June 1995

HONOR ROLL

428th Session, Basic Law Enforcement Academy - Spokane - January 31 through April 20, 1995

Highest Achievement in Scholarship:	*Deputy Joseph A. Bonin - Spokane County Sheriff's Office*
Highest in Night Mock Scenes:	*Deputy George J. Dvorak - Franklin County Sheriff's Office*
Outstanding Officer (Attitude & Effort):	*Officer David L. Marrs - Elmer City Police Department*
Highest in Pistol Marksmanship:	*Officer Michael C. Thompson - Walla Walla Police Department*
Best Overall:	*Officer Lawrence T. Yokoyama - WA ST Gambling Comm.*

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429th Session - Basic Law Enforcement Academy - February 7 through April 5, 1995

President:	*Officer Roy A. Porter - Seattle Police Department*
Best Overall:	*Officer Anna Christine Elias - King County Police Department*
Best Academic:	*Officer Aaron Defolo - Everett Police Department*
Best Firearms:	*Officer William T. Sofield - King County Airport Police Department*

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Corrections Officer Academy - Class 211 - April 10 through May 5, 1995

Highest Overall:	*Officer David V. Lynch - Clallam Bay Corrections Center*
	Officer Keith Alan Rogers - Mountlake Terrace Police Department
Highest Academic:	*Officer Tracey D. Leavell - Lewis County Corrections*
Highest Practical Test:	*Officer Rebecca Isherwood - Airway Heights Correctional Center*
	Officer David V. Lynch - Clallam Bay Corrections Center
	Officer Keith Alan Rogers - Mountlake Terrace Police Department
	Officer Randall D. Smith - Coyote Ridge Correctional Center
Highest in Mock Scenes:	*Officer William R. Bridges, Jr. - Pierce County Jail*
	Officer Craig Scott Fretts - Hoquiam City Jail
	Officer Laura M. Potts - Coyote Ridge Correctional Center
	Officer Charles B. Storlie - Chelan County Regional Jail
Highest Defensive Tactics:	*Officer Eric S. Grove - King County Division of Corrections*
	Officer Charles B. Storlie - Chelan County Regional Jail

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1995 WASHINGTON LEGISLATIVE ENACTMENTS -- PART I

LED EDITOR'S INTRODUCTORY NOTE: This is the first part of a several-part digest of 1995 State legislative enactments of interest to Washington law enforcement officers and/or their agencies. We will try throughout our updates to note any current RCW sections affected by the legislation if significant. Where new sections are created by legislation, the State Code Reviser must assign an appropriate section number. That process should be completed by the Code Reviser by early fall of 1995.

Beware: As always with this publication, any opinions, express or implied, are the personal views of the LED Editor alone. A formal Attorney General Opinion (AGO) may be obtained only by means of a formal written request to Attorney General Christine Gregoire by one of the following -- a legislator, an elected prosecutor, or one of certain state government officials.

Preview of Part II: Much of the July LED will be devoted to Part II of our annual legislative update. Among the enactments of interest to be covered next month are CHAPTER 129 (INITIATIVE 159) the "Hard Time For Armed Crime Act," and CHAPTER ___ (ESSB 5439) "Becca" Bill and CHAPTER ___ (ESSB 5885) "Family Preservation" Bill, the latter two enactments relating to juvenile runaways and at-risk juveniles, among other things.

NO STATUTE OF LIMITATIONS ON "HOMICIDE BY ABUSE"

CHAPTER 17 (SB 5027)

Effective Date: July 23, 1995

Amends RCW 9A.04.080(1)(a) to provide that, as with "murder" and "arson if a death results", the statute of limitations never runs out on the crime of "homicide by abuse".

COMMON LAW LIENS AGAINST PUBLIC EMPLOYEES

CHAPTER 19 (SB 5630)

Effective Date July 23, 1995

Amends sections of Title 60 RCW to limit the filing of nonconsensual common law liens (liens) against the real or personal property of federal, state, or local officials or employees, relieving clerk's personnel from responsibility for processing invalid liens, and providing for recovery of costs and attorney fees for those public officials and employees who take action to strike invalid liens.

MISDEMEANOR FOR FAILING TO OBEY OFFICER IN TRAFFIC STOP

CHAPTER 50 (SSB 5367)

Effective Date July 23, 1995

Amends RCW 46.61.015 (failure to obey order in traffic situation) and 46.61.020 (failure to give certain information or documents to officer in traffic situation) to expressly provide as to each section that violation is a misdemeanor. The elements of the crimes are not changed by the amendments.

FIREWORKS LAW OVERHAUL

CHAPTER 61 (SSB 5997)

Effective Date: April 17, 1995

Amends numerous sections of chapter 70.77 RCW to strengthen state fireworks enforcement provisions and to require that all fireworks sales comply with state regulations. NOTE: The LED may not include the details of this legislation, so law enforcement agencies may wish to obtain copies from their legal advisors or other sources.

CHILD VICTIM HEARSAY

CHAPTER 76 (SSB 5214)

Effective Date: July 23, 1995

Amends RCW 9A.44.120 relating to admissibility of certain categories of child crime victim hearsay by adding to the existing "sexual contact" category another category -- child hearsay "describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110."

RESTRAINING ORDER REVISIONS

CHAPTER 93 (SSB 5835)

Effective Date: July 23, 1995

Amends RCW 10.31.100(2) to add two more mandatory arrest circumstances: probable cause to believe a person has knowingly violated a restraining order issued in (i) a dissolution action (RCW 26.09.050) and (ii) a child custody action (RCW 26.10.040). Also amends RCW 26.09.050 [and 26.10.040] to require that courts in those proceedings address restraining order issues and adding the following language in each of those sections:

> Restraining orders issued under this section restraining the person from molesting or disturbing another party or from going onto the grounds of or entering the home, workplace, or school of the other party or the day care or school of any child shall prominently bear on the front page of the order the legend: VIOLATION OF THIS ORDER WITH ACTUAL NOTICE OF ITS TERMS IS A CRIMINAL OFFENSE UNDER CHAPTER 26.09 [26.10] RCW AND WILL SUBJECT A VIOLATOR TO ARREST.
>
> The court shall order that any restraining order bearing a criminal offense legend, any domestic violence protection order, or any antiharassment protection order granted under this section, in addition to the law enforcement information sheet or proof of service of the order, be forwarded by the clerk of the court on or before the next judicial day to the appropriate law enforcement agency specified in the order. Upon receipt of the order, the law enforcement agency shall forthwith enter the order into any computer-based criminal intelligence information system available in this state used by law enforcement agencies to list outstanding warrants. The order is fully enforceable in any county in the state.

CIVIL ANTI-HARASSMENT RE UNDER 18'S

CHAPTER 127 (SSB 6028)

Effective Date: July 23, 1995

Adds another basis for issuance of civil anti-harassment orders under RCW 10.14.040 as follows:

> (6) The parent or guardian of a child under age eighteen may petition for an order of protection to restrain a person over age eighteen from contact with that child upon a showing that contact with the person to be enjoined is detrimental to the welfare of the child.

Also amends the definition at RCW 10.14.020 of "unlawful (civil) harassment" to make it consistent with the above-noted change in RCW 10.14.040.

LURING

CHAPTER 156 (SB 5039)

Effective Date: July 23, 1995

Amends RCW 9A.40.090 to make a housekeeping change which deletes references to "developmentally disabled person" and inserts "a person with a developmental disability."

PROBABLE CAUSE ARREST FOR CRIMINAL TRESPASS

CHAPTER 184 (EHB 1550)

Effective Date: January 1, 1996

Amends subsection (1) of RCW 10.31.100 to establish an additional categorical exception to the statutory "misdemeanor presence" rule. Arrests based on probable cause will be permitted for "criminal trespass" under RCW 9A.52.070 and 080. Section 2 of this act also provides as follows:

> This act shall take effect January 1, 1996. Prior to that date, law enforcement agencies, prosecuting authorities, and local governments are encouraged to develop and adopt arrest and charging guidelines regarding criminal trespass.

Your LED Editor is curious regarding what such "arrest and charging guidelines" might specify. Readers are asked to please forward any such guidelines developed in their respective jurisdictions, so that we may share this information with other LED readers.

SEX OFFENDER REGISTRATION

CHAPTER 195 (SB 5239)

Effective Date: July 23, 1995

Amends RCW 9A.44.130 and 140 to provide that persons convicted under RCW 9.68A.090 (communication with a minor for immoral purposes) are "sex offenders" and therefore subject to the registration requirements of the statute.

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BRIEF NOTE FROM THE NINTH CIRCUIT COURT OF APPEALS

FEDERAL FIREARMS LAW PROVISIONS ON RESTORATION OF FIREARMS RIGHTS CONSTRUED AUTOMATICALLY AS RESTORING RIGHTS UPON DISCHARGE FROM CONVICTION UNLESS DISCHARGE ORDER EXPRESSLY DECLARES THAT FIREARMS POSSESSION PROHIBITED; RELATED WASHINGTON STATE STATUTE SUBJECT TO CONTRARY INTERPRETATION -- In U.S. v. Herron, 45 F. 3d 340 (9th Cir. 1995) the U.S. Court of Appeals for the Ninth Circuit has interpreted the federal firearms provision at 18 U.S.C. sec. 921(a)(20) -- addressing restoration of federal firearms rights -- in an extreme pro-restoration manner. The Ninth Circuit ruling is consistent with rulings of the Fifth and Seventh Circuits, but it is inconsistent with rulings of the Fourth and Sixth Circuits of the U.S. Court of Appeals.

The Herron Court holds that a person with a conviction that would disqualify the person from firearms possession under state law (in Washington, RCW 9.41.040) automatically has his or her federal firearms rights restored under section 921(a)(20) of the federal law upon entry by a state court of a felony conviction discharge order, unless the state court expressly declares in that order that the convicted person is barred from possessing firearms. As is noted in the preceding paragraph, there is a split of federal circuit courts on the issue in Herron.

The view of the Ninth, Fifth, and Seventh Circuits is based on a strict reading of the language of the federal statute. The view of the Fourth and Sixth Circuits is based on a common sense view that the whole of state law, not the vagaries of the process of entry of discharge orders, should control restoration of rights.

Result: dismissal of federal indictment against Danny S. Herron by U.S. District Court for the Eastern District of Washington affirmed.

LED EDITOR'S COMMENT: The Herron ruling has implications for enforcement of chapter 9.41 RCW by state and local officers in Washington. That is because RCW 9.41.070(3) provides a limited restoration of firearms possession rights for those "exempt under 18 U.S.C. sec. 921(a)(20) . . . except as otherwise prohibited by this chapter." We do not believe that Herron requires the conclusion under state law that discharge documents automatically restore firearms possession rights unless they expressly prohibit possession of firearms.

In Attorney General Opinion 1993 No. 10, the AG opined that 18 U.S.C. sec. 921 (a)(20) does not provide an exemption for a Washington conviction because subsection (3) of RCW 9.41.040 requires an express finding of "rehabilitation" or "innocence" by a discharging court in order to relieve the convicted person of firearms disability. Under that view, the absence of an express prohibition on gun possession in discharge papers falls far short of an express finding of rehabilitation or innocence. (See also AGO 1988 No. 10 addressing restoration of rights issues under chapter 9.41 RCW.) We believe the rationale of AGO 1993 No. 10 still stands after Herron; note that the Ninth Circuit did acknowledge in Herron that its ruling did not control interpretation of Washington law by Washington courts. Also, prosecutors faced with a section 921 argument in a state law prosecution may wish to argue in the alternative that Herron misconstrues the federal statute, and that the interpretations by the conflicting federal circuit courts should prevail.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) **"OTHER OFFENSES" EVIDENCE ADMISSIBLE IF THOSE OFFENSES ARE VERY SIMILAR TO THE ONE AT TRIAL** -- In State v. Lough, 125 Wn.2d 847 (1995) the State Supreme Court addresses the issue of whether evidence that the defendant had previously drugged and raped four other women, while in relationships with them, was admissible evidence in a case where similar conduct was charged for the purpose of showing a common plan or scheme under Evidence Rule (ER) 404(b).

The Court notes that "other offenses" evidence is admissible as part of a "common scheme or plan" under one of two variations on the term "plan" -- (1) a larger plan of which several crimes constitute constituent parts; or (2) a plan devised and used repeatedly to perpetuate separate but very similar crimes. The Court then goes on to declare that, under variation #2 of "plan" above, evidence of prior misconduct is admissible to prove a plan where the past crimes are very similar in mode of operation. They need not be "signature crimes," but need only be acts which have the occurrence of common features such that

> the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.

The Court goes on to rule that the other crimes evidence against Lough was similar enough to the charged crime to qualify for admission under the above-described ER 404(b) test.

Result: King County Superior Court convictions for first degree burglary, indecent liberties, and attempted second degree rape affirmed; sentence exceeding standard range (60 months) affirmed.

LED EDITOR'S NOTE: For a similar decision in a Court of Appeals case not reported in the LED, see State v. Roth (Randolph), 75 Wn. App. 808 (Div. I, 1994).

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WASHINGTON STATE COURT OF APPEALS

NO CRIME IF TRAFFIC VIOLATOR WON'T PROMISE TO RESPOND PER CITATION FORM

Port Orchard v. Tilton, 77 Wn. App. 178 (Div. II, 1995)

Facts and Proceedings: (Excerpted from Court of Appeals decision)

> On May 18, 1991, a Port Orchard police officer stopped Tilton for speeding. The officer filled out a notice of infraction that contained the following statement: "Without admitting having committed each of the above infractions/offenses, I promise to respond as directed on this notice". The officer demanded that Tilton sign on a line printed beneath this statement, but Tilton refused.
>
> The officer then charged Tilton with "failure to sign notice of infraction" and

obstructing a public servant. A municipal court jury acquitted of obstructing but convicted of failure to sign. [COURT'S FOOTNOTE: The officer also gave Tilton a speeding ticket, which resulted in a $38 fine.]

Tilton appealed the failure-to-sign conviction to superior court, which ordered a trial de novo. Before such trial was held, . . . Tilton filed a motion to dismiss . . .. In essence, he asserted that the City, as a matter of law, could not produce evidence sufficient to prove the charge. The Superior Court ruled

> that the language which defendant refused to endorse is not language whereby he acknowledges receipt of a notice of infraction. Hence, the motion must be granted and the cause dismissed.

[Two footnotes omitted]

ISSUE AND RULING: Is it a misdemeanor for a traffic violator to refuse to sign a "promise to respond" on the uniform traffic citation form? (ANSWER: No) Result: Kitsap County Superior Court dismissal order affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

RCW 46.61.021(3) provides:

> Any person requested to identify himself to a law enforcement officer pursuant to an investigation of a traffic infraction has a duty to identify himself, give his current address, and sign an acknowledgement of receipt of the notice of infraction.

RCW 46.61.022 provides in part:

> Any person who wilfully fails to . . . comply with RCW 46.61.021(3), is guilty of a misdemeanor.

These statutes apply in Port Orchard by virtue of Port Orchard Municipal Code § 10.04.010.

Tilton argues that he cannot be guilty of violating these statutes because he was not asked to acknowledge, and he did not refuse to acknowledge, receipt of a copy of the traffic infraction. His premise is that promising to appear in court is different from acknowledging receipt of a copy of a document, and that he was only asked to make a promise to appear in court.

We agree. A person does not acknowledge receipt of a copy of a document merely because he or she promises to appear in court. Nor does a person decline to acknowledge receipt of a copy of a document merely because he or she declines to promise to appear in court. Thus, Tilton did not refuse to acknowledge receipt of a copy of the notice of infraction merely because he declines to promise to appear in court, and the City's evidence is insufficient to prove the facts needed to convict under RCW 46.61.021(3).

> Our conclusion is supported by the fact that if we held otherwise, we would allow Tilton to be convicted for refusing to make a promise that he had a right not to make. As the City conceded at oral argument, a motorist stopped for a traffic infraction has no legal duty to promise to appear in court; if he or she refuses to make such a promise, he or she can be taken to jail, but he or she does not commit a crime merely by virtue of the refusal. Former RCW 46.63.060 (Laws of 1984, ch. 224, § 2); RCW 46.64.015; Former RCW 46.64.020(2) (Laws of 1988, ch. 38, § 1(2)). Thus, Tilton had a right not to promise to appear in court, and it would be irrational to convict him of a crime because he exercised that right.
>
> Nothing said herein means that an officer cannot ask a motorist to "copy receive" a traffic citation, or that the motorist who refuses such a request cannot be convicted under RCW 46.61.021(3). We hold only that a motorist who declines to make a promise to appear in court does not, by that act alone, refuse to acknowledge receipt of a copy of a traffic citation.

LED EDITOR'S COMMENT:

In last month's LED, in our "Next Month" entry at page 22, we said the following about Tilton:

> *The Tilton decision declares that there is no legal requirement that a person "promise to respond." Accordingly, under Tilton, unless the language of the standard citation form is changed, violators cannot be lawfully arrested or cited with the misdemeanor of "failure to sign" a traffic citation. Craig Adams, police legal advisor for the Pierce County Sheriff's Office, suggests the following interim "cure" to Tilton:*
>
> > *If a person refuses to sign a Notice of Infraction, merely ask him/her to "Copy Receive" it. Just write the words "Copy Received" on the front of the Notice of Infraction, ask the person to sign it, and issue it to him/her. If the person refuses, you can issue the misdemeanor (or make an arrest, if your agency's policy permits -- LED Ed.).*
>
> *Postscript re Tilton: As the May LED was going to print, we read the Tilton decision a few more times. Contrary to what we suggest above, Tilton seems to say that arrest is authorized for failure to sign a promise to respond to a notice of traffic infraction, even though such a failure does not constitute a crime. This issue will be analyzed in the June LED.*

As we noted last month, eventually the traffic infraction citation forms will have to be changed to delete the "promise to respond" block (or the statute will have to be amended). Meanwhile, legal advisor Adams' advice quoted last month looks pretty good.

Commenting on our May "Postscript" note regarding the suggestion of the Tilton Court that arrest may be lawful if the traffic violator refuses to sign a "promise to respond" (see RCW 46.64.015) using the current citation, we have our doubts. If the conduct is not a crime, should arrest be lawful? We would suggest that the safer approach is to make an arrest (if permitted under the particular police agency's policies) only after using the

second step of the two-step, "copy received" approach suggested last month by legal advisor Adams (set forth above).

WARRANTLESS LOOK INTO TOILET STALL OK IF PC TO: (1) ARREST & (2) BELIEVE SUSPECT INSIDE; ALSO, INEVITABLE DISCOVERY RULE SUPPORTS EVIDENCE ADMISSION
State v. White, 76 Wn. App. 801 (Div. I, 1995)

Facts:

A team of Seattle police officers watched an exchange of money and a packet between Gregory K. White and another man. On the totality of the circumstances, the exchange gave the observing officers probable cause to believe that White had just bought cocaine from the other man. Officer Jim Pugel had not observed the exchange, but he received a radio report describing White and asking that he participate in an effort to find and arrest White. Officer Pugel's efforts led him to a restaurant, Steve's Broiler. What happened next is described by the Court of Appeals as follows:

> Pugel went inside Steve's Broiler and gave the manager a description of White. The manager told him that a man matching White's description had gone into the restroom. Pugel went into the restroom and saw one of the stalls occupied by someone wearing purple sweat pants and brown shoes, the clothes [described in the radio report]. No one else was in the restroom.
>
> Pugel walked to the stall and looked over the door. He saw White sitting on the toilet with his pants below his knees and currency lying on top of his underwear. Pugel told White he was under arrest and to come out with his pants down. When White emerged from the stall, Pugel immediately handcuffed him. Shortly thereafter, two transport officers came into the restroom. Pugel removed $103 from White's underwear and pulled up his pants. Pugel then searched White's jacket, which White had left in the toilet stall, and found $65, a pager, and 16 rocks of cocaine.

Proceedings: (Excerpted from Court of Appeals opinion)

> White moved pretrial to suppress this evidence. The motion was denied. A jury found White guilty as charged, and the trial court imposed a sentence within the standard range. As part of his sentence, the trial court ordered White to remain out of certain areas with a high incidence of drug trafficking.

ISSUES AND RULINGS: (1) Did Officer Pugel have probable cause to arrest White? (ANSWER: Yes, under the "fellow officer" rule); (2) Was Officer Pugel's warrantless entry of the toilet stall lawful? (ANSWER: Yes, because he had PC to arrest White); (3) Assuming for the sake of argument that the entry of the toilet stall was unlawful, would the "inevitable discovery" exception to the Exclusionary Rule justify admission of the evidence? (ANSWER: Yes) Result: King County Superior Court conviction and sentence for possession of a controlled substance with intent to deliver affirmed.

ANALYSIS:

(1) Probable Cause to Arrest

The Court's analysis of the probable cause issue is as follows:

> "Probable cause for a warrantless arrest exists when facts and circumstances within the arresting officer's knowledge are sufficient to cause a person of reasonable caution to believe that a crime has been committed." Based on his narcotics training and experience, [Officer] Magee testified that White's actions throughout the contact between [other suspect] Murray and the man in the white sweat suit were consistent with the actions of a lookout or setup person in a drug transaction. [COURT'S FOOTNOTE: [Officer] Magee testified that he had witnessed hundreds of narcotics transactions.] These observations were sufficient to give [Officer] Magee probable cause to believe that White had committed a crime. Under the fellow officer rule, [Officer] Pugel had probable cause to arrest White based on Magee's observations. See State v. Maesse, 29 Wn. App. 642 (1981) **[Dec. '81 LED:04]** (rule "permits probable cause to be determined upon the information possessed by the police as a whole when they are acting in concert").

[Some citations omitted]

(2) Warrantless Search Of Toilet Stall

The Court of Appeals begins its analysis of the toilet search issue by noting that in some circumstances, a police officer is barred from looking into an occupied toilet stall:

> In Tukwila v. Nalder, 53 Wn. App. 746 (1989)**[Sept. '89 LED:17]**, we held that an officer's act of looking into an enclosed toilet stall constitutes a search under article 1, section 7 of the state constitution because an enclosed toilet stall is an area in which a person has both a subjectively and an objectively reasonable expectation of privacy. We also held that the search in that case was unreasonable because it was a general exploratory search not based on any suspicion that a crime had been committed. Thus, under Nalder, Pugel's actions constituted a search because, by looking into the toilet stall, he intruded into an area in which White had a reasonable expectation of privacy. Unlike the search in Nalder, however, this search was not a general exploratory search because Pugel had probable cause to arrest White. The issue we must decide is whether a warrantless search of a toilet stall for a suspect whom an officer has probable cause to arrest is reasonable under the Fourth Amendment.

[Footnote, some citations omitted]

Then the Court explains that "exigent circumstances" (here, possible evidence destruction and/or officer safety concerns) did not justify the toilet stall entry, because there was no evidence that White was aware that the police were pursuing him. However, the Court goes on to hold that White did not have a reasonable expectation of privacy while inside the toilet stall, because Officer Pugel had probable cause (A) to arrest him and (B) to believe he was inside:

> There are circumstances in which a strict application of the warrant requirement is both impractical and illogical. In those instances, courts have held that probable

> cause to conduct a warrantless search is sufficient to satisfy the Fourth Amendment requirement of reasonableness. This is such a circumstance. It is analogous to the hot pursuit exception to the warrant requirement which allows an officer to pursue a fleeing suspect into the most sanctified of all private spaces -- the home. Although White was not fleeing because he did not know the police were pursuing him, Pugel was clearly justified in following him into the restroom and looking over the stall to make sure the person the manager identified was in fact the suspect he was following. Had he not done so, the suspect could have left while Pugel was waiting for a man whose shoes and pants matched the description to come out of the stall. We conclude that where, as here, the police have probable cause to believe that a crime has been, is being, or is about to be committed and that the suspect is in a toilet stall, it is reasonable to search the stall for that person notwithstanding the warrant requirement.
>
> Our holding here strikes a balance between the reasonable expectation of privacy identified in Nalder and society's interest in apprehending criminal suspects. In Nalder we were concerned primarily with the fact that evidence had been obtained through a general exploratory search, one that was not focused on anyone the officer had reason to believe was engaged in criminal activity *before* he looked into the stall. As such, the search "subjected the innocent, as well as the guilty, to unreasonable intrusions.'" In this case, Pugel had probable cause to believe that White was in the stall. When he entered the restroom, he observed that only one stall was occupied. Underneath the stall door, he saw shoes and pants matching the description of those worn by the suspect he was to arrest. Looking over the stall to ascertain whether the man in the stall was the suspect and to place White under arrest did not constitute an unreasonable intrusion on his privacy under these circumstances. Because the search was not unreasonable, it did not violate the Fourth Amendment.

[Footnotes, some citations omitted]

(3) "Inevitable Discovery" Exception

In Nix v. Williams, 467 U.S. 431 (1984) **Aug. '84 LED:01** the U.S. Supreme Court held that the Fourth Amendment Exclusionary Rule does not apply to exclude evidence unlawfully obtained, if the government can show that the evidence at issue ultimately would have been discovered by lawful means. The Court of Appeals in White cites numerous Washington cases which have discussed the exception without adopting it. Then, the White Court recommends adoption of the rule in Washington and goes on to assert that the following criteria apply for admitting evidence under the inevitable discovery rule:

> (1) The police did not act unreasonably or to accelerate the discovery of the evidence in question; (2) proper and predictable investigatory procedures would have been utilized; and (3) those procedures would have inevitably resulted in the discovery of the evidence in question.

The Court goes on to state that all three criteria would be met by the facts in White, and therefore that the inevitable discovery exception would apply even if the look into the toilet stall were held to be unlawful. **[LED EDITOR'S COMMENT: Criterion number 1 of the "inevitable discovery"**

criteria, "reasonableness" of police actions, is confusing in light of the fact that we are talking about an exception to exclusion in the case of unreasonable searches. Presumably, "reasonableness" means that the police behavior was not egregious, or something like that. It appears that most courts in other jurisdictions instead use a "no bad faith" test for this element of the "inevitable discovery" rule. See generally, LaFave, Search & Seizure § 11.4(g).]

REMOVAL OF TUBE PROTRUDING FROM DRUG ARRESTEE'S ANUS IS LAWFUL "STRIP SEARCH" UNDER CHAPTER 10.79 RCW, NOT UNLAWFUL "BODY CAVITY" SEARCH

State v. Jones, 76 Wn. App. 592 (Div. I, 1995)

Facts and Proceedings:

Following a "controlled buy" of drugs from Steven Jones by police informants, Jones was arrested as he came out of room 28 of the Golden West Motel in Edmonds. After transporting Jones, officers discovered $300 worth of rock cocaine which Jones had apparently ditched in the back seat of the patrol vehicle. Based on (1) the officers' failure to find any drugs in their search incident to arrest prior to transport, (2) the officers' observations of Jones' movements in the back seat during transport, (3) the drugs then found after the transport, and (4) other information, the officers suspected that Jones had some sort of drug container secreted in his anus.

They ultimately recovered the tube from that location. Jones moved prior to trial to suppress evidence of the tube found in his anus. The Court of Appeals describes as follows the facts and trial court proceedings pertinent to the plastic tube suppression motion:

> During the trial, the defense challenged the admission of a plastic tube recovered from Jones' anus during a warrantless custodial search in the "drunk tank" or holding cell of the Lynnwood jail. The tube was introduced as evidence of intent to deliver, based on the theory that a person would not conceal drugs in a body cavity if that person were just a user.
>
> Officer Bonallo of the Edmonds Police Department testified that he transported Jones from the Golden West Motel to the Lynnwood jail. Because Jones made furtive movements, Bonallo radioed detective Connor for assistance. Connor met Bonallo outside the jail. At that time, both officers knew that suspected cocaine had been sloughed onto the floor of he patrol car and that no drugs were found on Jones' person when he was searched incident to arrest and prior to being placed in the car. Connor also testified that some unnamed person in room 28 told him Jones carried drugs in a tube in his rectum.
>
> The officers took Jones into the drunk tank. Although Bonallo and Connor testified differently on some details, both agreed that by that time Connor had put on surgical-type rubber gloves and Jones knew he was going to be more intensively searched. The officers had communicated to Jones that they believed there might be drugs in his rectum. Jones lowered his pants and underwear and then was told to bend over and spread the cheeks of his buttocks. According to the officers, when he did that, a small portion of the tube extended from his anus, and Connor removed the tube by touching that extended portion. The tube was open. [COURT'S FOOTNOTE: Apparently, while in the patrol car, Jones had managed

to empty the tube of its contents.] Detective Connor did not touch Jones.

Jones testified that he himself pulled a small portion of the tube out and offered to remove it because he did not want the officers to conduct a body cavity search of his rectum, as they clearly indicated they intended to do. He said the officers told him that they were going to go in and get the tube.

Defense counsel argued that the warrantless search was improper whether or not it was considered to be a strip search or a body cavity search because Jones was coerced into making the tube available by threats of probing his rectum against his will.

The court ruled that the search was a strip search, properly conducted pursuant to RCW 10.79.070, rather than a body cavity search. Written findings of fact and conclusions of law were subsequently entered.

Defendant was convicted of delivery of cocaine and possession of cocaine with intent to manufacture or deliver.

ISSUES AND RULINGS: (1) Was the procedure followed by the police in removing the plastic tubing a "strip search" or a "body cavity" search as those terms are defined in chapter 10.79 RCW? (ANSWER: It was a "strip search" -- and, therefore, a search warrant was not required); (2) Was the strip search justified under RCW 10.79? (ANSWER: Yes, because Jones had been arrested for possession of cocaine); (3) Did Jones' offer to remove the plastic tube prior to its removal affect the legality of the strip search? (ANSWER: No). Result: affirmance of Snohomish County Superior Court convictions for delivery of cocaine and possession of cocaine with intent to manufacture or deliver.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) "Strip Search" Definition

A "strip search" means "having a person remove or arrange some or all of his or her clothing so as to permit an inspection of the genitals, buttocks, anus, or undergarments of the person or breasts of a female person." RCW 10.79.070(1). A "body cavity search" means the "touching or probing of a person's body cavity, whether or not there is actual penetration of the body cavity." RCW 10.79.070(2). "Body cavity" means "the stomach or rectum of a person and the vagina of a female person." RCW 10.79.070(3). No person may be subjected to a body cavity search unless a search warrant is issued pursuant to superior court criminal rules. RCW 10.79.080(1).

Here, when Jones bent over a small portion of the tube protruded from his anus, and Officer Connor retrieved it by touching that extended portion. Detective Connor did not touch Jones. There is no evidence that either detective touched or probed Jones' rectum in any way. In absence of touching or probing Jones' body cavity, this search does not fall within the definition of a body cavity search under RCW 10.79.070(2). Rather, it was a strip search as defined in RCW 10.79.070(1).

Jones argues that the removal of the tube was not merely a strip search even if the

tube extended beyond his anus and could be seen without touching and probing. He argues that Detective Connor touched him by removing the tube that was inserted into his body. Thus, the issue becomes whether removing an object inserted in a body cavity is a body cavity search. RCW 10.79.070(2) specifically defines a body cavity search as the *touching* or *probing* of a person's body cavity. The evidence is clear that Connor did not touch Jones' body cavity. The fact that he touched an object embedded inside the body cavity does not constitute touching the body cavity itself. Nor did his actions in removing the tube constitute "probing" Jones' body cavity. Accordingly, we conclude that removing an object from a body cavity without touching or probing the person does not constitute a body cavity search under RCW 10.79.070(2).

(2) Justification For Strip Search

Because this was a strip search, the next issue to be decided is whether the search was properly conducted without a warrant. Three exceptions exist to the rule that a search warrant is required to conduct a strip search. The exception applicable to the present case is as follows:

> (a) There is a reasonable suspicion to believe that a strip search is necessary to discover weapons, criminal evidence, contraband, or other thing concealed on the body of the person to be searched, that constitutes a threat to the security of a holding, detention, or local correctional facility;

RCW 10.79.130(1)(a). For the purposes of subsection (1) of this section, a reasonable suspicion is deemed to be present when the person to be searched has been arrested for:

> (c) An offense involving possession of a drug or controlled substance . . .

RCW 10.79.130(2).

Here, Jones was arrested for an offense involving possession of cocaine which under RCW 10.79.130(2)(c), automatically means that a reasonable suspicion is deemed to be present. Thus, the search was properly conducted without a warrant.

(3) Jones' Offer To Help

Jones next argues that Detective Connor either explicitly or implicitly threatened to use his gloved fingers to probe inside Jones' rectum, and that this as an improper threat because such a search was prohibited without a search warrant. See RCW 10.79.080(1). According to the record, the officers indicated to Jones that they thought he might have drugs in his rectum, and at the same time Detective Connor put rubber gloves on. The understanding was that Jones was to be more intensively searched. These facts could easily have led Jones to believe that he would be subject to a body cavity search.

However, even if Jones thought he would be subject to a body cavity search, no unlawful search resulted from this assumption. The trial court found in its

conclusions as to disputed facts that Jones did not touch or adjust the tube with his hands in response to his belief that he would be subjected to a body cavity search. Had he done so, that well may have constituted a search. See United States v. Mastberg, 503 F.2d 465, 471 (9th Cir. 1974) (where defendant was told by border inspector that if she did not remove object from her body cavity a doctor would be called to do so, defendant's removal of the object constituted a "search"). However here, Jones simply offered to remove the tube himself. That offer alone did not constitute an illegal search.

[Footnote omitted]

OVERT ACT REQUIREMENT NOT MET IN CASE FOR ATTEMPTED COCAINE POSSESSION

State v. Grundy, 76 Wn. App. 335 (Div. III, 1994)

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

> Officer Gary Garza was posing as a drug runner in an alley. He saw Mr. Grundy leave a nearby apartment complex. Officer Graza approached Mr. Grundy and asked him what he wanted. Mr. Grundy stated "he wanted 20". The following dialogue ensued:
>
> I said, "20 what?"
> He said, "20 of coke."
> Uh -- I then said, "You have the money?"
> He said, "Yeah, I have the money?"
> Then I asked him, "Let me see it."
> And he said that he wanted to see the stuff first.
> And then he was placed under arrest.

ISSUE AND RULING: Was the evidence sufficient to support a conviction for attempted possession of cocaine? (ANSWER: No, the State failed to prove an "overt act.") Result: Yakima County Superior Court conviction for attempted possession of a controlled substance reversed and case dismissed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Mr. Grundy was charged with attempted possession of cocaine. He contended his conduct constituted mere solicitation, but he was found guilty of attempted possession and sentenced to perform 80 hours of community service.
>
> The necessary elements of attempt to commit a crime are intent and an overt act.
> . . .
>
> Mr. Grundy does not challenge the sufficiency of the evidence of intent. He argues there is no evidence of an overt act sufficient to establish attempt to possess cocaine. An overt act is a "'direct ineffectual act done toward commission of a crime"'. The overt act must be a substantial step, that is, one which is strongly corroborative of the crime. Solicitation, in the sense of enticing someone to commit a crime, "does not constitute the overt act . . . that is a necessary element of the crime of attempt."

> Here, Mr. Grundy did not approach the officer; the officer approached him. He asked for cocaine only in response to the officer's asking him what he wanted. Although his words evidenced an intent to acquire possession of cocaine, they are insufficient, without more, to constitute the requisite overt act.
>
> The overt act must be more than preparation; it must be "'a direct, ineffectual act done toward commission of a crime and, where the design of a person to commit a crime is clearly shown, slight acts done in furtherance of this design will constitute an attempt.'" In Roby [State v. Roby, 67 Wn. App. 741 (Div. III, 1992) **June '93 LED:18**], we found when Mr. Roby produced a $100 bill for $50 worth of cocaine, that was a sufficient overt act to support finding an attempt to possess a controlled substance. Here, the evidence did not show a sufficient step for us to find an overt act leading directly toward consummation of the attempted crime. The parties were still in the negotiation stage.

[Some citations omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **NO "AUTOMATIC STANDING" TO REQUEST "EXCLUSIONARY RULE" REMEDY FOR UNLAWFUL SEARCH AND SEIZURE** -- In State v. Carter, 74 Wn. App. 320 (Div. I, 1994) the Court of Appeals rejects defendant's contention that she had "automatic standing" to seek exclusion of evidence for an unlawful search by law enforcement officers.

Following a "buy-bust" drug sale which started outside and ended up inside in a motel room, the undercover officer who had made the "buy" left the room. Moments later, he came back with several other officers. The officers made what defendant claimed was an unlawful (no consent, no hot pursuit, no exigent circumstances) entry into the room. At the time of the entry, defendant Carter was present in the room and, due to her earlier involvement in the drug deal, she was arrested.

At trial, defendant asserted that this was a "mistaken identity" case -- that she was not the person police had contacted initially outside the motel room. She asserted further that she happened to be in the room only as a momentary visitor waiting for a friend to return. She was not an overnight guest.

The Court of Appeals holds that under these facts: (1) defendant had no privacy interest in the motel room which would give her standing under the Federal constitution to challenge the police entry of the room; and (2) while prior Washington case law has suggested that a person charged with a crime having "possession as an element" might have "automatic standing" under the Washington constitution to challenge a police search, "automatic standing" actually does not provide a basis for exclusion of unlawfully obtained under the Washington Constitution. Accordingly, the Court declares, Carter lacked standing to challenge the entry of the motel room, and the Court does not need to address the issue of "whether the officers' warrantless entry into the motel room was justified by exigent circumstances."

Result: affirmance of King County Superior Court convictions for delivery of a controlled substance (1 count) and for possession of a controlled substance (1 count). Status: the State Supreme Court accepted review and heard argument on March 15, 1995; decision pending.

LED EDITOR'S COMMENT:

As is noted above, the State Supreme Court heard argument in this case on March 15, 1995. A decision can be expected probably by this fall. Our guess is that the Court will agree with the Court of Appeals for Division I that there is no "automatic standing" under the Washington constitution. It is possible that the Supreme Court will avoid answering the issue and will resolve the case on another basis as it did in a 1992 case, but we are hopeful that Carter will kill "automatic standing." This issue needs to be resolved, as is demonstrated by a recent Division III Court of Appeals opinion in State v. Jose Diaz Hernandez Gonzalez (No. 13221-8-III) disagreeing with Carter and "adhering" to the automatic standing rule. If the Court of Appeals ruling in Carter is upheld, then Gonzalez will be overruled and the state and federal "standing" rules will be the same; searches and seizures will be subject to challenge under either constitution only by those whose personal rights have been invaded.

It should be noted, however, that a lack of standing for persons with no privacy rights in an area -- let us use the example of car thieves in stolen cars -- does not mean that police operate without constitutional restrictions as to such persons. The leading commentators point out that if a car thief is unlawfully stopped or unlawfully arrested (lack of reasonable suspicion or lack of probable cause, for example) while driving a stolen car, then he or she would be able to challenge an unlawful search of the stolen car as the "fruit" of the unlawful stop or arrest. See LaFave, Search and Seizure, 2d ed., sec. 11.3(e), and Hall, Search and Seizure, sec. 6.12.

And if a car thief has placed his or her personal effects in his or her personal briefcase or handbag, the thief would likely have standing to object to an unlawful search of the case or bag. On the other hand, if: (1) the thief is not unlawfully stopped, (2) the vehicle is accessed while in a location in which the thief has no right of privacy, and (3) the search does not extend to the thief's personal effects (e.g., unoccupied car parked on the street is entered by police in order to look at VIN number on doorpost or to look in glove box for registration papers), the thief will have no standing to challenge the entry of the vehicle.

LED EDITOR'S NOTE: For a similar ruling on "automatic standing" in a reported Court of Appeals decision not reported in the LED, see State v. Jones, 68 Wn. App. 843 (Div. I, 1993) (upholding King County Superior Court conviction of Joseph Adams).

(2) **SUPERVISOR'S AUTHORIZATION FOR RCW 9.73.230 SINGLE-PARTY CONSENT RECORDING MUST SPECIFY WHICH OFFICERS WILL RECORD; SEVERAL OTHER ISSUES UNDER SECTION 230 RESOLVED FAVORABLY TO THE STATE** -- In State v. Jimenez, 76 Wn. App. 647 (Div. I, 1995), the Court of Appeals addresses five issues under RCW 9.73.230, the 1989 amendment to the Privacy Act which permits police to conduct single-party consent recordings of certain drug conversations where such recording is authorized in advance by a police officer above the level of first-line supervisor.

The issues and rulings are as follows: (1) Must the authorization to record by in writing?

(ANSWER: No); (2) Must the consent by an officer to the recording be in writing? (ANSWER: No, at least when the consenting party is also the officer seeking authorization to record); (3) May a police agency do five separate authorizations in regard to a particular investigation, i.e., may an agency not limit itself to one authorization and two extensions per investigative effort? (ANSWER: Yes; there is no limit on the number of separate authorizations per investigative effort permitted under RCW 9.73.230); *(4) Must an authorization list by name the specific officers authorized to record conversations, i.e., is it unlawful for the authorization to refer in general terms, as here, to "any other members of the Skagit County Interlocal Drug Enforcement Unit" or "members of the Skagit County Interlocal Drug Enforcement Unit and/or their representatives"? ANSWER: Yes, the authorization must give specific names of authorized officers.);* (5) Must any information obtained while police are illegally recording be suppressed, even if police made a good faith mistake in the authorization process? (ANSWER: Yes, all information must be suppressed.)

As to issue 4 in italics above, the Court of Appeals analysis in part is as follows:

> [T]he statute specifically requires that the written report prepared at the time of authorization shall indicate the names of the officers authorized to intercept, transmit and record the conversation. RCW 9.73.230(2)(c). The requirements of the statute must be strictly complied with for authorizations to be valid. State v. Gonzalez, 71 Wn. App. 715 (1993) **March '94 LED:06**. The Gonzalez court found that, unlike the consensual taping of in-custody interrogations under RCW 9.73.090, technical errors are fatal to an authorization under RCW 9.73.230. Unlike RCW 9.73.090, the persons against whom the recordings are being used have not consented to, and are unaware of, a recording made under RCW 9.73.230. **[LED EDITOR'S COMMENT: This last sentence is not an accurate description of the law under O90, but the Court's erroneous statement probably did not affect its decision.]** The specific procedural instructions of RCW 9.73.230 are necessary to "limit abuse of what amounts to self-authorized electronic surveillance."
>
> Law enforcement officers should provide the information required by the statute in a clear and understandable written report. Catchall phrases such as those used in the May 19 and 27 authorizations will not suffice to meet the specificity required by the statute. This does not necessarily mean, however, that failure to complete a particular form utilized by the law enforcement agency will fail to satisfy the statute. Generally, if all the required information can be gleaned from the face of the authorization report, including who is authorized and who is acting, the authorization is valid.
>
> On the May 19 report the description of probable cause states that "an undercover detective" will engage in the recorded conversation. Because the authorization portion of the report allowed "any other member of the Skagit County Interlocal Drug Enforcement Unit" to engage in transmitting or recording, the specific persons authorized cannot be determined from the report. On this report Detective Spevacek is listed as the consenting party, but his participation is unclear because of the other language. Because the required information cannot be gleaned from the face of the May 19 authorization report, it is invalid.
>
> On the May 27 report, although no specific persons are listed as authorized, the

> description of probable cause states that Detective Spevacek will be the officer transmitting or recording the conversation. However, the catchall authorization in this report likewise renders it unclear who else will be engaged in the recording. This report attempts to authorize not only the entire drug enforcement unit, but also any of its representatives. We hold that the May 27 authorization is also invalid.

Result: Skagit County Superior Court convictions: (1) of Maria Jimenez affirmed (one count) and reversed (two counts), and (2) of Jesus Jimenez affirmed (one count), reversed (one count) and left undecided (this one count is remanded for further review in the trial court).

LED EDITOR'S COMMENT:

We would hope that the Jimenez holding that officers doing recording must be identified in the section 230 authorization document is subject to some qualifications so that the identity of undercover officers can be protected. Maybe an analogy could be made to the case law that provides a limited protection from discovery of surveillance locations. See e.g. Anderson v. U.S., 607 A.2d 490 (D.C. Ct. App. 1992). Perhaps a listing of unnamed undercover officers 1, 2, 3, etc. with a confidential master list might suffice. Officers should check with their legal advisors and/or prosecutors; in light of the plain language of the statute, we feel that the authorization should identify the officers by name, unless another method is advised by the legal advisor or prosecutor.

(3) **LOCKED BEDROOM IN SINGLE-FAMILY HOUSE NOT A SEPARATE UNIT OF "BUILDING" FOR PURPOSES OF "FIRST DEGREE RAPE" LAW, SO "FELONIOUS ENTRY" COULD NOT BE PROVEN** -- In State v. Thomson, 71 Wn. App. 634 (Div. II, 1993) the Court of Appeals rules that the facts of the case showed that defendant committed a "felonious remaining", not a "felonious entry," of a rape victim's house, and therefore defendant could be convicted only of rape in the second degree, not rape in the first degree. The facts and lower court proceedings in the case are described by the Court of Appeals as follows:

> T., an adult female, lived in a house in Cowlitz County, Washington. The house had several rooms, one of which was her bedroom. Her bedroom was equipped with a lock on the door. **[She occupied the entire house. LED Ed.]**
>
> T. met [John Wayne] Thompson during the evening of July 6, 1990. During the early morning hours of July 7, she invited him to her house. Apparently, they went to the house and entered it together. He then made sexual advances, which T. rebuffed. However, she said he could sleep in a guest bedroom. She then went into her bedroom and locked the door.
>
> At this point in time, according to the stipulated facts, Thomson was licensed or invited to be in certain areas of the home, including the living room, kitchen, bathroom, and guest bedroom. He had no license, invitation or privilege to enter T.'s bedroom.
>
> Later that night, Thomson broke through T.'s bedroom door and forcibly compelled her to have sexual intercourse. She resisted, but her efforts failed.
>
> The State charged Thomson with first degree rape committed in violation of RCW

9A.44.040(1)(d). RCW 9A.44.040 provides in pertinent part:

> (1) A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory:
> . . .
> (d) Feloniously enters into the building or vehicle where the victim is situated.

At a bench trial on stipulated facts, the trial court found that Thomson had engaged in sexual intercourse with T. by forcible compulsion, and that he had feloniously entered into a building in which T. was situated. Thus, it convicted him of first degree rape.

The Court of Appeals reverses the trial court ruling, holding that there was no evidence that Thomson intended to commit a felony when he entered the victim's home, and therefore, there was no felonious entry of the building where the victim was situated; hence, the aggravating factor of RCW 9A.44.040(1)(d) was not met based on Thompson's original entry of the house with the victim's consent. The Court also rejects an argument by the prosecutor that the "bedroom" could be deemed to be a separate unit of a "building" (see definition at RCW 9A.04.110(5)) just because the door was locked and the victim separately occupied the bedroom.

Result: Cowlitz County Superior Court conviction of first degree rape reversed; Court of Appeals holds defendant to be guilty of second degree rape and remands case for re-sentencing.

LED EDITOR'S COMMENT: We don't know whether the prosecutor will appeal on what we see as a difficult argument; we can't see a locked bedroom in a single-family home as a separate "building" under Title 9A RCW. We don't know of a legislative proposal in the works, but we would hope that the statute will ultimately be amended by the Legislature to make clear that "felonious remaining," as well as "felonious entering," aggravates forcible rape from second degree to first degree status. It would seem to be a simple, non-controversial amendment.

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The Law Enforcement Digest is edited by Assistant Attorney General, John Wasberg, Office of the Attorney General. Editorial comment and analysis of statutes and court decisions express the thinking of the writer and do not necessarily reflect the opinion of the Office of the Attorney General or the Washington State Criminal Justice Training Commission. The LED is published as a research source only and does not purport to furnish legal advice.