



Law Enforcement

May 2004

Digest

HONOR ROLL

567th Basic Law Enforcement Academy – November 3, 2003 through March 17, 2004

President: Gregory Martinez – King County Sheriff’s Office
Best Overall: Ty Sheehan – Twisp Police Department
Best Academic: Ty Sheehan – Twisp Police Department
Best Firearms: Joshua Meyer – Pierce County Sheriff’s Office
Tac Officer: Officer Joe Engman – Bellevue Police Department

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**LAW ENFORCEMENT MEDAL OF HONOR CEREMONY SET FOR FRIDAY MAY 7,
2004 IN LACEY AT 1:00 P.M.**

In 1994, the Washington Legislature passed chapter 41.72 RCW, establishing the Law Enforcement Medal of Honor. This honor is reserved for those police officers who have been killed in the line of duty or who have distinguished themselves by exceptional meritorious conduct. This year's ceremony will take place Friday, May 7, 2004 at the St. Martin's College Pavilion, 5300 Pacific Avenue S.E. in Lacey, Washington, commencing at 1:00 PM. This year the ceremony will be the week prior to Law Enforcement Week across the nation.

This ceremony is a very special time, not only to honor those officers who have been killed in the line of duty and those who have distinguished themselves by exceptional meritorious conduct, but also to recognize all officers who continue, at great risk and peril, to protect those they serve. This ceremony is open to all law enforcement personnel and citizens who wish to attend.

**GREEN DECISION UPDATE: IN DECISION ADDRESSING ARREST AUTHORITY FOR
FAILURE TO TRANSFER MV TITLE, WASHINGTON SUPREME COURT DELETES
PARAGRAPH THAT LIMITED TERRY STOP AUTHORITY**

In the March 2004 LED at pages 8-11, we reported on the January 15, 2004 Washington Supreme Court decision in State v. Green, where the Supreme Court held that the failure of a person to transfer title to a motor vehicle is not a "continuing offense," that a custodial arrest for that offense violated the "misdemeanor presence" rule of RCW 10.31.100, and that therefore a search incident to that custodial arrest was unlawful. On March 3, 2004, in response to a motion for reconsideration filed by the Pierce County Prosecutor's Office, the Supreme Court issued a revised opinion (beware to those reading the Court's yellow-covered advance sheets, as the version reported at 150 Wn.2d 740 is not the revised version). In its March 3, 2004 revised opinion, the Court deleted the next-to-last paragraph from its original opinion, but made no other revisions.

This means that the restriction that the Green Court imposed on custodial arrest for failure to transfer MV title remains in place. Law enforcement may not make a custodial arrest or write a citation for this offense, but must instead process the offense through the prosecutor's office by way of written complaint.

All of the analysis in the Green decision except the next-to-last paragraph addressed *arrest* authority. Only the next-to-last paragraph addressed *Terry stop* authority. That now-deleted, next-to-last paragraph read as follows:

The Court of Appeals also concluded the initial stop was valid, citing State v. Miller, 91 Wn. App. 181 (1998) **Dec 98 LED:18** (officer may stop an individual based on a reasonable suspicion that criminal activity is afoot). But since failure to transfer title is not an ongoing offense, there was no criminal activity afoot to investigate.

LED EDITORIAL COMMENTS: We understand, as we did when we made our comments in March, that prosecutors generally are making a fairly narrow reading of the arrest-authority restriction in the Green decision, limiting its restrictions on custodial arrests to the particular type of crime there addressed – failure to transfer title – or at least to just

that crime and a few other crimes (e.g., bail-jumping) whose elements are similar in nature to the crime of failure to transfer title. Under that advice, officers would not make arrests or citations (on probable cause) for the offense of failure to transfer title (and other “similar” offenses, as defined per prosecutor advice).

In our March 2004 comments, we stated our view that the most troubling aspect of the Green opinion was the next-to-last paragraph stating that the officers did not even have justification to make a Terry stop because they were not witness to a crime occurring in their presence. We are grateful the language was deleted, and we thank and congratulate the Pierce County Prosecutor’s Office. In our March 2004 comments, we stated that we were surprised by the wording of the now-deleted paragraph in Green in light of our reading of the precedents in Washington and in other jurisdictions holding that officers may make a Terry stop based on reasonable suspicion that a crime or traffic infraction is occurring, is about to occur, or has occurred in the past. We have since had brought to our attention some case law from a few other jurisdictions and some academic commentary suggesting that Terry stops should not be allowed based on reasonable suspicion as to minor offenses committed in the past (as opposed to reasonable suspicion regarding offenses occurring in the officer’s presence). We continue to believe, however, that the more reasonable and practical view, as the majority view under the case law, is that there is no “in the presence” restriction on Terry stops.

As always, we urge officers to consult their local prosecutors and legal advisors.

INFORMATION REGARDING THE LAW ENFORCEMENT DIGEST

The LED Editors -- Assistant Attorneys General John Wasberg and Shannon Inglis -- recently became aware that there is a private commercial service offering somewhat similar services to those provided by the LED. To assist readers in making decisions as to whether additional resources are needed, we provide this brief note to apprise LED readers of the service that is provided through publication of the LED.

The LED is published monthly by the Washington Criminal Justice Training Commission (CJTC). It is primarily a compilation of court decisions of interest to law enforcement from the Washington appellate courts and from the U.S. Supreme Court. We also address some U.S. Court of Appeals’ decisions, some new Washington legislation, and occasionally some miscellaneous additional legal topics. Monthly LED’s from January 1992 forward are available via a “Law Enforcement Digest” link on the Criminal Justice Training Commission (CJTC) Internet Home Page at: [<http://www.cjtc.state.wa.us>]. New LEDs appear around the middle of each month; for example, this “May 2004 LED” appeared on the CJTC’s Internet LED page around the middle of April 2004. Subject matter indexes and a few topical articles and Internet links are also available on the CJTC’s Internet LED page. LED editorial commentaries and analyses of statutes and court decisions express the thinking of the writers and do not necessarily reflect the views of the Office of the Attorney General or of the CJTC. The LED does not purport to furnish legal advice and is published by the CJTC as an aid to research only.

1. Which court decisions and which new legislation are included in the LED?

We try to include every published Washington appellate court decision which addresses issues of: (a) Arrest, Search & Seizure; (b) interrogations/Miranda; or (c) substantive criminal law under Titles 9, 9A, 69.50, 46, and other RCW titles. We include select Washington appellate court decisions addressing other issues of interest, such as issues relating to governmental civil liability, Rules of Evidence, speedy arraignment/trial, restitution, and (rarely) sentencing. We

include every U.S. Supreme Court decision addressing Arrest, Search & Seizure issues and interrogations/Miranda. We also include select U.S. Supreme Court decisions addressing other issues of interest to law enforcement.

We rarely include decisions from the 9th Circuit addressing Arrest, Search & Seizure issues, and even more rarely include 9th Circuit decisions on other issues of interest. We have our most difficulty trying to decide which 9th Circuit decisions to include. On the one hand, there are many 9th Circuit decisions, and they are not always consistent with each other. On the other hand, if the 9th Circuit decides that the answer to a Search and Seizure question is “clearly established,” then law enforcement officers do not have qualified immunity in civil rights suits if they act contrary to such rulings. It is obviously helpful to officers and their agencies if we keep them informed of what the 9th Circuit thinks is “clearly established” in the Search & Seizure area. Where the 9th Circuit decision is clear-cut in this regard, we generally strive to include it.

Almost never does **LED** include unpublished Washington Court of Appeals’ opinions or trial court decisions. We feel that including such non-precedential decisions, even with a disclaimer, would be more confusing than enlightening to law enforcement.

In an annual “Legislative Update,” usually published in multiple parts over several months, we include entries on every new Washington legislative enactment that we believe to be of interest to law enforcement.

2. What are the priorities for timing of entries in the LED?

First priority on timing of appearance of case law entries are the most important of the decisions from the Washington appellate courts and the U.S. Supreme Court addressing issues on Arrest, Search & Seizure and interrogations/Miranda. We try to get entries on those decisions into the **LED** such that the entry appears on the CJTC website within two months of the issuance of the appellate court decision. Second priority in terms of timing are decisions from these courts addressing less important issues on Arrest, Search & Seizure and interrogations/Miranda. Beyond that, it is difficult to articulate a standard regarding timing of appearance of entries in the **LED**, other than to note that we give greater priority in this regard to U.S. Supreme Court and Washington State Supreme Court decisions than to Washington Court of Appeals decisions.

With respect to our annual Legislative Update, we try to get entries on the most important new legislation onto the CJTC **LED** Internet page before the effective date of the legislation, but that often is not possible where the legislation has an “immediate” (upon signing by the Governor) effective date.

Readers are encouraged to let the **LED** Editors or the CJTC know if they have questions or comments regarding the discussion above.

BEWARE OF 1988 FEDERAL “VIDEOTAPE PRIVACY PROTECTION ACT”

Washington law enforcement officers should be aware of the 1988 Federal “Videotape Privacy Protection Act,” 18 United States Code, section 2710. In a recent unpublished decision, one of the divisions of the Washington Court of Appeals ordered exclusion of video rental evidence because the law enforcement officer who had obtained the information from a video store had not used a search warrant to obtain the information. This federal statute contains both a broad exclusion-of-evidence provision and civil remedies for violations. The statute can be accessed on the Internet at the following link: <http://www4.law.cornell.edu/uscode/18/2710.html>

2004 WASHINGTON LEGISLATIVE UPDATE – PART ONE

LED EDITORS' INTRODUCTORY NOTE: This is Part One of what will be at least a two-part compilation of 2004 Washington State legislative enactments of interest to law enforcement. Part Two will appear next month. Note that, unless a different effective date is specified in the legislation, enactments adopted during the 2004 regular session take effect on June 10, 2004, i.e., 90 days after the end of the regular session.

Thank you to Tom McBride and Pam Loginsky of the Washington Association of Prosecuting Attorneys for providing us with helpful information.

Consistent with our past practice, our Legislative Updates will for the most part not digest legislation in the subject areas of sentencing, consumer protection, retirement, collective bargaining, civil service, tax, budget, and worker benefits. We will include in next month's LED a cumulative index of enactments covered in the first two parts of the 2004 legislative update.

Text of the 2004 legislation is available on the Internet, chapter by chapter, at [http://www.leg.wa.gov/pub/billinfo/2003-04/chapter_to_bill_table.htm]. We will include some RCW references in our entries, but where new sections or chapters are created by the legislation, the State Code Reviser must assign the appropriate code numbers. Codification will likely not be completed until early fall of this year.

We remind our readers that any legal interpretations that we express in the LED are the views of the editors and do not necessarily reflect the views of the Attorney General's Office or of the Criminal Justice Training Commission.

“CRIMINAL IMPERSONATION” DEGREES BUMPED UP IN CLASSIFICATION

CHAPTER 11 (SB 6177)

Effective Date: July 1, 2004

Amends RCW 9A.60.040 to make criminal impersonation in the first degree a class C felony and amends RCW 9A.60.045 to make criminal impersonation in the second degree a gross misdemeanor.

NEW \$100 PENALTY FOR DOMESTIC VIOLENCE OFFENDERS

CHAPTER 15 (SSB 6384)

Effective Date: June 10, 2004

The Final Bill Report for this legislation summarizes it as follows:

A new penalty of up to \$100 is established for anyone convicted of a crime involving domestic violence. All superior courts and courts of limited jurisdiction may impose this penalty, in addition to any other penalty, restitution, fine or cost already required under law. Judges are encouraged to solicit input from victims when assessing an offender's ability to pay this penalty. Specifically, judges should inquire into the families' financial circumstances.

Revenues collected must be used to fund domestic violence advocacy, prevention, and prosecution programs in the city or county in which the court imposing the penalty is located.

In cities and counties where domestic violence programs do not exist, revenues may be used to contract with recognized community based domestic violence program providers. The Legislature intends the revenue to be in addition to existing sources of funding to enhance or help and prevent the reduction and elimination of domestic violence programs.

Revenues collected from this new penalty are not subject to remittance requirements or subject to distribution to the state public safety and education account.

LAW ENFORCEMENT OFFICERS WHO ARE PARTIES TO DOMESTIC VIOLENCE OR CIVIL HARASSMENT CASES ARE SUBJECT TO COURTHOUSE FIREARMS RESTRICTIONS

CHAPTER 16 (HB 2473)

Effective Date: June 10, 2004

Amends RCW 9.41.300(6)(b) by making courthouse firearms restrictions applicable to "a law enforcement officer who is present at a courthouse building as a party to an action under chapter 10.14, 10.99, or 26.50 RCW, or an action under Title 26 RCW where any party has alleged the existence of domestic violence as defined in RCW 26.50.010."

RENTERS WHO ARE VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT OR STALKING GET SOME PROTECTION UNDER LANDLORD-TENANT LAWS

CHAPTER 17 (2EHB 1645)

Effective Date: March 15, 2004

The House Bill Report for this enactments modifications to the Landlord Tenant Act (chapter 59.18 RCW), summarizes the changes as follows:

A tenant may terminate a rental agreement without further obligation under the agreement if the tenant or a household member is a victim of a crime of domestic violence, sexual assault or stalking and if:

the tenant or household member has a valid order of protection or has reported the domestic violence, sexual assault or stalking to a "qualified third party" who has provided a written record of the report; and

the request to terminate was made within 90 days of the reported act or event that led to the protective order or report to a qualified third party.

"Qualified third party" means law enforcement, health professionals, court employees, licensed mental health professionals or counselors, trained advocates for crime victim/witness programs, or clergy.

A written record that a report was made to a qualified third party may be made by a document signed by the third party that includes specified information. In addition, the record of the report may be made by completion of a form that substantially complies with the form set out in the Act. The name of the alleged perpetrator must be provided to the qualified third party, but the perpetrator's name may not be included on the record of the report that is provided to the tenant or household member. However, the qualified third party must retain a

copy of the record of a report and must note the name of the alleged perpetrator on the retained copy. Providing a record of a report to a qualified third party does not waive the confidential or privileged nature of the communication to the third party.

A tenant who terminates a rental agreement is liable for payment of rent for the month in which he or she quits the premises but is not responsible for the payment of rent for any future months. In addition, the tenant is entitled to a full refund of the deposit, subject to the conditions in the lease agreement for retaining any portion of the deposit.

A landlord may not terminate a tenancy, fail to renew a tenancy, or refuse to enter into a rental agreement with a person based on that person's or a household member's status as a victim of domestic violence, sexual assault or stalking or based on the person having previously terminated a rental agreement. A landlord who refuses to enter into a rental agreement under these circumstances may be liable to the tenant in a civil action for damages.

If a tenant provides a landlord with a copy of a court order granting possession of a dwelling unit to him or her to the exclusion of one or more co-tenants, the landlord must replace or reconfigure the locks on the dwelling if requested by the tenant. The tenant is responsible for the cost of the lock change. The landlord is not liable for any damages that result from the lock change.

REQUIRING LAW ENFORCEMENT AGENCIES TO ADOPT POLICIES ADDRESSING ALLEGATIONS OF DOMESTIC VIOLENCE ACTS BY OFFICERS

CHAPTER 18 (SSB 6161)

Effective Date: June 10, 2004

Amends chapter 10.99 RCW to require that, By December 1, 2004, a state model policy be developed addressing the way in which law enforcement agencies respond to allegations of domestic violence committed by sworn employees. The Washington State Association of Sheriffs and Police Chiefs (WASPC) is responsible for developing this model policy, in conjunction with representatives from state and local law enforcement agencies, victims rights organizations, and all other appropriate organizations.

The model policy must provide for the minimum standards in a large number of areas specified in the legislation.

No later than June 1, 2005, every general authority law enforcement agency in Washington must adopt and implement the model policy or its own domestic violence policy. Any policy adopted must meet the minimum standards set forth. If an agency develops its own policy, it must first consult with public and private domestic violence advocates and other appropriate organizations.

By June 30, 2006, every sworn employee must receive training on his or her agency's domestic violence policy. Employees hired on or after March 1, 2006, must receive training on his or her agency's domestic violence policy within six months of employment.

By June 1, 2005, every agency must provide a copy of its domestic violence policy and a statement asserting that the agency has complied with the training requirements set forth in this bill to WASPC.

WASPC must maintain a copy of each agency's domestic violence policy. By January 1, 2006, WASPC must provide a complete list of those agencies that have not adopted policies and/or complied with the training requirements to the Governor and Legislature.

GOOD FAITH IMMUNITY CREATED FOR THOSE WHO “COOPERATE” IN A CHILD ABUSE INVESTIGATION

CHAPTER 37 (SHB 3083)

Effective Date: June 10, 2004

The House Bill Report summarizes the background and substance of this amendment to RCW 26.55.060 as follows:

Background

Current law provides immunity for persons who in good faith report suspected child abuse or neglect, or testify in a judicial proceeding as to alleged child abuse or neglect. Two Washington appellate court decisions provided fairly broad interpretations of the immunity for mandated reporters. These decisions included doctors who did not report the abuse, but participated in child abuse investigations under the reporter immunity clause.

There is no provision in statute, however, that specifically provides immunity to persons who assist in child abuse investigations. Therefore, members of a multi-disciplinary investigation team may still be liable. In addition, neighbors, relatives or others who provide information to investigators may also be held liable.

Summary of Substitute Bill:

A person is immune from civil liability for cooperating in an investigation of child abuse or neglect if the person acted in good faith and without gross negligence. The immunity does not apply to a person cooperating in an investigation if the person caused or allowed the child abuse or neglect to occur.

ELECTRONIC ISSUANCE OF INFRACTIONS AND CITATIONS; UNLAWFUL TO IMPROPERLY DISPOSE OF INFRACTIONS

CHAPTER 43 (SHB 2583)

Effective Date: July 1, 2004

Amends RCW 7.80.150, in part, as follows:

(1) Every law enforcement agency in this state or other agency authorized to issue notices of civil infractions shall provide in appropriate form notices of civil infractions which shall be issued in books with notices in quadruplicate and meeting the requirements of this section, or issued by an electronic device capable of producing a printed copy and electronic copies of the citations.

The chief administrative officer of every such agency shall be responsible for the issuance of such books or electronic devices and shall maintain a record of every such book or electronic device and each notice contained therein issued to individual members or employees of the agency and shall require and retain a receipt for every book or electronic device so issued.

(2) Every law enforcement officer or other person upon issuing a notice of civil infraction to an alleged perpetrator of a civil infraction under the laws of this state

or of any ordinance of any city or town shall deposit the original or a printed or electronic copy of such notice of civil infraction with a court having competent jurisdiction over the civil infraction, as provided in RCW 7.80.050.

Upon the deposit of the original or a printed or electronic copy of such notice of civil infraction with a court having competent jurisdiction over the civil infraction, the original or copy may be disposed of only as provided in this chapter.

(3) It is unlawful and is official misconduct for any law enforcement officer or other officer or public employee to dispose of a notice of civil infraction or copies thereof or of the record of the issuance of the same in a manner other than as required in this section.

UNLAWFUL DISCHARGE OR DISCIPLINE OF RESERVE OFFICERS

CHAPTER 44 (SHB 2601)

Effective Date: June 10, 2004

Amends RCW 49.12.460, which prohibits an employer from discharging or disciplining a volunteer fire fighter because of "leave taken related to an alarm of fire or an emergency call" to afford reserve law enforcement officers the same protection.

ADDITIONAL RESTRICTIONS PLACED ON EPHEDRINE, PSEUDOEPHEDRINE, AND PHENYLPROPANOLAMINE

CHAPTER 52 (ESSB 6478)

Effective Date: July 1, 2004

The Final Bill Report summarizes this legislation (revising chapters 18.64 and 69.43 RCW) as follows:

Shopkeepers, who are not licensed pharmacies, and itinerant vendors may purchase ephedrine, pseudoephedrine, and phenylpropanolamine only from wholesalers or manufactures licensed by the Department of Health. A shopkeeper or itinerant vendor who violates this must be warned by the Board of Pharmacy. If the shopkeeper or itinerant vendor commits a subsequent violation, the Board of Pharmacy may suspend or revoke their registration.

Shopkeepers and itinerant vendors who purchase ephedrine products in a suspicious transaction are subject to percentage-of-sales and record-keeping requirements. Such shopkeepers and itinerant vendors may not sell any quantity of ephedrine products if the total prior monthly sales of these products exceed 10 percent of the shopkeeper's or itinerant vendor's total monthly sales of nonprescription drugs in March through October, or 20 percent from November through February. The board may suspend or revoke the license of a shopkeeper or itinerant vendor who violates this limitation. Such shopkeepers and itinerant vendors must also maintain inventory records of the receipt and disposition of nonprescription drugs. Records must be available for inspection by the board or any law enforcement agency and shall be maintained for two years. The board may suspend or revoke the shopkeeper's or itinerant vendor's registration for violating this record requirement.

No wholesalers may sell any quantity of ephedrine products if the total prior monthly sales of these products to persons in Washington exceeds 5 percent of the wholesaler's total prior monthly sales of nonprescription drugs to persons in Washington in March through October. This limit is 10 percent for November through February. The board may suspend or revoke the license of a

wholesaler that violates this limitation. The board may exempt a wholesaler from this limitation if the wholesaler is related by common ownership to the retailer and neither the wholesaler nor the retailer has a history of suspicious transactions in precursor drugs.

Wholesalers located in Washington and outside of Washington who sell both legend drugs and nonprescription drugs, and those who sell only nonprescription drugs to pharmacies, practitioners, and shopkeepers in Washington must be licensed by the Department of Health. Wholesalers are prohibited from selling any quantity of ephedrine products to any person in Washington other than a licensed pharmacy, shopkeeper or itinerant vendor registered in Washington, or a practitioner. A violation of this prohibition is punishable as a class C felony.

It is unlawful for any person to sell or distribute ephedrine products unless the person is licensed or registered by the Department of Health under the statute concerning pharmacists or is a practitioner as defined in statute.

Practitioners authorized to prescribe drugs may sell, transfer or otherwise furnish ephedrine products as long as a single transaction does not exceed the three package, three gram limitation.

The Board of Pharmacy must transmit to the Department of Revenue a copy of each report of a suspicious transaction that it receives.

The Board of Pharmacy may exempt specific ephedrine products from the sales restriction, upon application of a manufacturer, if the product meets the federal definition of an ordinary over-the counter pseudoephedrine product, or the net weight of the pseudoephedrine base is equal to or less than three grams, even though the package's total weight exceeds three grams, and the board determines that the value of the product to the people of Washington outweighs the danger, and the product, as packaged, has not been used in the illegal manufacture of methamphetamine.

MILITARY ID MADE ACCEPTABLE FORM OF ID FOR LIQUOR SALES

CHAPTER 61 (SHB 2685)

Effective Date: June 10, 2004

Amends RCW 66.16.040 to make military ID that does not have a visible signature an alternative acceptable form of identification for sales of liquor.

AMENDMENT TO IMPLIED CONSENT AND DRIVING UNDER THE INFLUENCE STATUTES TO PROVIDE UNIFORMITY IN ADMISSIBILITY OF BREATH TESTS

CHAPTER 68 (SHB 3055)

Effective Date: June 10, 2004

Makes a number of changes to RCW 46.20.308 and RCW 46.61.506. Among the changes are an amendment to RCW 46.20.308(1) to specifically authorize the issuance of search warrants for breath or blood. Also combines with SHB 2660 (see below) to amend RCW 46.20.308(2). The combined changes to subsection (2) of RCW 46.20.308 are as follows:

(2) The test or tests of breath shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or any drug or the person to have been driving or in actual physical control of a motor vehicle while having alcohol in a

concentration in violation of RCW 46.61.503 in his or her system and being under the age of twenty-one. However, in those instances where the person is incapable due to physical injury, physical incapacity, or other physical limitation, of providing a breath sample or where the person is being treated in a hospital, clinic, doctor's office, emergency medical vehicle, ambulance, or other similar facility ~~((in which a breath testing instrument is not present))~~ or where the officer has reasonable grounds to believe that the person is under the influence of a drug, a blood test shall be administered by a qualified person as provided in RCW 46.61.506~~((4))~~(5). The officer shall inform the person of his or her right to refuse the breath or blood test, and of his or her right to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506. ~~((The officer shall warn the driver that:~~

~~— (a) His or her license, permit, or privilege to drive will be revoked or denied if he or she refused to submit to the test;~~

~~— (b) His or her license, permit, or privilege to drive will be suspended, revoked, or denied if the test is administered and the test indicates the alcohol concentration of the person's breath or blood is 0.08 or more, in the case of a person age twenty one or over, or in violation of RCW 46.61.502, 46.61.503, or 46.61.504 in the case of a person under age twenty one; and~~

~~— (c) His or her refusal to take the test may be used in a criminal trial.))~~ The officer shall warn the driver, in substantially the following language, that:

— (a) If the driver refuses to take the test, the driver's license, permit, or privilege to drive will be revoked or denied for at least one year; and

— (b) If the driver refuses to take the test, the driver's refusal to take the test may be used in a criminal trial; and

— (c) If the driver submits to the test and the test is administered, the driver's license, permit, or privilege to drive will be suspended, revoked, or denied for at least ninety days if the driver is age twenty-one or over and the test indicates the alcohol concentration of the driver's breath or blood is 0.08 or more, or if the driver is under age twenty-one and the test indicates the alcohol concentration of the driver's breath or blood is 0.02 or more, or if the driver is under age twenty-one and the driver is in violation of RCW 46.61.502 or 46.61.504.

...

[LED EDITORS' NOTE: Revised implied consent warnings will be available and should be used for all tests administered on or after 12:01 a.m. on June 10, 2004.]

The bill also amends RCW 46.61.506, regarding admissibility of breath test results, as follows:

(4) (a) A breath test performed by any instrument approved by the state toxicologist shall be admissible at trial or in an administrative proceeding if the prosecution or department produces prima facie evidence of the following:

(i) The person who performed the test was authorized to perform such test by the state toxicologist;

(ii) The person being tested did not vomit or have anything to eat, drink, or smoke for at least fifteen minutes prior to administration of the test;

(iii) The person being tested did not have any foreign substances, not to include dental work, fixed or removable, in his or her mouth at the beginning of the fifteen-minute observation period;

(iv) Prior to the start of the test, the temperature of the simulator solution as measured by a thermometer approved of by the state toxicologist was thirty-four degrees centigrade plus or minus 0.3 degrees centigrade;

(v) The internal standard test resulted in the message "verified";

(vi) The two breath samples agree to within plus or minus ten percent of their mean to be determined by the method approved by the state toxicologist;

(vii) The simulator external standard result did lie between .072 to .088 inclusive; and

(viii) All blank tests gave results of .000.

(b) For purposes of this section, "prima facie evidence" is evidence of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved. In assessing whether there is sufficient evidence of the foundational facts, the court or administrative tribunal is to assume the truth of the prosecution's or department's evidence and all reasonable inferences from it in a light most favorable to the prosecution or department.

(c) Nothing in this section shall be deemed to prevent the subject of the test from challenging the reliability or accuracy of the test, the reliability or functioning of the instrument, or any maintenance procedures. Such challenges, however, shall not preclude the admissibility of the test once the prosecution or department has made a prima facie showing of the requirements contained in (a) of this subsection. Instead, such challenges may be considered by the trier of fact in determining what weight to give to the test result.

[LED EDITORS' NOTE: Because the statute does not indicate whether the mouth check must be conducted visually, or whether asking the suspect is sufficient, officers are advised to do both (unless the suspect invokes his or her right to remain silent or requests an attorney, in which case officers should conduct a visual inspection only).]

The bill also expands the list of individuals who may draw blood by amending RCW 46.61.506 as follows:

(5) When a blood test is administered under the provisions of RCW 46.20.308, the withdrawal of blood for the purpose of determining its alcoholic or drug content may be performed only by a physician, a registered nurse, (~~or a qualified technician~~) a licensed practical nurse, a nursing assistant as defined in chapter 18.88A RCW, a physician assistant as defined in chapter 18.71A RCW, a first responder as defined in chapter 18.73 RCW, an emergency medical technician as defined in chapter 18.73 RCW, a health care assistant as defined in chapter 18.135 RCW, or any technician trained in withdrawing blood. This limitation shall not apply to the taking of breath specimens.

[LED EDITORS' NOTE: Although the list of individuals who may perform blood draws has been expanded, not all of these individuals are authorized by their licenses to draw blood. Accordingly, if an officer asks one of the listed individuals to perform a blood draw and the person indicates that he or she is not authorized to do so, the officer should locate another listed individual to perform the blood draw.]

CRIMINAL TRESPASS DEFENSE IS NARROWED

CHAPTER 69 (SB 6357)

Effective Date: June 10, 2004

Amends RCW 9A.52.020 by adding the following sentence to subsection (3):

A license or privilege to enter or remain on improved and apparently used land that is open to the public at particular times, which is neither fenced nor otherwise enclosed in a manner to exclude intruders, is not a license or privilege to enter or remain on the land at other times if notice of prohibited times of entry is posted in a conspicuous manner.

PROPERTY TAX FOR CRIMINAL JUSTICE FUNDING IN SMALLER COUNTIES

CHAPTER 80 (HB 2519)

Effective Date: July 1, 2004

Counties with populations of 90,000 or less are authorized, with local voter approval, to impose a new regular property tax of up to 50 cents per thousand dollars of assessed value on property in the county. The funds are to be used for criminal justice purposes only.

“CYBERSTALKING” CRIMINALIZED

CHAPTER 94 (ESHB 2771)

Effective Date: March 24, 2004

The crime of “cyberstalking” is created under a new section in chapter 9.61 RCW providing as follows:

(1) A person is guilty of cyberstalking if he or she, with intent to harass, intimidate, torment, or embarrass any other person, and under circumstances not constituting telephone harassment, makes an electronic communication to such other person or a third party:

(a) Using any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act;

(b) Anonymously or repeatedly whether or not conversation occurs; or

(c) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household.

(2) Cyberstalking is a gross misdemeanor, except as provided in subsection (3) of this section.

(3) Cyberstalking is a class C felony if either of the following applies:

(a) The perpetrator has previously been convicted of the crime of harassment, as defined in RCW 9A.46.060, with the same victim or a member of the victim's family or household or any person specifically named in a no-contact order or no-harassment order in this or any other state; or

(b) The perpetrator engages in the behavior prohibited under subsection (1)(c) of this section by threatening to kill the person threatened or any other person.

(4) Any offense committed under this section may be deemed to have been committed either at the place from which the communication was made or at the place where the communication was received.

(5) For purposes of this section, "electronic communication" means the transmission of information by wire, radio, optical cable, electromagnetic, or other similar means. "Electronic communication" includes, but is not limited to, electronic mail, internet based communications, pager service, and electronic text messaging.

EXPANDING MANDATORY USE OF IGNITION INTERLOCK DEVICES, AND REVISING LICENSING PROVISIONS RELATING TO ALCOHOL RELATED OFFENSES

CHAPTER 95 (SHB 2660)

Effective Date: June 10, 2004

Amends several existing laws relating to ignition interlock devices and licensing provisions relating to alcohol related offenses. Among these amendments are the following:

Amends RCW 10.05.140 to require that as a condition of granting a deferred prosecution petition on any alcohol-dependency based case, the court shall also order the installation of an ignition interlock device.

Amends RCW 46.20.311 to require that the Department of Licensing suspend a person's license when the department determines, upon notification from the interlock provider or otherwise, that an interlock required under RCW 46.20.720 is no longer installed and functioning as required. The suspension shall remain in effect until the department receives written verification that the interlock is functioning.

Amends RCW 46.20.3101 to require that license suspensions for refusals be given day-for-day credit against license suspensions imposed under RCW 46.61.5055 arising out of the same incident.

Creates a "temporary restricted" driver's license for drivers who have lost their licenses because of DUI related criminal or administrative sanctions and which is to be granted only if the applicant has installed an ignition interlock.

PROHIBITING WEAPONS IN RESTRICTED ACCESS AREAS OF COMMERCIAL SERVICE AIRPORTS

CHAPTER 116 (SSB 6389)

Effective Date: June 10, 2004

The bill amends RCW 9.41.300(1) to add the following to the list of areas where it is unlawful to knowingly possess a weapon or knowingly have a weapon under one's control:

(e) The restricted access areas of a commercial service airport designated in the airport security plan approved by the federal transportation security administration, including passenger screening checkpoints at or beyond the point at which a passenger initiates the screening process. These areas do not include airport drives, general parking areas and walkways, and shops and areas of the terminal that are outside the screening checkpoints and that are normally open to unscreened passengers or visitors to the airport. Any restricted access area shall be clearly indicated by prominent signs indicating that firearms and other weapons are prohibited in the area.

As with the other restrictions of RCW 9.41.300(1), subsection (e) does not apply to persons engaged in military activities sponsored by the federal or state government, while engaged in official duties; sworn law enforcement personnel whether on or off duty; or lawfully armed security personnel while engaged in official duties.

Violation of RCW 9.41.300(1) is a gross misdemeanor.

PROVIDING FOR MENTAL HEALTH EVALUATIONS AND TREATMENT FOR JUVENILE OFFENDERS CONVICTED OF ANIMAL CRUELTY IN THE FIRST DEGREE; PROHIBITING VACATION OF CONVICTION

CHAPTER 117 (SSB 6105)

Effective Date: July 1, 2004

Adds language to RCW 13.40.127(5) which provides:

(5) Any juvenile granted a deferral of disposition under this section shall be placed under community supervision. The court may impose any conditions of supervision that it deems appropriate including posting a probation bond. . . . The court may require a juvenile offender convicted of animal cruelty in the first degree to submit to a mental health evaluation to determine if the offender would benefit from treatment and such intervention would promote the safety of the

community. After consideration of the results of the evaluation, as a condition of community supervision, the court may order the offender to attend treatment to address issues pertinent to the offense.

The bill also adds language to RCW 13.40.127(9) that excludes animal cruelty in the first degree from those juvenile convictions that may be vacated.

ADDING "REGIONAL TRANSIT AUTHORITY" TO STATUTES DEFINING UNLAWFUL BUS CONDUCT

CHAPTER 118 (SB 6326)

Effective Date: June 10, 2004

Amends RCW 9.91.025 and RCW 46.04.355 to include facilities or vehicles operated by a "regional transit authority" in the definitions of municipal transit station, and municipal transit vehicle, so that unlawful bus conduct applies to facilities or vehicles operated by a regional transit authority.

CRIMINALIZING RECORDING A MOTION PICTURE THAT IS BEING SHOWN AT AN EXHIBITION FACILITY

CHAPTER 119 (SB 6378)

Effective Date: June 10, 2004

A new crime is adopted in a new chapter in Title 19 RCW making it a gross misdemeanor to knowingly record a motion picture being shown in an exhibition facility without the consent of both the owner/lessee of the facility and the licensor of the motion picture. This crime does not apply to persons who operate recording functions of audiovisual devices in retail establishments. Nor does this crime apply to the use of recording devices in lawfully authorized investigative, protective, law enforcement, or intelligence-gathering activities involving the recording of motion pictures in exhibition facilities.

VICTIMS OF JUVENILE CRIME GIVEN SAME BASIC RIGHTS AS VICTIMS OF ADULT CRIMES

CHAPTER 120 (ESSB 6472)

Effective Date: July 1, 2004

The Final Bill Report for this legislation (amending various provisions in Title 13 RCW) summarizes it as follows:

Victims, survivors of victims, and witnesses of crimes committed by juveniles are given the same rights as victims of adult offenders. Victims of both adult and juvenile violent and sexual offenders are entitled to have a support person of the victim's choosing attend witness interviews and judicial proceedings so long as they do not unnecessarily delay the investigation and prosecution of the crime. Victims of a juvenile in a diversion program must be advised of the diversion process and given forms for victim impact letters and restitution claims.

The same definition of "victim" is added to the chemical dependency disposition alternative for juvenile offenders and to juvenile restitution provisions. "Victim" includes any person who has sustained emotional, psychological, physical, or financial injury as a direct result of the crime, as well as a known parent or guardian of a minor victim or of a victim who is not a minor but is incapacitated, incompetent, disabled, or deceased.

Legislative intent regarding restitution for juvenile offenders is clarified. Restitution for counseling costs reasonably related to the offense is authorized for victims of all juvenile offenses, not just for sex offenses.

Judges are given discretion to relieve a juvenile offender of an obligation to pay restitution to an insurance provider if the juvenile does not have the means to pay and could not reasonably acquire the means to pay over a ten-year period. Judges are also given discretion to relieve juveniles of the requirement to pay restitution in diversion cases, and if that relief is granted, the court may order an appropriate amount of community restitution (compulsory service for the benefit of the community). Unlike a fine or monetary penalty, the crime victim penalty assessment required of juvenile offenders cannot be converted to community restitution.

Language governing orders in dispositions involving sex offender treatment is clarified to ensure that a court must order that an offender shall not attend the same school as the victim or the victim's siblings.

DEFENSE CREATED RE THEFT AND POSSESSION OF STOLEN MERCHANDISE PALLETS

CHAPTER 122 (SB 6338)

Effective Date: June 10, 2004

Amends RCW 9A.56.020(2) and RCW 9A.56.140 to provide that in any prosecution for theft or possessing stolen property, it is a sufficient defense "that the property was merchandise pallets that were received by a pallet recycler or repairer in the ordinary course of its business."

CRIMINAL IMPERSONATION IN SECOND DEGREE COVERS IMPERSONATING A VETERAN OR ACTIVE MEMBER OF THE ARMED FORCES

CHAPTER 124 (ESSB 5861)

Effective Date: July 1, 2004

Amends RCW 9A.60.045 to make a person guilty of criminal impersonation in the second degree if the person:

(b) Falsely assumes the identity of a veteran or active duty member of the armed forces of the United States with intent to defraud for the purpose of personal gain or to facilitate any unlawful activity.

RECIPROCITY FOR CONCEALED WEAPONS LICENSES

CHAPTER 148 (ESB 5083)

Effective Date: June 10, 2004

Adds a new section to chapter 9.41 RCW reading as follows:

(1)(a) A person licensed to carry a pistol in a state the laws of which recognize and give effect in that state to a concealed pistol license issued under the laws of the state of Washington is authorized to carry a concealed pistol in this state if:

(i) The licensing state does not issue concealed pistol licenses to persons under twenty-one years of age; and

(ii) The licensing state requires mandatory fingerprint-based background checks of criminal and mental health history for all persons who apply for a concealed pistol license.

b) This section applies to a license holder from another state only while the license holder is not a resident of this state. A license holder from another state must carry the handgun in compliance with the laws of this state.

(2) The attorney general shall periodically publish a list of states the laws of which recognize and give effect in that state to a concealed pistol license issued under the laws of the state of Washington and which meet the requirements of subsections (1)(a)(i) and (ii) of this section.

CERTAIN FORMS OF MUTUAL-CONSENT FIGHTING PROHIBITED

CHAPTER 149 (SSB 6103)

Effective Date: March 26, 2004

Amends provisions in chapter 67.08 RCW to prohibit the promotion of certain forms of mutual-consent fighting. "No holds barred," "frontier," or "extreme" fighting are defined as having the purpose of intentionally injuring a contestant and their promotion is prohibited. Other forms of mutual-consent fighting that involve the participation of contestants who are not trained in the sport ("combative," "toughman" "toughwoman" or "badman" fighting) are defined and their promotion is prohibited. "Elimination tournaments" are also defined and their promotion is prohibited. The promotion of any form of fighting prohibited by the statute is a class C felony. Mere participants are not subject to criminal penalty under this legislation.

ADDRESSING OFFENDERS WHO ARE SUBJECT TO TREATMENT ORDERS

CHAPTER 166 (E2SSB 6358)

Date: July 1, 2004

This legislation addresses the need for coordination among DOC and others as to offenders who are subject to treatment orders for mental health or chemical dependency. Among the many changes under this comprehensive legislation is a requirement that, when a jail releases a person subject to a discharge review, the jail must notify the county designated mental health professional (CDMHP) or county designated chemical dependency specialist (CDCDS) 72 hours in advance of the release, or upon release if the jail did not have 72 hours notice. The CDMHP or CDCDS, as appropriate, must evaluate the person within 72 hours of release.

BAIL BOND AGENT LICENSING MADE MANDATORY; PRIOR NOTIFICATION TO LOCAL LAW ENFORCEMENT REQUIRED FOR PLANNED FORCED ENTRIES

CHAPTER 186 (SHB 2313)

Effective Date: June 10, 2004

Under extensive amendments to chapter 18.185 RCW, the Legislature establishes a system of mandatory training and licensing for bail bond recovery agents. Among other things, the enactment requires prior notice to local law enforcement agents and the wearing of identifying clothing when bail bond recovery agents made a planned forced entry of premises to apprehend a fugitive.

The enactment expressly declares that it does not "restrict or limit in any way the powers of bail bond agents as recognized in and derived from the United States Supreme Court case of Taylor v. Taintor, 16 Wall. 366 (1872). The Taylor v. Taintor decision permits bail bond agents to enter private premises and search for fugitives without a search warrant.

COMMERCIAL DRIVER'S LICENSE LAW TIGHTENED TO MEET FEDERAL REGULATIONS

CHAPTER 187 (SHB 2532)

Effective Date: June 10, 2004

The House Bill Report for this legislation summarizes it as follows:

In order to comply with new federal regulations, this bill amends the Uniform Commercial Driver's License Act to:

Prohibit "masking" of traffic violations from the driving records of a CDL holder.

Add additional traffic violations and offenses that would disqualify a person from driving a commercial motor vehicle.

Require the Department of Licensing to obtain a new CDL applicant's driving record from every state in which they have been licensed in the last 10 years.

Provide for the disqualification of a CDL where the holder has caused a fatality through the negligent operation of a commercial motor vehicle.

Permit the immediate disqualification of a CDL where the holder has been determined to constitute an imminent hazard by the federal DOT.

Require instruction permit holders to be at least eighteen years of age, to have passed a general knowledge examination, and paid the appropriate application and exam fees.

Prohibit CDL instruction permit holders from operating a commercial motor vehicle transporting hazardous materials.

Create a new endorsement category for school bus operation.

Update definitions of "hazardous materials," "school bus," and "serious traffic violations."

PROHIBITING USE OF HOOKS WITH INTENT TO PIERCE FLESH OF BIRD OR MAMMAL

CHAPTER 220 (SB 6560)

Effective Date: March 29, 2004

Adds a new section to RCW 16.52 providing that the use of a hook with intent to pierce the flesh of a bird or mammal constitutes animal cruelty. The unlawful use of a hook is a gross misdemeanor.

SPECIAL LICENSE PLATE WILL HONOR OFFICERS KILLED IN THE LINE OF DUTY

CHAPTER 221 (SSB 6148)

Effective Date: June 10, 2004

The Final Bill Report for this legislation summarizes it as follows:

The Department of Licensing (DOL) must issue a special license plate displaying a symbol honoring law enforcement officers in Washington who were killed in the line of duty.

The Law Enforcement Memorial license plates will be available January 1, 2005.

An applicant for a Law Enforcement Memorial license plate must pay an initial fee of \$40 and a renewal fee each year thereafter of \$30. The initial revenue generated from the plate sales must be deposited into the motor vehicle account until the state has been reimbursed for the implementation costs. Upon reimbursement, the revenue must be deposited into the law enforcement memorial account.

DOL must enter into a contract with a qualified nonprofit organization requiring that the organization use the plate revenue to provide support and assistance to survivors and families of law enforcement officers in Washington who were killed in the line of duty and to construct, maintain, and utilize a memorial on the state capitol grounds to honor fallen officers.

ADDRESSING TOLL COLLECTION EVASION

CHAPTER 231 (SHB 2475)

Effective Date: June 10, 2004

Amends RCW 46.61.690 to fill in some gaps in the law that defines toll evasion. Also adds new sections and amends current provisions in chapter 46.63 RCW governing penalties for evading toll collection systems, by making these violations non-moving traffic infractions and by creating procedures for issuing these infractions, including procedures for toll facilities that use photo-monitoring systems.

CRIMINALIZING DELIVERY OF LIVE NONAMBULATORY LIVESTOCK

CHAPTER 234 (2802)

Effective Date: March 31, 2004

Adds a new section to chapter 16.52 RCW making it a gross misdemeanor to knowingly transport or accept delivery of live “nonambulatory livestock” (as defined in the act) to, from, or between any livestock market, feedlot, slaughtering facility, or similar facility that trades in livestock. The transport of each nonambulatory livestock animal is a separate and distinct violation. However, livestock that was ambulatory before transport to a feedlot and became nonambulatory through injury during transport may be unloaded and placed in a separate pen at the feedlot for rehabilitation.

ADDRESSING ID THEFT, INCLUDING INCREASING CIVIL PENALTY, AND HAVING DOL IMPLEMENT BIOMETRIC MATCHING BY 2006

CHAPTER 273 (3SSB 5412)

Effective Date: July 1, 2004

The civil liability for committing identity theft in the first or second degree is increased from \$500 to \$1,000 or actual damages, whichever is greater. Also, under a new section in chapter 46.20 RCW, the Department of Licensing (DOL) must implement a voluntary-participation, biometric matching system by January 1, 2006. This system is to be used only to verify the identity of an applicant for renewal or issuance of a duplicate license or identicard. When the biometric driver's license and identicard system is established, DOL must allow every person applying for an original, renewal, or duplicate driver's license or identicard the option of submitting a biometric identifier.

RELAXING LAWS THAT RESTRICT WAGERING ON HORSES

CHAPTER 274 (ESSB 6481)

Effective Date: April 1, 2004

Amends RCW 67.16.200 to relax limitations on simulcasting of horse racing at live racing facilities and at satellite locations. Also adds a new section to RCW 67.16 to allow “advance deposit wagering” on horse races. “Advance deposit wagering” is defined as a form of parimutuel wagering in which an individual deposits money in an account with an entity authorized by the Horse Racing Commission, and the individual deposits money in an account with an entity authorized by the Commission, and the account funds are then used to pay for parimutuel wagering made in person, by telephone or through communication by other electronic means. An entity offering advance deposit wagering on horse racing is prohibited from extending credit to participants, must verify the ID, residence and age of a person establishing an account, and may not allow anyone under the age of 21 to open, own, or have access to an advance deposit wagering account.

BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

RESTRICTIONS ON ADMISSIBILITY OF “TESTIMONIAL” HEARSAY ARE TIGHTENED UNDER THE SIXTH AMENDMENT’S CONFRONTATION CLAUSE -- In Crawford v. Washington, 124 S.Ct. 1354 (2004), in a ruling under the Sixth Amendment confrontation clause, the U.S. Supreme Court reverses a Washington conviction and a Washington Supreme Court decision. This is a far-reaching ruling that will prevent prosecutors throughout the nation from introducing hearsay statements at criminal trials in most circumstances where: (1) the out-of-court statement (the hearsay) is “testimonial” in nature; (2) the defendant did not have a prior opportunity to formally cross-examine the declarant; and (3) the declarant is not available at trial and hence cannot be cross-examined at trial.

At Mr. Crawford’s trial for felony assault and attempted murder of a male acquaintance, the trial court allowed the State to put into evidence a tape-recorded hearsay statement that Mr. Crawford’s wife had given to the police describing the stabbing incident. Because Mr. Crawford asserted the marital status privilege at trial, his wife was not available at trial for cross-examination. On review of Mr. Crawford’s conviction of first degree assault with a deadly weapon, the Washington Supreme Court upheld admission of the wife’s out-of-court statement on grounds that the statement was reliable because in interlocked with (i.e., was essentially the same as) Mr. Crawford’s confession to the police. See State v. Crawford, 147 Wn.2d 424 (2002) **Feb 03 LED:09** The Washington Supreme Court cited as authority for its 2002 decision the U.S. Supreme Court precedent of Ohio v. Roberts, 448 U.S. 56 (1980).

In an opinion authored by Justice Scalia, the U.S. Supreme Court has now reversed the Washington Supreme Court’s 2002 decision in Crawford (by unanimous vote) and has overruled the U.S. Supreme Court’s 1980 decision in Ohio v. Roberts (by 7-2 vote). As noted above, under the new rule, if a declarant’s out-of-court statement that is “testimonial” in nature and was not subjected at the time of its making to cross-examination, it will not be admissible if the declarant is not available at trial for cross-examination. The courts will no longer engage in case-by-case efforts to try to determine “reliability” of such statements on the totality of the circumstances, as they had been doing under the 1980 decision in Ohio v. Roberts.

The Crawford Court does not try to provide an all-encompassing definition of “testimonial” for purposes of application of its new rule. However, the Scalia opinion quotes from several alternative, suggested definitions of “testimonial” found both in case law and in briefing in the Crawford case. The Court notes one broad definition offered in an amicus curiae (friend-of-the-court) brief submitted by a group of criminal defense attorneys. That amicus brief suggested that “[an out-of-court statement is testimonial if] made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” The Scalia opinion does say with certainty that “[w]hatever else the term [i.e., “testimonial”] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to [statements given in] police interrogations.”

The ramifications of Crawford v. Washington will not be known for years. It does appear, however, that Crawford immediately impacts the use of child hearsay statements. Initial disclosures that children make to parents, teachers, doctors, and so forth may be deemed as “non-testimonial” and, thus these statements would still be admissible in court when the child is unavailable to testify if the State can demonstrate full compliance with RCW 9A.44.120, and can satisfy the “reliability” requirements contained in our state’s appellate cases. It is possible, however, that a court could also deem even these child disclosures to non-police “testimonial” if it appears that the statements were obtained for use against a defendant at trial, rather than simply to determine whether the child has been harmed, and by whom. Statements that the child victim makes to police officers, or government forensic interviewers are certainly “testimonial” and will be admissible only if the child takes the stand.

"Excited utterances" made to civilians or to police officers should be considered "non-testimonial" and likely will be admissible under the confrontation clause. Most excited utterances are "non-testimonial" because the statements are not made in the expectation that they are likely to be used at trial. It is anticipated that criminal defense attorneys will argue otherwise.

"Dying declarations," even if "testimonial," may escape a confrontation clause challenge, the Scalia opinion appears to suggest.

"Smith affidavits" (see State v. Smith, 97 Wn.2d 856 (1982)), most recently noted in the January 2004 LED entry regarding State v. Nieto, 119 Wn. App. 157 (Div. I, 2003)), should not be impacted by Crawford v. Washington. That is because current Washington case law allows admission of "Smith affidavits" (or sworn declarations) into evidence only if the affiant (declarant) takes the witness stand at trial.

Result: Reversal of Washington Supreme Court decision that had affirmed the Thurston County Superior Court conviction of Michael D. Crawford for first degree assault while armed with a deadly weapon; case remanded for possible re-trial.

LED EDITORIAL ATTRIBUTION NOTE: Parts of this LED entry were adapted from a description of the Crawford decision and its implications provided to the LED Editors by the Washington Association of Prosecuting Attorneys. Thank you WAPA.

WASHINGTON STATE COURT OF APPEALS

STRIKER/GREENWOOD SPEEDY ARRAIGNMENT/SPEEDY TRIAL RULE VIOLATED WHERE STATE DID NOT TRY, AS DEFENDANT HAD EARLIER REQUESTED, TO LOCATE HIM THROUGH HIS ATTORNEY

State v. Austin, 119 Wn. App. 319 (Div. II, 2003)

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

In February 2000, [a sheriff's deputy] interviewed Austin apparently regarding an alleged rape of a 9 year old child with whose family Austin had been living. Austin was living in a hotel and did not have a permanent address. But he told [the deputy] that Eric Valley was his attorney; he gave [the deputy] Valley's business card, which contained Valley's address and telephone number; and he said that Valley would know of his future whereabouts.

On June 26, 2000, the State filed an information charging Austin with first degree rape of a child. At the same time, it obtained a warrant for Austin's arrest and it mailed notice of the filing of the information to Austin at what the parties concede was an incorrect address. The notice was returned with the notation, "Moved, no forwarding address." The State did not call Valley to ask about Austin's address or take any other steps to locate Austin.

Thirteen months later, on July 6, 2001, the Pacific County Sheriff's Office arrested Austin on the warrant. At his arraignment, Austin moved to dismiss the charge for violation of his speedy trial rights. The trial court concluded that "[t]he State did not fail to use due diligence in locating [Austin] or good faith in attempting to locate [him]."

ISSUE AND RULING: Did the State meet its duty under CrR 3.3 to act with good faith and with all due diligence in attempting to bring Austin to arraignment in a timely fashion? (ANSWER: No, rules a 2-1 majority; the State, per Austin's earlier request, should have contacted Austin's attorney to try to learn Austin's whereabouts.

Result: Reversal of Pacific County Superior Court order denying Leroy F. Austin's motion to dismiss charges; case remanded for hearing to determine whether it would have been futile under the circumstances to call Austin's attorney.

ANALYSIS:

The Court of Appeals explains that its analysis is guided by Washington Supreme Court decisions interpreting the "speedy trial" court rule at CrR 3.3 in State v. Greenwood, 120 Wn.2d 585 (1993) and State v. Striker, 87 Wn.2d 870 (1976) and other decisions (we will refer to the combined effect of these rulings in this LED summary simply as the "Striker rule"). Under the Striker rule, although the speedy trial court rule does not expressly address the effect of an unnecessary delay between the filing of an information and the arraignment, a timely arraignment is required. Where the defendant is amenable to process and there is a long and unnecessary delay between charging and arraignment, the Striker rule's requirement that a defendant be arraigned in a timely fashion applies. Under the Striker rule, the trial court sets a constructive arraignment date 14 days after the filing of the information, which starts the speedy trial period, and the State must bring an out-of-custody defendant to trial within 104 days, and failure to do so requires dismissal with prejudice.

The Striker rule for trial within 104 days does not apply, however, if the State acted in good faith and with due diligence in attempting to bring the defendant before the court, or if any period of delay results from any fault or connivance on the part of the defendant. The burden is on the State to prove due diligence in attempting to bring a defendant before a court for arraignment, for purpose of countering a defendant's argument that the State violated the Striker requirement. The burden is on the State in this regard because only the State knows what efforts it made during the relevant period.

Under the Striker rule's requirement that the defendant be arraigned in timely fashion, the State does not have the burden of locating a defendant who has not provided accurate information of his whereabouts. But, if the State has information that may lead to a defendant's whereabouts, to meet the Striker rule's due diligence requirement, the State must take reasonable steps to follow up on that information, or show that doing so would be unreasonably burdensome or futile.

Here, the Court of Appeals' majority opinion concludes that the State's failure to attempt to contact defendant through his attorney's phone number, which defendant had provided to police as a contact number, demonstrated lack of due diligence at the point in time when the State learned that the mailed notice of the criminal information charging defendant with first degree rape of a child had been returned with no forwarding address. Therefore, the majority opinion concludes, State must be held to have violated the Striker rule unless the State can show on remand that efforts to locate defendant through his attorney would have been futile. The majority opinion thus concludes its analysis by explaining as follows why the Court is remanding the case to the trial court for a hearing on the futility question:

Here, the trial court took no evidence and made no finding as to whether the efforts to contact Austin through [his attorney] would have been futile. Thus, we remand for the superior court to take evidence, enter findings, and make a proper disposition in accordance with those findings and this opinion.

INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCW'S, AND TO WAC RULES

The Washington Office of the Administrator for the Courts maintains a web site with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [<http://www.courts.wa.gov/>]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [<http://legalwa.org/>] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions from 1939 to the present. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [<http://www.courts.wa.gov/rules/>].

Many 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 many significant opinions of the Court issued before 1990. another website for U.S. Supreme Court opinions is the Court's website at [<http://www.supremecourtus.gov/opinions/02slipopinion.html>]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since January 2000 can be accessed (by date of decision only) by going to the Ninth Circuit home page at [<http://www.ca9.uscourts.gov/>] and clicking on "Opinions." Federal statutes can be accessed at [<http://www4law.cornell.edu/uscode/>]

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2004, is at [<http://slc.leg.wa.gov/>]. Information about bills filed in 2003 Washington Legislature is at the same address -- look under "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent WAC amendments is at [<http://slc.leg.wa.gov/wsr/register.htm>]. In addition, a wide range of state government information can be accessed at [<http://access.wa.gov/>]. The address for the Criminal Justice Training Commission's home page is [<http://www.cjtc.state.wa.us>], while the address for the Attorney General's Office home page is [<http://www.wa/ago>].

The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the **LED** should be directed to Mr. Wasberg at (206) 464-6039; Fax (206) 587-4290; E Mail [johnw1@atg.wa.gov]. Questions regarding the distribution list or delivery of the **LED** should be directed to [ledemail@cjtc.state.wa.us]. **LED** editorial commentary and analysis of statutes and court decisions express the thinking of the writers and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The **LED** is published as a research source only. The **LED** does not purport to furnish legal advice. **LED's** from January 1992 forward are available via a link on the Commission's Internet Home Page at: [<http://www.cjtc.state.wa.us>].