2023 CASELAW DIGEST

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§1983 Statute of limitations - When a prisoner pursues state post-conviction DNA testing through the state-provided litigation process, the statute of limitations for a §1983 procedural due process claim begins to run when the state litigation ends, which includes the denial of a motion to reconsider under the applicable state court rules. *Reed v. Goertz*, No. 21–442 (April 19, 2023).

Codefendant confessions – *Bruton*'s rule is narrow and applies only to directly accusatory incriminating confessions made by (nontestifying) co-defendants. In a joint trial, admitting the co-defendant's out-of-court confession, which implicated a (nonconfessing) defendant, does not violate the confrontation clause, if that confession is: 1) not obviously redacted; 2) only indirectly implicates the nonconfessing defendant; and 3) coupled with a limiting instruction, which tells the jury to only consider the confession against the confessor. In this case, the U.S. Supreme Court upheld having a law enforcement officer read one of the co-defendant's confession to the jury, but replace the defendant's name with, "somebody else," and "the other person." *Samia v. United States*, No. 22-196 (June 23, 2023).

True Threats – To constitute a "true threat," 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 and justifiable risk that the conduct would cause harm to another. *Counterman v. Colorado*, No. 22-138 (June 27, 2023).

Washington Supreme Court:

Animal cruelty – Animal Cruelty in the First Degree, RCW 16.52.205, is not an alternative means crime. Starving, dehydrating, or suffocating an animal are different definitions or descriptions of the cruelty required to commit the offense. No unanimity instruction is required. *State v. Shoop*, No. 101196-2 (May 4, 2023).

Bail – A defendant charged with any Class A felony may be held without bail under article I, § 20 of the Washington Constitution, "…upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons…." The phrase, "…offenses punishable by the possibility of life in prison…" refers to the maximum possible punishment, not the standard range under the SRA. Policy considerations and disparate impacts do not dictate the interpretation of the plain language of a constitutional provision. *In re Pers. Restraint of Sargent*, No. 100552-1 (June 8, 2023).

(Editor's note: The decision specifically does not address denying bail in the case of a defendant charged with a third strike that is a Class B or C felony.)

Collateral attack - All motions brought pursuant to any subsection of CrR 7.8(b) are subject to RCW 10.73.090's one-year time bar for collateral attacks. *State v. Hubbard*, No. 101004-4 (April 27, 2023).

Community custody – CrR 7.8(b) does not grant the trial court authority to modify court-imposed community custody conditions after a judgment and sentence is final. A trial court cannot modify community custody conditions without express statutory authority to do so. *State v. Hubbard*, No. 101004-4 (April 27, 2023).

Conditions of community custody – A condition of community custody is not unconstitutionally vague if an ordinary person can understand the prohibition and the standards

are objective and sufficiently ascertainable. The absence of a precise definition does not necessarily equate to vagueness. Here, prohibitions of possessing sexually explicit materials, obtaining permission before "dating" persons with minor children and not forming relationships with persons with minor children without disclosing sex offender status were not vague. *In re Pers. Restraint of Ansell*, No. 100753-1 (August 10, 2023).

(*Editor's note – This case deals exclusively with conditions of community custody imposed by the ISRB, and not by a court or by statute*.)

Criminal history – In a disposition hearing, a juvenile court may not consider pending charges that a juvenile offender has not admitted to committing. However, it was proper for the court, when considering the respondent's criminal history, to consider the original felony charges in two past plea agreements where the respondent had pled to lesser-included misdemeanors, as the respondent had stipulated to probable cause for the original charges. *State v. J.W.M.*, No. 100894-5 (Feb. 16, 2023).

Criminal solicitation – "Money or other thing of value" as used in the criminal solicitation statute, RCW 9A.28.030, unambiguously includes things that possess desirability, utility, or importance, even if they do not possess traditional economic or monetary value. Here, a mother's promise to her son that he would be with her forever if he poisoned his father, was an "other thing of value." *State v. Valdiglesias LaValle*, No. 101442-2 (September 28, 2023).

Denial of assistance of counsel – Representation at trial by an experienced member of the Idaho bar, who was not legally authorized to practice in Washington, was not a complete denial of assistance of counsel, which would require reversal of the convictions without a showing of prejudice. *In re Pers. Restraint of Lewis*, No. 99939-2 (Feb. 2, 2023).

Double jeopardy – A Felony Murder 1st Degree conviction based on Robbery 1st Degree cannot stand when the evidence is insufficient to support a completed robbery, and the jury were not

instructed on attempted robbery serving as a predicate offense. *In re Pers. Restraint of Knight*, No. 101068-1 (November 9, 2023).

(*Editor's note: It is unclear what precedential value this case has. It appears to be an application of pre-existing law to a unique situation.*

The Defendant was charged with Felony Murder 1st Degree (predicated on Robbery 1st Degree,) Robbery 1st Degree and other charges for a home invasion in which the Defendant and her accomplices stole the wedding rings from the homeowners at gunpoint, then forced them to reveal the location of their home safe. The defendants then killed the husband, but never managed to breach or take the safe before fleeing.

In a 2020 PRP, the Defendant challenged her convictions based on double jeopardy – that she was punished both for the charged robbery as well as the predicate robbery. The Supreme Court rejected her argument and upheld the convictions. See In re Pers. Restraint of Knight, 196 Wn.2d 330, 473 P.3d 663 (2020).

The majority and dissent disagree on the basis of the holding of the 2020 PRP. Five justices hold that the convictions were upheld in 2020 because the charged robbery was based on the taking of the wedding rings, and the predicate robbery was based on the (incomplete) robbery of the safe.

However, because the jury were not instructed on an attempted robbery serving as the predicate for the felony murder charge, the majority holds there is insufficient evidence of a completed robbery to serve as a predicate offense.

In the lead opinion, four justices hold that the felony murder must be vacated. Writing separately, one justice concurs in the analysis, but would uphold the murder and vacate the robbery.

The four dissenting justices would hold that the 2020 opinion held that the charged robbery and the predicate robbery do not merge because the robbery and murder had separate purpose and effect.)

Education funding - Art. IX, section 1 of the Washington constitution, which makes education the paramount duty of the state, does not include capital construction costs within the category of education costs for which the State alone must make "ample provision." State and local school districts must share the responsibility for those school capital construction costs. *Wahkiakum Sch. Dist. No. 200 v. State*, 101052-4 (September 7, 2023).

Eminent domain - An inverse condemnation claimant bears the burden of showing their suit is not barred by the subsequent purchaser rule. The subsequent purchaser rule also bars any subsequent tort claim based on the same governmental conduct. *Maslonka v. Pub. Util. Dist. No. 1 of Pend Oreille County*, No. 101241-1 (August 3, 2023).

Fair & impartial jury - Dismissing frustrated juror who engaged in self-harm during deliberations was not an abuse of discretion. Such an act raised legitimate concerns about the ability of the jury to deliberate and did not merit using the more stringent *Elmore* standard, which asks if there is any reasonable probability the juror's actions arose from an evaluation of the evidence. *State v. Norman*, No. 100777-9 (Feb. 2, 2023).

Involuntary Treatment Act – The requirements of the ITA are "totally disregarded" when a person is detained beyond the legal authority under the act. The remedy is dismissal. *In the matter of the Detention of A.C.*, No. 100668-3 (July 27, 2023).

Involuntary Treatment Act – Forcible medication before a court hearing, where the detainee was not held without authority of law and brought promptly before a judge after the violation, is not a "total disregard" of the ITA. *In the matter of the Detention of A.C.*, No. 100668-3 (July 27, 2023).

Involuntary Treatment Act – Holding a detainee overnight after an emergency detention lapses is a total disregard of the ITA. Filing a new case does not remedy holding a person without authority. If a detainee was detained beyond the authority of the ITA in a previous petition, dismissal of new commitment petitions is required. *In re Detention of D.H.*, No. 100716-7 (July 27, 2023).

JR Commitment over age 21 – The juvenile court may impose an upwards manifest injustice disposition up to age 25 for two categories of juvenile offenses when committed at age 16 or 17: 1) A++ offenses; and 2) violent offenses committed while armed with a firearm. RCW 13.40.300(2). *State v. J.W.M.*, No. 100894-5 (Feb. 16, 2023).

Jury proportionality – Article I, sections 21 and 22 of the Washington Constitution do not provide greater protection of the fair cross section guaranty than the Sixth Amendment to the federal constitution. *State v. Rivers*, No. 100922-4 (August 3, 2023).

Lesser included offenses – To be entitled to a lesser-included instruction, in addition to each of the elements of the lesser offense being necessary elements of the offense charged, there must be some evidence must be presented that affirmatively establishes the lesser crime was committed. *State v. Avington*, No. 101398-1 (September 28, 2023).

(*Editor's note – this case reaffirms State v. Coryell's analysis of State v. Workman.*)

Manifest injustice – Courts do not incarcerate children because it is good for them. A juvenile court abused its discretion when it made a manifest injustice determination by placing significant weight on the respondent's treatment needs without linking those needs to a serious and clear danger to society. *State v. J.W.M.*, No. 100894-5 (Feb. 16, 2023).

Notice – Due process requires adequate notice to a juvenile respondent of the factual basis and aggravating factors which support a manifest injustice disposition prior to the proceeding in which the State seeks to prove them, but not formal, written notice of the State's intent to seek such a disposition. *State v. J.W.M.*, No. 100894-5 (Feb. 16, 2023).

Notice of tort action - The presuit notice requirements of chapter 4.96 RCW apply when suing a public employee in their individual capacity, while acting within the scope of employment. The presuit notice requirements conflict with the procedure for commencing a suit in CR 3(a), but do not violate the separation of powers, as a precondition to suing a government entity is part of the waiver of sovereign immunity, which is within the legislature's constitutional authority. *Hanson v. Carmona*, No. 99823-0 (March 23, 2023).

Persistent Offender Accountability Act – Sentencing a persistent offender to life without the possibility of early release, where the offender was convicted of his first "strike" offense at age 17 in adult court, does not violate article 1, section 14 of the Washington constitution. Punishment for a current offense is punishment for the current offense, not the prior offenses that aggravate the current sentence *State v. Reynolds*, No. 100873-2 (September 21, 2023).

Postconviction collateral relief – The Supreme Court may grant postconviction collateral relief in the interests of justice when a criminal defendant's argument, which was narrowly rejected in his direct appeal, was adopted in a subsequent case. *In re PRP of Rhone*, No. 101204-7 (May 11, 2023).

(*Editor's note: Although this opinion expressly disavows applying precedent retroactively, it effectively does just that. The Supreme Court explains that it gave the Defendant the benefit of the rule concerning jury selection he proposed because his rule was originally rejected in a 4-1-4 split, with the single concurring justice stating that while she agreed with the majority in the Defendant's case, she agreed with the dissent for future cases.*)

Prosecutorial error – A prosecutor's flagrant or apparently intentional appeal to jurors' racial or ethnic bias cannot be cured and is *per se* prejudicial. Whether a prosecutor appeals to racial or ethnic bias is decided using an objective observer standard. The "objective observer" is aware of implicit bias and the history of racial discrimination in the United States. *State v. Bagby*, No. (January 19, 2023).

Protection Orders (civil) – Respondents in civil Sexual Assault Protection Order cases may not raise criminal affirmative defenses, such as reasonably believing the victim had capacity to consent. The Sexual Assault Protection Order Act functions independently of the criminal code and omits any mention of affirmative defenses. *DeSean v. Sanger*, No. 101330-2 (October 5, 2023).

(*Editor's note: The SAPO in question in this case was granted under former chapter 7.90 RCW, but the opinion indicates the same reasoning will apply to chapter 7.105 RCW, the current statutory scheme.*)

Public duty doctrine – Public duty doctrine only protects a public entity when the cause of action arises from a breach of a statutory duty. Therefore, in a suit alleging breach of a common law duty in an allegedly negligent response to a 911 call for medical assistance, the public duty doctrine will not shield the responding public entity. *Norg v. City of Seattle*, No. 100100-2 (January 12, 2023).

(*Editor's note: 5-4 decision, majority authored by Justice Yu. Justice Madsen's dissent is worth reading.*)

Resentencing – An order for resentencing effectively vacates the prior sentence. Therefore, such an order is appealable by the state, pursuant to RAP 2.2(b)(3). *State v. McWhorter*, No. 101691-3 (September 28, 2023).

Resentencing – A reduction of the offender score that does not change the standard range does not render a judgment & sentence facially invalid where the defendant received a standard range sentence. *In re Pers. Restraint of Richardson*, No. 101043-5 (November 14, 2022, publication ordered March 10, 2023).

Resentencing of juveniles sentenced as adults – Offender who was sentenced at age 17 in 2012 to a *de facto* life sentence, and whose attorney did not present mitigating factors of youth at resentencing, has an adequate remedy in RCW 9.94A.730. Because RCW 9.94A.730 provides relief as it provides meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, the petitioner cannot show prejudice, and is not entitled to be resentenced. *In re the Personal Restraint of Carrasco,* No. 100073-1 (March 9, 2023).

Resentencing of juveniles sentenced as adults - Offender who was sentenced at age 17 to a 37-year sentence was not entitled to be resentenced, even though the sentencing court did not consider the mitigating factors of youth. *Houston-Sconiers*' resentencing mandate is a procedural rule designed to effectuate its substantive rule that juveniles who possessed lower culpability due to the mitigating factors of youth may not receive life sentences without the possibility of release. RCW 9.94A.730, which effectively converts the determinate life sentence the offender received into an indeterminate sentence, is an adequate remedy. *In re the Personal Restraint of Hinton*, No. 98135-3 (March 9, 2023).

Right to counsel – A criminal defendant has the right to counsel at every appearance before the Superior Court, including preliminary and initial appearances. However, an initial appearance, where the court makes a bail decision which is subject to later revision, is not a "critical stage," where depravation of counsel would be structural error. A second appearance, where the defendant is informed of the State's charging decision and the charges is also not a "critical stage." Therefore, failure to provide counsel at these hearings is subject to a constitutional harmless error analysis. *State v. Heng*, No. 101159-8 (December 7, 2023) and *State v. Charlton*, No. 101269-1 (December 7, 2023).

(*Editor's note: Heng and Charlton had very similar fact patterns, but Charlton had one more appearance before counsel was appointed. In both cases the Supreme Court found that the depravation of counsel was harmless beyond a reasonable doubt.*)

Same criminal conduct – The test to determine the criminal intent for the purposes of a same criminal conduct analysis under the SRA is to compare the objective statutory criminal intent of the crime. For example, the intent of burglary is to commit a crime against persons or property. The intent of attempted rape is to rape. The intent of Assault 1st Degree is to inflict great bodily harm. Those are different. It is irrelevant that the defendant's subjective intent was for one of

his or her several crimes to further the other. *State v. Westwood*, No. 100570-9 (September 7, 2023).

Search & seizure – 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. 1596, 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 exceptions requires more. *State v. Teulilo*, No. 101385-0 (June 8, 2023).

Separation of powers – RCW 10.116.030(3)(a), which requires a sheriff of a noncharter county to obtain permission of the chair of the board of county commissioners before deploying tear gas, violates article XI, § 5 of the Washington constitution. Quelling riots is a core duty of the sheriff, and the legislature may not delegate or transfer an elected official's discretion on how to fulfill their core duty to another elected official. *Snaza v. State*, No. 101375-2 (September 14, 2023).

Seizure – A transit rider was unlawfully seized when a fare inspection, conducted on a moving bus by an armed sheriff's deputy, escalated to where the rider was handcuffed. *State v. Meredith*, No. 100135-5 (March 16, 2023).

(*Editor's Note: There are five opinions. The lead opinion, signed by three, would hold that a fare inspection on a moving bus conducted by a pair of armed sheriff's deputies is a seizure in violation of article I, section 7 of the Washington constitution. The two separate concurrences, each signed by only one, would not reach the constitutional issue but hold there was no evidence of statutory authority for the sheriff's deputy to conduct fare inspections. However, the two*

concurrences disagree as to whether the fare inspection constitutes a seizure, with one opining it does, and the other opining the defendant was not seized until handcuffing, later in the contact. The dissent, signed by four, would hold that the fare inspection does not constitute a seizure. Therefore, five justices agree that the fare inspection was not a seizure, and five justices agree that there was an unlawful seizure, but for two different reasons, and at two different points in time.)

Washington voting rights act – The Washington voting rights act protects all Washington voters from discrimination on the basis of race, color, and language minority group. Therefore, the WVRA does not violate the privileges and immunities clause of article I, § 12 of the Washington Constitution or the equal protection clause of the fourteenth amendment. The WVRA's costs provision is also constitutional. *Portugal et al. v. Franklin County et al.*, No. 100999-2 (June 15, 2023).

Washington Court of Appeals:

Attorney-client privilege – 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 crafter to disincentivize such behavior going forward and must at least include vacation of the judgment. *State v. Myers*, No. 83588-2-I (June 5, 2023, Opinion withdrawn and substituted August 7, 2023).

Blake – A defendant is entitled to have those simple possession convictions vacated, but cannot withdraw her or his pleas to multiple charges that include simple possession under the rule regarding indivisible pleas. Simple possession was not a nonexistent crime, but rather a crime that was later held to be unconstitutional. *State v. Olsen*, No. 56574-9-II (May 31, 2023).

Petition for Review granted, December 5, 2023 No. 102131-3.

Breach of plea agreement – An under-18 defendant who entered into a plea agreement to a reduced charge and an agreed lengthy sentence in adult court in 2012 is not now entitled to resentencing based on the mitigating factors of youth. Rather, seeking such a mitigated resentencing constitutes a breach of the plea agreement by the defendant. *State v. Harris*, No. 38217-6-III (April 27, 2023) **Petition for Review granted December 5, 2023 No. 102311-1.**

Clerical mistakes – Amending a judgment & sentence to set a minimum term of incarceration after a hearing in which the parties disputed the court's authority to set a minimum term is not

correcting a "clerical mistake," and so exceeds the relief available under CrR 7.8(a). Clerical mistakes are such things as language that incorrectly conveys the court's intention, or something inadvertently omitted. Imposing a minimum term of sentence (especially when the parties disputed the court's authority to do) so is a substantive change. *State v. Bartholemew*, 57948-1-II (November 28, 2023).

(*Editor's note: The real point of this opinion appears to be to send a message to the legislature to enact "Monschke-fix" legislation giving the court authority to set a minimum term of sentence in cases of 18 - 21 year old defendants convicted of aggravated murder in the first degree who have been found to possess mitigating properties of youth, and cannot receive an LWOP sentence.*)

~~**Community supervision** – Community custody is not the same as "community supervision," as used in RCW 9.94A.589(5), therefore, imposing 36 months of community custody, to run consecutively to the term of community custody the Defendant was serving when he committed his new crime, was not an illegal sentence. *State v. Buck*, No. 38382-2-III (January 10, 2023.)~~

Reversed by *State v. Buck*, No. 101703-1 (March 14, 2024).

Conditions of sentence – A sentence condition prohibiting access to material "depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4)" is not vague or overbroad for a juvenile adjudicated guilty of Rape 2nd Degree (by forcible compulsion). *State v. J.H-M.*, No. 84443-1-I (November 13, 2023) **Petition for Review granted No. 102635-8 (April 9, 2024).**

Confrontation Clause - Expert witnesses may testify to their own conclusions, even when they rely on data prepared by non-testifying technicians. Therefore, it was not error to allow a toxicology lab supervisor to testify as to the results, where that supervisor had independently reviewed the testing and the results and testified to her own opinions. *State v. Hall-Haught*, No. 84247-1-I (August 1, 2023, unpublished).

(*Editor's note: A motion to publish is likely forthcoming. In the meantime, please refer to GR 14.1(a) when considering citing to this opinion.*)

Courtroom closure – Division III's General Order 2012-1, which requires the use of initials or pseudonyms for victims or witnesses who were under 18 at any time of the events in the case, does not violate the defendant's right to an open courtroom, as the child's full name is still available upon examination of the full record. *State v. Delgado*, No. 38661-9-III (December 12, 2023).

COVID-19 protocols - Imposition of COVID-19 protocols are "trial management decisions," reviewed for abuse of discretion. Here, the trial court did not abuse its discretion by denying a mistrial when defense counsel claimed his ability to communicate with his client was hampered by 1) the use of masks; 2) a (transparent) partition between counsel and client; and 3) some jurors seated behind counsel table during trial (to allow for social distancing.) *State v. Ferguson*, No. 55768-1-II (February 28, 2023).

COVID-19 protocols, Jury selection – Jurors wearing face masks during *voir dire*, which covered their noses and months, arguably making it more difficult to judge their reactions to questions, did not deprive the Defendant of the right to an impartial jury. *State v. Bell*, No. 83387-1-I (January 30, 2023), withdrawn and substituted by *State v. Bell*, 83387-1-I (May 22, 2023).

COVID-19 protocols, Confrontation – Sworn testimony is not necessary to support a trial court's finding that having witnesses appear remotely is "necessary." *State v. Wade*, No. 82910-6-I (July 17, 2023).

COVID-19 protocols, Jury selection – Remote jury selection does not violate the right to a jury drawn from a fair cross-section of the community. *State v. Wade*, No. 82910-6-I (July 17, 2023).

Coroner notification – The Coroner Notification statute, RCW 68.50.020, is unconstitutional as-applied to a person convicted of murder, as compelling a murderer to report to location of the body of his victim would implicate the murderer's right to remain silent under the fifth amendment. *State v. Merritt*, No. 38763-1-III (November 28, 2023, unpublished).

Conditions of sentence – A sentence condition prohibiting the defendant from having "hostile" contact with law enforcement is unconstitutionally vague. *State v. Shreve*, No. 57658-9-II (November 21, 2023).

Credit for time served – In the unusual situation where a prisoner received consecutive sentences for two separate cases, but the first conviction was vacated while the prisoner is still incarcerated pursuant to the second conviction, that offender should receive credit for time served on the first (vacated) sentence towards the second. *PRP of Dean*, No. 38934-1-III (July 27, 2023, publication ordered September 7, 2023).

Curative instructions – In a trial where the two molestation charges had been severed, and a motion *in limine* prohibited mentioning the severed allegation, testimony that the defendant "had been fooling around with those kids" was a serious irregularity that effectively denied the defendant's right to a fair trial. The court's curative instruction that the witness' testimony was "hindered by her inability to clearly hear the Prosecutor's questions" was insufficient because it failed to inform the jury that the comment was improper and not to be considered. Additionally, the instruction was ineffective because it was given two days after the improper testimony, and the record indicated that the witness could hear just fine after being provided an assistive device. *State v. Gogo*, No. 84083-5-I (December 26, 2023).

Dangerous dogs – The State has not preempted the field of regulating domestic animals. Local ordinances may impose broader or stricter standards than state law, define "dangerous dog" more

broadly, and place greater limits of dog ownership. *State v. Richards*, No. 56949-3-II (November 7, 2023) **Petition for review granted March 5, 2024, No. 102627-7**.

Denial of assistance of counsel – Defendant was not denied assistance of counsel where trial counsel did not make an opening statement, failed to alert the court the Defendant was falling asleep during trial, failed to object to inadmissible evidence, failed to cross-examine most witnesses, did not move to dismiss a charge for which there was insufficient evidence, attempted to appear at sentencing on a sex offense by phone while simultaneously appearing on another docket, failed to correct a miscalculated offender score, and argued for sentencing alternatives for which the defendant did not qualify. These are complaints of poor performance, which are better framed as ineffective assistance, which the defense specifically disclaimed. *State v. McCabe*, No. 84635-3-I (January 30, 2023).

Disclosure of sealed records – If juveniles who are the subject of sealed dependency records are sufficiently involved in an investigation or case which they are not the subject of, their records may be disclosed to other participants in the juvenile justice or care system, pursuant to RCW 13.50.100(3). *In the matter of the Welfare of O.C. and D.C.*, No. 56609-5-II (May 16, 2023).

Discovery – In a postconviction motion for his client file from his former attorney, RPC 1.16(d) entitles the offender to the discovery in the file, subject to the redaction procedure in CrR 4.7(h)(3). *State v. Murry*, No. 38492-6-III (published January 26, 2023).

Double jeopardy – Assault in the First Degree and Drive-By Shooting, both committed at the same time, did not merge for double jeopardy purposes, as the two crimes contain distinct elements. *State v. Bell*, No. 83387-1-I (January 30, 2023), withdrawn and substituted by *State v. Bell*, 83387-1-I (May 22, 2023).

Double jeopardy – One attempt to have sexual contact with two (fictional) child victims did not merge into one count of Attempted Rape of a Child. Unlike solicitation, which focusses on the number of solicitations, or conspiracy, which penalizes the conspiracy to commit any number of crimes, criminalizing an attempt aims to punish a substantial step towards each victim. That the victims were fictitious is irrelevant; impossibility is not a defense. *In re Glant*, No. 56383-5 II (February 7, 2023).

Double jeopardy – Although a *Petrich* instruction alone will not insulate against a double-jeopardy claim, such a claim will fail when the State makes it manifestly apparent that specific acts are the basis of the different counts, and that to convict each act must the distinct and proven beyond a reasonable doubt. *State v. Reedy*, No. 83039-2-I (April 10, 2023).

Double jeopardy – Imposition of three mandatory firearms enhancements based on a single firearm does not violate the double jeopardy prohibition on multiple punishments. *State v. Wade*, No. 82910-6-I (July 17, 2023).

Eminent domain – A political subdivision does not lose authority to condemn property for a for a statutorily authorized public use (here, stormwater) just because the project also provides a benefit for which there is no authority to condemn (here, salmon recovery.). *City of Sammamish v. Titcomb, et al*, No. 83886-5-I (March 13, 2023, Petition for Review granted Sept. 8, 2023.)

Evidence – A court may not rely on evidence from a proceeding in another case. Although a court may take judicial notice of court records, this does not extend to the judge's memory of testimony from another case, even if the case is related (although, here, not joined.) In this dependency case it was error for the judge to rely on evidence produced at the same parent's dependency case involving the older child. *In re Dependency of R.L.L.*, Nos. 39204-0-III & 38898-1-III (December 21, 2023).

Excessive fines & Restitution - Restitution to a crime victim that is only the amount of the victim's loss is not punitive. Therefore, the excessive fines clause does not apply. *State v. Ellis*, No. 56984-1-II (June 13, 2023).

Felony Firearm Offender registration - The mandatory felony firearm registration requirements of RCW 9.41.330(3) are only mandatory for offenders convicted of a requisite offense on or after June 9, 2016. *State v. Senior, Junior*, No. 84012-6-I (July 31, 2023).

Firearm rights restoration – A person who is prohibited under federal law from possessing a firearm may have his or her rights to possess a firearm under *Washington* law restored pursuant to RCW 9.41.040(4). The federal law prohibiting firearm possession by those convicted of a misdemeanor crime of domestic violence does not pre-empt state law. *Kincer v. State*, No. 57196-0-II (April 18, 2023).

Forensic genetic genealogy – There is no privacy interest in DNA uploaded to a public database. A defendant lacks standing to challenge a search of the DNA of relatives that were voluntarily uploaded to a public database. There is no privacy interest in bodily fluids that one abandons at a crime scene. *State v. Hartman*, No. 56801-2-II (August 22, 2023).

GR 37 – Exercising preemptory challenges against the only two potential jurors who responded to questions about race during *voir dire* and showed an awareness of "racial justice issues" is improper and will result in reversal under GR 37. *State v. Harrison*, No. 55983-8-II (May 2, 2023).

GR 37 – The erroneous denial of a preemptory challenge due to GR 37 is reviewed under a nonconstitutional harmless error standard. *State v. Hale*, No. 57057-2-II (October 31, 2023).

GR 37 – GR 37 applies to all jurors, not just jurors of color, so courts may not limit the parties' use of GR 37 challenges to only jurors of color. *State v. Matamua*, No. 56832-2-II (November 28, 2023).

(*Editor's note: Though not explicitly stated, this opinion appears to be published to highlight the appellate court's disapproval of the trial court's procedure of requiring the parties to agree which members of the venire GR 37 "applies to" prior to voir dire. The ruling which upheld this defendant's conviction, that a denial of a preemptory challenge under an erroneous GR 37 ruling is reviewed under a nonconstitutional harmless error standard, was decided last month in State v. Hale, No. 57057-2-II (October 31, 2023).*)

Impeachment - Prior inconsistent statements of a witness may not be excluded as overly prejudicial when that exclusion allows a key witness to testify to their version of events virtually unchallenged. When applying ER 403's balancing test of probative value vs. unfair prejudice, the proper focus is on the truth-seeking process, and the more essential the witness' testimony, the more the value of impeachment outweighs the potential prejudice. Here, a key state witness testified at a sexual assault trial that the victim was unconscious or incoherent during a time that she had previously told the police that she and the victim had had a conversation about the victim's history of being sexually assaulted and disbelieved. The trial court abused its discretion by excluding cross-examination into the content of the conversation to impeach the witness' assertion that the victim was unconscious or incoherent. *State v. Bartch*, No 83386-3-I (October 30, 2023).

Ineffective assistance – Despite arguing it in close, defense council was ineffective for failing to request an instruction on revived self-defense, where the evidence could support such an instruction. *State v. Fleeks*, No. 82911-4-I (January 23, 2023).

Ineffective assistance, Excusable homicide, Justifiable homicide – Failure to request a jury instruction on excusable and justifiable homicide for first degree manslaughter was objectively deficient, and also prejudicial where the jury convicted the defendant of the lesser-included

offense of first-degree manslaughter, but not for murder, where the instructions were properly given. *State v. Moreno*, No. 38425-0-III (May 18, 2023).

Indecent exposure - RCW 9A.88.010 does not require actual nudity and is not unconstitutionally vague as applied. Showing a clearly erect, though clothed, penis in a highly sexualized way, namely, masturbation, is "indecent exposure" as defined by the statute, which is a common phrase understandable by people of common intelligence. *State v. Thompson*, No. 84366-4-I (August 28, 2023, publication ordered October 3, 2023).

Issue preservation – In order to preserve a motion to sever for appeal, the motion must be renewed after some factual basis to support a claim of prejudice has been made. A motion renewed before any evidence has been introduced, or even proffered, is insufficient to preserve the issue for appeal, as a court cannot abuse discretion based on facts that it does not know. *State v. McCabe*, No. 38180-3-III (April 6, 2023).

(*Editor's note: The Court reached this decision based on evidence law, not the 6th Amendment.*)

Jury proportionality – No sixth amendment violation where the defendant failed to show either that representation of Black people in the *venire* was not fair and reasonable in relation to the population, or systemic exclusion. The Court declined to evaluate underrepresentation using comparative disparity, as it distorts underrepresentation in small groups. And evidence showed that King County made efforts to be systemically inclusive, including separating the county into two jury assignment areas. *State v. Fleeks*, No. 82911-4-I (January 23, 2023).

Jury selection – A juror who says, "[if I am] on the fence, then I may agree with everyone…" should have been excused for cause. If the juror is "on the fence" then the State has not carried its burden. *State v. Smith*, No. 83187-9-I (August 21, 2023) **Petition for Review granted January 2, 2024**.

Jury selection – When random numbering of potential jurors resulted in a low probability that members of the Defendant's race would be seated on the jury panel, it was not an abuse of discretion to refuse to change procedures, during jury selection, to bias the process to make it more likely potential jurors of the Defendant's race would be seated. *State v. McKnight*, No. 56250-2-II (January 10, 2023).

Juvenile sex offender registration – Sex offender registration is not punishment, so the eight amendment's bar on cruel and unusual punishment does not prohibit mandatory sex offender registration for juveniles under a *Houston-Sconiers* analysis. *State v. Domingo-Cornelio*, No. 56483-1-II (April 25, 2023).

Juvenile resentencing – A court need not consider the mitigating factors of youth in resentencing a defendant who was 18 at the time of his crime. *State v. Ellis*, No. 56984-1-II (June 13, 2023).

Legal financial obligations – The mandatory $500 victim penalty assessment is still not an excessive fine under the eighth amendment, even if it might be partially punitive. *State v. Griepsma*, No. 83720-6-I (March 13, 2023).

Legal financial obligations – Interest on restitution is a cost – a financial obligation that is imposed on a criminal defendant as a result of a conviction. Therefore, the recent change to RCW 10.82.090, which makes interest on restitution discretionary based on consideration of a number of enumerated factors, applies to all criminal defendants whose judgments are not yet final. *State v. Reed*, No. 84716-3-I (November 20, 2023).

Lesser degree offenses – It was not error to admit evidence of the defendant's prior convictions for assaults against the victim in a trial where only DV Assault 2nd Degree (substantial bodily harm prong) was charged, because Felony DV Assault 4th Degree is a lesser degree offense of

DV Assault 2nd Degree, and the State would have to prove the prior assaults in order to prove Felony DV Assault 4th Degree. *State v. Johnson*, No. 83738-9-I (October 16, 2023, opinion withdrawn and substituted January 2, 2024).

(*Editor's note: In this case, the prior conviction evidence was also admissible to assess the victim's credibility, and was accompanied by a limiting instruction.*)

Lesser included offenses – Because the *mens rea* of burglary is the intent to commit a crime therein, not a knowing trespass, trespass is not a lesser-included offense of Burglary. *State v. Brown*, No. 38749-6-III (April 25, 2023).

Lustful disposition – Prior advances made by the defendant towards the victim a year before the charged sexual assault, admitted as evidence of "lustful disposition" (prior to the holding in *State v. Crossguns*, 199 Wn.2d 282 (2022)) are inadmissible under ER 404. Such behavior is only minimally probative of motive, and cumulative, where no other motive is reasonable. *State v. Bartch*, No 83386-3-I (October 30, 2023).

Missing witness – Although the State may argue that a defendant has produced insufficient evidence to support his factual assertions, the missing witness doctrine must apply before the State may argue that the defendant should have called a natural witness, and the State must raise the issue early enough in the proceedings for the defendant to explain why the witness is not being called. *State v. Stotts*, No. 38822-1-III (April 20, 2023).

Open courtrooms – Closing the courtroom to hear a motion pertaining to the admissibility of prior sexual activity under the rape shield law does not violate the public trial right. *State v. Hicklin*, No. 56077-1-II (April 25, 2023).

Privacy act – The sounds of a sexual assault, including the victim saying, "No, no, no let me sleep," "No, don't," "JR stop" "No," "Please stop," "I'm not doing this" "I'm scared," "JR, JR stop it hurts," "Wait, why are you doing this, I'm begging you please stop, no, get off me, get off

me please" is not a "private conversation" as defined by the Privacy Act, Chapter 9.73 RCW. Therefore, a recording of such sounds, made without the consent of the rapist, is admissible. *State v. Kamara*, No. 84473-3-I (December 4, 2023).

Postconviction collateral relief – The time-bar exemption for a "significant change in the law" under RCW 10.73.100(6), does not apply to 1) a sentencing court's failure to comply with *Houston-Sconiers*' procedural mandate of considering the mitigating factors of youth; and 2) including a *Blake*-impacted conviction that does not change the standard range. *PRP of Rodriguez*, No. 83134-8-I (December 11, 2023).

Postconviction discovery – The State has no obligation to produce discovery materials to a defendant posttrial, absent a showing of good cause. A defense attorney's obligation to turn over the client file to the defendant does not transfer to the State. *State v. Albright*, No. 38482-9-III (March 14, 2023).

Protection orders - Defendants don't get credit for time previously restrained on pretrial DV No-Contact Orders towards postconviction Orders. *State v. Smalley*, No. 84638-8-I (January 17, 2023).

Protection orders – Imposition of a lifetime post-conviction sexual assault no-contact Order prohibiting a parent offender from contacting his or her victim child implicates a constitutional right, and so requires an on-the-record analysis which balances: 1) the right to parent; 2) the need for the no-contact order; and 3) whether any viable less-restrictive provision exists. *State v. Reedy*, No. 83039-2-I (April 10, 2023).

Protection orders - Electronic GPS monitoring ordered pursuant to former RCW 26.50.060(1)(j) (now RCW 7.105.310(l)) in concert with a civil domestic violence protection order is constitutional as applied under article I, § 7. While electronic monitoring of a person's

location is an intrusion upon a "private affair," the statute provides the requisite authority of law. *Davis v. Arledge*, No. 84157-2-I (June 26, 2023).

Prosecutorial error – Because the prosecutor maintains the *Brady* list and decides which officers are placed on it, a prosecutor vouches to the veracity of police witnesses by introducing evidence of the "*Brady*" list at trial, and then arguing to the jury that the police witnesses would not risk being placed on the "*Brady*" list (and potentially their careers) by lying on the stand. *State v. Stotts*, No. 38822-1-III (April 20, 2023).

Prosecutorial error – It was improper to characterize a killing by gunfire as an "execution" where the defendant fired two shots in rapid succession during an altercation with the victim. Cases where a prosecutor properly characterized a killing as an "execution" are distinguishable because in those cases the defendant wounded the victim with the first shot, then fired a second, deliberate shot whose only purpose could be to end the victim's life. *State v. Meza*, 83747-4-I (May 15, 2023).

(*Editor's note: The Court of Appeals takes issue with the prosecutor's slow-motion replay of the video showing the shooting, characterizing it as "altered," because the reduced playback speed exaggerated the pause between the first and second shot. Use caution replaying in slow motion where timing is probative.*)

Prosecutorial error – A generic tailoring argument (alleging a defendant tailored his testimony based on the facts at trial, but without linking it to any specific testimony) raised only in the prosecution's closing argument is prosecutorial error. However, the error is not incurable. *State v. Carte*, No. 83589-1-I (August 21, 2023).

Postarrest silence – It was prosecutorial error to characterize the defendant's testimony, which added detail not previously disclosed, as "new information," where that detail was additional, but not inconsistent to the defendant's prior statements and other evidence in the case. Defendants

have no duty to supplement their statements to the police. *State v. Meza*, 83747-4-I (May 15, 2023).

Rape in the First Degree – For a rape to be elevated to first degree pursuant to RCW 9A.44.040(1)(d) (feloniously entering a building or vehicle where the victim is situated) the victim must be "situated" inside the building or vehicle before the defendant enters. *State v. Aguilar*, No. 83773-7-I (August 21, 2023).

Rape shield law – A victim can open the door to evidence about past sexual history for impeachment purposes that would normally be inadmissible under the rape shield law, if the victim makes a statement that is inconsistent with his or her past sexual history. Here, the victim claimed she wouldn't have consented to the sexual assault in question because she had a boyfriend. However, there was ample evidence that she had had multiple consensual partners while she was with that boyfriend. *State v. Bartch*, No 83386-3-I (October 30, 2023).

Rapid Recidivism – The aggravating factor in RCW 9.94A.535(3)(t), of committing the current offense shortly after release from incarceration, is not unconstitutionally vague just because "shortly after" is not defined. Here, committing Vehicular Homicide and Hit & Run – Death only 93 days after release from incarceration constituted "shortly after." *State v. Jackson*, No. 84547-1-I (November 6, 2023).

Relevance – In a murder prosecution, the fact that a prosecution witness was on probation for DUI and had lied about alcohol and drug consumption to a probation officer in the recent past was inadmissible, as it was more prejudicial than probative. *State v. Fleeks*, No. 82911-4-I (January 23, 2023).

Resentencing – A decrease in the offender score that does not change the standard range does not render a judgment & sentence facially invalid. *State v. Kelly*, No. 56461-1-II (March 21, 2023, Petition for Review granted October 4, 2023).

(*Editor's note: This is the holding of In re Pers. Restraint of Richardson, which was decided by the Supreme Court in November, but only published last week.*)

Resentencing – When an appellate court reverses a sentence, resentencing is presumptively *de novo*. The trial court may consider any and all arguments by both the State and the defendant. *State v. Vasquez*, No. 38471-3-III (May 2, 2023, unpublished, Petition for Review granted October 4, 2023).

(*Editor's note: Although this opinion is unpublished, it announces a significant change in the law. Prosecutors handling resentencings should anticipate the defense demanding full resentencing hearings anytime any case is remanded for any reason.*)

Resentencing – A remand for resentencing carries a presumption of *de novo* resentencing. The defendant may even raise an argument which the appellate court ruled waived in the appeal. The resentencing judge may consider rulings by another judge during the sentencing of the offender, but must conduct its own independent review. *State v. Dunbar*, No. 39125-6-III (July 18, 2023).

Resentencing – Defendants who are resentenced, and whose new sentence includes a condition of no contact and a postconviction protection order don't get credit for time previously restrained. A defendant resentenced on a class C felony crime of domestic violence can be properly restrained from contacting the victim for five years at resentencing, even if he spent a year restrained pursuant to the initial (vacated) sentence. *State v. Vanslyke*, No. 84430-0-I (October 16, 2023).

Resentencing of juveniles sentenced as adults – A 17 year old defendant, resentenced after the court considered mitigating evidence related to the defendant's youth, may not appeal imposition of a standard range sentence. *State v. Stewart*, No. 57572-8-II (July 11, 2023).

Resentencing of juveniles sentenced as adults – Juvenile ranges are not presumed to apply to defendants under the age of 18 sentenced as adults. However, if the mitigation qualities of youth are present, those ranges may serve as guidance. The standard adult ranges are a "starting point," but not a presumption. *State v. Larry*, No. 56648-6-II (November 7, 2023).

Resentencing of juveniles sentenced as adults – A sentencing court may order earned early release time on firearm enhancements as part of an exceptional downwards sentence based on the mitigating qualities of youth. *State v. Larry*, No. 56648-6-II (November 7, 2023).

Restitution – Sentencing courts lack discretion to reduce the amount of restitution award paid to the Crime Victim's Compensation Fund, pursuant to RCW 9.94A.753(7). *State v. Morgan*, No. 84536-5-I (November 13, 2023).

Right to appeal – Absent any evidence in the record to the contrary, a statement on plea of guilty which shows the defendant entered into the plea knowingly, intelligently and voluntarily, together with a 20 year delay, creates a presumption of a valid waiver of the right to appeal strong enough to sustain a state's motion to dismiss. *State v. D.G.A.*, No. 38325-3-III (March 16, 2023).

Right to confer with counsel – Where the defendant appears by video from jail without counsel physically present in the same room during a critical stage of the proceedings, reviewing courts consider the totality of the circumstances to decide whether a criminal defendant's right to confer with counsel was violated. Providing explicit guidance on the record for the process for private communication between attorney and client is not necessarily required, but is one circumstances

reviewing courts consider. Here, the defendant's right was violated where such guidance was not on the record, and the defendant's outbursts indicated that having the ability to confer with counsel might have been helpful. *State v. Bragg*, No. 85049-1-I (October 16, 2023).

Right to present a defense – The trial court violated the Defendant's right to present a defense by excluding the testimony of a witness who was 1) not timely disclosed; and 2) couldn't say for sure that he was home the night of the incident, but was home "about 99% of the time," and would testify he never heard anyone scream or yell, as the victim testified she had. The error was compounded by the State's claim in opening statement that there were no witnesses, which opened the door to the witness' testimony. *State v. Broussard*, No. 83056-2-I (March 13, 2023).

Right to present a defense – An evidentiary ruling which erroneously excludes the defendant's evidence will only constitute a violation of the right to present a defense if the evidence was: 1) relevant; 2) material; and 3) vital to the defense. *State v. Young*, No. 38604-0-III (July 13, 2023).

Same criminal conduct – Assault in the First Degree and Drive-By Shooting, both committed at the same time, were separate criminal conduct under the Sentencing Reform Act. Assault in the First Degree requires an individual victim, whereas the general public is the victim of Drive-By Shooting. *State v. Bell*, No. 83387-1-I (January 30, 2023), withdrawn and substituted by *State v. Bell*, 83387-1-I (May 22, 2023).

Same criminal conduct – A sentencing court has no burden to *sua sponte* conduct a same criminal conduct analysis. The Defendant bears the burden of establishing his or her prior offenses constitute the same criminal conduct, just as the State bears the burden of establishing a defendant's priors. A criminal defendant may not raise an unpreserved same criminal conduct argument for the first time on appeal. *State v. Jackson*, No. 84547-1-I (November 6, 2023).

Sentencing – The trial court lacks the authority to order firearm enhancements to run concurrently as a downwards exceptional sentence. *State v. Kelly*, No. 56461-1-II (March 21, 2023, Petition for Review granted October 4, 2023).

Sentencing, *ex post facto* – Because a finding that a defendant committed a crime within a date range is not an admission that the defendant committed the offense on any particular date, when a defendant is convicted of committing a crime within a date range that encompasses two applicable sentencing statutes, the defendant should be sentenced using the earlier applicable statute. *State v. England*, No. 38778-0-III (May 16, 2023, unpublished).

(*Editor's note: Although unpublished, this case is included for cautionary reasons. When crimes are alleged to have taken place in broad date ranges, as is common for sex offenses against children, prosecutors should be cautious about changes in sentencing laws that took place during the date range alleged. If the defendant pleads, consider a stipulation to a date range that does not encompass a statutory change. If the case proceeds to trial, consider a special verdict for that asks for a finding as to a specific date or date range.*)

Sentencing – A defendant effectively stipulates to the criminal convictions he or she presents in pleadings. Here, the defendant's recitation of 12 prior convictions and adjudications in a sentencing memorandum (and verbal agreement to the sentencing range) relieved the State of its burden to prove those convictions with other documentation. That the defendant's recitation of his criminal history only results in an offender score of 12 (rather than 14) does not merit resentencing as the standard range is the same and therefore any error is harmless. *State v. Royal*, No. 83322-7 (May 22, 2023, published in part).

Search & seizure – Under the attenuation doctrine, fruits of an illegal search may be sufficiently attenuated from the official misconduct as to not warrant suppression. Washington's attenuation doctrine, specific to article I, § 7, only applies when an unforeseeable intervening act completely severs the causal connection between the illegal search and the discovery of evidence. There are no exceptions that rely on speculation, the likelihood of deterrence, or the reasonableness of the

misconduct. Here, the police discovered the defendant's phone number in a SIM card found on a homicide victim, and were able to link it to the defendant based on a record of an encounter with police that was ruled to be an illegal seizure. The homicide, which occurred after the illegal seizure, was not a superseding cause which severed the link between the evidence and the illegal seizure. *State v. McGee*, No. 83043-1-I (May 30, 2023, Petition for Review granted Nov. 9, 2023 No. 102134-8).

Search & seizure - A driver's consent to search their car does not extend to searching the contents of closed containers inside the car that do not belong to the driver. Here, the defendant passenger had a legitimate expectation of privacy under article I, § 7 in the backpacks he left inside the car when he fled from the police during a traffic stop. He did not abandon the backpacks or relinquish his privacy interest in them because he was in the vehicle with permission, and took steps to conceal the backpacks from the officer before fleeing. *State v. Garner*, No. 56861-6-II (2023).

Search & seizure - A host does not have authority to consent to a search of a present guest's grocery bags located inside the host's premises. A person has a reasonable privacy interest in grocery bags, which are are "traditional repositories of personal belongings." *State v. Giberson*, No. 56081-0-II (April 4, 2023).

Self-defense – Because the state bears the burden of proving a lack of self-defense, it is an inaccurate statement of the law to argue "[t]here is no benefit of the doubt… when it comes to the amount of force that you apply…" in a self-defense case. *State v. Meza*, 83747-4-I (May 15, 2023).

Self-defense – An instruction on justifiable homicide based upon resistance to a felony or attempted felony (RCW 9A.16.050(2), WPIC 16.03) is repetitious when the felony or attempted

felony is an attack on the defendant's person which necessarily threatens life or great bodily harm, and the jury is already being instructed on justifiable homicide based on a threat to life or great bodily harm (RCW 9A.16.050(1), WPIC 16.02). *State v. Bogdanov*, No. 56202-2-II (July 25, 2023).

Sealed records – Disclosure of sealed court records to a specified party does not constitute (or require) unsealing under GR 15. "Unsealed" means available to the public. *In the matter of the Welfare of O.C. and D.C.*, No. 56609-5-II (May 16, 2023).

Shackling – A defendant who is shackled at sentencing without the requisite individualized findings by the court that restraints are necessary must be resentenced unless the State shows that the error was harmless beyond a reasonable doubt. Here, the State cannot make that showing because the judge found the defendant had been convicted of two prior "strike" offenses, and sentenced the defendant to the top of the range on the non-strike offense. *State v. Jarvis*, No. 56086-1-II (June 13, 2023).

Sufficiency of the evidence – ~~Defendant's aggressive advance towards the victim in a "scary aggressive" manner while holding a rifle, but never pointing or aiming it at the victim, which made her afraid that he meant some general harm, without more, was insufficient to support a conviction for Assault in the Second Degree under a theory of apprehension of battery with a deadly weapon.~~ *PRP of Arntsen*, No. 83075-9-I (January 3, 2023) **Reversed by *In re Pers. Restraint of Arntsen*, No. 101635-2 (February 29, 2024).**

Surrender of firearms – In a compliance hearing for Order to surrender weapons, it is error for the court to take the State's failure to seek a search warrant as evidence of the respondent's compliance. It is the respondent's burden to prove compliance with the Order to Surrender. The onus is on the court to issue a search warrant if probable cause exists to believe the respondent

possesses weapons after a surrender Order. R- CW 9.41.801(4). The State's role in such a hearing, if it chooses to attend, is to be an "information provider." RCW 9.41.801(8)(b). *Sayson v. Espoinoza*, No. 84168-8-I (July 17, 2023, unpublished).

Second Amendment - The Second Amendment does not bar the state from criminalizing the possession of firearms by felons. Washington's Unlawful Possession of a Firearms statute, RCW 9.41.040(1) is constitutional. *State v. Ross*, No. 84490-3-I (November 6, 2023).

Special relationship doctrine (civil) – Jails possess complete control over inmates' liberty, and therefore owe a special duty to protect inmates. Therefore, jails cannot use the felony defense (RCW 4.24.420) or comparative fault (RCW 5.40.060) defenses in a civil suit alleging the jail was negligent in allowing an inmate to smuggle heroin into the jail that another inmate then used to overdose and die. *Anderson v. Grant County*, No. 38892-1-III (November 28, 2023).

Unlawful factoring – Unlawful Factoring, RCW 9A.56.290, can only be committed by a "factor," that is, a person (including a partnership, corporation, trust, or unincorporated association) that acts or transacts business for another. *State v. Restvedt*, No. 56856-0-II (April 11, 2023).

Washout – The State may rely on the sentence information in a judgment & sentence to extrapolate a release date and prove the defendant's prior felonies have not "washed out" under the SRA. There is no presumption the "washout" period begins at the entry of the judgment & sentence. *State v. Green*, No. 38781-0-III (May 17, 2023).

Withdrawal of plea – The prosecutor's statement to the African American defendant during plea negotiations that if he proceeded to trial, the jury would be "…not necessarily be a jury of your peers, but it'll be a jury of our peers, be a lot of white folks…" (emphasis added) rendered the

defendant's plea involuntary (although a defense attorney may properly say the same thing to a client.) *State v. Horntved*, No. 38928-6-III (December 12, 2023).

Wrongly Convicted Persons Act – To survive summary judgment under the Wrongly Convicted Persons Act, the claimant must meet a burden of production sufficient for a reasonable trier of fact to find the elements of the claim by clear and convincing evidence. *Apolo-Albino v. State*, No. 83552-1-I (July 31, 2023).

Youthful offenders – *Monschke*'s prohibition on *de facto* life sentences, and *Houston-Sconiers*' grant of 'absolute discretion' to depart from the SRA do not apply to youthful offenders (i.e. those over 18 but whose crimes exhibit some of the mitigating factors of youth.) *State v. Krueger*, No 83899-7-I (October 23, 2023, publication ordered December 14, 2023).

Ninth Circuit:

Collateral consequences – A 2009 gross misdemeanor conviction of Harassment under RCW 9A.46.020, is a "crime of violence" for immigration purposes under 18 U.S.C. § 16(a). *Rodriguez -Hernandez v. Garland*, No. 21-456 (December 27, 2023).

(*Editor's note: In this case the defendant was convicted in 2009, when the maximum possible punishment was one year. It was subsequently lowered to 364 days in 2011 specifically to address immigration consequences.* See *Laws of 2011, Ch. 96, §1.*)

Arms – ~~A criminal statute prohibiting possession of butterfly knives violates the second amendment. A butterfly knife is an "arm," and more analogous to a pocketknife than historically prohibited bladed weapons such as Bowie knives or the Arkansas toothpick.~~ *Teter v. Lopez*, No. 20-15948 (August 7, 2023) **opinion vacated, *en banc* reconsideration granted February 22, 2024**.

Brady – In order to constitute a *Brady* violation, the withheld evidence must have a reasonable probability of affecting a judicial proceeding. In this 42 USC § 1983 claim, the plaintiff's harm (being held in pretrial detention six months for murder, during which time the district attorney's office did not disclose another person's confession in their possession) did not result from a proceeding tainted by nondisclosure because the prosecutor dismissed the charge prior to a judicial proceeding. *Parker v. County of Riverside, et al*, No. 22-55614 (August 15, 2023).

Disqualification of prosecutor – Disqualification of an entire prosecutor's office is an extreme remedy that implicates separation-of-powers doctrine. There must be specific findings against the accused prosecutors, and a determination that the misconduct or conflict pervades the office. To disqualify an entire prosecutor's office, a court must find both a strong factual predicate for blanket disqualification that continued representation of the government by that prosecutor's office will result in a legal or ethical violation. *U.S. v. Williams*, No. 22-10174 (May 18, 2023).

Firearm enhancements – U.S.S.G. § 2D1.1(b)(1), which provides for an enhancement of the Guidelines calculation if a defendant possessed a dangerous weapon at the time of a felony drug offense, is constitutional under the Second Amendment following *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 213 L.Ed.2d 387 (2022). *U.S. v. Alaniz*, No. 22-30141 (June 13, 2023).

Qualified Immunity/Deadly Force – Two police officers were entitled to qualified immunity for their use of deadly force under the following circumstances: the officers responded to the decedent's home in response to a domestic violence call. Two children exited the house and told the officers that their parents were fighting, their mother needed an ambulance, and that the only weapon in the house was a BB gun. The officers entered the house and announced their presence, one with a drawn firearm. The decedent shouted, "fuck you, punks!" disobeyed orders to get on the ground, and charged at the officers through a short, narrow hallway. The officers shot the decedent five times. *Waid v. County of Lyon*, No. 22-15382 (November 21, 2023).

Search & seizure – Removing a car key fob hanging from a suspect's belt loop exceeded the scope of a *Terry* stop for suspicion of trespassing. The fob was neither a weapon nor part of the trespassing investigation. The suspect's claim that he did not have a car did not constitute abandonment of the fob; abandonment requires denial of ownership and physical relinquishment, and the defendant did neither in relation to the fob. *United States v. Baker*, No. 20-50314 (January 30, 2023).

Other federal circuits and foreign cases of interest:

Breach of plea agreement – The government impliedly breached the plea agreement for a low-end sentence where it's presentation and arguments at sentencing, including dwelling on prejudicial information already before the court, emphasizing the damage drugs have had on society, and revealing there was much internal disagreement in the US Attorney's office about the plea agreement, could only serve to inflame the court with the goal of a higher sentence, which was imposed. While a plea agreement does not require an enthusiastic recommendation, the government may not purport to make the agreed recommendation while "winking at the… court to impliedly request a different outcome." *U.S. v. Farias-Contreras*, No. 21-30055 (Feb. 15, 2023).

COVID-19 protocols - The Sixth Amendment's fair cross-section requirement does not apply to unvaccinated potential jurors; the fair cross-section requirement applies to the jury *venire*, not the *petit*, so striking unvaccinated jurors from the *venire* for cause was not error. *United States v. Colon & Lopez-Alvarado*, No. 22-4187 (April 11, 2023).

Domestic violence – College dormmates, who were assigned the same living space by the university, had only been residing together for two months, and where there was no evidence the two prepared and ate meals together, engaged in other communal living activities, or had a "socially interdependent relationship" of any kind, were not "family or household members" as defined by Massachusetts law. *S.J. v. T.S.*, No. 22-P-944 (Massachusetts Supreme Judicial Court, August 28, 2023).

(*Note: G.L. ch. 209A, §1, the Massachusetts statute in question, defines "family or household members," in relevant part, as "persons who… are or were residing together in the same household…."*)

Discovery violations – A trial court may reduce the severity of a defendant's charge, here from first degree murder to second degree murder, as a deterrent sanction in an extreme case of egregious discovery violations. *People v. Tippet*, No. 23SA111 (Colo., December 11, 2023).

Dog sniffs - The use of a narcotics-detection dog to sniff defendant's crotch area for drugs qualifies as a search and thus implicates the protections of the Fourth Amendment. *People v. Butler*, No. 95 (N.Y., December 19, 2023).

Ethics - RPC 4.2 prohibits a defense attorney from contacting a represented co-conspirator who is cooperating with the State without the knowledge or consent of that co-conspirator's lawyer. *In The Matter of Ashutosh S. Joshi*, No. S23Y0155 (Ga, January 18, 2023).

(*Editor's Note: Georgia's RPC 4.2 is phrased slightly differently from Washington's, but not so much as to make a difference in this situation.*)

Police misconduct - A police officer is not deprived of a liberty interest in continued employment as a police officer be being placed on the PID list, which effectively ends his career. *Adams v. City of Harahan*, No. 22-30218 (April 14, 2023).

Protection orders – Tagging someone on Facebook is an intentional, knowing form of communication that can constitute a no-contact order violation. *Boes v. Texas*, No. 07-22-00204-CR (August 15, 2023).

Subsequent remedial measures – Nothing in the plain language of Kentucky Rule of Evidence 407, which prohibits the admission of evidence of subsequent remedial measures as proof of negligence (and which is identical to Washington's ER 407) prohibits its application in criminal cases. *Pozo-Illas v. Commonwealth of Kentucky*, No. 19-CR-002766 (March 23, 2023).

Attorney General Opinions:

Assault weapons – Rim fire rifles are not excluded from every definition of "assault weapon" as defined by the Firearms Act. A rim fire rifle that is semiautomatic is an "assault weapon" if it is either (1) a specific firearm listed in RCW 9.41.010(2)(a)(i), (2) has an overall length of less than 30 inches per RCW 9.41.010(2)(a)(ii), or (3) is a "conversion kit, part, or combination of parts, from which an assault weapon can be assembled." AGO 2023 No. 4 (October 2, 2023).

Assault weapons - A pawnbroker who receives an assault weapon as security for a loan may lawfully return the weapon upon repayment of the loan, as this is not a "delivery," but a return of property of which the pawnbroker was a bailee. However, if the owner defaults on the loan, the pawnbroker can only sell the weapon to the armed forces or a law enforcement agency (with the exception of during the safe harbor period, which has long since passed.) AGO 2023 No. 5 (October 5, 2023).

Police use of force – Chapter 10.120 RCW probably prohibits the police from using physical force when providing emergency aid unless force is otherwise authorized by statute. Use of "chokeholds" or neck restraints is unlawful, even if used to save human life, but officers may not face civil liability under such a circumstance. E2SHB 1310 and subsequent amendments (codified as chapter 10.120 RCW) will probably be interpreted to discard the "reasonable officer" standard of *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L.Ed.2d 443 (1989) and replace it with a necessary force standard. AGO 2023 No. 1 (January 2, 2023).

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