LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: Thank you!

SEPTEMBER 2019

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

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WARRANT OFFICER-AFFIANTS DID NOT FULLY EXPLAIN THEIR "EXPERIENCE AND TRAINING" OR HOW THAT BACKGROUND LED TO THEIR CONCLUSIONS REGARDING WHAT THEY EXPECTED TO FIND IN CELL PHONE SEARCHES, THE AFFIDAVITS ESTABLISHED PROBABLE CAUSE FOR WARRANTS TO SEARCH CELL PHONE

United States v. Garay, ___ F.3d ___ , 2019 WL ___ (9th Cir., September 17, 2019)

Facts: (Excerpted from Ninth Circuit opinion)

> When San Bernardino County deputy sheriffs attempted, in March of 2017, to stop Garay for a traffic violation, Garay, with a passenger in the car, led them on a high-speed chase. The chase culminated in Garay's crashing the car into a ditch and attempting to flee on foot. A search of his person revealed thousands of dollars in cash and quantities of four different illegal drugs. He was placed under arrest.
>
> With the car totaled in the ditch, the officers had to arrange to have the car towed. In preparation, they searched the contents of the car, finding two loaded rifles, ammunition, and two cell phones, one of which was claimed by the passenger. The officers filled out a Vehicle Report on which they listed some property (firearms), but they did not list other property in the "remarks" section. They booked the rifles, ammunition, and cell phones as evidence.
>
> To search the contents of the cell phones, state law-enforcement officers obtained a warrant on the strength of an officer's affidavit describing the circumstances leading up to the discovery of the phones. These circumstances included the drugs and cash found on Garay's person and the affiant's "knowledge, based on training and experience," that individuals who possess firearms take pictures of them and communicate via text messages to further their criminal activity.
>
> When the case was referred for federal prosecution, a second, federal warrant was issued on the basis of similar information as well as on the "collective experiences" of law enforcement agents that felons prohibited from possessing guns use mobile phones to coordinate buying and selling guns.
>
> Garay contends that the warrantless seizure of the phone itself was unreasonable and that the affidavits supporting the search of the contents of Garay's phone were inadequate.

[Some paragraphing revised for readability]

Proceedings below:

Nahach Garay was charged under a federal statute, 18 U.S.C. § 922(g)(1), as a felon in possession of a firearm. He moved to suppress evidence found as a result of the search of his cell phone. The phone contained photographs that tied him to the firearm that was recovered from the car.

The district court rejected his motion, ruling that the phone was lawfully seized in an inventory search of the car, and that the state and federal warrants authorizing the search of the phone's contents were supported by probable cause. Garay was convicted as charged.

ISSUES AND RULINGS: 1. Following a lawful impound of a disabled car that defendant had run into a ditch during a lawful police pursuit, police began what they later characterized as an inventory search of the vehicle. They found and seized two loaded rifles, ammunition, and two cell phones, one of which was claimed by the passenger. Consistent with their agency's procedures, the officers filled out a Vehicle Report on which they listed some property (firearms), but they did not list other property in the "remarks" section. They booked the rifles, ammunition, and cell phones as evidence. Search warrants were later obtained to search the defendant's cell phone.

Was the seizure of Garay's cell phone lawful based on the impound-inventory search exception to the search warrant requirement even though the inventory form was not completely filled out? (ANSWER BY NINTH CIRCUIT: Yes, because there is no evidence that the search was conducted in bad faith or for the sole purpose of criminal investigation)

2. To search the contents of seized cell phones, state law-enforcement officers obtained a warrant on the strength of an officer's affidavit describing the circumstances leading up to the discovery of the phones. These circumstances included the drugs and cash found on Garay's person and the affiant's "knowledge, based on training and experience," that individuals who possess firearms take pictures of them and communicate via text messages to further their criminal activity. When the case was referred for federal prosecution, a second, federal warrant was issued on the basis of similar information as well as on the "collective experiences" of law enforcement agents that felons prohibited from possessing guns use mobile phones to coordinate buying and selling guns.

Is defendant correct that (A) under the Fourth Amendment, before the affiants' conclusions that are based on their "training and experience" may be taken into consideration, the affiants must explicitly detail the nature of their expertise or experience and how that experience bears on the facts prompting the search; and (B) this showing was not made in the affidavit in this case? (ANSWER BY NINTH CIRCUIT: No)

Result: Affirmance of U.S. District Court federal law conviction for possession by a felon of a firearm of Nahach Manuel Garay, aka Nahach Guerrero, aka Polar Bear.

ANALYSIS: (Excerpted from Ninth Circuit opinion; subheadings revised)

1. *The inventory search and seizure of the defendant's phone were lawful even though not all agency inventory procedures were followed*

> Before towing or impounding a vehicle, officers may seize and inventory the contents of that vehicle in order to avoid liability for missing items. See South Dakota v. Opperman, 428 U.S. 364, 369 (1976). If done according to standardized criteria and not in "bad faith or for the sole purpose of investigation," police inventory procedures satisfy the Fourth Amendment. Colorado v. Bertine, 479 U.S. 367, 372 (1987).
>
> The government correctly contends that the seizure of Garay's cell phone was justified as part of an inventory search in preparation for the car's towing. Garay does not dispute that the decision to tow the car was a reasonable and good-faith exercise of the officers' care-taking function; Garay had just been arrested and the car was totaled and lying in a ditch. . . . It is well established that, once a vehicle has been impounded or towed, police are permitted to inventory the car's contents. . . .

Garay contends, however, that the officers used their authority to inventory the car's contents here to unlawfully rummage for evidence. Inventory searches are consistent with the Fourth Amendment only if they are not used as an excuse to rummage for evidence. See Florida v. Wells, 495 U.S. 1, 4 (1990) ("an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence").

To support his argument that this search was pretextual, Garay cites the absence of any inventory sheet listing the property found inside the car, a list required under the sheriff's department's inventory policy. As noted above, the officers listed only some property in the Vehicle Report, though they booked additional property as evidence. The district court dismissed this argument, pointing out that a department's policies do not define constitutional rights.

Such policies do, however, assist courts to determine whether an inventory search is legitimate, as opposed to pretextual. . . .

In this case, we see no reason to hold that the officers were rummaging for evidence. The contents of the wrecked car had to be removed and safeguarded before the car was towed from the site. That is the essence of an inventory search.

Because the site was in effect a crime scene, the items in the car were sensibly treated as evidence. The searching officer complied with the department's inventory-search policy in material respects.

For instance, he obtained the tow truck driver's signature and noted the date and time of the driver's arrival; he obtained a file number for the inventory; he checked a box on the relevant inventory form indicating that items of potential value were in the car before identifying and booking the items recovered from the car as "evidence/property."

That the officer did not complete the inventory list that ordinarily would be completed as part of a department inventory search is not, on its own, a material deviation from policy. Other circuits have expressly recognized that the failure to complete an inventory form does not invalidate an inventory search. . . . [Citations to decisions from 5th, 1st and 11th Circuits of the U.S. Court of Appeals omitted].

Further, we as well as several other circuits have upheld inventory searches despite other comparable administrative errors. . . [Citations to decisions from 9th, 8th, 7th and 2nd Circuits of the U.S. Court of Appeals omitted].

The underlying principle was perhaps best stated in United States v. Rowland, where the Eighth Circuit explained that administrative errors should not, on their own, invalidate inventory searches: "There must be something else; something to suggest the police raised 'the inventory-search banner in an after-the-fact attempt to justify' a simple investigatory search for incriminating evidence." 341 F.3d 774, 780 (8th Cir. 2003). . . .

Here, by contrast, we find no reason to conclude that the inventory search was used to rummage for evidence. Given the circumstances leading up to the search, the officers no doubt expected to find evidence of criminal activity inside the vehicle. But that expectation would not invalidate an otherwise reasonable inventory search. See United States v. Bowhay, 992 F.2d 229, 231 (9th Cir. 1993) (explaining that "dual motives" in

inventory-search context are permissible). The district court did not err in concluding that Garay's cell phone was lawfully seized as part of a valid inventory search.

2. *The search warrants for the cell phone were supported by probable cause even though the "training and experience" statements of the affiants were not adequately supported*

Two magistrate judges, one state and one federal, issued warrants to search the cell phone's contents. Garay argues that the affidavits contained in the warrant applications were not supported by probable cause. The question before us, therefore, is whether the magistrate judges had a substantial basis to conclude that the warrant applications established probable cause. . . .

An affidavit in support of a search warrant shows probable cause if, under the totality of the circumstances, it reveals "a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983).

The district court found the support for each warrant to be more than adequate. The affidavit in support of the state warrant described all the relevant circumstances. These included the high-speed chase leading up to the crash and Garay's attempt to flee, followed by Garay's arrest and the discovery of drugs and cash on his person, as well as the discovery of loaded guns, ammunition, and cell phones inside the car.

The affidavit also recited the affiant's training and experience, reflecting that people who possess firearms "like to take pictures of [those items]" with their cell phones, and "will also communicate via text" regarding criminal activity.

When the case was later referred for federal prosecution, the affidavit for the federal warrant covered the same ground as the state affidavit, but was even more specific in stating that the affiant, based on her training and experience, as well as the "collective experiences" of other law enforcement agents, knew that felons prohibited from owning guns "often use digital devices, including mobile phones, to coordinate buying or selling those guns . . . to promote their possession of guns to others" and to contact suppliers for future purchases or referrals.

Garay nevertheless contends that both warrants lacked probable cause. He asserts that the affiants' belief on the basis of their "training and experience," unadorned by sufficient supporting details, cannot properly be considered in establishing probable cause. He argues that, before the affiants' beliefs may be taken into consideration, the affiants must detail the nature of their expertise or experience and how that experience bears on the facts prompting the search.

Our standards, however, are not so stringent. We have long held that affiants seeking a warrant may state conclusions based on training and experience without having to detail that experience. See, e.g., United States v. Hendershot, 614 F.2d 648, 654 (9th Cir. 1980) (finding that affiant's conclusion "based on [his] experience from prior bank robbery investigations" was proper; emphasizing that "[i]t is not necessary to detail that experience to determine that the conclusion is not capricious" (internal quotation marks omitted)). We have also held that magistrate judges may "rely on the conclusions of experienced law enforcement officers regarding where evidence of a crime is likely to be found." United States v. Fannin, 817 F.2d 1379, 1382 (9th Cir. 1987) (citing United States v. Crozier, 777 F.2d 1376, 1380 (9th Cir. 1985)).

> Further, there was a sufficient factual basis for both magistrate judges to conclude, independently of the affiants' beliefs,that evidence might be found on Garay's cell phone. Garay relies on authorities in which the warrant applications had contained no factual basis from which to connect the place to be searched with the evidence sought. . . . .
>
> But here, the affidavits explained all of the circumstances leading up to the search of the car that had been wrecked, and explained that Garay was then arrested for having drugs and cash on his person. These facts, coupled with the affiants' experience and beliefs, provide a reasonable basis to infer that evidence tying Garay to the criminal activity of which he was suspected might be found on the cell phone.
>
> Magistrate judges may, as they likely did here, draw their own reasonable inferences about where evidence might be kept based on the nature of the suspected offense and the nature of the evidence sought. . . .
>
> We owe "great deference" to magistrate judges' probable-cause findings. . . . The district court correctly determined that the affidavits supporting both warrants in this case gave rise to at least a fair probability that evidence of a crime would be found on Garay's cell phone.

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

LEGAL UPDATE EDITORIAL NOTES ABOUT OTHER RESEARCH SOURCES REGARDING THE IMPOUND-INVENTORY EXCEPTION TO THE SEARCH WARRANT REQUIREMENT: The Washington Supreme Court has interpreted the Washington constitution as imposing restrictions on impound-inventory searches in addition to those imposed by the Fourth Amendment. For general information on impound-inventory issues for Washington law enforcement officers and prosecutors, see pages 329-336 of "Confessions, Search, Seizure and Arrest: A Guide for Police Officers and Prosecutors," May 2015, a collection of case law by Pamela Loginsky, staff attorney for the Washington Association of Prosecuting Attorneys. The collection of cases is accessible both on the website of WAPA and on the Criminal Justice Training Commission's Internet LED page.

Also accessible on the CJTC LED page is the "Law Enforcement Legal Update Outline" by your Legal Update editor with cases on arrest, search, seizure, and other topical areas of interest to Washington law enforcement officers, plus a chronology of independent grounds rulings under Article I, Section 7 of the Washington Constitution. See pages 49-50 for some case citations and brief summaries of rulings in impound-inventory cases.

Also note the Washington Supreme Court's September 26, 2019 decision on an inventory search in State v. Peck/State v. Tellvik, digested below in this Legal Update beginning at page 18.

LEGAL UPDATE EDITORIAL COMMENT ON THE SEARCH WARRANT PROBABLE CAUSE/NEXUS ISSUE:

In every search warrant affidavit, the affiant-officer should generally include at least a brief statement regarding the affiant's particular training and experience because (1) the existence of probable cause will usually be based in some part on the affiant's opinion

concerning the meaning or significance of information contained in the affidavit; and (2) the description of the evidence to be seized often may be based in part on an inference that the affiant has drawn.

The Garay decision digested immediately above appears to say that there was no detail provided in the affidavits about the affiants' experience and training beyond the general statements that the affiants were basing their inferences about what would be found in the phone on their general "experience and training." If so, that is certainly not best practice, which is to provide some factual information regarding the nature and extent of the experience and training.

Also on the probable cause issue, the Washington Supreme Court in State v. Thein, 138 Wn.2d 133 (1999), in what purported to be an interpretation of the Fourth Amendment, appeared to impose a heightened nexus requirement for probable cause that is primarily based on officer-affiant "experience and training." The Thein Court first set out the obvious general propositions that to establish probable cause: (1) the affidavit supporting the search warrant must "set[ ] forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched;" and (2) the affidavit must establish "'a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place [this would also apply to a cell phone as place] to be searched.'"

The Thein Court then went beyond these general statements to hold that boilerplate generalizations in affidavits regarding the habits and practices of drug dealers or other types of criminals generally will be insufficient to produce probable cause without more facts establishing a specific factual nexus in the particular case (for instance: (1) where there is a grow operation in an open field, a warrant will not be obtainable for the suspect's house merely by indicating that drug dealers tend to keep detailed grow records in their homes; and (2) where a suspect is caught away from his home attempting to sell a large quantity of illegal drugs, a warrant will not be obtainable for the suspect's home merely by indicating that drug dealers keep records and other indicia of drug-dealing in their homes).

Thein and Washington appellate court decisions applying Thein may be in conflict with the Fourth Amendment's probable cause/nexus analysis in the Ninth Circuit's Garay decision. Washington officers should consult their legal advisors and local prosecutors for guidance on the probable cause nexus requirement in cases involving "experience and training" probable cause nexus facts similar to those in Garay. Federal appellate courts do not appear to be as exacting as Washington appellate courts in their nexus analysis based on Thein. In some circumstances, this might be a reason to consider handing a case off to federal authorities.

WASHINGTON'S FELONY TELEPHONE HARASSMENT STATUTE AT RCW 9.61.230 DOES NOT VIOLATE FREE SPEECH PROTECTIONS AS THE STATUTE IS BEING APPLIED TO THE FACTS OF THE PROSECUTION OF MR. WAGGY

In U.S. v. Waggy, ___ F.3d ___ , 2019 WL ___ (9th Cir., September 5, 2019), a three-judge Ninth Circuit panel affirms Robert Waggy's conviction under the federal Assimilative Crimes Act for felony telephone harassment in violation of Washington Revised Code section

9.61.230(1)(a),(b), arising from the defendant's repeated telephone calls to a Veterans Administration medical center.

Waggy argued that section 9.61.230 violates the First Amendment Freedom of Speech Clause as applied to him because he merely wanted to talk about his medical care and the VA's unpaid bills. He claimed that he did not truly intend to harass the VA employee who answered the calls. The panel held by a 2-1 majority that: (1) section 9.61.230(1)(a) requires proof that a defendant specifically intended to harm the victim when initiating the call; and (2) that as applied to the facts of this case, that requirement ensures that Waggy (who failed on appeal to challenge the evidentiary support for the jury's finding that he had the intent required by the statute) was convicted for his conduct, not for speech protected by the First Amendment.

The Majority Opinion in the case describes the key facts as follows:

> During his first call, Defendant demanded that the VA pay him $9.25 million or "get off [his] property." He threatened to come to the Center to seize the property and to "use force to defend himself." [The VA employee who answered the phone] testified that Defendant's threat frightened her and that he told her to "do [her] fucking job." After [the VA employee] asked Defendant to "be respectful and to keep the call professional," he screamed at [her] and called her a "fucking cunt." [The VA employee] testified that Defendant "was screaming, not just yelling. I mean, there's a difference between yelling and screaming. And he was screaming into the phone." Payne then hung up on Defendant; "I can handle yelling, I can handle screaming, but I can't handle being called names like that."
>
> Defendant immediately called back. The VA employee testified [that] . . . . "he was just screaming, still yelling, um, just obscenities."
>
> [The VA employee] testified that Defendant used "a lot of F bombs," such as "Fuck everything. So, to do my, do my fucking job and to fucking listen[.]" [She] also testified that, except for the obscenities, she could not understand what Defendant's words meant. Asked whether she could "make sense of what he was saying at that point," [she] responded, "I really couldn't understand him on that . . . second call"; his tone was "[b]eyond elevated." Defendant hung up on [the VA employee]. . . .
>
> Defendant called back a third time. He reiterated his demands for "his property" or "his money." [The VA employee] informed Defendant that she would "take a message and get it to the appropriate department." Defendant called [her] a "fucking cunt" again. [She] hung up the phone, testifying that Defendant "was so irrational on the phone, he was just screaming, like screaming, um, and it made me scared. I didn't want to talk to him any more." . . . .

[Footnotes and references to the charging documents omitted]

CIVIL RIGHTS ACT CIVIL LIABILITY: AFTER RECONSIDERATION, NINTH CIRCUIT PANEL STICKS WITH ITS 2018 FOURTH AMENDMENT RULING THAT AN IRS AGENT PARTICIPATING IN EXECUTION OF A SEARCH WARRANT VIOLATED A RESIDENT'S PRIVACY RIGHTS IN OBSERVING THE RESIDENT <u>VERY CLOSELY</u> DURING THE RESIDENT'S TRIP TO THE HOME'S BATHROOM

In Ioane v. Hodges, ___ F.3d ___ , 2019 WL ___ (9th Cir., September 19, 2019), a three-judge Ninth Circuit panel, after taking one year to consider a motion for reconsideration, issues an opinion that has some revisions but contains the same essential constitutional and Civil Rights Act analysis as set forth in the same case in Ioane v. Hodges, 903 F.3d 929 (9th Cir., September 10, 2018). The Court holds that, viewing the allegations by plaintiff in the best light for plaintiff, an IRS agent is not entitled to qualified immunity because the female officer's very close watch on a female resident during the latter's toilet trip violated clearly established Fourth Amendment privacy case law.

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

LEGAL UPDATE EDITORIAL NOTE: I digested this case at pages 9-13 of the September 2018 Legal Update. I can email a PDF of the September 2018 Legal Update to anyone who asks me at [jrwasberg@comcast.net].

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WASHINGTON STATE SUPREME COURT

INDEPENDENT GROUNDS INTERPRETATION OF THE WASHINGTON CONSTITUTION: 5-4 VOTE HOLDS THAT EMERGENCY AID FUNCTION OF THE COMMUNITY CARETAKING EXCEPTION TO THE WARRANT REQUIREMENT IS NOT APPLICABLE WHERE OFFICERS INVESTIGATING A POSSIBLE HOMICIDE/DEAD BODY IN A HOME ENTERED THE HOME WITH "SIGNIFICANT" SUSPICION THAT EVIDENCE OF A CRIME WAS IN THE HOME

State v. Boisselle, ___ Wn.2d ___ , 2019 WL ___ (September 12, 2019)

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LEGAL UPDATE INTRODUCTORY EDITORIAL NOTE QUOTING FROM WAPA STAFF ATTORNEY PAM LOGINSKY REGARDING THE BOISEELLE DECISION: In a "Case Note" on the website of the Washington Association of Prosecuting Attorneys, WAPA staff attorney Pam Loginsky summarizes as follows the elements of the Washington constitution's independent Community Caretaking Exception to the Search Warrant Requirement, as re-defined in the Washington Supreme Court Majority Opinion in Boisselle:

> **The test for evaluating whether an officer exercised his or her community caretaking function when conducting a warrantless search is multi-part:**
>
> **(1) Was the community caretaking exception used as a pretext for criminal investigation? If the court finds pretext, the analysis ends. If the court determines that the [invoking of the] exception was not a pretext, the analysis continues.**
>
> **(2)(a) If the search fell within an officer's general community caretaking function, such as the performance of a routine check on health or safety, the court must determine whether the search was "reasonable." "Reasonableness" depends upon a balancing of a citizen's privacy interest in freedom from police intrusion**

against the public's interest in having police perform a community caretaking function.

(2)(b) If the search fell within an officer's emergency aid function which arises from a police officer's community caretaking responsibility to come to the aid of persons believed to be in danger of death or physical harm, the court, before determining whether the search is "reasonable," must first determine whether:

- **(1) the officer subjectively believed that an emergency existed requiring that he or she provide immediate assistance to protect or preserve life or property, or to prevent serious injury,**
- **(2) a reasonable person in the same situation would similarly believe that there was a need for assistance, and**
- **(3) there was a reasonable basis to associate the need for assistance with the place searched.**

I agree with that summary of the re-defined rule. I also agree with Ms. Loginsky's summary, as follows, of the rulings in the Boisselle Majority Opinion:

The officer's warrantless entry into the defendant's duplex in this case violated article I, section 7 [of the Washington constitution] because their emergency aid function search was a pretext for a criminal investigation as the officers were suspicious, if not convinced, that a crime had taken place before entering the unit. When an officer makes a warrantless entry with suspicions that a crime has been committed, the entry must be tested under the "exigent circumstances exception to the warrant requirement."

The Washington Supreme Court declined to adopt a new rule permitting law enforcement officers to make warrantless searches of homes under the community caretaking exception in order to recover decomposing bodies.

[**Editor's note by Pam Loginsky: If police have probable cause to believe a decomposing body or corpse is in a home the search warrant application may allege a violation of RCW 68.50.020 (failure to notify coroner of the existence and location of human remains). The warrant application will need to include a statement about contacting coroner or medical examiner's office and that they had no record of a death reported at the address to be searched.].**

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Facts and Proceedings below: (Excerpted from the Boisselle Majority Opinion)

On August 13, 2014, a passerby notified law enforcement of a man fleeing the scene of a roadside fire. [Auburn Police Detective A] responded to the fire and located a pile of charred, bloodied debris, including carpet, carpet padding, laminate flooring, a towel, and a spent bullet casing. Due to the amount of blood on the items, [Detective A] " feared . . . that someone could be either seriously injured on the side somewhere, or deceased" and initiated a missing person/homicide investigation. [Detective A] sent the items to the crime lab for DNA (deoxyribonucleic acid) testing, which rendered a match

to Brandon Zomalt. Later in his investigation, [Detective A] identified Boisselle as a suspect.

At 6:38 p.m. on September 1, South Sound 911 received an anonymous call regarding a possible homicide at a duplex unit in Puyallup. The anonymous caller reported that a friend named Mike said that he had shot and possibly killed someone at the duplex unit in self-defense. Soon after, the Puyallup Police Department's tip line received a similar anonymous call reporting a possible dead body in the unit.

Law enforcement was subsequently dispatched to the duplex unit. Pierce County Sheriffs Deputies [B and C] responded to the residence at approximately 6:50 p.m. Both Deputies [B and C] knocked on the front door of the unit multiple times, but they did not receive a response. The deputies proceeded to walk around the duplex and heard a dog barking aggressively inside the unit as they approached. The deputies could not see inside the unit as the lights were off and the blinds and curtains were drawn throughout.

Pierce County Sheriff's Sergeant [D] arrived at the duplex unit around 7:13 p.m. Sergeant [E] soon after. Due to the nature of the anonymous phone calls, both Sergeants [D and E] "wanted to confirm, as best [they] could, that there may or may not have been a crime, or there may or may not have been a victim." While walking around the unit, [Sergeant E] noted a foul odor emanating from the garage. He believed the smell was either rotting garbage or a decomposing body.

As [Sergeants D and E] approached a sliding glass door at the rear of the duplex unit, the dog inside came up to the door and pushed aside the blinds covering the door, allowing the sergeants to see inside the unit. [Sergeant E] saw furniture overturned in the living room of the unit and signs of a struggle. [Sergeant D] also noted that carpet in the living room had been ripped out, which "is never a good sign in police work. It's something that's sometimes used to cover up a crime scene." [Sergeant E] determined "[i]t's a very suspicious welfare check at this point" and called animal control to secure the dog inside the unit in case he and [Sergeant D] decided to enter the home.
.
The deputies and [Sergeant D] began contacting neighbors to obtain more information. Neighbors stated that a man named Mike lived in the duplex unit and that although there was usually heavy traffic in and out of the unit, they had not seen anyone in the last four or five days. The officers determined that the duplex unit was Boisselle's last known address.

[Sergeant E] then noticed a man across the street taking particular interest in law enforcement's activities. [Sergeant E] approached the man, who identified himself as Christopher Williamson. Williamson stated that his friend Zomalt lived in the duplex with Boisselle and that he had not seen Zomalt in several weeks. Williamson also mentioned that Zomalt was associated with a missing person investigation in Auburn and asked if the officers "had details [on the] location of [Zomalt's] body."

At approximately 8:00 p.m., there was a phone call between [Sergeant E] and [Detective A] It is unclear from this court's record who made initial contact with whom, and the exact content of the phone call is not part of this court's record.

During the call, [Detective A] informed [Sergeant E] of the roadside fire and the missing person/homicide investigation concerning Zomalt. [Detective A] also stated that he would be interested to know whether any carpet was missing from the duplex unit. Shortly after, a second phone call between [Sergeant E] and [Detective A] took place; the record is silent as to what was discussed during this second call.

Both Sergeants [D and E] decided to enter the unit and conduct a warrantless search, believing the emergency aid function of the community caretaking exception to the warrant requirement justified entry. [Sergeant D] noted that he had "suspicion of a crime." [Sergeant E] determined:

> Dealing with a suspicious welfare check and possibly someone that's down inside, has been hurt or dead, we don't know. So at that point I'm thinking the bottom line is you can't walk away from this. You have got a duty to do something. There's too much information to say that . . . something possibly happened inside. With what we . . . observed, the information I received from [Detective A], the two anonymous tips, you can't just walk away from something like that.

Law enforcement and animal control entered the duplex unit at 8:20 p.m. The officers located Zomalt's body in the garage of the unit and later secured a warrant to search the remainder of the home.

The State charged Boisselle with first degree murder or, in the alternative, second degree murder, and second degree unlawful possession of a firearm. Prior to trial, Boisselle moved to suppress evidence obtained as a result of the warrantless search of his home. Boisselle argued that the officers' warrantless search did not fall within the emergency aid function because the officers did not subjectively believe that someone was inside the home needing assistance for health and safety reasons.

The trial court denied Boisselle's motion to suppress and issued findings of fact and conclusions of law. The trial court ultimately concluded that the officers' entry into Boisselle's home fell within the community caretaking exception because the officers subjectively believed that either Zomalt or Boisselle "could be dead or injured and therefore require assistance for health or safety reasons." The trial court also concluded that the officers were not motivated to enter the unit to investigate a potential crime and that their entry was not a pretext for conducting an evidentiary search.

Following a jury trial, Boisselle was convicted of second degree murder and second degree unlawful possession of a firearm. Boisselle appealed his convictions, arguing that the trial court erred in denying his motion to suppress because the officers' search of his home did not fall within the emergency aid function of the community caretaking exception under either article I, section 7 of the Washington Constitution or the Fourth Amendment to the United States Constitution. State v. Boisselle, 3 Wn. App. 2d 266, 276-77 (2018).

The Court of Appeals affirmed Boisselle's convictions, holding that the officers' search was permissible because they had a reasonable belief that someone inside the duplex unit likely needed aid or assistance.

[Case citation revised for style; some paragraphing revised for readability]

ISSUE AND RULING: Law enforcement received two anonymous 911 calls reporting a possible homicide having occurred in Boisselle's duplex unit. When the officers arrived at Boisselle's duplex unit, they noticed a smell that could be attributed to a decomposing body, and they sought to confirm whether a crime had been committed or if a crime victim was inside. The officers were eventually able to see into the unit and saw signs of a struggle and missing carpet, which could be a sign that someone sought to cover up a crime scene. The officers spoke with another officer and learned that it was suspected that Boisselle's unit may be related to an ongoing missing person/homicide investigation in which Zomalt had been identified as a victim. The officers confirmed that Zomalt was living in the duplex unit with Boisselle and that no one had seen either man for at least several days. The officers then decided to make entry and conduct a warrantless search of Boisselle's home, nearly two hours after they had arrived at the residence.

1. Do these circumstances establish that the officers acted on pretext such that this case does not come within the Washington constitution's "medical aid exception to the community caretaking function" exception to the search warrant requirement? (ANSWER BY SUPREME COURT: Yes, rules a 5-4 majority)

2. Should the Washington constitution recognize a rule permitting law enforcement officers to make warrantless searches of homes under the community caretaking exception in order to recover decomposing bodies? (ANSWER BY SUPREME COURT MAJORITY: No, declares a 5-member majority; the four Justices in dissent in this case also recognize that there is not a broad dead body exception to the search warrant requirement, but they argue for application of the community caretaking function based on the totality of the facts in this case)

VOTING: In the majority against the State are author Owens joined by Justices McCloud, Yu, Fairhurst and Madsen. In dissent in favor of the State's position are author Stephens joined by Justices Wiggins, Johnson and Gonzalez.

Result: Reversal of Division One Court of Appeals decision that affirmed the Pierce County Superior Court judgment on jury verdict against Michael Clifford Boisselle, Jr., finding him guilty of Second Degree Murder and Second Degree Unlawful Possession of a Firearm; case remanded for possible re-trial.

ANALYSIS BY WASHINGTON SUPREME COURT MAJORITY:

1. The Emergency Aid Function Of The Community Caretaking Function Does Not Apply

The Supreme Court Majority Opinion frames its analysis exclusively under article I, section 7 of the Washington constitution and does not address whether the Fourth Amendment is less protective of privacy. The Majority Opinion clarifies the boundaries of the Community Caretaking Exception to the constitutional search warrant requirement.

The Opinion states that there are two separate and distinct prongs to the Community Caretaking Exception. The first prong allows law enforcement officers to conduct "**routine checks on health and safety**."

The second prong allows for searches under law enforcement's **Emergency Aid Function**.

The Majority Opinion asserts that this case must be analyzed under the second prong, which has been characterized in a variety of ways in past Washington Supreme Court decisions. The Majority Opinion asserts that the Court has decided in this case to redefine the test.

Before setting out the revised definition of the standard, however, the Majority Opinion first states that the test has long required, per State v. Kinzy, 141 Wn.2d 373, 385 (2000), before turning to the elements of the test, that courts determine whether an officer's actions were "total divorced" from the detection and investigation of criminal activity. It must first be determined that the exception was not used as a pretext for a criminal investigation.

The Majority Opinion in Boiselle continues as follows, first setting out the revised definition of the standard, and **then proceeding to rule that the failure of the State to pass the threshold pretext test resolves this case**:

> [W]e hold that the emergency aid function of the community caretaking exception applies when (1) the officer subjectively believed that an emergency existed requiring that he or she provide immediate assistance to protect or preserve life or property, or to prevent serious injury, (2) a reasonable person in the same situation would similarly believe that there was a need for assistance, and (3) there was a reasonable basis to associate the need for assistance with the place searched.
>
> . . . .
>
> . . . . We hold that the officers' warrantless search of Boisselle's home was a pretext for a criminal investigation. Accordingly, the officers' warrantless search violated article I, section 7, and the trial court erred in denying Boisselle's motion to suppress.
>
> . . . .
>
> To determine whether the law enforcement officers exercised their emergency aid community caretaking function in conducting a warrantless search of Boisselle's home, we must answer the threshold question of whether the officers' search was a pretext for a criminal investigation. A pretextual search occurs when officers rely on some legal authorization as a mere pretense "to dispense with [a] warrant when the true reason for the seizure is not exempt from the warrant requirement." When determining whether a given search is pretextual, "the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior."
>
> .
>
> Viewing the totality of the circumstances, we are unconvinced that the officers' search of Boisselle's home was not a pretext for a criminal investigation. Law enforcement's involvement began because of two anonymous 911 calls reporting a crime. When the officers arrived at Boisselle's duplex unit, they noticed a smell that could be attributed to a decomposing body, and they sought to confirm whether a crime had been committed or if a crime victim was inside. The officers were eventually able to see into the unit and saw signs of a struggle and missing carpet, which could be a sign that someone sought to cover up a crime scene.
>
> The officers spoke with [Detective A] after [Zomalt's friend, Williamson] asked about the location of Zomalt's body. [Detective A] notified the officers that Boisselle's unit may be related to an ongoing missing person/homicide investigation in which Zomalt had been

identified as a victim. The officers confirmed that Zomalt was living in the duplex unit with Boisselle and that no one had seen either man for at least several days.

The officers also had suspicions that a crime had taken place and that "[w]ith what [they] observed, the information . . . from [Detective A], the two anonymous tips, you can't just walk away from something like that." The officers then decided to make entry and conduct a warrantless search of Boisselle's home-nearly two hours after they had arrived at the residence.

Taken together, these facts demonstrate that the officers were suspicious, if not convinced, that a crime had taken place. Because of the officers' significant suspicions, the search of Boisselle's home was necessarily associated with the detection and investigation of criminal activity. . . . While the officers purportedly entered Boisselle's home to render aid or assistance, the officers were not solely motivated by a perceived need to provide immediate aid. Indeed, the trial court found that the officers "were not able to confirm an immediate emergency existed."

Instead, the officers sought to perform their official duties to uncover whether a crime had taken place and whether a crime victim was located inside Boisselle's home. When officers act to uncover criminal activity, their actions are of the very type that article I, section 7's warrant requirement is directed. . ;. .

Although the trial court concluded that the officers' warrantless search of Boisselle's home was not pretextual, we hold that the trial court's findings of fact do not support such a conclusion. Because the officers had significant suspicions of criminal activity, the officers were conducting a criminal investigation, and there was no present emergency, it was objectively unreasonable for the officers to conduct a warrantless search of Boisselle's home.

Consequently, it appears that the officers used the emergency aid community caretaking function as a mere pretense for an evidentiary search. Accordingly, the officers' warrantless search of Boisselle's home was pretextual and did not fall under the emergency aid function of the community caretaking exception. . . .

Importantly, we note that our holding does not prevent law enforcement from conducting a warrantless search of a home for purposes of a criminal investigation when exigent circumstances are present. The emergency aid doctrine is different from the 'exigent circumstances' exception to the warrant requirement." Although both doctrines involve situations where law enforcement must act immediately, "[u]nlike the exigent circumstances exception, 'the emergency [aid] doctrine does not involve officers investigating a crime.'" . . .

[Some citations omitted; some paragraphing revised for readability]

2. <u>There Is No "Dead Body" Exception To The Warrant Requirement</u>

The <u>Boisselle</u> Majority Opinion rejects what it asserts is a request from the State for a "dead body" rule under the Community Caretaking Function rule, which would allow warrantless entries into homes to recover decomposing bodies. The Majority Opinion explains:

> The State suggests that "[w]hether criminal agency is suspected, or not, the need to humanely recover the dead body remains a constant community caretaking need." Although a number of activities fall within law enforcement officers' community caretaking functions, not every exercise of a caretaking function will fall within the community caretaking exception.
>
> The defining characteristic of the community caretaking exception under article I, section 7 is that the warrantless search is totally unrelated to the criminal investigation duties of police and is not a pretext for a criminal investigation. Accordingly, granting law enforcement officers unfettered authority to enter homes and search for decomposing bodies would contravene article I, section 7 and eviscerate the community caretaking exception. Because the community caretaking exception to the warrant requirement adequately provides for the recovery of decomposing bodies, we decline to adopt the State's proposed "dead body" rule.

[Paragraphing revised for readability]

DISSENTING OPINION

Justice Stephens authors a dissenting opinion that is joined by Justices Wiggins, Johnson and Gonzalez. The Dissent points out that the officers had mixed motives – both investigatory and community caretaking – and that the community caretaking rationale justified the entry under the particular facts of this case. The dissent points out that mixed motives do not necessarily make a traffic or investigatory stop pretextual, and that a similar, more nuanced and more reasonable/totality of the circumstances, approach should be taken for community caretaking function entries of all types.

LEGAL UPDATE EDITORIAL NOTES REGARDING THE DOG IN THE HOUSE:

1. The Supreme Court in Boisselle essentially ignored the presence of the possibly starving dog in the house.

In the Court of Appeals, the Boisselle COA Majority Opinion concluded that circumstances were emergent for two reasons: (1) because the officers needed to get inside to quickly determine the need for assistance of any living person inside; and (2) to remove any dead body that was at risk of being consumed by a possibly starving carnivorous animal. Neither of the Opinions in the Supreme Court addresses the theory that a dead body might be consumed by a starving dog. I reviewed the Supreme Court briefs in this case, as well as listening to the Supreme Court oral argument on TVW. The State did not expressly abandon that alternative theory about the possibly starving dog. I do not know why neither of the Supreme Court Opinions addressed the theory put forward by the Court of Appeals, if only to reject it as a stretch of imagination. Such a response to the Court of Appeals discussion would seem best practice in Supreme Court opinion-writing and decision-making.

2. The Majority Opinion for the Supreme Court in Boisselle notes that a warrant can be obtained to rescue a possibly starving animal.

The Majority Opinion in Boisselle contains a footnote pointing out that RCW 16.52.085(1) in the RCW chapter on "Prevention of Cruelty to Animals" provides authority to seek a warrant to retrieve an animal under the apparent circumstances of this case:

It is also important to note that our holding does not prevent law enforcement from entering a home to retrieve an abandoned, starving animal. See RCW 16.52.085(1) ("If a law enforcement officer or animal control officer has probable cause to believe that an owner of a domestic animal has violated this chapter ... the officer may authorize, with a warrant, the removal of the animal to a suitable place for feeding and care.").

INDEPENDENT GROUNDS INTERPRETATIONS OF THE WASHINGTON CONSTITUTION ON (1) AUTOMATIC STANDING AND (2) INVENTORY SCOPE: DEFENDANTS HELD TO HAVE "AUTOMATIC STANDING" TO CHALLENGE THE SCOPE OF A WARRANTLESS INVENTORY SEARCH OF A STOLEN VEHICLE; BUT THE SCOPE OF THE NON-PRETEXTUAL SEARCH IS HELD IN A 5-4 RULING TO HAVE BEEN PROPERLY EXTENDED TO OPENING AN INNOCUOUS, UNLOCKED CONTAINER (WHICH, UNLIKE LUGGAGE, A PURSE, OR A SHAVING KIT, DID NOT HAVE AN "AURA OF PRIVACY") OF UNKNOWN OWNERSHIP FOUND IN THE PASSENGER AREA IN A STOLEN VEHICLE THAT WAS ASSOCIATED WITH THE DEFENDANTS, WHO WERE APPREHENDED JUST AFTER BURGLARIZING A HOME

State v, Peck, State v. Tellvik, ___ Wn.2d ___ , 2019 WL ___ (September 26, 2019)

Facts and Proceedings below: (Excerpted from Supreme Court majority opinion)

On Friday, January 23, 2016, Michael Peck and Clark Tellvik were seen on a security camera, burglarizing a home. The owner of the home was demonstrating her home's new surveillance system to a friend on her phone when she saw the crime in progress. She called 911, and officers arrived at the home within minutes.

When officers arrived, a Dodge Dakota pickup truck was stuck in the snow in front of the house. Peck and Tellvik were outside the truck, trying to free it from the snow. The officers contacted Peck and Tellvik, frisked them, and detained them.

Additional responding officers arrived within minutes, ran the registration of the vehicle, and discovered it was stolen. At this point, it was about 1:21 a.m. The officers arrested Peck and Tellvik for possession of a stolen vehicle.

After Peck and Tellvik were read their Miranda rights. Peck agreed to speak with an officer. Peck said he had been picked up earlier in the day in the Dodge Dakota pickup by Tellvik. Peck told the officer that he had never seen Tellvik drive the pickup and that Tellvik started it with a screwdriver.

The officer asked if Peck and Tellvik had gone in any of the buildings or the house. Peck assured the officer that they had not. The officer also asked Peck if he had anything in the vehicle. After some equivocation. Peck said that a cell phone, a car battery, and a small bag of tools belonged to him. Peck told the officer that the vehicle was not running well, so they brought the battery and tools just in case the truck broke down. Peck told the officer nothing else in the truck belonged to him.

Soon after the officer was done talking with Peck, the homeowner arrived. She confirmed with the police officers that she did not know either Peck or Tellvik and that

they did not have permission to be on her property. She also confirmed that her outbuilding, which was open, had been locked when she left.

When asked about the battery and the bag of tools Peck claimed, the homeowner said they were hers and that they had been stored in the outbuilding. The officers found a pry bar in the snow beneath the Dodge Dakota's driver's side door and it appeared from the latch and door of the outbuilding that it had been pried open. The officers accompanied the homeowner into the outbuilding and determined that somebody had been inside.

Peck and Tellvik were taken from the scene. Because the pickup was stolen and stuck on private property, the officers impounded the vehicle and called for a tow truck. Before the tow truck arrived, an officer conducted an inventory search. When asked at trial why he inventoried the vehicle, the officer testified:

> A: We want to make sure there's nothing inside that vehicle that the owner could be held responsible for if it's illegal. We don't want to return any drugs, any weapons, anything with that vehicle that shouldn't be in it. We want to go through the inside of the vehicle, make sure there's nothing unsafe, nothing illegal in there.
>
> Q: Okay. All right. So that's one - - that's one purpose for it. And, what's another purpose for an inventory search?
>
> A: Another purpose, to inventory what items are in the vehicle. Another purpose also is if you get an occupied stolen to remove the property of the-occupants, so it's not returned to the owner of the vehicle.
>
> Q: Okay. And-when you want to make a list of the stuff, what - - what purpose does that serve?
>
> A: To show a list of what was in the vehicle.
>
> Q: Okay. And why would you - - why would you care?
>
> A: Just in case someone claims that their diamond ring was left in that car and now it's gone.
>
> Q: Okay. So, - - so who does it protect?
>
> A: Everyone.
>
> Q: And by everyone, it protects - - the sheriff's office?
>
> A: Sheriff's office, the registered owner, the other folks who have property inside that vehicle, their property isn't given away to someone it's not supposed to.
>
> Q: And how about the tow company?
>
> A: It also protects the tow company, yes.

When asked if searching for something specific, the officer responded:

> A: No. The main thing with one of these searches is to make sure you haven't got something dangerous that can go back to the owner. A good example is a case they had in Seattle recently where a stolen Jeep was returned to the owner, and it's full of used hypodermic needles. The last thing I want is to hop into my rig and reach down - - seats and get - - poked by somebody's (inaudible). And I'd feel the same way - - -any vehicle that we return to an owner.

During the inventory search, the officer discovered that the ignition was punched out. The officer saw a "black zippered nylon case" that seemed to hold CDs (compact disks), and opened it. When asked why he opened it, he responded, "No telling what could be in it." And he further testified that "I didn't know if it belonged to the owner of the truck. It could very well have registration documents in it. It could have belonged to one of the subjects that were there that night."

Inside the black zippered nylon case was packaged methamphetamine, an electronic scale, and a smoking pipe. The State charged Peck and Tellvik with several crimes, including possession of a controlled substance with intent to deliver. Peck and Tellvik moved to suppress the contents of the black zippered nylon case. The trial court denied the motion to suppress, finding the inventory search to be proper and finding no evidence of pretext. ("I didn't see anything out of the ordinary here that would make me think that [the officer] was trying to use the inventory search to try to-bypass a warrant requirement.").

Peck and Tellvik were subsequently convicted. Both appealed their controlled substance convictions. The Court of Appeals reversed the trial court's denial of the motion to suppress.

[Some paragraphing revised for readability]

ISSUES AND RULINGS: (1) The defendants were apprehended as burglary suspects, and were in possession of a stolen car. They were subsequently charged with possession of illegal drugs found in an inventory of the impounded car. Do the defendants have standing to challenge the scope of the inventory search? (ANSWER BY SUPREME COURT: Yes, agree all nine justices, because the circumstances meet the two basic requirements for automatic standing under the Washington constitution: (A) they were charged with a crime – possession of illegal drugs – where possession is an essential element, and (B) they were in possession of the illegal drugs at the time of the search)

(2) The officers lawfully impounded the stolen, stuck-in-the-snow car. During an inventory of the passenger area of the car, they came upon a black zippered nylon case that seemed likely to contain CDs. Past appellate court decisions have held that a closed purse, shaving kit or luggage should not be opened during an inventory search absent "manifest necessity." The closed zippered container here did not have the "aura of privacy" of a purse, shaving kit or luggage. Under the circumstances of this case involving inventorying the contents of a stolen car, did the scope of the inventory search lawfully extend to opening the zippered container and inspecting its contents? (ANSWER BY SUPREME COURT: Yes, rules a 5-4 majority)

NOTES ON WASHINGTON SUPREME COURT VOTING IN THIS CASE AND IN BOISSELLE: In the majority for the State's position on inventory scope are author Justice Gonzalez

and Majority Opinion signees Owens, Wiggins, Stephens and Johnson. In dissent on the inventory scope issue – i.e., voting against the State – are author Justice McCloud and Dissenting Opinion signees Justices Fairhurst, Madsen and Yu. Thus, Justices McCloud, Fairhurst, Madsen and Yu voted against the State's position in both of the search and seizure cases (Boisselle, see above, and Peck/Tellvik) digested in this September 2019 Legal Update.

Result: Reversal of unpublished Division Three Court of Appeals decisions that reversed the Kittitas County Superior Court (1) convictions of Michael Nelson Peck and Clark Allen Tellvik for possession of a controlled substance with intent to deliver; and (2) denial of defendants' motions to suppress.

ANALYSIS: (Excerpted from Supreme Court Majority Opinion; subheadings revised)

1. Defendants Have Automatic Standing Under The Washington Constitution

> First, we must decide whether the defendants have standing to challenge the search. The State argues Peck and Tellvik do not have standing because a thief should have no privacy interest that overrides that of the true owner. But in our state [under article I, section 7 of the Washington constitution], a defendant has automatic standing to challenge a search if (1) possession is an essential element of the charged offense and (2) the defendant was in possession of the contraband at the time of the contested search or seizure. . . . And a defendant has automatic standing to challenge the legality of a seizure '"even though he or she could not technically have a privacy interest in such property." . . .
>
> Peck and Tellvik have automatic standing to challenge the inventory search. The first prong of the test is satisfied because both were charged with possession of a controlled substance with intent to deliver. *See* RCW 69.50.401(1).
>
> The second prong is satisfied because Peck and Tellvik were in possession of the truck up until the time of the search. As such, Peck and Tellvik have automatic standing to challenge the warrantless inventory search of the black zippered nylon case.
>
> The dissent claims that we "eviscerate[] automatic standing." We do not. Peck and Tellvik have automatic standing to challenge the admission of evidence found during the inventory search. Because we find Peck and Tellvik have automatic standing to challenge the inventory search, we address the propriety of the search.

2. The Scope Of The Inventory Search Of The Stolen Vehicle Occupied By The Suspected Thieves Was Lawful Under The Facts Of This Case

> One of [the] narrow exceptions [to the search warrant requirement of the Washington constitution] is a non-investigatory inventory search. Inventory searches have long been recognized as a practical necessity. State v. Tyler, 177 Wn.2d 690, 700-01 (2013) (citing State v. Gluck, 83 Wn.2d 424, 428 (1974)). To be valid, inventory searches must be conducted in good faith and not as a pretext for an investigatory search. [Tyler]. at 701 (citing State v. Houser, 95 Wn.2d 143, 155 (1980)).
>
> Inventory searches are also limited in both scope and purpose. As we held in Tyler, "Warrantless inventory searches are permissible because they (1) protect the vehicle

owner's (or occupants') property, (2) protect law enforcement agencies/officers and temporary storage bailees from false claims of theft, and (3) protect police officers and the public from potential danger." Tyler, 177 Wn.2d at 701 (citing State v. White, 135 Wn.2d 761, 769-70 (1998)).

[Court's Footnote: *A "bailee" is "[s]omeone who receives personal property from another, and has possession of but not title to the property. A bailee is responsible for keeping the property safe until it is returned to the owner." Black's Law Dictionary 173 (11th ed. 2019).]*

"Unlike a probable cause search and search incident to arrest, officers conducting an inventory search perform an administrative or caretaking function." State v. VanNess, 186 Wn. App. 148, 162, 344 P.3d 713 (2015) . . .. Here, because we are not faced with a locked container, we do not opine on the propriety of law enforcement's opening of a locked container in the context of an inventory search.

Peck and Tellvik argue there is no constitutional difference between a locked container and one that is merely closed. Having examined the three cases [that they cite], we disagree.

First, in Houser, the defendant was charged with two counts of possession of a controlled substance. The charges were based on drugs found by police after impounding the defendant's vehicle. The police opened the locked trunk and searched a shopping bag, within which was a closed toiletry bag that the police also opened and found drugs. . . .

Contending that the evidence obtained during the inventory search should have been suppressed by the trial court, the defendant challenged the propriety of the impoundment as well as the scope of the search. We held (1) the impoundment was unconstitutional, (2) opening the locked trunk in the course of an inventory search was unconstitutional, and **(3) opening the closed luggage within the locked trunk was unconstitutional**. . . .

The third holding [in Houser] is pertinent here: "where a closed piece of *luggage* in a vehicle gives no indication of dangerous contents, an officer cannot search the contents of the luggage in the course of an inventory search unless the owner consents." When read in context, two things are clear: (1) the Houser court, similar to the Wisdom court, relied heavily on the personal and private nature of luggage and (2) based on the personal and private nature of luggage, the court announced a rule regarding only luggage, not all closed containers.

Indeed, in coming to the holding, we framed the issue as "the issue of whether the contents of unlocked luggage found within an automobile may be examined in the course of an inventory search." And to be sure, we emphasized the privacy interests in personal luggage by contrasting other types of closed containers and packages "e.g., a kit of burglar tools or a gun case," which do not implicate the same privacy interests.

Finally, the closed luggage was removed from the locked trunk of an unlawfully impounded vehicle, and the owner did not consent to the search of his luggage. Here, there was no closed *l*uggage, and the closed nylon case was not found in the defendant's vehicle's locked trunk – it was found in the passenger compartment of a

known stolen vehicle with shattered back windows and a punched-out, screwdriver-started ignition that was properly impounded. We did not announce a categorical rule against opening closed containers in the course of an inventory search, and given the vastly different facts, Houser does not control.

Second, in Wisdom, the Court of Appeals focused on the intimate nature of the closed container in question before finding that "a zipped shaving kit bag found on the seat of a truck" should have been suppressed. Relying on Houser, the court stated that "Washington courts recognize an individual's privacy interest in his closed luggage, whether locked or unlocked." . The Wisdom court focused on the privacy interest in a purse "because of the secrets obtained therein" and likened rummaging through a purse to rummaging through a shaving kit. And finally, a "citizen places personal items in luggage in order to transport the items in privacy and with dignity." The Wisdom court, similar to the Houser court, placed great emphasis on the intimate nature of the closed shaving kit bag – considerations that do not arise here.

And third, in White, we considered whether officers could lawfully open the locked trunk of a vehicle during an inventory search. Specifically, we considered whether a trunk release mechanism diminished an individual's privacy interest in a locked trunk. We found it did not. We restricted our holding to law enforcement's opening of the locked trunk and explicitly declined to opine on the opening of a closed container found therein. ("We do not address the impound issue or the search of the closed tackle box because the permissible scope of an article I, section 7 inventory search has been exceeded.").

We emphasized the significance of the trunk being locked, and held, "Whether a locked trunk is opened by a key or a latch, it is still locked." And therefore, "We hold the use of the trunk release mechanism in this case is still the warrantless search of a locked trunk, which brings this case squarely under the [second] holding of Houser." But a locked trunk is not at issue here. As such, like Houser, White does not control. We reject Peck and Tellvik's attempt to treat the nylon case as a locked container.

Whether this was a proper inventory search turns, in part, on the context here. First, the police knew the vehicle was stolen. Second, Peck and Tellvik were arrested while in the process of burglarizing a home and were observed taking items from the home and its surroundings. Responding officers testified that a purpose in conducting an inventory search of the truck was to determine ownership of both the truck and its various contents. Third, the search was not pretextual.

And finally, the innocuous nature of the container at issue is important: a nylon case that looked like it contained CDs does not possess the same aura of privacy as a purse, shaving kit, or personal luggage. Under these circumstances, it was proper for police to do more than merely inventory the unlocked nylon case as a sealed unit.

The first purpose of an inventory search is to protect the owner's property. It would undermine this purpose to require the case to be inventoried simply as a closed container. Here, there was no readily available way to know who the owner of the property was.

The only people present at the time of the arrest were Peck and Tellvik, and Peck disclaimed ownership of most of the property inside the stolen vehicle. The property

could belong to any number of people, including the stolen vehicle's owner, the owner of the burglarized home, or even Peck and Tellvik.

In Houser, a case that did not involve a stolen vehicle, we deemed intrusion into a car's unlocked glove compartment "reasonable in light of the valid objectives of an inventory search because documents of ownership and registration are customarily stored in the glove compartment and it often serves as a place for the temporary storage of valuables." Under these circumstances, neither logic nor experience illuminates a difference between an unlocked glove compartment and an unlocked nylon case.

The second purpose of an inventory search is to protect bailees from the true owners' claims that their property was damaged after it was taken into police custody. Under these circumstances – where it is clear the car was stolen and the ownership of its contents was unknown – a full accounting of the containers' contents is a reasonable way to safeguard bailees.

Additionally, inventorying the contents protects the vehicle's owner from being presented with drugs, guns, or property that simply does not belong to them when the stolen vehicle is returned. Perhaps most importantly, one of the officers testified that the container "could very well have registration documents in it."

For practical reasons, an inventory search of a vehicle known to be stolen is simply different from other inventory searches. Compare State v. Lynch, 84 Wn. App. 467, 477-78 (1996) (quoting 3 Wayne R. LaFave, Search and Seizure § 7.4(e) at 568 (3d ed. 1996)). The totality of the circumstances reasonably informs the legitimate scope of the inventory.

In [the case of an inventory search of a stolen vehicle], there is a need to know who owns the vehicle and who owns its contents in order to do an adequate inventory. We conclude that under these circumstances, a proper inventory search of a stolen vehicle extends to opening unlocked, innocuous closed containers in order to determine ownership.

We emphasize that this limited proper purpose cannot be used as a pretext for an investigatory search. Our holding is limited to cases where the circumstances strongly indicate that ownership is unknown. Here, where the vehicle was stolen, Peck and Tellvik were arrested immediately outside of a home that they were currently burglarizing, and the trial court explicitly found no evidence of pretext, the search was proper.

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

DISSENTING OPINION

Justice McCloud authors a dissenting opinion that is joined by Justices Fairhurst, Madsen and Yu. They argue for an extreme privacy protection rule that apparently would absolutely bar opening any container ever in any inventory search (even involving stolen vehicles) except where there exist "manifest necessity" circumstances. Those four justices were in the 5-person majority in Boisselle. Justice Owens was the swing vote in the two cases.

The Dissenting Opinion seems to imply that its view is more persuasive simply because the Dissenting Opinion uses more words (almost 3 times as many) than the Majority Opinion.

LEGAL UPDATE EDITOR'S COMMENT: The Majority Opinion in Peck/Tellvik indicates that the Opinion is merely a fact-based clarification that is consistent with past decisions on the scope of inventory searches. Next summer, I will be revising my Legal Update outline on the CJTC internet LED page to incorporate Peck/Tellvik into the outline, and to revise some of the summary notes relating to prior Washington appellate court decisions. While it is encouraging that a majority of the Washington Supreme Court voted for the State in this case, the subtle and nuanced fact-based analysis may be difficult for law enforcement agencies to synthesize and apply to other fact patterns involving other containers: What containers have an "aura of privacy?" Does the "aura of privacy" question guide inventory scope where a vehicle being inventoried is not suspected to be stolen? As always, I suggest that law enforcement officers/agencies seek guidance from agency legal advisors and local prosecutors on the legal issues addressed in the Legal Update.

JUVENILE'S MIRANDA INVOCATION BEFORE SIGNING DETENTION CENTER INVENTORY FORM BARRED TRIAL COURT FROM LAWFULLY ADMITTING THE FORM IN PROSECUTION FOR UNLAWFUL POSSESSION OF METHAMPHETAMINE, AND THAT TRIAL COURT'S ERROR WAS NOT HARMLESS IN LIGHT OF DEFENDANT'S "UNWITTING" POSSESSION" AFFIRMATIVE DEFENSE AND THE FACTS OF THE CASE

State v. A.M., ___ Wn.2d ___ , 2019 WL ___ (September 12, 2019)

Facts and Proceedings below: (Excerpted from Supreme Court Majority Opinion)

> *Background Facts*
>
> A.M. entered a Goodwill store with two other women, a juvenile and an adult, pushing a shopping cart with a backpack in it. The adult woman put two Halloween costumes in the cart, and A.M. opened the large pocket of the backpack to put the costumes in. The loss prevention officer observed the entire incident on the security cameras in the store.
>
> As the three women were leaving the store without paying for the costumes, A.M. put the backpack on her back. The loss prevention officer stopped A.M. just outside of the store. A.M. was detained and escorted to Goodwill's security room to await police officers. When police arrived, they arrested A.M. for theft.
>
> In a search incident to the arrest, police also searched the backpack and, in one of the smaller outer pockets, found a prescription bottle that looked to be a marijuana dispensary bottle filled with what appeared to be several little "baggies" inside. The officer believed it was methamphetamine and took the baggies for further testing. The substance was confirmed to be methamphetamine.
>
> A.M. was booked in the juvenile detention center. At some point after her arrest, but prior to being booked, A.M. invoked her Miranda rights. A.M. was required to sign an inventory form accounting for her belongings, which read, "I have read the above accounting of my property and money and find it to be accurate. I realize that property not claimed within 30 days will be subject to disposal."

When released, A.M. signed the same form, which stated, "I have received the above listed property." The backpack was listed in the inventory form as part of A.M.'s belongings.

Procedural Facts

A.M. was charged with one count of third degree theft and one count of possession of a controlled substance. The case proceeded to bench trial. At trial, the State sought to admit the detention center inventory form, which indicated the backpack was A.M.'s property. The trial court admitted the form over defense counsel's objection.

A.M. also raised the unwitting possession affirmative defense. She testified that she had no knowledge of the methamphetamine in the backpack and that she got the backpack from the other juvenile's home. A.M. testified it was likely the other juvenile's or the adult woman's backpack and not hers.

The trial court rejected A.M.'s unwitting possession defense and convicted her of both counts.

A.M. appealed her possession of a controlled substance conviction. A.M. raised for the first time on appeal that the admission of the inventory form was a violation of her right against self-incrimination, and she also argued that the unwitting possession defense was a violation of due process. The Court of Appeals declined to review her Fifth Amendment claim, holding that even if there was error, it caused no prejudice to her case and, as such, she does not meet the requirements for RAP 2.5(a)(3). The court also rejected her due process argument.

ISSUES AND RULINGS: 1. Where A.M. invoked her Miranda rights while in custody and then signed a detention center inventory form, did the trial court violate her Miranda rights in admitting into evidence the inventory form? (ANSWER: Yes)

2. Was it harmless error for the trial court to admit the signed inventory form into evidence? (ANSWER: No, defendant was prejudiced by the admission of the inventory form)

LEGAL UPDATE EDITOR'S NOTE REGARDING ISSUE ADDRESSED IN CONCURRING OPINION: Justice McCloud writes a Concurring Opinion joined by Justice Gonzalez arguing that the Supreme Court should invoke constitutional Due Process protections to judicially legislate a mental state element into the Washington statutes on unlawful possession of drugs.

Result: Reversal of decision of Division One of the Court of Appeals that affirmed the Snohomish County Superior Court (juvenile court) adjudication of guilt of one count of third degree theft and one count of possession of a controlled substance.

ANALYSIS: (Excerpted from Supreme Court Majority Opinion)

The trial court violated Miranda in admitting the inventory form into evidence

When A.M. was arrested by police, she invoked her *Miranda* rights. She was unquestionably in custody when she was arrested at Goodwill and transported to the

juvenile detention center. Thus, any words or actions on the part of the police that were reasonably likely to elicit an incriminating response violate the Fifth Amendment.

A.M. was required to sign an inventory form listing the backpack, which held the methamphetamine. Above the signature lines were two statements: "I have read the above accounting of my property and money and find it to be accurate. I realize that property not claimed within 30 days will be subject to disposal" and "I have received the above listed property."

While a standard intake form itself does not necessarily violate a defendant's Fifth Amendment rights, the signed statement on the intake form violated A.M.'s right against self-incrimination. She was clearly in custody, and signing the intake form was involuntary.

At trial, the juvenile center supervisor testified that the juvenile signs the intake form after reviewing it with staff. Any refusal to sign the form or disagreement with the inventory list by the juvenile would be noted on the sheet. Requiring a juvenile to sign a form with that statement would be reasonably likely to elicit an incriminating response from the suspect.

The manifest constitutional error was not harmless

. . . .

During closing arguments, when addressing the unwitting possession defense, the prosecutor stated, "We know that she signed for the backpack, indicated it was her property when she was booked in. We know that she signed for it again when she was released, even though today she has testified that it wasn't her backpack." In essence, the prosecutor directly addressed and contradicted A.M.'s unwitting possession defense by relying on the inventory form to support the conviction. Without the admission of the intake form, the prosecutor would not have been able to use A.M.'s statements in the form to refute her unwitting possession defense.

. . . . A.M. need prove only by a preponderance of the evidence the affirmative defense of unwitting possession. See State v. Deer, 175 Wn.2d 725 (2012) (noting the affirmative defense '"ameliorates the harshness of a strict liability crime.'") A.M. testified that the backpack was not hers and that she believed it belonged to one of the other two women who were with her "[b]ecause it came from their house" and she "[saw the two women] bring it out of their house." The State relied on her property form to counter that testimony.

Further, A.M. testified that she never looked into the outer pocket of the backpack where the methamphetamine was found, and the evidence showed only that A.M. put the costumes into the main pouch of the backpack. She also testified that even though the backpack was not her property, she took it from the detention center only because "it belonged to my best friend and her family at the time."

When A.M. returned the backpack to her friend, she confronted her friend, asking why the methamphetamine was in the backpack. A.M. testified that she never knew methamphetamine was in the bag and that she had never seen the pill bottle or the little baggies before.

> In sum, A.M. testified that the adult female put the children's costumes into the cart and that A.M. placed the costumes into the large pocket of the backpack. The costumes were children's costumes, and A.M. had no children. . . . No witness saw A.M. look into the small side pocket where the drugs were found. The only testimony about ownership of the backpack came from A.M., who said that it came from the adult female's home and that A.M. did not own the backpack. A.M. also testified that the adult female was "under the influence."
>
> At the conclusion of trial, the judge said she did not believe A.M. "perjured herself]." But the only evidence in the record that reasonably contradicts unwitting possession of the methamphetamine is the admitted inventory form signed by A.M. that indicates the backpack as her property. The prosecutor referenced the fact that A.M. signed for the backpack as her own on at least two different occasions in the record. Even though the trial court said the inventory form was "not a big factor," it did consider that evidence in making its decision.
>
> Based on a review of the entire record, it is difficult to say beyond a reasonable doubt, the trier would reach the same conclusion absent the manifest constitutional error.
>
> We hold the admission of the inventory form was manifest constitutional error in violation of A.M.'s right against self-incrimination. As such, we reverse the lower court's decision that the admission of the inventory form was proper.

[Some citations omitted; one citation revised for style; footnotes omitted; some paragraphing revised for style]

SEX OFFENDER'S COMMUNITY CUSTODY CONDITION BARRING HIM FROM LOITERING IN OR FREQUENTING PLACES WHERE CHILDREN CONGREGATE HELD NOT VOID FOR VAGUENESS IN 5-4 VOTE IN WASHINGTON SUPREME COURT

In State v. Wallmuller, ___ Wn.2d ___ , 2019 WL ___ (September 26, 2019), the Washington Supreme Court votes 5-4 to overturn a Court of Appeals decision that held that one of the community custody conditions imposed in sentencing a sex offender violated constitutional Due Process protections by being too vague.

Frank Wallmuller pleaded guilty to first degree rape of a child and sexual exploitation of a minor. He successfully appealed on grounds of sentencing error and imposition of improper community custody conditions, and the Court of Appeals remanded for correction of those errors. On remand, the trial court struck the challenged community custody conditions, but re-imposed three of the original conditions relating to contact with children.

Those conditions read:

> (15) The defendant shall not have contact with minor children under the age of 18 years unless in the presence of a responsible adult who is capable of protecting the child and is aware of the conviction, and contact has been approved by the Community Corrections Officer and the sexual offender's treatment therapist in advance;
>
> (16) The defendant shall not participate in youth programs, to include, but not limited to, sports programs, scouting programs, and school programs;

(17) The defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, campgrounds, and shopping malls.

Defendant appealed to Division Two of the Court of Appeals, which struck down condition # 17 for being too vague. Now, a 5-4 majority of the Washington Supreme Court has held that condition # 17 is sufficiently clear to meet Due Process requirements.

Result: Reversal of Division Two Court of Appeals decision that struck community custody condition # 17 imposed by the Mason County Superior Court.

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WASHINGTON STATE COURT OF APPEALS

WASHINGTON'S FAILURE-TO-REGISTER STATUTE IS HELD UNCONSTITUTIONAL IN IMPOSING A DUTY TO REGISTER AS A SEX OFFENDER BASED ON AN OUT-OF-STATE CONVICTION FOR ACTIONS THAT WOULD NOT BE DEFINED AS A SEX OFFENSE IN WASHINGTON

In State v. Batson, ___ Wn. App. 2d ___ , 2019 WL ___ (Div. I, August 12, 2019), Division One of the Court of Appeals rules that a provision of the Sex Offender Registration Statute, RCW 9A.44.128(10)(h), is unconstitutional to the extent it imposes a duty to register as a sex offender based on an out-of-state conviction for which there is no comparable Washington crime. The Court of Appeals rules that the provision is an unconstitutional delegation of the legislative function to another state in violation of Article II, Section 1 of the Washington constitution.

In the Batson case, the defendant was required to register as a sex offender in Washington because he was required to register in Arizona, the state of his conviction. The defendant's Arizona conviction was for consensual sex with a 16-year-old and was not comparable to a Washington offense because the age of consent in Washington is 16 (with some exceptions: see the exceptions in RCW 9A.44.093 and RCW 9A.44.096 addressing Sexual Misconduct With A Minor).

Result: Reversal of King County Superior Court conviction of Benjamin Batson for felony failure to register as a sex offender.

LEGAL UPDATE EDITORIAL NOTE/COMMENT: It is my understanding that this ruling impacts hundreds of persons in Washington who are "sex offenders" based on out-of-state convictions. The King County Prosecutor's Office has petitioned the Washington Supreme Court for discretionary review. A tentative date for a ruling on the request for further review appears to be December 3, 2019. I think that it is likely that the Washington Supreme Court will grant review, but I would not want to guess how the Court will decide the case if it grants review.

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

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

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

In September 2019, 6 unpublished Court of Appeals opinions fit these categories. I do not promise to be able catch them all, but each month I will make a reasonable effort to find and list all decisions with these issues in unpublished opinions from the Court of Appeals. I hope that readers, particularly attorney-readers, will let me know if they spot any cases that I missed in this endeavor, as well as any errors that I may make in my brief descriptions of issues and case results.

1. State v. Jake Michael Belanger: On September 4, 2019, Division Two of the COA rejects the appeal of defendant from his Pierce County Superior Court convictions for *(A) two counts of possession of a controlled substance with intent to deliver, each with two firearm enhancements; (B) one count of possession of a controlled substance; and (C) two counts of first degree unlawful possession of a firearm.* **The Court of Appeals rules that a Community Corrections Officer had sufficient justification for a CCO search of the defendant's car where:**

> Belanger's failure to report to DOC resulted in a warrant for his arrest. The lawful search of Belanger's person incident to arrest resulted in the discovery of heroin, methamphetamine, and alprazolam pills, in violation of Belanger's community custody conditions. [The CCO] testified that in his experience, a person with controlled substances on his person may have additional controlled substances in the person's vehicle. Additionally, as law enforcement approached Belanger, he was seen reaching down towards the driver's floorboard of the vehicle and [the CCO] believed there was a possibility he was reaching for a weapon he was prohibited from possessing.

2. State v. Tracey Kimberly Bailey; On September 10, 2019, Division Three of the COA rejects the appeal of defendant from his Thurston County Superior Court conviction for *unlawful possession of a controlled substance, methamphetamine*. **The Court of Appeals rules that a law enforcement officer had reasonable suspicion for a Terry stop of a suspected trespasser where:**

> David Brown called the emergency 911 line. Brown called contemporaneously to the incident. He provided an address and a description of the woman who was thereafter found .2 miles away from the address. Brown stated he had allowed Bailey to stay at the residence in the past [but that permission to come on the premises had been withdrawn]. Thus, the information available to the deputy supports the conclusion that the caller was the alleged victim of the unwanted person on his property.

3. State v. Norman Macy Eyle: On September 16, 2019, Division One of the COA rejects the appeal of defendant from his King County Superior Court conviction for *domestic violence assault in the second degree*. At trial, the court admitted statements that the alleged victim made to an emergency room nurse. **The Court of Appeals rules that the statements meet the Sixth Amendment Confrontation Clause's primary purpose test for non-testimonial hearsay**.

4. State v. Timothy James Clinkscales: On September 23, 2019, Division One of the COA rules under the hearsay restrictions in the Rules of Evidence in favor of the appeal of defendant from his Snohomish County Superior Court conviction for *felony violation of a court order with a special finding of domestic violence*. The Court of Appeals remands the case for a new trial. The Court of Appeals rules that the trial court erred in not instructing the jury that it could not consider for the truth of the matter asserted an officer's hearsay testimony that the person who answered the officer's knock at the door identified herself as the woman protected by a no-contact order. That is**, the jury should have been instructed that the officer's hearsay statement could not be considered as proof that the person who answered the door was in fact the person protected by the no-contact order.**

5. State v. Jesus Junior Villareal: On September 30, 2019, Division One of the COA rules against the State's appeal from a Whatcom County Superior Court order in a *methamphetamine possession case* granting defendant's suppression motion on grounds that **defendant was seized in a Terry stop without reasonable suspicion**. The highly fact-based ruling rejects the State's two arguments and holds that (1) Villareal, who was contacted by an officer after having parked his car in a market parking lot, was seized by the officer prior to the officer learning that Villareal did not have a valid driver's license, and (2) the officer's knowledge of a series of commercial burglaries in the area relatively recently (but over a month previously) did not combine with other facts to give the officer reasonable suspicion to believe that Villareal was engaged in unlawful behavior.

6. State v. Kevin Joe Brunson: On September 30, 2019, Division One of the COA rejects defendant's appeal from his King County Superior Court convictions for *seven counts of robbery in the second degree*. The Court of Appeals rules that the trial court did not err (1) in denying his motion to suppress evidence based on his claim that **his extraterritorial arrest by Seattle PD officers in Pierce County** was not supported by **RCW 10.93.070(5)** of the Washington Mutual Aid Peace Officer Powers Act; and (2) in **denying his motion for a Frye hearing regarding the admissibility of evidence regarding the ACE-V fingerprint analysis technique**. On the extraterritorial arrest issue, the Court of Appeals declares: "Here, SPD officers executed in Pierce County a valid warrant for Brunson's arrest. **RCW 10.93.070(5) clearly and unambiguously authorizes any qualified Washington peace officer to "execut[e] an arrest warrant" anywhere within the state**."

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

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

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

The Legal Update does not speak for any person other than Mr. Wasberg, nor does it speak for any agency. Officers are urged to discuss issues with their agencies' legal advisors and their local prosecutors. The Legal Update is published as a research source only and does not purport to furnish legal advice. Mr. Wasberg's email address is jrwasberg@comcast.net. His cell phone number is (206) 434-0200. The initial monthly Legal Update was issued for January 2015. Mr. Wasberg will electronically provide back issues on request.

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

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

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

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

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