



Law Enforcement

December 2001

Digest

DECEMBER LED TABLE OF CONTENTS

2001 LED SUBJECT MATTER INDEX 1

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT..... 14

IMPLIED CONSENT LAW PERMITS BLOOD TESTING BEYOND CIRCUMSTANCES LISTED IN SUBSECTION (3) OF RCW 46.20.308, BUT COURT HOLDS REPEAT BAC READING OF "INTERFERENCE DETECTED" IS NOT PROOF OF "PHYSICAL INCAPACITY" UNDER CURRENT WAC RULES
City of Kent v. Beigh, ___ Wn.2d ___, 32 P.3d 258 (2001)..... 14

JURY SHOULD NOT HEAR THAT PART OF A TAPE-RECORDING OF AN INTERROGATION WHERE OFFICERS ARE TELLING THE SUSPECT THAT THEY THINK HE IS LYING
State v. Demery, 144 Wn.2d 753 (2001)..... 15

"HARASSMENT" DOES NOT CONTAIN ELEMENT OF DEFENDANT'S KNOWLEDGE THAT THREAT WILL BE COMMUNICATED TO VICTIM; COURT ALSO EXPLAINS WHAT CONSTITUTES A "THREAT"
State v. J.M., 144 Wn.2d 472 (2001) 15

TOXICOLOGIST'S REPORT NOT ADMISSIBLE IN DRUG CASE, BECAUSE REPORT FAILED TO NAME PERSON FROM WHOM DRUGS WERE OBTAINED BY TOXICOLOGIST
State v. Neal, 144 Wn.2d 600 (2001)..... 16

WASHINGTON STATE COURT OF APPEALS 16

NO SIXTH AMENDMENT VIOLATION BY OFFICERS IN TAKING UNCOUNSELED STATEMENT FROM REPRESENTED DEFENDANT ON CHARGED MATTER, BECAUSE DEFENDANT INITIATED CONTACT
State v. Erickson, ___ Wn. App. ___, 33 P.3d 85 (Div. III, 2001) 16

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS 19

POSSESSING "PSEUDOEPHEDRINE HYDROCHLORIDE" IS NOT PROHIBITED BY RCW 69.50.440
State v. Halsten, ___ Wn. App. ___ (Div. II, 2001) [2001 WL 1299003]..... 19

PART OF EXTORTION STATUTE STRUCK DOWN ON FREE SPEECH GROUNDS
State v. Pauling, 108 Wn. App. 445 (Div. I, 2001) 19

NOTE: UPDATE ON VIENNA CONVENTION ON CONSULAR RELATIONS 20

2001 LED SUBJECT MATTER INDEX

LED EDITORIAL NOTE: Our annual LED subject matter index covers all LED entries from January 2001 through December 2001. Since 1988 we have published a twelve-month index each December. Since establishing the LED as a monthly publication in 1979, we have published three multi-year subject matter indexes. In 1989, we published a 10-year index covering LED's from January 1979 through December 1988. In 1994, we published a 5-year subject matter index covering LED's from January 1989 through December 1993.

In 1999, we published a 5-year index covering LED's from January 1994 through December 1998. We plan another 5-year index in 2004 covering 1999-2003. The 1989-1993 cumulative index, the 1994-1998 cumulative index, and monthly issues of the LED from January 1992 on are available via a link on the Criminal Justice Training Commission's Internet Home Page at: <http://www.wa.gov/cjt>.

ACCOMPLICE LIABILITY

Federal "Pinkerton Doctrine" on accomplice liability does not apply under RCW's. State v. Stein, 144 Wn.2d 236 (2001) - October 01:14

"ARMED WITH A DEADLY WEAPON"

Evidence held sufficient to support sentence enhancement for being armed with a deadly weapon at the time of commission of a crime. State v. Schelin, 104 Wn. App. 48 (Div. III, 2000) -- March 01:16 (Review is pending in the Washington Supreme Court)

ARREST, STOP AND FRISK

Roadblock program for illegal drugs in high crime areas violates Fourth Amendment. City of Indianapolis v. Edmond, 531 U.S. 32 (2001) -- January 01:02

Staats v. Brown Update — Authority To Arrest For F&W Violations -- March 01:03

When vehicle passenger gave false name during traffic stop, officers were justified in requesting identification documents from that passenger and in making subsequent arrest based on "open view" of illegal drugs. State v. Cook, 104 Wn. App. 186 (Div. III, 2001) -- March 01:07

Warrant to arrest convicted-but-not-yet-sentenced felon for violating terms of release pending appeal may be based on less than probable cause. State v. Fisher, 104 Wn. App. 772 (Div. III, 2001) -- April 01:14 (Review is pending in the Washington Supreme Court)

Pro-State rulings on seizure-of-person, search-incident-to-arrest in case involving late-night spotlighting and contacting of man in parked car. State v. O'Neill, 104 Wn. App. 850 (Div. I, 2001) -- May 01:20 (Review is pending in the Washington Supreme Court)

Holding a person's ID while conducting a warrants check held to be "seizure." State v. Crane, 105 Wn. App. 301 (Div. II, 2001) -- June 01:08

Court of Appeals rejects safety-frisk rationale for search, but upholds post-arrest search of nearby car as a search "incident to arrest." State v. Bradley, 105 Wn. App. 30 (Div. I, 2001) -- June 01:10

Fourth Amendment permits custodial arrest for all misdemeanors, even if punishable only by a fine; Washington law is probably more restrictive. Atwater v. City of Lago Vista, 532 U.S. 769 (2001) -- July 01:18

It is lawful to stop car based on DOL record showing the license of the registered owner is in suspended status, but if further investigation reveals the driver not to be the registered owner, then the detention must end immediately. State v. Penfield, 106 Wn. App. 157 (Div. III, 2001) -- August 01:12

No "pretext" rule for arrests under Fourth Amendment; but there is almost certainly a "pretext arrest" rule under Washington constitution. Arkansas v. Sullivan, 532 U.S. 769 (2001) -- September 01:06

Felony stop at gunpoint was not an “arrest” -- police use of force was reasonable, so “Terry” seizure tested against “reasonable suspicion” standard. U.S. v. Rousseau, 257 F.3d 925 (9th Cir. 2001) -- September 01:06

Defendant will try to show that stop by “emphasis patrol” in Columbia Gorge pretextual. State v. Rainey, 107 Wn. App. 129 (Div. III, 2001) -- September 01:20

Because driver leaned over toward front-seat passenger while officer was making post-stop radio check on driver during 1:15 a.m. traffic stop of driver, passenger was subject to lawful frisk once officer learned and acted on information that driver was subject to custodial arrest. State v. Horrace, 144 Wn.2d 346 (2001) -- October 01:04

Some light shed on search issues of 1) voluntary abandonment of effects, 2) Mendez-based order to passenger to stay in vehicle, and 3) knowledge element of Parker “search incident” rule regarding non-arrested passenger’s effects. State v. Reynolds, 144 Wn.2d 282 (2001) -- October 01:08

Exclusionary Rule applies where evidence is obtained by other-state officer in Washington arrest which is not expressly authorized by RCW’s. State v. Barker, 143 Wn.2d 915 (2001) -- October 01:11

1st Amendment does not bar warrantless arrest of nude dancers for obscene conduct, but civil case must be retried to determine if their conduct was obscene. Furfaro v. City of Seattle, 144 Wn.2d 363 (2001) -- November 01:02

ASSAULT AND RELATED CRIMES

Pencil was “deadly weapon” under “assault one” based on totality of circumstances; but Court questions whether jail cellmates are “cohabitants” covered by DV law. State v. Barragan, 102 Wn. App. 754 (Div. III, 2000) -- April 01:19

“Immediate area” phrase in drive-by shooting statute held void-for-vagueness as applied to facts where shooting occurred two blocks from transport car. State v. Locklear, 105 Wn. App. 555 (Div. II, 2001) -- November 01:20 (Review is pending in the Washington Supreme Court)

BARRATRY

“Barratry” charge could not be pursued by State against pro se subject of traffic citation who filed “demand for particulars” papers on citing officers. State v. Sullivan, 143 Wn.2d 162 (2001) -- September 01:11

CITIZEN’S ARREST AND RELATED MATTERS

On totality of circumstances, store security personnel did not violate “shopkeepers’ privilege” in holding suspected shoplifter until police arrived. Guijosa, et. al. v. Wal-Mart Stores, Inc., 101 Wn. App. 777 (Div. II, 2000) -- February 01:21

CIVIL COMMITMENT OF MENTALLY ILL

Officer’s reason for seizing mentally ill person is not an element of proof in a civil commitment proceeding under chapter 71.05 RCW. State v. V.B., 104 Wn. App. 953 (Div. II, 2001) -- April 01:18

CIVIL LIABILITY

“Pointing guns as excessive force” ruling to be reconsidered. Robinson v. Solano County, 218 F.3d 1030 -- January 01:03 (Decision by 3-judge panel at 218 F.3d 1030 not to be cited as precedent unless adopted by majority vote of 11-judge panel; review is pending in the 9th Circuit)

Staats v. Brown Update — Authority To Arrest For F&W Violations -- March 01:03

No qualified civil immunity for shooting emotionally disturbed man with less-than-lethal beanbag round where no clear warning given. Deorle v. Rutherford, 242 F.3d 1119 (9th Cir. 2001) -- June 01:05

1st Amendment does not bar warrantless arrest of nude dancers for obscene conduct, but civil case must be retried to determine if their conduct was obscene. Furfaro v. City of Seattle, 144 Wn.2d 363 (2001) -- November 01:02

DEADLY FORCE

“Pointing guns as excessive force” ruling to be reconsidered. Robinson v. Solano County, 218 F.3d 1030 -- January 01:03 (Decision by 3-judge panel at 218 F.3d 1030 not to be cited as precedent unless adopted by majority vote of 11-judge panel; review is pending in the 9th Circuit)

DOMESTIC VIOLENCE

Act of DV need not be recent to justify permanent DVPA protection order. Spense v. Kaminski, 103 Wn. App. 325 (Div. III, 2000) -- March 01:19

Pencil used as weapon was “deadly weapon” under “assault one” based on totality of circumstances; but court questions whether jail cellmates are “cohabitants” covered by DV law. State v. Barragan, 102 Wn. App. 754 (Div. III, 2000) -- April 01:19

Article: Possession Of Firearms And Dangerous Weapons By Persons Subject To DV, Other Court Orders -- State & Federal Statutes -- September 01:02

No-contact order issued pre-conviction remains valid post-conviction. State v. Schultz, 106 Wn. App. 328 (Div. I, 2001) -- November 01:20 (Review is pending in the Washington Supreme Court)

ELECTRONIC SURVEILLANCE

Detective lawfully tricks defendant into e-mail, ICQ exchange with fictitious child: RCW 9.73 challenge rejected and attempted rape-of-child conviction upheld. State v. Townsend, 105 Wn. App. 622 (Div. III, 2001) -- June 01:21 (Review is pending in the Washington Supreme Court)

EVIDENCE LAW

Where charges were possession of drug paraphernalia and possession of marijuana, defendant entitled to put on evidence of his reputation for not using drugs. State v. Day, 142 Wn.2d 1 (2000) -- January 01:03

No error in trial court’s minor restriction on defense attorney’s questions about officer’s surveillance location. State v. Darden, 103 Wn. App. 368 (Div. I, 2000) -- March 01:20 (Review is pending in the Washington Supreme Court)

“Excited utterance” and “medical diagnosis” hearsay-exception rulings for State. State v. Woods, 143 Wn.2d 658 (2001) -- September 01:08

Court rules inappropriate for jury consideration that part of a tape-recording of interrogation containing officers’ statements to the suspect that they thought he was lying. State v. Demery, 144 Wn.2d 753 (2001) -- December 01:15

Toxicologist’s report not admissible in drug case, because report failed to name person from whom drugs were obtained by toxicologist. State v. Neal, 144 Wn.2d 600 (2001) -- December 01:17

EXTORTION

Part of extortion statute struck down on free speech grounds. State v. Pauling, ___ Wn. App. ___, 31 P.3d 47 (Div. I, 2001) -- December 01:20

FIREARMS LAWS AND OTHER WEAPONS LAWS

Evidence sufficient to convict for 1) “obstructing” and 2) “unlawful possession of firearm” (the latter prosecution was based on “constructive possession” rationale). State v. Turner, 103 Wn. App. 515 (Div. II, 2000) -- March 01:11

Montana law automatically restoring gun rights in Montana did not restore felon’s Washington gun rights, but “early discharge” certificate constituted procedure finding “rehabilitation” per RCW 9.41.040(3). State v. Radan, 143 Wn.2d 323 (2001) -- June 01:06

Presence of some of defendant’s personal effects in bedroom not enough to establish his “constructive possession” of a gun found there. State v. Alvarez, 105 Wn. App. 215 (Div. III, 2001) -- June 01:17

Article: Possession Of Firearms And Dangerous Weapons By Persons Subject To DV, Other Court Orders -- State & Federal Statutes -- September 01:02

No ex post facto constitutional violation in Washington Legislature’s 1994 and 1996 amendments expanding gun law restrictions for those with conviction records. State v. Schmidt, State v. Ayers, 143 Wn.2d 658 (2001) -- September 01:08

Trial court’s failure in 1998 sentencing proceeding to warn defendant of firearms possession bar, plus other facts, preclude his conviction under RCW 9.41.040 for unlawful firearms possession – Court of Appeals rules that defendant was misled. State v. Leavitt, 107 Wn. App. 361 (Div. II, 2001) -- November 01:17

Court rejects constitutional challenges to conviction for unlawful possession of firearms in violation of RCW 9.41.040. State v. Krzeszowski, 106 Wn. App. 638 (Div. I, 2001) -- November 01:18

FISH AND WILDLIFE LAWS

Staats v. Brown Update — Authority To Arrest For F&W Violations -- March 01:03

FORFEITURES

Civil asset forfeiture hearing, delayed to accommodate related criminal trial, held to be timely under UCSA; also, PC test met; and wife’s “innocent owner” defense rejected. Escamilla v. Tri-City Metro Drug Task Force, 100 Wn. App. 742 (Div. III, 2000) -- January 01:15

FREE SPEECH

Public disclosure of abortion providers’ names and addresses - through posters and on the internet - protected by First Amendment. Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists, 244 F.3d 1007 (9th Cir. 2001) -- May 01:02 (rehearing en banc granted)

1st Amendment does not bar warrantless arrest of nude dancers for obscene conduct, but civil case must be retried to determine if their conduct was obscene. Furfaro v. City of Seattle, 144 Wn.2d 363 (2001) -- November 01:02

Part of extortion statute struck down on free speech grounds. State v. Pauling, 108 Wn. App. 445 (Div. I, 2001) -- December 01:20

HARASSMENT

Term, “mental health,” in criminal harassment statute held unconstitutional. State v. Williams, 144 Wn.2d 197 (2001) -- September 01:10

“Harassment” does not contain element of defendant’s knowledge that threat will be communicated to proposed victim; Court also explains what constitutes a “threat” under “harassment” statute. State v. J.M., 144 Wn.2d 472 (2001) -- December 01:16

IMPLIED CONSENT

Interference reading on BAC machine does not justify blood test under implied consent statute. Kent v. Beigh, 102 Wn. App. 269 (Div. I, 2000) -- January 01:14; see entry below this topic regarding Washington Supreme Court decision.

Post-traffic-arrest warnings requirement of “implied consent” statute not triggered where no probable cause as to DUI; hence, consenting blood test admissible despite officers’ failure to give implied consent warnings. State v. Avery, 103 Wn. App. 527 (Div. II, 2000) -- February 01:18

Correction Note Regarding Possible Admissibility Of PBT Results -- March 01:21

For BAC test on DUI arrestee to be admissible, a prior warning of the right to counsel under CrR 3.1 or CrRLJ 3.1 must advise of right to counsel “at this time.” State v. Templeton, 103 Wn. App. 527 (Div. I, 2001) -- September 01:12

Implied consent statute held to permit blood testing beyond the circumstances listed in subsection (3) of RCW 46.20.308, but supreme court holds that repeat BAC reading of “interference detected” is not “physical incapacity” under current WAC rules. City of Kent v. Beigh, ___ Wn.2d ___, 32 P.3d 258 (2001) -- December 01:14

INTERROGATIONS AND CONFESSIONS

Sixth Amendment right to counsel -- including its post-arraignment, “initiation-of-contact” bar -- does not extend to other crimes, even to closely related crimes. Texas v. Cobb, 532 U.S. 162 (2001) -- June 01:02

For BAC test on DUI arrestee to be admissible, a prior warning of the right to counsel under CrR 3.1 or CrRLJ 3.1 must advise of right to counsel “at this time.” State v. Templeton, 107 Wn. App. 144 (Div. I, 2001) -- September 01:12

No Sixth Amendment violation by officers in taking uncounseled statement from represented defendant on charged matter, because defendant was the person who initiated the contact. State v. Erickson, ___ Wn. App. ___, 33 P.3d 85 (Div. III, 2001) December 01:17

INTIMIDATION LAWS

K-12 schools intimidation statute, RCW 28A.635.100, gets pro-State interpretation. State v. Avila, 102 Wn. App. 882 (Div. III, 2000) -- January 01:13

Conditional “gun locker time” statement to counselor held admissible and sufficient to support conviction for “intimidating a judge.” State v. Side, 105 Wn. App. 787 (Div. III, 2001) -- June 01:19

JAIL OPERATION

Washington Attorney General Opinion Addresses Code Cities Contracting With Nongovernmental Entities Re Jails -- January 01:22

KNOWINGLY MAKING FALSE STATEMENT IN OFFICIAL REPORT (RCW 40.16.030)

Knowingly making false statement in inspection report filed with Health Department concerning a sewage system was not a violation of RCW 40.16.030. State v. Hampton, 143 Wn.2d 789 (2001) -- September 01:11

LEGISLATION

2001 Legislative Update -- Part One -- July 01:01-16; Part Two -- August 01:02-05; Index To Parts One And Two -- August 01:02-05; Part Three -- September 01:04

LINEUPS, PHOTO ID'S AND SHOWUPS

Showup ID probably unlawful because attorney-request by arrestee was not timely honored per court rule (CrR 3.1), but error held harmless. State v. Jaquez, 105 Wn. App. 699 (Div. II, 2001) - June 01:18

Note re identification procedures (Lineups, Photo ID's, and Showup ID's) article on CJTC LED internet page -- Aug 01:20

MALICIOUS MISCHIEF

Evidence of second degree malicious mischief held sufficient in case of prankster playing with his foster brother's police radio. State v. Gardner, 104 Wn. App. 541 (Div. II, 2001) -- April 01:17

Destruction of co-owned, co-possessed community property held not malicious mischief; Division Two both distinguishes and disagrees with Division One Webb decision. State v. Coria, 105 Wn. App. 51 (Div. II, 2001) -- May 01:23 - (Review is pending in the Washington Supreme Court)

"MEDICAL NECESSITY" DEFENSE

No "medical necessity" defense under federal drug laws; Washington law differs. U.S. v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483 (2001) -- August 01:08

MILITARY DUTY CALL-UP

NOTE: CJTC will not consider as a lapse in law enforcement service the time periods during which law enforcement officers are called to active military duty -- November 01:02

MURDER AND OTHER CRIMINAL (NON-TRAFFIC) HOMICIDES

Premeditation evidence sufficient to support first degree murder conviction. State v. Townsend, 142 Wn.2d 838 (2001) -- March 01:02

Firing single shot into car occupied by two people supports two convictions for attempted first degree murder even if shooter thought only one person in car. State v. Price, 103 Wn. App. 845 (Div. II, 2000) -- March 01:17

"Whole statement" approach to co-defendant's statements against interest rejected; also, "major participation" required for death sentence for accomplice. State v. Roberts, 142 Wn.2d 471 (2000) -- April 01:09

OBSTRUCTING

Evidence sufficient to convict for 1) "obstructing" and 2) "unlawful possession of firearm" (the latter prosecution was based on "constructive possession" rationale). State v. Turner, 103 Wn. App. 515 (Div. II, 2000) -- March 01:11

PROFITEERING (RCW 9A.83)

1995 amendment to Profiteering Act violated Washington constitution's "subject-in-title" and "single subject" requirements -- "obstructing" laws likely affected. State v. Thomas, 103 Wn. App. 800 (Div. II, 2000) -- February 01:17 (The 2001 Washington Legislature corrected this problem.)

RAPE AND OTHER SEX OFFENSES

Detective lawfully tricks defendant into e-mail, ICQ exchange with fictitious child: RCW 9.73 challenge rejected and attempted rape-of-child conviction upheld. State v. Townsend, 105 Wn. App. 622 (Div. III, 2001) -- June 01:21

SEARCH AND SEIZURE

Abandonment

Some light shed on search issues of 1) voluntary abandonment of effects, 2) Mendez-based order to passenger to stay in vehicle, and 3) knowledge element of Parker "search incident" rule regarding non-arrested passenger's effects. State v. Reynolds, 144 Wn.2d 282 (2001) -- October 01:08

Administrative Search Warrants

Courts lack authority under current laws to issue administrative search warrants to search for evidence of civil violation of county code. State v. Lansden, 144 Wn.2d 654 (2001) -- November 01:03

Citizen As Government Agent (or not)

Police awareness of long-term, intense, independent investigation of son's death by his father did not make father a "government agent" for purposes of Search & Seizure law. State v. Swenson, 104 Wn. App. 744 (Div. I, 2000) -- January 01:19

Apartment manager and defendant's mother acted as "private" searchers. State v. Krajieski, 104 Wn. App. 377 (Div. II, 2001) -- March 01:09

Consent Search Exception To Warrant Requirement

Emergency exception to warrant requirement justifies initial entry of residence to investigate DV report; also, consent justifies follow-up search. State v. Johnson (Donovan Q.), 104 Wn. App. 409 (Div. II, 2001) -- April 01:09

Three search rulings in sex molester case: (1) Ferrier consent argument rejected because case not "knock-and-talk"; but (2) search warrant declared partially unsupported under Thein analysis; and (3) Court of Appeals makes "plain view" ruling adverse to state on videotape-watching. State v. Johnson (Larry E.), 104 Wn. App. 489 (Div. II, 2001) -- May 01:05

Ferrier precedent requires "knock-and-talk" consent search warnings in non-exigent investigation of reported drug-dealing in hotel room. State v. Kennedy, 107 Wn. App. 972 (Div. II, 2001) -- November 01:06

Third-party consent search rule of Leach narrowly construed to recognize that one co-habitant alone can consent to residential entry, though not full residential search, while other co-habitant is present. State v. Hoggatt, 108 Wn. App. 257 (Div. II, 2001) -- November 01:08

Correctional Officer Searches Of Legal Documents

Additional fact-finding required to determine whether jail officers' inspections of criminal defendants' legal documents were justified by security concerns. State v. Garza, 99 Wn. App. 291 (Div. III, 2000) -- January 01:21

Drug-Testing

South Carolina public hospital's drug-testing policy for pregnant women violates Fourth Amendment, because crime control was goal of governmental policy. Ferguson v. City of Charleston, S.C., 532 U.S. 67 (2001) -- June 01:05

Emergency Exception To Warrant Requirement

Emergency exception to warrant requirement justifies initial entry of residence to investigate DV report; also, consent justifies follow-up search. State v. Johnson (Donovan Q.), 104 Wn. App. 709 (Div. II, 2001) -- April 01:09

"Community caretaking"/"emergency exception" justifies entry of marijuana-smoking babysitter's residence, as well as justifying subsequent non-pretextual search for her in bedroom. State v. Gibson, 104 Wn. App. 792 (Div. II, 2001) -- May 01:17

Entry Of Private Premises To Arrest

State concedes issue of "exigent circumstances" for warrantless residential-entry; and State loses on issue of "attenuation" re officer's post-arrest identification of defendant; but burglary conviction is upheld on "harmless error" analysis. State v. Le, 103 Wn. App. 354 (Div. I, 2000) -- February 01:07

Escapee from juvenile institution had no reasonable privacy expectation against search of residence where friend's friend was allowing him to reside. State v. Thang, 103 Wn. App. 660 (Div. III, 2000) -- February 01:16 (Review is pending in the Washington Supreme Court)

Officer in hot pursuit of minor-in-possession suspect lacked authority to make a forcible warrantless entry of a third party's residence. State v. Besette, 105 Wn. App. 793 (Div. III, 2001) -- August 01:14

Exclusionary Rule

State concedes issue of "exigent circumstances" for warrantless residential-entry; and State loses on issue of "attenuation" re officer's post-arrest identification of defendant; but burglary conviction is upheld on "harmless error" analysis. State v. Le, 103 Wn. App. 354 (Div. I, 2000) -- February 01:07

Exclusionary rule applies where evidence is obtained by other-state officer in Washington arrest which is not expressly authorized by RCW's. State v. Barker, 143 Wn.2d 915 (2001) -- October 01:11

Exigent Circumstances

State concedes issue of "exigent circumstances" for warrantless residential-entry; and State loses on issue of "attenuation" re officer's post-arrest identification of defendant; but burglary conviction is upheld on "harmless error" analysis. State v. Le, 103 Wn. App. 354 (Div. I, 2000) -- February 01:07

Identity Of Confidential Informant (Disclose Or Protect)

No disclosure of CI's ID because not relevant or needed for fair determination. State v. Lusby, 105 Wn. App. 257 (Div. III, 2001) -- September 01:18

"Incident To Arrest" (Non-Vehicle)

"Gloria Smith" rule barring inventory searches at booking onailable arrest warrants does not limit searches in the field "incident to arrest," even if two searches occur in field, and second is delayed due to prisoner transfer. State v. Ross, 106 Wn. App. 876 (Div. I, 2001) -- September 01:15

"Incident To Arrest" (Vehicle)

In "buy-bust" operation, arrest made in tavern bathroom 50-75 feet away from vehicle which suspect had briefly occupied following drug sale did not justify "search incident" of vehicle under Stroud rule. State v. Wheless, 103 Wn. App. 749 (Div. I, 2000) -- March 01:04

Driver who kept his gun in his passenger's purse not allowed to raise Parker "search incident to arrest" challenge to search of her purse. State v. Jones, 104 Wn. App. 966 (Div. II, 2001) -- April 01:12 (Review is pending in the Washington Supreme Court)

Pro-State rulings on seizure-of-person, search-incident-to-arrest in case involving late-night spotlighting and contacting of man in parked car. State v. O'Neill, 104 Wn. App. 850 (Div. I, 2001) -- May 01:20 (Review is pending in the Washington Supreme Court)

When motor home is being used as a vehicle on the roads, Stroud's "bright line" rule applies, and the entire readily-accessible passenger area is subject to search incident to custodial arrest of driver or passenger. State v. Vrieling, 144 Wn.2d 489 (2001) -- October 01:02

Some light shed on search issues of 1) voluntary abandonment of effects, 2) Mendez-based order to passenger to stay in vehicle, and 3) knowledge element of Parker "search incident" rule regarding non-arrested passenger's effects. State v. Reynolds, 144 Wn.2d 282 (2001) -- October 01:08

Under Parker MV "search incident" rule, where there is confusion over ownership of property in passenger area, officers may search such personal property for ID. State v. Jackson, 107 Wn. App. 646 (Div. I, 2001) -- October 01:15

Vehicle search held "not incident to arrest" because arrestee had no ready access to or immediate control of vehicle at the time of arrest; also, State's impound-inventory theory rejected because search was investigatory. State v. Johnston, 107 Wn. App. 280 (Div. II, 2001) -- October 01:18

Jail Booking Inventory Of Effects

"Gloria Smith" rule barring inventory searches at booking onailable arrest warrants does not limit searches in the field "incident to arrest," even if two searches occur in field, and second is delayed due to prisoner transfer. State v. Ross, 106 Wn. App. 876 (Div. I, 2001) -- September 01:15

Open View

Despite fact that driver of stopped vehicle was known to be a cocaine dealer and seemed nervous and evasive, officer's "open view" of suspicious white powder on driver's pants leg held to not justify entry of vehicle to seize and test the powder. State v. Lemus, 103 Wn. App. 94 (Div. III, 2000) -- February 01:02

Plain View

Three search rulings in sex molester case: (1) Ferrier consent argument rejected because case not “knock-and-talk”; but (2) search warrant declared partially unsupported under Thein analysis; and (3) Court of Appeals makes “plain view” ruling adverse to State on videotape-watching. State v. Johnson (Larry E.), 104 Wn. App. 489 (Div. II, 2001) -- May 01:05

Privacy Protection for Citizens

Under Fourth Amendment, a guest’s overnight stay in his host’s home need not have a social purpose in order for the guest to have privacy protection against government. U.S. v. Gamez-Orduno, 253 F.3d 453 (9th Cir. 2000) -- April 01:08

Enclosed garage gets protection against warrantless, nonconsenting police entry even though: 1) garage door open, 2) loud music playing inside, and 3) renter directed officer to look for resident in garage. State v. Dyreson, 104 Wn. App. 703 (Div. III, 2001) -- May 01:15 (Note that knock-and-announce rule would likely apply here as well)

Thermal imaging of residence requires search warrant under 4th Amendment. Kyllo v. U.S., 121 S.Ct. 2038 (2001) -- August 01:07

Random checking of MV license plate numbers against DOL data upheld. State v. Martin, 106 Wn. App. 850 (Div. I, 2001) -- August 01:09

Social guest in home which officers entered under unlawful search warrant held to have automatic standing to challenge the entry. State v. Magneson, 107 Wn. App. 221 (Div. II, 2001) -- November 01:12

Consent search at mother’s home did not violate defendant’s rights; under totality of circumstances, he lacked privacy rights there. State v. Francisco, 107 Wn. App. 247 (Div. I, 2001) -- November 01:14

Probable Cause

Three search rulings in sex molester case: (1) Ferrier consent argument rejected because case not “knock-and-talk”; but (2) search warrant declared partially unsupported under Thein analysis; and (3) court makes “plain view” ruling adverse to state on videotape-watching. State v. Johnson (Larry E.), 104 Wn. App. 489 (Div. II, 2001) -- May 01:05

Thein PC issue resolved against State in burglar’s challenge to search warrant for his home; but court makes pro-state rulings on issues re citizen-informant credibility, and re Miranda-initiation-of-contact. State v. McReynolds, 104 Wn. App. 560 (Div. III, 2001) -- May 01:11

Search warrant affidavit fails to establish PC that misdemeanor wanted on arrest warrant would be inside third party premises targeted by search warrant. State v. Anderson (Rob Joseph), 105 Wn. App. 223 (Div. III, 2001) -- June 01:13

Schools - Searches By School Officials

K-12 student’s violation of his school’s closed-campus rule did not justify a search of the student by a school attendance officer. State v. B.A.S., 103 Wn. App. 549 (Div. I, 2000) -- February 01:13

Securing Premises Based On PC To Search

Where police have PC to search home, and resident voluntarily steps outside, 4th Amendment permits police to restrict him from entering his home while they seek warrant. Illinois v. McArthur, 531 U.S. 226 (2001) -- April 01:02

Standing

Escapee from juvenile institution had no reasonable privacy expectation against search of residence where friend's friend was allowing him to reside. State v. Thang, 103 Wn. App. 660 (Div. III, 2000) -- February 01:16 (Review is pending in the Washington Supreme Court)

Social guest in home which officers entered under unlawful search warrant held to have automatic standing to challenge the entry. State v. Magneson, 107 Wn. App. 221 (Div. II, 2001) -- November 01:12

Consent search at mother's home did not violate defendant's rights; under totality of circumstances, he lacked privacy rights there. State v. Francisco, 107 Wn. App. 247 (Div. I, 2001) -- November 01:14

SEXUAL EXPLOITATION (RCW 9.68A.040)

Washington's "sexual exploitation of a minor" statute survives constitutional challenge in "show me your breasts" high school videotaping case. State v. D.H., 102 Wn. App. 620 (Div. I, 2000) -- January 01:18

SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION

Statute on sex offender registration and community notification survives constitutional challenge on due process, liberty and privacy grounds. Personal Restraint Petition of Douglas Earl Meyer, 142 Wn.2d 608 (2001) -- February 01:02

SIXTH AMENDMENT AND RELATED COURT RULE PROTECTIONS

Sixth Amendment right to counsel -- including its post-arraignment, "initiation-of-contact" bar -- does not extend to other crimes, even to closely related crimes. Texas v. Cobb, 532 U.S. 162 (2001) -- June 01:02

Showup ID probably unlawful because attorney request by an arrestee was not timely honored per court rule (CrR 3.1), but error held harmless. State v. Jaquez, 105 Wn. App. 699 (Div. II, 2001) -- August 01:18

For BAC test on DUI arrestee to be admissible, a prior warning of the right to counsel under CrR 3.1 or CrRLJ 3.1 must advise of right to counsel "at this time". State v. Templeton, 107 Wn. App. 141 (Div. I, 2001) -- September 01:12

No Sixth Amendment violation by officers in taking uncounseled statement from represented defendant on charged matter, because defendant was the person who initiated the contact. State v. Erickson, ___ Wn. App. ___, 33 P.3d 85 (Div. III, 2001) -- December 01:17

STALKING

Stalking evidence sufficient to convict park-and-watch defendant; also, stalking statute, though broad, is not unconstitutionally vague. State v. Ainslie, 103 Wn. App. 1 (Div. I, 2000) -- January 01:06

TRAFFIC (Title 46 RCW) (See also “Implied Consent”)

“Appropriately marked” phrase in felony-eluding statute requires that police vehicle bear some insignia identifying it as official police vehicle. State v. Argueta, 107 Wn. App. 532 (Div. I, 2001) -- November 01:10

UNIFORM CONTROLLED SUBSTANCES ACT AND OTHER DRUG LAWS

Where charges were possession of drug paraphernalia and possession of marijuana, defendant entitled to put on evidence of his reputation for not using drugs. State v. Day, 142 Wn.2d 1 (2000) -- January 01:03

Multiple convictions justified for multiple marijuana grows located in different places. State v. Davis, 142 Wn.2d 165 (2000) -- January 01:05

“Drug house” evidence held insufficient to support conviction. State v. Ceglowski, 103 Wn. App. 346 (Div. II, 2000) -- January 01:09

Fingerprints on meth “box lab” items supports conviction for manufacturing, but this evidence alone does not support conviction for possessing with intent to deliver. State v. Todd, 101 Wn. App. 945 (Div. III, 2000) -- January 01:11

Civil asset forfeiture hearing, delayed to accommodate related criminal trial, held to be timely under UCSA; also, PC test met; and wife’s “innocent owner” defense rejected. Escamilla v. Tri-City Metro Drug Task Force, 100 Wn. App. 742 (Div. III, 2000) -- January 01:15

No “medical necessity” defense under federal drug laws. U.S. v. Oakland Cannabis Buyers’ Cooperative, 121 S.Ct. 1711 (2001) -- August 01:08

Possessing “pseudoephedrine hydrochloride” is not prohibited by RCW 69.50.440. State v. Halsten, ___ Wn. App. ___ (Div. II, 2001) [2001 WL 1299003] -- December 01:19

VAGUENESS DOCTRINE

Stalking evidence sufficient to convict park-and-watch defendant; also, stalking statute, though broad, is not unconstitutionally vague. State v. Ainslie, 103 Wn. App. 1 (Div. I, 2000) -- January 01:06

VOYEURISM (RCW 9A.44.115)

Up-skirt photographing at mall punishable under voyeurism statute. State v. Glas, 106 Wn. App. 895 (Div. III, 2001) -- November 01:19

VIENNA CONVENTION AND CONSULAR NOTIFICATION

No exclusion of confession for violation of Vienna convention treaty requirement that officers tell arrested foreign national of right to consulate notification. State v. Jamison and State v. Acosta, 105 Wn. App. 572 (Div. I, 2001) -- August 01:18

Note: Update on Vienna convention on consular relations. December 01:20

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) IMPLIED CONSENT STATUTE HELD TO PERMIT BLOOD TESTING BEYOND THE CIRCUMSTANCES LISTED IN SUBSECTION (3) OF RCW 46.20.308, BUT SUPREME COURT HOLDS THAT REPEAT BAC READING OF “INTERFERENCE DETECTED” IS NOT EVIDENCE OF “PHYSICAL INCAPACITY” UNDER CURRENT WAC RULES -- In City of Kent v. Beigh, ___ Wn.2d ___, 32 P.3d 258 (2001), the Washington Supreme Court unanimously

agrees that the Court of Appeals was wrong in its holding last year in the Beigh case (see January 2001 LED at 14-15), when the Court of Appeals ruled that subsection (3) of RCW 46.20.308 provides the sole authority for officers to invoke the implied consent statute in requesting that a motorist submit to a blood test. However, a 5-4 majority of the Court rules that a DUI arrestee whose breath three times caused a BAC Verifier Datamaster to report “interference detected” cannot, for that reason alone and under current WAC rules, be deemed to have a “physical incapacity” or “other physical limitation of providing a breath sample” for purposes of RCW 46.20.308(2).

Thus, with the exception of the interference-reading circumstances before the Court, the Beigh Court restores the prior accepted understanding in the law enforcement community as to interpretation of the implied consent statute. Also, in light of the analysis in the Beigh majority opinion on the “interference-reading” question, it appears that the State Toxicologist could cure the problem for future cases by simply amending the administrative rules at WAC 448-13-055. Meanwhile, however, the Beigh decision holds that forced-blood tests are not appropriate in this circumstance under current WAC rules. Until such time as the WAC rule is amended, officers who get inexplicable “interference” readings from a BAC machine should try to test the DUI suspect on another BAC machine.

Result: Affirmance of Court of Appeals decision that affirmed King County Superior Court and Kent Municipal Court orders suppressing blood test results in the DUI prosecution of Richard Beigh; case remanded to Kent Municipal Court for further appropriate proceedings.

(2) COURT RULES INAPPROPRIATE FOR JURY’S CONSIDERATION THAT PART OF A TAPE-RECORDING OF INTERROGATION CONTAINING OFFICERS’ STATEMENTS TO THE SUSPECT THAT THEY THOUGHT HE WAS LYING -- In State v. Demery, 144 Wn.2d 753 (2001), a five-justice majority of the Washington Supreme Court rules that such jurors should not have heard statements made by police officers during a taped interrogation accusing the suspect of lying. Such statements constitute impermissible opinion testimony that a jury should not have been allowed to hear, the majority rules.

Generally, at trial, no witness may testify that the defendant is guilty or is not truthful. Such testimony is deemed unfairly prejudicial to the defendant because it invades the exclusive role of the jury.

The Demery lead opinion of four justices (Owens, Smith, Ireland and Bridge) notes that the police commonly use the permissible interrogation technique of accusing the suspect of lying. Courts in some other jurisdictions have ruled that, because such statements by the interrogating police officers are not made in live testimony, and because the statements are offered at trial only to provide context for the responses of the defendant, the statements are not impermissible opinion, and hence may be presented to the jury.

However, five justices on the Washington Supreme Court take the view in Demery that such statements of the officer are the same as live testimony that the defendant is lying. Accordingly, the Washington rule under Demery is that such statements must be edited from the tape-recording or transcript of the interrogation that is considered by the jury. However, Justice Alexander, joining Justices Sanders, Johnson, Madsen, and Chambers in taking that restrictive view, separately concluded that the error was harmless in that the officers’ statements, considered together with other evidence, did not have a material effect on the outcome of the case. Justice Alexander thus joins the other justices Owens, Smith, Ireland and Bridge in affirming defendant’s conviction for robbery and kidnapping.

Result: Reversal of Court of Appeals decision and affirmance of Pierce County Superior Court convictions of Kenneth L. Demery for first degree robbery and first degree kidnapping.

LED EDITORIAL COMMENT: The Demery ruling should not affect how officers conduct interrogations. The five-justice majority did not state that there was anything improper about the method of interrogation. In preparing cases for trial, prosecutors will simply need to do more editing of tape recordings and transcripts of interrogations, as well as in how they question officers about what was said in interrogations.

(3) “HARASSMENT” DOES NOT CONTAIN ELEMENT OF DEFENDANT’S KNOWLEDGE THAT THREAT WILL BE COMMUNICATED TO PROPOSED VICTIM; COURT ALSO EXPLAINS WHAT CONSTITUTES A “THREAT” -- In State v. J.M., 144 Wn.2d 472 (2001), the Washington Supreme Court unanimously affirms the decision of the Court of Appeals (see November 2000 **LED:14**), ruling that a conviction of felony harassment under RCW 9A.46.020(1)(a)(i) does not require that the State prove that the defendant knew or should have known that his or her threat to cause bodily injury would be communicated to the proposed victim.

J.M., a 13-year-old who had recently been suspended from school, told fellow middle school students of his plan to kill the school principal and certain other staff at the school. One of those students reported the information to the principal, who became concerned and reported the matter to the Seattle Police Department.

These facts established a “threat” for purposes of the “harassment” statute, the Supreme Court holds. The J.M. Court summarizes as follows its interpretation of the “knowledge” and “threat” elements of the harassment statutes:

As to communicating the threat, the defendant must be aware that he or she is *communicating* a threat. Therefore, the individual who writes a threat in a personal diary, or who mutters a threat without awareness that it is heard, or who loudly makes a threat when he or she thinks no one else is around, does not “knowingly threaten.”

As to the nature of the threat, whether or not the speaker actually intends to carry out the threat is not relevant. However, the communication must be of the *intent* to cause bodily injury. Thus, the defendant must be aware that the threat is of such an intent. It must, therefore, be a real or serious threat. Idle talk, joking, or puffery does not constitute a knowing communication of an actual *intent* to cause bodily injury. Thus, the statute as a whole requires that the perpetrator knowingly threaten to inflict bodily injury by communicating directly or indirectly the intent to inflict bodily injury; the person threatened must find out about the threat although the perpetrator need not know nor should know that the threat will be communicated to the victim; and words or conduct of the perpetrator must place the person threatened in reasonable fear that the threat will be carried out.

Result: Affirmance of Court of Appeals decision (101 Wn. App. 716 (Div. I, 2000) **Nov 2000 LED:14**) which affirmed a King County Superior Court juvenile adjudication of guilt for felony harassment.

(4) TOXICOLOGIST’S REPORT NOT ADMISSIBLE IN DRUG CASE, BECAUSE REPORT FAILED TO NAME PERSON FROM WHOM DRUGS WERE OBTAINED BY TOXICOLOGIST -- In State v. Neal, 144 Wn.2d 600 (2001), a unanimous Washington Supreme Court rules that the trial court in a methamphetamine possession case should have excluded a certified copy of a toxicologist’s report. Because the certification failed to name the person from whom the substance was received, the toxicologist’s report did not meet the requirements of the hearsay exception in Court Rule (CrR) 6.13(b) and therefore was not admissible.

Result: Reversal of Court of Appeals decision which had affirmed the Skamania County Superior Court conviction of Lisa Marie Neal for possession of methamphetamine; remand of case for dismissal.

WASHINGTON STATE COURT OF APPEALS

NO SIXTH AMENDMENT VIOLATION BY OFFICERS IN TAKING UNCOUNSELED STATEMENT FROM REPRESENTED DEFENDANT ON CHARGED MATTER, BECAUSE DEFENDANT WAS THE PERSON WHO INITIATED THE CONTACT

State v. Erickson, ___ Wn. App. ___, 33 P.3d 85 (Div. III, 2001)

Facts: (Excerpted from Court of Appeals decision)

Erickson was arrested and jailed in Stevens County during July 1999 for the murder of Matthew J. Davis. On July 8, the Stevens County Superior Court appointed counsel for Mr. Erickson. On July 10, Mr. Erickson gave incriminating statements without the presence of his counsel that became the subject of an unsuccessful motion to suppress and this appeal.

Regarding the statement, the unchallenged findings indicate Mr. Erickson told his jailer on July 10 that he wanted to speak to a sheriff's officer. The jailer called Detective Anderson for instructions. The detective told the jailer not to talk to Mr. Erickson. Mr. Erickson, who was familiar with writing voluntary statements, asked the jailer for a pen and some paper to write on. The jailer advised Mr. Erickson of his constitutional rights and his waiver rights. Mr. Erickson then wrote a voluntary statement. Detective Anderson also advised Mr. Erickson again of his constitutional rights. Mr. Erickson waived them. Mr. Erickson said he wished to set the record straight and tell his side of the story. He said he wished to make a statement and agreed to have it recorded. Mr. Erickson was advised again of his rights before making his statement.

Mr. Erickson knew he had assigned counsel. Mr. Erickson did not know counsel's telephone number. He did not ask for counsel's telephone number because it was late and he did not want to bother counsel at home. Prior to making his recorded statement, Mr. Erickson again acknowledged his awareness that he had counsel. The officers did not ask Mr. Erickson any questions while he made his recorded statement.

[Underlining added by **LED** Editors]

Proceedings: Andrew David Erickson testified at his trial for first degree murder and second degree unlawful possession of a firearm. On cross-examination, Erickson admitted that he had made the voluntary, recorded confession. Erickson was convicted on both charges.

ISSUE AND RULING: Where a represented defendant initiates contact with officers on a charged matter, does it violate the Sixth Amendment for the officers to obtain a waiver of rights and take the defendant's statement in the absence of counsel? (ANSWER: No)

Result: Affirmance of Stevens County Superior Court conviction of Andrew David Erickson for first degree murder under RCW 9A.32.030 and for second degree unlawful possession of a firearm under RCW 9.41.040.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Mr. Erickson relies chiefly on State v. Stewart, 113 Wn.2d 462 (1989) for his waiver of rights arguments. The Stewart court stated, "once the Sixth Amendment right to

counsel has attached, the state may not properly interrogate the accused in the absence of counsel unless the accused validly waives his or her constitutional right." The Stewart court focused on police-initiated interrogation pertaining to the charged crime. Mr. Erickson initiated this statement according to the unchallenged findings. Thus, Stewart is distinguishable.

Even still, Mr. Erickson gave his statement after his Sixth Amendment rights had attached. Thus, the question remains whether Mr. Erickson validly waived his Sixth Amendment right to attorney assistance (among others not in issue), when initiating his statement to the police pertaining to the charged offense. See Murphy v. Holland, 845 F.2d 83, 85 (4th Cir. 1988) (holding defendant's initiated conversation with police did not violate principle prohibiting police interrogation after Sixth Amendment right to counsel invoked); Tucker v. Kemp, 818 F.2d 749, 751 (11th Cir. 1987) (defendant initiated contact, not a Sixth Amendment violation); Davis v. State, 330 Ark. 76, 953 S.W.2d 559, 562 (1997) (defendant initiated statement allowed after appointment of counsel at arraignment); State v. Owens, 827 S.W.2d 226, 228 (Mo. App. 1991) (once defendant invokes Sixth Amendment right to counsel, "any subsequent interrogation must be initiated by him").

These authorities are persuasive. Therefore, we hold for the first time that non-coerced, custodial, defendant-initiated statements made without police interrogation, fall outside the general rule prohibiting custodial interrogations following invocation of the Sixth Amendment right to counsel and constitute waiver. See Michigan v. Jackson, 475 U.S. 625 (1986). Because coercion and custody are not at issue here, we next address waiver. "The key inquiry in determining whether a waiver is valid is whether the defendant knew of his rights during questioning and the consequences of waiving those rights."

Here, the unchallenged findings show Mr. Erickson initiated contact with the jailer and the detectives for the purpose of making statements. Mr. Erickson knew he had an attorney but did not have the telephone number. He did not ask for the telephone number because he did not want to call counsel. Mr. Erickson declined the jailer's offer of a telephone. The jailer read Mr. Erickson his rights and Mr. Erickson, who had an extensive criminal history, understood them well. Mr. Erickson, who was already familiar with written voluntary statements, asked for a pen and some paper on which he wrote his statement. The detectives read Mr. Erickson his rights twice more before he gave an oral recorded statement. Mr. Erickson again waived his rights. Neither the jailer nor the detectives asked Mr. Erickson any questions. Mr. Erickson was calm, rational, and in control of himself at the time he made his statements.

The findings support the conclusion beyond a preponderance of evidence that Mr. Erickson knew of and voluntarily waived his counsel rights when he initiated contact with law enforcement and made his statement. Accordingly, we conclude the trial court did not err when it declined to suppress the statement.

[Underlining added by **LED** Editors]

LED EDITORIAL COMMENT: In the excerpts above of the Erickson Court's analysis and description of the facts, we underlined the Court's statements that the detective (and the correctional officer) did not question Erickson. While this fact made the Court's decision easier, we think that the case law from other jurisdictions (both the cases cited in the Erickson opinion and other cases) strongly supports the view that the detective lawfully could have interrogated Erickson after Erickson initiated contact and waived his rights. But the legally safest approach in this context (defendant-initiated contact and waiver of rights) might be to first try to get the defendant to give a statement without questioning and then to proceed with interrogation.

Officers should be aware, however, that if asked in an actual case, prosecutors are constrained by ethical restrictions to advise officers to not participate in uncounseled contact in this Sixth Amendment context, even where the defendant initiates the contact and interrogation is therefore permitted. Among other things, this ethical dilemma for prosecutors (not an ethical dilemma for officers) is briefly described in our article "Initiation of Contact Rules under the Fifth and Sixth Amendments." The article has been updated with the Erickson decision and is available on the CJTC LED webpage at [<http://www.wa.gov/cjt/ledpage.html>].

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) POSSESSING "PSEUDOEPHEDRINE HYDROCHLORIDE" IS NOT PROHIBITED BY RCW 69.50.440 -- In State v. Halsten, ___ Wn. App. ___ (Div. II, 2001) [2001 WL 1299003], the Court of Appeals rules that, because RCW 69.50.440 uses the term, "pseudoephedrine," not "pseudoephedrine hydrochloride," and not "pseudoephedrine salts," the statute does not apply to possession of the latter substances.

Police in this case lawfully caught defendant in possession of methamphetamine, isopropyl alcohol, coffee filters, toluene, red phosphorus, latex gloves, and a utility knife. In addition, defendant was in possession of three boxes of "Equate" pseudoephedrine cold and allergy tablets. Defendant was prosecuted and convicted on charges of possessing pseudoephedrine with intent to manufacture methamphetamine under RCW 69.50.440.

On review, the Court of Appeals holds however, that because the scientific evidence established that the cold tablets were not "pseudoephedrine," but instead were "pseudoephedrine hydrochloride" (a "salt" of pseudoephedrine), the conviction must be reversed.

Result: Reversal of Lewis County Superior Court conviction of Edward Halsten for possessing pseudoephedrine with intent to manufacture.

LED EDITORIAL COMMENT: It appears that it would be very simple to amend RCW 69.50.440 to correct the "error" found by the Court of Appeals. Legislative amendment presumably will be pursued in the next session of the Washington Legislature. For now, however, Washington law enforcement agencies should check with their local prosecutors for advice. The 2001 Washington Legislature enacted chapter 96, Laws of 2001, amending RCW 69.43 to make it a gross misdemeanor to possess more than three packages of 15 or more grams of pseudoephedrine without a permit, regardless of intent to manufacture methamphetamine. Because Halsten holds that a suspect (regardless of intent) cannot be charged under RCW 69.50.440 if found in possession of cold tablets (pseudoephedrine hydrochloride) from which pseudoephedrine has not yet been extracted, it appears that such cases, for now, should be referred to prosecutors for the gross misdemeanor charge under chapter 69.43 RCW as amended in 2001.

(2) PART OF EXTORTION STATUTE STRUCK DOWN ON FREE SPEECH GROUNDS -- In State v. Pauling, 108 Wn. App. 445 (Div. I, 2001), the Court of Appeals rules that part of Washington's second degree extortion statute in chapter 9A.56 RCW is unconstitutionally overbroad, because the statutory prohibitions on certain types of "threats" are not limited to wrongful threats and the statute does not include any defenses that would limit the reach of these provisions to only unprotected speech.

The defendant in Pauling had sent sexually explicit photographs of the victim (his ex-girl friend) to her family members and others. He then threatened to place such photos on the Internet and to send the pictures to her neighbors and others, but that he would stop if she paid him a \$5000 debt on which he had obtained a default judgment in a Florida small claims court. Pauling was convicted of second degree extortion under RCW 9A.56.130 on the theory that his "threats" fell under the following

subsections of the definition of “threat” at RCW 9A.04.110(25): **(e)** (“[threat] to expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule”); and **(j)** “[threat] to do any other act which is intended to harm substantially the person threatened or another with respect to his health, safety, business, financial condition, or personal relationships”].

The Pauling Court explains that, under the First Amendment of the U.S. Constitution, a criminal statute that defines the word “threat” to include the communication of information that is not inherently wrong or unlawful sweeps too broadly to withstand constitutional challenge. Parts of Washington extortion statute and its incorporated “threat” definition fail this test, the Pauling Court holds. The Pauling decision does not find fault with “extortion in the first degree”, nor does the opinion appear to invalidate “extortion in the second degree when committed by means of “threat” falling under the following subsections of RCW 9A.04.110(25): **(d)** ([threat] to accuse any person of a crime or cause criminal charges to be instituted against any person [subject to the defense provided in RCW 9A.56.130(2)]”); and **(h)** (“[threat] to take wrongful action as an official against anyone or anything, or wrongfully withhold official action, or cause such action or withholding”).

Result: Reversal of Snohomish County Superior Court conviction of Molotov F. Pauling for two counts of extortion in the second degree.

Status: The Snohomish County Prosecutor’s Office has petitioned the Washington Supreme Court for review.

NOTE: UPDATE ON VIENNA CONVENTION ON CONSULAR RELATIONS

The Vienna Convention on Consular Relations (VCCR) is a treaty among most nations of the world requiring that aliens (all foreign nationals) subjected to custodial arrest be advised of the rights to have their foreign consul contacted. We provided a comprehensive article addressing the VCCR in the May 1999 LED. A link to that LED, as well as a link to the reader-friendly U.S. State Department webpage, can be found on the CJTC LED webpage -- [<http://www.wa.gov/cjt/ledpage.html>].

Since May 1999, we have provided LED entries on two Washington Court of Appeals decisions and one U.S. Ninth Circuit Court of Appeals decision. Each was a criminal case in which the appellate courts rejected defense arguments that confessions taken following a violation of the treaty should be suppressed. See State v. Martinez-Lazo, 100 Wn. App. 869 (Div. III, 2000) **Aug 00 LED:13**; State v. Jamison, 105 Wn. App. 572 (Div. I, 2001) **Aug 01 LED:18**; U.S. v. Lombera-Camorlinga, 206 F.3d 888 (9th Cir. 2000) **May 00 LED:12**.

However, the courts in those criminal cases left open the question whether a violation of the treaty might be enforced by a private civil remedy. Recently, a federal district court judge in New York said “yes,” holding that foreign nationals may sue under the treaty and the federal civil rights statute. See Standt v. City of New York, 153 F. Supp.2d 417 (S.D.N.Y. 2001). The Standt Court’s view that a Vienna Convention violation is a civilly actionable Civil Rights violation appears to be a minority position. But only time, and ultimately the U.S. Supreme Court, will tell whether the Standt Court got it right.

INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCW’S, AND TO WAC 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 more simply accessed through a separate link clearly designated. Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible on the Courts' website or by going directly to [<http://www.courts.wa.gov/rules>].

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 many significant opinions of the Court issued before 1990.

Easy access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2001, is at [<http://slc.leg.wa.gov/>]. Access to the "Washington State Register" for the most recent WAC amendments is at [<http://slc.leg.wa.gov/wsr/register.htm>]. Information about bills filed in the 2001 Washington Legislature is at the same address -- look under "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. In addition, a wide range of state government information can be accessed at [<http://access.wa.gov>]. The address for the Criminal Justice Training Commission's webpage is [<http://www.wa.cjt>], while the address for the Attorney General's Office webpage is [<http://www/wa/ago>].

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 Darlene Tangedahl of the Criminal Justice Training Commission (CJTC) at (206) 835-7337; Fax (206) 439-3752; e mail [dtangedahl@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 via a link on the Commission's Internet Home Page at: [<http://www.wa.gov/cjt>].