Supreme Court Issues

May Term 2016
Cases Set for Oral Argument
Updated July 5, 2016

Adverse Possession—Elements—Adverse Use—Permissive Use—Presumption—Applicability

Whether the presumption of permissive use present in prescriptive easement claims applies to adverse possession claims.

No. 91622-5, *Lundgren and Lundgren* (respondents) *v. Upper Skagit Indian Tribe* (appellant). (*See also:* Indians—Jurisdiction—Quieting Title—Adverse Possession—Mutual Recognition and Acquiescence—Property Conveyed to Indian Tribe Before Assertion of Adverse Possession Claim—Effect of Tribal Immunity). (Oral argument 6/9/16).

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Agriculture—Farm Labor Contractors—License—Necessity—Agent—Liability for Agent's Failure to Obtain License—Knowing Use of Unlicensed Contractor—Failure to Verify Whether Contractor Licensed

Whether in this class action for violation of the Farm Labor Contractor Act, chapter 19.30 RCW, an entity that was paid a fee to manage all aspects of farming an apple orchard, including hiring workers and making all planting and harvesting decisions, was a "farm labor contractor" required to have a license under the act, and if so, whether two companies who contracted with the unlicensed contractor to manage the orchard are jointly and severally liable under RCW 19.30.200 for "knowingly" using an unlicensed contractor's services when they did not know the contractor was unlicensed but failed to inspect the license or verify whether the contractor was licensed.

No. 91945-3, *Saucedo, et al.* (appellees) *v. John Hancock Life & Health Ins. Co., et al.* (appellants). (Oral argument 1/14/16).

Certified from U. S. Court of Appeals, Ninth Circuit.

No. 13-35955 (9th Cir.).

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Animals—Dogs—Liability for Attack—Statutory Provisions—Strict Liability—Exception—Lawful Application of Police Dog—Bite Against Police Officer

Whether a police dog was "lawfully applied" for purposes of avoiding strict liability for a bite under RCW 16.08.040(2) where the dog while working on an active crime scene bit a police officer who was also working on the scene.

No. 91761-2, *Bryent and Patricia Finch* (petitioners) *v. Thurston County Sheriff's Office, et al.* (respondent). (Oral argument 1/19/16).

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Arbitration—Mandatory Arbitration—Trial De Novo—Attorney Fees—Improvement of Position—Amount Compared—Offer of Compromise—Scope—Attorney Fees and Costs of Arbitration

Whether the trial court, in assessing costs and reasonable attorney fees against a defendant under RCW 7.06.050 because he failed to improve his position in a trial de novo following mandatory arbitration and an offer of compromise, properly included known costs of arbitration in calculating the plaintiff's offer to compromise for a specific amount "plus taxable costs incurred in arbitration."

No. 92489-9, *Nelson* (petitioner) *v. Michael Erickson, et ux.* (respondents). (Oral argument 6/23/16).

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Assault, Criminal—Domestic Violence—Protection Order—Violation—Felony Offense—Elements—Two Prior Convictions—Qualifying Orders—Proof—Sufficiency—Stipulation to Admissibility of Prior Convictions

Whether in a prosecution for felony violation of a no contact order on the basis of two prior qualifying convictions for violating protection orders, the State was required to present evidence of the statutes under which the previously violated protection orders were issued to show that they were qualifying convictions even though the defendant stipulated to the admissibility of the prior convictions at trial.

No. 92293-4, *State* (petitioner) *v. Case* (respondent). (Oral argument 6/21/16).

189 Wn. App. 422 (2015).

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Attorney and Client—Malpractice—Criminal Defense Lawyer—Elements—Innocence of Underlying Crime—Exception—Uncorrected Sentencing Error

Whether a plaintiff must prove his actual innocence in order to pursue a malpractice action alleging that his lawyers' negligent failure to act after an appellate court remanded for resentencing caused him to serve a longer sentence, and whether an exception to the actual innocence doctrine applies if the sentence the plaintiff served was within the standard range and not beyond what could lawfully be imposed.

No. 91567-9, *Piris* (petitioner) *v. Alfred Kitching, et al.,* (respondents). (Oral argument 1/12/16).

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Civil Rights—Law Against Discrimination—Employment Discrimination—Disparate Treatment—Hostile Work Environment—Race Discrimination—Assignment of Psychiatric Hospital Staff to Patient Based on Patient's Expressed Racial Threats

Whether Western State Hospital violated the Washington Law Against Discrimination when it considered the race of staff members in assigning them to a psychiatric patient who had made threatening remarks about African-American staff.

No. 91494-0, *Blackburn, et al.* (appellants) *v. State of Wash. Dep't of Social & Health Servs., et al.* (respondents). (Oral argument 5/5/16)

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Condominiums—Declaration—Amendment—Statutory Provisions—Voting Percentage—Ninety Percent Requirement—Change in Uses to Which Units Are Restricted—"Uses"—Scope—Leasing

Whether an amendment to a condominium association's declaration limiting the number of condominium units that may be leased at any one time changed the "uses" to which units were restricted, requiring approval of 90 percent of the voting owners of the association pursuant to RCW 64.34.264(4) of the Washington Condominium Act.

No. 91247-5, *Bilanko* (respondent) *v. Barclay Court Owners Ass'n* (appellant). (Oral argument 2/18/16).

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Constitutional Law—Freedom of Speech—Begging—Time, Place, and Manner Restriction—Place Restriction—Highway On and Off Ramps—Traditional Public Forum—Content Neutrality

Whether a city of Lakewood ordinance prohibiting persons from "begging" (asking for money or goods as charity) on highway on and off ramps violates First Amendment free speech rights.

No. 91827-9, *City of Lakewood* (respondent) *v. Willis* (petitioner). (Oral argument 2/16/16).

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Counties—Joint Self-Insurance Agreement—Assignments—After Loss—Prohibition

Whether a county and its employee were precluded from assigning any claims they might have against a county risk pool self-insurance program (formed under chapters 48.62 and 39.34 RCW) and its commercial insurers, where the risk pool's joint self-insurance liability policy and interlocal agreement contained non-assignment provisions and the commercial insurers issued "following form" policies.

No. 91154-1, *Wash. Counties Risk Pool, et al.* (respondents) *v. Clark County, Wash., et al.* (petitioners). (*See also:* Statutes—Construction—Counties—Joint Self-Insurance Agreement—Contracts—Insurance—Liability Policy—Duty to Defend). (Oral argument 5/10/16).

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Criminal Law—Confessions—Voluntariness—Information Required by Jail Authorities as a Condition for Receiving Safe Housing—Gang Affiliation Documentation—Right of Confrontation—Harmless Error

Whether in a criminal prosecution against multiple defendants, statements of gang affiliation made by the defendants in a jail's gang documentation forms, which are intended to prevent rival gang members from being housed together for their safety, constituted involuntary statements inadmissible at trial, and whether their admission violated the codefendants' confrontation rights, and if so, whether admission of the forms was harmless.

No. 91185-1, *State* (respondent) *v. Anthony Deleon, Ricardo Deleon, and Octavio Robledo* (respondents). (Oral argument 2/23/16). (*See also* Criminal Law—Punishment—Sentence—Outside Standard Range—Aggravating Circumstances—Gang Activity—Proof—Generalized Gang Evidence—Admissibility—Harmless Error.)

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Criminal Law—Domestic Violence—Evidence—Other Offenses or Acts—Prior Acts of Domestic Violence—Lack of Victim Recantation—Admissibility

Whether in a prosecution for unlawful imprisonment in connection with domestic violence, the defendant's history of domestic violence against the complaining witness was admissible under ER 404(b) as evidence the witness was constrained without consent even though the witness did not recant her allegations against the defendant.

No. 91771-0, *State* (respondent) *v. Ashley, Jr.* (petitioner). (Oral argument 2/18/16).

187 Wn. App. 908 (2015)

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Criminal Law—Evidence—Criminal Trial—Absence of Diminished Capacity Defense—Intellectual Disability—Admissibility—Proof of Lack of Mens Rea—Assessing Defendant's Credibility

Whether in a prosecution for first degree murder where the defendant did not assert a defense of diminished capacity, evidence of the defendant's intellectual disabilities was nonetheless relevant and admissible to prove lack of the required mens rea at the time of the killing and for purposes of assessing the defendant's credibility.

No. 92021-4, *State* (respondent) *v. Clark* (appellant). (Oral argument 3/15/16). (*See also:* Criminal Law—Right to Counsel—Effective Assistance of Counsel—Prejudice—Sentencing Consequences—Noncapital Crime.)

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Criminal Law—Evidence—Hearsay—Right of Confrontation—Statement of Nontestifying Codefendant—Redaction—Sufficiency—Name Replaced With "The First Guy"

Whether in a felony murder prosecution the defendant's constitutional right to confront witnesses against him was violated by the admission at trial of a non-testifying codefendant's out-of-court statements that had been redacted to replace the name of the defendant with "the first guy."

No. 91438-9, *State* (petitioner) *v. Fisher & Trosclair* (respondents). (Oral argument 1/14/16)

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Criminal Law—Evidence—Opinion Evidence—Expert Testimony—Opinion Based on Defendant's Out-of-Court Statements—Credibility of Defendant—Bias Evidence—Prior Conviction—Admissibility

Whether in a prosecution for third degree assault the defendant's prior convictions were improperly admitted to impeach out-of-court statements of the defendant that a defense expert had relied upon in testifying in support of a diminished capacity defense.

No. 92261-6, *State* (petitioner) *v. Mohamed* (respondent). (Oral argument 6/7/16).

189 Wn. App. 533 (2015).

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Criminal Law—Harassment—Felony Offense—Proof—Sufficiency—Recipient's Notification of Being on "Hit List" Without Viewing Message—Recipient's Knowledge that Defendant in Police Custody

Whether in this prosecution for felony harassment based on a threat to kill, the evidence was sufficient to convict where, after the defendant was in police custody, the recipients were told by a third party that they were on the defendant's "hit list" but did not receive specific information about the defendant's communications. *See* RCW 9A.46.020.

No. 92593-3, *State* (respondent) *v. Trey M.* (appellant). (*See also:* Criminal Law—Harassment—Felony Offense—Threat to Kill—"True Threat"—Mens Rea—Objective or Subjective Intent.) (Oral argument 5/5/16).

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Criminal Law—Harassment—Felony Offense—Threat to Kill—"True Threat"—Mens Rea—Objective or Subjective Intent

Whether in light of *Elonis v. United States*, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015), the State in a prosecution for the Washington crime of felony harassment based on a threat to kill must prove that the defendant subjectively intended the recipient of the defendant's communication to perceive the communication as a genuine threat to kill or knew that the communication would be perceived as such. *See* RCW 9A.46.020.

No. 92593-3, *State* (respondent) *v. Trey M.* (appellant) (*See also:* Criminal Law—Harassment—Felony Offense—Proof—Sufficiency—Recipient's Notification of Being on "Hit List" Without Viewing Message—Recipient's Knowledge that Defendant in Police Custody.) (Oral argument 5/5/16).

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Criminal Law—Hearsay—Prior Inconsistent Statement—Other Proceeding—Statement Given to Police

Whether in a criminal prosecution a witness's written statement to police signed under oath and inconsistent with the witness's trial testimony was admissible at trial as a statement that was not hearsay because it was given "at a trial, hearing, or other proceeding" within the meaning of ER 801(d)(1)(i).

No. 91669-1, *State* (respondent) *v. Otton* (petitioner). (Oral argument 2/18/16).

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Criminal Law—Homicide—Felony Murder—Robbery as Predicate Felony—Accomplice—Affirmative Defense—Lack of Knowledge Codefendants Were Armed and Planned a Robbery—Jury Instruction—Necessity—Evidence in Support

Whether in a felony murder prosecution predicated on the commission of robbery the trial court erred in failing to instruct the jury on the defendant's claimed affirmative defense that she lacked knowledge that her codefendants were armed and planned a robbery. *See* RCW 9A.32.030(1)(c).

No. 91438-9, *State* (petitioner) *v. Fisher & Trosclair* (respondents). (Oral argument 1/14/16)

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Criminal Law—Possession of Stolen Motor Vehicle—Indictment and Information—Sufficiency—Essential Elements—Withholding Vehicle From Use of True Owner or Person Entitled Thereto

Whether in charging the crime of possession of a stolen motor vehicle the State must allege as an essential element in the information that the defendant withheld the vehicle from the use of the true owner or person entitled thereto.

No. 92060-5, *State* (petitioner) *v. Porter, Jr.* (respondent). (Oral argument 5/24/16).

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Criminal Law—Punishment—Death Penalty—Eligibility—Arbitrary and Capricious Application

Whether RCW 10.95.020 fails to sufficiently narrow the class of defendants eligible for the death penalty so as to prevent random and arbitrary imposition of the death penalty.

No. 88086-7, *State* (respondent) *v. Gregory* (appellant). (Oral argument 2/25/16). (*See also:* Criminal Law—Punishment—Death Penalty—Reversal on Appeal—New Special Sentencing Proceeding—Statutory Authority—Discretion of Prosecutor—Validity—Cruel and Unusual Punishment—Due Process; Criminal Law—Punishment—Death Penalty—Review—Proportionality—Cruel Punishment—State Constitution—Absence of Violent Criminal Record—Only One Victim; Criminal Law—Punishment—Death Penalty—Review—Proportionality—Finding by State Supreme Court—Right to Jury Trial; Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Evidence—Statutory Provisions—"Facts and Circumstances of Murder"—Vagueness; Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Jury—Selection—Disqualification—Misunderstanding of Burden of Proof; Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Prosecutor's Conduct—Misconduct—Argument—"Declare the Truth"—Value of Mitigation Evidence—Comparison With Victim's Rights—Characterization of Severity of the Crime—Comment on Defendant's Demeanor.)

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Criminal Law—Punishment—Death Penalty—Reversal on Appeal—New Special Sentencing Proceeding—Statutory Authority—Discretion of Prosecutor—Validity—Cruel and Unusual Punishment—Due Process

Whether in this death penalty prosecution in which the death sentence originally imposed was reversed on appeal and the case was remanded for resentencing, RCW 10.95.090 prohibits the prosecutor from again seeking the death penalty, and if not, whether the prosecutor's discretion to again seek the death penalty violates the Eighth and Fourteenth Amendments to the United States Constitution.

No. 88086-7, *State* (responsdent) *v. Gregory* (appellant). (Oral argument 2/25/16). (*See also:* Criminal Law—Punishment—Death Penalty—Eligibility—Arbitrary and Capricious Application; Criminal Law—Punishment—Death Penalty—Review—Proportionality—Cruel Punishment—State Constitution—Absence of Violent Criminal Record—Only One Victim; Criminal Law—Punishment—Death Penalty—Review—Proportionality—Finding by State Supreme Court—Right to Jury Trial; Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Evidence—Statutory Provisions—"Facts and Circumstances of Murder"—Vagueness; Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Jury—Selection—Disqualification—Misunderstanding of Burden of Proof; Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Prosecutor's Conduct—Misconduct—Argument—"Declare the Truth"—Value of Mitigation Evidence—Comparison With Victim's Rights—Characterization of Severity of the Crime—Comment on Defendant's Demeanor.)

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Criminal Law—Punishment—Death Penalty—Review—Proportionality—Cruel Punishment—State Constitution—Absence of Violent Criminal Record—Only One Victim

Whether in this death penalty prosecution the death sentence was disproportionate and constituted cruel punishment under article I, section 14 of the Washington Constitution when the defendant lacked a history of violent felonies and killed a single victim.

No. 88086-7, *State* (respondent) *v. Gregory* (appellant). (Oral argument 2/25/16). (*See also:* Criminal Law—Punishment—Death Penalty—Eligibility—Arbitrary and Capricious Application; Criminal Law—Punishment—Death Penalty—Reversal on Appeal—New Special Sentencing Proceeding—Statutory Authority—Discretion of Prosecutor—Validity—Cruel and Unusual Punishment—Due Process; Criminal Law—Punishment—Death Penalty—Review—Proportionality—Finding by State Supreme Court—Right to Jury Trial; Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Evidence—Statutory Provisions—"Facts and Circumstances of Murder"—Vagueness; Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Jury—Selection—Disqualification—Misunderstanding of Burden of Proof; Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Prosecutor's Conduct—Misconduct—Argument—"Declare the Truth"—Value of Mitigation Evidence—Comparison With Victim's Rights—Characterization of Severity of the Crime—Comment on Defendant's Demeanor.)

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Criminal Law—Punishment—Death Penalty—Review—Proportionality—Finding by State Supreme Court—Right to Jury Trial

Whether RCW 10.95.130(2) violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by assigning to the Washington Supreme Court rather than to the jury the task of determining the proportionality of a death sentence.

No. 88086-7, *State* (respondent) *v. Gregory* (appellant) (Oral argument 2/25/16). (*See also:* Criminal Law—Punishment—Death Penalty—Eligibility—Arbitrary and Capricious Application; Criminal Law—Punishment—Death Penalty—Reversal on Appeal—New Special Sentencing Proceeding—Statutory Authority—Discretion of Prosecutor—Validity—Cruel and Unusual Punishment—Due Process; Criminal Law—Punishment—Death Penalty—Review—Proportionality—Cruel Punishment—State Constitution—Absence of Violent Criminal Record—Only One Victim; Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Evidence—Statutory Provisions—"Facts and Circumstances of Murder"—Vagueness; Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Jury—Selection—Disqualification—Misunderstanding of Burden of Proof; Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Prosecutor's Conduct—Misconduct—Argument—"Declare the Truth"—Value of Mitigation Evidence—Comparison With Victim's Rights—Characterization of Severity of the Crime—Comment on Defendant's Demeanor.)

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Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Evidence—Statutory Provisions—"Facts and Circumstances of Murder"—Vagueness

Whether RCW 10.95.060(3) is unconstitutionally vague in allowing the State to present evidence "concerning the facts and circumstances of the murder" at the penalty phase of a death penalty prosecution.

No. 88086-7, *State* (respondent) *v. Gregory* (appellant) (Oral argument 2/25/16). (*See also:* Criminal Law—Punishment—Death Penalty—Eligibility—Arbitrary and Capricious Application; Criminal Law—Punishment—Death Penalty—Reversal on Appeal—New Special Sentencing Proceeding—Statutory Authority—Discretion of Prosecutor—Validity—Cruel and Unusual Punishment—Due Process; Criminal Law—Punishment—Death Penalty—Review—Proportionality—Cruel Punishment—State Constitution—Absence of Violent Criminal Record—Only One Victim; Criminal Law—Punishment—Death Penalty—Review—Proportionality—Finding by State Supreme Court—Right to Jury Trial; Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Jury—Selection—Disqualification—Misunderstanding of Burden of Proof; Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Prosecutor's Conduct—Misconduct—Argument—"Declare the Truth"—Value of Mitigation Evidence—Comparison With Victim's Rights—Characterization of Severity of the Crime—Comment on Defendant's Demeanor.)

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Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Jury—Selection—Disqualification—Misunderstanding of Burden of Proof

Whether in this death penalty prosecution the trial court erred in declining to excuse for cause a juror who had repeatedly expressed the belief that the defendant would have to prove to the juror that life without early release rather than death was the proper punishment.

No. 88086-7, *State* (respondent) *v. Gregory* (appellant) (Oral argument 2/25/16). (*See also:* Criminal Law—Punishment—Death Penalty—Eligibility—Arbitrary and Capricious Application; Criminal Law—Punishment—Death Penalty—Reversal on Appeal—New Special Sentencing Proceeding—Statutory Authority—Discretion of Prosecutor—Validity—Cruel and Unusual Punishment—Due Process; Criminal Law—Punishment—Death Penalty—Review—Proportionality—Cruel Punishment—State Constitution—Absence of Violent Criminal Record—Only One Victim; Criminal Law—Punishment—Death Penalty—Review—Proportionality—Finding by State Supreme Court—Right to Jury Trial; Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Evidence—Statutory Provisions—"Facts and Circumstances of Murder"—Vagueness; Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Prosecutor's Conduct—Misconduct—Argument—"Declare the Truth"—Value of Mitigation Evidence—Comparison With Victim's Rights—Characterization of Severity of the Crime—Comment on Defendant's Demeanor.)

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Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Prosecutor's Conduct—Misconduct—Argument—"Declare the Truth"—Value of Mitigation Evidence—Comparison With Victim's Rights—Characterization of Severity of the Crime—Comment on Defendant's Demeanor

Whether in this death penalty prosecution the prosecutor engaged in misconduct warranting a new sentencing proceeding by stating during penalty phase closing argument that the jury in its verdict should "speak the truth," that the mitigation evidence was the "best that could be said" about the defendant, that the defendant had rights while the victim did not, and that the defendant's crime was "as bad as it gets," and by commenting on the defendant's demeanor.

No. 88086-7, *State* (respondent) *v. Gregory* (appellant). (Oral argument 2/25/16). (*See also:* Criminal Law—Punishment—Death Penalty—Eligibility—Arbitrary and Capricious Application; Criminal Law—Punishment—Death Penalty—Reversal on Appeal—New Special Sentencing Proceeding—Statutory Authority—Discretion of Prosecutor—Validity—Cruel and Unusual Punishment—Due Process; Criminal Law—Punishment—Death Penalty—Review—Proportionality—Cruel Punishment—State Constitution—Absence of Violent Criminal Record—Only One Victim; Criminal Law—Punishment—Death Penalty—Review—Proportionality—Finding by State Supreme Court—Right to Jury Trial; Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Evidence—Statutory Provisions—"Facts and Circumstances of Murder"—Vagueness; Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Jury—Selection—Disqualification—Misunderstanding of Burden of Proof.)

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Criminal Law—Punishment—Sentence—Financial Assessments—Ability to Pay—Contempt—Federal Social Security and State-Granted Public Benefits—Protection of Federal and State Public Benefits from Execution, Levy, Attachment, Garnishment, or Other Legal Processes

Whether the trial court's refusal in contempt proceedings to remit discretionary legal financial obligations imposed as part of an individual's criminal sentence violates the federal Social Security Act's anti-alienation, anti-attachment provision, 42 U.S.C. § 407(a), where the individual's sole income is a Social Security Act benefit.

No. 92594-1, *City of Richland* (respondent) *v. Wakefield* (petitioner). (Oral argument 5/24/16).

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Criminal Law—Punishment—Sentence—Outside Standard Range—Aggravating Circumstances—Gang Activity—Proof—Generalized Gang Evidence—Admissibility—Harmless Error

Whether in this prosecution for first degree assault in which the State sought exceptional sentences based intent to benefit a street gang, RCW 9.94A.535(3)(aa), the trial court erred in admitting generalized evidence of street gang activity and membership, and if so, whether the error was harmless.

No. 91185-1, *State* (respondent) *v. Ricardo Deleon, Anthony Deleon and Octavio Robledo* (petitioners). (Oral argument 2/23/16). (*See also* Criminal Law—Confessions—Voluntariness—Information Required by Jail Authorities as a Condition for Receiving Safe Housing—Gang Affiliation Documentation—Right of Confrontation—Harmless Error.)

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Criminal Law—Review—Costs—Substantially Prevailing Party—Withdrawal of Counsel After Filing *Anders* Brief

Whether for purposes of awarding costs under RAP 14.2 to the party who "substantially prevailed on review" of a criminal conviction, the State was the prevailing party where the conviction was affirmed after the defendant's counsel filed a brief and was allowed to withdraw under the procedure outlined in *Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

No. 91531-8, *State* (respondent) *v. Stump* (petitioner). (Oral argument 1/28/16).

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Criminal Law—Right to Counsel—Effective Assistance of Counsel—Prejudice—Sentencing Consequences—Noncapital Crime

Whether in a prosecution for first degree murder in which the State did not seek the death penalty, defense counsel was deficient in failing to object to statements to the jury that the death penalty was not at issue, and if so, whether the defendant was prejudiced.

No. 92021-4, *State* (respondent) *v. Clark* (petitioner). (Oral argument 3/15/16). (*See also:* Criminal Law—Evidence—Criminal Trial—Absence of Diminished Capacity Defense—Intellectual Disability—Admissibility—Proof of Lack of Mens Rea—Assessing Defendant's Credibility.)

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Criminal Law—Searches and Seizures—Warrantless Search—Validity—Abandoned Property —Flight from Stolen Vehicle—Pursuit of Fleeing Suspect—Search of Cellular Telephone

Whether police lawfully searched a criminal defendant's cellular telephone without a warrant on the basis that the defendant had abandoned the telephone by leaving it in a stolen vehicle when he fled to avoid police apprehension, and the search was conducted only to reach a person on the list of "contacts," and thereby identify the fleeing defendant.

No. 91532-6, *State* (respondent) *v. Samalia* (petitioner). (Oral argument 1/12/16).

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Criminal Law—Sexual Offenses—Child Molestation—Second Degree Child Molestation—Elements—Lower Age Limit—Indictment and Information—Sufficiency

Whether it is an essential element of second degree child molestation under RCW 9A.44.086(1), that the victim was at least 12 years old at the time of the crime, and if so, whether the information in this case was constitutionally deficient in failing to expressly allege the lower age limit.

No. 92274-8, *State* (respondent) *v. Goss* (petitioner). *(See also:* Criminal Law—Trial—Argument—Closing Argument—Scope—Restriction—Failure of State to Offer Recorded Police Interview Into Evidence—Missing Witness Doctrine—Applicability.) (Oral argument 7/7/16).

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Criminal Law—Trial—Argument—Closing Argument—Scope—Restriction—Failure of State to Offer Recorded Police Interview Into Evidence—Missing Witness Doctrine—Applicability

Whether in this prosecution for child molestation the trial court erroneously precluded the defendant in closing argument from asserting, as an analog to the "missing witness doctrine," that the State failed to introduce his recorded police interview into evidence because it weakened the State's case.

No. 92274-8, *State* (respondent) *v. Goss* (petitioner). *(See also:* Criminal Law—Sexual Offenses—Child Molestation—Second Degree Child Molestation—Elements—Lower Age Limit—Indictment and Information—Sufficiency.) (Oral argument 7/7/16).

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Criminal Law—Trial—Misconduct of Prosecutor—Argument—Witnesses—Failure to Call—Available Corroborative Witness

Whether, in a prosecution for methamphetamine possession, the prosecutor committed misconduct in commenting on the defendant's failure to call a witness to support his unwitting possession affirmative defense.

No. 91660-8, *State* (petitioner) *v. Sundberg* (respondent). (Oral argument 1/19/16).

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Criminal Law—Trial—Presence of Defendant—Right To Be Present—Absence—Jury Selection Proceeding—Harmless Error—Test—Showing of Possibility of Prejudice—Necessity

Whether in this criminal prosecution in which the defendant's constitutional right to be present was violated when in his absence some prospective jurors were excused on the basis of written responses to a questionnaire, the defendant on appeal had to first raise the possibility he was prejudiced before the burden shifted to the State to prove the violation was harmless, and if not, whether the State failed to prove that the violation was harmless beyond a reasonable doubt.

No. 92310-8, *State* (petitioner) *v. Slert* (respondent). (Oral argument 6/23/16).

189 Wn. App. 821 (2015).

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Criminal Law—Trial—Presence of Defendant—Right to be Present—Scope—Alternate Juror Selection Process

Whether in this criminal prosecution the defendant's right to be present was violated when during a recess the court clerk randomly selected the jurors who would serve as alternates.

No. 89321-7, *State* (petitioner) *v. Jones* (respondent). (Oral argument 2/23/16) (*See also:* Criminal Law—Trial—Right to Public Trial—Closure—What Constitutes—Alternate Juror Selection—During Recess.)

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Criminal Law—Trial—Right to Public Trial—Closure—What Constitutes—Alternate Juror Selection—During Recess

Whether in this criminal prosecution the trial court violated the defendant's right to a public trial when during a recess it had the court clerk randomly select the jurors who would serve as alternates without engaging in the courtroom closure analysis set forth in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

No. 89321-7, *State* (petitioner) *v. Jones* (respondent). (Oral argument 2/23/16) (*See also:* Criminal Law—Trial—Presence of Defendant—Right to be Present—Scope—Alternate Juror Selection Process.)

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Death—Wrongful Death—Accrual of Cause—Subsisting Cause of Action—Necessity—Action or Inaction by Decedent During Life

Whether the personal representative of a decedent is precluded from bringing this wrongful death action stemming from the decedent's death due to asbestos exposure because the decedent at the time of his death had no subsisting cause of action for his own injuries, either because the statute of limitations had expired on any claims by the decedent or because the decedent had already obtained a judgment against one of the wrongful death defendants during his lifetime.

No. 91969-1, *Deggs* (petitioner) *v. Asbestos Corp. Ltd., et al.* (respondents). (Oral argument 3/10/16)

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Deeds of Trust—Defaulting Borrower—Lender Entry into Premises Prior to Foreclosure and Trustee's Sale—Predefault Agreement Permitting Entry—Validity—Receivership Statute—Exclusivity of Preforeclosure Remedy

Whether under Washington's lien theory of mortgages and its ejectment statute, RCW 7.28.230(1), a borrower and a lender may execute a predefault agreement allowing the lender to enter, maintain, and secure the encumbered property before foreclosure and sale, or whether instead Washington's receivership statute, chapter 7.60 RCW, provides the exclusive remedy for lender entry into encumbered property before foreclosure absent postdefault consent of the borrower.

No. 92081-8, *Laura Zamora Jordan* (plaintiff) *v. Nationstar Mortgage, LLC* (defendant). (Oral argument 1/19/16).

Certified From: United States District Court, Eastern District of Washington

No. 2:14-CV-0175-TOR (E.D. Wash.)

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Eminent Domain—Compensation—Litigation Costs—30-Day Settlement Offer—Modification of Scope of Condemnation at Trial—Effect

Whether in this eminent domain action in which Sound Transit condemned a parcel of land for an easement, the property owner is entitled to litigation costs under RCW 8.25.070(1) in connection with the trial on just compensation when Sound Transit made an initial 30-day settlement offer but then modified the scope of the easement sought at trial.

No. 91653-5, *Cent. Puget Sound Reg'l Transit Auth.* (respondent) *v. Airport Inv. Co.* (petitioner). (Oral argument 1/21/16). (*See also:* Eminent Domain—Compensation—Proof—Hearsay—Admission of Party Opponent—Out-of-Court Expert Valuation.)

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Eminent Domain—Compensation—Proof—Hearsay—Admission of Party Opponent—Out-of-Court Expert Valuation

Whether in an eminent action the trial court properly admitted the property owner's personal belief as to the property's value, derived from an out-of-court expert valuation, as an admission of a party opponent exempt from the hearsay rule, or whether the testimony was inadmissible as conveying an out-of-court expert opinion.

No. 91653-5, *Cent. Puget Sound Reg'l Transit Auth.* (respondent) *v. Airport Inv. Co.* (petitioner). (Oral argument 1/21/16). (*See also:* Eminent Domain—Compensation—Litigation Costs—30-Day Settlement Offer—Modification of Scope of Condemnation at Trial—Effect.)

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Employment—Compensation—Damages for Nonpayment of Wages—Attorney Fees—Statutory Provisions—"Action"—What Constitutes—Administrative Appeal of Disciplinary Action

Whether a city of Seattle employee's successful administrative appeal of a disciplinary action before the city civil service commission, in which the employee recovered back pay, entitled the employee to an award of reasonable attorney fees under RCW 49.48.030, which provides for an award of attorney fees to an employee who recovers wages or salary owed in "any action" against an employer.

No. 91742-6, *Arnold* (respondent) *v. City of Seattle, d/b/a Human Services Dep't* (petitioner). (Oral argument 1/12/16).

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Employment—Compensation—Minimum Wage—Overtime—Exclusions—Commission Pay—"Retail or Service Establishment"—Textile Goods Rentals

Whether a company that rents textile products such as uniforms and towels to other businesses is a "retail or service establishment" for purposes of RCW 49.46.130(3), thus exempting it from having to pay its commissioned employees overtime wages.

No. 91801-5, *Cooper and Scott* (respondents) *v. Alsco, Inc.* (appellant). (Oral argument 6/7/16).

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Environment—Administrative Proceedings—Energy Facility Site Selection—Environmental Review—Consideration of Alternatives—Grant of Lease for Energy Facility—Limitation on Grantor's Alternatives—Effect on Discretion of Energy Facility Site Evaluation Council and Governor

Whether under a regulation adopted by the Energy Facility Site Evaluation Council, under which no agency may take action that would "limit the choice of reasonable alternatives" until environmental review by the responsible official is complete, a port in granting a lease to develop an oil terminal on the port's property improperly limited the choice of reasonable alternatives available to the council and the governor in their decision on energy site certification under the energy facility site locations act, chapter 80.50 RCW. *See* WAC 197-11-070(1).

No. 92335-3, *Columbia Riverkeeper, et al.* (petitioners) *v. Port of Vancouver, et al.* (respondents). (Oral argument 6/23/16).

189 Wn. App. 800 (2015).

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Garnishment—Writ Procedure—Issuance of Writ By Creditor's Attorney—Enforceability—Application By Affidavit—Necessity—Sufficiency of Affidavit

Whether the attorney of record for a judgment creditor may issue an enforceable writ of garnishment under RCW 6.27.020(2) without a separate application by affidavit under RCW 6.27.060, and if such an affidavit is required in this circumstance, whether the writ of garnishment is enforceable when the affidavit fails to include the facts listed at RCW 6.27.060, including that the plaintiff has reason to believe that the garnishee is indebted to the defendant in amounts exceeding those legally exempted from garnishment.

No. 92565-8, *Carter* (plaintiff) *v. Peterson Enter., Inc.* (defendant). ***Note: Case closed, matter is moot.**

Certified from United States Dist. Court for the Eastern Dist. of Wash.
No. 2:15-CV-257-RMP (E.D. Wash.)

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Indians—Jurisdiction—Quieting Title—Adverse Possession—Mutual Recognition and Acquiescence—Property Conveyed to Indian Tribe Before Assertion of Adverse Possession Claim—Effect of Tribal Immunity

Whether in this action to quiet title to property that had been conveyed to an Indian tribe before the action was filed, the superior court had *in rem* jurisdiction to hear the action despite the tribe's assertion of sovereign immunity when the claimants asserted that they acquired title to the disputed property by adverse possession and mutual recognition and acquiescence before it had been conveyed to the tribe.

No. 91622-5, *Lundgren and Lundgren* (respondents) *v. Upper Skagit Indian Tribe* (appellant). (*See also:* Adverse Possession—Elements—Adverse Use—Permissive Use—Presumption—Applicability). (Oral argument 6/9/16).

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Indians—Juveniles—Parental Relationship—Termination—Indian Child Welfare Act—State Law Provisions—Applicability—Parental Status—Petition By Indian Parent and Stepparent to Terminate Rights of Non-Indian Parent

Whether an Indian parent and stepparent who petition to terminate a non-Indian parent's rights as to an Indian child must show that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful" under the federal Indian Child Welfare Act and the parallel state statute, 25 U.S.C. § 1912(d) and RCW 13.38.130(1).

No. 92127-0, *In re the Adoption of T.A.W., R.B. and C.B.* (petitioners) *v. C.W.* (respondent). (Oral argument 5/24/16).

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Industrial Insurance—Assessments—Premiums—Eligibility—Workers—Worker or Independent Contractor—Franchisee

Whether franchisees of a commercial cleaning services franchisor who personally perform the cleaning services, using the franchisor's cleaning methods and approved equipment, are "workers" for whom the franchisor must pay industrial insurance premiums and who are not excluded from the purview of the Industrial Insurance Act under RCW 51.08.195(3).

No. 91610-1, *Dep't of Labor & Indus.,* (respondent) *v. Lyons Enters. Inc., D/B/A Jan-Pro Cleaning Sys.,* (petitioner). (Oral argument 1/21/16).

186 Wn. App. 518 (2015)

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Industrial Insurance—Award—Recoupment—Grounds—Adjudicator Error—What Constitutes—Reliance on Innocent Misrepresentation by Claimant—Finality of Order—Effect

Whether in an action by the Department of Labor and Industries to recoup an overpayment of workers' compensation benefits, the department's reliance on an innocent misrepresentation as to the injured worker's marital status constituted an "adjudicator error" under RCW 51.32.240(1)(b), precluding recoupment of the award after it became final.

No. 92215-2, *Birrueta* (respondent) *v. Dep't of Labor and Indus.* (petitioner). (Oral argument 6/21/16).

188 Wn. App. 831 (2015).

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Industrial Insurance—Claims—Limitation Period—Commencement—Date of Injury

Whether the one-year statute of limitations of RCW 51.28.050 on filing a workers' compensation claim begins to run on the day of the injury or the following day.

No. 92122-9, *Kovacs* (petitioner) *v. Dep't of Labor & Indus.* (respondent). (Oral argument 5/26/16).

188 Wn. App. 933 (2015).

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Industrial Insurance—Judicial Review—Instructions—Special Consideration to Attending Physician—Necessity

Whether in this trial on a workers' compensation claim, the trial court was required, at the claimant's request, to instruct the jury to give special consideration to the expert testimony of the claimant's treating physician.

No. 91963-1, *Clark County* (respondent) *v. McManus* (petitioner). (Oral argument 3/15/16).

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Insurance—Property Damage—Water Damage—Exclusions—Suspension of Coverage During Vacancy of Building—Effective Date of Suspension

Whether an endorsement in a commercial property insurance contract suspending coverage for water damage during the vacancy of the property suspended coverage at the beginning of any vacancy or only after 60 days of vacancy.

No. 91777-9, *Lui and Lui* (petitioners) *v. Essex Ins. Co.* (respondents). (Oral argument 3/10/16).

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Judgment—Collateral Estoppel—Applicability—Appellate Decision—Subsequent Retroactive Legislative Amendment—Pending Tax Refund Claim

Whether 2010 legislation that retroactively narrowed the applicability of an exemption from the Washington business and occupation tax in response to *Dot Foods, Inc. v. Department of Revenue*, 166 Wn.2d 912, 215 P.3d 185 (2009), relating to a taxpayer's tax refund claim for the tax periods from January 2000 through April 2006, preserved the collateral estoppel effect of that decision as to the same taxpayer's refund claim for the tax periods from May 2006 through December 2007, and, if not, whether the legislation violated separation of powers principles.

No. 92398-1, *Dot Foods, Inc.*, (respondent/cross-appellant) *v. Dep't of Revenue* (appellant/ cross-respondent). (Oral argument 1/28/16). (*See also:* Taxation—Business & Occupation Tax—Exemptions—Direct Seller's Representative—Statutes—Amendment—Retroactivity—Validity—Due Process).

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Juveniles—Juvenile Justice—Disposition—Conditions—Letter of Apology—Validity—First Amendment

Whether a condition of a juvenile disposition for assault with sexual motivation requiring the offender to write an apology letter to the victim violates the First Amendment free speech right.

No. 91934-8, *State* (respondent) *v. K.H.-H.* (petitioner). (Oral argument 2/16/16).

188 Wn. App. 413 (2015)

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Juveniles—Parental Relationship—Termination—Imprisoned Parent—Statutory Factors—Failure to Consider—Harmless Error

Whether in a proceeding to terminate an incarcerated individual's parental rights to a child, the juvenile court's failure to expressly consider the factors applicable to incarcerated parents under RCW 13.34.180(1)(f) may be harmless, and if so, whether the error in this case was harmless.

No. 91921-6, *In re the Termination of K.J.B.* (Oral argument 5/26/16).

188 Wn. App. 263 (2015).

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Juveniles—Parental Relationship—Termination—Imprisoned Parent—Time of Imprisonment

Whether RCW 13.34.180(1)(f), which requires the juvenile court in a parental termination proceeding to consider certain factors "if the parent is incarcerated," applies if a parent is incarcerated at some point during the dependency or only when a parent is incarcerated at the time of the termination hearing.

No. 92448-1, *In re Dependency of D.L.B. (See also:* Juveniles—Parental Relationship—Termination—Improvement of Parent—State Services—Imprisoned Parent—Specification of Services in Permanency Plan—Failure to Address Requirements for Imprisoned Parent—Challenge to Adequacy of Provision of Services—Failure Previously Challenge Permanency Plan—Effect). (Oral argument 5/26/16).

188 Wn. App. 905 (2015).

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Juveniles—Parental Relationship—Termination—Improvement of Parent—Parental Unfitness—Parent's Remedying of Deficiencies—Absence of Attachment and Bonding—Child's Unwillingness to Participate in Reunification Services—Effect

Whether a parent's rights to his child were properly terminated when the parent remedied all identified parental deficiencies but was determined to be unable to parent because the child was unwilling to reunite with the parent and the trial court found the child would be harmed by an attempt to repair the parent-child relationship.

No. 91757-4, *In re the Welfare of K.M.M.* (Oral argument 5/3/16)

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Juveniles—Parental Relationship—Termination—Improvement of Parent—State Services—Imprisoned Parent—Specification of Services in Permanency Plan—Failure to Address Requirements for Imprisoned Parent—Challenge to Adequacy of Provision of Services—Failure Previously Challenge Permanency Plan—Effect

Whether in the absence of a challenge to the permanency plan that the Department of Social and Health Services established upon the removal of a dependent child from home, the parent in a termination proceeding who had been incarcerated during part of dependency may claim that the department failed to offer or provide all necessary services under RCW 13.34.180(1)(d) because the permanency plan did not address the requirements for incarcerated parents specified by RCW 13.34.136(2)(b)(i)(A).

No. 92448-1, *In re Dependency of D.L.B. (See also:* Juveniles—Parental Relationship—Termination—Imprisoned Parent—Time of Imprisonment). (Oral argument 5/26/16).

188 Wn. App. 905 (2015).

Top

Juveniles—Parental Relationship—Termination—Improvement of Parent—State Services—State's Duty—Parental Unfitness—Proof—Sufficiency

Whether in this petition to terminate parental rights, in which the State relies on a lack of attachment and bonding, the State failed to prove (1) that it provided all necessary services, reasonably available, capable of correcting parental deficiencies, where the parent was offered therapeutic visitation but was not offered specific attachment and bonding services, or (2) that the parent is currently unfit based in part on lack of parent-child bonding that cannot be remedied in the near future, where the parent is successfully parenting a younger child.

No. 91925-9, *In re the Welfare of B.P.* (Oral argument 5/3/16).

188 Wn. App. 113 (2015).

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Limitation of Actions—Death—Wrongful Death—Medical Treatment—Malpractice—Limitation Period—Statutory Provisions

Whether the time limit for bringing a wrongful death action based on the death of an unborn child resulting from allegedly negligent prenatal health care is governed by the general personal injury statute of limitations, RCW 4.16.080, or the medical malpractice statute of limitations, RCW 4.16.350, which could be tolled for a year by a good faith request for mediation.

No. 92216-1, *Fast, et al.* (petitioners) *v. Kennewick Pub. Hosp. Dist. d/b/a Kennewick Gen. Hosp., et al.* (respondents). (Oral argument 7/7/16).

188 Wn. App. 43 (2015).

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Medical Treatment—Products Liability—Warnings—Duty to Warn—Medical Product—Prescription Only—Sufficiency of Warning—Determination—Strict Liability or Negligence Standard

Whether in this product liability action for personal injuries sustained by a patient during the use of a robotic surgical system, the standard of liability for the manufacturer's duty to warn of the system's known dangers is one of strict liability or only negligence.

No. 92210-1, *Taylor, Estate of Fred E. Taylor* (petitioner) *v. Intuitive Surgical Inc. (respondent).* (Oral argument 6/7/16).

188 Wn. App. 776 (2015).

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Mental Health—Involuntary Commitment—Probable Cause Hearing—Privacy—Use of Initials in Place of Full Name

Whether in connection with a petition for continued detention of a person for involuntary mental health treatment, courts should use the person's initials in place of the person's full name.

No. 91950-0, *In re the Det. of W.C.C.* (Oral argument 2/16/16). (*See also:* Mental Health—Involuntary Commitment—Hearing—Probable Cause Hearing—Timeliness—Continuance—End of Period—Excluded Days).

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Mental Health—Involuntary Commitment—Probable Cause Hearing—Timeliness—Continuance—End of Period—Excluded Days

Whether holidays and weekends are excluded in calculating the maximum period allowed for a continuance under RCW 71.05.240(1) for a probable cause hearing on a petition for continued detention of a person for involuntary mental health treatment.

No. 91950-0, *In re the Det. of W.C.C.* (Oral argument 2/16/16). (*See also:* Mental Health—Involuntary Commitment—Probable Cause Hearing—Privacy—Use of Initials in Place of Full Name.)

187 Wn. App. 303 (2015)

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Mental Health—Involuntary Commitment—Sexually Violent Predators—Trial—Presence of Defendant—Right To Be Present—Jury Selection—Harmless Error

Whether a person subject to a sexually violent predator civil commitment proceeding has a constitutional right to be present at all critical stages of the proceeding, including jury selection, and if so, whether in this case the person's absence without waiver from a portion of jury selection was harmless.

No. 92332-9, *In re the Det. of Black* (respondent). (Oral argument 7/7/16).

189 Wn. App. 641 (2015).

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Municipal Corporations—Ordinances—Violation—Fine—Validity—Judicial Determination—Writ of Review—Writ Not Sought—Effect—Declaratory Judgment—Availability—Timeliness—Analogous Period

Whether a judicial challenge to a mayor's decision upholding a municipal fine may be brought by an action for declaratory relief as an alternative to a writ of review under RCW 7.16.040, and if so, whether the declaratory action in this case was timely when filed two months after the mayor's final decision.

No. 91978-0, *New Cingular Wireless* (respondent) *v. City of Clyde Hill* (petitioner). (Oral argument 2/23/16).

187 Wn. App. 210 (2015)

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Negligence—Duty—Protection of Others—Special Relationship—Actor and Third Person—Criminal Acts of Third Person—"Taking Charge" of Third Person—Scope of Duty—Jail Inmate—Mental Health Issues—Failure to Examine and Treat

Whether in a negligence action against a county stemming from the death or injury of several persons at the hands of a former jail inmate a month after his release from jail, the county may be liable under its "take charge" duty to control the inmate on the basis of its alleged failure to adequately diagnose and treat the inmate for his mental condition while he was incarcerated.

No. 91644-6, *Binschus, et al* (respondents) *v. Skagit County* (petitioner). (Oral argument 1/14/16)

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Open Government—Public Disclosure—Response by Agency—"Silent Withholding"—Judicial Review—Time Limitation—Equitable Tolling

Whether a county willfully and silently withheld data responsive to a Public Records Act request for an internet access log, and if so, whether the statute of limitations for bringing an action for violation of the act should be equitably tolled.

No. 92161-0, *Belenski* (petitioner) *v. Jefferson County* (respondent). (Oral argument 5/12/16).

187 Wn. App. 724 (2015).

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Pensions—Public Employees—Washington State Patrol—Plan 1—Adjustment to Benefits—Option Allowing Surviving Spouse to Receive Same Monthly Retirement Benefit Member Received During Lifetime—Actuarial Reduction of Benefit During Member's Lifetime—Authority of Department of Retirement Systems to Alter Originally Established Flat Rate Reduction to One Based on Individualized Actuarial Calculations—Constitutional Law—Contracts—Impairment

Whether under a statute providing an actuarially equivalent retirement option, which allows a member of the Washington State Patrol Retirement System Plan 1 to receive a reduced monthly benefit during his or her life in order to provide the surviving spouse the same monthly retirement allowance as the member received, the Department of Retirement Systems had statutory authority to increase the originally established flat rate three-percent reduction to amounts based on individualized actuarial calculations, and if so, whether increased reductions unconstitutionally impair the contractual rights of a member who was employed when the original flat rate reduction was in effect.

No. 92671-9, *Lenander* (appellant) *v. Wash. State Dep't of Retirement Sys.* (respondent). (Oral argument 5/10/16).

Certified from Division Two of the Court of Appeals

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Personal Restraint—Issue Not Raised by Parties—Propriety of Addressing—Global Plea Agreement—Expiration of Statute of Limitations on Less Than All Charges—Remedy

Whether, when considering a timely personal restraint petition, the Court of Appeals properly addressed a statute of limitations issue not raised by the parties, and what remedies are available if it is determined that the statute of limitations had expired on three of four charges before the personal restraint petitioner executed an "indivisible plea agreement" that must be enforced as a whole.

No. 91268-8, *In re Pers. Restraint of Swagerty* (petitioner). (Oral argument 5/10/16).

Unpublished

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Personal Restraint—Petition—Timeliness—Statutory Limits—Exceptions—Significant Change in Law—Appellate Decision—Retroactivity—*W.R.* Case.

Whether the decision in *State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014), holding that a defendant in a prosecution for rape by forcible compulsion does not bear the burden of proving that the alleged victim consented to sexual intercourse, constitutes a "significant change in law" that applies retroactively, exempting a personal restraint petition from the one-year limit on collateral relief under RCW 10.73.100(6).

No. 92421-0, *In re Pers. Restraint of Colbert* (petitioner). (Oral argument 5/3/16)

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Personal Restraint—Prisons—Disciplinary Proceedings—Sanctions—Revocation of Early Release Credits Not Yet Earned—Validity

Whether as a disciplinary sanction for violating prison regulations, the Department of Corrections may revoke early release credit that the inmate has not yet earned, including credit applicable to a consecutive sentence that the inmate has yet to serve.

No. 91920-8, *In re Pers. Restraint of Stuhr* (petitioner). (Oral argument 5/12/16).

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Property—Title—Recording of Liens—Negligence—Duties—Scope—Third Parties

Whether a title company owes a duty of care to third parties to refrain from negligently recording legal instruments.

No. 91932-1, *Centurion Properties III, LLC, et al.* (appellants) *v. Chicago Title Ins. Co.* (respondent). (Oral argument 1/21/16).

Certified from U. S. Court of Appeals, Ninth Circuit.

Nos. 13-35725 & 13-35692 (9th Cir.).

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Quieting Title—Boundaries—Common Grantor Doctrine—Agreement to Boundary—Purchase by Legal Description—Effect

Whether the common grantor doctrine applies to this property dispute between two purchasers of a divided parcel who treated a contiguous fence line as the boundary between their properties for the first two years after the sale, such that the fence line rather than the legally described line on the sale documents established the true boundary line.

No. 92324-8, *Leslie Pendergrast, et al.* (respondent) *v. Robert Matichuk, et ux., et al.* (petitioners). *(See also:* Trespass—Cutting of Timber—Treble Damages—Scope—Noneconomic Damages). (Oral argument 6/21/16).

189 Wn. App. 854 (2015).

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Schools—Students—Supervision—Duty—Reasonably Foreseeable Dangers—Student With History of Sexually Assaultive Behavior—Registered Sex Offender

Whether in a negligence action against a school district by a student who was sexually assaulted off campus by a fellow student who was a registered sex offender, the district had a duty to supervise and monitor the sex offender student so as to protect the plaintiff from sexual assault.

No. 91775-2, *N. L.* (respondent) *v. Bethel School District* (petitioner). (Oral argument 1/28/16).

187 Wn. App. 460 (2015)

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Searches and Seizures—Warrantless Search and Seizure—Companion of Arrested Person—Validity—Officer Safety

Whether for purposes of securing the scene of the arrest of a person who had been reported to have pointed a gun at someone's head, and who was known to have an outstanding arrest warrant, police officers lawfully detained and searched the arrestee's companion who was walking alongside him and who volunteered during the stop to possessing a firearm.

No. 91986-1, *State* (petitioner) *v. Flores* (respondent). (Oral argument 3/10/16).

188 Wn. App. 305 (2015)

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Statutes—Construction—Counties—Joint Self-Insurance Agreement—Contracts—Insurance—Liability Policy—Duty to Defend

Whether a county risk pool created under chapters 48.62 and 39.34 RCW had a duty to defend a county and its employee under a joint self-insurance liability policy, and whether the existence of such a duty to defend is properly analyzed under principles of contract law or principles of insurance law where RCW 48.01.050 provides that two or more local governmental entities that join together to jointly self-insure "are not an 'insurer' under this code."

No. 91154-1, *Wash. Counties Risk Pool, et al.* (respondents) *v. Clark County, Wash., et al.* (petitioners). (*See also:* Counties—Joint Self-Insurance Agreement Assignments—After Loss—Prohibition). (Oral argument 5/10/16).

Top

Statutes—Initiatives—I-1366—Validity—Scope of Initiative Power—State Constitutional Amendment Procedure—Single Subject

Whether I-1366, which reduces the state sales tax unless by April 15, 2016, the legislature puts forward for popular vote a constitutional amendment requiring a two-thirds vote of the legislature for any tax increase, violates article XXIII, section 1, of the Washington Constitution, under which constitutional amendments must be proposed in the legislature and approved by a two-thirds vote before submission to popular vote, and whether the initiative violates the single subject rule of article II, section 19, of the Washington Constitution. **SPECIAL NOTE**: Under an accelerated schedule, any amicus motions and briefs are due March 2, 2016.

No. 92708-1, *Lee, et al.* (respondents) *v. The State of Washington, et al.* (appellant). (Oral Argument 3/15/16)

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Taxation—Business & Occupation Tax—Exemptions—Direct Seller's Representative—Statutes—Amendment—Retroactivity—Validity—Due Process

Whether a 2010 statutory amendment enacted in response to *Dot Foods, Inc. v. Department of Revenue*, 166 Wn.2d 912, 215 P.3d 185 (2009), narrowing the applicability of the direct seller's exemption from Washington's business and occupation tax, may constitutionally be applied retroactively to a pending tax refund claim for tax periods predating the amendment.

No. 92398-1, *Dot Foods, Inc.* (respondent/cross-appellant) *v. Dep't of Revenue* (appellant/cross-responsdent). (Oral argument 1/28/16) (*See also:* Judgment—Collateral Estoppel—Applicability—Appellate Decision—Subsequent Retroactive Legislative Amendment—Pending Tax Refund Claim).

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Taxation—Business and Occupation Tax—Wholesalers—Order Placed by Out-of-State Customer with Out-of-State Sales Office—Goods Shipped Directly to Third Party or Customer's Facility in Washington—Commerce Clause

Whether Washington's business and occupation tax applies to a New York corporation's "national sales"(sales originating outside Washington in which the product is shipped directly to the out-of-state customer's Washington facility) and "third party drop-shipped sales"(sales originating outside Washington in which the product is shipped directly to a third party located in Washington), and if so, whether application of the tax violates the commerce clause of article I, section 8 of the United States Constitution.

No. 92080-0, *Avnet, Inc.* (petitioner) *v. Dep't of Revenue* (respondent). (Oral argument 5/12/16).

187 Wn. App. 427 (2015).

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Taxation—Constitutional Law—Uniformity—Necessity—Tribal Property—Payment in Lieu of Excise Tax—Taxation Power—Negotiation of Payment with County—Validity

Whether provisions of RCW 82.29A.055(2) and (3) that allow counties to negotiate Indian Tribes' payments in lieu of excise taxes on tribal property used for "economic development" violate the uniform taxation clause under article VII, section 1 of the Washington Constitution or unconstitutionally surrender the legislature's taxing authority.

No. 91534-2, *City of Snoqualmie* (respondent) *v. King County Exec. Dow Constantine, et al.* (appellant). (Oral argument 5/5/16).

Top

Taxation—Estate Tax—State Estate Tax—Applicability—"Transfer of Property" Upon Death—What Constitutes—Federal Gift Taxes Paid by Decedent Within Three Years Before Death

Whether federal gift taxes that a decedent paid within three years before his death, which were included in the decedent's gross estate for federal estate tax purposes, are subject to Washington's estate tax where such tax is imposed on "every transfer of property" and property includes the gross estate as defined by federal estate tax law. *See* RCW 83.100.020(7), (11); RCW 83.100.040(1).

No. 92791-0, *Estate of Barry A. Ackerley* (appellant) *v. Wash. Dep't of Revenue* (respondent). (Oral argument 6/9/16).

Certified from Division II Court of Appeals.

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Trespass—Cutting of Timber—Treble Damages—Scope—Noneconomic Damages

Whether in this action for timber trespass the defendant's liability for treble damages under the timber trespass statute, RCW 64.12.030, extends to noneconomic damages that were awarded to the plaintiff.

No. 92324-8, *Leslie Pendergrast, et al.* (respondent) *v. Robert Matichuk, et ux., et al.* (petitioners). *(See also:* Quieting Title—Boundaries—Common Grantor Doctrine—Agreement to Boundary—Purchase by Legal Description—Effect.) (Oral argument 6/21/16).

189 Wn. App. 854 (2015).

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