LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

DECEMBER 2024

TABLE OF CONTENTS FOR DECEMBER 2024 LEGAL UPDATE

****

NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: VIEWING THE FACTUAL ALLEGATIONS IN THE BEST LIGHT FOR THE PLAINTIFF, 3-JUDGE PANEL REJECTS QUALIFIED IMMUNITY FOR OFFICER WHO SHOT AN APPARENTLY SUICIDAL, ARMED-WITH-A-POCKET-KNIFE ROBBERY SUSPECT WHO, AT THE POINT OF THE INJURIOUS SHOOTING (1) WAS HOLDING THE KNIFE TO HIS OWN NECK AND NOT PRESENTLY BRANDISHING THE KNIFE AT THE OFFICER OR OTHERS; AND (2) ALTHOUGH FAILING TO COMPLY WITH NUMEROUS COMMANDS TO DROP THE KNIFE AND IGNORING DEADLY FORCE WARNINGS, THE MAN – IN THE VIEW OF THE PANEL – COULD BE REASONABLY VIEWED UNDER ESTABLISHED CASE LAW AS SUICIDAL AND NOT AN IMMEDIATE THREAT TO THE OFFICER OR OTHERS

In Singh v. City of Phoenix, ___ F.4th ___ , 2024 WL ___ (9th Cir., December 26, 2024), Plaintiff was a man whom a police officer shot and injured during an arrest where officers had responded to a report that the man had attempted an armed robbery and had subsequently chased the victim brandishing a knife. When the officers contacted the suspect, he was no longer chasing anyone, and he was holding a pocketknife to his own throat. As is required where the issue is whether government defendants are entitled to summary judgment granting them qualified immunity from Civil Rights Act liability, the Ninth Circuit panel views the factual allegations in the case in the best light for the Plaintiff. Included in the allegations were those of an expert witness for the Plaintiff opining that less-lethal force was an option at the point when the officer shot Plaintiff.

Staff of the Ninth Circuit provide the following brief summary of the excessive force analysis in the Ninth Circuit Opinion (the summary is not part of the Opinions):

> Smith-Petersen and another police officer responded to a report of an attempted robbery with a knife. When they arrived, Singh held a knife to his own neck and asked the officers to shoot and kill him. He refused to drop the knife, and [Officer] Smith-Petersen shot and seriously injured him.
>
> The district court held that although a reasonable jury could find that [Officer]Smith-Petersen violated Singh's constitutional right, she was nevertheless protected by qualified immunity from Singh's 42 U.S.C. § 1983 suit because there was no clearly established law that would have put her on notice that her force was objectively unreasonable under the circumstances. The district court remanded the state claims to state court for resolution.
>
> The panel agreed with the district court's holding, not challenged on appeal, that Singh established a plausible, although not conclusive, constitutional violation at step one of the qualified immunity analysis.
>
> At step two—in which plaintiff bears the burden of showing that the rights allegedly violated were clearly established—the panel held that Glenn v. Washington County, 673 F.3d 864 (9th Cir. 2011), involving materially similar facts, put Smith-Petersen on notice that her use of deadly force plausibly violated Singh's right to be free from excessive force. Here as in Glenn, (1) plaintiff did not brandish a knife but rather held it to his own

neck; (2) despite failing to comply with commands to drop the knife, a number of circumstances weighed against deeming plaintiff an immediate threat; (3) the offense here— attempted robbery with a knife—was less serious than in Glenn; (4) plaintiff did not actively resist arrest; (5) officers should have been aware that plaintiff was emotionally disturbed; and (6) no effective warning was given. Finally, the question of whether Smith-Petersen could have used less intrusive means of force was better suited to resolution by the trier of fact.

. . . .

[Some paragraphing revised for readability]

Result: Reversal of ruling of U.S. District Court for Arizona that granted qualified immunity to Officer Smith-Peterson of the Phoenix Police Department based on the District Court's conclusion that case law had not clearly established that the use of deadly force was not reasonable under the circumstances; case remanded to the District Court for

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: PANEL RULES 2-1 THAT OFFICERS RESPONDING TO CALLS ABOUT A MENACING MAN IN THE NEIGHBORHOOD DID NOT VIOLATE THE FOURTH AMENDMENT (EVEN VIEWING THE FACTS IN THE LIGHT MOST FAVORABLE TO PLAINTIFFS) IN FATALLY SHOOTING THE MAN WHO (1) WAS ADVANCING ON THE OFFICERS BRANDISHING WHAT APPEARED TO BE A LONG-BLADED WEAPON, AND (2) IGNORED BOTH THEIR ORDERS TO STOP AND THEIR WARNINGS THAT THEY WERE ABOUT TO SHOOT HIM

In Napouk v. Las Vegas Municipal Police Department, ___ F.4th ___, 2024 WL ___ (9th Cir., December 10, 2024), in a section 1983 Civil Rights Act lawsuit, a Ninth Circuit panel rules 2-1 in affirming a U.S. District Court summary judgment order in favor of for two Las Vegas Metropolitan Police Department officers. The officers fatally shot a man who was brandishing what the officers reasonably believed was a long-bladed weapon, and who ignored orders from the officers after he had approached dangerously close to the officers.

The lawsuit that claimed excessive force was brought by the parents of the deceased, Lloyd Gerald Napouk. The Ninth Circuit Majority Opinion determines that the officers are entitled to qualified immunity from the excessive force claim for the alternative reasons that (1) the officers did not violate the Fourth Amendment in using deadly force; and (2) even if one assumes that the use of deadly force violated the Fourth Amendment, no controlling precedent had "clearly established" the unlawfulness of use of deadly force in these circumstances.

Under the first prong of the two-pronged standard for qualified immunity, the Majority Opinion determines under the guidelines in the U.S. Supreme Court precedents of Graham v. Connor, 490 U.S. 386, 396 (1989) and Tennessee v. Garner, 471 U.S. 1, 8 (1985) that it was objectively reasonable for the officers to determine in the circumstances that deadly force was required. The Majority Opinion asserts that this determination was made under a careful balancing that considers the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. The key factor in this analysis under Graham, considers three factors: (1) severity of the crime; (2) immediacy of the threat; and (3) resistance to arrest or attempts to escape.

Staff of the Ninth Circuit provide the following brief summaries of the Majority and Dissenting Opinions (the summaries are not part of the Opinions):

Staff summary's description of the facts

The officers responded to reports of a man walking around a residential neighborhood in the middle of the night with a "machete" or a "slim jim," behaving suspiciously and walking up to cars and houses. When they arrived, they attempted to engage Napouk for several minutes, but he refused to follow their commands and repeatedly advanced toward them with what the officers believed was a long, bladed weapon.

When Napouk advanced upon the officers a final time with the weapon, coming within nine feet of Sergeant Kenton, both officers fired their weapons, killing him. Napouk's weapon turned out to be a plastic toy fashioned to appear as a blade.

Staff summary's description of the legal contentions of the Plaintiffs

Napouk's parents and estate sued, alleging excessive force in violation of the Fourth Amendment, deprivation of familial relations in violation of the Fourteenth Amendment, municipal liability based on Monell v. Department of Social Services, 436 U.S. 658 (1978), and Nevada state law claims.

Staff summary's description of the holdings and rationales of the Majority Opinion

The [Majority Opinion ruled] that the officers were entitled to qualified immunity from the Fourth Amendment excessive force claim.

First, the totality of the circumstances based on the undisputed facts shows that Napouk posed an immediate threat to the officers at the moment they fired. No rational jury could find that the officers' mistake of fact as to Napouk's weapon, which objectively looked like a machete, was unreasonable.

Second, as the district court determined, Napouk may have committed assault with a deadly weapon as the event unfolded by brandishing the object and refusing to respond to the officers' orders.

Third, Napouk repeatedly failed to comply with the officers' orders to drop his weapon and to stop moving, and advanced toward the officers with the weapon.

Accordingly, the officers' conduct did not violate the Fourth Amendment, but even if it did, they would still be entitled to qualified immunity because they did not violate clearly established law.

The [Majority Opinion further ruled] that plaintiffs' Fourteenth Amendment deprivation of a familial relationship claim failed because there was no evidence that the officers acted with anything other than the legitimate law enforcement objectives of self defense and defense of each other.

Finally, plaintiffs' Monell claims failed because there was no constitutional violation and plaintiffs' state law claims failed because the officers were entitled to discretionary-function immunity under Nevada state law.

Staff summary's description of the views expressed in the Concurring Opinion (the Concurring Opinion addresses only the Fourteenth Amendment Due Process claim of the parents of the deceased)

> Judge R. Nelson concurred in the majority opinion and the conclusion to affirm the district court's dismissal of plaintiffs' Fourteenth Amendment substantive due process claim for deprivation of a familial relationship. In [Judge Nelson's] view, substantive due process does not extend to the Napouks' relationship with their forty-four-year-old son.

Staff summary's description of the views expressed in the Dissenting Opinion

> Dissenting, Judge Sanchez stated that the majority erred by failing to evaluate the evidence in the light most favorable to the nonmoving party and by minimizing evidence that, when properly credited, created genuine disputes of material fact. A rational trier of fact could find that the officers' use of deadly force was objectively unreasonable because Napouk did not pose an imminent threat to the safety of the officers, he was not committing a crime or resisting arrest, and several non-lethal alternatives were available to contain the slowly unfolding encounter.
>
> And [according to Judge Sanchez] Ninth Circuit caselaw clearly establishes that police officers may not kill a suspect who does not pose an imminent threat to the safety of officers or bystanders, is not committing any crime or actively resisting arrest, and in which non-lethal alternatives are available to the officers.

[Subheadings added; some paragraphing revised for readability; staff summary's phrase "the panel held" replaced by the phrase "the majority Opinion ruled"]

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

> At around midnight on October 27, 2018, a bystander called the LVMPD nonemergency line to report that a white adult male was walking down Floating Flower Avenue with a "slim jim" or a "long stick," peering into cars, talking to himself, and raising his fist at the cars. Three minutes later, another bystander called 911 to report that an African American adult male with a "machete," "big tool," or "piece of metal" was going door-to-door looking into houses, talking to himself, and pointing the object at the houses.
>
> [Court's footnote 1: *The callers made differing reports as to the man's race. In actuality, Napouk was Innuit*.]
>
> A few minutes later, the first bystander called again to report that the man had moved to Tender Tulip Avenue and was going into people's backyards and looking into windows. The bystander told the operator that he was armed and would shoot the man if he came into his yard.
>
> A few minutes after the first call, Seargent Kenton and Officer Gunn, riding in separate patrol cars, assigned themselves to the call. According to the information they received from dispatch, a male wearing a baseball cap and camo backpack was walking around with a "slim jim," a "long stick," or "possibly a . . . machete," going door to door and peering into windows. A police helicopter was also dispatched.

When the officers arrived in the neighborhood, Gunn briefly spoke with the second bystander, who told him that Napouk was one street over and wearing sunglasses. The officers did not preplan or communicate before they interacted with Napouk.

Both officers drove over to the next street, where Napouk came out from between two houses. Both officers thought Napouk was holding a machete. Gunn activated his patrol car lights and parked his car right in front of Napouk, and Kenton parked behind Gunn.

Gunn exited his car with his gun drawn and stood near the driver side door, immediately telling Napouk to "put it on the ground," and drop it. He asked Napouk what was in his hand and repeated his command to drop it. Kenton also exited his car, moved towards Napouk with his gun drawn, repeatedly asked Napouk what was in his hand, and told him to put it on the ground.

Kenton also repeatedly commanded Napouk to remove the headphones from his ears while pointing to his own ears. Napouk stood still for several seconds to the right of Gunn's patrol car, holding the long, black object at his side. Gunn reported that Napouk was not following commands and "saying we're gonna have to shoot him."

Napouk then walked slowly in front of and around to the driver side of Gunn's patrol car, where Gunn was standing, failing to follow the officers' commands to put the object down. Gunn retreated to stand behind the back of his patrol car, and both officers continued to repeat commands to "drop the knife." Napouk stood next to the driver side door of Gunn's patrol car and smoked a cigarette for over a minute, with Gunn positioned at the driver side bumper and Kenton on the passenger side at the hood of the car.

The officers repeatedly told Napouk that "it's not worth it," that "it's all good, man. We can talk," and that "you're not in any trouble," and Kenton also tried asking his name. Kenton radioed during this time to request a beanbag shotgun and a canine unit and asked that medical be standing by. Napouk stayed in the same place and moved the long object in different positions, pointing it outward, up in the air, and straight out next to him.

After around two minutes standing in one place and failing to abide by the officers' commands, Napouk moved more quickly along the side of the car toward Gunn, telling the officers twice to "get out of here." Gunn retreated around the other side of the car, repeating his command to drop the weapon. Kenton followed Napouk around the car repeating commands to drop it.

Napouk then turned and walked at Kenton, who retreated back to stand with Gunn at the passenger side near the hood of the car. Both officers said "I'm gonna shoot you," and Napouk responded "you have to." Gunn told Napouk if he took one more step towards them, "I will shoot you," and Napouk said, "I know." Kenton told him again to drop it and "it's not worth it man," and again tried to ask his name and talk to him.

Napouk stopped at the front driver side of Gunn's patrol car for another minute, moving his hat around on his head and telling the officers to "get out of here," while the officers stood on the passenger side, continuing to repeat commands to drop it and attempting to

ask his name. Eventually, he began slowly moving again, across the front of the car toward them.

They again retreated, Gunn behind a parked car on the side of the road next to his patrol car, and Kenton to the back of Gunn's patrol car. Kenton again radioed to request that someone with a beanbag shotgun come in behind him.

Napouk continued to move slowly in their direction, changing his grip on the object a few times. The officers continued instructing him to put it down, and Kenton told him "I don't want to shoot you today." Napouk continued to move along the passenger side of Gunn's patrol car towards Kenton, positioning himself between the two officers. Gunn told Kenton to "watch your crossfire." Kenton told Napouk "one more step and you're dead," to which Napouk responded, "I know" and continued advancing. When Napouk was about nine feet away, the officers both shot him multiple times.

Other officers put a handcuff on Napouk and performed first aid and CPR immediately following the shooting, but Napouk was pronounced dead at the scene. After the shooting, it was discovered that the object was a plastic toy fashioned to appear as a blade. Napouk's toxicology report revealed that he had been high on methamphetamine.

[Some paragraphing revised for readability; bolding added]

Result: Affirmance of summary judgment ruling by the Nevada U.S. District Court in favor of the officers and the LVMPD.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: PHOENIX PD DEFENDANTS PREVAIL OVER PLAINTIFFS WHO ASSERT A VARIETY OF CLAIMS ARISING FROM ACTIONS THAT PHOENIX PD DEFENDANTS TOOK AGAINST POLITICAL DEMONSTRATORS PROTESTING OUTSIDE A 2017 RALLY HELD FOR THEN-PRESIDENT TRUMP

In Puente v. City of Phoenix, ___ F.4th ___ , 2024 WL ___ (9th Cir., December 19, 2024), a three-judge Ninth Circuit panel is unanimous in ruling in favor the City of Phoenix Police Department and certain named police officers. The panel rejects the various constitutional theories for claims that arose out actions of the Phoenix PD and named officers in dealing with political demonstrators on a particular occasion.

The Ninth Circuit staff summary (which is not a part of the Ninth Circuit panel's Opinion) provides the following synopsis of the panel's Opinion:

The panel reversed the district court's partial denial of summary judgment to Phoenix Police Department ("PPD") defendants and affirmed the district court's partial grant of summary judgment to PPD defendants in an action under 42 U.S.C. § 1983 brought by two organizations and four individuals asserting a variety of claims arising from actions that defendants took against political demonstrators protesting outside a rally held by then-President Trump at the Phoenix Convention Center on August 22, 2017.

Plaintiffs alleged that defendants violated their constitutional rights under the First, Fourth, and Fourteenth Amendments by dispersing protesters through the use of tear

gas, other chemical irritants, and flash-bang grenades. After certifying two distinct classes, the district court ultimately granted summary judgment to defendants on all claims except for the individual Fourth Amendment excessive force claims asserted by three of the individual plaintiffs against certain PPD officers.

The panel affirmed the district court's summary judgment for defendants on the class claims for excessive force under the Fourth and Fourteenth Amendments. There was no "seizure" of the class members within the meaning of the Fourth Amendment because the record showed that defendants' use of airborne and auditory irritants was not objectively aimed at restraining the class members, even temporarily.

Because the class's excessive-force claims arose outside the context of a seizure, the panel evaluated those claims under the Fourteenth Amendment shocks-the-conscience test rather than the Fourth Amendment's objective reasonableness standard. Given the quickly escalating situation, there was no triable issue that the officers had an improper purpose to harm rather than legitimate law enforcement objectives at the time they decided to employ chemical irritants and flash-bang grenades to disperse the crowd.

The panel reversed the district court's denial of summary judgment to the individual defendants on the excessive-force damages claims asserted by individual plaintiffs Yedlin, Travis and Guillen, who were physically impacted by projectiles. The panel held that the officers were entitled to qualified immunity because they acted reasonably under the circumstances or did not violate clearly established law.

The panel next affirmed the district court's summary judgment for the individual defendants with respect to the First Amendment claims asserted by all plaintiffs, on their own behalf, and on behalf of the classes. The individual defendants were entitled to qualified immunity because, based on the undisputed facts, including the use of unidentified gas and pyrotechnic devices by agitators, there were sufficient objectively reasonable grounds to establish the requisite clear and present danger of an immediate threat to public safety, peace, or order. Moreover, there was no triable issue that the dispersal of the crowd was undertaken with retaliatory intent.

The panel affirmed the district court's summary judgment to Police Chief Williams. Because the panel concluded that all of Plaintiffs' claims either fail or did not involve the violation of a clearly established right, Plaintiffs' claims of supervisorial liability necessarily fail.

Finally, the panel affirmed the district court's summary judgment to the City of Phoenix on the municipal liability claim. Plaintiffs failed to raise a triable issue that Chief Williams caused or ratified the use of excessive force against Guillen or that the City was deliberately indifferent to Guillen's constitutional rights.

[Some paragraphing revised for readability]

Result: Dismissal of all of the Plaintiffs' section 1983 claims against the City of Pheonix PD and against the individual police officers.

IN CRIMINAL CASE, PANEL HOLDS THAT A LAWFUL TRAFFIC STOP DID NOT BECOME AN ARREST DESPITE THE HANDCUFFING OF THE DETAINEE – OFFICER SAFETY AND PUBLIC SAFETY CONSIDERATIONS JUSTIFIED THE LEVEL OF INTRUSION

In United States v. In, ___ F. 4th ___ , 2024 WL ___ (9th Cir., December 30, 2024), a three-judge Ninth Circuit panel is unanimous in holding under the totality of the circumstances that placing a suspect in handcuffs did not convert a traffic stop into an arrest that would have required probable cause.

Three bicycle officers made a traffic stop near Las Vegas Boulevard ("the Strip") in Las Vegas, Nevada. The officers saw a car with a California license with a taillight out parked in a red-curb, no-parking zone about fifty feet from the Strip. Defendant In was seated in the driver's seat of the car.

Officer Diaz walked up to the driver's-side window, requesting In's driver's license, registration, and insurance. Simultaneously, Officer Anderson approached the other side of In's car. She saw a Glock lying on the floor of the back seat area of [the defendant's] car, and she informed Officer Diaz of that observation. Officer A then ordered [the defendant] to get out of the car. [Defendant] complied with the order. After [defendant] denied that that he had any weapons in the car but admitted that he had a California arrest record for marijuana, Officer Diaz handcuffed him. A records check while at the scene disclosed that [defendant] had a California felony record. The officers then obtained a search warrant and subsequently recovered the gun.

The U.S. District Court suppressed the gun – based on the handcuffing of In – on the District Court judge's rationale that the officers had exceeded the scope of a Terry detention and thus had arrested In without probable cause. The Ninth Circuit panel reverses the District Court's suppression order. The legal analysis by the Ninth Circuit panel includes the following:

> The use of "especially intrusive means" of effecting Terry stops has been held permissible in certain circumstances, including:
>
> > (1) where the suspect is uncooperative or takes action at the scene that raises a reasonable possibility of danger or flight; (2) where the police have information that the suspect is currently armed; (3) where the stop closely follows a violent crime; and (4) where the police have information that a crime that may involve violence is about to occur.
>
> . . . .
>
> In this case, the officers' decision to handcuff defendant made the traffic stop more intrusive than a typical Terry stop, but the use of handcuffs was reasonable under the circumstances and did not convert the stop into an arrest. Officer Andersen saw an unsecured gun on the floor of the backseat of In's car seconds into the traffic stop, and when Officer Andersen asked In whether he had a gun in his car after In was ordered out of his car, [the defendant] lied and said "No."
>
> While [defendant] was physically cooperative with the officers up until this point, he became uncooperative when he answered untruthfully the officer's question about having a gun in his car, and his response reasonably raised the possibility that the stop could turn extremely dangerous due to the information gap that existed between the officers and [defendant] and the unsecured gun on the floor of the backseat of the car. . .

. The safety risks posed by the stop were amplified because the stop occurred about fifty feet from the Strip, a densely populated tourist area, and the officers were patrolling on bicycles without the protection of a patrol car if the traffic stop turned dangerous.

Because the officers were patrolling on bicycles, they could not place [defendant] inside a patrol car while conducting their investigation. If the officers had not handcuffed [defendant], they would have had to rely on their ability to physically overpower [him] if he attempted to reach for the gun that was visible and loose on the floor of the backseat of the car. Although [defendant] did not actually reach for the exposed gun, the question is whether officers had a sufficient basis to fear for their safety to warrant the intrusiveness of the actions taken. . . .

Considering the totality of the circumstances, we hold that the officers had a sufficient and reasonable basis to fear for their safety, justifying their decision to handcuff [defendant] so that their safety was assured during their investigation. The officers had good reason to handcuff [defendant] to prevent him from being able to access the unsecured gun on the floor of the backseat.

The officers were eliminating the possibility that [defendant] could gain access to the unsecured gun. That conduct properly protected both the officers and the general public. And this is true even though Nevada is an open carry state. See Nev. Const. art. I, § 11. Because the officers' conduct was reasonable under the circumstances, the Terry stop did not escalate into a de facto arrest without probable cause.

[Citations omitted; some paragraphing revised for readability]

Result: Reversal of suppression order U.S. District Court (Nevada).

LEGAL UPDATE EDITOR'S COMMENT: Appellate case law for Washington is consistent with the result and analysis in the In case. See, for example, State v. Belieu, 112 Wn.2d 587 (1989) (felony stop procedures that included handcuffing of home invasion suspects in Terry stop were justified under the totality of the circumstances).

****

WASHINGTON STATE COURT OF APPEALS

DIVISION THREE PANEL RULES THAT THE PHRASE "ACTUAL PHYSICAL CONTROL" IN THE TRAFFIC CODE'S RCW 46.61.504 IS NOT UNCONSTITTUTIONALLY VAGUE

In State v. Ramos, ___ Wn. App.2d ___ , 2024 WL ___ (Div. III, December 5, 2024), Division Three of the Court of Appeals rejects the argument of defendant that the Washington traffic code's "actual physical control" prohibition IN RCW 46.61.504 is unconstitutionally vague.

In the Opinion's opening section that covers two pages, the issues and rulings in the case are summarized as follows:

Emma Rose Ramos was charged with being in actual physical control of a motor vehicle while under the influence after she was found asleep in the front passenger seat of her Jeep while it was parked on the side of the street with the engine running. Ramos moved to dismiss the charge, arguing that the physical control statute was unconstitutionally

vague as applied to her. Specifically, Ramos argued that if the definition of "actual physical control" was so broad as to include a person sitting in the passenger seat of a parked vehicle then the criminal offense failed to give notice of the proscribed behavior and failed to provide ascertainable standards of guilt to protect against arbitrary enforcement.

The City of Spokane (City) defended the constitutionality of the statute, but argued that the term "actual physical control" is broad enough to encompass a person in the passenger seat of a motionless vehicle. Noting cases where passengers were found to be in actual physical control, the Spokane Municipal Court concluded that the statute lacked a clear and consistent definition and was void for vagueness as applied to Ramos.

The City sought direct review by the Supreme Court, which denied review and transferred the case to this court pursuant to RAP 4.3(e). As a preliminary matter, we hold that upon transfer by the Supreme Court of a notice for direct review, the Court of Appeals should apply the factors set forth in RAP 4.3(a)(1) and (2) to determine whether direct review should be granted. If the Court of Appeals does not grant direct review, a final decision appealable as a matter of right should be transferred to the superior court to be processed according to the Rules on Appeal from a Court of Limited Jurisdiction. In this case, we grant the City's request for direct review.

Turning to the constitutional issue, we reverse the municipal court's dismissal of the physical control charges based on the court's conclusion that the statutory crime of being in physical control of a vehicle is unconstitutional. The physical control statute is not unconstitutionally vague as applied to Ramos. The term "actual physical control" has been defined with sufficient clarity as "'existing' or 'present bodily restraint, directing influence, domination or regulation.'" State v. Smelter, 36 Wn. App. 439, 442, 674 P.2d 690 (1984) (internal quotation marks omitted) (quoting State v. Ruona, 133 Mont. 243, 248, 321 P.2d 615 (1958)). In plain terms, and as applied to the statute, it means the existing or present ability, through the use of bodily force, to restrain, direct, influence, or regulate the movement of a vehicle.

Since Ramos withdrew her Knapstad1 motion below and proceeds on the constitutional challenge only, we do not decide whether the application of this definition to the facts in this case requires dismissal. Instead, we remand for further proceedings.

The Ramos Court discusses as follows some of the relevant Washington precedents that have held that the facts of the case support convictions for violating the "actual physical control' statute:

The "existing or present ability" focuses on the suspect's ability to exert physical force as opposed to the vehicle's ability to move. In State v. Smelter, the defendant was found seated in the driver's seat of a vehicle that was out of gas with its engine off, parked partly on the shoulder of an interstate freeway. 36 Wn. App. 439, 440 (1984). At the time he was stopped, the defendant's breath alcohol was over the legal limit.

The Smelter court rejected the defendant's argument that he was not in actual physical control because his vehicle was inoperable. Instead, the court adopted a widely used definition of the term "actual physical control" to mean "'existing' or 'present bodily restraint, directing influence, domination or regulation.'" . . . .Movement of a vehicle is not

included in this definition. Instead, after surveying other decisions, the court found that "[p]ositioning in the driver's seat is an element common to all of the cases that have found actual physical control of a motionless vehicle." . . . . see also State v. Maxey, 63 Wn. App. 488, 491-92 (1991) (stating that Smelter is the seminal authority for the definition of actual physical control).

One year later, our court held that the law did not violate equal protection by allowing those charged with physical control to assert the defense of safely-off-the- roadway when the defense was not available to those charged with driving under the influence. State v. Beck, 42 Wn. App. 12, 14 (1985). In reaching this conclusion, this court noted the distinction between the two offenses: "[p]hysical control means the defendant is in a position to physically regulate and determine movement or lack of movement of the vehicle," whereas "[t]o be guilty of driving while intoxicated, the driver must be in physical control and also 'must have had the vehicle in motion at the time in question.'" quoting McGuire v. City of Seattle, 31 Wn. App. 438, 442 (1982)).

While Smelter recognized that under the ordinary definition of "actual physical control" a person in the passenger seat is not able to control the movement of a motionless vehicle, subsequent cases have found that a passenger can be in actual physical control of a moving vehicle if they have the power to guide the vehicle by reaching over and grabbing the steering wheel. See, e.g., N. Pac. Ins. Co. v. Christensen, 143 Wn.2d 43, 49, 17 P.3d 596 (2001). In North Pacific Insurance Co., the Supreme Court applied the definition of actual physical control adopted in Smelter, noting that while the passenger's dominion of the vehicle was brief, grabbing the wheel of a moving vehicle was sufficient to direct the path of the vehicle and cause an accident.

Here, the City acknowledges Smelter's widely recognized definition of actual physical control, but contends that the Supreme Court decision in State v. Votava, 149 Wn.2d 178 (2003), expanded that definition to include a person sitting in the passenger seat of a motionless vehicle who may have driven the vehicle to that location at an earlier time or who may have moved into the driver seat and drove the vehicle while still intoxicated. We disagree that Votava changed the definition of "actual physical control."

In Votava, the court was asked to decide whether a defendant charged with actual physical control, who was found asleep in the driver's seat of a running vehicle, could assert the defense of "safely off the roadway." This defense is available if "the person has moved the vehicle safely off the roadway." RCW 46.61.504(2). Votava produced evidence that while he was riding in the passenger seat, he directed the driver to pull into a parking lot. The driver left and Votava moved into the driver seat and fell asleep. The State argued that the defense of safely-off-the-roadway was not available to Votava because he did not move the vehicle safely off the roadway but only obtained physical control after the vehicle was moved.

Ultimately, the Votava court held that the defense of safely-off-the-roadway was available to Votava, noting that driving a moving vehicle was not an element of being in physical control of a vehicle and should not be required for the defense. Votava, 149 Wn.2d at 184. In reaching this conclusion, the court made several general comments about the crime of physical control. For example, the court cited Beck for the proposition that "[a]n officer may charge actual physical control of a vehicle when a person is in the position to control the movement or lack of movement of the vehicle." The court also cited Smelter for the proposition that "[w]hen the evidence gives rise to a reasonable

> inference that the vehicle was where it was by a person's choice, that person is in actual physical control of the vehicle." And the court cited Arambul for the proposition that "[a] person may be in actual physical control even if someone else is driving." (citing In re Arambul, 37 Wn. App. 805, 808, 683 P.2d 1123 (1984)).
>
> These comments were made to support the court's conclusion on the meaning of the defense of physical control and specifically the phrase "'the person has moved the vehicle.'" Votava at 183 (quoting RCW 46.61.504(2)). The court was not addressing the definition of "actual physical control," and any language suggesting such would be dicta. Votava did not change or expand the meaning of "actual physical control." Indeed, the court noted that the "actual physical control statute was enacted to protect the public by (1) deterring anyone who is intoxicated from getting into a car except as a passenger, and (2) enabling law enforcement to arrest an intoxicated person before that person strikes." Votava at 184.
>
> The term "actual physical control" is not vague as applied to Ramos or persons similarly situated. The phrase means "'existing' or 'present bodily restraint, directing influence, domination or regulation,'" or as we noted above, the existing or present ability, through the use of bodily force, to restrain, direct, influence, or regulate the movement of a vehicle. Smelter, 36 Wn. App. at 442 (internal quotation marks omitted) (quoting Ruona, 133 Mont. at 248). We do not find this definition ambiguous. The phrase is sufficiently definite. And the definition does not leave police with arbitrary discretion to decide when the law has been violated.

[Some citations omitted, others revised for style]

Result: Reversal of Spokane Municipal Court order that dismissed the "physical control" charge against Emma Rose Ramos; case remanded to the Municipal Court for that Court to (1) address any further motions for dismissal and/or (2) try the case.

RESTORATION OF FIREARMS RIGHTS UNDER RCW 9.41.041 AS INTERPRETED IN 2019 WASHINGTON SUPREME COURT RULING IN THE BARR DECISION: BY 2-1 VOTE, DIVISION ONE PANEL RULES THAT A SEALED CLASS A JUVENILE CONVICTION DISQUALIFIES THE OFFENDER FROM HAVING FIREARM RIGHTS RESTORED, EVEN THOUGH RCW 13.50.260 PROVIDES THAT A SEALED CASE IS "TREATED AS IF [IT] NEVER OCCURRED"

In Jerome Othello Clary IV v. State, ___ Wn. App. 2d ___ , 2024 WL ___ (December 2, 2024), Division One of the Court of Appeals rejects the arguments of a defendant in his appeal from a King County Superior Court order that denied his petition for the restoration of his firearms rights. In a 2-1 vote, the panel rules that Mr. Clary's sealed Class A juvenile conviction is a disqualifies him from having his firearm rights restored, even though RCW 13.50.260 provides that a sealed case is "treated as if [it] never occurred."

The introduction of the Majority Opinion in Clary provides the following conclusory overview of the Majority Opinion's ruling:

> Approximately two decades ago, a court convicted Jerome Othello Clary—who was a juvenile at the time—of child molestation in the first degree and entered an order of disposition revoking his right to possess firearms.

> Since then, Clary completed all the requirements to have his juvenile court file sealed under RCW 13.50.260, and a trial court entered an order to that effect. Under RCW 13.50.260(6)(a), which governs the legal effect of such an order, "the proceedings in the case shall be treated as if they never occurred."
>
> Years later, Clary petitioned the trial court to restore his right under Washington law to possess a firearm. The court denied the petition, finding that "a sealed juvenile conviction" is a "disqualifying offense" under RCW 9.41.041. Because the court's ruling is consistent with our Supreme Court's controlling analysis in Barr v. Snohomish County Sheriff, 193 Wn.2d 330, 440 P.3d 131 (2019), we affirm.

The Clary Dissenting Opinion's introduction summarizes as follows the contrary view of Judge Michael Diaz:

> The issue before this court is whether a sealed, juvenile, class A felony conviction disqualifies Clary from restoring his state right to possess a firearm under RCW 9.41.041(1), despite the fact that RCW 13.50.260(6)(a) mandates that sealed juvenile case proceedings "shall be treated as if they never occurred[.]" The issue before this court is not whether Clary is now or ever will be actually eligible to possess a firearm under all laws that bind him. He expressly concedes he is not eligible to possess a firearm under current federal law. Still, this case is significant because of how this court, and perhaps our Supreme Court ultimately, interprets the legislature's sweeping mandate to "treat" juvenile cases (with limited exceptions) "as if they never occurred," when a juvenile offender does everything we ask of them.
>
> My esteemed colleagues in the majority agree that this case presents the "intersection" of these statutes and offer a well-reasoned analysis of Barr v. Snohomish County Sheriff, 193 Wn.2d 330, 440 P.3d 131 (2019), which they believe controls the disposition of this case. I respectfully dissent because—as I interpret and would harmonize the statutes, and as I understand Barr—Clary is not disqualified from the restoration of this state constitutional right. And, thus, I would reverse and remand this matter for the trial court to grant Clary the relief he seeks.

Result: Affirmance of order of King County Superior Court denying the petition of the Clary to restore his firearms rights.

IN A FELONY CRASH CASE, TRIAL COURT IS HELD TO HAVE LAWFULLY ADMITTED RESULTS OF A 2022 RE-TEST OF DEFENDANT'S BLOOD SAMPLE THAT WAS ORIGINALLY TESTED IN 2020; EXPIRED "USE BY" DATE ON VIAL CONTAINING THE BLOOD DID NOT PRECLUDE ADMISSIBILITY OF THE 2022 TEST RESULT IN LIGHT OF STATUTES, CASE LAW, AND EXPERT TESTIMONY; APPELLATE COURT RELIES IN SIGNIFICANT PART ON THE 2024 SUPREME COURT DECISION IN STATE V. KELLER

In State v. Leer, ___ Wn. App. 2d ___ , 2024 WL ___ (Div. I, December 30, 2024), Division One of the Court of Appeals rules for the State in an Opinion in the first paragraph summarizes the defendant's contention and the ruling:

> Eric Emil Leer was charged with two counts of vehicular homicide and two counts of vehicular assault, all alleged to have occurred while he was under the influence, after a

> wrong-way motor vehicle accident in January 2020. On appeal, he assigns error to the trial court's ruling to admit results from a 2022 retest of his blood sample which was obtained and first tested pursuant to a search warrant in 2020. Leer asserts that because the vial that contained his blood sample was past the "use by" date provided by the manufacturer by the time of the second test, those test results did not meet the requirements of the governing statute and administrative rules. We disagree and affirm.

The Leer Opinion determines to be persuasive the expert witness testimony for the State, and the Opinion includes analysis of RCW 46.61.506 and ch. 448-14 WAC. The Opinion also relies on the analysis in the Washington Supreme Court decision in State v. Keller, 2 Wn.3d 887 (2024), as well finding support in the analysis in an unpublished Court of Appeals Opinion in Kanta v. Department of Licensing, No. 58434-4-II (Wash. Ct. App. Oct. 1, 2024) (unpublished), https://www.courts.wa.gov/ opinions/pdf/D2%2058434-4-II%20Unpublished%20Opinion.pdf.

A January 2, 2025, email message from the Traffic Safety Resource Program reported to the listserv on the Leer decision as follows:

> WA Crash Prosecutors - COA Div. I agrees with us and follows the reasoning in Keller. The trial court must confine its foundational thresholds to admission to the four-corners of the statute (RCW 46.61.506(3) & WAC 448-14-020(3)). Analysis prior to the lapse of the vial's expiration date is **NOT** a requirement and does not per se bar admission of the tox. Further – and this is another important part – the court noted that the State's 702 expert testified that the lapse of the expiration **would not adulterate the sample** based on the stability studies relied upon by our expert and discussed on the record! This goes a bit further than the holding in Kanta from Division II and it's published! Reach out to your TSRP for briefing and guidance.

Result: Affirmance of Mason County Superior Court convictions of Eric Emil Leer for two counts of vehicular homicide and two counts of vehicular assault, all while under the influence.

****

BRIEF NOTES REGARDING DECEMBER 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 nine entries below address the December 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. Kasey Calvin Cooper: On December 3, 2024, Division Three of the COA rejects the arguments of defendant in his appeal from Chelan County Superior Court convictions for (A) *unlawful possession of a controlled substance with intent to deliver* and (B) *unlawful possession of a controlled substance*.

On appeal, the Cooper Court rejects defendant's argument that the State violated his right to remain silent by eliciting testimony that he failed to open his hotel room door when asked to do so by law enforcement officers. The Cooper Opinion summarizes as follows the Court's view that the defendant's argument fails:

> To support his argument that his refusal to answer the door was substantive evidence of his guilt, Mr. Cooper cites Washington Supreme Court cases that hold the Fifth Amendment protection on silence applies to a suspect's interactions with law enforcement prior to arrest. State v. Lewis, 130 Wn.2d 700 (1996); [State v. Easter, 130 Wn.2d 228 (1996)]. However, subsequent to Lewis and Easter, the United States Supreme Court held that, absent an express invocation of the right to silence, the Fifth Amendment does not preclude the State from introducing a suspect's prearrest silence as evidence of guilt. Salinas v. Texas, 570 U.S. 178, 183 (2013).
>
> **Here, [the detective] testified about his training and experience with individuals who do not initially open the door for police attempting to serve a warrant. This testimony was not a comment on Mr. Cooper's silence. But, even if Mr. Cooper's initial refusal to open the door amounted to prearrest silence, the Fifth Amendment generally does not protect against evidence of a defendant's actions or demeanor. State v. Barry, 183 Wn.2d 297, 305 (2015). Consequently, the State was entitled to present evidence of Mr. Cooper's failure to open the hotel room door. Because Mr. Cooper's Fifth Amendment right to silence was not implicated, he has failed to make a plausible showing that the evidence had a practical and identifiable consequence on his trial.**

[Some citations revised for style]

Here is a link to the Opinion in State v. Cooper:
https://www.courts.wa.gov/opinions/pdf/398609_unp.pdf

2. State v. John Martinez: On December 9, 2024, Division One of the COA rejects the arguments of defendant in his appeal from his Snohomish County Superior Court conviction for *animal cruelty*. The defendant raised an argument under Evidence Rule 404(b), claiming that the trial court had admitted some irrelevant evidence of other wrongdoing by the defendant. The Court of Appeals rejects that argument by defendant. That issue that will not be addressed in this Legal Update entry.

In a novel argument that did not challenge his underlying conviction, Martinez also argued that, because he was convicted of only a nonviolent felony, his Second Amendment right to bear arms

is violated by the consequent restriction of the conviction on the possession of firearms, as mandated by RCW 9.41.040 and RCW 9.41.047.

The Martinez Court discusses U.S. Supreme Court precedents and Washington appellate decisions, including State v. Ross, 28 Wn. App. 2d 644 (2023), review denied, 2 Wn.3d 1026 (2024), leading to the following conclusion by the Court:

> **Restrictions on firearm possession by a felon, regardless of whether the crime of conviction was violent or nonviolent, do not violate the rights guaranteed by the Second Amendment. As a result of his conviction, Martinez is a felon, and thus, his as-applied challenge to the restrictions fails**

Here is a link to the Opinion in State v. Martinez:
https://www.courts.wa.gov/opinions/pdf/848241.pdf

3. State v. David J. Fernandez: On December 17, 2024, Division Two of the COA rejects the arguments of defendant in his appeal from his Pierce County Superior Court conviction for *assault in the first degree*. One of defendant's arguments on appeal was that he was denied a fair trial because a detective – describing the arrest and booking of the defendant – was allowed to testify that there was probable cause at that point to charge defendant with assault. The detective thus testified in regard to the domestic violence arrest of the defendant that "there was probable cause [to charge Fernandez with domestic violence assault] so he was booked into jail."

The discussion by the Fernandez Court on this issue includes the following:

> **"Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury." [State v. Kirkman, 159 Wn.2d 918, 927 (2007)]. To determine if testimony is an impermissible opinion, a court considers the circumstances of the case "including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact." . . . .**
>
> As to the first factor, a police officer's testimony "carries an 'aura of reliability.'" . . . However, an officer's testimony on guilt has "low probative value because their area of expertise is in determining when an arrest is justified, not in determining when there is guilt beyond a reasonable doubt." . . .
>
> Here, [the officer] testified that "there was probable cause to charge [] Fernandez with [domestic violence] assault and assault, so he was booked into jail." Fernandez argues this testimony "made clear [the officer's] professional opinion that Fernandez was guilty as charged."
>
> **However, this conclusion is unsupported by the testimony, as [the officer] never commented on Fernandez's guilt beyond a reasonable doubt. He merely stated there was probable cause to charge Fernandez.**
>
> As such, [the officer's] statement was not impermissible opinion testimony because he offered no opinion on Fernandez's guilt. Moreover, even if Fernandez could show that

> this testimony was erroneous, he cannot show that this testimony prejudiced him and had identifiable consequences at trial because the jury could still rely on [the victim's] testimony, evidence of [the victim's] injuries, [video evidence], and even [the defendant's] own testimony, as explained above.
>
> Therefore, we conclude there was no manifest constitutional error, and Fernandez has waived [non-constitutional theories for challenging] this alleged error by not objecting below.

[Footnote omitted; some citations omitted or revised for style; some paragraphing revised for readability]

In footnote 6 partway through the above-excerpted discussion, the Court of Appeals notes that there is some gray area in the Washington appellate case law in relation to admissibility of police officer testimony asserting that the officer believed that he or she had probable cause to arrest:

> State v. Sutherby, 138 Wn. App. 609, 617 (2007) . . . has language appearing to address our facts here: "In some instances, a witness who testifies to his belief that the defendant is guilty is merely stating the obvious, such as when a police officer testifies that he arrested the defendant because he had probable cause to believe he committed the offense. See, e.g., State v. Kirkman, 159 W[n].2d 918 (2007)." There are other cases that cite to Sutherby for this precise quote. However, Kirkman does not support this statement and the referenced language may even be dicta.

[Case citations revised for style and readability]

Here is a link to the Opinion in State v. Fernandez:
https://www.courts.wa.gov/opinions/pdf/D2%2058390-9-II%20Unpublished%20Opinion.pdf

4. State v. Darrius Montrell Galom: On December 16, 2024, Division One of the COA rejects the arguments of defendant in his appeal from a King County Superior Court conviction for *two courts of second degree assault*. Two of defendant's unsuccessful legal challenges to his conviction are: (1) his argument that the trial court should have granted his motion – grounded in constitutional search-and-seizure protections – to suppress evidence from a pen register, trap and trace (PRTT) order and a cell phone warrant; and (2) his argument that the trial court erred in admitting purported "evidence of flight" to show consciousness of guilt.

Warrant and PRTT order challenges by defendant: On the defendant's challenge to the warrant, the Galom Opinion engages in length complex analysis of highly-fact-based legal issues of probable cause, particularity, and overbreadth. The State prevails under this analysis, except that the Galom Opinion points to some overbroad language in the PRTT order (overbroad because not supported by the probable cause affidavit/declaration). But the overbroad language is held to be "severable" from the rest of the search authorization in the order and thus not to taint the search and seizure.

Admissibility at trial of cross-examination questioning of defendant by the deputy prosecutor for defendant's failure to report the shooting, as well as deputy prosecutor's pointing to purported "evidence of flight" by defendant: Defendant Galom had not objected at trial to (1) "evidence of flight" questioning of him during trial, and (2) questioning of him

about his failure to call 911 or otherwise report the purportedly self-defense shooting. Accordingly, at the appellate level he could argue against admissibility of this line of questioning only if the questioning violated a constitutional right. Shortly after the shooting, defendant Galom traveled to Indiana, and he stayed there until he was arrested. Also, he never reported the shooting to the police. His testimony at trial was that he had shot in self-defense, and that his reason for going to Indiana was solely to avoid retaliation. The Galom Court agrees with the trial court's view that going to Indiana could be evidence of both fear of retaliation (defendant's claim) and consciousness of guilt (the State's theory), and therefore the State could make the argument that the trip was evidence of the latter.

The Galom Court acknowledges that a defendant's constitutional right against self-incrimination will generally be violated with the admission of evidence, standing alone, of a defendant's failure to report his criminal acts, or defendant's silence at the time of arrest or after Miranda warnings. However, the U.S. Supreme Court declared in Jenkins v. Anderson, 447 U.S. 231, 237-238 (1980) that:

> **Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. . . . Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.**

The Galom Court concludes:

> **Galom's case is in conformity with Jenkins, and thus does not raise a constitutional issue. As in Jenkins, Galom was involved in a killing and then for several days made no report to the authorities, only to claim while testifying at trial that the killing was in self-defense and so lawful. Under Jenkins, Galom was properly subject to cross-examination on his failure to make that claim at the time of the killing, and the Fifth Amendment did not shield him from this cross examination.**

Here is a link to the Opinion in State v. Galom:
https://www.courts.wa.gov/opinions/pdf/847139.pdf

5. State v. Dennis M. Bauer: On December 16, 2024, Division One of the COA reverses the Clallam County Superior Court convictions of defendant for *(A) three counts of aggravated murder in the first degree, and (B) multiple counts for violations of firearms laws.* The Court of Appeals rules that the trial court made numerous prejudicial errors (1) under the Rules of Evidence (those issues and the rulings in Bauer will not be addressed in the Legal Update); and (2) an error in a ruling on a Miranda issue. The case is remanded to the Superior Court for re-trial.

On the Miranda issue, the Bauer Court agrees with defendant's argument that a law enforcement officer violated the defendant's rights during an interrogation by continuing to question the defendant after the defendant said some things that the Court of Appeals concludes, taking those statements together, constituted an unequivocal assertion of the defendant's right to consult an attorney.

The key facts relating to the Miranda invocation issue are described as follows by the Bauer Court:

> Here, when placed in custody and asked to waive his Miranda rights, Bauer stated, "I'd rather not sign [the waiver]" and emphasized that he did not know what was happening. In response, [Officer A], who read Bauer his rights, reassured him that "constitutional rights . . . will never go away." Even if Bauer were to sign the waiver, [Officer A] specified, [Bauer] could assert any of his rights at any point during the interview.
>
> Bauer then stated, "I've found that usually people that start talking end up in kind of trouble, they don't even know what they're getting into so I'd much rather speak to a lawyer I think." [Officer A] acknowledged Bauer's statement, saying "[o]kay, so you don't." But when Bauer reiterated that he did not know what the arrest was about, [Officer A] continued to press on the waiver. Bauer eventually signed and responded to questioning without his attorney.

In key part, the legal analysis of the Bauer Court on the Miranda invocation issue is as follows:

> A suspect's request for counsel is unequivocal if they articulate their desire with sufficient clarity such that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. State v. Gasteazoro-Paniagua, 173 Wn. App. 751, 756 (2013). The Washington Supreme Court has held that " '[m]aybe [I] should contact an attorney' " or "I guess I'll just have to talk to a lawyer about it" are equivocal statements rather than an unequivocal request, but that " 'I gotta talk to my lawyer' " and " 'I'm gonna need a lawyer because it wasn't me' " are unequivocal requests for an attorney. Gasteazoro-Paniagua, 173 Wn. App. at 756 (alterations in original) (internal quotation marks omitted) (quoting State v. Radcliffe, 164 Wn.2d 900, 907-08 (2008); State v. Nyasta, 168 Wn. App. 30, 42 (2012); State v. Pierce, 169 Wn. App. 533, 544-45 (2012)).
>
> Here, when placed in custody and asked to waive his Miranda rights, Bauer stated, "I'd rather not sign [the waiver]" and emphasized that he did not know what was happening. In response, [the officer], who read Bauer his rights, reassured him that "constitutional rights . . . will never go away." Even if Bauer were to sign the waiver, [the officer] specified, [Bauer] could assert any of his rights at any point during the interview.
>
> Bauer then stated, "I've found that usually people that start talking end up in kind of trouble, they don't even know what they're getting into so I'd much rather speak to a lawyer I think." [The officer] acknowledged Bauer's statement, saying "[o]kay, so you don't."
>
> But when Bauer reiterated that he did not know what the arrest was about, [the officer] continued to press on the waiver. Bauer eventually signed and responded to questioning without his attorney.
>
> Bauer expressed twice, within minutes of being read his Miranda rights, that he did not understand his arrest and that he did not want to waive his rights. This came in the form of three statements. Bauer first stated that he did not want to sign the waiver. His second statement, noting that he found that people who start talking usually end up in trouble, explained his desire not to sign the waiver.
>
> He then added that he would rather speak to a lawyer. That third statement, specifically stating that he would rather speak to a lawyer, followed directly on the heels of [the officer] affirming that he could assert his rights at any time.

> Including "I think" at the end of that sentence was, in this circumstance, simply a description of his current train of thought; unlike "I guess," which carries an association of uncertainty. Any reasonable officer would have understood that statement to be a request for an attorney.
>
> In fact, [the officer] acknowledged Bauer's desire not to talk. Beyond the any reasonable officer standard, the record supports that [the officer] actually understood Bauer's request. Bauer unequivocally invoked his right to counsel. And because [the officer] continued the investigation after Bauer unequivocally invoked his right to counsel, law enforcement violated Bauer's constitutional right to silence.

[Some paragraphing revised for readability; some citations revised for style]

Here is a link to the Opinion in State v. Bauer:
https://www.courts.wa.gov/opinions/pdf/866087.pdf

6. State v. Jonathan Daniel Smith: On December 24, 2024, Division Two of the COA affirms defendant's Clark County Superior Court conviction for *second degree murder.* On appeal, Smith lost an argument, among others, that the trial court erred under Miranda v. Arizona in admitting into evidence a recording of a statement that he made to himself – saying "I had to do it. I had to do it." – while he was alone in a law enforcement interview room where he had been left following his invocation of his right to attorney in response to Miranda warnings. The Smith Court rejects defendant's argument that leaving him alone in the interview room was the equivalent of questioning him following his invoking of his right to an attorney.

The Smith Court describes the relevant facts as follows:

> The officers transported Smith to the local precinct and detained him in an interview room. Smith was shirtless and bleeding from a wound on his forehead, and his hands were cuffed in front of him. A detective informed Smith that the interview room was audio and video recorded. The detective also advised Smith of his constitutional rights under Miranda. Smith said that he did not understand his rights and that he was not willing to speak to the detective without an attorney. The detective did not ask Smith any questions.
>
> After the detective left, Smith remained in the interview room by himself for approximately 90 minutes. While he was alone in the interview room, Smith said to himself, "I had to do it. I had to do it." The statement was picked up by the recording equipment.

In key part, the Smith Court's analysis of the Miranda issue is as follows:

> Smith argues that holding him alone in the interview room for a long period without the attorney he had requested was the functional equivalent of an interrogation. He claims that law enforcement exploited his situation – he was shirtless, bleeding, and handcuffed – and had reason to believe that the psychological and physical pressure would cause Smith to cave and make incriminating statements that could be recorded. Smith contends that holding him under these conditions was a continuation of his interrogation.

Courts in other jurisdictions have rejected similar arguments. In United States v. Hernandez-Mendoza, a law enforcement officer detained two people in his patrol vehicle and left them alone. 600 F.3d 971, 974 (8th Cir. 2010). A video recorder in the vehicle recorded an incriminating conversation between the two people. The court rejected the argument that activating the recording device was the functional equivalent of a custodial interrogation. The court stated,

> [The officer's] act of leaving the appellants alone in his vehicle, with a recording device activated, was not the functional equivalent of express questioning. [The officer] may have expected that the two men would talk to each other if left alone, but an expectation of voluntary statements does not amount to deliberate elicitation of an incriminating response. "Officers do not interrogate a suspect simply by hoping that he will incriminate himself." Id. at 977 (quoting Arizona v. Mauro, 481 U.S. 520, 529 (1987)).

In United States v. Swift, officers placed two suspects alone in an interrogation room together. 623 F.3d 618, 620 (8th Cir. 2010). Officers monitored their conversations, and they heard incriminating statements. The court affirmed the denial of a suppression motion, finding the reasoning of Hernandez-Mendoza controlling. The court stated, "Even though officers may have hoped that Swift or Harlan would make incriminating statements when left alone, that action was not express questioning. Nor does that action rise to the 'functional equivalent' of a police interrogation."

Other cases have refused to suppress statements made by people left alone in a recorded law enforcement vehicle. United States v. Colon, 59 F. Supp. 3d 462, 468 (D. Conn. 2014) (ruling that placing suspects in a police car "in hopes that they might make incriminating statements" did not amount to interrogation); State v. Younger, 556 P.3d 838, 855 (Kan. 2024) (stating that the defendant "was not constitutionally protected from incriminating herself by making spontaneous statements").

Conversely, Smith cites no authority for the proposition that leaving a defendant in an interview room constitutes interrogation. Instead, Smith argues that his case is similar to State v. Wilson, 144 Wn. App. 166 (2008). In Wilson, the defendant was charged with felony murder after stabbing her ex-boyfriend. While in police custody, the defendant referenced an attorney during the interrogation and the police terminated the interrogation. Later, believing that the defendant had been married to the victim, a deputy entered the interview room and told her that her husband had died from his injuries. The defendant collapsed and said that she did not mean to kill him.

The [Wilson court] held that the officer should have known that telling the defendant about the death was reasonably likely to elicit an incriminating response. The court reasoned that, because the officer elicited the defendant's statement after she had invoked her right to counsel, admission of the statement during trial was a constitutional error.

But this case is different from Wilson. Officers did not make any statements to Smith that were likely to elicit an incriminating response. Indeed, no one said anything at all to Smith before he made the statement that "he had to do it" while alone in the interview room.

As stated above, police interrogation includes "express questioning," or "words or actions . . . that the police should know are reasonably likely to elicit an incriminating response." [Rhode Island v. Innis, 446 U.S. 291, 301 (1980)]. Law enforcement did not engage in any

> express questioning or actions reasonably likely to elicit an incriminating response from Smith in the recorded interview room.
>
> We conclude that Smith's recorded statement that "[he] had to do it" made in the interrogation room was not a product of custodial interrogation and was made voluntarily. Therefore, we hold that the statement was not obtained in violation of Smith's constitutional rights.

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

In a footnote, the Smith Opinion declares, in an alternative ruling, that any error in admitting defendant's statement of "I had to do it," was a harmless error because the statement was consistent with defendant's self-defense theory.

Here is a link to the Opinion in State v. Smith:
https://www.courts.wa.gov/opinions/pdf/D2%2058351-8-II%20Unpublished%20Opinion.pdf

7. State v. Michael Scott Pearson: On December 24, 2024, Division Two of the COA affirms the Thurston County Superior Court conviction of defendant for *second degree assault with a deadly weapon*. On appeal, in defendant raised two opinion-testimony challenges to the admissibility of the arresting officer's testimony in regard to her review of a surveillance video. Defendant fails to convince the Court of Appeals on one of his challenges, and he does convince the Court of Appeals on his other challenge, but the Court concludes that the trial court's error on that issue was harmless in light of the admissible evidence of guilt in the record.

In the introductory paragraphs of the Opinion, the Pearson Court summarizes as follows its ruling and rationale on the officer-opinion-testimony issues:

> Michael Pearson was charged with one count of second degree assault with a deadly weapon after an altercation with his neighbor, Elijah St. Clair. The incident was captured on surveillance cameras at the tiny home community where both parties lived.
>
> At a jury trial, the arresting officer was allowed to testify, over Pearson's objections, that she watched the surveillance video before arresting Pearson. The same officer was allowed, again, over defense objections, to give her opinion about what the surveillance video depicted, despite the fact that she was not present for the altercation and therefore was in no better position than the jury to evaluate what the video showed. During this testimony, the officer repeatedly referred to the object in Pearson's hand in the video as a knife, and described his actions as "winding up," "building power" as if to "strike."
>
> The jury found Pearson guilty and sentenced him to 55 months of confinement for the assault with an additional 12 months added for the use of a deadly weapon. Pearson appeals, claiming that the trial court erred in admitting the arresting officer's testimony for two reasons: first, that the officer's statement that she viewed the security footage prior to arresting Pearson constitutes an improper opinion on Pearson's guilt; and second, that allowing the officer to describe the surveillance video exceeded the allowable scope of lay witness testimony, as she was not present for the altercation and was therefore in no better position to evaluate what the video showed than the jury.
>
> Pearson also claims that he received ineffective assistance of counsel because when his counsel objected to the officer testifying about the content of the video, the court asked

what support he was relying on for the objection and counsel failed to provide the relevant authority.

We hold that the officer's testimony that she viewed the security footage prior to arresting Pearson did not constitute an improper opinion on guilt, and the trial court did not err in allowing this testimony. We further hold that the officer's testimony describing the contents of the video constituted improper opinion testimony, and that it was error to admit this evidence. However, the admission of the officer's testimony was harmless when viewed in the context of the entire trial.

Finally, we reject Pearson's ineffective assistance of counsel claim, as even if his counsel's performance was deficient, Pearson cannot show that he was prejudiced by such deficient performance. Accordingly, we affirm the conviction.

Here is a link to the Opinion in State v. Pearson:
https://www.courts.wa.gov/opinions/pdf/D2%2058415-8-II%20Unpublished%20Opinion.pdf

LEGAL UDATE EDITOR'S NOTE: Recent WAPA case law notes at https://waprosecutors.org/caselaw/ have included the following information of the issue in Pearson noted immediately above:

WAPA Weekly roundup for the week of December 23, 2024

Lay opinion testimony – A witness' subjective opinion as to what is occurring in a video exhibit is not admissible under ER 701 if the witness is in no better position than the jury in evaluating what the video depicts. State v. Pearson, No. 58415-8-II (December 24, 2024, unpublished). WAPA Editor's note: This is the same ruling as the 9th Circuit's case United States v. Dorsey, No. 19-50182 (9th Circuit, December 4, 2024) reported in last week's Roundup. https://cdn.ca9.uscourts.gov/datastore/opinions/2024/12/04/19-50182.pdf

The message is the same: If your witness is going to narrate a video, you must establish why that narration by the witness is helpful to the jury under ER 701, i.e. why it is something the jury can't perceive for themselves. This can include the witness having watched the video numerous times (U.S. v. Begay, 42 F.3d 486, 502–03 (9th Cir. 1994), having listened to the recording with headphones (see State v. Smith, No. 58351-8-II (December 24, 2024, unpublished), having knowledge about a person's appearance that may not be apparent to the jury, such as height, gait, etc. (See Dorsey, above.) or familiarity with the scene.)

WAPA weekly roundup for the week of December 16, 2024

Lay opinion testimony – A lay opinion is not "helpful" under ER 701 unless the opining witness has some personal knowledge or experience that supports a more informed judgment than the jury can make on its own. A detective's testimony about salient but minor details in a surveillance video shown to the jury were admissible under ER 701 because the detective had watched the video multiple times. However, the detective's opinion that the defendant was one of the masked men in a surveillance video was not helpful to the jury (and therefore inadmissible) because there was no evidence the detective was more able to identify the defendant than the jury. United States v. Dorsey, No. 19-50182 (9th Circuit, December 4, 2024).

(WAPA Editor's note: This case is largely one of a lack of foundation. Had the detective testified that he was familiar with the defendant's gait, for example, his lay opinion testimony might have

been admissible. Also, don't forget that federal circuit court opinions are persuasive, but not binding, on Washington state courts.)

8. State v. Ray Castillo: On December 24, 2024, Division Two of the COA affirms the Clark County Superior Court conviction of defendant Castillo for *second degree assault*. One of the issues on appeal was whether the defendant's Sixth Amendment right to confrontation was violated in the admission at trial of all of the statements of the alleged victim [hereafter, "the victim"] to a law enforcement officer. The officer took her statements immediately after the officer made a traffic stop of a third party. At that point, the victim and her female friend had run up to the officer and yelled that the victim had been assaulted moments earlier by the victim's boyfriend. They told the officer that the boyfriend was running away, and they pointed to a man running across a field. The officer radioed a request for assistance, and he talked to victim for a few minutes to get some more information.

The Sixth Amendment confrontation clause prohibits the admission of "testimonial" hearsay statements unless two conditions are met: (1) the declarant is unavailable, and (2) the defendant had a prior opportunity for cross-examination. To determine whether out of court statements are testimonial or nontestimonial, courts apply the primary purpose test. This test looks at all of the circumstances to determine whether the purpose of the statements at the time was to create evidence for trial (testimonial), or whether there was another primary purpose, such as, for example, dealing with an ongoing emergency or asking questions to guide providing of emergency care.

Included in the Castillo Court's Sixth Amendment right of confrontation analysis applied to the facts of this case is the following:

> The record suggests that the alleged assault had just occurred when Jordan contacted [the officer] and a reasonable listener—here, [the officer]—would conclude that Jordan potentially faced an ongoing emergency. [State v. Koslowski, 166 Wn.2d 409, 418-19 (2009)]. [The officer] had no idea who Jordan, Hammond, and Castillo [i.e., the victim, her friend-witness, and the defendant] were, their relationship to one another, or whether Castillo posed a danger as he ran from the scene. [The victim] and [the officer] were in an exposed, public area. During trial, [the officer] testified:
>
> > I have a male running across the open field . . . and behind the bank. And then, I have the two females that had run over and they're talking over each other. I'm trying to get them to slow down, so I could retain what they're saying as well cutting the driver—I had to get the driver out of there, cause I couldn't do all of that. It was too much.
> >
> > . . . .
> >
> > . . . . . Just a very chaotic scene. . . . Officer safety issues, I don't want to deal with that and turn my back on the car, to deal with [the victim and the eyewitness], I don't want to necessarily turn my back on [the victim and the eyewitness] to deal with the car. And I've got a male that just ran off. I don't know what his role is either. And it's just not a very conducive area to conduct a lengthy investigation until the scene is made safe.
>
> It is evident that the questions [the officer] asked Jordan were "to resolve [a] present emergency," so that he could understand what was happening, not to conduct a lengthy or

> formal investigation. [Koslowski, 166 Wn.2d at 419]. Moreover, [the officer] testified that he only spoke to Jordan for a few minutes, during which Jordan provided, not in response to any questioning, a description of the assault and identified Castillo.
>
> Thus, because the record supports the finding of an ongoing emergency, the statements Jordan made to [the officer] when [the officer] first arrived on the scene were not for the purpose of creating a trial record and do not implicate the confrontation clause. [State v. Burke, 196 Wn.2d 712, 739 (2021)]

The Castillo Court also notes, without analysis of the relevant legal issues, that the defendant conceded that the victim's statements to the officer fell within either the excited utterance or present sense impression hearsay exceptions.

Here is a link to the Opinion in State v. Castillo:
https://www.courts.wa.gov/opinions/pdf/D2%2057721-6-II%20Unpublished%20Opinion.pdf

9. State v. Jonnathan Ray Hoskins: On December 30, 2024, Division One of the COA issues a unanimous Opinion affirming the King County Superior Court conviction of defendant for *murder in the first degree pursuant to RCW 9A.32.030(1)(c) (felony murder), predicated on burglary in the first degree*. One of the key issues in the case was whether the trial court erred in admitting the defendant's statements to police during a recorded custodial interrogation. Defendant argued that he unambiguously invoked his right to silence, and that the detective violated Miranda-based case law by continuing the interrogation. The Hoskins Opinion discusses precedents from the United States Supreme Court and Washington State Supreme Court.

Defendant argued on appeal that, during the interrogation, he clearly asserted his right to silence through the following statements at various points in the interrogation: "I just wanna go home," "I just wanna go to jail," The Hoskins Opinion concludes in a fact-intensive legal analysis that the trial court did not err in concluding that, in the context of all of the facts of the lengthy interrogation, these statements by defendant did not unambiguously assert his right to silence requiring termination of the interrogation.

The Hoskins Opinion notes further that the defendant made a third statement of "I ain't got nothin' else to say ma'am," but that he made the statement at a point when the detective was not in the interrogation room and did not hear the recorded statement.

Further context regarding this latter point of fact is provided as follows in two passages in the State's brief in Hoskins. Here is a link from the Washington Courts website to the State's Brief of Respondent:
<https://www.courts.wa.gov/content/Briefs/A01/849395%20Respondent%20's.pdf>

Thus, at page 52 of the Brief of Respondent, the State explained: "at one point, [the detective] left the room and shut the door, and after she did, Hoskins said, 'I ain't got nothin' else to say, ma'am, fuck that.'"

And, at page 53, footnote 6, the Brief of Respondent explained: "The [trial] court found that Hoskins' statement, 'I ain't got nothin' else to say, ma'am, fuck that,' was made after [the detective] left the room, that she had not heard it, and that Hoskins did not invoke his rights in her presence and instead continued to talk to her when she returned. Regardless, the State did not offer that statement at trial, or any statements made after that point."

LEGAL UPDATE EDITOR"S NOTE:

- **For an article discussing some Miranda case law relevant to the Hoskins decision, see on the Criminal Justice Training Commission's LED page "Initiation of Contact Rules Under Fifth Amendment" by John R. Wasberg, updated through July 1, 2024, link at: https://www.cjtc.wa.gov/sites/default/files/2024-07/Initiation%20of%20Contact%20Rules%20Under%20the%20Fifth%20Ammendment%20%281%29.pdf**

Here is a link to the Opinion in State v. Hoskins:
https://www.courts.wa.gov/opinions/pdf/849395.pdf

****

LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

Beginning with the September 2015 issue, the most recent monthly Legal U pdate 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 of opinions 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.

****

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 https://www.cjtc.wa.gov/resources/law-enforcement-digests

****