
NOVEMBER 2018
LAW ENFORCEMENT
DIGEST
CRIMINAL JUSTICE TRAINING COMMISSION
WASHINGTON

# LAW ENFORCEMENT ONLINE TRAINING DIGEST

Welcome to the new **Law Enforcement Digest Online Training**! This refreshed edition of the LED continues the transition to an online training resource created with the Washington law enforcement officer in mind. Select court rulings from the previous month are summarized briefly, arranged by topic, with emphasis placed on the practical application of legal changes to law enforcement practices.

Each cited case includes a hyperlinked title for those who wish to read the court's full opinion, as well as references to select RCWs. Links to additional Washington State prosecutor and law enforcement case law reviews and references are also included.

*The materials contained in this document are for training purposes. All officers should consult their department legal advisor for guidance and policy as it relates to their particular agency.*

# LAW ENFORCEMENT ONLINE TRAINING DIGEST

NOVEMBER 2018 Edition

*Covering select case opinions issued in October and November 2018*

1. **WARRANTLESS SEARCH; RUSE**
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# 1 WARRANTLESS SEARCH; RUSE

ADMINISTRATIVE INVESTIGATION – BENEFITS FRAUD

Whalen v. McMullen, No. 17-35267 (Oct. 31, 2018)

Ninth Circuit Court of Appeals

**FACTS**:

The plaintiff was being investigated for possible fraud related to her social security disability benefits. The officer assigned to the case was a detective with the WA State Patrol assigned to the Cooperative Disability Investigations Unit ("CDIU") a group comprised of various state agency actors tasked with investigating possible social security benefit fraud. CDIU investigations are generally assigned to one of three tracks: civil, criminal, or administrative charges. The Unit's investigations may lead to criminal fraud prosecutions, or to civil or administrative penalties.

# 1 WARRANTLESS SEARCH; RUSE

ADMINISTRATIVE INVESTIGATION – BENEFITS FRAUD

Whalen v. McMullen, No. 17-35267 (Oct. 31, 2018)

Ninth Circuit Court of Appeals

**FACTS, cont.**:

The investigating officer contacted the plaintiff at her home, identifying himself as a law enforcement officer with the WA State Patrol. He then gained permission to enter the plaintiff's home by using a ruse: falsely claiming he was investigating an identity theft case, and requesting her help in the fictional investigation. The detective did not inform her of the true nature of his investigation at any point. He used this ruse to gain warrantless entry into the plaintiff's home. The detective also recorded the plaintiff without notice or permission both in and outside of her home.

The plaintiff was not charged with any crime, but the videos were used by the State in her benefits hearing. She filed a §1983 claim before the 9th Circuit Court of Appeals challenging the search as a violation of her Fourth Amendment right to be free from unreasonable search.

# 1 WARRANTLESS SEARCH; RUSE

ADMINISTRATIVE INVESTIGATION – BENEFITS FRAUD

Whalen v. McMullen, No. 17-35267 (Oct. 31, 2018)

Ninth Circuit Court of Appeals

**TRAINING TAKEAWAY – Reasonableness of the Search**

**A search of a person's home is unreasonable where an officer identifies himself as a law enforcement officer, and then uses the trust and/or civic duty that establishes to gain a homeowner's consent to enter based upon a ruse he presents to her about the purpose of the entry and nature of the investigation.**

- Here, although the plaintiff gave consent for the officer to enter her home, it was based under the ruse that she was assisting the officer in an investigation of a fabricated case involving another person suspected of committing identify theft.

Had he not identified himself as law enforcement, using the influence of that to bolster the ruse of the made-up crime investigation, the subsequent search may not have violated the homeowner's 4th Amendment reasonable expectation of privacy. (See,

# 1 WARRANTLESS SEARCH; RUSE

ADMINISTRATIVE INVESTIGATION – BENEFITS FRAUD

Whalen v. McMullen, No. 17-35267 (Oct. 31, 2018)

Ninth Circuit Court of Appeals

**TRAINING TAKEAWAY:**

**A "ruse" search – where the officer is identifying himself as a government agent/law enforcement officer is different from an "undercover" search – where there is no identification of the**

- Here, although the plaintiff gave consent for the officer to enter her home, it was based under the ruse that she was assisting the officer in an investigation of a fabricated criminal case involving another person suspected of committing identify theft.

Had he not identified himself as law enforcement, using the influence of that to bolster the ruse of the made-up crime investigation, the subsequent search may not have violated the homeowner's 4th Amendment reasonable expectation of privacy.

# 1 WARRANTLESS SEARCH; RUSE

ADMINISTRATIVE INVESTIGATION – BENEFITS FRAUD

Whalen v. McMullen, No. 17-35267 (Oct. 31, 2018)

Ninth Circuit Court of Appeals

**TRAINING TAKEAWAY:**

**A search of a person's home is unreasonable where an officer identifies himself as a law enforcement officer, and then uses the trust and/or civic duty that identification gives him to gain a homeowner's consent to engage in a warrantless entry into her home/conduct a search based upon a ruse he presents to her.**

Although the homeowner/plaintiff gave consent for the officer to enter her home, it was based under the ruse that she was assisting the officer in a fictional criminal investigation into possible identify theft.

Had he not identified himself as law enforcement, using the influence of that to bolster the ruse of the made-up criminal investigation, the subsequent warrantless entry/search may not have violated the homeowner's 4th Amendment reasonable expectation of privacy.

# 1 WARRANTLESS SEARCH; RUSE

ADMINISTRATIVE INVESTIGATION – BENEFITS FRAUD

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Ninth Circuit Court of Appeals

**TRAINING TAKEAWAY – Qualified Immunity:**

**The officer was entitled to qualified immunity (protecting him from liability in the plaintiff's claim) because the law on the challenged search was not clearly established at the time.**

- QUALIFIED IMMUNITY protects officers (and other public officials) from being sued unless, while performing their official duties, they violate a "clearly established" law that a reasonable person would have known.

At the time the officer engaged in the conduct, the law was not clear on whether using this type of ruse during a civil or administrative investigation into possible benefits fraud was a search, and if it was, whether the conduct was reasonable. This protected him from liability, even though the court was critical of his actions.

# 1 WARRANTLESS SEARCH; RUSE

ADMINISTRATIVE INVESTIGATION – BENEFITS FRAUD

Whalen v. McMullen, No. 17-35267 (Oct. 31, 2018)

Ninth Circuit Court of Appeals

**PRACTICE POINTER – Qualified Immunity:**

**Warrantless ruse entries are not an easy "bright line rule" area of the law. When a court determines if a ruse search impermissibly "shocked the conscience," they use a fact-based totality of the circumstances process.**

- Although this case involved a civil investigation into benefits fraud, the law on warrantless ruse entries in criminal cases is also an area requiring careful action. Officers should rely on the guidance received by their local prosecuting authority.

# 2 MURDER; SEARCH WARRANTS; CONFESSION

**1st DEGREE MURDER**
State v. Scherf, No. 88906-6, (November 8, 2018)
WASHINGTON STATE SUPREME COURT

**The following WA Supreme Court opinion stems from the murder of Monroe Correctional Complex Officer Jayme Biendl. The defendant is now appealing his conviction. We recognize Officer Biendl's ultimate sacrifice, and urge any interested readers to consider honoring Jayme by participating in the upcoming 7th Annual Jayme Biendl Memorial 5k Run/Walk on January 27th in Monroe. Event page and registration information here.**

**The Court's opinion is lengthy, and covers a number of legal issues. To present the materials in the clearest fashion, following a brief summary of the facts of the case, each individual issue relevant to law enforcement will be presented as a separate training section.**

Officer Jayme Biendl, EOW January 29, 2011

ODMP Page:
https://www.odmp.org/officer/20674-

# 2 MURDER; SEARCH WARRANTS; CONFESSION

**1st DEGREE MURDER**
State v. Scherf, No. 88906-6, (November 8, 2018)
WASHINGTON STATE SUPREME COURT

**FACTS:**

Defendant was imprisoned at the Monroe Correctional Complex – WA State Reformatory serving a sentence of life without parole when he murdered Corrections Officer Jayme Biendl on January 29, 2011. He was convicted of aggravated murder, and sentenced to the death penalty. This appeal challenges the defendant's conviction and sentence.

# 2a MURDER; SEARCH WARRANTS; CONFESSION

1st DEGREE MURDER
State v. Scherf, No. 88906-6, (November 8, 2018)
WASHINGTON STATE SUPREME COURT

## 2a: SEARCH WARRANTS

(1) PRIVACY OF MEDICAL RECORDS

(2) SEARCH WARRANTS AND PROBABLE CAUSE

(3) SCOPE OF "EVIDENCE OF THE CRIME"

(4) PARTICULARITY

# 2a MURDER; SEARCH WARRANTS; CONFESSION

**1st DEGREE MURDER**
State v. Scherf, No. 88906-6, (November 8, 2018)
WASHINGTON STATE SUPREME COURT

## PRIVACY OF MEDICAL RECORDS

**A prisoner has no statutory right under RCW 70.02 (the Uniform Health Care Information Act) to privacy in medical records seized from his cell during execution of a search warrant.**

There was no reasonable expectation of privacy because the records sought by lawenforcement (1) were not held by a medical provider or facility, and (2) were in held by the defendant in his cell, which he knew was subject to period inspections by DOC personnel.

*NOTE: As a prisoner, the defendant has no 4th Amendment privacy rights for items or documents found in his cell or taken from his cell and stored.* ***See, Hudson v. Palmer (1984)***

# 2a MURDER; SEARCH WARRANTS; CONFESSION

1st DEGREE MURDER
State v. Scherf, No. 88906-6, (November 8, 2018)
WASHINGTON STATE SUPREME COURT

## SEARCH WARRANTS AND PROBABLE CAUSE

**A search warrant may only be issued where probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized, exists.**

Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that (1) the defendant is involved in criminal activity and (2) evidence of the crime can be found at the place to be searched.

There must be a **nexus** between criminal activity and the item to be seized, and also a nexus between the item seized and the place to be searched.

# 2a MURDER; SEARCH WARRANTS; CONFESSION

**1st DEGREE MURDER**
State v. Scherf, No. 88906-6, (November 8, 2018)
WASHINGTON STATE SUPREME COURT

## SCOPE OF "EVIDENCE OF THE CRIME"

**"Evidence of the crime" includes more than just evidence proving that a crime was committed. It may be evidence relevant to sentencing, or to the defendant's mental state during the commission of the crime.**

Here, the State could reasonably believe that the medical records seized from the defendant's jail cell may include evidence bearing on his mental and physical condition, including information that would be required to be considered as possible mitigating evidence in the capital punishment phase of the defendant's trial, as well as possible evidence relevant to his ability to form the intent to kill.

# 2a MURDER; SEARCH WARRANTS; CONFESSION

**1st DEGREE MURDER**
State v. Scherf, No. 88906-6, (November 8, 2018)
WASHINGTON STATE SUPREME COURT

## SCOPE OF "EVIDENCE OF THE CRIME"

### PRACTICE POINTER:

With the elimination of capital punishment in WA State (see, State v. Gregory (Oct. 2018)) there may be further argument on the issue as specifically relevant to sentencing on capital cases.

**In any event, the general practice remains to be as clear as possible in your warrant and its execution regarding what items/records you are searching for, and why.**

# 2a MURDER; SEARCH WARRANTS; CONFESSION

**1st DEGREE MURDER**
State v. Scherf, No. 88906-6, (November 8, 2018)
WASHINGTON STATE SUPREME COURT

## PARTICULARITY OF SEARCH WARRANT

**A search warrant authorizing search of the defendant's medical records "wherever contained" within the WA State Reformatory, that was accompanied by an affidavit both incorporated by reference as well as physically attached to the search warrant that referenced the records area, described with sufficient particularity the items to be seized.**

To prevent general searches, overreaching seizure of evidence, or issuance of warrants on vague or doubtful basis of fact, a search warrant must particularly describe the place to be searched, and the persons or things to be seized.

The descriptions should be particular enough to limit the discretion of the executing officer.

# 2a MURDER; SEARCH WARRANTS; CONFESSION

**1st DEGREE MURDER**
State v. Scherf, No. 88906-6, (November 8, 2018)
WASHINGTON STATE SUPREME COURT

## PARTICULARITY OF SEARCH WARRANT

**TRAINING TAKEAWAY:**

**To prevent general searches, overreaching seizure of evidence, or issuance of warrants on vague or doubtful basis of fact, a search warrant must particularly describe the place to be searched, and the persons or things to be seized.**

**The descriptions should be particular enough to limit the discretion of the executing officer.**

Here, the search warrant named not only the place where the search warrant was to be executed (the WA State Reformatory – Monroe), but also described with particularity the records area within the prison in which officers believed the records to be located.

# 2b MURDER; SEARCH WARRANTS; CONFESSION

1st DEGREE MURDER
State v. Scherf, No. 88906-6, (November 8, 2018)
WASHINGTON STATE SUPREME COURT

## 2a: RIGHT TO AN ATTORNEY – CrR 3.1

# 2b MURDER; SEARCH WARRANTS; CONFESSION

**1st DEGREE MURDER**
State v. Scherf, No. 88906-6, (November 8, 2018)
WASHINGTON STATE SUPREME COURT

## SUSPECT'S RIGHT TO AN ATTORNEY - CrR 3.1

**Under the 6th Amendment, the defendant's right to an attorney attached when he was charged with Officer Biendl's murder because the delay was reasonable given the circumstances of the case.**

Under WA Criminal Court Rule 3.1, the right to an attorney attaches as soon as feasible after the defendant is taken into custody, appears before a magistrate, or is formally charged – whichever occurs earliest.

There is no obligation for officers to delay the normal pre-booking procedure or delay execution of a search warrant in order to accommodate a defendant's request to speak to an attorney.

# 2b MURDER; SEARCH WARRANTS; CONFESSION

**1st DEGREE MURDER**
State v. Scherf, No. 88906-6, (November 8, 2018)
WASHINGTON STATE SUPREME COURT

## SUSPECT'S RIGHT TO AN ATTORNEY - CrR 3.1

**TRAINING TAKEAWAY:**

**Law enforcement must make reasonable efforts to put a defendant in contact with an attorney when requested.**

- The court has not dictated what specific duties officers have in satisfying this requirement – the reasonableness of the attempt to permit a defendant to communicate with a lawyer is dependent on the specific circumstances of the case.
  - At the time the defendant requested counsel, (1) detectives needed to obtain search warrants; (2) there was a risk to prison security and the lockdown of other inmates; (3) there were safety concerns for the defendant; and (4) restrictions were placed on the facility due to the lockdown.
  - Defendant requested an attorney at 9pm, and was put in contact with one at 9am the following morning. This delay, in light of the circumstances, was reasonable.

# 2c MURDER; SEARCH WARRANTS; CONFESSION

1st DEGREE MURDER
State v. Scherf, No. 88906-6, (November 8, 2018)
WASHINGTON STATE SUPREME COURT

## 2c: CONFESSION

### (1) DELAY IN PRELIMINARY APPEARANCE

### (2) VOLUNTARINESS

# 2c MURDER; SEARCH WARRANTS; CONFESSION

**1st DEGREE MURDER**
State v. Scherf, No. 88906-6, (November 8, 2018)
WASHINGTON STATE SUPREME COURT

## DELAY IN PRELIMINARY APPEARANCE AND VALIDITY OF CONFESSION

**A suspect may be in custody for purposes of *Miranda*, but not considered in "detention" for purposes of the CrR 3.2.1(d)(1) right to a preliminary appearance.**

Although the defendant was "in custody" for purposes of *Miranda* from the point he was handcuffed outside the prison chapel on the day of the murder, the "detention" and right to a preliminary appearance before a judge under CrR 3.2.1 didn't trigger until he was booked for the murder of CO Biendl – 22 days later.

# 2c MURDER; SEARCH WARRANTS; CONFESSION

1st DEGREE MURDER
State v. Scherf, No. 88906-6, (November 8, 2018)
WASHINGTON STATE SUPREME COURT

## DELAY IN PRELIMINARY APPEARANCE AND VALIDITY OF CONFESSION

### TRAINING TAKEAWAY:

**A delay in preliminary appearance before a judge, as required under Criminal [Court] Rule 3.2.1(d)(1), is not an automatic basis for excluding the confession of the defendant. When weighing the voluntariness of a confession, the court will consider any unreasonable delay as just one factor to be evaluated.**

- Although the defendant had been held in custody in the Snohomish County Jail for 22 days without a preliminary appearance before a judge, the court held that this transfer from the prison was for the defendant's own protection, and his hold was under the sentence he was serving for his previous criminal conviction.

# 2c MURDER; SEARCH WARRANTS; CONFESSION

1st DEGREE MURDER
State v. Scherf, No. 88906-6, (November 8, 2018)
WASHINGTON STATE SUPREME COURT

## DELAY IN PRELIMINARY APPEARANCE AND VALIDITY OF CONFESSION

### PRACTICE POINTER:

**When a suspect is in custody on other charges, it is important for officers to re-advise the suspect of his *Miranda* rights when speaking to him in regard to a new investigation/crime.**

Here, the court noted that the detective's repeated reminders of his *Miranda* rights in the period between the commission of the crime and his formal arrest for the murder of Officer Biendl, supported the voluntariness of the defendant's confession.

# 2c MURDER; SEARCH WARRANTS; CONFESSION

1st DEGREE MURDER
State v. Scherf, No. 88906-6, (November 8, 2018)
WASHINGTON STATE SUPREME COURT

**VOLUNTARINESS OF TAPED CONFESSION**

**The defendant's videotaped statements weren't made involuntary by the fact that he was held in harsh conditions in solitary confinement following the murder.**

**The court considered facts that mitigated the conditions, including:**

- Defendant was repeatedly advised of his *Miranda* rights,
- Interviews were done on his terms,
- He met twice with attorneys before his first interview with police,
- Another attorney meeting occurred before his third interview,
- Defendant appeared calm and organized, and
- According to his defense expert witness, the defendant possibly confessed because he was hating himself for what he had done.

# 2c MURDER; SEARCH WARRANTS; CONFESSION

**1st DEGREE MURDER**
State v. Scherf, No. 88906-6, (November 8, 2018)
WASHINGTON STATE SUPREME COURT

## VOLUNTARINESS OF TAPED CONFESSION

**PRACTICE POINTERS:**

**Officers can provide critical evidence that prosecutors can use to establish that a suspect's statements were voluntary, and therefore admissible.**

- Remember to details about the timing, setting, advisement of *Miranda* rights, any discussion related to *Miranda*, demeanor of the suspect, etc.

- Recordings will obviously capture some of these details, but it's always a good idea to document them in your reports as well.

# 2d MURDER; SEARCH WARRANTS; CONFESSION



## 2d: TESTIMONY OF OFFICER – OPINION ON GUILT

# 2c MURDER; SEARCH WARRANTS; CONFESSION

**1st DEGREE MURDER**
State v. Scherf, No. 88906-6, (November 8, 2018)
WASHINGTON STATE SUPREME COURT

**TESTIMONY OF OFFICER – OPINION OF GUILT**

**Although a witness may not testify about the defendant's innocence or guilt, here the questions the detective asked the defendant during pretrial interviews were not overly prejudicial, and were relevant to showing the defendant's state of mind and a lack of coercion by the police during the confession.**

The testimony at issue was the detective:

- asking the defendant during pretrial interviews (1) what he would say about the victim's death if she could hear him (and then respecting the defendant's request to not talk about that), and (2) whether he was sorry about the victim's death; and
- Referring to "the murder" [of Officer Biendl]

This testimony was relevant to show the defendant's state of mind, and supported the State's denial of coercion by the police during the confession. The court also noted that this testimony didn't introduce anything new to the jury –they knew the charge was murder.

# 2 MURDER; SEARCH WARRANTS; CONFESSION

**1st DEGREE MURDER**
State v. Scherf, No. 88906-6, (November 8, 2018)
WASHINGTON STATE SUPREME COURT

## CASE OUTCOME:

Although the court upheld the defendant's conviction for the murder of CO Biendl, the sentence was overturned as a result of the prior ruling in State v. Gregory (Oct. 11, 2018) which held that the death penalty statute was unconstitutional.

The conviction stands, but the court ordered that the defendant be resentenced accordingly for this conviction. Regardless, there will be no change to his incarceration status since at the time of CO Biendl's murder he was already serving a life sentence for a prior conviction.

# 3 RESIDENTIAL BURGLARY



**FACTS**:

An elderly woman moved out of her home in October 2014 due to a need to be closer to family because of her poor health. Furniture, including beds in every room, clothes, appliances, and personal items were left in the house. No one else lived in the home. The woman and her son tried to visit the home once or twice a week. Over time, the home's windows and doors were broken to facilitate entry by strangers. The son eventually boarded up the house and placed no trespassing signs to keep people out.

On a visit to the home in February 2016, the son suspected that someone was in the house, and called 911 for assistance. When the deputy arrived, the suspect exited the house with a backpack containing items the victim identified as ones she'd left behind in the house.

The defendant now challenges his conviction for Residential Burglary, claiming that an abandoned house is not a "dwelling."

# 3 RESIDENTIAL BURGLARY



**TRAINING TAKEAWAY:**

**An unoccupied house may can be a "dwelling" for the purposes of proving a charge of Residential Burglary where the former occupant still considered it her home, furniture and personal affects remained, and regular visits were made to the property.**

RCW 9A.04.110(7) defines "dwelling" as "any building or structure . . . which is used or ordinarily used by a person for lodging."

There is no bright line rule for what is or isn't a "dwelling" – it's a **factual determination** made by the jury or judge.

# 3 RESIDENTIAL BURGLARY



STATE V. HALL, COA No. 50543-6-II (Nov. 27, 2018)

Court of Appeals, Division II

**PRACTICE POINTERS:**

**If you are attempting to charge a suspect with Residential Burglary, and the house is not a currently occupied "dwelling," you will need to document information about the past use of the house, its current state, and any planned future use.**

**The court recognized several supporting facts provided by the investigating officer that made this house a "dwelling," versus a willfully abandoned property:**

- The elderly resident had lived in the home for 30 years,
- its primary use was for lodging,
- she only moved out because her medical needs required it,
- she would have seemingly returned if able
- the home was left fully furnished and containing personal items
- the family/homeowner made regular visits over the 15 months the homeowner didn't live in the house in order to secure it against criminal activity.

# FURTHER READING

For further cases of interest to law enforcement, please see the comprehensive monthly Legal Update for Law Enforcement prepared by Attorney John Wasberg (former longtime editor of the original LED), which is published on the WASPC Law Enforcement Resources webpage:

**http://www.waspc.org/legal-update-for-washington-law-enforcement**

The Washington Prosecutor's Association publishes a comprehensive weekly summary of a wide range of caselaw geared toward the interests of Washington State Prosecutors. This resource is authored by WAPA Staff Attorney Pam Loginsky.

**http://70.89.120.146/wapa/CaseLaw.html**

# Questions?

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