

September, 1994

**HONOR ROLL**

*418th Session, Basic Law Enforcement Academy - May 4 through July 26, 1994*

*Best Overall: Officer Matthew E. Holmes - Kent Police Department*  
*Best Academic: Officer Graydon L. Matheson - King County Police Department*  
*Best Firearms: Officer Christopher C. Rathbun - Aberdeen Police Department*  
*President: Deputy James S. Harai, Jr. - Pierce County Sheriff's Department*

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*Corrections Officer Academy - Class 198 - July 11 through August 5, 1994*

*Highest Overall: Officer Kevin T. Fiore - King County Division of Corrections*  
*Highest Academic: Officer Robert F. Smith - King County Division of Corrections*  
*Highest Practical Test: Officer Kimbrelly Coffey - DSHS/Western State Hospital*  
*Officer Kevin T. Fiore - King County Division of Corrections*  
*Highest in Mock Scenes: Officer Selen M. "Nina" Blom - King County Division of Corrections*  
*Officer Charles P. Casey - Washington Corrections Center*  
*Officer Philip D. Sullivan - Washington State Penitentiary*  
*Highest Defensive Tactics: Officer Christopher P. Ward - Kent Corrections Facility*

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**SEPTEMBER LED TABLE OF CONTENTS**

**UNITED STATES SUPREME COURT** ..... 2

SLIM MAJORITY HOLDS THAT ARRESTEE'S ASSERTION DURING INTERROGATION --  
"MAYBE I SHOULD TALK TO A LAWYER" -- ISN'T MIRANDA ASSERTION  
Davis v. U.S., 62 LW 4587 (1994) ..... 2

**WASHINGTON STATE SUPREME COURT** ..... 5

ALL-PARTY CONSENT-TO-SEARCH RULE OF LEACH NOT APPLICABLE TO MOTOR  
VEHICLES  
State v. Cantrell, 124 Wn.2d 183 (1994) ..... 5

**BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT** ..... 8

SHORT DURATION OF POSSESSION DOESN'T NECESSARILY NEGATE DRUG CHARGE  
State v. Staley, 123 Wn.2d 794 (1994) ..... 8

ABSENCE FROM COURT AFTER TRIAL STARTS WAIVES RIGHT TO BE PRESENT  
State v. Thompson, 123 Wn.2d 877 (1994) ..... 9

**WASHINGTON STATE COURT OF APPEALS** ..... 10

COURT'S ANALYSIS APPEARS TO BE FAULTY IN RE: ISSUE OF POLICE POWER IN SEAT-BELT VIOLATION SITUATION TO ASK UNIDENTIFIED PASSENGER TO STEP FROM CAR  
State v. Cole, 73 Wn. App. 844 (Div. III, 1994) ..... 10

BEER BREATH, INTOXICATION SIGNS, NEARBY BEER BOTTLES = MIP  
State v. Fager, 73 Wn. App. 617 (Div. III, 1994) ..... 12

ODOR PLUS INTOXICATION PLUS PRESENCE AT KEGGER SUPPORTS MIP CONVICTION  
State v. Dalton, 72 Wn. App. 674 (Div. III, 1994) ..... 14

**BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS** ..... 16

SERIOUSNESS OF SUSPECTED CRIME RELEVANT TO TERRY "REASONABLE SUSPICION"  
State v. Randall, 73 Wn. App. 225 (Div. I, 1994) ..... 16

OMISSIONS FROM WARRANT AFFIDAVIT NOT SHOWN TO BE DELIBERATE OR RECKLESS  
State v. Clark, 68 Wn. App. 592 (Div. II, 1993) ..... 17

POSSESSION OF "RESIDUE" OF COCAINE SUFFICIENT TO SUPPORT DRUG CONVICTION  
State v. Malone, 72 Wn. App. 429 (Div. I, 1994) ..... 18

**UNITED STATES DISTRICT COURT FOR WESTERN DISTRICT OF WASHINGTON** ..... 19

STATUTE PROHIBITING ASSISTING SUICIDE ATTEMPT DECLARED UNCONSTITUTIONAL  
Compassion In Dying, et. al. v. State of Washington, et. al. ..... 19

**1994 WASHINGTON LEGISLATIVE ENACTMENTS -- PART IV** ..... 20

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**UNITED STATES SUPREME COURT**

**SLIM MAJORITY HOLDS THAT ARRESTEE'S ASSERTION DURING INTERROGATION -- "MAYBE I SHOULD TALK TO A LAWYER" -- ISN'T MIRANDA ASSERTION**

Davis v. U.S., 62 LW 4587 (1994)

**LED EDITOR'S INTRODUCTORY NOTE: Although the following case involved an appeal from a military court-martial, rather than a civilian criminal trial, the opinions of the Court make clear that the Fifth Amendment interpretation by the Court applies generally to criminal prosecutions.**

**Facts and Proceedings:**

Following his arrest as a murder suspect, Davis was Mirandized by military investigators who wished to interrogate him. He waived his rights and answered questions for over an hour. At that point, Davis said, "Maybe I should talk to a lawyer."

The investigating officers then stopped the questioning momentarily and asked neutral questions to determine whether David wanted to assert his right to an attorney under the Fifth Amendment. Davis responded that he did not want a lawyer, and the questioning resumed for another hour, at which time Davis said unequivocally that he wanted a lawyer. Questioning ceased at that point.

In his military court-martial for murder, Davis lost a motion to suppress the interrogation statements. He was convicted and sentenced to life.

ISSUE AND RULING: Where a suspect who has already clearly waived his Miranda rights subsequently makes an ambiguous statement about his right to counsel during the ensuing questioning, must the interrogating law enforcement officers cease questioning until they can clarify whether the suspect wants a lawyer? (ANSWER: No, says a 5-4 majority.) Result: Court-martial murder conviction and life sentence affirmed.

ANALYSIS: The Court had three options for resolving the question of what officers should do when a custodial suspect who has waived his rights and is in the process of giving a statement then makes an ambiguous statement about his right to an attorney: (OPTION 1) the most restrictive approach -- argued by Davis in this case -- would require that all questioning cease and would not even allow interrogating officers to attempt to clarify the suspect's wishes; (OPTION 2) the middle ground approach -- that argued by several law enforcement groups in friend-of-the-court briefs in this case -- would require officers to do what was done in this case, i.e., clarify the suspect's wishes about talking to an attorney before continuing the questioning; or (OPTION 3) the most pro-enforcement approach allows law enforcement interrogators to continue questioning without the need to ask any clarifying questions unless and until the suspect makes a clear and unequivocal request for an attorney (or for termination of the questioning).

The majority opinion authored by Justice O'Connor (joined by Rehnquist, Scalia, Kennedy, and Thomas) chooses OPTION 3. The five-justice majority opinion asserts as follows that the Court's decision balances the rights of citizens against the need for effective law enforcement and the need for a "bright line" rule:

We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who -- because of fear, intimidation, lack of linguistic skills, or a variety of other reasons -- will not clearly articulate their right to counsel although they actually want to have a lawyer present. But the primary protection afforded suspects subject to custodial interrogation is the Miranda warnings themselves. "[F]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process." A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted. Although Edwards [Edwards v. Arizona, 451 U.S. 477 (1981) May - Aug. '81 LED:04] provides an additional protection -- if a suspect subsequently requests an attorney, questioning must cease -- it is one that must be affirmatively invoked by the suspect.

In considering how a suspect must invoke the right to counsel, we must consider the other side of the Miranda equation: the need for effective law enforcement. Although the courts ensure compliance with the Miranda requirements through the exclusionary rule, it is police officers who must actually decide whether or not they

can question a suspect. The Edwards rule -- questioning must cease if the suspect asks for a lawyer -- provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information. But if we were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney, this clarity and ease of application would be lost. Police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he hasn't said so, with the threat of suppression if they guess wrong. We therefore hold that, after a knowing and voluntary waiver of the Miranda rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.

**Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney.** [Emphasis added] That was the procedure followed by the NIS agents in this case. Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel. But we decline to adopt a rule requiring officers to ask clarifying questions. If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.

...

The courts below found that petitioner's remark to the NIS agents -- "Maybe I should talk to a lawyer" -- was not a request for counsel, and we see no reason to disturb that conclusion. The NIS agents therefore were not required to stop questioning petitioner, though it was entirely proper for them to clarify whether petitioner in fact wanted a lawyer.

#### CONCURRING OPINION:

Justice Souter's concurring opinion (joined by Blackmun, Stevens and Ginsburg) argues that OPTION 2 described above at page 2 should have been chosen. They argue that the majority's ruling is not true to the spirit of the line of cases under Miranda requiring that the government prove the threshold waiver of rights through clear and convincing evidence. Also, the concurring justices assert that the majority has not really chosen a rule that is more easy to apply than the "clarification approach" of OPTION 2; the concurring justices point out that questions about the clarity of a "request" for counsel will often arise even if the Court requires a clear assertion of the right to counsel in order to bar further questioning under the Edwards rule. They assert that the question of "how clear is clear" is not so easily answered.

The concurring justices also discuss OPTION 1, totally rejecting the idea that police might be barred by Edwards from trying to clarify an unclear statement that might be construed to be an assertion of the right to counsel.

#### LED EDITOR'S COMMENT:

While we have not expressly said so in our past LED articles on the Edwards rule, we have long stated the view in our classroom updates that where a person being lawfully interrogated makes an ambiguous statement which could be interpreted as an assertion of the right to counsel or right to silence, the officers should cease questioning and try to clarify the suspect's desires re: counsel or cessation of questioning. See generally our discussion in our April '93 LED article -- "Initiation of Contact" Rules Under the Fifth and Sixth Amendments." April '93 LED:2-10. While Justice O'Connor's opinion for the majority in Davis makes our view appear overly conservative, we are sticking to it for several reasons.

First, as Justice O'Connor points out in the text of her opinion that we've emphasized in bold above, the clarification approach will prevent situations from arising where, in hindsight, trial judges view as a "clear request for counsel" what the interrogating officer felt at the time was an ambiguous request at best. Second, our Washington courts may impose a stricter standard, either through (A) an "independent grounds" reading of the Washington constitution or (B) an interpretation of the Rules of Court. To date, our appellate courts have read the state constitution and the Federal constitution to be identical in regard to restrictions on interrogations. See State v. Earls, 116 Wn.2d 364 (1991) May '91 LED:02. However, we have some fear that an issue like this one could be used by a majority of our state court to depart from Miranda standards established by the U.S. Supreme Court. As for the Rules of Court, some restrictive readings of the "right to counsel" provision in the Criminal Rules for Courts of Limited Jurisdiction, CrRLJ 3.1, have been made in recent years. It seems a bit of a stretch, but we see some risk that this state's appellate courts could use the right-to-counsel provision of CrRLJ 3.1 to impose a requirement for clarifying questions in response to ambiguous mid-questioning assertions of rights (and, much worse from our point of view, to thereafter use the Court Rules as a basis for imposing other additional limits on interrogations).

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### WASHINGTON STATE SUPREME COURT

#### **ALL-PARTY CONSENT-TO-SEARCH RULE OF LEACH NOT APPLICABLE TO MOTOR VEHICLES**

State v. Cantrell, 124 Wn.2d 183 (1994)

Facts and Proceedings: (Excerpted from Supreme Court opinion)

In June 1990, Defendant and a friend, Ingo Schweitzer, were traveling from California up the West Coast. Both men were college students. The motor vehicle they were traveling in belonged to the parents of Mr. Schweitzer. The Defendant and Mr. Schweitzer were using the vehicle with the owners' knowledge and permission.

By June 28, 1990, they had reached the state of Washington. A Washington State Patrol trooper working in Pacific County testified that radar showed the Schweitzer vehicle was traveling at a speed of 70 m.p.h. in a 55 m.p.h. zone. The trooper stopped the vehicle and cited Defendant, who was driving, for the speeding

violation. During the stop, the trooper learned that the vehicle belonged to the parents of the passenger, Mr. Schweitzer.

After Defendant signed the citation, the trooper asked Mr. Schweitzer and Defendant Cantrell if they had any open containers of alcohol or other contraband in the vehicle. They responded that they had some unopened bottles of alcohol. Because the trooper "was basically curious to see if they were telling the truth" and because he "felt they had something in the vehicle that they didn't want me to know about", the trooper asked Mr. Schweitzer for permission to search the vehicle. The trooper testified that it was his "standard procedure" to ask for a consent to search in approximately 50 to 75 percent of the traffic stops he made. He explained that he asked for consents whenever he felt there may have been something in the vehicle that the person should not have had.

Mr. Schweitzer was handed a written consent form. The trooper asked Mr. Schweitzer to read the form, and explained that the form was a consent to search his vehicle. The trooper also told Mr. Schweitzer that he was looking for any type of contraband or open containers of alcohol. Mr. Schweitzer then read the form and signed it. The trial court determined that Mr. Schweitzer understood and voluntarily signed the form and that the form was clear that he could have refused consent. Defendant Cantrell was not asked to sign a similar consent form and testified that he did not know that the trooper was planning to search the vehicle, but Cantrell made no objection when the officer searched the vehicle. The search resulted in the arrest of both men for possession of marijuana, paraphernalia, and methamphetamine.

The trial court denied Defendant's motion to suppress, holding that Mr. Schweitzer had authority to consent to the search of his parents' vehicle without the additional consent of Defendant Cantrell. Defendant Cantrell was subsequently found guilty.

The Court of Appeals reversed the conviction. State v. Cantrell, 70 Wn. App. 340 (1993) **Oct. '93 LED:21**. The Court of Appeals held in part: (1) State v. Leach, 113 Wn.2d 735 (1989) [**Feb. '90 LED:03**] requires police to obtain the consent of all persons possessing approximately equal control over a vehicle before searching a vehicle without a warrant; and (2) even if the consent was otherwise found to be valid, the fact that the trooper here obtained the consent during an illegal detention following the end of the valid traffic stop tainted the consent, making the search unlawful. **[LED EDITOR'S NOTE: On review in the State Supreme Court, the prosecutor sought review only of the first holding by the Court of Appeals.]**

[Some citations omitted]

**ISSUE AND RULING:** Does the consent search rule of State v. Leach which requires that all persons present with common authority over a private area be asked for consent to search apply to motor vehicles? (**ANSWER:** No, Leach does not apply to motor vehicle search cases.) **Result:** Court of Appeals reversal of Pacific County Superior Court conviction affirmed; a portion of the Court of Appeals opinion is disaffirmed, however.

ANALYSIS: (Excerpted from the Supreme Court opinion)

The consent exception often arises when a third person, and not the ultimate defendant, give the consent to search. . . . Generally, whether such consent is valid depends on the voluntariness of the consent and on whether the consenting party has common authority over the place or thing to be searched.

There is no question here that Mr. Schweitzer's consent was voluntary. In fact, he was warned in writing that he had the right to refuse to consent to the search. In this case, Mr. Schweitzer was literate, educated and signed a consent card which informed him he had the right to refuse permission to search and, hence, no one argues that the consent was involuntary.

There is also no question in this case that Mr. Schweitzer had the authority to consent to a search of his parents' car. Common authority rests on the mutual use of the property by persons generally having joint access or control. Generally, the borrower of a car may consent to a search. Here, it is not disputed that the passenger (the owners' son) had sufficient control to consent to a search of the vehicle. The only question, then, is whether this court's decision in Leach should be extended to apply to searches of motor vehicles.

. . .

In Leach [State v. Leach, 113 Wn.2d 735 (1989) **Feb. '90 LED:03**], a person with common authority consented to the search of business premises, but the defendant (cooccupant), who also was present at the premises at the time of the search, was not asked for his consent. There was no evidence that Leach's consent to search was sought or that he objected to the search. This court, in a sharply divided opinion, held that when a "cohabitant [is] present and able to object, the police must also obtain the cohabitant's consent." (Court's emphasis.) The Leach dissent criticized the majority because it relied upon cases in which the cooccupant/defendant was present and objecting to the search and the majority extended these cases to the situation where the cohabitant was present but not objecting. The dissent in Leach also pointed out that the majority relied on cases which involved privacy interests in homes, and not other premises, and opined that the majority unreasonably extended the protections of the home to nonresidential property.

The basic issue before the court here is whether the Leach rule should be extended to searches of vehicles. The third party consent cases turn on the suspect's reasonable expectation of privacy. If the suspect has willingly allowed another person common authority over the place or thing, then he or she runs the risk that the other will expose it to another person. Both Leach and Matlock focus on the reasonable expectation of privacy when considering the issue of a third person's authority to consent to a search.

While there is a privacy interest in an automobile, the interest does not rise to the level of a person's expectation of privacy in a residence. There is less expectation of privacy in an automobile than in either a home or an office. Since a person enjoys a lesser expectation of privacy in a vehicle than in an office or a home, we

decline to extend the rule enunciated in State v. Leach to vehicle searches. . . .

. . .

We conclude that the Fourth Amendment clearly does not require all occupants of a motor vehicle to independently consent to the search of the vehicle; the voluntary consent of one who possesses common authority over a vehicle is sufficient to support a search. We reiterate that the issue of whether such consent would continue to be valid as to a cooccupant if the cooccupant overtly objected to the search is not before us.

We therefore disaffirm that part of the Court of Appeals opinion in this case which purported to extend the Leach rule to apply to vehicle searches. However, . . . we do not review the Court of Appeals conclusion in this case to the effect that even if the consent was valid, the fact that the trooper here obtained the consent during an allegedly illegal detention tainted the otherwise valid consent. Since that alternative ground for reversal of the conviction is not challenged, the result of the Court of Appeals decision remains unchanged.

[Text, footnotes, and citations omitted]

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

**(1) Independent State Constitutional Grounds? In Cantrell, because the parties did not adequately brief the state constitutional issue, the Supreme Court did not consider whether the Washington Constitution, article 1, section 7, provides greater restrictions on consent searches than does the federal constitution. We have hope that our Court will not create special "independent grounds" restrictions on consent searches. This is a somewhat vague hope, however; we base our hope primarily on the fact that the Court has not ever before placed additional restrictions on consent searches on independent grounds, and on the fact that the Court has made only a few independent grounds rulings in the past decade. On the other hand, we have our concerns because "independent grounds" analysis is a highly arbitrary exercise. To paraphrase a legal pundit -- the Supreme Court does not have the last word because it's right; it's right because it has the last word.**

**(2) Is Leach Rule In Trouble? The critical manner in which the court in Cantrell discusses Leach -- pointing out in a footnote that the cases elsewhere are split even on the question of whether an objecting residential cooccupant can veto a cooccupant's consent to a search --gives us some hope that the Court might eventually reverse itself on its cooccupant, all-party consent rule. For now, however, officers must assume that the Leach rule continues to apply to consent requests in cooccupant situations at homes and business premises.**

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

**(1) SHORT DURATION OF POSSESSION OF DRUGS DOESN'T NECESSARILY NEGATE**

**DRUG CHARGE** -- In State v. Staley, 123 Wn.2d 794 (1994) the Supreme Court addresses legal issues surrounding a criminal defense theory related to a claim of "unwitting possession of illegal drugs." Staley, a cabaret musician, had been found in possession of a vial of cocaine when Spokane police arrested him for DWI. He claimed: (1) that the vial had been placed in his "tip" jar while he was performing at a restaurant; (2) that when he discovered the vial of cocaine (which he immediately recognized as such) he became embarrassed and therefore placed it in his pocket; and (3) that he had forgotten that he had the cocaine after he left the restaurant and began his drive home.

At trial, Staley convinced the Superior Court judge to give an instruction explaining that "unwitting" possession of cocaine is not unlawful. However, the Superior Court judge refused Staley's request to give another instruction stating that "fleeting, momentary, temporary or unwitting" possession is not unlawful (our emphasis -- we will refer to this latter instruction as the "duration" instruction -- LED Ed.). A jury convicted Staley of unlawful possession.

The Court of Appeals for Division III reversed, because the trial court had refused the "duration" instruction. The prosecutor then appealed to the Supreme Court. In a unanimous opinion, the State Supreme Court reverses the Court of Appeals decision, reinstating Staley's conviction.

Addressing Staley's proposed (and rejected) "duration" instruction, the Court explains that a very brief and knowing handling of illegal drugs under some circumstances might not constitute illegal possession of drugs. **[LED EDITOR'S COMMENT: We question why this is so; we think the Courts would have made more sense of the law had they overruled the 1969 precedent of State v. Callahan, 77 Wn.2d 27 (1969) -- a constructive possession case decided against the state, wrongly, we believe. Callahan included the unfortunate language offered in Staley's instruction.]** However, the Court explains that it is not appropriate to instruct a jury regarding the need for any minimum duration of possession. Along the way, the Supreme Court also implies as follows that the trial court was naive in giving an instruction on "unwitting" possession:

In fact, the court did instruct on "unwitting" possession in the language of WPIC 52.01 based on Staley's argument that he had forgotten that the drugs were in his possession. While we question whether possession can become "unwitting" merely by memory lapse, the trial court's generosity in giving this instruction is not challenged.

Result: Spokane County Superior Court conviction for possession of cocaine affirmed.

**(2) ABSENCE FROM COURT AFTER COMMENCEMENT OF TRIAL WAIVES RIGHT TO BE PRESENT FOR TRIAL** -- In State v. Thompson, 123 Wn.2d 877 (1994) the State Supreme Court rules that the trial court did not abuse its discretion in going forward with a defendant's trial in his absence. Defendant voluntarily had absented himself after the trial had begun and this acted as an implied waiver of his right to be present, the Court holds. A more stringent test must be met by the State where the defendant absents himself before commencement of the trial, the Court explains, but that was not the case here. Result: King County Superior Court conviction for delivery of a controlled substance affirmed.

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**WASHINGTON STATE COURT OF APPEALS**

**COURT'S ANALYSIS APPEARS TO BE FAULTY IN RE: ISSUE OF POLICE POWER IN SEAT-BELT VIOLATION SITUATION TO ASK UNIDENTIFIED PASSENGER TO STEP FROM CAR**

State v. Cole, 73 Wn. App. 844 (Div. III, 1994)

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

On March 1, 1991, three state patrol troopers and two deputies in four cars were conducting a "DWI emphasis patrol" on the highway between Colfax and Pullman.

At approximately 9 p.m., [Officer 1] observed a car traveling 25 miles per hour in a 35-mile-per-hour zone and occasionally weaving onto the shoulder of the highway.

[The officer] pulled in behind the car and noticed its exhaust pipes were also too short. He decided to stop the car and issue a citation for defective exhaust, improper lane travel and driving on the shoulder. RCW 46.37.390; RCW 46.61.140.

[Officers 2 and 3], in another car, followed [Officer 1] to assist. The car pulled off the road in response to the patrol's signal. [Officer 1] parked behind and to the left, while [Officer 2] parked behind and to the right. [Officer 4] arrived sometime later in a third patrol car. [Officer 1] approached and began questioning the car's driver, Kevin Williams. [Officer 2] approached the passenger side, where Mr. Cole was sitting.

As [Officer 2] approached the passenger door, he notice Mr. Cole was not wearing a safety belt and decided to cite him for a safety belt infraction; he did not know whether Mr. Cole had been wearing a safety belt before the car stopped. He asked for identification, but Mr. Cole did not have identification with him. Mr. Cole did provide his name and birthdate.

[Officer 2] asked Mr. Cole to step out of the car. He later testified that standard [agency] procedure called for separation of an unidentified person from other car occupants. In this way, he explained, [an officer] could ask Mr. Cole his name out of Mr. Williams' presence and then return to confirm the information with Mr. Williams. Mr. Cole got out of the vehicle and the [officer] patted him down for weapons. Finding none, [Officer 2] recorded Mr. Cole's name and birthdate for a radio check, sent Mr. Cole to stand in front of [Officer 1's] car and directed [Officer 3] to watch him.

As [Officer 2] walked to where [Officer 1] was questioning Mr. Williams, he heard a clinking sound, turned around, and saw Mr. Cole pushing something under the patrol car with his foot. [Officer 2] retrieved the object and identified it as a glass pipe containing a white crystalline residue, probably cocaine. Mr. Cole was arrested for possession of a controlled substance. In the search of Mr. Cole incident to his arrest, [Officer 4] also found a vial of white powder, over \$5,000 in cash, another glass pipe and an 8-inch knife.

Mr. Cole was charged by information with possession of a controlled substance (RCW 69.50.206(b)(5), .401(d)) and possession of drug paraphernalia (RCW

69.50.102, .412(1)). He moved to suppress the evidence recovered in the search as the fruits of an illegal search and seizure. The trial court denied the motion. Mr. Cole submitted his case on a stipulated record and was found guilty on both charges.

[Officers' names deleted]

ISSUE AND RULING: Did the scope of the investigatory stop of Cole exceed that which was reasonable under the circumstances? (ANSWER: Yes) Result: Whitman County Superior Court convictions of possession of cocaine and drug paraphernalia reversed. Status: State's petition for review pending in State Supreme Court.

ANALYSIS: (Excerpted from Court of Appeals opinion)

A person stopped for a traffic infraction may be detained only for the time reasonably necessary "to identify the person, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction". RCW 46.61.021(2). Vehicle passengers are not required to carry driver's licenses or other identification. He need only "identify himself, give his current address, and sign an acknowledgement of receipt of the notice of infraction." RCW 46.61.021(3).

...

As noted, Mr. Cole was not required to carry a driver's license, vehicle registration or insurance identification. A passenger stopped for an infraction need only identify himself, give his current address, and sign the notice of infraction. RCW 46.61.021(3). Mr. Cole did all of this.

At the point Mr. Cole was told to step out of the car, the infraction investigation escalated to a Terry stop. But a Terry stop was not warranted by the nature of the investigation (a safety belt violation) or the officer's suspicions (he apparently had none). The pat-down search of Mr. Cole, moreover, would have been justified only if [Officer 2] could have pointed to specific and articulable facts creating an objectively reasonable belief that a suspect is armed and presently dangerous. . . . [Officer 2] expressed no concern Mr. Cole might be armed nor did he express concern for his safety for that matter. His only reason for detaining Mr. Cole was to confirm his identity; that is not sufficient grounds for the detention.

The scope of an investigatory stop is determined by considering (1) the purpose of the stop, (2) the amount of physical intrusion on the suspect's liberty, and (3) the length of time of the seizure. Even assuming the original stop was justified, removing Mr. Cole from the car, frisking him and putting him under the control of another officer went beyond the intrusions necessary for a minor traffic infraction.

Because the seizure of Mr. Cole was unreasonable, evidence obtained as a result of the seizure must be suppressed.

[Some citations omitted, officer's name deleted]

## **LED EDITOR'S COMMENT:**

The Court of Appeals may have reached the right result in this case, but it makes two major errors in its analysis. We concede that the result may have been correct, because there appeared to be inadequate support in the record for frisking Cole. However, the Court was way off base on two points in its analysis.

First, if we read the opinion correctly, the Court is saying that if a passenger suspected of a seatbelt violation says he is "Bill Clinton" and lives "at the White House", the officer must allow him to sign the citation and go on his way. Although we are aware of no cases on point, we believe that THIS CANNOT BE THE LAW. Surely, the officer investigating this infraction or any other infraction has the power to investigate by doing a radio check of the information provided, and by checking with other persons accompanying the suspected violator.

Second, the Court makes no mention of the U.S. Supreme Court and State Supreme Court precedents which allow officers total discretion to direct out of their motor vehicles drivers suspected of traffic or criminal law violations. See Pennsylvania v. Mimms, 434 U.S. 106 (1977) and State v. Kennedy, 107 Wn.2d 1 (1986) Dec. '86 LED:01. Mimms and Kennedy are based on officer-safety concerns expressly recognized by the Courts in each case, and on the need for a "bright-line" rule for ease of police decision-making. While the Cole case involved a directive to a passenger, as opposed to a driver, we think the situations are exactly parallel, and, therefore, that the State Supreme Court and the U.S. Supreme Court would allow officers to order suspected passenger-violators out of their vehicles, without objective justification, under the same officer-safety rationale that supported the Mimms and Kennedy "bright line" rulings as to suspected driver-violators.

On the other hand, the law is unclear on the question of an officer's authority to direct a passenger out of a vehicle where only the driver is suspected of a violation, and the passenger has done nothing to indicate that he might be a danger to the officer. For cases going both ways on this latter question, see Professor LaFave's Treatise on the Fourth Amendment, Section 9.4(a). There are no reported Washington cases on the latter point.

## **BEER BREATH, INTOXICATION SIGNS, NEARBY BEER BOTTLES = MIP**

State v. Fager, 73 Wn. App. 617 (Div. III, 1994)

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

At about 2:20 a.m. on June 23, 1992, Spokane Police Officer James Muzatko stopped a vehicle being driven by Mr. Fager. There were two passengers. Officer Muzatko, a police officer for 19 years, detected the strong odor of beer in the vehicle and the "definite and positive odor of beer" on Mr. Fager's breath. He observed that Mr. Fager had watery and bloodshot eyes, a white coated tongue, and "the classic symptoms associated with suspicion of drunk driving". While Mr. Fager looked for his driver's license, Officer Muzatko noticed two quart-size beer bottles in the vehicle, one behind the passenger seat and one behind the driver's seat. The partially full bottles were closed, but were within reach of Mr. Fager when he was driving.

Mr. Fager was charged with being a minor in possession of alcohol. At an adjudicatory hearing, he testified he had not consumed any alcohol that night but had taken cold medication. He said the bottles of beer belonged to his passengers.

On redirect examination, Officer Muzatko testified that prior to becoming a police officer he was trained as a nurse. He stated the odor he detected from Mr. Fager was beer, not cold medicine. Mr. Fager was found guilty.

**ISSUE AND RULING:** Was there sufficient evidence to support Fager's conviction of minor in possession of liquor under RCW 66.44.270? (**ANSWER:** Yes) **Result:** Spokane County Superior Court conviction for being a minor in possession of liquor affirmed.

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

Mr. Fager asserts that because Officer Muzatko did not see him consume the liquor the evidence is insufficient to corroborate the conviction. State v. Hornaday, 105 Wn.2d 120 (1986) [**April '86 LED:15, June '86 LED:16**]. We do not agree.

...

In Hornaday, the arresting officer did not see the defendant acquire, possess or consume liquor. Applying former RCW 10.31.100, the court concluded that unless the officer observed a person under the age of 21 drink liquor, consumption had not occurred in the officer's presence and the defendant had not violated RCW 66.44.270 [**COURT'S FOOTNOTE:** In 1987, the Legislature amended RCW 10.31.100 to permit a warrantless misdemeanor arrest when an officer has "*probable cause* to believe that a person has committed or is committing a misdemeanor . . . involving the acquisition, possession, or consumption of alcohol by a person under the age of twenty-one years . . ."].

The defendant in State v. Allen, 63 Wn. App. 623 (1991) [**April '92 LED:06**] relied on Hornaday and argued the evidence was insufficient to support her conviction of being a minor in possession of intoxicants. This court reviewed Hornaday and noted the arrest there was pursuant to former RCW 10.31.100(1) which authorized warrantless arrests only for misdemeanors committed in the arresting officer's presence. We noted that because a violation of former RCW 66.44.270(2) was not at issue in Hornaday, the court's statement concerning violation of the statute was dicta. We stated: "the court [in Hornaday] misspoke and intended to say the defendant was 'not guilty of violating RCW 66.44.270 in the presence of the officer' as required for a lawful warrantless misdemeanor arrest."

Similarly, in State v. Preston, 66 Wn. App. 494 (1992) [**Oct. '92 LED:08**] *aff'd*, 122 Wn.2d 553 (1993), the defendant was convicted of being a minor in possession by consumption. He claimed the evidence was insufficient to support the conviction because the officer had not seen him drink the beer. The officer in Preston had observed the defendant put a bag of empty beer bottles into a trash receptacle and had smelled the odor of alcohol on the defendant's breath. The court in Preston

noted that when Hornaday was decided, former RCW 10.31.100 allowed no exception to the requirement that a warrantless arrest for a misdemeanor could be made only when the offense was committed in the officer's presence.

According to the court in Preston, the reasoning in Hornaday that an officer must see the minor consume alcohol was dicta. The court in Preston declined to follow Hornaday: "The Hornaday court clearly did not intend to require, as a matter of law, that in order to convict a minor for consumption of alcohol the arresting officer must testify that the minor consumed alcohol in his presence."

Recently in State v. Dalton, 72 Wn. App. 674 (1994) [**Sept. '94 LED:14**] this court again addressed whether evidence was sufficient to support a conviction for minor in possession of liquor. There, the officer observed the defendant in close proximity to a beer keg during a party, saw the defendant walk unsteadily, and noted his bloodshot eyes and slurred speech. The officer smelled the odor of alcohol on the defendant. We held the officer's observations, in context with the other evidence, were sufficient to prove the defendant had possession: "The officer's opinion, based on his training and experience, that [defendant] appeared intoxicated, was not refuted."

Here, Officer Muzatko testified that Mr. Fager's eyes were bloodshot and that his breath had the heavy odor of beer. According to Officer Muzatko, who had 19 years' experience, Mr. Fager had "the classic symptoms associated with suspicion of drunk driving." Mr. Fager's breath had the odor of beer, not cold medicine. This testimony has not been refuted. There is sufficient evidence to support the conviction.

[Some citations, one footnote omitted; LED references added]

**LED EDITOR'S NOTE:** In 1993 the Legislature added a second, alternative MIP crime to RCW 66.44.270. See August '93 LED at 21 and September '93 LED at 08 discussing the newer MIP offense of minor-under-the-influence-in-public. The variation on MIP added in 1993 was not addressed in Fager, where the facts arose in 1992. If the 1993 law had been in effect when these facts arose, defendant would clearly have been guilty under the alternative MIP crime, as well as the "old" MIP offense.

## **ODOR PLUS INTOXICATION PLUS PRESENCE AT KEGGER SUPPORTS MIP CONVICTION**

State v. Dalton, 72 Wn. App. 674 (Div. III, 1994)

Facts: (Excerpted from Court of Appeals opinion)

The evidence at Mr. Dalton's bench trial was limited to the testimony of Officer Kim M. Thomas. The officer testified that on November 9, 1991, he responded to a call for backup at a Spokane residence. When he arrived, there were officers inside the home and at the front door. He observed several plastic cups of beer and a beer keg inside.

Officer Thomas identified Mr. Dalton as a person he saw inside the residence and

one he watched exit through the front door. He said Mr. Dalton's identification was checked by another officer as he left. He described Mr. Dalton, noting he "was a little unsteady, his voice was slurred and he [had] blood-shot eyes". He also noticed "the strong odor of alcoholic beverage about him". Officer Thomas testified he was within 1 foot of Mr. Dalton when he questioned him and, based on his training and experience, Mr. Dalton appeared to be intoxicated.

Officer Thomas told Mr. Dalton not to drive. However, as the officer watched, Mr. Dalton walked part way down the street and got into the driver's side of a parked vehicle. The officer approached and questioned him about driving. He responded by stating he was waiting for a ride. The officer then asked who owned the vehicle and whose keys were on the passenger seat. Mr. Dalton stated he did not know. Officer Thomas checked the registration of the vehicle and learned it was registered to James Dalton. Mr. Dalton was then placed under arrest.

Proceedings: Dalton was adjudicated as guilty in juvenile court of minor in possession under former RCW 66.44.270(2).

ISSUE AND RULING: Was there sufficient evidence to support the charge that Dalton was unlawfully in possession of liquor under former RCW 66.44.270(2)? (ANSWER: Yes) Result: Spokane County Superior Court juvenile adjudication of MIP affirmed.

ANALYSIS:

This case required analysis of the following language of RCW 66.44.270(2):

It is unlawful for any person under the age of twenty-one years to possess, consume, or otherwise acquire any liquor.

RCW 66.44.270 was amended subsequent to the May 1992 incident at issue in Dalton. The amendment (in 1993) added public intoxication by minors as a separate offense (see August '93:21 and September '93:08 LED's for information re: 1993 amendment to RCW 66.44.270); however, the language at issue in Dalton was not changed in the 1993 amendments.

The Court of Appeals analyzes the sufficiency-of-the-evidence issue before it as follows:

As noted in Hornaday [State v. Hornaday, 105 Wn.2d 120 (1986) **April '86 LED:15**; **June '86 LED:16**], "possession" is not defined in RCW 66.44.270. Hornaday supplied the following definition: A person possesses alcohol if he or she knows of the substance's presence, it is immediately accessible, and he or she exercises dominion or control over it. Possession may be actual or constructive.

The presence of liquor in one's system does not constitute possession *per se* because the person's power to control, possess, use or dispose of it ends upon assimilation. However, evidence of assimilation is circumstantial evidence of prior possession. Although insufficient by itself to support a conviction, when combined with other corroborating evidence of sufficient probative value, evidence of assimilation can be sufficient to prove possession beyond a reasonable doubt. As the State contends, the issue in Hornaday was whether the defendant committed a

misdemeanor (possession of alcohol) in the presence of the arresting officer, not what evidence was sufficient to convict at trial.

Here, the officer observed Mr. Dalton in the residence in close proximity to a beer keg and plastic cups of beer. A "kegger" was in progress. He observed the youth as he exited the residence, noting his unsteady walk, slurred speech, and bloodshot eyes. He smelled the odor of alcohol. The officer's opinion, based on his training and experience, that Mr. Dalton appeared intoxicated, was not refuted. Mr. Dalton's observed physical condition in context with the other evidence was sufficient to prove he had possessed alcohol beyond a reasonable doubt.

[Some citations omitted]

**LED EDITOR'S NOTES:** Other recent MIP cases involving the sufficiency-of-the-evidence issue, with similar pro-state outcomes, include: State v. Preston, 66 Wn. App. 494 (Div. II, 1992) Oct. '92 LED:08 (beer breath + empty beer bottles nearby + admissions = MIP); and State v. Walton, 67 Wn. App. 127 (Div. I, 1992) Jan '93 LED:09 (beer breath + admissions = MIP). See also State v. Fager, in this month's LED above, at 12, addressing the same legal issue.

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

(1) **SERIOUSNESS OF SUSPECTED CRIME RELEVANT TO TERRY'S "REASONABLE SUSPICION" STANDARD** -- In State v. Randall, 73 Wn. App. 225 (Div. I, 1994) the Court of Appeals declares that in evaluating the sufficiency of police suspicions to justify a Terry stop as well as a Terry frisk, the nature of the crime under investigation is relevant. Police officers are given the greatest leeway in the "reasonable suspicion" evaluation if the suspected crime is one of violence posing a threat to public safety. The Court explains:

The tip in this case was of an alleged armed robbery, a violent crime posing a significant threat to the safety of the officers and the public in general. An officer acting on a tip involving the threat of violence and rapidly developing events does not have the opportunity to undertake a methodical, measured inquiry into whether the tip is reliable, as does an officer acting on a tip that a nonviolent offense such as possession of drugs has been committed, or an officer seeking a search warrant based on a tip. Rather, when acting on a tip that a violent offense has just been committed, as here, the officer must make a swift decision based upon a quick evaluation of the information available at the instant his or her decision is made. To require an officer under these circumstances to stop and undertake an in-depth analysis of the reliability of the information received by the police dispatcher would greatly impede the officer's discharge of duty and would greatly increase the threat to the public safety. Under such circumstances, the officer should be able to rely on the reliability of information disseminated by police dispatch and when his or her observations corroborate the information and create a reasonable suspicion of criminal activity, to make an investigatory stop.

Here, we find that, under the totality of the circumstances, [University of

Washington Police] Officer Stone had a reasonable suspicion that Randall was engaged in, or had just engaged in, criminal activity, and that the investigatory stop was reasonable. The officer received information from police dispatch that an armed robbery of a store had just occurred. The dispatch gave the location of the store and a description of the two male robbers. The dispatch also informed Officer Stone that the weapon used was a small caliber handgun. The information was fairly specific and was almost certainly given by a victim or witness. Approximately 10 minutes after hearing the dispatch, Officer Stone saw two males who fit the description of the armed robbers, one of whom was Randall. The individuals were standing in a park, 6 blocks from the site of the robbery. The park was not used frequently at that time of the evening. As the two males saw Officer Stone approaching, they turned and left the area. The investigatory stop was reasonable.

We also find that Officer Stone's frisk of Randall was reasonable. The officer was acting upon information of an armed robbery committed with a small caliber handgun. Randall fit the description of one of the suspects. Officer Stone patted Randall down and felt a small hard object inside the pocket of the heavy jacket Randall was wearing. Under these circumstances, Officer Stone had a reasonable suspicion that Randall was armed and the frisk was reasonable.

[Footnote, citations omitted]

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

**(2) OMISSIONS FROM WARRANT AFFIDAVIT NOT SHOWN TO BE DELIBERATE OR RECKLESS** -- In State v. Clark, 68 Wn. App. 592 (Div. II, 1993) the Court of Appeals reviews a trial court's determination that omissions from an officer's sworn statements in support of a 1989 search warrant did not require suppression of evidence seized under the warrant. Among other things, the officer's sworn statement in support of the warrant had explained to the issuing judge that the informant had helped his next-door-neighbors, the Clark's, set up a marijuana growing operation in the early 1980's. However, the officer's statement continued, the friendship between the informant and his neighbors had become strained around 1984, and any friendship or partnership between them had ended at that time.

The officer made this sworn statement in support of the warrant in the presence of the issuing judge, and the identified informant gave his sworn statement at the same time. The "basis of information" element of probable cause was clearly established in the informant's statements detailing his past and current observations of activity at the Clark's house. And, on the face of things, the informant's credibility was established in that he appeared in person to give his statement to the issuing judge, and the information provided was about his own criminal involvement (and hence against his penal interest).

The defendants' challenge to the probable cause was based on their claim that the officer should have told the issuing judge the following things about the informant: (1) that the informant only admitted his own involvement in the marijuana growing operation after being assured by police that he could not be prosecuted because the statute of limitations had expired, and (2) that, as of 1989 when the information was provided, there was an ongoing feud between the informant and the Clark's. The Court of Appeals' analysis of the legal issue concerning the omitted facts is as

follows:

An omission or incorrect statement made in support of a search warrant may invalidate the warrant if it was (1) material, and (2) made deliberately or with reckless disregard for the truth. Material facts deliberately or recklessly omitted from an affidavit must be added to the information contained in that affidavit and if the affidavit, as supplemented, then fails to support a finding of probable cause, the warrant is void and the evidence is excluded.

Here, the Superior Court found, after a hearing, that although the omitted information was material, it was not omitted deliberately or with a reckless disregard for the truth. "Reckless" disregard for the truth may be shown where the affiant in fact entertained serious doubts as to the truth' of the information in the absence of the omitted facts. Further, the "serious doubts" must be shown by "(1) actual deliberation on the part of the affiant, or (2) the existence of obvious reasons to doubt the veracity of the informant or the accuracy of his reports."

The Clarks have not shown that the Superior Court erred in finding that the omissions were made neither deliberately nor with a reckless disregard for the truth. There was no showing of "actual deliberation" by either Swanton or Dalton. Furthermore, the omitted information, although material, does not cast any more doubt on the veracity or accuracy of the information provided by Swanton than did the information disclosed to the judge regarding the strained relationship between Swanton and the Clarks.

[Some citations omitted; some internal quotation marks deleted]

Result: Clallam County Superior Court convictions under Uniform Controlled Substances Act against Linda and Robert Clark affirmed.

**LED EDITOR'S NOTE:** In a separate civil action the Clallam County Sheriff's Office had forfeited real estate and personal property involved in the marijuana growing activity. The Clark's raised several constitutional and statutory challenges to the forfeiture of their real property, all of which were rejected by the Court of Appeals.

**(3) EVIDENCE OF POSSESSION OF "RESIDUE" OF COCAINE SUFFICIENT TO SUPPORT DRUG POSSESSION CONVICTION** -- In State v. Malone, 72 Wn. App. 429 (Div. I, 1994) the Court of Appeals rejects defendant's argument that his conviction for cocaine possession should not stand because he possessed only a residue of cocaine in a baggie. The amount of the residue was estimated to be less than one-tenth of a gram. The Court's analysis on this issue is as follows:

Finally, Malone contends that the State failed to produce sufficient evidence to convince the trier of fact beyond a reasonable doubt that Malone possessed cocaine under RCW 69.50.401(d). [COURT'S FOOTNOTE: Malone was convicted pursuant to RCW 69.50.401(d) which provides that "[i]t is unlawful for any person to possess a controlled substance."] Malone cites to out-of-state case law and asks us to read into the statute a requirement that, to be charged with possession, there must be a measurable or usable amount of cocaine. Applying

this requirement to the facts presented here, Malone argues that his possession of residue contained in the baggie did not constitute possession because the residue was not of a measurable or usable amount, and thus, the evidence was insufficient to support the conviction.

Malone's argument is contrary to Washington case law. In State v. Williams, 62 Wn. App. 748 (1991)[Feb. '92 LED:14], Williams was charged with cocaine possession under RCW 69.50.401(d). In Williams, possession was based on residue in the bowl of a crack pipe, which had been found on Williams and determined to be cocaine. No other cocaine was found on Williams. The trial court dismissed the charges on the grounds that RCW 69.50.412(1), the drug paraphernalia statute, and RCW 69.50.401(d), the possession statute, were concurrent statutes. The trial court reasoned that the Legislature intended the presence of residue in drug paraphernalia to be evidence of only a paraphernalia violation. This court reversed and held that RCW 69.50.412(1) and RCW 69.50.401(d) are not concurrent. The court noted that RCW 69.40.401(d) does not require that a minimum amount be possessed in order to sustain a conviction.

Thus, we hold that RCW 69.50.401(d) does not require that a minimum amount of drug be possessed, but that possession of *any* amount can support a conviction.

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

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**UNITED STATES DISTRICT COURT FOR WESTERN DISTRICT OF WASHINGTON**

**STATUTE PROHIBITING ASSISTING SUICIDE ATTEMPT -- RCW 9A.36.060 -- DECLARED UNCONSTITUTIONAL** -- In Compassion In Dying, et. al. v. State of Washington, et. al., the U.S. District Court for Western Washington (Judge Barbara J. Rothstein) has declared RCW 9A.36.060 to be unconstitutional, but the Court has denied a request to bar enforcement of the statute. RCW 9A.36.060 provides as follows:

A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide.

Judge Rothstein's holding in part is as follows:

The court declares RCW 9A.36.060 unconstitutional because it places an undue burden on the exercise of a protected Fourteenth Amendment liberty interest by terminally ill, mentally competent adults acting knowingly and voluntarily, without undue influence from third parties, who wish to commit physician-assisted suicide. The court further declares RCW 9A.36.060 unconstitutional because it violates the right to equal protection under the Fourteenth Amendment by prohibiting physician-assisted suicide while permitting the refusal or withdrawal of life support systems for terminally ill individuals.

Result: RCW 9A.36.060 declared unconstitutional but injunctive relief is denied; accordingly, the statute may continue to be enforced by state and local law enforcement officers and prosecutors.

Status: the State Attorney General has filed an appeal to the Ninth Circuit of the United States Court of Appeals.

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## 1994 WASHINGTON LEGISLATIVE ENACTMENTS -- PART IV

**LED EDITOR'S INTRODUCTORY NOTE**: This is the fourth part in a four-part presentation of 1994 Washington legislation of interest to Washington law enforcement personnel. It contains: (A) some notes regarding two additional legislative updates which will be distributed to Washington law enforcement either through the LED or otherwise in the next few months, and (B) an index of legislation covered in the June, July, and August LED's.

### MANUAL ON JUVENILE RUNAWAYS

Section 509 of chapter 7, Laws of 1994, 1st extra session, requires that the Criminal Justice Training Commission provide Washington law enforcement agencies with a "manual" describing the statutes relating to juvenile runaways. We hope to be able to use a document on the juvenile laws currently being developed by others in the Attorney General's Office. The "manual" will likely appear in the pages of an LED within the next few months.

### MORE INFORMATION ON FIREARMS

We are currently working with others on a "Question and Answer" sheet on frequently asked questions regarding the firearms law overhaul made by chapter 7, Laws of 1994, first extra session. It may be a few months before the Q & A sheet is ready for general distribution.

### CORRECTION NOTICE RE JULY FIREARMS CHART

The firearms law chart in the July LED at page 20 incorrectly designates "Assault 3 and 4" and "Rape of a Child 3" as "serious offenses" -- please strike the "SO" designation for each of these crimes on your chart. The chart also duplicates near the bottom of the chart the entries of "Rape of a Child 1, 2" -- please strike the latter entries as they are duplicates and fail to properly designate these as "serious offenses;" the proper designations are made for "Rape of a Child 1, 2" at lines 16 and 17 of the chart.

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## CUMULATIVE INDEX OF 1994 LEGISLATION

### ENACTMENTS DIGESTED IN JUNE LED

SUBJECT	CHAPTER	JUNE <u>LED</u> PAGE NO.
SEX CRIMES INVOLVING HUMAN REMAINS	Chapter 53	06
<a href="#">DISCLOSING OFFENDER HIV STATUS TO VICTIMS</a>	<a href="#">Chapter 72</a>	<a href="#">06</a>
CHILD PASSENGER RESTRAINT SYSTEMS	Chapter 100	06
<a href="#">GAMBLING</a>	<a href="#">Chapter 120</a>	<a href="#">07</a>
CLEANUP RE: RESIDENTIAL BURGLARY	Chapter 121	07
<a href="#">MOTOR VEHICLE FORFEITURE FOR TWO DUI'S IN FIVE YEARS</a>	<a href="#">Chapter 139</a>	<a href="#">07</a>
RECKLESS ENDANGERMENT OF HIGHWAY WORKERS	Chapter 141	07
<a href="#">CUSTODIAL INTERFERENCE</a>	<a href="#">Chapter 162</a>	<a href="#">08</a>
ALIENS CARRYING FIREARMS	Chapter 190	08
<a href="#">OBSTRUCTING A LAW ENFORCEMENT OFFICER</a>	<a href="#">Chapter 196</a>	<a href="#">09</a>
GAMBLING, LOTTERY	Chapter 218	09
<a href="#">ANIMAL CRUELTY</a>	<a href="#">Chapter 61</a>	<a href="#">10</a>
CORRECTING CERTAIN CRIMINAL LAW PROVISIONS	Chapter 271	12
<a href="#">1994 OMNIBUS DRUNK DRIVING ACT</a>	<a href="#">Chapter 275</a>	<a href="#">14</a>
FIREARMS ACT OVERHAUL	Chapter 7, 1st Sp. S.	16

### ENACTMENTS DIGESTED IN JULY LED

SUBJECT	CHAPTER	JULY <u>LED</u> PAGE NO.
MORE FIREARMS LAW	Chapter 7, 1st Sp. S.	15

### ENACTMENTS DIGESTED IN AUGUST LED

SUBJECT	CHAPTER	AUG. <u>LED</u> PAGE NO.
PUBLIC TRANSIT FACILITY CRIMES	Chapter 45	12
<a href="#">DOC NOTIFICATION RE RELEASE OF CERTAIN OFFENDERS</a>	<a href="#">Chapter 77</a>	<a href="#">12</a>
PUBLIC SCHOOL ATTENDANCE BY JUVENILE SEX OFFENDERS	Chapter 78	13
<a href="#">SEX OFFENDER REGISTRATION</a>	<a href="#">Chapter 84</a>	<a href="#">13</a>
LAW ENFORCEMENT MEDAL OF HONOR	Chapter 89	14
<a href="#">SEX OFFENDER RELEASE NOTICES</a>	<a href="#">Chapter 129</a>	<a href="#">14</a>
VEHICLE FORFEITURE FOR DUI, PHYSICAL CONTROL	Chapter 139	15
<a href="#">JUNK VEHICLES</a>	<a href="#">Chapter 176</a>	<a href="#">18</a>
UNDERAGE PERSONS IN LICENSED PREMISES	Chapter 201	18
<a href="#">CIGARETTE MACHINE LOCATIONS</a>	<a href="#">Chapter 202</a>	<a href="#">18</a>
INVOLUNTARY ALCOHOLISM TREATMENT	Chapter 231	18
<a href="#">COMBINED FISHING AND HUNTING LICENSE</a>	<a href="#">Chapter 255</a>	<a href="#">19</a>
SEAWEED HARVESTING	Chapter 286	20
<a href="#">ALIENS CARRYING FIREARMS</a>	<a href="#">Chapter 190</a>	<a href="#">20</a>
OBSTRUCTING A LAW ENFORCEMENT OFFICER	Chapter 196	20
<a href="#">OMNIBUS DRUNK DRIVING ACT</a>	<a href="#">Chapter 275</a>	<a href="#">20</a>
FIREARMS ACT OVERHAUL	Chapter 7, 1st Sp. S.	20

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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.

