LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

OCTOBER 2022

TABLE OF CONTENTS FOR OCTOBER 2022 LEGAL UPDATE

****

NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

IN A DRUG-SMUGGLING CASE WHERE LAW ENFORCEMENT: (1) MADE A "CONTROLLED DELIVERY" TO A SUSPECT'S RESIDENCE, BUT (2) CHOSE NOT TO USE AN ANTICIPATORY SEARCH WARRANT, AND (3) INSTEAD CHOSE TO SEEK A WARRANT AFTER ENTRY, NINTH CIRCUIT PANEL RULES UNDER THE FOURTH AMENDMENT EXCLUSIONARY RULE THAT THE "INDEPENDENT SOURCE DOCTRINE" APPLIES TO PERMIT ADMISSION OF EVIDENCE SEIZED UNDER A SEARCH WARRANT (THE PANEL ASSUMES FOR THE SAKE OF ARGUMENT THAT LAW ENFORCEMENT COMMITTED FOURTH AMENDMENT VIOLATIONS SHORTLY BEFORE THE PREVIOUSLY DRAFTED WARRANT WAS ISSUED AND EXECUTED)

In United States v. Saelee, ___ F.4th ___ , 2022 WL ___ (9th Cir., October 11, 2022), a three-judge Ninth Circuit panel applies the "independent source" exception to the Fourth Amendment exclusionary rule and rules for the government in a drug-smuggling prosecution without addressing the merits of the defendant's Fourth Amendment claim of unlawful search.

Federal agents were alerted to discovery of Ecstasy in packages being shipped to the defendant's home. They decided to do a "controlled delivery" of fake Ecstasy to the defendant's home and to arrest him when he accepted the delivery.

A few days before the controlled delivery, a federal agent prepared a nearly complete affidavit in support of a search warrant for Saelee's apartment. The agent had discussed with the U.S. Attorney's Office the possibility of getting an "anticipatory search warrant," in advance of the controlled delivery. An anticipatory warrant would authorize a search of the apartment upon fulfillment of the triggering condition that the planned controlled delivery first be successfully completed, i.e., the defendant would accept delivery at his doorway. **The anticipatory search warrant method was approved by the U.S. Supreme Court in United States v. Grubbs, 547 U.S. 90, 96–97 (2006).** The lead agent in the Saelee case decided instead to seek a traditional

search warrant by making the request after the controlled delivery, based on the facts concerning the actual delivery itself.

The controlled delivery to the front door of the defendant's home occurred at 9:30 a.m. The lead agent sought a warrant soon after the controlled delivery had occurred. The warrant was granted a little over an hour later, at 10:43 AM.

Defendant's request for suppression of evidence in the case pointed to indisputable facts in the case and argued that, before obtaining the search warrant at 10:43 a.m., (1) the officers unconstitutionally came within the curtilage of his home with intent to arrest him and without a warrant or exigent circumstances; (2) they arrested him inside his home without a warrant and in the absence of exigent circumstances; and (3) before obtaining the warrant (i.e., between 9:30 a.m. and 10:43 a.m.), they entered the apartment and conducted an extensive search that exceeded the scope of a protective sweep or a permissible securing of the premises, and they seized the delivered packages, his cell phone and wallet, and the ammunition in his bedroom (though, admittedly, they did not remove the items from his home, and they did not search his cell phone before getting the warrant).

The Ninth Circuit panel notes that under the independent source doctrine, suppression of evidence is unwarranted, even where evidence was initially discovered during, or as a consequence of, an unlawful search, when the evidence is later obtained independently from activities that are untainted by the initial illegality. Defendant contended that the district court erred in applying the independent source doctrine and that, in light of the agents' multiple violations of the Fourth Amendment prior to issuance of the warrant, the evidence obtained as a result of those violations should have been suppressed.

However, the Ninth Circuit rules that, assuming without deciding that Fourth Amendment violations occurred, suppression is not required in the Saelee case because all of the tangible and intangible evidence obtained as a result of the alleged violations was independently rediscovered or reseized when the agents executed a search warrant that was both sought and issued independently of any such violations.

A key part of the Ninth Circuit panel's analysis in Saelee reads as follows:

> "[The Independent Source exception] ensures that the police will be placed "in the same, not a worse, position that they would have been in if no police error or misconduct had occurred." . . .
>
> To establish that "evidence initially acquired unlawfully" has later been independently obtained through an untainted source, the Government must show "that no information gained" from the Fourth Amendment violations "affected either [1] the law enforcement officers' decision to seek a warrant or [2] the magistrate's decision to grant it." [Murray v. U.S., 487 U.S. 533, 539–40 (1988)]. We conclude that the district court correctly held that both of those showings had been made here; indeed, Saelee does not seriously contend otherwise.
>
> First, there is no clear error in the district court's factual finding that the agents' decision to seek the warrant was unaffected by the alleged Fourth Amendment violations. See Murray, 487 U.S. at 543 (holding that this determination is an issue of fact to be determined by the district court in the first instance). Before any of the challenged actions occurred, Agent Anderson had already prepared a near-complete warrant

application in consultation with the U.S. Attorney's Office, save for the addition of a single paragraph to be inserted after the controlled delivery was completed.

Moreover, it is clear that Agent Anderson dictated that final paragraph very shortly after the initial entry into Saelee's apartment at 9:35 AM, and prior to the search activities documented in the agents' photos. The warrant was granted by the magistrate judge at 10:43 AM, shortly after Agent Anderson telephonically swore to the contents of the warrant application before that magistrate, and Agent Anderson averred that the warrant application was submitted to the magistrate approximately one hour after he had dictated that additional paragraph to the U.S. Attorney's Office.

That indicates that Agent Anderson called the U.S. Attorney's Office at approximately 9:43 AM – meaning that he did so promptly after the initial arrest and securing of the premises and before most (if not all) of the ensuing search and seizure activities. Given that the application was nearly complete before any unlawful conduct occurred, and was completed within minutes of the allegedly illegal arrest and entry, the district court did not clearly err in concluding that the agents' decision to seek the warrant was unaffected by any of the Fourth Amendment violations that Saelee alleges.

Second, the magistrate judge's decision to issue the warrant was plainly not affected by the asserted Fourth Amendment violations. The only "facts" included in the warrant application that were learned as a result of the alleged violations were that Saelee had been arrested and that the premises had been secured.

That information adds nothing, logically or legally, to whether there was probable cause to search the premises, and it is therefore clear that it did not influence the magistrate judge's decision to issue the warrant. . . .

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

Result: Affirmance of Tony Saelee's convictions for federal drug trafficking crimes by the U.S. District Court (Northern District of California).

LEGAL UPDATE EDITOR'S COMMENTS: 1. The Washington Supreme Court has ruled that the "Independent Source" doctrine applies under the Washington Constitution, article I, section 7. State v. Betancourth, 190 Wn.2d 357 (March 22, 2018). Therefore, the Ninth Circuit ruling in Saelee should be applicable in the Washington courts.

2. Officers who are considering making a "controlled delivery" may wish to consult with their prosecutors to discuss the possibility of using an "anticipatory search warrant," which would seem to be lawful in Washington. I concede, however, that I can find no published Washington appellate court decisions addressing this type of search warrant or the U.S. Supreme Court ruling in United States v. Grubbs, 547 U.S. 90, 96–97 (2006).

SUSPECT IN CUSTODIAL INTERROGATION IS HELD TO HAVE UNEQUIVOCALLY SELECTIVELY ASSERTED HIS RIGHT TO SILENCE UNDER MIRANDA

In habeas corpus review of a State of California death penalty case in Michaels v. Ron Davis, ___ F.4th __ , 2022 WL ___ (9th Cir., October 18, 2022), a 3-judge Ninth Circuit panel reviews addresses many issues, one of which was whether the defendant made a selective unequivocal

invocation of his right to silence under Miranda during a custodial interrogation. The suspect made his statement shortly after a detective read the defendant his rights from a Miranda card. The Majority Opinion in the case describes the key relevant parts of the interrogation as follows:

> Detective Gaylor: "Having in mind and understanding your rights as I've told you, are you willing to talk with us?"
>
> Michaels: "Sure. No problem."
>
> Detective Gaylor: "Do you know why you're here?"
>
> Michaels: "Yes."
>
> Detective Gaylor: "Tell me, in your own words."
>
> Michaels: "Murder."
>
> Detective Gaylor: "Murder of who?"
>
> Michaels: "Murder of JoAnn Clemons."
>
> Detective Gaylor: **"Well, what's your side of the story? What happened?"**
>
> Michaels: **"I don't know if I should without an attorney. (Laughter.) It ain't going to do me no . . .** [sentence not completed] (Laughter.)
>
> Detective Allen: "Well, we need to know. Let's put it this way, Kurt. He just advised you of your rights. And you said, that yeah, you wanted to talk to us. There's no problem. **If at any time that you do not want to talk with us, you can stop at any particular time. If there's any time that we ask you a question that you don't want to answer, you can stop at any time.**
>
> Michaels: **"Okay, that one. (Laughter.)"**

The detectives continued questioning the defendant at that point, and he made incriminating statements that were used in his capital murder case. The Ninth Circuit panel declares that with the bolded answer "Okay, that one" the defendant selectively exercised his right to silence as to any questions regarding "his side of the story" or as to "what happened." The panel goes on to rule, however, that in light of the overwhelming evidence of guilt, admission at trial of defendant's subsequent admissions in the interrogation was harmless error. The panel is unanimous as to harmless error with respect to the guilty verdict, but the panel splits 2-1 as to harmless error with respect to the death sentence. One of the judges dissents, contending in vain that the error was not harmless as to the death sentence.

Result: Affirmance of judgment of U.S. District Court (Southern District of California) denying Kurt Michaels's habeas corpus petition challenging his California conviction and death sentence for the 1988 murder of JoAnn Clemons.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: VIEWING

THE PLAINTIFFS' ALLEGATIONS IN THE BEST LIGHT FOR THE PLAINTIFFS AS REQUIRED AT THE SUMMARY JUDGMENT STAGE OF THE PROCEEDINGS, NINTH CIRCUIT PANEL DENIES QUALIFIED IMMUNITY TO OFFICERS WHO SHOT AND KILLED A MAN WHO – DEPENDING ON WHO A FACT-FINDER BELIEVES – MAY OR MAY NOT HAVE BEEN RAISING A GUN TOWARD THE OFFICERS

In Peck v. Montoya, ___ F.4th ___ , 2022 WL ___ (9th Cir., October 18, 2022), a three-judge Ninth Circuit panel reverses in part a federal District Court summary judgment ruling for law enforcement defendants in a Civil Rights Act section 1983 civil liability case. The case arose out of a fatal police shooting by officers who assert that they perceived a mortal threat from a civilian.

A Ninth Circuit staff summary (which is not part of the Court's Opinion), provides the following synopsis of the Opinions authored by two members of the three-judge panel:

> The panel affirmed in part and reversed in part the district court's denial of defendants' motion for summary judgment in an action brought pursuant to 42 U.S.C. § 1983 arising from the shooting of Paul Mono by Orange County Sherriff's deputies.
>
> Five deputies responded to a 911 call reporting that Mono was acting erratically and threatening someone with a firearm. The deputies asserted that Mono ignored their warnings, picked up a gun, and began raising it toward them. At that point, two of the deputies shot and killed Mono.
>
> Susan Peck, Mono's wife, told a different story. She claimed that eyewitness testimony and ballistics analysis proved that Mono was not moving toward the gun, never touched the gun, and did not pose an immediate threat to himself or others. Peck brought this action asserting that the deputies violated Mono's Fourth Amendment right to be free from excessive force and her own Fourteenth Amendment right to a familial relationship.
>
> On the excessive-force claim, the panel concluded that the deputies who shot Mono were not entitled to qualified immunity. Insofar as the deputies argued that the evidence was insufficient to raise a genuine issue of fact, the panel lacked jurisdiction to resolve the factual disputes.
>
> The panel concluded that drawing all reasonable inferences in Peck's favor, a jury could conclude that defendants Montoya and Johnson fired at an unarmed man who, although in the presence of a gun, never picked it up and in fact was moving away from it when he was shot. Officers may not kill suspects simply because they are behaving erratically, nor may they kill suspects who do not pose an immediate threat to their safety or to the safety of others simply because they are armed.
>
> The panel next concluded that the deputies who did not shoot Mono were entitled to qualified immunity. Because defendants [the three other deputies] Frey, Lind, and Carrington did not form a plan to shoot Mono, nor did they set in motion acts by Montoya and Johnson that they knew or should have known would cause a constitutional violation, they were not integral participants in the [alleged] constitutional violation. The district court therefore erred in denying their motion for summary judgment on the excessive-force claim.

Turning to Peck's familial-association claim, the panel noted that whether such a claim could be asserted by a spouse, rather than a parent or child, has not been addressed by this court. Nevertheless, even under this court's case law relating to familial-association claims asserted by parents and children, Peck's claim failed because no showing of a purpose to harm had been made or even attempted. No evidence suggested that the deputies shot Mono for any other purpose than their (possibly mistaken) perception of the need for self-defense. Consequently, there was no Fourteenth Amendment violation, and the deputies were entitled to qualified immunity on this claim.

Concurring in the result, Judge Schroeder agreed with the majority's conclusion that the deputies who used deadly force were not entitled to qualified immunity and that the three deputies who did not shoot were entitled to qualified immunity because they were not integral participants in the use of excessive force.

Judge Schroeder stated, however, that the majority opinion added, as part of its discussion of integral participation, an unnecessary discussion of but-for causation, apparently in order to cast doubt on its applicability in [the Ninth Circuit]. To the extent there may be an open question in [the Ninth Circuit] about the applicability of but-for causation, the question should be answered in a case where the issue is raised. Judge Schroeder further stated that it was not for the panel to opine on what the officers may have been thinking, or what they thought they were accomplishing when they stationed themselves at the windows of Mono's house.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: 2-1 MAJORITY OF NINTH CIRCUIT PANEL REJECT A CONTRARY SIXTH CIRCUIT OPINION AND CONCLUDE THAT CHALKING OF VEHICLE TIRES AS PART OF ENFORCEMENT OF PARKING TIME LIMITS IS LAWFUL UNDER THE ADMINISTRATIVE SEARCH EXCEPTION TO THE FOURTH AMENDMENT WARRANT REQUIREMENT

In Verdun v. City of San Diego, ___ F.4th ___ , 2022 WL ___ (9th Cir., October 26, 2022), a three-judge Ninth Circuit panel votes 2-1 in ruling that a parking enforcement employee's marking of a car's tires to aid in the enforcement of parking time limits was justified as an administrative search under the Fourth Amendment. The panel thus affirms the U.S. District Court's order granting summary judgment to the City of San Diego and the City's police department.

The Majority Opinion contains over 20 pages of analysis and ultimately concludes that even if one assumes for the sake of argument that chalking of tires by municipal parking enforcement employees is a "search" under the Fourth Amendment, the employees are not required to obtain warrants before chalking tires as part of enforcing time limits on city parking spots.

That is because, as the Majority Opinion explains, even assuming the temporary dusting of chalk on a tire constitutes a Fourth Amendment "search" (as to that assumption, see the U.S. Supreme Court precedents of United States v. Jones, 565 U.S. 400, 406–07 (2012), and later in Florida v. Jardines, 569 U.S. 1, 5 (2013)), the tire-chalking activity falls within the well-established administrative search exception to the warrant requirement. That is because tire chalking: (A) complements a broader program of traffic control, (B) is reasonable in its scope and manner of execution, (C) is not used for general crime control purposes, and (D) is an intrusion personal liberty that is de minimis at most.

The Majority Opinion expressly disagrees with the ruling and reasoning of the Sixth Circuit in Taylor v. City of Saginaw, 11 F.4th 483, 488–89 (6th Cir. 2021) ("Taylor II"), which held that tire chalking was not subject to the administrative search exception (but which expressed no opinion on whether chalking might be subject to some other exception to the warrant requirement).

Like the Majority Opinion in Verdun, the Dissenting Opinion contains over 20 pages of analysis. The Dissenting Opinion argues that exceptions to the search warrant requirement, including the administrative search exception, should be narrowly construed. While traffic enforcement, and almost any other government function would be more efficient and more convenient if officers could skirt the Fourth Amendment, the Dissenting Opinion argues, both (1) the original understanding of the Fourth Amendment and (2) Supreme Court precedents do not permit a policy of indiscriminate searches for such an ordinary government enterprise as parking enforcement.

The Dissenting Opinion complains that, while chalking tires may not be intrude greatly on personal liberty, the duty of the courts is to safeguard against even "stealthy encroachments" on the Fourth Amendment. The Dissenting Opinion argues that allowing the chalking program is a stealthy encroachment on the Fourth Amendment.

Result: Affirmance of U.S. District Court grant of summary judgment to the City of San Diego and its police department.

****

WASHINGTON STATE SUPREME COURT

LAW ENFORCEMENT EYEWITNESS IDENTIFICATION PROCEDURES: WASHINGTON SUPREME COURT MODIFIES ITS OPINION IN THE DERRI CASE, REVISING ITS GUIDANCE FOR ID PROCEDURES BASED ON "MODERN SCIENTIFIC EVIDENCE" BY NOTING THAT THE QUESTION OF WHETHER SEQUENTIAL PROCEDURES ARE SUPERIOR TO SIMULTANEOUS PROCEDURES HAS NOT BEEN RESOLVED IN SCIENTIFIC TESTING

State v. Derri, ___ Wn.2d ___ , 2022 WL ___ (June 23, 2022) (June 23, 2022, Opinion was revised on September 9, 2022)

In the June 2022 Legal Update, I digested the June 23, 2022, Washington Supreme Court Opinion in State v. Derri, in which the Supreme Court addressed legal issues relating to police identification procedures. In the June 23 Opinion, the Supreme Court opined, among many other assertions, that conducting ID procedures sequentially is superior to conducting them simultaneously. On September 9, 2022, the Washington Supreme Court issued a revised Opinion that acknowledged that scientific research has not resolved whether sequential identification procedures are superior to simultaneous identification procedures.

****

WASHINGTON STATE COURT OF APPEALS

PRESENCE OF AN IDAHO DETECTIVE WITH EXPERTISE IN CHILD PORN INVESTIGATION IN THE EXECUTION OF A SEARCH WARRANT IN WASHINGTON IS HELD LAWFUL WHERE THE WASHINGTON LAW ENFORCEMENT AGENCY REQUESTED

THE PARTICIPATION OF THE IDAHO DETECTIVE; UNPUBLISHED PORTIONS OF THE OPINION ADDRESS ADDITIONAL ISSUES RELATING TO PROBABLE CAUSE, AS WELL AS PARTICULARITY AND BREADTH OF THE SEARCH WARRANT

In the child pornography prosecution in State v. Chambers, ___ Wn. App. 2d ___ , 2022 WL ___ (Div. III, October 4, 2022), Division Three of the Court of Appeals rules, among other things, that "the presence and participation of a detective from Idaho's Moscow Police Department, at the request of a Washington sheriff's office deputy, to aid in the execution of the search warrant was not prohibited by statute and was otherwise authorized by common law."

The Opinion explains in some detail how a Moscow (ID) Police Department detective specializing in crimes against children used file-sharing software (BitTorrent) to investigate child pornographers in the area. The detective developed probable cause that defendant Chambers was currently using computers in his home in Asotin County to download and share known images of depictions of minors engaged in sexually explicit conduct. The detective shared thiat information with the Asotin County Sheriff's Office.

An Asotin County Sheriff's Office deputy obtained a search warrant for Chambers' home and computer(s) to search for evidence of his involvement in child pornography. The deputy requested that the Moscow PD detective participate in execution of the search warrant in Asotin County because the Idaho detective had greater expertise in the subject area. The Idaho detective accordingly helped in the execution of the search warrant at Chambers' home and also helped in the questioning of Chambers at the scene.

The search yielded considerable incriminating evidence. Chambers was subsequently convicted of 24 counts of first degree possession of depictions of a minor engaged in sexually explicit conduct, (B) two counts of first degree dealing in such depictions, (C) one count of second degree dealing in such depictions.

Chambers challenges the search on grounds of lack of express statutory authority for an Idaho officers to provide law enforcement assistance in a Washington investigation. The State responds that under common law, officers are authorized to use subject matter experts to assist in a search, even if those experts are law enforcement officers from another jurisdiction.

[LEGAL UPDATE EDITOR'S NOTE: See the editorial note at the end of this case entry. Washington's Mutual Aid Peace Officer Powers Act, chapter 10.93 RCW, contains authority in its definition of "specially commissioned Washington peace officer" at RCW 10.93.020(5) for Washington law enforcement agencies to specially commission officers from Idaho or Oregon jurisdictions.]

The Chambers Court explains as follows why the Court agrees with the State's argument that the use of the Idaho detective in Washington was not precluded by law:

> As the parties seem to agree, the statutes do not authorize nor do they prohibit the presence of law enforcement from other jurisdictions during a search. In certain circumstances, that do not apply here, out-of-state officers have authority to seize a person in Washington. See Washington Mutual Aid Peace Officer Powers Act of 1985 (chapter 10.93 RCW) and the Uniform Act on Fresh Pursuit (chapter 10.89 RCW). RCW 10.93.070 provides exceptions to the general rule that an officer's authority is restricted to his or her territorial jurisdiction. While this statute does not grant out-of-state officers

the authority to act inside Washington, subsection (3) of the statute authorizes Washington peace officers to enforce the criminal laws of the state outside their territorial bounds "in response to the request of a peace officer with enforcement authority." RCW 10.93.070(3). If the assistance is not requested, however, the presence of an officer from another jurisdiction who is tagging along for his own purposes can undermine the seizure. State v. Bartholomew, 56 Wn. App. 617, 622 (1990).

In Bartholomew, Division One of this court held that a Seattle officer's presence outside his territorial jurisdiction during a warrantless felony arrest by Tacoma police could not be justified under RCW 10.93.070 where the Seattle officer was looking for evidence of a separate crime without a warrant. . . . Critically, nothing in the record indicated that the Tacoma police needed assistance to execute a search warrant for items in the home. . .

In dicta [language not necessary to support the ruling], Division One discussed situations where the presence of the Seattle officer would have been justified such as when executing a warrant where the expertise and assistance of experienced officers was requested. . . . For example, the court described participation of drug enforcement officers in executing the search of a drug manufacturing operation where safe confiscation and identification required expertise that a small rural community officer might be inadequate. . . .

In support of that hypothetical, the [Bartholomew] court compared several federal cases analyzing [a particular federal statute quoted in Bartholomew] to support the premise that federal officers were authorized when genuinely requested for assistance. . . . The case before us presents this hypothetical.

In State v. Kern, Division One approved the use of civilian experts to aid in the execution of a search warrant. 81 Wn. App. 308, 315 (1996). In Kern, an officer served a search warrant on a bank and instructed the bank employees to provide him with the designated records. . . . The bank employees participated in the record search without unnecessary supervision especially where the officer was not trained to retrieve and preserve the records in question. . . .

The [Kern] court found the delegation proper where the civilians were disinterested third parties with little possibility of exceeding the scope of the warrant. . . . Additionally, the court held that "[a]bsent constitutional considerations, the rules for execution and return of a warrant are essentially ministerial in nature." . . .

Although Chambers does not raise a constitutional argument, the United States Supreme Court has held that "it is a violation of the Fourth Amendment for police to bring . . . third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant." Wilson v. Layne, 526 U.S. 603, 614 (1999). In Wilson, police invited the press on a media ride-along during the execution of a warrant.

The Court [in Wilson] held that the presence of the reporters violated the defendant's Fourth Amendment rights because their "presence . . . inside the home was not related to the objectives of the authorized intrusion." . . . Similar to the holding in Bartholomew, the Court distinguished situations where a third party "directly aided in the execution of

the warrant," recognizing that such conduct "has long been approved by this Court and our common-law tradition." . . .

Here, Chambers does not dispute that [the Idaho detective] was aiding [the Washington detective] in the execution of the search warrant. Instead, he argues that Idaho police were "deeply involved" in the case, suggesting that they took over the search and investigation. This argument is contrary to the trial court's finding that [the Washington detective] was the lead investigator in this case and that she obtained the warrant and directed its execution. Chambers does not dispute this finding and there is no evidence that the Idaho officers exerted independent authority during the search. When the warrant needed to be expanded, [the Idaho detective] stopped his search and [the Washington detective] contacted a judicial officer to amend the warrant.

Otherwise, Chambers' argument focuses on extrajudicial issuance of warrants outside a court's jurisdiction and unauthorized arrests outside an officer's jurisdiction. Neither of these factual situations occurred here. There is no indication that the Idaho officers arrested Chambers or enforced the laws. Instead, they participated in the execution of a search warrant at the direction of the lead investigator, [the Washington detective] and provided her with technical expertise.

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

Result: Affirmance of Asotin County Superior Court convictions of Michael E. Chambers for (A) 24 counts of first degree possession of depictions of a minor engaged in sexually explicit conduct, (B) two counts of first degree dealing in such depictions, (C) one count of second degree dealing in such depictions.

LEGAL UPDATE EDITORIAL NOTES: 1. As noted above, the Washington Mutual Aid Peace Officer Powers Act, chapter 10.93 RCW, contains language that authorizes the special commissioning by Washington law enforcement agencies of law enforcement officers of Idaho or Oregon agencies. See RCW 10.93.020(5) which provides:

> **(5) "Specially commissioned Washington peace officer", for the purposes of this chapter, means any officer, whether part-time or full-time, compensated or not, commissioned by a general authority Washington law enforcement agency to enforce some or all of the criminal laws of the state of Washington, who does not qualify under this chapter as a general authority Washington peace officer for that commissioning agency, specifically including reserve peace officers, and specially commissioned full-time, fully compensated peace officers duly commissioned by the states of Oregon or Idaho or any such peace officer commissioned by a unit of local government of Oregon or Idaho. A reserve peace officer is an individual who is an officer of a Washington law enforcement agency who does not serve such agency on a full-time basis but who, when called by the agency into active service, is fully commissioned on the same basis as full-time peace officers to enforce the criminal laws of the state.**

Washington law enforcement agencies dealing with a situation like that in the Chambers case should consult their legal advisors and/or local prosecuting attorney's office regarding this possible option.

Note also that for officers from Washington agencies, State v. Rasmussen, 70 Wn. App. 853 (Div. I, 1993), held that an officer from a Washington law enforcement agency with a consent letter from the chief of police or sheriff of another Washington jurisdiction is not restricted by the rationale of State v. Bartholomew from taking action in that other jurisdiction. I think, however, that chapter 10.93 RCW does not allow for the consent letter option where assistance from Oregon or Idaho officers is sought.

2. The Chambers Opinion addresses some other issues in an unpublished portion of the Opinion. Among other things, the Court provides detailed, fact-intensive analysis that rejects arguments by Chambers attacking the search warrant and affidavit, concluding that (1) the search warrant affidavit established a nexus between his computer and the IP address on the date the IP address was linked to the dissemination of depictions of minors engaged in sexually explicit conduct; (2) the probable cause in the affidavit was not stale; and (3) the search warrant does not violate constitutional requirements for particularity and breadth relating to computer-focused search warrants in child pornography cases.

The detailed analysis of these issues fact-intensive issues in the unpublished portion of the Opinion covers almost 18 pages and will not be addressed in the Legal Update other than as noted above in this editor's note.

TWO RULINGS -- (1) MEANING OF "THING OF VALUE" UNDER SOLICITATION STATUTE, RCW 9A.28.030(1): A MOTHER'S LOVE IS NOT A "THING OF VALUE" UNDER THE STATUTTE, AND THUS A MOTHER DID NOT COMMIT SOLICITATION TO COMMIT MURDER WHEN SHE PROMISED HER CHILD THAT THEY WOULD BE TOGETHER FOREVER IF THE CHILD WERE TO POISON A MAN WHO IS THE CHILD'S FATHER AND THE MOTHER'S EX-HUSBAND; (2) PRIVACY ACT EXEMPTION AT RCW 9.73.030(2): THE CHILD'S RECORDING OF THE CONVERSATION WAS NOT SUBJECT TO THE ACT'S PROHIBITION BECAUSE THE MOTHER WAS CONVEYING A "THREAT"

State v. LaValle, ___ Wn. App. 2d ___ , 2022 WL ___ (Div. I, October 10, 2022)

Facts and Proceedings below:

A 10-year-old boy secretly recorded his mother, defendant LaValle, as she suggested that the boy poison his father, who is her ex-husband. She promised that the boy and his younger brother could be with her forever if the father died. At the time of the conversation, the father had full custody of their children, and the mother was required to pay child support.

Ms. LaValle was convicted of solicitation to commit murder for her suggestion to her son in the recorded conversation. The recorded conversation was admitted in evidence at trial, and that was the only evidence presented of the mother asking or suggesting the killing of her ex-husband.

ISSUES AND RULINGS: (1) The Privacy Act, chapter 9.73 RCW, generally prohibits the recording of a private conversation without consent of all in the conversation. RCW 9.73.030(2)(b) exempts from that general prohibition the recording of [conversations] which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands."

Did the mother's suggestion that her son kill his father constitute conveying a "threat" such that the exemption in the Privacy Act, RCW 9.73.030(2), applies to allow the recording? (ANSWER BY THE COURT OF APPEALS: Yes)

(2) RCW 9A.28.030(1) provides that "A person is guilty of criminal solicitation when, with intent to promote or facilitate the commission of a crime, he or she offers to give or gives money or other thing of value to another to engage in specific conduct which would constitute such crime or which would establish complicity of such other person in its commission or attempted commission had such crime been attempted or committed."

Was the mother's promise of staying together with her children forever a "thing of value" under the solicitation statute, RCW 9A.28.030(1)? (ANSWER BY COURT OF APPEALS: No)

Result: Reversal of Skagit County Superior Court conviction of Vanessa Valdiglesias Lavalle for solicitation to commit murder; case dismissed with prejudice (i.e., charges cannot be filed again for the acts that were prosecuted in this case).

ANALYSIS BY COURT OF APPEALS:

1. *Privacy Act exemption for conversations that convey threats*

RCW 9.73.030(2)(b) exempts from that general prohibition the recording of [conversations] which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands." The key part of the analysis of the Court of Appeals in LaValle is as follows:

> Our Supreme Court has held that discussing a threat in the planning stages falls under the word "convey" of RCW 9.73.030(2)(b). State v. Caliguri, 99 Wn.2d 501, 507-08 (1983); State v. Babcock, 168 Wn. App. 598, 609 (2012).
>
> In the instant case, Valdiglesias LaValle conveyed a threat of bodily harm in the planning stages. The recording portrayed Valdiglesias LaValle teaching S.G. what was needed to do to poison Grady and cause him to die. She told S.G. not to tell anyone about it and to keep it a secret between them. These statements convey a request that is of a similar nature to a threat of bodily harm – the poisoning to death of Grady.

2. *"Thing of value" under the solicitation statute*

The LaValle Court does not identify any Washington precedent on point to the issue in this case, so the Court engages in statutory construction that addresses a variety of considerations. Ultimately, the Court of Appeals concludes that "a 'thing of value' under RCW 9A.28.030(1) contemplates things, tangible or intangible, that have monetary value." The LaValle Court concludes that a mother's promise of love forever is not a "thing of value" under this definition.

TESTIMONY FROM A DETECTIVE REGARDING DEFENDANT'S EXERCISE OF HIS RIGHT TO SILENCE VIOLATED THAT RIGHT AND SHOULD NOT HAVE BEEN PERMITTED BY THE TRIAL COURT

In State v. Palmer, ___ Wn. App. 2d ___ , 2022 WL ___ (Div. II, October 11, 2022), Division Two of the Court of Appeals reverses defendant's convictions and remands the case for re-trial on charges of assault in the fourth degree and assault of a child in the second degree. The

reversal is primarily based on the trial court judge's violation of the defendant's right to counsel, but the Court of Appeals declares that the judge also erred in allowing a detective to comment in testimony heard by the jury regarding the defendant's exercise of the right to silence.

The Palmer Court explains as follows the Court's reasoning on the right-to-silence issue:

> B. *Legal Principles [Relating To A Witness Commenting On A Defendant's Right To Silence]*
>
> The Fifth Amendment to the United States Constitution states that no person "shall . . . be compelled in any criminal case to be a witness against himself." . . . The Washington Constitution contains a similar provision: "[n]o person shall be compelled in any criminal case to give evidence against himself." . . . Washington courts have interpreted both provisions to provide the same protection. State v. Easter, 130 Wn.2d 228, 235 (1996).
>
> The right against self-incrimination prohibits the State from eliciting comments from witnesses about the defendant's pre- or post-arrest silence. [Easter] The State may also not suggest the defendant is guilty because they chose to remain silent, because the assurance of Miranda is that remaining silent will not be penalized. [Easter]
>
> C. *Analysis [Of The Right To Silence Issue]*
>
> Here, the State unequivocally elicited a comment from [the detective] about Palmer's decision to remain silent. The State asked [the detective] if he had spoken to Palmer after Palmer's arrest and overnight confinement.
>
> [The Detective] testified, "I went back the next morning, thinking that, you know, a day sitting in the county jail, you know, there's some time to think, and maybe Mr. Palmer would want to do the right thing here." [The detective] further testified that he told Palmer, "You've had some time to think. Do you want to talk?" and that Palmer responded that he did not want to talk.
>
> [The detective's] testimony was a comment on Palmer's right to remain silent. [Easter]. More pointedly, contrary to Easter, the State suggested that Palmer was guilty due to his silence. [Easter. Indeed, [the detective] testified that Palmer remained silent after being given a chance to "do the right thing" by admitting criminal conduct. This statement presupposed Palmer's guilt and created an impossible choice: Palmer could either do right by confessing to molesting a child or do wrong by remaining silent.
>
> Implicit in the "silence equals wrongfulness" notion is that silence withholds the "truth" – that "truth" being one's criminal conduct, even if there was no criminal conduct. In this context, a defendant cannot maintain their presumption of innocence by remaining silent. A detective's belief on this front may assist with their investigative duty, but established authority prohibits using a defendant's right to remain silent to suggest guilt to the jury. [Easter].
>
> Alone, this violation may warrant reversal and a new trial. However, because we reverse on other grounds, we remind the State that it is forbidden from eliciting comments about Palmer's silence during his new trial.

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

Result: Reversal (primarily based on a right-to-counsel issue not addressed in this Legal Update entry) of Grays Harbor County Superior Court conviction of Michael Leon Palmer.

****

BRIEF NOTES REGARDING SEPTEMBER 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 seven entries below address the October 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. Michael Patrick Frazer [plus several akas]: On October 11, 2022, Division Two of the COA rejects the defendant's challenges to his Pierce County Superior Court convictions for *(A) one count of second degree assault, (B) one count of felony harassment, and (C) nine counts of a no-contact order violation*. Among other rulings, the Court of Appeals rules that **the "excited utterance" exception to the hearsay rule (Evidence Rule 803(a)(2)) applies to statements that the alleged victim made to two law enforcement officers who talked to the victim on the day of the crime, even though one of the officers talked to the victim about two hours after she escaped from the defendant**. The Court of Appeals first explains as follows the requirements for application of the rule:

> For the excited utterance exception to apply, the declarant's statement must meet three requirements: "(1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement of the startling event or condition, and (3) the statement related to the startling event or condition." . . . The first two elements may be established by evidence extrinsic to the declarant's plain words "such as the declarant's behavior, appearance, and condition; appraisals of the declarant by others; and the circumstances under which the statement is made." . . . .
>
> When assessing whether a statement qualifies as an excited utterance, we may refer to relevant factors such as the statement's spontaneity, the passage of time, the

> declarant's emotional state, and the declarant's opportunity to reflect or fabricate a story. . . . . However, the passage of time alone does not control. Id. In addition, the declarant's later recantation of an earlier statement does not disqualify the statement as an excited utterance. . . .

[Citations omitted]

Then, the Court of Appeals explains how the rule applies to the testimony of the two officers:

> *b. Statements [by the victim to Officer A]*
>
> [The victim] experienced a startling event. Frazer held a knife to her throat and said that he was going to kill her. Frazer was driving to a place where he told [the victim] he was going to kill her and dump her body. [The victim] jumped out of the vehicle and ran screaming toward [a Good Samaritan civilian rescuer's] vehicle, and then became hysterical again as Frazer chased [the rescuer's vehicle] down the highway.
>
> In addition, [the victim] still was under the stress of excitement from the incident when she talked to [Officer A]. [Officer A] received a report regarding the incident less than 20 minutes after [the civilian rescuer] first called 911 and talked to [the victim] shortly thereafter. [The victim] was very upset and distraught, and she was sobbing, shaking, and fearful. [Officer A] testified that [the victim] began crying after she told him that Frazer held a knife against or next to her throat.
>
> Based on these facts, [the victim's] statements to [Officer A] constituted excited utterances under ER 803(a)(2). . . .
>
> c. *Statements [by the victim to Officer B]*
>
> [Officer B] did not speak with [the victim] until approximately two hours after the incident. Therefore, the question is whether [the victim] still was under the stress of excitement from the incident when she made the statements to [Officer B].
>
> [The victim] was upset when [Officer B] talked with her. She was extremely exhausted, crying, and fearful. [The victim] broke down into tears twice as she described the incident, and she told [Officer B] that she was not supposed to make it out of the car alive and that [the civilian rescuer] had saved her life. Further, [the victim] remained fearful of what [defendant's] associates would do to her if she provided a written statement. Based on her observations, [Officer B] believed that [the victim] still was affected by what had happened to her when they talked. Therefore, we conclude that the two-hour passage of time did not dampen the effects of [defendant's] threats and actions on [the victim] .
>
> . . . . [The Court of Appeals next distinguishes on their facts several appellate court precedents relied on by the defendant in this case.]
>
> . . . . [W]e conclude that the two-hour passage of time did not render the ER 803(a)(2) excited utterance exception inapplicable to [the victim's] statements to [Officer B].

The unpublished Opinion in State v. Michael Patrick Frazer can be accessed on the Internet at: https://www.courts.wa.gov/opinions/pdf/D2%2055928-5-II%20Unpublished%20Opinion.pdf

2. State v. Jordan Preston Ortiz: On October 13, 2022, Division Three of the COA rejects the defendant's challenges to his Chelan County Superior Court convictions for *two counts of possession of a controlled substance* (one count for heroin and one count for methamphetamine). The Court of Appeals rules that **the corpus delicti rule does not require suppression of incriminating statements that he made to law enforcement**.

The introduction to the Ortiz Opinion summarizes the Court's ruling as follows:

> Police responded to a disturbance call at a known drug house and arrested Jordan Ortiz on an outstanding warrant. Upon searching Mr. Ortiz, police found multiple varieties of controlled substances in large amounts and a wad of cash in small denominations totaling $275. Mr. Ortiz made admissions upon arrest and during a later recorded jail phone call to an acquaintance that supported his intent to sell drugs.
>
> He challenges his convictions for possession of a controlled substance with intent to distribute on the basis that his admissions should have been suppressed under the corpus delicti rule. He argues that absent his admissions, the evidence was insufficient to show an intent to distribute where he innocently possessed the drugs for personal use.
>
> We hold that the evidence, when considered in context and totality, is sufficient to corroborate Mr. Ortiz's admissions and that the trial court did not err in denying his motion to suppress his statements.

[Some paragraphing revised for readability]

In a search of Mr. Ortiz incident to his arrest on a warrant, a law enforcement officer found and seized a baggy of heroin, two "baggies" of methamphetamine, and separate baggies with four pills. The total methamphetamine within two separate baggies weighed 31.9 grams and was broken into numerous small and larger pieces. The one bag of methamphetamine tested by the lab weighed 18.89 grams. The cash value of the methamphetamine was $1,200. The ball of heroin weighed 4.3 grams (with baggie) and 3.3 grams alone. Separately packaged were two pills of Suboxone (buprenorphine hydrochloride), one pill of diazepam, and one-half of a pill of Xanax (alprazolam). The officer stated that, in her opinion, the drug amounts were larger than average user amounts. The arrestee claimed to use drugs but not deal them, but he also made some incriminating statements during the search incident to arrest.

The doctrine of corpus delicti is intended to protect against court fact-finders in criminal case considering questionable confessions; the doctrine requires the State to provide independent corroborating evidence of any crime described in the defendant's incriminating statement before it may be admitted. The defendant in this case relied on State v. Sprague, 16 Wn. App. 2d 213, 225 (2021) and State v. Brockob, 159 Wn.2d 311, 327-28 (2006). Those cases note that the rule for Washington courts requires evidence that is independent of the confession or admission that (1) corroborates the defendant's statement with prima facie evidence, (2) is consistent with guilt, and (3) is inconsistent with a hypothesis of innocence for (4) the specific crime charged. Under the Washington rule, if the independent evidence supports reasonable and logical inferences of both criminal agency and noncriminal cause, the evidence is insufficient to corroborate a defendant's admission of guilt.

After extensive discussion of the Washington case law, the Ortiz Opinion concludes as follows that the corpus delicti rule does not require suppression of the defendant's incriminating statements:

> Mr. Ortiz challenges the sufficiency of evidence corroborating his intent to distribute the controlled substances as opposed to possessing them for personal use. Mr. Ortiz was observed hopping the fence of a house that "has been associated with drug dealing." He was not only in possession of controlled substances but a variety of substances in an amount more than personal use and packaged separately. In addition, Mr. Ortiz had a wad of cash separate from his wallet totaling $275 in small denominations. While his possession of controlled substances alone is not sufficient to show intent, and the possession of cash in isolation could just as easily be innocent conduct, when the totality of the corroborating evidence is considered in context, it supports an intent to deliver and does not support a hypothesis of innocence.

The unpublished Opinion in State v. Jordan Patrick Ortiz can be accessed on the Internet at: https://www.courts.wa.gov/opinions/pdf/383261_unp.pdf

3. State v. Jason Allan Johanson: On October 18, 2022, Division Three of the COA rejects the defendant's challenges to his Whitman County Superior Court convictions for *assault in the third degree* for swatting an officer's arm. The defendant unsuccessfully argued on appeal that his use of force against the officer was constitutionally permissible because he was unlawfully seized, unlawfully detained, unlawfully arrested, and he reasonably feared serious injury at the point when he swatted an officers arm. **The Johanson Opinion concludes that: (1) no seizure occurred when officers initially contacted him to talk to Johanson about his not wearing a mask on a transit bus as required under the law at the time; (2) to the extent that the police contact became a seizure at some point, the seizure was supported by reasonable suspicion that Johanson was committing a crime by not wearing a mask on the bus and for being disorderly and refusing to leave the bus; (3) Johanson was lawfully arrested for assaulting an officer when he swatted an officer's arm that was outstretched to warn Johanson to not further approach the officer; and (4) Johanson was not in danger of unlawful injury by any officer at the point that Johanson swatted the officer's arm.**

The Opinion in State v. Jason Allan Johanson can be accessed on the Internet at: https://www.courts.wa.gov/opinions/pdf/383172_unp.pdf

4. State v. Eric Clinton Ott: On October 24, 2022, Division One of the COA rejects the defendant's challenges to his King County Superior Court convictions for *one court of incest in the first degree*. The Court of Appeals rejects defendant's argument, among his several arguments, that the evidence was insufficient to prove the crime of incest because the State failed to prove that T.P. was his biological daughter:

> Ott argues that there is insufficient evidence that T.P. was his biological "descendant" because the State did not confirm their relationship with DNA testing or "a sworn statement attesting to biological paternity." Instead, Ott claims that presumed paternity, under the Uniform Parentage Act conferred legal paternity on men but that this presumed paternity does not prove Ott is T.P.'s biological father.

The Court of Appeals concludes that the following evidence was sufficient to establish the T.P. was the biological daughter of the defendant:

> **Ott was married to T.P.'s biological mother when T.P. was born and Ott was therefore presumed to be T.P.'s father as a matter of law. RCW 26.26A.115(1)(i). T.P. testified that Ott was her father, and Ott acknowledged the same. Ott never denied that T.P. was his biological daughter.**

The Court of Appeals cites and discusses cases from other jurisdictions that have rejected arguments along the lines of Ott's argument.

The Opinion in State v. Eric Clinton Ott can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/826247.pdf

5. State v. Alex Miyares: On October 24, 2022, Division One of the COA rejects the defendant's challenges to his King County Superior Court convictions for *two counts of first degree child molestation*. The defendant argued on appeal in relation to an element of the child hearsay issues that statements that the child victim made to her adoptive mother, to the adoptive mother's partner, and to a child forensic interviewer were not spontaneous, and therefore were inadmissible because they were made in response to questioning by those persons. **The Court of Appeals rejects this child hearsay argument because the trial court record supports the trial court rulings that the questioning of the child was "open-ended" and not suggestive of any answers.**

Analysis by the Court of Appeals includes the following discussion of the testimony in the case:

> [The child] first disclosed that [defendant] had touched her after the child's adoptive mother questioned [the child] about her behavior the night before. [The adoptive mother] testified that she did not ask [the child] anything specific, but asked only "What was—why did you act that way when I walked into the room?" When [the child] disclosed that "Alex touches me," Tolliver then asked "what does that mean?"
>
> Similarly, [the partner of the adoptive mother] testified that [the child] made the same disclosure to him after he asked her what had happened. [The child forensic interviewer] testified that she used open-ended questions to interview [the child] in order to avoid influencing [the child's] disclosure. None of these witnesses posed leading or suggestive questions to [the child]. The trial court did not err in finding that B.B.'s statements were spontaneous

The Opinion in State v. Alex Myares can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/834088.pdf

6. State v. David Wayne Turner: On October 25, 2022, Division Two of the COA agrees with the appeal by the State from a Thurston County Superior Court suppression order. The Court of Appeals rules that **a community corrections officer had authority in that role to search the car, including the trunk**, of Turner where Turner (1) was on probation and had an active warrant for failing to report to his community corrections officer; (2) had committed violations involving controlled substances three times in the past year; and (3) did not stop his car when signaled to do so, and instead continued to drive for approximately 20 seconds before stopping the car, bypassing areas where he could safely pull over, during which time he appeared to be moving around and trying to conceal something.

The Opinion in State v. David Wayne Turner can be accessed on the Internet at:

https://www.courts.wa.gov/opinions/pdf/D2%2056129-8-II%20Unpublished%20Opinion.pdf

7. State v. William Howard Witkowski: On October 25, 2022, Division Two of the COA rejects the defendant's challenges to his Pierce County Superior Court convictions for: (A*) one count of unlawful possession of a controlled substance with intent to deliver (heroin); (B) one count of unlawful possession of a controlled substance with intent to deliver (methamphetamine); (C) twelve counts of first degree unlawful possession of a firearm; (D) one count of unlawful possession of a controlled substance (oxycodone); and (E) seven counts of unlawful possession of a stolen firearm* (Witkowski does not appeal his conviction for one count of third degree defrauding a public utility). **The Court of Appeals rules that a search warrant affidavit established probable cause to search defendant's home, and that the information in the affidavit was not stale.**

The Court of Appeals describes as follows the key facts that were described in the affidavit:

> In May 2015, Ohop Mutual Light Company shut off power to Witkowski's property as a result of non-payment. On October 6, 2015, an engineering coordinator for Ohop went to the property in response to a customer reporting an illegal power hookup on the property and observed that the original power meter belonging at the address was laying on the ground. A stolen power meter had been installed in its place. The engineer took detailed photos of the illegal power hookup, the stolen meter providing power to the residence, and the original meter before he left the property to investigate records at the Ohop office. When he returned to the property later that day, [the Ohop engineer] discovered that the stolen power meter had been removed.

The key part of the Court's Opinion analyzing the staleness issue is as follows:

> Witkowski argues that the information in the warrant affidavit was stale and insufficient to show probable cause. He argues the information was stale because of the [several-week] delay between the [early October] report by the Ohop Mutual employee and the [late-October] execution of the warrant and because the Ohop Mutual employee had reported that the stolen power meter was no longer at the hookup site. We disagree.
>
> . . . .
>
> In reviewing the issue of staleness in a probable cause determination, we consider the information presented to the issuing magistrate and look to the totality of the circumstances to evaluate whether the facts underlying the search warrant are stale. [State v. Maddox, 152 Wn.2d 499, 506 (2004)]. Information is not stale "if the facts and circumstances in the affidavit support a commonsense determination that there is continuing and contemporaneous possession of the property intended to be seized." [Maddox].
>
> In evaluating staleness, length of time is only one factor we consider along with other relevant circumstances, including the nature and scope of the suspected criminal activity. Maddox (observing the majority rule in other jurisdictions that the staleness determination depends on the nature of criminal activity, the length of the activity, and the nature of the property to be seized).
>
> In State v. Hall, the court considered whether a two-month lapse between the informant's tip and execution of the search warrant rendered the tip stale; there, the

informant had reported his earlier observations of the defendant's home marijuana grow operation. 53 Wn. App. 296, 299-300 (1989). The court found that probable cause existed because it was reasonable to believe that the grow operation was still in existence based on the number of marijuana plants already found and the informant's description of the size of the marijuana plants in the home.

Witkowski attempts to distinguish this case from Hall by emphasizing the Ohop Mutual employee's report that the stolen power meter was no longer visible when he returned to the property on October 6, but his attempt falls short. Witkowski contends that this case is more similar to Maddox where the day before law enforcement executed its search warrant, the informant was told Maddox was "out" of the methamphetamine that law enforcement suspected would be found during its search.

Unlike the methamphetamine in Maddox, the evidence expected to be found at Witkowski's property was not transitory by nature. Witkowski argues that no evidence showed the stolen power meter remained on the premises, but [he] ignores that there was also no evidence to suggest that it had been sold or removed as opposed to simply placed out of sight after the Ohop Mutual employee visited. Moreover, given the ongoing nature and scope of the suspected criminal activity – theft of power for over five months – it is not unreasonable to suspect that evidence of that activity remained on the property.

We apply a commonsense analysis, and common sense supports the reasonable inference that the stolen power meter or other evidence of power theft remained on the property. Under the totality of the circumstances, we hold that the trial court did not err by concluding that probable cause existed to believe Witkowski was involved in criminal activity and that evidence of that criminal activity would be found on his property.

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

The Opinion in State v. William Howard Witkowski can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2056179-4-II%20Unpublished%20Opinion.pdf

****

LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

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

In May of 2011, John Wasberg retired from the Washington State Attorney General's Office. For over 32 years immediately prior to that retirement date, as an Assistant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011) of the Criminal Justice Training Commission's Law Enforcement Digest. From the time of his retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the production of the LED. That arrangement ended in the late fall of 2014 due to variety of concerns, budget constraints and friendly differences regarding the approach of the LED going forward. Among other things, Mr. Wasberg prefers (1) a more expansive treatment of the core-

area (e.g., arrest, search and seizure) law enforcement decisions with more cross references to other sources and past precedents; and (2) a broader scope of coverage in terms of the types of cases that may be of interest to law enforcement in Washington (though public disclosure decisions are unlikely to be addressed in depth in the Legal Update). For these reasons, starting with the January 2015 Legal Update, Mr. Wasberg has been presenting a monthly case law update for published decisions from Washington's appellate courts, from the Ninth Circuit of the United States Court of Appeals, and from the United States Supreme Court.

The Legal Update does not speak for any person other than Mr. Wasberg, nor does it speak for any agency. Officers are urged to discuss issues with their agencies' legal advisors and their local prosecutors. The Legal Update is published as a research source only and does not purport to furnish legal advice. Mr. Wasberg's email address is jrwasberg@comcast.net. His cell phone number is (206) 434-0200. The initial monthly Legal Update was issued for January 2015. Mr. Wasberg will electronically provide back issues on request.

****

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

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

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

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

access to some articles on and compilations of law enforcement cases, go to [cjtc.wa.gov/resources/law-enforcement-digest].

****