

LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

2022 SUBJECT MATTER INDEX FOR LEGAL UPDATE

EDITORIAL NOTE: This is the eighth annual Legal Update subject matter index. It covers all Legal Update entries addressing published opinions from January 2022 through and including the December 2022 Legal Update. Note that in early 2020, I released a five-year index for 2015 through 2019 (available on request to jrwasberg@comcast.net). The Legal Update entries address the version of the opinion that appeared on the court website for the date indicated, and it is possible that there were revisions in the final version of the opinion that later appeared in the published report of the decisions. Although the Legal Update includes information every month about unpublished opinions from the Washington Court of Appeals, those entries are not addressed in this index, other than to note them collectively under the heading “Unpublished Washington Court of Appeals Opinions.” In this 2022 index, entries are arranged chronologically within each category and subcategory based on the date of the appearance in the Legal Update (in other words, earlier entries appear before later entries within the categories and subcategories). Citations to court decisions include a citation to the Legal Update as the final part of the entries. The Legal Update citation is abbreviated; for example, the citation in the first entry under “ANIMAL CRUELTY” immediately following this note, to “February 22:02” means that the State v. Abdi-Issa case entry appears in the Legal Update for February 2022 starting at page 02.

ANIMAL CRUELTY (Chapter 16.52 RCW)

Two holdings: (1) Animal abuse can constitute a crime of domestic violence; (2) Under the facts of this case, where a bystander witnessed acts of animal abuse, a jury could find that the crime had a destructive and foreseeable impact on persons other than the victim. State v. Abdi-Issa, ___ Wn.2d ___, 504 P.3d 223 (February 17, 2022) – February 22:02

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

In criminal case, three-judge Ninth Circuit panel rules that officers are automatically authorized under the Fourth Amendment to take a reasonable period of time to check a driver’s criminal history during a traffic stop; that is because a records check for this reason is inherently related to officer safety and therefore does not require independent reasonable suspicion of a crime to justify extending the duration of the stop for this purpose. U.S. v. Hylton, 30 F.4th 842 (9th Cir., April 5, 2022) – April 22:05

Affirmative action impacts analysis of “seizure” of the person by law enforcement: In a unanimous independent grounds ruling under article I, section 7 of the Washington constitution, the Washington Supreme Court departs from the Fourth Amendment’s approach to objective standards in ruling that the possibility of “implicit bias” must be part of the totality-of-the-circumstances “objective” test for determining if a “person of color” has been “seized” by law enforcement – this new blanket rule applies in every case where a contacted person is BIPOC (Black, Indigenous, or otherwise a Person of

Color) and takes that fact into account in asking if “an objective observer could conclude that due to law enforcement’s display of authority or use of physical force,” the person was not free (1) to leave or (2) to refuse a request or (3) to otherwise terminate a police encounter. State v. Sum, ___ Wn.2d ___, 511 P.3d 92 (June 9, 2022) – June 22:12

Probable cause to arrest regarding RCW 9.41.270: Where a law enforcement officer was responding to two calls to dispatch reporting alarm over suspect’s display of a pistol, but neither reporting party indicated either (1) a threatening display or (2) concealment of the pistol on the suspect’s person, a Ninth Circuit panel votes 2-1 to affirm the federal district court’s ruling that under Washington state law, the officer did not have probable cause to believe that the defendant had displayed a pistol in a manner that “warranted alarm for the safety of persons” present at the time of the display. United States v. Willy, 40 F.4th 1074 (9th Cir., July 26, 2022) – July 22:03

ASSAULT (Chapter 9A.36 RCW)

Third degree assault: Under RCW 9.36.031(1)(d) an assailant’s hands are not a “weapon or other instrument or thing likely to produce bodily harm.” State v. Altman, ___ Wn. App.2d ___, 2022 WL ___ (Div. II, August 23, 2022, unpublished Opinion is ordered published on November 15, 2022) – November 22:02

ATTORNEY GENERAL OPINIONS

AGO 2022 No. 1 addresses some questions relating to 2021 Washington legislation that addressed law enforcement use of physical force. – January 22:12

CIVIL LIABILITY

Civil Rights Act section 1983 lawsuits (Against Corrections)

3-judge panel rules that case must go to trial on prisoner’s claims that prison officials violated his constitutional free speech rights and constitutional and statutory religious freedom rights in confiscating some of his mail. Jones v. Slade, 23 F.4th 1124 (9th Cir., January 24, 2022) – January 22:09

3-judge panel rules that case must go to trial on prisoner’s claim that prison officials violated his statutory religious freedom rights in relation to his belief that he must use scented oil for his prayers. Johnson v. Baker, 23 F.4th 1209 (9th Cir., January 26, 2022) – January 22:10

In a decision interpreting the Eighth Amendment excessive force standard, Ninth Circuit Majority Opinion (1) reverses part of a U.S. District Court grant of summary judgment to law enforcement based on plaintiff-escapee’s allegations that, after he had already been captured and handcuffed, he was (a) punched by an officer and (b) bitten by a police K-9; (2) affirms part of a summary judgment ruling for law enforcement based on bodycam video-audio because that evidence blatantly contradicts the plaintiff-escapee’s allegations as to (a) his would-be attempt to surrender and (b) the duration of the application of force up to the point when he was handcuffed; Dissenting Opinion would have granted summary judgment to law enforcement in full. Hughes v. Rodriguez, F.4th 1211 (9th Cir., April 21, 2022) – April 22:07

Viewing the prisoner-plaintiff's allegations in the best light for plaintiff, Nevada corrections officials' "wait and see" medical treatment plan for prisoner with enlarged prostate eventually violated the Eighth Amendment prohibition of cruel and unusual punishment under the "deliberate indifference" standard. Stewart v. Aranas, 32 F.4th 1192 (9th Cir., May 4, 2022) – May 22:04

Muslim prison inmate was lawfully denied a request to be housed with other religious Muslims so that non-Muslim prisoners would not harass him as he prays; it would be discriminatory to grant such a request. Al Saud v. Days, 36 F.4th 949 (9th Cir., June 8, 2022) – June 22:10

Instruction given to jury in prisoner's lawsuit against prison officials for failure to protect him from prison gang erroneously precluded jury from weighing whether security concerns supported officials' decisions; the case must be retried with revised jury instructions. Fierro v. Smith, 39 F.4th 640 (9th Cir., July 5, 2022) – July 22:06

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. Simmons v. Arnett, ___ F.4th ___, 2022 WL ___ (9th Cir., August 31, 2022) – August 22 :08

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

3-judge panel rules, even viewing the Plaintiff's allegations in the best light for Plaintiff, that officers did not use excessive force when they removed a disruptive but passively resisting protester from a city council meeting by using minimal force in lifting her by her arms and carrying her out of the meeting. Williamson v. City of National City, 23 F.4th 1146 (9th Cir., January 24, 2022) – January 22:02

3-judge panel rules that, viewing the Plaintiffs' allegations in the best light for the Plaintiffs, two officers used excessive force and violated clearly established law when they used a taser and put a pre-trial detainee in a head restraint, even after the detainee — who had his hands handcuffed and legs shackled — had apparently stopped resisting and posed no threat. Hyde v. City of Willcox, 23 F.4th 863 (9th Cir., January 6, 2022) – January 22:03

Viewing the allegations in the best light for legal representatives of person fatally shot by police, court denies qualified immunity on excessive force claim to county of riverside (ca) officer who fired the fatal shots without any prior warning. Estate of Najera Aguirre v. County of Riverside, ___ F.4th ___, 2022 WL ___ (9th Cir., March 24, 2022) – March 22:06

U.S. Supreme Court rules that Plaintiff may sue law enforcement for malicious prosecution based on the Fourth Amendment where the criminal prosecution that arose from the challenged law enforcement actions ended without a conviction. Thompson v. Clark, 142 S.Ct. 1332 (April 4, 2022) – April 22:04

Viewing the Plaintiff's allegations in the best light for him, panel denies qualified immunity to detectives who, in a surprise attack without warning, tackled and fractured the hip of a robbery suspect who they arguably knew (because he had just emerged from

a courthouse) was not armed. Andrews v. City of Henderson, 35 F.4th 710 (9th Cir., May 23, 2022) – May 22:03

The mere failure in a custodial interrogation to give Miranda warnings does not provide grounds for a Fifth Amendment-based Civil Rights Act lawsuit, even where the un-Mirandized statement was introduced at an earlier criminal trial, and the jury acquitted in that criminal trial. Vega v. Tekoh, 142 S.Ct. 2095 (June 23, 2022) – June 22:05

Accepting Plaintiff's allegations as true for purposes of addressing the summary judgment question, a Ninth Circuit panel rules that an officer's use of his vehicle as a roadblock to stop a bicyclist traffic law violator was excessive force, but the panel grants the officer qualified immunity because there is no controlling case law on point factually. Seidner v. De Vries, 39 F.4th 591 (June 30, 2022) – June 22:07

Accepting Plaintiff's allegations as true for purposes of addressing the summary judgment question, the District Court should not have dismissed a wrongfully convicted person's lawsuit claiming that detective's fabrication of evidence constitutes a civil rights violation. Richards v. County of San Bernardino, 39 F.4th 562 (9th Cir., June 24, 2022) – June 22:08

Accepting Plaintiff's allegations as true for purposes of addressing summary judgment question, government defendant is not entitled to qualified immunity on Plaintiff's claim against police department employee for allegedly: (1) conspiring with non-custodial parent, (2) to deceive family court to get restraining order against Plaintiff, and (3) to remove child from custodial parent's control. David v. Kaulukukui, 38 F.4th 792 (9th Cir., June 27, 2022) – June 22:11

Qualified immunity is granted even though Fourth Amendment was violated where officers failed, prior to searching a suspect's home, to put in writing on a search warrant the judge's telephonic authorization to expand the warrant to include the suspect's home. Manriquez v. Ensley, ___ F.4th ___, 2022 WL ___ (9th Cir., August 30, 2022) – August 22:03

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. J.K.J. v. City of San Diego, 42 F.4th 990 (9th Cir., August 2, 2022) – August 22:04

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. Hernandez v. City of Phoenix, 43 F.4th 966 (9th Cir., August 5, 2022) – August 22:06

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. Demarest v. City of Vallejo, ___ F.4th ___, 2022 WL ___ (9th Cir., August 16, 2020) – August 22:08

Ninth Circuit panel votes 2-1 to apply the 2018 Ninth Circuit precedent of Martin v. Boise in ruling that the Eighth Amendment’s prohibition against cruel and unusual punishment precludes, where public shelter is not available, enforcement of a city ordinance of Grants Pass (Oregon) that prohibits homeless persons from using a blanket, pillow or cardboard box for protection from the elements. Johnson v. City of Grants Pass, ___ F.4th ___ (9th Cir., September 28, 2022) – September 22:02

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 towards the officers. Peck v. Montoya, ___ F.4th ___ , 2022 WL ___ (9th Cir., October 18, 2022) – October 22:06

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. Verdun v. City of San Diego, ___ F.4th ___ , 2022 WL ___ (9th Cir., October 26, 2022) – October 22:08

In a 2-1 ruling, Ninth Circuit panel rules that factual disputes preclude granting qualified immunity to officer in deadly force case where there is dispute in the record as to whether, in addition to other disputed facts, the shooting officer told the now-deceased to “stop” pummeling a straddled fellow officer, and the summary judgment record would allow a jury to conclude that (1) the shooting officer did not warn that deadly force was about to be used by the officer, and (2) time would have allowed such a warning before shooting. Smith v. Agdeppa and LAPD, ___ F.4th ___ , 2022 WL ___ (9th Cir., December 30, 2022) December 22:02

“Private search exception” to the Fourth Amendment is applied in a case where disgruntled employees of an electrical contractor acted on their own to provide a government enforcement agency with cell site location information (CSLI) regarding the location of the employer’s vehicles; “third party search exception” of the Fourth Amendment is declared inapplicable on the facts of this case. The Legal Update entry includes notes regarding Washington appellate court rulings on “private search exception” and “third party search exception.” Kleiser and Mr. Electric of Clark County v. Department of Labor & Industries, ___ F.4th ___ , 2022 WL ___ (9th Cir., December 9, 2022) – December 22:04

Civil Rights Act section 1983 lawsuits (Against government actors who are not law enforcement or corrections officers)

No liability for county attorneys’ actions of reviewing, without first obtaining a court order, of county child abuse investigation files where the file review was conducted in order to defend against the children’s lawsuit for investigators’ earlier interviewing of the children without first obtaining a court order or parental consent. A.C. v. Cortez, ___ F.4th ___ , 2022 WL ___ (9th Cir., May 13, 2022) – May 22:05

Civil Rights Act Section 1983 Civil Liability Regarding Law Enforcement Employment

On reconsideration, Ninth Circuit panel again concludes that plaintiff-officer is entitled to trial (and police chief is not entitled to qualified immunity) based on her allegation that

police chief committed gender-discrimination against her by pretextually subjecting her to internal affairs investigation in order to preclude her eligibility for promotion. Ballou v. McElvain, ___ F.4th ___, 2022 WL ___ (9th Cir., March 24, 2022) – March 22:04

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

Man who was shot by police loses his negligence-based claim that, in effect, suggests that police should have unconstitutionally forced entry into his home and detained him during an earlier encounter; his unsuccessful argument is essentially that an earlier detention would have prevented his subsequent dangerous armed behavior that justified police shooting him. Ghodsee v. City of Kent, ___ Wn. App. 2d ___, 508 P.3d 193 (Div. I, April 18, 2022) – April 22:14

Court of Appeals upholds dismissal of staffing-level-based wrongful death lawsuit that family brought against Pierce County Sheriff's Office following deputy's line-of duty death. Estate of Daniel McCartney v. Pierce County, ___ Wn. App. 2d ___, 513 P.3d 119 (Div. II, June 28, 2022) – June 22:22

DISTRICT COURT COMMISSIONER'S AUTHORITY UNDER WASHINGTON LAW

Trial by District Court commissioner held valid where defendant's attorney agreed to that procedure. State v. Boldt, ___ Wn. App. 2d ___, 2022 WL ___ (Div. I, February 22, 2022) – February 22:04

DOMESTIC VIOLENCE, INCLUDING INTERFERING WITH REPORTING AND VIOLATING PROTECTION ORDERS

Two holdings: (1) Animal abuse can constitute a crime of domestic violence; (2) Under the facts of this case, where a bystander witnessed acts of animal abuse, a jury could find that the crime had a destructive and foreseeable impact on persons other than the victim. State v. Abdi-Issa, ___ Wn.2d ___, 504 P.3d 223 (February 17, 2022) – February 22:02

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

Property owner loses constitutional Due Process challenges to real property forfeiture under Washington drug laws (RCW 69.50.505) of premises used for illegal marijuana grow operation. Pastor v. Real Property Commonly described As 713 SW 353rd Place, Federal Way, ___ Wn. App. 2d ___, 2022 WL ___ (Div. I, March 21, 2022) – March 22:18

State held to have committed Brady violations by not providing to the defendant information about a codefendant-witness's jail disciplinary infractions, her possible mental health issues in jail, and a jailer's note describing her as untrustworthy; but, in light of other evidence in the case, the Brady violations are held to not require reversal of convictions. Personal Restraint Petition of Mulamba, ___ Wn.2d ___, 508 P.3d 645 (April 28, 2022) – April 22:13

Eyewitness identification Due Process analysis: Washington Supreme Court declares that in applying the U.S. Supreme Court's two-part test for admissibility of eyewitness testimony, Washington courts must consider widely accepted modern scientific evidence

in assessing both the Part I question (Were the law enforcement ID procedures impermissibly suggestive?) and the Part II question (If the answer to the part I question is “yes,” is the in-court identification testimony nonetheless reliable under all relevant circumstances?) State v. Derri, ___ Wn.2d ___, 2022 WL ___ (June 23, 2022) – June 22:18
Note: On September 9, 2022, the Washington Supreme Court revised on element of the Derri Opinion; see below in this section.

Where multiple eyewitnesses died during the 12-year period between (1) the state’s development of probable cause to charge the defendant and (2) filing of the charge, Division One of the Court of Appeals overturns, with prejudice against retrial, defendant’s first degree felony murder conviction; the ruling is based on the totality of the facts and on a rationale of constitutional Due Process protection against unreasonable and prejudicial pre-accusatorial delay. State v. Stearns, ___ Wn. App. 2d ___, 2022 WL ___ (Div. I, September 19, 2022) – September 22:06

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) – October 22:09

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

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 statute, 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 Privacy Act’s prohibition against unconsented recording because the mother was conveying a “threat.” State v. LaValle, ___ Wn. App. 2d ___, 2022 WL ___ (Div. I, October 10, 2022) – October 22:13

ENTRAPMENT (RCW 9A.16.070)

In case involving online child-sex-crime sting, defendant wins by a 7-2 vote of the Washington Supreme Court his argument regarding the right to a jury instruction on the statutory affirmative defense of entrapment. State v. Arbogast, ___ Wn.2d ___, 506 P.3d 1238 (March 31, 2022) – March 22:13

EVIDENCE RULES, EVIDENCE LAW

In sex crime case, Washington Supreme Court rejects “lustful disposition” label for justifying admitting prior-bad-acts evidence, but the Court determines under the facts of this case that the defendant’s prior acts of sexual assault were lawfully admitted by the trial court based on evidence rule 404(b). State v. Crossguns, 199 Wn.2d 282 (March 10, 2022) – March 22:15

Hearsay from assault victim to medical providers held admissible in criminal prosecution under both (1) Sixth Amendment right-to-confrontation analysis, and (2) evidence rule

hearsay exception for statements made for diagnosis or treatment. U.S. v. Latu, ___ F.4th ___, 2022 WL ___ (9th Cir., August 31, 2022) – August 22:09

EXCLUSIONARY RULE

See the “Exclusionary Rule” subtopic under Searches below.

EXTRATERRITORIAL AUTHORITY OF LAW ENFORCEMENT FROM OTHER STATES

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 appellate court’s Opinion address additional issues relating to probable cause, as well as particularity and breadth of the search warrant. State v. Chambers, ___ Wn. App. 2d ___, 2022 WL ___ (Div. III, October 4, 2022) – October 22:09

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

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. State v. Palmer, ___ Wn. App. 2d ___, 2022 WL ___ (Div. II, October 11, 2022) – October 22:14

In criminal prosecution, defendant loses on his theory under Garrity v. New Jersey that his statements to government investigators were coerced and therefore should be suppressed; he cannot meet the dual requirements for subjective belief and objective reasonableness necessary to support suppression under a Garrity-based claim of coercion. United States v. Wells, ___ F.4th ___, 2022 WL ___ (9th Cir., December 14, 2022) – December 22:08

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

Gun-owner plaintiffs win on grounds of statutory preemption (RCW 9.41.290) their challenge to a City of Edmonds ordinance that makes it an infraction to store unlocked any firearm and to allow access to such a firearm by others not permitted by law to possess a firearm. Bass v. City of Edmonds, ___ Wn.2d ___, 2022 WL ___ (April 21, 2022). Bass v. City of Edmonds, ___ Wn.2d ___, 2022 WL ___ (April 21, 2022) – April 22:11

Second amendment precludes application of New York’s “have and carry” licensing statute to require a showing of “proper cause” by any person who wishes to possess a handgun outside of the home. New York State Rifle & Pistol Association v. Bruen, 142 S.Ct. 2111 (June 23, 2022) – June 22:04

U.S. Supreme Court sends two cases back to the Ninth Circuit for reconsideration in light of the Supreme Court’s interpretation of the Second Amendment in New York State Rifle & Pistol Association v. Bruen – July 22:03

Probable cause to arrest regarding RCW 9.41.270: Where a law enforcement officer was responding to two calls to dispatch reporting alarm over suspect’s display of a pistol, but neither reporting party indicated either (1) a threatening display or (2) concealment of the pistol on the suspect’s person, a Ninth Circuit panel votes 2-1 to affirm the federal

district court's ruling that under Washington state law, the officer did not have probable cause to believe that the defendant had displayed a pistol in a manner that "warranted alarm for the safety of persons" present at the time of the display. United States v. Willy, 40 F.4th 1074 (9th Cir., July 26, 2022) – July 22:03

Court of Appeals panel declares to have been unconstitutional the pre-2021 Washington statute addressing surrender of firearms for some defendants who were subject to protection orders; 2021 amendments to the statutory scheme probably cured the constitutional problems. State v. Flannery, ___ Wn. App. 2d ___, 2022 WL ___ (Div. II, November 22, 2022) – November 22:04

FIRST AMENDMENT FREEDOM OF SPEECH

3-judge panel rules that case must go to trial on prisoner's claims that prison officials violated his constitutional free speech rights and constitutional and statutory religious freedom rights in confiscating some of his mail. Jones v. Slade, 23 F.4th 1124 (9th Cir., January 24, 2022) – January 22:09

FIRST AMENDMENT RELIGIOUS FREEDOM

3-judge panel rules that case must go to trial on prisoner's claims that prison officials violated his constitutional free speech rights and constitutional and statutory religious freedom rights in confiscating some of his mail. Jones v. Slade, 23 F.4th 1124 (9th Cir., January 24, 2022) – January 22:09

Muslim prison inmate was lawfully denied a request to be housed with other religious Muslims so that non-Muslim prisoners would not harass him as he prays; it would be discriminatory to grant such a request. Al Saud v. Days, 36 F.4th 949 (9th Cir., June 8, 2022) – June 22:10

FORFEITURE UNDER CONTROLLED SUBSTANCES STATUTE (RCW 69.50.505)

Property owner loses constitutional Due Process challenges to real property forfeiture under Washington drug laws (RCW 69.50.505) of premises used for illegal marijuana grow operation. Pastor v. Real Property Commonly described As 713 SW 353rd Place, Federal Way, ___ Wn. App. 2d ___, 2022 WL ___ (Div. I, March 21, 2022) – March 22:18

HARMING A POLICE DOG (RCW 9A.76.00)

For purposes of the harming-a-police dog statute, RCW 9A.76.200(1), "maliciously" means "an evil intent, wish, or design to vex, annoy, or injure" a police dog. State v. Moose, ___ Wn. App. 2d ___, 2022 WL ___ (Div. III, November 22, 2022) – November 22:02

[HUMAN] TRAFFICKING (RCW 9A.40.100)

Evidence is held to be sufficient to support convictions for first degree human trafficking (RCW 9A.40.100(1)) and first degree promoting prostitution (RCW 9A.88.070). State v. Braun, ___ Wn. App. 2d ___, 2022 WL ___ (Div. III, January 20, 2022) – January 22:11

INDIAN (NATIVE AMERICAN) LAW

In a 5-4 ruling, the U.S. Supreme Court concludes that states have broad concurrent power to prosecute crimes on reservations committed by non-Indians against Indians. Oklahoma v. Castro-Huerta, 142 S.Ct. 2486 WL 2334307 (June 29, 2022) – June 22:07

Cowlitz tribe members have no off-reservation aboriginal rights or civil rights law right to fish. State v. Simmons, ___ Wn. App. 2d ___, 2022 WL ___ (Div. II, August 16, 2022) – August 22:11

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

The mere failure in a custodial interrogation to give Miranda warnings does not provide grounds for a Fifth Amendment-based Civil Rights Act lawsuit, even where the un-Mirandized statement was introduced at an earlier criminal trial, and the jury acquitted in that criminal trial. Vega v. Tekoh, 142 S.Ct. 2095 (June 23, 2022) – June 22:05

Suspect in custodial interrogation is held to have unequivocally selectively asserted his right to silence under Miranda. Michaels v. Ron Davis, ___ F.4th ___, 2022 WL ___ (9th Cir., October 18, 2022) – October 22:05

LEGISLATION

2022 Washington legislative summaries from the Washington Association of Sheriffs and Police Chiefs. – May 22:03

2022 Washington legislative summaries from the Washington Administrative Office of the Courts. – May 22:03

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

First degree felony murder: Evidence is held sufficient to support jury verdict that victim was killed “in the furtherance of” a kidnapping. State v. Meza, ___ Wn. App.2d ___, 2022 WL ___ (Div. I, June 27, 2022) – June 22:20

PRIVACY ACT (Chapter 9.73 RCW)

See “Electronic Surveillance and Recording” topic above

PROMOTING PROSTITUTION (Chapter 9A.88 RCW)

Evidence is held to be sufficient to support convictions for first degree human trafficking (RCW 9A.40.100(1)) and first degree promoting prostitution (RCW 9A.88.070). State v. Braun, ___ Wn. App. 2d ___, 2022 WL ___ (Div. III, January 20, 2022) – January 22:11

RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT (RLUIPA)

3-judge panel rules that case must go to trial on prisoner’s claims that prison officials violated his constitutional free speech rights and constitutional and statutory religious

freedom rights in confiscating some of his mail. Jones v. Slade, 23 F.4th 1123 (9th Cir., January 24, 2022) – January 22:09

3-judge panel rules that case must go to trial on prisoner’s claim that prison officials violated his statutory religious freedom rights in relation to his belief that he must use scented oil for his prayers. Johnson v. Baker, 23 F.4th 1209 (9th Cir., January 26, 2022) – January 22:10

Muslim prison inmate was lawfully denied a request to be housed with other religious Muslims so that non-Muslim prisoners would not harass him as he prays; it would be discriminatory to grant such a request. Al Saud v. Days, 36 F.4th 949 (9th Cir., June 8, 2022) – June 22:10

RESEARCH TOOLS/SOURCES

Announcement: Research materials by John Wasberg have been updated through July 1, 2022, and are available on the Criminal Justice Training Commission’s Internet LED page under “Special Topics” – July 22:02

RESTITUTION

Restitution amount in assault case properly included compensating the victim for paid vacation and sick leave that she needed to use due to her injuries in the assault. State v. Long, ___ Wn. App. 2d ___, 2022 WL ___ (Div. I, March 7, 2022) – March 22:17

ROBBERY (Chapter 9A.56 RCW)

Shoplifter who turned himself into a robber when he used force to escape from store security is not allowed to argue for a diminished robbery sentence based on the allegedly minimal amount of force that he used to get away; the definition of “robbery” in the robbery statute expressly states that the degree of force used is immaterial. State v. Thomason, ___ Wn.2d ___, 2022 WL ___ (July 7, 2022) – July 22:07

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

Abandoned personal property as not protected under the constitutional privacy protections

In appeals from convictions for sexual crimes against children, a Ninth Circuit panel rejects defendants’ challenges to government searches – including a ruling that videos that defendants had hidden in an attic crawlspace of a home that they subsequently sold were “abandoned” under the Fourth Amendment, even though the defendants gave up on trying to recover the videos from the sold home only because they feared detection by law enforcement if they tried for such retrieval. United States v. Fisher, ___ F.4th ___, 2022 WL ___ (9th Cir., December 21, 2022) – December 22:09

Exclusionary Rule

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). U.S. v. Saelee, ___ F.4th ___, 2022 WL ___ (9th Cir., October 11, 2022) – October 22:03

Plain View (Sometimes confused with “Open View” by Washington appellate courts)

Fourth Amendment “open view” (or is it “plain view”?) doctrine’s “immediately apparent” requirement: Probable cause that item being pushed down the street on a dolly was stolen property did not justify officer in removing a blanket from the item to confirm the officer’s suspicion because the identity of the object under the blanket was ambiguous. State v. Elwell, 199 Wn.2d 256 (March 3, 2022) – March 22:11

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

In criminal case, a child pornography and child exploitation defendant loses his Fourth Amendment argument that the conduct of Facebook and Yahoo in searching his accounts are actions on behalf of the federal government in light of federal statutes. U.S. v. Rosenow, 33 F.4th 529 (9th Cir., April 27, 2022) – April 22:09

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. Demarest v. City of Vallejo, ___ F.4th ___, 2022 WL ___ (9th Cir., August 16, 2020) – August 22:08

In appeals from convictions for sexual crimes against children, a Ninth Circuit panel rejects defendants’ challenges to government searches – including a ruling that videos that defendants had hidden in an attic crawlspace of a home that they subsequently sold were “abandoned” under the Fourth Amendment, even though the defendants gave up on trying to recover the videos from the sold home only because they feared detection by law enforcement if they tried for such retrieval. United States v. Fisher, ___ F.4th ___, 2022 WL ___ (9th Cir., December 21, 2022) – December 22:09

Private searches

In criminal case, a child pornography and child exploitation defendant loses his Fourth Amendment argument that the conduct of Facebook and Yahoo in searching his accounts are actions on behalf of the federal government in light of federal statutes. U.S. v. Rosenow, 33 F.4th 529 (9th Cir., March 27, 2022) – April 22:09

Private search doctrine/Private search exception of Fourth Amendment

In a federal prosecution for possessing child pornography, under the Fourth Amendment’s doctrine regarding searches by private persons, a detective did not need a warrant to support his viewing of images that defendant’s ex-fiancée had already viewed on defendant’s laptop; note, however, that under the 2008 interpretation of the Washington constitution in State v. Eisfeldt, such warrantless viewing would be held unlawful in a Washington prosecution. U.S. v. Phillips, ___ F.4th ___, 2022 WL ___ (9th Cir., April 29, 2022) – April 22:10

“Private search exception” to the Fourth Amendment is applied in a case where disgruntled employees of an electrical contractor acted on their own to provide a government enforcement agency with cell site location information (CSLI) regarding the location of the employer’s vehicles; “third party search exception” of the Fourth Amendment is declared inapplicable on the facts of this case. The Legal Update entry includes notes regarding Washington appellate court rulings on “private search exception” and “third party search exception.” Kleiser and Mr. Electric of Clark County v. Department of Labor & Industries, ___ F.4th ___, 2022 WL ___ (9th Cir., December 9, 2022) – December 22:04

Probable cause to search

Search warrant affidavit established nexus to cybercrime defendant’s home where the affidavit set forth factual allegations showing that digital devices were used to commit his fraud scheme, and the affidavit (a) explained that “many people generally keep their cell phones and other digital devices . . . in their home” and (b) provided extensive evidence that defendant did so in this case; defendant’s staleness attack on the affidavit’s probable cause is also rejected. U.S. v. Kvashuk, 29 F.4th 1077 (9th Cir., March 28, 2022) – March 22:07

2021 Blake decision invalidating Washington’s former statute that prohibited simple possession of controlled substances did not retroactively invalidate a 2017 warrant to search for controlled substances in support of an investigation for possession of controlled substances. State v. Moses, ___ Wn. App.2d ___, 2022 WL ___ (Div. II, June 27, 2022) – June 22:19

Third party search exception/Third party search doctrine

“Private search exception” to the Fourth Amendment is applied in a case where disgruntled employees of an electrical contractor acted on their own to provide a government enforcement agency with cell site location information (CSLI) regarding the location of the employer’s vehicles; “third party search exception” of the Fourth Amendment is declared inapplicable on the facts of this case. The Legal Update entry includes notes regarding Washington appellate court rulings on “private search exception” and “third party search exception.” Kleiser and Mr. Electric of Clark County v. Department of Labor & Industries, ___ F.4th ___, 2022 WL ___ (9th Cir., December 9, 2022) – December 22:04

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

Second Amendment precludes application of New York’s “have and carry” licensing statute to require a showing of “proper cause” by any person who wishes to possess a handgun outside of the home. New York State Rifle & Pistol Association v. Bruen, 142 S.Ct. 1211 (June 23, 2022) – June 22:04

U.S. Supreme Court sends two cases back to the Ninth Circuit for reconsideration in light of the Supreme Court’s interpretation of the Second Amendment in New York State Rifle & Pistol Association v. Bruen – July 22:03

SENTENCING

Two holdings: (1) Animal abuse can constitute a crime of domestic violence; (2) Under the facts of this case, where a bystander witnessed acts of animal abuse, a jury could find that the crime had a destructive and foreseeable impact on persons other than the victim. State v. Abdi-Issa, ___ Wn.2d ___, 504 P.3d 223 (February 17, 2022) – February 22:02

Restitution amount in assault case properly included compensating the victim for paid vacation and sick leave that she needed to use due to her injuries in the assault. State v. Long, ___ Wn. App. 2d ___, 2022 WL ___ (Div. I, March 7, 2022) – March 22:17

Shoplifter who turned himself into a robber when he used force to escape from store security is not allowed to argue for a diminished robbery sentence based on the allegedly minimal amount of force that he used to get away; the definition of “robbery” in the robbery statute expressly states that the degree of force used is immaterial. State v. Thomason, ___ Wn.2d ___, 2022 WL ___ (July 7, 2022) – July 22:07

SIXTH AMENDMENT RIGHT TO CONFRONTATION

Defendant’s Sixth Amendment right to confrontation was not violated by allowing two out-of-state witnesses to testify by video based on health concerns regarding exposure to covid-19 in air travel. State v. Milko, 21 Wn. App. 2d 279 (Div. II, March 15, 2022) – March 22:17

Defendant’s Sixth Amendment Right to Confrontation was not violated by trial court allowing immunocompromised mother and her child to testify by video based on health concerns regarding exposure to Covid-19. State v. D.K., ___ Wn. App. 2d ___, 2022 WL ___ (Div. I, April 6, 2022) (March 14, 2022 unpublished Opinion ordered published) – April 22:17

Sixth Amendment right to confrontation: Out-of-court statements by defendant’s brothers are held not to be “testimonial,” and therefore admission of the statements at trial did not violate the confrontation clause. State v. Ta’afulisia, ___ Wn. App. 2d ___, 2022 WL ___ (Div. I, May 9, 2022) – May 22:07

Hearsay from assault victim to medical providers held admissible in criminal prosecution under both (1) Sixth Amendment right-to-confrontation analysis, and (2) evidence rule hearsay exception for statements made for diagnosis or treatment. U.S. v. Latu, ___ F.4th ___, 2022 WL ___ (9th Cir., August 31, 2022) – August 22:09

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. State v. Wiggins, ___ Wn. App. 2d ___, 2022 WL ___ (Div. I, August 29, 2022) – August 22:11

SIXTH AMENDMENT RIGHT TO JURY TRIAL

Rule against police testimony that defendant has lied was not violated by trial court judge’s admission of recording and transcription of police interrogation in which detective asked defendant if child witness in sex crime case was lying about certain matters; the evidence was admitted for the permissible purpose of providing context for the interrogation and for understanding that defendant made contradictory statements during

the interrogation. State v. Putnam, ___ Wn. App. 2d ___ (Div. I, February 22, 2022) – February 22:03

SOLICITATION (RCW 9.28.030)

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 statute, 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 Privacy Act’s prohibition against unconsented recording because the mother was conveying a “threat.” State v. LaValle, ___ Wn. App. 2d ___ , 2022 WL ___ (Div. I, October 10, 2022) – October 22:13

TRAFFIC

DUI: Washington Supreme Court is unanimous in holding constitutional the per se THC DUI prong at RCW 46.61.502, which criminalizes driving with a THC blood level of 9.4 +/- 2.5 ng/ml within two hours of driving; also, the Supreme Court declares that the word “marijuana” is now disfavored. State v. Fraser, ___ Wn.2d ___ , 2022 WL ___(May 12, 2022) – May 22:06

DUI defendant is unsuccessful in his claim to the arresting officer, to the trial court, and to the Court of Appeals that he became intoxicated by drinking after driving into a river because driving into the river made him upset. State v. Gregory, ___ Wn. App. 2d ___ , 2022 WL ___ (Div. III, December 22, 2022) – December 22:12

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

Property owner loses constitutional Due Process challenges to real property forfeiture under Washington drug laws (RCW 69.50.505) of premises used for illegal marijuana grow operation. Pastor v. Real Property Commonly described As 713 SW 353rd Place, Federal Way, ___ Wn. App. 2d ___ , 2022 WL ___ (Div. I, March 21, 2022) – March 22:18

2021 **Blake** decision invalidating Washington’s former statute that prohibited simple possession of controlled substances did not retroactively invalidate a 2017 warrant to search for controlled substances in support of an investigation for possession of controlled substances. State v. Moses, ___ Wn. App.2d ___ , 2022 WL ___ (Div. II, June 27, 2022) – June 22:19

Constructive possession evidence held sufficient to support possession element of conviction for possession of controlled substances with intent to deliver; however, on an unrelated issue, i.e., the prosecutor’s references to a “Mexican ounce” in argument to the jury, are held to require re-trial of defendant. State v. Ibarra-Erives, ___ Wn. App. 2d ___ , 2022 WL ___ (Div. I, September 19, 2022) – September 22:03

UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS

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

LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

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

In May of 2011, John Wasberg retired from the Washington State Attorney General’s Office. For over 32 years immediately prior to that retirement date, as an Assistant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011) of the Criminal Justice Training Commission’s Law Enforcement Digest. From the time of his retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the production of the LED. That arrangement ended in the late fall of 2014 due to variety of concerns, budget constraints and friendly differences regarding the approach of the LED going forward. Among other things, Mr. Wasberg prefers (1) a more expansive treatment of the core-area (e.g., arrest, search and seizure) law enforcement decisions with more cross references to other sources and past precedents regarding these core-area cases; and (2) a broader scope of coverage in terms of the types of cases that may be of interest to law enforcement in Washington (though public disclosure decisions generally are unlikely to be addressed in depth in the Legal Update). For these reasons, starting with the January 2015 Legal Update, Mr. Wasberg has been presenting a monthly case law update for published decisions from Washington’s appellate courts, from the Ninth Circuit of the United States Court of Appeals, and from the United States Supreme Court. Since January 2018, he has also been providing some information every month about certain categories of unpublished Washington Court of Appeals decisions. No information about the specifics of those decisions is provided in this 2020 subject matter index.

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

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>]. The Criminal Justice Training Commission (CJTC) [Law Enforcement Digest Online Training](#) can be found on the internet at [cjtc.wa.gov/resources/law-enforcement-digest].