LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

SEPTEMBER 2021

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY REGARDING LAW ENFORCEMENT: LOS ANGELES CITY ORDINANCE HELD TO VIOLATE THE FOURTH AMENDMENT IN AUTHORIZING GOVERNMENT SEIZURE AND DISPOSAL OF "BULKY ITEMS" (AS DEFINED IN THE ORDINANCE) THAT HOMELESS PERSONS STORE IN PUBLIC AREAS

In Garcia v. City of Los Angeles, ___ F.3d ___ , 2021 WL ___ (9th Cir., September 2, 2021), a three-judge Ninth Circuit panel rules 2-1 that the federal constitution's Fourth Amendment bars a Los Angeles city ordinance that targets the homeless and prohibits the storage of "bulky items" on public property, allowing for such "bulky items" to be immediately seized and destroyed.

The LA ordinances at issue provides that no person shall store any bulky item in a pubic area, and that without prior notice, the City may remove and may discard any bulky item, whether attended or unattended. The ordinance exempts any bulky item "designed to be used as a shelter," as well as tents, bicycles, walkers, crutches or wheelchairs. "Bulky items" are defined as items that are too large to fit into a 60-gallon container.

The panel relies on the Ninth Circuit ruling in in Lavan v. City of Los Angeles, 693 F.3d 1022 (9th Cir. 2012), in which the Court upheld a preliminary injunction that prohibited City of Los Angeles employees from summarily destroying homeless individuals' publicly stored personal property. The panel sees no meaningful distinction between the destruction of property enjoined in Lavan and the destruction of property enjoined here. The panel also concludes that the ordinance at issue is not severable such that part of the ordinance can be preserved.

Result: Affirmance of U.S. District Court (Central District of California) preliminary injunction prohibiting the City of Los Angeles from discarding homeless individuals' "Bulky Items" that are stored in public areas, as authorized by a provision of its municipal code.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY REGARDING PROBATION DEPARTMENT: REQUIRING THAT SEX OFFENDER WHO IS SENTENCED TO PARTICIPATE IN TREATMENT PROGRAM ADMIT TO HIS CRIME OF CONVICTION CANNOT BE THE BASIS FOR A CIVIL RIGHTS LAWSUIT BASED ON HIS FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION

[LEGAL UPDATE EDITOR'S PRELIMINARY EDITORIAL NOTE: Much of the text of the summary below regarding the Chavez ruling was taken verbatim from a Ninth Circuit staff summary.]

In Chavez v. Robinson, ___ F.3d ___ , 2021 WL ___ (9th Cir., September 8, 2021), a three-judge Ninth Circuit panel upholds the District Court's dismissal of a Civil Rights lawsuit brought by Daniel Chavez alleging that his constitutional rights were violated when, as a condition of his supervised release and while his appeal of his conviction was pending, he was required to complete a sex offender treatment program. He was discharged from the program and given a limited jail sanction for refusing to admit to the conduct underlying his conviction. The admission was a required part of his treatment.

Among other things, the Ninth Circuit panel rules 2-1 that Chavez cannot establish the probation department violated his Fifth Amendment right against self-incrimination. The panel states that the claim required consideration of the distinction between the core constitutional right protected by the Fifth Amendment's Self-incrimination Clause and the prophylactic rules that are designed to safeguard that right, such as the requirement of Miranda warnings prior to custodial interrogation. The panel holds that it is bound by the rule adopted by six U.S. Supreme Court justices in Chavez v. Martinez, 538 U.S. 760, 770 (2003) that the Fifth Amendment is not violated unless and until allegedly coerced statements are used against a suspect in a criminal case. Because Chavez did not make a statement that was used in a criminal proceeding, he could not bring a civil action against the government under § 1983 for a violation of his Fifth Amendment right against self-incrimination.

Thus, the panel ruled by a 2-1 vote that Chavez's claim was based on a violation of the judge-made protection from being forced to give incriminating testimony. Because this privilege is a prophylactic rule designed to safeguard the core constitutional right protected by the Self-Incrimination Clause rather than the core constitutional right itself, Chavez could use the privilege only defensively as a shield and could not wield it as a sword in an action for damages.

The Ninth Circuit panel goes on to also reject arguments by Chavez that his Sixth Amendment right to counsel and his First Amendment right to freedom of speech were violated by the procedures described above.

Result: Affirmance of U.S. District Court dismissal of Civil Rights Act section 1983 lawsuit brought by Chavez.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY REGARDING LAW ENFORCEMENT EMPLOYMENT: OFFICER IS ENTITLED TO TRIAL BASED ON HER ALLEGATION THAT POLICE CHIEF COMMITTED GENDER-DISCRIMINATION AGAINST HER BY PRETEXTUALLY SUBJECTING HER TO INTERNAL AFFAIRS INVESTIGATION IN ORDER TO PRECLUDE HER ELIGIBILITY FOR PROMOTION

In Ballou v. McElvain, ___ F.3d ___ , 2021 WL ___ (9th Cir., September 28, 2021), a three-judge Ninth Circuit panel rules that a police officer's allegations of gender-discrimination are sufficient to allow her Civil Rights Act section 1983 lawsuit go to a jury. At this summary judgment motion stage of the proceedings, the plaintiff's allegations are viewed in the best light for the plaintiff.

The Ninth Circuit staff summary (which is not part of the Ninth Circuit's Opinion) summarizes the key parts of the Opinion as follows:

> The panel affirmed the district court's order denying, on summary judgment, qualified immunity to Police Chief James McElvain on [a police officer] plaintiff's First Amendment and Equal Protection disparate treatment claim; and held that it lacked jurisdiction under the collateral order doctrine to resolve the question of whether [the chief] was entitled to qualified immunity on [the officer's] claim that she was retaliated against, in violation of the Equal Protection Clause of the Fourteenth Amendment, in an action brought pursuant to 42 U.S.C. § 1983 alleging retaliation and employment discrimination.
>
> [The officer] asserted that [the Chief] discriminated against her because of her gender by intentionally subjecting her to internal affairs investigations to preclude her eligibility for promotion and then declining to promote her to sergeant even though she was the most qualified candidate. The [Ninth Circuit] panel held that, construing all facts and inferences in her favor, [the officer] sufficiently alleged unconstitutional sex discrimination in violation of the Equal Protection Cause of the Fourteenth Amendment.
>
> [The officer] established a prima facie claim for disparate treatment and the record supported the conclusion that McElvain's articulated reasons for not promoting [the officer] were pretextual. The panel rejected, as profoundly mistaken, [the argument by the Chief's attorneys] that to state an equal protection claim, proof of discriminatory animus alone was insufficient, and [a hypothetical] plaintiff must show that defendants treated plaintiff differently from other similarly situated individuals. The panel stated that the existence of a comparator is not a prerequisite to stating a disparate treatment claim under the Fourteenth Amendment.
>
> The panel held that the actions alleged here were so closely analogous to those identified in Lindsey v. Shalmy, 29 F.3d 1382, 1385-86 (9th Cir. 1994), and so clearly covered by the focus on promotion in Bator v. State of Hawai'i, 39 F.3d 1021, 1028 (9th Cir. 1994), that any reasonable officer would recognize that discriminatorily conducting

an investigation to stall a promotion as unconstitutional under the two cases, read in combination.

[The Chief] was therefore not entitled to qualified immunity on the claim that he encouraged and sustained discriminatory investigations into [the officer's] workplace performance and thereby denied her promotion at least in part on the basis of sex. As [the officer's] disparate treatment claim alleged that [the Chief] violated her clearly established rights under the Equal Protection Clause, [the Chief] was not entitled to qualified immunity on that claim.

The panel held that it lacked jurisdiction to consider whether [the Chief] was entitled to qualified immunity on the claim that he violated [the officer's] rights under the Equal Protection Clause of the Fourteenth Amendment by retaliating against her for opposing [the Chief's alleged] sex discrimination. The panel stated that the district court did not deny [the Chief] qualified immunity on [the officer's] Equal Protection retaliation claim because the district court had determined that there was no clearly established law on the constitutional issue. Because the panel's jurisdiction under the collateral order doctrine was limited to reviewing the denial of qualified immunity, the panel declined to reach that question.

Finally, the panel affirmed the denial of qualified immunity to [the Chief] on [the officer's] First Amendment retaliation claim. The panel held that [the officer's] speech opposing sex discrimination in the workplace was inherently speech on a matter of public concern and was clearly protected by the First Amendment. Whether [the officer's] protected expression actually was the but-for cause of the adverse employment actions went to the ultimate question of liability and needed to be resolved by the jury at trial. But it did not bear on the question before the panel now—whether retaliating against [the officer] for that expression would, as a matter of law [viewing her allegations in the best light for plaintiff], violate her clearly established constitutional rights.

Because [the officer's] factual account was not "blatantly contradicted by the record," the panel would not disturb the district court's determination that [the officer's] retaliation claims were sufficiently supported to survive summary judgment.

[Some paragraphing revised for readability]

Result: Affirmance of U.S. District Court (Western Washington) order denying, on summary judgment, qualified immunity to the police chief on plaintiff's First Amendment and Equal Protection disparate treatment claim.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY REGARDNG LAW ENFORCEMENT: UNDER PROCEDURAL BAR OF HECK V. HUMPHREY, PLAINTIFF IS NOT ALLOWED TO SUE LAW ENFORCEMENT FOR DOG BITE WHERE: (1) HE PREVIOUSLY PLEADED "NO CONTEST" AND WAS FOUND GUILTY OF RESISTING ARREST; AND (2) THE RESISTING CHARGE WAS GROUNDED IN PART ON HIS ADMITTED STRUGGLE WITH OFFICERS AND THEIR CANINE, LEADING TO THE DOG BITE

In Sanders v. City of Pittsburg (CA), ___ F.3d ___ , 2021 WL ___ (9th Cir., September 23, 2021), a three-judge Ninth Circuit panel upholds the U.S. District Court's dismissal of a Civil Rights lawsuit, relying on the U.S. Supreme Court precedent of Heck v. Humphrey, 512 U.S.

477 (1994). The lawsuit alleged that police officers used excessive force when they deployed a police dog against plaintiff, but the case turned on the procedural fact that in pleading "no contest" in a related resisting arrest criminal prosecution, the plaintiff essentially agreed that the dog bite was lawful.

The Ninth Circuit staff summary (which is not part of the Ninth Circuit's Opinion) summarizes the key parts of the Opinion as follows:

> After being spotted in a stolen car, plaintiff, Morgan Sanders, fled from the police. He led them on a car chase, a foot chase and then struggled after being tackled. During the scuffle, a police officer commanded a police dog to bite Sanders's leg, and Sanders was finally subdued and charged with, among other counts, resisting arrest under California Penal Code § 148(a)(1), which prohibits resisting, delaying or obstructing a police officer during the discharge of his duties. Sanders pleaded no contest to all the charges against him [in the criminal case] and stipulated that the factual basis for his plea was based on the preliminary hearing transcript.
>
> Under [Heck v. Humphrey, 512 U.S. 477 (1994)], a § 1983 claim must be dismissed if a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence, unless the conviction or sentence has already been invalidated.
>
> The panel first stated that a defendant can't be convicted under [the California resisting arrest statute] if an officer used excessive force at the time of the acts resulting in the conviction. Consequently, an excessive force claim cannot survive the Heck bar if it is predicated on allegedly unlawful actions by the officer at the same time as the plaintiff's conduct that resulted in his [resisting arrest] conviction.
>
> Moreover, Heck bars any § 1983 claim alleging excessive force based on an act or acts constituting any part of the factual basis of a [resisting arrest] conviction. The panel noted that the factual basis for Sanders's plea was based on multiple acts of resisting arrest, including his struggle with officers when the police dog bit him.
>
> The panel held that Sanders could not stipulate to the lawfulness of the dog bite as part of his [resisting arrest] guilty plea and then use the very same act to allege an excessive force claim under § 1983. Success on such a claim would "necessarily imply" that his conviction was invalid. Sanders's claim was, therefore, barred under [Heck v. Humphrey, 512 U.S. 477 (1994)].

[Some paragraphing revised for readability]

Result: Affirmance of U.S. District Court (Northern District of California) order dismissing the lawsuit filed by Sanders.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY RELATED TO CORRECTIONS DISCIPLINARY PROCEEDINGS: PRISON OFFICIALS HELD TO HAVE VIOLATED PRISONER'S DUE PROCESS RIGHTS WHEN, WITHOUT LEGITIMATE PENOLOGICAL REASON, THEY DID NOT ALLOW HIM TO ACCESS THE ENVELOPES (OR COPIES OF THEM) IN WHICH DRUGS WERE ALLEGEDLY FOUND BEING SMUGGLED TO HIM

Melnik v. Dzurenda, ___ F.3d ___ , 2021 WL ___ (9th Cir., September 27, 2021)

A staff summary (which is not part of the Ninth Circuit Opinion) summarizes the three-judge panel's Majority and Dissenting Opinions as follows:

> The panel affirmed the district court's order, on summary judgment, denying qualified immunity to Nevada correctional officials in an action brought pursuant to 42 U.S.C. § 1983 by a state prisoner alleging defendants violated his constitutional rights by denying him the ability to examine certain documents that could have served as evidence in a prison disciplinary proceeding.
>
> Plaintiff was charged with unauthorized or inappropriate use of the prison mail system after prison officials intercepted two envelopes addressed to plaintiff which contained methamphetamine in secret compartments in the enclosed letters. After plaintiff was notified of the prison charges, he asked multiple times to be able to examine the envelopes or copies of the envelopes, but those requests were denied or ignored.
>
> At the prison disciplinary hearing that followed, images of the envelopes and information about their contents were the only evidence presented to support the charges. Plaintiff testified that he was innocent and had been framed by other inmates. He was found guilty.
>
> The panel held [by 2-1 vote] that defendants were not entitled to qualified immunity because Plaintiff had a constitutional right under the Due Process Clause of the Fourteenth Amendment to be permitted to examine documentary evidence for use in the prison disciplinary hearing. The panel held that the right referenced in Wolff v. McDonnell "to present documentary evidence in" the prisoner's own defense must generally include the ability to obtain the documentary evidence in the first place. 418 U.S. 539, 566 (1974).
>
> Similarly, if a prisoner is to be able to respond to evidence presented against him, as a general proposition he should be allowed to know what it is and to examine it, unless there is reason [legitimate penological reason] to the contrary.
>
> The panel further concluded that the right to examine documentary evidence for use in a prison disciplinary hearing was clearly established at the time when plaintiff was denied access to the material.
>
> Dissenting, Judge Bennett would hold that defendants were entitled to qualified immunity because they did not violate clearly established law. Judge Bennett did not read Wolff as clearly establishing any right that would allow plaintiff to compel access to the prison's evidence against him.
>
> The majority suggested that Wolff implicitly recognized a prisoner's right to compile evidence in his defense. But Judge Bennett doubted that a passing comment [in the Wolff Opinion] on the prison's ability to limit the compilation of evidence could constitute a clearly established right. Nor could Judge Bennett locate such a right in this Circuit's case law.

Result: Affirmance of order of U.S. District Court (Nevada) denying qualified immunity to State of Nevada corrections officials.

IN THIS CRIMINAL CASE, THE FOURTH AMENDMENT "PRIVATE SEARCH" DOCTRINE IS HELD NOT TO APPLY, BASED ON A RULING THAT FEDERAL AGENTS WENT TOO FAR WITHOUT A SEARCH WARRANT IN FOLLOWING UP A "GOOGLE ALERT" REGARDING POSSIBLE CHILD PORNOGRAPHY; NOTE THAT THE WASHINGTON CONSTITUTION DOES NOT RECOGNIZE THE FOURTH AMENDMENT'S "PRIVATE SEARCH" DOCTRINE

United States v. Wilson, ___ F.3d ___ , 2021 WL ___ (9th Cir., September 21, 2021)

A staff summary (which is not part of the Ninth Circuit Opinion) summarizes the three-judge panel's Opinion as follows:

> The panel vacated a District Court conviction for possession and distribution of child pornography, reversed the District Court's denial of a motion to suppress, and remanded for further proceedings in a case in which the panel addressed whether the government's warrantless search of the defendant's email attachments was justified by the private search exception to the Fourth Amendment.
>
> As required by federal law, Google reported to the National Center for Missing and Exploited Children (NCMEC) that the defendant had uploaded four images of apparent child pornography to his email account as email attachments. No one at Google had opened or viewed the defendant's email attachments; its report was based on an automated assessment that the images the defendant uploaded were the same as images other Google employees had earlier viewed and classified as child pornography.
>
> Someone at NCMEC then, also without opening or viewing them, sent the defendant's email attachments to the San Diego Internet Crimes Against Children Task Force, where an officer ultimately viewed the email attachments without a warrant. The officer then applied for warrants to search both the defendant's email account and his home, describing the attachments in detail in the application.
>
> The private search doctrine of the Fourth Amendment] concerns circumstances in which a private party's intrusions would have constituted a search had the government conducted it, and the material discovered by the private party then comes into the government's possession. Invoking the precept that when private parties provide evidence to the government on their own accord, it is not incumbent on the police to avert their eyes, the Supreme Court formalized the private search doctrine in Walter v. United States, 447 U.S. 649 (1980), which produced no majority decision, and United States v. Jacobson, 466 U.S. 109 (1984), which did.
>
> The panel held that the government did not meet its burden to prove that the officer's warrantless search was justified by the private search exception to the Fourth Amendment's warrant requirement. The panel wrote that both as to the information the government obtained and the additional privacy interests implicated, the government's actions here exceed the limits of the private search exception as delineated in Walter and Jacobsen and their progeny.
>
> First, the government search exceeded the scope of the [prior] private search because [the subsequent government search] allowed the government to learn new, critical information that it used first to obtain a warrant and then to prosecute the defendant.

> Second, the government search also expanded the scope of the [prior] private search because the government agent viewed the defendant's email attachments even though no Google employee—or other person—had done so, thereby exceeding any earlier privacy intrusion.
>
> Moreover, on the limited evidentiary record, the government has not established that what a Google employee previously viewed were exact duplicates of the defendant's images. And, even if they were duplicates, such viewing of others' digital communications would not have violated the defendant's expectation of privacy in his images, as Fourth Amendment rights are personal.
>
> The panel concluded that the officer therefore violated the defendant's Fourth Amendment right to be free from unreasonable searches when he examined the defendant's email attachments without a warrant.

[Some paragraphing revised for readability]

Result: Reversal of U.S. District Court [Southern District of California] conviction of Luke Wilson for possession and distribution of child pornography in violation of federal law.

LEGAL UPDATE EDITOR'S COMMENT: Note that in State v. Eisfeldt, 163 Wn.2d 638 (2008), the Washington Supreme Court ruled that "[T]he private search doctrine is inapplicable under the Washington Constitution" because "[t]he individual's privacy interest protected by article I, section 7 survives the exposure that occurs when it is intruded upon by a private actor." This is even more reason for Washington investigators in these circumstances to try to get a search warrant or otherwise investigate without examining the email attachments without a warrant.

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WASHINGTON STATE COURT OF APPEALS

"FIREARM" DEFINITION UNDER UNLAWFUL POSSESSION STATUTE: EVIDENCE IS HELD SUFFICIENT TO SUPPORT CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM WHERE WEAPON IS SHOWN TO BE A "GUN IN FACT" AND "NOT A TOY GUN"

In State v. Gouley, ___ Wn. App. 2d ___ , 2021 WL ___ (September 8, 2021), Division Two of the Court of Appeals rejects a defendant's argument on appeal that the State failed to provide adequate evidentiary support for its successful prosecution for first degree unlawful possession of a firearm that the shotgun that he possessed qualified as a "firearm" under chapter 9.41 RCW 9.41. The Court of Appeals rules that the evidence established that the shotgun was a "firearm" under the statute because the evidence showed the shotgun was a "gun in fact" and "not a toy gun."

Gouley was convicted of a felony and was under community supervision when he missed an appointment with his community corrections officer (CCO). The Department of Corrections issued a warrant for Gouley's arrest. Gouley's CCO and other officers found Gouley asleep in his bedroom. In searching the bedroom, the officers discovered a shotgun under Gouley's bed. Gouley was previously convicted of a serious offense and was prohibited from possessing a firearm. Gouley admitted to his CCO that the shotgun belonged to him. When the shotgun was

discovered under Gouley's bed, it was missing a bolt action assembly and was not operable in that condition.

The State charged Gouley with one count of first degree unlawful possession of a firearm and one count of escape from community custody.

At trial, the State's expert testified that to make the shotgun operable a bolt or bolt action must be inserted into the receiver of the firearm. He stated that a bolt action for that particular shotgun is readily available for purchase online. The expert conceded that the only way to truly determine whether the shotgun is operable would be to load the shotgun and fire it. He testified that even with a bolt action, there was a conceivable possibility that the shotgun would not fire if there was an issue with the firing pin, the trigger spring, or the firing pin spring.

Gouley was convicted by a jury of unlawful possession of firearm in the first degree and escape from community custody. He appealed only from the conviction for unlawful possession of a firearm in the first degree.

One of Gouley's arguments on appeal was that the evidence was insufficient to sustain his conviction because the State did not set forth sufficient evidence that the shotgun was a "firearm" as defined under former RCW 9.41.010(9) (2017). He argued that the State was required to prove that the shotgun could be made operable with reasonable effort in a reasonable amount of time.

The Court of Appeal rejects this argument under the following analysis:

> *Definition of a "Firearm" Under Former RCW 9.41.010(9)*
>
> A "firearm" as defined in former RCW 9.41.010(9) is a "weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." To qualify as a firearm within the meaning of former RCW 9.41.010(9), the firearm "need not be operable during the commission of a crime." [State v. Raleigh, 157 Wn. App. 728, 734 (2010)]; see also State v. Olsen, 10 Wn. App. 2d 731, 737 (2019). Instead, the dispositive inquiry is "whether the firearm is a 'gun in fact' rather than a 'toy gun.'" Raleigh, 157 Wn. App. at 734 (quoting State v. Faust, 93 Wn. App. 373, 380 (1998)).
>
> In Olsen, the defendant challenged a trial court's decision to instruct the jury regarding the definition of a firearm based on [the Washington Pattern Jury Instructions] which followed the statutory definition of a firearm in former RCW 9.41.010(9). There, the trial court declined to give Olsen's proposed instructions that to constitute a firearm, the device must be "capable of being fired either instantly or with reasonable effort and within a reasonable time" and that the state must present sufficient evidence that the firearm was operable.
>
> We clarified in Olsen that despite prior confusion in the decisions issued by our court, there is no requirement that the State set forth evidence showing that the device was operable at the time of the offense. Rather, we agreed with Raleigh that the State's burden was to prove that the firearm was a "'gun in fact,'" as opposed to a toy gun. . . .
>
> Consequently, whether a firearm can be rendered operational with reasonable effort and within a reasonable time period is immaterial to whether the firearm is a "firearm" under former RCW 9.41.010(9). . . .

Instead, the State must set forth evidence showing that the firearm is "a gun in fact, not a toy gun; and the real gun need not be loaded or even capable of being fired to be a firearm." Faust, 93 Wn. App. at 380.

B. APPLICATION The State presented evidence sufficient to show that the device at issue was a firearm as defined under former RCW 9.41.010(9) because it was a gun in fact and not a toy. [The State's expert] described the shotgun as a "Kessler Arms 20 gauge bolt action shotgun." He stated that although the shotgun was produced by the Kessler company, which was in operation for only two years [over 50 years ago], the shotgun is not rare, and it is affordable and readily obtainable.

Although the shotgun was missing a bolt action, [the State's expert] testified that the gun could be made operable and could fire if a bolt or bolt assembly is inserted into the receiver.

Gouley does not dispute that the shotgun was a gun in fact, but he argues that this is not enough for the State to meet its burden. Gouley points to the fact that beyond the missing bolt action, the State's expert opined that the shotgun might still not fire because "there might be something wrong with the firing pin of that firearm or maybe the trigger spring, or the firing pin spring."

However, the fact that the shotgun was defective or inoperable when it was discovered does not mean that the shotgun was a toy, or anything other than a "gun in fact." . . . And whether the device was a gun in fact is the only relevant determination that the jury had to make. . . . The foregoing evidence was sufficient to establish that the device recovered in Gouley's bedroom was a gun in fact, meeting the definition of firearm under former RCW 9.41.010(9).

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

Result: Affirmance of Mason County Superior Court conviction of Jessie C. Gouley for first degree unlawful possession of a firearm.

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BRIEF NOTES REGARDING SEPTEMBER 2021 UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS ON SELECT LAW ENFORCEMENT ISSUES (NONE THIS MONTH)

None of the September 2021 unpublished opinions from the Washington Court of Appeals meet my criteria for inclusion in the Legal Update. This was a first for the Legal Update since I began covering the unpublished opinions several years ago.

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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 prosecutors. The Legal Update is published as a research source only and does not purport to furnish legal advice. Mr. Wasberg's email address is jrwasberg@comcast.net. His cell phone number is (206) 434-0200. The initial monthly Legal Update was issued for January 2015. Mr. Wasberg will electronically provide back issues on request.

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

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

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

circuit number for “9” in this address to go to the home pages of the other circuit courts. Federal statutes are at [http://www.law.cornell.edu/uscode/].

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

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