January Term 2019
Cases Set for Oral Argument

Civil Rights—Employment Discrimination—Disability Discrimination—Disability—What Constitutes—Physical Impairment—Obesity

Whether under the Washington Law Against Discrimination, chapter 49.60 RCW, which prohibits discrimination on the basis of physical impairment, obesity may qualify as an impairment, and if so, under what circumstances.

No. 96335-5, *Taylor, et al.* (plaintiffs-appellants) *v. Burlington N. Railroad Holdings, Inc.* (defendants-appellees). (Oral argument 2/28/19).

Certified from U.S. Court of Appeals for the 9th Circuit, No. 16-35205.

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Controlled Substances—Punishment—Special Drug Offender Sentencing Alternative—Sentence Enhancements—Effect on Standard Sentencing Range—Waiver—Validity

Whether, in imposing a drug offender sentencing alternative (DOSA) on convictions for delivery of a controlled substance, the trial court had authority to waive school zone sentence enhancements in determining whether the standard range sentence was 24 months or less for purposes of the offender's eligibility for a residential-based DOSA under RCW 9.94A.660(3).

No. 95992-7, *State* (petitioner) *v. Yancey* (respondent). (Oral argument 1/17/19).

3 Wn. App. 2d 735 (2018).

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Constitutional Law—Freedom of Speech—Elections—Presidential Electors—Violation of Elector Pledge—Fine—Validity

Whether RCW 29A.56.340, which authorizes the State to fine a presidential elector for failing to vote for the winning candidate of the elector's party, violates the First Amendment.

No. 95347-3, *In re the Matter of Guerra, John & Chiafalo* (petitioners). (Oral argument 1/22/19).

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Courts of Limited Jurisdiction—District Courts—Jurisdiction—Subject Matter—Amount in Controversy—Limitation—Action Exceeding—Dismissal of Action—Necessity

Whether the amount-in-controversy limitation on actions in district court is a limit on the district court's subject matter jurisdiction, and if so, whether the district court must dismiss a complaint that seeks damages in excess of the amount-in-controversy limit or may transfer the complaint to superior court.

No. 96200-6, *Banowsky* (petitioner) *v. Guy Backstrom, D.C., d/b/a/ Bear Creek Chiropractic Ctr.* (respondent). (Oral argument 3/14/19).

4 Wn. App. 2d 338 (2018).

Top

Criminal Law—Former Jeopardy—District Court—Dismissal of Prosecution for Lack of Evidence Offense Committed in County of District Court Jurisdiction

Whether double jeopardy principles bar reinstatement of district court criminal charges after the court dismissed the case for lack of jurisdiction when the State rested without presenting evidence that the crime occurred in the county in which the court sat.

No. 95080-6, *State* (respondent) *v. Karpov* (petitioner). (Oral argument 1/15/19)

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Criminal Law—Former Jeopardy—Multiple Convictions—Same Offense—First Degree Felony Murder and First Degree Rape—Felony Murder Predicated on First Degree Rape

Whether in this prosecution for first degree rape and first degree felony murder predicated on first or second degree rape or first or second degree attempted rape, the defendant's convictions for both first degree felony murder and first degree rape violate double jeopardy principles.

No. 96090-9, *State* (respondent) *v. Muhammad* (petitioner). (Oral argument 2/21/19). (*See also:* Searches and Seizures—Warrantless Search—Phone Records—Cell Site Location Information—Exigent Circumstances—Threat to Officer or Public Safety—Investigation of Crime—Necessity for Immediate Action—Harmlessness).

4 Wn. App. 2d 31 (2018).

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Criminal Law—Jury—Misconduct—Bias and Prejudice—Investigation by Trial Court—Adequacy

Whether in this criminal prosecution of an African American defendant, the trial court failed to adequately investigate a claim of juror bias made by an African American juror who had initially held out, who asserted after the verdict that she had not believed the defendant was guilty, felt personally attacked and belittled during deliberations, and believed that her treatment by other jurors was the result of implicit racial bias.

No. 95920-0, *State* (respondent) *v. Berhe* (petitioner). (Oral argument 3/19/19).

Unpublished.

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Criminal Law—Punishment—Sentence—Juvenile Offender—Youthfulness of Offender—Consideration—Constitutional Requirement—Effect on Sentencing Reform Act—Consecutive Sentences—De Facto Life Sentence

Whether in this prosecution of a 15-year-old offender for aggravated first degree murder and first degree murder, the trial court at resentencing pursuant to RCW 10.95.035, which was enacted in response to *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), had discretion in considering the offender's youthfulness to run his sentences for the murders concurrently, and whether the sentence the court imposed, consisting of a prison term of 25 years to life for aggravated first degree murder and a consecutive term of 280 months for first degree murder, constitutes a de facto life sentence in violation of *Miller* where the offender will not be eligible to seek parole until he is about 60 years old and has served about 45 years in prison.

No. 95814-9, *State* (respondent) *v. Gilbert* (petitioner). (Oral argument 1/22/19).

Unpublished.

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Criminal Law—Right to Confront Witnesses—Statement of Nontestifying Witness—Testimonial or Nontestimonial Statement—Test—Statements Made to Medical Personnel—Signed Medical Record Waivers—Effect

Whether in this prosecution for second degree assault, the Court of Appeals, in reviewing whether the trial court violated the defendant's right of confrontation by admitting statements the unavailable victim had made to medical personnel, properly applied the "primary purpose" test articulated in *Ohio v. Clark*, 135 S. Ct. 2173, 192 L. Ed. 2d 306 (2015), and if so, whether the court correctly held that statements the victim made to medical personnel at the hospital emergency room and during follow up care days later, including statements he made after signing a police medical records waiver form, were not testimonial and thus did not violate the defendant's right of confrontation.

No. 95971-4, *State* (respondent) *v. Scanlon* (petitioner). (Oral argument 1/24/19).

2 Wn. App. 2d 715 (2018).

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Criminal Law—Searches and Seizures—Depictions of Minor Engaged in Sexual Conduct—Cell Phone Search—Invalidity of Search Warrant—Independent Evidence of Images on Cell Phone—Remedy on Appeal—Dismissal of Charge or Remand for Suppression of Evidence and Further Proceedings

Whether in this prosecution for possession of depictions of a minor engaged in sexually explicit conduct, in which the Court of Appeals held invalid the warrant authorizing a search of the defendant's cell phone containing the depictions, the court erroneously remanded for dismissal of the charges rather than for suppression of the illegal evidence and further proceedings where witnesses testified at trial to viewing the depictions on the cell phone before it was searched.

No. 96035-6, *State* (petitioner) *v. McKee* (respondent). (Oral argument 3/12/19).

3 Wn. App. 2d 11 (2018).

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Criminal Law—Searches and Seizures—Warrantless Search—Validity—Exigent Circumstances—Plain View—Inadvertent Discovery—Necessity

Whether in this prosecution for attempted murder and arson, in which the defendant was hospitalized after the fire for smoke inhalation, police officers, without a warrant, lawfully seized a bag containing the defendant's clothing from his hospital room under the exigent circumstances exception to the warrant requirement or the plain view exception, and whether under the plain view exception, the view of incriminating evidence must be inadvertent under the Washington Constitution.

No. 96017-8, *State* (petitioner) *v. Morgan* (respondent). (Oral argument 1/17/19).

Unpublished.

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Criminal Law—Witnesses—Cross-Examination—Scope—Limitation—Victim's Immigration Status—Harmless Error—Standard

Whether in this prosecution for rape, burglary, assault, and unlawful imprisonment the trial court's erroneous exclusion of evidence of the victim's application for a special U-visa, which the defendant sought to admit to show witness bias, was harmless in light of evidence other than direct eyewitness testimony corroborating the victim's testimony that she was sexually assaulted.

No. 95905-6, *State* (petitioner) *v. Romero-Ochoa* (respondent). (Oral argument 1/15/19)

Unpublished.

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Declaratory Judgment—Parties—Standing— State Agency—Interference with Agency's Mission

Whether the Washington State Housing Finance Commission had standing to bring an action for declaratory and injunctive relief against National Homebuyers Fund, a California nonprofit public benefit corporation providing down payment assistance in Washington, on the basis of the commission's claim that the corporation was improperly diverting borrowers from the commission's programs and interfering with its statutory mission.

No. 96063-1, *Wash. State Hous. Fin. Comm'n* (petitioner) *v. Nat'l Homebuyers Fund, Inc., et al.* (respondents). (Oral argument 3/14/19).

Unpublished.

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Environment—Air Pollution—Emissions of Air Contaminants—Greenhouse Gases—Reduction Standards—Agency Regulations—Applicability to Nondirect Emitters—Validity

Whether the Washington Department of Ecology's Clean Air Rule, chapter 173-442 WAC, and associated amendments to greenhouse gas reporting rules under chapter 173-441 WAC are invalid to the extent they apply to fossil fuel suppliers that do not directly emit greenhouse gases.

No. 95885-8, *Ass'n of Wash. Bus., et al.* (respondent) *v. Wash. Dep't of Ecology, et al.* (appellant). (Oral argument 3/19/19).

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Evidence—Documents—Confidential Work Product—Statements Made to Insurer—Application for Personal Injury Protection Benefits

Whether in this personal injury action stemming from an automobile accident, statements and descriptions of the accident contained in an application to an insurer for personal injury protection benefits constitute inadmissible confidential attorney work product.

No. 95827-1, *Barriga Figueroa* (respondent) *v. Prieto Mariscal* (petitioner). (Oral argument 3/14/19).

3 Wn. App. 2d 139 (2018).

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Franchises—Sales to Franchisees—Fair and Reasonable Price—Markup on Printing Services—Price Franchisor Paid—Relevance to Claim that Franchisor Charged More Than Fair and Reasonable Price—Charge to Franchisee of Twice What Franchisor Paid

Whether under the Franchise Investment Protection Act, which prohibits a franchisor from selling a franchisee any product or service "for more than a fair and reasonable price," RCW 19.100.180(2)(d), a franchisee may prove a violation of the act with evidence of the price at which the franchisor obtained the product or service in the absence of evidence that the price was not a true market price, and whether a franchisor violates the act as a matter of law when it charges a franchisee twice what it paid for a product or service.

No. 96304-5, *Money Mailer, LLC* (appellant) *v. Brewer* (respondent). (Oral argument 3/19/19).

Certified from the U.S. District Court, Western District of Washington, 2:15-cv-01215-RSL

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Homicide—Vehicular Homicide—Elements—Causation—Proximate Cause—Superseding Causes—Intervening Causes—Foreseeability—Victim's Conduct

Whether in this prosecution for vehicular homicide, the victim's conduct constituted an intervening, superseding cause of his death, precluding conviction, when the victim acted as a Good Samaritan by exiting his own car and aiding a driver whose car had come to rest in a freeway's lanes of traffic after colliding with the defendant, who had fled the scene.

No. 95947-1, *State* (respondent) *v. Frahm* (petitioner). (Oral argument 2/21/19).

3 Wn. App. 2d 812 (2018).

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Insurance—Consumer Protection—Acts of Insurance Adjuster—Individual Liability—Good Faith—Statutory Duty—Breach—Right of Action

Whether an insurance adjuster employed by an insurance company may be personally liable to an insured consumer for violation of the Consumer Protection Act and breach of the statutory duty of insurer good faith.

No. 95867-0, *Keodalah* (respondent) *v. Allstate Ins. Co., et al.* (petitioners). (Oral argument 2/26/19).

3 Wn. App. 2d 31 (2018).

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Juveniles—Juvenile Justice—Disposition—Duration—Outside Standard Range—Manifest Injustice—Completed Sentence—Mootness

Whether a former juvenile defendant's challenge to a manifest injustice sentence above the standard range is moot where the defendant has completed the sentence and is now an adult, and if so, whether the court should consider the moot sentencing issue.

No. 95542-5, *State* (respondent) *v. B.O.J.* (petitioner). (Oral argument 3/12/19). (*See also*: Juveniles—Juvenile Justice—Disposition—Duration—Outside Standard Range—Manifest Injustice—Due Process—Plea Agreement—Breach; Juveniles—Juvenile Justice—Disposition—Duration—Outside Standard Range—Manifest Injustice—Factors Considered—Defendant's Personal Circumstances—Validity—Sufficiency of Evidence).

Unpublished.

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Juveniles—Juvenile Justice—Disposition—Duration—Outside Standard Range—Manifest Injustice—Due Process—Plea Agreement—Breach

Whether in a juvenile justice proceeding the State breached a plea agreement in recommending a manifest injustice sentence above the standard range, and if so, whether the sentence should be vacated.

No. 95542-5, *State* (respondent) *v. B.O.J.* (petitioner). (Oral argument 3/12/19). (*See also*: Juveniles—Juvenile Justice—Disposition—Duration—Outside Standard Range—Manifest Injustice—Completed Sentence—Mootness; Juveniles—Juvenile Justice—Disposition—Duration—Outside Standard Range—Manifest Injustice—Factors Considered—Defendant's Personal Circumstances—Validity—Sufficiency of Evidence).

Unpublished.

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Juveniles—Juvenile Justice—Disposition—Duration—Outside Standard Range—Manifest Injustice—Factors Considered—Defendant's Personal Circumstances—Validity—Sufficiency of Evidence

Whether in imposing a manifest injustice sentence above the standard range on a defendant in a juvenile justice proceeding, the superior court considered inappropriate factors, including the personal circumstances of the defendant, and whether the evidence supported the manifest injustice sentence.

No. 95542-5, *State* (respondent) *v. B.O.J.* (petitioner). (Oral argument 3/12/19). (*See also*: Juveniles—Juvenile Justice—Disposition—Duration—Outside Standard Range—Manifest Injustice—Completed Sentence—Mootness; Juveniles—Juvenile Justice—Disposition—Duration—Outside Standard Range—Manifest Injustice—Due Process—Plea Agreement—Breach).

Unpublished.

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Juveniles—Juvenile Justice—Disposition—Outside Standard Range—Manifest Injustice—Factors—Threat of Serious Bodily Injury—High Risk to Reoffend—Sufficiency of Evidence

Whether in this juvenile prosecution in which the superior court imposed a manifest injustice disposition above the standard range, the evidence supported the court's findings that the juvenile threatened serious bodily injury, and thus the mitigating factor that there was no threat of serious bodily injury was inapplicable, and that the juvenile posed a high risk to reoffend.

No. 96434-3, *State* (respondent) *v. T.J.S.-M.* (petitioner). (Oral argument 3/14/19). (*See also:* Juveniles—Juvenile Justice—Disposition—Outside Standard Range—Manifest Injustice—Special Sex Offender Disposition Alternative—Suspended Disposition—Review—Ripeness; Juveniles—Juvenile Justice—Disposition—Outside Standard Range—Manifest Injustice—Standard of Proof).

Unpublished.

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Juveniles—Juvenile Justice—Disposition—Outside Standard Range—Manifest Injustice—Special Sex Offender Disposition Alternative—Suspended Disposition—Review—Ripeness

Whether a juvenile defendant's challenge to a manifest injustice disposition above the standard range imposed in connection with a special sex offender disposition alterative (SSODA) is ripe for review before the SSODA is revoked.

No. 96434-3, *State* (respondent) *v. T.J.S.-M.* (petitioner). (Oral argument 3/14/19). (*See also:* Juveniles—Juvenile Justice—Disposition—Outside Standard Range—Manifest Injustice—Standard of Proof; Juveniles—Juvenile Justice—Disposition—Outside Standard Range—Manifest Injustice—Factors—Threat of Serious Bodily Injury—High Risk to Reoffend—Sufficiency of Evidence).

Unpublished.

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Juveniles—Juvenile Justice—Disposition—Outside Standard Range—Manifest Injustice—Standard of Proof

Whether the standard of proof that the State must meet to justify a manifest injustice disposition above the standard range in a juvenile prosecution is beyond a reasonable doubt or clear and convincing evidence, and whether in this context these standards are equivalent.

No. 96434-3, *State* (respondent) *v. T.J.S.-M.* (petitioner). (Oral argument 3/14/19). (*See also*: Juveniles—Juvenile Justice—Disposition—Outside Standard Range—Manifest Injustice—Special Sex Offender Disposition Alternative—Suspended Disposition—Review—Ripeness; Juveniles—Juvenile Justice—Disposition—Outside Standard Range—Manifest Injustice—Factors—Threat of Serious Bodily Injury—High Risk to Reoffend—Sufficiency of Evidence).

Unpublished.

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Juveniles—Parental Relationship—Termination—Improvement of Parent—State Services—Rehabilitation and Reunification Services—State's Duty—Compliance—Sufficiency—Futility

Whether in this child dependency and parental termination proceeding, the Department of Social and Health Services failed to timely and adequately offer the father rehabilitative and reunification services, and if so, whether the State showed that offering such services would have been futile despite the father's assertion that his resistance to engaging in services and his expressed intention to move out of state (which he ultimately did not do) stemmed from frustration with the department's dilatory conduct.

No. 96155-7, *In re the Termination of Parental Rights to M.O.* (Stricken). (*See also:* Juveniles—Parental Relationship—Termination Petition by State—Guardianship Petition by Parent—Competing Petitions—Constitutional Law—Due Process—Standard and Burden of Proof for Ordering Termination Rather Than Guardianship—Best Interest of Child).

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Juveniles—Parental Relationship—Termination Petition by State—Guardianship Petition by Parent—Competing Petitions—Constitutional Law—Due Process—Standard and Burden of Proof for Ordering Termination Rather Than Guardianship—Best Interest of Child

Whether in proceedings involving a petition by the State to terminate parental rights to a child and a competing petition by a parent to establish a guardianship, constitutional due process principles require the State to prove by clear and convincing evidence that a guardianship would be contrary to the child's best interests before the court may terminate parental rights rather than establish a guardianship.

No. 96155-7, *In re the Termination of Parental Rights to M.O.* (Stricken). (*See also:* Juveniles—Parental Relationship—Termination—Improvement of Parent—State Services—Rehabilitation and Reunification Services—State's Duty—Compliance—Sufficiency—Futility).

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Landlord and Tenant—Mixed Use Area—Apportionment of Lessor and Lessee Liability for Injury—Lessor Liability as Owner for Hidden Defects or as Partial Possessor of Land

Whether the Port of Bellingham may be liable as a premises owner for an injury that occurred on a portion of port property leased to the Alaska Marine Highway System where the lease transferred to the lessee only priority usage, defined as a superior but not exclusive right to use the leased property, but reserved the right of the port to permit third-party use that did not interfere with the lessee's priority use and where the port was responsible for maintaining and repairing the leased property.

No. 96187-5, *Adamson, et al.* (plaintiffs-appellees) *v. Port of Bellingham* (defendant-appellee). (Oral argument 2/28/19).

Certified from US Court of Appeals 9th Circuit.

___F.3d ___, 2018 WL 3876548 (9th Cir. Aug. 14, 2018) Nos. 16-35314, 16-35368, D.C. No. 2:14-cv-01804-MJP

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Open Government—Public Disclosure—Exemptions—Investigative Records—Applicability—After Completion of Investigation

Whether under the exemption from disclosure under the Public Records Act for records of investigations of employment discrimination claims, *see* RCW 42.56.250(6), Snohomish County properly disclosed only redacted copies of records that were first requested while a discrimination investigation was ongoing, even though by the time the county disclosed the records the investigation had been completed.

No. 96164-6, *Gipson* (petitioner) *v. Snohomish County* (respondent). (Oral argument 2/26/19).

Unpublished.

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Prisons—Medical Treatment—Jail Inmate—Felony Arrestee—Responsibility for Costs—County Obligation—Reimbursement from City Whose Officers Arrested Inmate

Whether under RCW 70.48.130(6), which allows a jail's governing unit to obtain reimbursement for an inmate's medical expenses from the unit of government "whose law enforcement officers initiated the charges on which the person is being held in jail," the arrest of a felony suspect by city police officers constitutes the "initiation of charges," entitling the county jail where the arrestee is incarcerated to seek reimbursement from the city for the inmate's medical expenses.

No. 95586-7, *Thurston County, et al.* (appellants) *v. City of Olympia, et al.* (respondents). (Oral argument 2/21/19).

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Prosecuting Attorneys—Special Prosecutor—Appointment—By Court—Validity—Mandamus Action by Judges Against County Clerk

Whether Benton-Franklin County Superior Court judges had authority to appoint a special deputy prosecuting attorney to represent them in their mandamus action seeking to compel the Franklin County clerk to provide paper copies of court records as required by Franklin County Local General Rule 3.

No. 95945-5, *In re the Appointment of a Special Deputy Prosecuting Att'y*. (Oral argument 2/28/19).

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Searches and Seizures—Automobiles—Stolen Vehicle—Warrantless Search—Inventory Search—Scope—Unlocked Container

Whether during a warrantless inventory search of a stolen vehicle, law enforcement officers lawfully opened a closed, unlocked container found in the vehicle.

No. 96069-1, *State* (petitioner) *v. Peck* (respondent). (Oral argument 2/26/19).

Consolidated with: *State* (petitioner) *v. Tellvik* (respondent).

Unpublished, *Peck*.
Unpublished, Tellvick.

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Searches and Seizures—Warrantless Search—Phone Records—Cell Site Location Information—Exigent Circumstances—Threat to Officer or Public Safety—Investigation of Crime—Necessity for Immediate Action—Harmlessness

Whether police with a warrant to search a car of a defendant suspected to be involved in a rape and murder were justified by exigent circumstances in locating the car through the warrantless acquisition of a cell phone carrier's cell tower site location information showing the location of the defendant's cell phone, and if not, whether the warrant-based search was sufficiently untainted by the warrantless search to permit admission of the evidence, or whether the inadmissible evidence was harmless.

No. 96090-9, *State* (respondent) *v. Muhammad* (petitioner). (Oral argument 2/21/19). (*See also:* Criminal Law—Former Jeopardy—Multiple Convictions—Same Offense—First Degree Felony Murder and First Degree Rape—Felony Murder Predicated on First Degree Rape).

4 Wn. App. 2d 31 (2018).

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Searches and Seizures—Warrantless Search—Validity—Community Caretaking Function—Scope—Emergency Aid—Health and Safety Check—Private Dwelling—Test—Retrieval of Dead Body—Presence of Carnivorous Animal

Whether under the emergency aid form of the community caretaking exception to the warrant requirement, law enforcement officers lawfully entered a private dwelling without a warrant when they reasonably believed that someone inside was injured or dead and present inside was an aggressive and likely starving dog.

No. 95858-1, *State* (respondent) *v. Boisselle* (petitioner). (Oral argument 3/12/19).

3 Wn. App. 2d 266 (2018).

Top

Weapons—Possession—Concealed Weapons Permit—Eligibility—Prior Adjudication in Juvenile Court of a Felony Offense—Sealed Record—Effect

Whether the effect of sealing a person's juvenile adjudication of guilt for a class A felony pursuant to RCW 13.50.260 is to treat the conviction as though it never occurred, entitling the person to possess firearms and making the person eligible to obtain a concealed pistol license under RCW 9.41.070.

No. 96072-1, *Barr* (respondent) *v. Snohomish County Sheriff* (petitioner).
(Oral argument 1/17/19)

4 Wn. App. 2d 85 (2018).

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