



Law Enforcement

JULY 2009

Digest

642nd Basic Law Enforcement Academy – January 26th, 2009 through June 2nd, 2009

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PART THREE OF THE 2009 WASHINGTON LEGISLATIVE UPDATE

LED INTRODUCTORY EDITORIAL NOTE: This is Part Three of a three-part compilation of 2009 State of Washington legislative enactments that may be of interest to law enforcement. This part includes an index of the legislation digested in all three parts.

Note that unless a different effective date is specified in the legislation, bills adopted during the 2009 regular session take effect on July 26, 2009 (90 days after the end of the regular session). For a few enactments, different sections have different effective dates for separate sections. We have generally shown a single effective date applicable to the sections that we believe are most critical to law enforcement officers and their agencies.

Consistent with our past practice, our Legislative Updates will for the most part excluded legislation in the subject areas of sentencing, consumer protection, retirement, collective bargaining, tax, budget, and workers' compensation benefits. We have included most of the enactments that create new crimes, even though many of those enactments address conduct that, we would guess, most officers will never be called upon to investigate.

Thank you to Tom McBride and Pam Loginsky of the Washington Association of Prosecuting Attorneys for assistance in providing us with information and ensuring that we did not miss any legislation of interest to law enforcement. Also thank you to Kathryn McLeod, Senior Counsel in the AGO's Fish, Wildlife and Parks Division for help with our entry regarding chapter 333.

Text of each of the 2009 Washington acts is available on the Internet at [<http://apps.leg.wa.gov/billinfo/>]. Use the 4-digit bill number for access to the enactment. References in our entries to "Bill Reports" are to summaries prepared by legislative staff. Bill reports are available at the referenced Internet address.

We will include some RCW references in our entries, but where new sections or chapters are created by the legislation, the State Code Reviser must assign the appropriate code numbers. Codification by the Code Reviser will likely not be completed for several months.

We remind our readers that any comments or interpretations that we express in the **LED** regarding either legislation or court decisions: 1) do not constitute legal advice, 2) express only the views of the editors, and 3) do not necessarily reflect the views of the Attorney General's Office or of the Criminal Justice Training Commission.

CRIMINALIZING CERTAIN ACTS ENGAGED IN TO COLLECT SMALL LOANS

Chapter 13 (SB 5164)

Effective date: July 26, 2009

Amends RCW 31.45.082 to add a number of restrictions on how licensed check cashers and sellers collect upon delinquent small loans, including prohibitions on claiming connection to law enforcement and making late night or unreasonably frequent communications. RCW 31.45.180, which was not amended, provides: "Any person who violates or participates in the violation of any provision of the rules or orders of the [Washington Director of Financial Institutions] or of this chapter is guilty of a misdemeanor."

EVALUATING THE NEED FOR A DIGITAL FORENSIC CRIME LAB

Chapter 27 (SB 5184)

Effective date: July 26, 2009

The Final Bill Report describes the effect of this Act as follows:

The WSP and [Attorney General] must convene a work group to study the need for a virtual digital forensic lab. The study must include reviewing and evaluating the costs and effectiveness of state-of-the-art technologies used by digital forensic labs in other states. The work group must also consider advantages and disadvantages of regional and centralized digital forensic labs, and the merits of staffing such labs exclusively with uniformed officers or a mix of law enforcement and civilian personnel.

The work group must report to the Legislature with its recommendations by October 30, 2009.

CONTINGENT ON FUNDING, CREATING THROUGH WASPC AN ELECTRONIC STATEWIDE UNIFIED SEX OFFENDER NOTIFICATION AND REGISTRATION PROGRAM

Chapter 31 (SSB 5261)

Effective date: July 26, 2009

Amends RCW 36.28A.040 to add a subsection (6) providing as follows: "When funded, the Washington association of sheriffs and police chiefs shall implement and operate an electronic statewide unified sex offender notification and registration program."

CREATING THE WASHINGTON GRAIN COMMISSION

Chapter 33 (SHB 1254)

Effective date: July 26, 2009

Creates the Washington Grain Commission and eliminates the Washington Barley Commission and Washington Wheat Commission. A new chapter of misdemeanor violations (including violating Commission rules, submitting fraudulent information to the Commission, and failing to make certain reports) is created and will be codified in Title 15 RCW.

AUTHORIZING CRIME VICTIMS' COUNSELING FOR VICTIMS OF SEX OFFENSES COMMITTED OUTSIDE WASHINGTON WHERE THE VICTIMS COOPERATE IN RELATION TO WASHINGTON CIVIL COMMITMENT PROCEEDINGS

Chapter 38 (SHB 1221)

Effective date: July 26, 2009

Adds a new subsection to RCW 7.68.070. The victim of a sex offense that occurred outside of Washington who has been notified, interviewed, deposed, or has testified in a civil commitment proceeding of the perpetrator may receive funds for appropriate mental health counseling to address distress arising from participation in the proceedings. Fees for mental health counseling are to be determined by reference to the medical fee schedule for workers' compensation.

REQUIRING MV DEALER TO DISCLOSE DAMAGE AND REPAIRS IN SELLING NEW MV

Chapter 49 (SSB 5388)

Effective date: July 26, 2009

Amends RCW 46.70.180 to, among other things, make it a misdemeanor for a motor vehicle dealer not to disclose in writing prior damage and repairs of over \$1000 or 5% of value in relation to sales of new motor vehicles.

REVISING LAW REGULATING USE OF ELECTRONIC IDENTIFICATION DEVICES

Chapter 66 (SHB 1011)

Effective date: July 26, 2009

Amends RCW 19.300.010 and adds a new section to chapter 19.300 RCW. The new section prohibits governmental and business entities from remotely reading, for certain purpose, a radio-frequency identification device. Exceptions are provided for emergencies, health care purposes, identifying of accident victims, search warrant authorization, court-ordered monitoring, and certain other public safety purposes.

ALLOWING INPUT TO DEPARTMENT OF CORRECTIONS BY CRIME VICTIMS REGARDING OFFENDER PLACEMENT IN THE COMMUNITY

Chapter 69 (HB 1076)

Effective date: August 1, 2009

Adds a new section to chapter 72.09 RCW creating a mechanism by which a crime victim or the victim's next of kin are allowed notice from and input to DOC regarding an offender's placement in work release.

REGULATION OF "EXCHANGE FACILITATORS"

Chapter 70 (E2SSHB 1078)

Effective date: July 26, 2009

Creates a new chapter in Title 19 RCW addressing "exchange facilitators," who are persons and entities in business relating to certain types of transfers of property intended to avoid tax consequences. This new chapter includes some new felonies and misdemeanors for false statements and mishandling of funds. The crimes also constitute civil violations of the Consumer Protection Act.

REPEALING CRIMINAL LIBEL LAWS

Chapter 88 (SB 5147)

Effective date: July 26, 2009

In response to the decision of the Court of Appeals in State v. Parmelee, 145 Wn. App. 223 (Div. II, 2008) **Oct 08 LED:24** (holding Washington's criminal libel statute facially unconstitutional on freedom of speech grounds), this Act repeals the criminal libel provisions in chapter 9.58 RCW.

REGULATING "LIFE SETTLEMENT" TRANSACTIONS

Chapter 104 (SSB 5195)

Effective date: July 26, 2009

This is a comprehensive law addressing "life settlements" which involves certain transactions relating to life insurance policies. Felony crimes are created relating to fraudulent acts and to acting as a broker without proper authorization.

AUTHORIZING CERTAIN COUNTY OFFICIALS, INCLUDING SHERIFFS, TO MAINTAIN OFFICES AT LOCATIONS OTHER THAN THE COUNTY SEAT

Chapter 105 (SB 5233)

Effective date: July 26, 2009

Amends various provisions in Title 36 RCW to permit, at the discretion of the county commissioners, the county sheriff, superior court clerk, treasurer, and road engineer to keep offices at locations other than the county seat, provided the official also keeps an office at the county seat.

AUTHORIZING WSP TO ACCEPT DONATIONS

Chapter 108 (SB 5695)

Effective date: July 26, 2009

Adds a new section to chapter 43.43 RCW reading as follows:

The Washington state patrol may accept any and all donations, bequests, gifts, conveyances, devices, and grants conditional or otherwise; or money, property, service, or other things of value which may be received from the United States or any agency thereof, any governmental agency, institution, person, firm, or corporation, public and private, to be held, used, or applied for the purpose of fulfilling its mission.

AUTHORIZING EXPANSION OF SHERIFFS' CIVIL SERVICE COMMISSION FROM 3 TO 5

Chapter 112 (SB 5322)

Effective date: July 26, 2009

Amends RCW 41.14.030 to authorize county legislative authorities to expand the civil service commission for a sheriff's office from three to five (with certain specifications regarding qualifications for membership on the commission).

REGULATING ACCOUNTANCY PRACTICES

Chapter 116 (SSB 5434)

Effective date: July 26, 2009

Among other things, adds new accountancy-practice crimes to chapter 18.04 RCW.

REGULATING CONSUMER LOAN COMPANIES

Chapter 120 (SHB 1621)

Effective date: July 1, 2010

Among other things, creates some new crimes in chapter 31.04 RCW relating to business practices of consumer loan companies.

PROTECTING VICTIMS' RIGHTS TO GIVE STATEMENTS BEFORE PRISONER RELEASE

Chapter 138 (HB 1281)

Effective date: August 1, 2009

Adds a new section to chapter 7.69 RCW and amends RCW 9.95.420, 9.94A.885 and 7.69.030. Victims, survivors of victims, and witnesses are given a right to make a statement to the Indeterminate Sentence Review Board (ISRB) prior to the granting of post-sentence release of a prisoner from confinement. The statements may be made in person, by representation, via audio, videotape, or other electronic means, or in writing. Victims and survivors of victims also are given the right to present a statement to the Clemency and Pardons Board using the same alternative means of communication as allowed before the ISRB.

CLARIFYING STANDARDS FOR TINTING ("SUNSCREENING") OF CAR WINDOWS; ALSO DEFINING "COLLECTOR VEHICLE"

Chapter 142 (ESB 5581)

Effective date: July 26, 2009

Makes numerous changes in the text of RCW 46.37.430, which the standards for tinting of car windows; such tinting is referred to in the statute as "sunscreening." Also adds a new section to chapter 46.04 RCW, the definitions chapter of the traffic code, reading as follows: "Collector vehicle' means any motor vehicle that is more than thirty years old."

AUTHORIZING THE DEPARTMENT OF CORRECTIONS TO TRAIN ITS OWN PERSONNEL

Chapter 146 (SSB 5987)

Effective date: July 26, 2009

The Final Bill Report describes the effect of this enactment as follows (emphasis added):

The requirement to obtain basic corrections officer training through the CJTC does not apply to Department of Corrections (DOC) employees who work for the

prisons division. DOC is responsible for identifying training standards, designing training programs, and providing training for those employees. The Secretary of DOC must consult with experts and corrections professionals and solicit input from labor organizations in designing its training requirements.

Training for community corrections officers will continue to be developed and delivered collaboratively between DOC and the CJTC.

All corrections employees with DOC must successfully complete core training requirements and all other requirements for career level certification within a time period specified by the Secretary. The Secretary is responsible for assuring that the training needs of its corrections employees are met and must conduct an annual review of the training program.

REGULATING REVERSE MORTGAGE LENDING

Chapter 149 (EHB 1311)

Effective date: July 26, 2009

Among other things, creates new crimes in chapter 31.04 RCW regarding business practices of those engaging in reverse mortgage lending.

REGULATING SELLING, SOLICITING, OR NEGOTIATING INSURANCE

Chapter 162 (EHB 1568)

Effective date: July 1, 2009

Among other things, creates new crimes in Title 48 RCW regarding selling, soliciting, and negotiating insurance.

PROTECTING A WOMAN'S RIGHT TO BREASTFEED IN A PUBLIC PLACE

Chapter 164 (HB 1596)

Effective date: July 26, 2009

Amends the anti-discrimination laws of RCW 49.60.030 and 49.60.215 to declare and protect the right of women to breastfeed in public places.

REQUIRING CRIMINAL HISTORY RECORD CHECKS FOR SOME DOL EMPLOYEES

Chapter 169 (HB 1844)

Effective date: July 26, 2009

Requires DOL to conduct criminal history background checks of current and prospective employees involved in the issuance of enhanced driver's licenses and identicards.

REMOVING CRIMINAL PENALTY FOR VIOLATOR WHO DOES NOT SIGN A NOTICE OF NATURAL RESOURCES CIVIL INFRACTION

Chapter 174 (SB 5298)

Effective date: July 26, 2009

Deletes subsection (6) from RCW 7.84.030 as of July 26, 2009. The repealed subsection (6) has provided that "Failure to sign an infraction notice shall constitute a misdemeanor under chapter 9A.20 RCW." The repeal of this criminal provision makes the infraction scheme of chapter 7.84 RCW consistent with that for motor vehicles violations and for other civil infractions, the provisions of which were repealed in the 2006 legislative session (see **May 2006 LED** at page 17 reporting on chapter 270, Laws of 2006).

CREATING WASHINGTON HEALTH CARE DISCOUNT PLAN ORGANIZATION ACT

Chapter 175 (SSB 5480)

Effective date: July 26, 2009

Among other things, creates new crimes relating to business practices under this new act.

MODIFYING THE DEFINITION OF “CONVICTION” FOR THE PURPOSES OF THE UNIFORM COMMERCIAL DRIVER’S LICENSE ACT

Chapter 181 (Senate Bill 6068)

Effective date: July 26, 2009

Amends RCW 46.25.010(7) to provide that “entry into a deferred prosecution program under chapter 10.05 RCW” is a “conviction” for purposes of commercial driver’s licenses.

REGULATING BUSINESS PRACTICES UNDER UNIFORM LIMITED PARTNERSHIP ACT

Chapter 188 (SHB 1067)

Effective date: January 1, 2010

Section 208 of this enactment adds a new section to chapter 25.10 RCW making it a gross misdemeanor to sign a record that the person knows is false in any material respect with the intent that the record be delivered to the Secretary of State for filing.

WSP’S NOTIFICATION TO JUVENILE SEX OFFENDERS OF THEIR RIGHT TO SEEK RELIEF FROM SEX OFFENDER REGISTRATION REQUIREMENTS

Chapter 210 (SSB 5326)

Effective date: July 26, 2009

Amends RCW 9A.44.145 to require that at least annually the Washington State Patrol notify sex and kidnapping offenders who committed their crimes as juveniles of the right to seek relief from registration requirements.

REGULATING HARVESTING AND TRANSPORTING FOREST PRODUCTS

Chapter 245 (SHB 1038)

Effective date: July 26, 2009

This enactment rewrites a number of statutes regarding the gathering and transporting of specialized forest products. County sheriffs have permitting responsibility, but the responsibility can be outsourced. Among other things, the enactment amends RCW 76.48.120 to make it a class C felony to knowingly or intentionally offer as real any document required by chapter 76.48 RCW that is false, fraudulent, forged, or stolen. Other violations of the chapter are gross misdemeanors. Courts have authority to suspend the right to obtain a permit for up to 3 years. Seizure and forfeiture provisions are included relating to unlawfully obtained specialty forest products.

ALLOWING MULTIPLE DIVERSIONS FOR JUVENILES CHARGED WITH PROSTITUTION AND PROSTITUTION LOITERING

Chapter 252 (SHB 1505)

Effective date: July 26, 2009

Allows prosecutors to divert a charge of juvenile prostitution if the county has created a comprehensive program for such diversion.

ADDING ADDITIONAL APPROPRIATE LOCATIONS FOR TRANSFER OF NEWBORNS

Chapter 290 (SSB 5718)

Effective date: July 26, 2009

Amends RCW 13.34.360. A person may currently leave a newborn child at hospitals and fire stations without facing criminal prosecution for certain crimes. This enactment adds to the list of places “a federally designated rural health clinic during its hours of operation.”

REGULATING GENETIC COUNSELING

Chapter 302 (SSB 5608)

Effective date: July 26, 2009

Establishes a licensing scheme related to the profession of genetic counseling and creates a new crime, practicing without a license, under existing RCW 18.130.190(7).

REVISING NUMEROUS PROVISIONS IN TITLE 77 RCW'S FISH AND WILDLIFE LAWS

Chapter 333 (SHB 1778) Effective date: July 26, 2009 (except sec. 54-70; see below)

Section 1 amends RCW 77.15.050's definition of "conviction" to include "failure to appear at a hearing to contest an infraction or criminal citation." Section 5 amends RCW 77.15.610 to make it a crime for commercial taxidermists and fur buyers to violate reporting requirement rules of WDFW. Section 6 amends RCW 77.32.470 to authorize the Fish and Wildlife Commission to adopt rules allowing a two-fishing-pole stamp for fishing license holders.

Sections 7-10 amend various Title 77 RCW provisions by striking references to a "salmon guide" license and replacing that term with "food fish guide" license. The new license includes guiding for salmon as well as other classified food fish. Section 14 creates two new crimes in Title 77 RCW involving "unlawful use of department permits": unlawful use of an experimental fisheries permit is a gross misdemeanor, and unlawful use of other types of permits is a simple misdemeanor.

Section 17 amends RCW 77.15.370 by making it a gross misdemeanor to possess an oversized sturgeon. Section 20 amends RCW 77.15.620 to make it a class C felony to: 1) fail, while fish dealing without a license, to document certain specified fish-dealing practices; or 2) violate any other rule governing wholesale fish buying and selling.

Section 22 amends RCW 77.12.879 to make it mandatory for vehicles transporting commercial or recreational vessels from any designated aquatic invasive species (AIS) state or foreign country to carry documentation that the vessel has been inspected and found free of AIS. The amendment to this section also requires persons transporting vessels used in AIS-infested states or foreign countries to bear the cost of impoundment, transportation, cleaning and decontamination.

Sections 44-49 create a new chapter in Title 77 RCW modeled after chapter 63.35 RCW, Unclaimed Property in Hands of State Patrol. This new chapter provides a mechanism for fish and wildlife officers to properly dispose of lost and unclaimed personal property.

Sections 54-70 rewrite various statutes governing claims for wildlife damage to commercial crops or commercial livestock. The effective date of these new laws is July 1, 2010. Section 61 amends RCW 77.36.030 to clarify when the owner, the owner's immediate family member, the owner's documented employee, or a tenant of real property, may trap or kill wildlife that is threatening human safety or causing property damage on that property, without the necessary licenses (this amendment is apparently in part a response to the Washington Supreme Court decision in State v. Vander Houwen, 163 Wn.2d 25 (2008) **May 08 LED:16.**)

Section 73 creates a new stand-alone Western Washington Pheasant hunting permit.

CREATING THE GUARANTEED ASSET PROTECTION WAIVER MODEL ACT

Chapter 334 (EHB 1530)

Effective date: July 26, 2009

Among other things, creates a class B felony in Title 48 RCW for knowingly engaging in certain activity relating to certain types of financial agreements without a registration, unless exempt.

REGULATING PRACTICE OF LANDSCAPE ARCHITECTURE

Chapter 370 (SSB 5273)

Effective date: Various

Among other things, makes it a gross misdemeanor under existing RCW 18.235.170 to obtain or attempt to maintain a landscape architecture license by willful or fraudulent misrepresentation.

REVISING LAWS REGARDING DOC SUPERVISION OF OFFENDERS

Chapter 375 (ESSB 5288)

Effective date: July 26, 2009

This comprehensive enactment makes significant changes in laws relating to supervision of offenders by the Department of Corrections.

MONDERNIZING THE WASHINGTON CODE OF MILITARY JUSTICE

Chapter 378 (SHB 1036)

Effective date: July 26, 2009

Makes a number of changes in the Code of Military Justice, including clarification regarding jurisdiction of the State vs. that of military authorities.

ALLOWING TRIBAL AUTHORITIES TO CHANGE SPEED LIMITS ON NON-LIMITED-ACCESS STATE HIGHWAYS WITHIN THE TRIBE'S RESERVATION

Chapter 383 (HB 1448)

Effective date: July 26, 2009

Creates a new section in chapter 46.61 RCW allowing Tribal authorities to change speed limits on non-limited access state highways within the boundaries of the tribe's reservation. A change to a speed limit must be based on engineering and traffic investigation. A change is not effective until it has been approved by the Department of Transportation, and appropriate signs have been posted giving notice of the change. If the change is for non-limited-access state highways that are also part of city streets, the change must also be approved by the local government before it is effective.

AUTHORIZING IMPOUNDING OF VEHICLES OF REPEAT PROSTITUTION OFFENDERS

Chapter 387 (ESHB 1362)

Effective date: July 26, 2009

Amends RCW 9A.88.140 to authorize impounding of vehicles of repeat prostitution offenders. Allows creation by local governments of impound zones in areas of high prostitution for first time offenders. Signs must be posted. Vehicles involved in prostitution crimes may be impounded and the owner/driver required to pay a \$500 fine to redeem the vehicle. The fine must be refunded if the offender is found not guilty of the offense.

CLARIFYING ARREST AND SEARCH AUTHORITY OF DOC OFFICERS

Chapter 390 (ESHB 1792)

Effective date: July 26, 2009

Amends RCW 9.94A.631. Among other things, this enactment adds a new subsection providing as follows:

For the safety and security of [DOC] staff, an offender may be required to submit to pat searches, or other limited security searches, by community corrections officers, correctional officers, and other agency approved staff, without reasonable cause, when in or on [DOC] premises, grounds, or facilities, or while preparing to enter [DOC] premises, grounds, facilities, or vehicles. Pat searches of offenders shall be conducted only by staff who the same gender as the offender, except in emergency situations.

ADDRESSING RIGHTS OF (1) TENANT-VICTIMS OF UNLAWFUL HARASSMENT BY ANYONE; AND (2) TENANT-VICTIMS OF SEXUAL ASSAULT, STALKING OR UNLAWFUL HARASSMENT BY A LANDLORD OR A LANDLORD'S EMPLOYEES

Chapter 395 (SHB 1856)

Effective date: July 26, 2009

Amends RCW 59.18.575 to: 1) add "unlawful harassment" by any perpetrator to the existing list of crimes that allow a tenant to terminate a rental agreement with no further obligation to the landlord if certain conditions are met; 2) add provisions that allow a tenant or household member who is the victim of sexual assault, stalking, or unlawful harassment by a landlord or landlord's employees to change or add locks to the tenant's dwelling; also establishes procedures to be followed in such cases.

EXPANDING THE LIST OF CRIMES THAT REQUIRE DISMISSAL OF CERTIFICATED AND CLASSIFIED SCHOOL EMPLOYEES

Chapter 396 (ESHB 1741)

Effective date: July 26, 2009

Adds many additional crimes to the list of enumerated crimes that result in mandatory termination of certificated and classified k-12 school employees, mandatory permanent certificate revocation, and the barring of contractor's employees from school grounds.

Provides that, in the event of a final termination for certain felony crimes, school districts may seek to recover salary and other compensation paid to a k-12 classified or certificated employee between such time as the employee was placed on administrative leave and the time his or her termination becomes final. Requires mandatory revocation when the certificate was obtained through fraudulent means.

Requires the Office of the Superintendent of Public Instruction (OSPI) to review, on a quarterly basis, information provided by the Washington State Patrol regarding convictions and guilty pleas.

Allows k-12 school superintendents and administrators to file complaints with the OSPI regarding certificated individuals, regardless of whether the individual is employed by the complainant.

Requires k-12 school district superintendents to notify the OSPI when the district terminates the employment of a certificated employee on the basis of a guilty plea or conviction for enumerated felony crimes; also requires the OSPI to maintain a record of such notices.

EXPANDING NOTIFICATION UNDER DOC PROGRAM FOR VICTIMS AND WITNESSES TO INCLUDE NOTICE REGARDING THOSE CONVICTED OF VIOLATING DV COURT ORDERS

Chapter 400 (HB 1790)

Effective date: August 1, 2009

Amends RCW 72.09.712 and 72.09.714. This expands DOCs victim and witness notification program to include notification regarding offenders convicted of violating DV orders under RCW 10.99.040, 10.99.050, 26.09.300, 26.10.220, 26.26.138, 26.50.110, 26.52.070, or 74.34.145.

REGULATING SHOPS AND BUSINESSES PROVIDING SERVICES OF BODY ART, BODY PIERCING AND TATTOOING

Chapter 412 (SSB 5391)

Effective date: July 1, 2010

A license is required to practice body art, body piercing, and tattooing.

Body art is defined as the practice of invasive cosmetic adornment including the use of branding and scarification. Body piercing is defined as the practice of penetrating the skin to insert an

object, including jewelry for cosmetic purposes. Tattooing is defined as the practice of piercing or puncturing the human skin with a needle or other instrument for the purpose of implanting an indelible mark or pigment into the skin.

The Department of Licensing (DOL) must administer licensing for these practices according to minimum safety and sanitation standards set by the Washington Department of Health (DOH). A license is required for individual practitioners and for body art, body piercing, and tattooing businesses. DOL will inspect businesses every two years or upon receipt of a complaint. Business and individual licenses must be renewed annually.

Minimum standards are established by DOL for body art, body piercing, and tattooing businesses. DOH will establish sterilization standards for body art, body piercing, and tattooing. Individual practitioners of body art, body piercers, and tattoo artists are subject to the Uniform Regulation of Business and Professions Act.

CREATING EVIDENCE PRIVILEGE FOR CERTAIN MENTAL HEALTH PRACTITIONERS

Chapter 424 (SSB 5931)

Effective date: July 26, 2009

Adds a new privilege to RCW 5.60.060 for mental health counselors, independent clinical social workers, and marriage and family therapists licensed under chapter 18.225 RCW.

REQUIRING RETAIL ESTABLISHMENTS TO ALLOW ACCESS TO EMPLOYEE RESTROOMS

Chapter 438 (ESHB 1138)

Effective date: July 26, 2009

Adds a new section to chapter 70.54 RCW. Requires retail establishments to allow non-employee individuals access to "employee restrooms" where such individuals suffer from qualifying medical conditions. The qualifying individuals will be given a form from their health care professionals. Fraudulent use of a form as evidence of the existence of an eligible medical condition is a misdemeanor. In addition, a retail establishment must allow any customer to use an employee restroom if: 1) three or more employees are working at the time the customer requests access to the restroom, and 2) the establishment does not normally make a restroom available to the public, and 3) either (a) the employee restroom is reasonably safe for the customer, or (b) the customer's access to the restroom does not pose a risk to the establishment of its employees.

RELAXING THE STANDARDS FOR DOC MEDICAL PLACEMENT/RELEASE OF CERTAIN CLASSES OF LOW-RISK OFFENDERS NEEDING COSTLY MEDICAL TREATMENT

Chapter 441 (EHB 2194)

Effective date: August 1, 2009

Amends RCW 9.94A.728 to relax the standards that authorize DOC's qualified release of certain classes of low-risk prisoners with costly medical conditions. DOC must make a determination, among other things, that the placement/release will save the State money and that the offender is a low risk to re-offend.

REVISING JUVENILE SENTENCING AND DECLINE PROVISIONS

Chapter 454 (ESSB 5746)

Effective date: July 26, 2009

Revises various provisions in Title 13 RCW relating to sentencing of juveniles, and relating to trying juveniles in adult court.

PROTECTING CONSUMER DATA IN VEHICLES

Chapter 485 (SSB 5574)

Effective date: July 1, 2010

Creates a misdemeanor in a new chapter in Title 46 RCW. The Final Bill Report describes this new misdemeanor crime as follows:

Data on a recording device may not be accessed by anyone other than the owner of the vehicle except in the following five situations: (1) upon a court order for the data or pursuant to discovery; (2) when consent is given by the owner or someone who would reasonably be assumed to have the consent of the owner; (3) for research to improve vehicle safety as long as the owner and the vehicle remain anonymous; (4) to respond to a medical emergency; and (5) when the data is being used to fulfill a subscription services agreement. The accessing of recording device data by anyone other than the owner except in one of the situations described above is a misdemeanor, as is the sale of any data from a recording device to a third party without the explicit permission of the owner.

ALLOWING FOR RELICENSING DIVERSION PROGRAMS FOR CERTAIN DWLS VIOLATORS

Chapter 490 (SSB 5732)

Effective date: July 26, 2009

Among other things, this enactment authorizes diversion programs for DWLS violators in certain circumstances.

HELPING PROTECT FOREIGN WORKERS FROM HUMAN TRAFFICKING VIOLATIONS BY REQUIRING THAT THEY BE PROVIDED WITH INFORMATION ABOUT THEIR RIGHTS, AND BY EDUCATING DOCTORS AND OTHER PROFESSIONAL HOW TO SPOT VICTIMS

Chapter 492 (E2SB 5850)

Effective date: July 26, 2009

Adopts a new chapter in Title 19 RCW establishing employment standards for foreign workers (employment standards are enforced civilly by the Washington Department of Labor and Industries). Also amends provisions in RCW 18.71.080, 18.71.090 and 18.225.040 to try to ensure that physicians, psychologists, mental health counselors, marriage and family therapists, and social workers are able to recognize when persons are victims of human trafficking. In part, the Final Bill Report describes the effect of these civil law provisions in part as follows:

International labor recruitment agencies and domestic employers of foreign workers must provide a disclosure statement [regarding several employment standards] to foreign workers, not including those who hold an H-1B visa, who have been referred to or hired by a Washington employer

The Office of Crime Victims Advocacy [in the Washington Department of Community, Trade, and Economic Development - - see RCW 43.280.080] must supply the regulatory bodies that regulate physicians, psychologists, mental health counselors, marriage and family therapists, and social workers with information on methods or recognizing victims of human trafficking. The information must be culturally sensitive and include information relating to minor victims. The regulatory authority must distribute this information to its members.

FURTHER EXPANDING THE LAW REGARDING DOMESTIC PARTNERSHIPS

Chapter 521 (ESSSB 5688)

Effective date: July 26, 2009

Included in this voluminous enactment are new sections in chapters 9.68, 9.68A, 9A.16, 9A.40, 9A.44, 9A.76 and 10.99 RCW.

ATTEMPTING TO PROTECT VULNERABLE ADULTS THROUGH DETERRING AND PUNISHING EXPLOITERS BY BARRING THEM FROM SHARING IN ESTATES OF VICTIMS
 Chapter 525 (SHB 1103) Effective date: July 26, 2009

This enactment precludes any person who participates in unlawful financial exploitation of a vulnerable adult from acquiring any property or receiving any benefit as the result of the death of the vulnerable adult. "Financial exploitation" includes but is not limited to theft, forgery, fraud, identity theft, robbery, burglary and extortion.

EXPANDING TIME YOUTHS MAY RESIDE AT CRISIS RESIDENTIAL CENTERS
 Chapter 569 (SHB 2346) Effective date: July 26, 2009

Amends RCW 13.32.A.130 to expand from five to fifteen the maximum number of days that a youth (for instance, a runaway) may reside at a semi-secure Crisis Residential Center (CRC) or a community-based secure CRC.

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UNITED STATES SUPREME COURT

SIXTH AMENDMENT INITIATION-OF-CONTACT RULE OF MICHIGAN V. JACKSON IS ELIMINATED IN A 5-4 DECISION

Montejo v. Louisiana, ___ S.Ct. ___, 2009 WL 1443049 (2009)

LED INTRODUCTORY EDITORIAL NOTE: The 5-4 decision of the U.S. Supreme Court digested below overrules the U.S. Supreme Court decision in Michigan v. Jackson, 475 U.S. 625 (1986). The 1986 decision in Michigan v. Jackson created a prophylactic rule barring law enforcement officers from initiating contact with a charged defendant as to the charged matter after the defendant had accepted counsel or had asserted the right to counsel at an arraignment or a similar post-charging court proceeding. The ruling in Montejo required revision of the article titled “Initiation of Contact’ Rules under Fifth and Sixth Amendment” on the Criminal Justice Training Commission’s LED website. An updated article has been placed on the website.

Facts and Proceedings below:

Jesse Jay Montejo was suspected of involvement in a robbery and murder. Law enforcement officers conducted an interrogation that began with Miranda warnings by the interrogators and a waiver of rights by Montejo. He admitted to killing the victim in the course of a botched burglary and to having tossed the gun in a lake. Several days later, at a preliminary hearing (known in Louisiana as a 72-hour hearing), Montejo was charged with first degree murder. The judge at the hearing ordered the public defender’s office to represent Montejo on the charges. Montejo did not say anything at the hearing as to whether he was requesting appointment of an attorney or asserting the right to an attorney.

Later that same day, before Montejo had consulted with his court-appointed attorney, two detectives visited Montejo at jail (**LED EDITORIAL NOTE: The detectives later testified that they were unaware that counsel had been appointed for Montejo, but that is irrelevant to the decision in this case.**). The facts are disputed as to the content and timing of what was said in the ensuing conversation. Apparently before Mirandizing Montejo again, the detectives asked Montejo to lead them to the site of the gun. After some further discussion, the detectives

re-Mirandized Montejo, and he waived his rights. He then led the detectives to the site of weapon. During the trip, he also wrote out an apology to the victim's widow.

At Montejo's trial, the letter of apology was admitted over his objection on Sixth Amendment grounds. He was convicted of first degree murder and sentenced to death. On appeal, the Louisiana Supreme Court affirmed his conviction and sentence. The Louisiana Supreme Court held to be inapplicable the rule of Michigan v. Jackson, 475 U.S. 625 (1975), which then barred law enforcement officers from initiating contact with a charged defendant as to the charged matter after the defendant had accepted counsel or asserted the right to counsel at an arraignment or similar post-charged court proceeding. The Louisiana Supreme Court held that the rule of Michigan v. Jackson did not apply to defendants who did not make any express assertion invoking the right to an attorney during a preliminary hearing.

ISSUE AND RULING: In Michigan v. Jackson, 475 U.S. 625 (1986), the U.S. Supreme Court held that law enforcement officers are barred under the right-to-counsel provision of the U.S. Constitution's Sixth Amendment from initiating contact with a charged defendant as to the charged matter after the defendant had accepted counsel or had asserted the right to counsel at an arraignment or similar post-charged court proceeding. Should Michigan v. Jackson be overruled such that law enforcement officers are permitted: 1) to initiate contact with a charged defendant at any stage of the criminal proceedings, and 2) to attempt to obtain a waiver of rights and a statement on the charged matter? (**ANSWER:** Yes, rules a 5-4 majority).

Result: Remand to the Louisiana courts to determine if, before being re-Mirandized, Montejo asserted his rights under the Fifth Amendment when the detectives re-contacted him at the jail to ask him to lead them to the gun (or if Montejo subsequently failed to preserve his right to raise this Fifth Amendment issue).

ANALYSIS IN MAJORITY OPINION:

The majority opinion by Justice Scalia first notes that the Louisiana Supreme Court's interpretation of Jackson would create an impractical rule that would lead to different results in different jurisdictions for no good reason. The majority opinion then turns to the question of whether the rule of Jackson should be preserved.

Courts are reluctant to overturn precedent because expectations and practice develops around precedent. But a precedent only two decades old does not involve the same level of expectations and ordered practice as older precedents. More important to the majority, it appears, is that the rule of Jackson has proved unworkable, is untenable theoretically, and is not necessary.

The majority opinion points out that the Fifth Amendment right-to-counsel, initiation of contact rule resulting from the combined effect of three U.S. Supreme Court decisions – Edwards v. Arizona, 451 U.S. 477 (1981), Arizona v. Roberson, 486 U.S. 675 (1988), and Minnick v. Mississippi, 498 U.S. 146 (1990) – provides broad protection for suspects who wish to assert their right to counsel. Under the latter rule, when a suspect who is in custody asserts the right to counsel, officers must cease the interrogation, and no officer may initiate contact with the suspect while that suspect remains in continuous custody on any prior crime by the suspect, even after the suspect has consulted an attorney. See the article titled "Initiation of Contact' Rules under the Fifth Amendment" on the Criminal Justice Training Commission's LED website.

Also, the basic Sixth Amendment right-to-counsel protection is not changed under the Montejo decision. Thus, once a suspect has been charged with a crime, in order for officers to lawfully talk to the suspect about the charged matter, regardless of whether the person is in custody, officers must first give the person Miranda warnings and obtain a waiver. See Patterson v. Illinois, 487 U.S. 285 (1988) (Miranda warnings suffice for obtaining Sixth Amendment waiver); Fellers v. U.S., 124 S.Ct. 1019 (2004) **March 04 LED:05** (before questioning a charged defendant in his kitchen, officers were required to obtain a Miranda waiver even though the suspect was not in custody for Miranda purposes).

These protections are sufficient, the majority concludes. It is not necessary to also have a Sixth Amendment initiation-of-contact bar. Therefore, Michigan v. Jackson is overruled.

The Montejo majority opinion also explains that the Sixth Amendment has never been guided by the rules of professional conduct that govern all lawyers, including prosecutors, in order to protect the attorney-client relationship. Under professional conduct rules, lawyers handling a case generally are subject to professional sanctions if they or their agents communicate with the other party outside of court proceedings without the consent of the lawyer representing that other party.

CONCURRING OPINION BY JUSTICE ALITO:

Justice Alito writes a short concurring opinion, joined by Justice Kennedy. The concurrence addresses the dissenters' criticism of the majority for setting aside an established precedent. Justice Alito points out that all but one of the dissenting justices were in the majority in the Fourth Amendment decision in Arizona v. Gant, 129 S.Ct. 1710 (2009) **June 09 LED:13**, in which the Supreme Court overruled the precedent of New York v. Belton for reasons similar to those given for overturning precedent by the majority in Montejo.

LED EDITORIAL COMMENTS:

1. Washington's constitution is not more restrictive on law enforcement in this subject area: Unlike the subject area of search and seizure, where the Washington appellate courts have determined that the Washington constitution is more restrictive on law enforcement officers in a number of respects, the Washington appellate courts to date have interpreted the Washington constitution as not imposing greater restrictions with regard to the Sixth Amendment and Fifth Amendment protections implicated in the initiation-of-contact cases. See Tacoma v. Heater, 67 Wn.2d 733 (1966) (Sixth Amendment); State v. Medlock, 86 Wn. App. 89 (Div. III, 1997) Aug 97 LED:21 (Sixth Amendment); State v. Earls, 116 Wn.2d 364 (1991) (Fifth and Sixth Amendments); State v. Radcliffe, 164 Wn.2d 900 (2008) Dec 08 LED:18 (Fifth Amendment); State v. Unqa, 165 Wn.2d 95 (2008) March 09 LED:15 (Fifth Amendment).

2. Professional conduct restrictions on prosecutors: Like other jurisdictions in the United States, Washington has a rule of professional conduct (RPC 4.2) that generally bars a lawyer, including a deputy prosecutor in a criminal case, from being involved, by direct contact or indirectly but knowingly through an agent (such as a law enforcement officer), in communications with a represented party in a pending case without the consent of the other party's lawyer. Law enforcement officers who are not both (1) lawyers and (2) acting as lawyers in a given court case are not subject to RPC 4.2. But law enforcement officers should be aware that the prosecutor's office cannot be a participant, even indirectly, in such contact. If (1) an officer plans to talk to a charged

and represented defendant about the charged matter without first obtaining consent from the defense attorney, and (2) the officer informs the prosecutor's office regarding the plan, the officer should expect that the prosecutor will discourage the officer from making the contact.

Whether a prosecutor's involvement in such a contact will require suppression of the defendant's statements during the contact is not clear under Washington law. In a decision issued 40 years ago, the Washington Supreme Court ruled under a predecessor version of RPC 4.2 that such a violation of the rules of professional conduct does not require suppression. See State v. Nicholson, 77 Wn.2d 415 (1969). It is possible that the Washington Supreme Court would not rule the same if it were to look at the issue again. The courts in other jurisdictions are split on this suppression question.

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) **SEIZURE OF DRUGS BASED ON "PLAIN FEEL" THROUGH PANTS COIN POCKET HELD UNLAWFUL BECAUSE OFFICER MANIPULATED BAGGIE** – In State v. Garvin, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 1478483 (2009), the Washington Supreme Court votes unanimously to overturn lower court rulings, and holds that a law enforcement officer exceeded the scope of frisk of a person that is allowed under the Fourth Amendment rule of Terry v. Ohio when the officer manipulated a baggie in a suspect's pants coin pocket to determine if the baggie contained illegal drugs.

The case involves what is sometimes referred to as the "plain feel" exception to the warrant requirement. This is a very limited variation of the "plain view" exception. Under the Fourth Amendment, an officer making a lawful seizure of a person based on reasonable suspicion of criminal activity may pat down the outer clothing of the suspect to try to detect weapons if the officer has reason to believe that the suspect is armed and dangerous. The scope of such a frisk is limited to pat-down for weapons.

In Minnesota v. Dickerson, 508 U.S. 366 (1993) **Sept 93 LED:15**, the U.S. Supreme Court adopted the plain-feel rule, holding that an officer conducting a lawful frisk may seize any contraband that the officer can immediately identify as such based on initial pat. The officer may not manipulate the item after a reasonable officer would have concluded that the item touched is not a weapon and does not contain a weapon. In State v. Hudson, 124 Wn.2d 107 (1994) **Oct 94 LED:06**, the Washington Supreme Court reached the same conclusion under analysis under the Fourth Amendment only (the Hudson Court declined to review whether the Washington constitution's article 1, section 7, which in some search-and-seizure contexts has been held to be more restrictive on law enforcement than the Fourth Amendment, imposed a more restrictive rule).

The Garvin Supreme Court opinion is authored by Justice Sanders. He both describes and provides excerpts from the seizing officer's testimony regarding the factual circumstances of the frisk. The opinion follows that with a summary explanation of why the Court concludes that the frisk exceeded the lawful scope permitted for a pat-down for weapons:

In his report, [the officer] indicates he first felt something in the coin pocket, which he "recognized ... as a plastic baggie." He continued squeezing and noticed "[t]here was something inside the plastic baggie that moved around inside when I

squeezed it.” He similarly testified, “It was obvious when I squeezed it gave way.... As I continued to squeeze, the granules separated. It's like the area I pinched granules separated and down from there.”

The officer admitted he did not feel any weapons or hard objects in the pocket but continued to squeeze in “one motion” anyway. This indicates [the officer] immediately ascertained there were no weapons (whether razor blades or needles small enough to fit in a tiny coin pocket), and then as he continued to manipulate, he discovered the baggy and its substance with a granular texture. Indeed, to feel 0.5 grams of methamphetamine through a plastic bag and a jeans coin pocket, [the officer] needed to manipulate the contents thoroughly. His testimony about how coin pockets are common places to stash dime baggies further indicates that at that point, the squeezing was not about finding weapons but about discovering drugs. Thus, [the officer's] actions run afoul of both Hudson's requirement of “immediate recognition of contraband,” and Dickerson, which we cited with approval in Hudson.

In Dickerson, the United States Supreme Court held police may seize contraband detected through the sense of touch only as long as the protective pat-down stays within the bounds marked by Terry. That's because touch alone can result in an officer's immediate knowledge of suspected contraband if the contour or mass of the object makes its identity immediately apparent. However, the Court said that since the officer in Dickerson determined the lump was contraband only after squeezing and otherwise manipulating the contents of the defendant's pocket, which the officer already knew contained no weapon, the search exceeded the lawful bounds of Terry.

Like the United States Supreme Court, this court has recognized a Terry frisk for weapons must be brief and nonintrusive. In State v. Hobart, 94 Wn.2d 437, 446 (1980), for example, an officer felt “spongy” objects in the defendant's pocket during a weapons pat-down. Although the officer did not fear the objects were weapons, he squeezed them anyway and determined they contained narcotics. This court held that once the officer ascertained the objects were not weapons, the permissible scope of the search ended and he needed probable cause to search further. “To approve the use of evidence of some offense unrelated to weapons would be to invite the use of weapons[] searches as a pretext for unwarranted searches, and thus to severely erode the protection of the Fourth Amendment.”

Since the methamphetamine [the officer] discovered in Garvin's coin pocket was the product of an unlawful search, the evidence must be suppressed.

[Some citations omitted]

Result: Reversal of Court of Appeals decision (unpublished) that affirmed the Yakima County Superior Court conviction of Anthony Gaylord Garvin for possession of methamphetamine.

LED EDITORIAL COMMENT: Justice Sanders’ opinion for the Court is based on the Fourth Amendment of the federal constitution. The Court does not decide the case based on article 1, section 7 of the Washington constitution. Also, the opinion does not explain why the Court does not address the State constitutional issue. The opinion does include, however, a footnote that contains a citation to and description of a law student’s criticism, in a 1996 Seattle University law review article, of the “plain feel” rule. The law

student believed that the rule gives law enforcement too much authority to seize evidence. The student's law review article invited the Washington appellate courts to adopt a rule under article 1, section 7 that does not allow for "plain feel" seizure. We will not try to predict whether that will happen in some future Washington appellate court decision. Despite the fact that the Garvin decision is unanimous, we do not think that a majority of the other justices signing the Court's opinion are necessarily committed to supporting this gratuitous point raised in a law student's article. In any event, in our view, the exception for "plain feel" is quite narrow and therefore not very useful to law enforcement.

(2) WHERE MOTOR VEHICLE PASSENGER WAS INJURED IN A DUI CRASH, SHE WAS A "VICTIM" UNDER RCW 9A.08.020(5), AND THEREFORE SHE COULD NOT LAWFULLY BE CONVICTED OF DUI AS AN ACCOMPLICE – In City of Auburn v. Hedlund, 165 Wn.2d 645 (2009), the Washington Supreme Court, in a 5-4 vote, agrees with Division One of the Court of Appeals. The Supreme Court rules that, where a passenger is injured in an accident involving DUI, the passenger is a "victim" within the meaning of RCW 9A.08.020(5), and therefore cannot be convicted of DUI under an accomplice theory.

RCW 9A.08.020 provides in relevant part that:

A person is an accomplice of another person in the commission of a crime if: (a) With knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it.

The City of Auburn pointed out that, in addition to furnishing alcohol to minority-age party-goers, the adult Teresa Hedlund aided, promoted, and encouraged the driver's reckless and intoxicated driving by videotaping the activities at the party and in the car. This made Hedlund complicit in Stewart's criminal acts, the City argued. Hedlund responded that subsection (5) of RCW 9A.28.020 states that a person is not an accomplice in a crime committed by another person if he or she is a victim of that crime. That subsection reads in full:

Unless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if: (a) He is a victim of that crime; or (b) He terminates his complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime.

The Supreme Court majority opinion's determination of Hedlund's "victim" status is based in part on RCW 46.61.5055. The latter statute provides the penalty schedule for alcohol violators. RCW 46.61.5055 provides that a trial court exercising its discretion in setting penalties for those convicted of DUI or reckless driving shall consider whether the person's driving at the time of the offense was responsible for injury or damage to another person or another person's property. The statute thus recognizes that DUI and reckless driving may involve individual victims beyond the State in the abstract and the public at large.

Hedlund's injuries were the direct result of Stewart's reckless and intoxicated driving. Under RCW 46.61.5055, the sentencing court would have been required to consider Hedlund's injuries in imposing sentence on Stewart had he lived and had charges been brought against him. Having sustained serious injuries as a result of Stewart's criminal acts, Hedlund is Stewart's victim. RCW 9A.08.020(5) thus bars her prosecution as an accomplice, the Supreme Court majority opinion concludes.

Justice Madsen authored a dissenting opinion joined by Justices Gerry Alexander, James Johnson, and Charles Johnson.

Result: Affirmance of Court of Appeals ruling (see **Jan 08 LED:22**) that Teresa A. Hedlund's municipal court jury trial conviction for DUI was properly set aside by the King County Superior Court.

WASHINGTON STATE COURT OF APPEALS

PROBABLE CAUSE AS TO DUI, PLUS THE SCIENTIFIC FACT THAT ALCOHOL DISSIPATES IN THE BODY OVER TIME, HELD NOT TO ADD UP TO EXIGENT CIRCUMSTANCES SUPPORTING REACHING THROUGH DOORWAY TO ARREST MAN SUSPECTED OF BEING INTOXICATED AND OF HAVING DRIVEN DRUNK 1 HOUR EARLIER

State v. Hinshaw, ___ Wn.2d ___, 205 P.3d 178 (Div. III, 2009)

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

On February 28, 2006, at 9:39 p.m., dispatch advised Moses Lake police officers of a person driving a car on a bike path. Shortly thereafter, an officer spoke with the person who reported the incident. She described the car and stated that she heard the car hit something on the bike path and a tire blow out.

At 9:57 p.m., an officer contacted Mr. Hinshaw, who was riding a bicycle close to the bike path. Mr. Hinshaw stated that he had been a passenger in the suspect car, but had not been driving. Mr. Hinshaw was released from further questioning. Officers then searched the area for a car that matched the description given by the witness. At 10:31 p.m., officers found the car parked at Mr. Hinshaw's house with a flat front tire.

Officers knocked on the front door of Mr. Hinshaw's house. Mr. Hinshaw initially spoke with the officers through a closed door. Mr. Hinshaw then opened the door, but left the screen door shut. Mr. Hinshaw was cooperative with officers. He confirmed his identity and admitted to drinking at a bar that evening. Officers could smell the odor of alcohol through the screen door.

Officers concluded that Mr. Hinshaw was intoxicated. Concerned that Mr. Hinshaw's blood-alcohol level was dissipating, Officer Ramon Lopez opened the screen door, reached inside Mr. Hinshaw's house, and grabbed Mr. Hinshaw's arm, advising him that he was under arrest. Mr. Hinshaw stepped back from the door and officers followed him inside his house. Officer Lopez never let go of Mr. Hinshaw's arm and followed him inside where he arrested him. Mr. Hinshaw refused to take a breath test.

The State charged Mr. Hinshaw with the misdemeanor offenses of driving while under the influence of intoxicants (DUI), first degree negligent driving, and hit and run. Before trial, Mr. Hinshaw moved to suppress evidence obtained as a result

of the officers' warrantless entry into his home. The district court denied the motion, finding that DUI is a "grave offense" and the potential dissipation of blood-alcohol evidence permitted the officers to enter Mr. Hinshaw's home. Mr. Hinshaw was convicted by a jury of all charges.

The superior court affirmed the district court's ruling. It also found that DUI is a grave offense and the risk of losing blood-alcohol evidence was a sufficient exigency justifying the warrantless entry.

ISSUE AND RULING: The officers had probable cause to believe Hinshaw had driven his car on a bike path about an hour earlier that evening, and he appeared to be under the influence of alcohol when the officers contacted him at his home. Did exigent circumstances exist to support the officers' actions of opening his screen door and reaching through the doorway to place him under arrest? (ANSWER: No)

Result: Reversal of Grant County Superior Court order denying Roger Hinshaw's motion to suppress evidence.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Mr. Hinshaw first contends that the Washington Constitution imposes an absolute ban on warrantless home arrests for misdemeanors. To support his position, Mr. Hinshaw points to language in State v. Hatchie, 161 Wn.2d 390 (2007) **Oct 07 LED:06** that provides, "but for [an arrest] warrant, police entry into a private home to make a misdemeanor arrest is per se invalid." Based on this language, Mr. Hinshaw asserts that *no* exigency justifies a warrantless home arrest for a misdemeanor.

Mr. Hinshaw's argument is not persuasive. Immediately after stating that a warrantless entry for a misdemeanor arrest is per se invalid, the Hatchie court noted that in such a situation the " 'presumption of unreasonableness is *difficult to rebut*, and the government *usually* should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate.' " In view of this language, the court is simply stating that it is the rare situation where a warrantless home entry for a minor offense would be justified. We conclude that Hatchie does not stand for an absolute ban on such entries.

Next, Mr. Hinshaw argues that even if we reject his argument that the entry here was per se invalid under Hatchie, it cannot be justified under a Fourth Amendment analysis because police failed to establish that immediate action was required to deal with an emergency. To support his argument, he points to the lack of evidence pertaining to the length of the alleged delay in obtaining a warrant or the degree to which Mr. Hinshaw's blood-alcohol level would have changed during that undefined period of time. Accordingly, he assigns error to the trial court's findings that (1) the potential loss of blood-alcohol evidence justified the arrest, and (2) the process of obtaining a warrant is not "instantaneous"-that "[s]ome time-under the circumstances, *precious* time in an evidentiary sense-would have been lost to the warrant process."

All warrantless entries of a home are presumptively unreasonable. We have held that absent exigent circumstances, both the Fourth Amendment and article 1, section 7 of the Washington State Constitution prohibit the warrantless entry into

a person's home to make an arrest. Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment.”

“Exigent circumstances” involve a true emergency, i.e., “an immediate major crisis,” requiring swift action to prevent imminent danger to life, forestall the imminent escape of a suspect, or the destruction of evidence. “The idea underlying the exigent circumstances exception to the requirement of a search warrant is that police do not have adequate time to get a warrant.” The police bear the heavy burden of showing that exigent circumstances necessitated immediate police action. They must show why it was impractical, or unsafe, to take the time to get a warrant. State v. Wolters, 133 Wn. App. 297 (Div. II, 2006) **July 06 LED:18**. “When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequence if he postponed action to get a warrant.”

In evaluating exigency, we apply the following factors: (1) the gravity of the offense, particularly whether it is violent; (2) whether the suspect is reasonably believed to be armed; (3) whether police have reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) the suspect is likely to escape if not swiftly apprehended; (6) the entry is made peacefully; (7) the police are in hot pursuit; (8) the suspect is fleeing; (9) the officers or public are in danger; (10) the suspect has access to a vehicle; and (11) there is a risk that the police will lose evidence. Not all factors must be met in order to find exigent circumstances; however, the circumstances must show that the officer needed to act quickly.

Here, the State argues that the State established that DUI is a grave offense and that the potential destruction of blood-alcohol evidence justified the warrantless entry into Mr. Hinshaw's home. It also argues that “because DUI is always and necessarily accompanied by the exigent circumstance of destruction of evidence (since blood-alcohol content is in a constant state of change), exigent circumstances may exist in every DUI case provided that DUI is a sufficiently grave offense.”

We disagree. The police here presented no evidence of a major crisis demanding immediate entry into Mr. Hinshaw's home. The record shows that police had probable cause to believe Mr. Hinshaw had become intoxicated and had driven home where he remained. The reckless operation of the car and consequent threat to public safety had ended. There was no suggestion that Mr. Hinshaw was armed or dangerous. He posed no threat, imminent or otherwise, to the safety of the officers or the public. His car was essentially disabled and police had last seen him on a bicycle. He was not fleeing or seeking to escape. Finally, the circumstances here did not involve violence or threats of violence. His offense had not harmed anyone, he had merely damaged property.

Furthermore, police failed to make any showing that destruction of evidence was imminent, or that the arresting officer could not have obtained a warrant before the alcohol dissipated. The evidence offered by the State consisted solely of Officer Lopez's testimony that, “Mr. Hinshaw admitted that he was drinking at a local establishment . . . I didn't want to lose the alcohol evidence.” He offered no evidence about the length of time necessary to obtain a warrant or the time

required to secure the evidence. In short, police made no showing that a delay of any length would have resulted in the imminent destruction of evidence. Without evidence of some real immediate and serious consequence resulting from a delay in obtaining a warrant, the State failed to carry its burden to prove exigency.

While no Washington case addresses our particular facts, a recent Oregon case supports our conclusion. In State v. Kruse, 220 Or. App. 38, 184 P.3d 1182 (2008), officers had probable cause to believe the defendant had committed a DUI and other alcohol related offenses. When officers went to the defendant's house, she refused to speak to them. Officers entered her home without a warrant. At the suppression hearing, an officer testified that he did not know the " 'exact time' " required to obtain a warrant but that it would have been " 'very lengthy.' " The trial court found that the dissipation of alcohol constituted an exigent circumstance justifying the warrantless entry into a private home.

The Oregon Court of Appeals reversed the trial court, finding that "[t]he state failed to prove that a warrant, including a telephonic warrant, could not have been obtained within a reasonable time." It ultimately held that "the potential destruction of evidence may justify a warrantless entry into a suspect's home *if the state proves that the arresting officers could not have obtained a warrant before the alcohol in the suspect's body dissipated.*" "

This is precisely what the State failed to prove here-that a warrant could not be obtained before the evidence dissipated. Without evidence of any exigency justifying the warrantless entry, we need not address whether DUI is a grave offense. It is well settled that no exigency is created simply because there is probable cause to believe that a serious crime has been committed.

[Footnotes, some citations omitted]

LED EDITORIAL COMMENTS: Warrantless home entries by police are scrutinized very closely by the Washington appellate courts. Some attorneys are going to urge greater caution in this area than are others. Officers should seek guidance from their prosecutors and legal advisors.

Here are some of the comments (with minor modifications) that we made in the August 2001 LED regarding the Court of Appeals decision in State v. Bessette, 105 Wn. App. 793 (Div. III, 2001), a case in which the Court of Appeals held that an officer in hot pursuit of an MIP suspect did not have sufficient exigent circumstances to justify a warrantless home entry of a third person's residence in order to arrest the MIP suspect - -

Comment # 1: "Hot pursuit" of misdemeanants into residences: The law is not settled on this point, but officers should assume that exigency, above and beyond "hot pursuit," is required to justify non-consenting, warrantless entry of a residence to arrest a fleeing misdemeanant or fleeing gross misdemeanant. Thus, the hot pursuit arrest of a fleeing DUI suspect in State v. Griffith, 61 Wn. App. 35 (Div. III, 1991) Sept 99 LED:18 just inside the threshold of her front door was lawful, but apparently only because the officer had probable cause (not mere reasonable suspicion) as to DUI before entering, and because the alcohol would be significantly dissipated if the officer waited for a search warrant or arrest warrant before entering.

Comment # 2: Warrantless “hot pursuit” of felons into residence: Division Three’s Bessette opinion does not discuss the rule for felony “hot pursuit” into a residence (reasonably so, we note, as the facts there did not involve a felony). We would note, however, that in U.S. v. Santana, 427 U.S. 38 (1976), the U.S. Supreme Court held that an officer was legally justified in chasing a felon from a public location into her home, even though there was no arrest warrant, search warrant, or other exception to the warrant requirement supporting that entry. We know of no case law, in this state or elsewhere, suggesting that the “bright line” of Santana does not apply in all felony “hot pursuit” situations.

Comment # 3: Stock search warrants should be considered: Washington law enforcement agencies might want to develop stock search warrants to deal with misdemeanor “hot pursuit” situations. The fact that such search warrants can be issued telephonically: a) makes this a practical option, and b) is a factor, as it was in the Hinshaw case digested here, that will be considered by any court attempting to decide whether circumstances were truly exigent.

Note that if the officer in pursuit has probable cause to believe that the person being pursued has a current arrest warrant (felony or misdemeanor) and has fled into his own home, then the officer generally would be justified in forcing entry to arrest based on the arrest warrant. See State v. Hatchie, 161 Wn.2d 390 (2007) Oct 07 LED:06.

INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCWS, AND TO WAC RULES

The Washington Office of the Administrator for the Courts maintains a website 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. 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/court_rules/].

Many United States Supreme Court opinions can be accessed at [<http://supct.law.cornell.edu/supct/index.html>]. This website 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 own website at [<http://www.supremecourtus.gov/opinions/opinions.html>]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [<http://www.ca9.uscourts.gov/>] and clicking on “Decisions” and then “Opinions.” Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for “9” in this address to go to the home pages of the other circuit courts. Federal statutes are at [<http://www.law.cornell.edu/uscode/>].

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 2007, is at [<http://www.leg.wa.gov/legislature/>].

Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "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 proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [<http://access.wa.gov>]. The internet address for the Criminal Justice Training Commission's LED is [<https://fortress.wa.gov/cjtc/www/led/ledpage.html>], while the address for the Attorney General's Office home page is [<http://www.atg.wa.gov>].

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]. 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. LEDs from January 1992 forward are available via a link on the Criminal Justice Training Commission's Internet Home Page [<https://fortress.wa.gov/cjtc/www/led/ledpage.html>]