



# Law Enforcement

MAY 2010

# Digest

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*Law enforcement officers: Thank you for your service, protection and sacrifice.*

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## **LAW ENFORCEMENT MEDAL OF HONOR & PEACE OFFICERS MEMORIAL CEREMONY IS SET FOR FRIDAY, MAY 7, 2010 IN OLYMPIA AT 1:00 P.M.**

In 1994, the Washington Legislature passed chapter 41.72 RCW, establishing the Law Enforcement Medal of Honor. This honor is reserved for those police officers who have been killed in the line of duty or who have distinguished themselves by exceptional meritorious conduct. This year's ceremony will take place Friday, May 7, 2010, commencing at 1:00 PM, at the Law Enforcement Memorial site in Olympia on the Capitol Campus, which is adjacent to the Supreme Court Temple of Justice. This is the fourth year that the Medal of Honor and Peace Officers Memorial ceremonies will be a

combined program. The ceremony this year is the Friday before Law Enforcement Week (May 9-15, 2010) across the nation.

This ceremony is a very special time, not only to honor those officers who have been killed in the line of duty and those who have distinguished themselves by exceptional meritorious conduct, but also to recognize all officers who continue, at great risk and peril, to protect those they serve. This ceremony is open to all law enforcement personnel and all citizens who wish to attend. A reception will follow the ceremony.

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## **PART ONE OF THE 2010 WASHINGTON LEGISLATIVE UPDATE**

**LED INTRODUCTORY EDITORIAL NOTE:** This is Part One of what likely will be a two-part compilation of 2010 State of Washington legislative enactments of interest to law enforcement.

Note that unless a different effective date is specified in the legislation, acts adopted during the 2010 regular session take effect on June 10, 2010 (90 days after the end of the regular session). For some acts, different sections have different effective dates within the same act. We will generally indicate the effective date(s) 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 not digest legislation in the subject areas of sentencing, consumer protection, retirement, collective bargaining, civil service, tax, budget, and workers' compensation benefits.

Text of each of the 2010 Washington acts and of their bill reports is available on the Internet at [<http://apps.leg.wa.gov/billinfo/>]. Use the 4-digit bill number for access to the act and bill reports.

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 until early fall of this year.

Thank you to the staff of the Washington Association of Prosecuting Attorneys (WAPA) and Washington Association of Sheriffs and Police Chiefs for assistance in our compiling of acts of interest to Washington law enforcement.

We remind our readers that any legal 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.

### **ADDRESSING CERTAIN RESPONSES TO DRUG OVERDOSES**

Chapter 9 (ESB 5516)

Effective date: June 10, 2010

Adopts an intent section, amends RCW 18.130.180, amends RCW 9.94A.535, adds a new section to chapter 69.50 RCW, and adds a new section to chapter 18.130 RCW. The following is the Final Bill Report's summary of this act:

A person will not be charged or prosecuted for possession of a controlled substance under the Uniform Controlled Substances Act if:

(1) that person believes that he or she is witnessing a drug-related overdose and seeks medical assistance for that person in good faith; or (2) that person experiences a drug-related overdose and is in need of medical assistance. A person will also not be charged if the evidence for the charge of possession of a controlled substance under RCW 69.50.4013, or penalty under RCW 69.50.4014, was obtained as a result of that person seeking or receiving medical assistance. However, that person remains liable for charges of manufacturing or sale of a controlled substance. This protection does not apply to suppression of evidence in other criminal charges.

A person acting in good faith may receive, possess, and administer naloxone to an individual suffering from an apparent opiate-related overdose. Health practitioners or persons who administer, dispense, prescribe, purchase, acquire, possess, or use naloxone in a good faith effort to assist a person experiencing or likely to experience an opiate-related overdose will not be in violation of professional conduct standards or provisions.

A court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence, including but not limited to, a defendant's good faith effort to obtain or provide medical assistance for someone experiencing a drug-related overdose.

#### **AUTHORIZING BREATH TESTING EQUIPMENT STANDARDS**

Chapter 53 (HB 2465)

Effective date: June 10, 2010

RCW 46.61.506's provisions listing the evidence that the State must produce in order for breath test results to be admissible are amended to take into consideration breath testing machines that use dry gas external standard simulators as well as liquid external standard simulator solutions.

#### **PROHIBITING CERTAIN TOWING INCENTIVES**

Chapter 56 (HB 2592)

Effective date: June 10, 2010

Amends RCW 46.55.035 to make it a gross misdemeanor for registered tow truck operators to enter into any contract or agreement or offer an incentive to a person authorized to order a private impound that is related to the authorization of an impound. These incentives include monetary or nonmonetary things of value, but do not include items of de minimis value that are given in the ordinary course of business such as: promotional items including pens, calendars, and cups; holiday gifts such as cookies or candy; flowers for occasions such as illness or death; or the cost of a meal for one person. The provision of the signs required to be posted on private property and the labor and materials associated with this placement is not a violation of this prohibition.

#### **IMPOSING CONDITIONS FOR GIVING AWAY, SELLING EMERGENCY VEHICLES**

Chapter 117 (SSB 6356)

Effective date: June 10, 2010

The Final Bill Report summarizes this act's amendment to RCW 46.37.195 as follows:

Prior to selling or giving an emergency vehicle to a non-law enforcement or emergency agency including private ambulance businesses, the public agency must remove the emergency lighting, radios, and any other emergency equipment from the vehicle that was not originally installed by the manufacturer. The equipment may be retained or transferred to another public law enforcement or emergency agency or it must be destroyed. The agency must also remove all decals, state and local designated law enforcement colors, and stripes that were not installed by the manufacturer. The sale or donation to a broker specializing in the resale of emergency vehicles or a charitable organization for use by a public law enforcement or emergency agency is allowed with the emergency equipment intact. If the broker or charitable organization sells or donates the emergency vehicle to a person or entity that is not a public law enforcement or emergency agency, or private ambulance business, the broker or charitable organization must remove the equipment and designations.

**ESTABLISHING A DEFINITION OF “THREAT” FOR “MALICIOUS HARASSMENT”**

Chapter 119 (SSB 6398)

Effective date: June 10, 2010

Amends RCW 9A.36.080(6) to add the following definition:

(b) “Threat” means to communicate, directly or indirectly, the intent to: (i) Cause bodily injury immediately or in the future to the person threatened or to any other person; or (ii) Cause physical damage immediately or in the future to the property of a person threatened or that of any other person.

**REDUCING CRIME VICTIMS’ COMPENSATION BENEFITS**

Chapter 122 (E2SSB 6504)

Effective date: April 1, 2010

Amends various statutes to reduce certain crime victims’ compensation benefits.

**AUTHORIZING LAW ENFORCEMENT AGENCIES TO OBTAIN PERSONAL INFORMATION REGARDING TRANSIT PASSES WITH A COURT ORDER**

Chapter 128 (SSB 5295)

Effective date: June 10, 2010

This act implements a number of recommendations of the Sunshine Committee. One of those recommendations relates to the exemption for information relating to transit passes. In amending RCW 42.56.330, the act adds language that specifically allows for the release of personally identifying information of persons who acquire and use transit passes and other fare payment media “to law enforcement agencies if the request is accompanied by a court order.”

**MAKING TECHNICAL CHANGES IN UNIFORM CONTROLLED SUBSTANCES ACT**

Chapter 177 (HB 2443)

Effective date: June 10, 2010

Amends various provisions of the Uniform Controlled Substances Act. In part, the Final Bill Report summarizes the act as follows:

Schedules I through V of the Washington Uniform Controlled Substances Act.

Schedules I through V of the Washington Uniform Controlled Substances Act are updated to incorporate changes made to Board rules and federal law since 1993. [ ] 68 drugs, substances, and immediate precursors to drugs are added, removed, or rescheduled: [listing all items, schedule by schedule] . . .

Definition of Practitioner.

The definition of "practitioner" is expanded to include osteopathic physician's assistants and naturopathic physicians.

Multiple Sclerosis.

Multiple sclerosis is added to the list of diseases and conditions for which a Schedule II non-narcotic stimulant may be prescribed, dispensed, or administered.

**ESTABLISHING (1) NEW RESTRICTIONS ON SALES OF METHAMPHETAMINE PRECURSORS, AND (2) A STATEWIDE ELECTRONIC TRACKING SYSTEM FOR SALES OF EPHEDRINE, PSEUDOEPHEDRINE, AND PHENYLPROPANOLAMINE**

Chapter 182 (E2SHB 2961)

Effective date: June 10, 2010

Amends RCW 69.43.105's gross misdemeanor provisions to require that methamphetamine precursors be placed either behind a counter where the public is not permitted or in a locked display case where customers must ask employees for assistance to gain access. A customer must electronically or manually sign a record of any transaction in which he or she purchased methamphetamine precursors. The record must contain the name and address of the purchaser, the date and time of the sale, the name and the initials of the person conducting the transaction, the name of the product sold, and the total quantity in grams of the precursors being sold.

Amends RCW 69.43.110's gross misdemeanor provisions to change the daily sales limit for methamphetamine precursors to reflect federal law. A merchant may not sell more than 3.6 grams of methamphetamine precursors to a purchaser in a single day or more than nine grams per purchaser in a 30-day period. Likewise, a purchaser may not buy more than 3.6 grams of methamphetamine precursors in a single day or more than nine grams in a 30-day period.

Also directs the Board of Pharmacy to develop a statewide electronic tracking system for sales of ephedrine, pseudoephedrine, and phenylpropanolamine. The goal for having the system operational is July 1, 2011.

**RESTRICTING USE OF RESTRAINTS ON PREGNANT PRISONERS**

Chapter 187 (ESHB 2747)

Effective date: June 10, 2010

This act amends a number of statutes. The Final Bill Report summarizes the act as follows:

Use of Restraints.

No restraints of any kind may be used on any pregnant woman or youth incarcerated in a correctional or detention facility while she is in labor, during childbirth, or in postpartum recovery. Restraints may only be used in extraordinary circumstances on a pregnant woman or youth incarcerated in a correctional or detention facility during transportation to and from visits to medical providers and court proceedings during the third trimester of her pregnancy. Extraordinary circumstances exist where an officer makes an individualized determination that restraints will be necessary to prevent escape or injury to herself, medical or correctional personnel, or others.

Whenever restraints are used, the corrections officer must document in writing the reasons for their use, the kind of restraint used, and the reasons why such restraints were considered the least restrictive. Nothing in this act affects the use of hospital restraints requested for the medical safety of the patient by treating physicians.

If the doctor, nurse, or other health professional treating the pregnant woman or youth requests that restraints not be used, the corrections officer accompanying the pregnant woman or youth shall immediately remove all restraints. Any time restraints are used on a pregnant woman or youth, they must be the least restrictive available and the most reasonable under the circumstances. In no case shall leg irons or waist chains be used on any pregnant woman or youth.

No correctional personnel shall be present during the pregnant woman's or youth's labor or childbirth while she is being attended to by medical personnel, unless specifically requested by medical personnel. If the employee's presence is requested by medical personnel, the employee should be female if practicable.

Notice.

The Washington Association of Sheriffs and Police Chiefs, the Department of Corrections, the Department of Social and Health Services, the Juvenile Rehabilitation Administration, and the Criminal Justice Training Commission must, by September 1, 2010, jointly develop an information packet for distribution. The packet must describe the requirements of this act. The information packet, once developed, must be distributed to all medical staff and nonmedical staff involved in the transportation of women and youth who are pregnant.

Notice of the requirements of this act must be provided to all women or youth who are pregnant at the time that a state correctional facility assumes custody of them. Notice of the requirements of this act must be posted in conspicuous locations in an institution, detention or correctional facility, including where medical care is provided.

**REQUIRING REPORTS TO DSHS RE PRESENCE OF CHILDREN UNDER THE AGE OF 13 IN MOTOR VEHICLE WHERE DRIVER WHO IS CHILD'S PARENT, GUARDIAN, OR LEGAL CUSTODIAN IS BEING ARRESTED FOR DRUG-RELATED OR ALCOHOL-RELATED OFFENSE**

Chapter 214 (SHB 3124)

Effective date: June 10, 2010

Adds a new section to chapter 46.61 RCW (and a parallel new section to chapter 26.44 RCW) providing as follows:

A law enforcement officer shall promptly notify child protective services whenever a child is present in a vehicle being driven by his or her parent, guardian, or legal custodian and that person is being arrested for a drug or alcohol-related driving offense. This section does not require law enforcement to take custody of the child unless there is no other responsible person, or an agency having the right to physical custody of the child that can be contacted, or the officer has reasonable grounds to believe the child should be taken into custody pursuant to

RCW 13.34.050 or 26.44.050. For purposes of this section, "child" means any person under thirteen years of age.

**AUTHORIZING CITIES AND COUNTIES TO ESTABLISH "GOLF CART ZONES"**

Chapter 217 (SSB 6207)

Effective date: June 10, 2010

Amends various provisions in Title 46 RCW to authorize cities and counties to establish "golf cart zones" under conditions set forth in the act.

**ADDRESSING USE OF WIRELESS COMMUNICATIONS DEVICES WHILE DRIVING**

Chapter 223 (SSB 6345)

Effective date: June 10, 2010

Amends the two statutes that prohibit usage of wireless communications devices while driving, RCW 46.61.667 and RCW 46.61.668, by deleting the "secondary action" enforcement limits of those statutes, thus authorizing enforcement as a primary action.

Amends RCW 46.20.055 and RCW 46.20.075 to provide that a holder of an intermediate license may not operate a motor vehicle while using a wireless communications device unless the person is using the device "to report illegal activity, summon medical or other emergency help, or prevent injury to a person or property."

Amends one of the exceptions of RCW 46.61.668 to permit a driver to "relay information that is time sensitive between a transit or for-hire operator and that person's dispatcher, in which the device is permanently affixed to the vehicle;" incorporates the identical exception in RCW 46.61.667.

**INCREASING PENALTIES AND ENHANCING ENFORCEMENT OF SCHOOL AND PLAYGROUND CROSSWALK PROTECTION LAWS**

Chapter 242 (SSB 6363)

Effective date: June 10, 2010

Amends RCW 46.61.235, 46.61.245, 46.61.261 and 46.61.440. The Final Bill Report summarizes the act as follows:

A vehicle driver who commits an infraction by failing to stop for a pedestrian or bicyclist within a crosswalk that is marked with school or playground speed zone signs receives twice the scheduled penalty for the infraction. In addition, a vehicle driver in a school or playground speed zone receives twice the scheduled penalty if the driver commits an infraction by failing to exercise due care to avoid colliding with a pedestrian or failing to yield the right of way to a pedestrian or bicyclist on the sidewalk. The penalties for these infractions may not be waived, reduced, or suspended. Fifty percent of the money collected from the infractions is deposited into the school zone safety account.

School districts may erect signs informing motorists of the monetary penalties assessed for the school and playground speed zone infractions related to pedestrians and bicyclists. Crossing guards who observe pedestrian or bicycle-related violations may prepare a written report to law enforcement. Crossing guards must be age 18 or older to prepare the written report. The report must include information about the violation and information to allow law enforcement to identify the violator. If the report is delivered to law enforcement, it must be delivered within 72 hours after the violation occurred. If a law enforcement officer

is able to identify the driver and has reasonable cause to believe the infraction occurred, the officer may issue an infraction.

**PROTECTING POLICE AND EMERGENCY VEHICLES AND OPERATORS IN EMERGENCY ZONES (REVISING THE “MOVE OVER LAW”)**

Chapter 252 (ESHB 2464)

Effective date: January 1, 2011

Amends RCW 46.61.212’s “move over” provisions. “Emergency zone” is defined as “the adjacent lanes of the roadway two hundred feet before and after” the specified protected vehicles under the existing law. The act adds the following subsections to the existing provisions of RCW 46.61.212:

(2) A person may not drive a vehicle in an emergency zone at a speed greater than the posted speed limit.

(3) A person found to be in violation of this section, or any infraction relating to speed restrictions in an emergency zone, must be assessed a monetary penalty equal to twice the penalty assessed under RCW 46.63.110. This penalty may not be waived, reduced, or suspended.

(4) A person who drives a vehicle in an emergency zone in such a manner as to endanger or be likely to endanger any emergency zone worker or property is guilty of reckless endangerment of emergency zone workers. A violation of this subsection is a gross misdemeanor punishable under chapter 9A.20 RCW.

(5) The department [of licensing] shall suspend for sixty days the driver's license, permit to drive, or nonresident driving privilege of a person convicted of reckless endangerment of emergency zone workers.

Also amends RCW 46.63.020, 46.20.342 and 46.63.110 to make technical changes relating to the changes to RCW 46.61.212. Also directs WSP and DO”T to conduct education and outreach efforts regarding RCW 46.61.212.

**REVISING RCW 46.52.130’S PROVISIONS RELATING TO DRIVER ABSTRACTS**

Chapter 253 (SHB 2939)

Effective date: October 31, 2010

Rewrites the entirety of RCW 46.52.130 in plain language and also revises the statute to require that DOL indicate in an abstract obtained for employment purposes that an individual was not at fault in an accident if the individual provides court records to DOL to that effect.

**REVISING LAW RELATING TO BAIL FOR FELONY OFFENSES, CONTINGENT ON THE VOTERS OF WASHINGTON RATIFYING HOUSE JOINT RESOLUTION 4220**

Chapter 254 (HB 2625)

Effective date: January 1, 2011 (but see below)

This act will take effect on January 1, 2011, but (with one minor exception) only if the voters of Washington ratify HJR 4220 (see entry below regarding HJR 4220 below in this LED at page 21) at the next general election (presumably November 2, 2010).

The act adopts a new chapter in Title 10 RCW. It requires an individualized judicial determination of bail for the release of a person arrested and detained for a felony. It requires a judge to order pretrial detention of a person charged with a capital offense or an offense punishable by life in prison if the judge finds by clear and convincing evidence that the person

has a propensity for violence that creates a substantial likelihood of danger to the community or other persons and no conditions of release will reasonably assure the safety or another or the community. The act provides procedures for pretrial release and detention.

**ADOPTING “RANDY’S LAW” TO (1) MAKE RENDERING CRIMINAL ASSISTANCE IN THE FIRST DEGREE A CLASS B FELONY, AND (2) MAKE “RELATIVES” LIABLE FOR THIS CLASS B FELONY UNLESS THE RELATIVES ARE UNDER THE AGE OF 18 WHEN THEY COMMIT THE OFFENSE**

Chapter 255 (SSB 6293)

Effective date: June 10, 2010

Section 1 of the act amends RCW 9A.76.070 to increase the classification of rendering criminal assistance in the first degree from class C to class B felony. Section 1 also amends subsection 2 of the statute as follows (underlining indicates new language):

(b) Rendering criminal assistance in the first degree is a gross misdemeanor if it is established by a preponderance of the evidence that the actor is a relative as defined in RCW 9A.76.060 under the age of eighteen at the time of the offense.”

Section 2 of the act provides that the act will be known as “Randy’s Law.”

**APPOINTING A WORK GROUP TO STUDY BAIL PRACTICES AND PROCEDURES**

Chapter 256 (SSB 6673)

Effective date: June 10, 2010

Creates a work group to study bail practices and procedures. The work group is to report to the Washington Supreme Court, the Governor, and appropriate committees of the Legislature by December 1, 2010.

**EXCLUDING PHOTOGRAPHS AND MONTH AND YEAR OF BIRTH OF CRIMINAL JUSTICE WORKERS FROM DISCLOSURE, EXCEPT FOR NEWS MEDIA REQUESTORS WHO ARE NOT PRISON MEDIA OR JAIL MEDIA**

Chapter 257 (E2SHB 1317)

Effective date: June 10, 2010

Amends RCW 42.56.250 of the Public Records Act to add a qualified exemption from public disclosure reading as follows:

(7) Photographs and month and year of birth in the personnel files of employees and workers of criminal justice agencies as defined in RCW 10.97.030. The news media, as defined in RCW 5.68.010(5), shall have access to the photographs and full date of birth. For the purposes of this subsection, news media does not include any person or organization of persons in the custody of a criminal justice agency as defined in RCW 10.97.030.

**AUTHORIZING SUSPENSION OF PAROLE/PROBATION OF OFFENDERS CHARGED WITH NEW FELONIES IN CERTAIN CIRCUMSTANCES**

Chapter 258 (SSB 6548)

Effective date: June 10, 2010

The Final Bill Report summarizes the background and content of this act as follows:

**Background [re existing law]:**

The Interstate Compact for Adult Offender Supervision is an agreement entered into between the states permitting supervision of offenders across state lines.

Each state is bound by the terms of the compact, which requires a state to supervise an offender if the offender meets certain criteria. The state receiving the offender for supervision must supervise the individual consistent with the supervision of other similar offenders sentenced in the receiving state.

Many offenders received by Washington for supervision are on a parole or probation system. Washington does not have the jurisdiction to revoke an offender's parole or probation if warranted. Applying Washington's unique sentencing laws to an offender on parole or probation can be confusing. Prior to 1984 Washington had a parole system. There are still offenders in Washington who are on parole or who are in prison and may get out on parole at some point in the future. The parole board (now designated as the Indeterminate Sentence Review Board-ISRB) may take a variety of actions when an offender violates the terms of his or her parole, including suspension of the person's parole pending the disposition of new criminal charges.

**Summary [of act]:**

The Department of Corrections (DOC) may supervise an offender on supervision under the Interstate Compact who is on parole or probation consistent with the supervision of other offenders in Washington who are on parole. Specifically, if an offender is charged with a new felony offense, under the ISRB or DOC's sanction authority, the offender's parole or probation may be suspended pending disposition of the criminal charges.

DOC is required to identify the states from which it receives the highest number of offenders for supervision, determine the feasibility and cost of establishing memoranda of understanding with those states, and report back to the Legislature by December 1, 2010. Washington representatives, at the next meeting of the Interstate Commission, must seek a resolution regarding: any inequitable distribution of costs, benefits, and obligations; the scope of the mandatory acceptance policy; and the authority of the receiving state to determine when it can no longer supervise an offender. DOC must examine the feasibility and cost of withdrawal from the Interstate Compact and report back to the Legislature by December 1, 2010.

**IMPROVING BENEFITS FOR COURSE-OF-EMPLOYMENT DEATHS OF PUBLIC SAFETY EMPLOYEES**

Chapter 261 (EHB 2519)

Effective date: Various; see summary below

Amends RCW 41.26.048, 51.32.050, 28B.15.380, 28B.15.520, 41.26.510, 43.43.285, and 43.43.295; and creates new sections.

For State retirement systems death and disability benefits, the lump-sum death benefit for members of LEOFF Plan 2 and WSPRS Plan 2 is increased to \$214,000 and automatically adjusted each year by an amount equal to the Consumer Price Index for urban wage earners and clerical workers for the Seattle/Tacoma/Bremerton area up to a maximum of 3 percent per year. This applies to all members of LEOFF Plan 2 and WSPRS Plan 2 killed in the course of employment since January 1, 2009. The 10-year service requirement for a survivor annuity and the joint and 100 percent survivor reduction are removed for survivors of LEOFF Plan 2 and WSPRS Plan 2 members that died in the course of employment. A minimum duty-related death survivor annuity of 10 percent of average final salary is established for LEOFF Plan 2 and

WSPRS Plan 2. This applies to all future payments of benefits for LEOFF Plan 2 members that were killed in the course of employment since October 1, 1977, and WSPRS Plan 2 members killed in the course of employment since January 1, 2003.

For State workers' compensation benefits, the optional lump sum payment payable upon remarriage is increased for LEOFF 2 and WSPRS 2 survivors of a member killed in the course of employment from an amount equal to 24 times the monthly allowance that the member was receiving at the time of remarriage to an amount equal to 36 times the monthly allowance.

For State tuition and education benefits, State institutions of higher education must waive all tuition, service fees and activity fees for children and spouses of law enforcement officers, firefighters, and Washington State Patrol Officers, that die or become totally disabled in the course of employment while employed by any public law enforcement agency or full time or volunteer fire department in Washington. The boards of higher education institutions must report to the Higher Education Coordinating Board or the State Board for Community and Technical Colleges on the cost of tuition and other fees waived under the act. The state boards must report these results annually to the appropriate fiscal and policy committees of the Legislature.

### **RESTRICTING OUTINGS FROM CERTAIN STATE FACILITIES**

Chapter 262 (SHB 2717)

Effective date: June 10, 2010

Restricts the circumstances under which a person committed to a State institution or facility to determine competency, restore competency, or as a result of a finding of not guilty by reason of insanity may leave that institution without a court order. Requires the Secretary of DSHS to notify local law enforcement of any authorized leave granted to a person committed to a state institution or facility.

### **IMPROVING RISK ASSESSMENT PROCEDURES RELATING TO PERSONS FOUND NOT GUILTY BY REASON OF INSANITY**

Chapter 263 (ESB 6610)

Effective date: June 10, 2010

The Final Bill Report summarizes this act as follows:

An independent public safety review panel is established to review DSHS's proposals for conditional release, furlough, temporary leaves, or movement around the grounds concerning persons found [not guilty by reason of insanity] NGRI. The panel must consist of seven members appointed by the Governor, including a psychiatrist, a psychologist, a representative of the Department of Corrections (DOC), a prosecutor, a law enforcement representative, and a consumer and family advocate representative. The panel must complete an independent assessment and provide a written determination of the public safety risk presented by any conditional release recommended by DSHS, and may provide an alternative recommendation. The panel's recommendation must be submitted to the court with the DSHS assessment.

If DSHS determines that a person committed as NGRI presents an unreasonable safety risk which, based on behavior, clinical history, and facility security is not manageable in a state hospital setting, the secretary may arrange for the placement of the person in any facility operated by DSHS or the DOC, provided that appropriate mental health treatment targeted at mental health rehabilitation is provided to the person and the person is afforded all of his or her procedural

rights. Such a person remains under the legal custody of DSHS. DSHS must review the placement of such a person at least once every three months and report to the Legislature once every six months. This provision expires on June 30, 2015.

Any change in the mental health of a person found NGRI who has been conditionally released which may cause the person to become a danger to public safety must be reported to the court. Periodic supervision reports regarding a person found NGRI on conditional release must include information about all arrests, new criminal charges filed, or changes in mental health status.

The court must schedule a revocation hearing for a person found NGRI on conditional release who has been returned to the hospital within 30 days.

For the purpose of a petition for final release from supervision related to a person found NGRI, a person affected by a mental disease or defect in a state of remission is considered to have a mental disease or defect requiring supervision when the disease may, with reasonable medical probability, occasionally become active and, when active, render the person a danger to others.

DSHS may submit a petition for the conditional release or final release of a person found NGRI to superior court when DSHS believes that conditional release or final release is appropriate and the person has not submitted his or her own petition for release. The Attorney General represents DSHS in this hearing.

The Washington State Institute for Public Policy must research validated assessment tools for use in assessing competency to stand trial and level of risk for persons found NGRI who may become eligible for conditional release.

## **REVISING RCW 36.28A.090'S PROCESS FOR ISSUING FIREARMS QUALIFICATION CERTIFICATES TO RETIRED LAW ENFORCEMENT OFFICERS**

Chapter 264 (SHB 2226)

Effective date: June 10, 2010

Amends RCW 36.28A.090's provisions for issuing firearms certificates in relation to the 2004 federal Law Enforcement Officers Safety Act (LEOSA) that authorizes qualified law enforcement officers and qualified retired law enforcement officers to carry a concealed firearm in any state under certain conditions. The existing procedures for a retired officer to apply to a local law enforcement agency for issuance of a firearms certificate, including the requirement for the officer to undergo a federal background check, are eliminated.

The Washington Association of Sheriffs and Police Chiefs [WASPC] must develop, and make available on its website, a model certificate to be used as a firearms qualification certificate for retired law enforcement officers. A retired law enforcement officer is deemed to satisfy the federal certification requirements if the officer possesses a firearms qualification certificate that: [1] uses the model certificate developed by WASPC; [2] provides that either a law enforcement agency, or an individual or entity certified to provide firearms training, acknowledges that the bearer has been qualified or otherwise found to meet standards established by the Criminal Justice Training Commission for firearms qualification for the basic law enforcement training academy; and [3] indicates that the determination of qualification was made within the previous year.

A law enforcement agency is not required to complete the firearms qualification certificate.

**ESTABLISHING A WASPC-ADMINISTERED PROGRAM TO VERIFY SEX-AND-KIDNAPPING OFFENDER ADDRESSES; REMOVING 90-DAY REPORTING REQUIREMENT FOR LEVEL II AND III OFFENDERS; PLUGGING A LOOPHOLE FOR REQUIRED WEEKLY REPORTING BY TRANSIENT OFFENDERS**

Chapter 265 (SHB 2534)

Effective date: June 10, 2010

Amends RCW 9A.44.130 and 9A.44.135, and adds a new section to chapter 36.28A RCW. The Final Bill Report for this act summarizes its background and content as follows:

**Background [re existing law]:**

Sex and Kidnapping Offender Registration & Reporting Requirements.

A sex or kidnapping offender must register with the county sheriff of the county in which he or she resides. Level II and III sex offenders who have a fixed residence must report to the county sheriff every 90 days. An offender who lacks a fixed residence must report weekly to the county sheriff. The sheriff may require the person to provide a list of the locations where he or she stayed over the last seven days. A person who knowingly fails to comply with the registration requirements is guilty of Failure to Register. In *State v. Flowers*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2010 WL 4364652 (Div. II, 2010), the Washington Court of Appeals found that because the statute authorizes the sheriff to require an offender without a fixed residence to provide a list of locations where he or she stayed but does not itself require a list, an offender may not be convicted of Failure to Register if he or she fails to provide an accurate list to the sheriff.

Verification of a Registered Sex or Kidnapping Offender's Address.

The chief law enforcement officer of a jurisdiction must make reasonable attempts to verify the address of registered offenders in the jurisdiction. "Reasonable attempts" are defined to include: (1) for registered sex and kidnapping offenders, an annual mailing of an address verification form; and (2) for sexually violent predators, a mailing every 90 days of an address verification form. The offender must sign and return the form to the chief law enforcement officer of the jurisdiction within 10 days of receipt.

**Summary [of act]:**

Verification of a Registered Sex or Kidnapping Offender's Address.

When funded, the Washington Association of Sheriffs and Police Chiefs (WASPC) must administer a grant program for sex and kidnapping offender address verification by local governments. The WASPC must: [1] enter into performance-based agreements with local governments so that offenders' addresses are verified every 12 months for level I and unclassified offenders, every six months for level II offenders, and every three months for level III offenders; [2] collect performance data; and [3] submit an annual report to the Governor and the Legislature.

Unclassified offenders and kidnapping offenders are considered at risk level I, unless the local jurisdiction believes a higher classification level is in the interest of public safety. "Reasonable attempts" to verify an offender's address include participation in the WASPC grant program. If a sheriff, police chief, or town marshal does not participate in the WASPC grant program, the chief law enforcement officer of the jurisdiction must send an annual address verification form to offenders in the county and must send an address verification form every 90 days to sexually violent predators. County sheriffs and police chiefs or town marshals may enter into agreements to fulfill these address verification obligations.

#### Offender Reporting Requirements.

Level II and III sex offenders with a fixed residence are no longer required to report to the county sheriff every 90 days.

An offender who lacks a fixed residence must keep an accurate accounting of where he or she stayed during the week and provide it to the sheriff upon request.

### **EXEMPTING REGISTRANTS' ID INFORMATION FROM PUBLIC DISCLOSURE WHERE REGISTRANT SEEKS NOTIFICATION REGARDING SEX OFFENDER**

Chapter 266 (SSB 6361)

Effective date: June 10, 2010

Amends RCW 42.56.240 to exempt from public disclosure: "Information submitted to the statewide unified sex offender notification and registration program under RCW 36.28A.040(6) by a person for the purpose of receiving notification [from WASPC] regarding a registered sex offender, including the person's name, residential address, and e-mail address." Makes a parallel amendment to RCW 36.28A.040.

### **IMPROVING THE ADMINISTRATION AND EFFICIENCY OF SEX AND KIDNAPPING OFFENDER REGISTRATION**

Chapter 267 (SSB 6414)

Effective date: June 10, 2010

Among other things, this act amends RCW 9A.44.130, 9A.44.140, 9A.44.145, 9.94A.030, 9.94A.501, 9.94A.701, 9.94A.702, and 70.48.470. The act also adds new sections to chapter 9A.44 RCW. In part, the Final Bill Report summarizes the background and content of this act as follows:

#### **Background [re existing law and other background information]:**

In 2008, the Legislature created the Sex Offender Policy Board (Board) to promote a coordinated and integrated response to sex offender management. One of the first tasks assigned to the Board, through 2SHB 2714 (2008), was to review Washington's sex offender registration and notification laws. The Board submitted a report to the Legislature in November 2009, which contained several consensus recommendations including:

[1] standardize all registration requirement deadlines within the registration statute to three business days with few exceptions; [2] change the statute so that a juvenile sex offender's first failure to register offense will not bar them from petitioning for relief from registration; [3] establish a statutory list of criteria that is

illustrative to the judge of considerations that may be important in determining whether an adult offender should be relieved from registration; [4] adopt a tiered approach to the class of felony for a failure to register as a sex offender – class C for the first two convictions and class B for the third and subsequent convictions; [5] reduce community custody for the first failure to register for a sex offense conviction to 12 months; second and subsequent convictions would continue to require 36 months of supervision; [6] repeal the 90-day registration requirement for level II and III adult sex offenders and support codification of law enforcement's address verification program.

Washington's registration law requires a sex or kidnapping offender to keep the county sheriff informed of his or her residence and any school the offender plans to attend or is attending. The statute sets out the time frames for the offender to provide this notice. In many cases, the timeframes are not consistent. For example, an offender must notify the sheriff: [1] at the time of release from custody; [2] within 72 hours of changing his or her residence address in the same county; [3] within ten days of moving to a new county; and [4] within 48 hours of ceasing to have a fixed residence.

A person who has a duty to register for a sex offense committed when the person was a juvenile may petition the court to be relieved of that duty: [1] if the petitioner was 15 years or older at the time of the offense, the petitioner must show by clear and convincing evidence that continued registration will not meet the purposes of the statute; [2] if the petitioner was under the age of 15 at the time of the offense, the petitioner must show by a preponderance of the evidence that the juvenile has not committed a new sex or kidnapping offense in the 24 months following adjudication and continued registration will not meet the purposes of the statute.

The failure to register is considered a sex offense and will preclude the petitioner from being relieved of the duty to register. Adult offenders convicted of class B or class C sex offenses may be relieved of the duty to register after ten years for a class C offense or 15 years for a class B offense. In order for the court to relieve a person from registration, the petitioner must not commit any new offense in the stated time period and show by clear and convincing evidence that future registration will not meet the purposes of the statute. For both adult and juvenile offenders, a failure to register is a class C felony if the underlying sex offense was a felony, carrying a maximum sentence of 60 months. A person may not be sentenced to confinement time and community custody in excess of the statutory maximum. When an offender has been convicted of a failure to register several times or has a significant criminal history, the statutory range for a failure to register is 43 to 57 months and carries a mandatory term of community custody of 36 months. If the offender were sentenced to 57 months confinement, an offender could only be sentenced to a three-month term of community custody. For this reason, the Legislature passed 2SHB 2714 in 2008 changing an adult failure to register to a class B felony (statutory maximum of 120 months). This law takes effect after the 2010 Legislative Session unless otherwise amended by the Legislature.

**Summary [of act]:**

Business day and disqualifying offense are defined. An offender may not be relieved from registration if that offender has committed a disqualifying offense within the applicable time period. The timeframes for a sex or kidnapping offender to report to the county sheriff are changed to three business days with the exception of a few isolated circumstances. A person who is moving in-state must provide notice by certified mail or in person with the county sheriff.

An offender who is required to register in his or her state of conviction must register in Washington unless the person has specifically been relieved of registration by the state of conviction. A person's duty to register for an out of state offense continues indefinitely, but the person may petition after 15 years in the community with no disqualifying offense. Separate sections address the duration of registration, relief from registration and relief from registration for offenses committed as a juvenile. When the person's duty to register ends by operation of law, the person may request the county sheriff to review his or her records. If the sheriff finds that the person has been in the community the requisite period of time with no disqualifying offense, the sheriff will request that the Washington State Patrol (WSP) remove the person from the sex or kidnapping offender registry. Law enforcement and the WSP are immune from liability for the removal or failure to remove a person from the registry.

When determining whether to relieve an adult or juvenile from registration, a list of criteria is provided as guidance for the court to consider, including the nature of the offense, any subsequent criminal history, the offender's stability in the community, and any other factors the court considers relevant.

A person who is required to register for an offense committed when the person was a juvenile may be relieved of registration if the person has not committed a new sex or kidnapping offense since adjudication. The person will not be prevented from being relieved of registration if the person was convicted of only one failure to register. However, the person may not have been adjudicated or convicted of a failure to register in the 24 months prior to filing.

A juvenile or adult conviction for failure to register carries a maximum 12-month sentence of community custody for the first conviction and 36 months for the second and subsequent convictions. The Department of Corrections is directed to apply these changes retroactively to offenders currently incarcerated or on community custody. The first two adult convictions for failure to register are designated as class C felonies. An adult offender's third conviction for failure to register is designated as a class B felony.

A table of the impacts of the various convictions for a failure to register [is provided in the Final Bill Report but omitted from this [LED](#) entry].

## **ADDRESSING WSP'S REGULATION OF IGNITION INTERLOCK MANUFACTURERS AND VENDORS; SETTING DEADLINE FOR MANDATORY USE OF FUEL CELL TECHNOLOGY**

Chapter 268 (SHB 2466)

Effective date: June 10, 2010

Addresses WSP's regulation of ignition interlock manufacturers and vendors. Also provides that "companies not using ignition interlock devices that employ fuel cell technology as of the effective date of this act shall have five years from the effective date of this act to begin using ignition interlock devices that employer fuel cell technology."

## ADDRESSING IGNITION INTERLOCK DEVICES IN RELATION TO ACCOUNTABILITY OF PERSONS CONVICTED OF DRIVING UNDER THE INFLUENCE

Chapter 269 (2SHB 2742)

Effective date: January 1, 2011

The Final Bill Report for this act summarizes it as follows:

### Ignition Interlock License.

Changes are made regarding who may apply for an IIL [Ignition Interlock License]. A person who has been convicted of vehicular homicide or vehicular assault due to driving under the influence may apply for an IIL. Persons whose licenses have been suspended due to DUI based on driving under the influence of drugs may apply for an IIL. Persons who enter into deferred prosecutions for DUI are no longer required to apply for an IIL.

The employer vehicle exception is expanded to include vehicles leased or rented by the person's employer and vehicles whose care or maintenance is the temporary responsibility of the employer and driven at the direction of the employer.

The list of circumstances under which the court may waive the requirement that a person apply for an IIL is expanded. If a court finds that a person is not eligible to receive an IIL, the court is not required to make any further subsequent inquiry or determination as to the person's eligibility. The court must order alcohol monitoring in cases where the IIL requirement is waived and the court has orders that the person not consume alcohol.

### Additional Ignition Interlock Requirements.

When a person has his or her regular driver's license reinstated and an ignition interlock device is required to be installed, the requirement remains in effect until the DOL receives a declaration from the person's ignition interlock vendor certifying that there have been no "incidents" in the four consecutive months prior to the date the requirement expires. An "incident" is: (1) an attempt to start the vehicle with a BAC of .04 or higher; (2) failure to take or pass any required re-test; or (3) failure of the person to appear at the vendor when required.

### Prior Offenses.

The definitions of "prior offenses" and "within seven years" are amended. A prior offense within seven years means that the arrest for the prior offense occurred either before or *after* the arrest for the current offense. However, if a deferred prosecution is revoked based on a subsequent DUI-related conviction, the subsequent conviction may not be treated as a prior offense of the revoked deferred prosecution for the purposes of sentencing.

### Liability.

If as part of the person's judgment and sentence, a person is required to install an ignition interlock device on all motor vehicles operated by the person and the person is under the jurisdiction of the municipality or county probation or

supervision department, the probation or supervision department must verify the installation of an ignition interlock device. The county probation or supervision department satisfies the requirement to verify installation if it receives a written verification by an ignition interlock company stating that it has installed a device on a vehicle owned or operated by the person. The municipality or county has no further obligation to supervise the use of the device by the person and is not civilly liable for any injuries or damages caused by the person for failing to use a device or for driving under the influence of intoxicating liquor or any drug.

Other Provisions.

It is a gross misdemeanor, rather than a misdemeanor, for a person to drive a vehicle without an ignition interlock device when the person is required to have one. A person commits driving while license suspended in the second degree if he or she is driving while his or her regular driver's license is suspended and the person is eligible to obtain an IIL but did not obtain one.

Procedures for the DOL to cancel IILs and occupational and temporary restricted licenses are amended to be consistent with current practices for cancellations of regular driver's licenses.

The effective date of cancellation is 45 days, rather than 15 days, from the date the DOL mails the notice of cancellation.

**ADDRESSING VEHICLE LICENSE FRAUD**

Chapter 270 (2SHB 2436)

Effective date: July 1, 2010

Amends RCW 46.16.010. In part, the Final Bill Report summarizes the act as follows:

Failure to Make Initial Vehicle Registration.

Failure to make initial registration before operation of the vehicle on the highways of this state is a traffic infraction, and the violator must pay a fine of \$529 to be deposited into the Vehicle Licensing Fraud Account. The person must pay the delinquent taxes and fees which will be deposited and distributed in the same manner as if the taxes and fees were paid in a timely fashion.

Licensing of a Vehicle in Another State to Evade the Taxes and Fees.

A first offense is a gross misdemeanor punishable by: up to one year in the county jail; a fine of \$529 to be deposited into the Vehicle License Fraud Account; a fine of \$1,000 to be deposited into the Vehicle License Fraud Account; and the payment of the delinquent taxes and fees which will be deposited and distributed in the same manner as if the taxes and fees were paid in a timely fashion.

Licensing of a Vehicle in Another State to Evade the Taxes and Fees.

A second or subsequent offense is a gross misdemeanor, punishable by: up to one year in the county jail; a fine of \$529 to be deposited into the Vehicle License Fraud Account; a fine of \$5,000 to be deposited into the Vehicle License Fraud Account; and the payment of the delinquent taxes and fees which will be

deposited and distributed in the same manner as if the taxes and fees were paid in a timely fashion. A fiscal year appropriation of \$75,000 to the DOR and of \$250,000 to the WSP is made from the Vehicle Licensing Fraud Account for the purposes of vehicle license fraud enforcement and collections by the WSP and the DOR.

**MODIFYING DOMESTIC VIOLENCE PROVISIONS, INCLUDING THE MANDATORY ARREST PROVISION RE THE “PRIMARY PHYSICAL AGGRESSOR” IN RCW 10.31.100(2)**

Chapter 274 (ESHB 2777)

Effective date: June 10, 2010

Among other things, this act amends RCW 10.31.100, 10.99.045, 26.50.020, 26.50.060, 26.50.070, 10.99.040, 9.94A.030, 9.94A.525, 9.94A.535, 3.66.068, 3.50.330, 35.20.255, 26.50.150, and 68.50.160; adds a new section to chapter 36.28A RCW; adds new sections to chapter 26.50 RCW; adds a new section to chapter 7.90 RCW; adds a new section to chapter 10.14 RCW; adds new sections to chapter 2.56 RCW; and adds a new section to chapter 10.99 RCW. In part, the Final Bill Report summarizes this act as follows:

Law Enforcement and Arrest Provisions.

For the purposes of identifying the primary physical aggressor [under RCW 10.31.100(2)(c)], the arresting officer must consider the history of domestic violence of each person involved, including whether the conduct was part of an ongoing pattern of abuse. . . .

No-Contact Orders.

At the time of the defendant's first appearance before the court for an offense involving domestic violence, the prosecutor must provide the court with the defendant's criminal history and history of no-contact and protection orders.

All courts are required to develop policies and procedures to grant victims a process to modify or rescind a no-contact order. The Administrative Office of the Courts (AOC) is required to develop a model policy to assist the courts in implementing this requirement. The AOC also must develop a pattern form for no-contact orders issued for offenses involving domestic violence. A no-contact order issued by the court must substantially comply with the pattern form developed by the AOC.

Protection Orders.

New provisions are created to address when a court, in issuing protection orders for domestic violence, sexual assault, and harassment, may exercise personal jurisdiction over a nonresident. When issuing a domestic violence protection order, courts may restrain the respondent from cyber stalking or monitoring the actions, location, or communication of the victim by using wire or electronic technology.

Any person 13 years of age or older may petition the court for a domestic violence protection order if he or she is the victim of violence in a dating relationship and the respondent is 16 years of age or older. A petitioner who is under the age of 16 must petition the court through a parent, guardian, or next friend. "Next friend" means any competent individual, over eighteen years of

age, chosen by the minor and capable of pursuing the minor's stated interest in the action. With regard to protection orders, the AOC must update the law enforcement information form that it provides for the use of a petitioner who is seeking an ex parte protection order, as a way to prompt the petitioner to disclose on the form whether the person whom the petition is seeking to restrain has a disability, brain injury, or impairment requiring special assistance.

Any law enforcement officer that knowingly serves a protection order to such a respondent requiring special assistance must make a reasonable effort to accommodate the needs of the respondent to the extent practicable without compromise to the safety of the petitioner.

#### Reconciling No-Contact and Protection Orders.

By December 1, 2011, the AOC must develop guidelines for all courts to establish a process to reconcile duplicate or conflicting no-contact or protection orders issued in Washington. The AOC must provide a report to the Legislature by January 1, 2011, concerning the progress made to develop these guidelines.

Sentencing Reforms. [**LED EDITORIAL NOTE: The summary of the sentencing reforms has been omitted from this LED entry.**]

#### Treatment/Services for Perpetrators and Victims.

Any program that provides domestic violence treatment to perpetrators of domestic violence must be certified by the DSHS and meet minimum standards for domestic violence treatment purposes. The DSHS may conduct on-site monitoring visits of treatment programs, including reviewing program and management records, to determine the program's compliance with minimum certification qualifications and rules.

#### Transmittal of Concealed Pistol License Information between Agencies.

The AOC must convene a work group to address the issue of transmitting information between the courts and law enforcement regarding the revocation of concealed pistol licenses for those individuals that are subject to a protection order or no-contact order. The workgroup must review current practices, identify methods to expedite the transfer of information, and report its recommendations to the Legislature by December 1, 2010.

#### Human Remains Disposition.

A person who has been arrested for or charged with first or second degree murder or first degree manslaughter by reason of the death of the decedent is prohibited from controlling the disposition of the decedent's remains. The right to control the disposition vests in an eligible person in the next applicable class listed in statute.

## **PROVIDING GUIDANCE FOR EVALUATING WHETHER PERSONS SHOULD BE DETAINED UNDER THE INVOLUNTARY TREATMENT ACT**

Chapter 280 (2SHB 3076)

Effective date: June 10, 2010

The Final Bill Report summarizes this act as follows:

Risk Assessment Tool.

The Washington State Institute for Public Policy, in collaboration with the Department of Social and Health Services and other applicable entities, is required to search for a validated mental health assessment tool or combination of tools for the assessment of individuals for detention, commitment, or revocation under the ITA [Involuntary Treatment Act]. This provision expires on June 30, 2011.

Determinations for Civil Commitment.

A Designated Mental Health Professional (DMHP) conducting an evaluation for a 72-hour commitment under the ITA must consider all reasonably available information from credible witnesses and records regarding: [1] prior recommendations for evaluation for civil commitments as ordered by a superior court judge; [2] historical behavior of the person, including a history of one or more violent acts; [3] prior determinations of incompetency or insanity; [4] prior commitments under the ITA.

A credible witness may include family members, landlords, neighbors, or others with significant contact and history of involvement with the person being evaluated. If the DMHP relies upon information from a credible witness in reaching the decision to detain an individual under the Involuntary Treatment Act, the DMHP must provide to the prosecutor contact information for that witness. Either the DMHP or the prosecutor must provide notice of the date, time, and location of any probable cause hearing for the person detained.

The DMHP and the court, when making a determination regarding detention under the ITA, may consider symptoms and behavior, which standing alone would not support detention. These symptoms and behaviors may support a finding of a likelihood of serious harm to the person or others or that the person is gravely disabled. The symptoms that may be considered are those which: [1] are closely associated with symptoms or behavior which preceded and led to a past incident of involuntary hospitalization, severe deterioration, or one or more violent acts; [2] represent a marked and concerning change in the baseline behavior of the person; and [3] without treatment, the continued deterioration of the respondent is probable.

Notice Upon Discharge.

When a person who has been detained under the ITA is discharged from an evaluation and treatment facility or state hospital, the facility or hospital must provide notice of the discharge to the office of the DHMP responsible for the initial commitment and the professional office for the DHMP in the county where the person is expected to reside. The facility or hospital must also provide the offices of the DHMP with a copy of any less restrictive order or conditional release order issued upon discharge.

The notice and documents must be provided no later than one business day following the discharge. No notice is required if the person is discharged for the purpose of transfer to another facility for continued detention and treatment.

The Department of Social and Health Services must maintain and make available an updated list of contact information for offices of DMHPs around the state.

#### Financial Obligations for Defendants.

A judge, before imposing any legal financial obligations upon a defendant who suffers from a mental health condition, must first determine that the defendant has the means to pay such sums. This requirement does not apply to the victim penalty assessment or any restitution ordered by the court.

### **REVISING SOME PROVISIONS IN MEDICAL MARIJUANA ACT**

Chapter 284 (SSB 5798)

Effective date: June 10, 2010

Revises various provisions in chapter 69.51A RCW and adds a new section to the chapter. The Final Bill Report summarizes the act as follows:

Health care professionals are defined for purposes of this act as physicians, osteopathic physicians, physician assistant and osteopathic physician assistants, naturopaths, and advanced registered nurse practitioners.

Health care professionals provide the valid documentation which authorizes the medical use of marijuana for qualified patients who benefit from its use. Valid documentation for medical marijuana use must be a signed and dated statement by the health care professional on tamper resistant paper. Tamper resistant paper is defined. Copies of a signed statement by a qualifying patient's health care professional or medical records are still valid documentation if obtained prior to the effective date of this act. Health care professionals who advise patients regarding the medical use of marijuana cannot be penalized for doing so.

### **ADDRESSING CERTAIN SEX CRIMES INVOLVING MINORS**

Chapter 289 (ESSB 6476)

Effective date: June 10, 2010

Amends RCW 9.68A.100 to increase the classification for commercial sexual abuse of a minor from class C to class B felony. Amends RCW 9.68A.101 to increase the classification for promoting commercial sexual abuse of a minor from class B to class A felony. Amends RCW 9.68A.110 to clarify that it is no a defense to prosecution under RCW 9.68A.100 (commercial sexual abuse of a minor) that the defendant did not know the age of the victim.

Also amends provisions relating to impounding cars and fining victimizers of minors in commercial sexual abuse. And includes extensive provisions relating to providing government services to minors who are being exploited in commercial sex crimes.

### **STATING PUBLIC POLICY THAT LAW ENFORCEMENT PERSONNEL BE TRUTHFUL AND HONEST**

Chapter 294 (SSB 6590)

Effective date: June 10, 2010

In response to the Washington Supreme Court decision in Kitsap County Deputy Sheriff's Guild v. Kitsap County, 167 Wn.2d 428 (2009) **Jan 10 LED:05** (motion for reconsideration pending), this act adds a new section to chapter 43.101 reading as follows:

It is the policy of the state of Washington that all commissioned, appointed, and elected law enforcement personnel comply with their oath of office and agency policies regarding the duty to be truthful and honest in the conduct of their duties.

**PROPOSING A CONSTITUTIONAL AMENDMENT ON BAIL STANDARDS**  
ESHJR 4220

The voters of the State of Washington will vote in the next general election (presumably November 2, 2010) whether to adopt the following amendment to Article I, section 20 of the Washington constitution (the underlined language is what would be added):

All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great. Bail may be denied for offenses punishable by the possibility of life in in prison upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons, subject to such limitations as shall be determined by the legislature.

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**BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT**

(1) **RCW 10.58.035 HELD CONSTITUTIONAL BUT ALSO HELD NOT TO HAVE RELAXED THE CORROBORATION REQUIREMENT FOR SUFFICIENCY OF EVIDENCE UNDER CORPUS DELICTI RULE; SUPREME COURT APPEARS TO HAVE ISSUED A MOSTLY ADVISORY OPINION** – In State v. Dow, 168 Wn.2d 243 (2010), in a unanimous decision, the Washington Supreme Court upholds the constitutionality of RCW 10.58.035, adopted in 2003, but reaches a conclusion that seems to mean that the statute has little, if any, effect on prosecutions. The statute makes a defendant's out-of-court "confession" or "admission" or "other statement" admissible as substantive evidence where the alleged victim of the crime has died or is incompetent to testify at trial, so long as the statement is found trustworthy under a totality-of-the-circumstances test outlined in the statute.

Keith Dow was charged with first degree child molesting. The superior court ruled that the four-year-old victim, who was three at the time of the alleged offense, was incompetent to testify. The superior court also ruled that the child's out-of-court statements were not admissible under the child hearsay rule. The superior court also concluded that defendant's statement to police was entirely exculpatory, and that there was no inculpatory evidence in the case. Despite the absence of incriminating evidence, the State argued to the superior court that defendant's statement was admissible under RCW 10.58.035, and that the prosecution should be allowed to proceed.

Defendant then successfully moved prior to trial (1) for suppression of his exculpatory statement to police interrogators, and (2) for dismissal of the charges based on the absence of incriminating evidence.

On the State's appeal, the Court of Appeals reversed (**May 08 LED:22**), remanding for a determination of whether the State had other evidence to support the charge. On the State's

petition for review of that ruling, the Supreme Court rules that the charge must be dismissed because there is no evidence of defendant's guilt, and it would be a useless gesture to remand the case to superior court. Along the way the Supreme Court addresses RCW 10.58.035.

RCW 10.58.035 provides in relevant part as follows (emphasis added):

(2) In determining whether there is substantial independent evidence that the confession, admission, or other statement of the defendant is trustworthy, the court shall consider, but is not limited to:

(a) Whether there is any evidence corroborating or contradicting the facts set out in the statement, including the elements of the offense;

(b) The character of the witness reporting the statement and the number of witnesses to the statement;

(c) Whether a record of the statement was made and the timing of the making of the record in relation to the making of the statement; and/or

(d) The relationship between the witness and the defendant.

As we noted at the outset of this brief note, the Dow Court upholds the constitutionality of RCW 10.58.035, adopted in 2003, but reaches a conclusion that seems to mean that the statute is of little use to prosecutors. The statute makes a defendant's out-of-court "confession" or "admission" or "other statement" admissible as substantive evidence where the alleged victim of the crime has died or is incompetent to testify at trial, so long as the statement is found trustworthy under a totality-of-the-circumstances test outlined in the statute. The Supreme Court's lead opinion authored by Justice Charles Johnson concludes that this statute merely makes a statement admissible and does not in any way relax the "common law" (court-made, or decisional, law) corpus delicti rule for sufficiency of evidence, which rule precludes convictions based on uncorroborated confessions or admissions of defendants.

Justice Jim Johnson writes a lone, one-paragraph concurring opinion that appears to be directed at prosecutors and law enforcement personnel. After stating his concurrence with the lead opinion, he states: "I write separately, however, to emphasize the heightened need for substantiating evidence in sexual assault cases involving very young victims who are likely to be found incompetent to testify."

Result: Reversal of Court of Appeals decision that reversed (and remanded for further hearings) the Cowlitz County Superior Court order dismissing first degree child molestation charges against Keith Ian Dow; the Washington Supreme Court affirms the Superior Court's order of dismissal.

**LED EDITORIAL COMMENTS:** In May 2008 LED entry on the Court of Appeals decision in Dow, we mistakenly indicated in our summary that the defendant had made an inculpatory statement during police questioning. But none of the opinions in the Court of Appeals said that, nor do either the opinions by the Supreme Court in Dow say that. In fact, all of the opinions state that the defendant did not make any inculpatory statement.

Arguably, in light of the absence of any inculpatory statement by defendant Dow, the Supreme Court's decision in Dow is a mere advisory opinion in relation to a case where – unlike in Dow – there is an actual admission/inculpatory statement by the defendant to

police or someone else. But we would guess that in the lower courts the Supreme Court will be deemed to have finally spoken in Dow.

**(2) PUBLIC RECORDS ACT: COURT ESTABLISHES A 16-PART TEST TO GUIDE TRIAL COURTS IN ESTABLISHING DAILY PENALTIES** – In Yousoufian v. Sims, \_\_\_ Wn.2d \_\_\_, \_\_\_P.3d \_\_\_, 2010 WL 1225083 (2010), the Washington Supreme Court revisits a case that it previously decided and then set for reconsideration. By a 5-4 vote, the Court reestablishes a 16-factor nonexclusive test (with 7 mitigating factors and 9 aggravating factors) to be used by trial courts in assessing the per-day element of penalties under the Public Records Act (PRA). The Court emphasizes, however, that the 16-factor test is only guidance. Applying these factors, the majority sets the penalty in the Yousoufian case at \$45 per day, for a total penalty of \$371,340 against King County. The Court also explicitly rejects the argument that a penalty calculation should begin at the midrange of the penalty scale in RCW 42.56.550(4).

This decision follows a re-argument of a decision issued in January 2009 (not addressed in the LED), which established 16 “nonexclusive” factors to be used in assessing penalties under the Public Records Act. The 2009 majority opinion was authored by Justice Richard Sanders. After that decision was issued, King County learned that the attorney representing Justice Sanders in Justice Sanders’ own Public Records Act lawsuit against the Attorney General’s Office had used the 2009 Yousoufian decision to greatly increase his request for penalties. Using that information, King County moved for reconsideration and for Justice Sanders’ recusal from further participation in the Yousoufian case.

The Supreme Court granted King County’s motion, and re-argument was heard in September 2009. In briefing preceding the re-argument, the parties and all amici curiae except the State advocated for or against various factors articulated in the January 2009 decision. The State’s amicus brief argued without success: (1) that some factors set forth in the January 2009 decision inappropriately addressed matters outside an agency’s control; and (2) that the Court should more closely follow the statute, which sets the boundaries of the penalty to be assessed but otherwise leaves the daily amount within the sound discretion of the trial court.

The majority opinion is written by Justice Alexander and joined by four justices (Charles and James Johnson, Chambers and pro tem, Morgan). The majority opinion specifically rejects the suggestion that trial courts should begin their penalty determination at the midpoint of the 5 to 100 dollar penalty scale in RCW 42.56.550(4). “Trial courts may exercise their considerable discretion under the PRA’s penalty provisions in deciding where to begin a penalty determination,” and must consider the entire penalty range.

In Part IV of the opinion, the majority reestablishes essentially the same 16-factor test as in the January 2009 opinion, but “emphasize[s]” that the factors: (a) “are offered only as guidance;” (b) “may not apply equally or at all in every case;” (c) “are not an exclusive list of appropriate considerations;” (d) “[have]” no one factor [that] should control;” and (e) “should not infringe upon the considerable discretion of trial courts to determine PRA penalties.

The seven mitigating factors that may serve to decrease the penalty are: (1) lack of clarity in the PRA request; (2) the agency’s prompt response or legitimate follow-up inquiry for clarification; (3) the agency’s good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions; (4) proper training and supervision of the agency’s personnel; (5) the reasonableness of any explanation for noncompliance by the agency; (6) the helpfulness of the agency to the requestor; and (7) the existence of agency systems to track and retrieve public records.

The nine aggravating factors that may support increasing the penalty are: (1) a delayed response by the agency, especially in circumstances making time of the essence; (2) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions; (3) lack of proper training and supervision of the agency's personnel; (4) unreasonableness of any explanation for noncompliance by the agency; (5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency; (6) agency dishonesty; (7) the public importance of the issue to which the request is related, where the importance was reasonably foreseeable to the agency; (8) any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was reasonably foreseeable to the agency; and (9) a penalty amount necessary to deter future misconduct by the agency, considering the size of the agency and the facts of the case.

Justice Owens dissents, joined by three justices (Madsen, Fairhurst and pro tem, Seinfeld), arguing that the Supreme Court should have respected the trial court's exercise of discretion, and therefore should have affirmed the trial court's per day penalty assessment.

Result: Affirmance, with significant modifications, of Court of Appeals decision that reversed in part and affirmed in part a King County Superior Court decision; per day penalty is set at \$45 per day for 8,252 days; total penalty awarded is \$371,340, plus reasonable attorney fees and costs incurred in connection with the appeal.

**(3) RCW 9.94A.533(5) DRUGS-IN-JAIL SENTENCING ENHANCEMENT DOES NOT APPLY TO ARRESTEE WITH METHAMPHETAMINE THAT WAS DISCOVERED IN SEARCH WHEN HE WAS BOOKED INTO JAIL; HE DID NOT VOLITIONALLY BRING DRUGS TO JAIL** – In State v. Eaton, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2010 WL 1077891 (2010), the Supreme Court, in a 5-4 ruling, affirms the Court of Appeals (**see April 08 LED:24**) and rules that RCW 9.94A.553(5), which provides an enhanced sentence for illegal drug possession that occurs in a jail, does not apply where a person is arrested outside the jail with illegal drugs hidden on his person, and the drugs are discovered shortly after the arrestee has been transported to jail and is being processed there.

The majority opinion is authored by Justice Chambers and joined by Justices Charles Johnson, Stephens, Sanders and Alexander. The majority opinion responds to a criticism by the dissent regarding the possibility that an arrestee might escape the sentencing enhancement if he or she (1) initially successively smuggled drugs into jail because the drugs were not found in the booking search, but then (2) the drugs were discovered. The majority suggests that: "At some point, when the defendant retains possession despite the opportunity to do otherwise, possession within the zone becomes voluntary."

The dissenting opinion is authored by Justice Fairhurst and joined by Justices James Johnson, Owens and Madsen.

Result: Affirmance of Court of Appeals decision (**April 08 LED:24**) that vacated the Clark County Superior Court sentence enhancement of Thomas Harry Eaton on his conviction for possession of methamphetamine.

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### NEXT MONTH

The June 2010 LED will include Part 2 of the 2-part 2010 Washington Legislative Update, plus entries on recent court decisions, including an entry regarding Brooks v. City of Seattle, \_\_\_

F.3d \_\_\_, 2010 WL 1135776 (9<sup>th</sup> Cir. 2010), a March 26, 2010 Ninth Circuit 3-judge panel's Civil Rights Act civil liability decision holding, by 2-1 vote, that officers acted reasonably and therefore were entitled to qualified immunity in relation to their use of a Taser on a misdemeanor arrestee who was resisting arrest. The officers deployed the Taser in "touch" or "drive-stun" mode after they had tried without success to get cooperation, and after they had warned the increasingly confrontational suspect that non-cooperation would result in use of the Taser. The majority opinion distinguishes a Taser on "touch" or "drive-stun" mode from a Taser on "dart" mode in this factual context.

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### **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/](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>].

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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 Home Page [<https://fortress.wa.gov/cjtc/www/led/ledpage.html>]

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