

# September 1995

## HONOR ROLL

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**CORRECTION NOTICE FOR 430TH SESSION - March 7 through May 25, 1995 - In the Best Firearms category there was a tie, but only one officer was mentioned in the July LED Honor Roll. Our apologies to Renton Police Officer Alan W. Ezekiel who tied for Best Firearms, as well as earning Best Academic.**

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### **432nd Session, Basic Law Enforcement Academy - May 9 through August 1, 1995**

President: Officer Daniel J. Romero - Seattle Police Department  
Best Overall: Officer Brian B. Lutschg - Marysville Police Department  
Best Academic: Officer Brian B. Lutschg - Marysville Police Department  
Best Firearms: Officer Ken H. Ng - Black Diamond Police Department

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### **Corrections Officer Academy - Class 216 - July 10 through August 4, 1995**

Highest Overall: Officer Joseph M. Dunn - Chelan County Regional Jail  
Highest Academic: Officer Bertha G. Elzinga - King County Div of Corrections  
Officer Sean P. Steinbrech - Chelan County Regional Jail  
Highest Practical Test: Officer Dale S. Klein - King County Div of Corrections  
Officer Ruby A. Serven - Washington State Penitentiary  
Highest in Mock Scenes: Officer Charlene V. Alvarado - Washington Corrections Center  
Officer Edward J. Ewald - Washington Corrections Center  
Officer Ruby A. Serven - Washington State Penitentiary  
Highest Defensive Tactics: Officer Joseph M. Dunn - Chelan County Regional Jail

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**BRIEF NOTES FROM THE UNITED STATES SUPREME COURT**

**(1) KNOCK-AND-ANNOUNCE REQUIREMENT IS PART OF THE FOURTH AMENDMENT --** In Wilson v. Arkansas, 131 L.Ed.2d 976 (1995) a unanimous U.S. Supreme Court holds that the Fourth Amendment of the U.S. Constitution includes the knock-and-announce principle established under English common law as a limitation upon law enforcement entry of private premises. However, while incorporating the knock-and-announce rule in the Fourth Amendment, the U.S. Supreme Court leaves unanswered most questions about the content of that rule. Instead, the Supreme Court remands the case before it to the Arkansas trial court, leaving it to the trial court to determine whether the officer's no-knock residential entry with a search warrant was a lawful "exigent circumstances" entry under the facts of this case.

Result: Arkansas trial court convictions for a variety of controlled substances offenses reversed; case remanded for hearings on the knock-and-announce issue.

**LED EDITOR'S COMMENT:** This decision by the U.S. Supreme Court should not change activities by Washington law enforcement officers, but it will open them and their agencies to Federal civil rights actions on some knock-and-announce issues. Washington officers are already subject to RCW 10.31.040, which requires knock and announcement prior to entry of a building to arrest and/or search, unless exigent circumstances can be established. Case law in Washington under RCW 10.31.040 establishes that the following constitute exigent circumstances justifying a no-knock entry -- case-specific probable cause to believe that knocking and announcing will result in: (a) destruction of evidence, (b) serious danger to officers or others, or (c) escape of suspects.

We believe that it is very unlikely that the Federal Fourth Amendment standard will be more restrictive on law enforcement than the standard of RCW 10.31.040 as interpreted by the Washington appellate courts. That is, we see no greater restriction under the Fourth Amendment than under RCW 10.31.040 as to what constitutes exigent circumstances, or as to the knocking, announcing, and waiting requirements of the rule in those situations where knocking and announcing is required.

**(2) RANDOM URINE TESTING OF K-12 STUDENT ATHLETES OK UNDER FOURTH AMENDMENT --** In Vernonia School District 47J v. Acton, 63 LW 4653 (1995) a six-member majority of the U.S. Supreme Court rules that random, suspicionless urinalysis testing of public school students who participate in interscholastic athletics, where such testing is undertaken by a

school district in its custodial and guardianship capacity to combat growing drug use by students, and to protect the health and safety of student athletes, is not an unreasonable search prohibited by the Fourth Amendment of the U.S. Constitution.

In a narrowly written opinion limited to the special setting of this case, the majority determines that the special interests of the school district outweigh the limited privacy interests of the student athletes. The majority points out that such student athletes, who share open showers and open toilet facilities in the locker room setting, have a reduced expectation of privacy which is only minimally affected by the method of urine collection and testing used by the school district. Outweighing this limited privacy interest is the district's interest in curbing student drug usage through the effective method of random testing, the majority holds.

Result: Vacation of decision of the 9th Circuit of the U.S. Court of Appeals which had declared the school district policy to be unconstitutional.

**(3) FEDERAL STATUTE BANNING GUNS NEAR SCHOOLS VIOLATES INTERSTATE COMMERCE CLAUSE OF U.S. CONSTITUTION** -- In U.S. v. Lopez, 131 L. Ed.2d 626 (1995) the U.S. Supreme Court rules, 5-4, that 18 U.S.C. § 922(q)(1)(A), the Federal Gun-Free School Zones Act banning possession of guns within 1,000 feet of a school is unenforceable because Congress lacked authority to enact it under the U.S. Constitution's "interstate commerce" clause.

Case law under the interstate commerce clause has established that the U.S. Congress lacks power to enact criminal laws addressing purely local concerns because such local concerns do not substantially affect interstate commerce. The Supreme Court majority rules in Lopez that the possession of guns near schools is not a matter substantially affecting interstate commerce (at least under the current form of the Federal statute), and, therefore, the federal statute is invalid.

Result: affirmance of dismissal order by Fifth Circuit of the United States Court of Appeals.

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

**This ruling in no way affects either: (1) the validity of existing state statutes or local ordinances, or (2) the authority of state or local jurisdictions to enact such laws. Hence, the prohibition on possession of guns at schools under RCW 9.41.280 is not affected by the ruling in Lopez.**

**Recently, it was reported in the BNA's Criminal Law Reporter that the Clinton administration will present to Congress a revised Gun-Free School Zones Act with an additional element relating to interstate commerce. We are not aware of the details.**

**(4) BRADY RULE REQUIRING PROSECUTION TO DISCLOSE EVIDENCE FAVORABLE TO DEFENDANT CONSTRUED IN FAVOR OF DEFENSE** -- In Kyles v. Whitley, 131 L.Ed.2d 490 (1995) the United States Supreme Court liberally interprets in favor of a capital murder defendant the rule of Brady v. Maryland, 373 U.S. 83 (1963). The Brady rule requires the prosecution to turn over evidence favorable to the defense if that evidence is also "material" to the case.

A sharply divided Supreme Court rules, 5-4, that the Brady rule was violated by the prosecutor's non-disclosure to the defense in a capital murder trial of evidence: (1) that would have permitted the jury to conclude that the police uncritically accepted the assertions of an informer whose

accounts were inconsistent and whose behavior suggested that he himself might have been the perpetrator; (2) that the lead police witness was either not fully candid or not fully informed; (3) that the informer might have planted crucial evidence; (4) that a key eyewitness gave a description of the perpetrator that matched the informer rather than the accused; (5) that another eyewitness had been coached; and (6) that the various eyewitnesses' descriptions of the perpetrator were inconsistent.

Along the way, the majority opinion seems to suggest that **even when police have not revealed to the prosecutor all evidence that is material and favorable to the defense, the prosecutor may be responsible under the Brady rule for disclosing this unknown evidence to the defense.**

Result: reversal of Fifth Circuit U.S. Court of Appeals ruling denying capital murder defendant Kyle's habeas corpus relief; case remanded to Louisiana court system for re-trial.

**LED EDITOR'S COMMENT:**

The text in bold above regarding the prosecutor's responsibility under the Brady disclosure rule for any information known by police, even if not shared by them with the prosecutor, is just one reason why police investigators should share any potentially relevant information they obtain after charges have been filed and a case is being prosecuted. Another reason for fully disclosing information to the prosecutor in the described situation is that such a sharing will insulate the investigators and their agency from civil liability for malicious prosecution. See e.g., Bender v. Seattle, 99 Wn.2d 582 (1983) Aug. '83 LED:11; Peterson v. Littlejohn, 56 Wn. App. 1 (Div. I, 1989) May '90 LED:18.

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**BRIEF NOTE FROM THE NINTH CIRCUIT OF THE U.S. COURT OF APPEALS**

**WASHINGTON STATUTE PROHIBITING THE PROMOTION OF SUICIDE ATTEMPTS HELD CONSTITUTIONAL** -- In Compassion in Dying v. State of Washington, 49 F.3d 586 (9th Cir. 1995) a 2-1 majority of the Ninth Circuit of the U.S. Court of Appeals reverses a District Court ruling (see 850 F. Supp. 1454 (W.D. Wash. 1994), **Sept. '94 LED at 19**) and holds that RCW 9A.36.060 (prohibiting promoting a suicide attempt) does not violate individual rights to privacy or to equal protection of the laws. The majority thus finds no general constitutional right to commit physician-assisted suicide. Result: reversal of ruling of U.S. District Court Judge Barbara Rothstein which had invalidated RCW 9A.36.060. Status: the 9th Circuit has granted a rehearing before an eleven-member panel of the court.

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

(1) "**MARKET VALUE**" FOR PROOF OF DEGREE OF RETAIL THEFT ADDRESSED -- In State v. Kleist, 126 Wn.2d 432 (1995) the State Supreme Court addresses two questions regarding proof of "market value" of items taken in a retail theft.

First, the Court clears up some confusion generated by past Court of Appeals cases regarding the

use of a store's price tags to prove the "market value" of items under chapter 9A.56 RCW. The Court holds that if defendant challenges the accuracy of the price tags, then the prosecution must put on foundation testimony to show the accuracy of the price tags. Compare the decisions digested in the April 1995 LED -- State v. Rainwater, 75 Wn. App. 256 (Div. I, 1994) **April '95 LED:19**, and State v. Kleist, 74 Wn. App. 429 (Div. III, 1994) **April '95 LED:17** (Kleist is a Court of Appeals ruling which is reversed by the State Supreme Court decision digested here).

The State Supreme Court rules here that adequate foundation was established through the testimony: (a) of a Bon Marche security guard that the price tag matched computerized store inventory records, and (b) of a Bon sales manager regarding the accuracy of the records system and regarding the fact that the retail store prices are not negotiable.

Second, however, a 5-4 majority of the Court holds that a defendant in a retail theft case must be allowed by the trial court to present evidence that the stolen items are being sold at lower prices at similar retail stores nearby, even if the other stores' prices are sale prices. The Supreme Court majority rules in Kleist that the trial court erroneously rejected defendant's request that she be allowed to present testimony from a Nordstrom's employee that the items that Kleist had stolen from the Bon (which totaled more than \$250 per Bon price tags) were on sale and priced at less than \$250 total at the nearby Nordstrom's.

Result: Spokane County Superior Court conviction for second degree theft reversed; case remanded for re-trial.

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### WASHINGTON STATE COURT OF APPEALS

#### **NO ANTICIPATORY, NON-CUSTODIAL INVOCATION OF MIRANDA RIGHTS "UNDER INITIATION OF CONTACT" RULE; ALSO, NO "FOCUS" TRIGGER TO MIRANDA**

State v. Warness, 77 Wn. App. 636 (1995)

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

Investigating a rape complaint, a police officer contacted Warness at his home. The officer made it clear to Warness that he was not under arrest, did not have to speak to the police, and was free to leave at any time. Sometime after the conversation began, Warness stated he did not want to talk any further without an attorney. The officer ended the conversation and left.

Approximately 1 month after the incident a warrant was issued for Warness' arrest. After arresting Warness, a second police officer informed him of his Miranda rights. Warness acknowledged his rights and signed a written waiver. Warness then made statements to the effect that he had not had intercourse with the alleged victim on the evening in question. Warness later invoked his right to counsel.

Prior to trial, Warness objected to the admission of his statements to the second officer, arguing that he invoked his right to counsel regarding the rape investigation

during the first meeting with police. The trial court allowed the statements, ruling that Warness' Fifth Amendment rights had not attached at the first meeting.

Warness declined to testify at trial and stipulated to having had intercourse with the victim on the evening in question. During the testimony of the interrogating officer, Warness' statements that he had not had intercourse were elicited.

ISSUE AND RULINGS: Did police violate Warness' Fifth Amendment rights by initiating an interrogation request one month after the previous non-custodial contact which Warness had terminated by asserting his right to an attorney? (ANSWER: No) Result: Snohomish County Superior Court conviction for second degree rape affirmed.

ANALYSIS:

The Court of Appeals notes that in Edwards v. Arizona, 451 U.S. 477 (1981) **May - Aug. '81 LED:04**, the U.S. Supreme Court held that when a defendant being subjected to law enforcement custodial interrogation invokes his right to counsel, the interrogator must cease questioning, and law enforcement personnel may not reinitiate interrogation as to that crime or any other prior crime until the subject himself or herself re-initiates contact. **[LED Editor's Note: the Court of Appeals neglects to point out that the Edwards rule does not appear to bar re-initiation of contact if the subject has been released from custody following a custodial invocation of the Fifth Amendment right to counsel. For a discussion of "initiation of contact" rules under the Fifth and Sixth Amendments, see our LED article in the April '93 LED (pages 2-10). The "continuous custody" element of the rule -- see case citations at page 6 of the April '93 LED article -- would provide an alternative reason for ruling in the State's favor in the Warness case.]**

The Court of Appeals rejects Warness' assertion that the Edwards rule barred initiation of contact. Because Warness was not in custody when the officer first contacted him at his home, there was no initial trigger to the Edwards "initiation of contact" rule. A person cannot invoke his Fifth Amendment "right to counsel" anticipatorily, the Court further holds, so the fact that Warness had previously invoked his right to counsel in the non-custodial setting of his home was of no significance in the post-arrest interrogation one month later.

The Court of Appeals also rejects Warness' alternative argument that because the officer had "focused" upon him in the earlier interrogation contact at his home, Warness should be deemed to have been "in custody" for Miranda purposes at that time. The Court of Appeals points out that the U.S. Supreme Court and Washington State Supreme Court have rejected Warness' theory of a "focus" trigger to Miranda and have consistently held that custody-which-is-the-functional-equivalent-of-arrest is the trigger to Miranda. See, for example, Stansbury v. California, 128 L. Ed.2d 293 (1994) **July '94 LED:02**; State v. Harris, 106 Wn.2d 784 (1986) **Dec. '86 LED:04**; and State v. Short, 113 Wn.2d 35 (1989) **Oct. '89 LED:13**. The Court of Appeals concludes its Miranda trigger analysis as follows:

In this case, Warness was approached at his home and was able to end his contact with police at will. The officer made clear to Warness that he did not have to talk and was free to end the conversation at any time. Warness could not reasonably have believed that his freedom of action was restricted. Warness was not in custody during his first meeting with police and was, therefore, not able to

invoke his Fifth Amendment right to counsel.

**PROBABLE CAUSE TO ARREST, SEARCH MV FOR RAPE EVIDENCE ESTABLISHED; ALSO, CLAIM OF DELIBERATE OR RECKLESS OMISSION FROM WARRANT AFFIDAVIT NOT PROVEN**

State v. Herzog, 73 Wn. App. 34 (Div. II, 1994)

Facts:

On six separate occasions during a two-month period in the Spring of 1989, individual female victims were abducted and raped by a man operating in the Vancouver (Wash)-Portland area. Each of the victims similarly described her abductor, his pickup truck, and his MO. **LED EDITOR'S NOTE: To save space, we have not only reduced the print size on this LED entry, but we have also omitted the respective victims' descriptions; the reader should note that the Court of Appeals opinion sets forth their accounts and shows how each element of the police investigation described below corroborated the victims' reports.]**

Police investigators suspected that each of the women had been raped by the same man. They provided an artist's sketch of the suspect to local newspapers. After the sketch was published, the ex-stepson of Gary Kenneth Herzog contacted the police. What happened after that is described by the Court of Appeals as follows:

[The stepson] said he had seen an artist's sketch of the attacker in the newspaper and believed it "could be [Herzog]". He qualified his statement by saying the sketch was not a "good depiction" of Herzog. His description of Herzog matched that given by the six women, including the fact that Herzog sported a "double-hearted tattoo." He also said that Herzog drove a "1970 or early 1970's Chevrolet four-wheel-drive pickup truck, yellow in color". He said he had been sexually molested by Herzog in the past.

The police obtained a photo of Herzog, which showed a person "distinct[ly] similar" to the description the six women had given. They confirmed through licensing records that Herzog owned a "four-wheel-drive Chevrolet", and through arrest records that Herzog previously had been charged with a sex crime in King County. His ex-stepson was the alleged victim, and the charge had ultimately been dismissed.

After ascertaining that Herzog worked at the Freightliner Corporation in Portland, the police went there to conduct further investigation. In Freightliner's parking lot, they saw a "four-wheel-drive Chevrolet pickup truck with a canopy that met the general description of what we were looking for . . ." They also saw a chain hanging from the truck's rearview mirror. They made these observations from the street, which was separated from the parking lot by 6 to 30 feet of landscaping.

The police sought permission from Freightliner's security department before entering Freightliner's parking lot. After permission was granted, several officers walked past the truck and looked through its windows. Although they did not enter the truck, or "even put [a] face against the window", [further corroboration of the victims' reports was obtained when] they were able to see various items, including an automatic transmission, sheepskin seat covers, pillows, cupholders, towels, a covered spare tire, a broken light under the roof of the canopy, and writing under the roof of the canopy.

The police then met Herzog in Freightliner's offices. Observing that he resembled each victim's description of her attacker, they arrested him. After he was under arrest, they [corroborated the victims' reports when they] observed a double-heart tattoo on his left shoulder and a scar on his stomach.

Later that day, the police obtained Oregon search warrants for Herzog's truck, for the room in which he was living, and for samples of his blood, saliva and hair. When they searched the truck, they seized the items they had seen while the truck was parked at Freightliner. When they searched the room, they seized a pair of brown cowboy boots, a pair of white tennis shoes, and a polo-type shirt with blue and white stripes. They did not find a handgun.

Lineups were held within a short time. Each of the six women identified Herzog as her attacker.

As the investigation continued, the police contacted the King County Prosecutor's office to find out why the charge involving the ex-stepson had been dismissed. The reason, they were told, was that the ex-stepson had recanted his allegations.

Proceedings: (Excerpted from Court of Appeals opinion)

Later in 1989, Herzog was tried in Oregon for the attacks on [four of the victims]. He was convicted on 17 counts of kidnapping, rape, sodomy, and sexual abuse. He was sentenced to 435 years in prison, and the sentence was affirmed on appeal.

Also in 1989, Washington charged Herzog with the first degree kidnapping of S (count 1), the first degree rape of S (count 2), the attempted first degree kidnapping of B (count 3), and the second degree assault of B (count 4). Before trial, he moved to suppress the evidence seized pursuant to the Oregon search warrants. The trial court denied the motion.

...

The State introduced various items of tangible evidence seized as a result of the Oregon search warrants. That evidence tended to corroborate the victims' testimony, and to connect Herzog with the attacks.

Herzog called several witnesses and testified on his own behalf. He denied perpetrating any of the incidents.

The jury convicted on all counts.

ISSUES AND RULINGS: (1) Did the police conduct an illegal search when they looked at Herzog's truck in the parking lot at Freightliner? (ANSWER: No, they merely observed things which were in open view -- no "search" occurred); (2) Did the affidavit for the Oregon search warrants establish probable cause to search Herzog's truck and room? (ANSWER: Yes); (3) Did Herzog establish that the police made intentional or reckless omissions in the affidavit supporting the Oregon search warrants? (ANSWER: No) Result: Clark County Superior Court convictions for first degree kidnapping, first degree rape, attempted first degree kidnapping and second degree assault affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) Observing the Truck Not "Search"

The Fourth Amendment applies when government agents conduct a "search". Government agents conduct a "search" when they infringe upon a person's constitutionally protected expectation of privacy. Conversely, government agents do not conduct a "search" when they make observations from a place where they have the right to be. . . .

Here, the officers stood on the public street and looked at the truck. Then, with Freightliner's

permission, they walked through the parking lot and looked into the truck. These activities did not involve anything other than observing, from lawful vantage points, things in open view. There was no search, and the Fourth Amendment did not apply.

### (2) PC To Arrest

Even when made in a public place, an arrest must be supported by probable cause. "Probable cause exists 'where the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in a belief that an offense has been . . . committed.'" "The question of probable cause should not be viewed in a hypertechnical manner."

The police had probable cause to arrest when they took Herzog into custody at Freightliner. Several of the women had said their attacker had a distinctive tattoo on his arm, and Herzog's ex-stepson had said Herzog wore that kind of tattoo. The women had described the attacker's person, and the police had observed that Herzog fit the description. The women had described the vehicle of their attacker in great detail -- a light colored (tan or yellow) Ranger-type pickup, with a canopy that had a stripe on each side, automatic transmission, 4-wheel-drive shifter, fuzzy seat covers, cupholders, towels, pillows, gold chain hanging from the rearview mirror, writing on the underside of the roof of the canopy, broken light under the canopy -- and the police had confirmed those details by their own lawful observations. The police had also confirmed through state records that the truck was owned by Herzog. Viewed in combination, these facts and circumstances were such that a person of reasonable caution would have believed that Herzog had committed the crimes in question.

### (3) Omissions in the Affidavit

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. "Allegations of negligence or innocent mistake are insufficient." The defendant bears the burden of establishing the necessary facts.

Herzog says the police recklessly omitted to include in the search warrant affidavit the fact that his ex-stepson had recanted his sexual abuse charge against Herzog. However, the police included in the affidavit the fact that the charge had been dismissed, and they did not discover that the dismissal was due to the ex-stepson's recantation until *after* the search warrants had been issued. Nothing indicates that the failure to discover the recantation was intentional or reckless; indeed, nothing indicates that it was even negligent, in view of the rapidity with which events were unfolding at the time. We hold that the failure to state that the ex-stepson had recanted does not affect the legality of the search warrants.

Herzog also says the police recklessly omitted to state in the affidavit that before they went to Freightliner, the ex-stepson had qualified his identification of Herzog by saying the artist's sketch "could be" him but was not a "good depiction". According to testimony given later at trial, the ex-stepson actually told the police that the depiction was "similar . . . it could be him". Moreover, even if the ex-stepson's qualifying words had been included in the affidavit, nothing would have changed, for with or without such words, the affidavit contained a wealth of information demonstrating probable cause. There was no material omission from the affidavit.

[Some citations omitted]

**LED EDITOR'S NOTE:** The Court of Appeals also discusses at length the question of whether evidence relating to one of the uncharged rapes was lawfully admitted into evidence by the trial court. The general rule is that evidence of uncharged crimes is not admissible because of its prejudicial effect. However, the Court holds that, because of the many similarities in the MO's of each of the rapes and of the victims' descriptions of their attacker, the evidence relating to one of the uncharged rapes tended to show the identity of the rapist and was therefore admissible.

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

**(1) STRIP SEARCH STATUTE'S PROVISION FOR REASONABLE SUSPICION JAIL INTAKE SEARCHES ON WRITTEN AUTHORIZATION UPHELD AGAINST CONSTITUTIONAL ATTACK**  
-- In State v. Audley, 77 Wn. App. 897 (Div. I, 1995), Division One of the Court of Appeals upholds the constitutionality of subsection (1)(a) of RCW 10.79.130 (the strip search statute).

Defendant Audley had been observed selling rock cocaine on the street and appeared to have his cache of rock cocaine in his crotch area under his clothes. After Audley was arrested by Seattle officers and taken to a police station holding cell, the officers applied to a police administrator for written permission to strip search Audley. Permission was granted, and a strip search uncovered 40 rocks of cocaine in a baggie hidden under Audley's clothes in his crotch.

Prior to trial, Audley challenged the constitutionality of RCW 10.79.130, which provides:

- (1) No person to whom this section is made applicable by RCW 10.79.120 may be strip searched without a warrant unless:
  - (a) *There is a reasonable suspicion to believe that a strip search is necessary to discover weapons, criminal evidence, contraband, or other thing concealed on the body of the person to be searched, that constitutes a threat to the security of a holding, detention, or local correctional facility;*
  - (b) There is probable cause to believe that a strip search is necessary to discover other criminal evidence concealed on the body of the person to be searched, but not constituting a threat to facility security; or
  - (c) There is a reasonable suspicion to believe that a strip search is necessary to discover a health condition requiring immediate medical attention.
- (2) *For the purposes of subsection (1) of this section, a reasonable suspicion is deemed to be present when the person to be strip searched has been arrested for:*
  - (a) A violent offense as defined in RCW 9.94A.030 or any successor statute;
  - (b) An offense involving escape, burglary, or the use of a deadly weapon; or
  - (c) *An offense involving possession of a drug or controlled substance under chapter 69.41, 69.50, or 69.52 RCW or any successor statute.*

[Emphasis added]

The trial court rejects Audley's challenge, as does the Court of Appeals, the latter holding: (1) that the state and federal constitutions provide the same level of protection against warrantless strip searches; (2) that subsection (1)(a) of RCW 10.79.130 is constitutionally valid; (3) that the facts of this case justified a search under subsection (1)(a); and (4) that the search in this case was valid even though the search was conducted after Audley had been placed in a holding cell.

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

(2) **NO "CAT OUT OF THE BAG" RULE UNDER MIRANDA** -- In State v. Baruso, 72 Wn. App. 603 (Div. I, 1993) the Court of Appeals declares that the fact that a suspect made a voluntary statement during police questioning which was in technical violation of the Miranda rule, but did not involve physical or mental coercion, did not necessarily make inadmissible his later voluntary statements after proper Miranda warnings were given.

The Court holds that under such circumstances there is no per se requirement that the post-Miranda statements be removed in time and place from the statements made in violation of the Miranda rule. Instead, the courts must review the facts on a case-by-case basis to determine if the subsequent confession was free of the taint of the earlier Miranda violation.

The ruling in Baruso agrees with the ruling in State v. Allenby, 68 Wn. App. 657 (Div. I, 1992) **Oct. '93 LED:18**. Both Baruso and Allenby hold that the State Supreme Court's decision in State v. Lavaris, 99 Wn.2d 851 (1983) **Aug. '83 LED:10** was overruled by the U.S. Supreme Court decision in Oregon v. Elstad, 470 U.S. 298 (1985) **June '85 LED:10**.

Result: King County Superior Court conviction for two counts of aggravated first degree murder affirmed.

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

In light of the recent rulings in Allenby and Baruso, we feel fairly confident in reversing a position we stated after Lavaris was decided. At that time (see Aug. '83 LED at 11) we stated our view that whenever a custodial suspect is questioned without being given adequate Miranda warnings, then any followup questioning must be preceded by a cat-out-of-the-bag warning to the effect that: "any statements just made cannot be used against you . . ." Baruso and Allenby are clear authority that our suggestion in 1983 as to the need for a special warning was rendered incorrect by the 1985 decision of the U.S. Supreme court in Elstad (cited above). A special warning, though not prejudicial to the state's case, is apparently not required in the described situation, so long as the initial questioning occurred under circumstances which were non-coercive and involved only the technical Miranda violation. On the other hand, if the initial questioning occurred under coercive circumstances (e.g., a threat or actual physical assault on the suspect or improper promises) resulting in an involuntary statement, then a special warning -- plus a time-out period -- will no doubt be required in order for any subsequent interrogation response to be admissible.

(3) **REVOCAION OF DEFERRED PROSECUTION ON DUI NO. 1 MANDATORY ON CONVICTION OF DUI NO. 2 EVEN IF APPEAL HAS BEEN FILED ON DUI NO. 2** -- In State v. Kuhn, 74 Wn. App. 787 (Div. II, 1994) the Court of Appeals holds that under RCW 10.05.100 revocation of a defendant's deferred prosecution by a court of limited jurisdiction is to occur as soon as the defendant is subsequently convicted of a similar offense. Thus, revocation is automatic when an adjudication of guilt by a jury or trial court is entered for the subsequent offense, without regard to whether the defendant seeks appellate review of the subsequent conviction. Accordingly, John Kuhn's deferred prosecution on an earlier DUI was properly

revoked based on a conviction for a second DUI offense, even though he had immediately appealed that subsequent conviction. Result: Kitsap County Superior Court order revoking deferred prosecution affirmed. (The Superior Court order had reversed an earlier District Court order denying revocation of the deferred prosecution).

**(4) WILDLIFE LAW VIOLATION: DIVISION THREE DISAGREES WITH DIVISION TWO AND RULES THAT KILLING DEER WITH TWO ANTLERS IN THREE-ANTLER AREA IS VIOLATION OF RCW 77.21.010(2), NOT VIOLATION OF RCW 77.16.020(1); ALSO, NECESSITY DEFENSE REJECTED** -- In State v. Bailey, 77. Wn. App. 732 (Div. III, 1995), Division Three of the Court of Appeals rules that a hunter who illegally shot a wounded 2-point deer in an area with a 3-point antler restriction should have been prosecuted under RCW 77.21.010(2) (which makes it a misdemeanor to violate the rules of the Wildlife Commission, including the antler-restriction rules), not under RCW 77.16.020(1) (which prohibits hunting, controlling or possessing a species out of season). The Court of Appeals rules that antler number differences do not make deer with these differences different "species", and therefore killing a two-antler deer in an area with a three-antler restriction is not the killing of a species during a closed season.

In reversing defendant Bailey's conviction, Division III of the Court of Appeals disagrees with Division Two, which held in State v. Rhodes, 58 Wn. App. 813 (Div. II, 1990) **Jan. '91 LED:19** that the killing of a "doe deer" during a season open to the killing of "buck deer" was the killing of a species during a closed season and hence a violation of RCW 77.16.020(1).

The Court of Appeals also addresses in an advisory portion of its Bailey opinion a question of whether the common law defense of necessity could apply to a hunting law violation such as an antler-restriction violation. Bailey had argued that he killed the two-point deer because it was already injured. In part, the Court's negative response to this argument is as follows:

The necessity defense may be asserted by a defendant when the physical forces of nature or the pressure of circumstances cause the accused to take unlawful action to avoid a harm which social policy deems greater than the harm resulting from a violation of the law. The defense is not applicable . . . where a legal alternative is available to the accused.

Here, the alleged "pressure" resulted from Mr. Bailey's perceived need to kill the wounded deer as soon as possible to prevent its prolonged suffering.

The rationale of the necessity defense is based on public policy: [T]he law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law.

Courts have recognized the necessity defense in wildlife cases under limited circumstances where wildlife was killed to protect property [citing out-of-state decisions]. However, such cases are of little assistance when the justification for killing is based solely on empathy for the animal being killed. Such justification is strikingly similar to the "mercy killing" defense.

The usual justification for mercy killing is to prevent the unremitting and

uncontrollable pain of a dying person. While there are emotional and compassionate arguments for mercy killing as applied to all species, such defense has been rejected for a number of reasons, including its potential for abuse. The case at hand raises the same concern. Even if hunters were competent to determine whether or when an injured animal will die from its injuries, the opportunities for abuse are enormous. For this reason alone, we conclude the necessity defense is unavailable for violations of game animal laws.

Even if the necessity defense were available as a defense to the killing of an injured game animal, it is unavailable as a defense to its possession or control. Further, the necessity defense requires proof by a preponderance of evidence that there was no legal alternative. Here, if Mr. Bailey or Mr. Thompson could have notified the Wildlife department of the injured deer, but did not, there was a legal alternative to killing it.

Result: Whitman County Superior Court conviction under RCW 77.16.020(1) reversed and prosecution dismissed.

**(5) PURCHASER OF COCAINE NOT GUILTY OF UCSA "DELIVERY"** -- In State v. Morris, 77 Wn. App. 948 (Div. II, 1995) the Court of Appeals rules that a person who purchases a controlled substance for himself or herself does not commit the crime of delivering a controlled substance under RCW 69.50.401. The Court of Appeals distinguishes other cases from this state and elsewhere where a "procuring agent" or an intermediary was held guilty of delivery. The Court explains:

The State cites several Court of Appeals cases holding that the "procuring agent" defense under Washington's prior Dangerous Drug Act is no longer available under the Uniform Act. The "procuring agent" cases do not directly address the liability of the ultimate purchaser, but instead consider whether an intermediary between the seller and purchaser can be guilty of "delivery". In each case, the defendant facilitated the delivery by locating a seller after being asked for drugs by an undercover officer or informant. The procuring agent was not the purchaser, and the agent participated in some significant way in the delivery of the drugs. [Citing State v. Ramirez, 62 Wn. App. 301 (Div. I, 1991) **no LED entry**]. The Court of Appeals recognized in the most recent of these cases that the liability of the procuring agent differs from the liability of the ultimate purchaser, distinguishing [a] decision of the Oregon Court of Appeals. We agree and need not consider the liability of the procuring agent.

[Most citations omitted]

Result: Cowlitz County Superior Court conviction for delivery of controlled substance reversed.

**(6) NO RIGHT FOR CITIZEN TO USE FORCE TO RESIST UNLAWFUL ARREST IF THAT ARREST PRESENTS A RISK ONLY OF A LOSS OF FREEDOM** -- In State v. Valentine, 75 Wn. App. 611 (Div. III, 1994) the Court of Appeals rules that the jury was properly instructed in Valentine's prosecution for third degree assault. The charge arose from Valentine's resistance to arrest for "failure to cooperate" and "failure to sign a notice of traffic infraction."

On appeal Valentine had challenged a trial court jury instruction on the "right to resist arrest" which instructed in pertinent part:

*The use of force to prevent an unlawful arrest which threatens only a loss of freedom, if you so find, is not reasonable.*

The majority judges explain why this instruction correctly stated the law:

Mr. Valentine was charged with violating RCW 9A.36.031(1)(g), which provides that a person is guilty of third degree assault if he or she "[a]ssaults a law enforcement officer . . . who was performing his or her official duties at the time of the assault." During the process of a lawful arrest, an arrestee or an interested third party may not use force against the arresting officer unless the arrestee can show he or she was in actual danger of serious injury. In the event an arrest is unlawful, however, the arrestee has the right to resist as long as the resistance is reasonable and proportioned to the injury threatened. The use of force to prevent an unlawful arrest which threatens only a loss of freedom, however, is not reasonable.

[Citations omitted]

Result: Spokane County Superior Court conviction of third degree assault affirmed.

**(7) NO "DESTRUCTION OF EVIDENCE" EXCEPTION TO SCOPE LIMITS ON TERRY FRISK; BUT PC TO ARREST WAS PRESENT AND SEARCH WAS REASONABLY CONTEMPORANEOUS WITH ARREST** -- In State v. Rodriguez-Torres, 77 Wn. App. 687 (Div. I, 1995) the Court of Appeals reviews a case where a police officer, believing that he had just witnessed defendant trying to sell illegal drugs, chased the suspect down, seized him, searched his pockets, found the illegal drugs in a pocket, and placed him under arrest.

The prosecution defended the case by arguing that under Terry v. Ohio, the landmark U.S. Supreme Court decision on "stop and frisk", the officer was justified in searching the suspect's pockets for evidence so long as the officer had: (1) reasonable suspicion that the suspect was committing a crime, and (2) reasonable suspicion that the suspect was trying to go into his pocket to grab and toss the illegal drugs. The Court of Appeals rejects this theory, pointing out that even in the "plain feel" frisk cases (see e.g., Minnesota v. Dickerson, 124 L. Ed.2d 334 (1993) **Sept. '93 LED:15**) the courts do not allow an officer conducting a frisk to inspect the contents of a suspect's pocket unless the officer has reason to believe that the pocket contains a weapon.

However, the Court of Appeals goes on to determine that the officer actually had probable cause to make an arrest under the facts of this case, viewed in light of the officer's expertise. The Court of Appeals explains as follows:

Magee observed Rodriguez-Torres' companion give him money and Rodriguez-Torres showed him an object which he kept cupped in his hand. This transaction occurred in an area well known for narcotics sales. Someone yelled "Police" when the officer approached, and Rodriguez-Torres and his companion left the scene quickly.

Under these facts, Magee had probable cause to believe Rodriguez-Torres had committed the offense of possession with intent to deliver a controlled substance. Therefore, we conclude that the search was valid as incidental to Rodriguez-Torres' arrest. See State v. Ward, 24 Wn. App. 761 (1979)[Feb. '80 LED:04] (holding that when probable cause exists at the time of the search, a search can be considered incidental to arrest, even if it occurs shortly before the arrest.)

[Citations omitted]

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

**(8) INFANCY DEFENSE: COURT ADDRESSES SUFFICIENCY OF PROOF OF KNOWLEDGE THAT ACT "WRONG"** -- In State v. Linares, State v. Pam, 75 Wn. App. 404 (Div. I, 1994) the Court of Appeals addresses the infancy defense (RCW 9A.04.050 in reviewing two unrelated juvenile offender appeals consolidated for review purposes.

RCW 9A.04.050 provides:

Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong.

The Court of Appeals' analysis of the infancy defense under the facts of the two cases before it is as follows:

Capacity determinations, by their nature, are fact-specific inquiries and must be determined on a case by case basis. In addition to the nature of the crime, the following factors are relevant in determining whether a child knew the act he or she was committing was wrong: (1) whether the child evinced a desire for secrecy, (2) the child's age, (3) prior conduct similar to that charged, (4) any consequences that attached to that conduct, and (5) acknowledgment that the behavior is wrong and could lead to detention.

We conclude that there was sufficient evidence presented in Linares' case to enable a rational trier of fact to find capacity by clear and convincing evidence. In addition to Linares' statement to Officer Sweeney [**admitting to the officer that he did a theft and that it was wrong -- LED Ed.**], the court considered his statement to Gonzales [**admitting to a teacher that he did a theft and that it was wrong -- LED Ed.**] and the testimony of Linares' teachers and a school psychologist regarding his level of maturity and intellectual development. Although some of these witnesses felt Linares did not understand the legal prohibitions against his acts, none testified that he did not understand that his conduct was wrong. The court was also able to observe Linares' demeanor when he took the stand at the hearing. Linares' conduct during and after the break-in is also highly probative in establishing that he appreciated the wrongfulness of his conduct [*COURT'S FOOTNOTE: Upon seeing police, Linares dropped a radio he was carrying. At the police station he lied to Sweeney, claiming that stolen items found on his person were his belongings.*]. The finding of capacity is further supported

by the fact that Linares was 11 years old at the time of the incident, the upper end of the age range in which a child is presumed incapable of committing a crime.

The State did not meet its burden in Pam's case. Apart from the fact that Pam was 11 years old at the time of the incident, there was no other evidence presented at the hearing besides his custodial statement on which the court could have based its capacity finding. Pam was not present at the hearing, and the court did not have an opportunity to observe his demeanor. The court did not hear testimony from any other witness besides Officer Phipps. Although in his statement to Phipps following the incident Pam acknowledged that his actions were wrong, that is insufficient evidence from which a rational trier of fact could have concluded that Pam appreciated the wrongfulness of his act *at the time* it was committed.

In State v. K.R.L., 67 Wn. App. 721 (1992) [June '93 LED:11], the court held a juvenile's statement to his mother admitting the wrongfulness of his conduct was insufficient to support the finding of capacity. The juvenile in that case was 8 years old, and his statement was made only after he had been beaten by his mother. The court reasoned that K.R.L.'s statement did not establish that he knew what he did was wrong at the time of the act because after he had been beaten

he undoubtedly came to the realization that what he had done was wrong. We are certain that this conditioned the child, after the fact, to know that what he did was wrong. That is a far different thing than one[s] appreciating the quality of his or her acts at the time the act is being committed.

To the extent that Pam's statements did not establish his appreciation of the wrongfulness of his conduct at the time it was committed, this case is similar to K.L.R.. Although Pam was not beaten like K.L.R., once the children were separated and given Miranda warnings it must have been obvious to Pam that he had done something wrong. Furthermore, when the police showed up, the children did not try to hide what they had done, lie, or otherwise evidence a desire for secrecy. Nor had they suffered any consequences from the similar behavior the day before, acts which Pam readily admitted. We hold that a child's after-the-fact acknowledgement that he or she understood that the conduct was wrong is insufficient, standing alone, to overcome the presumption of incapacity by clear and convincing evidence.

The disposition in Linares is affirmed and the disposition in Pam is reversed.

[Some footnotes, some citations omitted; emphasis added]

Result: King County Superior Court juvenile adjudication of guilty (of 2nd degree burglary, 3rd degree theft) against Carlos Linares affirmed; adjudication of guilty (of 1st degree malicious mischief) against Issac Lee Pam reversed.

**(9) PROBABLE CAUSE NEXUS ESTABLISHED TO SEARCH MARIJUANA GROWER'S PERMANENT RESIDENCE** -- In State v. O'Neill, 74 Wn. App. 820 (Div. I, 1994) the Court of Appeals rejects defendant's argument in which he admitted that police had clearly established probable cause (PC) to support search warrants for several marijuana grow houses, but in which

he argued that police could not establish PC to search his permanent home.

During their investigation of a marijuana grow operation involving several persons and several homes, police never observed defendant O'Neil at home at 7222 Palatine North in Seattle. However, per the affidavit filed in support of a search warrant, police did learn that, as of the date of the warrant application, the following was true:

- (1) Tax records show O'Neil owns the residence at 7222 Palatine Ave. N.
- (2) O'Neil owns a vehicle registered with the 7222 Palatine Ave. N. address. O'Neil owned another vehicle which listed his business address.
- (3) O'Neil's current Washington State driver's license shows his address to be 7222 Palatine Ave. N.
- (4) Utility records for 10208 15th Avenue N.E. listed the owner as Thomas O'Neil, living at 7222 Palatine Avenue North.
- (5) On February 26, 1993, while touring the Mountlake Terrace condominium, belonging to O'Neil's parents, the officer noted it was sparsely furnished. She observed mail, papers and checks addressed to O'Neil at his business address and his residence at 7222 Palatine Ave. N.
- (6) While touring the condominium, the officer spoke with a real estate agent who told her that O'Neil was temporarily staying there while it was for sale, but his actual residence was elsewhere.

The Court of Appeals rules, 2-1, that these facts established a sufficient PC "nexus" (connection) between O'Neil, drug-dealing and the home at 7222 Palatine, citing cases to support the following statement of black letter law:

[A] nexus is established between a suspect and a residence if the affidavit provides probable cause to believe the suspect is involved in drug dealing and the suspect is either living there or independent evidence exists that the suspect may be storing records, contraband, or other evidence of criminal activity at the residence.

[Citations omitted, emphasis added]

Result: King County Superior Court suppression ruling reversed; case remanded for further proceedings against Regan W. Hagar and Leigh Anne Bryan; related pending charges against Thomas and Richard O'Neil and Craig Porter, will also now go forward in the Superior Court.

(10) **MERE PRESENCE OF GUN NOT "USE" OR "THREAT TO USE" GUN FOR PURPOSES OF RAPE ONE STATUTE** -- In State v. Bright, 77 Wn. App. 304 (Div. III, 1995) a police officer (now a former police officer) challenged his convictions on two counts of first degree rape, claiming on appeal that the evidence was not sufficient to support the convictions.

The aggravating factor asserted by the State to justify the first degree rape charge was the element -- "uses or threatens to use a deadly weapon . . ." found in RCW 9A.44.040(1)(a). The State in Bright argued that this "deadly weapon" element was satisfied by the mere presence of the officer's guns on his person and in the police vehicle when he stopped and had sex with a female arrestee he had been transporting to the jail.

The officer's testimony was that the sexual intercourse with the prisoner was totally consensual,

while the victim testified that the sex was nonconsensual. However, the victim's story did not indicate that the officer made any use of the guns or even made any verbal reference to the guns during the incident at issue. Under these facts, the Court concludes, the convictions for first degree rape have no support in the evidence and must be reversed.

Result: Superior Court convictions for first degree rape (two counts) based on use or threatened use of deadly weapon reversed; cases remanded to Superior Court for retrial on charges of second degree rape.

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