularity such that the warrant supported a search of the fire pit in an open area on the property? (ANSWER BY COURT OF APPEALS: Yes)

(2) Did the search warrant describe the items to be seized with sufficient particularity to justify seizing the victim's body where the warrant authorized the seizing of "trace evidence" of biological material but did not expressly authorize the seizing of a body? (ANSWER BY COURT OF APPEALS: Yes)

(3) Did the search warrant describe the crime under investigation with sufficient particularity to justify the search that occurred? (ANSWER BY COURT OF APPEALS: Yes)

(4) Did the search warrant authorize the intensity of the search of the fire pit that occurred? (ANSWER BY COURT OF APPEALS: Yes)

Result: Affirmance of Snohomish County Superior Court convictions of George Donald Hatt, Jr., for first degree murder, unlawful possession of a firearm in the second degree, possession of an unlawful firearm and evidence tampering.

ANALYSIS:

1. Particularity of the description of the place to be searched

With respect to the place description in the warrant, the Hatt Court's analysis is as follows:

> A warrant adequately describes a place to be searched when "the officer executing the warrant can, with reasonable care, identify the place intended." State v. Cockrell, 102 Wn.2d 561, 570-71 (1984). A street address or legal description of the property is sufficient to identify the place to be searched. In one instance, we upheld a warrant authorizing a search of 60 acres of real property. See State v. Christiansen, 40 Wn. App. 249, 251, 253 (1985). "A warrant to search a specific tract of real property necessarily authorizes a search of parts of that property." . . . .
>
> In this case, the warrant specified the correct street address of the .083-acre property where Hatt lived as the property to be searched. Officers executing the warrant were able to identify the property. Because a warrant for the search of real property authorizes a search of parts of the property and the fire pit was part of the property, the fire pit was included in the place to be searched and did not need to be separately designated. The warrant described the place to be searched with adequate particularity.

[LEGAL UPDATE EDITOR'S COMMENT: The immediately preceding paragraph seems misleading. Best practice where there is probable cause support for searches of all buildings on property is to expressly include a reference to all buildings in the search warrant authorization. My reading of the Hatt opinion's somewhat inartful description of the facts is that the search warrant did this by authorizing searching of the warrant-described .083-acre parcel of property where Hatt resided, including the searching of a single family residence and numerous detached sheds, outbuildings and various operable and apparently inoperable recreation vehicles or like items used by squatters.]

2. Particularity of the description of the items to be seized

With respect to the items description, the Hatt Court's analysis is as follows:

> We next consider whether the warrant described the items to be seized with adequate particularity. Hatt's chief objection to the language of the warrant seems to be that the warrant authorized a search for "trace evidence" of biological material rather than an entire body.
>
> A search warrant must be "sufficiently definite so that the officer executing the warrant can identify the property sought with reasonable certainty." State v. Stenson, 132 Wn.2d

668, 692 (1997). A description of items to be seized is sufficient if it is "as specific as the circumstances and the nature of the activity under investigation permit." [State v. Perrone, 119 Wn.2d 538, 547 (1992). Generic descriptions may be sufficient if probable cause is shown and a more precise identification cannot be determined at the time the warrant is issued. A showing of probable cause requires reasonable grounds for suspicion that the accused committed the indicated crime from the facts in the affidavit and reasonable inferences therefrom. State v. Clark, 143 Wn.2d 731, 748 (2001). In Clark, the Supreme Court found that a warrant for "trace evidence from the victim in the van" satisfied the particularity requirement of the Fourth Amendment.

The affidavit stated that Fincher saw Hatt digging in the fire pit and Hatt told Fincher he the fire pit that burned actively for two or three days. On the second day that the fire was burning, Fincher saw Hatt pour liquids into the fire pit, which Hatt identified as "lye, lime, and acid." When a detective observed the fire pit a few days later, he noticed that "the soil in the area of the fire pit appeared freshly disrupted and it contained debris that was consistent with a recent fire having burned in the pit area." The detective did not note seeing a body in the fire pit.

Based on the information available to the sheriff's office when it applied for the search warrant, the description of "trace evidence" of biological material was sufficient to satisfy the particularity requirement. The affidavit established probable cause, and a more precise description of the biological material was not available at the time the warrant issued. It would have been reasonable to assume that trace evidence might be all that remained of Spencer's body after it was burned for two to three days and doused with corrosive chemicals. The descriptions given of the biological and physical evidence to be seized allowed the officers executing the warrant to identify the material to be seized with reasonable certainty.

3. Particularity of the description of the crime under investigation

With respect to the crime-under-investigation description, the Hatt Court's analysis is as follows:

In a statement of additional grounds for review, Hatt also contends that the warrant was overbroad because it did not specify the subsections of the statutes governing the suspected crimes. The warrant stated that there was "probable cause to believe that the crime(s) of: RCW 9A.32.030 Murder in the First Degree, RCW 9A.32.050 Murder in the Second Degree, RCW 9.41.040 Unlawful Possession of a Firearm Second Degree" had been committed and that evidence of those crimes could be found at the property, (emphasis omitted)

In State v. Riley, the Washington Supreme Court found that a warrant that did not list any specific crime, but authorized the seizure of "any fruits, instrumentalities and/or evidence of a crime" and specified only broad categories of material, was overbroad and invalid. 121 Wn.2d 22, 26, 28 (1993). The court held that "[a] search warrant that fails to specify the crime under investigation without otherwise limiting the items that may be seized violates the particularity requirement of the Fourth Amendment." In State v. Higgins, Division Two of this court found that a warrant was overbroad when it "did not contain a list of items to be seized, did not incorporate the affidavit [listing specific items to be seized] by reference, and did not list a subsection of the second degree assault statute." 136 Wn. App. 87, 90, 94 (2006).

> Here, although the warrant did not specify the specific subsections of the statutes, it was clear which crimes were under investigation. Additionally, as discussed above, the warrant included a detailed list of the items to be seized, which were logically related to the specified crimes. The warrant was not overbroad. **[LEGAL UPDATE EDITOR'S COMMENT: To nitpick, in my view regarding the proper usage of the legal terms, the attack by defendant here is a particularity attack, not an overbreadth attack.]**

4. Scope of the search under the warrant

With respect to the scope of the search, the Hatt Court's analysis is as follows:

> Hatt contends that the officers executing the warrant exceeded the permissible scope of the warrant when they moved and sifted through the dirt and debris in the fire pit. As we concluded above, because the warrant authorized the search of the entire property and the fire pit was on that property, the fire pit was within the scope of the warrant.
>
> Having concluded that the fire pit was permitted to be searched under the warrant, the next issue is whether moving and sifting through dirt and debris in the fire pit was a permissible way to search the fire pit. The warrant did not specifically authorize, nor did the affidavit request, any specific method of searching the property. Officers were authorized to seize "[d]igging equipment or other tools which could be used to disturb soil, excavate soil, or disrupt soil or vegetation." The warrant also authorized the search of any locked or sealed items that required damaging to access the contents.
>
> Reading the warrant in a common-sense manner, it is sufficiently clear that the officers executing the warrant would understand that, because they were authorized to seize digging equipment, they should pay particular attention to and search areas of the property that appeared to have been dug into. Although the fire pit was not locked or sealed, the disruption of the dirt and debris in the fire pit is analogous to damaging an item to access evidence inside. The officers permissibly searched the fire pit when they moved and sifted through the dirt and debris.

WASHINGTON PRIVACY ACT (CHAPTER 9.73 RCW) AND OFFICER BODY CAMERAS: RECORDINGS UP TO THE POINT OF ARREST HELD ADMISSIBLE DESPITE ABSENCE OF ADVISEMENT OF THE RECORDING – THAT IS BECAUSE THE CONVERSATIONS INSIDE THE HOME WITH THE POLICE WERE NOT "PRIVATE" DURING THE INVESTIGATION OF A "SHOTS FIRED" REPORT

State v. Clayton, ___ Wn. App. 2d ___ (Div. III, November 19, 2019)

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

> The charges arose from a visit by law enforcement to a Spokane home. On the evening of October 7, 2016, multiple officers responded to the residence following a report of shots being fired. Mr. Clayton let officers in the residence and consented to a search. There were six people in the residence in addition to the officers who entered. Three officers had active body cameras recording the investigation, but none of the residents were advised of that fact.

An officer discovered two revolvers in a dresser and also observed bullet holes in a couch, wall, and the floor. Upon learning that Mr. Clayton was ineligible to possess the revolvers, officers arrested him for unlawful possession of the weapons. The prosecutor charged two counts of unlawful possession of a firearm based on the October arrest.

Clayton's girlfriend, Barbara Lawley, told officers that one month earlier, Clayton had fired a shot in the apartment that struck the couch on which she was sitting. Ultimately, the prosecutor charged Clayton with one count of second degree assault and one count of unlawful possession of a firearm for the September incident, as well as two counts of unlawful possession of a firearm for the two weapons recovered in October.. . .

After conducting a CrR 3.6 hearing on a defense motion to suppress the recordings, the court permitted the video evidence only to the point where the officer discovered the guns and arrested Clayton. Body camera footage from one of the officers was played for the jury at trial.

. . . .

The jury acquitted Clayton on the assault charge, but convicted him of all three unlawful possession charges. . . .

ISSUE AND RULING: Were the conversations with the officers inside the home "private" for purposes of application of the Privacy Act, chapter 9.73 RCW? (ANSWER BY COURT OF APPEALS: No, and therefore the recordings of conversations are admissible)

Result: Affirmance of three Spokane County Superior Court convictions for unlawful possession of a firearm by a convicted person.

ANALYSIS:

The Privacy Act prohibits intercepting or recording a private communication unless all parties to the communication consent. RCW 9.73.030(1)(b). "Any information obtained in violation of RCW 9.73.030 . . . shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state." RCW 9.73.050. "Whether a conversation is private is a question of fact but may be decided as a question of law where . . . the facts are not meaningfully in dispute." State v. Modica, 164 Wn.2d 83, 87 (2008).

The Privacy Act does not define "private," but courts have previously found it means "'belonging to one's self . . . secret . . . intended only for the persons involved (a conversation) . . . holding a confidential relationship to something . . . a secret message: a private communication . . . secretly: not open or in public.'" State v. Clark, 129 Wn.2d 211, 225 (1996) . . . . A communication is private under the act when (1) the parties have a subjective expectation that it is private, and (2) that expectation is objectively reasonable. Modica, 164 Wn.2d at 88. Among other things, the subject matter of the calls, the location of the participants, the potential presence of third parties, and the roles of the participants are relevant to whether the call is private.

The legislature has crafted some specific provisions that address the recording of conversations involving law enforcement. Two of those provisions are of particular interest to this case. Law enforcement may record people who have been arrested upon

(i) informing the person that a recording is being made, (ii) stating the time of the beginning and ending of the recording in the recording, and (iii) advising the person at the commencement of the recording of his or her constitutional rights. In addition, (iv) the recording may be used only for valid police or court activities. RCW 9.73.090(1)(b).

Vehicle mounted cameras may also make audio and visual recordings from video cameras mounted in police vehicles. RCW 9.73.090(1)(c). Absent exigent circumstances, the person must be told that he or she is being recorded. However, there is no requirement that the individual consent to the recording.

Here, the trial court concluded that the investigation did not involve a private conversation and that the provisions of RCW 9.73.090(1)(b) did not apply until Mr. Clayton was arrested. Mr. Clayton argues on appeal that the conversations in his home were private and should have been suppressed under the authority of RCW 9.73.030.

[Footnote by Court of Appeals: *In his motion to reconsider the result of the CrR 3.6 hearing, Mr. Clayton argued that the recordings were made in violation of City of Spokane policy to advise citizens that they were being recorded and, thereby, obtain consent to the recording. He does not assert on appeal that the city policy could amend the Privacy Act or otherwise has application to this appeal*.]

Case law informs our analysis of this argument. This court has held that communications taking place in the street during an arrest were not private conversations. State v. Flora, 68 Wn. App. 802 (1992). At issue in Flora was an attempted prosecution of a man and his friend for secretly recording the man's conversations with officers who were investigating whether there was a violation of a protection order. This court ruled that there was no violation of RCW 9.73.030 because the conversation was not private. This court rejected the idea that the officers performing official functions in the presence of a third person maintained a privacy interest under the Privacy Act.

The Washington Supreme Court agreed with Flora in Clark. At issue in Clark were conversations between would-be drug sellers and strangers passing by on the street. Acting under a court authorization, police recorded conversations between drug sellers and an undercover informant who consented to the recordings.

Clark stated a multi-factor test for determining whether a conversation is "private" under the Privacy Act. That test looked to the subjective expectations of the parties to the conversation, duration and subject matter of the conversation, location of the conversation and potential presence of third parties, and the role of the nonconsenting party and his relationship to the consenting party. The court concluded that the drug sales communications, many of which happened in front of third parties or otherwise were exposed to the general population, were not private conversations.

The court made two observations that inform our decision in this case. First, while approving Flora, the Clark majority noted that generally "the presence of another person during the conversation means that the matter is not secret or confidential." The court also noted that public transactions do not become private conversations merely because they take place in the home, a constitutionally protected area.

[Footnote by Court of Appeals: *The Clark majority relied, for this principle, on State v. Hastings, 119 Wn.2d 229 (1992). There, undercover officers had knocked on the door of a house, indicated their purpose was to purchase drugs, and were permitted into the dwelling. Hastings rejected the defendant's argument that he had a reasonable expectation of privacy in selling drugs in his house*.]

Also informative is Lewis v. Dep't of Licensing, 157 Wn.2d 446 (2006). There, several consolidated cases presented the issue of the admissibility of car-mounted camera recordings. Citing to Clark and Flora, the court noted that "this court and the Court of Appeals have repeatedly held that conversations with police officers are not private." It concluded its analysis of the topic by announcing: "we hold that traffic stop conversations are not private for purposes of the privacy act."

An unusual variation on this problem was presented in State v. Mankin, 158 Wn. App. 111 (2010). There, some police officers being interviewed by a criminal defense attorney refused to consent to the recording of the interview.

This court concluded that the pretrial interviews were not private conversations under the Privacy Act, noting that officers regularly are interviewed by defense attorneys and expect that statements made in the interviews might be used at trial. Relying on Flora, the court determined that officers performing public duties were not engaging in private conversations.

[Footnote by Court of Appeals: *We need not address the question of whether a "private conversation" can exist under the statute if one side, the police, cannot have a privacy expectation in the conversation*.]

With these decisions in mind, we now turn to Mr. Clayton's argument that his conversations in the home were private conversations that could not be recorded without his consent. The balance of the Clark factors establish that the conversations among the police and the various occupants of the apartment were not private.

Conversations with uniformed, on-duty law enforcement officers are typically not private conversations. Flora, 68 Wn. App. 802; Lewis, 157 Wn.2d 446. People understand that information they provide to officers conducting an investigation is going to turn up in written police reports and may be reported in court along with the observations made by the officers. Mr. Clayton never expressed a subjective belief that the conversations were private and no officer could claim such an interest. The conversations took place in his apartment, a place where he had some subjective expectation of privacy, but they also occurred in the presence of five others. The subject matter of the visit – a report of a gun being fired and subsequent search for the weapon – was not a private one. The relationship between the parties, investigators and the person being investigated, was not a personal one and does not suggest that the conversation was a private one.

In sum, the Clark factors indicate that no private conversations took place within the meaning of the Privacy Act. The trial court correctly recognized that only when the police arrested Mr. Clayton did the provisions of RCW 9.73.090(1)(b) come into play. There was no reasonable expectation that the investigation involved a private matter. The trial court did not err in denying the motion to suppress.

> The Privacy Act does not address police body cameras. It is up to the legislature to extend the protections of the act to the use of those cameras if it so desires. In the meantime, we are not in a position to treat the on-duty public activities of law enforcement officers as private matters.

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

TWO RULINGS UNDER WASHINGTON PRIVACY ACT, CHAPTER 9.73 RCW: (1) IN STING OF MAN SEEKING SEX WITH CHILD, DEFENDANT IMPLIEDLY CONSENTED TO RECORDING OF PRE-INTERCEPT COMMUNICATIONS WITH UNDERCOVER DETECTIVE; AND (2) PROBABLE CAUSE SUPPORTED LAW ENFORCEMENT AGENCY'S SUBSEQUENT AUTHORIZATION TO RECORD THE SUSPECT'S COMMUNICATIONS

In State v. Racus, 7 Wn. App. 2d 287 (Div. II, January 23, 2019), in a case arising from an undercover sting, the Court of Appeals rejects defendant's arguments under chapter 9.73 RCW challenging his convictions for attempted first degree rape of a child and communicating with a minor for immoral purposes.

[LEGAL UPDATE EDITOR'S NOTE: I try to include all of the decisions of a particular month in the Legal Update issued the following month. For example, I tried to get all of the November appellate decisions of interest in this November Legal Update that is being issued in early December. I overlooked the January 23, 2019 decision in Racus when the decision was issued. I very recently became aware of the Racus decision when I was researching another case.]

The published portion of the Racus opinion issues rulings on two key issues under chapter 9.73 RCW. First, the opinion rules, consistent with Washington Supreme Court precedent, that in email and text communications between the suspect and the undercover law enforcement officer, the communications were "private" under chapter 9.73 RCW, but the suspect impliedly consented, by virtue of the means of communication, to the recording of the communications.

The Racus Court explains as follows on the implied consent issue under chapter 9.73 RCW:

> Here, the pre-intercept communications sent by Racus to "Kristl" [a fictional person created by the undercover officer] were communications made by Racus in response to an advertisement in the casual encounters section of Craigslist. Racus had created a Gmail account to use Craigslist and to respond to the advertisement posted by [the undercover officer]. Racus also testified that he was aware that the text messages "would be preserved and potentially seen." As a result, in his text messages to "Kristl," Racus avoided explicitly stating that it was his intent to engage in oral sex with "Kristl's" fictitious eleven-year-old daughter.
>
> Similar to the defendant in [State v. Townsend, 147 Wn.2d 666, 678 (2002)] here, Racus had to understand that computers are message recording devices and that his text messages with "Kristl" would be preserved and recorded on a computer. By communicating in this way, Racus impliedly consented to the communications being recorded, and thus, the recording of the communications was lawful under RCW 9.73.030(1)(a). Because the recording of the pre-intercept communications was lawful,

the trial court did not err by denying Racus's motion to suppress the pre-intercept e-mail and text messages. Thus, this argument fails.

[Court's footnote 6: *Racus also argues that the trial court erred by finding that [the undercover officer] was the "intended recipient" of the messages; thus, Racus did not consent to the communications being recorded. However, this argument fails because our Supreme Court has held that a defendant's unawareness that the recipient of a message was a police detective does not destroy consent.* State v. Athan*, 160 Wn.2d 354, 371 (2007).*

Racus also analogizes his case to State v. Hinton*, 179 Wn.2d 862 (2014). In Hinton, the defendant sent text messages to a known associate, and unbeknownst to him, officers had his associate's telephone. That case is not analogous because the court in Hinton was addressing a claim under article I, section 7 of our state constitution, not a claim under the WPA*.]

[Some citations omitted, others revised for style]

Second, the Racus opinion rules that the law enforcement agency's authorization to record subsequent communications was lawful because the Privacy Act allows for communications to be recorded when authorized by someone above a "first line supervisor" if "[p]robable cause exists to believe that the conversation or communication" will involve "[a] party engaging in the commercial sexual abuse of a minor." RCW 9.73.230(1)(b)(ii). (Emphasis added)

The Racus Court explains as follows on the probable cause issue:

> Former RCW 9.68A.100(1)(c) (2013) provides that a "person is guilty of commercial sexual abuse of a minor if . . . [h]e or she solicits, offers, or requests to engage in sexual conduct with a minor in return for a fee." The WPA also provides that "[a]ny information obtained in violation of RCW 9.73.030 . . . [is] inadmissible." RCW 9.73.050.
>
> Probable cause exists where the facts and circumstances are within the officer's knowledge and the facts and circumstances are such that the officer has reasonably trustworthy information sufficient to warrant a person of reasonable caution to believe that an offense has been committed. State v. Terrovona, 105 Wn.2d 632, 643 (1986). Probable cause requires more than a bare suspicion of criminal activity. Terrovona, 105 Wn.2d at 643 . . . .
>
> [The undercover officer] testified that the terms "presents," "gifts," and "donations" and the phrase "open to presents" as used in the advertisement, are used by persons viewing the Craigslist casual encounters section to suggest payment for a fee or the exchange of money for sex. Shortly after contacting "Kristl," Racus e-mailed and asked, "So what is it you are looking to get out of this? So we are on the up and up." When Racus did not receive a response, he followed up the next morning by sending an e-mail and then a text message asking, "Is this free? Or. are you looking for something?" He then sent a series of e-mail and text messages attempting to set up sex between him and "Kristl's" daughter. Based on all of these communications, [the undercover officer] requested and obtained an intercept authorized by a supervisor.
>
> In the case at bar, Racus responded to an advertisement that requested a sexual encounter with a minor, the advertisement used a colloquialism for payment, and Racus

asked about payment. The communications that Racus exchanged with "Kristl" establish that he was aware that she was offering her two minor daughters for sex in exchange for a fee and that he appeared interested in paying.

All of these communications demonstrate that Racus intended to exchange sex with a minor for a fee. Thus, we hold that based on the totality of the circumstances, there were facts that would lead a reasonable detective to conclude that probable cause existed to believe that Racus would engage in the commercial sexual abuse of a minor in exchange for a fee. Thus, the WSP properly authorized the intercept to record the communications with Racus under RCW 9.73.230(1)(b)(ii). Therefore, because intercept authorization was proper, we hold that the trial court did not err by denying the motion to suppress the post-intercept communications.

[Some citations omitted, others revised for style

Result: Affirmance of Pierce County Superior Court convictions of Darcy Dean Racus for attempted first degree rape of a child and communicating with a minor for immoral purposes.

Status: On June 5, 2019, the Washington Supreme Court denied the petition of defendant for discretionary review; the Court of Appeals decision is final.

OFFICERS GAVE PROPER LAY OPINION TESTIMONY UNDER EVIDENCE RULES 602 AND 701 WHEN THEY TESTIFIED REGARDING A STREET DRUG-BUY OPERATION THAT THEY IDENTIFIED SELLER DEFENDANT BASED IN PART ON LOOKING AT FACEBOOK (OFFICER A) AND A BOOKING PHOTO (OFFICER C)

State v. Henson, ___ Wn. App. 2d ___ , 2019 WL ___ (Div. I, November 12, 2019)

Facts: (Excerpted from Court of Appeals opinion)

On November 9, 2016, several police officers were conducting an operation to buy illegal drugs in Seattle. When police are conducting operations to target an area with a high level of drug dealing, officers will buy drugs from a number of people, identify the sellers, and then later arrest the sellers.

On November 9, 2016, a man sold methamphetamine to [Officer A], an undercover police officer, at a McDonald's. The man told [Officer A] that his name was "Raggooey."

[Officer A] tasked [Officer B] to attempt to identify the man. [Officer B] successfully obtained the man's identification and reported to [Officer A] that the man's name was Raphael Henson. [Officer B] provided Henson's middle initial and birthdate from his identification. [Officer A] then looked up a Facebook photo for Henson and verified that it was the same person that he had purchased methamphetamine from in the McDonald's. Someone referred to Henson on the Facebook page as "Raggooey."

Officer C was also involved in the operation and observed Henson making the sale. Officer C then looked at booking photos and matched the person who he had observed to a picture of defendant Henson.

Proceedings: Henson was charged with one count of violation of the UCSA for allegedly delivering methamphetamine on November 9, 2016. Henson denied selling methamphetamine to Volpe. He said that he often lost his identification cards. Henson denied going by the nickname "Raggooey."

Included in the extensive evidence from several officers involved in the operation was the identification testimony of Officer A that included his opinion that the person he bought methamphetamine was the person depicted on Henson's Facebook page. Also included was the identification testimony of Officer C that the person who he observed selling methamphetamine was the person depicted in Henson's booking photo.

ISSUE AND RULING: Did Officer A and Officer C both give proper lay opinion testimony under Evidence Rules 602 and 701 when they testified that they identified Henson based in part on looking at a Facebook page (Officer A) and a booking photo (Officer C)? (ANSWER BY COURT OF APPEALS: Yes)

Result: Affirmance of King County Superior Court conviction of Raphael Henson for delivery of methamphetamine.

ANALYSIS:

Lay witnesses may lawfully testify to matters about which they have personal knowledge. ER 602. Lay witness testimony is limited to "opinions or inferences which are rationally based on the perception of the witness, helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge." ER701.

Much of the focus of the Court of Appeals opinion in Henson is focused on whether the defendant preserved at trial his current objection that the identification opinion testimony of Officer A and of Officer C was admissible. The Court of Appeals rules that the defendant loses for at least two reasons: (1) he did not preserve at trial the objections that he is now pursuing on appeal; and, (2) in the alternative, Officers A and C gave proper lay opinion testimony.

RCW 71.05.240: FIREARMS RIGHTS NOT LOST IF SUPERIOR COURT IN MENTAL HEALTH INVOLUNTARY COMMITMENT ORDER FAILS TO GIVE STATUTORY NOTICE TO DETAINEE REGARDING LOSS OF FIREARMS RIGHTS

In In re Detention of T.C., ___ Wn. App. 2d ___ (Div. I, Oct. 28, 2019), Division One of the Court of Appeals addresses the consequences of the Superior Court's failure to comply with its obligations under RCW 71.05.240 regarding notice to a detainee as to the loss of his constitutionally protected firearm rights. The Court of Appeals concludes that this error by the superior corut requires restoration of the detainee's right to possess a firearm as if the commitment order never occurred.

This ruling is based on RCW 71.05.240(2), which explicitly states:

> (2) If the petition is for mental health treatment, the court at the time of the probable cause hearing and before an order of commitment is entered shall inform the person both orally and in writing that the failure to make a good faith effort to seek voluntary

treatment as provided in RCW 71.05.230 will result in the loss of his or her firearm rights if the person is subsequently detained for involuntary treatment under this section.

[Emphasis added]

Result: Reversal and vacation of King County Superior Court involuntary commitment order and restoration of the firearms rights of T.C.

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BRIEF NOTES REGARDING NOVEMBER 2019 UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS ON SELECT LAW ENFORCEMENT ISSUES

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

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

In November 2019, five 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 issues and case results.

1. State v. Christopher Michael Ramsey.: On November 12, 2019, Division One of the COA rejects the appeal of the defendant from his Snohomish County Superior Court convictions for *second degree burglary and third degree malicious mischief*. The trial court relied on the Washington Supreme Court decisions in State v. Jorden,160 Wn.2d 121 (2007), and In re Personal Restraint of Nichols, 171 Wn.2d 370 (2011) in denying Ramsey's motion to suppress evidence derived from a search of a motel registry with consent of the motel desk clerk. The Court of Appeals rules in Ramsey that **under Jorden and Nichols individualized and particularized suspicion is sufficient to authorize the search of the motel registry with consent of the motel personnel**. Defendant unsuccessfully argued that either a warrant or an established exception to the warrant requirement was necessary to search the hotel registry.

2. State v. David William Haug: On November 13, 2019, Division Two of the COA agrees with the appeal of the defendant from the Lewis County Superior Court's conviction for *unlawful possession of a controlled substance*. Defendant's conviction followed the Superior Court's denial of his motion to suppress evidence. The Court of Appeals rules that **defendant was arrested for burglary as a holdover tenant without probable cause, and that therefore evidence seized from him in a jail inventory search following arrest must be suppressed.** Key analysis by the Court of Appeals on probable cause is as follows:

> [Al]though [the homeowner] and her daughter stated that Haug had no authority to be in the residence after December 7, Haug's assertion that he had not been served with an eviction notice, the failure of any party to show that a writ of restitution had been issued, and [the homeowner's daughter's] statement to [the officer] that she had agreed to allow Haug to stay in the residence after the eviction notice was allegedly posted, all would make a reasonable person question whether Haug had been lawfully evicted from the property and whether he still had authority to enter the residence. Thus, without following up to determine if a writ of restitution requiring Haug to vacate the property had been issued, [the officer] did not have probable cause to arrest Haug.

3. State v. Juan Jose Carrillo: On November 18, 2019, Division One of the COA rejects the appeal of the defendant from the King County Superior Court conviction for *felony harassment and assault in the second degree*. One issue in the case was whether the defendant was prejudiced by a law enforcement officer's improper testimony that defendant invoked his Miranda rights when the officer sought to question him in a custodial interrogation. **The Court of Appeals rules that where the trial court immediately instructed the jury to disregard the officer's statement about defendant invoking his Miranda rights, and where other incriminating evidence in the case was "overwhelming," the error was harmless**.

4. State v. James Michael Mills, Jr.: On November 19, 2019, Division Two of the COA rejects the appeal of the defendant from his Grays Harbor County Superior Court convictions for *second degree assault – domestic violence and felony harassment – domestic violence*. The Court of Appeals rules that the trial court did not err in its ruling under the **excited utterance exception to the hearsay rule** in admitting testimony from two police officers who communicated with the victim shortly after the alleged assault (including choking), at which point she had red marks on her neck, and she was physically shaking, obviously scared and casting nervous looks at the suspect.

5. State v. Daniel W. Schroeder, Sr.: On November 26, 2019, Division Two of the COA rejects the appeal of the defendant from his Lewis County Superior Court conviction for *possession of methamphetamine*. Defendant loses his argument that under the totality of the circumstances his consent to a search of his small leather case was not voluntary. The Court's opening paragraph capsulizes the facts of the case as follows:

> Police approached Daniel Schroeder Sr. after they saw him engage in a suspected drug transaction. An officer told Schroeder, who uses a wheelchair, that they would not immediately arrest him and would instead refer charges if he was honest with them. Schroeder handed the officer a small leather case and agreed the officer could open it. The case contained methamphetamine.

The opinion subsequently describes more complicated facts than might be taken from the capsulized view above. As noted, **the Court ultimately concludes on the totality of the complicated facts that the wheelchair-bound defendant consented to the search**, even though the officer: (1) did not tell defendant that he had a right to refuse consent, and (2) implied that cooperation was defendant's best option because that would result in only a referral of charges, not a trip to jail, that day.

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

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

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