



Law Enforcement

August 1998

Digest

HONOR ROLL

477th Session, Basic Law Enforcement Academy - April 14th through July 8th, 1998

President: Shawn C. Clapp - Bremerton Police Department
Best Overall: Chad D. Williams - Longview Police Department
Best Academic: Chad D. Williams - Longview Police Department
Best Firearms: Shawn C. Clapp - Bremerton Police Department
Tac Officer: Don Davis - King County Sheriff's Office

Corrections Officer Academy - Class 273 - June 6th through June 26th, 1998

Highest Overall: Crystal White - Washington State Corrections Center for Women
Chad Williams - Cowlitz County Corrections
Highest Academic: Chris Johnson - McNeil Island Corrections Center
Rick Porter - Yakima County Corrections
Highest Practical Test: Pilar King - McNeil Island Corrections Center
Jeff Kinne - Coyote Ridge Corrections
Highest in Mock Scenes: Crystal White - Washington State Corrections Center for Women
Highest Defensive Tactics: Christina Graves - Washington Corrections Center

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WASHINGTON STATE SUPREME COURT

"SUBMISSION TO AUTHORITY" TEST FOR "SEIZURE" UNDER HODARI D REJECTED IN INDEPENDENT GROUNDS READING OF STATE CONSTITUTION’S ARTICLE 1, SECTION 7

State v. Young, 135 Wn.2d __ (1998)

Facts:

Robert Carpenter, a Pierce County Deputy Sheriff, was driving on patrol at 9:40 p.m. in an area he knew to have very heavy distribution activity in crack cocaine and methamphetamine. The deputy spotted Kevin Young standing on a street corner. Though Deputy Carpenter had observed no suspicious behavior on Young's part, the deputy decided to make a social contact with Young, in part because the deputy did not recognize Young.

After parking his vehicle at curbside near Young, Deputy Carpenter, who was in uniform, got out and walked up to Young. Young cooperated with the deputy's request that he provide his name. Observing nothing suspicious, the deputy got back in his cruiser and drove up the street a block or so, parking alongside the road just after cresting a hill. Dispatch responded to the deputy's inquiry about Young with radio information that Young had an extensive record relating to illegal drugs.

Deputy Carpenter then looked in his rear view mirror to observe that Young had proceeded after him on foot to near the crest of the hill. Young had stepped part way into the street and was looking at the patrol car. The deputy interpreted as an attempt by Young to see if "the coast was clear." Deputy Carpenter turned his vehicle around and proceeded at a normal pace to go back and contact Young. At the same time, Young began walking very quickly away. The Supreme Court majority opinion describes what happened next:

Young, walking at a fast pace, began moving toward a bushy area near an apartment complex. Carpenter then speeded up. As Carpenter drove up the hill, he shined the patrol vehicle spotlight on Young when Young was about three or four feet from a tree. He saw Young walk behind the tree, crouch down, and toss something about the size of a small package into the area near the tree. Young continued walking, now away from the tree, and at a very fast pace. After he was away from the tree, he "stopped running" and began walking.

Carpenter drove to the opposite side of the street, stopped his patrol car close to the tree, and exited the vehicle. He asked Young to stop. Then he retrieved the object he saw Young dispose of behind the tree. Carpenter described the object as half a Coke can with a charred bottom, containing a rock-like substance that appeared to be crack cocaine.

In answering the question as to why he stopped Young after he had seen Young dispose of the package, Carpenter said: "I believed he was trying to dispose of some type of contraband, narcotics or something, that he didn't want me to find on his possession at the time, and I believed that his actions were suspicious enough for me to check and see what that was." After retrieving the can, he arrested Young for possession of a controlled substance. Carpenter testified Young was not free to leave after he told him to stop, but he did not direct Young to stop at any time other than the single instance after he saw him throw the object behind the tree.

Proceedings:

The prosecutor charged Young with unlawful manufacture of an imitation controlled substance. Young moved to suppress the evidence. The trial court granted the motion, ruling that Young had been seized at the point when the deputy spotlighted him. Because the deputy did not have reasonable suspicion at that point, and because the spotlighting led to Young's act of discarding the contraband, the evidence was the fruit of an unlawful seizure, the trial court held. The prosecutor appealed and prevailed in the Court of Appeals (see **Sept. '97 LED: 12**). Defendant then was granted discretionary review in the State Supreme Court.

ISSUES AND RULINGS: (1) Does the Washington constitution, article 1, section 7, provide a different standard for determining what constitutes a "seizure" of the person than does the U.S. Constitution's Fourth Amendment? (ANSWER: Yes, concludes a Court which is unanimous on

this point; the Washington constitution's definition of seizure includes circumstances where a suspect fails to submit to a police "show of authority"); (2) For purposes of article 1, section 7, did the deputy seize Young at the point when he shined his spotlight on Young? (ANSWER: No, rules a 7-2 majority). Result: Affirmance of Court of Appeals decision reversing Pierce County Superior Court suppression ruling; remand for trial.

ANALYSIS:

(1) Difference between state and federal constitutional definitions of "seizure" of the person.

In California v. Hodari D, 499 U.S. 621 (1991) **July '91 LED:01**, the U.S. Supreme Court held under the Fourth Amendment that, when a citizen flees from police who are trying to seize him, or, when the citizen otherwise fails to comply with a police "show of authority" which would otherwise constitute a seizure, the citizen has not been "seized" for constitutional purposes. Accordingly, the U.S. Supreme Court held in Hodari D that, even though the police officer, in chasing a suspect in that case, had made a sufficient "show of authority" to otherwise constitute a seizure, the defendant could not challenge the officer's conduct for lack of justification. The Hodari D Court held that there was no seizure, because the defendant had failed to submit to the officer's show of authority.

Thus, the non-submitting defendant in Hodari D could not claim that his tossing away of a rock of cocaine during the chase was the fruit of an unlawful seizure by the officer. In other words, even though the chasing officer's suspicions had fallen short of the "reasonable suspicion" standard of Terry v. Ohio, this was irrelevant, as there was no seizure which required justification. **LED EDITOR'S COMMENT: The Hodari D Court expressly reserved for the future, and neither the U.S. Supreme Court nor the Washington Supreme Court has yet resolved, the issue of whether a citizen's unprovoked flight at the sight of police, taken alone, provides reasonable suspicion for a seizure. Most legal commentators suggest that at least one additional suspicious fact must be combined with flight in order to meet the reasonable suspicion standard.]**

Justice Talmadge writes the majority opinion in Young. His opinion for the majority notes that, at the point at issue (i.e., the time of spotlighting Young), as was assumed in Hodari D, the officer did not have sufficient articulable suspicion-- "reasonable suspicion" per Terry v. Ohio -- to justify a seizure. Thus, the police action would be lawful only if no "seizure" occurred and therefore no justification was required. **[LED EDITOR'S COMMENT: Justice Talmadge's opinion for the majority actually refers in this context to a lack of "probable cause," but there is no indication in the opinion that the Court intends to increase the suspicion standard for Terry stops; we are certain that the Terry standard remains at reasonable suspicion.]**

The Young majority opinion refers to the "submission to authority" test of Hodari D as one which is part objective and one which is part subjective. That is because the test depends in part on how a reasonable, innocent person would respond to an officer's show of authority [an objective standard], and in part on how the citizen in a given case did respond [the Young majority refers to this second part of the test as "subjective"]. **[LED EDITOR'S COMMENT: We don't see the second part of this test as being truly "subjective." It is an unusual focus in Fourth Amendment law, in that it depends on the citizen's actions rather than the officer's actions. But it is not truly "subjective" because it is not dependent on someone's intent, motive or perception. Nonetheless, the Hodari D test is inconsistent with the usual Fourth Amendment approach, as pointed out by the Young opinion, in not focusing solely on the**

action of the law enforcement officer. The Young majority argues that a "seizure" standard should provide law enforcement officers with guidance as to what actions on their part, irrespective of the citizen's response, are constitutionally permitted.]

The Young majority opinion concludes that Hodari D's incorporation of a "submission to authority" element in the definition of seizure is contrary to the Washington constitution's definition of "seizure." The primary reason for this "independent grounds" reading of the Washington constitution is past Washington case law. In past decisions, the Washington courts have focused solely on the objective aspects of the officer's show of authority, the Young Court declares.

Thus, under the Washington case law, in circumstances where a reasonable, innocent person would feel free to leave or would feel free to decline to submit to the police inquiry or contact, the person is not seized. However, in circumstances where this hypothetical reasonable person would feel compelled to cooperate, the past Washington cases have not found an exception to the "seizure" definition for the situation where the person did not actually cooperate.

The Young Court concludes that the Washington constitution should be read consistently with the past Washington cases. Therefore, the Court concludes, Hodari D's consideration of the citizen's response is not part of the Washington test.

(2) Spotlighting not necessarily a seizure

The Young majority begins its analysis of the question of whether an article 1, section 7 seizure occurred in this case by explaining that not every citizen contact by uniformed, armed police officers is a seizure requiring justification. Furthermore, the fact that an officer asks for a name or for ID, or poses general questions to the citizen, does not generally constitute such a restraint on freedom as to constitute a seizure requiring justification. The Young majority opinion does note some police actions which, depending on the totality of the circumstances, might be held to go beyond a mere social contact and require "reasonable suspicion" to justify them:

Examples of circumstance that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.... In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person. [Citing U.S. v. Mendenhall, 446 U.S. 544 (1980)]

Turning to the facts of the case before it, the Young Court concludes that the spotlighting on Young, under the totality of the circumstances, did not constitute a seizure requiring justification:

The shining of the spotlight in this case does not rise to the level of intrusiveness discussed in Mendenhall. Carpenter did not have his siren or emergency lights on. No weapon was drawn. The police car did not come screeching to a halt near Young. Young was on a public street in public view. The shining of the light on him revealed only what was already in plain view, Young's person, and not anything he wished to keep private. The deputy did not see the contraband until Young disposed of it. "In [a previous Washington Supreme Court decision], this court explained that 'what is voluntarily exposed to the general public' is not

considered part of a person's private affairs." The illumination by the spotlight did not amount to such a show of authority a reasonable person would have believed he or she was not free to leave, not free simply to keep on walking or continue with whatever activity he or she was then engaged in, until some positive command from Carpenter issued. To rule as Young requests that the shining of a spotlight was, in effect, a per se violation of article I, section 7 would call into question legitimate police patrol functions at night where the spotlight is a necessary tool to illuminate a scene. Mere illumination alone, without additional indicia of authority, does not violate the Washington Constitution. There was no disturbance of private affairs under article I, section 7 here.

DISSENTING OPINION:

Justice Alexander, joined by Justice Johnson, agrees with the majority opinion: (a) that the deputy did not have reasonable suspicion when he spotlighted Young; and (b) that the Hodari D submission element is not part of the Washington "seizure" definition. However, Justice Alexander dissents from that part of the majority opinion which finds no seizure. Justice Alexander's dissent argues that the totality of the circumstances-- a social contact followed by spotlighting -- should have been viewed as a seizure requiring reasonable suspicion.

LED EDITOR'S ADDITIONAL COMMENTS:

(1) No change in law enforcement advice or instruction. The Young decision should not significantly change how officers are instructed or advised regarding their constitutional authority. While Hodari D had allowed prosecutors to argue in some flight cases that items discarded by fleeing suspects were admissible despite lack of police justification for the pursuits, this should not have affected how advice or instruction on constitutional authority was given to police officers. We doubt that anyone had instructed or advised officers to chase, based on a hope of non-submission combined with a hope of a tossing of evidence. We assume that officers did not come up with this idea on their own. In any event, such a strategy now would not be fruitful under Young.

(2) Implications of Young for vehicle searches incident to arrest and for obstructing arrests. The Young Court's rejection of Hodari D's submission test may have a pro-state impact in the following two circumstances --

(A) MOTOR VEHICLE SEARCH INCIDENT TO ARREST: A driver who is signaled by stop by a police car siren or overhead lights has been seized at that point. If that person is subject to a custodial arrest, the passenger area of the car is subject to a search incident to arrest. Once that person submits to authority, if the person gets out of the car and tries to lock it up to foil a subsequent search incident to arrest, the police will have a strong argument that the passenger area of the vehicle is still subject to a "search incident to arrest" because the seizure process began while the person was inside the vehicle. Compare State v. Smith, 119 Wn.2d 675 (1992) Nov. '92 LED:04 (Smith holds that items are subject to search incident to arrest based on their location when the "arrest process" begins -- the question that the courts will have to answer is: Does Smith also authorize searches of areas and items which are located within the "search incident" area when the seizure process, which may precede the arrest process, begins? We think the answer is "yes" and that the Young decision supports that answer.)

(B) OBSTRUCTING ARRESTS: In State v. Hudson, 56 Wn. App. 490 (1990) April '90 LED:16, the Court of Appeals held that a person who attempts to elude a Terry stop is guilty of obstructing. While a person who fails to stop his or her vehicle when signaled to do so by the police is guilty of the misdemeanor of failure to obey an officer making a traffic stop (RCW 46.21.022), there is no equivalent crime for one who is afoot. Now, reading Young together with Hudson, the pedestrian who fails to comply with an officer's seizure directive (assuming the directive is lawful, i.e., based on at least reasonable suspicion) is subject to a charge of obstructing. See also, State v. Mendez, 88 Wn. App. 785 (Div. III, 1997) Feb. '98 LED:03.

(3) Potential troubling paragraph in majority opinion regarding reason for contact. After discussing Deputy Carpenter's preliminary suspicions about Young prior to spotlighting Young, the majority opinion declares "the deputy acted reasonably in seeking to renew his contact with Young." Because the Young majority opinion goes on to hold that Young was not seized until after the deputy spotlighted him, this statement is wholly unnecessary to the Court's decision. Until there is a seizure, a law enforcement officer needs absolutely no justification to focus on or to merely contact a potential suspect. We do not think that the Young majority intended to imply anything to the contrary. We hope that judges don't read some contrary threshold requirement into this quoted unnecessary statement about authority-to-contact in Young.

BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

CHILD SEX ABUSE TESTIMONY INADMISSIBLE BECAUSE TIME FRAME OF ABUSE NOT ESTABLISHED; ALSO, HEARSAY RE ABUSE NOT SUFFICIENTLY CORROBORATED-- In In Re the Welfare of A.E.P. & W.M.P., 135 Wn.2d ___ (1998), the State Supreme Court rules in a child dependency case that the testimony of a five-and-a-half-year-old should not have been admitted by the trial court, because the child had not been shown to be competent to testify. The Supreme Court also rules that hearsay as to the child's statements should not have been admitted, because the hearsay statements about sexual abuse were not sufficiently corroborated. **[LED EDITOR'S NOTE: While this was a dependency case, not a criminal case, the Supreme Court's rulings on the evidence issues will be applied in criminal cases.]**

(1) Child witness competency issue: There is no absolute lower age limit for establishing competency of a child witness. However, the party offering testimony of a child witness must meet a five-part test as stated in State v. Allen, 70 Wn.2d 690 (1967). The Allen test requires that the child exhibit: (1) an understanding of the obligation to speak the truth on the witness stand; (2) **the mental capacity at the time of the occurrence concerning which he or she is to testify to receive an accurate impression of it;** (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words the memory of the occurrence; and (5) the capacity to understand simple questions about it.

Requirement #2 of the Allen competency test was not met, the A.E.P. Court holds, because there was nothing in the record to establish the time frame within which the alleged sexual abuse occurred. Without any evidence as to when in the history of the five-and-a-half-year-old's life the alleged sexual abuse had occurred, the trial court could not possibly have made a correct determination as to the child's mental capacity at the time of the alleged occurrences.

(2) Child sex abuse hearsay corroboration issue: RCW 9A.44.120 provides that in criminal cases, juvenile offender cases, and dependency cases, out-of-court statements of a child under age 10 describing any act of sexual conduct performed with or on the child, or describing any act of physical abuse of the child resulting in substantial bodily harm, will be admissible if: (1) the court finds sufficient indicators of **reliability** of the statements and:

(2) The child either:

(a) Testifies at the proceedings; **or**

(b) Is **unavailable** as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is **corroborative** evidence of the act.

The question of **reliability** under subsection (1) of RCW 9A.44.120 is determined by looking at the totality of the circumstances surrounding the child's making of the out-of-court statements. The leading case on child hearsay reliability is State v. Ryan, 103 Wn.2d 165 (1984), setting out the following nine non-exclusive factors to consider on the reliability issue:

- (1) whether there is an apparent motive to lie;
- (2) the general character of the child;
- (3) whether more than one person heard the statements;
- (4) whether the statements were made spontaneously;
- (5) the timing of the declaration and the relationship between the declarant and the witness;
- (6) whether the statement contains express assertions about past facts;
- (7) whether cross examination could show the child's lack of knowledge;
- (8) the possibility that the child's recollection is faulty;
- (9) whether the circumstances give reason to suspect that the child misrepresented defendant's involvement.

The A.E.P. Court suggests that there were serious questions about the "reliability" of the hearsay statements made by the alleged victim, A.E.P., in succession to (i) a daycare provider, (ii) a follow-up interviewer from CPS, and (iii) a subsequent interviewer who was a police detective. The untrained daycare provider, a past child sex abuse victim herself, had interviewed A.E.P. first--she used closed, leading questions focusing on the child's father as the suspect, and her questions came immediately after the daycare provider had punished A.E.P. for fondling A.E.P.'s younger sister.

The CPS interviewer had followed up the next day by interviewing the child in the evening hours under less than ideal conditions; the CPS interviewer's questions may also have led the child, the Court suggests. And the police detective who questioned A.E.P. a week later set the interview up properly, but the CPS interviewer then interrupted A.E.P.'s statement to the detective by trying to lead A.E.P. to tell the detective the story that A.E.P. had previously told the CPS interviewer. Ultimately, however, the Supreme Court holds that a determination of reliability was not required in this case, because a showing of corroboration was also required, and there was insufficient evidence of corroboration.

Under the child abuse hearsay statute set forth in part above, **corroboration** is required where the child is **unavailable** to testify. A child such as A.E.P. who is held to be incompetent to testify at the time of trial is "unavailable" within the meaning of the statute. **Hearsay statements from**

the unavailable child will be admissible only if they meet the test of RCW 9A.44.120 for reliability and corroboration. The leading case on corroboration is State v. Swan, 114 Wn.2d 613 (1990) **Nov. '90 LED:01**. In Swan the State Supreme Court found sufficient corroboration for the child's hearsay statements in: (i) parallel disclosures from another victim, (ii) precocious sexual knowledge by the victim(s), (iii) the victim's masturbatory behavior and other behavior with an anatomically correct doll, (iv) complaints of pain, and (v) other physical and emotional evidence. The A.E.P. Court declares that no substantial corroboration of this sort was established in the A.E.P. dependency proceeding. Accordingly, the Court holds that the hearsay at issue was not sufficiently corroborated to be admitted under RCW 9A.44.120.

Result: Reversal of Mason County Superior Court finding of abuse in dependency proceeding.

WASHINGTON STATE COURT OF APPEALS

DETECTIVE ACTED PROPERLY IN SEEKING CLARIFICATION FROM ARRESTEE WHO HAD RESPONDED TO MIRANDA WARNINGS BY STATING HE WOULD BE NEEDING A COURT-APPOINTED ATTORNEY BECAUSE HE COULDN'T AFFORD TO HIRE ONE

State v. Copeland, 89 Wn. App. 492 (Div. II, 1998)

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

In April 1995, Copeland fled to Virginia when he learned that Longview police were investigating him for a second degree rape. The Cowlitz County prosecutor filed an information, and the local court issued an arrest warrant. Copeland was arrested in Virginia, and Longview detectives flew to Virginia to transport Copeland back to Washington.

When the Longview detectives sought to interrogate Copeland in Virginia, the lead detective advised him of his Miranda rights orally and in writing. Copeland responded that he would be needing a court appointed attorney, because he could not afford an attorney (the Court of Appeals does not provide an exact quote of Copeland's response). The lead detective then advised Copeland that when Copeland returned to Washington, Copeland would be provided a court-appointed attorney if he could not afford one. The detective next asked Copeland if he was presently requesting to have an attorney immediately, or if he was then willing to talk without an attorney. Copeland responded that he did not have a problem with talking to the detective at that time.

Copeland then gave his side of the story. He first denied having sexual intercourse with the alleged victim, but he then admitted to it (the Court of Appeals does not provide details regarding any qualifying explanation Copeland gave with this admission). Upon returning to Washington, Copeland explained to the detective for the first time that, while he had admittedly engaged in sex with the alleged victim, she had agreed to provide him with sex in exchange for drugs.

Prior to trial, Copeland argued that the interrogation in Virginia was unlawful, claiming that the detective violated his right to counsel under the Sixth Amendment of the U.S. Constitution and a Washington Court Rule, CrR 3.1. He argued further that the follow-up Washington interrogation was tainted by the Virginia interrogation. His motion was denied, and he was convicted of the second degree rape.

ISSUE(S) AND RULING: Did the interrogation in Virginia violate Copeland's right to counsel under constitutional or court rule provisions? (ANSWER: No, because he responded to Miranda warnings with an ambiguous statement which the detective properly clarified before proceeding with interrogation.) Result: Reversal of Cowlitz County Superior Court conviction for reasons not addressed in this LED entry (failure of the prosecutor to respond to defense counsel's discovery request by disclosing the alleged victim's prior unrelated conviction for theft); case remanded for retrial.

ANALYSIS:

LED Editor's Introductory Note: The analysis which follows is consistent with the result and approach of the Court of Appeals on the interrogation issue. However, we have filled in a number of gaps in the Copeland Court's analysis. The Copeland Court mixes (A) analysis under the Sixth Amendment [on which the case law is sparse] with (B) references to CrR 3.1 [on which the case law is even more limited] with (C) citations to Fifth Amendment cases [on which case law is abundant] without express analysis of Fifth Amendment issues. Because issues are raised under all three areas of law under the facts of this case, we will separate the three areas of law and analyze them separately. Again, we believe that our analysis is consistent with the approach of the Copeland Court.

Note that we do not go into detailed analysis of Fifth and Sixth Amendment "Initiation of Contact" issues, because the facts of this case do not raise post-assertion "initiation" issues. See our "Initiation of Contact" article in the April 1993 LED. ...Note further that, while we separately discuss the three areas of law--5th Amendment, 6th Amendment, and CrR 3.1 -- the respective areas must all be considered together as a sort of triple-filter system to determine whether any given statement produced by interrogation is admissible.

(1) Fifth Amendment Right To Counsel In Relation To Right Against Self Incrimination

The Fifth Amendment right to counsel (and to silence) attaches in any law enforcement confrontation where there is both: (A) "custody" (control over the suspect which is at least the functional equivalent of arrest), and "interrogation" (police words or conduct deliberately designed to and reasonably likely to elicit an incriminating response). In any such custodial interrogation, police must first give full warnings about the rights to silence and counsel, and they must first obtain an unambiguous waiver before proceeding with interrogation. If the suspect unambiguously asserts either of the rights, police must immediately stop the interrogation. If the suspect asserts the right to counsel in this setting, from that point forward, police are subject to the restrictions of the Fifth Amendment "initiation of contact" rule, so long as the suspect remains in continuous custody.

If the suspect makes an ambiguous statement regarding the rights to counsel or silence at the time of the initial request for waiver, then police need not cease their efforts. However, if officers wish to proceed, they must first clarify the suspect's wishes. [Note that there is some confusion in the Fifth Amendment law as to whether police must clarify an ambiguous statement by the suspect in this pre-waiver setting, because the U.S. Supreme Court was less than precise when it held in Davis v. U.S., 512 U.S. 452 (1994) [**Sept '94 LED:02**] that an ambiguous statement about the right to counsel, **post waiver in mid-interrogation**, if later found to be truly ambiguous, need not be clarified and does not require any pause in the interrogation. Davis apparently does not relieve police from the obligation to clarify ambiguous, **pre-waiver** statements from suspects

about rights **at the outset of interrogation**, as there would otherwise be no waiver at all in such cases. See State v. Leyva, 951 P.2d 738 (Utah 1997)]

With respect to the Copeland interrogation in Virginia, the Court of Appeals does not tell us the exact words used by Copeland in response to the detective's Miranda warnings and waiver request. However, it would appear that the response by Copeland that he would need a court-appointed attorney because he could not afford one was not a clear statement that he wanted an attorney at that time. Hence, the detective acted properly in seeking clarification. Once the detective clarified that Copeland was primarily describing his personal financial situation, that Copeland did not want to immediately talk to an attorney, and that Copeland in fact wanted at that time to talk to the detective, then the detective was authorized under the Fifth Amendment to proceed to get a waiver and to interrogate.

(2) Sixth Amendment Right To Counsel

As the Copeland Court notes, the Sixth Amendment right to counsel attaches at the time that formal charges are filed. See U.S. v. Gouveia, 467 U.S. 180 (1984). However, police are free to initiate contact with the defendant and to obtain a waiver of this Sixth Amendment right on a charged matter prior to the point at which the charged defendant triggers an "initiation of contact" bar when he makes his first court appearance and asserts his case-specific Sixth Amendment right to counsel (See State v. Valdez, 82 Wn. App. 294 (Div. III, 1996) **Oct. '96 LED:04**).

The U.S. Supreme Court has held that the required wording of warnings in obtaining a waiver of Sixth Amendment rights (and presumably the requirements for compliance with other technical aspects of the waiver process) is the same as under the Fifth Amendment. See Patterson v. Illinois, 487 U.S. 285 (1988) **Sept. '88 LED:03**. Since the technical requirements of the waiver process are the same under the Sixth and Fifth Amendments, the Fifth Amendment cases on ambiguous responses, per the Fifth Amendment discussion above, guide the analysis on the Sixth Amendment.

Thus, in the Copeland interrogation, the defendant's Sixth Amendment right to counsel had attached as soon as the information had been filed in Cowlitz County. Thus, the Longview detective was required to obtain a waiver of Copeland's Sixth Amendment right to counsel before questioning him in Virginia. However, because Copeland had not yet appeared in court on the charge, the officer was not restricted from initiating contact with Copeland. The detective gave Copeland Miranda warnings, which are sufficient to obtain both a Sixth Amendment and a Fifth Amendment waiver. Copeland responded ambiguously regarding his counsel right, and the detective appropriately clarified the statement before proceeding to obtain a waiver and to interrogate. Hence, for the same reason that there was no Fifth Amendment violation, there was no Sixth Amendment violation in the Virginia questioning.

(3) CrR 3.1 Right To Counsel

A somewhat undefined right to counsel attaches under CrR 3.1(b) "as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs first." CrR 3.1(c) provides further in relation to the post-arrest, pre-appearance aspect of this court rule "right to counsel" as follows:

- (1) When a person is taken into custody that person shall immediately be advised of the right to a lawyer. Such advice shall be made in words easily understood,

and it shall be stated expressly that a person who is unable to pay a lawyer is entitled to have one provided without charge.

(2) At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer.

There is little case law under CrR 3.1 outside of the special context of DUI/BAC testing situations. What case law exists in that context and other contexts addresses only:

(1) the point (custody/arrest) at which the right attaches and the nature of the exclusionary rule (prejudice-based, not automatic, exclusion of evidence) which applies in the case of violation of the right (See State v. Trevino, 127 Wn.2d 735 (1995) **Jan. '96 LED:03**);

(2) the requirement that a police officer immediately make a reasonable attempt to provide at least telephonic access to counsel when the defendant asserts the right (See State v. Kirkpatrick, 89 Wn. App. 407 (Div. II, 1997) **March '98 LED: 12**); and

(3) the arguable requirement that police limit their contacts with, or at least give special warnings to, in-custody suspects where police know or should know the suspects have tried to contact counsel (See State v. Greer, 62 Wn. App. 779 (Div. I, 1991) **Feb. '92 LED:05**).

The few cases decided under CrR 3.1 require, as noted above, certain warnings, but none of the cases require that police obtain a waiver of the court rule right to counsel. Thus, all that appears to be required at the threshold under CrR 3.1 is the giving of warnings. Apparently, the warnings may be either: (A) in abbreviated form to address the two specific requirements of the rule, or (B) they may be the full Miranda warnings (See CJTC warning cards). And if the suspect does not affirmatively request an attorney following receipt of the warnings, police need not do anything to facilitate a consult with counsel. See State v. Halbakken, 30 Wn. App. 834 (Div. I, 1981). However, under the Kirkpatrick decision noted above, and under the DUI/BAC cases, if the custodial suspect states that he or she wants an attorney, police must respond to the request by making a reasonably immediate attempt to provide at least telephonic access to counsel.

In the Copeland case, in providing Copeland with the full Miranda warnings, the Longview detective satisfied the threshold requirement of CrR 3.1(b) that he advise the custodial, charged suspect of his right to counsel under the court rule. The detective was not required **under the court rule itself** to obtain a waiver of rights, but the detective was required to accommodate a request for counsel contact if such a request was made by the defendant. The detective satisfied this latter aspect of the court rule by clarifying the suspect's wishes before proceeding with interrogation. If Copeland had told the detective that he did want immediate contact with an attorney, then the detective would have been required to make a reasonable effort to put Copeland in immediate contact with an attorney. However, when Copeland clarified that he was just talking about his personal financial straits, and that he didn't want an immediate attorney-consult, then the Longview detective acted properly under CrR 3.1 in proceeding to obtain a waiver and to interrogate Copeland.

“UNLAWFUL ENTRY” ELEMENT OF BURGLARY CONVICTION HOLDS UP FOR WOULD-BE THIEF CAUGHT IN GRADE SCHOOL CLASSROOM WITH WEAK “AUTUMN” STORY

State v. Allen, 90 Wn. App. ____ (Div. III, 1998) [955 P.2d 403]

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

Corey Dejuan Allen entered [teacher] Rodney Burke's fifth-grade classroom at Stevens Elementary School when the classroom was empty while the children were in P.E. Mr. Burke returned to his classroom approximately 2 to 3 minutes after walking his class to P.E. and found Mr. Allen crouched down by his desk with his hand on Mr. Burke's jacket. Mr. Burke shouted: "What are you doing?" At this, Mr. Allen fumbled and rose to his feet. Mr. Allen acted scared, surprised and flustered. The two then walked into the hall where Mr. Burke again asked Mr. Allen what he was doing. Mr. Allen replied that he was there to pick up Autumn, one of Mr. Burke's students. Mr. Burke insisted Mr. Allen report to the office. Mr. Allen reluctantly obliged. After questioning Mr. Allen about his reasons for being in the school, Mr. Allen again stated he was there to pick up Autumn. However, Mr. Allen did not know Autumn's last name. Autumn's name was in block letters in the classroom as "student of the week." Additionally, Autumn's name was the first on a stack of papers on Mr. Burke's desk. The principal looked up whether Autumn's parents had provided Mr. Allen's name as a person with permission to pick her up from school. His name was not provided. Mr. Allen admitted he did not have Autumn's mother's permission to pick her up. Mr. Allen then complained Mr. Burke and the principal were being rude and walked out.

Mr. Burke identified Mr. Allen from photographs shown to him by Richard Shaw, school security investigator. Mr. Allen was then located and charged with one count of second degree burglary. The jury convicted Mr. Allen as charged.

ISSUE AND RULING: Was there sufficient evidence of defendant's "unlawful entry" into the classroom to support his burglary conviction? (ANSWER: Yes) Result: Affirmance of Spokane County Superior Court conviction for second degree burglary.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Mr. Allen contends he cannot be guilty of second degree burglary because his entry into the school was lawful. RCW 9A.52.030(1) provides: "A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling." RCW 9A.52.010(3) defines 'enters or remains unlawfully' as a person who 'enters or remains unlawfully' in or upon premises when he is not then licensed, invited or otherwise privileged to so enter or remain." Subsection (3) further provides: "A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of a building which is not open to the public."

Neither Washington courts nor the Legislature has addressed whether a public school building is "open to the public" during school hours. Mr. Shaw testified that it was school policy that all individuals must report to the office upon arriving at the school, but he stated it was not against the law to not report in. Mr. Shaw also testified in certain circumstances it may be against the law to enter or remain in a school during school hours. The State does not cite a specific school policy, RCW

or WAC to support its assertion that a school building is not open to the public during school hours. On the other hand, neither has Mr. Allen provided citations to the contrary. In State v. Brooks, 741 S.W.2d 920 (Tenn.Crim.App.1987), the Tennessee Court of Criminal Appeals reversed trespassing convictions on school grounds. Tennessee defined trespass as "unlawfully entering upon the premises of another." The court dismissed the convictions holding "[w]e are of the opinion the language of this statute is not broad enough to encompass property which is owned and operated by a governmental entity and is open to the public." Our case is distinguishable from Brooks because there the defendants were merely trespassing on the school's lawn; here, Mr. Allen was not just on the school grounds but beyond the general administrative areas and means of ingress and egress. He was inside one of the classrooms without specific invitation.

RCW 9A.52.010(3) specifically provides that the scope of someone's permission to be in a building can be limited. Mr. Allen may, at best, have had implied permission as a member of the public to enter the school using means of ingress and egress and report to the administrative office. However, he extended the scope of any implied permission by entering the classroom, a place not generally open to the public without prior arrangement. See State v. Thomson, 71 Wn. App. 634 (1993) (defendant had permission to enter his victim's home, but did not have permission to enter her bedroom); People v. Mackabee, 263 Cal.Rptr. 183 (1989) (defendant had permission to enter building's lobby, but not private offices beyond the lobby). Mr. Allen did not have a license, privilege or invitation to be in Mr. Burke's classroom according to Mr. Burke. The school rules were not followed. Mr. Allen did not have a student in Mr. Burke's class, let alone the entire elementary school. His assertion that he was there to pick up a child named Autumn was demonstratively untrue. The jury could, and apparently did, conclude Autumn was merely a name he saw for the first time in the classroom.

Additionally, the State's public interests and policies recognize the care, protection, and safety of children are of the highest order. See RCW 26.09.002; RCW 13.24.020. The State mandates children's education. RCW 28A.225.010. When children are in government care for mandatory education, a *parens patriae* relationship exists. We reason Mr. Allen's freedom of movement in a public place, like a school, may be reasonably limited through school policies when necessary for the protection of children just as the movement of children in public surroundings may be regulated for their own protection. Thus, Mr. Allen's argument he has free access in the public schools is without merit. Therefore, based on the evidence, it can be inferred Mr. Allen's entry was unlawful and since criminal intent is undisputed, the elements of second degree burglary have been met. Accordingly, sufficient evidence exists to support Mr. Allen's conviction.

[Some citations omitted]

FINGERPRINT EVIDENCE ALONE FAILS TO SUPPORT CONVICTION FOR BURGLARY WHERE THERE IS REASONABLE INNOCENT EXPLANATION FOR PRESENCE OF PRINTS

State v. Bridge, 90 Wn. App. ____ (Div. III, 1998) [955 P.2d 418]

Facts: (Excerpted from Court of Appeals opinion)

Between the morning of October 13 and the morning of October 14, 1996, someone broke into Lee Verment's barn. The burglar entered by destroying the barn door. Miscellaneous hardware items were moved. A new 18-inch magnetic tool with the store tag still attached was moved from its usual resting place and dropped at the point of entry.

A police expert identified a latent thumbprint on the tag as Andrew Bridge's. She did not find Mr. Verment's prints on the tool. Mr. Verment did not know Mr. Bridge and had never invited him onto his property. Mr. Bridge was charged with second degree burglary.

The State's fingerprint expert testified that no conclusive determination can be made as to how long a fingerprint would last, but that "a print is very fragile ...it doesn't last very long ... especially on the tag." She also testified that there are a number of reasons why a person could touch an item and not leave a latent fingerprint.

Proceedings: Bridge was convicted of second degree burglary. The only evidence linking him to the burglary was the latent fingerprint on the magnetic tool.

ISSUE AND RULING: Is the fingerprint evidence alone sufficient to support the burglary conviction under the facts of this case? (ANSWER: Yes) Result: Reversal of Spokane County Superior Court conviction of second degree burglary.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Fingerprint evidence is sufficient to support a conviction if the trier of fact (here the judge) could infer from the circumstances that the fingerprint could only have been impressed at the time of the crime. State v. Lucca, 56 Wn. App. 597 (1990) [**April '90 LED:09**]. Circumstantial evidence is as probative and reliable as direct evidence.

But to support a criminal conviction, the circumstantial evidence must be consistent with guilt and inconsistent with a hypothesis of innocence. "The facts relied upon to establish a theory by circumstantial evidence must be of such a nature and so related to each other that it is the only conclusion that fairly or reasonably can be drawn from them." A verdict of guilty based on circumstantial evidence must be inconsistent with any reasonable theory tending to establish innocence.

When fingerprint evidence is the only evidence linking a defendant to a crime and the fingerprint is found on a moveable object, the State must show that the fingerprint could only have been impressed during the commission of the crime, and not earlier. Mikes v. Borg, 947 F.2d 353 (9th Cir. 1991). We distinguish between moveable objects generally accessible to the public and fixed objects generally inaccessible to the public.

In Mikes, the Ninth Circuit held that if fingerprint evidence is the only evidence linking a defendant with a crime, the government "must present evidence sufficient to permit the jury to conclude that the objects on which the fingerprints appear

were inaccessible to the defendant prior to the time of the commission of the crime.”

Here, the tag on which Mr. Bridge’s fingerprint was found was affixed to a tool that had been recently purchased. And although the State presented evidence that fingerprints are fragile, and therefore do not last very long, it did not show how long fingerprints can last. Nor did the State rule out the possibility that Mr. Bridge’s fingerprint might have been impressed while the tool was recently in the stream of commerce. The tool had been purchased in an area open to the public. The tool was accessible to Mr. Bridge before being moved by the victim to his barn.

We agree with the court in Mikes that “to allow this conviction to stand would be to hold that anyone who touches anything which is found later at the scene of a crime may be convicted,” of burglary.

We conclude that the evidence of a latent fingerprint absent proof by the State that the print could “only have been impressed at the time the crime was committed” is insufficient to support a conviction for burglary.

[Some citations omitted]

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) STAYING TO THREATEN OCCUPANTS OF HOME AFTER BEING ASKED TO LEAVE SUPPORTS BURGLARY CONVICTION – In State v. Davis, 90 Wn. App. ____ (Div. I, 1998), [954 P.2d 325] the Court of Appeals upholds the burglary conviction of a man who had entered an apartment by permission of occupants, but who substantially overstayed his welcome.

Ralph Davis had gone into an apartment with permission of Ms. Tucker, a woman occupant. Mr. Milton, the woman’s boyfriend had just forced her out following an argument. Davis began arguing with the boyfriend and other occupants in the apartment. The boyfriend told Davis the argument was “none of his business.” Two occupants then ordered Davis to leave. Davis pulled a concealed handgun and separately threatened two occupants before leaving.

Davis was charged and convicted of first degree burglary and two counts of second degree assault. Davis appealed, arguing that the elements of burglary had not been established by the evidence. The Court of Appeals analysis of the sufficiency-of-the-evidence of burglary is as follows:

To establish first degree burglary, the State must prove,

with intent to commit a crime against a person or property therein, [the defendant] enter[ed] or remain[ed] unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the [defendant] or another participant in the crime (a) [was] armed with a deadly weapon, or (b) assault[ed] any person.

Davis argued the State failed to show he entered or remained unlawfully because Tucker gave him permission to enter the apartment. "A person 'enters or remains unlawfully' in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain." Moore and Anthony both testified Milton told Davis to leave when he began yelling and pulled his gun. Thus, his license to enter the apartment was specifically revoked. Viewing this evidence in the light most favorable to the State, there was sufficient evidence that Davis remained unlawfully in the apartment after his license was revoked.

[Footnotes and case citations omitted]

Result: Affirmance of Snohomish County Superior Court convictions for first degree burglary (one count) and second degree assault (two counts); reversal of Superior Court on sentencing issue (Court of Appeals increases the sentence based on burglary statute anti-merger provisions not addressed here).

(2) CALIFORNIA'S PRO-GOVERNMENT BURGLARY RULE ALLOWING PROOF OF UNLAWFUL ENTRY BASED ON ENTRY-WITH-INTENT REJECTED IN CAR WASH CASE – In State v. Miller, 90 Wn. App. ____ (Div. III, 1998) [954 P.2d 925], the Court of Appeals rejects the State's argument that Washington courts should follow the rule of California courts that a person who enters an area open to the public with intent to commit a crime can be prosecuted for burglary.

James C. Miller was caught by police in an area of an open, self-service car wash. The area where he was caught was open to the public. He was caught using bolt cutters to break into some coin boxes. Miller was charged with and convicted of burglary in the second degree, having burglary tools and third degree theft. On appeal, Miller successfully challenged the two burglary-related convictions by arguing that an element of burglary – entering or remaining unlawfully – could not be proven in the circumstance of a person entering or remaining in an area open to the public, unless permission to enter or remain has been withdrawn by a person with authority to withdraw such permission.

The Court of Appeals agrees with defendant and reverses his two burglary-related convictions. The Court narrowly construes three Washington cases cited by the prosecutor – State v. Collins, 110 Wn.2d 253 (1988); State v. Thompson, 71 Wn. App. 634 (Div. II, 1993); and State v. McDaniels, 39 Wn. App. 236 (Div. II, 1984). The Court of Appeals states that these three cases stand only for the proposition that a person in control of a premises otherwise open to the public, or open to a particular visitor, can impliedly or expressly revoke or limit a particular person's right to be on the premises. The facts of the Miller case did not support a conclusion that anyone did anything contemporaneous with Miller's presence at the car wash to revoke or limit the invitation to Miller to be at the car wash, the Court holds.

Result: Reversal of Asotin County Superior Court convictions for second degree burglary and having burglary tools; third degree theft conviction not disturbed. Status: Decision final; the prosecutor has decided not to seek review in the State Supreme Court.

LED EDITOR'S COMMENT: Another way of stating the issue in this case under Washington's burglary statute is whether the person in control of property impliedly grants permission to enter or remain only to those who do not intend to commit a crime. The Court of Appeals sums up its view of this issue when it says the following:

The State's logic is that no owner would grant entry for the purpose of committing a crime. Any license, invitation or privilege is only granted for a legitimate purpose (like washing a vehicle for the required fee). Therefore, any entry or remaining for an illegitimate or criminal purpose violates the license, invitation or privilege and is unlawful. The State's argument is not supported by the statute or by case law and would lead to results far outside the legislative intent. For example, under this theory every shoplifting inside a building would be elevated from a misdemeanor to the class B felony of second-degree burglary. Most other indoor crimes might also be elevated to burglary (citing California cases, among others).

In a footnote to the above quote, the Miller Court recognizes that the result that it describes as being outside the Washington Legislature's intent is in fact the rule in California, and in states such as Illinois which follow the "California Rule." It is important to note something that our Miller Court may not have recognized: it appears that the "California Rule" limits burglary charges in states following the rule to persons who have criminal intent at the time of entry, and does not extend to those who form criminal intent after entry. The Washington Courts could so interpret our statute, but the interpretation would have to difficulty navigating around limiting case law, as well as our burglary statute's reference to "enters or remains unlawfully." In order to make the California Rule applicable in Washington, it may be necessary for our Legislature to amend the statute to provide that: "A person who enters a building, dwelling, or vehicle with intent to commit a crime enters unlawfully."

(3) DETECTIVE'S MISCONDUCT IN COURTROOM RESULTS IN DISMISSAL OF CHARGES – In State v. Granacki, ___ Wn. App. ___ (Div. I, 1998), the Court of Appeals upholds, on "abuse of discretion" review, a trial court's decision to dismiss criminal charges based on a detective's courtroom misconduct.

When a case involving charges of robbery and theft went to trial, the lead detective on the case was allowed, as is typical, to remain at counsel table with the deputy prosecutor to assist. During a mid-morning recess on the second day of trial, the detective was observed by a court clerk reading the notes of the absent defense attorney. During the lunch-hour break the same day, defense counsel observed the detective engaged in a friendly hallway conversation with a juror, within earshot of other jurors waiting for admission to the jury room.

When those matters were brought to the attention of the trial judge, he held a hearing. The judge found both actions of the detective to be misconduct. Based on the combined misconduct, the trial judge dismissed the charges.

On appeal, the prosecutor argued that the sanction of dismissal was too severe. The Court of Appeals focuses solely on the detective's misconduct of reviewing defense counsel's notes, not the detective's misconduct of openly fraternizing with a juror. The Court of Appeals analysis of the "notes" sanction begins with discussion of State v. Cory, 62 Wn.2d 372 (1963):

[In Cory] the trial court dismissed a criminal case after it discovered that the sheriff had taped conversations between the defendant and his attorney in the jail. The Supreme Court observed that a defendant cannot receive effective representation unless he is able to confer with his attorney in private. It noted that intrusion by the

State into a defendant's privileged communications with counsel violates not only the defendant's right to effective representation by counsel, but his right to be protected against unreasonable searches and to due process of law. Even "high motives and zeal for law enforcement cannot justify spying upon and intrusion into the relationship between a person accused of {a} crime and his counsel." For that reason, the Court held that, where the State intrudes on a defendant's right to effective representation by intercepting privileged communications between an attorney and his client, the only adequate remedy is dismissal. This is because there is no meaningful way to isolate the prejudice resulting from such interference even if a new trial is granted. As the Court observed, "...{t}he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

The State argues that we should decline to apply Cory to the facts of this case because the violation of Granacki's right to counsel was not as egregious as that in Cory. While the intrusion here was less extensive than the eavesdropping in Cory, what [the detective] examined when he looked at defense counsel's notes was essentially a distillation of conversations Granacki had had with his attorneys. As such, it was analogous to the conversations recorded by the sheriff in Cory. In addition, because the incident there took place in the courtroom itself, it was also an abuse of the trust the court had placed in the detective by permitting him to remain to assist the deputy prosecutor. Cory makes clear that any intrusion into a defendant's confidential communications with his attorney is sanctionable.

There is also more than one purpose for dismissing a case where the State violates a defendant's right to communicate privately with his or her attorney. The dismissal not only affords the defendant an adequate remedy but discourages "the odious practice of eavesdropping on privileged communication between attorney and client." As the Cory court noted, there is no way to isolate the prejudice resulting from such an intrusion. Where the behavior is egregious, as it was here, the trial court does not abuse its discretion by presuming there was prejudice to the defendant's right to counsel. It is true that [the detective] had not communicated what he saw to the deputy prosecutor when the defense moved for a mistrial. But that does not prevent what he read from affecting either his own testimony or comments he made to the deputy prosecutor during trial.

We recognize this case is unusual. Normally misconduct does not require dismissal absent actual prejudice to the defendant. Even then, the trial court may properly choose to impose a lesser sanction because this is a classic example of trial court discretion. Had the court chosen to ban [the detective] from the courtroom, exclude his testimony and prohibit him from discussing the case with anyone, we would not find an abuse of its discretion. But, based on the trial judge's evaluation of all the circumstances and ..., the sanction he imposed was also within his discretion.

[Some citations, names deleted]

Result: Affirmance of King County Superior Court dismissal of charges of second degree robbery (two counts), attempted second degree robbery (one count), third degree theft (one count) and fourth degree assault (one count).

FOLLOW-UP NOTE TO PEN REGISTER ITEM IN 1998 LED LEGISLATIVE UPDATE

In the June '98 LED at pages 9-12, we digested chapter 217, the 1998 "Pen Register, Trap and Trace" enactment based on materials supplied by Pat Sainsbury, Chief Deputy Prosecuting Attorney, Fraud Division, King County Prosecuting Attorney's Office. Mr. Stainsbury has since created a set of forms for implementing this new law. The forms, with accompanying explanatory material, may be obtained: (A) by writing to Val Epperson, Fraud Division, King County Prosecuting Attorney's Office, Room 1002, 900 Fourth Avenue, Seattle, WA, 98164-1001; or (B) by linking to "pen register" a WordPerfect document on the Criminal Justice Training Commission's Internet Home Page at: <http://www.wa.gov/cjt>

CORRECTION TO CITATIONS IN PREVIOUS LED'S

The May '98 LED entry at page 9 on State v. Kutch (trespassed shoplifter guilty of burglary) contained an erroneous citation. The correct citation for Kutch is 90 Wn. App. 244 (Div. III, 1998). The May '98 LED entry at page 18 on State v. McCarty (money laundering statute does not require proof of intent to conceal) also contained an erroneous citation. The correct citation for McCarty is 90 Wn. App. 195 (Div. II, 1998).

NEXT MONTH

In the September LED, we will address, among other recent court decisions, the following 1998 decisions of the United States Supreme Court: (1) Pennsylvania DOC v. Yeskey, 1998 WL 309065 (ruling unanimously that the program accessibility protections of Title II of the Americans with Disability Act (ADA) apply to prisoners in correctional facilities); (2) Bragdon v. Abbott, 1998 WL 332958 (ruling 5-4, in a case involving a private dentist, that HIV-infected people are protected under Title II of the ADA even in the period of the infection during which they suffer no symptoms of AIDS); (3) U.S. v. Bajakajian, 1998 WL 323512 (ruling 5-4 that a forfeiture of over \$300,000 in currency under the forfeiture provisions of a federal currency-smuggling law would violate the "excessive fines" ban of the U.S. Constitution's 8th Amendment); (4) Pennsylvania Board of Probation and Parole, 1998 WL 323537 (ruling 5-4 that the federal Exclusionary Rule for illegal searches and seizures does not apply in probation and parole hearings); (5/6) Faragher v. City of Boca Raton, 1998 WL 336322, and Burlington Industries, Inc. v. Ellerth, 1998 WL 336326 (clarifying standards relating to sexual harassment in the work place); (7) Caron v. U.S., 1998 WL 323528 (ruling 6-3 that, where a state's law provided for only partial restoration of a convicted felon's right to possess firearms, the federal law banning all firearms possession by felons nonetheless applied in the full to that felon); (8) Monge v. California, 1998 WL 336328 (ruling in a split vote that the constitutional double jeopardy prohibition does not apply to bar re-trial in a "Three Strikes" case where the purpose of the re-trial is to establish the sufficiency of one of the prior convictions as a "strike"); (9) Muscarello v. U.S., 63 CrL 308 (1998) (ruling 5-4 that a federal sentencing law prescribing a five-year mandatory sentence for "carrying" a firearm during and in relation to a federal drug trafficking offense or violent federal crime covers a gun kept in a locked trunk or locked glovebox during the commission of the crime).

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