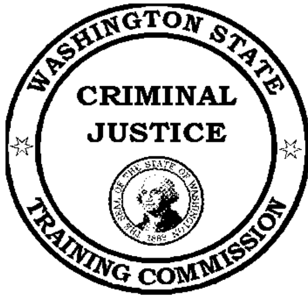

Law Enforcement Digest

JULY 2011

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

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NOTICE REGARDING JUNE 2011 LAW ENFORCEMENT DIGEST: We apologize that the June 2011 LED was not posted to the Criminal Justice Training Commission website until June 8. This delay was due to technical difficulties with the CJTC website that resulted in the CJTC's inability to post documents to its website.

We strive to ensure that the LED is posted by the third Friday of each month (for example the July LED will ideally be posted by the third Friday in June) and will continue to do so in the future. Again, we apologize for any inconvenience this delay may have caused.

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PART TWO OF THE 2011 WASHINGTON LEGISLATIVE UPDATE

LED INTRODUCTORY EDITORIAL NOTE: This is Part Two of what we anticipate will be a two-part compilation of 2011 State of Washington legislative enactments of interest to law enforcement. A subject matter index for both parts is provided beginning on page 16 of this LED.

Note that unless a different effective date is specified in the legislation (which will be shown with bolding in this update), acts adopted during the 2011 regular session take effect on July 22, 2011 (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.

Text of each of the 2011 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 likely will not be completed until early fall of this year.

Thank you to the staff of the Washington Association of Prosecuting Attorneys (WAPA), Washington Association of Sheriffs and Police Chiefs (WASPC) and the Washington State Patrol 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 editor, and (3) do not necessarily reflect the views of the Attorney General's Office or of the Criminal Justice Training Commission.

RECONCILING CHANGES MADE TO VEHICLE AND VESSEL REGISTRATION TITLE PROVISIONS DURING THE 2010 LEGISLATIVE SESSIONS
Chapter 171 (ESB 5061) **Effective date: July 22, 2011 and June 30, 2012**

Makes numerous amendments to title 46 RCW and other titles. The Final Bill Report summarizes the changes as follows: "Various technical corrections to certain vehicle and vessel registration statutes are made as a result of: (1) oversight or error in drafting SB 6379 from 2010, (2) double amendments made during the 2010 legislative sessions, or (3) the recodification from SB 6379."

Provides that "any statutory changes made by this act should be interpreted as technical in nature and not interpreted to have any substantive policy or legal implications."

MEDICAL USE OF CANNABIS – PARTIAL VETO
Chapter 181 (ESSSB 5073) Effective date: July 22, 2011

Makes numerous amendments to the existing laws relating to the medical use of marijuana (now referred to throughout as cannabis).

Expands the list of medical conditions that may benefit from the use of medical cannabis.

Provides that qualifying patients "shall not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences under state law based solely on their medical use of cannabis, notwithstanding any other provision of law." Health care professionals "shall also not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences under state law for the proper authorization of medical use of cannabis . . . ."

Provides that police officers may seize cannabis plants, useable cannabis, or cannabis product exceeding the legal limit. However, in the case of "plants, the qualifying patient or designated provider shall be allowed to select the plants that will remain at the location." (Emphasis added.) Officers may not be held civilly liable for failure to seize cannabis.

Amends RCW 69.51A.060(1) to reduce from a misdemeanor to a class 3 civil infraction the classification of the offense of use or display of medical cannabis in a manner or place which is open to the view of the general public..

In addition, the Final Bill Report summarizes the amendments, as well as the Partial Veto by the Governor, as follows:

> Health Care Professionals. In order to provide valid documentation, demonstrating that the patient is a qualifying patient, a health care professional must examine the patient, document the terminal or debilitating medical condition of the patient, inform the patient of other options for treating the terminal or debilitating medical condition, and document other measures attempted to treat the terminal or debilitating medical condition. The health care professional may not have a business which consists solely of authorizing the medical use of cannabis and may not advertise the medical use of cannabis.

Patient Protections. Qualifying patients may assert an affirmative defense, whether or not the patient possesses valid documentation, if the patient possess no more than the permissible levels of cannabis; the patient exceeds the permissible levels of cannabis but is able to establish a medical need for the additional amounts; and an investigating peace officer does not possess evidence of an unlicensed cannabis operation, theft of electrical power, illegal drugs, frequent visits consistent with commercial activity, violent crime, or that the subject of the investigation has an outstanding arrest warrant.

Parental rights may not be restricted solely due to the medical use of cannabis unless this results in long-term impairment that interferes with the performance of parenting functions. Qualifying patients may not be denied an organ transplant solely because of the use of medical cannabis.

Collective Gardens. Qualifying patients and their designated providers may form collective gardens to produce cannabis for the medical use of members of the collective gardens. Collective gardens are limited to ten qualifying patients and a total of 45 plants and 72 ounces of useable cannabis.

Designated Providers. Qualifying patients may revoke a designation of a designated provider at any time. A person may stop serving as a designated provider at any time but may not serve another patient until 15 days have elapsed.

Limitations. Health insurers are not required to provide cannabis as a covered benefit. The National Guard is not required to permit the medical use of cannabis of its employees. Drugfree workplaces are permitted and medical use of cannabis workplace accommodations are not required. [**LED EDITORIAL NOTE: Correctional agencies and departments and jails are also not required to accommodate the medical use of cannabis in correctional facilities or jails.**]

Evaluation and Study. The Washington State Institute for Public Policy must conduct a cost-benefit evaluation of the act and report its results to the Legislature by July 1, 2014. The University of Washington and the Washington State University may conduct scientific research on the efficacy and safety of administering cannabis as part of medical treatment.

Local Governments. Cities, towns, and counties may adopt zoning requirements, business licensing requirements, health and safety requirements, and business taxes pertaining to the production, processing, or dispensing of cannabis or cannabis productions within their jurisdictions.

Partial Veto Summary: The Governor vetoed provisions that would establish a patient registry within the Department of Health (DOH) and provide arrest protection for those patients who register. Licensing provisions for producers, processors, and dispensaries were vetoed, as well as the section providing current producers and dispensaries with an affirmative defense if they register with the Secretary of State and file a letter of intent with DOH or the Department of Agriculture (DOA). Also vetoed are the sections prohibiting the advertising of medical cannabis and the requirement that the Joint Legislative Audit and Review Committee review the licensing programs if the federal government

authorizes the medical use of cannabis and the requirement that if expenditures from the Health Professions Account exceed receipts, the amount will be made up by the General Fund. Housing protections for medical cannabis patients are also vetoed.

<u>LED EDITORIAL COMMENT</u>: This year's changes to the medical marijuana laws are lengthy and complex. Officers should consult their agency legal advisors and/or local prosecutors for specific guidance in interpreting this law.

ON PREMISES SPIRITS SAMPLING
Chapter 186 (ESHB 1202) Effective date: July 22, 2011

Directs the Liquor Control Board to establish a pilot project for spirit sampling in state liquor stores for the purpose of promoting a sponsor's product. Directs the selection of a designated number of stores and imposes restrictions.

USE OF EXISTING FEES COLLECTED FOR THE COST OF TRAFFIC SCHOOL
Chapter 197 (HB 1473) Effective date: July 22, 2011

Adds new sections to chapter 46.83 RCW proscribing where fees collected by a traffic school that are in excess of the cost of the traffic school may be utilized, prohibiting the increasing or imposing of new fees solely for those uses, and prohibiting fees in excess of the penalty for an unscheduled traffic infraction.

CHARITABLE SOLICITATIONS
Chapter 199 (SHB 1485) Effective date: July 22, 2011

Makes significant amendments to chapter 19.09 RCW governing charitable solicitations. Also amends RCW 19.09.275 which to make it a misdemeanor for an entity to violate any provision of chapter 19.09 RCW or to give false or incorrect information to the Secretary of State, Attorney General, or county prosecuting attorney in filing statements (and a gross misdemeanor to do so knowingly).

STATE ROUTE 527
Chapter 201 (SSHB 1519) Effective date: July 22, 2011

Amends RCW 47.17.745 to transfer a 2.51 mile section of State Route 527 from the state to the City of Bothell. The transferred section begins at State Route 522 and ends at Interstate 405.

DEPORTATION OF CRIMINAL ALIEN OFFENDERS – PARTIAL VETO
Chapter 206 (ESHB 1547) **Effective date: April 29, 2011**

Amends RCW 9.94A.685 to allow the Department of Corrections to deport criminal alien offenders without the approval of the sentencing court and the prosecuting attorney. This applies to all crimes except a violent offense or sex offense. The arrest warrant issued when the offender is released to the immigrations and customs enforcement agency remains in effect indefinitely.

CERTAIN COMMERCIAL MOTOR VEHICLE PROVISIONS
Chapter 227 (HB 1229) **Effective date: July 22, 2011 and January 30, 2012**

Makes a number of changes to the Commercial Driver's License (CDL) requirements. The Final Bill Report summarizes the changes as follows:

> Various changes are made to Washington's CDL requirements.
>
> A person who applies for a CDL must certify that he or she expects to engage in one of four types of driving: nonexcepted interstate, excepted interstate, nonexcepted intrastate, or excepted intrastate. For a two-year period of time, the DOL may require a person who holds a CDL prior to the effective date of this act to self-certify driving type.
>
> Definitions are added for each of the four types of driving. Those who engage in excepted interstate driving are not required to obtain a medical certificate. Those who engage in excepted intrastate driving are excepted from all or parts of the state CDL driver qualification requirements. A person who self-certifies that he or she expects to engage in nonexcepted interstate driving must submit a medical examiner's certificate to the DOL.
>
> A category labeled "V" has been added to the endorsements and restrictions to indicate that a driver has been issued a federal medical variance.
>
> If a driver fails to self-certify or provide a medical examiner's certificate when one is required, the DOL must mark the commercial driver license information system (CDLIS) driver's status as "not-certified" and must start procedures to downgrade the driver's license. A driver whose CDL has been downgraded may restore his or her CDL privileges by providing the necessary documents to the DOL.
>
> If a driver's medical certification or medical variance information expires, the DOL must provide notification that the driver will be given a noncertified medical status, and the DOL must provide notification that the driver's CDL privileges will be removed unless the driver changes his or her self-certification of driving type. If a driver is given a noncertified medical status, the DOL must initiate procedures for downgrading the driver's license.
>
> Recordkeeping requirements are revised for the DOL:
>
> . . .
>
> Minimum disqualification periods are increased for a driver who violates an out-of-service order. A person is disqualified from driving a commercial motor vehicle for not less than 180 days but not more than a year for the first violation of an out-of-service order. A person is disqualified from driving a commercial motor vehicle for not less than two years but not more than five years for two violations of an out-of-service order in a 10-year period.
>
> Monetary penalties for drivers and employers for violations of out-of-service orders are increased. A driver who is convicted of violating an out-of-service order is subject to a civil penalty of not less than $2,500 for a first violation and not less than $5,000 for a second or subsequent violation. An employer who allows the operation of a commercial motor vehicle when there is an out-of-service order is subject to a penalty of not less than $2,750 but not more than $25,000.

[Initial and renewal fees are increased]

TESTING FOR BLOODBORNE PATHOGENS
Chapter 232 (HB 1454) Effective date: July 22, 2011

Amends RCW 70.24.340(4) to allow law enforcement officers, firefighters, health care providers, health care facility staff, department of corrections' staff, jail staff, or other categories of employment determined by the board of health to be at risk of substantial exposure to HIV, who have experienced a substantial exposure to another person's bodily fluids in the course of their employment, to request that the person whose bodily fluids they have been exposed to be tested for bloodborne pathogens in addition to HIV.

Amends RCW 70.24.105(2) to require that when such a test has been requested and performed that the results be provided to the requesting person.

OFFENDERS WITH DEVELOPMENTAL DISABILITIES OR TRAUMATIC BRAIN INJURIES
Chapter 236 (SHB 1718) Effective date: July 22, 2011

Amends RCW 2.28.180 to authorize counties to include non-violent felony and non-felony offenders with developmental disabilities or traumatic brain injuries in mental health courts.

Adds a new section to chapter 70.48 RCW that provides: "When a jail has determined that a person in custody has or may have a developmental disability as defined in RCW 71A.10.020 or a traumatic brain injury, upon transfer of the person to a department of corrections facility or other jail facility, every reasonable effort shall be made by the transferring jail staff to communicate to receiving staff the nature of the disability, as determined by the jail and any necessary accommodation for the person as identified by the transferring jail staff."

NONLEGAL IMMIGRATION-RELATED SERVICES – "IMMIGRATION SERVICES FRAUD PREVENTION ACT"
Chapter 244 (SSB 5023) **Effective date: October 20, 2011**

Amends chapter 19.154 RCW (immigration assistant practices act) in an attempt to curtail the unauthorized practice of law by non-lawyers and other unauthorized persons in the area of immigration.

Also requires that persons licensed as a notary public comply with the act and prohibits them from using the term notario public, notario, immigration assistant, immigration consultant, immigration specialist, or any other designation or title, in any language, that conveys or implies that he or she possesses professional legal skills in the areas of immigration law, when advertising notary public services in the conduct of their business, unless they are licensed to practice law in this state.

Provides a civil cause of actions for damages for violation of the act. Violation is also a gross misdemeanor under RCW 19.154.100.

ABANDONED OR DERELICT VESSEL
Chapter 247 (SSB 5271) Effective date: July 22, 2011

Amends RCW 79.100.110 to add a new misdemeanor:

(1) A person who causes a vessel to become abandoned or derelict upon aquatic lands is guilty of a misdemeanor.
(2) A person who intentionally, through action or inaction and without the appropriate state, local, or federal authorization, causes a vessel to sink, break up, or block a navigational channel upon aquatic lands is guilty of a misdemeanor.

PENALTIES FOR PUBLIC RECORDS VIOLATIONS
Chapter 273 (SHB 1899) Effective date: July 22, 2011

Amends RCW 42.56.550(4) to remove the minimum daily penalty that a court may award a person who prevails against an agency in a public records act lawsuit. Courts may now award between $0 and $100 per day.

UNLAWFUL DUMPING OF SOLID WASTE
Chapter 279 (SSB 5350) Effective date: July 22, 2011

RCW 70.95.240 relating to the unlawful dumping of solid waste. Modifies provisions relating to litter cleanup restitution payments and their use, and prohibits a landowner who authorizes dumping on his or her property from receiving such payments.

COTTAGE FOOD OPERATIONS
Chapter 281 (ESSB 5748) Effective date: July 22, 2011

Adds a new chapter to title 69 RCW to allow for "cottage food operations" which will be regulated by the Department of Agriculture. "Cottage food operation" means a person who produces cottage food products only in the home kitchen of that person's primary domestic residence in Washington and only for sale directly to theconsumer. "Cottage food products" means nonpotentially hazardous baked goods; jams, jellies, preserves, and fruit butters . . . and other nonpotentially hazardous foods identified by the director [of the Department of Agriculture] in rule."

Adopts a regulatory scheme that includes requirements relating to food preparation and authorized inspection.

Section 9 provides that any person engaging in a cottage food operation without a valid permit or otherwise violating any provision of the chapter or rules adopted under the chapter is guilty of a misdemeanor. A second or subsequent violation is a gross misdemeanor. However, if the director finds that a person has committed a violation of any provisions of the chapter, and that violation has not been punished as a crime, then the director may impose upon and collect from the violator a civil penalty not exceeding one thousand dollars per violation per day. Each violation shall be a separate and distinct offense.

REGULATION OF SECOND HAND DEALERS ["CASH FOR GOLD"]
Chapter 289 (ESHB 1716) Effective date: July 22, 2011

Adds a number of sections to chapter 19.60 RCW relating to the regulation of second hand precious metal dealers, including adding a definition of "second hand precious metal dealer" to RCW 19.60.010(7), requiring a business license for second hand precious metal dealers, and imposing record keeping requirements.

Section 3 requires that second hand precious metal dealers collect significant information relating to any transaction involving property consisting of a precious metal bought or received from an individual. Such records shall be open to inspection by law enforcement during business hours, and must be maintained for three years following the date of the transaction.

Section 5 provides that if the chief law enforcement officer has "compiled and published a list of persons who have been convicted of any crime involving theft, then a secondhand precious metal dealer shall utilize such a list for any transaction involving property other than property consisting of a precious metal . . . ."

Section 7 provides:

> (1) It is a gross misdemeanor for:
> (a) A secondhand precious metal dealer to knowingly make, cause, or allow to be made any false entry or misstatement of any material matter in any book, record, or writing required to be kept under sections 1 through 6 and 9 of this act involving property consisting of precious metal;
> (b) A secondhand precious metal dealer to receive any precious metal property from any person known to the secondhand precious metal dealer as having been convicted of burglary, robbery, theft, or possession of or receiving stolen property within the past ten years whether the person is acting in his or her own behalf or as the agent of another; or
> (c) A secondhand precious metal dealer to knowingly violate any other provision relating to precious metals under sections 3 through 6 and 9 of this act.
> (2) It is a class C felony for a secondhand precious metal dealer to commit a second or subsequent violation of subsection (1) of this section involving property consisting of a precious metal.

Also regulates second hand precious metal dealers' involvement in "hosted home parties."

ACCOUNTABILITY FOR PERSONS DRIVING UNDER THE INFLUENCE OF ALCOHOL OR DRUGS
Chapter 293 (ESSHB 1789) **Effective date: July 22 and September 1, 2011**

Makes a number of amendments to the existing DUI laws including elevating a DUI to a felony DUI if the person has ever previously been convicted of felony DUI in Washington. [**LED EDITORIAL NOTE: Although at first glance this change might seem unnecessary as any DUI subsequent to a felony DUI would also result in a charge of felony DUI, this makes it easier for prosecutors to prove the felony DUI.**] Also expands the definition of prior offense to include a conviction for vehicular assault or vehicular homicide, based on driving in a reckless manner or driving with the disregard for the safety of others, if the original charge was filed as a vehicular assault or vehicular homicide, based on DUI.

Requires the installation of an ignition interlock device for six months if a person is convicted of negligent driving in the first degree and has any prior offense within seven years, reckless driving and has any prior offense within seven years if the original charge was filed as a DUI, or reckless driving, whether or not the person has any prior offenses, if the original charge was filed as vehicular assault based on DUI or vehicular homicide based on DUI.

The $125 fee imposed on offenders is increased to $200. Of the total amount, $175 must be distributed in the same manner as the current fee is distributed, and $25 of the fee must be

deposited into the Highway Safety Account to be used solely for funding Washington Traffic Safety Commission (WTSC) grants to reduce statewide collisions caused by DUI.

REQUIRING THE DENIAL OF A CONCEALED PISTOL LICENSE APPLICATION WHEN THE APPLICANT IS INELIGIBLE TO POSSESS A FIREARM UNDER FEDERAL LAW
Chapter 294 (SHB 1923) Effective date: July 22, 2011

Amends RCW 9.41.070 to require that Washington state concealed pistol license applications be denied when the applicant is prohibited from possessing a firearm under federal law. Requires issuing agencies to conduct the check through the National Instant Criminal Background Check System.

Also requires an applicant who is not a United States citizen to provide the applicant's country of citizenship, United States issued alien number or admission number, and the basis on which the applicant claims to be exempt from federal prohibitions on firearm possession by aliens.

LED EDITORIAL COMMENT: State and federal firearms prohibitors differ from each other. This amendment should remedy the relatively common concealed pistol license application situation where an individual is permitted to possess a firearm under Washington state law, but is prohibited from possessing the firearm under federal law.

BACKGROUND CHECKS FOR CHILD CARE LICENSEES AND EMPLOYEES
Chapter 295 (SSHB 1903) Effective date: July 22, 2011

Adds and amends sections to chapter 43.215 RCW to require fingerprint based background checks for anyone seeking a childcare license or employment in any licensed childcare facility.

MASTER LICENSE SERVICE PROGRAM
Chapter 298 (SHB 2017) **Effective date: July 1, 2011**

Transfers the Master License Service Program from the Department of Licensing to the Department of Revenue (DOR). Creates a single set of rules governing the confidentiality and disclosure of licensing information along with the conditions in which the DOR is not prohibited from disclosing such information. Creates a misdemeanor offense for the disclosure of certain confidential licensing information. If the violator is a current state employee, future employment with the state is prohibited for two years.

MAKING REQUESTS BY OR ON BEHALF OF AN INMATE UNDER THE PUBLIC RECORDS ACT INELIGIBLE FOR PENALTIES [EXCEPT WHERE AGENCY ACTS IN BAD FAITH]
Chapter 300 (SSB 5025) Effective date: July 22, 2011

Amends RCW 42.56.565 to prohibit a court from awarding penalties under RCW 42.56.550(4) (penalty provision of the public records act) to a person who was serving a criminal sentence in a state, local, or privately operated correctional facility on the date the public records request was made, unless the court finds that the agency acted in bad faith.

IMPROVING COMMUNICATION, COLLABORATION, AND EXPEDITED MEDICAID ATTAINMENT WITH REGARD TO PERSONS DIVERTED, ARRESTED, CONFINED OR TO BE RELEASED FROM CONFINEMENT OR COMMITMENT WHO HAVE MENTAL HEALTH OR CHEMICAL DEPENDENCY DISORDERS
Chapter 305 (SSB 5452) Effective date: July 22, 2011

The Final Bill Report summarizes the bill as follows:

> **Background**: The Post Institutional Medical Assistance system (PIMA system) is a communication tool under development at the Department of Social and Health Services (DSHS) which will facilitate suspension of medical assistance and expedited medical assistance applications for persons in custody of a correctional facility or institution for mental disease.
>
> **Summary**: DSHS may disclose the fact, place, and date of an individual's civil commitment for mental health treatment to a correctional institution for the purpose of using the PIMA system. An evaluation and treatment facility, emergency department, or crisis stabilization unit which detains a person for a civil commitment evaluation must make reasonable attempts to inform a peace officer if the patient is released pursuant to a specific request if the officer has provided contact information. Notification of the release or escape of a state hospital patient committed following a charge for a sex, violent, or felony harassment offense must be provided to the chief of police and sheriff of the city or county which had jurisdiction over the person at the time of the offense.

EGGS AND EGG PRODUCTS IN INTRASTATE COMMERCE
Chapter 306 (SSB 5487) **Effective date: August 1, 2012**

Amends and adds sections to chapter 69.25 RCW (Washington wholesome eggs and egg product act) imposing additional requirements relating to the housing conditions of hens. It is a misdemeanor to violate any provision of chapter 69.25 RCW. A second or subsequent violation is a gross misdemeanor. See RCW 69.25.150(1).

HARASSMENT
Chapter 307 (SSB 5579) Effective date: July 22, 2011

Makes a number of changes relating to the issuance of civil anti-harassment orders. The Final Bill Report summarizes the changes as follows:

> District courts have original jurisdiction to grant civil anti-harassment protection orders and municipal courts may opt to exercise jurisdiction by adopting procedures through local court rules. The district court or municipal court must transfer proceedings to the superior court if (1) the respondent to the petition is under 18 years of age; (2) the action involves title or possession of real property; (3) a superior court has exercised or is exercising jurisdiction over a proceeding involving the parties; or (4) the action would have the effect of interfering with a respondent's care, control, or custody of the respondent's minor child.
>
> Prior to granting an ex parte temporary anti-harassment protection order or a civil antiharassment protection order, the court may consult the judicial information system for records regarding criminal histories and other current proceedings involving the parties.
>
> In granting an ex parte temporary anti-harassment protection order or a civil anti-harassment protection, the court cannot restrict the respondent's (1) constitutionally protected free speech; (2) use or enjoyment of his or her real property unless the order is related to dissolution proceedings or a separate action involving the title or possession of real property; and (3) right to care,

control, or custody of his or her minor child, unless the order is related to dissolution proceedings, non-parental actions for child custody, or proceedings under the Uniform Parentage Act or the Family Reconciliation Act.

An intentional violation of a court order by a defendant charged with a crime involving harassment under RCW 9A.46.040, or the equivalent local ordinance, is a misdemeanor.

A willful violation of a court order by a defendant found guilty of the crime of harassment issued under RCW 9A.46.080, or the equivalent local ordinance, is a misdemeanor.

SHARK FINNING ACTIVITIES
Chapter 324 (SSB 5688) Effective date: July 22, 2011

Creates new crimes of unlawful trading in shark fins, added to chapter 77.15 RCW, which read as follows:

(1) Except as otherwise provided in this section, a person is guilty of unlawful trade in shark fins in the second degree if:
(a) The person sells, offers for sale, purchases, offers to purchase, or otherwise exchanges a shark fin or shark fin derivative product for commercial purposes; or
(b) The person prepares or processes a shark fin or shark fin derivative product for human or animal consumption for commercial purposes.
(2) Except as otherwise provided in this section, a person is guilty of unlawful trade in shark fins in the first degree if:
(a) The person commits the act described by subsection (1) of this section and the violation involves shark fins or a shark fin derivative product with a total market value of two hundred fifty dollars or more;
(b) The person commits the act described by subsection (1) of this section and acted with knowledge that the shark fin or shark fin derivative product originated from a shark that was harvested in an area or at a time where or when the harvest was not legally allowed or by a person not licensed to harvest the shark; or
(c) The person commits the act described by subsection (1) of this section and the violation occurs within five years of entry of a prior conviction under this section or a prior conviction for any other gross misdemeanor or felony under this title involving fish, other than a recreational fishing violation.
(3)(a) Unlawful trade in shark fins in the second degree is a gross misdemeanor. Upon conviction, the department shall suspend any commercial fishing privileges for the person that requires a license under this title for a period of one year.
(b) Unlawful trade in shark fins in the first degree is a class C felony. Upon conviction, the department shall suspend any commercial fishing privileges for the person that requires a license under this title for a period of one year.
(4) Any person who obtains a license or permit issued by the department to take or possess sharks or shark parts for bona fide research or educational purposes, and who sells, offers for sale, purchases, offers to purchase, or otherwise trades a shark fin or shark fin derivative product, exclusively for bona fide research or educational purposes, may not be held liable under or subject to the penalties of this section.
(5) Nothing in this section prohibits the sale, offer for sale, purchase, offer to purchase, or other exchange of shark fins or shark fin derivative products for

> commercial purposes, or preparation or processing of shark fins or shark fin derivative products for purposes of human or animal consumption for commercial purposes, if the shark fins or shark fin derivative products were lawfully harvested or lawfully acquired prior to the effective date of this section.

VEHICLE AND VESSEL QUICK TITLE
Chapter 326 (SHB 1046) **Effective date: January 1, 2012**

Amends and adds sections relating to the issuance of "quick titles" for vehicles and vessels, including prohibiting the quick title process from being used to obtain the first title issued to a vehicle previously designated as a salvage vehicle.

OPERATION OF MOTORCYLES
Chapter 332 (SHB 1328) Effective date: July 22, 2011

Amends RCW 46.61.613 to temporarily suspend the provisions of RCW 46.37.530 and 46.61.610 through 46.61.612 (relating to equipment standards and helmet use) with respect to the operation of motorcycles on closed roads during parades or public demonstrations that have been permitted by a local jurisdiction.

Also expands the types of special license plates that the Department of Licensing may issue to motorcycles.

RESTRICTING ACCESS TO JUVENILE RECORDS
Chapter 333 (SHB 1793) Effective date: July 22, 2011

Amends RCW 13.50.050 to address the treatment of juvenile records when the juvenile receives a full and unconditional pardon from the Governor. The proceedings shall be treated as if they never occurred and the subject of record may reply accordingly to any inquiry about the events upon which the pardon was received. "Any agency shall reply to any inquiry concerning the records pertaining to the events for which the subject received a pardon that records are confidential, and no information can be given about the existence or nonexistence of records concerning an individual." Additionally, all records held by any court, law enforcement agency or prosecutor's office "shall be automatically destroyed within thirty days of being notified by the governor's office that the subject of those records received a full and unconditional pardon by the governor."

IMPROVING THE ADMINISTRATION AND EFFICIENCY OF SEX AND KIDNAPPING OFFENDER REGISTRATION
Chapter 337 (SSB 5203) Effective date: July 22, 2011

Makes a number of changes to the sex and kidnapping offender registration statutes.

The Final Bill Report summarizes the bill as follows:

> Terminology currently used throughout the registration and notification provisions are defined for the first time. Fixed residence is defined generally as a building that a person lawfully and habitually uses as living quarters a majority of the week. Lacks a fixed residence means the person does not have a residence that falls into the fixed residence definition and specifically includes a shelter program, an outdoor sleeping location, or locations where the person does not have permission to stay.

For the purposes of registration in this state, a sex offense includes:

- any federal conviction classified as a sex offense under the federal Sex Offender Registration and Notification Act;
- any military conviction for a sex offense; and
- any conviction in a foreign country for a sex offense obtained with sufficient safeguards for due process.

A person with a federal or out-of-state conviction for a sex offense may request to be removed from the registry if the person was relieved of the duty to register in the person's state of conviction. The person must provide proof of relief from registration to the county sheriff. If the county sheriff determines the person should be removed from the registry, the sheriff will request the Washington State Patrol remove the person.

The information a person must provide when registering is clarified. A person may be required to update any of his or her registration information in conjunction with any address verification conducted by the sheriff or as part of any notice the person is required to provide.

Changes clarify that two or more prior felony convictions for failure to register will classify a new conviction for failure to register as a class B felony regardless if those convictions were in Washington or in another state. A person who is required to register in Washington for a crime committed in another state may petition for relief from registration in the county of the person's residence rather than being required to file in Thurston county.

The responsibility of law enforcement and a school in response to notification that a sex offender will attend the school is set out in a separate statute. Law enforcement must provide notice to the school principal and the school district. Information about the student that must be provided is specified to include the risk level classification.

Provisions are updated to reflect the current practices of WASPC utilizing the SONAR system.

JUVENILES WHO HAVE BEEN ADJUDICATED OF A SEX OFFENSE
Chapter 338 (SSB 5204) Effective date: July 22, 2011

Amends RCW 9A.44.143 relating to when juvenile offenders may be relieved of the duty to register as sex offenders, and amends RCW 13.50.050 relating to the sealing of records of juvenile sex offenses.

USE OF TELEVISION VIEWERS IN MOTOR VEHICLES
Chapter 368 (SHB 1103) Effective date: July 22, 2011

Amends RCW 46.37.180(1) to remove the prohibition against television viewers, screens, or other means of visually receiving television broadcasts from being located at any point forward of the back of the driver's seat. The section now reads: "No person shall drive any motor vehicle equipped with any television viewer, screen, or other means of visually receiving a television broadcast <u>when the moving images are</u> visible to the driver while operating the motor vehicle <u>on a public road, except for live video of the motor vehicle backing up.</u>"

The exemption for law enforcement vehicles communicating with mobile computer networks remains unchanged.

USE OF EXPRESS TOLL LANES IN THE EASTSIDE CORRIDOR [ON I-405]
Chapter 369 (EHB 1382) Effective date: July 22, 2011

Adds a new section to chapter 47.56 RCW that authorizes the "imposition of tolls for express toll lanes on Interstate 405 between the junctions with Interstate 5 on the north end and NE 6th street in the city of Bellevue on the south end." A violation of the lane restrictions is an infraction. The express toll lanes project must be terminated if it does not meet certain performance criteria within two years.

REDUCING CUSTOMER WAIT TIMES AT DRIVER LICENSING OFFICES
Chapter 370 (ESHB 1635) Effective date: July 22, 2011

Allows the Department of Licensing to authorize the administration of driver licensing examinations by commercial driver training schools and school districts' traffic safety education programs in order to maintain and reprioritize its staff for the purpose of reducing the wait times at its driver licensing offices.

NEGLIGENT DRIVING RESULTING IN SUBSTANTIAL BODILY HARM, GREAT BODILY HARM, OR DEATH OF A VULNERABLE USER OF A PUBLIC WAY
Chapter 372 (SSB 5326) **Effective date: July 1, 2012**

Creates a new infraction, with significant penalties and license suspension, for negligent driving in the second degree with a vulnerable user victim. The new section, added to chapter 46.61 RCW, reads in part as follows:

> (1) A person commits negligent driving in the second degree with a vulnerable user victim if, under circumstances not constituting negligent driving in the first degree, he or she operates a vehicle, as defined in RCW 46.04.670, in a manner that is both negligent and endangers or is likely to endanger any person or property, and he or she proximately causes the death, great bodily harm, or substantial bodily harm of a vulnerable user of a public way.
> (2) The law enforcement officer or prosecuting authority issuing the notice of infraction for an offense under this section shall state on the notice of infraction that the offense was a proximate cause of death, great bodily harm, or substantial bodily harm, as defined in RCW 9A.04.110, of a vulnerable user of a public way.
> (3) Persons under the age of sixteen who commit an infraction under this section are subject to the provisions of RCW 13.40.250.
> . . .
>
> (11)(c) "Vulnerable user of a public way" means:
> (i) A pedestrian;
> (ii) A person riding an animal; or
> (iii) A person operating any of the following on a public way:
> (A) A farm tractor or implement of husbandry, without an enclosed shell;
> (B) A bicycle;
> (C) An electric-assisted bicycle;
> (D) An electric personal assistive mobility device;

(E) A moped;
(F) A motor-driven cycle;
(G) A motorized foot scooter; or
(H) A motorcycle.

AUTOMATED SCHOOL BUS SAFETY CAMERAS
Chapter 375 (SSB 5540) Effective date: July 22, 2011

Authorizes school districts to install and operate automated school bus safety cameras on school buses to be used for the detection of violations of RCW 46.61.370(1) (stopping for school bus when sign is out) if the use of the cameras is approved by a vote of the school district board of directors.

Amends RCW 46.63.030(1) to add that a law enforcement officer has the authority to issue a notice of infraction when the infraction is detected through the use of an automated school bus safety camera.

The remaining provisions are similar to those for automated traffic cameras, including that the infraction does not become part of the registered owner's driving record.

LED EDITORIAL COMMENT: Section 10 of the act provides that "Sections 5, 7, and 9 of this act take effect upon certification by the secretary of transportation that the new statewide tolling operations center and photo toll system are fully operational. A notice of certification must be filed with the code reviser for publication in the state register. If a certificate is not issued by the secretary of transportation by December 1, 2012, sections 5, 7, and 9 of this act are null and void."

Section 5 of the act is the section that authorizes officers to issue notices of infraction when the infraction is detected through the use of an automated school bus safety camera. Section 7 relates to the proof necessary to establish the infraction. Section 9 appears to be a revised system for notifying the department of licensing of outstanding infractions.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) WORDS ALONE CANNOT CONSTITUTE OBSTRUCTING – In State v. Williams, ___ Wn.2d ___, 2011 WL 1834259 (2011), the Washington Supreme Court rules unanimously that merely lying to a law enforcement officer cannot ever constitute obstructing under RCW 9A.76.020. Defendant Williams had told multiple lies to law enforcement officers during the course of a law enforcement investigation into a theft, and he had been convicted of three charges: 1) first degree theft, 2) obstructing, and 3) "knowingly making a false or misleading material statement to a public servant . . . ." in violation of RCW 9A.76.175. His appeal challenged and therefore affected only his conviction for obstructing.

Result: Reversal of Court of Appeals decision (see State v. Williams, 152 Wn. App. 537 (Div. II, 2009) **Jan 10 LED:17**) that affirmed the Pierce County Superior Court conviction of Michael Deroun Williams for obstructing.

LED EDITORIAL COMMENT: **The Supreme Court opinion is authored by Justice Tom Chambers. The opinion expressly states that the Court is not addressing Williams' conviction for a false statement to a public servant under RCW 9A.76.175. But the opinion contains some loose and troubling theoretical constitutional law discussion that likely will trigger challenges by defendants who are charged under RCW 9A.76.175 for lying to law enforcement officers. And the Supreme Court was unanimous in joining in the opinion that reversed Williams' conviction for obstructing. Nonetheless, we think that – in any future case involving a conviction under RCW 9A.76.175 for lying to a law enforcement officer – a majority of the Washington Supreme Court will support the conviction if the evidence is that the defendant "knowingly [made] a false or misleading material statement to a public servant . . . ." in violation of RCW 9A.76.175.**

(2) STATE'S WAIVER/FAILURE-TO-PRESERVE-ARGUMENT THEORY REJECTED IN VEHICLE SEARCH INCIDENT CASES – In the consolidated case of State v. Robinson, ___Wn.2d ___, 2011 WL 1434607 (2011) (involving defendants Michael Wayne Robinson and Francisco Javier Millan in two separate cases consolidated on appeal), the Washington Supreme Court rules under article I, section 7 of the Washington constitution that a criminal defendant can raise a constitutional theory for the first time in the appellate courts where: (1) a Washington appellate court (or, presumably, the U.S. Supreme Court) has issued a new controlling constitutional interpretation material to the defendant's case, (2) that interpretation overrules an existing controlling interpretation, (3) the new interpretation applies retroactively to the defendant, and (4) the defendant's trial was completed prior to the new interpretation.

Seven of the nine members of the Washington Supreme Court agree in the Robinson and Millan cases that (1) the vehicle-search-incident ruling of the United States Supreme Court in Arizona

v. Gant, 129 S. Ct. 1710 (2009) **June 09 LED:13** was a new interpretation of the Fourth Amendment; and (2) that the vehicle-search-incident ruling of the Washington Supreme Court in State v. Patton, 167 Wn.2d 369 (2009) **Dec 09 LED:17** and subsequent cases similarly was a new interpretation of article I, section 7. These seven Washington Supreme Court Justices further agree that in light of this legal proposition, Millan and Robinson are allowed to raise the admissibility of evidence under Gant and Patton for the first time on appeal. The Court further rules, however, that the record is not sufficiently developed to fully address the substantive constitutional issues, and that each case must be remanded to the trial court for the defendants and the State to further develop the record on the defendant's search-law-based claims.

Chief Justice Madsen writes a dissent (joined by Justice James Johnson) arguing that Gant and Patton did not establish new constitutional interpretations, and therefore the Court should apply the judicial-economy-based principle of waiver, or failure to preserve argument, and not allow the defendants to raise their constitutional challenges that they raised for the first time in the appellate courts.

Result: Each of the criminal defendants in the two consolidated cases prevails. Reversal of Court of Appeals decision in State v. Millan, 151 Wn. App. 492 (Div. II, 2009) **Nov 09 LED:21** – the latter decision had affirmed the Pierce County Superior Court conviction of Francisco Javier Millan for unlawful possession of a firearm. Reversal of unpublished Court of Appeals decision in State v. Robinson – the latter decision had affirmed the Thurston County Superior Court convictions of Michael Wayne Robinson on multiple felony charges. Each case is remanded to superior court for possible re-trial.

****

WASHINGTON COURT OF APPEALS

RCW 46.61.210'S FAILURE-TO-YIELD PROVISIONS APPLY ONLY TO EMERGENCY PASSING EFFORTS, NOT TO TRAFFIC STOP CIRCUMSTANCES; DRIVER WHO PULLED OVER TO LEFT, INSTEAD OF RIGHT, SHOULDER OF I-5 WHEN SIGNALED TO STOP FOR SPEEDING DID NOT VIOLATE THE STATUTE (OR ANY OTHER STATUTE, IT APPEARS)

State v. Weaver, ___ Wn. App. ___, 2011 WL 1252125 (Div. II, 2011)

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

> On February 3, 2009, Weaver was driving northbound on Interstate 5 in Lewis County. [A] Washington State Patrol Trooper was stopped on the side of the freeway watching for speeding motorists. After [the trooper] observed Weaver's vehicle exceeding the posted speed limit, he activated his emergency lights and siren and pulled behind her to perform a traffic stop.
>
> Weaver slowed down, signaled to the left, and pulled to the left shoulder of the freeway. [The trooper] directed Weaver to move across the freeway to the right shoulder, which Weaver did. [The trooper] then cited Weaver for, among other infractions, failing to yield under RCW 46.61.210. [Court's footnote: *The other infractions are not before us.*]
>
> Weaver contested the infraction and the District Court found that she committed the infraction of failing to yield to an emergency vehicle. Weaver appealed to the Superior Court, which reversed the District Court's ruling and held that the failure

> to yield statute applies only when the approaching emergency vehicle is responding to an "actual emergency," not when making a traffic stop.

<u>ISSUE AND RULING</u>: When signaled to stop for speeding, Ms. Weaver pulled over on the left shoulder instead of the right shoulder of the I-5 freeway. Does RCW 46.61.210, the failure-to-yield statute, which requires that drivers pull over to the right shoulder to allow emergency vehicles to pass, apply to a driver who is being stopped for a traffic law violation? (<u>ANSWER</u>: No)

<u>Result</u>: Affirmance of Lewis County Superior Court decision that reversed the District Court's finding that Anna Weaver committed the traffic infraction of failure to yield to an emergency vehicle.

<u>ANALYSIS</u>:

In salient part, the analysis by the Court of Appeals is as follows:

> There are four statutes relevant to our analysis. The primary statute at issue, RCW 46.61.210(1) provides:
>
>> Upon the immediate approach of an authorized emergency vehicle making use of audible and visual signals meeting the requirements of RCW 46.37.190, or of a police vehicle properly and lawfully making use of an audible signal only the driver of every other vehicle shall yield the right-of-way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the roadway clear of any intersection and shall stop and remain in such position until the authorized emergency vehicle has passed, except when otherwise directed by a police officer.
>
> RCW 46.04.672 defines "vehicle . . . right-of-way" as "the right of one vehicle . . . to proceed in a lawful manner in preference to another vehicle . . . approaching under such circumstances of direction, speed, and proximity as to give rise to danger of collision unless one grants precedence to the other." The failure to abide by RCW 46.61.210(1) is a civil infraction. RCW 46.63.020.
>
> The third statute, RCW 46.61.021(1), provides that "[a]ny person requested or signaled to stop by a law enforcement officer for a traffic infraction has a duty to stop." And finally, RCW 46.37.190 provides in pertinent part:
>
>> (1) Every authorized emergency vehicle shall, in addition to any other equipment and distinctive marking required by this chapter, be equipped with at least one lamp capable of displaying a red light visible from at least five hundred feet in normal sunlight and a siren capable of giving an audible signal.
>> . . . .
>>
>> (5) The use of the signal equipment described in this section . . . shall impose upon drivers of other vehicles the obligation to yield right-of-way and stop as prescribed in RCW 46.61.210, 46.61.370, and 46.61.350.

. . . .

> The plain language of RCW 46.61.210(1) clearly requires drivers to pull to the right and yield when an emergency vehicle is operating emergency equipment and is attempting to pass. Only after the emergency vehicle has passed is it then lawful for the driver to return to the roadway. RCW 46.61.210(1). Because in this case [the trooper] was not attempting to travel beyond the vehicle that committed a traffic infraction, it is clear that Weaver's conduct did not implicate the failure to yield statute under RCW 46.61.210(1) whatsoever.
>
> Instead, RCW 46.61.021(1) governs, which plainly and simply compels the driver to stop whenever signaled to do so by a police officer. [Court's footnote: *A driver that fails to obey a police officer is guilty of a misdemeanor under RCW 46.61.022.*] RCW 46.61.021(1) is silent as to which side of the roadway a driver must pull to. Had the legislature intended for drivers to comply with RCW 46.61.210(1) when stopped by a police officer, it certainly could have done so. And no statutory language exists that links RCW 46.61.210 and RCW 46.61.021 together, despite references to other statutes in RCW 46.61.210. The relevant statutory language does not support the State's position here.

LED EDITORIAL COMMENT: There appears to be no violation of law in the situation of the Weaver case, i.e., a driver pulling over on the left shoulder instead of the right shoulder of the freeway in a traffic stop. As set forth in the excerpt above, the Court of Appeals opinion impliedly suggests, however, that if a driver fails to stop when signaled to do so by an officer, then the proper statute to cite is the misdemeanor of violation of RCW 46.61.022.

****

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) COMMON LAW CIVIL LIABILITY: TO PROVE "SPECIAL RELATIONSHIP" BETWEEN CRIME VICTIM AND GOVERNMENT AS EXCEPTION TO "PUBLIC DUTY DOCTRINE," 911 OPERATOR'S STATEMENTS TO CALLER NEED NOT BE SHOWN BY PLAINTIFFS TO HAVE BEEN FALSE OR INACCURATE – In Munich v. Skagit Emergency Communications Center (and others), ___Wn. App. ___, 2011 WL 1376996 (Div. I, 2011), the Court of Appeals holds that in a lawsuit based on a 911 operator's assurance of law enforcement response, the suing party need not show that the assurance was false or inaccurate in order to establish a "special relationship' for purposes of the "public duty doctrine."

At 6 p.m. on October 1, 2005, William Munich called 911 from his rural property and reported that the neighbor on adjoining property had just shot at him with a rifle from the property line fence. After immediately getting an officer dispatched to the scene of the event, the 911 operator engaged in the following phone conversation with Mr. Munich (as set forth in the Court of Appeals opinion):

> [Operator]: Ok, my partner's already got . . . my partner's already got a deputy that's headed towards you.
> Munich: Ok, thank you[.]
>
> [Operator]: Ok, so are you going to wait, you're going to wait there for contact?
> Munich: Oh yeah, definitely[.]

[Operator]: Ok, did the, when the guy with the gun left, did he leave on foot or in a vehicle[.]
Munich: No, he lives right there, I know him, I mean he's standing right there right on the fence line.

[Operator]: He's still standing there on the fence line?
Munich: I can't see him from here[.]

[Operator]: Ok. Are you in a house? Are you someplace safe?
Munich: I'm in my . . . I'm in my garage right now[.]

[Operator]: Ok, is there a house on that property or is there just a garage there?
Munich: There's just a garage, we're just in the process of building a . . . , we just finished the garage and now we're trying a house.

[Operator]: Ok, you're going to wait there at the garage for contact then?
Munich: Yeah, I have a cable across the driveway so . . .

[Operator]: Ok, all righty, there's already a deputy that's en route to you, ok?
Munich: Ok thank you[.]

[Operator]: All righty, thank you, bye bye.

The call ended at 6:03. At 6:10, Mr. Munich called 911 again and while he was telling the operator about the "crazy bastard" neighbor chasing him down a road – he on foot and the assailant in a car – the attacker fatally shot Mr. Munich. An officer arrived very shortly after the fatal shooting and arrested the shooter.

Mr. Munich's estate sued Skagit County and some of its agencies for negligence in the response to the incident. The County moved for summary judgment under the public duty doctrine, under which a general duty to provide crime-fighting services to the public is not sufficient to establish a specific duty to a particular victim of crime for purposes of establishing negligence-based civil liability. The estate countered that a "special relationship" (one of several exceptions to the public duty doctrine) was created in this case with the 911 call and the promise of law enforcement response by the operator to Mr. Munich. The County responded that a "special relationship" cannot be proven in this context without establishing that the 911 operator made false or inaccurate statements in the call. The superior court rejected the County's argument, and now so has the Court of Appeals.

The Court of Appeals remands the case for trial on the factual questions of whether (1) an express assurance of help was sought by Mr. Munich and given by the operator, and (2) Mr. Munich detrimentally relied on any such assurance.

Result: Affirmance of Skagit County Superior Court decision denying Skagit County's motion for summary judgment; case remanded for trial.

Status: The Skagit County agencies have petitioned the Washington Supreme Court for discretionary review. The Supreme Court likely will act on the petition in the fall of this year.

LED EDITORIAL COMMENT: It is important from a civil liability standpoint that 911 operators and others taking calls for services strive to be accurate and to not over-

promise in describing the ongoing, pending or expected law enforcement response to the call. We believe that the Court of Appeals has misinterpreted the Washington case law on the public duty doctrine. There appears to be no basis for finding a special relationship between any Skagit County agency and the crime victim in this case. We hope that the Washington Supreme Court will accept review and will hold that the public duty doctrine bars liability in this case.

(2) CITY ORDINANCE HELD LAWFUL IN MANDATING "HOLDS" OF VEHICLES IMPOUNDED AFTER ARRESTS FOR CERTAIN SPECIFIED OFFENSES – In City of Kent v. Mann, ___ Wn. App. ___, 2011 WL 1448126 (Div. I, 2011), Division One of the Court of Appeals disagrees with Becerra v. City of Warden, 117 Wn. App. 510 (Div. III, 2003) **Sept 03 LED:21** and holds that a City of Kent ordinance mandating fixed periods of impoundment for arrests for certain specified offenses is lawful under chapter 46.55 RCW and under the Washington Supreme Court decision in All Around Underground, Inc. v. Washington State Patrol, 148 Wn.2d 145 (2002) **Feb 03 LED:02**.

The Court of Appeals describes the facts and proceedings below as follows:

> On March 13, 2009, Mann was driving his car and waiting at an intersection in Kent when [an officer] of the Kent Police Department ran his car's license plate number and discovered that the registered owner of the car, named Raymond Mann, had his license suspended in the second degree. [The officer] stopped the car and asked the driver whether his name was Raymond Mann. Mann said yes. [The officer] arrested Mann and called for a tow truck to impound Mann's car. In his report, [the officer] wrote, "Since [Mann's] driving status was DWLS 2, I placed a 30 day hold on his vehicle."
>
> Mann requested a vehicle impound hearing in Kent municipal court. Citing All Around and Becerra, he argued that the impoundment was improper because [the officer] failed to exercise discretion in deciding to impound and because KCC 9.39.030, by not permitting the officer to exercise discretion regarding the period of impoundment, exceeded the authority granted under RCW 46.55.120(1)(a). The City argued that [the officer] exercised discretion regarding the impoundment and that the impoundment period was properly imposed because RCW 46.55.120(1)(a) granted municipalities the sole authority to determine the period of impoundment. The municipal court ruled that [the officer] did exercise discretion in deciding to impound, but that KCC 9.39.030 was invalid under RCW 46.55.120(1)(a) because it did not permit the exercise of discretion by officers and trial courts over the impoundment period. The court relied on All Around and Becerra. It directed Mann's car to be released immediately and directed the City to pay for costs incurred to date, less initial impound costs and storage fees. The City appealed to King County Superior Court. The superior court affirmed the municipal court's ruling that KCC 9.39.030 violated chapter 46.55 RCW insofar as it mandated the period of impoundment and failed to allow discretion by the impounding officer. The superior court, like the municipal court, relied on All Around, Becerra, and RCW 46.55.120. It entered an order on December 11, 2009. We granted review.

The Mann Court disagrees with the analysis in Becerra **Sept 03 LED:21.** The Court explains:

> RCW 46.55.113(1) permits agencies and municipalities to promulgate rules to govern vehicle impoundment procedures when, among other things, a driver is

arrested for driving with a suspended or revoked driver's license. But the statute contemplates that a law enforcement officer shall have the discretion, in the first instance, to decide whether to impound a vehicle. <u>All Around</u>, 148 Wn.2d at 154-55. The statute further provides, in RCW 46.55.120(1)(a), that "[i]f a vehicle is impounded because the operator is [in a suspended or revoked status], the vehicle may be held for up to thirty days at the written direction of the agency ordering the vehicle impounded."

Pursuant to these statutes, the City of Kent promulgated KCC 9.39.030. The ordinance provides, in part, that whenever a driver is arrested for driving with a suspended or revoked license, "the vehicle is subject to impoundment at the direction of a law enforcement officer." KCC 9.39.030(A)(1). It also provides for fixed, mandatory periods of impoundment at the maximum provided by RCW 46.55.120(1)(a) for each category of license suspension or revocation. We must decide whether this latter provision exceeds the authority granted to municipalities by the impoundment statute and is therefore an invalid exercise of the City's authority.

We hold that the ordinance is a valid exercise of the City's authority under the impoundment statute. The statute's plain language permits the vehicle to be held for up to a specified number of days "at the written direction of <u>the agency</u> ordering the vehicle impounded." RCW 46.55.120(1)(a)(emphasis added). Thus, it is evident that the "agency" ordering the impoundment is vested with the authority of determining the period of impoundment within the bounds set by the statute. Mann argues that the language "may be held" in RCW 46.55.120(1)(a) shows that impounding officers must have discretion over the period of impoundment. We disagree. RCW 46.55.120 makes no mention of law enforcement officers having authority over the period of impoundment. Nor do we interpret the word "may" to mean that an agency cannot promulgate a rule setting fixed, mandatory impoundment periods. The statute simply states that the agency may not hold a vehicle for <u>more</u> than the applicable number of days, and that it must provide written direction. Other than the maximum impoundment periods set forth in the statute, there is nothing in the statute's language from which we can discern a legislative intent to limit a municipality's discretion regarding the period of impoundment.

Furthermore, other language in the impoundment statute reveals a legislative intent to conduct vehicle impoundments in a uniform and non-discriminatory manner. . . .
. . .

. . . The statute describes two situations in which agencies shall release a vehicle prior to the expiration of the impoundment period. Otherwise, the statute provides that the agency shall "deny release in all other circumstances <u>without discretion</u>." RCW 46.55.120((1)(a)(ii)(emphasis added). In light of this language, it would be illogical to interpret the statute to permit ordinances that confer discretion over the impoundment period beyond that expressly provided in the statute. More importantly, to read the statute as requiring an impounding officer to exercise individual discretion over how long to impound a vehicle would result in precisely the type of non-uniform application that the statute expressly seeks to avoid.

In sum, we agree with the City that RCW 46.55.120(1)(a) gives it the authority to determine the period of impoundment and the discretion to set fixed, mandatory periods of impoundment within the bounds set by the statute. We also agree with the City that the statute does not provide an impounding officer with discretion over the period of impoundment.

We recognize that Mann, as well as the courts below, relied on Becerra for the proposition that a municipality exceeds its statutory authority when it promulgates an ordinance that limits the discretion of the impounding officer regarding the impoundment period and instead imposes fixed, mandatory impoundment periods. We are convinced, however, that Becerra misconstrues the holding of All Around and misreads RCW 46.55.120(1)(a). All Around held only that RCW 46.55.113(1) vested in a law enforcement officer the discretion over whether to impound and that because the Washington State Patrol regulation overruled that discretion and mandated impoundment in all cases, the regulation exceeded the authority granted by the statute. All Around, 148 Wn.2d at 154-59. There was no occasion in that case for the Supreme Court to interpret RCW 46.55.120(1)(a). Moreover, because the language of RCW 46.55.113(1) and 46.55.120(1)(a) is different, we disagree with Becerra's reasoning that All Around compels the result here. Becerra holds that because, under All Around, RCW 46.55.113(1) does not authorize an ordinance that mandates impoundment, RCW 46.55.120(1)(a) likewise does not authorize mandatory impoundment periods. But in our view, just as RCW 46.55.120(1)(a) authorizes officer discretion whether to impound ("the vehicle is subject to summary impoundment . . . at the direction of a law enforcement officer"), RCW 46.55.120(1)(a) plainly authorizes a municipality to exercise discretion to determine the impoundment period ("the vehicle may be held [for the applicable period] at the written direction of the agency ordering the vehicle impounded").

Nor do we agree that the term "may be held," as used in RCW 46.55.120(1)(a), is indicative of a legislative intent to allow officers to have discretion to set different terms of impoundment in each individual case. As we have explained, such a reading of the statute is directly at odds with the express legislative directive that the impoundment statute be applied in a manner that is uniform and non-discriminatory. Under Becerra, early release from impoundment could occur in any case for any reason at all, instead of being uniformly limited to the two exceptions prescribed by the legislature in RCW 46.55.120(1)(a)(i) and (ii).

As we read All Around and the provisions of chapter 46.55 RCW at issue in this case, local impoundment ordinances must permit an officer to exercise discretion over the initial decision to impound. But after a vehicle is impounded, an ordinance may impose fixed, mandatory periods of impoundment, consistent with RCW 46.55.120(1)(a). We therefore reverse the superior court and hold that KCC 9.39.030 is a proper exercise of the authority granted to the City under chapter 46.55 RCW.

Result: City of Kent prevails; reversal of King County Superior Court decision that affirmed a ruling that the City of Kent ordinance violates chapter 46.55 RCW insofar as it mandates the period of impoundment and fails to give officers discretion regarding the period of impoundment.

LED EDITORIAL COMMENT: As the Court explains, in All Around, 148 Wn.2d 145 [Feb 03 LED:02] the state Supreme Court held that the Washington State Patrol's former impound

policy, which required that officers impound vehicles under RCW 46.55.113, was invalid because it removed officer discretion in determining whether or not to impound a vehicle. As the Mann Court points out, the All Around Court was not required to interpret RCW 46.55.120 which addresses "holds" for vehicles impounded for DWLS. We think that the Mann Court is correct in its analysis and holding that RCW 46.55.120 does not require officer discretion.

The Mann Court does not discuss whether the officer exercised appropriate discretion in impounding Mann's vehicle in the first place. Our experience has been that courts will generally require more than what is provided in the facts of Mann in order to find that an officer exercised appropriate discretion. However, it is possible that Mann did not challenge the impound itself, only the hold, which would explain why the Court did not address whether the officer exercised appropriate discretion in impounding Mann's vehicle.

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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].

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 (CJTC) 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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The Law Enforcement Digest is edited by Assistant Attorney General Shannon Inglis of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to AAG Inglis at Shannon.Inglis@atg.wa.gov. Retired AAG John Wasberg provides assistance to AAG Inglis on the LED. LED editorial commentary and analysis of statutes and court decisions express the thinking of the editor 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 CJTC Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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