LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

OCTOBER 2015

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BRIEF NOTES FROM THE NINTH CIRCUIT, U.S. COURT OF APPEALS

(1) CONSTITUTIONAL DOUBLE JEOPARY PROHIBITION HELD TO PRECLUDE PERJURY CONVICTION OF MAN WHO EARLIER CONVINCED JUDGE IN TRAFFIC CASE TO BELIEVE HIS CLAIM OF NOT BEING THE DRIVER OF SPEEDING CAR – In Wilkinson v. Gingrich, ___F.3d ___, 2015 WL ___ (9th Cir., Sept. 03, 2015), a three-judge Ninth Circuit panel rules that constitutional protection against double jeopardy bars prosecuting for perjury a person who successfully lies in traffic court that he or she was not the driver of the vehicle related to the alleged violation.

A three-judge panel affirms the district court's judgment granting James Kendell Wilkinson's habeas corpus petition challenging his conviction for perjury for previously testifying in a traffic court proceeding that he was not the driver of a car (1) that had been stopped for speeding and (2) whose driver had been ticketed. The State of California brought the perjury prosecution based on evidence developed after Wilkinson was acquitted of the speeding offense. A jury convicted Wilkinson of perjury. After Wilkinson lost his appeals in the California appellate system, he filed in federal court for habeas corpus relief.

The three-judge Ninth Circuit panel agrees with the U.S. District Court that the California appellate court unreasonably applied federal precedent when it held that Wilkinson's acquittal in traffic court did not bar the subsequent perjury prosecution. The panel held that the traffic court necessarily decided in Wilkinson's favor an issue that was critical to both the traffic court and

perjury proceedings – i.e., that Wilkinson was not the driver of the speeding car – and that the State was therefore precluded by the Double Jeopardy Clause from bringing the perjury prosecution.

Result: Affirmance of U.S. District Court (Central District of California) grant of habeas corpus relief to James Wilkinson.

LEGAL UPDATE EDITORIAL COMMENT: This seems to be a crazy result, but I do not have a strong feeling that it is a wrong under the case law.

(2) REVERSE STING INVOLVING PLAN TO RIP OFF A FICTITIOUS DRUG STASH HOUSE HELD NOT OUTRAGEOUS GOVERNMENTAL MISCONDUCT – In United States v. Pedrin, ___F.3d ___, 2015 WL ___ (9th Cir., August 17, 2015), a 3-judge Ninth Circuit panel votes 2-1 to reject defendant's argument of outrageous government misconduct in a case that involved a reverse sting – a would-be plan to rob a drug stash house. Defendant's unsuccessful argument was grounded in the federal constitution's Due Process clause,

A federal law enforcement agent was working with a CI. The agent had done many other reverse stings in the past following a similar scheme. The CI told the agent that his nephew called to ask the uncle to help with robbing drug houses. The CI had immediately alerted the agent, who arranged for a meeting with the nephew and the defendant. A plan to rob a fictitious drug house was made. The defendant was warned on the way to the home-invasion robbery that the plan was actually a sting. He fled at that point, but he was eventually arrested and charged with various drug trafficking counts. He was convicted at trial.

The defense of outrageous governmental misconduct (which differs from statutory and common law entrapment defenses) has its source in the Due Process clause of the Fourteenth Amendment of the federal constitution. The Ninth Circuit panel applies the test that was used in United States v. Black, 733 F.3d 294 (9th Cir. 2013). The Black decision identified six elements that are assessed to determine if there has been outrageous government misconduct: (1) known criminal characteristics of the defendants at the time the sting is planned; (2) individualized suspicion of the defendants at the time the sting is planned; (3) the government's role in creating the crime of conviction; (4) the nature and scope of the government's encouragement of the defendant to commit the criminal conduct; (5) the nature and extent of the government's participation in the criminal conduct; and (6) the nature of the crime being pursued and the necessity for the actions taken in light of the nature of the criminal enterprise and investigative challenges relating to the nature of the criminal enterprise.

The majority opinion in Pedrin notes that the defendant (through the nephew) approached the agent, so it was not a case of the agent going into a bar and asking around and setting someone up. The other factors all pointed to the defendant wanting to do this offense without much prodding. In short, the Pedrin Court concludes that the Black test for establishing outrageous government misconduct was not met here.

The dissenting judge bitterly complains about the government's conduct in the case.

Result: Affirmance of U.S. District Court (Arizona) conviction of Alex Pedrin, Jr. for a federal drug crime.

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WASHINGTON STATE SUPREME COURT

LANGUAGE OF MIRANDA WARNINGS: DETECTIVE'S REPLY TO SUSPECT'S REQUEST FOR CLARIFICATION OF ATTORNEY APPOINTMENT PROCESS – EXPLAINING HOW "APPOINTMENT" OF AN ATORNEY COMES ONLY THROUGH A COURT PROCEEDING – HELD TO MAKE HIS MIRANDA ADVISEMENT "CONTRADICTORY AND CONFUSING"

State v. Mayer, ___Wn.2d ___, 2015 WL 6388248 (Oct. 22, 2015)

Facts and Proceedings below: (Excerpted from Supreme Court majority opinion)

> One evening, two hooded gunmen robbed KC Teriyaki, a casual restaurant in Salmon Creek, while the employees were closing the restaurant for the day. The masked gunmen pushed one of the employees inside the restaurant; pointed a gun at the employee; grabbed a bag from inside; and then fled with the bag, which contained cash from the day's sales. Police responded to the scene and interviewed the employees as well as the restaurant's owner.
>
> The timing and method of the robbery led police to suspect that someone with inside knowledge was involved in the planning of the robbery. The owner identified Emily Mayer as a disgruntled ex-employee, and Emily and her brother-Mayer, the defendant in the instant case-became suspects. An anonymous tipster called 911 shortly thereafter and told police that he had overheard Mayer bragging about robbing a restaurant. The caller provided a description of Mayer's vehicle. Police then stopped the vehicle, detained Mayer and the vehicle's other occupants, and transported them to the police station for questioning regarding the robbery.
>
> [A detective] of the Clark County Sheriff's Office questioned Mayer in an interview room at the police station. [The detective] began by reading Mayer his Miranda rights and asking if he could record the interview. Mayer initially waived his Miranda rights and agreed to the recording. Once recording began, [the detective] again advised Mayer of his Miranda rights **[LEGAL UPDATE EDITORIAL NOTE: RCW 9.73.090(1)(b) requires such re-advisement at the outset of a recorded custodial interrogation]**:
>
> > You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right at this time to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before questioning if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements.
>
> This time, however, Mayer asked [the detective] to clarify how he could obtain appointed counsel:
>
> [Detective]: Do you understand each of these rights as I've explained them to you?

MR. MAYER: Yes. Um, If I wanted an attorney and I can't afford one, what - - what would - - ?

[Detective]: If you wanted an attorney - - you know, if you were charged with a crime and arrested, if you wanted an attorney and couldn't afford one, the Court would be willing to appoint you one. Do you want me to go over that with you again?

MR. MAYER: Yeah, but how would that work? Will you be - - how it - - how I

[Detective]: You're not under arrest at this point, right? **[LEGAL UPDATE EDITORIAL NOTE: Telling a custodial suspect that he is not under arrest does not necessarily make the circumstance non-custodial under the totality-of-the-circumstances test for custody under Miranda. The parties and courts at all levels in this case apparently deemed Mayer to have been in a custodial arrest situation throughout the interrogation.]**

MR. MAYER: Oh, okay. Okay.

[Detective: So, if you were, then you would be taken to jail and then you'd go before a judge and then he would ask you whatever at that point, if you were being charged, you would [sic] afforded an attorney if you couldn't - - you know, if you weren't able to afford one.

MR. MAYER: All right. I understand.

[Detective]: Understand?

MR. MAYER: Yeah.

[Detective]: Okay. So you do understand your rights?

MR. MAYER: Yes.

After this exchange, Mayer waived his Miranda rights, agreed to speak with [the detective] regarding the robbery, and made incriminating statements. Mayer admitted, among other things, that on the day of the robbery he met with his sister Emily, who drove the getaway car, and John Taylor, the other robber; they drove to the teriyaki restaurant; Mayer entered the restaurant with Taylor; Taylor was armed with a handgun, and Mayer had a knife; Mayer told the employees "give me the money"; Taylor grabbed the deposit bag containing money; Mayer ran from the restaurant with Taylor; they were picked up by Emily; and Mayer split the proceeds of the robbery with Taylor.

Mayer was arrested and charged with 11 criminal counts (later reduced to 10 counts), including robbery in the first degree. Mayer moved to suppress the incriminating statements he made during his interview with [the detective], but the superior court denied the motion after a hearing.

During the five-day trial, the State introduced Mayer's confession and called several witnesses who testified regarding the events surrounding the robbery and

> Mayer's involvement in the robbery. Among the witnesses were Mayer's accomplice and sister Emily; his other accomplice, John Taylor; Mayer's girlfriend, Sarah Baker; Mayer's friend Brandon Sheldon, to whom Mayer entrusted a revolver around the time of the robbery; restaurant employee and robbery victim AI Juarismi Ortiz Garcia (Ortiz); eyewitness Bobbie Woodworth; and Matthew Scott, the tipster who alerted the police to Mayer's whereabouts.
>
> **[LEGAL UPDATE EDITORIAL NOTE: The next four paragraphs of the majority opinion, omitted here, describe the overwhelming evidence, in addition to Mayer's confession, of Mayer's guilt.]**
>
> . . . .
>
> The jury ultimately convicted Mayer on all 10 pending counts. The trial court sentenced Mayer to 306 months of imprisonment. The Court of Appeals unanimously affirmed the conviction and sentence in an unpublished opinion.

[Footnotes omitted]

ISSUE AND RULING: Did the detective's response to Mayer's request for clarification of the attorney appointment process – i.e., detective explaining how "appointment" of an attorney can come only later through a court proceeding – render the overall Miranda advisement "contradictory and confusing," such that the Miranda waiver was invalid? (ANSWER BY SUPREME COURT: Yes, rule the five justices who join in the majority opinion)

NOTE ABOUT SUPREME COURT VOTING: The five justices joining in the majority opinion authored by Justice Wiggins conclude that, while the trial court erred in admitting Mayer's voluntary but Miranda-violative confession, the error was harmless in light of the overwhelming other evidence of his guilt. Two justices, Madsen and Yu, join in an opinion (authored by Chief Justice Madsen) that concurs in the affirming result but for the reason that they believe that the detective's overall Miranda advisement was proper. Two justices, Gonzalez and Fairhurst join in an opinion (authored by Justice Gonzalez) that concurs in the affirming result but argues that the Court should not have addressed the Miranda issue, and instead should have affirmed exclusively under harmless error analysis.

Result: Affirmance of Clark County Superior Court conviction of Nicholas Keith Mayer of 10 criminal counts, including robbery in the first degree.

ANALYSIS: (Excerpted from Supreme Court majority opinion)

> Here, the State has not met its burden of showing that Mayer had the requisite level of comprehension regarding his rights at the time he waived them. While [the detective] began the interview by providing an accurate and adequate explanation of Mayer's rights under the Fifth Amendment to the federal constitution, [the detective's] responses to Mayer's questions regarding the appointment of counsel obscured the meaning of the initial warnings and likely confused Mayer regarding the timing of when his right to the presence of appointed counsel-and perhaps his other Miranda rights as well-would attach. [the detective] did not cure· the contradiction by clarifying how Mayer might exercise his Miranda rights during the interrogation that was about to commence.

Consequently, the State has failed to establish that Mayer's waiver of his Miranda rights was knowing and intelligent.

. . .

Had the explanation of Mayer's rights ended after [the detective's] initial recitation, we could reject Mayer's Miranda challenge with no need for extended comment. Similarly, [the detective's] later statements regarding the timing of appointment of counsel would not necessarily run afoul of Miranda if we were to read them in isolation. As a practical matter, [the detective] may well have been accurately describing the appointment process in Clark County when he told Mayer that he would not be able to have counsel appointed for him unless and until he was arrested, jailed, charged, and arraigned. Taken together, however, [the detective's] description of the process for appointment of counsel appeared to contradict his initial Miranda warnings.

. . . .

[P]olice may expand on the Miranda warnings or clarify the rights they convey, including the right to appointed counsel and the time at which an indigent suspect can expect to have counsel appointed for him, so long as the explanation as a whole clearly informs the suspect of his rights. For example, in [Duckworth v. Eagan, 492 U.S. 195 (1989)], the primary case on which the State relies, the Supreme Court upheld the adequacy of the following written advice of rights form:

> "Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer."

Duckworth, 492 U.S. at 198.

The [United States] Supreme Court held that this warning "touched all the bases required by Miranda," specifically citing the above-emphasized portions of the advice-of-rights form. The Court explicitly distinguished Duckworth from cases in which "the reference to the right to appointed counsel was linked [to a] future point in time after the police interrogation." .

Unlike the advice-of-rights form in Duckworth, [the detective's] warnings conditioned the attachment of Mayer's right to appointed counsel on several future events and did not clarify how Mayer might protect his Fifth Amendment rights despite the unavailability of appointed counsel. The advice-of-rights form at issue in Duckworth explicitly told suspects how they can protect their Miranda rights despite the unavailability of appointed counsel: "If you wish to answer

questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer."

The Supreme Court specifically quoted this portion of the Duckworth advice-of-rights form in holding that the form adequately conveyed suspects' rights under Miranda.

[The detective here] could have cured any injury done to Mayer's Miranda rights if he had offered a comparable clarification after telling Mayer that appointed counsel was not yet available. But instead, [the detective] simply told Mayer that he had no way of getting an appointed attorney at that time and left it at that. [The detective's] failure to clarify how Mayer might protect his Fifth Amendment rights despite his inability to obtain appointed counsel is fatal to the State's argument that Mayer knowingly and intelligently waived his Fifth Amendment rights under Miranda and its progeny. The right to speak to counsel prior to questioning and have counsel present during questioning is absolute. If, as a practical matter, no attorney is available to speak to an indigent suspect prior to questioning, the suspect may protect his right to have counsel present during questioning by remaining silent until such time that counsel can be provided for him. The advice-of-rights form in Duckworth explicitly informed Mayer's question included no such clarification.

Duckworth reasoned that the advice-of-rights form given to Duckworth had "touched" on all the basic principles required by Miranda. Here, by contrast, there is no evidence that Mayer accurately understood his Fifth Amendment rights. In Doody v. Ryan, 649 F.3d 986 (9th Cir. 2011) **Sept 11 LED:05** (Doody II), the Ninth Circuit distinguished Duckworth because, among other things:

> The officers [in Duckworth] did not deviate from the printed form with inaccurate and garbled elaborations. There was no downplaying of the significance of the warnings. Most importantly, there was no implication that the right to counsel was available only if the individual being questioned had committed a crime.

Doody v. Ryan, 649 F.3d 986, 1004 (9th Cir. 2011) (Doody II). Similarly here, [the detective's] explanations introduced a number of key elements that were not present in Duckworth. [The detective] emphasized that Mayer was not under arrest, thus downplaying the significance of the warnings and the adversarial nature of the encounter. . . . [The detective] further suggested that appointed counsel was available only to suspects who had been arrested, charged, jailed, and arraigned. Because he provided no clarification explaining how Mayer, who was indigent, could protect his Fifth Amendment rights without appointed counsel, [the detective] increased the already palpable sense of isolation that a suspect experiences during police interrogation. Duckworth sets forth the minimum standards that must be met for an effective Miranda warning. In this case, the explanation of Mayer's rights did not meet those standards.

Of course, police officers may inform a suspect facing interrogation that appointed counsel is not immediately available. But if they tell a suspect that appointed counsel is not available until a future point in time, they

> **must also clarify that this does not affect the suspect's right to have counsel present during interrogation and his right to remain silent unless and until a lawyer can be present.**
>
> Without such a clarification, the suspect may perceive the officer's statement that appointed counsel is not yet available as contradicting the earlier Miranda warnings and as suggesting that his Miranda rights had not yet attached. Such a clarification was provided in Duckworth; it was not provided in Mayer's case.
>
> Instead, [the detective's] explanation of Mayer's right to counsel places this case squarely in the category that Duckworth explicitly distinguished: cases where the police link the right to appointed counsel to a future point in time after the police interrogation. By creating such a linkage, [the detective's] explanation of Mayer's Fifth Amendment rights under Miranda became unclear at best and misleading at worst.

[Emphasis added; footnote omitted; some citations omitted, others revised for style]

LEGAL UPDATE EDITORIAL NOTE REGARDING LED ENTRY ON THIS DECISION: Mayer is addressed in the October 2015 Law Enforcement Digest beginning at page 1.

LEGAL UPDATE EDITORIAL NOTE REGARDING SUPREME COURT'S REJECTION OF DEFENDANT'S ALTERNATIVE MIRANDA ARGUMENT: The majority opinion in Mayer rejects defendant's alternative Miranda argument that he invoked his right to an attorney and was ignored by the detective. The majority opinion explains as follows why this argument by defendant fails:

> **Mayer also claims that his questions about how he could obtain appointed counsel constituted an unequivocal invocation of his right to counsel. We disagree. The police must stop an interrogation if a suspect makes "an unambiguous or unequivocal request for counsel." Davis v. United States, 512 U.S. 452, 461-62 (1994) Sept 94 LED:02. But Mayer's briefing does not point to any specific statements that Mayer made during the interview that might constitute a clear invocation of the right to counsel. The transcript of the interview shows that Mayer asked how he might obtain an attorney if he wanted one. Questions regarding the process for obtaining counsel are not tantamount to an actual, unequivocal request for counsel. We therefore reject Mayer's argument that he invoked his right to counsel.**

LEGAL UPDATE EDITORIAL COMMENT:

It is not common for a custodial suspect to, as here, ask ambiguously about the process for appointment of an attorney. But when that happens, officers are faced with a difficult choice. We bolded the following paragraph in the above excerpt from the majority opinion:

> **Of course, police officers may inform a suspect facing interrogation that appointed counsel is not immediately available. But if they tell a suspect that appointed counsel is not available until a future point in time, they must also clarify that this does not affect the suspect's right to have**

> **counsel present during interrogation and his right to remain silent unless and until a lawyer can be present.**

Another option is to advise the custodial suspect that the officer does not wish to confuse the suspect, and to then simply ask whether the suspect wishes for the warnings to be repeated. Another option is for the officer to ask the custodial suspect: (1) if he or she wants an immediate contact with an attorney, and (2) if so, whether (assuming the circumstances in that jurisdiction would allow for the following option) he or she wants to try to call an attorney, including an on-call public defender.

As always, I urge law enforcement readers to consult their own legal advisors and/or local prosecutors on legal issues. I would be very interested in learning the views of others regarding how best to deal with a custodial suspect's question about the appointment-of-counsel process.

RAPE OF A CHILD: AFFIRMATIVE DEFENSE CLAIMING REASONABLE BELIEF AS TO AGE BASED ON VICTIM'S "DECLARATIONS AS TO AGE" CANNOT BE GROUNDED IN VAGUE STATEMENT BY VICTIM IMPLYING THAT SHE IS OLD ENOUGH TO DRINK

State v. O'Dell, ___Wn.2d __, 2015 WL ___ (August 13, 2015)

Facts and Proceedings below:

10 days after his 18th birthday, O'Dell had sexual intercourse with A.N., who was 12 years old. O'Dell had met A.N. the night before when she was drinking wine with friends, and he had commented at that time that she looked too young to be drinking. He alleges that she responded "I get that a lot," and he inferred from her response that she was considerably older than she looked. O'Dell alleges that he found out about A.N.'s actual age from A.N.'s mother after the sex with A.N. had occurred.

O'Dell was prosecuted for second degree rape of a child. The trial court refused O'Dell's request that the jury be instructed on the affirmative defense of reasonable belief that the victim was at least 14 years old or less than 36 months younger than O'Dell, based on the victim's declarations as to age. O'Dell was convicted by the jury.

ISSUE AND RULING: O'Dell commented to A.N. that she appeared to be too young to be drinking. She responded "I get that a lot." Did A.N.'s statement support O'Dell's reasonable belief defense under RCW 9A.44.030(2) and 9A.44.076? (ANSWER BY SUPREME COURT: No, because the child's vague statement was not an explicit regarding her age; the Court is unanimous on this issue. Note that the Court splits 5-4 on a sentencing issue not addressed in the Legal Update.)

Result: Affirmance of Island County Superior Court conviction of Sean Thompson O'Dell for second degree rape of a child; remand for Superior Court to assess whether O'Dell's youth reduces his culpability for his crime and therefore justifies a reduced sentence.

ANALYSIS: (Excerpted from Supreme Court majority opinion)

> In a prosecution for rape of a child in the second degree (an offense defined not by the perpetrator's use of force but instead by the victim's age) "it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed

> the victim to be older." RCW 9A.44.030(2); RCW 9A.44.076. But it is an affirmative defense, provable by a preponderance of the evidence, that "at the time of the offense the defendant reasonably believed the alleged victim to be [at least fourteen, or less than thirty-six months younger than the defendant] based upon declarations as to age by the alleged victim." RCW 9A.44.030(2), (3)(b).
>
> O'Dell contends that A.N. made a declaration as to her age when, in response to his comment that she appeared too young to be drinking, she responded, "I get that a lot." The trial court properly rejected this argument. The trial court noted in its ruling that A.N.'s comment "doesn't say anything . . . about any specific ages." This determination was correct. . . .

[Citation to record omitted; footnote omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) SEIZED LETTER PLUS OTHER EVIDENCE SHOWING PRIOR INDIRECT THREAT SUPPORTS CONVICTION FOR CRIME OF INTIMIDATING A FORMER WITNESS – In State v. Ozuna, ___Wn.2d ___, 2015 WL ___ (Sept. 17, 2015), the Washington Supreme Court is unanimous in rejecting the gang member defendant's argument that his conviction under RCW 9A.72.100 for intimidating a former witness (a fellow gang member) is not supported by substantial evidence in the record.

To support a conviction under the statute, the State must prove a "threat," which means "[t]o communicate, directly or indirectly, the intent" to harm another in various listed ways. The unanimous Supreme Court rules that a rational jury could have found the defendant guilty of the crime of intimidating a former witness based in part, but not in whole, upon a letter that the defendant intended, but failed, to transmit to a third party. Authorities confiscated the letter before it was delivered to anyone by the defendant, though the letter was later shown by a detective to the targeted former witness.

The crime of intimidating a witness requires that the perpetrator intentionally conveyed the threat to threat's target or to a third party. Because a corrections officer confiscated the letter before defendant could give it to the intended recipient, the letter did not satisfy this test because the defendant did not intentionally give the letter to the correctional officer. But circumstantial evidence in the case, including the contents of the letter, supported that jury's verdict because the evidence showed that the defendant had intentionally participated in prior conversations with third persons indirectly conveying threats to harm the former witness.

Result: Affirmance of Yakima County Superior Court conviction of Adrian Bentura Ozuna for intimidating a former witness.

LEGAL UPDATE EDITORIAL NOTE: The Supreme Court's opinion discusses the following Washington decisions that support the view that a person can convey a threat or can convey tampering efforts indirectly (by intentionally informing third parties of his or her intentions or plans regarding the target) under the intimidating statutes and other statutes: State v. Hansen, 122 Wn.2d 317 (1993) Feb 93 LED:15 (statute prohibiting intimidating a judge); State v. Anderson, 111 Wn. App. 317 (2002) Aug 02 LED:12 (statute

prohibiting intimidating a former witness); State v. Williamson, 131 Wn. App. (2005) (statute prohibiting tampering with a witness); State v. Hosier, 157 Wn.2d 1 (2006) Aug 06 LED:06 (statute prohibiting communication with a minor for immoral purposes).

(2) CONSTITUTIONAL DOUBLE JEOPARY PROHIBITION HELD TO PRECLUDE MURDER CONVICTION OF MAN WHO EARLIER CONVINCED JUDGE IN PROSECUTION FOR UNLAWFUL POSSESSION OF FIREARM TO BELIEVE HIS CLAIM THAT HE DID NOT POSSESS THE FIREARM – In in re Personal Restraint of Moi, ___Wn.2d ___, 2015 WL ___ (Oct. 29, 2015), the Washington Supreme Court unanimously rules that Washington and federal constitutional protections against double jeopardy bar prosecuting for murder a person who was previously acquitted of unlawfully possessing a firearm. The State's theory and evidence in the murder prosecution was that the victim was murdered with the same firearm that Moi was previously acquitted of possessing.

Result: Grant of Personal Restraint Petition of Mathew Wilson Moi from his 2007 King County Superior Court conviction for murder.

LEGAL UPDATE CROSS REFERENCE NOTE: Among the appellate court decisions relied on by the Washington Supreme Court is the September 3, 2015 Ninth Circuit U.S. Court of Appeals decision in Wilkinson v. Gingrich digested above at page 2.

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WASHINGTON STATE COURT OF APPEALS

SEARCH OF BEDROOM THAT A VIOLATING PROBATIONER SHARED WITH HER NON-PROBATIONER BOYFRIEND VIOLATED THE BOYFRIEND'S PRIVACY RIGHTS WHERE HE DID NOT CONSENT TO THE SEARCH; FRISK OF BOYFRIEND, HOWEVER, IS UPHELD AS JUSTIFIED BASED ON SEVERAL SWORDS, AN AXE AND MULTIPLE KNIVES IN OPEN VIEW IN THE ROOM

State v. Rooney, ___Wn. App. ___, 2015 WL 5935471 (Div. II, October 13, 2015)

Facts and Proceedings below: (Excerpted from Court of Appeals opinion)

> Alexandria White, who was serving a term of community custody, began living in Rooney's home in December 2013 shortly after her release from prison. [A] Community Corrections Officer (CCO) supervised White's community custody. [The CCO] had also supervised Rooney's previous community custody, which [Rooney] had completed. As a result, [the CCO] knew that in the past Rooney and White had lived together "like a married couple" and they had "always lived in the same room together." After White moved in with Rooney again that December, [the CCO] became aware that White had changed her address without notifying him, which violated her community custody conditions. [The CCO] learned of her whereabouts from another probationer that he supervised, Thomas DeClue, who also lived with Rooney in the same house.
>
> [The CCO] obtained an arrest warrant for White and, with a team of law enforcement officers, went to Rooney's house to arrest her on December 30, 2013. DeClue answered [the CCO's] knock, and he pointed to a bedroom next to the front door when [the CCO] asked to speak to White. As [the CCO] walked

into the bedroom, White was standing in the bedroom with Rooney, who appeared to be asleep in bed. [The CCO] saw a pink backpack, a purse, and a baby carrier in the bedroom. Another officer . . . noticed female clothes and a purse in the bedroom. White's infant child was on the bed. [The CCO] observed swords and axes hanging on the bedroom wall and a couple of knives laying on the shelves. He observed additional weapons on Rooney's nightstand. [The CCO] advised White that by failing to report her new address and not being available for contact she had violated her community custody. White acknowledged that she knew she should have updated her address with the CCO, and that [the CCO] would arrest her for the violation.

After [the CCO] arrested White and placed her in the living room, [the CCO] told White that he was going to search the bedroom. White responded that she lived in the living room, not the bedroom, but [the CCO] did not see any sleeping arrangements or anything that appeared to be White's belongings in the living room. When [the CCO] asked about her relationship with Rooney, White responded that they were "trying to work it out."

[The CCO] ordered Rooney to leave the bedroom so the officers could search it. Rooney objected to the search because he was not currently on community custody, but he began to physically comply. Rooney, who was dressed in what appeared to be boxer shorts, asked to put on pants. [The CCO] replied that he would have to search the pants "for safety reasons" before Rooney could put them on and leave the room. Given the other weapons in the room, [the CCO] was concerned that Rooney might have a weapon in the pants. Rooney grabbed a pair of pants, and when [the CCO] took hold of the pants, he immediately felt a firearm.

After Rooney was arrested and placed in the living room, [the CCO] and [another officer] searched the bedroom and found methamphetamine, heroin, and clonazepam. The State charged Rooney with three counts of unlawful possession of a controlled substance (methamphetamine, heroin, and clonazepam) and one count of first degree unlawful possession of a firearm. Rooney moved to suppress evidence of the controlled substances and the firearm. The trial court denied Rooney's motion.

The trial court found Rooney guilty as charged after a stipulated facts trial.

[Footnote omitted]

ISSUES AND RULINGS: (1) Where Rooney shared control of the bedroom with probationer White, could the officers rely on White's implicit consent (that was tied to her probationary status) to search the bedroom, despite the fact that Rooney was present and objecting to the search? (ANSWER BY COURT OF APPEALS: No, the search was an unlawful, non-consenting search as to Rooney for two independently sufficient reasons: (1) Rooney was present at the time of the search (per Washington constitution); and (2) Rooney objected to the search (per federal and Washington constitutions)).

(2) Was it reasonable based on safety concerns about the many weapons (several swords, an axe and multiple knives) in open view the room for the CCO to check Rooney's pants for a

weapon before allowing Rooney to put the pants on? (ANSWER BY COURT OF APPEALS: Yes, the frisk of the pants was justified by reasonable safety concerns)

Result: Reversal of Cowlitz County Superior Court convictions of Norman Granvel Rooney for unlawful possession of methamphetamine, heroin, and clonazepam; affirmance of conviction of Rooney for first degree unlawful possession of a firearm.

ANALYSIS:

1. Unlawfulness of search of room without Rooney's consent

> Under RCW 9.94A.631(1), a CCO may require a probationer to submit to the search of his or her residence if the CCO has a well-founded suspicion that the person has violated a condition of his or her community custody sentence. State v. Winterstein, 167 Wn.2d 620 (2009) **Feb 10 LED:24**. RCW 9.94A.631(1) technically does not create an exception to the warrant requirement. Instead, it requires the probationer to consent to a search, and consent is an exception to the search warrant requirement. . . . Requiring a probationer to consent to a warrantless search is reasonable because a person serving a community custody sentence has a lesser expectation of privacy. . . . It is undisputed that White was a probationer under the Department of Correction's supervision, she had violated a term of her community custody, a valid arrest warrant was issued for her arrest under RCW 9.94A.631(1), and she knew she would be arrested.
>
> The issue here, however, is whether Rooney, as a cohabitant, had a right to object to a search of the bedroom that he shared with White. In searches involving a cohabitant who consents to a warrantless search, Washington has adopted the common authority rule, which provides that a cohabitant may grant consent to search a residential area that each cohabitant has equal authority to control. State v. Morse, 156 Wn.2d 1 (2005) **Feb 06 LED:02**]. This rule is based on the Washington Constitution's guarantee of each individual's expectation of privacy and the theory that a person assumes risk that his or her cohabitant may allow "outsiders" into a shared space. Cohabitants also "impliedly agreed" to allow their cohabitants to waive their constitutional right to privacy by consenting to an officer's search of the shared space. This implied agreement makes the common authority rule derivative of the consent exception to the warrant requirement.
>
> A cohabitant's authority to consent to a warrantless search of a shared residential space is not absolute. A cohabitant with equal or greater control over the place to be searched may validly consent to a warrantless search if none of the other cohabitants are present and object to the search. Morse. The consent of only one person with common authority over the place to be searched when multiple cohabitants are present, however, is not sufficient to conduct a lawful search of shared space. . . .
>
> The State relies on RCW 9.94A.631(1) to argue that the officers' search of Rooney's bedroom was lawful because White was a probationer who had violated a term of her community custody and who resided in Rooney's bedroom. We disagree because a probationer's diminished expectation of privacy does not apply to his or her cohabitants. . . .

The facts of this case are analogous to an officer who seeks consent to a warrantless search of a residence from one cohabitant with common authority, but another cohabitant with common authority who is present at the time objects to the search. Under RCW 9.94A.631(1), [the CCO] could require White to consent to a warrantless search of her residence. Under Morse, even if White had consented, once Rooney objected to the warrantless search there is no question that the officers' search would have been unlawful. Morse **[LEGAL UPDATE EDITORIAL COMMENT: Indeed, under the independent grounds interpretation of the Washington constitution in Morse, the mere presence of Rooney, whether or not he objected, precluded reliance on his co-habitant's consent to search.]** see also Georgia v. Randolph, 547 US 103 (2006) **May 06 LED:05** ("[A] physically present inhabitant''s express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant."). The State's reliance on RCW 9.94A.631(1) for authority to search Rooney's bedroom due to White's status as a probationer does not diminish Rooney's individual right to privacy under the Washington Constitution.

. . . . [T]he officers' warrantless search of Rooney's bedroom was unlawful as to Rooney, and the trial court erred in denying Rooney's motion to suppress the methamphetamine, heroin, and clonazepam evidence found during the unlawful search.

2. Lawfulness of frisk of Rooney's pants for safety reasons

An officer may conduct a nonconsensual protective Terry frisk for weapons if the officer can articulate specific facts that create an objectively reasonable belief that the person is armed and dangerous. The officer need not be certain that the person is armed before he or she conducts a protective frisk. We are reluctant to substitute an officer's judgment in the field for our own. "A founded suspicion is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing." . . .

The trial court's findings of fact . . . support its conclusions of law . . . that [the CCO's] frisk of Rooney's pants was based upon specific and objective facts that led to a reasonable suspicion that Rooney may have been armed. [The CCO] noticed "several swords, an axe, and multiple knives" in Rooney's bedroom and these weapons made him concerned for the officers' safety. Further, Rooney does not challenge the trial court's finding . . . that [the CCO] told Rooney that the pants would be searched for weapons "for safety reasons" before he could put them on. Rooney also does not challenge [the trial court] finding . . . that Rooney then "openly grabbed his pants" after [the CCO] told him he would search the pants that Rooney wanted to wear. .

Rooney's behavior following [the CCO's] warning that the pants would be searched, together with [the CCO's] observation of the weapons in plain view in his bedroom, gave [the CCO] articulable suspicion that the pants Rooney wanted to wear might have contained a weapon. The trial court did not err in concluding that [the CCO] had a reasonable objective belief that Rooney may have had a firearm in his pants and that [the CCO's] protective search was lawful.

> Therefore, the trial court properly denied Rooney's motion to suppress the firearm evidence.

[Some citations omitted, others revised for style; footnotes omitted]

LEGAL UPDATE EDITORIAL NOTE REGARDING LED ENTRY ON THIS DECISION: Rooney is addressed in the October 2015 Law Enforcement Digest beginning at page 4.

LEGAL UPDATE EDITORIAL COMMENT: The defendant did not challenge the authority of the officers to be in his bedroom. In my view, the officers lawfully entered the house and the bedroom because they had an arrest warrant for Ms. White, and they had reason to believe (based on what they learned at the front door just before entering) that she was in the bedroom. If the entry is viewed as an entry under a misdemeanor arrest warrant, the officers' actions in entering to execute the arrest warrant are within the limits of the Washington constitution as interpreted in State v. Hatchie, 161 Wn.2d 390 (2007) Oct 07 LED:06.

EVIDENCE ALLEGEDLY DISCOVERED UNDER SEARCH WARRANT SUPPRESSED BECAUSE NO ONE WITNESSED OFFICER'S INVENTORY OF THE ITEMS SEIZED UNDER THE WARRANT, AS IS REQUIRED UNDER WASHINGTON CRIMINAL RULE 2.3, AND BECAUSE THE VIOLATION OF THE RULE PREJUDICED THE DEFENDANT

State v. Linder, ___ Wn. App. ___, 2015 WL 5933732 (Div. III, October 13, 2015)

Facts and Proceedings below: (Excerpted from Court of Appeals opinion)

> Aaron Linder was arrested by [Law Enforcement Officer A] in March 2013 for driving with a suspended license. During the search incident to arrest, [Officer A] found a small tin box inside the pocket of Mr. Linder's hoodie. After being informed of his Miranda rights, Mr. Linder admitted being a daily user of hard drugs and that the tin box contained drug paraphernalia. But he refused to give his consent for [Officer A] to open the box initially, and refused a second time at the police station.
>
> Later on the day of the arrest, after [Officer B] arrived at the police station to begin his 5:00 p.m. to 5:00 a.m. shift, [Officer A] asked [Officer B] to conduct a canine exam of the tin box. [Officer B] took the box outside, placed it on the ground along the wall of an adjacent building and deployed his drug dog along the base of the building. The dog alerted to the box. Based on the dog's alert and Mr. Linder's statements, [Officer B] applied for a search warrant.
>
> The search warrant was approved by the prosecutor's office the next day, but it was not until very late that evening that [Officer B] was able to reach a judge available to sign it. He drove to the judge's home and obtained his signature shortly before midnight. Upon his return to the police station, [Officer B], without anyone else present, executed the warrant by opening the metal box and photographing and inventorying its contents. It was typical for the department's night shift officer to work alone. The [] police department has a total of only five sworn officers.

[Officer B] inventoried the tin box as containing two pieces of aluminum foil, an empty plastic box, two plastic tubes, a hair pin, a safety pin, and a piece of plastic from a cigarette package. The cigarette wrapper contained a crystalline substance that appeared to be methamphetamine. After he finished the inventory and completed the return of service form, [Officer B] placed the items, a copy of his report, and a note for [Officer A] in a temporary evidence locker.

The next morning, [Officer A], also acting alone, verified that the contents in the box matched [Officer B's] inventory and field tested a small quantity of the cellophane wrapper and its contents, which tested positive for methamphetamine. He packaged the remainder of the crystalline substance for submission to the crime laboratory. Mr. Linder was thereafter charged with one count of violation of the Uniform Controlled Substances Act, chapter 69.50 RCW, for possession of methamphetamine.

Before trial, Mr. Linder moved to suppress the evidence found in the tin box on the grounds that it was searched in violation of CrR 2.3(d). The rule provides that a return of the search warrant shall be made promptly, shall be accompanied by a written inventory of any property taken, and-relevant here-that "[t]he inventory shall be made in the presence of the person from whose possession or premises the property is taken, or in the presence of at least one person other than the officer." In the suppression hearing that followed, both [Officer A] and [Officer B] testified that they were unaware of the rule's requirement that the inventory be made in the presence of another person.

The State argued that suppression was not warranted because [Officer B's] violation of CrR 2.3(d) was ministerial and would not invalidate the warrant absent a showing of prejudice.

The trial court granted Mr. Linder's motion to suppress. While finding that "[Officer B's] decision to search and inventory the defendant's box alone was done in good faith and resulted from him not being aware of the requirements of CrR 2.3(d)," it concluded that CrR 2.3(d)'s requirement of a witness to the inventory "is not purely advisory" and "must have some meaning." It also concluded:

> Absent suppression, there is no adequate remedy for a violation of CrR 2.3(d). A defendant's only recourse would be to testify that, for example, there were no drugs in the container. Such testimony would be pitted against the word of a police officer. From common experience, this places defendant at a disadvantage.

Having suppressed the evidence, the court determined that further prosecution was impossible and dismissed the case without prejudice.

[Footnotes and citations to the record omitted]

ISSUE AND RULING: In a series of decisions over the past 40-plus years, Washington appellate courts have followed the reasoning of federal courts in similar circumstances. In the absence of a showing of prejudice due to violation, the courts have declined to suppress

evidence for violations of various ministerial requirements in Superior Court Criminal Rule 2.3 (CrR 2.3). Should the evidence be suppressed in this case based on the officer's violation of the inventory witness requirement of CrR 2.3 in light of the fact that defendant's only recourse for an admitted violation is to call the officer a liar regarding what was found in the search under the warrant? (ANSWER BY THE COURT OF APPEALS: Yes, the evidence must be suppressed because the officer's violation of CrR 2.3 is prejudicial to the defendant)

Result: Affirmance of Cowlitz County Superior Court ruling that suppressed the evidence in the prosecution against Aaron L. Linder.

TEXT OF COURT RULE:

CrR 2.3(d) provides in its entirety:

> The peace officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken. If no such person is present, the officer may post a copy of the search warrant and receipt. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person from whose possession or premises the property is taken, or in the presence of at least one person other than the officer. The court shall upon request provide a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> In State v. Bonds, 98 Wn.2d 1 (1982), our Supreme Court, surveying prior cases, observed that "we have not limited the exclusionary rule to protection of the constitutional immunity from unreasonable search (or seizure)." In addition to citing cases in which it had applied the exclusionary rule to misdemeanor arrests that violated common law, or applied the rule without finding it necessary to determine whether a misdemeanor arrest was constitutionally unreasonable, it explained:
>
> > The exclusionary rule has also been applied when a statute is violated in the course of obtaining evidence. In some cases, the statute itself provides that evidence obtained in violation of its provisions shall be inadmissible, e.g., RCW 9.73.050. . . . However, even where the statute does not specifically provide for inadmissibility, the exclusionary rule has been applied where no other remedy is available for enforcement of the statutory requirements. State v. Krieg, 7 Wn. App. 20 (1972). In sum, therefore, we have extended the exclusionary rule beyond the original Fourth Amendment context.
>
> . . . .
>
> Our Supreme Court has also applied the remedy of exclusion of evidence for some violations of the criminal rules. CrR 3.1 provides that when a person in police custody requests access to a lawyer, officers must make reasonable

efforts to put him or her in contact with one. Where evidence is tainted by a violation of that court rule, the Court has held that suppression is the proper remedy. . . .

In this case, the trial court concluded, among other matters, that "[a]bsent suppression, there is no adequate remedy for a violation of CrR 2.3(d)." This conclusion parallels the reasoning in Krieg, cited in Bonds, that suppression was warranted where a highway patrolman failed to inform the defendant that he had the right to refuse to submit to a chemical test of his breath or blood for blood alcohol content and the right to have additional tests administered by any qualified person of his choosing. . . . And unlike in Bonds, the credibility of the State's evidence in this case *was* impaired by the illegality. This is reflected in the trial court's handwritten changes to proposed findings. The trial court changed a proposed finding as to what "[Officer B] found" in the tin box to address, instead, what "[Officer B] testified he found." It struck three proposed findings that the items in the box had been "accurately" captured by the sergeant's photographs and "accurately" inventoried. .

The State nonetheless argues that we should apply a longstanding series of decisions by this court in which, in the context of violations of CrR 2.3, we have applied the reasoning of federal courts that the search and seizure rules impose ministerial requirements, a violation of which should not be a basis for suppressing evidence unless prejudicial. The State cites State v. Bowman, 8 Wn. App. 148 (1972); State v. Smith, 15 Wn. App. 716 (1976); State v. Wraspir, 20 Wn. App. 626 (1978); State v. Parker, 28 Wn. App. 425 (1981); State v. Kern, 81 Wn. App. 308 (1996) **Oct 96 LED:12**; State v. Aase, 121 Wn. App. 558 (2004) **July 04 LED:20**; State v. Temple, 170 Wn. App. 156 (2012) **Dec 12 LED:16**.

[LEGAL UPDATE EDITORIAL NOTE: At this point, the Court of Appeals discusses the seven decisions in the order that they are listed in the preceding paragraph. I have omitted the Court's discussion of the first four decisions.]

. . . .

In Kern, a deputy sheriff served a bank with a search warrant describing specific records of a customer's account that bank employees then searched for and produced to the county on their own. The defendant moved to suppress the records for multiple alleged violations of CrRLJ 2.3(c). For the most part, the appellate court rejected the defendant's construction of the rule. It found one violation of the rule where the deputy prematurely filed an inventory and return reflecting items he expected to be delivered by the bank, before any records had been received into police custody. The court cited Parker in holding that because the "departure from the rules was ministerial and harmless" and Kern "alleges no prejudice," suppression was not appropriate.

In Aase, the defendant sought suppression of evidence because he was provided with a copy of the search warrant several minutes into the search rather than at its outset. Denial of the suppression motion was affirmed because Aase did not argue that he was prejudiced by the several-minute delay; among cases cited by the court were Kern, Parker, and Bowman.

Finally, in Temple, the defendant alleged multiple defects in the search warrant, its execution and return, including that the search warrant inventory was not made in the presence of another person. Temple conceded that each error was insufficient standing alone to invalidate the warrant absent a showing of prejudice, so the arguments Mr. Linder makes in this case were never addressed by the court. Instead, Temple argued that the cumulative effect of the errors raised constitutional concerns requiring suppression. Responding to that argument, the court observed that "[t]he courts' ministerial rules for warrant execution and return do not 'flow so directly from the Fourth Amendment's proscription upon unreasonable searches that failure to abide by them compels exclusion of evidence obtained in execution of a search warrant, '" Terple at 162 (quoting 2 Wayne R. LaFave, SEARCH and SEIZURE § 4.12, at 717 (3d ed. 1996)).

The first thing we observe about this court's and the federal decisions is that while they frequently mention the ministerial character of the search and seizure rules, the touchstone of the courts' decisions is prejudice. "Ministerial" means

> Of, relating to, or involving an act that involves obedience to instructions or laws instead of discretion, judgment, or skill; of, relating to, or involving a duty that is so plain in point of law and so clear in matter of fact that no element of discretion is left to the precise mode of its performance.

Black's Law Dictionary 1146 (10th ed. 2009) . . . "Ministerial" does not mean "unprotective of a right." By way of example, the duty to give Miranda warnings is ministerial, as is the duty to administer to testifying witnesses an oath to tell the truth.

In an oft cited decision by Judge Ruggerro Aldisert addressing whether suppression is an appropriate remedy for violation of the federal search and seizure rule, he merely *observes* that the procedural requirements are essentially ministerial; he does not treat their ministerial character as any basis for deciding whether the remedy of suppression is available for their violation. . . . United States v. Hall, 505 F.2d 961 (3rd Cir. 1974).

. . . .

[B]ecause some violations of ministerial procedures set forth in the search and seizure rule can be consequential and some will not, Hall holds that a "motion to suppress . . . should be granted by the district court only when the defendant demonstrates prejudice from the Rule 41(d) violation." The ministerial character of the federal rules' procedures is a fact, but is not relevant to whether exclusion of evidence is an appropriate remedy.

Neither party to this case cites any reported federal or state decision addressing whether a violation of a requirement that the inventory of a search be conducted with at least one witness is prejudicial and requires exclusion of the evidence; we assume the parties, like we, searched for but were unable to find any such case.

. . .

In the seven Washington decisions relied upon by the State, almost all of the searches were conducted in a manner that satisfied the purpose, if not the letter, of the procedure required by the rule. In many cases, the violations could be cured after the fact. As a result, no prejudice to a right of the defendant was demonstrated.

Here, by contrast, an officer's unwitnessed inventory would appear to be non-prejudicial only if the trial court found the inventory to be accurate despite the violation, and substantial evidence supported that finding (thus satisfying the purpose of the rule); or if the violation could be remedied after the fact. Neither is the case here.

The trial court's handwritten revision of the proposed findings make it especially clear that it was unwilling to find that [Officer B''] photographs accurately depicted the items in the tin box or that his inventory was accurate. While the trial court found [Officer B] to be operating in good faith ignorance of the requirement of the rule in performing the inventory by himself, his conduct did not satisfy the purpose of CrR 2.3(d)'s witness requirement which, as observed in Wraspir,"seems to be to safeguard, if possible, against errors, willful or inadvertent, by one officer acting alone."

[Officer B's] violation could not be cured after the fact, for, as the trial court concluded, a defendant's only recourse would be to deny the accuracy of the inventory in opposition to the word of a police officer, and "[f]rom common experience, this places defendant at a disadvantage."

Krieg supports the exclusion of the evidence where no other remedy is available to enforce a rule's requirements. Exclusion of the fruits of [Officer B's] search also satisfies two of the three objectives identified in Bonds. As to the first – protecting individuals' privacy interests against unreasonable government intrusions – it is true that the tin box had already been lawfully seized from Mr. Linder. But we hold that individuals still have an interest, even if it falls short of a constitutional right, in being protected from the admission into evidence of an inventory conducted in violation of the rule and that is irretrievably tainted by having been prepared by a single officer, with literally no one else around. Exclusion of the evidence serves the third objective identified in Bonds of preserving the dignity of the judiciary by refusing to consider evidence obtained through illegal means. Only the second objective – deterring the police from acting unlawfully – is arguably not served, given the trial court's finding that [Officer B] acted in good faith ignorance of the requirement of the rule. In other contexts, our Supreme Court has held that deterring unlawful police action is not the paramount concern of our state exclusionary rule. State v. Afana, 169 Wn.2d 169 (2010) **Aug 10 LED:09** (refusing to recognize a "good faith" exception to the state exclusionary rule). The trial court's unchallenged findings supported its conclusion that exclusion of the evidence was the appropriate remedy.

[Emphasis added; some citations omitted, others revised for style]

LEGAL UPDATE EDITORIAL NOTE REGARDING LED ENTRY ON THIS DECISION: Linder is addressed in the October 2015 Law Enforcement Digest beginning at page 5.

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BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS

CONSISTENT AND CLEAR PAST EXPRESSIONS OF OBJECTION TO SEXUAL ADVANCES ARE SUFFICIENT TO MEET THIRD DEGREE RAPE STATUTE'S ELEMENT REFERRING TO "EXPRESSED . . . LACK OF CONSENT" – In State v. Mares, ___ Wn. App. ___, 2015 WL ___ (Div. III, Sept. 24, 2015), the Court of Appeals rules that the evidence in the case is sufficient to support defendant's conviction of third degree rape despite the fact that the victim did not express her lack of consent contemporaneously with the act of sexual intercourse.

In Mares, over a period of several months, the victim had consistently and clearly told Gustavo Mares, her cousin, that she did not want to be his girlfriend and did not want to have sex with him. Then, one night, after a long day of work, the victim drank some wine with Gustavo and went to bed by herself. She woke to realize that Gustavo was having sexual intercourse with her. She objected and he stopped.

Under RCW 9A.44.060(1)(a), a person is guilty of rape in the third degree when (under circumstances not constituting rape in the first or second degree) the person engages in sexual intercourse with a victim who did not consent to sexual intercourse, and "such lack of consent was clearly expressed by the victim's words or conduct." The Court of Appeals explains as follows that the facts of the case support defendant's conviction of third degree rape:

> Textually, RCW 9A.44.060 plainly does not say when the lack of consent must be clearly expressed. Mr. Mares does not explain how we justify imposing a requirement of contemporaneity that the legislature chose not to impose. And when we consider that the underlying purpose of the statutory requirement that lack of consent be clearly expressed is to avoid criminalizing a reasonable misunderstanding, it is clear that the substance of the expression can be more important than its timing. Some expressions of lack of consent, if not recanted, are timeless: "Don't ever touch me again;" "If you lay a hand on me, I'm calling the cops;" "I wouldn't have sex with you if you were the last person on Earth." And a statement three weeks ago that "We are cousins; what you are doing is wrong; it is not okay" says more about a person's attitude than does a statement a few moments ago that "I don't know; I'm tired."

In a separate unsuccessful argument that the statute is void for vagueness, Mr. Mares argued that, under the facts, if he were to be charged with rape, it should be rape in the second degree, which prohibits having sexual intercourse with a victim who is incapable of consent by reason of being physically helpless or mentally incapacitated. See RCW 9A.44.050(1)(b) and State v. Al-Hamdani, 109 Wn. App. 599 (2001) **Sept 02 LED:17**. The Mares Court responds to this argument as follows:

> Here, the beverage consumed by [the victim] had an alcohol content lower than most wines (6 percent alcohol by volume); there was no evidence she had difficulty finding her way to bed; she testified that she had worked a long day and sleeps heavily following long work days; and upon awakening to the rape, she was able to seize and cock a rifle and order Mr. Mares to leave. On these facts, a charge of second degree rape might not have been a viable alternative.

Result: Affirmance of Okanogan County Superior Court conviction of Gustavo Duarte Mares for third degree rape.

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

Beginning with the September 2015 issue, the most recent monthly Legal Update for Washington Law Enforcement will be placed under the "LE Resources" link on the Internet Home Page of the Washington Association of Sheriffs and Police Chiefs. As new Legal Updates are issued, the current and 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 past LED treatment of these core-area cases; and (2) a broader scope of coverage in terms of the types of cases that may be of interest to law enforcement in Washington (though public disclosure decisions 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. 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]. The internet address for the Criminal Justice Training Commission (CJTC) Law Enforcement Digest (LED) is [https://fortress.wa.gov/cjtc/www/led/ledpage.html].