Law Enforcement Digest

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HONOR ROLL

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Tac Officer:	Officer Adam Wood - Yelm Police Department

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BRIEF NOTES FROM THE 9TH CIRCUIT, U.S. COURT OF APPEALS

(1) PEPPER SPRAY APPARENTLY MAY NOT BE USED TO OVERCOME MERELY PASSIVE RESISTANCE -- In Headwaters Forest Defense v. County of Humboldt, ___ F.3d ___ (9th Cir. 2000) [2000 WL 531004], the Ninth Circuit of the United States Court of Appeals issues a ruling in a civil case that will make it extremely difficult, if not impossible, for law enforcement to justify use of pepper spray to overcome merely passive resistance of protesters.

At issue in this case was whether, under the totality of the circumstances, a reasonable jury could have found that law enforcement officers in Humboldt County, California directed excessive force against nonviolent protestors. To try to get the otherwise-passively resisting protestors to release "black bears" (self-releasing steel cylinder devices linking the arms of pairs of protestors), officers seeking to arrest the protestors applied pepper spray to the eyes and faces of the protestors. The officers used the pepper spray based on a policy decision that this type of force was safer than use of grinders to cut off the "black bears." The Headwaters Forest Defense Court concludes that a reasonable jury could have concluded that use of pepper spray was unreasonable under the circumstances. Along the way, the Court says some things which, as noted above, will make it difficult to justify use of pepper against passive resistance.

LED EDITORIAL NOTE: Washington law enforcement agencies will want to review their policies regarding use of pepper spray in light of the Headwaters Forest Defense decision. The full text of the decision may be accessed at the FINDLAW WEB SITE at: [http://laws.findlaw.com/9th/9817250.html].

Result: Reversal of Federal district court decision granting judgment as a matter of law to law enforcement agency and law enforcement officers; remand for trial.

(2) "POSSE COMITATUS ACT" HELD TO BAR USE OF NAVY PERSONNEL IN SUPPORT OF STATE AND LOCAL ENFORCEMENT; NINTH CIRCUIT DECISION APPEARS TO CONFLICT WITH WASHINGTON SUPREME COURT PRECEDENT -- In U.S. v. Chae Won Chon, 210 F.3d 990 (9th Cir. 2000), the Ninth Circuit of the United States Court of Appeals rules that the federal "Posse Comitatus Act" (PCA) implicitly applies to Navy personnel, just as it expressly applies to Army and Air Force personnel. However, the Court finds an exception to the Act applicable in the Chae Won Chon case.

Defendant Chon was suspected of knowingly purchasing stolen Navy equipment from co-defendants, Buddy Costa and Mahlon K. Kapule, Jr., who had broken into a Navy warehouse to steal the equipment. Personnel of the civilian Naval Criminal Investigative Service (NCIS) took a lead role in the investigation, which also involved personnel of the FBI and the Honolulu Police Department. All three defendants were convicted, and all three appealed, arguing, among other things, that the NCIS had violated the PCA.

The PCA expressly prohibits Army and Air Force military personnel from participating in federal, state or local civilian law enforcement activities, except when acting in their purely personal capacities. The Ninth Circuit rules in Chae Won Chon that, although the PCA does not expressly mention the Navy and the Marine Corps, the PCA does implicitly include those other branches of the military, including the civilian personnel of the Navy's NCIS. This interpretation of the PCA by the Ninth Circuit appears to be directly contrary to the interpretation of the PCA by the Washington Supreme Court in State v. Short, 113 Wn.2d 35 (1989). The Washington Court held in its 1989 Short decision that Navy personnel are not subject to the constraints of the PCA.

However, the Ninth Circuit goes on in the Chon case to find that the NCIS agents' official investigative activities were permissible, because the agents were acting for an independent military purpose, i.e., the protection of military equipment.

Result: Affirmance of Federal district court convictions of Chon, Costa and Kapule.

LED EDITORIAL NOTE: The full text of the Chon opinion may be accessed at the "FINDLAW" Web Site at [http://laws.findlaw.com/9th/9810469.html].

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WASHINGTON STATE SUPREME COURT

FELON WHO LEFT GUN IN CAR FOR THREE DAYS "USED" THE CAR TO COMMIT FELONY POSSESSION OF GUN; THE SAME GOES FOR ILLEGAL DRUGS IN THE CAR; THEREFORE, HIS DRIVER'S LICENSE MUST BE REVOKED

State v. Batten, 140 Wn.2d 362 (2000)

Facts and Proceedings: (Excerpted from Supreme Court opinion)

> On December 21, 1997, Camas Police Officer Penniger stopped a vehicle because its license tabs were expired. After determining that the driver of the vehicle was James Allen Batten, Officer Penniger learned that there was an outstanding warrant for Batten's arrest. She, therefore, arrested Batten and performed a search of his car incident to the arrest. Under the driver's seat the officer found a .380 caliber handgun. In the console between the two front seats she found a cotton ball and a spoon. Both items were coated with what was later determined to be methamphetamine residue. When questioned by the police officer, Batten admitted that he was a convicted felon and could not legally possess a firearm. He told the officer that he had been target shooting with the handgun three days earlier and had forgotten that he left it in the car.
>
> The Clark County prosecuting attorney charged Batten with two felonies, unlawful possession of a controlled substance and unlawful possession of a firearm in the second degree. RCW 69.50.401(d); RCW 9.41.040(1)(b)(i). He pleaded guilty to both charges. At sentencing the trial court found that Batten's storage and transportation of the handgun and controlled substance in his vehicle constituted "use" of the motor vehicle in the commission of the felonies to which he pleaded guilty. Over Batten's objection, it ordered that Batten's license to drive be revoked. The Department of Licensing thereafter revoked Batten's driver's license for one year.
>
> Batten appealed to the Court of Appeals, Division Two, claiming that the trial court erred in ordering revocation of his driver's license on the basis that he used his motor vehicle in the commission of the charged felonies. That court affirmed the revocation, concluding that "where the felony is a possessory offense, the 'use' of a motor vehicle occurs by the mere presence of the prohibited item in the vehicle." State v. Batten, 95 Wn. App. 127 (1999) **Nov 99 LED:17**.

ISSUE AND RULING: Was there a sufficient relationship between A) Batten's vehicle and B) the gun and drugs found in it to justify revocation of his driver's license under RCW 46.20.285(4)? (ANSWER: Yes, because he used the vehicle as a place to store those items.) Result: Affirmance of Clark County Superior Court order that James Allen Batten's driver's license be revoked.

ANALYSIS: (Excerpted from Supreme Court opinion)

> RCW 46.20.285(4) requires the revocation of a person's driver's license for a period of one year for "[a]ny felony in the commission of which a motor vehicle is used." Batten contends here, as he did in the Court of Appeals, that the trial judge should not have revoked his license. He bases his argument on his assertion that "[t]he vehicle is . . . not something that is being used in the commission of a felony." He argues that there must be "a stronger connection between the crime and the use of the vehicle" than what he describes as his mere "passive use of the vehicle." Focusing his attention on the word "used" in the statute, he asserts that the aforementioned statute comes into play only when there is "a nexus between the offense and the vehicle," not merely when the use of the vehicle is "incidental" to the crime.
>
> In affirming the decision of the trial court, the Court of Appeals determined that in order for the statute to apply

> the vehicle must contribute in some way to the accomplishment of the crime. There must be some relationship between the vehicle and the commission or accomplishment of the crime. Accordingly, where the conviction is a possessory felony, we hold that the possession must have some reasonable relation to the operation of a motor vehicle or that the use of the motor vehicle must contribute in some reasonable degree to the commission of the felony.
>
> In support of its reasoning, the Court of Appeals consulted a dictionary in order to ascertain the plain and ordinary meaning of the word "used" and concluded that it meant "'employed in accomplishing something.'" We are entirely comfortable with the Court of Appeals' view of the statute in question. In reaching this conclusion, we accept the concession of both parties that there is nothing ambiguous about the word "used," and we approve the meaning the Court of Appeals ascribed to that term and the language of the statute in question.
>
> We also agree with the Court of Appeals that there was a sufficient nexus between Batten's possession of the firearm and methamphetamine and the use of the motor vehicle to justify the revocation of his license. As that court noted, Batten had left the handgun in the car for several days in a spot where it would not be easily detected. Employing a vehicle as a place to store and conceal the weapon, in our judgment, creates a sufficient relationship between the use of the vehicle and the crime of unlawful possession of the weapon to bring the possession of the weapon within the reach of the statute. The same can be said of Batten's possession of the methamphetamine. Although the paraphernalia that contained the methamphetamine was not hidden from view, as was the case with the handgun, a portion of the automobile, the console, was the repository for the illegal substance. We believe this is a sufficient relationship between the contraband and the vehicle to bring the possession of the substance within the ambit of the statute.
>
> In conclusion, we are satisfied that there was a sufficient relationship between Batten's use of the vehicle and the crimes to which he pleaded guilty to justify revocation of his driver's license. In reaching this decision, we note that the Court of Appeals appeared to suggest that the requisite relationship between the vehicle and the crimes would not have been present if the seized items had been on Batten's person, rather than under the driver's seat or in a console. Because that factual scenario is not present here, we view that portion of the opinion as dicta and reserve the determination of that narrower issue for a day when it is squarely presented.

[Some citations omitted]

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

IMPRISONED SEX OFFENDERS CAN BE COMMITTED FOR TREATMENT AS SEX PREDATORS WITHOUT PROOF THAT THEY COMMITTED AN "OVERT ACT" DURING IMPRISONMENT -- In State v. Henrickson, ___ Wn.2d ___ (2000) 2000 WL 633336, the Washington Supreme Court rules, 8-1, that the State may commit an already-imprisoned sex offender as a "sex predator" without proving the commission of a recent "overt act" of sexual predation.

Previous appellate court decisions and responsive legislation had left some uncertainty regarding the "overt act" element of sex predator law at chapter 71.09 RCW. In In re Personal Restraint of Young, 122 Wn.2d 1 (1993), the Washington Supreme Court held that both the then-existing statutory provisions and constitutional due process protections required that, in order to invoke the sex predator statute against a person not presently incarcerated, the State must prove that the non-incarcerated person has committed a recent overt act evidencing sexual predator status. The 1995 Washington Legislature then codified the Young holding by amending RCW 71.09.030 to require proof of a recent

overt act when a person "has since been released from total confinement," but not when a person "is about to be released from total confinement."

In Henrickson, the Washington Supreme Court was asked to decide whether chapter 71.09 RCW or constitutional due process standards require proof of a recent overt act when an individual has, at some point, been previously released into the community, but the person is subsequently re-incarcerated and remains incarcerated on the day a "sexually violent predator" petition is filed. The Henrickson majority holds that no proof of a recent overt act is constitutionally or statutorily required when, on the day the petition is filed, and individual is presently incarcerated for: A) a sexually violent offense, RCW 71.09.020(6); or B) for an act that by itself would have qualified as a recent overt act, RCW 71.09.020(5).

Justice Sanders is the lone dissenter.

Result: Reversal of the decision of the King County Superior Court in the Halgren case. Affirmance of the Court of Appeals in State v. Henrickson, although on alternate grounds. Donald Henrickson and Michael Allen Halgren are held to have been properly committed to the Special Commitment Center.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) "PUBLIC DUTY" DOCTRINE DOES NOT BAR CAUSE OF ACTION BY PARENTS AGAINST LAW ENFORCEMENT FOR NEGLIGENT CHILD ABUSE INVESTIGATION - In Rodriguez v. Perez, 99 Wn. App. 439 (Div. I, 2000), the Court of Appeals holds that parents may bring an action for negligent investigation against law enforcement officers who conduct an investigation into alleged child abuse.

Parents and children allegedly involved in a Wenatchee "sex ring" brought this lawsuit against governmental entities and the individual DSHS and law enforcement investigators, alleging negligent investigation and negligent supervision (among other claims). The Rodriguez Court begins with a general discussion of how the "public duty" doctrine generally bans suits against the government for negligent investigation, explaining:

> In all negligence actions the plaintiff must prove the defendant owed the plaintiff a duty of care. Thus, in general, a claim for negligent investigation does not exist under the common law because there is no duty owed to a particular class of persons. In the area of law enforcement investigation, the duty owed is typically owed to the public. For example, the duty of police officers to investigate crimes is a duty owed to the public at large and is therefore not a proper basis for an individual's negligence claim.

The Rodriguez Court then explains that the Legislature "has created a limited exception in the area of child abuse investigations by imposing a duty of investigation for the protection of a specified class." The class being protected is parents and children. The duty was created with the enactment of RCW 26.44.050, which provides in part:

> Upon the receipt of a report concerning the possible occurrence of abuse or neglect it shall be the duty of the law enforcement agency or the Department of Social and Health Services to investigate and provide the protective services section with a report in accordance with the provision of chapter 74.13 RCW, and where necessary to refer such report to the court. . . .

RCW 26.44.050.

The Rodriguez Court distinguishes this case from the "typical criminal investigation [which] is premised on a duty that is owed to the public at large." The Court finds that both DSHS and law enforcement have a statutory duty to investigate under RCW 26.44.050 excerpted above. The Court states:

> The rationale in permitting negligent investigation claims against DSHS is based on DSHS's statutory duty to investigate child abuse and the protected status of the parents and children bringing the claims. Those considerations apply equally to claims against law enforcement officers when those officers are conducting investigations pursuant to

> the statutory directives set forth in RCW 26.44. RCW 26.44.050 requires the appropriate law enforcement agency or DSHS to investigate a report of alleged child abuse. It is clear that the inclusion of law enforcement was intentional.
>
> That this case involves a criminal investigation rather than an investigation conducted solely by DSHS does not affect our analysis. If both entities have received reports and responded by initiating an investigation, RCW 26.44.035 requires the agencies to "coordinate the investigation and keep each other apprised of progress." It makes little sense to conclude that one agency owes a duty of care and the other does not when both are conducting investigations required by the statute. Moreover, the appellants allege that [the] Detective . . . and CPS investigator . . . , working as a team, conducted the investigations. If, as appellants allege, they conducted interviews together and their interviewing techniques constituted negligence, then it would be incongruous to hold each co-investigator to a different standard of conduct.

[Citation omitted.]

Result: Reversal of King County Superior Court dismissal of claim for negligent investigation; case remanded for trial.

(2) NO DUTY OF CARE OWED TO CHILD CARE WORKER WHEN GOVERNMENT INVESTIGATING ALLEGATIONS THAT THE WORKER COMMITTED CHILD ABUSE - In Pettis v. State, 98 Wn. App. 553 (Div. I, 1999), the Court of Appeals holds that, as a matter of law, no duty of care is owed by government investigators to a child care worker when such government investigators are investigating allegations that the worker committed child abuse. The Pettis Court also holds, on an issue not addressed in this **LED,** that there was no evidence under the facts of this case to support a claim of intentional infliction of emotional distress.

Plaintiff sued DSHS and a DSHS investigator for negligent investigation and intentional infliction of emotional distress. Plaintiff's allegations of negligence were based on a DSHS investigation of plaintiff Pettis, a child care worker, for alleged child abuse. Pettis sued after the investigator determined that the evidence was inconclusive.

Generally, under the "public duty doctrine," Washington does not recognize a cause of action for negligent investigation. However, there are several exceptions to the public duty doctrine. One such exception is the "legislative intent" exception. This exception applies when the Legislature enacts a statute intended to protect a particular class of individuals. Washington courts have previously recognized a cause of action for negligent investigation, based on the "legislative intent" of RCW 26.44, where parents are the plaintiffs. See Yonker v. DSHS, 85 Wn. App. 71 (1997). **May 97 LED:19.** Pettis argued that this exception should be extended to child abuse investigations involving childcare workers.

The Pettis Court declines to extend the legislative intent exception, pointing out that "[t]he Legislature has specifically included parents, custodians, and guardians of children 'within the class of persons who are foreseeably harmed by a negligent investigation into allegations of child abuse[.]'" (Citation omitted.) The Pettis Court then notes: "If the duty of care is to be extended to child care workers, the proper body to make that decision is the Legislature. The state Legislature has thus far declined to do so."

The Pettis Court also rejects plaintiff's claim that the "special relationship" exception to the public duty doctrine applies. The Pettis Court explains:

> The public duty doctrine allows individuals who are not part of a protected class to bring suit against a public official only when a special relationship was established between that individual and the official. To establish a special relationship Pettis must show that 1) direct contact or privity between the public official and her sets her apart form the general public, 2) express assurances were given to her by a public official, and 4) thee assurances justify her reliance. None of these criteria are satisfied. In particular, there is no evidence that any assurances were given to her by DSHS or Mikkelsen that justified an expectation of a duty of care to Pettis.

[Citations omitted]

The Pettis Court also finds that the 1997 amendments to RCW 26.44 requiring that an alleged perpetrator receive notification, along with certain additional information, are not remedial. Thus, the provisions apply prospectively only, and do not apply to Pettis's case, the facts of which arose prior to 1997. Moreover, even if the 1997 amendments did apply retroactively, they would not support Pettis's lawsuit, the Pettis Court concludes.

Result: Affirmance of King County Superior Court order of summary judgment dismissing the case.

(3) INADVERTENT MISSTATEMENT OF START TIME ON INTERROGATION TAPE DOES NOT REQUIRE SUPPRESSION OF RECORDING -- In State v. Demery, 100 Wn. App. 416 (Div. II, 2000), the Court of Appeals rejects a robbery-and-kidnapping defendant's argument that a law enforcement officer's inadvertent error in stating the start time of a recorded interrogation did not require suppression of the recording.

RCW 9.73.090(1)(b) provides:

> Video and/or sound recordings may be made of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court. Such video and/or sound recordings shall conform strictly to the following:
>
> (i) The arrested person shall be informed that such recording is being made and the statement so informing him shall be included in the recording;
>
> (ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;
>
> (iii) At the commencement of the recording the arrested person shall be fully informed of his constitutional rights, and such statements informing him shall be included in the recording;
>
> (iv) The recordings shall only be used for valid police or court activities.

In State v. Mazzante, 86 Wn. App. 425 (Div. II, 1997) **Aug 97 LED:20**, the Court of Appeals ruled RCW 9.73.090(1)(b) would be "strictly construed" such that, where Miranda warnings were not part of the recording, the entire recording, as well as testimony regarding the interrogation, must be suppressed. Defendant Demery argued that the "strict construction" rule of Mazzante required suppression in his case as well. The Demery Court explains, however, that his reliance on Mazzante is misplaced:

> [T]he Mazzante court noted that substantial compliance with subsections (i) and (ii) is acceptable in limited circumstances. When the only procedural defect in a taped interview is the absence of a correct start time, the court may admit the tape under RCW 9.73.090 unless there is an allegation of police misconduct that makes the existence of the time announcement a matter of critical importance. Here, Demery does not assert police misconduct in connection with the timing of the interview.
>
> Further, the record indicates that the interviewing officer simply misread his watch by an hour when he recited the start time. The officer recited the start time as "1057 hours." Part way through the interview, the officer stated that "[i]t's five after ten now." At the close of the interview, the officer stated that "the time is 10:10." As nothing suggests that this slip of the tongue was material and as the taping procedure complied substantially with RCW 9.73.090(1)(b)(ii), the trial court did not err in admitting the recording generally.

On another issue related to admissibility of the tape recording, the Court of Appeals holds that the court should not have played the recording to the jury without first deleting the officer's accusatory questions to Demery. While it is not improper interrogation to accuse a suspect or to tell him he is lying, the Court of Appeals rules that a jury should not ordinarily hear such opinions by officers as to a defendant's guilt or innocence.

Result: Reversal of first degree robbery conviction (one count) and first degree kidnapping convictions (three counts of Kenneth Demery); case remanded to Pierce County Superior Court for re-trial using a copy of the recording which has been edited to delete some of the accusatory questions.

(4) ADULT WHO ASKED HIS 16-YEAR-OLD NIECE TO VOLUNTARILY POSE FOR NUDE PICTURES (BEFORE THE TWO ENGAGED IN VOLUNTARY SEX) WAS GUILTY OF "COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES" -- In State v. Pietrzak, 100 Wn. App.

291 (Div. III, 2000), the Court of Appeals rejects defendant's argument that he did nothing criminal in talking his 16-year-old niece into allowing him to take nude pictures of her before they had voluntary sex.

RCW 9.68A.090 prohibits "communication with a minor for immoral purposes." The statute defines "minor" as "any person under the age of 18, but the statute does not define what constitutes "communication" or "immoral purposes." Washington case law interprets "communicate" as including conduct as well as words, and the case law interprets "immoral purpose" as sexual misconduct.

Washington case law divides RCW 9.68A.090 communications into three categories: 1) those involving conduct made criminal by RCW 9.68A (for instance, 9.68A.100's prohibition on "patronizing a juvenile prostitute"); 2) those involving conduct made criminal by other statutes (for instance, RCW 9A.44's bar against "rape of a child"); and 3) those involving conduct that would be legal if performed. The first two categories are unlawful criminal communications under RCW 9.68A.090. Defendant Pietrzak's communications were unlawful under this test, the Pietrzak Court explains:

> [The trial] court found that Mr. Pietrzak "employed, authorized, or caused [C.S.], then age 16, to engage in sexually explicit conduct," by exhibiting her unclothed body for "sexual stimulation of the viewer" and photographs. RCW 9.68A.040 prohibits a person from compelling, aiding, inviting, employing, authorizing, or causing a minor to engage in sexually explicit conduct with the knowledge that such conduct will be photographed.
>
> Because Mr. Pietrzak's resulting conduct (photographing) is prohibited, RCW 9.68A.040(1), any communication regarding that conduct is also prohibited.

Result: Affirmance of Spokane County Superior Court conviction of Stanley L. Pietrzak for communication with a minor for immoral purposes.

(5) TEACHER-COACH IN SEXUAL RELATIONSHIP WITH STUDENT "ABUSED A SUPERVISORY POSITION" THROUGH INDIRECT PROMISES, AND THUS WAS GUILTY OF "SEXUAL MISCONDUCT WITH A MINOR" -- In State v. Fiser, 99 Wn. App. 714 (Div. II, 2000), the Court of Appeals broadly construes the "indirect… promises" provision of RCW 9A.44.010(9) to conclude that a high school teacher and coach who engaged in a sexual relationship with a student "abused (his) supervisory position" in relation to the student, and that he therefore was guilty of sexual misconduct with a minor in the first degree.

RCW 9A.44.093(1) defines as follows the crime of "sexual misconduct with a minor in the first degree":

> (1) A person is guilty of sexual misconduct with a minor in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual intercourse with another person who is at least sixteen years old but less than eighteen years old and not married to the perpetrator, if the perpetrator is at least sixty months older than the victim, is in a significant relationship to the victim, and abuses a supervisory position within that relationship in order to engage in or cause another person under the age of eighteen to engage in sexual intercourse with the victim. (Emphasis added)

RCW 9A.44.010(9) defines as follows "abuse of a supervisory position":

> 'Abuse of a supervisory position' means a direct or indirect threat or promise to use authority to the detriment or benefit of a minor.

In part, the Fiser Court's description of the facts of the case are as follows:

> Steven Fiser was a teacher at Yelm High School during the school years of 1994 and 1995. During this time, A.G. was a junior at Yelm High School. She was sixteen years old when the academic year began. In the beginning of her junior year, A.G. was a student in Fiser's history class. At the end of her history class, A.G. became involved in girl's fast pitch softball. The season for girl's fast pitch softball started around the end of February 1995. Fiser was her coach on the softball team.

> Fiser invited A.G. to baby-sit at his house in January of 1995. On that evening Fiser asked if he could kiss her. Fiser kissed her and then engaged in sexual intercourse with her.
>
> After this first event of sexual intercourse, A.G. considered her relationship with Fiser to have changed from a teacher/student to a boyfriend/girlfriend relationship. She was flattered by this relationship with Fiser, an admired teacher. She had private access almost everyday to Fiser, who was her teacher and coach. Frequently during these private times, they would talk about school events, how Fiser was not happy in his marriage, and they would kiss. Fiser would issue her notes to excuse her from other classes so that she could come to his classroom during his "prep period." She also told the jury that she had access to Fiser's classroom, his desk, and his computer. Because of their relationship, she said she felt like she could ask Fiser for things she could not ask other teachers.
>
> A.G. also testified about two more sexual episodes with Fiser that occurred in his classroom. First, toward the end of February 1995, A.G. performed oral sex on Fiser when she was working in his classroom on a school project, after Fiser wrote her a note to get out of class. Second, she told the jury the last time they had sexual intercourse was in Fiser's classroom, when he was getting ready for a noon hour pep rally. She was helping Fiser get dressed as a cheerleader for the school event.

At trial, Fiser denied any sexual relations with A.G., and he also denied that he had made any promises of benefits, express or implied, direct or indirect, or that he ever gave A.G. any favors as her teacher and coach. On appeal from his conviction, Fiser argued that the benefits alleged by A.G. (special access to Fiser, his classroom, and his computer; notes from Fiser excusing her from classes; and "teacher's pet" status -- all of which ended when the relationship ended) was not sufficient evidence of indirect promises of benefits to satisfy the statute. The Fiser Court holds to the contrary:

> We hold in cases where a school teacher is charged with sexual misconduct with a minor where the minor gains actual benefits in school during a sexual relationship that an indirect promise for these benefits can be implied.
>
> This evidence shows that A.G. received benefits from Fiser while she was having a sexual relationship with him. These repeated minor benefits that A.G. received show that an indirect promise existed that Fiser would use his authority for A.G.'s benefit. Accordingly, there was sufficient evidence to find that Fiser abused his supervisory position.

Result: Affirmance of Thurston County Superior Court conviction for Steven Fiser of sexual misconduct with a minor (two counts).

(6) YOUNG CHILD'S TOUCHING OF FATHER'S PENIS RESULTING IN FATHER'S SEXUAL GRATIFICATION QUALIFIES AS "SEXUAL CONTACT," AND HENCE WAS "CHILD MOLESTATION" EVEN IF FATHER DID NOT DIRECT CHILD TO DO THE TOUCHING - In State v. Gary J.E., 99 Wn. App. 258 (Div. III, 2000), the Court of Appeals reverses a trial court judge's dismissal of two counts of child molestation. The trial court mistakenly believed that evidence that a man's young son had touched his father's penis, causing a physical reaction of sexual gratification in the father, was not evidence of "sexual contact," because there was no evidence that the father had directed the child to do the touching. ***[LED EDITORIAL NOTE: The Court of Appeals description of the testimony and pertinent facts is very cursory, so we can't provide a more detailed description.]***

RCW 9A.44.010(2) defines "sexual contact" as follows:

> "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

The Gary J.E. Court explains why it concludes that the trial court judge erred:

> RCW 9A.44.010(2) is not ambiguous. It makes no distinction between whether the victim's intimate parts are touched by the accused or whether the accused's intimate parts are

> touched by the victim. Here, the undisputed facts reveal that on at least two occasions M.E. touched his father's penis, causing in the father a physical reaction equated with sexual gratification. Under these facts a rational trier of fact could have found beyond reasonable doubt that the essential elements of first degree child molestation were present. Accordingly, the trial court erred when it determined that Mr. E. must have caused the sexual contact to occur in order for the molestation charges to apply.

Result: Reversal in part of Grant County Superior Court ruling on Gary J.E.'s motion to dismiss; case remanded for trial of two counts of child molestation and one count of child rape.

(7) IN FORFEITURE MATTER, COUNTY'S "NOTICE OF SEIZURE" ALONE DOESN'T FREEZE BANK ACCOUNT -- In Snohomish County v. City Bank, 100 Wn. App. 35 (Div. I, 2000), the Court of Appeals rules that a law enforcement agency's written but non-judicial "Notice of Seizure" didn't succeed in freezing the bank account of a marijuana grower.

After learning that Kim Cramer was growing marijuana at a residence, personnel of the Snohomish County Regional Narcotics Task Force (the County) also learned Cramer had an interest in a bank account at City Bank. The County presented City Bank with a document entitled "Notice of Seizure." Cramer subsequently withdrew funds from the bank account. Snohomish County filed suit against City Bank for allowing Cramer to withdraw the funds. The trial court ruled against Snohomish County.

The Court of Appeals has now affirmed that trial court decision. RCW 30.20.090 immunizes banks from liability for disregarding an adverse claim against deposited funds in a bank unless the person making the adverse claim: 1) obtains a court order; or, alternatively, 2) posts a surety (e.g., a bond) approved by the bank. Because Snohomish County did not satisfy either of those requirements under RCW 30.20.090, the Court of Appeals rejects the appeal by Snohomish County.

Result: Affirmance of Snohomish County Superior Court order in favor of City Bank's release of funds from the bank account of Kim Cramer.

(8) INTENT TO DELIVER DRUGS PROVED BY THE FOLLOWING EVIDENCE: POSSESSION OF 1) NEARLY $2000 IN BILLS; 2) A SINGLE BAGGIE CONTAINING 25 GRAMS OF ROCK COCAINE; 3) A PAGER, A CELL PHONE AND A CHARGER FOR THE CELL PHONE; PLUS 4) A HANDWRITTEN NOTE CONTAINING THE SPANISH WORD FOR "SNOW" AND COLUMNS OF NUMBERS -- In State v. Campos, 100 Wn. App. 218 (Div. III, 2000), the Court of Appeals rules 2-1 that there was sufficient evidence to support the "intent to deliver" element of defendant's conviction of possessing cocaine with intent to deliver.

During a search incident to a DUI arrest of defendant Campos, officers found a baggie containing 25 grams of rock cocaine. Other items were found indicating Campos' intent to deliver the rock cocaine. He was tried and convicted of possession of the cocaine with intent to deliver. In upholding this conviction, while recognizing that possession alone of a large quantity of drugs does not establish "intent to deliver" those drugs, the Division Three's majority's analysis in part is as follows:

> Here, Mr. Campos possessed a large amount of cocaine, only 0.5 grams under an ounce. Detective Newport testified that this amount of cocaine was more consistent with a dealer than a user because the users usually purchase 3.5 grams or less. While the police did not locate any scales or other drug paraphernalia, Mr. Campos had a substantial sum of money ($1,750) on his person. This qualifies as an additional factor showing intent under [prior decisions]. The State's witnesses testified that a large of amount of cash in small, assorted denominations is consistent with narcotics sales.
>
> Additionally, the State introduced evidence that a pager, a cell phone and a charger for the phone were found in Mr. Campos's truck. Officer Hook testified these items are "tools of the trade" for drug dealers. The State introduced [a] piece of paper with columns of numbers and a slang word for cocaine that, according to Officer Hook, could be a record of drug sales. Officer Hook also testified Mr. Campos gave contradictory explanations of the paper.
>
> In sum, although Mr. Campos attempted to offset the State's evidence with innocent explanations, the jury resolved the factual issues in favor of the State. The jury resolves

> contradictory evidence by making credibility determinations. We do not redecide credibility determinations.

Judge Schultheis dissents, arguing in vain that defendant Campos had a plausible explanation for carrying a large amount of cash and relatively large amount of rock cocaine. Judge Schultheis argues further as follows:

> Besides possessing one ounce of cocaine and $1,750 in cash, Mr. Campos had a cell phone, a cell phone charger and a pager. Many people-most of whom do not deal drugs-carry such equipment in their vehicles, and the mere possession of these items should not support intent to deliver, absent additional evidence that they were used to arrange deliveries of cocaine. Further, the officer's speculation that the list of numbers might be a ledger for drug transactions does not constitute compelling evidence.
>
> Because convictions for possession with intent to deliver are highly fact specific, they require substantial corroborating evidence in addition to the fact of possession. The evidence here is neither substantial nor sufficiently corroborative, and I would reverse the conviction.

Result: Affirmance of Okanogan County Superior Court conviction of Gabriel Campos for possessing cocaine with intent to deliver.

LED EDITORIAL NOTE: The question of sufficiency of evidence of "intent to deliver" depends on the totality of the circumstances, and therefore it is highly fact-dependant and case-specific. For some other recent LED entries on this issue, see the cases noted in April 2000 LED at page 18 and in the February 2000 LED at page 12.

(9) RESTITUTION AMOUNT MAY INCLUDE EMPLOYER'S COSTS INVESTIGATING AN EMBEZZLER -- In State v. Wilson, 100 Wn. App. 44 (Div. III, 2000), the Court of Appeals rejects an embezzler's argument that the amount of a restitution order should not include full investigation costs expended by her employer, including overtime, bookkeeping, accounting, private detective and attorney services. The Wilson Court concludes that all these direct expenses to the employer meet the requirement of RCW 9.94A.142, the restitution statute, that a victim's injury or loss of property be a direct result of defendant's crime.

Result: Affirmance of Spokane County Superior Court restitution order in relation to conviction of Jessica Jean Wilson, aka Jessica Wilson-Farler, for first degree theft.

(10) FOURTH PRONG OF HARASSMENT STATUTE IS NOT VAGUE OR OVERBROAD - In State v. Williams, 98 Wn. App. 765 (Div. I, 2000), the Court of Appeals holds that the fourth prong of the criminal harassment statute is not unconstitutionally vague or overbroad.

The defendant was charged with harassment based on the following conduct:

> [The defendant was terminated from his job and when he requested his paycheck, he was told that it would be available on the next scheduled payday.] [The day before payday, he] returned to the store with a friend and told . . . the bookkeeper, that he had come to get his check. [She] told Williams he would have to speak with . . . [the general manager]. When Williams approached [the general manager's] desk and asked him for his paycheck, [the general manager] said the checks could not be distributed until the next day. Williams replied that some employees were paid before the scheduled payday, but [the general manager] explained that was a special exception for the night crew. Williams responded by saying, "Motherfucker, you better give me my check." At that point either Williams or his friend said, "Don't make me do what I want to do," and Williams shifted his body sideways and put his hand on his hip. [The general manager] saw something in Williams's pants and was certain it was a gun. He testified that [the bookkeeper] then mouthed the words, "He has a gun." [The general manager] was scared and gave Williams his paycheck. As Williams and his friend walked out of the store laughing, Williams said, "Don't make me strap your ass." . . .

RCW 9A.46.020(1)(a) provides that a person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or

(ii) To cause physical damage to the property of a person other than the actor; or

(iii) To subject the person threatened or any other person to physical confinement or restraint; or

(iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

[Emphasis supplied.]

The defendant challenged his conviction, alleging that the fourth prong of the statute is vague and overbroad.

In analyzing the overbreadth challenge, the Williams Court first considers whether the statute reaches constitutionally protected activity. The Court concludes that, while "on its face, the statute proscribes at least some protected speech," it does not prohibit a "real and substantial" amount of protected activity. When read as a whole, the statute has factors that sufficiently limit its scope to save it from an overbreadth challenge. The Court thus notes:

> RCW 9A.46.020(1)(a)(iv) proscribes only threats to do an act that is intended to substantially harm another's physical or mental health or safety. In addition, the threat must be "malicious," which means "an evil intent, wish, or design to vex, annoy, or injure another person." Finally, criminal liability only attaches if the person threatened has a reasonable fear that the threat will be carried out. These factors sufficiently limit the scope of the statute's application despite any ambiguity surrounding the term "mental health." Contrary to Williams's argument, a person cannot be convicted simply because he or she makes a threat. The State must also prove intent, malice, and a fear that is reasonable.

[Citation omitted.]

The Court also rejects a vagueness challenge to the statute, stating:

> We conclude that RCW 9A.46.020(1)(a)(iv) is not unconstitutionally vague because, when read in its entirety, it contains specific conditions that collectively give the ordinary citizen adequate notice of what type of threats it prohibits. First, criminality under RCW 9A.46.020(1)(a)(iv) does not depend on the victim's subjective reaction, as Williams claims, because it prohibits only acts intended by the defendant to cause substantial harm to another's mental health. The harm that the victim actually suffers, if any, is irrelevant. Second, the threat must be made knowingly and maliciously. Third, the threat must be to do an act that is intended to cause substantial harm to another's mental health. Finally, the person threatened must have a reasonable fear that the threat will be carried out. When viewed together, these limitations support our conclusion that RCW 9A.46.020(1)(a)(iv) is not vague and clarify any ambiguity in the term "mental health." Viewing the statute as a whole, the ordinary person would know that harm to mental health does not include the incidental annoyances or upsets of everyday life, such as anger or sadness, in response to another person's speech. Rather, the statute precludes only threats that are made in a particular manner (knowingly and maliciously), to do an act that is calculated to cause significant injury (substantial harm to another's physical or mental well-being or safety), and that cause a certain kind of fear (reasonable). It follows that, because the statute as a whole provides the ordinary person with constitutionally-sufficient notice, the limitations on its application discussed above also provide sufficient standards to prevent arbitrary enforcement.

[Citation omitted.]

Result: Affirmance of King County District Court conviction of Chris Williams for harassment.

(11) "TWO-STRIKES" SENTENCING LAW IS NOT UNCONSTITUTIONALLY "CRUEL" -- In State v. Morin, 100 Wn. App. 25 (Div. I, 2000), the Court of Appeals upholds the constitutionality of "two strikes" version of Washington's Persistent Offender Accountability Act (POAA).

In light of the facts of his case, Sean Morin was a very unsympathetic candidate for challenging the constitutionality of the law. This is manifest in the Court of Appeals' summary of its decision, as follows:

> Sean Morin broke into a retirement center, pulled down the pajamas of a 95-year-old blind woman, touched her in her vaginal area, and covered her mouth to keep her quiet. He then stole her wallet. Morin was convicted of robbery in the first degree, burglary in the first degree, and indecent liberties by forcible compulsion. Because he had previously been convicted of rape in the first degree, Morin was sentenced to life in prison without parole under Washington's Persistent Offender Accountability Act (POAA). His appeal challenges the constitutionality of the "two strikes" version of the statute and raises certain trial issues. We hold the sentence is not unconstitutional, reject Morin's other arguments, and affirm.

One argument by Morin was that the sentence of life in prison without parole for two sex offense convictions was disproportionate to his crimes, and therefore violative of the Washington constitution's prohibition against "cruel" punishment. The Morin Court explains that, in State v. Fain, 94 Wn.2d 387 (1980), the Washington State Supreme Court set forth the factors for analysis in such a "cruel" punishment challenge. Those factors are: 1) the nature of the crime or crimes; 2) the legislative purpose; 3) the punishment that would be received in other states or under federal law; and 4) the punishment imposed for other offenses in Washington. After careful analysis of each element of the test, the Morin Court concludes that the punishment of life in prison without parole was not grossly disproportionate to defendant Morin's crimes, and therefore that his sentence was not unconstitutionally cruel.

Result: Affirmance of Skagit County Superior Court conviction of Sean T. Morin for robbery one, burglary one, and indecent liberties by forcible compulsion; affirmance of sentence to life in prison without parole.

LED EDITORIAL NOTE: In 1996, the Washington Supreme Court upheld the constitutionality of the "3 strikes" version of the Washington POAA sentencing scheme. See State v. Manussier, 129 Wn.2d 652 (1996); State v. Rivers, 129 Wn.2d 697 (1996); State v. Thorne, 129 Wn.2d 736 (1996); Oct 96 LED:04.

(12) NO EX POST FACTO PROBLEM WITH 1994 AMENDMENTS TO CHAPTER 9.41 RCW MAKING RIFLES AND SHOTGUNS OFF LIMITS TO FELONS -- In State v. Schmidt, 100 Wn. App. 297 (Div. II, 2000), the Court of Appeals rejects defendant's challenge to the 1994 amendments to chapter 9.41 RCW barring convicted felons from possessing rifles and shotguns.

In 1988, Zachary B. Schmidt was convicted of second degree assault. Under Washington law as of 1988, as a convicted felon, Schmidt could not lawfully possess a handgun, but it was then lawful for him to possess a long rifle or shotgun. In 1994, the Washington Legislature amended RCW 9.41.040 to expand the prohibition to all firearms, thus making it illegal for felons such as Schmidt to possess a handgun, rifle or shotgun.

In 1997, Schmidt was caught with a rifle. He was charged and convicted of unlawful possession of a firearm by a felon. Schmidt appealed, arguing his conviction violated "ex post facto" prohibitions in the Washington and U.S. Constitutions. The ex post facto constitutional prohibition has been interpreted as providing in part that a law may not be enacted to criminally punish conduct which occurred before the effective date of the legislation.

A majority of the Court of Appeals judges in Schmidt agree (in an opinion authored by Judge Morgan) with the Division One Court of Appeals decision in State v. Watkins, 76 Wn. App. 726 (Div. I, 1995) **April 95 LED:02.** The Schmidt majority opinion declares that a change of this sort in firearms possession laws does not violate ex post facto prohibitions because the new law does not punish past conduct, but instead punishes future conduct (i.e., possession of a firearm after the effective date of the new law). In a concurring opinion, Judge Armstrong argues that the 1994 amendments do address past conduct (by

taking away Schmidt's right to possess a firearm based on his past conduct), but that the purpose of the 1994 law change was not punitive, and, for that distinct reason, constitutional ex post facto protections are not violated.

Result: Affirmance of Kitsap County Superior Court conviction of Zachary B. Schmidt for unlawful possession of a firearm under RCW 9.41.040.

(13) DELAY IN CHARGING DEFENDANT, WHICH DELAY IN PART LED TO LOSS OF JUVENILE COURT JURISDICTION, DID NOT VIOLATE DEFENDANT'S DUE PROCESS RIGHTS -- In State v. Brandt, 99 Wn. App. 184 (Div. II, 2000), the Court of Appeals holds that delay in charging defendant, which delay in part led to his being charged as an adult, did not violate his right to due process.

While in a juvenile institution following a juvenile court adjudication for first degree child rape and first degree child molestation, Brandt, who was then age 17, admitted to institution staff that he had previously molested several other children. Staff passed this information to a law enforcement detective who, in the next few months, attempted to interview two of the three possible additional victims. The detective ran into difficulties due to the childrens' youth and the families' unwillingness to cooperate. Also, defendant Brandt refused to talk to the detective during this follow-up. At the time, the detective did not try to interview the third of the possible victims, reported as Brandt's cousin, A.M., even though the detective had a name, phone number and address for that third possible victim.

Brandt then turned age 18, four months after he had made his admissions to the juvenile institution staff. Nineteen months later, the third possible victim, A.M., together with her mother, contacted the detective. Charges of first degree child molestation of A.M. were filed against Brandt in adult court the next day.

Brandt challenged the adult court's jurisdiction, arguing that the delayed investigation violated his due process right to be tried in juvenile court. The trial court denied his motion and convicted him of first degree child rape.

On appeal, the Court of Appeals notes that, once a person turns age 18, any criminal charges must be filed in adult court. A pre-charging delay (between the date of a report to police and the defendants 18th birthday) which results in a loss of juvenile court jurisdiction may violate the defendant's right to "due process" of law in only two circumstances: 1) a deliberate delay by the State to circumvent the juvenile justice system, or 2) negligent delay.

Defendant Brandt argued that the delay in his case was negligent. However, citing several Washington precedents, the Brandt Court declares that investigatory delays will typically be held to be justified, and such delays will be found not negligent, so long as the police follow standard procedures or normal practices.

The Court of Appeals agrees with the trial court that the detective was not negligent in not seeking out A.M. in the four months before Brandt turned 18, and that any delay after that point was irrelevant on the due process issue. The Court of Appeals also points out that it would be speculative to conclude that, assuming that the detective had made the contact before Brandt turned 18, charges would have been filed immediately after the detective did talk to A.M. and her mother.

Finally, the Brandt Court concludes by agreeing with the trial court that, in light of defendant Brandt's past record and his past failure to take advantage of services available to him in the juvenile system, the juvenile court would likely have declined him into adult court even if juvenile charges had been filed before his 18th birthday.

Result: Affirmance of Clallam County Superior Court conviction of Steven Phillip Brandt of first degree child rape.

(14) PATTERN OF "TRUTH-OR-DARE" SEX GAMES JUSTIFIES ADMISSION OF EVIDENCE OF DEFENDANT'S PRIOR BAD ACTS IN CHILD MOLESTATION PROSECUTION -- In State v. Griswold, 98 Wn. App. 817 (Div. III, 2000), the Court of Appeals rules that evidence of a child molestation defendant's previous, uncharged, truth-or-dare games (which in each case gradually escalated into sexual conduct) with other pubescent or adolescent children was sufficiently similar to the case at hand to make the "prior bad acts" evidence admissible.

Generally, evidence of a defendant's prior misconduct is inadmissible when introduced to prove he acted similarly in the case at hand. See ER 404(b). However, such evidence can be admitted where: 1) the

bad acts can be shown to be mere parts of a bigger plan; or 2) where the evidence demonstrates that the individual "devised a plan" that is distinctive in nature and used the plan repeatedly to perpetrate separate but "very similar" crimes. It is the second prong of these alternative admissibility tests that was at issue in this case.

In State v. Lough, 125 Wn.2d 847 (1995) **June 95 LED:06**, the Washington Supreme Court found sufficient distinctiveness and similarity of plan and circumstances to admit evidence that the rape defendant had drugged and raped unconscious victims in the past. In the following cases, the Court of Appeals has found sufficient distinctiveness and similarity to admit prior bad acts: State v. Baker, 89 Wn. App. 726 (Div. I, 1997), **Nov. 98 LED:18** (child-abuser's "back rub" technique with young children staying overnight in his home); State v. Krause, 82 Wn. App. 688 (1996) ("systemic scheme" of child-abuser who gained access to young boys by befriending their parents and working to gain affections of the boys); State v. Carleton, 82 Wn. App. 680 (1996) ("markedly similar conduct" where defendant repeatedly told teenage boys, whom he met through a youth organization, that they could help him resolve his problem of homosexual alternate personality by engaging in sexual contact).

The Griswold Court finds sufficient distinctiveness and similarity In defendant Griswold's "truth or dare" game which he used in relation to each of his pubescent or adolescent victims in combination with his position of trust, respect or authority.

Result: Affirmance of Walla Walla County Superior Court conviction of Jeffrey Q. Griswold of third degree child molestation.

(15) STRIKER/GREENWOOD "SPEEDY TRIAL/SPEEDY ARRAIGNMENT" RULE REQUIRES DISMISSAL OF CHARGES WHERE GOVERNMENT FAILED TO TRY TO CONTACT DEFENDANT AT ADDRESS ON ARREST WARRANT -- In State v. Jones, ___ Wn. App. ___, 998 P.2d 921 (Div. II, 2000), the Court of Appeals affirms the trial court's dismissal of charges for the government's violation of the speedy trial rule under CrR 3.3, State v. Striker, 87 Wn.2d 870 (1976) and State v. Greenwood, 120 Wn.2d 585 (1993).

A warrant was issued for the arrest of defendant Jones based on charges of joyriding and unlawful possession of a controlled substance. The warrant listed a particular address, but over the next four months the assigned law enforcement officer did not go to that address to see if defendant lived there, nor did he or other officers otherwise look for her. The officer believed she had moved to Montana. In fact, however, she was living in a small trailer parked at the address listed on the warrant (or at least so she convinced the trial court in this case).

Approximately four months after the arrest warrant was issued, and just a few days after Jones went to Montana for a short visit, Montana authorities arrested her on the warrant. She raised a "speedy trial" challenge to the government's failure to timely bring her to arraignment and to trial on the underlying charges. The trial court granted her motion, and now the Court of Appeals has affirmed.

The Jones Court describes as follows the "speedy trial" rule of Striker and Greenwood:

> CrR 4.1(a) requires that a defendant be promptly arraigned after the filing of the information. Under CrR 3.3(c)(1), a defendant who is not detained in jail must be arraigned no later than 14 days after her first appearance and brought to trial no later than 90 days after arraignment. But CrR 3.3 does not address the effect of an unnecessary delay between the filing of the information and the arraignment. To address this problem, the Supreme Court held that "where a long and unnecessary delay occurs in bringing a defendant who is amenable to process before the court, CrR 3.3's 90-day trial period is deemed to commence at the time the information was filed, instead of when the defendant finally appeared before the court to answer for the charge." State v. Greenwood, 120 Wn.2d 585 (1993) (summarizing holding of State v. Striker, 87 Wn.2d 870 (1976)).
>
> In Greenwood, the Supreme Court held that Striker still applies following the 1980 revisions to CrR 3.3. When the defendant is amenable to process and there is an unnecessary delay in bringing the defendant before the court, Striker applies and creates a constructive arraignment date fourteen days after the filing of the information. Therefore, a defendant who is not detained in jail must be brought to trial within 104 days

> of the filing of the information (90 + 14 days). A criminal charge not brought within this time period must be dismissed with prejudice. See CrR 3.3(i).
>
> But the Striker rule only applies if the defendant is amenable to process and if there is a long and unnecessary delay. Thus, a constructive arraignment date is not required if the delay is caused by any fault or connivance of the defendant or if the prosecution acts in good faith and with due diligence in attempting to bring the defendant before the court.

Applying this rule to the facts Jones's case, the Jones Court concludes that Jones was a Washington resident amenable to process throughout the relevant time period, and that the State failed to exercise due diligence when it failed to mail a summons or serve a warrant on Jones at her Washington residence within the time period at issue.

The Jones Court finds distinguishable State v. Vailencour, 81 Wn. App. 372 (Div. I, 1996) **Sept 96 LED:09**, where the defendant's sister had supplied an incorrect address to police. In Vailencour, the Court of Appeals held that the State's failure to try to contact the defendant at the incorrect address regarding the pending charge, while indicating a lack of due diligence, was harmless in that it would have been futile. On the other hand, the evidence indicated that an attempt to contact defendant Jones at the given address would not have been futile, the Jones Court indicates.

Result: Affirmance of Pierce County Superior Court dismissal of drug and joyriding charges against Rechelle L. Jones.

(16) NO EXCLUSION OF EVIDENCE FOR EVIDENCE SEIZED IN SEARCH FOLLOWING ARREST OF PERSON WHO ASSAULTED OFFICERS WHO, IN TURN, WERE UNLAWFULLY ARRESTING HIM -- In State v. Cormier, 100 Wn. App. 457 (Div. III, 2000), the Court of Appeals rules 2-1 that the Exclusionary Rule, which ordinarily requires exclusion of evidence seized as the fruit of an unlawful search or seizure, does not require exclusion where: A) an unlawful police seizure leads to B) an unlawful assault on the officers by the subject of that seizure, and which assault, in turn, leads to C) arrest of that person for that assault and ultimately a search at the jail booking for the assault, yielding contraband drugs. Because it is unlawful for a citizen to assault officers in response to a merely unlawful seizure or arrest, an arrest for such an assault is itself lawful; and a "search incident to arrest" or a "jail booking search" which follows is also lawful.

Result: Affirmance of Spokane County Superior Court convictions of Manuel R. Cormier for third degree assault and possession of a controlled substance.

(17) STATUTE OF LIMITATIONS WAS TOLLED FOR PROSECUTING LAWYER-THIEF WHO MOVED TO NEW YORK; CONSTITUTIONAL CHALLENGE TO TOLLING PROVISION OF RCW 9A.04.080 REJECTED -- In State v. McDonald, ___ Wn. App. ___ (Div. I, 2000), the Court of Appeals rejects the constitutional argument of a lawyer-thief who asserted that the statute of limitations should have continued to run during the time she lived out of state following the commission of her crimes.

In December 1990, attorney Kimberlee Ann McDonald stipulated with the Washington State Bar Association (WSBA) that she had unlawfully appropriated client trust funds. Immediately after signing the stipulation, she moved to the State of New York, and she lived there until May 1995, when she moved back to the State of Washington. Between December 1990 and May 1995, she visited Washington briefly on several occasions. She also left a forwarding address with the U.S. Postal Service and the WSBA for this time period. In April 1997, the King County Prosecutor filed theft charges against her. She was convicted, and she appealed.

On appeal, she admitted that she was not "usually and publicly resident within this state" for the three-year period of the statute of limitations for felony theft. RCW 9A.04.080 contains a general three-year limitations period for filing charges on felony crimes, but the statute also contains "tolling" provisions for the time period a person is out of state; "tolling" occurs, according to the Washington case law, even if the government knows or should know the out-of-state address of the person. Defendant McDonald argued, however, that it violated the "Commerce Clause" of the U.S. Constitution to toll the limitation period under the circumstances of her case, because she could easily have been located in New York and then extradited. The McDonald Court distinguishes the case she cites, and the Court concludes that the State's interest in preserving scarce resources by avoiding the expense of extraditing a person who is at large in another state outweighs any arguable protection provided by the federal Commerce Clause.

(Note that there are special speedy trial rules regarding persons incarcerated by other jurisdictions. See e.g. State v. Simon, 84 Wn. App. 460 (Div. I, 1996) **June 97 LED:12.)**

Result: Affirmance of King County Superior Court conviction of Kimberlee Ann McDonald on six counts of theft (she had previously been suspended from the practice of law by the Washington State Bar Association; and she had also been convicted of bank fraud in federal court in New York based on the same misconduct.)

(18) "UNWITTING POSSESSION" INSTRUCTION SHOULD HAVE BEEN GIVEN TO JURY IN PROSECUTION FOR "UNLAWFUL POSSESSION OF A FIREARM" -- In State v. May, 100 Wn. App. 477 (Div. III, 2000), the Court of Appeals rules that the trial court erred in a prosecution for "unlawful possession of a firearm" (RCW 9.41.040) by not instructing the jury in this "constructive possession" case that no crime is committed where defendant is unaware of the presence of the firearm.

Defendant already had a felony record when police executed a search warrant at his residence. Officers found illegal drugs and a gun. Defendant was prosecuted and convicted on drug and gun charges. Defendant claimed that the gun belonged to someone else, and that he had no idea that the gun was in his house. The trial court instructed the jury on "constructive possession," declaring that construction possession occurs when there is no actual physical possession, but there is dominion and control over the item. But the trial court refused to give defendant's "unwitting possession" instruction, which would have advised the jury as follows:

> A person is not guilty of unlawful possession of a firearm if the possession is unwitting. Possession of a firearm is unwitting if a person did not know that the firearm was in his possession. The burden is on the defendant to prove by a preponderance of the evidence that the firearm 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 Court of Appeals rules that the trial court was required to give an unwitting possession instruction. While ignorance of the law is no excuse, ignorance of the fact of the presence of a prohibited item is a defense in a case charging unlawful possession of such an item, the May Court rules.

Result: Reversal of Benton County Superior Court "unlawful possession of a firearm" conviction against Raymond M. May; remand for possible re-trial on that charge; affirmance of convictions on four drug charges not addressed here.

(19) "BAIL JUMPING" LAW APPLIES TO FAILURE TO SHOW AT PROBATION HEARING -- In State v. Pope, ___ Wn. App. ___, 999 P.2d 51 (Div. II, 2000), the Court of Appeals holds that the bail jumping statute applies to a defendant who fails to appear at a probation hearing as required. The Pope Court rejects the defendant's hyper-technical argument that, once convicted, a defendant cannot violate the statute for failing to appear at a sentencing or a post-sentencing probation proceeding.

Result: Affirmance of Lewis County Superior Court bail-jumping conviction of Michael Pope; reversal, on grounds not addressed in this **LED** entry, of bail jumping conviction of Monte Robin Kaija, Jr., whose case was consolidated with Pope's case.

(20) "WITNESS TAMPERING" IS "CRIME OF DISHONESTY" FOR IMPEACHMENT PURPOSES -- In State v. Bankston, 99 Wn. App. 266 (Div. III, 2000), the Court of Appeals rejects a drug dealer's argument that his prior conviction for witness tampering should not have been admitted in his trial for possession of methamphetamine.

Police searched the vehicle of David W. Bankston incident to his arrest for driving with a suspended license. They found methamphetamine, and the prosecutor subsequently charged Bankston with possession of the illegal drug. At trial, Bankston claimed that the meth belonged to a vehicle passenger, Thomas J. Hunt. The trial court allowed the prosecutor to introduce for impeachment purposes evidence of Bankston's prior conviction for "witness tampering", while the trial court denied defendant Bankston's effort to introduce, for purposes of impeaching Hunt's testimony, evidence of Hunt's prior conviction of possession of methamphetamine.

On defendant's appeal following his conviction, the Court of Appeals upholds the trial court's evidentiary rulings. Under Evidence Rule (ER) 609(a)(2), the trial court is required to admit evidence of a witness's conviction of a crime of dishonesty. "Witness tampering" is a crime of dishonesty, the Bankston Court holds. On the other hand, under ER 609(a)(1), evidence of a prior conviction for a crime not involving dishonesty is generally presumed to be prejudicial, and therefore the latter type of conviction evidence may be admitted to impeach a witness only after careful balancing by the trial court of the prejudice of the evidence against its probative value. The Bankston Court concludes that the trial court did not, on balance, abuse its discretion in rejecting evidence of the passenger's prior conviction for possession of methamphetamine.

Result: Affirmance of Benton County Superior Court conviction of David Wayne Bankston for possession of methamphetamine.

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2000 WASHINGTON LEGISLATIVE UPDATE -- PART THREE CANCELLED

*LED EDITORIAL NOTE: In The May and June 2000 **LED**'s, in Parts One and Two of our 2000 Washington Legislative Update, we promised a Part Three. On further review, we believe that we have adequately covered the 2000 Washington legislation of interest. Please let us know if you believe we have overlooked a 2000 enactment of special interest to law enforcement.*

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INTERNET ACCESS TO COURT DECISIONS, STATUTES, AND COURT RULES

The Washington office of the Administrator for the Courts maintains a web site with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http:www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be accessed through a separate link clearly designated.

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct]. This web site contains all U.S. Supreme Court opinions issued since 1990 and most significant opinions of the Court issued before 1990.

A good source for easy access to relatively current Washington state agency administrative rules (including WSP equipment rules at Title 204 WAC) can be found at [http://slc.leg.wa.gov/WACBYTitle.htm]. Washington Legislation and other state government information can be accessed at [http://access.wa.gov]. Access to current Washington WAC rules, as well as RCW's current through 1999 can be accessed from the "Legislative Information" page at [http: www.leg.wa.gov/ wsladm/ses.htm]. The text of acts adopted in the 2000 Washington legislature is available at the following address: [http://www.leg.wa.gov]. Look under "bill info," "house bill information/senate bill information," and use bill numbers to access information.

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the **LED** should be directed to Mr. Wasberg at 206 464-6039; Fax 206 587-4290; E Mail [johnw1@atg.wa.gov]. Questions regarding the distribution list or delivery of the **LED** should be directed to Ed Johnson of the Criminal Justice Training Commission (CJTC) at (206) 835-7372; Fax (206) 439-3752; e mail [EJohnson@cjtc.state.wa.us]. **LED** editorial comment and analysis of statutes and court decisions expresses the thinking of the writers and does not necessarily reflect the views of the Office of the Attorney General or the CJTC. The **LED** is published as a research source only. The **LED** does not purport to furnish legal advice. **LED**'s from January 1992 forward are available on the Commission's Internet Home Page at:[http://www.wa.gov/cjt].