LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

JUNE 2021

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UNITED STATES SUPREME COURT

IN CRIMINAL CASE, THE U.S. SUPREME COURT RULES THAT THE PER SE EXIGENT CIRCUMSTANCES RULE FOR HOT PURSUIT OF FLEEING FELONS THAT WAS RECOGNIZED IN THE 1976 U.S. SUPREME COURT DECISION IN SANTANA DOES NOT SUPPORT A PER SE EXIGENCY RATIONALE FOR WARRANTLESS ENTRY IN HOT PURSUIT OF MISDEMEANOR VIOLATORS; ADDITIONAL FACTUAL JUSTIFICATION, – BEYOND THE MERE FACT OF HOT PURSUIT – ARE NEEDED IN ORDER TO ESTABLISH EXIGENCY IN HOT PURSUITS OF FLEEING MISDEMEANANTS

Lange v. California, ___ S.Ct. ___ , 2021 WL ___ (June 23, 2021)

[LEGAL UPDATE EDITOR'S PRELIMINARY NOTE: The following "case note" on the website of the Washington Association of Prosecuting Attorneys was authored by WAPA Staff Attorney Pam Loginsky regarding the U.S. Supreme Court's Lange v. California decision:

> ***Hot Pursuit of Misdemeanor Suspect*.**
>
> **Under the Fourth Amendment, pursuit of a fleeing misdemeanor suspect does not always—that is, categorically—justify a warrantless entry into a home. Whether a warrantless entry is permissible in such cases requires a case-specific determination as to whether the exigencies of the situation create a compelling need for official action and no time to secure a warrant. Such exigencies may exist when an officer must act to prevent imminent injury, the destruction of evidence, or a suspect's escape. Lange v. California, No. 20-18 (Jun. 23, 2021).**
>
> **[WAPA STAFF ATTORNEY EDITOR'S NOTE: The Lange opinion is consistent with Washington's existing 11-factor test for determining whether exigent circumstances exist to justify a warrantless entry into a home for a non-felony fleeing suspect. Compare City of Seattle v. Altschuler, 53 Wn. App. 317, 766 P.2d 518 (1989) (warrantless entry into motorist's garage while pursuing suspect who drove through red light and failed to stop by driving at a non-reckless 30 mph for 12 blocks to his home's garage was improper), with State v. Wolters, 133 Wn. App. 297, 135 P.3d 562 (2006) (officer lawfully entered defendant's home without a warrant after defendant, who drove erratically and failed to stop when signaled, pulled into his own driveway, exited his truck, refused to remove his hands from**

his pockets or to remain in the driveway as ordered, and officer could not see whether the defendant had a weapon in his hands).]

Facts and Proceedings below in Lange v. California: (Excerpted from Supreme Court Majority Opinion's staff summary, which is not part of the Court's Opinion)

> This case arises from a police officer's warrantless entry into petitioner Arthur Lange's garage. Lange drove by a California highway patrol officer while playing loud music and honking his horn.
>
> The officer began to follow Lange and soon after turned on his overhead lights to signal that Lange should pull over. Rather than stopping, Lange drove a short distance to his driveway and entered his attached garage.
>
> The officer followed Lange into the garage. He questioned Lange and, after observing signs of intoxication, put him through field sobriety tests. A later blood test showed that Lange's blood-alcohol content was three times the legal limit.
>
> The State charged Lange with the misdemeanor of driving under the influence. Lange moved to suppress the evidence obtained after the officer entered his garage, arguing that the warrantless entry violated the Fourth Amendment. The Superior Court denied Lange's motion, and its appellate division affirmed.
>
> The California Court of Appeal also affirmed. It concluded that Lange's failure to pull over when the officer flashed his lights created probable cause to arrest Lange for the misdemeanor of failing to comply with a police signal. And it stated that Lange could not defeat an arrest begun in a public place by retreating into his home. The pursuit of a suspected misdemeanant, the court held, is always permissible under the exigent-circumstances exception to the warrant requirement.
>
> The California Supreme Court denied review.

ISSUE AND RULING: In U.S v. Santana, 427 U. S. 38 (1976), the U.S. Supreme Court ruled that exigent circumstances exist and categorically justify warrantless residential entry where (1) officers have probable cause to arrest a felon, (2) the officers are in the process of attempting to arrest the felon, and (3) the suspected felon flees into a private residence in an apparent attempt to evade arrest. Does this same per-se-exigency rule apply where the would-be arrestee has committed only a misdemeanor, not a felony? (ANSWER BY SUPREME COURT: No, actual exigency must exist under the totality of the circumstances; the facts must support a reasonable conclusion as to the need to enter prior to the point in time it would take to get a warrant in order to prevent: (1) imminent injury of any person, (2) the destruction of evidence, or (3) a suspect's escape.)

Result: Case remanded; it is possible that the State of California will argue on remand (along the lines of argument in Justice Thomas's Concurring Opinion) that the Exclusionary Rule does not apply.

MAJORITY OPINION'S ANALYSIS: ((Excerpted from Supreme Court Majority Opinion's staff summary, which is not part of the Court's Opinion)

[LEGAL UPDATE EDITOR'S NOTE REGARDING THE MAJORITY OPINION'S REFERENCES TO "AMICUS": The Majority Opinion responds in a number of passages to the arguments of "Amicus." When the State of California notified the Court that the State was no longer arguing for a categorical Fourth Amendment rule authorizing misdemeanor hot pursuit, the Supreme Court appointed attorney Amanda Rice as amicus curiae (friend of the Court) to defend the California appellate court ruling on review.]

HELD: Under the Fourth Amendment, pursuit of a fleeing misdemeanor suspect does not always – that is, categorically – justify a warrantless entry into a home.

(a) The Court's Fourth Amendment precedents counsel in favor of a case-by-case assessment of exigency when deciding whether a suspected misdemeanant's flight justifies a warrantless home entry.

The Fourth Amendment ordinarily requires that a law enforcement officer obtain a judicial warrant before entering a home without permission. . . . . But an officer may make a warrantless entry when "the exigencies of the situation," considered in a case-specific way, create "a compelling need for official action and no time to secure a warrant." Kentucky v. King, 563 U. S. 452, 460 (2011); Missouri v. McNeely, 569 U. S. 141, 149 (2013)

The Court has found that such exigencies may exist when an officer must act to prevent imminent injury, the destruction of evidence, or a suspect's escape. The amicus contends that a suspect's flight always supplies the exigency needed to justify a warrantless home entry and that the Court endorsed such a categorical approach in United States v. Santana, 427 U. S. 38 (1976).

The Court disagrees. In upholding a warrantless entry made during a "hot pursuit" of a felony suspect, the Court stated that Santana's "act of retreating into her house" could "not defeat an arrest" that had "been set in motion in a public place." Even assuming that Santana treated fleeing-felon cases categorically, that statement still does not establish a flat rule permitting warrantless home entry whenever a police officer pursues a fleeing misdemeanant.

Santana did not resolve the issue of misdemeanor pursuit; as the Court noted in a later case, "the law regarding warrantless entry in hot pursuit of a fleeing misdemeanant is not clearly established" one way or the other. Stanton v. Sims, 571 U. S. 3, 8, 10 (2013). Misdemeanors run the gamut of seriousness, and they may be minor. States tend to apply the misdemeanor label to less violent and less dangerous crimes. The Court has held that when a minor offense (and no flight) is involved, police officers do not usually face the kind of emergency that can justify a warrantless home entry. See Welsh v. Wisconsin, 466 U. S. 740, 742–743 (1984).

Add a suspect's flight and the calculus changes – but not enough to justify a categorical rule. In many cases, flight creates a need for police to act swiftly. But no evidence suggests that every case of misdemeanor flight creates such a need. The Court's Fourth Amendment precedents thus point toward assessing case by case the exigencies arising from misdemeanants' flight.

When the totality of circumstances shows an emergency – a need to act before it is possible to get a warrant – the police may act without waiting. Those circumstances include the flight itself. But pursuit of a misdemeanant does not trigger a categorical rule allowing a warrantless home entry.

(b) The common law in place at the Constitution's founding similarly does not support a categorical rule allowing warrantless home entry whenever a misdemeanant flees.

Like the Court's modern precedents, the common law afforded the home strong protection from government intrusion, and it generally required a warrant before a government official could enter the home. There was an oft-discussed exception: An officer, according to the common-law treatises, could enter a house to pursue a felon.

But in the misdemeanor context, officers had more limited authority to intrude on a fleeing suspect's home. The commentators generally agreed that the authority turned on the circumstances; none suggested a rule authorizing warrantless entry in every misdemeanor-pursuit case. . . .

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

Justice Kagan is author of the Majority Opinion and is joined by four Justices who do not write or sign separate Opinions.

Justice Kavanaugh signs onto Justice Kagan's Majority Opinion but also writes a Concurring Opinion that states that "the cases of fleeing misdemeanants will almost always also involve a recognized exigent circumstance – such as a risk of escape, destruction of evidence, or harm to others – that will still justify warrantless entry into a home." And he states that "Importantly, moreover, the Court's opinion does not disturb the long-settled rule that pursuit of a fleeing felon is itself an exigent circumstance justifying warrantless entry into a home. See United States v. Santana, 427 U. S. 38, 42–43 (1976) .. . . "

Justice Thomas writes a separate Concurring Opinion that agrees to some extent with the Kagan Majority Opinion, and that raises a separate theory regarding the Fourth Amendment Exclusionary Rule (a theory that is not addressed in the Majority Opinion but gets some support from the Concurring Opinions of Justices Kavanaugh and Justice Roberts).

Justice Roberts writes a Concurring Opinion (joined by Justice Alito) that (1) indicates that the California courts should allow Lange to argue that he was not actually fleeing, and that he was just oblivious to the flashing lights of the patrol car, (2) then attacks the Majority Opinion at great length, arguing that Santana's rule should be applied to misdemeanor hot pursuit, and (3) seems to suggest some support for Justice Thomas's argument about the Fourth Amendment Exclusionary Rule. **[LEGAL UPDATE EDITORIAL COMMENT ABOUT THE EXCLUSIONARY RULE DISCUSSION IN THE CONCURRING OPINIONS: In light of the Washington Supreme Court's past independent grounds past regarding the Exclusionary Rule under article I, section 7 of the Washington constitution, my initial reaction is that I do not see much chance for success for an Exclusionary Rule exception for an unlawful misdemeanor hot pursuit into a residence under the Washington constitution.]**

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR CORRECTIONAL OFFICERS: LAWSUIT THAT WAS TRIGGERED BY A JAIL DETAINEE'S DEATH THAT OCCURRED AS THE ALLEGED RESULT OF CORRECTIONAL OFFICERS KNEELING ON HIS BACK FOR AN EXTENDED PERIOD OF TIME MUST BE REEXAMINED BY THE EIGHTH CIRCUIT COURT OF APPEALS UNDER THE MANY REASONABLENESS FACTORS OF GRAHAM V. CONNOR

In Lombardo v. St. Louis, ___ S.Ct. ___ (June 28, 2021), the U.S. Supreme Court rules 6-3 that an Eighth Circuit Court of Appeals ruling that correctional officers did not use excessive force against a pre-trial detainee must be remanded to the Court of Appeals for that Court to reexamine the case carefully considering the factual record in light of each of the factors for assessing lawfulness of use of force against pre-trial detainees as required by Graham v. Connor, 490 U. S. 386, 397 (1989) and Kingsley *v.* Hendrickson, 576 U. S. 389 (2015).

The Supreme Court makes this determination almost exclusively based on a critical reading of the Majority Opinion's reading of the Lombardo Court of Appeals decision. The Supreme Court decision was made following receipt of the plaintiffs' petition for review, without benefit of further briefing or oral argument at the Supreme Court. The Majority Opinion is "per curiam" (i.e., unsigned).

Justice Alito files a Dissenting Opinion, which Justices Thomas and Gorsuch join. The Dissenting Opinion indicates that (1) the Majority Opinion contorts language in the Eighth Circuit's Opinion, and (2) that the Court should have either (A) allowed the fact-based decision below to stand, or (B) taken up the case by granting the petition, receiving briefing and oral argument, and deciding the real question that the case presents.

As is required where the question before the courts is whether the government actors are entitled to qualified immunity against the suit of the plaintiffs, the Supreme Court's unsigned Majority Opinion views all of the allegations in the case in the best light for the plaintiffs (the parents of the deceased). The Supreme Court's Majority Opinion reads as follows:

> Facts taken from viewing the allegations in the best light for plaintiffs:
>
> On the afternoon of December 8, 2015, St. Louis police officers arrested Nicholas Gilbert for trespassing in a condemned building and failing to appear in court for a traffic ticket. Officers brought him to the St. Louis Metropolitan Police Department's central station and placed him in a holding cell.
>
> At some point, an officer saw Gilbert tie a piece of clothing around the bars of his cell and put it around his neck, in an apparent attempt to hang himself. Three officers responded and entered Gilbert's cell. One grabbed Gilbert's wrist to handcuff him, but Gilbert evaded the officer and began to struggle.
>
> The three officers brought Gilbert, who was 5'3" and 160 pounds, down to a kneeling position over a concrete bench in the cell and handcuffed his arms behind his back. Gilbert reared back, kicking the officers and hitting his head on the bench.

After Gilbert kicked one of the officers in the groin, they called for more help and leg shackles. While Gilbert continued to struggle, two officers shackled his legs together. Emergency medical services personnel were phoned for assistance.

Several more officers responded. They relieved two of the original three officers, leaving six officers in the cell with Gilbert, who was now handcuffed and in leg irons.

The officers moved Gilbert to a prone position, face down on the floor. Three officers held Gilbert's limbs down at the shoulders, biceps, and legs. At least one other placed pressure on Gilbert's back and torso. Gilbert tried to raise his chest, saying, "'It hurts. Stop.'" After 15 minutes of struggling in this position, Gilbert's breathing became abnormal and he stopped moving.

The officers rolled Gilbert onto his side and then his back to check for a pulse. Finding none, they performed chest compressions and rescue breathing. An ambulance eventually transported Gilbert to the hospital, where he was pronounced dead.

Proceedings Below:

Gilbert's parents sued, alleging that the officers had used excessive force against him. The District Court granted summary judgment in favor of the officers, concluding that they were entitled to qualified immunity because they did not violate a constitutional right that was clearly established at the time of the incident. The U. S. Court of Appeals for the Eighth Circuit affirmed on different grounds, holding that the officers did not apply unconstitutionally excessive force against Gilbert.

Legal Analysis

In assessing a claim of excessive force, courts ask "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." Graham *v.* Connor, 490 U. S. 386, 397 (1989).

[Footnote 2: *Petitioners brought their excessive force claims under both the Fourth and Fourteenth Amendments. . . . . We need not address whether the Fourth or Fourteenth Amendment provides the proper basis for a claim of excessive force against a pretrial detainee in Gilbert's position. Whatever the source of law, in analyzing an excessive force claim, a court must determine whether the force was objectively unreasonable . .. .*]

"A court (judge or jury) cannot apply this standard mechanically." Kingsley *v.* Hendrickson, 576 U. S. 389, 397 (2015). Rather, the inquiry "requires careful attention to the facts and circumstances of each particular case." Graham, 490 U. S., at 396.

Those circumstances include "the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff 's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting." Kingsley, 576 U. S., at 397.

Although the Eighth Circuit cited the Kingsley factors, it is unclear whether the court thought the use of a prone restraint – no matter the kind, intensity, duration, or

surrounding circumstances – is per se constitutional so long as an individual appears to resist officers' efforts to subdue him. The [Eighth Circuit] cited Circuit precedent for the proposition that "the use of prone restraint is not objectively unreasonable when a detainee actively resists officer directives and efforts to subdue the detainee." . . .

The [Eighth Circuit] went on to describe as "insignificant" facts that may distinguish that precedent and appear potentially important under Kingsley, **including that Gilbert was already handcuffed and leg shackled when officers moved him to the prone position and that officers kept him in that position for 15 minutes**. . . .

Such details could matter when deciding whether to grant summary judgment on an excessive force claim. Here, for example, record evidence (viewed in the light most favorable to Gilbert's parents) shows that **officers placed pressure on Gilbert's back even though St. Louis instructs its officers that pressing down on the back of a prone subject can cause suffocation**.

The evidentiary record also includes well-known **police guidance recommending that officers get a subject off his stomach as soon as he is handcuffed because of that risk**. The guidance further indicates that **the struggles of a prone suspect may be due to oxygen deficiency, rather than a desire to disobey officers' commands**.

Such evidence, when considered alongside the duration of the restraint and the fact that Gilbert was handcuffed and leg shackled at the time, may be pertinent to the relationship between the need for the use of force and the amount of force used, the security problem at issue, and the threat – to both Gilbert and others – reasonably perceived by the officers.

Having either failed to analyze such evidence or characterized it as insignificant, the [Eighth Circuit's] opinion could be read to treat Gilbert's "ongoing resistance" as controlling as a matter of law. Such a per se rule would contravene the careful, context-specific analysis required by [the Supreme Court's] excessive force precedent.

We express no view as to whether the officers used unconstitutionally excessive force or, if they did, whether Gilbert's right to be free of such force in these circumstances was clearly established at the time of his death. We instead grant the petition for certiorari, vacate the judgment of the Eighth Circuit, and remand the case to give the court the opportunity to employ an inquiry that clearly attends to the facts and circumstances in answering those questions in the first instance.

[Subheadings and bolding added; some case citations omitted, other citations revised for style; some paragraphing revised for readability; two footnotes omitted]

LEGAL UPDATE EDITORIAL NOTES REGARDING 2021 WASHINGTON LEGISLATION: **It has been many years since I have tried to write summaries regarding new Washington legislation of interest to law enforcement. I will not change my practice. The work outgrew me. In recent years, the Washington Association of Sheriffs and Police Chiefs annually has produced a great product in that regard in an End Of Session Report. The 2021 End of Session Report is expected to be completed and placed on the WASPC website some time in the month of July 2021. Three key pieces of enacted legislation in 2021 relating to Washington "peace officers" use of force are:**

- **Chapter 324** (House Bill 1310) Permissible uses of force (Effective date July 25, 2021) Accessible on the Internet at: http://lawfilesext.leg.wa.gov/biennium/2021-22/Pdf/Bills/Session%20Laws/House/1310-S2.SL.pdf?q=20210702093948

- **Chapter 320** (House Bill 1054) Tactics and equipment (Effective date July 25, 2021) Accessible on the Internet at: http://lawfilesext.leg.wa.gov/biennium/2021-22/Pdf/Bills/Session%20Laws/House/1054-S.SL.pdf?q=20210702094128

- **Chapter 321** (Senate Bill 5066) Duty of officers to intervene (Effective date July 25, 2021) Accessible on the Internet at: http://lawfilesext.leg.wa.gov/biennium/2021-22/pdf/bills/session%20laws/senate/5066-s.sl.pdf?q=20210702094240

TRIBAL POLICE OFFICERS HAVE AUTHORITY TO DETAIN TEMPORARILY AND TO SEARCH NON-INDIAN PERSONS TRAVELING ON PUBLIC RIGHTS-OF-WAY RUNNING THROUGH A TRIBAL RESERVATION FOR POTENTIAL VIOLATIONS OF STATE OR FEDERAL LAW

United States v. Cooley, ___ S.Ct. ___ , 2021 WL ___ (June 1, 2021)

[LEGAL UPDATE EDITORIAL NOTE: In a "case note" on the website of the Washington Association of Prosecuting Attorneys, WAPA staff attorney Pam Loginsky provides the following useful information about the Cooley decision.

> **Tribal Police Officers. *Held*: A tribal police officer has authority to detain temporarily and to search non-Indian persons traveling on public rights-of-way running through a reservation for potential violations of state or federal law. United States v. Cooley, No. 19-1414 (Jun. 1, 2021).**
>
> **[*WAPA Staff Attorney Editor's Note*: Neither the Washington nor the United States Constitution applies to tribes or tribal police officers. See, e.g., Settler v. Lameer, 507 F.2d 231, 241-42 (9th Cir. 1974); Young v. Duenas, 164 Wn. App. 343, 356, 262 P.3d 527 (2011). Instead, their conduct is judged by the Indian Civil Rights Act ("ICRA"). See 25 U.S.C. § 1302 (2) ("No Indian tribe in exercising powers of self-government shall . . . violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized"). This standard is comparable to the Fourth Amendment, see United States v. Becerra-Garcia, 397 F.3d 1167 (9th Cir. 2005), but is not co-extensive with the requirements of Washington Const. art. I, § 7.]**

Facts and proceedings below in Cooley: (Excerpted from a staff summary of the Supreme Court Majority Opinion; the staff summary is not part of the Court's Opinion)

> Late one night, Officer James Saylor of the Crow Police Department approached a truck parked on United States Highway 212, a public right-of-way within the Crow Reservation

in the State of Montana. Saylor spoke to the driver, Joshua James Cooley, and observed that Cooley appeared to be non-native and had watery, bloodshot eyes.

Saylor also noticed two semiautomatic rifles lying on Cooley's front seat. Fearing violence, Saylor ordered Cooley out of the truck and conducted a pat-down search. Saylor also saw in the truck a glass pipe and a plastic bag that contained methamphetamine.

Additional officers, including an officer with the federal Bureau of Indian Affairs, arrived on the scene in response to Saylor's call for assistance. Saylor was directed to seize all contraband in plain view, leading Saylor to discover more methamphetamine.

Saylor took Cooley to the Crow Police Department where federal and local officers further questioned Cooley.

Subsequently, a federal grand jury indicted Cooley on drug and gun offenses. The District Court granted Cooley's motion to suppress the drug evidence. The Ninth Circuit affirmed.

[The Ninth Circuit] reasoned that a tribal police officer could stop (and hold for a reasonable time) a non-Indian suspect if the officer first tries to determine whether the suspect is non-Indian and, in the course of doing so, finds an apparent violation of state or federal law. The Ninth Circuit concluded that Saylor had failed to make that initial determination here.

[Some paragraphing revised for readability]

ISSUE AND RULING: Does a tribal police officer have authority to detain temporarily and to search non-Indian persons traveling on public rights-of-way running through a reservation for potential violations of state or federal law? (ANSWER IN MAJORITY OPINION SIGNED BY EIGHT JUSTICES: Yes)

Result: Reversal of Ninth Circuit and U.S. District Court suppression rulings, and remand of case to the District Court of Montana for trial.

ANALYSIS: (Excerpted from a staff summary of the Supreme Court Majority Opinion; the staff summary is not part of the Court's Opinion)

(a) As a "general proposition," the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Montana *v.* United States, 450 U. S. 544, 565.

The Court identified in Montana two exceptions to that general rule, the second of which fits almost like a glove here: A tribe retains inherent authority over the conduct of non-Indians on the reservation "when that conduct threatens or has some direct effect on . . . the health or welfare of the tribe." . . . . The conclusion that Saylor's actions here fall within Montana*'s* second exception is consistent with the Court's prior Montana cases. . . . Similarly, the Court has held that when the "jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities." . . . .

> Ancillary to the authority to transport a non-Indian suspect is the authority to search that individual prior to transport, as several state courts and other federal courts have held. While that authority has sometimes been traced to a tribe's right to exclude non-Indians, tribes "have inherent sovereignty independent of th[e] authority arising from their power to exclude," Brendale *v.* Confederated Tribes and Bands of Yakima Nation, 492 U. S. 408, 425 (1989) (plurality opinion), and here Montana*'s* second exception recognizes that inherent authority.
>
> In addition, recognizing a tribal officer's authority to investigate potential violations of state or federal laws that apply to non-Indians whether outside a reservation or on a public right-of-way within the reservation protects public safety without implicating the concerns about applying tribal laws to non-Indians noted in the Court's prior cases.
>
> Finally, the Court doubts the workability of the Ninth Circuit's standards, which would require tribal officers first to determine whether a suspect is non-Indian and, if so, to temporarily detain a non-Indian only for "apparent" legal violations. . . . The first requirement produces an incentive to lie. The second requirement introduces a new standard into search and seizure law and creates a problem of interpretation that will arise frequently given the prevalence of non-Indians in Indian reservations.

(b) Cooley's arguments against recognition of inherent tribal sovereignty here are unpersuasive.

> While the Court agrees the Montana exceptions should not be interpreted so as to " 'swallow the rule,'" . . .this case does not raise that concern due to the close fit between Montana*'s* second exception and the facts here. In addition, the Court sees nothing in existing federal cross-deputization statutes that suggests Congress has sought to deny tribes the authority at issue. To the contrary, existing legislation and executive action appear to operate on the assumption that tribes have retained this authority.

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

Justice Alito writes a separate Concurring Opinion that is not joined by any other Justice. His Concurring Opinion reads in its entirety as follows:

> I join the opinion of the Court on the understanding that it holds no more than the following: On a public right-of-way that traverses an Indian reservation and is primarily patrolled by tribal police, a tribal police officer has the authority to (a) stop a non-Indian motorist if the officer has reasonable suspicion that the motorist may violate or has violated federal or state law, (b) conduct a search to the extent necessary to protect himself or others, and (c) if the tribal officer has probable cause, detain the motorist for the period of time reasonably necessary for a non-tribal officer to arrive on the scene.

I think that this concurrence by Justice Alito seems to read the Majority Opinion as limiting tribal police authority more than a straightforward reading of the Opinion indicates, but I claim no expertise in the area of tribal police authority.

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WASHINGTON STATE COURT OF APPEALS

PRIVATE PERSON'S ACTIONS OF RETRIEVING A SUSPECT'S DISCARDED ITEMS AND TURNING THEM OVER TO A COLD-CASE DETECTIVE FOR DNA TESTING IS HELD NOT TO HAVE BEEN INSTIGATED BY THE DETECTIVE AND THEREFORE NOT TO HAVE TRIGGERED ANY CONSTITUTIONAL PROTECTION OF THE DEFENDANT AGAINST SEARCHES AND SEIZURES BY THE GOVERNMENT OR BY AGENTS OF THE GOVERNMENT

State v. Bass, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. I, June 1, 2021)

Facts:

In early 2015, a detective leading a cold case investigation of a 1989 rape and murder was trying to get DNA of Timothy Forrest Bass, a suspect in the case who was ultimately convicted of felony murder in the first degree. The Bass Opinion describes relevant facts relating to the detective's eventual acquisition of the DNA:

> At this time [early 2015], Bass was working as a delivery truck driver for Franz Bakery. [The detective] reached out to Kim Wagner, the manager of the Franz Bakery outlet store, hoping to obtain company consent to swab the delivery trucks for "touch DNA," or DNA left behind when people touch or use something. [The detective] did not identify the employee he was investigating. Wagner told [the detective] he would need to talk with the corporate offices in order to get permission for any such search and provided him with a phone number for the corporate office. The company refused to give permission to law enforcement to search its vehicles.
>
> Over two years later, in May 2017, [the detective] contacted Wagner [the store manager] again and asked her for the general areas of Bass's delivery route. Wagner asked if he was investigating Stavik's murder. He confirmed he was. She asked if his investigation was related to Bass; he again confirmed it was. The detective informed Wagner he was looking for items that Bass might cast off that may contain his DNA. Wagner provided [the detective] information regarding Bass's normal route, and [the detective] agreed to update her if he found anything.
>
> Shortly thereafter, [the detective] surveilled Bass as he drove his route, hoping to collect anything Bass discarded, like "cigarette butts, bottles, anything he might have drank from, anything he might have eaten or half eaten and thrown away." He later told Wagner that Bass had not discarded any items. **Wagner indicated that she would see if he discarded any items at work, such as water bottles, and asked if that would help. [The detective] said "okay," but told her that he was not asking her to do anything for him.**
>
> In August 2017, Wagner saw Bass drink water from a plastic cup and throw the cup away in a wastebasket in the bakery's employee break room. She collected that cup and stored it in a plastic bag in her desk. Two days later, she saw Bass drink from a soda can and, again, after he discarded it in the same trash can, she retrieved it and stored it with the cup. [The detective] did not direct Wager to take any items and did not tell her how to handle or package these items.

> Wagner contacted [the detective] via text to let him know she had two items Bass had discarded in the garbage. [The detective] met Wagner in the Franz Bakery parking lot, picked up the items, and sent them to the Washington State Crime Lab for analysis. The Crime Lab confirmed that the DNA collected from Bass's soda can and cup matched the male DNA collected from the semen in [the victim's] body.

Proceedings below:

Bass was charged with first degree felony murder. He lost a suppression motion to suppress the DNA that was collected from the soda can and the cup that Wagner gave to the detective. Bass was found guilty in a jury trial.

ISSUE AND RULING: Was the store manager Wagner acting as a State agent such that Bass can argue that his privacy rights were violated by the government under article I, section 7? (ANSWER BY COURT OF APPEALS: No, because the trial court found Wagner was not an agent at the time that she pulled Bass's cup and soda can from the trash, and there is substantial evidence supporting this finding.

Result: Affirmance of Whatcom County conviction of Timothy Forrest Bass for first degree felony murder.

ANALYSIS:

> To prove a private citizen was acting as a government agent, the defendant must show "that the State in some way 'instigated, encouraged, counseled, directed, or controlled' the conduct of the private person." . . . The "mere knowledge by the government that a private citizen might conduct an illegal private search without the government taking any deterrent action [is] insufficient to turn the private search into a governmental one." . . . For an agency relationship to exist, there must be "a manifestation of consent by the principal [the police] that the agent [the informant] acts for the police and under their control and consent by the informant that he or she will conduct themselves subject to police control." . . . .
>
> . . . .
>
> The trial court heard live testimony from both [the detective] and Wagner. At the conclusion of this hearing, the trial court found that Wagner was not acting as an agent of [the detective] when she retrieved the plastic cup and soda can from the garbage can at the Franz Bakery outlet store because it was Wagner who conceived the idea to search the garbage, and [the detective] did not direct, entice, or instigate Wagner's search. Bass assigns error to this finding.
>
> Bass also assigned error to Findings Nos. 12, 13, and 16, to the extent the court found that Wagner "acted independently to further her own ends in seizing Bass's plastic cup and soda can." The challenged findings are:
>
> > 12. Ms. Wagner indicated that she would see if he discarded any items at work such as water bottles and asked if that would help. [The detective] indicated okay, but that he was not asking her to do anything for him.

13. Ms. Wagner testified that she felt a moral obligation to assist in this investigation. . . . .

16. [The detective] had not directed Ms. Wagner to take any items and did not tell her how to handle these specific items or how to package them.

We conclude the challenged findings are supported by substantial evidence. Det. Bowhay and Wagner both testified that [the detective] did not ask or encourage Wagner to look for items to seize and did not tell her what type of items to take. Wagner testified [the detective] did not instruct her to find an item containing Bass's saliva; she made that assumption based on her husband's experience in doing an ancestry DNA test and on watching television crime shows. Wagner confirmed that [the detective] did not encourage her to find Bass's DNA and gave her no guidance in how to do so.

Bass argues that because [the detective] knew of and acquiesced to Wagner's search for items Bass might discard at work, the trial court had insufficient evidence supporting its finding of agency. But it is well-established in Washington that an agency relationship requires more than mere knowledge or acquiescence in a private citizen's actions; our courts require evidence the government in some way prompted or motivated the actions of the would-be government agent. **[LEGAL UPDATE EDITOR'S NOTE: Here, the Bass Court cites and briefly describes the rulings in three Washington Court of Appeals precedents.]** . . . . Because there is no evidence of police instigation, encouragement, or control over Wagner's activities, the trial court's findings are substantially supported by the record before us.

Bass alternatively argues [the detective] instigated and encouraged Wagner's search by asking her for information about Bass's delivery route, by having repeated contacts with her to keep her updated on the outcome of police surveillance of Bass, and then not discouraging Wagner when she volunteered to look for items Bass may have discarded.

[The detective] did ask Wagner for Bass's delivery route. But as Wagner [the store manager] testified, the route is public knowledge. "[Y]ou can sit on a street corner and you can see the same person drive by the same time every day." **A reasonable trial court could find a material difference between asking a private citizen to disclose publicly available information and asking that same person to search garbage bins for discarded items potentially containing a suspect's DNA.**

With regard to the argument that repeated contacts with law enforcement transformed Wagner into a state agent, Wagner testified she had "very few" contacts with the police over a period of two years and estimated that she talked to them "[l]ess than ten" or "[m]aybe less than five" times." **[T]he mere fact that there are contacts between the private person and police does not make that person an agent." . . . . A reasonable trial court could find that the number of contacts Wagner had with [the detective], over a period of two years, was insufficient to make her an agent of law enforcement.**

Finally, [the detective] conceded he did not discourage Wagner from looking for items Bass might discard at work. But as Bass admitted at the suppression hearing, "the State has no requirement to dissuade" a private citizen from searching for evidence. On appeal, Bass asks this court to deem [the detective's] failure to dissuade Wagner as the equivalent of implied encouragement because

"law enforcement could encourage private citizens to conduct illegal searches so long as they uttered the words, 'I cannot tell you to do that.'" But the trial court rejected Bass's argument that [the detective], through his conduct and words, made it clear to Wagner that he needed her help to find Bass's DNA. And Wagner testified she was acting on her own. The trial court clearly found this testimony credible and we will not review on appeal the trial court's credibility determinations. . . .

Bass insists that "Wagner would never have been involved in the investigation or known the police wanted Bass's DNA except for the fact that [the detective] sought her out." Even if true, Bass cites no authority for the proposition that a police officer, by merely sharing information with a private citizen about an ongoing investigation, "recruited" that person into helping with the investigation. And it is contrary to the trial court's finding that [the detective] did not "direct" Wagner to take any items discarded by Bass.

[Citations omitted; footnote omitted]

LEGAL UPDATE EDITORIAL NOTE: The State's briefing in this case also argued that defendant Bass abandoned the items that he tossed into the trash, but the Court of Appeals does not address that argument. See the State's briefing for COA case number 80156-2-I on the Washington Courts website. "Abandonment" for search and seizure purposes is different from abandonment under property law. Leaving/discarding an item in a public area (e.g., in the bushes in the park) with subjective intent to return and retrieve the item may not be abandonment of one's property interest in the item, but it may be abandonment for search and seizure purposes because it is abandonment of any reasonable expectation of privacy as against members of the public or the police discovering and seizing the item. See discussion in LaFave, Search and Seizure, A Treatise on the Fourth Amendment, section 2.6 (4th Ed., 2004). This assumes that the "abandonment" was not caused by unlawful police conduct. Some Washington appellate court abandonment cases are State v. Whitaker, 58 Wn. App. 851 (Div. I, 1990) and State v. Samalia, 186 Wn.2d 262 (July 28, 2016). A complication in the Bass case for the abandonment theory is that a corporate representative had previously denied permission to the detective to search the company's trucks, and there was no corporate consent to search the trash cans that were inside the business premises. Also, while defendant appears to lack standing to raise this issue under Washington case law on standing, the Court of Appeals was able to avoid these issues when it ruled that no governmental search occurred.

CHIEF-AUTHORIZED RECORDING OF PRIVATE COMMUNICATIONS IN NARCOTICS INVESTIGATION UNDER RCW 9.73.230 IS HELD INADMISSIBLE BECAUSE THE WRITTEN REPORT TO THE CHIEF DID NOT SPECIFY THE NAMES OF ALL OF THE OFFICERS AUTHORIZED TO INTERCEPT, TRANSMIT AND RECORD THE PRIVATE COMMUNICATIONS; HOWEVER, THE STATUTE PROVIDES THAT ONLY THE RECORDINGS, NOT UNAIDED WITNESS TESTIMONY, IS REQUIRED TO BE EXCLUDED, SO THE TRIAL COURT MUST NOW DECIDE IF ADMITTING THE RECORDINGS WAS HARMLESS ERROR

In State v. Ridgley, ___ Wn. App. 2d ___ , ___ WL ___ (Div. III, June 8, 2021), Division Two of the Court of Appeals rules that a recording of communications in a narcotics investigation that

was approved by a chief of police must be suppressed because of one area of non-compliance of a report submitted to the chief,. The chief was part of a task force.

The Court of Appeals holds that the chief had authority under RCW 9.73.230 to authorize the interception and recording, but that the report submitted to chief did not meet the strictly construed requirement of RCW 9.73.230(2)(c) that the report must "indicate . . . the names of the officers authorized to intercept, transmit and record the private communications be set forth in the application. The report submitted to the chief in Ridgley named the detective who wrote the report as being so authorized and further provided as to the officers authorized to intercept, transmit, or record the communication that this included "other officers participating in this investigation."

The Court agrees with the ruling of Division One of the Court of Appeals in State v. Jimenez, 76 Wn. App. 647, 651-52 (1995) which made the same ruling on this naming-of-officers issue under RCW 9.73.230.

The Ridgley Court further notes, however, that a violation of the report provisions of RCW 9.73. 230 does not preclude officers or other participants in the communications from testifying to what they saw or heard. Therefore, the Court of Appeals remands the case to the Superior Court for a determination if the trial court's admission into evidence of the recordings was harmless error. The Ridgley Court's analysis on this issue is as follows:

> Evidence obtained in violation of the privacy act's self-authorizing provision is generally inadmissible at a criminal trial. RCW 9.73.050. However, a party or eyewitness to an unauthorized recording is not necessarily prohibited from testifying as to what they saw or heard. RCW 9.73.230(8). When "law enforcement officers make a genuine effort to comply with" RCW 9.73.230, a violation of the statute will not prohibit introduction of evidence unaided by the improperly obtained intercept or recording. [State v. Jimenez, 128 Wn.2d 720, 722, (1996) (Jimenez II); (citing RCW 9.73.230(8)].
>
> Mr. Ridgley agrees the officers in his case made a genuine effort to comply with RCW 9.73.230. As a result, our ruling on the inadmissibility of the undercover recordings does not invalidate all of the State's evidence. Percipient witnesses, including the confidential informant and possibly law enforcement, were still eligible to testify, so long as their testimony was not formed or aided by the undercover recordings.
>
> Where, as here, we have invalidated only a portion of evidence at trial based on invalid recordings, remand is appropriate for the trial court to assess the effect, if any, of the improperly admitted evidence on the defendant's convictions, including the impact on the State's search warrants. Jimenez II, 128 Wn.2d at 726. If the admission of the recordings is found to have been harmless, the convictions should be affirmed. If, however, the admission of the recordings is deemed prejudicial, Mr. Ridgley will be entitled to a new trial.

[Some citations revised for style; footnotes omitted]

Result: Reversal of Lewis County Superior Court convictions of Scott Eugene Ridgley for two counts of methamphetamine delivery, one count of methamphetamine possession with the intent to deliver, and one count of maintaining a premises or vehicle for using controlled substances

LEGAL UPDATE EDITOR'S REMINDER RE RESEARCH TOOL: ELECTRONIC SURVEILLANCE AND DIGITAL EVIDENCE MANUAL FROM THE KING COUNTY PROSECUTOR'S OFFICE

I note as I have in the past that readers should find useful on Privacy Act issues the 2017 update of one of the research sources on the home page of the website of the Washington Association of Prosecuting Attorneys (WAPA): Electronic Surveillance and Digital Evidence in Washington State, 2017, by the King County Prosecuting Attorney's Office, Special Operations. Chapter 5 (pages 45-53) is headed "Interceptions/Recording: Drug, Child Sex Abuse Cases" and addresses RCW 9.73.230.

STRICT LIABILITY FOR DUI VEHICULAR HOMICIDE: BUT-FOR CAUSATION OF A DEATH WHILE DRIVING DRUNK RESULTS IN CRIMINAL LIABILITY; STATE V. BLAKE DOES NOT HELP DEFENDANT'S CHALLENGE HERE TO STRICT LIABILITY BECAUSE, UNLIKE SIMPLE DRUG POSSESSION, "DRUNK DRIVING" IS "NEITHER INNOCENT NOR PASSIVE"

In State v. Vanderburgh, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. III, June 17, 2021), the Majority Opinion for the Division Three panel summarizes the Court's ruling in the Opinion's first two paragraphs as follows:

> Washington law holds drunk drivers strictly liable for their misconduct. An impaired driver who kills another person is guilty of vehicular homicide regardless of whether the victim contributed to their injuries. Liability can be escaped only when an unforeseeable superseding cause breaks the causal chain between the impaired person's driving and the victim's injuries.
>
> Meegan Vanderburgh was driving drunk when she rear-ended a pickup truck that had stopped at an intersection for pedestrians. The force of Ms. Vanderburgh's vehicle caused the pickup to lurch forward and kill one of the pedestrians. Although the pedestrian had been crossing the street illegally and may also have been impaired, this misconduct was not an unforeseeable superseding act. At most, it was simply a concurrent cause of the pedestrian's death. As such, the trial court did not err in limiting evidence and instructions to the jury regarding the pedestrian's alleged misconduct. Ms. Vanderburgh's judgment of conviction is affirmed.

In footnote 4, the Majority Opinion explains as follows why defendant is not helped in this case by the Washington Supreme Court ruling in State v. Blake, 197 Wn.2d 170 (2021), which stuck down Washington's law prohibiting simple possession of controlled substances on constitutional grounds because the statute, since amended, did not have a mental state element):

> Ms. Vanderburgh argues the Washington Supreme Court's decision in State v. Blake, 197 Wn.2d 170 (2021), overrules this court's holding in [State v. Burch, 197 Wn. App. 382 (2016)] that DUI vehicular homicide is a strict liability offense. According to Ms. Vanderburgh, Blake requires reading a mens rea into the DUI vehicular homicide statute, otherwise an intoxicated driver may be held liable for passive, innocent conduct. We disagree with Ms. Vanderburgh's assessment of Blake. Blake recognized that the legislature may enact strict liability offenses "to protect the public from the harms that have come with modern life by putting the burden of care on those in the best position to avoid those harms." . . . . However, Blake held that strict criminal liability cannot apply to

> "wholly innocent and passive non-conduct." . . . . Contrary to Ms. Vanderburgh's assertions, drunk driving is neither innocent nor passive. Drunk driving is a crime, regardless of whether the driver causes injury or is otherwise negligent. . . . Moreover, the conduct in vehicular homicide by intoxication requires the choice to consume alcohol and drive, an unquestionably dangerous combination." State v. Bash, 130 Wn.2d 594, 611 (1996) (plurality opinion).

[Some citations omitted, others revised for style]

The Majority Opinion engages in extended discussion of the concept of "superseding cause" as it applies to DUI vehicular homicide. The Concurring Opinion in Vanderburgh disagrees with much of the Majority Opinion's discussion of that concept, but the Concurring Opinion ultimately agrees with the result of affirmance of the conviction in light of the facts of this case.

LEGAL UPDATE EDITOR'S NOTE: Ever since I was in law school 40-plus years ago, I have found legal discussions of the more arcane aspects of causation to be confusing. I am also always a little suspicious that others who are discussing the issues may also be confused. I will not try to declare a winner or to summarize or excerpt from the competing discussions of superseding cause in the Vanderburgh Majority Opinion or the Vanderburgh Concurring Opinion.

Result: Affirmance of Spokane County Superior Court conviction of Meegan M. Vanderburgh for DUI vehicular homicide

"POSSESSION OF STOLEN PROPERTY": POSSESSION OF A FORGED CHECK DOES NOT VIOLATE THE STATUTE BECAUSE A PAPER CHECK IS EXPRESSLY EXCLUDED FROM THE DEFINITION OF "ACCESS DEVICE" IN RCW 9A.56.010(1)

In State v. Arno, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. III, June 22, 2021), Division Three of the Court of Appeals rules that possession of a forged check does not constitute possession of stolen property. That is because the final nine words of the definition of "access device" expressly exclude a check from being considered an "access device." The key words of the definition in RCW 9A.56.010(1) are bolded in the passage immediately below:

> "Access device" means any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, **other than a transfer originated solely by paper instrument;**

Result: Reversal of Yakima County Superior Court conviction of Ibrahim Deven Teran Arno for possession of stolen property; in an unpublished portion of the Court's Opinion, the Court rejects defendant's other arguments and affirms his convictions for forgery and bail jumping.

RCW 9A.36.150(1)(b): PROHIBITION AGAINST INTERFERING WITH THE REPORTING OF DOMESTIC VIOLENCE IS A STRICT LIABILITY CRIME

In State v. Christian, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. I, June 1, 2021), the Court of Appeals rejects the argument of defendant that the trial court should have instructed the jury that the crime of interfering with the reporting of domestic violence (RCW 9A.36.150(1)(b)

contains a mental state element of either intentional or knowing prevention of reporting. The Christian Court holds that the crime is a strict liability crime.

Result: Affirmance of Snohomish County Superior Court convictions of Charles Freeman Christian for three domestic violence-related crimes: (1) assault in the second degree by strangulation or suffocation, (2) assault in the fourth degree, and (3) interfering with the reporting of domestic violence.

CORRECTIONS OFFICERS QUALIFY AS "LAW ENFORCEMENT OFFICERS" UNDER THE THIRD DEGREE ASSAULT STATUTE, RCW 9A.36.031(1)(g)

In State v. Griepsma, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. I, 2021) (May 24, 2021 Unpublished Opinion declared Published on June 24, 2021), the Court of Appeals rejects the arguments of defendant against his convictions for six counts of third degree assault and one count of third degree malicious mischief. Two of the third degree assault counts were for assaulting police officers, and four of the charges were for assaulting correctional officers in the Skagit County jail after the police officers brought him there.

Defendant argued on appeal that, as to his assaults on correctional officers, he should instead have been charged with custodial assault under RCW 9A.36.100. He had two legal constructs for his challenge, but both constructs failed because the custodial assault statute and the assault three statute do not overlap in the way that he claims.

The Court of Appeals explains the differing coverage of the two statutes as follows:

> RCW 9A.36.031(1)g) defines third degree assault to include assault against "a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault." "[L]aw enforcement" means "the department of people who enforce laws, investigate crimes, and make arrests." [citing dictionary definition.] A sheriff's office is a law enforcement agency. . . .
>
> Therefore, although corrections officers who are employed by a sheriff's office may not be "law enforcement officer[s]," they are nonetheless "employee[s] of a law enforcement agency." RCW 9A.36.031(1)(g). The State established that the victims in counts 5, 6, 8, and 9 were employed by the Skagit County Sheriff's Office. Accordingly, they fall into the class of victims described by RCW 9A.36.031(1)(g). We therefore conclude that there is sufficient evidence to support these convictions.
>
> Griepsma disagrees and contends that we should read the statute narrowly to exclude corrections officers because to do otherwise would "render the custodial assault statute largely redundant or superfluous." While it is true that we do not "interpret a statute in any way that renders any portion meaningless or superfluous," . . .the plain reading of the third degree assault statute does not render the custodial assault statute meaningless or superfluous.
>
> **The custodial assault statute punishes the assault of a "staff member or volunteer, any educational personnel, any personal service provider, or any vendor or agent thereof" at any corrections institution.** RCW 9A.36.100(1). This list includes many individuals who are not covered by the third degree assault statute,

including volunteers as well as corrections staff members who are employed by entities other than law enforcement agencies. Therefore, Griepsma's contention fails.

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

Result: Affirmance of Skagit County Superior Court convictions of James David Griepsma, Jr., for six counts of third degree assault and one count of third degree malicious mischief.

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BRIEF NOTES REGARDING JUNE 2021 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 11 entries below address the June 2021 unpublished Court of Appeals opinions that fit the above-described categories. I do not promise to 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 some element of the descriptions of the holdings/legal issues are bolded.

1. State v. Stephen Wayne Canter: On June 1, 2021, Division One of the COA issues an Opinion that is published in part and is unpublished in part. The Court of Appeals rejects defendant's challenge of his Snohomish County Superior Court convictions for *two counts of attempted first degree child molestation*. The prosecution arose out of a law enforcement "Craigslist" sting. The issues addressed in the published portion of the Opinion will not be addressed in the Legal Update. In the unpublished part of the Opinion, **the Court rejects Canter's arguments that police: (1) exceeded the scope of a search warrant (the Court rules that a warrant's authorization to search an SUV for cell phones, among other items, extended to plastic bags found within the SUV because those bags could reasonably be believed to contain cell phones); (2) destroyed potentially useful evidence in bad faith (the Court rules that defendant failed to show how a photograph that law enforcement inadvertently destroyed could have exonerated him); and (3) violated his right to privacy under the Washington privacy act (WPA), chapter 9.73 RCW (the Court rules under well-established Washington case law that defendant impliedly consented to recording his text and e-mail messages during the course of the sting operation).**

2. State v. Jeffrey Dwayne Brooks: On June 1, 2021, Division One of the COA rejects defendant's challenge to his King County Superior Court convictions for (A) *second degree possession of a firearm* and (B) *possession of heroin with intent to deliver*. The Court of Appeals rules that **information in a search warrant affidavit for defendant's residence and two vehicles was not stale where (A) the warrant was executed on May 4, and (B) the supporting affidavit described, among other events and observations, (1) a successful controlled buy by a CI in "mid-April" at the defendant's residence, and (2) an unsuccessful controlled buy at defendant's car on "April 20."**

3. State v. Antoine Joseph Perry: On June 2, 2021, Division Two of the COA rejects defendant's challenge to his Pierce County Superior Court convictions for (A) *rape in the second degree,* (B) *assault in the second degree, and* (C) *unlawful imprisonment*. The Court rules that **the trial court did not abuse its discretion in: (1) admitting evidence related to an uncharged rape, because similarities in the two attacks showed a common scheme or plan; and (2) admitting testimony from a sexual assault nurse examiner (SANE) under ER 803(a)(4), because the purpose of the nurse's examination was not solely forensic, i.e., not solely to collect evidence**.

4. State v. Matthew Nicholas McGowan: On June 7, 2021, Division One of the COA rejects defendant's challenge to his Snohomish County Superior Court for *first degree murder*. The Court of Appeals rules that **the trial court did violate defendant's right of confrontation under the U.S. Constitution's Sixth Amendment in admitting out-of-court statements of a non-testifying co-conspirator because the statements were not "testimonial:" the statements were made for the primary purpose of telling a third co-conspirator that a criminal plan had gone awry, not to create an out-of-court substitute for trial testimony.**

5. State v. Seth C. Tapaka: On June 7, 2021, Division One of the COA rejects defendant's challenge to his King County Superior Court convictions for (A) *robbery in the first degree* and (B) *unlawful possession of a firearm in the first degree*. **The Court of Appeals rules that the defendant's Sixth Amendment right to confrontation was violated when testimonial hearsay statements of two robbery victim's 911 calls were admitted at trial. However, the Court of Appeals concludes that the trial court's error was harmless in light of the other overwhelming evidence against defendant.** The Court of Appeals engages in lengthy analysis that explains the Court's conclusion that the 911 callers' statements were testimonial under Sixth Amendment Confrontation Clause analysis.

6. State v. Arthur S. Durone: On June 8, 2021, Division Two of the COA rejects the State's appeal from a *Lewis County Superior Court suppression order*. The Court of Appeals rules that **a search warrant lacked sufficient particularity to satisfy the Fourth Amendment where the warrant authorized officers to search defendant's entire vehicle and to seize "all items of evidence of the crime(s)" of "Possession of a Controlled Substance," "Possession of Drug Paraphernalia," and "Felon in Possession of a Firearm."** The Court of Appeals declares:

> **We hold that the warrant was overbroad and violated the Fourth Amendment's particularity requirement because it failed to list any particular items to be seized. Some description of the items that may be seized is necessary to guide the executing officer's discretion and to inform the person subject to the search of what items could be seized. We affirm the trial court's order suppressing all evidence seized pursuant to the overbroad warrant and affirm the trial court's order finding the State's case effectively terminated.**

7. State v. Colby D. Vodder: On June 17, 2021, Division Three of the COA agrees with defendant's challenge to his Spokane County Superior Court conviction for *first degree felony murder*. **The Court of Appeals rules that, by allowing a detective to testify to his opinion that defendant was guilty, the trial court violated both (1) the Rules of Evidence (ER 702) regarding expert testimony, and (2) the defendant's Sixth Amendment right to have the jury act as fact-finder.** The Court asserts that in asking the detective about what the detective told the defendant's mother regarding defendant's possible guilt, the defendant did not "open the door" to the prosecutor asking the detective if the detective believed that defendant was guilty. The error is ruled not harmless in light of the admissible evidence in the case, and the case is remanded for re-trial for felony murder predicated on second-degree kidnapping.

8. In re Personal Restraint Petition of Nicholas Brandon Van Duren: On June 21, 2021, Division One of the COA rejects defendant's request for personal restraint relief from his Snohomish County Superior Court conviction for *residential burglary while on community custody*. Police stopped a car based on a description from a witness contemporaneously reporting a nearby burglary. Officers opened the trunk of the vehicle without a search warrant, and they observed golf clubs. They then got a list of items that the resident believed had been stolen in the burglary, and that list did not include golf clubs. An affidavit for a subsequently requested search warrant for the car did not mention the search of the trunk or the earlier discovery of the golf clubs. A search of the car under the warrant recovered some items that the burglary victim had described. **The Court of Appeals rejects defendant's argument that the initial unlawful search of the trunk of the car required suppression of evidence seized in the execution of the search warrant. That was because defendant has failed to show any causal connection between (A) the unlawful initial trunk search and (B) the discovery of the evidence that he seeks to have suppressed.**

9. State v. Nicolas Aaron Clark: On June 22, 2021, Division Two of the COA rejects defendant's challenge to his Clark County Superior Court convictions for (A) *three counts of sexual exploitation of a minor*, (B) *two counts of first degree child molestation*, and (B) *six counts of first degree possession of depictions of a minor engaged in sexually explicit conduct*. The Court of Appeals notes that the case began with an investigative tip from the National Center for Missing and Exploited Children (NCMEC). The tip explained that Tumblr.com, an electronic service provider, submitted information to the NCMEC tip line that an image of suspected child pornography had been uploaded through its servers. Tumblr.com reported "that on or about June 23, 2018, a subject using the Uniform Resource Locator (URL) funrufus.tumblr.com attempted to, or did, pass an image identified as child pornography through their servers." The tip included two Internet Protocol (IP) addresses of the subject at the time of the incident. Based on the IP addresses, police officers were able to verify that the subject spent time in Vancouver.

The Court of Appeals rules that an affidavit for a search warrant for Clark's electronic devices established probable cause for a search warrant to collect subscriber information from Verizon related to certain suspect IP addresses. Some of the key fact-based analysis is as follows:

> [The detective] described Tumblr.com, explained subscriber information as it related to Verizon, the "funrufus" account, and IP addresses. He included information from Tumblr.com and Yahoo related to the URL and e-mail accounts provided in the tip. [The detective] also described [the detective's] experience and training in cybercrime. [The detective] described the image so that the reader could determine that (1) it contained a

single prepubescent female clothed in underwear, (2) with the underwear pulled aside to expose her vagina, and (3) the child's legs are separated making the focal point of the picture the vagina area.

The description of the image, when taken together with the affidavit's description of the Tumblr.com site, [the detective's] experience, and the other information from the NCMEC tip is sufficient to make a reasonable inference that criminal activity would be found by a search. . . . The image described meets the statutory definition of a "depiction of a minor engaged in sexually explicit conduct" under RCW 9.68A.070 and 9.68A.011(4)(f). Because Tumblr.com is used to share photos, and because the image was passed through Tumblr.com's servers from an IP address located in Vancouver, it is reasonable to infer from the affidavit that a person in Vancouver was involved in criminal activity.

[Case citation omitted; bolding added]

10. State v. Nathaniel Wilfred Broussard: On June 22, 2021, Division Three of the COA rejects defendant's challenge to his Pierce County Superior Court convictions for (A) *burglary in the second degree* and (B) *making or having burglar tools*. **The Court of Appeals rules that a sheriff's office social media post (which contained some false information) that was posted shortly after defendant's arrest did not conclusively require dismissal of the charges based on "governmental misconduct" where: (1) the trial court allowed the parties to question potential jurors about their exposure to the case; (2) the trial court generously removed any juror who had heard of the case; and (3) defendant did not exhaust his peremptory challenges and did not move for a change of venue.**

11. State v. Chelsea Kirsten Hayes: On June 29, 2021, Division Two of the COA rejects defendant's request for "personal restraint relief" from her Thurston County Superior Court convictions for (A) *conspiracy to deliver a controlled substance* and (B) *possession of a controlled substance with intent to deliver*. She argued that a search warrant was not lawful because it transposed two digits in her house number. The address of her house is "72**50** 14th Avenue SE in Lacey" and the warrant described the place to be searched as located at "72**05** 14th Avenue SE in Lacey." **The Court of Appeals explains as follows why the transposing of numbers did not invalidate the warrant in this case where the officers executing the search warrant knew where she lived:**

[A]n incorrect address on a search warrant alone does not invalidate the warrant; the key inquiry is whether there are adequate assurances that a mistaken search would not be likely to occur. State v. Bohan, 72 Wn. App. 335, 339 (1993) . . . . Where, as here, the officers executing the warrant knew where the defendant lived, an error in the address listed on the warrant is immaterial. Bohan at 340; see State v. Rood, 18 Wn. App. 740, 745-46 (1977).

[Citations revised for style]

Based on State v. Blake, 197 Wn.2d 170, 173 (2021), which is the Washington Supreme Court's decision that invalidated the former strict liability statute prohibiting simple possession of controlled substances, the Court of Appeals sets aside the defendant's conviction for that crime under the former statute.

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

Beginning with the September 2015 issue, the most recent monthly Legal Update for Washington Law Enforcement is placed under the "LE Resources" link on the Internet Home Page of the Washington Association of Sheriffs and Police Chiefs. As new Legal Updates are issued, the three most recent Legal Updates will be accessible on the site. WASPC will drop the oldest each month as WASPC adds the most recent Legal Update.

In May of 2011, John Wasberg retired from the Washington State Attorney General's Office. For over 32 years immediately prior to that retirement date, as an 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 p[Officer B]cutors. The Legal Update is published as a research source only and does not purport to furnish legal advice. Mr. Wasberg's email address is jrwasberg@comcast.net. His cell phone number is (206) 434-0200. The initial monthly Legal Update was issued for January 2015. Mr. Wasberg will electronically provide back issues on request.

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

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

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990.

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

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

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