



# Law Enforcement

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# Digest

## HONOR ROLL

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**493<sup>rd</sup> Session, Basic Law Enforcement Academy – April 20<sup>th</sup>, 1999 through July 14<sup>th</sup>, 1999**

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## SEPTEMBER LED TABLE OF CONTENTS

**BRIEF NOTES FROM THE U.S. SUPREME COURT..... 2**

**FOURTH AMENDMENT “CARROLL” DOCTRINE DOES NOT REQUIRE SEPARATE FINDING OF EXIGENCY (BUT ALAS, NO “CARROLL” DOCTRINE IN WASHINGTON)**  
**Maryland v. Dyson, 119 S.Ct. 2013 (1999)..... 2**

**“DISABILITY” FOR PURPOSES OF FEDERAL ADA’S ANTI-DISCRIMINATION LAW TAKES INTO ACCOUNT DISABILITY-MITIGATING MEASURES**  
**Sutton et. al. v. United Air Lines, Inc., 119 S.Ct. 2139 (1999); Murphy v. United Parcel Service, Inc., 119 S.Ct. 2133 (1999); and Albertsons, Inc. v. Krinkinburg, 119 S.Ct. 2162 (1999)..... 3**

**HEARSAY TESTIMONY BY POLICE OFFICER TELLING OF CONFESSION BY DEFENDANT’S COHORT VIOLATED CONFRONTATION CLAUSE OF SIXTH AMENDMENT**  
**Lilly v. Virginia, 119 S.Ct. 887 (1999)..... 4**

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

**“PRETEXT STOP”: WASHINGTON SUPREME COURT HOLDS IN 5-4 INDEPENDENT GROUNDS INTERPRETATION OF WASHINGTON CONSTITUTION’S ARTICLE 1, SECTION 7 THAT PRETEXT RULE REQUIRES OBJECTIVE AND SUBJECTIVE REVIEW OF STOP**  
**State v. Ladson, 138 Wn.2d 343 (1999)..... 5**

**WASHINGTON STATE COURT OF APPEALS ..... 11**

**“FRESH PURSUIT,” “EMERGENCY” PROVISIONS OF RCW 10.93.120 AUTHORIZED TACOMA OFFICER TO GO INTO LAKEWOOD TO FIND AND ARREST DUI SUSPECT**

City of Tacoma v. Durham, \_\_\_ Wn. App. \_\_\_ (Div. II, 1999) [978 P.2d 514] ..... 11

**DETECTIVES WERE NOT REQUIRED TO INTERRUPT CUSTODIAL INTERROGATION OF SUSPECT WHEN ATTORNEY CAME TO STATIONHOUSE; POSTPONING PRELIMINARY APPEARANCE ON UNRELATED CHARGE WAS NOT LAWFUL BUT DID NOT BY ITSELF MAKE CONFESSION INVOLUNTARY**

State v. Bradford, \_\_\_ Wn. App. \_\_\_ (Div. III, 1999) [978 P.2d 534] ..... 15

**STATE WINS ON CONSTRUCTIVE POSSESSION, PRESERVATION-OF-EVIDENCE ISSUES**

State v. Potts, 93 Wn. App. 82 (Div. III, 1998) ..... 17

**ATTORNEY GENERAL OPINION CONCLUDES THAT THERE IS NO BAR TO EMPLOYMENT OF OFFICERS OF AGES 18-20** ..... 19

**INTERNET ACCESS TO COURT DECISIONS, STATUTES, AND COURT RULES ...** 19

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**BRIEF NOTES FROM THE U.S. SUPREME COURT**

**(1) FOURTH AMENDMENT “CARROLL” DOCTRINE DOES NOT REQUIRE SEPARATE FINDING OF EXIGENCY (BUT ALAS, NO “CARROLL” DOCTRINE IN WASHINGTON)** – In Maryland v. Dyson, 119 S.Ct. 2013 (1999), the U.S. Supreme Court unanimously reaffirms that the Fourth Amendment “Carroll Doctrine” (also known as the “automobile exception to the search warrant requirement” or “probable cause car search rule”) does not require a separate showing of exigent circumstances.

Under the doctrine announced by U.S. Supreme Court in its 1925 decision in Carroll v. U.S., courts applying the “Carroll Doctrine” have consistently held that if police have probable cause to search a mobile vehicle located in a non-private area, police may immediately search all areas of the vehicle without obtaining consent or getting a search warrant. The rationale of the “Carroll Doctrine” has been said in recent U.S. Supreme Court rulings to be two-pronged: 1) the vehicle’s mobility and location in a public place creates per se exigency “requiring” immediate search without a warrant; and 2) a vehicle is not entitled to the same level of privacy protection as a home.

In Dyson, a Maryland appellate court had addressed a case where Maryland police developed probable cause at 12 noon on a Tuesday that Dyson was going on a trip from Maryland to New York to pick up a “large supply” of drugs. Rather than trying to get a search warrant while Dyson was on his drug run, the officers simply waited until Dyson returned 13 hours later, at 1 a.m. on Wednesday evening. On Dyson’s return to Maryland, the officers stopped his car, arrested him, and searched his car, finding a small amount of crack cocaine (23 grams) in a bag in the car’s trunk. The Maryland appellate court suppressed the evidence, believing that, because the officers had time to get a search warrant, the Fourth Amendment requires actual exigent circumstances in this circumstance.

Now the U.S. Supreme Court has reversed the Maryland court’s decision, holding that the Carroll doctrine presumes exigent circumstances for PC car searches and therefore, permits a warrantless searches in this situation.

Result: Reversal of Maryland appellate court decision and reinstatement of Dyson’s drug conviction.

**LED EDITOR'S COMMENT:** The Washington courts would suppress the evidence in this circumstance. In a 1983 "independent grounds" reading of article 1, section 7 of the Washington constitution in State v. Ringer, 100 Wn.2d 686 (1983), the Washington Supreme Court rejected the "Carroll Doctrine." Washington's "Ringer rule" requires actual exigent circumstances before Washington officers may make a warrantless, nonconsenting search of a car based solely on probable cause to search. See e.g., State v. Patterson, 112 Wn.2d 731 (1989) Sept 89 LED:15 (where officers found the unoccupied, likely getaway car of a burglar just five minutes after the burglary, it was lawful for them to search it in their effort to track down the perpetrator.) Washington officers could lawfully make a warrantless, non-consenting seizure of a car in the Dyson circumstances; Washington officers could also lawfully arrest the suspect in the Dyson situation; and they could lawfully search him and the passenger area of the car "incident to arrest." See State v. Stroud, 106 Wn.2d 144 (1986). However, because Ringer eliminated the "Carroll Doctrine" for Washington law enforcement, Washington officers would not be permitted to make a warrantless, non-consenting trunk search in the Dyson circumstance.

**(2) "DISABILITY" FOR PURPOSES OF ADA ANTI-DISCRIMINATION LAW TAKES INTO ACCOUNT DISABILITY-MITIGATING MEASURES** – In three decisions issued the same day in separate cases, the U.S. Supreme Court has set limits on the definition of "disability" for purposes of the federal Americans with Disabilities Act ("ADA"). The Supreme Court has ruled that the determination of "disability" status requires consideration of available disability-mitigating measures such as corrective lenses and medications. The cases are Sutton et. al. v. United Air Lines, Inc., 119 S.Ct. 2139 (1999); Murphy v. United Parcel Service, Inc., 119 S.Ct. 2133 (1999); and Albertsons, Inc. v. Krinkinburg, 119 S.Ct. 2162 (1999).

There are two ways for a job applicant or worker to qualify for disability protection under the ADA. First, a person with an *actual* mental or physical impairment meets the definition if the impairment substantially limits the person in a major life activity (though the employer can defend by establishing the need for the particular requirement). Second, a person who is *regarded or perceived* to have a substantially limiting impairment, even if the person is not actually disabled, will also qualify for disability protection. In combination, the decisions in Sutton, Murphy and Krinkinburg limit the size of both classes of federal plaintiffs.

The primary effect of the three decisions is to limit what constitutes an *actual disability* under the ADA. On that question, the Sutton decision rejects the case of two extremely nearsighted job applicants that the airline rejected for pilot jobs. The vision of both applicants was correctable to 20-20 with lenses. Similarly, the Murphy decision holds that high blood pressure, which UPS used as a basis to disqualify a mechanic job applicant, did not qualify as a disability. That is because the condition was controllable with medication. The Krinkinburg case, like Sutton, addressed a vision requirement. Albertsons requires its drivers to meet a visual acuity requirement set under a federal DOT regulation. The Krinkinburg decision notes that the employer there had no choice but to comply with the federal DOT's requirement, and, for that additional reason, the employer was not subject to suit under the ADA.

The Sutton decision also narrows what constitutes being *regarded as having a disability* under the ADA. The majority opinion in that case noted that the job applicants there fell far short of establishing this status. The pilot applicants there had alleged only that they were

regarded by the airline as being unable to work as *global airline pilots*. There are many other pilot jobs, as well as jobs of other types, the majority notes. Hence, the plaintiffs could not establish that they were regarded as having a disability, i.e., that they were regarded by the airline as being substantially limited in a major life activity.

One issue not addressed in these cases is whether ADA disability status extends to a person with a correctable disability, but who chooses (perhaps out of concern regarding side effects of medication or risks of surgery) not to correct the disability. This issue may call for a rule of reason similar to that used in workers' compensation law to deal with compensation claimants who refuse treatment or surgery.

**LED EDITOR'S NOTE:** Washington's state statute prohibiting disability discrimination, chapter 49.60 RCW, may or may not be held to define "disability" more broadly. There are no reported Washington appellate court decisions on the various "mitigation" questions. Employment law experts (which your LED Editor is not) and the Washington Human Rights Commission should be consulted by those with state law questions of this sort.

**(3) HEARSAY TESTIMONY BY POLICE OFFICER TELLING OF CONFESSION BY DEFENDANT'S COHORT HELD INADMISSIBLE AS VIOLATING CONFRONTATION CLAUSE OF SIXTH AMENDMENT** – In Lilly v. Virginia, 119 S.Ct. 887 (1999), the U.S. Supreme Court "unanimously" (though with several concurring opinions) reverses the Virginia Supreme Court's ruling which would have relaxed restrictions on admissibility of cohort confessions under the Sixth Amendment's Confrontation Clause.

In Lilly, two brothers were among three suspects in a crime spree which had ended in murder. One of the brothers had admitted to police that he had some involvement in the crime spree, but he claimed no involvement in the more serious crimes, including the murder. The "confessing" brother put the blame for the murder on his brother. However, on Fifth Amendment self-incrimination grounds, the confessing brother refused to testify at the non-confessing brother's trial for the murder and other crimes. The Virginia Supreme Court held that the confession of the defendant's brother was admissible under the Sixth Amendment because the hearsay exception for statements made against penal interest recognizes the reliability of the out-of-court statement. The U.S. Supreme Court has now set aside the Virginia High Court's decision.

The Lilly Court notes that the Confrontation Clause ensures the reliability of evidence against a defendant by subjecting the statement to testing in court (sworn testimony of declarant subject to cross examination). Hearsay statements are sufficiently dependable under the Confrontation Clause only when: (1) the statements fall within a "firmly rooted [hearsay] exception;" or (2) the particular statements, on the totality of the circumstances, contain specific "guarantees of trustworthiness" such that courtroom testing would be expected to add little to their reliability.

The U.S. Supreme Court in Lilly then goes on to hold that the hearsay exception for "statements against penal interest" defines too large a class to satisfy, as a general proposition, Confrontation Clause requirements for reliability. Accomplice statements that shift or spread blame to a criminal defendant generally fall outside the realm of those "hearsay exceptions [that are] so trustworthy that adversarial testing can be expected to add little to the [the statements'] reliability. Statements "against penal interest" are not within a firmly rooted hearsay exception to the hearsay rule, and, therefore, will be admissible only if, under the totality of the circumstances of the case, they are reliable. **LED EDITOR'S**

**NOTE: For a Washington appellate court opinion discussing admissibility of an accomplice confession under the “totality” test, see State v. Rice, 120 Wn.2d 549 (1993) Nov. 93 LED:02.]**

**Result:** Virginia Supreme Court decision affirming murder conviction vacated; case remanded for retrial.

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**WASHINGTON STATE SUPREME COURT**

**“PRETEXT STOP”: WASHINGTON SUPREME COURT HOLDS IN 5-4 INDEPENDENT GROUNDS INTERPRETATION OF WASHINGTON CONSTITUTION’S ARTICLE 1, SECTION 7 THAT PRETEXT RULE REQUIRES BOTH OBJECTIVE AND SUBJECTIVE REVIEW OF OFFICER’S MOTIVE FOR TRAFFIC STOP**

State v. Ladson, 138 Wn.2d 343 (1999)

Facts and Proceedings: (Excerpted from majority opinion)

On October 5, 1995, City of Lacey police officer Jim Mack and Thurston County sheriff’s detective Cliff Ziesmer were on proactive gang patrol. The officers explained they do not make routine traffic stops while on proactive gang patrol although they use traffic infractions as a means to pull over people in order to initiate contact and questioning. The trial court factually found:

While on gang patrol, Officer Mack selectively enforces traffic violations depending on whether he believes there is the potential for intelligence gathering in such stops.

On the day in question Richard Fogle attracted the attention of officers Mack and Ziesmer as he drove by. Fogle and his passenger Thomas Ladson are both African-American. Although the officers had never seen Ladson before, they recognized Fogle from an unsubstantiated street rumor that Fogle was involved with drugs. The trial court found, “Officer Mack’s suspicions about Fogle’s reputed drug dealing was his motivation in finding a legal reason to initiate the stop of Fogle’s vehicle.”

The officers tailed the Fogle vehicle looking for a legal justification to stop the car. They shadowed the vehicle while it refueled at a local filling station and then finally pulled Fogle over several blocks later on the grounds that Fogle’s license plate tabs had expired five days earlier. The officers do not deny the stop was pretextual.

The police then discovered Fogle’s driver’s license was suspended and arrested him on the spot. After securing Fogle in handcuffs in the squad car, the police conducted a full search of the car “incident to Fogle’s arrest.” Then they turned their attention to the passenger, Thomas Ladson. They ordered Ladson to exit the vehicle, patted him down, and required him to stand against the car while they searched its interior. The police searched Ladson’s jacket which was in the passenger’s seat and found a small handgun. Ladson was placed under arrest and searched. On Ladson’s person and in his jacket the police found several baggies of marijuana and some \$600 in cash.

Ladson was charged with unlawful possession of a controlled substance with intent to deliver while armed with a deadly weapon, and possession of a stolen firearm.

Ladson filed a pretrial motion to suppress the evidence on the grounds it was obtained during an unconstitutional pretextual traffic stop. The trial court agreed and granted the motion ruling, “pretextual stops by law enforcement officers are violative of the Constitution.”

The State appealed and shortly thereafter the United States Supreme Court decided Whren v. United States, 517 U.S. 806 (1996) **Aug 96 LED:09**, holding pretextual traffic stops do not violate the Fourth Amendment to the United States Constitution. Accordingly, the Court of Appeals, relying on Whren, reversed the suppression order. State v. Ladson, 86 Wn. App. 822 (1997) **Oct 97 LED:15**. However, the Court of Appeals refused to address the state constitutional claim, stating Ladson inadequately briefed the issue.

**ISSUE AND RULING:** Does the Washington constitution’s article 1, section 7, like the Fourth Amendment of the U.S. Constitution, bar a “pretext” challenge to a law enforcement officer’s probable cause stop of a vehicle for a traffic infraction? (**ANSWER:** No, the Washington constitution requires review of such a stop to determine whether, from an objective and a subjective perspective, the stop was pretextual.) **Result:** Reversal of Division Two, Court of Appeals decision which had reversed a Thurston County Superior Court suppression order in a drugs and firearms possession case against Thomas I. Ladson.

#### **ANALYSIS:**

In Whren v. U.S., 517 U.S. 806 (1996) **Aug 96 LED:09**, the U.S. Supreme Court unanimously held that no pretext challenge is permitted under the U.S. Constitution’s Fourth Amendment to a probable cause stop for a traffic infraction. In Whren, the U.S. Supreme Court reviewed a case where specialized narcotics officers had a hunch about a driver’s involvement in illegal drug activity based on facts which did not arise to reasonable suspicion (high drug area, youthful occupants in a Pathfinder with temporary plates, and driver’s 20-second wait at a stop sign looking into the lap of a passenger). The officers followed the Pathfinder and stopped it on probable cause to believe the driver had failed to signal before turning. The officers admitted in the suppression hearing that the traffic stop was pretextual, i.e., that they had the subjective intent to gather information about the occupants’ possible drug crime involvement. The Whren majority held that no “pretext stop” challenge is permitted under the Fourth Amendment on these or any other facts.

Prior to the Whren decision, many lower federal courts and many state courts had held that, while an inquiry into the officer’s “subjective intent” in making the stop was not permitted, an “objective” pretext inquiry was necessary. See, for example, the Division One, Washington Court of Appeals decision in State v. Chapin, 75 Wn. App. 460 (Div. I, 1994) **Dec 94 LED:17**. The “objective” test crafted by these courts asks whether a reasonable officer “would have made the stop in the absence of an improper purpose.” This test looks at the officer’s “standard or routine procedures” to see if he or she departed from them.

Under this “objective” test, if a specialized non-traffic officer never, or only on rare occasion, makes traffic stops other than to pursue the specialized role, then the stop would be held unlawfully pretextual. Under the Whren facts, the stop would have been held to be unlawfully

pretextual by a court following the “objective” test, because the officer was not engaged in routine or standard procedures for that particular officer.

However, in Whren, a unanimous U.S. Supreme Court reversed, holding that such a test was not truly objective, but was instead a test of “virtual subjectivity.” The U.S. Supreme Court has traditionally favored objective tests for Fourth Amendment rules. A truly objective test would not bar any traffic stop for which an officer has probable cause as to a violation of law, regardless of what other reasons the officer may have for the intrusion, the Whren majority held. Accordingly, the U.S. Supreme Court held in Whren that the defendant could not challenge the probable cause traffic stop.

Now, however, a 5-4 majority of the Washington Supreme Court has rejected both the U.S. Supreme Court’s “no pretext possible” approach and the approach of many pre-Whren decisions of limiting the rule to the objective test. Purporting to find historical justification for a pretext rule in several pre-Whren Washington precedents, the Ladson majority holds that article 1, section 7 of the Washington constitution contains a “pretext traffic stop” prohibition. **The Ladson majority goes further, however, declaring that “when determining whether a given stop is pretextual, the court should consider the totality of the circumstances including both the subjective intent of the officer as well as the objectiveness reasonableness of the officer’s behavior.”**

Finally, applying this test to the facts of Ladson’s case, the Ladson majority finds the stop of Ladson to be pretextual. For that reason the Ladson majority suppresses the evidence gathered following the unlawful stop of Ladson’s cohort.

#### **LED EDITOR’S COMMENTS:**

**(1) General comments on “independent grounds” rulings under the Washington state constitution. After 20 years of “independent grounds” rulings in Washington, we would sound like an unlawyerly sore loser if we were to make a crack about the irony of our Court’s arguably pretextual use of an “independent grounds” interpretation to establish a Washington-unique “pretext” rule. So, we move on, trying to sort out where we go from here.**

**The strongest practical attack on “independent grounds” rulings by state courts rejecting Fourth Amendment rules to place greater search & seizure restrictions on state and local law enforcement officers is that the rulings often depart from established case law and interwoven doctrine. Because such interpretations have little or no case law context, they create confusion, and hence chaos in the trial courts, as the participants in the criminal justice system try to interpret the rulings in relation to other elements of search & seizure doctrine. Of the approximately 20 “independent grounds” rulings of Washington’s appellate courts over the past 20 years, Ladson is at or near the top of the list in creating confusion over the scope of the “independent grounds” ruling. As we explain in further detail in our comments below, we are most troubled by the language in the majority opinion, which we set out in bold in the excerpts above, where Justice Sanders declares that “pretext” includes a subjective component. We hope that the Ladson pretext rule will eventually come to be applied in a narrow fashion, as we believe that several members of the majority there intended only to attack a particular police practice. However, it appears for now, to overdo a nautical metaphor, that the “pretext”**

doctrine has been cast adrift on the judicial seas with neither doctrinal anchor nor doctrinal rudder.

(2) **The objective test for pretext.** Before the U.S. Supreme Court rejected pretext analysis in the Whren case in 1996, of the courts which applied a pretext rule, most such courts limited application of the rule to what those courts called an “objective” test. Stated in simple terms, the “objective” pretext rule is that, if an officer is acting within the normal range of practices and procedures for his or her particular job assignment, then the stop is lawful, even if the officer had an ulterior motive. Tested in this “objective” manner, the stop is said to be lawful because a reasonable officer (without such ulterior motive) would have made the stop under the same circumstances. Thus, even though the officer had an ulterior motive for a stop, the courts would not invalidate the stop as a pretext. Under this “objective” test, a patrol officer would almost never be held to have made a pretext traffic stop, because all traffic laws would be within the normal range of practices and procedures for a patrol officer. See the fairly recent pre-Ladson Washington Court of Appeals decisions in State v. Chapin, 75 Wn. App. 460 (Div. I, 1994) Dec. 94 LED:17 and State v. Blumenthal, 78 Wn. App. 82 (Div. I, 1995) Nov. 95 LED:13 – in each case, the Court applied the “objective” pretext test to reject a defendant’s pretext challenge to a stop by a patrol officer. On the other hand, officers working highly specialized areas, particularly narcotics officers in urban police departments, generally would have to admit in suppression hearings that they do not write traffic tickets except to further a narcotics investigation goal. Courts applying the “objective” pretext test would throw out the case where such admissions were made by the specialized-unit officers in suppression hearings.

In its 1996 decision in Whren, the U.S. Supreme Court declared that objective tests are almost always the exclusive measure of lawfulness under the Fourth Amendment. The so-called “objective” test for pretext described in the paragraph above was actually a test of “virtual objectivity,” the Whren Court declared, and hence not truly objective. Under the Whren Court’s view, a truly objective test simply looks at whether the officer has sufficient articulable objective suspicions to believe a violation or crime has occurred. The Whren ruling was that, if the officer has such information, the stop is valid, regardless of any ulterior motive of the officer.

The Ladson decision rejects Whren’s approach. Accordingly, the objective test will be applied in Washington as part of the pretext test. Hence, the lawfulness of traffic stops by narcotics officers, gang unit members, and similarly specialized officers, will be measured in part against their normal practices and procedures. Officers in such units probably should forget about using traffic infraction stops where the primary, if not exclusive, motive is to “fish” for criminal violations or for criminal intelligence (and they should not try to finesse the rule by directing patrol officers to make such stops on their behalf). What is much more troubling, however, from a law and order perspective, is that the Ladson majority opinion appears to makes stops by all officers subject to attack under a “subjective” proof standard.

(3) **“Subjective” pretext inquiry.** What did the Ladson majority have in mind when they said the Chapin Court did not go far enough with its “objective” test, and that

the “totality of the circumstances” test for pretext also includes review of the “subjective intent of the officer?” Many prosecutors and police legal advisors in Washington are worried that, any time an infraction stop turns into a criminal case, defense attorneys will want to look into the heart and mind of the officer. In the event of such inquiries, will any “ulterior” motive invalidate the stop? And what is an “ulterior” motive? Assuming we can identify what constitutes an ulterior motive, what if such motive is mixed among other motives for the stop (we assume that, in many cases, officers making stops or taking other enforcement actions have a mixture of motives, ruminations, partial suspicions, and other brain-wave activity)? Are there any standards to guide the trial judge’s determination of such matters?

One Washington police legal advisor has offered the following reasonable suggestion for a limiting interpretation of the majority opinion. *Based on Ladson's discussion with approval of pre-Ladson pretext cases from Washington and elsewhere, it seems clear that there is no "pretext" unless the PRIMARY motivation for the traffic stop is to investigate UNRELATED serious crime for which the officer lacks reasonable suspicion.* While this statement of the rule allows for an inquiry into the mind of the officer as the Ladson majority intended (we think unwisely), it appears to offer some restriction on the defendant's suppression chances in, for instance, a case involving a "garden variety" traffic stop which evolves into a DUI case. Unfortunately, no one will know the limits of Ladson's pretext rule until the Washington courts sort it out on a case by case basis.

One suggestion made by some prosecutors and police legal advisors is that, if a traffic stop develops into a criminal investigation, officers should send the paperwork on the traffic violation through to the prosecutor, along with the criminal violation paperwork. (Note: don't issue a citation in this circumstance unless that is the advice of your prosecutor; issuing an infraction citation in an incident that also gives rise to criminal charges can cause speedy trial/speedy arraignment problems under the Washington court rules.) In addition, and we hate to say this as a member of the driving public, the more citations that an officer writes for a broader range of violations the less likely it is that a defendant will be able to suggest that he or she was singled out for a criminal “fishing” expedition. In addition, agencies with special emphasis traffic units, such as “DUI emphasis” units may want to think about re-naming the units, perhaps as “saturation traffic patrol units” or “traffic enforcement emphasis” units. And officers in those units may want to consider omitting reference to the arguably irrelevant fact of their assignment to such units in their reports, though, in doing so, they will have to take into account that defendants will be allowed to inquire in this regard in any event.

(4) Is there a warrant exception to the pretext rule? In State v. Witherspoon, 82 Wn. App. 634 (Div. III, 1996) Nov. 96 LED:07 and in State v. Davis, 35 Wn. App. 224 (Div. I, 1983) Jan. 84 LED:06, different divisions of the Court of Appeals ruled in pre-Ladson analysis that a pretext inquiry was not permitted where a stop was initiated based on an arrest warrant. And in State v. Goodin, 67 Wn. App. 623 (Div. II, 1993) March 93 LED:17, a case involving a warrant to search a third party's residence to find a person who was the subject of an arrest warrant, the Court of Appeals held

that the same rule applied to searches under search warrants. The rationale for the rulings seems to be that it is also the courts, not just the officers, who have focused upon the person who is the subject of the intrusion, and that the officers are merely carrying out the directives of the courts. While we would expect that Washington prosecutors will argue that these decisions still have life following the Ladson decision, only time will tell whether an officer's motives in warrant situations will be a fruitful area of inquiry for defendants.

(5) Is subjective intent of the officer a pertinent question as to other search & seizure rules which have previously been guided solely by objective reasonableness standards? Defense attorneys may try to argue that the use of a subjective intent test on the pretext issue justifies use of a subjective intent test in other search & seizure subareas (such as the rules defining "probable cause," "reasonable suspicion," "Terry seizure status," "arrest status," etc.) which have traditionally been tested exclusively under a standard of objective reasonableness.

From a purely logical perspective, the Ladson majority opinion's rhetoric puts the Court on a "slippery slope" which could support argument for importation of a "subjective intent" element into every search & seizure standard. However, pure logic does not appear to be the penchant of the Court, and we think that at least several of the five-member majority were focused on what they perceived as a fairly narrow problem, not on any generalized problem with the use of objective search & seizure standards. We would think, therefore, that defense attorneys should not be able to get very far in such efforts.

As support for our view that Ladson does not foreshadow the end of objective standards for search & seizure in Washington, we point to last year's "independent grounds" ruling in State v. Young, 135 Wn.2d 498 (1998) Aug. 98 LED:02. There, the Washington Supreme Court rejected the Fourth Amendment definition of "seizure" insofar as it depended upon the compliance of the suspect with an officer's show of authority. The Young majority (which included three members of the Ladson majority) criticized the U.S. Supreme Court's Fourth Amendment "seizure" standard in part because the U.S. Supreme Court's "compliance" rule was not an objective standard, and, therefore, did not give officers guidance in any given case as to whether their conduct would violate search & seizure rules.

We would hope that this rationale by the Young majority, as well as the well-established Washington case law on objective standards in other areas of search & seizure law, will help beat down attempts by the criminal defense bar to use Ladson to import tests of subjective intent into other areas. Making subjective intent a relevant inquiry in pretext analysis may have some public policy justification (though we see it as a big mistake), but making subjective intent a relevant inquiry across the board of search & seizure law would be disastrous. A generalized subjective intent rule would mean that, in each and every case, officers would have the power to destroy the State's case simply by testifying, whether through intent or inadvertence, whether in good faith or bad faith (including corrupt motives), that they had the wrong state of mind.

Regardless of whether one thinks it is a reasonable use of scarce judicial resources to try, in each and every case, to look into the hearts and minds of law enforcement

officers, we have an additional concern that we will try to state somewhat euphemistically. With all due respect to our law enforcement officer readership, taking into account the varying mental and moral capacities of officers, as well as the distribution of the seven deadly sins along a bell-shaped curve in our society, we think that the criminal justice system would not be well-served by importing a subjective intent standard across the spectrum of search & seizure law.

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### WASHINGTON STATE COURT OF APPEALS

#### **“FRESH PURSUIT,” “EMERGENCY” PROVISIONS OF RCW 10.93.120 AUTHORIZED TACOMA OFFICER TO GO INTO LAKEWOOD TO FIND AND ARREST DUI SUSPECT**

City of Tacoma v. Durham, \_\_\_ Wn. App. \_\_\_ (Div. II, 1999) [978 P.2d 514]

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

Pierce Transit supervisor Dwayne Stewart saw William Durham's car driving erratically in the area of South 38th and South Tacoma Way in Tacoma, Washington. Durham ran a red light and nearly hit Stewart's car. Because he was concerned that Durham might be under the influence of intoxicants, Stewart called 911 while continuing to follow Durham's car as it weaved across the center line and rolled backward at a stop light.

Radio dispatch informed Tacoma police officer Quinn of Durham's dangerous driving. When he caught up to Durham's car, it was located at South 74th and Lakewood Drive, in the City of Lakewood. Quinn activated his emergency lights, and Durham stopped. Quinn smelled a strong odor of alcohol when he approached Durham. After conducting field sobriety tests, Quinn arrested Durham on suspicion of driving under the influence.

Durham was found guilty after a bench trial on stipulated facts.

ISSUES AND RULINGS: 1) Was it “fresh pursuit” under RCW 10.93.070(6) and 10.93.120 where, as here, the arresting officer did not observe or contact the arrestee until the arrestee was across the officer’s territorial boundary line? (ANSWER: Yes); 2) Was it “fresh pursuit” under RCW 10.93.120 even though the arrestee did not become aware that he was being pursued during the time that he was in the jurisdiction of the pursuing officer? (ANSWER: Yes); 3) Did Durham’s erratic driving provide independent justification for his arrest under the “emergency” provision of RCW 10.93.070(2)? (ANSWER: Yes); 4) Did the fact that the arrest of Durham occurred in another city deprive the City of Tacoma of jurisdiction to try him for DUI committed in Tacoma? (ANSWER: No). Result: Affirmance of Pierce County Superior Court ruling upholding Tacoma Municipal Court DUI conviction of William R. Durham.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1)(2) Relaxed “fresh pursuit” rules under RCW 10.93.120 – efforts to stop suspect need not start, nor must suspect be aware of pursuit, while suspect is located in arresting officer’s territory.

Durham first argues that the doctrine of fresh pursuit does not justify his arrest because the State did not establish that Durham knew he was being pursued by Quinn when he was within the Tacoma city limits.

RCW 10.93.070(6) allows a police officer to enforce the traffic or criminal laws of this state throughout its territorial bounds when the officer is in fresh pursuit, as defined by RCW 10.93.120(2). RCW 10.93.120 provides in pertinent part as follows:

(1) Any peace officer who has authority under Washington law to make an arrest may proceed in fresh pursuit of a person (a) who is reasonably believed to have committed a violation of traffic or criminal laws, ...

(2) The term "fresh pursuit," as used in this chapter, includes, without limitation, fresh pursuit as defined by the common law. Fresh pursuit does not necessarily imply immediate pursuit, but pursuit without unreasonable delay.

These statutes are part of the Washington Mutual Aid Peace Officers Powers Act, RCW ch. 10.93, enacted in 1985 to expand common law restrictions on limited territorial enforcement and to remove artificial barriers to mutual aid and cooperative law enforcement. RCW 10.93.001.

As stated, the statutory definition of fresh pursuit relies, at least in part, on the common law. The Court of Appeals identified five common law elements of fresh pursuit in City of Wenatchee v. Durham, 43 Wn. App. 547 (1986):

(1) that a felony occurred in the jurisdiction; (2) that the individual sought must be attempting to escape to avoid arrest or at least know he is being pursued; (3) that the police pursue without unnecessary delay; (4) that the pursuit must be continuous and uninterrupted, though there need not be continuous surveillance of the suspect nor uninterrupted knowledge of his location; and (5) that there be a relationship in time between the commission of the offense, commencement of the pursuit, and apprehension of the suspect.

Durham concedes that element (1) has been superseded by statute, in that fresh pursuit may be undertaken for traffic offenses. He argues that the record does not support element (2), because he did not know he was being pursued while he was in Tacoma. He adds that without pursuit across a boundary line of the jurisdiction wherefrom a suspect is thought to have committed a crime, there is no pursuit, let alone fresh pursuit. We disagree.

As support for this argument, he cites the Wenatchee holding. There, a Wenatchee police officer saw a car without a rearview mirror and a vehicle hood and followed it, without activating his vehicle's siren or flashing lights, across the Chelan County boundary into Douglas County. At that time, officers generally had no authority to arrest an offender outside the geographical

boundaries of their municipality, but could make such an arrest when in fresh pursuit. The Court of Appeals held, however, that the fresh pursuit exception did not justify the arrest in Wenatchee:

While pursuit does not imply a fender-smashing Hollywood style chase scene, it does connote something more than mere casual following.... There is no evidence Mr. Durham was attempting to escape or fleeing the jurisdiction to avoid arrest. Nor is there evidence that Mr. Durham knew he was being pursued while in Wenatchee.

In a footnote, the court noted the recent enactment of the Washington Mutual Aid Peace Officers Powers Act, and its expansion of jurisdictional authority under certain circumstances, but observed that the Act was inapplicable because Durham's arrest occurred before the Act became effective.

The Act does apply here. At first blush, the definition of fresh pursuit in RCW 10.93.120(2) appears to fully incorporate the common law elements of that doctrine. However, the Legislature used the words "without limitation" as a preface to "as defined by the common law." RCW 10.93.120(2). It also removed the first element of the common law definition by allowing police to arrest outside their jurisdiction when in pursuit of a possible traffic offender.

The Legislature did not provide an express directive that it was abrogating the common law by enacting RCW 10.93. However, by applying fresh pursuit to non-felony offenses and traffic infractions, the statute clearly is inconsistent with the common law as defined in Wenatchee [v. Durham]. We interpret the phrase "without limitation" to mean that courts are not limited by the common law definition, but may consider the Legislature's overall intent to use practical considerations in deciding whether a particular arrest across jurisdictional lines was reasonable. Here, Officer Quinn's pursuit of Durham was immediate and necessary to apprehend a dangerous driver. Quinn was required to cross into the City of Lakewood to effectuate the traffic stop and prevent harm to other drivers; the inherent mobility of Durham's driving offense in an urban area should not thwart his prosecution.

In light of the entire statute, considering both legislative intent and plain language, we hold that the RALJ court properly determined that Officer Quinn effected a valid arrest. Fresh pursuit is a more flexible doctrine under RCW 10.93.120 than it was at common law, and we interpret the statute liberally to allow for an arrest under the circumstances presented here. The individual need not know he is being pursued, nor must the active pursuit cross a boundary.

(3) "Emergency" arrest under RCW 10.93.070(2)

We also note that, even if the elements of fresh pursuit were not satisfied under RCW 10.93.120, there was an independent basis for a valid arrest. According to RCW 10.93.070(2), a police officer may cross over to another jurisdiction and make an arrest "[i]n response to an emergency involving an immediate threat to human life or property". In this case, Officer Quinn was responding to a 911 call by Stewart, who

observed Durham's car weaving across the center line after it ran a red light and nearly struck his car. Clearly, this situation presented an emergency, and Quinn reasonably responded across jurisdictional lines. Such erratic driving was an immediate threat to human life or property.

(4) Jurisdiction to prosecute in Tacoma despite extraterritorial arrest

Durham also alleges that the Tacoma Municipal Court lacked jurisdiction to hear his case, because he was arrested in Lakewood. He cites no authority for this proposition. Durham committed the offense first in Tacoma and later in Lakewood; therefore the Tacoma Municipal Court had jurisdiction to hear his case. See, RCW 3.50.020, 35.20.030, 35.20.250.

**DETECTIVES WERE NOT REQUIRED TO INTERRUPT CUSTODIAL INTERROGATION OF SUSPECT WHEN ATTORNEY CAME TO STATIONHOUSE; POSTPONING PRELIMINARY APPEARANCE ON UNRELATED CHARGE WAS NOT LAWFUL BUT DID NOT MAKE CONFESSION INVOLUNTARY**

State v. Bradford, \_\_\_ Wn. App. \_\_\_ (Div. III, 1999) [978 P.2d 534]

Facts and Proceedings:

Over a weekend, Ted Louis Bradford was arrested and booked into jail after he had confessed to an incident of indecent exposure. Because Mr. Bradford and his car roughly met the description of a suspect and his car in an unrelated rape committed in the same neighborhood several months earlier, detectives decided to question Bradford about the rape.

At 9 a.m. on the following Monday morning, detectives contacted Bradford at the jail. They told him that they wanted to talk to him about a "serious assault." Bradford waived his Miranda rights and agreed to talk to the detectives. After talking to the detectives for over an hour, all the while denying involvement in the rape, Bradford agreed to take a polygraph exam offered by the detectives. The polygraph exam took several hours to complete.

While the polygraph exam was ongoing, the detectives talked to an assistant city attorney. They informed the assistant city attorney that they hoped that Bradford's scheduled 1:15 preliminary appearance on the indecent exposure charge could be postponed to the following day so that they could continue the interrogation process on the rape without interruption. The preliminary appearance was then put over to the following day. After the polygraph exam was completed, the detectives resumed questioning Bradford off and on through the afternoon. Bradford continued to deny the rape. At one point in the continuing session, Bradford said he wanted to call his wife. The detectives allowed him to do so in private, and they then resumed questioning after Bradford had completed the call. Bradford was given ample breaks for food, water, rest and the like during the Monday questioning.

At about 2:15 p.m. the same afternoon, a public defender came to the police station, telling desk staff that he had been asked by Bradford's wife to talk to Bradford. After consulting a deputy county prosecutor, the detectives told the public defender that he could not talk to Bradford unless Bradford himself asked the detectives for an attorney. Later that afternoon, Bradford confessed to the rape.

Bradford was subsequently convicted of first degree rape and first degree burglary.

ISSUES AND RULINGS: (1) At the point when the public defender came to the police station, were the detectives required, under (a) the Federal constitution's Fifth Amendment, (b) the Washington constitutional counterpart, or (c) state or federal constitutional due process requirements, to stop the interrogation or at least to tell Bradford about the presence of the attorney at the stationhouse? (ANSWER: No, the actions of third parties are irrelevant to the Miranda waiver inquiry; Bradford could waive his constitutional rights without knowledge of such actions); (2) Under the Sixth Amendment, could the officers lawfully initiate contact with Bradford about the uncharged rape while he was in custody after being charged with the unrelated crime of indecent exposure? (ANSWER: Yes); (3) Does the violation of Bradford's right under the court rule, CrRLJ 3.2.1, for a speedy preliminary appearance on the indecent exposure charge, require suppression of his confession regarding the unrelated rape? (ANSWER: No, rules a 2-1 majority, because this violation of CrRLJ 3.2.1 was not of such magnitude as to render his confession involuntary) Result: Affirmance by 2-1 majority of Yakima County Superior Court of first degree rape and first degree burglary convictions of Ted Louis Bradford.

ANALYSIS:

(1) Miranda and due process protections.

In State v. Corn, 95 Wn. App. 41 (Div. III, 1999) **June 99 LED:03**, Division Three of the Court of Appeals somewhat reluctantly applied federal and state constitutional precedents in rejecting Ms. Corn's Miranda-based argument under similar circumstances to those in the Bradford case. Ms. Corn had waived her Miranda rights following her arrest, and she had then given police a voluntary confession. Apparently while this questioning was ongoing, an attorney was trying to contact Ms. Corn through the police department and prosecutor's office. Ms. Corn argued unsuccessfully to the Court of Appeals that police should have stopped interrogating her, or at least should have told her about her attorney's efforts to contact her, rather than proceeding with her interrogation. The Corn Court applied federal and state precedents in ruling that an attorney's call or visit to the stationhouse is irrelevant to the question of whether a suspect's Miranda waiver is valid.

As in Corn, the Bradford majority rejects, under the same state and federal constitutional provisions as were at issue in Corn, Mr. Bradford's argument that the police should have stopped their questioning to tell him of the attorney's appearance at the stationhouse. The Bradford majority also rejects Mr. Bradford's invitation to the Court to interpret the Washington Court Rule on "right to counsel," CrR 3.1, as supporting his argument.

(2) Initiation of contact under the Sixth Amendment

State and federal case law under the federal constitution's Sixth Amendment "right to counsel" bars police from initiating contact with a charged defendant on the charged matter (or on any closely related matter) following arraignment on the pending charges. However, in State v. Stewart, 113 Wn.2d 462 (1989) **Jan. 90 LED:03**, the Washington Supreme Court held that this Sixth Amendment bar to initiating contact with charged suspects does not apply where the contact with the charged defendant relates to an uncharged, unrelated matter. The Stewart Court held that, so long as the suspect's Fifth Amendment rights are not violated by the contact (i.e., so long as police do not ignore the suspect's assertion of Miranda rights at the time of the assertion or thereafter by initiating contact, following such a Miranda rights assertion, while he or she remains in continuous custody), police are not barred from initiating contact and obtaining a confession from the detainee on the unrelated, uncharged matter.

The Bradford Court applies the Stewart precedent to reject Bradford's Sixth Amendment "initiation of contact" theory. Even assuming that Mr. Bradford had already been arraigned on the public indecency charge, the police would not have been barred under the Sixth Amendment from contacting him to talk to him about the unrelated rape charge until such time as he asserted his Miranda rights on the uncharged rape. Mr. Bradford never asserted his Miranda rights during the time period at issue, and hence the Fifth Amendment did not bar the further contacts throughout the day. Therefore, the contacts and questioning were lawful under both the Fifth Amendment and the Sixth Amendment. **LED EDITOR'S NOTE: We last published a comprehensive article on Fifth and Sixth Amendment rules on "initiation of contact" in the April 1993 LED. Since that time, we have continued to update the article. We would be happy to e-mail updated electronic versions of the article to interested readers.]**

(3) Violation of "preliminary appearance" rule, CrRLJ 3.2.1(d)(1)

Under CrRLJ 3.2.1(d)(1), a charged, in-custody defendant must be brought before a magistrate for a preliminary appearance "as soon as practicable after the detention is commenced, but in any event before the close of business the next judicial day." The rule was violated in this case, the Bradford majority notes. However, reviewing the violation for its possible effect on the confession under a totality-of-the-circumstances test, the majority upholds the trial court finding that the confession was voluntary.

DISSENTING OPINION:

Judge Schultheis authors a harshly worded dissent, arguing that the government engaged in serious misconduct which rendered Bradford's confession involuntary.

**STATE WINS ON CONSTRUCTIVE POSSESSION, PRESERVATION-OF-EVIDENCE**

State v. Potts, 93 Wn. App. 82 (Div. III, 1998)

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

In September 1996, Mr. Potts asked Barbara Taylor if he could borrow her black pickup truck to help his friend, Stephanie Beidman, move. Later that day, Mr. Potts was the passenger in the pickup driven by Ms. Beidman when they were stopped by Sergeant Jonathan Coe of the Clarkston police. Officer Coe knew Ms. Beidman was driving with a suspended license. As he approached the truck, he noticed the passenger was "moving around" in his seat and "pulling stuff" from his pockets. After he arrested Ms. Beidman, he asked Mr. Potts to step out of the pickup. The officer found two used hypodermic syringes on the seat vacated by Mr. Potts. These were put into a plastic security box and later thrown away. Officer Coe found a plastic bag of white powder under Mr. Pott's seat. He guessed the powder was methamphetamine. A field test and later crime lab report revealed the bag contained amphetamine and a noncontrolled substance.

Mr. Potts was charged with one count of possession of a controlled substance: methamphetamine. RCW 69.50.401(d). A jury trial was held in February 1997. At the close of the State's evidence supporting the above facts, defense counsel moved to dismiss for failure to establish the element of possession. The motion was denied, the defense offered no witnesses, and the jury reached a verdict of guilty.

ISSUE AND RULING: 1) Was there sufficient evidence of Potts' possession of illegal drugs to support a conviction? (ANSWER: Yes); 2) Were defendant's due process rights violated by the

police failure to preserve hypodermic syringes found in the vehicle? (ANSWER: No) Result: Reversal of Asotin County Superior Court conviction of Paul J. Potts on charge of possession of methamphetamine (reversal was on grounds not addressed here – Potts had been charged with possession of methamphetamine, but the evidence established that he had instead been in possession of amphetamine); case remanded for re-trial under amended charges.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Constructive Possession

Possession may be actual or constructive. The baggie here was not found on Mr. Potts's person, so the State had to establish constructive possession by showing he had dominion and control over the baggie or the premises where it was found. [Court's Footnote: A vehicle is considered a premises. Whether a passenger's occupancy of an area of an automobile constitutes dominion and control over drugs in that area depends on the facts in each case.] More than mere proximity to the controlled substance must be proved; the court must look at the totality of the circumstances to determine whether the jury could reasonably infer dominion and control. Here, Officer Coe saw Mr. Potts removing "stuff" from his pockets, found two used syringes in Mr. Potts's seat and found the baggie directly under his seat. Ms. Taylor testified she had not put the baggie or the syringes in the pickup, although she also testified other people had occupied the passenger seat recently. This evidence is sufficient for a reasonable juror to find possession beyond a reasonable doubt.

2) Due Process/Preservation Of Evidence

Because we must assume the truth of the state's evidence, it is enough for review of the sufficiency of the evidence that Officer Coe testified he found the two syringes. But Mr. Potts's challenge also appears to raise the issue of his right to demand preservation of this evidence. **Due process under the Fourteenth Amendment requires the State to preserve material exculpatory evidence. To be material and exculpatory, the evidence's exculpatory value must have been apparent before it was destroyed and must be of such a nature that comparable evidence could not be reasonably obtained. If the evidence is only potentially useful, the failure to preserve it does not deny due process unless the defendant can show the State acted in bad faith.** The used syringes here could have as easily been inculpatory as exculpatory. As such, they were only potentially useful to the defense. The State presented evidence from Officer Coe and the crime lab technician that syringes usually were not tested because of the biohazards involved. Compliance with an established policy supports good faith. Under these circumstances, disposal of the syringes did not violate Mr. Potts's Fourteenth Amendment rights.

[Citations omitted; bolding added by LED Ed.]

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**ATTORNEY GENERAL OPINION CONCLUDES THAT THERE IS NO BAR TO  
EMPLOYMENT OF OFFICERS OF AGES 18-20**

In AGO 1999 No. 6 the Washington Attorney General announces in a formal opinion that there is no legal bar on Washington law enforcement agencies to employment of persons

18-20 years old as law enforcement officers. The opinion may be accessed on the Attorney General's webpage [<http://www.wa.gov/ago/>] and by clicking on the link for "opinions."

**LED EDITOR'S NOTE:** AGO 1999 No. 6 does not go into detail regarding federal law limits on persons under age 21 purchasing pistols. However, we have been told by an ATF representative that state and local officers ages 18-21 not otherwise disqualified may purchase a firearm from a federally licensed firearms dealer by presenting a certified letter from the chief officer of their agency.

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### **INTERNET ACCESS TO COURT DECISIONS, STATUTES, AND COURT RULES**

The Washington office of the Administrator for the Courts maintains web sites with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. One address provides just decisions which have been issued within the preceding 14 days [<http://www.wa.gov/courts/opinpage/recent.htm>]. Two other addresses provide more court information and also include decisions issued within the preceding 90 days [<http://www.wa.gov/courts/home/htm>] and [<http://www.wa.gov/courts/opinpage/home.htm>].

United States Supreme Court opinions can be accessed at [<http://supct.law.cornell.edu/supct>]. This web site contains all U.S. Supreme Court opinions issued since 1990 and most significant opinions of the Court issued before 1990.

A good source for easy access to relatively current Washington state agency administrative rules (including WSP equipment rules at Title 204 WAC) can be found at [<http://slc.leg.wa.gov/WACBYTitle.htm>]. Washington Legislation and other state government information can be accessed at [<http://access.wa.gov/>] by clicking on "L" and then "legislation" or other topical entries in the "Access Washington" Home Page "Index."

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