LAW ENFORCEMENT MEMORIAL DAY - MAY 15

"**...to have laid so costly a sacrifice upon the altar of freedom.**"
Abraham Lincoln, in a letter to a mother of a fallen soldier.

HONOR ROLL

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443rd Session, Basic Law Enforcement Academy - January 3 - March 26, 1996

President:	Officer Christopher M. Buroker - Kennewick Police Department
Best Overall:	Deputy Raymond M. Clayton - Walla Walla County Sheriff's Department
Best Academic:	Officer Matthew L. Nixon - Department of Fish & Wildlife
Best Firearms:	Officer Jeffery S. Williams - Kent Police Department

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Corrections Officer Academy - Class 227 - March 4 - 29, 1996

Highest Overall:	Officer Robert L. Campbell, Jr. - Pierce County Jail
Highest Academic:	Officer James M. Dougan - Yakima Police Department
Highest Practical Test:	Officer Susan M. Fullwood - McNeil Island Correctional Center
Highest in Mock Scenes:	Officer Lori R. Brady - Mason County Jail
	Officer Robert L. Campbell, Jr. - Pierce County Jail
	Officer Linda D. Duncan-Casaw - Cedar Creek Corrections Center
	Officer Paul R. Jones - Pierce County Jail
Highest Defensive Tactics:	Officer James M. Ebel - Spokane County Jail
	Officer Robert M. Kocher - Pierce County Jail

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Corrections Officer Academy - Class 228 - March 4 - 29, 1996

Highest Overall:	Officer Ian W. Thomas - Yakima Police Department
Highest Academic:	Officer Jonathan D. Newkirk - Pierce County Jail
	Officer Joseph R. Tipton - Olympic Correctional Center
Highest Practical Test:	Officer Ian W. Thomas - Yakima Police Department
	Officer Lenna A. Bradley - Washington Corrections Center
Highest in Mock Scenes:	Officer Lenna A. Bradley - Washington Corrections Center
	Officer Bradley L. Tucker - Spokane County Jail
Highest Defensive Tactics:	Officer Ian W. Thomas - Yakima County Jail
	Officer Matthew L. Thompson - Geiger Corrections Center

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

FAILURE TO NAME OFFICERS PARTICIPATING IN AGENCY-AUTHORIZED RECORDING OF DRUG DEAL CONVERSATIONS VIOLATES RCW 9.73.230, BUT "GOOD FAITH" SAVES EVIDENCE -- In State v. Jimenez, 128 Wn.2d 720 (1996), the State Supreme Court reverses the Court of Appeals' decision in State v. Jimenez, 76 Wn. App. 647 (Div. I, 1995) **June '95 LED:18**. The Supreme Court overturns the Court of Appeals' broad reading of the exclusionary rule provision of RCW 9.73.230. However, the Supreme Court leaves intact the Court of Appeals' interpretation of the provision of the statute that requires the naming of all officers involved in self-approved agency authorizations for intercepting and recording drug communications.

The Court of Appeals had held in Jimenez that the police agency's self-approved authorization to intercept and record drug deal conversations pursuant to RCW 9.73.230 violated the statute, because the written authorization document at issue had failed to name the officers who would be participating in the interception and recording. Instead, the authorization at issue in Jimenez had merely declared that "members of Skagit County Interlocal Drug Enforcement Unit and/or their representatives" were authorized to intercept and record.

The Court of Appeals had ruled in Jimenez that failure to name the specific officers authorized to record was fatal to the authorization, because section 230 requires that the recording officers be "named". The Court of Appeals then went on to suppress not only the recordings but also all information obtained during the recording activity, including information obtained through police observations totally independent of the recordings.

The prosecutor sought review of the Court of Appeals' Jimenez ruling, but only on the suppression holding, not on the Court's interpretation of the statutory requirement that officers engaged in recording activity be named. **[LED Editor's Note: In light of the finality of the Court of Appeals' holding on the naming requirement in Jimenez, it appears that, unless otherwise advised by their prosecutors, Washington law enforcement agencies completing 230 authorizations should be naming all officers expected to be involved in intercepting and recording activity.]**

The prosecutor's argument on the exclusionary ruling, with which the State Supreme Court agrees, is that subsection (8) of RCW 9.73.230 permits officers to testify where: (1) a good faith mistake invalidates a 230 authorization, and (2) the officers' testimony is based upon their "independent" observations (i.e., observations untainted by the recording). With emphasis added, subsection (8) of section .230 provides in part:

> In any subsequent judicial proceeding, evidence obtained through the interception or recording of a conversation or communication pursuant to this section shall be admissible only if:

> (a) The court finds that the requirements of subsection (1) of this section were met . . .
> . . .
> **Nothing in this subsection bars the admission of testimony of a party or eyewitness to the intercepted, transmitted, or recorded conversation or communication when that testimony is unaided by information obtained solely by violation of RCW 9.73.030.**

In accepting the prosecutor's statutory "good faith" argument in Jimenez, the Supreme Court distinguishes a case -- State v. Salinas, 121 Wn.2d 689 (1993) **Nov. '93 LED:08** -- where the emphasized language of subsection (8) was at issue. In Salinas, the law enforcement agency conducting unlawful one-party consent recording activity had made no effort to comply with RCW 9.73.230. The Supreme Court had held in Salinas that subsection (8) did not help the State's case. Not only the recordings, but also the officers' independent observations while doing the recordings were inadmissible, the Court had held in that case.

The Supreme Court then turns to the circumstances of the Jimenez case, explaining as follows why all-inclusive exclusion is not required under the Jimenez facts:

> The State suggests RCW 9.73.230(8) was intended to apply in cases where officers attempt to comply with RCW 9.73.230 and act in good faith on an invalid authorization. We agree. The unaided evidence provision in RCW 9.73.230(8) was clearly intended to apply to this type of case. If it does not apply here, it will never apply.
>
> . . . Salinas may be distinguished by the absence of any attempt by the investigating officers to comply with RCW 9.73.230. Consequently, we did not foresee that our reading of RCW 9.73.050 would be interpreted to render RCW 9.73.230(8) meaningless in cases where law enforcement officers made a genuine effort to comply with the privacy act. This case presents an opportunity to reconcile the general exclusionary rule of RCW 9.73.050 with the more specific provisions of RCW 9.73.230(8).
>
> We hold that where law enforcement officers make a genuine effort to comply with the privacy act and intercept a private conversation pursuant to an RCW 9.73.230 authorization, the admissibility of any information obtained is governed by the specific provisions of RCW 9.73.230(8). Absent compliance with that section, the intercepted or recorded communication itself will be inadmissible. However, the unaided evidence provision in the same section precludes the suppression of any other evidence. State v. Gonzalez [71 Wn. App. 715 (Div. III, 1993) **March '94 LED:06** (addressing the validity of a recording which occurred beyond the statutory 24-hour time limit -- LED Ed.] is overruled insofar as it is inconsistent with this decision.

Result: Court of Appeals' all-inclusive suppression ruling reversed; cases against Maria and Jesus Jimenez remanded to Skagit County Superior Court to determine whether their convictions for delivery and possession of cocaine should be sustained or overturned based on the witnesses' testimony which is free of taint of the unlawful recordings.

LED EDITOR'S COMMENT: The 1989 guidelines by the Washington Association of Sheriffs and Police Chiefs made the following suggestion in relation to exclusionary exception of subsection (8) of RCW 9.73.230, and its requirement of "unaided" testimony in the event of a section 230 error:

> **Although officers may be tempted to use the recordings or transcriptions as an aid for writing their reports, this should never be allowed to occur. This needs to also extend to discussions about the conversations between the secretary who transcribes the conversation and the undercover officer . . .. The officer or officers involved in the recording process may need to be available to answer questions from the transcriber concerning the content of the recording, etc., however, the consenting party involved in the discussion needs to be isolated from exposure that may prevent his/her testimony at trial. To further complicate this area, one must avoid basing future search warrants on information taken directly from the recording or transcription. Although it is perfectly acceptable for all parties who were involved in the conversation to utilize information based solely on their recall, the use of these interceptions in this manner could endanger future actions if based on the recordings.**

LED EDITOR'S NOTE: Next month's LED will include another recent case interpreting RCW 9.73.230. In State v. Smith, 80 Wn. App. 535 (Div. I, 1996), the Court of Appeals has held that where law enforcement officers know, prior to issuance of an authorization, the specific location where interception and recording is expected to take place, they must state that location in the authorization document, in addition to any generalized "boilerplate" language about other possible locations.

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WASHINGTON STATE COURT OF APPEALS

PURSE LEFT IN STORE NOT "ABANDONED", BUT SEARCH FOR IDENTIFICATION OK

State v. Kealey, 80 Wn. App. 162 (Div. II, 1995)

Facts: After two shoppers had left a retail store following a purchase, a store clerk noticed that the shoppers had left a purse behind. The Court of Appeals describes as follows what happened after that:

> After a few minutes, the clerk took the purse into the back room and opened it . . .. She removed a makeup bag from the purse, and thought she smelled marijuana in the bag. She did not see any drugs inside, and she did not attempt to look for identification. Without replacing the makeup bag, she shut and tossed the purse into a corner. Five minutes later, the two women returned to the shoe department and asked the clerk if she had seen the purse. The clerk lied and said she had not. The clerk explained at the suppression hearing that she did not want the women to know she had found marijuana in the bag.

The women looked for the purse throughout the shoe department and elsewhere in the store. The store manager helped them search the shoe department. The women were frantic because the purse was missing and "real mad, real angry, real frustrated." Unable to find the purse, the two women left shortly after the store's closing time.

The next morning the shoe department manager noticed the makeup bag that had been left on her desk. She picked it up and smelled marijuana. She unzipped the makeup bag and saw a baggie containing what appeared to be marijuana. The department manager incorrectly assumed that the makeup bag belonged to the clerk. The assistant store manager searched the bag and found, not only the baggie of marijuana, but also a larger package containing a white powdery substance and a smaller bag containing a hard rock crystal substance.

The assistant store manager then contacted the local narcotics task force. Detective Ray Hartley examined the makeup bag, finding a baggie of marijuana and a larger baggie containing white powder, which he believed to be methamphetamine. The clerk who had originally found the purse explained that two women shoppers had left the purse. The clerk then produced the zipped leather purse and the police examined it. According to Detective Hartley, "no thought was ever given to obtaining a warrant before searching the purse. Nor was any thought given to justification for a warrantless search. The search of the purse was undertaken simply to establish its ownership." The detectives reexamined the purse after returning to their office. "Once again, no effort to obtain a warrant was made. The only justification for the search of the purse was to locate identification."

The detectives found in the bag two rent checks made out to Carolyn Kealey and an AT&T long distance card in her name. These items were the only evidence of the ownership of the purse. After discovering Kealey's name, the police officers set up a sting operation, resulting in Kealey's arrest.

Proceedings: Kealey was charged with five drug counts under RCW 69.50.401. She successfully moved pre-trial to suppress, and, after granting the suppression motion, the trial court dismissed the charges for lack of evidence.

ISSUES AND RULINGS: (1) Was the mislaid purse "abandoned" such that Ms. Kealey did not have a reasonable expectation of privacy in the purse? (ANSWER: No); (2) Assuming the purse was not "abandoned", was the police officer nonetheless justified in searching the purse for identification, where the officer knew that he was likely to discover illegal drugs in the purse, as well as ID? (ANSWER: Yes, the search for ID was justified despite his awareness of the likely presence of illegal drugs.) Result: Cowlitz County Superior Court suppression order reversed; case remanded to the Superior Court for trial.

ANALYSIS:

(1) ABANDONMENT; PRIVACY

In critical part, the Court of Appeals' analysis on the abandonment/privacy issue is as follows:

The precise issue here is whether, in the eyes of society, a person loses a reasonable expectation of privacy in a purse after misplacing the purse. We resort to the common law of personal property to assist us:

> The laws of trespass and tort are not controlling when considering whether the Fourth Amendment applies or is violated in a particular case, but reference to those laws may be helpful in resolving whether a person has a reasonable expectation of privacy under the Fourth Amendment. . . .

The common law distinguishes among property that is abandoned, lost, or misplaced. Property is abandoned when the owner intentionally relinquishes possession and rights in the property. Property is lost when the owner has parted with possession unwittingly and no longer knows its location. Property is mislaid when the owner intentionally puts it in a particular place, then forgets and leaves it. For the purposes of this case, we see no meaningful distinction between lost and mislaid property, and we treat them interchangeably.

A person who abandons property loses any ownership interest in the property, and relinquishes any reasonable expectation of privacy in it. By contrast, at common law, one does not relinquish ownership in goods by losing or misplacing them. . . .

We hold that the owner of lost or mislaid property, who is in the eyes of the common law an inadvertent bailor, retains a reasonable expectation of privacy in the property, just as she would retain a reasonable expectation of privacy if she were a deliberate bailor who had intentionally consigned the property to a courier, postal service, or common carrier. This expectation of privacy is diminished, however, by the fact that the finder/bailee has an obligation to seek out the owner of the goods and to try to return them. In other words, the owner's expectation of privacy is diminished to the extent that the finder may examine and search the lost property to determine its owner.

. . .

Applying these principles to this case, the trial court correctly determined that Kealey did not abandon her purse. Kealey did not voluntarily relinquish her expectation of privacy as demonstrated by her attempt to find the purse shortly after leaving it where she was trying on shoes. Kealey had no intention of divesting herself of the purse or the women would not have returned to retrieve the purse or behaved so frantically in searching for it. Rather than abandoning the purse, Kealey mislaid the purse. The store stood as a bailee for her when the clerk exerted control over the purse. Kealey remained in constructive possession and retained a reasonable expectation of privacy in the purse, diminished to the extent that the finder would probably search the purse for identification. We hold that the police officers conducted a search governed by the Fourth Amendment when they searched Kealey's purse.

[Citations and footnotes omitted]

(2) JUSTIFICATION FOR POLICE SEARCH

In critical part, the Court of Appeals' analysis on the justification issue is as follows:

> The police officers justified their search on the grounds that they were searching for identification. The police had a right, if not an obligation, to search the purse for identification for the purpose of returning the purse. We hold that searching lost or mislaid property for identification is an exception that makes reasonable a warrantless search. The coexistence of investigatory and administrative motives does not invalidate the lawful search for identification. Thus, the police officers did not lose their right to search the purse for identification when they learned the purse contained drugs. Our holding is supported by the fact that Kealey's reasonable expectation of privacy in her misplaced purse is diminished to the extent that a finder would search for identification.
>
> Several further reasons support our holding. First, the Fourth Amendment prohibits unreasonable searches, but it does not metamorphose reasonable searches into unreasonable ones simply because the police officers have additional information of wrongdoing. Second, Kealey's privacy interest in the contents of her purse was already subject to the right of the police to search for identification, and knowledge that Kealey was probably involved in illegal activities does not increase her privacy interest. Third, requiring a search warrant would create a paradox under the circumstances of this case. If we required a warrant, and the magistrate found probable cause to search, then the police would search the purse. But if the magistrate found no probable cause, then the police would be back where they began, and would presumably be entitled to search the purse for identification for the purpose of returning the purse to its owner. Fourth, in the analogous context of inventory searches, courts have held that the presence of an investigatory motive does not invalidate a nonpretexual search to inventory the contents of property seized by police.

[Citations and footnotes omitted]

NONCUSTODIAL TELEPHONE QUESTIONING IN APPARENT PC/FOCUS SITUATION DOES NOT TRIGGER MIRANDA; ALSO, DEFENSE "AUTHENTICATION" OBJECTION REJECTED

State v. Mahoney, 80 Wn. App. 495 (Div. III, 1996)

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

> Police telephoned Erik Duane Mahoney and asked him whether he was present when stereo equipment was stolen from a vehicle parked at a Spokane apartment complex. Mr. Mahoney said he and two friends were "checking out cars" at about 1:30 a.m. He then admitted that he kept an eye out while the others removed the rear window of a vehicle and took stereo equipment and sunglasses from the vehicle. Mr. Mahoney was charged with second degree theft and second degree malicious mischief. The trial court admitted Mr. Mahoney's telephone statements over his objections. Mr. Mahoney was convicted of second degree theft and third degree malicious mischief. . .

ISSUES: (1) Was the telephonic interrogation of Mahoney "custodial" such that Miranda warnings and waiver were required? (ANSWER: No) (2) Did the State properly "authenticate" Mahoney as

the person on the other end of the phone line? (ANSWER: Yes) Result: Spokane County Superior Court convictions for second degree theft and second degree malicious mischief affirmed.

ANALYSIS: (Excerpted from Court of Appeals' decision)

(1) Miranda

> **Miranda safeguards apply when a "suspect's freedom of action is curtailed to a degree associated with formal arrest.** That determination depends on whether the "suspect reasonably supposed his freedom of action was curtailed." A Miranda interrogation is not limited to express questioning. It includes words or conduct by the police "that the police should know are reasonably likely to elicit an incriminating response from the suspect."
>
> In [State v. Pejsa, 75 Wn. App. 139 (Div. II, 1994) **Dec. '95 LED:18**], the defendant had several incriminating "throw phone" conversations with police, after he barricaded himself in an apartment. At trial, he moved to suppress police tapes of the negotiations because they contained "custodial" statements taken without the benefit of Miranda warnings. Division Two observed that Miranda focuses on custodial interrogations because of their secrecy. When an interrogator is alone with a suspect, police may employ a number of subtle psychological pressures. A suspect's will is much more likely to be overcome in an atmosphere controlled by the police. Isolation is the key aspect of a custodial setting. . . . Police in [an] interrogation setting can restrain a suspect and apply whatever psychological techniques they think will be most effective.
>
> In State v. Denton, 58 Wn. App. 251 (1990) **[Oct. '90 LED:01]**, the defendant telephoned a police detective after being arrested for robbery. The detective jokingly asked the defendant whether he had robbed a store. The defendant told him he had been arrested for bank robbery. Not realizing the defendant was serious, the detective asked, "[D]id you do it?" The defendant responded, "I was there." The detective asked other incriminating questions which the defendant answered. The conversation did not carry with it coercive and intimidating factors that are normally present in jailhouse interrogations and that the Miranda Court sought to guard against. The officer was not physically present and the defendant was "free to terminate the conversation at any time simply by hanging up the telephone."
>
> Mr. Mahoney relies on State v. Lewis, 32 Wn. App. 13 (1982) **[Sept. '82 LED:07]**. His reliance is misplaced. There, police had probable cause for an arrest but set up an interrogation of the suspect at police headquarters to develop additional incriminating information. Here, Mr. Mahoney spoke with the detective on the telephone, not at police headquarters. He was not in custody. Nor was his situation inherently coercive. He could have simply hung up and terminated the conversation. The conversation did not lend itself to secrecy or subtle psychological pressures. The telephone conversation between Mr. Mahoney and the detective was not a custodial interrogation.

(2) Authentication

> Mr. Mahoney next argues that the court should not have admitted the telephone statements because they were not property authenticated -- he was not properly identified. Authentication is required. Evidence of identity may be either direct or circumstantial.
>
> The detective who spoke to Mr. Mahoney had known him for several years and was familiar with his voice. And he had had at least two recent contacts. The detective telephoned Mr. Mahoney's residence and his mother answered. Mr. Mahoney tried unsuccessfully to return the detective's call. The detective again called Mr. Mahoney -- at the same number. Mr. Mahoney also gave first-hand details about the theft. He was therefore adequately identified to authenticate the telephone conversation.

[Some citations omitted; emphasis added]

LED EDITOR'S COMMENT:

This is a helpful case for law enforcement, but it would have been a better case if the published opinion had been more carefully written by the Court of Appeals. We would have liked to see the following matters more explicitly addressed.

(1) Did the telephoning officer have PC to arrest Mahoney when he made his interrogating call? ANSWER: It appears that the officer did have probable cause to arrest Mahoney and hence had "focused" on him as a suspect. Otherwise, defendant wouldn't have argued that State v. Lewis -- See Sept. '82 LED:07 -- supported his case. It would have helped the precedential value of this decision if the Court of Appeals had expressly stated that there was in fact probable cause to arrest Mahoney at the time of the phone conversation.

(2) Does the 1982 decision in State v. Lewis have any continuing validity? ANSWER: No, no, no and no. The 1982 Court of Appeals' decision in Lewis held that probable cause triggered Miranda even though (1) Lewis came to the investigator's office voluntarily and of his own free will, and (2) he was free to terminate the interview and to leave at any time. Subsequent cases demonstrate, however, that the Lewis-type, tactical, voluntary, station-house questioning is permitted without Miranda warnings if done properly. There is in fact no probable cause/focus trigger to Miranda, except perhaps in officer-deception situations. See entries on this issue in the following recent LED's: Sept. '95:06; May '95:10; July '94:02. We would have hoped that the Court of Appeals would have explained in Mahoney that the 1982 Court of Appeals decision in State v. Lewis was not only distinguishable factually (i.e., station-house questioning vs. phone questioning) but also was simply in error legally. Lewis was based on a misreading of the Miranda requirements, as subsequent cases from the U.S. Supreme Court, Washington Supreme Court, and Washington Court of Appeals demonstrate. Again, we believe that there is no PC/focus trigger to Miranda.

(3) Does any "seizure" establish Miranda's "custody" element, or is the Miranda warnings-requirement triggered only by those seizures that are the functional equivalent of arrest? ANSWER: The latter. The Mahoney court correctly notes in the above-emphasized first sentence of excerpted analysis that only those seizures that curtail freedom to a "degree

associated with a formal arrest" constitute "custody" for Miranda purposes. Unfortunately, the Mahoney court then says that this determination depends on whether the "suspect reasonably believed his freedom of action was curtailed." What the court should have said to maintain clarity and accuracy was to finish the sentence -- i.e., the determination depends on whether the "suspect reasonably believed his freedom of action was curtailed to a degree associated with a formal arrest."

CONSTRUCTIVE POSSESSION OF DRUGS SHOWN BY TOTALITY OF CIRCUMSTANCES

State v. Robinson, 79 Wn. App. 386 (Div. I, 1995)

Facts and Proceedings: (Excerpted from Court of Appeals' opinion; emphasis added)

> In early 1989, Seattle Police Detective Darryl Williams, working undercover, began buying methamphetamine from Steven Blair. Blair told Williams his suppliers were two women named "Bonnie and **Mary Ann**", whom he frequently referred to as "the girls."
>
> On April 20, 1989, Detective Williams asked if Blair could sell him a pound of methamphetamine. Blair called Williams back and said he had talked to the girls, that they could get it, and that their price was $25,000. When Williams agreed to this price, Blair said the girls would pick up the drugs in Olympia somewhere and bring them to his apartment in Seattle at about 4 p.m. Williams called Blair several times throughout the afternoon and evening. Blair told Williams the girls had not shown up yet because they had "met with some friends" and were "sitting and talking." Finally, Williams said he had to leave and could not wait any longer.
>
> Four days later, on April 24, 1989, Detective Williams called Blair again. They rescheduled the transaction for 4 p.m. that afternoon. Williams went to Blair's apartment, where Blair introduced him to **Mary Ann Robinson**, Bonnie Lindsay, and others. **Robinson** and Lindsay were sitting on a couch in the living room. A small blue and white cooler was on the floor at the end of the couch.
>
> According to Williams' trial testimony, he said to **Robinson**, "'I am sorry that things didn't work out the other night. I had to take off . . ..'" **Robinson** responded, "'Well, if I had known that you were in such a hurry, then I would have just brought the stuff, because I was just sitting talking to friends.'"
>
> Blair came out of an adjoining office with a ziplock baggie containing a pound of methamphetamine and handed it to Williams. Shortly thereafter, by prearranged signal, an anti-crime team forced entry into Blair's apartment and arrested everyone there. The police seized the pound of methamphetamine and the blue and white cooler. The contents of the cooler included bags with methamphetamine, narcotics paraphernalia, baggies, money bands, some small purses and a tampon holder. Several of the bags had notations of their weight, dates, and times, suggesting they were packaged for distribution and sale. In searching **Robinson**, the police found in her pocket a syringe containing methamphetamine.

The State initially charged **Robinson** and Blair with possessing methamphetamine with intent to manufacture or deliver. **Mary Ann Robinson** obtained counsel. When the State later charged Bonnie Lindsay, the same attorney agreed to represent her also. Steven Blair pleaded guilty. After some discussions with defense counsel, the State obtained a dismissal of charges against Bonnie Lindsay. **Mary Ann Robinson** went to trial, was convicted, and received an exceptional sentence of 48 months.

ISSUE AND RULING: Was there sufficient evidence of Robinson's dominion and control to support her conviction of possession of the drugs on a constructive possession theory? (ANSWER: Yes) Result: reversal on grounds not addressed here (conflict of interest of trial attorney) of King County Superior Court conviction for possessing methamphetamine with intent to manufacture or deliver; case remanded for re-trial.

ANALYSIS: (Excerpted from Court of Appeals' opinion)

> A defendant has constructive possession of the drugs if she has dominion and control over them. The State must prove more than a passing control; it must prove actual control. Mere proximity to the drugs and evidence of momentary handling will normally not support a finding of constructive possession.
>
> The State relies in part on evidence that Robinson demonstrated sophisticated knowledge about the sources and characteristics of methamphetamine when interviewed by a detective after she was arrested. Such evidence, while tending to depict Robinson as a dealer rather than a user, does not independently prove that she was in possession of the drugs on April 24.
>
> The critical evidence tying Robinson to the drugs was the testimony of Detective Williams that when he greeted her on April 24 with regret that "things didn't work out" on April 20, Robinson responded with "'Well, if I had known that you were in such a hurry, then I would have just brought the stuff, because I was just sitting talking to friends.'" This remark tends to show that she was in control of the drugs when they were brought into the apartment on April 24 and that she intended to complete the transaction previously arranged for April 20.
>
> Robinson argues that even if she did bring the drugs into the apartment, the evidence remains insufficient because by the time the arresting officers arrived, she had turned possession of the drugs over to Blair. We disagree. The evidence shows more than past momentary handling by a visitor as in State v. Callahan, 77 Wn.2d 27 (1969). Viewing the evidence in the light most favorable to the State, a rational trier of fact could have found, beyond a reasonable doubt, Robinson had dominion and control over the drugs.

[Some citations omitted]

CONSTRUCTIVE POSSESSION STANDARD GETS PRO-STATE RULING

State v. Ponce, 79 Wn. App. 651 (Div. III, 1995)

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

> On October 16, 1992, police officers knocked on the door of a residence in Yakima. Mr. Ponce answered the door and gave the officers permission to search. Giving his name as Armando Villa Duran, Mr. Ponce told one officer he and Jose Sanchez had been renting the house for about two months. After a quick reconnaissance to determine how many people were in the residence, the officers conducted a second, more exhaustive, search and discovered a bindle of cocaine on a bedroom floor and a spoon with heroin residue lodged in a kitchen wall. When told that the bindle had been found, Mr. Ponce accused the officers of lying or of planting the drugs.
>
> Mr. Ponce was charged by information with possession of cocaine and possession of heroin, RCW 69.50.401(d). At trial, Mr. Ponce moved to dismiss after the State rested its case, arguing the State failed to prove he had constructive possession of the cocaine or heroin. . . .
>
> The court denied Mr. Ponce's motion. . . . Mr. Ponce was convicted of one count of possession of cocaine and sentenced to thirty-five days in jail.

ISSUE AND RULING: Did the trial court properly instruct the jury that constructive possession may be proved by showing that the defendant had dominion and control over either the drugs or the premises in which the drugs were found? (ANSWER: Yes) Result: Yakima County Superior Court conviction for possession of cocaine affirmed.

ANALYSIS: (Excerpted from Court of Appeals' opinion)

> Jury instructions are sufficient if, taken as a whole, they inform the jury of the applicable law, are not misleading and permit the defendant to argue his or her theory of the case. Mr. Ponce's proposed instruction limited constructive possession to "dominion and control over the substance." . . .
>
> Recent cases have established that the State may show that the person charged had dominion and control over the contraband *or* over the premises in which the contraband was found. . . .
>
> Dominion and control is determined by looking at the totality of the circumstances, including whether the residence is temporary or permanent and whether the defendant had personal knowledge of the presence of the drugs. Mr. Ponce admitted at trial that he had rented and resided at the apartment for about two months prior to the police search. Additionally, the jury was instructed that possession of a controlled substance is not unlawful if the defendant did not know it was in his possession. The jury had to find not only that Mr. Ponce was a resident of the premises, but that he knew the cocaine was on the premises. Instructions must be considered as a whole. The two instructions together prevent the constructive possession instruction from operating as a "directed verdict" for possession.
>
> Altogether, the court's instructions were supported by the evidence and informed the jury of the applicable law.

[Citations omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **MALICIOUS HARASSMENT LAW (RCW 9A.36.080) DOES NOT REQUIRE PROOF OF: (1) "PRESELECTION OF VICTIM (IN ANTI-BIAS PROTECTED CLASS)", OR (2) BIAS AS "SUBSTANTIAL FACTOR" BEHIND PROHIBITED THREATS OR ACTS --** In State v. Pollard, 80 Wn. App. 60 (Div. I, 1995), the Court of Appeals rejects defendant's argument that because of the randomness of his contact with the victim against whom he uttered threats and racial epithets, he should not be convicted of malicious harassment under RCW 9A.36.090.

Defendant Pollard, a 19-year-old caucasian, was drunk when he encountered a African-American 12-year-old. The child was standing in his own yard. Pollard, who was a foot taller than the 12-year-old, uttered a series of threats and racial epithets against the child and the child's African-American friend. Pollard was subsequently arrested and charged with malicious harassment. He argued that the charges should be dismissed because: (1) there as no evidence that he preplanned his outburst of threats and epithets against his victims, and (2) the racial bias was not a substantial factor behind his threats. In significant part, the Court's analysis rejecting Pollard's arguments is as follows:

> Pollard contends that unless a finding of preplanning is required, a person who merely utters a biased statement during the commission of another crime could become liable for felony harassment even though the initial crime was only a misdemeanor. Pollard is correct that the statute does not criminalize uttering biased remarks during the commission of another crime and that the State must show that the defendant selected his victim on a basis listed in the statute. But his argument confuses the *selection* of the victim which, by definition, must be made beforehand, with the randomness of the *encounter* with the victim. It does not follow that, because the encounter with the victim is not planned, the defendant's selection of the victim as a target is also random. It is entirely conceivable that a person could be walking down the street, have a random encounter or confrontation with a member of a group he or she does not like and decide then and there to assault that person because of the victim's membership in the target group. That is precisely what happened here. Pollard was not merely committing a separate crime when he happened to utter a racial slur. Rather, he committed the crime after he noticed Durham's and Duncan's race.
>
> In sum, we reject Pollard's contention that the State must produce evidence of preplanning in order to prove the crime of malicious harassment. Pollard's reading of the statute would essentially graft a requirement onto the statute that the State prove the defendant went out looking for a particular type of person to harass or intimidate, a requirement not supported by case law or statutory language.
>
> In the alternative, Pollard contends RCW 9A.36.080 is unconstitutionally vague because it is unclear what part of the defendant's motivation in assaulting his victim that person's membership in a particular group must be. He urges us to construe the statutory language "because of" the person's race to require a showing that the

> victim's race was at least a substantial factor in the defendant's motive for the assault. As with his sufficiency of the evidence argument, he contends that without this requirement a person making a biased statement while committing a misdemeanor assault may be subject to a felony prosecution for malicious harassment depending on the individual sensibilities of the police, investigator, or prosecutor. He further argues that if we hold that the victim's status must be a substantial factor in the defendant's motive in committing the assault, his conviction cannot stand because racial bias played only a small role in his assault on Durham.
>
> A statute is not impermissibly vague if it provides "both adequate notice and standards to prevent arbitrary enforcement." The party challenging a statute has the burden of proving unconstitutionality beyond a reasonable doubt. . . . [W]e reject Pollard's argument that the statute is unconstitutionally vague without a substantial factor requirement. . . . [I]n the context of Pollard's argument here, the words "because of" are sufficiently intelligible to the average citizen to give fair notice of what the law prohibits and that the statute does not need to be clarified as he urges.

[Citations omitted; italics by Court of Appeals]

Result: Snohomish County Superior Court conviction of Tory W. Pollard affirmed.

(2) **REPAIR TECHNICIAN ON BAC CIRCUIT BOARDS NEED NOT BE CERTIFIED --** In State v. McGinty, 80 Wn. App. 157 (Div. I, 1995), the Court of Appeals holds that an electronics technician who: (1) repairs circuit boards on BAC Verifier Datamaster machines, and (2) is not directly responsible for determining the proper working order of the machines in the field, is not required to be certified as a technician by the state toxicologist to repair and maintain the machines. Result: affirmance of King County Superior Court order affirming King County District Court conviction for DUI.

(3) **YEP PROGRAM IN SEATTLE IS A "SCHOOL" FOR PURPOSES OF DRUG ACT SENTENCE ENHANCEMENT --** In State v. Vasquez, 80 Wn. App. 5 (Div. I, 1995), the Court of Appeals rejects defendant's argument that the program near which he sold drugs to an undercover officer was not a "school" for purposes of the sentence enhancement provision of RCW 69.50.435(a). The Court holds instead that the Youth Education Program, a General Equivalency Degree (GED) program (1) offered by Seattle Public Schools for high school dropout students, and (2) located on the third floor of an office building (the Alaska building) in downtown Seattle, is a "school" for purposes of RCW 69.50.435(a). Result: affirmance of King County Superior Court conviction for delivery of a controlled substance with school grounds sentence enhancement. **LED EDITOR'S NOTE: See also the related decision in State v. Shannon, 77 Wn. App. 379 (Div. I, 1995) Oct. '95 LED:10, where the Court of Appeals rejected an argument under RCW 69.50.435(a) that the same YEP program had no "school grounds" because it is located entirely on the third floor of a downtown Seattle office building and has no outdoor playground or outdoor landscaping.**

(4) **STRIKER SPEEDY TRIAL RULE DEEMS OUT-OF-STATE PERSON NOT "AMENABLE TO PROCESS"** -- In State v. Cintron-Cartegena, 79 Wn. App. 600 (Div. I, 1995), the Court of Appeals rejects the defendant's argument that his speedy trial rights under CrR 3.3, as interpreted by the

State Supreme Court in State v. Striker, 87 Wn.2d 870 (1976), had been violated **[Note: for recent analysis on the Striker speedy trial rule, see the entries on the Stewart, Hudson, Jones, and Bazan cases in the January 1996 LED at pages 14-20. The State Supreme Court has accepted review in the Cintron-Cartegena case and the Stewart case, both of which raise the same issue.]** The Court of Appeals in Cintron-Cartegena asserts an absolute, bright-line rule. While one is in another state, and not incarcerated there, the person is not "amenable to (judicial) process", and therefore the Striker rule does not apply during that time. Result: affirmance of King County Superior Court convictions for first degree statutory rape and indecent liberties.

(5) **ON-SITE, SUBLESSOR LANDLORD MAY OR MAY NOT BE LIABLE FOR SUBTENANT'S GROW OPERATION--** In State v. Roberts, 80 Wn. App. 342 (Div. I, 1996), the Court of Appeals reverses the conviction of Dirk Roberts, for a controlled substances violation, and remands his case for retrial to allow him to defend on the theory that the marijuana grow operation in his house was entirely the responsibility of another person in the house.

Roberts had leased the house he was living in. Roberts claimed to have then subleased the basement area to a subtenant named Sylvester. It was in that basement area that Seattle Police officers executing a search warrant had found a marijuana grow operation. Roberts had tried to defend against a marijuana possession charge by trying to prove that he had nothing to do with the alleged subtenant's grow operation, but the trial court frustrated his theory of defense by restricting his proof and argument.

The Court of Appeals rules that the trial court erred in assuming, for purposes of the State's proof of "constructive possession" of the marijuana, that Roberts' ability to evict the alleged subtenant Sylvester amounted to dominion and control over the subleased premises (and hence over the marijuana). The Court of Appeals rules in this regard that, if the jury had believed that the alleged subtenant actually existed, Roberts could have defended on the "dominion and control" question on the theory that the subtenant had exclusively occupied the basement recreation room where the marijuana grow operation had been located. Even though Roberts would have had the legal authority to evict Sylvester for his illegal activity, that authority would not necessarily have given him dominion and control over the marijuana grow, the Court of Appeals rules.

The Court of Appeals also explains that Roberts could not be guilty as an "accomplice" merely by (i) accepting rent from the subtenant, (ii) paying for utilities, and (iii) not taking direct action to terminate the marijuana grow operation by contacting the police or the absentee landlord. All of these facts, including failure to contact the absentee landlord or the police regarding the grow operation, was only proof, at most, of presence and assent. These facts alone did not establish accomplice liability, the Court of Appeals declares.

Result: reversal of King County Superior Court conviction of possessing marijuana with intent to deliver or manufacture; case remanded for re-trial.

LED EDITOR'S NOTE: Perhaps implying that an alternate charge might have been more appropriate, in a footnote the Court of Appeals addresses as follows a charge not prosecuted in Roberts:

> **Roberts was not charged with violating either of Washington's "crack house" statutes, RCW 69.50.402(6) or RCW 69.53.010(1), which make criminal the knowing**

maintenance of any "place" for delivery, manufacture, sale, transfer, use, or storage of any controlled substance. A landlord violates RCW 69.53.010(1) by knowingly acquiescing in such activity by a tenant or subtenant. See State v. Sigman, 118 Wn.2d 442 (1992)[May '92 LED:05]. The landlord can defend a charge of violating RCW 69.53.010(1) by proving that he or she made a good faith effort to contact the police, or has initiated an unlawful detainer action. See RCW 69.53.010(2).

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BRIEF NOTES FROM THE 9TH CIRCUIT COURT OF APPEALS

(1) **ANTICIPATORY SEARCH WARRANT LAWFUL WHERE AFFIDAVIT SHOWS "SURE COURSE"** -- In U.S. v. Ruddell, 71 F.3d 331 (9th Cir. 1995), the Court of Appeals for the Ninth Circuit rules that an anticipatory search warrant may be used by police to facilitate a controlled delivery of contraband. In Ruddell's case, the contraband was child pornography, but the ruling would apply equally to controlled drug deliveries.

The Ruddell Court declares that "[a]n affidavit in support of an anticipatory search warrant must show that the property sought is on a sure course to the destination targeted for the search." In the Ruddell case, the affidavit provided probable cause to believe that there had been a transaction under which the contraband item was to be delivered to Ruddell's home. This was sufficient to justify the "anticipatory warrant" for the controlled delivery and immediate follow-up search, the Court holds.

Result: United States District Court (Nevada) conviction for possession of child pornography [18 U.S.C. § 2252(a)(2)] affirmed.

LED EDITOR'S NOTE: For past LED entries addressing the issue of whether anticipatory warrants are authorized under the federal or state constitutions, see August '95 LED:16, July '92 LED:20, Dec. '91 LED:13, and Sept. '90 LED:21. No Washington appellate court has yet squarely addressed this issue, nor has the U.S. Supreme Court. Of the federal and state courts in other jurisdictions which have addressed the issue, almost all have answered in the affirmative, as did the Ninth Circuit in Ruddell.

(2) **WASHINGTON'S ASSISTED SUICIDE STATUTE HELD UNCONSTITUTIONAL IN PART** -- In Compassion in Dying, et. al. v. State of Washington, et. al., 58 CrL 1555 (9th Cir. 1996), the U.S. Court of Appeals for the Ninth Circuit has ruled that RCW 9A.36.060, Washington's law prohibiting the knowing assistance in a suicide, unconstitutionally infringes on individual due process/liberty interests to the extent that the law would punish a person who "aids" in a suicide under certain circumstances. Result: by an en banc 8-3 decision, the Ninth Circuit reverses a 1995 Ninth Circuit decision by a 3-judge panel (see **Sept. '95 LED at page 5**) and affirms a 1994 Federal District Court decision declaring the statute unconstitutional in part (see **Sept. '94 LED at page 19**). Status: the State of Washington will seek review in the United States Supreme Court.

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NEXT MONTH

The June LED will include PART ONE of an update of legislation passed in the 1996 Washington

legislative session and signed into law by Governor Lowry. Most of that legislation will have a June 6, 1996 effective date. Among the legislation to be addressed are: chapter 295 (firearms law), chapter 248 (domestic violance law), chapter 133 (at-risk youth legislation), chapter 114 (school zone traffic offense penalty enhancement), and chapter 36 (boating hit-and-run). We will also note that ESBH 2406, which would have permitted court-ordered pen registers and phone traps under certain circumstances, was vetoed in its entirety by Governor Lowry.

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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.

LAW ENFORCEMENT, ALZHEIMER'S DISEASE & the LOST ELDER

Officers will be asked to respond to reports of older people who are missing from their homes or from nursing facilities. Most officers will come in contact with elderly persons out on the street, lost and confused. Officers may also become involved in cases of neglector abuse of elders. In all of these situations, officers should consider the possibility of Alzheimer's disease.

WHAT IS ALZHEIMER'S DISEASE?

First described by Dr. Alois Alzheimer in 1906, Alzheimer's disease is the most common form of dementia. "Dementia" refers to a group of symptoms, including loss of memory and impaired thinking. Alzheimer's is the most common form of dementia.

Alzheimer's is not a normal part of aging, nor is it a mental illness. It is a degenerative brain disease, meaning it gets worse over time while eroding a person's ability to remember, to think, to make sound judgments and eventually to care for him or herself. It is a terminal illness, the fourth leading cause of death among adults in America. Currently, there is no cure.

Life expectancy from the time symptoms first appear is 8 to 10 years, although some people have lived with the disease for 20 years or more. Alzheimer's disease and related disorders (such as "multi-infarct" dementia, caused by vascular disease and strokes) affect an estimated four million men and women nationwide.

There is no single test for Alzheimer's. The best diagnostic method involves a team of medical professionals that rules out all other possible causes of memory impairment. A full diagnostic workup is important because there are a number of conditions which can mimic the symptoms of dementia (including depression, alcoholism, drug reactions, nutritional deficiencies, head injury, or infections such as AIDS, meningitis or syphilis).

THE NATURE OF THE PROBLEM FOR POLICE

Alzheimer's is primarily a disease of the elderly. Its prevalence among all people over age 65 is estimated at 10%. One major study puts the prevalence rate for those over age 85 (the fastest growing population in America) at a staggering 47%. A small percentage of people with Alzheimer's are younger, typically in their 40s, 50s or early 60s.

An estimated 75% of people with dementia live in the community, with the remainder in nursing or rest homes. At the very least, 20% of people with the disease who live in the community are living alone. This is especially alarming, because a national survey done by the Alzheimer's Association indicates that less than 2% of those who live in the community, or their caregivers, receive any support services, such as adult day care or home health aid.

Being aware of these circumstances can help officers understand how people with Alzheimer's wander from their homes and become lost. It may be because there is no one at home to supervise and help them. Often, it is because their caregivers, physically frail themselves, are totally exhausted from providing the around-the-clock care and supervision all people with Alzheimer's eventually require. The typical caregiver at home is a woman in her 70s who has at least two chronic health problems.

ENHANCED POLICE RESPONSE: THE SAFE RETURN PROGRAM

With the support of the U.S. Justice Department, the Alzheimer's Association operates the *Safe Return* program around the clock, 365 days a year. It is available to law enforcement nationwide through a toll-free number: 800-572-1122.

When a memory-impaired person wanders away from home or an institution and the 800 number is called, the *Safe Return* operator will work with the missing person's caregiver and police to gather critical information. If necessary, an area representative of *Safe Return* can issue a Fax Alert at any time of day to numerous agencies in the surrounding communities, including police, hospitals and shelters. Follow-up counseling and service referrals are also offered to address the situation which led the elder to wander in the first place.

FIELD PROCEDURES

There are no field tests to determine if someone has Alzheimer's, so officers must look for clues.

IDENTIFICATION

Safe Return Registration and ID

The most immediate and clear way to know if someone has Alzheimer's is to look for an ID bracelet with the words "memory impaired" on it, or for a wallet card with the same message.

Because this kind of information is so helpful in the field, police officers should advise families to register patients with the *Safe Return* program.[1] For a one-time $25 fee (waived, if necessary), the patient's key information is placed in a central registry. The patient receives a bracelet with his or her first name, the words "memory impaired" and the toll-free number (800-572-1122) on the back. [See *Safe Return* registration form at page 22.]

[1] **Indeed, it is recommended that departments consider engaging in an organized outreach effort to increase registration in the program. Such a project has proven worthwhile because it improves the overall safety of this vulnerable group, serves as a tangible expression of the department's concern for the**

community, and facilitates the efficient use of police resources in locating and returning individuals who wander.

Other Forms of ID
On encountering a confused elder, keep in mind that few people with Alzheimer's wear ID bracelets, or wrist bands from hospitals or nursing homes. If there is no exterior ID, check for a driver's license, wallet card or other identification. If the individual has no paper ID, check for personalized ID labels on inner and outer clothing.

If No Identification
If the individual has no identification at all and cannot properly identify himself, contact the Safe Return operator (800-572-1122). The operator will check reports to *Safe Return* in your area and also advise experienced on-call area personnel who can alert the elder service network in surrounding communities for a possible match, based on the individual's description and behavior.

Behavior and Mental Status

In addition to checking for identification, pay attention to how the individual looks, behaves and interacts with you. As a first responder, keep in mind that people with Alzheimer's can be sick or injured but unable to communicate this information effectively. Keep your interview and assessment simple. Be calm and use a reassuring tone of voice, since they will take their action cues from your words and your behavior.

Consider the following clues in determining whether you are dealing with someone who has Alzheimer's.

Physical Clues
Blank facial expression; inappropriate clothing for the weather (these individuals are typically in their 70s and 80s, however, and should *not* be confused with street people); visual-spacial problems that cause an unsteady gait (do *not* assume, however, that the person is intoxicated).

Psychological Clues
Short term memory loss; repeating the same questions; confused as to time and location; disoriented about own and others' identities; trouble finding the right words to describe things, or simply unable to communicate; may also be delusional, or become agitated if frightened.

Situational Clues
An elderly person reported or discovered in one of the following situations may be suffering from Alzheimer's:

Missing or found wandering: Wandering is far and away the most life-threatening behavior associated with Alzheimer's disease. It is also by far the most common situation you will encounter in Alzheimer's cases. Studies estimate that 60-70% of Alzheimer patients will wander from their residences at some point in their illness.

Wandering can be caused by restlessness due to boredom, lack of exercise, confusion about time or a change in the physical environment, agitation caused by over-stimulation (from crowds, noise or an argument with a caregiver, for example), or fear caused by a delusion or hallucination.

All people with Alzheimer's who can walk are at risk of wandering, and thus becoming missing persons. Most suffer from other serious medical problems in addition to Alzheimer's and are on essential medications which they will be without. All, if not found quickly, are at risk of death. (in one 12 month period, there were four such deaths reported in the Boston area alone). Health problems and diminished mental capacity dramatically increase the risk of death or serious injury for wanderers, especially after the first 24 hours.

Driving: Alzheimer's disease affects reaction time and visual-spacial perception. Because they may be driving, yet unaware of the severity of their disease, people with Alzheimer's can easily become lost or even leave the scene of an accident after literally forgetting what happened. A study of people in the early stage of the disease who were still driving indicates that over 40% had been in an accident and 44% routinely got lost.

What follows are some other, less common situations in which police may encounter people with Alzheimer's disease:

False Reports: People with Alzheimer's may report an "intruder" in the house, who turns out to be a wife or husband. They may also report thefts that did not occur, since Alzheimer's can cause heightened suspiciousness.

Victimization: People with Alzheimer's are easy prey, especially for con artists. They may also come to your attention through legal actions like evictions and repossessions because they have forgotten, or are just not able, to pay bills.

Shoplifting: Sometimes people with Alzheimer's simply forget that they have picked something up, that it is necessary to pay for the item, or even that they are in a store. Not all elderly shoplifters have Alzheimer's, but police should consider that possibility, particularly if the elder appears disoriented.

Indecent Exposure: People with Alzheimer's often fidget with zippers and buttons, which can be misinterpreted. Many have also lost impulse control, so if it feels too hot, they may take their clothes off. If they feel the need to go to the bathroom, they may just do it without realizing they are not in the bathroom.

INTERACTING WITH SOMEONE WHO MAY HAVE ALZHEIMER'S

To facilitate a safe return of someone with Alzheimer's, you must ease the situation and avoid causing the person to have a "catastrophic reaction," best described as a sort of super anxiety attack. What most people would consider mildly stressful, like being stopped and questioned by a police officer, can truly upset someone with Alzheimer's. The individual is most likely to break down, sobbing and crying, but may also become frightened and try to get away. The person may become agitated and begin pacing or, in extreme cases, become aggressive.

Avoid Restraints if Possible

Understandably, the use of handcuffs and other restraints are likely to cause a catastrophic reaction. You should take advantage of any leeway you can offer the person to avoid handcuffs. An Alzheimer patient who is extremely frightened or upset, however, may

threaten his own or others' safety. In this situation, restraint may be the best alternative for maintaining order. As a rule, these are frail men and women in their 70s and 80s. If restraint is necessary, practice techniques for preventing injury.

Keep the "Climate" Cool

If you keep your voice calm and speak in a reassuring manner, you may help the memory impaired person, and others involved, to do the same. It is also important to use non-threatening hand gestures and to be firm, but non-aggressive. Again, reassurance is better than any medication in treating this disease and will help you draw the most helpful response from someone with Alzheimer's.

This disease alters the brain's ability to process contradictions, so it never pays to argue with the person.

Practice Behavior Management

The theory of "behavior management" in Alzheimer care is often just common sense. People with Alzheimer's will tend to take their cues from you, from your body language and your tone of voice. For example, if you find the individual sitting on the sidewalk and she will not get up, sit down next to her. When you get up, she is likely to get up. If you move to get into your cruiser, she will follow your cues to get in the vehicle. If, on your arrival at her home (or at the station or hospital) she refuses for some reason to get out--for example, she says that it is raining when in fact it is sunny--offer a solution that makes sense to her, given her changed reality. First, tell her that everything is okay, that there's food inside. Then you might try telling her you have an umbrella for her. And if she should ask for her long deceased mother, tell her she'll be right along. Alzheimer's disease can prevent her brain from correctly processing our reality. Be respectful, be reassuring, but don't be afraid to gently humor her by momentarily entering her reality. It works, and because of the nature of this disease, there is nothing disrespectful in such an approach. It is a compassionate response.

Communicate Simply

Keep communications simple. If possible, you should speak to the individual one-on-one, away from crowds and noise. Overloading the person with information amid too much commotion may lead to a catastrophic reaction. Keep these considerations in mind:

Approach from the Front and Introduce Yourself
Do your best not to surprise the person when you approach him. Be sure he sees you. Tell him who you are and why you are there. You may have to explain several times because the person often will not remember, from moment to moment, what you think should be obvious.

Speak Slowly and Calmly
Alzheimer's greatly shortens attention span. To hold the person's attention, look directly into his eyes and speak slowly and calmly.

Ask Only One Question at a Time
Try to ask simple questions. Do not ask questions which require a lot of thought and memory. Think of the brain in these cases as a sort of "overloaded switchboard" with incoming calls not always plugged into the right circuit. And remember, the person's answers may not reflect what he really means to say. As one patient put it, "It's as if I hear things and they get into the wrong slots, which make no sense to me at all."

Keep Instructions Positive
For example, say, "Please sit here in the car. Everything will be okay." Try to avoid instructions requiring the subject to do, or think about, more than one simple thing at a time. Don't say things like, "Sit there and be quiet until I come back and don't try to get out of the car."

If the Person Does Not Respond To What You Say, Wait a Moment and Then Repeat What You Said
The person may not remember what certain words mean, so it helps simply to restate what you said earlier.

Do Not Assume the Person Is Hearing-Impaired
Some 50% of people with Alzheimer's are indeed hearing-impaired, but shouting will probably not help them understand the meaning of your words. It may even frighten or agitate them, because your shouting could make you appear angry.

POLICE AND THE ALZHEIMER NETWORK

What cannot be emphasized enough is that a missing person with Alzheimer's represents an emergency situation. Police cannot invoke any waiting period before taking action. Sadly, the ability of people with Alzheimer's to find their way from one point to another--called "cognitive mapping"--is impaired very early in the disease process.

Additionally, these individuals are at high risk of dehydration and hypothermia. Their judgment is impaired, their health may be seriously impaired, and they risk experiencing a catastrophic reaction at any time when lost, especially as darkness approaches. And if safety reasons are not enough, consider the psychological terror of being lost and unable to think through what to do about it.

For all of these compelling reasons, the Alzheimer's Association and the U.S. Justice Department initiated the *Safe Return* program. *Safe Return* was designed specifically to assist you in your encounters with individuals suffering from Alzheimer's disease.

Notification: How Officers Learn about Alzheimer Wanderers and What Steps They Need To Take

You will encounter or learn about wanderers in three different ways.

1. The Street Encounter

As discussed previously, you will at some time encounter an Alzheimer patient during patrol or while answering a call thought to involve a different issue--for example, a report of a man walking aimlessly on the shoulder of a busy road, an unfamiliar woman appearing disoriented in a local neighborhood, or a routine auto accident. But you soon discover that the man, the woman or the driver is elderly and very confused.

In virtually any such interaction where the memory-impaired person does not require medical attention, the object is to return the person safely to his or her primary caregiver. Be aware, however, that Alzheimer's affects short term memory more than long term memory. For that reason, people with Alzheimer's may tell you that they live in a particular house or on a street where they lived many years ago, while forgetting where they live now.

2. The Caregiver Notifies Police

A second scenario occurs when a caregiver calls police to request assistance in finding a missing elder.

Collect Information
When you receive a call from a caregiver about a missing elder who may be memory-impaired, be sure to obtain the following information:

- Caller's name, phone and address.
- Length of time missing.
- Whether the missing person is registered with *Safe Return* and wearing the program bracelet.
- Whether the person is carrying any ID, money, credit or ATM cards.
- Where last seen.
- Whether the person has disappeared before and, if so, where found.
- Physical appearance, clothing.
- Medical condition and any essential medications.
- Whether on foot or driving. If driving, get make, model and tags of car.
- Whether the person can communicate, knows own name, address, speaks English.
- Whether the person appeared to be agitated before the disappearance.
- Whether the immediate area was searched. If not, request that the caller have someone do so immediately, or have the caller do so. If at all possible, however, someone at the caller's residence should remain by the phone.

Call Safe Return Operator
You should then contact the operator at the *Safe Return* program at the toll-free number (800-572-1122) to communicate the information you collected.

Cooperate with the Local Chapter of the Alzheimer's Association
The *Safe Return* operator will notify on-call personnel in your area to assist you in coordinating efforts to find the missing person. You may also choose to speak directly with staff at the local chapter to seek their assistance and expertise, either through the national *Safe Return* operator at any hour, or by calling the local chapter during regular business hours.

3. Safe Return Notifies Police

A third situation arises when a caregiver calls *Safe Return* before calling police. The *Safe Return* operator will obtain the necessary information and advise the caregiver to notify the local police immediately.

The *Safe Return* operator will also:

Contact the Local Police
The *Safe Return* operator will verify that the caregiver has called your department and will also provide any additional information which may be helpful, particularly if the missing person is registered in the program.

Notify Alzheimer's Association On-Call Personnel for Your Area
After being notified by *Safe Return*, the on-call person for your area will contact the reporting caregiver (typically a family member or nursing home official) to verify that the patient is still lost, and to discuss the circumstances.

On-call personnel may also contact your department and discuss any additional response to the situation, and at that point may activate the Fax Alert.

Finding the Missing Elder: Police Communication and Search Responsibilities

The police have two major responsibilities when confronted with a report concerning someone missing who may have Alzheimer's disease. They must (1) handle communication and (2) conduct an appropriate search.

1. Communications

Certain kinds of communications are critical. Police must:

Place the Report on the NCIC Network
Be sure to check NCIC to see if the information has been logged appropriately. If not, make sure that is done.

Issue Radio Report to Surrounding Communities
You should ensure that a radio report is issued to police agencies in the surrounding communities. Do not assume that a fax transmittal is a substitute for radio contact. Most police officers use the radio as their immediate source of information and, especially in cases of missing Alzheimer patients, no time should be lost.

Notify Change of Shifts at Your Own Department
Take responsibility for ensuring that future shifts are notified about the missing person. Failure to inform future shifts can affect the continuity of the search.

Ask Neighboring Police Departments To Include a Report in All Shift Briefings

Inform Media Outlets
Media outlets, especially TV stations, should be notified immediately when any of the following conditions apply:

- The missing person has a life-threatening health problem.
- The weather is severe.
- It is dark out, the person has been missing for more than two hours and an effort has already been made to find him.

Notify Local Postal Officials
Postal officials can alert mail carriers, who provide an excellent network of eyes and ears in the community where the missing person may still be wandering.

2. The Search

Check Immediate Area
Officers should search the immediate and surrounding areas first and double check the person's residence. If possible, return every few hours to the area where the person was last seen. When on foot, most missing persons with Alzheimer's are located within a fairly short distance, usually within a mile or two from where they disappeared.

Check Familiar Places
Be sure to check those places most familiar to the person, such as a former

neighborhood or past place of employment, a relative's home, a regularly attended place of worship, a frequented shopping place, a favorite restaurant, and so forth.

In rural areas, the person is often found a short distance from a road or open field, near a creek or drainage ditch, or tangled in underbrush.

It is important to know that missing persons with Alzheimer's disease usually will not respond to your shouts or cry out for help.

STRATEGIES TO RESOLVE THE CASE

Your goal is to return the missing person safely home to his or her primary caregiver, and to call the *Safe Return* operator for follow-up by the local Alzheimer Association chapter.

Although circumstances in these cases may vary, there are several recommended strategies which effectively resolve most cases:

Transport Individual to Hospital

Whenever the individual 1) clearly needs medical attention, 2) appears to be suffering from poor hygiene and obvious neglect, or 3) has not been reported missing, has no ID and cannot give a clear name or address, transport him to the hospital Emergency Room. Be sure to let the ER staff know that the individual has a memory impairment or appears confused and disoriented, so that ER staff can properly supervise him and avoid the possibility of discharging him without supervision.

Return Individual to Caregiver

If the individual does not need medical attention and has a caregiver at home, return him to his residence, but advise the caregiver that the patient's wandering is life-threatening behavior and suggest that the caregiver contact the local chapter of the Alzheimer Association for further help.

Return Individual to Nursing Home

If the individual disappeared from a nursing or rest home and does not need medical attention, return him to the facility but also contact the local chapter of the Alzheimer Association so the chapter can offer advice and training to staff at the facility in order to avoid future wandering incidents.

Inform Safe Return Program When Individual Found

Once you or another source notifies the *Safe Return* operator that the missing Alzheimer patient has been located, the program's on-call personnel for your area will verify the report and then authorize a Fax Alert to all of the previously notified agencies and outlets to inform them that the search is over. This saves your department countless hours of phone calls.

Follow-up with Local Alzheimer's Chapter Always Essential

Even in cases where the situation appears to be easily resolved, it is important to alert the local chapter, which keeps valuable records of wandering episodes. Professional staff can assess the situation which resulted in the person's wandering and encourage the development of a service plan to cover any gaps in care or supervision. People with Alzheimer's living alone or routinely left unattended by a caregiver are all potential wanderers who are likely to become lost more than once

As with other issues involving the elderly, police departments are beginning to understand that a coordinated response is critical. That is why you are encouraged to use the *Safe Return* network and other support available from the National Alzheimer's Association and its more than 200 local chapters. The Association has developed expertise over the last two decades to help you find missing elders and to assist in adjusting care-giving conditions which may have contributed to their disappearance.

CONCLUSION

Increasingly, officers are dealing with people living in the community who have Alzheimer's disease. Effective intervention is a challenge both for the individual officer and for the department.

The officer must demonstrate compassion and good judgment when interacting with individuals for whom communication, through no fault of their own, may be extremely difficult. Despite that frustration, remember to keep calm, to keep your perspective and, just as importantly, your sense of humor. People with Alzheimer's disease are members of our society to be valued and respected. As neurologist A.R. Luria wrote:

> *People do not consist of memory alone. They have feeling, will, sensibility, moral being. It is here you may touch them, and see a profound change.*

People with Alzheimer's have lost their ability to remember, not their sense of pain and fear. They need your protection.