

April, 1994

HONOR ROLL

412th Session, Basic Law Enforcement Academy - November 30, 1993 through February 25, 1994

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WASHINGTON STATE SUPREME COURT

USE OF INFRARED THERMAL DETECTION DEVICES IS "SEARCH"; WARRANT REQUIRED

State v. Young, 123 Wn.2d 173 (1994)

Facts and Proceedings: (Excerpted from Supreme Court's lead opinion authored by Justice Charles Johnson)

On August 14, 1990, the Edmonds Police Department received an anonymous note in the mail. It stated that Mr. Robert A. Young operated "a big marijuana grow" and contained Mr. Young's name, address and telephone number.

Detective L. Paul Miller began an investigation. He confirmed the address and telephone number contained in the note belonged to Young. He checked for state and federal criminal histories on Young and found none. Detective Miller went to Young's address numerous times and observed the basement windows were consistently covered, although he never observed any bright lights in the home. Miller walked by the home on the public sidewalk, but did not detect any odor of marijuana.

Miller obtained the power consumption records for Young's home over the previous 6 years and found an abnormally high level of power consumption, and a marked increase in power consumption over the previous 3 years. Based on his prior experience in investigating indoor marijuana growing operations, he believed the power consumption increase to abnormally high levels at Young's home to be consistent with a marijuana growing operation.

A few days later, Detective Miller obtained assistance from United States Drug Enforcement Agency Special Agent Mark Hedman, who had been trained in the use of infrared thermal detection devices. An infrared device detects differences in the surface temperatures of targeted objects. Used at night, the device highlights manmade heat sources as a white color and cooler temperatures as a shade of gray. The device can detect a human form through an open window when the person is leaning against a curtain, and pressing the curtain between the window screen and his or her body. The device can also detect the warmth generated by a person leaning against a relatively thin barrier such as a plywood door.

At approximately 11:30 p.m. on August 21, 1990, Detective Miller and Agent

Hedman went to Young's address and conducted a thermal surveillance of the home. The thermal detection device revealed what Hedman considered to be abnormal heating patterns. The foundation of the home was shown to be warm in certain spots, indicating the downstairs was warmer than the upstairs. The device revealed the lower portion of the chimney was warm and the other one cool. If there had been a fire in the fireplace the entire chimney would have been warm.

Miller and Hedman checked the utility meter on the side of the home, and found it was also warm, indicating a load on the line. Miller and Hedman then used the thermal detection device to expose the heating patterns of other homes in the neighborhood, and compared those patterns with the heating pattern at Young's home. Hedman and Miller noted the pattern at Young's home differed from the other residences in the neighborhood. Miller concluded there was a marijuana growing operation in the home.

Based on an affidavit containing the facts described above, Detective Miller obtained a search warrant for Mr. Young's home on August 28, 1990. The warrant was executed and a quantity of marijuana was seized. Young was charged with possession of marijuana with intent to manufacture or deliver.

Prior to trial, Young moved to suppress the evidence and the motion was denied. The trial court found Young guilty on stipulated facts.

ISSUES AND RULINGS: (1) Does the privacy protection provision of article 1, section 7 of the Washington constitution require that the government obtain a search warrant before using an infrared thermal detection device to detect heat distribution patterns in a private residence? (ANSWER: Yes); (2) Does the Fourth Amendment of the U.S. Constitution also require a search warrant prior to use of an infrared thermal detection device on a private residence? (ANSWER: Yes); (3) Deleting the heat distribution information from the government's affidavit, does the affidavit establish probable cause to search Young's residence for a marijuana grow? (ANSWER: No). Result: Snohomish County Superior Court conviction for possession of a controlled substance with intent to manufacture or deliver reversed.

ANALYSIS:

INTRODUCTORY NOTE

Justice Charles Johnson writes the lead opinion joined in all respects by Justices Utter, Smith, Dolliver and Brachtenbach. Justice Guy joins in only the result of suppressing the evidence; Justices Durham and Andersen concur in the result and in the lead opinion's Fourth Amendment analysis, but not its state constitutional analysis; and Justice Madsen concurs in the result and the lead opinion's state constitutional analysis, but not its Fourth Amendment analysis. Justices Guy, Durham, Andersen, and Madsen do not explain the reasons for their limited concurrences.

ISSUE 1: State Constitutional Privacy Protection

In ruling that use of an infrared heat detector is a "search" subject to the state constitution's warrant requirement, Justice Johnson's lead opinion rejects the idea that use of a heat detector on a home is similar to using binoculars, the warrantless use of which is generally permitted. Johnson explains:

We have already determined the use of binoculars does not constitute a particularly intrusive method of viewing as long as the object observed could have been seen with the naked eye had the officer been closer to the object. State v. Manly, 85 Wn.2d 120 (1975). A police officer is allowed to use binoculars "to confirm what could otherwise lawfully be seen with the naked eye". State v. Ludvik, 40 Wn. App. 257 (1985)[**Sept. '85 LED:06**]. Under such circumstances the sense-enhancing capability of the binoculars does not provide information that could not have been obtained without the device. On the other hand, an infrared device does expose information that could not have been obtained without the device.

[Citations modified]

Justice Johnson then explains why the majority justices believe use of the heat detector is a "search":

The police used an infrared thermal detection device to detect heat distribution patterns undetectable by the naked eye or other senses. With this device the officer was able to, in effect, "see through the walls" of the home. **[Justice Johnson is in danger of losing his literary license with this statement. -- LED Editor's whimsical comment.]** The device goes well beyond an enhancement of natural senses. In addition, the nighttime infrared surveillance enabled the officers to conduct their surveillance without Mr. Young's knowledge. The infrared device thus represents a particularly intrusive means of observation that exceeds our established surveillance limits.

The nature of the property viewed is also a factor in whether the surveillance unconstitutionally intruded on Mr. Young's private affairs. The infrared device was targeted at the outside of the home but allowed the officers to see more than what Mr. Young left exposed to public view. The device allowed the officers to draw specific inferences about the inside of the house. When directed at a home, the infrared device allows the officer to determine which particular rooms a homeowner is heating, and thus using, at night. This information may reflect a homeowner's financial inability to heat the entire home, the existence and location of energy consuming and heat producing appliances, and possibly even the number of people who may be staying at the residence on a given night. The device discloses information about activities occurring within the confines of the home, and which a person is entitled to keep from disclosure absent a warrant. Thus, this information falls within the "private affairs" language of Const. art. 1, § 7.

The State contends this particular infrared device revealed only crude data, so this surveillance should not be considered a search. However, in construing Const. art. 1, § 7, we have resisted uncertain protection which results from tying our right to privacy to the constantly changing state of technology. We recognize as technology races ahead with ever increasing speed, our subjective expectations of privacy may be unconsciously altered. Our right to privacy may be eroded without our awareness, much less our consent. We believe our legal right to privacy should reflect thoughtful and purposeful choices rather than simply mirror the

current state of the commercial technology industry. At the same time, a privacy right that is defined by a particular level of technological sophistication is administratively unworkable. Governmental agents could not be certain at what point a warrant is required.

The current boundaries on police surveillance established by our case law allow the police to conduct effective investigations without depriving people of the sense of privacy they have held and are entitled to hold in this state. We are not prepared to extend those boundaries to include warrantless infrared surveillance. The infrared thermal detection investigation represents a particularly intrusive method of surveillance which reveals information not otherwise lawfully obtained about what is going on within the home.

The use of the thermal detection device to perform a warrantless, infrared surveillance violated the Washington State Constitution's protection of the defendant's private affairs.

[Citations to record omitted]

Justice Johnson's lead opinion also rejects the idea that case law allowing the use of drug-sniffing canines supports the warrantless use of heat detectors:

To date, dog sniffs have not been classified as searches by our case law. According to the State, just as odor escapes a compartment or building and is detected by the sense-enhancing instrument of a canine, so also does heat escape a home and is detected by the sense-enhancing infrared camera. Therefore, the argument is that if a dog sniff is not a search, neither should infrared surveillance constitute a search.

However, the analogy misses the mark. Thus far the Washington courts have refused to adopt the United States Supreme Court's blanket rule that dog sniffs are not searches. State v. Boyce, 44 Wn. App. 724 (1986)[**Nov. '86 LED:06**]. Instead, our [Washington's] courts have employed a more conservative approach to dog sniffs and require an examination of the circumstances of the sniff.

The question whether and under what conditions a warrantless dog sniff might constitute a violation of Const. art. 1, § 7 is not before the court. For the purpose of the State's argument, however, we note that private residences were not involved in any of the cases decided by the Washington appellate courts where warrantless dog sniffs were approved. See State v. Stanphill, 53 Wn. App. 623 (1989)[**July '89 LED:14**](dog sniff of package at post office not a search); State v. Boyce, 44 Wn. App. 724 (1986)(dog sniff of safety deposit box at a bank not a search); State v. Wolohan, 23 Wn. App. 813 (1979)[**Nov. '79 LED:05**](dog sniff of parcel in bus terminal not a search). That the object of the search is a home is critical.

In fact, in each of these cases the courts acknowledged a dog sniff might constitute a search if the object of the search or the location of the search were subject to heightened constitutional protection. Therefore, the State's analogy of

infrared sense enhancement to the canine sniff cases is not useful.

[Some citations omitted]

ISSUE 2: Fourth Amendment Privacy Protection

Justice Johnson's lead opinion then goes on to assert that the Fourth Amendment of the U.S. Constitution also bars use of heat detectors on residences. This view is based upon the U.S. Supreme Court decision in U.S. v. Karo, 468 U.S. 705 (1984) **Oct. '84 LED:05** where the Court ruled that while use of an electronic beeper or tracking device to track a container on the open highways is not a Fourth Amendment "search", the use of a beeper to track a container while it is inside a private residence is a "search" requiring a warrant. Johnson explains:

In this case, the infrared device used was at least as intrusive as the beeper in Karo. In Karo, the beeper was not sensitive enough to reveal the can's precise location within an enclosed structure. In contrast, the infrared device at issue here reveals the specific location of heat within the home. An infrared device need not produce the equivalent of a photographic image before it is declared intrusive under the Fourth Amendment:

[t]he monitoring of an electronic device such as a beeper is, of course, less intrusive than a full-scale search, but it does reveal a critical fact about the interior of the premises that the Government is extremely interested in knowing and that it could not have otherwise obtained without a warrant.
[citing Karo]

Here, like Karo, the information conveyed by the infrared device was critical to the government. The police relied heavily on the infrared surveillance results, and the inferences that could be drawn from them, in obtaining the search warrant.

[Some citations omitted]

ISSUE 3: Probable Cause

The lead opinion's analysis of the probable cause issue is as follows:

Probable cause is established when the affidavit sets forth facts sufficient to lead a reasonable person to conclude there is a probability the defendant is involved in criminal activity. The application for a search warrant must be judged in the light of common sense, with doubts resolved in favor of the warrant. Generally, the probable cause determination of the issuing judge is given great deference.

In this case, the affidavit for the search warrant was based on an anonymous tip that the defendant was growing marijuana, confirmation and the address and telephone number given by the informant belonged to Young; public utility records showing high electricity consumption for the type of house, and a dramatic increase in consumption over the last 3 years; the observed absence of utilities using large amounts of electricity, such as hot tubs or saunas, which might explain the high consumption; the officer's observation that the basement windows were

consistently covered; the government agents' judgment that this information pointed to a growing operation; and the results of infrared surveillance.

The informant's tip as a basis for probable cause fails to meet the 2-prong test of Aguilar-Spinelli. Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964). This test requires the informant's basis of knowledge and veracity be established. However, if a police investigation reveals suspicious activity along the lines of the criminal behavior proposed by the informant, then the corroborating investigation may replace the requirements of Aguilar-Spinelli. More than public or innocuous facts must be corroborated, however.

Here, the police investigation corroborated the phone number and address given by the informant and discovered abnormally high electrical consumption. These are innocuous facts that do not necessarily indicate criminal activity. **[Citing State v. Huft, 106 Wn.2d 206 (1986) Sept. '86 LED:03 a case where probable cause was found wanting on similar facts. -- LED Ed.]** The additional fact the windows of the basement were always covered does not add enough to the equation to support a finding of probable cause. The primary basis of the probable cause determination was the illegally obtained infrared surveillance. Without the results of the infrared surveillance, and the interpretation of those results by Detective Miller and Agent Hedman, the police did not have sufficient incriminating information to obtain a warrant.

[Some citations omitted]

LED EDITOR'S COMMENTS:

1. Fourth Amendment Rationale Doubtful: We strongly doubt that the U.S. Supreme Court would rule that use of infrared heat detectors is a Fourth Amendment search, as the majority declares in Young. While the Karo case on beepers provides some support for this view, as asserted by Justice Johnson, we think a majority of the U.S. Supreme Court would analogize the use of a heat detector to dog sniffs of inanimate objects and garbage can searches at curbside, both of which the U.S. Supreme Court has held not to be searches. Of course, our view is purely academic, as the State Supreme Court's broader reading of privacy protections under our State Constitution constitutes the last word on the subject for Washington officers. Hence, use of heat detectors, like curbside garbage can searches, are "searches" subject to the warrant requirement under the Washington Constitution. Until such time as the State Supreme Court changes its collective mind, heat detector usage and garbage can searching requires a search warrant.

2. What now? We were recently asked whether a search warrant for use of a heat detector legally could be issued by a judge based on: (A) less suspicion than probable cause as to a marijuana grow, e.g., reasonable suspicion, or (B) probable cause as to heat emissions, rather than probable cause as to a grow. We doubt it.

Under current law, a search warrant cannot issue on less than probable cause unless state legislation expressly says so. See recent decision by the Washington Supreme Court in a housing inspection case out of City of Seattle, City of Seattle v. McCready -- No. 59359-1 (case to be digested in a future LED). So option "A" is out. In addition, we see option "B"

as nothing more than trying to justify indirectly what cannot be justified directly under option "A". Of course, agencies are urged as always to check with their prosecutors for their views on this issue. Some prosecutors may be willing to test the limits of the State Supreme Court's cutting-edge jurisprudence.

We do feel that legislation expressly allowing use of heat detectors under search warrants grounded in less than PC -- i.e., reasonable suspicion as to a grow operation -- would likely pass state constitutional muster. Maybe garbage can warrants based on reasonable suspicion could be part of the same legislative package. And while we're at it, maybe authority to use pen registers based on a warrant (this on probable cause) could also be added to any such legislation . . . Oops . . . That sounds like more law and order than Washington state can stand . . . Is there interest out there in developing some of these ideas? We'd be happy to draft legislation in this area.

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **HORIZONTAL GAZE NYSTAGMUS TEST IS ON HOLD** -- In State v. Cissne, ___ Wn. App. ___ (Div. III, 1994) Division III of the Court of Appeals addresses the admissibility of the horizontal gaze nystagmus (HGN) test in a DWI prosecution. The Court of Appeals rules on the threshold question of whether the test is a "scientific test" subject to the requirements for testimony about such tests established in Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923) -- holding that it is subject to Frye. (Frye required that if a scientific test is "novel" then it must rest on generally accepted scientific principles in order for testimony about the test to be admissible.) However, the Court of Appeals ultimately determines that the trial court must: (1) make further findings under Frye as to whether the test is "novel", and (2) if it is "novel", then if it is "reliable", before the Court of Appeals can finally rule on the issue. The case is remanded to the trial court to address these questions.

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

Mr. Cissne was stopped after a police officer saw him make an improper left turn, weave in and out of his lane of traffic and almost strike a guardrail on six or seven occasions. The officer noticed a strong odor of intoxicants about Mr. Cissne's person. Six field sobriety tests were administered: the one foot balance test, the finger-to-nose test, the alphabet test, the walk-and-turn test, the finger counting test, and the horizontal gaze nystagmus (HGN) test.

Mr. Cissne was unable to perform the one foot balance test and, instead of touching his nose with his finger, he touched his forehead with one hand and his lower lip with the other. He had difficulty reciting the alphabet, he failed the walk-and-turn test, was unable to perform the counting test and, based on the officer's testimony at trial, the HGN test results indicated the presence of nystagmus.

Mr. Cissne was placed under arrest and taken to the police station. Throughout the officer's investigation, Mr. Cissne repeatedly threatened to sue him, told him he was making a mistake, and made what the officer interpreted as sexual advances.

Mr. Cissne moved in limine to bar testimony about the HGN test results, his

statements about suing the officer, and statements interpreted as sexual advances. He argued that the HGN test was not based on generally accepted, i.e., that it is not "novel", and that it is scientific principles, was therefore inadmissible under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), and the statements made to the officer were irrelevant and prejudicial. His motion in limine was denied and the case proceeded to trial.

Although the State failed to present any evidence regarding the reliability of HGN testing, the arresting officer was permitted to testify as to Mr. Cissne's HGN test results and to give his opinion regarding them. The arresting officer and dispatch officer testified as to the objected-to-statements made by Mr. Cissne after his arrest.

The jury found Mr. Cissne guilty of driving while intoxicated. His conviction was affirmed on appeal by the Superior Court.

[Footnotes omitted]

The Court of Appeals then describes in great detail the HGN test, its usage nationally to test for sobriety, and the conflicting case law from other jurisdictions on admissibility of the test to prove DWI. Courts in some jurisdictions have held that the HGN is not a scientific test, and therefore that there are generally no greater restrictions on law enforcement officer testimony regarding the HGN test than with other field sobriety tests. On the other hand, many courts have held that the test is a "scientific" test. As noted above, the Court of Appeals in Cissne agrees with those courts elsewhere which hold that the HGN test is a "scientific test" subject to Frye. The Cissne Court then turns to the question of whether the HGN testimony meets Frye.

Those courts elsewhere determining the test to be a scientific test have taken one of three approaches: (1) some hold that their states' evidence rules do not require that scientific evidence meet the Frye test for novel scientific evidence -- these courts generally hold that the HGN test is sufficiently reliable to be admissible; on the other hand, (2) courts in some jurisdictions have held that the Frye test does apply, but have found that HGN testing is generally accepted and therefore admissible; while (3) courts in yet other jurisdictions have held that Frye applies and have held further that the prosecution must show that the test is not "novel" and is readily understandable by ordinary persons, i.e., non-experts. The Court of Appeals in Cissne decides to follow this third line of cases that apply Frye, and the Court remands the Cissne case to the trial court with the following directions:

We decline the State's invitation to follow those few jurisdictions that have concluded that HGN testing meets Frye standards. The trial court must evaluate, weigh and consider the conflicting evidence before determining whether the test is novel, and, if it is novel, whether it is reliable as an indicator of the probability of impairment or of a specific alcohol level.

Result: Douglas County DWI conviction reversed; case remanded for hearing on HGN test Frye issue and for re-trial. Status: petition for review pending in State Supreme Court.

LED EDITOR'S NOTES:

(1) **Statements admissible:** The Court of Appeals does rule to be admissible the

defendant's statements during his arrest. In those statements, defendant indicated that he would sue the officer, and he also suggested that he was sexually interested in the officer. Those statements were relevant on the issue of defendant's intoxication, the Court holds.

(2) Frye test still viable: In Daubert v. Merrell Dow Pharmaceutical, 125 L. Ed.2d 469 (1993) the U.S. Supreme Court ruled that under the Federal Rules of Evidence the "generally accepted principle" standard of Frye does not apply, and instead that admissibility of scientific evidence should turn solely on interpretation of Federal Evidence Rule 702 governing admissibility of expert witness testimony. The Cissne decision rejects the prosecution's invitation to take the Daubert approach and reject Frye, noting that our State Supreme Court had not yet had an opportunity to address the issue under Washington's Evidence Rule 702 subsequent to Daubert. **UPDATE NOTE**: On March 3, 1994, in State v. Riker, No. 58970-4 (a case involving the "battered woman defense"), the State Supreme Court expressly addressed Daubert and ruled that the Frye test does continue to apply under Washington's Rules of Evidence; thus our Supreme Court has rejected the approach taken by the U.S. Supreme Court in Daubert.

(2) **ADULT COURT DECLINATION WARNING IN JUVENILE MIRANDA WARNING TO DWI VIOLATOR NOT ACCURATE, BUT DOES NOT REQUIRE SUPPRESSION OF JUVENILE'S POST-ARREST STATEMENTS** -- In State v. Schatmeier, et. al., ___ Wn. App. ___ (Div. III, 1994) the Court of Appeals for Division III rules that, where a juvenile has been arrested for driving while intoxicated, a Miranda warning is "inaccurate" where it informs the juvenile, among other things, that his statement "may be used against (him) in juvenile court or in a criminal prosecution in any adult court in the event juvenile court declines jurisdiction in (his) case . . ." The Court declares that the flaw in such a warning in this context is that a DWI case cannot be "declined" for adult court criminal prosecution, but instead goes to district court as a traffic case. However, the Court goes on to hold that such technically inaccurate Miranda warnings did not make the warnings in this case inadequate. The Court's analysis of the adequacy of the warnings is in part as follows:

Statements stemming from custodial interrogation may not be used unless the prosecutor demonstrates the use of procedural safeguards, which include, "the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." . . .

Advisement of Miranda rights need not follow precise language word for word, but must inform a defendant of his rights "in a way which conveys their full import". . . .

An inaccurate Miranda warning may be sufficient if there is direct evidence that the defendant was aware of his or her rights. Whether proper warnings have been given is a factual matter for the trial court to decide in each case. . . .

In State v. Rupe, 101 Wn.2d 664 (1984) [**Oct. '84 LED:13**], the defendant was advised that "[a]nything I say or sign can be used against me." He [Rupe] asserted that he should have been advised that "any statement . . . can and will be used as evidence against him". The court found that the warning was sufficient to adequately inform the defendant of his constitutional rights.

The test for adequacy of Miranda warnings is simply whether a defendant

understands that he had a right to remain silent, and that anything he said could be used against him in a court of law. The warnings given to the four juveniles, although technically inaccurate, conveyed that message. An arrestee is not required to understand the precise legal effect of his or her admissions. . . .

The warnings here began with the categorical admonition that "[a]ny statement that you do make can and will be used as evidence against you in a court of law." Only then do the warnings proceed to the contingent and permissive statement. "If you are a juvenile, your statement may be used against you in juvenile court or in a criminal prosecution in any adult court in the event juvenile court declines jurisdiction in your case." The officers did not promise the juveniles that they would be tried in juvenile court. The warnings were sufficient to advise the defendants that their statements could be used against them in court, either juvenile or adult court. That is all Miranda requires.

The Court of Appeals remands the consolidated cases before it to the trial court level for determination of whether a valid waiver of rights was given following what the Court holds to be adequate Miranda warnings -- the lower courts had erroneously thrown out the statements because those courts were under the mistaken impression that the technically inaccurate warnings had required automatic suppression of post-arrest statements.

Result: reversal of rulings in cases of Jon Barry Schatmeier, Keri Lynn Durgan, Robert R. Wright, Keleigh D. Hall; cases remanded for hearings on Miranda waiver issue and then for trial. Status: motion for reconsideration denied; time remains to file petition for review.

LED EDITOR'S COMMENT: At this point, because we believe in "bright line" or simple rules where possible, we believe that officers should continue to give the "declination" warning to juveniles in all circumstances requiring Miranda warnings. The decision in Schatmeier is not yet final, as a petition for review may be filed in the State Supreme Court. As we learn of any further developments in the Courts, or of any contrary legal advice being given on this question, we will inform our LED readers.

(3) **MIRANDA WARNING'S INCLUSION OF "BY THE COURT" LANGUAGE DOESN'T REQUIRE SUPPRESSION OF STATEMENTS, BLOOD TEST** -- In State v. Teller, 72 Wn. App. 49 (Div. III, 1993) the Court of Appeals rejects a DWI defendant's argument that a law enforcement officer gave her improper Miranda warnings following her DWI arrest.

The Court of Appeals sets out, as follows, the Miranda warnings given to Ms. Teller by the arresting officer:

[1.] You have the right to remain silent. . . . [2.] Any statement that you do make can and will be used against you and stand up against you in a court of law. [3.] You have the right at this time to an attorney of your own choosing and to have him or her present before or during questioning, or the making of any statements. [4.] If you cannot afford an attorney you are entitled to have one appointed for you by the court without cost to you and to have him or her present before or during questioning or the making of any statement. [5.] You have the right to exercise any of the above rights at any time before or during any questioning and the making of any statement.

[Emphasis added by LED Ed.]

The emphasized "by the court" language in warning number four above was challenged by Ms. Teller as violating either: (1) the Fifth Amendment of the U.S. Constitution, or (2) Washington Court Rule CrRLJ 3.1 which provides in pertinent part:

(c) Explaining the Availability of a Lawyer.

(1) When a person has been arrested he or she shall as soon as practicable be advised of the right to a lawyer. Such advice shall be made in words easily understood, and it shall be stated expressly that a person who is unable to pay a lawyer is entitled to have one provided without charge.

(2) At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place him or her in communication with a lawyer.

The Court of Appeals holds that, when read in their entirety, the warnings given Teller adequately explained her rights. In addition, the Court rules that CrRLJ 3.1 requires no different warnings than does the Fifth Amendment as interpreted in Miranda. Accordingly, after further concluding that Teller did waive her rights, the Court of Appeals affirms a Superior Court ruling that Teller's statement and breath test were admissible against her.

In a closing footnote, however, the Court of Appeals does note that public defenders are available by phone 24 hours a day in Spokane County, and that the "by the court" language could mislead some arrestees. The Court then comments:

Under the circumstances, we fail to understand why Spokane County has not deleted the "by the court" language from its warnings. The language could create confusion and violate a defendant's constitutional rights in a case factually dissimilar to the one before us.

Result: affirmance of Spokane County Superior Court ruling that Miranda warnings were adequate; case remanded to district court for trial.

(4) CONSENT LETTER JUSTIFIES EXTRA-TERRITORIAL INVESTIGATION, ARREST; IF CONSENT AUTHORITY PRESENT, THEN NO REQUIREMENT THAT POLICE SHOW "NECESSITY" FOR THE EXTRA-TERRITORIAL ACTION -- In State v. Rasmussen, 70 Wn. App. 853 (Div. I, 1993) the Court of Appeals rejects defendant's argument that Black Diamond police officers who had been given an enforcement "consent" letter from the Kent Chief of Police lacked authority to arrest defendant at the culmination of an undercover drug deal in the City of Kent. Defendant's argument and the Court's response (in significant part) is as follows:

Rasmussen argues that State v. Bartholomew, 56 Wn. App. 617 (1990) [**April '90 LED:03**] controls this case. In Bartholomew, the defendant was a suspect in a robbery that had taken place in Seattle. An anonymous informant notified the police that the defendant had committed the Seattle robbery and gave the police the address of a residence in Tacoma. The Seattle police contacted the Tacoma police and discovered that another occupant of the home was a suspect in a

Tacoma robbery, and the Tacoma police had obtained a search warrant for the residence. The Seattle police accompanied the Tacoma police into the residence, ostensibly to assist the Tacoma officers with the execution of the search warrant, although the Tacoma officers had not requested assistance. The Seattle officers arrested the defendant in the residence and seized evidence from his car, although they had no arrest warrant or search warrant.

The State argued the arrest was lawful under RCW 10.93.070(3), which authorizes extraterritorial law enforcement when requested by a peace officer of another jurisdiction. The court found that RCW 10.93.070(3) was intended to facilitate necessary assistance, and the Seattle police could not circumvent the constitutional warrant requirements by tagging along with the Tacoma police, who did not need or request their assistance.

Rasmussen argues that Bartholomew prohibits any extraterritorial activity absent a showing of underlying necessity and cooperation. Rasmussen interprets Bartholomew too broadly, however. The provision applied in Bartholomew addressed a different subsection, RCW 10.93.070(3), which requires a specific request for assistance. In contrast, the circumstances of the instant case fall within RCW 10.93.070(1), which authorizes extraterritorial law enforcement with the prior written consent of the chief of police of the outside jurisdiction. Bartholomew is also distinguishable because the intrusiveness of the arrest was more extreme; the officers entered a private residence without a warrant. The Act specifically provides that it shall be liberally construed to modify common law restrictions and therefore should be applied accordingly.

We find this court's decision in Ghaffari v. Department of Licensing, 62 Wn. App. 870 (1991) [Feb. '92 LED:17], review denied, 118 Wn.2d 1019 (1992) to be dispositive of the case at hand. In Ghaffari, a Renton police officer observed a weaving vehicle while outside the Renton city limits. The officer followed the vehicle and pulled it over inside the city limits of Black Diamond. When the driver refused to provide the officer with a breath test, an order was entered by the Department of Licensing revoking his driving privileges for 1 year. The driver appealed the order, contending that the Renton officer had no authority to stop the vehicle outside Renton. The Department of Licensing maintained that the officer's actions were lawful under RCW 10.93.070(1) and submitted two consent letters addressed to the Renton Chief of Police. One letter was signed by the Black Diamond Chief of Police and the other letter was signed by the Sheriff Director of the King County Department of Public Safety. This court found (1) the statute was constitutional and set forth adequate safeguards for enforcement, and (2) when a party challenges an officer's jurisdiction under the Act, the State must prove compliance with the Act, either by documentary evidence or testimony. The court found the officer's testimony and submission of the consent letters to be ample evidence of the officer's authority to act.

The facts of the instant case are similar to the facts presented in Ghaffari. Rasmussen, like Ghaffari, was first observed and apprehended outside the jurisdiction of the apprehending officer. Moreover, as in Ghaffari, the State has submitted into evidence a consent letter granting authority to Black Diamond police officers within the jurisdiction of Renton. The Ghaffari court specifically found such

letters to constitute adequate proof of authority.

[Footnotes, some citations omitted]

Result: King County Superior Court conviction for delivery of a controlled substance affirmed.

(5) FALSE, MISLEADING REPORTS ORDINANCE WITHSTANDS CONSTITUTIONAL CHALLENGE -- In Yakima v. Irwin, 70 Wn. App. 1 (Div. III, 1993), the defendant is unsuccessful in his appeal from a misdemeanor conviction for filing a "false, misleading or exaggerated police report" as prohibited under a City of Yakima ordinance.

Defendant, an anti-abortionist, had telephoned the Yakima police to report that "somebody [was] ripping the arms and legs off of a little baby." When a responding officer arrived at the scene, he asked if there was a dismembered child in the area; Mr. Irwin pointed to an abortion clinic nearby and said "they're murdering babies in there." Irwin was charged in Yakima Municipal Court with violating Yakima Municipal Code 6.48.010 which provides in relevant part as follows:

It is unlawful for any person to cause to make any willfully untrue, false, misleading, unfounded or exaggerated statement or report to the police department of the city of Yakima, or to any officer or representative thereof, . . .

The Superior Court affirmed the municipal court conviction. The Court of Appeals has now affirmed the conviction, rejecting defendant's arguments, among others: (1) that the ordinance was so vague in its terms as to violate his constitutional due process rights, and (2) that the evidence was not sufficient to support the conviction.

Result: affirmance of Yakima County Superior Court judgment, which in turn had affirmed a Yakima Municipal Court judgment on a jury verdict of guilty under YMC 6.48.010.

(6) SUPERIOR COURT MAY ISSUE CIVIL ANTI-HARRASSMENT ORDERS -- In McIntosh v. Nafziger, 69 Wn. App. 906 (Div. I, 1993) the Washington Court of Appeals rules that even though RCW 10.14.150 expressly mentions only "district courts" in authorizing the issuance of civil anti-harassment orders, the statute must be given a constitutional reading which allows superior courts to issue such orders as well. Result: King County Superior Court entry of protection order and award of attorney fees affirmed.

BRADY BILL INFORMATION

Introduction

By the time this issue of the LED reaches our readers in early April, the Federal "Brady Bill" will have been in effect for over a month. All state and local law enforcement agencies and all federally licensed firearms dealers (FFL's) will have received explanatory materials from the Bureau of Alcohol, Tobacco and Firearms (ATF).

The purpose of this LED entry is to communicate some of ATF's "Questions and Answers" (Q & A's) to officers and to provide some additional bits of information regarding the Brady Bill. Our entry is not comprehensive. The best resources for understanding the Brady Bill are: (1) the Act itself, (2) the ATF materials sent to all chiefs and sheriffs, and (3) the following regional ATF office contacts:

WESTERN WASHINGTON ATF GROUP SUPERVISOR (NORM PRINS)
ROOM 892 - JACKSON FEDERAL BUILDING
915 SECOND AVENUE
SEATTLE, WA 98174
(206) 220-6450

EASTERN WASHINGTON ATF RESIDENT AGENT IN CHARGE (TIM BUNS)
402 E YAKIMA AVENUE, SUITE 460
YAKIMA, WA 98901
(509) 575-5993

ATF RESIDENT AGENT IN CHARGE (BOB HARPER)
W. 920 RIVERSIDE, ROOM 288
SPOKANE, WA 99210
(509) 353-2862

State Legislative Update

At April LED deadline, the Washington Legislature still had an opportunity to make the major changes in chapter 9.41 RCW which would make possession of a CCW permit sufficient documentation of a no-felony record to qualify a person to immediately purchase a handgun without necessity of the five-day waiting period otherwise necessitated by Brady. However, the changes in chapter 9.41 necessary to make Washington what ATF calls a "Brady-alternative state" were comprehensive, and our prognosis at LED deadline was that such changes would not occur.

Brief Overview of Brady

With certain exceptions addressed in the ATF Q & A's below, Brady requires that FFL's send a purchaser's "statement of intent to obtain a handgun" to the purchaser's chief law enforcement officer -- the "CLEO" (we interpret this in Washington state to be the chief or sheriff of the prospective purchaser's place of residence), and the FFL must then wait five (5) days after notifying the CLEO before delivering the handgun to the purchaser. During that 5-day wait, the CLEO is "required" to make a reasonable effort" to determine if any of the following disqualifiers exist:

- indictment for or convicted of a felony
- fugitive from justice
- unlawful user of or addicted to controlled substances
- adjudicated a mental defective or committed to a mental institution
- illegal alien
- dishonorable discharge, or
- renouncement of citizenship

There are serious sanctions against the FFL for delivering the handgun in violation of Brady's 5-day wait rule, but there

appear to be no sanctions against the CLEO (other than public embarrassment) for doing a records check that does not fully satisfy the "reasonable effort" "requirement".

ATF's Q & A's

1. **Q. Who must comply with the 5-day waiting period requirement imposed by the Brady Act?**

- A. Federally licensed firearms importers, manufacturers, and dealers must comply with the requirement prior to the sale, transfer, or delivery of a handgun to a nonlicensed individual.

2. **Q. How does the Brady Act affect a Federal firearms licensee?**

- A. The waiting period provisions of the law make it unlawful for any Federal firearms licensee to sell a handgun to a nonlicensee unless the licensee:

(1) obtains a statement from the purchaser (Brady form) containing the purchaser's name, address, and date of birth appearing on a valid photo identification, and a statement that the purchaser is not a felon, under indictment, or otherwise prohibited from receiving or possessing the firearm under the law;

(2) verifies the identity of the transferee by examining an identification document presented;

(3) within 1 day after the purchaser furnishes the statement, contacts (by telephone or otherwise) the chief law enforcement officer (CLEO) of the place of the residence of the purchaser and advises such officer of the contents of the statement;

(4) within 1 day after the purchaser furnishes the statement, provides to the chief law enforcement officer of the place of residence of the purchaser a copy of the statement and the officer makes a reasonable effort to determine whether the purchaser is prohibited from possessing the particular handgun(s) sought to be purchased; and

(5) the licensee waits 5 business days from the date the licensee furnished notice of the contents of the statement before transferring the handgun to the purchaser (during which period the licensee has not received information from the chief law enforcement officer that possession of the handgun by the purchaser would be in violation of the law) OR the licensee receives notice from the chief law enforcement officer of the place of the residence of the purchaser that possession of the handgun by the purchaser does not violate the law.

3. **Q. Does the 5-day waiting period requirement apply to sales of handguns to Law Enforcement?**

- A. No. These sales are exempt. However, the dealer should obtain from the purchaser a certification from the purchaser's commanding officer stating that the handgun is being acquired for official use.

4. **Q. What is the effect date of the Brady Act?**

- A. The waiting period provisions of the law are effective on February 29, 1994 and cease on November 30, 1998. However, the provisions dealing with the increase in license fees, multiple sales reports, transport of firearms by common carriers, and thefts of firearms from a federal firearms licensee are permanent and were effective on November 30, 1993.

5. **Q. Are there any exceptions to the 5-day waiting period requirement?**

- A. Licensees need not comply with the waiting period requirements in 4 situations. These include handgun transfers (a) pursuant to an official's written statement of the buyer's need for a handgun based upon a threat to life; (b) to buyers having a State permit **[LED EDITOR'S NOTE: A Washington permit to carry a concealed weapon does not qualify; there is no qualifying Washington permit for Brady purposes.]** or whose records have been checked

and in either case an official has verified eligibility to possess firearms; (c) of National Firearms Act weapons approved by AFT; and (d) certified by ATF as exempt because compliance with the waiting period is impractical.

6. Q. Must a dealer wait 5 days before transferring the handgun to the buyer?

A. No, if the dealer has received notice from the chief law enforcement officer within the 5 business days that the officer has no information indicating that the buyer's receipt or possession of the handgun would violate the law.

7. Q. When does the 5-day waiting period begin to run?

A. At the time the licensee provides notice to the CLEO. *[Apparently, this means actual receipt by the CLEO, not the date of mailing by the FFL. -- LED Editor's comment in italics]*

8. Q. Does the Brady Act apply to licensed collectors?

A. No, except if they purchase other than a curio or relic handgun. In that event they would have to provide the licensed dealer with a Brady form.

9. Q. Why can't the Brady form contain information such as P.O.B, gender, race, SS#, etc.?

A. Because it is restricted to only 5 areas that are specifically referenced under the new law. ATF is offering the buyer the option to place this information on the Brady form.

10. Q. How much checking does the CLEO have to do?

A. The CLEO must conduct a check that involves a reasonable effort to determine whether Federal, State, or local law would prohibit receipt by the transferee. For example, checking NCIC, wanted persons, and triple III.

11. Q. Does the CLEO have to respond to the licensee?

A. No, the law does not specifically require a response either way. However, if the CLEO fails to respond on prohibited buyers, the officer would not be preventing the sale from occurring.

12. Q. What is a "handgun" for purposes of the Brady Act?

A. The term "handgun" means (a) a firearm which has a short stock and is designed to be held and fired by the use of a single hand and (b) any combination of parts from which a firearm described by (a) can be assembled.

13. Q. Is the dealer required by the Brady Act to obtain and retain a copy of the Brady form?

A. Yes.

14. Q. Does the CLEO have to maintain any records?

A. No. Within 20 days after the date the Brady form was signed and dated by the purchaser, the CLEO must destroy all records except those that involved prohibited buyers.

15. Q. Does a licensed collector selling a curio or relic handgun have to obtain a Brady form?

A. No. Collectors' sales of handguns are not subject to the waiting period requirement. However, a licensed collector would be subject to the requirements of the Brady law if purchasing other than a curio or relic handgun from a licensed dealer.

16. Q. What is the penalty for a buyer's falsification of the Brady form?

A. A felony offense under 18 U.S.C. 922(a)(6), 924(a)(1)(A).

17. Q. What is the penalty for the failure of a FFL to obtain the Brady form?

A. Whoever knowingly violates these provisions shall be subject to a fine of not more than \$100,000, imprisonment for not more than one year, or both.

18. Q. Were there any provisions under the Brady Act other than the 5-day waiting period?

A. Yes. The Act contains provisions dealing with multiple sales reports, transport of firearms by common carriers, thefts of firearms from Federal firearms licensees, and an increase in the license fee for dealers in firearms.

19. Q. What is the change regarding the multiple sales report?

A. In addition to furnishing multiple sales reports to ATF, licensees are required to submit such reports to the "department of State police or State law enforcement agency of the State or local law enforcement agency of the jurisdiction in which the sale or other disposition took place."

20. Q. Can the CLEO or other law enforcement official maintain a file of Reports of Multiple Sales received from a licensee?

A. No. The law prohibits keeping records more than 20 days after the date the form is received by the CLEO. Exceptions would be for those forms involving prohibited persons.

21. Q. Will current Federal firearms dealers (including pawnbrokers) have to pay an additional fee to maintain their license?

A. Upon the next renewal of their license they will be required to pay a \$90 fee for a 3-year period.

22. Q. Does the new law on common and contract carriers require that intrastate carriers obtain written acknowledgement of delivery of firearms?

A. Yes, if the carrier delivers firearms which are being shipped interstate.

23. Q. What is the penalty for theft of a firearm from the person or premises of a licensed dealer?

A. As provided by 18 U.S.C. 924(i)(1) - \$250,000 fine, 10 years imprisonment, or both.

24. Q. A licensed firearms dealer attends a gunshow in a town distant from his licensed premises and meets a prospective customer who is interested in acquiring a handgun. However, because the handgun may not be delivered until the 5-day waiting period has elapsed, the dealer finds that he will be unable to meet with the customer and deliver the handgun after the period expires. May the dealer transfer the handgun to the gunshow promoter for delivery to the purchaser at the end of the 5-day waiting period?

A. No. Assuming the gunshow promoter is unlicensed, the transfer of a handgun between the dealer and the promoter would be subject to the requirements of Brady. Thus, the transfer between the dealer and promoter could not be made without completion of ATF F 5300.35 and compliance with the 5-day waiting period.

25. Q. Dealer A attends a gunshow in a town distant from his licensed premises, but in the same state in which his licensed premises is located, and meets a prospective customer who is interested in acquiring a handgun. May Dealer A transfer the handgun to Dealer B for delivery to the purchaser at the end of the 5-day waiting period?

A. Yes. Transfers of handguns between licensees are not subject to the requirements of Brady. Dealer A could transfer the handgun to Dealer B, and Dealer B could then have the purchaser complete ATF Form 5300.35. After Dealer B has complied with the Brady requirements and 5 business days have elapsed, Dealer B could deliver the handgun to the purchaser, assuming the other requirements of the law have been satisfied. In addition, Dealer B should obtain an executed ATF Form 4473 from the purchaser at the time of the delivery.

26. Q. What evidence is required for a CLEO to advise a licensee not to sell a handgun to an individual?

A. The GCA makes it unlawful for an FFL to transfer a handgun if the FFL has reasonable cause to believe the buyer is prohibited from receiving or possessing the handgun under Federal, State, or local law. The same standard applies to notifications by CLEOs under Brady. Thus, if a records check results in information that an individual may be prohibited from acquiring a handgun, a CLEO would be justified in reporting to the FFL that there is reasonable cause to believe the buyer is a prohibited person. For example, a records check indicates that a purchaser was arrested for a felony but does not indicate the disposition of the charge. CLEOs should make every reasonable effort to determine a disposition of felony charges. However, if a disposition cannot be determined, the CLEO may notify the FFL that there is reasonable cause to believe the buyer is a prohibited person. If the buyer can provide the CLEO with information establishing that he/she was not under indictment for or convicted of the charge, the CLEO could notify the FFL that the CLEO has withdrawn the objection to the sale.

Any questions CLEOs have concerning the effect under State law of convictions for various offenses, deferred adjudications, pardons, expunctions, etc. should be addressed to State authorities. Unless the particular offenses were charged in Federal court, State law will dictate whether the offenses are disabling. Questions concerning the effect of these events under Federal law should be addressed to the appropriate ATF Assistant Chief Counsel.

27. Q. What is sufficient evidence that an individual is an unlawful user of or addicted to controlled substances so that a CLEO should advise an FFL not to transfer a handgun to the individual?

A. The disability of unlawful use is imposed only upon a present unlawful user of controlled substances. Evidence of such use might, for example, consist of statements of witnesses to such unlawful use, a series of convictions for unlawful possession where possession was of a quantity indicating personal use, a recent conviction for unlawful possession where the quantity possessed indicated personal use, or medical records showing use of or addiction to controlled substances.

28. Q. What forms of identification must a dealer obtain from a purchaser under Brady?

A. The identification document presented by the purchaser must have a photo of the purchaser, name, address, and date of birth, and must be issued by a governmental entity for the purposes of identification of individuals. Examples of acceptable identification documents are driver's licenses and passports.

29. Q. If a CLEO will accept notification only by mail, what evidence should the dealer obtain to establish the date on which the CLEO received actual notice so he will know when the 5-day waiting period begins?

A. If a CLEO is notified by mail, licensees are required to send the notice by registered or certified mail (return receipt requested) or by any other method of mailing which will provide a written receipt. The date of receipt by the CLEO will be indicated on the return receipt returned to the FFL. The date of receipt will determine when the 5-day waiting period begins.

30. Q. What records should a CLEO check to determine whether the purchaser is prohibited from receiving or possessing firearms due to drug abuse, a dishonorable discharge, or being an illegal alien?

A. Brady requires CLEOs to make a "reasonable effort" to ascertain within 5 business days whether the buyer's receipt or possession of a handgun would be in violation of law, including research in whatever State and local

record keeping systems are available and in a national system designated by the Attorney General (NCIC). The law clearly anticipates some minimal effort to check available records. Thus, the CLEO should check every available record system that may contain information relating to the categories of prohibited persons, including drug abusers, individuals dishonorably discharged from the military, and illegal aliens. For example, if centralized mental health records are maintained in the jurisdiction and are accessible by the CLEO, the CLEO should make a "reasonable effort" to determine whether the individual has been committed to a mental institution. Criminal records systems available to the CLEO may disclose whether the purchaser is possibly an unlawful user of controlled substances or an illegal alien.

It is difficult to prescribe what type of records search is a "reasonable effort" in every instance. The level of research will vary from CLEO to CLEO, depending on the resources available, the personnel available to conduct the searches, and the law enforcement priorities of the CLEO's jurisdiction.

31. Q. When must a purchaser complete ATF F 5300.35? At what point in the transaction is the purchaser required to execute the ATF F 4473?

A. Brady requires that ATF F 5300.35 be completed at the time the buyer expresses an intent to acquire a handgun from a licensee. The firearm need not be in the licensee's inventory as long as the buyer has the intent to acquire a handgun. The instructions on ATF F 4473 provide that the form is to be executed by the transferee at the time of delivery of the firearm. Thus, ATF Form 5300.35 would be executed prior to sale of a handgun and Form 4473 would be executed after the sale is made, at the time of delivery of the handgun.

32. Q. Can a CLEO maintain a data base of handgun purchasers? If so, what kind of information can be maintained in the data base?

A. CLEOs are required to destroy Forms 5300.35 and records containing information derived from the forms within 20 business days after the date the form was executed. However, CLEOs need not destroy forms or information derived from forms if the purchaser is found to be prohibited by law from receiving or possessing a handgun. Thus, the Brady law does not prohibit CLEOs from maintaining a data base of individuals who are prohibited by law from receiving or possessing handguns.

33. Q. Can a dealer maintain a data base of handgun purchasers?

A. Federal law does not preclude a dealer from maintaining a data base of handgun purchasers. However, such a data base would not excuse a dealer from complying with the requirements of Brady for each handgun sale, transfer, or delivery.

34. Q. If a CLEO advises an FFL not to transfer a handgun to an individual, does the individual have any appeal rights?

A. The individual may request the CLEO to provide the reason for the determination. The CLEO is required to provide reasons for the determination in writing within 20 business days after receipt of the request.

The law provides that CLEOs and other persons responsible for providing criminal history background information are not liable for damages for preventing the sale of a handgun to an individual who may lawfully receive or possess a handgun.

35. Q. Brady requires a dealer to wait 5 "business days" before transferring a handgun to a purchaser. What are "business days?"

A. "Business days" are days on which State offices in the State where the dealer's premises is located are open. If State offices are not open on Saturday and Sunday, these days do not count as "business days," even if the CLEO is open on these days.

36. Q. May a CLEO charge licensees a fee for performing a background check? If so, and the licensee refuses to pay

the fee, is the CLEO still required to perform the records check?

A. The Brady law does not prohibit the imposition of fees for performing records checks. Such fees would be imposed pursuant to applicable State and local law. If State law prohibits the sale of a handgun unless the fee for the records check is paid, then such a sale could not be made. Under these circumstances a CLEO would have no obligation to perform a records check.

37. Q. Is the redemption of a pawned handgun subject to the requirements of the Brady law? If so, may the pawnbroker obtain an executed Form 5300.35 and comply with the waiting period requirements before the redemption of the handgun so that at the time of redemption the handgun may be returned to the owner without further delay?

A. The transfer of a pawned handgun from the licensed pawnbroker to the owner is subject to the requirements of Brady. The licensee may have the owner of the handgun execute the Form 5300.35 at the time the handgun is pawned or at any time during the redemption period. Thus, the licensee may comply with the waiting period requirement prior to the redemption of the handgun.

38. Q. A handgun is delivered to a licensee by an unlicensed individual for the purposes of repair. Is the return of the repaired handgun subject to the requirements of the Brady law? Would the transfer of a replacement handgun from the licensee to the owner of the damaged handgun be subject to the requirements of Brady?

A. Neither the transfer of a repaired handgun nor the transfer of a replacement handgun would be subject to the requirements of the Brady law. Completion of ATF F 4473 is also not required. However, the licensee's permanent acquisition and disposition records should reflect the return of the handgun or transfer of a replacement handgun.

39. Q. In light of the Brady law, may a licensee sell, transfer, or deliver a handgun to a nonlicensed individual who does not appear in person at the licensed premises?

A. No. Unless the purchaser appears in person at the licensed premises, the licensee cannot comply with the requirement in the Brady law that the identity of the purchaser be verified by means of a Government-issued identification document containing a photograph.

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 express the thinking of the writer and do 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.

