# LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

**MARCH 2024**

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## UNITED STATES SUPREME COURT

**FIRST AMENDMENT FREE SPEECH: PUBLIC OFFICIALS WHO POST ON THEIR PERSONAL SOCIAL MEDIA ACCOUNTS ABOUT THEIR WORK AND ARE EXERCISING THE POWER TO SPEAK ON BEHALF OF THEIR PUBLIC ENTITY ON THOSE ACCOUNTS CAN BE HELD LIABLE FOR BLOCKING THEIR CRITICS**

In Lindke v. Freed, ___ S.Ct. ___ , 2024 WL ___ (March 15, 2024), the U.S. Supreme Court is unanimous in establishing a fact-based, totality of the circumstances First Amendment test relating to public officials who post on their personal social media accounts and then try to censor critics who reply to such posts.

The lengthy and complex Opinion holds that a public official who prevents someone from commenting on the official's personal social-media page, on which the official occasionally posts about work, can be held to have engaged in state action under 42 U.S.C. §1983 (of the Civil Rights Act), but only if two things are true.

The official can be liable under 42 U.S.C. §1983 only if the official both: (1) possessed actual authority to speak on the government entity's behalf on a particular matter; and (2) purported to exercise that authority when speaking in the relevant social-media posts.

**LEGAL UPDATE RESEARCH NOTE: For a brief article addressing the Opinion in Lindke v. Freed, see the March 15, 2024, online article by Amy Howe on SCOTUSblog, accessible at the following link:**
**https://www.scotusblog.com/2024/03/public-officials-can-be-held-liable-for-blocking-critics-on-social-media/**

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## NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

### CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: ALTHOUGH A REASONABLE JURY COULD FIND THAT THE FORCE EMPLOYED BY OFFICER IN FIRING HER FIFTH AND SIXTH SHOTS AT HERNANDEZ WAS EXCESSIVE, SHE WAS ENTITLED TO QUALIFIED IMMUNITY BECAUSE CASE LAW DID NOT CLEARLY ESTABLISH THAT SUCH A SHOOTING VIOLATED THE FOURTH AMENDMENT

In Estate of Hernandez v. City of Los Angeles, ___ F.4th ___ , 2024 WL ___ (March 21, 2024), a three-judge Ninth Circuit panel addresses Plaintiffs' 42 U.S.C. § 1983 action arising from the shooting death of their family member, Daniel Hernandez, during a confrontation with LAPD officers. On the Plaintiffs' federal constitutional law claims, the panel is unanimous in affirming the U.S. District Court's grant of summary judgment to the shooter, Officer McBride (as to Fourth and Fourteenth Amendment claims) and to the Los Angeles Police Department (as to claims based on the Monell precedent). The panel reverses the U.S. District Court's grant of summary judgment on several of the Plaintiffs' state law claims.

A staff summary (which is not part of the panel's Opinion) provides the following synopsis of the Opinion:

> Affirming the district court's grant of summary judgment to McBride, the officer who shot Hernandez, on plaintiffs' Fourth Amendment excessive force claim, the panel held that **although a reasonable jury could find that the force employed by McBride in firing her fifth and sixth shots at Hernandez was excessive, she was nonetheless entitled to qualified immunity because McBride did not violate clearly established law.**
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> Affirming the district court's grant of summary judgment to all defendants on plaintiffs' Fourteenth Amendment claim, the panel held that plaintiffs failed to show that McBride acted with a purpose to harm without regard to legitimate law enforcement objectives, and therefore there was no Fourteenth Amendment violation.
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> Affirming the district court's grant of summary judgment to the City of Los Angeles and the LAPD on plaintiffs' [claim under Monell v. Department of Social Services, 436 U.S. 658 (1978), which requires proof that a violation resulted from an official municipal policy, an unofficial custom, or because the municipality was deliberately indifferent in a failure to train or supervise the officer], the panel agreed with the district court that even if there was an underlying constitutional violation, plaintiffs failed to provide any basis for holding the City and LAPD liable for McBride's shooting of Hernandez.
>
> The panel reversed the district court's grant of summary judgment to defendants with respect to plaintiffs' state law claims for assault, wrongful death, and violation of [an identified California statute]. Because the reasonableness of McBride's final volley of shots presented a question for a trier of fact, the district court erred in dismissing these state law claims based on its determination that McBride's use of force was reasonable.

The Hernandez panel's Opinion explains that, as a general rule, where the governmental parties in a section 1983 lawsuit are seeking a summary judgment ruling, the evidence and factual allegations are viewed in the light most favorable to the Plaintiffs. But where there is an

unchallenged videotape of the circumstances, as in this case, the facts are viewed in the light shown by videotape. See the U.S. Supreme Court precedent of Scott v. Harris, 550 U.S. 372, 378, 380– 81 (2007). However, the Hernandez panel's Opinion notes further that the Scott decision notes that, to the extent that a fact is not clearly established by the videotape evidence, courts must view the evidence in the light most favorable to the Plaintiffs in their summary judgment assessment.

The Hernandez panel's Opinion describes the fact of the case as follows:

> During the late afternoon of April 22, 2020, uniformed officers Toni McBride and Shuhei Fuchigami came upon a multi-vehicle accident at the intersection of San Pedro Street and East 32nd Street in Los Angeles. They decided to stop and investigate the situation. Video footage from the patrol car and from McBride's body camera captured much of what then transpired.
>
> As the officers arrived near the intersection, they observed multiple seriously damaged vehicles, some with people still inside, and at least two dozen people gathered at the sides of the road. As the officers exited their patrol car, the car's police radio stated that the "suspect's vehicle" was "black" and that the suspect was a "male armed with a knife."
>
> A bystander immediately told the officers about someone trying to "hurt himself," and [Officer] Fuchigami stated loudly, "Where is he? Where's he at?" In response, several bystanders pointed to a black pickup truck with a heavily damaged front end that was facing in the wrong direction near two parked vehicles on the southbound side of San Pedro Street.
>
> The officers instructed the crowd to get back, and McBride drew her weapon. One nearby driver, who was sitting in her stopped sedan, told [Officer] McBride through her open car window that "he has a knife." McBride asked her, "Why does he want to hurt himself?" and the bystander responded, "We don't know. He's the one who caused the accident."
>
> [Officer] McBride instructed that bystander to exit her car and go to the sidewalk, which she promptly did. McBride then shouted to the bystanders in both English and Spanish that they needed to get away. At the same time, the police radio announced that the suspect was "cutting himself" and was "inside his vehicle." McBride then asked her partner, "Do we have less lethal?" Referencing the smashed pickup truck, McBride said, "Is there anybody in there?" She then stated, "Hey, partner, he might be running."
>
> As McBride faced the passenger side of the truck, which was down the street, she then saw someone climb out of the driver's side window. McBride yelled out, "Hey man, let me see your hands. Let me see your hands man," while a bystander yelled, "He's coming out!"
>
> Daniel Hernandez then emerged shirtless from behind the smashed black pickup truck, holding a weapon in his right hand. As he did so, Officer McBride held her left hand out towards Hernandez and shouted, "Stay right there!" Hernandez nonetheless advanced towards McBride in the street, and he continued to do so as McBride yelled three times, "Drop the knife!" While Hernandez was coming towards her, McBride backed up several steps, until she was standing in front of the patrol car.

> Hernandez began yelling as he continued approaching McBride, and he raised his arms out by his sides to about a 45-degree angle. McBride again shouted, "Drop it!" As Hernandez continued yelling and advancing with his arms out at a 45-degree angle, Officer McBride fired an initial volley of two shots, causing Hernandez to fall to the ground on his right side, with the weapon still in his right hand. At the point that McBride fired at Hernandez, he was between 41-44 feet away from her.
>
> Still shouting, Hernandez rolled over and leaned his weight on his hands, which were pressed against the pavement. He began pushing himself up, and he managed to get his knees off the pavement. As Hernandez started shifting his weight to his feet to stand up, [Officer] McBride again yelled "Drop it!" and fired a second volley of two shots, causing Hernandez to fall on his back with his legs bent in the air, pointing away from McBride.
>
> Hernandez began to roll over onto his left side, and as he did this, McBride fired a fifth shot. Hernandez then continued to roll over, so that he was again facing McBride. His bent left knee was pressed against the ground, and he placed his left elbow on the street, as if to push himself upwards. But Hernandez started to collapse to the ground, and just as he did so, McBride fired a sixth shot.
>
> Hernandez then lay still, face-down on the street, as McBride and other officers approached him with their pistols drawn. McBride's body camera clearly shows that the weapon was still in Hernandez's right hand as an officer approached and took it out of his hand.
>
> The weapon turned out not to be a knife, but a box cutter with two short blades at the end. Starting from the point at which Hernandez came out from behind the truck until he collapsed on the ground, the entire confrontation lasted no more than 20 seconds. All six shots were fired within eight seconds.
>
> Hernandez died from his injuries. A forensic pathologist retained by Plaintiffs opined that McBride's sixth shot – which the pathologist concluded "more likely than not" struck Hernandez in the top of his head before ultimately lodging inside the tissues in his neck – caused "[t]he immediately fatal wound in [Hernandez's] death."
>
> The pathologist further concluded that "[t]he next most serious wound was the wound to [Hernandez's] right shoulder that involved the lung and liver," which he opined was "more likely than not" inflicted by McBride's fourth shot. However, he stated that the shoulder wound "would not . . . have produced immediate death" and that "[w]ith immediate expert treatment, this wound alone may have been survivable." . . . .

[Some paragraphing revised for readability; one footnote omitted]

The Hernandez Opinion explains as follows the panel's determination that a reasonable jury could find that the force employed by McBride in firing her fifth and sixth shots at Hernandez was excessive:

> [E]ven though [Officer] McBride's first volley of shots was reasonable as a matter of law, we must still consider whether she "acted unreasonably in firing a total of [six] shots." [Plumhoff v. Rickard, 572 U.S. 765, 777 (2014)]. On that score, Plumhoff holds that, "if

police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended."

We have cautioned, though, that "terminating a threat doesn't necessarily mean terminating [a] suspect." Zion v. County of Orange, 874 F.3d 1072, 1076 (9th Cir. 2017) (emphasis added). Thus, if an initial volley of shots has succeeded in disabling the suspect and placing him "in a position where he could [not] easily harm anyone or flee," a "reasonable officer would reassess the situation rather than continue shooting."

Applying these principles to this case, we agree with the district court that the undisputed video evidence confirms that, at the time McBride fired the second volley of shots, the "threat" that Hernandez posed had not yet "ended." [Plumhoff] Despite falling down after having been hit by two bullets, Hernandez immediately rolled over, pressed his hands against the ground, and began shifting his weight to his feet in order to stand up. All the while, he continued shouting, and he still held his weapon in his hand despite yet another instruction by McBride to drop it. McBride's third and fourth shots were thus reasonable as a matter of law.

However, McBride's final volley of shots – i.e., shots five and six – present a much closer question. Immediately after the fourth shot, Hernandez was lying on his back with his legs in the air, pointing away from where McBride was. Hernandez then rolled over onto his left side such that his back was towards McBride. He was in that position – facing away from McBride and still lying on his side on the ground – when McBride fired her fifth shot.

Although Hernandez was still moving at the time of that shot, he had not yet shown that he was in any position to get back up. Hernandez then continued to roll over, so that he was again facing McBride. As Hernandez, while still down on the ground, first appeared to shift his weight onto his left elbow, McBride fired her sixth shot.

Under these circumstances, a reasonable trier of fact could find that, at the time McBride fired these two additional shots, the threat from Hernandez – who was still on the ground – had sufficiently been halted to warrant "reassess[ing] the situation rather than continu[ing] shooting." Zion, 874 F.3d at 1076. A reasonable jury could find that, at the time of the fifth and sixth shots, Hernandez "was no longer an immediate threat, and that [McBride] should have held [her] fire unless and until [Hernandez] showed signs of danger or flight."

Alternatively, a reasonable "jury could find that the [third] round of bullets was justified." On this record, the reasonableness of the fifth and sixth shots was thus a question for the trier of fact, and the district court erred in granting summary judgment on that issue.

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

Results: (1) Affirmance of order of U.S. District Court (Central California) granting qualified immunity to the Officer McBride with respect to the Civil Rights Act claims for alleged violations of the Fourth Amendment (excessive force) and Fourteenth Amendment (Due Process)

(2) affirmance of order of U.S. District Court rejecting for lack of supporting allegations of fact the Plaintiff's claim against the City of Los Angeles under Monell v. Department of Social Services, 436 U.S. 658 (1978); and

(3) reversal of U.S. District Court order that dismissed the plaintiffs' claims under California law, concluding that factual questions will need to be resolved by a trier of fact on those claims.

**SECOND AMENDMENT: PRE-TRIAL ORDERS BARRING TWO FELONY-ACCUSED DEFENDANTS FROM POSSESSING FIREARMS ARE CONSISTENT WITH THE SECOND AMENDMENT IN ANALYSIS UNDER THE U.S. SUPREME COURT DECISION IN NEW YORK STATE RIFLE & PISTOL ASS'N, INC. V. BRUEN, 597 U.S. 1 (2022)**

In U.S. v. Perez-Garcia, ___ F.4th ___ , 2024 WL ___ (9th Cir., March 18, 2024), a unanimous Ninth Circuit panel addresses consolidated appeals from U.S. District Court orders subjecting two defendants (Appellants in this case) to a condition of pretrial release that temporarily barred them from possessing firearms pending trial. The Ninth Circuit panel rejects the Appellants' arguments that their pretrial firearms possession prohibitions violate their Second Amendment rights under New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022).

The panel held that the Bail Reform Act of 1984's firearm condition in relation to pretrial release is constitutional as applied to Appellants. The panel explains that the holding is consistent with how courts have long balanced the constitutional rights of pretrial detainees and releasees with legitimate public safety and logistical considerations. Thus, the ruling is consistent with our nation's long history of temporarily disarming criminal defendants facing serious charges and those deemed dangerous or unwilling to follow the law.

Result: Affirmance of pre-trial orders of the U.S. District Court judges in the cases of U.S. v. Perez-Garcia, and U.S. v. Fencl.

**LEGAL UPDATE EDITOR'S NOTE: Washington Court Rules similarly give authority to judges to temporarily bar firearms possession pre-trial. See the following.**

**Superior Court Criminal Rules, CrR 3.2:**
**https://www.courts.wa.gov/court_rules/pdf/CrR/SUP_CrR_03_02_00.pdf**

**Criminal Rules for Courts of Limited Jurisdiction, CrRLJ 3.2:**
**https://www.courts.wa.gov/court_rules/pdf/CrRLJ/CLJ_CrRLJ_03_02_00.pdf**

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## WASHINGTON STATE SUPREME COURT

**CONSTITUTIONAL DUE PROCESS PROTECTION AGAINST UNREASONABLE AND PREJUDICIAL PRE-ACCUSATORIAL DELAY: DESPITE THE FACT THAT MULTIPLE EYEWITNESSES DIED DURING THE 12-YEAR PERIOD BETWEEN (1) THE STATE'S DEVELOPMENT OF PROBABLE CAUSE TO CHARGE THE DEFENDANT AND (2) THE FILING OF THE CHARGE OF FIRST DEGREE FELONY MURDER, THE TOTALITY OF THE FACTS SHOWING NEGLIGENCE BY THE STATE RESULTING IN PRE-ACCUSATORIAL DELAY DO NOT REQUIRE OVERTURNING OF CONVICTION OF DEFENDANT**

In State v. Stearns, ___ Wn.2d ___ , 2024 WL ___ (March 28, 2024), the Washington Supreme Court is unanimous in reversing a September 2022 decision of the Division One Court of

Appeals that had overturned defendant's first-degree felony murder conviction based on pre-accusatorial delay in charging the defendant.

The overturned Court of Appeals Opinion had ruled that where multiple eyewitnesses died during the 12-year period between (1) the state's development of probable cause to charge the defendant and (2) the filing of the charge the totality of the facts required reversal of the conviction with prejudice based constitutional Due Process protection against unreasonable and prejudicial pre-accusatorial delay.

The first three paragraphs of the unanimous Opinion for the Washington Supreme Court summarize the ruling and rationale of that Court as follows:

> A person charged with a crime has a due process right to be prosecuted in a timely manner so they may meet the charges against them. While deciding what is "timely" involves policy questions left to the legislature in setting statutes of limitation and to the executive in exercising prosecutorial discretion, courts play an important role in determining when an instance of prosecutorial delay violates fundamental concepts of justice and requires dismissal of the charges. This case requires us to examine the framework for balancing the relevant considerations and making such a determination.
>
> In 2004, the State matched DNA samples from a homicide victim, Crystal Williams, to John Stearns. The State acknowledges it had probable cause to charge Stearns as early as 2005, but charges were not filed until 2017, apparently due to a misplaced homicide file. Stearns moved to dismiss, arguing that the State's 12-year pre-accusatorial delay violated his due process rights. Specifically, he claimed the delay prejudiced his defense because a key witness who died before trial would have testified that she saw the victim with someone other than Stearns in the hours before her death. The trial court denied the motion, and a jury convicted Stearns of first degree murder. The Court of Appeals reversed his conviction, concluding that the State's charging delay was negligent, and that the loss of key witness testimony violated Stearns's due process rights.
>
> We reverse. Though the State was negligent in failing to bring charges sooner, the resulting loss of a witness's testimony did not, on balance, amount to a denial of due process. The due process inquiry is necessarily fact intensive, and Stearns has not demonstrated that the prejudice he suffered from the loss of the witness's potential testimony was sufficient to justify the dismissal of this serious murder case.

Result: Reversal of decision of Division One of the Court of Appeals that had set aside the King County Superior Court first degree murder conviction of John Ray Stearns; case remanded to the Court of Appeals to address other issues (not identified in the Opinion of the Washington Supreme Court) that defendant Stearns has raised on appeal.

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## WASHINGTON STATE COURT OF APPEALS

**RCW 77.15.080: DIVISION THREE PANEL REACHES CONCLUSION THAT BEING "ENGAG[ED] IN . . . HUNTING ACTIVITIES" DOES NOT GENERALLY INCLUDE ANY PERIOD DURING WHICH ONE IS DRIVING A VEHICLE, UNDER THE EXPRESS**

**RATIONALE THAT A PERSON CANNOT IN REALITY BE DRIVING A VEHICLE AND LAWFULLY TRYING TO HARVEST GAME AT EXACTLY THE SAME POINT IN TIME; THE PANEL REJECTS THE REASONING OF THE MAJORITY OPINION IN A 2007 DIVISION THREE OPINION THAT UPHELD A VEHICLE STOP BY WDFW OFFICERS UNDER SIMILAR CIRCUMSTANCES**

In State v. Miller, ___ , Wn. App. 2d ___ , 2024 WL ___ (Div. III, March 28, 2024), a Division Three panel disagrees with the interpretation of RCW 77.15.080 that was set forth in a Majority Opinion for a prior Division Three decision in Schlegel v. Department of Licensing, 137 Wn. App. 364 (2007).

The Miller Court rules (1) that a stop of defendant Miller's vehicle by DFW officers was not lawful because not supported by reasonable suspicion that he was engaged in hunting activities at the moment of the stop, (2) that evidence seized after the stop should therefore have been suppressed by the trial court, and (3) that the defendant's conviction for possessing a loaded shotgun in his vehicle in violation of RCW 77.15.460(1) must be reversed.

The Miller Opinion's opening paragraphs summarize the panel's ruling and primary rationale as follows:

> RCW 77.15.080 authorizes Department of Fish and Wildlife (DFW) officers to perform a brief investigatory stop when "articulable facts" indicate a person is "engaged in . . . hunting activities." Relying on this statute, DFW officers stopped James Miller's sport-utility vehicle (SUV) in the Colockum Wildlife Area when they saw him wearing an orange sweatshirt and slowly driving down a bumpy road during modern firearm deer and elk season.
>
> In the course of the stop, officers discovered a loaded shotgun and rifle on the passenger seat and Mr. Miller was charged with misdemeanor firearms violations. Prior to trial, Mr. Miller moved to suppress evidence of the loaded firearms, arguing they were discovered as a result of an illegal stop. The trial court denied the motion and Mr. Miller was convicted. We now reverse.
>
> By its plain terms, RCW 77.15.080 permits an investigative stop only when the totality of the circumstances demonstrates a substantial possibility that the target of the stop is actively engaged in hunting**. Rarely, if ever, will a person in the act of driving a vehicle be "engaged in . . . hunting activities." RCW 77.15.080. Hunting and driving are incompatible.** To the extent this court's prior opinion in Schlegel v. Department of Licensing, 137 Wn. App. 364, 153 P.3d 244 (2007) states otherwise, we respectfully disagree with that decision.
>
> Mr. Miller was doing nothing more than driving his SUV at the time DFW officers performed the stop. This was not a hunting activity. The stop therefore did not fall under the purview of RCW 77.15.080 and Mr. Miller's motion to suppress should have been granted. We reverse Mr. Miller's conviction and remand for further proceedings.

[Paragraphing revised for readability; emphasis added]

Further in the Opinion, the Miller Court states that the panel's view is that officers "must be aware of facts creating a substantial possibility that a person to be stopped is presently engaged in an effort to kill, injure, harass, harvest, or capture wild animals or wild birds in an area where

such animals may reasonably be expected," and that generally such suspicion does not exist where a person is in the act of driving a vehicle.

The Miller Court declines to address the constitutional challenges raised by defendant Miller regarding the vehicle stop, choosing to decide case solely under the Court's interpretation of RCW 77.15.080.

Result: Reversal of Kittitas County Superior Court conviction of James Michael Miller.

**LEGAL UPDATE EDITOR'S COMMENTS:**

**(1) Under RCW 77.15.080, can a person be found to be "engaged in . . . hunting activities" while driving a vehicle (and likewise as to any passengers in the vehicle)?**

**I am persuaded by the reasoning in the 2007 Division Three Majority Opinion in Schlegel that asserted that a person generally can be both driving and "engaged in . . . hunting activities" at the same time. I concede that the facts in Schlegel (where a man was stopped while he was driving a truck on a dirt road in a wildlife area on the opening day of elk hunting season while wearing warm clothing) and in the Miller case are admittedly close on the statutory "articulable facts" standard, but I feel that the reasoning generally as to what it means to be "engaged in . . . hunting activities" was better understood by the majority judges in the Schlegel case. The Majority Opinion in Schlegel explained:**

> **Hunting is defined as "an effort to kill [or] injure" a "wild animal or wild bird." RCW 77.08.010(7). Washington authority has generally held that hunting involves more than the actual shooting of an animal. "Hunters begin to `hunt big game' not when they actually encounter big game, but rather when they make an effort to kill or injure big game in an area where such animals may reasonably be expected." State v. Walsh, 123 Wn.2d 741, 748, 870 P.2d 974 (1994).**

**The 2007 Schlegel Opinion thus concluded that a person is engaged in hunting activity (I note that this includes illegal hunting activity) when the person is (1) driving around in an area open to hunting and (2) looking for game in order to harvest game.**

**The March 28, 2024, Division Three Miller Opinion quotes much of the same language from the 1994 Walsh Washington Supreme Court Opinion as was quoted in the 2007 Schlegel Majority Opinion, but in my view the 2024 Miller panel fails to grasp the essence of the explanation in that Opinion as well as in the 1994 Washington Supreme Court Opinion in Walsh. There, the Supreme Court in 1994 rejected an argument of a defendant who argued that he was not "hunting big game" when he shot at a decoy because the decoy was not big game. The Washington Supreme Court explained in Walsh that:**

> **This argument camouflages an incorrect assumption: that to hunt big game, defendants must actually encounter big game. Hunting, however, is an activity involving effort. From 1947 to the present, the Legislature has defined hunting as "an effort to kill [or] injure" a wild animal or wild bird. (Italics ours.) RCW 77.08.010(7). Every fall, thousands of Washington residents journey deep into the woods in search of game. To say that they do not hunt until they actually encounter game defines the activity far too narrowly. Like hunting, when we take**

**rod and reel to a mountain lake and dip our line in its waters, we begin to fish. Effort defines these activities.**

**Walsh, 123 Wn.2d 748.**

**(2) Which Division Three decision should be followed as precedent?**

**In footnote 4, the Miller Opinion cites Washington case law and a law review article in acknowledging that, for the same legal reason that the Miller panel was not required to follow as precedent the reasoning of 2007 Schlegel Opinion (I note that it is immaterial that Schlegel was decided by a different Division Three panel), trial courts in future cases (and, I would add, by logical extension, enforcement officers and prosecutors and legal advisors) are free to find the Schlegel Opinion to be more persuasive and to therefore follow the reasoning of that Opinion. There exists no controlling precedent on this issue until the Washington Supreme Court provides the last word.**

**I note that one rule/guide for statutory construction that should be considered on this question – and was not mentioned in the Miller Opinion – is the rule that a judicial interpretation of a statute (such as the 2007 Schlegel interpretation) is presumed (albeit not conclusively) to have been considered by the Legislature where a statute was subsequently amended by the Legislature without change to the statutory language that was construed in the earlier decision. RCW 77.15.080 was amended in 2012 and 2014 without change to the "engag[ed] in . . . hunting activities" language construed in the 2007 Schlegel Majority Opinion.**

**HIGHLY FACT-DEPENDENT EVIDENCE LAW ISSUES OF (1) CHILD WITNESS COMPETENCY AND (2) ADMISSIBILITY OF CHILD HEARSAY ARE RESOLVED AGAINST DEFENDANT IN ANALYSIS THAT, PER LEGAL STANDARDS, IS DEFERENTIAL TO TRIAL COURT'S DETERMINATIONS ON THESE QUESTIONS; RYAN RELIABILITY FACTORS ADDRESS RELIABILITY OF A CHILD'S STATEMENTS, NOT RELIABILITY OF WITNESSES TO WHOM CHILD DISCLOSES THE INFORMATION**

In State v. Houser, ___ Wn. App. 2d ___ , 2024 WL ___ (Div. II, March 6, 2024), a three-judge Division Two panel rejects a defendant's appeal from his sex offense convictions for offenses against his six-year-old daughter.

The Houser Court's Opinion includes extended analysis (most of which is not included here) of the facts and the law on both of the following fact-intensive issues:

(1) Under well-established, case-law-based, multi-factor tests for competency of witnesses to testify, the Opinion rules that an eight-year-old child witness was lawfully ruled competent to testify at defendant's trial despite the child's vulnerabilities in testifying as a witness to crimes committed and events occurring when the child was six years old (see State v. Allen, 70 Wn.2d 690 (1967)); and

(2) Under equally well-established rules for admissibility of child hearsay under RCW 9A.44.120 and case law interpreting the statute, the Opinion rules that the child's hearsay statements to four persons (a forensic interviewer from the prosecutor's office, a pediatric nurse practitioner, a boyfriend of the child's mother, and the child's mother) were lawfully admitted at defendant's trial (see State v. Ryan, 103 Wn.2d 165 (1984)).

The Opinion includes the following explanation why defendant's attacks on the veracity and memories of the child's mother and the mother's boyfriend (as opposed to the memory of the child victim) are generally misplaced in relation to the child hearsay statute and State v. Ryan:

> Houser next contends that the new statements from Boyd [the child victim's mother] and Cooley [the boyfriend of the mother] should have been excluded because they were unreliable under the Ryan factors. Houser contends that Boyd and Cooley both had a motive to lie about A.H.'s statements (factor 1), the statements were not spontaneous and were made months or years after the disclosure (factor 4), A.H. made the statements months or years after her initial disclosures and could not remember much of the events (factor 8 or 9), and the timing and surrounding circumstances weigh against the reliability of A.H.'s statements (factor 9).
>
> The State responds that Houser misapplies the Ryan factors to Boyd and Cooley as witnesses, not to A.H. where the application rightfully belongs.
>
> We agree with the State. Houser predominantly focuses his application of the factors on the reliability of Boyd and Cooley as witnesses, not on A.H. . . . Indeed, the reliability of Boyd and Cooley is irrelevant to determining the reliability of A.H.'s disclosures. The Ryan factors concern the reliability of a child's statements, not the reliability of the witness to whom the child discloses the information. . . . Any inconsistencies about the witnesses on the stand (Boyd and Cooley) could have been (and were) explored through cross-examination. By largely focusing his application of the Ryan factors on the wrong person, Houser's argument is unpersuasive.

[Footnote, citations omitted]

Result: Affirmance of Pierce County Superior Court convictions of Kevin Wayne Houser for two counts of first degree child molestation and one count of second degree incest committed against A.H., his six-year-old daughter.

**BASED ON 2O19 WASHINGTON SUPREME COURT RULING IN BARR V. SNOHOMISH COUNTY SHERIFF, COURT OF APPEALS RULES THAT PETITION FOR RESTORATION OF FIREARMS RIGHTS WAS PROPERLY REJECTED BASED ON PETITIONER'S RECORD OF JUVENILE FELONY ADJUDICATIONS, EVEN THOUGH HIS JUVENILE RECORD WAS SEALED**

In McIntosh v. State, ___ Wn. App. 2d ___ , 2024 WL ___ (Div. II, March 5, 2024), Cai H. McIntosh loses his appeal from a superior court's order denying his petition to restore his firearm rights.

McIntosh argued that his circumstances were legally distinguishable from those addressed in the Washington Supreme Court Opinion in Barr v. Snohomish County Sheriff (Barr II) 193 Wn.2d 330 (2019). In Barr, the Washington Supreme Court ruled that the juvenile sealing-of-records statute does not provide for expungement of juvenile felony adjudications or for restoration of federal firearms rights, and therefore the sheriff in that case was not required to issue a concealed pistol license to a person who had a sealed record on a juvenile felony adjudication.

The McIntosh Opinion declares as follows that the Supreme Court's Barr decision controls in the case before the Corut of Appeals:

> We hold that under our Supreme Court's decision in Barr II, an adjudication in a sealed juvenile proceeding in which a juvenile is convicted of an offense continues to exist as a conviction for the purposes of restoration of firearm rights. Therefore, McIntosh's juvenile adjudications resulting from his convictions for first degree rape of a child and first degree child molestation disqualify him from petitioning for restoration of firearm rights. We affirm the superior court's order denying McIntosh's petition for restoration of firearm rights.

Result: Affirmance of Clark County Superior Court ruling that denied the petition of Cai Hunter McIntosh for restoration of his firearm rights.

**MEDICAL DIAGNOSIS OR TREATMENT HEARSAY EXCEPTION AT ER 803(a)(4) DOES NOT APPLY WHERE DECLARANT (IN THIS CASE A CHILD) (1) DID NOT SEEK AN EXAMINATION AND (2) "CONSENTED" TO EXAMINATION ONLY BECAUSE A PERSON AUTHORIZED TO PROVIDE INFORMED CONSENT (A PARENT) AUTHORIZED THE EXAMINATION**

In State v. Arumugam, ___ Wn. App. 2d ___ , 2024 WL ___ (Div. I, March 25, 2024), a three-judge Division One panel rules that the trial court committed an error in an evidentiary ruling on the medical hearsay exception, but that the error was harmless in light of the admissible evidence of guilt for three counts of child rape as to one child and on three counts of child molestation of another child.

The Arumugam Court explains that for statements to be admissible as a hearsay exception for statements obtained for purposes of medical diagnosis or treatment under the ER 803(a)(4), there must be evidence that the declarant's subjective intent for consenting to the examination was for the purpose of medical diagnosis or treatment. If a declarant (here, a child) "consented" to an examination only because another person (here, a parent) who was authorized to provide informed consent authorized the examination (see RCW 7.70.065) the medical hearsay exception does not apply to the statements made during the examination. In key part, the explanation of the Arumugam Court for its ruling under the medical diagnosis or treatment hearsay exception is as follows:

> The record unmistakably establishes that [the child victim] did not want to be physically examined by [Nurse Mettler}. [Nurse Mettler] testified to always asking a child for permission to examine them before doing so and to not examining a child "if they really don't want to be examined." However, here, [the child victim] expressly told [Nurse Mettler] that he "felt h[is] body was fine" and "did not feel that [he] needed to do the exam." Nevertheless, [Nurse Mettler] did not follow what she testified to be her standard practice of declining to examine children who do not want to be examined.
>
> We infer from the circumstances that [Nurse Mettler] examined [the child victim] only after obtaining [the mother's] consent to do so. Parents are authorized to provide informed consent to medical providers on behalf of their minor children to undergo treatment, as a matter of legislative grace:

> Persons authorized to provide informed consent to health care, including mental health care, on behalf of a patient who is under the age of majority and who is not otherwise authorized to provide informed consent, shall be a member of one of the following classes of persons in the following order of priority: . . .
>
> (iii) Parents of the minor patient
>
> RCW 7.70.065(2)(a).
>
> This statute allows parental consent to be imputed to a minor for medical care but does not impute the parent's motive or purpose to that minor. No other statute or rule does so either. Put differently, RCW 7.70.065(2) simply allows for adult authority to overcome a minor's stated desires regarding medical treatment.
>
> On the record before us, there is no evidence of [the child victim] articulating a desire to obtain medical treatment as a result of being raped by [the defendant]. To be clear, as to the sexual assault examination specifically, the record establishes nothing more than [the child victim's] submission to adult authority. Nothing in the record indicates that [the child victim] sought to "promote treatment" by submitting to an intrusive examination. Because the case law requires that the patient's desire to "promote treatment" must be established for the hearsay exception to apply, . . . the trial court erred in admitting [the child victim's] statements to [Nurse Mettler] pursuant to ER 803(a)(4).

[Case citations omitted; footnote omitted]

Result: Affirmance of King County Superior Court convictions of Murugananandam Arumugam for three counts of child rape as to one child and for three counts of child molestation as to another child.

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

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

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

The nine entries below address the March 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. J.G.: On March 6, 2024, Division Two of the COA rejects the appeal of defendant from his Jefferson County Superior Court juvenile court adjudications for (A) *one count of driving while license suspended,* and (B) *one count of failure to transfer title*. The Court of Appeals remands the case for a hearing for entry of written findings of fact and conclusions of law regarding a third charge of resisting arrest.

**In fact-based analysis that will not be summarized or excerpted in this Legal Update entry, the Court of Appeals rules under the following facts that: (1) J.G. was not subjected to a pretext stop, (2) J.G. was stopped based on reasonable suspicion of criminal activity, and (3) the officer who (a) made the social contact (b) that was followed by a temporary seizure (c) that was followed by an arrest in this case was justified under the facts and the relevant constitutional standards in his escalating commands and actions:**

> In January 2022, just before 1:00 a.m., Jefferson County Sheriff's Deputy [A] was on patrol. The ground was covered in snow and the roads were icy. While on patrol, [Deputy A] observed a slow-moving vehicle near a group of mailboxes. Suspecting possible mail crimes, [Deputy A] pulled up behind the vehicle but did not activate his emergency lights.
>
> [Deputy A] ran the vehicle's license plate number on his in-vehicle computer. The return information listed the vehicle as having been sold to J.G. more than 45 days earlier. The return further indicated that title to the vehicle had not been transferred. The return included J.G.'s name, date of birth, and an incident number indicating that J.G. had previously been warned that his driver's license was suspended. [Deputy A] also learned that J.G. had a third degree suspended license.
>
> [Deputy A] continued to follow the vehicle down a dirt road and it attempted to make a three-point turn. When the vehicle was about ten feet away and perpendicular to [Deputy A's] patrol vehicle, [Deputy A] exited his patrol vehicle and approached the vehicle on foot. [Deputy A] did not engage his emergency lights.
>
> As [Deputy A] approached the vehicle, he observed the driver to be a "young black male." Backlit by his patrol vehicle's headlights, [Deputy A] shined his flashlight on his uniform and announced his presence. Tapping on the driver's side window, [Deputy A] repeatedly announced "sheriff's office" and instructed the driver to stop their car; in these interactions, [Deputy A] spoke in an increasingly loud voice. Standing on a one-lane gravel drive, [Deputy A] "maneuvered a few times for officer safety reasons" while standing next to the vehicle. [Deputy A] thought that the driver was pretending not to see him as the driver gave the officer a "peripheral look" but never fully turned to look at him.
>
> After giving one last announcement to stop the vehicle, [Deputy A] "transitioned [his] flashlight to [his] right hand and struck the driver's window . . . causing it to shatter." The driver accelerated and their vehicle slid into a ditch.

> [Deputy A] instructed the driver to step out of the vehicle, but the driver did not do so. [Deputy A asked], "[Y]ou're [J.G.], correct[?]" and "[the driver] said yes." [Deputy A] advised J.G. he was under arrest and again told J.G. to step out of the vehicle. After the arrival of [Sergeant B], J.G. exited the vehicle and was taken into custody.

[Footnote omitted; citations to the record omitted]

Here is a link to the Opinion in State v. J.G.:
https://www.courts.wa.gov/opinions/pdf/D2%2057188-9-II%20Unpublished%20Opinion.pdf

2. State v. Anthony Ray Brownfield: On March 12, 2024, Division Two of the COA rejects the appeal of defendant from his Clallam County Superior Court convictions for *three counts of child rape*.

At trial, the State played a video recording for the jury of a detective interviewing Brownfield. Brownfield argues that at two points during that interview, he invoked his right to remain silent and therefore the trial court violated his Fifth Amendment right by admitting the statements after holding a CrR 3.5 hearing.

**The Court of Appeals holds that no constitutional error occurred because:**

**(A) after Brownfield made an initial invocation of his right to remain silent, Brownfield then immediately revoked that invocation, rendering his attempt at invocation equivocal; and**

**(B) what Brownfield claims was a second invocation was not an invocation at all when taken in context.**

The Court of Appeals sets out as follows the key text from the interrogation with some explanatory information interspersed (this Legal Update entry has omitted the name of the detective):

> DETECTIVE: So, do you understand each of these rights as I've explained them to you?
>
> MR. BROWNFIELD: Mm-hmm.
>
> DETECTIVE: Having these rights in mind, do you wish to talk to me now?
>
> MR. BROWNFIELD: No.
>
> DETECTIVE: You don't wish [inaudible]
>
> MR. BROWNFIELD: You can talk. You can talk all you want. I'll listen.
>
> DETECTIVE: Okay. Um, so at this time, you're willing to talk to me, but you might not say anything. Am I correct in what I'm understanding?
>
> MR. BROWNFIELD: Mm-hmm.
>
> DETECTIVE: Okay. So what I wanted to . . . .

. . . .

Roughly five minutes after the interview began, the following exchange between [the detective] and Brownfield occurred:

> DETECTIVE: You say that things can be explained in court but I'm going to give you a chance to try and explain what she's told me, because when a girl comes onto a guy, it's kind of odd, so is that, is that what went down?
>
> BROWNFIELD: Maybe. I don't care to talk about this, I feel disgusted with myself given this whole situation. Just f***ing kill me or I'll kill myself. It's all over. My life is over. Everything is over. . . .

. . . .

The interview continued:

> BROWNFIELD: Yeah, I was a piece of shit. I f***ing can't, I couldn't. Yeah, my daughter came onto me so f***ing what. I was f***ing weak.
>
> DETECTIVE: [Inaudible] making you weak at the time? [Pause.] I mean is that your, is that your character? Has it happened since? Or is it –
>
> BROWNFIELD: No.
>
> Detective: So is it just a one, not a one time but a one event thing?
>
> BROWNFIELD: Yeah. I've been disgusted with myself ever since.
>
> Brownfield went on to make self-incriminating statements during the interview.

After providing some explanation of the principles in the case law on invocation of Miranda rights and retractions of invocations of Miranda rights, the Brownfield Opinion then explains the Court's view regarding how those principles apply to the facts of the case:

> Brownfield contends that he unequivocally invoked his right to silence when he said, "No" in response to [the detective] "[D]o you wish to talk to me now?" after reading Brownfield his rights. The State responds that Brownfield's statement was equivocal because, first, Brownfield interrupted [the detective] as [the detective] tried to confirm Brownfield's wishes, saying, "— You can talk. You can talk all you want. I'll listen." And second, when [the detective] again sought clarification from Brownfield, Brownfield agreed that he was willing to talk to [the detective], but he might not actually say anything to [the detective]. [the detective] asked Brownfield, "Am I correct in what I'm understanding?" Brownfield affirmed that [the detective's] understanding was correct.
>
> We agree with the State and the trial court. While Brownfield did initially appear to invoke his right to remain silent by responding, "No," when asked if he wished to speak with [the detective], that invocation was immediately revoked and made equivocal when he said, "You can talk all you want. I'll listen," and then confirmed [the detective's] understanding that he was "willing to talk to [him], but [he] might not say anything."

> Brownfield further argues that even if the trial court correctly determined that his first claimed invocation of his right to remain silent was equivocal, he later unequivocally invoked his right to remain silent during questioning when he said "I don't care to talk about this . . ." The State, in its response, . . . . contends that this statement, like the other, was equivocal in light of the surrounding context of the statement. We agree with the State and hold that Brownfield's purported invocation of his right to remain silent was equivocal in light of the circumstances surrounding the statement.
>
> [The detective] said to Brownfield, "You say that things can be explained in court but I'm going to give you a chance to try and explain what [the victim, Brownfield's daughter] has] told me, because when a girl comes onto a guy, it's kind of odd, so is that, is that what went down?" Brownfield responded, "Maybe. I don't care to talk about this, I feel disgusted with myself given this whole situation. Just f***ing kill me or I'll kill myself. It's all over. My life is over. Everything is over."
>
> While Brownfield indeed said, "I don't care to talk about this," he then continued to make statements in the same breath and without pausing. The next video clip of the interview picks up with Brownfield continuing to talk, during which he said, "Yeah, I was a piece of shit. . . . Yeah, my daughter came onto me so f***ing what. I was f***ing weak." In this context, it is clear that the phrase "I don't care to talk about this," was not an invocation of his right to remain silent, much less an unequivocal one.
>
> We find no error in the trial court's conclusion that Brownfield did not unequivocally invoke his right to remain silent during his interview with [the detective], nor in the trial court's decision to admit Brownfield's statements at trial.

[Footnote omitted; citations to the record omitted]]

Here is a link to the Opinion in State v. Brownfield:
https://www.courts.wa.gov/opinions/pdf/D2%2057205-2-II%20Unpublished%20Opinion.pdf

**LEGAL UPDATE EDITOR'S RESEARCH NOTE: For some background information on some relevant case law relating to Miranda see, on the Criminal Justice Training Commission LED page: (1) pages 21 through 29 of Confessions, Search, Seizure and Arrest: A Guide for Police Officers and Prosecutors May 2015 By Pamela B. Loginsky, Staff Attorney, Washington Association of Prosecuting Attorneys, discussing defendant invocation of rights and revoking of initiation and related issues (note that although Ms. Loginsky's Guide has not been updated since 2015, I believe that none of the cases discussed at pages 21 through 29 have been overruled by more recent appellate court decisions; and (2) the outline titled "Initiation of Contact Rules Under The Fifth Amendment" (updated through July 1, 2023) compiled by your Legal Update editor, John Wasberg. Here is a link to the CJTC LED page: https://www.cjtc.wa.gov/resources/law-enforcement-digest**

3. State v. Rene Mackperson Ramirez Lopez: On March 18, 2024, Division One of the COA rejects the appeal of defendant from his Snohomish County Superior Court convictions for (A) *one count of tampering with a witness-domestic violence* and (B) *two counts of violating a domestic violence no contact order*. **The Court of Appeals rejects the argument of defendant that the trial court erred in ruling that the recordings of his jail phone calls were properly authenticated under the controlling statute and Court Rule.** The Court of

Appeals describes as follows the key evidence showing lawful authentication of the phone call recordings:

> Here, the State presented evidence that the speakers were Ramirez-Lopez and [the victim]. The first jail call within exhibit 41 was made using Ramirez-Lopez's own pin number and name, which established his voice on the remaining jail calls. Additionally, there was circumstantial evidence from the substance of the conversations that the female speaker was [the victim], including discussion of facts of the current case, requesting the female speaker put money on the male's jail account which was consistent with [the victim] depositing money into Ramirez-Lopez's account, discussion of the no-contact order, references to a prior assault that was consistent with an assault on [the victim], referring to the male speaker as "Mac," which [the victim] was known to call Ramirez-Lopez, and professions of their feelings for one another. Additionally, the trial court heard [the victim] testify in court and listened to the recording before it admitted the recording into evidence.
>
> Boone testified that the recordings were made in real time, the recordings were accurate in the information they reflected, the jail relied on the accuracy of the recordings, and she was unable to alter them in any way. [The county jail's records specialist] confirmed she listened to the recording prior to coming to court and the recording was a fair and accurate copy of Ramirez-Lopez's phone calls as reflected in the call log. [The records specialist] testified that although only one out of the 11 phone calls was tied to Ramirez-Lopez's pin number, all the phone calls could be attributed to him because he contacted the same phone number. This foundational testimony, together with the identification of the voices, was sufficient to authenticate the recording.

Here is a link to the Opinion in State v. Ramirez-Lopez:
https://www.courts.wa.gov/opinions/pdf/851331.pdf

4. In the Matter of the Personal Restraint of Steven C. Allgoewer: On March 19, 2024, Division Three of the COA issues a partially published Opinion that addresses numerous issues in rejecting the challenges of Allgoewer to the revocation of his parole. Allgoewer was convicted in Spokane County Superior Court in 2008 for two sex felonies, and he was released from prison on community custody in 2020. He was then arrested in 2022 and returned to prison for violating his community custody conditions.

**Some of the issues addressed in the unpublished part of the Allgoewer Opinion are defendant Allgoewer's challenges to the CCO's search of his person, apartment, cell phone, computer, and vehicle. Defendant Allgoewer argued that the searches violated his constitutional rights. The Court of Appeals explains as follows why the Court rejects his search challenges:**

> **Pointing out that he was found to have violated condition No. 6, which requires him to submit to such searches, Allgoewer contends that this condition is invalid because it does not require the search to be based on reasonable suspicion. Finally, he contends that there was no nexus between the areas and items searched and the suspected violations.**
>
> The ISRB responds that Allgoewer fails to establish the search was unlawful . . . . ISRB points out that Allgoewer signed agreements consenting to such searches and even

without consent there was reasonable suspicion to believe that evidence of a violation of a release condition would be found in the places searched.

We conclude that the CCO had reasonable cause to search Allgoewer and his property and therefore, as applied, condition No. 6 was not unconstitutional. Generally, "searches without a valid warrant . . . are [ ] 'unreasonable' per se unless it is demonstrated that public interest justifies creation of an exception to the general warrant requirement." State v. Simms, 10 Wn. App. 75, 85 (1973).

**Under the Fourth Amendment and article 1, section 7, probationers and parolees have a diminished right of privacy permitting a warrantless search if reasonable. RCW 9.94A.631(1); [State v. Massey, 81 Wn. App. 198, 200 (1996)]. "The search is reasonable if an officer has a well-founded suspicion that a violation has occurred." Massey, 81 Wn. App. at 200.**

However, the location to be searched must be limited "to property reasonably believed to have a nexus with the suspected probation violation." State v. Cornwell, 190 Wn.2d 296, 306 (2018).

ISRB contends the searches in this case were lawful because Allgoewer consented to any announced/unannounced searches of all computers and electronic devices under the Social Media and Internet Monitoring Agreement. However, Washington courts have consistently found that parole and probation conditions which require a parolee or probationer to submit to searches still require reasonable suspicion for the search to be lawful. [Footnote citing cases omitted]

"Courts require reasonable suspicion for such searches in part because these intrusions run the risk of exposing a large amount of private information." State v. Olsen, 189 Wn.2d 118, 132 (2017). Accordingly, the fact that Allgoewer signed a consent form to search his electronic devices does not waive the requirement that the search for the devices and of the devices must have been supported by reasonable suspicion.

Allgoewer challenges the validity of condition No. 6, which requires him to submit to a search of his person and property, arguing that because condition No. 6 does not limit such searches based on reasonable suspicion it is overbroad. We disagree.

This exact argument was rejected in Massey, 81 Wn. App. at 201. There we concluded that although it is advisable, an order such as this does not necessitate the inclusion of language restricting searches to those based on reasonable suspicion. "[R]egardless of whether the sentencing court includes such language in its order, the standard for adjudicating a challenge to any subsequent search remains the same: Searches must be based on reasonable suspicion." [Massey, 81 Wn. App. at 201]

The parties also dispute whether the exclusionary rule applies to ISRB proceedings. We do not decide this question because we determined that Allgoewer failed to establish that the searches in this case were unreasonable.

The record demonstrates that [the CCO] received notice that Allgoewer had been in an undisclosed relationship with M.B. The next day M.B. confirmed that she had been in a dating and sexual relationship with Allgoewer and had recently obtained a Harassment Restraining Order against Allgoewer. M.B. also had screenshots of explicit messages

> from Allgoewer which were sent through his phone and computer using both email and social media.
>
> The DOC Warrants Unit was able to confirm that there was a restraining order that had been served on Allgoewer on February 2, 2022. The evidence [that the CCO] gathered from M.B. prior to conducting the search was sufficient for a well-founded suspicion that Allgoewer had violated condition O by having an undisclosed dating or sexual relationship.
>
> Based on this reasonable suspicion, [the CCO] arrested Allgoewer and searched his person, residence and vehicle for electronic devices. The search uncovered evidence of these and other violations. A search of Allgoewer's residence revealed an unauthorized HP ProBook laptop. When [the CCO] searched Allgoewer's vehicle for the Dell laptop, she found marijuana.
>
> The information provided by M.B. also indicated there was a reasonable probability that evidence of this unapproved relationship, including texts, photos, and emails Allgoewer sent to M.B. during their relationship, would be found on Allgoewer's cell phone and computers. The cell phone was likely to be kept on his person, and Allgoewer told [the CCO] that his Dell laptop was located in his vehicle.
>
> Accordingly, there was a nexus between the suspected violation and the search of Allgoewer, his electronic devices, and the vehicle. . . . On this record, condition No. 6 was not unconstitutional because [the CCO] had reasonable cause to search Allgoewer and his property. Moreover, there was a nexus between the items searched and the alleged violation.

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

Here is a link to the Opinion in In Re Allgoewer:
https://www.courts.wa.gov/opinions/pdf/395057_pub.pdf

5. State v. Stacy Brooke Smith: On March 19, 2024, Division Two of the COA rejects the appeal of defendant from his Grays Harbor County Superior Court conviction for *controlled substances homicide* (defendant did not appeal from his conviction for identity theft). Defendant's appeal from his conviction for controlled substances homicide focused on his argument under the corpus delicti rule that the evidence does not support his conviction because his admission to a law enforcement officer of giving the victim a "dirty thirty" was not sufficiently corroborated.

**The corpus delicti of controlled substance homicide requires proof (1) that the controlled substance was delivered to the deceased person and (2) the use of that controlled substance resulted in the death. Where an essential part of the State's proof is an incriminating statement from the defendant, the State must present evidence independent of the incriminating statement that the charged crime occurred; the defendant's statement alone is insufficient to support a conviction. The Court of Appeals concludes under the following facts that the corpus delicti rule is satisfied in the Smith case**:

> On March 28, 2021, Don Casey died in the trailer that he shared with his long-term partner Sarah Hemminger. Casey's landlord, Jeff Ragan, heard shouting inside the trailer, went inside, and saw that Casey was not breathing. Smith was present when Casey began having difficulties.
>
> A toxicology screen of Casey's blood disclosed that he had taken several drugs, including fentanyl, before his death. The medical examiner attributed Casey's death to "a combination drug overdose," and opined that fentanyl was the major contributor to his death.
>
> Smith was a friend of Casey and Hemminger. She was at their trailer frequently. Hemminger paid Smith to perform household tasks. Ragan's partner described Smith as Casey and Hemminger's caregiver. Smith and Ragan had helped get Casey into bed earlier on the night of his death because Casey was intoxicated.
>
> Law enforcement interviewed Smith about the circumstances of Casey's death. During this interview, Smith stated that she had given Casey a "dirty 30" pill, a type of counterfeit pill that contains fentanyl, and that he had taken a portion of it shortly before his death.
>
> Law enforcement also interviewed Smith's friend Christine Anderson, who stated that "Smith gave Casey the dirty 30 four days before in pieces."

[Citations to the record omitted; some paragraphing revised for readability]

Here is a link to the Opinion in State v. Smith:
https://www.courts.wa.gov/opinions/pdf/D2%2057435-7-II%20Unpublished%20Opinion.pdf

6. State v. Luis M. Morales Hernandez: On March 21, 2024, Division Three of the COA agrees with the appeal of defendant from his Benton County Superior Court conviction for *first degree child molestation*. The case is remanded for re-trial.

The Court of Appeals rules that **the defendant's trial counsel provided constitutionally deficient representation where the trial counsel did not submit a recorded Spanish language interrogation of defendant to a qualified, independent interpreter for an authentic interpretation.** The detective who conducted the interrogation is fluent in Spanish but of course he is not "independent." He testified at trial to his interpretation of the questions and answers in the recorded interrogation (for reasons not relevant to this appeal, the recording itself was not admitted in evidence). The Court of Appeals rules that "[t]he lack of an authentic interpretation permitted the detective to mischaracterize Mr. Hernandez's statements, precluded his attorney from effectively challenging the detective's testimony, and hindered Mr. Hernandez's ability to seek admission of exculpatory statements he made to the detective."

Here is a link to the Opinion in State v. Hernandez:
https://www.courts.wa.gov/opinions/pdf/387801_unp.pdf

7. State v. Darren L. Arends: On March 25, 2024, Division One of the COA affirms the ruling of the Snohomish County Superior Court *denying, because Mr. Arends had filed in the wrong county, the petition of Mr. Arends to restore his firearms rights*. The opening paragraphs of the Arends Opinion summarize the ruling as follows:

> Under former RCW 9.41.040, individuals could petition to restore their firearm rights in their county of residence or in the court that entered the relevant prohibition on firearm possession. **In early 2023, the legislature restricted the appropriate venue for firearm restoration petitions to the county that entered the prohibition on firearm possession.**
>
> A month after the new statute took effect, Darren Arends petitioned to restore his firearm rights in Snohomish County Superior Court, his county of residence. The superior court denied his petition, citing improper venue.
>
> **On appeal, Arends claims that the former firearm restoration statute applies to him because his right to petition for restoration "vested" before the new statute took effect. Therefore, he maintains, he can file his petition in his current county of residence rather than in Davison County, South Dakota, the county that entered the prohibition. Because the legislature did not intend to create a vested right to petition for firearm restoration, we disagree and affirm.**

Here is a link to the Opinion in State v. Arends:
https://www.courts.wa.gov/opinions/pdf/858700.pdf

8. State v. Jeanne Marie Lucy: On March 26, 2024, Division Three of the COA rejects the appeal of defendant from her Grant County Superior Court convictions for *two counts of assault in the third degree* based on her assaults on two police officers. **The Lucy Court rules that (1) the evidence is sufficient to support the convictions, and (2) that the trial court did not abuse its discretion in allowing into evidence body camera footage of the defendant's use of the "N" word against one of the officers (the Lucy Court rejects her argument based on the Rules of Evidence that this footage was irrelevant and more prejudicial than probative).**

The Lucy Opinion describes the facts of the case as follows:

> [Officer A] approached Jeanie Lucy after responding to a service call. Ms. Lucy admitted to being intoxicated, and her responses to [Officer A's] questions did not make sense. She became agitated and began yelling and flailing her arms. She continued yelling despite [Officer A' attempts to communicate with her. [Officer A] told Ms. Lucy if she continued yelling, he would place her under arrest.
>
> Ms. Lucy placed her arms to her sides and slightly behind her, and walked quickly toward [Officer A] with her chest pushed forward. [Officer A] believed Ms. Lucy was going to assault him, so he put his hand up in a defensive manner, but did not walk toward her. With her arms still at her sides and slightly behind her, Ms. Lucy came into contact with [Officer A's] hand, and then pulled her hands up. [Officer A] then grabbed Ms. Lucy's right arm, placed her on the ground, and put her under arrest.
>
> [Officer B] arrived on scene after Ms. Lucy had been handcuffed and was sitting on the ground. Ms. Lucy thrashed around while [Officer B] and another officer on scene assisted her to a patrol vehicle. During this process, Ms. Lucy turned toward [Officer B], a Black man, and called him the N-word. Then, almost simultaneously, she kicked him in the leg. As she was being placed in the patrol vehicle, Ms. Lucy kicked [Officer B] again.

Here is a link to the Opinion in State v. Lucy:
https://www.courts.wa.gov/opinions/pdf/391469_unp.pdf

9. State v. Ryan Christopher Fancher: On March 26, 2024, Division Two of the COA rejects the appeal of defendant from his Cowlitz County Superior Court convictions for (A) *assault in the second degree* and (B) *retail theft in the third degree with special circumstances*. **The Court of Appeals rejects defendant's argument that a contemporaneous show-up identification of him by an eyewitness to his retail theft was impermissibly suggestive and not otherwise reliable** (the witness had seen him running out of a home improvement store with a shopping cart full of unpaid-for merchandise). The Court of Appeals provides a detailed account of the testimony of the eyewitness and of the officer who conducted what the Court of Appeals rules was the non-suggestive show-up identification procedure. To save space, the Legal Update will not summarize or provide excerpts from this discussion in the Fancher Opinion.

Here is a link to the Opinion in State v. Fancher:
https://www.courts.wa.gov/opinions/pdf/D2%2057664-3-II%20Unpublished%20Opinion.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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