



# Law Enforcement

# Digest

FEBRUARY, 1993

## HONOR ROLL

396th Session, Basic Law Enforcement Academy - October 1 through December 22, 1992

- President: *Officer John T. Sparks - Everett Police Department*
- Best Overall: *Deputy Ken Lewis - Clallam County Sheriff's Department*
- Best Academic: *Deputy Ken Lewis - Clallam County Sheriff's Department*
- Best Firearms: *Officer Jon A. Frazier - Lummi Law and Order*

Corrections Officer Academy - Class 176 - November 9 through December 11, 1992

- Highest Overall: *Officer Robert E. Plaske - Clallam Bay Corrections Center*
- Highest Written: *Officer John M. Phillips - Clallam Bay Corrections Center*
- Highest Practical Test: *Officer Thomas F. Gillespie - Clallam Bay Corrections Center*
- Highest in Mock Scenes: *Officer James P. Sullivan - Clallam Bay Corrections Center*
- Highest Defensive Tactics: *Officer Duane R. Bowman - Clallam Bay Corrections Center*

## FEBRUARY LED TABLE OF CONTENTS

I.	<b>MIRANDA NOTE</b> .....	3
II.	<b>BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT</b> .....	4
	DELAY OF A FEW HOURS BETWEEN END OF ATTACK AND VICTIM'S REPORT DOES NOT DISQUALIFY REPORT FROM "EXCITED UTTERANCE" STATUS UNDER HEARSAY RULE <i>State v. Strauss</i> , 119 Wn.2d 401 (1992) .....	4
	DRUG LAW'S ENHANCED PENALTY FOR DRUG-RELATED CRIME NEAR SCHOOL BUS ROUTE SURVIVES VAGUENESS, EQUAL PROTECTION CONSTITUTIONAL CHALLENGES <i>State v. Coria</i> , 120 Wn.2d 156 (1992) .....	5
	NEEDLE EXCHANGE PROGRAM NOT VIOLATIVE OF DRUG PARAPHERNALIA ACT <i>Health District v. Brockett</i> , 120 Wn.2d 140 (1992) .....	6
III.	<b>BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS</b>	
	STORAGE LOCKER HELD WITHIN SCOPE OF WARRANT TO SEARCH APARTMENT <i>State v. Llamas-Villa</i> , 67 Wn. App. 448 (Div. I, 1992) .....	6
	OPEN CONTAINER TRAFFIC INFRACTION DOESN'T JUSTIFY ARREST, NOR DOES FACT VIOLATOR CLAIMED THAT HIS ONLY ID WAS PICTURE-LESS COSTCO CARD <i>State v. Barwick</i> , 66 Wn. App. 706 (Div. III, 1992) .....	7

NO EXIGENCY, NO EMERGENCY WHERE OFFICERS TESTIFIED THAT THEY HAD NO REASON TO BELIEVE THAT ANYONE WAS STILL INSIDE JUST-BURGLERED RESIDENCE <u>State v. Muir</u> , 67 Wn. App. 149 (Div. I, 1992)	8
PRIOR CONTACT WITH POSSIBLE ARMED FELON JUSTIFIES FRISK DURING TRAFFIC STOP <u>State v. Collins</u> , 66 Wn. App. 157 (Div. I, 1992)	9
FIVE-SECOND WAIT AFTER KNOCK-AND-ANNOUNCE SATISFIES RCW 10.31.040 <u>State v. Garcia-Hernandez</u> , 67 Wn. App. 492 (Div. I, 1992)	9
LAW ALLOWING STOP BECAUSE OF LICENSE PLATE TAB INDICATING PRIOR "NO LICENSE" ARREST UPHELD IN FOURTH AMENDMENT AND ARTICLE 1, SECTION 7 CHALLENGES <u>Seattle v. Yeager</u> , 67 Wn. App. 41 (Div. I, 1992)	10
USE OF DRAWN GUNS TO APPROACH SUSPECT ON JUST-COMPLETED BURGLARY NOT NECESSARILY AN "ARREST" REQUIRING PROBABLE CAUSE TO SUPPORT STOP <u>State v. Smith</u> , 67 Wn. App. 81 (Div. I, 1992)	11
BUILDING INSPECTOR'S NON-CONSENTING ENTRY INTO HOUSE RULED UNLAWFUL <u>State v. Browning</u> , 67 Wn. App. 93 (Div. I, 1992)	11
FILM LAB MANAGER NOT POLICE AGENT IN GIVING PHOTO NEGATIVES TO POLICE; NO PRIVACY FOR NEGATIVES GIVEN TO COMMERCIAL DEVELOPER <u>State v. Walter</u> , 66 Wn. App. 862 (Div. I, 1992)	12
NO <u>IN CAMERA</u> HEARING RE ID OF CI WHERE ENTRAPMENT CLAIM UNSUPPORTED <u>State v. Vazquez</u> , 66 Wn. App. 573 (Div. II, 1992)	13
EVEN IF DEFENDANT CORRECTLY GUESSES ID OF CI, COURT NEED NOT TELL HIM OF CI'S <u>IN CAMERA</u> TESTIMONY IF CI NOT A POLICE AGENT OR WITNESS ON GUILT QUESTION <u>State v. Stansbury</u> , 64 Wn. App. 601 (Div. I, 1992)	14
BROAD EXCLUSIONARY PROVISION OF ELECTRONIC SURVEILLANCE STATUTE, RCW 9.73, MANDATES SUPPRESSION OF EVIDENCE WHERE OFFICERS MONITORED CONVERSATIONS WITHOUT COURT ORDER OR WRITTEN SUPERVISOR AUTHORIZATION <u>State v. Salinas</u> , 67 Wn. App. 232 (Div. I, 1992)	14
INDIRECT THREAT SUPPORTS CONVICTION FOR INTIMIDATING A JUDGE <u>State v. Hansen</u> , 67 Wn. App. 511 (Div. I, 1992)	15
MURDERER LOSES ON THEORY THAT HOSPITAL'S TERMINATION OF LIFE SUPPORT, NOT HIM, CAUSED DEATH OF HIS VICTIM WHO HAD BEEN IN A VEGETATIVE STATE <u>State v. Yates</u> , 64 Wn. App. 345 (Div. II, 1992)	16
DOCTRINE OF "IMPERFECT SELF-DEFENSE" DOES NOT APPLY IN WASHINGTON <u>State v. Bergeson</u> , 64 Wn. App. 355 (Div. II, 1992)	16
INTENTIONAL HIV EXPOSURE AS ASSAULT IS NOT UNCONSTITUTIONALLY VAGUE <u>State v. Stark</u> , 66 Wn. App. 423 (Div. II, 1992)	16

FACTUAL IMPOSSIBILITY NO DEFENSE TO ATTEMPTED DRUG POSSESSION <u>State v. Lynn</u> , 67 Wn. App. 339 (Div. I, 1992) .....	17
DWI ARRESTEE'S RIGHT TO PRE-BAC TEST CONSULT WITH COUNSEL SATISFIED WHERE PUBLIC DEFENDER CONTACTED BY PHONE, THOUGH PRIVATE ATTORNEY WAS NOT <u>Seattle v. Sandholm</u> , 65 Wn. App. 747 (Div. I, 1992) .....	18
"PROFESSIONAL RESCUER DOCTRINE" AND "FIREMAN'S RULE" GET NARROW READING; OFFICERS MAY SUE MEN WHO ASSAULTED THEM IN HOTEL DISTURBANCE <u>Ballou v. Nelson</u> , 67 Wn. App. 67 (Div. I, 1992) .....	19
EXCITED UTTERANCES BY THREE-YEAR-OLD ADMISSIBLE UNDER HEARSAY RULE <u>State v. Bryant</u> , 65 Wn. App. 428 (Div. I, 1992) .....	19
CCDR SENT BY "FAX" ADMISSIBLE AS PROOF DRIVING PRIVILEGE REVOKED <u>State v. Smith</u> (Timothy), 66 Wn. App. 825 (Div. I, 1992) .....	19
DETECTIVE LAWFULLY TESTIFIED ABOUT PIMP-PROSTITUTE RELATIONSHIP <u>State v. Simon</u> , 64 Wn. App. 948 (Div. I, 1991) .....	20
FINGERPRINT EXPERT CAN'T TESTIFY THAT ANOTHER EXPERT VERIFIED HIS ANALYSIS <u>State v. Wicker</u> , 66 Wn. App. 409 (Div. I, 1992) .....	20
TESTING OF RANDOM SAMPLE OF SEIZED COCAINE SUPPORTS CONVICTION <u>State v. Caldera</u> , 66 Wn. App. 548 (Div. I, 1992) .....	20
JUVENILES REQUIRED TO PAY FOR ASSAULT VICTIMS' COUNSELING <u>State v. Landrum</u> , 66 Wn. App. 779 (Div. I, 1992) .....	21
NO MARITAL PRIVILEGE WHERE DEFENDANT ACCUSED OF WITNESS TAMPERING WITH REGARD TO CHILDREN SO THEY WOULDN'T TESTIFY AGAINST HIM FOR RAPE <u>State v. Sanders</u> , 66 Wn. App. 878 (Div. I, 1992) .....	21

\*\*\*\*\*

### MIRANDA NOTE

#### MIRANDA CUSTODY TEST REVISITED -- MUNIZ IS IRRELEVANT TO CUSTODY ISSUE

In our comments on last month's LED entry, State v. Walton (Jeffrey), 67 Wn. App. 127 (Div. I, 1992) we promised to revisit the Miranda trigger question this month. We will limit our commentary this month to the question of whether Miranda warnings are required in roadside sobriety testing. We are told that some DWI defense attorneys are arguing that the U.S. Supreme Court decision in Pennsylvania v. Muniz, 496 U.S. 582 (1990) Aug. '90 LED:06 generally requires Miranda warnings prior to any and all roadside sobriety testing. We are surprised to hear that some lower court judges are accepting the argument.

If this is true, the courts are misreading Muniz. Miranda warnings are required when two conditions are present at the same time: (1) a person is in Miranda "custody" (the functional equivalent of arrest) and (2) the person is being "interrogated." The Muniz case has

absolutely nothing to do with the question of whether someone is in "custody" for Miranda purposes. The following cases decided prior to Muniz expressly hold that a person being subjected to roadside sobriety testing generally is not in custody for Miranda purposes -- Heineman v. Whitman County, 105 Wn.2d 796 (1986) July '86 LED:06, Berkemer v. McCarty, 468 U.S. 420 (1984) Oct. '84 LED:01, and Pennsylvania v. Bruder, 488 U.S. 9 (1988) May '89 LED:05. The Walton case digested in last month's LED at 9 follows the reasoning of those cases in holding that the subject of the MIP stop there was not in custody for Miranda purposes. Thus, Walton also supports the view that roadside sobriety testing is generally not custodial for Miranda purposes.

The Muniz case dealt only with the second element of the two-pronged trigger to Miranda, i.e., does the action of police constitute "interrogation." The Court's description of the facts in Muniz explains that the defendant was first subjected to roadside sobriety testing (to which tests no objection was or could be taken) and was later subjected to more sobriety testing at the stationhouse after arrest. Footnote 3 of the Muniz decision expressly notes with approval that the Pennsylvania courts had admitted Muniz's verbal admissions during the earlier roadside tests and questioning because "Muniz was not taken into custody for purposes of Miranda until he was arrested after the roadside tests were completed." (citing Bruder)

Thus, Muniz has no relevance to the custody issue under Miranda. In almost all DWI cases, it is only after a person has been arrested and transported to the stationhouse that any question should arise regarding which parts of the sobriety tests constitute "interrogation." The difficult question of what part of sobriety testing constitutes interrogation" was discussed in the August 1990 LED in our Muniz entry and will not be revisited here (other than to note that almost none of the tests constitute "interrogation" because they involve mere observation of physical behavior rather than questioning). However, we will revisit the custody issue and we will keep revisiting it -- functional arrest is the trigger to Miranda, and questions of what constitutes "interrogation" under Muniz are totally irrelevant where the person being field-tested for sobriety is not in a custody status that is the functional equivalent of arrest.

We cannot believe that the judge who carefully reviews the cases would disagree with our views on the limits of Muniz after reading Walton, Heineman, Bruder, Berkemer, Muniz, and State v. Short, 113 Wn.2d 35 (1989) Oct. '89 LED:13. We ask those officers who are getting "Munized" to show this commentary to your prosecutors. We would like someone to explain what we have missed.

Next month we will address another Miranda-related sobriety testing issue which has arisen in at least one municipal court. An Auburn Municipal Court judge has apparently ruled that drivers must be specially warned before field sobriety testing (a) that they are not required to perform field sobriety tests and (b) that their refusal to perform such tests will not be used against them. There is absolutely no legal authority for such a warnings requirement. While such a warning would accurately reflect the law -- people are not required to perform such tests -- no case and no statute requires a warning to this effect. What next? Required warnings on the door panels of police cars? More fun on this issue next month.

\*\*\*\*\*

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

**(1) DELAY OF A FEW HOURS BETWEEN END OF ATTACK AND VICTIM'S REPORT DOES NOT DISQUALIFY REPORT FROM "EXCITED UTTERANCE" STATUS** -- In State v. Strauss, 119 Wn.2d 401 (1992) the State Supreme Court rejects defendant's argument that the trial court erred in admitting a police officer's hearsay testimony regarding a rape victim's report of a rape. Defendant argued that the victim's report could not qualify under the "excited utterance" exception to the hearsay rule, pointing out that there was a delay of several hours between her escape from her attacker and her report to the investigating officer.

The Supreme Court's analysis is as follows:

An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." ER 803(a)(2). In this case, the defendant does not dispute that a sexual assault is a "startling event", or that D.E.'s statement referred to this event. The key determination is "whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment." The record supports the trial court's determination that D.E. was still under the influence of the incident when she made her statement to Officer Johal. When the officer took D.E.'s statement, D.E. was very distraught, very red in the face and crying. At the time, D.E. appeared to be in a state of shock resulting from the incident.

The defendant argues that the trial court erred in determining that D.E.'s statement to the officer qualified as an excited utterance because up to 3 1/2 hours might have passed between the time D.E. fled from Strauss until the time the officer met her at the gas station. The passage of time between the startling event and the declarant's statement is a factor to be considered in determining whether the statement is an excited utterance. The passage of time alone, however, is not dispositive. State v. Thomas, 46 Wn. App. 280, 284 (1986) **May '87 LED:15** (trial court did not err in determining that statements made after a 6- to 7-hour time span qualified as excited utterances); State v. Flett, 40 Wn. App. 277 (1985) (a statement made 7 hours after a rape was properly admitted as an excited utterance because of the declarant's "continuing stress" during that time period).

The trial court's determination that a statement falls within the excited utterance exception will not be disturbed absent an abuse of discretion. The record reflects that the trial court did not abuse its discretion in this case.

[Some citations omitted]

**Result:** King County Superior Court sentence for second degree rape reversed on grounds unrelated to the issue addressed above; case remanded to Superior Court for further sentencing proceedings.

**(2) DRUG LAW'S ENHANCED PENALTY FOR DRUG-RELATED CRIME NEAR SCHOOL BUS ROUTE SURVIVES VAGUENESS, EQUAL PROTECTION CHALLENGES** -- In State v. Coria, 120

Wn.2d 156 (1992) the Washington State Supreme Court rules, 6-3, that the portion of RCW 69.50.435 which enhances penalties for drug-related crimes committed within 1000 feet of a school bus route stop is neither unconstitutionally vague nor violative of constitutional equal protection requirements. Another portion of this section enhances penalties for drug-related crimes near schools; this portion of the statute is also constitutional. Result: Yakima County Superior Court convictions of defendant Coria and several other defendants affirmed; Court of Appeals ruling reversed.

(3) **NEEDLE EXCHANGE PROGRAM NOT VIOLATIVE OF DRUG PARAPHERNALIA ACT** -- In Health District v. Brockett, 120 Wn.2d 140 (1992) the State Supreme Court unanimously holds that a county health district has authority under chapter 70.24 RCW to conduct a needle exchange program notwithstanding the fact that delivery of hypodermic needles in other circumstances constitutes a violation of RCW 69.50.412(2) (drug paraphernalia act). Result: Spokane County Superior Court judgment for Spokane County Health District affirmed.

\*\*\*\*\*

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

(1) **STORAGE LOCKER HELD WITHIN SCOPE OF WARRANT AUTHORIZING SEARCH OF APARTMENT** -- In State v. Llamas-Villa, 67 Wn. App. 448 (Div. I, 1992), the Court of Appeals reviews a scope-of-the-warrant search issue under the following facts (as described by the Court):

On January 7, 1990, at 12:45 a.m., four officers executed a search warrant at Llamas's apartment. The search warrant authorized the search of "[t]he apartment located at 3301 NE 123rd #101, in the City of Seattle" and the seizure of:

Cocaine, items used to weigh, package and prepare narcotics for use or sale, records of customers and records of sales indicative of narcotics trafficking, narcotics paraphernalia, US Currency as the proceeds of narcotics trafficking, papers of dominion and control over the residence, and firearms used to protect the narcotics and money from robbery or police intervention.

... [Finding no evidence in the apartment or on Llamas's person, other than a set of keys on a key ring, one of the officers, Nicholson, left the apartment.] Once outside, he noticed a door marked "storage" immediately to his right. The door was located a couple of feet from the front door of Llamas's apartment. Nicholson opened the door and entered a room containing several lockers, some of which had locks on them. One of the lockers was labeled "101" and was padlocked. Nicholson believed that the locker was a storage locker for apartment 101. He returned to Llamas's apartment to get the ring of keys found on Llamas and began trying each key in the padlock. One of the keys opened the padlock and Nicholson looked in the locker. He found an open paper sack containing cocaine, heroin, a .22 Ruger handgun and approximately \$3,200 in cash.

Robert Jarvis, the manager of the apartment complex, testified that part of the rental fee for each unit included use of a storage locker located in the apartment complex. He also testified that Llamas became a tenant of apartment 101 in November of 1989 and was a tenant when officers searched his apartment. Jarvis stated that the door to the room containing the storage lockers was supposed to be locked, but that "the doors don't shut up all the way."

Following execution of the search warrant, Llamas was charged by information with one count of possession of cocaine with intent to manufacture or deliver, in violation of RCW 69.50.401(a). Llamas moved to suppress evidence seized during the search of the padlocked locker located in the storage room next to his apartment. The trial court denied Llamas's motion. Finding that the relevant facts were undisputed, the trial court reasoned that (1) the detective objectively and reasonably believed locker 101 belonged to the apartment, (2) the storage locker was functionally equivalent to an attic or basement, (3) the search warrant did not exclude a storage locker, (4) the locker was in close proximity to the apartment, and (5) there was no indication that the magistrate would not have included the locker had the police been aware of the floor plan of the apartment building.

A jury convicted Llamas as charged and he received a sentence in the standard range.

Acknowledging that the scope-of-the-warrant issue was a close one, the Court of Appeals rules for the State. After discussing several case precedents, the Court of Appeals holds as follows:

Based on the above cases, we conclude that the storage locker labeled "101" was not a place different or separate from Llamas's apartment, and that the search of the storage locker fell within the scope of the warrant to search Llamas's apartment. We point out, however, that the authority of the police to search lockers located in the storage room was strictly limited to the locker appurtenant to Llamas's apartment.

Result: King County Superior Court conviction for possessing a controlled substance with intent to manufacture or deliver affirmed.

#### LED EDITOR'S COMMENT:

We feel that this case presented a very close question, and that if the storage room had been located -- (a) in the basement, (b) on another floor, or (c) even a significant distance down the hall with a secure door -- the ruling might well have been different. Accordingly, we would recommend generally that a second warrant be obtained if, during the execution of a search warrant for an apartment, officers learn of a storage locker located in a different area of the apartment building, and the search warrant fails to expressly address the storage locker.

(2) OPEN CONTAINER TRAFFIC INFRACTION DOESN'T JUSTIFY ARREST, NOR DOES FACT THAT VIOLATOR CLAIMED THAT HIS ONLY ID WAS A PICTURE-LESS COSTCO CARD -- In State v. Barwick, 66 Wn. App. 706 (Div. III, 1992) the Court of Appeals rules that a search of Barwick's wallet by a state trooper was unlawful and that drugs the trooper discovered in

the wallet were therefore inadmissible. Barwick was a passenger in a vehicle the trooper lawfully stopped for a traffic violation. Barwick was in possession of an open beer and was properly subject to an infraction citation under the motor vehicle open container law, RCW 46.61.519(2). When the trooper asked Barwick for identification, Barwick initially appeared to hesitate, and he then produced only a picture-less Costco card with his name on it.

Sensing that Barwick was being furtive and trying to keep him from looking at the wallet, the trooper directed Barwick to lay his wallet on the hood of the car so that its contents could be inspected for ID. As Barwick complied and the trooper shined his flashlight on the wallet, the trooper saw a bundle of what later tested to be cocaine.

The Court of Appeals rules that on these facts the trooper lacked authority to make a custodial arrest of Barwick, and therefore lacked authority to: (a) search Barwick as an incident of arrest, or (b) even make him turn over the wallet for an ID check. The trooper's sense of Barwick's furtiveness with the wallet is dismissed by the Court of Appeals as perhaps nothing more than ordinary nervousness of a citizen stopped by a law enforcement officer.

Result: Benton County Superior Court conviction for possession of a controlled substance reversed. Status of case: decision final, no petition for review filed.

LED EDITOR'S COMMENT: While this was a very close case in our estimation, and we tend toward agreement with the result on the facts described by the Court, we are troubled by the Court's apparent dismissal of the trooper's testimony about Barwick's furtiveness with the wallet. Ordinarily, the trial court is deferred to on such purely factual matters. That is because the trial court observes the demeanor of the witnesses. We haven't seen the transcript, but we would guess that the trooper's testimony was that the furtiveness with the wallet was unusual and was unlike the ordinary nervousness observed in many people during a traffic stop. If not, and if the facts would have supported it, both the report and the testimony should have detailed this point.

(3) **NO EXIGENCY, NO EMERGENCY WHERE OFFICERS TESTIFIED THAT THEY HAD NO REASON TO BELIEVE ANYONE WAS STILL INSIDE JUST-BURGLERED RESIDENCE** -- In State v. Muir, 67 Wn. App. 149 (Div. I, 1992) the Court of Appeals holds that where law enforcement officers who responded to a burglary call testified that they had no reason to believe any burglars or occupants remained in the residence when they arrived at the scene, the officers had no authority to go inside the residence. According to the Court of Appeals, the officers' testimony was that at the time of their entry they did not believe any burglars remained in the house or that any other person was in the house. They apparently waited for 30 minutes or more after their arrival before entering the house.

In light of this testimony, the Court of Appeals holds that neither the exigent circumstances exception nor the emergency exception to the warrant requirement justified the warrantless, nonconsenting entry into the house. Accordingly, the Court of Appeals rules that the search was unlawful. Therefore, the Court suppresses the evidence (a marijuana grow operation) observed during the unlawful search.

Result: King County Superior Court conviction for possession of a controlled substance with intent to deliver reversed.

#### LED EDITOR'S COMMENT:

We haven't read the transcript so we have little idea of the testimony, but it seems to us that the officers at the scene made some major assumptions if they testified as indicated by the Court of Appeals. Unless the house was transparent, we would think that the facts known on arrival at the scene would have allowed them to assert that it was necessary to check inside for accomplices and possible assault victims, notwithstanding statements to the contrary by the suspects.

(4) **PRIOR CONTACT WITH POSSIBLE ARMED FELON JUSTIFIES FRISK DURING TRAFFIC STOP** -- In State v. Collins, 66 Wn. App. 157 (Div. 1, 1992) the Court of Appeals rules 2-1 that police lawfully did a frisk of defendant during a traffic stop (for defective brake lights). One of the officers involved in the stop was aware that Michael Floyd Collins had been arrested a few months before on a felony warrant and had had a holster and bullets (but apparently no gun) in his vehicle at the time of the arrest. These facts, according to the majority (but not the dissent) justified the frisk of Collins during the traffic stop, and hence the bundle of speed that fell out of Collins' pocket during the frisk was lawfully seized. **Result:** King County Superior Court conviction for possession of a controlled substance affirmed. **Status:** the defendant's petition for review was granted by the State Supreme Court on October 27, 1992. Oral argument will be heard sometime in 1993.

(5) **FIVE-SECOND WAIT AFTER KNOCK-AND-ANNOUNCE SATISFIES RCW 10.31.040 UNDER TOTALITY OF THE CIRCUMSTANCES** -- In State v. Garcia-Hernandez, 67 Wn. App. 492 (Div. 1, 1992) the Court of Appeals finds no violation of the knock-and-announce rule of RCW 10.31.040 under the following circumstances (as described by the Court of Appeals):

On July 14, 1990, a Seattle Police narcotics team served a search warrant on defendant Garcia-Hernandez. Sergeant Ed Caalim testified that the target residence was located in a multistory apartment building with a communal front porch. Each apartment's front entrance was located off the porch on the main level. The narcotics team approached the apartment building around 1:30 a.m. It was a hot summer night, and there were about 10 people on the porch. The detectives pulled up to the building in plain cars and parked in front. They were wearing jackets with large letters on the front and back identifying them as "Police", and baseball caps that also read "Police". As the detectives began to exit their cars, Sergeant Caalim heard "someone yelling something" and saw about four people scramble off the porch into the apartments. Sergeant Caalim did not recall seeing anyone run into the target residence, apartment A.

Afraid that someone on the porch might alert the occupants of apartment A that the police were approaching, Sergeant Caalim directed some of the officers to detain the remaining people on the porch, and he and another detective approached apartment A. The front door to the apartment was ajar. Sergeant Caalim pushed it open further, and twice yelled, "Seattle Police, search warrant." The officer waited about 5 seconds after identifying himself, and then entered the apartment. To Sergeant Caalim's left was a dark living room, to his right, a lighted hallway. The detectives went down the hallway to a bedroom. The door was slightly ajar. Sergeant Caalim pushed the door open and again yelled "police" in English and in Spanish. He found the defendant sitting on his bed in the room, holding a plate.

...  
After hearing the testimony, the trial court ruled that the police substantially complied with the "knock and announce" rule, codified in RCW 10.31.040. The court therefore denied the defendant's motion to suppress evidence of cocaine found during the detectives' search of the apartment.

After discussing several prior cases on the knock-and-announce rule, and noting that police knock-and-announce procedures will be looked at less restrictively when entry is under a warrant than without, the Court of Appeals explains its position that the five-second wait between knock and entry was reasonable under the facts of this case:

Here . . . the officers announced their identity and purpose in compliance with the statute. Further . . . the police here were justified in suspecting that the commotion on the porch in response to the officers' approach to the apartment building may have alerted the defendant to their presence. Further, even though Sergeant Caalim did not see anyone go into the defendant's apartment, his concern that someone on the porch may have warned the defendant that police were approaching was reasonable given the number of people on the porch and the flurry of activity that ensued upon the officers' approach. In addition, had the police waited long, they would have risked the possibility that the drugs would be destroyed. Finally, the fact that the apartment door was open indicated that the apartment was occupied and that it was unlikely that the occupants were asleep. This supports the inference that the defendant heard the officer's announcement and did not respond. Under these circumstances, we conclude that the 5-second delay was reasonable, and that the defendant's failure to respond during that time was an implicit denial of admission.

Result: King County Superior Court conviction for possession of a controlled substance with intent to deliver affirmed.

#### LED EDITOR'S COMMENT:

Knock-and-announce cases are looked at on a case-by-case basis. While entry after a five-second post-knock wait was upheld here, in some search warrant execution cases a five-second wait will not be adequate. Assuming no exigent circumstances (which would justify dispensing with knock-and-announce altogether), a slightly longer wait would probably be necessary after a late-night knock-and-announce on a closed door of a house where the occupants have apparently retired for the evening.

(6) LAW ALLOWING STOP BECAUSE OF LICENSE PLATE TAB INDICATING PRIOR "NO LICENSE" ARREST UPHeld IN FOURTH AMENDMENT AND ARTICLE 1, SECTION 7 CHALLENGES -- In Seattle v. Yeager, 67 Wn. App. 41 (Div. I, 1992) the Court of Appeals for Division I upholds RCW 46.16.710 against State (article 1, section 7) and Federal (Fourth Amendment) constitutional attacks. The statute authorizes an officer to stop a motor vehicle being operated with a license plate which has been tabbed to indicate that the registered owner was previously arrested for violation of one of the following license laws -- RCW

Court conviction and of King County Superior Court order which had affirmed the conviction.

**(7) USE OF DRAWN GUNS TO APPROACH SUSPECT ON JUST-COMPLETED BURGLARY NOT NECESSARILY AN "ARREST"** -- In State v. Smith, 67 Wn. App. 81 (Div. I, 1992) the Court of Appeals rejects defendant's argument that police officers' use of drawn guns to approach him as a night-time burglary suspect converted a lawful Terry stop (which would be supportable on reasonable suspicion) into an arrest (supportable only on probable cause). The Court of Appeals rejects his argument, declaring:

A police officer is entitled to use a drawn weapon during an investigative stop if there is "[a] founded suspicion" for the officer's belief that a suspect is armed and presently dangerous. State v. Belieu, 112 Wn.2d 587 (1989) [Sept. '89 LED:17]. Here, the officers were responding to reports of actual crimes, specifically, residential burglaries. Smith matched the description provided and was stopped leaving the area of the crimes. We have previously noted that "[i]t is well known that burglars often carry weapons", State v. Harvey, 41 Wn. App. 870 (1985) (officers justified in conducting patdown of burglary suspect). Under these circumstances, we conclude that the officers did not act unreasonably in approaching Smith with their guns drawn.

**Result:** King County Superior Court convictions for second degree burglary (three counts) affirmed.

#### **LED EDITOR'S COMMENTS:**

**(1) No Per Se "Drawn Guns" Rule** -- While officer safety is foremost over exclusionary rule considerations, not all suspected burglars justify drawn guns for the stop. A day-time stop of an otherwise unthreatening burglary suspect in a T-shirt and jeans probably would not merit drawn guns without significant indicators of a weapon.

**(2) More Miranda Custody Or Lack Thereof** -- In a recent unpublished opinion on the Miranda "custody" issue (see comment at 3-4 above), the Court of Appeals for Division I relied on the Belieu case (cited in the above-quoted analysis) in holding that questions in the gun-point Terry stop of a dangerous felon were not "custodial" questioning under Miranda. While Miranda warnings, where practicable, are advisable in such close "custody" cases, that case illustrates that the appellate courts will usually get it right if the right arguments are made.

**(8) BUILDING INSPECTOR'S NON-CONSENTING ENTRY INTO HOUSE RULED AN UNLAWFUL SEARCH** -- In State v. Browning, 67 Wn. App. 93 (Div. I, 1992) the Court of Appeals holds that where a building inspector entered a newly constructed house to conduct a "final inspection" without the consent of the occupants who were then present at the house the nonconsenting entry was in violation of the Uniform Building Code and was therefore an unlawful search. Accordingly, the Court of Appeals suppresses the evidence (a marijuana grow operation) observed during the building inspector's unlawful entry. **Result:** Snohomish County Superior Court conviction for possession of a controlled substance with intent to deliver reversed.

**(9) FILM LAB MANAGER NOT POLICE AGENT IN DELIVERING PHOTO NEGATIVES TO POLICE; NO CONSTITUTIONAL PRIVACY PROTECTION FOR NEGATIVES GIVEN TO**

(9) **FILM LAB MANAGER NOT POLICE AGENT IN DELIVERING PHOTO NEGATIVES TO POLICE; NO CONSTITUTIONAL PRIVACY PROTECTION FOR NEGATIVES GIVEN TO COMMERCIAL DEVELOPER ANYWAY** -- In State v. Walter, 66 Wn. App. 862 (Div. I, 1992) the Court of Appeals rejects defendant's challenge to the admission of photographs admitted into the evidence by the trial court in his prosecution for preparing counterfeit drivers' licenses. The process by which the photographs came into the hands of the police is described by the Court of Appeals as follows:

Walter took photographs of individuals under the age of 21 in front of a large mockup of the emblem of the state of Tennessee. The photographs were to be utilized in the preparation of counterfeit (facsimile) Tennessee driver's licenses of those individuals. Walter delivered the negatives of the photographs to a commercial film processor to have prints made. The manager of the film lab processing the negatives contacted the police when she saw the negatives. The manager was concerned about potential liability for making prints from the negatives. In response to the contact from the film lab, a police detective requested copies of the prints. The film lab complied and provided the police with a set of the prints. The individuals in the photographs were subsequently identified and interviewed. Several of those individuals testified at trial regarding the nature of the photographs and their intended use of the preparation of counterfeit identification.

The Court of Appeals holds that under these facts: (1) defendant failed to establish that the government was involved in any search activity because he failed to show sufficient police involvement in the photo lab's: (a) discovery of the negatives and (b) decision to turn them over to the police (AND HENCE THE SEARCH WAS A "PRIVATE" SEARCH NOT SUBJECT TO THE EXCLUSIONARY RULE UNDER FEDERAL OR STATE CONSTITUTIONAL PRIVACY PROVISIONS), and, alternatively, (2) defendant had no reasonable expectation of privacy in the contents of negatives he turned over to a commercial photo-processing firm (AND HENCE THERE WAS NO PRIVACY PROTECTION IN THE NEGATIVES).

Result: King County District Court conviction for preparing counterfeit drivers' licenses under RCW 66.44.328 affirmed.

LED EDITOR'S NOTE: The Court of Appeals also rules that the preparing of a counterfeit identification card for use in purchasing alcohol is by itself a violation of RCW 66.44.328; the prosecution need not show that the counterfeiter actually supplied the identification to someone under age 21. Supplying false identification to a person under age 21 is one basis for criminal liability under RCW 66.44.328; the act of counterfeiting ID for alcohol purchase is a separate basis for liability.

LED EDITOR'S COMMENT: While we agree with the Court of Appeals on the "private citizen" issue, we question the Court's declaration that there is no privacy protection in negatives delivered to a commercial film processor. If garbage in a can awaiting curbside pickup is protected (as it is under the State constitutional reading in State v. Boland -- see Jan. '91 LED at 02) and telephone toll records are protected (as they are under State v. Gunwall, 106 Wn.2d 54 (1986) Aug. '86 LED: 04) then we think there is a good chance that film at a film-processor is also protected under the State Constitution. Therefore, we think that if a law enforcement agency wishes to obtain negatives or photographs from a film lab, and the film

lab hasn't come forward with the evidence on its own volition, a search warrant should be sought.

**(10) NO NEED FOR IN CAMERA HEARING RE IDENTITY OF CI WHERE ENTRAPMENT CLAIM UNSUPPORTED** -- In State v. Vazquez, 66 Wn. App. 573 (Division II, 1992) the Court of Appeals rejects the argument of two appellants that the trial court erred when it denied their request for an in camera hearing (such hearings involve only the judge, the prosecutor, the police and their CI) to determine the identity of the confidential informant.

The police testified in the case that their CI had identified one of the two defendants as someone with whom they could negotiate a cocaine purchase by telephone. In the phone conversation they arranged a purchase of a half kilo of cocaine and a half ounce of heroin for \$10,000.

The deal was to be completed at a motel selected by the defendant, according to police. On the date, time and place allegedly selected by defendant, the deal was partially completed (one of the defendants had a cocaine package concealed under his shirt and a packet of heroin in his boot) at which point arrests were made.

Prior to trial, defendants requested an in camera hearing to learn the identity of the CI, telling a story described by the Court of Appeals as follows:

Vazquez testified at a pretrial hearing that a "fat man" approached him in Yakima and offered him employment in Tacoma. He said that this man drove him and Valdez to Tacoma and paid for their motel room. Finally, he said that the man gave Vazquez a package, told him to conceal it in his pants and "deliver it when the friend got there, when the other guy got there, and that he would leave some money there." Vazquez also testified that he had no knowledge of the package of heroin, which was found concealed in his boot following his arrest. Neither Valdez nor Vazquez offered any more than pure speculation that the "fat man" was the informant or that he was in any way connected with law enforcement. Neither did they allege that this man lured or induced them into agreeing to commit a crime they would not otherwise commit. Rather, Vazquez appeared to suggest, at the pretrial hearing, that he unwittingly possessed the drugs in question. Valdez's counsel argued, simply, that Valdez had no knowledge of what had occurred in the motel room.

In rejecting the defendants' argument for an in camera hearing, the Court of Appeals explains:

The record of the pretrial hearing shows that the police report contradicts Vazquez's assertion that he did not know what was in the package. Furthermore, it appears that the police report showed that Valdez was aware of the contents of the package and that he acted as a lookout during the transaction. Certainly, the defendants' acts of negotiating with Koppisch [the undercover officer] during the transaction evidenced an intent to deliver drugs and conflicts with their claim of unwitting possession.

Our Supreme Court has held that an informant was not a material witness when the facts alleged by the defendant failed, as a matter of law, to establish a defense of entrapment. . . .

In short, Vazquez and Valdez have offered no evidence to establish that the "fat man" likely was the informant who set up the initial telephone call between Koppisch and Vazquez or that he was a government agent. Even assuming that they made such a showing, they have failed to show that this person is a material witness who can offer evidence that is relevant. The culpability of the defendants is based almost entirely on their behavior in the motel room. Because no one other than the defendants and Officer Koppisch was present during the drug transaction, the informant could not offer evidence bearing on what transpired. The informant, in short, is not a witness who would be helpful to the defendants and we cannot say, therefore, that the trial court's denial of the defendants' request for an in camera hearing was manifestly unreasonable or exercised on untenable grounds for untenable reasons.

**Result:** Pierce County Superior Court conviction under UCSA (possession with intent to deliver) of Ofelio Vazquez and Jose Valdez affirmed.

**(11) EVEN IF DEFENDANT CORRECTLY GUESSES ID OF CI, COURT NEED NOT TELL HIM OF CI'S IN CAMERA TESTIMONY IF CI NOT A POLICE AGENT OR GUILT WITNESS --** In State v. Stansbury, 64 Wn. App. 601 (Div. I, 1992) the Court of Appeals reviews Stansbury's convictions for drug offenses. Stansbury had challenged the search warrant under which the drugs had been seized, arguing that because the trial court determined in an in camera proceeding that defendant had correctly guessed the identity of the confidential informant, the trial court should have disclosed to him the informant's testimony in the in camera hearing.

Rejecting this argument, the Court of Appeals rules that only if the confidential informant had turned out to be -- (1) a person acting under the close direction and control of the police, or (2) a person whose testimony would have been relevant to the issue of guilt or innocence in the case -- would the informer's privilege not apply. The sealed transcript from the trial court's in camera proceedings did not show either, the Court of Appeals rules, and therefore the in camera transcript may remain sealed. **Result:** Island County Superior Court convictions (two counts under UCSA) affirmed.

**(12) BROAD EXCLUSIONARY PROVISION OF ELECTRONIC SURVEILLANCE STATUTE, RCW 9.73, MANDATES SUPPRESSION OF EVIDENCE WHERE OFFICERS MONITORED CONVERSATIONS WITHOUT COURT ORDER OR WRITTEN SUPERVISOR AUTHORIZATION -** In State v. Salinas, 67 Wn. App. 232 (Div. I, 1992) the Court of Appeals rules in a 2-1 decision that where an undercover law enforcement officer wore a body wire with recording capacity during a drug buy with no statutory authority to do so, all evidence obtained by the officer during the transaction (including visual observations) was inadmissible under the broad exclusionary provision of the electronic surveillance statute at RCW 9.73.050.

Except under very limited circumstances, single-party consent interception or recording of private conversations through use of electronic equipment is unlawful unless the use of such equipment is authorized by either a court order or, in some drug investigation circumstances, by written approval from an officer above the level of first-line supervisor. The Court of Appeals rules that all evidence obtained where an officer wears a wire without such required authorization, even where the use of the wire does not aid the gathering of evidence, will result in suppression of all observations by the officer during the transaction.

Accordingly, the majority rules that the undercover officer's observations here must be stricken from a search warrant affidavit which described the drug buy. Without this information the affidavit did not establish probable cause for a search, and hence the illegal drugs seized under the warrant were inadmissible. Result: King County Superior Court conviction for possession of a controlled substance with intent to deliver reversed.

**(13) INDIRECT THREAT TOWARD JUDGE SUFFICIENT TO SUPPORT CONVICTION FOR INTIMIDATING A JUDGE** -- In State v. Hansen, 67 Wn. App. 511 (Div. I, 1992) the Court of Appeals reviews sufficiency-of-the-evidence and attorney-client-privilege arguments under the following circumstances (as described by the Court of Appeals):

On March 6, 1990, Hansen telephoned Chris Youtz, an attorney whose name Hansen obtained from a referral service. Hansen told Youtz that he had been conspired against at trial and was wrongly sent to prison by a "kangaroo court". Although Hansen did not mention Judge Dixon specifically, he did refer to the prosecutor and public defender by name. Believing that a civil rights action under 42 U.S.C. § 1983 would be fruitless, Youtz told Hansen that he would not handle the case. Youtz explained, however, that he did not practice criminal law and that Hansen could always consult an attorney with more expertise in that area or contact the lawyer referral service again. Upon hearing this, Hansen became "very upset" and stated:

"When you say I am not going to get any help from the Bar, I am not going to get any help from anybody" . . . "What I am going to do," . . . "I am going to get a gun and blow them all away, the prosecutor, the judge and the public defender."

After speaking to Youtz for several more minutes, Hansen ended the conversation. Youtz, who was concerned, consulted with the bar association and his law partner, and then telephoned the prosecutor. When the prosecutor told him that Judge Dixon had presided over Hansen's trial, Youtz telephoned the judge and described his conversation with Hansen. Youtz later explained that he:

was convinced that some action very well could be taken against these individuals, the prosecutor, the judge and the public defender, and . . . it was that concern that helped me call them and warn them.

After an investigation, Hansen was arrested and charged with intimidating a judge, RCW 9A.72.160. Prior to trial, Hansen moved to preclude all statements made during his telephone conversation with Youtz, claiming that they were protected by the attorney-client privilege. The trial court denied the motion, however, concluding that there was no attorney-client relationship when the threat was made and that, in any event, the statements were made in the furtherance of future criminal activity. Hansen was subsequently convicted in a 1-day bench trial. The court found that Hansen indirectly communicated a threat to Judge Dixon because the judge had sentenced him to prison.

[Emphasis added]

The Court of Appeals affirms the conviction, ruling that Hansen's statement to attorney Youtz was a "threat" within the meaning of RCW 9A.72.160. The Court also rules that the Superior Court was correct in rejecting Hansen's attorney-client-privilege argument -- not only was there no attorney-client relationship when the statement was made but, in any event, statements relating to future criminal acts are not covered by the privilege.

**Result:** King County Superior Court conviction for intimidating a judge affirmed.

**(14) MURDERER LOSES ON THEORY THAT HOSPITAL'S TERMINATION OF LIFE SUPPORT, NOT HIM, CAUSED DEATH OF HIS VICTIM** -- In State v. Yates, 64 Wn. App. 345 (Div. II, 1992) the Court of Appeals holds: (1) that a person charged with murder has no standing to bring a court action to keep a would-be murder victim on life support systems; (2) that the State's duty to preserve evidence does not require that the State maintain the life of a would-be murder victim in a permanent vegetative condition; (3) that, in any event, failure to preserve evidence violates a person's due process rights only if the government acts in bad faith (and there was no bad faith here in the family's decision to allow hospital personnel to terminate life support); and (4) that when life support is removed from a person in a permanent vegetative state, the legally cognizable cause of death is the act that generated the need for the life support, not the removal of the life support. **Result:** aggravated first degree murder conviction and sentence of life without parole by Pierce County Superior Court affirmed; other convictions and sentences for three counts of rape in the first degree and two counts of attempted murder in the first degree were not challenged by defendant. This case was prosecuted by the Kitsap County Prosecutor's Office in Pierce County after a change of venue.

**(15) DOCTRINE OF "IMPERFECT SELF-DEFENSE" DOES NOT APPLY IN WASHINGTON** -- In State v. Bergeson, 64 Wn. App. 355 (Div. II, 1992) the Court of Appeals rejects defendant's argument that the trial court should have given a manslaughter instruction to the jury considering a murder charge. In so doing the Court of Appeals rejects defendant's invitation to apply the so-called "imperfect self defense" doctrine. The Court of Appeals explains that the "imperfect self defense" doctrine followed in some other jurisdictions allows a defendant to argue that he is guilty only of manslaughter, rather than murder, by showing that he subjectively believed: (a) that he was in imminent danger of great personal injury and (b) that he was using only the amount of force necessary to repel the danger, even though this fear was not objectively justified under the "reasonable man" test. The Court of Appeals rules that only the "perfect self-defense" rule applies in Washington, and that this rule requires that the use of force be both objectively and subjectively justified (in which case there is a total defense).

**Result:** Clallam County Superior Court conviction for second degree murder affirmed.

**(16) STATUTE MAKING INTENTIONAL HIV EXPOSURE SECOND DEGREE ASSAULT IS NOT UNCONSTITUTIONALLY VAGUE** -- In State v. Stark, 66 Wn. App. 423 (Div. II, 1992) defendant unsuccessfully challenges three convictions for second degree assault for intentionally exposing his sexual partners to HIV. The Court of Appeals rejects defendant's claim that the following statutory language at RCW 9A.36.021(1)(e) is unconstitutionally vague:

"(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: . . . (e) With intent

to inflict bodily harm, exposes or transmits human immunodeficiency virus as defined in chapter 70.24 RCW; . . ."

The Court also rejects defendant's argument that there was insufficient evidence of his "intent to inflict bodily harm" under the statute, explaining as follows:

The testimony supporting the element of intent to inflict bodily harm includes Dr. Locke's statements detailing his counseling sessions with Stark. With regard to the first victim, we know that Stark knew he was HIV positive, that he had been counseled to use "safe sex" methods, and that it had been explained to Stark that coitus interruptus will not prevent the spread of the virus. . . . With regard to the later victims, we have, in addition to this same evidence, Stark's neighbor's testimony that Stark, when confronted about his sexual practices, said, "I don't care. If I'm going to die, everybody's going to die." We also have the testimony of the victim in count 2 that Stark attempted to have anal intercourse with her and did have oral sex, both methods the counselors told Stark he needed to avoid. See also Commonwealth v. Brown, \_\_\_ Pa. Super. \_\_\_, 605 A.2d 429 (1992) (Defendant threw his feces into face of prison guard. Court found that there was sufficient evidence to support finding of intent to inflict bodily harm when defendant had been counseled by both a physician and a nurse about being tested HIV positive and that he could transmit the virus through his bodily fluids.); State v. Haines, 545 N.E.2d 834 (Ind. Ct. App. 1989) (sufficient evidence to convict of attempted murder when defendant, knowing he was HIV positive, spit, bit, scratched, and threw blood at officer) Scroggins v. State, 109 Ga. App. 29, 401 S.E.3d 13 (1990) (sufficient evidence to convict of aggravated assault with intent to murder when defendant, knowing he was HIV positive, sucked up excess sputum, bit an officer, and laughed about it later) . . .

**Result:** Clallam County Superior Court convictions for second degree assault affirmed.

(17) **FACTUAL IMPOSSIBILITY NO DEFENSE TO ATTEMPTED POSSESSION OF CONTROLLED SUBSTANCE, RCW 69.50.407** -- In State v. Lynn, 67 Wn. App. 339 (Div. I, 1992) the State Court of Appeals holds that the following general provision at RCW 9A.28.020(2) applies to a charge of attempted possession of a controlled substance:

If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission.

Accordingly, the Court of Appeals affirms Christopher Lynn's conviction under RCW 69.50.407 for attempt to commit a controlled substance offense where he was fooled into buying a package of aspartic acid from an undercover police officer.

**Result:** Snohomish County Superior Court convictions for delivery (two counts) and attempted possession (one count) of a controlled substance affirmed.

**(18) DWI ARRESTEE'S RIGHT TO PRE-BAC TEST CONSULT WITH COUNSEL SATISFIED WHERE PUBLIC DEFENDER CONTACTED BY PHONE, AND ARRESTEE'S PRIVATE ATTORNEY COULD NOT BE CALLED DUE TO SCAN AUTHORIZATION PROBLEM -- In Seattle v. Sandholm, 65 Wn. App. 747 (Div. I, 1992) the Court of Appeals holds that a DWI arrestee's right to counsel was not violated under the following facts (as described by the Court):**

Sandholm told Officer Abraham that he wished to talk to his family attorney in Tacoma. He indicated that despite the late hour he could reach his attorney at home. He further stated that he had a telephone credit card with which he could pay for the call.

Officer Abraham informed Sandholm that he could not call the attorney in Tacoma "from where we were at because . . . the telephone system wouldn't allow me to dial long distance without a SCAN number which I didn't have and nobody in our unit had. . . . So, there was no way we could access the SCAN system to allow Mr. Sandholm to contact the attorney he wished in Tacoma".

Officer Abraham told Sandholm that he could talk to a public defender, but Sandholm insisted on speaking with his own attorney. Sandholm was so adamant about talking with the attorney, Officer Abraham insisted that he speak with the public defender. Officer Abraham then placed a call to Leslie Garrison of the Seattle-King County Public Defender Association. Officer Abraham handed the phone to Sandholm and moved away to permit Sandholm to talk to the attorney. The conversation lasted approximately 8 to 10 minutes.

Despite having spoken with the public defender, Sandholm continued to demand the opportunity to speak with his family attorney in Tacoma. Officer Abraham, in turn, tried to explain why that was not possible. When Sandholm was offered an opportunity to take the BAC Verifier Data Master Test, he refused to take the test until he could speak with his attorney or have the attorney present. Officer Abraham then cited Sandholm for driving while intoxicated and released him.

The Court of Appeals holds that there was no violation of Sandholm's right to counsel under Washington Court Rule CrRLJ 3.1 under these facts because the rule requires only that the DWI arrestee be given a reasonable opportunity to consult a lawyer:

Sandholm was not only provided an opportunity to contact a lawyer, he did contact a lawyer, namely Leslie Garrison. Although Garrison was a public defender and Sandholm wished to speak with his family attorney in Tacoma, nothing in the rule provides for access to counsel of your choice. Sandholm has not cited any case law standing for the proposition that the rule contemplates a right to access to counsel of choice nor are we aware of any. Accordingly, the Municipal Court's determination that Sandholm was denied his right to access to counsel pursuant to CrRLJ 3.1 is erroneous.

The Court of Appeals also notes that even if there had been a violation of Sandholm's right to an opportunity for attorney contact, the proper remedy for such a violation is suppression of any evidence obtained after the violation, not dismissal of the charges as occurred here.

Result: case remanded to Seattle Municipal Court for trial.

**LED EDITOR'S COMMENT:** Perhaps this is obvious, but . . . even though the government prevailed under these facts, we think that if an agency's phone system will accommodate a credit card call as requested here then it should be permitted.

**(19) "PROFESSIONAL RESCUER DOCTRINE" AND "FIREMAN'S RULE" GET NARROW READING; OFFICERS MAY SUE MEN WHO ASSAULTED THEM IN HOTEL DISTURBANCE --** In Ballou v. Nelson, 67 Wn. App. 67 (Div. I, 1992) the Court of Appeals rules that two police officers who were assaulted when they responded to a hotel disturbance were not barred from suing the two men who assaulted them. The assailants argued unsuccessfully that the suit was barred under: (1) the "professional rescuer doctrine", and (2) the fireman's rule.

The "professional rescuer doctrine" generally bars a professional rescuer (e.g., police officer, firefighter, etc.) from suing anyone their profession requires them to rescue or aid. The "fireman's rule" is similar to the "professional rescuer doctrine" but more specifically is applied to prevent a firefighter or police officer from suing a landowner for negligence when the professional public safety officer is injured on the property of the landowner while responding to a call. We will not dwell on the details of the Court's analysis other than to note that the Court rules here against the assailants and appears to hold that neither rule would ever bar a public safety officer from suing a person who intentionally assaulted the officer while the officer was carrying out his or her duties.

Result: Snohomish County Superior Court judgments awarding damages of \$4500 and \$2000 to the officers affirmed.

**(20) EXCITED UTTERANCES BY THREE-YEAR-OLD ADMISSIBLE UNDER HEARSAY RULE --** In State v. Bryant, 65 Wn. App. 428 (Div. I, 1992) the Court of Appeals rules admissible the hearsay statements of a three-year-old who had witnessed a murder. Shortly after her grandmother was fatally assaulted, the three year-old was found nearby by a neighbor. The child looked frightened. She briefly described how her grandfather had beaten her grandmother. When a detective talked to the child about an hour later, she made a similar statement.

It was not error for the trial court to allow the hearsay testimony of both witnesses under the excited utterance exception to the hearsay rule, the Court of Appeals rules. That rule allows hearsay testimony where witnesses repeat out-of-court declarations which were made by a declarant who was under the influence of a triggering "exciting" event. Even the hearsay statements of an incompetent (such as the child here) are admissible if the statements otherwise satisfy the "excited utterance" rule. Moreover, the fact that some of the statements here were made in response to questioning does not necessarily take the statements out of this hearsay exception, the Court rules. Finally, because the "excited utterance" exception is a "firmly rooted" hearsay exception, the Sixth Amendment right to confrontation of witnesses does not require a different result than the Evidence Rules, as it might with a hearsay exception not so "firmly rooted" in the law. Result: King County Superior Court conviction for second degree felony murder affirmed.

**(21) CCDR SENT BY "FAX" ADMISSIBLE AS PROOF DRIVING PRIVILEGE REVOKED --** In State v. Smith (Timothy), 66 Wn. App. 825 (Div. I, 1992) the Washington State Court of Appeals rejects defendant's challenges to introduction in his trial for driving while license

revoked of a facsimile transmission (FAX) of a certified copy of his driving record (CCDR) from DOL. The Court holds: (1) that the FAX copy of the CCDR was admissible under the public records exception to the hearsay rule (RCW 5.44.040), and (2) that its admission did not violate the "best evidence" rule (ER Title 10). **Result:** Whatcom County Superior Court conviction for driving while license revoked affirmed; defendant's conviction for MIP arising out of the same arrest was not appealed.

**(22) DETECTIVE LAWFULLY GAVE EXPERT TESTIMONY ABOUT PIMP-PROSTITUTE RELATIONSHIP** -- In State v. Simon, 64 Wn. App. 948 (Div. I, 1991) the Court of Appeals reviews Gregory Simon's conviction for promoting prostitution in the first degree. The prosecution presented as an expert witness a Seattle Police Detective, Robert Benson, who had been involved in the investigation of the alleged offense. Detective Benson testified that he had investigated 400 prostitution cases over a 6-year period, and that he had investigated over 50 promoting prostitution cases during that time. He then gave some opinions regarding the nature of the pimp-prostitute relationship.

The prosecutor apparently presented this testimony in order to show that a mild threat or mild use of force by a pimp against his prostitute may be of much greater significance in the pimp-prostitute relationship than it would be in most other relationships. An element of promoting prostitution in the first degree is the pimp's use of threats or force. Testimony about the pimp-prostitute relationship is helpful to jurors who can't be expected to understand the world of the pimp and prostitute, the Court of Appeals says. For this reason, the Court of Appeals holds that the trial court did not err in admitting Detective Benson's expert testimony.

**Result:** King County Superior Court conviction of promoting prostitution in the first degree reversed on other grounds not addressed here; case remanded for re-trial.

**(23) FINGERPRINT EXPERT'S TESTIMONY THAT ANOTHER EXPERT VERIFIED HIS ANALYSIS WAS INADMISSIBLE HEARSAY** -- In State v. Wicker, 66 Wn. App. 409 (Div. I, 1992) the Washington State Court of Appeals holds that the trial court erred when it allowed one fingerprint expert to testify that the initials of a second fingerprint expert on the fingerprint card meant that the second expert had confirmed the first expert's fingerprint match in the case. The second expert did not testify in the case. Ruling that admission of the first expert's testimony about the second expert's confirmation was inadmissible hearsay and violated defendant's constitutional right to confront witnesses against him, the Court of Appeals reverses the defendant's burglary conviction. **Result:** King County Superior Court conviction for second degree burglary reversed; case remanded for retrial.

**(24) TESTING OF RANDOM SAMPLE OF SEIZED DRUG SUPPORTS FINDING THAT ENTIRE QUANTITY SEIZED WAS COCAINE** -- In State v. Caldera, 66 Wn. App. 548 (Div. I, 1992) the Court of Appeals holds that the laboratory testing of only a random sample of suspected cocaine was adequate to identify the entire quantity as cocaine under the following facts (as described by the Court):

During an undercover operation, Caldera delivered several plastic bags containing a white powdery substance believed to be cocaine to undercover officers. A forensic expert visually inspected the substance in each of the plastic bags and testified that the bags all appeared alike and each contained a similar amount of the white powdery substance. She randomly selected one

bag for scientific testing. It tested positive as cocaine. Based on this random sampling, the trial court found that all the bags contained cocaine.

**Result:** affirmation of King County Superior Court conviction for delivery of a controlled substance and exceptional sentence based on the quantity of cocaine delivered.

**(25) JUVENILE COURT MAY REQUIRE ASSAILANT TO PAY FOR VICTIMS' PSYCHOLOGICAL COUNSELING --** In State v. Landrum, 66 Wn. App. 779 (Div. I, 1992) the Washington State Court of Appeals holds that juvenile defendants who were charged with felony sexual assaults in two unrelated cases -- but allowed to plead guilty to fourth degree assaults -- could be ordered by the juvenile court to pay restitution for the cost of their victims' psychological counseling (as necessitated by the sexual assaults), as well as the cost of any necessary medical exams related to the sexual assaults.

**Result:** King County Superior Court dispositions and restitution orders on guilty pleas affirmed.

**(26) NO MARITAL PRIVILEGE WHERE DEFENDANT ACCUSED OF WITNESS TAMPERING WITH REGARD TO CHILDREN SO THE CHILDREN WOULDN'T TESTIFY AGAINST HIM FOR RAPING THEM --** In State v. Sanders, 66 Wn. App. 878 (Div. I, 1992) the Court of Appeals rules that the marital privilege evidence rule under RCW 5.60.060(1) does not apply in a prosecution for witness tampering if the underlying offense with which the defendant has been charged involves the sexual abuse of a child of one of the spouses. Accordingly, the Court of Appeals rules that Sanders' wife could be called to testify that Sanders gave her money over a two-year period so she could take the children, go to California (per his suggestion), and move from place to place, at times staying with various members of Sanders extended family, and at other times staying in an apartment which he helped her lease. During this time, the school-age children did not attend school. The Court of Appeals also holds that this evidence was sufficient to support a "tampering" conviction as to the child even though defendant did not personally control the child's activities during the pertinent time period.

**Result:** King County Superior Court convictions for first degree statutory rape (three counts under former statute) and tampering with a witness (two counts) affirmed.

**LED EDITOR'S NOTE:**

See also the recent case abolishing the "violent crime" restriction on the crimes-against-spouse exception to the marital privilege, State v. Thornton, 119 Wn.2d 578 (1992) Jan. '93 LED at 08. Thornton holds that one spouse may testify against the second spouse as to any crime the second spouse has committed against the first spouse.

.....

The Law Enforcement Digest is edited by Assistant Attorney General, John Wasberg, Office of the Attorney General. Editorial comment and analysis of statutes and court decisions expresses the thinking of the writer and does not necessarily reflect the opinion of the Office of the Attorney General or the Washington State Criminal Justice Training Commission. The LED is published as a research source only and does not purport to furnish legal advice.