LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: ***Thank you for your service, protection and sacrifice***

APRIL 2024

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UNITED STATES SUPRME COURT

CIVIL RIGHTS ACT CIVIL LIABILITY UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964: IN A SEX DISCRIMINATION CASE, THE U.S. SUPREME COURT RULES THAT THE STANDARD FOR PROVING JOB DISCRIMINATION BY AN EMPLOYEE WHO IS REASSIGNED – BUT IS NOT DEMOTED OR DOCKED ANY PAY – IS LOWER THAN SOME FEDERAL CIRCUIT COURTS HAD HELD, REQUIRING ONLY A SHOWING OF "SOME" HARM, NOT "SIGNIFICANT" HARM

In Muldrow v. City of St. Louis, ___ S.Ct. ___. 2024 WL ___ (April 17, 2024), the U.S. Supreme Court rules that in a sex discrimination Civil Rights Act case, the standard for proving job discrimination by a person reassigned but not demoted or docked pay is lower than some federal circuit courts had held. The Muldrow holding is that a person in such a situation need only show "some" harm, not "significant" harm that came about in treatment that was based on such protected status as gender, sexual orientation, gender identity, or pregnancy.

A Supreme Court staff summary (which is not part of the Court's Opinions) briefly summarizes as follows the factual allegations of the Plaintiff relating to changes in her job conditions, the procedural background below, and the holding of the Court:

> *Factual Allegations Regarding Changes In Plaintiff's Job Conditions*
>
> Sergeant Jatonya Clayborn Muldrow maintains that her employer, the St. Louis Police Department, transferred her from one job to another because she is a woman. From 2008 through 2017, Muldrow worked as a plainclothes officer in the Department's specialized Intelligence Division. In 2017, the new Intelligence Division commander asked to transfer Muldrow out of the unit so he could replace her with a male police officer. Against Muldrow's wishes, the Department approved the request and reassigned Muldrow to a uniformed job elsewhere in the Department.
>
> While Muldrow's rank and pay remained the same in the new position, her responsibilities, perks, and schedule did not. After the transfer, Muldrow no longer worked with high-ranking officials on the departmental priorities lodged in the Intelligence Division, instead supervising the day-to-day activities of neighborhood patrol officers. She also lost access to an unmarked take-home vehicle and had a less regular schedule involving weekend shifts.
>
> *Procedural Background For Proceedings In Courts Below*
>
> Muldrow brought this Title VII suit to challenge the transfer. She alleged that the City, in ousting her from the Intelligence Division, had "discriminate[d] against" her based on sex "with respect to" the "terms [or] conditions" of her employment. 42 U. S. C. §2000e–2(a)(1). The District Court granted the City summary judgment. The Eighth Circuit affirmed, holding that Muldrow had to – but could not – show that the transfer caused her a "materially significant disadvantage." . . . Muldrow's lawsuit could not proceed, the

court said, because the transfer "did not result in a diminution to her title, salary, or benefits" and had caused "only minor changes in working conditions."

Holding

An employee challenging a job transfer under Title VII must show that the transfer brought about some harm with respect to an identifiable term or condition of employment, but that harm need not be significant.

Result: Reversal of ruling of Eighth Circuit of the United States Court of Appeals, remand of case to the lower federal courts for further proceedings consistent with the U.S. Supreme Court decision.

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: NINTH CIRCUIT PANEL RULES THAT DEADLY FORCE WAS JUSTIFIED WHERE AN OFFICER SHOT AN ALLEGEDLY SUICIDAL MAN WHO WAS CLOSELY APPROACHING THE OFFICER AND WIELDING A KNIFE

In Hart v. City of Redwood City, ___ F.4th ___ , 2024 WL ___ (9th Cir., April 19, 2024), a three-judge Ninth Circuit panel is unanimous in reversing the U.S. District Court's denial, on summary judgment, of qualified immunity to City of Redwood City Police Officer Gomez in a Civil Rights Act section 1983 action alleging constitutional and state law violations arising from the deadly shooting of Kyle Hart. The Hart panel rules that the officer was justified in using deadly force.

A Ninth Circuit staff summary (which is not part of the Court's Opinion) provides the following synopsis of the Hart Court's Opinion:

> Officers Gomez and Velez responded to a call involving a man attempting suicide with a knife in his backyard. When they arrived, they found the man's wife covered in blood and frantically pleading for help.
>
> At her urging, the officers went to the backyard, where they found Hart holding a knife. They told him to drop the knife, but instead of doing so he began moving towards them with the knife raised. As Hart neared the officers, Officer Velez deployed her taser, but it was ineffective. With Hart approaching closely and wielding a knife, Officer Gomez shot and killed him.
>
> As an initial matter, the panel held that it had jurisdiction because both whether the disputed facts were material and whether qualified immunity applied were questions of law subject to the court's jurisdiction. The panel held that Officer Gomez was entitled to qualified immunity. Plaintiffs failed to show that Officer Gomez's conduct was objectively unreasonable and therefore a violation of Hart's Fourth Amendment rights. Hart posed an immediate threat when he rapidly approached the officers brandishing a knife and refusing commands to drop it.
>
> Moreover, even if Officer Gomez's conduct violated the Fourth Amendment, he would still be entitled to qualified immunity because the conduct did not violate clearly

established law. None of the cases Plaintiffs identified would have put Officer Gomez on notice that his actions in this case would be unlawful.

The Hart Opinion provides the following detailed description of the factual allegations as viewed, necessarily at this summary judgment stage of the proceedings, in the best light for the Plaintiff:

> On December 10, 2018, plaintiff Kristin Hart (Plaintiff, and together with her children, Plaintiffs) heard one of her two children crying and called out to her husband Kyle Hart (Hart) to help comfort the child. When she did not hear a response, Plaintiff went into the kitchen to check on Hart and found him using a "serrated utility knife" to cut at his own throat while their son watched. Plaintiff told Hart "many times" to stop cutting himself; Hart lowered the knife several times, but each time resumed cutting himself.
>
> Eventually, Plaintiff managed to take the knife from Hart. She began searching for her cell phone to call 911, but when she could not find it, Hart gave her his phone. She called 911, but as she did Hart retrieved a different knife and again began cutting at his throat. Plaintiff told the 911 dispatcher that her husband was committing suicide by cutting his throat and his wrists. While she was on the phone, her husband went into the backyard, and continued to cut himself on the throat, arms, and chest.
>
> Officers Roman Gomez and Leila Velez were the first to arrive on the scene. Plaintiff met them in the front yard, uninjured, but covered in blood and frantically pleading for them to help Hart. Because Gomez was senior, he took the lead and instructed Velez "to go less lethal with the taser" while he "would go lethal with [his] firearm."1
>
> > [Court's footnote 1: *Another officer was enroute with a "40 millimeter less lethal" weapon but did not arrive until some time later*.]
>
> The officers asked Plaintiff where Hart was and immediately ran in the direction she pointed.
>
> The officers took a narrow, muddy path on the left side of the house to reach the backyard. Gomez took the lead, holding his firearm "low ready" while Velez came behind him with her taser. Plaintiff followed behind them. While the parties agree on the broad strokes of what happened next, their testimonies vary regarding certain details.
>
> Gomez stated that he approached the backyard from the "middle left" side of the pathway to give himself a better view of the yard as he rounded the corner. Although he did not look to see Velez's position behind him, he assumed that because he was to the left, she was behind him and to his right. Velez, on the other hand, stated that she was on Gomez's left side, rather than his right.
>
> They found Hart standing in the backyard holding a knife. Plaintiff stated that Hart was standing in the back corner of the backyard, holding the knife to his throat. Gomez said that the first time he saw Hart, the man was standing on the other side of some patio furniture and a small child's play structure, facing away from them and holding the knife down from his side. Velez indicated that Hart was facing them and holding the knife out at shoulder height.
>
> Gomez yelled "drop the knife" twice. Instead of dropping the knife, Hart began moving towards the officers while still holding the knife. Plaintiff remembered seeing Hart move

toward the officers, but at that point she realized her children were unattended, so she left to check on them. Plaintiff did not see the shooting.

Gomez said that Hart came towards them at a slow run, holding the knife out towards the officers, going from thirty feet away to eight or ten feet away in "approximately five seconds." Velez characterized Hart's pace as a "brisk walk."

What is not disputed – and was recognized by Plaintiffs' own expert – is that Hart went from his starting position across the yard to where he eventually ended up only a few feet from the officers in less than 5.9 seconds.

The officers did not warn Hart that they would shoot, but with him approaching and wielding a knife, they took action to protect themselves. Velez testified that she fired her taser at Hart before any shots were fired. She said that Hart was still upright and holding the knife up at them when she fired the taser. One taser probe struck Hart on the left side of his head, and the other missed, passing Hart and landing 17 feet away from the officers. Because contact with both probes is required for the taser to function, the taser had no effect on Hart.

Velez testified that Gomez only fired after the taser failed to make contact with Hart. Gomez, however, stated that he fired his "firearm simultaneously to when Officer Velez fired her taser."

Regardless of the timing, the taser was ineffectual, and Gomez fired five shots, striking Hart three times in the upper torso. Velez stated that, after Hart was shot, he fell to the ground five feet to her left; Gomez stated that Hart fell at his feet. Paramedics were already enroute when Gomez requested medical assistance. The paramedics transported Hart to an emergency room, but he was ultimately pronounced dead.

While there are some discrepancies regarding the details of the incident, the material facts are not in dispute.

When Officers Gomez and Velez arrived at Hart's residence, Plaintiff was covered in blood and frantic. At her urging, the officers went along the side of the house to the backyard, where they found Hart holding a knife. Gomez told Hart to "drop the knife." Instead of complying, Hart began moving towards the officers while still holding the knife. As corroborated by the officers' testimony, Plaintiffs' expert, and the 911 call recording, Hart crossed the backyard to within a few feet of the officers in less than 5.9 seconds. Viewing Hart – who advanced on them with a knife – as an imminent threat,2

> [Court's footnote 2: *At his deposition, Plaintiffs' expert conceded that Hart posed an imminent threat to the officers*.]

Velez fired her taser, but this was ineffective because only one probe made contact with Hart. Gomez fired five shots, striking Hart three times in the upper torso. Hart fell to the ground near the officers, was provided emergency medical assistance, but was pronounced deceased upon arrival at an emergency room.

[Some paragraphing and formatting revised for readability]

Result: Reversal of ruling of U.S. District Court (Northern District of California) that had denied the motion of the government defendants based on qualified immunity.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: QUALIFIED IMMUNITY IS GRANTED TO OFFICERS IN 2-1 DECISION WHERE OFFICERS, AT THE DIRECTION OF AN ON-SCENE PARAMEDIC, USED THEIR BODY WEIGHT TO RESTRAIN A DANGEROUS AND ERRATIC MAN WHILE HE WAS PRONE (AND COMPLAINING THAT HE COULD NOT BREATHE) IN ORDER TO STRAP HIM TO A BACKBOARD FOR HOSPITAL TRANSPORT; SUCH QUALIFIED IMMUNITY WAS GRANTED SOLELY BECAUSE NO PREVIOUS CONTROLLING APPELLATE DECISION HAD MADE THAT HOLDING ON SUCH FACTS

In Perez v. City of Fresno, ___ F.4th ___ , 2024 WL ___ (9th Cir., April 15, 2024), a three-judge Ninth Circuit panel votes 2-1 to grant qualified immunity in a Civil Rights Act lawsuit by the family of a man who died due to actions of police officers. The police officers had needed to restrain the man for transport for medical attention due to his erratic and dangerous behavior on foot on a public roadway.

Unfortunately, the man died due to the restraint method that the police officers used at the request of a paramedic. In the lawsuit, the officers conceded that a reasonable jury could find that they violated the Fourth and Fourteenth Amendments by their action – albeit at the direction of a paramedic at the scene – of applying pressure to a backboard while Perez was in a prone position and thereafter ignoring his statement that he could not breathe. Therefore, the Majority Opinion in Perez notes, qualified immunity for the officers in this case hinges entirely on whether the unlawfulness of these actions, taken at the direction of medical personnel, was clearly established when Perez died.

A Ninth Circuit staff summary (which is not part of the Opinion) provides a brief synopsis of the Majority Opinion and the Partially Dissenting Opinion in the case. The following four paragraphs are quotes from the summary regarding the Majority Opinion (though with the phrase "Majority Opinion" substituted for the word "panel"):

> The [Majority Opinion] affirmed the district court's summary judgment for the City and County of Fresno, individual law enforcement officers, and a paramedic in an action brought by the family of Joseph Perez, who asphyxiated and died after the officers, at the direction of the paramedic, used their body weight to restrain Perez while he was prone in order to strap him to a backboard for hospital transport.
>
> The [Majority Opinion] held that the law-enforcement officers were entitled to qualified immunity. At the time of Perez's death in 2017, the law did not clearly establish, nor was it otherwise obvious, that the officers' actions – pressing on a backboard on top of a prone individual being restrained for medical transport, at the direction of a paramedic working to provide medical care – would be unconstitutional.
>
> The [Majority Opinion] next held that the paramedic involved was entitled to qualified immunity because the law did not clearly establish at the time that a paramedic acting in a medical capacity to restrain a person in order to secure the person for medical transport could be held liable for a constitutional violation under either the Fourth or Fourteenth Amendment.

> Finally, the [Majority Opinion] held that the district court properly dismissed plaintiffs' claims [against the County and City under Monell v. Department of Social Services, 436 U.S. 658 (1978)] because plaintiffs presented insufficient evidence that the City and the County were deliberately indifferent to their duty to properly train their law-enforcement officers.

The Ninth Circuit staff summary provides the following brief synopsis of the Partially Dissenting Opinion:

> Concurring in part and dissenting in part, Judge S.R. Thomas concurred in the majority's analysis of the paramedic liability and failure-to-train claims. However, he disagreed with the conclusion that the law governing the conduct of the individual law-enforcement defendants was not clearly established in 2017. [The Dissenting Opinion agues that] extensive federal case law, departmental guidance, and common sense gave the officers fair warning that applying continuous force to the back of a prone person who claims he cannot breathe is constitutionally excessive.

The Majority Opinion provides the following description of the facts in the Perez case:

> In May 2017, FCSO received a call for assistance regarding a man – later identified as Perez – who was acting erratically, sprinting through the street, screaming, and hiding in bushes. Before FCSO could respond to the call, three FPD officers encountered Perez without being dispatched. The FPD officers observed Perez standing in the roadway, waving his arms, and yelling what sounded like "help" in their direction. When the officers approached Perez, he was talking to himself, stating that people were chasing and hitting him. Based on Perez's behavior, the officers believed that he was under the influence of a controlled substance.
>
> According to the officers, to prevent Perez from darting into traffic on the four-lane roadway or charging at the officers near the roadway, they seated Perez on the curb and placed him in handcuffs. When the dispatched FCSO deputies arrived, they found Perez seated, handcuffed, and surrounded by the FPD officers.
>
> Five minutes after encountering Perez, one of the FPD officers called emergency medical services (EMS) to facilitate an involuntary psychiatric detention under California Welf. & Inst. Code § 5150. Initially, the officer requested a "code two" because he believed that Perez was a danger to himself and others. A minute and a half later, the officer elevated the request to a "code three." The ambulance took approximately 14 minutes to arrive on scene because it was originally sent to the wrong location.
>
> While awaiting the ambulance, Perez stood up from the curb and refused to comply with the officers' instructions to sit back down. In response, several of the officers took Perez to the ground to prevent him from running into traffic. While on the ground, one officer struck Perez's left side three times with his knee and then applied a wrist lock. At the same time, another officer reported that Perez was being combative.
>
> Two additional FCSO deputies responded to the scene and waited in their patrol vehicle on standby. While the officers on the ground attempted to restrain Perez, his face repeatedly hit the ground, causing him to bleed. One officer placed a towel underneath Perez's chin and face and lifted Perez's head off the ground while holding one end of the towel in each hand. Another officer asked Perez if he could breathe, and Perez

responded that he could. According to the officers, at this point, Perez was lying on his stomach, but he continued to kick his legs. The officers applied a RIPP restraint to Perez's ankles and looped it around his handcuffs to control his leg movement. The officers un-looped the restraint from Perez's handcuffs when EMS arrived – approximately thirty seconds to a minute after they applied this restraint.

When EMS arrived, the paramedics retrieved a backboard. Paramedic Morgan Anderson stated that they were going to attach Perez to the board while he was prone so that he could be medically transported. The officers removed the towel holding Perez's head and assisted the paramedics in applying the backboard. As this was happening, Perez yelled that he could not breathe. Anderson nevertheless told one of the officers to sit on the backboard. The officer complied and sat on the board for one minute and thirteen seconds while other officers applied pressure and worked with Anderson to secure the backboard.

After the seated officer stood up, the paramedics continued securing Perez to the backboard for another two minutes before turning him over. Once Perez was placed on his back, the paramedics discovered that he did not have a pulse.

The paramedics then transported Perez to the hospital, where he was pronounced dead. The coroner attributed Perez's death to compression asphyxia during restraint with methamphetamine toxicity as another significant contributor. The coroner classified Perez's death as a homicide. [Court's footnote 2: *According to the coroner, the average lethal dose of methamphetamine is 200 nanograms per milliliter. Perez had ten times that amount in his bloodstream*.]

[Some paragraphing revised for readability; court's footnote 1 omitted]

Footnote 3 of the Majority Opinion indicates that there was no issue regarding the lawfulness of the uses of force other than the backboard circumstances:

> *The district court concluded that the officers' other uses of force, including taking Perez to the ground, administering knee strikes, applying a wrist lock, using the towel, and utilizing the RIPP restraint, were not excessive. Plaintiffs do not challenge the district court's findings on appeal. While Plaintiffs' opening brief mentions the towel and uses the term "hog-tie," to refer to the RIPP restraint that was eventually removed when EMS arrived, Plaintiffs present no meaningful argument that the district court erred in finding that neither use of force was independently excessive.*

Result: Affirmance of summary judgment rulings in favor of the government civil defendants by the U.S. District Court (Eastern District of California).

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: IN FIRST AMENDMENT FREE SPEECH CASE INVOLVING A PUBLIC FORUM PREACHER'S VERBAL CONFRONTATION OF PERSONS ATTENDING AN ABORTION RIGHTS RALLY AND AN LGBTQ EVENT, THE RULE AGAINST ALLOWING A "HECKLER'S VETO" SUPPORTS THE FREE SPEECH-BASED REQUEST OF THE PREACHER FOR AN INJUNCTION AGAINST THE SEATTLE POLICE WHERE – AFTER THE PREACHER WAS ATTACKED BY RALLY ATTENDEES WHO VEHEMENTLY OPPOSED HIS CONFRONTATIONALLY POSED STRONG RELIGIOUS VIEWS – THE POLICE HAD

PREVIOUSLY (1) ORDERED THE PREACHER TO MOVE AWAY FROM THOSE ATTACKING THE PREACHER AND (2) ARRESTED HIM FOR OBSTRUCTING

In Meinecke v. City of Seattle, ___ F.4th ___ , 2024 WL ___ (9th Cir., April 18, 2024), a three-judge Ninth Circuit panel grants injunctive relief to a confrontational public-places-preacher. The injunction prohibits the Seattle Police Department from enforcing obstruction laws in a way that significantly restricts protected religious speech in traditional public forum areas where officers believe that members of the public opposing the speech will act or have acted in a hostile manner toward the speaker.

A Ninth Circuit staff summary (which is not part of the Court's Opinion) provides the following synopsis of the Opinion:

> The panel reversed the district court's denial of Matthew Meinecke's motion for preliminary injunctive relief in a 42 U.S.C. § 1983 action arising from two events – an abortion rally and LGBTQ pride event – at which Meinecke, a devout Christian, sought to read Bible passages and was arrested for obstructing a police officer after he refused to move to a different location.
>
> When attendees at both events began to abuse and physically assault Meinecke, officers asked him to move and ultimately arrested him for obstruction when he refused, rather than deal with the wrongdoers directly. Meinecke sued the City of Seattle and certain Seattle police officers (together, the City), and sought to preliminary enjoin them from enforcing "time, place, and manner" restrictions and applying the City's obstruction ordinance "to eliminate protected speech in traditional public fora whenever they believe individuals opposing the speech will act hostile toward it."
>
> The panel held that Meinecke has standing to pursue prospective injunctive relief, given that the City has twice enforced its obstruction ordinance against him, he has stated that he will continue his evangelizing efforts at future public events, and the City has communicated that it may file charges against him for doing so.
>
> The panel held that Meinecke established a likelihood of success on the merits of his First Amendment claim. The restrictions on his speech were content-based heckler's vetoes, where officers curbed his speech once the audience's hostile reaction manifested.
>
> Applying strict scrutiny, the panel held that there were several less speech-restrictive alternatives to achieve public safety, such as requiring protesters to take a step back, calling for more officers, or arresting the individuals who ultimately assaulted Meinecke. The panel held that Meineke established irreparable harm because a loss of First Amendment freedoms constitutes an irreparable injury, and the balance of equities and public interest favors Meinecke.

[Some paragraphing revised for readability]

Result: Remanded [to the U.S. Western District Court] with instructions to enter a preliminary injunction consistent with this opinion in favor of Meinecke.

IN A CRIMINAL CASE RAISING A SIXTH AMENDMENT RIGHT OF CONFRONTATION ISSUE, NINTH CIRCUIT PANEL HOLDS THAT HEARSAY FROM THE ALLEGED VICTIM WAS ADMISSIBLE BECAUSE THE DEFENDANT FORFEITED HIS RIGHT OF CONFRONTATION BY WRONGDOING THAT CAUSED THE ABSENCE OF THE VICTIM FROM TRIAL

In U.S. v. Blackshire, ___ 4th ___ , 2024 WL ___ (9th Cir., April 19, 2024), a three-judge Ninth Circuit panel rejects defendant Lawrence Blackshire's hearsay-based challenges under the Sixth Amendment Right of Confrontation to his convictions and sentence for various offenses arising out of an assault on his girlfriend, C.S., whose hearsay statement were admitted at his trial despite her absence at the time of trial.

Some of the key evidence of defendant's responsibility for C.S.'s absence at the time of trial is described as follows in the Blackshire Opinion:

> In support of its proffer [to the trial court on the forfeiture-by-wrongdoing issue], the government submitted three recordings of conversations Blackshire had while in jail. In the first, Blackshire told his new girlfriend in a phone call that he would "be just fine" at trial because "[t]here are no victims. They can't find shit." He said no one would find any "victims" because "I already fucking made peace with everybody and shit, everything's fucking cool, and we already discussed the whole fucking not showing up to court thing."
>
> In a phone call recorded a few days later, Blackshire asked a woman to tell C.S. that "if the Feds get a hold of her, just play dumb, whatever. Not show up, whatever."
>
> In the third recording, he told his new girlfriend during an in person visit that "people are gonna be lookin' for her. So you need to tell [C.S.'s ex-boyfriend] there he don't know nothing about nothin." Blackshire asked his girlfriend to "find her and tell her – make sure . . . make sure she does not fuckin' . . . no matter what the fuck they tell her they can't fuckin' – they can't force her to go."

[Some paragraphing revised for readability]

A Ninth Circuit staff summary (which is not part of the Court's Opinion) provides the following synopsis of the portions of the Opinion relating to the forfeiture-by-wrongdoing issue:

> After the government could not locate C.S. to testify at trial, the district court admitted statements she gave to police officers and a nurse. The panel held that the district court did not err in finding that Blackshire forfeited his right to confront C.S. by causing her unavailability and in admitting C.S.'s out-of-court statements.
>
> To admit C.S.'s statements under the forfeiture by wrongdoing rule, the government was required to prove by a preponderance of the evidence that Blackshire intentionally and wrongfully caused C.S.'s unavailability. Blackshire conceded that the record supported an inference that he had the requisite intent, but contended (1) the government failed to prove that his conduct caused C.S.'s absence and (2) there was no wrongdoing because recordings relied upon by the district court show only that he made "peace" with C.S. and told her that she could not be compelled to testify. The panel rejected those arguments.

The panel held that circumstantial evidence supports the inference that Blackshire caused C.S.'s absence. As to the wrongfulness requirement, the panel explained (1) the government did not need to show that Blackshire engaged in criminal wrongdoing that caused unavailability; and (2) Blackshire's past domestic violence against C.S. is relevant to determining whether Blackshire's actions were wrongful.

Against the backdrop of past abuse, Blackshire's recorded statements can reasonably be interpreted as evidencing efforts to coerce, unduly influence, or pressure C.S. into not showing up in court.

[Some paragraphing revised for readability]

Result: Affirmance of convictions of Lawrence Lorenzo Blackshire by U.S. District Court (Arizona) for various offenses arising out of an assault on his girlfriend.

LEGAL UPDATE EDITOR'S NOTE: For a Washington appellate court decision on this issue, see State v. Hernandez, 192 Wn. App. 673 (Div. I, Feb. 16, 2016), where the Court of Appeals invoked the Sixth Amendment case-law-based doctrine of forfeiture-by-wrongdoing. In Hernandez, a child molester induced his victim's mother to take the alleged victim and her brother to Mexico. The Court of Appeals ruled that his conduct forfeited the right to confront the child, her brother, and her mother. For the same reason, the Hernandez Court held that defendant also forfeited his right to raise a challenge under the child hearsay statute. Thus, the hearsay from those persons was admitted over challenges under the U.S. Constitution and under hearsay rules.

FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION: IN A CASE WHERE LAW ENFORCEMENT DID NOT VIOLATE THE FOURTH AMENDMENT RIGHT OF A CALIFORNIA PAROLEE IN SEARCHING HIS CELL PHONE, A NINTH CIRCUIT PANEL HOLDS THAT FORCING HIM TO PLACE HIS THUMB ON THE PHONE TO OPEN IT DID NOT VIOLATE THE FIFTH AMENDMENT

In U.S. v. Payne, ___ F.4th ___ , 2024 WL ___ (9th Cir., April 17, 2024), a three-judge Ninth Circuit panel rules, among other things, that where officers forced a California parolee to open his cell phone by forcing his thumb onto the phone, the officers did not violate his Fifth Amendment right against self-incrimination.

The Payne Opinion explains that the compelled use of a biometric to unlock an electronic device was not testimonial because it required no cognitive exertion by the suspect. The Opinion places this law enforcement action in the same category as a blood draw or a fingerprint taken at booking, as this action merely provided the CHP with access to a source of potential information. The complex legal analysis of the Fifth Amendment issue covers 12 pages.

The Payne Opinion begins its legal analysis in the case by explaining that the Fourth Amendment was not violated by the officers because, as a parolee subject to suspicion-less search under the broad search provisions of California law regarding parolees, the defendant could not challenge the search of his phone. For Washington officers dealing with persons on community custody conditions, not in parole status, the warrantless, non-consenting, non-exigent search of the phone under the circumstances of the Payne case would have separately violated (1) a statute (RCW 9.94A.631(1)) and (2) article I, section 7 of the Washington

constitution, both of which require fact-based justification and nexus for searching any particular personal or real property of a person who is under community custody conditions.

The Payne Opinion nonetheless will be helpful authority for Washington officers and prosecutors for circumstances where a search of a suspect's phone is a lawful search (for instance, authorized by a search warrant), but the suspect is not willing to cooperate by providing a biometric to open the electronic device. Note, however, that the Payne Opinion indicates that officers will be violating the Fifth Amendment if they ask the suspect which digit/finger unlocks the phone, because that answer would be testimonial under the Firth Amendment.

Result: Affirmance of U.S. District Court (Central District of California) conviction based on the conditional plea of guilt of Jeremy Travis Payne for possession of fentanyl with intent to distribute.

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WASHINGTON STATE SUPREME COURT

KITSAP COUNTY DISTRICT COURT RULING IS REVERSED IN A 7-2 RULING IN WHICH THE MAJORITY JUSTICES HOLD (1) THAT NO SOURCE OF LAW REQUIRES A BREATH TEST INSTRUMENT TO PERFORM THE CALCULATION REQUIRED BY FORMER WAC 448-16-060 INTERNALLY; AND (2) THAT THE STATE CAN LAY FOUNDATION FOR ADMITTING THE BREATH TEST BY PERFORMING THE REQUIRED CALCULATION AT A LATER TIME

In State v. Keller, ___ Wn.2d ___ , 2024 WL ___ (April 4, 2024), the Washington Supreme Court votes 7-2 to reverse a Kitsap County District Court ruling that had excluded from evidence in a DUI trial breath alcohol test results from 2020 produced from Dräger Alcotest 9510 machines. The District Court judge concluded that the machines were required to make certain calculations, and that the State could not itself make the calculations independent of the machines. The Supreme Court Majority Opinion in Keller summarizes the ruling as follows:

> On May 9, 2020, Austin River Keller drove his car into a ditch and later failed a breath alcohol test. That started a chain of events that led the Kitsap County District Court to suppress – to exclude from evidence in court – breath alcohol test results produced from the Dräger Alcotest 9510 machines in Keller's case and in all other DUI (driving while under the influence of an intoxicant) cases in Kitsap County District Court. The district court concluded that those breath test results violated state statutes and regulations and, hence, that the State would be unable to lay a foundation for their admission under this court's precedent and our state's evidence rules.
>
> The district court is correct that state law places strict limits on the admission of breath test results into evidence. A breath test is "valid" if it is performed "according to methods approved by the state toxicologist." RCW 46.61.506(3). And a breath test is admissible only if the breath samples "agree to within plus or minus ten percent of their mean to be determined by the method approved by the state toxicologist." RCW 46.61.506(4)(a)(vi).
>
> The district court is also correct that in 2010, the state toxicologist "approved" "the method" for performing that calculation; it was memorialized in former WAC 448-16-060 (2010). That method required the mean of the four individual test results to be "rounded"

to the nearest four decimal places prior to determining the plus or minus 10 percent range. Former WAC 448-16-060.

> [Court's footnote 1: *The Dräger Alcotest 9510 takes two breath samples from the subject and performs two tests on each sample, yielding four results.*]

And, importantly, the district court is also correct that despite those statutes and regulations, the Dräger machine has never rounded the mean before calculating the plus or minus 10 percent range. Instead, the Dräger was programmed to truncate the mean before performing that calculation.

But the district court erred in ruling that those statutes and regulations require the Dräger machine itself to perform the mean and the plus or minus 10 percent range calculation in accordance with former WAC 448-16-060's rounding method. It therefore erred in concluding that the machine's failure to do those necessary mathematical calculations itself rendered the results invalid and inadmissible under RCW 46.61.506, State v. Baker [56 Wn.2d 846, 852 1960)] and our evidence rules.

We therefore reverse. We hold that the relevant statutes and regulations do not require the Dräger machine itself to perform the mean and the plus or minus 10 percent range calculation at the time of the test. As the State acknowledges, the State must certainly comply with those statutes and regulations. But it can establish those required pieces of the foundation for admission of breath test results by doing the math discussed above in a different manner (as long as that different manner meets all other rules on admission of evidence in a criminal trial).

We reverse the district court's evidentiary rulings and suppression order and remand for further proceedings consistent with this opinion.

> [Court's footnote 3: *The state toxicologist formally amended WAC 448-16-060 in November 2022 to approve of the truncation method. Wash. St. Reg. 22-21-032 (Nov. 6, 2022). The State argues in the alternative that we should apply amended WAC 448-16-060 retroactively. Because we conclude the breath test results are admissible even under the former version of WAC 448-16-060, we need not reach the State's alternative argument.*

[Some paragraphing revised for readability; footnotes repositioned for Legal Update formatting]

Result: Reversal of Kitsap County Superior Court ruling that excluded from evidence the State's breath test evidence against DUI defendant Austin River Keller.

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BRIEF NOTES REGARDING APRIL 2024 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 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 generally not sufficiency-of-evidence-to-convict issues).

The five entries below address the April 2024 unpublished Court of Appeals opinions that fit the above-described categories. I do not promise to be able catch them all, but each month I will make a reasonable effort to find and list all decisions with these issues in unpublished opinions from the Court of Appeals. I hope that readers, particularly attorney-readers, will let me know if they spot any cases that I missed in this endeavor, as well as any errors that I may make in my brief descriptions of issues and case results. In the entries that address decisions in criminal cases, the crimes of conviction or prosecution are italicized, and brief descriptions of the holdings/legal issues are bolded.

1. State v. James Thomas III: On April 4, 2024, Division Three of the COA affirms the Spokane County Superior Court convictions of defendant for (A) *assault in the fourth degree*, (B) *intimidating a witness*, (C*) tampering with a witness*, and (D) *violation of a no contact order*. Among other rulings, **the Thomas Court concludes that playing at trial a recording of a jailhouse phone call from defendant to a co-conspirator did not violate the confrontation clause of the Sixth Amendment. The Court concludes that the co-conspirator's words were not "testimonial" under the rubric of the U.S. Supreme Court precedents of Crawford v. Washington, 541 U.S. 367 (2004) and Davis v. Washington, 547 U.S. 813, 821-24 (2006) and their progeny**.

Here is a link to the Opinion in State v. Thomas:
https://www.courts.wa.gov/opinions/pdf/391647_unp.pdf

2. Gabriella Cothran (as Personal Representative) v. City of Tacoma: On April 9, 2024, Division Two of the COA affirms an order of the Pierce County Superior Court that *(1) granted summary judgment to City of Tacoma and South Sound 911; and (2) dismissed, based on the "professional rescuer doctrine," a lawsuit for wrongful death and loss of consortium related to a murder of a police officer*.

The professional rescuer doctrine applied by the Court of Appeals in this case is a common law (i.e., court-decision-made) rule that provides generally that a professional rescuer – such as a firefighter or a police officer – who is injured in the performance of the professional rescuer's duties assumes the risk of such an injury and is not entitled to damages. The Court of Appeals briefly summarizes some of the relevant facts in the case in the first two introductory paragraphs of the Court's Opinion, as follows:

> Tacoma Police officers detained Bruce Johnson at the Tacoma mall for carrying a shotgun, wearing a "Sheriff" hat, carrying handcuffs on his belt, and being hostile with mall security. At the time, Johnson had an active warrant for his arrest stemming from a previous assault incident. The parties dispute whether the responding officers knew about the warrant. Instead of arresting Johnson, the officers returned Johnson's shotgun to him and released him.

> Two weeks later, Officer Jake Gutierrez responded to a domestic disturbance call at Johnson's home. When Gutierrez entered the home, Johnson used the same shotgun to shoot Gutierrez multiple times and beat him with the end of the gun. Gutierrez died from his injuries.

Additional relevant factual details are described in the body of the Opinion.

Here is a link to the Opinion in Cothren v. City of Tacoma:
https://www.courts.wa.gov/opinions/pdf/D2%2057310-5-II%20Unpublished%20Opinion.pdf

3. State v. Marc Macias On April 16, 2024, Division Three of the COA affirms the Klickitat County Superior Court conviction of defendant for *second degree rape*. Defendant argued that his incriminating statements to a police officer should have been suppressed on grounds that (1) defendant was in custody when the officer initially asked him some questions at his place of work without first Mirandizing him, and (2) defendant's subsequent incriminating statements after being Mirandized were the product of an improper "two-step" interrogation method in which Mirandizing comes too late because the "cat is out of the bag."

The Macias Court rejects both arguments based on the Court's conclusion that the initial questioning was not "custodial" in light of the facts that: (1) Macias was at his place of employment; (2) there is no indication that the conversation took place in an enclosed room or building; (3) only one officer was present; (4) Macias was not ordered to do anything; (5) the officer did not exert any control over Macias' movement during the initial questioning; and (6) the officer's initial questioning was brief, and the officer gave Miranda warnings shortly after the suspect began making incriminating statements.

Here is a link to the Opinion in State v. Macias:
https://www.courts.wa.gov/opinions/pdf/391418_unp.pdf

4. State v. Germi Rashad Zeigler: On April 16, 2024, Division Two of the COA in a part-published opinion reverses the Pierce County Superior Court conviction of defendant for *second degree murder*. In the published part of the Opinion, the Zeigler Court rules that the trial court did not correctly instruct the jury on the "first aggressor" rule relating to a claim of self-defense. The facts, procedural background, and analysis by the Zeigler Court for that ruling will not be addressed in the Legal Update.

Defendant did not challenge a separate conviction for unlawful possession of a firearm by a convicted person.

In the unpublished part of the Zeigler Opinion, the Court explains as follows at pages 28-29 that **expert testimony from a detective relevant to the prosecution for second degree murder about the tendency of shooters to flinch upon firing a gun was relevant and was not speculative:**

> Here, during opening statement, Zeigler stated that if one intended to commit a premeditated murder, then they would not shoot the person in the leg.
>
> Although the firearm that Zeigler used to shoot Tate was never recovered, [the detective] testified generally about the effect of flinching when shooting a firearm. He testified that flinching was a common issue among new and seasoned shooters. And it was typical for righthanded shooters to end up shooting lower and to the right from where they were

aiming, and lefthanded shooters typically ended up shooting lower and to the left from where they were aiming.

[The detective's] testimony showed that flinching had common effects, no matter who the shooter was, and that he knew how flinching typically affected a shooter's aim. Although he could not specifically tie his testimony to Zeigler and the gun he used, it was not speculative because flinching had similar effects on all types of individuals. And the testimony was relevant circumstantial evidence because it had the tendency to make the fact that Zeigler was intending to kill Tate more probable based on where he was aiming instead of where the bullet actually hit Tate.

Therefore, the trial court did not err in admitting Martin's testimony regarding flinching upon firing a weapon.

Here is a link to the Opinion in State v. Zeigler:
https://www.courts.wa.gov/opinions/pdf/D2%2056585-4-II%20Published%20Opinion.pdf

5. State v. Brittney Carol Gustaitis: On April 16, 2024, Division Two of the COA affirms the Clark County Superior Court conviction of defendant for *attempting to elude a pursuing police* vehicle, but the Court of Appeals reverses her conviction *for possession of a stolen vehicle*. **The reversal of her conviction for possession of a stolen vehicle is based on the trial court's erroneous admission under the Business Records Hearsay Exception the testimony of a law enforcement officer that the vehicle at issue was listed in a stolen vehicle database.**
Here is a link to the Opinion in State v. Gustaitis:
https://www.courts.wa.gov/opinions/pdf/D2%2057153-6-II%20Unpublished%20Opinion.pdf

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

law update for published decisions from Washington's appellate courts, from the Ninth Circuit of the United States Court of Appeals, and from the United States Supreme Court.

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

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

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

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

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

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