September 1996

HONOR ROLL

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449th Session, Basic Law Enforcement Academy - May 7 - July 30, 1996

President:	Officer Theodore Jackson - Department of Fish & Wildlife
Best Overall:	Officer Sean E. Robertson - Tukwila Police Department
Best Academic:	Officer Sean E. Robertson - Tukwila Police Department
Best Firearms:	Officer John L. Giron - Bremerton Police Department

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Corrections Officer Academy - Class 235 - July 8 - August 2, 1996

Highest Overall:	Officer Christy L. Frank - Clallam Bay Corrections Center
Highest Academic:	Officer Jeff M. Bolt - Yakima County Corr./Deten. Center
Highest Practical Test:	Officer Michael W. English - Spokane County Jail
Highest in Mock Scenes:	Officer Thomas E. Arnold - Washington C.C. for Women
	Officer Joan M. Dalesky - Twin Rivers Corrections Center
	Officer Karla R. Eagle - Washington C.C. for Women
	Officer Christy L. Frank - Clallam Bay Corrections Center
	Officer Lorett G. Husser - Pierce County Sheriff's Department
	Officer Michael P. Kapsch - McNeil Island Correctional Center
	Officer Peter L. Leutz - Twin Rivers Corrections Center
Highest Defensive Tactics:	Officer Christopher J. W. Allen - Yakima Police Department

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Corrections Officer Academy - Class 236 - July 8 - August 2, 1996

Highest Overall:	Officer Jonathan N. Simbler - Geiger Corrections Center
Highest Academic:	Officer Jonathan N. Simbler - Geiger Corrections Center
	Officer Karen D. Wright - Clark County Jail
Highest Practical Test:	Officer Shane A. Maitland - Airway Heights Correctional Center
	Officer Madeline M. Speredowich - Twin Rivers Corrections Center
	Officer Brenda M. Starcher - Washington State Reformatory
	Officer John R. McLaughlin - Clallam Bay Corrections Center
Highest in Mock Scenes:	Officer Jonathan N. Simbler - Geiger Corrections Center
	Officer Joan M. Dalesky - Twin Rivers Corrections Center
	Officer Karla R. Eagle - Washington C.C. for Women
	Officer Christy L. Frank - Clallam Bay Corrections Center
	Officer Lorett G. Husser - Pierce County Sheriff's Department
	Officer Michael P. Kapsch - McNeil Island Correctional Center
	Officer Peter L. Leutz - Twin Rivers Corrections Center
Highest Defensive Tactics:	Officer Julie A. Schoniger - Airway Heights Correctional Center

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BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

(1) **PRISONERS' INJUNCTIVE ACTION OVER LAW LIBRARY ACCESS LACKS MERIT**-- In Lewis v. Casey, 64 L.W. 4587 (1996), the United States Supreme Court rules that a federal district court injunction requiring significant, system-wide changes in the Arizona state prison system regarding prisoner access to law libraries was without support under the facts and civil rights laws, because the prisoners made an insufficient showing of actual injury in relation to their right of access to the courts. The U.S. Supreme Court declares that under the caselaw governing such actions the prisoners were required "to show **widespread actual injury**...". The Court notes that the record contained nothing more than a few isolated instances of actual injury, falling far short of the necessary showing. Result: reversal of Ninth Circuit Court of Appeals ruling which had affirmed a district court injunction.

(2) **FIRST AMENDMENT PROBLEM FOR TWO SECTIONS OF CABLE TV ACT OF 1992**-- In Denver Area Ed. Tel. Consortium, Inc. v. FCC, 59 Cr. L. 2241 (1996), the U.S. Supreme Court rules in divided voting that two sections of the Federal Cable TV Act adopted by Congress in 1992 violate the First Amendment's free speech clause. The two offending sections are: **section 10(b)** which requires that cable operators carrying "patently offensive" programming on leased access channels segregate such programming on a single channel and block access unless written consent is obtained from subscribers; and **section 10(c)**, which permits cable operators to prohibit "patently offensive" programming on public, educational, or governmental use channels. Result: reversal in part of D.C. Circuit Court of Appeals decision.

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WASHINGTON STATE SUPREME COURT

OFFICER'S FIREARMS IMPLY THREAT TO USE THEM IN RAPE CIRCUMSTANCE

State v. Bright, 129 Wn.2d 211 (1996)

Facts:

Fred Bright, a male law enforcement officer, had insisted (contrary to police agency rules and despite a female officer's offer to do the job) on acting alone in transporting to jail a female prisoner, Ms. L.. He had arrested her on a warrant previously issued for violation of a condition of her sentence for a shoplifting conviction. Shortly after the trip began, Officer Bright invited Ms. L. to join him in the front seat, and she accepted. To make room, Officer Bright moved several items, including a rifle, from the front seat to the back seat.

According to Ms. L.'s testimony at trial, once she had moved to the front seat area, Officer Bright, while continuing to drive, began fondling Ms. L.'s breasts with his right hand. He then grasped her by the neck, forced her head onto his lap, and made her commit fellatio. Officer Bright then pulled over on a dirt road, ordered her out of the car, ordered her to remove certain clothing, and forcibly raped her.

Ms. L.'s testimony with respect to the force element of the rapes is described by the Supreme Court majority as follows:

> [A]t all times during the encounter [Officer Bright] was armed with the handgun he carried in a holster strapped to his waist, and his rifle was on the back seat of the patrol car. Ms. L. stated she was aware of the presence of both weapons during the encounter, but at no time did [Officer Bright] directly use or threaten to use either weapon to gain her compliance. However, Ms. L. testified she thought about trying to get away while the patrol car was stopped, but [Officer Bright] might falsely accuse her of attempting to flee from custody, and possibly even shoot her....[She also testified]: "Well, I knew that he could use them. I knew they were there. He had a gun on his waist. I didn't feel safe until I was away from him, and his guns, and his car."

Proceedings:

Officer (now former officer) Bright was convicted of two counts of first degree rape.

ISSUE AND RULING: Was there sufficient evidence on the "threatens to use a deadly weapon" element of first degree rape to support the convictions? (ANSWER: Yes, rules a 6-3 majority) Result: reversal of Court of Appeals decision **(See Sept. '95 LED:18)** that had reversed a superior court conviction for first degree rape; both rape one convictions thus are reinstated.

ANALYSIS: (Excerpted from majority opinion)

> First degree rape is codified in RCW 9A.44.040, which provides in relevant part that:
>
> > (2) 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: (a) *Uses or threatens to use a deadly weapon or what appears to be a deadly weapon;* or (b) Kidnaps the victim; or (c) Inflicts serious physical injury; or (d) Feloniously enters into the building or vehicle where the victim is situated.
>
> (Emphasis by Court).
>
> To convict a person of first degree rape, then, the State must prove beyond a reasonable doubt that the person (1) engaged in sexual intercourse (2) by forcible compulsion and (3) under one of the four possible aggravating circumstances. Because elements one and two are not disputed in this appeal, and because there was no additional allegation of kidnapping, serious physical injury or felonious entry, our attention is focused solely upon whether under the evidence in this case

[Bright] used or threatened to use a deadly weapon, or what appeared to be a deadly weapon, under RCW 9A.44.040(1)(a).

The State contends [Bright] made an *implied threat* to use a deadly weapon while committing the rapes and is thus guilty of rape in the first degree. It is undisputed that [Bright] did not actually *use* a weapon nor *expressly threaten to use* a weapon. But the State argues that by simply being armed as a law enforcement officer having custody of a prisoner, his victim, he impliedly threatened to use the weapon.

. . .

An examination of all the facts in this case -- including [Bright's] authority as a police officer, the presence of weapons on his person and in his patrol car, his greater size, his use of physical force, and his deliberate choice of a remote location for the sex acts -- demonstrates sufficient evidence of an implied threat by [Bright] to use a deadly weapon to support his conviction of first degree rape under RCW 9A.44.040(1)(a).

. . .

The particular question here is whether [Bright] impliedly threatened Ms. L. with a deadly weapon to meet the requirement that he "use[d] or threaten[ed] to use a deadly weapon" for a conviction of first degree rape under RCW 9A.44.040(1). The Legislature has defined a "threat" for purposes of the criminal code as communicating "directly or indirectly, the intent . . . [t]o cause bodily injury in the future to the person threatened or to any other person . . .." Evidence in this case is sufficient for conviction of first degree rape if [Bright's] conduct indicated, as a matter of logical probability, an intent to use his weapons to coerce or compel compliance by Ms. L.

. . .

Bright evidenced his intent to use his handgun or rifle by his choice to remain armed with the handgun in the holster around his waist, as part of his larger plan to render Ms. L. helpless. In his version of consensual sexual activity, [Bright] explained he decided to remain armed because of the difficulty of removing his gun belt.

In rejecting [Bright's] claim of consent, the jury could also reject his explanation of his choice to wear his weapon during the sex acts. Instead, the jury doubtless believed Ms. L.'s testimony that [Bright] wore his guns as a threat. . . .

There is no dispute that a police officer wears a weapon to indicate the officer's intent to use it to assure compliance with an order. The officer need not expressly threaten the targeted person with the weapon. Both the target and the officer know the threat to use the weapon is implied and inherent in the authority of the police. Generally, we consider as benign a police officer's implied threat to use a weapon. That implied threat remains, and even increases, when a police officer wears weapons during commission of a crime.

> By his knowing decision to remain armed while he assaulted and raped Ms. L., Bright communicated to his victim his intent to use his weapon if she resisted. From the record in this case we can conclude that Bright deliberately contrived the factors of the guns, his nonregulation transport of a woman prisoner, his choice of a remote locale, and his use of force -- all with the intent to create a situation threatening enough to reduce Ms. L. to helplessness.
>
> Bright testified they engaged in consensual sex. Ms. L. testified he raped her. It is the role of the jury to weigh the credibility of this testimony, along with any surrounding facts and circumstances tending to support or discount the two conflicting accounts.

[Footnotes and citations omitted]

DISSENT

Dissenting Justices Madsen, Johnson and Alexander argue that, under the evidence in the record, there was no evidence that Officer Bright made a threat, express or implied, to use either of the firearms.

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WASHINGTON STATE COURT OF APPEALS

CUSTODIAL ARREST FOR NEGLIGENT DRIVING UPHELD ON TOTALITY TEST

State v. Nelson, 81 Wn. App. 249 (Div. II, 1996)

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

> On August 12, 1993, a state trooper stopped Nelson for driving 81 m.p.h. in a 65 m.p.h. zone. While he was completing the citation, she seemed angry. When he released her, she
>
> > rapidly accelerated her vehicle from the stop and in so doing sprayed [him] and his vehicle with gravel, causing [him] to shield his head with his arm to avoid being injured. Gravel struck both [him] and his vehicle.
>
> The trooper followed Nelson and soon observed that she was again driving more than 80 m.p.h. in a 65 m.p.h. zone. Thus, he stopped her a second time and made a custodial arrest for negligent driving. Incident to that arrest, he searched her car and discovered methamphetamine.
>
> A week later, the State charged Nelson with unlawful possession of a controlled substance. Nelson moved to suppress, arguing that a custodial arrest for negligent driving is constitutionally unreasonable. The motion was denied, a bench trial was held, and Nelson was convicted.

ISSUE AND RULING: In light of the fact that the penalty for negligent driving under former RCW 46.61.525 does not carry any possibility of jail time, is a custodial arrest (and search incident to

that arrest) prohibited under state or federal constitutional provisions? (ANSWER: No; under some circumstances, including the circumstances here, a custodial arrest is permitted for negligent driving). Result: affirmance of Cowlitz County Superior Court conviction for negligent driving.

ANALYSIS:

In the case of State v. Reding, 119 Wn.2d 685 (1992) **Dec. '92 LED:17**, the Washington State Supreme Court held, based on an exception to the cite-and-release requirement of RCW 46.64.015(2), that custodial arrest is lawful for any of the traffic crimes listed in RCW 10.31.100(3).

The pertinent cite-and-release language in RCW 46.64.015 addressed in Reding declares:

> Whenever any person is arrested for any violation of the traffic laws or regulations which is punishable as a misdemeanor or by imposition of a fine, the arresting officer may serve upon him or her a traffic citation and notice to appear in court. . . . An officer may not serve or issue any traffic citation or notice for any offense or violation except either when the offense or violation is committed in his or her presence or when a person may be arrested pursuant to RCW 10.31.100, as now or hereafter amended. The detention arising from an arrest under this section may not be for a period of time longer than is reasonably necessary to issue and serve a citation and notice, except that the time limitation does not apply under any of the following circumstances:
>
> (1) Where the arrested person refuses to sign a written promise to appear in court as required by the citation and notice provisions of this section;
>
> **(2) Where the arresting officer has probable cause to believe that the arrested person has committed any of the offenses enumerated in RCW 10.31.100(3), as now or hereafter amended;**
>
> (3) When the arrested person is a nonresident and is being detained for a hearing under RCW 46.64.035.

In turn, the traffic crimes listed in RCW 10.31.100(3) for which custodial arrest is permitted under Reding are as follows:

> (a) RCW 46.52.010, relating to duty on striking an unattended car or other property;
> (b) RCW 46.52.020, relating to duty in case of injury to or death of a person or damage to an attended vehicle;
> (c) RCW 46.61.500 or 46.61.530, relating to reckless driving or racing of vehicles;
> (d) RCW 46.61.502 or 46.61.504, relating to persons under the influence of intoxicating liquor or drugs;
> (e) RCW 46.20.342, relating to driving a motor vehicle while operator's license is suspended or revoked;

(f) RCW 46.61.525, relating to operating a motor vehicle in a negligent manner.

Negligent driving is one of the listed crimes in subsection (3) of RCW 10.31.100. Under Reding, therefore, custodial arrest would appear to be lawful. Defendant Nelson argued, however, that the former negligent driving statute under which she was charged is different from all of the other traffic crimes listed in subsection (3). Unlike the other listed crimes, the former negligent driving statute did not punish the crime with jail time, only a fine. Defendant Nelson argued that it violated her constitutional right against unreasonable searches and seizures for police to make a custodial arrest for negligent driving under any circumstances. In rejecting this argument, the Court of Appeals declares in Nelson:

> In our view, the State's interest in public safety controls this case. The trooper stopped Nelson once and gave her a citation for driving more than 80 m.p.h. With most members of the driving public, that would have deterred conduct of the same kind for at least a few minutes. Nelson's response, however, was to spray the officer with gravel and resume driving at more than 80 m.p.h. At that point, if not before, she presented a danger to other persons using the public highway, and the State had a significant interest in maintaining the safety of those persons. This interest counterbalanced Nelson's liberty interest, and thus caused Nelson's arrest to be "reasonable" for Fourth Amendment purposes.
>
> **Our holding does not mean that RCW 10.31.100(3)(f) and RCW 46.64.015(2) are constitutionally valid in every case; conceivably, a case could arise in which the alleged negligent driving was not truly dangerous, so the State's public safety interest would be minimal.** Our holding does mean, however, that the cited statutes are (a) constitutional as applied here and (b) "facially" constitutional. In contexts not involving the First Amendment, according to the United States Supreme Court, a statute is "facially constitutional" unless a challenger "establish[es] that no set of circumstances exists under which the Act would be valid.
>
> . . .
>
> Nelson additionally argues that if the police can either cite or arrest for negligent driving, they will have "unfettered discretion." This argument, however, flies wide of the target. To say the police may arrest is rarely if ever to say that they must do so; on the contrary, to say that the police may arrest usually if not always means that they have discretion to arrest or not arrest, depending on the circumstances that they face. The question here, then, is not whether the trooper had discretion, but whether he abused it. Nelson does not argue he abused it, nor could she do so in light of the facts present here.
>
> Lastly, Nelson argues that even if her arrest was not unconstitutional under the Fourth Amendment to the Federal Constitutional, it was unconstitutional under Article I, Section 7, of the state constitution. After considering her Gunwall [independent grounds] analysis, however, it is our view that the two constitutions do not differ in any way that would affect this case.

[Footnotes and citations omitted; bolding added by LED Editor]

LED EDITOR'S COMMENTS:

(1) May officers automatically make a custodial arrest for crimes listed in subsection (3) of RCW 10.31.100? Read literally, the State Supreme Court decision in State v. Reding, 119 Wn.2d 685 (1992) Dec. '93 LED:17, **based on deference to legislative direction, would allow automatic custodial arrest on probable cause for any of the crimes set forth in subsection (3) of RCW 10.31.100. However, the discussion above in Nelson indicates that the Court of Appeals panel does not believe that the Reding Court intended such a "bright line" rule.**

We don't want to go too far in suggesting adoption of the limits on Reding found in the Nelson discussion of the constitutional issue, but we would suggest that officers may want to consider taking a special approach to "negligent driving" on the automatic arrest list under Reding. First, the line between "negligent driving" and "reckless driving" (Reding involved a reckless driving arrest) is pretty thin, and, if you don't have PC as to reckless driving, maybe you don't have PC as to negligent driving either. Second, negligent driving under 1996 amendments to RCW 46.61.525 is now divided into two degrees, only one of which is criminal. While the constitutional issue is far from resolved, unless there are special circumstances such as were present in Nelson, officers might be safer in citing-and-releasing, not arresting, where they believe that the facts meet "negligent driving" but do not rise to "reckless driving," and they have not absolutely decided that they are going to transport based on an arrest for the criminal offense of negligent driving in the first degree.

(2) May officers search incident to custodial arrest in situations where they have not yet decided whether or not to make a custodial arrest? In some circumstances, officers dealing with a driver who has committed one of the offenses listed in subsection (3) of RCW 10.31.100 may not have decided whether to make full custodial arrest at the point at which they search the interior of a vehicle under a "search incident" rationale. While Nelson does not involve this fact pattern, a recurring question in law enforcement circles is whether the officer's individual pre-search indecision about (or a general agency practice against) making an arrest for such crimes as driving recklessly, with license suspended or revoked, etc., militates against "search incident" authority.

In State v. Stortroen, 53 Wn. App. 654 (Div. I, 1989) Aug. '89 LED:14 **the Court of Appeals declared that an officer's pre-search intent not to make custodial arrest for driving while suspended precluded a "search incident." However, the following year, a different panel of the Court of Appeals rejected the reasoning of Stortroen. In State v. Brantigan, 59 Wn. App. 481 (Div. I, 1990)** [Feb. '91 LED:05, April '91 LED:19]**, the Court of Appeals noted that the test of the lawfulness of search incident to arrest is purely objective, and that the Stortroen Court had erred by using a subjective test. Because a reasonable officer could have made a custodial arrest at the time of a search of the interior of a violator's vehicle, the Brantigan Court held that the "search incident" was lawful even though the officer's pre-search intent as to custodial arrest was not established.**

We think Brantigan correctly interpreted the law, but we reiterate our suggestion in this grey area regarding "negligent driving" as the arrest-search trigger is in the extreme grey. The safer approach, as indicated above, is to not use "negligent driving" as the search incident trigger in any event unless the officer plans to transport based on arrest for

negligent driving in the first degree.

SPEEDY TRIAL: NO DUE DILIGENCE PROBLEM IF ADDRESS GIVEN POLICE IS WRONG

State v. Vailencour, 81 Wn. App. 372 (Div. I, 1996)

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

> After Vailencour exited a store with apparently stolen merchandise, two security guards followed him into the parking lot and attempted to arrest him. Vailencour escaped after threatening one of the guards with a knife. When Vailencour returned later to retrieve his car, a security guard noted his license plate number. The police contacted the registered owner of the car, who stated she had recently sold the car to Vailencour (her brother). She gave an address for Vailencour which, as Vailencour later testified, was not correct.
>
> The State filed charges of third degree theft and third degree assault on June 22, 1993. The prosecutor's office mailed notice of arraignment to Vailencour at his current and previous addresses registered with the Department of Licensing (DOL). The current address was also his mother's current address. Both notices were returned as undeliverable. Vailencour did not appear at the June 30 arraignment, and the court issued a warrant for his arrest. The warrant was transmitted to the city and county of his last known address with DOL (his mother's address).
>
> Vailencour did not live at any of the addresses obtained by the prosecutor, nor had he given any forwarding information to the post office. However, he received most of his mail through his mother's address.
>
> Vailencour was stopped for a traffic violation on October 30, but was not arrested. Vailencour changed his address with DOL in November. He was stopped again in December and this time was arrested as a result of a warrants check.
>
> Vailencour timely objected to his January arraignment date on speedy trial grounds. The trial court determined that, under a standard of due diligence, the police should have discovered the outstanding warrant when Vailencour was stopped in October. Therefore, the court assigned November 13 (15 days after the traffic stop) as the constructive arraignment date. The scheduled trial date was thus within the speedy trial period.
>
> Vailencour waived his right to trial by jury, and the trial proceeded on stipulated facts. The court found Vailencour guilty of third degree assault, and dismissed the charge of third degree theft on the State's motion.

ISSUE AND RULING: Under the Striker "speedy trial" rule, did the State's failure to follow up on the address given by defendant's sister constitute a "due diligence" violation even though the address she had given turned out to be wrong? (ANSWER: No) Result: affirmance of King County Superior Court conviction for third degree assault.

ANALYSIS:

The Court of Appeals begins its analysis by explaining the "speedy trial" rule of CrR 3.3 as interpreted in the leading cases of State v. Striker, 87 Wn.2d 820 (1976) and State v. Greenwood, 120 Wn.2d 585 (1993). The Striker/Greenwood rule requires that the State act in good faith and with due diligence in bringing a charged defendant before the trial court for arraignment in a timely manner. The Court is Vailencour then turns to the issue of due diligence under the facts before it:

> The court found that the State did not fail to exercise due diligence to locate Vailencour until the initial traffic stop in October. Vailencour asserts that the State did not exercise due diligence prior to the stop. Due diligence requires the State's timely action on the information it has regarding the defendant's whereabouts. The State mailed notices to Vailencour's current and previous addresses registered with the DOL. The State's failure to contact Vailencour's mother after those notices were returned does not establish lack of due diligence. But the State failed to exercise due diligence in one respect: it did not mail the arraignment notice to the address supplied by Vailencour's sister.
>
> However, the address given to the police by Vailencour's sister was a wrong address. Sending a notice to that address would have availed Vailencour nothing. Our case-law does not address the effect of a showing that the State has failed in its obligation of due diligence when it is conclusively shown that performing the act would not have provided any notice to the defendant. The overall purpose of the due diligence standard developed by the Greenwood line of cases is to ensure that the State takes those steps reasonably calculated to provide timely notice of pending charges to a defendant. Where it is conclusively shown that a particular failure by the State did not in fact deprive the defendant of such notice, we hold that reversal is not required.
>
> Our holding permits the State to demonstrate after the fact that a particular omission by it has had no practical consequence, and thus does not merit reversal on speedy trial grounds. This should not result in a weakening of the due diligence standard, however. The State cannot knowingly or negligently fail to take those steps required by due diligence without risking a violation of the speedy trial rule. Only where, as here, the State can demonstrate conclusively that no prejudice resulted to the defendant will a dismissal not result.

[Citations and footnotes omitted]

LED EDITOR'S NOTE: See the November '94 LED (pages 6-14), the January '95 LED (pages 14-19), and the May '96 LED (page 15) for several additional recent cases addressing the Striker speedy trial rule.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **NO PRIVACY IN STORAGE FACILITY RECORDS, BUT WARRANT TO SEARCH STORAGE LOCKER FAILS PC TEST DUE TO LACK OF VERACITY SHOWING ON INFORMANT** -- In State v. Duncan, 81 Wn. App. 70 (Div. III, 1996), the Court of Appeals for

Division Three rules: (A) that as a general rule, absent an explicit confidentiality agreement between a storage locker customer and the storage facility operator, there is no privacy right as to law enforcement access to storage facility records which identify a customer and which show the customer's entrance and exit from the facility; but (B) that a search warrant affidavit required for search of James Allen Duncan's storage locker was insufficient to establish probable cause to search the locker.

On the probable cause question, the Court of Appeals describes as follows the affidavit's informant-based probable cause information and the result of the search:

> Meda K. Hansen, Mr. Duncan's girlfriend, told Officer Guyer about a domestic dispute. She said that two hours earlier she had accompanied Mr. Duncan to Irwin Storage. There, Ms. Hansen saw Mr. Duncan take approximately 14 ounces of marijuana from the storage unit. Mr. Duncan told Ms. Hansen that the storage unit contained 20 pounds of marijuana. A fight started because of the marijuana; Mr. Duncan pulled her hair. Office Guyer saw red marks on Ms. Hansen's face, and loose hair. The Yakima Police Department received a report of an assault at 6:06 p.m. Ms. Hansen lied about her name. Her real name is Sara DaVee. Officer Guyer spoke to Betty Arnold, Irwin Storage's manager. She confirmed that Mr. Duncan rented a unit and that his code showed entry into the facility at 5:59 p.m. and exit at 6:03 p.m.
>
> Detective Merryman also said that a prior investigation targeted Mr. Duncan, resulting in Mr. Duncan's arrest for growing a large quantity of high quality marijuana. Based on this information, a judge issued a search warrant for the storage unit that Mr. Duncan rented. The police found approximately 19 ounces of marijuana.

The Court of Appeals rules (Judge Sweeney writing the opinion) that the affidavit's description of the informant's report was sufficient to establish the "basis of information prong" of the two-pronged Aguilar-Spinelli test for informant-based PC, but was insufficient to establish the "veracity" prong of that test. The Court's analysis of PC (in excerpt form) is as follows:

> *Basis of Knowledge*. Information showing the informant personally has seen the facts asserted and is passing on firsthand information satisfies the basis of knowledge prong. Here, Ms. DaVee said she was with Mr. Duncan at the storage facility and personally observed a quantity of marijuana in the storage unit. She also said Mr. Duncan told her the storage unit contained 20 pounds of marijuana. Mr. Duncan complains that her information is insufficient because it does not show how she was familiar with marijuana. We disagree. Ms. DaVee said Mr. Duncan told her it was marijuana. That is sufficient.
>
> *Veracity*. Under the veracity prong, police must present the issuing magistrate with sufficient facts to determine either the informant's inherent credibility or reliability. The veracity prong is satisfied in either of two ways: (1) the informant's credibility may be established, or (2) if nothing is known about the informant, the facts and circumstances surrounding the information may reasonably support an inference that the informant is telling the truth. If a police investigation reveals suspicious activity along the lines of the criminal behavior proposed by the informant, then the

corroborating investigation may satisfy the requirements of Aguilar-Spinelli.

The affidavit here fails to explain Ms. DaVee's credibility or reliability. Police did not check her identity, address, phone number, employment, residence or length of residence, or family history. There was, however, an attempt to corroborate Ms. DaVee's information by additional police investigations.

The next question, then, is whether that effort was adequate. The police found that Mr. Duncan rented the storage unit and he had visited the unit within the two hours before the police talked to the storage facility's manager. But these are innocuous facts. They do not suggest criminal activity. At most, they establish that Ms. DaVee had personal knowledge of Mr. Duncan. Other corroboration includes Ms. DaVee's red face, and loose hair. But again, this information would not point to possession of marijuana. While the information corroborates the domestic dispute, it does not corroborate that the storage unit contained marijuana. Independent police investigation should point out '"'*probative indications of criminal activity* along the lines suggested by the informant'."

Nor is Ms. DaVee's identity enough to presume reliability. The informant's identification is merely a consideration in determining whether the informant is truly a citizen informant. Naming a person is not alone a sufficient ground on which to credit an informer. It is only one factor in determining an affidavit's sufficiency. Other factors also militate against a conclusion that Ms. DaVee is a citizen informant. The earlier domestic dispute colored her information with self-interest.

Even with admission of the records corroborating Mr. Duncan's visits to the facility, insufficient corroboration exists to establish the Aguilar-Spinelli veracity prong.

Failure to Consider Prior Criminal History. Finally, the State argues that the court should have considered Mr. Duncan's prior criminal history in determining probable cause. In State v. Sterling, 43 Wn. App. 846 (1986)**[Sept. '86 LED:07]**, the court permitted the use of a prior conviction as a factor when determining whether probable cause existed to issue a warrant. But a prior criminal record does not give the police probable cause to conduct a warrantless search. Here, the court appropriately did not find a valid search warrant based on Detective Merryman's affidavit that Mr. Duncan had been subjected to prior investigations. Contrary to Sterling, the affidavit here does not say Mr. Duncan had a prior criminal record but only that he was arrested and subjected to other investigations. Even if considered, a prior criminal record cannot provide probable cause to conduct a warrantless search. Omitting the informant's information, probable cause does not exist merely because of prior investigations focusing on Mr. Duncan.

[Some citations omitted]

Result: affirmance of Yakima County Superior Court suppression order.

Status: decision on whether the State's petition for review is to be granted will be made by the State Supreme Court on October 1, 1996.

LED EDITOR'S COMMENT: We believe that the Court of Appeals erred when it did not consider the prior criminal history of Duncan *along with* the informant's report in its analysis of whether veracity had been established. We hope that the State Supreme Court will decide to accept review, and that the Court will ultimately (in 1997?) reverse in favor of the State. Under a common sense view, as well as traditional Aguilar-Spinelli analysis, this was PC to search. We believe that (1) it is a close question whether the description of the citizen informant met the veracity prong without need for corroboration; and that, assuming that it did not, (2) corroboration as to criminal activity was established.

(2) **CONSENT TO BLOOD TEST BY VEHICULAR HOMICIDE SUSPECT NOT UNDER ARREST INVALIDATED BASED ON LACK OF PRIOR WARNINGS RE RIGHT TO ADDITIONAL TEST --** In State v. Rivard, 80 Wn. App. 633 (Div. III, 1996), the Court of Appeals agrees with a lower court decision suppressing a blood test obtained with permission of a vehicular homicide suspect. Even though the vehicular homicide suspect was not under arrest when asked to consent, the Court holds that the officer was required to give prior implied consent warnings, including admonition about the right to additional testing.

The Court of Appeals holds that: (1) an officer is not required to invoke implied consent law merely due to driver's involvement in a serious injury accident; but (2) if an officer elects to obtain a blood sample, the officer must warn the suspect of his or her right to obtain an additional blood sample, even if the suspect has not been arrested. Accordingly, defendant Rivard was entitled to be informed of his right to independent testing, even though he had not been arrested and even though he had consented to giving a blood sample. His consent without such warning was not voluntary under the Fourth Amendment, the Court holds.

Result: Spokane County Superior Court suppression order affirmed; case remanded to the Superior Court for trial or dismissal of charges.

Status: review has been accepted by the State Supreme Court; oral argument will likely be held in the fall of 1996.

LED EDITOR'S COMMENT: The Court of Appeals holding that consent to a blood test is not "voluntary" unless one knows of one's right to obtain an independent test appears to be wrong and could have ominous implications. We know of no case that makes the lawfulness of a consent, outside the extremely narrow confines of "implied consent" statutes, turn on an officer's advice about additional rights of the subject of the consent request. Here, the implied consent statute did not apply, because no arrest was made. Hence, it appears that the consenting blood test should have been admitted under standard voluntariness analysis.

(3) **BOILERPLATE IN APPLICATION FOR COURT-ORDERED SINGLE-PARTY CONSENT RECORDING CRITICIZED** -- In State v. Manning, 81 Wn. App. 714 (Div. I, 1996), in reviewing a drug defendant's appeal, the Court of Appeals addresses a superior court order for electronic surveillance issued under RCW 9.73.090. The primary issue in the case was whether the State had satisfied the requirement in RCW 9.73.090(2) and 9.73.130(3)(f) that an application for such an order show that other investigative techniques are probably inadequate. Boilerplate allegations are not sufficient, the Court declares in the following analysis:

> The application for court approval requires the submission of an affidavit providing,

. . . "A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ". The judicial order authorizing the interception and recording of Manning's conversations concluded: "Normal investigative techniques reasonably appear to be unlikely to succeed if tried". The issue is whether the facts in the application sufficiently supported that conclusion.

The State relies on the following justifications, recited in the application. The anticipated conversations were of primary importance to the investigation. Interception and recording would avoid a one-on-one swearing contest as to who said what, provide uncontroverted evidence of Manning's criminal intent, minimize factual confusion, and rebut anticipated allegations of entrapment. The application stated, "No more reliable evidence of the communications or conversations is available than a recording, or recordings, of the actual conversations. The spoken words are themselves the best evidence of criminal intent. No other investigative method is capable of capturing these words in such clear and admissible evidentiary form." In further justification, the application averred it was necessary "to intercept and record conversations at the earliest stage of case development to maintain the integrity and proper direction of the investigator."

The justifications recited above appear to have become boilerplate in applications under the Privacy Act. Such justifications merely support the truism that having a recording to play at trial is advantageous to the State in obtaining a conviction. They do not inform the issuing judge of reasons why, in this particular case, other procedures will not successfully resolve the investigation.

Boilerplate is antithetical to the statute's particularity requirement set forth in RCW 9.73.130(3)(f). The requirement for a "particular statement of facts" reflects the Legislature's desire to allow electronic surveillance under certain circumstances but not to endorse it as routine procedure. Before resorting to an application under RCW 9.73.130, the police must either try, or give serious consideration to, other methods and explain to the issuing judge why those other methods are inadequate in the particular case. This is the critical inquiry to which the issuing judge and the trial judge must give their attention when reviewing an application. To approve an application that contains nothing more than general boilerplate declarations of the type set forth above would undermine the restrictive intent of the statute.

We do not read our prior cases as allowing generalities to fulfill the requirement for particularity. The particular facts presented for review have shown that police considered or tried other ways of investigating the case but found them impractical or unsafe. *[COURT'S FOOTNOTE: See, e.g., State v. Irwin, 43 Wn. App. 553 (1986)(defendant refused to deal with new parties; police unable to gain access to neighboring property) Cisneros, 63 Wn. App. 724 (Div. I, 1992)* ***[May '92 LED:13]*** *(attempts made to introduce undercover officers but defendant refused to talk to unknown persons); State v. Lopez, 70 Wn. App. 259 (1993)* ***[Nov. '93 LED:15]*** *(previous transactions showed that unaided surveillance was not possible).]* State v. Cisneros refers to an earlier decision, State v. Platz [33 Wn. App. 345 (1982)], as having "approved a wiretap order where the only justification for the order was to bolster the credibility of the testifying undercover officer. But the Platz decision

> itself relies on facts indicating that other investigative procedures had been used and that the homicide under investigation had nevertheless remained unsolved for nine months. The desirability of avoiding a "one-on-one swearing contest" was simply an additional consideration.
>
> The application in the present case is adequate because it contains more than boilerplate recitals. Its particular facts establish that Manning had been the target of previous narcotics investigations that ended inconclusively. The police decided to terminate those prior operations in part because Manning was known to be armed and dangerous. These facts meet the requirement of RCW 9.73.130(3)(f). They show that introducing an undercover officer without the protection of a transmitter would be unlikely to succeed in this particular case because of the known risk to the officer.

[Some citations and footnotes omitted]

Result: affirmance of King County Superior Court conviction for possession of a controlled substance with intent to distribute.

(4) **RESTITUTION TO COUNTY SHERIFF'S OFFICE AWARDED IN KILLING OF POLICE DOG**-- In State v. Kisor, 82 Wn. App. 175 (Div. II, 1996), the Court of Appeals makes the following rulings on restitution issues in a case where a defendant was convicted of killing a police dog: (1) The county was entitled to reimbursement for wages paid to the k-9 officer while he trained a replacement dog. (2) The county was entitled to reimbursement for vehicle expenses for transportation of the k-9 officer while he was attending training classes with the replacement dog. (3) The k-9 officer himself was not a victim of the crime, and therefore he was not personally entitled to restitution for the off-duty time he spent in training the replacement dog. (4) Even though the county received approximately $15,000 in private donations in memory of the killed dog and for its replacement, the restitution order was not required to be reduced in any way--payments received from private parties cannot reduce the restitution due from a criminal offender because this would allow him to escape full punishment. Result: Clark County Superior Court restitution order affirmed in part and reversed in part.

(5) **FETUS NOT A "CHILD" WITHIN MEANING OF CRIMINAL MISTREATMENT STATUTE**-- In State v. Dunn, 82 Wn. App. 122 (Div. III, 1996), the Court of Appeals rejects the State's appeal which argued that a mother could be prosecuted for criminal mistreatment under chapter 9A.42 RCW for ingesting cocaine during the course of her pregnancy. An unborn fetus is not a "person" for purposes of Title 9A RCW, the Court of Appeals rules. Therefore, because the criminal mistreatment statute protects children, among others, and defines "child" as "a **person** under eighteen years of age", one cannot be prosecuted under chapter 9A.42 for acts or omissions harmful to an unborn fetus. Result: affirmance of Grant County Superior Court order dismissing charge of criminal mistreatment against Selena S. Dunn, aka O'Brien.

(6) **NO DOUBLE JEOPARDY ISSUE WHERE DRUG FORFEITURE NOT CONTESTED--** In State v. Anderson, 81 Wn. App. 636 (Div. II, 1996), the Court of Appeals rules that, where a drug prosecution defendant failed to contest a related civil forfeiture under RCW 69.50.505, he was never placed in jeopardy by the forfeiture action and hence could not make a double jeopardy challenge.

Civil forfeiture proceedings: On February 8, 1994, defendant was arrested for possession of cocaine. A search incident to the arrest yielded two pagers and $97 in cash. That same day, the arresting agency served defendant with written notice of intent to forfeit the pagers and the cash. The defendant failed to make a claim of ownership of the items within the statutory time limit, and on May 18, 1994 an agency hearing examiner entered an "Order Confirming Forfeiture."

Criminal proceedings: One month earlier, on April 6, 1994, defendant had pleaded guilty of possession of cocaine. He then waited for over six months before making a motion in November of 1994 to vacate his guilty plea based on a double jeopardy theory.

These facts do not support a double jeopardy challenge, the Court of Appeals holds, because defendant was never placed in jeopardy by the civil forfeiture proceedings in which he did not participate.

Result: Pierce County Superior Court conviction Anthony Leroy Anderson for possession of cocaine affirmed.

LED EDITOR'S NOTE: The Anderson decision was issued by the Court of Appeals just before the United States Supreme Court issued its decision in the Ursery case digested in last month's LED at pages 11-12. Because the U.S. Supreme Court held in Ursery that civil forfeiture is not punishment for purposes of double jeopardy analysis, Ursery would preclude a double jeopardy challenge under any presumed factual scenario of civil forfeiture proceedings under RCW 69.50.505. Thus, following Ursery, the Anderson Court's double jeopardy distinction is unnecessary.

As we noted in the LED entry last month, however, Ursery left intact the case law allowing a party to challenge forfeiture based on the Eighth Amendment's prohibition on "excessive fines." Courts and legal commentators have taken several very different approaches to the "excessive fines" issue. But under the facts of Anderson -- forfeiting two pagers and $97 -- we don't see any likely problem under "excessive fines" analysis regardless of the doctrinal approach.

(7) **NO RIGHT OF PRIVACY IN STORE RECEIPTS WHERE DEFENDANTS WERE BEING INVESTIGATED FOR SUBMITTING FORGED STORE RECEIPTS TO INSURANCE COMPANY** -- In State v. Farmer, 80 Wn. App. 795 (Div. I, 1996), the Court of Appeals rejects the argument of forgery co-defendants, James E. Farmer and Carol L. Farmer, that their right of privacy under the Washington constitution was violated by the police investigation which obtained certain store receipts.

The Farmers had been investigated for submitting a false claim to their insurance company for water damage to household items Because the Farmers were suspected of having submitted doctored store receipts to the insurance company, the San Juan County Sheriff's Office had gone directly to the store and obtained the pertinent receipts. No search warrant or other legal process was used to obtain the receipts.

The Court of Appeals engages in the following analysis in rejecting the Farmers' claim that they had a right of privacy in the store receipts under the Washington Constitution's article 1, section 7 (the Court first recognizes that there can be no protection for records of this sort under the Federal Constitution's Fourth Amendment):

> The relevant inquiry is whether, under state law, the Farmers had a legitimate expectation of privacy in the receipts possessed by the stores. Our courts have held that a person has a legitimate expectation of privacy in telephone calls placed from his or her home, and in his or her garbage. However, a person who writes or passes a bad check drawn on his or her bank account cannot have any justifiable expectation that the status of the account at that time will remain private.
>
> Assuming, *arguendo*, a customer has a legitimate expectation of privacy in a transaction with a business, that expectation ceases to exist once that customer discloses evidence of the transaction to a third party, as the Farmers did when they submitted the altered receipts to the insurance company. As we have previously recognized, the United State Supreme Court has consistently held that "'a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.'" For example, in the context of the delivery of film to a film processor, "'One participating in illegal activities cannot reasonably expect that disclosures made to third persons will enjoy constitutional protection simply because of an assumption that the information will not be revealed to the government.'" Consequently, we find that any expectation of privacy the Farmers might have had in the transaction was eliminated by their own act of submitting evidence of the transactions to the insurance company, a third party, and that the warrantless seizures of the receipts from the stores did not violate the Farmers' right to privacy under the state constitution.

Result: affirmance of San Juan County Superior Court convictions of James E. Farmer (false claims and forgery) and of Carol L. Farmer (forgery).

(8) **CHECKING CONTENTS OF UNOCCUPIED UNLAWFULLY PARKED CAR DURING AUTO PROWL INVESTIGATION NOT LAWFUL, EITHER AS FRISK OR AS SEARCH --** In State v. Ozuna, 80 Wn. App. 684 (Div. III, 1996), the Court of Appeals rules that stolen property that police found in defendant's parked, unoccupied car was unlawfully obtained.

Officers had received a call about two nighttime auto prowlers seen running from an owner's car after the owner's car alarm had sounded. A responding officer did not find the suspected prowlers, but he did spot another car nearby (in the opposite direction from the line of flight of the reported prowlers), unlawfully parked on school grounds. The second car was suspiciously nosed into some bushes, as if someone had tried to hide it.

The officer checked the vehicle license and learned that the registered owner of the older model vehicle had a criminal record. Looking into the vehicle the officer observed an expensive-looking briefcase, an attache' case, and a gym bag in the car. Opening an unlocked door of the car, the officer checked the three items in the car, determining ultimately that they had been stolen.

Shanedoah Ozuna was charged with first degree possession of stolen property. However, he successfully moved pre-trial to suppress the evidence. On appeal, the Court of Appeals affirms the suppression order which held that the officer lacked authority to open the car's door and search its contents.

First, the Court of Appeals rejects the State's argument that Terry v. Ohio supports the

warrantless check of the contents of the unoccupied vehicle. Terry only justifies limited frisks for officer-safety purposes, the Court of Appeals explains, and no officer-safety reason justified a search of the unoccupied vehicle. Second, the Court of Appeals rejects the State's theories: (1) that there was probable cause to search the vehicle, plus exigent circumstances justifying a warrantless search; and (2) that the vehicle's owner (Ozuna) had no reasonable privacy expectation because he had illegally parked the car.

Result: Yakima County Superior Court suppression order affirmed.

(9) **STRIKER/GREENWOOD "SPEEDY TRIAL" RULE BARS PROSECUTION IN WELFARE THEFT CASES WHERE DSHS, NOT PROSECUTOR, NOTIFIED DEFENDANTS OF PENDING CHARGES** -- In State v. Marler, 80 Wn. App. 765 (Div. III, 1996), the Court of Appeals bars prosecution for a "speedy trial" violation by the State in three unrelated cases charging welfare theft.

In each of the welfare theft cases on review, the prosecutor had filed charges, and DSHS had then notified the respective defendants of the charges by letter directing them to make arrangements with the prosecutor to surrender for prosecution. In each case, the defendant failed to act on the DSHS letter, and, thereafter, a considerable period of time expired before the respective defendants were arraigned and then tried on the charges.

The trial court dismissed the charges in each case based on the State Supreme Court's Striker/Greenwood interpretations of the "speedy trial" court rules. The rules under CrR 3.3, which vary somewhat based on whether the case is initially filed in district or superior court, (1) rely on a "constructive arraignment date" in any case where defendant timely objects that there has been an unnecessary delay in bringing the non-confined defendant before the court on the charges; and (2) require that trial occur within 90 days of that date; unless (3) (a) the State acted in good faith and with due diligence in attempting to bring the defendant before the court, or (b) the defendant is at fault for the delay.

The Court of Appeals places the blame for the delay on the State in Marler, declaring that delegating to DSHS the prosecutor's duty to give notice of charges is not "due diligence" under Striker/Greenwood.

Result: affirmance of Spokane County Superior Court orders dismissing felony theft charges against John Dean Marler, Marcia Rose Vaughn, and Shannon Jean Francis.

(10) **HARASSMENT LAW'S FUTURE INJURY ELEMENT REQUIRES PROOF OF THREAT TO INJURE AT A DIFFERENT TIME OR PLACE** -- In Seattle v. Allen, 80 Wn. App. 824 (Div. I, 1996), the Court of Appeals reverses misdemeanor harassment convictions under a City of Seattle ordinance which is analogous to the State harassment law at RCW 9A.46.020 and requires proof of a threat to cause "bodily injury in the future to the person threatened . . ."
The evidence in Allen was that the defendant, who briefly took hostages, had threatened to shoot his victims if they didn't cooperate. Analogizing to case law which distinguishes between robbery (with an immediate-injury threat element) and extortion (with a future-injury element), the Court of Appeals declares:

> The difference between the crimes of robbery and extortion . . . is analogous to the difference between the crimes of assault and harassment. A threat to cause

> immediate injury may constitute an assault, but a threat to cause harm in the future is harassment. Compare WPIC 35.50 (assault is "an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury" and WPIC 36.06 (a person commits the crime of harassment when he or she, without lawful authority, knowingly threatens to cause bodily injury in the future to another person). Because every threat, by necessity, refers to an act sometime in the future, to prove harassment the prosecution is required to produce evidence that the threat is one to cause injury at a different time or place than the time and place where the defendant makes the threat. Without such a requirement, there is nothing to distinguish the crimes of harassment and assault and the phrase "in the future" becomes superfluous.

[Footnote, citation omitted]

The Court of Appeals rules in Allen that the threat by the defendant was to do injury then and there. Therefore, the Court holds that defendant did not commit the crime of harassment.

Result: reversal of King County Superior Court order affirming Seattle Municipal Court harassment convictions; a misdemeanor assault conviction arising from the same incident was not appealed by Allen and therefore still stands.

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MORE Q & A ON 1996 FIREARMS LAW AMENDMENTS

LED EDITOR'S INTRODUCTORY NOTE:

As promised in last month's LED at page 8, we have some additional Q & A's on the firearms law at chapter 9.41 RCW, as amended by chapter 295, Laws of 1996. As always, we remind our readers that any views that we express in the LED are solely our own and do not necessarily reflect the views of the Attorney General or the Criminal Justice Training Commission.

Q-1 The new definition of "law enforcement officer" now found at RCW 9.41.010(13), together with RCW 9.41.060, has the apparent effect of exempting from the requirement for obtaining a concealed pistol license all full-time and reserve law enforcement officers -- apparently whether on or off duty -- in city, county, and state general authority law enforcement agencies. However, the definition of "law enforcement officer" as it applies to limited authority law enforcement agencies such as fish and wildlife, gambling commission, state parks and recreation, etc., declares that they have such exempt status only if "duly authorized" by their employers to carry a concealed pistol. For limited authority peace officers, may the employing agency give only a limited authorization -- i.e., on duty only or only in certain on-duty circumstances?

A-1 Probably so, as such power is implied in the Legislature's choice of the term "duly" in the phrase "duly authorized." [NOTE: The legal advisors for the affected agencies will have to individually address this issue. We are simply making a "best guess" which is solely our own view.]

Q-2 An applicant for a concealed pistol license has a rap sheet showing a 10-year-old arrest and charge for felony sexual assault in another state. The applicant insists the charges were ultimately dismissed for insufficient evidence. The CPL-application-reviewing agency can find no record of a conviction or other disposition to the contrary on the charge. Does the prior charge disqualify the applicant?

A-2 No, because RCW 9.41.040(3) has been amended to provide that "[w]here no record of the court's disposition of the charges can be found, there shall be a rebuttable presumption that the person was not convicted of the charge."

Q-3 Subsections (1) and (3) of RCW 9.41.070 both refer to the granting of relief from firearms disabilities under Federal law, 19 U.S.C. Sec. 925(c). Is such relief presently available?

A-3 No, for many years now, Congress has continued restrictive appropriation provisions which prohibit ATF from acting on such applications.

Q-4 For most felony convictions under RCW 9.41.040(4)(b)(i), a person can petition to a "court of record" to obtain a restoration of rights based merely on five consecutive years in the community without further criminal conviction. For what felony crimes (whether committed by juveniles or an adult, in-state or out-of-state) must a person seeking a restoration of firearms rights present the additional special evidence necessary to obtain a "certificate of rehabilitation" under RCW 9.41.040(3)?

A-4 Any class A felony, or other felony with a maximum sentence of at least twenty years, or both; plus the following sex offenses even though they are not class A felonies: indecent liberties, child molestation in the second degree, incest against a child under age 14, and rape in the third degree.

Q-5 Subsection (3) of RCW 9.41.070 provides that one "who is exempt under [federal law] 18 U.S.C. Sec. 921(a)(20)(A) shall have his or her right to acquire, receive, transfer, ship, transport, carry, and possess firearms in accordance with Washington state law restored except as otherwise prohibited by this chapter." However, subsection (1) of RCW 9.41.070 provides that "[n]o person convicted of a felony [Note: previously the term here was "serious felony"] may have his or her right to possess firearms restored or his or her privilege to carry a concealed pistol restored, unless . . . RCW 9.41.040(3) or (4) applies." Does the provision of subsection (1) of 070, read together with other provisions of chapter 9.41 RCW, effectively negate the effect of subsection (3) as to felony convictions, such that no person convicted of a felony, in this state or elsewhere, automatically has his or her rights restored under the quoted portion of subsection (3)?

A-5 Yes. We believe that, under the 1996 amendment to subsection (1) of 070, any person with a prior felony conviction, in this state or elsewhere, must look exclusively to subsections (3) and (4) of RCW 9.41.040 and to RCW 9.41.047 for restoration of firearms rights. In turn, the latter provisions of chapter 9.41 RCW establish three classes of felons: (A) those convicted (in Washington courts only) of certain crimes committed prior to July 1, 1984 for which they received deferred sentences [FIREARMS RIGHTS HAVE BEEN AUTOMATICALLY RESTORED FOR THIS VERY LIMITED CLASS OF FELONS -- SEE RCW 9.41.040(4) & AGO 1988 NO. 10]; (B) those convicted of felonies here or elsewhere which are not Class A or equivalent, and also are not among certain additionally specified sex offenses [FOR THIS CLASS OF FELONS, THEY MUST KEEP A CLEAN RECORD FOR FIVE CONSECUTIVE YEARS AND THEN PETITION A

SUPERIOR COURT FOR RESTORATION BASED ON THE CLEAN RECORD -- SEE Q & A-4 ABOVE]; [C] those convicted here or elsewhere of Class A felonies or equivalent, or certain additionally specified sex offenses [FOR THIS CLASS OF FELONS, THEY MUST PETITION TO A SUPERIOR COURT FOR A "CERTIFICATE OF REHABILITATION", BASED NOT ONLY ON AN INTERVENING CLEAN RECORD, BUT ALSO PROOF OF "REHABILITATION" -- AGAIN SEE Q & A-4 ABOVE].

Q-6 Where RCW 9.41.040 and 9.41.047 refer to petitioning a "court of record' for restoration of firearms rights, is this reference limited to superior courts?

A-6 Yes, even though records are made in district court and municipal court proceedings, the Washington case law seems to limit the term, "court of record," to superior courts. See Washington Constitution, article 4, section 11; Seattle v. Filson, 98 Wn.2d 66 (1982).

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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.