



# Law Enforcement

February 1997

# Digest

## HONOR ROLL

\*\*\*\*\*

### 455th Session, Basic Law Enforcement Academy -September 27 through December 20, 1996

President: Officer Stephen Blalock - Federal Way Police Department  
 Best Overall: Officer Michael J. Rummel - Selah Police Department  
 Best Academic: Officer Michael J. Rummel - Selah Police Department  
 Best Firearms: Officer Kurtis M. Bowler - Renton Police Department

\*\*\*\*\*

### Corrections Officer Academy - Class 241 - November 11 through December 13, 1996

Highest Overall: William F. Dennis - Island County Jail  
 Highest Academic: William F. Dennis - Island County Jail  
 Highest Practical Test: William F. Dennis - Island County Jail  
 Highest in Mock Scenes: Mathew J. Howard - Airway Heights Correctional Center  
 Highest Defensive Tactics: RomaJean "RJ" Barker - Washington State Penitentiary

\*\*\*\*\*

### Corrections Officer Academy - Class 242 - November 11 through December 13, 1996

Highest Overall: Richard C. Rowe - King County Dept. Of Adult Detention  
 Highest Academic: Thomas H. Tangen - King County Dept. Of Adult Detention  
 Highest Practical Test: Marguerite D. Morris - King County Dept. Of Adult Detention  
 Highest in Mock Scenes: Richard C. Rowe - King County Dept. Of Adult Detention  
 Chris C. Skyberg - King County Dept. Of Adult Detention  
 Highest Defensive Tactics: Jeffrey McDonald - King County Dept. Of Adult Detention

\*\*\*\*\*

## FEBRUARY LED TABLE OF CONTENTS

**UNITED STATES SUPREME COURT** ..... 2

FOURTH AMENDMENT DOES NOT CONTAIN A BRIGHT-LINE "CLEAR BREAK" RULE  
 REQUIRING THAT POLICE TELL TRAFFIC DETAINEES THAT THEY ARE FREE TO LEAVE  
 BEFORE POLICE ASK THEM FOR CONSENT TO SEARCH THEIR VEHICLES  
Ohio v. Robinette, 60 CrL 2002 (1996) ..... 2

**WASHINGTON STATE SUPREME COURT** ..... 6

OFF-DUTY POLICE OFFICERS WORKING PRIVATE SECURITY BECAME “PUBLIC SERVANTS” AND “PEACE OFFICERS” PERFORMING “OFFICIAL DUTIES” WHEN THEY INVESTIGATED DRUG CRIME; OBSTRUCTING, RESISTING CONVICTIONS UPHELD  
State v. Graham, \_\_\_ Wn.2d \_\_\_(1996) ..... 6

**WASHINGTON STATE COURT OF APPEALS ..... 10**

DRUG FORFEITURE: CONSTITUTIONAL EXCESSIVENESS ANALYSIS EXAMINES BOTH (1) INSTRUMENTALITY FACTORS AND (2) PROPORTIONALITY FACTORS; ALSO, HOMESTEAD QUESTION ADDRESSED, GETS PRO-GOVERNMENT RULING; AND DOUBLE JEOPARDY ISSUE CONTROLLED BY URSERY’S PRO-GOVERNMENT RULING  
Tellevik v. Real Property Known As 6717 100th St. S.W., 83 Wn. App. 366 (Div. II, 1996) .... 10

**BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS ..... 13**

FORFEITURE OF CRIME PROFITS UNDER CRIMINAL PROFITEERING ACT NOT PUNISHMENT UNDER “DOUBLE JEOPARDY” OR “EXCESSIVE FINES” ANALYSIS  
State ex.rel. Eikenberry v. Frodert, 84 Wn.App. 20 (Div. II, 1996) ..... 13

PREACCUSATORIAL DELAY OF APPROXIMATELY EIGHT WEEKS IN CHARGING JUVENILE UNTIL AFTER HE PASSED AGE 18 REQUIRES DISMISSAL OF CHARGES  
State v. Frazier, 82 Wn.App. 576 (Div. II, 1996) ..... 13

**CLARIFICATION REGARDING MANDATORY ARREST, DISCRETIONARY ARREST, NO ARREST FOR COURT ORDER VIOLATIONS IN DOMESTIC VIOLENCE SITUATIONS ..... 14**

\*\*\*\*\*

**UNITED STATES SUPREME COURT**

**FOURTH AMENDMENT DOES NOT CONTAIN A BRIGHT-LINE “CLEAR BREAK” RULE REQUIRING THAT POLICE TELL TRAFFIC DETAINEES THAT THEY ARE FREE TO LEAVE BEFORE POLICE ASK THEM FOR CONSENT TO SEARCH THEIR VEHICLES**

Ohio v. Robinette, 60 CrL 2002 (1996)

Facts: (Excerpted from U.S. Supreme Court majority opinion)

This case arose on a stretch of Interstate 70 north of Dayton, Ohio, where the posted speed limit was 45 miles per hour because of construction. Respondent Robert D. Robinette was clocked at 69 miles per hour as he drove his car along this stretch of road, and was stopped by Deputy Roger Newsome of the Montgomery County Sheriff’s office. Newsome asked for and was handed Robinette’s driver’s license, and he ran a computer check which indicated that Robinette had no previous violations. Newsome then asked Robinette to step out of his car, turned on his mounted video camera, issued a verbal warning to Robinette, and returned his license.

At this point, Newsome asked, “One question before you get gone: [A]re you carrying any illegal contraband in your car? Any weapons of any kind, drugs,

anything like that?” Robinette answered “no” to these questions, after which Deputy Newsome asked if he could search the car. Robinette consented. In the car, Deputy Newsome discovered a small amount of marijuana and, in a film container, a pill which was later determined to be methylenedioxymethamphetamine (MDMA). Robinette was then arrested and charged with knowing possession of a controlled substance, MDMA, in violation of Ohio Rev. Code Ann. §2925.11(A) (1993).

Proceedings in Ohio courts: (Excerpted from U.S. Supreme Court majority opinion)

Before trial, Robinette unsuccessfully sought to suppress this evidence. He then pleaded “no contest,” and was found guilty. On appeal, the Ohio Court of Appeals reversed, ruling that the search resulted from an unlawful detention. The Supreme Court of Ohio, by a divided vote, affirmed. In its opinion, that court established a bright-line prerequisite for consensual interrogation under these circumstances:

“The right, guaranteed by the federal and Ohio Constitutions, to be secure in one’s person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase ‘At this time you legally are free to go’ or by words of similar import.”

ISSUES AND RULINGS: (1) When: (A) the patrol-officer’s subjective intent in continuing the detention of the traffic law violator and asking for consent to search was unrelated to the purpose of the original stop, and (B) no additional articulable facts justified the continuing detention, was the continuing detention an unlawful seizure? (ANSWER: No, says the majority, because the officer’s subjective intent is irrelevant under the Fourth Amendment); (2) Is there a bright-line “clear break” rule under the Fourth Amendment requiring that police tell traffic detainees that they are free to leave before asking them for consent to search their vehicles? (ANSWER: No, consent must be determined on a case-by-case basis on the totality of the circumstances). Result: Ohio Supreme Court ruling suppressing the evidence reversed; case remanded to Ohio courts for further proceedings.

ANALYSIS:

(1) Relevancy of subjective intent of officer unrelated to traffic violation?

Having characterized the defendant’s first issue as going to the patrol officer’s subjective intent, the majority opinion dismisses this part of the defendant’s challenge as being contrary to the Court’s established objective standards for Fourth Amendment rules:

We think that under our recent decision in *Whren v. United States*, 517 U.S. \_\_\_\_ (1996) [**Aug. ‘96 LED:09**] (decided after the Supreme Court of Ohio decided the present case), the subjective intentions of the officer did not make the continued detention of respondent illegal under the Fourth Amendment. As we made clear in *Whren*, “the fact that [an] officer does not have the state of mind which is hypothesized by the reasons which provide the legal justification for the officer’s action does not invalidate the action taken as long as the circumstances, viewed

objectively, justify that action.’ . . . Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.” And there is no question that, in light of the admitted probable cause to stop Robinette for speeding, Deputy Newsome was objectively justified in asking Robinette to get out of the car, subjective thoughts notwithstanding. See *Pennsylvania v. Mimms*, 434 U.S. 106, 111, n.6 (1977) (“We hold . . . that once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment’s proscription of unreasonable searches and seizures”).

[Some citations omitted]

(2) No bright-line rule requiring “free-to-leave” warning

Rejecting the Ohio Supreme Court’s proposed bright-line rule which would require a “free-to-leave” warning to a traffic stop detainee prior to any consent request, the majority explains that here, and on most Fourth Amendment issues, the Court favors a totality-of-the-circumstances approach to determine if the test of “reasonableness” has been met in any given case:

In applying [the reasonableness] test we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry. Thus, in *Florida v. Royer*, 460 U.S. 491 (1983), we expressly disavowed any “litmus-paper test” or single “sentence or . . . paragraph . . . rule,” in recognition of the “endless variations in the facts and circumstances” implicating the Fourth Amendment. Then in *Michigan v. Chesternut*, 486 U.S. 567 (1988) [**Oct. ‘88 LED:01**] when both parties urged “bright-line rules applicable to all investigatory pursuits, “ we rejected both proposed rules as contrary to our “traditional contextual approach.” And again, in *Florida v. Bostick*, 501 U.S. 429 (1991) [**Sept. ‘91 LED:06**] when the Florida Supreme Court adopted a *per se* rule that questioning aboard a bus always constitutes a seizure, we reversed, reiterating that the proper inquiry necessitates a consideration of “all the circumstances surrounding the encounter.”

We have previously rejected a *per se* rule very similar to that adopted by the Supreme Court of Ohio in determining the validity of a consent to search. In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1972), it was argued that such a consent could not be valid unless the defendant knew that he had a right to refuse the request. We rejected this argument: “While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.” And just as it “would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning,” so too would it be unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary.

The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and “[v]oluntariness is a question of fact to be determined from all the circumstances.” The Supreme Court of Ohio having held otherwise, its judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

[Some citations omitted]

**LED EDITOR'S COMMENT:**

In a dissent, Justice Stevens argues that the majority should have taken a different view of the Ohio Supreme Court decision on the first issue before them. Justice Stevens argues that the majority should have addressed the purely objective question of whether the patrol officer could extend the time of seizure of the traffic law violator. This is admittedly a close question in this circumstance where the officer had no articulable suspicion that any unlawful activity had occurred in addition to the traffic violation which had triggered the initial traffic stop. We find it troubling that the majority opinion does not expressly address the question of whether articulable suspicion of additional unlawful activity is necessary to justify extending a traffic stop after issuance of a warning or citation for a traffic violation.

Arguably, the majority's rejection of a bright-line rule requiring a "free-to-leave" warning in this situation implies that the majority would not always require additional articulable suspicion in this circumstance. Nonetheless, we think that the majority opinion has a major logical gap which undercuts its persuasiveness for state courts trying to decide whether to establish a rule for this issue in "independent grounds" readings of their state constitutions.

Because we have this doubt as to the logical strength of the Robinette majority opinion, and because we believe there is a fairly good chance that the Washington Supreme Court would take a different tack on this issue under our state constitution, we stick with the view we stated in our article in the October '96 LED at 19-21 ("Requesting Consent to Search During a Traffic Stop -- Is It a Seizure?"). In that article, we discussed the possibility of taking one of the following two approaches on this issue:

**(1) *CLEAR-BREAK APPROACH***

Upon completion of the ticketing process, the officer expressly informs the detainee after the detainee signs the ticket that he or she is (a) free to go, and (b) need not talk further, but that the officer is concerned about certain other matters and would like to ask a question or two. Then, posing questions in a non-coercive manner, the officer asks whether there are drugs, alcohol, or weapons in the vehicle (or the like), and then proceeds to a consent request if suggested by the answers or other circumstances.  
[OR]

**(2) *IN-THE-PROCESS APPROACH***

During the process of inquiry on the infraction matter and before completion of the ticketing process, the officer expressly informs the detainee that a ticket will be issued for a particular violation (this helps preclude argument later that the consent was leveraged by the implication

that the ticket could be avoided by cooperation), and then says that the officer wishes to ask a few questions about certain other matters. Then, posing questions in a non-coercive manner, the officer asks whether there are drugs, alcohol, or weapons in the vehicle (or the like), and then proceeds to a consent request if suggested by the answers or other circumstances. Regardless of what is found in the consent search, the officer should process the traffic infraction to completion (maybe by submitting a report on the infraction to the prosecutor).

We stand by these cautious approaches in spite of Robinette. Of note on this question is the fact that in a friend-of-the-court (“amicus”) brief to the U.S. Supreme Court in Robinette the pro-law-enforcement organization, Americans for Effective Law Enforcement, made the following statement suggesting support for a “clear break” approach:

Such a warning may be good police practice, and indeed *amicus* knows that many law enforcement agencies among our constituents have routinely incorporated a warning into their Fourth Amendment consent forms that they use in the field, but it is precisely that - a *practice* and *not a constitutional imperative*. An officer who includes such a warning in his request for consent undoubtedly presents a stronger case for a finding of voluntariness in a suppression hearing, and we would not suggest that such agencies and officers do otherwise. We know, too, that instructors in many police training programs of leading universities and management institutes routinely recommend such warnings as sound practice, likely to bolster the voluntariness of a consent to search. [We ourselves] conduct law enforcement training programs at the national level and many of our own speakers have made this very point.

**LED EDITOR’S NOTE:**

On a case raising an arguably related issue, the State Supreme Court has accepted review of the Court of Appeals decision in State v. Rife, 81 Wn.App. 130 (Div. I, 1996) Aug ‘96 LED:17. The Court of Appeals had held in Rife that the conducting of a routine check for warrants during a traffic stop is not an unlawful extension of the seizure even if a few minutes delay in processing are involved. The arguments in Rife may raise the extension-of-the-time-of-seizure questions discussed in Justice Stevens’ dissent in Robinette. Rife is set for oral argument on March 25, 1997. Rife will not likely be decided by the State Supreme Court before summer.

\*\*\*\*\*

**WASHINGTON STATE SUPREME COURT**

**OFF-DUTY POLICE OFFICERS WORKING PRIVATE SECURITY BECAME “PUBLIC SERVANTS” AND “PEACE OFFICERS” PERFORMING “OFFICIAL DUTIES” WHEN THEY INVESTIGATED DRUG CRIME; OBSTRUCTING, RESISTING CONVICTIONS UPHELD**

State v. Graham, \_\_ Wn.2d \_\_ (1996)

Facts and Proceedings: (Excerpted from Supreme Court opinion)

On August 10, 1993, two off-duty Seattle police officers, Kim Bogucki and Michelle Hackett, were working as security guards for the Denny Regrade Council, an organization of businesses in a downtown area of Seattle.

The officers were employed by the Seattle businesses to patrol a 3-block area between Stewart and Lenora Streets and Third and Fourth Avenues, an area in which the officers testified there was a large volume of illegal drug transactions. The officers, who patrolled the area on bicycles, were in uniform. Both were armed.

At approximately 11 p.m., Officers Bogucki and Hackett turned a corner from Stewart Street onto Third Avenue and almost ran into the 17-year-old defendant, who was walking southbound on Third Avenue.

The officers observed that the defendant was carrying a large wad of money and was separating the \$20 bills from the \$10 and smaller bills. Officer Hackett testified that she was looking at the defendant's hands and that it looked like he had a small plastic baggie with a white substance in it in his left hand. It appeared to Officer Hackett that the baggie contained rock cocaine. Officer Bogucki testified that the defendant was within 3 feet of her and that she saw a large amount of currency in wads and a small plastic cellophane wrapper containing white rocks, which she suspected were cocaine. Both officers had extensive experience and training in narcotics operations.

When the defendant saw the officers, he appeared startled. He looked very nervous and he shoved his hands into his front pants pockets and started across the street against the "Don't Walk" signal. Believing the defendant was in possession of a controlled substance, the officers told the defendant to come back to the curb. When he did not return voluntarily, the officers brought him back to the sidewalk. The defendant still had his hands in his pockets and the officers asked him to remove his hands from his pockets, for "officer safety" reasons. He refused, so the officers slowly took his hands from his pockets. The defendant was sweating profusely, looking around, and moving his feet. He appeared very nervous. His behavior led the officers to believe that what they had seen actually was narcotics. The officers then took money and other items out of the defendant's pockets. They removed \$296, a pager, a birth certificate and other papers from his pockets and spread these items on the ground. Officer Hackett believed the defendant was about to run and asked her partner, who was kneeling on the sidewalk examining the items, to stand. She testified that the defendant asked why she needed the other officer to stand, and she stated, "Because I think you have dope on you." The defendant then ran from the officers. The defendant believed the two to be police officers and testified that he ran because he had an outstanding warrant for a traffic violation.

The officers yelled "Stop[!] police," but the defendant continued to run from the officers for about 4 blocks and was caught as he tried to get into a taxi. The

defendant resisted by pulling away and flailing, kicking and screaming at the officers. The officers felt it was necessary to shackle the defendant.

The defendant was charged with obstructing a public servant in violation of former RCW 9A.76.020(3), and with resisting arrest in violation of RCW 9A.76.040. In a juvenile court fact-finding hearing, the defendant was found guilty of both offenses by the juvenile court commissioner.

The defendant appealed and the Court of Appeals affirmed in a partially published opinion. *State v. Graham*, 80 Wn.App.137 (1995) **March '96 LED:20.**

**ISSUES AND RULINGS:** (1) Were the off-duty police officers “public servants” performing “official duties” for purposes of the obstructing statute, and “peace officers” for purposes of the resisting arrest statute? (**ANSWER:** Yes, rules a unanimous Court); (2) Did the officers have probable cause to arrest Graham? (**ANSWER:** Yes, rules a unanimous Court). **Result:** Affirmance of King County Superior Court juvenile adjudications of guilty of (1) obstructing a public servant and (2) resisting arrest.

**ANALYSIS:**

(1) “Public servant”, “peace officer” status

After discussing conflicting case law from other states on the question of whether and to what extent off-duty police officers should be deemed to be peace officers, the Supreme Court declares:

In our view, public policy is furthered by the rule that a police officer is a public servant or peace officer who has the authority to act as a police officer whenever the officer reasonably believes that a crime is committed in his or her presence, whether the officer is on duty or off duty. This is particularly true when the officer is in uniform or when the officer is otherwise identified as a police officer. Whether an off-duty officer employed as a private security guard is acting in the discharge of his official duties is a question of fact that must be resolved according to the circumstances of each case.

The defendant argues that permitting off-duty police officers employed as private security guards to perform official police duties in response to criminal behavior could result in a violation of federal and state constitutional rights protecting against unlawful search and seizure. However, if an off-duty officer conducts a search or performs an arrest pursuant to his or her authority as a police officer, the officer would be acting on behalf of the state and would, therefore, be required to comply with the constitution.

In the present case, the officers involved were in uniform and were armed. Their job as security guards was to patrol the streets, not to arrest drug offenders. Each of the officers testified that she saw the defendant holding a large wad of money and a plastic bag containing white pebbles. The officers both had extensive experience and training in recognizing narcotics. Both believed the plastic bag contained cocaine and both believed they were witnessing a crime. They identified themselves as police officers and the defendant believed them to be police officers.

When the officers stopped the defendant, they stepped out of their roles as private security guards and into their roles as police officers. They were identified as police officers and their status as police officers was known to the defendant. The officers were acting as public servants who were discharging their official duties, for purposes of the obstructing statute, and as peace officers for purposes of the resisting arrest statute, at the time they were involved with the defendant.

[Some text and citations omitted]

(2) Probable cause

The Supreme Court begins its analysis of the probable cause issue by setting forth some basics of the concept of probable cause:

Under both the federal and state constitutions, probable cause is the objective standard by which the reasonableness of an arrest is measured.

Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed.

In determining whether probable cause to arrest in a narcotics case exists, the court must consider

the totality of the facts and circumstance within the officer's knowledge at the time of the arrest. The standard of reasonableness to be applied takes into consideration the special experience and expertise of the arresting officer.

[Some citations omitted]

Then the Court engages in extensive discussion of State v. Fore, 56 Wn.App. 339 (1989) **March '90 LED:05**, a Court of Appeals case where probable cause to arrest was found in an officer's observation of exchanges of money for baggies containing green vegetable matter. The Court then concludes its analysis of the probable cause issue as follows:

In the present case, the officers involved both had extensive experience and training in dealing with narcotics. Officer Bogucki testified that she had been involved in more than 1,000 narcotics arrests during a 5-year period. Officer Hackett testified that she had made well over 1,200 felony drug arrests, with all but about 10 dealing specifically with rock cocaine. Both officers testified that they saw the defendant carrying a large amount of cash and a small packet containing what looked like rock cocaine.

The defendant's reaction when he saw the officers was to quickly conceal the contents of his hands and to hide it in his front pants pockets. He then ignored the officers' request to stop. He looked very nervous and was sweating profusely even though the temperature was cold to the officers. Furtive

gestures, evasive behavior, and flight from the police are circumstantial evidence of guilt.

The facts and circumstances within the officers' knowledge were sufficient to cause a person of reasonable caution to believe the defendant possessed an illegal drug. They therefore had probable cause to arrest the defendant and were acting lawfully when they detained him.

[Some citations omitted]

\*\*\*\*\*

### **WASHINGTON STATE COURT OF APPEALS**

**DRUG FORFEITURE: CONSTITUTIONAL EXCESSIVENESS ANALYSIS EXAMINES BOTH (1) INSTRUMENTALITY FACTORS AND (2) PROPORTIONALITY FACTORS; ALSO, HOMESTEAD QUESTION ADDRESSED, GETS PRO-GOVERNMENT RULING; AND DOUBLE JEOPARDY ISSUE CONTROLLED BY URSERY'S PRO-GOVERNMENT RULING**

Tellevik v. Real Property Known As 6717 100th St. S.W., 83 Wn. App. 366 (Div. II, 1996)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

In September 1990, police officers discovered that Chavez was growing marijuana in his residence at 6717 100<sup>th</sup> Street S.W., Tacoma. On September 24, 1990, the State charged him with one count of manufacturing marijuana. On December 21, 1990, he was convicted.

Meanwhile, on November 13, 1990, the State filed a separate civil action in which it sought to forfeit Chavez' home. It did not allege that the home had been acquired with the proceeds of criminal activity.

On December 1, 1993, the State moved for summary judgment in the forfeiture case. At a hearing held on February 25, 1994, Chavez argued that forfeiture would constitute double jeopardy within the meaning of the Fifth Amendment to the United States Constitution and Article I, § 9 of the Washington Constitution; an excessive fine within the meaning of the Eighth Amendment and Austin v. United States; and a violation of his homestead rights under Washington Constitution Article XIX, § 1, and RCW 6.13.070(1). He asserted, in the course of arguing his excessive fines claim, that the trial court was required to conduct "a proportionality-type analysis." Rejecting all his claims, the trial court granted an order of forfeiture without making a proportionality analysis.

**ISSUES AND RULINGS:** (1) Does the order of civil forfeiture following a criminal conviction based on the same illegal use of the property violate state or federal double jeopardy prohibitions? (**ANSWER:** No); (2) Does the order of civil forfeiture violate the federal or state prohibitions against "excessive fines"? (**ANSWER:** Not answered, as trial court is held to have made a mistake in not doing "proportionality analysis"); (3) Is Chavez entitled to statutory or constitutional "homestead" protection even if his property is subject to forfeiture? (**ANSWER:**

No) Result: case remanded to Pierce County Superior Court for hearings on the proportionality question under the “excessive fines” issue.

ANALYSIS:

(1) Double jeopardy (Fifth Amendment)

The Court of Appeals first notes that the United States Supreme Court held in U.S. v. Ursery, 135 L. Ed.2d 549 (1996) **Aug. '96 LED:11** that civil forfeiture of crime-facilitating property is remedial in nature, not punishment, for purposes of double jeopardy analysis. Then the Court of Appeals notes that the Washington Supreme Court has held that federal and state constitutional double jeopardy protections are identical. Therefore, the Court rejects Chavez’s challenge to use-based forfeiture on double jeopardy grounds. Eventhough Chavez had been convicted in criminal proceedings, the crime-facilitating property could still be subjected to civil forfeiture, the Court holds. **[LED EDITOR’S NOTE: The Washington State Supreme Court currently has this double jeopardy issue pending before it as a state constitutional question in State v. Catlett (No. 64266-4) set for oral argument on February 26, 1997.]**

(2) Excessive fines (Eighth Amendment)

After discussing the text of the state and federal constitutional provisions precluding “excessive fines,” the Court of Appeals discusses conflicting use-based forfeiture case law from other jurisdictions on whether the focus should be: (1) the property’s role as an instrumentality in the crime; (2) the proportionality of the sanction of forfeiture in relation to the underlying illegal activity; or (3) both. The Court of Appeals then announces as follows that it requires both instrumentality and proportionality analysis on the “excessive fines” issue:

In light of these cases, we hold that constitutional excessiveness is analyzed by examining instrumentality and proportionality factors. **Instrumentality factors** include, but are not limited to, the role the property played in the crime; the role and culpability of the property’s owner; whether the offending property can readily be separated from innocent property; and whether the use of the property was planned or fortuitous. **Proportionality factors** include, but are not limited to, the nature and value of the property; the effect of forfeiture on the owner and innocent third parties; the extent of the owner’s involvement in the crime; whether the owner’s involvement was intentional, reckless or negligent; the gravity of the type of crime, as indicated by the maximum sentence; the duration and extent of the criminal enterprise, including in a drug case the street value of the illegal substances; and the effect of the crime on the community, including costs of prosecution.

In this case, the State seeks forfeiture under RCW 69.50.505(a)(8). That statute allows forfeiture of real property on either of two grounds. First, it allows forfeiture of real property “used with the knowledge of the owner for the manufacturing, compounding, processing, delivery, importing, or exporting of any controlled substance . . .” Second, it allows forfeiture of real property “acquired in whole or in part with proceeds traceable to an exchange or series of exchanges in violation” of various drug laws. Here, the State seeks forfeiture

only under the [used with the] knowledge provision, and the Washington Supreme Court has held that forfeiture under the [used with the] knowledge provision constitutes punishment within the meaning of the Eighth Amendment. Thus, the Eighth Amendment applies here.

When Chavez was before the trial court, he expressly asked for a proportionality analysis. The trial court declined. This was error, and we remand for further proceedings to determine whether the forfeiture sought here is excessive within the meaning of the Eighth Amendment to the United States Constitution.

[Footnotes, citations omitted; bolding added]

(3) Homestead exemption (state statutes and state constitution)

After comparing the UCSA forfeiture provisions to the statutory and constitutional homestead protections, the Court of Appeals concludes that a Washington owner of property has no homestead rights which can be asserted against the government's "commandeering" of his or her property under Washington's drug forfeiture laws.

\*\*\*\*\*

**BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS**

**(1) FORFEITURE OF CRIME PROFITS UNDER CRIMINAL PROFITEERING ACT NOT PUNISHMENT UNDER "DOUBLE JEOPARDY" OR "EXCESSIVE FINES" ANALYSIS** -- In State ex. rel. Eikenberry v. Frodert, 84 Wn.App. 20 (Div. II, 1996), the Court of Appeals rejects a drug dealer's "double jeopardy" and "excessive fines" challenges to a \$250,000 civil judgment against a drug dealer under the Criminal Profiteering Act (CPA).

The Court of Appeals notes that the provision of the CPA under which the judgment was entered against Klaus Frodert was RCW 9A.82.100(4)(g). That subsection authorizes judgment against a criminal profiteer "in an amount equal to the gain a person has acquired or maintained through an offense included in the definition of criminal profiteering."

The Federal Court analogizes this section of the CPA to provisions in civil forfeiture laws for forfeiture of "proceeds." The Court then notes that the weight of case law is that forfeiture of "proceeds" under such laws is not "punishment" for purposes of constitutional analysis under either "double jeopardy" (Fifth Amendment) or "excessive fines" (Eighth Amendment) protections. Accordingly, the Court holds that the civil judgment against Frodert under subsection (4)(g) of RCW 9A.82.100 was not subject to either "double jeopardy" or "excessive fines" attack.

Result: Thurston County Superior Court civil judgment under CPA for \$250,000 against Klaus Frodert affirmed.

**(2) PREACCUSATORIAL DELAY OF APPROXIMATELY EIGHT WEEKS IN CHARGING JUVENILE UNTIL AFTER HE PASSED AGE 18 REQUIRES DISMISSAL OF CHARGES** -- In State v. Frazier, 82 Wn.App. 576 (Div. II, 1996), the Court of Appeals accepts defendant's

constitutional due process argument that his rights were violated when the prosecutor's office delayed reviewing the police file on his case for eight weeks before charging him.

Ordinarily such delay is not cause for dismissal of charges where the delay in charging involves an adult criminal. However, such delay requires greater scrutiny where, as in this case, the defendant is under age 18 when the police report is filed with the prosecutor, but over 18 when charges are eventually filed. The filing in adult court, of course, means that punishment will be more severe than if charges had been filed in juvenile court when the police report was filed. The Court of Appeals asserts that in this circumstance a good reason must be given for delay which allows adult charges to be filed.

Here, the Frazier Court asserts, the prosecutor's office failed to provide any credible justification for most of the eight-week delay. The Frazier Court cites some past cases where the State was held to have an adequate excuse for preaccusatorial delay. Some of those past cases had involved the following reasonable excuses for delay: (1) need for sequential prosecution in order to secure the testimony of a codefendant; (2) waiting for lab results because of backlog at state crime lab; (3) a 55-day delay between the taking of a confession and filing of charges during on-going, large-scale, undercover drug buying operation; (4) 1 1/2 month delay between signed confession and filing due to vacation time, compensatory time and training time; (5) police completion of investigation occurred only a few weeks before alleged offender's 18th birthday.

The Frazier case fits none of these precedents, the Court of Appeals rules.

Result: Kitsap County Superior Court order dismissing residential burglary charges affirmed.

\*\*\*\*\*

#### CLARIFICATION REGARDING MANDATORY ARREST, DISCRETIONARY ARREST, NO ARREST FOR COURT ORDER VIOLATIONS IN DOMESTIC VIOLENCE SITUATIONS

**INTRODUCTORY DISCLAIMER: As with every remark which the LED editor makes, the following discussion represents only the informal views of the editor. Per the disclaimer which appears at the end of every monthly LED, the LED Editor does not speak for the Office of the Attorney General or the Criminal Justice Training Commission, and does not purport to offer legal advice.**

#### Summary Disclaimer

At pages 20-21 below, we have set out a brief summary of the arrest rules discussed in this article. As with all summaries, it cannot be relied upon without reference to the article it summarizes. On the other hand, for purposes of context and clarity, the reader may wish to refer to the summary before reading the article. We apologize for the length of the article, but we felt that we needed to explain in this special circumstance how we reached the conclusions set out in the summary below at 20-21.

#### The Jacques Case

In Jacques v. Sharp, 83 Wn. App. 532 (Div. I, 1996) **Dec. '96 LED:18-21**, Division One of the Court of Appeals held that law enforcement officers have no authority to arrest for a violation of an order for protection issued under the Domestic Violence Protection Act (DVPA) (chapter 26.50

RCW) unless the order contains one of the following express restraints or exclusions AND the conduct complained of in the case at hand violates one of these restraints or exclusions: (1) a restraint on acts of domestic violence, (2) exclusion from certain specified premises (currently specified as entering or going onto the grounds of a "residence, workplace, or school of the petitioner, or day care or school of a child"), or (3) a restraint on contact with a victim of domestic violence or the members of the victim's household.

The DVPA order provision considered by the Court of Appeals in Jacques v. Sharp had restrained the respondent, Robert Jacques, "from entering the area known as 'Magnolia' in Seattle." Division One held that Seattle Police officers who had arrested Mr. Jacques for entering Magnolia in violation of the DVPA order provision had lacked authority to arrest him because the provision did not concern any of the above-described types of prohibitions. The only remedy for this non-criminal violation was for the petitioner to pursue contempt-of-court sanctions against Mr. Jacques, the Court held in Jacques v. Sharp.

In its description of the facts and proceedings, the Court of Appeals in Jacques v. Sharp did not address whether the DVPA order on review contained a warning that violation of the terms of the order would subject Mr. Jacques to arrest. However, we read the Jacques decision as making the wording of any such warning irrelevant on the issue of whether violation of a non-restraint/non-exclusion provision can trigger arrest. Officers attempting to follow the rule of Jacques v. Sharp will need to look beyond such a warning to the express terms of the DVPA order for protection to determine whether one of the criminalized, arrest-triggering restraint or exclusion provisions has been violated.

*Status of Jacques v. Sharp: The City of Seattle petitioned the State Supreme Court for discretionary review, and on January 7, 1997, the State Supreme Court denied review; thus, the Court of Appeals decision is final, and the case goes back to superior court for trial. We assume that the decision presently can be cited as the controlling legal standard in this state. However, it is possible that the following issue, presumably before the court in Jacques, but not explicitly addressed, could again be raised in a future case which could hypothetically make its way to any of the three divisions of the Court of Appeals or to the State Supreme Court: Does the language in RCW 26.50.060(1)(e), which allows the issuing court to "[o]rder other relief as it deems necessary for the protection of the petitioner and other family or household members....", give the issuing court authority to impose additional, criminalized, arrest-triggering restraints beyond those expressly specified in other portions of the chapter 26.50 RCW? As we explain below, we read the Court of Appeals decision in Jacques v. Sharp to say "no" to this question.*

#### The December LED Editor's Note

The December 1996 LED discussion of the Division One Court of Appeals decision in Jacques v. Sharp concludes with the following too-brief, and admittedly misleading, if not clearly erroneous, LED Editor's Note (roman numeral references corrected for clarity):

Note that only with respect to violations of restraining orders issued in relation to child abuse proceedings are officers mandated to arrest for all violations, i.e., regardless of the type of violation. With respect to all other orders referenced in subsection (2) of RCW 10.31.100, arrest is mandatory only if, in the words of subsection (2), the "person has violated the terms of the order restraining the person from acts or threats of violence or restraining the person from going onto the grounds of or entering a residence, workplace, school or day care."

In light of the ruling in Jacques, it may be helpful for officers to think in terms of three categories of DV-related court order violations: (I) MANDATORY ARREST VIOLATIONS per RCW 10.31.100(2)(a); (II) DISCRETIONARY ARREST VIOLATIONS, e.g., certain non-threatening, non-violent, contact violations per RCW 26.50.060(1)(g) (see discussion...in Jacques v. Sharp; and (III) NO ARREST VIOLATIONS, per the holding in Jacques v. Sharp...check with your legal advisor.

Clarification (we hope) of arrest authority for various order violations

We failed in our December Jacques Note to take into account the specific "mandatory arrest" provisions in chapters 10.99 and 26.50 RCW. Those mandatory arrest provisions are broader than and apparently expand upon the mandatory arrest provisions in RCW 10.31.100(2)(a), as we will explain in greater detail below. Our oversight led to our error in paragraph two of the excerpt above where we stated in our Jacques Note that there are discretionary arrest circumstances for violations of DVPA orders for protection. We now are of the view that there are no discretionary arrest circumstances for violations of DVPA orders. This month, we revisit the subject matter of the above-quoted December 1996 LED Editor's remarks to correct and clarify our views of the law in this area.

Upon our further review of all of the pertinent legislation in Titles 10 and 26 RCW, we have concluded that, only if we stretch the definition of "domestic violence" to include violations of civil anti-harassment orders, can we continue to say that there are three different categories of arrest directives in that legislation-- i.e. [I] no arrest, [II] discretionary arrest, and [III] mandatory arrest. The only discretionary arrest directive for court order violations is for what we call "quasi-domestic violence" court orders, those issued under chapter 10.14 RCW, the statute authorizing civil anti-harassment orders.

In the remainder of this month's note on this subject, we will try to exhaustively go through all of the pertinent statutory provisions to address what we characterize as the three types of arrest directives (we will not address the provisions in the pertinent statutes granting civil and criminal immunity to peace officers who make good faith arrests under the statutes):

I. NO ARREST FOR DVPA "ORDER FOR PROTECTION" VIOLATIONS PER JACQUES

Under the holding of Jacques v. Sharp, no arrest is permitted for violations of court orders issued under chapter 26.50 RCW unless the person violates either: "restraint provisions" of DVPA orders, or the provisions of such orders which exclude the person "from a residence, workplace, school, or day care." The "restraint" provisions would be issued: under the post-hearing order authorization at RCW 26.50.060(1)(a) [*restraint "from committing acts of domestic violence"*] and (g) [*restraint "from having any contact with the victim of domestic violence or the victim's children or members of the victim's household"*]; or under the ex parte temporary order authorization at RCW 26.50.070(1)(a) [*restraint "from committing acts of domestic violence"*], (c) [*restraint "from interfering with the other's custody of the minor children or from removing the children from the jurisdiction of the court"*], or (d) [*restraint "from having any contact with the victim of domestic violence or the victim's children or members of the victim's household"*].

Again, under Jacques v. Sharp, where the person has violated a provision that is neither a "restraint" provision nor one of the listed premises-exclusion provisions, the only means of obtaining sanctions against the violator is through the contempt-of-court process. Thus, under Jacques v. Sharp, arrest is not authorized against the person who violates a DVPA order for protection regarding: the place of residence for minor children (060(1)(c)); participation in batterers' treatment (060(1)(d)); "other relief [the court] ...deems necessary for the protection of the petitioner and other family or household members" (060(1)(e) [**note: here we see room for debate as noted above in our discussion of the status of this case; maybe the State Supreme Court will hold that the "other relief" provision allows a court issuing a DVPA order to craft additional criminalized "restraint" provisions**]) ; court costs and fees assessments (060(1)(f)); electronic monitoring (060(1)(h)); "possession and use of personal effects" (060(1)(j)); or "use of a vehicle" (060(1)(k)).

The same "no arrest" bar would apply to DVPA orders for protection issued per RCW 26.50.025, which provides that "any order available under [chapter 26.50 RCW, the DVPA] may be issued in actions under chapter 26.09 [the "dissolution" chapter], 26.10 [the "child custody" chapter], or 26.26 RCW [the "parentage" chapter].

Similar "no arrest" situations exist for violations of "restraining" orders issued under chapters 26.09, 26.10, and 26.26 RCW. We will discuss those situations in Part III below in the context of discussing mandatory arrest under those chapters.

## II. **QUASI-DOMESTIC VIOLENCE-- DISCRETIONARY ARREST FOR VIOLATIONS OF CIVIL ANTI-HARASSMENT ORDER ISSUED UNDER CHAPTER 10.14 RCW**

RCW 10.31.100(8) provides:

A police officer **may** arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to believe that an order has been issued under chapter 10.14 RCW and the person has violated the terms of that order.

RCW 10.14.120 and 10.14.170 clarify that any violation of a civil anti-harassment order is criminal (a gross misdemeanor under RCW 10.14.170), but only if the person knew of the order. Because nothing in chapter 10.14 RCW overrides the discretionary "may arrest" language of RCW 10.31.100(8), it is clear that officers have discretionary authority, but are not mandated, to arrest for knowing violations of civil anti-harassment orders issued under chapter 10.14 RCW. **Note: we refer to these types of violations as quasi-domestic violence because violations of civil anti-harassment orders are not included in the definition of "domestic violence" crimes in chapter 10.99 RCW.**

## III. **MANDATORY ARREST FOR VIOLATIONS OF ORDERS ISSUED UNDER CHAPTERS 10.99, 26.09, 26.10, 26.44 AND 26.50 RCW.**

RCW 10.31.100(2)(a) mandates arrest for court order violations where an officer has probable cause to believe that:

An order has been issued of which the person has knowledge under RCW 10.99.040(2), 10.99.050, 26.09.050, 26.09.060, 26.10.040, 26.10.115, 26.44.063, chapter 26.26 RCW, or chapter 26.50 RCW **restraining the person and the**

**person has violated the order restraining the person from acts or threats of violence or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or, in the case of an order issued under RCW 26.44.063, imposing any other restrictions or conditions upon that person.** [Emphasis added by LED Editor]

If this subsection in RCW 10.31.100 were the only provision in the RCW's mandating arrest for the various court order violations, then there would be a gap in both chapter 10.99 RCW and chapter 26.50 RCW between what, on the one hand, is criminal, and what, on the other hand, triggers mandatory arrest. In other words, there would be some discretionary arrest situations under those statutes (which would raise thorny "misdemeanor presence" arrest rule questions). However, both chapter 10.99 RCW and chapter 26.50 RCW contain separate and broader mandatory arrest authority which eliminates any possible gap by mandating arrest for all criminal court order violations.

As we note above, our failure at the time that we were writing our December 1996 LED Editor's Note on Jacques: [A] to take into account the special and broader mandatory arrest provisions in chapters 10.99 and 26.50; and [B] to take into account that the mandatory arrest provision of RCW 10.31.100(2)(a) totally encompasses what are criminal violations of restraining orders issued under chapters 26.09, 26.10, 26.26, and 26.44 RCW; resulted in our Jacques Note's erroneous suggestion that there are discretionary arrest situations outside chapter 10.14 RCW (see part II above) when there in fact are not.

We will now turn to the various arrest provisions and related provisions in chapters 10.99, 26.09, 26.10, 26.26, 26.44, and 26.50 RCW:

**RCW 10.99.055 (criminal domestic violence "no contact" orders issued during the pendency of or following a DV trial)**

This section provides in its entirety:

A peace officer in this state shall enforce an order issued by any court in this state restricting a defendant's ability to have contact with a victim by arresting and taking into custody, pending release on bail, personal recognizance or court order, when the officer has probable cause to believe that the defendant has violated the terms of that order.

This mandate for arrest is broader than, and apparently overrides, the mandatory arrest language of RCW 10.31.100(2)(a) set forth above. Note also that a knowing violation of **any** of the "no contact" terms of a "no contact" order issued under chapter 10.99 RCW is a gross misdemeanor and triggers mandatory arrest (note that certain violations of court orders under this section, as well as sections in other chapters discussed in this article constitute felonies, but this fact does not affect our analysis, so we will not further address felony court order violations in this article).

The Jacques case does not affect arrest authority for violations of chapter 10.99 "no contact" orders, because all "no contact" violations are criminal and all such violations trigger mandatory arrest. In other words, there are not any "no arrest" situations for knowing violations of chapter 10.99 "no contact" orders.

## **RCW 26.09.300 (dissolution act "restraining" orders)**

Subsection (4) of this section provides:

A peace officer shall arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to believe that:

- (a) A restraining order has been issued under this chapter;
- (b) The respondent or person to be restrained knows of the order; and
- (c) **The person to be arrested has violated the terms of the order restraining the person from acts or threats of violence or restraining the person from going onto the grounds of or entering the residence, workplace, school, or day care of another.**

The text of subsection (4)(c) on mandatory arrest for violation of a dissolution act restraining order mirrors the provision of subsection (1) (not set out here), making the knowing violation of such a restraining order provision a misdemeanor. Thus, all criminal violations of such orders trigger mandatory arrest. Also, the mandate for arrest for restraining order violations in subsection (4)(c) of 26.09.300 is no broader than the arrest mandate of RCW 10.31.100(2)(a).

All other violations of "restraining" orders issued under chapter 26.09 RCW are non-criminal, and hence are subject to sanctions only through the petitioner's use of the contempt-of-court process.

## **RCW 26.10.220 ("restraining" orders in child custody actions) and RCW 26.26.138 ("restraining" orders in parentage actions)**

These two statutes contain effectively identical provisions to those in the dissolution act provision, RCW 26.09.300, discussed immediately above. Thus, identical standards for criminality/non-criminality of violations, and mandatory arrest vs. contempt-of-court process apply to these types of restraining orders as well.

## **RCW 26.44.063(8), 26.44.067, 10.31.100(2)(a) ("restraining" orders and "preliminary injunctions" in child abuse and dependent adult actions)**

Reading the three cited sections together, it is clear that **any** knowing violation of an order issued in a child abuse action under RCW 26.44.063 is a misdemeanor, and that arrest is mandatory for any violation. Chapter 26.44 RCW does not contain its own arrest mandate, but this does not leave a discretionary arrest gap. That is because RCW 10.31.100(2)(a) specifically mandates arrest for **any** violation of an order issued under RCW 26.44.063.

## **RCW 26.50.110 (DVPA "orders for protection")**

Subsection (2) of this section provides in its first sentence:

A peace officer shall arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order issued under this chapter that restrains the person or excludes the person from a residence, workplace, school, or day care, if the person restrained knows of the order.

This mandatory arrest provision mirrors the provision of subsection (1) of section 110 making the knowing violation of the order a gross misdemeanor. Thus, all criminal violations of DVPA orders trigger mandatory arrest. This mandate for arrest is broader than, and apparently overrides, the limiting language in the mandatory arrest provision of RCW 10.31.100(2)(a).

Under the Jacques v. Sharp decision noted above, a "restraining" provision, the violation of which is criminal and triggers arrest, is only a provision authorized by RCW 26.50.060(1)(a) or (g) or by RCW 26.50.070(1)(a), (c), or (d). Additional criminal prohibitions, the violation of which also trigger arrest, are found in the premises-exclusion provisions of RCW 26.50.060(1)(b) and RCW 26.50.070(1)(b). See discussion above in Part I at page \_\_\_ addressing "no arrest" situations for DVPA orders. As the Court of Appeals held in Jacques v. Sharp, all other violations of DVPA orders for protection are enforceable only through the contempt-of-court process.

## SUMMARY OF RULES OF ARREST DESCRIBED IN THIS ARTICLE

### **I. No arrest permitted**

**Chapter 26.50-- Violation of DVPA order for protection restriction which is not a "restraint" or "exclusion" restriction per Jacques v. Sharp.**

**Chapters 26.09, 26.10, 26.26-- Violation of restraining order provision (in dissolution, child custody, or parentage proceeding) which is not an act or threat of violence, and is not violation of provision restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care.**

### **II. Discretionary arrest**

**Chapter 10.14-- Violation of civil anti-harassment order provision.**

### **III. Mandatory arrest**

**Chapter 10.99-- Violation of any "no contact" provision of a "no contact" order issued pre-trial or post-conviction in a criminal proceeding under of Domestic Violence Act.**

**Chapter 26.44-- Violation of any provision of a temporary restraining order or preliminary injunction issued in a proceeding under the act on "abuse of children and adult dependent persons".**

**Chapters 26.09, 26.10, 26.26-- Violation of restraining order provision (in dissolution, child custody, or parentage proceeding) which is an act or threat of violence, or is violation of provision restraining the person from going onto the grounds of or entering the residence, workplace, school, or day care of another.**

**Chapter 26.50-- Violation of either: [I] the provisions of a DVPA order for protection issued under RCW 26.50.060 following a hearing that [A] excludes the person from going onto the grounds of or entering a residence, workplace, school, or day care; or [B] that restrains the person from committing acts of domestic violence, or from having any contact with the victim of domestic violence; or [II] the provisions of an ex parte temporary**

**DVPA order issued under RCW 26.50.070 that [A] excludes the person from going onto the grounds of or entering a residence, workplace, school, or day care; or [B] that restrains the person from committing acts of domestic violence, or from committing acts of domestic violence, or from interfering with the other's custody of the minor children or from removing the children from the jurisdiction of the court, or from having any contact with the victim of domestic violence or the victim's children or members of the victim's household.**

## CONCLUSION

We have done our best in this article to present complex issues in a straightforward, though thorough, way. However, we recognize that this is a confusing area of law, and that further clarification will be necessary, both in future LED's and in advice individually given by law enforcement agency legal advisors and trainers. We have been consulting police legal advisors and others regarding this article, and we expect to provide further clarification in the March 1997 LED. In addition, our guess is that, regardless of the outcome of Jacques v. Sharp in the State Supreme Court, clarifying legislation will eventually be necessary to better coordinate all of the various statutory provisions discussed in this article.

Meanwhile, we close with the following summarizing cautionary note: THE MERE FACT THAT A COURT ORDER SAYS: (1) THAT A RESPONDENT IS "RESTRAINED" OR (2) THAT VIOLATION IS A CRIME AND WILL SUBJECT THE VIOLATOR TO ARREST, DOES NOT NECESSARILY MAKE VIOLATION OF THE ORDER A CRIME AND DOES NOT NECESSARILY AUTHORIZE ARREST...consult the "summary of rules" above and check with the legal advisor for your agency...

\*\*\*\*\*

The Law Enforcement Digest is edited by Assistant Attorney General, John Wasberg, Office of the Attorney General. Editorial comment and analysis of statutes and court decisions express the thinking of the writer and do not necessarily reflect the opinion of the Office of the Attorney General or the Washington State Criminal Justice Training Commission. The LED is published as a research source only and does not purport to furnish legal advice.

\*\*\*\*\*

**(4) IMPLIED CONSENT-- OBSESSIVE COMPULSIVE DISORDER NO DEFENSE TO LICENSE REVOCATION FOR REFUSAL TO TAKE BAC TEST--** In Medcalf v. DOL, 83 Wn. App. 8 (Div. II, 1996), the Court of Appeals rejects a driver's claim that his condition of obsessive compulsive disorder (OCD) provided him with a defense to license revocation for his refusal to take a breath test following his lawful arrest for DUI.

The Court of Appeals explains that past cases have held that a **mental** condition, whether voluntary or nonvoluntary, is not a defense for refusal to take a breath test. Purely mental conditions do not provide a defense because **the arresting officer must have an objective basis by which to ascertain whether the debilitating condition asserted actually exists.** The Court then notes:

Because there was no **physical** evidence that Medcalf was unable to take the breath test, Medcalf's failure to respond to Officer Giuntoli's instructions on taking the test was properly deemed a refusal to take the test. The State correctly points out that Medcalf's failure to give a response while he sat at the breath machine constituted a refusal because (1) he was given the opportunity to respond, and (2) OCD, a **mental** condition, was irrelevant to his capacity to refuse the test. [Bolding added by LED Ed.]

Result: Affirmance of Kitsap County Superior Court order which had affirmed DOL's revocation of Thomas R. Medcalf's driver's license.

**(5) HARASSMENT: VICTIM MAY HAVE REASONABLE FEAR OF BEING HARMED IN MANNER OTHER THAN THAT PRECISELY DESCRIBED BY PERPETRATOR--** In State v. Savaria, 82 Wn.App. 832 (Div. I, 1996), the Court of Appeals holds that, under the criminal harassment statute (chapter 9A.36 RCW), a victim's reasonable fear of harm need not be that the precise threat made by the perpetrator will be carried out.

According to the testimony of the alleged victim, she had been Savaria's girlfriend, and Savaria was angry over her expected role in his upcoming prosecution. While he was awaiting prosecution for assaulting her and for violation of a no-contact order she had obtained, Savaria allegedly threatened to kill her with a gun. At trial, the would-be victim testified that when she heard this threat she was unsure that Savaria would kill her, but she was definitely afraid that he would hurt in some manner, based on her knowledge of his instability.

The Court of Appeals looks at the language in the harassment statute which requires that any threat otherwise covered by the law "places the person threatened in reasonable fear that the threat will be carried out." (Emphasis added by LED Ed.) Recognizing that the statute's language could be read to require that the victim's fear must be that he or she will come to the precise harm or suffer the precise manner of attack described in the perpetrator's words, the Court of Appeals rejects such an interpretation as illogical.

Instead, the Court of Appeals holds that the threat violates the statute so long as it instills a reasonable fear in the target of the threat that any of the statutorily proscribed harms will occur. Thus, a threat to kill which reasonably instills any of the following fears will be covered:

...fear of bodily injury in the future to the person threatened or to any other person...

...fear that physical damage will be caused to the property of any person other than the threatener...

...fear that the person threatened or any other person will be subjected to physical confinement or restraint...

...fear that the threatener will substantially harm the person threatened or another with respect to his or her physical or mental health or safety...

The Court of Appeals concludes that the victim's claimed fear regarding the threat by Savaria was sufficient to make a case of harassment under RCW 9A.46.020.

Result: King County Superior Court convictions for harassment and intimidating a witness reversed on grounds not addressed here (admissibility of new evidence and jury instruction issues); case remanded for retrial.

**(6) MULTIPLE PERSONALITY DISORDER DEFENSE RE ABSENCE OF NECESSARY MENTAL STATE DOES NOT APPLY WHERE ALTER PERSONALITY HAD REQUISITE MENTAL STATE--** In State v. Jones, 82 Wn. App. 871 (Div. III, 1996), the Court of Appeals for Division III rejects defendant/appellant's claim that the evidence did not establish the required mental state for indecent liberties (defendant committed the assault against a three-year old foster daughter).

In a non-jury trial, defendant Cheryl Jones had presented the testimony of an expert witness who proved to the satisfaction of the trial court that: (1) Jones suffered from multiple personality disorder (MPD); (2) she committed her act of sexual contact on the victim at a time when she was in an alter personality known as "Cat"; (3) her core personality did not know what "Cat" was doing; but (4) her alter personality of "Cat" knew what she was doing when the events occurred. The trial court then held that these facts supported a holding that Jones acted knowingly, and therefore that she was guilty of indecent liberties.

The Court of Appeals affirms the trial court conviction, implying that, so long as the alter personality has the requisite mental state, then a defendant suffering from MPD is deemed to have the altered personality's mental state, regardless of whether the core personality is aware of the conduct in question.

Result: Chelan County Superior Court conviction for indecent liberties affirmed.

**(7) LIES TOLD TO POLICE OFFICER ARE NOT "OBSTRUCTING" BUT ARE "PROVIDING A FALSE OR MISLEADING MATERIAL STATEMENT TO A PUBLIC SERVANT" --** In State v. Williamson, 84 Wn.App 37 (Div. II, 1996), the Court of Appeals holds that the State's charging document was inadequate in charging defendant under former RCW 9A.76.0201(3) with "hinder[ing], delay[ing], or obstruct[ing] a public servant. Along the way, the Court of Appeals indicates that the only charge authorized under current Title 9A RCW for lying to a law enforcement officer is that of "providing a false or misleading material statement to a public servant" under RCW 9A.76.175.

Defendant Williamson had been arrested as a suspected minor in possession of a firearm. He gave a false name to the arresting officer, and police officers then spent over half an hour determining defendant's true name. Defendant was charged with being a minor in possession

of a firearm and with obstructing a public servant under the former RCW 9A.76.020 (the charging document declared that Williamson did “hinder, delay or obstruct” a public servant).

The Court of Appeals finds the wording of the “obstructing” charge to be defective based on case law on the former obstructing statute. The Williamson Court interprets the “obstructing” statute case law as holding that only conduct, not mere words, can “hinder, delay or obstruct” a public servant; thus, one who lies to a public servant does not “hinder, delay or obstruct” the public servant, the Court declares. Accordingly, the Court of Appeals holds that the charging document on Williamson’s obstructing charge was fatally defective.

Result: Pierce County Superior Court conviction for obstructing a public servant reversed; conviction by same court for minor in possession of a firearm confirmed.

### **LED EDITOR’S COMMENT:**

**Assuming that the Williamson Court’s analysis is correct, then under current RCW provisions, the only appropriate charge for lying to a law enforcement officer is under RCW 9A.76.175 -- “providing a false or misleading material statement to a public servant”. Washington law enforcement officers and prosecutors would be well-advised to make that assumption.**

**(8) FORCIBLY ENTERING WOULD-BE RAPE VICTIM’S CAR NOT “FELONIOUS” ENTRY OF VEHICLE** -- In State v. Maganai, 83 Wn.App. 735 (Div. II, 1996), the Court of Appeals rules that, where defendant forced his way into a woman’s car and pulled her out in an attempt to rape her, defendant could not be convicted of first degree rape because he did not “feloniously” enter her vehicle.

The pertinent portion of the Court of Appeals analysis is as follows:

Maganai contends that his actions did not constitute the offense of first degree rape because he did not *feloniously* enter DT’s automobile. The State asks us to interpret “felonious entry” as including any criminal entry, whether a felony or misdemeanor offense.

RCW 9A.44.040(1)(d) provides: “(1) A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory: . . . (d) *Feloniously* enters into the building or vehicle where the victim is situated.” (Emphasis added.) Two statutes penalize the wrongful entry into a vehicle: RCW 9A.52.095, vehicle prowling in the first degree (entry into a motor home); and RCW 9A.52.100, vehicle prowling in the second degree (entry into a motor vehicle other than a motor home). Vehicle prowling in the first degree is punishable as a statutory felony. Second degree vehicle prowling is punishable as a gross misdemeanor.

According to the dictionary, the term “felonious,” as used in RCW 9A.44.040(1)(d), is ambiguous. It can have both the specific meaning offered by Maganai, (1) “of, relating to, or having the quality of a felony,” or (2) the more general meaning, “being against the law,” forwarded by the State. WEBSTER’S THIRD NEW INT’L DICTIONARY 836 (1966).

We applied the narrower interpretation in *State v. Thompson*, 71 Wn.App. 634 (1993). There we said that a “felonious entry” is an entry that is “burglarous” as opposed to “lawful or trespassory.” The *Thompson* case involved a charge of first degree rape. The victim invited Thompson to spend the night in her home, but she did not invite him into her bedroom. Later that evening, Thompson forcibly entered the victim’s bedroom and forced her to have sex with him. On appeal, Thompson argued that his entry into the bedroom was not felonious and, therefore, could not support his first degree rape conviction.

Looking to legislative intent behind the burglary statute and the definition of the term “building”, this court found that the unauthorized entry into a room in a single occupancy residence was not a burglary under Washington law and, therefore, could not serve as the predicate offense for a first degree rape conviction. Moreover, we noted that, even without the legislative history, application of the rule of lenity would require the ambiguity in the statute to be resolved in favor of the defendant.

In the present case, Maganai entered DT’s Jeep, a motor vehicle, during the attempted rape. Although the Legislature has defined the burglarious entry into a motor *home* as a felony, it chose to define a second degree car prowl as only a misdemeanor. Therefore, Maganai did not commit a felony when he broke into DT’s car.

[Some citations omitted]

Result: Pierce County Superior Court conviction for first degree attempted rape vacated. Case remanded for resentencing for second degree attempted rape.

\*\*\*\*\*

**PC FOR JUVY’S ARREST FOUND IN CUMULATIVE KNOWLEDGE OF ALL INVESTIGATING OFFICERS; ALSO, MIRANDA WAIVER UPHELD DESPITE “ADH” DISORDER**

State v. Harrell, 83 Wn. App. 393 (Div. I, 1996)

Facts:

Fire Investigator Joy Veranth was investigating an incident involving the exploding of a molotov cocktail when she heard over the radio that one of her juvenile suspects was being sought by a police officer, Jeffrey R. Dixon, for investigation of domestic violence. Fire Investigator Veranth called Police Officer Dixon and asked him to hold the suspect for her if he made contact. Shortly thereafter, Dixon did contact one of the two juvenile suspects, Jason V. Harrell.

The Court of Appeals describes what happened next:

As he usually does for officer safety purposes, Dixon patted Harrell down prior to placing him in the back of his patrol car to wait for Veranth. The officer had

noticed that the right pocket of Harrell's jacket, which Harrell was now wearing, bulged in a way that seemed unusual and, when Dixon's hand came in contact with it, felt what he described as a small, hard, long and oval object among a number of other items in the pocket. His immediate concern was that it was a weapon, possibly the barrel of a small gun. When Dixon removed the item from Harrell's pocket, it appeared to him to be a homemade bomb several inches long wrapped in black electrical tape with something that resembled a firecracker fuse extending from one end. After patting Harrell down, Dixon handcuffed him because, based on their prior contacts, he felt uncomfortable placing Harrell in the back of the patrol car without handcuffs. Dixon testified that he did not subjectively intend to place Harrell under arrest at that time but intended only to detain him until Veranth arrived.

When Veranth arrived, Harrell was transferred from the back of Dixon's patrol car to the front seat of Veranth's car where Veranth questioned him. Veranth did not remove the handcuffs because she does not carry a weapon. She asked Harrell whether he was comfortable and whether he had ever been advised of his rights before. He responded affirmatively to both questions. Veranth read Harrell his Miranda rights from a standard card, explaining each one as she read. She noticed that he followed the words on the card with his eyes as she read. Veranth testified that Harrell indicated he understood his rights and that he was very forthcoming in describing the fire incident. At no time did he request a lawyer or indicate that he did not want to speak with her. After he told her what had happened once, Veranth asked him if she could record his statement. He answered without any hesitation that she could. He then repeated what he had told her for the tape recorder. After Harrell completed his statement, Dixon removed the handcuffs.

Proceedings: (Excerpted from Court of Appeals opinion)

Harrell was charged with first degree reckless burning, possession of an incendiary device, and possession of an explosive device. At the fact finding hearing, Harrell moved to suppress both his custodial statements and the evidence seized as a result of the search. The trial court found that both the search and the custodial interrogation were lawful and denied both motions. The court found Harrell guilty of possession of an incendiary device and of an explosive device but dismissed the charge of first degree reckless burning.

ISSUES AND RULINGS: (1) Did Officer Dixon have probable cause to arrest Harrell, thus justifying the search of his pocket? (ANSWER: Yes); (2) Did Harrell give a valid waiver of his Miranda rights? (ANSWER: Yes) Result: Affirmance of King County Superior Court adjudications of Harrell (as juvenile) for possession of an incendiary device and possession of an explosive device.

ANALYSIS:

(1) Probable cause to arrest/search incident

The Court of Appeals explains as follows why it upholds the search of Harrell's pocket as a lawful search incident to arrest:

Searches and seizures must be supported by probable cause whether or not a formal arrest has been made. . . . [W]hen officers conduct a joint investigation, the cumulative information possessed by all the officers may be considered in assessing whether the police had probable cause to arrest. For that reason, we need not limit our examination of the facts to those within the personal or subjective knowledge of the arresting officer. As long as probable cause exists at the time of the search, the search may be considered a search incident to arrest even if it occurs shortly before an arrest. The need to remove weapons which might be used to assault an officer and prevent destruction of evidence justifies a search incident to arrest.

Here, three witnesses had identified Harrell to Investigator Veranth as one of the two boys in the immediate vicinity of the explosion when it occurred. Two saw Harrell light something and one saw him throw something just moments before the explosion. The witnesses had also told Veranth that Harrell and his companion hurried out of the park immediately after the explosion. Veranth heard over the radio that Dixon was responding to a domestic violence call involving Richmond, who had been identified by the same witnesses as the second boy in the park. She then told Dixon of the arson investigation and asked him to hold either Harrell or Richmond in connection with that investigation if he found them.

Under these facts, Officer Dixon had probable cause to believe that Harrell had committed the offense of possession of an incendiary device. Although Officer Dixon did not subjectively consider Harrell under arrest when he detained him, the search was nevertheless a valid search incident to arrest because probable cause to arrest Harrell for that offense existed at the time he conducted the search.

[Some citations omitted]

## (2) Miranda waiver by juvenile

The Court of Appeals begins its analysis of the Miranda waiver issue as follows:

Harrell next argues that the trial court erred in admitting his statement to the police. He asserts that he lacks the ability to understand and to knowingly and intelligently waive his Miranda rights because he suffers from attention deficit hyperactivity disorder (ADHD) and a learning disability. In determining whether a juvenile's confession is voluntary, a court must consider the totality of the circumstances, including the juvenile's age, experience, education, background, intelligence and capacity to understand the warnings given, the nature of those rights and the consequence of waiving those rights. In Dutil v. State, 93 Wn.2d 84 (1980), the Supreme Court explained:

Studies which the petitioners have called to our attention indicate that juveniles often do not understand the full import of the exercise or waiver of their constitutional rights. This is not surprising. Indeed, we would be surprised if many adults can be said to have such comprehension. As

this court held in State v. Aiken, 72 Wn.2d 306 (1967), the test is whether a person knew he had the right to remain silent, and that anything he said could be used against him in a court of law, not whether he understood the precise legal effect of his admissions. If a juvenile understands that he has a right, after he is told that he has that right, and that his statements can be used against him in a court, the constitutional requirement is met.

The fact that a juvenile receives low scores on aptitude tests is a factor to be considered but does not necessarily render a confession inadmissible.

[Some citations omitted]

The Court then goes on to explain why it rejects Harrell's claim that his attention deficit hyperactivity disorder (ADHD) prevented him from understanding his rights, and his claim that the officers were unduly coercive in their methods. Not only was the ADHD evidence not compelling, but Harrell's solid performance as a witness for himself in trial court was inconsistent with his claim. As to the claim of undue coercion, the Court of Appeals finds no support for the claim; the fact that Harrell was in handcuffs during the questioning did not compel the conclusion that he was coerced into waiving his rights, the Court concludes.

**DRUG DEALER WHO CLAIMED TO BE ACTING AS A POLICE INFORMANT WHEN HE DELIVERED COKE TO THIRD PARTY LOSES ARGUMENT THAT HE WAS ENTITLED TO IMMUNITY UNDER RCW 69.50.506(C); CI AGREEMENT CONTRADICTS THEORY**

State v. McReynolds, 80 Wn. App. 894 (Div. III, 1996)

Facts: (Excerpted from Court of Appeals opinion)

In May 1992 Mr. McReynolds walked into the Zillah police station and volunteered his services to the LEAD Task Force. He told Detectives Ron Shepard and Mike Everts he wanted to help rid the Buena and Toppenish areas of drug activity by working for them as a confidential informant. They questioned him regarding the whereabouts of several fugitives wanted in connection with illegal drug transactions and arranged to meet with him again a week or two later. In the interim, Mr. McReynolds called the detectives with information about two of the fugitives.

At Mr. McReynolds' second meeting with Detectives Shepard and Everts, on May 26, they recruited him as an informant and had him read and sign two documents: (1) a consent to have his conversations recorded and (2) an admonishment advising him he is not a police officer, is not to violate any law to gather information, and shall not possess, sell or deliver drugs except as specifically directed by a LEAD Task Force detective. The detectives directed Mr. McReynolds to look for drug sources and gather information, but warned him not to use or sell drugs, or become involved in any drug deals. Mr. McReynolds told them he knew a cocaine dealer named Sandy Clark, and he would try to recruit her as an informant or discover her drug source.

During approximately the same period, Stan Rolison also approached the task force. She explained he had a drug problem and had unsuccessfully tried

everything to beat his addiction; he now wanted to burn his drug connection bridges and help get the drug dealers off the streets. The task force signed him on as a confidential informant, and Detectives Shepard and Everts worked with him. Mr. Rolison identified Mr. McReynolds (known to him only as Randy) as a possible drug dealer in Buena.

Detectives Shepard and Everts decided not to have Mr. McReynolds make any buys for them; instead, they set up a sting operation targeting Mr. McReynolds. On June 2 and 3, 1992 Mr. Rolison contacted Mr. McReynolds under the direction and supervision of the task force, and took delivery of cocaine four times.

Proceedings:

McReynolds was charged with four counts of delivering cocaine based on the four occasions when he allegedly sold cocaine to Rolison. The trial judge rejected McReynolds' proposed jury instruction which read:

Delivery of a controlled substance is lawful or excused if when the delivery occurs, the Defendant believes that he is acting as an agent of any authorized state, county, or municipal officer, engaged in the lawful performance of his duties.

The jury convicted McReynolds on one of the counts.

ISSUE AND RULING: Was McReynolds entitled to his proposed jury instruction on statutory immunity? (ANSWER: No) Result: Yakima County Superior Court conviction for delivery of cocaine affirmed.

STATUTE AT ISSUE:

RCW 69.50.506(c) provides:

No liability is imposed by this chapter upon any authorized state, county or municipal officer, engaged in the lawful performance of his duties.

ANALYSIS: (Excerpted from Court of Appeals opinion)

RCW 69.50.401 makes delivery of a controlled substance unlawful, except as authorized by statute. RCW 69.50.506(c) is a statutory exception for authorized state, county or municipal officers engaged in the lawful performance of their duties. To invoke the statutory immunity of RCW 69.50.506(c), Mr. McReynolds had to establish (1) he was an authorized officer (2) engaged in the lawful performance of his duties. He could not do that. Mr. McReynolds acknowledged in writing his understanding that he was not a police officer, did not have any legal authority, did not have authority to violate any criminal law to gather information or provide confidential informant services, and could not engage in any cocaine transactions except under specific direction by a LEAD Task Force detective.

Mr. McReynolds concedes there is no direct authority supporting his argument that a confidential informant or agent of the police should be covered by the statute, but asserts the argument is supported by analogy. He contends that if a confidential

informant or agent of the police acting at the direction of the police must comply with constitutional safeguards when conducting a search, . . . then in appropriate circumstances they should also enjoy police immunity granted by statutes such as RCW 69.50.506(c).

Mr. McReynolds' analogy is flawed. Mr. McReynolds. . . was not acting at the direction of the police when he delivered cocaine. He was given explicit written and verbal warnings not to possess, sell or deliver drugs except as specifically directed by a LEAD Task Force detective; he ignored those warnings at his own risk.

It is not necessary to address whether a confidential informant is entitled to a privileged activity instruction based on RCW 69.50.506(c), because Mr. McReynolds was not prosecuted for a drug transaction in which he was acting at the direction of the police. Mr. McReynolds' proposed instruction based on RCW 69.50.506(c) was not warranted by the evidence, nor, based as it is upon his subjective belief, is it an accurate statement of the law.

[Some citations omitted]

**(3) BB GUN THREAT WAS THREAT TO USE "DEADLY WEAPON" SUPPORTING CONVICTION FOR ATTEMPTED FIRST DEGREE KIDNAPPING; VICTIM'S STATEMENT TO POLICE 20 MINUTES AFTER ATTEMPTED KIDNAPPING WAS "EXCITED UTTERANCE"--** In State v. Majors, 82 Wn. App. 843 (Div. I, 1996), the Court of Appeals rejects defendant's arguments: (1) that the evidence against him did not support his conviction for attempted first degree kidnapping; and (2) that certain hearsay statements to the police by the victim should not have been admitted as "excited utterances" in the trial.

(1) Sufficiency of the evidence of a threat to use deadly force

The facts relating to the sufficiency of the evidence issue are as follows: Defendant had slowed his car alongside the 15-year-old female victim, a stranger to him, who was walking alongside the road. Defendant (who had previously confided to a girlfriend, now ex-girlfriend, his plan to kidnap and sexually assault a young woman) pointed a BB gun at the victim and said: "[t]his is a real ...gun. Get in the car now or I'll blow your head off." (At trial the victim testified that she thought at the time that the gun might be a BB gun because it resembled one owned by her brother and because the bore looked too small to shoot bullets.) Before defendant could do anything further, another car approached from behind defendant's car, and defendant drove away.

In its analysis of the sufficiency of the evidence issue, the Court of Appeals implies that, if defendant had successfully completed a kidnapping, he could not have been convicted of the completed crime of first degree kidnapping because the weapon he was using to make his threats was not actually a deadly weapon. However, he could be convicted of **attempted** first degree kidnapping, the Court holds, because his actions constituted a "substantial step" toward using a deadly weapon to achieve abduction through threats.

(2) "Excited utterance"

The facts relating to the excited utterance issue were as follows: Immediately after the defendant drove away, the victim told her story to the couple in the car who had inadvertently foiled the attack. The couple then took the victim to the nearby home of her aunt, and the victim told her aunt about the incident. Then the victim called 911 from her aunt's home and reported the incident.

Next, approximately twenty minutes after the incident had occurred, an officer arrived at the aunt's home and took a report from the victim. The officer who took the report later testified that the victim was "nervous, shaking a little bit, and her speech was rapid." The Court of Appeals holds that under these facts the statement given to the officer qualified as an excited utterance. In significant part, the Court's analysis is as follows:

Over defense objection, the trial court permitted police officer Miller to repeat statements made to him by C.H. under the "excited utterance" exception to the hearsay rule. This exception allows the use of statements made while under the stress of events surrounding the crime. C.H. described the circumstances of the crime, including Majors's automobile license number, to Miller approximately twenty minutes after the incident but after first speaking to the Andersons, her aunt, and the 911 operator. When she spoke to Miller, C.H. was "[n]ervous, shaking a little bit, [and] her speech was rapid."

To qualify for admissibility as an excited utterance, it is not enough that the declarant spoke with the witness while under the influence of the startling event. The trial court must also focus on whether there has been any chance of "fabrication, intervening influences, or the exercise of choice or judgment." Here, the court's ruling was supported by evidence of C.H.'s "visibly shaken" demeanor, her youth and the relatively small amount of time between the incident and the declaration. On the other hand, the value of the hearsay testimony was reduced by the opportunity for intervening influences. In those twenty minutes, C.H. spoke with the Andersons, rode with them to look for her brother, then drove to her aunt's house, where she spoke with the aunt and the 911 operator.

We review the trial court's decision to admit the evidence under an abuse of discretion standard. We do not find an abuse of discretion here, particularly because this was a bench trial in which the court is presumed to give evidence its proper weight. Furthermore, the statement was cumulative of other testimony, including C.H.'s own, and the Andersons', who witnessed C.H. speaking to Majors, saw her frightened and shocked demeanor, and recorded Majors's license plate number.

Result: Affirmance of Snohomish County Superior Court conviction for attempted first degree kidnapping.