

Supreme Court Issues
Cases Not Yet Set & January Term 2019
June 10, 2019

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- Weapons—Possession—Second Degree Unlawful Possession—Alternative Means—Statutory Provisions.

Cases Not Yet Set

Attorney and Client—Practice of Law—Unauthorized Practice—“Practice of Law”—GR 24 Testimony and Evidence—Instruction Using Language of GR 24—Validity—Comment on Evidence

Whether in this criminal prosecution for the unlawful practice of law, the trial court improperly commented on the evidence by using [GR 24](#) to instruct the jury on the definition of “practice of law” when an expert witness had testified that [GR 24](#) defined the term and the text of [GR 24](#) was admitted into evidence.

No. 96775-0, *State (respondent) v. Yishmael (petitioner)*. (See also: [Attorney and Client—Practice of Law—Unauthorized Practice—Strict Liability Offense](#); [Attorney and Client—Practice of Law—Unauthorized Practice—“Practice of Law”—Validity—Vagueness](#)).

[6 Wn. App. 2d 203 \(2018\)](#).

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Attorney and Client—Practice of Law—Unauthorized Practice—“Practice of Law”—Validity—Vagueness

Whether the statute establishing the crime of unlawful practice of law, [RCW 2.48.180\(3\)](#), is unconstitutionally vague as to the meaning of “practice of law.”

No. 96775-0, *State (respondent) v. Yishmael (petitioner)*. (See also: [Attorney and Client—Practice of Law—Unauthorized Practice—Strict Liability Offense](#); [Attorney and Client—Practice of Law—Unauthorized Practice—“Practice of Law”—GR 24 Testimony and Evidence—Instruction Using Language of GR 24—Validity—Comment on Evidence](#)).

[6 Wn. App. 2d 203 \(2018\)](#).

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Attorney and Client—Practice of Law—Unauthorized Practice—Strict Liability Offense

Whether the crime of unlawful practice of law, [RCW 2.48.180\(3\)](#), is a strict liability offense.

No. 96775-0, *State* (respondent) *v.* *Yishmael* (petitioner). (See also: [Attorney and Client—Practice of Law—Unauthorized Practice—“Practice of Law”—Validity—Vagueness](#); [Attorney and Client—Practice of Law—Unauthorized Practice—“Practice of Law”—GR 24 Testimony and Evidence—Instruction Using Language of GR 24—Validity—Comment on Evidence](#)).

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Carriers—Taxation—Transportation Services—Operation of School Buses—Under Contract with School Districts—Classification

Whether a school bus operator is an operator of transportation services “for hire,” and thus is subject to the public utility tax, chapter [82.16 RCW](#), rather than the business and occupations tax, chapter [82.04 RCW](#).

No. 96694-0, *First Student, Inc.* (petitioner) *v.* *State, Dep’t of Revenue* (respondent).

[4 Wn. App. 2d 857 \(2018\)](#).

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Civil Rights—Law Against Discrimination—Exemptions—Religious Organizations—Validity—Sexual Orientation—Staff Attorney Position—Applicability

Whether in this employment discrimination suit against a religious organization, the exclusion of religious and sectarian organizations from the Washington Law Against Discrimination shields the defendant from liability for refusing to hire an applicant for a staff attorney position in the defendant's legal clinic based on the applicant's sexual orientation.

No 96132-8. *Woods* (appellant) v. *Seattle's Union Gospel Mission* (appellee).

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Constitutional Law—Right to Privacy—State Guaranty—Searches and Seizures—Mandatory Impoundment of Vehicle Incident to Arrest for Driving Under the Influence—Validity

Whether [RCW 46.55.360](#) (also known as Hailey's Law), which requires the impoundment of a vehicle for at least 12 hours when the driver is arrested for driving under the influence, violates article I, section 7 of the Washington Constitution, requiring the suppression in a criminal prosecution of evidence seized in an inventory search conducted incident to an impoundment.

No. 96183-2, *State* (petitioner) v. *Villela* (respondent).

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Counties—Use of Public Right-of-Way—Utility Services—Franchised Right—Charge of Rent—Validity

Whether King County has authority to charge public and private utilities rent for the utilities' use of rights-of-way along county roads.

No. 96360-6, *King County* (petitioner) v. *King County Water Dists. & Ames Lake, et al.* (respondent).

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Credit—Collection—State Collection Agency Act—Collection Efforts—What Constitutes—Communications Between Attorneys

Whether a judgment holder violates Washington’s Collection Agency Act when its attorney communicates by email to the judgment debtor’s attorney demanding more money than the judgment holder is entitled to.

No. 96853-5, *Fireside Bank, fka Fireside Thrift Co.* (respondent) *v.* *Askins* (petitioner).
(See also: [Judgment—Vacation—Scope—Affirmative Relief—Show Cause Hearing Under CR 60\(b\)—Authority of Court](#)).

[6 Wn. App. 2d 431 \(2018\)](#).

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Criminal Law—Duress—Applicability—Aggravated First Degree Murder—Aggravating Factor

Whether in a prosecution for aggravated first degree murder predicated on kidnapping, the defendant was entitled to assert a duress defense to the kidnapping aggravating factor.

No. 96777-6, *State* (respondent) *v.* *Whitaker* (petitioner).

[6 Wn. App. 2d 1 \(2018\)](#).

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***Criminal Law—Punishment—Sentence—Juvenile Offenders—*Miller v. Alabama*—*Miller Fix*—Indeterminate Sentence Review Board—Petition for Early Release—Factors—Remedy for Improper Denial of Release**

Whether in this offender’s petition for early release pursuant to [RCW 9.94A.730](#) for crimes committed as a juvenile, the Indeterminate Sentence Review Board (ISRB), in denying release, considered improper factors, including the underlying crimes, victim impact, and the portion of the offender’s sentence already served, and if so, whether the proper remedy is to remand to the board for reconsideration under appropriate evaluation factors or, as the Court of Appeals ordered here, remand with directions to release the offender after establishing release conditions.

No. 96695-8, *In re Pers. Restraint of Brashear* (respondent).

[Unpublished.](#)

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Criminal Law—Punishment—Sentence—Juvenile Offenders—*Miller v. Alabama*—*Miller Fix*—Resentencing—Direct Appeal—Conversion to Personal Restraint Petition—Validity

Whether a resentencing pursuant to *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and the *Miller*-fix statute, [RCW 10.95.030\(3\)](#), may be challenged under the terms of the statute only by a personal restraint petition, and if so, whether requiring an appellate challenge to be made by personal restraint petition violates a defendant’s right to appeal under article 1, section 22, of the Washington Constitution.

No. 96709-1. *State* (petitioner) *v. Delbosque* (respondent). (See also: [Criminal Law—Punishment—Sentence—Juvenile Offenders—*Miller v. Alabama*—*Miller Fix*—Resentencing—Findings of Fact](#)).

6 Wn. App. 2d 407 (2018).

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Criminal Law—Punishment—Sentence—Juvenile Offenders—*Miller v. Alabama*—*Miller Fix*—Resentencing—Findings of Fact

Whether in this case involving juvenile resentencing pursuant to *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the superior court’s findings leading to the imposition of a 48-year minimum sentence were supported by substantial evidence where the court found that the defendant had an ongoing attitude towards others reflective of the underlying crime and that the aggravated first degree murder he committed when he was 17 was not symptomatic of transient immaturity, and whether the trial court otherwise complied with the *Miller*-fix statute, [RCW 10.95.030\(3\)](#), in setting the defendant’s minimum term.

No. 96709-1, *State (petitioner) v. Delbosque (respondent)*. (See also: [Criminal Law—Punishment—Sentence—Juvenile Offenders—*Miller v. Alabama*—*Miller Fix*—Resentencing—Direct Appeal—Conversion to Personal Restraint Petition—Validity](#)).

[6 Wn. App. 2d 407 \(2018\)](#).

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Criminal Law—Trial—Presence of Defendant—Right to be Present—Waiver—What Constitutes—Pro Se Defendant—Removal for Disruptive Behavior—Voluntariness of Waiver—Further Conduct of Trial—Validity

Whether in this criminal prosecution in which the defendant represented himself, the defendant voluntarily absented himself from trial and waived his right to be present through his disruptive behavior, and if so, whether the court properly allowed witnesses to testify in the defendant’s absence.

No. 96663-0, *State (respondent) Davis (petitioner)*.

[6 Wn. App. 2d 43 \(2018\)](#).

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**Discovery—Privilege—Marriage-Therapist
Order—Scope—Privacy—Relevance**

Privilege—Waiver—Protective

Whether in this medical negligence lawsuit stemming from misdiagnosis of cancer in an infant, the defendant physicians are entitled to discovery of the parents' marriage counselling records on the basis they may be relevant to contest the parents' claim for emotional distress damages, even though the records are concededly privileged under [RCW 5.60.060\(9\)](#).

No. 96669-9, *Magney* (petitioner) v. *Pham, M.D., et al.* (respondents).

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**Elections—Fair Campaign Practice Act—Campaign Contributions—Identities of
Contributors—Concealment—Statutory Provision—Validity**

Whether in a civil action by the State alleging concealment of the source of a campaign contribution in violation of [RCW 42.17A.435](#) of the Fair Campaign Practices Act, the State may rely solely on evidence that the defendant failed to register as a political committee and failed to report contributions as required under [RCW 42.17A.205\(1\)](#) and [RCW 42.17A.235\(1\)](#).

No. 96604-4, *State* (respondent) v. *Grocery Mfrs. Ass'n* (petitioner). (See also: [Elections—Fair Campaign Practice Act—"Political Committee"—Reporting Requirement—Validity—First Amendment—Adverse Consequences to Organization's Members](#); [Elections—Fair Campaign Practice Act—Enforcement—Civil Remedies—Treble Damages—Intentional Conduct—Subjective Intent](#)).

[State's petitioner for review.](#)

[5 Wn. App. 2d 169 \(2018\).](#)

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Elections—Fair Campaign Practice Act—Enforcement—Civil Remedies—Treble Damages—Intentional Conduct—Subjective Intent

Whether, to obtain treble damages under [RCW 42.17A.765\(5\)](#) on the basis of an “intentional” Fair Campaign Practices Act violation, the State must prove that the defendant knowingly violated the act.

No. 96604-4, *State* (respondent) *v. Grocery Mfrs. Ass’n* (petitioner). (See also: [Elections—Fair Campaign Practice Act—“Political Committee”—Reporting Requirement—Validity—First Amendment—Adverse Consequences to Organization’s Members](#); [Elections—Fair Campaign Practice Act—Campaign Contributions—Identities of Contributors—Concealment—Statutory Provision—Validity](#)).

State’s petition for review.

5 Wn. App. 2d 169 (2018).

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Elections—Fair Campaign Practice Act—“Political Committee”—Reporting Requirement—Validity—First Amendment—Adverse Consequences to Organization’s Members

Whether provisions of the Fair Campaign Practices Act, chapter [42.17A RCW](#), requiring “political committees” to disclose campaign contributors’ identities violate First Amendment freedom of speech and freedom of association principles.

No. 96604-4, *State* (respondent) *v. Grocery Mfrs. Ass’n* (petitioner). (See also: [Elections—Fair Campaign Practice Act—Campaign Contributions—Identities of Contributors—Concealment—Statutory Provision—Validity](#); [Elections—Fair Campaign Practice Act—Enforcement—Civil Remedies—Treble Damages—Intentional Conduct—Subjective Intent](#)).

State’s petition for review.

5 Wn. App. 2d 169 (2018).

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Employment—Compensation—Minimum Wage—Overtime—Agricultural Exclusion—Validity—Privileges and Immunities—Equal Protection

Whether the agricultural exclusion from the overtime pay requirement of the Washington Minimum Wage Act violates article I, section 12 of the Washington Constitution, which bars laws granting to any citizen, class of citizens, or non-municipal corporation privileges or immunities not equally belonging to all citizens or corporations.

No. 96267-7, *Martinez-Cuevas, et al.* (petitioners, cross-respondents) v. *DeRuyter Bros. Dairy, Inc., et al.* (respondents, cross-petitioners).

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Insurance—Consumer Protection—Automobile Insurance—Unlawful Limits or Unlawful Termination of Personal Injury Protection Benefits—Remedy

Whether injured automobile insureds whose personal injury protection (PIP) benefits were terminated or limited in violation of [WAC 284-30-330](#) may bring a Consumer Protection Act claim against the insurer to recover out-of-pocket medical expenses and/or compel payments to medical providers, and to recover excess premiums paid for the PIP coverage, the costs of investigating the unfair acts, and/or the time lost complying with the insurer's unauthorized demands.

No. 96931-1, *Peoples, et al.* (plaintiffs) v. *United Servs. Auto. Ass'n, et al.* (defendants).

Certified from the United States District Court Western District of Washington, No. C18-1173RSL.

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Insurance—Duty to Defend—Determination—Benefit of Doubt—Insurer’s Bad Faith—Title Insurance—Exclusions—Easements Undisclosed by Public Records—Indian Shellfish Harvesting Treaty Right

Whether in an action for breach of a title insurer’s duty to defend, the insured proved a breach and the insurer’s bad faith where the insurer refused to defend against an Indian tribe’s asserted right to harvest shellfish from the insured’s tidelands on the basis of a policy exclusion for easements not disclosed by the public record.

No. 96726-1, *Robbins* (respondent) *v. Mason County Title, et al.* (petitioner). (See also: [Judgment—Summary Judgment—Scope of Relief—Affirmative Defenses Not Encompassed by Motion for Summary Judgment](#)).

[5 Wn. App. 2d 68 \(2018\)](#).

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***Judges—Disqualification—Affidavit of Prejudice—Timeliness—Exercise of Discretion—Motions—Joint Motion—Agreed Order Extending Discovery Deadlines**

Whether in this civil product liability case, the trial judge’s ruling on an agreed motion continuing witness disclosure deadlines was a “discretionary ruling” disallowing any party from thereafter filing an affidavit of prejudice against the judge pursuant to [RCW 4.12.050](#).

No. 96952-3, *Godfrey & Kornfeld* (respondent) *v. Ste. Michelle Wine Estates, Ltd., et al.* (petitioners).

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Judgment—Summary Judgment—Scope of Relief—Affirmative Defenses Not Encompassed by Motion for Summary Judgment

Whether an insurer's affirmative defenses to a claim of breach of the duty to defend survived the plaintiff's summary judgment motion where the plaintiff did not specifically move for summary dismissal of the defenses and the insurer claimed that further discovery was required related to the defenses.

No. 96726-1, *Robbins (respondent) v. Mason County Title, et al. (petitioner)*. (See also: [Insurance—Duty to Defend—Determination—Benefit of Doubt—Insurer's Bad Faith—Title Insurance—Exclusions—Easements Undisclosed by Public Records—Indian Shellfish Harvesting Treaty Right](#)).

[5 Wn. App. 2d 68 \(2018\)](#).

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Judgment—Vacation—Scope—Affirmative Relief—Show Cause Hearing Under CR 60(b)—Authority of Court

Whether, in an action on a judgment creditor's purported Collection Agency Act violation, the judgment debtor may seek relief through a [CR 60](#) motion to vacate the underlying judgment.

No. 96853-5, *Fireside Bank, fka Fireside Thrift Co. (respondent) v. Askins (petitioner)*. (See also: [Credit—Collection—State Collection Agency Act—Collection Efforts—What Constitutes—Communications Between Attorneys](#)).

[6 Wn. App. 2d 431 \(2018\)](#).

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Juveniles—Juvenile Justice—Right to Counsel—Effective Assistance of Counsel—Constitutional Adequacy of Indigent Defense Services—Duty to Ensure—State—Actionability

Whether the State of Washington or the Washington State Office of Public Defense has an actionable duty to cure claimed systemic and significant deficiencies in a county's provision of indigent defense services to juveniles charged with criminal offenses.

No. 96766-1, *Davidson, et al.*, (plaintiffs) v. *State, et al.* (defendants).

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Municipal Corporations—Ordinances—Initiatives—Employee Rights—City of Seattle Initiative 124—Validity—Subject and Title Requirements—Rational Unity

Whether I-124, a city of Seattle initiative that concerns health, safety, and labor standards for Seattle hotel employees, lacks rational unity in violation of the single subject rule.

No. 96781-4, *Am. Hotel & Lodging Ass'n* (respondent) v. *City of Seattle, et al.* (petitioners). (*See also*: [Municipal Corporations—Ordinances—Initiatives—Validity—Subject and Title Requirements—Single Subject—Statutory Provisions—Applicability to First Class Charter Cities](#)).

[Local 8 Petition for Review](#).

[6 Wn. App. 2d 928 \(2018\)](#).

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Municipal Corporations—Ordinances—Initiatives—Validity—Subject and Title Requirements—Single Subject—Statutory Provisions—Applicability to First Class Charter Cities

Whether [RCW 35A.12.130](#), which requires municipal ordinances and initiatives to contain no more than one subject, applies to first class charter cities such as the city of Seattle.

No. 96781-4, *Am. Hotel & Lodging Ass'n (respondent) v. City of Seattle, et al. (petitioners)*. (See also: [Municipal Corporations—Ordinances—Initiatives—Employee Rights—City of Seattle Initiative 124—Validity—Subject and Title Requirements—Rational Unity](#)).

[Local 8 Petition for Review](#).

[6 Wn. App. 2d 928 \(2018\)](#).

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Negligence—Juveniles—Child Abuse—Investigating—Government Duty—Report of Child Abuse or Neglect—Scope—Statutory Reporting Duty—Possible Future Abuse or Neglect—Proposed Placement

Whether in this negligence action against the Department of Children, Youth, and Families arising out of the death of a child at the hands of his birth father after the child was removed from his birth mother and placed with the father, allegations the mother relayed to the department about the father's past acts of violence against her and warning that the child would die if placed with the father amounted to "a report concerning the possible occurrence of [child] abuse or neglect" within the meaning of [RCW 26.44.050](#), triggering the department's duty to investigate.

No. 96830-6, *Wrigley, et al. (respondents) v. State of Wash., DSHS, et al. (petitioners)*.

[5 Wn. App. 2d 909 \(2018\)](#).

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Personal Restraint—Petition—Denial of Petition—Finality—What Constitutes

Whether for purposes of determining the timeliness of a federal petition for a writ of habeas corpus, the time limit for which is tolled while a state postconviction petition is “pending,” the denial of a Washington personal restraint petition is final on the date the Washington Supreme Court denies a motion to modify a ruling of its commissioner denying discretionary review of the Court of Appeals denial of the petition, or rather when the clerk of the Court of Appeals issues a certificate of finality as required by [Rule 16.15\(e\)\(1\)\(c\)](#) of the Rules of Appellate Procedure.

No. 96980-9, *Phongmanivan* (petitioner) v. *Haynes* (respondent).

Certified from U.S. Court of Appeals for the Ninth Circuit.

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***Products Liability—“Seller”—“Manufacturer”—Temporary Use Product—Amusement Ride**

Whether a sale for temporary use of a product such as an amusement ride makes the owner of the product a “seller” of a product potentially subject to liability under the Washington Product Liability Act, and if so, whether the owner is a “manufacturer” under the act when it disassembles and reassembles, constructs, overhauls, or changes the ride before it is put into commerce.

No. 97223-1, *Swartwood, et al.* (plaintiffs) v. *Fun-Tastic Shows, Inc., et al.* (defendants). (See also: [Products Liability—Washington Product Liability Act—“Apparent Manufacturer” Liability—Tests—Objective Reliance Test—Applicability](#)).

Certified from U.S. District Court, Western District of Wash., Fed. No. C17-5971 BHS.

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***Products Liability—Washington Product Liability Act—“Apparent Manufacturer” Liability—Tests—Objective Reliance Test—Applicability**

Whether in an action under the Washington Product Liability Act, only the factors articulated in *Rublee v. Carrier Corp.*, 192 Wn.2d 190, 210-11 (2018), are relevant in determining whether the owner of a product held itself out as a manufacturer, or whether additional factors such as those articulated in *Cadwell Industries, Inc. v. Chenbro America, Inc.*, 119 F. Supp. 2d 1110 (E.D. Wash. 2000), may also be relevant.

No. 97223-1, *Swartwood, et al.* (plaintiffs) v. *Fun-Tastic Shows, Inc., et al.* (defendants). (See also: [Products Liability—“Seller”—“Manufacturer”—Temporary Use Product—Amusement Ride](#)).

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***Prosecuting Attorneys—Disqualification—Conflict of Interest—Disqualification of Entire Prosecuting Attorney’s Office—Necessity**

Whether, in this first degree murder prosecution involving retrial on remand, the entire Grant County Prosecuting Attorney’s Office must recuse itself based on a conflict of interest where the newly-elected prosecuting attorney represented the defendant as a consulting attorney in the first trial but had no involvement on remand.

No. 96943-4, *State* (petitioner) v. *Nickels* (respondent).

7 Wn. App. 2d 491 (2019).

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Torts—Wrongful Death—Public Duty Doctrine—Exceptions—Enforcement of Statute—Summary Judgment—Conditional Grant Pending Jury Findings on Reasonableness of Government’s Actions—Validity

Whether in a wrongful death suit alleging that a county health department negligently failed to warn medical providers within its jurisdiction of a health risk relating to Hantavirus, the superior court erred in “conditionally” granting the plaintiff’s motion for partial summary judgment, ruling that application of the failure to enforce exception to the public duty doctrine would depend on the jury determining whether the county’s actions in light of a previous nonfatal Hantavirus case were “appropriate” under [WAC 246-101-505](#).

No. 96464-5, *Ehrhart* (respondent) v. *King County, et al.* (petitioner).

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**Assault, Criminal—Homicide—Vehicular Assault and Vehicular Homicide—
Causation—Proximate Cause—Superseding Causes—Intervening Causes—
Absence—Proof—Burden of Proof**

Whether in this prosecution for vehicular assault and vehicular homicide, in which the defendant presented evidence of another cause of the collision that resulted in the injury and death of others, the State bore the burden of proving that the other cause was not an intervening, superseding cause of the accident.

No. 96217-1, *State (petitioner) v. Imokawa (respondent)*. (Oral argument 5/16/19).

[4 Wn. App. 2d 545 \(2018\)](#).

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**Building Regulations—Building Permit—Right of Action—Unlawful Act—
Knowledge of Unlawfulness—What Constitutes**

Whether in a suit for damages for a city's imposition of an unlawful land use permit condition pursuant to [RCW 64.40.020](#), under which a city is liable if it knew or should have known its action was unlawful or exceeded its lawful authority, the trial court and the Court of Appeals erred in determining that the city was not liable because it reasonably believed the permit condition was lawful.

No. 96613-3, *Church of the Divine Earth (petitioner) v. City of Tacoma (respondent)*.
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Controlled Substances—Possession—Unwitting Possession—Affirmative Defense—Burden of Proof—On Defendant—Validity—Due Process

Whether requiring a defendant charged with possession of a controlled substance to prove the affirmative defense of unwitting possession improperly shifts the State's burden to prove the elements of the charge beyond a reasonable doubt in violation of due process principles.

No. 96354-1, *State* (respondent) *v. A.M.* (petitioner). (Oral argument 5/28/19). (*See also: Criminal Law—Witnesses—Self-Incrimination—Compelled Testimony—Incriminating Statements Made to Jail Authorities—Statement on Jail Inventory Form—Admission to Ownership of Property—Required as Condition for Return of Property*).

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Criminal Law—Evidence—Right to Present Defense—Expert Testimony—Scientific Evidence—Acceptance in Scientific Community—Necessity

Whether in a prosecution for first degree aggravated murder where arson was the charged aggravating factor, the trial court violated the defendant's right to present a defense by excluding expert testimony questioning the fire marshal's origin and cause conclusions on the basis the expert failed to perform his own origin and cause evaluation of the fire scene.

No. 95396-1, *State* (respondent) *v. Arndt* (petitioner). (Oral argument 6/27/19). (*See also: Homicide—First Degree Murder—Aggravated First Degree Murder—Aggravating Circumstances—First Degree Arson—Simultaneous Prosecution for First Degree Arson—Former Jeopardy—Merger*).

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Criminal Law—Punishment—Sentence—Criminal History—“Washout” of Convictions—“Washout” Period—Class C Felony—Confinement for Failure to Pay Legal Financial Obligation—Effect

Whether in calculating the current offender score in this criminal prosecution, the defendant’s brief incarcerations for failing to pay legal financial obligations pursuant to a 2001 conviction constituted “confinement pursuant a felony conviction” pursuant to RCW 9.94A.525(2)(c), such that the incarcerations reset the five-year “washout” period for previous 1997 and 2001 class C felony convictions, allowing them to be included in the offender score.

No. 96643-5, *State (petitioner) v. Schwartz (respondent)*. (Oral argument 6/25/19).

[6 Wn. App. 2d 151 \(2018\)](#).

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Criminal Law—Domestic Violence—Protection Order—Violation—Felony Offense—Proof—Applicable Order—Stipulation—Acceptance—Necessity

Whether in this prosecution for felony violation of a postconviction domestic violence no contact order, the trial court was required to accept the defendant’s offer to stipulate to the existence of the order and the defendant’s knowledge of it so as to avoid the prejudice resulting from admitting the order into evidence.

No. 96325-8, *State (petitioner) v. Taylor (respondent)*. (Oral argument 5/28/19).

[4 Wn. App. 2d 381 \(2018\)](#).

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Criminal Law—Insanity—Competency to Stand Trial—Determination—Evaluation of Defendant—Prior Determination of Competency—Subsequent Circumstances

Whether in this first degree burglary prosecution in which a jury found the defendant competent to stand trial, the trial court should have had the defendant reevaluated for competency when circumstances indicated that his mental health condition may have subsequently deteriorated.

No. 96653-2, *State (petitioner) v. McCarthy (respondent)*. (Oral argument 6/27/19).

[6 Wn. App. 2d 94 \(2018\)](#).

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Criminal Law—Punishment—Restitution—Power of Court—Timeliness—Statutory Provisions—Following Resentencing

Whether on remand for resentencing after reversal of the sentence on one of several criminal convictions, the trial court had authority to enter a new restitution order as to one of the convictions not challenged on appeal, even though the resentencing occurred more than 180 days after the date of the original sentencing hearing. See [RCW 9.94A.753\(1\)](#) (amount of restitution must be determined at sentencing or within 180 days thereafter).

No. 96490-4, *State (respondent) v. Barbee (petitioner)*. (Oral argument 5/7/19).

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Criminal Law—Punishment—Sentence—Conditions—Community Custody—Prohibition Against Frequenting Places Where Minor Children Congregate—Validity—Vagueness

Whether a community custody condition prohibiting the convicted defendant from frequenting “places where children congregate such as parks, video arcades, campgrounds, and shopping malls” is unconstitutionally vague.

No. 96313-4, *State* (petitioner) v. *Wallmuller* (respondent). (Oral argument 5/14/19).

[4 Wn. App. 2d 698 \(2018\)](#).

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Criminal Law—Punishment—Sentence—Life Imprisonment Without Parole—Juvenile Offenders—*Miller* Fix—Resentencing—Sentencing Reform Act—Applicability

Whether in a resentencing pursuant to the “*Miller* fix” statute, [RCW 10.95.035](#), the court may apply the exceptional sentencing provisions of the Sentencing Reform Act so as to run the sentences on multiple convictions for aggravated first degree murder and first degree assault concurrently rather than consecutively.

No. 96496-3, *State* (petitioner) v. *Leo* (respondent). (**STRICKEN**). (*See also:* [Criminal Law—Punishment—Sentence—Life Imprisonment Without Parole—Juvenile Offenders—*Miller* Fix—Resentencing—State as “Party” to Resentencing—Review—Availability to State](#)).

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Criminal Law—Punishment—Sentence—Life Imprisonment Without Parole—Juvenile Offenders—*Miller* Fix—Resentencing—State as “Party” to Resentencing—Review—Availability to State

Whether the State is a “party” to a “*Miller* fix” resentencing proceeding under [RCW 10.95.035](#), and if so, whether the State may seek discretionary review of the modified sentence pursuant to [RAP 2.3](#).

No. 96496-3, *State* (petitioner) v. *Leo* (respondent). (**STRICKEN**). (See also: [Criminal Law—Punishment—Sentence—Life Imprisonment Without Parole—Juvenile Offenders—*Miller* Fix—Resentencing—Sentencing Reform Act—Applicability](#)).

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Criminal Law—Punishment—Sentence—Life Imprisonment Without Parole—Persistent Offender Accountability Act—Strike Offense Committed as Youthful Adult—Cruel and Unusual Punishment—Applicability of *Fain* Factors

Whether it constitutes cruel and unusual punishment under the United States Constitution or cruel punishment under the Washington Constitution to sentence an adult offender to life imprisonment without early release under the Persistent Offender Accountability Act based on a prior “strike” offense the defendant committed when he was a youthful adult (19, 20, and 21 years old).

No. 95263-9, *State* (respondent) v. *Moretti* (petitioner). (Oral argument 5/28/19).

Consolidated with, No. 95510-7, *State* (respondent) v. *Nguyen* (petitioner), and No. 96061-5, *State* (respondent) v. *Orr* (petitioner).

[Unpublished, *Moretti*.](#)

[Unpublished, *Nguyen*.](#)

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**Criminal Law—Witnesses—Self-Incrimination—Compelled Testimony—
Incriminating Statements Made to Jail Authorities—Statement on Jail Inventory
Form—Admission to Ownership of Property—Required as Condition for Return
of Property**

Whether in a prosecution for possession of a controlled substance, the trial court should have suppressed the defendant's claim of ownership of the backpack in which the substance was found, made on a jail inventory form as a condition for the return of property, on the basis the statement constituted compelled self-incriminating testimony in violation of the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution.

No. 96354-1, *State* (respondent) *v.* *A.M.* (petitioner). (Oral argument 5/28/19). (*See also*: [Controlled Substances—Possession—Unwitting Possession—Affirmative Defense—Burden of Proof—On Defendant—Validity—Due Process](#)).

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**Employment—Compensation—Minimum Wage—Pieceworkers—
Nonagricultural Employers—Non-Piece-Rate Work**

Whether Washington's Minimum Wage Act requires nonagricultural employers to pay their pieceworkers per hour for time spent performing activities outside of piece-rate work.

No. 96264-2, *Sampson, et al.* (plaintiffs) *v.* *Knight Transp., Inc., et al.* (defendants). (Oral argument 5/16/19).

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Employment—Construction Projects—Safe Workplace—Common Law Duty of Care—General Contractor—Control Over Site—Actual or Per Se Control

Whether an employee of a subcontractor on a construction project asserting a common law personal injury claim against the general contractor must show that the general contractor actually retained control over the construction site, or whether control exists as a matter of law as in claims under the Washington Industrial Safety and Health Act.

No. 96527-7, *Vargas, et al.* (petitioner) v. *Inland Wash., LLC, et al.* (respondent). (Oral argument 6/27/19). (See also: [Employment—Construction Projects—Safe Workplace—WISHA—Common Law Duty of Care—General Contractor—Nondelegable Duties—Vicarious Liability for Subcontractors’ Violations](#)).

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Employment—Construction Projects—Safe Workplace—WISHA—Common Law Duty of Care—General Contractor—Nondelegable Duties—Vicarious Liability for Subcontractors’ Violations

Whether in this personal injury action by an employee of a subcontractor against the general contractor on a construction project, the employee raised a genuine issue of material fact as to whether the general contractor directly violated its duties under the Washington Industrial Safety and Health Act or the common law duty of care, and whether the general contractor is vicariously liable for violations of either duty by its subcontractors.

No. 96527-7, *Vargas, et al.* (petitioner) v. *Inland Wash., LLC, et al.* (respondent). (Oral argument 6/27/19). (See also: [Employment—Construction Projects—Safe Workplace—Common Law Duty of Care—General Contractor—Control Over Site—Actual or Per Se Control](#)).

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Homicide—First Degree Murder—Aggravated First Degree Murder—Aggravating Circumstances—First Degree Arson—Simultaneous Prosecution for First Degree Arson—Former Jeopardy—Merger

Whether the defendant's convictions for first degree arson and for first degree aggravated murder where arson was the aggravating factor violated double jeopardy principles under the merger doctrine.

No. 95396-1, *State (respondent) v. Arndt (petitioner)*. (Oral argument 6/27/19). (*See also: Criminal Law—Evidence—Right to Present Defense—Expert Testimony—Scientific Evidence—Acceptance in Scientific Community—Necessity*).

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Homicide—Jury—Selection—Sentencing Consequences—Noncapital Crime—Prosecutorial Misconduct—Discussion of Death Penalty

Whether in this noncapital first degree felony murder prosecution, the prosecutor committed prejudicial misconduct in asking questions during jury selection that led to a discussion of the death penalty.

No. 96344-4, *State (petitioner, cross-respondent) v. Pierce (respondent, cross-petitioner)*. (Oral argument 5/30/19).

No. 96345-2, *State (petitioner) v. Bienhoff (respondent)*. (*See also: Jury—Selection—Peremptory Challenges—Race Based—Trial Court's Ruling—Sufficiency—Findings in Favor of State; Jury—Replacement of Juror—After Commencing Deliberations—Instructions—Begin Deliberations Anew—Failure to Instruct; Jury—Presence of Alternate Juror During Deliberations—Effect*).

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Indictment and Information—Sufficiency—Notice of Charge—Rendering Criminal Assistance—Essential Elements—Definition of Elements—Necessity

Whether in this prosecution for first degree rendering criminal assistance under [RCW 9A.76.070\(1\)](#), the definition of “rendering criminal assistance” set forth in [RCW 9A.76.050\(5\)](#) describes elements of the offense that must be alleged in the charging document, such that the charging document in this case was insufficient in alleging the crime only in the language of the first degree rendering criminal assistance statute (that the defendant rendered criminal assistance to a person who had committed or was being sought for a class A felony).

No. 96599-4, [State \(petitioner\) v. Davis, et al. \(respondent\)](#). (Oral argument 6/25/19).

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Industrial Insurance—Disability—Permanent Total Disability—Prior Administrative Denial of Temporary Total Disability Benefits—Effect—Collateral Estoppel—Res Judicata

Whether a firefighter’s industrial insurance claim for permanent total disability stemming from cancer is precluded by collateral estoppel or res judicata principles on the basis of an administrative determination in his earlier claim for temporary total disability that the cancer did not arise from his employment.

No. 96189-1, [Weaver \(respondent\) v. City of Everett, et al. \(petitioners\)](#). (Oral argument 5/9/19).

[4 Wn. App. 2d 303 \(2018\)](#).

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Insurance—Insured Status—Certificate of Insurance—Effect

Whether under Washington law an insurer is bound by representations made by its authorized agent in a certificate of insurance with respect to a party's status as an additional insured under a policy when the certificate includes language stating that it does not amend, extend, or alter the coverage afforded by the insurance policy.

No. 96500-5, *T-Mobile USA, Inc.* (plaintiff) v. *Selective Ins. Co. of Am.* (defendant). (Oral argument 5/16/19).

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Insurance—Settlement—Failure To Notify Insurer—Prejudice—Necessity

Whether an insurer claiming breach of contract by the insured in failing to give the insurer notice of a settlement with a third party responsible for the injuries, as required by the contract, is entitled to a remedy only if the insurer was prejudiced by the breach.

No. 96516-1, *Grp. Health Coop.* (petitioner) v. *Coon, et ux.* (respondents). (Oral argument 5/30/19). (See also: [Insurance—Subrogation—Tortious Loss—Necessity—Burden on Insurer](#)).

[4 Wn. App. 2d 737 \(2018\)](#).

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Insurance—Subrogation—Tortious Loss—Insurer’s Recovery From Third Party—Full Compensation—“Made Whole” Doctrine—Deductible

Whether under the common law “made whole” rule or an automobile insurance policy provision stating that the insurer’s right to recover in subrogation applied only after the insured was “fully compensated,” the insurer after recovering from the tortfeasor had to compensate the insured for her full deductible before it could recover in subrogation.

No. 96185-9, *Daniels (petitioner) v. State Farm Mut. Auto. Ins. Co. (respondent)*. (Oral argument 5/7/19).

[4 Wn. App. 2d 268 \(2018\)](#).

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Insurance—Subrogation—Tortious Loss—Necessity—Burden on Insurer

Whether a medical insurer seeking subrogation from the proceeds of the insured’s settlement with a third party may recover in subrogation only if it shows that the insured’s injury for which medical expenses were incurred resulted from the third party’s tortious act.

No. 96516-1, *Grp. Health Coop. (petitioner) v. Coon, et ux. (respondents)*. (Oral argument 5/30/19). (*See also*: [Insurance—Settlement—Failure To Notify Insurer—Prejudice—Necessity](#)).

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Intoxicating Liquors—Automobiles—Driving While Intoxicated—Repeat Offense—Felony Offense—Elements—Prior Convictions—Reckless Driving—Involvement of Alcohol or Drugs—Question of Law or Fact

Whether, in a prosecution for felony driving under the influence, the question whether a prior conviction for reckless driving qualifies as a “prior offense” involving alcohol or drugs so as to elevate the current offense to a felony is one of law for the court or one of fact for the jury.

No. 96747-4, *State (respondent) v. Wu (petitioner)*. (Oral argument 6/13/19).

[6 Wn. App. 2d 679 \(2018\)](#).

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Jury—Presence of Alternate Juror During Deliberations—Effect

Whether in this criminal prosecution the trial court violated the defendants’ right to an impartial jury by allowing alternate jurors to be present in the jury room during deliberations.

No. 96344-4, *State (petitioner, cross-respondent) v. Pierce (respondent, cross-petitioner)*. (Oral argument 5/30/19).

No. 96345-2, *State (petitioner) v. Bienhoff (respondent)*. (*See also*: [Homicide—Jury—Selection—Sentencing Consequences—Noncapital Crime—Prosecutorial Misconduct—Discussion of Death Penalty](#); [Jury—Selection—Peremptory Challenges—Race Based—Trial Court’s Ruling—Sufficiency—Findings in Favor of State](#); [Jury—Replacement of Juror—After Commencing Deliberations—Instructions—Begin Deliberations Anew—Failure to Instruct](#)).

[Unpublished, Pierce](#).

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Jury—Replacement of Juror—After Commencing Deliberations—Instructions—Begin Deliberations Anew—Failure to Instruct

Whether the trial court in this criminal prosecution committed reversible error in failing to instruct the jurors to begin deliberations anew after it replaced a juror with an alternate juror after deliberations had begun.

No. 96344-4, *State* (petitioner, cross-respondent) *v.* *Pierce* (respondent, cross-petitioner). (Oral argument 5/30/19).

No. 96345-2, *State* (petitioner) *v.* *Bienhoff* (respondent). (See also: [Homicide—Jury—Selection—Sentencing Consequences—Noncapital Crime—Prosecutorial Misconduct—Discussion of Death Penalty](#); [Jury—Selection—Peremptory Challenges—Race Based—Trial Court’s Ruling—Sufficiency—Findings in Favor of State](#); [Jury—Presence of Alternate Juror During Deliberations—Effect](#)).

Unpublished, *Pierce*.

Unpublished, *Bienhoff*.

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Jury—Selection—Peremptory Challenges—Race Based—Trial Court’s Ruling—Sufficiency—Findings in Favor of State

Whether in this criminal prosecution in which the State used a peremptory challenge to excuse an African American juror during jury selection, the State offered an adequate race-neutral explanation for the challenge based on the juror’s uncertainty in being able to render a decision without knowing whether the death penalty was possible.

No. 96344-4, *State* (petitioner, cross-respondent) *v.* *Pierce* (respondent, cross-petitioner). (Oral argument 5/30/19).

No. 96345-2, *State* (petitioner) *v.* *Bienhoff* (respondent). (See also: [Homicide—Jury—Selection—Sentencing Consequences—Noncapital Crime—Prosecutorial Misconduct—Discussion of Death Penalty](#); [Jury—Replacement of Juror—After Commencing Deliberations—Instructions—Begin Deliberations Anew—Failure to Instruct](#); [Jury—Presence of Alternate Juror During Deliberations—Effect](#)).

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***Juveniles—Parental
Intervention—Due Process**

Relationship—Termination—Trial—Judges—

Whether in this proceeding seeking to terminate a mother's parental rights to her biological child, the superior court's interjections and questions of witnesses throughout the termination hearing had the cumulative effect of depriving the mother of her due process right to a fair trial.

No. 96842-0, *In re the Dependency of B.K.* (Oral argument 6/13/19).

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**Landlord and Tenant—City Ordinance—Prohibition on Landlords Inquiring
Into or Taking Adverse Action Based on Tenant's or Prospective Tenant's
Criminal History—Constitutionality—Substantive Due Process—Standard**

In this substantive due process challenge to a city of Seattle ordinance precluding residential landlords from inquiring about, or taking adverse action based upon, a tenant's or prospective tenant's criminal history, what is the standard under the Washington Constitution for analyzing the substantive due process claim in relation to this ordinance?

No. 96817-9, *Yim, et al.* (plaintiffs) v. *City of Seattle* (defendant). (Oral argument 6/11/19).

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**Landlord and Tenant—Tenant—Residential Lease Application—First-in-Time
Ordinance—Constitutionality**

Whether a city of Seattle ordinance that requires residential landlords to publish tenant criteria and accept the first qualified applicant is an unconstitutional regulatory taking or limitation on commercial speech.

No. 95813-1, *Yim, et al.* (respondents) v. *City of Seattle* (appellant). (Oral argument 6/11/19).

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Open Government—Public Disclosure—Denial—Penalty—Amount—Findings Based on Written Evidence—Review—Standard of Review

Whether in a Public Records Act case, the proper standard of review of factual findings underlying a penalty assessment based solely on written evidence is abuse of discretion, substantial evidence, or de novo.

No. 96286-3, *Hoffman (petitioner) v. Kittitas County, et al. (respondents)*. (Oral argument 5/9/19).

[4 Wn. App. 2d 489 \(2018\)](#).

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Open Government—Public Disclosure—Exemptions—Other Statutory Exemptions—Personal Information—In-Home Caregivers—Retroactivity

Whether in this action to enjoin the State from releasing requested information on in-home caregivers who contract with the State, the union representing the in-home caregivers is entitled to an injunction under [RCW 43.17.410\(1\)](#), which prohibits agencies from releasing sensitive personal information of in-home caregivers, and [RCW 42.56.640\(2\)](#), which exempts such information from disclosure under the Public Records Act, chapter [42.56 RCW](#), both of which were enacted by initiative measure after the records request was made.

No. 96578-1, *Serv. Emps. Int'l Union Local 925 (petitioner) v. Dep't of Early Learning, et al. (respondent)*. (Oral argument 6/13/19).

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Open Government—Public Disclosure—Public Agency—What Constitutes—Legislature—House of Representatives—Senate—Individual State Legislators

Whether the Washington State Legislature, the House of Representatives, and the Senate are “agencies” subject to the Public Records Act, and whether individual state legislators and their offices are “agencies” subject to the act.

No. 95441-1, *The Associated Press, et al.* (respondents/cross-petitioners) v. *The Washington State Legislature, et al.* (petitioners/cross-respondents). (Oral argument 6/11/19).

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Open Government—Public Disclosure—Public Records—What Constitutes—Employee Communications—Public Sector Union Organizing Activity—Created or Retained on Public Employer’s Systems

Whether email messages kept on a public university’s email system consisting of exchanges between university employees and a private labor union concerning unionization efforts are public records subject to disclosure under the Public Records Act, chapter [42.56 RCW](#).

No. 96262-6, *Freedom Found.* (petitioner) v. *Serv. Emps. Int’l Union Local 925* (respondent). (Oral argument 5/14/19).

[4 Wn. App. 2d 605 \(2018\)](#).

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**State—Highways—Bridges—Damage—Vehicle-Caused
Liability—Statutory Shield—Effect**

Damage—State

Whether in this action by the State for vehicle-caused damage to the Interstate 5 Skagit River Bridge, the State is barred from being held contributorily negligent by [RCW 46.44.020](#), which states that no liability may attach to the State for damages by reason of the existence of a structure over roadway where at least 14 feet of vertical clearance is provided, and [RCW 46.44.110](#), which provides that a vehicle operator is liable for “all damages” to a highway or bridge resulting from illegal or negligent operation of a vehicle.

No. 96538-2, *State Dep’t of Transp. (respondent) v. Mullen Trucking 2005, Ltd., et al. (petitioner)*. (Oral argument 6/25/19).

([Petitioner Motorways Transp., Ltd. Petition](#)).

[5 Wn. App. 2d 787 \(2018\)](#).

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**Taxation—Property Tax—Campaign Voucher Program—Constitutional Law—
Freedom of Speech—Political Speech—Election-Related Speech**

Whether the city of Seattle’s campaign voucher program, which levies a property tax to fund vouchers that city residents can use to support political candidates, violates First Amendment principles.

No. 96660-5, *Elster & Pynchon (appellants) v. The City of Seattle (respondent)*. (Oral argument 5/14/19).

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Taxation—Sales Tax—Refund—Business and Occupation Tax—Deductions—Worthless Debts—Statutory Provisions—Applicability—Profit-Sharing Losses Under Agreement with Credit Provider

Whether a retailer under a profit-sharing agreement with the financier of retailer-labelled credit card accounts is entitled to a refund of Washington sales taxes or a deduction against Washington business and occupation taxes based on reductions to its profit-sharing income stemming from its agreement to guarantee defaulted credit card accounts.

No. 96383-5, *Lowe's (petitioner) v. Dep't of Revenue, State of Wash. (respondent)*.
(Oral argument 5/30/19).

[5 Wn. App. 2d 211 \(2018\)](#).

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Theft—Identity Theft—Alternative Means—Statutory Provisions—Election by State

Whether identity theft, [RCW 9.35.020\(1\)](#), is an alternative means offense for purposes of jury unanimity requirements, and if so, whether the conviction in this prosecution is sustainable because the State elected to proceed on only one alternative.

No. 96397-5, *State (respondent) v. Barboza-Cortes (petitioner)*. (Oral argument 5/9/19).
(*See also*: [Weapons—Possession—Second Degree Unlawful Possession—Alternative Means—Statutory Provisions](#)).

[5 Wn. App. 2d 86 \(2018\)](#).

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Torts—Indemnity—Trespass—Cutting of Timber—Liability—Indemnity—Equitable Indemnity—ABC Rule

Whether logging contractors who cut trees at a property owner's direction and settled claims against them by an adjacent property owner for timber trespass have viable claims for equitable indemnity against the property owner who hired them.

No. 96214-6, *Porter & Zimmer (respondent) v. Kirkendoll, et al.* (Oral argument 5/7/19). (See also: [Trespass—Cutting of Timber—Liability—Principal and Agent—Relationship—Liability of Principal—Release of Agent—Effect; Waste—Right of Action—Right to Recover for Timber Trespass—Waste Independent of Timber Trespass—Necessity](#)).

[5 Wn. App. 2d 686 \(2018\)](#).

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Trespass—Cutting of Timber—Liability—Principal and Agent—Relationship—Liability of Principal—Release of Agent—Effect

Whether in this lawsuit for timber trespass, logging contractors that cut the plaintiff's trees were acting as the agents of the defendant property owner who hired them, such that the plaintiff's release of the logging contractors from liability pursuant to a settlement operated to also release the defendant from liability.

No. 96214-6, *Porter & Zimmer (respondent) v. Kirkendoll, et al.* (petitioner). (Oral argument 5/7/19). (See also: [Torts—Indemnity—Trespass—Cutting of Timber—Liability—Indemnity—Equitable Indemnity—ABC Rule; Waste—Right of Action—Right to Recover for Timber Trespass—Waste Independent of Timber Trespass—Necessity](#)).

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Waste—Right of Action—Right to Recover for Timber Trespass—Waste Independent of Timber Trespass—Necessity

Whether a lawsuit for waste under [RCW 4.24.630\(1\)](#) is available in addition to an action for timber trespass under [RCW 64.12.030](#) if relief for the same damages sought in the waste action is available under the timber trespass statute.

No. 96214-6, *Porter & Zimmer* (respondent) v. *Kirkendoll, et al.* (petitioner). (Oral argument 5/7/19). (See also: [Trespass—Cutting of Timber—Liability—Principal and Agent—Relationship—Liability of Principal—Release of Agent—Effect; Torts—Indemnity—Trespass—Cutting of Timber—Liability—Indemnity—Equitable Indemnity—ABC Rule](#)).

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Weapons—Possession—Second Degree Unlawful Possession—Alternative Means—Statutory Provisions

Whether second degree unlawful possession of a firearm, [RCW 9.41.040\(2\)\(a\)](#), is an alternative means offense for purposes of jury unanimity requirements.

No. 96397-5, *State* (respondent) v. *Barboza-Cortes* (petitioner). (Oral argument 5/9/19). (See also: [Theft—Identity Theft—Alternative Means—Statutory Provisions—Election by State](#)).

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