LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

JULY 2020

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ANNOUNCEMENT: THE FOLLOWING RESEARCH MATERIALS BY JOHN WASBERG HAVE BEEN UPDATED THROUGH JULY 1, 2020 AND ARE AVAILABLE ON THE CRIMINAL JUSTICE TRAINING COMMISSION'S INTERNET LED PAGE UNDER "SPECIAL TOPICS"

OUTLINE: "Law Enforcement Legal Update Outline: Cases On Arrest, Search, Seizure, And Other Topical Areas Of Interest to Law Enforcement Officers; Plus A Chronology Of Independent Grounds Rulings Under Article I, Section 7 Of The Washington Constitution"

OUTLINE: "Initiation of Contact Rules Under The Fifth Amendment"

ARTICLE: "Eyewitness Identification Procedures: Legal and Practical Aspects"

These documents compiled by John Wasberg (retired Senior Counsel, Office of the Washington State Attorney General) are updated at least once a year, and they are now updated through July 1, 2020. Several 2019 and 2020 court decisions and a 2002 court decision were added to the "Law Enforcement Legal Update Outline" (the first item), but it was not necessary to add any recent court decisions or any substantive revisions to the other two items.

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

[LEGAL UPDATE EDITOR'S REMINDER REGARDING HOW TO ACCESS NINTH CIRCUIT DECISIONS: This month's Update includes numerous Ninth Circuit decisions, and I am giving only abbreviated treatment to the text of the first Opinion digested this month (Monzon v. City of Murietta). I expect that some of the Legal Update readers will want to read the actual Monzon Opinion to study the extensive complex facts and lengthy legal analysis in Monzon (the Opinion is authored by Judge Lawrence VanDyke and joined by Judges Kenneth K. Lee and Consuelo M. Callahan)]. I take this occasion to remind Legal Update readers that information is provided at the end of each Legal Update issue regarding accessing decisions of some courts, including the Ninth Circuit. As noted there, decisions of the Ninth Circuit of the U.S. Court of Appeals 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."

CIVIL RIGHTS ACT CIVIL LIABILITY: OFFICERS HELD TO HAVE USED REASONABLE FORCE WHEN THEY SHOT AND KILLED THE ADULT SON OF PLAINTIFFS FOLLOWING A HIGH-SPEED CHASE AND FOLLOWING HIS: (1) IGNORING OF COMMANDS TO STOP THE VAN, AND (2) DRIVING NEAR, TOWARD, AND AMONGST THE ON-FOOT OFFICERS

In Monzon v. City of Murietta, ___ F.3d ___ , 2020 WL ___ (9th Cir., July 22, 2020), a three-judge Ninth Circuit panel affirms the U.S. district court's summary judgment for the government defendants in a Civil Rights Act lawsuit alleging that police officers used unreasonable deadly force when they shot and killed Junef Monzon following a high-speed chase.

A "summary" by Ninth Circuit staff synopsizes the 3-judge panel's unanimous Opinion in Monzon as follows (the staff summary is not part of the Ninth Circuit's decision; note that the subheadings have been added by the Legal Update Editor):

> [1. Deadly force was objectively reasonable under the totality of the circumstances]
>
> The panel held that that the officers' use of deadly force was objectively reasonable given the dynamic and urgent situation, where officers were faced with the immediate threat of significant physical harm. The panel noted that first, the severity of Monzon's crime weighed in favor of the use of force. Monzon led officers on a dangerous high-speed chase at night, and he refused to stop his van at the behest of officers even after coming to the end of a street.
>
> Second, Monzon posed an immediate threat to the safety of the officers when he ignored commands to stop the van and drove near, toward, and amongst the officers [who were] on foot.

> Third, Monzon's driving endangered the officers and left them with only seconds to consider less severe alternatives.
>
> Finally, a reasonable officer in the position of the individual defendant officers would have probable cause to believe that Monzon posed an immediate threat to the safety of one or more of the other officers or himself.
>
> [2. Even if one assumes that use of deadly force was not reasonable, qualified immunity applies because the officer did not violate a clearly established right under the case law extant at the time of the shooting]
>
> The panel held that even if the officers' use of deadly force was not reasonable on the uncontested facts of this case (which it was), the second prong of the qualified immunity analysis would still compel affirming the district court because the officers did not violate a clearly established right. The panel further rejected [1] plaintiffs' claims that the City failed to train the officers, and [2] plaintiffs' claims brought under state law.

[Some paragraphing revised for readability; subheadings added]

Result: Affirmance of summary judgment order in favor of the government defendants by the U.S. District Court (Central District of California) in this Civil Rights Act lawsuit alleging that police officers used unreasonable deadly force when they shot and killed Junef Monzon following a high-speed chase.

LEGAL UPDATE EDITORIAL NOTES FROM THE MONZON OPINION: A combination of self-imposed limits on space and time commitment led me to give, as noted above, abbreviated treatment to Monzon v. City of Murietta decision of the Ninth Circuit. As is also noted above, I expect that many of the Legal Update readers will want to read the actual Monzon decision to study the extensive complex facts and lengthy legal analysis. I am providing here some excerpts from the Court's legal analysis. I caution readers that full context is best provided by reading the entire Monzon Opinion.

I also remind that, as always, the Legal Update does not speak for any person or entity other than me, and that it is published as a research source only and does not purport to furnish legal advice. I urge law enforcement officers to discuss issues with their agencies' legal advisors and their local prosecutors.

1. Lack of warning prior to shooting is not dispositive against the use of deadly force: Under the Fourth Amendment case law, a factor in assessing reasonableness is whether, if practicable, officers gave a warning before using deadly force. The Monzon Court explains that it was not practicable to give a warning before shooting in this case:

> **[W]e take note that the officers did not provide a deadly force warning. But this fact is not determinative. The urgency of this chaotic situation made a deadly force warning impractical because the van went from a standstill to crashing into a cruiser at over 17 mph in 4.5 seconds.**
>
> **And assuming that Monzon put his hands up in the air, we cannot look at that fact in isolation and ignore the quickly changing situation. The uncontested fact that Monzon was still driving and turning his car toward the officers while allegedly**

raising his hands in surrender (after having just hit a fence post and finishing a high-speed chase) must also be taken into account.

In that circumstance, it was objectively reasonable for the officers to believe that whatever else Monzon was doing, he was not surrendering. A reasonable officer in the position of [each of the five officers] would have probable cause to believe that Monzon posed an immediate threat to the safety of one or more of the other officers or himself as Monzon drove his car toward and among the five officers.

[Some paragraphing revised for readability]

2. The government is not required to separately justify every single shot taken under reasonableness analysis: The Monzon Court explains in footnote 7 that under U.S. Supreme Court precedent, when officers are justified in using deadly force, they need not reassess the rapidly unfolding circumstances after each shot that is fired:

In contrast to plaintiffs' argument that officers must justify every shot, the Supreme Court in [Plumhoff v. Rickard, 572 U.S. 765, 777 (2014)] observed that "'if lethal force is justified officers are taught to keep shooting until the threat is over,'" and "officers need not stop shooting until the threat has ended."

3. Plaintiffs' claims that Monzon was driving at a "slow" rate of speed as he drove toward the on-foot officers fails to recognize the threat to the officers that he posed:

[The] evidence shows that Monzon accelerated from a full stop to 15 mph in one second (4.5 to 3.5 seconds before the crash), never braked, and was moving at least 25 feet every second when he ran the van into the police cruiser. [Court's footnote 9: *Plaintiffs acknowledge that Monzon's van accelerated to at least 16 mph one second before crashing into Mikowski's cruiser. And the black box data that plaintiffs rely on tells us that the van was traveling at 17.4 mph at the time of impact*.]

Moreover, like in [Wilkinson v. Torres, 610 F.3d 546 (9th Cir., 2010)], the officers were aware that the van headed in their direction could accelerate dangerously and without notice at any moment. Given the hazardous predicament Monzon had put them in, the officers' actions were reasonable.

Plaintiffs repeatedly emphasize the "slow" speed of the van, but this fact, taken as true, does not distinguish this case from Wilkinson because the minivan in Wilkinson was also not moving fast when the officers fired. Id. at 552 ("Although the vehicle was moving at a slow rate of speed because of the slippage, it could have gained traction at any time, resulting in a sudden acceleration in speed.").

Here, it is undisputed that the van's event data recorder, or "black box," shows that the van's acceleration pedal was repeatedly pressed down between 80 and 99 percent during the very short 4.5 seconds from start to impact, and the van reached a speed of over 17 mph before hitting [Officer] Mikowski's cruiser. Just like Rickard accelerated after a temporary stop in [the U.S. Supreme Court decision in Plumhoff v. Rickard, 572 U.S. 765, 777 (2014)], Monzon was obviously accelerating.

And even a van traveling at only 10 mph moves approximately 15 feet every second, which is significant when a van that has been driven erratically is moving in close proximity to officers.

[Some paragraphing revised for readability; one citation omitted]

PROBABLE CAUSE TO SEARCH TRACTOR-TRAILER WAS PRESENT WHERE (A) TROOPER SMELLED MARIJUANA IN CAB, (B) SUSPECT ADMITTED TO SMOKING MARIJUANA SIX-TO-SEVEN HOURS EARLIER, AND THEN, (C) DURING TERRY FRISK, SUSPECT CHANGED STORY TO ADMIT SMOKING MARIJUANA THREE-TO-FOUR HOURS EARLIER; ALSO, OFFICER WAS NOT REQUIRED TO BELIEVE DEFENDANT'S CLAIM OF HAVING EARLIER TOSSED THE REMAINDER OF HIS MARIJUANA; AND, PROBABLE CAUSE TO SEARCH THE CAR FOR MARIJUANA WAS PRESENT EVEN THOUGH NEVADA HAS QUALIFIEDLY DECRIMINALIZED POSSESSION OF SMALL AMOUNTS OF MARIJUANA, BECAUSE OFFICER COULD REASONABLY SUSPECT RECENT SMOKING IN THE MOVING VEHICLE OR DRIVING UNDER THE INFLUENCE

[<u>LEGAL UPDATE EDITOR'S PRELIMINARY COMMENT</u>: Note that under the Fourth Amendment, probable cause to search a mobile vehicle (located in a public place) for contraband drugs will support a search without a warrant, as occurred here in this search by a Nevada Highway Patrol Trooper. If the facts of this case had arisen in Washington, a search warrant would have been required because Washington's constitution, article I, section 7, does not support the probable cause car search exception to our constitution's search warrant requirement (and no other search warrant exception was supportable on the facts). However, the probable cause analysis is the same on these particular facts whether one is looking at (A) the Fourth Amendment probable cause car search exception, or (B) instead, probable cause for a search warrant under the Washington constitution. Thus, I believe that the tractor-trailer could have been secured and a search warrant obtained if the facts of this case had arisen for a Washington officer making the traffic stop in Washington State.]

<u>U.S. v. Malik</u>, ___ F.3d ___ , 2020 WL ___ (9th Cir., July 6, 2020)

<u>Facts</u>: (Excerpted from Ninth Circuit Opinion)

> Nevada Highway Patrol Trooper Chris Garcia pulled over a tractor-trailer for speeding outside of Ely, Nevada. When he approached the tractor-trailer, Garcia smelled marijuana in the cab.
>
> The driver, Haseeb Malik, admitted he smoked a marijuana cigarette six to seven hours earlier in the day. Garcia subsequently radioed for backup and conferred with Trooper Adam Zehr about whether to search the cab of the tractor-trailer.
>
> Having decided to search the cab, Garcia re-approached the tractor-trailer, ordered Malik and his co-driver, Abdul Majid, out of the cab, and Terry frisked both defendants. During the course of the Terry frisk, Malik changed his story, admitting that he smoked the marijuana cigarette three to four – rather than six to seven – hours earlier. During Garcia's subsequent search of the cab, he discovered 135 pounds of cocaine and 114 pounds of methamphetamine.

[Some paragraphing revised for readability]

Proceedings below:

After their arrest, Malik and Majid moved to suppress the narcotics, arguing Garcia lacked probable cause to search the cab and containers therein. The district court granted the motion.

ISSUES AND RULINGS: (1) Was there probable cause to search the tractor-trailer for marijuana where (A) Trooper Garcia smelled marijuana coming from the cab, (B) the suspect admitted to smoking marijuana six-to-seven hours earlier, and (C) then, during a Terry frisk, the suspect changed his story to admit smoking marijuana three-to-four hours earlier? (ANSWER BY NINTH CIRCUIT: Yes)

(2) In assessing the probable cause question, was Trooper Garcia required – despite the fact that the suspect had changed his story regarding the length of time since he had consumed marijuana – to believe defendant's claim of having earlier tossed the remainder of his marijuana? (ANSWER BY NINTH CIRCUIT: No)

(3) Was there probable cause to believe that there was evidence of a violation of law in the tractor-trailer despite the fact that the State of Nevada has qualifiedly decriminalized possession of small amounts of marijuana? (ANSWER BY NINTH CIRCUIT: Yes)

Result: Reversal of U.S. District Court (Nevada) suppression ruling; case remanded for trial of federal charges related to the discovery in a law enforcement search of 135 pounds of cocaine and 114 pounds of methamphetamine.

ANALYSIS: (Excerpted from Ninth Circuit Opinion)

> We begin with the Government's argument that the district court erred by failing to evaluate the totality of the circumstances known to [Trooper] Garcia prior to his search. We agree that the district court failed to evaluate the totality of circumstances known to [Trooper] Garcia.
>
> The district court limited its analysis to whether [Trooper] Garcia had probable cause at the time he approached the cab with the intent to search it. During the Terry frisk of the defendants, however, Malik made statements contradicting his earlier story about when he had smoked the marijuana cigarette. The district court's decision not to include Malik's contradictory statements in its totality of the circumstances analysis was error. See United States v. Ped, 943 F.3d 427, 431 (9th Cir. 2019) (the "assessment of probable cause" takes into account "the totality of the circumstances known to the officers at the time of the search").
>
> The district court's failure to analyze the totality of the circumstances is part and parcel of its broader error; namely, its focus on [Trooper] Garcia's subjective motivations for performing the search. "Fourth Amendment reasonableness is predominantly an objective inquiry." Ashcroft v. al-Kidd, 563 U.S. 731, 736 (2011) . . . . Although administrative searches are an exception to this rule, see United States v. Orozco, 858 F.3d 1204, 1210-11 (9th Cir. 2017) (observing that "actual motivations do matter" in administrative-search cases (internal quotation marks omitted)), [Trooper] Garcia stopped the tractor-trailer because he reasonably suspected Malik was speeding.

> Unlike Orozco, which involved an officer's decision to use his administrative search authority as pretext for an investigatory stop, ..., [Trooper] Garcia stopped the tractor-trailer as part of a criminal investigation supported by reasonable suspicion. His subjective motivations [for the subsequent search], therefore, are not relevant. . . .

[LEGAL UPDATE EDITOR'S COMMENT REGARDING PRETEXT: in State v. Ladson, 138 Wn.2d 343 (1999), the Washington State Supreme Court interpreted article I, section 7 of the Washington constitution as imposing a pretext stop prohibition. In State v. Arreola, 176 Wn.2d 284 (2012), the Washington Supreme Court held that a patrol officer's mixed-motive vehicle stop was not pretextual because he: (1) had an articulable, reasonable suspicion of muffler violation; and (2) consciously and independently determined the stop was needed to address the muffler violation. But nothing in facts of this case indicate that the officer's initiation of the stop was motivated by anything other than enforcement of the law against speeding, so even if this case had arisen in the state of Washington involving a Washington officer, defendant's pretext argument would have failed.]

> Finally, we turn to whether [Trooper] Garcia had probable cause to search the cab and containers therein for evidence of violations of Nevada law. We conclude he did.
>
> Although Nevada has decriminalized the possession of small amounts of marijuana, it remains a misdemeanor in Nevada to "smoke[] or otherwise consume[] marijuana in a public place, . . . or in a moving vehicle." Nev. Rev. Stat. § 453D.400(2). Nevada also continues to prohibit drivers from operating a vehicle while under the influence of marijuana. See Nev. Rev. Stat. §§ 453D.100(1)(a), 484C.110, 484C.400.
>
> Malik admitted he smoked a marijuana cigarette earlier that day, but told Garcia he had thrown out the remainder of the marijuana cigarette. [Trooper] Garcia was entitled to rely on Malik's admission in making the probable cause determination, . . . , and was not required to believe Malik's statement about throwing out the remainder of the marijuana cigarette, see District of Columbia v. Wesby, 138 S. Ct. 577, 592 (2018) (observing that "officers are free to disregard either all innocent explanations, or at least innocent explanations that are inherently or circumstantially implausible"), particularly in light of Malik's changing story about when he smoked the marijuana cigarette, see [Wesby] (observing that when a suspect changes his or her story, the officer can "reasonably infer[] that [the person being questioned is] lying and that their lies suggest[] a guilty mind").
>
> We conclude [Trooper] Garcia had probable cause to search the cab and containers therein for evidence of violations of Nevada state law based on Malik's admission and shifting story.

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

REASONABLE SUSPICION FOR A TERRY STOP: SELF-IDENTIFIED CALIFORNIA BAR WORKER'S DETAILED CALL REPORTING THAT PATRONS HAD SEEN A DESCRIBED MAN WITH A GUN GAVE OFFICER REASONABLE SUSPICION UNDER CALIFORNIA GUN LAWS FOR A STOP TO INVESTIGATE THE SUSPECT FOR CARRYING A GUN

CONCEALED; BEWARE THAT ANALYSIS WOULD DIFFER IN OPEN CARRY, CPL-ON-REQUEST STATES SUCH AS WASHINGTON STATE

U.S. v. Vangergroen, ___ F.3d ___ , 2020 WL 3737376 (9th Cir., July 7, 2020)

Facts: (Excerpted from Ninth Circuit Opinion)

> At about 11:27 p.m. on February 17, 2018, an individual [the witness] who worked at a bar called Nica Lounge ("Nica") in Concord, California called 9112 to report a man with a gun seen on his person. [The witness] gave his name, identified his position at Nica, and indicated he was calling from the bar. He explained that three of Nica's customers had told him they saw a man in the area with a pistol "on him."
>
> [The witness] said the man (whom he could see) was in the back parking lot and had just walked into a neighboring bar. [The witness] described the man as "Latin," "wearing a blue sweater with a Warriors . . . logo," "skinny," and in his early 20s, features that mostly matched Vandergroen's [Court's footnote 3: *Vangergroen is not, however, Latino*."].
>
> Continuing in the call, [the witness] next reported that the man had walked out of the neighboring bar and was in the parking lot next to Nica Lounge. The operator asked for more details about the man, including whether the suspect had been fighting. [The witness] said the man had not. The operator also asked [the witness] where the gun was located on the defendant, and [the witness] indicated that he would ask the patrons who reported the gun to him.
>
> Before [the witness] could provide more information, however, the man started running through the parking lot by Nica. [The witness] started reporting the man's movements, including that the man jumped into a black four-door sedan. [The witness] identified the car as a "Crown Vic," noted the man was driving out of the parking lot, and told police officers arriving on the scene which car to follow. At the end of the call ("the 911 call"), [the witness] provided his full name and phone number.
>
> In response to the 911 call, dispatch alerted officers that "patrons think they saw a HMA [Hispanic Male Adult] blu[e] warriors logo carrying a pistol." Dispatch directed officers to "1907 Salvio[,] Nica Lounge," and stated,
>
> > 3 patrons think they saw an HMA with a blue sweatshirt on carrying a pistol. We're getting further. . . . HMA wearing a blue sweatshirt with a Warriors logo on it. . . currently IFO Pizza Guys. . . . no 4-15 [i.e. no fight] prior to patrons seeing the male with a pistol. 3 females say they saw it on him. We're still getting further. . . . Subject is running toward DV8 Tattoos and just got into a black vehicle. . . getting into a 4-door sedan, black in color . . . .
>
> Shortly thereafter, an officer reported over the dispatch "we're gonna do a high-risk car stop." The police then executed a stop of the man, later identified as Vandergroen. During this stop, the police conducted a search of Vandergroen's car and found a loaded semi-automatic handgun under the center console to the right of the driver's seat. An officer then placed Vandergroen under arrest.

[Some paragraphing revised for readability; one footnote omitted]

Proceedings below:

Vandergroen was charged in federal district court with being a being a felon in possession of a firearm. The court denied his motion to suppress the handgun. He was convicted based on his stipulation of facts that reserved his right to appeal the suppression ruling.

ISSUE AND RULING: The following circumstances relating to the reasonable suspicion issue were present in this case:

- A 911 caller provided his full name and phone number, place of work and employment position at an identified restaurant bar, making him a known informant.
- The caller reported that multiple patrons told him that Vandergroen had a gun on him, and the caller offered to ask follow-up questions to the patrons about the exact location of the gun.
- Although the patrons remained anonymous during the call, the patrons were still at the bar, and their earlier contemporaneous statements to the caller had recounted first-hand knowledge of seeing the suspect's gun.
- The 911 caller described the suspect and the suspect's departing car in detail.
- Officers corroborated the tip in part when they spotted the suspect's car.
- The information provided by the 911 caller, who is shown by the other bullet points to be reliable, gave the police reasonable suspicion that the reported suspect was carrying a concealed firearm, which (unlike some other states, such as Washington) is presumptively a crime in California.

Do these facts add up to reasonable suspicion that justified the stop of Vandergroen? (ANSWER BY NINTH CIRCUIT: Yes)

Result: Affirmance of U.S. District Court (Oakland District Court) conviction of Shane Vandergroen for being a felon in possession of a firearm.

ANALYSIS:

Under the "reasonable suspicion" standard of the Fourth Amendment, in order to justify a Terry stop, a tip from a 911 caller (1) must exhibit reliability and (2) must provide information on potential illegal activity serious enough to justify a stop. The Ninth Circuit Opinion in Vandergroen explains as follows that the tip in this case meets both requirements:

> A. *Reliability*
>
> The Supreme Court and this circuit have identified a number of factors that can demonstrate the reliability of a tip, including whether the tipper is known, rather than anonymous, Florida v. J.L., 529 U.S. 266, 270 (2000); whether the tipper reveals the basis of his knowledge, Rowland, 464 F.3d at 908; whether the tipper provides detailed predictive information indicating insider knowledge, [Rowland]; whether the caller uses a 911 number rather than a non-emergency tip line, Foster v. City of Indio, 908 F.3d 1204, 1214 (9th Cir. 2018); and whether the tipster relays fresh, eyewitness knowledge, rather than stale, second-hand knowledge, United States v. Terry-Crespo, 356 F.3d 1170, 1176–77 (9th Cir. 2004).

When evaluating the reliability of a tip such as the 911 call here, in which a caller reports information from a third party regarding possible criminal activity, we consider the reliability of both the caller himself and the third party whose tip he conveys. See United States v. Brown, 925 F.3d 1150, 1153 (9th Cir. 2019) (considering both the fact that the caller was known and that the third-party tipster was anonymous in evaluating the reliability of such a tip).

The totality of the circumstances in this case demonstrates that the 911 call was sufficiently reliable to support reasonable suspicion.

First, the statements by the witness himself were undoubtedly reliable. [The witness] provided his name and employment position, making him a known, and therefore more reliable, witness. See J.L., 529 U.S. at 270 (noting that a known informant is more reliable); see also Rowland, 464 F.3d at 907 ("[A] known informant's tip is thought to be more reliable . . . .").

Further, [the witness] "reveal[ed] the basis of [his] knowledge – explaining that multiple patrons told him that Vandergroen had a gun on him and offering to ask follow-up questions to the patrons about the exact location of the gun – thereby enhancing the tip's reliability. . . . Finally, the fact that [the witness] placed his call using an emergency line, which allows calls to be recorded and traced, increased his credibility. Foster, 908 F.3d at 1214.

Second, we conclude that, viewed collectively, the statements by Nica's patrons were also reliable. Although the patrons remained anonymous during the call, which generally cuts against reliability, their statements "exhibit[ed] 'sufficient indicia of reliability'" to overcome this shortcoming. . . .

[Court's footnote: *That the FBI was later able to identify one of the witnesses for an interview, does not alter this analysis. "The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search," not after. Florida v. J.L., 529 U.S. 266, 271 (2000).*]

The reports were based on fresh, first-hand knowledge. The patrons reported personally seeing the gun on Vandergroen shortly before they reported it to [the witness]. "[P]olice may ascribe greater reliability to a tip, even an anonymous one, where an informant was reporting what he had observed moments ago, not stale or second-hand information." Terry-Crespo, 356 F.3d at 1177 (internal quotation marks and citation omitted).

Furthermore, the fact that the anonymous tipsters were Nica's patrons who were still at the bar when the 911 call was being made "narrowed the likely class of informants," making their reports more reliable. . . . Further still, the fact that multiple individuals reported seeing a gun also made the information more reliable. The existence of multiple tipsters, though anonymous, mitigates the specter of "an unknown, unaccountable informant . . . seeking to harass another [by] set[ting] in motion an intrusive, embarrassing police search" by relaying false information. . . .

Taken together, these factors rendered the information provided by the Nica's patrons through [the witness] sufficiently reliable to support reasonable suspicion.

United States v. Brown, 925 F.3d 1150 (9th Cir. 2019), contrary to Vandergroen's contention, does not suggest otherwise. In Brown, we determined that a call made by an identified witness at the behest of an anonymous witness reporting a man with a gun did not support reasonable suspicion because the tip was neither reliable nor indicative of potentially illegal activity.

As we explained [in Brown], "[t]he tip suffer[ed] from two key infirmities – an unknown, anonymous tipster and the absence of any presumptively unlawful activity." . . . [The decision in Brown] does not control in this case because the 911 call here was both more reliable than the tip in Brown and (as explained further below) conveyed information about presumptively unlawful conduct.

As to reliability, whereas the tip in Brown originated from a single witness who made clear "that she did not want to provide a firsthand report because she '[does not] like the police,'" . . . , the 911 call here conveyed information from three witnesses, and none of them expressed reluctance to be held directly accountable for their reports. Moreover, the caller who relayed the tip in Brown did not personally see the suspect.

By contrast, the Nica employee in this case was looking at Vandergroen while making the 911 call, and was able to help the police identify Vandergroen by describing his movements in real time. This factor further bolstered the reliability of the tip. . . .

B. *Potential Illegality of Reported Behavior*

While the 911 call was thus reliable, it may only support reasonable suspicion if it also "provide[d] information on potential illegal activity." Foster, 908 F.3d at 1214. In other words, a tip must demonstrate that "criminal activity may be afoot," id. (quoting Terry v. Ohio, 392 U.S. 1, 30 (1968)), and the "absence of any presumptively unlawful activity" from a tip will render it inadequate to support reasonable suspicion, Brown, 925 F.3d at 1153.

Furthermore, any potential criminal activity identified must be serious enough to justify "immediate detention of a suspect." United States v. Grigg, 498 F.3d 1070, 1080–81 (9th Cir. 2007).

[LEGAL UPDATE EDITOR'S COMMENT RE GRIGG: In U.S. v. Grigg, the Ninth Circuit held that a Terry stop is not justified for what, in my view at least, are a small number of non-dangerous misdemeanors where (1) the misdemeanors were not committed in the presence of an officer, (2) the misdemeanors do not have potential for ongoing or repeated danger or risk of escalation, and (3) there is a reasonable alternative under the totality of the circumstances for identifying the suspect. I believe that this restriction on Terry stops does not include those misdemeanors that are listed in RCW 10.31.100 as exceptions to the "in the presence" arrest rule.]

The 911 call gave the police reason to suspect Vandergroen was carrying a concealed firearm, which is presumptively a crime in California. See Cal. Penal Code § 25400. [The witness] indicated that patrons had seen Vandergroen with a gun "on him." This language, conveyed to the police by the dispatcher, would suggest to a reasonable police officer that Vandergroen at least potentially had the gun concealed on his body.

> **We have recognized that because California "makes it generally unlawful to carry a concealed weapon without a permit . . . a reasonable officer could conclude that there is a high probability that a person identified in a 911 call as carrying a concealed handgun is violating California's gun laws." Foster, 908 F.3d at 1215-16. As such, the tip provided information on potentially illegal activity. This was in contrast to the tip in Brown, which did not describe conduct that was presumptively illegal in Washington, where that case arose. . . . ([Brown held] that a tip that a man in Washington was carrying a gun was not "reliable in its assertion of illegality" because "[i]n Washington State, it is presumptively lawful to carry a gun").**
>
> [The witness] was reliable as an identified caller using an emergency line, and the Nica patrons' reports he conveyed contained sufficient indicia of reliability to support reasonable suspicion. Furthermore, the reported activity – possessing a concealed weapon – was presumptively unlawful in California and was ongoing at the time of the stop.

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

LEGAL UPDATE EDITOR'S NOTE/COMMENT ABOUT NINTH CIRCUIT'S 2019 DECISION IN BROWN AND THIS 2020 DECISION IN VANDERGROEN: The Ninth Circuit decision in U.S. v. Brown, 925 F.3d 1150 (9th Cir., June 5, 2019) described above in a bolded paragraph, a different three-judge Ninth Circuit panel ruled that two fact elements – (1) an anonymous tip that a well-described, black man was walking in a Seattle neighborhood in possession of a gun; plus (2) the man's flight when the man saw that King County Metro Officers were following him with their emergency flashers activated – did not add up to reasonable suspicion to stop the man under Terry. In part, the Washington-law-specific Ninth Circuit's analysis in Brown was as follows:

> **In Washington State, it is presumptively lawful to carry a gun. It is true that carrying a concealed pistol without a license is a misdemeanor offense in Washington. See RCW §§ 9.41.050(1)(a) ("[A] person shall not carry a pistol concealed on his or her person without a license to carry a concealed pistol . . . ."), 9.41.810 (explaining that any violation of the subchapter is a misdemeanor "except as otherwise provided"). However, the failure to carry the license is simply a civil infraction. § 9.41.050(1)(b) ("Every licensee shall have his or her concealed pistol license in his or her immediate possession at all times . . . . Any violation of this subsection . . . shall be a class 1 civil infraction . . . ."). Notably, Washington is a "shall issue state," meaning that local law enforcement must issue a concealed weapons license if the applicant meets certain qualifications. RCW 9.41.070(1).**
>
> **The anonymous tip that Brown had a gun thus created at most a very weak inference that he was unlawfully carrying the gun without a license, and certainly not enough to alone support a Terry stop. Compare Delaware v. Prouse, 440 U.S. 648, 663 (1979) (holding that unless there is a particularized suspicion that the driver is unlicensed, officers are prohibited from stopping drivers solely to ensure compliance with licensing and registration laws).**

But note the following recent comment in a Case Note from Staff Attorney, Pam Loginsky, Washington Association of Prosecuting Attorneys, regarding trying to transplant from California to Washington the facts of this 2020 decision in Vandergroen:

> **Editor's note [by Pam Loginsky]: A bare report that someone is in possession of a firearm in Washington does not provide reasonable suspicion for an investigative stop. This is because Washington is both an open carry state and liberally grants concealed weapons permits. See United States v. Brown, 925 F.3d 1150, 1154 (9th Cir. 2019). A stop may have been permissible [in Washington under the facts of Vandergroen] if the individual with the pistol had been in that portion of the lounge "classified by the state liquor and cannabis board as off-limits to persons under twenty-one years of age." RCW 9.41.300(1)(d).**

"ATTENUATION" STANDARD UNDER FOURTH AMENDMENT EXCLUSIONARY RULE NOT MET WHERE, ALTHOUGH EIGHT MONTHS HAD PASSED SINCE LAW ENFORCEMENT OBTAINED INCRIMINATING ADMISSIONS FROM DEFENDANT WHILE VIOLATING HIS FOURTH AMENDMENT RIGHTS, THE FBI AGENT MAKING THE SUBSEQUENT QUESTIONING: (1) BEGAN BY TELLING DEFENDANT THAT THE AGENT HAD "FOLLOW-UP QUESTIONS," AND (2) SAID NOTHING TO MAKE DEFENDANT AWARE THAT HIS EARLIER ADMISSIONS COULD NOT BE USED AGAINST HIM

In U.S. v. Bocharnikov, ___ F.3d ___ , 2020 WL ___ (9th Cir., July 27, 2020), a three-judge Ninth Circuit panel reverses a U.S. District Court denial of a motion to suppress inculpatory statements in a case in which the defendant entered a conditional guilty plea to aiming a laser at an aircraft in violation of 18 U.S.C. § 39A. A Ninth Circuit staff "summary" synopsizes the Majority and Concurring Opinions as follows:

> After someone at the defendant's address pointed a laser at a police aircraft in flight, officers went to the defendant's home, illegally [as conceded by the government] detained him, interrogated him without Miranda warnings, and after the defendant confessed, seized the laser.
>
> Eight months later, an FBI agent approached the defendant outside his home and stated he was there to ask "follow-up" questions about the incident. The defendant again admitted to shining the laser at the plane.
>
> The defendant moved to suppress the inculpatory statements he made to the FBI agent because the illegality of the first encounter tainted the second. The government did not dispute that the initial encounter violated at least the Fourth Amendment.
>
> The [Ninth Circuit Majority Opinion] explained that when a confession results from certain types of Fourth Amendment violations, the government must go beyond proving that the confession was voluntary – it must also show a sufficient break in events to undermine the inference that the confession was caused by the Fourth Amendment violation. After considering together the relevant factors set forth in Brown v. Illinois, 422 U.S. 590 (1975), the [Majority Opinion asserted that the panel] was persuaded that the second encounter, introduced as a "follow up" to the first, was directly linked to the original illegalities.

> The [Majority Opinion] explained that although significant time had passed, and the record does not show that the officers' conduct was purposeful or flagrant, the eight-month time period was collapsed by the agent opening the conversation by stating that he was following up on the original investigation. Without other intervening circumstances that act to separate the incidents, the panel concluded that the government cannot carry its burden of proving that the defendant's statements were sufficiently attenuated from the illegal detention and seizure eight months prior.
>
> [The Concurring Opinion by Judge Chhabria asserted his view that suppression of evidence] is warranted only because of how this case was presented to the [three-judge] panel: instead of meaningfully analyzing the defendant's first encounter with law enforcement to help the panel determine what sort of violation occurred, the government joined the defendant in the view that because his rights were violated in the first encounter (and regardless of which particular rights were violated), the panel must conduct the attenuation analysis outlined in [Brown v. Illinois, 422 U.S. 590 (1975)] to determine whether the confession must be excluded.

[Some paragraphing revised for readability]

LEGAL UPDATE EDITORIAL COMMENT: The Majority and Concurring Opinions in Bocharnikov provide interesting academic reading about the Attenuation Exception under the Exclusionary Rule. The Concurring Opinion is helpful to prosecutors in explaining how a prior Miranda violation is easier to overcome for Attenuation purposes than a Fourth Amendment violation. But the two Opinions probably are not much help generally as guidance to law enforcement officers to their actions going forward.

I do think, however, that the following passage in the Majority Opinion is of some help to officers for situations in which an officer: (1) is re-contacting someone who previously made an incriminating statement during a prior law enforcement contact, and (2) the re-contacting officer knows almost certainly that the earlier statement was obtained as the result of a violation of the Fourth Amendment:

> **Significantly, Bocharnikov was not read his Miranda rights during either encounter. So, even though he was released from the high-stress interrogation by the MCSD officers, nothing happened to help him understand that he did not have to cooperate with Agent Hoover and reaffirm what he had already confessed. Agent Hoover's reference to "follow-up questions" made clear to Bocharnikov that Agent Hoover knew what [Bocharnikov] had already told the officers. The government points to nothing else in the intervening eight months that could serve to make Bocharnikov think he had anything to gain from walking back the statements he made during the illegal detention in July.**
>
> **[Court's footnote 4: *It is irrelevant for our purposes whether Miranda warnings were required before the second encounter, which was, by all accounts, friendly, noncoercive, and noncustodial. The two encounters were, quite naturally, linked in Bocharnikov's mind. We note the absence of a Miranda warning because the issuing of a Miranda warning, though not required in a noncustodial situation, might have served to break the link between the two questionings*. See [Oregon v. Elstad, 470 U.S. 298, 314 (1985)]].**

I think that in a follow-up contact of the sort involved in Bocharnikov, the subsequent questioning would best be preceded by a sit-down strategy session with an agency legal advisor or an attorney from the prosecutor's office. And I think that the contact with the suspect probably should include Miranda warnings, plus an express assurance to the suspect that the suspect is not in custody at that point, followed by a further assurance that the prior Fourth Amendment violation means that the prior admissions by the suspect will not be admissible in court. As always, I defer of course to legal advice to the contrary provided by an agency legal advisor or the prosecutor's office.

CIVIL RIGHTS ACT CIVIL LIABILITY: EIGHTH AMENDMENT "EXCESSIVE FINES" CHALLENGE TO THE $63 FINE LEVEL OF THE CITY OF LOS ANGELES FOR OVERTIME PARKING FAILS, BUT NINTH CIRCUIT REMANDS CASE FOR LOOK AT JUSTIFICATION FOR AN ADDITIONAL $63 FINE FOR LATE PAYMENT

In Pimintel v. City of Los Angeles, ___ F.3d ___ , 2020 WL ___ (9th Cir., July 22, 2020), a 3-judge Ninth Circuit panel rules 2-1 that a federal Eighth Amendment Excessive Fines challenge may be brought in regard to the amount of city parking fines. In addition, all three members of the panel apparently agree that a overtime fine of $63 is not constitutionally excessive, but that an additional $63 fine for late payment must be reviewed further by the U.S. District Court.

A "summary" by Ninth Circuit staff briefly synopsizes the Majority Opinion and Concurring Opinion in Pimintel as follows (the staff summary is not part of the Ninth Circuit's Opinions):

> Under the ordinance, if a person parks her car past the allotted time limit and forces people to drive around in search of other parking spaces, she must pay a $63 fine. And if she fails to pay the fine within 21 days, the City will impose a late-payment penalty of $63.
>
> The panel held [by a 2-1 vote] that the Excessive Fines Clause applies to municipal parking fines. The panel noted that the Supreme Court's recent decision in Timbs v. Indiana, 139 S. Ct. 682, 687 (2019), incorporated the Excessive Fines Clause of the Eighth Amendment to the states through the Fourteenth Amendment. The panel held that the Timbs decision affirmatively opened the door for Eighth Amendment challenges to fines imposed by state and local authorities. The panel therefore extended the four-factor analysis set forth in United States Bajakajian, 524 U.S. 321 (1998) to govern municipal fines.
>
> The panel held that the initial fine of $63 did not violate the Excessive Fines Clause because it was not grossly disproportionate to the offense of overstaying the time at a parking space. The panel reversed, however, the district court's summary judgment in favor of the City as to the late payment penalty of $63. The panel held that based on the record, it did not know the City's justification for setting the late fee at one hundred percent of the initial fine. The panel therefore remanded for the district court to determine under Bajakaijian whether the City's late fee ran afoul of the Excessive Fines Clause.
>
> Concurring in the judgment, Judge Bennett stated that because the City of Los Angeles conceded that the Excessive Fines Clause applied to parking fines, he concurred in the judgment. Judge Bennett wrote separately because he did not believe the Excessive Fines Clause should routinely apply to parking meter violations.

Result: Affirmance in part and reversal in part of the summary judgment ruling for the City of Los Angeles by the U.S. District Court (Central District of California) in an action brought pursuant to 42 U.S.C. § 1983 challenging a Los Angeles parking ordinance as violating the Eighth Amendment's Excessive Fines Clause; case remanded for further proceeding to determine whether the $63 late fee is excessive.

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WASHINGTON STATE COURT OF APPEALS

CONSTITUTIONAL "TRUE THREAT" STANDARD PROTECTING FREEDOM OF SPEECH HELD TO PROTECT A PETULANT 17-YEAR-OLD FROM A PROSECUTION FOR HARASSMENT FOR SENDING VAGUE TEXTS, PEPPERED WITH SMILEY EMOJIS AND LOLS, TO HER FRIENDS STATING THAT SHE WANTED TO KILL HER MOTHER

In State v. D.R.C., ___ Wn. App. 2d ___ , 2020 WL ___ (Div. III, July 14, 2020), Division Three of the Court of Appeals reverses the Juvenile Court adjudication and disposition against D.R.C. for criminal harassment under RCW 9A.46.020 based on texts that she sent to friends stating that she wanted to kill her mother. The Court of Appeals summarizes its ruling on the First Amendment "true threat" issue as follows in an introduction to its Opinion:

> The State is prohibited from penalizing constitutionally protected speech. But not all speech is protected. When it comes to the crime of harassment, speech is not protected if it constitutes a true threat, as opposed to mere bluster or hyperbole. The test for a true threat is objective, though not abstract. The State must show a reasonable person in the defendant's position would have foreseen the speech would be perceived as a true threat by the individuals in the defendant's intended audience.
>
> Here, D.R.C. sent a series of text messages to her friends, indicating she wanted to kill her mother. The texts were sent in the midst of a mother-daughter fight. They were vaguely worded and peppered with smiling emojis and the initialism "LOL." There is no indication D.R.C. ever meant for her mother to see the texts or that D.R.C. ever threatened her mother directly. Given these circumstances, the State has not met its burden of proving a true threat. The record shows nothing more than odious expressions of frustration. D.R.C.'s guilty adjudication and disposition is therefore reversed.

The D.R.C. Opinion provides in the facts section extensive quotes from the daughter's text messages to friends, which, to save space, I have omitted from this Legal Update entry. But I have provided in the following passages from D.R.C. some of the content of those text messages, as set forth in the Opinion's analysis section:

> "A true threat is a serious threat." State v. Kilburn, 151 Wn.2d 36, 43 (2004). It is not an idle statement, a joke, or even a "hyperbolic expression[] of frustration." State v. Kohonen, 192 Wn. App. 567, 583 (2016). When assessing whether a statement at the heart of a criminal prosecution constitutes a true threat, our analysis is more demanding than otherwise applicable in a sufficiency challenge. We look carefully at context and independently assess whether a statement in fact "falls within the ambit of a true threat in order to avoid infringement on the precious right to free speech." [Kilburn]

The focus of the true threat analysis is on the speaker. But we do not look at the speaker's actual intent. State v. Trey M., 186 Wn.2d 884, 893 (2016). **Instead, the test is objective. We ask whether a reasonable person in the speaker's position would foresee their statement would be interpreted as a serious expression of intent to cause physical harm.** [State v. Williams, 144 Wn.2d 197, 207-08 (2001)].

While the true threat analysis requires an objective analysis with respect to the speaker, the same is not true of the audience. When assessing whether a reasonable person in the speaker's position would foresee a statement interpreted as a serious threat, we look at the speaker's actual intended audience, not a reasonable audience or an unintended recipient. See Kilburn, 151 Wn.2d at 52-53 (reviewing foreseeable impact on the actual audience, a juvenile identified as "K.J."); Kohonen, 192 Wn. App. at 580 (reviewing foreseeable impact on the actual audience, a juvenile defendant's peer group on Twitter).

Our case law has identified various tools for distinguishing true threats from hyperbole or a joke. Specific plans of causing harm are more threatening than vagaries. State v. Locke, 175 Wn. App. 779, 793 (2013). **A threat will be perceived as more serious when it is conveyed with a serious demeanor**. Trey M., 186 Wn.2d at 906- 07. **And a threat is understood as more serious when it is repeated to different audiences.**

In assessing whether the defendant's speech constituted a true threat, it is helpful to hear from members of the defendant's intended audience. An audience member's actual reactions are often typical of what would be expected and therefore provide a guide "for what reaction a reasonable speaker under the circumstances would have foreseen. [Kohonen]

With these principles in mind, we consider D.R.C.'s case. D.R.C.'s intended audience was not her mother, it was her two friends Joshua and Lexy. Thus, whether D.R.C.'s mother found her daughter's texts alarming is not our focus. We instead must ask whether a reasonable person in D.R.C.'s position would have foreseen that either Joshua or Lexy would have interpreted D.R.C.'s texts as true threats, as opposed to merely a joke or an expression of emotion.

Our analysis of the perspective of Joshua and Lexy is hampered by the fact that neither was called as a witness at trial. Unlike prior cases such as Kilburn and Kohonen, we lack testimony here explaining the actual reactions of D.R.C.'s audience to her texts. Such reactions would be important in assessing whether it was reasonable for D.R.C. to believe her statements would have been interpreted as a joke or merely venting. These reactions also would have been helpful in analyzing the meaning of the various emojis D.R.C. sprinkled throughout her texts. Without explicatory testimony, we are left with only our impressions of the text message exchanges.

We look first to D.R.C.'s exchange with Joshua. According to the State's exhibit, Joshua was the one who started using violent language when he texted, "Haha beat her ass." By prefacing his comment with "Haha," Joshua unambiguously indicated he was entertaining a joke. D.R.C. then made the comment, "imma get her killed."

At this point, Joshua did not change his joking tone. Instead he completed his comment "Woh chill just beat her ass" with the initialism "lol." Given the entirety of this exchange, the record simply does not suggest Joshua interpreted D.R.C. as conveying a serious threat.

Even if Joshua had been troubled by D.R.C.'s comments, the context of the text messages is still not indicative of a true threat. Immediately after Joshua's "lol" text, D.R.C. reiterated the joking nature of the exchange by accenting her message with an emoji entitled "rolling on the floor laughing,"

[The Court's footnote 8 provides in full the following guide to researching emojis:

["*Full Emoji List, v11.0, UNICODE, http://www.unicode.org/emoji/charts-11.0/fullemoji-list.html (last updated Dec. 19, 2018). "Unicode is the leading organization attempting to standardize emojis." Eric Goldman, Emojis and the Law, 93 WASH. L. REV. 1227, 1232 (2018)."]

A reasonable person using this emoji in the context of Joshua's "Haha" and "lol," would not have foreseen D.R.C.'s statements as conveying a true intent to cause harm.

We next look at D.R.C.'s statements to Lexy. Unfortunately, the State's exhibits do not provide much context for this exchange. We do not have Lexy's response to D.R.C.'s text, "Imma fucking kill this bitch." However, D.R.C. prefaced her text with an emoji entitled "face with tears of joy." In addition, D.R.C. indicated she was upset because her mother was going to make D.R.C. live with her father.

This parent child conflict is the type of circumstance commonly associated with teenage frustration, but not homicidal ideation. Given the vagueness of D.R.C.'s statement that she wanted to kill her mother, and the other contextual indicators, the statement to Lexy is not reasonably interpreted as a true threat.

D.R.C.'s past conversation with Lexy supports D.R.C.'s testimony that she tended to use hyperbolic language with her friends. In the prior text between D.R.C. and Lexy, D.R.C. accompanied her statements about harming or killing a mutual acquaintance with "Lmfao"; the face with tears of joy emoji, ; a shrug emoji,; a smiling face with horns emoji, ; a zany face emoji, ; and a heart emoji, . The combination of the initialism and emojis conveyed an unmistakable message of sarcasm, as opposed to a serious intent to cause harm or death.

The fact that D.R.C. repeated the statements about her mother to both Joshua and Lexy is not indicative of a serious threat to kill. Both Joshua and Lexy were known to D.R.C. and appeared to be a part of the same social group. As a result, D.R.C.'s messaging to both Joshua and Lexy is akin to a peer group tweet, [see Kohonen], as opposed to a statement that was repeated to nonpeers in positions of authority. [Trey M.]

The language used by D.R.C. was distastefully violent, but it was not as disturbing as some of the past statements held to fall within First Amendment protections. In Kilburn, the juvenile defendant said to a classmate, "I'm going to bring a gun to school tomorrow and shoot everyone and start with you . . . maybe not you first."

> Despite the specificity of this statement and the fact the classmate found it troubling, our Supreme Court ruled that, in context, the statement did not constitute a true threat. If Kilburn's statement was not a true threat, then D.R.C.'s emoji-filled texts certainly were not.
>
> Because the record fails to establish D.R.C.'s statements constituted true threats, we reverse her adjudication of guilt. While we rule in D.R.C.'s favor, our disposition should not be interpreted as approval of D.R.C.'s choice of language. We, like the trial court, find nothing funny in the texts.
>
> Nevertheless, the First Amendment protects all sorts of speech, even when the sentiment is hurtful or vile. [Federal court decision cites omitted] D.R.C. would do well to heed the advice of the juvenile court judge and find a peer group that does not consist of "mean girls." It appears from the record D.R.C. had turned her life around by the time of trial. We hope that remains the case.

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

LEGAL UPDATE EDITORIAL NOTE/COMMENT: Note that if the statements by the 17-year-old daughter had not been vaguely worded and peppered with smiling emojis and LOLs, this case could have had a different outcome. It is not necessary in a harassment prosecution that the State prove that the defendant (1) intended for the target of the threats to see the threats or (2) made the threats directly to the target.

LEGAL UPDATE EDITORIAL COMMENT: In my purely personal view, this was a close case.

Result: Reversal of Yakima County Juvenile Court finding of guilt of D.R.C. for harassment under RCW 9A.46.020(1) and (2)(a).

SEXUAL ASSAULT PROTECTION ORDERS MAY NOT BE ISSUED TO RESTRAIN CHILDREN UNDER THE AGE OF EIGHT; RCW 9A.04.050 INFANCY STANDARD LIMITS SUCH PROTECTION ORDERS

In In re Nina Jones, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. I, June 29, 2020), the Court of Appeals rules that children under the age of eight may not be restrained by a Sexual Assault Protection Order (SAPO) under chapter 7.90 RCW (neither a *temporary* nor a *permanent* SAPO) because children under the age of eight lack the capacity to commit a sexual assault or other crime. See RCW 9A.04.050 ("Children under the age of eight years are incapable of committing crime. Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong. . . . ").

The Jones Court also explains that, likewise based on RCW 9A.04.050, a *temporary* SAPO is also unavailable to restrain any child under age twelve because a child in that age range is presumed incapable of committing crime. For children between eight and 12 years, a *permanent* SAPO restraining their conduct may be available, but only after a hearing in which the presumption of criminal incapacity is removed.

Result: Affirmance of Snohomish County Superior Court order imposing sanctions for pursuing a frivolous civil action under Civil Rule 11 against an attorney who filed for Sexual Assault Protection Orders against children on behalf of a client.

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BRIEF NOTES REGARDING JULY 2020 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 very 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 probably not sufficiency-of-evidence-to-convict issues).

The 9 entries below are July 2020 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, the crimes of conviction or prosecution are italicized, and the legal issues/holdings are bolded.

1. State v. John Warren Epps, Jr.: On May 4, 2020, Division One of the COA rejects the appeal of Epps from his Stevens County Superior Court conviction for *second degree unlawful possession of a firearm*. He argued that the firearm was seized as a result of a search warrant issued without probable cause to believe that he in possession of a firearm at the time the time of issuance and the warrant and at the time of the search. **The Court of Appeals rules that non-stale probable cause firearms would be found based in key part on: (1) a contemporaneous statement from Epps to law enforcement that he "still had firearms in a 'safe' place because he lived in the woods;" (2) information that Mr. Epps was known to have possessed firearms at his property prior to recent issuance of a protection order, and information that he failed to surrender any firearms.**

2. State v. Kyle J. Rockafellow: On July 14, 2020, Division Two of the COA disagrees with the appeal by the State of Washington from a Pacific County Superior Court *order granting the petition of Rockafellow for rehabilitation of his firearms rights under chapter 9.41 RCW*. On November 13, 2012, the Superior Court sentenced Rockafellow for fourth degree assault, domestic violence. This disqualified him from owning, possessing, using, or controlling a firearm. The superior court entered a suspended jail sentence and 24 months of probation. Due to Rockafellow's failure to complete certain requirements of his supervision, he did not complete his probationary period until March 23, 2016. On November 1, 2018, Rockafellow petitioned the court for restoration of his firearm rights. The State opposed the petition, arguing that Rockafellow had not achieved three crime free years in the community

since completing his probationary period. **The superior court concluded that the requisite three-year crime-free period began on the date of Rockafellow's sentencing, and therefore entered an order restoring his firearm rights. The Court of Appeals agrees with the Superior Court's interpretation of RCW 9.41.040(4)(a)(ii)(B)**

3. State v. Antonio Marcell Mitchell: On July 16, 2020, Division Three of the COA ruled against Mitchell in his appeal from his Spokane County Superior Court conviction for *possession of methamphetamine*. The key issue in the case was whether an officer's information that Antonio Mitchell was subject to an active Department of Corrections (DOC) warrant on the evening of December 4, 2018, required confirmation before an arrest the following evening, in which he was found to possess methamphetamine. **The Court of Appeals explains as follows its "common sense" conclusion that the warrant information had not become stale, under probable cause analysis, in one day:**

> **As the trial court noted, a warrant could be quashed within an hour, but we would not expect an arresting officer to have to re-check DOC information that had been retrieved an hour earlier. Officer Conrath's day-old information that a DOC warrant had been issued for Mr. Mitchell's arrest was sufficient to cause a reasonable officer to believe it remained active. It was recent enough**.

4. State v. Austin John Parks: On July 20, 2020, Division One of the COA ruled against the appeal of Parks from his Snohomish County Superior Court convictions for *two counts of third degree assault*. For two reasons, the Court of Appeals rejects his argument that the State improperly commented on his pre-arrest silence. **First, the Parks Court notes that in Salinas v. Texas, 570 U.S. 178 (2013) the U.S. Supreme Court effectively rejected Washington case law that began with State v. Easter, 130 Wn.2d 228 (1996); Easter had erroneously held that there is a federal Fifth Amendment right protecting against the State commenting at trial on a defendant's pre-arrest silence in the face of law enforcement efforts at contacts. Second, the Parks Court declines to consider the defendant's argument for resurrecting the Easter argument based on an independent grounds reading of the Washington constitution; the Parks Court explains that there is no factual basis for considering the argument about pre-arrest silence comments in this case because the prosecutor did not elicit testimony or make an argument that Parks appeared to be purposely avoiding pre-arrest contact with law enforcement**.

5. State v. Cameron J. Ellis: On July 20, 2020, Division One of the COA agrees with the appeal of Ellis from his King County conviction of *one count of felony violation of a no-contact order*, but the Court of Appeals rejects his appeal from convictions on *five other counts of felony violation of a no-contact order*. **The reason for overturning one of the convictions is a prejudicial violation of the defendant's Sixth Amendment right to confront witnesses. The Ellis Court explains as follows that an officer's testimony describing the alleged victim's statements contained "testimonial hearsay" in violation of the Sixth Amendment**:

> The record shows that B.S.'s [B.S. is the alleged victim] January 28, 2018 statements to [the officer] were testimonial because the primary purpose of the interrogation was not to aid an ongoing emergency. [The officer] testified that he spoke with B.S. for approximately 10 minutes while he was at the scene. The questioning focused on eliciting from B.S. the details of what happened. [The officer] testified B.S. told him that she "unlocked her vehicle" and "realized that Mr. Ellis was in the vehicle with her." According to [the officer], B.S. told [the defendant] that "he couldn't be there" because of the no-contact order. Then [the defendant] punched her and she "jumped out of the

> vehicle while it was still moving." [The officer] testified, "[F]rom there, she ran into the Denny's" and a bystander called 911. B.S. gave [the officer] a detailed description of Ellis, including what he was wearing, and denied needing medical attention. [The officer] testified that B.S. did not provide "any sort of written statement" and that he did not "ever try to follow up with her." A reasonable listener would not believe that the primary purpose of [the officer's] questioning was to meet an ongoing emergency. B.S. had recovered her car and the scene was secure. Although deputies did not locate Ellis in the area, there was no evidence to suggest that he posed "a threat of harm, thereby contributing to an ongoing emergency." State v. Ohlson, 162 Wn.2d 1, 15 (2007). There was no indication that he possessed a weapon or tried to return to the scene. And [the officer] testified that B.S. "did not want any medical attention," and that she was "insisting that she had to go pick up her child and that she had to leave right away because she had to pick them up." Neither were B.S.'s statements primarily the type necessary to resolve an ongoing emergency. Rather, they were responses to [the officer's] questioning about what happened and whether she needed medical attention. These questions, when viewed objectively, primarily elicited statements that described events that happened in the past and were potentially relevant to a subsequent prosecution. Finally, although B.S.'s conversation occurred in the informal setting of a Denny's parking lot, the environment was secure with the deputies present. We conclude that B.S.'s January 28 statements were testimonial and that admitting the statements through [the officer] violated Ellis' Sixth Amendment right to confront witnesses.

6. State v. Aaron Lee Kinley: On July 27, 2020, Division One of the COA rules against the appeal of Kinley from his Whatcom County Superior Court convictions for (A) *attempted rape of a child in the second degree* and (B) *communicating with a minor for immoral purposes*. Among other rulings, the Court of Appeals rejects Kinley's claim of outrageous government conduct regarding the nature of the interactions between law enforcement and the defendant in a Craigslist sting directed at sex predators preying on children. **The Court thus rejects his Due Process-based claims of outrageous government conduct in analysis distinguishing the facts of this case from those in State v. Solomon, 3 Wn. App. 2d 895 (2018) where the Court of Appeals concluded that the undercover officer went too far in communications with the defendant.**

7. State v. Jose Jonael Ayala Reyes: On July 27, 2020, Division One of the COA rules against the appeal of Reyes from his Pierce County Superior Court convictions for (A*) first degree murder* and (B) *conspiracy to commit first degree murder*. The Court's Opinion includes almost 10 pages of fact-specific legal analysis regarding the defendant's challenge to admissibility to his admissions during a recorded interrogation in Spanish by an FBI agent fluent in Spanish. The Court of Appeals rules that the trial court record supports the trial court rulings that: **(1) Reyes understood the Miranda warnings and waived his rights; (2) Reyes did not unequivocally invoke his right to silence during the interrogation, although he made statements indicating that he did not want to talk about certain areas of the agent's inquiry; (3) the defendant's statements were given voluntarily when one considers the totality of the circumstances; and (4) the FBI agent's promise at one point in the interrogation not to "tell anyone" was not a promise of total confidentiality, but instead was a permissible assurance that defendant's fellow gang co-conspirators would not be told that Reyes had identified them as co-conspirators**.

8. In the Matter of the Personal Restraint of Tyrone Eaglespeaker: On July 28, 2020, Division Two of the COA rules against the Personal Restraint Petition of Eaglespeaker seeking vacation of his Skamania County Superior Court conviction for *second degree rape*. The Court of

Appeals rules that **defendant is not entitled to a new trial based on "newly discovered evidence," and that the defendant also is not entitled to relief based on the State's duty of disclosure to defendant under Brady v. Maryland, 373 U.S. 83 (1963)**. The facts related to these claims by defendant are extensive, and the sub-issues are several, particularly on the several sub-issues under Brady. But it appears to me that the Court of Appeals has correctly and clearly sorted out the issues in the lengthy Opinion.

9. State v. Trevor J. Haugen: On July 31, 2020, Division Three of the COA rejects the appeal of Haugen from his Spokane County Superior Court convictions for (A) *first degree unlawful possession of a firearm*, and (B) *possession of an unlawful weapon*. In addition to ruling that there is sufficient evidence in the record to support the convictions, the Court of Appeals also rejects Haugen's argument that the corpus delicti rule mandates that his admission of guilt to the investigating officer should not have been admitted. In key part, the explanation of the Court of Appeals is as follows on sufficiency of the evidence and corpus delicti:

> This was a circumstantial case of actual possession. Police trailed Mr. Haugen over freshly fallen snow. They discovered a bag containing a short-barrel shotgun placed on the fresh snow. They followed a set of footprints leading from the bag to Mr. Haugen. One officer confirmed that Haugen's shoes made the tracks they were following. Mr. Haugen admitted that the gun was his and that he intended to sell it. From this evidence, the trial court easily could confirm that Mr. Haugen was the one who possessed the illegal weapon.
>
> Mr. Haugen further argues that the court should not have considered his admission without the corpus delicti of the offense having first been established. Before admitting a defendant's "confession" to the crime, the State must first establish that the crime actually was committed. State v. Brockob, 159 Wn.2d 311, 327-328, 150 P.3d 59 (2006) That was easily satisfied here. **The corpus of the crime was the illegal shotgun. No one can possess them, but someone recently had abandoned the bag with the gun. A crime had been committed [and therefore the trial court properly considered his admission under the corpus delicti rule].**

LEGAL UPDATE EDITOR'S NOTE: Note that under the corpus delicti rule there must be sufficient evidence that a crime was committed, but that there need not be any evidence that the defendant is the person who committed the crime.

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

Beginning with the September 2015 issue, the most recent monthly Legal Update for Washington Law Enforcement is placed under the "LE Resources" link on the Internet Home Page of the Washington Association of Sheriffs and Police Chiefs. As new Legal Updates are issued, the current and 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 Assistant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011) of the Criminal Justice Training Commission's Law Enforcement Digest. From the time of his retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the

production of the LED. That arrangement ended in the late fall of 2014 due to variety of concerns, budget constraints and friendly differences regarding the approach of the LED going forward. Among other things, Mr. Wasberg prefers (1) a more expansive treatment of the core-area (e.g., arrest, search and seizure) law enforcement decisions with more cross references to other sources and past precedents; and (2) a broader scope of coverage in terms of the types of cases that may be of interest to law enforcement in Washington (though public disclosure decisions are unlikely to be addressed in depth in the Legal Update). For these reasons, starting with the January 2015 Legal Update, Mr. Wasberg has been presenting a monthly case law update for published decisions from Washington's appellate courts, from the Ninth Circuit of the United States Court of Appeals, and from the United States Supreme Court.

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

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

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

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

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

proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The Criminal Justice Training Commission (CJTC) Law Enforcement Digest Online Training can be found on the internet at [cjtc.wa.gov/resources/law-enforcement-digest].

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