LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

AUGUST 2022

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT SECTION 1983 LIABILITY FOR LAW ENFORCEMENT: QUALIFIED IMMUNITY IS GRANTED IN A 2-1 VOTE, EVEN THOUGH THE FOURTH AMENDMENT WAS VIOLATED WHERE OFFICERS FAILED, PRIOR TO SEARCHING A SUSPECT'S HOME, TO PUT IN WRITING ON A PHYSICAL SEARCH WARRANT A NOTATION REGARDING THE ISSUING JUDGE'S TELEPHONIC AUTHORIZATION TO EXPAND THE WARRANT TO INCLUDE THE SUSPECT'S HOME

In Manriquez v. Ensley, ___ F.4th ___ , 2022 WL ___ (9th Cir., August 30, 2022), a three-judge Ninth Circuit panel votes 2-1 to grant qualified immunity to law enforcement. All three judges agree that officers violated the Fourth Amendment where, after a judge telephonically authorized expansion of a search warrant, the officers executed the expanded authorization without physically amending the warrant in writing. But two of the Ninth Circuit appellate judges conclude that the officers are entitled to qualified immunity because the Fourth Amendment case law had not clearly established at the time of the execution of the search that such a physical amendment of the search warrant was required.

Seeking authority to search a motel room that officers had probable cause to believe contained evidence of drug dealing, police officers complied with the Fourth Amendment warrant requirement that a warrant include a description of the "place to be searched." The officers thus obtained a search warrant that expressly authorized search of a motel room suspected of being a hub for drug trafficking.

The officers then decided after searching the motel room that their probable cause also supported a search of the key suspect's home as well. They called the judge and asked the judge over the phone to expand the scope of the warrant to include the home. The judge agreed, but the officers did not physically amend the warrant. The search of the home yielded some incriminating evidence, but the resident of the home successfully challenged the search based in part on the failure of the officers to amend the physical warrant to expressly state that a search of the suspect's home had been expressly authorized by the judge.

The resident of the home filed a federal court section 1983 Civil Rights Act lawsuit. The U.S. District Court rejected the officers' motion for summary judgment seeking qualified immunity. Now, the Majority Opinion of the Ninth Circuit panel holds that the District Court erred in denying the officers qualified immunity because case law had not clearly established at the time of the search that the search of the home in these circumstances would violate the Fourth Amendment.

The Majority Opinion concludes that a reasonable officer could have believed – based on the lack of clear and direct case law at the time of the search – that he or she could search the home because the court had orally approved the search even though the officer failed to expressly write that change on the physical warrant.

Concurring in part and dissenting in part, the third judge agrees with the Majority Opinion that the officers violated the Fourth Amendment when they searched Plaintiff's home with a warrant that described only the motel room. But the Concurring Opinion asserts that the Fourth Amendment's particularity requirement is plain under the case law, and that the case law has

clearly established this constitutional right. Qualified immunity should be denied, she contended, because at the time of the search any reasonable officer would have understood that the failure to expressly write information about the place to be searched on the warrant would be constitutionally fatal to execution of the warrant.

LEGAL UPDATE EDITOR'S COMMENT: Of course, regardless of whether the third judge on the Ninth Circuit panel is correct on the status of the case law at the time of the search, officers should ensure that when a judge expands the scope of a search warrant in a telephonic authorization, they expressly note the expansion in writing on the warrant.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: IN REVISED OPINION, 2-1 MAJORITY RULES ON THE TOTALITY OF THE ALLEGATIONS THAT TWO OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY UNDER THE CLEARLY ESTABLISHED LAW PRONG OF THE TEST; NO PRIOR CONTROLLING COURT RULING HAD DETERMINED THAT OFFICERS NEED TO CALL FOR A PARAMEDIC WHEN A VOMITING ARRESTEE TELLS THE OFFICERS THAT THE VOMITING IS DUE TO HER PREGNANCY, NOT WITHDRAWAL FROM DRUGS

In J.K.J. v. City of San Diego, __ F.4th __ , 2021 WL __ (9th Cir., August 2, 2022), a three-judge Ninth Circuit panel reconsiders the panel's November 15, 2021, ruling. The factual basis for the lawsuit was the failure of the two officers to call for a paramedic after a warrant arrestee vomited in the back seat of a patrol car. The woman told the officers that she was vomiting because of pregnancy, not withdrawal from drugs. The officers apparently believed her, and they did not call for a paramedic at that point. Within the hour, she became unconscious, and paramedics were called to help her. She died nine days later.

The November 15, 2021, Majority Opinion (see 17 F.4th 1247) declared that, viewing the U.S. District Court record in the best light for the Plaintiff (who is a successors in interest to the deceased) the officers were entitled to qualified immunity under both prongs of the qualified immunity test, i.e., (Prong 1) their acts and omissions did not violate the constitution, and (2) (Prong 2) even if their acts and omissions violated the constitution, the case law had not clearly established such a constitutional standard as of point in time when they were dealing with vomiting deceased.

The August 2, 2022, Majority Opinion cuts the Prong One analysis out of its November 15, 2021, Opinion. The revised (and shortened) Majority Opinion limits the qualified immunity analysis to the second prong. The revised Majority Opinion now is limited to concluding that, even if one assumes for the sake of argument that the officers' acts and omissions violated the constitution, the case law had not clearly established the constitutional standard at the time that they were dealing with vomiting arrestee. The revised Majority Opinion does not opine on whether the officers violated the constitution.

A staff report (which is not part of the Majority Opinion or Dissenting Opinion) summarizes the August 2, 2022, revised Majority Opinion and the Dissenting Opinion as follows:

> [Majority Opinion]
>
> When officers discovered, after stopping the car, that Jenkins was subject to arrest based on a warrant involving a prior methamphetamine offense, they handcuffed her

and put her in defendant [Officer] Durbin's cruiser. Inside the cruiser, Jenkins vomited, and defendant [Officer] Taub called for paramedics but cancelled the call after Jenkins said she was pregnant and not detoxing.

On several occasions during the transport to the police station, Jenkins groaned and screamed for help. After fingerprinting Jenkins at the police station, as she lay on her side, defendants placed her back in the cruiser. About eleven and a half minutes later, they found her unconscious, called for paramedics, and began CPR. Jenkins fell into a coma and died nine days later.

[The Majority Opinion concludes – on an issue regarding what evidence could be considered in the procedural posture of this case] that the district court validly exercised its discretion in choosing to review a bodycam video that plaintiff had incorporated by reference into the amended complaint. Second, the [Majority Opinion notes that the] district court did not assign the video too much weight. Lastly, [the Majority Opinion asserts that] to the extent the district court found that the video contradicted anything in the amended complaint, it rejected plaintiff's conclusory allegations regarding whether the officers' conduct met the legal standard of a constitutional violation.

The [Majority Opinion next concludes – on the merits of the case] that the district court did not err in dismissing the amended complaint.

Addressing the municipal liability claim brought under Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 690 (1978), the [Majority Opinion concludes] that the complaint did not plausibly allege that any City policy or custom "was the moving force" behind the constitutional violations Jenkins allegedly suffered. Rather the allegations suggested that that the moving force behind the alleged constitutional violation was not a failure to train, but the officers' [alleged] failure to heed their training.

The [Majority Opinion concludes] that the alleged violative nature of the officers' conduct, in failing to recognize and respond to Jenkins' serious medical need, was not clearly established in the specific context of this case. None of the cases cited by [the Plaintiff] presented circumstances where an officer had to grapple with how to handle a detainee who exhibited signs of medical distress but explained them away. Defendants therefore did not violate clearly established law and were entitled to qualified immunity under the second prong of the qualified immunity test.

[Dissenting Opinion]

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

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

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

[Some paragraphing revised for readability; bracketed text added]

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

CIVIL RIGHTS ACT SECTION 1983 LIABILITY FOR LAW ENFORCEMENT: NINTH CIRCUIT ADDRESSES COMPLICATED ISSUES RELATING TO A LAW ENFORCEMENT EMPLOYEE'S CLAIM THAT HE HAS A FREEDOM OF SPEECH RIGHT UNDER THE FIRST AMENDMENT TO PUBLISH FACEBOOK POSTINGS THAT DENIGRATE A PARTICULAR ETHNIC GROUP AND MEMBERS OF A PARTICULAR RELIGION

In Hernandez v. City of Phoenix, ___ F.4th ___ , 2022 WL ___ (9th Cir., August 5, 2022), a three-judge Ninth Circuit panel addresses complicated First Amendment freedom of speech issues relating to postings by a law enforcement employee (Hernandez) on Facebook. On several sub-issues, the panel remands the case for trial.

A Ninth Circuit staff summary (which is not part of the Court's Opinion) provides the following synopsis of the Opinion:

> The panel affirmed in part and reversed in part the Arizona District Court's dismissal of an action brought pursuant to 42 U.S.C. § 1983 and Arizona law alleging that: (1) the City of Phoenix Police Department retaliated against Sergeant Juan Hernandez in violation of his First Amendment rights when it took steps to discipline him for posting content to his personal Facebook profile that denigrated Muslims and Islam; and (2) provisions of the Department's social media policy were overbroad and vague.
>
> The District Court rejected [Hernandez's] First Amendment retaliation claim on the ground that Hernandez's speech did not address matters of public concern and was therefore not entitled to constitutional protection under the balancing test established in Pickering v. Board of Education of Township High School District 205, Will County, 391 U.S. 563 (1968). The court also rejected [Hernandez's] claim that certain provisions of the Department's social media policy were facially invalid.
>
> Analyzing the content, form (time, place, and manner) and context of Hernandez's posts, the panel concluded that the posts qualified as speech on matters of public concern. While it was true that each of Hernandez's posts expressed hostility toward, and sought to denigrate or mock, a major religious faith and its adherents, the [United States] Supreme Court has made clear that the inappropriate or controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern. Although it seemed likely that Hernandez's posts could impede the performance of his job duties and interfere with the Department's ability to effectively carry out its mission, no evidence of actual or potential disruptive impact caused by Hernandez's posts was properly before the panel at this stage of the proceedings.

[LEGAL UPDATE EDITORIAL NOTE: The Hernandez Opinion notes that the important factual questions regarding actual or potential disruptive impact caused by Hernandez's posts must be addressed on remand of the case to the District Court for trial. The Ninth Circuit Opinion itself states: "In remanding the case, we do not mean to suggest that the Department will face a particularly onerous burden to justify disciplining Hernandez for his posts, given the comparatively low value of his speech."]

The panel therefore reversed the District Court's dismissal of [Hernandez's] First Amendment retaliation claim and his related claim under the Arizona Constitution and remanded for further development of the factual record. The panel held that the District Court properly rejected [Hernandez's] facial overbreadth challenge to certain provisions of the Department's social media policy, except as to the clauses prohibiting social media activity that (1) would cause embarrassment to or discredit the Department, or (2) divulge any information gained while in the performance of official duties, as set forth in section 3.27.9B.(7) of the policy.

In largely agreeing with the District Court, the panel noted that most of the challenged restrictions directly promoted the same interests that the Supreme Court has already held to be valid bases for imposing restrictions on public employee speech – government employers have a strong interest in prohibiting speech by their employees that undermines the employer's mission or hampers the effective functioning of the employer's operations. The Department, however, did not have a legitimate interest in prohibiting speech merely because the Department might find that speech embarrassing or discrediting.

The panel noted that virtually all speech that lies at the core of First Amendment protection in this area – for example, speech exposing police misconduct or corruption – could be expected to embarrass or discredit the Department in some way. In the absence of a developed factual record, the panel could not conclude that plaintiffs' facial overbreadth challenge to these clauses failed as a matter of law.

Addressing section 3.27.9B.(7) of the social media policy, the panel held that although the Department has a strong interest in prohibiting the disclosure of confidential information, this section swept much more broadly because it prohibited the disclosure of any information gained while on the job, including information that could expose wrongdoing or corruption. This provision therefore could silence speech that warrants the strongest First Amendment protection in this context.

Because [Hernandez's] challenge was resolved [by the District Court] on the pleadings, the [law enforcement agency] had not yet had an opportunity to produce evidence attempting to establish that this provision was appropriately tailored.

The panel affirmed the District Court's rejection of [Hernandez's] facial vagueness challenge to the same provisions discussed above and their municipal liability claim. Like many employment policies, the challenged provisions were framed in broad and general terms that nonetheless provided sufficient guidance to employees as to the types of social media posts that are prohibited.

[Some paragraphing revised for readability]

Result: Reversal in part and affirmance in part of dismissal of the lawsuit by the U.S. District Court (Arizona); case remanded to the District Court for trial.

CIVIL RIGHTS ACT SECTION 1983 LIABILITY FOR LAW ENFORCEMENT: NINTH CIRCUIT PANEL RULES THAT FOURTH AMENDMENT DOES NOT PROHIBIT LAW ENFORCEMENT DOING DRIVER'S LICENSE CHECKS AT SOBRIETY CHECKPOINTS; NOTE THAT SOBRIETY CHECKPOINTS ARE NOT ALLOWED UNDER ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION

In Demarest v. City of Vallejo, ___ F.4th ___ , 2022 WL ___ (9th Cir., August 16, 2020), a three-judge Ninth Circuit panel rules in a section 1983 Civil Rights Act lawsuit that Plaintiff's Fourth Amendment rights were not violated when he was arrested after declining a police officer's repeated demands that, as a vehicle driver, he show his driver's license at a sobriety checkpoint. The Demarest Opinion holds that the request was a reasonable element of the sobriety checkpoint.

Result: Affirmance of U.S. District Court (Eastern District of California) dismissal of Plaintiff's lawsuit.

LEGAL UPDATE EDITORIAL COMMENT: In State v. Mesiani, 110 Wn.2d 454 (1988) the Washington Supreme Court held that sobriety checkpoints are not permitted under article I, section 7 of the Washington constitution, at least without carefully tailored authorizing legislation from the Washington State Legislature. The Legislature has since had before it proposed authorizing legislation but has not enacted the proposals.

CIVIL RIGHTS ACT SECTION 1983 LIABILITY FOR CORRECTIONS: EIGHTH AMENDMENT STANDARDS ARE HELD NOT TO HAVE BEEN VIOLATED IN (1) A CORRECTIONS OFFICER'S SHOOTING OF A PRISONER WITH SPONGE-TIPPED ROUNDS TO HELP QUELL A PRISON FIGHT, OR (2) A NURSE'S ABBREVIATION OF AN EXAM AND NOTE-TAKING IN ORDER TO EXPEDITE THE TREATMENT PROCESS FOLLOWING THE OFFICER'S USE OF FORCE

In Simmons v. Arnett, F.4th ___ , 2022 WL ___ (9th Cir., August 31, 2022), a three-judge panel affirms the U.S. District Court's grant of summary judgment to government defendants in a Civil Rights Act section 1983 lawsuit brought by a California state prisoner alleging (1) excessive force and (2) deliberate indifference to medical needs. The lawsuit was brought after a State of California corrections officer shot the Plaintiff-prisoner with three sponge-tipped plastic rounds to try to stop a prison fight, breaking Simmons's leg and injuring his buttocks and thigh. Following the fight, a prison nurse treated Simmons's injuries and transferred him to an emergency room without fully completing her notes or conducting a full body examination.

The panel holds, though not unanimously, that, even viewing the allegations in the best light for the Plaintiff-prisoner (as is required on the summary judgment, the U.S. District Court correctly concluded that there was no constitutional violation in either the shooting of the plastic rounds or in the nurse's abbreviation of her exam and her note-taking.

Majority Opinion

Excessive Force Issue Related To The Sponge Rounds: As to the shooting of the sponge rounds, two members of the panel agree that under all of the circumstances (not all of which are reported in my brief summary), the decision to shoot the prisoner with sponge rounds was not an excessive use of force. The corrections officer had a duty to keep prison staff and the prisoners in his care safe, and he used the lowest level of force available to him under the circumstances, in light of the fact that he could not abandon his control booth station to otherwise take action to stop the fight other than sounding an alarm, which he did. There was no evidence showing that, in shooting the prisoner with sponge rounds, the corrections officer had any improper motive, let alone that he acted "maliciously and sadistically for the very purpose of causing harm," which is the applicable Eighth Amendment standard for assessing an officer's use of force in the corrections setting.

Deliberate Indifference Issue As To The Nurse's Acts And Omissions: As to the nurse, the Plaintiff-prisoner was required under the Eighth Amendment standard to prove that she exhibited "deliberate indifference." The Majority Opinion asserts that to show deliberate indifference, the Plaintiff-prisoner was required to prove that the nurse purposefully ignored or purposefully failed to respond to his pain or possible medical need. Instead, the Majority Opinion asserts, her actions reflected the conduct of a medical professional who quickly and successfully ensured that her patient see a physician to receive the appropriate level of care.

Qualified Immunity Based On Absence Of Clearly Established Case Law Standard: Finally, even assuming that the corrections office or the nurse somehow may have violated the Eighth Amendment, the Majority Opinion asserts that those government civil defendants are both entitled to qualified Immunity because their actions could not be characterized as violating some clearly established principle of constitutional law. The government civil defendants were therefore entitled to protection under the doctrine of qualified immunity, and summary judgment was properly entered in their favor.

Concurring/Dissenting Opinion Of The Third Judge

Concurring in part and dissenting in part, the third judge agrees with the Majority Opinion's conclusion that the District Court's grant of summary judgment in favor of the nurse should be affirmed because her conduct did not rise to the level of deliberate indifference. But the third judge on the panel dissents from the majority's grant of qualified immunity to the correctional officer who shot the sponge rounds.

Result: Affirmance of U.S. District Court (Central District of California) summary judgment ruling for the government defendants.

HEARSAY FROM ASSAULT VICTIM TO MEDICAL PROVIDERS HELD ADMISSIBLE IN CRIMINAL PROSECUTION UNDER BOTH (1) SIXTH AMENDMENT RIGHT-TO-CONFRONTATION ANALYSIS, AND (2) THE EVIDENCE RULE HEARSAY EXCEPTION FOR STATEMENTS MADE FOR DIAGNOSIS OR TREATMENT

In U.S. v. Latu, ___ F.4th ___ , 2022 WL ___ (9th Cir., August 31, 2022), a three-judge Ninth Circuit panel affirms an felony assault conviction in a federal court criminal prosecution in which an inmate (Latu) at a federal detention center, repeatedly punched and kicked an inmate (Yamaguchi), who suffered multiple serious injuries. The victim did not testify, but the trial court admitted his statements – in which he stated that he was assaulted (though not identifying the

assailant) and that his pain level was an eight out of ten – through the testimony of a nurse and a surgeon who treated him shortly after the attack.

The defendant argued that admitting this testimony violated both (1) the Evidence Rule bar to hearsay evidence, and (2) and the bar against hearsay evidence under the Confrontation Clause of the Sixth Amendment.

The analysis under both of these legal theories is highly fact-specific. The Latu panel's unanimous Opinion describes as follows some to the facts in the case (the panel's further description of the testimony of the two key witnesses is described elsewhere in the Opinion, and is not summarized or excerpted in this Legal Update entry):

> Latu's assault of Yamaguchi was captured on surveillance video played to the jury. Just before the incident, Latu was seen pacing back and forth and peering into a recreation room in the FDC. Inside the room, a handful of inmates including Yamaguchi were seated around a table playing cards. Latu opened the door and immediately began punching and kicking Yamaguchi, who fell to the floor. Once the attack ended, struggling to steady himself, Yamaguchi limped away with a large bloodstain on his shirt.
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> An hour and twenty-five minutes later, FDC staff saw visible swelling to Yamaguchi's jaw and eye and promptly sent him to the medical unit. Yamaguchi's jaw had been fractured in two places, requiring same-day surgery. Yamaguchi had also suffered face and rib fractures, face and eyebrow lacerations, and a concussion.
>
> Yamaguchi saw Nurse Daniel Chi at the FDC health unit. Chi's practice is to perform "a head-to-toe assessment to determine what was injured, extent of injury, and then course of action." As part of that assessment, Chi asks about the cause of a patient's injuries because the "[m]echanism of injury can also play into the severity of the injury."
>
> When asked, Yamaguchi initially responded that he had fallen out of bed. But given the extent of the injuries, Chi did not believe that explanation and pressed further.
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> Yamaguchi then admitted that he was assaulted. Nurse Chi's practice is also to ask patients about their subjective pain level. He explained that "pain is a very subjective type of symptom" and that an initial pain level provides a "starting point" to monitor during treatment. When asked, Yamaguchi said that his pain level was an eight out of ten, with his jaw as his greatest source of pain.
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> Yamaguchi was transported that same day to the emergency room at Queen's Medical Center. He was treated there by oral and maxillofacial surgeon Dr. James Michino.
>
> Dr. Michino's "first question" with patients is always "what happened." He tries "to gather as much information as possible regarding the traumatic injury." That includes the cause of a patient's injuries because "the amount of force" involved in an injury can alert him to "possible injuries that could get missed."
>
> When Dr. Michino asked, Yamaguchi responded that while he did not "remember the details," he "was assaulted" and "essentially lost consciousness."

[Some paragraphing revised for readability]

The panel's Opinion holds that the trial court properly admitted the statements made by Yamaguchi to his medical providers. That is because the statements fall within the hearsay exception for statements made "for purposes of medical diagnosis or treatment" under Fed. R. Evid. 803(4).

The panel's Opinion also holds that the trial court's admission of these statements did not violate the Confrontation Clause because the primary purposes of the nurse and the doctor in requesting the information was to evaluate and treat the victim's injuries, not to forensically establish past facts for trial.

Result: Affirmance of U.S. District Court (Hawaii) conviction of defendant for felony assault in violation of federal law.

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WASHINGTON STATE COURT OF APPEALS

SIXTH AMENDMENT RIGHT TO CONFRONTATION: IN DUI TRIAL THAT TURNS ON THE RESULT OF LAB TESTS ON A BLOOD SAMPLE, TESTIMONY IS GENERALLY REQUIRED FROM A LAB ANALYST WHO ACTUALLY CONDUCTED TESTS ON THE SAMPLE

In State v. Wiggins, ___ Wn. App. 2d ___ , 2022 WL ___ (Div. I, August 29, 2022), the Court of Appeals rules that a DUI defendant's Sixth Amendment right to confrontation was violated by a superior court ruling that reversed a municipal court order that dismissed a charge of driving under the influence (DUI) against the defendant where the key evidence in the case was a test of the defendant's blood. The Court of Appeals rules that the Sixth Amendment right to confrontation required testimony from the laboratory analyst who conducted the blood tests, and that the prosecution could not stand based only on testimony of a laboratory expert who merely reviewed the results of the testing by the actual analyst who conducted the blood tests.

Result: Reversal of King County Superior Court decision that reversed the dismissal order of the Seattle Municipal Court order that dismissed a DUI charge against Roosevelt Wilkins.

COWLITZ TRIBE MEMBERS HAVE NO OFF-RESERVATION ABORIGINAL RIGHTS OR CIVIL RIGHTS LAW RIGHT TO FISH

In State v. Simmons, ___ Wn. App. 2d ___ , 2022 WL ___ (Div. II, August 16, 2022), Division Two of the Court of Appeals rules against the aboriginal-rights challenge of two members of the Cowlitz Indian tribe from their Grays Harbor Superior Court convictions for first and second degree unlawful recreational fishing. This Simmons Court's rationale for this ruling is briefly summarized as follows in the "Weekly Roundup for August 19, 2022" on the Case Law 2022 webpage of the Washington Association of Prosecuting Attorneys [the link to the case law webpage is https://waprosecutors.org/case-law-2022/]

> The court rejected the defendants' claim that as members of the Cowlitz Indian Tribe, they had off-reservation aboriginal rights to harvest clams without a license, and in excess of the daily limit. The off-reservation **rights of the Cowlitz Tribe to fish were extinguished** by the 1863 Lincoln Proclamation and related congressional authorizations. Further, the defendants' aboriginal rights to fish are not protected by

Washington civil rights law under State v. Towessnute, 197 Wn.2d 574, 486 P.3d 111 (2021), which involved a member of the Yakama tribe whose off-reservation rights were protected by a treaty.

[Bolding in original]

Result: Affirmance of Grays Harbor County Superior Court convictions of Andrew Larry Simmons and Michael Myron Simmons for fist and second degree unlawful recreational fishing (for harvesting clams without a license along the Washington coast).

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BRIEF NOTES REGARDING AUGUST 2022 UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS ON SELECT LAW ENFORCEMENT ISSUES

Under the Washington Court Rules, General Rule 14.1(a) provides: "Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate."

Every month I will include a separate section that provides very brief issue-spotting notes regarding select categories of unpublished Court of Appeals decisions that month. I will include such decisions where issues relating to the following subject areas are addressed: (1) Arrest, Search and Seizure; (2) Interrogations and Confessions; (3) Implied Consent; and (4) possibly other issues of interest to law enforcement (though generally not sufficiency-of-evidence-to-convict issues).

The two entries below address the August 2022 unpublished Court of Appeals opinions that fit the above-described categories. I do not promise to be able catch them all, but each month I will make a reasonable effort to find and list all decisions with these issues in unpublished opinions from the Court of Appeals. I hope that readers, particularly attorney-readers, will let me know if they spot any cases that I missed in this endeavor, as well as any errors that I may make in my brief descriptions of issues and case results. In the entries that address decisions in criminal cases, the crimes of conviction or prosecution are italicized, and descriptions of the holdings/legal issues are bolded.

1. State v. Tony Lee Combs: On August 8, 2022, Division One of the COA rejects the defendant's challenges to his Whatcom County Superior Court convictions for *felony harassment and fourth degree assault*. The State conceded on appeal that the **defendant's trial counsel provided ineffective counsel in failing to argue that a recorded interrogation of defendant was inadmissible because the officer failed to include on the tape a recording of the Miranda warnings (see RCW 9.73.090(1)(b)(iii); State v. Courtney, 137 Wn. App. 376, 382 (2007)).** The Court of Appeals concludes, however, that in light of the clear credibility of the testimony of the victim and other evidence in the case, the defendant cannot establish that he was prejudiced by the erroneous admission of the recording of the interrogation.

The Combs Unpublished Opinion can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/826409.pdf

2. State v. Caleb Joel Stanley: On May 17, 2022, Division Two of the COA disagrees with defendant's challenge to the sufficiency of evidence for his Stevens County Superior Court conviction of *third degree assault under RCW 9A.36.031(1)(g)* for spitting at a corrections officer who would have been hit in the face by the spit if the officer had not stepped backward to avoid being hit. The Court of Appeals explains that **the evidence in the case is sufficient to establish "assault" under the common law definition that includes, as one of the alternative definitions, "assault by placing the victim in reasonable apprehension of bodily harm." The Court of Appeals rules that a jury could find could find that the officer, who testified that he was in apprehension of possible transmission of a communicable disease generally through spit, "was placed in apprehension of harm and that his apprehension was reasonable."** The Court of Appeals expressly declines to address defendant's argument, among his other arguments on the sufficiency issue, that expert testimony is necessary regarding possible transmission of a communicable disease through spit. The Court asserts that defendant did not preserve this argument at trial because he did not challenge the officer's lay testimony as being unqualified expert testimony.

The Stanley Unpublished Opinion can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/382222_unp.pdf

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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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