# LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

**NOVEMBER 2024**

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## NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

### CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR CORRECTIONS: PANEL RULES IN FAVOR OF ARIZONA STATE PRISONER ON HIS FIRST AMENDMENT FREEDOM OF RELIGION AND EQUAL PROTECTION CLAIMS REGARDING HIS REQUEST FOR A DIETARY OPTION UNDER HIS UNUSUAL RELIGIOUS THEORY

In Fuqua v. Raak, ___ F.4th ___ , 2024 WL ___ (9th Cir., November 1, 2024), a three-judge panel reverses in the Arizona District Court ruling granting summary judgment to the State of Arizona against the religion-based constitutional claims of a state prisoner regarding his diet. A Ninth Circuit staff summary (which is not part of the panel's Opinion) provides the following synopsis of the Opinion:

> In an action brought by Arizona state inmate Michael Ray Fuqua alleging that prison chaplain Jeffrey Lind denied his request for a religious dietary option, the panel reversed the district court's grant of summary judgment to [Chaplain Lind] on Fuqua's First Amendment Free Exercise and Fourteenth Amendment Equal Protection Clause claims and affirmed the district court's grant of summary judgment to [Chaplain Lind] on Fuqua's Religious Land Use and Institutionalized Persons Act ("RLUIPA") claim.
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> Fuqua describes himself as an "adherent to the Christian Israelite beliefs," which he asserts are a "subset of [the] Christian Identity" faith. He requested to be placed on the list to observe "Passover and Feast of Unleavened Bread," which [Chaplain Lind] denied.
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> The district court found that Fuqua failed to raise a triable issue that the denial substantially burdened his religious exercise or that [Chaplain Lind] treated him differently from members of other faiths.
>
> With respect to Fuqua's [federal statutory religious protection claim under RLUIPA], the district court relied on an alternative ground for granting summary judgment to [Chaplain Lind}, namely, that RLUIPA only authorizes equitable relief and Fuqua's equitable claims were moot.
>
> Addressing Fuqua's First Amendment and RLUIPA claims, the [Ninth Circuit] panel concluded that a reasonable trier of fact could find that Fuqua was denied his requested dietary accommodation, not based on his failure to follow a neutral and valid procedural rule for requesting accommodations, but rather based on [Chaplain Lind's] own theological assessment of the correctness and internal doctrinal consistency of Fuqua's belief system.

> **Denying accommodation on such grounds, taken together with the averred practical monetary and physical consequences**, sufficed to establish a substantial burden. Because this ground was the only basis for the district court's grant of summary judgment on Fuqua's First Amendment claim, the panel reversed the district court's summary judgment in favor of [Chaplain Lind] on the First Amendment [religious freedom] claim.
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> Addressing Fuqua's Equal Protection claim, the panel concluded that a factfinder could reasonably conclude that [Chaplain Lind] failed to make a "good faith accommodation" of Fuqua's request for a dietary option that was already being made available to members of another denomination, and that [Chaplain Lind] intentionally acted because of subjective antipathy towards Fuqua's belief system. Accordingly, the panel reversed the district court's summary judgment in favor of [Chaplain Lind] on Fuqua's Equal Protection claim.
>
> The panel affirmed the district court's grant of summary judgment to Lind on Fuqua's [federal statutory] RLUIPA claim based on the district court's alternative ground that RLUIPA only authorizes equitable relief and Fuqua's equitable claims were moot. The panel held that this court's decision in Wood v. Yordy, 753 F.3d 899 (9th Cir. 2014), forecloses suits seeking monetary damages under RLUIPA against state officers, and Fuqua conceded that that any equitable claim he may have under RLUIPA was moot. Accordingly, Fuqua's RLUIPA claim failed as a matter of law.

[Bolding added]

Result: Reversal in part of summary judge order that was previously issued in favor of the State of Arizona by the U.S. District Court for Arizona.

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## WASHINGTON STATE SUPREME COURT

### COURT RULES 7-2 THAT A COUNTY DISTRICT COURT LACKED STATUTORY AUTHORITY IN A DANGEROUS DOG PROSECUTION TO CONDITION SUSPENSION OF A DEFENDANT'S JAIL SENTENCE ON THE DEFENDANT SURRENDERING HER DOG FOR TERMINATION

In State v. Richards, ___ Wn.2d ___ , 2024 WL ___ (November 21, 2024), the Washington Supreme Court votes 7-2 to affirm a Washington Court of Appeals decision that set aside a District Court order that conditioned suspension of a dangerous dog sentencing order on the defendant having her dog destroyed.

The introduction to Majority Opinion in Richards summarizes the Court's ruling as follows:

> Jennifer Richards was convicted of having a dangerous dog at large and was sentenced to nearly a year in jail, which was suspended on the condition of surrendering her dog for termination. The district court ordered that Jennifer Richards would not have to serve her 364-day sentence if she forfeited her property – her dog named Thor – following her conviction under Revised Code of Wahkiakum County (RCWC) 16.08.050.

> The Court of Appeals vacated the condition and determined the district court exceeded its statutory authority in imposing the condition. We hold that forfeiture – whether criminal or civil – requires statutory authorization, and that the district court exceeded its sentencing powers when it ordered Richards to forfeit Thor. We affirm the Court of Appeals.

The ruling appears to mean that a court of limited jurisdiction in Washington must be able to point to specific statutory authority in to justify an order to forfeit personal property as a condition of a suspended sentence.

Result: Affirmance of Washington Court of Appeals decision that reversed the Wahkiakum County District Court order that conditioned suspension of defendant's jail sentence on the destroying of her dog. The Court of Appeals previously affirmed the gross misdemeanor conviction of Jennifer A. Richards for violating the Wahkiakum County "dangerous dogs" ordinance. The District Court conviction was upheld in the earlier review in the Court of Appeals, and the conviction was not on review in the Washington Supreme Court's review of the sentencing/forfeiture issue.

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## WASHINGTON STATE COURT OF APPEALS

**STATE LOSES: DIVISION THREE PANEL HOLDS THAT ACCOMPLICE LIABILITY FOR NEITHER BURGLARY NOR THEFT WAS ESTABLISHED WHERE THE DEFENDANT WAS PRESENT AS A PASSENGER IN HER OWN CAR WHEN THE DRIVER DISEMBARKED AND WENT INTO A BUILDING AND BROUGHT BACK AN ITEM THAT THE THIEF-DRIVER HAD STOLEN FROM THE BUILDING, EVEN THOUGH THE THIEF-DRIVER THEN GOT HELP FROM THE DEFENDANT IN ACCESSING THE CAR'S TRUNK TO STASH THE STOLEN ITEM**

In State v. Hanley, ___ Wn. App. 2d ___ , 2024 WL ___ (Div. III, November 27, 2024), a three-judge Division Three panel provides the following overview of the Court's ruling in the opening two paragraphs of the Opinion:

> In 1975, the Washington State Legislature separated the legal constructs of accessory before the fact from accessory after the fact. The legislature placed the concept of accessory before the fact in RCW 9A.08.020 and labeled one's assistance to the principal before the crime's completion as accomplice liability. The legislature inserted the notion of accessory after the fact in RCW 9A.76.050 and branded one's aid to the principal after the crime as rendering criminal assistance. . . .
>
> This severance of legal theories controls the outcome of this appeal. A jury convicted appellant Laurel Hanley of being an accomplice to Kimberly Parsley's crime of second degree burglary and third degree theft. Assuming the State presented evidence sufficient to convict Hanley of knowingly aiding Parsley with her criminal episode, the evidence avails only as to assistance after completion of the crimes. The State did not charge Hanley with rendering criminal assistance. We reverse her two convictions [that are] based on accomplice liability.

[Case citations omitted]

The Hanley Opinion's recitation of the underlying facts in the case is colorful but unnecessarily long and complex; it will not be set forth or excerpted in the Legal Update. But the Court's description of the relevant facts in the context of the Court's legal analysis is relatively concise. After discussing many Washington appellate precedents relevant to the accomplice lability question, the Hanley Opinion thus explains as follows why accomplice liability was not established as to the defendant in this case:

> During the prosecution of [defendant], the evidence established that Kimberly Parsley [the driver] traveled to the property using [Defendant's] car. [Defendant] sat in the passenger seat. The State presented no evidence that [Defendant] knew in advance of Parsley's intent to steal.
>
> The State presented no evidence of [Defendant] possessing knowledge of Parsley having committed any earlier crime, let alone burglary or theft. Trial testimony failed to even establish that [Defendant] knew to where Parsley wished to drive the car before the two arrived at the [burglarized] property. The State unearthed no conversations between [Defendant] and Parsley leading to the crimes.
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> . . . .
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> [Defendant] never testified to any understanding about Kimberly Parsley's reason for entering the Britschgi property contrary to burglarizing the home or barn. . . . Requiring [the defendant] to assume the burden of producing evidence of her anticipation of a legal purpose for entering the Britschgi land [the burglary site] borders on improperly shifting the burden of proof to [the Defendant].
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> [Defendant] stayed in the Ford Focus while Kimberly Parsley knocked on the backdoor of the Britschgi house. After discovering no one was home, Parsley went to the separate garage and took an army uniform.
>
> Parsley brought the uniform back to the car where [Defendant] sat, and [Parsley] asked [Defendant] for access to the trunk. The State never presented testimony that [Defendant] wished for Parsley to take the military uniform. Parsley did not keep the uniform in [Defendant's] Ford Focus for long, but instead transferred the coat to the truck in which [Parsley] rode hours later.

Result: Reversal of Stevens County Superior Court convictions of Laurel Lynn Hanley for second degree burglary and third degree theft.

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**BRIEF NOTES REGARDING NOVEMBER 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 two entries below address the November 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. Michael T. Waye: On November 21, 2024, Division Two of the COA rejects the arguments of a defendant in his appeal from his Mason County Superior Court convictions for (A) *two counts of first degree unlawful possession of a firearm and* (B) *one count of possession of an unlawful firearm*.

Defendant Waye raised constitutional arguments on appeal, arguing as he had argued in the trial court that: (1) the officer who stopped him for speeding did not have a reasonable articulable suspicion of speeding where the officer's suspicion that defendant was going 60 mph in a 35 mph zone was based solely on the officer's pacing while following defendant in a patrol car; (2) that the seizure was unconstitutionally pretextual under the landmark Washington Supreme Court opinion in State v. Ladson, 138 Wn.2d 343 (1999); and (3) that the Court of Appeals should decline to consider another landmark Washington Supreme Court decision in State v. Chacon Arreopla, 176 Wn.2d 284 (2012), in which the Washington Supreme Court added a pro-government corollary to the pretext rule of Ladson to allow for "mixed motive" stops.

**The Court of Appeals rules in Waye that (1) the pacing testimony was sufficient to establish that the defendant was speeding; (2) the officer did not act pretextually in deciding to follow defendant Waye after the officer saw Waye's truck stop in the middle of an intersection for about a minute at 1:30 a.m. in an area where there been recent drug crimes and other crimes; and (3) assuming, for the sake of the legal argument, that there is some question about whether the stop was pretextual under Ladson, the stop qualifies under Chacon Arreola as a mixed motive stop under the following analysis:**

> Here, there were a number of residential driveways and ninety-degree turns along the road. And [the officer] determined that Waye was speeding and driving in a manner that was inconsistent with typical driving behavior. [The officer] therefore actually and consciously made an appropriate and independent determination that stopping Waye would be reasonably necessary to further traffic safety.
>
> Under Chacon Arreola, this remains true even if the legitimate reason for the stop, addressing the speeding infraction, was secondary, and [the officer] was primarily motivated by a hunch that criminal activity was afoot or some other reason that is insufficient to justify a stop. [citing Chacon Arreola]. Moreover, we cannot expect [the officer] "to simply ignore the fact that an appropriate and reasonably necessary traffic stop

might also advance a related and more important police investigation." [citing Chacon Arreola].

The Waye Opinion also states in a footnote that a Washington Supreme Court precedent such as Chacon Arreola cannot be ignored or overruled by the intermediate Washington Courts of Appeals. Therefore, the Court of Appeals cannot consider on its merits the defendant's request that the Waye Court ignore the precedent of Chacon Arreola.

Here is a link to the Opinion in State v. Waye:
https://www.courts.wa.gov/opinions/pdf/D2%2058292-9-II%20Unpublished%20Opinion.pdf

*2.* State v. Michael Wayne Pickering: On November 21, 2024, Division Two of the COA rejects the arguments of a defendant in his appeal from his Grays Harbor County Superior Court convictions for (A) *two counts of possession of a stolen firearm* and (B) *two counts of unlawful possession of a firearm.* Defendant argued on appeal that a search warrant that yielded the critical evidence against him did not meet the particularity requirement of the constitution.

The search warrant in the case alleged that the three residents of the target house had all committed the crime of "Unlawful Possession of a Firearm, RCW 9.41.040." All three of them had prior criminal convictions barring them from possession of firearms. Also, for all of them, there was probable cause that they were in possession of firearms that were in the house. No issue of probable cause was raised in the appeal.

The search warrant for the house authorized a search for:

> • Evidence of the [crime of Unlawful Possession of a Firearm], including:
>
> Rifles chambered in .243 caliber, .257 caliber, .308 or .300 caliber a 17HMR hunting rifle and a AR Style Shot gun.
>
> • Any and all firearms.
>
> • Evidence of dominion and control of the place searched including mail, receipts, identification, bills, rental agreements, licensing documents and other personal property whose owner/possessor may be readily determined.

Defendant's primary challenge to the search warrant authorization was the broad authorization to search for "any and all firearms." In rejecting this argument, the Pickering Court notes that:

> Because of his criminal history, Pickering was precluded from possessing any firearms, and the search warrant was expressly limited to firearms and evidence of Pickering's dominion and control of the firearms; thus, the search warrant was sufficiently particular.

Here is a link to the Opinion in State v. Pickering:
https://www.courts.wa.gov/opinions/pdf/D2%2057671-6-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 U pdate for Washington Law Enforcement is placed under the "LE Resources" link on the Internet Home Page of the Washington Association of Sheriffs and Police Chiefs. As new Legal Updates are issued, the three most recent Legal Updates will be accessible on the site. WASPC will drop the oldest each month as WASPC adds the most recent Legal Update.

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

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

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

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

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at [http://www.supremecourt.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search

mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. Federal statutes are at [http://www.law.cornell.edu/uscode/].

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

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