LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

FEBRUARY 2025

TABLE OF CONTENTS FOR FEBRUARY 2025 LEGAL UPDATE

NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS……..02

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT AND PROSECUTORS: FOURTH AMENDMENT VIOLATION IS DECLARED ALTHOUGH QUALIFIED IMMUNITY IS DETERMINED WHERE AN OREGON PROSECUTOR ALLEGEDLY DISCLOSED NUDE PHOTOS THAT IDAHO AGENCIES: (1) HAD EXTRACTED FROM AN ARRESTEE'S PHONE WITH HER LIMITED CONSENT; AND (2) LATER SHARED WITH THE OREGON PROSECUTOR, WHO ARGUABLY DID NOT HAVE A VALID OFFICIAL JUSTIFICATION FOR ASKING FOR THE NUDE PHOTOS AND INFORMATION
Olson v. Grant, ___ F.4th ___ , 2025 WL ___ (9th Cir., February 10, 2025)…….02
Here is a link to the Opinions in Olson v. Grant:
https://cdn.ca9.uscourts.gov/datastore/opinions/2025/02/10/23-35365.pdf

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: LAW ENFORCEMENT OFFICERS FROM LA COUNTY DA'S OFFICE WHO WERE PART OF A JOINT FEDERAL-STATE TASK FORCE INVESTIGATING FEDERAL SOCIAL SECURITY LAW FRAUD WERE NOT SUBJECT TO SUIT UNDER SECTION 1983 BECAUSE THE OFFICERS WERE ACTING UNDER COLOR OF FEDERAL, NOT STATE, LAW ENFORCEMENT AUTHORITY
Thai v. County of Los Angeles, ___ F.4th ___ , 2025 WL ___ (February 12, 2025) …..05
Here is a link to the Opinion in Thai v. County of Los Angeles:
https://cdn.ca9.uscourts.gov/datastore/opinions/2025/02/12/23-55326.pdf

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT AND CORRECTIONS: DOCUMENTS FROM SAN DIEGO CRITICAL INCIDENT REVIEW BOARD ARE HELD TO BE PROTECTED BY ATTORNEY-CLIENT PRIVILEGE
Greer v. County of San Diego, ___ F.4th ___ , 2025 WL ___ (February 12, 2025)……06
Here is a link to the Opinions in Greer v. County of San Diego:
https://cdn.ca9.uscourts.gov/datastore/opinions/2025/02/10/23-55607.PDF

WASHINGTON STATE COURT OF APPEALS……..08

DIVISION TWO RULES THAT THE INDEPENDENT SOURCE DOCTRINE SUPPORTS ADMISSION OF DIGITAL EVIDENCE SEIZED FROM A CELL PHONE PURSUANT TO A VALID WARRANT, REGARDLESS OF WHETHER AN OFFICER'S INITIAL, WARRANTLESS SEIZURE OF THE PHONE WAS CONSTITUTIONALLY AUTHORIZED IN A CASE WHERE: (1) LAW ENFORCEMENT DID NOT SEARCH THE PHONE UNTIL AFTER THE WARRANT EXPRESSLY AUTHORIZED THE SEARCH, AND (2) THE ISSUANCE OF THE WARRANT WAS NOT GROUNDED IN ANYTHING LEARNED IN THE EARLIER MERE SEIZURE OF THE PHONE; COURT ALSO ADDRESSES FOURTH AMENDMENT SEARCH WARRANT (1) PROBABLE CAUSE STANDARD REGARDING CITIZEN INFORMANTS, AND (2) WARRANT PARTICULARITY REQUIREMENT
State v. Tyson, ___ Wn. App. 2d ___ (Div. II, February 25, 2025)……08
Here is a link to the Opinion in State v. Tyson:
https://www.courts.wa.gov/opinions/pdf/D2%2058888-9-II%20Published%20Opinion.pdf

DIVISION ONE RULES UNDER THE TOTALITY OF THE CIRCUMSTANCES THAT THE TRIAL JUDGE VIOLATED DEFENDANT'S STATE AND FEDERAL RIGHTS TO CROSS EXAMINE WITNESSES WHERE THE TRIAL JUDGE WAS OVERLY RESTRICTIVE IN LIMITING CROSS-EXAMINATION REGARDING THE PENDING "U VISA APPLICATIONS" OF TWO WITNESSES
State v. Bravo, ___ Wn. App. 2d ___ (Div. I, February 18, 2025)……..13
Here is a link to the Opinion in State v. Bravo:
https://www.courts.wa.gov/opinions/pdf/850300.pdf

NOTE REGARDING THE CJTC'S LAW ENFORCEMENT DIGEST……14

BRIEF NOTES REGARDING FEBRUARY 2025 UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS ON SELECT LAW ENFORCEMENT ISSUES……..……..14

****

NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT AND PROSECUTORS: FOURTH AMENDMENT VIOLATION IS DECLARED ALTHOUGH QUALIFIED IMMUNITY IS DETERMINED WHERE AN OREGON PROSECUTOR ALLEGEDLY DISCLOSED NUDE PHOTOS THAT IDAHO AGENCIES: (1) HAD EXTRACTED FROM AN ARRESTEE'S PHONE WITH HER LIMITED CONSENT, AND (2) LATER SHARED WITH THE OREGON PROSECUTOR, WHO ARGUABLY DID NOT HAVE A VALID OFFICIAL JUSTIFICATION FOR ASKING FOR THE NUDE PHOTOS AND INFORMATION

In Olson v. Grant, ___ F.4th ___ , 2025 WL ___ (9th Cir., February 10, 2025), a three-judge panel dismisses a section 1983 Civil Rights Act lawsuit against an Oregon county's sheriff and the county's prosecutor for the alleged disclosure of nude pictures and other items from a woman's phone. The Oregon sheriff claimed that he never had possession of or saw the pictures or other

information, and the Oregon prosecutor – who had obtained the items on request to a prosecuting attorney in Idaho – claimed to have never disclosed those items to anyone. However, Plaintiff Olson reasonably alleged that there was evidence – in light of community gossip and rumors about the content of the phone – that someone in the Oregon prosecutor's had disclosed the contents of the phone outside of the office.

The following is adapted from a Ninth Circuit staff summary (which is not part of the Majority Opinion or Dissenting Opinion) of the Opinions [bracketed text has been added]:

> [Factual and Procedural Context*]*
>
> Olson was arrested in Idaho for marijuana possession and signed a form giving Idaho police consent to search her phone, who then created an "extraction," or copy, of her phone contents.
>
> Defendant Glenn Palmer, then-Sheriff of Grant County, Oregon, heard about the Idaho arrest and, curious about whether Olson was romantically involved with Grant County Deputy Tyler Smith, asked defendant Jim Carpenter, then-Grant County Attorney and County Prosecutor, to request the phone extraction from the Idaho prosecutor in Olson's case.
>
> Carpenter [the Oregon prosecutor] requested and obtained the extraction [from the Idaho prosecutor] and reviewed the contents before allegedly [according to Carpenter] deleting the data. However, Olson subsequently heard gossip around town about the contents of her phone, including nude photos, all seemingly [to her] originating from the sheriff's office. She sued Sheriff Palmer, County Prosecutor Carpenter, and Grant County, alleging, among other things, a Fourth Amendment violation.
>
> [Majority Opinion Analysis]
>
> The panel affirmed the district court's summary judgment for Sheriff Palmer for lack of supervisory liability because there was no evidence that Palmer reviewed the extraction or had any supervisory authority over [the Oregon Grant County Prosecutor] Carpenter. [The Sheriff's request that Carpenter procure and review Olson's cell phone data failed to establish supervisory control. The panel declined to impose supervisory liability for a constitutional violation where, at best, there was a cooperative relationship between colleagues [i.e., Oregon's Grant County Sheriff and Oregon's Grant County Prosecutor].
>
> The panel next agreed with the district court that [Prosecutor] Carpenter was entitled to qualified immunity because Olson's right to be free from Carpenter's search was not clearly established at the time.
>
> The panel determined, however, that developing constitutional precedent in this area would be helpful, and, therefore, held that Carpenter's search infringed on Olson's Fourth Amendment rights. This case involved a law enforcement agency accessing highly sensitive cell phone data from another jurisdiction in the absence of a warrant, consent, or even any investigation or suspicion of criminal activity on the part of a suspect. Olson was arrested in Idaho for possession of marijuana, which is not illegal in Oregon, and there was no reason for [Oregon Sheriff] Palmer or [Oregon Prosecutor} Carpenter to suspect that Deputy Smith had taken part in criminal activity.

> Olson's consent in Idaho did not extend to a search by a different law enforcement agency, in another state, and the search did not fall into any exception to the warrant requirement.
>
> [Concurring Opinion]
>
> Concurring in part and concurring in the judgment, Judge Bress agreed that the claims against Sheriff Palmer failed because there was no evidence he exercised supervisory control over County Prosecutor Carpenter, and that Carpenter was entitled to qualified immunity because any constitutional violation was not clearly established. These points were sufficient to resolve this appeal, and Judge Bress would end the analysis there. [In his concurrence, Judge Bress asserted that] this was not a case in which it would be helpful to the development of the law to answer the underlying constitutional question even when the defendant prevails on qualified immunity grounds.

The Majority Opinion in Olson v. Grant cites the 2014 U.S. Supreme Court decision in Riley v. California in explaining that the contents of Olson's phone were protected by the Fourth Amendment:

> In Riley v. California, the Court addressed "whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested." 573 U.S. 373, 378 (2014). The Court concluded that review of a cell phone was a Fourth Amendment search requiring a warrant. [Riley at 386]. Pointing to the ubiquity, storage capacity, and range of information available on the modern cell phone, the Court went on to characterize the cell phone as "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." [Riley at 385]. A search of these devices "implicate[s] privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse," because modern cell phones "could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." [Riley at 393]. "Indeed, a cell phone search would typically expose to the government far more than the most exhaustive search of a house." [Riley at 396] (emphasis omitted). Given these weighty privacy interests, the Court held that "a warrant is generally required" to search a cell phone, absent application of another exception to the warrant requirement. [Riley 401].

The Majority Opinion goes on to explain that Olson's consent to the Idaho officials to access the contents of her phone did not justify the search by the Oregon County Attorney, nor did any other exception to the Fourth Amendment warrant requirement apply. Finally, the Majority Opinion rejects in the following passage the Oregon Prosecutor's attempted justification for his review of the phone contents:

> [T]he two asserted government interests are unavailing. Palmer [the Prosecutor] was "curious" about whether Olson's phone might reveal misconduct on Smith's part. Carpenter was interested in reviewing the phone for possible Brady material in cases where Smith might testify. Olson was arrested in Idaho for the possession of marijuana, which is not illegal in Oregon, and there was no reason for Palmer or Carpenter to suspect that Smith had taken part in criminal activity. Not surprisingly, Carpenter was never able to articulate which cases he was concerned that Smith would testify in, and for which any Brady material regarding this incident would be relevant. No precedent supports invoking a hypothetical Brady concern to overcome the warrant requirement.

> Even the most "[u]rgent government interests are not a license for indiscriminate police behavior." Maryland v. King, 569 U.S. 435, 448 (2013). The government interests here are not plausible, let alone urgent, and its behavior was wholly indiscriminate. Accordingly, we hold that Carpenter's warrantless search of Olson's cell phone constituted a Fourth Amendment violation.

Result: Affirmance of order of U.S. District Court for Oregon dismissing the section 1983 Civil Rights Act lawsuit of Plaintiff against the Oregon officials, Grant County Sheriff Turner and the Grant County Prosecuting Attorney Carpenter.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: LAW ENFORCEMENT OFFICERS FROM LA COUNTY DA'S OFFICER WHO WERE PART OF A JOINT FEDERAL-STATE TASK FORCE INVESTIGATING FEDERAL SOCIAL SECURITY LAW FRAUD WERE NOT SUBJECT TO SUIT UNDER SECTION 1983 BECAUSE THE OFFICERS WERE ACTING UNDER COLOR OF FEDERAL, NOT STATE, LAW ENFORCEMENT AUTHORITY

In Thai v. County of Los Angeles, ___ F.4th ___ , 2025 WL ___ (February 12, 2025), a three-judge Ninth Circuit panel is unanimous in affirming a U.S. District Court ruling that dismissed a lawsuit against two law enforcement officers from the Los Angeles District Attorney's Office, where the officers had been assigned full time to a joint federal-state task force to investigate allegations of fraud in Social Security disability benefits applications.

A Ninth Circuit staff summary (which is not part of the Ninth Circuit Opinion) summarizes the Opinion of the Court as follows:

> [T]he panel held that the officers were acting under the color of federal rather than state law for purposes of 42 U.S.C. § 1983. Plaintiffs, Vietnamese refugees and residents of San Diego County, alleged that the officers violated their constitutional rights by forcibly entering their homes and interrogating them about their disability benefits.
>
> Plaintiffs' complaint focused on claims brought under 42 U.S.C. § 1983, which authorizes injured parties to seek damages against persons who violate their constitutional rights under color of state law. The panel held that, because the federal government was the source of authority under which the task force, the Cooperative Disability Investigations (CDI) Unit, was implemented; and, because the officers' day-to-day work was supervised by a federal officer, the officers were acting under color of federal, rather than state, law.
>
> Although the officers continued to receive their paychecks from Los Angeles County while they were assigned to the CDI Unit, the Social Security Administration reimbursed Los Angeles County for their salaries and overtime. The investigations took place in San Diego, outside of Los Angeles County, indicating that the officers were not drawing on their authority as Los Angeles District Attorney's Office investigators.
>
> Finally, the federal nature of the CDI Unit is consistent with many other law enforcement programs that involve both state and federal employees whose officers have been held not liable to suit under § 1983. Plaintiffs provided no evidence that the authority of the

> state was exerted in enforcing the law such that the officers' conduct was fairly attributable to the state.

The Ninth Circuit panel discusses section 1983 decisions from other federal circuit courts, and the Opinion sums up the general view in the case law as follows:

> We agree with our sister circuits. To determine whether state officials assigned to a joint federal-state program operate under color of state law, we consider the totality of the circumstances. In general, where the source of authority for the program is federal in nature and the state officials' participation in the challenged conduct is subject to the immediate control of a federal supervisor, those officials act under color of federal law, not under color of state law.

[Some paragraphing revised for readability]

Result: Affirmance by the Ninth Circuit of the dismissal by the U.S. District Court for Southern California of the section 1983 lawsuit.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT AND CORRECTIONS: DOCUMENTS FROM SAN DIEGO CRITICAL INCIDENT REVIEW BOARD ARE HELD TO BE BROADLY PROTECTED BY ATTORNEY-CLIENT PRIVILEGE

In Greer v. County of San Diego, ___ F.4th ___ , 2025 WL ___ (February 12, 2025), a three-judge Ninth Circuit panel votes 2-1 to (1) reverse a U.S. District Court's order to unseal documents from the County of San Diego's Critical Incident Review Board ("CIRB") that had been produced in an underlying civil rights action, and (2) remand with instructions to return and/or destroy the disputed documents because they were protected by the attorney-client privilege.

The following is adapted (with a few edits not all identified in the Legal Update passages) from a Ninth Circuit staff summary (which is not part of the Majority Opinion or Dissenting Opinion in the case) of the Opinions [note also that the bracketed text has been added]:

> [Factual and procedural context:]
>
> Frankie Greer brought an action against the County of San Diego under 42 U.S.C. § 1983, alleging that he suffered serious injuries while incarcerated in the San Diego Central Jail. During discovery, he sought the production of documents related to in-custody deaths from the County's CIRB meetings. The CIRB's stated purpose is to consult with legal counsel when an incident occurs which may give rise to litigation, identify problem areas, and recommend remedial action to avoid future liability.
>
> The district court found that the requested documents were not protected by the attorney-client privilege because the CIRB serves multiple purposes unrelated to obtaining legal advice from counsel. The district Court rejected efforts to immunize documents from disclosure simply because an attorney was involved in an incident investigation.

After Greer settled his claims with the County, various media organizations successfully moved to intervene for the purpose of unsealing the CIRB documents that had been produced in the litigation.

[Majority Opinion Analysis: (Note that where the Staff Summary refers to the "panel held" I have generally substituted "the Majority Opinion held"]

The [Majority Opinion] held that the appeal was **not moot** even though the County had elected to produce the purportedly privileged CIRB documents. Because the panel could order the district court to direct intervenors' counsel and plaintiff's counsel to return or destroy their copies of the CIRB documents, particularly given that they received non-redacted versions, effective relief remained available.

The [Majority Opinion] held that the attorney-client privilege applied to the disputed CIRB documents. The district court erred in determining that obtaining legal advice was not the primary goal of the CIRB meetings memorialized in the underlying reports. A lawyer's recommendations on both liability for past events and avoidance of future liability-creating events constitute legal advice. Both the participants in the CIRB and its critics consistently viewed the primary purpose of the CIRB as assessing legal liability for a past event and avoiding legal liability for future similar events.

The panel **further rejected intervenors' alternative argument that even if the attorney-client privilege applies, the County waived that privilege** by, among other things, failing to establish an attorney-client relationship with every person who attended the CIRB meetings at issue. The Chief Legal Advisor's declaration stated that he was the legal advisor for the San Diego County Sheriff's Department as a whole, not just for the Sheriff alone.

All participants in CIRB meetings were employees of the Sheriff's Department and, therefore, the attorney-client privilege attached.

Judge Graber concurred in order to address in greater detail how [the Ninth Circuit's] precedents concerning review of the question whether the attorney-client privilege applies to a particular communication came to be in disarray, and to add a real-world perspective to the analysis of the attorney-client privilege.

[Dissenting Opinion Analysis]

Judge Koh agreed the case was not moot but otherwise dissented on three grounds. First, binding Ninth Circuit precedent provides that the clear error standard applies to the district court's factual finding that the primary purpose of the CIRB reports was not to obtain legal advice. The district court's factual finding on this score was not clearly erroneous, but to the contrary, supported by ample evidence in the record, including the County's policy manual, statements by County officials and, most importantly, the CIRB reports themselves. Indeed, some CIRB reports do not record any attendance or statements by an attorney at all, let alone legal advice.

Second, [Judge Koh asserted that] the County waived the privilege by twice failing to properly assert it. Despite a direct order from the district court to identify the reports' recipients, the County failed to identify who attended the relevant CIRB meetings and all of the individuals who received the CIRB reports on its privilege log. Without this

information the court below could not properly assess whether all elements of the privilege were established.

Third [Judge Koh contended], the majority has offered no basis to order that the entirety of the CIRB reports be withheld from production. The CIRB reports contain much information that is undeniably not privileged, including information that is publicly available. Ninth Circuit precedent provides that the proper remedy is to redact whatever privileged material is contained in the CIRB reports, not withhold all the CIRB reports in their entirety.

[Bolding, subheadings, and bracketed text added; some paragraphing revised for readability]

Result: Reversal by Ninth Circuit of the dismissal by the order for the Plaintiffs by the U.S. District Court for Southern California.

****

WASHINGTON STATE COURT OF APPEALS

DIVISION TWO RULES THAT THE INDEPENDENT SOURCE DOCTRINE SUPPORTS ADMISSION OF DIGITAL EVIDENCE SEIZED FROM A CELL PHONE PURSUANT TO A VALID WARRANT, REGARDLESS OF WHETHER AN OFFICER'S INITIAL, WARRANTLESS SEIZURE OF THE PHONE WAS CONSTITUTIONALLY AUTHORIZED IN A CASE WHERE: (1) LAW ENFORCEMENT DID NOT SEARCH THE PHONE UNTIL AFTER THE WARRANT EXPRESSLY AUTHORIZED THE SEARCH, AND (2) THE ISSUANCE OF THE WARRANT WAS NOT GROUNDED IN ANYTHING LEARNED IN THE EARLIER MERE SEIZURE OF THE PHONE; COURT ALSO ADDRESSES FOURTH AMENDMENT SEARCH WARRANT (1) PROBABLE CAUSE STANDARD REGARDING CITIZEN INFORMANTS, AND (2) WARRANT PARTICULARITY REQUIREMENT

State v. Tyson, ___ Wn. App. 2d ___ (Div. II, February 25, 2025)

Facts: (Excerpted from the Court of Appeals Opinion)

Tommy Tyson adopted multiple children, including two boys, AT, aged 10, and BT, aged 10. During a celebration of AT's adoption, Mr. Benoit, a Court Appointed Special Advocate (CASA) volunteer and mandatory reporter, saw a photo of a child pulling his shirt up and his pants down to expose his penis on Tyson's cell phone while AT was scrolling through pictures. Benoit asked AT to scroll back to the photo and AT refused. AT stated that it was a pinky finger and not a penis that was shown in the photograph. AT said he did not know who the person in the picture was.

Benoit confronted Tyson who said that the boys were playing around with his phone. Benoit asked Tyson to scroll back to the photo. Tyson obliged and Benoit saw a video and the still photo of the boy on Tyson's cell phone. Tyson admitted that the photo was of AT and deleted the photo and video.

Benoit reported the photo to Child Protective Services (CPS). CPS decided to remove the children from Tyson's home. The same day, [a deputy sheriff] accompanied CPS when they went to the residence to remove the children. The CPS social worker told [the deputy] that there was a history of unfounded sexual allegations at the residence. The

social worker also told [the deputy] about the incident where Benoit observed the photo on Tyson's cell phone, as described above.

Tyson was not home, so [the deputy] and another CPS worker returned to the home the next day. When they arrived, Tyson let [the deputy] and the CPS worker into the home and [the deputy] observed a cell phone sitting on a table in the living room. [the deputy] confirmed the cell phone was Tyson's and told Tyson that he was going to take possession of the cell phone pending a search warrant.

Tyson said that he had already deleted the picture on the phone. [The deputy] believed that the deleted photos could be recovered. Tyson provided [the deputy] with the passcode to unlock the phone, but [the deputy] never attempted to use it.

[The deputy] did not search the phone, but instead confiscated the phone during the time needed to secure a search warrant. [The deputy] took possession of the cell phone because he was concerned that evidence on the phone would be destroyed if the phone was not secured. [The deputy] stated that he "didn't want to leave the phone there with either it being destroyed or somehow disappeared while [he] was doing that side of the job."

Days later, Janis Rawlin-Ercambrack, a friend of Tyson's, called law enforcement to report that she had received a laptop and hard drive from Tyson. Tyson told her he was giving them to her because he was afraid that they contained a photo of AT holding Tyson's penis.

Tyson's brother, Travis Tyson, reported to law enforcement that he was at Tyson's house the day before the boys were placed into protective custody and that Tyson was deleting items from his computer and admitted to having "questionable porn." Travis said that Tyson gathered items into a trash bag that he did not want law enforcement to find, and that Tyson asked Travis to take his laptop and hard drive out of state, which Travis refused to do. Travis reported that Tyson later told him he had given his laptop and hard drive to Rawlin-Ercambrack.

One month later, a judge authorized a warrant to search Tyson's cell phone, laptop, and hard drive. The complete statements of Benoit, Rawlin-Ercambrack, and Travis were included in the affidavit of probable cause. The warrant authorized law enforcement to search the cell phone, laptop, and hard drive "for evidence only and specifically related to the crime of; Possession of depictions of minor engaged in sexually explicit conduct RCW 9.68A.070." The warrant included the statutory definition of sexually explicit conduct as defined in RCW 9.68A.011.

A review of Tyson's hard drive, pursuant to this warrant, uncovered hundreds of photos and videos of minor boys in various states of undress, including fully exposed genitals. One video involved four minor boys engaged in oral and anal sex and masturbation. The hard drive also contained nude photos of AT and BT.

The photo seen by the CASA volunteer could not be recovered from the cell phone. During forensic interviews in late 2019 and early 2020, AT and BT reported being sexually abused by Tyson.

In October 2020, the warrant was rewritten . . . . Like the first warrant, the second warrant included the complete statements of Benoit, Rawlin-Ercambrack, and Travis in the probable cause statement. [Court's footnote: *Law enforcement applied for two search warrants in October 2020, but the first was never executed. Accordingly, we refer to the warrant that was executed as the second warran*t.]

The warrant authorized law enforcement to search the cell phone, laptop, and hard drive for evidence of possession of depictions of minors engaged in sexually explicit conduct as defined in RCW 9.96A.070. The warrant also specifically identified the image of AT seen by the CASA volunteer and the photo of AT holding Tyson's penis as items to be searched for and provided a date range to search within. Pursuant to this warrant, and with the aid of updated technology, law enforcement was able to locate images of AT and BT with Tyson's penis in their mouths on the cell phone. There were also several images depicting the boys with their genitalia exposed or bent over, exposing their anuses.

Based on these images, law enforcement applied for an addendum to the warrant to authorize the seizure of the additional images that appeared to depict Tyson sexually assaulting the boys. This third warrant authorized law enforcement to search Tyson's cell phone for evidence of

> Rape of a Child First Degree RCW 9A.44.073 and Possession of depictions of a minor engaged in sexually explicit conduct RCW 9.68A.070 including: . . . .
>
> 4. Digital image(s) pertaining to apparent sexual abuse of [AT], [BT], or J.L. for the date range of 10-22-14 to 11-17-17. Law enforcement has no knowledge of when the image was actually created, modified, or deleted; and
>
> 5. Digital image(s) pertaining to nude images of [AT], [BT], or J.L. exposing their genitals or anuses for the date range of 10-22-14 to 11-17-17. Law enforcement has no knowledge of when the image was actually created, modified, or deleted; and
>
> 6. Non-criminal digital image(s) of [AT], [B.T], or J.L. for the date range of 10-22-14 to 11-17-17 for reference to compare to items #4 and #5 for identification purposes.

Tyson did not challenge the second and third warrants below on the basis that they lacked the required particularity.

[Some paragraphing revised and reformatting of footnotes for readability]

Proceedings below: (Excerpted from Court of Appeals Opinion)

The State charged Tyson with two counts of first degree child molestation and one count of first degree possession of depictions of minor engaged in sexually explicit conduct. Tyson moved to suppress all evidence obtained from the search of his cell phone, and later expanded his motion to include suppression of all evidence obtained as a result of the search warrants in this case.

With regard to the cell phone, Tyson argued that the deputy's seizure of the phone pending the issuance of a warrant to search it was unlawful, and that any evidence obtained during the subsequent search of the phone should be suppressed.

With respect to the search warrants, Tyson argued that the first warrant was unlawful because it lacked sufficient particularity. Tyson further argued that the evidence obtained as a result of the subsequent warrants should be suppressed as "'fruit of the poisonous tree'" of the unlawful first warrant.

Following a hearing, the trial court denied both of Tyson's motions to suppress. The trial court ruled that the warrantless seizure of the cell phone was authorized by the exigent circumstances exception, but not by the plain view exception. The trial court further ruled that the warrants were supported by probable cause and sufficiently particular.

RULINGS OF LAW BY THE COURT OF APPEALS:

1. *VERACITY AND BASIS OF INFORMATION/KNOWLEDGE OF CITIZEN INFORMATION SOURCES SUPPORTED THE AFFIANT-OFFICER STATEMENTS IN SUPPORT OF THE SEARCH WARRANT THAT WAS AT ISSUE ON APPEAL*

The Opinion of the Court of Appeals determines that the search warrant affidavit met the veracity and basis-of-knowledge prongs of the Aguilar-Spinelli Fourth Amendment standard because the named citizen information sources – Benoit, Rawlin-Ercambrack, and Travis – (1) were presumptively truthful as citizen information sources, and (2) each had personal knowledge of the information they provided to the affiant-officer. Benoit told the affiant-officer about the photo he observed and the conversation he had with [defendant Tyson]. RawlinErcambrack and Travis each told the affiant-officer about conversations they had personally had with defendant Tyson and the conduct they directly observed. And the accounts of these citizen informants were consistent with each other, thus buttressing the basis-of-knowledge prong of probable cause.

2. *TYSON LOSES HIS ONLY PRESERVED PARTICULARITY CHALLENGE TO WARRANT*

In key part, the Court of Appeals rejects as follows an argument that defendant bases on State v. Keodara, 191 Wn. App. 305, 364 P.3d 777 (2015):

> [T]yson argues that the first warrant did not satisfy the particularity requirement because it did not comply with a perceived requirement in State v. Keodara, 191 Wn. App. 305, 364 P.3d 777 (2015), that a warrant to search electronic devices specify which files and applications are to be searched in the drives, disks, and memory storage devices. But the Court of Appeals Keodara imposes no such requirement. Under Keodara, a warrant to search electronic devices is sufficiently particular if it distinguishes between items the State has probable cause to seize and those it does not.
>
> Here, the first warrant limited the search to the cell phone, laptop, and hard drive which, based on the supporting affidavit, law enforcement had probable cause to believe contained evidence of possession of depictions of a minor engaged in sexually explicit conduct. And the search was limited to "evidence only and specifically related to the crime of; Possession of depictions of minor engaged in sexually explicit conduct RCW 9.68A.070."

> The warrant also included the statutory definition of sexually explicit conduct, which provides a detailed list of the types of conduct the statute prohibits. These limitations sufficiently differentiate materials protected by the First Amendment, like adult pornography, from the items authorized to be seized. The warrant could not be more specific because the officers did not know where on these devices such evidence might be stored.
>
> Because the warrant limited the search to data for which there was probable cause and was as specific as possible with the information known to law enforcement at the time, the warrant met the particularity requirement.

[Paragraphing revised for readability]

3. THE INDEPENDENT SOURCE DOCTRINE SUPPORTS THE SEARCH OF TYSON'S PHONE UNDER A SEARCH WARRANT

The Court of Appeals explains in summary form in the following passage why the Independent Source Doctrine renders irrelevant Tyson's argument that the warrantless seizure of his phone rendered invalid the subsequent search of his phone under a warrant:

> Tyson contends that his cell phone was seized unconstitutionally and, therefore, his conviction must be reversed because all evidence obtained from the cell phone must be suppressed. This is so, he contends, because exigent circumstances did not support the seizure of the phone and [the deputy] could have obtained a warrant immediately after the picture on his phone was discovered by the CASA volunteer.
>
> But even assuming, without deciding, that the warrantless seizure of Tyson's cell phone during the time required to secure a search warrant was unreasonable, the evidence obtained from the cell phone is admissible under the independent source doctrine. As we conclude above, the photos and evidence on the cell phone were seized pursuant to valid search warrants. Because there had been no search of the phone prior to the warrant application, no information from the phone was used in any of the search warrant affidavits. Therefore, neither the deputy's decision to seek the warrants nor magistrate's decision to issue the warrants were influenced by the warrantless seizure of the cell phone. The trial court did not err in denying Tyson's motion to suppress.

LEGAL UPDATE EDITOR'S RESEARCH NOTE/COMMENT: As seen in the paragraph above, the Court of Appeals relies on the "Independent Source Doctrine" and thus does not rule on whether it was reasonable for law enforcement to make a temporary seizure of Tyson's phone based on probable cause to believe it contained evidence. The State's Brief of Respondent in Tyson, includes a lengthy argument on this issue, citing and discussing extensive case law at pages 16-32 (including discussion of State v. Huff, 64 Wn. App. 641 (1992) and numerous decisions from courts in other jurisdictions that the constitution allows the temporary seizure of a phone or other personal property so that the evidence is not destroyed while a search warrant for the phone or other personal property is being sought during a reasonable period of time after the phone seizure). Here is a link to the State's Brief State v. Tyson:

https://www.courts.wa.gov/content/Briefs/A02/588889-respondent's%20Brief.pdf

The permissible duration of the seizure of a phone prior to the application for a search warrant is not discussed in detail in the Tyson Opinion (which, as noted above, avoids

addressing the issue) or in the parties' briefs as I understand the briefs. My understanding of the constitutional law in this subject area (though I have not recently researched the issue) is that the government must proceed with all due speed in seeking a search warrant after making a seizure of personal property (whether the item seized is a phone or a vehicle or other item) in this situation. See the discussion in State v. Huff, 64 Wn. App. 641 (1992) (accessible at https://casetext.com/case/state-v-huff-29). As always, I urge law enforcement readers of the Legal Update to consult their local prosecutor or agency counsel on any and all issues addressed in the Legal Update.

Result: Affirmance of Pierce County Superior Court convictions of Tommy Darren Tyson for two counts of first degree child molestation and one count of first degree possession of depictions of minor engaged in sexually explicit conduct.

DIVISION ONE RULES UNDER THE TOTALITY OF THE CIRCUMSTANCES THAT THE TRIAL JUDGE VIOLATED DEFENDANT'S STATE AND FEDERAL RIGHTS TO CROSS EXAMINE WITNESSES WHERE THE TRIAL JUDGE WAS OVERLY RESTRICTIVE IN LIMITING CROSS-EXAMINATION REGARDING THE PENDING "U VISA APPLICATIONS" OF TWO WITNESSES

In State v. Bravo, ___ Wn. App. 2d ___ (Div. I, February 18, 2025), the introductory paragraphs of the Court of Appeals Opinion summarize as follows the procedural background and the ruling of the Court of Appeals:

> A jury convicted Gildardo Bravo of rape of a child in the first degree. At trial, Bravo sought to cross-examine the victim, M.H., about her and her family's pending U visa application. A U visa grants temporary legal residence to a person who is the victim of a qualifying crime and who helps law enforcement investigate or prosecute that crime. [Court's footnote 1: *State v. Romero-Ochoa, 193 Wn.2d 341, 344, 440 P.3d 994 (2019)*].
>
> Qualifying crimes [under the law relating to U visas] include, among other things, rape, domestic violence, and sexual assault. [Court's footnote 2: 8 U.S.C. § 1101(a)(15)(U)(iii).]
>
> The trial court limited Bravo's cross-examination of M.H. to her knowledge at the time of her initial report to investigators—six years before her trial testimony. The court also precluded cross-examination of M.H.'s sister, L.H., as to their immigration status.
>
> Bravo appeals and argues that exclusion of the U visa evidence violated his state and federal constitutional rights to confront witnesses. We agree with Bravo, reverse his conviction, and remand for a new trial. [Court's footnote 3: *Because we reverse and remand for a new trial, we do not reach other issues raised by Bravo's appeal*.]

[Reformatted by the Legal Update editor by moving the footnotes into the body of passages]

The concluding two paragraphs of the Bravo Opinion read as follows:

> The State's closing argument emphasized that M.H. and L.H. demonstrated no bias and had no motive to fabricate. But Bravo was not able to cross-examine and expose any motive for bias or motive to fabricate, so the jury was unaware of their motives. Because of the State's closing argument, lack of corroborating evidence, and inconsistencies in

testimony, assuming the "damaging potential of cross-examination were fully realized" we cannot "nonetheless say that the error was harmless beyond a reasonable doubt." Romero-Ochoa, 193 Wn.2d at 348.

We reverse Bravo's conviction and remand for a new trial.

Result: Reversal of Whatcom County Superior Court conviction of Gildardo Bravo for rape of a child in the first degree; case remanded for re-trial.

****

NOTE REGARDING THE CJTC'S LAW ENFORCEMENT DIGEST

Please note that the January 2025 issue of the Criminal Justice Training Commission's Law Enforcement Digest is available (along with back issues) on the LED page of the CJTC at https://www.cjtc.wa.gov/resources/law-enforcement-digests

****

BRIEF NOTES REGARDING FEBRUARY 2025 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 eight entries below address the February 2025 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. Derek Steven Lebeda: On February 3, 2025, Division One of the COA affirms the Kitsap County Superior Court convictions of defendant for *two counts of assault in the second degree with firearm enhancements*. The prosecution was based on defendant holding a gun to the head of two separate victims.

Among other rulings, the Lebeda Court rejects the defendant's arguments that the trial court violated his federal and state confrontation clause rights when the trial court admitted part of a

recording of a 911 call from the alleged victim, Grace. **Under state and federal case law, the constitutional right to confrontation of witnesses generally bars the admission of hearsay statements that are "testimonial." When questioning of a victim or witness by an officer or a 911 operator or other government officer shifts from addressing an ongoing emergency into the process of eliciting information for investigation of a possible crime, the statements of the victim or witness shift from non-testimonial to testimonial. This is a highly fact-intensive inquiry.**

In key part, the Lebeda Opinion (with case law citations omitted here) explains as follows why defendant's confrontation clause argument fails in regard to the non-testimonial statements made by the alleged victim, Grace, to the 911 call-taker:

> As to Grace's 911 call, [defendant] challenges only the final portion when Grace was prompted to discuss what led to the incident, as this shifted the call from addressing an ongoing emergency to eliciting information for investigation of a possible crime.
>
> . . . .
>
> To determine whether a statement is testimonial or nontestimonial, courts apply the "primary purpose test." . . . "Courts must determine the primary purpose of an interrogation 'by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs.' " . . . Determining "whether an emergency exists and is ongoing is a highly context-dependent inquiry." . . .
>
> Here, while Grace stated, "They're about to make contact with the vehicle, he's getting out of the car right now," the fact that officers had just arrived does not obviate the emergency. The 911 operator was using information provided by Grace to direct the police to the right location:
>
> > [Operator] Do you see my officers in the area?
> >
> > [Grace] Yes, yes, yes, I see them, I see them, I see them, they're right there.
> >
> > [Operator] Are you able to point out where they're going?
> >
> > [Grace] Yeah, I'm pointing, right, pointing right, right to them.
> >
> > [Operator] Okay. Okay, just let me know when they make contact with the vehicle, okay?
>
> The testimony and the video exhibits also indicate the police took some time to approach the vehicle after they arrived. Additionally, among the statements made by Grace, she indicated Lebeda's erratic behavior could be due to being under the influence of something, which would be helpful for officers in addressing the situation.
>
> Immediately after Grace's answer, the operator asks if the officers are making contact, and Grace confirms they have. The call and transcript capture commands in the background that indicate the officers' efforts to gain control of the situation were ongoing.

> Thus, because the 911 call continued to discuss the ongoing emergency, we hold the statements were nontestimonial and that the trial court's admission of the statements did not violate the confrontation clause.

[Case citations, footnote omitted; some paragraphing revised for readability]

Here is a link to the Opinion in State v. Lebeda:
https://www.courts.wa.gov/opinions/pdf/870670.pdf

2. State v. Darius Caleb Villa: On February 10, 2025, Division One of the COA reverses the King County Superior Court convictions of defendant for (A) *two courts of first degree child molestation*, and (B) *one count of third degree child molestation*.

Among other rulings, the Villa Court, relying on the Washington Supreme Court decision in State v. Unga, 165 Wn.2d 95 (2008), rejects the defendant's argument for suppression of statements that he made to a detective. Defendant claims that his statements to a detective in non-custodial questioning were involuntary based on the defendant's theories that, among other things, the detective: (1) minimized the defendant's culpability and the potential consequences for child molestations that defendant was accused of having committed when he was 13 years old, 16 years old, and 19 or 20 years old; and (2) the detective appealed to his religious beliefs.

The Villa Court points out that the defendant was 24 years-old and had earned a college Associate degree as of the time of questioning. **[LEGAL UPDATE EDITOR'S NOTE: The analysis might have been different if the defendant had been much younger and/or had significant intellectual and emotional development challenges.]**

The fact-based legal analysis by the Court of Appeals on the voluntariness issue includes the following:

> Here, there is substantial evidence in the record from which the trial court could have found by a preponderance of the evidence that Villa's statements to [the detective] were voluntary. At the time of the interview, Villa was 24 years old and had obtained an associate's degree.
>
> When [the detective] initially contacted Villa to "get his statement," she told him she was a "detective" assigned to a case regarding "a meeting at the church." Villa agreed to meet with [the detective], and this meeting took place over Villa's lunch break outside of his work in [the detective]'s car. During this meeting, [the detective] wore plain clothes and kept the vehicle doors unlocked.
>
> Before the interview, [the detective] informed Villa that he was not under arrest, read a form advising Villa of his Miranda rights—including his rights to remain silent and to have counsel present during the interview—asked Villa if he understood these rights, and told him, "If you don't want to give me your side of the story, then you don't sign [the form] and you leave." Villa replied that he understood his rights and initialed and signed the form. Ultimately, the interview lasted only 42 minutes.
>
> . . . .
>
> **Villa argues his statements were involuntary due to [the detective]'s "material misrepresentation of the legal consequences of Villa responding to her inquiries."**

In support of this argument, Villa points to the following statement by [the detective]:

> **"I know when people are younger, that when they struggle with some of that stuff and they just have curiosities, that, you know, they just – they do – it's kind of like playing doctor or just testing the waters, because you're not sure. A lot of that is kind of normal for younger folk. . . . As long as it doesn't continue into you know, your 20s and 30s, that's when . . . there's a problem.**

According to Villa, [the detective]'s statement that "there's a problem" only if such conduct extends past the age of 20 was essentially a "promise" that he would not be prosecuted for the alleged conduct, some of which occurred when Villa was much younger.

. . . .

[The detective]'s statements about "hav[ing] curiosities," "playing doctor," and "testing the waters" not being "a problem" during childhood were not a promise not to prosecute.

Instead, [the detective] simply said "a lot of that is kind of normal." (Emphasis added). At no point did [the detective] tell Villa that sexually touching children several years younger than himself was legal or that he would not be prosecuted if he admitted to such conduct.

. . . .

Villa also contends that his statements were involuntary because he only gave them after [the detective] improperly appealed to his religious beliefs. Villa points to [the detective]'s remark, after Villa claimed he did not recall the behavior for which he was seeking forgiveness, that she "grew up in . . . a Lutheran church . . . believing that you really can't apologize for something and be forgiven if you don't take responsibility for what it is you did."

Villa's argument is unpersuasive given the [the holding of the Washington State Supreme Court in the Unga case] regarding such conduct: A police officer's psychological ploys such as playing on the suspect's sympathies, saying that honesty is the best policy for a person hoping for leniency, or telling the suspect that he could help himself by cooperating may play a part in a suspect's decision to confess, "but so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary." [Unga] 165 Wn.2d at 102 (quoting Miller v. Fenton, 796 F.2d 598, 605 (3rd Cir. 1986)). Given the numerous circumstances discussed above indicating that Villa knew [the detective] was speaking to him in connection with a criminal investigation and that he could stop speaking to her at any time, Villa's statements—like those in Unga—were the product of his own balancing of competing considerations and thus voluntary.

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

Here is a link to the Opinion in State v. Villa:
https://www.courts.wa.gov/opinions/pdf/856278.pdf

3. State v. John Phi Truong: On February 11, 2025, Division Two of the COA affirms the Cowlitz County Superior Court order that denied the motion of Truong to invalidate his convictions for (A) *unlawful possession of a controlled substance with intent to deliver*, and (B) *first degree unlawful possession of a firearm*.

In August 2018. Truong was on community custody for a prior conviction for unlawful possession of a controlled substance (UPCS), at a point when DOC officers and local law enforcement officers discovered controlled substances and a firearm in his residence. The August 2018 search was conducted pursuant to RCW 9.94A.631(1), which gives DOC authority to conduct a warrantless search of an offender's residence based on "reasonable cause to believe that [the] offender has violated a condition or requirement of [his/her] sentence." Based on the fruits of the August 2018 search, Truong was convicted of (A) *unlawful possession of a controlled substance with intent to deliver*, and (B) *first degree unlawful possession of a firearm*.

In 2021, the Washington Supreme Court decided State v. Blake, 197 Wn.2d 170 (2021), which determined that the existing RCW prohibition on simple possession of a controlled substance was unconstitutional. Truong subsequently obtained a vacation of the simple possession conviction that in August 2018 had provided the underlying basis for the August 2018 search. He then sought to vacate his conviction that was based on the fruits of the August 2018 search.

The Truong Court rejects Truong's request to retroactively invalidate the August 2018 search and the subsequent conviction that was based on the fruits of that 2018 search. The Court relies on the precedents of: (A) State v. Moses, 22 Wn. App. 2d 550, 556 (2022) (holding that 2021 Blake decision invalidating Washington's former statute that prohibited simple possession of controlled substances did not retroactively invalidate a 2017 warrant to search for controlled substances in support of an investigation for possession of controlled substances.); (B) In re Personal Restraint of Pleasant, 21 Wn. App. 2d 320 (2022); and (C) State v. Balles, 32 Wn. App. 2d 356, 359 (2024).

Here is a link to the Opinion in State v. Truong:
https://www.courts.wa.gov/opinions/pdf/D2%2059648-2-II%20Unpublished%20Opinion.pdf

4. State v. Timothy James Scales: On February 11, 2025, Division Two of the COA affirms the Pierce County Superior Court conviction of defendant for *second degree unlawful possession of a firearm*. The Court of Appeals rejects defendant's argument, among other arguments, that he was unlawfully seized without reasonable suspicion early in a contact with an officer. Defendant argued that he was seized without reasonable suspicion at a point prior to the point at which the officer arrested defendant on probable cause and conducted a search incident to the arrest.

The Court of Appeals bases its ruling on the following undisputed factual findings by the trial court:

> I. On February 14, 2023, in Lakewood, Washington, multiple squad cars were dispatched to investigate a shooting in the area of the Crown Pointe Apartments and Wards Lake Park. While there, police also came into contact with an individual (not the

defendant) wanted on a felony warrant and had taken him into custody. As a result of these two investigations, there were a number of police officers present, (approximately 10 to 14) the apartment parking lot was congested, and the squad cars were parked in a way that prevented vehicles from entering or leaving.

II. [The sergeant who ultimately arrest the defendant] observed a car with two occupants parked in the Southwest corner of the apartment parking lot. It was unclear whether the vehicle's engine was running or whether the occupants of the vehicle had arrived before or after the squad cars. The sergeant approached and asked why they were there. It was 10:40 PM, and [the sergeant] shone his flashlight at the occupants while they talked.

III. Defendant Timothy Scales was in the driver's seat and Ms. Marino was in the front passenger's seat. Scales is Asian. Scales and Marino advised they had been visiting one of the apartments. [The sergeant] advised that the officers should have their cars out of the way soon so that the couple could go to dinner, and he ended the contact.

IV. [The sergeant] returned to his patrol car and performed a records search that showed the vehicle was not registered to the defendant but to a woman. He ran a CAD search for prior police contacts with the vehicle and ascertained the driver was Timothy Scales. He confirmed this through a photo of the defendant on his computer. The sergeant ran a records check on Scales and learned that he was a convicted felon prohibited from possessing firearms, that he had a prior conviction for unlawful possession of a firearm, and that there were outstanding warrants for Scales' arrest, bookable at Nisqually jail.

V. Approximately eight to ten minutes after ceasing his initial contact, [the sergeant] returned to the parked car and arrested Scales based on his active warrants. The arrest was audio and video recorded.

The legal analysis of the Court of Appeals on the unlawful seizure issue includes the following explanation:

> **Based on the totality of the circumstances, an objective observer would conclude that Scales was free to leave the apartment complex on foot, leave his vehicle and return to the apartment he had been visiting, or otherwise remove himself from the police presence. [See State v. Johnson, 8 Wn. App. 2d 728, 744 (2019)] . . . There are no facts present here which indicate that Scales was being detained by the police at the scene: no requests were made of Scales, no use of force or display of authority was directed at Scales, and Scales could have left the scene at any time prior to [the sergeant] arresting him on the warrant [See State v. Sum, 199 Wn.2d 627 (2022)].**
>
> **Scales relies heavily on [the sergeant's] statement that "the officers should have their cars out of the way soon so that the couple could go to dinner," and that [the sergeant] never explicitly told Scales that he was free to leave the parking lot by some means other than his vehicle. However, [the sergeant's] statement strongly implies that Scales' inability to drive out of the parking lot was incidental to the police cars being there for the shooting investigation—not for the purpose of detaining Scales. Further, nothing in the sergeant's] statement would indicate to an objective observer that [the sergeant] was requiring Scales to stay in the parking lot or maintain the police contact. Finally, there is no requirement that law**

enforcement officers expressly inform a person with the words that they are free to leave a contact. . . .

Here is a link to the Opinion in State v. Scales:
https://www.courts.wa.gov/opinions/pdf/D2%2058503-1-II%20Unpublished%20Opinion.pdf

5. State v. Edward A. Martinez: On February 11, 2025, Division Three of the COA affirms the Spokane County Superior Court conviction of defendant for *premeditated murder in the first degree*.

One of defendant's arguments on appeal was that his confession was inadmissible. Defendant argued that, after defendant invoked his right to an attorney during a custodial interrogation, the interrogating detective continued to interrogate defendant contrary to the Miranda-based initiation-of-contact rules of the Edwards v. Arizona, 451 U.S. 477 (1981) line of cases.

The Court of Appeals concludes that the facts do not support the defendant's theory. Instead, the Court of Appeals concludes that the trial court correctly ruled that defendant, after invoking his Miranda rights during a custodial interrogation, voluntarily initiated further contact with the detective. Therefore, the defendant's confession was admissible under the Miranda-based "initiation of contact" rules.

The trial court's relevant findings of fact, which defendant does not challenge on appeal, are as follows [the Legal Update has substituted "the detective" for the name of the detective}]:

1. The defendant, Edward Martinez, was contacted and detained by Spokane Police officers relating to a homicide investigation on August 13, 2020.
2. The defendant was transported to the police station where he was placed into an interview room, handcuffed to the floor by a chain.
3. The defendant was interviewed by [a detective].
4. Prior to any questioning, [the detective] advised the defendant of his constitutional rights, per Miranda, as provided for on a department issued constitutional rights card.
5. The defendant acknowledged his rights but invoked his right to an attorney at 0835 hours.
6. No questioning occurred, though [the detective] informed the defendant that he would be booked into jail for first degree murder.
7. The defendant made a statement asking, "He's dead?" The detective confirmed that [the victim] had died and told the defendant "You killed him."
8. The detective also told the defendant that he could reach out to him by way of a kite if the defendant wished to speak with [the detective] about this incident.
9. As the detective was gathering his belongings to leave the room, the defendant reinitiated contact and stated that he would speak with the detective and that he did not need a lawyer.
10. [The detective] again advised the defendant of his constitutional rights, per Miranda, as provided for on a department issued constitutional rights card.
11. The defendant again acknowledged his rights and waived his rights at this time. He agreed to provide a statement to the detective. This second set of rights were read and waived at 0838 hours.

LEGAL UPDATE EDITIORAL RESEARCH NOTE:

For an article discussing some relevant Miranda case law, 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, at: https://www.cjtc.wa.gov/resources/law-enforcement-digests

Here is a link to the Opinion in State v. Martinez:
https://www.courts.wa.gov/opinions/pdf/398820_unp.pdf

6. State v. Julian Hipolito Toral: On February 13, 2025, Division Three of the COA affirms the Spokane County Superior Court conviction of defendant for *possession of a controlled substance (methamphetamine) with intent to distribute*.

Defendant conceded on appeal that he had possessed methamphetamine that was lawfully seized from his backpack in a search incident to arrest. However, Washington case law, as discussed in the Toral Opinion, requires evidence of something more than possession of a large amount of illegal drugs (here, 21.95 grams of meth), to prove intent to distribute.

Defendant argued on appeal that there was insufficient evidence in the record to prove that he had intent to distribute the meth. The Court of Appeals rules that the additional evidence of intent in the record – (1) scales that were found in the backpack, and (2) the meth residue that was found on the scales – was sufficient to meet the case law sufficiency requirement for proving possession with intent to distribute.

Here is a link to the Opinion in State v. Toral:
https://www.courts.wa.gov/opinions/pdf/397874_unp.pdf

7. State v. Aiden Fetters: On February 18, 2025, Division One of the COA affirms the Skamania County Superior Court conviction of defendant for *residential burglary*.

Defendant was a UPS driver who was prosecuted for burglary based on his entry of, exploration of, and behavior inside, a home to which he was supposed to be making a UPS package delivery. His behavior inside the home included picking up a purse and opening it while inside the home. One of defendant's arguments on appeal was that, in allowing into evidence body-cam footage of an officer's interrogation of defendant, the trial court improperly permitted the law enforcement officer, through the footage, to express opinions about defendant's guilt.

The Fetters Court rejects his argument under the following analysis:

> **[The officer] is heard telling Fetters that his version of events "doesn't make sense," encouraging Fetters to "be square" with him, and urging Fetters to tell him "the honest truth." [The officer] also is heard telling Fetters that his explanation sounded "weird to [the officer]" and "seem[ed] kind of odd."**
>
> **[The officer's] commentary certainly expressed skepticism about Fetters' account, and, as a matter of best practice, the parties could have redacted these statements from the interrogation. His statements, however, were not, on their face, individually or together, "an explicit or almost explicit" statement on "an ultimate issue of fact" or represented [the officer]'s "personal opinion on [Fetters'] guilt." [State v. Kirkman, 159 Wn.2d 918, 936-37 (2007)].**

> Instead, as in [State v. Smiley, 195 Wn. App. 185 (2016)], [the officer] is essentially telling Fetters "'to tell [him] the truth.'" . . . And, also as in Smiley, rather than "stating a personal opinion about [Fetters'] veracity," [the officer's] comments were "'tactical interrogation statements designed to challenge the defendant's initial story and elicit responses that are capable of being refuted or corroborated by other evidence or accounts of the event discussed.'"
>
> The questions gave the defendant the opportunity to explain why his account of what happened made sense despite its seeming inconsistency with other evidence." [Smiley] .. . .; see also State v. Demery, 144 Wn.2d 753, 763 (2001) (plurality opinion) (where a plurality of our Supreme Court held that "juries understand that the police typically do not believe the defendant's story" and that, therefore, they are unlikely to "attach any special significance to this fact," or to give an officer's statements in a pretrial interview disproportionate weight because "an officer's statement made during a taped interview is essentially different from a prosecutor's statement made during trial" . . . .
>
> Therefore, these statements were "not an impermissible opinion regarding [Fetters'] veracity," let alone explicit or nearly explicit statements of guilt. . . .
>
> Fetters also contends that [the officer] conveyed his explicit opinion of his guilt during the interview by telling him what he was being arrested for.
>
> Specifically, Fetters argues that by "explicitly" telling Fetters what he was being arrested for, [the officer] "made an explicit statement that he held these personal beliefs: Fetters you're a burglar; You're a thief; You're a liar. It doesn't get more explicit than this." **[LEGAL UPDATE EDITORIAL NOTE: The officer did not actually say these things; instead, they are the argumentative paraphrasing in the defendant's appellate court briefing.]**
>
> In fact, Sgt. Clifford stated, "Okay. So right now you're under arrest for burglary and attempted theft, okay?"
>
> We conclude that the words [the officer] actually uttered are not a "nearly explicit" statement of [the officer's] opinion that Fetters was guilty, but only, at most, that he had probable cause to arrest him, was effectuating the arrest, and confirmation that Fetters understood that action. Fetters' characterization of those statements would be examples of such explicit statements, but [the officer] did not make such statements. In turn, none of [the officer]'s pretrial interview statements constitute manifest constitutional error.

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

The Fetters Opinion also rejects, in analysis not included here, some challenges of defendant to purportedly opinion testimony of the officer regarding typical "casing" behavior of burglars.

Here is a link to the Opinion in State v. Fetters:
https://www.courts.wa.gov/opinions/pdf/868403.pdf

8. State v. Richard James Rotter: On February 18, 2025, Division One of the COA affirms the Snohomish County Superior Court convictions of defendant for (A) *aggravated first degree murder with a firearm enhancement*; (B) *second degree unlawful possession of a firearm*; (C) *possession of a controlled substance with intent to manufacture or deliver with a firearm*

enhancement; and (D) *attempting to elude a pursuing police vehicle with an endangerment-to-others aggravato*r.

One of defendant's arguments on appeal was that a detective's testimony as an expert witness was impermissible opinion testimony. The detective's testimony related to whether the quantities of illegal drugs found in defendant's vehicle were more consistent with drug dealing or with personal use.

The Rotter Court rejects the defendant's attack on the detective's testimony in analysis that includes the following:

> An expert witness properly expresses an opinion when it is "not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence." State v. Smiley, 195 Wn. App. 185, 189-90 (2016). But opinion testimony is improper when it comments on the witness' veracity or intent, tells the jury what decision to reach, or concludes that a defendant is guilty. State v. Fleeks, 25 Wn. App. 2d 341, 369 (2023). A witness who provides an opinion, directly or by inference, on a defendant's guilt violates the defendant's constitutional right to a jury trial. . . . Specifically, it impedes the jury's ability to independently determine the facts. . . .
>
> An expert can express an opinion on a subject even though it embraces an ultimate fact to be found by the jury. [State v. Kirkman, 159 Wn.2d 918 (2007)]. But to avoid witnesses expressing their personal beliefs about the defendant's guilt, "one permissible and perhaps preferred way" for trial counsel to question an expert is to phrase a question embracing the ultimate fact in terms of "'is it consistent with' instead of 'do you believe.'" State v. Montgomery, 163 Wn.2d 577, 592 (2008).
>
> Here, the State asked [the detective] on direct examination about the amount and value of drugs found in Rotter's vehicle and whether those quantities were more consistent with drug dealing or personal use.
>
> > Q. [B]ased on the amount of methamphetamine that is there, 10.18 grams, were you able to approximate a street value that that would go for?
> >
> > A. I estimated it between $270 and $360.
> >
> > Q. The amount of drugs that are there, in your numerous contacts with people that typically are just drug users versus drug dealers, did you draw a conclusion as to the amount of drugs that are present as to whether or not that is consistent with dealing or using?
> >
> > A. In my training and experience, it would be more consistent with dealing.
> >
> > Q. Were you able to approximate a street value as to the amount of heroin that was present?
> >
> > A. I was. . . . It was between $1,300 and $1,625 based on . . . that 1/16 of an ounce . . . sale.

Q. Okay. And based on your training and experience and contact over the years with drug users versus drug dealers, was the amount of drugs, the over 20 grams present, more consistent with drug using or drug dealing?

A. Drug dealing, sir.

Q. Okay. And then the various suspected fentanyl pills which totaled 1,950 pills, you talked to us about what the typical user amount is and the amounts it would go for. Were you able to approximate a street value of the fentanyl that was found in that black camera bag?

A. That was between $7,800 and over $13,000.

Q. Okay. And based on your training and experience in contacting drug traffickers and drug users, was this more consistent with personal use or dealing?

A. Most definitely dealing.

Viewed in context, [the detective] did not express a personal opinion on Rotter's guilt. Instead, his testimony made inferences from the evidence and "explained the arcane world of drug dealing," which "was helpful to the trier of fact in understanding the evidence." . . .

Still, Rotter argues that like a detective's testimony in [State v. Montgomery, 163 Wn.2d 577, 592 (2008)], [the detective]'s testimony was improper. In that case, the detective testified he "'felt very strongly that [the defendants] were, in fact, buying ingredients to manufacture methamphetamine.'" Montgomery, 163 Wn.2d at 587-88. Our Supreme Court concluded [in Montgomery] the opinion [expressed by the detective in his testimony] was improper because it "went to the core issue and the only disputed element, [the defendant]'s intent." The [Montgomery] court noted it was "very troubling" that the testimony "used explicit expressions of personal belief."

As discussed above, [the detective in the Rotter case] did not express a personal belief that Rotter possessed drugs with the intent to distribute them. Instead, he commented generally that the amount of drugs and other evidence seized from Rotter's car were more consistent with drug dealing than with personal use. The testimony was not improper.

[Some citations omitted, others revised for style]

Here is a link to the Opinion in State v. Rotter:
https://www.courts.wa.gov/opinions/pdf/852469.pdf

****

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 Assistant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011) of the Criminal Justice Training Commission's Law Enforcement Digest. From the time of his retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the production of the LED. That arrangement ended in the late fall of 2014. 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.

The Criminal Justice Training Commission continues to publish monthly issues of the Law Enforcement Digest (LED). Monthly LEDs going back to 2009 can be found on the CTJC's website at https://www.cjtc.wa.gov/resources/law-enforcement-digests.

****

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

****