# Law Enforcement Digest

March 1999


## HONOR ROLL

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**487th Session, Basic Law Enforcement Academy - October 14, 1998 through January 13, 1999**

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|---|---|
| President: | John Pugh - King County Sheriff's Office |
| Best Overall: | John Pugh - King County Sheriff's Office |
| Best Academic: | John Pugh - King County Sheriff's Office |
| Best Firearms: | Kerrick Ward - Yakima Police Department |
| Tac Officer: | Don Davis - King County Sheriff's Office |

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**488th Session, Basic Law Enforcement Academy - November 12, 1998 through February 11, 1999**

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| President: | Gregory Barfield - Renton Police Department |
| Best Overall: | Craig Price - Seattle Police Department |
| Best Academic: | James Saunders - Pierce County Sheriff's Office |
| Best Firearms: | Kenneth Henson II - Kent Police Department |
| Tac Officer: | Cedric Gonter - Auburn Police Department |

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## BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

**HIGH COURT STRIKES DOWN NINTH CIRCUIT'S EXPANSIVE DUE PROCESS NOTICE REQUIREMENT FOR POLICE SEIZURES OF PERSONAL PROPERTY --** In City of West Covina v. Perkins, 1999 WL 9696 (1999) [119 S.Ct. 678], a unanimous U.S. Supreme Court reverses a decision of the Ninth Circuit of the U.S. Court of Appeals which would have imposed detailed notice requirements on all law enforcement seizures of personal property.

Implicitly, the Ninth Circuit's West Covina decisions also appeared to impose notice requirements for personal property seizures beyond search warrant seizures. The Ninth Circuit had held in Perkins v. City of West Covina, 113 F.3d 1004 (9th Cir. 1997) **Aug. '97 LED:14,** that, where law enforcement officers seize personal property under a search warrant, the Due Process clause of the 14th Amendment of the federal constitution requires that officers give notice to the property owner (or person lawfully in control of the property) which includes at least the following:

> as on the present notice, the fact of the search, its date, and the searching agency; the date of the warrant, the issuing judge, and the court in which he or she serves; and the persons to be contacted for further information. In addition, the notice must inform the recipient of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court. In circumstances such as those presented by this record, the notice must include the search warrant number or, if it is not available or the record is sealed, the means of identifying the court file. It also must explain the need for a written motion or request to the court stating why the property should be returned."

Implicit in the Ninth Circuit's West Covina decision was an apparent general due process requirement that police provide notice of procedures for return of property whenever they seize personal property, whether under a warrant or otherwise. The Supreme Court rejects the Ninth Circuit's expansive reading of the Due Process clause, asserting that the Court of Appeals went far beyond case law, statutes, court rules, and established law enforcement practices throughout the country. The lead opinion for the Supreme Court declares that, in the circumstance under review in this case, the Due Process clause requires only that, "when law enforcement agents seize property pursuant to warrant, …[they] take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return."

In a concurring opinion joined by Justice Scalia, Justice Thomas suggests that the lead opinion by Justice Kennedy went too far in conceding that the Due Process clause has any application to police "search and seizure" practices.

Result: Reversal of Ninth Circuit decision which, in turn, had reversed a California federal district court decision granting summary judgment to the City of West Covina; presumably, summary judgment will now be reinstated by the district court, and the lawsuit will be dismissed.

**LED EDITOR'S COMMENT: The now-reversed Ninth Circuit decision in West Covina has been addressed twice previously in the LED. After reporting the decision in the August 97 LED at 14, we reported in the July 98 LED that the City of Tacoma had adopted a comprehensive procedure to implement the Ninth Circuit decision in relation to all seizures of personal property. Now, Washington law enforcement agencies must evaluate what notice requirements are imposed by law following the U.S. Supreme Court decision.**

**In cases involving seizures of personal property under search warrants, it seems quite clear that compliance with Washington court rules, CrR 2.3 and CrRLJ 2.3, will satisfy the U.S. Supreme Court's requirement for notice. Those court rules for superior court and courts of**

**limited jurisdiction, respectively, identically require in pertinent part in subsection (d) as follows:**

> **The peace officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken. If no such person is present, the officer may post a copy of the search warrant and receipt.**

**Questions may remain, however, as to whether there are notice requirements regarding the process for recovery of property seized by peace officers in other contexts. In asserting that some sort of notice, though much less than would have been required by the Ninth Circuit, is required in search warrant seizure situations, Justice Kennedy's lead opinion for the Supreme Court in West Covina arguably implies that some sort of minimal notice is required in other property seizure situations as well.**

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## BRIEF NOTE FROM THE UNITED STATES COURT OF APPEALS

**FEDERAL ANTI-GRATUITY STATUTE DOESN'T FORBID PROSECUTORS' LENIENCY-FOR-TESTIMONY DEALS** – In the late fall of 1998, media attention nationwide was given to a bombshell anti-prosecution decision of a 3-judge panel of the 10th Circuit federal Court of Appeals in U.S. v. Singleton, 144 F.3d 1343 (10th Cir. 1998). The Singleton 3-judge panel held, in a strict literal reading of the law, that the federal statute which makes it a crime to promise a thing of value for a witness's testimony applies to prosecutors' widespread practice of offering leniency to cooperating witnesses in exchange for their truthful testimony. A 12-judge panel has now reversed the 3-judge panel's ruling by a 9-3 vote. See 64 CrL 261 (1999 WL 6469). Two other federal circuit courts have also recently ruled for the government on this question. See 64 CrL 222; 64 CrL 209. Thus, the much-publicized 3-judge panel decision against leniency deals may have had its Warholian "15 minutes of fame" and may now become relegated to history. Note also that the federal statute at issue in Singleton is broader than Washington statutes on bribery and tampering in relation to witnesses, so the question is unlikely to be given serious consideration by the Washington courts.

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# WASHINGTON STATE SUPREME COURT

## DRIVERS, BUT NOT PASSENGERS, MAY BE AUTOMATICALLY ORDERED OUT OF, OR BACK INTO, THEIR VEHICLES AT ROUTINE TRAFFIC STOPS

State v. Mendez, ___ Wn.2d ___ (1999) [1999 WL 33079]

Facts: (Excerpted from unanimous Supreme Court opinion)

> On February 6, 1996, at approximately 12:50 in the afternoon, one of two Yakima police officers in a patrol car on routine patrol observed a vehicle fail to stop at a stop sign. The officers activated the patrol car's overhead lights, and stopped the car that ran the stop sign. Both officers exited the patrol car and approached the stopped vehicle. Efrain Mendez, 16, was a passenger in the front seat of the stopped vehicle. Both he and the driver got out of the vehicle as soon as it came to a stop. Both officers testified Mendez then began walking away. One of the officers told Mendez to get back into the vehicle, but Mendez turned, fumbled with his shirt and reached inside his clothes more than once, and continued walking away. He then ran, even after a subsequent command to return to the vehicle.

[The arresting officer] chased Mendez on foot, caught him, and placed him under arrest. Although the trial court described the chase as "brief", [the officer] testified:

> He ran south through Lions Park, and then he crossed eastbound across Fifth Avenue, and then he went south to Tieton, and then when he went east on Tieton towards Fourth Avenue I lost sight of him behind the credit union building. I was about a – I was back at Pine, so I just paralleled him east on Pine, and picked him up again over by the trolley barns.

Upon arresting Mendez, the officer searched him and found a pipe the officer believed was used to smoke marijuana.

Proceedings:

Mendez was charged in juvenile court with (1) obstructing and (2) possession of drug paraphernalia. After his suppression motion was denied, he was adjudicated guilty on both counts. He appealed to the Court of Appeals, which affirmed the juvenile court. See 88 Wn. App. 1 (Div. III, 1997) **Feb. 98 LED:03.** Mendez then obtained review in the State Supreme Court.

ISSUE AND RULING: Does article 1, section 7 of the Washington constitution provide automatic authority for officers making a routine traffic stop to order passengers to get out of, or to get back into, their vehicles? (ANSWER: No; while the Fourth Amendment of the federal constitution does provide automatic "bright line" authority for officers in a routine traffic stop to order *both drivers and passengers* out of their vehicles, article 1, section 7 provides such automatic authority *only as to drivers; officers must articulate an objective rationale for directing* ***passengers*** *out of vehicles at routine traffic stops.* Result: Reversal of Court of Appeals decision which had affirmed Yakima County Superior Court adjudications of guilt of obstructing and possession of drug paraphernalia against juvenile Efrain Mendez.

ANALYSIS:

The opinion for the unanimous Washington Supreme Court is authored by Justice Talmadge. He notes that the U.S. Supreme Court has interpreted the federal constitution's Fourth Amendment as providing authority for officers making routine traffic stops to order both drivers and passengers out of, or back into, their vehicles. Under the federal constitution, there is no need to articulate any objective justification for the order. The intrusion is minimal, the U.S. Supreme Court has held, and the "officer safety" considerations override the usual requirement that officers provide case-specific justification for interfering with citizens' privacy and liberty.

In "independent state constitutional grounds" rulings interpreting article 1, section 7 over the past 20 years, the Washington Supreme Court has placed greater restrictions on certain types of law enforcement search and seizure actions than has the U.S. Supreme Court. The Mendez Court concludes, primarily based upon this "independent grounds" case law development over the past two decades, that article 1, section 7 requires greater restriction than the federal constitution in relation to peace officer control over passengers at routine traffic stops.

The Mendez opinion declares that, as to *drivers*, the rule under article 1, section 7 is identical to the "bright line" rule of the federal constitution. Under article 1, section 7, as under the Fourth Amendment, an officer at a routine traffic stop may automatically order a driver out of, or back into, his or her vehicle, with no need for the officer to justify the directive. However, the state constitutional rule differs from the federal constitutional rule as to *passengers*. Under the

Washington constitution, an officer must have an articulable, objective rationale based on safety concerns, in order to justify ordering a passenger out of, or back into, the vehicle.

Justice Talmadge asserts that the justification for ordering a passenger out of a vehicle in this situation is not necessarily tested against the standards of Terry v. Ohio, unless the officer's action with regard to the passenger is investigative. The Mendez opinion explains the new rule for justifying the exercise of control over passengers at traffic stops:

> An officer must therefore be able to articulate an objective rationale predicated specifically on safety concerns, for officers, vehicle occupants, or other citizens, for ordering a passenger to stay in the vehicle or to exit the vehicle to satisfy art. I § 7. This articulated objective rationale prevents groundless police intrusions on passenger privacy. But to the extent such an objective rationale exists, the intrusion on the passenger is de minimis in light of the larger need to protect officers and to prevent the scene of a traffic stop from descending into a chaotic and dangerous situation for the officer, the vehicle occupants, and nearby citizens.
>
> To satisfy this objective rationale, we do not mean that an officer must meet Terry's standard of reasonable suspicion of criminal activity. Terry must be met if the purpose of the officer's interaction with the passenger is investigatory. For purposes of controlling the scene of the traffic stop and to preserve safety there, we apply the standard of an objective rationale. Factors warranting an officer's direction to a passenger at a traffic stop may include the following: the number of officers, the number of vehicle occupants, the behavior of the occupants, the time of day, the location of the stop, traffic at the scene, affected citizens, or officer knowledge of the occupants; these factors are not meant to be exclusive; nor do we hold that any one factor, taken alone, automatically justifies an officer's direction to a passenger at a traffic stop. The inquiry into the presence or absence of an objective rationale requires consideration of the circumstances present at the scene of the traffic stop.

Applying the Court's newly-created rule to the facts of the Mendez case, the Court holds the arrest of Efrain Mendez for "obstructing" to be invalid. The Court acknowledges that, where an officer has authority to make a Terry "seizure" of the person, once that seizure is made, a person who attempts to flee may lawfully be arrested for obstructing. Here, however, passenger Mendez had done nothing more than step out of the car at the point when the officer seized him by ordering him to get back in the car. There was no articulable, objective rationale to justify the seizure, and therefore the seizure was unlawful.

Admittedly, a*fter* the officer gave the order to get back in the car, Mendez then began suspiciously fumbling with his jacket. Of course, however, what an officer observes *after* a seizure cannot be used to justify the seizure. Accordingly, because the officer had no articulable basis for his order: (a) the seizure (by order to halt) was unlawful, (b) the obstructing arrest for fleeing the seizure was therefore also unlawful, and (c) the evidence obtained in a search of Mendez incident to the arrest was the inadmissible fruit of the prior unlawful enforcement actions.

**MAN WHO "BROUGHT A KNIFE TO A FIST FIGHT" WAS NOT, ON THE TOTALITY OF THE CIRCUMSTANCES, ENTITLED TO A "SELF DEFENSE" JURY INSTRUCTION; COURT AVOIDS PER SE RULE**

State v. Walker, 136 Wn.2d 767 (1998)

Facts and Proceedings:

The majority opinion in this split decision from the State Supreme Court describes the facts in the case based upon defendant Timothy Todd Walker's testimony at trial. Defendant Walker got into an argument on the street with his

neighbor, Roger Shepardson. Defendant Walker's wife had been having an affair with Shepardson. In the first stage of the argument, Shepardson threatened to "kick the shit out of" Walker, bumped him, and questioned his manhood for not fighting back.

Defendant momentarily withdrew from the altercation into his home. He got a large hunting knife with a fixed five-inch blade, and he put the knife in his back pocket. Then, he went out into the street to resume the argument with Shepardson. Shepardson was a much larger man. Walker claimed to have a back problem. Walker claimed that Shepardson attacked him, and that Shepardson beat him until he was in a compromised position. Walker allegedly feared for his life at that point.

Walker then killed Shepardson with the knife. At Walker's prosecution for murder, the trial court did not allow Walker to present a self-defense theory to the jury. Walker was convicted of second degree murder.

ISSUE AND RULING: Did the trial court err in denying defendant's request for a jury instruction on self defense? (ANSWER: No) Result: Affirmance of Court of Appeals decision which had affirmed Cowlitz County Superior Court conviction for second degree murder.

ANALYSIS BY MAJORITY:

The majority opinion explains that there is no hard-and-fast rule at law against using a knife to defend one's self from an attack with bare fists. That is, there is no "bright line" rule that one cannot "bring a knife to a fist fight", as had been suggested in an earlier unpublished opinion in this case by the Court of Appeals. However, the majority justices conclude that, under the facts of this case, Walker was not entitled to a "self defense" jury instruction. The majority opinion's explanation in part is as follows:

> A summation of the law on self-defense is necessary. A defendant cannot present a self-defense instruction to the jury without first "producing some evidence which tends to prove that the killing occurred in circumstances amounting to self-defense." One of the elements of self-defense is the person relying on the self-defense claim must have had a reasonable apprehension of great bodily harm.
>
> In determining whether a defendant has produced sufficient evidence to show reasonable apprehension of harm, the trial court must apply a mixed subjective and objective analysis. The subjective aspect of the inquiry requires the trial court to place itself in the defendant's shoes and view the defendant's acts in light of all the facts and circumstances known to the defendant. The objective aspect requires the court to determine what a reasonable person in the defendant's situation would have done. The imminent threat of great bodily harm [the standard in a case where deadly force was used in defense] does not actually have to be present, so long as a reasonable person in the defendant's situation could have believed that such threat was present.
>
> The importance of the objective portion of the inquiry cannot be underestimated. Absent the reference point of a reasonably prudent person, a defendant's subjective beliefs would always justify the homicide. "Applying a purely subjective standard in all cases would give free rein to the short-tempered, the pugnacious, and the foolhardy who see threats of harm where the rest of us would not…" The objective part of the standard "keeps self-defense firmly rooted in the narrow concept of necessity." …
>
> There is no dispute as to the proper rule of law applicable to this case. Defendant has the burden of introducing some evidence in support of his claim that he had a reasonable fear of great bodily injury. If "there is no reasonable ground for the person attacked ... to believe that his person is in imminent danger of death or great bodily harm, and it appears to him that only an ordinary battery is all that is intended, he has no right to repel a threatened assault by the use of a deadly weapon in a deadly manner."
>
> It is clear from the record that the trial court applied the proper subjective/objective inquiry into Defendant's claimed fear of great bodily harm. If the trial court's decision had rested upon the purely objective principle rejected in Walden, there would have been no reason for the court to delve into the facts supporting Defendant's claimed belief of imminent danger of great bodily injury. Instead, the court would have simply ruled Defendant's use of the knife against the unarmed Shepardson was unjustifiable, with no discussion of Defendant's mixed subjective/objective perspective of the attack. The trial court, however, gave much attention to the circumstances of the fight, and the court clearly examined Defendant's subjective point of view when determining whether a reasonable person could have perceived a threat of great bodily injury from the fist fight with Shepardson.

The court's factual finding that no evidence supported Defendant's claimed belief of imminent danger of great bodily injury is reviewable only for abuse of discretion. The trial judge heard all of the testimony, observed the demeanor of the witnesses, and reviewed all the evidence. The trial judge had the opportunity to view Defendant in court and see if, and how much, his back injury restricted his physical movements. The trial judge was in the best position to hear and weigh the evidence to determine if any of it supported Defendant's self-defense claim. After reviewing all of the information before the court, the trial judge refused to allow Defendant's proposed jury instructions on self-defense.

The trial court's factual findings are supported by the record. Even though Defendant was of smaller stature than Shepardson, and even though Defendant had a back injury, no facts in the record support Defendant's claimed fear that Shepardson was going to kill him. Shepardson and Defendant had one or two verbal altercations prior to the night of the fight, and during one of those altercations Shepardson threatened to "kick the shit out of" Defendant. Defendant, however, never heard Shepardson make any death threats against him in contrast to the facts of Painter [State v. Painter, 27 Wn. App. 708 (1980)]. Shepardson was never portrayed as being a violent person or having a history of injuring or killing people. Prior to engaging in the fist fight, Defendant had no reasonable ground to fear that Shepardson would inflict great bodily harm on Defendant.

As mentioned above, Defendant's main self-defense argument rested upon the assertion that he began fearing for his life only as a result of the alleged beating he was receiving from Shepardson. The facts did not support this claimed fear. The trial court observed there was no physical evidence that Defendant suffered any kind of injury, other than a possible, unsubstantiated cut by the side of his mouth. There was no evidence of any swelling or bruising on Defendant which would have indicated a severe physical beating.

In contrast to Defendant's lack of any injuries, a pathologist testified Shepardson's body exhibited five knife wounds, including the fatal blow, to the chest and trunk area. In addition, Shepardson had three stab wounds on his right arm, and two or three stab wounds on his left arm. Shepardson's fists showed no signs of bruising to indicate he had punched anything with sufficient force to cause a bruise to his fists. No evidence supported Defendant's claimed fear for his life as a result of the alleged beating. As the trial court stated, "What we have is a fight going on which is a simple assault or certainly nothing else at that point...." Defendant went into the street to argue with Shepardson, and the argument turned into a simple fist fight, even taking into account Defendant's subjective perceptions. Any reasonable person standing in Defendant's shoes would have perceived that only "an ordinary battery is all that [wa]s intended," in which case the use of deadly force was unjustified.

[U]nder certain circumstances, a person may reasonably fear great bodily injury from a severe beating by naked hands. Such circumstances are not present in this case. Defendant failed to offer any evidence supporting his claimed fear that Shepardson intended to commit anything more than an ordinary battery against him; rather, the evidence showed that, even taking into account all Defendant knew at the time, no reasonable person could have feared great bodily harm.

[Citations omitted]

DISSENTING OPINION: Justice Madsen writes a dissenting opinion joined by Justices Sanders, Johnson and Alexander. The dissenting opinion argues that the trial judge and majority justices are making the same error, i.e., determining a) whether in fact Walker acted in self defense, rather than b) whether there was sufficient evidence to submit the self defense question to the jury.

The dissenting opinion similarly analyzes the question of whether Walker was a “first aggressor,” and therefore not entitled to a self defense instruction for that separate reason. The trial court had rejected Walker’s self defense theory for that additional reason. The Supreme Court majority does not address the “first aggressor” question, while the dissent argues that the trial court erred as well on the “first aggressor” question, and that the trial court did not have any basis for not finding Walker’s story sufficient to allow him to take his self defense theory to the jury.

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## BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

**(1) VICTIM/PETITIONER CANNOT "CONSENT" TO VIOLATION OF DVPA ORDER** – In State v. DeJarlais, 136 Wn.2d 939 (1998) a unanimous Supreme Court rejects defendant's argument that the jury should have been instructed on his consent defense in his prosecution for violation of a protection order issued under the Domestic Violence Protection Act.

In response to defendant's argument that the Court's interpretation of the DVPA discourages reconciliation, the Court explains:

> We note nothing in the statute prevents drafting a protection order which allows some contact, for instance, by telephone or through a third party. There is no requirement that all contact be prohibited. And, while modification of an order is only possible after notice and hearing, it can be accomplished any time up to the order's expiration date. RCW 26.50.130.
>
> Our reading of the statute is consistent with the Legislature's intent and clear statement of policy. Requests for modification of that policy should be directed to the Legislature not this court. The statute, when read as a whole, makes clear that consent should not be a defense to violating a domestic violence protection order. The Defendant is not entitled to an instruction which inaccurately represents the law.

Result: Affirmance of Court of Appeals decision (see **March 98 LED at 17-18**) which affirmed Pierce County Superior Court convictions for violation of a DVPA protection order and for third degree rape.

**(2) AFTER LOSING CIVIL SERVICE APPEAL, OFFICER MAY PURSUE GRIEVANCE REMEDY** – In Civil Service Commission of the City of Kelso v. City of Kelso and others, ___ Wn.2d ___ (1999) [1999 WL 3902/969 P.2d 474], the State Supreme Court reverses a Court of Appeals decision and rules that a City of Kelso law enforcement officer who lost a civil service appeal from a disciplinary suspension under RCW chapter 41.12 could pursue a grievance procedure under a labor contract.

Result: Reversal of Court of Appeals decision (see **February 98 LED:21**) which had affirmed a Cowlitz County Superior Court decision affirming the officer's suspension; the end result is reinstatement of the arbitrator's order reducing the officer's 10-day suspension to a written reprimand.

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## PENDING CASES IN THE WASHINGTON STATE SUPREME COURT

**HOMICIDE CAUSATION ISSUES POSED IN CASES PENDING BEFORE THE WASHINGTON SUPREME COURT** – In two criminal homicide cases, the Washington State Supreme Court is reviewing causation issues which are probably of more interest to lawyers and law professors than to law enforcement officers.

In State v. Nicholas J. McDonald, the Supreme Court is reviewing a Division Two Court of Appeals ruling [reported at 90 Wn. App. 604 (Div. II, 1998)] that, where a defendant shoots a still-alive-but-dying victim who has already suffered mortal gunshot wounds inflicted by another, the defendant can be held (under the rule allowing for multiple proximate causes) to have been a proximate cause of the death. And in State v. Antonio Perez-Cervantes, the Supreme Court is reviewing a Division Two Court of Appeals ruling [reported at 90 Wn. App. 566 (Div. II, 1998)], that the rights of a homicide defendant were violated when he was precluded by the trial judge from arguing that his stabbing victim's subsequent use of cocaine and the victim's failure to obtain continuing medical care for medical complications from the stabbing were intervening, superseding causes of the victim's death.

The Court of Appeals decisions in State v. McDonald, and State v. Perez-Cervantes have not been previously reported in the **LED**.

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## WASHINGTON STATE COURT OF APPEALS

**CAR PROWLING SEIZURE SUPPORTED BY REASONABLE SUSPICION, OBSTRUCTING ARREST BY PC**

State v. Contreras, 92 Wn. App. 307 (Div. II, 1998)

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

> Shortly after noon on October 15, 1996, police received a call about a possible vehicle prowl at 6303 East "F" Street in Tacoma, where a male was prowling around a white vehicle. Within five minutes of receiving the dispatch, Officer Michael Scarfo responded; he arrived at the scene and observed Contreras seated behind the steering wheel of a white car parked in front of 6303 East "F" Street.
>
> Scarfo exited his vehicle and ordered Contreras to raise his hands. Contreras did not raise his hands; instead, he just smiled. Scarfo again ordered Contreras to raise his hands, but he did not. Contreras seemed "out of it," again smiled at Scarfo, and began moving his hands back and forth around the dashboard, "like he was going to do something with them." Scarfo then pulled his gun, pointed it at Contreras, and again ordered him to raise his hands. Contreras continued to move his hands around the dashboard.
>
> Officer Gregory Wolfe arrived and approached the white vehicle from behind. Scarfo opened the driver's side door and ordered Contreras to exit the car, but Contreras did not move. The officers pulled Contreras out of the vehicle and pushed him up against the car with his hands on the roof. Contreras did not respond to any of the officers' questions about his identity or purpose for being in the vehicle. While the officers conducted a weapons patdown, Contreras took his hands off the roof and moved them down by his chest. The officers then handcuffed Contreras and placed him in the patrol car.
>
> With Contreras in the patrol car, the officers continued to investigate the possible vehicle prowl. Wolfe asked Contreras whether he owned the white car or had permission to be inside it. Contreras refused to answer or to disclose his name or other information. Wolfe told Contreras he could be arrested if he did not provide information about who he was or why he was in the car. Contreras then told Wolfe his name was "James." Scarfo did not smell any intoxicants on Contreras, but he noticed that Contreras appeared to be under the influence of a controlled substance.
>
> Meanwhile, the officers inspected the white car for evidence of forced entry but found none. On the front passenger seat they discovered a paper bag containing miscellaneous items, including a wallet with the identification of a "James Rideout."
>
> The officers determined the white car was registered to a Ronald Sigafoos, who lived at 6307 East "F" Street, but they were unable to contact him. The neighbor who had called the police about the vehicle prowl told the officers on the scene that he had seen a male ring the doorbell of 6307 East "F" Street, receive no answer, walk to the white car, try to open the doors, and then get in through the driver's open door.
>
> The officers arrested Contreras for obstructing a law enforcement officer and took him to the station for booking. At the station, Contreras was uncooperative and refused to talk to police. During the booking search, the booking officer found in Contreras' jacket pocket a baggy containing methamphetamine.
>
> The State charged Contreras with unlawful possession of a controlled substance, RCW 69.50.401(d). At trial, Contreras testified that he had been drinking the night before, but could not remember how he had gotten to the area, how he had gotten into the car, or what had happened with the police; and he did not know a James Rideout. The jury convicted Contreras as charged.

ISSUE AND RULING: 1) Was the initial seizure of Contreras supported by reasonable suspicion as to car prowling? (ANSWER: Yes); 2) Was the subsequent arrest of Contreras supported by probable cause as to obstructing? (ANSWER: Yes) Result: Affirmance of Pierce County Superior Court conviction of Rene Contreras for possession of a controlled substance.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Reasonable Suspicion For Terry Seizure Of Suspected Car Prowler

> Police may detain a citizen for an investigative stop on less than probable cause. An investigative stop is reasonable if the officer has specific and articulable facts giving rise to a reasonable suspicion that the suspect has been or is involved in criminal activity.

Contreras argues that the officers' handcuffing and placing him in the patrol car constituted an unconstitutional seizure because they lacked a reasonable and articulable suspicion that he was involved in criminal activity until after they seized him. His position is not supported by the case law.

In State v. Little, 116 Wn.2d 488 (1991) [**June 91 LED:09**], police received a call reporting a group of juveniles loitering on the grounds of an apartment complex. When the officers arrived, Little fled. The court determined that these circumstances created a reasonable suspicion that Little was involved in criminal activity and justified the officers' investigative detention.

In State v. Glover, 116 Wn.2d 509 (1991) [**June 91 LED:09**], police routinely patrolled the grounds of an apartment complex for trespassers and loiterers. During one such patrol, two officers noticed Glover, who they believed was not a resident of the complex. Glover tried to evade the police by walking in the other direction; he kept looking back and fidgeting while walking away. The court held that the officers had a reasonable suspicion of criminal activity justifying an investigatory detention, based on Glover's location and suspicious actions and the officers' knowledge of the complex's residents.

Here, the officers received a report of a possible vehicle prowl of a white car by an unidentified male in front of 6303 East "F" Street. Within five minutes, Scarfo arrived and found Contreras sitting in a white car in front of 6303 East "F" Street. Contreras appeared "out of it," refused to obey the officer's commands to raise his hands or get out of the car, and refused to speak to the officers. As in Glover, these facts created a reasonable suspicion of criminal activity. Contreras' location in the vehicle, his suspicious and uncooperative behavior, coupled with the report of a vehicle prowl of a white car in that location, justified the officers' investigatory stop.

2) Probable Cause To Arrest For Obstructing

A person is guilty of obstructing a law enforcement officer if he or she "willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties." RCW 9A.76.020(1).

> The statute's essential elements are (1) that the action or inaction in fact hinders, delays, or obstructs; (2) that the hindrance, delay, or obstruction be of a public servant in the midst of discharging his official powers or duties; (3) knowledge by the defendant that the public servant is discharging his duties; and (4) that the action or inaction be done knowingly by the obstructor....

Contreras does not contend that any of the above four elements are lacking. Rather, he argues that his actions did not constitute grounds for an arrest for obstructing where he merely refused to talk to the officer. Contreras is correct that mere refusal to answer questions is not sufficient grounds to arrest for obstruction of a police officer. But Contreras did more than merely refuse to talk. He also disobeyed the officer's orders to put his hands up in view of Scarfo, to exit the car, to keep his hands on top of the car, and to provide his name. Instead, he gave Wolfe a false name.

> In State v. Hudson, 56 Wn. App. 490 (1990) [**April 90 LED:16**], Division One held that a suspect's flight from police [**after being lawfully stopped – LED Ed.**] hindered or delayed investigation and arrest, thus supporting a conviction for obstruction. In Little, the court ruled, "Appellant's refusal to stop when requested by the officers hindered, delayed and/or obstructed the officers in the discharge of their official duties." And in State v. Mendez, 88 Wn. App. 785 (1997) [**Feb. 98 LED:03**], the court determined that by disobeying an officer's order to return to the car and attempting to flee, the appellant "hindered, delayed and obstructed the police officers in their investigation of the traffic offense." **[Mendez was reversed on other grounds. See entry in this LED at page 4 above. LED Ed.]** Finally, in City of Sunnyside v. Wendt, 51 Wn. App. 846 (1988), the court found that by falsely stating he had no license, Wendt knowingly hindered the officer in his investigation of a traffic accident by giving false information. **[Note that the better charge for lying to an officer is now "providing a false or misleading statement to a public servant" under RCW 9A.76.175 – LED Ed.]**

Here, Contreras' additional actions -- disobeying police orders to put his hands up and to exit the vehicle, and giving false information -- hindered and delayed the officers' investigation of a possible vehicle prowl. These actions are sufficient to support an arrest for obstructing a law enforcement officer.

[Some citations, one footnote omitted]

**LOW KEY DEMANDS FOR MONEY SUFFICIENT TO SUPPORT ROBBERY CONVICTION**

State v. Collinsworth, 90 Wn. App. 546 (Div. I, 1997)

Facts and Proceedings:

Daniel Collinsworth was charged with and convicted in a non-jury trial of five counts of armed robbery in the second degree. Typical of the facts on each count were the facts on Count 1, as described by the Court of Appeals:

> On December 30, 1995, Collinsworth entered a Seattle branch of Washington Mutual Bank and approached teller Michael Hoiland. Collinsworth, who appeared to be "very nervous" and "fidgety," told Hoiland in a "serious" tone of voice, "I need your hundreds, fifties and twenties." When Hoiland paused, unsure of what to do, Collinsworth said, "I'm serious." As Hoiland started retrieving currency, Collinsworth added, "No bait, no dye."
>
> Because Collinsworth was wearing baggy clothing, Hoiland could not determine whether he had a weapon; Collinsworth did not put his hands in his pocket or otherwise indicate that he had a weapon. Hoiland perceived Collinsworth's words to be an ultimatum or threat to harm other employees or customers if he did not comply.
>
> Hoiland explained that Washington Mutual has a policy requiring tellers to comply with any demand or request for money, whether or not a weapon is displayed. Hoiland stated that he complied with Collinsworth's demand because of the bank policy and because of the perceived threat.

Collinsworth challenged the charges on all counts during argument to the trial court judge. He unsuccessfully argued to the trial judge that he could be convicted only of theft, not robbery, because there was no evidence that he had used force or threatened to use force to obtain the bank's money. Collinsworth was convicted on five counts of second degree robbery and one count of attempted second degree robbery.

ISSUE AND RULING: Was there evidence that Collinsworth used force or threats of force sufficient to support his robbery conviction? (ANSWER: Yes) Result: Affirmance of King County Superior Court convictions for second degree robbery (five counts) and affirmance of one count of attempted second degree robbery.

ANALYSIS:

The Court of Appeals begins its analysis by describing defendant's argument:

> In order to establish robbery, the State was required to prove, among other things, that Collinsworth took bank property "by the use or threatened use of immediate force, violence, or fear of injury...." Collinsworth argues that this element was not established because he expressed no threats to any of the tellers, displayed no weapon, made no threatening gestures, and demanded the money in a "calm" voice. He maintains that his conduct did not constitute robbery merely because he was able to "exploit" a weakness in the banks' operating procedure, which required tellers to comply with any demands for money. He requests that his robbery convictions be vacated and that the case be remanded for resentencing on convictions for first degree theft and first degree attempted theft.

Then the Court discusses several federal court decisions which have held similar low key demands to be implied threats, and therefore to be sufficient to support a robbery charge. Finally, the Collinsworth Court sums up its view that defendant Collinsworth was guilty of robbery under Washington law:

> Under the circumstances of this case, the fact that Collinsworth did not display a weapon or overtly threaten the bank tellers does not preclude a conviction for robbery. "The literal meaning of words is not necessarily the intended communication." In each incident, Collinsworth made a clear, concise, and unequivocal demand for money. He also either reiterated his demand or told the teller not to include "bait" money or "dye packs," thereby underscoring the seriousness of his intent. No matter how calmly expressed, an unequivocal demand for the immediate surrender of the bank's money, unsupported by even the pretext of any lawful entitlement to the funds, is fraught with the implicit threat to use force. "Any force or threat, no matter how slight, which induces an owner to part with his property is sufficient to sustain a robbery conviction." The trial court's findings that the tellers were fearful of immediate injury and would have handed over the money even without the policy requiring compliance are unchallenged on appeal.

United States v. Wagstaff [**a Federal Court of Appeals decision – LED Ed.**], relied upon by Collinsworth, is factually distinguishable. In Wagstaff, the defendant entered a bank, put on a ski mask, walked into the tellers' area, and started removing money from a cash drawer. There was no teller nearby, and the defendant did not say anything or present a note. Thus, the issue was whether a teller's subjective fear, standing alone, was sufficient to establish a taking by intimidation.

In this case, Collinsworth expressed his demands for money directly to the teller. Viewed in the light most favorable to the State, the evidence was sufficient to support the trial court's findings that Collinsworth obtained bank property through the use or threatened use of "immediate force, violence or fear of injury."

[Citations and footnotes omitted]

**CRACK-UNDER-THE-HAT EVIDENCE DOES NOT SUPPORT "UNWITTING POSSESSION" INSTRUCTION**

State v. Buford, ___ Wn. App. ___ (Div. I, 1998) [967 P.2d 548]

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

The State charged Buford with possession of cocaine based on a small amount of cocaine residue found in a crack pipe that the police seized from under Buford's hat. At trial, Buford did not present any evidence to rebut the State's case-in-chief, but did request an unwitting possession instruction that he patterned after WPIC 52.01:

> A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession or did not know the nature of the substance.
>
> The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

The trial court refused to give the instruction, citing the lack of evidence to support Buford's claim that he unwittingly possessed the cocaine: "There is no evidence by which the trier of fact could infer or determine that the possession was unwitting." The jury returned a guilty verdict, and the trial court sentenced him within the standard range.

ISSUE AND RULING: Does the mere fact that only a small amount of cocaine was found in the crack pipe under Buford's hat constitute sufficient evidence to support a jury instruction on "unwitting possession?" (ANSWER: No) Result: Affirmance of King County Superior Court conviction of Ronald Lewis Buford for possession of cocaine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

"Generally, an instruction can be given to the jury if evidence exists to support the theory upon which the instruction is based." But no Washington court has specifically held what quantum of evidence is necessary before a criminal defendant is entitled to an unwitting possession instruction. Therefore, we must resolve this issue before deciding whether the trial court erred in refusing Buford's proposed unwitting possession instruction.

Buford, pointing to the law of self-defense, contends that "any evidence" of unwitting possession should entitle a criminal defendant to an unwitting possession instruction.

As an initial matter, it should be noted that although unwitting possession and self-defense are analogous to the extent they are both affirmative defenses, the two defenses are not analogous in terms of their respective burdens of proof. "Unwitting possession is a judicially created affirmative defense that may excuse the defendant's behavior, notwithstanding the defendant's violation of the letter of the statute." [State v. Balzer, 91 Wn. App. 44 (Div. II, 1998) **Nov 98 LED:14**]. "To establish the defense, the defendant must prove, by a preponderance of the evidence, that his or her possession of the unlawful substance was unwitting." (citing State v. Riker, 123 Wash.2d 351 (1994)). Self-defense, on the other hand, negates the culpable mental states of intent, knowledge,

recklessness, and criminal negligence. As a result, if one of these mental states is an element of the crime charged, "the State must prove the absence of self-defense beyond a reasonable doubt[.]"

The unwitting possession defense is analogous to the affirmative defense of entrapment in terms of their respective burdens of proof. That is, entrapment, like unwitting possession, "is a defense that admits that the defendant committed the crime and seeks to excuse the unlawful conduct." And to establish the defense, the defendant must prove, by a preponderance of the evidence, that he or she was entrapped, i.e., he or she was induced into committing the crime by law enforcement agents and otherwise would not have committed the crime.

Regarding the quantum of evidence necessary to entitle a criminal defendant to an entrapment instruction, this court has held that the "defendant must present evidence which would be sufficient to permit a reasonable juror to conclude that the defendant has established the defense of entrapment by a preponderance of the evidence." We hold that a criminal defendant is not entitled to an unwitting possession instruction unless the evidence presented at trial is sufficient to permit a reasonable juror to find, by a preponderance of the evidence, that the defendant unwittingly possessed the contraband.

In this case, the only evidence that could arguably support Buford's claim that he unwittingly possessed the cocaine is that the amount of cocaine seized was small and had to be scraped out of the crack pipe with a scalpel. But this evidence, without more, does not support an inference that Buford unwittingly possessed the cocaine. In fact, as the State contends, Buford's proposed instruction would have invited the jury to engage in speculation or conjecture:

> Without receiving some basic facts -- such as where did the defendant get the pipe, how long had he been carrying the pipe, did he express dismay that he possessed the pipe, why was he carrying the pipe under his hat, did he know what the pipe was used for, and did he know what cocaine looked like -- the jury could not have properly utilized [Buford's proposed unwitting possession] instruction.

Therefore, as the trial court found, the evidence was not sufficient to permit a reasonable juror to find, by a preponderance of the evidence, that Buford unwittingly possessed the cocaine. Accordingly, the trial court properly refused to give the unwitting possession instruction that Buford requested.

[Some citations omitted]

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## BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

**(1) "EXTREME INDIFFERENCE TO HUMAN LIFE" HAS FOCUS ON SPECIFIC VICTIM UNDER "HOMICIDE BY ABUSE" STATUTE** – In State v. Edwards, 92 Wn. App. 157 (Div. I, 1998), the Court of Appeals rejects defendant's argument that the jury was inappropriately instructed in his prosecution for "homicide by abuse."

Defendant's argument focused on the phrase "extreme indifference to human life" which appears in both the "homicide by abuse" statute and the "murder in the first degree" statute. RCW 9A.32.055(1) (homicide by abuse) provides:

> (1) A person is guilty of homicide by abuse if, **under circumstances manifesting an extreme indifference to human life**, the person causes the death of a child or person under sixteen years of age, a developmentally disabled person, or a dependent adult, and the person has previously engaged in a pattern or practice of assault or torture of said child, person under sixteen years of age, developmentally disabled person, or dependent person.

RCW 9A.32.030(1)(b) (murder in the first degree) provides in relevant part:

> (1) A person is guilty of murder in the first degree when:
> ....
> (b) **Under circumstances manifesting an extreme indifference to human life**, he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person.

[Emphasis added to statutory excerpts by **LED** Editor]

Prior cases under the first degree murder statute have held that the phrase "extreme indifference to human life" in that statute addresses an indifference to human life in general, not an indifference to the life of a particular victim. A jury must be so instructed in a first degree murder case. A conviction cannot stand under the first degree murder statute if the evidence shows that the defendant was engaged in a one-on-one act against a particular person and caused the death of that person through conduct showing an extreme indifference to the life of that particular victim.

In this case of first impression under the homicide by abuse statute, defendant Edwards sought a similar limiting interpretation of the phrase, "extreme indifference to human life." The Court of Appeals explains why it rejects defendant's argument for an identical interpretation of the phrase in the different context of the two statutes:

> The first degree murder and homicide by abuse statutes have differing structures and purposes. One of the elements of homicide by abuse is a pattern of abuse against a specific victim. It follows, therefore, that the mens rea of "extreme indifference" must be an indifference to the life of that victim in particular. By contrast, the first degree murder statute does not specify that the actionable conduct be committed against a particular victim, nor that there be a previous pattern of abuse against that victim in particular. The mens rea of "extreme indifference" in the first degree murder statute therefore applies in circumstances different from those contemplated in the homicide by abuse statute.
>
> While the Legislature may have had in mind the same standard of mens rea -- "extreme indifference to human life" -- for both the first degree murder and homicide by abuse statutes, the Legislature clearly intended that these crimes apply to different classes of victims. In 1987 the Legislature created the crime of homicide by abuse in response to the death of Eli Creekmore at the hands of his father. State v. Creekmore, 55 Wn. App. 852 (1989). The final bill report for Substitute Senate Bill 5089 (1987) reads, in part:
>
> > It has been reported that it is very difficult to obtain a conviction for murder in child abuse cases because such a conviction requires a showing that the adult involved intended to kill the child ... A new crime of homicide by abuse is created.
>
> The Legislature clearly intended to create a statute which applies in circumstances not covered by then-existing statutes. The plain language and the context of the homicide by abuse statute requires that the "human life" referred to is the life of the victim, not human life in general.

Result: Affirmance of Snohomish County Superior Court conviction of Christopher Edwards for both homicide by abuse and second degree murder, with sentences running concurrently.

**(2) FIRST DEGREE ANIMAL CRUELTY CONVICTION UPHELD** – In State v. Andree, 90 Wn. App. 917 (Div. I, 1998), the Court of Appeals rejects defendant's challenges to his conviction for first degree animal cruelty.

RCW 16.52.205 provides:

> A person is guilty of animal cruelty in the first degree when, except as authorized in law, he or she intentionally (a) inflicts substantial pain on, (b) causes physical injury to, or (c) kills an animal by a means causing undue suffering, or forces a minor to inflict unnecessary pain, injury, or death on an animal.

The Court of Appeals holds: A) that the evidence of defendant's act of killing a cat by stabbing it nine times with a hunting knife clearly brought him within the statute; and B) that the statutory term "undue suffering" is not void for vagueness.

Result: Affirmance of John Paul Andree's King County Superior Court conviction of first degree animal cruelty.

**(3) MALFUNCTIONING GUN WAS "FIREARM" FOR PURPOSES OF RCW 9A.36.021, 9.94A.125, 9.41.010** -- In State v. Faust, ___ Wn. App. ___ (Div. II, 1998) [967 P.2d 1284], the Court of Appeals rules that a malfunctioning gun was a "firearm" for purposes of RCW 9A.36.021 (second degree assault), RCW 9.94A.125 (sentencing enhancement for firearms), and RCW 9.41.010 ("firearms" definition under "firearms and dangerous weapons" statute).

This case involved an assault with a gun by Mr. Faust against his wife. The Court of Appeals describes as follows the facts relating to the operability of the gun:

> Annette Faust testified that before the day of the assault her husband's gun had not been working. He told her that "it was jamming or something was wrong with it and it didn't work." But, on the day of the assault, he told her that it had been repaired. Initially, Annette did not believe that the gun had been repaired. But when she saw that he had bullets and was putting the clip into the gun, she "got really, really scared" and thought that maybe he had gotten it fixed. Although Faust had difficulty putting the clip into the gun, he did get the magazine closed after he dug around with the knife. The gun jammed.
>
> The police tested the gun and could not get it to fire. They inserted the magazine into the gun that Faust had used and pulled back the slide. When the slide moved forward, the round jammed and would not go into the chamber. The officers used .380 caliber ammunition. They also tried, without success, to manually load a round into the chamber. An officer testified that it might be possible to fire the gun using smaller ammunition, such as a .32 caliber round. But the police did not test this theory and found only .380 caliber ammunition in the Faust home.

The critical statute in this case is RCW 9.41.010, which defines "firearm" as "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." Defendant Faust argued that a gun incapable of being fired at the time of the criminal act is not a "firearm" for purposes of the sentencing enhancement provisions under the above laws. However, the Court of Appeals concludes that, for purposes of the above statutes, a gun qualifies as a "firearm" so long as it is a real gun, even if it is inoperable at the time of the criminal act.

Result: Affirmance of Clallam County Superior Court conviction of Eric Wayne Faust for second degree assault and of enhanced sentence for use of a firearm in the commission of a crime.

**(4) PARENT CAN BE GUILTY OF UNLAWFUL IMPRISONMENT OF CHILD** – In State v. Kinchen, 92 Wn. App. 442 (Div. I, 1998) the Court of Appeals recognizes that parents can be held liable for "unlawful imprisonment" of their children under RCW 9A.40.040(1).

Defendant Kinchen was convicted of unlawful imprisonment of his two very troublesome children. Kinchen had allegedly: 1) locked his children, ages 8 and 9, in a bathroom on some occasions for his entire work shift; and 2) locked his children at large in the apartment on other occasions, with padlocks placed on food cupboards. The evidence was that the bathroom was "escape proof," but that the apartment was otherwise quite easy to escape from safely, by egress through a window.

The Court of Appeals notes that the pertinent statutory provisions before it are RCW 9A.40.040(1), which states:

> A person is guilty of unlawful imprisonment if he knowingly restrains another person.

and the definition of "restrain" at RCW 9A.40.040(1), which reads:

> "Restrain" means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his liberty. Restraint is "without consent" if it is accomplished by a) physical force, intimidation, or deception, or b) any means including acquiescence of the victim, if he is a child less than sixteen years old or an incompetent person and if the parent, guardian, or other person or institution having lawful control or custody of him has not acquiesced.

Defendant Kinchen argued in his appeal that the statute was void for vagueness and hence invalid as applied to actions of a parent in child-raising. In part, the Court of Appeals analysis rejecting this argument is as follows:

> Kinchen's appeal focuses on the phrase "lawful authority" and the phrase used in the statute, "without legal authority." Analogizing to cases in which the Supreme Court has deemed statutes and ordinances to be unconstitutionally vague, while containing phrases such as "lawful order," "without lawful purpose," and "without lawful excuse," Kinchen contends that these words leave the scope of the statutory proscriptions uncertain, especially when coupled with the fact that he, as a parent, has the right to restrict the movements of his children or to punish them. Kinchen argues that the statute allows police officers, prosecutors, and juries to enforce the statute in a subjective manner. We must disagree.
>
> Our State Supreme Court has denied facial challenges to the phrase " without legal authority" as it pertains to the kidnapping statute and the harassment statute. The court in State v. Worrell [111 Wn.2d 537 (1988)] found the phrase was not vague because persons of ordinary intelligence are able to read the definition of "restrain" and determine what types of activity are being proscribed.

> Additionally, the court found that persons could resort to cases interpreting the statute if they needed further guidance.
>
> Kinchen claims the restraint of his children could not be "without legal authority," given his rights as a parent. There is no question that a parent has a right to parent without the State's interference with child-rearing practices, including reasonable discipline not proved to be injurious to the child's health, welfare, and safety. In fact a parent may impose reasonable corporal punishment. Further, courts have held that a parent may restrict or exclude children from portions of a house, that the children are not entitled to "free reign" or an absolute privilege of use of the entire home. A standard of reasonableness or moderateness has been applied in this state to actions of a parent.
>
> The prevalent approach is to determine '"whether, in light of all the circumstances, the [parental] conduct itself, viewed objectively, would be considered excessive, immoderate, or unreasonable."' As in other circumstances, persons of ordinary intelligence are able to read the statutory definition of "restrain" (RCW 9A.40.010(1)) and determine what types of activity are being proscribed. Here, the jury was instructed in the fourth paragraph of instruction 6, "When done by a parent for purposes of restraining or correcting a child, physical discipline of a child is with lawful authority when it is reasonable and moderate." Kinchen's argument that the statute fails to provide notice to parents or citizens of proscribed conduct is not convincing. The statute is not unconstitutionally vague as applied here.

The Court of Appeals goes on to declare that Kinchen could be convicted on the allegations about locking the children in the bathroom (because of that room's security and the obvious unreasonableness of the practice) but not for locking the children at-large in the apartment (in part because egress was so easy). The problem in this case, the Court of Appeals asserts, is that the jury instructions and verdict form do not make it possible for the Court of Appeals to determine whether the jury convicted based on the bathroom lockups alone or on a combination of the at-large and bathroom lockups. Accordingly, the Court sends the case back to the trial court to re-try Mr. Kinchen for unlawfully imprisoning his children in the bathroom.

Result: Reversal of King County Superior Court convictions (two counts) of Stacey Kinchen for unlawful imprisonment; remand for re-trial.

**(5) COURT EXPLORES ENTRAPMENT ISSUE IN CASE OF BRIBE-SEEKING OFFICER** – In State v. O'Neill, ___ Wn. App. ___ (Div. I, 1998) [967 P.2d 985], the Court of Appeals addresses an issue of wording of instructions on entrapment in a case involving a corrupt law enforcement officer who sought a bribe from a DUI arrestee. The standard instruction on entrapment reads as follows:

> Entrapment is a defense to a criminal charge if:
>
> a) the criminal design originated in the mind of law enforcement officials or any person acting under their direction; and
>
> b) the defendant was lured or induced to commit a crime the defendant had not otherwise intended to commit.
>
> The defense is not established if the law enforcement official(s) did no more than afford the defendant an opportunity to commit a crime. The use of a reasonable amount of persuasion to overcome reluctance does not constitute entrapment.
>
> The burden of proof as to the defense of entrapment is on the defendant. This burden is satisfied if, based on the evidence before you, you conclude that it is more likely than not that both elements a) and b) are true.

This standard instruction was given to the jury in O'Neill's case. When the corrupt officer had offered on the night of a DUI arrest to make the DUI case go away, O'Neill had negotiated and paid the officer a bribe of $3000.00. In the trial, the trial court gave the jury the above standard entrapment instruction. The defendant took exception to the following two statements in the above-quoted standard instructions on entrapment (with italics added):

> The defense is not established if the law enforcement official(s) did no more than afford the defendant an opportunity to commit a crime. *The use of a reasonable amount of persuasion to overcome reluctance does not constitute entrapment.*

The Court of Appeals rejects defendant's challenge to the first sentence, but the Court agrees with O'Neill's challenge, under the peculiar facts of this case, to the second sentence (italicized above).

Result: Reversal of King County Superior Court bribery conviction of Brian K. O'Neill; case remanded for re-trial.

Status of appeal: The Court of Appeals decision is final.

**LED EDITOR'S NOTE: We won't explore the reasons given in the lead opinion in O'Neill as to why one of the statements in the standard instruction was ok while the other was not under the particular facts of this case involving a corrupt police officer. Of more interest to us is Judge Becker's concurring opinion in which she argues that an entrapment defense simply cannot be made in a case involving an officer who pursues a bribe for his own purely personal and illegal ends, rather than to gather evidence for the purpose of arresting and prosecuting a suspect. Because the Washington Supreme Court will not be reviewing the O'Neill decision, we must await another "corrupt officer" case to find out what the Supreme Court thinks about Judge Becker's viewpoint.**

**(6) TRIAL COURT LINEUP GROOMING ORDER UPHELD** – In State v. Smith, 90 Wn. App. 856 (Div. I, 1998), the Court of Appeals upholds a trial court order directing the accused to be groomed before appearing in a lineup to duplicate his appearance in an ID lineup.

In pretrial proceedings Smith challenged the State's motion to require him to shave his beard and appear in an ID lineup. A store clerk who had earlier been victimized in an armed robbery had spotted Smith ten days later. On her alert, police had arrested Smith. Smith was charged, and the prosecutor brought a motion for a shave and a lineup.

At the time of the robbery, the two store clerk witnesses had described the robber as being clean shaven, though one of the witnesses later changed her story to say the robber had a few days' growth of stubble on the day of the robbery. At the time of Smith's arrest, however, he had a well-established beard.

In response to the state's motion for a grooming order, Smith put on a fairly convincing case that he had had a beard throughout the time of the robbery. After discussing the applicable case law, the Court of Appeals concludes:

> It is the function of the jury to weigh the evidence, determine the credibility of witnesses and decide disputed questions of fact. Smith argues that he is not the robber because he had facial hair at the time of the robbery, while the robber was clean shaven. Smith also argues that he is not the robber because his fingerprints do not match those found on the doorknob at the scene of the robbery, and because the robber wore an earring, while he does not have pierced ears. All of this evidence may be presented at trial, and Smith's arguments regarding the evidence are more appropriately addressed to the jury.
>
> Trial courts are not required to conduct an evidentiary hearing before issuing an order compelling a defendant to alter his or her appearance before appearing in a lineup. In the absence of irrefutable evidence of Smith's appearance on the day of the robbery, or within a short time thereafter, we cannot say that the order compels Smith to alter his appearance so that he looks different from the way he looked at the time of the robbery. We find no abuse of discretion.

Result: Dismissal of petition of Leon T. Smith, Jr., for discretionary review of King County Superior Court order for grooming and appearance in lineup.

**(7) FIREARMS POSSESSION BAR FOR FELONS HAS NO DATE-OF-CONVICTION LIMITATION** – In State v. Weed, 91 Wn. App. 810 (Div. II, 1998), the Court of Appeals rejects defendant's argument that certain felony convictions do not bar firearms possession under RCW 9.41.040 if they were committed before July 1, 1993.

Two degrees of unlawful possession of a firearm are provided under RCW 9.41.040(1)(a) and (b) as follows:

> (1)(a) A person, whether an adult or juvenile, is guilty of the crime of **unlawful possession of a firearm in the first degree**, if the person owns, or has in his or her control any firearm after having previously been convicted in this state or elsewhere of **any serious offense** as defined in this chapter.
>
> (b) A person, whether an adult or juvenile, is guilty of the crime of **unlawful possession of a firearm in the second degree**, if the person does not qualify under (a) of this subsection for the crime of

unlawful possession of a firearm in the first degree and the person owns, has in his or her possession, or has in his or her control any firearm:

(i) After having previously been convicted in this state or elsewhere of **any felony** not specifically listed as prohibiting firearm possession under (a) of this subsection, **or any of the following crimes when committed by one family or household member against another, committed on or after July 1, 1993**: Assault in the fourth degree, coercion, stalking, reckless endangerment, criminal trespass in the first degree, or violation of the provisions of a protection order or no-contact order restraining the person or excluding the person from a residence (RCW 26.50.060, 26.50.070, 26.50.130, or 10.99.040);

(ii) After having previously been involuntarily committed for mental health treatment under RCW 71.05.320, 71.34.090, chapter 10.77 RCW, or equivalent statutes of another jurisdiction, unless his or her right to possess a firearm has been restored as provided in RCW 9.41.047;

(iii) If the person is under eighteen years of age, except as provided in RCW 9.41.042; and/or

(iv) If the person is free on bond or personal recognizance pending trial, appeal, or sentencing for a serious offenses as defined in RCW 9.41.010.

[Bolding added by **LED** Editor]

Defendant Weed was arrested in 1997 for domestic violence. At that time, he was determined to be in control of three firearms. Because he had a record of a conviction for a 1979 class C felony, Weed was charged with second degree unlawful possession of a firearm. He was convicted of three counts (one for each firearm).

Weed appealed, arguing that the phrase in subsection (1)(b), "committed on or after July 1, 1993," modifies both prior phrases, i.e., the phrase relating to non-serious felonies, as well as the next phrase relating to certain gross misdemeanors against family or household members. The Court of Appeals finds no support for Weed's argument. The plain meaning of the words of the statute makes the date limitation applicable only to the gross misdemeanors listed in subsection (1)(b), the Court of Appeals concludes.

Result: Affirmance of Jefferson County Superior Court convictions (three counts) of Christopher Weed for unlawful possession of a firearm in the second degree.

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## LED SUBJECT MATTER INDEX – 1994 - 1998

A five-year cumulative subject matter index for **LED**'s from January 1994 through December 1998 is now available on the Criminal Justice Training Commission's Internet Home Page at [http://www.wa.gov/cjt]

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## NEXT MONTH

The March 1999 **LED** will digest, among other items, the Court of Appeals decision in State v. Barstad, ___ Wn. App. ___ (Div. III, 1999) [1999 WL 9827] (holding that an angry driver who killed two people when he ran a red light at a busy intersection at high speed could be convicted under the "extreme indifference" variation of first degree murder).

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## LAW ENFORCEMENT MEDAL OF HONOR—NOMINATIONS ARE OPEN

In 1994, the Washington Legislature passed chapter 41.72 RCW, establishing the Law Enforcement Medal of Honor. This honor is reserved for those police officers who have been killed in the line of duty or who have distinguished themselves by exceptional meritorious conduct. This year's ceremony will take place Monday, May 10, 1999 at the Capitol Rotunda in Olympia, commencing at 1:00 PM. This is the first day of Law Enforcement Week across the nation.

The Law Enforcement Medal of Honor Committee is accepting nominations for those officers who will be honored in this year's ceremony. **Nominations must be postmarked no later than April 1, 1999.** If you wish to submit a nomination, and wish to obtain a copy of the Rules and Qualifications and blank Nomination Forms, **please call 206-389-2554 or write to Gary Fox, Secretary, Law Enforcement Medal of Honor Committee, P.O. Box 40116, Olympia, WA 98504-0116**. You may also obtain a copy of the rules and forms from your local Chief or Sheriff, as a complete set of these documents have also been sent to them. You may also contact the committee at the above phone number and address if you want assistance in the preparation of your nomination, or if you have any questions or concerns.

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

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