June, 1993

HONOR ROLL

400th Session, Basic Law Enforcement Academy - February 3 through April 23, 1993

President:	*Deputy Tedd A. Betts - Lewis County Sheriff's Department*
Best Overall:	*Officer James W. Burchett - Bremerton Police Department*
Best Academic:	*Officer Steven R. Sundstrom - Seattle Police Department*
Best Firearms:	*Deputy Tedd A. Betts - Lewis County Sheriff's Department*

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Corrections Officer Academy - Class 180 - March 15 through April 9, 1993

Highest Overall:	*Officer Brenda L. Board - Benton County Corrections*
Highest Written:	*Officer David J. Renschler - Special Offender Center*
	Officer Richard L. Robinson - Washington State Penitentiary
Highest Practical Test:	*Officer Brenda L. Board - Benton County Corrections*
	Officer Stephen C. Crooks - Washington State Penitentiary
Highest in Mock Scenes:	*Officer Brenda L. Board - Benton County Corrections*
Highest Defensive Tactics:	*Officer Stephen C. Crooks - Washington State Penitentiary*

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Corrections Officer Academy - Class 181 - March 15 through April 9, 1993

Highest Overall:	*Officer Paul J. Brown - Cedar Creek Corrections Center*
Highest Written:	*Officer Paul J. Brown - Cedar Creek Corrections Center*
Highest Practical Test:	*Officer Paul J. Brown - Cedar Creek Corrections Center*
Highest in Mock Scenes:	*Officer Larry M. Cook - Twin Rivers Corrections Center*
Highest Defensive Tactics:	*Officer Sean K. Duke - Chelan County Regional Jail*

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CRIMINAL VIOLATIONS OF PRIVATE SECURITY GUARD AND PRIVATE

DETECTIVE LICENSING LAWS -- PART II

A. INTRODUCTION

This is the second part of a two-part article on the 1991 legislation establishing a statewide scheme to license and regulate private detectives and private security guards, armed and unarmed. Part One of our article in last month's LED (at 2-7) set forth key statutory language pertinent to criminal law enforcement, including definitions, exemptions and specific crimes established under chapter 18.165 RCW (regulating private detectives) and under chapter 18.170 RCW (regulating private security guards).

In Part Two this month, we will do three things: first, we will set out in a rough breakdown what we believe to be the elements of the key crimes defined under the two RCW chapters, and we will make comments on those offenses; second, we will provide some criminal law enforcement questions and answers; and third, we will provide sample copies of the licenses issued by the Department of Licensing to the various categories of persons.

Also, while we will not discuss other than in this paragraph the exemptions set forth in part and discussed in last month's entry, we will note two things about the exemptions: (1) generally only contract security employees are covered by the laws, and proprietary security employees providing services for just one employer, such as Boeing security and railroad police, are not covered by either chapter; and (2) for those who must draft citations or complaints, the absence of an exemption is not an element of the crime (see State v. Houck, 32 Wn.2d 681 (1949)).

Finally, a note about criminal prosecution. County prosecutors will no doubt have varying views regarding both the priority for prosecution under these chapters and the interpretation of some of the more ambiguous statutory provisions. We present this article simply for information purposes, and as one person's view regarding the meaning of the statute. We defer as always to the 39 county prosecutors and their deputies who must pursue any charges in court. Nothing in this article is intended as a comment about the need, or lack thereof, for an aggressive enforcement or prosecution policy under these laws. In addition, we welcome debate on any of the personal opinions offered in this article, and we emphasize that any opinions expressed are personal, and that if a formal opinion of the Office of the Attorney General is desired, that must be sought through proper channels.

B. ELEMENTS OF THE CRIMES

1. SECURITY GUARD CRIMES UNDER RCW 18.170.160 (All Gross Misdemeanors)

Crimes under subsection (1):

(i) Performing the functions and duties of a private security guard in this state
(ii) without a temporary registration card or a permanent license.

COMMENT: Based on a Court of Appeals decision under a similar statutory prohibition on brokering real estate without a license, we believe that the courts would hold that this is a strict liability crime, i.e., that there is no mental state element to the crime. See State v. Waymire, 26 Wn. App. 669 (1980).

Presenting as his or her own the license of another.

COMMENT: This is a strict liability crime and there is no apparent defense under the statute.

Attempting to use as his or her own the license of another.

COMMENT: While not carefully drafted, this crime arguably incorporates the "attempt" provisions of chapter 9A.28 RCW. If it does, then in order to obtain a conviction, one must prove a substantial step plus intent to the commit the crime.

(i) Giving false or forged evidence of any kind to the Director of the Department of Licensing
(ii) in obtaining or attempting to obtain a license under chapter 18.170 RCW.

COMMENT: This also appears to be a strict liability crime; however, the courts might read a "knowledge" element into the statute in light of the fraud aspect of this violation. Also, as noted in our last "COMMENT", the "attempt" variation on this crime may require proof of a substantial step plus intent to commit the crime.

(i) Falsely impersonating another person
(ii) who is a licensee under the security guard chapter.

COMMENT: This appears to be a strict liability crime, but as with the previous crime a "knowledge" element might be read into the "false impersonation" element.

Attempting to use an expired license or a revoked license.

COMMENT: While not carefully drafted, this crime also arguably incorporates the "attempt" provisions of chapter 9A.28. If it does, then one must show a substantial step plus intent to the commit the crime.

Violating any other provision of the security guard chapter, 18.170 RCW.

COMMENT: There are a variety of conceivable crimes based on provisions throughout chapter 18.170, but we wonder whether the courts will be enthusiastic about using this "catchall" provision to make into crimes all violations of the various technical provisions of the chapter not expressly declared to be crimes. An important enforcement question is presented under this language and the provisions of both the private security guard law (section .070) and the private detective law (section .080) which require that a person carry the proper license at all times on duty and exhibit the card upon request. We believe that a good argument can be made that failure to carry the card is a strict liability crime under each chapter, as is failure to exhibit the card upon request, but on the other hand we certainly could understand any prosecutor's reluctance to take on the test case prosecuting one of these "other provisions" violations for "failure to carry" or "refusal to show." See our further comments on this issue in the questions and answers at 6-7.

Crimes under subsection(2):

(i) Owning or operating a private security company in this state
(ii) without first obtaining a private security company license.

COMMENT: This is strict liability crime. However, there is a problem in the legislative drafting of this subsection which could easily be cured with an amendment. The problem is that the subsection does not expressly make it criminal for any company to keep operating when its license is suspended, revoked or expired. We assume that the Legislature intended that such activity be a crime. The statute to cite for these latter violations would appear to be either subsection (3) of section .250 (see below) or subsection (1) of 160 (violation of "any other provision" of the chapter -- see above) the latter of which, as noted in the comment above, is a murky area of the law.

Crimes under subsection (3):

(i) Owner or qualifying agent
(ii) of a private security company
(iii) employing a person to perform the duties of a private security guard without either a temporary registration card or a permanent security guard license.

COMMENT: This is a strict liability crime.

Crime under subsection (4):

(i) Performing the functions and duties of an armed private security guard
(ii) in this state
(iii) without a valid armed private security guard license from DOL.

COMMENT: This is a strict liability crime.

Crime under subsection (5):

(i) private security company
(ii) hires, contracts with, or otherwise engages the services of an unlicensed armed private security guard
(iii) knowing that he or she does not have a valid armed private security guard license.

COMMENT: Note the knowledge element of this crime.

Crime under subsection (6):

(i) possessing or using any vehicle or equipment which does not belong to a public law enforcement agency, and
(ii) displaying the word "police" or "law enforcement officer," or having any sign, shield, marking, accessory, or insignia that indicates that the equipment or vehicle belongs to a public law enforcement agency.

COMMENT: This is a strict liability crime.

SECURITY GUARD CRIME UNDER RCW 19.170.250 (Gross misdemeanor)

Crime under subsection (3):

(i) practice of a profession or operating a business for which a license is required by

chapter 18.170 RCW
(ii) without a license

COMMENT: This is a strict liability crime. In our comment on subsection (2) of section .160 above we noted that the earlier subsection might be inadequate for charging the security guard company where the company continues to operate after the operator's license has been suspended or revoked or has expired. Subsection .250(3) appears to address this situation. In regards to other unlicensed practice, subsection (3) of .250 seems to overlap with other provisions in section .160, and the more specific provisions of section .160 would be the better subsections for charging purposes.

2. PRIVATE DETECTIVE CRIMES UNDER RCW 18.165.150 AND 18.165.240(3)

The crimes set forth under RCW 18.165.150 exactly mirror the crimes under RCW 18.170.160 with the exception that one cannot obtain a temporary private detective license while one can obtain a temporary security guard license. With that exception then, and with the substitution of "detective" terminology for "security guard" terminology, the elements of the private detective crimes are identical to those set forth above for security guards; in the interest of saving space, we will not repeat those elements or our comments on those crimes. Similarly, RCW 18.165.240(3) mirrors RCW 18.170.250(3), and we won't repeat those elements or comments.

C. **ENFORCEMENT QUESTIONS AND ANSWERS**

Q. May a law enforcement officer make a "Terry stop" of a security guard or private detective simply to ask for his or her license?

A. No. Unless the law enforcement officer has reasonable suspicion (objective facts providing more than an inarticulable basis for believing that the person is violating this or another law), the officer may not make a forcible stop.

Q. Does it make any difference in the response to the preceding question that the private security guard or private detective is carrying a gun and hence needs a special "armed security guard" or "armed private detective" license?

A. No, the law enforcement officer needs reasonable suspicion of a violation of law in order to justify a stop.

Q. Where the officer does not make a stop but lawfully makes a "mere contact" with a security guard or private detective, may the officer ask the person to produce an appropriate license?

A. Yes, the officer may ask.

Q. May the person be charged with a crime if he or she is asked to produce the proper license card when contacted on the job as a private security officer (armed or unarmed) or as a private detective (armed or unarmed) and is unable to produce the card?

A. Probably, but it is a very close question of law. RCW 18.165.080(1) (private detectives) and RCW 18.170.070(1) (private security guards) declare that the person "shall carry" the

appropriate license card when engaged in the regulated activity. RCW 18.165.150(1) (private detectives) and RCW 18.170.160(1) (security guards) make it a gross misdemeanor to "violate any of the provisions" of the respective chapters. While we think that these sections in combination create crimes, we also recognize that a very good argument can be made that the legislature was not specific enough in making this a gross misdemeanor crime. See, for example, State v. MacRae, 101 Wn.2d 63 (1984) (throwing out a traffic prosecution under the "due care and caution" statute). We could understand prosecutors' reluctance to pursue these "violations", and we think that amendatory legislation should be considered, making both "failure to carry" and "refusal to show" violations, perhaps civil infractions. In our personal view, consideration should also be given to reclassifying some of the other violations noted above in section B as civil infractions.

Q. Is it a crime to refuse to show one's license upon request by a law enforcement officer?

A. We think so, for the same reasons as given in our last answer. Again, RCW 18.165.080(1) (private detectives) and RCW 18.170.070(1) (private security guards) and RCW 18.165.150(1) and RCW 18.170.160(1), when read together, apparently make it a crime to refuse to show the license to anyone. On the other hand, for the same reasons as we gave in our preceding answer, we recognize that a good argument can be made that the Legislature did not create a gross misdemeanor crime for refusal to show the license. A further vagueness or overbreadth defect in the "refusal to show" provision is that the statute appears to mandate showing the license to anyone who requests anytime. This provision needs legislative tightening, we believe, both for the reason of this vagueness, as well as the problem discussed in the last previous answer.

Q. What if the person provides an apparently current, valid license card but provides no other identification and refuses to answer any other questions. May the person be charged with any crime or violation?

A. No. There is nothing in any Washington statute to suggest that any crime can be charged in this situation, assuming no traffic violation or other crime is involved.

Q. What if, in the same situation, the security guard or private detective lies regarding his or her license status?

A. The person who lies to the officer in this situation can be charged with "obstructing" in our opinion. This is not a uniformly accepted view, however, and depends on the approach of your local prosecutor and judiciary to the crime of "obstructing" generally. See brief discussion re: "obstructing" in April '90 LED:16. And if the person uses an expired license or revoked license or the license of another person in this situation, he or she is subject to a charge under RCW 18.165.150(1) (private detective) or RCW 18.170.160(1) (private security).

Q. May an officer check with the Department of Licensing to determine a person's license status?

A. Yes. The officer may call (PHONE (206) 664-9072 -- security guards and (206) 664-9071 -- private detectives) during office hours (8-5, M-F) or write for status of either security guards or private detectives to the Security Guard Licensing Program, Department of

Licensing, P.O. Box 9045, Olympia, Washington 98507-9045. Status of a person ordinarily can be determined based on first name, last name and middle initial, along with the name of the employer, but it is helpful to give date of birth as well.

Q. If an officer learns through statements by the private security guard or private detective or through a check with DOL of a violation under one of the various criminal offenses defined in one of the two licensing statutes, may the officer write a citation for the gross misdemeanor on the spot?

A. Yes, if any of the unlicensed activity took place in the presence of the officer. See RCW 10.31.100. If the crime did not occur in the officer's presence, then the matter must be processed as a complaint through the prosecutor's office. Of course, if prosecutors wish as a matter of policy to process all violations through the complaint process, that is appropriate as well.

Q. If a person is carrying a firearm on the job and therefore is acting as an armed private security guard or armed private detective, and the person does not have a license to be armed issued by DOL under chapter 18.165 or 18.170, but the person does have a license under RCW 9.41.070 to carry a concealed weapon (a CCW permit), may the person be charged with a violation of chapter 18.165 or 18.170 RCW?

A. Yes. The CCW permit does not relieve the person from the duty to be properly licensed for armed business activity under these licensing statutes. The converse is true as well; the security guard or private detective license card does not authorize the person to carry a handgun concealed without a CCW permit.

Q. In the situation described in the preceding question, may the officer seize the violator's gun?

A. Yes, but the gun is just evidence of a crime. In our view, it is not subject to forfeiture for the violation of the licensing laws and ordinarily would have to be returned at the close of the case unless there is an independent reason for forfeiture. See RCW 9.41.098 authorizing forfeiture of firearms for certain specified criminal activity.

Q. May a business be cited whenever one of its security guards or private detectives is cited or charged with performing the functions and duties of the position without a license?

A. This is subject to agency-by-agency and prosecutor-by-prosecutor policy decisions, but we think that the answer is "yes". The owner or qualifying agent of a private security company may be charged under RCW 18.170.160(3) and the owner or qualifying agent of a private detective agency may be charged under RCW 18.165.150(3) in any situation involving unlicensed, unarmed activity by an individual employee of the company. If, instead, the violation is that the person is armed but does not have the necessary special license to be armed, then the charge is against the company and is under RCW 18.165.150(5) (private detective law) or RCW 18.170.160(5) (security guard law).

D. **SAMPLE LICENSES AND CARDS**

The following is a sample of the card which the security guard or private detective is required to

carry under the law:

The above sample is a license card for an "armed private detective." The licenses for "unarmed private detective," "armed security guard" and "unarmed security guard" are identical in form, except of course in the category designation.

The following is a sample of the license which is to be displayed at the place of business:

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **MIRANDA WARNINGS REQUIRED WHERE CCO TALKS TO PAROLEE AT JAIL --** In State v. Willis, 64 Wn. App. 634 (Div. III, 1992) the Court of Appeals holds that a community corrections officer's (CCO's) interview of a jailed client-parolee suspected of recent criminal activity was a

custodial interrogation that should have been preceded by Miranda warnings. The factual circumstance of Willis are described by the Court of Appeals as follows:

> At the suppression hearing, Terry Antles testified he is the community corrections officer for Mr. Willis. He saw Mr. Willis in July 1989, immediately after Mr. Willis had been released from prison. After that meeting, Mr. Antles did not see Mr. Willis until October 6, 1989, when he went to the Yakima jail to talk to him following his confinement on burglary and third degree assault charges. Mr. Antles testified his purpose in talking with Mr. Willis was to learn about Mr. Willis' activities in the community since they last met in July. He interviewed Mr. Willis in his single-person cell. Both of them sat on the bed, with a distance of about 3 feet between them. He did not advise Mr. Willis of his Miranda rights.
>
> Mr. Antles asked Mr. Willis if he had been using drugs when he was arrested on the burglary and assault charges. Mr. Willis said "yes", and Mr. Antles asked how he supported his drug habit. Mr. Willis replied he had been doing a little bit of everything. Mr. Antles asked him if he could be more specific. Mr. Willis said he had been selling marijuana, ripping people off, and stealing cars. Mr. Antles again asked him to be more specific. Mr. Willis said he remembered stealing a 1988 red Nissan truck, resulting in this conviction, and taking a stereo, Fuzzbuster, speakers, and some money out of it. According to Mr. Antles, the interview was conducted in a normal, conversational tone of voice. Mr. Willis testified Mr. Antles was upset during the interview and "hounded" him.

Result: reversal of Yakima County Superior Court conviction for taking a motor vehicle without permission.

LED EDITOR'S NOTE: This ruling does not require Miranda warnings by a CCO in a non-custodial setting such as the CCO's office. See Minnesota v. Murphy, 465 U.S. 420 (1984).

(2) **SEX OFFENDER REGISTRATION STATUTE NOT VIOLATIVE OF EX POST FACTO PROVISION --** In State v. Taylor, 67 Wn. App. 350 (Div. I, 1992) the Court of Appeals rules, 2-1, that the sex offender registration statute is predominantly regulatory rather than punitive. Therefore, application of the statute to persons who committed sex crimes before the effective date of the statute does not violate constitutional ex post facto prohibitions. Result: registration requirement imposed by King County Superior Court affirmed.

(3) **TITLE 9A DEFINITION OF "OFFICER" APPLIES TO "MISAPPROPRIATION OF RECORD" CHARGE UNDER RCW 40.16.020 --** In State v. Korba, 66 Wn. App. 666 (Div. II, 1992) the Court of Appeals holds that the broad definition of "officer" and "public officer" at RCW 9A.04.110(13) of (which include assistants, deputies, clerks, employees, etc. applies to a charge of misappropriation of a public record at RCW 40.16.020. The Court rejects defendant's argument that the narrow, common law, meaning of "officer" (which excludes deputies, assistants and employees) should apply.

Result: Pierce County Superior Court conviction for misappropriation of record affirmed (defendant, a clerk in the Vital Records Office of Pierce County -- was also convicted of third degree theft; she did not appeal that conviction).

LED EDITOR'S NOTE: While the Court of Appeals reached the correct result, the Court

should have pointed out in support of its ruling the provision at RCW 9A.04.090 which provides:

> **The provisions of chapters 9A.04 through 9A.28 RCW of this title are applicable to offenses defined by this title or another statute, unless this title or such other statute specifically provides otherwise.**

RCW 9A.04.090 thus expressly incorporates all of the definitions of chapters 9A.04 through 9A.28 RCW in the criminal provisions of all titles of the RCW unless the statute in question provides otherwise. Chapter 40.16 does not "provide otherwise."

(4) **FELONY-ELUDER WHO PRESENTED NO EVIDENCE OF LACK OF AWARENESS OF PURSUING OFFICERS COULD NOT ARGUE THAT HE WAS NOT "SUBJECTIVELY" RECKLESS --** In State v. Sampson, 65 Wn. App. 9 (Div. I, 1992) the State Court of Appeals rejects defendant's argument that under the decision in State v. Sherman, 98 Wn.2d 53 (1989) the jury in his felony-eluding trial should have been given an instruction that would have allowed him to argue that while his driving was "reckless" from an "objective" (reasonable person test) point of view, he nonetheless was not reckless from a "subjective" (individual state of mind) perspective.

Defendant claimed that he "panicked" when the police vehicle began its chase and that this panic was similar to the physiological seizure which the State Supreme Court hypothesized in the Sherman case to illustrate how a subjective rule applies. In Sherman the State Supreme Court declared that reckless driving must be both objectively and subjectively reckless. The Court in Sampson rejects Sampson's attempt to liken his claimed panic to the epileptic seizure hypothesized in Sherman, and the Court also points out that any initial panic by Sampson was short-lived, because he wilfully and wantonly continued to try to elude the pursuing officers over a 6.4 mile chase.

Result: affirmance of Whatcom County Superior Court conviction for attempting to elude a pursuing police vehicle (RCW 46.61.024).

LED EDITOR'S COMMENT:

We're not sure whether "panic" could ever justify reckless eluding behavior, but there always is a possibility that a subjective test might be applied. Therefore, investigating officers should make a special effort to get a contemporaneous statement from the felony eluder or reckless driving arrestee. This will help prevent creative defense theories at trial.

(5) **EVIDENCE INSUFFICIENT TO OVERCOME PRESUMPTION THAT EIGHT-YEAR-OLD CAPABLE OF CRIME --** In State v. K.R.L., 67 Wn. App. 721 (Div. II, 1992) the Court of Appeals rules that the State did not present sufficient evidence to overcome the presumption that an 8-year-old had criminal capacity, and therefore the juvenile's adjudication of residential burglary must be set aside.

To overcome the presumption of RCW 9A.04.050 that a child age 8 through 11 years is incapable of committing a crime (or a juvenile offense), the State must present "clear and convincing" evidence that the child had sufficient capacity, at the time the crime occurred, to understand the act and to understand that it was wrong.

The primary evidence in this case of the child's criminal capacity was that he had previously gotten in trouble on two occasions -- once for stealing other children's Easter candy and another time for taking joyrides on other children's bicycles. In the case on appeal, a residential burglary incident, the 8-year-old had broken into the house of a neighbor woman who had recently scolded him, and he had mutilated her gold-fish. The evidence that the child knew what he had done was wrong consisted primarily of his mother's testimony that he admitted that he was in the wrong after being beaten "black and blue" with a belt.

The Court of Appeals reverses the trial court's determination that criminal capacity was sufficiently proven. The Court of Appeals sees the prior incidents as being relatively innocuous behavior common to many children, and the Court questions the value of the child's remorse following a beating. Also of significance is the Court of Appeals' note that "there was no expert testimony in this case from a psychologist or other expert."

Result: Clallam County Juvenile Court adjudication of guilt for residential burglary reversed.

LED EDITOR'S COMMENT: We're not in the trenches, so we don't know what happens day to day in trial court, but based on our reading of appellate cases, we believe that in a vigorously contested case the State will have difficulty showing criminal capacity in an 8-year-old who is not a serious recidivist. We feel that in such case, the State will usually need to present expert testimony from a psychologist or other expert on criminal capacity. A similar proof problem is often presented in indecent liberties or rape cases where the theory is that the victim was not capable of consent due to mental deficiency. We think that where the government has the burden of proving someone's mental capacity "beyond a reasonable doubt" or by "clear and convincing evidence," the government will generally need to hire an expert to win a vigorously contested case.

(6) **"GROSS RECEIPTS" TERM IN LOCAL GAMBLING TAX ORDINANCE GETS PRO-TAXPAYER READING --** In TLR, Inc. v. Town of LaCenter, 68 Wn. App. 29 (Div. II, 1992) Division II of the Court of Appeals rules that the undefined term, "gross receipts," in a local gambling tax ordinance does not include amounts that would have been received from lost or stolen pull tabs and punchboard tickets if those tabs and tickets had instead been sold. The town ordinance at issue did not include a definition similar to that provided in the State Gambling Commission regulation, WAC 230-02-110, which reads as follows:

> *"Gross gambling receipts" means the monetary value that would be due* to any operator of a gambling activity for any chance taken, for any table fees for card playing, or other fees for participation, as evidenced by required records. The value shall be stated in U.S. currency, before any deductions for prizes or any other expenses. In the absence of records, gross gambling receipts shall be the maximum that would be due to an operator from that particular activity if operated at maximum capacity.

Ruling that the Gambling Commission's regulation does not apply to the local ordinance and that the ordinary meaning of "gross receipts" is more inclusive than the definition in the Commission's regulation, the Court of Appeals rules for the taxpayer -- amounts that would have been generated from lost or stolen tabs and tickets are not included in "gross receipts."

Result: Clark County Superior Court ruling for the Town of LaCenter reversed.

LED EDITOR'S COMMENT: Any municipality or county with a similar ambiguity in its gambling tax ordinance can cure it either by providing a definition along the lines of the Gambling Commission regulation, or by expressly stating that allegedly lost or stolen tabs and tickets are included in "gross receipts."

(7) **MENTALLY DISABLED DEFENDANT HELD TO HAVE VOLUNTARILY WAIVED MIRANDA RIGHTS --** In State v. Cushing, 68 Wn. App. 388 (Div. I, 1993), Division I of the Court of Appeals rules that Cushing's waiver of rights and confession to a series of violent crimes was voluntary. The Court's analysis is as follows:

> Officers read Cushing his rights at least four times and carefully explained them. They told him, for example, that his right to remain silent meant that he did not have to talk to them if he didn't want to and pointed out that there was no attorney present. They also read the waiver form to Cushing and explained it with care. **[COURT'S FOOTNOTE: Dr. Kenneth Muscatel, a licensed clinical psychologist, testified as a defense expert. He stated that when he interviewed Cushing some time after his arrest, Cushing was able to recite the Miranda warnings. Dr. Muscatel also said that Cushing had a basic understanding of those rights and knew, for example, that "remain silent" meant "not talking". Dr. Gregg Gagliardi, a psychologist at Western State Hospital, testified for the State. He discussed Cushing's particular interest in violent movies and his greater-than-average exposure to the legal procedures related to major crimes.]** The detectives spoke to Cushing in a normal, nonthreatening manner. They relied primarily on open-ended questions, showing him photographs of the various residences involved and allowing him to tell them whether he was familiar with each residence and,if so, why. The detectives did not press Cushing when he indicated that he did not remember. They offered him breaks, coffee and water and ended the interview when he said he was tired. The defendant himself concedes that the officers' actions would not intimidate or coerce a "normal" person. In fact, the precautions taken by the detectives in conducting the interview were clearly intended to take Cushing's mental impairments into account.
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> Where, as here, the defendant himself concedes that the confession would be voluntary if he were not mentally disabled, the impact of that condition on the voluntariness of the confession becomes the only issue. We have independently reviewed the videotape of Cushing's confession and agree with the trial court that his demeanor during the course of the interview, his comprehension of events, and his memory of the crimes all indicated that his participation in the interview was not the product of an overborne will. There is no indication that the detectives exploited Cushing's mental condition to obtain the confession. The video-tape also does not support Cushing's contentions that he was suffering from lack of sleep or that his confession was extracted in return for a promise that he would go to Western State Hospital or be on television. Cushing's confession was not involuntary under the totality of the circumstances even when his mental illness and retardation are considered.

[Two footnotes omitted]

LED EDITOR'S NOTE: Cushing also argued that because he had mental age under 12, the trial court should have applied RCW 13.40.140, which provides that a waiver of Miranda rights of a juvenile under the chronological age of 12 may be made only by the juvenile's parent or guardian. In rejecting this argument, the Court of Appeals notes:

> An adult [such as Cushing] whose limited intellectual and emotional development is compounded by mental illness and whose life experience is four or five times as long as that of a child is not the same as or in a position similar to a child.

Result: King County Superior Court convictions of aggravated first degree murder, attempted first degree murder, burglary, and attempted burglary affirmed.

(8) **EVIDENCE OF SUBSTANTIAL STEP SUFFICIENT TO SUPPORT ATTEMPTED MURDER CONVICTIONS --** In State v. Hale, 65 Wn. App. 752 (Div. III, 1992) the Court of Appeals holds that the following facts (as described by the Court) are sufficient evidence of -- (1) defendant's intent to cause the death of her children, and (2) a substantial step to that end. The Court holds, therefore, that the evidence supports her conviction for attempted murder:

> In February 1990, Mary Ann Hale separated from her husband. She became depressed, cried often, lost weight, and had trouble sleeping. She started taking sleeping pills. Ms. Hale told her sister she was worried about providing for her children and feared that if she became any more depressed, she would take her life and the lives of her children.
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> On March 4, Ms. Hale bought over-the-counter sleeping pills. That evening she told her children she had pills which would help their sore throats and help them sleep. She gave each child approximately 10 pills. Soon after the children went to bed, Ms. Hale called her friends, Roy and Linda Dampier. She asked for Mr. Dampier. Because he was unavailable, she told Ms. Dampier she had overdosed herself and her children because she could not stand the separation from her husband and she worried about who would care for the children. Ms. Hale asked that Ms. Dampier have Mr. Dampier come to her home the next day to find their bodies. Ms. Dampier called the sheriff. Paramedics responded and administered medication to the children and Ms. Hale. Ms. Hale and the children were taken to the hospital. Although they showed signs of confusion and delirium, they recovered. The children were discharged the following day.
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> . . .
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> At trial, the emergency room physician who treated the Hale children testified the dosage given was excessive and potentially, but not predictably, lethal.

Result: Yakima County Superior Court convictions for attempted first degree murder affirmed, but case remanded for re-sentencing based on a sentencing ruling not addressed here.

(9) **GANG MEMBERSHIP MAY BE AGGRAVATING FACTOR FOR SENTENCING PURPOSES IF MOTIVATION FOR UNDERLYING CRIME WAS TO FURTHER GANG INTERESTS --** In State

v. Smith, 64 Wn. App. 620 (Div. II, 1992) the Court of Appeals holds that under certain circumstances a criminal defendant's constitutional freedom of association is not violated by the sentencing court's consideration of the defendant's gang membership as an aggravating factor in imposing sentence. If the sentencing court finds that one of defendant's motivations for committing the crime was to further the criminal enterprises of the gang, then that may be considered as an aggravating factor. Result: Pierce County Superior Court exceptional sentence of 500 months based on Gregory Trammel Smith's convictions for first degree murder (one count) and attempted first degree murder (two counts) affirmed.

(10) **EVIDENCE SUFFICIENT TO SUPPORT CONVICTION FOR CONSPIRACY TO DELIVER CONTROLLED SUBSTANCE --** In State v. Smith, 65 Wn. App. 468 (Div. I, 1992) the Court of Appeals holds that the following facts were sufficient to support Brian D. Smith's conviction for conspiracy to deliver a controlled substance:

> On the evening of February 16, 1988, Corporal Corey Cook of the Snohomish Police Department, working undercover, agreed to purchase 50 doses of LSD from Bruce Erickson. They arranged to meet at a park-and-ride lot in the city of Snohomish.
>
> On that same evening, Smith stopped by Erickson's residence in Everett. Erickson asked Smith for a ride to Snohomish, ostensibly to meet David Hensler. Smith agreed to give Erickson a ride as Smith also wanted to see Hensler. Hensler owed Smith $600 for rent and telephone bills. Smith and Erickson arrived at the Snohomish park-and-ride lot at 8:15 p.m., in Smith's Datsun pickup. Smith drove and Erickson was in the passenger seat.
>
> Corporal Cook approached the passenger side and spoke to Erickson, asking Erickson if he had any LSD. Erickson produced a plastic bag containing LSD. Corporal Cook asked Smith if he had tried the LSD and if it was any good. Smith replied that "he was going to college at the time and he couldn't afford to get messed up, but that his wife had taken some of it, and . . . 'it really [messed] her up.'" Corporal Cook testified that he took this to refer to a beneficial quality of LSD. Corporal Cook then agreed to purchase the LSD, handed the money to Erickson, and arrested both Smith and Erickson.
>
> At the police station, Corporal Cook questioned Smith. Corporal Cook recorded the following statement in his police report.
>
>> Smith told me that he was aware that Erickson was selling me acid at the Park and Ride and said that he was in Everett at the time and had to go to Snohomish anyway and that Erickson said that he needed a ride.
>
> Smith was charged with conspiracy to deliver a controlled substance. Smith waived his right to a jury trial. At the bench trial, Corporal Cook testified that he interpreted Smith's statement that he recorded in the police report to mean that Smith was in Everett when he learned of the impending LSD sale.
>
> At the close of the State's case, Smith moved to dismiss for lack of sufficient evidence. Smith argued that there was insufficient evidence from which the trier of

fact could find all of the essential elements of conspiracy to deliver a controlled substance. The trial court denied the motion, finding that there was sufficient evidence of conspiracy because Smith agreed to assist Erickson in delivering LSD by giving Erickson a ride to Snohomish, knowing that Erickson's purpose was to sell LSD.

Smith then testified on his own behalf and stated that he had not known in advance of the sale that Erickson was going to sell LSD. Smith also denied telling Corporal Cook that his wife had used LSD.

At the conclusion of the bench trial, the court found Smith guilty of conspiracy to deliver a controlled substance because Smith "knew that Erickson's purpose was to go sell some LSD."

Result: Snohomish County Superior Court conviction for conspiracy to deliver controlled substances affirmed.

(11) **"FORCIBLE COMPULSION" ELEMENT OF SECOND DEGREE RAPE STATUTE NOT MET BY EVIDENCE --** In State v. Weisberg, 65 Wn. App. 721 (Div. II, 1992) the Court of Appeals rules that the evidence in the case did not meet the statutory definition of "forcible compulsion" under the rape statute, and therefore that the evidence did not support the defendant's second degree rape conviction.

The evidence in the case is described by the Court of Appeals as follows:

Weisberg, a 54-year-old manufacturer's representative for a clothing company, and the 39-year-old victim, P.C., were neighbors in a Vancouver, Washington apartment complex. Weisberg and his wife lived three doors away from P.C. and he occasionally would see her in the common areas of the complex and stop to chat.

On P.C.'s birthday, September 7, 1989, Weisberg offered P.C. a birthday gift -- her choice of items from the racks and boxes of sample clothing in his apartment. She was interested and the next evening, Weisberg went to her apartment door and again invited her to come to his apartment to make her clothing selection. P.C. accepted and, after calling to her roommate where she was going, willingly accompanied Weisberg to his apartment.

Once inside the Weisberg apartment, the two went upstairs to the defendant's bedroom where he kept the sample racks. As they were climbing the stairs Weisberg kissed P.C. on the cheek. In the bedroom, Weisberg helped P.C. choose two blouses and a skirt. P.C. said that she wanted to try on the items to make sure that they fit, and in order to do so, she removed her shorts and her shirt. Weisberg assisted her and he suggested the clothing would fit better if P.C. removed her underclothing. When P.C. did not immediately take off her bra and panties, Weisberg removed them for her. There is no evidence that Weisberg used any force or threatened or suggested harm to P.C. if she did not remove the undergarments. Nor did P.C. ever attempt to leave Weisberg's apartment although the uncontested evidence was that his apartment doors were not locked

> from the inside and that her apartment door was not locked from the outside. P.C. testified that she did not try to stop Weisberg because she was afraid "that he might try to hurt me or something, and I didn't want to take the chance."
>
> P.C. first tried on the blouses and then the skirt. After she removed the skirt and before she put her own clothes back on, Weisberg told her to lie down on his bed. When she said that she did not want to lie on the bed, Weisberg responded,"go ahead and lay on the bed anyway." Again, there is absolutely no evidence indicating either that Weisberg suggested or threatened harm to P.C. if she did not comply or that he used any physical force to obtain compliance.
>
> Next, Weisberg removed his clothes, rubbed P.C. with baby oil, and then had intercourse with her. When she told him to stop, that it was hurting her, he immediately stopped. He advised her to go take a shower to wash off the baby oil. P.C. showered, returned to the bedroom, dressed, and watched television in the bedroom while the defendant took his own shower. Weisberg returned to the bedroom, dressed and then went downstairs for a couple of soft drinks. The two had their drinks and watched part of a movie on television. After approximately an hour in the apartment, Weisberg escorted P.C. downstairs and out the front door. P.C. testified that before she left, "he [Weisberg] turned around and said, 'Don't say anything to anybody what I did.'"

Because this evidence could not support a finding that Weisberg used either (a) force or (b) a threat of physical injury against his victim, the Court of Appeals rules that a finding of "forcible compulsion" could not be supported by the evidence. Accordingly, the evidence did not support defendant's second degree rape conviction based on rape by forcible compulsion.
Result: Clark County Superior Court conviction for second degree rape by forcible compulsion reversed; case remanded for entry of a judgment of third degree rape based on non-consenting sexual intercourse.

(12) **PUBLIC DISCLOSURE ACT DOES NOT REQUIRE THAT POLICE DISCLOSE UNSUBSTANTIATED REPORT OF CHILD ABUSE --** In City of Tacoma v. Tacoma News, 65 Wn. App. 140 (Div. II, 1992) the Court of Appeals agrees with the City of Tacoma that a police incident report and several letters to the police regarding the subject of the incident report need not be disclosed to the Morning News Tribune under the Public Disclosure Act (RCW 42.17).

Tacoma Police had received an anonymous report of possible child abuse. The police and several other state and local agencies investigated the report but none could substantiate the allegation. Subsequently, the Tribune requested the investigative records, alleging, among other things, that the reported abuser was a public figure.

Under these facts, the Court of Appeals holds in a relatively narrow, fact-based opinion, the Public Disclosure Act does not require that the Tacoma Police Department disclose the records. The Court of Appeals declares to be significant in its analysis the fact that the allegations in the report could not be substantiated. Also of significance was the fact that the child-abuse reporting law (chapter 26.44 RCW) contains a relatively broad confidentiality provision, which, though not controlling here, reflects legislative intent to protect records of the kind before the Court here.

Finally, the Court of Appeals rejects the Tribune's argument that it had a constitutional right of

access to the records under the First Amendment. The First Amendment protects the right of the press to publish information to which the press has already gained access; it does not give the press the right of access to information, the Court of Appeals explains. The Public Disclosure Act does give the press a relatively broad right to public records, subject to certain exceptions, but this statutory right is no broader than the right of the general public to such access.

Result: Pierce County Superior Court judgment denying access to the records affirmed.

(13) **EVIDENCE IN UNDERCOVER STINGS SUFFICIENT TO SUPPORT CONVICTION FOR ATTEMPTED POSSESSION OF DRUGS EVEN THOUGH UNDERCOVER OFFICERS ACTUALLY HAD NO DRUGS; "FACTUAL IMPOSSIBILITY" NO DEFENSE TO CHARGE --** In State v. Roby, 67 Wn. App. 741 (Div. III, 1992), defendants Roby and Baker unsuccessfully challenged the sufficiency of the evidence to support their convictions for attempted possession of controlled substances. In separate incidents, each of the defendants had tried to buy cocaine from undercover officers in heavy narcotics trafficking areas in Yakima. In these transactions, neither undercover officer actually had any cocaine on his person or showed the suspects anything appearing to be cocaine. The Court's analysis of the issue of the sufficiency of the evidence is as follows:

> RCW 69.50 does not define the term "attempt". When a statute fails to define a term, the term is presumed to have its common law meaning and the Legislature is presumed to know the prior judicial use of the term. RCW 69.50.407 was enacted in 1971, prior to the 1975 enactment of RCW 9A.28.020.
>
> In 1971, the necessary elements of "attempt to commit a crime" were criminal intent and an overt act. The ordinary meaning of "intent" is the mental step of planning to achieve a goal. An overt act was understood to mean a "direct, ineffectual act done toward commission of a crime and, where the design of a person to commit a crime is clearly shown, slight acts done in furtherance of this design will constitute an attempt."
>
> . . .
>
> The facts previously noted are sufficient to support finding that Mr. Roby and Mr. Baker had a criminal intent to possess a controlled substance and an overt act toward the actual possession of a controlled substance. The fact that drugs were not actually available at the time of the act is not, contrary to the contentions of Mr. Roby and Mr. Baker, a defense. "Factual impossibility" is not a defense to an attempted crime.

Result: Yakima County Superior Court convictions and sentences for attempted possession of controlled substances affirmed.

(14) **"SUBSTANTIAL STEP" ELEMENT OF CONSPIRACY STATUTE DOES NOT REQUIRE "OVERT ACT" AS DOES "SUBSTANTIAL STEP" ELEMENT OF ATTEMPT STATUTE --** In State v. Dent, 67 Wn. App. 656 (Div. I, 1992) the Court of Appeals rules that the "substantial step" element of the conspiracy statute is different from, and easier to prove, than the "substantial step" element of the attempt statute. The Court's analysis on this issue is as follows:

> The instruction requested by the defense on the substantial step element of a conspiracy was wrong. The conspiracy statute, RCW 9A.28.040, does not define "substantial step", and as yet there are no Washington cases defining the term in the conspiracy context. We now clarify a substantial step in the context of conspiracy cases. In attempt cases, the "substantial step" element is similar to the overt act required under the former attempt statute. The "overt act" requirement ensured that a person was not punished for criminal intent alone. In contrast, "[t]he gist of [conspiracy] is the confederation or combination of minds." In conspiracy cases, the "substantial step" requirement is similar to the "overt act" requirement under federal conspiracy law:
>
> > The function of the overt act in a conspiracy prosecution is simply to manifest "that the conspiracy is at work," and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence.
>
> Even if, as Dent argues, action in pursuance of the agreement is to take action toward commission of the crime, acts of mere preparation are enough to manifest that the agreement exists and is at work. Accordingly, we hold the substantial step in conspiracy cases need not be limited to conduct which is more than mere preparation. To hold otherwise would require that every conspiracy also be an attempt. That interpretation would blur the distinction between the conspiracy and attempt statute. Dent's proposed instruction was misleading and did not inform the jury of the applicable law.

[Citations omitted]

Result: Snohomish County Superior Court conviction for conspiracy to commit first degree murder affirmed. Status: the State Supreme Court has accepted review.

LED EDITOR'S COMMENT:

We agree with the Court of Appeals that the "substantial step" evidence can be different in a "conspiracy" case than in an "attempt" case, but we would take a slightly different approach in our analysis. Maybe we are misreading the Court of Appeals' opinion, but we think the Court of Appeals' analysis might be read to mean that the phrase "substantial step" has two different meanings depending on whether one is looking at the "attempt" statute or the "conspiracy" statute. We think that a better way to support the Court's approach is to view the identical phrase, "substantial step," appearing in both statutes as having the same meaning in both statutes, but to then focus on what the step is taken towards. The "attempt" statute requires a "substantial step toward the commission of [a specific] crime," while the "conspiracy" statute requires only a "substantial step in pursuance of [the] agreement." A step "toward commission of a crime" must be more than preparatory; a step "in pursuance of an agreement" need not be.

(15) **SEATTLE "SMALL ANIMAL" ORDINANCE WITHSTANDS CONSTITUTIONAL CHALLENGE --** In Ramm v. City of Seattle, 66 Wn. App. 15 (Div. I, 1992) the Court of Appeals upholds against a broad-based constitutional attack the City of Seattle's "small animal" ordinance, which, among other things, generally limits a person living in the city in a single-family residential

structure to three small animals. Result: King County Superior Court judgment upholding the Seattle ordinance affirmed.

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LED CORRECTION NOTICE

The April '93 LED entry (at 10-13) on State v. Lee, 68 Wn. App. 253 (Div. I, 1992) ("Search Of Occupant's Pants During Narcotics Warrant Execution Unlawful") contains an error. The conviction of defendant, Robert Hill, related to cocaine that police found in the pant's search was reversed, not affirmed, as indicated in our "Result" entry at page 11. However, the defendant was convicted on another count related to evidence not connected to the pant's search, and that conviction was affirmed on appeal.

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NEXT MONTH

The July '93 LED will feature the first part of a several-part update of legislation from the 1993 Washington legislative session. The update will include a comprehensive list of all of the 1993 enactments that we believe to be of direct interest to law enforcement, and which enactments we will address over the next several months. We will also present recent case law of interest, including State v. Flora, 68 Wn. App. 802 (Div. I, 1993), a holding that a conversation between a citizen and the police in the citizen's front driveway was not "private," and therefore that the citizen's secret tape-recording of the conversation did not violate chapter 9.73 RCW.

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The Law Enforcement Digest is edited by Assistant Attorney General, John Wasberg, Office of the Attorney General. Editorial comment and analysis of statutes and court decisions expresses the thinking of the writer and does not necessarily reflect the opinion of the Office of the Attorney General or the Washington State Criminal Justice Training Commission. The LED is published as a research source only and does not purport to furnish legal advice.