ACLU OF WASHINGTON AMICUS DOCKET

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CRIMINAL JUSTICE

Jury Pay Impacts Jury Diversity. A case was brought on behalf of people called for jury duty in King County who wanted to fulfill their duty of jury service but could not afford to be paid only $10 per day—the amount required by WA state law—because many employers do not pay salaries while jurors serve. The trial court dismissed the case on the grounds that the minimum wage law did not apply to jurors because they are not "employees," and the Court of Appeals in a 2-1 ruling upheld the trial court. ACLU-WA has filed an amicus brief explaining the importance of jury diversity and the many factors, including low pay, that create barriers to jury diversity in WA. Low juror pay disproportionately affects those facing financial hardship and people of color, which means they are less likely to be represented on juries. Juries should be representative of the communities in which they serve to the extent possible because representative juries decrease the presence of bias, increase efficacy, and result in jury decisions that are more legitimate in the eyes of the public. Plaintiffs in the case are now seeking review in the Washington Supreme Court and ACLU-WA will file an amicus in support of review. (*Rocha et al. v. King County*, ACLU Attorney Nancy Talner; Cooperating Attorney: Jamal N. Whitehead (Schroeter Goldmark & Bender)).

Meaningful Notice Must Be Given Before the Government Takes Property. Seattle police believed Ms. Shin was dealing drugs and used informants to gather evidence against her. When she was arrested, Seattle sought to forfeit (take) $19,000 in Ms. Shin's cash and other property allegedly connected to the drug dealing. The City sent notice of forfeiture by certified mail to a homeless services center address used by thousands of people as their legal mailing address when they lack a traditional address—even though the police knew where she was living. Not surprisingly, the notice did not reach Ms. Shin. Luckily, she found out about the forfeiture anyway, filed a claim challenging it, and is arguing on appeal that the City did not provide her with the legally required notice. The Court of Appeals granted review because of the public interest in the notice issue; many other jurisdictions throughout Washington continue to use improper notice forms. The ACLU will file an amicus brief discussing the significant civil liberties problems associated with civil asset forfeiture and the importance of the government complying with notice procedures. (*Shin v. City of Seattle*, ACLU Attorneys Mark Cooke, Antoinette M. Davis, and Nancy Talner).

DISABILITY RIGHTS

Police Negligence in Shooting of Mentally Disabled, Spanish-Speaking Tacoma Resident. On June 29th, 2013, Cesar Beltran-Serrano, a Spanish-speaking man with mental disabilities, was shot five times by a police officer as he walked away from a routine investigatory stop. The officer made contact with Mr. Beltran-Serrano and quickly concluded he was mentally ill and did not speak English. While waiting for a Spanish-speaking officer to arrive, the officer repeatedly gave orders in English to Mr. Beltran-Serrano, who became frightened and tried to walk away. After a taser had no effect, the officer shot Mr. Beltran-Serrano five times to stop him, leaving him severely and permanently injured. The trial court dismissed Mr. Beltran-Serrano's subsequent lawsuit, holding that police use of deadly force does not allow for negligence claims. The Washington Supreme Court granted discretionary review. Our brief, filed on October 1st,

2018, argues that the police have a duty of care owed to the citizens they serve, including those with disabilities and those who speak languages other than English. Disallowing negligence claims against the police in this situation would remove a key tool of deterrence to the use of excessive and deadly force. (*Beltran-Serrano v. City of Seattle*, ACLU Attorney Antoinette M. Davis; Cooperating Attorney: J. Dino Vasquez (Karr Tuttle Campbell)).

FREE SPEECH & EXPRESSION

Calling the Police and Complaining About Police Misconduct are Not Crimes. Mr. Dawley, a disabled veteran who frequently called police about a variety of non-emergency issues, was arrested and charged with three counts of intimidating a public servant and a count of telephone harassment after a series of complaints to police about how he was treated. The police claimed Mr. Dawley's statements and conduct were threats and he was convicted of two counts of intimidating a public servant and one count of telephone harassment. ACLU-WA filed an amicus brief supporting Mr. Dawley's argument on appeal that the statute criminalizing intimidating a public servant is unconstitutionally overbroad and limits protected speech because it fails to distinguish "true threats" from strongly worded but constitutionally protected complaints about the police. (*State v. Dawley*, ACLU Attorneys Nancy Talner and Lisa Nowlin; Cooperating Attorney: Matthew Crossman).

DOJ Regulation Preventing Partial Representation by Non-Profit Lawyers. In May of 2017, the ACLU submitted an amicus brief in support of Northwest Immigrant Rights Project's (NWIRP) challenge to a Department of Justice restriction on their ability to consult with clients unless they are formally representing them in court. This regulation severely restricts NWIRP's First Amendment right to shape its legal mission and to speak with immigrants. The court agreed and granted a preliminary injunction, preventing the enforcement of the regulation until the conclusion of this case. A 3-day trial was held in November and the case is currently stayed pending settlement negotiations. (*NWIRP et al. v. Sessions et al.*, ACLU Attorney Emily Chiang; Cooperating Attorney: Jake Ewart (Hillis Clark Martin & Peterson, P.S.)).

Complaining to the Government Is Not a Crime. Mr. Waggy is a former Marine who receives his healthcare at the Veterans Administration (VA). He has had several heated phone conversations with the VA to complain about not receiving proper care because he has not received all the treatment he needs. Mr. Waggy was charged with Washington Telephone Harassment for calling the VA, yelling and swearing at one of its secretaries, and then calling back with a string of obscenities (which did not include any threats) after she hung up on him. This statute infringes on plainly protected First Amendment Speech when it criminalizes the use of "lewd, lascivious, and indecent" speech in calls made to government officials. ACLU-WA, along with others, filed amicus briefs in the Eastern District and Ninth Circuit courts arguing that the statute creates an unconstitutional, content-based restriction on calls to government officials. (*Waggy v. U.S.*, ACLU Attorney Lisa Nowlin).

GOVERNMENT TRANSPARENCY

Offices of the State Legislature are Subject to Public Oversight Through Public Records. Various news outlets have sued the state legislature, senate, house and relevant leaders for failure to comply with the Public Records Act (PRA). These outlets made PRA requests of each legislative office and elected members of the Legislature, who all took the position that they were not "agencies" subject to the PRA. The trial court found the offices of senators and representatives are indeed "agencies" under the PRA and the Washington Supreme Court has granted review. ACLU-WA filed an amicus brief focused on the importance of government transparency; the specific language of the PRA, its history, and purposes; and the constitutional implications of the public's right to see and know what government actors are doing. (*Associated Press et al. v. Washington State Legislature et al.*, ACLU Attorney Antoinette Davis; Cooperating Attorney: Katherine George (Johnston-George LLP)).

IMMIGRANTS' RIGHTS

Unconstitutional Immigration Enforcement by Local Police. We filed an amicus brief in support of Northwest Immigrant Right Project's (NWIRP) lawsuit, *Rodriguez Macareno v. Thomas*. Mr. Rodriguez Macareno called the police because someone had jumped his fence at 4am. The Tukwila Police Department arrived, warned the trespasser—and then arrested Mr. Rodriguez Macareno, the victim, because they ran his name through a database and Immigration and Customs Enforcement (ICE) listed him as having an administrative "warrant." They then arrested him and took him directly to ICE. Our brief explains that police departments that engage in this type of immigration enforcement violate both the federal Fourth Amendment right to be free from unreasonable search and seizure and the Washington Constitution's prohibition on warrantless arrests. (*Rodriguez Macareno v. Thomas*, ACLU Attorney Eunice Cho; Cooperating Attorneys: Kenneth Payson and Jennifer Chung (Davis Wright Tremaine)).

PRIVACY

Government Employees' Birthdates are Private. The Evergreen Freedom Foundation filed a public records request to various state agencies, seeking the names and associated birthdates of state employees. The Foundation wanted to use that information to find employees' home addresses so it could mail them flyers encouraging them not to join a union. The unions argued that the employees have a privacy right in their birthdates and on April 27, 2018, the ACLU filed an amicus brief in the Washington Supreme Court urging the Court to agree. The brief argued that the personnel records exemption to the PRA applies to birthdates because personnel records are the source of birthdate information—and birthdates are private information that can be used to intrude on other sensitive records. (*WSPEA v. Evergreen Freedom Foundation*, ACLU Attorney Nancy Talner; Volunteer Attorney Doug Klunder).

Government Installation of Malware and Operation of Child Pornography Site. Federal law enforcement engaged in a nationwide operation, pursuant to a search warrant issued by a magistrate, targeting online access to child pornography. The agents failed to clearly disclose to the magistrate that they would be operating a massive child pornography website, omitted critical

information about the malware they planned to install on target computers, and did not explain that the malware created significant security risks for the computers they were hacking. In October 2017, the ACLU filed an amicus brief in the Ninth Circuit Court of Appeals supporting the defendant's argument that the search warrant was invalid because the magistrate's duty to independently determine the validity of the warrant application was undermined by the agents' deception in describing the methods they used. (*United States v. Tippens*, ACLU-WA Attorneys Nancy Talner and Shankar Narayan; ACLU National Attorneys Jennifer Granick, Brett Max Kaufman, and Vera Eidelman; Cooperating Attorney: Karin Jones (Stoel Rives LLP)).

Refusing Warrantless Entry to the Police is Not Obstruction of Justice. Police arrived at Mr. McLemore's door after a reported domestic disturbance, knocked for a prolonged period of time, and threatened to break the door down. When Mr. McLemore came to the door and stated that he was exercising his right to refuse them entry without a warrant, they broke down his door and arrested him for obstruction of a law enforcement officer, based on his failure to let the police in. We filed an amicus brief with the Washington Association of Criminal Defense Lawyers and Washington Defender Association arguing that this misuse of obstruction charges has a chilling effect on the exercise of individual rights in interactions with the police. We asked the court to limit interpretation of the statute in order to protect constitutional rights. The Washington Supreme Court issued a split 4 to 4 Opinion, half in favor of Mr. McLemore's conviction and half against—functionally affirming Mr. McLemore's conviction. ACLU-WA will file an amicus in support of reconsideration, explaining that the ruling creates confusion about significant rights, making it very difficult for organizations like the ACLU to provide know-your-rights information. (*Shoreline v. McLemore*, ACLU Attorney Nancy Talner; Cooperating Attorney: Nicole Beges (Pierce County Department of Assigned Counsel))

Closed Containers Are Not Subject to Warrantless Inventory Searches of Vehicles. We filed an amicus brief with the Washington Supreme Court arguing that closed containers cannot be searched as part of a warrantless inventory search of an impounded vehicle. Even when (as in this case) a truck is stolen, opening a closed container in the truck while doing an inventory search violates strong privacy interests. This use of inventory searches risks revealing intimate, personal information or effects and we asked that the Court strictly limit their usage to maintain constitutionally protected privacy rights. (*State v. Peck and Tellvik*, ACLU Attorney Antoinette Davis; Volunteer Attorney: Douglas Klunder)

RACIAL JUSTICE

Racial Bias In Jury Deliberations. Racial biases in jury deliberations violate a defendant's right to a fair trial and undermine the fair and impartial administration of the criminal justice system. A black juror in a criminal case was accused by other jurors of siding with a defendant purely because they were both black. Following the conviction of the defendant, the juror reached out to the defendant's attorney to inform him of the racial hostility during jury deliberations. In spite of the attorney's requests for a thorough investigation, the trial court made very little inquiry and refused to order a new trial. The Court of Appeals affirmed. We filed an amicus brief with the Washington Supreme Court asking that the court require investigations into these incidents and

that they grant the defendant in the case a new trial. (*State v. Berhe*, ACLU Attorney Antoinette Davis; Cooperating Attorney: Margaret Enslow (MBE Law Group))

Racial Bias in Jury Selection. In a murder case involving two defendants, the prosecutor used a peremptory challenge to remove the only black juror. The excluded juror stated several times that she could be fair and impartial. When the defense made a Batson objection to the prosecutor's challenge, the prosecutor alleged it was not based on racial bias but instead was supported by the juror's "pause" before answering if she could give the prosecution a fair trial, and because her brother's experience with the criminal justice system "left a bad taste in her mouth." ACLU-WA, the Korematsu Center, the Washington Association of Criminal Defense Lawyers, and Washington Defender Association filed an amicus brief explaining how the prosecutor's reasons amount to an invalid peremptory challenge under the GR 37 standard (a recently adopted court rule that heightens scrutiny of bias in jury selection). The brief details how white jurors paused in answering questions too, but their pause was considered "thoughtfulness" while the African American juror's pause was used against her. The brief also discusses the implicit racial bias in using a juror's family's experience with the criminal justice system against her, which the Court has recognized as being historically associated with improper discrimination in jury selection. (*State v. Pierce et al.*, ACLU Attorneys Nancy Talner and Antoinette Davis).

SECOND CHANCES

Supporting Access to Housing for Those with Criminal Records ACLU-WA co-signed an amicus brief with the Korematsu Center in November 2018 in support of Seattle's Fair Chance Housing Ordinance. The ordinance would make it easier for people with criminal records to access housing by preventing landlords from inquiring about arrest, criminal conviction, or criminal history records when screening tenants. The brief describes how screening based on criminal history creates racial disparities in access to housing and provides evidence that there is no link between criminal records and good tenancy. A hearing on the City and Plaintiffs' respective motions for summary judgement was held on January 11, 2019 and we are awaiting the judgement of the court. (*Yim et al. v. City of Seattle*, ACLU Attorney Nancy Talner).

YOUTH

Youth as a Mitigating Factor in Criminal Sentencing Should Apply Retroactively. Mr. Meippen was sixteen years old in 2006, when he was convicted in an adult court of first-degree assault and sentenced to 19 years—the top end of the adult sentencing range, including a 5-year mandatory minimum for use of a gun. In March 2017, the WA Supreme Court ruled in another case that because of the "mitigating qualities of youth," when juveniles are sentenced in adult court, the sentencing court must have discretion to reject mandatory minimums like the gun enhancement, and can impose sentences well below the standard range based on youthfulness and other individualized mitigating factors. Our amicus brief supports Mr. Meippen's case, which argues that this ruling should apply retroactively to allow him and other juveniles given very long adult prison sentences without consideration of youth as a mitigating factor to argue

for reduced sentences now. (*In re Meippen*, ACLU Attorney Nancy Talner; Cooperating Attorney: Eric Nusser (Terrell Marshall Law Group)).

A History of Trauma Should Not Result in Longer Sentences for Juveniles. ACLU-WA recently filed amicus briefs with other amici in two cases in which juveniles were sentenced to exceptionally harsh sentences for misdemeanor crimes because the court decided they were unlikely to comply with services in the community. In one case, the court reasoned that the juvenile's victimization in sex trafficking put her in need of a significantly longer sentence in detention in order to provide treatment and "structure." As a result, she received 27-36 weeks detention for a crime for which sentencing guidelines suggest no more than 30 days. In the second case, similar reasoning regarding the juvenile's history of running away from foster care placements resulted in an excessive one-year sentence. Research demonstrates that detention does not result in rehabilitation for juveniles and, if anything, increases rates of recidivism. Neither will these excessive sentences do anything to increase the safety and well-being of the juveniles or their communities. We asked the court to reverse these sentences and to declare that a history of trauma, vulnerability, and dependency should not be a factor that increases sentences in juvenile cases. (*State v. F.T.*, ACLU Attorney Nancy Talner; Cooperating Attorney: Tadeu Velloso (Phillips Burgess)) (*State v. B.J.*, ACLU Attorney Nancy Talner and Vanessa Hernandez; Cooperating Attorney: Amy Muth (Law Office of Amy Muth)).

Three Strikes Mandatory LWOP Sentencing Laws Result in Disproportionate Sentences. ACLU-WA submitted a brief in *State v. Moretti*, which asks the WA Supreme Court to address whether a sentence of life without parole (LWOP) constitutes cruel punishment when it is imposed under a three strikes mandatory minimum statute and some of the crimes were committed when the defendant was a young adult. The brief asks the Court to consider individual mitigating circumstances and highlights the tremendous variation in seriousness of the crimes on the "strikes" list. ACLU-WA has always opposed the three strikes mandatory minimum because it disproportionately impacts people of color and often results in disproportionate sentencing. (*State v. Moretti*, ACLU Attorneys Nancy Talner and Antoinette Davis; Cooperating Attorneys: Ulrike Connelly, Lindsay McAleer, and Michelle Maley (Perkins Coie LLP)).