
## COVERING CASES PUBLISHED IN MAY 2024

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**Cases in the Law Enforcement Digest are briefly summarized, with emphasis placed on how the rulings may affect Washington law enforcement officers or influence future investigations and charges.** Each cited case includes a hyperlinked title for those who wish to read the court's full opinion. Links have also been provided to key Washington State prosecutor and law enforcement case law reviews and references.

The materials contained in the LED Online Training are for training purposes. All officers should continue to consult with their department legal advisor for guidance and policy as it relates to their particular agency.
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Each month's Law Enforcement Digest covers court rulings issued by some or all of the following courts:

- **Washington Courts of Appeals**. The Washington Court of Appeals is the intermediate level appellate court for the state of Washington. The court is divided into three divisions. Division I is based in Seattle, Division II is based in Tacoma, and Division III is based in Spokane.
- **Washington State Supreme Court**. The Washington Supreme Court is the highest court in the judiciary of the U.S. state of Washington. The court is composed of a chief justice and eight justices. Members of the court are elected to six-year terms.
- **Federal Ninth Circuit Court of Appeals.** Headquartered in San Francisco, California, the United States Court of Appeals for the Ninth Circuit (in case citations, 9th Cir.) is a federal court of appeals that has appellate jurisdiction over the district courts in the western states, including Washington, Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, and Oregon.
- **United States Supreme Court:** The Supreme Court of the United States is the highest court in the federal judiciary of the United States of America.

## WASHINGTON LEGAL UPDATES

The following training publications are authored by Washington State legal experts and available for additional caselaw review:

- Legal Update for WA Law Enforcement authored by retired Assistant Attorney General, John Wasberg
- **Caselaw Update** - WA Association of Prosecuting Attorneys [2018-2021] | [2022-2023] [2024]

**Case Review**

The Washington State Judicial Opinions website provides free public access to the precedential, published appellate decisions from the Washington State Supreme Court and Court of Appeals.

# Case Menu

The cases this month include one case from the United States Supreme Court, two from the 9th Circuit federal court and four unpublished cases. Of note, there were no published state cases that were of general interest to WA law enforcement, so unpublished cases were included.

## CASES

1. Culley v Marshall, 22-585, (May 9, 2024, US Supreme Court)
2. United States v Duarte, 22-50048 (May 9, 2024, 9th Circuit)
3. United States v Anderson, 20-50345 (May 2, 2024, 9th Circuit)
4. State v Galegher, (May 7, 2024, Unpublished)
5. State v Mittelstaedt, 58349-6 (May 5, 2024, Unpublished)
6. State v Loring, 39282-1 (May 9, 2024, Unpublished)
7. State v Gutierez-Valencia, 39256-2 (May 16, 2024, Unpublished)

**General Disclaimer:**

**1.** The case digests presented here are owned by the Washington State Criminal Justice Training Commission. They are created from published slip opinions[1] and are general and may not apply to specific issues in specific cases or investigations. They are published as a research and training resource for law enforcement officers, investigators, detectives, supervisors, agencies, and other interested law enforcement-related parties. The digests do not constitute legal advice, nor does their publication create or imply an attorney client relationship with any law enforcement agency or officer or party. All law enforcement personnel, parties, and agencies must review the actual published case opinions and consult their agencies' legal advisors, union counsel, and local prosecutors for specific guidance on the application of the opinions to specific issues in specific cases or investigations.

2. Blank lines have been added to some of the court opinions for readability.

[1] Slip opinions are frequently revised after initial publication and after the creation of these case digests. In any specific case or investigation, it is necessary to review the final version of the opinion published by the Washington State Judicial Opinions website.

## QUESTIONS?

- Please contact your training officer if you want this training assigned to you.
- Visit the ACADIS portal page for status, news and **resources** for organizations, officers and training managers news, updates, and links.
- Send Technical Questions to lms@cjtc.wa.gov or use our Support Portal.


# Factual Background

This United States Supreme Court case arose from two drug civil forfeiture cases from Alabama. Both cases involved seizures of personal property, namely vehicles. The two owners each claimed that they had loaned their vehicles to someone else and did not know they would be used in the commission of a drug offense. The case is of interest to LE officers and officials involved in civil forfeitures.

The first owner was the mother of the alleged drug offender. She loaned her car to her son and her son was stopped by municipal police officers. The officers found marijuana and a loaded handgun in the car. They arrested the son and charged him with possession. They also seized the car and commenced a civil forfeiture against the car.

The forfeiture complaint was filed ten days after the seizure of the car. The mother delayed responding to the complaint for six months, and first raised her innocent owner defense a year later. The Alabama court eventually ruled in her favor and returned the car.

The second owner loaned her car to a friend. The friend was stopped by municipal police officers who found a large amount of methamphetamine. The friend was charged with drug trafficking and the car was seized incident to arrest.

The forfeiture case was brought thirteen days after the seizure of the car. The owner failed to appear, and a default judgment was entered. The owner appeared later and was able to have the default set aside. The owner later raised an innocent owner defense. That defense was successful, and the car was returned to her.

The forfeiture statute provided for the procedure for civil forfeiture of the two vehicles:

> At the time of the seizures of the two cars, Alabama Law authorized the civil forfeiture of a car used to commit or facilitate a drug crime. See Ala. Code §20–2–93(a)(5) (2015).
>
> Officers could seize the car "incident to an arrest" so long as the State then "promptly" initiated a forfeiture case. §20–2–93(b)(1), (c). In the interim before the forfeiture hearing, the car's owner could recover it by posting bond at double the car's value. See §20–2–93(h); §28–4–287 (2013). At the forfeiture hearing, the owner could prevail and recover the car under Alabama's "affirmative defense" for "innocent owners of property

> subject to forfeiture." Wallace v. State, 229 So. 3d 1108, 1110 (Ala. Civ. App. 2017). That defense required the owner to show that the owner lacked knowledge of the car's connection to the drug crime. See Ala. Code §20–2–93(h) (2015). Slip Opinion, p.2

Although both owners were successful in recovering their cars through the civil forfeiture proceedings, they also filed civil class action lawsuits. In the class action cases, the two owners argued that a preliminary hearing was required by due process in addition to the final forfeiture hearing, and that their due process rights were violated because the cars were held by the municipalities while the forfeiture proceedings were pending. That issue led the Supreme Court to grant the petition and hear the case.

# Analysis of the Court

The precise issue decided in *Culley* was limited. The majority opinion both framed the issue and summarized the court's decision as follows:

> When police seize and then seek civil forfeiture of a car that was used to commit a drug offense, the Constitution requires a timely forfeiture hearing. The question here is whether the Constitution also requires a separate preliminary hearing to determine whether the police may retain the car pending the forfeiture hearing. This Court's precedents establish that the answer is no: The Constitution requires a timely forfeiture hearing; the Constitution does not also require a separate preliminary hearing. Slip Opinion, p.1

The majority opinion reviewed prior civil forfeiture cases and historical forfeiture practices. It concluded that a preliminary hearing was not required by due process because of the already existing requirement of a prompt final forfeiture hearing. The due process test for timeliness of the final hearing already included four factors to be considered:

> This Court concluded that a post-seizure delay "may become so prolonged that the dispossessed property owner has been deprived of a meaningful hearing at a meaningful time." Id., at 562–563. The Court elaborated that timeliness in civil forfeiture cases must be assessed by "analog[izing] . . . to a defendant's right to a speedy trial" and considering four factors: the length of the delay, the reason for the delay, whether the property owner asserted his rights, and whether the delay was prejudicial. Id., at 564 (citing Barker v. Wingo, 407 U. S. 514, 530 (1972)). Those factors are appropriate guides in the civil forfeiture context, the Court explained, because the factors ensure that "the flexible requirements of due process have been met." 461 U. S., at 564–565. Slip Opinion, p.7

The four factors were sufficient for due process purposes to assure that the seized property was forfeited in accordance with due process of law according to the court's majority.

The decision in *Culley* included concurring and dissenting opinions. Two justices concurred but expressed concern about recent development of forfeiture laws and practices. Their concerns can be summarized as follows:

> These new laws have altered law enforcement practices across the Nation in profound ways. My dissenting colleagues catalogue a number of examples, see post, at 3–6 (opinion of SOTOMAYOR, J.), but consider just a few here. To secure a criminal penalty like a fine, disgorgement of illegal profits, or restitution, the government must comply with strict procedural rules and prove the defendant's guilt beyond a reasonable doubt. In re Winship, 397 U. S. 358, 363 (1970).
>
> In civil forfeiture, however, the government can simply take the property and later proceed to court to earn the right to keep it under a far more forgiving burden of proof. See Knepper 39.
>
> In part thanks to this asymmetry, civil forfeiture has become a booming business. In 2018, federal forfeitures alone brought in $2.5 billion. Id., at 15. Meanwhile, according to some reports, these days "up to 80% of civil forfeitures are not accompanied by a criminal conviction." Slip Opinion, Gorsuch Concurrence, p.3

Three justices dissented. They would have adopted a test to be applied by lower courts in deciding whether a preliminary hearing should be required. The concerns of the dissenting justices can be summarized as follows:

> A police officer can seize your car if he claims it is connected to a crime committed by someone else. The police department can then keep the car for months or even years until the State ultimately seeks ownership of it through civil forfeiture. In most States, the resulting proceeds from the car's sale go to the police department's budget. Petitioners claim that the Due Process Clause requires a prompt, post-seizure opportunity for innocent car owners to argue to a judge why they should retain their cars pending that final forfeiture determination. When an officer has a financial incentive to hold onto a car and an owner pleads innocence, they argue, a retention hearing at least ensures that the officer has probable cause to connect the owner and the car to a crime.
>
> Today, the Court holds that the Due Process Clause never requires that minimal safeguard. In doing so, it sweeps far more broadly than the narrow question presented and ham-strings lower courts from addressing myriad abuses of the civil forfeiture

> system. Because I would have decided only which due process test governs whether a retention hearing is required and left it to the lower courts to apply that test to different civil forfeiture schemes, I respectfully dissent. Slip Opinion, Sotomayor Dissenting, p. 1

# Training Takeaway

The Alabama statute applied by the two police departments required the departments to "promptly" initiate forfeiture proceedings. The final forfeiture hearing was required to be timely held and timeliness was to be judged by a four-factor due process test. These safeguards were sufficient to satisfy due process for the time being in the eyes of the majority. For those LE officials involved in civil forfeiture, this case does not represent a drastic change in due process requirements for civil forfeiture.

Nevertheless, the two-justice concurring opinion (Justices Gorsuch and Thomas) and the three-justice dissent (Justices Sotomayor, Kagan and Jackson) should be viewed as a cautionary warning. The concurrence and dissent together show that the court is divided on where civil forfeiture due process may go in the future. Officers and their departments and their legal advisors should not consider this decision as necessarily constituting the court's final word.

EXTERNAL LINK: View the Court Document

## Disclaimer Concerning Federal Cases

Federal cases should be reviewed by Washington law enforcement with caution. There are many issues of interest to Washington law enforcement, to include criminal procedure, search and seizure, application of evidence rules, and uses of force, and other constitutional issues, that are decided differently by Washington courts compared to their federal counterparts.

All law enforcement personnel, parties, and agencies must review the actual published case opinions in these cases and consult their agencies' legal advisors, union counsel, and local prosecutors for specific guidance on whether the application of federal cases should be applied to specific issues in specific cases or investigations.


# Factual Background

**This case arose from a federal prosecution for felon in possession of a firearm ("UPOF") under the federal UPOF code provision.** The defendant was stopped for running a stop sign after having driven past officers in a vehicle with tinted front windows. After the officers activated their emergency equipment, they saw a rear seat passenger throw a handgun out a back window.

An officer returned to the area where the gun was thrown. The gun was a .380 Smith and Wesson handgun and was missing its magazine. A later search of the passenger compartment of the vehicle turned up a loaded magazine which fit the .380 "perfectly."

**The defendant was indicted and convicted of federal UPOF.** His prior felony convictions were all non-violent and included Unlawful Possession of a Controlled Substance (UPCS) and eluding. He appealed and challenged his conviction on the basis that the federal UPOF code provision was unconstitutional under the Second Amendment as applied to him. His challenge was based primarily on the recent US Supreme Court decision in *New York State Rifle & Pistol Ass'n v. Bruen*[1]. That case is well worth reading because it substantially altered the course of Second Amendment jurisprudence.

[1] 597 U.S. 1 (2022)
*New York State Rifle & Pistol Ass'n v Bruen*

# Analysis of the Court

**This case and Bruen should be reviewed and considered for the impact they will have on investigations involving firearms.** The 9th Circuit panel reviewed prior 9th Circuit Second Amendment opinions and opinions from other circuits in light of the *Bruen* case. It determined that the prior cases were no longer controlling after *Bruen*, and that the mode of analysis adopted in *Bruen* was henceforth required to be applied to Second Amendment cases. The court stated:

> [A prior 9th Circuit case] *Vongxay* is clearly irreconcilable with *Bruen* and therefore no longer controls because *Vongxay* held that [the federal UPOF code provision,] § 922(g)(1) comported with the Second Amendment without applying the mode of analysis that *Bruen* later established and now requires courts to perform. *Bruen* instructs us to assess all Second Amendment challenges through the dual lenses of text and history. If the Second Amendment's plain text protects the person, his arm, and his proposed course of conduct, it then becomes the Government's burden to prove that the challenged law is consistent with this Nation's historical tradition of firearm regulation. Slip Opinion, p.4.

The 9th Circuit panel reviewed the federal UPOF utilizing the text and history analysis method from Bruen. As to the text part of the analysis, it quickly determined that the text of the Second Amendment applied to the defendant's Second Amendment claim in his UPOF case:

> Step one of *Bruen* asks the "threshold question," Range, 69 F.4th at 101, whether "the Second Amendment's plain text covers" (1) the individual, (2) the type of arm, and (3) the "proposed course of conduct" that are at issue, *Bruen*, 597 U.S. at 19, 31–32. Here, as in *Bruen*, it is undisputed that the Second Amendment protects the arm in this case (a handgun) and the conduct involved (simple possession). See id. at 31–32. All that is left for us to decide is the first textual element: whether *Duarte* is among "the people" to whom the Second Amendment right belongs. Slip Opinion, p. 22

As to the final element of the text analysis, the panel determined that the defendant was of "the people to whom the Second Amendment right belongs" because he was a U.S. citizen even though he was also a convicted felon.

After applying the *Bruen* text analysis, the panel moved on to the historical tradition analysis. It found that the federal prosecutors failed to identify historical founding era laws sufficiently comparable to the federal UPOF code provision. Thus, under the history part of the text and history analysis, the federal prosecutors failed to prove that federal UPOF should be exempted from the defendant's Second Amendment challenge.

# Training Takeaway

The effect of *Bruen*, *Duarte*, and other Second Amendment cases on state and local UPOF laws and firearm sentence enhancements is beyond the scope of this case digest. **All LE personnel must consult with local prosecutors, legal advisors, and supervisors concerning the continued viability of UPOF and firearm enhancement charges in light of potential future Second Amendment challenges.**

The panel's conclusion as to the defendant in *Duarte* indicated that convicted felons may rely on the protection of the Second Amendment as may other "Americans."

We do not base our decision on the notion that felons should not be prohibited from possessing firearms. As a matter of policy, § 922(g)(1) may make a great deal of sense. But "[t]he very enumeration of the [Second Amendment] right" in our Constitution "takes out of [our] hands . . . the power to decide" for which Americans "th[at] right is really worth insisting upon." *Heller*, 554 U.S. at 634 (emphasis added).

Duarte is an American citizen, and thus one of "the people" whom the Second Amendment protects. The Second Amendment's plain text and historically understood meaning therefore presumptively guarantee his individual right to possess a firearm for self-defense. The Government failed to rebut that presumption by demonstrating that permanently depriving Duarte of this fundamental right is otherwise consistent with our Nation's history. We therefore hold that § 922(g)(1) violates Duarte's Second Amendment rights and is unconstitutional as applied to him.

EXTERNAL LINK: View the Court Document


# Factual Background

**This case arose from a felon in possession of a firearm prosecution** investigated by county LE officers in San Bernardino County, California. The investigation originated as a traffic stop which led to an inventory search of the defendant's truck and seizure of a handgun.

The deputy who made the stop saw the defendant driving in a high crime area with a partially obstructed license plate. He activated his emergency equipment. The defendant responded by making several turns before bringing his truck to a stop in a residential driveway. He was detained in a patrol car but not immediately arrested.

The deputies conducted an inventory search of the truck. The resident informed them that he did not know the defendant and requested that the truck be removed. It was disputed between the defendant and the deputies whether the search began before or after talking to the resident about the truck. The deputies completed a California Highway Patrol (CHP) form for the inventory but did so in an incomplete fashion.

The defendant brought a suppression motion before his trial. He claimed the inventory search was an unlawful, warrantless search under the Fourth Amendment. The trial court denied the motion. The defendant entered a conditional guilty plea which preserved his right to appeal. He then appealed.

# Analysis of the Court

**The 9th Circuit considered the case en *banc***, which means it was heard by the whole of the court. The majority opinion held that the search was an invalid inventory search. A concurring opinion agreed with that decision but also viewed the search as invalid under community care taking. And finally, a dissenting opinion disagreed with the majority and would have upheld the search.

The majority opinion focused on inventory searches. Inventory searches are a recognized exception to the warrant requirement of the Fourth Amendment. The reasons for the exception include the following:

> "In applying the reasonableness standard adopted by the Framers, *this Court has consistently sustained police intrusions into automobiles impounded or otherwise in lawful police custody where the process is aimed at securing or protecting the car and its contents*." Id. at 373 (emphasis added).

> The Court further explained that the practice of inventorying the contents of impounded vehicles "developed in response to three distinct needs: [1] the protection of the owner's property while it remains in police custody, [2] the protection of the police against claims or disputes over lost or stolen property, and [3] the protection of the police from potential danger." Slip Opinion, p.13, quoting *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976) (underlining supplied)

An additional requirement for inventory searches is good faith. The reason for the good faith requirement is:

> A proper "policy or practice governing inventory searches should be designed to produce an inventory," and if the policy or practice gives officers the ability to exercise discretion, the Fourth Amendment requires that the exercise of such discretion be "based on concerns related to the purposes of an inventory search." . . . This is the rare context where the Fourth Amendment analysis is not purely objective-subjective motivations are material. Slip Opinion, p.14, quoting *Florida v. Wells*, 495U.S. 1(1990)

**The majority opinion reviewed the circumstances of the inventory search of the defendant's truck in light of the inventory search exception.** The court found fault with the failure of the officers to completely fill out the inventory search form, and with having not listed all of the personal property that was in the truck. In the eyes of the court the focus of the inventory search was on the gun not on inventorying the content of the truck. That focus cut against the search having been done to protect and preserve personal property found in the impounded truck.

The court stated:

> The bottom line is simple: the deputies' recording of a single item used as evidence, despite San Bernadino County Sheriff's Department (SBCSD) procedure requiring that they inventory "any personal property contained within the vehicle" was not mere "minor" or "slipshod" noncompliance. *Bertine*, 479 U.S. at 369; *Magdirila*, 962 F.3d at 1157. It was a material deviation from SBCSD's standard inventory procedure, see *Magdirila*, 962 F.3d at 1157, and the "inventory" that they produced was incapable of serving the non-investigative purposes of protecting an owner's personal property and protecting officers against accusations of theft or loss of an owner's property, see *Opperman*, 428 U.S. at 369. This combination is relevant in assessing the deputies' motives for searching Anderson's truck and strongly suggests that they acted for purely investigatory reasons. Slip Opinion, p. 25

Five judges disagreed concerning the validity of the inventory search. In the eyes of the dissent the majority decision was error:

> Under settled law, the validity of an inventory search depends on whether officers acted in bad faith or for the sole purpose of investigation. With an inspector's clipboard, the majority instead holds that officers violated the Constitution because they did not follow the court's new hyper-technical rules for filling out forms—which the deputies here had to do in the middle of the night after lawfully stopping a career criminal. The touchstone of the Fourth Amendment is reasonableness. In scrutinizing the minutiae of officer paperwork, the majority loses sight of this core constitutional principle. Slip Opinion, Dissent, p.38

The previous version of this case was decided by a three judge panel. The case presented here was by the en banc court and supersedes the three judge opinion. You can read the previous version published in December 2022 on our website: Law Enforcement Digests

# Training Takeaway

The department requirements for an inventory search played a crucial role in the outcome of the Anderson case. It is possible that if the CHP inventory form had been meticulously filled out, and if all of the significant personal property found in the truck had been listed, the outcome may have been different. The good faith requirement and the administrative reasons supporting a valid inventory search led to the majority second guessing the officers stated purpose for the search. Had the search proceeded strictly in compliance with the departments policies and procedures there would have been less reason for the court to engage in such second-guessing.

It is also an important takeaway to recognize that Washington courts have applied similar rules and analysis in inventory search cases. This includes the good faith requirement. For an example of analysis in this area by a Washington appellate court, See State v. Tyler, 177 Wn.2d 690 (2013)[2].

[2] Free access to Washington State judicial opinions can be obtained through the Washington State Judicial Opinions Public Access Web site here: Washington Public Access Case Reports. To access the Tyler case, or any other Washington judicial opinion, type in the citation in the search box. For Tyler, type in "Tyler 177 Wn.2d 690".

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## Caution as to Unpublished Opinions

Unpublished Washington court opinions differ from published opinions in their legal effect. A Washington court rule, General Rule 14.1(a), provides: "Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate."

This rule applies to court proceedings and filings. The cases presented here are for continuing education purposes. The analysis of the courts in these opinions, while not binding as precedent, can be persuasive and instructive as to the particular issues decided in the unpublished opinions.


# Factual Background

This case arose from a prosecution for four counts of delivery of heroin and methamphetamine. Thurston County Narcotics Task Force officers utilized a confidential informant (CI) to conduct a buy walk operation. The CI communicated with the defendant via messaging to arrange the deliveries. The officers preserved evidence of the communications via screenshots. The screenshots included both halves of the messages, namely the messages from the CI and the messages from the defendant.

At trial, the defendant objected to the admissibility of the CI's messages as hearsay. The CI did not testify. In response, the State argued that the CI's messages were not offered for the truth of the matter asserted but instead were offered to show the context of the defendant's messages and to show the effect of the CI's messages on the defendant.

The defendant appealed and argued that the admission of the CI's messages was error.

# Analysis of the Court

The Court of Appeals affirmed the trial court's decision to admit the CI's text messages.

The court stated the deciding legal principle as follows: "Statements are not hearsay if they are not offered to prove the truth of the matter asserted. . . Statements also are not hearsay if used to provide context for the defendant's statements. . . In addition, statements are not hearsay if used only to show the effect on the listener without regard to the truth of the statement." Slip Opinion, pp. 3-4 (citations omitted).

The court's application of the legal principles was straightforward. "The purpose of the exhibits containing the CIs' messages was to provide context for Galegher's statements to the CIs and to show the effect of the messages on Galegher. The truth of the messages was immaterial. They were admitted only to show that Galegher was setting up meetings to sell drugs. Therefore, the messages were not hearsay because they were not offered to prove the truth of the matter asserted." Slip Opinion, p. 4

# Training Takeaway

**Text messages are not the only communications subject to the hearsay rule.** Any assertion (other than from the defendant) - which is not from a witness on the stand in court - is potentially subject to a hearsay objection. An advantage of text messages for court purposes is that they are written and in the nature of a transcript and are thus easily separated by speaker.

**Documenting communications by who the speaker is can be very important.** Statements from the defendant on trial are categorically not classified as hearsay, whereas statements from a party such as a CI might be. The ability to show clearly that the defendant was affected by and responded to the CI's communications contributed to this court's decision.

EXTERNAL LINK: View the Court Document

*State v. Mittelstaedt*

No. 58349-6

Unpublished

*May 5, 2024*

# Factual Background

**This case arose from a prosecution for second degree burglary of an enclosed outdoor space.** The property owners set up game cameras to monitor an unoccupied residence that had been damaged by fire. The property was enclosed by a wood fence and blackberry brambles. The access to the fenced area was via a driveway that was blocked by fence panels that were padlocked. One of the panels had a gap which was large enough to walk through.

The cameras captured intruders cutting one of the padlocks. They went to the property and found a truck and several people inside the fenced area. The police were called and two individuals from the truck were arrested inside the fenced area. The defendant was charged and convicted of second-degree burglary of the fenced area. He appealed.

# Analysis of the Court

The appeal focused on whether there was sufficient evidence for the burglary charge. The court stated the legal principle as follows:

> A person commits second degree burglary "if, with intent to commit a crime against a person or property therein, [they] enter[] or remain[] unlawfully in a building other than a vehicle or a dwelling." RCW 9A.52.030(1). For the purposes of the burglary statute, a "building" includes a "fenced area" that encloses a building's curtilage. RCW 9A.04.110(5); *Wentz*, 149 Wn.2d at 350. *But in order for entering the area to constitute a burglary, the area must be "completely enclosed either by fencing alone or . . . a combination of fencing and other structures."* (italics supplied for emphasis) *State v. Engel*, 166 Wn.2d 572, 580, 210 P.3d 1007 (2009). Slip Opinion, p. 3

**The court overturned the defendant's conviction because the area entered by the defendant was not completely enclosed**. The court identified the blackberry brambles as insufficient and that there was a gap where one of the fence panels formed a gate. These facts made the burglary charge untenable.

# Training Takeaway

It is an element of burglary of a fenced area that the area must be completely enclosed. Fencing and structures may combine but there must be evidence that the area entered was completely enclosed. In any case involving burglary of a fenced area, **it would be prudent and appropriate for the investigating officer to personally examine and document the entire perimeter** so as to have personal knowledge, and the ability to testify that the area was completely enclosed.

EXTERNAL LINK: View the Court Document


# Factual Background

This case arose from a prosecution for robbery and promoting prostitution. The female prostitute victim lived in the Tri-Cities and met the defendant in Spokane. She and the defendant began communicating about teaming up to make money from the victim's prostitution services.

The communications led to the defendant transporting the victim to Spokane. There, during two days of staying in motels, the victim responded to online requests for prostitution services. The arrangement came to a violent end when on the third day the defendant drove the victim to a trail head and robbed her at gun point.

The defendant was charged with robbery and promoting prostitution. The prosecutor gave notice of intent to call a detective from the FBI Child Exploitation and Human Trafficking Task Force as an expert witness.

The defendant filed a motion to suppress the expert. The trial court denied the motion and allowed the detective to testify. During his testimony in an answer that went beyond the question asked by the prosecutor, the detective twice used the term "gorilla pimp." His use of the term did not refer to the defendant and the prosecutor prudently never used the term, neither during testimony nor in argument.

The defendant was convicted and appealed. The two primary issues were the admissibility of the expert testimony, and the detective's use of the street term "gorilla pimp."

# Analysis of the Court

The court found no error in either of the primary issues. It affirmed the conviction.

As to the admissibility of expert testimony, the court referenced the standard which courts use to interpret and apply **the expert witness evidence rule. Namely, the rule requires a court to evaluate the qualifications of the proposed expert and determine whether the witness's testimony would be helpful to the trier of fact**. As to the qualifications of the task force detective, the court found no error in the trial court allowing him to testify.

The court also found no error in the determination that the task force detective' testimony was helpful to the trier of fact. "Det. Johnson's testimony was helpful to the trier of fact because it provided information regarding the subculture of human trafficking and the terminology commonly used therein." Slip Opinion, p.11.

The most contentious issue arose from the term "gorilla pimp." The issue was presented as prosecutorial misconduct. The court rejected the defendant's prosecutorial misconduct arguments but also discussed the inappropriateness of using a term that could be interpreted as a derogatory racial stereotype.

The court referenced a prior case, *State v. McKenzie*[3] in which the defendant's conviction was overturned because the prosecutor had used the term. In its discussion of the McKenzie case, the court discussed why the term "gorilla pimp" and other animal analogies referencing a defendant are constitutionally improper:

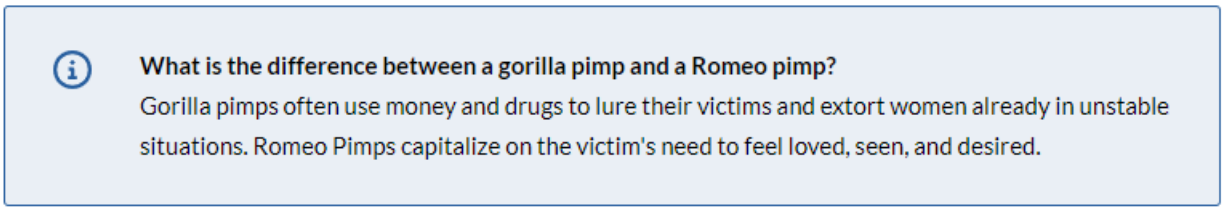
> As to the content of the challenged statements, we acknowledged that "'[t]he use of animal analogies at trial is problematic'" and often used in racially coded language. Id. at 730 (alteration in original) (quoting In re Pers. Restraint of Richmond, 16 Wn. App. 2d 751, 752, 482 P.3d 971 (2021)). We noted the historical "practice of dehumanizing Black people by analogizing them to primates," went beyond academia and included racist tropes in films like "King Kong." (RKO Radio Pictures 1933). Id. at 730, 731.
>
> We went on to recognize that "[a]t this point in our history we should not have to belabor the point that using a gorilla analogy when discussing human behavior, specifically the behavior of a Black man, is clearly racist rhetoric." Id. at 730. Thus, we found the use of the term "gorilla pimp" by the prosecutor to be offensive and racist rhetoric. Slip Opinion, p. 16

The court in *Loring* distinguished *McKenzie*. In *McKenzie*, offending terms were used by the prosecutor not just the witness. They were also used more extensively.

The court also stated:

> Turning to the case at hand, we consider and apply the Bagby factors. We continue to adhere to the admonishment that the State must refrain from adopting and using terminology that could be considered code language for racial stereotypes. However, after applying an objective analysis to the facts in this case and the Bagby factors, we hold that the reference to a "gorilla pimp" in this case was not a "flagrant or apparently intentional" appeal by the prosecutor to racial bias.

As the State concedes, the term "gorilla pimp" is improper when used as a racially charged code word to describe Black men. Mr. Loring is a Black man. However, unlike in McKenzie, in this case the prosecutor did not inject the term into the testimony. There is no evidence that the prosecutor's neutral question was intended to evoke the witness's use of a racially charged term. However, even if this could be implied, we note that after the detective used the term, the prosecutor asked a leading question to suggest that the defendant was a "Romeo pimp" and the detective agreed. Loring was not described as a "gorilla pimp," and unlike in McKenzie, there was no testimony that the identities were interchangeable. Slip Opinion. pp. 17-18




# Training Takeaway

**Testimony in court can be viewed as a team effort.** Trial prosecutors and LE witnesses can both be accused of misconduct. In the area of racial stereotypes, trial and appellate courts can be expected to react strongly to testimony that includes animal analogies or racial stereotypes of any kind. All such references should be avoided.

Preparation for testimony before trial can always include asking the prosecutor about terms that are close to the line in this area. In addition to pre-trial preparation, it is also usually possible for witnesses, including LE officers, to request a recess and clarify whether they should give an answer that would include an animal analogy or racial stereotype. When such issues are raised outside the presence of the jury, the trial court has an opportunity to rule specifically on what a witness may say and not say. **Such caution can go a long way toward avoiding reversible error.**

[3] Free access to Washington State judicial opinions can be obtained through the Washington State Judicial Opinions Public Access website here: Washington Public Access Case Reports. To access the McKensie case, or any other Washington judicial opinion, type in the citation in the search box. For McKensie, type in "McKensie 21 Wn. App. 2d 722".

EXTERNAL LINK: View the Court Document


# Factual Background

This case arose from a domestic violence kidnapping, rape, and assault. The victim and the defendant had been in a relationship since 2010. They had broken up but remained in contact. In 2018 the victim asked the defendant to move out of her residence. He did so but repeatedly waited for her and was occasionally allowed in the apartment and to spend the night.

The violent incident that led to the defendant's prosecution took place in January 2019 at the residence. According to the victim's testimony the defendant accused her of being with another man. He then attacked her, raped her, held her against her will, and assaulted her. During the incident she attempted to flee but was pulled back into the residence by her hair. A neighbor witnessed the attempt to flee, and the police responded while the defendant was still on the premises. The victim persuaded the defendant to allow her to put on makeup and go to the police and tell them "everything was fine." She then reported that he had attacked her.

The defendant's testimony included claims that they had argued about the victim's ex-boyfriend, that they had had consensual sexual relations, that the victim attempted to leave but was accidentally injured. The defendant also claimed that when the police arrived the victim told him to keep quiet. She then put on makeup before answering the door. After opening the door, she abruptly screamed that the defendant wanted to kill her.

The responding police officers were asked to testify about statements made by the victim immediately after the incident. Officer Taylor testified that he escorted the victim to a patrol car and that he asked her what happened. Over a hearsay objection from the defense attorney, he was allowed to testify that she said the defendant had threatened to kill her with a knife.

Another officer later interviewed the victim more extensively. The trial court ruled that his testimony about her statements was hearsay and excluded.

The defendant was convicted and appealed. One of the issues on appeal was the admissibility of Officer Taylor's testimony about the victim's statement. The trial court ruled that it was admissible as an excited utterance under the evidence rules.

# Analysis of the Court

The Gutierrez-Valencia court upheld the trial court's ruling. It held that the victim's statements to Officer Taylor were admissible as excited utterances.

Excited utterances are an exception to the hearsay rule. "An excited utterance is a statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Slip Opinion, p.10. Specific requirements for an excited utterance to be admissible include that, "The 'key determination is whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment." Id., p. 11.

The testimony about the victim's emotional state established that her statements were excited utterances.

> Vera made the statement within a minute of running from her apartment crying and yelling, "[H]elp me. He's going to kill me." RP at 380. Vera was crying, shaking, and was extremely emotional when she made the statement. The close proximity in time between the altercation and the statement, the violent nature of the confrontation, Vera's extremely emotional presentation, and the statement relating to the event, supports the trial court's finding that Vera was under the stress of the condition when she made the statement. The trial court did not abuse its discretion in admitting the excited utterance. Id. pp 11-12

# Training Takeaway

**The importance of documenting a domestic violence (DV) victim's emotional state cannot be overstated.** Excited utterances are powerful both because they are generally made close to when the incident occurred and because of their emotional content. Descriptive documentation of a victim's appearance, emotional state, and how close in time to the offense is crucial to admissibility.

**Domestic violence cases can turn on effective report writing.** It is not uncommon for a DV victim to recant while a case is pending. In such cases, excited utterances and other evidence gathered at the scene can make all the difference.

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# Law Enforcement Digest – May 2024
# Cases & References

1. Culley v Marshall, 22-585, (May 9, 2024, US Supreme Court)

2. United States v Duarte, 22-50048 (May 9, 2024, 9th Circuit)

3. United States v Anderson, 20-50345 (May 2, 2024, 9th Circuit)

4. State v Galegher, (May 7, 2024, Unpublished)

    a. RCW 9A.52.030
    b. RCW 9A.04.110

5. State v Mittelstaedt, 58349-6 (May 5, 2024, Unpublished)

6. State v Loring, 39282-1 (May 9, 2024, Unpublished)

7. State v Gutierez-Valencia, 39256-2 (May 16, 2024, Unpublished)

## Case Review

The Washington State Judicial Opinions website provides free public access to the precedential, published appellate decisions from the Washington State Supreme Court and Court of Appeals.

> Some cases in this LED include direct quotes from the court's opinion that include the words *"see other case"* directions. URLs to these cases are not included in this LED.

## WA Legal Updates

For further reading, the following training publications are authored by Washington State legal experts and available for additional caselaw review:

- Legal Update for WA Law Enforcement authored by retired Assistant Attorney General, John Wasberg
- **Caselaw Update** by WA Association of Prosecuting Attorneys [2018-2021] | [2022-2023] [ 2024 ]