LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

JULY 2024

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Here is a link to the Opinion in State v. Fields:
https://www.courts.wa.gov/opinions/pdf/848119.pdf

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ANNOUNCEMENT: THE FOLLOWING RESEARCH MATERIALS BY JOHN WASBERG HAVE BEEN UPDATED THROUGH JULY 1, 2024, AND ARE AVAILABLE ON THE CRIMINAL JUSTICE TRAINING COMMISSION'S INTERNET LED PAGE UNDER "SPECIAL TOPICS"

The LED page is at: https://www.cjtc.wa.gov/resources/law-enforcement-digest

OUTLINE: "Law Enforcement Legal Update Outline: Cases On Arrest, Search, Seizure, And Other Topical Areas Of Interest to Law Enforcement Officers; Plus A Chronology Of Independent Grounds Rulings Under Article I, Section 7 Of The Washington Constitution"

ARTICLE: "Initiation of Contact Rules Under the Fifth Amendment

ARTICLE: "Eyewitness Identification Procedures: Legal and Practical Aspects"

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: OFFICERS USED EXCESSIVE FORCE WHEN THEY DEPLOYED A POLICE DOG THAT ALLEGEDLY BIT PLAINTIFF FOR AT LEAST 20 SECONDS AFTER PLAINTIFF HAD SURRENDERED AND LAY PRONE WITH HIS ARMS OUTSTRETCHED

In Rosenbaum v. City of San Jose, ___ F.4th ___ , 2024 WL ___ (9th Cir., July 11, 2024), a Ninth Circuit staff summary (which is not part of the Court's Opinion) provides the following synopsis of the Opinion for the unanimous decision of the three-judge panel in the case:

> The panel affirmed the district court's denial of qualified immunity to City of San Jose police officers in an action alleging that the officers used excessive force when they

deployed a police dog that allegedly bit plaintiff Zachary Rosenbaum for more than twenty seconds after he had surrendered and lay prone on his stomach with his arms outstretched.

The panel noted that in its limited interlocutory review, it viewed the facts in the light most favorable to Rosenbaum unless they were blatantly contradicted by the record, including the video evidence in this case. Contrary to defendants' contention on appeal, bodycam video from the arrest did not contradict, and generally supported, Rosenbaum's allegation that while he lay on his stomach "in full surrender with his hands stretched out and surrounded by all named defendants with their firearms trained on him," the police dog "was allowed to continue biting [him] for over 20 seconds, before being pulled away."

At a minimum, whether the officers acted reasonably in permitting the police dog to hold the bite for its duration under these circumstances was a triable question to be decided by a jury. Further, this Circuit's caselaw clearly establishes that officers violate the Fourth Amendment when they allow a police dog to continue biting a suspect who has fully surrendered and is under officer control.

[Some paragraphing revised for readability]

The Opinion of the Court describes as follows the allegations and other evidence in the case, as viewed in the best light for Plaintiff at this qualified immunity review stage of the case:

On the evening of September 10, 2019, San Jose police responded to a domestic violence report at Rosenbaum's partner's home. The arrest team included Sergeant Bret Hatzenbuhler; canine Officer Hymel Dunn and his police dog "Kurt;" and Officers Ryan Ferguson, Francisco Vallejo, and Gary Anderson. Officer Dunn testified that no other officer on the scene was trained in handling Kurt. Prior to the officers entering the house, Rosenbaum's partner told them that Rosenbaum was under the influence of alcohol or narcotics and that he had previously owned firearms, but she believed they were destroyed in a fire.

After announcing their presence, Officer Dunn released Kurt into the first floor of the house to search for Rosenbaum, and officers entered the home soon thereafter. Officers cleared the first floor and then positioned themselves at the bottom of a stairwell leading to the second story, with firearms drawn and pointed upward.

Rosenbaum was at the top of the second story landing, wearing a tank top and sweatpants. Sergeant Hatzenbuhler testified that the officers had no reason to believe that anyone else was upstairs with him. Over the next six minutes, officers instructed Rosenbaum that he was under arrest and commanded him to come down the stairs and surrender.

Rosenbaum did not comply and repeatedly questioned why he was under arrest. During this exchange, officers warned Rosenbaum that if he did not come down the stairs, a police dog would be sent upstairs and would bite him.

Approximately nine minutes after officers entered the home, Officer Dunn released Kurt and Officer Ferguson simultaneously fired a stun bag. Officers ascended the stairs in single formation and apprehended Rosenbaum near the second-floor landing. As

officers approached Rosenbaum, he was found unarmed and seated with his back against the wall and Kurt biting his right forearm.

Rosenbaum alleges that "Officer Dunn deployed his police K-9 to attack and bite [him] even though [Rosenbaum] had his hands visibly raised in a surrender position, was not armed, was not trying to evade arrest, and had posed no threat to the officers." Rosenbaum further alleges "that after the K-9 was deployed to bite [Rosenbaum], and while [Rosenbaum] was laying on his stomach in full surrender with his hands stretched out and surrounded by all named Defendants with their firearms trained on him, that the K-9 was allowed to continue biting [him] for over 20 seconds, before being pulled away."

Bodycam video of the arrest generally supports Rosenbaum's allegations. As officers reached the second floor landing, Rosenbaum can be seen seated with his back against the wall and Kurt biting his right forearm. The video does not show any resistance by Rosenbaum, and indeed Officer Dunn testified that Rosenbaum did not attempt to strike or kick the officers, punch the police dog, use threatening language, or flee the scene at any point during the encounter.

Approximately five seconds after officers reached the second floor, Kurt dragged Rosenbaum onto his stomach. The bodycam video shows Rosenbaum sliding down without resistance as Officer Dunn says "good boy."

At least one officer's gun is drawn and pointed at Rosenbaum. Another officer stands on Rosenbaum's legs as Rosenbaum yells out for his partner and says, "he's bleeding me out." The video then shows one officer holding Rosenbaum's left arm behind his back while Kurt pulls Rosenbaum's right arm above his head, and a third officer planting his foot on Rosenbaum's right shoulder.

Kurt continued to pull Rosenbaum's arm over his head, giving one last forceful shake before Officer Dunn commanded the dog to let go of Rosenbaum's arm. In short, the video evidence supports Rosenbaum's allegation that a police dog bit him for more than twenty seconds after he had surrendered and lay prone on his stomach with arms outstretched.

Rosenbaum was taken to the hospital for treatment of multiple puncture wounds and lacerations. He required several surgeries and claims he has permanent damage to his arm. He was later charged with two counts of felony assault by means of force likely to produce great bodily injury pursuant to California Penal Code § 245(a)(4), to which he pled no contest and served 90 days in jail, with other conditions.

[Footnotes omitted; some paragraphing revised for readability]

Result: Affirmance of order by U.S. District Court (Northern District of California) denying qualified immunity to officers.

LEGAL UPDATE EDITOR'S NOTE: In footnote 1, the Rosenbaum Opinion explains why the Ninth Circuit upholds the District Court's inclusion of all of the officers in the liability determination even through only one of them was the dog's handler:

> **Although Officer Dunn was the only officer in charge of the police dog and trained to control him, the district court held that there was a material dispute of fact as to**

whether Sergeant Hatzenbuhler and Officers Anderson, Ferguson, and Vallejo were "integral participants" in Officer Dunn's use of excessive force and therefore also potentially subject to liability. See Boyd v. Benton County, 374 F.3d 773, 780 (9th Cir. 2004) (Officers may be liable for a Fourth Amendment violation under the "integral participation analysis," which "does not require that each officer's actions themselves rise to the level of a constitutional violation."). Because Defendants do not challenge the district court's integral participant determination on appeal, we do not address it.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: IN SHOOTOUT WITH VEHICLE'S DRIVER, OFFICERS ARE HELD ENTITLED TO QUALIFIED IMMUNITY FOR ACCIDENTALLY HITTING A PASSENGER WHO WAS IN THE VEHICLE BUT NOT OTHERWISE INVOLVED IN THE SHOOTOUT

In Cuevas v. City of Tulare, ___ F.4th ___ , 2024 WL ___ (9th Cir., July 10, 2024), a three-judge Ninth Circuit panel rules that the law enforcement officers sued in the case are entitled to qualified immunity because (1) there is no controlling case law precedent holding liability in closely similar circumstances; and (2) it is not "obvious" that the officers' actions violated the Fourth Amendment excessive force standard.

A Ninth Circuit staff summary (which is not part of the Court's Opinion) provides the following synopsis of the Opinion for the unanimous decision of the three-judge panel in the case:

> The panel affirmed on qualified immunity grounds the district court's summary judgment in favor of police officers in an action brought pursuant to 42 U.S.C. § 1983 and California law alleging that the officers used excessive force by shooting into a vehicle following a high-speed felony chase, seriously injuring passenger Rosa Cuevas.
>
> Quinntin Castro led police on a high-speed chase and kept trying to flee after he got stuck in mud. A responding officer broke his car window to order him to stop and another officer put his police dog through the window. Castro responded by shooting – and killing – the dog, hitting the dog's handler in the process. The remaining officers returned fire in defense of themselves and the fallen officer, ultimately killing Castro. During the gunfight, they accidentally hit Cuevas multiple times.
>
> The panel held that under clearly established Fourth Amendment law, Cuevas was seized.
>
> [The panel held that] it was not clearly established, however, that the force the officers used was excessive. None of Cuevas's cited cases clearly establish that officers violated her rights when they shot her while defensively returning fire during an active shooting.
>
> Nor was it obvious that the officers could not return fire after Castro killed their police dog and shot an officer. In excessive-force cases where police officers face a threat, the obviousness principle will rarely – if ever – be available as an end-run to the requirement that law must be clearly established.

[Some paragraphing revised for readability]

Result: Affirmance of qualified immunity ruling of U.S. District Court (Eastern District of California).

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR CORRECTIONS: EXCESSIVE FORCE, ADA, AND REHABILITATION ACT JURY DETERMINATIONS ARE HELD SUPPORTED WHERE PRISONER WITH ONE LEG WAS EXTRACTED FROM HIS CELL WITHOUT USE OF A WHEELCHAIR OR OTHER MOBILITY-ASSISTING DEVICE

In Bell v. Williams, ___ F.4th ___ , 2024 WL ___ (9th Cir., July 18, 2024), a Ninth Circuit staff summary (which is not part of the Court's Opinion) provides the following synopsis of the Opinion for the unanimous three-judge panel's decision in the case:

> The panel affirmed in part, reversed in part, and vacated in part the district court's judgment and damages award for Vincent Bell following a jury trial in Bell's action alleging that deputies used excessive force against him during a cell extraction and transfer while he was a pretrial detainee in the San Francisco Jail, in violation of the Fourteenth Amendment, the Americans with Disabilities Act (ADA), and the Rehabilitation Act.
>
> Bell alleged that Sergeant Yvette Williams did not provide Bell, whose right leg is amputated above the knee, a wheelchair or other mobility device during the procedure to accommodate Bell's disability. Instead, she required Bell to hop on his one leg until it gave out. She then stood by as deputies picked up Bell and carried him by his arms and leg the rest of the way
>
> The panel held that substantial evidence supported the jury's verdict on the merits of Bell's Fourteenth Amendment excessive force claim against Williams and his ADA and Rehabilitation Act claims against the City and County of San Francisco. Even assuming that Bell's initial resistance to moving cells created a disturbance warranting the use of force, evidence supported Bell's argument that he had resigned himself to moving cells and demonstrated complete compliance by the time Sergeant Williams began the cell extraction.
>
> Williams' decision to commence the cell extraction without using a wheelchair or other assistive device resulted in Bell being carried by his arms and leg, a use of force that the jury could find unreasonable, especially given the alternatives contemplated by the jail's policies. The jury could also find that reasonable accommodations existed to assist Bell in transiting between the two cells, even in light of the jail's legitimate security interests, and the district court did not err in its jury instructions on Bell's ADA and Rehabilitation Act claims.
>
> The panel reversed the district court's decision as to Bell's [theory claiming the City's separate liability under [Monell v. Department of Social Services, 436 U.S. 658 (1978)] for the constitutional violation because Bell did not present substantial evidence at trial showing that the City's training was the product of deliberate indifference to a known risk.
>
> The panel also vacated the jury's compensatory damages award and remanded for a remittitur or a new trial. Although the panel gave substantial deference to the jury and to the district court's firsthand assessment of Bell's injuries, the panel concluded, as a

matter of law, that Bell did not present evidence about his two-minute experience resulting in relatively minor injuries that could support the award of more than half a million dollars in compensatory damages.

[Some paragraphing revised for readability]

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: IN CASE WHERE DEATH RESULTED FROM OFFICERS' USE OF BODY WEIGHT FORCE IN RESTRAINING A MENTALLY DISTRESSED PERSON WHO ALLEGEDLY WAS TRYING TO COMPLY, QUALIFIED IMMUNITY IS DENIED TO OFFICERS ON FOURTH AMENDMENT CLAIM FOR EXCESSIVE USE OF FORCE

In Scott v. Las Vegas Metropolitan Police Department, ___ F.4th ___ , 2024 WL ___ (9th Cir., July 31, 2024), a three-judge Ninth Circuit panel denies qualified immunity to two Las Vegas Police Department officers on the Fourth Amendment excessive force claim of representatives of a deceased man's estate. A Ninth Circuit staff summary (which is not part of the Ninth Circuit panel's Opinion) summarizes the panel's unanimous Opinion as follows:

> The panel affirmed the district court's denial of qualified immunity to Las Vegas Metropolitan Police Department officers on a Fourth Amendment claim for violation of the right to be free from excessive force, and reversed the district court's denial of qualified immunity on a Fourteenth Amendment claim for violation of the right to familial association.
>
> Roy Scott, who was unarmed and in mental distress, called the police for help. Officers used force to restrain him, although he complied with officers' orders and was not suspected of a crime, and shortly after lost consciousness and was later pronounced dead. Scott's daughter Rochelle and a representative of Scott's estate sued the Department and two officers.
>
> The panel affirmed the district court's denial of qualified immunity on Plaintiffs' Fourth Amendment claim. Viewing the facts in the light most favorable to Plaintiffs [as is required at this stage of the proceedings where the government Defendants are requesting summary judgment on their qualified immunity claim], the officers violated Scott's Fourth Amendment right to be free from excessive force. Because Scott was mentally ill, was not suspected of a crime, and did not present a risk to officers or others, the government's interest in applying force was limited.
>
> A reasonable jury could find that the officers' use of severe or deadly force was constitutionally excessive. The panel further held that Scott's Fourth Amendment rights were clearly established at the time of the violation. Drummond ex rel. v. Drummond v. City of Anaheim, 343 F.3d 1052 (9th Cir. 2003), clearly established that the officers' use of force was constitutionally excessive.
>
> The panel reversed the district court's denial [to the officers] of qualified immunity on Rochelle's Fourteenth Amendment claim [which has a much more stringent standard for plaintiffs than does the Fourth Amendment]. Viewing the facts in the light most favorable to plaintiffs, the officers violated Rochelle's right to familial association. However, because that right was not clearly established [as a Fourteenth Amendment violation] at the time of the officers' conduct, the officers were entitled to qualified immunity.

[Bracketed language added by Legal Update editor; emphasis added]

The Ninth Circuit provides the following description of the facts, construing the allegations in favor of the Plaintiffs as required at this stage of review in the case:

> Early in the morning on March 3, 2019, Roy Scott called 911. He reported multiple assailants outside his apartment with a saw. Las Vegas Metropolitan Police Department Officers Smith and Huntsman were assigned to the call. Dispatch notified the officers that Scott was mentally ill.
>
> Scott was distressed and hallucinating when Officers Smith and Huntsman arrived at his apartment. After Smith and Huntsman knocked and identified themselves, Scott yelled to the officers to "break the door down" claiming that there were people inside his house. The officers did not break the door in because they did not hear anyone inside the apartment. Instead, they continued to knock and order Scott to come to the door. About two minutes after first knocking on the door, Smith told Huntsman, "this is a 421A for sure," using the department code to indicate he believed Scott was mentally ill.
>
> Huntsman then called through the door: "Sir, have you been diagnosed with any mental diseases?" After Scott did not come to the door, Smith asked dispatch to call Scott back to ask him to come to the door, noting again that Scott appeared to be mentally ill. Smith then said to Huntsman: "I ain't going in there. That's too sketchy." Huntsman agreed, "That dude's wacky." Peering into Scott's window, Huntsman asked Smith if he could see the "crazed look in [Scott's] eye." They could not see anyone else in Scott's apartment.
>
> When Scott did not open the door, Smith called their sergeant, turning off his body worn camera. On Huntsman's camera, Smith can be heard telling their sergeant that Scott sounds mentally ill. After ending the call, Smith told Huntsman that their sergeant said that "at the end of the day we can't do anything if we don't hear any reason to have an exigent circumstance." Smith also explained that their Sergeant suggested they try again to get Scott to come to the door.
>
> Smith resumed knocking and ordered Scott to come to the door. Seconds later, and about seven minutes after Smith and Huntsman arrived on the scene, Scott opened the door.
>
> As Scott opened the door, Smith retreated down the stairs in front of Scott's apartment. Scott held a metal pipe at his side as he descended the stairs. He immediately dropped the pipe when officers asked him to do so. Disoriented, Scott asked the officers twice: "What am I supposed to do?" Smith and Huntsman directed him to stand near a wall at the base of the stairs, and Scott immediately complied.
>
> When Huntsman asked Scott if he had any other weapons, Scott produced a knife from his front pocket and said, "I am sorry." He handed the knife to Huntsman handle-side out and did not make any threatening gestures.
>
> Smith and Huntsman ordered Scott to face the wall, shining a flashlight at him. Scott told them that the light bothered him and that he had paranoid schizophrenia. [Scott] asked twice: "Can you just put me in the car please?" When asked about the weapons

he had relinquished, Scott explained, "I think people are after me." Smith again directed Scott to face the wall, and Scott replied, "I'm paranoid, I can't turn around."

Smith told Scott, "You're fine. We are out here to help you." Scott repeatedly responded, "I'm not fine." Although they did not discuss it, officers allege they recognized Scott was in "some sort of distress" and concluded he met the qualifications for a medical hold for his mental health and safety.

Smith and Huntsman approached Scott and grabbed his arms. Scott repeatedly pleaded "please" and "what are you doing" in a distressed voice, while Smith and Huntsman pulled him to the ground.

At first, the officers held Scott's arms at his sides while he was lying on his back. In this position, Scott screamed, struggled, and pled with the officers to leave him alone for over two minutes. The officers then eventually rolled Scott onto his stomach, repeatedly ordering Scott to "stop."

With Scott on his stomach and with his hands restrained behind his back, Huntsman put his bodyweight on Scott's back and neck for about one to two minutes. At the same time Smith put his weight on Scott's legs, restraining his lower body. Scott's pleas turned increasingly incoherent and breathless as Huntsman applied his bodyweight.

After handcuffing him, the officers attempted to roll Scott on his side, as he continued to incoherently cry out that he wanted to be left alone. When they rolled Scott over, his face was bloody from contact with the ground. Scott stopped yelling and thrashing around after a few minutes. Scott did not respond when Smith and Huntsman tried to wake or revive him.

Shortly after, when the paramedics arrived, Scott was still unresponsive. Scott was pronounced dead after paramedics removed him from the scene. Plaintiffs' expert found that Scott had died from restraint asphyxia.

[Footnote omitted; some paragraphing revised for readability]

Result: Affirmance of the U.S. District Court (Nevada) denial of qualified immunity to Las Vegas Metropolitan Police Department officers on a Fourth Amendment claim for violation of the right to be free from excessive force, and reversal of the District court's denial of qualified immunity on a Fourteenth Amendment claim for violation of the right to familial association.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT IN USE OF DEADLY FORCE: 11-JUDGE NINTH CIRCUIT PANEL WILL CONDUCT NEW REVIEW IN CASE WHERE 3-JUDGE PANEL RULED THAT QUALIFIED IMMUNITY SHOULD BE GIVEN TO AN OFFICER WHO SHOT A MAN SIX TIMES

In a July 8, 2024, ruling in Estate of Hernandez v. City of Los Angeles, the Ninth Circuit has assigned the case for new review by an 11-judge panel. A ruling by a 3-judge panel in the case was previously reported in March 2024 Legal Update. The 3-judge panel's March 21, 2024, ruling – which has now been vacated – was that, although a reasonable jury could find that the force employed by an officer in firing her fifth and sixth shots at Hernandez was excessive, she

is entitled to qualified immunity because case law did not clearly establish that such a shooting violated the Fourth Amendment.

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WASHINGTON STATE SUPREME COURT

UNANIMOUS WASHINGTON SUPREME COURT REJECTS A TRUCK-AND-TRAILER OWNER'S CLAIM THAT HE HAD A WASHINGTON CONSTITUTIONAL RIGHT TO PARK AND LIVE IN HIS TRUCK AND TRAILER ON PUBLIC LOTS AND STREETS IN VIOLATION OF TIME LIMITS IMPOSED BY A CITY OF LACEY ORDINANCE

In Potter v. City of Lacey, ___ Wn.2d ___ , 2024 WL ___ (July 3, 2024), the Washington Supreme Court is unanimous in answering a State-law legal question submitted to the Supreme Court from the Ninth Circuit in relation to a federal Civil Rights case. The Washington Supreme Court rejects a truck-and-trailer owner's claim that he has a Washington constitutional right to park and live in his truck and trailer on public lots and streets.

The opening four paragraphs of the Opinion for the unanimous decision summarize as follows the facts, procedural background, and the ruling:

> Jack Potter lived in a 23-foot travel trailer hitched to his truck. He parked his truck and attached trailer on public lots and streets in the city of Lacey, Washington.
>
> In 2019, Lacey (or the City) passed an ordinance barring people from parking such large vehicles and trailers on public lots and streets for more than four hours per day. The City then ordered Potter to move his trailer and truck off the city hall parking lot and off Lacey streets.
>
> Potter sued the City and claimed – in part – that its new ordinance violated his state constitutional "right to reside," which he argued inhered in the state constitutional right to intrastate travel. The Ninth Circuit Court of Appeals has certified questions of state law to this court concerning this right-to-travel – or, as Potter calls it, this right-to-reside– claim:
>
> > Is the right to intrastate travel in Washington protected under the Washington State Constitution, or other Washington law? If Washington state law protects the right to intrastate travel, does the RV [(recreational vehicle)] Parking Ordinance codified in LMC [(Lacey Municipal Code)] §§ 10.14.020-[.]045 violate Jack Potter's intrastate travel rights?
>
> We treat this two-part inquiry as a single question that asks, "Does the RV Parking Ordinance codified in LMC §§ 10.14.020-.045 violate Jack Potter's claimed Washington State constitutional right to intrastate travel?" The answer to that question is no. Potter has not established that his claimed right to reside inheres in a Washington state constitutional right to intrastate travel or that it protects his preferred method of residing in Lacey: by siting his 23-foot trailer on a public street in violation of generally applicable parking ordinances.

[Footnote and a citation to the record omitted]

In footnote 1, the Potter Opinion explains that the Washington Supreme Court is exercising its discretion in this case in not addressing two other Washington constitutional theories not certified by the Ninth Circuit: (1) Potter's argument that enforcing Lacey's parking ordinance against him violates the Washington Constitution's prohibition against cruel punishments; and (2) the ACLU's argument in a friend-of-the-court brief that enforcing Lacey's ordinance violates the Washington Constitution's guaranty of a freedom of association.

Result: Washington Supreme Court's answer to the Ninth Circuit certified question submitted to the Ninth Circuit for consideration by the Ninth Circuit in Potter's lawsuit against the City of Lacey.

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WASHINGTON STATE COURT OF APPEALS

CHILD MOLESTATION DEFENDANT LOSES CHALLENGES TO WARRANT SEARCH OF HIS PHONE WHERE (1) WARRANT MEETS PARTICULARITY REQUIREMENTS, AND (2) LAW ENFORCEMENT OFFICERS WERE ABLE TO EXECUTE THE WARRANT USING AN EXTRACTION DEVICE KNOWN AS THE "CELLEBRITE TOUCH," THUS LIMITING THE SCOPE OF INFORMATION THAT CAME UNDER THEIR REVIEW

In State v. Ortega, ___ Wn. App. 2d ___ , 2024 WL ___ (Div. III, July 11, 2024), Division Three of the Court of Appeals rejects the challenges of defendant, Justin Ortega, to his convictions for eight instances of sexual and physical abuse against his girlfriend's young daughters. On appeal, he unsuccessfully argued that images seized from his phone under a search warrant were the product of an unconstitutional cell phone search under a warrant.

Facts and Procedural Background in the Trial Court (Excerpted from Court of Appeals Opinion):

> Detective [A] of the Yakima Police Department applied for a search warrant to examine the contents of the phone. The superior court granted a warrant, authorizing police to search Mr. Ortega's cell phone and seize any images or videos depicting Mr. Ortega engaged in "sexual contact" with M.R., as well as any information identifying the owner of the device.
>
> Pursuant to the warrant, police searched the phone and seized 35 images, some showing Mr. Ortega as the device's owner (for example, selfies taken by Mr. Ortega), some showing him engaged in sexual contact with M.R., and one showing him engaged in sexual contact with J.R.
>
> Mr. Ortega moved to suppress the fruits of the cell phone search. He argued that the warrant was insufficiently particular, in violation of the state and federal constitutions. The trial court held an evidentiary hearing on the motion and the State presented testimony from detectives [A] and [B]. According to the testimony, officers began the search.
>
> According to the testimony, officers began the search by connecting Mr. Ortega's phone to an extraction device known as the "Cellebrite Touch." Detective [B] then ran an extraction that allowed the files on Mr. Ortega's phone to be organized into categories (for example, messages, images, etc.). Once extracted, data is not visible unless someone opens the individual category folders through Cellebrite's physical analyzer

program. Neither Detective [B] nor Detective [A] recalled reviewing anything besides photos and videos.

Detective [B] was asked, "are you able to" simply type in "8-year-old girl, sexual contact and only remove" those images "from [the phone?]" Detective [B] responded, "No. . . . It's just not possible." He clarified that it would be possible to run a search directing the program to extract solely images, instead of all of the phone's data, but such an extraction would be incomplete because it would not gather deleted images.

Detective [B] also agreed that it was technically possible to search the phone manually for the authorized images, given that the phone had no passcode. But he explained that "best practice dictates that hand searches occur after a forensic search is conducted, that way there's no chance that you would delete or change any data." Detective [A] explained that the forensic extraction process "preserves [the cell phone] in the same format that it was at the time it was searched."

After the data extraction, Detective [B] gave Detective [A] a thumb drive containing more than 5,000 extracted images. Detective [A] agreed that it was similar to being given a physical photo album and having to flip through the pages to find what you are looking for. As he explained, "Somebody has to manually go through and identify which images . . . depict sexual contact." Detective [A] explained that after he seized 35 images, M.R. and J.R. identified themselves in the photographs they were shown.

The trial court denied Mr. Ortega's motion to suppress the images seized from his cell phone. Mr. Ortega subsequently waived his right to a jury trial and his case was tried to the bench. The court found Mr. Ortega guilty as charged. . . .

[Citations to the trial court record omitted; footnote omitted]

ANALYSIS:

LEGAL ANALYSIS (Excerpted from the Opinion for the Court of Appeals)

1. *Whether the warrant failed the particularity requirement*

"Both the Fourth Amendment [to the United States Constitution] and article I, section 7 [of the Washington Constitution] require that a search warrant describe with particularity the place to be searched and the persons or things to be seized." . . . The particularity requirement, which aims to prevent generalized rummaging through a suspect's private affairs, "is of heightened importance in the cell phone context," given the vast amount of sensitive data contained on the average user's smartphone device. State v. Fairley, 12 Wn. App. 2d 315, 320 (2020). . . .

The purposes of the particularity requirement are to prevent a general search, limit the discretion of executing officers, and ensure that items to be searched or seized are supported by probable cause. State v. Perrone, 119 Wn.2d 538, 545 (1992). When reviewing whether a warrant satisfies the requirement, we do not take a hyper-technical approach. Perrone at 549. Rather, we interpret a warrant "in a commonsense, practical manner." Perrone.

The warrant here easily satisfies the particularity requirement. It directed officers to "search" the phone and "seize . . . images and/or videos depicting Justin Ortega engaged in sexual contact with" an eight-year-old, along with "information identifying the owner of the device.". . . . This did not permit a general rummaging; it was akin to a warrant allowing a search of a residence for controlled substances and indicia of ownership. The terms of the warrant were sufficiently descriptive to direct the actions of law enforcement; the warrant only allowed for a search of areas of the phone where the officer might find photos or indicia of ownership. And, as set forth in the warrant, there was probable cause to believe that images of Mr. Ortega assaulting M.R. would be found on the phone and that the phone belonged to Mr. Ortega.

Mr. Ortega complains that the warrant authorized a wholesale data dump of information on his phone. But this issue goes to how the warrant was executed. The warrant itself did not mention broad swaths of cell phone data. . . . Nor did the warrant specify a forensic method for how officers were to search Mr. Ortega's phone. Thus, Mr. Ortega's complaints about the data dump go not to the issue of particularity, but to the officers' execution of the warrant.

2. *Whether officers exceeded the scope of the warrant*

. . . .

"'[A] computer search may be as extensive as reasonably required to locate items described in the warrant' based on probable cause." . . . The scope of a search can be limited by identifying targeted content. . . . When a warrant authorizes a search for a particular item, the scope of the search "'generally extends to the entire area in which the object of the search may be found.'" . . .

The record here shows detectives [A] and [B] properly limited the scope of their search to the terms of the warrant. The images of M.R. could have been located almost anywhere on Mr. Ortega's cell phone – not only in a photos application, but also in e-mails and text messages. Had the detectives chosen to search Mr. Ortega's phone manually, they likely would have needed to sort through data other than images in order to find the targets of their search. And they would have risked jeopardizing the evidentiary integrity of the phone. . . .

By instead using forensic software, the detectives were able to organize the data from Mr. Ortega's phone without first viewing the phone's contents. This enabled them to limit their search to data labeled as photos and videos, thus restricting the scope of the search to areas where the target of the search could be found.

Mr. Ortega laments that, due to the extraction method used by police, "the entire contents of the phone" were "available" to police. But it is unclear how the mere availability of the data constituted an intrusion into Mr. Ortega's "private affairs" absent any indication that law enforcement in fact looked at data besides that which they were authorized to examine. . . . The phone was not password protected; its contents were therefore "available" to law enforcement the moment it came into their possession. But a seizure is not the same as a search. . . .

> Here, the extraction process did not, by itself, enable law enforcement to view the entire contents of Mr. Ortega's phone. It was still necessary to open up the individual data-type folders created through the extraction process.
>
> By using forensic software to extract and organize data from Mr. Ortega's phone, the detectives were able to minimize their review of the phone contents and tailor their search to the evidence authorized by the warrant. This did not violate Mr. Ortega's constitutional rights. . . .

[Some citations to cases and the record omitted; some case citations revised for style; some paragraphing revised for readability]

Result: Affirmance of Yakima County Superior Court convictions of Justin Joe Ortega for eight instances of sexual and physical abuse against his girlfriend's young daughters.

LEGAL UPDATE EDITOR'S NOTES: Two of the four footnotes in the Ortega Opinion read as follows:

> **Footnote: 3 Mr. Ortega emphasizes that our state constitution "provides for broader privacy protections than" its federal counterpart. State v. Z.U.E., 183 Wn.2d 610, 618, 352 P.3d 796 (2015). This is certainly true and explains why the state constitution is less forgiving of warrantless searches. See, e.g., State v. Hendrickson, 129 Wn.2d 61, 69 n.1, 917 P.3d 563 (1996). However, Mr. Ortega cites no authority indicating that our state constitution imposes a stricter particularity requirement.**
>
> **Footnote 4 While the warrant here only authorized seizure of images of Mr. Ortega engaged in sexual contact with M.R., the image of Mr. Ortega engaged in sexual contact with J.R. was properly seized under the plain view doctrine. See State v. Temple, 170 Wn. App. 156, 164, 285 P.3d 149 (2012) ("Under the plain view doctrine, an officer must (1) have a prior justification for the intrusion, (2) inadvertently discover the incriminating evidence, and (3) immediately recognize the item as contraband."). Law enforcement had a prior justification for the intrusion into the photo album on Mr. Ortega's phone: the warrant. And while executing that warrant, law enforcement inadvertently discovered an image of Mr. Ortega engaged in sexual contact with J.R., a nine-year-old, which any reasonable observer would immediately recognize as contraband.**

THREE RULINGS: (1) UNDER EVIDENCE LAW STATUTORY PRIVILEGE AT RCW 5.60.060(9) FOR COMMUNICATIONS WITH A LICENSED MARRIAGE AND FAMILY THERAPIST, THE PRESENCE OF BOTH SPOUSES IN A JOINT COUNSELING SESSION DOES NOT ELIMINATE THE PRIVILEGE; (2) PRIVACY ACT (CHAPTER 9.73 RCW) MAKES INADMISSIBLE A RECORDING OF A "PRIVATE" CONVERSATION BY ONE SPOUSE OF ANOTHER WHERE IT WAS NOT CLEARLY ANNOUNCED THAT THE OTHERWISE PRIVATE CONVERSATION WAS BEING RECORDED; (3) OFFICER'S TESTIMONY WAS NOT INADMISSIBLE OPINION TESTIMONY WHERE HE TESTIFIED REGARDING THE VICTIM'S DEMEANOR DURING HIS QUESTIONING OF HER

In State v. Fields, ___ Wn. App. 2d ___ , 2024 WL ___ (Div. I, July 29, 2024), Division One of the Court of Appeals reverses the second degree rape convictions of defendant Christopher

Fields based on legal conclusions by the Court of Appeals that the trial court prejudicially erred (1) under RCW 5.60.060(9) in admitting evidence of statutorily privileged conversations; and (2) under the Privacy Act, chapter 9.73 RCW, in admitting a recording of a private conversation between spouses. The Court of Appeals rules in favor of the State on a third issue, concluding that an officer's testimony about a victim's demeanor was not inadmissible opinion testimony.

The Court of Appeals thus rules that: (1) under the evidence law statutory privilege at RCW 5.60.060(9) for communications with a licensed marriage and family therapist, the presence of both spouses in a joint counseling session does not eliminate the privilege; and (2) the Privacy Act makes inadmissible the recording of a "private conversation" by one spouse of another where it was not clearly announced by the person doing the recording that the private conversation was being taped; and (3) a law enforcement officer's testimony was not inadmissible opinion testimony where he testified regarding the victim's demeanor during questioning of her by the officer.

THE THREE RULINGS

1. Ruling on Therapist Privilege under RCW 5.60.060(9)

This Legal Update entry will not address the Fields Opinion's lengthy discussion of the facts and law on this issue, other than to note here that the Fields Opinion appears to make a broad ruling rejecting several rationales offered by the State for suggested exceptions to the principle that – under the evidence law statutory privilege at RCW 5.60.060(9) for communications with a licensed marriage and family therapist – the presence of both spouses in a joint counseling session does not eliminate the privilege

2. Chapter 9.73 Rulings on Issues Regarding (A) "Private" Conversation and (B) Announcement-of-Recording Exception

(A) *Was the conversation "private"?*

The Fields Opinion discusses the Washington cases that have addressed the question of whether a conversation is "private" for purposes of chapter 9.73 RCW. The Opinion comes down on the side of "private" where, among other things: (1) the conversation occurred between husband and wife in their home with no one else present; (2) the person being taped (the defendant) stated that he did not wish to be taped; (3) the subject matter and lengthy duration of the conversation was indicative of a private conversation.

(B) *Was there an announcement during the conversation that it was being taped?*

In key part, the analysis in the Fields Opinion is as follows in agreeing with defendant on the announcement issue:

> The statute allows consent of the non-recording party to be inferred where one party has announced to all other parties in a reasonably effective manner that the conversation is being recorded as long as that announcement is included in the recording. RCW 9.73.030(3).
>
> There was no such announcement in the recording at issue here. The recording reflects that the parties were in the middle of a conversation when R.F. began to record it. The recording contains no statement or other "reasonably effective" communication by R.F.

that she is recording the conversation. Instead, the State argues that Fields knew she was recording because R.F. had her phone in her hand during the conversation and had previously told Fields she would record conversations she felt were getting "out of control." However, notifying a party at an earlier point in time that you may record a later conversation based on your feelings about that conversation does not meet the requirements of the exception outlined by statute. . . .

3. Ruling on Opinion Testimony Issue

In key part, the analysis in the Fields Opinion is as follows in rejecting the defendant's argument that the law enforcement officer was improperly allowed to present opinion testimony:

> Fields argues that the investigating detective was permitted to give improper opinion testimony regarding R.F.'s demeanor during her police interview, namely that she was "crying" and was not "gleeful" or "giggling."
>
> Witnesses may not express an opinion, directly or indirectly, on credibility or guilt. State v. Kirkman, 159 Wn.2d 918, 927-28 (2007). Whether testimony is impermissible opinion testimony depends on several factors, including "'(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.'" State v. Aguirre, 168 Wn.2d 350, 359 669 (2010) (quoting Kirkman, 159 Wn.2d at 928). Improper opinion testimony from a police officer raises additional concerns because "an officer's testimony often carries a special aura of reliability." . . . However, testimony based on inferences from the evidence, which does not comment directly on the defendant's guilt or on the veracity of a witness, and is otherwise helpful to the jury, does not generally constitute an opinion on guilt. State v. Rafay, 168 Wn. App. 734, 806 (2012). . . .
>
> In the instant case, the detective testified that during the interview R.F. "cried" and was "fearful." The State asked whether R.F. had giggled, laughed, or discussed "being excited, or thrilled, or gleeful" during that time, to which the detective answered that R.F. had not. The trial court overruled Fields' objection to the testimony. This witness and testimony followed the defense's cross-examination of R.F., in which the defense asked whether R.F. had been "gleeful," "excited," or "happy" to be able to report Fields to police.
>
> In Aguirre, the Washington Supreme Court held it was not improper opinion testimony where a police officer testified to a "general description of the demeanor of domestic violence victims" before providing testimony limited to "her objective observations of the victim during their interview as compared to other victims whom [the officer] had interviewed during her lengthy criminal justice career." . . . Here, the detective's testimony was limited only to his observations of R.F., he did not compare or discuss the demeanor of anyone else or the expected demeanor of a person reporting sexual assault. Additionally, the questions eliciting such statements were in direct response to the defense theory that R.F. had fabricated allegations against Fields and was happy to report him to police because she was unhappy in their marriage.
>
> The trial court did not abuse its discretion in declining to find that the detective's observations of R.F.'s demeanor amounted to improper opinion testimony.

[Some citations omitted, others revised for style]

Result: Reversal of King County Superior Court conviction of Christopher Michael Fields of two counts of rape in the second degree; case remanded for possible re-trial.

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BRIEF NOTES REGARDING JULY 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 10 entries below address the July 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. R.M. v. King County: On July 8, 2024, Division One of the COA reverses the ruling of the King County Superior Court that denied the King County governmental entity's request for dismissal of the civil suit of Plaintiff (R.M.) for "outrage" against the County (dismissal of her claim of negligent investigation, a theory that is not allowed under Washington tort law, was not at issue in this appeal).

The claim of outrage under tort law was based on allegations by the Plaintiff that in 1993 and 1994, when she was in her mid-teens, she was being prostituted by the couple for whom she worked as a nanny. She contended that law enforcement had information that should have alerted law enforcement to her particular circumstances, and no immediate action was taken to protect her. **In fact-based analysis of the legal question, the Court of Appeals declares that a flaw in R.M.'s "outrage" argument is that the intentional tort of outrage requires conduct that is (1) extreme and outrageous, and (2) directed at the Plaintiff. While R.M. presented evidence that a detective knew that the sex trafficking operation involved minors, R.M. failed to present evidence, other than speculation, that the detective knew that R.M. herself was involved before R.M. had already fled from the sex traffickers.**

Here is a link to the Opinion in R.M. v. King County:
https://www.courts.wa.gov/opinions/pdf/849034.pdf

2. State v. Nathan O. Beal: On July 9, 2024, Division Three of the COA rejects the challenges of defendant to his Spokane County Superior Court conviction for *first degree murder*. The defendant argued on appeal that the trial court erred in not requiring a Frye hearing before admitting testimony from a ballistics expert. The Frye rule of law dates back to Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (1923) and requires a hearing to determine for "novel" scientific techniques proof that the techniques are generally accepted as reliable in the relevant scientific community. **Citing State v. DeJesus, 7 Wn. App. 2d 849 (2019), and providing additional analysis, the Beal Opinion concludes that ballistics testimony like that allowed in the trial in the Beal trial has been established in the appellate case law to be not "novel." Accordingly, there was no need for a Frye hearing in the case.**

Here is a link to the Opinion in State v. Beal:
https://www.courts.wa.gov/opinions/pdf/395740_unp.pdf

3. State v. Jennifer Lorraine Martin: On July 9, 2024, 2024, Division Two of the COA affirms the Pierce County Superior Court conviction of defendant for *possession of a stolen vehicle*. On appeal, defendant argued that the trial court misapplied the hearsay rules by allowing a deputy to testify that (1) the deputy had followed the defendant until she went into a grocery store, (2) a grocery store employee who was inside the store then told the deputy that defendant was in a restroom and that the defendant had been in the restroom since defendant had come into the store. In key part, the Martin Court's analysis on the hearsay issue is as follows:

> [Evidence Rule] 803(a)(1) provides [a hearsay] exception for present sense impressions and [for this exception] the declarant's availability is immaterial. A present sense impression is a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." ER 803(a)(1). "Present sense impression statements must grow out of the event reported and in some way characterize that event." . . . "The statement must be a 'spontaneous or instinctive utterance of thought,' evoked by the occurrence itself, unembellished by premeditation, reflection, or design. It is not a statement of memory or belief." . . . .
>
> **Here, deputies were at the grocery store looking for Martin. A store employee approached the deputies and told them Martin was in the restroom and had been in there since she came in. This statement was made within minutes of the deputies starting their search for Martin and was based on the store employee's observation of what was happening at the grocery store. The contemporaneous and spontaneous nature of the statement, including the timing, nature, and content, reduces the chance of misrepresentation or fabrication by the witness. Therefore, the statement was a present sense impression under ER 803(a)(1) and an exception to the hearsay rule. Accordingly, the trial court did not abuse its discretion in denying Martin's hearsay objection.**

[Case citations omitted]

Here is a link to the Opinion in State v. Martin:
https://www.courts.wa.gov/opinions/pdf/D2%2057915-4-II%20Unpublished%20Opinion.pdf

4. State v. Shawn Dominique Francis: On July 16, 2024, 2024, Division Two of the COA affirms the Kitsap County Superior Court convictions of defendant for *attempted second degree assault and felony harassment convictions, both with deadly weapon enhancements*.

The Court of Appeals agrees with defendant that jury instructions at his trial did not properly define "threat" in light of the U.S. Supreme Court decision in Counterman v. Colorado, 143 S.Ct. 2106 (2023). However, the Court of Appeals concludes that the error in instructing the jury was harmless error in light of the totality of the evidence in the case.

The 2023 U.S. Supreme Court decision in Counterman held under the First Amendment Free Speech clause that, in order to convict for crimes that involve a threat element, there must be a "true threat," which means, among other things, that a trial fact-finder must determine that defendant "consciously disregarded a substantial risk that his communications would be viewed as threatening violence." The U.S. Supreme Court asserted in Counterman that this "true threat" standard means that a speaker (1) is aware that others could regard his statements as threatening violence, and (2) delivers the statements anyway.

Under Counterman, the prosecution must prove and the jury must find that the defendant had some subjective understanding of the threatening nature of his or her statements. The defendant must have been at least reckless in consciously disregarding a substantial risk that the statements would be viewed as threatening violence. Thus, jury instructions in a threat-based prosecution must so inform the jury, and the jury instructions in Francis did not do that.

In key part, the fact-based part of the harmless error analysis in Francis is as follows:

> . . . [N]either Francis nor any other witnesses testified that Francis's statements were hyperbolic, that Francis had a longstanding pattern of saying similar things without meaning them, or that intoxication or symptoms of a mental illness affected Francis's state of mind on the day of the incident. See [State v. Calloway, 550 P.3d 77 (2024)].. Francis denied making any threats, but the jury did not find this assertion credible because they found him guilty of harassment.
>
> Given the repeated threats to kill while approaching and then fighting with Williams while holding a knife, no reasonable jury would find that Francis did not at least consciously disregard a substantial risk that his communications would be viewed as threatening violence. Therefore, we hold that the instructional error was harmless beyond a reasonable doubt.

Here is a link to the Opinion in State v. Francis:
https://www.courts.wa.gov/opinions/pdf/D2%2057963-4-II%20Unpublished%20Opinion.pdf

5. In the Matter of the Personal Restraint Petition of Chelsea Kirsten Hayes: On July 9, 2024, Division Two of the COA rejects the Personal Restraint challenge of defendant Hayes to her Thurston County Superior Court convictions for (A) *conspiracy to deliver a controlled substance* and (B) *possession of a controlled substance with intent to deliver*. She argues that a search warrant was not lawful because the warrant transposed two digits in her house number. The address of her house is "72**50** 14th Avenue SE in Lacey" and the warrant described the place to be searched as located at "72**05** 14th Avenue SE in Lacey." **The Court of Appeals explains why the transposing of numbers did not invalidate the warrant:**

> **[A]n incorrect address on a search warrant alone does not invalidate the warrant; the key inquiry is whether there are adequate assurances that a mistaken search would not be likely to occur. State v. Bohan, 72 Wn. App. 335, 339 (1993) . . . .**

Where, as here, the officers executing the warrant knew where the defendant lived, an error in the address listed on the warrant is immaterial. Bohan at 340; see State v. Rood, 18 Wn. App. 740, 745-46 (1977).

Here is a link to the Opinion in the Chelsea Kirsten Hayes case:
https://www.courts.wa.gov/opinions/pdf/D2%2055510-7-II%20Unpublished%20Opinion.pdf

6. State v. Michael Anthony Brower, aka Zilla Crowley: On July 23, 2024, Division Two of the COA affirms the Thurston County Superior Court conviction of defendant for *second degree murder*. In lengthy analysis of the two primary legal issues in the case, the Court of Appeals rules that (as summarized by the Legal Update editor):

(1) there is no right under the Washington constitution requiring, on pain of suppression of statements for violation of the right, the recording of custodial interrogations (the Court of Appeals discusses two Washington Court of Appeals precedents on point, as well as discussing the 2021 Washington legislation codified in chapter 10.122 RCW that provides that non-recording of a custodial interrogation is only a factor to be considered, along with other relevant circumstances of the interrogation, in determining whether inculpatory statements are admissible); and

(2) **hearsay statements by a nine-year-old child at the crime scene to responding detectives were "testimonial" under Sixth Amendment confrontation clause case law, and therefore the statements should not have been admitted at trial; however, the further ruling on this point is that the error in admitting the hearsay was harmless in light of the admissible evidence of guilt in the record**.

Here is a link to the Opinion in State v. Brower, aka Crowley:
https://www.courts.wa.gov/opinions/pdf/D2%2057412-8-II%20Unpublished%20Opinion.pdf

7. State v. Patrick Michael Lathrop: On July 23, 2024, Division Two of the COA affirms the Pierce County Superior Court conviction of defendant for *first degree assault with a firearm sentencing enhancement*. **The Court of Appeals rejects the defendant's argument that the trial court erred in not admitting into evidence his hearsay statements to a detective during interrogation.** Defendant did not convince the Court of Appeals that (1) he had been seeking at trial to use the hearsay statements for a non-hearsay purpose; or (2) that the statements should have been allowed in evidence under Evidence Rule 803(a)(3), which provides an exception for a "statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health).

Here is a link to the Opinion in State v. Lathrop:
https://www.courts.wa.gov/opinions/pdf/D2%2058247-3-II%20Unpublished%20Opinion.pdf

8. Joseph Gavin Morgan v. Pierce County: On July 29, 2024, 2024, Division One of the COA affirms the Pierce County Superior Court ruling that the "Public Duty Doctrine" bars the lawsuit of Mr. Morgan for alleged breach of a duty of the county in an execution sale by the County to sell the executed-upon property to the highest bidder

Here is a link to the Opinion in Morgan v. Pierce County:
https://www.courts.wa.gov/opinions/pdf/866273.pdf

9. State v. Lorenzo Reyes Armenta: On July 29, 2024, Division One of the COA affirms the Pierce County Superior Court convictions of defendant for *rape of a child in the first degree and child molestation in the first degree*. **The Court of Appeals rejects defendant's argument under the highly-fact-dependent evidence law issues of (1) child witness competency and (2) admissibility of child hearsay are resolved against defendant in analysis that, per well-established legal standards, is deferential to the trial court's determinations on these questions.**

Here is a link to the Opinion in State v. Armenta:
https://www.courts.wa.gov/opinions/pdf/866249.pdf

10. State v. Zachary Ephrem Gililung: On July 30, 2024, Division Two of the COA, in an Opinion that published in part, affirms the Pierce County Superior Court convictions of defendant (arising from a sting undercover operation to catch child sex predators) for *one count of attempted commercial sexual abuse of a minor and one count of communication with a minor for immoral purposes*. In a published part of the Court's Opinion, the Court rejects an argument of defendant regarding sentencing (that issue will not be addressed in the Legal Update).

In the unpublished part of the Opinion, the Court of Appeals rules, among other rulings, that **defendant was not entitled to an entrapment instruction based on the way in which the government conducted the sting operation.**

Some of the Court's analysis in the unpublished part of the Opinion, regarding the entrapment instruction issue is as follows:

> For his communication with a minor for immoral purposes count, Gililung argues the trial court abused its discretion in refusing to instruct the jury on the defense of entrapment because there was some evidence of the elements of the defense.
>
> First, he notes the advertisement initially said that the person was 23 years old and only later did "she" say "she" was 16 years old. According to Gililung, this, combined with his own testimony that he did not want to have sex with a minor, was some evidence that he was not predisposed to the crime.
>
> Second, Gililung argues that he was induced because although the person disclosed that "she" was 16, "she" said that "she" was "discreet," and "she" essentially promised "she" would not say anything to anyone.
>
> Third, Gililung argues that additional evidence of inducement comes from when he said he was not comfortable with someone who was 16, and the person asked what "she" could do to make him comfortable.
>
> Fourth, Gililung contends that he was induced by being intentionally lured back through a taunt when Detective Klein's texted, " 'Wow. F[*]ck off. Bye." "
>
> We disagree that Gililung has shown he was entitled to an entrapment instruction.
>
> Gililung's initial argument that there was some evidence that he was not predisposed to commit the crime because law enforcement changed the age of the purported victim is unpersuasive given that law enforcement repeatedly clarified that the female was just 16 years old. Indeed, after being told multiple times the person was just 16, Gililung

continued communicating with the person, apparently withdrew $100 from an ATM, and drove to the hotel where the detective stated the minor would be—all showing that Gililung was predisposed to commit the crimes against a minor.

Similarly unpersuasive is Gililung's argument that there was some evidence of inducement because he was essentially induced by promises of discretion from law enforcement. Rather than showing inducement, these statements are more fairly characterized as affording Gililung an opportunity to commit the crimes by suggesting that he would not be caught. Likewise, Gililung fails to explain how [the undercover detective's] question about what "she" could do to "reassure him" amounted to inducement, especially when the detective did not make any promises following the question.

Finally, Gililung's arguments about the text message which read, "Wow. F[*]ck off. Bye" are utterly unpersuasive. Gililung contends that this text, coupled with the detective's testimony that he "'always tr[ies] to keep going'" during the operation, shows that law enforcement was trying to lure him back and, accordingly, is some evidence of inducement. But the detective also testified that even if he typically wants to "keep going," his "command staff always cuts [him] off."

And, here, when Gililung texted that he was not coming, the MECTF decided to close down the operation for the evening. Consequently, [the detective] ended the conversation in what he was believed to be the voice of a trafficked sex worker who was frustrated with her time being wasted. There is no support for Gililung's contention that the text could be reasonably construed as an intentional taunt designed to lure him back to the hotel.

Thus, even when viewed in the light most favorable to Gililung, none of the evidence that Gililung sets forth is sufficient to permit a reasonable juror to find entrapment by a preponderance of the evidence; the facts cited by Gililung cannot be reasonably considered some evidence of "opportunity 'plus' something else, such as excessive pressure placed on the defendant." [State v. Arbogast, 199 Wn.2d 356, 377 (March 31, 2022)].

Thus, we hold that the trial court did not abuse its discretion in refusing to instruct the jury on entrapment with respect to the communication with a minor for immoral purposes count.

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

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

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

In May of 2011, John Wasberg retired from the Washington State Attorney General's Office. For over 32 years immediately prior to that retirement date, as an Assist ant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011)

of the Criminal Justice Training Commission's Law Enforcement Digest. From the time of his retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the production of the LED. That arrangement ended in the late fall of 2014 due to variety of concerns, budget constraints, and friendly differences 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.

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

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

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

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's, is at [http://www.leg.wa.gov/legislature]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "Washington

State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. For information about access to the Criminal Justice Training Commission's Law Enforcement Digest and for direct access to some articles on and compilations of law enforcement cases, go to https://www.cjtc.wa.gov/resources/law-enforcement-digests

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