



# Law Enforcement

JUNE 2008

# Digest

## 622<sup>nd</sup> Basic Law Enforcement Academy – December 13, 2007 through April 23, 2008

President: Steven M. Lessard – King County Sheriff's Office  
Best Overall: Jason Dewey – Seattle Police Department  
Best Academic: Thomas Heller – Seattle Police Department  
Best Firearms: Steven Lessard – King County Sheriff's Office  
Tac Officer: Tom Arnold – Lakewood Police Department

## 623<sup>rd</sup> Basic Law Enforcement Academy – January 7, 2008 through May 13, 2008

President: Jose Chiprez – Mattawa Police Department  
Best Overall: Heather Sorsdal – Sedro Woolley Police Department  
Best Academic: Sarah Gordon – University of Washington Police Department  
Best Firearms: Daniel Christian – King County Sheriff's Office  
Tac Officer: Gary Eggleston – Kirkland Police Department

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**PART TWO OF THE 2008 WASHINGTON LEGISLATIVE UPDATE**

**LED INTRODUCTORY EDITORIAL NOTE:** This is Part Two of what likely will be a two-part compilation of 2008 State of Washington legislative enactments of interest to law enforcement. At the end of Part Two is an index to the two parts. We will provide a Part Three if we need to either address additional enactments or provide clarification about enactments addressed in Parts One and Two.

Note that unless a different effective date is specified in the legislation, acts adopted during the 2008 regular session take effect on June 12, 2008 (90 days after the end of the legislative session). For some acts, different sections have different effective dates. We have generally indicated the effective date applicable to the sections that we believe are most critical to law enforcement officers and their agencies.

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.

Text of each of the 2008 Washington acts is available on the Internet at [<http://apps.leg.wa.gov/billinfo/>]. Use the 4-digit bill number for access to the enactment.

Thank you to Tom McBride and Pam Loginsky of the Washington Association of Prosecuting Attorneys for providing information. Thank you also to the WSP’s Government and Media Relations section for providing information.

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 by the Code Reviser 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 regarding either legislation or court decisions do not constitute legal advice, express only 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.

**LEGISLATIVELY RECOGNIZING DOMESTIC PARTNERSHIPS FOR SOME PURPOSES, INCLUDING FOR PRIVILEGE PURPOSES**

Chapter 6 (2SHB 3104)

Effective Date: Primarily June 12, 2008

This act amends many RCW provisions to expand the rights and responsibilities of persons registered as “domestic partners” under chapter 26.60 RCW.

Included are amendments to RCW 5.60.060(1) to extend spousal testimonial privilege to domestic partners. Also, domestic partners are added to the definition of “survivors” under the victims’ rights provisions of RCW 7.69.020, and they are added to the definition of “family members” under

the victims' rights provisions of RCW 7.69B.010. And RCW 26.50.010 of the DVPA chapter is amended to add "domestic partners" to the definition of "family or household members."

But the Legislature did not amend RCW 10.99.020's definition of "family or household members." Therefore, for purposes of the 4-hour mandatory-arrest-for-assault provisions of RCW 10.31.100(2)(c), officers will continue to be guided by the un-amended RCW 10.99.020 definition.

Also, various forfeiture laws are amended to protect the community property interest of innocent domestic partners.

### **ACCESSING RECORDS OF ADDRESS CONFIDENTIALITY PROGRAM PARTICIPANTS**

Chapter 18 (SHB 1421)

Effective Date: June 12, 2008

Among other things, amends RCW 40.24.070 to read as follows:

The secretary of state may not make any records in a program participant's file available for inspection or copying, other than the address designated by the secretary of state, except under the following circumstances:

- (1) If requested by a law enforcement agency, to the law enforcement agency; and
  - (a) The participant's application contains no indication that he or she has been a victim of domestic violence, sexual assault, or stalking perpetrated by a law enforcement employee; and
  - (b) The request is in accordance with official law enforcement duties and is in writing on official law enforcement letterhead stationery and signed by the law enforcement agency's chief officer, or his or her designee; or
- (2) If directed by a court order, to a person identified in the order; and
  - (a) The request is made by a nonlaw enforcement agency; or
  - (b) The participant's file indicates he or she has reason to believe he or she is a victim of domestic violence, sexual assault, or stalking perpetrated by a law enforcement employee.

And adds a new section to chapter 40.24 RCW reading as follows:

A court order for address confidentiality program participant information may only be issued upon a probable cause finding by a judicial officer that release of address confidentiality program participant information is legally necessary:

- (1) In the course of a criminal investigation or prosecution; or
- (2) To prevent immediate risk to a minor and meet the statutory requirements of the Washington child welfare system.

Any court order so issued will prohibit the release of the information to any other agency or person not a party to the order.

### **LIMITING THE OBLIGATIONS OF LANDLORDS UNDER WRITS OF RESTITUTION**

Chapter 42 (ESHB 1865)

Effective Date: June 12, 2008

Amends RCW 59.18.312. The Final Bill Report summarizes the amendments as follows:

Upon the execution of a writ of restitution, the landlord must take possession of any property of the tenant found on the premises. The landlord *may* store the property in any reasonably secure place, including on the premises, unless: (a) the tenant has requested storage by serving the landlord with a written request within three days of service of the writ of restitution (in which case the landlord *must* store the property); or (b) the tenant has objected to storage (in which case the landlord must deposit the property upon the nearest public property). The presumption that the tenant does not object to storage if the tenant is not present during the eviction is removed.

If the landlord knows that the tenant is a person with a disability and the disability (as defined by the law against discrimination) impairs or prevents the tenant from making a written request for storage, it is presumed that the tenant has requested storage unless the tenant objects in writing.

The procedures for selling and disposing stored property are changed. The threshold cumulative value of property for when a landlord must provide more notice to the tenant before selling the property is changed from \$50 to \$100. For property with a cumulative value over \$100, the landlord may sell the property (but not dispose of it) after 30 days, rather than 45 days, from the date the landlord sent notice of the sale to the tenant. The landlord may dispose of any property not sold. The notice must be delivered to the tenant's last known address.

When serving the writ of restitution, the sheriff must also serve the tenant with a form provided by the landlord in which the tenant may request the landlord to store the tenant's property. The landlord's form must substantially comply with the form created in the act.

**LEGISLATIVELY RECOGNIZING "CHIEF FOR A DAY" PROGRAM OF THE CRIMINAL JUSTICE TRAINING COMMISSION**

Chapter 69 (HB 2999)

Effective Date: June 12, 2008

The Final Bill Report describes the background and content of this act as follows:

The Legislature finds that the CJTC's participation in charitable work, such as the "Chief for a Day" program (program) that provides special attention to chronically ill children, advances the overall purposes of the CJTC by promoting positive relationships between law enforcement and the citizens of Washington.

The program is a special program where commissioners and staff partner with local, state, and federal law enforcement agencies, hospitals, and the community provide a day of special attention to chronically ill children. Each child is selected and sponsored by a law enforcement agency. The event occurs one day, annually or every other year, and may occur on the grounds and in the facilities of the CJTC. The program may include any appropriate honoring of the child as a chief, such as a certificate swearing the child in as a chief, a badge, a uniform, and donated gifts such as games, puzzles, and art supplies.

The duties and powers of the CJTC are expanded to include promoting positive relationships between law enforcement and citizens by authorizing commissioners and staff to participate in the program events. The CJTC is

authorized to accept grants and gifts and use public facilities for purposes of the events. The Executive Director of the CJTC must designate staff who may participate in the program. However, all staff and commissioners who participate in the events of the program must comply with the state's ethics rules and regulations.

## **SPECIFYING STATE AGENCIES THAT MAY ACCESS CRIMINAL HISTORY RECORD INFORMATION**

Chapter 74 (HB 2955)

Effective Date: June 12, 2008

The Final Bill Report summarizes this act as follows:

An investigative unit is established within the OAG, the DOL, the DSHS, the L&I, and the ESD. The directors of the respective agencies must employ qualified supervisory and investigative personnel for the program. The directors of the agencies, their designee, or their respective investigation units are authorized to receive state and federal criminal history record information that includes non-conviction data for purposes associated with the investigation of abuse or fraud in certain programs administered by the agency.

The L&I may access criminal history information only in the investigation of persons filing for or receiving workers' compensation benefits. The ESD may access the information for any purpose associated with an investigation of abuse or fraud in the unemployment compensation program. The DOL and the DSHS may access the information for any purpose associated with an investigation conducted by the investigation unit for public assistance or licensing. The OAG may access information for the prosecution of any act prohibited under the Consumer Protection Act.

The CJTC is authorized to receive criminal history record information, including nonconviction data, for any purpose associated with CJTC employment or peace officer certification. For a national criminal history records check, fingerprints must be submitted to the WSP. After a state criminal history search, the WSP must forward the fingerprints to the FBI for a national record check.

Dissemination or use of non-conviction data for unauthorized purposes is prohibited.

## **MODIFYING RULES OF EVIDENCE TO MAKE COMMISSION OF OTHER SEX OFFENSES ADMISSIBLE IN MORE SEX OFFENSE PROSECUTIONS**

Chapter 90 (SSB 6933)

Effective Date: June 12, 2008

Currently, Washington Supreme Court Evidence Rule 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

And Evidence Rule 404(b) currently provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The Final Bill Report for this act that adds a new section to chapter 10.58 RCW summarizes the act as follows:

Washington Superior Court Evidence Rule 404(b) is changed through an amendment to RCW Chapter 10.58. In a criminal action charging a sex offense, evidence of the defendant's commission of other sex offenses is admissible, notwithstanding Washington's Evidence Rule (ER) 404(b), if relevant to any fact in issue, if the evidence is not inadmissible under ER 403.

The prosecutor is required to disclose such prior-sex-offense evidence to the defendant at least 15 days before trial, including statements of witnesses or summaries of the substance of any testimony expected to be offered. For purposes of this exception to ER 404(b), the term "sex offense" is defined. Factors for the trial judge to consider when making the ER 403 balancing test are included in the bill.

**EXPANDING THE LIST OF CRIMES FOR WHICH DNA WILL BE TAKEN FOLLOWING A CONVICTION**

Chapter 97 (2SHB 2713)

Effective Date: June 12, 2008

Amends RCW 43.43.754 to expand the list of circumstances when DNA will be taken following conviction. In addition to conviction (or juvenile adjudication) of any felony, conviction (or juvenile adjudication) of any of the following will also trigger the taking of DNA: Assault in the fourth degree with sexual motivation (RCW 9A.36.041, 9.94A.835); Communication with a minor for immoral purposes (RCW 9.68A.090); Custodial sexual misconduct in the second degree (RCW 9A.44.170); Failure to register as sex offender (RCW 9A.44.130); Harassment (RCW 9A.46.020); Patronizing a prostitute (RCW 9A.88.110); Sexual misconduct with a minor in the second degree (RCW 9A.44.096); Stalking (RCW 9A.46.110); Violation of a sexual assault protection order granted under chapter 7.90 RCW.

DNA will also be taken from every adult or juvenile individual who is required to register under RCW 9A.44.130.

**WASPC REGISTERED OFFENDER WEBSITE: LEVEL I SEX OFFENDERS WHO FAIL TO MAINTAIN REGISTRATION ARE ADDED**

Chapter 98 (HB 2786)

Effective Date: June 12, 2008

The Washington Association of Sheriffs and Police Chiefs is required to include on its public web site, which presently includes registered kidnappers and registered Level II and III sex offenders, Level I sex offenders during that time that the Level I's are out of compliance with sex offender registration requirements.

**ADDRESSING MORTGAGE LENDING, INCLUDING CREATING NEW CRIMES**

Chapter 108 (SHB 2770)

Effective Date: June 12, 2008

In addition to adopting a number of provisions relating to licensing and other aspects of mortgage-lending practices, this act creates several new crimes in newly adopted sections in Title 19 RCW.

Section 9 creates the crime of mortgage fraud, a class B felony. Section 10 makes knowingly altering, destroying, shredding, mutilating or concealing a record (or attempting such), in an attempt to avoid prosecution for mortgage fraud, a class B felony. The statute of limitations for both new felonies is five years after the violation or three years after the actual discovery of the violation. Section 11 creates additional class B felonies for using the proceeds of mortgage fraud to obtain any interest in real property, or to obtain an interest in or control of any enterprise or real property knowing that the interest or control was obtained through a pattern or mortgage fraud. Also, mortgage fraud is added to the Criminal Profiteering Act at RCW 9A.82.010.

**ADDRESSING NON-PAYMENT OF FARES ON PUBLIC TRANSPORTATION, AND AUTHORIZING CIVIL FINES FOR NON-PAYORS**

Chapter 123 (ESHB 2480)

Effective Date: June 12, 2008

Adds new sections to chapter 35.85 and 36.57 RCW and amends RCW 35.58.020 and 35.57A.010. The Final Bill Report for this act summarizes its content as follows:

Passengers traveling on public transportation operated by PTBAs, Metros, and city-owned transits are required to pay the established fare and to provide proof of payment when requested to do so by persons designated to monitor fare payment.

Metros, PTBAs, and city-owned transits are authorized to designate persons to monitor fare payment, and to establish a schedule of civil fines and penalties for civil infractions related to fare payment violations. A civil infraction not to exceed \$250 may be issued by designated fare monitors to passengers who: fail to pay the fare; fail to provide proof of payment when requested to do so by a person designated to monitor fare payment; or refuse to leave the bus when asked by a person designated to monitor fare payment. The authority to issue civil citations for fare payment violations is supplemental to any other existing authority to enforce fare payment [such as prosecution for theft or trespass].

**ADDRESSING HIGHER EDUCATION CAMPUS SECURITY PLANS**

Chapter 168 (SSB 6328)

Effective Date: June 12, 2008

Amendment to RCW 28B.10.569 requires, "within existing resources," that institutions of higher education create and distribute campus safety plans. The plans are to cover a number of things, including mutual aid agreements and memorandums of understanding with local jurisdictions.

**ADDRESSING VEHICLES CONTAMINATED BY HAZARDOUS CHEMICALS**

Chapter 201 (2SHB 2817)

Effective Date: June 12, 2008

Amends RCW 66.44.050 and adds new sections to chapter 66.44 RCW and chapter 66.55 RCW. The Final Bill Report summarizes the act as follows:

After a local health officer has issued an order declaring a vehicle or vessel unfit and prohibiting its use due to contamination by hazardous chemicals, the city or county in which the property is located must prohibit its use, occupancy, or removal, and require demolition, disposal, or decontamination. The city, county, or local law enforcement agency may impound the vehicle or vessel.

The owner of a contaminated vehicle or vessel must have the property demolished, disposed of, or decontaminated by an authorized contractor, or under a written work plan approved by the local health officer within 30 days of

receiving an order declaring the property unfit and prohibited from use. After all procedures granting the right of notice and the opportunity to appeal have been exhausted, if the property owner has not acted, then the local health officer or the local law enforcement agency may demolish, dispose of, or decontaminate the property. If the local health officer or local law enforcement agency has taken responsibility for demolition, disposal, or decontamination, then all rights, title, and interest in the property are forfeited to the local health jurisdiction or the local law enforcement agency.

The property owner is responsible for the costs of the property's demolition, disposal, or decontamination, as well as all costs incurred by the local health officer or the local law enforcement agency, except:

- the legal owner of a vehicle or a vessel whose sole basis of ownership is a bona fide security interest is responsible for costs only if the legal owner had knowledge of or consented to any act or omission that caused contamination of the vehicle or vessel; and
- if the vehicle or vessel has been stolen and the property owner neither had knowledge of nor consented to any act or omission that contributed to the theft and subsequent contamination of the vehicle or vessel, the owner is not responsible for costs, except: (1) if the registered owner is insured, the registered owner must, within fifteen calendar days of receiving an order declaring the property unfit and prohibiting its use, submit a claim to his or her insurer for reimbursement of costs; and (2) must provide proof of claim to the local health officer or the local law enforcement agency.

The Department of Licensing must place notification on the title of contaminated vehicles and vessels declared unfit and prohibited from use by order of the local health officer. The Department of Licensing [DOL] must also place notification on the title when vehicles or vessels have been decontaminated and released for reuse.

A person is guilty of a gross misdemeanor if he or she advertises for sale or sells a contaminated vehicle or vessel that has been declared unfit and prohibited from use by the local health officer when:

- the person has knowledge that the local health officer has issued an order declaring the vehicle or vessel unfit and prohibiting its use; or
- a notification has been placed on the title that the vehicle or vessel is contaminated.

A person may advertise for sale or sell a vehicle or vessel after a release for reuse document has been issued by the local health officer or a notification has been placed on the title that the vehicle or vessel has been decontaminated and released for reuse.

A tow operator who contracts with a law enforcement agency for transporting an impounded vehicle must only remove a contaminated vehicle to a secure public facility and is not required to store or dispose of the vehicle. The vehicle must remain in the care, custody, and control of the law enforcement agency to be demolished, disposed of, or decontaminated. The law enforcement agency must pay for all costs incurred as a result of the towing if the vehicle owner does not pay within 30 days. The law enforcement agency may seek reimbursement from the owner.

**“CIVIL DISORDER TRAINING” STATUTE AMENDED TO ADD PROPERTY PROTECTION**  
Chapter 206 (SB 5868) Effective Date: June 12, 2008

This act amends RCW 9A.48.120. The Final Bill Report summarizes the background and effect of this act as follows:

Background: In 2002, the Legislature passed an anti-"civil disorder training" bill [RCW 9A.48.120] making it illegal to instruct others in how to commit violent public disturbances intended to hurt *people*. Proponents believe that this change successfully prevented hate groups from operating paramilitary training camps in Washington. But, proponents of this bill believe the existing law has a loophole, in that it does not prohibit training in how to commit violent disturbances if those violent disturbances are intended to *destroy property*.

Summary: "Civil disorder" means any public disturbance involving acts of violence that is intended to cause an immediate danger of, or to result in, significant injury to property or the person of any other individual.

**MODIFYING LAW RELATING TO IDENTITY THEFT**  
Chapter 207 (SB 5878) Effective Date: June 12, 2008

The Final Bill Report for this act's revision to chapter 9.35 RCW summarizes the background and effect of the amendments as follows:

Background: In order for a victim of identity theft to exercise certain state and federal rights, it is necessary for the victim to have a police incident report. RCW 19.182.162 requires a consumer who claims to be a victim of identity theft to have a copy of a police report filed by the consumer in order to obtain a block of a fraudulent entry on his or her credit report. By law, identity theft victims must have police reports to freeze their credit, to place long term fraud alerts on credit reports, and to obtain records of fraudulent accounts from merchants. A nationwide survey conducted by the Federal Trade Commission shows that in 2005, 19 percent of the people surveyed said police would not take their report of identity theft. Seven states, exclusive of Washington, have pending legislation to mandate the taking of identity theft reports and 15 states have the law in place.

Summary: A person who believes his or her financial information or means of identification has been illegally obtained, used, or disclosed to another to commit, aid or abet a crime, may file an incident report with a law enforcement agency that has jurisdiction over the victim's residence, place of business, or the place where the crime occurred. The law enforcement agency is directed to create a police incident report and provide the complainant with a copy of the report. The agency is authorized to refer the report to another law enforcement agency. Investigation of a report claiming identity theft is not mandated under this act and

an incident report is not required to be counted as an open case for statistical purposes.

The relevant unit of prosecution for identity theft is an unlawful use of a means of identification or financial information. A defendant may be prosecuted and punished separately for every instance the defendant unlawfully obtains, possesses, transfers, or uses the means of identification or financial information, unless the instances constitute the same criminal conduct. Whenever any series of transactions involving a single person's identification or financial information would, when considered separately, constitute identity theft in the second degree because of value, and the series of transactions are part of a common scheme or plan, the transactions may be aggregated for purposes of determining the degree of identity theft involved. If a person commits another crime during the commission of identity theft, the defendant may be prosecuted and punished separately for the other crime as well as for the identity theft.

**IMPROVING DSHS, OMBUDSMAN REVIEWS AND REPORTS REGARDING SUSPECTED-CHILD-ABUSE FATALITIES AND NEAR-FATALITIES**

Chapter 211 (2SSB 6206)

Effective Date: June 12, 2008

Makes some changes in the law regarding DSHS's conducting of and reporting (to the Office of the Family and Children's Ombudsman, to the Legislature, and to a DSHS-created public web site) in "child fatality reviews" on the unexpected death or near fatalities of children where there is apparent abuse by the child's parent.

**PROVIDING FOR DESTROYING OF JUVENILE DIVERSION RECORDS**

Chapter 221 (SHB 1141)

Effective Date: June 12, 2008

Under an amendment to RCW 13.50.050, this act requires criminal justice agencies to destroy juvenile records relating to diversion in the circumstances specified in the act.

**AUTHORIZING TRIBAL POLICE OFFICERS TO ACT AS GENERAL AUTHORITY WASHINGTON STATE POLICE OFFICERS**

Chapter 224 (EHB 2476)

Effective Date: July 1, 2008

Adds a new chapter to Title 10 RCW. The Final Bill Report summarizes the enactment as follows:

[Authority]

Tribal police officers are authorized to act as general authority Washington State Peace Officers when the appropriate tribal government meets specified requirements regarding certification, insurance liability, and administration. The appropriate tribal government must submit proof of the required certification and other information to the Office of Financial Management (OFM) for review and verification. Only when this information has been provided to the OFM are the tribal police officers authorized to act as general authority Washington State Peace Officers. The authority is granted only within the exterior boundaries of the reservation or outside the exterior boundaries of the reservation pursuant to statute: with consent of the local sheriff; in response to an emergency involving threat to human life or property; in response to a request for assistance pursuant to a mutual law enforcement assistance agreement; when transporting a

prisoner; when the officer is executing an arrest or search warrants; or when an officer is in fresh pursuit.

#### Certification

For a tribal police officer to be authorized as a general authority Washington State Peace Officer he or she must be certified pursuant to statute. The appropriate tribal law enforcement agency must have a written agreement with the CJTC and have submitted its police officers seeking certification to the same requirements as the state's certified peace officers.

The Criminal Justice Training Commission must notify the OFM in the event a tribal police officer authorized under this section is decertified or if a participating tribal government is otherwise in noncompliance with statutory requirements.

#### Insurance Liability

Tribal governments must carry liability insurance and waive sovereign immunity to the extent of such coverage so as to allow a civil action for damages in the event a tribal police officer acting in the capacity of a state peace officer commits a tort. The OFM will have discretion to determine the adequacy of coverage based on its own risk management analysis.

#### Inter-Local Requirements

Authorized tribal police officers acting in the capacity of a state peace officer must submit copies of any citation, notice of infraction, or any incident report to the appropriate local police chief or sheriff within three days. Any citations must be to Washington courts, except that any Indian cited within the exterior boundaries of the reservation may be cited to tribal court. Any citation that does not follow these requirements is unenforceable.

### **MAKING FAILURE BY AN ADULT TO REGISTER AS A SEX OFFENDER OR KIDNAPPING OFFENDER A CLASS B FELONY**

Chapter 230 (2SHB 2714)

Effective Date: June 12, 2008

The Final Bill Report summarizes the content of this act as follows:

#### Failure to Register as a Sex Offender

The penalty for felony-level Failure to Register as a Sex Offender is increased from a class C felony to a class B felony.

The Sex Offender Policy Board must review and make recommendations regarding sex and kidnapping offender registration and public notification. The review and recommendations must, at a minimum, include:

- the appropriate class of felony and sentencing designations for a conviction of Failure to Register;
- the appropriate groups and classes of adult and juvenile offenders who should be required to register;

- the duration and termination process for sex and kidnapping offender registration and public notification; and
- simplification of statutory language to allow the Department of Corrections, law enforcement, and offenders to more easily identify registration and notification requirements.

In formulating its recommendations, the Sex Offender Policy Board must review the experience in other jurisdictions and any available evidence-based research to ensure that its recommendations have the maximum impact on public safety. The Sex Offender Policy Board must report to the Governor and the Legislature no later than November 1, 2009.

### Juvenile Sentencing

For purposes of juvenile sentencing, the offense category for Failure to Register as a Sex Offender is retained at its current level, which is offense category C (offense category D for attempts, bailjumps, conspiracies, or solicitations).

## **EXPANDING METAL PROPERTY LAWS TO COVER “PRIVATE METAL PROPERTY”**

Chapter 233 (SHB 2858)

Effective Date: June 12, 2008

This act builds on provisions in chapter 19.290 RCW adopted in 2007 and digested in the July 2007 **LED** at pages 12-13. The Legislature’s Final Bill Report summarizes this 2008 act as follows:

A new category of metal property is created [in chapter 19.290. RCW] called private metal property. “Private metal property” is defined as catalytic converters, either singly or in bundles, bales, or bulk, that have been removed from vehicles for sale as a specific commodity.

Scrap metal businesses entering into a transaction to purchase or receive private metal property from a member of the general public or a commercial enterprise are subject to the same record keeping requirements and penalties as those required for transactions involving non-ferrous metal property and commercial metal property. The records that must be kept include but are not limited to: the name, date, and signature of the person with whom the transaction is made; the time, date, location, and value of the transaction; the name of the employee representing the scrap metal business in the transaction; the vehicle and license plate number of the vehicle used to deliver the private metal property; and a description of the property being purchased or received.

No scrap metal business may purchase or receive private metal property from a commercial enterprise unless that enterprise has a commercial account with the scrap metal business.

All required records must be open and available to law enforcement upon request. After notice from law enforcement that private metal property has been reported as stolen, a scrap metal business must tag and hold that property for the statutory maximum of time as directed by law enforcement.

Transactions involving private metal property valued at greater than \$30 may not be made in cash or to anyone who does not provide a street address. Similar to payments made for non-ferrous metal property, payment must be by non-transferable check no earlier than 10 days after the transaction.

Vehicle wreckers and hulk haulers that obtain metal from the components of vehicles are exempt from all of the reporting requirements that apply to scrap metal dealers and scrap metal processors.

**CIGARETTE IGNITION STRENGTH STANDARDS TO BE ENFORCED BY STATE DIRECTOR OF FIRE PROTECTION AND AGO THROUGH CIVIL PENALTY SCHEME**

Chapter 239 (2SSB 5642)

Effective Date: August 1, 2009

Beginning August 1, 2009, only reduced ignition cigarettes may be sold in Washington. Administration and civil enforcement of this act is by the Washington State Director of Fire Protection and the Washington Attorney General's Office.

**CREATING A SEX OFFENDER POLICY BOARD**

Chapter 249 (SSB 6596)

Effective Date: June 12, 2008

Creates the Sex Offender Policy Board from a broad cross-section of experts and practitioners to access and report on the performance of all components of the sex offense response systems statewide.

**PROTECTING CONFIDENTIALITY OF SUBSCRIBERS' WIRELESS PHONE NUMBERS**

Chapter 271 (2SHB 2479)

Effective Date: June 12, 2008

The Final Bill Report summarizes the content of this act as follows:

The restrictions on including wireless phone numbers in a directory [in chapter 19.250 RCW adopted in 2005] are extended to cover "directory providers." A directory provider is defined as any person in the business of marketing, selling, or sharing the phone number of any subscriber for commercial purposes.

Reasonable Investigation. Before including any phone number in a directory, a directory provider must undertake an ongoing, reasonable investigation to determine whether the number is a wireless number. A directory provider is presumed to have undertaken a reasonable investigation if the directory provider compares the phone number against a commercially available list of wireless numbers or ported numbers at least every 30 days. The directory provider also must use up-to-date, available technology when conducting its investigation.

If the investigation reveals that the number is a wireless phone number, the directory provider may not include the number in a directory, unless the subscriber of the wireless phone number has given his or her express, opt-in consent or unless an exception applies. Providers of reverse lookup services are exempt from these opt-in requirements.

Pre-existing Directories. A directory provider that has maintained a directory before the effective date of this act must within 30 days either: (1) secure the express, opt-in consent of each subscriber in the directory; or (2) remove the wireless phone numbers of any subscribers who have not provided their express, opt-in consent. These restrictions do not apply to the following: (1) a directory

provider that has conducted a reasonable investigation and is unable to determine whether the number is a wireless number; (2) a person who publishes a wireless phone number in a directory where the subscriber pays a fee to have the number published for commercial purposes; (3) a person who publishes a wireless phone number in a directory that is obtained directly from a radio communications service company where the radio communications service company has already obtained express, opt-in consent; (4) a person who publishes a subscriber's phone number that was ported from listed wireline service to wireless service within the previous 15 months; and (5) providers of reverse phone number search services. [An exception is also provided for disclosing information for responding to emergency communications.]

Reverse Phone Number Search Services. Providers of reverse phone number search services must allow a subscriber to perform a reverse phone number search for free to determine whether the subscriber's wireless number is contained in the provider's directory or database.

Subscribers may opt-out of having their wireless number included in a reverse phone number search service at any time. A violation of this requirement is a [civil] violation of the Consumer Protection Act.

Penalties. If a directory provider includes a wireless phone number in a directory without the subscriber's express opt-in consent, the directory provider may be fined up to \$50,000 for violating the act. [The Attorney General may bring such civil actions.] However, a directory provider has not violated the act if it includes a wireless number in a directory after it undertook a reasonable investigation and was unable to determine whether the number was a wireless number.

[Bracketed text added by **LED** Eds.]

## **CREATING DUTY TO REPORT FOR PERSONS WHO INADVERTENTLY DISCOVER SKELETAL HUMAN REMAINS**

Chapter 275 (E2SHB 2624)

Effective Date: June 12, 2008

Amends existing provisions aimed at preserving inadvertently discovered skeletal human remains and adds a new section to chapter 68.50 RCW (the statute addressing dead bodies). The new section includes the following subsection creating a misdemeanor:

(1) It is the duty of every person who knows of the existence and location of skeletal human remains to notify the coroner and local law enforcement in the most expeditious manner possible, unless such person has good reason to believe that such notice has already been given. Any person knowing of the existence of skeletal human remains and not having good reason to believe that the coroner and local law enforcement has notice thereof and who fails to give notice to the coroner and local law enforcement, is guilty of a misdemeanor.

Similar misdemeanor provisions are added as part of new sections in chapter 27.44 RCW (the "Indian Graves and Records Act") and chapter 68.60 RCW (the "Abandoned and Historic Cemeteries and Historic Graves Act").

## **ADDRESSING CRIMINAL STREET GANGS**

Chapter 276 (E2SHB 2712)

Effective Date: June 12, 2008

The following are excerpts from the Legislature's Final Bill Report summarizing the act:

Sentencing. The crime of Involving a Juvenile in a Felony Offense is created [in the sentencing provisions of chapter 9.94A RCW]. It occurs when an adult gang member, convicted of a felony, has compensated, threatened, or solicited a minor in order to involve that minor in the commission of the underlying felony offense. A prosecutor may file a special allegation that the felony committed involved the compensation, threatening, or solicitation of a juvenile in the commission of the felony offense. The penalty for the underlying offense is calculated by multiplying the standard sentencing range for the completed offense by 125 percent. If the new calculated standard sentence range exceeds the statutory maximum sentence for the offense, the statutory maximum sentence is the presumptive sentence unless the offender is a persistent offender.

*Aggravating Factors.* The list of aggravating factors in the Sentencing Reform Act is expanded to include any crime that is intentionally committed directly or indirectly for the benefit, aggrandizement, gain, profit, advantage, reputation, membership, or influence of a gang.

*Community Custody.* In the instance of a gang member convicted of an offense involving the unlawful possession of a firearm, the court must sentence the offender to a term of community custody.

*Malicious Mischief.* A new crime called "Criminal Street Gang Tagging and Graffiti" is created [in a new section in chapter 9A.48 RCW]. A person is guilty of Criminal Street Gang Tagging and Graffiti if he or she commits Malicious Mischief in the third degree and he or she has multiple current or prior convictions for Malicious Mischief in the third degree offenses.

When a defendant is prosecuted in a criminal action for a misdemeanor offense, other than a violation of a Criminal Street Gang Tagging and Graffiti offense, for which the person injured by the act constituting the offense has a remedy by a civil action, the offense may be compromised.

*Civil Penalties.* The same special civil penalties imposed for shoplifting and related thefts of property or services are created for offenses involving Criminal Street Gang Tagging and Graffiti. In addition to actual damages to the property, penalties and costs may be recovered by the property owner from the person causing the physical damage to the property. If the defendant is an adult or emancipated minor, those additional penalties and costs include: the value of the damaged property, to a maximum of \$1,000; a penalty of at least \$100, but not more than \$200; and reasonable attorneys' fees and court costs.

*Definitions.* The following terms are defined [in amendments to RCW 9.94A.030]:

. . .

"Pattern of criminal street gang activity" . . . :

The definitions of "criminal street gang," "criminal street gang associate or member," "criminal street gang-related offense," and "pattern of criminal street gang activity" preempt any conflicting city or county codes ordinances. Cities, towns, counties, or other municipalities may only enact laws and ordinances relating to criminal street gangs that contain definitions that are consistent with definitions in state law.

Database. The WASPC must work with the WSP to expand the use of an existing statewide database accessible by law enforcement agencies to include criminal street gang data.

...

Grants. *The Washington Association of Sheriffs and Police Chiefs' Gang Grant Program.* The WASPC must establish a gang grant program available to local law enforcement agencies with the goal of targeting gang crime.

...

Witness Relocation Program. The Department of Community, Trade and Economic Development (DCTED) must, subject to available funds, establish a temporary witness assistance grant program for witnesses of felony gang-related offenses. The DCTED must work with each local prosecuting attorney to determine how funding is to be provided to reimburse county prosecutors for providing assistance to witnesses. The DCTED must distribute agency pre-approved witness assistance grant funds to county prosecuting attorneys on a quarterly basis. Grants are limited to \$5,000 per witness or for up to a three month period.

The DOC's Study to Reduce Gang Involvement. The DOC is required to study the best practices to reduce gang involvement and recruitment among its incarcerated offenders. The study and recommendations must include intervention and successful re-entry programs for gang members seeking to opt-out of gangs. Such programs may include, but are not limited to, tattoo removal, anger management, and obtaining a GED. The DOC must provide a report on its findings to the Legislature by January 1, 2009.

**EFFECTIVE NEW YEAR'S DAY 2009: ADDRESSING IGNITION INTERLOCK LAW PROVISIONS, AND MAKING RELATED IMPLIED CONSENT LAW CHANGES**

Chapter 282 (E2SHB 3254)

Effective Date: Primarily January 1, 2009

The act addresses a number of items relating to ignition interlock and deferred prosecution in the DUI context.

Among other things, the act amends RCW 46.20.308's law enforcement implied consent warning provisions to add the following warning:

- (d) If the driver's license, permit, or privilege to drive is suspended, revoked, or denied the driver may be eligible to immediately apply for an ignition interlock driver's license.

and to add the following to the written revocation notice explanation:

that the person waives the right to a hearing if he or she receives an ignition interlock driver's license.

The act also amends the felony DUI laws to include the circumstance where a person with a prior out-of-state conviction comparable to a Washington DUI-related vehicular homicide or DUI-related vehicular assault commits a DUI (RCW 46.61.502) or physical control offense (RCW 46.61.504) in Washington.

**AUTHORIZING EMPLOYMENT LEAVE FOR VICTIMS OF DV, SEXUAL ASSAULT OR STALKING**

Chapter 286 (SHB 2602)

Effective Date: April 1, 2008

This act authorizes employment leave for victims and family members of victims of domestic violence, sexual assault, or stalking. The Washington Department of Labor and Industries is required to provide notice-posters on this new law, and employers are required to post the posters. Notice will also be provided in specified court proceedings, and notice may also be provided by prosecution/law enforcement victim/witness officers.

**REVISING SERVICE OF PROCESS PROVISIONS FOR DV PROTECTION ORDERS**

Chapter 287 (ESB 6357)

Effective Date: June 12, 2008

Amends provisions in chapter 26.50 RCW to make it easier to meet service of process requirements for permanent domestic violence protection orders. The act is known as "The Rebecca Jane Griego Act."

**CREATING TASK FORCES TO ADDRESS FINANCIAL FRAUD AND IDENTITY THEFT CRIMES**

Chapter 290 (2SHB1273)

Effective Date: June 12, 2008

Creates two task forces, one for Spokane County, and one for King-Pierce Counties, to be appointed by the Department of Community, Trade, and Economic Development. The task forces will, among other things, apply to the Department for funding to hire prosecutors and law enforcement personnel dedicated to investigating and prosecuting financial fraud and identity theft crimes.

**STUDYING EMERGENCY RESPONSE FOR HIGHER EDUCATION FACILITIES**

Chapter 293 (2SHB 2507)

Effective Date: June 12, 2008

This act requires WASPC and WSP to conduct a study of certain emergency response elements at public and private institutions of higher education in Washington.

**PROVIDING FOR ADDRESS CONFIDENTIALITY FOR VICTIMS OF TRAFFICKING**

Chapter 312 (SSB 6339)

Effective Date: June 12, 2008

Adds victims of "trafficking" to those who may apply to the Washington Secretary of State to participate in the address confidentiality program under chapter 40.24 RCW. "Trafficking" is defined as follows:

"Trafficking" means an act as defined in RCW 9A.40.100 or an act recognized as a severe form of trafficking under 22. U.S.C. Sec. 7102(8) as it existed on the effective date of this subsection, or such subsequent date as may be provided by the secretary of state by rule, consistent with the purposes of this subsection, regardless or whether the act has been reported to law enforcement.

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### **BRIEF NOTE FROM THE UNITED STATES SUPREME COURT**

**TEXAS COURTS ARE NOT REQUIRED TO COMPLY WITH PRESIDENT'S MEMORANDUM DIRECTING THEM TO GIVE EFFECT TO INTERNATIONAL COURT'S RULING UNDER THE VIENNA CONVENTION ON CONSULAR RIGHTS** - - In Medellín v. Texas, 128 S.Ct. 1346 (2008), a 6-3 majority of the U.S. Supreme Court rejects the argument of a Mexican national, capital murder defendant. The defendant raised an argument under the Vienna Convention on Consular Rights. He sought to be relieved from the ordinary time bar under the remedy of habeas corpus so that he could argue for suppression of his confession for failure of Texas officers to advise him in 1993 of his right to contact the Mexican consul. No such warning was given after his 1993 arrest before he made a Mirandized confession to his participation in the 1993 gang rapes and brutal murders of two Houston teenage girls.

After Medellín was convicted and sentenced to death, he lost his direct appeal in the Texas courts. He then raised his Vienna Convention claim in an application for state post-conviction relief. The Texas courts held that he was procedurally barred from raising the claim because he had not raised it during the direct appeal process. He then brought the claim in a federal district court, but the federal district court rejected his claim. He sought review in Fifth Circuit of the U.S. Court of Appeals.

In 2004, while Medellín's case was pending in the Fifth Circuit, the International Court of Justice ruled that the rights of Medellín and 50 other Mexican nationals on death row in Texas and other states had been violated by the courts of the U.S. The 2004 International Court ruling was that that he and others were entitled to reconsideration of their cases even though they had failed to timely meet state procedural-default rules at the time that they raised the Vienna Convention argument. On February 28, 2005, President Bush issued a Memorandum stating that the U.S. would "discharge its international obligations" under the International Court ruling "by having State courts give effect to the ruling."

After that, the Fifth Circuit rejected Medellín's argument without considering the International Court's ruling. He sought review in the U.S. Supreme Court, but he also re-filed for habeas corpus relief in the Texas state courts in light of the International Court's ruling. The U.S. Supreme Court then decided to let the Texas state courts first rule on his new state-court request for relief. The Texas state courts again ruled that Medellín's Vienna Convention argument was barred by procedural default rules, and that the Texas courts were not required to grant relief based on the Presidential Memorandum's directive. The U.S. Supreme Court then accepted review and issued this 2008 decision. The majority of the U.S. Supreme Court rules, in large part based on the constitutional separation of powers principles, that the President

could not force the Texas state courts to ignore state-law procedural-default limits on successive habeas corpus petitions.

Consistent with this 2008 decision, the U.S. Supreme Court previously ruled in 2006 in Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) **Sept 06 LED:02**, a case involving different defendants not addressed in the International Court ruling, that state default rules applied despite the Vienna Convention.

Result: Affirmance of ruling of Texas Court of Criminal Appeals rejecting the habeas corpus petition of Jose Ernesto Medellín; he remains on death row in Texas.

**LED EDITORIAL NOTE**: The May 99 LED included a relatively comprehensive article at 18-21 discussing rights of foreign nationals under Vienna Convention on Consular Relations. We explained that, where officers learn that an arrestee is a foreign national, the warnings or contact requirements should be satisfied relatively soon following custodial arrest. We also noted that the treaty does not apply where there is only a Terry seizure or routine traffic stop. We explained that the treaty extends to all foreign nationals arrested in a foreign country covered by the treaty regardless of the legality of their presence in the country where they are arrested.

For additional information and instructions and forms regarding the Treaty, the Federal Department of State's webpage link can be found on the CJTC LED webpage. The Department of State provides excellent materials that can be downloaded for use by law enforcement agencies. Also on the CJTC LED webpage is an outline by Pam Loginsky, Staff Attorney with the Washington Association of Prosecuting Attorneys. Her article contains, among discussions of other topics, a detailed discussion of the Vienna Convention treaty (the outline is titled "Confessions, Search, Seizure and Arrest: A Guide for Police Officers and Prosecutors" and is updated by Ms. Loginsky annually around the month of May).

Our most recent LED entry regarding the Vienna Convention was a report on the Ninth Circuit U.S. Court of Appeals decision that disagreed with a Seventh Circuit U.S. Court of Appeals decision as to whether a violation of the Vienna Convention will support a section 1983 civil rights suit. The Ninth Circuit held that such a violation will not support a section 1983 suit. See Cornejo v. County of San Diego, 504 F.3d 853 (9th Cir. 2007) Nov. 07 LED:02. In our notes closing the November 2007 LED entry on Cornejo, we provided additional cites to LEDs addressing cases interpreting the Vienna Convention.

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### **WASHINGTON STATE COURT OF APPEALS**

**DOC FELONY PROBATION ARREST WARRANT WOULD HAVE JUSTIFIED ENTRY OF MOM'S HOUSE IF OFFICERS HAD DEVELOPED REASONABLE SUSPICION TO BELIEVE HOUSE WAS THE WARRANT SUBJECT'S CURRENT RESIDENCE; BUT ENTRY OF A SHED IN THE BACKYARD DID NOT MEET THIS STANDARD BECAUSE OFFICERS HAD NO GROUNDS TO BELIEVE SUSPECT STAYED THERE**

State v. McKague, \_\_ Wn. App. \_\_, 178 P.3d 1035 (Div. II, 2008)

Facts and Proceedings below:

Jay McKague was the subject of an outstanding DOC felony probation violation arrest warrant. The warrant listed his address as 13849 SE Solberg Road. On two dates in the past,

apparently unspecified in the record in this case, officers had arrested Jay at a residence at 13903 SE Solberg Road where his mother lived, and where, it turned out, Jay's adult brother Ken sometimes stayed. Four deputies of the Thurston County Sheriff's Office and four CCOs for DOC decided to go the 13903 SE Solberg Road residence of Jay's mother to look for Jay. The Court of Appeals describes the facts and proceedings as they developed from that point:

[T]he officers surrounded the main house, a 10 by 10 foot shed, and a travel trailer on the property, while [the lead deputy and lead CCO] went to the front door. Patricia Schultz, Jay and Ken's mother, answered the door. "Frank explained to her why [they] were there and [that they] were looking for Jay McKague [and] she responded that he wasn't there right now. [The lead CCO] explained that [they] were going to search the residence like [they] had in the past to ensure that he wasn't there. [And they] did so." [The lead deputy] testified that he did not recall whether [the lead CCO] obtained permission to search the residence but, rather, told Schultz "that they were actually going to go inside."

[The lead deputy] also testified that [the lead CCO] did not need to ask permission because DOC operates "under different rules."

When the officers did not find Jay in Schultz's main house, they searched the outbuildings. [The lead deputy] asked Schultz if the officers would find anyone in the outbuildings, but he did not obtain her permission to search them. [The lead deputy] testified that Schultz told him "nobody should be in the travel trailer but [the officers] might run into Ken . . . in the shed in the back yard because he stays there," but she did not know if he was present at the time.

The door to the shed was closed but not locked and, therefore, [[the lead deputy]] entered it. He observed clothing and furniture, including a couch. [The lead deputy] testified that blankets were covering the space between the couch's armrest and the shed wall, and that there may have been "about a foot between the actual armrest [of the couch] and the wall and then about a foot-and-a-half between the lower part of the couch and the wall." Although [the lead deputy] did not see the blankets moving, and Jay is over six feet tall and weighs approximately 250 pounds, [the lead deputy] believed that Jay could have been hiding under the blankets. He testified that he believed Jay could have been hiding in the small space under the blankets because the side wall of the couch could have been cut out and a "person would be able to [lie] completely underneath that couch all the way to the wall, and [that he has], in fact, arrested people in that exact same scenario before."

Therefore, [the lead deputy] pulled back the blankets and found two partially open plastic grocery sacks filled with green vegetable matter that he recognized as marijuana. He also observed two full brown paper sacks under the plastic sacks and smelled an obvious odor of marijuana. [The lead deputy] then lifted up the couch to ensure that Jay was not under it and, thereafter, exited the shed. He telephonically applied for a search warrant, which was granted, and searched the rest of the outbuildings, finding additional marijuana and drug paraphernalia. When Ken subsequently arrived and acknowledged that he lived in the shed, the officers arrested him.

The trial court permitted the State to present the evidence that the officers gathered in the shed and the jury found Ken guilty of unlawful possession of a controlled substance, more than 40 grams of marijuana. The trial court sentenced him to 18 months in prison and 9 to 12 months of community custody.

[Footnotes omitted; some of the bracketed material was supplied by the Court, some by the LED Eds.]

ISSUE AND RULING: 1) Law enforcement officers assisting community corrections officers making an unconsenting entry of private premises to arrest a person named on a probation violation warrant must have, among other things, reasonable suspicion to believe that the person named on the warrant is currently a resident of the premises. Did the officers have reasonable suspicion to believe that the residence at 13903 SE Solberg Road was Jay McKague's current residence such that their unconsenting entry of the residence to search for Jay under the DOC felony probation violation arrest warrant was lawful? (ANSWER: No, they did not have reasonable suspicion to believe that the residence was Jay's current residence); 2) Even assuming for the sake of argument that the officers did have reasonable suspicion to believe that the residence at 13903 SE Solberg Road was Jay's current residence, were they justified in looking for Jay in the shed in the back yard? (ANSWER: No, they did not have reasonable suspicion that Jay was living in the shed)

Result: Reversal of Thurston County Superior Court conviction of Ken Duane McKague for unlawful possession of a controlled substance.

ANALYSIS: (The legal analysis by the Court of Appeals is a bit confusing, but it appears to be as we describe below.)

If the arrest warrant had not been a probation violation warrant but an ordinary warrant, then, under constitutional entry-to-arrest standards, the officers, in acting without a search warrant, would have been required to establish probable cause that Jay lived at 13903 SE Solberg Road, the address where they made their forcible entry, as opposed to the 13849 address listed on the arrest warrant. But because the warrant was for a probation violation, the officers were required to establish only the lower standard of reasonable suspicion (see generally Terry v. Ohio) that Jay currently lived at the place forcibly entered.

The McKague Court concludes, however, that the information that the officers possessed did not meet even the relaxed reasonable suspicion standard as to Jay's current residence. The officers' testimony that they had arrested Jay at the 13903 SE Solberg Road address twice in the past did not establish reasonable suspicion that he currently resided there. That is because the State did not provide any dates as to those arrests so as to contradict the listing on the arrest warrant of a different address of residence.

Finally, the McKague Court concludes that, even assuming that the officers had reasonable suspicion to believe that Jay was currently residing with his mother at 13903 SE Solberg Road, they did not have any reason to believe that he resided in the shed in the back yard where they found Ken's marijuana while looking for Jay. The brothers' mother told officers that they "might run into Ken . . . in the shed in the back yard because he sometimes stays there." That did not provide any basis for concluding that Jay stayed or resided there, the Court concludes.

Accordingly, because the officers did not have legal authority to enter the shed without a search warrant or consent or exigent circumstances, the plain view doctrine does not support the officers' seizure of Ken's marijuana in the shed.

## **BENCH WARRANT FOR FAILURE TO APPEAR FOR POST-CONVICTION PROBATION COURT REVIEW JUSTIFIES ARREST DESPITE LACK OF COURT FINDING OF PROBABLE CAUSE AS TO PROBATION VIOLATION**

State v. Erickson, \_\_\_ Wn. App. \_\_\_, 179 P.3d 852 (Div. I, 2008)

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

On November 16, 2006, a Lynnwood police officer made contact with Erickson. Erickson willingly volunteered his name when asked. After terminating contact, the officer entered Erickson's name into a warrant database and discovered a bench warrant issued by Lynnwood Municipal Court. The officer reinitiated contact with Erickson and arrested him based on the warrant. At the jail, the booking officer searched Erickson and discovered a baggie of cocaine.

Erickson was charged with possession of a controlled substance. He moved to suppress evidence based on his contention that the warrant was invalid due to lack of probable cause. After a CrR 3.6 hearing, the trial judge denied Erickson's motion to suppress. Erickson waived his right to a jury and stipulated to a bench trial on agreed documentary evidence. He was convicted as charged and sentenced to 90 days in jail.

[Footnote omitted]

ISSUE AND RULING: Where the bench warrant was issued for Erickson's failure to appear for post-conviction court review of a possible probation violation, did the warrant justify the arrest even though the warrant-issuing court had not made a probable cause finding as to the alleged probation violation? (ANSWER: Yes, the arrest was justified by the bench warrant)

Result: Affirmance of Snohomish County Superior Court conviction of Anthony Jay Erickson for misdemeanor possession of a controlled substance.

### ANALYSIS:

The Erickson Court's core analysis is as follows:

The bench warrant used to arrest Erickson was issued because he failed to appear at a probation review hearing following his conviction for assault in the fourth degree. Erickson had been released on probation following this conviction. While he was under the supervision of the municipal court, Erickson's probation officer filed a report alleging that Erickson had violated that probation by failing to report to the probation department upon release and failing to enroll in drug treatment. Erickson was summonsed to appear at a probation review hearing but the summons was returned because Erickson had moved and not provided the court with his new address, contrary to the terms of his probation. The municipal judge ordered a bench warrant for failure to appear at the review hearing.

It is undisputed that the municipal court record shows probable cause existed for and that Erickson was found guilty of assault in the fourth degree. Nevertheless, Erickson maintains that an additional finding of probable cause that he committed

a probation violation was required before the court could issue a bench warrant for his arrest. We disagree.

The municipal court issued a warrant not because it found that Erickson had violated his probation but because he was *convicted of assault* and subsequently failed to appear for a hearing at which the court could make a determination regarding an alleged probation violation. Failure to appear, in itself, is not a crime. Any punishment imposed for a probation violation relates to the original conviction for which probation was granted. Thus, although the alleged probation violation and subsequent failure to appear set the wheels in motion for Erickson's eventual arrest, the assault conviction was the crime underlying the issuance of the bench warrant.

A finding of probable cause for a probation violation is not required before issuing a warrant for failure to appear. As a probationer, Erickson had a right to minimum due process before his probation could be revoked, including “ ‘(a) written notice of the claimed violations of [probation or] parole; (b) disclosure ... of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence.’ ” But these requirements must be met before Erickson's probation is revoked, not before the court may issue a bench warrant for failure to appear.

[Some footnotes and citations omitted]

The Erickson Court goes on to distinguish the circumstances of this case from those in State v. Walker, 101 Wn. App. 1 (Div. II, 2000) **Aug 00 LED:14**, where the Court of Appeals held that under the Washington Court Rules a court clerk has no authority, without judicial participation, to issue a warrant to arrest a person for failing to pay a fine or appear in court on a criminal citation.

The Erickson Court also distinguishes the circumstances of this case from the circumstances in State v. Parks, 136 Wn. App. 232 (Div. I, 2006) **Feb 07 LED:23**, where the Court of Appeals held that a bench warrant issued by a judge for failure to appear for trial does not justify an arrest because the court has not yet made a finding of probable cause for the underlying charge. The Erickson Court agrees with the analysis of the Ninth Circuit Court of Appeals in U.S. v. Gooch, 506 F.3d 1156 (9<sup>th</sup> Cir. 2007) **Feb 08 LED:02** that Parks does not apply to the post-conviction circumstance of a court-issued bench warrant for failure to appear for probation review. That is because in the latter circumstance there has already been a determination by a court - - i.e., the guilty verdict or adjudication - - that the person committed the underlying offense.

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### **NEXT MONTH**

The July 2008 LED will include entries on the following recent appellate court decisions:

(1) the Washington Supreme Court's decision (May 1, 2008) in State v. Gatewood, holding that a person's surprised expression upon seeing police as they drove by a bus shelter, his subsequent furtive gesture as if hiding something, and his walking away as police approached did not add up to reasonable suspicion for a Terry stop;

(2) the Washington Court of Appeals decision (April 17, 2008) in State v. Adams, holding that that an officer was not justified in frisking a mere passenger in a stolen car whose driver was arrested for PSP; and

(3) the Washington Court of Appeals decision (April 29, 2008) in State v. Montes-Malindas, holding that the circumstances added up to pretextual stop where an officer saw persons acting suspiciously near a van, watched them from a secluded spot, then followed their van and stopped it for going a short distance without headlights on.

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### **INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCWS, AND TO WAC RULES**

The Washington Office of the Administrator for the Courts maintains a website 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/court-rules>].

Many United States Supreme Court opinions can be accessed at [<http://supct.law.cornell.edu/supct/index.html>]. This website 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/opinions.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." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address. Federal statutes are at [<http://www.law.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 2006, is at [<http://www1.leg.wa.gov/legislature>]. Information about bills filed since 1997 in the Washington Legislature is at the same address. "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 proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [<http://access.wa.gov>]. The internet address for the Criminal Justice Training Commission's home page is [<https://fortress.wa.gov/cjtc/www/led/ledpage.html>], while the address for the Attorney General's Office home page is [<http://www.atg.wa>].

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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. **LEDs** from January 1992 forward are available via a link on the Criminal Justice Training Commission's Internet Home Page [<https://fortress.wa.gov/cjtc/www/led/ledpage.html>]

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