LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

MAY 2024

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2024 WASHINGTON LEGISLATIVE SUMMARIES FROM THE WASHINGTON ADMINISTRATIVE OFFICE OF THE COURTS

The Washington Administrative Office of the Courts has issued legislative summaries for many of the enactments of the 2024 Washington State Legislature. The summaries are accessible on the Internet on the "Resources" page of the Washington Courts website.

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UNITED STATES SUPREME COURT

CIVIL FORFEITURE AND DUE PROCESS: U.S. SUPREME COURT VOTES 6-3 TO HOLD THAT, WHILE CONSTITUTIONAL DUE PROCESS REQUIREMENTS MANDATE A TIMELY FORFEITURE HEARING, SUCH PRINCIPLES DO NOT REQUIRE A SEPARATE PRELIMINARY HEARING DURING THE FORFEITURE PROCESS; HOWEVER, IN LIGHT OF THE DISSENTING AND CONCURRING OPINIONS IN THE CASE, SOME DOUBT IS LEFT REGARDING THE FUTURE OF THE DUE PROCESS REQUIREMENTS FOR FORFEITURE

In Culley v. Marshall, ___ S.Ct. ___ , 2024 WL ___ (May 9, 2024), the U.S. Supreme Court rules, in a 6-3 vote, that a "preliminary hearing" is not required for civil forfeiture. The Majority Opinion acknowledges that under the Due Process protections of the U.S. constitution, a civil forfeiture hearing must be reasonably timely in determining whether an owner of seized personal property will lose the property permanently. However, the Majority Opinion concludes that Due Process protections do not also require a separate "preliminary hearing" about whether police may keep cars or other property while the forfeiture hearing is in process.

The U.S. Supreme Court Reporter of Decisions provides a summary of Majority Opinion in the following Syllabus (the Syllabus is not part of any of the Opinions of the Justices):

[*Facts and Proceedings below*]

> Petitioner Halima Culley loaned her car to her son, who was later pulled over by Alabama police officers and arrested for possession of marijuana. Petitioner Lena Sutton loaned her car to a friend, who was stopped by Alabama police and arrested for trafficking methamphetamine.
>
> In both cases, petitioners' cars were seized under an Alabama civil forfeiture law that permitted seizure of a car "incident to an arrest" so long as the State then "promptly" initiated a forfeiture case. Ala. Code §20–2–93(b)(1), (c). The State of Alabama filed forfeiture complaints against Culley's and Sutton's cars just 10 and 13 days, respectively, after their seizure.
>
> While their forfeiture proceedings were pending, Culley and Sutton each filed purported class-action complaints in federal court seeking money damages under 42 U. S. C. §1983, claiming that state officials violated their due process rights by retaining their cars during the forfeiture process without holding preliminary hearings. In a consolidated appeal, the Eleventh Circuit affirmed the dismissal of petitioners' claims, holding that a timely forfeiture hearing affords claimants due process and that no separate preliminary hearing is constitutionally required.

[*Holding*]

> *Held*: In civil forfeiture cases involving personal property, the Due Process Clause requires a timely forfeiture hearing but does not require a separate preliminary hearing.

[*Summary of Legal Analysis in Majority Opinion*]

> (a) Due process ordinarily requires States to provide notice and a hearing before seizing real property. But States may immediately seize personal property subject to civil forfeiture when the property (for example, a car) otherwise could be removed, destroyed, or concealed before a forfeiture hearing. When a State seizes personal property, due process requires a *timely* post-seizure forfeiture hearing. *See* United States *v.* Von Neumann, 474 U. S. 242, 249–250 (1986); United States *v.* $8,850, 461 U. S. 555, 562–565 (1983).
>
> The Court's decisions in $8,850 and Von Neumann make crystal clear that due process does not require a separate preliminary hearing to determine whether seized personal property may be retained pending the ultimate forfeiture hearing.
>
> In $8,850, the Court addressed the process due when the Customs Service seized currency from an individual entering the United States but did not immediately file for civil forfeiture of the currency. The Court concluded that a post-seizure delay "may become so prolonged that the dispossessed property owner has been deprived of a meaningful hearing at a meaningful time," . . . , and prescribed factors for courts to consider in assessing whether a forfeiture hearing is timely. . . .

In Von Neumann, a property owner failed to declare the purchase of his new car upon driving it into the United States, and a customs official seized the car after determining that it was subject to civil forfeiture. The plaintiff filed a petition for remission of the forfeiture – in essence, a request under federal law that the Government exercise its discretion to forgive the forfeiture – which the Government did not answer for 36 days. The plaintiff sued, arguing that the Government's delay in answering the remission petition violated due process.

The Court [in Von Neumann] rejected that claim, broadly holding that due process did not require a pre-forfeiture-hearing remission procedure in the first place. . . . Instead, Von Neumann held that a timely forfeiture hearing satisfies due process in civil forfeiture cases, and that $8,850 specifies the standard for when a forfeiture hearing is timely.

Petitioners' argument for a separate preliminary hearing appears to be a backdoor argument for a more timely forfeiture hearing to allow a property owner with a good defense to recover her property quickly. But the Court's precedents already require a timely hearing, and a property owner can raise $8,850-based arguments to ensure a timely hearing.

Petitioners' efforts to distinguish Von Neumann on the ground that the statutory remission procedure in that case was discretionary fail because that fact played no role in the Court's constitutional analysis. Petitioners also cannot distinguish the relevant language in Von Neumann as dicta [i.e., language unnecessary to support the decision], as the Court ruled for the Government on the ground that a timely "forfeiture proceeding, without more, provides the post-seizure hearing required by due process" in civil forfeiture cases. . . .

Similarly, petitioners' contention that Mathews *v.* Eldridge, 424 U. S. 319 (1976), should govern petitioners' request for a preliminary hearing fails given that this Court decided $8,850 and Von Neumann after Mathews.

In addition, petitioners point to the Court's Fourth Amendment decisions in the criminal context to support their contention that a preliminary hearing is required in the civil forfeiture context. That analogy fails. Fourth Amendment hearings are not adversarial, and address only whether probable cause supports the arrestee's detention. See Gerstein *v.* Pugh, 420 U. S. 103, 119–122 1975).

Here, petitioners argue that the immediate seizure of personal property requires adversarial preliminary hearings, and they assert that those hearings must address their affirmative defense of innocent ownership. But the Due Process Clause does not require more extensive preliminary procedures for the temporary retention of property than for the temporary restraint of persons.

(b) Historical practice reinforces the Court's conclusions in *$8,850* and *Von Neumann* that due process does not require preliminary hearings in civil forfeiture cases. Since the Founding era, many federal and state statutes have authorized the Government to seize personal property and hold it pending a forfeiture hearing, without a separate preliminary hearing.

> Petitioners and their *amici* do not identify any federal or state statutes that, before the late 20th century, required preliminary hearings in civil forfeiture cases. Some States have recently enacted laws requiring preliminary hearings in civil forfeiture cases, but those recent laws do not support a constitutional mandate for preliminary hearings in every State.
>
> History demonstrates that both Congress and the States have long authorized law enforcement to seize personal property and hold it until a forfeiture hearing. The absence of separate preliminary hearings in civil forfeiture proceedings – from the Founding until the late 20th century – is weighty evidence that due process does not require such hearings.

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

Justice Sotomayor files a Dissenting Opinion that is joined by Justices Kagan and Brown Jackson. In the opening two paragraphs of her Dissenting Opinion, Justice Sotomayor summarizes her disagreement with the Majority Opinion as follows:

> A police officer can seize your car if he claims it is connected to a crime committed by someone else. The police department can then keep the car for months or even years until the State ultimately seeks ownership of it through civil forfeiture. In most States, the resulting proceeds from the car's sale go to the police department's budget. Petitioners claim that the Due Process Clause requires a prompt, post-seizure opportunity for innocent car owners to argue to a judge why they should retain their cars pending that final forfeiture determination. When an officer has a financial incentive to hold onto a car and an owner pleads innocence, they argue, a retention hearing at least ensures that the officer has probable cause to connect the owner and the car to a crime.
>
> Today, the Court holds that the Due Process Clause never requires that minimal safeguard. In doing so, it sweeps far more broadly than the narrow question presented and hamstrings lower courts from addressing myriad abuses of the civil forfeiture system. Because I would have decided only which due process test governs whether a retention hearing is required and left it to the lower courts to apply that test to different civil forfeiture schemes, I respectfully dissent.

Justice Gorsuch files a Concurring Opinion that is joined by Justice Thomas. His analysis leaves some room for future litigation regarding Due Process requirements in relation to civil forfeiture. The Concurring Opinion includes the following statement: "this case leaves many larger questions unresolved about whether, and to what extent, contemporary civil forfeiture practices can be squared with the Constitution's promise of due process." However, Gorsuch and Thomas both nonetheless signed onto the Majority Opinion.

LAW ENFORCEMENT LEGAL UPDATE EDITOR'S NOTE AND COMMENT: If the Petitioners in Culley v. Marshall had prevailed in their Due Process argument for a preliminary hearing requirement for civil forfeiture matters, amendments to Washington State's controlled substances seizure-and-forfeiture statute, RCW 69.50.505, presumably would have been required.

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

SECOND AMENDMENT AND POSSESSION OF FIREARMS BY PERSONS WITH FELONY CONVICTIONS: IN A CRIMINAL CASE, A NINTH CIRCUIT PANEL RULES 2-1 THAT THE SECOND AMENDMENT BARS ENFORCEMENT OF A FEDERAL STATUTE THAT PRECLDUES FIREARMS POSSESSION BY PERSONS WHO: (1) HAVE BEEN CONVICTED OF NON-VIOLENT OFFENSE(S), AND (2) HAVE SERVED THEIR TIME IN PRISON AND HAVE REENTERED SOCIETY

In U.S. v. Duarte, ___ F.4th ___ , 2024 WL ___ (9th Cir., May 9, 2024), a three-judge Ninth Circuit panel votes 2-1 under the Second Amendment to rule that the federal statutory bar to firearms possession by persons previously convicted of a felony (see 18 U.S.C. § 922(g)(1)), is unconstitutional as applied to Steven Duarte, who was convicted for a non-violent offense and who has served his time in prison and reentered society.

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

> The panel held that under New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022), § 922(g)(1) violates the Second Amendment as applied to Duarte, a non-violent offender who has served his time in prison and reentered society; and that [the Ninth Circuit precedent of United States v. Vongxay, 594 F.3d 1111 (9th Cir. 2010)], which did not apply the mode of analysis that Bruen later established and now requires courts to perform, is clearly irreconcilable with [the U.S. Supreme Court Opinion in] Bruen.
>
> Applying Bruen's two-step, text-and-history framework, the panel concluded (1) Duarte's weapon, a handgun, is an "arm" within the meaning of the Second Amendment's text, that Duarte's "proposed course of conduct – carrying [a] handgun[] publicly for self-defense" – falls within the Second Amendment's plain language, and that Duarte is part of "the people" whom the Second Amendment protects because he is an American citizen; and (2) the Government failed to prove that § 922(g)(1)'s categorical prohibition, as applied to Duarte, "is part of the historic tradition that delimits the outer bounds of the" Second Amendment right.
>
> Judge M. Smith dissented. He wrote that until an intervening higher authority that is clearly irreconcilable with [the Ninth Circuit's 2010 decision in Vongxay] is handed down, a three-judge panel [of the Ninth Circuit] is bound by that [Ninth Circuit] decision. He wrote that Bruen, which did not overrule Vongxay, reiterates that the Second Amendment right belongs only to law-abiding citizens; and that Duarte's Second Amendment challenge to § 922(g)(1), as applied to nonviolent offenders, is therefore foreclosed.

Result: Reversal of conviction of defendant Duarte by the U.S. District Court (Central District of California) for the federal crime of possession of a firearm after a felony conviction.

LAW ENFORCEMENT LEGAL UPDATE EDITOR'S NOTES AND COMMENTS: 1. *Status of decision*: It is likely that the federal government will request review of the three-judge panel's decision, seeking review by an eleven-judge Ninth Circuit panel. If such review is granted, then the three-judge panel's decision will be set aside pending the further review. It could take many months for that process to play out. Also, regardless of

whether or not such review is granted in the Ninth Circuit, it seems likely that ultimately one of the two parties in this case will seek review in the U.S. Supreme Court.

2. *Future Washington Second Amendment litigation*: It is also likely that some defendants will rely on the Duarte decision to raise Second Amendment arguments in some prosecutions for Second Degree Possession of a Firearm under chapter 9.41 RCW. While the Ninth Circuit's interpretations of the constitution are not binding on the Washington courts, the Ninth Circuit's constitutional interpretations are given some weight.

IN A CRIMIINAL CASE, AN 11-JUDGE NINTH CIRCUIT PANEL RULES 6-5 THAT UNDER THE FOURTH AMENDMENT, A SEARCH DID NOT QUALIFY AS AN "INVENTORY" SEARCH WHERE OFFICERS LISTED ON THE INVENTORY FORM ONLY THE CONTRABAND AND NOT THE DEFENDANT'S LAWFULLY POSSESSED ITEMS THAT WERE ALSO FOUND IN THE TRUCK

In U.S. v. Anderson, ___ F.4th ___ , 2024 WL ___ (9th Cir., May 2, 2024), a three-judge Ninth Circuit panel votes 6-5 to hold that a purported inventory search of a vehicle was actually an unlawful investigatory search in significant part. Contrary to their law enforcement agency's requirements, the officers listed on the inventory form only the contraband that formed the basis for the criminal charges, and the officers did not list the defendant's lawful possessions that were also in the car.

A Ninth Circuit staff summary (which is not part of the Ninth Circuit Opinions) provides the following description of the case and the Majority Opinion, Concurring Opinion, and Dissenting Opinion:

> [*Issue Presented*]
>
> The en banc court reversed the district court's denial of a motion to suppress a firearm found during a warrantless search of the defendant's truck in a case that presented the question whether an officer's failure to comply with governing administrative procedures is relevant in assessing the officer's motivation for conducting an inventory search. The primary question was whether the deputies' deviation from the governing inventory procedure indicates that they acted in bad faith or solely for investigative purposes.
>
> [*Majority Opinion*]
>
> The en banc court held that an officer's compliance (or as is the case here, non-compliance) with department policy governing inventory searches is part of the totality of circumstances properly considered in determining whether a search satisfies the requirements of the inventory-search exception to the warrant requirement. Based on the circumstances presented here, the en banc court concluded that the deputies who searched the defendant's truck acted solely for investigatory reasons, and that the warrantless search therefore violated the Fourth Amendment.
>
> [*Concurring Opinion*]
>
> Concurring, Judge Mendoza agreed with the majority's finding that the deputies' inventory search violated the Fourth Amendment. Writing separately to address an issue

not reached by the majority, Judge Mendoza would reverse the district court's decision on the additional ground that the deputies lacked a valid community caretaking justification to impound the truck.

[*Dissenting Opinion*]

Dissenting, Judge Bress, joined by Judges Callahan, Ikuta, Owens, and VanDyke, wrote that the majority distorts the legal framework for inventory searches, contravenes decades of Supreme Court and circuit precedent, and turns hairsplitting distinctions into constitutional rules.

Judge Bress wrote that although under settled law the validity of an inventory search depends on whether officers acted in bad faith or for the sole purpose of investigation, the majority instead holds that officers violated the Constitution because they did not follow the court's hyper-technical rules for filling out forms – which the deputies here had to do in the middle of the night after lawfully stopping a career criminal.

[Some paragraphing revised for readability; subheadings added]

Result: Reversal of an order denying a suppression motion by the U.S. District Court (Central District of California).

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR CORRECTIONS: BASED ON THE RECORD IN THIS CASE, THREE-JUDGE PANEL RULES THAT PLAINTIFFS FAILED TO ESTABLISH THAT ARIZONA'S USE OF PRIVATE PRISONS VIOLATES DUE PROCESS PROTECTIONS OR CERTAIN OTHER PROTECTIONS OF THE U.S. CONSTITUTION

In Nielsen v. Thornell, ___ F.4th ___ , 2024 WL ___ (9th Cir., May 21, 2024), a three-judge Ninth Circuit panel rejects constitutional challenges brought by the NAACP's Arizona chapter and two former prisoners challenging the constitutionality of Arizona's governmental use of private prisons.

The Plaintiffs made arguments based on several constitutional provisions, and they alleged, among other factual claims, that private prisons are motivated by profit, and therefore that private prisons cut costs in ways that result in (1) diminished safety and security, and (2) in reduced programming and services.

A Ninth Circuit staff summary (which is not part of any of the Opinions) provides the following synopsis for the Lead Opinion, the Concurring Opinion, and the Dissenting Opinion:

[*Summary of the Analysis of the Lead Opinion*]

Addressing plaintiffs' procedural due process challenges, inmates do not have a protected liberty interest in avoiding private prisons because such prisons do not impose an "atypical or significant hardship" beyond ordinary prison conditions. Moreover, plaintiffs' speculative inferences failed to plausibly allege that private prisons have a financial incentive to keep prisoners incarcerated longer and that they do so by manipulating disciplinary proceedings.

Arizona law expressly bars private prisons from disciplining prisoners or making decisions affecting their sentence credits or release dates, and plaintiffs' complaint

provided no factual allegations that plausibly suggested that private prison employees defy this law.

The Thirteenth Amendment does not prohibit incarceration in a private prison. The Amendment does not forbid prison labor requirements, and incarceration in a private prison does not remotely approximate chattel slavery.

Plaintiffs failed to plausibly allege that confinement in a private prison violates the Eighth Amendment. Inchoate allegations of an intangible offense to dignity—at least as asserted here – could not support an Eighth Amendment claim, and plaintiffs failed to establish that incarceration in a private prison poses a serious threat to prisoners' physical well-being.

Finally, the Fourteenth Amendment's Due Process and Equal Protection Clauses do not prohibit incarceration in a private prison. Plaintiffs cannot establish that a right against confinement in a private prison is deeply rooted in this nation's historical tradition nor that Arizona's private prison system discriminates against a suspect class. Applying rational basis scrutiny, Arizona has a legitimate interest in increasing the efficiency of its operations, and privatization is a rational attempt to achieve this goal.

[*Summary of the Analysis of the Concurring Opinion*]]

Concurring in the judgment, Judge Nguyen agreed that plaintiffs' constitutional challenge to Arizona's private prison scheme fell short. She wrote separately to emphasize that the panel's decision is limited only to the deficiencies in this particular case and did not decide whether every use of private prisons necessarily passes constitutional muster.

[*Summary of the Analysis of the Dissenting Opinion*]

Dissenting, Judge Collins wrote that the operative complaint fails to establish that NAACP's Arizona chapter has either direct organizational standing on its own behalf or representational standing on behalf of others, and that the claims of the putative class representatives were moot. Accordingly, [in the view of Judge Collins] the panel lacked jurisdiction to reach the merits. Judge Collins would vacate the district court's judgment and remand with instructions to consider whether to allow amendment of the complaint to cure this jurisdictional deficiency.

[Some paragraphing revised for readability; subheadings added]

Result: Affirmance of order of U.S. District Court (Arizona) dismissing the lawsuit.

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BRIEF NOTES REGARDING MAY 2024 UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS ON SELECT LAW ENFORCEMENT ISSUES

Under the Washington Court Rules, General Rule 14.1(a) provides: "Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate."

Every month I will include a separate section that provides brief issue-spotting notes regarding select categories of unpublished Court of Appeals decisions that month. I will include such decisions where issues relating to the following subject areas are addressed: (1) Arrest, Search and Seizure; (2) Interrogations and Confessions; (3) Implied Consent; and (4) possibly other issues of interest to law enforcement (though generally not sufficiency-of-evidence-to-convict issues).

The five entries below address the May 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 are italicized, and brief descriptions of the holdings/legal issues are bolded.

1. State v. Louis Edward Galegher: On May 7, 2024, Division Two of the COA affirms the Thurston County Superior Court convictions of defendant for *four counts of delivery of a controlled substance*. Among other rulings, the Court of Appeals rejects the argument of Galegher in which he argues that the trial court erred when it admitted hearsay messages from non-testifying CIs to defendant Galegher. **The Galegher Court rules that the trial court correctly determined that text and Facebook messages from the CIs were not hearsay because they were not offered into evidence for the truth of the matters asserted. Instead, the hearsay messages from the CIs were offered in evidence by the State in order to: (1) show the context of Galegher's messages, which, because he is a party defendant, were not hearsay; and (2) demonstrate the effect of the messages of the CIs on defendant Galegher**.

Here is a link to the Opinion in State v. Galegher:
https://www.courts.wa.gov/opinions/pdf/D2%2058620-7-II%20Unpublished%20Opinion.pdf

2. State v. Marshall Lorne Mittelstaedt: On May 7, 2024, Division Two of the COA reverses the Pierce County Superior Court conviction of defendant for *second degree burglary*. The Court of Appeals accepts the concession of the State that the evidence in the record is insufficient to support the defendant's conviction. The Court of Appeals summarizes the facts and procedural background of the case as follows:

> Property owners called police when their security cameras detected people cutting a gate and entering their property in a truck. The property was only partially fenced, with at least one gap in the fence that a person could walk through, and partially bordered by blackberry brambles. Police arrested Marshall Lorne Mittelstaedt after finding him inside a truck parked in the property's driveway. The State charged Mittelstaedt with second degree burglary and a jury convicted him. Mittelstaedt appeals his conviction. He argues, and the State concedes, that there was insufficient evidence to convict him of second degree burglary because the property was not completely enclosed.

Key language in the Mittelstaedt Opinion's legal analysis provides as follows:

> **A person commits second degree burglary "if, with intent to commit a crime against a person or property therein, [they] enter[] or remain[] unlawfully in a building other than a vehicle or a dwelling." RCW 9A.52.030(1). For the purposes**

of the burglary statute, a "building" includes a "fenced area" that encloses a building's curtilage. RCW 9A.04.110(5); [State v. Wentz, 149 Wn.2d 342, 350 (2003)]. But, in order for entering the area to constitute a burglary, the area must be "completely enclosed either by fencing alone or . . . a combination of fencing and other structures." State v. Engel, 166 Wn.2d 572, 580, 210 P.3d 1007 (2009).

Here is a link to the Opinion in State v. Mittelstaedt:
https://www.courts.wa.gov/opinions/pdf/D2%2058349-6-II%20Unpublished%20Opinion.pdf

3. State v. Avery L. Loring: On May 9, 2024, Division Three of the COA affirms the Spokane County Superior Court convictions of defendant for (A) *first degree robbery*, and (B) *second degree promoting prostitution*. The Court of Appeals provides thorough analysis to support the Court's legal conclusion that **the trial court did not abuse its discretion in allowing a detective to provide expert testimony regarding human trafficking, including testimony about: (1) the nature of the pimp-prostitute relationship for "Romeo pimps" in general and how the relationship in this case fits that profile; and (2) the terminology used by pimps in general and how the language used by defendant Loring in his communications with the prostitute in this case is consistent with that terminology.**

Here is a link to the Opinion in State v. Loring:
https://www.courts.wa.gov/opinions/pdf/392821_unp.pdf

4. State v. J. Jesus Gutierrez-Valencia: On May 16, 2024, Division Three of the COA affirms the Yakima County Superior Court convictions of defendant for (A) *first degree kidnapping,* (B) *second degree rape,* (C) *second degree assault,* (D) *unlawful imprisonment,* (E) *felony harassment, and* (F) *interfering with reporting of domestic violence*.

The Court of Appeals rejects the defendant's argument that the trial court abused its discretion in admitting hearsay testimony from an officer under the "excited utterance" exception to the hearsay rule. The officer testified at trial to statements made by the alleged victim. The officer had talked to that victim shortly after she emerged from her home to escape from the defendant. In key part, the legal analysis in the Gutierrez-Valencia Opinion is as follows.

> **Here, the statement at issue is [the officer's] testimony that "[s]he said the male, Jose Gutierrez, had threatened to kill her with the knife." Vera made the statement within a minute of running from her apartment crying and yelling, "[H]elp me. He's going to kill me." Vera was crying, shaking, and was extremely emotional when she made the statement.**
>
> **The close proximity in time between the altercation and the statement, the violent nature of the confrontation, Vera's extremely emotional presentation, and the statement relating to the event, supports the trial court's finding that Vera was under the stress of the condition when she made the statement. The trial court did not abuse its discretion in admitting the excited utterance.**
>
> Mr. Gutierrez-Valencia contends that because [the officer] had asked Vera what happened, Vera's statement was not an excited utterance. We disagree.
>
> Excited utterances "can be prompted by a question which itself follows an exciting event, such as asking a crime victim what happened." . . . . However, "the statements must be 'provoked by the occurrence itself' rather than by the subsequent questioning." . . . .

> When a victim is subject to extended questioning that allows the victim to reflect on the consequences of the statement, the statement may be the product of the questioning rather than provoked by the occurrence.
>
> . . . .
>
> **[The officer] asked Vera "what happened" within a minute of her exiting the apartment. Based on Vera's demeanor, the close proximity in time between the confrontation and the statement, and the officer asking only a single question, Vera's response was likely provoked by the occurrence rather than a result of her reflecting on the consequences of her response to [the officer's] question.**

[Citations omitted]

Here is a link to the Opinion in State v. Gutierrez-Valencia:
https://www.courts.wa.gov/opinions/pdf/392562_unp.pdf

5. State v. Richard Dewayne Nelson: On May 20, 2024, Division One of the COA affirms the King County Superior Court conviction of defendant for *second degree intentional murder with a firearm enhancement*. Among other rulings, the Court of Appeals rejects, based on the "independent source doctrine," defendant's challenge to a warrant to search his computer. He argued that the search warrant that he challenged (which was the first of two search warrants issued and executed serially in the case) did not describe with sufficient particularity the items to be seized.

As noted above, two search warrants were issued in succession, and two searches of the defendant's computer were conducted in succession in the case. The scope of the second warrant, in the words of the Court of Appeals, "essentially cover[ed] the same categories of information [as the first search warrant] but limit[ed] the information requested and the dates to [two narrow date ranges]." **The Court of Appeals concludes that the trial court's decision to issue the second warrant was not affected by or made by relying on information obtained in the search pursuant to the first search warrant. After describing the relevant facts of this case and the case law under Washington's "independent search doctrine" as explained by the Washington Supreme Court decision in State v. Betancourth, 190 Wn.2d 357, 364-65 (2018), the Court of Appeals concludes as follows:**

> **While the first search warrant may not have been sufficiently particular, under the independent source doctrine, the information obtained under the first search warrant was admissible as long as the second search warrant was valid. Defense counsel did not object to the second search warrant. Nelson has thus waived the argument that the second search warrant was invalid.**

Here is a link to the Opinion in State v. Nelson:
https://www.courts.wa.gov/opinions/pdf/844113.pdf

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

Beginning with the September 2015 issue, the most recent monthly Legal Update for Washington Law Enforcement is placed under the "LE Resources" link on the Internet Home

Page of the Washington Association of Sheriffs and Police Chiefs. As new Legal Updates are issued, the three most recent Legal Updates will be accessible on the site. WASPC will drop the oldest each month as WASPC adds the most recent Legal Update.

In May of 2011, John Wasberg retired from the Washington State Attorney General's Office. For over 32 years immediately prior to that retirement date, as an Assist ant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011) of the Criminal Justice Training Commission's Law Enforcement Digest. From the time of his retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the production of the LED. That arrangement ended in the late fall of 2014 due to variety of concerns, budget constraints and friendly differences regarding the approach of the LED going forward. Among other things, Mr. Wasberg prefers (1) a more expansive treatment of the core-area (e.g., arrest, search and seizure) law enforcement decisions with more cross references to other sources and past precedents; and (2) a broader scope of coverage in terms of the types of cases that may be of interest to law enforcement in Washington (though public disclosure decisions are unlikely to be addressed in depth in the Legal Update). For these reasons, starting with the January 2015 Legal Update, Mr. Wasberg has been presenting a monthly case law update for published decisions from Washington's appellate courts, from the Ninth Circuit of the United States Court of Appeals, and from the United States Supreme Court.

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

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

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

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

circuit number for “9” in this address to go to the home pages of the other circuit courts. Federal statutes are at [http://www.law.cornell.edu/uscode/].

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

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