

# LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

## 2021 SUBJECT MATTER INDEX FOR LEGAL UPDATE

**EDITORIAL NOTE:** This is the seventh annual Legal Update subject matter index. It covers all Legal Update entries addressing published opinions from January 2021 through and including the December 2021 Legal Update. Note that in early 2020, I published a five-year index for 2015 through 2019 (available on request to jrwasberg@comcast.net). The Legal Update entries address the version of the opinion that appeared on the court website for the date indicated, and it is possible that there were revisions in the final version of the opinion that later appeared in the published report of the decisions. Although the Legal Update includes information every month about unpublished opinions from the Washington Court of Appeals, those entries are not addressed in this index, other than to note them collectively under the heading “Unpublished Washington Court of Appeals Opinions.” In this 2021 index, entries are arranged chronologically within each category and subcategory based on the date of the appearance in the Legal Update (in other words, earlier entries appear before later entries within the categories and subcategories). Citations to court decisions include a citation to the Legal Update as the final part of the entries. The Legal Update citation is abbreviated; for example, the citation in the first entry under “ACCOMPLICE LIABILITY immediately following this note, to “January 21:24” means that the State v. Birge case entry appears in the Legal Update for January 2021 starting at page 24.

### ACCOMPLICE LIABILITY (RCW 9A.08.020)

Officers must go to criminal trial on charges of Third Degree Child Assault and Official Misconduct based on allegations by others that the officers were accomplices or principals in a grandmother’s striking of her disturbed and acting-up child with a belt. State v. Birge, State v. Jahner 16 Wn. App. 2d 16 (Div. II, January 5, 2021) – January 21:24

Accomplice-liability-based convictions for practicing massage without licenses (RCW 18.130.190(7)) upheld against challenge that prosecution should have been under lesser offense of allowing employees to give unlicensed massages (RCW 18.108.035). State v. Zheng, \_\_\_ Wn. App. 2d \_\_\_, 491 P.3d 254 (Div. II, July 7, 2021) – July 21:14

### ANIMAL CRUELTY (Chapter 16.52 RCW)

Animal cruelty: Evidence is held to be sufficient to support conviction, but re-trial is required due to jury-instruction error. State v. Jallow, \_\_\_ Wn. App. 2d \_\_\_, 482 P.3d 959 (Div. I, March 8, 2021) – March 21:21

### ARREST, STOP AND FRISK (See also “Searches” topic)

The application by law enforcement of physical force to the body of a person with objectively manifested intent to restrain the person is a Fourth Amendment “seizure” under the “mere touch” rule, regardless of how the person responds to such intentional application of force; therefore, a Fourth Amendment seizure occurred when an officer

shot a fleeing suspect with intent to apprehend her, even though she did not stop after being hit. Torres v. Madrid, 141 S.Ct. 899 (March 26, 2021) – March 21:03. Revisited in the April 2021 Legal Update beginning at page 3.

Reasonable suspicion standard held not met for Terry stop of suspected drug-dealer where an arrestee spontaneously told police the name of her drug-dealer, but police did not – at least to the satisfaction of the Court of Appeals panel – sufficiently corroborate her allegation. State v. Morrell, \_\_\_ Wn. App. 2d \_\_\_ (Div. III, March 9, 2021) – March 21:14

Officer's Terry frisk held in criminal case to have exceeded safety-based scope limits for frisks where the officer extracted and examined a baggie of heroin that was in the detainee's pocket. U.S. v. Brown, \_\_\_ F.3d \_\_\_, 2021 WL \_\_\_ (9<sup>th</sup> Cir., May 12, 2021) – May 21:11

Seizure of suspect is held in criminal case to have been an arrest, not a Terry seizure, and the arrest is held to have not been supported by an arrest warrant where officers had not recently verified the warrant. State v. Pines, 17 Wn. App. 2d 483 (Div. I, May 17, 2021) – May 21:13

By boarding a public bus and accepting transportation, defendant consented to the conditions of ridership, which include complying with a fare enforcement officer's request for proof of payment. State v. Meredith, \_\_\_ Wn. App. 2d \_\_\_, 492 P.3d 198 (Div. I, July 26, 2021) – July 21:12

### **ASSAULT (Chapter 9A.36 RCW)**

Officers must go to criminal trial on charges of Third Degree Child Assault and Official Misconduct based on allegations by others that the officers were accomplices or principals in a grandmother's striking of her disturbed and acting-up grandchild with a belt. State v. Birge, State v. Jahner 16 Wn. App. 2d 16 (Div. II, January 5, 2021) – January 21:24

Corrections officers qualify as "law enforcement officers" under the Third Degree Assault statute, RCW 9A.36.031(1)(g). State v. Griepsma, \_\_\_ Wn. App. 2d \_\_\_, 2021 WL \_\_\_ (Div. I, 2021) (May 24, 2021 Unpublished Opinion declared Published on June 24, 2021) – June 21:20

Division One panel holds in a First Amendment Free Speech ruling that, on the totality of the circumstances, there was no "true threat" and hence no harassment under a Seattle ordinance where (1) a man driving by a police officer after dark without lights on pointed a finger at the officer causing the officer to believe that the man was pointing a gun, (2) the driver yelled "fuck the police" as he drove by, and (3) the officer was reasonably fearful for his safety because the officer believed the driver had pointed a gun at him. The Court of Appeals apparently concludes as a matter of law that the evidence cannot support the trial court's finding and conclusion that a reasonable person doing what the defendant did would understand that the officer would perceive that the defendant's actions and words presented a serious expression of a threat. State v. Johnson, \_\_\_ Wn. App. 2d \_\_\_, 2021 WL \_\_\_ (Div. I, December 27, 2021) – December 21:04

### **ATTORNEY GENERAL OPINIONS**

**E2SHB 1310 [Chapter 324, Washington Laws of 2021] (Officer Use of Force).** Opinion Docket No. 21-08-02. Request by Representatives Roger Goodman and Jesse Johnson. The Attorney General's Office seeks public input on the following questions. – August 21:10

## **CIVIL LIABILITY**

*Civil Rights Act section 1983 lawsuits (Against Corrections)*

**No qualified immunity for San Diego County Jail or for three of the jail's nurses where the level and nature of medical monitoring and care to an overdosed, recently-arrested inmate was objectively unreasonable under the applicable constitutional Due Process standard for pre-trial detainees.** Sandoval v. County of San Diego, 985 F.3d 652 (9<sup>th</sup> Cir., January 13, 2021) – January 21:12

**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.** Lombardo v. St. Louis, 141 S.Ct. 2239 (June 28, 2021) – June 21:07

**In a case where a heroin addict died within 30 hours of jail intake, a three-judge panel addresses "the right of detainees to direct-view safety checks" and grants qualified immunity on the issue, but the panel recognizes a Due Process right on this issue going forward.** Gordon v. County of Orange, 6 F.4th 961 (9<sup>th</sup> Cir., July 28, 2021) – July 21:04

**Prison officials held to have violated prisoner's Due Process rights when, without legitimate penological reason, they did not allow him to access envelopes or copies of them in which drugs were allegedly found being smuggled to him.** Melnik v. Dzurenda, 14 F.4th 981 (9<sup>th</sup> Cir., September 27, 2021) – September 21:06

*Civil Rights Act section 1983 lawsuits (Against Law Enforcement - - see subhead above for corrections)*

**The mere failure in a custodial interrogation to give Miranda warnings can provide grounds for a Fifth Amendment-based civil rights suit where the un-Mirandized statement was introduced at a criminal trial, and the jury acquitted in that criminal trial.** Tekoh v. County of Los Angeles, 985 F.3d 713 (9<sup>th</sup> Cir., January 15, 2021) – January 21:09 Note: On June 3, 2021, the Ninth Circuit denied a request for re-hearing by an 11-judge panel.

**Public employee Freedom of Speech: Police officer is entitled to a trial on whether police agency could lawfully drop him from the sniper team for his comment on Facebook that it was a "shame" that a suspect did not have any "holes" in him.** Moser v. Las Vegas Metropolitan Police Department, 984 F.3d 900 (9<sup>th</sup> Cir., January 12, 2021) – January 21:10

**No qualified immunity for officers in case where, at the close of a car pursuit, officers shot the driver and his passenger who they had boxed in on a dead-end street – the appellate panel concludes that a jury could reasonably find on the facts viewed in the best light for plaintiffs that the driver did not pose sufficient risk to the officers to justify their use of deadly force.** Villanueva v. California, 986 F.3d 1158 (9<sup>th</sup> Cir., January 28, 2021) – February 21:03

The application by law enforcement of physical force to the body of a person with objectively manifested intent to restrain the person is a Fourth Amendment “seizure” under the “mere touch” rule, regardless of how the person responds to such intentional application of force; therefore, a Fourth Amendment seizure occurred when an officer shot a fleeing suspect with intent to apprehend her, even though she did not stop after being hit. Torres v. Madrid, 141 S.Ct. 899 (March 26, 2021) – March 21:03

Qualified immunity is ordered for officers in lawsuit challenging (1) their deployment of a police K-9 (after other less-lethal control techniques had failed), and (2) the duration of the dog’s bite in arrest of a resisting DUI suspect; consistent with U.S. Supreme Court guidance in 2007 Scott v. Harris decision, panel’s opinion relies on audio-video-recordings rather than favoring plaintiff’s allegations. Hernandez v. Town of Gilbert, 989 F.3d 739 (9<sup>th</sup> Cir., March 4, 2021) – March 21:07

Viewing the allegations in the best light for plaintiff, Ninth Circuit panel holds that where plaintiff was giving officers only passive resistance, officers used excessive force when they executed a take-down maneuver while holding plaintiff in a “police lead” position; that is, they tripped plaintiff so that he would fall face first onto the pavement as they held his arms back. Rice v. Morehouse, 989 F.3d 1112 (9<sup>th</sup> Cir., March 8, 2021) – March 21:08

In case involving arrest of violent suspect reported to be suffering from an epileptic seizure, panel votes 2-1 to grant qualified immunity to law enforcement defendants on issues relating to (a) excessive force, (b) Americans with Disabilities Act, (c) probable cause to arrest, and (d) allegedly fabricated police report. O’Doan v. Sanford, 991 F.3d 1027 (9<sup>th</sup> Cir., March 19, 2021) – March 21:10

11-judge panel votes 7-4 in ruling that the Second Amendment does not provide a right to openly carry a handgun in public. Young v. State of Hawaii, \_\_\_ F.3d \_\_\_, 2021 WL 1114180 (9<sup>th</sup> Cir., March 24, 2021) – March 21:12

The application by law enforcement of physical force to the body of a person with objectively manifested intent to restrain the person is a Fourth Amendment “seizure” under the “mere touch” rule, regardless of how the person responds to such intentional application of force; therefore, a Fourth Amendment seizure occurred when an officer shot a fleeing suspect with intent to apprehend her, even though she did not stop after being hit. Torres v. Madrid, 141 S.Ct. 899 (March 26, 2021) – March 21:03. Revisited in the April 2021 Legal Update beginning at page 3.

Three rulings against law enforcement in a false confession case involving an innocent juvenile suspect – (1) “Could I have an attorney? because that’s not me,” was an unambiguous request for an attorney, and detectives’ ignoring of the request supports a section 1983 Fifth Amendment claim; (2) Fifth Amendment was violated by coercive questioning of 13-year-old boy with repeated assertions that if the boy did not confess, the courts might “throw the book at him;” and (3) if other detectives were remotely watching another detective engaging in coercive questioning, they may be held liable for not intervening. Tobias v. Arteaga, 996 F.3d 571 (9<sup>th</sup> Cir., April 27, 2021) – April 21:04

“Community caretaking exception” to Fourth Amendment search warrant requirement does not allow for warrantless, non-consenting entry of residence to search for and seize firearms of possibly suicidal resident; ruling by Supreme Court does not address

scope of “exigent circumstances” or “emergency circumstances” exceptions to the warrant requirement – the court treats those exceptions, which the government defendants did not rely on in this case, as unrelated to the community caretaking exception. Caniglia v. Strom, 141 S.Ct. 1596 (May 17, 2021) – May 21:02

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. Garcia v. City of Los Angeles, 11 F.4th 1113 (9<sup>th</sup> Cir., September 2, 2021) – September 21:02

Officer is entitled to trial based on her allegation that police chief committed gender-discrimination against her by pretextually subjecting her to an internal affairs investigation in order to preclude her eligibility for promotion. Ballou v. McElvain, 14 F.4<sup>th</sup> 1042 (9<sup>th</sup> Cir., September 28, 2021) – September 21:04

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 arrest charge was grounded in part on his admitted struggle with officers and their canine, leading to the dog bite. Sanders v. City of Pittsburg, 14 F.4<sup>th</sup> 968 (9<sup>th</sup> Cir., September 23, 2021) – September 21:05

U.S. Supreme Court grants qualified immunity to law enforcement in two cases where the court explains that case law had not clearly established that it constituted excessive force: (1) in one case, to kneel on the back of a contemporaneously knife-possessing DV suspect for eight seconds; or (2) in the second case, to shoot and kill a trespassing ex-husband who was ignoring officers’ orders and had a hammer in hand and over his head, poised to throw it at officers who were six to ten feet away. Rivas-Villegas v. Cortesluna, 142 S.Ct. 4 (October 18, 2021) – October 21:02

2-1 Ninth Circuit 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. J.K.J. v. City of San Diego, \_\_\_ F.4<sup>th</sup> \_\_\_, 2021 WL \_\_\_ (9<sup>th</sup> Cir., November 15, 2021) – November 21:03

Qualified immunity ordered on Freedom of Speech issue for law enforcement officer who escorted a member of the press away from a dialogue with a protester based on the officer’s understanding of the need to maintain separate zones for protesters and counter-protesters. Saved Magazine v. Spokane Police Department, \_\_\_ F.4<sup>th</sup> \_\_\_, 2021 WL \_\_\_ (9<sup>th</sup> Cir., December 9, 2021) – December 21:02

*Civil Rights Act section 1983 lawsuits (Against Probation Department - - see subheads above for corrections and law enforcement)*

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. Chavez v. Robinson, 12 F.4<sup>th</sup> 978 (9<sup>th</sup> Cir., September 8, 2021) – September 21:03

*Civil Liability of Law Enforcement Under Negligence Theory and Other State Law Theories*

**Jury verdict against City of Tacoma is upheld in wrong-apartment search warrant case based on theory of negligent execution of the warrant; Supreme Court declines to recognize a “negligent investigation” theory.** Mancini v. City of Tacoma, \_\_\_ Wn.2d \_\_\_, 479 P.3d 656 (January 28, 2021) – February 21:08

**Felony bar statute, RCW 4.24.420: In a wrongful death lawsuit against King County law enforcement defendants by the estate of Renee Davis, the jury must resolve some fact questions, in light of the mental health problems of Ms. Davis, about the intent of the armed Ms. Davis at the time of the shooting.** Davis v. King County, \_\_\_ Wn. App. 2d \_\_\_, 2021 WL \_\_\_ (Div. I, February 1, 2021) – February 21:12

**In lawsuit by the Estate of Charleena Lyles, the jury/factfinder must resolve some fact questions on (1) whether officers were reasonable in resorting to use of lethal force, and (2) whether, for purposes of the felony-bar statute (RCW 4.24.420), the knife-wielding Ms. Lyles, in light of her mental health problems, had the requisite intent under that statute.** Commissioner Eric Watness and others v. City of Seattle and others, \_\_\_ Wn. App. 2d \_\_\_, 2021 WL \_\_\_ (Div. I, Feb. 16, 2021) – February 21:15

**Public Duty Doctrine does not bar lawsuit for alleged governmental negligence in responding to a 911 call for emergency medical assistance.** Norg v. City of Seattle, \_\_\_ Wn. App. 2d \_\_\_, 491 P.3d 237 (Div. I, July 19, 2021) – July 21:14

### **CRIME VICTIMS’ RIGHTS (Chapter 7.69 RCW)**

**Under RCW 7.69.030(7), a deceased crime victim’s personal property must be returned to a family member even if crime remains under investigation unless the statute’s standard for keeping the property is met.** Burton v. City of Spokane, \_\_\_ Wn. App. 2d \_\_\_, 482 P.3d 968 (Div. III, March 18, 2021) – March 21:25

### **CYBERSTALKING (RCW 9.61.260)**

**Cyberstalking: Evidence is held sufficient to support conviction.** State v. Mireles, \_\_\_ Wn. App. 2d \_\_\_, 482 P.3d 942 (Div. I, March 8, 2021) – March 21:23

### **DEFAMATION LAWSUIT BY LAW ENFORCEMENT OFFICERS**

**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.** Miller and Spaulding v. Sawant, \_\_\_ F.4th \_\_\_, 2021 WL \_\_\_ (9<sup>th</sup> Cir., November 10, 2021) – November 21:05

### **DEFERRED PROSECUTION**

**Five-year deferred prosecution means five years; the deferment period does not expire at the point when a treatment program is completed.** State v. Skrobo, 17 Wn. App. 2d 197 (Div. II, April 20, 2021) – April 21:18

### **DISCIPLINE OF LAW ENFORCEMENT**

Dismissal from employment is held on grounds of public policy to be the **only** appropriate punishment where an officer who was kicked in the face with a Doc Martens boot by a handcuffed woman almost immediately retaliated by punching her in the face hard enough to cause an orbital fracture. Seattle Police Department v. Seattle Police Officers' Guild, \_\_\_ Wn. App. 2d \_\_\_, 2021 WL \_\_\_ (Div. I, April 5, 2021) – April 21:14

### **DOMESTIC VIOLENCE, INCLUDING INTERFERING WITH REPORTING AND VIOLATING PROTECTION ORDERS**

**RCW 9A.36.150(1)(b): Prohibition on interfering with the reporting of domestic violence is a strict liability crime.** State v. Christian, \_\_\_ Wn. App. 2d \_\_\_, 2021 WL \_\_\_ (Div. I, June 1, 2021) – June 21:19

**RCW 9A.36.150(1)(b): Prohibition against interfering with the reporting of domestic violence is a strict liability crime.** State v. Christian, \_\_\_ Wn. App. 2d \_\_\_, 2021 WL \_\_\_ (Div. I, July 6, 2021) (reconsideration and affirmance of June 1, 2021 ruling) – July 21:13

### **DUE PROCESS PROTECTION, INCLUDING EYEWITNESS IDENTIFICATIONS AND BRADY REQUIREMENTS ON GOVERNMENT**

**Two rulings: (1) Suggestive identification procedure using a single Facebook picture was not so suggestive as to render in-court identification unreasonable; and (2) Brady violations do not require reversal of drug-dealing corrections officer's conviction because of other evidence in the case.** U.S. v. Bruce, \_\_\_ F.3d \_\_\_, 2021 WL 98242 (9<sup>th</sup> Cir., January 12, 2021) – January 21:14

**Washington State's strict liability statute prohibiting drug possession held (1) to violate state and federal constitutional due process protections and (2) to be invalid because the statute prohibits unintentional, unknowing possession of a controlled substance.** State v. Blake, 197 Wn.2d 170 (February 25, 2021) – February 21:07

**Washington state's innocent-explanation interpretation of the court-made corpus delicti rule: The rule was not satisfied in a prosecution for possession of methamphetamine with intent to deliver where police discovered in defendant's living room 10 grams of methamphetamine, a scale, untorn plastic grocery store bags, and a drug pipe; therefore, a 2-1 majority holds that his voluntary confession to being a drug dealer is not admissible; however, the court is unanimous that this evidence supports his conviction for possession with intent to deliver.** State v. Sprague, 16 Wn. App. 2d 213 (Div. II, Feb. 9, 2021) – February 21:16 **Note:** On May 11, 2021, Division Two issued a revised Opinion that addressed a sentencing issue but did not revise the corpus delicti or sufficiency-of-evidence analysis.

**Eyewitness identification procedures: Ninth Circuit panel rules against murderer in addressing ID procedure issues involving circumstances of officers providing confirmation information to eyewitnesses immediately after photo montages.** Walden v. Shinn, 990 F.3d 1183 (9<sup>th</sup> Cir., March 12, 2021) – March 21:13

**Showup identification procedure: In a 2-1 ruling, Court of Appeals panel rules under Due Process analysis that evidence of a car theft victim's eyewitness identification of suspect in a showup conducted shortly after the crime occurred (1) was not impermissibly suggestive, and (2) did not result in a substantial likelihood of irreparable**

**misidentification.** State v. Scabbyrobe, \_\_\_ Wn. App. 2d \_\_\_, 482 P.3d 301 (Div. III, March 18, 2021) – March 21:18

**Photo montage ID procedure declared by two members of three-judge panel not to have been impermissibly suggestive, but the third judge makes a good argument to the contrary where picture of defendant in the montage was the only picture of a person with a neck tattoo.** State v. Derri, 17 Wn. App. 2d 376 (Div. I, May 11, 2021) – May 21:18

### **ELECTRONIC SURVEILLANCE AND RECORDING (Privacy Act, Chapter 9.73 RCW)**

**Electronic intercept-and-record court order that was issued under the felony-investigations provisions of the Privacy Act (RCW 9.73.090(2) and RCW 9.73.130) was supported by a showing of necessity, i.e., a showing that other normal investigative procedures would be “unlikely to succeed.”** State v. Gonzalez, \_\_\_ Wn. App. 2d \_\_\_, 484 P.3d 9 (Div. III, April 6, 2021) – April 21:12

**Supervisor-authorized recording of private communications in narcotics investigation under RCW 9.73.230 is held inadmissible because the written report to the supervisor 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. Therefore, the trial court must now decide if admitting the recordings was harmless error.** State v. Ridgley, \_\_\_ Wn. App. 2d \_\_\_, 488 P.3d 864 (Div. III, June 8, 2021) – June 21:16

**WSP participants in “Net Nanny” sting operation did not violate defendant’s rights under chapter 9.73 RCW (the Privacy Act) because the sender of a text message runs the risk that the recipient will share the content of that message with one or multiple other persons.** State v. Bilqi, \_\_\_ Wn. App. 2d \_\_\_, 2021 WL \_\_\_ (Div. II, October 19, 2021) – October 21:09

**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 who had texted with the suspect, (2) claimed that he was using a replacement phone to text the new message, and (3) made a deal to buy methamphetamine.** State v. Bowman, \_\_\_ Wn.2d \_\_\_, 2020 WL \_\_\_ (November 9, 2020) – November 21:07

### **EVIDENCE RULES, EVIDENCE LAW**

**6-3 majority of Washington Supreme Court rules that all but one of the hearsay statements of a now-deceased victim to a sexual assault nurse examiner (SANE) were not testimonial and therefore are admissible; Court reaches similar result under Evidence Rule 803(a)(4)’s hearsay exception for statements made for medical diagnosis or treatment.** State v. Burke, \_\_\_ Wn.2d \_\_\_, 2021 WL \_\_\_ (January 14, 2021) – January 21:17

**Rape defendant wins new trial based on successful evidence law challenges on issues of: (1) Rape Shield Statute’s limits; (2) relevancy of would-be victim’s allegedly drunken and flirtatious behavior with him (including sitting on his lap) and others earlier during the evening of the alleged rape; (3) allowable scope of questioning of state’s experts; and**

**(4) admissibility of reputation evidence of defendant’s reputation for sexual morality.** State v. Jacob Nathaniel Cox, 17 Wn. App. 2d 178 (Div. III, April 20, 2021) – April 21:15

**Child witness competency: Trial court did not abuse its discretion in ruling the 7-year-old sex-abuse victim was competent to testify even though she could not remember the identity of the alleged abuser or the details of the abuse.** State v. Hancock, 17 Wn. App. 2d 113 (Div. III, April 8, 2021) – April 21:16

### **EXCESSIVE FINES CLAUSE OF EIGHTH AMENDMENT**

**Forfeiture of vehicle held to be supported under RCW 69.50.505, but to violate the excessive fines clause of the federal constitution’s Eighth Amendment because the vehicle owner is indigent.** Jacobo Hernandez v. City of Kent, \_\_\_ Wn. App. 2d \_\_\_, 2021 WL \_\_\_ (Div. I, October 25, 2021) – October 21:08

### **EXTREME RISK PROTECTION ACT (Chapter 7.94 RCW)**

**Court of Appeals upholds superior court order for renewal of an Extreme Risk Protection Order requested by the Seattle Police Department under chapter 7.94 RCW to bar possession of firearms.** Seattle Police Department v. Demetrius Jones, \_\_\_ Wn. App. 2d \_\_\_, 2021 WL \_\_\_ (Div. I, October 18, 2021) – October 21:11

### **FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION (See also “Interrogations and Confessions” topic)**

**In Miranda/constitution-based ruling, Court of Appeals rules that prosecutor should not have asked detective or defendant at trial about defendant’s post-arrest silence.** State v. Cook, 17 Wn. App. 2d 96 (Div. III, April 6, 2021) – April 21:13

**The prosecution violated defendant’s Fifth Amendment right against self-incrimination by asking a law enforcement officer about defendant’s decision to remain silent after arrest and a night in jail.** State v. Palmer, \_\_\_ Wn. App. 2d \_\_\_, 493 P.3d 158 (Div. II, August 19, 2021) – August 21:08

### **FIREARMS AND OTHER DANGEROUS WEAPONS (Chapter 9.41 RCW and other statutes)**

**11-judge Ninth Circuit panel will review three-judge panel’s August 2020 2-1 decision that held unconstitutional a California statute that bans possession of large-capacity ammunition magazines.** Duncan v. Becerra, 2021 WL \_\_\_ (9<sup>th</sup> Cir., February 25, 2021) – February 21:03

**Gun owners win, so far, in action challenging on grounds of statutory preemption (RCW 9.41.290) a City of Edmonds ordinance that makes it an infraction to store unlocked any firearm and to allow access to such a firearm of others not permitted by law to possess.** In City of Edmonds and others v. Brett Bass and others, 16 Wn. App. 2d 488 (Div. I, February 22, 2021) – February 21:16

**11-judge panel votes 7-4 in ruling that the Second Amendment does not provide a right to openly carry a handgun in public.** Young v. State of Hawaii, \_\_\_ F.3d \_\_\_, 2021 WL 1114180 (9<sup>th</sup> Cir., March 24, 2021) – March 21:12

**Second Amendment and Washington constitutional right-to-bear arms: Man who was prosecuted for carrying a sword in a Seattle public park loses an as-applied constitutional challenge to the City of Seattle’s “dangerous knife” ordinance.** Zaitzeff v. City of Seattle, \_\_\_ Wn. App. 2d \_\_\_, 484 P.3d 470 (Div. I, April 5, 2021) – April 21:17

**RCW 9.41.171 prohibition on alien possession of a firearm is held to not be a strict liability crime, and instead to have an implied element of knowing possession.** State v. Flores, \_\_\_ Wn. App. 2d \_\_\_, 492 P.3d 184 (Div. I, July 26, 2021) – July 21:13

**“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.”** State v. Gouley, \_\_\_ Wn. App. 2d \_\_\_, 494 P.3d 458 (September 8, 2021) – September 21:09

**Court of Appeals upholds superior court order for renewal of an Extreme Risk Protection Order requested by the Seattle Police Department under chapter 7.94 RCW to bar possession of firearms.** Seattle Police Department v. Demetrius Jones, \_\_\_ Wn. App. 2d \_\_\_, 2021 WL \_\_\_ (Div. I, October 18, 2021) – October 21:11

**Second Amendment held in 7-4 vote by Ninth Circuit panel not to be violated by California statutes banning possession of large-capacity magazines that hold more than 10 rounds of ammunition.** Duncan v. Bonta, \_\_\_ F.3d \_\_\_, 2021 WL \_\_\_ (9<sup>th</sup> Cir., November 30, 2021) – November 21:04

## **FIRST AMENDMENT FREEDOM OF SPEECH**

**Public employee Freedom of Speech: Police officer is entitled to a trial on whether police agency could lawfully drop him from the sniper team for his comment on Facebook that it was a “shame” that a suspect did not have any “holes” in him.** Moser v. Las Vegas Metropolitan Police Department, 984 F.3d 900 (9<sup>th</sup> Cir., January 12, 2021) – January 21:10

**Qualified immunity ordered on Freedom of Speech issue for law enforcement officer who escorted a member of the press away from a dialogue with a protester based on the officer’s understanding of the need to maintain separate zones for protesters and counter-protesters.** Saved Magazine v. Spokane Police Department, \_\_\_ F.4<sup>th</sup> \_\_\_, 2021 WL \_\_\_ (9<sup>th</sup> Cir., December 9, 2021) – December 21:02

**Division One panel holds in a First Amendment Free Speech ruling that, on the totality of the circumstances, there was no “true threat” and hence no harassment under a Seattle ordinance where (1) a man driving by a police officer after dark without lights on pointed a finger at the officer causing the officer to believe that the man was pointing a gun, (2) the driver yelled “fuck the police” as he drove by, and (3) the officer was reasonably fearful for his safety because the officer believed the driver had pointed a gun at him. The Court of Appeals apparently concludes as a matter of law that the evidence cannot support the trial court’s finding and conclusion that a reasonable person doing what the defendant did would understand that the officer would perceive that the defendant’s actions and words presented a serious expression of a threat.** State v. Johnson, \_\_\_ Wn. App. 2d \_\_\_, 2021 WL \_\_\_ (Div. I, December 27, 2021) – December 21:04

**HARASSMENT (Chapter 9A.46 RCW) See also “TELEPHONE HARASSMENT”**

Division One panel holds in a First Amendment Free Speech ruling that, on the totality of the circumstances, there was no “true threat” and hence no harassment under a Seattle ordinance where (1) a man driving by a police officer after dark without lights on pointed a finger at the officer causing the officer to believe that the man was pointing a gun, (2) the driver yelled “fuck the police” as he drove by, and (3) the officer was reasonably fearful for his safety because the officer believed the driver had pointed a gun at him. The Court of Appeals apparently concludes as a matter of law that the evidence cannot support the trial court’s finding and conclusion that a reasonable person doing what the defendant did would understand that the officer would perceive that the defendant’s actions and words presented a serious expression of a threat. State v. Johnson, \_\_\_ Wn. App. 2d \_\_\_, 2021 WL \_\_\_ (Div. I, December 27, 2021) – December 21:04

### **HOMESTEAD ACT (Chapter 6.13 RCW)**

Washington Supreme Court addresses Washington’s Homestead Act as applied to an otherwise homeless person’s use of a vehicle as his primary residence. City of Seattle v. Long, \_\_\_ Wn.2d \_\_\_, 2021 WL \_\_\_ (August 12, 2021) – August 21:02

### **IMPLIED CONSENT, BREATH AND BLOOD TESTS FOR ALCOHOL (RCW 46.20.308)**

Implied Consent statute: Timeline for DOL’s statutory duty to hold a hearing on suspension or revocation does not start to run until after DOL has received both (1) an officer’s sworn report and (2) a timely hearing request from the driver. Smith v. Washington DOL, \_\_\_ Wn. App. 2d \_\_\_, 2021 WL \_\_\_ (October 18, 2021); Dyson v. Washington DOL, \_\_\_ Wn. App. 2d \_\_\_, 2021 WL \_\_\_ (October 18, 2021) – October 21:11

### **INDIAN AN (NATIVE AMERICAN) LAW**

United States Supreme Court rules that 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, 141 S.Ct. 1638 (June 1, 2021) – June 21:10

**INTERROGATIONS AND CONFESSIONS** (See also “Sixth Amendment Right to Counsel” and “Criminal Rule 3.1” topics)

Miranda warnings held required on grounds that questioning during police-suspect meeting at shopping mall parking lot was “custodial” considering all of the circumstances (including temporarily separating the suspect from his seven-year-old son); however, the Exclusionary Rule that applies to Miranda violations does not require suppression of physical evidence produced by the questioning, so remand is needed in order to determine if defendant voluntarily consented to a search. U.S. v. Mora-Alcaraz, 986 F.3d 1151 (9<sup>th</sup> Cir., January 21, 2021) – January 21:04

The mere failure in a custodial interrogation to give Miranda warnings can provide grounds for a Fifth Amendment-based civil rights suit where the un-Mirandized statement was introduced at a criminal trial, and the jury acquitted in that criminal trial. Tekoh v. County of Los Angeles, 985 F.3d 713 (9<sup>th</sup> Cir., January 15, 2021) – January 21:09 Note: On June 3, 2021, the Ninth Circuit denied a request for re-hearing by an 11-judge panel.

Three rulings against law enforcement in a false confession case involving an innocent juvenile suspect – (1) “Could I have an attorney? because that’s not me,” was an unambiguous request for an attorney, and detectives’ ignoring of the request supports a section 1983 Fifth Amendment claim; (2) Fifth Amendment was violated by coercive questioning of 13-year-old boy with repeated assertions that if the boy did not confess, the courts might “throw the book at him;” and (3) if other detectives were remotely watching another detective engaging in coercive questioning, they may be held liable for not intervening. Tobias v. Arteaga, 996 F.3d 571 (9<sup>th</sup> Cir., April 27, 2021) – April 21:04

In Miranda/constitution-based ruling, Court of Appeals rules that prosecutor should not have asked detective or defendant at trial about defendant’s post-arrest silence. State v. Cook, 17 Wn. App. 2d 96 (Div. III, April 6, 2021) – April 21:13

## **LEGISLATION**

**2021 Washington legislative summaries from the Washington Association of Sheriffs and Police Chiefs – July 21:03**

**2021 legislative summaries from the Washington Administrative Office of the Courts – July 21:03**

**E2SHB 1310 [Chapter 324, Washington Laws of 2021] (Officer Use of Force).** Opinion Docket No. 21-08-02. Request by Representatives Roger Goodman and Jesse Johnson. The Attorney General’s Office seeks public input on the following questions. – August 21:10

## **MALICIOUS MISCHIEF (Chapter 9A.48 RCW)**

**Sufficiency of evidence of malicious mischief under chapter 9A.48 RCW: Evidence that defendant did not own property that he damaged is sufficient to prove (1) that the property was “property of another,” and (2) that defendant had not “obtained the express permission of the owner or operator of the property.”** State v. J.A.V., \_\_\_ Wn. App.2d \_\_\_, 2021 WL \_\_\_ (Div. III, December 23, 2021) – December 21:12

## **MESSAGE PRACTICE WITHOUT A LICENSE (RCW 18.130.190)**

**Accomplice-liability-based convictions for practicing massage without licenses (RCW 18.130.190(7)) upheld against challenge that prosecution should have been under lesser offense of allowing employees to give unlicensed massages (RCW 18.108.035).** State v. Zheng, \_\_\_ Wn. App. 2d \_\_\_, 491 P.3d 254 (Div. II, July 7, 2021) – July 21:14

## **MURDER AND OTHER CRIMINAL HOMICIDES (Chapter 9A.32 RCW)**

**Where death is the result of a labor safety regulation violation, and the facts support a criminal charge under the Workplace Safety Statute (RCW 49.17.190(3)), the specific-controls-over-the-general rule does not preclude charging the employer under the Second Degree Murder statute (RCW 9A.32.050).** State v. Numrich, 197 Wn.2d 1 (February 4, 2021) – February 21:11

## **NECESSITY DEFENSE AT COMMON LAW**

**Washington Supreme Court allows protester against climate change to use necessity defense in prosecution for trespass and obstruction of a train. State v. Spokane County District Court, \_\_\_ Wn.2d \_\_\_, 2021 WL \_\_\_ (July 15, 2021) – July 21:11**

### **OFFICIAL MISCONDUCT (RCW 9A.80.010)**

**Officers must go to criminal trial on charges of Third Degree Child Assault and Official Misconduct based on allegations by others that the officers were accomplices or principals in a grandmother’s striking of her disturbed and acting-up child with a belt. State v. Birge, State v. Jahner, 16 Wn. App. 2d 16 (Div. II, January 5, 2021) – January 21:24**

### **POSSESSING STOLEN PROPERTY (Chapter 9A.56 RCW)**

**Possession of a forged check does not violate the possession-of-stolen-property statute because a paper check does not qualify as an “access device” as that term is defined in RCW 9A.56.010(1). State v. Arno, \_\_\_ Wn. App. 2d \_\_\_, 489 P.3d 654 (Div. III, June 22, 2021) – June 21:19**

### **PRIVACY ACT (Chapter 9.73 RCW)**

**See “Electronic Surveillance and Recording” topic above**

### **PROMOTING PROSTITUTION (RCW 9A.88.080)**

**Promoting prostitution: Evidence is held to be sufficient to support convictions where defendant’s conduct went beyond the acts of a mere customer, which is how he tried to portray himself in his defense against prosecution. State v. Peters, 16 Wn. App. 2d 452 (Div. I, February 22, 2021) – March 21:23 Note: On May 10, 2021, the Court of Appeals issued a revised opinion but did not change the analysis on sufficiency of the evidence of promoting prostitution.**

### **PUBLIC RECORDS ACT (Chapter 42.56 RCW)**

**Individual with YouTube channel who sought to qualify as “news media” for purposes of getting access to photographs and the month and year of birth of persons who work in criminal justice agencies held to not qualify as “news media” because his channel did not have a separate legal identity. Green v. Pierce County, \_\_\_ Wn.2d \_\_\_, 2021 WL \_\_\_ (May 27, 2021) – May 21:12**

### **RAPE AND OTHER SEX CRIMES (Chapter 9A.44 RCW)**

**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 thus did not do any overcoming of resistance. In State v. Gene, \_\_\_ Wn. App. 2d \_\_\_, 2021 WL \_\_\_ (Div. I, November 29, 2021) – November 21:09**

### **RECALL-OF-SHERIFF PETITIONS**

**Washington Supreme Court decides two separate cases addressing recall petitions against the sheriffs of Snohomish County and Benton County. In re Recall of Fortney, \_\_\_**

Wn.2d \_\_\_, 2021 WL \_\_\_ (January 14, 2021); In re Recall of Hatcher, \_\_\_ Wn.2d \_\_\_, 2021 WL \_\_\_ (January 14, 2021) – January 21:23

**Washington Supreme Court addresses recall petition directed at elected sheriff for Thurston County.** In re Recall of John Snaza, \_\_\_ Wn.2d \_\_\_, 2021 WL \_\_\_ (February 11, 2021) – February 21:12

## **RESEARCH TOOLS/SOURCES**

**Announcement: Research materials by John Wasberg have been updated through July 1, 2021, and are available on the Criminal Justice Training Commission’s Internet LED page under “Special Topics”** – July 21:03

## **ROBBERY (Chapter 9A.56 RCW)**

**Evidence in a First Degree Robbery prosecution is held sufficient to prove that defendant or his accomplice was armed with a deadly weapon during a robbery.** State v. Sullivan, \_\_\_ Wn. App. 2d \_\_\_, 491 P.3d 176 (Div. I, July 6, 2021) – July 21:13

**SEARCHES** (See also “Arrest, Stop and Frisk” topic)

*Community caretaking exception to the search warrant requirement*

**“Community caretaking exception” to Fourth Amendment search warrant requirement does not allow for warrantless, non-consenting entry of residence to search for and seize firearms of possibly suicidal resident; ruling by Supreme Court does not address scope of “exigent circumstances” or “emergency circumstances” exceptions to the warrant requirement – the court treats those exceptions, which the government defendants did not rely on in this case, as unrelated to the community caretaking exception.** Caniglia v. Strom, 141 S.Ct. 1596 (May 17, 2021) – May 21:02

*Community corrections officer searches*

See the subtopic “Probation and Parole Searches” below

*Entry of Private Premises to Arrest*

**In this 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 – is needed in order to establish exigency in hot pursuits of fleeing misdemeanants.** Lange v. California, 141 S.Ct. 2011 (June 23, 2021) – June 21:03

*Execution of search warrant*

**Jury verdict against City of Tacoma is upheld in wrong-apartment search warrant case based on theory of negligent execution of the warrant; Supreme Court declines to recognize a “negligent investigation” theory.** Mancini v. City of Tacoma, \_\_\_ Wn.2d \_\_\_, 479 P.3d 656 (January 28, 2021) – February 21:08

*Exigent circumstances exception to search warrant requirement (including emergencies)*

**“Community caretaking exception” to Fourth Amendment search warrant requirement does not allow for warrantless, non-consenting entry of residence to search for and seize firearms of possibly suicidal resident; ruling by Supreme Court does not address scope of “exigent circumstances” or “emergency circumstances” exceptions to the warrant requirement – the court treats those exceptions, which the government defendants did not rely on in this case, as unrelated to the community caretaking exception. Caniglia v. Strom, 141 S.Ct. 1596 (May 17, 2021) – May 21:02**

*Overbreadth and particularity requirements for search warrant description of items*

**Fourth Amendment overbreadth rule is tied to the probable-cause-to-search standard: A “some-means-more” inference does not always apply, but the inference applies to allow a broad search in this case where the report was that the previously convicted felon-target of the search had agreed to hide a gun for a domestic violence suspect: the felon-target’s agreement to hide the gun supported a search for more guns in the felon-target’s home. U.S. v. King, \_\_\_ F.3d \_\_\_, 2021 WL \_\_\_ (9<sup>th</sup> Cir., January 14, 2021) – January 21:03**

*Particularity requirement for search warrants*

See subtopic immediately above this section

*Privacy expectations, scope of constitutional protections, definition of “search”*

**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 who had texted with the suspect, (2) claimed that he was using a replacement phone to text the new message, and (3) made a deal to buy methamphetamine. State v. Bowman, \_\_\_ Wn.2d \_\_\_, 2020 WL \_\_\_ (November 9, 2021) – November 21:07**

**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. Garcia v. City of Los Angeles, 11 F.4th 1113 (9<sup>th</sup> Cir., September 2, 2021) – September 21:02**

*Private searches*

**A 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. Therefore, the private person’s actions did not trigger 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 \_\_\_, 487 P.3d 936 (Div. I, June 1, 2021) – June 21:13 Note: The Court of Appeals issued a revised Opinion on August 16, 2021, but the ruling and analysis on this search and seizure issue did not change. See entry immediately below under this subtopic.**

**After reconsidering a June 1, 2021, Opinion, Division One panel again rules in a criminal case that a private person’s actions of retrieving a suspect’s discarded items and turning**

them over to a cold case detective for DNA testing was not instigated by the detective and therefore did not trigger 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 \_\_\_, 491 P.3d 988 (Div. I, August 16, 2021) – August 21:03

#### *Private Search Doctrine of Fourth Amendment*

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.4th \_\_\_, 2021 WL \_\_\_ (9<sup>th</sup> Cir., September 21, 2021) – September 21:08

#### *Probable cause to search*

Fourth Amendment overbreadth rule is tied to the probable-cause-to-search standard: A “some-means-more” inference does not always apply, but the inference applies to allow a broad search in this case where the report was that the previously convicted felon-target of the search had agreed to hide a gun for a domestic violence suspect: the felon-target’s agreement to hide the gun supported a search for more guns in the felon-target’s home. U.S. v. King, \_\_\_ F.3d \_\_\_, 2021 WL \_\_\_ (9<sup>th</sup> Cir., January 14, 2021) – January 21:03

5-4 majority of Washington Supreme Court rejects Thein-based challenge to probable cause support for search warrant for cell phone records, including cell site location information. The Majority Opinion identifies probable cause in the affidavit’s (1) description of defendant’s use of cell phones shortly before and shortly after a jewelry store burglary, and (2) strong evidence – including post-burglary fencing activity and the wearing of an unusual jewelry item matching a stolen item – that defendant was the burglar. State v. Denham, \_\_\_ Wn.2d \_\_\_, 2021 WL \_\_\_ (July 1, 2021) – July 21:05

In WDFW investigation of charter fishing business for unlawful recreational fishing by alleged “high-grading” of halibut, search warrant probable cause issues are addressed. State v. Gudgell, \_\_\_ Wn. App.2d \_\_\_, 2021 WL \_\_\_ (Div. II, November 23, 2021) – Nov 21:08

#### *Ruses*

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 who had texted with the suspect, (2) claimed that he was using a replacement phone to text the new message, and (3) made a deal to buy methamphetamine. State v. Bowman, \_\_\_ Wn.2d \_\_\_, 2020 WL \_\_\_ (November 9, 2021) – November 21:07

#### *Youth services center patient treatment records*

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. Daybreak Youth Services v. Clark

County Sheriff's Office, \_\_\_ Wn. App. 2d \_\_\_, 2021 WL \_\_\_ (Div. II, November 9, 2021) – November 21:08

## **SECOND AMENDMENT OF U.S. CONSTITUTION AND WASHINGTON GUN RIGHTS**

**11-judge Ninth Circuit panel will review three-judge panel's August 2020 2-1 decision that held unconstitutional a California statute that bans possession of large-capacity ammunition magazines.** Duncan v. Becerra, 2021 WL \_\_\_ (9<sup>th</sup> Cir., February 25, 2021) – February 21:03

**Gun owners win, so far, in action challenging on grounds of statutory preemption (RCW 9.41.290) a City of Edmonds ordinance that makes it an infraction to store unlocked any firearm and to allow access to such a firearm of others not permitted by law to possess.** In City of Edmonds and others v. Brett Bass and others, 16 Wn. App. 2d 488 (Div. I, February 22, 2021) – February 21:16

**11-judge panel votes 7-4 in ruling that the Second Amendment does not provide a right to openly carry a handgun in public.** Young v. State of Hawaii, \_\_\_ F.3d \_\_\_, 2021 WL 1114180 (9<sup>th</sup> Cir., March 24, 2021) – March 21:12

**Second Amendment and Washington constitutional right-to-bear arms: Man who was prosecuted for carrying a sword in a Seattle public park loses an as-applied constitutional challenge to the City of Seattle's "dangerous knife" ordinance.** Zaitzeff v. City of Seattle, \_\_\_ Wn. App. 2d \_\_\_, 484 P.3d 470 (Div. I, April 5, 2021) – April 21:17

**Second Amendment held in 7-4 vote by Ninth Circuit panel not to be violated by California statutes banning possession of large-capacity magazines that hold more than 10 rounds of ammunition.** Duncan v. Bonta, \_\_\_ F.3d \_\_\_, 2021 WL \_\_\_ (9<sup>th</sup> Cir., November 30, 2021) – November 21:04

## **SENTENCING**

**Five-year deferred prosecution means five years; the deferment period does not expire at the point when a treatment program is completed.** State v. Skrobo, 17 Wn. App. 2d 197 (Div. II, April 20, 2021) – April 21:18

## **SIXTH AMENDMENT RIGHT TO CONFRONTATION**

**6-3 majority of Washington Supreme Court rules that all but one of the hearsay statements of a now-deceased victim to a sexual assault nurse examiner (SANE) were not testimonial and therefore are admissible; Court reaches similar result under Evidence Rule 803(a)(4)'s hearsay exception for statements made for medical diagnosis or treatment.** State v. Burke, \_\_\_ Wn.2d \_\_\_, 2021 WL \_\_\_ (January 14, 2021) – January 21:17

**Sixth Amendment right to confrontation: Forfeiture by wrongdoing exception applies where defendant's pre-trial conduct induced the absence of the victim at trial.** State v. Brownlee, \_\_\_ Wn. App. 2d \_\_\_, 492 P.3d 866 (Div. II, August 10, 2021 ordering publication of an April 20, 2021, unpublished opinion) – August 21:07

## **THEFT, POSSESSING STOLEN PROPERTY AND RELATED CRIMES (Chapter 9A.56 RCW)**

**Possession of a forged check does not violate the possession-of-stolen-property statute because a paper check does not qualify as an “access device” as that term is defined in RCW 9A.56.010(1).** State v. Arno, \_\_\_ Wn. App. 2d \_\_\_, 489 P.3d 654 (Div. III, June 22, 2021) – June 21:19

**Moped meets the statutory definition of “motor vehicle” for purposes of the robbery, theft and possessing stolen property statutes.** State v. Level, \_\_\_ Wn. App. 2d \_\_\_, 493 P.3d 1230 (Div. III, August 24, 2021) – August 21:09

## **TRAFFIC**

**Strict liability for DUI vehicular homicide: but-for causation of a death while driving drunk results in criminal liability.** State v. Blake, 197 Wn.2d 170 (2021) does not help defendant’s challenge here to strict liability because, unlike simple drug possession, “drunk driving” is “neither innocent nor passive.” State v. Vanderburgh, \_\_\_ Wn. App. 2d \_\_\_, 489 P.3d 272 (Div. III, June 17, 2021) – June 21:18

## **UNIFORM CONTROLLED SUBSTANCES ACT AND OTHER DRUG LAWS (Chapter 69.50 RCW)**

**Washington State’s strict liability statute prohibiting drug possession held (1) to violate state and federal constitutional due process protections and (2) to be invalid because the statute prohibits unintentional, unknowing possession of a controlled substance.** State v. Blake, 197 Wn.2d 170 (February 25, 2021) – February 21:07

**Washington state’s innocent-explanation interpretation of the court-made corpus delicti rule: The rule was not satisfied in a prosecution for possession of methamphetamine with intent to deliver where police discovered in defendant’s living room 10 grams of methamphetamine, a scale, untornd plastic grocery store bags, and a drug pipe; therefore, a 2-1 majority holds that his voluntary confession to being a drug dealer is not admissible; however, the court is unanimous that this evidence supports his conviction for possession with intent to deliver.** State v. Sprague, 16 Wn. App. 2d 213 (Div. II, Feb. 9, 2021) – February 21:16 Note: On May 11, 2021, Division Two issued a revised Opinion that addressed a sentencing issue but did not revise the corpus delicti or sufficiency-of-evidence analysis.

**Forfeiture of vehicle held to be supported under RCW 69.50.505, but to violate the excessive fines clause of the federal constitution’s Eighth Amendment because the vehicle owner is indigent.** Jacobo Hernandez v. City of Kent, \_\_\_ Wn. App. 2d \_\_\_, 2021 WL \_\_\_ (Div. I, October 25, 2021) – October 21:08

**Division Two of the Court of Appeals rules that the Washington Supreme Court’s ruling in Blake that struck down as unconstitutional the former statute prohibiting mere possession of controlled substances also requires invalidation of the former statute barring possession of 40 grams or less of marijuana while under 21 years of age.** State v. A.L.R.H., \_\_\_ Wn. App. 2d \_\_\_, 2021 WL \_\_\_ (Div. II, December 7, 2021) – December 21:13

## **UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS**

**Brief notes regarding unpublished Washington Court of Appeals opinions on select law enforcement issues** – – Monthly near the end of every issue of the Legal Update.

**WASHINGTON INDUSTRIAL SAFETY AND HEALTH ACT (Chapter 49.17 RCW)**

**Where death is the result of a labor safety regulation violation, and the facts support a criminal charge under the Workplace Safety Statute (RCW 49.17.190(3)), the specific-controls-over-the-general rule does not preclude charging the employer under the Second Degree Murder statute (RCW 9A.32.050).** State v. Numrich, 197 Wn.2d 1 (February 4, 2021) – February 21:11

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**LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE**

Beginning with the September 2015 issue, the most recent monthly Legal Update for Washington Law Enforcement is placed under the “LE Resources” link on the Internet Home Page of the Washington Association of Sheriffs and Police Chiefs. As new Legal Updates are issued, the current and two or 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 regarding these core-area cases; 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 generally 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. Since January 2018, he has also been providing some information every month about certain categories of unpublished Washington Court of Appeals decisions. No information about the specifics of those decisions is provided in this 2020 subject matter index.

The Legal Update does not speak for any person other than Mr. Wasberg, nor does it speak for any agency. 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/](http://www.courts.wa.gov/court_rules/)].

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

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