WASHINGTON DEFENDER ASSOCIATION

SHERI'S SIDEBAR | 1/15/2025 | Sheri M. Oertel

Authorities, Tips, Random Tidbits and "WHO KNEW?"

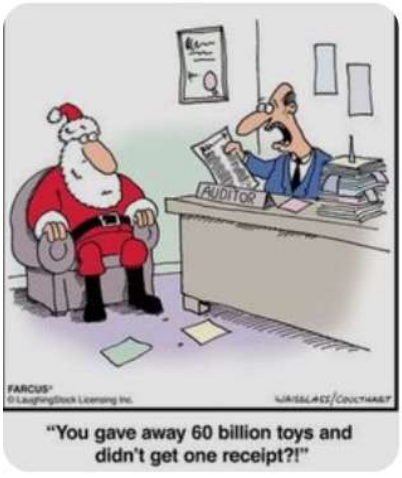
Sheri's Sidebar Editions are archived here: https://defensenet.org/resource-category/sheris-sidebar/

Important legal change included in this edition. Please review.

HI everyone, I am back again with things I wish I had known during practice, things that have changed, interesting tidbits, and random tips for practice. Welcome back to:

SHERI'S SIDEBAR

HAPPY NEW YEAR 2025! Well, except the IRS and tax part 😉



1) IMPORTANT LEGAL CHANGE BELOW!!

See *Farhane v. United States*, 20-1666 (en banc):

- ***Padilla* consequences may now apply to Naturalized Citizens:**
  - *if any of the conduct occurred prior to the Naturalization Process,*
  - *only on specific charges.*
- Which means, as defense attorneys, we have the duty to inquire **ABOUT whether a client is a Naturalized Citizen for purposes of *Padilla* for certain types of charges as defined by Immigration Law.**

- **You may need to negotiate for the client to only plead to dates which are AFTER the date they became a NATURALIZED CITIZEN; and have the *charges amended* to those dates too as part of the negotiation.**

- **PLEASE CONTACT WDA Immigration Project for case help and more specific information by filling out the intake form located here: https://defensenet.org/online-adult-immigration-intake-form/**

- You can also find a .**pdf** version of the form to print and take with you to client meetings so you make sure you don't miss any necessary questions here: https://defensenet.org/online-adult-immigration-intake-form/

"Keep your answers short and don't get defensive. That's my job."

Advise your clients properly 😊

2) **You are probably aware the police officers using hand sanitizer prior to administering the PBT test FALSELY PROVIDES OR INCREASES a BAC level, right?**
    a. **WHY DO I CARE?**
    b. If the PBT was used in part to get Probable Cause, you can move to suppress all evidence obtained afterwards for the lack of PC.
        - Be strategic.
            1. If the police report doesn't state clearly, interview the officer with questions such as, in your report it states you had/used the following evidence to obtain PC: list all, list FST's if performed, list PBT; is that correct?
            2. You would agree then that you had a reasonable suspicion when you asked X to perform the FST's?
            3. Then you also asked X to perform a PBT in order to get the PC to arrest X and get X off the road that night?
                a. If the officer then admits he or she needed the PBT to get to probable cause, file motions immediately.
        - See e.g
            1. "In a prosecution for attempting to distribute and possessing with the intent to distribute marijuana, the magistrate **judge had the legal authority to dismiss the complaint for lack of probable cause at or after the defendant's initial appearance following his arrest, even though the preliminary hearing had not yet been held**. The magistrate judge saw little difference between dismissing a complaint for lack of probable cause at a preliminary hearing, as was authorized under the rules of criminal procedure, and dismissing the complaint at some point during or after an initial appearance but before a probable cause determination at a preliminary hearing had been made. 28 No. 16 West's Criminal Law News 9 (*citing U.S. v. Coiscou, 2011 WL 2518764 (S.D. N.Y. 2011)).*

            2. Even the case cited by Pierre recognizes that all that is required is probable cause. *Albright v. Oliver,* 510 U.S. 266, 271, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). **Indeed, the *Albright* Court held that a defendant's constitutional right includes the right to be free from prosecution lacking probable cause.** *Albright,* 510 U.S. at 271, 114 S.Ct. 807.
            State v. Pierre, 108 Wn. App. 378, 387–88, 31 P.3d 1207, 1212 (2001).

        - There are some WA cases that talk about whether an individual may be kept in custody on bail or have any Conditions of Release imposed when there is no PC. HOWEVER, a defendant has a constitutional right to be free from

prosecution lacking probable cause! Motion to Dismiss – which the Court has the authority to dismiss.

c. There is also statutory authority providing the prosecutor should not file or maintain any case without the minimum of probable cause but truly the State should have the case fully investigated. [Which is why the speedy trial rule is only 60/90 days for speedy trial. If only the DPA's would complete an investigation prior to filing charges!! RCW 9.94A.411(2)(b)(i)(A):

In certain situations, a prosecuting attorney may authorize filing of a criminal complaint before the investigation is complete if:

(A) Probable cause exists to believe the suspect is guilty; *and…*

d. RESOURCES

- Here is a link to a video demonstrating the proof: https://defensenet.org/resources/defense-attorney-demonstrates-police-caused-pbt-error/

- Here is a link to a study saying the same thing: https://pubmed.ncbi.nlm.nih.gov/23406081/#:~:text=Conclusions:%20The%20use%20of%20common,not%20allowed%20to%20dry%20appropriately.
- There were 3 types of application of the sanitizer and whether it was allowed to fully dry??
    1. It didn't specify if the blow straw was already placed in the machine prior to the sanitizer being used. The lowest false positive, following the manufacturer's instructions for use of sanitizer was .001.
    2. However, the largest false positive 0.134!
    3. All participants were checked at 0.0000 prior to the sanitizer being used by the person administering the test to the participants.

e. At least two studies have found that use of most common hand sanitizers can distort readings to show the presence of alcohol when, in fact, the test subject had a blood alcohol level of zero.

f. **In some cases, the readings were almost double the legal limit of.08. These *false readings also occurred when the participant used gloves after using hand sanitizer.***

g. PBT results may be attacked on several grounds, such as:

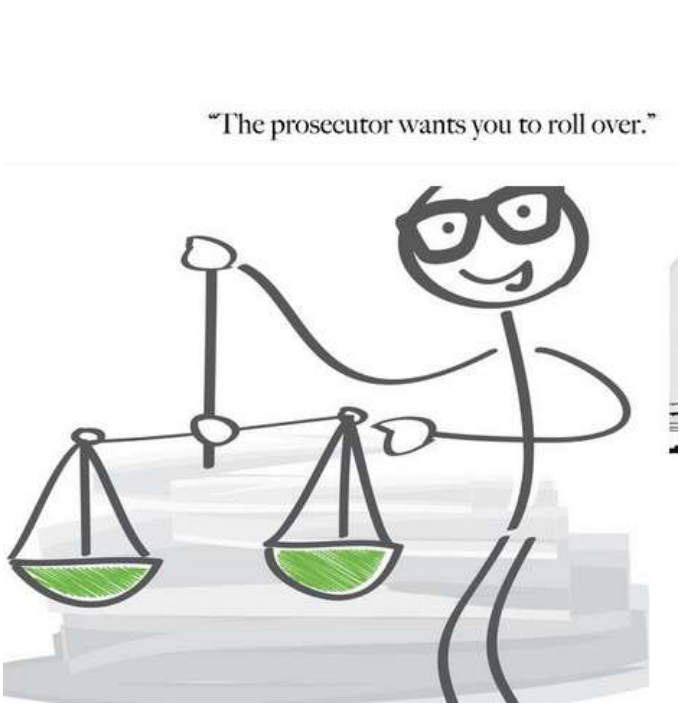
- When the PBT is not administered in compliance with state toxicologist's protocols.[11] For example, the results will be inaccurate if the test was administered to a person who consumed alcohol within 15 minutes before the test, due to any alcohol remaining in the person's mouth.[12]

- If the device had not been certified at the time of the test, under the protocols approved by the state toxicologist, its evidentiary value is limited greatly, and the result may be deemed invalid or unreliable, **and therefore not helpful in the determination of probable cause [in addition to mere suppression of breath test results]**.[13]
- PBT results may also be challenged when the manufacturer's guidelines have not been followed, although generally speaking, strict compliance with the manufacturer's guidelines of breath testing devices is not required.[14]
- **If a PBT result is found to be inadmissible, and probable cause to arrest lies almost entirely upon the results, the subsequent arrest may be deemed unlawful**.[16] § 22:1. Preliminary breath testing (PBT)—Generally, 32 Wash. Prac., Wash. DUI Practice Manual § 22:1 (2023-2024 ed.). Footnote 12: WAC 448-15-030.

If probable cause to arrest did not exist when the police initially stopped the suspect, an illegal arrest was made and all evidence gained after the arrest would be inadmissible. While probable cause to arrest is rather apparent when a suspect was driving recklessly and a strong smell of alcohol on his breath was evident to the officer or the suspect got out of the automobile with a bottle of liquor in his hand, probable cause is not so apparent where an individual is stopped for a routine driver's license check or similar reason, and the officers smell alcoholic odors but do not detect further evidence of drunkenness. State courts divide on the question of probable cause to make an arrest under the latter fact situation. 19 Am. Jur. Trials 123 (Originally published in 1972)

The dark side of hand sanitizer.

3) **Who is tired of prosecutors trying to limit discovery so much that defense counsel has to file motion after motion with the court to obtain MANDATORY discovery?**
    a. **The argument I am hearing prosecutors are saying is, "We only have to provide EXCULPATORY evidence, not all evidence."**
        - WRONG
        - Obviously, the State must also discover INCULPATORY evidence. The purpose of discovery is to allow the defense to fully investigate the charges and to prevent surprise at trial. Yet, some prosecutors and deputy prosecutors are arguing this!
        - Brady also requires FAVORABLE EVIDENCE & IMPEACHMENT EVIDENCE to be provided to defense, with the affirmative duty and burden upon the State to do so. Brady and its progeny line of cases then say, the State must provide all impeachment evidence requested. However, some of Brady is codified in CrR 4.7.



CrR 4.7(a)

(3) Except as is otherwise provided as to protective orders, **the prosecuting attorney shall disclose to defendant's counsel any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt** as to the offense charged.

**NOTE: These limits within the rule are interpreted in the Brady progeny line of cases to include ALL FAVORABLE EVIDENCE (#3) and an affirmative duty to go seek out from all

government agencies and other agencies IMPEACHMENT EVIDENCE once requested by defense.

The Fifth Amendment to the United States Constitution requires that prosecutors make available evidence "**favorable to an accused** ... where the evidence is **material** either **to guilt** or **to punishment.**" *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

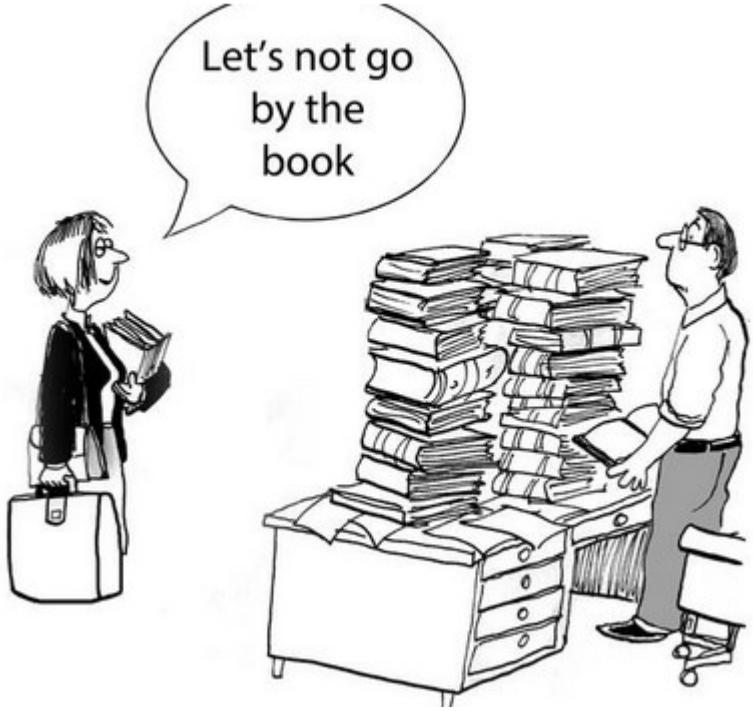
I actually heard one prosecutor argue they only had to provide exculpatory evidence and not inculpatory, or that they can limit which inculpatory evidence they discover/disclose, **even if they intend to use it at court.**

DISCLAIMER: All cartoons, images or memes herein are solely for jest and are in no way intended to be a true threat to any individual, agency, or property. It's just comedy, relaxation by laughter, sarcasm and the First Amendment, as all WDA excellent attorneys are aware!

> To be a [true] threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the receiver of the message, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in [jest or idle talk] [jest, idle talk, or political argument]. In addition, the speaker must know of and disregard a substantial risk that the statement or act would be interpreted in that manner.

DOUBLE DISCLAIMER: The disclaimer is in jest also, I know these circumstances would not cause a reasonable person in the position of the received to perceive a serious expression of intention to carry out anything in any funny, ironic, sarcastic memes, cartoons, or images.

4) **We know that one division of the appellate court cannot overturn a decision of another division, only the Supreme Court can do so. We also know that the divisions can split and not rule the same way on the same issue. However, DID YOU KNOW that there is caselaw stating an appellate division can ignore its own precedent if it now believe it is incorrect?**



"Were we bound by *Schlegel*, we would agree with the State that the stop was justified under RCW 77.15.080. **But stare decisis does not exist "between or among the divisions of the Court of Appeals."** *In re Pers. Restraint of Arnold*, 190 Wn.2d 136, 148-49, 410 P.3d 1133 (2018). We ordinarily strive to follow our prior decisions because we value consistency, and we must give our prior decisions "respectful consideration." *Id*. at 154, 410 P.3d 1133; *see id*. at 150-51, 410 P.3d 1133. **However, if we conclude one of our prior opinions was incorrect, we**

are free to depart from it. *See Grisby v. Herzog*, 190 Wn. App. 786, 810-11, 362 P.3d 763 (2015).

We disagree with a previous Court of Appeals opinion allowing the Department of Corrections to exclude counsel from all such hearings. *Grisby v. Herzog*, 190 Wn. App. 786, 789, 362 P.3d 763, 764 (2015). [referencing *In re Pers. Restraint of McNeal,* 99 Wn. App. 617, 635, 994 P.2d 890 (2000)].

- Both are division 1 cases.
- They just mark disagreed with on the prior case.
- So much for binding precedent, right? The Supreme Court doesn't do that without a thoughtful analysis and discussion in the record as to why the prior precedent is not being followed.

5) **What do you have to provide when a client requests their file? DISCOVERY, motions filed, other filed documents. The attorney is not required to provide work product, attorney notes with opinions, or drafts of motions not filed. Whether it is the burden on the State to provide discovery or the duty of defense counsel to provide discovery on a client file request has long been disputed.**

Whether, what and when a defense attorney must provide to the client upon a request for the file has been debated multiple times over the past two years; with some saying discovery is included in the request for the file, and others saying the former client must get discovery from the State – especially in light of digital discovery being available and discovery consisting of large amounts of digital evidence now.

There is a case directly on point: *State v. Albright*, 25 Wn. App. 2d 840, 841, 525 P.3d 984, 985, review denied, 532 P.3d 155 (Wash. 2023. The Court found the rules requiring defense counsel to disclose/copy the client's file do not transfer to the State. Furthermore, post-conviction discovery is unavailable from the State without a showing of extraordinary good cause.

As we held in *State v. Padgett*, 4 Wash. App. 2d 851, 424 P.3d 1235 (2018), a client is entitled to discovery contained in his client file, subject to nonprejudicial withholdings under RPC 1.16(d) and redactions under CrR 4.7(h)(3). In holding that Murry's rule-based request for discovery was being adequately addressed by a separate public records request, the superior court abused its discretion. *State v. Murry*, 24 Wn. App. 2d 940, 942, 523 P.3d 794, 796 (2022)

To be clear, CrR 4.7(h)(3) creates obligations for the defense attorney and not the prosecutor. State v. Woodward, No. 51178-9-II, slip op. at 2-3 (Wash. Ct. App. June 18, 2019) (unpublished) (defense attorney no longer had file, and motion for duplicate discovery from the prosecution was denied), https://www.courts.wa.gov/opinions/pdf/D2%2051178-9-

II%20Unpublished%20Opinion.pdf. Upon request by a defendant, defense counsel shall provide a client's file, including discovery, after making appropriate redactions and approval of the prosecutor. Any disagreements will be decided by the superior court on motion filed in the criminal case. *State v. Murry*, 24 Wn. App. 2d 940, 947, 523 P.3d 794, 799 (2022).

Count VIII: RLD 1.1(i) and (j), violations of RLD 8.1(a)(4) (lawyer must provide clients or their substituted counsel, upon request, with their files and other documents in lawyer's possession), RPC 1.15(d) (lawyer must protect a client's interests such as surrendering papers and property to which the client is entitled). *In re Juarez*, 143 Wn.2d 840, 872, 24 P.3d 1040, 1058 (2001).

6) Did you know that the WSBA has best practices recommendations for retention of client files?

In speaking with attorneys who are employees, contract attorneys and from various counties, I discovered that there is no consistent timeframe attorneys consistently use to retain client files.

I have been told 7 years, having to do with taxes. I have been told 1 year if there is no appeal filed – although what about a PRP? I was also told 3 years, without a stated reason,

This is important because of the precedent above which the Court found the State is not required to provide discovery to our clients without a showing of extraordinary good cause.

The WSBA document was published in 2020, stating:

Records which must be kept for 7 years (pg. 5 of attached):

- **Trust account information**. RPC 1.15B(a).

  ****NOTE:** "The preservation obligation under RPC 1.15B goes beyond the dissolution or sale of a practice—meaning that you are required under RPC 1.15B(b) to make appropriate arrangements for the maintenance of records specified in RPC 1.15B(a) even after a practice transition.

- **Records relating to any property that you hold other than funds**. The record must identify the property, who it is held for (client or 3rd party), the date it was received, and the location where it is safeguarded. RPC 1.15(c)(3).

The Bar states these are the only two explicit rules for document retention under the RPCs.

The Bar further states for all other records, you may retain or destroy the at your discretion.

- We know that is not accurate because we have to maintain the client's file at minimum until their appeals have been exhausted.

- *See e.g. State v. Padgett*, 4 Wn. App. 2d 851, 855, 424 P.3d 1235, 1237 (2018)(holding the trial court was obligated to grant a pro se defendant a copy of his trial file and discovery for a future PRP, despite the client having an appellate attorney currently involved in the direct appeal). *Albright*, supra distinguishes that the State is not required to provide the discovery from the original trial without the showing of an extraordinary good cause.

- It has good information on creating a retention policy and making sure you are clear about it when telling the client, and that other authority may exist depending on your case type.

https://defensenet.org/resources/wsba-best-practices-for-client-file-retention/

"We're throwing out the old rules."

**PLEASE NOTE THAT THE LEGISLATIVE SESSION IS PRESENT, WHICH MAY LEAD TO RESPONSES TAKING A BIT LONGER FROM THOSE WDA ATTORNEYS WORKING ON THE LEGISLATIVE TEAM.

Also, if you are asked for input, a survey, or even to testify about a bill, please do so if you are able. WDA works on the legislation to help the attorneys in practice!

"Senator, regarding my alleged breaking of the leash law, I am here to fully cooperate with your committee."

Let's try to start the new year by properly managing the stress of last year. We all work very hard to protect our client's rights, handle overloaded case schedules, and have deadlines which are at times impossible to meet. That doesn't count time spent at trial, motion hearings, interviews and investigations. Let's all remember to give ourselves some grace and each other the benefit of the doubt if things appear to be going wrong.

"Anderson, if you think you can get out of the deadline by spontaneously combusting, you're sadly mistaken."

Let’s all get some short-term and long-term strategies to manage the stress we all have working criminal defense.

Have a great year in 2025 everyone!

Sheri