Law Enforcement Digest

August 1997

HONOR ROLL

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459th Session, Basic Law Enforcement Academy - April 9, 1997 through July 1, 1997

President:	David A. Crocker - Gig Harbor Police Department
Best Overall:	Brian T. Markert - Redmond Police Department
Best Academic:	Brian T. Markert - Redmond Police Department
Best Firearms:	John R. Schuler - King County Department of Public Safety
Tac Officer:	Rod Sniffen - Everett Police Department
Asst. Tac Officer:	Don Gulla - King County Department of Public Safety

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461st Session, Spokane - Basic Law Enforcement Academy - April 2, 1997 through June 24, 1997

Highest Achievement in Scholarship:	Karl F. Thompson - Spokane Police Department
Highest Achievement in Night Mock Scenes:	Alan D. Edwards - Spokane Police Department
Outstanding Officer:	Robert S. Beebe - Hoquiam Police Department
Highest Achievement in Pistol Marksmanship:	Karl F. Thompson - Spokane Police Department
Best Overall Firearms:	Karl F. Thompson - Spokane Police Department

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Corrections Officer Academy - Class 252 - June 2, 1997 through June 24, 1997

Highest Overall:	Andrea Ann Baccetti - Washington Corrections Center for Women
Highest Academic:	Andrea Ann Baccetti - Washington Corrections Center for Women Robert J. Bodfield - Washington Corrections Center
Highest Practical Test:	David Hockenberry - Washington Corrections Center Troy Anthony Jackson - Pierce County Sheriff's Office
Highest in Mock Scenes:	Andrea Ann Baccetti - Washington Corrections Center for Women Shaun M. Carr - Washington Corrections Center
Highest Defensive Tactics:	Aaron Randall James - Pine Ridge Pre-Release

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Corrections Officer Academy - Class 253 - June 2, 1997 through June 27, 1997

Highest Overall:	Joyce L. Smith - Island County Jail Janice Vicente - Pierce County Sheriff's Office
Highest Academic:	Janice Vicente - Pierce County Sheriff's Office
Highest Practical Test:	Joyce L. Smith - Island County Jail
Highest in Mock Scenes:	Bernard Stanley Moody - Twin Rivers Corrections Center Janice Vicente - Pierce County Sheriff's Office
Highest Defensive Tactics:	Adrian V. Wevers - Spokane County Jail

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AUGUST LED TABLE OF CONTENTS

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1997 LEGISLATIVE ENACTMENTS -- PART TWO

LED EDITOR'S INTRODUCTORY NOTE: This is Part Two of what we expect to be a three-part update of 1997 Washington State legislative enactments of interest to law enforcement. We believe that we have included in Parts One (See July 1997 LED) and Two most of the significant 1997 enactments of special interest to law enforcement. Part Three next month will provide: (A) follow-up notes on Parts One and Two enactments; (B) information regarding any enactments of interest that may have been overlooked in Parts One and Two; and (C) an index of the 1997 enactments addressed in Parts One, Two, and Three.

We have tried to incorporate RCW references in our summaries, but where new sections or chapters are created, the State Code Reviser must assign appropriate code numbers, a process that likely will not be completed until early fall. As always, we remind our readers that any legal interpretations that we express in the LED do not necessarily reflect the views of the Attorney General's Office or of the Criminal Justice Training Commission.

PROTECTION OF VULNERABLE ADULTS

CHAPTER 392 (E2SHB 1850) Effective Date: July 27, 1997

Most of the law changes under the broad-based bill to improve the overall legislative scheme for protection of vulnerable adults were part of a package requested by Attorney General Christine Gregoire. We will address the five areas of change of greatest significance to law enforcement agencies in Washington.

Assistant Attorney General Melissa J. De Groff of the Attorney General's Criminal Justice Division is available to provide assistance and training to law enforcement and prosecutors' office personnel on the laws for protection of vulnerable adults. AAG De Groff may be reached by telephone at (253) 593-2388 in Tacoma, or at her email address: MelissaD@atg.wa.gov.

Criminal mistreatment (Chapter 9A.42 RCW)

Amends several sections in chapter 9A.42 RCW to better protect vulnerable adults from the reckless acts and omissions of "criminal mistreatment" proscribed under that chapter. RCW 9.42A.010's definition of "dependent person" is amended with the addition of a sentence providing:

> A resident of a **nursing home**, as defined in **RCW 18.51.010**, a resident of an **adult family home**, as defined in **RCW 70.128.010**, and a **frail elder or vulnerable adult**, as defined in **RCW 74.34.020(8)**, is presumed to be a dependent person for purposes of this chapter. [Bolding added by LED Editor]

Anyone researching the scope of protection of "dependent person(s)" under these 1997 amendments must refer to the various incorporated definitions of the terms bolded in the passage immediately above. There will usually be time for research, and the statutory scheme is somewhat complicated. So we would suggest, in most cases, early consultation by law enforcement investigators with their local prosecutors.

We will not set out the text of the lengthy "nursing home" definition in RCW 18.51.010; generally, "nursing home" status of a facility should not be difficult to determine. One should be able to get some help from DSHS regarding whether an abode meets the RCW 70.128.010(1) definition of "adult family home" which is:

> ...a regular family abode in which a person or persons provide personal care, special care, room, and board to more than one but not more than six adults who are not related by blood or marriage to the person or persons providing the services.

Finally, the definition of "frail or vulnerable adult" in RCW 74.34.020(8) of the RCW chapter on "Abuse of Vulnerable Adults," declares that the term means:

> ...a person sixty years of age or older who has the functional mental or physical inability to care for himself or herself. "Frail elder or vulnerable adult" shall include persons found incapacitated under chapter 11.88 RCW [*Chapter 11.88 is the*

> *general guardianship statute*], or a person who has a developmental disability under chapter 71A.10 RCW [*Title 71A is the title on developmental disabilities*], and persons admitted to long-term care facility that is licensed or required to be licensed under chapter 18.20 [*this is the chapter on boarding homes*], 18.51 [*this is the chapter on nursing homes*], 72.36 [*this is the chapter on soldiers' and veterans' homes*], or 70.128 [*this is the chapter on adult family homes*], or home care agencies licensed or required to be licensed under chapter 70.127 RCW [*this is the chapter addressing such agencies].* [Italicized descriptions in brackets supplied by LED Editor]

Note that one effect of these incorporations is to presumptively cover all persons over 60 who are unable to care for themselves, as well as all developmentally disabled adults of whatever age.

On the other hand, it appears that there is generally available a defense to a charge of "criminal mistreatment" for a person providing "spiritual treatment in lieu of medical treatment" under certain circumstances. In a new "intent" section being added to chapter 9A.42 RCW, the Legislature has declared:

> It is the intent of the legislature that a person who, in good faith, is furnished Christian Science treatment by a duly accredited Christian Science practitioner in lieu of medical care is not considered deprived of medically necessary health care or abandoned.

Related to this latter statement of legislative intent is the following, more generic, spiritual treatment provision added to RCW 74.34.020 in the chapter on "Abuse of Vulnerable Adults" [note that a similar provision is also included in amendments to the "whistleblower" protections of chapter 70.124 RCW]:

> No frail elder or vulnerable person who relies upon and is being provided spiritual treatment in lieu of medical treatment in accordance with the tenets and practices of a well-recognized religious denomination shall for that reason alone be considered abandoned, abused, or neglected.

Amendments are made to RCW 9A.42.020, 030, and 050 to make clear how the criminal sanctions and defense provisions apply to "a person **employed** to provide to the child or dependent person the basic necessities of life..." Also adds a new section to chapter 9A.42 RCW to allow terminally ill persons or their designees to elect to receive only palliative care from certain listed institutions "providing care under the medical direction of a physician."

Sexual Assault (Chapter 9A.44 RCW)

Amends RCW 9A.44.050 to make it "second degree rape" for a person to engage in "sexual **intercourse**" in a non-consenting circumstance:

> When the victim is a **frail elder or vulnerable adult** and the perpetrator is a person who is not married to the victim and who has a **significant relationship** with the victim. [Bolding supplied by LED Editor]

Amends RCW 9A.44.100 to make it "indecent liberties" for a person to knowingly cause another person to have "sexual **contact**" with him or her in a non-consenting circumstance:

> When the victim is a **frail elder or vulnerable adult** and the perpetrator is a person who is not married to the victim and who has a **significant relationship** with the victim. [Bolding supplied by LED Editor]

A definition of "frail elder or vulnerable adult" is added to RCW 9A.44.010; it very closely parallels, but is not identical to, the definition of this term in chapter 74.34 RCW set forth above. In addition, a new alternative definition of "significant relationship" is added to RCW 9A.44.010 to include:

> A person who provides welfare, health or residential assistance, personal care, or organized recreational activities to frail elders or vulnerable adults, including a provider, employee, temporary employee, volunteer, or independent contractor who supplies services to long-term care facilities licensed or required to be licensed under chapter 18.20, 18.51, 72.36, or 70.128, and home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW, but not including a consensual sexual partner.

Administrative Reporting (Chapters 70.124 and 74.34 RCW)

Reclassifies from misdemeanor to gross misdemeanor the crime at RCW 70.124.070, the proscription against the knowing failure to report abuse of vulnerable adults. Also adds a new section to chapter 74.34 to make it a gross misdemeanor to knowingly fail to make reports required under the chapter on "adult family and boarding homes."

Criminal Background Checks and Licensing

Makes improvements in the statutory scheme requiring criminal records checks on job applicants and current employees of certain licensed agencies and facilities which care for, among others, vulnerable adults. Includes a new requirement for persons required to make statements in relation to criminal background checks; such persons must make their disclosure statements "under penalty of perjury."

Whistleblower Protection

Makes improvements in "whistleblower" protection under the RCW chapters relating to nursing homes and adult family homes, among other entities.

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UNITED STATES SUPREME COURT

NO BLANKET RULE OF "NO KNOCK" ENTRY FOR EXECUTING WARRANTS TO SEARCH FOR NARCOTICS; CASE-BY-CASE LOOK AT NO-KNOCK REASONABLENESS REQUIRED

Richards v. Wisconsin, 117 S.Ct. 1416 (1997)

Facts: (Excerpted from Supreme Court opinion)

> On December 31, 1991, police officers in Madison, Wisconsin obtained a warrant to search Steiney Richards' hotel room for drugs and related paraphernalia. The search warrant was the culmination of an investigation that had uncovered substantial evidence that Richards was one of several individuals dealing drugs out of hotel rooms in Madison.
>
> The officers arrived at the hotel room at 3:40 a.m. Officer Pharo, dressed as a maintenance man, led the team. With him were several plainclothes officers and at least one man in uniform. Officer Pharo knocked on Richards' door and, responding to the query from inside the room, stated that he was a maintenance man. With the chain still on the door, Richards cracked it open. Although there is some dispute as to what occurred next, Richards acknowledges that when he opened the door he saw the man in uniform standing behind Officer Pharo. He quickly slammed the door closed and, after waiting two or three seconds, the officers began kicking and ramming the door to gain entry to the locked room. At trial, the officers testified that they identified themselves as police while they were kicking the door in. When they finally did break into the room, the officers caught Richards trying to escape through the window. They also found cash and cocaine hidden in plastic bags above the bathroom ceiling tiles.

Proceedings: Richards moved to suppress the evidence seized from his hotel room. The trial court denied his motion, and Richards was then convicted. On his appeal, the Wisconsin Supreme Court upheld the trial court judgment, announcing a blanket rule permitting automatic "no-knock" entry in all narcotics search warrant executions, regardless of the facts regarding dangers or possible destruction of evidence.

ISSUES AND RULINGS: (1) Is a blanket rule allowing "no knock" entry to execute narcotics search warrants reasonable under the Fourth Amendment? (Answer: No); (2) Did the particular circumstances of this case provide "reasonable suspicion" which justified the "no knock" entry? (Answer: Yes). Result: Affirmance of Wisconsin state court decision upholding the method of execution of the search warrant.

ANALYSIS: Two years ago in Wilson v. Arkansas, 131 L.Ed.2d 976 (1995) **Sept. '95 LED:03**, the U.S. Supreme Court announced for the first time that the common law "knock-and-announce" rule restricting forcible entries of private premises is part of the Fourth Amendment. The common law "knock and announce" rule, which is codified in Washington statute, RCW 10.31.040, has been held to contain exceptions where the circumstances provide a reasonable basis for believing that knocking and announcing will result in: (1) escape of a suspect; (2) destruction of evidence; (3) danger to officers or others.

(1) Blanket Rule?

The Wisconsin Supreme Court had held in the Richards case that the likelihood of destruction of evidence and dangers to officers in narcotics warrant execution situations justifies a blanket "no knock" rule for all narcotics warrant situations. The opinion for the unanimous U.S. Supreme Court explains as follows why a blanket exception which would permit "no knock" entry for all narcotics search warrant executions goes too far:

> First, the exception contains considerable overgeneralization. For example, while drug investigation frequently does pose special risks to officer safety and the preservation of evidence, not every drug investigation will pose these risks to a substantial degree. For example, a search could be conducted at a time when the only individuals present in a residence have no connection with the drug activity and thus will be unlikely to threaten officers or destroy evidence. Or the police could know that the drugs being searched for were of a type or in a location that make them impossible to destroy quickly. In those situations, the asserted governmental interests in preserving evidence and maintaining safety may not outweigh the individual privacy interests intruded upon by a no-knock entry.
>
> A second difficulty with permitting a criminal-category exception to the knock-and-announce requirement is that the reasons for creating an exception in one category can, relatively easily, be applied to others. Armed bank robbers, for example, are, by definition, likely to have weapons, and the fruits of their crime may be destroyed without too much difficulty. If a per se exception were allowed for each category of criminal investigation that included a considerable--albeit hypothetical--risk of danger to officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless.
>
> Thus, the fact that felony drug investigations may frequently present circumstances warranting a no-knock entry cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to knock and announce in a particular case. Instead, in each case, it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and- announce requirement.
>
> In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. This standard--as opposed to a probable cause requirement--strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries.

[Some citations omitted]

(2) No-knock Justification Under Specific Facts Of This Case?

However, the U.S. Supreme Court goes on to hold that the particular facts of the Richards case justified the entry without compliance with “knock and announce” requirements. The Court explains:

> Although we reject the Wisconsin court's blanket exception to the knock-and-announce requirement, we conclude that the officers' no-knock entry into Richards' hotel room did not violate the Fourth Amendment. We agree with the trial court, and with Justice Abrahamson, that the circumstances in this case show

> that the officers had a reasonable suspicion that Richards might destroy evidence if given further opportunity to do so.
>
> The judge who heard testimony at Richards' suppression hearing concluded that it was reasonable for the officers executing the warrant to believe that Richards knew, after opening the door to his hotel room the first time, that the men seeking entry to his room were the police. Once the officers reasonably believed that Richards knew who they were, the court concluded, it was reasonable for them to force entry immediately given the disposable nature of the drugs.

[Some citations omitted]

LED EDITOR'S NOTE: The U.S. Supreme Court also notes in Richards that laws in some states give judges authority to issue "no knock" warrants upon proper justification from police/prosecutor applicants, but the Supreme Court does not address the legality of such laws. While the Washington Supreme Court has never addressed the issue, the Washington Court of Appeals has twice declared that judges in Washington lack authority under Washington law to give police advance "no knock" authority, and instead that officers must make an on-the-spot assessment of reasonable suspicion re: dangerousness, possible destruction of evidence or possible escape. See State v. Jeter, 30 Wn. App 360 (Div.II, 1981) Jan. '82 LED:03; State v. Spargo, 30 Wn. App. 949 (Div. II, 1982) May '82 LED:02.

LED EDITOR'S COMMENT: The U.S. Supreme Court takes care in Richards to clarify that the standard for evaluating whether one of the exceptions to knock-and-announce applies is "reasonable suspicion", not "probable cause." While the Washington case law under the state "knock-and-announce" statute, RCW 10.31.040, is somewhat ambiguous, we believe that the reasonable suspicion standard applies under the Washington statute. Officer-safety is an important consideration under the exceptions, and the Washington courts should use the "reasonable suspicion" standard of Terry v. Ohio under RCW 10.31.040.

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BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

(1) KANSAS CIVIL COMMITMENT LAW FOR SEXUAL PREDATORS UPHELD -- In Kansas v. Hendricks, 1997 WL 338555 (1997), the U.S. Supreme Court has ruled, 5-4, that Kansas' Sexually Violent Predator Act, modeled very closely on Washington State's similarly named Act is constitutional. Like the Washington scheme, the Kansas Act provides procedures for the civil commitment of persons, who, due to a "mental abnormality" or a "personality disorder", are likely to engage in "predatory acts of sexual violence."

The majority opinion for the U.S. Supreme Court is authored by Justice Thomas. His opinion rejects constitutional challenges by pedophile Hendricks based on constitutional protections of: (1) substantive due process (holding that the Act's requirement of precommitment proof of predatory dangerousness satisfies substantive due process requirements); (2) double jeopardy (holding that the Act does not establish "criminal" proceedings and that involuntary confinement under it is not "punishment" for purposes of double jeopardy analysis); and (3) ex post facto

(holding that, because ex post facto protection applies only to penal statutes, and the Act is not punishment, it does not trigger ex post facto consideration; and holding also that the Act does not actually have retroactive effect).

A concurring opinion by Justice Kennedy, who also signed Justice Thomas' majority opinion, leaves a little room for future challenges to sexual predator civil commitment laws. Justice Kennedy asserts that such a law might be subject to challenge if "civil commitment were to become a mechanism for retribution" or if medical professionals conclude that mental abnormality is "too imprecise" a term to provide the necessary justification for involuntarily confining persons.

Result: Reversal of Kansas Supreme Court decision invalidating Kansas Act; jury finding of sexually violent predator status reinstated.

(2) BRADY LAW REQUIREMENT FOR CLEO BACKGROUND CHECKS ON HANDGUN BUYERS STRICKEN -- In Prinz v. U.S., Mack v. U.S., 1997 W.L. 351180 (1997), the U.S. Supreme Court, by a 5-4 vote, strikes down, on "states rights" grounds, the requirement under the federal Brady Handgun Violence Prevention Act (the Brady Act) that the chief law enforcement officer (CLEO) of local law enforcement agencies perform background checks and perform related tasks on handgun purchases.

The majority justices find no express or implied authority in the federal constitution allowing the federal Congress to impose these tasks on city and county CLEO's. Because the Federal constitution is one of enumerated powers in this regard, and the Ninth Amendment reserves unenumerated powers to the States, the Brady Act's records-check requirement on CLEO's is invalid, the majority holds. Note, however, that the five-day waiting requirement of Brady was not affected by this ruling. More importantly, Washington law enforcement agencies are subject to requirements of state law in RCW 9.41.090 which parallel the Brady requirements. See August '96 LED at page 7. Therefore, the Prinz/Mack ruling should have little or no effect in Washington State.

Result: Reversal of Ninth Circuit U.S. Court of Appeals rulings; Montana and Arizona federal district court rulings invalidating the CLEO mandates of the Brady Act affirmed.

LED EDITOR'S NOTE: The 1993 Brady Act provides for a national instant background check system (run by a federal agency) to be in place by November 30, 1998. Congress has provided the necessary funding to date.

(3) NO CONSTITUTIONAL RIGHT TO DIE; ASSISTED SUICIDE LAWS UPHELD -- In State of Washington v. Glucksberg, 1997 WL 348094 (1997), and Vacco v. Quill, 1997 WL 340837 (1997), the U.S. Supreme Court unanimously upholds Washington State and New York State statutes banning assisted suicide.

In upholding the state laws banning assisted suicide, the U.S. Supreme Court rules that terminally ill patients do not have any fundamental right to physician assisted suicide under the U.S. Constitution. Several opinions were issued in this case, so even though the Court was unanimous in upholding the state statutes, Glucksberg and Vacco decisions leave some room for debate on some aspects of the "right to die" issue under the Federal constitution. Also, the decisions do not limit the authority of state legislatures to address this issue, nor, of course, do the decisions

address whether state courts might find a "right to die" in their state constitutional privacy protections.

Result: Reversal of federal Court of Appeals rulings in Glucksberg and Vacco cases; affirmance of district court rulings upholding the constitutionality of the respective state laws.

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NINTH CIRCUIT, U.S. COURT OF APPEALS

UNDER TENNESSEE V. GARNER, DEADLY FORCE JUSTIFIED AGAINST FLEEING FELON WHERE "SUBSTANTIAL RISK" OF DEATH OR SERIOUS BODILY HARM IN DELAYING CAPTURE

Forrett v. Richardson, 112 F.3d 416 (9th Cir. 1997)

Facts: (Excerpted from Court of Appeals opinion)

> Forrett committed a violent residential burglary at approximately 12:00 p.m. on November 29, 1990. While in the residence, he encountered, subdued, and tied up three victims. He shot one of the victims in the neck at point blank range and shot at another using a .38 caliber revolver he found in the house. He then fled the scene in a truck owned by one of the residents, taking with him several firearms and 250 rounds of ammunition.
>
> After Forrett left the house, one of the victims managed to untie himself and telephone the City of Riverside, California Police Department. The victim described Forrett's appearance, the crimes, the truck, and the weapons to the officers who arrived at the house a few minutes later. These details were promptly conveyed by radio to numerous officers, including the defendants. The officers began a search for Forrett, and found the truck within an hour. Neither Forrett nor the weapons were inside.
>
> A few minutes later, defendant Officer Kenneth Raya saw Forrett walking in a nearby residential neighborhood. Because Forrett matched the description of the burglar, Raya confronted Forrett. Forrett fled into the residential area on foot. Raya radioed for help and briefly chased Forrett. He stopped when Forrett ran out of view behind a house because he was worried that Forrett was armed and might ambush him. Raya waited for support, and when the other defendant officers, Elliott, Seymore and Manning, arrived moments later, they renewed the chase.
>
> Other officers meanwhile set up a perimeter around the neighborhood and began combing the area on foot. The police also used a helicopter to warn residents and the inhabitants of a nearby elementary school that they should remain indoors. The police took this precaution because they were concerned that Forrett would flee into a house or the school and take hostages.
>
> Forrett eluded capture for almost an hour by running across yards and streets, and jumping fences. He hid in a wooden shed for a few minutes, where he removed a layer of clothing in an attempt to change his appearance. The four defendant officers eventually chased him into a yard bounded on at least one side by a six-feet high wooden fence. Forrett paused in the yard to look around. The officers approached to within 20-30 feet and shouted at Forrett to stop and surrender. At trial, Forrett testified that at this point he was aware that the police were after him, that he was trying to get away, and that he heard the officers shouting, though he could not discern what they were saying.

> As Forrett hesitated, Officers Raya and Elliott fired seven or eight shots at him but did not hit him. Ignoring the shots, Forrett ran to the fence and began climbing over into the next yard. Officers Seymore, Elliott, and Manning fired several more shots as he scaled the fence. These rounds all missed Forrett, and he fell unwounded into the adjacent yard. The officers then fired through the fence. Two bullets hit Forrett as he got up to run away, one in the hip and the other in the back. Unable to run, Forrett was quickly apprehended by another officer who had come around to the other side of the fence. The officers expended approximately 24 rounds in stopping Forrett.
>
> The police found no guns, either on Forrett or in the vicinity where he was captured. Forrett eventually pled guilty to several felony counts related to the burglary and assaults.

Proceedings: The officers were cleared by an agency shooting review board, but Forrett then sued in federal court, claiming a violation of his civil rights in the shooting. The district court dismissed the action on grounds that Forrett's alleged facts did not state a valid claim.

ISSUE AND RULING: Did the officers have probable cause to believe that there was a substantial risk that death or serious bodily harm would result if Forrett's capture was delayed -- thus meeting the deadly force rule of Tennessee v. Garner? (Answer: Yes) Result: Affirmance of trial court judgment for police as a matter of law.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Under the Fourth Amendment, police may use only such force as is objectively reasonable under the circumstances. To prevent the escape of a felony suspect, a police officer may use deadly force only when it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a threat of serious harm, either to the officer or others. Tennessee v. Garner, 471 U.S. 1 (1985) **June '85 LED:08**.
>
> We first address what it means for a felony suspect to pose a threat of serious harm. Contrary to Forrett's position, the suspect need not be armed or pose an immediate threat to the officers or others at the time of the shooting. The Supreme Court in Garner identified specific situations in which a fleeing felony suspect may be deemed to pose a threat of serious harm to the officer or others:
>
> > Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.
> >
> > Under this test, it is not necessary that the suspect be armed or threaten the officer with a weapon. Whenever there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, if some warning has been given, where feasible.
>
> Forrett conceded that the officers had probable cause to believe he had committed a crime involving the infliction of serious harm. The defendants therefore had probable cause to believe that Forrett posed a serious threat of harm to them or others. Forrett also testified that he was consciously attempting to evade arrest at the time, and that he knew the police were chasing him and yelling at him, though he could not hear their words. This testimony

established that Forrett was trying to escape and that the defendants warned him before using deadly force.

The only remaining issue under Garner, then, is whether the use of deadly force was necessary to prevent Forrett from escaping. The necessity inquiry is a factual one "Did a reasonable non-deadly alternative exist for apprehending the suspect?"

Forrett contends that a less drastic alternative would have been to wait and capture him later by less deadly means. He theorizes that his capture was inevitable because the police had cordoned off the neighborhood and surrounded him with officers on foot and in a helicopter. He also argues that the defendants knew that one of their colleagues was stationed on the other side of the fence and that Forrett's capture was therefore imminent regardless of whether they shot him.

We do not find the evidence necessary to support this theory in the record. The defendants' decision to use deadly force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. Nothing in the record indicates that at the time of the shooting the defendants knew that their colleague was on the other side of the fence, or that other officers had established a closed perimeter. Nor does the evidence show that the police had actually established an escape-proof cordon at the time Forrett was shot.

Even if Forrett's capture was inevitable, it does not follow on these facts that the use of deadly force was unnecessary. The Fourth Amendment does not require law enforcement officers to exhaust every alternative before using justifiable deadly force. The alternative must be reasonably likely to lead to apprehension before the suspect can cause further harm. It is not, as Forrett would have it, any alternative that might lead to apprehension in the future. The option must be reasonable in light of the community's strong interests in security and preventing further harm.

The timing of a suspect's capture, and the opportunities for violence the suspect may have before capture, are therefore crucial to the reasonable necessity inquiry.

It is undisputed that Forrett used every desperate means at his disposal to elude capture for almost an hour of hot pursuit. He vaulted fences, hid in a shed, and removed easily identifiable clothing. He ignored the defendants' repeated shouts. He ran to the fence while the defendants fired more than eight shots at him. Despite the volley of bullets, he did not surrender and instead began climbing the fence. The defendants fired several more shots at him, and still he kept fleeing. The only objectively reasonable conclusion to be drawn from this evidence is that if the defendants had not shot him, he would have continued taking whatever measures were necessary to avoid capture.

The defendants therefore had probable cause to believe that Forrett was willing to use violent means to achieve his ends. The defendants knew that he was fleeing through a residential area where many of the neighborhood's residents and schoolchildren were in the vicinity. They also had probable cause to believe that he had recently invaded a home, tied up its occupants, shot one of them, and fled the scene by taking one occupant's truck, guns and ammunition. Adding these facts to his demonstrated willingness to take desperate measures, the defendants rightly concluded that it was highly possible that he would seize an opportunity to take an innocent bystander hostage. The use of deadly force was objectively reasonable under these circumstances.

For the foregoing reasons, the only reasonable conclusion that could be drawn from the evidence when construed in the light most favorable to plaintiff was that the officers did not violate plaintiff's Fourth Amendment rights. The District Court therefore properly granted judgment as a matter of law.

[Some citations omitted]

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BRIEF NOTES FROM THE NINTH CIRCUIT COURT OF APPEALS

(1) NOTICE PROVIDED AFTER EXECUTION OF SEARCH WARRANT INADEQUATE -- Perkins v. City of West Covina, 113 F.3d 1004 (9th Cir. 1997), the U.S. Court of Appeals for the Ninth Circuit rules, 2-1, that the standard notice provided by West Covina, California, police department following execution of a search warrant did not adequately protect due process rights of search subjects who seek return of seized property.

The notice provided in the search at issue in the Perkins case provided:

> To Whom it May Concern:
>
> 1. These premises have been searched by peace officers of the West Covina Police Department pursuant to a search warrant issued on 5-20-93, by the Honorable Dan Oki, judge of the Municipal Court, Citrus Judicial District.
> 2. The search was conducted on 5-21-93. A list of the property seized pursuant to the search warrant is attached.
> 3. If you wish further information, you may contact: Det. Ferrari or Det. Melnyk at [telephone number].

After discussing case law on due process/notice requirements, the majority opinion in Perkins declares as follows that the above notice was inadequate, and that the notice should have addressed certain additional considerations:

> It is not our function to specify the exact phrasing of an adequate notice. In cases where property is taken under California law, however, the notice should include the following: as on the present notice, the fact of the search, its date, and the searching agency; the date of the warrant, the issuing judge, and the court in which he or she serves; and the persons to be contacted for further information. In addition, the notice must inform the recipient of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court. In circumstances such as those presented by this record, the notice must include the search warrant number or, if it is not available or the record is sealed, the means of identifying the court file. It also must explain the need for a written motion or request to the court stating why the property should be returned.
>
> The detailed implementation of these general requirements is left to the appropriate government agency. All that is necessary is that the notice be reasonably calculated to inform people of the means by which they may be able to secure the prompt return of their seized property.

Results: Reversal of district court ruling on notice issue; summary judgment granted to Perkins on notice issue, and case remanded to district court for further proceedings.

LED EDITOR'S COMMENT: Washington law enforcement agencies should consult their legal advisors regarding adoption of a search warrant execution notice. We hope to have a sample notice for next month's LED.

(2) SAN DIEGO JUVENILE CURFEW ORDINANCE INVALIDATED ON CONSTITUTIONAL GROUNDS -- In Nunez v. City of San Diego, 114 F.3d 935 (9th Cir. 1997), the U.S. Court of Appeals for the Ninth Circuit strikes down San Diego's juvenile curfew ordinance on constitutional grounds (vagueness/overbreadth). The Court of Appeals does indicate that it would be possible to draft a constitutionally valid juvenile curfew ordinance if sufficiently broad exceptions were provided to protect constitutional rights of juveniles (see LED Editor's Note following State v. J.D. decision below at page 23 of this month's LED).

Result: Affirmance of federal district court ruling invalidating San Diego's ordinance.

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

CITIZENS HAVE NO RIGHT TO USE FORCE AGAINST OFFICERS TO RESIST UNLAWFUL ARREST THREATENING ONLY LOSS OF FREEDOM -- In State v. Valentine,132 Wn.2d 1 (1997), a 7-2 majority of the State Supreme Court rules that a person who is being unlawfully arrested has no right to use force to resist that arrest unless some danger is posed by that unlawful arrest other than a mere loss of freedom.

The majority opinion authored by Justice Alexander: (a) traces the historical development of the law in this area; (b) discusses conflicting Washington court decisions and trends of court decisions from other jurisdictions; and (c) considers public policy against anarchy, and hence against allowing citizens to use force against officers making a merely unlawful arrest (e.g. arrest without probable cause, arrest on invalid warrant, arrest on unlawful entry of private premises, etc.). The majority concludes:

> In sum, we hold that, although a person who is being unlawfully arrested has a right, as the trial court indicated in instruction 17, to use reasonable and proportional force to resist an attempt to inflict injury on him or her during the course of an arrest, that person may not use force against the arresting officers if he or she is faced only with a loss of freedom. We explicitly overrule Rousseau and the other cases that are inconsistent with our holding in this case.

Justice Sanders writes a vigorous dissent, disagreeing with the majority's analysis of the case law, as well as its public policy analysis. Justice Madsen joins the Sanders' dissent.

Result: Affirmance of Court of Appeals decision affirming Spokane County Superior Court conviction of third degree assault.

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WASHINGTON STATE COURT OF APPEALS

TRUCKER POINTING TO CAR AND MAKING WEAVING GESTURE NOT "REASONABLE SUSPICION" FOR STOP, AS TRUCKER'S CREDIBILITY NOT ESTABLISHED BEFORE STOP

State v. Jones, 85 Wn. App. 797 (Div. III, 1997)

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

> On October 19, 1993, Officer Kraemer was parked on the side of a road. A driver of a passing truck indicated with hand signals that the car in front of him was weaving on the road. Officer Kraemer immediately pulled in behind the car and followed. The car did not weave or move erratically. Officer Kraemer stopped it anyway because it was approaching an intersection with pedestrian traffic. The driver of the car, Ms. Jones, agreed to perform field sobriety tests. She failed those tests. Officer Kraemer arrested Ms. Jones.
>
> The State charged Ms. Jones with driving while intoxicated. Ms. Jones moved to dismiss the charge because the stop was improper. The district court denied her motion and convicted her of driving while intoxicated. The superior court affirmed.

ISSUE AND RULING: Did the police officer have enough information to determine the truthfulness of the truck driver and hence to properly conclude that he had "reasonable suspicion" for a stop? (ANSWER: No, rules a 2-1 majority) Result: Reversal of Okanogan County Superior Court affirmance of District Court denial of motion to dismiss charges; charges dismissed by Court of Appeals.

STATUS: The Okanogan County Prosecutor has filed a Petition for Review in the State Supreme Court, under Supreme Court No. 65477-8; the petition will be considered for acceptance or denial on October 7, 1997.

ANALYSIS BY MAJORITY: (Excerpted from majority opinion authored by Judge Sweeney and joined by Judge Schultheis)

> "Indicia of reliability" requires: (1) knowledge that the source of the information is reliable, and (2) a sufficient factual basis for the informant's tip or corroboration by independent police observation. While the requirement of establishing the reliability of a "citizen" informer has been relaxed, "some such showing is nonetheless necessary."
>
> The only basis for establishing the reliability of the informant here was a company name on the side of the truck. A name written on the side of a truck, without more, is not qualitatively different from an anonymous but named telephone caller. To establish the reliability of the source, more information is required.
>
> The State relies on State v. Anderson, 51 Wn. App. 775, (1988) **Oct. '88 LED:10**. Its reliance is misplaced. There the defendant did not challenge the reliability of the source. She challenged instead the factual basis for the tip. This court, in Anderson, acknowledged that the tip came from a juvenile probation and parole officer known to the arresting trooper: "the report came from an identified citizen informant, [and] Trooper Lothrop properly concluded the source of his information was reliable." In contrast, the informant here was not known to the arresting officer nor was the tip corroborated.

[Some citations omitted]

DISSENTING OPINION

Judge Kurtz dissents. He first explains his differing view of the Washington cases analyzed by the majority. He then concludes with a quotation from a Tennessee case which addresses a significant point ignored by the majority:

> Frequently, police officers, upon arriving at the scene of a crime, are hurriedly given valuable information by an eyewitness. Based upon this information, hot pursuit results. Later, when the officers return to the scene, the eyewitness who gave the information may have long since departed. To require in these tumultuous circumstances that the officers stop and ascertain the name, address, and full identification of the informant is totally unreasonable. To do so would frequently negate the value of the information imparted to the officers.

[Citation omitted]

LED EDITOR'S COMMENT: We agree with the dissent's common sense analysis. The majority has clearly misread the Fourth Amendment cases. We wonder what the majority's analysis would have been if the unknown trucker had yelled out his window to the officer that the driver of the car ahead had just been observed shooting a firearm at passing vehicles. The better view of the case law is that a face-to-face report makes the source credible for Terry stop purposes. Ideally, an officer first will attempt to identify a complaining witness, but an officer receiving a first-hand eyewitness report of crime from such a source generally should be able to immediately respond to such a non-anonymous report with a Terry stop of the suspect, without having to first investigate the citizen complainant for veracity. If the appellate system allows common sense to prevail, the prosecutor's petition for review will be granted, and the State Supreme Court will reverse the Court of Appeals decision by unanimous decision.

TERRY STOP DIDN'T BECOME ARREST WHEN OFFICER GRABBED SUSPECT AND TOLD HIM HE WAS "UNDER ARREST"; TOTALITY OF FACTS DON'T EQUAL ARREST

State v. Lyons, 85 Wn. App. 268 (Div. III, 1997)

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

> Wenatchee Police Officer Jim West ran a routine registration check on a parked vehicle and determined that its owner, Ronald Lyons, had a revoked driver's license and three outstanding misdemeanor warrants. A few days later, Officer West saw this car abruptly pull into a driveway when the driver spotted the officer. The driver got out of the vehicle. Minutes later, Officer West saw the car approaching, and observed the driver was a male. Officer West attempted to follow the car and again the driver turned into a driveway, got out of the car, and began walking toward a nearby apartment building. Officer West told the man to stop, but he continued walking away. When the man reached the door of the apartment building, Officer West again told him to stop, and when the man tried to open the door, the officer "grabbed onto him and told him he was under arrest for driving while suspended." The officer then asked his name and the man identified himself as Ron Lyons. A later search of Mr. Lyons' pockets disclosed methamphetamine, a controlled substance.

> Mr. Lyons was charged with one count of possession of a controlled substance. Mr. Lyons moved to suppress the methamphetamine as the fruit of an illegal arrest; the court denied his motion.

ISSUE AND RULING: Was the lawful investigative detention transformed into an arrest when the officer grabbed the suspect and told him he was "under arrest"? (ANSWER: No) Result: Affirmance of Chelan County Superior Court ruling denying suppression; case remanded for trial.

ANALYSIS: The Court of Appeals begins its analysis of the "Terry stop vs. Arrest" issue by observing that "not every seizure is a custodial arrest." The Court's analysis continues as follows:

> An officer who lacks probable cause to effect a custodial arrest may temporarily detain a suspect long enough to dispel the officer's reasonable suspicion. An officer may stop the driver of a vehicle based on the individualized suspicion arising from evidence the registered owner of the vehicle has a revoked or suspended driver's license. See City of Seattle v. Yeager, 67 Wn. App. 41 (1992) **[Feb. '93 LED:10]**.
>
> The issue presented here is whether the investigative stop was transformed into a custodial arrest by the officer's "grabbing" Mr. Lyons and stating, "You're under arrest." We find no Washington cases directly on point. Other jurisdictions have held the use of reasonable force to detain a suspect does not transform an investigative stop into an arrest. Likewise, other jurisdictions have held that an officer's statement that the detainee is under arrest does not turn an investigative stop into an arrest.
>
> Until Mr. Lyons disclosed his name, the officer was conducting a lawful investigative stop, a limited seizure, based on an articulable suspicion Mr. Lyons was driving without a license. The use of minimal force in this seizure and the limited intrusion were reasonable in light of Mr. Lyons' failure to stop when asked to do so. The officer had the right to dispel his suspicion by identifying the driver. Once he gave his name, the officer had probable cause for the arrest and search incident thereto. The motion to suppress was properly denied.

[Footnote, some citations omitted]

LED EDITOR'S COMMENTS: We believe that the correct decision was made here. However, we think that a creative defense counsel could have made a semi-respectable losing argument on the following points:

(1) WAS THE INFORMATION STALE?

Based on the Court's description, we assume that the officer did not run another check when he again saw the vehicle after learning a few days earlier that its registered owner (a) had a revoked driver's license, and (b) had outstanding misdemeanor warrants. Had the information become stale, or did the officer still have reasonable suspicion justifying a stop of the vehicle? The Yeager case allows the officer to assume for "reasonable suspicion" purposes that the registered owner of a vehicle may be driving it. What

Yeager does not address is how long a warrant-check or DOL record check hit remains fresh/valid? We think that the information was probably not stale, but we nonetheless suggest caution in all respects. Where possible, confirmation of an earlier hit should be done. In addition, if it is possible to confirm whether the observed current driver of a vehicle roughly meets the description information obtained from the dispatcher regarding the registered owner, there is less suppression risk in making the stop.

(2) IS IT CONSTITUTIONALLY PERMISSIBLE TO RUN A RANDOM RECORDS CHECK BASED ON DOL VEHICLE REGISTRATION INFORMATION?

This may seem like an absurd, exaggerated civil libertarian theory, but it is raised occasionally. There is very little case authority on point, but what little there is favors law enforcement. We are aware of two New Jersey decisions (State v. Lewis, 671 A.2d 1126 (1996) and State v. Myrick, 659 A.2d 976 (1995)) holding that there is no privacy protection against the random running of license plates. And the Arizona Supreme Court held in one case, without further analysis or citation to additional authority, that it did not violate a person's right of privacy for police to conduct random checks on license plates. State v. Harding, 670 P.2d 383, 392 (Ariz. 1983).

The Washington Court of Appeals recently discussed the New Jersey Lewis decision, as well as decisions from Illinois and Ohio, which have held such random checks against license plates to be lawful. See State v. Harlow, 85 Wn. App. 557 (Div. III, 1997) June '97 LED:05. The Harlow Court did not have to decide whether such random checks were lawful, because the check there was not random; however, the discussion in Harlow lends support to the lawfulness of conducting random checks. By not questioning the random license check in Lyons, Division III has again lent some support to the practice. We have seen no case law authority to the contrary, and we believe there is no constitutional restriction on the random checking.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) FAILURE TO RE-MIRANDIZE ON TAPE MAKES ARRESTEE'S RECORDED STATEMENT INADMISSIBLE -- In State v. Mazzante, 86 Wn. App. ___ (Div. II, 1997), the Court of Appeals rules that violation of the provisions of RCW 9.73.090 for tape recording the interrogation of an arrestee made the recorded statement of an alleged child abuser inadmissible.

James John Mazzante, Jr. was arrested for assaulting his six-week-old child. After the arresting detective had Mirandized Mazzante, the arrestee made a mostly-exculpatory, unrecorded statement, trying to explain the child's serious injuries with a story about inadvertent rough handling. Then Mazzante agreed to make a tape recorded statement. RCW 9.73.090 (1)(b) provides:

> Video and/or sound recordings may be made of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court. Such video and/or sound recordings shall conform strictly to the following:

> (i) The arrested person shall be informed that such recording is being made and the statement so informing him shall be included in the recording;
>
> (ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;
>
> (iii) At the commencement of the recording the arrested person shall be fully informed of his constitutional rights, and such statements informing him shall be included in the recording;
>
> (iv) The recordings shall only be used for valid police or court activities.

With one significant exception, the detective complied with the statute. The noncompliance by the detective occurred when, instead of repeating the full Miranda warnings and obtaining a waiver on tape, the detective merely mentioned on tape that Mazzante had earlier been advised off tape of his Miranda rights. The Court of Appeals holds that the detective's failure to re-advise Mazzante on tape of his Miranda rights made the tape recorded statement of the arrestee inadmissible.

Result: Reversal of Pierce County Superior Court CrR 3.5 ruling admitting the tape recording; case remanded for hearings on admissibility of the earlier unrecorded statement and for trial on first degree assault of a child.

(2) SIXTH AMENDMENT RULE REGARDING WAIVER OF RIGHTS DOES NOT REQUIRE THAT DEFENDANT FIRST BE ADVISED OF EXISTENCE OF PENDING CHARGES -- In State v. Medlock, 86 Wn. App. 89 (Div. III, 1997), Division Three of the Court of Appeals rejects defendant's Sixth Amendment argument. Defendant Medlock had been arrested in Canada by Canadian police after they developed probable cause to believe he had committed a murder in Spokane. After the arrest, Medlock was formally charged with murder in Superior Court by the Spokane County Prosecuting Attorney. Shortly thereafter, Spokane police investigators met with Medlock in Canada.

The Spokane investigators advised Medlock of his Miranda rights, but they did not advise him that he had been charged with murder. Medlock stated that he understood his Miranda rights, and he agreed to talk with the officers. He then confessed to the murder.

Prior to his trial on the murder charge, Medlock moved to suppress the statement to the Spokane officers on grounds that his Sixth Amendment right to counsel had been violated. He argued that he could not possibly have made a knowing waiver of his Sixth Amendment right to counsel without first being advised of the pending charge. The Court of Appeals rejects Medlock's Sixth Amendment challenge under the following analysis:

> Mr. Medlock's Sixth Amendment right to counsel had attached at the time of his interrogation by the Spokane police because he had been formally charged at that time. See Brewer v. Williams, 430 U.S. 387 (1977). He argues that his waiver of this right was not valid because he was not aware that charges had been filed. In Patterson v. Illinois, 487 U.S. 285 (1988) **[Sept. '88 LED:03]**, the defendant argued that although he had been given Miranda warnings, he did not

> validly waive his right to counsel under the Sixth Amendment. The Supreme Court rejected his argument finding that Miranda sufficiently informed the defendant of his right to counsel during questioning and the consequences of waiving that right.
>
> The key inquiry in determining whether a waiver is valid is whether the defendant knew of his rights during questioning and the consequences of waiving those rights. Mr. Medlock affirmatively indicated throughout his custody in Canada that he was aware of his rights and was waiving them. Having told Canadian officers that he was distraught because he had killed someone certainly indicates he knew of the seriousness of the matter and potential consequences. Informing him of the actual charge would not have heightened his awareness of the seriousness of his situation. The court did not err in denying Mr. Medlock's motion to suppress his statements to the Spokane officers.

[Some citations omitted]

The Court of Appeals also concludes that there is no greater protection in the Washington constitution's protection of the "right to counsel" than there is in the Federal constitution's parallel Sixth Amendment in the context of the waiver issue.

Result: Affirmance of Spokane County Superior Court first degree felony murder conviction. Status: Medlock's Petition for Review is pending in the Washington Supreme Court.

LED EDITOR'S NOTE: Other arguments raised by Medlock and rejected by the Court of Appeals included: (1) That the initial questioning by Canadian officials, though complying with Canadian law, did not comply with Washington or U.S. Constitutional law (THEORY REJECTED BECAUSE THE CANADIAN OFFICERS WERE NOT ACTING WITH COOPERATION AND ASSISTANCE OF WASHINGTON OFFICERS); and (2) That the corpus delicti of the underlying robbery was not established in this felony murder case, and hence Medlock's confession was not admissible (THEORY REJECTED BECAUSE, IN A FELONY MURDER CASE, WASHINGTON'S CORPUS DELICTI RULE DOES NOT REQUIRE ANY PROOF REGARDING THE PREDICATE FELONY).

LED EDITOR'S COMMENT: This was not an "initiation of contact" case. If Medlock had already been arraigned in the trial court on the pending charges, then, under the Sixth Amendment "initiation of contact" rule, the Spokane officers would not have been permitted to initiate contact with Medlock on that pending case. See State v. Valdez, 82 Wn. App. 294 (Div. III, 1996) Oct. '96 LED:04. However, because Medlock had not yet appeared in court on the pending charge, there was no Sixth Amendment bar to police initiation of contact with him. And because he had not asserted his Fifth Amendment rights (a) to silence and (b) to counsel during a custodial interrogation, the officers were not barred from initiating contact under the Fifth Amendment "initiation of contact" rule either. See article on "Initiation of Contact" in April '93 LED at 02.

(3) BELLINGHAM JUVENILE CURFEW LAW RULED UNCONSTITUTIONAL -- In State v. J.D., 937 P.2d 630 (Div. I, 1997), the Court of Appeals strikes down Bellingham's juvenile curfew ordinance on constitutional grounds. The J.D. Court rules that the ordinance contains: (A) overbroad restrictions on freedom of movement and expression and (B) impermissibly vague provisions giving police too little guidance. Result: Bellingham motion to dismiss J.D.'s

resisting arrest conviction is granted and Bellingham's juvenile curfew ordinance ruled unconstitutional. Status: Petition for review filed by State, petition now pending in the State Supreme Court.

LED EDITOR'S NOTE: City attorneys and county prosecutors throughout the state are studying this decision and recent curfew rulings elsewhere (see, e.g., the ruling of the Ninth Circuit in Nunez v. City of San Diego above at page 15). The key to drafting a constitutionally acceptable curfew ordinance if it is even possible given the uncertainties, of judicial review, lies in the exceptions provided to protect constitutionally protected activity. Due to LED space limitations, we do not plan to explore this complex issue in the LED.

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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.