Law Enforcement Digest

August 2005

580th Basic Law Enforcement Academy – February 15, 2005 through June 22, 2005

President: Christopher Littrell – Lynnwood Police Department
Best Overall: Christopher Littrell – Lynnwood Police Department
Best Academic: Christopher Littrell – Lynnwood Police Department
Best Firearms: Christopher Littrell – Lynnwood Police Department
Tac Officer: Officer Rich Peterson – Seattle Police Department

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581st Session, Basic Law Enforcement Academy, Spokane Police Academy
March 2, 2 005 through July 7, 2005

Highest Scholarship: Evan A. Logan – Spokane County Sheriff's Office
Highest Mock Scenes: Franklin W. McLain – Kennewick Police Department
Outstanding Officer: Evan A. Logan – Spokane County Sheriff's Office
Pistol Marksmanship: Jay E. Kernkamp, Colfax Police Department

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2005 WASHINGTON LEGISLATIVE UPDATE REVISITED

LED EDITORIAL INTRODUCTORY NOTE: After we published last month what we thought was the final part of a two-part 2005 Washington Legislative Update, we were made aware of another 2005 enactment of interest to law enforcement. In addition, we received an inquiry about one of the digested enactments suggesting that a little more explanation would be helpful. We will first revisit the previously digested enactment, and then we will provide information about the previously omitted enactment.

INCREASING PENALTIES FOR FAILING TO SECURE MOTOR VEHICLE LOAD

Chapter 431 (SHB 1478) Effective date: July 24, 2005

This enactment was digested in the July 2005 LED at page 15. In the July 2005 LED, we noted that the Legislature amended RCW 46.61.655 by adding a subsection (7) reading as follows:

> (7)(a)(i) A person is guilty of failure to secure a load in the first degree if he or she negligently fails to secure a load or part of a load to his or her vehicle in compliance with subsection (1), (2), or (3) of this section and causes bodily injury to another.
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> (ii) Failure to secure a load in the first degree is a gross misdemeanor.
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> (b)(i) A person is guilty of failure to secure a load in the second degree if he or she negligently fails to secure a load or part of a load to his or her vehicle in compliance with subsection (1) or (2) of this section and causes damage to property of another.
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> (ii) Failure to secure a load in the second degree is a misdemeanor.
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> (c) A person who fails to secure a load or part of a load to his or her vehicle in compliance with subsection (1), (2), or (3) of this section is guilty of an infraction if such failure does not amount to a violation of (a) or (b) of this subsection.

To put this amendment in proper context, we include here the provisions of RCW 46.61.655 that continue without any change. Subsections (1) through (6) read as follows:

> (1) No vehicle shall be driven or moved on any public highway unless such vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking, or otherwise escaping therefrom, except that sand may be dropped for the purpose of securing traction. Any person operating a vehicle from which any glass or objects have fallen or escaped, which would constitute an obstruction or injure a vehicle or otherwise endanger travel upon such public highway shall immediately cause the public highway to be cleaned of all such glass or objects and shall pay any costs therefor.

(2) No person may operate on any public highway any vehicle with any load unless the load and such covering as required thereon by subsection (3) of this section is securely fastened to prevent the covering or load from becoming loose, detached, or in any manner a hazard to other users of the highway.

(3) Any vehicle operating on a paved public highway with a load of dirt, sand, or gravel susceptible to being dropped, spilled, leaked, or otherwise escaping therefrom shall be covered so as to prevent spillage. Covering of such loads is not required if six inches of freeboard is maintained within the bed.

(4) Any vehicle with deposits of mud, rocks, or other debris on the vehicle's body, fenders, frame, undercarriage, wheels, or tires shall be cleaned of such material before the operation of the vehicle on a paved public highway.

(5) The state patrol may make necessary rules to carry into effect the provisions of this section, applying such provisions to specific conditions and loads and prescribing means, methods, and practices to effectuate such provisions.

(6) Nothing in this section may be construed to prohibit a public maintenance vehicle from dropping sand on a highway to enhance traction, or sprinkling water or other substances to clean or maintain a highway.

VICTIM-WITNESS RIGHTS PREVIOUSLY PROVIDED TO OTHER CLASSES OF VICTIMS AND WITNESSES ARE EXTENDED TO DEPENDENT PERSONS AND VULNERABLE ADULTS

Chapter 381 (ESHB 2126) Effective date: July 24, 2005

This enactment adopts a new chapter in Title 7 RCW (the new chapter will be given a code number later this year by the Washington Code Reviser's Office). The Act extends to "dependent persons" and "vulnerable adults," as defined in the Act, essentially the same rights as are currently provided to crime victims, survivors and witnesses under chapter 7.69 RCW, and are currently provided to child victims and witnesses under chapter 7.69A RCW.

As with all of the other session laws digested in our 2005 Washington Legislative Update, the session law can be accessed by typing in the bill number in the appropriate box on the "bill information" page of the Washington Legislature at the following Internet address: [http://www.leg.wa.gov/wsladm/billinfo1/bills.cfm].

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BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

(1) FEDERAL "CONTROLLED SUBSTANCES ACT" DOES NOT VIOLATE FEDERAL CONSTITUTION'S COMMERCE CLAUSE IN ITS APPLICATION TO CITIZENS OF CALIFORNIA, WHICH HAS A MEDICAL-USE-OF-MARIJUANA LAW – In Gonzales v. Raich, 125 S.Ct. 2195 (2005), the U.S. Supreme Court, in a 6-3 ruling, rejects the argument of users and growers of marijuana for medical purposes under the "California Compassionate Use Act."

Two California residents argued unsuccessfully in this case that it violated the Federal Constitution's Commerce Clause to apply the provisions of the federal "Controlled Substances Act" to criminalize manufacture, distribution or possession of marijuana in relation to intrastate activity covered by a state's medical marijuana law.

Result: Reversal of decision of Ninth Circuit of the U.S. Court of Appeals and remand to the Ninth Circuit for entry of an order vacating the injunctive relief ordered by that court.

LED EDITORIAL COMMENT: This decision does not directly impact application of Washington's Medical Marijuana law at RCW 69.51.010 through 69.50.080. Other states with variations on such laws are Alaska, Arizona, Colorado, Hawaii, Montana, Maine, Nevada, and Oregon.

(2) CONVICTION IN FOREIGN COUNTRY DOES NOT COUNT AS A CONVICTION UNDER FEDERAL FELON-IN-POSSESSION-OF-FIREARM LAW – In Small v. U.S., 125 S.Ct 1752 (2005), the U.S. Supreme Court rules 6-3 that the "convicted in any court" element of the federal felon-in-possession-of-firearm statute (18 U.S.C. § 922(g)(1) excludes convictions entered in foreign courts.

Result: Reversal of decision of Third Circuit Court of Appeals and of conviction of Gary Sherwood Small by Western U.S. District Court for Pennsylvania.

LED EDITORIAL COMMENT: The parallel issue under Washington's firearms laws at chapter 9.41 RCW has never been addressed in a Washington appellate court decision. Our best guess is that the Washington Supreme Court would come to a similar result, and would interpret the phrase "federal or out-of-state" conviction as not including a conviction in a court of a foreign country. As always, we caution that views expressed in "comments" in the LED represent only our own thinking, not official views of the AGO or CJTC. We urge law enforcement agencies to consult with their own local prosecutors and legal advisors on all legal questions.

(3) COURT DECIDES NOT TO DECIDE YET WHETHER THE VIENNA CONVENTION ON CONSULAR RELATIONS CONFERS INDIVIDUALLY ENFORCEABLE RIGHTS – In Medellin v. Dretke, 125 S.Ct. 2088 (2005), the U.S. Supreme Court decides on procedural grounds that the Court will not address this year the issue of whether the international treaty known as the Vienna Convention on Consular Relations (Vienna Convention) creates rights that individual aliens (i.e., citizens of countries other than the U.S.) can enforce in the state and federal courts in the United States.

The Law Enforcement Digest has previously addressed the Vienna Convention treaty on several occasions, starting with a relatively comprehensive article in the May 1999 LED. Also, several cases addressing the Vienna Convention are noted at page 36 of the "Law Enforcement Legal Update" outline that is accessible via a link on the Criminal Justice Training Commission's internet LED page. Also accessible via a link on the CJTC's internet LED page is the U.S. State Department webpage providing detailed information on the Vienna Convention.

To date, the Washington Supreme Court has not addressed the Vienna Convention, but several Washington Court of Appeals' decisions have addressed it. Those Washington Court of Appeals' decisions, like federal court decisions around the U.S. to date, have held that the Vienna Convention protects governmental interests and does not give enforceable rights to individuals. Thus, those courts have held that the Vienna Convention does not provide a basis for suppression of statements given to police interrogators who have failed to give proper warnings of Vienna Convention rights following custodial arrest and before interrogation.

However, as noted in the Medellin Court's discussion, the International Court of Justice (ICJ) recently (in 2004) held as to 54 consolidated cases involving Mexican citizens convicted in courts in the U.S. (including the case of Medellin), that rights under the Vienna Convention are individually enforceable. The ICJ's power to dictate to the U.S. generally or to the U.S. courts specifically is unclear. But President George Bush responded to the ICJ decision in a February 2005 Memorandum that the U.S. state courts would respect the ICJ ruling. What the ICJ ruling, together with the President Bush Memorandum, mean for individual cases is not clear. The U.S. Supreme Court's decision in Medellin frames, but does not answer, this question.

In Medellin, the U.S. Supreme Court had originally accepted review of the Texas capital murder, death penalty case with the intent of addressing, among other issues, whether a violation of the Vienna Convention could provide a basis for suppressing a suspect's otherwise lawfully obtained statements to law enforcement officers. But after further consideration, a majority of the U.S. Supreme Court decides to dismiss review so that several other issues (not addressed in this LED entry) can first be sorted out in the state and lower federal courts.

Several separate opinions are issued in the Medellin case, each with some discussion of the individual enforceability issue under the Vienna Convention. This discussion gives little indication, however, how the U.S. Supreme Court will eventually come out on this very important issue.

Result: Dismissal of writ of review in the habeas corpus case of Jose Ernesto Medellin; this dismissal allows state and lower federal courts to address a variety of issues in Jose Ernesto Medellin's case.

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

(1) NO FOURTH AMENDMENT VIOLATION OCCURRED IN RANDOM SELECTION OF AIRLINE PASSENGER FOR HANDHELD MAGNETOMETER WAND SCANNING – In U.S. v. Marquez, 410 F.3d 612 (9th Cir. 2005), the Ninth Circuit of the U.S. Court of Appeals rejects a cocaine-possession defendant's argument that his Fourth Amendment rights were violated when he was randomly selected at the airport to be subjected to individual scanning by a handheld magnetometer.

The Court notes that airport screening of passengers and their carry-on luggage in order to detect weapons and explosives and deter potential passengers from carrying such items on board is reasonably necessary and not overly intrusive in light of the interests at stake. The Court also explains that airport screening procedures are administrative searches, not criminal investigatory searches, and are conducted for two reasons: first, to prevent passengers from carrying weapons or explosives onto the aircraft, and second, to deter passengers from even attempting to do so. The intensity and scope of these administrative searches are limited in light of those purposes.

The Court also explains that airport screening searches are valid only if they recognize the right of a person to avoid search by electing not to fly. However, in order for the deterrence goal of the screening procedures to be effective, the rule must be that a passenger must exercise his right to abandon air travel before beginning the screening procedures.

Finally, the Court emphasizes that a different analysis might apply and a different result might be reached if there were evidence suggesting that a passenger such as Marquez was selected for the individual screening other than on a purely random basis; there was no such evidence in this case.

Result: Affirmance of conviction of Sergio Ramon Marquez for possession with intent to distribute cocaine by the U.S. District Court for the Western District of Washington.

(2) SIXTH AMENDMENT'S INITIATION-OF-CONTACT RESTRICTION IS NOT TRIGGERED BY A TRIBAL COURT ARRAIGNMENT – In U.S. v. Charley, 396 F.3d 1074 (9th Cir. 2005), the 9th Circuit of the U.S. Court of Appeals rules that an FBI agent did not violate the Federal Sixth Amendment rights of a murder suspect by engaging in Mirandized questioning of her after she was arraigned in tribal court but before she was arraigned in federal district court. The relevant part of the Court's analysis is as follow:

> The Sixth Amendment right to counsel "does not attach until a prosecution is commenced." In other words, it attaches "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Here, Charley's Sixth Amendment right to counsel was not triggered until she had her initial appearance in federal court on January 3, 2002. That Charlie was arraigned in tribal court on January 2, 2002, is irrelevant to determining when her Sixth Amendment right to counsel attached because we have squarely held that "the Sixth Amendment right to counsel does not apply in tribal court criminal proceedings." United States v. Percy, 250 F.3d 720, 725 (9th Cir. 2001). The district court properly denied Charley's motion to suppress her January 3, 2003 statements because Charley had not invoked her **Fifth** Amendment right to counsel, and her **Sixth** Amendment right to counsel had not yet attached when she made her request for an attorney before the tribal court. (Emphasis added)

Result: Affirmance of U.S. District Court conviction of Elvira Charley for three counts of fist degree murder.

LED EDITORIAL NOTE: For a detailed analysis of Fifth and Sixth Amendment initiation-of-contact rules, see the following article of the Criminal Justice Training Commission's internet LED page: "'Initiation of contact' rules under the Fifth and Sixth Amendments".)

(3) DOMESTIC DISTURBANCE FACTS (YELLING FROM INSIDE BY A POSSIBLE PERPETRATOR/VICTIM SUGGESTED TO OFFICER THAT THERE WAS POSSIBLE INJURY TO YELLER OR POSSIBLE DANGER TO OTHERS INSIDE) HELD TO BE "EMERGENCY" SUFFICIENT TO JUSTIFY WARRANTLESS ENTRY INTO HOME; ALSO, QUARLES' OFFICER-SAFETY EXCEPTION TO MIRANDA IS APPLIED – In U.S. v. Martinez, 406 F.3d 1160 (9th Cir. 2005) a Ninth Circuit 3-judge panel rules that a law enforcement officer responding to a domestic disturbance was justified by emergent circumstances in entering a residence without a warrant or consent. The Martinez Court describes the facts and relevant trial court proceedings as follows:

> In the summer of 2002 in Nampa, Idaho, police officer Mike Phillips was dispatched to the residence of Lisa and Monroe Martinez in response to a domestic violence call. The initial radio transmission received by Phillips indicated that there was an "out of control" male and that the 911 call was disconnected. Phillips recognized the address as a residence he had been called to on a previous occasion for a domestic violence incident. Phillips recalled that on the previous occasion the female had a "fat lip" because "the male subject had hit her."
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> Upon arriving on the scene Phillips saw Lisa Martinez in the front yard. Lisa was "very upset, crying, she had her face in her hands." Lisa did not say anything that indicated she had been physically injured, and Phillips did not observe evidence of physical injuries.
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> While attempting to speak with Lisa, Phillips could hear yelling coming from inside the house. Phillips "could not make out" precisely what was being said but he described it as "angry, hostile yelling." Phillips entered the house in order to make sure that the person yelling was not injured, that someone else in the house was not being injured, and to make sure the individual yelling was not going to come out of the house with weapons. One of the possible scenarios that occurred to Phillips was that "Mr. Martinez had a knife stuck in his chest and he was yelling because he was mad[that] he had been stabbed."

> As Phillips entered the house he saw a young boy standing in the doorway. He asked the boy if the doorway would lead him to the yelling man, and the boy responded affirmatively. Phillips followed the yelling through a laundry room and hallway to a bedroom where he observed Martinez kneeling on the floor and reaching under the bed. Martinez was yelling "he was going down for this."
>
> Phillips was afraid that Martinez was searching for a weapon under the bed. Phillips told Martinez to move into the living room "where we could figure out what was going on." At this point, Phillips did not regard Martinez as a criminal suspect. Upon entering the living room, Phillips noticed two rifles and a shortened barrel shotgun resting on the couch. Phillips "immediately" asked Martinez, "What are those doing there?" Martinez responded that he knew the police were coming and he was trying to get rid of the weapons before they arrived. Martinez, as it turned out, had been previously convicted in state court of felony possession of a controlled substance, and was on state probation at the time of the domestic disturbance.
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> Lisa and Monroe Martinez were both arrested for domestic battery. Later, the United States charged Monroe Martinez with unlawful possession of firearms under 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Following an evidentiary hearing, the district court denied Martinez's motion to suppress evidence of the discovered firearms and the statements made by Martinez while Officer Phillips was inside the house. Subsequently, Martinez entered a conditional plea, reserving the right to appeal the court's denial of his motion to suppress.

The Martinez Court holds that it was reasonable for the officer to enter the residence to check on the welfare of the yelling man inside as well as to check on the safety of others inside the premises.

In addition, the Martinez Court rules that the officer was excused, under the “public safety” exception to the Miranda warnings requirement, from giving Miranda warnings before asking about the guns. See New York v. Quarles, 467 U.S. 649 (1984). The Court explains its Quarles-based Miranda ruling as follows:

> Miranda is subject to a narrow "public safety" exception, allowing police officers the right to "ask questions reasonably prompted by a concern for the public safety." In order for the public safety exception to apply, there must have been "an objectively reasonable need to protect the police or the public from any immediate danger associated with [a] weapon." This exception allows officers, when reasonably prompted by a concern for the public safety, to engage in limited questioning of suspects about weapons in potentially volatile situations.
>
> Here, the officer entered the site of a domestic disturbance and, in the process of ascertaining what had occurred, observed weapons in plain view. The officer was entitled to make inquires about the weapons under the Quarles public safety exception to Miranda. The district court correctly denied the motion to suppress the few statements made by the defendant at the scene prior to receiving a Miranda warning.

[Some citations omitted]

Result: Affirmance of Idaho federal district court order denying the suppression motion of Monroe Martinez (and affirmance of his plea-based federal firearms law conviction and sentence).

(4) SAN JOSE OFFICERS ARE DENIED QUALIFIED IMMUNITY IN CIVIL RIGHTS CASE BECAUSE 1) THEY SEIZED MUCH MORE EVIDENCE DURING WARRANT SEARCHES THAN WAS "REASONABLE"; AND 2) THEY SHOT SOME DOGS DUE TO LACK OF A PRIOR REASONABLE PLAN FOR ENTRY INTO THE PERIMETER – In San Jose Charter of the Hells Angles Motorcycle Club v. City of San Jose, 402 F.3d 962 (9th Cir. 2005), the Court of Appeals denies qualified immunity to officers of the City of San Jose Police Department in a 2-1 ruling in a civil rights case brought by Hells Angels homeowners under 42 U.S.C. § 1983.

Very briefly summarized, the majority opinion's key rulings denying qualified immunity are as follows:

1) Seizing "any" and all indicia of gang membership

A deputy sheriff's broad instructions to officers searching residences and clubhouse for (in the literal words of the warrant) "any" indicia of affiliation with motorcycle club, to seize every item indicating such affiliation, which ended up being several truckloads of evidence -- including customized motorcycles, a refrigerator door, and a part of a driveway with signatures on it -- was an unreasonable execution of the search warrants in violation of the Fourth Amendment. The majority opinion asserts that the sole purpose of the search was to show that a motorcycle group was a criminal street gang, as would support sentence enhancement in a murder prosecution under California law. The majority opinion also asserts that reasonable officers would have known that this purpose did not justify the level of intrusion and excessive property damage that occurred in executing the warrant.

2) Shooting dogs

Officers who shot dogs while executing warrants to search residences for indicia of owners' affiliation in motorcycle group, for use in murder prosecution, were not entitled to qualified immunity from the owners' § 1983 claims. The majority opinion declares that a reasonable officer would have known that it was unreasonable to create a plan to enter the perimeter of a person's property, knowing for a week about the presence of dogs on the property, without considering a method for subduing the dogs besides killing them. The officers had no such plan. Therefore, the shooting of the dogs violated the Fourth Amendment. The majority opinion also concludes that the officers were not presented with exigent circumstances that necessitated killing the dogs.

Result: Affirmance of U.S. District Court's order denying qualified immunity for San Jose Police Department and its officers.

LED EDITORIAL NOTE: The summary above is very brief and may for that reason be misleading regarding the facts and rulings in the context of this case. At the end of every LED, along with other Internet site information, we provide the Internet address at which Ninth Circuit decisions can be accessed if one has the name of the case and the date of the decision. The date of San Jose decision addressed above is April 4, 2005.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) WHEN OFFICER HAS DISCRETION WHETHER TO MAKE CUSTODIAL ARREST (SUCH AS FOR DWLS), OFFICER MAY WAIT UNTIL AFTER MOTOR VEHICLE "SEARCH INCIDENT" TO EXERCISE THAT DISCRETION – In State v. Pulfrey, ___ Wn.2d ___, 111 P.3d 1162 (2005), the Supreme Court rejects a defendant's argument that, where an officer has

discretion whether or not to make a custodial arrest, the officer must exercise that discretion before conducting a search of the arrestee's vehicle "incident to" that arrest. The unanimous Court holds that the officer may wait to exercise that discretion until after searching the arrestee's vehicle and before transport.

Along the way, the Supreme Court also explains that, in light of RCW 46.64.015, any crime listed in RCW 10.31.100(3), such as the crime here, driving while license suspended, is one for which an officer may lawfully make a custodial arrest.

On grounds that defendant failed to timely raise the argument, the Pulfrey Court declines to address defendant's "independent grounds" argument under article 1, section 7 of the Washington constitution. Finally, on grounds that defendant filed to make an adequate record to pursue his theory, the Court also declines to address defendant's argument that his August 24, 2000 DWLS 3 arrest should be ruled unlawful in light of the Supreme Court's 2004 ruling in Redmond v. Moore, 151 Wn.2d 664 (2004) **July 04 LED:05; August 04 LED:23; October 04 LED:22**.

Result: Affirmance of Court of Appeals decision (see **April 04 LED:17**) that affirmed the King County Superior Court conviction of Van Ronald Pulfrey for possession of methamphetamine.

LED EDITORIAL COMMENT: In the March 2003 LED, we provided an article captioned "Custodial arrest and search incident to arrest of those arrested for driving while license suspended." The focus in that article was on pretext-related questions related to whether constitutional arrest authority was impacted by jail policies and police agency policies restricting officer discretion to book into jail on arrests for DWLS and some of the other crimes listed in RCW 10.31.100(3), The Pulfrey decision does not address the pretext-related issues addressed in our March 2003 LED article.

(2) COURT REJECTS LEGISLATURE'S ATTEMPT TO MAKE RETROACTIVE THE LEGISLATURE'S REVERSAL OF THE COURT'S 2002 INTERPRETATION IN ANDRESS OF THE SECOND DEGREE FELONY MURDER STATUTE – In In Re Hinton, 153 Wn.2d 853 (2004), the Washington Supreme Court among other things, rules that the 2003 Washington Legislature's attempt to make its amendment to the second-degree felony-murder statute retroactive violated ex post facto constitutional protection.

In In re Personal Restraint of Andress, 147 Wn.2d 602 (2002) **Dec 02 LED:16**, the Washington Supreme Court ruled that the second degree felony murder statute, as then written, did not perm it the crime of "assault" to serve as the predicate felony under Washington's second degree felony murder statute, former RCW 9A.32.050. The 2003 Washington Legislature quickly amended RCW 9A.32.050 to make clear that assault can be a predicate felony under the statute. See **April 03 LED:02**. The Legislature also declared that its amendment was retroactive. However, as noted above, the Hinton Court holds the retroactivity provision in the 2003 amendment unconstitutional under ex post facto analysis.

Result: Personal restraint petition of Jesse Hinton and 12 other petitioners granted; cases remanded for possible re-trial.

(3) MIRANDA WARNINGS WERE OK WITHOUT A FIFTH WARNING REGARDING THE "RIGHT TO STOP ANSWERING QUESTIONS AT ANY TIME" – In In re Dwayne Anthony Woods, ___ Wn.2d ___, ___ P.3d ___, 2005 WL 1403994 (2005), the Washington Supreme Court rejects an argument by a defendant (Dwayne Woods) in an aggravated first degree murder case that Miranda warnings that a person has a right to stop answering questions at any time. The Court explains:

Woods claims, finally, that during the reading of his Miranda rights, Detective Grabenstein failed to tell him that he had a "constitutional right to stop answering questions at any time until he talked to a lawyer." Because of this alleged omission, Woods argues, the statement he made to the detectives should not have been admitted into evidence.

Under Miranda, a suspect in custody must be warned prior to any questioning that: (1) he has the absolute right to remain silent, (2) anything that he says can be used against him, (3) he has the right to have counsel present before and during questioning, and (4) if he cannot afford counsel, one will be appointed to him. Here, [the detective] read those warnings to Woods from a "constitutional rights card." On this card, there are two questions: (1) "Do you understand these rights," and (2) "Do you want to give us these rights and answer my questions." After each of these questions, Woods wrote "yes."

Although suspects must be advised of their Miranda rights, the United States Supreme Court and this court have stated that there is no requirement that the warnings be given in the precise language stated in Miranda. The question is whether the warnings reasonably and effectively conveyed to a suspect his rights as required by Miranda."

Woods seems to contend that there is a fifth warning that must be added to the Miranda warnings--the right to stop answering at any time until he talks to a lawyer. For support, he relies on [Duckworth v. Eggan, 492 U.S. 195 (1989)]. In Duckworth, the police department advised the defendant of his Miranda rights from a form that included the statement, " 'You also have the right to stop answering at any time until you've talked to a lawyer.' " The actual issue presented in Duckworth was whether the Miranda rights given, with the language " '[w]e have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court,' " properly complied with Miranda. The United States Supreme Court held that the warnings "touched all of the bases required by Miranda." Citing this language from Duckworth, Woods argues that a proper Miranda warning must include the language, "you also have the right to stop answering questions at any time until you've talked to a lawyer." This argument is flawed. Just because the Supreme Court stated that the warnings given in Duckworth touched all bases does not mean that all elements in the Duckworth warnings must be present for the warnings to be effective.

As stated before, there is no requirement that the Miranda be given precisely as stated in Miranda v. Arizona. As long as the warnings are reasonably and effectively conveyed to the suspect, they are deemed proper. The actual Miranda warnings read to Woods by [the detective] were as follows:

> I am [name]. You have the right to remain silent. Anything you say can and will be used against you in a court of law.
>
> You have the right to talk to an attorney before answering any questions.... You have the right to have your attorney present during the questioning. If you cannot afford an attorney, one will be appointed for you without cost before any questioning if you so desire.

From the above excerpt, it is clear that Woods was given proper Miranda warnings. Although they are not word for word from Miranda v. Arizona, the message they convey is clear.

[Some citations omitted]

Result: Denial of personal restraint petition of Dwayne Anthony Woods (conviction for aggravated first degree murder and other convictions and death sentence upheld).

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WASHINGTON STATE COURT OF APPEALS

IDAHO LAW ON INTERSTATE FRESH PURSUIT JUSTIFIED WSP TROOPER'S PURSUIT AND SEIZURE OF DUI SUSPECT AT IDAHO HOSPITAL BASED ON REASONABLE SUSPICION; ALSO PROBABLE CAUSE JUSTIFIED SUBSEQUENT BLOOD TEST

In re Richie, ___ Wn. App. ___, ___ P.3d ___, 2005 WL 1330657 (Div. III, 2005)

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

> On June 29, 2003 at 1:11 a.m., Deputy John Jeffers was dispatched to a one vehicle accident near Anatone, Washington. There, he saw a pickup that had rolled to a stop on its top near the highway. He saw Mr. Richie on the ground next to the driver's side of the pickup with numerous injuries. During the investigation, Mr. Richie was transported to St. Joseph's Regional Medical Center in Lewiston, Idaho. Remaining to investigate, Deputy Jeffers saw an empty beer can near the truck. Washington State Patrol Trooper G.K. Bancroft arrived on the scene to investigate. His analysis indicated the pickup had been traveling about 87.7 miles per hour prior to the accident. Trooper Bancroft was suspicious of driving under the influence (DUI).
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> Trooper Bancroft pursued his investigation at the Idaho hospital. Mr. Richie was mainly unconscious and unresponsive to the Trooper's loud questions. Trooper Bancroft smelled an odor of alcohol on Mr. Richie's breath. At 4:46 a.m., the Trooper informed Mr. Richie he was under arrest for DUI by reading the special evidence warning for an unconscious driver.
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> Trooper Bancroft asked the hospital staff to call a phlebotomist to take a blood sample from Mr. Richie. Tammy Bower, a phlebotomist from Regional Pathology Laboratory, responded. Ms. Bower took the blood samples, which the Trooper sent to the Washington State Toxicology Laboratory. Mr. Richie's blood alcohol content was tested at .13. The chain of custody and blood test results are unchallenged except for the phlebotomist qualifications.
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> Under the above facts, DOL suspended Mr. Richie's license for 90 days. Mr. Richie elected a DOL administrative hearing without testimony. At the administrative hearing, Mr. Richie unsuccessfully contended the Idaho arrest was unlawful and his blood was illegally drawn. The hearing officer relied upon the sworn report of Trooper Bancroft and Deputy Jeffers to uphold Mr. Richie's license suspension and concluded State v. Steinbrunn, 54 Wn. App. 506 (1989) allowed the Idaho arrest.
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> Based upon the administrative record, the Asotin County Superior Court affirmed. The superior court rejected both Mr. Richie's continued illegal arrest argument under City of Clarkston v. Stone, 63 Wn. App. 500 (1991) **March 92 LED:06**, and his challenge to the phlebotomist's qualifications.

ISSUE AND RULING: Where the WSP Trooper learned that Richie had been traveling over 87 mph when Richie crashed in a one-car accident at around 1 a.m., where officers saw a beer can

near the overturned vehicle, and where the Trooper knew that Richie had been taken to a nearby Idaho hospital a few minutes earlier, did the Trooper have reasonable suspicion of DUI, and was the Trooper therefore justified under the Idaho statute on interstate fresh pursuit in going to the Idaho hospital and seizing Richie as a DUI suspect? (ANSWER: Yes, the Trooper had reasonable suspicion as to DUI, and the Trooper went to the hospital in a reasonable enough period of time to make the seizure one made on "fresh pursuit." NOTE ALSO: The Court goes on to hold, without detailed explanation, that the above information, plus the officer's observation of the suspect at the hospital, gave the officer probable cause to arrest, and therefore justified taking a blood sample at the hospital.)

Result: Affirmance of Asotin County Superior Court decision that affirmed DOL's suspension of the driver's license of Monte Lee Richie.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Mr. Richie contends his arrest in Idaho by a Washington law officer was unlawful. A lawful arrest triggers implied consent to a sobriety test. Generally, law enforcement officers lack the authority to make valid arrests outside of their appointed jurisdiction. However, the State responds that Idaho's fresh pursuit statute, I.C. § 19-701, authorized Mr. Richie's arrest in Idaho.
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> The hearing officer relied on State v. Steinbrunn, 54 Wn. App. 506 (1989), a case applying Washington law, in concluding Mr. Richie's arrest was lawful. By its terms, Washington's fresh pursuit statute is inapplicable to arrests made in other states. See RCW 10.89.010. Rather, the legality of Mr. Richie's arrest depends on Idaho law:
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> > [a]ny member of a duly organized state, county or municipal peace unit of another state of the United States who enters this state in fresh pursuit and continues within this state in such fresh pursuit, *of a person in order to arrest him on the ground that he is believed to have committed a felony in such other state*, shall have the same authority to arrest and hold such person in custody, as has any member of any duly organized state, county or municipal peace unit of this state, to arrest and hold in custody a person on the ground that he is believed to have committed a felony in this state. I.C. § 19-701 (emphasis added).
>
> In City of Clarkston v. Stone, 63 Wn. App. 500 (1991) **March 92 LED:06**, this court held a Washington police officer did not have the authority under I.C. § 19-701 to arrest in Idaho for a DUI. In Clarkston, the court decided police lacked reasonable suspicion of drinking and driving behavior in Washington before pursuing the driver into Idaho. Here, Washington officers found Mr. Richie at a Washington accident scene where uncontested evidence suggested drinking and driving. The authorities facilitated Mr. Richie's removal from the accident scene to an Idaho regional hospital for emergency care. Trooper Bancroft soon left the accident scene to follow Mr. Richie into Idaho to continue his investigation, suspicious of drinking and driving behavior.
>
> This is not a case of hot pursuit into a private area like a home, a different kind of analysis altogether. Rather, this is a case of applying the Idaho fresh pursuit statute to different facts than those found in Clarkston. Our focus is whether Trooper Bancroft possessed a reasonable suspicion that Mr. Richie had been drinking and driving in Washington before he entered Idaho to continue his investigation of Mr. Richie. This is not a case like Clarkston, where the police

lacked reason to believe Mr. Clarkston had been drinking and driving in Washington before pursing him into Idaho. The short investigative delay to facilitate Mr. Richie's emergency medical care is immaterial. The State asks us to overturn Clarkston, but we take this opportunity to clarify its holding because the facts are distinguishable, and thus, its legal analysis is susceptible of misinterpretation.

In interpreting its fresh pursuit statute, Idaho's Supreme Court has found "felony" to include misdemeanors treated as felonies for purposes of arrest in the other state. State v. Ruhter, 688 P.2d 1187 (Idaho 1984). In Ruhter, the court decided a Nevada officer lawfully followed a weaving driver into Idaho and arrested him for suspected DUI under I .C. § 19-701, because facts developed in Nevada justified the pursuit. Further, DUI is treated as a felony for purposes of arrest in Nevada. See also [Nevada .Revised Statutes] 484.379 (allowing arrests for certain misdemeanors, including DUI, without a warrant). The Clarkston court correctly reasoned the holding from Ruhter was factually distinguishable because it concluded the pursuing officer in the Clarkston case lacked drinking-and-driving facts before entering into Idaho in pursuit of Mr. Clarkston.

Here, the record shows the facts suggesting Mr. Richie's drinking and driving behavior were observed in Washington before Trooper Bancroft's pursuit into Idaho. In Ruhter, the officer had reason to believe the driver may have been under the influence prior to pursuing him into Idaho. Our facts are similar to those in Ruhter. Thus, we reach the same result as in Ruhter.

Like Nevada, Washington treats DUI as a felony for purposes of arrest. See RCW 10.31.100(3)(d) (allowing officers with probable cause to believe that a person is driving under the influence to arrest without a warrant). This was true when Clarkston was decided on its unique facts. See Laws of 1987, § 20, ch. 280 (codified as amended at RCW 10.31.100). Although Washington's fresh pursuit statute is not directly applicable, we note since Clarkston, Washington amended its fresh pursuit statute in 1998 to give foreign law enforcement the authority to make lawful arrests in Washington on suspicion of a felony or DUI. See RCW 10.89.010.

Considering the law and our unique facts, we clarify Clarkston and hold that pursuing Washington officers may effectuate a lawful arrest in Idaho for DUI if reasonable suspicion exists to believe the suspect may have been driving under the influence in Washington before the officer pursues the suspect into Idaho. Accordingly, we decline the State's invitation to overturn Clarkston, because its holding is based upon distinguishable facts, even if its legal reasoning may be capable of misinterpretation as suggested by the State.

In sum, Trooper Bancroft's accident investigation revealed Mr. Richie was involved in an accident with facts indicative of drinking and driving. Trooper Bancroft knew these facts before entering Idaho to pursue his ongoing investigation of Mr. Richie's accident. The Idaho statute merely requires a belief that an individual has committed a felony, not probable cause. See I.C. 19-701; see also Steinbrunn, 54 Wn. App. at 510 (recognizing probable cause to arrest is not required at the time of pursuit). In other words, similar to the situation in Ruhter, Trooper Bancroft had reason to believe Mr. Richie was a DUI suspect prior to "pursuing" him into Idaho. See Ruhter, 107 Idaho at 283. In Idaho, Trooper Bancroft properly established probable cause for arrest.

LED EDITORIAL COMMENT: The relevant language in Oregon's law governing fresh pursuit into Oregon from another state reads as follows:

> **Any member of a duly organized state, county or municipal peace unit of another state of the United States who enters this state in fresh pursuit, and continues within this state in such fresh pursuit, of a person in order to arrest the person on the ground that the person is believed to have committed a felony in the other state has the same authority to arrest and hold such person in custody as has any member of any duly organized state, county or municipal peace unit of this state to arrest and hold in custody a person on the ground that the person is believed to have committed a felony in this state.**

OR ST s 133.430(1). Oregon's statute employs a reasonable suspicion standard as the basis for pursuit. Our research has yielded no Oregon court decision like the Idaho Ruhter decision permitting interstate fresh pursuit of DUI offenders. So Oregon law is not as clear as Idaho's as to whether fresh pursuit into Oregon of non-felon DUI offenders' is permitted. Washington officers and agencies may want to consult their local prosecutors and legal advisors regarding legality of fresh pursuit of DUI suspects into Oregon.

Washington's RCW 10.89.010 governs fresh pursuit into Washington by Idaho and Oregon officers. Washington law also employs a reasonable suspicion standard though, unlike the Idaho and Oregon statutes, Washington's statute is explicit in permitting fresh pursuit in DUI cases. Washington's law reads as follows:

> **Any member of a duly organized state, county or municipal peace unit of another state of the United States who enters this state in fresh pursuit, and continues within this state in such fresh pursuit, of a person in order to arrest the person on the ground that he or she is believed to have committed a felony in such other state or a violation of the laws of such other state relating to driving while intoxicated, driving under the influence of drugs or alcohol, driving while impaired, or reckless driving shall have the same authority to arrest and hold such person in custody as has any member of any duly organized state, county or municipal peace unit of this state, to arrest and hold in custody a person on the ground that he or she is believed to have committed a felony or a violation of the laws of such other state relating to driving while intoxicated, driving under the influence of drugs or alcohol, driving while impaired, or reckless driving in this state.**

GAME AGENT'S APPROACH TO HOME VIA BACK DRIVEWAY WAS LAWFUL, AND HE HAD "OPEN VIEW" OF ELK CARCASS IN POACHING SUSPECT'S OPEN GARAGE; UNLAWFULNESS OF AGENT'S SUBSEQUENT WARRANTLESS ENTRY TO SEIZE CARCASS IS IRRELEVANT; AND MIRANDA WARNINGS WERE NOT REQUIRED FOR NON-CUSTODIAL QUESTIONING

State v. Posenjak, ___ Wn. App. ___, 111 P.3d 1206 (Div. III, 2005)

Facts and Proceedings below:

[**LED EDITORIAL NOTE REGARDING "TRIBAL HUNTING RIGHTS" ISSUE: This LED entry does not address all of the facts or any of the detailed legal analysis of the Court of Appeals relating to Robert Posenjak's unsuccessful claim of tribal hunting rights.]**

On September 9, 2002, Robert Posenjak shot and killed an elk on Washington State land in Kittitas County. At that time, there was no open hunting season for elk in the Kittitas area where the elk was taken. He transported the elk carcass to his residence in East Wenatchee. Mr. Posenjak did not have a hunting license or an elk tag. He attached a Snoqualmoo Tribe hunting tag to the elk.

Mr. Posenjak is a great-great-great-grandson of Chief Pat-ka-nam, who signed the Point Elliot Treaty. Mr. Posenjak is a member of the Snoqualmoo Tribe. The Snoqualmoo Tribe is not recognized by the federal government as a tribe with treaty rights. Additionally, Washington State does not recognize a Snoqualmoo hunting tag.

Game Officer [A] received a radio call from the Washington State Department of Fish and Wildlife concerning the possible poaching of an elk. He was provided a license plate number, which was traced to the Posenjak residence.

There are two driveways leading into the Posenjak residence. The south driveway leads toward a garage located at the rear of the residence. The north driveway leads to the front of the residence. There are no gates or "no trespassing" signs. In order to investigate the poaching report, Officer [A] entered the Posenjak residence through the south driveway. He parked his vehicle in front of the open garage door, where he observed Mr. Posenjak skinning an elk.

Mr. Posenjak exited the garage and approached the officer. Officer [A] indicated that he was investigating a possible poaching. Mr. Posenjak volunteered that he and his brothers had killed the elk in Kittitas County, that they were members of the Snoqualmoo Tribe, and that they were exercising their tribal hunting rights under the Point Elliot Treaty. He claimed that he had these rights based upon a decision of the Kittitas County District Court. The meeting was cordial and noncoercive. Mr. Posenjak was not detained or arrested. Mr. Posenjak returned to the garage and continued skinning the elk. Because he was unfamiliar with the hunting rights of the Snoqualmoo Tribe, Officer [A] contacted his superior, Sergeant [B], for assistance.

Sergeant [B] arrived and advised Mr. Posenjak that the Snoqualmoo Tribe did not have any recognized hunting rights. Officer [A] provided Mr. Posenjak his Miranda warnings. Mr. Posenjak waived his Miranda rights and again described to the officers his shooting of the elk and his tribal hunting right to do so. Officer [A] and Sergeant [B] confiscated the elk.

Mr. Posenjak was charged with unlawful hunting of big game in the second degree. His suppression motion was denied. At the bench trial, he did not seek to admit any evidence. He only called one witness, his brother Lon Posenjak. Lon Posenjak testified that he believed that there was elk hunting in the area before the introduction of elk by Washington State because his grandfather, William Gildow, told him "where the elk were" when he was a child. He testified that his grandfather was listed on the "Robin Rolls." Mr. Posenjak was convicted of unlawful hunting of big game in the second degree.

ISSUES AND RULINGS: 1) Did the first responding WDFW officer violate the constitutional privacy rights of the poaching suspect where the agent used the back driveway to approach the home, and where the game officer observed the elk carcass through the open garage door?

(ANSWER: No, a reasonably respectful citizen may have taken the back driveway, and the elk carcass was in "open view"); 2) Did the officers violate Posenjak's right of privacy when they made the warrantless entry through the open door into the garage to seize the elk carcass, and, if so, was any trial court error in admitting this evidence harmless? (ANSWER: Yes, the warrantless garage entry was unlawful, but the trial court error was harmless); 3) Was Officer A's initial questioning of Posenjak "custodial" such that prior Miranda warnings were required? (ANSWER: No, Posenjak was not in custody "to the degree associated with formal arrest").

Result: Affirmance of Douglas County Superior Court conviction of Robert G. Posenjak for unlawful hunting of big game in the second degree.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Open view and privacy

> No search occurs if the open view doctrine is satisfied. Under the open view doctrine, contraband that is viewed when an officer is standing in a lawful vantage point is not protected. If an officer is lawfully present at a vantage point and detects something by using one or more of his or her senses, no search has occurred. The officer may not simply intrude into a constitutionally-protected area to obtain the object.
>
> Police who have legitimate business may enter areas of the curtilage which are impliedly open to the public. However, the police may not make a "substantial and unreasonable departure" from the curtilage. The court determines the scope of the implied invitation by looking at the facts and circumstances of each case. Id. "An officer is permitted the same license to intrude as a reasonably respectful citizen."
>
> A person has almost no expectation of privacy in an access route to the house. The expectation of privacy in a driveway is determined under a test of reasonableness. The court reviews (1) the exposure of the driveway to the street and surrounding public areas, (2) the use of the driveway for common access to the house, and (3) the nature of the official incursion.
>
> The front porch is not a constitutionally-protected area. However, a person's home is a constitutionally-protected area. A person also has a reasonable expectation of privacy in his garage. An officer may not enter a garage merely because the garage door is open.
>
> Here, the open view doctrine is satisfied. Officer [A] saw the elk carcass inside the garage from a lawful vantage point when the garage door was open. Mr. Posenjak asserts that Officer [A] should have taken the other driveway. However, the driveway Officer [A] traveled was exposed to the street and surrounding public areas and used for common access to the house. Further, Officer [A]'s official incursion into the residence was for legitimate business. Finally, there were not any "no trespassing" signs. In other words, a reasonably respectful citizen may have taken the south driveway.
>
> Next, Mr. Posenjak asserts that he had a privacy interest in items located within his garage. Here, Officer [A] saw the elk carcass from a lawful vantage point. No privacy interest is affected by viewing the elk carcass from a lawful vantage point.

2) Harmless error in trial court's admission of carcass-seizure evidence

> Finally, Mr. Posenjak asserts that Sergeant [B] should not have taken the elk carcass. He is technically correct. The open view doctrine protects the view of items located in constitutionally-protected areas. It does not provide authority to enter constitutionally-protected areas to take the items without first obtaining a warrant. Here, Officer [A] and Sergeant [B] intruded upon Mr. Posenjak's privacy by taking the elk from Mr. Posenjak's garage. However, Officer [A] testified that he saw the elk carcass and the view of the elk carcass did not infringe upon Mr. Posenjak's privacy. Put differently, any error in admitting the evidence of the elk carcass was harmless. In conclusion, Officer [A] was able to testify that he saw the elk carcass through the open garage under the open view doctrine.

3) No Miranda custody

> Mr. Posenjak asserts that his incriminating statement is not admissible because he was not provided his Miranda warnings. In order to trigger Miranda protections, a "suspect must be in custody or 'otherwise deprived of his freedom of action in a significant way.' " Being deprived of freedom of action depends upon whether the " 'suspect reasonably supposed his freedom of action was curtailed.' " The question is not whether a reasonable person would believe that he was free to leave but rather whether he would believe that he was in " 'police custody of the degree associated with formal arrest.' " The suspect must be subjected to custodial interrogation. Incriminating statements and admissions that are not in response to an officer's questions are "freely admissible."
>
> In this case, Miranda does not provide Mr. Posenjak with any relief. First, he was not in custody or otherwise deprived of his freedom of action. On his own initiative, he exited the garage and spoke with Officer [A]. He was not under arrest. Instead, Mr. Posenjak was free to return to the garage. Second, Mr. Posenjak was not being interrogated. Instead, Mr. Posenjak volunteered the information. In conclusion, Mr. Posenjak's incriminating statements and admissions are admissible.

(Some citations omitted; emphasis added)

ONE-PARTY CONSENT TAPE RECORDING OF VICTIM'S OREGON-TO-WASHINGTON CALL ADMISSIBLE BECAUSE CALL WAS MADE FROM OREGON, RECORDING OCCURRED IN OREGON, AND RECORDING WAS INSTIGATED EXCLUSIVELY BY AN OREGON OFFICER NOT ACTING IN CONCERT WITH WASHINGTON OFFICERS

State v. Fowler, ___ Wn. App. ___, 111 P.3d 1264 (Div. II, 2005)

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

> Fowler, who lived with M.P.'s mother and her family in Washington State, began inappropriately touching M.P. when she was 12 years old. In May 1997, Fowler married M.P.'s mother after living with the family for many years. M.P. was 17 years old at the time of the marriage and became Fowler's stepdaughter. Fowler's inappropriate touching of M.P. escalated into sexual intercourse and oral sex after she became his stepdaughter.

In 2000, M.P. resisted Fowler's demand for sexual intercourse, but he held her down, straddled her waist, and penetrated her, despite her hitting him and crying. The family moved to Oregon soon after this event.

Fowler's sexual misconduct continued in Oregon. M.P. eventually left home to attend community college. When she returned home for a weekend in May 2002, Fowler had sexual contact with her again and later M.P. revealed Fowler's behavior to her mother. M.P.'s mother confronted Fowler and contacted Oregon authorities about M.P.'s disclosures. Soon after M.P.'s mother confronted Fowler, he left the home in Oregon and returned to Washington State.

In September 2002, Oregon State Police Detective Michael Wilson met with M.P. and her mother. As part of his investigation of the alleged sex offenses in Oregon, Detective Wilson asked M.P. to telephone Fowler from Oregon and tape-record their conversation. M.P. consented and made two telephone calls to Fowler in Washington. Fowler did not know that the conversations were recorded. M.P. and Fowler discussed some details about Fowler's sexual contact and intercourse with M.P. in Washington during the course of their recorded conversations.

Detective Wilson then interviewed Fowler in Washington about M.P.'s allegations. Detective Wilson advised Fowler of his Miranda rights before questioning him. Fowler denied many of M.P.'s allegations, but he admitted that he may have touched her inappropriately on occasion, especially when drinking. After Fowler made these statements, Detective Wilson informed him of the taped conversations. Fowler continued to deny M.P.'s allegations, but he briefly repeated that he may have acted inappropriately when drinking.

Detective Wilson eventually provided a copy of the two recorded conversations to law enforcement in Washington. In June 2003, the State of Washington charged Fowler with two counts of first degree incest, two counts of second degree incest, and one count of second degree rape.

The jury convicted Fowler as charged and he received concurrent standard range sentences.

ISSUES AND RULINGS: 1) Does chapter 9.73 RCW apply to the Oregon-police instigated call and recording from Oregon? (ANSWER: No); 2) The “silver platter” doctrine applies when a) authorities in another state or nation obtained evidence in a way that was lawful under their laws, and b) Washington officers did not instigate cooperate with, or assist the foreign authorities in any way. Does the “silver platter” doctrine apply under the facts of this case? (ANSWER: Yes)

Result: Affirmance of Thurston County Superior Court convictions of Alexander Leonard Fowler for first degree incest (two counts), second degree incest (two counts), and second degree rape (one count).

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Interpretation of chapter 9.73 RCW

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:

(a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication.

Our Supreme Court has held that "courts determining the validity of a telephone interception have looked to the law of the jurisdiction in which the interception--or the recording--occurred in order to determine the lawfulness of the interception." Kadoranian v. Bellingham Police Dep't, 119 Wn.2d 178 (1992) **Aug 92 LED:06**.

Here, the Oregon one-party consent statute applies to the recorded conversations between M.P. and Fowler because it is undisputed that M.P. recorded them in Oregon as part of an investigation of her allegations of Fowler's sexual misconduct in Oregon. Thus, under Oregon's one-party consent law, the Oregon recordings were legal. The trial court did not err in determining that RCW 9.73.030(1)(a) did not apply.

2) "Silver platter" doctrine

The silver platter doctrine applies when (1) the foreign jurisdiction lawfully obtained evidence; and (2) the forum state's officers did not act as agents or cooperate or assist the foreign jurisdiction in any way.

Here, Fowler does not dispute the court's findings that (1) M.P.'s two telephone calls to Fowler complied with Oregon's one-party consent law. Indeed, at the suppression hearing, Fowler's counsel agreed with the State that Washington authorities were not aware of Oregon's efforts until Detective Wilson contacted them and provided a copy of the tape-recorded conversations between M.P. and Fowler; and (2) no Washington State police officer instigated or had knowledge of Oregon's investigation of Fowler for criminal conduct alleged to have occurred in Oregon.

. . .

Given the trial court's undisputed factual findings, coupled with RCW 9.73.030(1)(a)'s inapplicability, the trial court did not err in applying the silver platter doctrine in order to admit the two recorded Oregon telephone conversations between M.P. and Fowler.

[Some citations omitted]

EVIDENCE OF "TAMPERING" WITH UTILITY SERVICES AND OF "FURTHERANCE OF OTHER CRIME" UNDER RCW 9A.61.030 HELD SUFFICIENT TO SUPPORT CONVICTION FOR FIRST DEGREE "DEFRAUDING OF PUBLIC UTILITY"

State v. Silva, ___ Wn. App. ___, 110 P.3d 830 (Div. I, 2005)

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

Dallas Anthony Silva is a contractor who owned two houses in Whatcom County, one on Sudden Valley Drive (Sudden Valley) and one on Hunsicker Street (Hunsicker). On October 30, 2001, while investigating a shooting at the Sudden

Valley house, sheriff's officers discovered a marijuana grow operation. The shooting victim was the tenant of Silva's Sudden Valley house. The tenant told officers he tended the grow operation in exchange for a portion of the profits and as payment of rent. Officers determined that the power to run the grow operation came from a line spliced off the main power cable prior to it reaching the electric meter for the residence. It was also determined that the spliced wire was not owned by Puget Sound Electric (PSE) and color differences were noted between the ground wire owned by PSE and that of the new line spliced into it. Silva was charged and convicted with the unlawful manufacturing of a controlled substance. That conviction is not directly at issue here.

A couple of days after the investigation at the Sudden Valley location began, a search warrant issued for Silva's Hunsicker residence. There, officers discovered a grow operation under construction similar to the one on Sudden Valley, but not yet growing plants. As at the other house, investigators found a breaker box at the Hunsicker location into which a line had been added from a splice in the main line. The second breaker box had been installed and the power diverted through it so that it did not register usage on the main electric meter at the house. This spliced line had power running through it.

PSE sent electricians to the Hunsicker house to confirm the diversion of electricity. PSE workers located a splice in the main cable, five feet from the new breaker box, and seven feet underground. The new cable connected to the second breaker box and was the same type used at the Sudden Valley house. PSE said it did not make the splice, and noted the splice was wrapped in the same type of tape as that found on the splice at the Sudden Valley location.

Several months later Silva was charged with defrauding a public utility in the first degree for diverting electricity at the Hunsicker house with the intent of furthering other criminal activity. After a bench trial on stipulated facts, Silva was convicted of the charge.

ISSUES AND RULINGS: 1) Did defendant's splicing into an electrical line to divert electricity around a meter box constitute "tampering" under chapter 9A.61 RCW? (ANSWER: Yes); 2) Was there sufficient evidence that defendant's "tampering" was "in furtherance of other criminal activity" such as to support defendant's conviction for first degree defrauding of a public utility under chapter 9A.61 RCW? (ANSWER: Yes)

Result: Affirmance of Whatcom County Superior Court conviction of Dallas Anthony Silva for defrauding a public utility in the first degree.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) "Tampering" evidence sufficient

Silva was charged under RCW 9A.61.030(1)(b), which states:

> (1) A person is guilty of defrauding a public utility in the first degree if:
>
> ...
>
> (b) Tampering has occurred in furtherance of other criminal activity.

Silva argues the statute requires proof that tampering occurred in furtherance of other criminal activity, but claims the findings and conclusions of the trial court only set forth that he diverted the electrical power and that the diversion was in furtherance of other criminal activity. Thus, he argues that although the trial court entered findings and conclusions, it failed to properly address the necessary element of tampering in its findings and conclusions.

RCW 9A.61.010(2) defines "[d]ivert" as "to change the intended course or path of electricity, gas, or water without the authorization or consent of the utility." RCW 9A.61.010(5) defines "[t]amper" as "to rearrange, injure, alter, interfere with, or otherwise prevent from performing the normal or customary function." Contrary to Silva's argument, the two are not necessarily mutually exclusive and the meaning of the words partially overlap.

The statutory elements of the crime of defrauding a utility in the first degree can be met by one of two acts. First, someone could divert utility services worth more than $1,500. That is not at issue here. The second prohibited act, the one charged here, is the tampering with utility services to further an additional crime. The perpetrator must tamper with the utility service with the unlawful intent to commit a further crime.

The definition of tamper includes rearranging, altering, or interfering with the providing of utility services. This broad definition of tampering includes a specific form of doing so, diverting. While it is possible to tamper with an electrical line without diverting electricity, given the statutory definitions it is virtually impossible to divert the electricity in the manner accomplished here without tampering with the electrical line. The diversion here was accomplished by rearranging, altering, or interfering with the electrical line.

A review of the record shows sufficient evidence to support a finding and conclusion of tampering. The findings and conclusions in this case, though not a model of clarity, when read as a whole, support the determination that Silva tampered with the electrical line even though they are couched in terms of "diversion."

2) “Furtherance of other criminal activity” evidence sufficient

Silva claims that even if there is sufficient evidence to support a finding that he tampered with the line, there is insufficient evidence to show that it "occurred in furtherance of other criminal activity" in order to support a conviction for defrauding the utility in the first degree. The trial court held that Silva diverted the electrical power at the Hunsicker residence for the purpose of growing marijuana, even though the Hunsicker location was not yet fully operational. The court broke down its reasoning into two parts: (1) that Silva could "power up" without drawing attention to his grow operation's high power use; and (2) that Silva could avoid paying a huge electric bill because the operation would draw so much current. The court analogized the case to conspiracy cases wherein a substantial step toward committing the crime is all that is required to complete it.

[T]here is significant evidence that Silva was building a second illegal marijuana grow operation. Although there were no plants at the Hunsicker location there were other indicia of his intent to complete a grow operation. Silva is a contractor who possessed the knowledge and equipment to perform the diversion.

> Significant evidence of the construction of a grow operation was found at the Hunsicker location, including tools, wiring, tin duct pipe, blowers and wood framing. The windows were covered with plywood so the bright light of a grow operation would not be noticed from outside, and a pulley system similar to that used at Sudden Valley to lower and raise grow lights was in place. The cable used to divert electricity at the Hunsicker location and the electrical tape used to wrap the splice were identical to that used at Sudden Valley. The inferences must be drawn in favor of the State. There is substantial evidence to allow a trier of fact to find the element of the tampering "in furtherance of other criminal activity" beyond a reasonable doubt.

[Footnotes and case citations omitted]

EVIDENCE THAT FLEEING SHOPLIFTER GRABBED STORE CLERK DURING VEHICULAR GETAWAY WAS SUFFICIENT TO SUPPORT CONVICTION FOR FIRST DEGREE ROBBERY

State v. Decker, ___ Wn. App. ___, 111 P.3d 286 (Div. I, 2005)

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

> In the afternoon of July 7, 2003, Corey Judd was working at his parents' store, the 757 Mini-Mart. Joseph Decker walked into the store, went behind the counter, and grabbed a handful of cigarettes. As he left, he turned and said, "Thanks, buddy." He did not pay for the cigarettes. Judd called 911 and followed Decker outside to write down his license plate number.
>
> Decker got into the front passenger seat of his car. There were three other people in the car. Judd approached the driver's door and put his hands on the windowsill of the door. Judd was upset that someone would steal from his family's business. He told the driver not to go anywhere. Judd noticed the other passengers looked surprised, and thought he heard someone laugh inside the car. He asked for the cigarettes back. Decker dropped the cigarettes onto the floor of the car, leaned over across the driver, and grabbed Judd's left arm. The grasp itself did not bruise Judd's arm or wrist.
>
> Judd started thinking about times when he had seen stories on television about people getting yanked off the ground and dragged. When he initially tried to pull his arm away, he was not able to free himself. The car started rolling, and Judd started flailing around trying to break free. He tried to get free any way he could, although he admitted he did not try to grab and remove Decker's arm. He hit the passenger window with his fist to try to startle Decker into releasing him, and broke it with a single punch, lacerating his arm. He also broke his toe either because the car ran over it or because he kicked the car. His doctor testified there was no way to know the actual cause of the injury, but it was more likely because of kicking.
>
> Judd eventually broke free and the car drove off. He estimated that the whole incident, from Decker leaving the store until the end, took about 15 to 20 seconds. Judd's injuries were initially treated by some customers and paramedics, and then he drove himself to the hospital for further treatment.

At the end of the state's case, Decker moved to dismiss the first degree robbery charge because the state had failed to prove the elements of the crime. The court's instructions to the jury set forth the elements of robbery in the first degree:

> A person commits the crime of robbery in the first degree when in the commission of a robbery or in immediate flight therefrom he or she inflicts bodily injury.

See RCW 9A.56.200(1)(a)(iii). Decker argued that "inflict" means to directly cause, and not merely result in bodily injury. Decker urged the trial court to rule that a "but for" cause is insufficient under the statute. The state argued against this "very narrow definition of the word inflict." The trial court agreed with the state:

> I believe that these injuries were caused by the defendant's action, that the defendant put into motion a series of events by his reaching across and grabbing Mr. Judd as he was attempting to get his property back, and that this, in effect, was a cause for infliction of injury because of [Mr. Judd's] natural reaction to what the defendant had done.

The trial court noted that by reaching across and grasping Judd, Decker put in motion a chain of events, and that sufficient evidence existed to deny the motion to dismiss. The jury convicted Decker of robbery in the first degree, and the trial court sentenced him within the standard range. Decker appeals and argues there was insufficient evidence to convict him of first degree robbery.

ISSUE AND RULING: When the store clerk was injured as a result, in part, of Decker grabbing him, did Decker “inflict” injury on the store clerk within the meaning of the first degree robbery statute, RCW 9A.56.200(1)(a)(iii)? (ANSWER: Yes).

Result: Affirmance of King County Superior Court conviction of Joseph A. Decker for first degree robbery.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The intent required to prove robbery in the first degree is intent to deprive the victim of property. Intent to cause bodily injury is not an element of robbery in the first degree as defined in Washington.
>
> [T]he jury had sufficient evidence to conclude that in flight from a robbery, Decker inflicted injury on Judd. Decker held onto Judd's arm. This act directly caused Judd to flail about and attempt to free himself. Judd's attempt to free himself directly caused his injuries. Thus there is a direct causal link between Decker's act and Judd's injuries. Without Decker's act of holding Judd's arm, Judd would not have been injured. Therefore, Decker inflicted Judd's injuries because his acts were both an actual and a proximate cause of Judd's injuries. It is not relevant that Decker did not intend to injure Judd.
>
> Further, the driver's act of starting the car rolling was not an intervening cause that relieves Decker of responsibility for Judd's injuries. An intervening cause is a force that operates to produce harm after the defendant has committed the act or omission. 'Intervening' is used in a time sense; it refers to later events." Here, Decker's act was not yet complete; he was still holding on to Judd's arm when the car started rolling. The driver's act of starting the car rolling, therefore, was

not a later event or an intervening cause; it was at most a concurring cause. *See* Souther, 100 Wn. App. at 710, 998 P.2d 350.

We conclude that sufficient evidence supported the conclusion that Decker's acts were a proximate cause of Judd's injuries, and therefore, that Decker inflicted Judd's injuries.

[Some citations omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) LEWIS RULE APPLIES TO OFFICERS' ACTIVATION OF PATROL CAR AUDIO-VIDEO RECORDING DEVICE – CHAPTER 9.73 DOES NOT REQUIRE SUPPRESSION BECAUSE STREET CONVERSATIONS ARE NOT "PRIVATE" –In State v. Kelly, ___ Wn. App. ___, 111 P.3d 1213 (Div. I, 2005), the Court of Appeals follows the decision it announced in Lewis v. Dep't of Licensing, 125 Wn. App. 666 (Div. I, 2005) **April 2005 LED:09** and holds that the failure of arresting officers in two separate DUI cases to comply with RCW 9.73.090(1)(c) by advising the arrestees that they were being recorded by patrol car video equipment did not require suppression of the recordings or of any evidence. Per Lewis, the Kelly Court holds that officers' street conversations with the DUI suspects in this case were not "private" for purposes of chapter 9.73, and therefore the suppression remedy of the statute does not apply.

Result: Reversal of King County Superior Court and District Court suppression-and-dismissal orders; remand of cases for DUI trials of Edward Kelly and Andrew De Waele.

LED EDITORIAL COMMENT: Of course officers should give the warnings required by RCW 9.73.090(1)(c).

(2) SHORT-BARRELED-SHOTGUN LAW VIOLATED EVEN IF DEFENDANT DID NOT KNOW POSSESSION OF SUCH A GUN WAS ILLEGAL – In State v. Williams, 125 Wn. App. 335 (Div. II, 2005), the Court of Appeals rejects defendant's argument that he was not guilty of unlawful possession of a short-barreled shotgun under RCW 9.41.190 because he did not know it was illegal to possess a gun with the configuration of the gun in question.

The Williams Court holds that under RCW 9.41.190, the State was required to prove only that defendant knew he possessed the gun, not that he possessed it knowing it to be illegal.

Result: Affirmance of Kitsap County Superior Court conviction of Matthew Arthur W. Williams for possessing a short-barreled shotgun.

LED EDITORIAL NOTES RE CHAPTER 9.41 RCW AND KNOWLEDGE ELEMENTS OR LACK THEREOF IN SELECT FIREARMS CRIMES:

RCW 9.41.040 prohibits possession of a firearm by a person previously convicted of a felony or of certain specific DV-related misdemeanors or by person charged with certain specified felonies pending certain specified court proceedings. Knowledge that one is in possession is an element of the crime – see State v. Anderson, 141 Wn.2d 357 (2000) Oct 00 LED:13. However, knowledge that it is wrong to be in possession is not an element of the crime – see State v. Semakula, 88 Wn. App. 719 (Div. I, 1997) March 98 LED:21; State v. Reed, 84 Wn. App. 379 (Div. II, 1997) April 97 LED:11.

RCW 9.41.190 prohibits possession of certain types of unlawful firearms, including short-barreled shotguns and rifles. Per the Williams Court's analysis above, the same knowledge standard applies to RCW 9.41.190 as applies to RCW 9.41.040. See also State v. Warfield, 119 Wn. App. 871 (Div. II, 2003) Feb 04 LED:17. That is, knowledge that one is in possession is an element of the crime, but knowledge of the illegality of such possession is not an element of the crime.

RCW 9.41.050 prohibits carrying a pistol concealed without a permit. Neither knowledge of possession nor knowledge of illegality is an element of this *strict liability* crime. See City of Seattle v. Briggs, 109 Wn. App. 484 (Div. I, 2001) Aug 02 LED:21.

(3) DEFENSE UNDER WASHINGTON'S MEDICAL MARIJUANA ACT HELD NOT MET BY FACTS OF CASE; ALSO, THE ACT IS HELD TO SUPERSEDE AND ABSOLUTELY PRECLUDE A COMMON LAW DEFENSE OF "MEDICAL NECESSITY" – In State v. Butler, ___ Wn. App. ___, 109 P.3d 493 (Div. II, 2005), the Court of Appeals rejects the "medical necessity" argument of a marijuana grower who was discovered to have a 49-plant grow operation in his home. Police had obtained consent to search from defendant's wife while police checking on defendant's welfare following a motor vehicle accident. Defendant was not home at the time of the search. When police arrested him later, defendant did not present a physician's written statement that he needed to use marijuana for a medical condition, and at trial he did not present such documentation either.

The Court of Appeals holds that the trial court properly rejected his request for public funds to hire a medical marijuana expert because he failed to meet the requirements of the Medical Marijuana Act, chapter 69.51A RCW. He failed to offer proof to show that he had a valid prior documentation of his medical need for marijuana; he never tried to show what amount constituted a 60-day supply for his condition, as required under the Act; and he never tried to show that he presented valid documentation to law enforcement when they arrested him.

Result: Affirmance of Cowlitz County Superior Court conviction of Curtis Andrew Butler for manufacturing marijuana, possessing marijuana and using drug paraphernalia.

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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.

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. Decisions of the Ninth Circuit of the U.S. Court of Appeals since January 2000 can be accessed (by date of decision only) by going to the Ninth Circuit home page at [http://www.://www.ca9.uscourts.gov/] and clicking on "Opinions."

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 2005, is at [http://slc.leg.wa.gov/]. Information about bills filed since 1997 in the 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. 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 [https:fortress.wa.gov/CJTC/www], while the address for the Attorney General's Office home page is [http://www.atg.wa.gov].

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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: [https:fortress.wa.gov/CJTC/www].