WASHINGTON STATE CRIMINAL JUSTICE TRAINING COMMISSION

Law Enforcement Digest

FEBRUARY 2011

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FEBRUARY 2011 LED TABLE OF CONTENTS

BRIEF NOTES FROM THE NINTH CIRCUIT, U.S. COURT OF APPEALS 3

SEARCH OF CONTAINER FOUND ON DEFENDANT'S PERSON AT TIME OF ARREST BUT NOT SEARCHED UNTIL AFTER HE WAS SECURED HELD UNLAWFUL; NINTH CIRCUIT DECISION CONFLICTS WITH WASHINGTON CASE LAW
U.S. v. Maddox, 614 F.3d 1046 (9th Cir. 2010) 3

THERE IS NO LONGER A NINTH CIRCUIT PRECEDENTIAL OPINION CONTAINING THE EXTENSIVE DETAILED STANDARDS THAT WERE SET FORTH IN AN EARLIER MAJORITY DECISION REGARDING DRAFTING AND EXECUTING COMPUTER SEARCH WARRANTS IN ORDER TO LIMIT "PLAIN VIEW" SEIZURES OF COMPUTER EVIDENCE
U.S. v. Comprehensive Drug Testing, Inc. (and two other cases consolidated for appeal), 621 F.3d 1162 (9th Cir. 2010) (decision filed September 13, 2010) 4

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT 5

RCW 9.46.240'S BAN ON INTERNET GAMBLING DOES NOT VIOLATE FEDERAL CONSTITUTION'S DORMANT COMMERCE CLAUSE
Rousso v. State of Washington, ___ Wn.2d ___, 239 P.3d 1084 (2010) 5

DEFENDANT MAY BE CONVICTED OF ATTEMPTED CHILD RAPE FOR COMMUNICATIONS AND ACTIONS IN RELATION TO A FICTIONAL UNDERAGE PERSON CREATED BY AN UNDERCOVER LAW ENFORCEMENT OFFICER
State v. Patel, 170 Wn.2d 476 (2010) 5

BAIL JUMPING IS CLASSIFIED FOR SENTENCING PURPOSES BASED ON CHARGE EXISTING AT TIME OF JUMP, NOT ON ULTIMATE DISPOSITION OF THAT CHARGE
State v. Coucil, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 5394776 (2010) 6

FLOOR HELD NOT TO BE AN "INSTRUMENT OR THING LIKELY TO PRODUCE BODILY HARM" UNDER THIRD DEGREE ASSAULT STATUTE WHERE DEFENDANT HAD HIS ARM AROUND VICTIM'S NECK AND THEY WENT TO THE FLOOR TOGETHER
State v. Marohl, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 5394775 (2010) 7

WASHINGTON STATE COURT OF APPEALS 7

RULINGS: 1) DEPUTY SHERIFFS DIDN'T USE COMMUNITY CORRECTIONS SPECIALIST PRETEXTUALLY AS "STALKING HORSE"; 2) TRIAL COURT SHOULD HAVE APPLIED PROBABLE CAUSE TEST TO DETERMINE IF OFFICERS REASONABLY CONCLUDED PROBATIONER RESIDED IN PREMISES FROM WHICH THEY ARRESTED HIM; 3) EVIDENCE SUFFICIENT ON POSSESSING MARIJUANA WITH INTENT TO DELIVER
State v. Reichert, ___ Wn. App. ___, 242 P.3d 44 (Div. II, 2010) 7

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS 13

UNDER RATIONALE THAT OFFICERS ENGAGED IN AFFIRMATIVE ACT OF "TAKING CONTROL" OF SCENE, AND DID SO NEGLIGENTLY, RATHER THAN MERELY NEGLIGENTLY FAILING TO ACT IN THE FIRST PLACE, LAWSUIT AGAINST CITY OF SEATTLE AND NAMED OFFICERS CAN GO FORWARD ON NEGLIGENCE THEORY NOT PRECLUDED BY THE "PUBLIC DUTY" DOCTRINE
Robb v. City of Seattle (and others), ___ Wn. App. ___, ___ P.3d ___, 2010 WL 5250879 (Div. I, 2010) 13

STANDING, MIRANDA, SCOPE-OF-STOP, AND SPOUSAL PRIVILEGE ISSUES ADDRESSED IN PRO-STATE RULINGS IN CASE WHERE OFFICER ASKED FEMALE DRIVER PROTECTED BY A NO-CONTACT ORDER TO IDENTIFY MALE PASSENGER
State v. Shufelen, 150 Wn. App. 244 (Div. I, 2009) 15

EVIDENCE THAT DEFENDANT STOOD ON FRONT PORCH, PUNCHED ACROSS THE THRESHOLD, AND HIT A PERSON INSIDE THE HOME IS SUFFICIENT TO SUPPORT HIS CONVICTION FOR FIRST DEGREE BURGLARY
State v. Koss, ___ Wn. App. ___, 241 P.3d 415 (Div. III, 2010) 17

TRESPASS CONVICTION AGAINST K-12 PUBLIC SCHOOL STUDENT'S MOTHER SET ASIDE BASED ON: (1) SCHOOL'S FAILURE TO FULLY INFORM HER OF HER APPEAL RIGHTS AT THE TIME THE SCHOOL GAVE HER A NOTICE OF TRESPASS, AND (2) ABSENCE OF PROOF OF ADEQUATE BASIS FOR NOTICE OF TRESPASS
State v. Green, 157 Wn. App. 833 (Div. I, 2010) 18

EVIDENCE SUFFICIENT TO SUPPORT CONVICTION FOR ATTEMPTED DRIVE-BY SHOOTING EVEN THOUGH GUN WAS IMPROPERLY LOADED AND WOULD NOT FIRE
State v. Oakley, ___ Wn. App. ___, 242 P.3d 886 (Div. II, 2010) 18

CONSTRUCTIVE POSSESSION OF DRUGS AND FIREARM ESTABLISHED WHERE DEFENDANT WAS SOLE OCCUPANT OF TRUCK REGISTERED TO HIM
State v. Bowen, 157 Wn. App. 821 (Div. II, 2010) 19

EVIDENCE THAT PEOPLE PROVIDED GUNS TO DEFENDANT KNOWING OF HER ONGOING STRIFE WITH HER ESTRANGED HUSBAND IS EVIDENCE OF AGREEMENT AND SUPPORTS A MURDER-CONSPIRACY CHARGE AGAINST HER
State v. Stark, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 5118751 (Div. III, 2010) 19

STATE MAY NOT LAWFULLY QUESTION DEFENDANT OUTSIDE SCOPE OF DIRECT TESTIMONY EITHER (1) ON CROSS EXAM OR (2) AS A REBUTTAL WITNESS
State v. Epefanio, 156 Wn. App. 378 (Div. III, 2010) 20

INDECENT EXPOSURE CONVICTION HELD TO BE SUPPORTED BY EVIDENCE THAT DEFENDANT WAS SEEN WALKING THROUGH NEIGHBORHOOD WHILE NUDE EXCEPT FOR SHOES AND A STOCKING CAP, EVEN THOUGH NO WITNESS SAW HIS GENITALS
State v. Vars, 157 Wn. App. 482 (Div. I, 2010) 20

EVIDENCE IN SEX STING CASE HELD SUFFICIENT TO SUPPORT SUBSTANTIAL STEP AND INTENT ELEMENTS OF ATTEMPTED CHILD RAPE
State v. Wilson, ___ Wn. App. ___, 242 P.3d 19 (Div. I, 2010) 22

NO PRIVILEGE FOR CHILD MOLESTER'S ADMISSIONS TO HIS THERAPIST, AND NO PROBLEM WITH USE OF SEARCH WARRANT TO OBTAIN THERAPIST'S RECORDS
State v. Hyder, ___ Wn. App. ___, ___ P.3d ___, 2010 WL ____ (Div. II, 2010) 23

NEXT MONTH 23

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

(1) SEARCH OF CONTAINER FOUND ON DEFENDANT'S PERSON AT TIME OF ARREST BUT NOT SEARCHED UNTIL AFTER HE WAS SECURED HELD UNLAWFUL; NINTH CIRCUIT DECISION CONFLICTS WITH WASHINGTON CASE LAW – In U.S. v. Maddox, 614 F.3d 1046 (9th Cir. 2010) (decision filed August 12, 2010), a 3-judge panel of the Ninth Circuit rules 2-1 that an officer's search of a metal vial on a key chain taken from the person of an arrested suspended driver during his custodial arrest was not a lawful search incident to arrest because the search did not occur until after the arrestee had been secured in a patrol car. Without mentioning the U.S. Supreme Court decision in U.S. v. Gant, 129 S.Ct. 1710 (2009) **June 09 LED:13**, the majority judges follow the logic of Gant in relation to vehicle searches. The Maddox majority thus holds that, once the DWLS arrestee had been secured in a police vehicle, no search of the metal vial was permitted under the "search incident" rationale, because there was no exigency or other justification to search the metal vial without a search warrant.

While the Ninth Circuit's Maddox decision does not mention Gant, two recent Washington Court of Appeals decisions have held that Gant's strict limits on vehicle searches incident to arrest does not extend to searches of persons incident to arrest. See State v. Johnson, 155 Wn. App. 270 (Div. III, 2010) **June 10 LED:18** and State v. Whitney, 156 Wn. App. 405 (Div. III, 2010) **August 10 LED:16**. The Washington Supreme Court denied the defendants' petitions for discretionary review in Johnson and Whitney.

Result: Affirmance of U.S. District Court (Eastern District of Washington) ruling suppressing evidence against Maddox.

LED EDITORIAL COMMENT: Ninth Circuit and other federal circuit court interpretations of the federal Fourth Amendment provide guidance to, but do not control, Washington appellate courts that are interpreting the Fourth Amendment. The Johnson decision of Division Three of the Court of Appeals that we digested in the June 2010 LED involved a search of an arrestee's purse. Maddox is in direct conflict with the Court of Appeals ruling in Johnson. In Johnson, the officer took Ms. Johnson's purse from her after she had gotten out of her vehicle holding her purse. The officer secured Ms. Johnson in a police car just before the officer searched her purse. The officer found methamphetamine in the purse. The Court of Appeals rejected Ms. Johnson's Gant-based theory under which she argued that, once she was secured, the purse was no longer subject to search incident to arrest.

Not only do Johnson and Whitney hold that Gant does not apply to searches of the person incident to arrest, but also, nothing in the numerous Washington car-search decisions issued since Gant was issued (which we have dutifully reported in LEDs over the past 18 months) expressly suggests that the rationale of Gant extends to searches of the person, as opposed to vehicle searches, incident to arrest. Thus, Johnson supports the proposition that, despite the analysis in the 2-1 ruling of the 3-judge Ninth Circuit

panel ruling in Maddox, officers may wait until they have secured an arrestee to complete a contemporaneous field search of items of personal property taken from the arrestee at the time of arrest.

Note that the facts of Maddox were such that the search might have been deemed to have been a vehicle search violating Gant. That is because the arresting officer in Maddox placed the key chain on the driver's seat of the suspended driver's vehicle before completing the process of arresting Maddox and securing him. The officer then returned to the arrestee's vehicle to retrieve the key chain from the car. Those facts arguably make the search a vehicle search incident to arrest. But the Maddox opinion does not analyze the search of the vial on the key chain as a vehicle search, instead addressing the search of the vial essentially as if the officer had retained it after taking it from the person of the arrestee during the arrest process. Thus, defense attorneys likely will argue that Maddox stands for the proposition that searches of items taken from the person of the arrestee are subject to the same constraints as are searches of vehicles after arrestees have been secured in a police car.

As always, we caution that what we say in the LED is our own personal thinking and is not legal advice. We always recommend that Washington officers consult their own legal advisors and local prosecutors regarding how to proceed in light of the appellate court decisions that we report and comment upon in the LED.

(2) THERE IS NO LONGER A NINTH CIRCUIT PRECEDENTIAL OPINION CONTAINING THE EXTENSIVE DETAILED STANDARDS THAT WERE SET FORTH IN AN EARLIER MAJORITY DECISION REGARDING DRAFTING AND EXECUTING COMPUTER SEARCH WARRANTS IN ORDER TO LIMIT "PLAIN VIEW" SEIZURES OF COMPUTER EVIDENCE – In U.S. v. Comprehensive Drug Testing, Inc. (and two other cases consolidated for appeal), 621 F.3d 1162 (9th Cir. 2010) (decision filed September 13, 2010), a significantly split 11-judge panel of the Ninth Circuit revises its August 26, 2009 decision (reported in the **October 2009 LED**), but the panel confirms its 2009 reversal of a pro-government 2008 decision of a three-judge Ninth Circuit panel.

The Comprehensive Drug Testing case relates to the federal government's investigation into a drug company's actions relating to steroid use by professional baseball players. In three separate proceedings before two different U.S. District Court judges, the lower court judges ruled adversely to the federal government. The two U.S. District Court judges determined, among other things, that the federal government had not complied with the "plain view" doctrine of the Fourth Amendment in their execution of search warrants. The federal agents seized – based on would-be "plain view" of intermingled computer records under warrants for drug-testing results on just ten professional baseball players – records relating to drug-testing of many other professional baseball players who were not mentioned in the search warrants.

The 2009 majority opinion of the 11-judge panel essentially affirmed the result of the rulings by the District Court judges (as does this latest, 2010, decision). The majority opinion for the 2009 decision included a detailed and comprehensive set of guidelines for administration of search warrants and grand jury subpoenas for electronically stored information. That 2009 majority opinion was concerned with giving law enforcement explicit rules for drafting and executing search warrants for computers by putting constraints on application of the "plain view" doctrine. The court-made rules announced in the majority opinion reflected the majority judges' concern about possible "fishing expeditions" by law enforcement officers doing computer searches under warrants.

The 2009 majority opinion sought to strike a balance between: (1) the government's legitimate interest in law enforcement, and (2) the people's right to privacy. The 2009 majority opinion stated that when the government wishes to obtain a search warrant to examine a computer hard drive or electronic storage medium in searching for specific incriminating files, a number of apparently mandatory rules set forth in the majority opinion must be followed by law enforcement personnel drafting the warrant, as well as by the warrant-issuing court.

Those extensive computer-search-warrant "rules" were excerpted in the **October 2009 LED**. The rules were criticized as overbroad rule-making by many, including the Seventh Circuit of the U.S. Court of Appeals (see U.S. v. Mann, 592 F.3d 779 (7th Cir. 2010)), suggesting that the guidelines looked more like legislation than fact-based case adjudication. Now, in the September 13, 2010 decision of the Court, only 5 of the 11 judges join in an opinion calling for such explicit rules. That is not a majority, so the rules are no longer precedent.

Result: Reversal in large part of the decision of the 2008 three-judge Ninth Circuit panel's 2-1 decision and general affirmance of the results of the suppression rulings of the U.S. District Court (California) judges below.

LED EDITIORIAL COMMENT: Only time will tell how federal and state courts will deal with future cases raising "plain view" search warrant execution questions involving computer searches. Meanwhile, it is our understanding that Washington judges issuing and reviewing search warrants have not to date called for strict compliance with the explicit rules set forth in the now-withdrawn 2009 Comprehensive Drug Testing majority opinion. No published Washington appellate court decision has yet addressed the guidelines issues.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) RCW 9.46.240'S BAN ON INTERNET GAMBLING DOES NOT VIOLATE FEDERAL CONSTITUTION'S DORMANT COMMERCE CLAUSE – In Rousso v. State of Washington, ___ Wn.2d ___, 239 P.3d 1084 (2010), the Washington Supreme Court unanimously holds that the ban on internet gambling in RCW 9.46.240 does not violate what is known as the "dormant commerce clause" in the U.S. Constitution. The dormant commerce clause has been interpreted by the United States Supreme Court, to preclude the states from enacting laws or regulations that excessively burden interstate commerce. The Rousso Court engages in extended analysis leading to its conclusion that RCW 9.46.240's burden on interstate commerce is not "clearly excessive" in light of the State of Washington's interests.

Result: Affirmance of Division One Court of Appeals decision (see **May 09 LED:23**) that affirmed a King County Superior Court decision granting summary judgment to the State of Washington.

(2) DEFENDANT MAY BE CONVICTED OF ATTEMPTED CHILD RAPE FOR COMMUNICATIONS AND ACTIONS IN RELATION TO A FICTIONAL UNDERAGE PERSON CREATED BY AN UNDERCOVER LAW ENFORCEMENT OFFICER – In State v. Patel, 170 Wn.2d 476 (2010), the Washington Supreme Court follows its precedent of State v. Townsend, 147 Wn.2d 666 (2002) **March 03 LED:11** in ruling that a defendant caught in a police Internet sting operation was lawfully convicted of attempted rape of a child. Defendant had arranged over the computer to meet a fictitious 13-year-old created by a detective, and, when the defendant showed up at the arranged location, police arrested him. Defendant's argument to

the Supreme Court was that Townsend must be reassessed, and that the Supreme Court should rule that making arrangements for a sexual contact with a fictional underage person and attempting to consummate those arrangements cannot constitute attempted rape of a child.

Under RCW 9A.28.020(1), the two elements of the crime of attempt are (1) intent to commit a particular crime and (2) the taking of a substantial step toward achieving that result. Under RCW 9A.28.020(2), legal and factual impossibility are not defenses to a criminal charge of attempt. Accordingly, where defendant manifested his intent to have sex with an underage child and then took a substantial step toward completion of the crime by going to the arranged meeting place, he committed attempted rape of a child, the Patel Court holds.

Result: Affirmance of Spokane County Superior Court conviction of Mitel Patel for attempted second degree rape of a child.

LED EDITORIAL NOTE: There are three opinions in Patel: a lead opinion signed by 4 justices; a concurring opinion signed by 3 justices; and another concurring opinion signed by 2 justices. The justices all appear to agree, per the above, that attempted rape charges are justified where a would-be victim is fictional. The justices appear to disagree, however, on whether the State may convict a person of attempted child rape in situations involving an accused: (1) who believed an intended sex partner to be underage but the latter person was real and an adult; or (2) who believed an intended sex partner to be an adult but the latter person was real and an underage child. In part, the disagreement stems from differences of opinion as to how to work into the analysis the Supreme Court's ruling in State v. Chhom, 128 Wn.2d 739 (1996) Aug 96 LED:16 (involving a 16-year-old's uncompleted effort to force a 9-year-old boy to suck his penis), which held that one can be guilty of attempted rape of a child despite the absence of a mental state element for that crime. These questions remain to be resolved another day if cases raising such facts arise.

LED CROSS REFERENCE NOTE: See the Wilson Supreme Court decision digested below at page 22 of this month's LED upholding a conviction for attempted rape of a child in a similar police sting situation.

(3) BAIL JUMPING IS CLASSIFIED FOR SENTENCING PURPOSES BASED ON CHARGE EXISTING AT TIME OF JUMP, NOT ON ULTIMATE DISPOSITION OF THAT CHARGE – In State v. Coucil, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 5394776 (2010), the Washington Supreme Court is unanimous in affirming the Court of Appeals (see **Sept 09 LED:21**), and ruling that "bail jumping" under RCW 9A.76.170 is classified for sentencing purposes based on the specific charge pending at the time that the defendant jumps bail, not on the ultimate disposition of that underlying charge.

In the Coucil case, defendant had been charged with felony harassment for threatening to kill Paul Carlson. Released on bail, Coucil failed to appear at a hearing. Eventually he was rearrested, tried, and convicted: (1) not of felony harassment, but instead of a lesser-included charge of misdemeanor harassment, for the threat against Carlson; and (2) of class C felony bail jumping, per RCW 9A.76.170(3)(c). The latter statute makes it a class C felony to jump bail where a "person was . . . charged with . . . a class B or class C felony . . . ." The Supreme Court concludes that the statute is unambiguous in providing that the underlying pending charge at the time of the bail jump is dispositive in determining the proper classification of bail jumping.

Result: Affirmance of Court of Appeals decision that affirmed the above-noted King County Superior Court convictions of Nikeemia Coucil.

(4) FLOOR HELD NOT TO BE AN "INSTRUMENT OR THING LIKELY TO PRODUCE BODILY HARM" UNDER THIRD DEGREE ASSAULT STATUTE WHERE DEFENDANT HAD HIS ARM AROUND VICTIM'S NECK AND THEY WENT TO THE FLOOR TOGETHER – In State v. Marohl, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 5394775 (2010), the Washington Supreme Court is unanimous in reversing the Court of Appeals (see **Sept 09 LED:24**), and ruling that evidence that a defendant who had his arm around the neck of his victim and went to the floor with him in the course of an assault, the jury could not lawfully find that the floor constituted an instrument or thing likely to produce bodily harm for purposes of the third degree assault statute, RCW 9A.36.031.

RCW 9A.36.031(1)(d) provides that: "(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree: . . . (d) with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm." (Emphasis added).

Defendant was involved in an altercation with another man inside a casino. There was evidence that, while both the defendant and victim were standing, the defendant placed his arm around the victim's neck and began walking, appearing to be attempting to pull victim out of the casino by the neck. As they proceeded, the two went to the floor together. Defendant landed on top of the victim, thus breaking off the victim's prosthetic arm at the elbow and causing cuts and bruises to his face. Under these circumstances, the jury could not find that the floor was an "instrument or thing likely to produce bodily harm," the Supreme Court holds, because in this factual scenario the floor was not similar to a weapon, and was not "a thing likely to produce bodily harm" in the sense intended by the Legislature.

The Supreme Court opinion appears to leave room for treating a floor or other stationary object (such as a brick wall) as a weapon or "instrument of thing likely to produce bodily harm" in a case where a defendant intentionally takes the victim's head and beats it against the stationary object. The Supreme Court opinion also notes, in light of the arm-around-the-neck evidence in the case, that the 2007 Washington Legislature amended RCW 9A.36.021(1)(g) to make assault by strangulation assault in the second degree (see **June 07 LED:04** briefly summarizing chapter 79, Washington Laws of 2007).

Result: Reversal of Court of Appeals decision that affirmed the Mason County Superior Court conviction of James Michael Marohl for third degree assault.

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WASHINGTON STATE COURT OF APPEALS

RULINGS: 1) DEPUTY SHERIFFS DIDN'T USE COMMUNITY CORRECTIONS SPECIALIST PRETEXTUALLY AS "STALKING HORSE"; 2) TRIAL COURT SHOULD HAVE APPLIED PROBABLE CAUSE TEST TO DETERMINE IF OFFICERS REASONABLY CONCLUDED PROBATIONER RESIDED IN PREMISES FROM WHICH THEY ARRESTED HIM; 3) EVIDENCE SUFFICIENT ON POSSESSING MARIJUANA WITH INTENT TO DELIVER

State v. Reichert, ___ Wn. App. ___, 242 P.3d 44 (Div. II, 2010)

Facts and Procedural background: (Excerpted from Court of Appeals decision)

> In 2008, Reichert was on probation under DOC supervision and had reported where he was to be living to DOC, as required. In May 2008, . . . Sheriff detectives received a tip from an informant that Reichert was selling marijuana and was living in a different residence on Sunde Road. The detectives contacted [a community corrections specialist with the fugitive apprehension unit of the

DOC] to determine whether Reichert was under active DOC supervision. [The DOC Officer] confirmed that Reichert was under DOC supervision and gave the detectives a couple of addresses to visit, which the detectives checked but were unable to locate Reichert.

Only when the detectives had the informant take them to the Sunde Road residence did the detectives find evidence of Reichert's whereabouts. Specifically, the detectives saw a vehicle registered to Reichert parked in front of the residence.

The detectives contacted [the DOC Officer] to report that Reichert did not appear to be living at the address on file with DOC. A month and a half later, they again contacted [the DOC Officer] to request the status of his investigation. [The DOC Officer] was not Reichert's assigned community corrections officer (CCO) but, as a community corrections specialist, he had authority to help supervise probationers. He asked the detectives to accompany him on a compliance check at the Sunde Road residence. They agreed.

At the Sunde Road residence, [the DOC Officer] identified himself, saw Reichert through the door window, and announced that he was conducting a compliance check to verify Reichert's residence. Reichert refused to come out for about 20 minutes before he finally stepped out and said, "Take me to jail."

[The DOC Officer] handcuffed Reichert and asked to be shown around the house. The detectives searched him for weapons, found and removed a set of keys, and read him his Miranda warnings. [The DOC Officer] then used the keys found on Reichert to open the door to the residence. [The DOC Officer] did not step into the residence but could smell the odor of marijuana emanating from inside.

Based on the marijuana odor, the detectives obtained a telephonic warrant to search the residence. Before searching, the detectives had a special weapons and tactics team (SWAT) clear the house. As the SWAT team was about to enter, Roy Brandenburg came out [Court's footnote: *Brandenburg resided at the Sunde Road residence and his appeal is linked with this case.*].

[Some footnotes omitted]

ISSUES AND RULINGS: 1) Did the law enforcement officers use the community corrections specialist as a "stalking horse" or otherwise act pretextually in this case such as to place the warrantless arrest of Reichert from a residence, and the officers' detection of marijuana odor coming from the residence, outside the reduced privacy standards applicable to searches directed to the probation and parole process? (ANSWER: No);

2) Did the Superior Court err in not applying a probable cause standard to determine if Reichert presently resided in the premises that officers entered without a search warrant? (ANSWER: Yes, and the case must therefore be remanded to the Superior Court to determine whether there was probable cause to believe that Reichert resided in the premises from he was arrested without a warrant, leading to officers' detecting of marijuana odor coming from the residence);

3) Is there sufficient evidence in the record to support the Superior Court's determination that Reichert intended to deliver the unlawful drugs that he possessed? (ANSWER: Yes)

Result: Case remanded to Kitsap County Superior Court for a hearing to determine if the officers had probable cause to believe that Joseph Andrew Reichert resided at the house officers from which the officers arrested him.

ANALYSIS:

1) Pretext

The Court of Appeals opinion includes extensive discussion of probationer-and-parolee-search case law under the U.S. Constitution's Fourth Amendment and the Washington Constitution's article I, section 7. That discussion does not definitively resolve whether the Court of Appeals believes that Reichert's pretext theory is a valid one under either the U.S. or Washington constitution, though the Court does note that the Washington case law supports the propositions that (1) a probationer or parolee's reduced expectation of protection can only be justified to the extent actually necessitated by the legitimate demands of the operation of the probation or parole process, and (2) community corrections officers may enlist the aid of law enforcement officers in performing community corrections duties. This discussion by the Reichert Court suggests that defendant's "stalking horse" or pretext theory has support under the Washington case law.

Ultimately, however, the Reichert Court concludes that the defendant's pretext theory is not, in any event, factually supported by the record in this case:

> Here, the facts do not support the argument that the detectives used [the DOC officer] as a *"stalking horse" or as some type of pretext* to avoid the Fourth Amendment warrant requirement. [**LED EDITORIAL COMMENT: Looking at the context, we believe the Court here meant "Fourth Amendment or article I, section 7 warrant requirement." See our further comments on the "stalking horse" or pretext issue at the end of this LED entry.**] To the contrary, the record contains substantial evidence supporting the trial court's finding that [the DOC officer] was acting within the purpose of his mandate to help supervise probationers. The detectives gave [the DOC officer] information that Reichert may have not reported living at the Sunde Road residence. [The DOC officer] then planned a compliance check and contacted the detectives to accompany him for safety reasons. Thus, although the detectives initially told [the DOC officer] that Reichert may be violating his community custody conditions, [the DOC officer] ultimately asked the detectives to assist him in visiting the Sunde Road residence for a DOC compliance check.
>
> Reichert nevertheless asserts that [the DOC officer] is somehow tainted because he was not Reichert's regular CCO. But one of [the DOC officer's] duties was to help the CCOs supervise and manage probationers. In the present case, he assisted Reichert's regular CCO in checking whether Reichert was living at his reported address, as DOC policy required. [The DOC officer] was enforcing a DOC policy that was rehabilitative in nature, designed to help keep probationers in an environment conducive to law-abiding behavior. Indeed, the notion that detectives used [the DOC officer] as pretext to search the Sunde Road residence is even less persuasive in light of our Supreme Court's recent holding in State v. Winterstein, 167 Wn.2d 620 (2009) **Feb 10 LED:24**, discussed below. We hold that [the DOC officer's] search was probationary in nature. The only question on remand is thus whether [the DOC officer] had authority to search the Sunde Road residence, based on probable cause that Reichert lived there.

2. Probable cause standard

The Reichert Court's analysis of the Winterstein issue is as follows:

> The trial court applied the reasonable suspicion standard we set forth in State v. Winterstein. But the Supreme Court reversed our decision and held that a CCO must have probable cause that a probationer lives at a residence before searching that residence. Winterstein **Feb 10 LED:24**. Notably, Winterstein did not change the standard under RCW 9.94A.631 that a CCO must have a reasonable suspicion before searching a probationer's person.
>
> We decline to evaluate the evidence to determine whether [under Winterstein the DOC officer] had probable cause to search the Sunde Road residence. We note, however, that the informant's information has relevance, depending on the extent of his or her basis of knowledge and reliability. We further note that the Reichert's admission, if any, that he lived at the Sunde Road residence is also relevant.
>
> Given that the trial court relied on the reasonable suspicion standard, the remedy our Supreme Court articulated in Winterstein, and the parties' agreement at oral argument that remand was appropriate to determine the facts under the probable cause standard, we remand for a full suppression hearing to determine if [the DOC officer] had probable cause to believe that Reichert lived at the Sunde Road residence before searching it.
>
> If on remand the trial court finds that [the DOC officer] had probable cause to believe Reichert resided in the same residence as Brandenburg, then it shall reenter the judgment and sentence. If the court finds that the [the DOC officer] did not have such probable cause, it may take appropriate action.

[Some citations omitted]

3. Sufficiency of the evidence of possession with intent to manufacture or deliver

The salient part of the Reichert Court's analysis of the sufficiency-of-evidence issue is as follows:

> Reichert stipulated that the substance found in the Sunde Road residence was marijuana, thus, we need only consider whether the evidence showed that he possessed it with an intent to deliver.
>
> Possession
>
> Possession may be actual or constructive. Actual possession occurs when the defendant has physical custody of the item, and constructive possession occurs if the defendant has dominion and control over the item. Dominion and control means that the defendant can immediately convert the item to their actual possession. Constructive possession need not be exclusive. When a person has dominion and control over a premises, it creates a rebuttable presumption that the person has dominion and control over items on the premises.
>
> Sufficient evidence supports the finding that Reichert resided at the Sunde Road residence, which is one circumstance from which the jury could infer that he had constructive possession of the nearly nine pounds of marijuana found in Brandenberg's room. First, Reichert refused to come outside and discuss his changed address and, instead, retreated into the Sunde Road residence for approximately 20 minutes. He also had keys on his person that opened the front

door. Second, during the subsequent search, [Detective A] found a safe in a bedroom closet containing paperwork with Reichert's name on it, whereas paperwork belonging to Brandenberg was found in another room. A jury could reasonably infer from this evidence that Reichert had one room and Brandenberg the other. Importantly, one piece of paper found in Reichert's room listed the amounts for various utility bills and then that amount divided by two. Finally, in the common areas of the house, [Detective A] found paperwork belonging to both Reichert and Brandenberg.

The jury could also infer from the following evidence that Reichert had constructive possession of the marijuana found inside the residence. The detectives smelled a "very strong and distinct odor of marijuana" from the safe in Reichert's room. They also found money in Reichert's room that a narcotic dog positively identified as having been mingled with narcotics, and they found on Reichert's bathroom counter a cut top to a plastic bag that forensically matched a plastic bag found in Brandenburg's room containing one-half pound of marijuana. Also, in the living room, detectives found marijuana smoking devices, including different sized bongs, and plastic baggies with marijuana residue. Based on the foregoing, we hold that Reichert had constructive possession of the marijuana.

Intent to deliver

Mere possession of drugs, without more, does not raise an inference of the intent to deliver. Rather, the State must prove at least one additional factor, suggesting a sale and not mere possession, to corroborate the defendant's intent to deliver. State v. Hagler, 74 Wn. App. 232 (Div. I, 1994) **Oct 94 LED:13**. In Hagler, the evidence was sufficient where the defendant was found in possession of 24 rocks of cocaine as well as $342 in cash. In another case, the court found sufficient evidence of intent where the defendant possessed drugs along with a gram scale and $850 in cash. State v. Lane, 56 Wn. App. 286 (1989).

Here, the jury had sufficient evidence that Reichert constructively possessed items commonly used to distribute marijuana, thus evidencing his intent to deliver. On top of the refrigerator in the kitchen, [the detective] found numerous "seal-a-meal" bags and "food-saver" bags, some of which had cut tops, as well as some Ziploc bags. Some of the bags had a marijuana residue and some of the bags had been heat sealed (a heat sealer was found in the living room). Written on a lid of a Ziploc box were dollar amounts of different weight quantities of marijuana. Further, [Detective B] found in the living room a digital scale tainted with marijuana residue. We hold that the evidence was sufficient for a jury to conclude that Reichert had the intent to deliver the marijuana he constructively possessed.

[Some citations omitted]

LED EDITORIAL COMMENT RE STALKING HORSE/PRETEXT CHALLENGES TO DOC SEARCHES WITH LAW ENFORCEMENT OFFICER ASSISTANCE

In the February 2002 LED, we digested the U.S. Supreme ruling in U.S. v. Knights, 534 U.S. 112 (2001) Feb 02 LED:02, interpreting the Fourth Amendment. The Reichert Court discusses the Knights decision, but does not make Knights the basis for its decision in light of the record and arguments in this case.

The U.S. Supreme Court held in Knights that the federal constitution's Fourth Amendment did not prohibit the State of California from having a statutory and administrative scheme requiring that persons on probation submit to warrantless searches based on reasonable suspicion of probation violations or criminal activity. Knights also appeared to hold that, 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." Our comments in the February 2002 LED were to the effect that the Washington Supreme Court might interpret the Washington constitution's article I, section 7 more restrictively than the U.S. Supreme Court had interpreted the Fourth Amendment in Knights. We cautioned that Washington courts might insert a subjective/pretext element (officer intent) requiring that the search not be a subterfuge "probation/parole" search essentially instigated and controlled by law enforcement officers. In the remainder of this Comment on Reichert, we repeat our 2002 comments on Knights, with a few stylistic and clarifying, but not substantive, revisions. Reichert is the first published Washington appellate court decision since the Supreme Court's issuance of Knights to address a search directed at a probationer.

Prior to the Supreme Court decision in Knights, Washington case law apparently equated the Fourth Amendment and article I, section 7 and held that the reduced expectation of privacy for probationers and parolees whose probation or parole conditions include search conditions, is constitutionally justified, but 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). While we can find no reported Washington appellate court decision suppressing evidence under the "stalking horse" or pretext rationale, the rule stated 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. 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 support 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 great theoretical doubt if analysis is restricted to the Fourth Amendment, and if one assumes 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. See generally the discussion in 5 LaFave, Search and Seizure: A Treatise on the Fourth Amendment, section 10.10(e) (*Searches directed at parolees and probationers - - Police involvement, 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 support to community corrections officers.

In the past 30 years, the Washington Supreme Court has found heightened privacy protection in "independent grounds" readings of the Washington constitution's article 1, section 7 in a number of search and seizure contexts. Some of those rulings have injected pretext or officer-intent considerations into what are purely objective standards under the U.S. Supreme Court's Fourth Amendment doctrine. 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 appeared to hold in Knights that there is no such restriction under the Fourth Amendment of the U.S. Constitution. We think that, at the very least, a community corrections officer should be present at the time of the search.

As always, 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 and Washington case law, including the Reichert ruling of the Court of Appeals digested here.

LED EDITORIAL NOTE ON ADDITIONAL APPELLATE DECISIONS ON SUFFICIENCY OF EVIDENCE OF INTENT TO DELIVER

For a list of numerous additional Washington appellate court cases addressing what evidence is needed (besides possession) to prove intent to deliver illegal drugs, see the LED entry and editorial note for State v. Slighte, 157 Wn. App. 618 (Div. II, 2010) Oct 10 LED:20.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) UNDER RATIONALE THAT OFFICERS ENGAGED IN AFFIRMATIVE ACT OF "TAKING CONTROL" OF SCENE, AND DID SO NEGLIGENTLY, RATHER THAN MERELY NEGLIGENTLY FAILING TO ACT IN THE FIRST PLACE, LAWSUIT AGAINST CITY OF SEATTLE AND NAMED OFFICERS CAN GO FORWARD ON NEGLIGENCE THEORY NOT PRECLUDED BY THE "PUBLIC DUTY" DOCTRINE – In Robb v. City of Seattle (and others), ___ Wn. App. ___, ___ P.3d ___, 2010 WL 5250879 (Div. I, 2010), the Court of Appeals rules that a lawsuit can go to trial where, in the words of the Court, law enforcement officers allegedly "t[ook] control of a situation and then depart[ed] from it leaving shotgun shells lying around within easy reach of a young man known to be mentally disturbed and in possession of a shotgun." The case involved a random shooting of a stranger by 17-year-old Samsom Berhe, who was subsequently found not guilty by reason of insanity. The victim's wife sued Seattle Police Department and two officers, arguing that in light of prior recent police contacts with Berhe and a particular contact with Berhe just a few hours before the shooting, the police officers and Seattle PD were subject to liability for the shooting.

The "public duty" doctrine generally precludes negligence-based liability for failure of law enforcement actors to take action. Under that doctrine, the "duty" for liability purposes is to the public and generally not to the individual who suffers injury unless one of four exceptions to the doctrine is applicable. Briefly stated, the exceptions are (1) a duty created by legislative intent, (2) failure to enforce the law in certain circumstances, (3) the "rescue doctrine," and (4) specially created relationship.

The Robb Court rules (1) that the public duty doctrine does not apply where officers engage in affirmative acts and do so negligently, rather than merely failing to act; and (2) that in Robb, the officers did the former (taking control of a situation where shotgun shells were ultimately left lying on the ground for Berhe to pick up and later us), not the latter (merely negligently failing to act). Thus, the Court of Appeals holds that, while none of the four exceptions to the public duty doctrine applies in Robb, that does not matter; the doctrine itself simply does not apply, the Court holds.

LED EDITORIAL NOTE: We will not attempt in the LED to describe or criticize the Robb Court's analysis and application of what we find to be a very elusive distinction between

(1) affirmative acts done negligently (subject to civil liability on grounds that they do not fall under the Public Duty Doctrine), and (2) negligent failure to act (not subject to civil liability because the circumstances fall under the Public Duty Doctrine). We think there is a good chance that the Robb case will end up in the Washington Supreme Court (though we are pessimistic that the result will be different there). At least for now, the LED will merely set out the Court's description, as follows, of the allegations and a part of the trial court procedural background in the case:

> Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The court considers the evidence in the light most favorable to the nonmoving party. [Citation omitted]
>
> Viewed in the light most favorable to Robb, the record shows that in May 2004, officers in the Southwest Precinct of the Seattle Police Department twice took Berhe to Harborview Hospital for a mental evaluation at the request of his parents who were afraid for the family's safety because of Berhe's erratic and destructive behavior. In June 2005, during the week before Berhe randomly selected Michael Robb as the target of his shotgun blast, precinct officers learned that Berhe was again engaging in bizarre and aggressive behavior and that he possessed a shotgun.
>
> On June 19, 2005, Officers [A and B] and another officer responded to a call from Berhe's mother. According to his mother, Berhe had a history of mental illness and was making suicide threats. The officers described Berhe as unresponsive and "acting strange." Berhe was taken to Harborview Hospital.
>
> On June 22, Officer [B] and another officer responded to a 911 call about an assault at Berhe's home. Berhe had been punching one of his brother's friends. When the officer approached, Berhe "spoke in normal tones then switched to deep demonic tones." He stated that he "ruled the world," that "all confused people need to be killed and tortured," and that "I control all the money" and "I'll kill all the haters." The officers took Berhe to Harborview Hospital for an involuntary mental health evaluation. The mental health professional released Berhe because the boy he assaulted declined to testify at a hearing. Berhe's parents were afraid of him and refused, at least initially, to let him come home.
>
> On June 21, the auto theft division of Seattle police received information from Bellevue police that Berhe had recently stolen a car and was keeping shotguns under his bed at home. The Bellevue police had been informed of this by Berhe's friend, Raymond Valencia, who they had recently arrested for car theft.
>
> On June 24, Berhe's father called police to report that Berhe and Valencia were in the backyard fighting and they both had shotguns. Numerous officers from the Southwest Precinct responded. By the time they arrived, the two boys and the shotguns were gone.
>
> On June 26, in the morning, two officers questioned and released Berhe and Valencia at a vacant rental home on Berhe's street where they had spent the night sleeping and drinking beer until being discovered by the owner.
>
> On June 26, late in the afternoon, Officer [A] responded to a report of a burglary about three miles from Berhe's home. He learned from a witness that Berhe and Valencia were "bragging about knowing where stolen items were being kept." Officer [A] and Officer [B] located Valencia and Berhe on a street near Berhe's

home and stopped them on suspicion of the burglary. Berhe was "very agitated." The officers patted down the two youths to check for weapons but found none. Upon finding a stolen watch in Valencia's pocket, they took him into custody and put him in a police car.

The officers noticed yellow shotgun shells on the curb next to where Berhe was standing. It is a disputed issue of fact whether [Officers A and B] personally knew or should have known that Berhe possessed a shotgun. For purposes of summary judgment, we assume they were aware of the information about Berhe gathered by fellow officers during the three days preceding this burglary stop. The officers did not ask any questions about the shotgun shells they saw lying on the ground, and they did not confiscate the shells. They released Berhe and told him to go home. Berhe walked away, making "incoherent comments." The officers drove away with Valencia.

A neighbor who was watching these events saw Valencia throw down some shotgun shells before being stopped. After the police left with Valencia, another witness saw Berhe come back, bend down, pick something up, and walk away. A short time later, Berhe stopped to see his neighbors and showed them a handful of yellow shotgun shells. He said he had a shotgun and was bragging about "popping off rounds all night."

Berhe fatally shot Michael Robb about two hours later at a location reachable by walking a short distance along a trail through a wooded area just to the north of Berhe's home. After the murder, Valencia took investigating officers to a place in the woods where Berhe had set up a makeshift shooting range. Searching the area, officers found 11 empty shell casings, 1 unused shotgun shell, and an empty 20-shell box. Valencia also made a statement admitting that he and Berhe committed a burglary investigated by officers from Seattle's Southwest Precinct on June 19, in which guns and ammunition were stolen. He said they sold most of the stolen property, but Berhe insisted on keeping one of the shotguns.

Elsa Robb filed this lawsuit in January 2008. Seattle moved for summary judgment. The trial court denied the motion . . . .

Result: Affirmance of King County Superior Court order denying summary judgment to the City of Seattle and Seattle P.D. Officers A and B; case remanded for trial.

(2) STANDING, MIRANDA, SCOPE-OF-STOP, AND SPOUSAL PRIVILEGE ISSUES ADDRESSED IN PRO-STATE RULINGS IN CASE WHERE OFFICER ASKED FEMALE DRIVER PROTECTED BY A NO-CONTACT ORDER TO IDENTIFY MALE PASSENGER – In State v. Shufelen, 150 Wn. App. 244 (Div. I, 2009), the Court of Appeals rules as follows:

(1) that the male passenger in a car lawfully stopped for a traffic violation had no standing to challenge an officer's request to the female driver that she identify the male passenger, who the officer suspected might be in violation of a no-contact order (NCO);

(2) that, regardless of the law of standing, the question to the driver did not come within Miranda requirements because the question did not address any possible criminal conduct by the driver (as opposed to the passenger) and hence was not "interrogation" covered by Miranda;

(3) that, regardless of the law of "standing", the question to the driver did not impermissibly change the scope of the stop because the question did not take long to ask or answer; and

(4) that, under RCW 5.60.060(1), the male passenger, who turned out the to be the husband of the driver and the prohibited person on the NCO, could not invoke the spousal-status privilege to prevent his wife – a victim of the NCO crime committed by him against her – from being called by the State, against her wishes, to testify against him for violating the no-contact order.

The key facts in Shufelen are as follows. The traffic stop occurred at night-time. Dispatch information was that the woman was protected by a no-contact order against her husband. The officer received detailed identifying descriptors regarding the husband, but dispatch also informed the officer that the husband had DOC warrants and also was considered an officer-safety risk. So, instead of walking up to the driver or passenger window of the car where he could get a good look at the passenger, the officer took the safety precaution of placing himself at the right rear of the car, and then had directed the driver to get out of the car. It was at the point that the driver got out of the car that the officer asked the question about the identity of the male passenger.

On the "standing" issue, the Shufelen Court explains that the evidence-suppression ruling, under similar circumstances, of the Court of Appeals in State v. Allen, 138 Wn. App. 463 (Div. II, 2007) **July 07 LED:21** is not controlling because the Allen Court expressly stated that the Court was not addressing standing.

Result: Reversal of King County Superior Court rulings that (1) suppressed the statement of the wife to police at the time of the stop identifying her husband as the person in the car, and (2) barred the wife from testifying against her husband based on the spousal-status rule of RCW 5.60.060(1) (also known as the "spousal incompetency" rule).

Status: The Washington Supreme Court denied the defendant's petition for discretionary review.

LED EDITORIAL NOTE: We previously overlooked this 2009 decision in collecting published appellate court decisions for the LED, perhaps because the decision was initially issued as unpublished and was only subsequently ordered published (though we make a concerted effort to watch for such delayed-publication decisions). In any event, we came across the Shufelen decision recently when key-citing the Allen decision in order to respond to a question. The question was whether officers may stop a car based solely on the facts that (1) the registered owner of a vehicle has obtained a no-contact order, and, (2) from the view from the patrol car, the gender of the passenger appears to fit the gender of the prohibited person. Our answer to that question was that the stop likely would be held to be unlawful (i.e., not supported by reasonable suspicion) without better corroboration that the passenger in the vehicle is the prohibited person.

LED EDITORIAL COMMENTS:

1) Allen decision. In digesting the Division Two Allen decision in the July 2007 LED, we discussed the facts underlying a suppression order in Allen (officer in traffic stop asking driver protected by a no contact order for the identity of the passenger without having any descriptors of the prohibited person on the order, i.e., defendant Allen), and we commented as follows:

> **We think that, if the officer in Allen had first obtained a description of Allen through another source (e.g., dispatch or computer check) before asking Allen and the driver for Allen's ID or identification information, and if that description had met the reasonable suspicion standard for a match to the vehicle passenger, then the Court of Appeals would have held that the identity inquiry was lawful.**

In Shufelen, as in Allen, during a traffic stop the officer had learned from dispatch about a no contact order protecting the driver against another person. The officer in Shufelen learned that the prohibited person was a white male, born in 1960. But the officer did not learn, before asking the driver to identify the passenger, any other descriptors about the prohibited person.

The Shufelen Court does not address the issue of whether the officer had reasonable suspicion about the passenger that would have justified asking the driver to identify her passenger. That is because the Shufelen Court holds that the passenger did not have constitutional "standing" to challenge the officer's asking of a question to the driver. The Shufelen Court notes that the Allen Court expressly declined to address the "standing" question, so the correctness of the Allen decision need not be addressed.

Rulings on "standing," of course, do not assess the substance of search and seizure law, and therefore are not useful to those of us trying to determine search and seizure law. The better tactic legally in the Allen/Shufelen scenario is to hold off on questions to driver and/or passenger about the identity of the passenger, first trying to obtain descriptors on the prohibited person (from dispatch or computer or otherwise), and trying to assess whether the passenger reasonably meets those descriptors.

2) Expanding the scope of a traffic stop. The Shufelen Court includes a footnote that relies on the U.S. Supreme Court's Fourth Amendment interpretation in Arizona v. Johnson, 129 S. Ct. 781 (2009) March 09 LED:03 to conclude that asking the driver about the identity of her passenger was not an unlawful expansion of the traffic stop because it did not "measurably extend the stop's duration." The Shufelen Court was conclusory on this question and did not address Washington decisions such as State v. Cantrell, 70 Wn. App. 34 (Div. II, 1993) Oct 93 LED:21 that seem to suggest that one must look at both the scope of the investigation (i.e., whether non-traffic matters are being investigated without reasonable suspicion) and the duration of the investigation to determine if a lawful stop has been turned into an unlawful seizure. In our commentary in the March 2009 LED, we questioned whether Arizona v. Johnson meets Washington constitutional requirements. Also, in the April 2005 LED, we explored this area of law in our follow-up discussion of the U.S. Supreme Court decision in Illinois v. Caballes, 125 S. Ct. 834 (2005) March 05 LED:03, April 05 LED:02. Washington case law is not so clear on this point regarding expanding the scope of investigation as the Shufelen decision suggests. Ideally, officers will be able to point to reasonable suspicion as to other criminal matters where a traffic stop has turned into an investigation of non-traffic matters.

(3) EVIDENCE THAT DEFENDANT STOOD ON FRONT PORCH, PUNCHED ACROSS THE THRESHOLD, AND HIT A PERSON INSIDE THE HOME IS SUFFICIENT TO SUPPORT HIS CONVICTION FOR FIRST DEGREE BURGLARY – In State v. Koss, ___ Wn. App. ___, 241 P.3d 415 (Div. III, 2010), the Court of Appeals rules that the evidence in the case is sufficient to support the defendant's conviction for first degree burglary.

Anthony David Koss punched a woman in the mouth after she opened the front door to her home. She was just inside the doorway, and he was jut outside the doorway on the porch. In a jury trial, Koss was convicted of first degree burglary. On appeal he argued, among other things, that the evidence did not support the jury verdict.

RCW 9A.52.020(1) defines first degree burglary as follows:

> A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom,

the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person. (Emphasis added)

The term, "enter," is defined in RCW 9A.52.010(2) (with emphasis added) to include "the entrance of the person, or the insertion of any part of his body, or any instrument or weapon held in his hand and used or intended to be used to threaten or intimidate a person or to detach or remove property . . . ." The Koss Court concludes that under these definitions the evidence – defendant's uninvited breaching of the threshold to punch the victim in the mouth – supports the conviction, because the defendant entered the building when his fist cross the threshold, and in so entering he assaulted a person.

Result: Affirmance of Spokane County Superior Court conviction of Anthony David Koss for first degree burglary.

(4) TRESPASS CONVICTION AGAINST K-12 PUBLIC SCHOOL STUDENT'S MOTHER SET ASIDE BASED ON: (1) SCHOOL'S FAILURE TO FULLY INFORM HER OF HER APPEAL RIGHTS AT THE TIME THE SCHOOL GAVE HER A NOTICE OF TRESPASS, AND (2) ABSENCE OF PROOF OF ADEQUATE BASIS FOR NOTICE OF TRESPASS – In State v. Green, 157 Wn. App. 833 (Div. I, 2010), the Court of Appeals reverses the trespass convictions of the mother of a student at a public elementary school.

First, the Green Court rejects the State's argument that, by not appealing her notice of trespass from the school district, the defendant waived her right to challenge the basis for the school's notice of trespass. The Court rules on this issue that the school district did not give the mother adequate notice of her appeal rights under RCW 28A.645.010 when the district gave her a notice of trespass.

Second, the Green Court rules that, because the State put on only hearsay testimony regarding the original basis for the notice of trespass, the State failed to prove that the mother had engaged in conduct that "disrupt[ed] classroom procedure or learning activity" within the meaning of RCW 28A.605.020. In a K-12 public school trespass case, the State is required to establish that the notice of trespass was based on such disruptive behavior, the Green Court holds.

Result: Reversal of King County Superior Court judgment that had affirmed two King County District Court convictions of Donna E. Green for first degree criminal trespass; charges ordered dismissed.

(5) EVIDENCE SUFFICIENT TO SUPPORT CONVICTION FOR ATTEMPTED DRIVE-BY SHOOTING EVEN THOUGH GUN WAS IMPROPERLY LOADED AND WOULD NOT FIRE – In State v. Oakley, ___ Wn. App. ___, 242 P.3d 886 (Div. II, 2010), the Court of Appeals rules that the evidence in the case is sufficient to support a conviction for attempted drive-by shooting even though the defendant's rifle did not and could not have fired a bullet, because the rifle had been improperly loaded with two cartridges in the chamber facing each other. The Court of Appeals explains its reasoning as follows:

RCW 9A.36.045(1) defines the crime of drive-by shooting:

> A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

> "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1). A substantial step is "conduct strongly corroborative of the actor's criminal purpose." State v. Aumick, 126 Wn.2d 422 (1995).
>
> We find that there was sufficient evidence to convict Oakley of attempted drive-by shooting. Oakley took a substantial step towards committing a drive-by shooting when he pointed a gun at the Lynns from the vehicle and attempted to fire it. Several witnesses observed the gun protruding from the car window as the car drove past the Lynns' house and identified Oakley as the individual holding the gun. Christopher heard a "cracking sound" like the sound of a gun jamming when Oakley "tried to shoot again." The firearms expert stated that the gun was operable if loaded correctly. Thus, although the gun did not discharge, there was sufficient evidence for a jury to convict Oakley of attempted drive-by shooting beyond a reasonable doubt.

Result: Affirmance of Pierce County Superior Court convictions of Augustus M. Oakley for second degree assault (3 counts) and for attempted drive-by shooting (1 count). Under analysis not addressed in the LED, the Court of Appeals also affirms Oakley's firearm sentencing enhancements, but vacates a portion of Oakley's restitution order.

(6) CONSTRUCTIVE POSSESSION OF DRUGS AND FIREARM ESTABLISHED WHERE DEFENDANT WAS SOLE OCCUPANT OF TRUCK REGISTERED TO HIM – In State v. Bowen, 157 Wn. App. 821 (Div. II, 2010), the Court of Appeals rules that the evidence of constructive possession was sufficient to support defendant Bowen's conviction for unlawful possession of methamphetamine and a firearm.

Bowen was determined by a Community Corrections Officer to be unlawfully in Mason County in violation of travel restrictions under the terms of his probation. Just prior to arrest, Bowen was the driver and sole occupant of a pickup truck registered to him. During a search of the front and back seat areas of the truck by the CCO and an assisting law enforcement officer immediately following Bowen's arrest from the vehicle, methamphetamine and a handgun were found. At trial, conflicting testimony was presented as to who owned the handgun and how it came to be in the passenger area of the vehicle. The Bowen Court concludes that the evidence that defendant was in dominion and control of the vehicle was sufficient to support the jury's determination that Bowen possessed the gun as well as the illegal drugs.

Result: Reversal (on grounds not addressed in the LED – i.e., improper actions of the Superior Court in conducting part of the jury selection process in chambers) of Kevin R. Bowen's Mason County Superior Court convictions for unlawful possession of methamphetamine and first degree unlawful possession of a firearm; case remanded for retrial.

(7) EVIDENCE THAT PEOPLE PROVIDED GUNS TO DEFENDANT KNOWING OF HER ONGOING STRIFE WITH HER ESTRANGED HUSBAND IS EVIDENCE OF AGREEMENT AND SUPPORTS A MURDER-CONSPIRACY CHARGE AGAINST HER – In State v. Stark, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 5118751 (Div. III, 2010), the Court of Appeals rules that where relatives of a woman who was involved in a stormy breakup with her estranged husband provided her with guns "for protection," that was sufficient evidence to support the agreement element of a charge against her of conspiracy to commit murder. The Stark Court explains as follows:

> A person is guilty of criminal conspiracy if, with the intent to commit a crime, he agrees with one or more other persons to engage in or cause the performance of

> such conduct, and any member of the conspiracy takes a substantial step in pursuance of the agreement. RCW 9A.28.040(1).
>
> The State must show an actual, rather than a feigned agreement with at least one other person to prove conspiracy. The State does not need to show a formal agreement. And, the conspiracy may be proven by the declarations, acts, and conduct of the parties, or by a concert of action. This proof may be circumstantial.
>
> Additionally, Washington implicitly recognizes that the subject crime of the conspiracy is an element. Here, the subject crime is first degree murder. Thus, the State must prove an agreement existed with premeditated intent to cause the death of another person. Here, the State proved Ms. Stark met with other individuals to obtain a handgun and a shotgun. Viewing the facts and the inferences from the facts as we must [in the State's favor], we agree the State has presented circumstantial evidence of an alleged conspiracy.

[Some citations omitted]

Result: Reversal (on jury instruction grounds not addressed in the LED) of Spokane County Superior Court convictions of Shelly L. Stark (aka Shellye L. Stark) for first degree premeditated murder and conspiracy to commit first degree murder; case remanded for retrial.

(8) STATE MAY NOT LAWFULLY QUESTION DEFENDANT OUTSIDE SCOPE OF DIRECT TESTIMONY EITHER (1) ON CROSS EXAM OR (2) AS A REBUTTAL WITNESS – In State v. Epefanio, 156 Wn. App. 378 (Div. III, 2010), Division Three of the Court of Appeals rejects the prosecution's argument that where a defendant took the witness stand and testified about certain aspects of the charge of rape of a child in the third degree, the defendant waived his right under the U.S. Constitution's Fifth Amendment not be a witness against himself. Therefore, the State could not question the defendant outside the scope of his direct examination, either on cross examination or by calling the defendant as a rebuttal witness.

The Court of Appeals rules, however, that the trial court's error of allowing the prosecutor, in calling the defendant as a rebuttal witness, to go beyond the scope of the defendant's direct testimony was a harmless error because the evidence was "overwhelming" that defendant was guilty.

Result: Affirmance of Spokane County Superior Court conviction of Titus Vincent Epefanio for rape of a child in the third degree.

(9) INDECENT EXPOSURE CONVICTION HELD TO BE SUPPORTED BY EVIDENCE THAT DEFENDANT WAS SEEN WALKING THROUGH NEIGHBORHOOD WHILE NUDE EXCEPT FOR SHOES AND A STOCKING CAP, EVEN THOUGH NO WITNESS SAW HIS GENITALS – In State v. Vars, 157 Wn. App. 482 (Div. I, 2010), the Court of Appeals makes the following holdings in an opinion upholding the conviction of Jeffrey L. Vars for indecent exposure: 1) the evidence that on May 3, 2008 defendant walked through a neighborhood nude except for shoes and a stocking cap and was observed to be nude by witnesses was sufficient to support the conclusion that he intentionally exposed his genitals even though no witness saw his genitals during the period at issue; 2) defendant's behavior on May 3, 2008 and his criminal history of similar offenses supported the conclusions (a) that he knew that his behavior would cause reasonable affront or alarm, and (b) that his behavior was sexually motivated.

The indecent exposure statute, RCW 9A.88.010, provides as follows:

(1) A person is guilty of indecent exposure if he or she intentionally makes any open and obscene exposure of his or her person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm. The act of breastfeeding or expressing breast milk is not indecent exposure.

(2)(a) Except as provided in (b) and (c) of this subsection, indecent exposure is a misdemeanor.

(b) Indecent exposure is a gross misdemeanor on the first offense if the person exposes himself or herself to a person under the age of fourteen years.

(c) Indecent exposure is a class C felony if the person has previously been convicted under this section or of a sex offense as defined in RCW 9.94A.030.

The Court of Appeals describes the facts of the case and the trial court procedure as follows:

At around 2:00 a.m., May 3, 2008, Jeffrey Vars drove to a Kirkland neighborhood, parked his car, removed his clothing, and began wandering naked through the streets. Approximately 30 minutes later, A.C. looked out the bedroom window on the second story of his condominium and saw a man, later identified as Vars, walking swiftly down the street. Vars was "completely nude" except for his shoes. A.C. felt ambivalent about the sighting, but since he considered the conduct inappropriate, he decided to call 911. A.C. saw Vars's buttocks but he did not see his genitalia.

Shortly after 5:00 a.m., D.B. was driving his car in the area when a man, later identified as Vars, ran across his headlights. D.B. could see that Vars was naked, though he appeared to be wearing a ski mask. Vars held his hands "up in sort of a menacing kind of posture." D.B. pulled into the post office parking lot and observed Vars crouching in the bushes along the road and watching him as D.B. turned his car around. D.B. called 911 and reported the sighting to the police. Like A.C., D.B. saw Vars's buttocks but not his genitalia.

Officer [A] responded to these two calls but was unable to locate anyone. About an hour after D.B.'s call, Officer [A] observed Vars, still nude, but holding a bundled garment in front of his genitalia. When the officer's patrol car became visible, Vars fled. Soon afterward, Officers [B] and [C] found Vars naked and squatting against a fence. As they approached, Vars again turned and ran into a nearby business lot. The officers pursued and eventually found him pulling on a pair of pants and wearing a black stocking cap, shoes, and a gray shirt. A large 10-inch rip ran along the left leg of his pants, allowing the officers to notice that he was not wearing any underwear. After the officers read Vars his Miranda warnings, he denied walking nude through the neighborhood. He claimed to be in the area looking for a place to defecate. A car registered to Vars was found 15 blocks from where he was arrested.

The State charged Vars with two counts of indecent exposure, each committed with an aggravating factor, sexual motivation. Vars waived his right to a jury trial and stipulated to facts underlying eight prior convictions for indecent exposure, two of which were felonies. The State moved in limine to admit evidence of these prior convictions under ER 404(b). The court granted the motion as to three convictions for the purposes of showing common scheme or plan, knowledge, absence of mistake or accident, and sexual motivation.

> The first of these prior convictions stemmed from an April 2000 incident when Vars was near Interstate 90 at 4:50 a.m. He was naked, except for his shoes and socks, and holding a jar of Vaseline. When the officer approached, Vars ran until the officer caught up with him. His car was parked at the end of a bike path, and his clothes were folded neatly underneath the driver's seat.
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> The second conviction resulted from a December 2000 incident where Vars was observed standing nude, with the exception of his shoes and socks, in a gas station parking lot in Renton just after 1:00 a.m. When the officer asked what he was doing, he replied that he was looking for a place to defecate.
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> The third conviction arose from an August 2004 incident. At 6:30 p.m. a witness saw Vars jump in and out of the roadside bushes while keeping a watch on the witness. Vars was naked except for his shoes and socks. When the police arrived, Vars attempted to flee. When caught, he explained to the officer that he needed a place to defecate, took exit 31, and did not see any of the nearby restaurants or gas station.
>
> The court found Vars guilty on both counts and that he had committed each count with sexual motivation. He received two concurrent 60-month sentences.

Result: Affirmance of King County Superior Court conviction of Jeffrey L. Vars on one of the two counts of indecent liberties with sexual motivation; reversal of conviction on the other count on double jeopardy grounds that Vars's conduct was a single ongoing event punishable only as a single criminal act; remand of case for re-sentencing on the single count.

(10) EVIDENCE IN SEX STING CASE HELD SUFFICIENT TO SUPPORT SUBSTANTIAL STEP AND INTENT ELEMENTS OF ATTEMPTED CHILD RAPE – In State v. Wilson, ___ Wn. App. ___, 242 P.3d 19 (Div. I, 2010), the Court of Appeals rejects the defendant's argument that the computer-sex-sting evidence was sufficient to support his conviction of attempted rape of a child. The Wilson Court explains as follows:

> Here, Wilson engaged in an e-mail exchange with Jackie [the undercover police officer's sting name] and arranged to have "oral and full sex" with a 13-year-old girl. After agreeing on the price of $300, Wilson went to the agreed upon meeting place. Consistent with the parties' plan that the 13-year-old would meet him in the parking lot of Dick's Drive-In and bring him to the apartment, he sat in his car and waited in the parking lot for approximately 30 minutes [staked out police officers watched him during this period, and then they arrested him]. When Wilson was arrested, he also had the amount of $300 that he agreed to pay in his pocket. And in his signed statement, Wilson admitted that he intended to have sex with a 13-year-old. Viewing the evidence in the light most favorable to the State, the jury could find beyond a reasonable doubt that Wilson intended to have sexual intercourse with a 13-year-old and took a substantial step toward the commission of the crime of rape of a child in the second degree.

Result: Affirmance of King County Superior Court conviction of Rodney Glenn Wilson for attempted rape of a child in the second degree.

LED CROSS REFERENCE NOTE: See the Patel Supreme Court decision digested above at pages 5-6 of this month's LED.

(11) NO PRIVILEGE FOR CHILD MOLESTER'S ADMISSIONS TO HIS THERAPIST, AND NO PROBLEM WITH USE OF SEARCH WARRANT TO OBTAIN THERAPIST'S RECORDS – In State v. Hyder, ___ Wn. App. ___, ___ P.3d ___, 2010 WL ____ (Div. II, 2010), the Court of Appeals rejects a child-molesting defendant's (1) evidentiary privilege arguments regarding admissibility of his statements to sex offense treatment providers about his child molesting, and (2) process arguments attacking law enforcement use of a search warrant instead of a subpoena to obtain the provider's records.

On the privilege issue, the Court of Appeals follows the precedents of State v. Warner, 125 Wn.2d 876 (1995) **May 95 LED:08** and State v. Ackerman, 90 Wn. App. 477 (1998) **Oct 98 LED:19** in ruling that the mandatory abuse reporting statute, RCW 26.44.030 overrides his claims of privilege relating to the testimony of the treatment providers. On the second issue, the Court of Appeals notes that the defendant failed to cite any support for his argument, and rules that nothing in law requires that the State use a subpoena or other procedural device instead of a search warrant to obtain such medical records.

Result: Affirmance of Grays Harbor Superior Court convictions of Jack T. Hyder for second degree child molesting and second degree incest; Hyder's enhanced sentence of 12 years imprisonment is also affirmed.

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NEXT MONTH

The March 2011 LED will include an entry digesting and commenting on the Washington Supreme Court's decision adverse to the State by 5-4 vote in State v. Schultz, ___Wn.2d ___, ___P.3d ___, 2010 WL ___ (2011). The decision was issued on January 13, 2011. The deadline for any motion for reconsideration is February 3, 2011.

Schultz involved police response to a citizen's phone call reporting a male and female yelling at each other in a neighboring apartment. The majority opinion in Schultz holds that "mere acquiescence" by a resident in the apartment of concern to an entry by police (where police had not requested consent to entry) was not consent under article I, section 7 of the Washington constitution. The dissent in Schultz does not address the merits of the consent issue, but the dissent does criticize the majority for reaching what the dissent calls a "significant holding" on the consent issue. The dissent asserts that there was not full exploration of the consent issue by either the courts below or by the parties' briefing, and therefore the majority should not have addressed the issue. As we will discuss in greater detail next month, we think that the Schultz majority's mere-acquiescence-is-not-consent holding is not significant, and that it is in fact consistent with Fourth Amendment case law. See, for example, U.S. v. Shaibu, 920 F.2d 1423 (9th Cir. 1989).

The Schultz majority opinion's primary focus is on whether the facts of the case fail to support the holdings of the superior court and the Court of Appeals (which decided the case by unpublished opinion) that the "emergency aid exception" justified a non-consenting warrantless entry into the residence in light of the police officers' knowledge of facts that indicated a possible domestic violence situation. Both the majority and dissent recognize that the possibility of domestic violence should be considered by courts when evaluating whether the requirements of the emergency aid exception to the warrant requirement are met.

The majority and dissent disagree sharply, however, on whether a warrantless entry was warranted under the particular facts of this case, where: (1) upon arrival, the responding officers heard the continuing yelling from the apartment of concern; (2) the obviously agitated and flustered woman who answered their knock at the apartment door stated initially that no one

else was present in the home; and (3) her statement to that effect was quickly proved to be a lie when police questioned her about the male voice they had heard, she called to "Sam," and he emerged from a bedroom.

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INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCWS, AND TO WAC RULES

The Washington Office of the Administrator for the Courts maintains a website 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. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/court_rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at [http://www.supremecourtus.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Decisions" and then "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. Federal statutes are at [http://www.law.cornell.edu/uscode/].

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 2007, is at [http://www.leg.wa.gov/legislature]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The internet address for the Criminal Justice Training Commission's LED is [https://fortress.wa.gov/cjtc/www/led/ledpage.html], while the address for the Attorney General's Office home page is [http://www.atg.wa.gov].

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to Mr. Wasberg at (206) 464-6039; Fax (206) 587-4290; E Mail [johnw1@atg.wa.gov]. LED editorial commentary and analysis of statutes and court decisions express the thinking of the writers and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LEDs from January 1992 forward are available via a link on the Criminal Justice Training Commission Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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