WASHINGTON STATE CRIMINAL JUSTICE TRAINING COMMISSION

Law Enforcement Digest

January 2004

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JANUARY LED TABLE OF CONTENTS

UNITED STATES SUPREME COURT 2

EXIGENCY JUSTIFIED FORCED ENTRY WHERE OFFICERS EXECUTING A SEARCH WARRANT FOR COCAINE ENTERED AFTER "KNOCKING AND ANNOUNCING" AND THEN WAITING 15 TO 20 SECONDS WITH NO RESPONSE
U.S. v. Banks, 124 S.Ct. 521 (2003) 2

BRIEF NOTE FROM THE NINTH CIRCUIT COURT OF APPEALS 8

PROSECUTION UNDER FEDERAL FIREARMS STATUTE, BASED ON PRIOR MISDEMEANOR CRIME OF DOMESTIC VIOLENCE, DOES NOT REQUIRE A DOMESTIC RELATIONSHIP AS AN ELEMENT OF THE UNDERLYING CRIME; HOWEVER, DEFENDANT'S CONVICTION UNDER WYOMING BATTERY STATUTE DID NOT SATISFY "PHYSICAL FORCE" REQUIREMENT OF FEDERAL STATUTE, AND DEFENDANT DID NOT WAIVE HIS RIGHT TO COUNSEL
United States v. Belless, 338 F.3d 1063 (9th Cir. 2003) 8

WASHINGTON STATE COURT OF APPEALS 12

WHERE JUDGE GAVE TELEPHONIC AUTHORIZATION FOR SEARCH, BUT NO ONE EXECUTED A WRITTEN WARRANT, SEARCH WAS WARRANTLESS IN VIOLATION OF THE WASHINGTON CONSTITUTION
State v. Ettenhofer, ___ Wn. App. ___, 79 P.3d 478 (Div. II, 2003) 12

RECANTING ALLEGED VICTIM'S PRIOR UNSWORN WRITTEN STATEMENT TO POLICE HELD INADMISSIBLE UNDER ER 801 – SMITH REQUIREMENTS NOT MET
State v. Nieto, ___ Wn. App. ___, 79 P.3d 473 (Div. I, 2003) 14

MAKER OF INCENDIARY DEVICE ("MOLOTOV COCKTAIL") CAN BE CONVICTED WITHOUT PROOF THAT HE DESIGNED THE DEVICE FOR USE IN "WILLFUL DESTRUCTION"
State v. Flinn, ___ Wn. App. ___, ___ P.3d ___ (Div. I, 2003) (2003 WL 22764870) 17

CONCEPT OF CONSTRUCTIVE POSSESSION DOES NOT INCLUDE ELEMENT OF IMMEDIATE ACCESSIBILITY OF THE ITEM ALLEGEDLY POSSESSED
State v. Howell, ___ Wn. App. ___, 79 P.3d 451 (Div. I, 2003) 19

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS..... 20

NO VIOLATION OF CHAPTER 9.73 (PRIVACY ACT) IN MOM'S USE OF SPEAKERPHONE FUNCTION AT BASE OF CORDLESS PHONE TO LISTEN IN ON DAUGHTER'S CONVERSATION – NO "DEVICE DESIGNED TO TRANSMIT" WAS USED
State v. Christensen, ___ Wn. App. ___, 79 P.3d 12 (Div. I, 2003) 20

UNCONSTITUTIONALITY DECLARED AS TO RCW 9.41.040(1)(B)(iv)'S PROHIBITION OF GUN OWNERSHIP (BUT NOT AS TO ITS PROHIBITION ON POSSESSION OR OF CONTROL) FOR THOSE FREE ON BOND OR PR PENDING TRIAL APPEAL OR SENTENCING
State v. Spiers, ___ Wn. App. ___, 79 P.3d 30 (Div. II, 2003) 21

NEXT MONTH 22

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UNITED STATES SUPREME COURT

EXIGENCY JUSTIFIED FORCED ENTRY WHERE OFFICERS EXECUTING A SEARCH WARRANT FOR COCAINE ENTERED AFTER "KNOCKING AND ANNOUNCING" AND THEN WAITING 15 TO 20 SECONDS WITH NO RESPONSE

U.S. v. Banks 124 S.Ct. 521 (2003)

Facts and Proceedings below: (Excerpted from Supreme Court opinion)

> With information that Banks was selling cocaine at home, North Las Vegas Police Department officers and Federal Bureau of Investigation agents got a warrant to search his two-bedroom apartment. As soon as they arrived there, about 2 o'clock on a Wednesday afternoon, officers posted in front called out "police search warrant" and rapped hard enough on the door to be heard by officers at the back door. There was no indication whether anyone was home, and after waiting for 15 to 20 seconds with no answer, the officers broke open the front door with a battering ram. Banks was in the shower and testified that he heard nothing until the crash of the door, which brought him out dripping to confront the police. The search produced weapons, crack cocaine, and other evidence of drug dealing.

In response to drug and firearms charges, Banks moved to suppress evidence, arguing that the officers executing the search warrant waited an unreasonably short time before forcing entry, and so violated both the Fourth Amendment and 18 U.S.C. § 3109. The District Court denied the motion, and Banks pleaded guilty, reserving his right to challenge the search on appeal.

A divided panel of the Ninth Circuit reversed and ordered suppression of the evidence found. In assessing the reasonableness of the execution of the warrant, the panel majority set out a nonexhaustive list of "factors that an officer reasonably should consider" in deciding when to enter premises identified in a warrant, after knocking and announcing their presence but receiving no express acknowledgment:

> "(a) size of the residence; (b) location of the residence; (c) location of the officers in relation to the main living or sleeping areas of the residence; (d) time of day; (e) nature of the suspected offense; (f) evidence demonstrating the suspect's guilt; (g) suspect's prior convictions and, if any, the type of offense for which he was convicted; and (h) any other observations triggering the senses of the officers that reasonably would lead one to believe that immediate entry was necessary."

The majority also defined four categories of intrusion after knock and announcement, saying that the classification "aids in the resolution of the essential question whether the entry made herein was reasonable under the circumstances":

> "(1) entries in which exigent circumstances exist and non-forcible entry is possible, permitting entry to be made simultaneously with or shortly after announcement; (2) entries in which exigent circumstances exist and forced entry by destruction of property is required, necessitating more specific inferences of exigency; (3) entries in which no exigent circumstances exist and non- forcible entry is possible, requiring an explicit refusal of admittance or a lapse of a significant amount of time; and (4) entries in which no exigent circumstances exist and forced entry by destruction of property is required, mandating an explicit refusal of admittance or a lapse of an even more substantial amount of time."

The panel majority put the action of the officers here in the last category, on the understanding that they destroyed the door without hearing anything to suggest a refusal to admit even though sound traveled easily through the small apartment. The majority held the 15-to-20-second delay after knocking and announcing to be "[in]sufficient ... to satisfy the

constitutional safeguards." **[LED EDITORIAL COMMENT: The Supreme Court decision excerpted below rejects the Ninth Circuit's attempt to create four separate "knock and announce" categories. The Supreme Court adopts a totality-of-the-circumstances approach instead.]**

Judge Fisher dissented, saying that the majority ought to come out the other way based on the very grounds it stressed: Banks's small apartment, the loud knock and announcement, the suspected offense of dealing in cocaine, and the time of the day. Judge Fisher thought the lapse of 15 to 20 seconds was enough to support a reasonable inference that admittance had been constructively denied.

ISSUE AND RULING: Under totality-of-the-circumstances analysis did exigent circumstances justify forced entry where, before they entered, officers "knocked and announced" and then waited 15-20 seconds with no response? (ANSWER: Yes, rules a unanimous Supreme Court; it was irrelevant that the occupant of the apartment was in the shower when officers knocked and therefore did not hear the "knock and announce").

Result: Reversal of decision of Ninth Circuit Court of Appeals and reinstatement of U.S. District Court (Nevada) conviction of Lashawn Lowell Banks on federal drug and firearms charges.

ANALYSIS: (Excerpted from Supreme Court decision)

There has never been a dispute that these officers were obliged to knock and announce their intentions when executing the search warrant, an obligation they concededly honored. Despite this agreement, we start with a word about standards for requiring or dispensing with a knock and announcement, since the same criteria bear on when the officers could legitimately enter after knocking.

The Fourth Amendment says nothing specific about formalities in exercising a warrant's authorization, speaking to the manner of searching as well as to the legitimacy of searching at all simply in terms of the right to be "secure ... against unreasonable searches and seizures." Although the notion of reasonable execution must therefore be fleshed out, we have done that case by case, largely avoiding categories and protocols for searches. Instead, we have treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case; it is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones. We have, however, pointed out factual considerations of unusual, albeit not dispositive, significance.

In Wilson v. Arkansas, 514 U.S. 927 (1995) **Sept 98 LED:03**, we held that the common law knock-and-announce principle is one focus of the reasonableness enquiry; and we subsequently decided that although the

standard generally requires the police to announce their intent to search before entering closed premises, the obligation gives way when officers "have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or ... would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence," Richards v. Wisconsin, 520 U.S. 385 (1997) **Aug 97 LED:07**. When a warrant applicant gives reasonable grounds to expect futility or to suspect that one or another such exigency already exists or will arise instantly upon knocking, a magistrate judge is acting within the Constitution to authorize a "no-knock" entry. *[Court's Footnote: Some States give magistrate judges the authority to issue "no- knock" warrants, and some do not. See, e.g., Richards v. Wisconsin, 520 U.S. 385, 396, n. 7, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997) (collecting state statutes and cases).]* And even when executing a warrant silent about that, if circumstances support a reasonable suspicion of exigency when the officers arrive at the door, they may go straight in.

Since most people keep their doors locked, entering without knocking will normally do some damage, a circumstance too common to require a heightened justification when a reasonable suspicion of exigency already justifies an unwarned entry. We have accordingly held that police in exigent circumstances may damage premises so far as necessary for a no-knock entrance without demonstrating the suspected risk in any more detail than the law demands for an unannounced intrusion simply by lifting the latch. United States v. Ramirez, 523 U.S. 65 (1998) **April 98 LED:03**. Either way, it is enough that the officers had a reasonable suspicion of exigent circumstances. *[Court's footnote: The standard for a no-knock entry stated in Richards applies on reasonable suspicion of exigency or futility. Because the facts here go to exigency, not futility, we speak of that alone.]*

Like Ramirez, this case turns on the significance of exigency revealed by circumstances known to the officers, for the only substantive difference between the two situations goes to the time at which the officers reasonably anticipated some danger calling for action without delay. Whereas the Ramirez Magistrate Judge found in advance that the customary warning would raise an immediate risk that a wanted felon would elude capture or pose a threat to the officers, here the Government claims that a risk of losing evidence arose shortly after knocking and announcing. Although the police concededly arrived at Banks's door without reasonable suspicion of facts justifying a no-knock entry, they argue that announcing their presence started the clock running toward the moment of apprehension that Banks would flush away the easily disposable cocaine, prompted by knowing the police would soon be coming in. While it was held reasonable for the police in Ramirez to enter forcibly upon arrival, the Government argues it was equally reasonable for the officers to go in with force here as soon as the danger of disposal had ripened.

Banks does not, of course, deny that exigency may develop in the period beginning when officers with a warrant knock to be admitted, and the issue comes down to whether it was reasonable to suspect imminent loss of evidence after the 15 to 20 seconds the officers waited prior to forcing their way. Though we agree with Judge Fisher's dissenting opinion that this call is a close one, 282 F.3d, at 707, we think that after 15 or 20 seconds without a response, police could fairly suspect that cocaine would be gone if they were reticent any longer. Courts of Appeals have, indeed, routinely held similar wait times to be reasonable in drug cases with similar facts including easily disposable evidence (and some courts have found even shorter ones to be reasonable enough). *[**LED** Ed. Note: Here the Supreme Court cites 7 federal court cases approving entry after waits from 10 to 20 seconds generally.]*

A look at Banks's counterarguments shows why these courts reached sensible results, for each of his reasons for saying that 15 to 20 seconds was too brief rests on a mistake about the relevant enquiry: the fact that he was actually in the shower and did not hear the officers is not to the point, and the same is true of the claim that it might have taken him longer than 20 seconds if he had heard the knock and headed straight for the door. As for the shower, it is enough to say that the facts known to the police are what count in judging reasonable waiting time, cf., e.g., Graham v. Connor, 490 U.S. 386, (1989) ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."), and there is no indication that the police knew that Banks was in the shower and thus unaware of an impending search that he would otherwise have tried to frustrate.

And the argument that 15 to 20 seconds was too short for Banks to have come to the door ignores the very risk that justified prompt entry. True, if the officers were to justify their timing here by claiming that Banks's failure to admit them fairly suggested a refusal to let them in, Banks could at least argue that no such suspicion can arise until an occupant has had time to get to the door, *[Court's footnote: It is probably unrealistic even on its own terms. The apartment was "small," 282 F.3d 699, 704 (C.A.9 2002), and a man may walk the length of today's small apartment in 15 seconds.]* a time that will vary with the size of the establishment, perhaps five seconds to open a motel room door, or several minutes to move through a townhouse. In this case, however, the police claim exigent need to enter, and the crucial fact in examining their actions is not time to reach the door but the particular exigency claimed. On the record here, what matters is the opportunity to get rid of cocaine, which a prudent dealer will keep near a commode or kitchen sink. The significant circumstances include the arrival of the police during the day, when anyone inside would probably have been up and around, and the sufficiency of 15 to 20 seconds for getting to the bathroom or the kitchen to start flushing cocaine down the

drain. That is, when circumstances are exigent because a pusher may be near the point of putting his drugs beyond reach, it is imminent disposal, not travel time to the entrance, that governs when the police may reasonably enter; since the bathroom and kitchen are usually in the interior of a dwelling, not the front hall, there is no reason generally to peg the travel time to the location of the door, and no reliable basis for giving the proprietor of a mansion a longer wait than the resident of a bungalow, or an apartment like Banks's. And 15 to 20 seconds does not seem an unrealistic guess about the time someone would need to get in a position to rid his quarters of cocaine.

Once the exigency had matured, of course, the officers were not bound to learn anything more or wait any longer before going in, even though their entry entailed some harm to the building. Ramirez held that the exigent need of law enforcement trumps a resident's interest in avoiding all property damage, and there is no reason to treat a post-knock exigency differently from the no-knock counterpart in Ramirez itself.

Our emphasis on totality analysis necessarily rejects positions taken on each side of this case. Ramirez, for example, cannot be read with the breadth the Government espouses, as "reflect[ing] a general principle that the need to damage property in order to effectuate an entry to execute a search warrant should not be part of the analysis of whether the entry itself was reasonable." At common law, the knock-and-announce rule was traditionally "justified in part by the belief that announcement generally would avoid 'the destruction or breaking of any house ... by which great damage and inconvenience might ensue.' " One point in making an officer knock and announce, then, is to give a person inside the chance to save his door. That is why, in the case with no reason to suspect an immediate risk of frustration or futility in waiting at all, the reasonable wait time may well be longer when police make a forced entry, since they ought to be more certain the occupant has had time to answer the door. It is hard to be more definite than that, without turning the notion of a reasonable time under all the circumstances into a set of sub-rules as the Ninth Circuit has been inclined to do. Suffice it to say that the need to damage property in the course of getting in is a good reason to require more patience than it would be reasonable to expect if the door were open. Police seeking a stolen piano may be able to spend more time to make sure they really need the battering ram.

On the other side, we disapprove of the Court of Appeals's four-part scheme for vetting knock-and-announce entries. To begin with, the demand for enhanced evidence of exigency before a door can reasonably be damaged by a warranted no-knock intrusion was already bad law before the Court of Appeals decided this case. In Ramirez (a case from the Ninth Circuit), we rejected an attempt to subdivide felony cases by accepting "mild exigency" for entry without property damage, but requiring "more specific inferences of exigency" before damage would be reasonable. The Court of Appeals did not cite Ramirez.

> Nor did the appeals court cite United States v. Arvizu, 534 U.S. 266 (2002) **April 02 LED:03** (again, from the Ninth Circuit). There, we recently disapproved a framework for making reasonable suspicion determinations that attempted to reduce what the Circuit described as "troubling ... uncertainty" in reasonableness analysis, by "describ[ing] and clearly delimit[ing]" an officer's consideration of certain factors. Here, as in Arvizu, the Court of Appeals's overlay of a categorical scheme on the general reasonableness analysis threatens to distort the "totality of the circumstances" principle, by replacing a stress on revealing facts with resort to pigeonholes. Attention to cocaine rocks and pianos tells a lot about the chances of their respective disposal and its bearing on reasonable time. Instructions couched in terms like "significant amount of time," and "an even more substantial amount of time," tell very little.

[Some citations omitted]

LED EDITORIAL COMMENT: While Washington law is more restrictive on law actions in some select sub-areas of search-and-seizure law, Washington law appears to be consistent with the interpretation of Fourth Amendment by the U.S. Supreme Court in Banks.

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BRIEF NOTE FROM THE NINTH CIRCUIT COURT OF APPEALS

PROSECUTION UNDER FEDERAL FIREARMS STATUTE, BASED ON PRIOR MISDEMEANOR CRIME OF DOMESTIC VIOLENCE, DOES NOT REQUIRE A DOMESTIC RELATIONSHIP AS AN ELEMENT OF THE UNDERLYING CRIME; HOWEVER, DEFENDANT'S CONVICTION UNDER WYOMING BATTERY STATUTE DID NOT SATISFY "PHYSICAL FORCE" REQUIREMENT OF FEDERAL STATUTE, AND DEFENDANT DID NOT WAIVE HIS RIGHT TO COUNSEL - In United States v. Belless, 338 F.3d 1063 (9th Cir. 2003), the Ninth Circuit Court of Appeals holds that: (1) the federal firearms statute prohibiting possession of a firearm by a person with a prior misdemeanor conviction for domestic violence (MCDV) does not require a domestic relationship as an element of the underlying crime; (2) defendant's conviction under statute which defined battery as "unlawfully touching another in a rude, insolent, or angry manner, or intentionally, knowingly, or recklessly causing bodily injury to another," did not satisfy "physical force" requirement of the federal statute; and (3) the defendant did not knowingly and intelligently waive his right to counsel before pleading guilty to the state MCDV charge, and thus the Wyoming conviction for MCDV could not support a federal conviction for unlawful possession of a firearm.

Robert Belless was convicted of illegally possessing a firearm, in violation of 18 U.S.C. § 922(g)(9), which makes possession of a firearm illegal for anyone "who has been convicted in any court of a misdemeanor crime of domestic violence."

"Misdemeanor crime of domestic violence" is defined as an offense that:

> (i) is a misdemeanor under Federal or State law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse,

> parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. § 921(a)(33)(A). "[A] person shall not be considered to have been convicted of such an offense for purposes of this chapter unless the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case." 18 U.S.C. § 921(a)(33)(B)(i)(I).

The Ninth Circuit recites the brief facts as follows:

> Robert Belless's prior crime arose from a citation for violating Wyoming Statute § 6-2-501(b), which states that he committed "assault & battery by assaulting Kristen Belless--grabbing her chest/neck area and pushing her against her car in an angry manner." The citation does not say so, but Kristen Belless was married to Robert Belless when he committed battery against her.
>
> He was put in jail, and taken to court the next day. There, without a lawyer, he pleaded guilty. Before sentencing, he obtained counsel, who moved unsuccessfully to have Belless's plea vacated. Belless was sentenced to serve ninety days, all suspended except for the time in jail he had already served, plus a $270 fine and six months probation.
>
> Six years later, in 2001, Belless was indicted in federal court for the felony of possessing a firearm "having been convicted of a misdemeanor crime of domestic violence." The district court denied his motion to dismiss the indictment. He then pleaded guilty but preserved his right to appeal the district court's ruling.

[Footnote omitted.]

A. Domestic Relationship

The Ninth Circuit holds that a domestic relationship need not be an element of the underlying state crime in order to qualify as a MCDV for purposes of the federal firearms statute. The Court explains:

> The Wyoming crime to which Belless pleaded guilty does not include as an element that the victim share one of the domestic relationships specified in 18 U.S.C. § 921(a)(33)(A)(ii) with the perpetrator. It says only that "A person is guilty of battery if he unlawfully touches another in a rude, insolent or angry manner or intentionally, knowingly or recklessly causes bodily injury to another." Wyoming Statute § 6-2-501(b). One who engages in conduct that violates the statute is guilty of the crime whether the victim is a spouse or a perfect stranger. Belless argues that the federal statute requires the state statute to include an "element" that the crime be "committed by a current or former spouse."
>
> The federal statute does not require that the misdemeanor statute charge a domestic relationship as an element. It requires only that the misdemeanor have been committed against a person who was in one of the specified domestic relationships. It is uncontested in this case that the victim named in the Wyoming citation, Kristen Belless, was Belless's wife, but he could have been convicted of

the crime even had he grabbed a perfect stranger by the arm and angrily shoved him against his car. We find no indication that Congress intended to exclude from the misdemeanors that may trigger 18 U.S.C. § 921(a)(33)(A)(ii) those crimes that are in fact committed against persons who have a domestic relationship specified in the statute, even if the triggering crime does not include such a relationship as an element. Our construction is consistent with the position taken by all seven of our sister circuits to have spoken to the issue.

. . .

In short, a "misdemeanor crime of domestic violence" means an offense that is a misdemeanor, has, as an element, the use of force and was committed by a person with the requisite relationship. . . .

. . . The purpose of the statute is to keep firearms out of the hands of people whose past violence in domestic relationships makes them untrustworthy custodians of deadly force. That purpose does not support a limitation of the reach of the firearm statute to past misdemeanors where domestic violence is an element of the crime charged as opposed to a proved aspect of the defendant's conduct in committing the predicate offense. The more traditional criminal statutes criminalize violence regardless of the victim's relationship to the perpetrator, so many cases of domestic violence will be prosecuted under statutes that do not specify a domestic relationship as an element. *[Court's Footnote 13: "Fewer than half of the states currently have a 'domestic assault' statute that expressly includes as elements both the use of force and a specific relationship between the offender and victim. Most states, and the District of Columbia, charge domestic violence offenders under general assault statutes." [United States v. Barnes, 295 F.3d 1354, 1364 (D.C. Cir. 2002)]. See also [United States v. Meade, 175.3d 215, 220 (1st Cir. 1999)] (requiring a domestic relationship element "would render the statute a dead letter in most jurisdictions")].*

[Some footnotes omitted.]

B. Force

The Ninth Circuit also holds, however, that the Wyoming assault statute under which the defendant was charged includes conduct that does not include the use or attempted use of "physical force" as required by the federal firearms statute. Although the criminal citation alleged that he grabbed the victim's chest/neck area and pushed her against a car in an angry manner, the Ninth Circuit holds that it was not clear what conduct the defendant pled guilty to. Accordingly, the Court finds there is insufficient evidence of "physical force." The Court explains:

Any touching constitutes "physical force" in the sense of Newtonian mechanics. Mass is accelerated, and atoms are displaced. Our purpose in this statutory construction exercise, though, is to assign criminal responsibility, not to do physics. As a matter of law, we hold that the physical force to which the federal statute refers is not *de minimis*. The traditional doctrine of *noscitur a sociis*, that "the meaning of doubtful words may be determined by reference to associated words and phrases," guides us in our inquiry. In the federal definition, the associated phrase is "threatened use of a deadly weapon." That is a gravely serious threat to apply physical force. By contrast, the Wyoming statute criminalizes conduct that is minimally forcible, though ungentlemanly.

. . .

> But the Wyoming law against rude touchings does not meet the requirements for the federal statute that defines the predicate offense for a felony firearm conviction: "the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. § 921(a)(33)(A)(ii). That category does not include mere impolite behavior. More inclusive battery statutes such as Wyoming's may be drafted to embrace conduct that too often leads to the more serious violence necessary as a predicate for the federal statute, but they are not limited to it, so cannot supply the necessary predicate. The phrase "physical force" in the federal definition at 18 U.S.C. § 921(a)(33)(A)(ii) means the violent use of force against the body of another individual.
>
> . . .
>
> The record indicates that Belless was charged with conduct that was a violent act and not merely a rude or insolent touching. But the record does not reveal the conduct to which he pleaded and for which he was convicted. Accordingly, we cannot conclude that the trier of fact, the Wyoming judge in this case, necessarily found Belless guilty of conduct that, under a modified categorical approach, serves as a predicate offense.

[Footnotes omitted.]

C. Right to Counsel

Finally, the Ninth Circuit concludes that the defendant did not knowingly and intelligently waive his right to counsel before pleading guilty to the underlying state crime. The Court explains:

> When Belless pleaded guilty to misdemeanor battery of his wife, he did not have counsel. The federal statute that prohibits possession of a firearm by persons who have been convicted of certain crimes of domestic violence requires that a defendant have been represented by counsel or have waived the right to counsel knowingly and intelligently before being convicted of a predicate offense. . . .
>
> . . .
>
> . . . Belless signed a written waiver, but the form he signed did not include a warning of the dangers and disadvantages of self representation. There is no record of any other such warning, oral or written. . . . Thus Belless's predicate conviction does not . . . meet the statutory condition that the prior conviction have been obtained with counsel or that the right to counsel have been waived knowingly and intelligently.
>
> . . .

Result: Reversal and remand of Robert Belless' conviction of illegal possession of a firearm in violation of 18 U.S.C. § 922(g)(9), which makes possession of a firearm illegal for anyone who has been convicted in any court of a MCDV.

****

WASHINGTON STATE COURT OF APPEALS

WHERE JUDGE GAVE TELEPHONIC AUTHORIZATION FOR SEARCH, BUT NO ONE EXECUTED A WRITTEN WARRANT, SEARCH WAS WARRANTLESS IN VIOLATION OF THE WASHINGTON CONSTITUTION

State v. Ettenhofer, ___ Wn. App. ___, 79 P.3d 478 (Div. II, 2003)

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

> In August 2000, a Lewis County sheriff's deputy arrested an individual who informed the deputy of a marijuana grow at Ettenhofer's property. Several days later, officers went to Ettenhofer's property to investigate the tip. While conducting a "knock and talk," officers smelled the marijuana coming from a shop building. They advised Ettenhofer that they would obtain a warrant to search the shops if he would not consent to the search. Ettenhofer refused and ordered the officers to leave his property. Some of the officers stayed at the home to ensure that the scene was not disturbed pending issuance of a search warrant, and one drove to a location where his cell phone would work and contacted a district court judge.
>
> The officer was placed under oath and gave a telephonic statement of grounds for the search. The judge found probable cause and authorized a search. But neither the judge nor the officer executed a written warrant.
>
> The search occurred thereafter, revealing the expected marijuana grow along with hanging bags of marijuana. A return was executed after the search in compliance with the relevant portion of CrR 2.3(d). The trial court denied Ettenhofers subsequent suppression motion, reasoning that Ettenhofer failed to show actual prejudice resulting from the written warrant failure. Trial occurred, and the court found Ettenhofer guilty as charged.

ISSUE AND RULING: Does a search that is telephonically approved by a judge but is not supported by a written warrant violate Court Rule, CrR 2.3(c), and the Washington Constitution, article 1, section 7? (ANSWER: Yes)

Result: Reversal of Lewis County Superior Court conviction of John Anthony Ettenhofer.

ANALYSIS: The Court of Appeals explains as follows why the Court believes that the Supreme Court Criminal Rule regarding telephonic warrants, CrR 2.3(c), requires that a written warrant be executed and served:

> Criminal Rule 2.3 outlines warrant and search procedures. CrR 2.3(c) provides that a warrant may only issue on a court determination of probable cause, and the affidavit establishing the grounds for issuance may be a document or "an electronically recorded telephonic statement."
>
> We note at the outset that a provision in CrR 2.3(c) does contemplate telephonic procedures. The State asserts that this provision prescribes a method of warrant issuance in which the judge's oral determination of probable cause and subsequent oral description of items subject to seizure is the warrant. But this argument clearly reads CrR 2.3(c)'s telephonic provision too broadly. The rule contemplates only that the sworn testimony establishing the grounds for the

> warrant may be telephonic. This provision addresses a phase of the warrant process that precedes actual warrant issuance, and it therefore cannot validate the officers' actions here. The rule provides for no further telephonic procedures.
>
> The rule does, however, contemplate further written procedures. After the court determines that probable cause exists, "it shall issue a warrant or direct an individual whom it authorizes for such purpose to affix the court's signature to a warrant identifying the property or person and naming or describing the person, place or thing to be searched." CrR 2.3(c). This command exposes three relevant points.
>
> First, it establishes that the rule is sequentially ordered. The probable cause determination, which may be based on a written or telephonic affidavit, occurs before warrant issuance, not at the issuance phase. Thus, the telephonic procedures do not apply during the issuance phase. Second, it directs the issuance of a warrant, which under any reasonable construction requires a physical document. Third, it requires the affixation of the authorizing court's signature. A signature cannot be affixed to an oral authorization in a manner consistent with the rule. Although simplistic, these points show that the procedure prescribed in CrR 2.3(c) has a written warrant as its end-product. And a written warrant as the end-product of the warrant rules is consistent with our collective experience in the various phases of criminal prosecution.
>
> As principles of statutory construction require that we harmonize CrR 2.3(c) with other relevant rules, we next turn to CrR 2.3(d). That rule requires that "[t]he 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" (emphasis added). As these words are perfectly clear, the Supreme Courts intent with respect to subsection (d) is not open to debate; it expected that the person searched would receive a physical document. Therefore, an oral warrant like the one at issue here does not satisfy the dictates of CrR 2.3(d).
>
> Besides proving that CrR 2.3(c) requires a written warrant, section (d) has another function in this case. As the officers did not have a written warrant, they could not have given Ettenhofer a copy of one as the rule commands. Thus, the officers violated CrR 2.3(d) in addition to CrR 2.3(c).
>
> These provisions establish that the Supreme Court intended a written, signed warrant when it enacted CrR 2.3(c). The requirement does not vanish when officers use the telephonic affidavit procedure. In such a situation, as here, after the court determines that probable cause exists, the officers must affix the authorizing courts signature to a properly executed, written warrant.

[Some text and footnotes omitted]

The Ettenhofer Court then concludes that the search here was effectively a warrantless search in violation of the Washington constitution, article 1, section 7. Accordingly, the evidence must be suppressed under article 1, section 7.

RECANTING ALLEGED VICTIM'S PRIOR UNSWORN WRITTEN STATEMENT TO POLICE HELD INADMISSIBLE UNDER ER 801 – SMITH REQUIREMENTS NOT MET

State v. Nieto, ___ Wn. App. ___, 79 P.3d 473 (Div. I, 2003)

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

> From June to December 2000, Nieto and WB worked together at a pizza restaurant in Blaine. At the time, WB was 14 years old and Nieto was 28 years old. WB stopped working at the restaurant in December 2000, but she continued to visit Nieto there, and the two had regular phone and email contact. In January 2001, shortly after WB turned 15 years old, Nieto told WB that he had romantic feelings for her, and WB responded in kind. Nieto left Whatcom County one month later, but they continued to stay in touch, and Nieto occasionally visited WB.
>
> WB's parents were concerned about this relationship, so they contacted [an officer] of the Blaine Police Department. [The officer] was trained in child abuse investigation and was WB's neighbor and a family acquaintance. In February 2002, one month after WB's 16th birthday, [the officer] interviewed WB at the police station. After the interview, WB handwrote and signed a seven page statement. She described her relationship with Nieto and admitted there were at least three occasions on which she and Nieto had consensual sexual intercourse before her 16th birthday.
>
> Nieto was charged with one count of third degree rape of a child. At his bench trial, WB recanted her written statement. She testified that she did not have intercourse with Nieto until after she turned 16 and that portions of her statement were lies. WB said she lied in her statement because [the officer] told her that Nieto was cheating on her and because [the officer] led her to believe Nieto would be sentenced to a longer jail term if she did not write a statement. She testified that she later felt guilty for writing the inaccurate statement.
>
> [The officer] testified that he said nothing to WB about possible prison terms for Nieto. But he did admit to telling WB he had witnesses who believed Nieto was dating another woman. [The officer] also testified that he read WB's statement to Nieto, Nieto admitted that the statement was true, and he commented that he was surprised by its detail. In contrast, Nieto testified that he did not hear the entire statement, did not admit that WB's statement was true, and had intercourse with WB only after she turned 16.
>
> The trial court determined that WB's written statement was admissible as substantive evidence under ER 801(d)(1)(i). Relying on the statement, the court found Nieto guilty of third degree rape of a child.

ISSUES AND RULINGS: 1) Did the penalty-of-perjury boilerplate language on each page of the pre-printed police form satisfy the oath requirement of Evidence Rule (ER) 801(d)(1)(i)? (ANSWER: No); 2) Were the proceedings under which [the officer] took the alleged victim's statement sufficiently formal to meet the requirements of ER 801(d)(1)(i)? (ANSWER: No); 3) Was there sufficient evidence to support the rape of a child conviction without the statement of the alleged victim? (ANSWER: No, because without the victim's statement the defendant's confession became inadmissible under the corpus delicti rule)

Result: Reversal and vacation of Whatcom County Superior Court conviction of Isaias Nieto of third degree rape of a child.

ANALYSIS: (Excepted from Court of Appeals opinion)

I. Evidence Rule 801 (d)(1)(i)

Under ER 801(d)(1)(i), a prior inconsistent statement is not hearsay and may be admitted as substantive evidence if: (1) the declarant testified at trial and was subject to cross-examination; (2) the statement was inconsistent with the declarant's testimony; (3) it was given under oath subject to penalty of perjury; and (4) it was provided at "a trial, hearing, or other proceeding, or in a deposition." The proponent of the statement's admissibility bears the burden of proving each of these elements. The trial court's decision to admit evidence is reviewed for an abuse of discretion. If the trial court based its evidentiary ruling on an incomplete legal analysis or a misapprehension of legal issues, the ruling may be an abuse of discretion.

A. Oath Requirement [Vagueness-of-Boilerplate-Problem]

Nieto first argues that WB's statement was not given under oath as required by ER 801(d)(1)(i). An unsworn written statement will satisfy the oath requirement if it is signed and contains language such as, "I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct[.]" RCW 9A.72.085. See also State v. Nelson, 74 Wn. App. 380 (1994) **May 95 LED:21**; State v. Sua, 115 Wn. App. 29, 47, 60 P.3d 1234 (2003) **May 03 LED:20**. In this case, WB wrote her statement on a pre-printed police form which included the following language on each page:

> I have read each page of this statement consisting of ---- page(s). Each page bears my signature, and all corrections, if any, bear my initials. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

The language was located at the bottom of the form's first page and at the top of each of the remaining pages.

This boilerplate language is ambiguous because it is unclear what the term "foregoing" refers to. The State asserts that it refers to the witness' written statement, but this is problematic because the language appears at the top of pages two through seven so that "foregoing" could only refer to the witness statement on the preceding pages. If this were the case, there would be no affirmation of the last page's contents. Alternatively, "foregoing" could refer to the first two sentences in the boilerplate language. Given the way the affirmation is written, the latter is the more likely interpretation. Because of this ambiguity, we cannot conclude that the statement satisfied the oath requirement. The nature and placement of the boilerplate language does little to aver that the statement's content is true.

B. "Other Proceeding" Requirement [Formality-of-Statement Problem]

Nieto next argues that Officer Landis' interview with WB was not an "other proceeding" as the evidence rule requires. To determine whether the interview was an "other proceeding," the court must analyze the facts of the case and the

purposes of the hearsay rule. The rule is designed to remove doubt about the circumstances under which the prior statement was made and provide minimal guarantees of truthfulness. "In determining whether evidence should be admitted, reliability is the key."

In assessing the reliability of a prior inconsistent statement, courts consider whether (1) the witness made the statement voluntarily; (2) there were minimal guarantees of truthfulness; (3) the statement was given following one of the legally permissible methods for determining whether there was probable cause; and (4) the witness was later subject to cross-examination. Nieto argues that WB's statement was not voluntary, nor were there minimal guarantees of truthfulness.

The State fails to demonstrate that WB's statement contained minimal guarantees of truthfulness, that is, " 'an oath and the circumstance of a formalized proceeding.' " As previously discussed, the oath requirement was not satisfied in this case. And, unlike the police interviews in State v. Smith, 978 Wn.2d 856 (1982) and State v. Nelson, 74 Wn. App. 380 (1994) **May 95 LED:21** no notary was present here, nor were any other formal procedures involved. WB testified that she did not read the "penalty of perjury" language, and she said the language had no meaning to her. [The officer] admitted he did not remember reading the language to WB. The record contains no indication that anyone told WB that her statement was given under penalty of perjury.

Like WB, the witness in Nelson testified that she did not realize her statement was being taken under penalty of perjury. The witness was equivocal about whether she read the oath language, and she testified that the notary did not read the oath to her. But the State in Nelson presented evidence that the prosecutor reviewed the statement with the witness and explained the importance of the affidavit, and the notary testified that it is her standard practice to ask the witness whether she has read the affidavit and execute the affidavit only if the witness answers affirmatively. Based on this evidence, the court found that minimal guarantees of truthfulness existed.

There is no similar evidence in this case. The State argues only that WB is very bright and appropriately filled in the numerous required blanks on the statement form, thus allowing the court to reasonably infer that she knowingly signed under the "penalty of perjury" language. This is insufficient to meet the State's burden. WB's statement lacked minimal guarantees of truthfulness and thus was not sufficiently reliable. "[R]eliability is the key" in determining whether a prior inconsistent statement should be admitted. Here, the trial court erred in admitting WB's statement as substantive evidence.

II. Sufficiency of the Evidence

The trial court heard conflicting testimony about whether Nieto admitted having intercourse with WB before her 16th birthday. [The officer] testified that he read WB's statement to Nieto with some interruptions, that Nieto never asked to see a copy of the statement, and that he agreed with the statement and commented that he was surprised by the detail. In contrast, Nieto testified that he asked to see a copy of the statement but [the officer] refused, [the officer] did not read the whole statement but rather appeared to skip parts, and he never told the officer that he agreed with the statement. In its findings of fact, the trial court found that

> [the officer] read WB's statement to Nieto and that Nieto admitted having intercourse with WB before her 16th birthday. Nieto now argues that insufficient evidence existed to support these findings.
>
> In reviewing a sufficiency of the evidence challenge, the court must determine whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have convicted the defendant beyond a reasonable doubt. A reviewing court defers to the trier of fact on issues of the persuasiveness of the evidence, witness credibility, and conflicting testimony. In this case, the trial court faced conflicting testimony and found Nieto to be less credible. It was within the court's discretion to do so. While the trial court did not err in finding that Nieto confessed, the confession is inadmissible under the corpus delicti rule. Under this rule, the court may not consider Nieto's alleged confession unless the State has established, through independent proof, that Nieto had intercourse with WB before her 16th birthday. Without WB's statement, the State has no evidence to establish the corpus delicti of third degree child rape. Therefore, Nieto's confession was inadmissible.
>
> Without WB's statement and Nieto's confession, a trier of fact would have no basis on which to convict Nieto. Accordingly, we vacate the conviction, reverse the judgment, and remand to correct the record accordingly.

LED EDITORIAL COMMENT: The Nieto Court likely would have held the victim's statement admissible if 1) the boilerplate language on each page of the statement had been at the bottom and had read:

> **I have read each page of this statement consisting of ---- page(s). Each page bears my signature, and all corrections, if any, bear my initials. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the entire statement is true and correct.**

and 2) if the trial court had found that the alleged victim had read that boilerplate affirmation (officers probably should read the language to the victim/witness and have the person initial the language.)

MAKER OF INCENDIARY DEVICE ("MOLOTOV COCKTAIL") CAN BE CONVICTED UNDER CHAPTER 9.40 RCW WITHOUT PROOF THAT HE DESIGNED THE DEVICE FOR USE IN "WILLFUL DESTRUCTION"

State v. Flinn, ___ Wn. App. ___, ___ P.3d ___ (Div. I, 2003) (2003 WL 22764870)

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

> In the early morning hours of May 6, 2002, Seattle Police responded to a report of a burglar alarm at the Meany Middle School Complex. They arrived to find Anthony Flinn on the roof of the school, pacing back and forth and shouting obscenities. Officers could hear Flinn breaking fixtures and equipment on the roof and throwing things. Officer Anderson identified himself as a police officer, and Flinn responded with an epithet. A school janitor arrived and let the officers into the school, where they gained access to the roof and arrested Flinn. He told the officers that certain forces were after him and that they were going to shoot him. And he said that he had made a Molotov cocktail. The officers recovered a gasoline-filled beer bottle wrapped in a red sock and capped with a wick-like cloth from the roof of the school.

At the police station, Flinn said that he had ingested a large amount of methamphetamines, and that he had been chased all night by "forces" that had been firing shots at him. Because he wanted to show his pursuers that he was "serious" he made several Molotov cocktails. Police subsequently found a second Molotov cocktail in the backyard of a residence located near the school, and the broken remnants of two more--one on the roof where Flinn had been captured, and another that had been thrown from the roof through a window of the school.

The State charged Flinn with attempted arson in the second degree, possession of an incendiary device, and malicious mischief in the first degree. . . .

[After a non-jury trial, the court] acquitted Flinn of the attempted arson and malicious mischief charges, but found him guilty of possession of an incendiary device.

ISSUE AND RULING: Did the trial court err in finding Flinn guilty of possession of an incendiary device absent proof that he designed the Molotov cocktails for the purpose of willful destruction? (ANSWER: No)

Result: Affirmance of King County Superior Court conviction of Anthony Oren Flinn for violation of RCW 9.40.120.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The State charged Flinn with possession of an incendiary device in violation of RCW 9.40.120, which provides:

> Every person who possesses, manufactures, or disposes of an incendiary device knowing it to be such is guilty of a felony, and upon conviction, shall be punished by imprisonment in a state prison for a term of not more than ten years.

(Emphasis added).

RCW 9.40.110(2) provides:

> "Incendiary device" means any material, substance, device, or combination thereof which is capable of supplying the initial ignition and/or fuel for a fire and is designed to be used as an instrument of willful destruction. However, no device commercially manufactured primarily for the purpose of illumination shall be deemed to be an incendiary device for purposes of this section.

(Emphasis added).

Based on these statutes, Flinn argues that the State was required to prove not only that the Molotov cocktails were capable of starting a fire, but also that Flinn "designed [the Molotov cocktails] to be used as ... instrument[s] of willful destruction." Given the trial court's factual finding that there was no direct or circumstantial evidence that Flinn "manufactured the incendiary devices with the intent to burn or damage any structure or property of another," Flinn contends that it was error to conclude that he unlawfully possessed the devices.

Essentially, Flinn claims that he cannot be convicted of possession of an incendiary device absent proof that he also manufactured the device with the specific intent to use it for willful destruction.

The State argues in response that the purpose of RCW 9.40.110(2) is to define a statutory term, not to add an essential mental element of the crime, and that the clear purpose of the phrase "designed for purposes of willful destruction" is to further describe the devices included in the definition of "incendiary device" rather than the mental state of the designer. Put another way, the State argues that the language indicates that a person violates the statute by possessing a device that he knows is made to destroy, whether or not he intends to destroy anything on the charged occasion. The State also reviews the legislative history of the statute, arguing that the addition of knowledge in the 1971 amendment to RCW 9.40.120, as the only mens rea element, further supports its view.

The meaning of an unambiguous statute is derived from its actual language, and the words are given the meaning provided by the statute or their ordinary meaning if not defined in the statute. RCW 9.40.120 is not ambiguous. The language of RCW 9.40.120 clearly means that it is a felony for any person to knowingly possess or manufacture or dispose of an incendiary device. Because these actions are listed in the disjunctive, it is clear that a person who only knowingly possesses or knowingly disposes of an incendiary device--regardless of who designed it--may be charged with a violation of this statute. Flinn's proposed interpretation requiring proof that the defendant himself or herself actually manufactured the device with a specific intent is therefore unreasonable.

Moreover, here, the trial court specifically found that Flinn's Molotov cocktails were actually incendiary devices under the statutory definition, in that they were "capable of being used to ignite and/or fuel a fire and to be an instrument of willful destruction. Flinn did not assign error to this finding. Because the trial court also found that he knowingly possessed the Molotov cocktails, it was not error to conclude that Flinn was guilty of violating RCW 9.40.120.

CONCEPT OF CONSTRUCTIVE POSSESSION DOES NOT INCLUDE ELEMENT OF IMMEDIATE ACCESSIBILITY OF THE ITEM ALLEGEDLY POSSESSED

State v. Howell, ___ Wn. App. ___, 79 P.3d 451 (Div. I, 2003)

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

Federal Way police officers John Stray and Chris Walker responded to a call concerning a disturbance at a motel. The motel manager had earlier rented a room to Marlon Howell, but no longer wanted Howell in the motel because he believed drug activity had occurred in the room. When the officers arrived, they observed a vehicle parked in front with the passenger door open and a woman in the driver's seat.

Officer Stray spoke with the driver, while Officer Walker contacted Howell and the motel manager. Howell told Walker he was the front seat passenger in the vehicle. Stray asked the driver, Sarah Sage, if she had been using drugs; she responded in the negative and invited Stray to look in the car. When Stray opened the glove box, a gun dropped out. Stray yelled "gun," and Walker immediately put Howell in handcuffs for officer safety.

> Stray spoke with Howell, who immediately admitted the gun was his and that he knew he was not allowed to have it because of his three felony convictions. Howell then called out to Sage, telling her to cooperate with the police because he had already told Walker the gun belonged to him. Stray placed Sage in handcuffs and read Miranda warnings to Howell and Sage.
>
> Walker took Howell to the Federal Way Police Department. Howell signed a written Miranda waiver and a statement admitting the gun was his and that he knew he was not supposed to have it because of his prior convictions.
>
> Howell was charged with unlawful possession of a firearm in the first degree. He was found guilty by jury, and sentenced to 36 months.

ISSUE AND RULING: Did the trial court properly reject defendant's proposed "constructive possession" instruction that would have advised the jury that to prove constructive possession the State must establish immediate accessibility of the item at issue? (ANSWER: No)

Result: Affirmance of King County Superior Court conviction of Marlon Howell for unlawful possession of a firearm in the first degree under RCW 9.41.040(1)(a).

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The instruction offered by the State and accepted by the trial court accurately informed the jury of the applicable law and did not preclude Howell from arguing his theory of the case. Howell's defense was that the police officers were biased and decided he was guilty of the crime before completing a thorough investigation. Whether or not he had immediate access to the weapon was not relevant to this theory.
>
> Howell's proposed instruction was not accurate because it added an element to the crime of unlawful possession of a firearm that is not included in the criminal statute. RCW 9.41.040(1)(a) provides that this crime is committed when "[a] person ... owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted ... of any serious offense as defined in this chapter." There is no requirement that the firearm be immediately accessible. The trial court did not abuse its discretion by rejecting Howell's proposed instruction.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) NO VIOLATION OF CHAPTER 9.73 (PRIVACY ACT) IN MOM'S USE OF SPEAKERPHONE FUNCTION AT BASE OF CORDLESS PHONE TO LISTEN IN ON DAUGHTER'S CONVERSATION – In State v. Christensen, ___ Wn. App. ___, 79 P.3d 12 (Div. I, 2003), the Court of Appeals rules that a mother's listening in on her daughter's phone conversation did not violate the Privacy Act, chapter 9.73 RCW.

The facts and procedural background in the case are described by the Christensen Court as follows:

> In October 2000 at approximately 8:30 p.m., Wilma Loeb was walking in downtown Friday Harbor, returning to her hotel after a meal out alone. As she made her way up the sidewalk on Spring Street, two young men approached her and one grabbed her purse. Initially, Loeb resisted, but she let go of the purse after falling to the ground and damaging her glasses. The young men ran away.

> Following his 18th birthday, which was 47 days after the robbery, the State charged Christensen with second degree robbery. He moved to dismiss, arguing that the prosecutor and law enforcement had intentionally delayed charging him until after his 18th birthday. The trial court denied the motion. The court also denied Christensen's motion in limine to exclude certain testimony of Carmen Dixon, his girlfriend's mother. Carmen monitored a telephone conversation between her daughter and Christensen discussing the robbery. Carmen used the speakerphone function at the base of a cordless phone after her daughter, Lacey, took the handset to her room to take Christensen's call. The challenged testimony centered on what Carmen heard.
>
> The jury found Christensen guilty of second degree robbery, and the court sentenced him to the high end of the standard range.

The Court of Appeals agrees with defendant's argument that, on the totality of the circumstances, the conversation between the daughter and defendant was "private" within the meaning of that undefined term in chapter 9.73 RCW. However, the Court holds that the mother's use of the speakerphone function at the base of the cordless telephone to monitor her daughter's cordless telephone conversation in another room with the daughter's boyfriend was not the use of a "device designed to transmit" to intercept a private communication in violation of chapter 9.73 RCW. The mother simply listened, in person, to the sound waves emanating from the base of the cordless telephone while daughter used the handset, and it was irrelevant that the daughter was in a different room than her mother.

The Christensen Court relies in large part on past appellate court decisions that have permitted monitoring of conversations by police listening in on a shared handset (State v. Corliss, 123 Wn.2d 656 (1994) **June 94 LED:02**) and listening in on an extension phone (State v. Bonilla, 23 Wn. App. 869 (Div. II, 1979)). The Christensen Court notes the presumption that, if the Legislature disagreed with these interpretations of the "device designed to transmit" language of RCW 9.73.030, the Legislature would have amended the statute.

Result: Affirmance of San Juan County Superior Court conviction of Oliver Christensen for second degree robbery.

(2) UNCONSTITUTIONALITY DECLARED AS TO RCW 9.41.040(1)(B)(iv)'S PROHIBITION OF GUN OWNERSHIP (BUT NOT AS TO ITS PROHIBITION ON POSSESSION OR OF CONTROL) FOR THOSE FREE ON BOND OR PR PENDING TRIAL – In State v. Spiers, ___ Wn. App. ___, 79 P.3d 30 (Div. II, 2003), the Court of Appeals rules that the state constitutional right to bear arms is violated by RCW 9.41.040(1)(b)(iv) which makes it unlawful for persons to own any firearm while free on bond or personal recognizance pending trial for a serious offense, regardless of whether possession and control of firearm was relinquished. The Spiers Court declares that the statute's prohibition against possession and control of firearms is sufficient to protect public safety and welfare, while the prohibition against firearm ownership is not reasonably necessary to protect public safety.

Result: Affirmance of Pierce County Superior Court convictions of Robert Judge Spiers on five counts of unlawful possession of a firearm in the second degree (on those counts where the jury was presented only with evidence of possession or control of guns, not of ownership); and reversal of convictions on three counts of second degree unlawful firearm possession; remand on the reversed counts for re-trial.

LED EDITORIAL NOTE: In effect, the Spiers ruling amends the firearms statute such that the prohibition of RCW 9.41.040(1)(b)(iv) against ownership or possession or control of a firearm by a person "free on bond or personal recognizance pending trial, appeal, or sentencing for a serious offense as defined in RCW 9.41.040" is a prohibition only against "possession" or "control," not against mere ownership.

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NEXT MONTH

The February 2004 LED will include entries on two Washington Supreme Court decisions issued by the Supreme Court on December 11, 2003.

In State v. Cheatam (2003 WL 22908854), the Supreme Court ruled that jail inmates generally lack any privacy protection from police inspecting inmate property that was taken at booking and placed in the inmate property room. The Cheatam Court also addressed an issue relating to admissibility of expert testimony on reliability of eyewitness testimony.

In State v. C.G. (2003 WL 22908814), the Supreme Court ruled that in order to convict an individual of felony harassment based upon a threat to kill (see RCW (A.46.020), the State must prove as an element of the crime that the person threatened was placed in reasonable fear that the threat to kill would be carried out as an element of the offense.

The February 2004 LED will also include an entry on the December 15, 2003 unanimous decision of the United States Supreme Court in Maryland v. Pringle (2003 WL 22938461) (holding that, where officers found cocaine behind an arm rest in the back seat area of a car during a lawful consent search conducted after observing a very large wad of cash in the glove box, officers had probable cause to arrest, on constructive possession grounds, all three persons in the car, including a front seat passenger who had no apparent ownership interest or control over the car).

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INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCW'S, AND TO WAC 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 more simply accessed through a separate link clearly designated. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions from 1939 to the present. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/rules].

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 many significant opinions of the Court issued before 1990. another website for U.S. Supreme Court opinions is the Court's website at [http://www.supremecourtus.gov/opinions/02slipopinion.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since 199 can be accessed (by date of decision only) at

Easy access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2003, is at [http://slc.leg.wa.gov/]. Information about bills filed in 2003 Washington Legislature is at the same address -- look under "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent WAC amendments is at [http://slc.leg.wa.gov/wsr/register.htm]. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The address for the Criminal Justice Training Commission's home page is [http://www.cjtc.state.wa.us], while the address for the Attorney General's Office home page is [http://www/wa/ago].

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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 [ledemail@cjtc.state.wa.us]. **LED** editorial commentary and analysis of statutes and court decisions express the thinking of the writers and do 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 via a link on the Commission's Internet Home Page at: [http://www.cjtc.state.wa.us].