



# Law Enforcement

January 2000

# Digest

## HONOR ROLL

**502<sup>nd</sup> Session, Basic Law Enforcement Academy – July 21<sup>st</sup>, 1999 through October 13<sup>th</sup>, 1999**

President: Brian Nelson – Everett Police Department  
Best Overall: Jon Law – Prosser Police Department  
Best Academic: Floyd May – Bremerton Police Department  
Best Firearms: Scott Dennis – Longview Police Department  
Tac Officer: Officer Rob Scholl – Kent Police Department

**514<sup>th</sup> Session, Basic Law Enforcement Academy, 104<sup>th</sup> Session, Spokane Police Academy  
September 1<sup>st</sup> through November 23<sup>rd</sup>, 1999**

Highest Scholarship: Rodney C. Matheny, Jr. – Richland Police Department  
Highest Mock Scenes: Erica M. Sawyer – Washington State University Police Department  
Outstanding Officer: Kevin W. Huxoll – Walla Walla Police Department  
Pistol Marksmanship: Kevin W. Huxoll – Walla Walla Police Department  
Overall Firearms: Kevin W. Huxoll – Walla Walla Police Department  
Tactical Firearms: Kevin W. Huxoll – Walla Walla Police Department

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## **INTRODUCING ASSISTANT ATTORNEY GENERAL SHANNON INGLIS AS CO-EDITOR OF THE LAW ENFORCEMENT DIGEST**

Assistant Attorney General Shannon Inglis is now co-editing the Law Enforcement Digest along with Senior Counsel John Wasberg. AAG Inglis has also taken over responsibility as the legal adviser to the Criminal Justice Training Commission and its advisory boards on training standards and education, while AAG Wasberg assumes other duties in the Attorney General's Office. Before coming to the Washington Attorney General's Office in May 1999, AAG Inglis worked at the Renton City Attorney's office from 1993 to 1998, and at the Snohomish County Prosecutor's Office from 1998 to May 1999. AAG Wasberg, who has edited the LED since 1978, will continue to be the lead editor on the Digest. Questions or comments regarding the contents of the LED should be directed to AAG Wasberg at (206) 464-6039; FAX (206) 587-4290; email at [johnw1@atg.wa.gov]. Questions or comments regarding the LED distribution list or delivery of the LED should be directed to Ed Johnson of the Criminal Justice Training Commission at (206) 439-3740, ext. 272; FAX (206) 439-3752; email [EJohnson@cjtc.state.wa.us].

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**BRIEF NOTE FROM THE U.S. SUPREME COURT**

**COURT REMINDS THAT THERE IS NO “CRIME SCENE” EXCEPTION TO WARRANT REQUIREMENT** – In Flippo v. West Virginia, 120 S. Ct. 7 (1999), the U.S. Supreme Court issues a very brief unanimous opinion re-stating that there is no “crime scene” exception to the warrant requirement.

In Flippo, police investigating a murder made a 16-hour warrantless search of the murder scene, a cabin at a state park. The Flippo Court points out that, in its prior decisions in Mincey v. Arizona, 437 U.S. 385 (1978) and Thompson v. Louisiana, 469 U.S. 17 (1984), the Supreme Court rejected the idea of a “crime scene” or “murder scene” exception. The rule for search of a crime scene is that, barring valid consent, police may search such a protected private area without a warrant only so long as actual exigent circumstances exist. As soon as police have dealt with actual exigent and/or emergent circumstances – such as: i) to search for victims and suspects, ii) to provide aid to surviving victims, iii) to arrest suspects, and iv) to search briefly for evidence to aid in the identification and pursuit of fleeing suspects – they should secure the scene and apply for a search warrant.

**Result:** Reversal of decisions of West Virginia courts which had appeared to apply a “crime scene” exception to the warrant requirement; on remand for trial, the West Virginia courts are free to look at a consent issue on the suppression question in the case.

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**BRIEF NOTE FROM THE NINTH CIRCUIT OF THE U.S. COURT OF APPEALS**

**CIVIL RIGHTS SUIT FOR FIFTH AMENDMENT VIOLATION ALLOWED TO PROCEED AGAINST OFFICERS WHO INTENTIONALLY IGNORED CUSTODIAL SUSPECTS’ INVOCATIONS OF MIRANDA RIGHTS** -- In California Attorneys for Criminal Justice, et. al. v. Butts, et. al., 1999 WL 1005103 (9<sup>th</sup> Cir. 1999), the Ninth Circuit Court of Appeals rules 2-1 in consolidated cases that, where interrogating officers intentionally ignored custodial suspects’ clear and repeated invocations of their Miranda rights, the officers were not entitled to qualified immunity from civil liability for Fifth Amendment civil rights violations.

In the two cases consolidated for appeal purposes (one involving Los Angeles PD officers and the other case involving Santa Monica PD officers), the officers were engaged in custodial interrogation when the suspects asserted their Miranda rights to counsel. Apparently relying on training given them in their respective departments, the officers purposely ignored the suspects’ invocations. In varying terms and clarity, the officers told the suspects that their further statements or admissions in post-invocation questioning would not be admissible in the State’s case-in-chief at trial. In one of the two cases, the interrogating officers also made a strong effort to talk the suspect out of consulting a lawyer before giving a further statement, suggesting that, once defense lawyers were involved, the chance of showing meaningful cooperation was gone.

The training given officers in the Santa Monica PD and LAPD is apparently based on the U.S. Supreme Court case law allowing impeachment use of otherwise voluntary statements taken in

custodial interrogation which violates Miranda. While a statement obtained in violation of Miranda will not be admissible in the State's case-in-chief, the statement will generally be admissible to impeach the defendant if he or she takes the witness stand. The statement obtained in violation of Miranda will also generally be admitted in sentencing. An additional reason such training has been given in these California police departments has been the fact that the "fruit of the poisoned tree" rule does not fully apply to exclude evidence derived from Miranda- violative interrogations.

An additional limit on the impact of the Miranda rule, and likely an additional reason for the aggressive approach advocated in the Santa Monica and LAPD training, is that a mere violation of Miranda, without more, generally has been held by courts to fall short of a constitutional violation. The idea in this regard is that the Miranda requirements are mere prophylactic rules to help prevent coerced confessions, and that the requirements do not spring from the core of the Fifth Amendment. Hence, an officer generally cannot be sued for a mere Miranda violation.

The LAPD and Santa Monica PD training thus is based on the idea that there is "nothing to lose" in purposely ignoring an invocation of rights and continuing with custodial interrogation. The Ninth Circuit ruling in Butts means, however, that there is in fact a great deal to lose in this situation. The majority ruling does not undercut the general rule that inadvertent violations of Miranda are not constitutional violations and therefore cannot support a civil rights lawsuit. But the majority in Butts, obviously taking great offense at the officers' intentional ignoring of counsel right invocations, holds that officers are subject to suit for such purposeful violations.

In addition, the Butts majority rejects the officers' argument that, because they were merely following department training and policy, they should be given qualified immunity. Citing Cooper v. Dupnik, 963 F.2d 1220 (9<sup>th</sup> Cir. 1992) [**Nov 92 LED:02**], the majority in Butts declares that the requirements of Miranda were clearly established when the officers made these violations. For that reason, the officers and their agencies should have known that they were committing constitutional violations when they deliberately ignored Miranda.

Dissenting in part, one of the judges argues that, under the Ninth Circuit's 1992 decision in Cooper v. Dupnik, something more egregious than a mere intentional violation of Miranda is necessary to support a civil rights lawsuit. The dissenting judge would have allowed a lawsuit only in one of the two cases. That was the case where the interrogating officers tried to talk the invoking suspect out of consulting a lawyer by telling him in effect that, once the lawyer was involved, they couldn't trust anything the suspect told them. This statement by the officers had the effect of coercing him to make a confession, the dissenting judge argues.

Result: Affirmance of California federal district court ruling denying summary judgment to the individual officers; case remanded for trial.

**LED EDITOR'S COMMENT:** We have checked with those who teach basic law enforcement training in Washington. We believe that no one in Washington teaches officers to intentionally ignore the requirements of Miranda. In teaching investigator classes over the past decade, your LED Editor has likewise not suggested that Miranda can or should be ignored; in addition, since 1993, Cooper v. Dupnik has been a part of the discussion in the investigator classes.

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## **BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT**

(1) **BICYCLIST USING A CROSSWALK TO CROSS A ROADWAY TREATED AS A PEDESTRIAN FOR PURPOSES OF RCW 46.61.235** -- In Pudmaroff v. Allen, 138 Wn.2d 55 (1999), a civil case arising out of a car-bicycle collision, the Washington Supreme Court rules

unanimously that a bicyclist using a crosswalk to cross a roadway is protected by the same law that protects pedestrians using crosswalks -- RCW 46.61.235(1)(the traffic law provision requiring that motorists stop for “pedestrians” in crosswalks).

The crosswalk at issue in this case was part of the Interurban Trail in Kent. A bicyclist sued a motorist whose car had struck the bicyclist while he was riding his bicycle in the crosswalk.

Justice Talmages’s opinion for the Court explains in the following footnote that the law relating to persons on bicycles is less than clear:

Bicyclists enjoy an anomalous place in the traffic safety laws of Washington. Bicyclists are generally not pedestrians. RCW [46.04.400](#), [47.04.010\(22\)](#). Nor are bicycles always considered vehicles; see RCW [46.04.670](#), [47.04.010\(40\)](#). For example, bicycles may be operated on both sidewalks and roadways. WAC 308-330- 555(2). Unfortunately, the Legislature has not clarified the status of bicycles under Washington's traffic safety laws. Statutes variously treat bicycles and bike paths in a recreational context, and at other times the statutes treat them as part of the transportation system. Cf. RCW [46.04.670](#) (both including and excluding bicycles in its definition of vehicle), [47.04.010\(40\)](#) (defining "vehicle" in a manner which would exclude bicycles), [47.06.100](#) (noting bicycle and pedestrian pathways are to be integrated with other transportation modes into a statewide multimodal transportation plan). See also RCW [47.30.005](#) (defining "trail" or "path" as "a public way constructed primarily for and open to pedestrians, equestrians, or bicyclists, or any combination thereof, other than a sidewalk. . . ."); [47.30.010\(2\)](#) (providing "[w]here a highway other than a limited access highway crosses a recreational trail of substantial usage for pedestrians, equestrians, or bicyclists, signing sufficient to insure safety shall be provided"); and [36.69.010](#) (authorizing the formation of park and recreation districts for the purpose of providing leisure time activities and recreational facilities as a public service, and defining recreational facilities to include bicycle paths); [47.30.070](#) (deeming bicycle, equestrian or pedestrian paths as public highways for purposes of 43 U.S.C. §912, and thereby saving them from reversion under the federal statute addressing reversion of abandoned railroad rights of way). These statutes indicate the Legislature has viewed bicycles and paths on a case by case basis, and without any continuity. Plainly, the Legislature could usefully consider and clarify the State’s traffic safety policy for bicycles and bicycle paths.

In explaining why it finds the bicyclist before it to be a “pedestrian” under RCW 46.61.235, the Pudmaroff Court gives an example to show the illogical or strained result that would occur if the Court were to make a contrary interpretation excluding bicyclists from pedestrian status under that statute. If several groups of children were travelling home from school on the Interurban Trail, some on foot, some on skateboards, some on roller blades, and some on bikes, and they crossed the street at the same place and in the same manner as Pudmaroff, and they were all struck by a vehicle, the vehicle’s driver would be liable to all of the children except those riding bicycles. The Pudmaroff opinion concludes that RCW 46.61.235 must be interpreted in a way that avoids that result.

Presumably, the Pudmaroff ruling would extend to support a law enforcement citation to a motorist for violation of RCW 46.61.235 under the same circumstances. Thus, a driver failing to stop for a bicyclist riding in a crosswalk would be subject to citation under the statute to the same extent that a driver would be subject to citation in relation to failing to stop for a person on foot in the crosswalk.

Result: Affirmance of Court of Appeals decision (see Nov. 98 LED: 13) which affirmed a King County Superior Court civil judgment on jury verdict for the injured bicyclist.

**(2) POLICE INCIDENT REPORTS ARE SUBJECT TO PUBLIC DISCLOSURE UNDER PDA AFTER CASE REFERRED TO PROSECUTOR; BUT JAIL BOOKING PHOTOS ARE NOT SUBJECT TO DISCLOSURE UNDER JAIL RECORDS LAW** – In Cowles Publishing Company v. Spokane Police Department, 139 Wn.2d 472 (1999), the Washington Supreme Court rules that: (1) police incident reports are subject to public disclosure under chapter 42.17 RCW once the police refer a case to the prosecutor, but (2) jail booking photos and other jail records are categorically exempt from disclosure in light of the express privacy protection provided in chapter 70.48.100(2).

1. Disclosure of incident report

On the matter of disclosure of the incident report in the case before it, the Supreme Court clarifies and distinguishes its ruling two years ago in Newman v. King County, 133 Wn.2d 565 (1997), a case involving a public disclosure request for investigation files in a long-unsolved murder case. In Newman, the Supreme Court ruled that the Public Disclosure Act exemption for investigative records (see RCW 42.17.310(1)(d)) protects the entire file on an investigation throughout the time that the investigation is open at the law enforcement agency. Distinguishing Newman, the Supreme Court rules in its latest Cowles opinion:

In sum, we hold in cases where the suspect has been arrested and the matter referred to the prosecutor, any potential danger to effective law enforcement is not such as to warrant categorical nondisclosure of all records in the police investigative file. In such cases, to the extent nondisclosure of records or parts of records is nevertheless necessary, the trial court should conduct an in camera review and make a case-by-case determination of whether nondisclosure is essential to effective law enforcement.

In this case, the only written document at issue is the police “incident report.” The Department has not carried its burden of proving that nondisclosure of the incident report was essential to effective law enforcement in this case. The report contained only a basic factual description of events. To the extent it contained information supplied by witnesses, these were not formal statements taken in preparation of trial. In short, there is nothing contained in the report the disclosure of which would have harmed pending legal process or compromised the privacy right of the defendant. Accordingly, the incident report in this case should have been disclosed at the time of the request.

[Footnotes omitted]

2. Disclosure of jail booking photograph

On the other hand, the Cowles Court rules that a jail booking photo is exempt from disclosure under RCW 70.48.100. That statute provides in part that records of persons confined in jail are to be held “in confidence” and “made available only to criminal justice agencies,” with limited law enforcement-related exceptions. The Cowles Court rejects the newspaper publisher’s arguments that the photo became subject to disclosure: (1) once it was shared with the police department, or (2) once the arrestee was released from jail.

Result: Affirmance of Spokane County Superior Court ruling granting request for disclosure of the incident report; reversal of Superior Court ruling which had granted request for disclosure of the jail booking photo.

**LED EDITOR'S NOTE:** In a concurring opinion, Justice Talmadge is joined by Justice Ireland in arguing in vain that the incident report should be deemed a protected investigative file until such time that the person has been arrested and charges have been filed by the prosecutor. The Washington Association of Prosecuting Attorneys plans to seek amendment in the Washington Legislature along these lines in the legislative session which begins in January 2000.

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**WASHINGTON STATE COURT OF APPEALS**

**NAKED-EYE OBSERVATIONS FROM PLANE AT 500 FEET: A) CONFORM TO STATE CONSTITUTIONAL RESTRICTIONS, AND B) PROVIDE PC RE MARIJUANA GROW**

State v. Wilson, 97 Wn. App. 578 (Div. III, 1999)

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

A Goldendale resident, who remained anonymous, told Police Detective Pat Kaley that Thomas Wilson was growing marijuana at his 393 Fish Hatchery Road residence in Goldendale. That same day, "a prominent business man in Goldendale" told Detective Roy Brown of the Klickitat County Sheriff's Office that he had been told Mr. Wilson watered the top of a small, roofless shed on his 393 Fish Hatchery Road property.

The Goldendale Police Department arranged for aerial surveillance of Mr. Wilson's property. Washington State Patrol Trooper Jim Williams, the pilot, is certified to spot marijuana from the air. Detective Kaley was on board the plane. Detective Arne Gonser of the Clark-Skamania County Drug Task Force was also on board. He is also a trained "marijuana spotter."

Detective Brown watched the plane from the ground. Using binoculars, he saw the plane circle over the Wilson residence. He estimated its altitude at about 500 feet. Detective Brown had been a deputy sheriff for 7 1/2 years. He completed the Washington State Law Enforcement Academy, a 2 1/2 - year assignment to the drug investigation unit, and formal training and experience in controlled substance matters.

Detective Gonser saw "15 to 20 plants or more" growing inside on the north wall of the roofless shed. The plants had been groomed and manicured. Both Detective Gonser and Trooper Williams were 90 percent sure they saw marijuana plants. Each saw a "fuzzy" type bud one associated with a marijuana plant. Detective Kaley saw green plants growing inside the building but could not say for sure if they were marijuana plants. Mr. Wilson made no showing that police used binoculars, although he claimed they must have.

Detective Gonser, Detective Kaley, and Detective Brown drove to an area close to Mr. Wilson's residence and saw the shed from Fish Hatchery Road. The shed windows were boarded up.

Detective Brown drafted an affidavit to support a search warrant. The Klickitat County Sheriff's Department got the warrant and executed on it the same day. They seized marijuana plants from the shed and house on Mr. Wilson's property. They also seized a pipe, a bong, weighing scales, and plastic baggies containing marijuana residue.

The State charged Mr. Wilson with manufacture of a controlled substance, possession of a controlled substance (marijuana) and use of drug paraphernalia. He moved to suppress the drug evidence. The court denied his motion and later convicted him of all three charges following a bench trial on stipulated facts.

ISSUE AND RULING: 1) Was the naked-eye aerial surveillance of Mr. Wilson's property from 500 feet an unlawful search in violation of article 1, section 7 of the Washington Constitution? (ANSWER: No); 2) Did the officers' overflight observations and other facts of the investigation add up to probable cause? (ANSWER: Yes)

Result: Affirmance of Klickitat County Superior Court conviction of Thomas Eugene Wilson for manufacture of a controlled substance (marijuana), possession of marijuana, and use of drug paraphernalia.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) PRIVACY ISSUE

Aerial surveillance is not a search where the contraband is identifiable with the unaided eye, from a lawful vantage point, and from a nonintrusive altitude. But aerial surveillance may be intrusive and require a warrant if the vantage point is unlawful or the method of viewing is intrusive. So the question here is whether aerial surveillance without binoculars from a fixed wing aircraft operating 500 feet above ground level is intrusive.

For us, adoption of the FAA limitations in this case makes the most sense because they are most consistent with current Washington law. FAA regulations permit fixed wing aircraft to operate at an altitude of 500 feet above the ground in other than congested areas. Five hundred feet above the ground is then a lawful vantage point because fixed wing aircraft can legally operate at that altitude. And the vantage point is therefore no more intrusive than police standing on a public street corner, or other legal vantage point. We hold therefore that police observations from a fixed wing aircraft operating 500 feet above ground level in other than congested areas do not violate article I, section 7, of the Washington State Constitution.

Mr. Wilson suggests that the officers must have used binoculars to see the marijuana. But that is a factual determination. And we are limited by the record before us. We find no indication in this record that the officers used visual enhancement equipment to see the marijuana. And Mr. Wilson did not refute the State's testimony that police saw marijuana with the naked eye from 500 feet above the ground.

[Citations omitted]

2) PROBABLE CAUSE ISSUE

Probable cause requires facts sufficient for a reasonable person to conclude the defendant probably is involved in criminal activity. We test the probable cause conclusion by using common sense rather than a hypertechnical approach. And the magistrate may certainly draw commonsense inferences from the facts and circumstances set forth in the affidavit.

Anonymous citizen reports. Probable cause requires a showing of both the basis of the informant's knowledge and the informant's veracity. Police may, however, independently investigate their suspicions, corroborate evidence obtained

through that investigation, and thereby shore up any deficiency in either of the Aguilar-Spinelli prongs knowledge or veracity. The corroborating evidence should point to suspicious activity along the lines suggested by the informant.

Here, the information by the citizen informants satisfies neither prong of Aguilar-Spinelli. But independent police investigation here more than cured the deficiencies in the informants' statements. During the flyover of Mr. Wilson's property, the officers saw a small, roofless shed containing 15 to 20 plants that were groomed and resembled marijuana. The officers also observed from Fish Hatchery Road that the shed windows were boarded up.

Officers' qualifications. Again, probable cause to issue a warrant is established if the supporting affidavits set forth facts sufficient for a reasonable person to conclude the defendant probably is involved in criminal activity. The affidavit supporting the search warrant included the following information, which documented the results of the independent police investigation:

- (1) Detective Gonser and Detective Kaley were on the aerial surveillance aircraft piloted by Trooper Williams.
- (2) Detective Gonser and Trooper Williams both were 90 percent sure they saw marijuana plants in the shed.
- (3) Although untrained in aerial observation, Detective Kaley thought he saw plants growing inside the building.
- (4) Detective Gonser is a trained observer for spotting growing marijuana from the air. During his three years of experience as a trained observer, he has spotted and eradicated over 30 marijuana gardens.
- (5) Trooper Williams is a trained and certified observer for spotting marijuana from the air.

The totality of the information in the affidavit provided ample cause for a reasonable person to conclude that Mr. Wilson was probably involved in criminal activity. The court did not abuse its considerable discretion in issuing the warrant based on the general statements of the officers' qualifications in the affidavit.

**LED EDITOR'S NOTE: Prior Washington State Supreme Court decisions approving overflights under "independent grounds" state constitutional privacy analysis, as discussed by the Court in Wilson are:**

**State v. Myrick, 102 Wn.2d 506 (1984) (naked-eye observation in flight at 1500 feet);**

**State v. Cockrell, 102 Wn.2d 561 (1984) (naked-eye observation in flight at 800 feet upheld);**

**State v. Cord, 103 Wn.2d 361 (1985) (naked-eye observation in flight at 3400 feet upheld).**

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

**(1) DETECTIVE'S "PROMISE" THAT HE WOULD SUBMIT CASE TO PROSECUTOR'S OFFICE CREATED A SPECIAL RELATIONSHIP, MAKING HIS POLICE AGENCY SUBJECT TO**

**SUIT UNDER EXCEPTION TO “PUBLIC DUTY DOCTRINE”** In City of Anacortes v. Torres, 97 Wn. App. 64 (Div. I, 1999), the Court of Appeals rules 2-1 that, where a detective “promised” an assault victim that he would submit a case to the prosecutor’s office but failed to do so, the detective’s police department may be held civilly liable under the “special relationship” exception to the “public duty doctrine.”

Under the public duty doctrine, recovery from a government agency on a negligence theory is allowed only where, among other things, plaintiff shows that the duty breached was owed to an individual, and was not merely the breach of an obligation owed to the public in general. That is, a duty owed to all is a duty owed to none. Liability may exist, however, where a relationship exists or has developed between the plaintiff and the municipality’s agents giving rise to a duty to perform a mandated act for the benefit of a particular person or class of persons. Such a special relationship arises where: (1) there is direct contact between the public official and the injured plaintiff which sets the latter apart from the general public, and (2) there are express assurances given by a public official, which (3) give rise to justifiable reliance on the part of the plaintiff. Thus, an actionable duty to provide police services can arise if these requirements are met.

In Torres, the Court reviews a case involving Shelley McGuffey, a woman who claimed to be the victim of long-term abuse by Michael McGuffey, Shelley’s ex-husband. The detective investigating the case was slow in bringing closure to his investigation due to: 1) his heavy work-load, 2) his questions about probable cause due to Shelley’s delayed reporting of the assaults, and 3) his doubts about Shelley’s willingness to follow through.

Nonetheless, on 08/15/93, the detective told Shelley that he would discuss the case the next day with the prosecutor’s office to see if charges would be filed. On 08/16/93, Shelley obtained a no-contact order against her ex-husband Michael. On 08/17/93, the detective stopped Michael’s car. The detective questioned Michael, took a gun from him, and served him with the no-contact order. But the detective did not arrest Michael in that 08/17/93 contact.

On 08/18/93 or 08/19/93, the detective discussed the case with the prosecutor’s office but he did not submit it for a filing decision. On 08/24/93 the detective had a telephone conversation with Shelley. When she suggested how she wanted the case to come out (suggesting the dropping of a rape charge and light sentencing on an assault charge), the detective counseled her that the charging strategy on the case would be the decision of the prosecutor, and that sentencing would be up to the courts.

Because the detective was very busy and still had some doubts about the case, he did not submit it to the prosecutor for a filing decision over the next month. On 09/27/93 Michael murdered Shelley in Anacortes. Michael fled and remains at large. Shelley’s surviving family filed suit against the Anacortes Police Department.

In a wrongful death decision last year in Beal v. City of Seattle, 134 Wn.2d 769 (1998) **Jan 99 LED:07**, the Washington Supreme Court found a special relationship and therefore exposure to liability, where an E-911 dispatcher promised to dispatch a police vehicle but failed to do so in reasonably timely manner. The Torres majority similarly finds a special relationship was created through the detective’s express assurances to the plaintiff that he would refer her case to the prosecutor. Ms. Torres’ survivors should be allowed to present their case to the jury, the Torres majority holds, explaining as follows:

Whether the promise to refer the case for a charging decision was an assurance inducing reasonable reliance is also a fact question not amenable to summary judgment. Stalked by a violent predator, Shelley had only two legal options for protecting herself-to seek help from the police in putting Michael behind bars, or to hide. In the past, she had tried hiding. In 1990, she escaped from Michael by moving from Texas to Washington. In early 1993, she escaped him by taking refuge in a shelter. But in August 1993, Shelley chose to seek help from the police. A jury could conclude that Shelley remained in Anacortes, going about a normal life without

trying to hide from Michael, only because she reasonably relied on the express assurance that her case had been referred for a charging decision. Further evidence of her reliance is the fact that she obtained a protective order and gave it to the police to serve, notwithstanding her well-documented fear of Michael's reaction once he realized she had reported him to the police. [The detective] explained that the reason he did not forward the file was that he was busy working on another case. He also expressed concern about lacking probable cause. If he had not promised an immediate referral, a jury would not be allowed to second-guess his reasons. As the City argues, the methods and timing of a police investigation are ordinarily not subject to scrutiny in a negligence action. But here, the detective's express assurance created a duty owed to Shelley to act in accordance with the assurance. When such a duty exists, a jury must be allowed to decide whether the failure to so act was a breach of duty. A jury will not necessarily accept [the detective's] explanations at face value. An alternative explanation may be inferred from his comment that Shelley was "real hesitant" to go through with her complaint: that the Anacortes police, concerned that Shelley once again would abandon the charges, decided simply to shelve the file rather than refer it to the prosecutor. A jury may decide that this decision was negligence. We hold that the trial court erred in ruling as a matter of law that the promise to refer Shelley's case to the prosecutor did not create a special relationship.

In dissent, Judge Baker argues that the Torres majority opinion represents an unwise expansion of the "special relationship" exception to the "public duty doctrine."

Result: Reversal of Skagit County Superior Court order of dismissal; remand for trial.

Status: City's motion for reconsideration pending.

**LED EDITOR'S COMMENT: If an officer tells a victim that the officer will submit the case to the prosecutor for a filing decision, the officer had better do so as expeditiously as possible or have a further conversation with the victim to modify the "promise."**

**(2) AFFIANT OFFICER'S ACCOUNT RE DEFENDANT'S MARIJUANA-SMOKING IN HIS CABIN DOESN'T PROVIDE PC TO SEARCH USER'S SHED; "BOILERPLATE" AFFIDAVITS CRITICIZED** – In State v. Klinger, 96 Wn. App. 619 (Div. II, 1999), the Court of Appeals holds that an affidavit describing an incident in which the affiant-officer observed defendant smoking marijuana in his cabin did not provide probable cause to search a storage shed located behind the cabin.

The affiant-officer included a great deal more information in his affidavit than the observation of defendant smoking a marijuana cigarette. However, other than an allegation that defendant had once been arrested for possession of marijuana, most of the remainder of the affidavit was what the Court of Appeals call "boilerplate." The boilerplate described, in multiple paragraphs based on the affiant's experience and training, the habits and practices of those engaged in the sale and use of illegal drugs, including the tendency of such people to store certain evidence in outbuildings.

The Court of Appeals rules that the affidavit did not provide a PC drug-connection to the shed of defendant, apparently a mere drug-user. Along the way, the Klinger Court criticizes the officer's computer-generated inclusion of extensive boilerplate in the affidavit. The Klinger Court concludes this point as follows:

The affidavit in this case is a tribute to modern personal computers. It begins by listing all of the items that the deputy has "good and sufficient reason to believe" are on the premises: There is a page of lists that has six headings, including "items used to facilitate the manufacturing, and/or distribution and/or packaging of marijuana," to "[r]ecords relating to the transportation, ordering, manufacturing, possession, sale, transfer and importation of controlled substances . . . ." It refers to books, invoices, records of real estate transactions, utility bills, money wrappers, photographs of co-

conspirators, none of which applies in this case. The affidavit contains two pages of paragraphs concerning what he has found common for persons who deal in and distribute illicit drugs to do within their residence. These include: to divide controlled substances into smaller quantities, to secrete it in outbuildings, to keep records of their crop growing, to disguise their assets, to have records of avoiding C.T.R. requirements, to have assets taken in trade, to maintain cryptic records of drugs they have given on assignment, to use computers, and to have weapons. The prosecutor plainly admitted that the bulk of the affidavit did not pertain to Mr. Klinger because this was not a distribution case. We do not favor this type of affidavit because it imparts no information or legitimate inferences from the possession of marijuana. Affidavits supporting search warrants should be particular about the crime involved. This affidavit proves that the computer must not be used in place of common sense.

Result: Reversal of Skamania County Superior Court conviction of Bruce G. Klinger for felony possession of marijuana (154 grams).

**(3) OFFICER MADE SEIZURE WHEN HE ASKED SUSPECT WHETHER SUSPECT WOULD MIND STICKING AROUND WHILE OFFICER CHECKED FOR ARREST WARRANT** – In State v. Barnes, 96 Wn. App. 217 (Div. III, 1999), the Court of Appeals rules 2-1 that the following facts established a Terry “seizure” by a law enforcement officer:

Spokane Police Officer Felix Moran spotted Ivan Barnes approaching the corner of First and Madelia on May 15, 1996. Mr. Barnes lived in the neighborhood.

Officer Moran noticed Mr. Barnes because within the two weeks previous he had seen an outstanding warrant on him for a minor infraction.

Officer Moran knew Mr. Barnes. He had arrested him 10 to 20 times before. But Mr. Barnes had no prior arrests or convictions for violence or weapons. And Officer Moran knew this. Mr. Barnes did have a history of drug-related misdemeanors, primarily possession of paraphernalia (his crack pipe) and a couple of thefts.

Officer Moran testified he would have approached and questioned Mr. Barnes, with or without a warrant. Officer Moran approached Mr. Barnes and told him that he had seen an outstanding warrant for him. Mr. Barnes told Officer Moran the warrant had been cleared. Officer Moran then asked if Mr. Barnes "would be willing to stick around while I check on it." Officer Moran specifically recalls using the words, "would you mind." Mr. Barnes stuck around.

The warrant had in fact been cleared.

Officer Moran's view of the contact was summed up in his testimony:

- Q. . . . And a field contact means when you just approach someone that - and see whether they will voluntarily talk to you?
- A. Right. Right. Which is how this started.
- Q. Okay. It started with a field contact?
- A. Yeah. That is how it started out. And the investigation of the warrant, of course.

Officer Moran did not tell Mr. Barnes he was free to leave. He subjectively believed, however, that Mr. Barnes was free to walk away. Mr. Barnes did not believe he was free to leave.

Applying a purely objective test, the Barnes majority concludes that a “seizure” occurred at the moment when the officer asked Barnes if he would wait for the warrant check. For the Barnes majority, it wouldn’t matter how the officer asked the question. The majority concludes that, unless the contacted person was expressly told that he was “free to leave,” a reasonable person would not feel free to leave once an officer told him that he believed there was an outstanding warrant for his arrest. Subjective belief of the officer and suspect are irrelevant, the Barnes majority asserts.

The Barnes majority does not squarely address the issue of whether the officer had reasonable suspicion which would justify holding Barnes to check for warrants, declaring that the State chose not to make any argument on this point. Hence, the Court assumes without analysis of the facts that defendant was seized without justification. Finally the Barnes majority concludes that the defendant was not lawfully arrested for “obstruction” when he resisted his unlawful seizure.

In dissent, Judge Brown argues that the majority (Judges Sweeney and Schultheis) should have deferred to the trial court’s finding that the contact between the officers and Barnes a voluntary non-seizure. Judge Brown argues further that Barnes was subsequently subjected to a lawful arrest for obstructing in analysis not addressed in this LED entry.

Result: Reversal of Spokane County Superior Court conviction of Ivan Earl Barnes for possession of crack cocaine.

**LED EDITOR’S COMMENT: We question the Barnes majority’s conclusion that the contact here was a “seizure.” But if officers want to make it more certain that a court will find a contact not to be a seizure, then officers should consider advising the suspect that he or she is “free to leave.”**

**(4) CPS INVESTIGATOR WORKING DEPENDENCY CASE WAS A STATE AGENT AND WAS THEREFORE REQUIRED TO MIRANDIZE JAILED CHILD ABUSE SUSPECT** – In State v. Nason, 96 Wn. App. 686 (Div. III, 1999), Division Three of the Court of Appeals rules that a CPS investigator working a dependency case should have Mirandized a jailed suspected child abuser before questioning him.

Miranda warnings are required prior to a) custodial b) interrogation c) by a state agent. The Court of Appeals indicates that the State conceded that there was a) custodial b) interrogation. On the question of whether the CPS investigator was c) a “state agent” for Miranda purposes, the Nason Court answers “yes” under the following analysis:

In Cates v. State, 776 S.W.2d 170 (Tex. Cr. App. 1989), an investigator for the [Texas] Department of Human Resources interviewed the defendant in the county jail and obtained admissions from him that were introduced at trial. The investigator did not give the defendant Miranda warnings prior to the interview. Although the investigator had not acted at the behest of law enforcement officials, the court held the statements were inadmissible because she was acting as a state agent with the duties to discover child abuse and turn the information over to law enforcement.

We conclude Mr. Armstrong’s conduct was similar to that of the investigator in Cates. As in Cates, Mr. Nason’s admissions were the result of Mr. Armstrong’s attempt to gather evidence of abuse, and Mr. Armstrong also had a duty to turn over evidence of child abuse to law enforcement officials. Finally, as in Cates, Mr. Armstrong did report Mr. Nason’s incriminating statements to law enforcement officials.

Additionally, we note that after the interview a law enforcement inquiry was directed to Mr. Armstrong about what was said and that Mr. Armstrong was first informed of Mr. Nason’s incarceration by law enforcement. Although suggestive that Mr. Armstrong was acting as a state agent, we need not draw this additional inference from these circumstances to conclude Mr. Armstrong was a state agent.

The fact that, unlike in Cates, Mr. Armstrong was investigating Mr. Nason for a civil proceeding does not change the result. In Mathis v. United States, 391 U.S. 1 (1968), the defendant was in prison on unrelated charges. During a routine tax investigation, a government investigator interviewed the defendant without giving him the Miranda warnings. The Supreme Court held that the interview violated the defendant's Fifth Amendment rights. It reasoned that although a tax investigation may be initiated for the purpose of a civil action, tax investigations frequently lead to criminal prosecutions. Furthermore, a criminal prosecution did in fact begin eight days after the interview with the defendant.

Here, although Mr. Armstrong was investigating Mr. Nason for the purpose of a dependency action, Mr. Armstrong was required to disclose incriminating evidence to law enforcement officials. As in Mathis, a criminal prosecution could, and did, arise shortly after the interview and the prosecution relied in part on evidence gathered by Mr. Armstrong. Mr. Armstrong was not caring for the interests of Mr. Nason or acting as his agent or representative, rather Mr. Armstrong owed his allegiance to the State. Thus, on balance the record indicates Mr. Armstrong acted as a state agent and was required to give Mr. Nason his Miranda warnings prior to questioning him.

[Some citations omitted]

The Nason Court goes on, however, to rule that the trial court's error in admitting the statement was harmless. Other evidence of the defendant's guilt was overwhelming, the Court declares, and therefore the conviction need not be overturned.

Result: Affirmance of Spokane County Superior Court conviction of Joshua Jay Nason for first degree assault.

**LED EDITOR'S NOTE**: In most cases, questioning of a "suspect" by a CPS investigator would **not** be subject to Miranda, because the questioning would not be custodial. When questioning occurs at a jail or prison, however, and the suspect is aware of the governmental role of the questioner, Miranda will generally apply. Be aware, however, that the mere fact that a person is in jail or prison does not make questioning "custodial" per se. While it is almost always advisable to Mirandize such a prisoner before interrogating him or her, there is some support in Washington case law and there is a substantial body of case law from other jurisdictions holding that not all governmental questioning of incarcerated persons is "custodial" for Miranda purposes. See State v. Post, 118 Wn.2d 596 (1992) March 93 LED:03; and see Laurie Magid, "Questioning the question-proof inmate – defining Miranda custody for incarcerated suspects." 58 Ohio State Law Journal 883 (1997). We plan to revisit this sub-issue in a future LED.

**(5) HEARSAY EXCEPTION FOR STATEMENTS MADE FOR "MEDICAL DIAGNOSIS OR TREATMENT" DOES NOT APPLY TO STATEMENTS TO "FORENSIC" INTERVIEWER; BUT TESTIMONY HELD ADMISSIBLE UNDER CHILD ABUSE HEARSAY STATUTE** – In State v. Lopez, 95 Wn. App. 842 (Div. III, 1999), the Court of Appeals rules that statements made by sexually abused children to a state social worker should not have been admitted by the trial judge under the rationale stated by the judge. The social worker was identified as a forensic interviewer for sexually abused children. The Lopez Court holds that the statements were not admissible under ER 803(a)(4) as hearsay statements made for purposes of medical diagnosis or treatment, because the interviews were conducted only for forensic purposes (i.e. for purposes of trial) and were not conducted for purposes of diagnosis or treatment. The statements were, however, admissible under RCW 9A.44.120, the child abuse victim hearsay exception.

ER 803(a)(4) is the Evidence Rule which exempts from the hearsay exclusionary rule:

[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or

general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

In the Lopez case, the interviewer whose testimony was at issue was a state social worker who was asked by the prosecutor to interview a child victim of sexual abuse solely for purposes of trial preparation. The Lopez Court categorizes the social worker as a “forensic” interviewer for that reason. Because the interviews were conducted only for “forensic” purposes, not treatment-focused medical diagnosis or treatment itself, the Lopez Court excludes the testimony. The Lopez Court does suggest in the following analysis that its view of ER 803(a)(4) may be more restrictive than that of other courts, and that there appears to be a conflict among the divisions of the Washington Court of Appeals on interpretation of ER 803(a)(4):

We can understand why the State believes that such statements may be admissible. In the context of the special problems presented to courts by child victims, some courts have taken an aggressive approach to the rule and have admitted hearsay statements that are only marginally related to medical treatment or diagnosis. *[Court's Footnote: Statements made to counselors in child abuse or rape situations have been admitted. Likewise, statements attributing fault to a member of the victim's immediate family have been held to be reasonably pertinent to treatment and admissible because it is "relevant to the prevention of recurrence of injury." Similarly, hearsay statements regarding identity have been admitted because child abuse can involve psychological as well as physical injury and there is a risk of further injury if the child and the abuser live in the same household. The exception has been applied to both treating physicians and physicians who are consulted for the purpose of enabling the physician to testify. Thus, a statement made to enable a forensic, nontreating doctor to make a diagnosis, even for court purposes, has been found to be within this hearsay exception.]* However, even in those cases, there was some relationship between the statements and the child's diagnosis or treatment.

[Citations and cases omitted]

The Lopez Court ultimately concludes that the purely forensic purpose of the interviews excludes the hearsay from admissibility under ER 803(a)(4):

Here, the State concedes Ms. Winston was hired solely to interview the children to determine the existence and extent of sexual abuse for trial purposes. There is nothing in the record that indicates the children understood that their statements would further diagnosis or treatment. And, there is nothing in the record that indicates the children's interviews were pertinent to diagnosis or treatment by any physician or counselor. Consequently, the statements made to Ms. Winston lacked the indicia of reliability required for admission under ER 803(a)(4).

[Citations and cases omitted]

The Lopez Court goes on to hold that the child hearsay was admissible under RCW 9A.44.120 (child abuse hearsay exception), and to hold further that the trial court's erroneous interpretation of ER 803(a)(4) (discussed above) was therefore harmless error.

In holding admissible the hearsay statements of the two child victims (who were 8 and 9 years old at the time of the interviews) to the forensic interviewer, the Lopez Court addresses the following reliability factors: 1) character of the children (they had no reputation for lying); 2) statements to more than one person (the children had given similar stories to their mother); 3) spontaneity (some statements made during the interview were spontaneous, as opposed to being the product of leading or suggestive questions); 4) role of questioner and questioner's relationship to the children (that a professional interviewer did the questioning enhanced the reliability of the interview); 5) chance of faulty recollection (the Lopez Court finds no suggestion of such in the evidence); and 6) other

circumstances surrounding the statements (the Lopez Court finds that the professional manner of interviewing the children enhanced reliability).

Result: Affirmance of Adams County Superior Court conviction of Saul M. Lopez for child molestation (two counts) and first degree rape (three counts) in crimes committed against three of his five children.

**(6) “EXCITED UTTERANCES” HEARSAY EXCEPTION APPLIED IN CASE WHERE, AT TRIAL, ALLEGED VICTIM TRIED TO RETRACT THE STATEMENT SHE HAD MADE AT TIME OF ASSAULT** -- In State v. Briscoeray, 95 Wn. App. 167 (Div. I, 1999), the Court of Appeals rules that there was substantial evidence: a) that a witness’s statements were uttered while the victim was still under the stress of excitement caused by the startling event, and b) that the victim had not in fact had an opportunity to fabricate her story. Therefore, the statements were properly admitted at trial, even though the victim later retracted the statements and testified at trial that she had lied at the time of her contact with authorities.

In Briscoeray, the alleged victim ran up to a security officer. She screamed that her boyfriend had tried to kill her with a handgun just moments earlier. After the security guard had gotten an E-911 dispatcher on the line, the victim continued to excitedly tell him how defendant had put a gun to her head and pulled the trigger until the gun jammed, whereupon he had pulled the clip, which had single bullet in it. A police officer soon arrived. The victim then repeated her story in excited fashion to the officer.

At trial, the victim recanted her story regarding the gun, claiming she had made up the gun story, knowing that defendant had a gun that sometimes jammed. Defendant objected to admission of hearsay testimony from the security guard and the responding police officer, but the trial court admitted the testimony under the “excited utterances” hearsay exception. Applying an “abuse of discretion” standard of review, the Court of Appeals upholds the trial court’s evidentiary ruling under the following analysis:

The key to the requirement that the statements be made while under the stress of excitement caused by the startling event is spontaneity. In determining spontaneity, courts look to the amount of time that passed between the startling event and the utterance, as well as any other factors that indicate whether the witness had an opportunity to reflect on the event and fabricate a story about it.

Here, the short amount of time that passed between the event and the utterances, as well as Brazier’s emotional state during the whole of that time, suggest that her statements were spontaneous. It is undisputed that Brazier approached the guard shack within 30 to 40 seconds after a neighbor reported the abuse, and that she was crying and upset and stating, “He tried to kill me! He tried to kill me!” It is also undisputed that Heyward called 911 within minutes after Brazier contacted him. Brazier remained upset as she talked to the 911 operator. Officer Carpenter arrived while she was still on the phone and immediately asked her what had happened. Brazier was upset at times as she told him the story.

Result: Affirmance of King County Superior Court conviction of Leonard L. Briscoeray for attempted second degree murder and for second degree assault.

**LED EDITOR’S NOTE RE “SMITH AFFIDAVITS”**: One way for investigators to deal with the possibility of a recanting victim/witness is to use a “Smith affidavit.” Under State v. Smith, 97 Wn.2d 856 (1982) and Evidence Rule (ER) 801 (d)(1)(i) (which provides a limited hearsay exception for prior inconsistent statements of a witness), a voluntary, sworn, written statement by a witness taken by police during their investigation will generally be admissible should the witness testify inconsistently with the statement at trial.

**(7) DISASSEMBLED GUN WHICH CAN BE READILY REASSEMBLED AND FIRED IS A “FIREARM” FOR PURPOSES OF RCW 9.41.040** – In State v. Padilla, 95 Wn. App. 531 (Div. I,

1999), the Court of Appeals rules that a disassembled gun which can be reassembled and fired in a matter of seconds is a "firearm" for purposes of RCW 9.41.040, the statute which bars possession of firearms by convicted felons and certain other disqualified persons.

A police officer contacted defendant in a dimly lit parking lot. When the officer spotted a handgun in the suspect's hand, the officer drew his service weapon. The defendant tossed his gun on the pavement at the officer's feet. In later testimony at trial, the defendant claimed that the gun was already in three pieces when he threw it down. Defendant testified that the gun had already been disassembled when a companion handed it to him, and, upon hearing the officer's demand, that he had immediately tossed it toward the officer. On the other hand, the officer testified at trial that the gun had been in one piece when the defendant tossed it.

A firearms instructor with the police department testified at trial that Padilla's disassembled gun, as it was when picked up by the arresting officer in three pieces, could have been reassembled and fired in about five seconds.

Padilla, a convicted felon, was convicted of unlawful possession of a firearm. He appealed. The issue on appeal was whether a disassembled gun under these circumstances is a "firearm" for purposes of RCW 9.41.040.

The Padilla Court focuses on the definition of "firearm" at RCW 9.41.010(1), which defines "firearm" for purposes of the unlawful possession offenses of chapter 9.41 RCW as "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." While finding some ambiguity in this definition, the Court of Appeals concludes that legislative intent was to encompass the circumstances of Padilla's case. The Court's explanation is in part as follows:

In amending the firearms statutes in 1994, the Legislature's intent was, among other things, to reduce violence. Laws of 1994, 1st Sp. Sess. ch 7, 101. "State efforts at reducing violence must include . . . reducing the unlawful use of and access to firearms[.]" The plain language of the prohibitions in RCW Chapter 9.41 demonstrates the Legislature's clear goals of keeping all firearms out of the hands of certain individuals and certain firearms out of the hands of all individuals. As we observed in State v. Anderson, 94 Wn. App. 151 (1999) [**Division One holding that gun need not be test-fired to show it is operational; case now awaiting oral argument in State Supreme Court – LED EDITOR'S NOTE**] "[i]t begs reason to assume that our Legislature intended to allow convicted felons to possess firearms so long as they are unloaded, or so long as they are temporarily in disrepair, or so long as they are temporarily disassembled, or so long as for any other reason they are not immediately operable." Such a result would allow convicted felons to escape an unlawful possession charge simply by keeping a gun disassembled. At the same time, "may be fired" indicates legislative intent that a gun rendered *permanently* inoperable is not a firearm under the statutory definition here at issue because it is not ever capable of being fired. Therefore, we hold that a disassembled firearm that can be rendered operational with reasonable effort and within a reasonable time period is a firearm within the meaning of RCW 9.41.010(1). State v. Faust, 93 Wn. App. 373 (1998) **March 99 LED:16** (holding that a malfunctioning firearm was a "firearm" for purposes of RCW 9.94A.310(3)(b) (the statute providing for a mandatory three-year sentencing enhancement for second degree assault where "the offender . . . was armed with a firearm as defined in RCW 9.41.010"))).

Result: Affirmance of King County Superior Court conviction of Shane Padilla for unlawful possession of a firearm in the first degree, RCW 9.41.040(1)(a).

**(8) CHILD PORNOGRAPHY LAW DOES NOT REQUIRE PROOF DEFENDANT KNEW AGE OF PERSON DEPICTED** – In State v. Rosul, 95 Wn. App. 175 (Div. I, 1999), the Court of Appeals holds that Washington's statutory scheme prohibiting possession of child pornography (RCW 9.68A.070) does not include as an element of the crime the defendant's knowledge of the age of the

person depicted in the material possessed. All that need be proven in this regard is defendant's knowledge of the general nature of the material. Interpreted in this way, the statute survives constitutional challenges for overbreadth and vagueness, the Rosul Court declares.

At trial defendant Rosul (who had been caught at work using his employer's computer system to download digitized images of girls under 12 engaged in sex acts) had proposed a jury instruction that would have required the jury find he had knowledge that the individuals depicted were minors. The statute requires proof only that defendant knowingly possessed visual or printed material depicting persons engaged in sexually explicit conduct who were in fact minors, the Rosul Court holds.

Result: Affirmance of King County Superior Court conviction against Ronald C. Rosul for possession of child pornography.

**(9) PLEA AGREEMENT FOR EXPUNGEMENT OF RECORD OF 4<sup>TH</sup> DEGREE ASSAULT CONVICTION MUST BE HONORED DESPITE LACK OF STATUTORY AUTHORITY** – In State v. Shineman, 94 Wn. App. 57 (Div. II, 1999), the Court of Appeals holds that a defendant who pleaded guilty to fourth degree assault was entitled to enforcement of a provision in the plea agreement to expunge the record, even though enforcement of the expungement provisions appeared to conflict with the governing statute.

The plea agreement included a provision that, if defendant met certain conditions, after a year the State would recommend dismissal of the charge and expungement of the charge from his record. However, when the time came for expungement provision of the agreement to be implemented, the prosecutor's office filed a pleading asserting that the deputy prosecutor who had entered into the agreement did not have authority to do so, and, in any event, RCW 10.97.060, as interpreted in State v. Gilkinson, 57 Wn. App. 861 (1990) **Oct 90 LED:13**, does not permit a court to order the State to expunge its records.

The Court of Appeals concedes in Shineman that RCW 10.97.060 does not give Washington courts power to order Washington law enforcement agencies to expunge criminal history records. However, constitutional due process protections require that the State comply with a plea agreement where the defendant has carried out his part of the bargain, the Shineman Court holds. Accordingly the Court rules as follows:

The State should "expunge" or delete all mention of Shineman's assault charge in this case from any state [*Court's Footnote: The trial court lacks the authority to order federal agencies to expunge any records they may have of this incident. See United States v. Engesser, 788 F.2d 1401 (9th Cir. 1986.)*] record open to the public. We agree with Shineman that the records themselves need not be destroyed; rather, they must be stored in such a way that members of the general public have no access to them, and all mention of the charge must be removed from his permanent record.

[Some footnotes omitted]

Result: Reversal of Pierce County Superior Court order denying expungement of conviction record of Dean Elliott Shineman.

**(10) BB GUN WAS "DEADLY WEAPON" FOR PURPOSES OF RCW 9A.36.021(1)(c)** -- In State v. Taylor, 97 Wn. App. 123 (Div. III, 1999), the Court of Appeals rules that, under the particular circumstances of the case before it, a BB gun was a "deadly weapon" for purposes of RCW 9A.36.021(1)(c).

In Taylor, a seventeen-year-old defendant confronted four younger boys who the defendant suspected had been trespassing on his family's property. He followed them and ordered them to stop and get down or he would shoot. They stopped and the defendant ordered them to lie face-down in the snow for 20 to 30 minutes. The Taylor Court describes in part what happened during that 20 to 30 minutes:

During that time, he brandished a black BB pistol that resembled a .45-caliber Colt automatic pistol. Mr. Taylor pointed the BB pistol at each of the three boys, and held

it about one-half inch from one boy's head. The boys testified they believed the pistol was a firearm and feared they were going to be shot.

The defendant was charged with three counts of second degree assault and three counts of unlawful imprisonment. He was found guilty of all six charges. He appealed only the second degree assault convictions, arguing that the BB gun was not shown by the State to be a deadly weapon. The Taylor Court explains as follows how it approaches the "deadly weapon" question:

An element of the crime is the use of a deadly weapon. The term "deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm[.] RCW 9A.04.110(6).

This provision creates two categories of deadly weapons. The first includes explosives or firearms, which are deemed deadly per se regardless of whether they are loaded. See State v. Carlson, 65 Wn. App. 153 (1992). The second category includes any other weapon or instrument that may be deadly in fact if it is "readily capable of causing death or substantial bodily harm," depending on "the circumstances in which it is used, attempted to be used, or threatened to be used[.]" RCW 9A.04.110(6); see Carlson, 65 Wn. App. at 158-59. A BB gun is not a firearm and thus is not a deadly weapon per se. Carlson, 65 Wn. App. at 161 n.10; see State v. Majors, 82 Wn. App. 843 (1996) (in most situations, a BB gun is not capable of causing death or serious injury). Whether a BB gun is a deadly weapon in fact is a question for the trier of fact. Carlson, 65 Wn. App. at 160.

[Some citations omitted]

Distinguishing this case from Carlson (a case where there was no evidence that the BB gun at issue was either operable or capable of being made operable), the Taylor Court concludes that "[t]he clear language of the statute requires the factfinder to consider the circumstances under which the defendant threatened to use the weapon. Here, there was ample evidence that [the defendant] threatened to use the BB gun to shoot the three boys in a way that would have caused substantial bodily harm."

**Result:** Affirmance of Grant County Superior Court juvenile adjudications of guilt against Charles E. Taylor for second degree assault (three counts) and unlawful imprisonment (three counts).

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## **INTERNET ACCESS TO COURT DECISIONS, STATUTES, AND COURT RULES**

The Washington office of the Administrator for the Courts maintains web sites with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. One address provides just decisions which have been issued within the preceding 14 days [<http://www.wa.gov/courts/opinpage/recent.htm>]. Two other addresses provide more court information and also include decisions issued within the preceding 90 days [<http://www.wa.gov/courts/home/htm>] and [<http://www.wa.gov/courts/opinpage/home.htm>].

United States Supreme Court opinions can be accessed at [<http://supct.law.cornell.edu/supct>]. This web site contains all U.S. Supreme Court opinions issued since 1990 and most significant opinions of the Court issued before 1990.

A good source for easy access to relatively current Washington state agency administrative rules (including WSP equipment rules at Title 204 WAC) can be found at [<http://slc.leg.wa.gov/WACBYTitle.htm>]. Washington Legislation and other state government information can be accessed at [<http://access.wa.gov/>] clicking on "L" and then "legislation" or other topical entries in the "Access Washington Home Page "Index."

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the **LED** should be directed to Mr. Wasberg at 206 464-6039; Fax 206 587-4290; E Mail [johnw1@atg.wa.gov]. Questions regarding the distribution list or delivery of the **LED** should be directed to Ed Johnson of the Criminal Justice Training Commission (CJTC) at (206) 439-3740, ext. 272; Fax (206) 439-3752; email [EJohnson@cjtc.state.wa.us]. **LED** editorial comment and analysis of statutes and court decisions expresses the thinking of the writers and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The **LED** is published as a research source only. The **LED** does not purport to furnish legal advice. **LED's** from January 1992 forward are available on the Commission's Internet Home Page at:[<http://www.wa.gov/cjt>].