LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

SEPTEMBER 2024

TABLE OF CONTENTS FOR SEPTEMBER 2024 LEGAL UPDATE

NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS……..03

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: 3-JUDGE PANEL HOLDS THAT OFFICERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY ON PLAINTIFF'S FOURTH AMENDMENT CLAIM BECAUSE, VIEWING THE FACTS IN THE LIGHT MOST FAVORABLE TO PLAINTIFF, NINTH CIRCUIT CASE LAW HAS ESTABLISHED THAT OFFICERS VIOLATE THE CONSTITUTION IF THEY SHOOT A PEACEFUL PROTESTER IN THE GROIN WITH A FOAM BATON ROUND IN RETALIATION FOR HIS EXERCISING OF HIS FIRST AMENDMENT RIGHT TO FREE SPEECH
Sanderlin v. Dwyer, ___ F.4th ___ , 2024 WL ___ (9th Cir., September 4, 2024)……03
Here is a link to the Opinion in Sanderlin v. Dwyer:
https://cdn.ca9.uscourts.gov/datastore/opinions/2024/09/04/23-15487.pdf

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: QUALIFIED IMMUNITY IS DENIED TO AN OFFICER ON GROUNDS THAT (1) VIEWING THE ALLEGATIONS IN THE LIGHT MOST FAVORABLE TO PLAINTIFF, THE OFFICER'S USE OF FORCE THAT INCLUDED KNEELING OF AN ARRESTEE'S BACK WAS EXCESSIVE FORCE; AND (2) AT THE TIME OF THE EVENT, A REASONABLE OFFICER WOULD HAVE BEEN AWARE OF THE CLEARLY ESTABLISHED CASE LAW AGAINST HIS ACTIONS
Spencer v. Pew, ___ F.4th ___ , 2024 WL ___ (9th Cir., September 16, 2024)……..06
Here is a link to the Opinion in Spencer v. Pew:
https://cdn.ca9.uscourts.gov/datastore/opinions/2024/09/16/21-15521.pdf

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY RELATING TO DEALING WITH PRE-TRIAL DETAINEES: 3-JUDGE PANEL RULES IN PART IN FAVOR OF PLAINTIFF IN HOLDING THAT ARIZONA'S MARICOPA COUNTY JAIL PRACTICE VIOLATES PRETRIAL DETAINEES' SUBSTANTIVE DUE PROCESS RIGHTS BY POSTING PHOTOGRAPHS OF ARRESTEES AND IDENTIFYING INFORMATION ON AN AGENCY MUGSHOT LOOKUP WEBSITE
Houston v. Maricopa County, __ F.4th __ , 2024 WL __ (9th Cir., Sept. 5, 2024)…….10
Here is a link to the Opinion in Houston v. Maricopa County:
https://cdn.ca9.uscourts.gov/datastore/opinions/2024/09/05/23-15524.pdf

CIVIL RIGHTS ACT SECTION 1983 CIVIL LAWSUIT REGARDING SECOND AMENDMENT: 3-JUDGE NINTH CIRCUIT PANEL RULES IN BRUEN-BASED CONSTITUTIONAL INTERPRETATION IN FAVOR OF MOST OF, BUT NOT ALL OF, HAWAII AND CALIFORNIA STATUTORY RESTRICTIONS – EVEN IF THE PERSON HAS A CONCEALED PISTOL LICENSE – ON BRINGING FIREARMS ONTO CERTAIN SPECIFIED SENSITIVE TYPES OF REAL PROPERTY
Wolford v. Lopez, ___ F.4th ___ , 2024 WL ___ (9th Cir., September 6, 2024)……10
Here is a link to the Opinion in Wolford v. Lopez:
https://cdn.ca9.uscourts.gov/datastore/opinions/2024/09/06/23-16164.pdf

CIVIL RIGHTS ACT SECTION 1983 CIVIL LAWSUIT REGARDING EXCESSIVE FINES CLAUSE OF U.S. CONSTITUTION: DOUBLING OF PENALTY FOR LATE PAYMENT OF PARKING TICKET IS QUESTIONED IN 2-1 DECISION BY A NINTH CIRCUIT PANEL THAT REMANDS FOR PROOF OF JUSTIFICATION
Pimentel v. City of Los Angeles, ___ F.4th ___ , 2024 F.4th ___ (Sept. 10, 2024)……..14
Here is a link to the Opinion in Pimentel v. City of Los Angeles:
https://cdn.ca9.uscourts.gov/datastore/opinions/2024/09/09/22-55946.pdf

CIVIL RIGHTS ACT SECTION 1983 LAWSUIT: BY A 2-1 VOTE, PLAINTIFF LOSES A FIRST AMENDMENT-BASED CLAIM OF EMPLOYER RETALIATION; COURT RULES THAT STATEMENTS OF PLAINTIFF DID NOT ADDRESS "MATTERS OF PUBLIC CONCERN"
Adams v. County of Sacramento, ___ F.4th ___ , 2024 WL ___ (9th Cir., September 9, 2024)……14
Here is a link to the Opinion in Adams v. County of Sacramento:
https://cdn.ca9.uscourts.gov/datastore/opinions/2024/09/09/23-15970.pdf

WASHINGTON STATE COURT OF APPEALS……..15

MIRANDA INVOCATION: STATEMENT BY CUSTODIAL SUSPECT TO AN OFFICER TO THE EFFECT THAT – "IF I AM UNDER ARREST AS A SUSPECT, THEN I WANT AN ATTORNEY" – IS HELD TO HAVE BEEN "NOT EQUIVOCAL" REGARDING WHETHER HE WANTED AN ATTORNEY, AND THE STATEMENT WAS THEREFORE A CLEAR INVOCATION OF HIS RIGHT TO ATTORNEY AT A POINT WHEN HE WAS IN FACT BOTH IN CUSTODY AND UNDER ARREST AS A SUSPECT
State v. Gardner, __ Wn. App. 2d __ , 2024 WL __ (Div. III, Sept. 24, 2024)……..15
Here is a link to the Opinion in State v. Gardner:
https://www.courts.wa.gov/opinions/pdf/388263_pub.pdf

UNDER ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION, WHERE PARENTS OF A DECEASED PERSON WERE HER SOLE HEIRS BY INTESTATE SUCCESSION (STATUTE-DETERMINED BECAUSE SHE HAD NO SPOUSE, AND THERE WAS NO WILL), THE PARENTS HAD AUTHORITY TO CONSENT TO A SEARCH OF THE VICTIM'S PHONE, DESPITE THE FACT THAT THE DEFENDANT

HAD A PRIVACY RIGHT UNDER WASHINGTON'S CONSTITUTION IN MESSAGES SENT FROM HER TO THE DECEDENT PRIOR TO THE DEATH OF THE DECEDENT
State v. Kelly, ___ Wn. App. 2d ___ , 2024 WL ___ (Div. III, September 10, 2024).....17
Here is a link to the Opinion in State v. Kelly:
https://www.courts.wa.gov/opinions/pdf/394115_pub.pdf

BRIEF NOTES REGARDING SEPTEMBER 2024 UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS ON SELECT LAW ENFORCEMENT ISSUES.....21

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: 3-JUDGE PANEL HOLDS THAT OFFICERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY ON PLAINTIFF'S FOURTH AMENDMENT CLAIM BECAUSE, VIEWING THE FACTS IN THE LIGHT MOST FAVORABLE TO PLAINTIFF, NINTH CIRCUIT CASE LAW HAS ESTABLISHED THAT OFFICERS VIOLATE THE CONSTITUTION IF THEY SHOOT A PEACEFUL PROTESTER IN THE GROIN WITH A FOAM BATON ROUND IN RETALIATION FOR HIS EXERCISING OF HIS FIRST AMENDMENT RIGHT TO FREE SPEECH

In Sanderlin v. Dwyer, ___ F.4th ___ , 2024 WL ___ (9th Cir., September 4, 2024), the law enforcement version of the facts (contending that Plaintiff was purposely screening for two apparently dangerous rioters armed with gallon paint can weapons at the point when an officer shot him in the groin with a 40mm foam baton round) is dramatically different from the Plaintiff's version of the facts (Plaintiff contends that at the point when he was hit by the foam baton round, he was merely protesting and was not purposely screening for anyone).

The 3-judge Ninth Circuit panel rules that a reasonable jury could construe the evidence in the record as establishing a violation of the Fourth Amendment and First Amendment by the officer who shot the foam baton round. That part of the ruling is addressed below in this Legal Update, but this Legal Update entry does not discuss the further ruling by the Ninth Circuit holding that: (1) the case law was clearly established in this regard at the time that the officer shot the foam baton round, and (2) the officer therefore is not entitled to qualified immunity.

A Ninth Circuit staff summary (which is not part of the Ninth Circuit's Opinion) provides the following brief synopsis of the Sanderlin Opinion:

> The panel affirmed the district court's denial of qualified immunity to San Jose Police Officer Michael Panighetti in Derrick Sanderlin's 42 U.S.C. § 1983 action alleging that Panighetti used retaliatory and excessive force against him in violation of his First and Fourth Amendment rights.
>
> While attending a protest, Sanderlin was struck in the groin by a 40mm foam baton round, fired directly at him by Panighetti.
>
> The panel held, that viewing the evidence in the light most favorable to Sanderlin, genuine disputes of material fact existed as to whether Panighetti's use of force was

retaliatory in violation of the First Amendment because (1) resolving the disputed facts in Sanderlin's favor, he was engaged in the protected activity of peacefully protesting, and (2) it is clearly established that police officers may not use their authority to retaliate against individuals for protected speech.

The panel held, that viewing the evidence in the light most favorable to Sanderlin, genuine disputes of material fact existed as to whether Panighetti's use of force was excessive in violation of the Fourth Amendment because (1) Panighetti's act of firing a projectile at Sanderlin constituted a seizure under the Fourth Amendment, (2) a triable issue of fact existed as to the reasonableness of the force used by Panighetti, and (3) although subsequent legal developments [in Fourth Amendment case law] narrowed the scope of seizures under the Fourth Amendment, the right violated was clearly established at the time of the incident.

The Sanderlin Opinion provides the following description of the facts:

[Officer] Panighetti testified in his deposition that as he approached the intersection of Santa Clara Street and 5th Street, he had been monitoring an individual wearing a San Francisco 49ers jersey who had been throwing objects at police officers and hiding behind corners. When [the officers] reached the intersection, Panighetti observed that individual in the 49ers jersey, along with another person, hiding behind the corner of a building.

Panighetti claimed that he was able to continue to visually monitor the two subjects because the building was glass all around the first floor. Panighetti then explained that he saw those two subjects holding gallon paint cans, and he believed they were poised to throw the paint cans at police officers. At one point, the subjects pushed a dumpster into the intersection and attempted to hide behind it.

At that point, a man later identified as Sanderlin moved into the sidewalk while carrying a sign over his head. Panighetti claimed that Sanderlin purposefully placed himself in front of officers to block the two subjects holding paint cans and hiding behind the dumpster. In video footage captured by Panighetti's body-worn camera, Sanderlin is seen standing on the sidewalk holding a sign, and a dumpster is behind him. The video does not clearly show the two subjects allegedly holding paint cans that Panighetti describes, though there is clearly a chaotic scene unfolding around this encounter.

In the video, Panighetti can be heard yelling to Sanderlin, "I'm going to hit you, dude. You better move!" Sanderlin fails to immediately comply, continuing to stand in the sidewalk holding his sign over his head. After only a few seconds, Panighetti fires a 40mm foam baton at Sanderlin, striking him in the groin area.

Sanderlin recoils from the impact and appears to take a few steps, shifting his weight between his feet in pain. He then limps out of the middle of the sidewalk, at which point he is no longer visible in the video footage.

According to Sanderlin, he and his wife, co-plaintiff Cayla Sanderlin, attended the protest on May 29 together. His wife indicated that she wanted to leave, but Sanderlin felt compelled to stay to show solidarity with his fellow demonstrators. At around 6:20 p.m., Sanderlin was standing near the intersection of East Santa Clara Street and 5th Street.

> In his declaration, Sanderlin stated that he was not posing a threat nor was he invading the personal space of any officers or attempting to shield any subjects from the police.
>
> Sanderlin stated he was merely standing with his hands over his head, imploring the officers to stop shooting other protestors. Sanderlin further stated he did not hear any warnings or instructions to move at the time he was shot by Panighetti. Sanderlin asserted that after Panighetti shot him, he fell to the ground immobile, and no officers rendered aid. His wife found him lying alone near the intersection of East Santa Clara Street and 5th Street, and she helped him stand and walk away. As a result of being shot in the groin, Sanderlin suffered severe injuries that required emergency surgery.

[Some of the paragraphing revised for readability]

A key part of the legal analysis in the Sanderlin Opinion reads as follows:

> To establish a claim for retaliatory violation of the First Amendment, Sanderlin must show (1) that he was engaged in a constitutionally protected activity; (2) that Panighetti's actions would "chill a person of ordinary firmness from continuing to engage in the protected activity;" and (3) that "the protected activity was a substantial or motivating factor in [Panighetti's] conduct." . . .
>
> [Officer] Panighetti argues that there are no genuine disputes of material fact as to the first and third elements. As to the first, Panighetti argues that Sanderlin was blocking Panighetti and other officers from taking action against the suspects standing behind the dumpster. Such obstruction of officers in their official duties, Panighetti argues, is not a constitutionally protected activity.
>
> But that argument assumes the truth of Panighetti's version of the facts, and at this stage of the proceedings, we must construe the evidence in the light most favorable to Sanderlin [Plaintiff]. ,. . . Whether or not Sanderlin was in fact obstructing officers, rather than engaging in the protected activity of peacefully protesting, will turn on whether a factfinder eventually credits Panighetti's description of the circumstances surrounding the shooting.
>
> According to Sanderlin, he was merely standing peacefully on the sidewalk holding the sign. Resolving the disputed facts in Sanderlin's favor, he was engaged in protected First Amendment activity.
>
> That brings us to the third element, which also turns on the same dispute of fact. If a factfinder concludes that there was no legitimate justification for Panighetti's actions, they could reasonably infer that those actions were motivated by retaliatory animus. . . .
>
> For these reasons, we agree that, when all factual disputes are resolved and all reasonable inferences are drawn in Sanderlin's favor, Panighetti's acts violated clearly established law. It is clearly established that police officers may not use their authority to retaliate against individuals for protected speech. . . .
>
> . . . .
>
> Ultimately, on this record, the reasonableness of the force used by Panighetti thus turns on "how the jury interprets the video footage, and whether the jury credits Panighetti's

> testimony that Sanderlin was blocking the police from targeting the two individuals behind the dumpster." To the extent that the jury discredits Panighetti's account or believes that Panighetti failed to consider other less intrusive tactics, it could determine that the use of force was unreasonable. . . .

[Case citations omitted; some paragraphing revised for readability]

Result: Reversal of the ruling of the U.S. District Court (Northern District of California) that granted summary judgment for Officer Panighetti; case remanded for trial.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: QUALIFIED IMMUNITY IS DENIED TO AN OFFICER ON GROUNDS THAT (1) VIEWING THE ALLEGATIONS IN THE LIGHT MOST FAVORABLE TO PLAINTIFF, THE OFFICER'S USE OF FORCE THAT INCLUDED EXTENDED PERIOD OF KNEELING ON AN ARRESTEE'S BACK AND NECK WAS EXCESSIVE FORCE; AND (2) AT THE TIME OF THE EVENT, A REASONABLE OFFICER WOULD HAVE BEEN AWARE OF THE CLEARLY ESTABLISHED CASE LAW AGAINST HIS ACTIONS

In Spencer v. Pew, ___ F.4th ___ , 2024 WL ___ (9th Cir., September 16, 2024), a three-judge panel is unanimous in ruling that a trial is needed to determine whether a law enforcement officer is liable in a case involving the officer's use of force against a combative arrestee where the officer's use of force included an extended period of kneeling on the arrestee's neck and back during which the arrestee complained of breathing difficulty.

A Ninth Circuit staff summary (which is not part of the Court's opinion) provides the following synopsis of the Court's Opinion:

> The panel affirmed in part and reversed in part the district court's summary judgment in favor of four law enforcement officers in plaintiff's 42 U.S.C. § 1983 action alleging the officers used excessive force during his arrest.
>
> The panel first considered whether Officers Pew, Rozema, and Macklin violated plaintiff's clearly established rights with respect to the force that they used to secure plaintiff's hands in two linked sets of handcuffs. As to this force, the panel affirmed the district court's grant of qualified immunity based solely on the second, "clearly established law" prong of the qualified immunity test. Given that this was not an obvious case and there was no precedent that squarely governed, the panel concluded that defendants were entitled to qualified immunity with respect to their use of force up to the point that plaintiff was handcuffed.
>
> Plaintiff also alleged that Officer Pew violated his clearly established Fourth Amendment rights by kneeling on his upper back and neck and by continuing to do so after he protested that it was difficult for him to breathe. Viewing the facts in light most favorable to plaintiff, the panel concluded that Pew's conduct violated clearly established law. Accordingly, in that respect, the panel reversed the district court's grant of qualified immunity to Pew.
>
> Finally, the panel considered whether any of the other officers were also liable for Pew's excessive force. Under this circuit's caselaw, an officer may be culpable for a constitutional violation committed by another officer if the former "is an 'integral participant' in the unlawful act" of the latter. Peck v. Montoya, 51 F.4th 877, 889 (9th Cir.

2022). The panel concluded that plaintiff failed to present sufficient evidence to create a triable issue of liability as to any other of the other officers.

The panel remanded for proceedings with respect to Officer Pew, and otherwise affirmed the district court's summary judgment to all defendants.

The Spencer Opinion describes as follows (1) the factual allegations in Plaintiff's favor, and (2) the uncontested video evidence

> Because this appeal arises from a grant of summary judgment, we view the evidence in the light most favorable to Spencer and draw all reasonable inferences in his favor. Scott v. Harris, 550 U.S. 372, 378 (2007). Accordingly, where Spencer's sworn statements directly contradict Defendants' statements, we disregard the latter and credit the former. However, to the extent that the uncontested video evidence from the officers' body cameras establishes the timing and occurrence of events, we "view[] the facts in the light depicted by the videotape." [Scott v. Harris, 380–81. With those principles in mind, we take the following facts as true for purposes of this appeal.
>
> On March 21, 2018, Mesa Police Department ("MPD") Officers Aaron Pew and Jacob Rozema were driving in an unmarked police vehicle on a street in Mesa, Arizona when another vehicle exiting a driveway pulled out right in front of them. Officer Pew, who was driving the police vehicle, had to "slam on his brakes" in order to avoid colliding with the other vehicle. The officers pulled over the other vehicle for having made an "unsafe and illegal traffic maneuver." Jamie Kern was driving the other vehicle, and Plaintiff Cole Spencer was in the front passenger seat. Spencer appeared visibly nervous as he spoke with the officers, and when asked to identify himself, he falsely stated that his name was "Kenneth Cory." Officer Rozema conducted an immediate records check, which indicated that Spencer did not match the DMV photograph for "Kenneth Cory." At that point, Rozema asked Spencer to step out of the vehicle and to "put his hands behind his back." Rozema told Spencer that he was under arrest, although the parties dispute whether Rozema also informed Spencer that the arrest was for "false reporting."
>
> As Spencer stepped out of the vehicle, Rozema grabbed and twisted Spencer's wrist.2
>
> > Court's Footnote 2: *There is no video or audio evidence in the record concerning this initial portion of the encounter with Spencer, which involved only Officers Pew and Rozema.*
>
> Spencer then "pushed Rozema with his left shoulder," hitting him in the chest. While Rozema continued to hold Spencer's wrist, one of the officers punched Spencer in the face, knocking Spencer to the ground. It was undisputed in the district court that, from this point forward, Spencer was not successfully handcuffed until after "approximately three-and-a-half minutes of wrestling with [Spencer]" by the officers.
>
> Over the course of the ensuing struggle, Pew deployed a taser against Spencer at least four times, including the specific taser uses that we will discuss momentarily. On the first occasion, the taser was deployed in "probe" mode — meaning that "the taser shot two small, electrically charged probes onto Mr. Spencer"— but Spencer was able to remove the probes from his neck. For the remaining three deployments, the taser was in "drive-stun" mode, meaning that Pew "activated the taser's electrical contact points and held the device to Mr. Spencer's body." During this time, Spencer was also repeatedly

punched and kicked in the face by the officers. Spencer acknowledges that the officers instructed him to give up his hands and that he did not do so, but he claimed that he told the officers that his hands were "locked up" from the effects of the taser. Spencer denies "throw[ing] a punch, a kick or any type of strike towards any officer" at any point during this struggle with the officers.

At some point after the struggle began, Deputy Kevin Shall from the Maricopa County Sheriff's Office ("MCSO") arrived. Unlike the MPD officers, the various MCSO deputies who arrived had body cameras that captured much of the ensuing events, and we therefore rely primarily on that video and audio evidence in recounting what happened from that point forward. [Scott v. Harris, 550 U.S. at 380–81].

At the time Shall arrived, Pew, Rozema, and Spencer were on a patch of dirt separating the main road from a dead-end parallel frontage road. Pew and Rozema were kneeling over Spencer who was lying on the ground, and they were attempting to handcuff him. Shall stayed with Kern, who was still seated in his vehicle nearby, and Shall at this point did not attempt to assist the officers in subduing Spencer

As Pew and Rozema struggled with Spencer, one of the officers yelled at him, "Put your hands behind your back! Hands behind your back!" Spencer can be heard saying something about his "hands" in response. This was followed by the sound of a taser, and Spencer then screamed, "I have a pacemaker!" At this point in the struggle, Spencer had shifted to being on his knees, with his head bent down towards his knees, and Officers Pew and Rozema were above Spencer, still attempting to handcuff him. As the officers continued to struggle with Spencer, one of them shouted, "Why are you resisting? Put your hands behind your back!"

Just at this point, Deputy Macklin arrived. As Macklin approached, Spencer was on his back, and one of the officers punched Spencer in the stomach. Spencer then turned to his side. Officer Pew pressed Spencer's face into the dirt as one of them stated, "Relax your arm, my man." Deputy Macklin began to assist Officers Pew and Rozema in subduing Spencer, and the officers managed to turn him onto his stomach. While pinning Spencer's head to the ground, Officer Pew repeatedly struck Spencer in the face with his knee.3

> Court's Footnote 3: According to his post-incident report, Officer Pew wrote that he (1) "delivered 3–4 knee strikes to [Spencer's] face with negative results," (2) "shoved [Spencer's] face into the ground 3–4 times," and (3) "placed [Spencer's] head between my knees with his head face down, put [m]y thumbs on the back of his neck . . . where I believed his carotid artery was located and squeezed . . . hoping [Spencer] would go unconscious, so we could control him."

Pew then grabbed Spencer's head and slammed it into the ground twice. With Macklin lying on top of Spencer to pin him down, one of the officers instructed another to "grab his left arm." Around this time, a third MCSO officer, Sergeant Clark, arrived and approached the officers and Spencer, but he did not intervene. As the officers tried to handcuff Spencer, one of them again told him, "Put your hand behind your back."

Pew then placed Spencer's head between his knees, and, while swearing, picked up Spencer's head and slammed it into the ground several times. Pew tasered Spencer in the neck for approximately 12 seconds, before then beginning to apply pressure to

Spencer's carotid artery using what he called in his police report the "carotid control technique." While he was doing so, an officer again instructed Spencer, "Put your hand behind your back!" Simultaneously, another officer had handcuffed Spencer's left hand and was attempting to handcuff his other hand.

An officer asked, "where's the other hand?" The officers were unable to bring Spencer's hands close enough to secure him in a single set of handcuffs, and so they chained two sets of handcuffs together in order to connect Spencer's left and right hands. Shortly thereafter, an officer said, "Clasp it, clasp it, clasp it, there you go." At that point, Spencer's right arm was also handcuffed. Around this point, Pew ceased applying pressure to Spencer's neck.

Once Spencer was handcuffed, Deputy Macklin, who had been laying on top of Spencer, picked himself up to his knees. Spencer was face down, and given the slack in his double-handcuffs, he was able to move his hands toward his side. One of the officers said, "Stop! We're going to f**k you up unless you put your hands behind your back." Another officer said, "Hey, next time don't lie to me about your name."

Pew got up and placed a knee on Spencer's upper back, as another officer asked, "You gonna tell me your name?" As Spencer lay on the ground with Pew's knee on his upper back, Pew said, "Stop f**king kicking me." Spencer squirmed on the ground, saying "please stop!" and "please help me!" Pew continued to place his knee on Spencer's upper back, as Spencer said, "I can't breathe. I cannot breathe." An officer responded by telling him "Ok, well relax!" while another said, "If you're screaming and fighting, man, you can breathe. You need to calm down." The camera revealed that Spencer's face was covered in blood.

Spencer attempted to turn himself so that he would not be on his stomach, but Pew flipped him back over and held him down with his knee. Spencer continued to complain that he could not breathe, and the officers allowed him to turn onto his right side. Pew stood up a few seconds later. The officers then held him down by pressing on his left arm while Macklin continued to kneel and straddle Spencer's legs. Shall then took Macklin's place. Spencer asked Shall to get off his legs, and he also asked to be able to move back to lying on his stomach, but the officers said no.

About 30 seconds later, however, they did allow him to move back onto his stomach. For the next several minutes, one or more officers held Spencer in place while Shall remained straddled over his legs. At one point, Spencer said, "Please untighten it," and an officer responded, "Hold on, Fire's here and they're going to check you out." Subsequently, an officer said, "Hey, Fire's gonna come over here and look at you, you're not gonna act stupid are you?" Spencer was then asked his name, and he responded that it was "Cole Spencer." Emergency medical personnel then arrived to attend to Spencer.

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

Result: Reversal of U.S. District Court (Arizona) grant of qualified immunity to Officer Pew; case remanded for trial.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY RELATING TO DEALING WITH PRE-TRIAL DETAINEES: 3-JUDGE PANEL RULES IN PART IN FAVOR OF PLAINTIFF IN HOLDING THAT ARIZONA'S MARICOPA COUNTY JAIL PRACTICE VIOLATES PRETRIAL DETAINEES' SUBSTANTIVE DUE PROCESS RIGHTS BY POSTING PHOTOGRAPHS OF ARRESTEES AND IDENTIFYING INFORMATION ON AN AGENCY MUGSHOT LOOKUP WEBSITE

In Houston v. Maricopa County, ___ F.4th ___ , 2024 WL ___ (9th Cir., September 5, 2024), a three-judge Ninth Circuit panel affirms in part and reverses in part the U.S. District Court's dismissal of a class action brought by Brian Houston alleging that Maricopa County's policy of posting photographs and identifying information of arrestees on its Mugshot Lookup website violated his rights to substantive and procedural due process and to a speedy public trial. The Ninth Circuit rules in favor of Plaintiff only on his substantive due process claim. That issue is apparently remanded to the U.S. District Court for further proceedings.

The Ninth Circuit panel notes that the right to substantive due process protects pretrial detainees from punishment before there has been an adjudication of guilt. To constitute punishment, a government action must (i) harm a detainee and (ii) be intended to punish him. A fact that is important to the Ninth Circuit's assessment of harm to the detainee is the fact that the photographs posted on the Mugshot Lookup website are often gathered by other internet sites and thus remain available after they are removed from the County website, even if the arrestee is never prosecuted or convicted.

A Ninth Circuit staff summary (which is not a part of the Court's Opinion) explains further as follows regarding the overturning of the dismissal of the substantive due process claim:

> Houston sufficiently alleged that, as a pretrial detainee, the Mugshot Lookup post caused him to suffer actionable harm — public humiliation and discomfort compounded by reputational harm. Although Houston's Mugshot Lookup post was not a condition of his pretrial detention, governmental actions that harmfully affect arrestees pretrial can violate due process if impermissibly punitive.
>
> Even if the County's assertion of transparency, without more, was a legitimate nonpunitive government interest, no rational relationship existed between that goal and the County's gratuitous inclusion of at least some of Houston's personal information on its Mugshot Lookup post. Absent a rational relation between the post and the County's interest, an inference that the post was motivated by punitive intent was plausible and so precluded dismissal.

[Some paragraphing revised for readability]

Result: Affirmance in part and reversal in part of order of U.S. District Court (Arizona) that dismissed the would-be class action lawsuit brought by Plaintiff; the case is remanded to the District Court for further proceedings.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LAWSUIT REGARDING SECOND AMENDMENT: 3-JUDGE NINTH CIRCUIT PANEL RULES IN BRUEN-BASED CONSTITUTIONAL INTERPRETATION IN FAVOR OF MOST, BUT NOT ALL, OF THE HAWAII AND CALIFORNIA STATUTORY RESTRICTIONS ON BRINGING FIREARMS – EVEN IF THE

PERSON HAS A CONCEALED PISTOL LICENSE – ONTO CERTAIN SPECIFIED SENSITIVE TYPES OF PROPERTY

Wolford v. Lopez, ___ F.4th ___ , 2024 WL ___ (9th Cir., September 6, 2024)

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LEGAL UPDATE EDITOR'S PRELIMINARY NOTE: The Wolford decision by the Ninth Circuit digested below appears to validate some Washington statutes restricting bringing firearms onto certain types of some sensitive types of property, but in addition the Wolford decision either (1) indicates invalidation of one or more other State of Washington statutory provisions in this area of law, or (2) leaves questions as to some other such provisions. The Legal Update will not try to provide comprehensive analysis addressing the various Washington statutory provisions impacted. If I become aware of a useful resource in this regard, the information will be provided in a future edition of the monthly Legal Update. If any reader becomes aware of such a useful resource, I would appreciate being informed. Most of the relevant Washington statutory provisions are at:

RCW 9.41.280
Possessing dangerous weapons on school facilities—Penalty—Exceptions.
https://app.leg.wa.gov/RCW/default.aspx?cite=9.41.280

RCW 9.41.282
Possessing dangerous weapons on child care premises—Penalty—Exceptions.
https://app.leg.wa.gov/RCW/default.aspx?cite=9.41.282

RCW 9.41.284
Possessing dangerous weapons at voting facilities—Penalty—Exceptions.
https://app.leg.wa.gov/RCW/default.aspx?cite=9.41.284

RCW 9.41.300
Weapons prohibited in certain places—Local laws and ordinances—Exceptions—Penalty.
https://app.leg.wa.gov/RCW/default.aspx?cite=9.41.300

RCW 9.41.305
Open carry of weapons prohibited on state capitol grounds and municipal buildings.
https://app.leg.wa.gov/RCW/default.aspx?cite=9.41.305

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In Wolford v. Lopez, ___ F.4th ___ , 2024 WL ___ (9th Cir., September 6, 2024), a three-judge Ninth Circuit panel upholds most of the State of Hawaii and State of California statutory restrictions on bringing a firearm onto certain specified types of real property, even when the person has a concealed pistol license. A Ninth Circuit staff summary (which is not part of the Ninth Circuit Opinion), provides the following synopsis of the Court's Opinion:

> The panel affirmed in part and reversed in large part district court orders preliminarily enjoining the implementation or enforcement of several provisions of Hawaii and California laws that prohibit the carry of firearms at sensitive places.

Hawaii generally prohibits a person with a carry permit from bringing a firearm onto fifteen types of property, and generally prohibits the carry of firearms onto private property unless the owner allows it.

California generally prohibits a person with a concealed carry permit from carrying a firearm onto more than two dozen types of property. California also generally prohibits the carry of firearms onto private property that is open to the public unless the owner allows it by clearly posting a sign at the entrance to the premises indicating that license holders are permitted to carry firearms onto the property.

Plaintiffs, individuals with concealed-carry permits and various organizations whose members hold concealed-carry permits, brought actions against the Attorney General of the State of Hawaii and the Attorney General of the State of California, alleging that the laws violate their Second Amendment right to keep and bear arms.

Applying the guidance in [the United States Supreme Court decision in [New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022)], on how to determine what kinds of places qualify as sensitive places such that firearms may be prohibited, the panel held that some — but not all — of the places specified by the Hawaii and California laws likely fall within the national tradition of prohibiting firearms at sensitive places.

The panel concluded that the proper approach for determining whether a place is sensitive is as follows: For places that have existed since the Founding [of the United States of America], it suffices for [the government agencies] to identify historical regulations similar in number and timeframe to the regulations that the Supreme Court cited as justification for designating other places as sensitive.

For places that are newer, [the government agencies] must point to regulations that are analogous to the regulations cited by the [United States] Supreme Court, taking into account that it is illogical to expect a government to regulate a place before it existed in its modern form. Historical regulations need not be a close match to the challenged law; they need only evince a principle underpinning our Nation's historical tradition of regulating firearms in places relevantly similar to those covered by the challenged law.

Applying these principles to the Hawaii statute, the panel affirmed the district court's preliminary injunction to the extent that it enjoins restrictions on firearms at financial institutions, parking lots adjacent to financial institutions, and parking lots shared by government buildings and nongovernmental buildings. The panel reversed the preliminary injunction to the extent that it enjoins restrictions on firearms at bars and restaurants that serve alcohol; at beaches, parks, and similar areas; and in parking areas adjacent to all of those places.

The panel also reversed the preliminary injunction with respect to the new default rule prohibiting the carry of firearms onto private property without consent. **[LEGAL UPDATE EDITOR'S NOTE: The Ninth Circuit panel states that "Hawaii's law allows a property owner to consent orally, in writing, or by posting appropriate signage on site. Haw. Rev. Stat. § 134-9.5(b)."]**

Applying these principles to the California statute, the panel affirmed the district court's preliminary injunction [based on invalidity of the statutes under the Second Amendment]

to the extent that it enjoins restrictions on firearms at hospitals and similar medical facilities, public transit, gatherings that require a permit, places of worship, financial institutions, parking areas and similar areas connected to those places.

The panel also affirmed the district court's preliminary injunction with respect to the new default rule as to private property. **[LEGAL UPDATE EDITOR'S NOTE: The Ninth Circuit panel states that "California's law . . . allows a property owner to consent only by "clearly and conspicuously post[ing] a sign at the entrance of the building or on the premises indicating that license holders are permitted to carry firearms on the property." Cal. Penal Code § 26230(a)(26).**]

The panel reversed the preliminary injunction to the extent it enjoins restrictions prohibiting firearms at bars and restaurants that serve alcohol, playgrounds, youth centers, parks, athletic areas, athletic facilities, most real property under the control of the Department of Parks and Recreation or the Department of Fish and Wildlife, casinos and similar gambling establishments, stadiums, arenas, public libraries, amusement parks, zoos, and museums; parking areas and similar areas connected to those places; and all parking areas connected to other sensitive places listed in the statute.

[Some paragraphing revised for readability]

The Court's Opinion includes a long "Conclusion" that provides some important clarifications as to what the Court is addressing and what the Court is not addressing:

Having concluded the historical analysis required by Bruen and the Supreme Court's other Second Amendment cases, we close with a few general observations.

First, taking a step back from the historical analysis, the lists of places where a State likely may ban, or may not ban, the carry of firearms appear arbitrary. A State likely may ban firearms in museums but not churches; in restaurants but not hospitals; in libraries but not banks.

The deep historical analysis required by the Supreme Court provides the missing link, but the lack of an apparent logical connection among the sensitive places is hard to explain in ordinary terms. In addition, the seemingly arbitrary nature of Second Amendment rulings undoubtedly will inspire further litigation as state and local jurisdictions attempt to legislate within constitutional bounds.

Second, we stress that owners of private property remain free to ban the carry of firearms on their private property. Nothing in the Second Amendment disturbs that basic background principle of property law. For the places where we hold that the States likely may not prohibit the carry of firearms, the practical effect of our ruling is merely that private-property owners may choose to allow the carry of firearms. Owners of hospitals, banks, and churches, for example, remain free to ban firearms at those locations.

Finally, we emphasize that an analysis about the constitutional limits of what a State may ban has no effect whatsoever on the choice by legislatures in other States not to ban the carry of firearms. . . . That is, a ruling that California permissibly may ban the carry of firearms in, for example, museums does not have any effect on the choice by other States not to ban firearms in museums. Persons residing in other States are

unaffected by California's law or Hawaii's law — or our decision — unless, of course, they choose to travel to California or Hawaii with firearms

[Case citations omitted; some paragraphing revised for readability; bolding added by Legal Update Editor]

Result: Affirmance in part, reversal in part of rulings of U.S. District Courts in California and Hawaii that had broadly enjoined enforcement of a wide range of statutory provisions for California and Hawaii banning possession .

LEGAL UPDATE EDITOR'S NOTE: Many amicus briefs were filed in the Ninth Circuit in this case; participating in that process was the Attorney General of the State of Washington. I have not read the amicus brief that was signed by the Attorney General the State of Washington.

CIVIL RIGHTS ACT SECTION 1983 LAWSUIT REGARDING EXCESSIVE FINES CLAUSE OF U.S. CONSTITUTION: DOUBLING OF PENALTY FOR LATE PAYMENT OF PARKING TICKET IS QUESTIONED IN 2-1 DECISION BY A NINTH CIRCUIT PANEL THAT REMANDS FOR PROOF OF JUSTIFICATION

In Pimentel v. City of Los Angeles, ___ F.4th ___ , 2024 WL ___ (9th Cir., September 9, 2024), a 3-judge Ninth Circuit votes 2-1 to reverse a U.S. District Court's summary judgment order that had ruled for the City of Los Angeles in a class action challenging the City's 100% penalty for not timely paying parking meter tickets.

Plaintiffs contend that the 100% penalty – in this case tacking an extra $63 (a 100% penalty) to the original fine of $63 – for failure to timely pay a fine for a parking meter violation violates the disproportionality prohibition of the Eighth Amendment's Excessive Fine Clause. The Pimentel Majority Opinion asserts that the Court cannot determine the gross disproportionality issue as a matter in this case because the City provided no evidence on how it set the $63 late fee amount.

The case is remanded to the District Court, apparently to allow the City to present proof regarding justification for the 100% penalty.

The Dissenting Opinion appears to essentially argue that making a federal Civil Rights Act case out of a $63 fine trivializes the Constitution.

Result: Reversal of order of U.S. District Court (Central District of California) that granted summary judgment to the City of Los Angeles; case is remanded, apparently to give the City of Los Angeles an opportunity to present evidence or argument that justifies a doubling, as a penalty for late payment, of the original parking violation fine.

CIVIL RIGHTS ACT SECTION 1983 LAWSUIT: BY A 2-1 VOTE, PLAINTIFF LOSES A FIRST AMENDMENT-BASED CLAIM OF EMPLOYER RETALIATION; COURT RULES THAT STATEMENTS OF PLAINTIFF DID NOT ADDRESS "MATTERS OF PUBLIC CONCERN"

In Adams v. County of Sacramento, ___ F.4th ___ , 2024 WL ___ (9th Cir., September 9, 2024), a 2-1 vote by a Ninth Circuit panel rejects Plaintiff's claim that her employer violated the First

Amendment by forcing her resignation based on text messages that Plaintiff sent to a friend complaining that another person was sending racist images. The Majority Opinion concludes that the text message sent by the Plaintiff did not relate to "matters of public concern" and therefore could not support her Free Speech-based Civil Rights Act lawsuit.

A Ninth Circuit staff summary provides the following synopsis of the Majority Opinion and the Dissenting Opinion:

> In an interlocutory appeal, the panel affirmed the district court's dismissal of First Amendment retaliation and derivative conspiracy claims brought by Kate Adams, the former Chief of Police for the City of Rancho Cordova, alleging that she was forced to resign from her post over allegations that while working for the Sacramento County Sheriff's Office she sent racist text messages.
>
> In evaluating the First Amendment rights of a public employee, the threshold inquiry is whether the statements at issue substantially address a matter of public concern. Speech involves matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest.
>
> The panel examined the plain language, form, and context of Adams's two text messages, and held that under the circumstances presented by this case, sending private text messages to two friends during "a friendly, casual text message conversation," forwarding offensive racist spam images, and complaining about the images does not constitute "a matter of legitimate public concern" within the meaning of Pickering v. Board of Education, 391 U.S. 563 (1968). Adams's speech was one of personal interest, not public interest. Accordingly, the panel affirmed the district court's dismissal of Adams's First Amendment retaliation and conspiracy claims.
>
> Dissenting, Judge Callahan stated that Adams should have the chance to hold the County accountable for its harsh reaction to her speech. The public concern test should be applied leniently in this case where Adams's speech did not fall within the realm of workplace grievances, had no arguable impact on her employer, and touched on matters of social or political concern.

Result: Affirmance of order of U.S. District Court (Eastern District of California) dismissed the lawsuit of Kate Adams.

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WASHINGTON STATE COURT OF APPEALS

MIRANDA INVOCATION: STATEMENT BY CUSTODIAL SUSPECT TO AN OFFICER TO THE EFFECT THAT – "IF I AM UNDER ARREST AS A SUSPECT, THEN I WANT AN ATTORNEY" – IS HELD TO HAVE BEEN "NOT EQUIVOCAL" REGARDING WHETHER HE WANTED AN ATTORNEY, AND THE STATEMENT WAS THEREFORE A CLEAR INVOCATION OF HIS RIGHT TO ATTORNEY AT A POINT WHEN HE WAS IN FACT BOTH IN CUSTODY AND UNDER ARREST AS A SUSPECT

In State v. Gardner, ___ Wn. App. 2d ___ , 2024 WL ___ (Div. III, September 24, 2024), Division Three of the Court of Appeals rules that a statement by a suspect in custody to an

officer to the effect that (closely paraphrasing) – "if I am under arrest as a suspect, then I want an attorney" – was an unequivocal invocation under Miranda of the defendant's right to an attorney. Therefore, statements that defendant subsequently made to his interrogators after that invocation should not have been admitted in the State's case in chief against defendant.

The Gardner Court rules further (in analysis not excerpted or summarized in the Legal Update) that the record does not contain sufficient untainted evidence that would support a ruling that the error by the trial court in admitting defendant's statements was harmless error. The case is therefore remanded to the trial court for re-trial.

FACTS: The Gardner Opinion sets forth the facts and trial court ruling on the Miranda issue:

> Gardner testified that Detective [A] had told him that if he did not come in for questioning he would be arrested. On June 13 an unmarked police car arrived at his parents' house and he was instructed to get in the car. Gardner said he was placed in handcuffs and then transported down to the mailboxes by his parents' house "where there was probably another 20 sheriff [sic] cars."
>
> He said that Detective [A] was there and Gardner told Detective [A] that if he "was under arrest for [sic] a suspect," he wanted an attorney. Detective [A] then ordered the handcuffs removed.
>
> Gardner was then transported to the sheriff's department where he said he subsequently asked both Detective [A] and Detective [B] if he was a suspect and said if he was, he would like an attorney present. He was told he was not a suspect. Detective [A] and Detective [B] then interviewed Gardner until he said he was done talking and they could talk to his attorney, at which point police arrested Gardner.
>
> The June 13 interview itself was played during the hearing. The video shows that after Gardner was advised of his Miranda rights and waived them, Detective [A] started out the interview by asking, "So, just so we can clear up some . . . additional stuff, you stated you wanted . . . to come over with an attorney?"
>
> Gardner responded that he had heard he was a suspect in the case from the Internet. Detective [B] told him, "You know how the media is." [Detective A] then distracted Gardner with additional conversation, and the interview continued.
>
> . . . .
>
> [T]he trial court concluded that Gardner was in custody at this time because a reasonable person in Gardner's position would have felt their freedom was curtailed to the degree associated with a formal arrest. However, the trial court further found Gardner's statements regarding an attorney were not unequivocal as to invoke his right to counsel and therefore concluded Gardner made a knowing, intelligent, and voluntary waiver of his rights. Accordingly, the court concluded Gardner's statements were admissible and denied his motion to suppress.

LEGAL ANALYSIS: The Gardner Opinion explains that in a custodial interrogation, the Miranda case law dictates that all questioning must stop at the point when a custodial suspect unequivocally (i.e., clearly) invokes the Miranda right to silence or to an attorney. The Gardner

Opinion notes that the State conceded in this case that the defendant was in Miranda custody at the point when he conditionally requested an attorney.

In detailed analysis not excerpted or summarized in this Legal Update entry, the Gardner Opinion discusses four appellate court precedents raised in briefing and oral argument by the State in the case, and the Gardner Opinion distinguishes all of the decisions based on differences in the facts of the cases.

Ultimately, the Gardner Opinion concludes in the following passage that the defendant's statement was a clear invocation of his right an attorney:

> Gardner made an unequivocal request for counsel if a condition [i.e., if he was under arrest as a suspect] was met. Police knew that the condition was met but continued to question Gardner in violation of Miranda. The subsequent Miranda warnings given to Gardner and Gardner's waiver did not cure any violation because further questioning cannot be used to undermine an unequivocal request for counsel. . . .

Result: Reversal of Yakima County Superior Court conviction of Randy Shea Gardner for first degree murder, second degree assault, first degree unlawful possession of a firearm, and felony harassment.

LEGAL UPDATE EDITOR'S NOTES: 1. Four appellate court decisions regarding Miranda invocation are discussed in some depth in the Gardner Opinion. The decisions are (1) State v. Piatnitsky, 180 Wn.2d 407 (2014); State v. Pierce, 169 Wn. App. 533 (2012); Smith v. Endell, 860 F.2d 1528 (9th Cir. 1988); and State v. Herron, 177 Wn. App. 96, 318 P.3d 281 (2013).

2. The Year-to-date Case Law Update on the website of the Washington Association of Prosecuting Attorneys (https://waprosecutors.org/caselaw/) provides the following summary of the ruling in State v. Gardner:

> **A conditional invocation of the right to an attorney is not necessarily equivocal. If a suspect makes an unequivocal request for an attorney predicated on a condition (here, "if I am a suspect, then I want an attorney") it is a conditional invocation which the police must respect if the condition is true. Since the defendant was a suspect at the time of the conditional (but unequivocal) invocation but was questioned without an attorney present, the statement is suppressed, even though there was a subsequent advisement with no invocation."**

UNDER ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION, WHERE PARENTS OF A DECEASED PERSON WERE HER SOLE HEIRS BY INTESTATE SUCCESSION (STATUTE-DETERMINED BECAUSE SHE HAD NO SPOUSE, AND THERE WAS NO WILL), THE PARENTS HAD AUTHORITY TO CONSENT TO A SEARCH OF THE VICTIM'S PHONE, DESPITE THE FACT THAT THE DEFENDANT HAD A PRIVACY RIGHT UNDER THE WASHINGTON CONSTITUTION IN MESSAGES SENT FROM HER TO THE DECEDENT PRIOR TO THE DEATH OF THE DECEDENT

In State v. Kelly, ___ Wn. App. 2d ___ , 2024 WL ___ (Div. III, September 10, 2024), defendant loses her appeal from her convictions for delivering hydrocodone and fentanyl to her now-deceased friend.

The decedent was single and without a will at the time of her death from an overdose from the drugs. After their daughter's death, the decedent's parents consented to a law enforcement search of the phone that the decedent had been using prior to her death. Messages on the phone from defendant to the decedent were incriminating on the drug delivery charges that are the basis for the prosecution of defendant Kelley.

The Kelly Court rejects defendant's argument that defendant's right of privacy under article I, section 7 of the Washington constitution was violated by the warrantless consent search of the phone. The Kelly Opinion relies on the Court's determination that the parents of the decedent inherited legal control of the phone at the moment of her death, and therefore the parents had authority to consent to a search of the phone after her death. Even though the defendant had a privacy interest under the Washington constitution in her messages to the decedent that law enforcement found on the phone, the parents' consent overrides that privacy interest under search and seizure law.

The Kelly Opinion describes as follows the key facts relating to (1) the legal interests in the phone, and (2) the messages on it:

> Before trial, Amber Kelly sought to suppress messages found on a cell phone used by Nichole Overton. Law enforcement had seized the phone after Nichole's demise. Father Phil Overton testified that he purchased multiple cell phones for Nichole, including the one confiscated and searched by law enforcement.
>
> Phil paid the cell phone's plan charges. The father did not expect to be repaid by Nichole for paying the bills. When asked if the phone was a gift to Nichole, Phil replied:
>
> > No, it was just an agreement. We had purchased the plan, a family plan for both of my daughters when they were very young, and we just had a family plan, and so as renewals or breakages happened, I would purchase a phone to replace it.
>
> Mother Laurie Overton declared that she did not expect to be repaid for the cost of Nichole's phone bills. When asked whether the phone was a gift, Laurie responded:
>
> > It was just something that we provided to them [her children] at a certain point in their lives.
>
> On May 22, 2021, Ashley Schavolt, [the decedent's] roommate, contacted Amber Kelly through Facebook messenger and requested hydrocodone. Kelly was Schavolt's only source for hydrocodone. By May 2021, Schavolt had ingested hydrocodone for two years. She began using the drug after an oral surgery. At trial, the State introduced as an exhibit a screenshot of Kelly and Schavolt's May 22 Facebook conversation. Schavolt later sent Kelly money over Facebook for two hydrocodone.
>
> At 11:08 p.m. on May 22, 2021, Amber Kelly sent Nichole Overton a Facebook message:
>
> > I have 1 I can give regardless, so hopefully I get them so you can have your 2. And Ashley is getting 2 dros if you could give them to her.

> "Dros" is shorthand for hydrocodone. The State introduced as a trial exhibit this message and other electronic communications between Kelly and Overton.
>
> At trial, Ashley Schavolt averred that, late on May 22, Nichole Overton returned home and brought her the two hydrocodone Schavolt had ordered from Amber Kelly. . . .

The Kelly Opinion asserts (1) that the State and the defendant each contend that ownership of the phone controls the issue of whether the parents of the deceased had authority to consent to a search of the phone; and (2) that the parties disagree regarding where the evidence leads on that question.

The Kelly Court disagrees with both parties regarding the significance of phone ownership in relation to the phone search, and the Court concludes that the right to control the phone under the law of intestate succession (with the parents as heirs in this case based on the RCWs) determines who had authority to consent to a search of the phone. The Court explains that the defendant did have a privacy interest under the Washington State constitution in her messages on the phone, but that the consent of the parents of the deceased overrides that interest:

> We depart from the parties and conclude that ownership does not act as the controlling factor when determining the party or parties authorized to consent to a search or seizure. Ownership stands as an important factor, but, in the end, the right to control possession and use of the object seized holds primacy. We conclude that, under Washington's law of intestate succession, Phil and Laurie Overton possessed the right to control the possession and use of Nichole Overton's cell phone when asked for authority to search by law enforcement. We do not decide whether the Overtons held such authority before the death of Nichole. We do not address the many cases cited by the parties in support of their respective contentions regarding ownership of the cellphone.
>
> . . . .
>
> Amber Kelly argues that the police search of Nichole Overton's cell phone before the issuance of the search warrant constituted an intrusion into a private affair because Kelly possessed a reasonable expectation of privacy in her Facebook message communications with Overton. If the State does not intrude unreasonably into someone's private affairs, no search has occurred and article I, section 7 has not been violated. State v. Bowman, 198 Wn.2d 609, 618 (2021); State v. Goucher, 124 Wn.2d 778, 783-84, (1994). The State argues that one has a limited right to privacy in electronic communications, but it does not deny that Kelly held a protected right to her communications even when found in Nichole Overton's cell phone. We conclude that Kelly possessed a constitutionally recognized privacy interest in the Facebook messages found on Overton's phone.
>
> To have standing to challenge a search and seizure, a defendant must have a privacy interest in the place or item searched. Our state Supreme Court has recognized that individuals possess a constitutionally protected privacy interest in information on their cellular devices. State v. Bowman, 198 Wn.2d 609, 618 (2021); State v. Samalia, 186 Wn.2d 262, 269 (2016).
>
> Amber Kelly did not own, possess, or control the use of Nichole Overton's cell phone. In State v. Hinton, 179 Wn.2d 862 (2014), the Washington Supreme Court addressed

whether a sender of text messages retained a privacy interest in his messages contained in the receiver of the message's cell phone. The Supreme Court resolved the issue on state constitutional grounds, holding Shawn Hinton retained a privacy interest in the text messages he sent to an associate's phone.

We move to the second element of the article 1, section 7 test. The "authority of law" component of section 7 demands a valid warrant unless the State shows that a search or seizure falls within one of the exceptions to the warrant requirement. State v. Hinton, 179 Wn.2d 862, 868-69 (2014). Consent is one of the exceptions. . . . The State has the burden of proving an exception applies. The State must show that any consent to search was voluntary, the consenting party had authority to consent, and the search did not exceed the scope of the consent. . . .

We could affirm the trial court's finding of consent on either one of two independent grounds: (1) Phil Overton retained ownership or control of the phone even though he delivered the phone to his daughter to use; or (2) control, if not ownership, of the phone passed to the parents immediately on Nichole's death. We affirm based on the second ground.

Article I, section 7 case law does not reference ownership of property when assessing effective consent to a seizure. Ownership may be in one person and the right of possession or control in another. . . . . At least in the setting of a residential landlord-tenant relationship, the owner of the premises generally lacks authority to consent. State v. Mathe, 102 Wn.2d 537, 544 (1984). Instead, a person must hold "authority" over the place or thing to be searched. State v. Cantrell, 124 Wn.2d 183, 187 (1994). Stated differently, the person bestowing consent must maintain a right to "control" over the property. . . . . Expectation of privacy in property relates to the authority to control the property. . . . That person can be one other than the accused. State v. Cantrell, 124 Wn.2d 183, 188 (1994).

. . . .

RCW 11.04.015 controls the descent and distribution of both real property and personal property of a decedent lacking a will. Nichole Overton died without a husband or children. Under RCW 11.04.015(2)(b), all of Overton's property passed to her parents, Phil and Laurie Overton. RCW 11.28.120(2) entitled the parents of Nichole Overton to administer the estate. Thus, we conclude that Phil and Laurie Overton had the right to control the cellphone and the right to authorize and seizure and search after Nichole's death.

Amber Kelly cites RCW 11.62.010(1) as instructing that Nichole Overton's parents did not gain ownership or control of the cellphone until forty days after the death of Nichole. The statute declares:

> Disposition of personal property, debts by affidavit, proof of death— Contents of affidavit—Procedure—Securities.
>
> (1) At any time after forty days from the date of a decedent's death, any person who is indebted to or who has possession of any personal property belonging to the decedent . . . shall pay such indebtedness or deliver such personal property, or so much of either as is claimed, to a person claiming to be a successor of the

> decedent upon receipt of proof of death and of an affidavit made by said person which meets the requirements of subsection (2) of this section.
>
> This statute does not address who has the right to control a decedent's property during the first forty days succeeding the death.
>
> . . . .
>
> Amber Kelly cites State v. Mathe, 102 Wn.2d 537 (1984) in support of her argument that, even if Nichole Overton's father owned the phone, Nichole still owned its contents. In State v. Mathe, the court ruled that the landlord of an apartment lacked authority to consent to search of the residence against the wishes of the tenant. Of course, the tenant remained alive at the time of the search. The decision lacks relevance to permission to search the contents of a cell phone after the phone user's demise.

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

Result: Affirmance of Whitman County convictions of Amber Dawn Kelly for delivery of hydrocodone and fentanyl.

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

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

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

The six entries below address the September 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. Mathew John Jagger: On September 3, 2024, Division One of the COA rejects the arguments of defendant and affirms the Snohomish County Superior Court convictions of defendant for (A) *attempted second degree rape of a child and* (B) *communication with a minor for immoral purposes via electronic communications*. The case arose from a law enforcement

sting using Facebook to catch defendant as an adult trying to arrange for sex with an underage person. The Jagger Court rejects defendant's several arguments, including his arguments that the trial Court erred in ruling (1) that testimony about defendant's alleged intellectual deficits from his forensic psychologist expert witness was not persuasive regarding defendant's claim that defendant lacked sufficient capacity to understand and waive his Miranda rights; and (2) that the corpus delicti rule does not apply to his statements.

- **On the Miranda issue, the Jagger Opinion concludes that the trial court's findings regarding defendant's ability to understand the Miranda warnings is supported by substantial evidence in the form of testimony from two detectives. The detectives separately Mirandized and interviewed the defendant, one at the scene of the arrest, and the other later that day at the stationhouse. The Jagger Court of Appeals notes that case law holds that substantial deference is given to the trial court's findings on validity of waiver, noting that the trial court can consider as evidence of voluntariness evidence relating to a defendant's demeanor, comprehension of events, memory of the crime, and participation in the interview.**

- **The corpus delicti rule generally requires that the elements of a crime be independently established as a prerequisite to admissibility of any out-of-court confession, admission, or other statement that a defendant made to anyone (whether or not to a law enforcement officer) where defendant was addressing his or her past conduct. On the corpus delicto issue, the Jagger Opinion concludes that defendant's statements to the fictional underage child (actually, of course, a law enforcement officer) were not subject to the restrictions of the corpus delicti rule because his transactional statements were part of the crimes of attempted second degree rape of a child and communication with a minor for immoral purposes via electronic communications. The Jagger Opinion includes the following analysis of the corpus delicti issue:**

  > **"Jagger's argument assumes the incriminating statements he made to 'Sara' were confessions. However, the statements constituted part of the crime. We have refused to apply the corpus delicti rule to exclude statements made before or during the commission of a crime. [See State v. Dyson, 91 Wn. App. 761, 763-64 (1988); see also State v. Pietrzak, 110 Wn. App. 670, 681- 82 (2002)].**
  >
  > **In Dyson, we rejected the argument that the defendant's statements covering negotiation and agreement for an act of prostitution were inadmissible because they were not corroborated by independent proof. The court defined "confession" as an "expression of guilt as to a past act" and held the corpus delicti rule did not apply because Dyson's statements were "made as part of the crime itself," and were not a confession to a completed crime. In Pietrzak, the State presented evidence that Pietrzak told people he disliked the victim and wanted to kill her. After Pietrzak made these statements, the victim disappeared. We held Pietrzak's incriminating statements made before the crime were not confessions and therefore did not require independent corroboration."**

  [Some citations omitted, others revised for style]

LEGAL UPDATE EDITOR'S RESEARCH NOTE REGARDING MIRANDA WAIVER: For some additional background information on case law relating to the proof of a valid (voluntary, knowing, and intelligent) waiver of rights under Miranda, see, on the Criminal Justice Training Commission LED page, pages 53 and 54 of Confessions, Search, Seizure and Arrest: A Guide for Police Officers and Prosecutors May 2015 By Pamela B. Loginsky, (former) Staff Attorney, Washington Association of Prosecuting Attorneys (note that although Ms. Loginsky is no longer with WAPA, and her Guide has not been updated since 2015, I believe that none of the cases discussed in the Guide regarding what I see as a relatively low bar for proof of a voluntary, knowing, and intelligent waiver under Miranda have been overruled by more recent appellate court decisions.

Here is a link to the Opinion in State v. Jagger:
https://www.courts.wa.gov/opinions/pdf/850377.pdf

2. State v. A.T.: On September 4, 2024, Division Two of the COA affirms the portion of the Lewis County Superior Court order adjudicating her guilty of *two counts of assault in the third degree*, but the Court of Appeals reverses the portion of the order adjudicating her guilty of *one count of interference with a health care facility*. The reversal of the latter charge is based upon the U.S. Supreme Court's definition of criminally "true threats" in the Court's interpretation of the First Amendment Free Speech clause in Counterman v. Colorado, 600 U.S. 66 (2023).

The facts relating to the Free Speech issue in the interference-with-a-health-care-facility prosecution involve the defendant making threats to kill or to otherwise cause physical harm to hospital staff who were forcibly changing her clothes during a mental health involuntary detention process at a hospital. Under Counterman, the prosecution must prove that the defendant had some subjective understanding of the threatening nature of his or her statements. The defendant must have been at least reckless in consciously disregarding a substantial risk that the statements that she made would be viewed by a reasonable person as threatening violence.

The Opinion of the Court of Appeals explains as follows the Court's view that the threats that A.T. was making to hospital personnel were not "true threats" under the Counterman standard:

> **Here, there was little to no evidence of A.T.'s subjective state of mind regarding the threats that she made. A.T. testified, but testified only that she did not want to change and began screaming and struggling in order to prevent hospital staff from cutting off her clothes and forcibly changing her into scrubs. A.T. did not testify specifically about the threats that she made to hospital staff. Furthermore, the threats that were shown on the body camera footage were made while A.T. was being forcibly restrained by multiple adults, therefore, it is not reasonable to infer that A.T. consciously disregarded a risk that her statements would actually be viewed as threats to harm hospital staff or kill anyone because there was no opportunity for A.T. to actually accomplish these actions. And although we recognize that A.T. was told that hospital staff had to treat her threats as though they were serious, that is reasonably understood to mean that hospital staff would react to her threats as though they were serious (i.e. call security, restrain her, etc.), not that hospital staff would actually believe her statements to be threatening violence.**
>
> **Given the specific facts presented here — a minor being detained for mental health issues and resisting hospital staff forcibly restraining her and stripping off her**

clothes—we cannot say that there was sufficient evidence to establish that A.T. was aware of, and consciously disregarded, a substantial risk that her statements would be viewed as threatening violence. Therefore, there was not sufficient evidence to satisfy the Counterman recklessness standard for establishing a true threat. Accordingly, we reverse A.T.'s adjudication for interfering with a health care facility.

Here is a link to the Opinion in State v. A.T.:
https://www.courts.wa.gov/opinions/pdf/D2%2058097-7-II%20Unpublished%20Opinion.pdf

3. Campbell v. City of Seattle.: On September 9, 2024, Division One of the COA affirms the King County Superior Court *order dismissing a lawsuit against the Seattle Police Department for failing to open an investigation*. The investigation would have been based on allegations of the Plaintiffs to the Seattle PD that Solomon Simone had unlawfully involved the Plaintiffs in sex trafficking and had been physically abusive to them. Plaintiffs argued that the Seattle PD had been negligent in its investigation of their complaints about Solomon Simone. **The Court of Appeals rules that the trial court lawfully granted the City's motion to dismiss because in essence the claim is based on a theory of "negligent investigation," which is not a cognizable claim against a law enforcement agency in Washington State.**

Here is a link to the Opinion in Campbell v. City of Seattle:
https://www.courts.wa.gov/opinions/pdf/860356.pdf

4. State v. Dalton Loren Smith.: On September 10, 2024, Division Two of the COA affirms the Pierce County Superior Court convictions of defendant for (A) *one count of unlawful possession of a firearm* and (B) *one count of failure to have an ignition interlock device.* In the introduction to the Opinion, the Court of Appeals summarizes the facts and the Court's ruling as follows:

> Deputy [A] and his partner responded to a call about an individual who had been passed out in the driver's seat of his vehicle at a gas station for three hours. After the deputies arrived and saw drug paraphernalia in the vehicle, they initiated a Terry v. Ohio, 392 U.S. 1 (1968), investigative stop by turning off the vehicle. Deputy [A] grabbed Smith's arm before waking him to ensure his own safety. Smith reached toward his waistband, which Deputy [A] recognized as a furtive movement toward a concealed weapon and pulled him out of the vehicle.
>
> A frisk of Smith's waistband area revealed the firearm that formed the basis of the unlawful possession charge. Smith argues that although it was reasonable for Deputy [A] to initiate the Terry stop, grabbing Smith's arm exceeded the permissible scope and intensity of the detention because it was not the least intrusive means to investigate his suspicion. The State argues that Deputy [A] acted reasonably throughout the stop and did not exceed the permissible scope and intensity. We disagree with Smith and hold that Deputy [A] acted reasonably in grabbing Smith's arm out of a reasonable concern for his safety.

[Paragraphing revised for readability]

Some of the analysis of the investigative stop issue in the Opinion reads as follows:

> "The requirements for a valid Terry stop and frisk are satisfied. First, Smith concedes that the initial basis for the detention was legitimate.

> Second, it was reasonable for Deputy [A] to fear for his safety in light of Smith's apparent level of impairment and his ready access to needles that could be used as a weapon.
>
> Third, although Smith argues that Deputy [A] could have secured his own safety through lesser means than those used, it was reasonable for [Deputy A] to secure Smith's arm in a way that allowed him to constrain Smith's movement.
>
> Moreover, Smith was not detained for a significant amount of time. It was Smith who caused the interaction to escalate when he twice reached for his waistband. Once Smith had taken those actions it was reasonable for Deputy [A] to remove him from the vehicle and frisk him for weapons.
>
> The force used by Deputy [A] was minimal in comparison to the risk, and did not convert the Terry detention into a formal arrest. Securing Smith's arm momentarily while waking him and escorting him out of the vehicle did not exceed the permissible scope of the stop.

[Some paragraphing revised for readability]

Here is a link to the Opinion in State v. Smith:
https://www.courts.wa.gov/opin ions/index.cfm?fa=opinions.showOpinion&filename=578727MAJ

5. State v. Cartez Juwon Green.: On September 16, 2024, Division One of the COA (A) reverses the King County Superior Court conviction of defendant for *first degree burglary with firearm enhancement*, and (B) affirms the conviction of defendant for *misdemeanor harassment*. The convictions arose out of a domestic violence incident involving the defendant's girlfriend, Samantha Turo. Ms. Turo did not testify at the trial, but the trial court admitted a recording of her victim-witness interview that was conducted by police shortly after the incident, as well as testimony of an officer regarding the interview.

The Court of Appeals agrees with defendant Green's argument against his burglary conviction. The Green Court concludes that the trial court erred under the Sixth Amendment right to confrontation because the victim's statements were "testimonial" under the Sixth Amendment case law. The Green Court also concludes that this constitutional error was not harmless in light of the insufficiency of the untainted evidence in the case to support a conviction beyond a reasonable doubt.

Here is a link to the Opinion in State v. Green:
https://www.courts.wa.gov/opinions/pdf/851519.pdf

6. State v. Nathan Eric Peters.: On September 16, 2024, Division One of the COA affirms the Whatcom County Superior Court conviction of defendant for *one count of felony harassment* for pulling out a handgun during a heated argument with a woman (Tabitha Jefferson-Ayosa) with whom a dating breakup was occurring. The first paragraph of the Peters Opinion summarizes the Court's legal analysis and ruling as follows:

> Peters asserts that the harassment statute under which he was convicted is unconstitutional. Peters also asserts that the jury was not presented with sufficient evidence to find that his words and conduct toward Tabitha Jefferson-Ayosa constituted a "true threat" as that term was clarified by the United States Supreme Court in Counterman v. Colorado, 600 U.S. 66, 72-83, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023). **Because Peters fails to establish manifest error as to the constitutionality of the harassment**

statute, both facially and as applied to him, and because the record contains ample evidence to support that he knew of and disregarded a substantial risk that his actions in this matter would be interpreted as a serious expression of an intention to carry out a threat to kill Jefferson-Ayosa, Peters' assertions fail. Accordingly, we affirm.

Here is a link to the Opinion in State v. Peters:
https://www.courts.wa.gov/opinions/pdf/857011.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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