# LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

## Law Enforcement Officers: Thank you!

**September 2018**

**TABLE OF CONTENTS FOR SEPTEMBER 2018 LEGAL UPDATE**

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## NINTH CIRCUIT, UNITED STATES COURT OF APPEALS

**MIRANDA-BASED EDWARDS-ROBERSON INITIATION-OF-CONTACT RULE VIOLATED WHERE, AFTER SUSPECT ASKED FOR AN ATTORNEY DURING A CUSTODIAL INTERROGATION, DETECTIVE ASKED SUSPECT FOR HIS "SIDE OF THE STORY" AND IMPLIED THAT COOPERATION MIGHT ALLOW SUSPECT TO GO HOME; ALSO SUSPECT'S RESPONSE TO DETECTIVE DID NOT CONSTITUTE RE-INITIATION OF CONTACT AND VOLUNTARY WAIVER BY THE SUSPECT**

Martinez v. Cate, ___ F.3d ___ , 2018 WL ___ (9th Cir., September 11, 2018)

Facts:

After Daniel Martinez was arrested as a murder suspect in a gang-related shooting, a detective interrogated him. The Ninth Circuit Opinion initially describes the key exchanges of the recorded interrogation in short form (the Opinion later expands the discussion) as follows:

> On December 10, 2005, at approximately 7:00 p.m., Detective Navarro interrogated Martinez. In the interview room, Detective Navarro uncuffed Martinez, got him some water, took some biographical information and said,
>
> > I want to talk to you about the shooting last night or two nights ago . . . . I know what happened already OK . . . . I really want to get your side of the story. I only have one side of the story right now. OK. UH from the guys across the street, the Sureños.
>
> Detective Navarro then read Martinez his Miranda rights.
>
> Immediately after hearing his Miranda rights, Martinez asked, "I can have an attorney?" Detective Navarro clarified whether Martinez wanted an attorney and Martinez stated, "I would like to have an attorney." Without a break, Detective Navarro asked Martinez if he already had an attorney (yes), what his attorney's name was (Percy), whether Martinez had already spoken to Percy (no), and whether Martinez would talk "but with an attorney present?" To the last question, Martinez replied "yeah [] cuz [sic] I don't know much about the law." Detective Navarro then questioned Martinez about Martinez's father's full name. After Martinez answered, the following interaction took place:
>
> **MARTINEZ**: Alright. I'm willing to talk to you guys uh but just I would like to have an attorney present. That's it.
>
> **NAVARRO**: Yeah, I don't know if we could get a hold of him right now.
>
> **MARTINEZ**: Yeah.
>
> **NAVARRO**: All I wanted was your side of the story. That's it. OK. So, I'm pretty much done with you then. Um, I guess I don't know another option but to go ahead and book you. OK. Because
>
> **MARTINEZ**: What am I being booked under?

**NAVARRO**: Your're going to be booked for murder because I only got one side of the story. OK.

**MARTINEZ**: But how how's he going to go about that. If we talk, once you get a hold of my uh attorney.

**NAVARRO**: That's the thing, I don't know when were going to get a hold of him. Maybe I don't know when he's going I don't know when you're going to call him.

**MARTINEZ**: I have to get a hold of him.

**NAVARRO**: Huh?

**MARTINEZ**: I have to get a hold of him?

**NAVARRO**: Yeah.

**MARTINEZ**: You guys don't (unintelligible)

**NAVARRO**: No. No, you're going to have to call him and it's going to have to be from jail.

After Martinez expressed frustration about the situation, he asked the detective, what did you want to talk to me about?" At which point Detective Navarro said that he wanted to talk about the shooting and asked if Martinez "want[s] the attorney," or whether Martinez did not care. Martinez and Detective Navarro went back and forth a bit, with the detective saying he wanted Martinez's side of the story and Martinez saying he did not want to go to jail and that he would tell the truth if that "help[ed] [him] walk away."

Without an attorney present, Detective Navarro continued to interrogate Martinez. At trial, Detective Navarro testified that he asked Martinez whether Martinez felt intimidated by Jefte during the confrontation, and whether Martinez saw a gun on Jefte. Detective Navarro testified that Martinez said he did not feel threatened and did not see a gun.

Proceedings below:

The trial court ruled that in continuing the interrogation the detective did not violate Miranda, and that Martinez voluntarily changed his mind and decided to talk without first consulting an attorney. Martinez was convicted of second degree murder. He lost an appeal to a California intermediate appellate court, and the California Supreme Court declined review. Martinez subsequently filed a habeas petition in U.S. District Court, but that Court denied his petition.

ISSUES AND RULINGS:

(1) In Edwards v. Arizona, 451 U.S. 477 (1981) and Arizona v. Roberson, 486 U.S. 675 (1988), the U.S. Supreme Court interpreted its Miranda rule as absolutely barring any further initiation of questioning of a custodial suspect who asserts the right to attorney and remains in continuous custody after asserting that right. Did the detective violate the Edwards-Roberson initiation-of-contact rule when the detective responded to Martinez's assertion of his attorney right by implying to Martinez that if Martinez told his "side of the story" the detective might allow Martinez

to go home following the interrogation? (ANSWER BY NINTH CIRCUIT: Yes, the detective violated the rule)

(2) In Oregon v. Bradshaw, 462 U.S. 1039 (1983), the U.S. Supreme Court ruled that a continuous custody suspect voluntarily initiated further conversation about the investigation with his interrogator after the suspect had asserted his right to an attorney, and that the suspect then voluntarily waived his Miranda rights. Did Martinez voluntarily initiate further conversation with the detective about the investigation, or did the detective instead initiate the further conversation about the investigation? (ANSWER BY NINTH CIRCUIT: Martinez was prompted by the detective and did not himself voluntarily initiate further conversation about the investigation)

Result: Reversal of order of U.S. District Court (Eastern District of California) that denied habeas relief to Martinez.

ANALYSIS: (Excerpted from Ninth Circuit Opinion)

ISSUE 1: Detective Navarro interrogated Martinez after Martinez invoked his attorney right

> Next, we turn to whether Detective Navarro's statements after Martinez invoked his right to counsel constituted the functional equivalent of express questioning. The functional equivalent of interrogation is defined as "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." This definition "focuses primarily upon the perceptions of the suspect, rather than the intent of the police," but is an objective standard such that the police "cannot be held accountable for the unforeseeable results of their words or actions." [Rhode Island v. Innis, 446 U.S. 291, 302 (1980)]
>
> After Detective Navarro told Martinez that he was not sure if his lawyer was available, Detective Navarro stated, "'a]ll I wanted was your side of the story. That's it. OK. So, I'm pretty much done with you then. Um, I guess I don't know another option but to go ahead and book you. OK. Because . . . ." Martinez cut in, "[w]hat am I being booked under?" to which Navarro replied "[y]our [sic] going to be booked for murder because I only got one side of the story. OK."
>
> The California Court of Appeal did not explicitly analyze whether Detective Navarro's two statements about booking Martinez constituted interrogation. Instead, the Court of Appeal stated, "[i]n our view, once Navarro clarified that Martinez was willing to talk to him, but wanted an attorney present, interrogation ceased." In the absence of any reasoning from the state court, the magistrate judge's Findings and Recommendations attempted to provide the best justification for the California court's conclusion that the statements about booking were not interrogation: "telling Petitioner that if the interrogation were over, he would be booked is informative in nature, and likewise may not be considered as interrogation." Under this justification, Detective Navarro's statements would be "attendant to arrest" and exempted from the definition of interrogation. However, this is an unreasonable application of the law to the facts because it does not reflect the correct standard for "interrogation" because it fails to consider the likely effect of the words on the listening suspect – particularly the words "[y]our [sic] going to be booked for murder because I only got one side of the story." Any reasonable officer would know that these particular statements about booking would likely elicit a response.

We think the only reasonable interpretation of (1) "all I wanted was your side of the story. That's it. OK. So, I'm pretty much done with you then. Um, I guess I don't know another option but to go ahead and book you. OK. Because," and (2) "your [sic] going to be booked for murder because I only got one side of the story. OK," is that the statements, in context, constitute interrogation. Again, the magistrate judge summed up the issue succinctly: "the officer did more here than just inform Petitioner that he was going to be booked. The officer's statements . . . create the potential implication that if Petitioner was to talk then he might not be booked." Our only issue with the magistrate judge's observation is the word "potential" – we would replace it with "inescapable."

**The clearest evidence of the interrogating nature of Detective Navarro's statements is their plain language.** By stating, "your [sic] going to be booked for murder **because** I only got one side of the story," Detective Navarro causally links Martinez's assertion of his constitutional right to the detective's decision to book the suspect for murder. **The obvious implication of that linkage is that if Martinez were to give his side of the story, by waiving his just-invoked right to counsel, he will not be booked, or not be booked for murder.** At the very least, the detective should know that his statement would be perceived this way and was "reasonably likely to elicit an incriminating response." *See* [Rhode Island v. Innis, 446 U.S. 291, 302 (1980)]

Further, Detective Navarro''s statements to Martinez were not definitive: "I'm **pretty much** done with you then;" and "**I guess I don't know** another option but to go ahead and book you." (Emphasis added.) **Saying that you are "pretty much" done with someone or that you "guess you don't know another option" strongly implies that you are not completely done with someone or that no other option exists**. The obvious implication is that Detective Navarro only had to book Martinez **if** he did not give his side of the story. Conversely, Navarro implied that, if Martinez gave his side of the story, Navarro might have alternative options to booking the suspect.

[Court's footnote 4: Detective Navarro's statements are also improper in that they implied Martinez would be punished for asserting his constitutional right to counsel. See Doyle v. Ohio, 426 U.S. 610, 618 (1976) ("while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit").]

The State argues that Detective Navarro telling Martinez that he was booking the suspect, or that he had no option but to book the suspect, was merely "attendant to arrest and custody," and "inform[ed] [Martinez] of circumstances which contribute[d] to an intelligent exercise of his judgment." However, this argument ignores the causal link in Navarro's statements. **Telling Martinez that he was being booked because he did not give his side of the story is different than an officer setting out the charges and the evidence against the suspect**. . . .

The State also argues that Detective Navarro's statements about booking Martinez were just informational and were "recounting what had occurred previously in their conversation." Beyond not offering any possible explanation about why Navarro would need to recount the conversation, this interpretation is also unreasonable because it ignores the causal nature of Detective Navarro's statements.

We cannot ignore the implications of Navarro's statement because the Innis test explicitly calls for considering the "perceptions of the suspect, rather than the intent of

the police." . . . **Thus, even if Detective Navarro only intended to recount what had happened during the conversation, and in no way thought that he was booking Martinez because he did not give a statement, the court must still consider how a suspect would perceive the statements.** The California Court of Appeal failed to do this. Further, how a suspect reacts to a statement can provide evidence of how the suspect perceived the statement.

**Here, Martinez responded as if he were being asked to give a statement, and that by doing so he would be able to avoid booking.** After Navarro told Martinez "[y]our [sic] going to be booked for murder because I only got one side of the story," Martinez responded "how's he going to go about that. If we talk once you get a hold of my uh attorney." Later, Martinez made multiple references to being willing to talk to avoid jail:

**MARTINEZ:** I just you know I'm tired of going back and forth to jail. And if that's the charge I mean you go, you don't get the choice to go back and forth you know so.

**NAVARRO:** Uh hmm. It's up to you. Do you want to talk or you want me to sit down?

**MARTINEZ:** Yeah. I mean I'm willing to talk to you, you know what I mean but

**NAVARRO:** With the truth?

**MARTINEZ:** Shit, if that's what helps me walk away.

**NAVARRO:** You're young man. Just be honest.

**MARTINEZ:** Honest, the truth I'm just trying to go through this and be able to walk home and

**NAVARRO:** So do you want to talk to me so I could sit down or what do you want to do?

**MARTINEZ:** Yeah.

**NAVARRO:** Yeah. OK. You don't you don't want Percy [Navarro's attorney] then right now? Right? You don't want Percy?

**MARTINEZ:** Well, If I I mean

**NAVARRO:** You don't want an attorney right now? You're willing to talk to me right now? I want to clarify that.

**MARTINEZ:** Yeah.

**NAVARRO:** OK.

**MARTINEZ:** I'm willing.

Martinez's willingness to talk after Detective Navarro's statements, and Martinez's multiple references to avoiding jail, suggest that he perceived Detective Navarro's statements as suggestions that he might not be booked if he talked.

Because Navarro continued to interrogate Martinez after Martinez had invoked his right to counsel, Navarro violated the clearly-established rule from Edwards. It was an unreasonable application of Innis and Edwards to conclude otherwise.

ISSUE 2: Martinez did not independently initiate further conversation about the investigation

After finding an Edwards violation, we next assess whether the incriminating statements were nonetheless admissible. To be admissible, Martinez would (1) have needed to initiate further communication with the police, and (2) voluntarily, knowingly, and intelligently waived his previously-invoked right.

First we analyze whether Martinez initiated further discussion with Navarro. The government argues that Martinez initiated further conversation by asking, "[w]hat am I being booked under?" The California Court of Appeal also suggested that Martinez's question may have "evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship. It could reasonably have been interpreted by the officer as relating generally to the investigation." . . .

**No fair-minded jurist could interpret Martinez's statement as a re-initiation of the conversation. For one, the conversation between Navarro and Martinez never stopped. Initiate means "to begin" and no reasonable jurist could review the transcript of the interaction between Detective Navarro and conclude that Martinez began the exchange about being booked for murder**. . . . . In fact, Detective Navarro was mid-sentence when Martinez asked his question.

Similarly, Martinez's question "what did you want to talk to me about?" also came in the same conversation. In every other case where the Supreme Court has held that a defendant initiated the communication with the police, there was some break in questioning. . . .. Further, Martinez's question was a direct response to Navarro's assertion that he had to book Martinez because he would not talk. **The detective's statements linking Martinez's booking to his invocation of the right to counsel, and the detective's comments that Martinez would need to call his own attorney from jail are exactly the type of badgering that Edwards was crafted to prevent.**

Second, even if Martinez did reinitiate, his statements are not admissible because in light of the Edwards violation it is presumed that Martinez's waiver of his right to counsel was invalid. . . . The California Court of Appeal did not explain its waiver analysis, simply stating that "Navarro proceeded to make certain that Martinez was waiving his right to counsel and did not want to have an attorney, or his attorney, present."

**No fair-minded jurist could review this record, conclude that the State overcame the Edwards presumption, and hold that Martinez's waiver was voluntary. First, Martinez's responses to Navarro's questions in themselves do not constitute a valid waiver. . . . Next, although Navarro told Martinez that it was up to him to decide whether to talk, the context of the encounter cannot be ignored.** This happened in the same conversation in which Navarro told Martinez that he was being booked because he would not talk, in the same conversation where Martinez expressed multiple times that he wanted a lawyer, and in the same conversation where Martinez said he was just trying to avoid getting booked. Detective Navarro's last two statements to Martinez before he finally relented are illustrative:

**NAVARRO:** Yeah. OK. You don't you don't want Percy then right now? Right? You don't want Percy?

**MARTINEZ:** Well, If I I mean

**NAVARRO:** You don't you don't want an attorney right now? Your willing to talk to me right now? I want to clarify that.

Martinez's response under Navarro's pressure is still equivocal: "[w]ell, if . . ." Martinez was still trying to assert his right to counsel as Navarro peppered him with questions. This is not indicative of a voluntary waiver.

Navarro never honored Martinez's invocation of his right to counsel and kept talking until he got the answer he wanted. He never gave Martinez more than a few moments. Ultimately, because custodial interrogation never stopped, the only reasonable interpretation of Navarro's responses to Martinez's invocation of the right to counsel is that the detective was "badgering [the] defendant into waiving his previously asserted Miranda rights." . . . In light of the Edwards presumption, the only reasonable conclusion is that Martinez's waiver "c[a]me at the authorities' behest . . . [and] is itself the product of the 'inherently compelling pressures" of Navarro's custodial interrogation. . . .

[Some citations omitted, others revised for style; revised subheadings supplied; some of the emphasis of text added by Legal Update editor]

The Ninth Circuit Opinion goes on to assert that was prejudiced by the error in admitting Martinez's post-invocation statements in the interrogation. The statements were key in the prosecution, and therefore the error was not harmless.

**LEGAL UPDATE RESEARCH NOTE REGARDING OTHER READING ON THE INITIATION-OF-CONTACT ISSUE ADDRESSED ABOVE: For discussion of case law relevant to this case, see the following article by John Wasberg on the CJTC LED Internet page: Initiation of Contact Rules Under The Fifth Amendment. The article was last updated effective July 1, 2018. See also the discussion at pages 21-26 of the following Washington-focused law enforcement guide on the Criminal Justice Training Commission's LED Internet page: Confessions, Search, Seizure and Arrest: A Guide for Police Officers and Prosecutors, May 2015, by Pamela B. Loginsky, Staff Attorney, Washington Association of Prosecuting Attorneys.**

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**CIVIL RIGHTS ACT CIVIL LIABILITY FOR ACTIONS DURING SEARCH WARRANT EXECUTION: NO QUALIFIED IMMUNITY BECAUSE FEMALE OFFICER'S VERY CLOSE WATCH ON FEMALE RESIDENT DURING THE LATTER'S TOILET TRIP VIOLATED CLEARLY ESTABLISHED FOURTH AMENDMENT PRIVACY CASE LAW**

In Ioane v. Noll, ___ F.3d ___ , 2018 WL ___ (9th Cir., September 10, 2018), a three-judge Ninth Circuit panel upholds a U.S. District Court (Eastern District of California) order that denied the federal government's motion for qualified immunity in a Civil Rights lawsuit. Ninth Circuit staff summarized the Ninth Circuit decision as follows (the summary is not part of the Court's opinion):

The panel affirmed the district court's order, on summary judgment, denying qualified immunity to an Internal Revenue Service Agent in an action alleging that the agent violated plaintiff's Fourth Amendment right to bodily privacy when, during the lawful execution of a search warrant at plaintiff's home, the [female] agent escorted [the female] plaintiff to the bathroom and monitored her [very closely] while she relieved herself.

The panel held that weighing the scope, manner, justification, and place of the search, a reasonable jury could conclude that the agent's actions were unreasonable and violated plaintiff's' Fourth Amendment rights. The agent's general interests in preventing destruction of evidence and promoting officer safety did not justify the scope or manner of the intrusion into plaintiff's most basic subject of privacy, her naked body. The panel further held that a reasonable officer in the agent's position would have known that such a significant intrusion into bodily privacy, in the absence of legitimate government justification, was unlawful. The agent therefore was not entitled to qualified immunity.

Concurring in the judgment, Judge Bea stated that he agreed with the majority's ultimate conclusion that the district court did not err in denying the agent's motion for summary judgment regarding plaintiff's claim that she violated plaintiff's clearly established constitutional rights. However, because he disagreed with the majority's holding that the agent's actions violated plaintiff's clearly established right to bodily privacy, Judge Bea wrote separately [arguing that case law had not previously clearly established that such actions by an officer of the same gender as the person observed violated privacy rights, but asserting that the officer was not justified by probable cause or reasonable and articulable officer safety concerns in monitoring the plaintiff's bathroom trip].

ANALYSIS IN LEAD OPINION

The key part of the majority opinion's legal analysis, considering the allegations by the plaintiff (Shelly Ione) in the best light for Ms. Ione, is as follows:

> Determining the reasonableness of a particular search involves balancing the degree to which the search intrudes upon an individual's privacy against the degree to which the search is needed to further legitimate governmental interests. . . . The required factors to consider are: "(1) the scope of the particular intrusion, (2) the manner in which it is conducted, (3) the justification for initiating it, and (4) the place in which it is conducted." . . . .
>
> Three cases from our Circuit inform the scope and manner of the intrusion here. We first recognized the right to bodily privacy in 1963. In York v. Story, we held that a plaintiff had alleged sufficient facts to state an invasion of bodily privacy claim under § 1983 when she alleged that three police officers took and distributed nude photos of her when she came to the station to report that she had been assaulted. 324 F.2d 450, 452, 455–56 (9th Cir. 1963). .According to the allegations in the complaint, the officers had insisted that it was necessary to take photos of the plaintiff for her case, and directed her to undress in a room of the police station despite the plaintiff's objections and insistence that she did not have bruises that required her to be photographed in the nude. Recognizing that the "naked body" is the most "basic subject of privacy," we concluded that the woman had alleged a claim that the officers' actions violated her privacy rights under the Fourteenth Amendment due process clause.

In 1985, we recognized that the right to bodily privacy also applies to inmates. In Grummett v. Rushen, male prison inmates filed a class action § 1983 lawsuit alleging that the prison's practice of allowing female correction officers to view male inmates showering, disrobing, and using toilet facilities violated their privacy rights. 779 F.2d 491, 492-93 (9th Cir. 1985). Although we held that the prisoners had a right to privacy in their naked body, we concluded that the officials had not violated the inmates' privacy rights because the officials' view of the inmates was "restricted by distance," "casual in nature," and justified by security needs. We concluded that the prison authorities had "devised the least intrusive means to serve the state's interests in prison security" and had not violated the inmates' rights to bodily privacy. . . .

Finally, in 1992, we held that a parole officer violated a female parolee's right to bodily privacy when he entered the bathroom stall while the parolee was providing a urine sample. Sepulveda v. Ramirez, 967 F.2d 1413, 1415-16 (9th Cir. 1992). Distinguishing the facts in Grummett, we determined that the parole officer's view of the parolee was "neither obscured nor distant," and "far more degrading to [the parolee] than the situation faced by the inmates in Grummett." Relying on Grummett and recognizing that parolee rights are "even more extensive than those of inmates," we concluded that the parole officer had violated the parolee's bodily privacy rights.

From [these three decisions], we conclude that the scope of the intrusion into Shelly's bodily privacy here was significant. Agent Noll intruded on Shelly's most basic subject of privacy, her naked body. . . . Moreover, unlike the prison inmates in Grummett and the parolee in Sepulveda, Shelly's privacy interests had not been reduced. Just as in Sepulveda, where we recognized that parolees have, "at a minimum, the same right to bodily privacy as a prison inmate," Shelly, who had not been detained and was not herself the subject of a search warrant, had more right to bodily privacy than a parolee . . . .. Therefore, the scope of Agent Noll's intrusion into Shelly's bodily privacy right was significant and weighs in favor of a determination of unreasonableness. [Court's footnote 2: *Although York, Grummett, and Sepulveda all involved searches by members of the opposite sex, gender was not central to the conclusion of whether the intrusion at issue was unreasonable.* . . .]

**Additionally, unlike the casual, obscured, and restricted manner of observation by the prison officials in Grummett, Agent Noll stood facing Shelly in the Ioanes' home bathroom while Shelly relieved herself. Agent Noll's intrusion was like the parole officer's intrusion in Sepulveda, which we concluded was unreasonable.** [Court's footnote 3: *Agent Noll contends that she does not recall escorting Shelly to the bathroom, but that such a practice is "standard procedure." However, nowhere in the record is this procedure memorialized, and it appears the other agents did not follow this "standard procedure" when Michael used the bathroom*.]

Therefore, the manner of Agent Noll's intrusion weighs in favor of concluding that the intrusion was unreasonable.

Furthermore, none of the justifications Agent Noll offered for initiating the search are borne out by the facts. **First, and most notably, the Ioanes were not detained during execution of the search warrant.** Despite the fact that the Fourth Amendment permits limited detention of individuals on the premises while officers execute a search warrant, *see* Michigan v. Summers, 452 U.S. 692, 703-05 (1981), the agents informed the Ioanes they were free to go. [Court's footnote 4: *In Summers, the Supreme Court held that it*

*was reasonable, for Fourth Amendment purposes, to detain individuals while officers execute a lawful warrant on the premises. This limited detention is justified by preventing flight, loss of incriminating evidence, and harm to occupants and officers. However, the Supreme Court has not held that these government interests authorize the type of bodily privacy intrusion that took place here.*]

Yet Agent Noll contends that her intrusion into Shelly's bodily privacy was justified because of the inherent risk that Shelly might destroy evidence. However, the fact that the Ioanes were not detained belies Agent Noll's contention that she and the other agents were worried about Shelly destroying "floppy disks, smart cards and PC cards . . . [hidden] on her person under her dress." If the agents legitimately feared that Shelly might destroy evidence in the bathroom, they would not have permitted Shelly to leave the premises where she could have destroyed of the evidence elsewhere, and they would have been constitutionally permitted to do so.

**Second, Agent Noll argues that monitoring Shelly was necessary to ensure that Shelly did not have anything dangerous concealed in her clothing. Yet the search warrant authorized only the search of the premises, not the individuals on the premises**. See Ybarra v. Illinois, 444 U.S. 85, 91-92 (1979) (rejecting the argument that individuals' Fourth Amendment rights are abrogated simply by virtue of the fact that they are on the premises where officers are executing a lawful search warrant). Furthermore, Agent Noll does not argue that she had a reasonable belief that Shelly was armed except for asserting that the agents had found other weapons on the premises.

And, even if Agent Noll possessed an objectively reasonable belief that Shelly was armed and dangerous, this belief only would have justified a pat-down for weapons, not the intrusion into bodily privacy that occurred here. . . . Indeed, the agents had monitored Shelly in the kitchen for approximately 30 minutes before Shelly asked to use the bathroom, and nowhere in the record does it reflect that the officers conducted a pat-down search of Shelly or Michael.

**Third, Agent Noll asserts that other safety concerns justified monitoring Shelly while she used the bathroom because the bathroom was not secure, and Shelly could have gained access to the rest of the house through a second door in the bathroom, putting officers or herself at risk. However, by the time Shelly needed to use the bathroom, other agents already had checked the bathroom for weapons. Additionally, Agent Noll offers no explanation why watching Shelly use the bathroom was the only way to abate the risk that Shelly might flee, given that other officers might have been recruited to stand outside the bathroom's second door**. . . . Indeed, the agents permitted Michael, who was the subject of the investigation, to use the bathroom while a male agent stood outside the door. In sum, the justifications Agent Noll offers for initiating the search weigh in favor of a determination of unreasonableness.

Finally, the search was conducted in the Ioane's home bathroom. The law recognizes heightened privacy interests in the home, which arguably makes this intrusion more egregious, especially when Shelly herself was not the subject of the search. . . .The place of the search, therefore, also weighs in favor of unreasonableness.

> Weighing the scope, manner, justification, and place of the search, a reasonable jury could conclude that Agent Noll's actions were unreasonable and violated Shelly's Fourth Amendment rights. . . .

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

The majority Opinion goes on to declare that the cases the opinion cites on the reasonableness issue support the conclusion that the case law was clearly established against the agent's Fourth Amendment intrusion at the time that she made the intrusion. Therefore, the majority opinion concludes that qualified immunity must be denied because: (1) the search violated the Fourth Amendment, and (2) the prior case law was well-established to that effect.

ANALYSIS IN CONCURRING OPINION

Judge Bea's concurring opinion indicates that the majority opinion is "likely correct" that the toilet-monitoring by the IRS agent violated the Fourth Amendment privacy rights of the plaintiff, but he asserts that case law, as of the point in time of the search warrant execution, was not clearly established. Judge Bea argues that previous appellate court decisions have made it clear that opposite-gender intrusions of this sort are unreasonable under the Fourth Amendment, but published appellate court decisions have not made it clear that same-gender intrusions of this sort are unreasonable.

Judge Bea's concurrence goes on, however, to declare that he would decide this case agent the government under the U.S. Supreme Court precedent of Ybarra v. Illinois, 444 U.S. 85 (1979), which held that officers executing a search warrant may not automatically frisk everyone on the premises. Judge Bea argues that the IRS agent would have needed probable cause to search the plaintiff and would have needed reasonable suspicion for a frisk. The agent had no factual justification for making an intrusion into the privacy of the plaintiff, Judge Bea argues, and therefore the privacy intrusion in the bathroom violated the clearly established case law relating to the Ybarra decision and search warrant execution.

Result: Affirmance of order of U.S. District Court (Eastern District of California) denying summary judgment to the federal government.

**CIVIL RIGHTS ACT CIVIL LIABILITY: NO QUALIFIED IMMUNITY FOR FOURTH AMENDMENT VIOLATION WHERE, IN ORDER TO TEACH SOME MIDDLE SCHOOL GIRL STUDENTS A LESSON AND "PROVE A POINT," SCHOOL RESOURCE OFFICERS ARRESTED AND TRANSPORTED THE GIRLS TO THE STATIONHOUSE FOR BEING DISRESPECTFUL TO ONE OF THE OFFICERS DURING HIS LECTURE AT THE SCHOOL THAT WAS FOCUSED ON RECENT COMPLAINTS ABOUT BULLYING BY SOME OF THE GIRLS BEING LECTURED**

Scott v. County of San Bernardino, ___ F.3d ___ , 2018 WL ___ (9th Cir., September 10, 2018)

**LEGAL UPDATE INTRODUCTORY EDITORIAL COMMENT REGARDING NINTH CIRCUIT PANEL'S RELIANCE ON "SCHOOL OFFICIAL" FOURTH AMENDMENT STANDARD WHERE THE ARRESTS WERE MADE BY LAW ENFORCEMENT OFFICERS:**

**School officials and school employees have greater latitude to seize and to search a students in K-12 school settings than do police officers in their dealings with persons in non-school settings. The courts have recognized the need for school officials to maintain order and discipline in schools and also to protect all students from illegal drugs and weapons. State v. Meneese, 174 Wn.2d 937, 943, 282 P.3d 83 (2012). However, in Meneese, the Washington Supreme Court declared that a police officer on assignment as a school resource officer (SRO) is not a "school official" for purposes of the school exception to the broader restrictions on search and seizure by law enforcement officers under the Washington and federal constitutions.**

**My research reflects that the Washington Supreme Court in Meneese overstated the clarity of the Fourth Amendment case law, and that it is not settled under the Fourth Amendment case law nationally whether school resource officers do or do not generally qualify as "school officials." In the Scott decision that is digested below, the Ninth Circuit panel declares in footnote 4 that the panel is assuming, without deciding the issue, that the relaxed "school officials" standard of the Fourth Amendment applies to the actions of the school resource officers (who clearly violated even that standard). Of course, for school resource officers acting in Washington state, the Meneese decision must be assumed to be controlling, such that SROs generally will not be treated as "school officials" in the Washington courts.**

**As always, law enforcement readers are urged to consult their own legal counsel and local prosecutors for guidance on issues addressed in the Legal Update.**

Facts and Procedural Background: (Excerpted from the Ninth Circuit Opinion's introductory, condensed version of the facts and procedural background)

> On October 8, 2013, a group of seventh grade girls (twelve and thirteen year-olds) were handcuffed, arrested, and transported in police vehicles from their middle school campus to the police station. An assistant principal had asked a school resource officer, Sheriff's Deputy Luis Ortiz, to counsel a group of girls who had been involved in ongoing incidents of bullying and fighting. School officials gathered the girls in a classroom to wait for Deputy Ortiz.
>
> The group included both aggressors and victims, and the school did not identify or separate them. When he arrived on campus, Deputy Ortiz initially intended to verify the information the school had given him and to mediate the conflict. Within minutes, however,
>
> **Deputy Ortiz concluded that the girls were being unresponsive and disrespectful. He decided to arrest the girls because, as he explained to them, he was not "playing around" and taking them to jail was the easiest way to "prove a point" and "make [them] mature a lot faster." Deputy Ortiz stated that he did not care "who [was] at fault, who did what" because "it [was] the same, same ticket, same pair of handcuffs."**
>
> Three of the girls sued the arresting officers and the County of San Bernardino for unlawful arrest in violation of state laws and the Fourth Amendment. The district court denied the defendants qualified immunity and granted summary judgment in favor of the students.

[Paragraphing revised for readability; bolding added by Legal Update Editor]

ISSUES AND RULINGS: (1) Did the officers violate the Fourth Amendment when they arrested and transported the girls based on the decision of Deputy Ortiz to "prove a point" about the need for youths to be respectful when being lectured by an adult about serious matters? (ANSWER BY NINTH CIRCUIT: Yes, the arrests violated the Fourth Amendment)

(2) Was the case law clearly established at the time of the arrests that the Fourth Amendment does not allow the arresting of middle school students solely for being disrespectful when being lectured by an adult about a serious matter? (ANSWER BY NINTH CIRCUIT: Yes, the case law was well established that a police seizure, even if at the behest of school officials, must, at a minimum, be reasonably related to its purpose and must not be excessively intrusive in light of the age and sex of the student and the nature of the infraction.)

**LEGAL UPDATE EDITOR NOTE RE STATE LAW ISSUE: The Ninth Circuit Opinion also affirms the trial court's order that granted summary judgement to the plaintiffs on their state law theory of false arrest.**

Result: Affirmance of order of U.S. District Court (Central District of California) granting summary judgment to the plaintiffs on their Civil Rights Act claims and their state law claims.

ANALYSIS: (Excerpted from Ninth Circuit Opinion)

ISSUE 1: Unreasonableness of the seizures under the Fourth Amendment

> We begin our analysis with New Jersey v. T.L.O., in which the Supreme Court held that the Fourth Amendment's "prohibition on unreasonable searches and seizures applies to searches conducted by public school officials." 469 U.S. 325, 333 (1985). The Court recognized, however, that "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject," and thus school officials may, under certain circumstances, conduct warrantless searches of students "under their authority." Whether such a search is permissible "depend[s] simply on the reasonableness, under all the circumstances, of the search." A determination of reasonableness requires "a twofold inquiry: first, one must consider 'whether the action was justified at its inception;' second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'" T.L.O.
>
> Though T.L.O. dealt with searches, not seizures, we have specifically extended its special needs test to seizures conducted by school officials in the school setting.
>
> Applying the T.L.O. two-part reasonableness test, we agree with the district court that the arrests of L.R., S.S., and R.H. were unreasonable because they were not "justified at [their] inception." The deputies were given only generalized allegations of group bickering and fighting, not specific information about L.R., S.S., or R.H. At most, Deputy Thomas knew that L.R. had been in a fight on campus one month prior. . . . Moreover, while the traditional Fourth Amendment analysis "is predominantly an objective inquiry," the "actual motivations" of officers may be considered when applying the special needs doctrine. . . . And, here, Deputy Ortiz's actual motivations are clear – he explicitly told the students that he was arresting them to prove a point and to "teach them a lesson." Deputy Ortiz told them:

> And for the one lady laughing that thinks it's funny, I am not playing around. I am dead serious that we are taking you guys to jail. That might be . . . the most easiest thing to do . . . to wanting to prove a point . . . that I am not playing around. . . . Here is a good opportunity for me to prove a point and make you guys mature a lot faster. Then, unfortunate [sic] for you guys, you guys will probably now be in the system. You will have a criminal record. Just because you guys can't figure something out here.

He continued:

> [H]ere is the thing right now . . . I don't care who is at fault, who did what. You hear that? I don't care who did what, who is saying what, and whose fault it is. To me it is the same, same ticket, same pair of handcuffs.

Deputy Ortiz clearly stated that the justification for the arrests was not the commission of a crime, since he did not "care who is at fault," nor the school's special need to maintain campus safety, but rather his own desire to "prove a point" and "make" the students "mature a lot faster." The arrest of a middle schooler, however, cannot be justified as a scare tactic, a lesson in maturity, or a chastisement for perceived disrespect. The special needs exception simply "do[es] not apply where the officer's purpose is not to attend to the special need[]" in question. . . . Indeed, where it is "clear from the testimony" of the arresting officer that the seizure occurred for an impermissible motive, "[t]his alone is sufficient to conclude that [a] warrantless [arrest] [is] unreasonable." . . .

Moreover, even if the arrests had been justified at their inception, we would find that they failed T.L.O.'s second prong, as they were not "reasonably related in scope to the circumstances which justified the interference in the first place." T.L.O.. T.L.O. held that a search "will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." The summary arrest, handcuffing, and police transport to the station of middle school girls was a disproportionate response to the school's need, which was dissipation of what Vice Principal Kendall characterized as an "ongoing feud" and "continuous argument" between the students.

We do not diminish the seriousness of potential violence between students, or the need for conflict resolution in the educational setting. But "[s]ociety expects that children will make mistakes in school – and yes, even occasionally fight." . . . Deputy Ortiz faced a room of seven seated, mostly quiet middle school girls, and only generalized allegations of fighting and conflict amongst them. Even accounting for what Deputy Ortiz perceived to be non-responsiveness to his questioning, the full-scale arrests of all seven students, without further inquiry, was both excessively intrusive in light of the girls' young ages and not reasonably related to the school's expressed need. Ironically, the primary instigator of the conflicts, L.V., was the only one released to a parent at the school campus.

The foundation of T.L.O.'s special needs standard is reasonableness. An arrest meant only to "teach a lesson" and arbitrarily punish perceived disrespect is clearly unreasonable under T.L.O. Under the circumstances of this case, we hold that the arrests of the students were unreasonable and in violation of the Fourth Amendment.

ISSUE 2: Clear establishment of the case law at the time of the seizures

> "Qualified immunity insulates the officers from liability unless 'existing [case law] precedent . . . ha[s] placed the statutory or constitutional question beyond debate.'" . . . Though the constitutional right must be clearly established such that "a reasonable official would understand that what he is doing violates that right," . . ."'t]here need not be a case dealing with these particular facts to find [the] conduct unreasonable," . . . .
>
> At the time of the students' arrest, it was clearly established that a police seizure at the behest of school officials must, at a minimum, be "reasonably related to its purpose, and must not be 'excessively intrusive in light of the age and sex of the student and the nature of the infraction.'" . . . . Defendants do not – and indeed, cannot – meaningfully contest Deputy Ortiz's motivation for the arrests, which he stated multiple times. No reasonable officer could have reasonably believed that the law authorizes the arrest of a group of middle schoolers in order to prove a point.

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

**CIVIL RIGHTS ACT CIVIL LIABILITY IN CORRECTIONS: EIGHTH AMENDMENT STANDARD IN EXCESSIVE FORCE CASES HELD NOT TO REQUIRE PROOF OF SADISM OR DERIVING OF PLEASURE FROM APPLICATION OF FORCE**

In Hoard v. Hartman, ___ F.3d ___ , 2018 WL ___ (9th Cir., September 13, 2018), a three-judge panel sets aside a jury verdict in favor of government defendants at an Oregon state prison. The panel concludes that the trial court jury was incorrectly instructed that a prison excessive force claim under the Civil Rights Act always requires proof that the application of force by correctional officers was done "sadistically."

The panel acknowledges that the U.S. Supreme Court stated in Whitley v. Albers, 475 U.S. 312, 320-21 (1986) "the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" (Emphasis added by Legal Update Editor) But the Ninth Circuit panel, disagreeing with a line of cases from the Eighth Circuit of the U.S. Court of Appeals, concludes that the U.S. Supreme Court did not intend with the use of the word "sadistically" to mean that the application of force never violates the Eighth Amendment where the force is applied without the desire of a correctional officer to gain pleasure from the application of the force.

The Hoard Opinion states the panel's view as follows:

> We have never required proof of sadism or masochism in excessive force cases. As we have explained before, in order to assess whether "the handling of [an inmate] was for the purpose of maintaining or restoring discipline, or for the malicious and sadistic purpose of causing him harm," we will "examine the need for the application of the measure or sanction complained of, the relationship between the need and the measure or sanction used, the extent of any injury inflicted, and the extent of the surrounding threat to the safety of staff and inmates." LeMaire v. Maass, 12 F.3d 1444, 1454 (9th Cir. 1993). Consistent with Whitley and its progeny, an officer's subjective enjoyment is not a necessary element of an Eighth Amendment excessive force claim. Of course, an

officer who harms an inmate for his or her personal enjoyment has engaged in excessive force, but that is not the question before us: the question is whether proof of sadism is required for excessive force claims. We hold that it is not.

Result: Reversal of Oregon Federal District Court judgment on jury verdict for the state government defendants; case remanded for retrial.

**CIVIL RIGHTS ACT CIVIL LIABILITY: FIRST AMENDMENT DOES NOT PROTECT PUBLIC EMPLOYEE FROM RETALIATION FOR SPEECH WHERE HER STATEMENTS AT A PUBLIC EVENT ABOUT RACIAL PROFILING WERE MADE IN HER ROLE AS A PUBLIC EMPLOYEE; BUT "LAST CHANCE" AGREEMENT HELD TO BE IMPERMISSIBLE PRIOR RESTRAINT ON SPEECH**

In Barone v. City of Springfield, ___ F.3d ___ , 2018 WL ___ (9th Cir., September 5, 2018), a three-judge Ninth Circuit panel rules that a police department employee cannot pursue a Civil Rights Act retaliation lawsuit based on her statements at a public meeting. That theory is not allowed because her statements were made within her job duties. However, the City runs into trouble with a "Last Chance" agreement that it required the plaintiff to sign to return to work.

The Ninth Circuit staff summary (not a part of the opinion) provides the following brief description of the panel's decision:

> The panel affirmed in part and reversed in part the district court's summary judgment and remanded in an action brought pursuant to 42 U.S.C. § 1983 alleging that plaintiff was retaliated against in her employment as a Community Service Officer for the Springfield Police Department, in violation of her First Amendment rights. Plaintiff asserted that [the government parties] retaliated against her after she responded at a public event to a citizen inquiry about racial profiling by the Police Department. The panel held that plaintiff's retaliation claim failed because she spoke as a public employee, so her speech was not protected by the First Amendment. The panel noted that plaintiff's speech at the event clearly fell within her job duties.
>
> Plaintiff was aware that she was speaking as a representative of the Department and discussing he work with the Department. Moreover, the panel noted that the speech at issue was a response to an inquiry about racial profiling complaints, a type of complaint plaintiff regularly received in her capacity as a Community Service Officer.
>
> The panel next held that an amended Last Chance Agreement which plaintiff was required to sign before returning to work was an unconstitutional prior restraint. Paragraph 5(g) of the amended Agreement barred plaintiff from saying or writing anything negative about the Department, the City or its employees. The panel held that Paragraph 5(g) restrained plaintiff's speech as a private citizen on matters of public concern, and appellees had not presented justifications sufficient to warrant Paragraph 5(g)'s overbroad restrictions.
>
> The panel thus held that Paragraph 5(g)'s prospective restriction violated the First Amendment. Addressing plaintiff's claim of municipal liability under Monell v. Department of Social Services, 436 U.S. 658 (1978), the panel held that there was a genuine issue of material fact about whether the City Manager delegated final policymaking authority over employee discipline to the Police Chief. If such authority

was delegated, the City would be liable under Monell. The panel therefore reversed and remanded for consideration of whether the City could be held liable for the Police Chief's conduct in requiring plaintiff to sign the amended Agreement.

Result: Affirmance in part and reversal in part of order of U.S. District Court (Oregon) that granted summary judgment to the government parties.

**CIVIL RIGHTS ACT CIVIL LIABILITY: EIGHTH AMENDMENT'S PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT PRECLUDES, WHERE PUBLIC SHELTER IS NOT AVAILABLE, ENFORCEMENT OF CITY OF BOISE ORDINANCE PROHIBITING CAMPING/SLEEPING ON PUBLIC PROPERTY**

In Martin v. City of Boise, ___ F.3d ___ , 2018 WL ___ (9th Cir., September 4, 2018), a three-judge Ninth Circuit panel rules the Cruel and Unusual Punishment clause of the Eighth Amendment precludes, where no public shelter is available, the enforcement of a Boise ordinance prohibiting camping or sleeping on public property.

The lead Opinion for the Ninth Circuit panel explains as follows that it is not a simple matter for the City of Boise to show that shelter is available:

> In dismissing Martin and Anderson's claims for declaratory relief for lack of standing, the district court emphasized that Boise's ordinances, as amended in 2014, preclude the City from issuing a citation when there is no available space at a shelter . . . [The District Court concluded] that there is consequently no risk that either Martin or Anderson will be cited under such circumstances in the future. Viewing the record in the light most favorable to the plaintiffs, we cannot agree.
>
> Although the 2014 amendments preclude the City from enforcing the ordinances when there is no room available at any shelter, the record demonstrates that the City is wholly reliant on the shelters to self-report when they are full. It is undisputed that Sanctuary is full as to men on a substantial percentage of nights, perhaps as high as 50%. The City nevertheless emphasizes that since the adoption of the Shelter Protocol in 2010, the BRM facilities, River of Life and City Light, have never reported that they are full, and BRM states that it will never turn people away due to lack space.
>
> The plaintiffs have pointed to substantial evidence in the record, however, indicating that whether or not the BRM facilities are ever full or turn homeless individuals away for lack of space, they do refuse to shelter homeless people who exhaust the number of days allotted by the facilities. Specifically, the plaintiffs allege, and the City does not dispute, that it is BRM's policy to limit men to 17 consecutive days in the Emergency Services Program, after which they cannot return to River of Life for 30 days; City Light has a similar 30-day limit for women and children. Anderson testified that BRM has enforced this policy against him in the past, forcing him to sleep outdoors.
>
> The plaintiffs have adduced further evidence indicating that River of Life permits individuals to remain at the shelter after 17 days in the Emergency Services Program only on the condition that they become part of the New Life Discipleship program, which has a mandatory religious focus. For example, there is evidence that participants in the New Life Program are not allowed to spend days at Corpus Christi, a local Catholic

program, "because it's . . . a different sect." There are also facts in dispute concerning whether the Emergency Services Program itself has a religious component. Although the City argues strenuously that the Emergency Services Program is secular, Anderson testified to the contrary; he stated that he was once required to attend chapel before being permitted to eat dinner at the River of Life shelter. Both Martin and Anderson have objected to the overall religious atmosphere of the River of Life shelter, including the Christian messaging on the shelter's intake form and the Christian iconography on the shelter walls. A city cannot, via the threat of prosecution, coerce an individual to attend religion-based treatment programs consistently with the Establishment Clause of the First Amendment. Inouye v. Kemna, 504 F.3d 705, 712–13 (9th Cir. 2007). Yet at the conclusion of a 17-day stay at River of Life, or a 30-day stay at City Light, an individual may be forced to choose between sleeping outside on nights when Sanctuary is full (and risking arrest under the ordinances), or enrolling in BRM programming that is antithetical to his or her religious beliefs.

The 17-day and 30-day limits are not the only BRM policies which functionally limit access to BRM facilities even when space is nominally available. River of Life also turns individuals away if they voluntarily leave the shelter before the 17-day limit and then attempt to return within 30 days. An individual who voluntarily leaves a BRM facility for any reason – perhaps because temporary shelter is available at Sanctuary, or with friends or family, or in a hotel – cannot immediately return to the shelter if circumstances change. Moreover, BRM's facilities may deny shelter to any individual who arrives after 5:30 pm, and generally will deny shelter to anyone arriving after 8:00 pm. Sanctuary, however, does not assign beds to persons on its waiting list until 9:00 pm. Thus, by the time a homeless individual on the Sanctuary waiting list discovers that the shelter has no room available, it may be too late to seek shelter at either BRM facility.

So, even if we credit the City's evidence that BRM's facilities have never been "full," and that the City has never cited any person under the ordinances who could not obtain shelter "due to a lack of shelter capacity," there remains a genuine issue of material fact as to whether homeless individuals in Boise run a credible risk of being issued a citation on a night when Sanctuary is full and they have been denied entry to a BRM facility for reasons other than shelter capacity. If so, then as a practical matter, no shelter is available. We note that despite the Shelter Protocol and the amendments to both ordinances, the City continues regularly to issue citations for violating both ordinances; during the first three months of 2015, the Boise Police Department issued over 175 such citations.

. . . .

We conclude that both Martin and Anderson have demonstrated a genuine issue of material fact regarding whether they face a credible risk of prosecution under the ordinances in the future on a night when they have been denied access to Boise's homeless shelters; both plaintiffs therefore have standing to seek prospective relief.

Result: Reversal in part, affirmance in part of order of U.S. District Court (Idaho) that granted summary judgment to the City of Boise on all issues.

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## WASHINGTON STATE SUPREME COURT

**EVIDENCE HELD SUFFICIENT TO SUPPORT FIREARM SENTENCING ENHANCEMENT BASED ON SHOTGUN IN "CARGO HOLD" OF DRUG DEALER'S CAR, PLUS EXTENSIVE ADDITIONAL EVIDENCE OF AN ARMED DRUG-DEALING BUSINESS FOUND IN A SEARCH OF THE CAR UNDER A WARRANT**

In State v. Van Elsloo, ___ Wn.2d ___ , 2018 WL ___ (September 13, 2018), the Washington Supreme Court reverses nine felony convictions and remands the matter for re-trial based on an error by the trial court in dismissing a juror. However, the Court holds that the evidence in the case would be sufficient to support firearm sentencing enhancements if presented in a new trial. This Legal Update entry will address only the firearm sentencing enhancement issue.

Facts and Procedural background

The key facts relating to the sentencing issue are described in the Supreme Court majority Opinion as follows:

> On September 7, 2012, while monitoring traffic, [a Bellingham police officer] saw a black Kia Sorrento make an illegal right turn. When [the officer] tried to stop the Kia, a chase ensued. When Leake overtook the Kia, he found it stopped in the middle of the road with the driver-side door open and the driver gone. A woman, Athena Aardema, was in the passenger seat and ultimately identified the driver as Adrian Sassen Van Elsloo.
>
> The police permitted Aardema to leave the scene. While helping Aardema remove her belongings from the car, [the officer who had stopped the car] saw the handle of a shotgun. The police impounded the Kia and obtained a search warrant.
>
> The search revealed a shotgun in the cargo hold. The search also revealed a digital scale, methamphetamine, 5 morphine pills, a pipe, a butane torch, 30 alprazolam pills, 67 clonazepam pills, seven small bags of heroin, a bill of sale with Sassen Van Elsloo's name, four prepaid cell phone cards, seven "burner" cell phones, gold jewelry, a bundle of 20 $1 bills, an iPad, the title for a 1990 Lincoln Town Car, a .38 revolver loaded with four bullets, a .22 pistol loaded with a magazine containing five bullets, six more rounds of ammunition, and a sock holding eight 12 gauge shotgun shells.
>
> Three months later, [the officer who made the earlier stop] stopped a 1990 Lincoln Town Car driven by Sassen Van Elsloo. Sassen Van Elsloo was charged with nine felony counts relating to the earlier encounter. The State added firearm enhancements to five of the charges.

The jury found Elsloo guilty on all counts. The Court of Appeals affirmed the trial court judgment, and the Supreme Court subsequently accepted review of the case.

LEGAL ANALYSIS:

The Supreme Court majority Opinion analyzes the sentencing issue as follows (note that the Court is unanimous on the sentencing issue):

> To establish that a defendant was armed for the purpose of a firearm enhancement, the State must prove (1) that a firearm was easily accessible and readily available for

offensive or defensive purposes during the commission of the crime and (2) that a nexus exists among the defendant, the weapon, and the crime. State v. Eckenrode, 159 Wn.2d 488, 493 (2007) (plurality opinion).

The presence, close proximity, or constructive possession of a weapon at the scene of a crime is, by itself, insufficient to show that the defendant was armed for the purpose of a firearm enhancement. . . . State v. Gurske, 155 Wn.2d 134, 138 (2005). Rather, for a person to be armed during the commission of a crime, the weapon must be easily accessible and readily available for use for either offensive or defensive purposes. . . . A defendant "does not have to be armed at the moment of arrest to be armed for purposes of the firearms enhancement," and the State "need not establish with mathematical precision the specific time and place that a weapon was readily available and easily accessible, so long as it was at the time of the crime." . . . .

In addition to proving that a weapon was readily available and easily accessible at the time of the crime, the State must offer sufficient evidence that there existed a nexus between Sassen Van Elsloo, the gun, and the commission of the drug crimes. The requirement of a nexus between the defendant, the weapon, and the crime "serves to place 'parameters . . . on the determination of when a defendant is armed, especially in the instance of a continuing crime such as constructive possession' of drugs." Gurske, 155 Wn.2d at 140 (alteration in original). Without this nexus, there is a risk that a defendant will be punished under the firearm enhancement for having a gun unrelated to the crime. To determine whether there was a nexus between the defendant, the weapon, and the crime, the court looks at the nature of the crime, the type of weapon, and the circumstances under which it was found. . . .

Here, Sassen Van Elsloo argues that the shotgun was too far away from him to qualify as easily accessible and readily available because Sassen Van Elsloo would have had to exit the car or move to the back seat to reach the shotgun. Sassen Van Elsloo also argues that there was insufficient evidence to support a nexus between him, the drugs, and the crime because "[t]here was also no evidence that Sassen-Vanelsloo ever had, or indicated an intent to use, the shotgun to protect the drugs." In making this argument, Sassen Van Elsloo relies on this court's decision in Gurske, where we found insufficient evidence to support a firearm enhancement.

In Gurske, the police found a zipped-up backpack in the back seat of the defendant's truck containing an unloaded pistol, a loaded magazine, and drugs. We determined that the gun was not easily accessible and readily available at the time of the crime because the backpack containing the gun was zipped and could not be removed by the defendant unless he exited the truck.

Additionally, when the crime is of a continuing nature, such as a drug operation, a nexus exists if the firearm is "there to be used" in the commission of the crime. . . . Applying that standard in Gurske, we found that no nexus existed between the weapon and the crime because the State had presented no evidence that Gurske had used or had access to the weapon during the commission of a crime, such as when he acquired or was in possession of the methamphetamine.

Sassen Van Elsloo argues that his case cannot be distinguished from Gurske. However, as the Court of Appeals pointed out, the present case is more closely aligned with those cases in which we found that reasonable juries could infer that guns kept at the site of

ongoing drug crimes were easily accessible during and had a sufficient nexus to the commission of the crime.

For example, in Eckenrode, we found sufficient evidence to support a firearm enhancement. There, Eckenrode called the police to report that an intruder was in his house and alerted the dispatcher that he was armed and ready to shoot the intruder. When the police responded, Eckenrode was sitting in his front yard in a lawn chair. The police swept the house for intruders and instead found methamphetamine, dried marijuana, a loaded rifle, an unloaded pistol, and the aroma of marijuana. After obtaining a warrant, the police found a marijuana grow and records of marijuana sales. Eckenrode was arrested outside his home, unarmed. He was convicted of the unlawful manufacture and possession of marijuana, and the jury found that he was armed on both counts.

There was sufficient evidence to support the firearm enhancements, even though Eckenrode was unarmed at the time of arrest. The gun was easily accessible and readily available: Eckenrode himself told the 911 operator that he had a loaded gun in his hand and was prepared to shoot the intruder. We also found a sufficient nexus among Eckenrode, the weapon, and the drug crimes, holding that a "jury could readily have found that the weapons were there to protect the criminal enterprise."

We distinguished Eckenrode from Gurske on the grounds that the State in Gurske presented no evidence that the weapon "was readily accessible at any relevant time or that there was any connection between the weapon and the crime," while in Eckenrode, the State presented evidence that the weapons were there to protect the marijuana grow.

**Here, there is sufficient evidence to conclude that the gun in Sassen Van Elsloo's car was easily accessible and readily available during the commission of the drug crimes and that a nexus existed between Sassen Van Elsloo, the gun, and the crime.**

**The State presented sufficient evidence that Sassen Van Elsloo was engaged in possessing and selling illegal drugs from the Kia as part of an ongoing criminal enterprise:** Aardema testified that she and Sassen Van Elsloo were selling drugs; the car contained a locked bank bag holding controlled substances separated and packaged in a style consistent with personal use and sales; numerous burner cell phones, glassine envelopes, small "baggies," and a digital scale of the style often used in the sale of controlled substances were found in the backpack in the car; and a locked safe containing a roll of $1 bills, a revolver, and a small semiautomatic handgun was found in the back of the Kia, the key to which was found in the passenger console.

**Additionally, sufficient evidence connected Sassen Van Elsloo to the drug operation being run out of the Kia**. The backpack contained several receipts with Sassen Van Elsloo's name; his DNA was found on the shotgun; and Aardema testified that Sassen Van Elsloo had been driving on the date of the incident, that the safe belonged to Sassen Van Elsloo, and that he took it wherever he went.

**Finally, there was sufficient evidence to find a nexus between the shotgun and Sassen Van Elsloo's ongoing possession and distribution of the drugs**. **First**, the shotgun was found less than a foot from the backpack, which contained the drugs and

was the sole source of the drug charges. **Second**, the gun was placed in the car with its grip facing at an angle toward the passenger compartment of the car, making it easy for someone entering the car to quickly grab the gun. **Third**, the gun had a shell in the magazine that could have been readily chambered and fired at another person. And **fourth**, the shotgun was kept out of the locked safe, unlike the revolver and semiautomatic handgun, which were not the subjects of the firearm enhancements. This is sufficient to support a conclusion that the firearm was "there to be used" in the commission of the drug crimes. Gurske, 155 Wn.2d at 138.

[Emphasis added; some citations omitted, others revised for style; footnotes citing and discussing other Washington decisions on the sufficiency-of-evidence issue omitted]

Result: Reversal, based on juror dismissal issue not addressed in the Legal Update, of all Whatcom County Superior Court convictions of Adrian Sassen Van Elsloo; case remanded for retrial.

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## WASHINGTON STATE COURT OF APPEALS

**INVESTIGATORY STOP SCOPE WAS REASONABLE: FACTS OF – 911 CALL FROM WITNESS REGARDING ALLEGED RECENT MALE-ON-FEMALE ASSAULT PLUS MALE SUSPECT'S ADMISSION TO OFFICER OF VERBALLY QUARRELING WITH APPARENT FEMALE COMPANION TOGETHER WITH MALE'S SUSPICIOUS DENIAL TO OFFICER OF HAVING ANY RELATIONSHIP WITH THE FEMALE PLUS THE EXISTENCE OF A DOMESTIC VIOLENCE NO-CONTACT ORDER AGAINST THE MALE – (1) RAISED A REASONABLE SUSPICION THAT MALE WAS VIOLATING NO-CONTACT ORDER AND (2) JUSTIFIED KEEPING THE MALE IN PLACE WHILE OFFICERS INVESTIGATED WHETHER THE FEMALE WAS THE PERSON PROTECTED BY THE DV NO-CONTACT ORDER**

State v. Alexander, ___ Wn. App. ___ , ___ P.3d ___ (Div. I, September 4, 2018)

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

> On October 24, 2016, at about 6:44 p.m., a motorist driving on Aurora Avenue called 911. The motorist identified herself and reported that she saw a man punch a woman at North 85th Street and Aurora Avenue North. She described the man as a white male, 20 to 30 years old, thin, wearing a baseball cap and a red hooded sweatshirt. She described the victim as a white female, 20 to 30 years old, five feet seven, slender, with long, dark, curly hair in a ponytail, wearing a red sweatshirt with plaid pajama pants. She reported they were traveling northbound.
>
> A dispatcher relayed the information provided by the 911 caller to [Officer A]. [Officer A] saw a man and woman matching this information walking northbound near 88th and Aurora. After following them for a short while, he stopped them. When he first saw them, they were walking and talking together. When [Officer A] started to follow them, the man began to walk in front of the woman.
>
> [Officer A] saw no assault or struggle between the man and the woman. He pulled his car off the road and detained the man and woman.

The man identified himself as Mark Alexander. The man admitted to getting "into the face of the woman" and arguing with her but denied assaulting her. He also denied having any relationship with the woman. [Officer A] ran the name through the law enforcement database. The search confirmed Alexander's identity. The search revealed no outstanding warrants but did reveal two active domestic violence no-contact orders. The orders prohibited Alexander from contacting a person named Danyail Carlson.

At that time, [Officer A] did not know the identity of the woman with Alexander. While [Officer A] searched the law enforcement database, the other officers spoke to the woman. She denied that she had been assaulted. When the officers asked her name, she gave a false name. Almost immediately, the officers discovered this after learning the woman's true identity as Carlson by looking at a booking photo.

[Officer A] arrested Alexander for violating the domestic violence no-contact orders. The State charged Alexander with domestic violence felony violation of a court order. Alexander asked the court to suppress evidence of the no-contact orders, claiming that [Officer A] did not have the required reasonable suspicion needed to justify the initial stop.

After a joint CrR 3.5/3.6 hearing, the trial court suppressed the no-contact orders on a different ground. It found that [Officer A] was justified in detaining Alexander but exceeded the scope of the initial Terry stop when (1) he ran Alexander's name through a law enforcement database and (2) he conducted a second round of questioning of the woman about her identity and the no-contact orders.

ISSUE AND RULING: An officer received 911 information of a witness report of an assault by a male against a female. The officer stopped a male and female meeting the 911 description. The male admitted that he had been verbally quarreling with the female a short while earlier, but the male denied that he had any relationship with the female. The officer checked a database and learned that the male was the respondent on no-contact orders protecting a specified female. The female denied having been assaulted and she gave officers a false name. Did officers exceed the reasonable scope of the investigatory stop by holding the suspect in place while they investigated and quickly found a booking photo of the female revealing that she was the person protected under the no-contact orders? (ANSWER BY COURT OF APPEALS: No, the officers acted reasonably in taking these additional steps after making the stop)

Result: Reversal of King County Superior Court suppression order; case remanded for trial of Mark Wade Alexander, Jr., for domestic violence felony violation of a court order.

ANALYSIS: (Excerpted from Court of Appeals decision)

"A lawful Terry stop is limited in scope and duration to fulfilling the investigative purpose of the stop." Similar to the analysis for determining the validity of the stop, the proper scope of a Terry stop depends on "the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained." If the initial investigation dispels the officer's suspicions, the stop must end. But if it confirms or further arouses the officer's suspicions, the officer may lawfully extend the scope and duration of the stop.

*Challenge to Finding of Fact*

The State first challenges the trial court's finding that [Officer A] concluded that no assault had occurred. The trial court made the following finding of fact:

> [Officer A] observed no struggle between the man and woman or assault occurring prior to the stop. The defendant, Mark Alexander, and the woman denied an assault had occurred. [Officer A] inspected the woman''s face for injury but did not observe any signs of injury. [Officer A] not take any photographs of the woman's face. The defendant Alexander denied any relationship with the woman. Based on this, [Officer A] concluded that no assault had occurred.

The trial court relied on this finding to conclude that at this point, the purpose of the stop – to investigate an assault – was satisfied and [Officer A] no longer had authority to detain Alexander.

The State contends that the record does not support a finding that [Officer A] concluded that no assault occurred. The State notes that when the trial court made its oral ruling, the prosecuting attorney asked the court to clarify whether it was finding that [Officer A] testified that he concluded that no assault had taken place. The court clarified that it "did not hear the officer state that he determined an assault had occurred; that he determined that there were no signs of injury at the time, after inspecting her for an injury, and that there were no statements from the victim . . . that. . . there had been physical contact with Mr. Alexander." The court accurately characterized [Officer A's] testimony. He never stated that he concluded that no assault had occurred.

Alexander argues that the court was entitled to draw this inference from the facts presented. We disagree. Evidence that the officer found no additional evidence to corroborate the assault described in the 911 call does not show that the officer concluded that no assault occurred. The court finding that [Officer A] concluded no assault occurred is not supported by substantial evidence.

In addition, the State points out in its reply brief that the court based its inference on a misstatement of the facts. The court found that [Officer A] concluded that no assault occurred after he inspected Carlson's face. But he only interacted with Carlson after he ran Alexander's name. Thus, [Officer A] could not have determined that no assault occurred based on the lack of visible injury until after he searched for and found Alexander's records.

*Challenges to Conclusions of Law (b)*

Next, the State challenges the trial court's conclusion that [Officer A] exceeded the scope of the Terry stop when he ran Alexander's name through the law enforcement database. The trial court reasoned,

> The scope of the Terry stop was exceeded when [Officer A] ran the defendant Alexander's name though a law enforcement database. At this point, [Officer A] had conducted an investigation of the allegation of assault and determined no assault had occurred. The purpose of the Terry stop to investigate and determine whether an assault had likely occurred was satisfied. Determining there was not

> probable cause to arrest for assault, [Officer A] no longer had the authority to detain the defendant Alexander.

Washington courts have often held that police may check for outstanding warrants during valid criminal investigatory stops. These checks are reasonable routine police procedures as long as they do not unreasonably extend the initial valid stop. Federal courts have also held that law enforcement may run warrant checks during Terry stops.

Here, the trial court concluded that the initial stop was a valid investigatory stop. Our legislature has directed that "[t]he primary duty of peace officers, when responding to a domestic violence situation, is to enforce the laws allegedly violated and to protect the complaining party." A report of a man assaulting a woman along the roadway presents a potential domestic violence situation. The history of domestic violence in our society informs police officers about the risk of serious harm to its victims.

After stopping Alexander, [Officer A] questioned him for about two minutes before returning to his car to run the name. The computer search that revealed the no-contact orders took approximately two minutes. The other officers then questioned Carlson about her identity. Within a few more minutes, they discovered Carlson's identity by looking up her picture. [Officer A] then arrested Alexander for violating a protection order approximately nine minutes after the initial stop.

When an officer conducts a valid investigatory stop to determine whether an assault occurred following a reliable informant tip, that officer may check for outstanding warrants. Under these facts, [Officer A] properly ran Alexander's name through the law enforcement database during the investigative stop.

The State also challenges the trial court's conclusion that [Officer A] exceeded the scope of the Terry stop when he questioned Carlson about her identity. . . .

.

**Two cases provide help in deciding whether [Officer A] had sufficient articulable facts to continue his search. The State compares the facts of this case to State v. Pettit, 160 Wn. App. 716 (2011). Alexander distinguishes Pettit and claims this case is more like State v. Allen, 138 Wn. App. 463 (2007). From our comparison of these two cases, we conclude that the facts here gave [Officer A] reasonable suspicion that Alexander was violating a no-contact order and justified an inquiry into the identity of the woman with him.**

In Pettit, a sheriff's deputy stopped Pettit because his car had a loud exhaust. A record check revealed that no-contact orders restrained him from contacting a 16-year-old girl, Michelle Whitmarsh. A female passenger in the front seat appeared to be about 16. The passenger gave the deputy the name Samantha Wright and a birth date. He ran that name and found no record. Dispatch also provided him information about Michelle Whitmarsh. The passenger matched the description from dispatch. The deputy arrested Pettit for violating the no-contact order. Division Two affirmed the trial court's decision to deny Pettit's motion to suppress Whitmarsh's identity. The court reasoned,

> Deputy [X] knew that the no-contact order protected a 16-year-old girl named Michelle Whitmarsh from Pettit and that Pettit's front seat female passenger appeared to be 16. These facts were sufficient to support a rational inference warranting the officer's initial request for the passenger's identification to

determine whether she was the person whom the no-contact order sought to protect. Pettit's female passenger provided a birth date that was not consistent with her apparent age, justifying the subsequent records check, which then led to the corroborating physical description, including the identifying tattoo on her left hand. The additional investigation was brief and did not significantly extend the duration beyond that of a typical traffic stop.

The court also noted that Whitmarsh's status as a minor who had been reported missing presented exigent circumstances warranting the brief detention.

In Allen, police stopped a car for failure to have a working license plate light. Allen was a passenger in the car. The officer checked the driver's information and discovered that she was "a [petitioner] in a protection order." The officer also learned that the restrained party was named Allen but did not know the gender [of the protected person on the order] or have a description. The officer asked for Allen's identity; both Allen and the driver gave a false name. After checking the given name with dispatch and discovering it was false, the officer questioned the driver further about the passenger's identity. The driver eventually identified the passenger as Allen. Division Two decided that the trial court should have suppressed the identification of Allen. It reasoned, in part, that "[w]ithout knowledge that the passenger provided a false name, [the officer] did not possess reasonable articulable facts to believe that the no-contact order referred to the passenger."

**This case differs from Pettit because [Officer A here] had no description of the protected person. But unlike in Allen, he had other articulable facts to suggest that the woman with Alexander was the protected party. [Officer A] was following up on a reliable informant tip reporting an assault when he discovered the domestic violence no-contact orders. Although he found no corroborating evidence to support the assault, based on his experience investigating assaults and domestic violence incidents, he knew that victims often stay with the assaulter. In addition, Alexander denied any relationship with the woman with whom he had been walking and talking, admitted that the two had been arguing, and that he had gotten into her face. And both Alexander and the woman demonstrated unwillingness to reveal her identity. Thus, unlike in Allen, but like in Pettit, [Officer A] had enough facts to raise a reasonable suspicion that a no-contact order was being violated.**

**Unlike in Pettit, this case does not involve a missing child. But it does involve an alleged recent assault, admitted quarreling, and a domestic violence no-contact order, thus warranting [Officer A's] investigation into the woman's identity.**

**Here, the Terry stop involved detention of an alleged assailant and victim, a very recent assault, a warrant check disclosing a protection order, admitted quarreling, and unwillingness to disclose the alleged victim's identity. These facts provided [Officer A] with sufficient reasonable suspicion to investigate whether the woman with Alexander was the protected person. Indeed, the public policy expressed by our legislature in RCW 10.99.030(5) makes the protection of that victim a primary duty of the officer. [Officer A] did not exceed the proper scope of the Terry stop.**

[Some case citations omitted; others revised for style; footnotes omitted; emphasis added]

**FBI AGENT'S TESTIMONY ABOUT USE OF PROPRIETARY SOFTWARE TO MAP OUT CELL TOWER STRENGTHS HELD TO BE NOT SUBJECT TO DEFENDANT'S FRYE CHALLENGE BECAUSE THE METHOD WAS NOT "NOVEL" SCIENTIFIC EVIDENCE**

In State v. Ramirez, ___ Wn. App. ___ , 2018 WL ___ (Div. III, August 30, 2018), the Court of Appeals rejects a murder defendant's argument that an FBI agent's testimony about use of FBI proprietary software to map out cell tower strengths should have been excluded as novel scientific evidence under Frye v. United States, 293 F. 103 (1923). His Frye argument was based upon the fact that the proprietary software that the FBI agent used had not been subjected to peer reviewed scientific testing. The defendant also unsuccessfully argued that the software does not sufficiently take into account imperfections and effects on cell transmission such as weather, obstructions and network traffic.

The Ramirez Court describes the FBI agent's testimony about her process as follows:

> Special Agent Banks testified that she is part of the FBI's Cellular Analysis Survey Team (CAST). CAST members receive training in engineering and in deciphering cell phone records. Special Agent Banks described two components to her work. First, she interprets historic call detail records from cellular telephone providers in order to discern the location of cell towers activated by a particular voice call or text message. Second, Special Agent Banks performs field tests of geographic areas to determine the strength of various cell towers. The field test involves driving through a location with a scanning device. The FBI's scanning device uploads cellular frequencies in a given area to a computer program, which plots signal strengths on an area map. Agent Banks testified that CAST agents had testified in approximately 400 courts throughout the country and that the CAST methodology is more widely accepted in the law enforcement community than any other cellular location method.

In key part, the legal analysis of the Court of Appeals on the admissibility issue under Frye and under the rules for admissibility of expert evidence is as follows:

> With respect to the Frye standard, cell site location testimony is not novel; it is widely accepted throughout the country. [citing extensive authority].
>
> While there is controversy over the ability of a cell site analyst to pinpoint the location of a cell phone at a given point in time, . . . that sort of testimony was not introduced in Mr. Ramirez's case. FBI Special Agent Banks was careful to explain that her testimony only provided information of the approximate area of Mr. Ramirez's cell phone. In addition, Agent Banks bolstered the reliability of her historical analysis by performing a drive-through analysis of the signal strength of the cell towers activated by Mr. Ramirez's cell phone and evaluating the "particular characteristics of the cell tower with which [Mr. Ramirez's] phone connected, [at 9:24 p.m.] including its power [and] the direction its antennae were facing."
>
> The fact that Special Agent Banks used proprietary software to map out cell tower strengths within Spokane Valley did not cause her testimony to fall outside of Frye. The theories behind the drive-through test/cell tower strength testimony were sound. It is not novel or uncommon to measure the strength of cell tower or radio frequencies. . . . In addition, computer programs routinely generate maps that correspond to real-world data. . . . While the FBI has not shared its proprietary software for external validation, the

> assumptions on which the software operated were transparent and readily capable of testing and replication. Mr. Ramirez was fully equipped to challenge the FBI's computer program through cross-examination or by hiring a defense expert. . . . Concerns about the FBI's software program did not present a reason for excluding Special Agent Banks's testimony under Frye.
>
> The trial court also did not abuse its discretion in admitting Special Agent Banks's testimony under ER 702 [governing expert testimony]. It is undisputed that Agent Banks qualifies as an expert in historical cell site analysis. Her testimony was also helpful to the jury. Agent Banks did not overestimate the quality of her cell site analysis. Throughout her testimony, she made the jury aware of the imprecision of cell site location information. . . . She cross tested the information obtained from the cell location records with information from her drive-through signal strength test. Mr. Ramirez cannot identify any realistic risk that the jury would have been confused by the nature of this testimony. The evidence was therefore properly admitted.

[Citations to court decisions and law review articles omitted]

The Court of Appeals also rejects defendant's challenge to eyewitness identification evidence (including his argument that a "double blind" procedure should have been used by law enforcement). The Court of Appeals concludes that defendant failed to preserve his theories by making an adequate challenge and record at the trial court level.

Result: Affirmance of Spokane County Superior Court convictions of Christopher Brian Ramirez for two counts of first degree premeditated murder and one count of unlawful possession of a firearm in the first degree.

**SENTENCING AGGRAVATOR FOR DV/ONGOING PATTERN OF PSYCHOLOGICAL ABUSE OF EVENTUAL MURDER VICTIM HELD TO BE MET BY EVIDENCE OF A SEVEN-WEEK PERIOD OF ABUSE LEADING UP TO THE MURDER**

In State v. Brush, ___ Wn. App. ___ , 2018 WL ___ (Div. II, August 28, 2018), the Court of Appeals upholds defendant's exceptional sentence of 1,060 months for first degree murder of his former girlfriend, Lisa Bonney. The Court of Appeals rules that there was no error in the trial court's sentence that in part was based upon RCW 9.94A.535(3)(h)(i), supported by a factual finding that Brush had committed an aggravated domestic violence offense as part of an ongoing pattern of psychological abuse of Bonney manifested by multiple incidents over a prolonged period of time. Among other things, the Court of Appeals rules that the seven-week period of repeated abuse of the victim was a "prolonged" period of time for purposes of the sentencing provision.

Result: Affirmance of Pacific County Superior Court sentence of Brian K. Brush to 1060 months for his first degree murder conviction.

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**BRIEF NOTES REGARDING SEPTEMBER 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 September 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. Troy Darrin Meyers: On September 4, 2018, Division One of the COA rules for the State in rejecting defendant's appeal from his Clark County Superior Court convictions for *possession of methamphetamine with intent to deliver and unlawful possession of cocaine*. The defendant's central **unsuccessful arguments on appeal were: (1) that an affidavit for a search warrant did not** – in its description of a CI and her drug history and motivation, the CI's observations inside the defendant's house, and the CI's participation in a controlled buy – **support probable cause for the warrant to search his house for evidence of possession of a controlled substance with intent to deliver; and (2) that the affidavit contained material misrepresentations of fact.**

2. State v. Ronald Lynn Cook, Sr.: On September 11, 2018, Division Two of the COA rules for the State in rejecting defendant's appeal from his Cowlitz County Superior Court conviction for *child molestation in the first degree*. On the central issue, the Court of Appeals rules that the **trial court did not abuse its discretion in admitting multiple child hearsay statements of the child victim**. Defendant was unsuccessful in arguing that the statements lacked reliability under the factors of State v. Ryan, 103 Wn.2d 165 (1984) on grounds that the statements to a forensic interviewer and other witnesses were contradictory, unspontaneous and involved assertions of past fact.

3. State v. James Laurence Louthan: On September 18, 2018, Division Two of the COA rules for the State in rejecting defendant's appeal from his Lewis County Superior Court conviction for *possession of a controlled substance*. The Court of Appeals rules that Louthan cannot show that the trial court erred by failing to suppress evidence seized during what Louthan asserts was an illegal search of his person**. Louthan's appeal fails because he cannot meet his burden of showing that he had been seized prior to his arrest, and because substantial evidence supports the trial court's finding that Louthan consented to a search of his person**.

4. State v. Craig Fredrick Clark: On September 20, 2018, Division Three of the COA rules for the State in rejecting defendant's appeal from his Spokane County Superior Court conviction for *third degree rape*. Over defendant's objection, the trial court admitted incriminating statements by defendant during a custodial interrogation. The Court of Appeals rules that the trial court did not err in concluding that a detective's lie during the recorded interrogation that DNA evidence

testing had already been completed does not require suppression of defendant's admission to having sex with the victim. The Court of Appeals concludes: "**The deception by police was not as coercively misleading as argued by Mr. Clark and the record supports the trial court's findings that the behavior of law enforcement did not overbear his will to resist**."
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5. State v. Aleander John Zietz: On September 24, 2018, Division One of the COA rules for the State in rejecting defendant's appeal from his King County Superior Court conviction for *possession of a stolen vehicle*. The Court of Appeals rules that defendant's **trial attorney did not perform incompetently by failing to object to an officer's expert opinion testimony** that: (1) stolen cars typically have multiple occupants, (2) a driver of a stolen car may make multiple sharp turns in order to detect whether he or she is being followed, (3) the occupants of the Accord were aware of his presence in the parking lot, (4) occupants of stolen vehicles often flee, and (5) wearing gloves in some contexts can indicate an intent to avoid leaving fingerprint evidence.

6. State v. Anthony Edward Ballentine: On September 24, 2018, Division One of the COA rules for the State in rejecting defendant's appeal from his King County Superior Court conviction for *burglary in the second degree*. The Court of Appeals rules that (1) **officers had reasonable suspicion justifying a 2:30 a.m. stop of a burglary suspect** in a business area on Aurora Avenue in Shoreline, Washington, in a police response to a business burglar alarm; and (2) **in full context, the Mirandized suspect did not unequivocally assert his right to silence under Miranda** when, after answering some questions, defendant answered "no" to an officer's question asking if the wanted to "make a statement."

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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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