LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

NOVEMBER 2021

TABLE OF CONTENTS FOR NOVEMBER 2021 LEGAL UPDATE

****

NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY: 2-1 MAJORITY RULES ON THE TOTALITY OF THE ALLEGATIONS THAT NO CONSTITUTIONAL VIOLATION OCCURRED WHERE OFFICERS DETERMINED AFTER A WARRANT ARREST THAT THE VOMITING ARRESTEE, WHO TOLD THE OFFICERS THAT THE VOMITING WAS DUE TO HER PREGNANCY, DID NOT NEED TO BE EXAMINED BY A PARAMEDIC

In J.K.J. v. City of San Diego, __ F.3d __ , 2021 WL __ (9th Cir., November 15, 2021), a three-judge Ninth Circuit splits, 2-1, with the Majority Opinion concluding that officers did not commit a constitutional violation where they did not call for a paramedic after a warrant arrestee vomited in the back seat of a patrol car, and she told them that she was vomiting because of pregnancy, not withdrawal from drugs. She soon became unconscious, She died nine days later.

A staff report (which is not part of the Majority Opinion or Dissenting Opinion) summarizes the two Opinions and the result in the case as follows:

> [Majority Opinion]
>
> [The Opinion for the 2-1 majority affirms] the district court's dismissal of an action brought pursuant to 42 U.S.C. § 1983 alleging constitutional violations by police officers in their treatment of Aleah Jenkins, who was arrested at a traffic stop, fell ill while in police custody, and died nine days later.
>
> When officers discovered, after stopping the car, that Jenkins was subject to arrest based on a warrant involving a prior methamphetamine offense, they handcuffed her and put her in defendant [Officer] Durbin's cruiser. Inside the cruiser, Jenkins vomited, and defendant [Officer] Taub called for paramedics but cancelled the call after Jenkins said she was pregnant and not detoxing.
>
> On several occasions during the transport to the police station, Jenkins groaned and screamed for help. After fingerprinting Jenkins at the police station, as she lay on her side, defendants placed her back in the cruiser. About eleven and a half minutes later, they found her unconscious, called for paramedics, and began CPR. Jenkins fell into a coma and died nine days later.
>
> [The Majority Opinion concludes – on an issue regarding what evidence could be considered in the procedural posture of this case] that the district court validly exercised its discretion in choosing to review a bodycam video that plaintiff had incorporated by reference into the amended complaint. Second, the [Majority Opinion notes that the] district court did not assign the video too much weight. Lastly, [the Majority Opinion asserts that] to the extent the district court found that the video contradicted anything in the amended complaint, it rejected plaintiff's conclusory allegations regarding whether the officers' conduct met the legal standard of a constitutional violation.
>
> The [Majority Opinion next concludes – on the merits of the case] that the district court did not err in dismissing the amended complaint.
>
> Addressing the municipal liability claim brought under Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 690 (1978), the [Majority Opinion concludes] that the complaint did not plausibly allege that any City policy or custom "was the moving force"

behind the constitutional violations Jenkins allegedly suffered. Rather the allegations suggested that that the moving force behind the alleged constitutional violation was not a failure to train, but the officers' [alleged] failure to heed their training.

Addressing the claims against the individual officers, the [Majority Opinion concludes] that the amended complaint failed to allege facts that would demonstrate either objective unreasonableness or objective deliberate indifference by either officer. Considering all the facts in the amended complaint and the incorporated video, the panel could not say that it was objectively unreasonable – much less an instance of objective deliberate indifference akin to reckless disregard—for the officers to conclude that paramedics were not needed at the traffic stop.

The [Majority Opinion further concludes] that the alleged violative nature of the officers' conduct, in failing to recognize and respond to Jenkins' serious medical need, was not clearly established [under controlling case law] in the specific context of this case. [The government defendants] were therefore also entitled to qualified immunity under the second prong of the qualified immunity test.

[Dissenting Opinion]

Dissenting in part, Judge Watford [argues] that the Majority Opinion offer[s] a truncated and highly sanitized account of the events giving rise to this lawsuit, at least as alleged by the plaintiff. Although at this stage of the case the panel was required to accept the plaintiff's factual allegations as true, the [Dissenting Opinion contends that the] Majority Opinion ignore[s] most of the facts alleged in the complaint.

The [Dissenting Opinion also argues that the plaintiff's] complaint also expressly incorporated by reference the contents of a publicly available body camera video that captures many of the relevant events, yet the Majority Opinion turned a blind eye to most of what that video depicted as well.

[According to the Dissenting Opinion] the plaintiff's complaint plausibly alleged that Jenkins, a young African-American woman, died in police custody because the officer responsible for transporting her to police headquarters took no action when she experienced an acute medical emergency. Judge Watford would reverse the district court's dismissal of the claims against Officer Durbin and remand for further proceedings.

[Some paragraphing revised for readability; bracketed text added]

Result: Affirmance of U.S. District Court (Southern District of California) order dismissing the plaintiff's section 1983 Civil Rights Act lawsuit.

SECOND AMENDMENT HELD IN 7-4 VOTE NOT TO BE VIOLATED BY CALIFORNIA STATUTES BANNING POSSESSION OF LARGE-CAPACITY MAGAZINES THAT HOLD MORE THAN 10 ROUNDS OF AMMUNITION

In Duncan v. Bonta, ___ F.3d ___ , 2021 WL ___ (9th Cir., November 30, 2021), an eleven-judge Ninth Circuit panel votes 7-4 to uphold against a Second Amendment challenge California statutes that ban possession of large-capacity ammunition magazines that hold more than ten

rounds of ammunition. In 2020, a three-judge Ninth Circuit panel ruled that the statutes violate the Second Amendment, but the Ninth Circuit then set aside that decision for review by the 11-judge panel.

There are five opinions from the 11 judges covering over 150 pages in total. The Legal Update will not try to summarize the opinions or even excerpt from the staff summary that covers almost six pages.

Result: Reversal of U.S. District Court order that granted summary judgment to the plaintiffs; thus, the Majority Opinion of the 11-judge panel rules that California's legislation banning LCMs does not violate the Second Amendment of the U.S. Constitution.

LEGAL UPDATE EDITOR'S NOTES/COMMENTS: Numerous friend-of-the-court briefs were filed by governmental agencies and private organizations. It seems likely that the challengers to the legislation will seek U.S. Supreme Court review. It could be a long while before this case is finally resolved. The State of Washington does not have a similar magazine-capacity-restricting statute, though somewhat similar legislation has been proposed in the recent past. The Washington Attorney General was one of the listed friends of the court participating in briefing in Duncan v. Becerra. I have not seen any of the briefs.

SEATTLE CITY COUNCILMEMBER SAWANT MUST DEFEND AGAINST THE CIVIL LAWSUIT CLAIMS OF TWO POLICE OFFICERS WHO ASSERT THAT SHE DEFAMED THEM BY ACCUSING THEM INDIVIDUALLY OF COMMITTING "A BLATANT MURDER" IN A POLICE SHOOTING THAT ENDED IN THE DEATH OF A SUSPECT UNDER DISPUTED CIRCUMSTANCES

In Miller and Spaulding v. Sawant, ___ F.3d ___ , 2021 WL ___ (9th Cir. November 10, 2021), a three-judge panel rules that two Seattle police officers have alleged sufficient claims to support their defamation lawsuit against Seattle City Councilmember Kshama Sawant.

A staff report (which is not part of the panel's Opinion) summarizes the Opinion and the result in the case as follows:

> The panel [of three judges unanimously reverses] the district court's dismissal of an action brought by Seattle police officers who alleged they were defamed by Defendant Kshama Sawant, a member of the Seattle City Council, through comments Sawant made about a deadly police shooting in which Plaintiffs were involved. The district court dismissed Plaintiffs' defamation claims on the ground that their third amended complaint failed adequately to allege that Sawant's remarks were "of and concerning" them.
>
> In reversing the district court, the [panel's Opinion first concludes] that Sawant's own words suggested that her remarks were directed not only at the police generally, but also at the individual officers involved in the shooting. She told the crowd that the shooting constituted "a blatant murder at the hands of the police," and she called for the Seattle Police Department to be held accountable "for their . . . individual actions."
>
> Second, [the panel's Opinion concludes that] the complaint plausibly alleged that some of those who read or heard Sawant's remarks—Plaintiffs' families, friends, and

> colleagues, as well as members of the general public—knew that Plaintiffs were the officers involved in the shooting.
>
> Third, [the panel's Opinion concludes that the] complaint plausibly alleged that these readers and listeners understood that Sawant's remarks were directed at Plaintiffs.
>
> The panel [holds] that under the governing federal pleading standard, Plaintiffs plausibly alleged that Sawant's communications were of and concerning them.
>
> The panel [disagrees] with the district court's conclusion that no reasonable person could conclude that Sawant's remarks concerned the individual officers but rather spoke to broader issues of police accountability. The panel [holds] that at most, the district court identified one reasonable interpretation of Sawant's words, not the only reasonable interpretation.
>
> [The panel's Opinion explains that] where a communication is capable of two meanings, one defamatory and one not, it is for a jury, not a judge, to determine which meaning controls. Here, Sawant's words reasonably carried with them the defamatory meaning Plaintiffs had assigned to them. Accordingly, the [panel's unanimous Opinion reverses] the district court's judgment and [remands] for further proceedings.

[Some paragraphing revised for readability; bracketed text added]

The staff summary does not address the final paragraph of the Ninth Circuit panel's Opinion, which rejects the officers' request that the case be assigned to a different district court judge on remand. The panel explains the rejection of this request as follows:

> Finally, Plaintiffs have requested that this case be reassigned to a different district judge on remand. In United States v. Reyes, 313 F.3d 1152, 1159 (9th Cir. 2002), we noted that "[a]bsent proof of personal bias on the part of the district judge," and no such proof has been proffered in this case, "remand to a different judge is proper only under unusual circumstances." One such "unusual circumstance" is "[a] district judge's adamance in making erroneous rulings," which "may justify remand to a different district judge." United States v. Sears, Roebuck & Co., 785 F.2d 777, 780 (9th Cir. 1986) (citations omitted).
>
> While it is true that this is the second appeal from this district judge's rulings on the sufficiency of the complaint, ... in Sears, Roebuck, in which the case was reassigned to a different judge on remand, we noted that "[t]his is the fourth pretrial appeal in this case and the third time the government has appealed from dismissal of the indictment," id. at 781. We do not believe that, here, these two erroneous rulings on the sufficiency of two different versions of the complaint rise to the level of "adamance." Suffice it to say that on remand the district court should accept the TAC as sufficiently pleading a defamation claim under Washington law. With that observation, Plaintiffs' request for reassignment is denied.

[Paragraphing revised for readability]

Result: Reversal of U.S. District Court (Western Washington) order dismissing a defamation action by Officers Miller and Spaulding.

****

WASHINGTON STATE SUPREME COURT

WASHINGTON CONSTITUTION, ARTICLE I, SECTION 7, WAS NOT VIOLATED WHERE AN OFFICER PERFORMED A RUSE BY COMMUNICATING THROUGH TEXT MESSAGES BETWEEN AN UNDERCOVER PHONE AND THE PHONE OF A SUSPECTED DRUG DEALER, AND THE OFFICER (1) CLAIMED TO BE A NAMED RECENT CUSTOMER OF THE SUSPECT, (2) CLAIMED THAT HE WAS USING A REPLACEMENT PHONE, AND (3) MADE A DEAL TO BUY METHAMPHETAMINE

In State v. Bowman, ___ Wn.2d ___ , 2020 WL ___ (November 9, 2020), the Washington Supreme Court reverses a Court of Appeals ruling and holds for the State in a case where a law enforcement officer performed a ruse on a drug dealer. The officer used an undercover cell phone to communicate through text messages with a suspected drug dealer, and the officer (1) claimed to be a named recent customer who had texted with the suspect, (2) claimed to be using a replacement phone to make the new text, and (3) made a deal to buy methamphetamine.

In Bowman, the Washington Supreme Court Majority Opinion (signed by five Justices) and the Concurring Opinion (signed by four Justices) agree that the officer's trickery did not violate the holding in the Washington Supreme Court's independent grounds ruling under article I, section 7 of the Washington constitution in State v. Hinton, 179 Wn.2d 862, 876-77 (2014). The Concurring Opinion states clearly that the officer's trickery would have been unlawful under Hinton if the officer had used the recent customer's own cell phone in his ruse to make the deal. The Majority Opinion in Bowman does not expressly disagree with that assertion in the Concurring Opinion in Bowman.

In the Washington Supreme Court's 2014 decision in Hinton, the Court held under article I, section 7 of the Washington constitution that the sender of an unopened text message has a State constitutional expectation of privacy in the communication. Thus, where a law enforcement officer – rather than the non-law enforcement intended recipient of the message – opened the text message without the consent of the intended recipient and communicated by text with the sender using the intended recipient's phone, this law enforcement action violated the right of privacy of the person who sent the initial message.

The Majority Opinion and Concurring Opinion in Bowman both distinguish the facts of Hinton from the facts in Bowman. The Majority Opinion rejects the defendant's constitutional arguments under both privacy and trespass analysis. The Concurring Opinion in Bowman contains some complex ruminations about constitutional privacy rights and racial disparities that I will not try to tackle in the Legal Update.

Result: Reversal of Washington State Division One Court of Appeals decision that reversed the King County Superior Court conviction of Reece William Bowman for possession of methamphetamine with intent to deliver; in other words, the King County Superior Court conviction of Reece William Bowman is affirmed.

****

WASHINGTON STATE COURT OF APPEALS

SEARCH WARRANT PROCESS THAT WAS USED BY SHERIFF'S OFFICE TO OBTAIN YOUTH SERVICES CENTER'S PATIENT TREATMENT RECORDS IS HELD TO NOT COMPLY WITH FEDERAL LAW REQUIREMENTS; INSTEAD, FEDERAL REGULATIONS REQUIRED THAT LAW ENFORCEMENT OBTAIN AN ORDER ON GOOD CAUSE BEFORE OBTAINING AND EXECUTING THE SEARCH WARRANTS

In Daybreak Youth Services v. Clark County Sheriff's Office, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. II, November 9, 2021), Division Two of the Court of Appeals rules that a sheriff's office investigation involving alleged misconduct at a treatment facility violated federal regulations because the sheriff's office failed to obtain a "good cause" court order prior to obtaining the treatment facility records with a search warrant.

The Court of Appeals holds in the Daybreak Youth Services case that a retroactive order does not cure the violation of not first obtaining a "good cause" order. The Court of Appeals also explains that under the applicable federal regulations a good cause order must "limit disclosure" of patient records to only those that are essential.

Result: Reversal of Clark County Superior Court order on good cause and the order denying the treatment center's motion for return of property.

IN WDFW INVESTIGATION OF CHARTER FISHING BUSINESS FOR UNLAWFUL RECREATIONAL FISHING BY ALLEGED "HIGH-GRADING" OF HALIBUT, SEARCH WARRANT PROBABLE CAUSE ISSUES ARE ADDRESSED

In State v. Gudgell, ___ Wn. App.2d ___ , 2021 WL ___ (Div. II, November 23, 2021), Division Two of the Court of Appeals addresses a case that arose from a WDFW investigation into suspected "high-grading of halibut." This unlawful practice involves the charter operator continuing to fish after the daily catch limit is reached, and then throwing the smallest fish overboard near the end of the day to come within the catch limit. The initial investigation determined that high-grading had occurred on two of five boats that used Pacific Salmon Charters (PSC) to book their passengers.

The WDFW included the above information in an affidavit and obtained a search warrant that extended authority to search to PSC customer records of all five boats that used the services of PSC. Then the records obtained in the search of PSC records were used to contact, among other persons, past passengers of one of the other three boats, the *Katie Marie*, which was owned and captained by defendant Robert Gudgell. Some of those past passenger-customers of the *Katie Marie* became witnesses in a high-grading prosecution against Robert Gudgell.

The Gudgell Court rules that the affidavit did not establish probable cause that evidence of a crime would be found in a search of records of PSC relating to the *Katie Marie*. Evidence that some boats engaged in high-grading did not establish that other boats engaged in high-grading. Therefore, the search warrant was overbroad as to the records of PSC relating to the *Katie Marie*.

Result: Affirmance of Pacific County Superior Court Superior Court reversal of the District Court convictions of David Gudgell and Robert Gudgell for unlawful recreational fishing in the second degree; however, the case against David Gudgell (who prevailed on appeal only on an instructional error) may be retried on remand. The search warrant was supported by probable cause as to David Gudgell.

EVIDENCE IS HELD INSUFFICIENT TO PROVE RAPE IN THE SECOND DEGREE BASED ON FORCIBLE COMPULSION WHERE VICTIM WAS UNCONSCIOUS OR UNABLE TO RESPOND AND THUS (1) SHE DID NOT DO ANY RESISTING, AND (2) DEFENDANT DID NOT DO ANY OVERCOMING OF RESISTANCE

In State v. Gene, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. I, November 29, 2021), the Court of Appeals rules that the evidence in a second degree rape prosecution was insufficient to support instructions to a jury that it could convict defendant on that charge based on engaging in sexual intercourse with the alleged victim either (1) by forcible compulsion, or (2) when the victim was incapable of consent by reason of being physically helpless or mentally incapacitated

In key part, the Gene Court's analysis is as follows:

> The essential elements of rape in the second degree by forcible compulsion are set forth in RCW 9A.44.050(1)(a):
>
> > A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person . . . [b]y forcible compulsion.
>
> "Forcible compulsion" is defined by statute:
>
> > "Forcible compulsion" means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.
>
> RCW 9A.44.010(6).
>
> In other words, for there to be forcible compulsion in the context of rape in the second degree, there must have been force that was "directed at overcoming the victim's resistance and was more than that which is normally required to achieve penetration." State v. McKnight, 54 Wn. App. 521, 528 (1989). "'Forcible compulsion is not the force inherent in any act of sexual touching, but rather is that used or threatened to overcome or prevent resistance by the [victim].'" State v. Corey, 181 Wn. App. 272, 277 (2014) . . . (quoting State v. Ritola, 63 Wn. App. 252, 254-55 (1991)). The resistance that forcible compulsion overcomes need not be physical resistance, but it must be reasonable resistance under the circumstances. McKnight, 54 Wn. App. at 528-29 (reasonable juror could find forcible compulsion when defendant pushed 14-year-old victim down and disrobed her over her requests that the advances stop).
>
> Here, viewing the evidence in the light most favorable to the prosecution, K.M. did not resist the penetration of her vagina by Gene's penis. K.M.'s testimony, set forth in full above, was that she was unconscious or unable to respond when Gene engaged in

sexual contact with her. Because K.M. was unable to respond, she could not resist the penile-vaginal assault and there was no resistance for Gene to overcome.

The State asserts that evidence of Gene positioning K.M.'s body and forcefully removed her clothing is evidence of force overcoming K.M.'s resistance, citing McKnight. In so contending, the State misapprehends the holding of McKnight. In McKnight, we explained that acts that overcome a victim's verbal resistance may constitute forcible compulsion:

> Reasonable minds can differ as to whether the acts of slowly pushing [the victim] to a prone position in response to the victim's requests that the advances stop and then removing her clothes in response to the victim's requests that the advances stop manifest a degree of force greater than that which is inherent in the act of intercourse. A reasonable juror could, however, infer from the evidence that these were acts of force over and above what is necessary to achieve intercourse and that these acts were employed to overcome [the victim]'s resistance.

McKnight, 54 Wn. App. at 528 (emphasis added)

Here, K.M. was unconscious or unable to voice any such resistance. The circumstance that K.M. slept in—clothed and on her side—did not constitute resistance to a sexual assault that K.M. had no reason to anticipate. Cf. Ritola, 63 Wn. App. at 254-55 (insufficient evidence of forcible compulsion when juvenile suddenly grabbed and squeezed female camp counselor's breast before removing his hand because, as camp counselor was too surprised to resist, there was no resistance to overcome). The force exerted by Gene was not employed to overcome any resistance posed by K.M. [State v. Corey], 181 Wn. App. at 277.

Rather, the force Gene used to move K.M.'s body into a prone position, separate her legs, and remove her shorts was nothing more than the force "needed to bring about sexual intercourse or sexual contact." Ritola, 63 Wn. App. at 254. When K.M. was able, she did resist, both by wrapping herself in a blanket and by yelling at Gene to "Get out. Get the fuck out. Leave." This resistance was successful, and Gene did not overcome it.

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

Result: Reversal of Thurston County Superior Court conviction of Darren Gene for rape in the second degree; case is remanded to the trial court for possible re-trial for rape in the second degree based on the statute's prohibition on engaging in sexual intercourse with a person who is incapable of consent by reason of being physically helpless or mentally incapacitated.

****

BRIEF NOTES REGARDING NOVEMBER 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 ten entries below address the November 2021 unpublished Court of Appeals opinions that fit the above-described categories. I do not promise to be able catch them all, but each month I will make a reasonable effort to find and list all decisions with these issues in unpublished opinions from the Court of Appeals. I hope that readers, particularly attorney-readers, will let me know if they spot any cases that I missed in this endeavor, as well as any errors that I may make in my brief descriptions of issues and case results. In the entries that address decisions in criminal cases, the crimes of conviction or prosecution are italicized, and descriptions of the holdings/legal issues are bolded.

1. In the Matter of the Personal Restraint of Robert Noonan Pounds: On November 8, 2021, Division One of the COA rejects the challenge of defendant to his King County Superior Court convictions for (A) *one count of firearm theft* and (B) *one count of unlawful firearm possession*. **The Pounds Court rules that probable cause supported defendant's arrest**, summarizing its analysis in key part as follows:

> Pounds argues [the detective] lacked probable cause to arrest him because no witness observed him with the stolen guns, Pounds had no direct connection with [the burglary victim], and no evidence directly tied Pounds to the [car] where police found the stolen guns.
>
> But the evidence established that when he arrested Pounds, [the detective] knew that Pounds was inside Hansen's home without permission [contemporaneous with the time of the crime], that [Pounds] left with [the suspected burglary accomplice] carrying items consistent with the size and shape of [the burglary victim's] missing firearms, and that shortly after the theft, police found some of [the victim's] stolen guns inside the car—a car associated with [the suspected accomplice]—abandoned near [the victim's] house. These facts are sufficient for a reasonable officer to believe Pounds took Hansen's guns
>
> [Court's footnote 5: *Pounds also argues that his arrest was unlawful because the traffic stop was a pretext to investigate the firearm theft. The record does not support this claim. [The detective] testified that he stopped Pounds not for any claimed traffic infraction but to arrest him for gun theft, unlawful possession of a firearm, and possibly burglary.*
>
> [Court's footnote 6: *Pounds also suggests that [the detective] was subjectively motivated to target Pounds because of prior contacts with him. But we determine probable cause by objective facts, not the subjective opinion of an officer. State v. Huff, 64 Wn. App. 641, 645 (1992).]*

The Court of Appeals Opinion in the Pounds case is accessible on the Internet at:
https://www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinion&filename=811223MAJ

2. State v. Viviana ("Venesa") Rangel-Ochoa: On November 8, 2021, Division One of the COA rejects the challenge of defendant to her King County Superior Court conviction for *residential burglary*. **On appeal, she argued that police coerced her Mirandized statements by driving her to her apartment to execute a search warrant. During the drive she spontaneously made some incriminating statements that were not prompted by police questions. The Court of Appeals rejects her argument. The Court rules that the record supports the trial court's determination that her incriminating statements were not coerced.**

The legal analysis by the Court of Appeals on the voluntariness-of-admissions issue is as follows:

> The detective did not ask any questions of Rangel-Ochoa and merely explained that they were driving back to her apartment to execute a search warrant.
>
> [Court's footnote 4: *The record is unclear as to why the detectives brought Rangel-Ochoa back to her home to execute the search warrant and whether they intended to release her if evidence of the burglary was not found after the search.*]
>
> However, Rangel-Ochoa argues that the detectives, by driving with her back to her home to execute a warrant, employed a "coercive technique" and "psychological tool" "designed to improperly coerce a statement."
>
> Rangel-Ochoa relies on Brewer v. Williams, 430 U.S. 387, 406 424 (1977) for her contention that she was wrongfully coerced as a result of the police driving her to a location connected to the crime. In Brewer, the defendant, Williams, turned himself in upon advice of his attorney in a town 160 miles away from Des Moines where the murder took place. Des Moines police picked up Williams, who they knew was a former mental patient and "deeply religious." During the 160-mile car ride, police told Williams that without his assistance, the young girl he murdered might be denied a "Christian burial." Though the Supreme Court noted that the detective "deliberately" set out to elicit information from Williams, the Court held that Williams's confession was inadmissible because he never waived his right to the assistance of counsel. Brewer is distinguishable.
>
> Contrary to Rangel-Ochoa's assertion, Brewer does not stand for the proposition that police engage in coercion when they drive with a suspect to a location connected with a crime. The Court [in Brewer] explained, it was "unnecessary to evaluate the ruling of the District Court that Williams' self-incriminating statements were, indeed, involuntarily made." Furthermore, the police "Christian burial" speech in Brewer is not at all comparable to police telling Rangel-Ochoa they were executing a search warrant in the instant case.
>
> A defendant's incriminating statements are involuntary or coerced if, based on the totality of the circumstances, a defendant's will was overborne. . . . A police officer's "psychological ploys" may influence a suspect's decision to make an incriminating statement, but such statements are still voluntary so long as the decision to make a statement "is a product of the suspect's own balancing of competing considerations." State v. Unga, 165 Wn.2d 95, 102 (2008) (citations omitted). At the point police drove Rangel-Ochoa back to her apartment, she was aware of her Miranda rights, and had

demonstrated that she understood how to exercise them by declining to answer some questions. Understanding that police were about to search her apartment does not establish that her will was overborne through coercion.

Substantial evidence in the record shows Rangel-Ochoa's statements in the patrol car were not in response to interrogation and were voluntary. The trial court did not err in admitting Rangel-Ochoa's statements.

[Some citations omitted, others revised for style; bracketed language added]

The Court of Appeals Opinion in the Rangel-Ochoa case is accessible on the Internet at:
https://www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinion&filename=816993MAJ

3. State v. William Jay Lind: On November 8, 2021, Division One of the COA rejects the challenge of defendant to his Snohomish County Superior Court conviction for *third degree rape*. The defendant argued that the trial court erred by admitting inculpatory custodial statements after the Mirandized defendant asked to talk to the interrogating officer "off the record." The Court of Appeals rules that Lind did not invoke his right to remain silent by asking to speak off the record, and the officer did not engage in deception or misrepresentation about Lind's constitutional rights in turning off the tape recorder and continuing to converse with the suspect. The Court of Appeals also rules in the alternative that any error in admitting the incriminating statements was harmless in light of the strength of other evidence of defendant's guilt.

LEGAL UPDATE EDITOR'S COMMENT: The Miranda issues on the merits regarding the "off the record" request of the defendant are concerning to me. I do not have U.S. Supreme Court or Washington appellate court or Ninth Circuit case law to cite, but I feel that it would be advisable to respond to a custodial suspect who says that he or she wants to talk off the record by telling the suspect that any statements may be used against the suspect unless the suspect exercises his or her right to remain silent or requests an attorney. See 2011 (7) AELE Mo. L. J. 401 ISSN 1935-0007 Criminal Law Section - July 2011 Beguiling a Confession – Subverting Miranda. Guest article by Judge Emory A. Plitt, Jr.

The Court of Appeals Opinion in the Lind case is accessible on the Internet at:
https://www.courts.wa.gov/opinions/pdf/810189.pdf

4. State v. Anna Valeriya Kasparova: On November 15, 2021, Division One of the COA rejects the challenge of defendant to her King County Superior Court conviction for *first degree murder*. Among other things, the Court of Appeals rules that **a warrant to search the defendant's Facebook account had probable cause support. The warrant was not based on mere speculation that evidence might be found there, but instead was based in part on evidence that Kasparova asked her sister to use Kasparova's Facebook account to publicly tell a false story about the robbery and shooting in the case**.

The Court of Appeals Opinion in the Kasparova case is accessible on the Internet at:
https://www.courts.wa.gov/opinions/pdf/811096.pdf

5. State v. J.Y.A.-V: On November 16, 2021, Division Three of the COA rejects the appeal of the State from a juvenile court ruling that statements made by the juvenile defendant were made after she had been unlawfully seized by officers without reasonable suspicion. The case

is remanded to the Yakima County Superior Court for a juvenile court adjudication for *minor appearing in public exhibiting the effects of alcohol*. The Court of Appeals rules **that a police officer made a seizure when he activated his emergency lights before approaching two persons (one inside a parked pickup truck and the other outside the pickup truck) who appeared to be arguing. And the Court of Appeals concludes that the facts in the case do not support a conclusion that the officer had a reasonable suspicion of any crime at the point when the officer activated his emergency lights. It appears that this ruling has the effect of terminating the case.**

The Court of Appeals Opinion in the J.Y.A.-V. case is accessible on the Internet at:
https://www.courts.wa.gov/opinions/pdf/372120_unp.pdf

6. State v. Roger Dean Lewis: On November 16, 2021, Division Three of the COA rejects the challenge of defendant to his Spokane County Superior Court conviction for *attempting to elude a police vehicle*. Under the following analysis, the Court of Appeals rules that an officer did not give impermissible guilt-opinion testimony in the case:

> "Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." ER 704. Whether a permissible opinion of an ultimate issue of fact is also an impermissible opinion of guilt depends on the specific circumstances of each case. State v. Demery, 144 Wn.2d 753, 759 (2001) (plurality opinion). In determining whether testimony constitutes an impermissible opinion, courts review the following factors: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charge, (4) the type of defense, and (5) the other evidence before the trier of fact. As illustrated by the following two cases, what often distinguishes a permissible opinion from an impermissible one is the extent to which the witness's opinion is based on observations that a trier of fact is capable of independently evaluating.
>
> In City of Seattle v. Heatley, 70 Wn. App. 573, 576, 854 P.2d 658 (1993), an officer testified about the defendant's performance of field sobriety tests, including reciting the alphabet, counting backward, and performing balance tests. The officer then expressed his opinion that the defendant was obviously intoxicated. We concluded that the opinion was not an impermissible opinion of guilt, largely because the opinion was based on information jurors are capable of independently evaluating.
>
> In State v. Quaale, 177 Wn. App. 603, 607-08 (2013), aff'd, 182 Wn.2d 191 (2014), an officer testified that the defendant was impaired based on the results of a horizontal gaze nystagmus test. We concluded that the opinion was an impermissible opinion of guilt, largely because the opinion was based on information jurors are not capable of independently evaluating.
>
> We now discuss the Demery factors. Here, the opinion was given by a law enforcement officer. This risks a jury giving the opinion undue weight. But the nature of the testimony, the nature of the charge, and the facts supporting the opinion, all lent themselves to being easily understood by the jury. Jurors have personal experience driving cars and being in traffic. They are fully capable of deciding whether a driver is driving recklessly or not. Moreover, Mr. Lewis's defense was not that his driving was safe. His defense was that he was not the driver.

> Applying the Demery factors, we conclude that [the deputy's] opinion that Mr. Lewis was driving recklessly was not an impermissible opinion of guilt. Rather, it was a permissible opinion based on her observations, made known to the jury, which the jury was fully capable of independently evaluating.

[Some citations omitted, others revised for style; bracketed text added]

The Court of Appeals Opinion in the Lewis case is accessible on the Internet at:
https://www.courts.wa.gov/opinions/pdf/378659_unp.pdf

7. State v. Brian Andrew Glaser: On November 18, 2021, Division Three of the COA rejects the challenge of defendant to his Kitsap County Superior Court conviction for *first degree murder*.

Probable cause issue

The Court of Appeals rejects an argument of defendant that a search warrant was not supported by probable cause where a detective's affidavit stated that he made a fingerprint match and that he had attended (A) scientific basic fingerprints course, 24 hours at the Biometric Technology Center of the FBI in Clarksburg, West Virginia; (B) 40 hours at the Michigan State forensic lab in Lansing, Michigan; and (C) FBI advanced crime scene photography training in Bremerton, Washington. **The Court of Appeals rules that this was sufficient information to support the latent print identification described in the search warrant affidavit, and thus to support the determination of probable cause for the search warrant.**

Search warrant inventory process issue

The Court of Appeals also rejects an argument of defendant that evidence should be suppressed based on failure of law enforcement to strictly comply with the inventory requirements of Criminal Rule 2.3(d) for execution of search warrants. CrR 2.3(d) requires in relevant part:

> . . . . The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person from whose possession or premises the property is taken, or in the presence of at least one person other than the officer. . . .

In Glaser, Detective A completed the inventory and receipt forms while Detective B was in the same room, but Detective B did not look over the form, did not sign on the line provided for a witness, and did not check Detective A's work for accuracy. The inventory form later proved to contain errors: it omitted information about shell casings and a backpack, and some items were insufficiently described.

The analysis by the Court of Appeals on the inventory issue is as follows:

> In State v. Linder, 190 Wn. App. 638, 646 (2015), this court reviewed the State's argument that generally a violation of CrR 2.3, which imposes only ministerial requirements, should not be a basis for suppressing evidence. We observed that when this court and federal courts have determined that suppression of evidence is an appropriate remedy for a rule violation, the touchstone has been prejudice. We noted that in cases relied on by the State,

> almost all of the searches were conducted in a manner that satisfied the purpose, if not the letter, of the procedure required by the rule. In many cases, the violations could be cured after the fact. As a result, no prejudice to a right of the defendant was demonstrated.
>
> Linder at 651.
>
> In Mr. Linder's case, the trial court granted the remedy of suppression because it found that no other remedy was adequate. A closed box was taken from Mr. Linder upon arrest. He would not consent to its being opened. After a drug dog alerted to it, police applied for a search warrant. *The warrant was obtained late at night, and "with literally no one else around," an officer opened the box and inventoried its contents.*
>
> Linder is easily distinguished. [Detective A] did not execute the search warrant and inventory the seized items "with literally no one else around." The trial court found that other officers did not participate in the inventory process in the way required by the rule, which would better ensure the inventory's accuracy. But the warrant was executed by a team of officers, with the result that there were multiple witnesses able to identify items that were seized and thereby identify inaccuracies.
>
> Mr. Glaser likens his case to Mr. Linder's because—just as the trial court observed in Linder—if he disputed that inventoried items were found in his home, it would be his word against the officers. That was an observation of the trial court in Mr. Linder's case, but it was not the basis for this court's holding. If the right to suppression turned on whether a defendant's challenge to an inventoried item would be his word versus the word of police officers, it would be available anytime a violation of CrR 2.3(d) could be identified.
>
> The holding in Linder is met here. This trial court was satisfied that the testimony of participating officers made it possible to distinguish the accurate substance of the inventory from its inaccuracies. Suppression was properly denied.

[Some citations omitted, others revised for style]

The Court of Appeals Opinion in the Glaser case is accessible on the Internet at:
https://www.courts.wa.gov/opinions/pdf/379922_unp.pdf

8. State v. Kyran John Lien: On November 23, 2021, Division Two of the COA rejects the challenge of defendant to his Kitsap County Superior Court convictions for (A) *communication with a minor for immoral purposes*, and (B) *tampering with physical evidence*. The convictions arose out of an undercover operation (a Craigslist sting) in which a Washington State Patrol (WSP) officer posing as a 13-year-old girl exchanged a series of text messages with Lien that ultimately included an explicit description of Lien having a sexual encounter with the girl. Among other rulings, the Lien Court determines that

(1) on the totality of the circumstances, **the government's conduct in the undercover operation did not constitute "outrageous government conduct"** (the Court of Appeals discusses the relevant published Washington State appellate decisions in State v. Lively, 130 Wn.2d 1 (1996); State v. Glant, 13 Wn. App.2d 356 (2020); and State v. Solomon, 3 Wn. App. 2d 895 (2018)); and

(2) **the defendant's text messages to the WSP officer posing as a 13-year-old girl were not protected under the Privacy Act, chapter 9.73 RCW**, because a person who chooses to communicate by text or email knows that the communications will be recorded (the Court of Appeals discusses the relevant published Washington State appellate decisions in State v. Glant, 13 Wn. App.2d 356 (2020); State v. Townsend, 147 Wn.2d 666 (2002); and State v. Racus, 7 Wn. App. 2d 287 (2019)).

The Court of Appeals Opinion in the Lien case is accessible on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2054146-7-II%20Unpublished%20Opinion.pdf

9. State v. Vincent Edward Landes: On November 29, 2021, Division One of the COA rejects the challenge of defendant to his King County Superior Court conviction for *domestic violence (DV) felony violation of a court order (FVCO)*. The Court of Appeals accepts the concession of the State that **the trial court violated the Sixth Amendment Right to Confrontation of defendant** by admitting a 911 recording of a call that was made to report that a person was violating a no-contact order. It was clear that the purpose of the call was not to report emergency circumstances but simply to report the violation of the order. Under these circumstances, the hearsay on the recording was "testimonial" under the Sixth Amendment Confrontation Clause case law from the United States Supreme Court. However, the trial court's error in admitting the recording was "harmless error," declares the Landes Court, because of the weight of other evidence in the case.

The Court of Appeals Opinion in the Landes case is accessible on the Internet at:
https://www.courts.wa.gov/opinions/pdf/813471.pdf

10. State v. Curtis Pouncy: On November 30, 2021, Division Two of the COA rejects the challenge of defendant to his Thurston County Superior Court convictions for *(A) attempted second degree rape of a child, and (B) communications with a minor for immoral purposes*. The convictions arose from the "Net Nanny" sting operation in which detectives assume false identities on the internet to offer under-age children for sex to would-be predators. In addition to rejecting on the totality of the circumstances the defendant's argument that the trial court should have instructed the jury on entrapment, the Court of Appeals also rules that:

(1) On the totality of the circumstances, **the government's conduct in the undercover operation did not constitute "outrageous government conduct"** (the Court of Appeals discusses the relevant published Washington State appellate decisions in State v. Lively, 130 Wn.2d 1 (1996); and State v. Glant, 13 Wn. App.2d 356 (2020)); and

(2) **the defendant's text messages to the WSP officer posing as a 13-year-old girl were not protected under the Privacy Act, chapter 9.73 RCW, or the Washington constitution** because a person who chooses to communicate by text or email knows that the communications will be recorded (the Court of Appeals discusses the relevant published Washington State appellate decisions in State v. Rhoden, 179 Wn.2d 893 (2014); State v. Glant, 13 Wn. App.2d 356 (2020); State v. Townsend, 147 Wn.2d 666 (2002); and State v. Racus, 7 Wn. App. 2d 287 (2019)).

The Court of Appeals Opinion in the Lien case is accessible on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2054146-7-II%20Unpublished%20Opinion.pdf

****

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 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.

****

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].

****