

July, 1994

HONOR ROLL

416th Session, Basic Law Enforcement Academy - March 8 through May 26, 1994

Best Overall: Officer Daniel H. Curtis - Seattle Police Department
Best Academic: Officer Daniel H. Curtis - Seattle Police Department
Best Firearms: Officer Kevin A. Compton - King County Police Department
President: Officer Sheppard Clarke - Tacoma Police Department

Corrections Officer Academy - Class 196 - May 2 through May 27, 1994

Highest Overall: Officer Traci L. Halvorson - Geiger Corrections Center
Highest Academic: Officer Traci L. Halvorson - Geiger Corrections Center
Officer Clinton A. Moll - Twin Rivers Corrections Center
Highest Practical Test: Officer Michael S. McCabe - Clark County Jail
Highest in Mock Scenes: Officer Ramona K. Gragg - Washington Corrections Cntr for Women
Highest Defensive Tactics: Officer Bobby R. Baker - Washington Corrections Cntr for Women
Officer Thomas J. Adolph - Redmond City Jail
Officer Traci L. Halvorson - Geiger Corrections Center

JULY LED TABLE OF CONTENTS

UNITED STATES SUPREME COURT 2

OFFICER'S UNCOMMUNICATED "FOCUS" IS IRRELEVANT TO MIRANDA CUSTODY ISSUE:
ONLY FORMAL ARREST OR EQUIVALENT RESTRAINT TRIGGERS WARNINGS MANDATE
Stansbury v. California, 55 CrL 2016 (1994)..... 2

WASHINGTON STATE SUPREME COURT 5

"IMPOSSIBILITY" DEFENSE FAILS FOR "SPOTLIGHT" HUNTERS OF DECOY DEER
State v. Walsh and Reeves, State v. Osborn, 123 Wn.2d 741 (1994) 5

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT 7

"FRYE" TEST GOVERNS ADMISSIBILITY OF SCIENTIFIC EVIDENCE IN WASHINGTON
State v. Riker, 123 Wn.2d 51 (1994) 7

"SUBSTANTIAL STEP" ELEMENT OF "CONSPIRACY" STATUTE IS EASIER FOR STATE TO
PROVE THAN "SUBSTANTIAL STEP" ELEMENT OF "ATTEMPT" STATUTE
State v. Dent, State v. Balcinde, 123 Wn.2d 467 (1994) 8

"EROTIC MUSIC STATUTE" INVALIDATED ON DUE PROCESS GROUNDS
Soundgarden v. Eikenberry, 123 Wn.2d 750 (1994) 10

SEX OFFENDER REGISTRATION STATUTE UPHELD AGAINST CONSTITUTIONAL
CHALLENGE State v. Ward, John Doe Parolee v. State, 123 Wn.2d 488 (1994) 11

"PRESERVATION OF EVIDENCE" ISSUE REMAINS UNRESOLVED; EVIDENCE OF
SPEEDING SUFFICIENT TO SUPPORT RECKLESS DRIVING INFERENCE INSTRUCTION
State v. Hanna, 123 Wn.2d 704 (1994) 12

1994 WASHINGTON LEGISLATIVE ENACTMENTS - PART II 14

NEXT MONTH 21

U.S. SUPREME COURT

**OFFICER'S UNCOMMUNICATED "FOCUS" IS IRRELEVANT TO MIRANDA CUSTODY ISSUE:
ONLY FORMAL ARREST OR EQUIVALENT RESTRAINT TRIGGERS WARNINGS MANDATE**

Stansbury v. California, 55 CrL 2016 (1994)

Facts:

At 11 p.m. police in a California city went to the home of Robert Stansbury, a man that they believed to be a witness to a rape-murder of a ten-year-old. The officers asked their potential witness to come to the police station to answer some questions. He agreed and went with them in a patrol car, apparently voluntarily, though the Supreme Court's opinion does not describe in detail the trial court record on the "custody" question.

At the stationhouse, police began questioning Stansbury without first giving him Miranda warnings. Stansbury's answers began to focus the officers' suspicions on him, particularly when Stansbury admitted prior convictions for rape, kidnapping and child molestation. At that point, another officer was brought into the room, and Miranda warnings were administered. Stansbury declined to talk and asked for a lawyer. He was arrested and charged with the child's murder.

Prior to trial, Stansbury moved to suppress the statement he had made at the police station prior to being Mirandized. The trial court judge denied the motion, primarily because the judge believed that the officers had not subjectively focused on Stansbury as a suspect before they learned his criminal history.

At trial a jury convicted Stansbury of first degree murder, rape, kidnapping, and a lewd act. The court sentenced him to death. He appealed to the California Supreme Court and lost. The California Supreme Court took much the same approach as the trial court to the Miranda issue, basing its rejection of Stansbury's Miranda challenge primarily on the fact that the officers had not subjectively focused upon him as a suspect in their initial questioning.

ISSUE AND RULING: Is the uncommunicated focus of an interrogating officer relevant to the

Miranda custody test? (ANSWER: No, unstated focus is irrelevant; only the degree of restraint, objectively viewed, is relevant) Result: convictions set aside, case remanded to California Supreme Court to re-analyze the custody issue.

ANALYSIS: (Excerpted from U.S. Supreme Court's per curiam opinion)

We held in Miranda that a person questioned by law enforcement officers after being "taken into custody or otherwise deprived of his freedom of action in any significant way" must first "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. . . . In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but **"the ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."** California v. Beheler, 463 U.S. 1121 (1983) [**Emphasis added by LED Editor**].

Our decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned. In Beckwith v. United States, 425 U.S. 341 (1976), for example, the defendant, without being advised of his Miranda rights, made incriminating statements to Government agents during an interview in a private home. He later asked that Miranda "be extended to cover interrogation in non-custodial circumstances after a police investigation has focused on the suspect." We found his argument unpersuasive, explaining that it "was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the Court to impose the Miranda requirements with regard to custodial questioning." As a result, we concluded that the defendant was not entitled to Miranda warnings: "Although the 'focus' of an investigation may indeed have been on Beckwith at the time of the interview . . . , he hardly found himself in the custodial situation described by the Miranda Court as the basis for its holding."

Berkemer v. McCarty, 468 U.S. 420 (1984) [**Oct. '84 LED:01**], reaffirmed the conclusions reached in Beckwith. Berkemer concerned the roadside questioning of a motorist detained in a traffic stop. We decided that the motorist was not in custody for purposes of Miranda even though the traffic officer "apparently decided as soon as [the motorist] stepped out of his car that [the motorist] would be taken into custody and charged with a traffic offense." [**DWI -- LED Ed.**] The reason, we explained, was that the officer "never communicated his intention to" the motorist during the relevant questioning. The lack of communication was crucial, for under Miranda "[a] policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time"; rather, "the only relevant inquiry is how a reasonable man in the suspect's shoes would have understood his situation." Other cases of ours have been consistent in adhering to this understanding of the custody element of Miranda. [**Citing and discussing additional cases -- LED Ed.**]

It is well settled, then, that a police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question whether the individual is in custody for purposes of Miranda. See F. Inbau, J. Reid, & J. Buckley, *Criminal Interrogation and Confessions* 232, 236, 297-298 (3d ed. 1986).

The same principle obtains if an officer's undisclosed assessment is that the person being questioned is not a suspect. In either instance, one cannot expect the person under interrogation to probe the officer's innermost thoughts. Save as they are communicated or otherwise manifested to the person being questioned, an officer's evolving but unarticulated suspicions do not affect the objective circumstances of an interrogation or interview, and thus cannot affect the Miranda custody inquiry. "The threat to a citizen's Fifth Amendment rights that Miranda was designed to neutralize has little to do with the strength of an interrogating officer's suspicions."

An officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned. Those beliefs are relevant only to the extent they would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her "freedom of action." Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest. The weight and pertinence of any communications regarding the officer's degree of suspicion will depend upon the facts and circumstances of the particular case. In sum, an officer's views concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned, may be one among many factors that bear upon the assessment whether that individual was in custody, but only if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave. (Of course, instances may arise in which the officer's undisclosed views are relevant in testing the credibility of his or her account of what happened during an interrogation; but it is the objective surroundings, and not any undisclosed views, that control the Miranda custody inquiry.)

We decide on this state of the record that the California Supreme Court's analysis of whether Stansbury was in custody is not consistent in all respects with the foregoing principles. Numerous statements in the court's opinion are open to the interpretation that the court regarded the officers' subjective beliefs regarding Stansbury's status as a suspect (or nonsuspect) as significant in and of themselves, rather than as relevant only to the extent they influenced the objective conditions surrounding his interrogation. So understood, the court's analysis conflicts with our precedents. The court's apparent conclusion that Stansbury's Miranda rights were triggered by virtue of the fact that he had become the focus of the officers' suspicions, is incorrect as well. Our cases make clear, in no uncertain terms, that any inquiry into whether the interrogating officers have focused their suspicions upon the individual being questioned (assuming those suspicions remain undisclosed) is not relevant for purposes of Miranda. See generally 1 W. LaFare & J. Israel, *Criminal Procedure* §6.6(a), pp. 489-490 (1984).

The State acknowledges that Lieutenant Johnston's and the other officers'

subjective and undisclosed suspicions (or lack thereof) do not bear upon the question whether Stansbury was in custody, for purposes of Miranda, during the station house interview. It maintains, however, that the objective facts in the record support a finding that Stansbury was not in custody during the entire interrogation.

We think it appropriate for the California Supreme Court to consider this question in the first instance. We therefore reverse its judgment and remand the case for further proceedings not inconsistent with this opinion.

[Some text and citations omitted; LED cites supplied in bold]

LED EDITOR'S COMMENT:

This unanimous decision in Stansbury illustrates two things: (1) the argument that "subjective focus" triggers Miranda cuts both ways (that is, depending on the facts, either the defendant or the police may want to argue that uncommunicated focus of suspicion is critical to determining Miranda custody), and (2) whoever argues for a "focus" trigger to Miranda loses. For LED entries in the past five years indicating that uncommunicated focus is irrelevant in determining whether Miranda warnings are required, see May '89 LED:05; Oct. '89 LED:13; May '92 LED:02; July '92 LED:21; Sept. '92 LED:02; Jan. '93 LED:09; Feb. '93 LED:03. Custody of a degree equivalent to formal arrest is necessary to trigger Miranda.

While Stansbury interprets the Fifth Amendment of the U.S. Constitution, not the Washington Constitution, the ruling controls the actions of Washington officers (and Washington courts who wish to follow the law) under both the Federal and the State constitutions. That is because the Washington Supreme Court has declared that the limitations on police interrogations (or, viewed on the flip-side, the citizens' protections against self-incrimination) in the Washington Constitution are identical to those in the Federal Constitution. See State v. Earls, 116 Wn.2d 364 (1991) May '91:02.

WASHINGTON STATE SUPREME COURT

"IMPOSSIBILITY" DEFENSE FAILS FOR "SPOTLIGHT" HUNTERS OF DECOY DEER

State v. Walsh and Reeves, State v. Osborn, 123 Wn.2d 741 (1994)

Facts:

WALSH AND REEVES

On November 16, 1990, wildlife agents set up a decoy buck deer in a clearing near a gravel road. One hour after sunset, a passing vehicle stopped, backed up, and shined its headlights directly at the decoy deer's reflective eyes. One of the vehicle's occupants, Walsh, got out and shot at the decoy deer; recognizing at that point that it was a decoy, the vehicle occupants tried to drive away, but wildlife agents stopped them. The agents found a rifle in the passenger area of the vehicle. The shooter made incriminating admissions following Miranda warnings.

OSBORN

On October 20, 1990, agents were watching a decoy deer which had been set up in an open area along a forest service road. A single-occupant vehicle stopped, backed up and aimed its headlights at the decoy deer's reflective eyes. The driver, Osborn, got out of the vehicle. He aimed a rifle at the decoy, lowered the rifle, raised it again to take aim, lowered it again, and then threw a rock at the decoy. He then tried to leave in his vehicle, at which point wildlife agents stopped his vehicle. The agents found the rifle with scope lying on the front seat.

Proceedings:

Walsh and Reeves were charged in Thurston County District Court with illegal spotlight hunting of deer. The same charge was filed against Osborn in Pierce County District Court No. 4. Both courts dismissed the charges on the theory that it is impossible to "hunt" something that is not a wild animal.

ISSUE AND RULING: Does the defense of factual impossibility apply to the crime of spotlight hunting of big game under RCW 77.16.050? (**ANSWER:** No) **Result:** cases remanded for trial to the respective district courts in Thurston County and Pierce County.

ANALYSIS: (Excerpted from Supreme Court opinion)

Traditionally, legal impossibility was a defense to criminal charges of attempt while factual impossibility was not. The distinction between the two proved extremely elusive, though, and the Model Penal Code, as well as most courts, no longer recognize impossibility as a valid defense to crimes of attempt. See State v. Davidson, 20 Wn. App. 893 (1978) [**Davidson was a stolen property sting case. See Jan. '79 LED:02**] legal impossibility defense greatly eroded). Instead, the courts aim their telescopic sights at whether a defendant completed the crime charged regardless of the impossibility, or whether the defendant committed an attempt. Compare Yakima v. Esqueda, 26 Wn. App. 347 (1980) [**Sept. '80 LED:04**] (completed crime) with Davidson, (attempt).

We begin our analysis with the plain words of the spotlighting statute. They are straightforward -- the statute requires proof of three elements: (1) hunting, (2) big game, and (3) artificial light. RCW 77.08.010(7) defines the first element, "[t]o hunt", as "an effort to kill, injure, capture, or harass a wild animal or wild bird." Next, RCW 77.08.030 defines "big game", the second element, as elk, blacktail deer, whitetail deer, moose, mountain goat, caribou, mountain sheep, pronghorn antelope, cougar, black bear, or grizzly bear. Finally, as agreed, "artificial light" includes a car's headlights.

Defendants argue they sighted a deer decoy in their rifles, not big game and, therefore, the State failed to prove at trial Defendants hunted big game. Instead, according to Defendants, the State proved they hunted styrofoam, an act which is not illegal. Defendants conclude the existence of the decoy made it impossible for Defendants to complete the crime of spotlighting.

This argument camouflages an incorrect assumption: that to hunt big game, defendants must actually encounter big game. Hunting, however, is an activity involving effort. From 1947 to the present, the Legislature has defined hunting as "an *effort* to kill [or] injure" a wild animal or wild bird. (Court's italics.) RCW 77.08.010(7). Every fall, thousands of Washington residents journey deep into the woods in search of game. To say that they do not hunt until they actually encounter game defines the activity far too narrowly. Like hunting, when we take rod and reel to a mountain lake and dip our line in its waters, we begin to fish. Effort defines these activities.

Hunters begin to "hunt big game" not when they actually encounter big game, but rather when they make an effort to kill or injure big game in an area where such animals may reasonably be expected. The spotlighting statute outlaws making this effort with the aid of artificial light. Whether a defendant fires a shot may be evidence of intent, but it is not essential to prosecuting the charge.

The Court of Appeals in Yakima v. Esqueda, [above], reached a similar result. Defendant Esqueda was an avowed transsexual who worked as a cocktail waitress at "the Corral", a local bar. Esqueda, dressed as a woman, agreed to engage in straight sex with an undercover policeman for \$150. Esqueda was charged and convicted with agreeing to engage in prostitution. The Court of Appeals, in upholding the conviction, ruled the prosecution proved both intent and the prohibited conduct, i.e., the agreement; and, therefore, the ability of either party to follow through was irrelevant. The crime was complete at the point of agreement.

We therefore affirm the Superior Courts' rulings. The Superior Courts held correctly the cases against Defendants Reeves, Walsh and Osborn should have gone to the trier of fact.

[Some citations omitted; all puns in original]

LED EDITOR'S NOTE: The Court also rejects constitutionally grounded vagueness and overbreadth challenges to the spotlight hunting statute.

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) "FRYE" TEST CONTINUES TO GOVERN ADMISSIBILITY OF SCIENTIFIC EVIDENCE IN WASHINGTON COURTS -- In State v. Riker, 123 Wn.2d 51 (1994) the State Supreme Court rules that the long-standing rule of Frye v. U.S., 293 F. 1013 (1923)(requiring generally that scientific opinion evidence be accepted in the relevant scientific community) continues to control admission of scientific evidence in the Washington courts.

In affirming the continuing applicability of the Frye test in Washington, the State Supreme Court expressly declines to follow the lead of the U.S. Supreme Court in Daubert v. Merrill Dow Pharmaceuticals, 125 L. Ed.2d 469 (1993). In Daubert, the U.S. Supreme Court had held in a products liability case that: (1) the Frye test's "general acceptance" rule did not survive enactment of the Federal Rules of Evidence (FRE), and (2) FRE 702 is the sole limit on a federal trial judge

determining relevancy and reliability of expert testimony, including scientific evidence.

In Riker, the defendant had been arrested and charged with the delivery and possession of cocaine. The defendant had sought to show the jury that the reason for her drug-dealing was her history of being battered by abusive men. The trial court had disallowed the testimony of an expert witness on the 'battered woman's syndrome,' although the trial court did allow the defendant to testify briefly to the jury about her past abusive relationships. Although the defendant claimed she had been coerced into possessing and delivering cocaine by the State's male informant, she had never been battered by the alleged coercive male informant, she did not have an intimate relationship with him, and her contacts with him were brief and business-oriented. Defendant was convicted on controlled substances charges, and she appealed, challenging the trial court's decision disallowing the testimony of the expert witness.

The Supreme Court in Riker articulates a general two-tiered inquiry consistent with prior cited cases on scientific opinion testimony: "First, has the scientific theory or principle from which the evidence is derived garnered general acceptance in the relevant scientific community under . . . [Frye]? Second, is the expert testimony properly admissible under ER 702?" Washington's ER 702 is in all relevant respects identical to the Federal Rule FRE 702, but the State Court has decided not to take the path taken by the U.S. Supreme Court in abandoning Frye.

Instead, our Court breaks the Frye inquiry down into two prongs: "(1) whether the underlying theory is generally accepted in the scientific community and (2) whether there are techniques, experiments, or studies utilizing that theory which are capable of producing reliable results and are generally accepted in the scientific community."

The Court concludes that the first prong was satisfied in Riker because the underlying theory of the battered person syndrome has been generally accepted in the scientific community. The Court notes, however, as to the second prong, that the "syndrome has been admitted only in cases in which the batterer and the victim have developed a strong relationship, usually over a period of years." The Court in Riker affirms the trial court's decision to exclude the expert's testimony, noting the absence of cases or studies extending the battered person theory to circumstances similar to this case, and relying on the expert's own admissions during an offer of proof that this was "a fairly recent use of the battered woman syndrome" and that this situation was a "departure from the classic" situation.

Result: King County Superior Court convictions of guilty of possessing a controlled substance (one count) and delivery of a controlled substance (three counts) affirmed.

(2) "SUBSTANTIAL STEP" ELEMENT OF "CONSPIRACY" STATUTE EASIER TO PROVE THAN "SUBSTANTIAL STEP" ELEMENT OF "ATTEMPT" STATUTE -- In State v. Dent, State v. Balcinde, 123 Wn.2d 467 (1994) the meaning of the "substantial step" element of the conspiracy statute was at issue. In their prosecution for conspiracy to commit first degree murder, defendants Dent and Blacinde had taken exception to the trial court's refusal to give one of their proposed jury instructions. The defendants had asked the court to instruct the jury that the "substantial step" element of the conspiracy statute requires "more than mere preparation."

In a unanimous opinion, the State Supreme Court explains why the trial court was correct in rejecting defendants' proposed instruction as being contrary to law. The Court explains:

An individual commits conspiracy when

with intent that conduct constituting a crime be performed, he [or she] agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a *substantial step* in pursuance of such agreement.

[Court's italics.] RCW 9A.28.040(1). The trial court instructed the jury that a "substantial step" is "conduct which strongly indicates a criminal purpose".

Defendants' proposed instruction is identical to WPIC **[Washington Pattern Instruction . . . LED Ed.]** 100.05, which defines the "substantial step" element of an *attempt* as "conduct which strongly indicates a criminal purpose and which is more than mere preparation." To support defendants' argument that the same definition of "substantial step" is applicable in the conspiracy context, the defendants rely on the note on use of WPIC 110.01, the pattern jury instruction defining criminal conspiracy, which refers to WPIC 100.05 for a definition of "substantial step".

At oral argument, the State argued that WPIC 100.05 may not even accurately define "substantial step" for attempt purposes. That issue is not before us. Even if WPIC 100.05 does correctly define the "substantial step" element of an attempt, we are not persuaded by defendants' argument that the same definition should be used in the conspiracy context. Differences in the language and focus of our attempt and conspiracy statutes and in the purposes of statutes criminalizing attempt and conspiracy convince us that the instruction given by the trial court was proper.

The first difference between the two crimes is in the language describing the type of "substantial step" that is required for each. RCW 9A.28.020(1) provides:

A person is guilty of an attempt to commit crime if, with intent to commit a specific crime, he does *any act which is a substantial step toward the commission of that crime.*

A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a *substantial step in pursuance of such agreement.*

[Court's italics.] The focus or end toward which a "substantial step" must be taken is described differently in each statute.

Additional differences between the two crimes can be found in the nature of the conduct sought to be prohibited and in the significance of the "substantial step" requirement (or overt act requirement in other jurisdictions), in each context, for determining whether the prohibited conduct has occurred. "In the case of attempt the act must go beyond preparation because the attempt is deemed a punishable segment of the crime intended." R. Perkins, *Criminal Law* 618 (2d ed. 1969), . . .

A "substantial step" is required in the attempt context to prevent the imposition of punishment based on intent alone.

The purpose of the "substantial step" or overt act requirement is different in the conspiracy context. A conspiracy has been defined as "a partnership in criminal purposes. The gist of the crime is the confederation or combination of minds." . . . The purpose of the "substantial step" requirement is, therefore, to "manifest 'that the conspiracy is at work,' and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence." . . .

The different purposes underlying the act requirements of the two offenses are well recognized.

[C]onspiracy focuses on the additional dangers inherent in group activity. In theory, once an individual reaches an agreement with one or more persons to perform an unlawful act, it becomes more likely that the individual will feel a greater commitment to carry out his original intent, providing a heightened group danger.

As an inchoate crime, conspiracy allows law-enforcement officials to intervene at a stage far earlier than attempt does. To obtain an attempt conviction, the prosecutor must prove that the actor performed an act beyond mere preparation To obtain a conspiracy conviction, however, the prosecutor need only prove that the conspirators agreed to undertake a criminal scheme or, at most, that they took an overt step in pursuance of the conspiracy. Even an insignificant act may suffice.

We agree that the conspiracy statute requires a lesser act than does the attempt statute. We are particularly persuaded by the fact that RCW 9A.28.040 requires only an act that is a "substantial step toward the commission of [the] crime". RCW 9A.28.020. We hold that preparatory conduct which furthers the ability of the conspirators to carry out the agreement can be "a substantial step in pursuance of [the] agreement". Therefore, we hold that the trial court properly refused to instruct the jury that the "substantial step" element of a conspiracy requires more than mere preparation.

[Text, citations omitted; italics by Court]

Result: Snohomish County Superior Court convictions of Roland Dent and Carole Balcinde for conspiracy to commit first degree murder affirmed.

(3) **"EROTIC MUSIC STATUTE" INVALIDATED ON DUE PROCESS GROUNDS** -- In Soundgarden v. Eikenberry, 123 Wn.2d 750 (1994) the State Supreme Court is unanimous that the Federal constitution's due process clause precludes enforcement of the scheme established in Washington's "Erotic Music Statute" at RCW 9.68.050 through .090.

The Court holds that the following two elements of the statute violate due process: (1) in a prosecution under RCW 9.68.060 for distributing erotic materials to minors, the State may prove

an element of the crime by relying upon a prior judicial determination that the materials are obscene; and (2) the two-stage procedure of RCW 9.68.060 for determining if a sound recording is erotic as applied to minors does not provide for notice of the initial hearing to all interested parties, nor is adequate notice given as to which sound recordings have been determined to be erotic.

The Court also holds that the question of whether materials are "erotic materials" under the invalidated statutory scheme is a jury question. That is because the question has sufficient "criminal" aspects to qualify as a question which, under the Washington State Constitution, must be resolved by a jury if that is the wish of the alleged violator.

Result: King County Superior Court decision invalidating the statute and permanently barring its enforcement is affirmed.

(4) SEX OFFENDER REGISTRATION STATUTE UPHELD AGAINST CONSTITUTIONAL CHALLENGE -- In State v. Ward, John Doe Parolee v. State, 123 Wn.2d 488 (1994) the State Supreme Court upholds the sex offender registration statute (RCW 9A.44.130-.140) against challenges that it violates constitutional -- (1) ex post facto, (2) equal protection, and (3) due process -- provisions. Along the way on the ex post facto issue, the Court explains its interpretation of the statute in terms of its limits on public dissemination of sex offender information by law enforcement agencies:

The first limits to disclosure appear when an agency determines whether to disseminate registrant information. Because the Legislature clearly intended public agencies to disseminate warnings to the public 'under limited circumstances', in many cases, both the registrant information and the fact of registration remain confidential. This cannot impose any additional burdens to that of registration.

For those cases which merit disclosure, the statute requires an agency to have some evidence that the offender poses a threat to the public or, in other words, some evidence of dangerousness in the future. The release of the registrant information must be "necessary for public protection". We note that the statute, on its face, requires the disclosing agency to have some evidence that the offender poses a threat to the community. Absent evidence of such a threat, disclosure would serve no legitimate purpose. Therefore, we hold that a public agency must have some evidence of an offender's future dangerousness, likelihood of reoffense, or threat to the community, to justify disclosure to the public in a given case. This statutory limit ensures that disclosure occurs to prevent future harm, not to punish past offenses.

When disclosure is appropriate, the statute also limits what a public warning may contain. As stated above, the statute authorizes release only of "relevant and necessary" information. This standard imposes an obligation to release registrant information reasonably necessary to counteract the danger created by the particular offender. For example, release of an offender's Social Security number may be unnecessary in many cases, but critical where a potential employer must discover the offender's identity and criminal background. Furthermore, the statutory requirement of "necessary information" and, for that matter, the Legislature's primary goal of protecting the public, obligates the disclosing agency

to gauge the public's potential for violence and draft the warning accordingly. An agency must disclose only that information relevant to and necessary for counteracting the offender's dangerousness.

Finally, the statute limits where an agency may disclose the registrant information. The Legislature dictated that disclosure must be "rationally related to the furtherance" of the goals of public safety and the effective operation of government. See Laws of 1990, ch. 3, § 116. Accordingly, the geographic scope of dissemination must rationally relate to the threat posed by the registered offender. Depending on the particular methods of an offender, an agency might decide to limit disclosure only to the surrounding neighborhood, or to schools and day care centers, or, in cases of immediate or imminent risk of harm, the public at large. The scope of disclosure must relate to the scope of the danger. In addition, the content of a warning may vary by proximity: next-door neighbors or nearby schools might receive a more detailed warning than those further away from harm.

As the Legislature indicated, however, we leave to the appropriate agencies the specific decisions of whether, what, and where to disclose within the parameters outlined above. We find that the statutory limits on disclosure ensure that the potential burdens placed on registered offenders fit the threat posed to public safety. Any publicity or other burdens which may result from disclosure arise from the offender's future dangerousness, and not as punishment for past crimes. We conclude, therefore, that registration and limited public disclosure does not alter the standard of punishment which existed under prior law.

Result: Pierce County Superior Court conviction of Jeffrey S. Ward for failing to register as a sex offender affirmed; King County Superior Court's dismissal of John Doe's action seeking relief from the statute affirmed.

LED EDITOR'S COMMENT: The Ward decision requires that all law enforcement agencies adopt a scheme along the lines of the protocols developed by the Washington Association of Sheriffs and Police Chiefs at the time the registration statute was adopted. For each registrant, the local law enforcement agency must evaluate the dangerousness of the registrant and, based on that dangerousness determination, make a considered decision regarding the appropriate content and scope of notice to the public regarding that person. The Ward decision and chapter 129, Laws of 1994, amending the pertinent statute, will be further addressed in next month's LED.

(5) "PRESERVATION OF EVIDENCE" RULE REMAINS UNRESOLVED; EVIDENCE OF SPEEDING SUFFICIENT TO SUPPORT RECKLESS DRIVING INFERENCE INSTRUCTION -- In State v. Hanna, 123 Wn.2d 704 (1994), the State Supreme Court rejects defendant's argument that traffic accident investigators violated his due process rights by failing to: (a) photograph or measure skid marks, and (b) preserve the victims' vehicle. Along the way, the Court points out that the rule regarding failure-to-preserve-evidence is unclear in Washington and remains so after this decision.

Hanna's contention regarding the value of the un-preserved evidence is described by the Court as follows:

Hanna contends the lack of this evidence affected the defense's ability to use the "crush" method to establish that Hanna was not speeding prior to the collision and to show the proximate cause of the accident was due to an impact with the blue car which veered in front of Hanna forcing him to skid across the median.

The Court then explains why it rejects Hanna's argument:

The law governing destruction of evidence cases is not settled in Washington. See State v. Ortiz, 119 Wn.2d 294 (1992) [**Sept. '92 LED:06**]. This court is split as to whether the standard set forth in Arizona v. Youngblood, 488 U.S. 51, (1988) [**Feb. '89 LED:01**], or that enunciated in State v. Vaster, 99 Wn.2d 44 (1983) [**No LED entry**], is controlling.

In Youngblood, the Supreme Court held "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." In Vaster, we articulated a 2-part balancing test. "[A] court should first consider whether there exists a *reasonable possibility* that the missing evidence would have affected the defendant's ability to present a defense." The defendant bears the burden of establishing that reasonable possibility. Then, "the court must balance the consideration of 'reasonableness' against the ability of the prosecution to have preserved the evidence."

We decline to adopt either standard in this case because the trial court's denial of Hanna's motion to dismiss would be affirmed under either approach.

Under Youngblood, Hanna fails to establish the State Patrol acted in bad faith by not measuring or photographing the skid marks in the northbound lane or retaining the victims' vehicle. The State Patrol's decisions not to preserve and retain the evidence may have reflected poor judgment, but the record establishes those decisions were based on a reasonable belief the evidence would not be relevant to either party.

Under Vaster, Hanna fails to meet his burden to establish a reasonable possibility the missing evidence affected his ability to present a defense.

The possibility is remote the missing evidence would have affected the speed estimates presented to the jury. The defense's expert, Kenneth Tharp, testified that for Hanna to have been traveling within the speed limit, the State Patrol's estimates of the crush damage would have to be significantly in error and its measurements of Hanna's skid marks, found to be 323 feet, would have to be off by 50 percent. In addition, even without the missing data, Tharp was able to estimate Hanna's speed at 60 to 54 m.p.h. based on photographs taken of the victim's vehicle. Tharp also testified that in partial head-on collisions, like the accident at issue in this case, both the "crush" method and the "conservation of momentum" method, used by the State, could be used to estimate precollision speeds. Based on the available collision data and the eyewitness testimony that Hanna was traveling "highway speed", we do not find a reasonable possibility that the missing evidence affected the defendant's ability to present a defense on this

issue.

Hanna has also not met his burden of establishing a reasonable possibility the lack of photographs or measurements of the skid marks in the northbound lane affected his ability to argue the blue car was the proximate cause of the accident. Given the testimony on Hanna's excessive speed, we do not believe the missing skid mark evidence would have bolstered this theory. In addition, the defense was still able to present its proximate cause theory through eyewitness testimony that Hanna's car came into contact with the blue car immediately prior to skidding onto the median.

Under Youngblood or Vaster, we hold the defendant's due process rights were not violated and affirm the trial court's denial of the defendant's motion to dismiss for failure to preserve evidence.

[Some citations omitted; bracketed LED cites added]

Result: King County Superior Court convictions of vehicular homicide and vehicular assault affirmed.

LED EDITOR'S NOTE: The Supreme Court also holds that, under the facts of this case, it was not constitutionally improper for the trial court to give the jury an instruction that allowed it to infer "reckless driving" (an element of both crimes under the State's theory in this case) from the defendant's excessive speed.

1994 WASHINGTON LEGISLATIVE ENACTMENTS - PART II

LED EDITOR'S INTRODUCTORY NOTE: This is part 2 of what we expect to be a four-part update of 1994 Washington State Legislative enactments. Our focus this month is on that portion of chapter 7, 1st special session, which overhauled firearms legislation. Next month, in part 3, we will provide information about any additional enactments that we believe to be of interest. One enactment that we promise to address is chapter 139, which, as noted in the June '94 LED at 7, allows for motor vehicle forfeiture for a second DWI in a five-year period. We will also provide an index of enactments covered in the June, July and August LED's.

Part 4 in September will revisit previously digested legislation which requires further review. We expect that to complete our 1994 update.

Once again, we remind our LED readers that any views expressed regarding the correct interpretation of legislation are solely our own and do not necessarily reflect those of the Attorney General or the Criminal Justice Training Commission. We repeat this qualifying remark with a special focus on the firearms legislation. Chapter 7, 1st special session, is rife with difficult issues which we expect to be pondered by police, lawyers, judges, and interested citizens in the coming months.

MORE FIREARMS LAW (CHAPTER 7, Wash. Sp. Sess., 1994 -- Eff. Date: July 1, 1994)

I. FEDERAL LAW/BRADY AND STATE LAW

In the April 1994 LED, we provided some information regarding the Brady Bill, including the fact that Brady requires that law enforcement agencies check handgun purchase applications from licensed dealers to see if a purchaser is prohibited by Federal or State law from receipt of the handgun. The following seven questions deal with the complex interrelationship of Federal and State law as to handgun purchases, and, incidentally, firearms possession generally.

Important to our analysis is our guess -- noted in last month's LED at 22 -- that the 1994 legislation did not change the basic interpretation to RCW 9.41.040(3) and 9.41.070 taken in Attorney General Opinions, AGO 1988, No. 10 and AGO 1993, No. 10. The AGO's take a very narrow view of restoration of rights under various sentencing statutes in Title 9 RCW. Assistant Attorneys General in the division for the Department of Corrections have interpreted the AGO's to mean that one who obtains the standard "Final Discharge" does not thereby have his or her firearms rights "restored." Instead, the person must petition the Superior Court and ask for a separate "Certificate of Rehabilitation," and the person must support the claim of rehabilitation with facts and names of persons who can support the claim. Such "Certificates of Rehabilitation" are quite rare; most felons obtain only a "Final Discharge" order, which, as noted, does not restore rights. In light of the many new disqualifier crimes in chapter 9.41, we expect that the courts will begin to see many more applications for "Certificates of Rehabilitation" in the coming months.

A chart following the Q & A's helps explain some of our analysis. The chart is a slightly modified version of a creation by Craig Adams, legal advisor to Pierce County Sheriff's Office. The chart lists by name all crimes which disqualify one from possession and/or concealed pistol license (CPL) issuance under ch. 9.41 RCW.

QUESTION #1 (Washington State Conviction Not On Chart Which Follows Q & A's): If a records check turns up only a Washington felony conviction for a crime that would not bar purchase under RCW 9.41.010, .040 and .070, for example, forgery, theft, or possessing stolen property, should the agency allow the purchase?

ANSWER: Yes, once the person is no longer under DOC supervision. One section of federal law bars transfer if the person has been "convicted" of any felony, but another section of federal law, 18 U.S.C. § 921(a)(20), requires that one look to the law of the jurisdiction -- here, Washington law -- to determine if the person is "convicted" for firearms possession purposes. For a person with a Washington forgery conviction, for instance -- a non-disqualifier under chapter 9.41 -- Federal law deems that person to be not "convicted" (or, in other words, to have had his rights "restored") once the person is no longer under a firearms restriction based on status as a prisoner, probationer or parolee. See RCW 9.41.045 which bars possession of firearms or ammunition by persons under the supervision of DOC.

Hence, once our Washington forger or thief is free from supervision, that person can possess a handgun (or any other firearm) under Washington law, and also may be party to a handgun transfer from a licensed dealer under Brady and under state law.

QUESTION # 2 (Washington State Pre-1984 Deferred Sentencing Conviction -- Probation Followed By Dismissal): If a person charged with a crime goes through the probation-followed-by-dismissal process authorized by RCW 9.95.200 and 240, does this process "restore" the

person's right to possess a firearm and, therefore, to purchase a handgun? [Note: The "deferred sentencing" scheme of RCW 9.95.200 and .240 applies only to crimes committed before July 1, 1984.]

ANSWER: Yes, but only if the conviction is not for one of the following: murder, manslaughter, robbery, rape, indecent liberties, arson, assault, kidnapping, extortion, burglary or UCSA RCW Sections 69.50.401(a) and .410. For crimes on the list in the preceding sentence, rights can be restored only in the manner discussed in the answers to Questions 3 and 4 below, even if the probation-followed-by-dismissal process of RCW 9.95.200 and .240 was followed.

QUESTION #3 (Washington State Possession-Disqualifying Conviction For "Serious Offense" -- "SO" In "Classification" Column On Following Chart): How does a person obtain a "restoration of rights" for a Washington conviction which is a "serious offense", and thereby regain the right to possess firearms and purchase handguns?

ANSWER: Restoration of rights for a "serious offense" conviction is governed by RCW 9.41.070(1)(g)(iii) and RCW 9.41.040(3). Basically, one who seeks restoration after having been convicted of a "serious offense" will need to pursue one of three courses: (a) obtain an express "Certificate of Rehabilitation" from a superior court (see discussion above in Intro to Q & A's); (b) to obtain a pardon from the Governor based on an express determination of innocence (which is rare); or (c) to obtain "relief from disabilities" by the Secretary of the Treasury (which at present is not being done at all). Until a Certificate of Rehabilitation, pardon, or Federal relief is granted, no transfer may be made under Brady. Furthermore, possession and licensing are barred for such persons under Washington law.

QUESTION # 4 (Washington State Possession-Disqualifying Conviction For Non-Serious, Non CAC Offense): How does one obtain a restoration of rights on a conviction of a crime listed as a disqualifier in RCW 9.41.040, but which is not also a "serious offense" or a "crime against a child or other person" (CAC) listed in RCW 43.43.830; for instance, what if conviction is for one of the "harassment" offenses, RCW 9A.46.060, which is not also a "serious offense" nor "CAC"?

ANSWER: Assuming that the situation addressed: (a) does not involve probation-followed-by-dismissal "deferred sentencing", which voids any conviction for a pre-1984 crime pursuant to RCW 9.41.070(4), 9.95.200 and 9.95.240 as addressed in answer to Q-#2 above; and (b) assuming it is not a non-serious-offense listed as a "crime against a child or other person" under RCW 43.43.830(5) [in which case RCW 9.41.070(1)(g)(ii) would govern (see answer to question #5 below)], we believe this situation is addressed in RCW 9.41.040(3) and restoration is the same as for "serious offenses." See Answer to Question 3 above. There are approximately 10 disqualifier crimes which are neither "SO's" nor "CAC's." See chart below.

QUESTION # 5 (Washington Conviction -- Non-serious Crime Against Child Or Other Person): How does one obtain a restoration of rights for a Washington conviction for a non-serious-offense, which, in contrast to the situation addressed in Question #4 above, is listed as a "crime against a child or other person" (CAC) -- e.g., prostitution, but which is not a possession-disqualifier under 040.

ANSWER: The procedure is provided in RCW 9.41.070(1)(g)(ii) and requires a special court order. That subsection provides as follows:

(ii) Except as provided in (g)(iii) of this subsection, any person who becomes ineligible for a concealed pistol license as a result of a conviction for a crime listed in (g)(i) of this subsection and then successfully completes all terms of his or her sentence, as evidenced by a certificate of discharge issued under RCW 9.94A.220 in the case of a sentence under chapter 9.94A RCW, and has not again been convicted of any crime and is not under indictment for any crime, may, one year or longer after such successful sentence completion, petition a court of record for a declaration that the person is no longer ineligible for a concealed pistol license under (g)(i) of this subsection.

There are approximately 20 CAC crimes which fit under the above-quoted restoration rule -- see chart at end of article, "classification" column, "CAC". We believe that rights to CPL issuance, as well as possession, on all possession-disqualifying offenses listed in RCW 9.41.040 (whether "serious offenses" or other) cannot be restored under subsection 070(1)(g)(ii). Restoration on such possession-disqualifying crimes is under RCW 9.41.070(3) as described in our answers to Q's 3 and 4.

QUESTION # 6: (Out-of-state Felony): If a records check turns up only an out-of-state felony conviction, does the Washington agency look to the law of the other state or to the law of Washington?

ANSWER: Both. Look to the law of the other state to see if the person's rights have been "restored". Remember, the Federal concept of "restoration" is that firearms rights are deemed to be "restored" as soon as prison term and parole restrictions on firearms possession end. If the law of the other state provides that convictions for certain categories of felonies (or for all felonies) cease to disqualify one from firearms possession as soon as parole conditions end, then rights are deemed to be "restored" at that point for Federal law purposes. Hence, if the law of the other state is that, once time has been served on a conviction, firearms rights are restored, then there is no out-of-state "conviction" for Brady purposes once that time has been served.

Assuming, however, that rights have not been restored under the other state's laws as to a particular felony, then the person may not purchase the gun regardless of whether Washington law would permit a purchase of the firearm as to that category of crime, e.g., forgery. On the other hand, assuming the person's rights have been "restored" under the other state's laws, then a check must be made to see if the felony is equivalent to a "serious offense" or "crime of violence" under RCW 9.41.010. If not, then the person may purchase, but if so, then, even if the other state has restored the person's rights, Washington law bars the transfer unless the Secretary of the Treasury has restored the person's rights under 18 U.S.C. § 925(c).

The statutory basis for the latter conclusion is as follows. The Washington statute addresses restoration of rights under another state's statutory scheme by providing in RCW 9.41.070(3) that a person who is exempt from disability under Federal law "under 18 U.S.C. § 921(a)(20)(A)" (which relates to restoration of rights by state law) "shall have his or her rights restored "except as otherwise prohibited by this chapter." Then, when one looks to RCW 9.41.070(1)(g)(iii), that subsection provides "otherwise" and does not appear to allow for restoration of rights for a "serious offense" equivalent under the laws of another state. It declares that "[n]o person convicted of a serious offense as defined in RCW 9.41.010 may have his or her right to possess firearms restored" except through one of three specified circumstances not pertinent here, (1) restoration by Secretary of Treasury under 18 U.S.C. § 925(c), (2) the very narrow exceptions for pardons,

annulments and dismissals in Washington under RCW 9.41.010(3)(4) -- which, based in part on our reading of AGO 1988 No. 10, we believe is limited to pardons with an express finding of innocence, and (3) "Certificates of Rehabilitation" issued by Washington courts (see discussion in Intro paragraphs above at 14). We recognize that a solid argument can be made that the reference to RCW 9.41.040(3) could be a reference to certificates of rehabilitation or equivalents issued by courts in other states, contrary to our assumption; if so, then the would-be "serious offender" from the other state would be restored upon issuance of such a certificate. However, we don't concede the correctness of the latter interpretation.

The bar to purchase and possession for a "serious-offense"-equivalent, out-of-state, conviction, where rights had been restored by the laws of the other state, would be viewed by ATF as being solely a Washington state law bar, not a Brady bar. Hence, while transfer would be barred by state law, along with possession and licensing for a CPL, there would be no Federal prosecution for possession or for unlawful transfer by the dealer.

QUESTION # 7 (Federal court felony conviction): Does one look to the law of the state where the Federal court sits to determine whether rights have been "restored" under Federal law?

ANSWER: No; on May 16, 1994, the U.S. Supreme Court ruled in Beecham v. U.S., 55 CrL 2091 (1994) that state laws regarding restoration of rights do not affect a Federal court conviction. Accordingly, if a person has a Federal felony conviction, the only means of restoring rights is through the Secretary of the Treasury, who, as previously noted, is not presently processing any such requests. Unless the Secretary has acted to restore rights on a Federal felon, the person is barred from making a handgun purchase or possessing a firearm under Federal law.

State law may allow the Federal felon to possess a firearm, depending on the nature of the crime. For instance, a Federal court felony conviction for forgery would not bar firearm possession under Washington's RCW 9.41.040, even though, as a Federal felony, it would bar a handgun transfer from a Federally licensed dealer (as well as possession of a firearm under Federal law) as noted above.

II. RETROACTIVITY OF 1994 CHANGES TO CH. 9.41 RCW

QUESTIONS AND ANSWERS:

If a person was lawfully issued a concealed weapons license before July 1, 1994, but at that time had one of the new possession-disqualifier crimes on his or her record: (a) May the license be revoked? **ANSWER:** No; (b) May the person be prosecuted for unlawful possession of a firearm in spite of the previous issuance of the concealed weapon license? **ANSWER:** Yes; (c) May the person lawfully purchase a firearm under RCW 9.41.090? **ANSWER:** No.

WARNING: Our personal views on retroactivity are quite speculative. There may be a formal or informal Attorney General's Opinion on this question within the next several months. We will apprise LED readers of any such opinion as soon as possible after learning of it.

III. "JUVENILE ADJUDICATIONS" REVISITED

We have been told by legislative staff that, contrary to our assertion in last month's LED at 21, the 1994 Legislature did not intend to eliminate "juvenile adjudications" of "serous offense" equivalents when it deleted "juvenile adjudication" language from RCW 9.41.010 and .040. The

assertion by staff is that the Legislature deleted the "juvenile adjudications" language because it was redundant in light of the ruling of the State Supreme Court in the case of In re A, B, C, D, E, 121 Wn.2d 80 (1993) **July '93 LED:16**. (An argument can also be made consistent with this assertion that the definition of "conviction" in RCW 9.41.040(3), as amended, is broad enough to encompass "juvenile adjudications"). In In re A, B, C, D, E, the State Supreme Court ruled that, for purposes of RCW 70.24.340(1)(a) in the HIV testing statute, the term "offenses" was broad enough to encompass juvenile adjudications, and that therefore juveniles adjudicated guilty of certain offenses could be required to undergo HIV testing.

We have our doubts that the holding in In re A, B, C, D, E can be so broadly read, and we will not change our view unless very clear 1994 legislative history can be found. We are told that there is no such legislative history. The Court in In re A, B, C, D, E declared to be significant the fact that the HIV testing statute was a "public health law", not a "criminal one." The same cannot be said of chapter 9.41 RCW; the firearms law is clearly a criminal statute. Also, the Court in In re A, B, C, D, E declared to be significant the fact that the statute there under review did not refer to "felonies", which the Court acknowledged can only be committed by adults. Here, there are numerous references in RCW 9.41.010 and .040 to "felony" crimes.

In light of the above-noted differences between chapter 9.41 and RCW 70.24.340(1)(a), and in light of inferences we draw from the following -- (a) numerous Title 9A RCW crimes expressly refer to juvenile adjudications where their inclusion is intended [see chapter 9A.76 RCW and In re Fredericks, 93 Wn.2d 28 (1980) March '80 LED:02 (Fredericks held that the former escape statute did not address juveniles who escaped from detention because the statute did not then refer to "equivalent juvenile offense(s)"); and (b) under the pre-1994 version of chapter 9.41 RCW, juvenile adjudications of only certain types of adult-equivalent crimes were expressly mentioned ("crimes of violence" and other crimes listed in .040, but none of the license-only-disqualifiers in .070) -- we think that the clear language of the statute probably excludes juvenile adjudications as disqualifiers. As always, law enforcement agencies are urged to consult their prosecutors and/or legal advisors on this and other difficult interpretation questions under chapter 7, 1st Sp. S., Laws of 1994.

- KEY: cac = crime against children or others as per RCW 43.43.830
 so = serious offense as per RCW 9.41.010
 ah = harassment offense as per RCW 9A.46.060
 dv = domestic violence offense as per RCW 10.99.020
 P = affects possession of firearms, RCW 9.41.040
 L = affects license to carry only, RCW 9.41.070; if "L" only is listed, conviction does not bar possession of firearm under RCW 9.41.040 or purchase of a handgun under RCW 9.41.090; rights may be restored by court per RCW 9.41.070(1)(g)(ii)
 * = offense requires federal relief from disabilities or Governor's pardon based on express finding of innocence or certificate of rehabilitation from a court in order to restore rights

CRIME:	CLASSIFICATION:	
Aggravated Murder	cac/so	P/L*
Murder 1	cac/so	P/L*
Murder 2	cac/so	P/L*
Kidnapping 1	cac/so/ah/dv	P/L*
Kidnapping 2	cac/so/ah/dv	P/L*
Assault 1	cac/so/ah/dv	P/L*
Assault 2	cac/so/ah/dv	P/L*
Assault 3	cac/so/ah/dv	P/L*
Assault 4	cac/so/ah/dv	P/L*
Assault of a Child 1	cac/so/ah	P/L*

Assault of a Child 2	cac/so/ah	P/L*
Assault of a Child 3	cac	L
Rape 1	cac/so/ah/dv	P/L*
Rape 2	cac/so/ah/dv	P/L*
Rape 3	cac/so/ah	P/L*
Rape of a Child 1	cac/so/ah	P/L*
Rape of a Child 2	cac/so/ah	P/L*
Rape of a Child 3	cac/so/ah	P/L*
Robbery 1	cac/so	P/L*
Robbery 2	cac/so	P/L*
Arson 1	cac/so	P/L*
Arson 2	so	P/L*
Burglary 1	cac/so/ah/dv	P/L*
Burglary 2	so/ah/dv	P/L*
Residential Burglary	so/ah	P/L*
Manslaughter 1	cac/so	P/L*
Manslaughter 2	cac/so	P/L*
Extortion 1	cac/so/ah	P/L*
Extortion 2	cac/ah	P/L*
Indecent Liberties	cac/so/ah	P/L*
Incest w/child over 14	cac	L
Incest with child under 14	so	P/L*
Vehicular Hom (Other than DWI reck)	cac	L
Vehicular Hom. (DWI/Reck)	so	P/L*
Promoting Prostitution 1	cac/so	P/L*
Communication with a minor	cac	L
Unlawful Imprisonment	cac/dv	P/L*
Sexual Exploit/minor	cac/so	P/L*
Criminal Mistreatment 1	cac	L
Criminal Mistreatment 2	cac	L
Child Abuse (RCW 26.44)	cac	L
Custodial Interference 1	cac	L
Custodial Interference 2	cac	L
Malicious Harassment	cac/ah	P/L*
Child Molestation 1	cac/so/ah	P/L*
Child Molestation 2	cac/so/ah	P/L*
Child Molestation 3	cac/ah	P/L*
Sexual Misconduct / Minor 1	cac	L
Sexual Misconduct / Minor 2	cac	L
Rape of a Child 1	cac/so	P/L*
Rape of a Child 2	cac/so	P/L*
Patronize Juv. Prostitute	cac	L
Child Abandonment	cac	L
Promoting Pornography	cac	L
Sell erotic material to a minor	cac	L
Custodial Assault	cac	L
Viol of child abuse restraining order	cac	L
Child Buying or selling	cac	L
Prostitution	cac	L
Felony Indecent Exposure	cac	L
Vehicular Assault	so	P/L*
Leading Organized Crime	so	P/L*
Controlled sub. homicide	so	P/L*
Reckless Endangerment 1	dv (per se with firearm)	P/L*
Reckless Endangerment 2	ah/dv	P/L*
Coercion	ah/dv	P/L*
Criminal Trespass 1	ah/dv	P/L*
Criminal Trespass 2	ah/dv	P/L*
Malicious Mischief 1	ah/dv	P/L*
Malicious Mischief 2	ah/dv	P/L*
Malicious Mischief 3	ah/dv	P/L*
Unlawful Imprisonment	ah	P/L*
Violation of Restraining Order re Residence	dv	P/L*
Harassment	ah	P/L*
Telephone Harassment	ah	P/L*

Stalking	ah	P/L*
Any class B felony with sexual motivation	so	P/L*
DWI (3 in 5 years)		P/L*
Felony violation of RCW 69.50		P/L*
Felony with deadly weapon verdict	so	P/L*
Felony with firearm used or displayed		P/L*
Violation of protection order	ah/dv	P/L*

NEXT MONTH

The August LED will include Part III of our Legislative Update as well as recent cases, including an entry on the decision in State v. Trevino, Court of Appeals No. 13272-2-III. Trevino is a 2-1 decision from Division III of the Court of Appeals which interprets the Washington Court Rules requiring advisement of the right to counsel (CrRLJ 3.1(b)(1), (c)(1) and CrR 3.1(c)(1)) -- see Criminal Justice Training Commission Miranda cards which provide a separate post-custody warning based on the court rules. Trevino holds that CrRLJ 3.1 requires that advisement of the right to counsel occur almost immediately after the moment of arrest. In Trevino, a DWI case, the Court excludes the results of a BAC test because the arresting officer had not advised the arrestee of his right to counsel before asking to look in the arrestee's mouth for foreign objects.

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.

