LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

JUNE 2023

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2023 WASHINGTON LEGISLATIVE SUMMARIES FROM THE WASHINGTON ADMINISTRATIVE OFFICE OF THE COURTS

The Washington Administrative Office of the Courts has issued legislative summaries for many of the enactments of the 2023 Washington State Legislature. The summaries are accessible on the Internet on the "Resources" page of the Washington Courts website. Or go to the following Internet address:

https://www.courts.wa.gov/newsinfo/content/pdf/2023%20Legislative%20Summary.pdf

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UNITED STATES SUPREME COURT

"TRUE THREATS" & CRIMINAL PROSECUTIONS THAT IMPLICATE THE FIRST AMENDMENT FREE SPEECH CLAUSE: 7-2 MAJORITY RULES THAT THE TEST IS SUBJECTIVE, NOT OBJECTIVE, AND THAT IN PROSECUTIONS FOR THREATS, THE MENTAL STATE OF "RECKLESSNESS" (OR A GREATER CULPABILITY OF MENTAL STATE) MUST BE MET

In Counterman v. Colorado, ___ S.Ct. ___ , 2023 WL ___ (June 27, 2023), the United States Supreme Court rules that the First Amendment free speech test for "true threats" in a criminal prosecution is not an objective test, but instead that the test requires proof of a mental state of recklessness or a greater culpability in terms of the defendant's understanding of the threatening nature of his statements.

The Counterman Majority Opinion concludes that the Colorado state courts incorrectly applied a purely objective standard (a reasonable person standard) to determine that Counterman's statements could be viewed as "true threats." Thus, the Colorado state courts are determined by the U.S. Supreme Court to have erred in not allowing defendant to argue his innocence based on his allegedly subjective belief that his statements would not be viewed as threats.

The Majority Opinion in Counterman asserts that in the threats context, this standard means that a speaker (1) is aware that others could regard his statements as threatening violence and (2) delivers the statements anyway. Thus, the prosecution must prove that the defendant had some subjective understanding of the threatening nature of his or her statements, at least consciously disregarding a substantial risk that the statements would be viewed as threatening violence.

Result: Reversal of Colorado state appellate court ruling that affirmed the trial court conviction of defendant, based on his many Facebook messages directed to a particular addressee. He had been convicted of violating a Colorado statute making it unlawful to "[r]epeatedly . . . make[] any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress."

LEGAL UPDATE EDITOR'S NOTE: The Washington Supreme Court asserted in State v. Kilburn, 151 Wn.2d 36 (2004) and State v. Trey M, 180 Wn.2d 884 (2016) that the test for "true threats" is an objective test. It would appear that the Counterman decision by the U.S. Supreme Court will need to be taken into account by Washington law enforcement

officers and prosecutors. As always, I suggest that officers check with their local prosecutors and/or agency legal advisors for guidance on issues addressed in the Legal Update.

CO-DEFENDANT CONFESSIONS AND THE SIXTH AMENDMENT RIGHT TO CONFRONT ADVERSE WITNESSES: 6-3 MAJORITY CLARIFIES THE RULE UNDER BRUTON IN A PRO-PROSECUTION HOLDING

In Samia v. United States, ___ S.Ct. ___ , 2023 WL 4139001 (June 23, 2023), a 6-3 majority of the Supreme Court rules in favor of the government in a criminal case on an issue under the U.S. Constitution's Sixth Amendment right to confrontation. The Majority Opinion holds that the trial court lawfully allowed the prosecutor to present a non-testifying co-defendant's confession through testimony of a law enforcement officer where the jury was instructed not to consider the evidence against the other defendant, and where certain other circumstances were present.

Over 50 years ago, in Bruton v. United States, 391 U.S. 123 (1968), the United States Supreme Court identified a circumstance where jury instructions were not sufficient: to protect a defendant's Sixth Amendment right to confront adverse witnesses. In Bruton, the prosecutor sought to present evidence of a non-testifying defendant's confession to police where the confession also incriminated a codefendant. Under the circumstances of that case, the Bruton Court ruled that "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." The Bruton Court therefore held that the introduction in a joint robbery trial of co-defendant William Evans' confession, indicating that Evans had "committed the robbery with Bruton," violated George Bruton's rights even though the judge instructed the jury to consider the confession only against Evans and not against Bruton.

In the Samia case, the U.S. Supreme Court Majority Opinion explains that the rule of Bruton is relatively narrow. Admitting the co-defendant's out-of-court confession in a joint trial did not violate the Confrontation Clause where the evidence regarding that confession: (1) was not redacted in an obvious way (the officer, with the trial court's permission, replaced the defendant's name with, "somebody else," and "the other person"); 2) did not directly implicate the non-confessing defendant; and 3) was coupled with a limiting instruction that told the jury to consider the confession only against the confessing co-defendant.

Result: Affirmance of ruling of Second Circuit of the U.S. Court of Appeals, which had affirmed the U.S. District Court conviction of defendant for the federal crimes of (A) conspiracy to commit murder-for-hire; (B) murder-for-hire; (C) conspiracy to murder and kidnap in a foreign country; (D) causing death with a firearm during and in relation to a crime of violence; and (E) conspiracy to launder money.

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: A 2-1 MAJORITY OF A THREE-JUDGE PANEL GRANTS QUALIFIED IMMUNITY TO OFFICERS BASED SOLELY ON THE ABSENCE OF CONTROLLING CASE LAW IN CASE WHERE THE MAJORITY OPINION ACKNOWLEDGES THAT THE OFFICERS UNLAWFULLY ARRESTED PLAINTIFF FOR OBSTRUCTING BASED ON NON-COOPERATION WITH THE OFFICERS'

REQUESTS; THE LEGAL UPDATE EDITOR'S COMMENT/VIEW IS THAT THE DISSENTING OPINION APPEARS TO HAVE THE MORE COMPELLING ANALYSIS

In Hill v. City of Fountain Valley, ____ F.4th ___ , 2023 WL ___ (9th Cir., June 1, 2023), a three-judge Ninth Circuit panel rules in a 2-1 vote that the U.S. District Court correctly granted qualified immunity to officers of the City of Fountain Valley (California) Police Department in a section 1983 Civil Rights Act lawsuit that arose from warrantless arrests and use of force in making arrests at a residence.

The difference of views between the Majority Opinion and the Dissenting Opinion are: (A) whether the Majority Opinion draws all inferences in favor the Plaintiffs, which is required where the government is seeking, based on qualified immunity, dismissal of a section 1983 claim without going to trial; and (B) whether Fourth Amendment case law is well-established for qualified immunity purposes such that reasonably informed officers would know that they may not make an arrest for obstructing where a person is merely refusing to cooperate with a request or demand of officers for access to the home to look for a possible suspect based on less than probable cause and less than reasonably supported exigent circumstances.

A Ninth Circuit staff summary (which is not part of the Ninth Circuit Majority Opinion or Dissenting Opinion) provides the following summary of the conflicting Opinions of the Ninth Circuit panel:

[*Staff summary of the facts*]

> Police responded to a 911 call that a Ford Mustang was darting erratically in the streets. Behind the wheel [according to the 911 caller] was a young white male, along with a blindfolded female in the car.
>
> With the aid of the car's license plate number provided by the caller, police officers figured out the home address of the driver. In reality [but unknown to the police at all times relevant to this case], the driver, Benjamin Hill, was taking his wife for a "surprise" anniversary dinner.
>
> When officers arrived at the home that Benjamin shared with his parents and before the mix-up could be cleared, the officers ordered Benjamin's parents, Stephen and Teresa, and brother, Brett [who officers thought might be their suspect, Benjamin], out of their home for obstructing the police and pushed Stephen to the ground as they handcuffed him.

[*Staff summary of the ruling and analysis in the lengthy Majority Opinion, which is not otherwise summarized or excerpted in this Legal Update entry*]

> The [Majority Opinion] rejected plaintiffs' contention that the police officers violated their Fourth Amendment rights against unreasonable seizure when the officers ordered them to exit the home or face arrest for obstruction. The officers never seized Brett or Teresa, who did not submit to the officers' demand to leave the home. [Brett and Teresa] therefore could not claim that they were unlawfully arrested.
>
> The [Majority Opinion] next held that while the officers did not have probable cause to arrest Stephen for obstruction of justice, they were nevertheless shielded by qualified immunity. The [Majority Opinion] noted that although it is well established under

> California law that even outright refusal to cooperate with police officers cannot create adequate grounds for police intrusion without more, here there was no clearly established law that the officers could not arrest Stephen, given his evasive behavior that appeared to interfere with an urgent investigation into a potential kidnapping.
>
> The [Majority Opinion next] held that Stephen's excessive force claim failed because he suffered only a minor injury when pushed to the grassy lawn during a tense encounter. Finally, [the Majority Opinion held that] Stephen's First Amendment retaliation claim did not pass muster because he presented no evidence that the officers arrested him because of his mild questioning of the officers.

[*Staff summary of the views set out in the lengthy Dissenting Opinion*]

> Concurring in part and dissenting in part, Judge Tashima agreed with the majority's decision to affirm the dismissal of the excessive force and First Amendment retaliation claims.
>
> Judge Tashima would reverse the dismissal of Stephen's unlawful seizure claim because [in his view] clearly established precedent prohibited the officers from making the warrantless arrest at Stephen's home, when they did not have probable cause, there were no exigent circumstances, and it was clearly established, among other things, that at the time "even an outright refusal to cooperate with police officers" did not justify a warrantless arrest for a violation of California Penal Code § 148.

[Bracketed language added by Legal Update editor; some paragraphing revised for readability]

The Majority Opinion describes the underlying facts of the case as follows:

> On the night of April 30, 2019, a comedy of errors cascaded into an ordeal for the Hill family. That night, Benjamin decided to take his wife for a "surprise" anniversary dinner. As he drove her to the restaurant, someone called 911 to report a "dark grey Ford Mustang" being driven "erratically" by a black-haired white male between the age of twenty-five and thirty. The caller also ominously noted a blindfolded female passenger.
>
> Based on the license plate number provided by the 911 caller, Fountain Valley police officers learned that the car belonged to Benjamin and obtained his home address. Officers Stuart Chase and Gannon Kelly then drove to Benjamin's home to "check the well-being" of the passenger.
>
> Shortly after the officers arrived at the residence, Teresa – Benjamin's mother – pulled into the driveway. The officers asked her whether Benjamin lived there and drove a grey Mustang. Teresa answered yes to both questions and told them that Benjamin was not home. But when the officers asked for Benjamin's phone number, she balked. She later admitted that she stopped cooperating with the police because she wanted to warn her son about the officers before they had a chance to call him.
>
> While the officers talked to Teresa, Stephen – Benjamin's father – exited the home to help bring their grandchildren into the house. The officers told the couple that they were investigating a report of erratic driving, once again asking for Benjamin's phone number. Then Teresa went inside with one of her granddaughters and tried to reach Benjamin.

> Skeptical that the officers were only investigating erratic driving, Stephen demanded that the officers tell him "what was really going on." The officers told him that they wanted to talk to Benjamin, citing the report of a blindfolded female passenger in his car. Stephen responded that Benjamin was out with his wife and offered to pass along the officers' business cards. The officers told Stephen to take his other granddaughter inside and to return with Benjamin's phone number.
>
> While waiting outside, the officers noticed someone moving inside the house by the bedroom window. Officer Chase then walked across the lawn to investigate further and saw a young male who matched Benjamin's description. Believing this person to be Benjamin, Officer Chase told him to exit the house.
>
> But the young male walked into a hallway, out of sight. Then Stephen entered the bedroom. Officer Chase asked Stephen, "Who's the other person here?" Not hearing the question, Stephen closed the curtains, hoping to keep the officers' flashlights from disturbing his granddaughter.
>
> The officers would later learn that the young man inside the house was not Benjamin but his brother, Brett. But at the time, the officers suspected that Benjamin's parents were hiding him from law enforcement. Through a window on the front door, the officers saw Teresa, Stephen, and an unidentified male they suspected to be Benjamin.
>
> The officers checked to see if the door was locked. At this point, they told the unidentified male to exit the house. The officers then threatened to arrest all of them for obstruction if they did not leave the house, according to the Hills. The officers, however, dispute that they threatened to arrest Teresa.
>
> Stephen stepped outside while Brett and Teresa remained inside. Stephen closed the door behind him and told the officers they could not come in. The parties dispute what happened next: Officer Kelly claims that he placed his foot in the doorjamb and Stephen closed the door on his foot; Stephen, on the other hand, claims that he never closed the door on Officer Kelly's foot. In any event, the officers immediately grabbed Stephen, led him to the front lawn, and brought him to the ground.
>
> While being brought to the grassy ground, Stephen's glasses cut him on the forehead. He also alleged neck and back injuries because Officer Kelly held Stephen down by kneeling on him. Several seconds after the officers led Stephen away from the front door, Brett and Teresa left the house to check on Stephen.

[Some paragraphing revised for readability; footnote 1 omitted]

DISSENTING OPINION:

The Dissenting Opinion by Judge Tashima does not appear to question the factual description that is made in the Majority Opinion, and his Opinion indicates that those facts can be summed up as follows:

> This case is about a follow-up investigation of a citizen's report of seeing an erratically driven car on the freeway with a blindfolded female in the front passenger seat. There was no missing person report and no report that the woman appeared to be in distress – nothing more than this reported speculative observation. Thus, the purpose of the

> follow-up investigation was to determine whether probable cause existed that the crime of kidnapping was being committed. Admittedly, during the officers' investigation, there was no probable cause to believe that the crime of kidnapping had been or was being committed.

The lengthy Dissenting Opinion includes the following brief summary of the legal basis for the Dissenting Opinion's attack against the also-lengthy Majority Opinion as follows:

> The majority's conclusion that the officers are entitled to qualified immunity fails on five independent grounds. First, the majority concedes that there was no probable cause to arrest Stephen, and probable cause is a requirement for a warrantless entry into a home. . . . Second, the City has not met its "heavy burden" of showing specific, articulable facts justifying exigent circumstances. . . . Nor has the City shown that a warrant could not have been obtained in time. . . . Moreover, in concluding that the officers are entitled to qualified immunity, the majority turns our summary judgment standard on its head, construing the facts and drawing all inferences in favor of the officers. Finally, our clearly established law prohibited the officers from making a warrantless arrest in the circumstances here – inside a home where there was no reasonably trustworthy information establishing probable cause that a crime was being committed nor any specific, articulable facts establishing exigent circumstances. . . . .

[Case citations omitted]

Result: Affirmance of U.S. District Court (Central District of California) order granting summary judgment based on qualified immunity to law enforcement officers from the City of Fountain Valley Police Department.

LEGAL UPDATE EDITOR'S COMMENT: As I have noted in the headline for this Legal Update entry, my personal thinking is that the Dissenting Opinion has the more compelling analysis. The circumstances of this case seemed to call for a check-in by the officers at the scene with a superior to get guidance that presumably would have directed the officers not to force residents of the house to cooperate under threat of arrest. More information was needed by the officers at the scene to be lawfully authorized to take warrantless enforcement action at the Hill's home in follow-up to the conclusory uncorroborated report from a civilian driver who reported seeing a blind-folded woman passenger in a well-described car that was being driven erratically by a described male driver.

Both the Majority Opinion and Dissenting Opinion in this case are lengthy, but in my assessment, this case boils down to how individual judges view the legal standard for qualified immunity: Where the action by law enforcement is easily determined to be unconstitutional, how closely do the facts of a prior decision adverse to law enforcement need to fit with the facts of the case at hand for qualified immunity to be denied to other of law enforcement in a subsequent case? The three Ninth Circuit judges agree that case law in California establishes a broad rule that a person cannot be arrested for obstructing for merely refusing to cooperate with law enforcement requests in situations somewhat similar to this one. Case law in the State of Washington is the same, though, as with California case law, no case is closely on point to the particular facts of this case. Some prior Washington appellate court decisions on what constitutes obstructing are:

- **State v. E.J.J., 183 Wn.2d 610 (June 25, 2015) (First Amendment Free Speech protection is factored into review of an adjudication for obstructing, and a conviction for the crime of obstructing is held not supported for a male juvenile who yelled at officers from home's doorway as officers dealt with the male juvenile's intoxicated juvenile sister outside.)**

- **State v. D.E.D., 200 Wn. App. 484 (Div. III, September 19, 2017) (Juvenile's "passive" resistance to handcuffing during an investigatory stop is held to not be obstructing; the three appellate judges agree on the result but not on the reasoning; two of the three judges take the view that there is no duty to cooperate in an investigatory stop; the third judge takes the view that there is a duty to cooperate in an investigatory stop, but only if the officer has reasonable suspicion for the stop.)**

- **State v. Canfield, ___ Wn. App. 2d ___ , 463 P.3d 755 (Div. III, May 21, 2020) (Evidence is held to be sufficient to support an obstructing conviction where the subject of an arrest warrant hindered officers during the arrest process beyond mere passive resistance to arrest)**

- **State v. White, 97 Wn.2d 92 (1982) (a Terry stop detainee may not be arrested for violating the "obstructing" statute for merely refusing to identify himself or herself)**

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: 2-1 MAJORITY OF A THREE-JUDGE PANEL GRANTS QUALIFIED IMMUNITY TO OFFICERS BASED ON THE ABSENCE OF CONTROLLING CASE LAW IN CASE WHERE THE MAJORITY OPINION CHOOSES NOT TO ADDRESS WHETHER THE OFFICERS VIOLATED THE FOURTH AMENDMENT WHEN – SUSPECTING, BASED ON THEIR EXPERIENCE AND THEIR OBSERVATIONS, THAT A ROBBERY WAS ABOUT TO TAKE PLACE – THEY (A) POINTED A GUN AT PLAINTIFF, (B) FORCEFULLY EXTRACTED HIM FROM A CAR, AND (C) DID THESE THINGS WITHOUT FIRST IDENTIFYING THEMSELVES AS LAW ENFORCEMENT OFFICERS

In Hopson v. Alexander, ____ F.4th ___ , 2023 WL ___ (9th Cir., June 16, 2023), a 2-1 majority of a 3-judge Ninth Circuit panel reverses a U.S. District Court ruling that denied qualified immunity to two law enforcement officers. The Majority Opinion concludes that there is not clearly established case law closely on point factually with the facts of this case where the officers suspected (as in Terry v. Ohio) from their observations of the Plaintiff that Plaintiff was about to rob a gas station, and the officers pointed a gun at Plaintiff, forcefully extracted him from a car, and did these things without first identifying themselves as law enforcement officers. The Majority Opinion expressly declines to address whether the enforcement actions of the officers violated the Fourth Amendment, relying exclusively on the qualified immunity prong relating to whether case law was established under the facts of the case.

Hopson sued the law enforcement officers in federal court after he had prevailed as a criminal defendant in his Fourth Amendment-based suppression motion in Arizona state superior court proceedings. Thus, after the state court suppressed a gun and drugs that officers had seized in the above-referenced enforcement action in the gas station parking area, Hopson sued the law enforcement officers.

A Ninth Circuit staff summary (which is not part of the Ninth Circuit Opinion) provides the following synopsis of the Majority Opinion and Dissenting Opinion:

[*Staff Summary of the facts*]

> Believing that two men were about to engage in the armed robbery of a gas station, defendants approached the suspects' vehicle with guns pointed, forcibly removed the driver, plaintiff DeJuan Hopson, and handcuffed him.

[*Staff summary of the ruling and analysis in the lengthy Majority Opinion*]

> In holding that the officers were entitled to qualified immunity, the [Majority Opinion] first determined that it was not clearly established that the officers lacked an objectively reasonable belief that criminal activity was about to occur. Under the qualified immunity framework and given the suspicious Terry-like conduct observed here, no clearly established law gave the panel cause to second-guess Detective Alexander's on-the-ground suspicion that an armed robbery was about to occur.
>
> And an armed robbery necessarily involves the use of weapons. Clearly established law therefore did not prevent the officers from suspecting plaintiff might be armed – which, in fact, he was.
>
> The panel held that defendants did not violate clearly established law when they pointed their guns at plaintiff. Noting that [the Ninth Circuit's case law] makes clear that pointing a gun at a suspect is not categorically out of bounds [in all circumstances], the [Majority Opinion] could find no authority [i.e., clearly established case law]] that placed the unconstitutionality of the detectives' conduct beyond debate in the circumstances they confronted.
>
> The panel next rejected plaintiff's contention that defendants violated clearly established law by using excessive force when removing him from the car and arresting him. No clearly established law prevented the detectives from acting quickly and with moderate force to ensure that plaintiff was detained without incident. Thus, no controlling authority [i.e., clearly established case law] clearly established beyond debate that the amount of force used during plaintiff's arrest was objectively unreasonable.
>
> Finally, the panel rejected plaintiff's argument that the detectives violated clearly established law in failing to identify themselves as law enforcement officers. Under the circumstances of this case, precedent did not clearly establish that the detectives' alleged failure to identify themselves as police officers made their use of force excessive.

[*Staff summary of the views expressed in the lengthy Dissenting Opinion's views*]

> Dissenting, Judge Rawlinson stated that under the facts of this case, viewed in the light most favorable to plaintiff, the officers violated clearly established law when they forcefully yanked plaintiff from his vehicle at gunpoint without warning and forcefully handcuffed him, when [in the interpretation of the record by Judge Rawlinson, Hopson] was merely conversing with a passenger in the vehicle and posed no immediate threat to the officers or to the public.

> Because the officers who used this gratuitous and violent excessive force [in the view of Judge Rawlinson] against plaintiff were not entitled to qualified immunity, Judge Rawlinson would affirm the district court's judgment.

[Bracketed language added by Legal Update editor; some paragraphing revised for readability]

Result: Reversal of U.S. District Court (Arizona) ruling that denied qualified immunity to the law enforcement officers.

FOURTH AMENDMENT REASONABLENESS STANDARD FOR SEARCH OF CALIFORNIA PAROLEE'S VEHICLE IS HELD TO HAVE BEEN MET WHERE OFFICERS HAD PROBABLE CAUSE TO BELIEVE (1) THAT THE MAN WAS ON PAROLE AND (2) THAT THE MAN WAS VIOLATING HIS PAROLE BY WEARING AN OAKLAND ATHLETICS HAT THAT SIGNALED GANG MEMBERSHIP; WASHINGTON STATE LAW WOULD REQUIRE MORE JUSTIFICATION FOR A VEHICLE SEARCH IN THESE CIRCUMSTANCES, I.E., REASONABLE SUSPICION THAT THE VEHICLE CONTAINED EVIDENCE OF PARTICULAR CRIMINAL CONDUCT OR OF VIOLATION OF OTHER PARTICULAR CONDITIONS OF COMMUNITY CUSTODY

In United States v. Estrella, ___ F.4th ___ , 2023 WL ___ (9th Cir., June 6, 2023), a three-judge Ninth Circuit panel is unanimous in concluding that the U.S. District Court correctly ruled in denying defendant's motion to suppress a handgun that law enforcement officers found in his vehicle. The search was based on the fact that one of the officers (1) had probable cause to believe that Estrella was then in parole status and was violating his parole status – based on that police officer's (A) discussions about the parole circumstances with the parole officer and the parolee (Estrella), (B) knowledge that Estrella's parole had started just one year earlier and that parole in California usually extends at least three years, and (C) knowledge gained from Estrella's parole officer that Estrella had committed a parole violation, through with no action against Estrella on that) four months earlier.

The police officer also had probable cause to believe that the parolee was violating his parole by wearing a Oakland Athletics hat, which is gang clothing for the parolee's gang in the area.

Under California statutes and under Fourth Amendment case law, those circumstances supported a seizure of Estrella and a search of his vehicle. **[LEGAL UPDATE EDITOR'S NOTE: In a Legal Update editor's comment below, I discuss the additional requirement under Washington statutes and case law, which would require, if these circumstances were to arise in a jurisdiction in the State of Washington, for a nexus between the suspected violation and the search of the vehicle; such a nexus would not be satisfied under the facts of this case.]**

The defendant apparently has not disputed that his wearing of the Oakland Athletics hat was a violation of his parole and supported his arrest for a parole violation by the officer under California law (in the gang world, the "A's" on the hat represents the Angelino Heights Sureños Gang). But defendant argued that the officers – at the time of the search of his vehicle – did not have sufficient information to conclude that he was currently on parole. Thus, the point of contention in the case is whether the officers had sufficient information at the time of the vehicle search to conclude that Estrella was currently on parole.

The Estrella Opinion notes that Ninth Circuit precedents have held that as a threshold requirement, an officer must know of a detainee's parole status before that person can be detained and searched pursuant to a parole condition. But Ninth Circuit precedents have not, prior to this case, specifically addressed how precise that knowledge must be. The Estrella Opinion holds, after discussion of case law (not specifically addressed in this Legal Update entry), that "probable cause" is the standard for establishing such knowledge.

The Estrella Opinion describes as follows the relevant facts that cause the panel to conclude that the officers had probable cause to believe that defendant Estrella was in current parole status at the time of the contact, even though the officers were not aware Estrella's end-date of parole:

> Following his release from prison, Estrella relocated to Lakeport, California. On July 2, 2018, Estrella visited the Lakeport Police Department ("LPD") to register as a convicted gang member, as required by Cal. Penal Code § 186.30. The police department informed Officer Tyler Trouette ("Trouette"), LPD's gang specialist and a member of the Lake County Gang Task Force, that Estrella was on parole and was registered as a member of the Angelino Heights Sureños gang.
>
> [Here, in a footnote, the panel's Opinion provides some information about the Lake County Gang Task Force.]
>
> Trouette familiarized himself with Estrella's "criminal history and his previous gang-related convictions." However, the record is silent as to whether Trouette personally became aware of the date Estrella's parole was set to conclude.
>
> On July 3, 2018, one day after Estrella completed his gang registration, Trouette visited Estrella at his home. According to the Government, Trouette and Estrella discussed Estrella's parole conditions, and confirmed that he was prohibited from associating with a gang or wearing gang attire. In his declaration, cited by the district court, Trouette describes this conversation as follows:
>
> > I told Mr. Estrella that I had not yet reviewed his gang conditions, but I presumed that they included that he could not associate with other gang members or possess things that are associated with the gang. Mr. Estrella said that he knew all the rules. Later in the conversation, I told him that LPD had knowledge of the Angelino[] Heights Sure[ñ]os and that he would not get away with wearing Oakland Athletics' hats or other things like that. Based on my training and experience, I know Oakland Athletics' hats are commonly worn by members of the Angelino[] Heights Sure[ñ]os because, to members of the gang, the 'A' on the hat signifies 'Angelino.'
>
> Thereafter, between July 2018 and August 2019, Trouette "had several additional conversations with . . . Estrella's parole officer about . . . Estrella." Through these conversations, the parole officer informed Trouette of Estrella's "conditions of parole and gang terms." Additionally, in April 2019, the parole officer informed Trouette that Estrella "had violated his parole by committing a battery."
>
> > [Here, in a footnote, the Majority Opinion notes that the record does not suggest that any action was taken as a result of this alleged violation.]

> [The parole officer] did not indicate at that point that Estrella's parole was soon to expire.
>
> This appeal arises from an encounter between [Officer] Trouette and Estrella on August 14, 2019 **–** fourteen months after Trouette learned that Estrella had been placed on parole, and only four months after Trouette was informed that Estrella had violated his parole conditions.
>
> At the time [August 14, 2019], Trouette was the Field Training Officer for Officer Ryan Cooley ("Cooley"), a new officer enrolled in LPD's field training program. At about 8:00 p.m., Trouette and Cooley were driving westbound on Lakeport's Armstrong Street in a marked patrol car.
>
> As they passed Polk Street, Trouette saw Estrella standing outside his residence next to a white Honda Accord and decided "to check up on him and verify that he was abiding by the terms of his parole." However, he declined to inform Cooley of Estrella's parole conditions, as he wanted the trainee to "find the relevant information through his own investigation."

After lengthy analysis of Fourth Amendment case law and concepts related to the parolee-search issue, the Estrella panel's Opinion sums up as follows the panel's views (1) that probable cause as to a parole violation is the standard for justifying the search of the parolee's vehicle, and (2) that the standard was met under the totality of the circumstances of this case:

> Applying the foregoing principles, we hold that a law enforcement officer must have probable cause to believe that an individual is on active parole before conducting a suspicion-less search or seizure pursuant to a parole condition. Consistent with our case law, and with general Fourth Amendment principles, the officer must possess advance knowledge of an applicable parole condition before they may detain or search a parolee. . . . That knowledge must be particularized enough for the officer to be aware that a parole condition applies and authorizes the encounter. . . . However, the officer need not be absolutely certain, with ongoing day-by-day or minute-by-minute awareness of the subject's parole status. . . .
>
> > [At this point in the Opinion, the Estrella Court includes the following footnote explaining that staleness principles may come into the analysis in some cases: "*We further note that existing rules governing staleness of probable cause may be applied by analogy to determine exactly when it is unreasonable for an officer to proceed without updating their information* . . . .]
>
> Instead [of imposing a standard of certainty, we hold that] it is sufficient for the officer to find, using the well-established rules governing probable cause, that the individual to be searched is on active parole, and an applicable parole condition authorizes the search or seizure at issue.
>
> Applying this rubric, we hold that [Officer] Trouette had probable cause to believe that Estrella was on active parole at the time of the encounter. As in [a prior cited California appellate court case], Trouette was familiar with Estrella: He met Estrella personally, reviewed his criminal history, discussed his parole conditions, and maintained contact with his parole officer.

> Although [Officer Trouette] did not know the precise start and end dates of Estrella's parole term, he knew that California parole ordinarily lasts three to four years. He also had good reason to believe that Estrella's term was not over: Estrella was released from prison in July 2018, about one year prior, and had violated a parole condition in April 2019, only four months prior.
>
> And distinct from [a prior cited Ninth Circuit decision], there was no uncertainty that Estrella was placed on California parole. Accordingly, Trouette had probable cause to believe that Estrella was subject to the statutory search condition imposed by Cal. Penal Code § 3067(b)(3), even without "up-to-the-minute" confirmation of his parole status. . . .

[Case citations omitted]

The Estrella Opinion also rejects the defendant's argument that the fact that Officer Trouette used this occasion as a learning experience for his trainee officer does not support defendant's argument that this encounter violated California's independent prohibition on arbitrary, capricious, or harassing searches.

Result: Affirmance of U.S. District Court (Northern District of California) conviction of Christian Alejandro Estrella for being in possession of a firearm and ammunition in violation of federal law.

LEGAL UPDATE EDITOR'S COMMENT/NOTE: 2016 Washington legislation, SB 6459 (Chapter 234), enacted RCW 9.94A.718, which provides that:

> **(1) Any peace officer has authority to assist the department with the supervisions of offenders.**
>
> **(2) If a peace officer has reasonable cause to believe an offender is in violation of the terms of supervision, the peace officer may conduct a search as provided under RCW 9.94A.631, of the offender's person, automobile, or other personal property to search for evidence of the violation. A peace officer may assist a community corrections officer with a search of the offender's residence if requested to do so by the community corrections officer.**
>
> **(3) Nothing in this section prevents a peace officer from arresting an offender for any new crime found as a result of the offender's arrest or search authorized by this section.**
>
> **(4) Upon substantiation of a violation of the offender's conditions of community supervision, utilizing existing methods and systems, the peace officer should notify the department of the violation.**
>
> **(5) For the purposes of this section, "peace officer" refers to a limited or general authority Washington peace officer as defined in RCW 10.93.020.**

Note that under Washington law, however, where a search by either law enforcement officers or community corrections officers is based on violation of the terms of community custody (as opposed to being a search incident to arrest for a crime, which exception to the warrant requirement has its own limitations), the scope of the search is limited to areas or

containers for which there is a probable cause nexus between the area searched and the particular violation. See State v. Jardinez, 184 Wn. App. 518 (Div. II, November 18, 2014).

Also note that the Ninth Circuit Court of Appeals held in United States v. Lara, 815 F.3d 605 (9th Cir., March 3, 2016) that the Fourth Amendment may specially limit the search of a probationer's cell phone, even if there is such a probable cause nexus because of special protections afforded cell phones under the Fourth Amendment. Shortly after the Lara decision was released, the following brief note regarding the ruling in Lara was posted in March 2016 website of the Washington Association of Prosecuting Attorneys (WAPA) under weekly "Case Law:"

> **A probationer's acceptance of a search term in a probation agreement does not render a warrantless, suspicion-less search of the probationer's cell phone lawful. Such a search may be reasonable [1] if the probation search condition expressly and unambiguously listed cell phones in the agreement, [2] if the defendant was convicted of a violent crime or of a "particularly 'serious and intimate' offense," and [3] the . . . . probationer's noncompliance with the terms of probation [is serious].**

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WASHINGTON STATE SUPREME COURT

IN THIS CRIMINAL CASE, OFFICER'S NON-PRETEXTUAL ENTRY AND LIMITED SEARCH OF ABSENT DEFENDANT'S HOME TO CHECK ON WELL-BEING OF DEFENDANT'S SPOUSE IS HELD BY A 7-2 MAJORITY TO BE JUSTIFIED UNDER THE WASHINGTON CONSTITUTION AS A LAWFUL "HEALTH AND SAFETY CHECK;" DEFENDANT LOSES HIS ARGUMENT THAT THE U.S. SUPREME COURT'S NARROW RULING IN CANIGLIA V. STROM IN 2021 – WHICH *LIMITED THE FOURTH AMENDMENT CONCEPT OF "COMMUNITY CARETAKING"* BUT DID NOT LIMIT OTHER WARRANT EXCEPTIONS – PRECLUDES THE STATE'S HEALTH-AND-SAFETY-CHECK ARGUMENT IN THIS CASE

State v. Teulilo, ___ Wn.2d ___ , 2023 WL ___ (June 8, 2023)

Facts: (Excerpted from the Washington Supreme Court majority opinion)

> On July 25, 2018, at approximately 10:26 a.m., Douglas County Sheriff's Office [Deputy A] was sent to 10 Riverside Place to do a welfare check. The 911 dispatcher advised that a caller, Michael Sines, had reported that Mrs. Peggy Teulilo did not arrive to pick up his mother that morning for a hair appointment. Mrs. Teulilo was a caregiver for Mr. Sines's mother. Mr. Sines also informed the dispatcher that Mrs. Teulilo had been involved in some type of domestic incident with her husband, Ului Teulilo, the previous day.
>
> [Deputy A] checked the Spillman system database and read the call from Mrs. Teulilo the previous day reporting that Mr. Teulilo had threatened her. [Deputy A] also read about a call from May in which Mrs. Teulilo reported that Mr. Teulilo had threatened to shoot her and then himself.
>
> [Deputy A] arrived at the Teulilo residence at 10:46 a.m. The residence is a fifth wheel trailer beside an orchard, with one other home on the property. A Dodge Caravan was

parked in the driveway. On arrival, [Deputy A] spoke with Earl Wilson, the property owner, who identified the trailer as the Teulilo residence. [Deputy A] knocked on the side of the trailer and the door, and announced, "'Sheriff's Office,'" but he received no answer.

[Deputy A] then spoke with Mr. Wilson again, and Mr. Wilson said that he knew Mr. Teulilo worked at WW Pumping and would call him. After a couple attempts, [Deputy A] was able to reach Mr. Teulilo at his employer's phone number. [Deputy A] explained that he needed to speak with Mrs. Teulilo and asked if Mr. Teulilo knew where she was. Mr. Teulilo said that Mrs. Teulilo should be at work at the Sines residence. When asked about the Dodge Caravan in the driveway, Mr. Teulilo confirmed it belonged to Mrs. Teulilo. Mr. Teulilo also provided a phone number for Mrs. Teulilo. [Deputy A] did not inform Mr. Teulilo that Mrs. Teulilo was missing, nor did he ask Mr. Teulilo to come home or whether he could check the residence.

[Deputy A] called Mrs. Teulilo's phone number several times. He also checked Spillman for other numbers associated with Mrs. Teulilo and called those, with no answer. [Deputy A] stood next to the trailer while calling the numbers, and could not hear any phone ringing inside.

[Deputy A] then called his supervisor, [Sergeant B], to inform him of the situation and get advice on what to do next. [Sergeant B] advised [Deputy A] to check if the front door was locked and, if not, to open the door and announce, "[S]heriff's [O]ffice." Prior to checking the door, [Deputy A] called Sines, who told him that Mrs. Teulilo was supposed to pick his mother up for an appointment, and Mrs. Teulilo would normally have called if there was any issue and she could not make it. Sines also reported that he had recently returned a pistol to Mrs. Teulilo that belonged to Mr. Teulilo.

[Deputy A] then checked the trailer door, finding it unlocked. He opened the door and announced, "[S]heriff's [O]ffice," without entering. He received no response. [Deputy A] called [Sergeant B] again, who directed [Deputy A] to enter the residence and perform a "community caretaking" check for Mrs. Teulilo based on the totality of the circumstances. [Deputy A] then opened the door, stepped inside, and announced himself.

From his position inside the door, [Deputy A] looked to the right and saw Mrs. Teulilo lying at the base of the bed with blood on her face and the surrounding area. [Deputy A] approached and saw that she was deceased, with significant trauma to her face that he initially thought came from a gunshot wound.

[Deputy A] then stepped out of the trailer and called [Sergeant B] again. He retrieved latex gloves and stepped back inside the residence to search for a gun, to see if it was a possible suicide. He observed the room, but he did not touch or move anything. He did not find a gun and exited again. While waiting for law enforcement personnel, [Deputy A] put up crime scene tape around the perimeter. He then reentered the trailer and took photos of the scene, again without moving or touching anything.

Two other law enforcement personnel made entries into the home. [Chief C] entered the trailer and viewed Mrs. Teulilo's body but did not touch or move anything. [Detective D] arrived shortly afterward to get information to prepare a search warrant and, while standing on the porch, reached his camera into the residence and took a photograph toward the bedroom area.

[Citations to the record omitted; Court's footnote 1 explaining the "Spillman system database" omitted]

Proceedings below: Teulilo was charged with first and second degree murder. The trial court denied a suppression motion by defendant after a hearing in which Deputy A testified that his purpose in being at the residence was to do a wellness check, that he did not suspect a crime before entering the residence, and that his purpose was to determine if Mrs. Teulilo needed assistance. Tuelilo obtained a grant of review of the suppression ruling in the Court of Appeals, which then certified the case to the Washington Supreme Court.

ISSUES AND RULINGS IN THE WASHINGTON SUPREME COURT:

(1) Deputy A made a warrantless entry of the Teulilo home to check on the health and safety of Mrs. Teulilo. In the U.S. Supreme Court's ruling in Caniglia v. Strom, 141 S. Ct. 1596 (May 17, 2021), the U.S. Supreme Court ruled that the narrow confines of the Fourth Amendment's "community caretaking exception" to the search warrant requirement did not allow for warrantless, non-consenting entry of a residence to search for and seize firearms of a possibly suicidal resident. Does the ruling by the U.S. Supreme Court in Caniglia v. Strom require that the warrantless residential entry in the Teulilo case be ruled unconstitutional?

ANSWER BY WASHINGTON SUPREME COURT: No, because the U.S. Supreme Court ruling in Caniglia v. Strom did not address the issue of whether law enforcement may make a reasonable warrantless entry of a residence to provide emergency aid or to check on the need for such aid, which in U.S. Supreme Court Fourth Amendment semantics involves a separate type of exception to the search warrant requirement. A health and safety check, as was involved in the Teulilo case, is not encompassed in the U.S. Supreme Court's use of the phrase "community caretaking." The Dissenting Opinion in Teulilo agrees with the answer of the Majority Opinion on this issue.

(2) Case law interpreting the Washington constitution, article I, section 7, allows warrantless entry of a residence to provide emergency aid or to check on the need for such aid. Unlike the Fourth Amendment, the requirements for this exception require more than objective reasonableness. Also required are (1) a subjective, non-pretextual belief of the need for entry; and (2) a reasonable connection between the alleged emergency (or need for the check) and the entry of the premises. In addition, this Washington constitutional exception to the warrant requirement also considers the actions of law enforcement after entry of the residence. Under the totality of the circumstances in the Teulilo case, were the entry and actions of Deputy A justified as an "emergency aid"/"health and safety check"?

ANSWER BY 7-2 MAJORITY: Yes, rules the Majority Opinion, the subjective and objective requirements of the Washington "health and safety check" exception are met by the totality of the circumstances of this case. The Dissenting Opinion, in fact-based analysis, disagrees with the Majority Opinion's conclusion that the subjective and objective requirements for a "health and safety check" were met under the totality of the circumstances of the case.

Result: Affirmance of Douglas County Superior Court ruling that denied the defendant's suppression motion; case remanded for trial of Ului Lakepa Teulilo on first and second degree murder charges.

ANALYSIS:

This Legal Update entry will not excerpt from or summarize the Washington Supreme Court Majority Opinion's analysis (with which the Dissenting Opinion agrees) of Issue 1 above, other than: (A) as set forth in this Update's description of Issue 1 and the "answer" on Issue 1 above in the section headed "Issues and Rulings in the Washington Supreme Court;" and (B) as I reiterate here in the following statement: Caniglia v. Strom, 141 S. Ct. 1596 (May 17, 2021) did not address the issue of whether law enforcement may make a reasonable warrantless entry of a residence to provide emergency aid or to check on the need for such aid. In U.S. Supreme Court Fourth Amendment semantics, these are separate types of exceptions to the search warrant requirement that are not encompassed in the U.S. Supreme Court's narrow use of the phrase "community caretaking" (which usage of the term is much narrower than the Washington Supreme Court's use of the term "community caretaking").

In key part, Washington Supreme Court Majority Opinion provides the following summary analysis in concluding on Issue 2 that Deputy B made a constitutionally lawful warrantless "health and safety check" when he entered the Teulilo residence:

> The petitioner argues that the entry was a pretext for investigating a domestic violence incident. However, nothing in the findings of fact indicate that [Deputy A] knew any crime had occurred before he entered. No crime had been reported and no evidence of a crime existed on his arrival at the Teulilo house.
>
> The trial court found that [Deputy A]'s concerns and actions were motivated by a sincere and genuine concern for the victim's health and safety, and his actions were not a pretext for investigation. The trial court made findings supporting the conclusion that [Deputy A]'s concern for the victim was subjectively reasonable: (1) Mrs. Teulilo's employer reported she had not reported for work, (2) Mr. Teulilo confirmed she should be at work, (3) Mrs. Teulilo was known to normally call her employer if she could not make it to work, but she did not call on this occasion, (4) Mrs. Teulilo made several reports of negative domestic incidents both to law enforcement and to her employer, (5) Mrs. Teulilo was not answering her phone, (6) Mrs. Teulilo's car was parked in the residence driveway, and (7) Mrs. Teulilo was not responding to [Deputy A]'s announcements and knocks.
>
> The petitioner insists that [Deputy A] repeatedly testified that he had no idea if there was anything wrong with Mrs. Teulilo and that he had no idea where she was, thus, he could not have reasonably believed that an emergency existed. While [Deputy A] may not have known what happened to Mrs. Teulilo before entering, the petitioner goes too far claiming that [Deputy A] did not believe that she may need help.
>
> [Deputy A] also testified that he was concerned for her safety; that his motivations in searching were to see if she was okay; and that given all the facts, he felt that something could have been wrong with her. As the trial court concluded, [Deputy A]'s subjective intent when entering the residence was not to investigate a crime.
>
> For the same reasons given above, the trial court also found that a reasonable person in the same situation would similarly believe that a need for assistance existed and that [Deputy A]'s entry was objectively reasonable under the totality of the circumstances. We agree. The record establishes that this trial court's factual findings are supported by the testimony and that the conclusions of law are supported by the findings.

> From the facts leading to the warrantless entry, [Deputy A] did not know whether he would find the victim alive, dead, or in need of medical assistance, or find no one at all. He did not have probable cause to investigate a crime, and no probable cause existed necessary to get a search warrant. Such a situation is why the health and safety check exception exists. We allow police to make reasonable entries to search for reported missing persons so they can potentially provide medical care if needed. Here, there was no pretext for a criminal investigation.
>
> For the health and safety check exception to apply, there must also be a balancing of a citizen's privacy interest in freedom from police intrusion against the public's interest in having the police investigate. If the public's interest outweighs that of the citizen's private interest, the entry is reasonable and permissible under our state constitution. [State v. Boisselle, 194 Wn.2d 1 (September 12, 2019)].
>
> Just because a crime by one person may be discovered does not mean that that person's interest outweighs the interest of a person who may be the victim or who may be injured. Prior to being found by [Deputy A], a possibility existed that Peggy was alive, injured, and hoping for help. At that point, Peggy had an interest in being found that outweighed Mr. Teulilo's privacy interests.
>
> Balancing interests also requires consideration of the actions taken once inside the home and whether those actions are reasonable. The intrusion in the Teulilo home was minimal. [Deputy A] tried the front door, which was unlocked. He took a step into the house and announced himself. Because of the small size of the home, he was able to see nearly the entirety of the home from just inside the door. [Deputy A] did not open any doors inside the home or search any closed spaces. Peggy's body was visible in plain view. The trial court concluded that [Deputy A]'s reentering the residence to look for a gun and take pictures, without moving or touching anything, did not exceed the scope of his initial entry under the plain view doctrine.
>
> A thorough factual inquiry demonstrates that the trial court here entered sufficient findings to support its conclusion that the entry was not a pretext for a criminal investigation.

[Some paragraphing revised for readability]

DISSENTING OPINION: Justice Whitener authors a Dissenting Opini0n that is joined by Justice Gordon McCloud. The Opinion argues that the record does not provide a reasonable basis for concluding that Ms. Teulilo was hurt or in need of immediate urgent care, and that therefore the entry of Deputy A and search for Ms. Teulilo was a pretextual search for criminal investigation.

LEGAL UPDATE EDITOR'S NOTES: 1. The Majority Opinion and Dissenting Opinion in Teulilo both discuss the Washington Supreme Court decision in State v. Boisselle, 194 Wn.2d 1 (September 12, 2019), where, in an independent grounds interpretation of the Washington constitution, a 5-4 ruling held that the Emergency Aid Function of the Washington Community Caretaking exception to the warrant requirement under the Washington constitution was not applicable in that case. In Boisselle, officers investigating a possible homicide/dead body in a home entered the home with "significant" suspicion that evidence of a crime was in the home.

2. A Case Law note on the website of the Washington Association of Prosecuting Attorneys for decisions issued in the period from May 21, 2023, to June 15, 2023, summarizes the holding in Teulilo as follows:

> **Emergency residential searches are permitted under the health and safety check or the emergency aid exception to article I, § 7 of the Washington constitution, and are reasonable under the Fourth Amendment. Both the emergency aid and health and safety exceptions begin with the requirement that the intrusion not be a pretext for a criminal investigation, as well as a subjective belief that someone is in need of assistance that is objectively reasonable. The U.S. Supreme Court's decision in Caniglia v. Strom, 593 U.S. ___, 141 S. Ct. 1596, 209 L. Ed. 2d 604 (2021) stands only for the proposition that police acting solely for community caretaking purposes is insufficient by itself to excuse the warrant requirements for entry into a residence, but Washington's exception requires more.**

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WASHINGTON STATE COURT OF APPEALS

IN CRIMINAL CASE, SIXTH AMENDMENT RIGHT TO COUNSEL THAT IS TIED TO THE ATTORNEY-CLIENT PRIVILEGE IS HELD VIOLATED WHERE CORRECTIONAL OFFICERS, LAW ENFORCEMENT OFFICERS, AND A DEPUTY PROSECUTOR EACH VIOLATED THE DEFENDANT'S ATTORNEY-CLIENT PRIVILEGE BY LOOKING AT PAPERS THAT HAD BEEN TAKEN FROM DEFENDANT'S JAIL CELL WITHOUT HIS CONSENT AND WITHOUT COURT AUTHORIZATION

In State v. Myers, ___ Wn. App. 2d ___ , 2023 WL ___ (Div. I, June 5, 2023), the Court of Appeals reverses the conviction of defendant for robbery in the first degree due to governmental misconduct within the meaning of CrR 8.3(b). The case is remanded for the trial court to hold further hearings and further consider defendant's motion to dismiss the charge.

The governmental misconduct consisted of multiple violations (by law enforcement officers, correctional officers, and a deputy prosecuting attorney) of defendant's Sixth Amendment right to counsel that is tied to the attorney-client privilege of defendant. The Myers Court rules that the trial court erred in many respects in addressing the remedy for the admitted violations of the defendant's motion to dismiss the charge.

The trial court correctly ruled that the government officers had violated defendant's Sixth Amendment right to counsel by looking at his attorney-client protected papers from his jail cell that had been taken from his jail cell without his consent and without authorization under a court order. And the trial court nominally recognized the case law rule that when a Sixth Amendment violation occurs in this way, the State can establish lack of prejudice in the case only if the State can show lack of prejudice to the defendant's Sixth Amendment attorney-client protections by meeting the high standard of "proof beyond a reasonable doubt."

But the Myers Court rules that the trial court erred by concluding *without proper thorough consideration of all relevant considerations relevant to the scrutiny of privileged information by each and every government actor*, that the defendant's Sixth Amendment rights could be protected by only suppressing the privileged papers that had been taken from his jail cell and looked at by the government actors. The Court of Appeals remands the case to the trial court

for the trial judge to make the necessary and proper thorough consideration of all relevant considerations relevant to the prejudice to defendant that occurred through the scrutiny of privileged information by each and every government actor who looked at his papers in this case.

The Myers Court summarizes the facts and lower court proceedings of the case as follows (more detailed factual descriptions of some elements of the facts are also set out in the Opinion):

> The State charged Adam Myers with one count of robbery in the first degree based on an incident at a Wells Fargo bank in the city of Snohomish, Washington. On April 26, 2021, the day of the reported robbery, [Detective A] responded to the scene and took over as the primary investigator. [Detective A] was an employee of the Snohomish County Sheriff's Office (SCSO), but was assigned as a detective for the city of Snohomish, which contracts with Snohomish County to provide police services for the Snohomish Police Department (SPD).
>
> During her initial investigation, [Detective A] discovered that the robbery suspect had passed a handwritten note to one of the bank tellers. [Detective A] then received digital photos and surveillance footage of the suspect from the day of the incident and ultimately identified Myers as a suspect. Myers was arrested on May 2, 2021. **SPD officers later searched Myers' residence pursuant to a search warrant and located a handwritten note that appeared to be the one given to the bank teller.**
>
> On September 21, 2021, [a deputy prosecuting attorney (DPA)] handling Myers' case sent an email to Myers' trial counsel. In the email, [the DPA] explained that the investigation had resulted in the discovery of a letter written by Myers to his former landlord and, in an effort to compare the handwriting, SCSO corrections deputies had seized five documents from Myers' jail cell.
>
> According to [the DPA], [Detective A] called him and stated that she received photographs of the documents and became concerned that they contained privileged attorney-client communications. To determine whether they were in fact privileged, [the DPA] then directed that the documents be reviewed by an "uninvolved detective," [Deputy B from the same sheriff's office as Deputy A], who indicated that several of the five documents that were ultimately seized may have contained attorney-client communications.
>
> On September 27, 2021, Myers moved to dismiss the case under CrR 8.3(b) based on governmental misconduct. At the hearing on the motion to dismiss, the testifying witnesses included [five Snohomish County Jail Corrections deputies]. At the conclusion of the hearing, the trial court found that a state actor had infringed on Myers's Sixth Amendment right to counsel, but that the State had rebutted the presumption of prejudice by proof beyond a reasonable doubt. Accordingly, the trial court denied Myers' 8.3(b) motion and instead ordered a lesser remedy of suppression of the documents collected from Myers' jail cell. In late November 2021, Myers' case proceeded to trial and the jury found him guilty as charged.

[Some paragraphing revised for readability; emphasis added; court's footnote 1 omitted]

The Myers Opinion explains in extensive analysis the many ways in which law enforcement officers, corrections officers, and the deputy prosecuting attorney violated the defendant's Sixth Amendment right. Included in the violations was the use of an uninvolved deputy sheriff ("colloquially referred to by the prosecutor's office as a taint team") to review documents to determine if they are attorney-client protected. The Court indicates that the only legally permitted taint team is a judge asked formally for review.

The Myers Opinion indicates that remedies that should be considered by the trial court judge on remand of the Myers case include: (1) dismissal of the case if the misconduct is deemed to be too extensive and egregious; (2) disqualification of some witnesses if re-trial is to occur; (3) questioning of the lead detective to determine if her investigative focus was sharpened or changed by her learning of the contents of defendant's attorney-client protected papers.

Result: Reversal of Snohomish County Superior Court conviction of Adam B. Myers for robbery in the first degree; case remanded to the Superior Court for either dismissal of the charge or a remedy (if that is feasible) that fully recognizes the requirements of case law addressing attorney-client-privilege violations of a defendant's Sixth Amendment right to an attorney.

LEGAL UPDATE EDITOR'S NOTES: 1. Two of the precedents discussed in the Myers Opinion are:

- **State v. Irby, 3 Wn. App. 2d 247 (Div. I, April 16, 2018) Which held that defendant was entitled to a new hearing placing a heavy burden on the State to establish beyond a reasonable doubt that jail officers did not prejudice defendant's case when the officers violated the constitution by reading papers that the jail officers found in his jail cell, and that he had clearly marked for his attorney's review in his case.**

- **State v. Pena Fuentes, 179 Wn.2d 808 (Feb. 6, 2014) Which declared that a detective's conduct in listening to tapes of several telephone conversations between a defendant and his attorney was "unconscionable" and gave rise to a presumption of prejudice to defendant's case that can be overcome by the State only by proof beyond a reasonable doubt; the case was remanded for hearing for the State to try to meet that standard.**

2. A Case Law note placed in June 2023 on the website of the Washington Association of Prosecuting Attorneys summarizes the holding in Myers as follows:

> **When a state actor may have intercepted privileged attorney-client communication, whether intentionally or inadvertently, the only appropriate party to review the communication is a neutral judicial officer. Use of a "taint-team" (a screened-off governmental actor who evaluates whether the communication(s) are privileged) is an additional violation of the attorney-client privilege. If privileged communications were intercepted, prejudice is presumed. The burden is on the State to prove, beyond a reasonable doubt, that the defendant was not prejudiced. If the defendant's privilege was infringed upon, any remedy pursuant to CrR 8.3 must be crafted to disincentivize such behavior going forward, and, if short of dismissal, must at least include vacation of the judgment.**

RCW 13.50.100(3): IN CIRCUMSTANCES INVOLVING AN ACTIVE INVESTIGATION BY A SHERIFF'S OFFICE RELATING TO A MISSING CHILD, THE COURT OF APPEALS UPHOLDS A FACT-BASED TRIAL COURT ORDER THAT GRANTED A SHERIFF'S OFFICE EMERGENCY MOTION – A MOTION THAT WAS SUPPORTED BY THE STATE OF WASHINGTON DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES – TO OBTAIN JUVENILE COURT DEPENDENCY RECORDS RELATING TO THE MISSING CHILD AND RELATING TO THAT CHILD'S SIBLINGS

In Matter of Welfare of OC, ___ Wn. App. 2d ___ , 529 P.3d 19 (Div. II, May 16, 2023), the Court of Appeals rules that in January of 2022, the Grays Harbor County Superior Court lawfully granted several emergency motions by the Grays Harbor County Sheriff's Office seeking access to dependency and juvenile court records: (1) relating to OC, who was born in 2016 and was missing; and (2) relating to two of OC's siblings, who were not missing.

The GH Sheriff's Office sought these records in pursuit of information that might help locate OC. The juvenile court granted the motions. OC's mother, JB, appealed the orders. The mother argues that the juvenile court erred when it granted the motions, particularly as to records related to the siblings, who are not missing.

The Court of Appeals rules on the totality of the circumstances of the OC case that the juvenile court did not err when it ordered the release of dependency court files to the Grays Harbor County Sheriff's office. The vote of the three-judge panel is 2-1 regarding release of the records that relate to the two siblings.

This Legal Update entry will not address the legal analysis in the Majority Opinion or Dissenting Opinion of the Court of Appeals, other than (A) to note that the Majority Opinion explains that the legal analysis must take into account the particular facts of each case where such access to records is sought; and (B) to note that the key statutory language is that in RCW 13.50.100(3), which provides that RCW 13.50.100(3) allows juvenile courts to disclose records to other participants in the juvenile justice system, which include law enforcement, "when an investigation or case involving the juvenile in question is being pursued by the other participant."

The difference of interpretation of RCW 13.50.100(3) between the Majority Opinion and the Dissenting Opinion in the OC case is whether the siblings of OC could be considered to be "involved" in the investigation relating to OC's disappearance.

The Court of Appeals holds further that the juvenile court abused its discretion when it used language that purported to unseal the records. The Myers Court also notes that to the extent the dependency court files contain transcripts of dependency hearings, those transcripts are not confidential or sealed.

Result: Affirmance of Grays Harbor County Superior Court order to the extent that it ordered the release of dependency court files to the Grays Harbor County Sheriff's Office; reversal as to some aspects of the order and remand to correct aspects of the order.

LEGAL UPDATE EDITOR'S NOTE: OC in the Matter of Welfare of OC is the child, Oakley Lyn Carlson. The website of the Gray Harbor County Sheriff's Office, last checked on July 4, 2023, provides the following request for information and notes that a reward of approximately $85,000 is being offered for information leading to location and recovery of Oakley Carlson:

The Grays Harbor County Sheriff's Office is seeking information reference the disappearance and suspected homicide of Oakley Carlson. On December 6th, 2021, a concerned citizen called requesting a welfare check be conducted on Oakley. Oakley's parents, Andrew Carlson and Jordan Bowers, were contacted and provided conflicting statements about her whereabouts. Their statements were later proven to be false. Andrew Carlson and Jordan Bowers were later arrested and convicted of child abuse unrelated to the disappearance of Oakley. Both Andrew Carlson and Jordan Bowers remain suspects in the disappearance of Oakley Carlson. Oakley was last seen by someone other than her biological parents on February 10th, 2021.

The GHCSO website is at https://www.graysharbor.us/departments/sheriff/index.php

SEATTLE POLICE DEPARTMENT OFFICERS WHO WERE PRESENT AT THE JANUARY 6, 2021, WASHINGTON DC CAPITOL GATHERING WIN ON CONSTITUTIONAL PRIVACY GROUNDS IN THEIR OPPOSITION TO PUBLIC DISCLOSURE OF INTERNAL INVESTIGATION RECORDS WHERE THE INVESTIGATIONS CONCLUDED THAT MISCONDUCT ALLEGATIONS WERE "NOT SUSTAINED"

In Does. v. Seattle Police Department, ___ Wn. App. 2d ___ , 2023 WL ___ (Div. I. June 26, 2023), Division One of the Court of Appeals rules that several officers of the Seattle Police Department (referred to as John Does and Jane Does in the legal action) are entitled to an injunction barring public disclosure by the SPD of internal affairs investigation records relating to the officers where charges of misconduct by the officers were concluded by SPD to be "not sustained."

The Does Court summarizes the background of the case and the Does Court's ruling as follows:

> We are presented today with the question of whether the Seattle Police Department (SPD) and the City of Seattle (the City) may disclose in investigatory records the identities of current or former Seattle police officers who were investigated regarding potential unlawful or unprofessional conduct during the events of January 6, 2021, in Washington, D.C.
>
> John Does 1, 2, 4, and 5 (the Does) sought judicial declaratory and injunctive relief after being informed that SPD, their employer, intended to publicly disclose the unredacted investigatory records in response to several PRA requests. Investigators have determined that allegations against the Does of unlawful or unprofessional conduct were "not sustained."
>
> The Does contend that their identities should thus not be disclosed in the requested records, which include transcripts of interviews in which they were compelled to disclose and discuss their political beliefs and affiliations. [Elsewhere in the Opinion, the Does Court briefly discusses Garrity v. State of New Jersey, 385 U.S. 493, 500 (1967).]
>
> The trial court denied the Does' motion for a preliminary injunction, concluding that the exceptions to permitted disclosure set forth in the PRA are inapplicable. The Does appealed from the trial court's order. . . .

> The United States Supreme Court has recognized a First Amendment right to privacy that protects against state action compelling disclosure of political beliefs and associations. Thus, only if the state actor (here, the City) demonstrates a compelling interest in disclosure, and that interest is sufficiently related to the disclosure, can the state actor lawfully disclose the Does' identities in the investigatory records. Because there is here established no compelling state interest in disclosing the Does' identities, the trial court erred by denying the Does' motion for a preliminary injunction.

[Some paragraphing revised for readability; bracketed information added]

Result: Reversal of King County Superior Court order requiring disclosure of certain unredacted records relating to the Does.

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BRIEF NOTES REGARDING JUNE 2023 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 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 four entries below address the June 2023 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 very brief descriptions of the holdings/legal issues are bolded.

1. State v. Raymundo Casares: On June 13, 2023, Division Three of the COA rejects the defendant's challenge to his Yakima County Superior Court convictions for *(A) on one count of aggravated first degree murder; (B) two counts of attempted first degree murder; and (C) one count of second degree unlawful possession of a firearm*. **Among other rulings, the Court of Appeals rules that no error was committed by the trial court in admitting pre-trial eyewitness identifications of Casares**. The Court of Appeals rules that a few aspects of the eyewitness identification procedures (sequential photo montages shown separately to two eyewitnesses) were unnecessarily suggestive, but that the identifications were reliable under the totality of the circumstances of the case. Therefore, the Court of Appeals rejects defendant's challenge to the trial court's admission of the pre-trial eyewitness identification evidence. Suggestiveness defects in the pre-trial eyewitness ID procedures that were done in

the Casares case were limited to the following facts: (1) different framing of the Casares picture from the other pictures in the montages shown to the witnesses; (2) double-blind procedures were not used; and (3) Casares was the only person in the montages with a unique face tattoo (though the tattoo was barely discernable in the picture of Casares).

On the reliability question, the Casares Opinion includes discussion of the U.S. Supreme Court precedent of Neil v. Biggers, 409 U.S. 188 (1972), which held that, among other aspects of reliability, courts must consider (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the degree of attention by the witness, (3) the accuracy of the prior description of the criminal by the witness, (4) the level of certainty demonstrated by the witness at the time of the procedure, and (5) the time between the crime and the identification procedure. The Casares Opinion also notes that other factors for consideration are situational factors such as distance, lighting, witness characteristics, stress, presence of a weapon, and duration of observation. The Casares Opinion also includes discussion of State v. Derri, 199 Wn.2d 658 (2022), in which the Washington Supreme Court held that the federal Due Process clause requires courts to apply relevant and widely accepted modern science on eyewitness identifications in determining whether the procedures used were suggestive and whether the identifications were otherwise reliable.

For an article addressing identification procedures, see "Eyewitness Identification Procedures: Legal and Practical Aspects," which may be accessed on the Internet at the Washington Criminal Justice Training Commission's Law Enforcement Digests page.

The Opinion in State v. Casares can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/377148_unp.pdf

2. State v. Aaron Maurice Mylan: On June 21, 2023, Division Two of the COA rejects the defendant's challenge to his Kitsap County Superior Court conviction for *felony harassment* arising out of an incident at a gas station in which he threatened multiple times to kill a store clerk, directing his threats at that store clerk. Mylan told the clerk that he had been to jail and was not afraid to go back. Another store clerk and a woman in the restroom each called 911 to report the incident as it was was occurring. Shortly after the incident, a law enforcement made a minimally intrusive contact with Mylan, and Mylan repeated the statement about having been incarcerated and not being afraid to go back. Among other things, **the Mylan Opinion declares that (1) admission of the two 911 calls did not violate the Sixth Amendment right to confrontation because the statements in the calls were not "testimonial;" and (2) Miranda warnings were not required during the officer's initial contact with Mylan because at that point Mylan's freedom of action had not been reduced in such a way as to resemble a formal arrest. See State v. Escalante, 195 Wn.2d 526 (2020).** The Mylan Opinion explains the factual grounding of these two conclusions; that discussion is not quoted or excerpted in this Legal Update entry.

The Opinion in State v. Mylan can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2057107-2-II%20Unpublished%20Opinion.pdf

3. State v. Dean Ervin Phillips: On June 21. 2023, Division Two of the COA agrees with the defendant's challenge to his Lewis County Superior Court conviction for *second degree extortion*, and the Court of Appeals remands the case for re-trial. The Phillips Court accepts the State's concession that **the prosecutor elicited improper opinion testimony from a detective, and that the prosecutor's questions and the detective's answers produced a**

violation of the defendant's Sixth Amendment right to jury trial. In key part, the analysis on this issue is summarized in the Opinion as follows:

> Phillips next argues that the prosecutor's questioning of Detective [A] elicited improper opinion testimony. . . . Generally, a witness may not opine during testimony on the defendant's guilt. State v. King, 167 Wn.2d 324, 331 (2009). When analyzing whether there was impermissible opinion testimony, we consider five factors: "(1) the type of witnesses involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact." [King] at 332-33 (quoting State v. Kirkman, 159 Wn.2d 918, 928 (2007)).
>
> And police officers' testimony may carry a "'special aura of reliability'" and therefore be especially prejudicial to a defendant. Here, the prosecutor first asked Detective [A] the general question of what conclusion he reached after speaking to [the fellow officer who was the alleged victim of the defendant's extortion attempt] about Phillips' letters. Detective [A] responded that the letter "appeared to be an extortion of [the fellow officer].
>
> Phillips objected to Detective [A's] comment, and the trial court sustained the objection. But rather than ending this line of questioning, the prosecutor continued on, asking, "What was the extortion part of this?" Detective [A] responded that "the extortion part" was that Phillips threatened to accuse [the fellow officer] of crimes if she did not pay him the requested dollar amount. By linking his personal conclusion of guilt to the charged crime of extortion, Detective [A's] testimony was an improper opinion. And his law enforcement position likely gave his testimony a "special aura of reliability" to the jury. Especially given the prosecutor solicited this testimony after Phillips' initial objection was sustained by the trial court, such questioning was improper.

[Some paragraphing revised for readability]

The Opinion in State v. Phillips can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2056734-2-II%20Unpublished%20Opinion.pdf

4. Personal Restraint Petition of Juna Luna Huezo: On June 29, 2023, Division Three of the COA rejects the defendant's challenge to his Benton County Superior Court convictions for *(A) one county of rape of a child in the first degree, and (B) two counts of child molestation in the first degree.* Among the key legal rulings by the Division Two panel are those relating to the testimony by Dr. Shannon Phipps, a family practice physician who conducted a sexual assault examination of one of the two stepchildren victims of the defendant. **The Court of Appeals rules that the testimony of Dr. Phipps (1) did not violate the Sixth Amendment jury-trial-right-based protection against witnesses opining as to a defendant's guilt (**"Dr. Phipps's opinion that T.O.'s demeanor reflected "an abnormality that [she] could have considered consistent with some sort of trauma" was too indefinite to be constitutionally impermissible."**); and (2) was admissible under the hearsay exception of the Rules of Evidence for statements that were obtained for purposes of medical diagnosis** ("[E] even though the statements were made to a medical professional assisting a police investigation, it is reasonable to believe that T.O.'s motive was to promote treatment and that Dr. Phipps relied on those statements for the purposes of treatment.").

The Opinion in State v. Huezo can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/386970_unp.pdf

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

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

In May of 2011, John Wasberg retired from the Washington State Attorney General's Office. For over 32 years immediately prior to that retirement date, as an Assistant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011) of the Criminal Justice Training Commission's Law Enforcement Digest. From the time of his retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the production of the LED. That arrangement ended in the late fall of 2014 due to variety of concerns, budget constraints and friendly differences regarding the approach of the LED going forward. Among other things, Mr. Wasberg prefers (1) a more expansive treatment of the core-area (e.g., arrest, search and seizure) law enforcement decisions with more cross references to other sources and past precedents; and (2) a broader scope of coverage in terms of the types of cases that may be of interest to law enforcement in Washington (though public disclosure decisions are unlikely to be addressed in depth in the Legal Update). For these reasons, starting with the January 2015 Legal Update, Mr. Wasberg has been presenting a monthly case law update for published decisions from Washington's appellate courts, from the Ninth Circuit of the United States Court of Appeals, and from the United States Supreme Court.

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

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

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

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court

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

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

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