



# Law Enforcement

February 2002

# Digest

## HONOR ROLL

### 539<sup>th</sup> Session, Basic Law Enforcement Academy – August 14<sup>th</sup> through December 21<sup>st</sup>, 2001

- President: Tony Hernandez - Jefferson County Sheriff's Office
- Best Overall: Michael R. Hill - Sequim Police Department
- Best Academic: Michael R. Hill - Sequim Police Department
- Best Firearms: Michael O. Western - Mason County Sheriff's Office
- Tac Officer: Officer David Campbell - Lacey Police Department

### 538<sup>th</sup> Session, Basic Law Enforcement Academy, Spokane Police Academy August 13<sup>th</sup> through December 19<sup>th</sup>, 2001

- Highest Scholarship: Jake D. Jensen - Spokane Police Department
- Highest Mock Scenes: Michael J. McNab - Spokane Police Department
- Outstanding Officer: Tom L. Gravelle - Spokane Police Department
- Pistol Marksmanship: William N. Boyer - Asotin County Sheriff's Office
- Overall Firearms: Skip O. Lemmon - Sunnyside Police Department
- Tactical Firearms: Skip O. Lemmon - Sunnyside Police Department

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## FEBRUARY LED TABLE OF CONTENTS

**BRIEF NOTE FROM THE UNITED STATES SUPREME COURT ..... 3**

**FOURTH AMENDMENT DOES NOT PROHIBIT WARRANTLESS, REASONABLE SUSPICION-BASED SEARCH OF PROBATIONER'S RESIDENCE BY CALIFORNIA LAW ENFORCEMENT OFFICER PURSUING CRIMINAL INVESTIGATION; WASHINGTON LAW MAY YIELD A DIFFERENT RESULT**  
**U.S. v. Knights, 122 S. Ct. 587 (2001)..... 3**

**WASHINGTON STATE COURT OF APPEALS ..... 4**

**TERRY STOP-AND-FRISK OK WHERE OFFICERS SUSPECTED OPEN-LIQUOR-CONTAINER VIOLATION IN PUBLIC AREA, AND OFFICERS WERE OUTNUMBERED**  
**State v. Bailey, \_\_\_ Wn. App. \_\_\_, 34 P.3d 239 (Div. I, 2001)..... 4**

**WHERE ONLY EVIDENCE OF DELIVERY WAS SELLER'S CONFESSION, CORPUS DELICTI OF "DELIVERY OF DRUGS BY SOMEONE" NOT MET IN DEADLY HEROIN O.D. CASE**  
**State v. Bernal, \_\_\_ Wn. App. \_\_\_ (Div. II, 2001)..... 5**

**"PUBLIC SAFETY" EXCEPTION TO MIRANDA WARNINGS REQUIREMENT NOT MET WHERE OFFICER'S PRE-FRISK QUESTION TO SUSPECT DID NOT MENTION SAFETY CONCERN**  
**State v. Spotted Elk, \_\_\_ Wn. App. \_\_\_, 34 P.3d 906 (Div. III, 2001)..... 7**

**FELONY-PROBATIONER WHO RAN FOLLOWING HIS ARREST ON A PROBATION-VIOLATION WARRANT COMMITTED FIRST DEGREE ESCAPE UNDER RCW 9A.76.110**  
**State v. Walls, 106 Wn. App. 792 (Div. III, 2001)..... 9**

**SIGNING A FICTITIOUS NAME TO A CHARGE SLIP WITHOUT AUTHORIZATION FROM THE ACCOUNT HOLDER IS "FORGERY" UNDER RCW 9A.60.020**

<u>State v. Daniels</u> , 106 Wn. App. 571 (Div. I, 2001) .....	11
<b>BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS.....</b>	<b>3</b>
<b>NO CIVIL LIABILITY IN 911 “FAILURE TO PROTECT” CASE, BECAUSE DISPATCHER PROMISED ONLY THAT POLICE WOULD RESPOND, AND THEY DID</b>	
<u>Sinks and Stock v. Russell</u> , ___ Wn. App. ___, 34 P.3d 1243 (Div. II, 2001) .....	13
<b>CONCLUSIVE PRESUMPTION FOR BAG-LIMIT VIOLATIONS IN FISH &amp; WILDLIFE STATUTE PROHIBITING “COMMERCIAL FISHING WITHOUT A LICENSE” HELD UNCONSTITUTIONAL</b>	
<u>State v. Mertens</u> , ___ Wn. App. ___; 34 P.3d 1239 (Div. II, 2001).....	14
<b>“VAGINA” UNDER “SEX OFFENSES” CHAPTER, RCW 9A.44, INCLUDES “LABIA MINORA”; ALSO, 1986 STATUTORY RAPE CONVICTION IS A “STRIKE” UNDER “TWO STRIKES” LAW</b>	
<u>State v. Delgado</u> , ___ Wn. App. ___, 33 P.3d 753 (Div. I, 2001) .....	15
<b>CONFRONTATION CLAUSE NOT VIOLATED BY ADMISSION OF HEARSAY UNDER CHILD SEXUAL ABUSE LAW (RCW 9A.44.120) AND “MEDICAL DIAGNOSIS” EXCEPTION (ER 803(a)(4))</b>	
<u>State v. Kilgore</u> , 107 Wn. App. 160 (Div. II, 2001) .....	15
<b>HEARSAY NOT ADMISSIBLE UNDER RCW 9A.44.120 WHERE CHILD DID NOT UNDERSTAND DIFFERENCE BETWEEN LIE AND TRUTH AT TIME SHE MADE OUT-OF-COURT STATEMENT</b>	
<u>State v. C.J.</u> , 108 Wn. App. 790 (Div. III, 2001).....	18
<b>IN FAILURE-TO-REGISTER CASE, SEX OFFENDER MUST BE ALLOWED TO PUT ON EVIDENCE ALLEGING FAULTY FILING PRACTICES IN SHERIFF’S OFFICE</b>	
<u>State v. Prestegard</u> , 108 Wn. App. 14 (Div. II, 2001).....	18
<b>EVIDENCE THAT DEFENDANT PHONED RESPONDENT’S HOME AND TALKED TO RESPONDENT’S SPOUSE ENOUGH TO SUPPORT CONVICTION UNDER NO-CONTACT ORDER</b>	
<u>State v. Ward, Baker</u> , 108 Wn. App. 621 (Div. I, 2001) .....	18
<b>ROBBERY-ONE STATUTE’S ELEMENT, “DISPLAY WHAT APPEARS TO BE A...DEADLY WEAPON,” IS NOT MET BY MERE EVIDENCE OF A STATEMENT BY DEFENDANT THAT HE HAS A DEADLY WEAPON HIDDEN ON HIS PERSON, UNLESS SUCH STATEMENT IS ACCOMPANIED BY AT LEAST A PHYSICAL GESTURE INDICATING THE LOCATION OF THE ALLEGED HIDDEN WEAPON</b>	
<u>State v. Scherz</u> , 107 Wn. App. 427 (Div. III, 2001) .....	19
<b>PRECEDENT OF <u>DAWSON v. DALY</u> DOES NOT PROTECT AGAINST DISCLOSURE OF PERFORMANCE EVALUATIONS OF CITY MANAGER</b>	
<u>Spokane Research and Defense Fund v. Spokane</u> , 99 Wn. App. 452 (Div. III, 2000).....	21
<b>PERSONAL E-MAILS ON GOVERNMENT COMPUTER ARE PUBLIC RECORDS, BUT THE E-MAILS MAY BE EXEMPT FROM DISCLOSURE AS “PERSONAL INFORMATION”</b>	
<u>Tiberino v. Spokane County</u> , 103 Wn. App. 680 (Div. III, 2000).....	22
<b>ONLY ONE DEFERRED PROSECUTION PER PERSON PER LIFETIME UNDER RCW 10.05.010; ALSO, NO “EX POST FACTO” CONSTITUTIONAL VIOLATION IN 1998 AMENDMENT</b>	
<u>City of Walla Walla v. Topel</u> , 104 Wn. App. 816 (Div. III, 2001) .....	23
<b>UNDER “ASSAULT ONE” STATUTE, REPEATEDLY KICKING VICTIM IN THE HEAD CAN BE “FORCE OR MEANS LIKELY TO PRODUCE DEATH OR GREAT BODILY INJURY”</b>	
<u>State v. Pierre</u> , 108 Wn. App. 378 (Div. I, 2001).....	23

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**BRIEF NOTE FROM THE UNITED STATES SUPREME COURT**

**FOURTH AMENDMENT DOES NOT PROHIBIT WARRANTLESS, REASONABLE SUSPICION-BASED SEARCH OF PROBATIONER’S RESIDENCE BY CALIFORNIA LAW**

**ENFORCEMENT OFFICER PURSUING CRIMINAL INVESTIGATORY PURPOSE;  
WASHINGTON LAW MAY YIELD A DIFFERENT RESULT** -- In U.S. v. Knights, 122 S. Ct. 587

(2001), the United States Supreme Court rules that it was lawful for a California detective to act on reasonable suspicion of criminal activity in conducting a warrantless, investigatory search of the residence of a felon who was on probation. Under California law, probationer Knights was required to submit to search at any time, with or without a warrant, by any probation or law enforcement officer.

A California court sentenced Mark Knights to probation based on a conviction for a felony drug offense. As noted, the court ordered Knights to submit to search at any time, with or without a search or arrest warrant, by any probation or law enforcement officer. Subsequently, a California detective, developed reasonable suspicion that Knights had since been involved in an arson incident involving over \$1 million destruction to public property. Without obtaining a search warrant or consent, and without exigent circumstances, the detective searched Knights' residence, finding incriminating evidence regarding the arson.

Knights was indicted in federal court for conspiracy to commit arson, among other crimes. However, a federal district court judge in California suppressed the evidence seized in the residential search, ruling that the Fourth Amendment of the U.S. Constitution relaxes search restrictions as to those on probation or parole only to the extent that the searches are conducted for "probationary" purposes. Since the search at issue was conducted for "criminal investigatory" purposes, not probation purposes, the search violated the Fourth Amendment, the district court held. The Ninth Circuit of the U.S. Court of Appeals affirmed, and the federal government obtained review in the U.S. Supreme Court.

The Supreme Court has reversed the Ninth Circuit, ruling that the Fourth Amendment does not prohibit the State of California from requiring that persons on probation submit to warrantless searches based on reasonable suspicion of probation violations or criminal activity. For Fourth Amendment purposes, it does not matter whether such a search is conducted by a community corrections officer or a law enforcement officer, and it does not matter whether the purpose of such a search is "probationary" or "criminal investigatory."

Result: Reversal of Ninth Circuit decision affirming district court's suppression order; case remanded for possible trial.

**LED EDITORIAL COMMENT:** Prior to the Supreme Court decision in Knights, Washington case law, apparently grounded in the Fourth Amendment, has held that the reduced expectation of privacy for probationers and parolees whose probation or parole conditions include search conditions, is constitutionally justified only "to the extent actually necessitated by the legitimate demands of the parole [or probation] process." See State v. Simms, 10 Wn. App. 75 (1973). The rule under Simms and other Washington decisions has been that law enforcement officers may not instigate purported probationary searches for criminal investigatory purposes to get around the constitutional warrant and probable cause requirements for criminal-investigatory searches. Moreover, community corrections officers may not lend themselves to such ruses. The general advice to law enforcement officers in Washington has been that, if they are relying for their authority on the relaxed constitutional protections for those on probation or parole, then the law enforcement officers should act only in a back-up capacity to protect the safety of community corrections officers who request such assistance while carrying out searches for possible probation or parole violations.

The Knights decision places this advice in some theoretical doubt, assuming that the controlling Washington statutes and the pertinent probation or parole conditions in a given case could be construed as extending power to law enforcement officers acting for criminal investigatory purposes. However, our best guess is that most, if not all, prosecutors in Washington will not want Washington law enforcement officers to test the

restriction under the Simms line of cases, and will want officers to assume that the search-and-seizure rules are relaxed in this context only when the law enforcement officers are acting as back-up support to community corrections officers.

In the past 20 years, the Washington Supreme Court has found heightened privacy protection in "independent grounds" readings of the Washington constitution's article 1, section 7. We think that there is a good chance that our Supreme Court would find the "probationary/parole searches only" restriction to be a part of article 1, section 7 limitations on Washington law enforcement, even though the U.S. Supreme Court held in Knights that there is no such restriction under the Fourth Amendment of the U.S. Constitution.

We recommend that Washington officers consult their own legal advisors and local prosecutors regarding how to proceed in light of the U.S. Supreme Court's decision in Knights.

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### WASHINGTON STATE COURT OF APPEALS

#### TERRY STOP-AND-FRISK OK WHERE OFFICERS SUSPECTED OPEN-LIQUOR-CONTAINER VIOLATION IN PUBLIC AREA, AND OFFICERS WERE OUTNUMBERED

State v. Bailey, \_\_\_ Wn. App. \_\_\_, 34 P.3d 239 (Div. I, 2001)

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

Two Seattle police officers were on an emphasis patrol for crime. They observed four individuals at the edge of a public school parking lot near a public playground and basketball courts. The officers observed two liquor bottles [one of which still contained liquor] next to Bailey. Suspecting a liquor violation, they approached him, did a protective frisk for weapons, and discovered a semiautomatic handgun in his possession. Bailey was arrested and charged with unlawful possession of a firearm in the first degree. At a pretrial hearing Bailey sought to suppress the weapon as the fruit of an illegal search. The motion was denied. Bailey was found guilty after a jury trial.

ISSUE AND RULING: Did the officers have sufficiently founded, articulable suspicion of crime and safety concerns to justify the Terry seizure and frisk of Bailey? (ANSWER: Yes)

Result: Affirmance of King County Superior Court conviction of Christopher Maurice Bailey for unlawful possession of a firearm in the first degree.

ANALYSIS: (Excerpted from Court of Appeals opinion)

As a general rule, warrantless searches and seizures are per se unreasonable." " One exception to the warrant requirement is a Terry investigative stop. Investigative stops are permissible only if (1) " 'the officer's action was justified at its inception,' " and (2) " 'it was reasonably related in scope to the circumstances which justified the interference in the first place.' "

"A seizure is reasonable if the [officer] can point to 'specific and articulable facts giving rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity.' " The reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop.

Here the officers observed Bailey sitting on the ground at a school parking lot, near a public playfield and public basketball courts. The officers observed liquor bottles near Bailey, at least one of which still contained liquor. These articulable

facts gave rise to a reasonable suspicion that Bailey was engaged in a liquor violation. The investigative stop was therefore justified, regardless of whether or not the bottles actually belonged to Bailey.

Interference with a suspect's freedom must also be reasonably related in scope to those circumstances which justified the interference in the first place. "[A] reasonable safety concern must exist to justify a protective frisk for weapons, and . . . the scope of the frisk must be limited to the protective purpose."

A reasonable safety concern exists "when an officer can point to 'specific and articulable facts' which create an objectively reasonable belief that a suspect is 'armed and presently dangerous.' " " 'The officer need not be absolutely certain that the individual is armed[.]' " The test is whether a reasonably prudent person in those circumstances would be warranted in the belief that someone's safety was in danger.

**Courts are reluctant to substitute their judgment for that of police officers in the field, and a founded suspicion from which the court can determine that the search was not arbitrary and harassing is all that is necessary. A valid weapons frisk pursuant to a Terry stop is justified if its scope is limited to a pat-down search of the outer clothing to discover weapons that might be used to assault the officer.**

**Here the officers were in an area where they were outnumbered. Even if the suspects had no connection to the liquor bottles, those bottles were handy to the suspects and could have been used as weapons. Therefore, the search for weapons did not violate the scope of the stop.**

The officers complied with the law. Their search consisted of a pat-down of Bailey's exterior, with the officer checking in his pocket only after he felt the bulk of the gun and its protruding handle.

[Citations and footnotes omitted; bolding added]

**IN HEROIN O.D. CASE, WHERE ONLY EVIDENCE OF DELIVERY OF DRUGS TO VICTIM WAS SELLER'S CONFESSION, CORPUS DELICTI OF "DELIVERY OF DRUGS" NOT MET**

State v. Bernal, \_\_\_ Wn. App. \_\_\_ (Div. II, 2001) [2001 WL 1557663]

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

In early December 1999, Zachariah Reid, age 14, was living in a trailer rented by his father's girlfriend. His father lived elsewhere.

At 3:00 a.m. on December 5, 1999, Reid was seen in good health. At 1:30 p.m. on the same date, his body was found inside the trailer. He had died from a heroin overdose.

On December 7, 1999, the police interviewed Bernal, who lived in the same trailer park. She admitted selling heroin to Reid on the evening of December 4, 1999.

Based on the foregoing -- the record contains no other material evidence -- the State charged Bernal with homicide by controlled substance (Count I) and distributing a controlled substance to a minor (Count II). Bernal filed a pre-trial motion to dismiss in which she alleged that the State could not prove the necessary corpus delicti and that the State lacked sufficient evidence to take the case to a jury. Ruling that the State could not prove the necessary corpus delicti, the trial court granted the motion. The State then filed this appeal.

ISSUE AND RULING: Did the State establish the corpus delicti for delivery of controlled substances or controlled substances homicide; i.e., did the State produce evidence, independent of defendant Bernal's out-of-court statements, sufficient to support a finding that the deadly heroin was delivered to the 14-year-old victim by someone other than the deceased himself? (ANSWER: No, rules a 2-1 majority)

Result: Affirmance of Cowlitz County Superior Court dismissal of charges of homicide-by-controlled-substances and delivery-of-heroin-to-a-minor against Marlena Deneece Bernal.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Washington's version of the corpus delicti rule requires that the State produce evidence, independent of the accused's statements, sufficient to support a finding that the charged crime was committed by someone. The rule does not require the State to establish who committed the charged crime.

Count I charged Bernal with controlled substances homicide. According to RCW 69.50.415, a person is guilty of that crime if he or she unlawfully delivers heroin that "is subsequently used by the person to whom it was delivered, resulting in the death of the user[.]" To prove a corpus delicti for Count I, the State had to produce evidence, independent of Bernal's statements, sufficient to support findings that heroin was delivered to Reid, and that his use of it resulted in his death.

Count II charged delivery of heroin to a minor in violation of RCW 69.50.401(a)(i) and RCW 69.50.406(a). According to the first of those statutes, a person is guilty of that crime if he or she knowingly delivers heroin to another. According to the second of those statutes, a person is subject to increased penalties if, while he or she is at least eighteen, he or she delivers to one who is under eighteen. To prove a corpus delicti for Count II, the State had to produce evidence, independent of Bernal's statements, sufficient to support a finding that heroin was delivered to Reid by someone.

Bernal does not dispute that the State produced evidence sufficient to support a finding that Reid's use of heroin resulted in his death. The remaining question is the same for both counts: Did the State produce evidence, independent of Bernal's statements, sufficient to support a finding that the heroin was delivered to Reid by someone else?

The State did not produce such evidence. The record shows that Reid was found dead of a heroin overdose. Excepting Bernal's statement, the record shows absolutely nothing about how Reid acquired the heroin that caused his death. We can speculate that he acquired it by delivery, by stealing it, by finding it, or by some other means -- but the record gives no rational basis for inferring one possibility over the others.

According to the dissent, it is simply speculation unsupported by evidence that Reid could have found or stolen the heroin. We agree entirely -- but it is equally speculative to infer that Reid obtained the heroin by delivery. There is simply no evidence, independent of Bernal's statements, from which to infer how Reid obtained heroin.

Washington's corpus delicti rule has not been satisfied, and the trial court correctly dismissed the case.

[Footnotes and citations omitted]

**"PUBLIC SAFETY" EXCEPTION TO MIRANDA NOT MET WHERE OFFICER'S PRE-FRISK QUESTION TO CUSTODIAL SUSPECT DID NOT MENTION SAFETY CONCERN**

State v. Spotted Elk, \_\_\_ Wn. App. \_\_\_, 34 P.3d 906 (Div. III, 2001)

Facts: (Excerpted from Court of Appeals opinion)

[A Spokane police officer] saw Ms. Spotted Elk in downtown Spokane and suspected she had outstanding arrest warrants. After confirming his suspicions, [the officer] arrested Ms. Spotted Elk. He did not give her the Miranda warnings. The officer knew Ms. Spotted Elk was a drug user and he was concerned she might have weapons, needles, or drugs on her person. Before cuffing and searching Ms. Spotted Elk incident to the arrest, [the officer] asked, "Do you have anything on your person I need to be concerned about?" Usually, but apparently not here, [the officer's] practice was to immediately explain: "Weapons, needles or anything that can poke me, stick me, of any kind?"

In response to [the officer's] question, Ms. Spotted Elk removed a plastic container from the shirt pocket over her breast. Ms Spotted Elk told the officer that the item was heroin belonging to a friend.

Proceedings below:

The State charged Ms. Spotted Elk with possessing heroin. At a suppression hearing, the trial court, based on safety considerations, ruled that Miranda warnings were not required, despite the fact that defendant was in custody when the officer asked her about what she might have on her person. The jury ultimately convicted Spotted Elk.

ISSUE AND RULING: Was the officer's question to the in-custody suspect exempt from Miranda based on safety considerations? (ANSWER: No)

Result: Reversal of Spokane County Superior Court heroin possession conviction of Pamela Faye Spotted Elk; case remanded for possible re-trial.

ANALYSIS: Under the Fifth Amendment, where officers are reasonably justified by concerns for the safety of themselves or others, officers may question a suspect in custody without Mirandizing the suspect. The Spotted Elk Court explains as follows why the Court rejects the State's argument for application of the "public safety" exception under Miranda:

[T]he officer knew Ms. Spotted Elk to be a drug user. He was concerned with and suspected both weapons and drugs. Given the broad nature of his question, which, according to this record, lacked his usual proviso explaining he was looking for weapons, needles or items that could poke or stick him, he should have known his query was reasonably likely to elicit an incriminating response. See State v. Birnel, 89 Wn. App. 459 (1998) **April 98 LED:11**. And, because the question went beyond the scope of a precautionary inquiry regarding weapons, the question reflected a measure of compulsion beyond that inherent in custody. Accordingly, the circumstances in this case were sufficiently coercive to constitute an interrogation for Miranda purposes.

The State persuaded the trial court that Officer Linn's question fell within the officer safety exception to the Miranda requirements. In Washington, "it is not a violation of either the letter or spirit of Miranda for police to ask questions which are strictly limited to protecting the immediate physical safety of the police themselves and which could not reasonably be delayed until after warnings are given." State v. Lane, 77 Wn.2d 860 (1970).

In Lane, while one officer read Mr. Lane his Miranda rights, another officer specifically asked the defendant if he had a gun. The Lane court noted the officer's question was related solely to officer safety with "good reason to believe" the defendant "was armed and potentially dangerous." Division One of this court

subsequently extended this exception to Miranda to a situation where the officer was trying to ascertain the location of a stabbing victim. State v. Richmond, 65 Wn. App. 541 (1992) **Sept 92 LED:12**.

Lane and Richmond support a series of propositions. The police may ask a question of a defendant prior to Miranda warnings if (1) the question is solely for the purpose of officer or public safety, and (2) the circumstances are sufficiently urgent to warrant an immediate question. If both conditions are met, the question does not constitute an interrogation in violation of Miranda. Next, we apply these principles and discuss why we conclude the exception does not apply here.

First, the officer's broad and apparently unqualified question was not related solely to his own safety. Officer Linn was concerned with and suspected the existence of drugs, not just hazardous objects. And, Ms. Spotted Elk certainly understood the question to apply to contraband on her person.

Second, no sense of urgency attended the arrest. Nothing in the trial court's findings of fact indicate Ms. Spotted Elk posed an apparent threat to the officer or the public.

[Some citations omitted]

The Spotted Elk Court goes on to suppress both defendant's verbal response and defendant's "non-verbal testimonial act," in response to the officer's question, in retrieving the heroin from her pocket and handing it to the officer. See State v. Lozano, 76 Wn. App. 116 (Div. III, 1994) **May 95 LED:15**.

The Spotted Elk Court then rejects the State's "harmless error" argument, reverses defendant's conviction, and remands of the case to the trial court for possible re-trial. The heroin will be admissible for the jury's consideration but only under very strict limitations that will shield the jury from learning that defendant produced the heroin in response to the officer's question. See State v. Lozano, 76 Wn. App. 116 (Div. III, 1994) **May 95 LED:15**.

#### **LED EDITORIAL COMMENT:**

The heading case on the public safety exception to Miranda, not cited by the Spotted Elk Court, is New York v. Quarles, 467 U.S. 649 (1984).

The ruling in this case likely would have been different if the officer in this case had asked something along these lines before conducting his search incident to arrest – "Do you have anything on your person I need to be concerned about for my safety -- weapons or needles or anything that can poke me or stick me?" Courts in other jurisdictions have held this to be a safety-related question exempt from Miranda warnings requirement, and the Spotted Elk Court implies that it would have ruled to that effect if the officer had phrased his question along those lines.

The California Peace Officers Legal Sourcebook notes a 1996 decision in that state -- People v. Cressy, 47 Cal. App. 4<sup>th</sup> 981 (Cal. App. 1996) holding that an un-Mirandized "needles" question in a pre-search-incident-to-arrest situation met the safety rationale. However, the Sourcebook notes that the Cressy Court explained that its ruling did not necessarily extend to firearms or other items that can be seized without immediate danger, and that safety questioning may not be expanded into a general investigation:

Our holding should be narrowly applied. It presupposes there is legal justification for a search...Questions about needles or other potentially contaminated sharp objects would be permissible. General questions like "What's in your pockets?" are overly broad. Allowable questions may only address the presence of items that might be harmful if they were seized without anticipation and particular caution. Questions about drugs in

general, most firearms or similar kinds of seizable, but not immediately dangerous, items would fall outside this narrow exception. Finally, improper interrogation may not be engaged in under the guise of ensuring safety. If a suspect acknowledges the presence of a syringe, an officer is not free to inquire about how or when it was acquired or for what purposes without a Miranda admonition and waiver.

**FELONY-PROBATIONER WHO RAN FOLLOWING HIS ARREST ON A PROBATION-VIOLATION WARRANT COMMITTED FIRST DEGREE ESCAPE UNDER RCW 9A.76.110**

State v. Walls, 106 Wn. App. 792 (Div. III, 2001)

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

An officer of the East Wenatchee Police Department saw Lonnie Walls and two other men walking down the street. The officer recognized the three men from prior contacts. He radioed in a "wants" check on the three men. Mr. Walls had a pending felony arrest warrant for violating the conditions of community placement.

The officer approached Mr. Walls and reported the pending arrest warrant. Mr. Walls identified himself. The officer confirmed the warrant was valid and told Mr. Walls he was under arrest.

The officer then asked Mr. Walls to step toward his patrol car. The officer briefly placed his hand on Mr. Walls's elbow and then escorted him to the patrol car. Mr. Walls walked directly in front of the officer. The officer then began to handcuff Mr. Walls. Mr. Walls started to comply, but then "bolted." Police caught him after a short chase.

The State charged Mr. Walls with first degree escape. He waived his right to a jury trial. The court found him guilty as charged.

ISSUE AND RULING: For purposes of the first degree escape statute, RCW 9A.76.110(1), was Walls being "detained pursuant to a conviction for a felony" when he ran from the officer who was arresting him on the probation violation warrant that stemmed from Walls' felony conviction? (ANSWER: Yes)

Result: Affirmance by 2-1 vote of Douglas County Superior Court conviction of Lonnie Franklin Walls for first degree escape.

ANALYSIS:

Defendant Walls argued that, when he bolted from the officer, he was not being "detained pursuant to a conviction for a felony conviction" for purposes of the first degree escape statute. The Walls Court disagrees, analyzing two Washington precedents as well as the pertinent statutory phrase.

In State v. Soliz, 38 Wn. App. 484 (Div. III, 1984) **May 85 LED:16**, the Court of Appeals ruled that, once a court issued an arrest warrant for a violation of conditions of parole deriving from a prior felony conviction, the alleged violator was in "escape" status, and hence the parolee's act of running from an officer who had arrested him on the felony parole warrant was first degree escape.

In State v. Perencevic, 54 Wn. App. 585 (Div. I, 1989) **Nov 89 LED:19**, the Court of Appeals held that defendant committed first degree escape when he escaped from jail, where he had been placed after being arrested for violating community supervision imposed following a felony conviction.

In significant part, the Walls Court's analysis of the statutory language, incorporating consideration of the Soliz and Perencevic decisions, is as follows:

"A person is guilty of escape in the first degree if, being detained pursuant to a conviction of a felony or an equivalent juvenile offense, he escapes from custody or a detention facility." RCW 9A.76.110(1). First degree escape then has two elements: (1) the person must be detained pursuant to a felony conviction, and (2) escape from either custody or a detention facility.

Mr. Walls had been "previously convicted of three counts of Residential Burglary and one count of Theft in the First Degree, all felonies." And "at the time of defendant's escape a valid arrest warrant was in effect for the defendant pursuant to his felony convictions."

Mr. Walls was detained on the strength of an outstanding felony warrant. This is so even though the violation was for what is now called community placement.

"Custody" is "restraint pursuant to a lawful arrest or an order of a court, or any period of service on a work crew[.]" RCW 9A.76.010(1). Restraint can occur through physical force, threat of force, or "conduct implying force will be used." [citing Soliz]

"Detained" is not defined in the escape statute. But the dictionary defines "detain" as "to hold or keep in or as if in custody." Webster's Third New International Dictionary 616 (1993). If Mr. Walls was in custody, then he was also detained.

Here, the officer told Mr. Walls he was under arrest, touched his elbow, and escorted Mr. Walls to the patrol car. The officer did not physically restrain Mr. Walls. But certainly the threat of force was present. Mr. Walls was in the officer's custody when he ran away. [citing Soliz]

The only remaining question is whether Mr. Walls was "detained pursuant to a conviction of a felony." RCW 9A.76.110(1). And that question is easily answered.

Under Perencevic, there need only be a "causal relationship between the warrants and the prior felony convictions." Here, there is such a causal relationship. Mr. Walls was on probation/community supervision for prior felonies. The warrant for his arrest was based on a "probation violation." The officer, therefore, detained Mr. Walls "pursuant to a conviction of a felony." [citing Perencevic]

[Some citations omitted]

### **SIGNING A FICTITIOUS NAME TO A CHARGE SLIP WITHOUT AUTHORIZATION FROM THE ACCOUNT HOLDER IS "FORGERY" UNDER RCW 9A.60.020**

State v. Daniels, 106 Wn. App. 571 (Div. I, 2001)

#### Facts and Proceedings below:

The customer service department of a Seattle department store received a telephone order for a \$1,000 gift certificate that was to be billed to the credit card of C.O. The telephone caller who purported to be C.O. directed that the gift certificate would be picked up at the downtown Seattle department store by a third person who would sign the charge slip on behalf of C.O. Employees of the customer service department became suspicious and verified that C.O. had never approved such a transaction. Daniels appeared at the store, claimed the gift certificate, and signed the credit slip "John Davis."

After a bench trial, the court convicted Daniels of forgery.

**ISSUE AND RULING:** Did Daniels “falsely make” or “falsely complete” an “instrument” for purposes of the “forgery” statute at RCW 9A.60.020? (**ANSWER:** Yes, he did both)

**Result:** Affirmance of King County Superior Court forgery conviction of Carlos Romallis Daniels.

**ANALYSIS:** (Excerpted from Court of Appeals decision)

Daniels denies he committed forgery for two reasons. First, he claims a forged instrument must be legally efficacious and the credit slip he signed was not. Second, he also claims he did not falsely make an instrument.

Washington's definition of forgery contains two elements: (1) the defendant must falsely make, complete, or alter a written instrument, and (2) the defendant must do so with an intent to injure or defraud. Daniels does not dispute that he had fraudulent intent.

Daniels claims that he did not make or complete the instrument.

Daniels both **made** and **completed** the instrument. He **made** the charge slip by adding the signature to what was otherwise a preprinted form. Adding the signature made the form into a complete charge slip. Once he signed it, the slip purported to be authentic, but was not because the ostensible maker was fictitious. Daniels also **completed** the charge slip. He transformed an incomplete instrument into a complete one by adding a signature to the charge slip and he did so without a grant of authority from the account holder.

Daniels' second argument, and his principal one, relates to the nature of an instrument. The forgery statute does not contain a definition of "instrument." Accordingly we look to the common law. In State v. Scoby [117 Wn.2d 155 (1991) **Jan 92 LED:02**] the court held that the common law rule of legal efficacy provides a supplementary definition of an instrument under the forgery statute. The rule of legal efficacy provides that forgery requires a "writing which, if genuine, might apparently be of legal efficacy or the foundation of legal liability." **Daniels claims the rule of efficacy is not satisfied in his case because the signature of "John Davis" on a charge slip for C.O.'s account does not create legal liability in C.O. Daniels mistakenly confuses apparent legal efficacy with actual legal validity.**

**The charge slip was not legally valid against C.O. because he did not give either Daniels or "John Davis" authority to sign on his account. But the slip was legally efficacious. To determine legal efficacy we look to the document itself. If the charge slip were genuine it might have been the basis of liability for C.O. because C.O. could have granted John Davis authority to sign on his account. The fact that he did not is irrelevant to the question of legal efficacy. On its face, the charge slip was legally efficacious.**

Our holding is consistent with the court's holding in State v. Morse, 38 Wn.2d 927 (1951). In Morse, the court held that legal efficacy existed where the defendant signed a check as drawer with the fictitious trade name "Hillyard Motors." The court noted that had the check been signed by persons doing business under the trade name, it would have been the basis of legal liability.

In contrast, in State v. Smith [71 Wn. App. 868 (Div. III, 1993) **May 94 LED:04**] the instrument at issue was a check. Smith stole the check from her grandmother. She filled out the amount and the "pay to the order of" field. But

Smith did not sign the check. Indeed, the check showed no signature by any drawer. The court in Smith held that an unsigned check could not be the basis of liability under the forgery statutes because Washington's Uniform Commercial Code regarding checks expressly stated, "[n]o person is liable on an instrument unless his signature appears thereon."

State v. Aitken is also instructive. [See State v. Aitken, 79 Wn. App. 890 (Div. I, 1995) **April 96 LED:15**] There, using false identification, the defendant set up accounts at both a Seattle and an Albuquerque, New Mexico bank. He deposited checks written on the New Mexico bank into the Seattle account. He then completed and presented a withdrawal slip on the Seattle account. The Aitken court stated that the threshold question was whether the withdrawal slip was an instrument within the meaning of the statute, and stated:

In State v. Scoby, after noting that the forgery statute does not define the term "instrument," the court went on to hold that an "instrument is something which, if genuine, may have legal effect or be the foundation of legal liability." Because the withdrawal slip directs the bank to pay funds from the account of its customer, it has legal effect and may be the basis of legal liability. The slip therefore is a written instrument under RCW 9A.60.020.

The defendant in Aitken also contended that his use of a fictitious name to both set up the account and to attempt to draw on it could not constitute forgery. This court disagreed, holding that a person can commit forgery with an assumed name if the name was assumed for the purpose of committing fraud.

Daniels has cited no statute or other authority that states a charge slip cannot be the basis of legal liability when signed by a person other than the account holder. The frequency with which the practice occurs suggests no such statute exists.

The charge slip would have been legally efficacious if genuine. Daniels falsely made and falsely completed the charge slip when he signed the fictitious name "John Davis" without authority to do so. We affirm.

[Some citations and footnotes omitted; bolding added]

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

**(1) NO CIVIL LIABILITY IN 911 "FAILURE TO PROTECT" CASE, BECAUSE DISPATCHER PROMISED ONLY THAT POLICE WOULD RESPOND, AND THEY DID** -- In Sinks and Stock v. Russell, \_\_\_ Wn. App. \_\_\_, 34 P.3d 1243 (Div. II, 2001), the Court of Appeals holds that the following circumstances do not provide a sufficient basis for civil plaintiffs in a 911 "failure to protect" case to avoid summary judgment dismissal:

John Stocks and Gerald Sinks [civilian process servers] angered Nicholas Cencich by serving him legal papers. Cencich responded by blocking Stocks and Sinks in his driveway and threatening to call 911 and report them for trespassing. When Cencich left and they were able to get out of the driveway, Stocks and Sinks drove away and called 911 to tell their side of the story. Stocks told the 911 operator that Cencich was still at the scene. He said, "I'm pretty sure he doesn't have any weapons. I don't think he's dangerous. He's just angry." The 911 operator told appellants to stay at the scene and a deputy would contact them.

Deputy Russell soon called and Stocks told him that Cencich seemed angry and agitated. He said Cencich had driven his truck so close to Stocks that the bumper nearly touched his knees. Stocks did not tell Russell that he felt he was in danger, that Cencich was armed or dangerous, or that Cencich had threatened or previously harmed himself or Sinks. Russell said he would come out to take Cencich's statement and talk to him. He said he did not understand Stocks and Sinks' request as one for protection. Before Russell reached the scene, Cencich approached Stocks and Sinks' car [approximately 20 minutes after the victims' call to 911] and shot at them, nicking Stocks in the face and hitting Sinks in the stomach and elbow.

The first element of a negligence action is "duty" on the part of the party sued. When liability of a government agency is at issue, the "public duty doctrine" bars the lawsuit unless the duty breached by the government is owed to the individual harmed, not just owed broadly to the general public. Four exceptions to the public duty doctrine are recognized under Washington law: 1) the special relationship exception; 2) the failure-to-enforce-a-statute-intended-to-protect-certain-classes-of-victims exception; 3) the legislative intent exception; and 4) the rescue exception.

This case involved plaintiffs' theory for application of the "special relationship exception." That exception has three requirements: 1) direct contact between the public employee and the injured plaintiff; 2) express assurances by the public employee; and 3) justifiable and detrimental reliance by the plaintiff on those assurance. See Torres v. City of Anacortes, 97 Wn. App 64 (Div. I, 1999) **Jan 2000 LED:10**.

In 911 lawsuits, plaintiffs suing the government entity generally must establish: 1) that they received assurances that help had been dispatched, and 2) that they relied on such assurances, resulting in their injury at the hands of a third party criminal perpetrator. See Bratton v. Welp, 106 Wn. App. 248 (Div. III, 2001) **Jan 02 LED:16**; Beal v. City of Seattle, 134 Wn.2d 769 (1998) **Jan 99 LED:07**; Noakes v. City of Seattle, 77 Wn. App. 694 (Div. I, 1995) **Oct 95 LED:21**.

After discussing past Washington cases on civil liability based on promises from law enforcement agencies to request for response, the Russell Court concludes that no liability can attach under these facts. Because the dispatcher gave no special assurances of protection from an ongoing attack or from any report of an immediate threat of one, the communications from the 911 operator did not create any civil liability duty for the law enforcement agency to get to the scene in time to prevent the attack on the plaintiffs/victims.

Result: Affirmance of Thurston County Superior Court summary judgment order dismissing a "failure to protect" lawsuit against the Thurston County Sheriff's Office and one of its deputies.

**(2) CONCLUSIVE PRESUMPTION FOR BAG-LIMIT VIOLATIONS IN STATUTE PROHIBITING "COMMERCIAL FISHING WITHOUT A LICENSE" IS UNCONSTITUTIONAL --**

In State v. Mertens, \_\_\_ Wn. App. \_\_\_, 34 P.3d 1239 (Div. II, 2001), the Court of Appeals focuses on the element, "acting for commercial purposes," that is found in the statute prohibiting "commercial fishing without a license." The Mertens Court rules that the definition of "acts for commercial purposes" found in RCW 77.15.110(1)(c) is unconstitutional because it creates an impermissible, conclusive presumption that a person who exceeds the possession or bag limits for personal use by more than a multiplier of three "acts for commercial purposes."

The Mertens Court declares that constitutional due process protections prohibit the use of a conclusive (or irrebuttable) presumption which declares that, "when fact B is proven, fact A must be taken as true, and the defendant is not allowed to dispute this at all." Under RCW 77.15.110(1)(C) of the Fish and Wildlife statutes, a person is deemed to be acting for commercial purposes if the person "exceeds the bag or possession limits for personal use by taking or possessing more than three times the amount of fish or wildlife allowed." This is an

unconstitutionally conclusive presumption, the Mertens Court holds. That is because the statutory provision, as applied in this case: a) allowed the State to prove that defendant's activity was "commercial" based only on a bag limit violation, and b) did not permit the unlicensed defendant to present his argument to the trial court that he possessed 94 geoducks solely in order to feed his 11-member family, not for commercial purposes.

Result: Reversal of Kitsap County Superior Court conviction of Steven L. Mertens for first degree commercial fishing without a license.

**LED EDITORIAL NOTE:** It appears that the Legislature could easily cure this constitutional problem by simply defining as a separate crime the mere possession of more than three times the bag-limit of certain fish or wildlife without a commercial license.

**(3) "VAGINA" UNDER "SEX OFFENSES" CHAPTER, RCW 9A.44, INCLUDES "LABIA MINORA"; ALSO, 1986 STATUTORY RAPE CONVICTION IS A "STRIKE" UNDER "TWO STRIKES" LAW** -- In State v. Delgado, \_\_\_ Wn. App. \_\_\_, 33 P.3d 753 (Div. I, 2001), the Court of Appeals rules that the undefined term, "vagina" as used in the definition of "sexual intercourse" in RCW 9A.44, includes the "labia minora." Accordingly, the Delgado Court rejects a child rapist's argument that, because the evidence was that his finger touched only the victim's labia minora, and did not penetrate her vaginal canal, he could not be convicted of child rape.

First, the Delgado Court asserts that defendant's construction of the statute is a strained one that is inconsistent with apparent legislative intent. Second, the Delgado Court asserts in the following discussion that defendant's interpretation is inconsistent with that given this and predecessor rape statutes in Washington:

[T]his court has specifically held that "[u]nder RCW 9A.44.073, the State must prove that the defendant penetrated, at a minimum, the lips of the victim's sexual organs." State v. Bishop, 63 Wn. App. 15 (1991); compare, State v. Snyder, 199 Wash. 298 (1939) (Stating that "it is not necessary that the penetration should be perfect, the slightest penetration of the body of the female by the sexual organ of the male being sufficient"), *quoting* 52 C.J. 1015, § 24(b).

This court has also held -- in response to the same argument proffered by Delgado in this case -- that for purposes of RCW 9A.44.010(1), "vagina means all of the components of the female sexual organ" and specifically, that "the labia minora are part of the definition of vagina." State v. Montgomery, 85 Wn. App. 192 (1999). These decisions are soundly reasoned, reflective of well-established principles of statutory construction, and directly applicable to this case. Thus, Delgado's conviction for first degree rape of a child is affirmed.

Result: Affirmance of King County Superior Court conviction of Dumas Delgado for first degree child rape and one count of first degree child molestation. In analysis not otherwise addressed in this **LED** entry, the Delgado Court reverses the trial court's sentencing decision, holding that Delgado's 1986 statutory rape conviction counts as a strike under the "two strikes" provision of the Persistent Offender Accountability Act.

**(4) CONSTITUTIONAL CONFRONTATION CLAUSE REQUIREMENTS NOT VIOLATED BY ADMISSION OF HEARSAY UNDER CHILD SEXUAL ABUSE STATUTE (RCW 9A.44.120) AND UNDER MEDICAL DIAGNOSIS HEARSAY EXCEPTION (ER 803(a)(4))** -- In State v. Kilgore, 107 Wn. App. 160 (Div. II, 2001), the Court of Appeals addresses several evidentiary issues in a multi-count child sex abuse prosecution. Along the way, the Kilgore Court explains the "confrontation clause" requirements of the federal constitution and how these requirements were satisfied as to hearsay testimony that was admitted under the child sexual

abuse hearsay statute (RCW 9A.44.120) and under the “medical diagnosis” hearsay exception of Evidence Rule 803(a)(4).

Child Abuse Hearsay Statute (RCW 9A.44.120)

RCW 9A.44.120 provides in relevant part as follows:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:

- 1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
- 2) The child either:
  - a) testifies at the proceedings; or
  - b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

While the statute does not say so, constitutional law principles dictate that such hearsay testimony must also satisfy constitutional confrontation clause rights of the defendant. To satisfy the defendant’s right to confront a child witness who is available to testify, the child must take the stand and either: 1) testify about the sexual abuse (though the child need not go into great detail); or 2) if the child has recanted or does not remember the events described in the hearsay statement, then the State must ask the child about the events and statements, and the defendant must have an opportunity to cross examine the child about these matters.

The Kilgore Court rules that the child hearsay statements met confrontation clause requirements. Contrary to her out-of-court statements, the alleged victim testified that she did not remember whether defendant had touched her “inside.” However, her testimony about the sexual abuse was otherwise consistent with her hearsay statements, and defendant had a full opportunity to cross examine her.

“Medical diagnosis or treatment” hearsay exception -- ER 803 (a)(4)

The Kilgore Court explains as follows its view that the statements the victim made to a nurse practitioner were properly admitted under ER 803(a)(4) and the confrontation clause:

Under ER 803(a)(4), "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are admissible. To be admissible, the declarant's apparent motive must be consistent with receiving treatment and the statements must be information upon which the medical provider reasonably relies to make a diagnosis. State v. Lopez, 95 Wn. App. 842 (1999). Determining the declarant's motive "rarely presents difficulty [for the court because] the circumstances generally speak for themselves." But courts have recognized that very young children might not understand why they are at a doctor's office, so courts apply a different test for those very young children: A very young child's statement to a medical provider is admissible under the exception if there is corroborating evidence of the statement and it

appears unlikely that the child would fabricate the cause of the injury. State v. Florczak, 76 Wn. App. 55 (Div. I, 1994) **March 95 LED:17**.

This different test raises an additional issue under the confrontation clause. To avoid violating a defendant's right to confront a witness, the prosecution offering hearsay testimony must have the declarant testify, show that the exception is firmly rooted, or show that the statement bears adequate indicia of reliability. The medical-diagnosis exception is normally a firmly rooted exception, but this is not true for statements by very young children under the alternative test in Florczak. Thus, under that test, the prosecution must either have the child testify or prove the statements are reliable.

Here, we hold that C.M.'s statements were admissible under this exception. The record shows that C.M. was almost 11 years old when she visited [nurse practitioner] Epstein-Ross at a hospital so we can assume she had a treatment motive. *[Court's footnote: Although these circumstances speak for themselves, other evidence suggested C.M. had a treatment motive. Epstein-Ross testified that C.M. told her she knew she was at the doctor's office because Kilgore raped her and Epstein-Ross testified that she told C.M. she needed to look at C.M.'s body to make sure she was healthy. Finally, C.M. asked specific questions seeking medical advice.]* Because of her age, it is unnecessary to address the secondary test laid out in Florczak. Epstein-Ross also testified that a patient's history forms an integral part of her diagnosis. Thus, the foundational requirements were met. Because the medical-diagnosis exception is firmly rooted, and because C.M. testified, there is no confrontation issue and the trial court properly exercised its discretion when it admitted C.M.'s statements to Epstein-Ross.

Kilgore relies upon State v. Carol M.D. to argue that the State was required to affirmatively establish that C.M. had a treatment motive for making her statements. See State v. Carol M.D., 89 Wn. App. 77 (1997) **May 98 LED:12**. Carol M.D. is distinguishable because it involved a therapist and the child explicitly denied knowing what a therapist did. When the party is offering hearsay testimony through the medical-diagnosis exception, when the declarant has stated he or she does not know what the medical personnel to whom the statement was made does, and when the opposing party makes a proper foundation objection after the declarant denies having such knowledge, the party offering the statement must affirmatively establish the declarant had a treatment motive. Otherwise, as long as the declarant is not a very young child, courts may infer the declarant had such a motive.

**Result:** Affirmance of Pierce County Superior Court convictions of Mark Patrick Kilgore for multiple counts of child rape and child molestation; reversal of two other sex offense convictions; remand to Superior Court for possible re-trial on the reversed counts.

**(5) CHILD HEARSAY NOT ADMISSIBLE UNDER RCW 9A.44.120 WHERE CHILD DID NOT UNDERSTAND DIFFERENCE BETWEEN LIE AND TRUTH AT TIME SHE MADE OUT-OF-COURT STATEMENT** -- In State v. C.J., 108 Wn. App. 790 (Div. III, 2001), the Court of Appeals agrees with a child-molestation defendant that, where a child-victim was shown to have been unable to tell the difference between a lie and the truth at the time she described the crime in an out-of-court statement, her hearsay statements should not have been admitted under the child hearsay statute, RCW 9A.44.120. Thus, even though the trial judge believed the child victim's statement was "reliable," it was error for that judge to admit the hearsay testimony of those to whom the child had reported the crime.

Result: Reversal, by 2-1 vote, of Benton County Superior Court first degree child molestation conviction of C.J., the 13-year-old cousin of the 3-year-old victim.

**(6) IN FAILURE-TO-REGISTER CASE, SEX OFFENDER MUST BE ALLOWED TO PUT ON EVIDENCE ALLEGING FAULTY FILING PRACTICES IN SHERIFF'S OFFICE** -- In State v. Prestegard, 108 Wn. App. 14 (Div. II, 2001), the Court of Appeals reverses a failure-to-register conviction for a sex offender on evidence-law grounds. Under Evidence Rule 406 allowing for admission of evidence of habit or routine practice (where otherwise relevant and admissible), the trial judge should have allowed the defendant to try to prove, based on alleged faulty filing practices in the sheriff's office, that he had in fact registered and that the office had lost the paperwork.

Result: Reversal of Wahkiakum County Superior Court conviction of sex offender Keith Alan Prestegard for failure to register per RCW 9A.44.130; case remanded for retrial.

**(7) EVIDENCE THAT DEFENDANT TELEPHONED THE HOME OF THE RESPONDENT ON A NO-CONTACT ORDER AND TALKED TO THE RESPONDENT'S SPOUSE HELD SUFFICIENT TO SUPPORT CONVICTION FOR VIOLATION OF NO-CONTACT ORDER** -- In State v. Ward, Baker, 108 Wn. App. 621 (Div. I, 2001), the Washington Court of Appeals holds, among other rulings in this appeal, that the evidence was sufficient to support a defendant's misdemeanor conviction for violating a no-contact order by contacting a third person by phone.

Ricky Baker was restricted under a no-contact order from having contact with A.B. "in person, by telephone or letter, through an intermediary, or in any other way." Baker called A.B.'s phone number. A.B.'s wife answered the phone. After saying he thought A.B. wanted him to call, Baker hung up. Under the following analysis, the Court of Appeals rules that this telephone call violated the no-contact order:

Because Baker called A.B.'s telephone number and spoke with his wife rather than with A.B. himself, he argues that he did not have contact with A.B. But the order also prohibited contact through intermediaries. The jury could reasonably infer that A.B.'s wife told him about Baker's call. A.B. and his wife lived in the same house, both had been affected by the ongoing problems with Baker, and A.B.'s wife was concerned enough to notify police officers. This is sufficient evidence to support Baker's conviction on count 3.

Result: Affirmance of King County Superior Court convictions of Darin Ward (for felony violation of a no-contact order) and of Ricky B. Baker (for one felony violation of a no-contact order and three misdemeanor violations of a no-contact order); note: this **LED** entry addresses only the Court's ruling on one of Ricky B. Baker's misdemeanor convictions.

**(8) ROBBERY-ONE STATUTE'S ELEMENT, "DISPLAY WHAT APPEARS TO BE A...DEADLY WEAPON," IS NOT MET BY MERE EVIDENCE OF DEFENDANT'S STATEMENT THAT HE HAS A DEADLY WEAPON, UNLESS SUCH STATEMENT IS ACCOMPANIED BY AT LEAST A PHYSICAL GESTURE INDICATING THE LOCATION OF THE ALLEGED HIDDEN WEAPON** -- In State v. Scherz, 107 Wn. App. 427 (Div. III, 2001), the Court of Appeals rules that the phrase "display what appears to be a firearm or...other deadly weapon" in the first degree robbery statute is not met by evidence that a bank robber said he had a deadly weapon on his person, but did not actually show it or at least make a physical gesture toward a part of his person where such weapon might be hidden.

The Scherz Court describes the facts of the case as follows:

On August 30, 1999, Mr. Scherz entered a Washington Trust Bank branch in downtown Spokane. Wearing camouflage clothes, he approached teller Helen Boehme and stated, "I need about a thousand dollars. I have a hand grenade in

my pocket and I need a thousand dollars." Ms. Boehme asked if he was serious; Mr. Scherz responded, "Yes." This made her fearful, so she gave him \$1,000. He put the money in his pocket and left the bank. Ms. Boehme did not see a hand grenade or any other weapon.

FBI agents soon arrested Mr. Scherz in a nearby hotel lobby and seized most of the money from his person. He confessed to Agent Leland McEuen that he robbed the bank and that he had told the bank teller he had a hand grenade. Mr. Scherz also told Agent McEuen that he had reached into his left jacket pocket and pulled out the end of a set of toenail clippers "just a little bit to see the silver, so she'd think it was a grenade." But neither Ms. Boehme nor any of the other bank employees who witnessed the robbery saw the toenail clippers or anything else that appeared to be a weapon. **LED EDITORIAL NOTE: As the Court explains later in its analysis, there was no evidence that any bank employee even saw Mr. Scherz's gesture toward his jacket pocket.** Agent McEuen did seize a pair of toenail clippers on a key chain from Mr. Scherz's person.

[Footnote omitted]

Scherz appealed his first degree robbery conviction based on related arguments challenging the jury instructions and the sufficiency of the evidence. In essence, Scherz argued that he did not "display" the hand grenade, and therefore he should have been convicted only of second degree robbery.

In analyzing the case, the Scherz Court addresses four prior Washington appellate court decisions which lead to Court to its decision in favor of defendant Scherz: State v. Henderson, 34 Wn. App. 865 (1985), State v. Kennard, 101 Wn. App. 533 (Div. I 2000) **Oct 2000 LED:20**; State v. Barker, 103 Wn. App. 893 (2000); State v. Bratz, 101 Wn. App. 662 (2000). Henderson, Kennard and Barker found the evidence of "display" sufficient while Bratz found the evidence of "display" to be insufficient for purposes of the first degree robbery statute.

In salient part, the Scherz Court's discussion of these four decisions is as follows:

Henderson, Kennard, and Barker are thus all consistent in that the defendants' threats of a weapon also involved a menacing physical act in addition to words so as to justify including the display element in the first degree robbery instructions. In Henderson, the defendant indicated the presence of a weapon with his hand in his bulging pocket to the first employee. Likewise, stating "I have this" while pointing to his pocket, implied the presence of a weapon to the second employee. In Kennard, the defendant patted his hip and told the victim he knew where she lived after stating he had a gun. And, in Barker, the defendant pointed his finger into the victim's back to make her think he had a gun.

In contrast, Bratz is the only Washington case cited or found that addresses the precise issue here, i.e., whether mere threatening words indicating the existence of a weapon satisfies the display element of first degree robbery. In Bratz, the defendant entered a bank and stated to a teller, " 'I have nitroglycerin in my coat and I need you to give me money or I'll blow up the bank.' " There was no evidence that the defendant showed nitroglycerin to anyone and none was discovered on his person when he was arrested shortly after the robbery. He challenged his first degree robbery conviction on the theory that the display element of the crime requires some physical manifestation beyond a mere verbal threat of harm with a deadly weapon.

The State argued to the contrary based on Henderson, **but the court agreed with Mr. Bratz**, explaining that the defendant in Henderson had to commit a

menacing physical act beyond his verbal indication he was armed in order to be found guilty of first degree robbery. Henderson thus actually held that the defendant's " 'words and actions' " together met the robbery statute's " 'displays what appears' " requirement.

The Bratz court further explained that to accept the State's interpretation of Henderson would render "displays" tantamount to "threatens." Yet, for example, in RCW 9A.44.040 (first degree rape) the Legislature has provided that a mere threat of use of a deadly weapon is sufficient to sustain a first degree rape charge. But with first degree robbery, the Legislature did not so provide, instead choosing to require the act of display. This is significant because " '[i]t is well settled that where the Legislature uses certain language in one instance but different, dissimilar language in another, a difference in legislative intent is presumed.' "

Bratz thus held that the mere threatened use of a deadly weapon in the commission of a robbery unaccompanied by any physical manifestation indicating a weapon is second degree robbery, and does not satisfy the display element of first degree robbery. To hold otherwise would negate the presumed distinction the Legislature intended in enacting the first and second degree robbery statutes.

We agree with Mr. Scherz that Bratz is controlling here. Unlike in Henderson, Kennard, and Barker, where the defendants' physical manifestations justified first degree robbery instructions for displaying what appeared to be a weapon, Mr. Scherz's mere statement he had a hand grenade is akin to Mr. Bratz's mere verbal threat to blow up the bank with nitroglycerin. Critically, not only did no witness see the silver end of the toenail clippers, but there is also no evidence in the record that anyone saw Mr. Scherz motion toward his pocket or make any physical gesture indicating a weapon along with the verbal threat. No witness was asked that question. **[LED EDITORIAL COMMENT: We think the State would have prevailed on appeal had a witness testified to observing the gesture.]**

The State nevertheless contends that the dictionary definition of "display" includes exhibiting to the sight or mind, thus making Mr. Scherz's verbal threat of a deadly weapon a display to the mind. And, any physical act by Mr. Scherz would only have reinforced the verbal display already completed. The State thus concludes Mr. Scherz's words were the equivalent of a "toy gun," which the victim was not expected to investigate to determine if it was real.

This reasoning is flawed because in both Henderson and Kennard, it was the defendants' *words and actions* that exhibited a weapon to the victims' minds. Mr. Scherz's mere statement only allowed the victim to imagine a weapon, yet perceive a threat that satisfied the elements of second degree robbery. Although the effect of fear on the victim may be the same, the defendant's verbal statement without more is insufficient for first degree robbery.

[Footnotes and some citations omitted; bolding added]

Result: Reversal of Spokane County Superior Court conviction of Michael Warren Scherz for first degree robbery; remand to Superior Court for entry of judgment of second degree robbery and for re-sentencing.

**(9) PRECEDENT OF DAWSON V. DALY DOES NOT PROTECT AGAINST DISCLOSURE OF PERFORMANCE EVALUATIONS OF CITY MANAGER** – In Spokane Research and Defense Fund v. Spokane, 99 Wn. App. 452 (Div. III, 2000), the Court of Appeals rules 2-1 that

performance evaluation summaries for the Spokane City Manager are subject to public disclosure.

The Spokane City Manager is appointed by the City Council. The Manager's job performance is evaluated yearly. As part of its 1999 evaluation, the Council sent questionnaires to a "broad spectrum of the community." The City then hired a consulting firm to compile and analyze the responses.

The Spokane Research & Defense Fund requested "a copy of summaries or tabulation of responses or other synopses used or being used by the City Council concerning [the City Manager]." The City denied the request on the ground that the information is exempt from public disclosure under RCW 42.17.310(1)(b), which exempts: "Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy."

The Court of Appeals begins by explaining that under the Public Disclosure Act:

[a] person's right to privacy is violated "only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." RCW 42.17.255. Under these provisions, the use of a test that balances the individual's privacy interests against the interest of the public in disclosure is not permitted. Even if the disclosure of the information would be offensive to the employee, it shall be disclosed if there is a legitimate or reasonable public interest in its disclosure. Dawson v. Daly, 120 Wn.2d 782 (1993).

In Dawson, the Washington State Supreme Court determined that "disclosure of performance evaluations, which do not discuss specific instances of misconduct, is presumed to be highly offensive within the meaning of RCW 42.17.255." The Supreme Court further held that "the performance evaluation of a deputy county prosecutor was not subject to public disclosure because the legitimate public interest in it was small and the disclosure could harm the public interest in efficient government." [citing Dawson]

The Court of Appeals distinguishes Dawson in the Spokane Research case, however, on grounds that a City Manager is a public figure, stating that:

The position of Spokane City Manager is not like that of other public employees. The Spokane City Manager is the City's chief executive officer, its leader and a public figure. The performance of the City Manager's job is a legitimate subject of public interest and public debate. A person in the position of Spokane City Manager cannot reasonably expect that evaluations of the performance of his or her public duties will not be subject to public disclosure.

The Court of Appeals holds that "the public has a legitimate interest in disclosure of [the City Manager's] performance evaluation. For that reason, the information is not exempt even if it would otherwise qualify under RCW 42.17.310(1)(b)."

Result: Affirmance of Spokane County Superior Court decision ordering disclosure of performance evaluation summaries and awarding attorney fees.

**(10) PERSONAL E-MAILS ON GOVERNMENT COMPUTER ARE PUBLIC RECORDS, BUT EXEMPT FROM DISCLOSURE AS "PERSONAL INFORMATION"** - In Tiberino v. Spokane County, 103 Wn. App. 680 (Div. III, 2000), the Court of Appeals holds that a county employee's personal e-mails on her county computer were public records, but were exempt from disclosure under the particular facts of this case.

An employee of the prosecutor's office sent 467 personal e-mails over a 40 working-day time frame to five different e-mail addresses. Many of these e-mails were to her mother and sister and some discussed her recent victimization by rape. The employee was terminated for

unsatisfactory job performance, and the county printed the e-mails in anticipation of litigation by the employee. Local newspapers made a public disclosure request seeking disclosure of the e-mails. The employee sought to prohibit their disclosure.

The Public Disclosure Act requires disclosure of public records by governmental entities upon request unless there is a specific exemption. One such exemption is found in RCW 42.17.310(1)(b), which exempts from disclosure: Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy. Under this exemption a person's right to privacy is violated "only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public."

The Court of Appeals determines that the e-mails were public records. However, the Court rules that disclosure of the content of Ms. Tiberino's e-mails would be highly offensive to a reasonable person, and that, because the content of the e-mails was unrelated to governmental operations, it was not of legitimate public concern (although the total number of e-mails was of legitimate concern). Accordingly, the Court concludes that the personal e-mails were exempt from disclosure under the "private information" exemption.

Result: Reversal of Spokane County Superior Court order requiring release of personal e-mails.

**LED EDITORIAL COMMENT: We think this case is highly fact-specific, and that the Court's decision was likely influenced by the sensitive nature of the information contained in the e-mails (e.g., the rape). In a factually different case, a court might not find that disclosure of personal e-mails would be highly offensive.**

**(11) ONLY ONE DEFERRED PROSECUTION PER PERSON PER LIFETIME UNDER RCW 10.05.010; ALSO, 1998 AMENDMENTS DO NOT VIOLATE "EX POST FACTO" CONSTITUTIONAL PROTECTIONS** - In City of Walla Walla v. Topel, 104 Wn. App. 816 (Div. III, 2001), the Court of Appeals holds that the amendments to the deferred prosecution statute prevent an individual from being granted more than one deferred prosecution in his or her lifetime.

Under chapter 10.05 RCW, deferred prosecution is authorized for some traffic offenses. In 1998, RCW 10.05.010 was revised to make persons eligible for only one deferred prosecution. Prior to the 1998 amendment, RCW 10.05.010 in essence allowed for one deferred prosecution every five years.

The Topel Court interprets the 1998 amendment to RCW 10.05.010 as limiting a person to just one deferred prosecution in his or her lifetime. Therefore, since defendant Topel had received a deferred prosecution in the early 1990's on a previous DUI, he could not receive a deferred prosecution following his arrest in 1999 on new DUI. The Topel Court also rejects defendant's ex post facto constitutional challenge to the 1998 amendment, explaining that defendant did not receive an enhanced punishment for his previous DUI, but instead merely received a penalty for his 1999 offense.

Result: Affirmance of Walla Walla Superior Court order affirming the Walla Walla County District Court conviction of Melven Topel for Driving Under the Influence.

**(12) UNDER "ASSAULT ONE" STATUTE, REPEATEDLY KICKING VICTIM IN THE HEAD CAN BE "FORCE OR MEANS LIKELY TO PRODUCE DEATH OR GREAT BODILY INJURY"** -- In State v. Pierre, 108 Wn. App. 378 (Div. I, 2001), the Court of Appeals rejects defendant's appeal from his conviction for assault in the first degree. Disagreeing with defendant's argument that there was insufficient evidence to convict him under RCW 9A.36.011(1)(a), the Pierre Court holds that repeatedly kicking and stomping the victim's head while he was lying on

the ground was “force or means likely to produce death or great bodily injury” in violation of the first degree assault statute.

Result: Affirmance of King County Superior Court conviction of Miguel T. Pierre for first degree assault.

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### **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 web site is [<http://www.wa.cjt>], while the address for the Attorney General's Office web site is [<http://www.wa/ago>].

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