



Law Enforcement

October 1997

Digest

HONOR ROLL

464th Session, Basic Law Enforcement Academy - June 9th through August 29th, 1997

President: Fred F. Douglas - Gig Harbor Police Department
Best Overall: Ken P. Petroff - Seattle Police Department
Best Academic: James V. Smith II - Whatcom County Sheriff's Office
Best Firearms: John P. Cagle - Kent Police Department
Tac Officer: Pat Lowery - Kent Police Department
Asst. Tac Officer: J.R. Hall - King County Department of Public Safety

Corrections Officer Academy - Class 255 - July 21st through August 15th, 1997

Highest Overall: Martin Allen Borcharding - Mason County Jail
Highest Academic: Jason M. Berreth - Clark County Jail
Highest Practical Test: Martin Allen Borcharding - Mason County Jail
Lawrence C. Baker - Pacific County Jail
Martin Allen Borcharding - Mason County Jail
Kenneth J. Henson, II - Thurston County Corrections
Highest in Mock Scenes: Phillip A. Collins - Washington State Penitentiary
Highest Defensive Tactics: Martin Allen Borcharding - Mason County Jail

OCTOBER LED TABLE OF CONTENTS

WASHINGTON STATE SUPREME COURT 3

EXTENDED SEIZURE OF JAYWALKER WHILE WARRANT CHECK CONDUCTED IS
DISAPPROVED ON STATUTORY GROUNDS; CONSTITUTIONAL ISSUE RESERVED
State v. Rife, 132 Wn.2d ___ (1997) 3

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT 6

LAW ON “SEXUAL EXPLOITATION OF A MINOR” HELD CONSTITUTIONAL BUT GETS NARROW READING IN HIDDEN CAMERA CASE

State v. Myers, ___ Wn.2d ___ (1997) and State v. Chester, ___ Wn.2d ___ (1997) 6

ALLOWABLE SCOPE OF WARRANT SEARCH DEFINED BY COMBINED EFFECT OF -- (A) AFFIDAVIT AND (B) SEARCH WARRANT -- WHERE THEY ARE PHYSICALLY ATTACHED AND WHERE WARRANT INCORPORATES AFFIDAVIT BY REFERENCE

State v. Stenson, ___ Wn.2d ___ (1997) 8

CALIFORNIA OFFICERS’ FAILURE TO FOLLOW CHAPTER 9.73 IN RECORDED INTERROGATION NOT ATTRIBUTED TO WASHINGTON OFFICERS; MIRANDA OK

State v. Brown, ___ Wn.2d ___ (1997) 8

CHILD ABUSE HEARSAY HELD INADMISSIBLE WHERE AVAILABLE CHILD VICTIM TAKES WITNESS STAND BUT DOES NOT DESCRIBE ACTS OF SEXUAL CONTACT

State v. Rohrich, 132 Wn.2d 472 (1997) 10

UCSA UPHELD: NO CONSTITUTIONAL RIGHT TO MEDICINAL USE OF MARIJUANA

State v. Seeley, ___ Wn.2d ___ (1997) 11

PROSECUTOR CAN CHARGE ACCUSED WITH TRAFFICKING IN THE SAME ITEM OF PROPERTY WHICH ACCUSED HAS BEEN CHARGED WITH STEALING

State v. Michielli, 132 Wn.2d 229 (1997) 11

LAW ON JUVENILE TRANSFER TO ADULT PRISON HELD CONSTITUTIONALLY VALID

Monroe v. Soliz, 132 Wn.2d 414 (1997) 11

CONSTITUTIONAL CHALLENGE TO SEX PREDATOR LAW RULED PREMATURE

McClatchey v. State, ___ Wn.2d ___ (1997) 12

WASHINGTON STATE COURT OF APPEALS 12

OFFICER’S ACT OF MOTIONING DRIVER OF PARKED CAR TO ROLL DOWN WINDOW WAS NOT A “SEIZURE”; PRECEDENT OF THORN GUIDES COURT

State v. Knox, 86 Wn. App. 831 (Div. II, 1997) 12

“PRETEXT STOP” THEORY REJECTED UNDER STATE, FEDERAL CONSTITUTIONS

State v. Ladson, 86 Wn. App. 822 (Div. II, 1997) 15

REAL PROPERTY NOT FORFEITABLE IF “GROWERS” CLEAR OUT BEFORE SEIZURE

City of Everett v. Real Prop. Known As 4827 268th St. NW, Stanwood, Snohomish Cty, 86 Wn. App. 69 (Div. I, 1997) 17

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS 19

“INEVITABLE DISCOVERY” PASSES STATE CONSTITUTIONAL TEST

State v. Richman, 85 Wn. App. 568 (Div. I, 1997) 19

HALLUCINATING PERSON HELD UNABLE TO GIVE CONSENT TO SEARCH HER PURSE
State v. Sondergaard, 86 Wn. App. 656 (Div. I, 1997) 20

COMING SOON 21

WASHINGTON STATE SUPREME COURT

EXTENDED SEIZURE OF JAYWALKER WHILE WARRANT CHECK CONDUCTED IS DISAPPROVED ON STATUTORY GROUNDS; CONSTITUTIONAL ISSUE RESERVED

LED EDITOR'S INTRODUCTORY NOTES:

Legislative fix? By the time our reader's receive this month's LED, the Washington Legislature may have held a special session to cure the problems created by the majority opinion in the Rife case, as summarized and discussed below. At LED deadline, we were hopeful that the Washington Legislature would meet specially in September to consider the following statutory changes: (1) insert language in RCW 46.61.021(2) to permit "warrant checks" by officers issuing traffic citations; and (2) add a new section somewhere in Title 10 to make clear that criminal justice agencies are not restricted from obtaining warrant information under circumstances where the warrant information request is not linked to a detention of a person.

Interpreter's gloss: The written opinion for the majority in Rife is not clear in stating the majority's rationale and, therefore, we had difficulty determining the nature and scope of the holding. The interpretation of the Rife majority opinion below is your LED Editor's best guess based on self-described "common sense" and on discussions with other lawyers.

State v. Rife, 132 Wn.2d ___(1997)

FACTS IN RIFE: Rife was stopped for jaywalking. The officer ran a warrant check. The warrant information came back in five to ten minutes. The officer got a "hit" on two warrants, and, after another five to ten minutes waiting for verification, the officer arrested Rife on the warrants. The officer did not write a jaywalking citation. In a search incident to the arrest on the warrants, the officer found heroin on Rife's person.

PROCEEDINGS IN RIFE: King County Superior Court convicted Rife for heroin possession after denying his suppression motion. The Court of Appeals affirmed, rejecting Rife's constitutional challenge to the extended detention. See 81 Wn. App. 258 (Div. I, 1996) **Aug. '96 LED:17**. The Court of Appeals ruled that the extension of the infraction detention was a reasonable de minimis intrusion.

ISSUE AND RULING IN SUPREME COURT: Do law enforcement officers have statutory authority to hold persons committing traffic infractions (including jaywalkers) solely for the purposes of running a warrant check? (**ANSWER: No**) **Result:** Reversal of Court of Appeals and King County Superior Court decisions; Rife's conviction for possession of heroin is vacated.

ANALYSIS BY MAJORITY: Justice Smith's majority opinion expressly declares that the majority's suppression decision is **not** based on either the state or the federal constitution. Instead, suppression is based only on state statutes. He writes that under state statutes authorizing seizure of persons suspected of committing Title 46 infractions there must be express authority for detention.

The only express statutory authority to hold civil traffic infraction detainees is that found in RCW 46.61.021. Justice Smith's opinion for the majority assumes that the statute applies to those detained for both driving and non-driving infractions covered in Title 46. This statute allows officers to hold the infraction detainee only for the length of time reasonably necessary to : (1) ID, (2) check driver's license/ MV registration/insurance status, and (3) issue a notice of infraction. Here, the officer was not in the process of doing any of these things while he waited for the warrant information. Accordingly, the majority rules, the extended seizure of Rife violated the statute, and the evidence therefore must be suppressed.

While unclear in several respects, the majority opinion is clear in one. The majority opinion makes clear that if a state statute were to expressly allow a warrant check as part of the processing of a civil infraction, then there would be no basis **in statute** (the Court reserves for the future, and does not resolve, constitutional issues) for a citizen's challenge to the extended detention while the police conducted the check. The majority opinion also indicates that if a local ordinance were to authorize the check, then, again, there would be no **statutory basis** for the challenge to the detention (LED Editor's Note: at LED deadline, we were aware of one city considering a curative local ordinance).

At two points in the majority opinion there are references to the lack of written police agency procedures on point, thus arguably implying that a written procedure of the police department on point might satisfy the majority's requirement that police be given statutory guidance. However, these two references appear to be mere passing references in the majority opinion. It seems highly unlikely that agency policy could cure the statutory-authority problem perceived by the Rife majority (nonetheless, law enforcement agencies may wish to consider adopting a policy to support any authorizing legislation or ordinances adopted on point).

***STATUS OF RIFE:** At LED deadline, the King County Prosecutor's Office was considering filing a motion for reconsideration in the State Supreme Court, hoping at least for a clarification of the grounding of the decision. For instance, at a few points in the opinion, the Rife majority opinion refers to the warrant check as a "search," thus providing some support for the ominous theory that there is a need for statutory authorization to do such a check even if it is not linked to a detention on a civil infraction investigation. The proposed legislation pending at LED deadline, as discussed briefly in the Introductory Notes above, would apparently cure these problems, or at least change the analysis if and when they arose again. Hence, based on the risks of reopening the issues in the Supreme Court, and based also on the anticipated curative effect of the pending legislative proposal, the prosecutor may have ultimately decided not to pursue the motion for reconsideration which was still under consideration at LED deadline.*

LED EDITOR'S COMMENTS RE RIFE

1. Optimistic narrow interpretation of holding in Rife: As we noted above, the majority decision in Rife is not as carefully crafted as we would have liked. However, the most reasonable interpretation of the holding is that: (1) as a matter of statutory interpretation

(as opposed to constitutional interpretation), an officer may NOT hold a person stopped for investigation of a civil infraction, traffic or otherwise, for longer than is necessary to write a citation for the infraction; and (2) because there is no statutory authorization to hold that person while a warrant check is done, such a civil infraction seizure violates the statutes of the State of Washington, as they existed on August 28, 1997, if the duration of the seizure is extended solely for the purpose of making a warrant check. Under our optimistic narrow reading of Rife, an officer issuing a traffic citation could continue past practice of asking dispatch for warrant information at the same time as he or she asks for license information; so long as the license information does not come back before the warrant information, there would be no problem under Rife.

2. Summary of things apparently NOT held in Rife: Even though somewhat ambiguous in this respect, Rife is NOT believed to be a holding that: (a) checking warrants is a "search", or (b) that police may not routinely and randomly check for warrants as a general proposition when no "seizure" question is presented. Thus, for example, we assume that the following would NOT be affected by Rife:... (i) a warrant check from a patrol car by an officer following a suspect who has not yet been seized; ... (ii) a warrant check by a detective sitting at a desk at the station house during the investigation of a criminal suspect not presently in the detective's custody; ... (iii) a warrant check by an officer holding a criminal suspect in the field on a valid Terry stop (on reasonable suspicion) or following arrest (on probable cause); ... (iv) a warrant check by an officer on the street who has already released a civil infraction detainee (in this circumstance, if a warrant hit is later obtained, the officer may try to locate the person and make an arrest on the warrant, because the arrest is not the direct result of any unlawful behavior by the officer); ... (v) a warrant check by an officer on the street who has obtained voluntary agreement by a suspect that the suspect will wait to see if any warrant exists; or ... (vi) a warrant check by an officer on the street to whom the infraction detainee has admitted the likely existence of a warrant in the system (in this circumstance, the admission justifies seizing the suspect under Terry v. Ohio based on reasonable suspicion as to the existence of the warrant, and the suspect may be held for the reasonable period of time needed for verification).

3. Constitutional issues which will remain after Rife: The U.S. Supreme Court has never addressed the constitutional issue which the State Supreme Court avoided in Rife. However, some courts in other states, as well as the Ninth Circuit of the U.S. Court of Appeals, have held under Fourth Amendment "seizure" analysis that a person suspected of committing a civil infraction can be detained only long enough to reasonably process the citation. Under these constitutional decisions from other jurisdictions, a warrant check, alone, does not justify extending the citation detention.

One state where there is well-established Fourth Amendment case law on this point is California. For that reason, California officers are taught to make the "license, registration, and warrants" inquiry ASAP, even before the stop, if possible. Officers there are advised further that once they have completed the citation paperwork at a reasonably deliberate pace, they must release the detainee even if the requested warrant information has not yet come back. Such an interpretation of constitutional law could develop in Washington at some point. Regardless of the shape of any authorizing legislation which is developed in response to Rife, Washington officers should keep these constitutional implications in mind: (a) as officers process such detentions, and (b) as officers prepare their reports on such detentions.

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) LAW ON “SEXUAL EXPLOITATION OF A MINOR” HELD CONSTITUTIONAL BUT GETS NARROW READING IN HIDDEN CAMERA CASE – In State v. Myers, ___ Wn.2d ___ (1997) and in State v. Chester, ___ Wn.2d ___ (1997), the State Supreme Court addresses issues relating to the validity and meaning of the chapter 9.68A crime of “sexual exploitation of a minor.” In Myers, the Supreme Court upholds the statute against a constitutional vagueness overbreadth attack and finds the evidence sufficient to convict; however, in Chester, the Supreme Court finds the evidence insufficient to convict.

FACTS: The facts in the two cases are described by the Supreme Court as follows:

Facts in Chester

On the morning of January 12, 1994, while the stepdaughter was in the shower, the Defendant placed a video camera under the child’s bed, aiming it toward a mirror on the closet door. The beginning of the video tape, exhibit 1, shows the Defendant setting up the camera, covering a portion of the camera with clothing or bedding, and then leaving the room. The video tape then shows Defendant’s stepdaughter walking into the room, wrapped in a towel. The tape goes on to show the stepdaughter walking in and out of the picture as she dressed. The video tape shows the stepdaughter from the front and back, both unclothed and partially clothed.

Testimony showed that the Defendant initially explained his actions as a “dumb joke” and that he was playing “Candid Camera.” According to the State’s evidence, he eventually admitted that he expected to see his stepdaughter in some state of undress because she would be coming out of the shower. He reportedly said he did not give much thought to whether she would be naked or wearing some type of underwear or bra. Police testified that he also said he thought he might see her in a pose bending over in her underwear.

Facts in Myers

While attending a family picnic, Gary Myers videotaped several scenes, including multiple shots of the clothed pubic and buttock areas of adults and children. When he returned home, using the same tape, he videotaped his seven-year old daughter, N.M., in the bathtub. This portion of the tape opens on the full figure of N.M., who says, “Daddy, don’t,” then moves to extreme close-ups of the child’s pubic area. The voice of the operator, identified as Myers at trial, can be heard during the filming, asking N.M. to move in a certain way, i.e., to put her head in the water, to show how long she is, etc. The camera zooms in again and again to full frame shots of the child’s pubic area.

Later that same day, Myers edited this tape and created a second tape. He edited the family picnic scene, deleting the more mundane shots of people at the family gathering, and repeating certain zoom shots of children’s clothed buttock

and pubic areas. He also edited the bathtub scene, deleting only the beginning shot, with N.M. saying, "Daddy, don't."

PERTINENT STATUTORY LANGUAGE

The key statutory language in these cases is as follows:

- (1) A person is guilty of sexual exploitation of a minor if the person:
 - (b) Aids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance[.]

RCW 9.68A.040(1)(b).

- (3) "Sexually explicit conduct" means actual or simulated:
 - (e) Exhibition of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer [.]

RCW 9.68A.011(3)(e)

ANALYSIS: The Supreme Court holds that the statute requires that a perpetrator do some affirmative act of assistance, interaction, influence or communication which indicates and results in a child's display of sexually explicit conduct. In the Chester case, the Court holds that the evidence was insufficient to convict because defendant Chester did not do anything affirmative to cause the child to engage in the conduct that was filmed by the hidden camera.

An alternative charge in the Chester case was that the defendant violated other provisions in the statute prohibiting a parent or legal guardian from "permitting" a minor to engage in sexually explicit conduct knowing that the conduct will be photographed. A 6 - 3 majority (Alexander, Talmadge and Dolliver dissenting) holds that the evidence fails here for the same reasons. This part of the statute requires: (a) that someone engage in the above-described affirmative conduct, and (b) that the parent or guardian fail to protect the child from this conduct, the Court holds. There was no such evidence against defendant Chester.

In the Myers case, on the other hand, the evidence was clear that defendant posed the child's actions. Mental state elements of the statute were satisfied as well, the Court holds.

Result: Court of Appeals rulings in both cases are affirmed [**See Oct. '96 LED:14 (Myers) and Oct. '96 LED:16 (Chester)**]; Gary K. Myers' Thurston County Superior Court conviction of sexual exploitation of a minor is reversed; Gary Powell Chester's Pierce County Superior Court conviction of sexual exploitation of a minor is reversed.

(2) ALLOWABLE SCOPE OF WARRANT SEARCH DEFINED BY COMBINED EFFECT OF -- (A) AFFIDAVIT AND (B) SEARCH WARRANT -- WHERE THEY ARE PHYSICALLY ATTACHED AND WHERE WARRANT INCORPORATES AFFIDAVIT BY REFERENCE – In State v. Stenson, ___ Wn.2d ___ (1997), the State Supreme Court addresses a number of issues in upholding the convictions and death penalty of Darold Ray Stenson (a man with several AKA's.)

Some of the issues in the case focused on a search under a warrant. One of the warrant issues concerned the permissible scope of the search for evidence relating to the suspected murders. Defendant argued that the search warrant's description of the area to be searched and the items to be searched for did not expressly allow for the scope of search actually made.

However, the Supreme Court upholds the search on the scope issue based in part upon the fact that the permissible scope was defined by the combined effect of the search warrant and the affidavit. Because the two documents were physically attached to each other, and because the warrant expressly incorporated the affidavit by reference, the scope of the search was defined by the combined effect of the particularizations under the two documents.

Result: Affirmance of Clallam County Superior Court judgment of aggravated first degree murder (two counts); affirmance of death penalty sentence.

(3) CALIFORNIA OFFICERS' FAILURE TO FOLLOW CHAPTER 9.73 IN RECORDED INTERROGATION NOT ATTRIBUTED TO WASHINGTON OFFICERS; MIRANDA OK – In State v. Brown, ___ Wn.2d ___ (1997), the State Supreme Court addresses numerous issues in upholding the conviction and death penalty of Cal Coburn Brown for a Washington torture-murder. One issue focused on the tape-recording of an interrogation by arresting California officers, while another issue focused on the wording of Miranda warnings by the California officers.

(1) RECORDED INTERROGATION: The California officers had taken a tape-recorded statement from Brown after arresting him. The California officers had failed to follow the requirements of RCW 9.73.090(1)(b) in taking a tape-recorded statement from the murder suspect Brown.

The statute provides:

- (b) Video and/or sound recordings may be made of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court. Such video and/or sound recordings shall conform strictly to the following:
 - (i) The arrested person shall be informed that such recording is being made and the statement so informing him shall be included in the recording;
 - (ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;
 - (iii) At the commencement of the recording the arrested person shall be fully informed of his constitutional rights, and such statements informing him shall be included in the recording;
 - (iv) The recordings shall only be used for valid police or court activities.

Officers from jurisdictions outside Washington are not subject to the requirement of chapter 9.73 RCW. Washington's Privacy Act generally limits electronic surveillance and recording only by Washingtonians and persons acting in Washington. Only if California officers were acting at the direction of the Washington officers would exclusion be required. The Supreme Court rules that there was no such directions by Washington officers, and, therefore, no basis for exclusion under chapter 9.73.

The California police had originally arrested Brown as a suspect in a California murder attempt. While they questioned him as to the California crime, he told them he had committed a murder in Washington. After confirming the death, Washington officers asked the California officers to question Brown about the Washington crime.

While the Washington officers had asked the California officers to question Brown, they had no knowledge regarding how the interrogation would be conducted. Under these facts, the Supreme Courts holds, the Washington officers' act of merely asking the California officers to take a statement did not make the California officers agents of the Washington officers. Therefore, there was no violation of RCW 9.73.090.

LED EDITOR'S COMMENT: Beware! This statute is strictly applied where Washington officers are involved. See State v. Mazzante, 86 Wn. App. 425 (Div. II, 1997) Aug. '97 LED:20 (excluding statement because interrogating detective did not state the Miranda warnings, which already had been given off-tape, at the beginning of the tape.

(2) WORDING OF MIRANDA WARNING: The State Supreme Court also addresses an issue regarding the wording of Miranda warnings by the California officers. If the warnings were improper, then Brown's statement would be suppressed even though the violation involved out-of-state officers, because officers in all states are subject to Fifth Amendment requirements.

The Court finds the warning to be adequate, though the Court does not endorse the wording. Brown had argued that the warnings did not properly advise Brown that his right to counsel applied before questioning, as well as during questioning. The Supreme Court holds that, when the warnings were looked at as a whole, they reasonably and effectively told Brown of his Miranda rights.

LED EDITOR'S COMMENT: We have always recommended that officers read Miranda warnings from a card or form in order to avoid problems, and we still make that recommendation. However, where the wording falls a little short, this ruling helps. It reflects the trend, in this state and elsewhere, in attacks on the wording (including foreign language translations) of Miranda warnings. The courts are generally reluctant to scrutinize the wording of the warnings, and the courts generally find sufficiency despite minor variations in wording.

Result: King County Superior Court conviction for aggravated first degree murder; affirmance of death penalty.

(4) CHILD ABUSE HEARSAY HELD INADMISSIBLE WHERE AVAILABLE CHILD VICTIM TAKES WITNESS STAND BUT DOES NOT DESCRIBE ACTS OF SEXUAL CONTACT – In State v. Rohrich, 132 Wn.2d 472(1997), the State Supreme Court rules that, where a child sex abuse victim is available as a witness for the prosecution and takes the stand, but does not give any testimony as to the charged sexual contact, the child cannot be deemed to have "testified" for purposes of the child abuse hearsay statute of RCW 9A.44.120.

RCW 9A.44.120 provides in part as follows:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another ... not otherwise

admissible by statute or court rule, is admissible in evidence ... in the courts of the state of Washington if:

- (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
- (2) The child either:
 - (a) ***Testifies at the proceedings;*** or
 - (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

[Italics and bolding added]

In the Rohrich case, the nine-year-old child victim, who had been determined to be competent, took the witness stand. However, she was not asked about, nor did she testify about, the alleged sexual contact by the defendant, her stepfather. Several witnesses testified to Rohrich's prior out-of-court (hearsay) statements about the alleged sexual contact. There was apparently no corroborating evidence for the child's out-of-court statements. Rohrich was convicted of several sex offenses against the child.

On the grounds that the hearsay was inadmissible, the Court of Appeals reversed Rohrich's conviction in a decision last year. See 82 Wn. App. 674 (Div. III, 1996) **Nov. '96 LED:19**. Now the State Supreme Court has affirmed the Court of Appeals decision, ruling that a child cannot be deemed to have "testified" for purposes of RCW 9A.44.120 unless the child actually gives testimony about the charged act(s) of sexual contact.

Result: Affirmance of Court of Appeals decisions reversing Whitman County Superior Court convictions of Gregory Michael Rohrich of two counts of First Degree Rape of a Child and one count of First Degree Child Molestation.

(5) UCSA UPHELD: NO CONSTITUTIONAL RIGHT TO MEDICINAL USE OF MARIJUANA – In State v. Seeley, ___ Wn.2d ___ (1997), the State Supreme Court rules, 8-1, that the broad statutory prohibition on use of marijuana under chapter 69.50 RCW is constitutionally valid.

The trial court had held in an "independent grounds" ruling that classifying marijuana as a Schedule I controlled substance, with no medical use exceptions, violates the special protections of the Washington constitution's counterpart to the U.S. Constitution's equal protection clause. The majority opinion of the State Supreme Court holds that there is no difference in effect between the "equal protection" provisions of the state and federal constitutions. The lone dissenter, Justice Sanders, argues in effect that, if the State cannot prohibit abortions consistent with equal protection and due process protections, then it cannot prohibit medicinal use of marijuana.

Result: Reversal of Pierce County Superior Court decision declaring to be unconstitutional the classification of marijuana as a Schedule I controlled substance.

(6) PROSECUTOR CAN CHARGE ACCUSED WITH TRAFFICKING IN THE SAME ITEM OF PROPERTY WHICH ACCUSED HAS BEEN CHARGED WITH STEALING – In State v. Michielli,

132 Wn.2d 229 (1997), the Court of Appeals rules, 5-4, that there is no bar under Title 9A RCW to a prosecutor charging a defendant: (1) under RCW 9A.82.050(2) with trafficking in an item of stolen property, and (2) under RCW 9A.56 RCW with stealing the same item. While such crimes may “merge” for sentencing purposes, this would not be a basis for dismissing either charge, or otherwise addressing the merger issue, prior to the State obtaining convictions on both charges.

Result: Affirmance of Spokane County Superior Court dismissal of charges on grounds not addressed in this LED entry, i.e., prosecutorial misconduct; the Supreme Court ruling also affirms in part and reverses in part a decisions of the Court of Appeals in the same case.

(7) LAW ON JUVENILE TRANSFER TO ADULT PRISON HELD CONSTITUTIONALLY VALID

– In Monroe v. Soliz, 132 Wn.2d 414 (1997), the State Supreme Court rules, 5-4, to uphold the constitutionality of RCW 13.40.280, which permits DSHS, with the consent of DOC, to administratively transfer a juvenile offender from a juvenile detention facility to an adult prison if the juvenile is found to present a “continuing and serious threat to the safety of others at the institution.”

The challenge to the statute was grounded primarily in an argument combining: (1) the right to jury trial, and (2) equal protection. The argument in effect was that since adults get a jury trial before being placed in an adult prison, so should juveniles before they can be placed in adult prisons. The majority opinion explains that: (1) there are differences in the status and rights of adult confinees, as compared to juvenile confinees, in adult institutions; (2) there are very good reasons for getting dangerous juveniles completely out of juvenile facilities; and (3) there are protections in place for the juvenile transferees, in that RCW 13.04.116(1)(a) requires that juveniles held in adult facilities must be housed in a manner that segregates them from adults in the adult detention facility.

Result: Reversal of Thurston County Superior Court decision invalidating the statutory scheme; note, however, that while the Supreme Court upholds the statute, it directs that Monroe must be housed separately from adult confinees.

(8) CONSTITUTIONAL CHALLENGE TO SEX PREDATOR LAW RULED PREMATURE – In McClatchey v. State, ___ Wn.2d ___ (1997), the State Supreme Court rejects as premature a challenge to the state’s law for commitment of sexually violent predators (see chapter 71.09 RCW).

McClatchey was sent to the Special Commitment Center (SCC) in Monroe for evaluation, pending trial on the State’s petition to commit him as a sexually violent predator. He filed a motion to dismiss the commitment petition, alleging that the conditions at the SCC are punitive, and, therefore, that commitment under chapter 71.09 would, among other things: (a) constitute double jeopardy, (b) be an ex post facto application of the law, and (c) violate substantive due process. The trial court denied McClatchey’s request for an evidentiary hearing.

The State Supreme Court (with a lone dissent by Justice Sanders) upholds the trial court’s denial of a hearing. The Supreme Court notes that sexual predator commitment proceedings have been held by both the U.S. Supreme Court and the State Supreme Court to be **civil** proceedings, so double jeopardy and ex post facto arguments cannot be raised in challenging the statute **on its face**. One can challenge the statute only **as applied in a given case**. That is, only if one can show that, under the specific facts of a given case, the confinement is clearly punitive in nature (possible example: if there is no treatment available at all), can one make an argument that the statute violates the constitutional provisions argued by McClatchey.

Under the constitutional case law relating to challenges to laws **as applied**, McClatchey must first be actually committed as a sexually violent predator before he can raise the constitutional issues. Thus, his motion challenging the statute is premature.

Result: Affirmance of Court of Appeals' decision which in turn had affirmed a Pierce County Superior Court decision denying McClatchey a hearing.

WASHINGTON STATE COURT OF APPEALS

OFFICER'S ACT OF MOTIONING DRIVER OF PARKED CAR TO ROLL DOWN WINDOW WAS NOT A "SEIZURE"; PRECEDENT OF THORN GUIDES COURT

State v. Knox, 86 Wn. App. 831 (Div. II, 1997)

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

On April 17, 1994, at about 2:45 a.m., the Washington State ferry docked at Winslow on Bainbridge Island. Trooper Daniel Presba was on the car deck waiting for vehicles to disembark when he noticed a ferry worker's unsuccessful attempts to awaken the driver of a truck that was blocking departing vehicles.

Concerned by the lack of a response, Presba approached the truck from the driver's side and saw Walter Knox with his head resting on the headrest and his eyes closed. Just as Presba was about to knock, Knox "awoke abruptly, and sat up and looked straight ahead, doing nothing." Presba observed that Knox's eyes were watery and bloodshot; he appeared to be in a stupor; the truck was out of gear and the emergency brake disengaged; and the engine was not running. Meanwhile, the traffic behind Knox could not move.

Presba motioned several times for Knox to roll his window down. When Knox finally responded, Presba was greeted with the strong odor of alcohol. He asked Knox if he was okay, to which Knox replied, "I'm fine." Knox then started the vehicle and again stated he was fine, but followed this with the inquiry, "Where am I?"

Concerned about Knox's ability to drive, Presba asked Knox to turn off the engine; Knox did not comply, but continued to stare straight ahead. At that point, Presba unlocked and opened Knox's door, planning to turn the engine off. Knox, however, finally responded to Presba's request and turned the engine off himself.

After Presba asked Knox how much he had had to drink, and Knox replied, "[A] good fair enough," Presba had Knox move to the passenger seat and Presba drove the vehicle off the ferry to the end of the loading ramp. There, Presba administered sobriety tests; Knox performed poorly on the tests. Based on these events, Presba arrested Knox, charging him with being in control of a vehicle while under the influence. RCW 46.61.504.

Knox moved to suppress the evidence obtained as a result of the contact, contending that Presba lacked probable cause to make the initial contact. The district court denied the motion and, after hearing the case on stipulated facts, found Knox guilty as charged.

Knox appealed to superior court. On August 2, 1995, the superior court filed a memorandum decision reversing the conviction. It determined that Knox's encounter with Presba constituted an unlawful search and seizure.

ISSUE AND RULING: Was Knox "seized" for federal Fourth Amendment and state constitutional purposes at the moment when the officer motioned for him to roll down his window? (**ANSWER:** No) **Result:** Reversal of Kitsap County Superior Court decision, and reinstatement of Kitsap County District Court conviction under RCW 46.61.504.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The fourth amendment to the United States Constitution and article I section 7 of the state constitution protect citizens from unreasonable searches and seizures. Not every citizen encounter with police, however, rises to the level of a seizure. A police contact constitutes a seizure only if, under the totality of the circumstances, a reasonable person would not have felt free to leave, "terminate the encounter, refuse to answer the officer's question, or otherwise go about his business."

Police activities such as engaging a citizen in conversation, identifying themselves as officers, or simply requesting identification do not convert a casual encounter into a seizure. On the other hand, the threatening presence of several officers, the display of a weapon, touching the defendant, and commanding language or tone of voice suggest that the encounter may have constituted a seizure. Instead, we consider the officer's actual conduct and whether it reasonably appeared to be coercive.

Here, Knox was asleep behind the wheel of his truck while it was parked on the deck of a ferry, and it appeared that a ferry employee could not awaken him. Further, the Knox vehicle was blocking the disembarkation of other vehicles in his row. Presba approached to determine the problem and to help.

Because of concerns about the effort it took to awaken Knox, Knox's apparently disoriented state upon awaking, and the physical signs of intoxication, Presba wanted to verify that Knox was in a safe condition to drive. Consequently, he requested that Knox roll down the window. Presba then asked Knox whether he was okay. After observing further unusual behavior, Presba asked Knox how much he had to drink.

These facts are similar to those in Thorn [State v. Thorn, 129 Wn.2d 347 (1996 Aug. '96 **LED:13**), a case in which the court held that the officer's conduct did not constitute a seizure of the defendant. In Thorn, a police officer observed a "flicker of light" inside a car parked legally in a parking lot. The officer described the light as similar to the light that emanates from a drug pipe. Approaching the car on foot, the officer asked the driver, "Where is the pipe?" Subsequently, the officer discovered evidence of a drug crime.

The Thorn court noted that the defendant did not provide any facts suggesting that the officer's tone of voice, body language, or manner were coercive. Thus, it concluded that considering the totality of the circumstances, a reasonable person would have believed that he was free to leave or could refuse to answer the officer's question. Consequently, the defendant was not seized and his Fourth Amendment rights were not implicated by the officer's contact.

The officer's contact here was no more invasive than was the officer's question in Thorn. As in Thorn, there was nothing about the officer's manner that was coercive. As in Thorn, Knox could have refused to answer. Nor are we persuaded by Knox's argument that the encounter was coercive because he was "stopped" while in a vehicle, as opposed to being a pedestrian who might feel more free to walk away. This distinction dissipates when the vehicle is parked in a public place.

[Some citations omitted]

LED EDITOR'S NOTE: The Court of Appeals closes with a footnote citing with approval the following decisions from other jurisdictions in cases involving analogous facts:

See also State v. Zubizareta, 122 Idaho 823, 839 P.2d 1237 (1992) (no seizure where officer approached parked vehicle and requested motorist to roll down window and turn off engine); In re Matter of Clayton, 113 Idaho 817, 748 P.2d 401 (1988) (officer's actions to determine whether driver slumped forward in slumber in vehicle with its motor running and lights on was prudent and within officer's caretaking function); People v. Murray, 137 Ill.2d 382, 148 Ill.Dec. 7, 11-12, 560 N.E.2d 309, 313-14 (1990) (no seizure where officer approached a car in which an individual was sleeping and tapped on window or asked the individual to roll down window; request that driver who just woke up provide identification or step out of car for purpose of determining ability to drive is proper); State v. Kersh, 313 N.W.2d 566, 568 (Iowa 1981) (survey of cases from other jurisdictions regarding the propriety of police opening a vehicle to determine whether an unconscious or disoriented person is in distress); Commonwealth v. Leonard, 422 Mass. 504, 663 N.E.2d 828, cert. denied, --- U.S. ---, 117 S.Ct. 199, 136 L.Ed.2d 135 (1996) (no seizure where officer opened unlocked door of car parked in breakdown area adjacent to highway after driver failed to respond to attempts to get his attention).

“PRETEXT STOP” THEORY REJECTED UNDER STATE, FEDERAL CONSTITUTIONS

State v. Ladson, 86 Wn. App. 822 (Div. II, 1997)

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

Officer Mack had heard rumors that Richard Fogle was involved in drug dealing. On October 5, 1995, Officers Mack and Ziessmer were on proactive gang control in Lacey when they noticed Fogle behind the wheel of a Chevrolet. Thomas L. Ladson was a passenger in the vehicle. Officer Ziessmer saw that the Chevrolet had expired license tabs. After the Chevrolet refueled and dispatch confirmed that the tabs had expired, the officers stopped the vehicle.

While on proactive gang patrol, Officer Mack's primary function does not include the regulation of routine traffic violations; Officer Mack does not pull over every car he sees with expired tabs; in fact, Officer Mack selectively enforces traffic violations depending on whether he believes there is potential for intelligence gathering in such stops. Officer Mack's motivation to initiate the stop of Fogle's vehicle was his suspicion about Fogle's dealings with illegal drugs.

During the stop, Officer Mack arrested Fogle after determining Fogle was driving with a suspended license. The officers asked Ladson to exit the car. During a search of the car incident to Fogle's arrest, the officers found a loaded gun, cash, and several baggies of marijuana in Ladson's jacket. Ladson was charged with two counts: one, possession of a controlled substance with intent to deliver while armed with a deadly weapon; and two, possession of a stolen firearm.

The trial court determined following a pretrial suppression hearing that

Officer Mack's selective enforcement of the traffic laws in this case, based on the ulterior purpose of intelligence gathering or gang-monitoring, constitutes an unconstitutional pretext search.... [A] reasonable officer on gang patrol would not have stopped Fogle's vehicle for the expired tabs violation in the absence of some other purpose or reason.

The court ordered the evidence gathered against Ladson suppressed.

ISSUES AND RULINGS: (1) Under the Fourth Amendment, where an officer has probable cause to believe a traffic violation has occurred, can the officer's pretextual basis for a stop invalidate the otherwise lawful seizure? (**ANSWER:** No); (2) Did defendant cite sufficient legal authority to raise his "pretext stop" question under the state constitution, article 1, section 7? (**ANSWER:** No) **Result:** Reversal of Thurston County Superior Court suppression order; case remanded for trial.

ANALYSIS:

(1) **Fourth Amendment**

In significant portion, the Court of Appeals' analysis of Ladson's "pretext stop" argument under the Fourth Amendment is as follows:

Generally, a traffic stop does not violate the Fourth Amendment where the police have probable cause to believe a traffic violation has occurred. Whren v. United States, 135 L.Ed.2d 89 (1996) [**Aug. '96 LED:09**]. Here, the police had probable cause to believe a traffic infraction had occurred when they observed Fogle's vehicle had expired license tabs. See RCW 46.16.010. The subjective intentions of law enforcement personnel "play no role in ordinary, probable-cause Fourth Amendment analysis." Probable cause justifies a search and seizure and usually outweighs any private interest in avoiding police contact:

Where probable cause has existed, the only cases in which we have found it necessary actually to perform the "balancing" analysis involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests--such as, for example,

seizure by means of deadly force, unannounced entry into a home, entry into a home without a warrant, or physical penetration of the body.

The State contends the suppression order was in error. When we apply Whren to the facts of this case, the trial court erred when it determined that, under the Fourth Amendment, the subjective intent of the investigating officers invalidated an otherwise lawful traffic stop. The traffic stop was clearly justified; the subjective intent of the officers irrelevant under the Fourth Amendment; the manner of the search and seizure nothing if not ordinary. The trial court's error arose out of its misplaced reliance on State v. Chapin, 75 Wn. App. 460 (1994) [**Dec. '94 LED:17**], where Division One of the Court of Appeals adopted and applied a Fourth Amendment pretext rule since rejected by an unanimous United States Supreme Court. [**Citing Whren – LED Ed.**]

The Chapin opinion holds that a stop is reasonable and, therefore, constitutional if a reasonable officer would have made the stop in the absence of an improper purpose. The reasonableness and propriety of the officer's conduct is determined in part by whether the officer adhered to or departed from standard or routine procedures. The Whren opinion rejects the "standard or routine procedure" test as "virtual subjectivity."

Because the Chapin pretext rule is incorrect, it is not necessary to determine whether the trial court properly applied Chapin to the facts of this case.

[Some citations omitted]

(2) State Constitution

In response to Ladson's state constitutional argument under article 1, section 7, the Court of Appeals declares that Ladson failed to cite any case authority which would support his challenge. Therefore, the Court of Appeals declines to address whether "pretext" can invalidate an otherwise lawful stop under the Washington constitution.

REAL PROPERTY NOT FORFEITABLE IF "GROWERS" CLEAR OUT BEFORE SEIZURE

City of Everett v. Real Prop. Known As 4827 268th St. NW, Stanwood, Snohomish Cty, 86 Wn. App. 69 (Div. I, 1997)

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

According to Detective Fred Helfers' affidavit, Helfers received information that Ray Canell might be involved in a grow operation. In late July 1995, Helfers contacted the Public Utilities District to check the property for possible power diversion. On August 8, 1995, PUD employee Dave Clark told Helfers that he had confronted Canell at the Stanwood property, who acted suspicious and nervous.

On August 9, 1995, Helfers drove to the address and saw a large rental truck backed up to the front doors of one of the buildings on the property. Fearing that the suspects may be moving a marijuana grow operation, Helfers arranged with two other detectives to conduct a "knock and talk." Canell refused consent.

Helfers then received a search warrant for the truck and the building located on the property.

That same day, the Everett Police Department served the search warrant. At the time of its execution, there was no existing marijuana grow operation, nor were there significant amounts of marijuana present. Circumstantial evidence, however, indicated that a marijuana grow operation was conducted on the property as recently as twenty-four to forty-eight hours before the execution of the search warrant. [The Everett P.D. subsequently filed a forfeiture acting on the real property.]

The property owner brought a motion to dismiss the forfeiture action. The trial court granted that motion, finding that RCW 69.50.505 required an existing prohibited use at the time of law enforcement intervention to support a real property forfeiture action.

ISSUE AND RULING: For purposes of the “government intervention” exception for real property seizures under the UCSA, was the real property currently “being used” for marijuana growing when seized? (**ANSWER:** No) **Result:** Affirmance of Snohomish County Superior Court order dismissing forfeiture action.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The forfeiture statute provides in relevant part:

(a) The following are subject to seizure and forfeiture and no property right exists in them:

(8) All real property, including any right, title, and interest in the whole of any lot or tract of land, and any appurtenances or improvements which are being used with the knowledge of the owner for the manufacturing, compounding, processing, delivery, importing, or exporting of any controlled substance [.]

However:

(iii) The possession of marijuana shall not result in the forfeiture of real property unless the marijuana is possessed for commercial purposes, the amount possessed is five or more plants or one pound or more of marijuana, and a substantial nexus exists between the possession of marijuana and the real property.

RCW 69.50.505(a)(8) (italics by court).

The Washington State Supreme Court interpreted this statute in [Tellevik v. Real Property, etc., 120 Wn.2d 68 (1992) **Jan. '93 LED:08**] where the police, in two consolidated cases, discovered marijuana grow operations upon the execution of search warrants. Months later, when the police brought complaints for forfeiture, the defendants argued that the property was not subject to forfeiture because the property was not "being used" as a grow operation when seized.

The Tellevik court determined that under a plain reading of the statute, the "being used" language meant that the forfeiture statute applied only when the property was presently being used as a grow operation when seized. The court, however, created an exception to the rule, holding that this present status was not lost "when illegal conduct ceases due to law enforcement intervention." Otherwise, the court reasoned, the legislative purpose of removing the profit incentive from drug trafficking would be thwarted because law enforcement would rarely be able to establish the requisite probable cause for the property's seizure before searching the property and arresting its occupants.

The City argues that here, a grow operation was also presently taking place that ceased "due to law enforcement intervention." The City claims that the intervention was the police investigation, which included the PUD employee installing the meter under police instruction and the "knock and talk." The City reasons that those acts caused Canell to move the grow operation based on fears that the police knew of his activities.

We reject this broad interpretation of "law enforcement intervention." The Tellevik court created a narrow exception to the forfeiture statute's plain and unambiguous "present" requirement to read meaning into the statute: After the police execute a search warrant, discover an ongoing grow operation, and arrest the people running the operation, it is axiomatic that no "present" grow operation will exist when the police later attempt to seize the property. Those circumstances do not exist here when a present grow operation was never discovered and when the police did not shut down the operation. Thus, we hold that the PUD employee's activities coupled with the "knock and talk" that purportedly caused Canell to move the grow operation does not constitute law enforcement intervention.

This conclusion is reinforced by the plain language of the forfeiture statute. For instance, the statute's provision on real property contains the language, "being used." RCW 69.50.505(a)(8). In contrast, the same forfeiture statute's provisions for other types of property contain broader language, including things that "are used or intended for use." Cf. RCW 69.50.505(a)(2)-(7). Thus, the Legislature explicitly narrowed the circumstances under which real property was subject to seizure and forfeiture. In the absence of a legislative mandate, we will not expand these circumstances beyond the narrow exception created in Tellevik.

[Some citations omitted]

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) "INEVITABLE DISCOVERY" PASSES STATE CONSTITUTIONAL TEST – In State v. Richman, 85 Wn. App. 568 (Div. I, 1997), the Court of Appeals for Division One upholds the "inevitable discovery" exception to the exclusionary rule under state constitutional analysis.

A police officer had responded to a store security person's request for assistance with Allen Richman, a suspected shoplifter. When the officer arrived, the officer learned that the security person had observed apparently stolen merchandise on the person of the suspect. The officer

made the same observation. At some point after the officer's arrival, the officer seized and searched a briefcase in the suspect's possession, finding more stolen merchandise.

The critical issue in the subsequent suppression motion in superior court was whether the briefcase had been searched "incident to Richman's arrest." The issue was significant because the value of the items in the briefcase was sufficient to push Richman's theft from second degree to first degree. The trial court had concluded that, due to the officer's inability to remember the exact sequence of events, the trial court could not determine whether Richman had been arrested before or after the briefcase was searched, thus making it difficult to determine whether the search was clearly "incident to arrest."

However, the Court of Appeals declares, the timing of the search was irrelevant in light of the "inevitable discovery" exception to the exclusionary rule. Because the officer clearly had probable cause to arrest Richman long before the officer searched the briefcase, it was inevitable: that the officer would have eventually arrested Richman. And at that point the officer would have searched Richman's person and personal effects, including the briefcase.

The Court of Appeals rejects defendant's argument that, because the Washington constitution – article 1, section 7 – often provides greater privacy protection than does the Fourth Amendment of the U.S. constitution, the inevitable discovery exception to the Exclusionary Rule should not be part of the Washington constitution. The Court of Appeals notes that the basis for the inevitable discovery doctrine is that the evidence would have been eventually gotten by permissible means. Accordingly, the Court of Appeals asserts, there is no concern with privacy protection in applying the doctrine under the state constitution.

Result: Affirmance of King County Superior Court conviction for first degree theft.

(2) HALLUCINATING PERSON HELD UNABLE TO GIVE CONSENT TO SEARCH HER PURSE – In State v. Sondergaard, 86 Wn. App. 656 (Div. I, 1997), the Court of Appeals rules, 2-1, that a person on drugs was incapable of understanding what was happening and therefore did not have capacity to consent to a search, even though police used no coercive methods in asking for consent.

The facts in Sondergaard are described by the Court of Appeals as follows. An officer responding to a 911 call regarding a disturbance by a renter of hotel room testified that after he came into Sondergaard's room:

He observed Sondergaard sitting in a dark room, fidgeting, rocking back and forth, and occasionally pointing at nothing in particular. Officer Post conversed with Sondergaard for two or three minutes, during which time she nonsensically mentioned that a soda can was moving.

Officer Post asked Sondergaard if she was on any drugs, and she said no. he then asked if he could look in her purse. Without hesitation, Sondergaard said he could. The officer saw a purse on the floor, just outside the bedroom door, and asked if it was hers. She said yes. Upon discovering narcotics in the purse, Officer Post arrested Sondergaard. Concerned about her physiological condition, he drove her to the hospital. By the time they reached the hospital Sondergaard began to "really rave". She screamed at Officer Post that he was letting his wife be killed by the falling ceiling tiles.

The trial court ultimately found, among other things, that the defendant's mental state made her incapable of understanding what was happening, and therefore incapable of giving a valid consent. The Court of Appeals majority affirms, finding substantial evidence to support the trial court finding. The majority does note, however, that the mere fact that one has taken drugs does make one incapable of giving consent. The question in this regard is whether the person is sufficiently aware of what is going on to give a voluntary consent.

Result: Affirmance of Whatcom County Superior Court suppression ruling.

LED EDITOR'S COMMENT: The majority rejects, for several reasons, the State's argument that the Court should apply confession law cases to find the consent valid. In Colorado v. Connelly, 479 U.S. 157 (1986) March '87 LED:01 , the U.S. Supreme Court ruled that, even though the defendant was insane and unable to make free and rational choices when he confessed waived his Miranda rights, the Miranda waiver was valid because the police did nothing wrong in obtaining the waiver. The Court of Appeals majority declares that Connelly's ruling on voluntariness of Miranda waiver does not apply to voluntariness of consent to search. The dissenting judge disagrees, arguing that the Connelly rule does apply to the consent voluntariness issue.

COMING SOON

In the August '97 LED at pages 14-15, we discussed the Ninth Circuit decision in Perkins v. City of West Covina, 113 F.3d 1004 (9th Cir. 1997) in which that Federal court held that a certain level of notice was required regarding the right to seek return of property seized in a search warrant execution. We had hoped to provide a sample notice which would address the Perkins' Court's concerns for the September or October LED's. However, a busy schedule, shifting priorities, and our natural tendency to overcomplicate things has delayed completion of this project. We now hope to have something ready by the December '97 LED.

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.