Law Enforcement Digest

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HONOR ROLL

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WASHINGTON STATE SUPREME COURT

KNOCK-AND-TALK AT RESIDENCE REQUIRES SPECIAL CONSENT WARNINGS

LED EDITOR'S PRELIMINARY COMMENT: The State Supreme Court decision in Ferrier digested below is an "independent grounds" reading of the privacy protections of the Washington Constitution, article 1, section 7. The decision holds that the State could not prove "voluntariness" of a consent to search given by a resident during a "knock and talk" procedure, because the officers did not expressly inform the resident of her rights in relation to consent searches. The decision is subject to varying interpretations as to the circumstances when officers will be required to give "consent rights" warnings in order to obtain consent to search. At its narrowest credible reading, the Ferrier decision mandates that in "knock and talk" law enforcement procedures conducted at private residences, in order to obtain a voluntary consent to search, officers must first give residents a set of warnings relating to the law of consent (advising of the right to refuse, the right to revoke, and the right to limit scope).

We will explore below in further comments, beginning at page 8, whether the Ferrier decision should be given a broader reading extending its warnings requirements to other contexts beyond the residential "knock and talk" procedures, e.g., consent requests involving vehicles. We will also be commenting further in future LED's as the law enforcement community tries to sort out the ramifications of this decision.

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State v. Ferrier, ___ Wn.2d ___ (1998)

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

On April 19, 1993, two officers of the Bremerton Police Department received information from Ferrier's son, who was then in detention at the Youth Services Center in Port Orchard, that his mother was conducting a marijuana grow operation at her house in Bremerton. Because Ferrier's son had no record as an informant, the officers were unable to make any judgment about his credibility. They did, however, drive by the residence that was located at the address given to them by the youth and confirmed that a house matching the description given to them was at that location.

Possessed only with the information Ferrier's son had provided to them and knowledge of the location of Ferrier's home, the officers met with two other Bremerton police officers at a "covert police department location" to discuss a procedure whereby they could gain entry to the home. At this meeting they hatched a plan to conduct a "knock and talk" because they believed that they could not obtain a search warrant without disclosing "the name of the informant, and we could do a knock and talk without doing that."

According to one of the police officers who testified at a suppression hearing, a knock and talk is a procedure

> like any other follow-up investigation that a detective or police officer would do. You go to the door, knock on the door, make contact with the resident, ask if you can come in to talk about whatever the complaint happens to be, which in this case there's a complaint of a marijuana grow.
>
> Once you're inside, you talk about why you're there and you ask for permission to search the premises.

The officer also testified that police officers have a high rate of success in getting home dwellers to consent to a search during a knock and talk. He indicated that "[v]irtually everybody allows you in.... I would say about half of them [knock and talks] were successful in terms of the fact that we found evidence of a crime."

At the conclusion of the meeting, the four police officers proceeded to Ferrier's residence. They were all armed and each wore a black "raid jacket [ ]" which had the word "police" emblazoned in yellow letters across the front and back. Upon arriving at Ferrier's residence, two of the officers went to the back of the house in order to "secure the premises." The others proceeded to the front entrance.

The officers who initially went to the front door of Ferrier's home later testified at the suppression hearing that Ferrier opened the door in response to their knock. They said that they immediately identified themselves to Ferrier as police officers, whereupon she invited them into her house. Upon entering the front room of Ferrier's home, the officers noticed that there were two infant children in the room. According to both officers, they then radioed the officers at the rear of the home who responded by entering the dwelling. Upon their entry into the home, the 15- by

15-foot front room contained Ferrier, her two infant grandchildren and the four Bremerton police officers.

According to all three officers who testified at the suppression hearing, Ferrier was told by them that they had information that a marijuana grow operation was being conducted in the house, and that they wanted to search the home and seize the marijuana. All of these officers indicated that Ferrier was then asked to consent to a search and that they went over a "consent to search" form with her before she signed it. The form did not indicate that she had the right to refuse consent to the search. The officers conceded that Ferrier was not told by them that she had the right to refuse to consent to a search, nor was she informed of any other rights. According to these officers, the consent form was signed by Ferrier within six or seven minutes after their entry into the home.

Ferrier, according to two of the officers, eventually led them upstairs to a locked door, which she unlocked after retrieving a key. The officers then entered the previously locked room and proceeded to search it. One officer testified that Ferrier was crying during the time the police officers were searching the room. Another officer indicated that Ferrier appeared frightened and nervous throughout the entire time they were at the premises.

Ferrier's testimony about the events leading to the search of her home varied in several respects from that of the police officers. **[LED EDITOR'S NOTE: In light of the fact that the trial court rejected Ms. Ferrier's story in its findings of fact, and the Supreme Court majority does not question the evidentiary support for those findings, it is difficult to understand why the majority would consider Ms. Ferrier's apparently fabricated version of events to be pertinent.]** She testified that when the officers were at her front door they said they wanted to talk to her about her son, and that they then "stepped into the house while they said that." She also stated that "I was terrified. I was scared. They [the police officers] told me they were going to take my grandchildren to Child Protective Services." Ferrier indicated that she only signed the consent to search form "[b]ecause I didn't want them to take my grandchildren away." Ferrier confirmed that the police officers did not tell her that she could refuse to consent to a search nor did they inform her of any other rights.

The search of the upstairs room resulted in the seizure of 29 mature marijuana plants, 39 starter plants, and other evidence of a marijuana grow operation. The police officers also seized $2,120 in cash from Ferrier's purse. Ferrier was thereafter charged in Kitsap County Superior Court with manufacturing a controlled substance.

Ferrier moved, pursuant to CrR 3.6(a), to suppress all of the evidence obtained as a result of the search of her home. Following a suppression hearing, the trial court denied her motion and entered findings of fact generally consistent with the State's version of the events leading to the seizure of the marijuana and other evidence. Ferrier and the State then entered into a stipulation as to the facts and submitted them to the trial court which, following Ferrier's waiver of a jury trial, found Ferrier guilty of the charged crime. Ferrier appealed the conviction to the Court of Appeals which affirmed.

ISSUE AND RULING: Does the Washington constitution, article 1, section 7, require that where law enforcement officers employ a knock-and-talk consent procedure as a means of avoiding the need to obtain a warrant to search a residence, they must give the occupant of the residence a specialized 3-part warning? (ANSWER: Yes, rules a 7-2 majority.) Result: Reversal of Kitsap County Superior Court conviction for manufacture of a controlled substance.

ANALYSIS BY MAJORITY: The first several pages of the majority analysis sets out the majority's view that Washington constitution, article 1, section 7, provides greater protection in the context of knock-and-talk home searches than is provided under the Fourth Amendment. In this part, the majority's analysis emphasizes past Washington "independent grounds" rulings which have provided heightened protection against residential searches. Ms. Ferrier could win her case only if she could establish as a matter of law a heightened protection under the state constitution; under the federal constitution's Fourth Amendment, voluntariness does not necessarily turn on whether the person was advised of the right to refuse consent, or even on whether the person was aware of the right to refuse. There was substantial evidence in this case to support the trial court finding that Ms. Ferrier's consent was "voluntary" for purposes of the Fourth Amendment, so the consent search could be held unlawful only if it violated state constitutional standards.

At the conclusion of this first part of the majority's analysis, the majority describes the limits of Ms. Ferrier's "independent grounds" claim, and the majority explains why this limited claim is of local concern sufficient for heightened state constitutional protection:

> Ferrier does not argue that the voluntary standard of consent is unconstitutional under article I, section 7. The core of her argument is that the police here violated her expectation of privacy in her home because they conducted the knock and talk in order to search her home, thereby avoiding the general requirement that a search warrant be obtained. Indeed, Ferrier argues that the violation of her privacy right was one of the factors that made her eventual consent involuntary. This right is clearly an interest of local concern under the sixth Gunwall factor due to "[t]he heightened protection afforded state citizens against unlawful intrusion into private dwellings [that] places an onerous burden upon the government to show a compelling need to act outside of our warrant requirement."

[Citation omitted; underlines added by **LED** Ed.]

The majority opinion goes on to explain its view that the knock-and-talk violated Ms. Ferrier's privacy rights:

> Having satisfied the need for an independent analysis, we next consider whether the police violated the greater privacy protection provided by article I, section 7 in the manner in which they conducted this knock and talk procedure in an effort to obtain Ferrier's consent to search her home. It is significant to our analysis, in this regard, that it is undisputed that Ferrier was in her home when the police initiated contact with her. In addition, the officers admitted that they conducted the knock and talk in order to avoid the necessity of obtaining a search warrant authorizing a search of the home. This, especially, flies in the face of our previous admonition that " '[w]here the police have ample opportunity to obtain a warrant, we do not look kindly on their failure to do so.' " Finally, and most importantly, the officers concede that they did not advise Ferrier that she had the right to refuse to consent to a search of her home. Based on these facts, all of which were found by the trial

court, we conclude that the knock and talk, as carried out here, violated Ferrier's state constitutional right to privacy in her home and, thus, vitiated the consent she gave. This is so because she was not advised, prior to giving her consent to the search of her home, that she could refuse to consent.

Central to our holding is our belief that any knock and talk is inherently coercive to some degree. While not every knock and talk effort may be accompanied by as great a show of force as was present here, we believe that the great majority of home dwellers confronted by police officers on their doorstep or in their home would not question the absence of a search warrant because they either (1) would not know that a warrant is required; (2) would feel inhibited from requesting its production, even if they knew of the warrant requirement; or (3) would simply be too stunned by the circumstances to make a reasoned decision about whether or not to consent to a warrantless search. In this context, Ferrier's testimony, which was supported by the officers, that she was afraid and nervous seems totally reasonable. Indeed, we are not surprised that, as noted earlier, an officer testified that virtually everyone confronted by a knock and talk accedes to the request to permit a search of their home.

We wish to emphasize that we are not entirely disapproving of the knock and talk procedure, and we understand that its coercive effects are not altogether avoidable. They can, however, be mitigated by requiring officers who conduct the procedure to warn home dwellers of their right to refuse consent to a warrantless search. This would provide greater protection for privacy rights that are protected by the state constitution and would also accord with the state's Fourth Amendment burden of demonstrating, by clear and convincing evidence, that consent to a search was voluntarily given.

If we were to reach any other conclusion, we would not be satisfied that a home dweller who consents to a warrantless search possessed the knowledge necessary to make an informed decision. That being the case, the State would be unable to meet its burden of proving that a knowing and voluntary waiver occurred. As the United States Supreme Court has noted in another context: "For those unaware of the privilege, the warning is needed simply to make them aware of it -- the threshold requirement for an intelligent decision as to its exercise." Miranda v. Arizona (1965). After all, "[a]ssessments of the knowledge that the defendant possessed ... can never be more than speculation; a warning is a clear-cut fact." [citing Miranda]

In reaching the conclusion we reach here, we are aware that an argument could be made that the rule we adopt today may be somewhat redundant because an officer's request for consent to search already implies that one has the right to refuse that request. That argument is unpersuasive and self-defeating. If we assume that the right to refuse consent is implicit in the request made by the police, then there is no harm in requiring them to explicitly inform the home dweller of that fact. Furthermore, we do not believe that requiring police officers to inform residents of their right to refuse consent to the search will seriously impede the ability of the police to use the knock and talk as an investigative tool, considering that there are many cases where a suspect consented to the search after being informed of the right to refuse consent.

> We believe that the expectation of privacy in the home is clearly "one which a citizen of this state should be entitled to hold, because "the home receives heightened constitutional protection." In light of the importance that we attach to that right in Washington, we are satisfied that public policy supports adoption of a rule that article I, section 7 is violated whenever the authorities' fail to inform home dwellers of their right to refuse consent to a warrantless search. After all, as we noted earlier, we have already held that the failure to warn is a factor to be employed in assessing the voluntariness of consent under the more permissive Fourth Amendment standard. In our judgment, further protection for individuals in their home is necessary because, unlike a search warrant, a search resulting from a knock and talk need not be supported by probable cause, or even reasonable suspicion, and the constitutionality of the search might otherwise only be reviewed, if ever, months after the search was conducted at an optional CrR 3.6 suppression hearing. Moreover, unlike a search based upon a warrant, the scope of a consensual search is often not limited to specific areas.
>
> While we recognize that a home dweller should be permitted to voluntarily consent to a search of his or her home, the waiver of the right to require production of a warrant must, in the final analysis, be the product of an informed decision. **We, therefore, adopt the following rule: that when police officers conduct a knock and talk for the purpose of obtaining consent to search a home, and thereby avoid the necessity of obtaining a warrant, they must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home. The failure to provide these warnings, prior to entering the home, vitiates any consent given thereafter.**

[Some citations, footnotes, and text omitted; bolding added]

DISSENT: Justice Durham writes a dissent which is joined by Justice Guy. The dissent argues that the Court should have found no heightened state constitutional restriction on police knock-and-talk consent procedures. The dissenters argue further that the consent was voluntary under the facts of the case.

LED EDITOR'S COMMENTS:

1. Does Ferrier extend beyond "knock and talk" situations? The Ferrier decision could be "weasel-worded" to limit it to its particular facts, but such a reading would surely fail in the courts. Thus, one could make an argument superficially supported by some language in the decision that Ferrier extends only to residential "knock and talk" situations or even to only certain kinds of such residential "knock and talks." We think that such narrow readings of the decision would be doomed to failure in the courts. Because the majority opinion in Ferrier hammers away repeatedly on the theme of the special privacy protection afforded the home under the state constitution, and because the majority does not give quite the same emphasis to its concerns about the inherent coerciveness of "knock and talk" procedures, we believe that Ferrier should be read as establishing a general rule for all consent requests to search private residences, whether in a "knock and talk" setting or otherwise. [Note: However, we believe that in a residential setting where officers are

seeking only consent to enter to talk to an occupant (even if they intend to arrest the person as well), rather than to search some or all of the premises, the courts will not require the Ferrier warnings for consent to merely enter the premises.]

We hope and believe that Ferrier will not be interpreted as extending strict warnings requirements generally to all settings outside residential searches, for example, to street contacts. However, law enforcement officers in Washington should be aware that defense attorneys can find some legal ammunition in the Ferrier decision to attack every consent on voluntariness grounds (and indeed to argue that the standard for review of each and every consent is no longer one of mere voluntariness, but rather, ala Miranda, is now one of whether the consent constitutes a voluntary and knowing waiver of rights).

Accordingly, in any given consent situation, law enforcement officers probably should consider whether the courts will later see the setting as inherently coercive. For instance, if an officer on game-day stadium duty seeks consent from a football fan to look in his or her cooler, we don't think that the courts will impose the Ferrier warnings requirements. On the other hand, where an officer requests consent to search from a person who is presently in police custody, because of the inherent coerciveness of that setting, we think that the Ferrier warnings should be given regardless of the setting.

What about vehicle stops? There has been considerable recent activity in the courts regarding the issue of whether officers may, after completing the issuance of a citation, without additional reasonable suspicion beyond the traffic violation, request consent to search a vehicle. See our brief discussion of this "extended detention" issue in the March '98 LED (beginning at page 7) where we suggested that officers make a "clear break" before requesting consent -- by first advising the person that he or she is free to go. Because of the continuing controversy in regard to the practice of transforming a traffic stop into a hunch-driven consent search, we think that the better approach in this situation is to both (a) establish the "clear break" and (b) give the Ferrier warnings by use of a written consent form.

... As noted in our preliminary comments above, we will revisit this area of law in the coming months to provide our thinking and that of others as to the breadth of application of Ferrier. We are aware of only two states, New Jersey and Mississippi, which have made similar "independent grounds" readings of their state constitutions to require proof of knowing waiver of the right to refuse consent. We will address the relevant case law of those states in next month's LED.

2. What about third party consent? Washington officers should assume that any situation where first party consent is subject to the Ferrier warnings requirement also requires such warnings to obtain valid third party consent to search. Hence, in any request for third party consent to search a residence, officers should give the necessary warnings to every occupant present (see State v. Leach, 113 Wn.2d 735 (1989) Feb. '90 LED:03 which requires consent from all persons present with common authority over any fixed premises; but see also State v. Cantrell, 124 Wn.2d 183 (1994) Sept. '94 LED:05) which holds that, where it is a vehicle that is to searched, consent to search the vehicle may be obtained from any person present with authority over the vehicle.)

3. What are the required warnings? **Most Washington law enforcement agency consent-to-search forms which we have seen advise the consenting party of the right to refuse consent to search but do not advise of the right to revoke or the right to restrict scope. Such forms should now be revised per the Ferrier majority opinion to incorporate warnings as to those additional rights. The Kitsap County Deputy Prosecutor who handled the Ferrier case, Pamela Loginsky, has created a written consent search form and a warning card to meet the Ferrier requirements. With her permission, we excerpt from the Kitsap County card and form below.**

EXCERPTS FROM WRITTEN CONSENT FORM: The suggested Ferrier acknowledgments and grant of permission in the written form are as follows:

Ferrier Warnings

(1) I understand that I may refuse to consent to search.
(2) I understand that if I consent to the search, I may withdraw or revoke that consent at any time.
(3) I understand that I may limit the scope of the consent to certain areas of the premises or vehicle.
(4) I understand that evidence found during the search may be used in court against me or against any other person.

Grant of permission and further acknowledgment

I hereby grant permission to search the above listed premises and/or vehicle. The search may extend to [ ] the entire premises or vehicle or [ ] the following portions of the premises and or vehicle _____

This permission is granted without threats or promises of any kind by any police agency. The granting of this permission is a free and voluntary act.

EXCERPTS FROM WARNING CARD: Deputy Prosecutor Loginsky's suggested warnings and waiver in a warning card are as follows:

Ferrier Warnings

(1) You have the right to refuse.
(2) If you consent to the search, you have the right to withdraw or revoke the consent at any time.
(3) You have the right to limit the scope of the consent to certain areas of the premises or vehicle.
(4) Evidence found during the search may be used in court against you or any other person.

Waiver

(1) Do you understand each of these rights I have explained to you?
(2) Having these rights in mind, do you wish to allow us to search _____?

We recently circulated a copy of these draft Ferrier warnings to some law enforcement contacts. Several persons questioned why the fourth warning was included. While the fourth warning was not a part of the Ferrier majority's analysis, it seems to us to be a reasonable addition to the other three warnings. As with everything which appears in the LED, we urge consultation with prosecutors, city attorneys and legal advisors on the question of whether a fourth warning is necessary or appropriate.

4. Making a record of an oral consent. Written consent is highly preferred to oral consent, because it avoids proof problems as to what warnings were given, and because it manifests the professional and non-coercive manner in which the consent was obtained. However, where an officer obtains only oral consent to search in situations subject to the Ferrier standard, the officer should include in the incident report or supporting officer statement the fact that the necessary warnings were given to the consenting party. And, as with Miranda warnings, officers giving Ferrier warnings should always read them from a card to help avoid disputes over the sufficiency of the warnings.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) CRIMINAL PROFITEERING ACT PENALTY DOES NOT VIOLATE DOUBLE JEOPARDY – In Winchester v. Stein, 135 Wn.2d 835 (1998), the State Supreme Court rules 5-4 that a $250,000 penalty under the Criminal Profiteering Act, over and above other penalties and costs under the Act, did not violate double jeopardy.

The majority adopts the pro-state approach of the U.S. Supreme Court to "double jeopardy" analysis, as stated in Hudson v. U.S., 118 S.Ct. 488 (1997) **March '98 LED:04**. The Washington Legislature has labeled the penalty at RCW 9A.82.100 as civil, and analysis of the penalty provision under the restrictive approach of Hudson does not reveal the penalty to be criminal in nature.

Result: Reversal of Court of Appeals decision which had reversed that part of a Clark County Superior Court order which imposed a $250,000 civil penalty, in addition to granting other remedies, in a case involving murder-for-hire and other crimes brought under the Criminal Profiteering Act.

(2) SAN JUAN COUNTY ORDINANCE AGAINST MOTORIZED PERSONAL WATERCRAFT SURVIVES ATTACK – In Weden v. San Juan County, 135 Wn.2d 678 (1998), a 7-2 majority of the State Supreme Court upholds against a broad-based constitutional attack of a San Juan County ordinance which bars motorized personal watercraft on most of the waters of San Juan County. Among the challenges rejected by the Supreme Court majority were claims of preemption, abuse of police power, violation of the public trust doctrine, violation of due process, and excessive vagueness.

Result: Reversal of Whatcom County Superior Court order of summary judgment against San Juan County; remand to Superior Court for entry of summary judgment for San Juan County.

(3) AGGRAVATED FIRST DEGREE MURDER CONVICTION OF ISLAND COUNTY DEPUTY-KILLER AFFIRMED – In State v. Hutchinson, 135 Wn.2d 863 (1998), a 6-3 majority of the State Supreme Court upholds the aggravated first degree murder conviction of Darrin Hutchinson, who killed two Island County deputy sheriffs.

The Supreme Court majority opinion rejects a number of defendant's challenges to his conviction, including challenges to a discovery sanction and to jury instructions on self defense. The three dissenting Supreme Court justices object to affirmance only on the discovery sanction.

Result: Affirmance of Island County Superior Court conviction for two counts of aggravated first degree murder (and sentences to life without parole) (this decision reverses a Court of Appeals decision which would have reversed the convictions based on the self defense instruction issue).

(4) STALKING LAW HELD CONSTITUTIONAL – In State v. Lee, 135 Wn.2d 369 (1998), the State Supreme Court rules 7-2 that the stalking law at RCW 9A.46.110 is not unconstitutionally vague or overbroad. This case addressed a former version of the stalking law, but the majority's analysis demonstrates that the current version of the statute would be upheld as well.

Result: Affirmance of Court of Appeals decision affirming King County Superior Court stalking convictions of Orson Henry Lee and Brian Edward Yates (unrelated cases consolidated for purposes of appeal).

(5) FORMER SENTENCING LAW DID NOT APPLY DEADLY WEAPON ENHANCEMENTS CONSECUTIVELY – In Post Sentencing Review of Guy L. Charles, 135 Wn.2d 239 (1998), the State Supreme Court rules unanimously that under the sentencing provisions of former RCW 9.94A.310, (of the "Hard Time For Armed Crime Act"), when two or more offenses each carried deadly weapon enhancements, and defendant is sentenced for those offenses concurrently, the enhancements are not consecutive to each other but are instead concurrent to each other.

Result: Reversal of Court of Appeals decisions relating to sentences of Guy Charles and Gary Lewis; cases remanded to trial courts for resentencing.

LED EDITOR'S NOTE: It appears that the 1998 amendments to RCW 9.94A under chapter 235, Laws of 1998, change the sentencing rule for enhancements on crimes committed on or after June 11, 1998. Enhancements for deadly weapons on crimes committed on or after that date are consecutive to each other under the 1998 amendments.

(6) NO ATTORNEY FEES RECOVERABLE FROM AGENCY IN THE MIDDLE UNDER PUBLIC RECORDS ACT – In Confederated Tribes, et.al. v. Johnson, 135 Wn.2d 734 (1998), the Washington State Supreme Court unanimously rules that records showing the amount of the "community contribution" paid by an Indian tribe under the terms of a tribal-state gaming compact are subject to disclosure under the Public Disclosure Act, RCW 42.17.250-348.

Of particular note to public agencies in Washington is the court's ruling on issues regarding attorney fees and delay-penalties in the case. Upon receiving the initial records request, the Gambling Commission had determined that the records were subject to disclosure, but the Commission had given the Indian tribes an opportunity to file an action to prevent disclosure. The tribes unsuccessfully undertook such an action in this case. Under these circumstances, a 6-3 majority of the Supreme Court holds that it would be inconsistent with legislative intent to force the Gambling Commission to pay the requester's attorney fees or to pay penalties for delay attributable to the tribes' action.

Result: Affirmance of Thurston County Superior Court order for public disclosure.

(7) STATE'S CIVIL LAW BAN ON FALSE POLITICAL ADS FAILS FREE SPEECH TEST – In State of Washington v. 119 Vote No, 135 Wn.2d 618 (1998), the State Supreme Court strikes down on federal constitutional free speech grounds the state statute at RCW 42.17.530 (1)(a) banning false political advertising.

The statute prohibits any person from sponsoring a political advertisement containing a false statement of material fact, where the sponsor knows of the falsity or recklessly disregards whether the statement is false. Civil fines, court costs, attorney feels and treble damages are available in a civil enforcement action by the Washington State Public Disclosure Commission. Ruling that the statute is too broad, the Supreme Court strikes the ban on false political advertising from the law. Four separate opinions are issued, with a total of five justices concluding under two of those opinions that the statute is facially invalid under the free speech clause.

Result: Ruling declaring unconstitutionality of RCW 42.17.530(1)(a).

LED EDITOR'S COMMENT: Beware ye Washington politicians. Even though the PDC may not be able to enforce the stricken law, there is still some risk of a common law libel or slander suit for malicious false political advertisements and speech.

(8) WASHINGTON STATUTE ALLOWING SOME CHILD WITNESSES TO TESTIFY BY CLOSED CIRCUIT TV UPHELD IN CLOSE DECISION – In State v. Foster, 135 Wn.2d 441 (1998), the Washington Supreme Court upholds (against federal and state constitutional confrontation clause challenges) the validity of RCW 9A.44.150 which, in limited circumstances, permits a child witness to testify via one-way closed-circuit television rather than in the physical presence of the accused. The Court also holds that the statute was properly applied in this first degree child molestation case in which the 6-year-old victim had had great difficulty testifying while the defendant was in the courtroom with her.

The majority opinion by Justice Guy finds the state and federal constitutional confrontation provisions through different wording, to be identical in the context of analyzing statutes allowing for closed circuit TV for child witnesses, Justice Alexander writes a separate concurring opinion in which he agrees with the result (affirmance of the conviction), but he argues that the Court should have found the State and Federal constitutions to be identical. Justice Johnson writes a dissent joined by Justices Smith, Sanders, and Madsen, in which he argues: A) that the State constitution should be read to be more protective of confrontation rights than the Federal constitution, and B) that the confrontation rights of defendant Foster were violated in this case.

Result: Affirmance of King County Superior Court conviction of Boyd Allen Foster for first degree child molestation.

LED EDITOR'S COMMENT: Because there are five votes for an "independent grounds" reading of the confrontation clause of the Washington constitution, the voting in this case leaves questions regarding the circumstances when the State Supreme Court will uphold future trial court decisions to use the closed circuit TV statute.

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WASHINGTON STATE COURT OF APPEALS

SEARCH CAN'T BE JUSTIFIED AS "INCIDENT TO ARREST" IF THE SEARCH FOLLOWS AN OFFICER'S OBJECTIVELY MANIFESTED DECISION NOT TO MAKE A CUSTODIAL ARREST

State v. McKenna, ___ Wn. App. ___ (Div. II, 1998) [958 P.2d 1017]

Facts: (Excerpted from majority opinion)

> On April 26, 1996, the Cowlitz County Jail was overcrowded. As a result, it was refusing to book anyone arrested for only a nonviolent misdemeanor.
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> About 2:30 a.m., Officer [A], a Kelso police officer, saw a car drive away from what he believed to be a drug house. The car was occupied by a female driver and a male passenger.
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> [Officer A] ran a computer check on the car. The results indicated that the car's annual license tabs had expired. [Officer A] could see, however, that the car had a current tab on its rear plate.
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> Suspecting false tabs, [Officer A] pulled the car over. After ascertaining that McKenna was the driver, he asked her to produce a driver's license and insurance card. She could not, so

he ran a computer check on her and her passenger. The results indicated (a) that McKenna's driver's license was expired; (b) that McKenna did not have insurance; (c) that McKenna was wanted on an arrest warrant issued by the Longview Municipal Court for driving without a valid operator's license; and (d) that the passenger was wanted on a similar warrant.

Because of the jail situation, [Officer A] did not arrest McKenna or the passenger. Instead, he cited McKenna for not possessing a valid operator's license or proof of insurance. He also told both her and the passenger to take care of their warrants by contacting the Longview Municipal Court.

Once [Officer A] completed the citations, McKenna and her passenger were "free to go." Their car, however, was not. [Officers B, C, and D] had arrived by this time, and when [Officer B] learned that neither McKenna nor her passenger had a valid driver's license, he ordered that her car be impounded and inventoried. Eventually, the car was searched and towed away.

When McKenna learned that her car was being impounded, she asked if she could retrieve some of the personal items that were in it. The officers agreed, and she loaded a number of items into a duffel bag.

At this point, McKenna lacked transportation, and it was after 2:30 a.m. Officer [C] told her he would call her a cab or give her a ride home in his patrol car. Before she could ride in his patrol car, however, "she would have to submit to a check of her person and bag for weapons." "At this point," according to the trial court's explicit finding, "[McKenna] and her companion were free to leave."
McKenna responded to [C's] statements by agreeing that he could search the duffel bag. As [Officer C] did so, according to the trial court's finding, he was "look[ing] for weapons and ... illegal drugs." He did not find either, but he did find drug paraphernalia in the nature of a pipe, cigarette wrapping papers, and a small set of scales.

[Officer C] then told McKenna to empty her pockets. She complied by taking "a plastic film canister out of her pocket and plac[ing] it on the car." [Officer C] opened the canister, found methamphetamine, and placed McKenna under arrest for possession of a controlled substance and possession of drug paraphernalia.

[Officers' names omitted]

Proceedings: (Excerpted from Court of Appeals majority opinion)

On May 1, 1996, the State charged McKenna with illegal possession of a controlled substance, methamphetamine. She moved to suppress, and after a hearing the trial court made several findings and conclusions pertinent here.

First, the court ruled that the search of McKenna's pockets could not be justified by probable cause to arrest for possession of drug paraphernalia. The court's reason, appropriately enough, was that there is no such crime. **[LED EDITOR'S NOTE: Mere possession of drug paraphernalia is not a crime under state statutes, but local jurisdictions are free to criminalize mere possession by local ordinance.]**

Second, the court ruled that the search of McKenna's pockets could not be justified by consent. When McKenna handed the duffel bag to Officer [C], she was "knowingly and voluntarily consent[ing] to a search of her bag for weapons," but she was not consenting to a search of her person for weapons or anything else. As a result, McKenna did not "take the plastic film canister out of her pocket as part of [a] consensual search of her person. Rather, she took it out of her pocket upon the order of Officer [C]."

> Third, the court ruled that the search of McKenna's pockets could be justified on the ground that it was "a valid search incident to an arrest ... that Officer [C] could have made on the outstanding Longview Municipal Court warrant." It was legally insignificant, the trial court thought, that no such arrest had actually been made. Based on this reasoning, the trial court denied the motion to suppress.
>
> After her motion to suppress had been denied, McKenna stipulated to the facts of the case and submitted to a bench trial. She was convicted, and this appeal followed.

[Officer's name omitted]

ISSUE AND RULING: Was the search justified as a "search incident to arrest" even though the officers had already clearly manifested to Ms. McKenna their intent to not make a custodial arrest? ANSWER: No, rules a 2-1 majority) Result: Reversal of Cowlitz County Superior Court conviction for possession of methamphetamine.

ANALYSIS BY MAJORITY: (Excerpted from majority opinion)

> It is undisputed that when Officer [C] ordered McKenna to empty her pockets, he was conducting a warrantless search of her pockets. The trial court implicitly so found, and the State does not assail its findings. The issue, then, is whether [Officer C]'s search of McKenna's pockets was justified under the Fourth Amendment to the United States Constitution.
>
> The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." It "prohibits warrantless searches unless the search is justified under an established exception to the warrant requirement." The State bears the burden of proving that a warrantless search falls under an established exception.
>
> Two established exceptions are a search conducted with consent and a search incident to valid arrest. The State does not rely on consent, nor does it assign error to the trial court's finding that McKenna did not consent to a search of her person. The State does, however, argue search incident to a valid arrest.
>
> According to the United States Supreme Court, the search-incident exception has historically involved two questions: (1) May a search be made of the arrestee's person? (2) May a search be made of the area within the arrestee's control?
>
> The first of these questions is the one involved here. Without additional cause, an officer may search the person of an arrestee incident to a lawful custodial arrest. The arrest need not precede the search, but it must be contemporaneous with the search. The officer must have probable cause to arrest before commencing the search, which is also to say that the arrest cannot be justified by the fruits of the search. The reasons for allowing the search are to protect the officer and prevent the destruction of evidence, or, put another way, to find and control weapons and evidence that might be on the person of the arrestee. It is thought that while the officer transports the arrestee to jail, the arrestee will have both motive and opportunity to use any weapon that might be on his or her person, and also to destroy any evidence that might be on his or her person.
>
> Although an officer may search incident to a lawful custodial arrest, he or she may not search incident to a lawful non custodial arrest. It is thought that the officer and arrestee will be in close proximity for only a few minutes, and the arrestee, who is about to be released anyway, will have little motivation to use a weapon or destroy evidence. The officer may pat the arrestee for weapons if he or she reasonably suspects the arrestee is armed.

The right to search incident to a lawful custodial arrest, once acquired, terminates no later than when the officer announces that the arrestee will be released rather than booked. Thereafter, the situation is the same as a noncustodial arrest, in that the arrestee will have little motivation to use a weapon or destroy evidence, and the officer will have little need to conduct a full search of the person. The officer may still pat for weapons if he or she reasonably suspects that the arrestee/releasee is armed.

In this case, [Officer A] arrested McKenna, and [Officer C] did also. Our task is to analyze whether either arrest supports [Officer C]'s search of McKenna's pockets under the principles just set forth. We begin with [Officer A]'s arrest.

[Officer A]'s arrest of McKenna will not support [Officer C]'s search of McKenna's pockets for at least two reasons. First, it was noncustodial. [Officer A] knew the jail situation, and because of it, he never formed an intent, much less manifested an intent, to arrest McKenna custodially. Perhaps this is best illustrated by the fact that after he learned of the outstanding warrants, he told both McKenna and her passenger to contact the municipal court on their own.
Second, [Officer A]'s arrest of McKenna terminated before [Officer C] searched McKenna's pockets. It is virtually undisputed, based on the officers' intent and also their objective manifestations, that McKenna was free to go once [Officer A] finished writing citations. Indeed, [Officer C] was offering to give her a ride home when he suggested that he search her bag and her person. Even if [Officer A]'s arrest could somehow be considered custodial, so that it could support a search-incident at some earlier point in time, it cannot support a search- incident after McKenna had been told she was free to go.

Likewise, [Officer C]'s arrest of McKenna will not support a search-incident because it was based only on the fruits of the search itself. The drug paraphernalia in the duffel bag did not give cause to arrest, because mere possession of drug paraphernalia is not a crime. **[LED EDITOR'S NOTE: Again, note that local jurisdictions are free to adopt local ordinances making mere possession of drug paraphernalia a crime.]** Like [Officer A], [Officer C] knew the jail was overcrowded, and that the officers were not going to arrest McKenna custodially, outstanding warrants notwithstanding. The record is devoid of any other reason to arrest, except the methamphetamine that was the fruit of the challenged search, and that may not be used to justify the challenged search.

If we perceive correctly, the dissent does not dispute that [Officer A]'s arrest ended when McKenna was told she could go. Nor does it dispute that [Officer C]'s arrest was based solely on the fruits of the disputed search. It reasons, however, (1) that the officers could have arrested McKenna on warrants, and (2) that what they could have done, as opposed to what they did do, makes [Officer C]'s search of McKenna's pockets a search incident to arrest. This reasoning is erroneous because, according to both United States Supreme Court and the Washington Supreme Court, a search can be incident to arrest only when the search and arrest are reasonably contemporaneous. When they are, it does not matter which comes first, but when they are not, the search is not incident to the arrest.

The State relies on State v. Brantigan [59 Wn. App. 481 (Div. I, 1990) **[Feb '91 LED:05]**] Its reliance, however, is misplaced. If Brantigan is good law, it stands at most for two propositions: (1) An arrest will be treated as custodial where the officer (a) had probable cause to make a custodial arrest; (b) announced the arrestee was under arrest; but (c) failed to announce whether the arrest was custodial or noncustodial. (2) An otherwise lawful custodial arrest will support a search incident to it, provided that the evidence does not show an unconditional decision to release prior to the officer's making the search. Neither of these propositions is helpful here, where the custodial/noncustodial nature of the various arrests is plain, and where the uncontroverted evidence shows that [Officer A], [Officer C] and the

> other officers released McKenna and her passenger well before [Officer C] searched McKenna's pockets.
>
> **Although we decline to rely on Brantigan, nothing herein means that a trial court must suppress evidence when an officer (a) arrests a defendant with probable cause to make a custodial arrest; (b) conducts a search contemporaneous with the arrest; but (c) for objectively manifested reasons arising after the search (e.g., being called to another, more pressing emergency), does not actually take the defendant into custody. We have no occasion to consider such a situation in deciding this case. [LED EDITOR'S NOTE: See LED Editor's comment below regarding the limited extent of the McKenna ruling.]**
>
> Summarizing, we hold that Officer [Officer A]'s arrest did not justify the challenged search because it was noncustodial, and because it ended before the challenged search occurred. We hold that Officer [Officer C]'s arrest did not justify the challenged search because it had no basis except the fruits of the challenged search. The dissent notwithstanding, the fact that an arrest could have been made, but was not made, is immaterial; what is material is the fact that the challenged search was not accompanied by a contemporaneous arrest (except the arrest based on the fruits of the challenged search, which cannot be used to justify the challenged search). The motion to suppress was well taken, and McKenna's conviction is hereby reversed.

[Most citations and footnotes omitted; officers' names omitted; bolding and **LED** Editor's Notes added]

DISSENT: Judge Hunt dissents from Judge Morgan's majority decision. Based on State v. Brantigan, 59 Wn. App. 481 (Div. I, 1990), **Feb '91 LED:05** she argues that the officer's intent whether or not to make a custodial arrest is irrelevant, because the test for lawfulness of an arrest is purely objective. Here, the officers had authority to arrest on a warrant. Then Judge Hunt points out that, so long as the arrest has valid support, a search can be "incident to lawful arrest" even if the search occurs just before the arrest rather than just after the arrest.

LED EDITOR'S COMMENT: The majority opinion in McKenna should be read narrowly. We agree with that part of the majority opinion which rejects the search under an objective test for "arrest". When Officer A told Ms. McKenna that she was to take care of the arrest warrant on her own, he in effect was announcing that she was not under arrest. In our view, under an objective view, she was not under arrest at that point, and nothing done later by Officer C objectively manifested that Ms. McKenna's status changed at the time that the search occurred. Thus, while there is one reference to officer-intent in Judge Morgan's majority opinion, this should not be seen as a case about officer intent (which we read to be irrelevant under the controlling case law), nor should it be viewed as a case barring a contemporaneous search which momentarily precedes a valid probable cause arrest or a valid warrant arrest (which would be lawful). Instead, we believe McKenna should be viewed as a case about a search of a non-arrested person (which is not permitted unless there is consent).

MIP CONVICTION AFFIRMED -- ID CARD ADMISSIBLE AS "PUBLIC RECORD"

State v. C.N.H., 90 Wn. App. 947 (Div. I, 1998)

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

> At 2 a.m. on July 19, 1996, a police officer for the Mercer Island Police Department noticed a car pull into a park and ride lot. He knew that no buses ran between 11 p.m. and 5 a.m., and a sign at the entrance warned that the lot was open only to Metro riders. The officer also knew that criminal activity had taken place in the lot in the past, so he watched as the car parked next to another vehicle. When he did not see any activity for 5 minutes, he approached the car. The driver opened his door, and the officer immediately smelled

alcohol and noticed opened beer bottles. The occupants of the car appeared to be juveniles. C.N.H. was in the back seat. She denied that she had been drinking, but when she blew in the officer's face, he smelled alcohol. The officer asked for her identification, and she produced a Washington State Identification card that showed she was 16 years old.

C.N.H. was charged by information with one count of minor in possession of liquor. At the fact-finding, the State introduced a certified copy of C.N.H.'s state-issued ID card to prove that she was younger than 21 years old. She objected, arguing that the document was inadmissible hearsay. The court overruled the objection, admitted the document, and found her guilty as charged. C.N.H. moved for revision based on the admission of the copy of her ID card, but the motion was denied.

ISSUE AND RULING: Was the ID card admissible evidence under the public records hearsay exception of RCW 5.44.040? (ANSWER: No) Result: Affirmance of King County Superior Court juvenile adjudication for MIP of C.N. Hoflack.

ANALYSIS: (Excerpted from Court of Appeals opinion)

RCW 5.44.040 provides that certified copies of public records may be admissible as an exception to the hearsay rule. To be admissible, a document prepared by a public official must (1) contain facts, rather than conclusions that involve the exercise of judgment or discretion or express an opinion, (2) relate to facts that are of a public nature, (3) must be retained for the benefit of the public, and (4) there must be express statutory authority to compile the report.

C.N.H.'s ID card contained facts, rather than conclusions involving the exercise of judgment, discretion, or opinions. It related to facts that are of a public nature, including her date of birth. The information on the card was retained for the benefit of the public. And, the Department of Licensing has express statutory authority to issue ID cards and is required to record the cardholder's birth date.

Thus, the certified copy of C.N.H.'s ID card satisfied the requirements for admission of public records under RCW 5.44.040. *[Court's footnote: Even if the document admitted was a Washington State driver's license the outcome would be the same. See RCW 46.01.040(13) and RCW 46.20.161 (the Department of Licensing is vested with all powers with respect to driver's licenses, which includes recording drivers' birthdates because that information must be stated on licenses).]* Moreover, C.N.H. did not challenge the accuracy of the record. Had she done so, the question presented would be different. But under the circumstances, the trial court did not err in admitting the copy of her ID card.

[Case citations, some footnotes omitted]

UNDER MIP LAW, "PUBLIC PLACE" DOES NOT INCLUDE BACK PATIO OF RESIDENCE

State v. S.E., 90 Wn. App. 886 (Div. I, 1998)

Facts (Excerpted from Court of Appeals opinion)

At S.E.'s adjudicatory hearing, testimony established that the police responded to a dispatch that there was a burglary in progress at an apartment complex. When police approached S.E., he was standing on the back patio area of a ground floor apartment. Police described the area as a little alcove with a glass slider.

Proceedings: (Excerpted from Court of Appeals opinion)

S.E. moved to dismiss the charge of minor in possession of liquor because the State had failed to prove that he was in a public place when he was found to be intoxicated. The

> juvenile court denied the motion, finding that the entire area outside the four walls of the apartment was a public place. The court noted that "it is very clear that this is a walk-through walkway area between the two complexes, patio going out to the common area."

ISSUES AND RULINGS: (1) For purposes of the MIP statute, RCW 66.44.270(2)(b) (prohibiting minor appearing in public place exhibiting the effects of having consumed liquor), was S.E. located in a "public place" at the point when the officer contacted him? (ANSWER: No); (2) Was the prosecutor's charging document worded broadly enough to allow S.E.'s conviction to stand under a theory that he had violated RCW 66.44.270(2)(a) (minor possessing, acquiring or consuming liquor)? (ANSWER: No) Result: Reversal of King County Superior Court adjudication of juvenile for MIP violation.

ANALYSIS:

(1) "Public place"

RCW 66.44.270(2)(b) provides that it is unlawful for a person under age 21 "to be in a public place...while exhibiting the effects of having consumed liquor." RCW 66.04.010 defines "public place" as follows (bolding added by LED Editor.):

> The list of places specifically classified as public places includes streets and alleys of incorporated cities and towns; state or county or township highways or roads; buildings and grounds used for school purposes; public dance halls and grounds adjacent thereto; those parts of establishments where beer may be sold under this title, soft drink establishments, public buildings, public meeting halls, lobbies, halls and dining rooms of hotels, restaurants, theaters, stores, garages and filling stations which are open to and are generally used by the public and to which the public is permitted to have unrestricted access; railroad trains, stages, and other public conveyances of all kinds and character, and the depots and waiting rooms used in conjunction therewith which are open to unrestricted use and access by the public; publicly owned bathing beaches, parks, and/or playgrounds **and all other places of like or similar nature to which the general public has unrestricted right of access, and which are generally used by the public.**

The Court of Appeals disagrees with the juvenile court's determination that S.E. had been located in a "public place" when the officer contacted him. The Court of Appeals explains:

> According to the State, the juvenile court found that S.E. was located by police on a walk-through walkway. The State argues that a walk-through walkway easily fits within the statutory definition of public place. We reject this argument on two grounds. First, although the juvenile court referred to the general area in which S.E. was found as a walk-through walkway, it found that S.E. was located on the back patio of the residence, and that the patio was one "going out to the common area." Second, a common area walkway in an apartment complex also does not fit the statutory definition of public place because it is not a place to which the general public has "unrestricted right of access", or which is "generally used by the public."

(2) Alternative basis for MIP charge

The prosecutor argued in the alternative in the S.E. case that the charging document was worded broadly enough to allow the adjudication to be supported by evidence that S.E. had possessed, acquired, or consumed liquor in violation of subsection (2)(a) of RCW 66.44.270. Under that subsection, the State would not need to prove the minor was located in a public place. Instead, the State would be required to prove only that the minor had possessed, acquired or consumed liquor. However, the Court of Appeals holds that the charging document was focused solely on the subsection (2)(b) appearing-in-a-public-place variation of MIP, and therefore the adjudication must be reversed and the charge must be dismissed.

CHILD MOLESTER LOSES ARGUMENTS ON "HUE AND CRY" HEARSAY EXCEPTION, COUNSELOR-PATIENT PRIVILEGE, RIGHT-OF-CONFRONTATION, AND CORPUS DELICTI RULE

State v. Ackerman, 90 Wn. App. 477 (Div. III, 1998)
Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> On February 2, 1996, the State charged Mr. Ackerman with one count of second degree child molestation. The information alleged that between October 1, 1994, and October 9, 1995, Mr. Ackerman molested P.K., his stepdaughter, who was born November 25, 1981.
>
> The court held hearings on several pretrial motions. The court determined that P.K. was unavailable to testify so the State could introduce certain hearsay statements at trial. The court also admitted Mr. Ackerman's confession. Although he contended the admission of his confession violated the corpus delicti rule, the court concluded the rule was met by the admissible hearsay statements.
>
> Finding P.K. unavailable, the court considered the admission of several hearsay statements under the fact of complaint doctrine. One of P.K.'s classmates testified P.K. told her in October 1995 that she had been sexually abused. Another classmate said P.K. informed him in November or December 1995 that she was abused. P.K.'s school counselor also testified that in October 1995, P.K. said she had been abused. Under the fact of complaint doctrine, the court admitted these hearsay statements. It also permitted Melinda Stafford, P.K.'s treatment counselor, to testify. Ms. Stafford stated P.K. told her that Mr. Ackerman had fondled her breasts over the last year. The court admitted this testimony under the medical treatment exception.
>
> Mr. Ackerman waived his right to a jury. At the conclusion of bench trial, the court found Mr. Ackerman guilty of second degree child molestation.

ISSUES AND RULINGS: 1) Was the hearsay testimony of P.K.'s classmates and her school counselor admissible under the "hue and cry" exception to the hearsay rule (also known as the "fact of the complaint" exception)? (ANSWER: Yes); 2) Was the hearsay testimony of P.K.'s treatment counselor admissible under the "medical treatment" exception to the hearsay rule? (ANSWER: Yes); 3) Was the admission of the hearsay testimony addressed in 1) and 2) above a violation of defendant's constitutional right of confrontation? (ANSWER: No); 4) Was the admission of defendant's confession consistent with the corpus delicti rule requiring corroboration of defendant's admission? (ANSWER: Yes) 5); Was the admission of testimony from defendant's sex offender treatment provider a violation of his counselor-provider privilege? (ANSWER: No) Result: Affirmance of Spokane County Superior Court conviction for second degree child molestation.

1) "Hue and cry" exception to hearsay rule

The Court's analysis of the "hue and cry" issue is as follows:

> The fact of complaint or "hue and cry" doctrine is a case law exception to the hearsay rule. State v. DeBolt, 61 Wn. App. 58 (1991). **[LED EDITOR'S NOTE: This hearsay exception is separate from, and much more limited in scope, than the "excited utterance" hearsay exception.]** It allows the State in a sex offense case to present evidence in its case in chief that the victim made a timely complaint to someone after the assault. Details of the complaint and the identity of the offender are not permitted.
>
> In the pretrial hearing on admissibility, P.K.'s schoolmates and the school counselor testified P.K. made a complaint of abuse and they further provided details of her statements. But at trial, the court only allowed testimony that P.K. stated she had been abused. These statements establishing that she made timely complaints were properly admitted under the fact of complaint doctrine.

2) "Medical treatment" exception to hearsay rule

The Court's analysis on the "medical treatment" exception issue is as follows:

> The court admitted Ms. Stafford's comments under the medical treatment exception to hearsay. Regardless of the availability of the declarant, the hearsay rule does not exclude "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." ER 803(a)(4). **[LED EDITOR'S NOTE: Many of the LED case citations re this exception can be found at Feb '96 LED:19; see also the entry on State v. Carol M.D. et. al, 89 Wn App 77 (Div. III, 1997) in the May '98 LED at 12.]** Statements made to counselors in child abuse or rape situations are encompassed by this exception. Statements attributing fault to a member of the victim's immediate household may be reasonably pertinent to treatment and are thus admissible because it is "relevant to the prevention of recurrence of injury." Moreover, identity is important since child abuse can involve psychological as well as physical injury and there is a risk of further injury if the child and the abuser live in the same household. Ms. Stafford, P.K.'s counselor, said P.K. related to her that Mr. Ackerman had fondled her breasts and kissed her. P.K. also told Ms. Stafford the incidents had been going on for one year and occurred in the home. The counselor indicated the goal of the family was to reunify. P.K.'s statements to her were made for purposes of medical treatment. Moreover, attribution of fault to Mr. Ackerman was relevant in the context of the clinical goal to reunify the family. The court properly admitted Ms. Stafford's testimony under ER 803(a)(4).

3) Constitutional confrontation right

Defendant argued that the constitutional right to confront witnesses requires a special showing of reliability of hearsay statements before they can be admitted against a defendant. The Court of Appeals agrees but holds that: A) P.K.'s statements to her treatment counselor were per se reliable because the "medical diagnosis or treatment" hearsay exception is "firmly rooted" in the law of evidence; and B) while the "hue and cry" rule is not a "firmly rooted" exception in the law of evidence, there was ample evidence of the reliability of P.K.'s statements to her classmates and school counselor.

4) Corpus delicti rule

The Court's analysis of the corpus delicti issue is as follows:

> Under the corpus delicti rule, the court may not consider a defendant's confession or admission unless the State has established the corpus delicti through independent proof. The independent proof need not establish the corpus delicti beyond a reasonable doubt, or even by a preponderance of the evidence; it need only support a logical and reasonable inference the crime occurred. To establish the corpus delicti of second degree child molestation, the State had to establish, independent of Mr. Ackerman's confession, that he touched P.K.'s intimate parts.
>
> Admissible hearsay statements are sufficient to corroborate a confession. P.K.'s statement to her therapist that Mr. Ackerman fondled her breasts supported the logical and reasonable inference the crime took place and was independent proof sufficient to establish the corpus delicti. The court did not err by admitting his confession.

5) Counselor-patient privilege

The Court of Appeals gives two independently sufficient reasons for rejecting defendant's claim of violation of the counselor-patient privilege under RCW 18.19.100. First, the mandatory reporting provision of RCW

chapter 26.44 for cases of child abuse overrides any privilege. Second, defendant expressly waived any privilege when, after he was charged, he signed written releases as a condition to receiving sex offender treatment.

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INTERNET ACCESS TO WASHINGTON APPELLATE COURT DECISIONS

The Washington office of the Administrator for the Courts maintains web sites with appellate court information, including recent court opinions. One address provides just decisions which have been issued within the preceding 14 days [http://www.wa.gov/courts/opinpage/recent.htm].

Two other addresses provide more court information and also include decisions issued within the preceding 90 days -- [http://www.wa.gov/courts/home.htm] & [http://www.wa.gov/courts/opinpage/home.htm].

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NEXT MONTH

In the November '98 LED, we will further address the Ferrier decision digested above at pages 2-10. We will also address, among other recent decisions, the State Supreme Court's 5-4 September 10, 1998 decisions in State v. Richards, 1998 WL 574431 upholding a search warrant execution "knock and announce" procedure and affirming a Court of Appeals decision digested at Nov '97 **LED**:17.

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