LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

JUNE 2024

TABLE OF CONTENTS FOR JUNE 2024 LEGAL UPDATE

****

UNITED STATES SUPREME COURT

SECOND AMENDMENT: FEDERAL STATUTE THAT BARS A PERSON SUBJECT TO A PARTICULARLY WORDED DOMESTIC VIOLENCE RESTRAINING ORDER IS HELD 8-1 NOT TO VIOLATE CONSTITUTIONAL GUN RIGHTS

In U.S. v. Rahimi, ___ S.Ct. ___ , 2024 WL ___ (June 21, 2024), an 8-1 majority of the U.S. Supreme Court (Justice Thomas dissenting) rules that the federal statute prohibiting persons subject to certain categories of domestic violence restraining orders is lawful under the U.S. Constitution's Second Amendment.

A summary by the Supreme Court's Reporter of Decisions (which is not part of the Opinions of the Justices), includes the following description of (1) the relevant factual and procedural circumstances of the case; (2) the statutory and constitutional context addressed in the case; and (3) a simple summary of the holding under the Majority Opinion:

> Respondent Zackey Rahimi was indicted under 18 U. S. C. §922(g)(8), a federal statute that prohibits individuals subject to a domestic violence restraining order from possessing a firearm. A prosecution under Section 922(g)(8) may proceed only if the restraining order meets certain statutory criteria.
>
> In particular, the order must either contain a finding that the defendant "represents a credible threat to the physical safety" of his intimate partner or his or his partner's child, §922(g)(8)(C)(i), or "by its terms explicitly prohibit[ ] the use," attempted use, or threatened use of "physical force" against those individuals, §922(g)(8)(C)(ii). Rahimi concedes here that the restraining order against him satisfies the statutory criteria, but argues that on its face Section 922(g)(8) violates the Second Amendment.

The District Court denied Rahimi's motion to dismiss the indictment on Second Amendment grounds. While Rahimi's case was on appeal, the Supreme Court decided New York State Rifle & Pistol Assn., Inc. *v.* Bruen, 597 U. S. 1 (2022). In light of Bruen, the Fifth Circuit reversed, concluding that the Government had not shown that Section 922(g)(8) "fits within our Nation's historical tradition of firearm regulation." 61 F. 4th 443, 460 (CA5 2023).

Held: When an individual has been found by a court to pose a credible threat to the physical safety of another, that individual may be temporarily disarmed consistent with the Second Amendment.

Result: Reversal of ruling of Fifth Circuit of the U.S. Court of Appeals; conviction of Zackey Rahimi for possessing a firearm in violation of 18 U. S. C. §922(g)(8) is reinstated.

LEGAL UPDATE EDITOR'S NOTE: The Majority Opinion in Rahimi notes that in the court's prior Second Amendment decision in District of Columbia v. Heller, 554 U.S. 570, 626, 627, n. 26 (2008), the Supreme Court referred to restrictions on possession of firearms by "felons and the mentally ill," as being "presumptively lawful."

6-3 MAJORITY RULES THAT THE ATF DURING THE TRUMP ADMINISTRATION YEARS INCORRECTLY REVISED ATF'S PRIOR STATUTORY INTERPRETATION IN BANNING BUMP STOCKS, WHICH ALLOW A RATE OF FIRE COMPARABLE TO MACHINE GUNS

In Garland v. Cargill, ___ S. Ct. ___ , 2024 WL ___ (June 14, 2024), a 6-3 majority of the U.S. Supreme Court rules that a change in interpretation by ATF during the Trump administration was incorrect, and that a bump stock does not convert a rifle into a "machinegun" within the meaning of the restrictions on weapons under federal statutes. The opening paragraph of the lengthy Majority Opinion authored by Justice Thomas and joined by four other Justices summarizes the ruling of the Court as follows:

> Congress has long restricted access to "'machinegun[s],'" a category of firearms defined by the ability to "shoot, automatically more than one shot . . . by a single function of the trigger." 26 U. S. C. §5845(b); see also 18 U. S. C. §922(*o*). Semi-automatic firearms, which require shooters to reengage the trigger for every shot, are not machineguns. This case asks whether a bump stock — an accessory for a semiautomatic rifle that allows the shooter to rapidly reengage the trigger (and therefore achieve a high rate of fire) — converts the rifle into a "machinegun." We hold that it does not and therefore affirm.

In a separate, three-paragraph Opinion, Justice Alito concurs with the Majority Opinion in all respects. He notes that there is a "simple solution" for those who wish for a different interpretation of the federal statutes, i.e., statutory amendment by Congress.

Justice Sotomayor is joined by Justices Kagan and Jackson in a Dissenting Opinion.

Result: Affirmance of the decision of the Fifth Circuit of the United States Court of Appeals that ruled in favor of Michael Cargill in his challenge to ATF's interpretation the federal statutes.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: U.S. SUPREME COURT ADDRESES FOURTH AMENDMENT-BASED MALICIOUS PROSECUTION CLAIMS IN TWO CASES DECIDED ON JUNE 20, 2024

The U.S. Supreme Court has held in past decisions that an unlawful arrest or charge can under some circumstance trigger Civil Rights Act civil liability for government officers on the theory that the Fourth Amendment was violated in the making of the arrest or in the making of the charge. On June 20, 2024, the Supreme Court made decisions in two cases related to these Fourth Amendment civil liability issues.

- Chiaverini v. City of Napoleon, ___ S.Ct. ___ , 2024 WL ___ (June 20, 2024)

In Chiaverini v. City of Napoleon, the Supreme Court issued a 6-3 ruling focused on an issue relating to whether a government officer or agency is immune from a malicious prosecution claim by an arrestee where the arrest was supported by probable cause to arrest, even if charges were ultimately not pursued by a prosecutor.

In a decision two years ago, the U.S. Supreme Court ruled in Thompson *v.* Clark, 596 U.S. 36 (2022) that if the arrest was based on a single charge, a Plaintiff must show that a government official charged him without probable cause, thus leading to an unreasonable seizure of the arrestee's person. In the Chiaverini decision, the Majority Opinion narrowly favored the arrestee-petitioner, holding that that the existence of probable cause for one charge does not "create a categorical bar" against a malicious prosecution claim relating to other charges.

However, the Chiaverini Majority Opinion limits this theory for liability by declaring that, unless the charge that is not supported by probable cause caused or lengthened the arrestee's detention, there is no Fourth Amendment violation.

- Gonzalez v. Trevino, ___ S.Ct. ___ , 2024 WL ___ (June 20, 2024)

In Gonzalez v. Trevino, the Supreme Court issued a per curiam (unsigned) Lead Opinion that clarifies the Court's decision five years ago in Nieves v. Bartlett, 587 U. S. 391 (2019) that addressed a Plaintiff's claims of "retaliatory arrest" tied to the Plaintiff's exercise of First Amendment rights. In Nieves, the Court held that, as a general rule, a plaintiff bringing a retaliatory-arrest claim under the First Amendment "must plead and prove the absence of probable cause for the arrest."

The 2019 ruling in Nieves recognized, however, a narrow exception under which probable cause does not defeat a Plaintiff 's claim if the Plaintiff produces "objective evidence that [the Plaintiff] was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been [arrested]."

Now, in Gonzalez, the Supreme Court rules that the Fifth Circuit failed to correctly interpret Nieves because the Fifth Circuit appeared to require essentially identical and identifiable comparators to meet the Nieves exception. The Supreme Court holds in Gonzalez that essentially any form of "objective evidence" of disparate treatment is sufficient. The Plaintiff in Gonzalez had presented a research survey to show disparate treatment. The Lead Opinion in Gonzalez declares:

> Gonzalez's survey is a permissible type of evidence because the fact that no one has ever been arrested for engaging in a certain kind of conduct – especially when the criminal prohibition is longstanding and the conduct at issue is not novel – makes it more likely that an officer has declined to arrest someone for engaging in such conduct in the past.

The Plaintiff in Gonzalez also asked the Supreme Court to limit the application of Nieves to "split-second" arrests, but the Supreme Court did not address that argument.

Three Concurring Opinions and one Dissenting Opinion (by Justice Thomas) are also issued.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: EIGHTH AMENDMENT DOES NOT LIMIT LOCAL OR STATE CRIMINAL LAWS THAT RESTRICT THE HOMELESS FROM SLEEPING OR CAMPING ON PUBLIC PROPERTY; 6-3 MAJORITY VOTE REJECTS NINTH CIRCUIT'S ATTEMPT TO EXPAND THE EIGHTH AMENDMENT

In City of Grants Pass v. Johnson, ___ S.Ct. ___ , 2024 WL ___ (June 28, 2024), the Supreme Court rules 6-3 that "camping ban" criminal laws restricting the homeless from sleeping on public property do not constitute "cruel and unusual punishment" and are therefore not prohibited by the Eighth Amendment.

The Majority Opinion rejects the status-crimes-for-being-homeless argument of the Plaintiffs that was accepted by the Ninth Circuit. Applying generally applicable laws prohibiting camping on public property is not application of "status crimes" because the laws being applied prohibit the actions of any person, regardless of the status of the person.

The final section of the Majority Opinion declares that the Eighth Amendment should not be stretched to address homelessness, a societal problem that raises difficult public policy questions that are not constitutional questions:

> Homelessness is complex. Its causes are many. So may be the public policy responses required to address it. At bottom, the question this case presents is whether the Eighth Amendment grants federal judges primary responsibility for assessing those causes and devising those responses. It does not.
>
> Almost 200 years ago, a visitor to this country remarked upon the "extreme skill with which the inhabitants of the United States succeed in proposing a common object to the exertions of a great many men, and in getting them voluntarily to pursue it." 2 A. de Tocqueville, Democracy in America 129 (H. Reeve transl. 1961). If the multitude of amicus briefs before us proves one thing, it is that the American people are still at it. Through their voluntary associations and charities, their elected representatives and appointed officials, their police officers and mental health professionals, they display that same energy and skill today in their efforts to address the complexities of the homelessness challenge facing the most vulnerable among us.
>
> Yes, people will disagree over which policy responses are best; they may experiment with one set of approaches only to find later another set works better; they may find certain responses more appropriate for some communities than others. But in our democracy, that is their right.

> Nor can a handful of federal judges begin to "match" the collective wisdom the American people possess in deciding "how best to handle" a pressing social question like homelessness. [Robinson v. California, 370 U. S. 660 (1962) (White, J., dissenting)]. The Constitution's Eighth Amendment serves many important functions, but it does not authorize federal judges to wrest those rights and responsibilities from the American people and in their place dictate this Nation's homelessness policy. The judgment below is reversed, and the case is remanded for further proceedings consistent with this opinion.

[Some paragraphing revised for readability]

Result: Reversal of Ninth Circuit ruling that had upheld a U.S. District Court injunction against the enforcement by the City of Grants Pass of certain City ordinance provisions against homeless persons.

LEGAL UPDATE EDITOR'S NOTE: Amicus briefs supporting the City of Grants Pass were filed by numerous entities, including the Washington Association of Sheriffs and Police Chiefs and the Washington State Association of Municipal Attorneys.

OBSTRUCTION CHARGE UNDER FEDERAL LAW: IN A FEDERAL PROSECUTION THAT AROSE FROM THE JANUARY 6, 2021, DC CAPITOL RIOT, SUPREME COURT RULES 6-3 THAT A FEDERAL OBSTRUCTING STATUTE MUST BE NARROWLY CONSTRUED

In Fischer v. United States, ___ S.Ct. ___ , 2024 WL ___ (June 27, 2024), a case involving a federal prosecution of a former Pennsylvania police officer who entered the Capitol on January 6, 2021, the 6-3 Majority Opinion holds that to prove a violation of the statute under which the defendant was charged, the government must show more than as contended by the prosecuting entity in the case. The prosecution must show that in his actions the defendant actually impaired the availability or integrity for use in an official proceeding of records, documents, objects, or other things used in an official proceeding, or attempted to do so.

The opening paragraph of the Majority Opinion in Fischer describes as follows the statutory construction question posed in the case:

> The Sarbanes-Oxley Act of 2002 imposes criminal liability on anyone who corruptly "alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding." 18 U. S. C. §1512(c)(1). The next subsection extends that prohibition to anyone who "otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so." §1512(c)(2). **We consider whether this "otherwise" clause should be read in light of the limited reach of the specific provision that precedes it.**

[Bolding added]

The Majority Opinion in Fischer concludes that the "otherwise" clause must be read in light of the limited reach of the specific provision that precedes it.

Result: Remanded for the D.C. Circuit Court of Appeals to assess the sufficiency of the indictment against Fischer in light of the U.S. Supreme Court's interpretation of the statute.

EXPERT IS PERMITTED UNDER FEDERAL EVIDENCE RULE 704(b) TO TESTIFY AGAINST DEFENDANT ACCUSED OF TRANSPORTING METHAMPHETAMINE THAT DRUG TRAFFICKERS DO NOT GENERALLY ENTRUST LARGE QUANTITIES OF ILLEGAL DRUGS TO PEOPLE WHO ARE UNAWARE OF WHAT THEY ARE TRANSPORTING

In Diaz v. U.S., ___ S.Ct. ___ , 2024 WL ___ (June 20, 2024), the U.S. Supreme Court rules 6-3 that expert testimony that "most people" in a group have a particular mental state is generally not an opinion about the defendant in the case at hand and therefore does not violate Federal Rule of Evidence 704(b).

A summary by the Supreme Court's Reporter of Decisions (which is not part of the Opinions of the Justices), includes the following description of (1) the relevant factual and procedural circumstances of the case; (2) the statutory and constitutional context addressed in the case; and (3) a simple summary of the holding under the Majority Opinion:

> Petitioner Delilah Diaz was stopped at a port of entry on the United States-Mexico border. Border patrol officers searched the car that Diaz was driving and found more than 54 pounds of methamphetamine hidden in the vehicle. Diaz was charged with importing methamphetamine in violation of 21 U. S. C. §§952 and 960, charges that required the Government to prove that Diaz "knowingly" transported drugs.
>
> In her defense, Diaz claimed not to know that the drugs were hidden in the car. To rebut Diaz's claim, the Government planned to call Homeland Security Investigations Special Agent Andrew Flood as an expert witness to testify that drug traffickers generally do not entrust large quantities of drugs to people who are unaware they are transporting them. Diaz objected in a pretrial motion under Federal Rule of Evidence 704(b), which provides that "[i]n a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense."
>
> The [trial] court ruled that Agent Flood could not testify in absolute terms about whether all couriers knowingly transport drugs, but could testify that most couriers know they are transporting drugs. At trial, Agent Flood testified that most couriers know that they are transporting drugs.
>
> The jury found Diaz guilty, and Diaz appealed, challenging Agent Flood's testimony under Rule 704(b). The [United States] Court of Appeals held that because Agent Flood did not explicitly opine that Diaz knowingly transported methamphetamine, his testimony did not violate Rule 704(b).
>
> Held: Expert testimony that "most people" in a group have a particular mental state is not an opinion about "the defendant" and thus does not violate Rule 704(b).

[Some paragraphing revised for readability]

Result: Affirmance of U.S. District Court drug crime conviction of Delilah Guadalupe Diaz.

LEGAL UPDATE EDITOR'S NOTE: A WAPA Case Law Note on the WAPA website (https://waprosecutors.org/caselaw/) includes the following WAPA Case Law Editor's Note regarding the Diaz decision:

Federal Evidence Rule 704(b) states, "[i]n a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." Washington's ER 704 lacks this provision. This case is included [in WAPA Case Law Notes] because it may have wider implications about what range of expert testimony is helpful to the jury.

SIXTH AMENDMENT RIGHT OF CONFRONTATION: WHEN AN EXPERT CONVEYS AN ABSENT ANALYST'S STATEMENTS IN SUPPORT OF THE EXPERT'S OPINION, AND THE STATEMENTS PROVIDE THAT SUPPORT ONLY IF TRUE, THEN THE STATEMENTS COME INTO EVIDENCE FOR THEIR TRUTH, AND THEREFORE THE STATEMENTS ARE SUBJECT TO A SIXTH AMENDMENT CONFRONTATION RIGHT CHALLENGE

In Smith v. Arizona, ___ S.Ct. ___ , 2024 WL ___ (June 21, 2024), the U.S. Supreme Court rules against the State on a Sixth Amendment Confrontation Issue relating to expert witness testimony. A WAPA Case Law Note on the WAPA website (https://waprosecutors.org/caselaw/) includes the following regarding the Smith v. Arizona decision:

> If an expert witness offers an out-of-court statement as the sole basis of her or his opinion, and the out-of-court statement supports the opinion only if the out-of-court statement is true, then the out-of-court statement has been offered for the truth of the matter asserted. Because, for example, if the non-testifying expert's opinion was wrong or mistaken, the testifying expert's opinion counts for nothing. *Smith v. Arizona*, No. 22-899 (June 21, 2024). *(WAPA Case Law Editor's note: Takeaway: ER 703 is not a path that circumvents the confrontation clause.)*

****

NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT IN USE OF DEADLY FORCE: QUALIFIED IMMUNITY IS DENIED TO OFFICER BECAUSE, VIEWING THE EVIDENCE IN THE BEST LIGHT FOR THE PLAINTIFF, A THREE-JUDGE PANEL CONCLUDES THAT: (1) A JURY COULD REASONABLY CONCLUDE THAT AN OFFICER USED EXCESSIVE FORCE WHEN HE SHOT A MAN; & (2) A REASONABLE OFFICER WOULD HAVE CONCLUDED THAT WHEN A MAN IS WALKING DOWN THE STREET CARRYING A GUN IN HIS WAISTBAND, POSING NO IMMEDIATE THREAT, POLICE OFFICERS MAY NOT SHOUT CONFLICTING COMMANDS AT HIM AND THEN KILL HIM

In Calonge v. City of San Jose, ___ F.4th ___ , 2024 WL ___ (9th Cir., June 7, 2024), a three-judge Ninth Circuit panel reverses a U.S. District Court order that granted qualified immunity to Officer Edward Carboni in a deadly force Civil Rights lawsuit brought by the mother of a man whom Officer Carboni shot and killed.

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

> The panel noted that this case is unusual in that other officers on the scene contradicted key facts asserted by Officer Carboni. Construing the facts in the light most favorable to plaintiff Rosalina Calonge, the panel concluded that a reasonable jury could decide that

> Officer Carboni violated Calonge's Fourth Amendment right to be free from excessive force.
>
> The panel resolved three disputed facts in plaintiff's favor for purposes of the appeal: (1) Calonge was not drawing his gun or otherwise making a threatening gesture when Officer Carboni shot him; (2) there were no bystanders in Calonge's vicinity when he was shot; and (3) officers did not instruct Calonge to get on the ground or otherwise stop.
>
> The totality of the circumstances did not justify deadly force. A reasonable jury could conclude that Calonge did not pose an immediate threat and was not fleeing arrest. Officers were not responding to the commission of a serious crime, and Calonge was not noncompliant, given the officers' conflicting commands about what to do with the gun.
>
> It would have been clear to a reasonable officer in Carboni's position at the time that shooting Calonge was unlawful. It was clearly established that when a man is walking down the street carrying a gun in his waistband, posing no immediate threat, police officers may not shout conflicting commands at him and then kill him.

[Paragraphing revised for readability]

The Ninth Circuit Opinion in Calonge authored by Judge Friedland describes as follows the conflicting evidence that a jury will be asked to sort out at trial on remand:

> During the afternoon of October 31, 2019, Calonge was near a shopping center in San Jose. He was carrying a Powerline 340 BB gun. A passerby, thinking that Calonge had a real handgun, called 911. About fifteen minutes later, a driver called 911 and reported a man with a gun walking down a street near the shopping center. That second caller expressed concern for the safety of students at nearby Independence High School, which released its students around the time of the call.
>
> The San Jose Police Department dispatched officers to the area. Officers Carboni, McKenzie, Yciano, and Pedreira were among those who responded. Officer Carboni requested that the San Jose Guardian Unit, a team trained to respond to active school shooters, be dispatched to Independence High School. Officer Carboni then exited his vehicle holding his rifle and activated his body-worn camera. Calonge was about twenty yards up the street, walking toward the officers. He was walking away from the school, which was about three blocks behind him. Officer Carboni testified that Calonge had the gun in his front waistband and was resting his right hand on it.
>
> Officer Carboni began shouting commands to Calonge, including "let me see your hands" and "drop it." A different officer shouted for Calonge to "drop the gun." A third officer shouted, "do not reach for it." That may have been Officer Yciano, who later testified that he instructed Calonge, "don't reach for the gun." A police report states that Officer Yciano also told Calonge to "get on the ground." Yet when asked at his deposition about what commands he gave, Officer Yciano testified only that he told Calonge not to reach for the gun and to drop the gun. He testified that he recalled an unspecified other officer telling Calonge to get on the ground. No command to get on the ground is audible in the body-worn camera footage.

When the officers began shouting commands, Calonge paused, crossed the street, and began heading in the opposite direction, away from the officers and generally toward the school. Officers Carboni, McKenzie, and Yciano followed him on foot at a distance of ten to thirty yards, walking along the road's median, while Officer Pedreira followed in a police car. According to the officers, Calonge looked over his shoulder a few times and smiled. He continued walking, but he did not speed up.

Officer Carboni started to say something to the other police officers. He began, "I'm gonna – hey . . ." before trailing off. He then shouted for Calonge to "drop it." A few seconds later, he said to the other officers, "Hey, watch out, I'm gonna shoot him. Watch out, watch out. Get out of the way." That statement took three seconds. Officer Carboni spent three more seconds steadying his rifle against a tree. He then shot Calonge once in the back. The bullet struck Calonge's heart, killing him. At no point had Officer Carboni warned Calonge that he was going to shoot. Just over one minute had elapsed between when Officer Carboni exited his police car and when he fired his gun.

Officer Carboni later testified that he fired his gun for two reasons. First, he said he saw Calonge's arm "bow out" such that there was space between his arm and his body, suggesting that he was drawing the gun. Second, Officer Carboni claimed that Calonge was walking toward some students who were ten or fifteen yards ahead and that he feared Calonge would take the students hostage.

Other evidence conflicts with both of Officer Carboni's stated reasons for shooting. As to whether Calonge moved his arm, although Officer McKenzie later stated that he saw Calonge's arm move away from his body, Officer Pedreira stated that he did not see Calonge do anything that suggested he was pulling his gun out of his waistband during the minute before he was shot. And Officer Yciano stated that he saw Calonge only "turn[] at an angle . . . as if he was trying to hide" the gun from the officers. 2

> [Court's footnote 2: *None of the footage from the officers' body-worn cameras shows Calonge's arm in the moments before the shooting*.]

As to whether there were students nearby, Officer Pedreira stated that he did not see anyone on the corner of the intersection toward which Calonge was headed. The footage from the body-worn cameras, including Officer Carboni's camera, does not show any bystanders near Calonge or further down the sidewalk toward the intersection.

Result: Remand of the case to the U.S. District Court (Northern District of California) for trial or other proceedings consistent with the Ninth Circuit ruling.

UNDER THE LIMITED CONSIDERATION IN HABEAS CORPUS REVIEW OF A STATE APPELLATE DECISION, A THREE-JUDGE NINTH CIRCUIT PANEL REJECTS DEFENDANT'S ARGUMENT THAT A CALIFORNIA APPELLATE COURT FAILED TO FOLLOW U.S. SUPREME COURT PRECEDENT IN RULING THAT THE MIRANDA-BASED INITIATION-OF-CONTACT RULE WAS VIOLATED WHEN (1) DETECTIVES PLACED DEFENDANT IN A JAIL CELL WITH AN UNDERCOVER INFORMANT (2) SHORTLY AFTER THEY HAD VIOLATED DEFENDANT'S RIGHTS BY CONTINUING A CUSTODIAL INTERROGATION DESPITE HIS INVOCATION OF HIS MIRANDA RIGHT TO AN ATTORNEY

In Grimes v. Phillips, ___ F.4th ___ , 2024 WL ___ (9th Cir., June 26, 2024), a three-judge Ninth Circuit panel issues an Opinion that addresses but does not resolve an issue under the Miranda-based initiation-of-contact rules. That issue was raised in a Concurring Opinion by U.S. Supreme Court Justice William Brennan in Illinois v. Perkins, 496 U.S. 292 (1990). However, the issue has never been resolved by a Majority Opinion in a U.S. Supreme Court decision. The Miranda-based theory of defendant Grimes in his habeas corpus petition depends on the Concurring Opinion by Justice Brennan in Illinois v. Perkins.

Under the standard for habeas corpus review, a state appellate court decision cannot be challenged for legal error if the U.S. Supreme Court has not resolved the legal issue for the state court decision. Grimes thus is not entitled to habeas corpus relief, the Ninth Circuit rules in Grimes v. Phillips.

Grimes was arrested for a shooting murder, and he asserted his right to counsel when detectives attempted a custodial interrogation of him at the stationhouse. Detectives did not end the interview at that point. Instead, a detective told Grimes that he did not need to talk to them, but that they wanted him to know that they were conducting a "very serious investigation" in which he had been implicated. They told him that they were investigating a murder for which he was going to be arrested. Grimes then asked "Why would I be arrested for murder?"

A detective then asked if Grimes wanted to wait for an attorney or to talk at that time. Grimes eventually agreed to speak without the presence of an attorney, and he admitted to having an altercation with the victim, though he denied involvement in the shooting. A few hours after the custodial interrogation, detectives placed Grimes in a jail cell with a previously coached undercover informant posing as a fellow inmate. Grimes made some incriminating statements in conversation with the undercover jail informant.

Grimes was convicted of murder in a California state trial court. Admitted evidence included statements by Grimes to the undercover jail informant. In Grimes' final appeal in the California court system, the California Court of Appeal ruled that his rights under Miranda as interpreted in Edwards v. Arizona, 451 U.S. 477 (1981) were violated when the detectives continued their interrogation after his invocation of his counsel right prior to placing him in a jail cell. However, the California Court of Appeal ruled that placing Grimes in a jail cell with an undercover informant and the informant's engaging Grimes in conversation did not violate Miranda. The California Court of Appeal relied on Illinois v. Perkins, 496 U.S. 292 (1990) for that ruling.

In Illinois v. Perkins, an undercover agent was placed in a cell with the defendant, who (1) was already incarcerated on charges unrelated to the subject of the agent's investigation, and (2) had not invoked his Miranda right to an attorney during a custodial interrogation prior to his incarceration. The defendant made statements implicating himself in the crime that the agent was investigating. The defendant in Perkins argued that his statements should be inadmissible because he had not been Mirandized by the undercover agent. The Supreme Court rejected his argument and held that an undercover law enforcement officer posing as a fellow inmate is not required to give Miranda warnings to and get a waiver from an incarcerated suspect before asking questions that may elicit an incriminating response.

The Majority Opinion in Illinois v. Perkins declared that "Miranda forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner." And, the Supreme Court declared that when a suspect "boast[s] about their criminal activities in front of persons whom they believe to be their cellmates," those statements are considered voluntary.

As noted above, the argument of Grimes is based on Justice Brennan's concurrence in Perkins. That Concurring Opinion emphasizes that the Majority Opinion's holding in Perkins is limited to "the question of whether Miranda applies to the questioning of an incarcerated suspect by an undercover agent." In Justice Brennan's stated view in his concurrence, nothing in the Perkins Majority Opinion suggests that, "had [the defendant] previously invoked his Fifth Amendment right to counsel [], his statements would be admissible." Under the standard for habeas corpus review, as noted above, Justice Brennan's concurrence in Perkins does not constitute clearly established Supreme Court precedent for habeas corpus review purposes.

Result: Denial of habeas corpus relief to Christopher Grimes from his State of California conviction and sentence for second degree murder.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR CORRECTIONS REGARDING MEDICAL TREATMENT REQUEST OF PRISIONER: BASED ON (1) LACK OF CONTROLLING PRECEDENT AND (2) THE FORGIVING EIGHTH AMENDMENT STANDARD OF "DELIBERATE INDIFFERENCE," PANEL GRANTS QUALIFIED IMMUNITY TO PRISON MEDICAL DIRECTOR WHO DENIED A PRISONER'S REQUEST FOR A PARTICULAR TYPE OF TREATMENT FOR HEPATITIS C

In Carley v. Aranas, ___ F.4th ___ , 2024 WL ___ (9th Cir., June 3, 2024), a three-judge Ninth Circuit panel rules that there was no controlling federal precedent against the decision of Nevada prison officials during the period in which the prison officials were denying a prison inmate treatment for her Hepatitis C.

A Ninth Circuit staff summary (which is not part of the Opinions of the Ninth Circuit panel) includes the following descriptions of the ruling and Opinion:

> The panel reversed the district court's denial, on summary judgment, of qualified immunity to Dr. Romeo Aranas, the former Medical Director of the Nevada Department of Corrections ("NDOC") in a 42 U.S.C. § 1983 action brought by Elizabeth Carley, an inmate in the custody of the NDOC, who alleged that Aranas was deliberately indifferent to her medical needs when he denied her request for certain Hepatitis C ("HCV") treatment.
>
> The panel held that Dr. Aranas was entitled to qualified immunity because no clearly established law rendered the HCV policies unconstitutional at the time of the alleged violation.
>
> The panel determined that the appropriately narrow inquiry asks whether a prison medical director between August 2013 and May 2018 would have been on notice that the NDOC HCV policy pertaining to treatment priorities for inmates was unconstitutional at the time. The appropriate inquiry is not whether evolving medical standards prescribed a course of best treatment and practice but whether the medical standard was so well established that the failure to prescribe the course of treatment could only be considered deliberate indifference within the meaning of the Eighth Amendment.
>
> The panel concluded that no decision of the Supreme Court, this court, or a "consensus of courts" would have put Dr. Aranas on notice that the relevant inmate treatment

prioritization schemes violated the Eighth Amendment during his time as the NDOC Medical Director.

Accordingly, the panel reversed the district court's order and remanded with instructions to grant summary judgment for Dr. Aranas.

[Some paragraphing revised]

Result: Reversal of decision of U.S. District Court (Nevada) against the Nevada DOC.

****

WASHINGTON STATE COURT OF APPEALS

WARRANTLESS SEARCH OF DEFENDANT'S VEHICLE BY CCO IS HELD UNCONSTITUTIONAL UNDER ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION BECAUSE THERE WAS NOT A SUFFICIENT NEXUS BETWEEN THE NATURE OF THE PROBATION VIOLATION (BEING PRESENT IN A PROHIBITED AREA) AND THE SEARCH OF THE VEHICLE FOR A FIREARM

In State v. Allah, ___ Wn. App.2d ___ , 2024 WL ___ (Div. I, June 20, 2024), a three-judge Washington Court of Appeals panel reverses defendant's conviction for unlawful possession of a firearm. The Allah Court rules that the firearm is not admissible because a warrantless search of defendant's vehicle by a community custody officer (CCO) was not justified under the restrictive Washington State constitutional standard for warrantless CCO searches.

The holding in Allah is that the following items did not add up to a sufficient nexus for a warrantless search by the CCO for a firearm in the probationer's vehicle: (1) Allah's prior criminal history, including a conviction for unlawful possession of a firearm; (2) his prior gang associations; (3) his then-observed violation of a geographic boundary probation condition that was tied to his gang connections.

The Allah Opinion describes as follows some facts and the lower court procedural background:

> In October 2020, Allah was on probation for a 2017 firearm conviction and driving his car in the Central District of Seattle, when a police officer pulled him over on suspicion of driving with a suspended license. After learning of Allah's probationary status, the officer contacted the Department of Corrections (DOC) and asked for a CCO to travel to the scene to discuss next steps.
>
> While he was on his way to the scene, [the CCO] reviewed Allah's prior conditions of community custody and noted that he was in violation of a geographic boundary condition, which excluded him from the Central District. According to [the CCO's] later testimony, Allah's prior CCO likely sought this geographic restriction because a police department listed Allah in a security group threat data base as a member of a gang associated with the Central District.

> Upon arriving at the scene, [the CCO] talked with Allah and then searched the car, specifically for a firearm. [The CCO] located a firearm on the floorboard underneath the driver's seat. He collected the firearm as evidence and arrested Allah.
>
> The State charged Allah with one count of unlawful possession of a firearm in the first degree as his prior convictions barred him from possessing firearms. Pre-trial, Allah moved to suppress the firearm evidence from [the CCO's] search under CrR 3.6 (motion), arguing in pertinent part that there was an insufficient nexus between the search and Allah's geographic violation. At the hearing on the motion, and as will be further discussed below, [the CCO] testified that the "geographic boundary [violation] alone wouldn't necessitate a search," and the "nexus for [his] search" was Allah's "history of firearms possession." The court denied Allah's motion.
>
> In December 2022, a jury convicted Allah as charged, and the court sentenced him to 41 months in prison. Allah now timely appeals.

[Footnotes omitted]

ANALYSIS:

Under the Washington State Constitution, article I, section 7, as under the Fourth Amendment [though not identically interpreted], a probationer has a limited expectation of privacy such that warrantless searches are allowed based on reasonable suspicion of probation violations or criminal activity in some circumstances. The Allah Court explains, however, that

> Even with [a] probationer's diminished privacy rights, however, article I section 7 of the Washington Constitution "permits a warrantless search of the property of an individual on probation only where there is a nexus between the property searched and the alleged probation violation." State v. Cornwell, 190 Wn.2d 296, 306 (2018) (emphasis added).
>
> And still, "[w]hen there is a nexus between the property searched and the suspected probation violation, an individual's reduced privacy interest is safeguarded in two ways." Cornwell, 190 Wn.2d at 304.
>
> First, a CCO must have "'reasonable cause to believe' a probation violation has occurred before conducting a search at the expense of the individual's privacy." [Cornwell] (quoting RCW 9.94A.631(1)).
>
> Second, "the individual's privacy interest is diminished only to the extent necessary for the State to monitor compliance with the particular probation condition that gave rise to the search. The individual's other property, which has no nexus to the suspected violation, remains free from search." [Cornwell]
>
> . . . .
>
> Our Supreme Court's decision in Cornwell, where it stuck down a search for lacking a sufficient nexus, is quite on point. There, the CCO arrested Cornwell based on his probation violation for failure to report. Following the arrest, the CCO searched the defendant's car, locating contraband. At the CrR 3.6 hearing, the CCO testified the search was "'to make sure there's no further violations of his probation.'"

> Our Supreme Court held that, while the CCO "may have suspected Cornwell violated other probation conditions, the only probation violation supported by the record is Cornwell's failure to report." As such, there was no nexus between property and the crime of failure to report and the failure to report violation was already established, rendering the search unnecessary for that purpose.
>
> Similarly, here, the geographic violation, without more, provides no reason why Allah may have had a firearm. Again, a warrantless search of a probationer can occur "only where there is a nexus between the property searched and the alleged probation violation." [Cornwell]. Just as the CCO's desire in Cornwell to avoid "further" probation violations is insufficient to establish such a nexus, so is the court's desire to generically "promote compliance with the law" and avoid circumstances that "might lead to reoffending." [Cornwell]

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

Result: Reversal of King County Superior Court conviction of Roman James Allah for unlawful possession of a firearm.

LEGAL UPDATE EDITOR'S COMMENT/NOTE: 2016 Washington legislation, SB 6459 (Chapter 234), enacted RCW 9.94A.718, which provides that:

> **(1) Any peace officer has authority to assist the department with the supervisions of offenders.**
>
> **(2) If a peace officer has reasonable cause to believe an offender is in violation of the terms of supervision, the peace officer may conduct a search as provided under RCW 9.94A.631, of the offender's person, automobile, or other personal property to search for evidence of the violation. A peace officer may assist a community corrections officer with a search of the offender's residence if requested to do so by the community corrections officer.**
>
> **(3) Nothing in this section prevents a peace officer from arresting an offender for any new crime found as a result of the offender's arrest or search authorized by this section.**
>
> **(4) Upon substantiation of a violation of the offender's conditions of community supervision, utilizing existing methods and systems, the peace officer should notify the department of the violation.**
>
> **(5) For the purposes of this section, "peace officer" refers to a limited or general authority Washington peace officer as defined in RCW 10.93.020.**

[Emphasis added]

Note that under Washington law, however (as was held in the Allah case), where a search by either law enforcement officers or community corrections officers is based on violation of the terms of community custody (as opposed to being a search incident to arrest for a crime, which exception to the warrant requirement has its own limitations), the scope of the search is limited to areas or containers for which there is a probable cause nexus between

the area searched and the particular violation. See State v. Cornwell, 190 Wn.2d 296, 306 (March 15, 2018).

IN A CRIMINAL HARASSMENT CASE, A CONVICTED DEFENDANT LOSES HIS ARGUMENT UNDER COUNTERMAN V. COLORADO THAT WASHINGTON'S HARASSMENT STATUTE IS UNCONSTITUTIONAL FOR FAILING TO ARTICULATE THE "TRUE THREAT" STANDARD OF COUNTERMAN THAT IS GROUNDED IN FIRST AMENDMENT FREE SPEECH PROTECTION, BUT DEFENDANT CAN BE RE-TRIED UNDER JURY INSTRUCTIONS THAT MEET THE COUNTERMAN STANDARD

In State v. Calloway, ___ Wn. App.2d ___ , 2024 WL ___ (Div. II, June 11, 2024), a three-judge panel for Division Two of the Court of Appeals loses his argument under the U.S. Supreme Court's 2023 decision in Counterman v. Colorado that Washington's harassment statute is unconstitutional for failing to articulate the "true threat" standard of Counterman. However, defendant can be re-tried under jury instructions that meet the Counterman standard

Turner Calloway was convicted of felony harassment for threatening to kill Aljorie Davis. After Calloway appealed his judgment and sentence, the United States Supreme Court decided Counterman v. Colorado, 143 S.Ct. 2106 (June 27, 2023) which defined the "true threat" standard for determining whether a threatening statement lacks the protection of the First Amendment to the United States Constitution.

Calloway argues that Counterman rendered Washington's harassment statute facially unconstitutional under the First Amendment. He also argues that Counterman rendered the jury instructions erroneous, and that the error was not harmless under the evidence presented at trial.

The Calloway Court rules that the Counterman decision did not render the Washington threat-based criminal provisions invalid, but that Counterman does require that the Washington statutes must be deemed to require that jury instructions must be consistent with the ruling in Counterman. Also, the error in the instructions cannot be deemed to have been harmless. However, defendant Calloway can be retried using instructions defining threat that meet the Counterman standard.

The U.S. Supreme Court decision in Counterman held under the First Amendment Free Speech clause that, in order to convict for crimes that involves 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 in the threats context, 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.

Thus, 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 Calloway did not do that.

Result: Reversal of Pierce County Superior Court conviction of Turner Lee Calloway; case remanded for re-trial.

PUBLIC DUTY DOCTRINE IS APPLIED TO PRECLUDE A LAWSUIT AGAINST AN OFFICER AND THE CITY OF FEDERAL WAY BECAUSE, WHEN AN OFFICER RESPONDED TO A REPORT OF A MOTOR VEHICLE COLLISION (AND THEN ANOTHER DRIVER CRASHED INTO THE PATROL CAR AND CAUSED INJURIES TO PERSONS AT THE SCENE), THE OFFICER (1) WAS PERFORMING A FUNCTION THAT WAS REQUIRED BY STATUTE, AND (2) OWED A DUTY ONLY TO THE PUBLIC AT LARGE

In Zorchenko v. City of Federal Way, ___ Wn. App.2d ___ , 2024 WL ___ (Div. I, June 10, 2024), the Court of Appeals applies the public duty doctrine in dismissing a lawsuit against a Federal Way police officer and the City of Federal Way. Thus, the Zorchenko Court applies the court-made "public duty doctrine," which allows governmental entities to escape liability in some circumstances where the governmental entity owes an actionable duty only to the public at large and not to any particular injured person. The first paragraph of the Zorchenko Opinion states as follows:

> A governmental entity's breach of a duty owed to the public at large is, as a matter of law, insufficient to sustain a tort claim for negligence. Here, the trial court dismissed negligence claims asserted against the City of Federal Way (the City), concluding that, in responding to a nonemergency report of a motor vehicle collision, the City owed a duty to the general public, but not a specific duty to the individuals who reported the incident. The trial court did not err in so concluding and granting the City's motion for summary judgment. We affirm.

In Zorchenko, the officer was called to an accident scene solely because one of the persons involved in a two-car collision had called dispatch and wanted (A) assistance in filing a police report, and (B) permission to move the vehicles from the scene of the collision. After the officer arrived and positioned her car, apparently safely, another car crashed into the officer's car and a chain reaction resulted allegedly in injuries to both of the drivers involved in the original collision.

In extensive analysis of the facts and the public duty doctrine that includes distinguishing the Washington Supreme Court's decision last year in Norg v. City of Seattle, 200 Wn.2d 749, 756 (2023), the Zorchenko Court concludes with the following paragraph:

> Zorchenko does not appear to dispute that responding to and investigating a reported motor vehicle collision is an exclusive and inherent governmental function or that [the officer's] duties were governed by statute.
>
> The statutory mandates involved in responding to the scene of a collision apply only to governmental actors and no law authorizes private entities to perform comparable functions. Because the City's employee was performing a function that was required by statute and owed a duty to the public at large, the trial court did not err in concluding that the public duty doctrine applied and dismissing the claims against the City.

[Footnote omitted]

Result: Affirmance of King County Superior Court decision that dismissed the lawsuits of the plaintiffs against the City of Federal Way and its officer.

****

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

1. State v. Manuel Lorenzo Matias: On June 4, 2024, 2024, Division Two of the COA affirms the Kitsap County Superior Court convictions of defendant *(A) as an accomplice to assault in the first degree with a deadly weapon against Santos Ramirez Pablo, in a manner manifesting deliberate cruelty; and (B) assault in the fourth degree against Noliber Luiz Ramirez Cruz.*

Among other rulings, the Court of Appeals rejects the argument of Matias that his admissions to an officer should be suppressed based on what he claims is a language barrier that prevented him from properly waiving his Miranda rights. His claim is that his native language is Mam (a Mayan language spoken by about 400,000 people in Guatemala and Mexico). The Court of Appeals rules that the trial court did not abuse its discretion in ruling – based on statements that Matias made to officers after his arrest and based on his testimony in a suppression hearing – that his waiver and statements were admissible because Matias was proficient in Spanish and had not expressed any discomfort with Spanish in his conversations with officers.

Here is a link to the Opinion in State v. Matias:
https://www.courts.wa.gov/opinions/pdf/D2%2058230-9-II%20Unpublished%20Opinion.pdf

2. State v. Lola Felipa Luna: On June 11, 2024, Division Two of the COA affirms the Kitsap County Superior Court conviction of defendant for *second degree murder* for a killing she did in a knife attack in January 2021. **The Court of Appeals rejects each of the many arguments raised by defendant. One of her arguments is that a detective violated her rights by Mirandizing and interrogating her in January 2021 without adhering to RCW 13.40.740, which took effect in January 2022. That statute addresses access to attorneys for juveniles. The statute provides that children cannot knowingly, intelligently, and voluntarily waive their Miranda rights until they have consulted with an attorney. RCW**

13.40.740(3)(a). The Court of Appeals rejects her argument that the statute should be retroactively applied to her case.

Here is a link to the Opinion in State v. Luna:
https://www.courts.wa.gov/opinions/pdf/D2%2057943-0-II%20Unpublished%20Opinion.pdf

3. State v. Brandon Edward Young: On June 13, 2024, Division Three of the COA affirms the Spokane County Superior Court confirms the convictions of defendant for *five counts of witness tampering, five counts of violating a domestic violence no-contact order, and one count of attempted no-contact order violation*.

One of the arguments unsuccessfully raised by defendant was that the trial court violated the hearsay rules. The trial court admitted statements of the victim to a 911 operator as "excited utterances." In salient part, the Young Court's analysis in support of rejecting this argument is as follows:

> "A statement qualifies as an excited utterance if (1) a startling event occurred, (2) the declarant made the statement while under the stress or excitement of the event, and (3) the statement relates to the event."
>
> . . . .
>
> Young asserts that the first call did not qualify as an excited utterance because it was based on threats that were made the night prior, and in the second call B.A. was calm and safe in her neighbor's home.
>
> As to the first call, the evidence supports the court's finding that B.A.'s 911 call related to the startling event of learning that Young [who had threatened her the night before] was [at that moment] on his way over to her apartment and [had again] threatened to harm her or her property. Similarly, the evidence supports the court's finding that B.A. called 911 the second time [about 15 minutes after the first call] as Young was at her apartment, beating on her door and crawling through her window. While the court found this was a closer call because of B.A.'s tone, she continued to express fear as a result of the event that was occurring. These findings support the court's conclusion that the second 911 call qualified as an excited utterance.
>
> Young argues that the threats B.A. was concerned with were made the night before. The trial court disagreed, and this decision was within its discretion given the evidence. In addition, the argument that B.A. appeared calm during the second call does not defeat application of the exception.
>
> **The purpose of this exception [for excited utterances] is to make sure the declarant is "still under the influence of the event so as to preclude any chance of fabrication, intervening influences, or the exercise of choice or judgment." State v Bryant, 65 Wn. App. 428, 433, 828 P.2d 1121 (1992). Here, the statements made were directly to the 911 operator as the event was occurring, and importantly, there is no requirement under the rule that a person maintain a certain tone of voice for it to apply. See ER 803(2).**

[Bolding and bracketed text added by Legal Update Editor]

Here is a link to the Opinion in State v. Young:
https://www.courts.wa.gov/opinions/pdf/394379_unp.pdf

4. State v. Paul Alvin Klever: On June 17, 2024, Division One of the COA reverses the Whatcom County Superior Court conviction of defendant for *possession of a controlled substance with intent to deliver*. The Court of Appeals rejects defendant's suppression-motion argument that Klever was unlawfully seized by a law enforcement officer at the point when Klever consented to a search of his car. On an issue unrelated to the seizure issue, the Court of Appeals rules that the trial court violated defendant's right to a public trial in the way in which the court conducted jury selection. That violation of law by the trial court requires that the case be re-tried.

On the seizure issue, the Court of Appeals describes as follows the facts that the trial court and the Court of Appeals each determined did not constitute a seizure of defendant prior to the point when he was arrested:

> While on patrol, [Deputy A] followed Klever's truck into an abandoned lot where Klever had parked. [Deputy A] Strand did not use his lights or siren. [Deputy A] followed Klever into the lot because he found it odd that Klever had "quickly" pulled off the road. [Deputy A] parked his vehicle 30-40 feet away from Klever, making sure not to block Klever's ability to exit the lot. [Deputy A] did not recognize Klever or Klever's vehicle while following Klever into the lot.
>
> [Deputy A] exited his vehicle and approached Klever's truck on foot. Once [Deputy A] reached the truck, he recognized Klever from prior contacts. [Deputy A] asked Klever what he was doing, and Klever responded that he had thought [Deputy A] was going to pull him over. When asked if he had seen any emergency lights, Klever answered no.
>
> Although [Deputy A] knew who Klever was, he asked Klever to identify himself to see whether Klever would answer truthfully, which Klever did. [Deputy A] then remembered that Klever's driver's license had been suspended at some point in the past and asked Klever if his license was still suspended. Klever answered that it was. At that point, [Deputy A's] partner, [Deputy B], arrived at the scene, and Klever was arrested for driving with a suspended license.

Here is a link to the Opinion in State v. Klever:
https://www.courts.wa.gov/opinions/pdf/850245.pdf

5. State v. Robert James Dagnon: On June 18, 2024, Division Two of the COA reverses the Lewis County Superior Court convictions of defendant for *three counts of harassing a criminal justice participant and one count of intimidating a judge*. The reversal is based on a violation by the trial court of defendant's right to a public trial. This ruling is based on the way in which the trial court conducted jury selection.

The Court of Appeals also 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 evidence in the case was sufficient to support a conviction by a properly instructed jury. Therefore, the Court of Appeals remands the case for re-trial with jury instructions conforming to the Counterman standard.

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 involves 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 Dagnon did not do that.

Here is a link to the Opinion in State v. Dagnon:
https://www.courts.wa.gov/opinions/pdf/D2%2058638-0-II%20Unpublished%20Opinion.pdf

6. State v. Edward M. Leavens: On June 20, 2024, Division Three of the COA affirms the Spokane County Superior Court conviction of defendant for *first degree assault – domestic violence*. One of defendant's arguments on appeal was that a detective violated defendant's Due Process rights by failing to take a sufficient quantity of the defendant's hair to test for defendant's claim that defendant's brother had drugged him with Rohypnol so that defendant would be unconscious at the time that the brother, according to defendant's theory, attacked the victim (their mother). **This Due Process claim of failure to collect evidence is subject to the same standard under the Washington and federal constitutions. Defendant must establish bad faith by law enforcement in failing to collect evidence. The Court of Appeals rules that defendant's theory is not supported in this case because defendant showed, at worst, only negligence by the detective in failing to collect a sufficient hair sample to test for Rohypnol.**

Here is a link to the Opinion in State v. Leavens:
https://www.courts.wa.gov/opinions/pdf/389090_unp.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 Assist ant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011) of the Criminal Justice Training Commission's Law Enforcement Digest. From the time of his retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the production of the LED. That arrangement ended in the late fall of 2014 due to variety of concerns, budget constraints and friendly differences regarding the approach of the LED going

forward. Among other things, Mr. Wasberg prefers (1) a more expansive treatment of the core-area (e.g., arrest, search and seizure) law enforcement decisions with more cross references to other sources and past precedents; and (2) a broader scope of coverage in terms of the types of cases that may be of interest to law enforcement in Washington (though public disclosure decisions are unlikely to be addressed in depth in the Legal Update). For these reasons, starting with the January 2015 Legal Update, Mr. Wasberg has been presenting a monthly case law update for published decisions from Washington's appellate courts, from the Ninth Circuit of the United States Court of Appeals, and from the United States Supreme Court.

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

****

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

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

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

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

access to the Criminal Justice Training Commission's Law Enforcement Digest and for direct access to some articles on and compilations of law enforcement cases, go to [cjtc.wa.gov/resources/law-enforcement-digest].

****