



Law Enforcement

October 2000

Digest

HONOR ROLL

510th Session, Basic Law Enforcement Academy – April 26th, 2000 to August 31st, 2000

President: Tony M. Perez - The Evergreen State College Police Department
Best Overall: Jennifer L. Carey - Kitsap County Sheriff's Office
Best Academic: Jarrod L. Seth - Everett Police Department
Best Firearms: Kenneth K. Brandt - Everett Police Department
Tac Officer: Officer Kory Pearce - Olympia Police Department

OCTOBER LED TABLE OF CONTENTS

NINTH CIRCUIT, U.S. COURT OF APPEALS.....2

“INVOCATION” TRIGGER TO SIXTH AMENDMENT’S BAR TO POLICE “INITIATION OF CONTACT” WITH CHARGED DEFENDANT IS EXPANDED TO INCLUDE PRE-INDICTMENT ATTORNEY-REPRESENTATION
U.S. v. Harrison, 213 F.3d 1206 (9th Cir. 2000)2

NO FOURTH AMENDMENT PRIVACY IN MOTEL REGISTRATION RECORDS; NO FERRIER APPLICATION IN FEDERAL COURT TO CONSENT SEARCH REQUEST; CONSENT HELD TO BE VOLUNTARY
U.S. v. Cormier, 220 F.3d 1103 (9th Cir. 2000).....5

BRIEF NOTES FROM THE NINTH CIRCUIT, U.S. COURT OF APPEALS10

NO CONSTITUTIONAL VIOLATIONS IN CASE RELATING TO WENATCHEE “SEX RING” INVESTIGATIONS
Devereaux v. Perez and others, 218 F.3d 1045 (9th Cir. 2000)10

POINTING GUN AT SUSPECT MAY BE EXCESSIVE FORCE UNDER FOURTH AMENDMENT – LAWFULNESS OF GUN-POINTING BY LAW ENFORCEMENT OFFICER DEPENDS ON NATURE AND IMMINENCE OF THREAT
Robinson v. Solano County, California, 218 F.3d 1030 (9th Cir. 2000)10

FBI MARKSMAN WHO SHOT VICKY WEAVER AT RUBY RIDGE IMMUNE FROM STATE CRIMINAL PROSECUTION -- HE HONESTLY AND REASONABLY BELIEVED THAT DEADLY FORCE WAS NECESSARY
Idaho v. Horiuchi, 215 F.3d 986 (9th Cir. 2000)11

BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT13

KNOWLEDGE OF PRESENCE OF GUN IS ELEMENT OF CRIME OF UNLAWFUL POSSESSION OF FIREARM
State v. Anderson, ___ Wn. 2d ___, 5 P.3d 1247 (2000).....13

STEALING UNCERTIFIED CLAMS FROM PRIVATE BED AND SELLING THEM FOR OVER \$500 IS THEFT TWO
State v. Longshore, ___ Wn.2d ___, 5 P.3d 1256 (2000)14

RCW 26.50 DV PROTECTION ORDER'S DISTANCE RESTRAINT PROVISION CRIMINALLY ENFORCEABLE
State v. Chapman, 140 Wn.2d 436 (2000) 14

WASHINGTON STATE COURT OF APPEALS 16

EDWARDS V. ARIZONA'S FIFTH AMENDMENT "INITIATION OF CONTACT" BAR IS LIFTED AS SOON AS SUSPECT IS MEANINGFULLY RELEASED FROM CONTINUOUS CUSTODY
State v. Jones, ___ Wn. App. ___, 6 P.3d 58 (Div. II, 2000)..... 16

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS..... 18

WHERE TACOMA POLICE SUPERVISOR AUTHORIZED SECTION 230 INTERCEPT AND RECORDING UNDER CHAPTER 9.73, IT WAS LAWFUL FOR AUTHORIZED OFFICERS IN TACOMA TO INTERCEPT AND RECORD CALL THAT SUSPECT PLACED FROM SUMNER TO TACOMA
State v. Matthews, ___ Wn. App. ___, 5 P.3d 1273 (Div. II, 2000) 18

NO SURVEILLANCE-POST PRIVILEGE IS AVAILABLE TO STATE WHERE EYEWITNESS TESTIMONY OF HIDDEN POLICE OBSERVER IS THE STATE'S ONLY EVIDENCE OF DRUG SALE BY DEFENDANT
State v. Reed, ___ Wn. App. ___, 6 P.3d 43 (Div. I, 2000) 18

PRO-STATE INTERPRETATION GIVEN TO FIRST DEGREE ROBBERY STATUTE'S PHRASE "DISPLAYS WHAT APPEARS TO BE A FIREARM "-- VICTIM NEED NOT SEE THE OBJECT REFERRED TO BY DEFENDANT
State v. Kennard, ___ Wn. App. ___, 6 P.3d 38 (Div. I, 2000) 20

LIQUOR BOARD'S REVOCATION OF BAR'S LICENSE SET ASIDE FOR LACK OF SUFFICIENT EVIDENCE THAT LICENSEE KNOWINGLY PERMITTED ILLEGAL ACTIVITY ON THE PREMISES
Oscar's, Inc. v. Washington State Liquor Control Board, 101 Wn. App. 498 (Div. I, 2000) 21

APPLICATION OF DRUG ABATEMENT STATUTE VIOLATED DUE PROCESS PROTECTIONS WHERE BAR OWNERS NOT SHOWN TO HAVE KNOWN OF ILLEGAL ACTIVITY ON THE PREMISES AS IT WAS OCCURRING
City of Seattle v. McCoy, ___ Wn. App. ___, 4 P.3d 159 (Div. I, 2000) 21

NINTH CIRCUIT, U.S. COURT OF APPEALS

"INVOCATION" TRIGGER TO SIXTH AMENDMENT'S BAR TO POLICE "INITIATION OF CONTACT" WITH CHARGED DEFENDANT IS EXPANDED IN QUESTIONABLE NINTH CIRCUIT DECISION TO INCLUDE KNOWN PRE-INDICTMENT ATTORNEY-REPRESENTATION

U.S. v. Harrison, 213 F.3d 1206 (9th Cir. 2000)

LED PRELIMINARY EDITORIAL NOTES: For an overview of Fifth and Sixth Amendment limits on police initiation of contact with suspects, see the article entitled "Initiation of Contact" Rules Under the Fifth and Sixth Amendments" on the LED page of the Criminal Justice Training Commission website at [<http://www.wa.gov/cjt>]. We think that the Harrison decision digested below is an erroneous interpretation of law. The decision is not yet final, as the U.S. Attorney is seeking reconsideration. We will keep our LED readers advised of the efforts to get the decision reversed.

Factual Background:

A federal grand jury in San Francisco issued a subpoena to Wayne Harrison to investigate his possible involvement in a coke-and-meth ring and in a related murder. Harrison obtained a lawyer to represent him. The attorney helped Harrison obtain use-immunity in relation to the grand jury

proceedings. Consistent with a story Harrison had told Oceanside, California detectives a few months earlier, Harrison testified to the grand jury that he knew very little about the murder, though he did admit he had given the murder victim a ride during the day of the murder.

During the next few months, an Assistant U.S. Attorney talked to Harrison's attorney, without resolution, about a possible polygraph exam, as well as about the possibility of Harrison's surrender if he were indicted. About nine months after that, the grand jury indicted Harrison on the drug and murder charges. A week later, FBI agents arrested Harrison in Florida. Harrison then waived his Miranda rights and talked to the agents. He adjusted the story he had told the grand jury, admitting that he was present when the murder was committed, but admitting no direct involvement in the murder.

Further Procedural History: (Excerpted from 9th Circuit opinion)

Before trial, Harrison moved to suppress the statements that he had made to the FBI agents in Florida ("the Florida statements"). The district court granted Harrison's motion and suppressed the Florida statements, "because the government failed to communicate with Harrison after his indictment through his retained counsel in violation of the Sixth Amendment." The court found that the nature of Harrison's pre-indictment contacts with attorney Traun compelled the conclusion that Traun represented Harrison at the time of the indictment. Because the court found that Traun represented Harrison at the time of the indictment, the court held that Harrison's Florida Miranda waivers were invalid. See Michigan v. Jackson, 475 U.S. 625 (1986) (deeming written waivers "insufficient to justify police-initiated interrogations after the [in-court] request for counsel" under Sixth Amendment analysis).

ISSUE AND RULING: Where the government should know that a defendant was represented by an attorney during grand jury proceedings which led to his indictment, does the Sixth Amendment right to counsel bar government agents from initiating contact with the defendant subsequent to his indictment, even though the defendant has not yet appeared in court following the indictment? (ANSWER: Yes)

Result: Affirmance of U.S. District Court decision ordering suppression of statements by alleged drug dealer and murderer, Wayne Harrison.

Status: The U.S. Attorney's motion for a re-hearing is pending.

ANALYSIS: Ordinarily, where a suspect has not yet been charged and appeared in court on the charges, the police are free under the Sixth Amendment to initiate contact with a suspect even though the suspect is represented by an attorney. The U.S. Supreme Court has, however, created complex "initiation of contact" bars to protect rights of citizens under the Fifth and Sixth Amendments.

Under the **Fifth Amendment**, the suspect's rights attach at the moment when police attempt custodial interrogation. If the suspect waives the Fifth Amendment right to counsel and to remain silent, then interrogation is permitted. However, if the suspect invokes either the right to silence or the right to counsel in a custodial interrogation setting, then police are restricted in relation to any further interrogation-related police "initiation of contact" with the suspect while he or she remains in continuous custody. A suspect cannot "anticipatorily" invoke the Fifth Amendment, so a suspect's attempts to assert the right to silence or the right to an attorney in a non-custodial situation does not bar police efforts to initiate interrogation in a subsequent custodial setting. Furthermore, persons other than the suspect, including the suspect's attorney, cannot invoke the Fifth Amendment rights on the suspect's behalf.

Under the **Sixth Amendment**, a defendant's right to counsel attaches when criminal charges are filed. Under case law prior to the 9th Circuit's Harrison decision, however, the attachments of 6th

Amendment rights has not restricted police from initiating contact with the charged defendant until he or she has appeared in court at an arraignment or preliminary hearing and expressly invoked the Sixth Amendment right to counsel. Prior to the Harrison decision, case law consistently held that a suspect couldn't "anticipatorily" invoke this Sixth Amendment right. Thus, under prior case law, the right first had to attach with the filing of charges, and, even then, police could still initiate contact and obtain a waiver (through simple Miranda warnings) until such time as the defendant appeared in court and invoked the Sixth Amendment's case-specific "right to counsel" on the charged matter.

Now, the Ninth Circuit's Harrison decision has held, in effect, that the Sixth Amendment right to counsel can be invoked before it even attaches. The Harrison Court holds that defendant Harrison's actions in retaining and being represented by an attorney during the investigatory phase of the case "invoked" his Sixth Amendment right. He was therefore held to have "invoked" the right as a matter of law at the time of his indictment, and hence to have invoked prior to the time of his arrest on the charges. Even though he did not expressly invoke his rights during the ensuing custodial interrogation, and even though he had not yet appeared in court on the newly-filed charges, police were not allowed to initiate contact to try to obtain a Sixth Amendment waiver, the Harrison Court holds.

In sum, the Harrison Court holds that the FBI agents in Florida could not initiate contact to obtain a waiver, because Harrison was deemed to have impliedly invoked, thus raising the Sixth Amendment "initiation of contact" bar. Accordingly, the Harrison Court holds that Harrison's post-arrest admissions to the FBI agents must be suppressed.

LED CROSS-REFERENCE NOTE: See also the LED entry below at page 16 regarding the Washington Court of Appeals decision in State v. Jones. Jones is a pro-State ruling on a Fifth Amendment "initiation of contact" issue. The Harrison decision does not affect Fifth Amendment "initiation of contact" rules.

LED EDITORIAL COMMENT: State and local law enforcement officers in Washington may be affected by the Ninth Circuit's Harrison decision. The Sixth Amendment right to counsel attaches when either a grand jury indictment is filed or a prosecutor files an information or a criminal complaint. State charges in Washington are generally filed by information. If, prior to such a charging event, police or prosecutors know that a state defendant has been actively represented by counsel, defense attorneys may argue that law enforcement is restricted under Harrison from initiating interrogation contacts with the defendant, even though he or she has not yet appeared in court on the charges and has not expressly invoked during interrogation.

Officers should consult their local prosecutors for advice regarding the Harrison's implications as to state law investigations. As to federal investigations, state and local officers who investigate and make arrests on federal matters will want to coordinate with federal agents and federal attorneys to ensure compliance with post-Harrison guidelines in the federal system.

NO FOURTH AMENDMENT PRIVACY IN MOTEL REGISTRATION RECORDS; NO FERRIER APPLICATION IN FEDERAL COURT TO CONSENT REQUEST HELD TO BE VOLUNTARY

U.S. v. Cormier, 220 F.3d 1103 (9th Cir. 2000)

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

On January 13, 1997, King County Detective Brad Ray ("Ray") went to the Quest Inn ("motel"), a motel located in a traditionally high-crime area in Seattle known as the Aurora Avenue "strip," to obtain the motel's guest registration records. After retrieving the records from the motel owner, Ray returned to his office to run a criminal records check on several of the guests staying at the motel. The records check revealed that there was a warrant outstanding on one motel guest and that Cormier, the defendant in this action, had "a fairly extensive criminal history." In

addition, the records check showed that Cormier was registered with state authorities as a sex offender.

Ray then contacted Toney Peters ("Peters"), a detective working a shift along the Aurora strip, and asked her if she would be willing to follow-up on Cormier's criminal history. As a result, Peters decided to conduct a "knock and talk" interview with Cormier in his motel room. Shortly after 8:00 P.M. on January 13, Peters approached Cormier's motel room from the outside and knocked on his door. Peters knocked only briefly before Cormier answered. He was wearing only a bathrobe and socks. Peters immediately identified herself as a police officer and asked Cormier if she could speak with him inside his room so that other motel occupants would not overhear their conversation. Cormier stepped back and allowed Peters to enter his room. Peters was dressed in plain clothes but her badge was visible because it was hanging on a chain around her neck.

After entering his motel room, Peters asked Cormier if she could question him. He stated that she could. Peters first asked Cormier whether he was the only guest registered to the room or whether there were other occupants. He responded that he was the only registered guest and that he was staying alone. Peters then informed Cormier that she was familiar with his criminal history and asked him whether he had any drugs or other illegal items in the motel room. He adamantly denied that he had any illegal contraband in the room. Peters then asked whether he would mind if she took a look around, and he stated that she could "go ahead."

Peters first found a bag of clothing located under the bathroom sink and there was some white powder residue visible on the clothes. Peters then moved to a doorless closet where she noticed several leather jackets on hangars. She noticed that the collar on one of the jackets had a hair gel stain, which was very similar to the gel in Cormier's hair. Peters then reached into the pocket of one of the jackets and found a loaded handgun. Cormier never asked Peters to stop searching nor did he ever protest the scope of the search.

After finding the gun, Peters asked Cormier whether the gun belonged to him. He answered that the gun belonged to some fishermen on a boat in Alaska. Peters placed Cormier under arrest after calling Officer Johnson, who was waiting in the car at the time, for back-up assistance. At that point, Cormier was arrested on suspicion that he had violated the Washington Uniform Firearms Act by being a convicted felon in possession of a firearm. Cormier was escorted to Johnson's police car and driven to jail.

Cormier was convicted by a jury of violating 18 U.S.C. § 922(g), a provision that prohibits a convicted felon from possessing a firearm. During the trial, Cormier filed three motions to suppress the gun found in his motel room. The district court denied all three motions. Specifically, the district court found that Cormier voluntarily consented to the entry and search of his motel room, even if the procedure employed by Peters had violated Washington state law. See State v. Ferrier, 136 Wn.2d 103 (1998) **Oct 98 LED:02** (requiring police officers, when conducting a "knock and talk," to inform the consenting person that they have the right to refuse or revoke consent at any time). Cormier was convicted and sentenced to 120 months imprisonment, followed by three years of supervised release.

ISSUE AND RULING: 1) Are motel registration records entitled to privacy protection under the federal constitution's Fourth Amendment? (ANSWER: No); 2) Does the Washington State Supreme Court's independent state constitutional grounds ruling in State v. Ferrier have any application in Federal Court where the question is validity of a "knock-and-talk" consent search? (ANSWER: No); 3) Was the consent in this case given voluntarily? (ANSWER: Yes)

Result: Affirmance of U.S. District Court conviction of Peter John Cormier of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g).

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) FOURTH AMENDMENT PROTECTION FOR MOTEL GUEST REGISTRATION RECORDS

Cormier's first contention on appeal is that the police unlawfully seized the guest registration records from the owner of the Quest Motel. Washington law requires "[e]very hotel and trailer camp [to] keep a record of the arrival and departure of its guests in such a manner that the record will be a permanent one for at least one year from the date of departure." See Wash. Rev.Code S 19.48.020. Although a motel owner is required to keep registration records, Cormier argues that the records are solely for business regulation purposes and not for police investigatory use. Even if Cormier is correct, however, he has still failed to allege a Fourth Amendment violation because he has no reasonable expectation of privacy in the records.

In United States v. Miller, 425 U.S. 435 (1976), the Supreme Court considered whether a bank depositor has a reasonable expectation of privacy in bank records, including such items as financial statements and deposit slips. Similar to the Washington statute at issue in this case, the bank in Miller was required by law to retain financial records belonging to its depositors. Recognizing that bank records are highly personal documents, the Supreme Court nevertheless found that "[t]he depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government." The Court reaffirmed its view that a person does not have a privacy interest in information revealed to a third party and subsequently conveyed to governmental authorities, even if the information is revealed on the assumption that it will be used for a limited purpose and that the third party will not betray their confidence. The key factor, Miller held, is that a person does not possess a reasonable expectation of privacy in an item in which he has no possessory or ownership interest.

Although Miller addressed whether a depositor possesses a Fourth Amendment interest in bank records, the analysis is equally applicable to motel registration records. Cormier was required to state his name upon checking into the motel. The motel then assigned him a room and recorded both his name and room number on the guest registration records. Although the police requested the records from the motel, the motel owner agreed to provide the records to the police voluntarily. Furthermore, unlike the bank records in Miller, the guest registration records did not contain highly personal information about Cormier. Instead, the registration records merely stated his name and room number. The Miller rationale is even more compelling in the context of guest registration records because no highly personal information is disclosed to the police. In addition, the one other circuit that has considered the question held, in accordance with Miller, that a guest does not have standing to challenge the use of guest registration records by the police. See United States v. Willis, 759 F.2d 1486 (11th Cir.1985); see also 1 Wayne R. Lafave, Search and Seizure S 2.7(c), at 633 (3d ed. 1996) ("[I]f law enforcement agents were allowed to consult business records which merely reveal a person's name or address or telephone number, this does not offend any interests protected by the Fourth Amendment.").

In light of Miller and Willis, therefore, a guest has no reasonable expectation of privacy in guest registration records. Accordingly, Cormier has failed to allege a Fourth Amendment violation in the police's use of the motel's guest registration records.

2) NO FERRIER APPLICATION IN FEDERAL COURT

Cormier relies on Ferrier, a case recently decided by the Washington Supreme Court, in arguing that Peters violated state law when she failed to inform Cormier that he had a right not to consent to the search or that he could revoke consent at any time while the search was being conducted. The district court assumed that Cormier's consent would be vitiated under the Washington rule, but nonetheless concluded that Cormier's consent was voluntarily and freely given under federal law. We agree because even if state law was violated, Cormier's consent is judged solely under federal law.

In Chavez-Vernaza [844 F.2d 1368 (9th Cir. 1987)], the leading case in this Circuit regarding the admissibility of evidence in federal court obtained in violation of state law, this Court considered whether financial records obtained in violation of an Oregon statute should be suppressed. State police officers, acting without assistance from federal authorities, seized records later used against Chavez-Vernaza in a federal prosecution. Chavez-Vernaza made an argument similar to that advanced here: The principle of comity is violated when a federal court does not suppress evidence obtained in violation of state law. In rejecting that argument, this Court unqualifiedly held that "evidence seized in compliance with federal law is admissible without regard to state law," even when state authorities obtained the evidence without any federal involvement. According to the panel, "requiring federal district courts to look to state law when determining the admissibility of evidence obtained in accordance with federal law would hamper the enforcement of valid federal laws and undermine the policy favoring uniformity of federal evidentiary standards." The general rule, therefore, is that evidence will only be excluded in federal court when it violates federal protections, such as those contained in the Fourth Amendment, and not in cases where it is tainted solely under state law.

There are two exceptions to the general rule that state law violations do not require suppression of evidence in federal court. The first exception arises when a court is determining the legality of an inventory search, see United States v. Wanless, 882 F.2d 1459 (9th Cir.1989), because "federal law on inventory searches by state or local police officers [requires] that they must be conducted in accordance with the official procedures of the relevant state or local police department." The second exception arises in searches incident to arrest, see United States v. Mota, 982 F.2d 1384 (9th Cir.1993), because "federal courts must determine the reasonableness of the arrest in reference to state law governing the arrest."

The common ground shared by these two exceptions is that the federal test for the legality of an inventory search and a search incident to arrest requires the incorporation of state law. For instance, an inventory search is only lawful under federal law if it also conforms to state law. Therefore, state law necessarily influences admissibility determinations, even in federal court. By the same token, the legality of a search incident to arrest by its very nature depends on the underlying legality of the arrest, a consideration governed by state law. In order to reconcile Chavez-Vernaza, Wanless, and Mota, it is necessary to recognize that the exceptions to the general rule are limited. State law is only relevant in determining the admissibility of evidence in federal court when the constitutional test for determining the legality of a search incorporates state law.

Because the constitutional test for determining the legality of a consent search, however, depends on whether a defendant's consent was freely and voluntarily given -- a test that does not depend on state law -- any violation of Washington state law does not require the suppression of evidence presented during Cormier's trial in federal court.

3) CONSENT VOLUNTARINESS

This Court considers the following five factors in determining whether a person has freely consented to a search: (1) whether defendant was in custody; (2) whether the arresting officers had their guns drawn; (3) whether Miranda warnings were given; (4) whether the defendant was told he had the right not to consent; and (5) whether the defendant was told that a search warrant could be obtained. After considering these five factors at some length, the district court ultimately concluded that Cormier's consent was voluntarily and freely given.

The district court's conclusion was not clearly erroneous because there is ample evidence in the record supporting its decision. First, Cormier was not in custody or seized at the time he tendered consent. Second, Peters was dressed in plain clothes and never flashed her gun as a display of authority. These facts are sufficient to support the district court's finding that Cormier consented to the entry and search of his motel room.

The fifth factor, whether the defendant was told that a search warrant could be obtained, has been the source of some disagreement in this Circuit. In United States v. Kim, 25 F.3d 1426 (9th Cir.1994), for example, this Court found that the failure to inform a defendant that a search warrant could be obtained supports a finding that a defendant freely and voluntarily consented to a search. According to Kim, the reason for that view is that threatening a defendant with a search warrant intimates that the "withholding of consent would ultimately be futile." In contrast, in Torres-Sanchez [83 F.3d 1123 (9th Cir. 1996)], we took the opposite approach, hinting that the failure to inform a defendant that a search warrant could be obtained constituted a failure to apprise him of all his legal rights, similar to not providing Miranda warnings once a suspect is in custody. It appears, therefore, that the application of the fifth factor depends on the particular circumstances of the case and thus hinges on whether a suspect is informed about the possibility of a search warrant in a threatening manner. In this case, the district court concluded that Peters' failure to inform Cormier that she could obtain a search warrant supported its view that Cormier freely and voluntarily consented to the search. Under the particular circumstances of this case, the district court's decision was not clearly erroneous.

Cormier counters by arguing that the absence of a Miranda warning coupled with a lack of notification regarding his right not to consent invalidated the search. However, the law requires a district court to consider the totality of the circumstances when evaluating consent. Thus, it is not necessary for all five factors to be satisfied in order to sustain a consensual search. For example, in United States v. Morning, 64 F.3d 531 (9th Cir.1995), this Court held that a defendant voluntarily consented even though the police had failed to tell the defendant he could refuse consent, neglected to give him a Miranda warning, and failed to inform him that a search warrant could be obtained. This case is virtually indistinguishable from Morning, providing further support for the district court's decision. Finally, the district court's factual finding that "Mr. Cormier has a very long, detailed and thorough experience with law enforcement," lessens the impact of the two absent factors because it increases the likelihood that Cormier was already aware of his rights to refuse consent and to remain silent. As a result, the district court's decision that Cormier's consent was voluntarily and freely given was not clearly erroneous.

LED EDITORIAL COMMENT: BEWARE AS TO RANDOMLY "FISHING" THROUGH MOTEL GUEST REGISTERS. Maybe we've gone into "independent grounds" shock after 20-plus years in this endeavor, but we fear the Washington appellate courts might find state constitutional privacy protection in motel registers. We believe, for instance, despite the lack of an on-point Washington precedent, that bank records of a suspect are private, and, except

where the bank is the victim, should generally be accessed by law enforcement through a search warrant.

On the other hand, we do recognize that there is a common sense argument that a motel register is not like a bank record, in that the motel registrant arguably does not consider the information to be confidential. Since 1915, a Washington statute, codified at RCW 19.48.020, has required that hotels and motels keep a registry of guests for at least one year from the date of their departure. Also, some cities have ordinances requiring that such registries be made available to law enforcement personnel. See, for example, Seattle's ordinance at SMC section 6.98.020. While statutes and ordinances don't override constitutional protections, their longstanding existence is considered in determining whether citizens' claims of independent state constitutional protection are reasonable. Even Washington's activist appellate courts, which in the past 20 years have often departed from Federal Fourth Amendment search & seizure doctrine to give citizens greater privacy protection under the Washington constitution, might recognize that the random checking of such records doesn't raise special local concerns deserving of state constitutional privacy protection.

Nonetheless, officers may want to seek advice from their legal advisors or prosecutors on this question. Where probable cause can be established, it never hurts to get a search warrant.

BRIEF NOTES FROM THE NINTH CIRCUIT, U.S. COURT OF APPEALS

(1) NO EVIDENCE OF CONSTITUTIONAL VIOLATIONS IN CASE RELATING TO WENATCHEE "SEX RING" INVESTIGATIONS -- In Devereaux v. Perez and others, 218 F.3d 1045 (9th Cir. 2000), the 9th Circuit of the U.S. Court of Appeals rules, 2-1, in a federal civil rights lawsuit relating to the Wenatchee "sex ring" investigation, that there was no evidence before it of a constitutional violation. The majority opinion summarizes its conclusion as follows:

The record reveals an investigation which was far from textbook perfect but not so outrageous that it offends traditional notions of due process or any clearly established constitutional right of due process. The constitutional dimensions of investigatory techniques employed to discover child sexual abuse are simply not clearly established. Upon review of the summary judgment for the Individual Defendants, the evidence supports only one finding: the interview techniques used by the Individual Defendants were not so "patently violative of [a] constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional."

Result: Affirmance of U.S. District Court (Eastern District of Washington) decision granting summary judgment dismissing lawsuit against certain government entities and employees.

LED EDITORIAL NOTE: The Devereaux majority opinion explains that two of the civil defendants, Detective Perez and Police Chief Badgley, had earlier settled with plaintiffs, so aspects of the case focusing on those particular defendants were not before the Court of Appeals. Note also that this case involved only the question of whether police and DSHS investigators violated federal constitutional provisions, not whether those investigators' acts or omissions would provide a basis for a lawsuit on non-constitutional grounds.

(2) POINTING GUN AT SUSPECT MAY BE EXCESSIVE FORCE UNDER FOURTH AMENDMENT -- IT DEPENDS ON NATURE AND IMMINENCE OF THREAT -- In Robinson v. Solano County, California, 218 F.3d 1030 (9th Cir. 2000), a 2-1 majority of the Ninth Circuit of the

U.S. Court of Appeals rules in a civil rights case that the trial court erred in ruling that police may not be sued for a civil rights violation for merely pointing a gun at a person.

The Robinson case arose when plaintiff Robinson found two dogs attacking livestock on his rural property. He shot the dogs, killing one and injuring the other. While searching for the wounded dog with shotgun in hand, he encountered and heatedly argued with the dog's owner. The dog's owner withdrew and called police. Police broadcast a description of a man who was carrying a shotgun, had just shot two dogs, and was "in the middle of the street yelling..."

When officers arrived at Robinson's home, he walked from his front door to the street to meet them. He did not have a visible weapon and he didn't make any threats as he approached. When he got within a few feet of the officers, two of the officers pointed their guns at his head ordered him to put his hands up. Other officers handcuffed Robinson and confined him in a patrol car for some 15-30 minutes while they interviewed the dogs' owner and other neighbors. Police then released Robinson. He was not charged with a crime.

Robinson sued under the federal civil rights law, 42 USC 1983, and under state common law. He alleged that the officers used unreasonable force in seizing him. After the civil jury could not reach a verdict on that issue, the trial court granted judgment as a matter of law to the officers and their agency. The trial judge concluded that the officers had "no dependable guidance upon the constitutional limitations, if any, upon a mere threat or display of force to effect a seizure" and, therefore, were entitled to qualified immunity.

On Robinson's appeal as to whether the trial judge erred in giving the police immunity as a matter of law, the Ninth Circuit majority reverses, concluding that governing law was well-established at the time of the incident. The majority judges in Robinson assert that it was well-established at the time of the officers' actions that pointing a gun at a suspect might constitute excessive force, depending on the totality of the circumstances.

The Robinson majority relies on McKenzie v. Lamb, 738 F.2d 1005 (9th Cir. 1984) in which the plaintiffs were arrested in a hotel room on suspicion that jewelry they were trying to sell was stolen. The plaintiffs in McKenzie alleged that police forced them against the wall, handcuffed them, threw them to the floor, and then pressed their gun barrels against the plaintiffs' heads. The McKenzie court held that the plaintiffs' evidence "provide[d] ample basis for a jury to find the police officers' conduct excessive" even if there was probable cause to arrest the plaintiffs.

The Robinson majority concedes factual differences between Robinson and McKenzie. Robinson does not involve as many types of force as McKenzie. Still, the Robinson majority says, the factual differences "do not change our analysis of whether McKenzie put officers on notice that putting a gun to a suspect's head in point blank range can constitute excessive force."

The qualified immunity issue in this case is whether the officers' use of force was reasonable. Disputed issues of fact prevent that issue from being resolved as a matter of law, the Robinson majority concludes. The majority thus notes that plaintiff Robinson asserted that when the police first saw him, he was calm, and the officers could easily see he did not have the shotgun. Plaintiff Robinson also asserted that the police did not draw their guns immediately and did not search his person, thus showing that they did not view him as an imminent threat to their safety. The officers dispute all these assertions. The Robinson majority concludes that the disputed facts "go to the very heart of the question of whether the officers' conduct was reasonable." For this reason, the majority says, the case must be left to a jury to resolve.

The dissenting judge argues in vain that the existing rule is that a police officer's mere pointing of a gun at a person, without some aggravating fact, is not actionable as "excessive force" under the Fourth Amendment. No Ninth Circuit decision had previously asserted otherwise, the dissenting judge claims, and therefore qualified immunity should be applied.

Result: Reversal of U.S. District Court decision on qualified immunity question; case remanded for re-trial on the excessive force claim.

(3) FBI MARKSMAN WHO SHOT VICKY WEAVER AT RUBY RIDGE IMMUNE FROM STATE CRIMINAL PROSECUTION WHERE HE HONESTLY AND REASONABLY BELIEVED THAT DEADLY FORCE WAS NECESSARY -- In Idaho v. Horiuchi, 215 F.3d 986 (9th Cir. 2000), the Ninth Circuit of the U.S. Court of Appeals rules, 2-1, that FBI marksman/sniper Lon Horiuchi, is immune from criminal prosecution for fatally shooting Vicky Weaver in the well-known Ruby Ridge standoff, even though agent Horiuchi is not civilly immune for having done so.

The facts regarding the Ruby Ridge standoff are complex and conflicting. We will not recount in this **LED** entry the varied accounts of the facts given by the majority and dissent in this case that came to the appellate court following a successful motion in the U.S. District Court to dismiss, not following a full trial. Nor will we try to summarize the factual descriptions given by a different Ninth Circuit panel in 1997 in relation to a civil action arising from the Ruby Ridge incident. Note also that there are detailed accounts of the incident in a U.S. Senate Committed Report and in a report of the U.S. Justice Department's Office of Professional Responsibility. Suffice it to say that these accounts of the facts vary from each other, though all cast blame on certain FBI personnel for not following constitutional restrictions on law enforcement use of deadly force.

The Horiuchi majority concludes that in shooting at David Harris and accidentally fatally injuring Vicky Weaver, FBI agent Horiuchi reasonably believed his actions to be necessary and proper. The Horiuchi majority also implies that, while the civil immunity standards appear to be similar, the courts will favor criminal immunity for federal officers over civil immunity in light of the Supremacy Clause of the U.S. Constitution, as well as the public police considerations against criminally prosecuting law enforcement officers who act in good faith to carry out their duties.

Judge Kozinski, a well-known Ninth Circuit libertarian activist, writes an impassioned dissent arguing that the evidence before the Court on appeal was sufficient to support the state prosecutor's charge that agent Horiuchi acted recklessly in shooting and killing Vicky Weaver. Therefore, Judge Kozinski argues, the case should have been presented to a jury.

Result: Affirmance of U.S. District Court order dismissing Idaho's charge of "involuntary manslaughter" against Len Horiuchi.

LED EDITORIAL NOTE RE CIVIL CASE: The Ninth Circuit decision in the Ruby Ridge civil case is Harris v. Roderick, 126 F.3d 1189 (9th Cir. 1997) (where the Ninth Circuit held against civil immunity as to most aspects of the lawsuit).

LED EDITORIAL NOTE RE DEADLY FORCE STANDARD: Nothing in the Horiuchi ruling suggests any relaxation in the deadly force standard for law enforcement. The Horiuchi majority opinion explains as follows how the standard for law enforcement use of deadly force allows use of deadly force to stop a fleeing felon only under strictly limited circumstances:

We have previously addressed the question of when a law enforcement officer may use deadly force against an escaping felon. In Forrett v. Richardson, 112 F.3d 416 (9th Cir.1997), we interpreted the Supreme Court's holding in Tennessee v. Garner, 471 U.S. 1 (1985), regarding the constitutional use of deadly force. Garner held:

[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving physical harm,

deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

In Forrett, we held that, under Garner, it was reasonable for officers to shoot Forrett, a suspect in a vicious assault during a home invasion robbery, to prevent his escape. Forrett had eluded officers for over an hour, vaulting fences and removing clothing. He was fleeing into a residential area where he could easily have taken hostages. We held that even if his capture were inevitable, deadly force was still reasonable because there was a substantial risk that Forrett would cause death or serious bodily harm if his apprehension were delayed.

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) **KNOWLEDGE OF PRESENCE OF FIREARM IS AN ELEMENT OF THE CRIME OF UNLAWFUL POSSESSION OF A FIREARM** -- In State v. Anderson, ___ Wn. 2d ___, 5 P.3d 1247 (2000), a 5-4 majority of the State Supreme Court reverses a Court of Appeals decision which had held that unlawful possession of a firearm is a strict liability crime. The Supreme Court majority rules that knowledge of the presence of a firearm is an implied element of the unlawful-possession-of-a-firearm crimes under RCW 9.41.040(1).

Under the Anderson majority's analysis, the State need not prove that the defendant knew it was unlawful to possess the firearm, but the State must prove beyond a reasonable doubt that the defendant knew the gun was present.

The facts and lower court proceedings in Anderson are described by the Anderson majority as follows:

A vehicle driven by Thaddius X. Anderson was stopped by Seattle police officers for a traffic violation. During the traffic stop the officers learned that there was an outstanding warrant for Anderson's arrest. Consequently, the officers arrested Anderson and searched the vehicle incident to his arrest. During the search the officers found a handgun under the driver's seat of the car. Because Anderson had a prior felony conviction he was charged with second degree possession [of a firearm under RCW 9.41.040].

At trial, Anderson contended that the handgun, as well as the vehicle, belonged to his cousin. Anderson said that he was unaware of the existence of the handgun until he was pulled over by the police officers. At the close of the presentation of evidence, the trial court instructed the jury that knowledge of the existence of the handgun was not an element of the offense, but that Anderson was entitled to an instruction that unwitting possession is a defense on which he had the burden of proof. The jury found Anderson guilty of the offense charged.

Anderson appealed his conviction to the Court of Appeals, Division One, which affirmed. State v. Anderson, 94 Wn. App. 151 (Div. I, 1999).

The Anderson majority rules that the jury in defendant Anderson's prosecution should have been instructed that to convict him of the crime of knowing possession of a stolen firearm, the jury must find that he knew the gun was in his cousin's car.

Result: Reversal of Court of Appeals decision and reversal of King County Superior Court conviction of Thaddius X. Anderson for second degree possession of a firearm under RCW 9.41.040 (case remanded for possible re-trial).

LED EDITOR'S NOTE: Some other crimes which presumably also have a similar implied element of knowledge include:

- alien in possession of a firearm, 9.41.170;
- loaded pistol in vehicle and other violations of concealed pistol license law, 9.41.050;
- loaded rifle or loaded shotgun in vehicle, 77.15.460; and
- unlawful firearms (machine guns and short-barreled shotguns and rifles), 9.41.190.

Other than a confession or a firearm lying in open view, evidence supporting the knowledge element for these crimes might include: nervousness, inconsistent statements, an implausible story, and no show of surprise when the gun is found (though this last item might be tricky under Washington's approach to self-incrimination issues).

(2) STEALING UNCERTIFIED CLAMS FROM PRIVATE BED AND SELLING THEM FOR OVER \$500 IS THEFT IN THE SECOND DEGREE -- In State v. Longshore, ___ Wn.2d ___, 5 P.3d 1256 (2000), the Supreme Court affirms the Court of Appeals (See **Feb 2000 LED:21**) and holds: (1) that clams in a private bed are protected by the theft statutes; (2) that uncertified clams taken from an area not certified as clean by the Department of Health do have a market value; and (3) that there was sufficient evidence in the record in this case that the clams had a value of more than \$250. Accordingly, the Longshore Court upholds a conviction for theft in the second degree.

The aptly named defendant, Longshore, was charged with second degree theft for taking 340 pounds of clams from private property and selling them for \$1.50 per pound. The defendant argued at trial: that clams in a natural bed are not subject to private possession and their removal therefore could not constitute theft; and that contaminated clams have no market value, and thus the clams were not worth over \$250.

In addition to holding that the fact of lack of certification of the clams (and hence the possibility of contamination) did not make them without value, the Longshore Court rejects defendant Longshore's common law theory and holds that, unlike wildlife or wild fish, clams can be possessed by the private landowner as private property for purposes of the theft statutes. The Court explains that, shellfish embedded upon private property are property subject to the ownership, possession, and control of the owner of the beach." "Naturally occurring clams on private property are the property of the private tideland owner, and thus the unauthorized taking of such clams constitutes theft under RCW 9A.56.040(1)(a)." Accordingly, taking the clams could constitute a theft.

Result: Affirmance of Court of Appeals decision that affirmed Mason County Superior Court conviction of Timothy M. Longshore for second degree theft.

(3) FORMER RCW 26.50 DV PROTECTION ORDER DISTANCE RESTRAINT PROVISION CRIMINALLY ENFORCEABLE – In State v. Chapman, 140 Wn.2d 436 (2000), the Washington State Supreme Court holds that the defendant was properly charged with, and convicted of, a class C felony for violating distance provisions of a domestic violence protection order.

RCW 26.50.110(5) makes it a class C felony to violate a court order issued under RCW 26.50 if the offender has at least two previous convictions for violating the provisions of a no contact order [issued under various chapters].

Former RCW 26.50.060(1), in effect when the case arose, provided in part:

- (1) Upon notice and after hearing, the court may provide relief as follows:
 - (a) Restrain the respondent from committing acts of domestic violence;
 - (b) Exclude the respondent from the dwelling which the parties share, from the residence, workplace, or school of the petitioner, or from the day care or school of a child;
 - ...
 - (e) Order other relief as it deems necessary for the protection of the petitioner and other family or household members sought to be protected, including orders or directives to a peace officer, as allowed under this chapter;
 - ...
 - (g) Restrain the respondent from having any contact with the victim of domestic violence or the victim's children or members of the victim's household;
 - ...

Chapman had at least two prior convictions and was charged with violating the terms of a domestic violence protection order which restrained him from entering or being within one mile of the petitioner's residence. [The facts are more fully set out in the November 1999 LED entry on the Court of Appeals decision beginning at page 15.] Chapman argued that the issuing court did not have authority to enter an order prohibiting him from coming within one mile of the residence. The State and the trial court relied on RCW 26.50.060(1)(b), which authorizes a court to restrain an individual from a residence.

The Court of Appeals, relying on Jacques v. Sharp, 83 Wn. App. 532 (Div. I, 1996) **Dec 96 LED:18-21** reversed Chapman's conviction, stating: "RCW 26.50.060(1)(b) does not authorize a court to exclude a respondent from any particular distance from such sites." The Supreme Court reverses the Court of Appeals, concluding that "[i]t is not necessary to address this Jacques v. Sharp question because the order was clear in its restraining language and can be justified under RCW 26.50.060(1)(e) as 'other relief' considered by the trial court as 'necessary for protection' of the petitioner and other family . . . members sought to be protected.." [Footnote omitted.] The Supreme Court thus holds Chapman was properly charged with, and convicted of, a class C felony.

Result: Reversal of Court of Appeals decision which had reversed the Thurston County Superior Court conviction of Gregory Wayne Chapman for felony violation of a domestic violence protection order.

LED EDITORIAL NOTE: The 2000 Washington Legislature's extensive amendments to the domestic violence laws add a subsection to RCW 26.50.060(1), as well as to other restraining-order/no-contact order statutes (including RCW 10.31.100(2)(a)), authorizing the court to "prohibit the respondent from knowingly coming within, or knowingly remaining within, a specified distance from a specified location." See Chapter 119, Washington Laws of 2000, addressed in the May 2000 LED at pages 4-5. Those year-2000 amendments are now in effect and appear to render the factual distinctions drawn in the Chapman decision, as well as the case law the Chapman Court discusses, little more than historical footnotes.

WASHINGTON STATE COURT OF APPEALS

EDWARDS V. ARIZONA'S "INITIATION OF CONTACT" BAR LIFTED AS SOON AS SUSPECT IS MEANINGFULLY RELEASED FROM CONTINUOUS CUSTODY

State v. Jones, ___ Wn. App. ___, 6 P.3d 58 (Div. II, 2000)

Facts: Officers responding to a bank robbery arrested Jones on probable cause and advised him of his Miranda rights. The Court of Appeals describes as follows what happened next:

Jones was arrested and advised of his Miranda rights. Although he initially agreed to talk, he said after only a few questions that he "might want to talk to a lawyer now." The officers ceased questioning and said Jones would have to initiate further conversation.

Four hours later, Jones was contacted by detectives and re-advised of his Miranda rights. He signed a written waiver of rights and did not ask to speak with an attorney. His earlier equivocal request for counsel was not clarified because the detectives did not know about it. He was released later the same evening, after making several statements. *[Court of Appeals footnote: These statements are not in issue here. The trial court later suppressed them, and the State has not appealed that ruling.]*

A few weeks later, officers re-arrested Jones and re-advised him of his Miranda rights. The Court of Appeals describes as follows what happened after that:

[Jones] waived his rights without asking for counsel, and he was not asked to clarify his October 5 equivocal request for counsel. He told the police that on October 5 he and his wife had been arguing while driving, she had kicked him out of the car, and he had wound up walking along Jovita Boulevard. He claimed never to have met McCormack and Binford, and never to have been in the yellow pickup or the K-car.

Proceedings: After two trials and other procedural developments, Jones stipulated to convictions on multiple charges. He appealed, having preserved his objection to admissibility of the statements he gave after his second arrest on October 23.

ISSUE AND RULING: Did the break in custody between Jones' October 5 interrogation and his October 23 interrogation lift any 5th Amendment restriction on police initiation of control for purposes of custodial interrogation? (**ANSWER:** Yes)

Result: Affirmance of convictions of Larry Rogers Jones for two counts of assault two and one count each of first degree robbery, unlawfully taking a motor vehicle, and theft of a firearm.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Jones argues that the police violated Edwards v. Arizona, 451 U.S. 477 (1981), when, on October 23, they initiated questioning without clarifying the equivocal request for counsel that Jones had made on October 5. Between October 5 and October 23, Jones was not in custody.

Edwards v. Arizona holds that once an accused "expresse[s] his desire to deal with the police only through counsel," he may not be interrogated further "until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Davis v. United States, 512 U.S. 452 (1994) elaborates on Edwards by holding that "[i]f the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him."

Washington follows Edwards but not Davis. When a Washington accused requests counsel equivocally, "[a]ny questioning after the equivocal assertion of the right to counsel must be strictly confined to clarifying the suspect's request." (citing State v. Robtoy, 98 Wn.2d 30 (1994); State v. Aten, 130 Wn.2d 640 1996) [See LED Editorial Comment on this passage below.]

Washington courts have not addressed whether Edwards and Robtoy apply when the defendant has been out of custody for a substantial period of time. Other courts, however, have held that Edwards does not apply. [Many decisions from other jurisdictions are cited and discussed here—LED Ed.] In People v. Trujillo [a Colorado decision] for example, the accused received his Miranda warnings and requested an attorney. The police ceased questioning and released him. He was re-arrested seven weeks later and re-advised of his Miranda warnings. The police re-initiated questioning, and the accused made an incriminating statement. Noting that Edwards is designed to "counteract the inherent pressures of custodial interrogation," the [Colorado] court held [in Trujillo] that Edwards does not apply to "situations where a defendant has not been in continuous custody but is reinterrogated after being released from custody"; in such situations, the accused "is no longer under the inherently compelling pressures of continuous custody." An exception might exist where a release is contrived, pretextual, or in bad faith, but there is no suggestion of that here. Finding these authorities persuasive, we conclude that the police lawfully questioned Jones on October 23, even though they did not clarify his October 5 equivocal request for counsel.

[Footnotes and citations omitted]

LED CROSS-REFERENCE NOTE: See also the LED entry above at page 2 regarding the Ninth Circuit decision in U.S. v. Harrison. Harrison addresses only a Sixth Amendment "initiation of contact" issue and has no effect on the Fifth Amendment issue addressed in Jones.

LED RESEARCH NOTE: As noted above in our introductory note to the Harrison entry at page 2, co-editor Wasberg has updated his article "Initiation of Contact' Rules Under the Fifth and Sixth Amendments." The article may be accessed on the Criminal Justice Training Commission webpage at [<http://www.wa.gov/cjt>]. The article will be updated on the CJTC webpage at least every six months.

LED EDITORIAL COMMENT: The Jones Court declares in the bolded language in the "Analysis" above that Washington's appellate courts are more restrictive than federal courts and most other state courts, and that "[W]hen a Washington accused requests counsel equivocally, [a]ny questioning after the equivocal assertion of the right to counsel must be strictly confined to clarifying the suspect's request." This is a debatable point academically, as we pointed out in our comments on State v. Aronholt, 99 Wn. App. 302 (Div. III, 2000) in the May 2000 LED at pages 15-16. But academics aside, interrogating officers in all jurisdictions are best advised to clarify any equivocal assertion of the right to counsel before proceeding with questioning.

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) WHERE TACOMA POLICE SUPERVISOR AUTHORIZED SECTION 230 RECORDING, IT WAS LAWFUL FOR AUTHORIZED OFFICERS IN TACOMA TO RECORD CALL THAT SUSPECT PLACED FROM SUMNER TO TACOMA -- In State v. Matthews, ___ Wn. App. ___, 5 P.3d 1273 (Div. II, 2000), the Court of Appeals applies the rule under the electronic surveillance statute, chapter

9.73 RCW, that territorial authority to intercept and record phone conversations depends on where the interception and recording occur, not where the call originates.

A Tacoma Police Department supervisor authorized the recording by Tacoma officers of a phone conversation with a drug dealer suspected of distributing cocaine from a location in Tacoma. The officers paged the suspect from Tacoma. He called back to Tacoma from Sumner, and the Tacoma officers intercepted the call recorded.

This interception and recording activity all occurred within Tacoma and therefore was within the territorial authority of the Tacoma officers, the Matthews Court holds, even though the suspect's call came from Sumner. The Court distinguishes one of its prior decisions, State v. Knight, 79 Wn. App. 670 (1995) **April 96 LED:07**. The difference between the Knight and Matthews cases, the Court of Appeals declares, is that in Knight an officer went outside his territorial jurisdiction, and outside the territorial jurisdiction of the officer who issued the 230 order, to do the interception and recording. On the other hand, in Matthews, the interception and recording occurred within the territorial jurisdiction of the intercepting/recording officers and the issuing supervisor. So Knight does not apply, the Court of Appeals rules in Matthews.

Result: Affirmance of Pierce County Superior Court convictions of Walter E. Matthews for unlawful delivery of cocaine, unlawful possession with intent to deliver, 3rd degree assault, and first degree unlawful possession of a firearm.

LED EDITORIAL COMMENT: In our LED editorial comments on the 1995 Court of Appeals decision in State v. Knight (see the April 1996 LED at pages 10 and 11), we explained why we thought that the Court of Appeals was overly restrictive there in interpreting the jurisdiction references in RCW 9.73.230. No case since Knight has addressed the Knight jurisdictional issue, and the Washington Supreme Court has never addressed the issue, so that issue remains unresolved, in our view. But with the passage of time, it becomes more and more difficult to argue that Knight was wrongly decided, so officers should try to work within the limits articulated in Knight.

(2) NO SURVEILLANCE-POST PRIVILEGE WHERE EYEWITNESS TESTIMONY OF HIDDEN POLICE OBSERVER ONLY EVIDENCE OF DRUG SALE -- In State v. Reed, ___ Wn. App. ___, 6 P.3d 43 (Div. I, 2000), the Court of Appeals rules that where a hidden police observer's eyewitness testimony was the only evidence of a defendant's illegal drug sale, the trial court erred in not requiring the State to disclose the location of the officer's surveillance post.

The Court of Appeals describes as follows the facts and trial court proceedings in the Reed case:

The Seattle Police Department conducted a "see/pop" operation in Pioneer Square during February 1999. In this type of operation, a police officer monitors a specific location for illegal narcotics transactions and calls other officers to arrest those involved after a transaction is observed.

During the surveillance, Officer Jokela served as the observing officer. He testified that he was stationed between 100 and 150 feet above ground level, equipped with binoculars capable of magnifying objects ten times. The record does not disclose Officer Jokela's distance from any particular location where narcotics transactions may have occurred.

Officer Jokela testified that he saw Roy Reed speak with an unknown individual, provide that individual with what appeared to be two rocks of cocaine, and accept money in return. The alleged buyer walked away and was never apprehended. Less than a minute after the alleged transaction, Officer Jokela provided other officers with a description, and they approached Reed. As the officers approached, they saw Reed drop a plastic bag on the ground, and arrested him. The bag was recovered and substances therein were tested and found to contain cocaine, but no money was discovered during the search incident to Reed's arrest.

Reed was charged with possessing cocaine with intent to deliver within 1,000 feet of a school bus route stop. Before trial the State moved to preclude Reed from cross-examining Officer Jokela about his exact location at the time he said he observed the transaction. The State based its motion on what it called a "surveillance location privilege," but acknowledged that such a privilege is not explicitly set forth by Washington's statutes or precedent. Reed objected, asserting a right to discover the surveillance location, to cross-examine Officer Jokela about what he could or could not see, and to independently verify the visibility from the surveillance location because Officer Jokela was the only witness to the alleged transaction.

In response to Reed's objection, the State proffered photographs taken from what was asserted to be the surveillance location. The photographs were taken by Officer Jokela's supervisor. Officer Jokela had provided his supervisor with directions to the surveillance location but was not present when the photographs were taken two and a half months after Reed's arrest and at a time of day different from when Reed was arrested. The court excluded the photographs because it was "satisfied they are at a different time, a different place, different weather, different darkness."

Nonetheless, the court refused to allow Reed to discover Officer Jokela's exact location. Instead, the court limited Reed's questions to Officer Jokela's "height above the ground, his direct line of vision, all of those things which relate to what he was able to see, whether the trees had foliage on them, whether there were buses." At trial, Officer Jokela testified that his view on the day of Reed's arrest was not obstructed by buses, and that by using binoculars he was able to tell the difference between the size of a dime and a quarter at street level. However, he agreed that he was not necessarily able to make out facial characteristics and that he was not able to ascertain the denominations of the bills allegedly passed here.

Reed was convicted as charged.

In reversing Reed's conviction, the Court of Appeals starts with the fundamental proposition that a criminal defendant in a Washington prosecution has a right at trial to confront and cross-examine witnesses against him. The Reed Court concludes that, in a drug sale prosecution, this constitutional right of defense outweighs any arguably government "surveillance location privilege" where the hidden police observer's testimony is the sole evidence.

Along the way, the Reed Court appears to reject the State's arguments that either RCW 5.60.060(5) (providing for a qualified "government informer" privilege) or Washington Evidence Rule (ER) 501 (cross-referencing various statutory privileges) supports the State's privilege argument. The Reed Court does leave room, however, for the State to argue under the common law that a surveillance location privilege broadly applies in pre-trial hearings. The Reed Court also leaves room for the State to argue in a future case that a limited surveillance location privilege applies at the trial stage of a case, but only where there is corroborating evidence of the drug sale, such as where the officer videotaped the drug sale.

Result: Reversal of King County Superior Court conviction of Roy C. Reed; case remanded for possible re-trial.

(3) PRO-STATE INTERPRETATION GIVEN TO FIRST DEGREE ROBBERY STATUTE'S PHRASE "DISPLAYS WHAT APPEARS TO BE A FIREARM"; VICTIM NEED NOT ACTUALLY SEE AN OBJECT IN ORDER FOR ELEMENT TO BE MET -- In State v. Kennard, ___ Wn. App. ___, 6 P.3d 38 (Div. I, 2000), the Court of Appeals provides a pro-state interpretation of the phrase "to display what appears to be a firearm" on a jury instruction relating to a first degree robbery charge.

RCW 9A.56.200 provides that a person is guilty of robbery in the first degree if the person "displays what appears to be a firearm or other deadly weapon." The jury instruction at issue in this case declared:

To 'display what appears to be a firearm' means to exhibit or show what appears to be a firearm to the view of the victim or to otherwise manifest by words or actions the apparent presence of a firearm even though it is not actually seen by the victim.

The Court of Appeals explains its view that this instruction correctly stated the law:

We find that this instruction correctly states the law. In State v. Henderson, 34 Wn. App. 865 (1983), the evidence showed that the victim of a robbery observed that the defendant's right hand was concealed in his right front pocket, which had a bulge, and the victim believed that the defendant had a small caliber pistol. When the victim of a second robbery, in response to the defendant's demand for all her money, asked, "Are you kidding?", the defendant replied, "No. I have this," and put his hand in his jacket pocket. This victim also believed that the defendant was armed. The defendant argued that there was insufficient evidence to prove the element "displays what appears to be a firearm or other deadly weapon" because neither of the victims actually saw a weapon. The Henderson court concluded that the evidence in both instances satisfied the element in question:

It seems to us that where the accused indicates (verbally or otherwise) the presence of a weapon (real or toy), the effect on the victim is the same whether it is actually seen by the victim or whether it is directed at the victim from inside a pocket. In either situation the apprehension and fear is created which leads the victim to believe the robber is truly armed with a deadly weapon. Accordingly, the victim feels compelled to comply with the accused's demand for money.

Result: Affirmance of King County Superior Court convictions of Ronald Dean Kennard for first degree robbery (one count) and second degree robbery (two counts).

(4) LIQUOR BOARD'S REVOCATION OF BAR'S LICENSE SET ASIDE FOR LACK OF SUFFICIENT EVIDENCE THAT LICENSEE KNOWINGLY PERMITTED ILLEGAL ACTIVITY ON THE PREMISES -- In Oscar's, Inc. v. Washington State Liquor Control Board, 101 Wn. App. 498 (Div. I, 2000), the Court of Appeals holds that "knowingly permit," in context of the Washington Liquor Control Board regulation at WAC 34-16-120(4) prohibiting a liquor licensee from knowingly permitting illegal activity on licensed premises, requires a showing that the licensee was aware of the facts of illegal activity or possessed information, under the criminal law standard of "knowingly" under RCW 9A.08.010(1)(6), from which a reasonable person would infer the facts of illegal activity; mere awareness of circumstances that could foreseeably lead to illegal activity is insufficient to show a violation.

The Court in Oscar's, Inc. rules further that the bare fact that undercover drug buys took place on the liquor licensee's premises was insufficient to support the Liquor Control Board's finding that the licensee "knowingly" permitted illegal activity on the premises within the meaning of RCW 9A.08.010(1)(b) and WAC 34-16-120(4).

Finally, the Oscar's, Inc. Court rules that the alleged failure of the liquor licensee to make a "serious effort" to comply with a 15-step drug elimination plan suggested by city police to tavern and nightclub owners was insufficient to support the Liquor Control Board's finding that the licensee "knowingly" permitted illegal activity on premises within the meaning of RCW 9A.08.010(1)(b) and WAC 34-16-120(4).

Result: Reversal of King County Superior Court decision affirming the Washington State Liquor Control Board's revocation of the liquor license of Oscar's, Inc; reversal of Liquor Board's revocation

of the liquor license; case remanded for further review under the proper standard of “knowingly permitting illegal activity on the premises.”

(5) APPLICATION OF DRUG ABATEMENT STATUTE HELD TO VIOLATE DUE PROCESS PROTECTIONS WHERE BAR OWNERS NOT SHOWN TO HAVE KNOWN OF ILLEGAL ACTIVITY ON THE PREMISES AS IT WAS OCCURRING -- In City of Seattle v. McCoy, ___ Wn. App. ___, 4 P.3d 159 (Div. I, 2000), the Court of Appeals hold that a trial court order applying the drug abatement statute of RCW chapter 7.43 violated constitutional due process protections where the abatement statute was applied to bar owners who were not proven to have been aware of illegal drug activity on their premises as it was occurring.

Seattle police officers made a number of undercover drug buys at the bar. However, no evidence was submitted by the City to establish that the bar owners were aware of any of this illegal activity or any other illegal activity as it was occurring. Under these facts, the Court of Appeals holds it would violate state and federal constitutional due process protections to apply the drug abatement statute to abate the McCoy's operation of their bar.

Result: Reversal of King County Superior Court order under RCW 7.43 shutting down McCoy's bar for one year.

INTERNET ACCESS TO COURT DECISIONS, STATUTES, AND COURT RULES

The Washington office of the Administrator for the Courts maintains a web site with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [<http://www.courts.wa.gov/>]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be accessed through a separate link clearly designated.

Many 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>]. Access to current Washington WAC rules, as well as RCW's current through 1999 can be accessed from the "Legislative Information" page at [<http://www.leg.wa.gov/wsladm/ses.htm>]. The text of acts adopted in the 2000 Washington legislature is available at the following address: [<http://www.leg.wa.gov>]. Look under "bill info," "house bill information/senate bill information," and use bill numbers to access information.

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 Kim McBride of the Criminal Justice Training Commission (CJTC) at (206) 835-7372; Fax (206) 439-3752; e mail [kmcbride@cjtc.state.wa.us]. **LED** editorial comment and analysis of statutes and court decisions expresses the thinking of the writers and does 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/>].

