Law Enforcement Digest

September 1998

HONOR ROLL

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479th Session, Basic Law Enforcement Academy - May 12 through August 5, 1998

President:	Richard A. Martin - Warden Police Department
Best Overall:	Jeffry K. Christiansen - Edmonds Police Department
Best Academic:	Jeffry K. Christiansen - Edmonds Police Department
Best Firearms:	Richard A. Martin - Warden Police Department
Tac Officer:	Cedric Gonter - Auburn Police Department

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Corrections Officer Academy - Class 271 - April 27 through May 22, 1998

Highest Overall:	Dean Lindberg - City of Kent Corrections
Highest Defensive Tactics:	William Conner - Coyote Ridge Corrections Center
Highest Practical Tests:	Lisa Mahlum - Lewis County Corrections
Highest Academics:	Carole Baldwin - Clark County Sheriff's Office
Highest Mock Scenes:	Derold Dye - Washington State Reformatory
	William Hultman - Pierce County Sheriff's Office

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Corrections Officer Academy - Class 272 - April 27 through May 22, 1998

Highest Overall:	Brian Frazier - Clallam Bay Corrections Center
Highest Defensive Tactics:	James Joehnk - Washington State Reformatory
Highest Practical Tests:	Melonie Patterson - King County Department of Adult Detention
Highest Academics:	Deborah Sage - Pierce County Sheriff's Office
Highest Mock Scenes:	James Joehnk - Washington State Reformatory

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Corrections Officer Academy - Class 274 - June 30 through July 28, 1998

Highest Overall:	Timothy Naylor - Airway Heights Correctional Center
Highest Academics:	Daniel Hettman - Larch Corrections Center
Highest Practical Test:	Misty Slatt - Geiger Corrections Center
	Timothy Naylor - Airway Heights Correctional Center
Highest in Mock Scenes:	Timothy Naylor - Airway Heights Correctional Center
Highest Defensive Tactics:	Harris Spencer - Cowlitz County Jail

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Corrections Officer Academy - Class 275 - June 30 through July 28, 1998

Highest Overall:	Lee Walter - Washington Corrections Center
Highest Academics:	Camille Janssen - Snohomish County Jail
Highest Practical Test:	Richard Fajardo - Washington State Reformatory
	Carl Horn - Washington Corrections Center

Jerry Long - Olympic Corrections Center
David Smiley - King County Department of Adult Detention
Lee Walter - Washington Corrections Center

Highest in Mock Scenes: Lee Walter - Washington Corrections Center
Highest Defensive Tactics: Mike Patlan - Yakima Police Department

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BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

(1) ADA PROGRAM ACCESSIBILITY/PUBLIC ACCOMMODATION PROVISIONS EXTEND TO PRISONERS IN CORRECTIONAL FACILITIES – In Pennsylvania DOC v. Yeskey, 118 S.Ct. 1952 (1998), the U.S. Supreme Court rules unanimously that the public accommodation/program accessibility provisions of the Americans with Disabilities Act (ADA) apply to inmates in state prisons. The Supreme Court finds the language of the ADA to be crystal clear in extending coverage to state prison inmates. The Court's logic would also extend coverage to city and county jail inmates.

The Supreme Court declines to address a constitutional issue in the case regarding the power of Congress to impose the ADA on state prisons. The Supreme Court declares that the issue was not timely raised. It will have to be addressed in a future case.

Result: Affirmance of the Third Circuit Court of Appeals decision ruling that a state prisoner had the right to sue over the denial of admission to a Motivational Boot Camp based on his hypertension.

(2) "DISABILITY" DEFINITION OF ADA COVERS HIV INFECTION, EVEN DURING ASYMPTOMATIC STAGES – In Bragdon v. Abbott, 118 S. Ct. 2196 (1998), a 5-4 majority of the U.S. Supreme Court rules that an individual infected with HIV is protected by the "public accommodation" portion of the federal Americans with Disabilities Act (ADA), even during stages of the disease process when this virus is in its asypmtomatic phase.

A dentist's patient had sued the dentist under the ADA because the dentist had refused to treat the patient in an office setting. The dentist was concerned about the risk to himself and others, because the patient had the HIV virus, though it was asympotmatic. The ADA defines "disability" in a fairly narrow way, limiting the concept to impairments substantially affecting such major life activities as walking, speaking, breathing, learning, working, and taking care of one's self. A lower federal court had held that even asymptomatic HIV status is a "disability" under the ADA definition, and therefore that the patient had a valid ADA claim.

Justice Kennedy writes for the 5-member majority, which agrees with the lower federal court that HIV is a physical impairment that substantially limits the major life activity of reproduction, thus meeting the ADA's definition of "disability." The Supreme Court remands the case to the lower

federal courts, however, asking for a reassessment of whether the patient's HIV infection poses a significant threat to the health and safety of others, thus justifying the dentist's refusal to treat the patient in his office.

Result: Affirmance of ruling of First Circuit Court of Appeals finding the ADA's definition of "disability" to be applicable to HIV status at all phases of the disease process.

(3) FEDERAL EXCLUSIONARY RULE NOT APPLICABLE IN PAROLE AND PROBATION HEARINGS – In Pennsylvania Board of Probation and Parole v. Scott, 118 S. Ct. 2014 (1998), a 5-4 majority of the U.S. Supreme Court rules that the federal Exclusionary Rule does not apply in probation and parole hearings.

The majority opinion by Justice Thomas points out that under the Fourth Amendment the Exclusionary Rule is not automatically applied for every violation of search and seizure rules. The purpose of the Exclusionary Rule is to deter unlawful police searches, and, in some categorical situations, the Supreme Court has held that this deterrence purpose would not be significantly furthered, and any marginal deterrence benefits would be outweighed by the cost of exclusion of reliable evidence of guilt.

Thus, in the past, the Supreme Court has chosen not to apply the Exclusionary Rule when unlawfully obtained evidence is used to impeach a testifying defendant, or when such evidence is offered in grand jury proceedings, civil tax proceedings, and civil deportation proceedings. The majority opinion in Scott declares that the same rationale weighs against application of the Exclusionary Rule in parole and probation hearings. Police, as well as probation and parole officers, are not likely to intentionally engage in illegal searches and seizures just because they know or believe that a suspect is on probation or parole, the majority indicates.

Result: Reversal of Pennsylvania Supreme Court decision holding that evidence should have been excluded from a parole hearing; case remanded for reinstatement of initial parole revocation decision.

LED EDITOR'S NOTE: Twelve years ago, in State v. Lampman, 45 Wn. App. 228 (Div. II, 1986) Feb. '87 LED:13, the Court of Appeals for Division Two held that the Washington Constitution, article 1, section 7, required application of the Exclusionary Rule to probation and parole hearings. Lampman recognized that parolees and probationers have reduced expectations of privacy in some contexts, but held that, where the privacy rights of such persons are violated, the Exclusionary Rule does apply. Although the Washington State Supreme Court has not addressed this "independent grounds" issue, the "independent grounds" ruling of Lampman appears to be current controlling authority for Washington parole and probation hearings. Accordingly, the U.S. Supreme Court ruling in Scott would not affect suppression in such Washington proceedings.

(4) FORFEITURE OF OVER $350,000 UNDER CURRENCY-SMUGGLING LAW HELD TO BE "EXCESSIVE FINE" -- In U.S. v. Bajakajian, 118 S. Ct. 2028 (1998), the U.S. Supreme Court rules 5-4 that forfeiture of over $350,000 in currency under a federal currency-smuggling law would violate the "excessive fines" ban of the U.S. Constitution's 8th Amendment. The majority opinion declares the standard under the "excessive fines" clause to be whether the fine or forfeiture is "grossly disproportional" to the underlying crime.

The defendant and his wife were caught when they tried to leave the U.S. with $357,144 in their luggage, after telling customs inspectors that they had only $15,000 in their possession. Defendant pleaded guilty (with an explanation about this foreign background and distrust of banks), and the issue became whether the federal currency-smuggling law which required forfeiture of the entire amount of the currency violated the "excessive fines" clause of the 8th Amendment. The majority rejects a "strict proportionality" standard in favor of a "gross disproportionality" standard.

The majority indicates that its ruling regarding "in personam" criminal penalties is a narrow decision and does not affect "in rem" forfeitures. The ruling does not affect forfeitures of instrumentalities of crimes under drug forfeiture and other forfeiture laws, the majority seems to suggest. The dissenting opinion argues that the majority fails to recognize the seriousness of the crime in the case. Also, the dissenting opinion says that several constitutional questions as to the law relating to fines and forfeitures under other laws are left by this decision. [**LED EDITOR'S NOTE: We are studying and seeking expert guidance on the Bajakajian decision and its ramifications, if any, for drug law forfeitures. We will comment further in a future LED.]**

Result: Affirmance of 9th Circuit Court of Appeals decision which in turn affirmed a District Court forfeiture of $15,000.

(5) SEXUAL HARASSMENT – HIGH COURT CLARIFIES RULES ON A) EMPLOYER VICARIOUS LIABILITY FOR ACTS OF SUPERVISORS, AND B) AFFIRMATIVE DEFENSE – In Burlington Industries v. Ellerth, 118 S. Ct. 2257 (1998) and in Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998), the U.S. Supreme Court decides two sexual harassment cases in which the Court tightens and makes more uniform the rules governing sexual harassment under the federal Civil Rights Act.

There are two types of sexual harassment claims: 1) quid pro quo and 2) hostile work environment. "Quid pro quo" is Latin for "this for that." It refers to any supervisor threatening any subordinate with negative changes in employment unless the subordinate gives in to the supervisor's sexual demands.

"Hostile work environment" refers to a situation where an employee is subjected (generally by supervisors or co-workers) to intimidating, hostile or offensive workplace conditions where such offensive conduct has a sexual content. Such conditions have the effect of unreasonably interfering with the person's work performance or adversely affecting the person's employment opportunity. The standard under the law for a claim of hostile work environment is how a reasonable woman or man in the same circumstance would react to the challenged conduct.

In Ellerth and Faragher, the Supreme Court clarified the responsibility of employers under federal law for acts of supervisors. In a case where a supervisor makes and carries out threats of job retaliation in order to obtain sexual favors, the employer would be automatically liable, with no defense to the sexual harassment claim. However, where the threats are never carried out, the threats may fall into the "hostile work environment" category of sex harassment claim, in which case the employer will have an affirmative defense to the sexual harassment claim.

The affirmative defense of the employer in the latter category of cases is A) that the employer exercised reasonable care in developing policies and in training employees to prevent and correct promptly any sexually harassing behavior; and B) that the employee-plaintiff unreasonably failed to take advantage of employer remedies or to avoid harm otherwise.

Result: Affirmance of Federal Court decision in Ellerth; reversal of Federal Court decision in Farragher.

LED EDITOR'S NOTE: Washington State has a separate statute against sex discrimination, RCW 49.60.180(3), which provides a remedy for sex harassment in addition to that of the federal statute at issue in Faragher and Ellerth. In DeWater v. State, 130 Wn.2d 128 (1996), the Washington Supreme Court explained for purposes of the Washington statute: (1) the definitions of "quid pro quo" and "hostile work environment" sexual harassment; (2) the circumstances when employers would be strictly liable for acts of immmediate supervisors and/or of higher level managers; and (3) the burdens of proof of the parties in cases where employer-negligence, rather than strict liability, applies. There appear to be subtle differences in all three areas between the rules under Washington law stated by the Washington Supreme Court in DeWater, on the one hand, and, on the other hand, the rules under federal law stated in the Faragher and Ellerth cases.

We will not attempt an analysis of the possible differences between state and federal law in the LED. At bottom, the basic advice for employers is not any different under state or federal law: (a) maintain comprehensive policies against sexual harassment; (b) provide continuing training of managers, supervisors and line workers on such policies; (c) investigate complaints in reasonably prompt fashion; (d) take reasonably prompt and adequate remedial action when complaints are founded; (e) attempt to ensure in employer policies, training, and followup to complaints that no retaliation is taken against good faith complainants even if their complaints do not result in remedial action.

(6) FEDERAL GUN LAW DEFERRING TO STATE LAW ON RESTORATION OF GUN RIGHTS NOT APPLICABLE UNLESS THERE IS FULL RESTORATION – In Caron v. U.S., 118 S. Ct. 2007 (1998), the U.S. Supreme Court rules 6-3 that, where a state's law provides for only partial restoration of a convicted felon's firearms rights, a federal law deferring to state restoration of gun rights did not apply to restore the felon's federal gun rights.

Thus, where Massachusetts state law restored a felon's rights to possess rifles and shotguns upon completion of his sentence and parole, but did not restore his right to possess a handgun, under 18 U.S.C. section 921(a)(20), the felon remained prohibited under federal law from possessing any firearm. According to the Caron majority opinion, some 15 other states (not including Washington) have state laws which similarly partially restore felons' rights to firearms.

Result: Affirmance of Federal Court sentence enhancement based on firearm possession and prior Massachusetts felony convictions.

LED EDITOR'S NOTE: Washington law formerly provided for a partial restoration of rights similar to Massachusetts law, but the Washington law was amended in 1994 to bar possession of any firearm by a person convicted of a disqualifying crime as specified in RCW 9.41.040. In addition, RCW 9.41.040's bar to firearm possession based on a disqualifying conviction is all-or-nothing; the Washington law does not allow for a partial restoration of rights, e.g., there is no such thing as a partial restoration to allow a person to hunt. Thus, the Caron decision does not affect persons convicted in Washington courts of felonies or the domestic gross misdemeanors specified in RCW 9.41.040. Such persons

with disqualifying Washington convictions remain barred under state and federal law from possessing any firearm, unless and until their firearms rights have been expressly restored by a Washington court issuing a certificate of rehabilitation.

However, the Caron ruling does affect persons with out-of-state convictions who wish to possess a firearm in Washington or wish to obtain a Washington concealed pistol license. That is because Washington law incorporates by reference the federal law on restoration of firearms rights. Thus, RCW 9.41.070 (3) provides in relevant part:

> **Any person whose firearms rights have been restricted . . . who is exempt under 18 U.S.C. Sec. 921 (a)(20)(A) shall have his or her right to acquire, receive, transfer, ship, transport, carry, and possess firearms in accordance with Washington state law restored except as otherwise prohibited by this chapter.**

Under this subsection of RCW 9.41.070 (which is further complicated because it must be read together with other provisions of RCW 9.41), no person with a felony conviction out of state or a disqualifying domestic gross misdemeanor conviction out-of-state may possess a firearm in Washington or obtain a Washington CPL unless his or her rights to possess a firearm have been restored in such other state for purposes of the federal law at 18 U.S.C. section 921 (a)(20) [and only if the out-of-state crime is not equivalent to a "serious offense" as that term is used in RCW 9.41.010 and 040]. Under the Caron interpretation, if the law of the other state does not fully restore all firearms rights to the previously convicted person, then he or she is barred under Washington law from obtaining a CPL or possessing any firearm.

(7) DOUBLE JEOPARDY PROHIBITION DOESN'T BAR MULTIPLE ATTEMPTS TO PROVE SUFFICIENCY OF PRIOR CONVICTION UNDER "THREE STRIKES" LAW – In Monge v. California, 118 S. Ct. 2246 (1998), a 5-4 majority of the U.S. Supreme Court distinguishes between capital (i.e. death penalty) and non-capital cases in holding that the Double Jeopardy Clause does not prevent a state from trying to prove a non-capital sentence enhancement after previously trying and failing to do so at trial.

The majority opinion in Monge thus upholds a California Supreme Court ruling which allowed for a remand in a "three-strikes" case to give the state another opportunity to prove the underlying facts on an earlier "strike" in a "three strikes" case. The U.S. Supreme Court majority in Monge distinguishes the Court's 1981 decision in Bullington v. Missouri in which the Court held that Double Jeopardy barred Missouri from trying again for the death penalty where a defendant had obtained a new trial on appeal of a conviction in which the original trial court had decided he should receive a life sentence rather than the death penalty. The Monge majority concludes that the Bullington ruling was primarily grounded in the drastic consequences of a death penalty proceeding, and that the Bullington rule should not be extended to other settings.

Result: Affirmance of California Supreme Court decision allowing state another chance to prove that a prior conviction of Monge qualified as a sentence-enhancer under California's "three strikes" law.

(8) FEDERAL LAW AGAINST "CARRYING" A FIREARM DURING CERTAIN CRIMES INCLUDES HAVING GUN IN LOCKED TRUNK DURING COMMISSION OF CRIME – In

Muscarello v. U.S., 118 S. Ct. 1911 (1998), the U.S. Supreme Court rules 5-4 that a federal sentencing law prescribing a five-year mandatory sentence for "carrying" a firearm during and in relation to a federal drug trafficking offense or violent federal crime covers a gun that the offender keeps in a locked trunk or locked glove box during the commission of the crime.

Result: Affirmance of enhanced sentencing by federal court in two federal cases consolidated for appeal purposes; in one of the cases, defendant Muscarello used his car to transport and sell marijuana to federal agents while keeping a handgun locked in the car's glove compartment; in the other case, defendants Cleveland and Gray-Santana had guns in the locked trunk of their car when they were stopped as they drove to an intended drug rip-off.

LED EDITOR'S NOTE: This decision will not directly affect cases in Washington courts, as our statutes are written differently, and, while they may consider federal court opinions for persuasive value, our state courts are free to interpret state statutes differently from the way federal courts interpret federal statutes. A similar sentencing enhancement statutory scheme in Washington refers to a person being in unlawful possession of controlled substances with intent to deliver while "armed" with a deadly weapon. RCW 9.94A.125 and 9.94A.310. The term "armed" is not statutorily defined, but Washington case law includes the circumstance where the weapon (including an unloaded firearm) is "easily accessible and readily available for use, either for offensive or defensive purposes." No Washington appellate decision has addressed whether a person who has a firearm locked in a trunk or glove box under the circumstances of the Muscarello cases is "armed" for purposes of Washington law.

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WASHINGTON STATE SUPREME COURT

HOUSER'S "MANIFEST NECESSITY" RULE FOR LOCKED TRUCK CHECKS IN IMPOUND INVENTORIES IS CONFIRMED IN INDEPENDENT READING OF ARTICLE 1, SECTION 7

State v. White, 135 Wn.2d ___ (1998)

Facts and Proceedings: (Excerpted from majority opinion)

> The Defendant, Ronald E. White, was stopped by police in Bellingham, Washington for failing to stop at a stop sign. When questioned, White wrongfully identified himself as "Dan White" and initially said he did not own the car. The officer asked the Defendant for consent to search the vehicle, which he refused. The officer asked the Defendant to exit the vehicle and, despite the fact the officer stopped the Defendant for running a stop sign, presented "Dan White" with a citation for driving with an expired license only. The officer told the Defendant his vehicle would be impounded under RCW 46.20.435, because the Defendant had an expired driver's license, and inventoried under Bellingham Police Department procedures.
>
> The Defendant then admitted he was Ron White and told the police officer he did not properly identify himself because of outstanding warrants for his arrest. The officer ran a second Department of Motor Vehicles search and discovered White's driving status had been revoked and there were six outstanding warrants for the

Defendant's arrest. The officer arrested the Defendant for the outstanding warrants and for driving while license revoked and placed the Defendant in the patrol car.

The police officer impounded the vehicle under RCW 46.20.435 because (1) the driver was operating a vehicle with a revoked license; (2) the officer was unsure of the true ownership of the vehicle; and (3) the Defendant had many outstanding warrants for his arrest.

The inventory search was conducted in accordance with Bellingham Police Department procedures which required police to search the trunk if it could be opened by a key or a release latch. During this search, a trunk release button was found in the unlocked glove box which opened the locked trunk. In the trunk, officers searched an unlocked fishing tackle box which, when opened, was found to contain drug paraphernalia, marijuana, lighters, smoking devices, clear wrapped currency, and clear wrapped cocaine.

The State charged White with unlawful possession of a controlled substance with intent to deliver in violation of RCW 69.50.401(a)(1) and driving while license suspended or revoked in violation of RCW 46.20.342. At trial, White moved to suppress the items found in his trunk. He argued the police had exceeded the scope of a lawful inventory search as set out in State v. Houser, 95 Wn.2d 143 (1980) by opening the locked trunk. The trial court agreed, suppressed the evidence, and dismissed the case. The Court of Appeals reversed and held the search valid. White, 83 Wn. App. 770 (1996) **[Jan '97 LED:15]**

ISSUES AND RULINGS: 1) Was the 1980 State Supreme Court decision in State v. Houser, 95 Wn.2d 143 (1980) grounded in an independent grounds reading of the Washington constitution? (ANSWER: Yes); 2) Does Houser's impound-inventory-scope rule, which bars a check of the contents of a locked trunk (in the absence of "manifest necessity"), act as a bar to checking the contents of a locked trunk, when the trunk is accessible via an unlocked trunk latch located in the passenger area of the vehicle? (ANSWER: Yes, rules a 7-2 majority) Result: Reversal of a Court of Appeals decision at 83 Wn. App. 770 (Div. I, 1996) **Jan 97 LED:15**, which had reversed a Whatcom County Superior Court suppression order; evidence ordered suppressed by State Supreme Court.

ANALYSIS: (Excerpted from majority opinion)

In this case, the police conducted a warrantless inventory search of the trunk of the Defendant's automobile. In Houser, we defined the permissible scope of an inventory search of an impounded vehicle. While we said inventory searches conducted under standard police procedures are reasonable, we stated "an inventory search may not be unlimited in scope. "Concerned about the possibility for abuse, we limited the scope of an inventory search "to those areas necessary to fulfill its purpose." After finding there was not an unreasonable risk of theft for property left in the locked trunk of a vehicle, we explicitly held an officer may not open and examine the locked trunk of an impounded vehicle during an inventory search absent a manifest necessity for conducting the search. The State argues, and the Court of Appeals agreed, the search was lawful in this case because access to the trunk was obtained via a trunk release button located in the unlocked

glove box. Both suggest this release mechanism creates a situation distinguishable from Houser; we disagree.

In this case, the Court of Appeals did not read Houser as establishing a bright line rule prohibiting the police from searching a locked automobile trunk. Rather, the Court of Appeals understood the analysis in Houser to focus on whether the potential for theft of valuables and for false claims against the police department justified the intrusion when the trunk could be opened from inside the passenger compartment. The Court of Appeals focused on the prevention of theft as described in South Dakota v. Opperman, 428 U.S. 364 (1976) rather than on the greater protection afforded to individuals under article I, section 7 of the Washington State Constitution. The Court of Appeals misread the essential holding of Houser.

In Houser, we found police could search an unlocked glove compartment of an abandoned automobile during an inventory search because documents of ownership and registration are kept there and because the glove box is a place of temporary storage of valuables. However, in Houser we limited the scope of the search and stated:

> We do not believe that it was necessary to enter the locked trunk in order to serve these purposes. We note that the inventory search which was approved in Opperman extended only to the car's unlocked glove compartment. Moreover, property locked in the trunk of an automobile, as here, presents no great danger of theft. It is apparent that a would-be thief would be unaware of the existence of property of value in the trunk. Indeed, countless numbers of automobiles with locked trunks are daily left on the city streets of this country without unreasonable risk of theft. Accordingly, we think that any need to protect property located in a locked trunk is outweighed by the countervailing privacy interests of the individual in the enclosed area of the trunk.

From this language, our focus was primarily on the individual privacy interests and not on the needs of police in avoiding claims, as the Court of Appeals discussed. By focusing on individual privacy interests, our analysis in Houser necessarily focused on the inquiry required by article I, section 7. This is unlike the Fourth Amendment analysis the United States Supreme Court used in Opperman.

The fact an automobile may have a trunk release mechanism does not diminish an individual's privacy interests. Inside trunk latch releases are merely a substitute for the use of a key to unlock the trunk. Whether a locked trunk is opened by a key or a latch, it is still locked. The privacy interests are the same. We hold the use of the trunk release mechanism in this case is still the warrantless search of a locked trunk, which brings this case squarely under the holding of Houser.

The Court of Appeals was correct in determining that Houser is grounded in article I, section 7 of the Washington State Constitution. Article I, section 7 provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Under the Washington Constitution, the relevant inquiry is whether the State unreasonably intruded into the Defendant's private affairs. The

analysis under article I, section 7 focuses, not on a defendant's actual or subjective expectation of privacy but, as we have previously established, on those privacy interests Washington citizens held in the past and are entitled to hold in the future. The holding in Houser centered on the privacy interests of the individual; accordingly, Houser is an article I, section 7 case.

The three principal reasons for conducting an inventory search are: (1) to protect the vehicle owner's property; (2) to protect the police against false claims of theft by the owner; and (3) to protect the police from potential danger. While the validity of an inventory search is not at issue, the scope of such a search is.

The general rule in Washington regarding the admissibility of evidence discovered during an inventory search accompanying the impoundment of a vehicle was set forth in State v. Montague, 73 Wn.2d 381 (1968).

> When ... the facts indicate a lawful arrest, followed by an inventory of the contents of the automobile preparatory to or following the impoundment of the car, and there is found to be reasonable and proper justification for such impoundment, and where the search is not made as a general exploratory search for the purpose of finding evidence of a crime but is made for the justifiable purpose of finding, listing, and securing from loss, during the arrested person's detention, property belonging to him, then we have no hesitancy in declaring such inventory reasonable and lawful, and evidence of crime found will not be suppressed.

Though the Montague court found inventory searches valid, the court firmly stated that inventory searches must be undertaken for lawful purposes.

> [N]either would this court have any hesitancy in suppressing evidence of crime found during the taking of the inventory, if we found that either the arrest or the impoundment of the vehicle was resorted to as a device and pretext for making a general exploratory search of the car without a search warrant.

From the history of article I, section 7 and from the precedent established in Montague, the rule enunciated in Houser emerged. Police are not permitted to search the locked trunk of an impounded vehicle absent a manifest necessity for so doing. Further, compliance with established police procedures does not constitutionalize an illegal search and will not enable the police to search a locked trunk without a warrant. While we recognize inventory searches may serve legitimate government interests, these interests are not limitless and do not outweigh the privacy interests of Washington citizens.

In this case, the police searched a locked automobile trunk during an inventory search. The police followed the Bellingham Police Department's standard impound/inventory procedure directing the police to search the trunk if access can be obtained by key or trunk release. Despite the Court of Appeals attempt to justify the search on the grounds of accessibility to a "would be thief," and the police department's reference to its longstanding procedures, no manifest necessity was demonstrated. Simply stated, the possibility of theft does not rise to the level of

> manifest necessity. Houser established a bright line rule prohibiting the police from intruding into an individual's privacy interests of a locked trunk regardless of its accessibility. Whether a key is needed to unlock the trunk or whether an interior release is used is of no distinction to the privacy interests of the individual under article I, section 7 of the Washington State Constitution.
>
> We do not address the impound issue or the search of the closed tackle box because the permissible scope of an article I, section 7 inventory search has been exceeded. We reaffirm Houser, which limits inventory searches to the passenger compartment of a vehicle and does not include locked trunks. We hold searches of closed and locked trunks are limited to those few situations when manifest necessity exists.

[Footnotes, some citations omitted]

JUSTICE DURHAM'S DISSENT:

Justice Durham dissents from the majority's holding that the 1980 Houser decision was based on an "independent grounds" reading of the Washington constitution. She points out that Houser was grounded entirely in Fourth Amendment case law and theory. Justice Durham also points out that under the U.S. Supreme Court's interpretation of the Fourth Amendment subsequent to the 1980 Houser decision, an inventory's scope is generally lawful if police operate in good faith under standardized police procedures. She asserts that under the Fourth Amendment the inventory scope in White did not exceed the permissible scope of an impound inventory. The Bellingham officers acted in good faith under standardized procedures when they opened the trunk by pushing the button of an unlocked passenger-area trunk latch and checked the contents of the trunk.

JUSTICE ALEXANDER'S DISSENT:

Justice Alexander agrees with the majority that the 1980 Houser decision was grounded in the Washington constitution. However, he disagrees with the majority's conclusion that the Houser inventory-scope rule bars police from using an unlocked passenger-area trunk latch to open an otherwise locked trunk of an impounded vehicle to inventory its contents.

LED EDITOR'S COMMENTS:

1) Independent grounds: We won't belabor the point because it is now irrelevant, but we agree entirely with Justice Durham. In concluding that the pre-Ringer decision of the 1980 Houser Court was grounded entirely in the then-existing Fourth Amendment case law, Justice Durham is persuasive when she adopts much of the viewpoint of the amicus brief of the Legal Advisors section of the Washington Association of Sheriffs and Police Chiefs. Nonetheless, the White decision to the contrary is now the law of Washington.

2) What now for inventory scope as to locked trunks AND CLOSED CONTAINERS? The 1980 Houser decision declared not only that locked trunks may not be inventoried without a "manifest necessity" justification, but the decision also held that closed, non-transparent containers located in the area subject to inventory should not be opened and searched unless: (A) "the police have reason to believe [they] hold instrumentalities which could be dangerous even when sitting idly in the police locker;" or (B) there is a "manifest

necessity" to search. The 1998 White Court says that it need not address the container search issue because such review is not necessary.

Nonetheless, with the White decision's announcement that the Houser inventory scope rule relating to trunk inventories is grounded in the state constitution, one must assume as well that Houser's restriction on inventories of closed containers in the vehicle passenger area is a state constitutional rule. The 1980 Houser Court had assumed that in conducting an inventory police would come across closed containers which were not subject to search under Houser's restrictions, but which the police might believe to contain valuables. In that case, the closed containers would not have to be opened, Houser said; instead, the containers could either be left in the vehicle or they could simply be placed in their unopened state in a police property room. This now appears to be the state constitutional rule of White/Houser.

3) What about consent/waiver requirements? In a footnote, the White Court addresses its 1984 decision in State v. Williams, 102 Wn.2d 733 (1984). The State Supreme Court had held there that before conducting a routine inventory in an impound situation, police must give the person in control of a vehicle an opportunity to consent to the inventory or at least to expressly reject the protection of an inventory. This discussion in White indicates that the present court thinks this limited "consent" is an element of a lawful inventory. Next month we will address questions surrounding the manner of asking for consent or waiver in this categorical factual context, as well as other questions relating to vehicle impounds and inventories.

4) What about Houser's limits on impounds? The 1980 Houser decision, and the decision in State v. Simpson, 95 Wn.2d 170 (1980) issued the same day, read together, held that vehicles generally may not be impounded unless: a) there is probable cause to seize them for evidence purposes, b) a statute authorizes it, or c) there is a "community caretaking" justification for the impound. As to the "community caretaking" rationale for impound, the Houser Court declared that impound is justified only if there are no reasonable alternatives to impoundment, and the Houser Court strongly implied that the officer's duty to consider alternatives to impoundment does not depend on what the vehicle operator says or does. [Note that subsequent Washington case law in the intermediate appellate courts has held that reasonable alternatives to impoundment generally must also be considered even where a statute authorizes impoundment. See February '98 LED at 19-20 discussing this unsettled issue.]

Just as the White Court declines to address Houser's restriction on opening and inventorying the contents of closed containers, the White Court says that it need not address Houser's limits on the threshold impound decision. Nonetheless, again, we believe that the White decision means that the Houser/Simpson "reasonable alternatives" discussion, to the extent the discussion might suggest greater restrictions on police than do the Fourth Amendment rules, must be viewed as being grounded in the Washington Constitution.

5) What about jail booking inventories? The same rationales have been given by federal and state courts to justify both vehicle impound inventories and jail booking inventories of personal effects. See Illinois v. Lafayette, 462 U.S. 640 (1983); State v. Smith, 76 Wn. App. 9 (Div. I, 1994) May '95:LED:17. If Houser's limits on inventorying the contents of closed

containers has now become a rule of state constitutional law, prosecutors may now be forced to explain why jail booking inventories of closed containers can be more intrusive then vehicle inventories of closed containers.

SELLING ILLEGAL DRUGS TO TWO SEPARATE BUYERS IN SEQUENCE, BUT AT THE SAME TIME AND PLACE, IS ONLY ONE CRIME FOR SENTENCING PURPOSES

State v. Williams, 135 Wn.2d ___ (1998)

Facts and Proceedings: (Excerpted from Supreme Court opinion)

> Williams sold rock cocaine to two police informants in a controlled buy arranged by the Pierce County narcotics squad. After one of the informants contacted Williams to arrange the sale, both informants met Williams at a residence where Williams sold 10 rocks to each. The informants then left the residence and returned to the police, who promptly arrested Williams.
>
> Williams was subsequently convicted of two counts of unlawful delivery. He argued at sentencing that the counts encompassed the same criminal conduct. The State argued that the deliveries were separate because they occurred consecutively and involved two people. The sentencing court agreed with the State and sentenced Williams to 60 months.

ISSUE AND RULING: Did the sale of cocaine to two informants in sequence, but at the same time and place, constitute the same criminal conduct for sentencing purposes? (ANSWER: Yes, rules a unanimous Court) Result: Reversal of Pierce County Superior Court sentence of George Clifton Williams for two counts of delivery of a controlled substance; case remanded for re-sentencing on one count.

ANALYSIS: (Excerpted from Supreme Court opinion)

> Multiple crimes encompass the same criminal conduct for sentencing purposes if they require the same criminal intent, are committed at the same place and time, and involve the same victim. The two crimes occurred at the same time and place, and the "victim" of both drug sales was the public at large, not the purchasers. The dispositive question, then, is whether the counts required the same criminal intent.
>
> The relevant inquiry is "the extent to which the criminal intent, objectively viewed, changed from one crime to the next.... This, in turn, can be measured in part by whether one crime furthered the other." Williams relies on our holding in State v. Garza-Villarreal that charges based on the simultaneous delivery of two different drugs constituted the same criminal conduct. The Court of Appeals found that case to be distinguishable and relied instead on State v. Burns, which involved one charge based on the defendant's sale of cocaine to an undercover officer and a second charge arising from the subsequent discovery of more cocaine in the defendant's van.
>
> The Court of Appeals reliance on Burns is misplaced and conflicts with [the decision in State v. Porter.] The crimes in Burns had different statutory mental

elements. The delivery count required an intent to deliver currently, whereas the possession count involved an intent to deliver in the future. By contrast the defendant in Porter, like Williams, was convicted of two counts of delivery, both of which required the same intent--to deliver currently. In Porter the defendant delivered methamphetamine and, immediately thereafter, marijuana, to the same undercover officer. The defendant's intent, objectively viewed, "was to sell both drugs in the present as part of an ongoing transaction." The sequential nature of the sales did not necessarily indicate different criminal intents, because the sales "occurred in a continuing, uninterrupted sequence of conduct as part of a recognizable scheme to sell drugs."

Similarly, Williams made two deliveries in an uninterrupted sequence as part of a single scheme to sell drugs. The offenses are as much part of "the same criminal conduct" as the deliveries in Porter. The only difference between this case and Porter is that Williams sold the drugs to two different buyers. But as indicated above, the buyers are not the victims; the public is. If delivery of two different drugs encompasses the same criminal conduct, the same is equally true of simultaneous deliveries of the same drug to two buyers.

[Some citations or parts of citations omitted]

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WASHINGTON STATE COURT OF APPEALS

SEARCH OF MOTOR VEHICLE PASSENGER'S PURSE FAILS "SEARCH INCIDENT" ANALYSIS; AND HER CONSENT WAS TAINTED BY UNLAWFUL DETENTION BY POLICE

State v. O'Day, ___ Wn. App. ___ (Div. III, 1998) [955 P.2d 860]

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

On August 30, 1995, [a WSP trooper] stopped a car driven by James Henry. [The trooper] had heard a radio report of a "gas drive-off" in Ritzville and recognized the identified vehicle as one he had seen earlier on Interstate 90. The officer arrested Mr. Henry and placed him in the patrol car. When [the trooper] said he was going to search the car, Mr. Henry admitted there was a black gym bag containing marijuana under the driver's seat.

[The trooper] told Ms. O'Day, the passenger, to step out of the car so he could conduct the search. The officer could not remember whether Ms. O'Day took her purse with her when she got out of the car, or whether he removed the purse himself. **[LED EDITOR'S NOTE: Isn't this an important factual question? See our "Comment" below.]** At any rate, the purse was placed on the hood of the car while [The trooper] searched the interior. Inside the car, the officer found the gym bag containing marijuana and drug paraphernalia.

[The trooper] asked Ms. O'Day if she had a valid driver's license to determine whether the car would have to be impounded. Ms. O'Day told the officer she did not have a license, but she showed him an identification card.

> [The trooper] did not suspect Ms. O'Day of any criminal activity, nor did he have a concern that she was armed or dangerous. But the officer testified he would not have allowed Ms. O'Day to leave the remote area because of his concern for her safety. If she had insisted on leaving, he would not have let her go and would have arrested her if necessary.
>
> [The trooper] asked Ms. O'Day if she had any drugs or weapons in her purse, and she responded that she did not. The officer then asked for Ms. O'Day's consent to search the purse. She agreed and signed a card indicating her consent. [The trooper] searched the purse and found methamphetamine and drug paraphernalia.
>
> Ms. O'Day was charged with possession of a controlled substance, RCW 69.50.401(d), and moved to suppress the evidence seized in the search of her purse. After hearing [the trooper's] testimony, the superior court concluded the search was not justified by the earlier arrest of Mr. Henry. The court also concluded that Ms. O'Day's consent was invalid because there were insufficient intervening circumstances to attenuate her detention beyond the purpose of the original stop. The court suppressed the evidence and dismissed the charge.
>
> [Officer's name deleted]

ISSUES AND RULINGS: 1) Did the search of the passenger's purse qualify as a search incident to the arrest of the driver? (ANSWER: No, because, according to the Court of Appeals, the purse was outside the vehicle before the officer began his search incident to arrest); 2) Was the passenger unlawfully detained at the time of the officer's request for consent to search her purse, and did this unlawful detention taint her otherwise voluntary consent? (ANSWER: Yes) Result: Affirmance of Adams County Superior Court suppression order and dismissal of charge.

ANALYSIS:

1) Search Incident Issue

Under Washington case law interpreting the State Constitution's article 1, section 7, incident to the custodial arrest of an occupant of a vehicle, police may search: A) the passenger area of the vehicle (but not the separated compartments of the trunk or engine compartment), and B) any unlocked containers or clothing left in the vehicle. Under this case law, police may also search: C) the person of the disembarked arrestee, but not D) the person of unarrested occupants (unless as a separately justified Terry frisk).

In Ms. O'Day's circumstance, the Court of Appeals declares that the purse was not subject to a "search incident", because the purse was already outside the vehicle when the vehicle "search incident" began. Compare the decisions in State v. Parker, 88 Wn. App. 273 (Div. III, 1997) **Jan '98 LED:12** (unarrested occupant's purse which she voluntarily left in vehicle was subject to "search incident" of vehicle); State v. Seitz, 86 Wn. App. 865 (Div. II, 1997) **Nov '97 LED:17** (purse on person of disembarked unarrested occupant not subject to "search incident"); State v. Nelson, 89 Wn. App. 179 (Div. III, 1997) **March '98 LED:08** (purse left in vehicle by unarrested occupant on express order of officer not subject to "search incident"); and State v. Hunnel, 89 Wn. App. 638 (Div. II, 1998) **March '98 LED:08** (Division II of Court of Appeals disagreeing with

Division III's Nelson decision and holding that purse left in vehicle by unarrested occupant on express order of officer is subject to "search incident").

The O'Day Court concludes on the "search incident" issue:

> The facts of this case do not implicate the core of the disagreement. Read together, Seitz, Parker, Nelson, and Hunnel all suggest that when a purse is no longer inside a vehicle to be searched, it is not subject to a search incidental to the arrest of the vehicle's driver…here, it is undisputed that the purse was not in the vehicle at the time [the trooper] began his search incident to Mr. Henry's arrest. The search therefore may not be justified as incidental to the arrest. **[LED EDITOR'S NOTE: See our first "Comment" below suggesting this conclusion misses an important point focusing on whether Ms. O'Day had voluntarily left her purse in the vehicle when she first stepped out of the vehicle.]**

In addition, the purse search could not be justified as a Terry frisk, the O'Day Court asserts, because the officer expressly testified that he was not concerned with safety when he did the search, only with the possibility that the purse might contain more illegal drugs.

2) Issue re allegedly unlawful extension of detention

The O'Day Court concludes that the unarrested Ms. O'Day was being detained by the officer at the time he asked her for consent. This conclusion as to her detention/seizure status is based upon the following facts: a) the trooper had directed Ms. O'Day to step out of the car; b) he had placed her purse out of her reach; c) he had asked if she had drugs or weapons in her purse; and d) he had asked her for consent to search the purse. [Note: Division Three probably would have determined Ms. O'Day's status differently only if the trooper had handed her back the purse, told her she was free to decline his inquiries about the purse or was free to go, told her she was free to refuse consent to search the purse, and only then asked for consent to search the purse.]

This conclusion of the Court as to Ms. O'Day's detention status at the time of the consent request then sets up the question of whether the officer's request for consent to search the purse unlawfully extended the length of detention. The O'Day Court says "yes." In part, the O'Day Court's analysis of this "seizure" issue is as follows:

> In Soto-Garcia [State v. Soto-Garcia, 68 Wn. App. 20 (Div. II, 1992) **March '93 LED:09**], an officer saw the defendant walking from an alley in an area known for cocaine trafficking. The officer pulled his patrol car over, and the defendant approached voluntarily. The officer asked several questions, which the defendant answered appropriately. The officer then asked if the defendant had any cocaine on him and obtained his permission to search. On appeal of a suppression order, the court agreed the evidence was sufficient "to conclude that a reasonable person would not have felt free to decline the police officer's requests that he provide information regarding his activities and submit to a search."
>
> In Armenta [State v. Armenta, 134 Wn.2d 1 (1997) **March '98 LED:05**], the two defendants approached a uniformed police officer at a truck stop and asked if he knew of a mechanic who could repair their car. The officer offered to look at the

> car himself, and they agreed. The officer asked the men for identification. He later noticed a bulge in one man's pocket and asked if it was a wallet; the man took out "[a] wad of money" and gave a suspicious explanation. The other man also produced bundles of money and gave a similarly suspicious explanation. At that point, the officer radioed for a "driver's check" on the two men, learned one of them had a suspended Arizona driver's license, and placed the bundles of cash in his patrol car "for safe keeping." The officer asked if there were any drugs or weapons in the car; defendant Armenta said "no." The officer then asked for permission to search the car, explaining that Armenta was not required to consent. He did consent, and the officer discovered drugs and weapons.
>
> The Supreme Court [in Armenta] noted that a request for identification generally is not a seizure, particularly when the request is for a purpose other than investigating criminal activity and when the police officer did not initiate the contact. However, the court held a seizure occurred when the officer placed the defendants' money in the patrol car, concluding reasonable persons would have realized at that point that they were not free to leave.
>
> In this case, [the trooper's] request for identification was not for investigative purposes, but was to determine if Ms. O'Day could drive the car. However, the officer also told Ms. O'Day to get out of the car, placed her purse outside her reach, asked if she had drugs or weapons in her purse, and asked if she would consent to a search. Ms. O'Day did not initiate the encounter. [The trooper] testified he asked for permission to search the purse because he believed, based on his discoveries during his search of the car, that the purse also might contain contraband. A reasonable person would realize under these circumstances that she was not free to leave. The encounter thus became an investigative detention, and Ms. O'Day was constitutionally seized at that time.

[Some citations omitted; officer's name deleted]

The trooper had no objective basis at that point for concluding that Ms. O'Day was engaged in any unlawful activity, and therefore he lacked authority to extend the detention by asking for consent to search. And this unlawful detention tainted the consent, the O'Day Court holds. Accordingly, the Court of Appeals upholds the trial court suppression of the drugs found in Ms. O'Day's purse.

LED EDITOR'S COMMENT: 1) SEARCH OF PASSENGER'S PURSE INCIDENT TO ARREST OF DRIVER. The O'Day Court asserts in its description of the facts that the record was not clear as to whether the trooper took the passenger's purse out of the vehicle himself or whether the passenger had it with her when she got out of the car. The O'Day Court's analysis suggests that resolution of this fact question was not necessary because the "search incident" did not begin until after the purse had been removed from the car. The O'Day Court appears to be in error in stating that it need not resolve this fact question. Once Ms. O'Day stepped from the vehicle, if she voluntarily left her purse behind, then, under the Washington case law cited by the Court, it was clearly subject to a "search incident." If the officer took the purse out of the car after she had disembarked, this would not take the purse out of the "bright line" authority of the search incident rule any more than would taking the driver's gym bag out of the car to search it.

2) EXTENDING DETENTION TO REQUEST CONSENT. The decision of the O'Day Court on the extended-detention issue may or may not be correct. This was a close case. The law in relation to police authority is murky where police extend car stops to ask of drivers or other vehicle occupants questions unrelated to the purpose of the stop. We have in the past recommended that police, who wish to follow a hunch following a mere traffic stop, make a "clear break" before doing so. Thus, after issuing a traffic ticket or a warning, an officer with a mere hunch that the vehicle may contain illegal drugs should, before investigating and asking for consent to search, advise the operator or other occupant of the vehicle that he or she is free to go or is free to decline to respond to his or her inquiries, or both. See Oct '96 LED at 19-21 and Feb '97 LED at 5-6.

However, the O'Day case did not involve extension of a mere traffic stop, nor did it involve a mere hunch. Rather, O'Day involved a situation where a vehicle's driver had been arrested, and the police officer had just found marijuana in the driver's gym bag. Admittedly the officer did not have enough suspicion to rise to "reasonable suspicion" as to Ms. O'Day. It does seem strange, however, that the law would not allow an officer to ask a passenger of a vehicle just found to contain marijuana whether the passenger has any marijuana on her person. Moreover, one could argue under the circumstances of this case that Ms. O'Day's "detention" was not extended by the inquiry into whether she had drugs or weapons in her purse, because she wasn't going to be allowed to walk off down the highway. The trooper would have impounded the vehicle and transported her to a safe location off the highway in any event.

Nonetheless, we believe that Washington police officers seeking to use consent to follow a hunch which falls short of reasonable suspicion face a difficult situation in light of the O'Day case and the Washington cases the O'Day Court relies on. Neither the U.S. Supreme Court nor the Washington Supreme Court has squarely addressed the constitutional issue posed in this factual setting. Accordingly, we feel that the better approach in this situation (i.e. no substantial concern for officer safety and no reasonable suspicion as to drugs in purse) would be to set up a "clear break" situation similar to the "clear break" for traffic law violations discussed above. Realistically, because of the remote setting of this stop, the officer would not have told Ms. O'Day that she was "free to leave" under the circumstances. However, the officer could have told her that she was free to decline to answer his questions and free to refuse to consent to a search of her purse, before asking her for consent.

IN-COURT ASSERTION OF 6TH AMENDMENT COUNSEL RIGHT ON CHARGED MURDER DOESN'T RAISE 5TH AMENDMENT BAR TO POLICE CONTACT ON UNRELATED UNCHARGED MURDER; NOR WAS ANY BAR TO POLICE CONTACT RAISED BY ATTORNEY'S ATTEMPTS TO CONTACT DEFENDANT AS POLICE QUESTIONED HIM

State v. Stackhouse, 90 Wn.2d 344 (Div. III, 1998)

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

> On January 11, 1995, Mr. Stackhouse and Jason Kukrall were arrested on Pend Oreille County charges for residential burglary and the murder of Steven Roscoe. They were arrested in Spokane and held in the Spokane County jail overnight. The following day, Spokane County deputies transported Mr. Stackhouse and Mr.

Kukrall in separate vehicles to the Pend Oreille County jail. As Mr. Kukrall was being transported to Pend Oreille County, two Spokane police detectives rode in the car and questioned him about the murder of Linda Jaramillo-Guillen that occurred in Spokane County on November 30, 1994. Mr. Kukrall implicated himself and Mr. Stackhouse in that murder. [Roscoe had been murdered in early January 1995.]

At the Pend Oreille County jail, Mr. Stackhouse was ushered into the jail library. There two Spokane detectives advised him of his Miranda rights. He waived them, agreed to speak and confessed to the murder of Ms. Guillen in Spokane County.

Mr. Stackhouse was then taken from the jail library and arraigned for the murder of Mr. Roscoe. At the preliminary hearing, the court appointed counsel to represent Mr. Stackhouse on the Roscoe murder charges. Both Spokane detectives attended the preliminary hearing. Mr. Stackhouse's attorney told him in court not to speak to anyone, including police.

Mr. Stackhouse was taken back to the Pend Oreille County jail. There the Spokane detectives asked for a taped confession on the Guillen murder. He agreed. On the tape, the detectives again read him his constitutional rights. He again waived them and admitted murdering Ms. Guillen.

As Mr. Stackhouse's confession was being recorded, his appointed attorney (on the Roscoe murder charges) tried to contact him. The jail supervisor told him that Mr. Stackhouse was unavailable. The lawyer assumed Mr. Stackhouse was being transported from the hearing. He waited for about 15 minutes. When the attorney became aware that Mr. Stackhouse was being interviewed, he demanded that the supervisor stop the interview. The jail supervisor left and returned a couple of times. The Spokane detectives finished taping the confession and left.

Mr. Stackhouse murdered Mr. Roscoe about five weeks after Ms. Guillen. Mr. Kukrall and Mr. Stackhouse were convicted of the Roscoe murder prior to this trial on Ms. Guillen's murder.

Mr. Stackhouse and Mr. Kukrall were charged with one count of first degree murder and in the alternative felony first degree murder during the commission of the robbery of Ms. Guillen.

ISSUES AND RULINGS: 1) Did the assignment of counsel for defendant on a charged murder raise a 5th Amendment bar to police contacting him on an unrelated, uncharged matter? (ANSWER: No); 2) Were police required under the 5th Amendment to stop custodial questioning of defendant when the jail supervisor learned that defendant's attorney was trying to contact his client? (ANSWER: No) Result: Reversal of Spokane County Superior Court first degree murder conviction on grounds not addressed here (failure of the trial court to remove two jurors for cause); case remanded for re-trial.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) No Non-Custodial, Anticipatory Assertion of 5th Amendment Right

Mr. Stackhouse contends his Sixth Amendment right to counsel attached at the arraignment on the Pend Oreille County murder charges. And therefore his Fifth Amendment right to counsel during the taped confession of the Spokane murder had been invoked.

A defendant's invocation of his Sixth Amendment right to counsel does not also invoke his Fifth Amendment right to have counsel present during a later custodial interrogation on an unrelated charge. State v. Stewart, 113 Wn.2d 462 (1989) **[Jan '90 LED:03]**. In Stewart, the court answered the same question now raised by Mr. Stackhouse: "Where an in-custody defendant's Sixth Amendment right to counsel is invoked at arraignment, but the defendant has not yet met with counsel, is the defendant's Fifth Amendment right to counsel violated when police interrogate the defendant on unrelated charges, procure a Miranda waiver, and obtain a confession?" The answer is no.

2) No Trickery Problem; Also, Attorney Can't Prevent Or Stop An Interrogation

Mr. Stackhouse argues that Stewart is not controlling because the State tricked him and he was confused. He contends the waiver of his rights was invalid because he had police from two different jurisdictions converging on him at once with questions about both crimes within a very short period of time. Police tricked him by refusing to tell him that his court-appointed Pend Oreille County attorney was trying to contact him during the taped confession. Stewart addresses his concerns.

When a defendant is arraigned, he is specifically advised of the pending charges and asked if he wishes to have counsel represent him on those charges. A subsequent custodial interrogation on unrelated matters requires new Miranda warnings including the right to have counsel present during interrogation on the new charges.

The Stewart Court reasoned that these two procedures occurring immediately after one another, i.e., an arraignment and custodial interrogation on separate and unrelated charges, would not confuse even the most uneducated defendant on the right to counsel on a separate, unrelated charge. The court noted that if a defendant had been appointed counsel at an arraignment, and then immediately advised about his right to an attorney during a subsequent and unrelated custodial interrogation, it is reasonable to assume that the defendant would indicate that he already had an appointed attorney that should be present during the interrogation. This would then prompt the person conducting the interrogation to again advise him of the nature of new charges, ask if he wants an attorney present for these charges--as opposed to the arraigned charges--or if he wishes to waive his rights. Mr. Stackhouse waived his Miranda rights and showed no confusion when doing so.

Allegations of trickery are also without merit. The record is unclear whether the detectives had knowledge that Mr. Stackhouse's attorney was trying to contact him. Regardless, at the time of the confession Mr. Stackhouse had waived his right to counsel. "[A] waiver is valid as a matter of law once it is determined that a suspect was aware of his rights and the State's intention to use his statements

against him, and his decision not to invoke those rights was uncoerced." State v. Earls, 116 Wn.2d 364 (1991) **[May '91 LED:02]**; Moran v. Burbine, 475 U.S. 412 (1986). The fact that an attorney, unbeknownst to the defendant, is trying to contact him during a confession has no bearing on the defendant's capacity to comprehend and knowingly relinquish his constitutional right.

[Some citations omitted]

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