Law Enforcement Digest

November 1997

HONOR ROLL

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459th Session, Basic Law Enforcement Academy - July 8 through October 3, 1997

President:	John C. Powers - Seattle Police Department
Best Overall:	Jeffrey G. Olson - Vancouver Police Department
Best Academic:	Brian D. Bragonier - King County Department of Public Safety
Best Firearms:	Jeffrey S. Newton - King County Department of Public Safety
Tac Officer:	Susan Bergt - Lacey Police Department
	Mike Sbory - Tacoma Police Department
Asst. Tac Officer:	Cedric Gonter - Auburn Police Department
	Special Agent Gary Drummheller - Washington State Gambling Commission

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Corrections Officer Academy - Class 256 - September 8 through October 3, 1997

Highest Overall:	Fred E. Graves - King County Department of Adult Detention
Highest Academic:	Matthew S. Blore - Clallam County Regional Jail
	Jevan Lynn Combs - Washington Corrections Center for Women
Highest Practical Test:	Fred E. Graves - King County Department of Adult Detention
Highest in Mock Scenes:	Rose A. Coates - King County Department of Adult Detention
	Fred E. Graves - King County Department of Adult Detention
	Clarance E. Guill, Jr. - Thurston County Jail
	Robert R. Huddleston - Chelan County Regional Jail
Highest Defensive Tactics:	Pedro P. Sanchez Cortez - Kent Corrections Facility

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Corrections Officer Academy - Class 257 - September 8 through October 3, 1997

Highest Overall:	Justin Cane Kissel - Chelan County Regional Jail
Highest Academic:	Donald G. Hoban - Olympic Corrections Center
Highest Practical Test:	Michael C. Weatherbee - Benton Corrections Center
Highest in Mock Scenes:	Matthew S. Brennan - Thurston County Jail
	Donald G. Hoban - Olympic Corrections Center
	Christopher Don Lloyd - Kittitas County Corrections
	Sean S. Sanchez - Washington Corrections Center
	Melanie K. Stalcup - King County Department of Adult Detention
Highest Defensive Tactics:	Justin Cane Kissel - Chelan County Regional Jail

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LEGISLATIVE UPDATE FROM SPECIAL SESSION

WARRANT CHECKS NOW EXPRESSLY AUTHORIZED IN TRAFFIC STOPS

CHAPTER 1 (HB 3902) Effective Date: September 17, 1997

This legislation amends RCW 46.21.021 in response to a State Supreme Court decision in State v. Rife, __Wn.2d__(1997) **Oct. '97 LED:03.** In Rife a majority of the Court held on statutory (not constitutional) grounds, that police may not extend the civil detention of a suspected traffic violator or jaywalker solely for the purpose of checking for outstanding warrants. See **Oct. '97 LED** at 3-6.

As noted, Rife was not grounded in any constitutional provision, so the Washington Legislature was free to respond. That is what the Legislature has done in chapter 1, Laws of 1997, First Special Session, amending subsection (2) of RCW 46.61.021 by inserting language giving police to do warrant checks in traffic stops (and, per Rife, jaywalker stops) as follows:

> (2) Whenever any person is stopped for a traffic infraction, the officer may detain that person for a reasonable period of time necessary to identify the person, check for outstanding warrants, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction.

LED EDITOR'S COMMENTS:

1. Is the legislation prospective? The amendment does not address whether the legislation will be prospective only, or, put another way, whether the restrictions of Rife will be applied to fact situations arising before the September 17, 1997 effective date of the legislation. Our guess is that the Washington courts will apply the legislation prospectively only, because the amendment changes the law as interpreted by the Court in Rife.

2. Does the Rife decision imply any restrictions on warrant checks conducted in any type of situation other than that squarely before the Court in Rife, i.e., an extended traffic stop? As we stated in last month's LED entry on Rife, we believe that Rife will have no impact on

warrant checks conducted outside the context of the particular facts of that case. That is, the Rife decision held unlawful only a warrant check on a jaywalker or traffic violator who is held for several minutes for that SOLE purpose. See Oct. '97 LED at 5 explaining our very narrow reading of Rife. And, at least prospectively, Rife will have no effect on the latter situation, because the Legislature has expressly authorized the check...Note, however, our concerns about constitutional issues expressed in the Oct. '97 LED at 5-6.

3. Status of Rife: At deadline for the November LED, a motion for reconsideration filed by the King County Prosecuting Attorney's Office was pending in the Supreme Court. That motion asks only that the Court revise the majority opinion to clarify that warrant checks may be freely and routinely conducted in a wide variety of circumstances outside the context of the extending of detentions in civil traffic stops. The Washington Association of Sheriffs and Police Chiefs filed an amicus curiae brief in support of the prosecutor's motion for reconsideration.

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BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

PRISON GUARDS WORKING FOR PRIVATE CONTRACTING FIRMS NOT ENTITLED TO QUALIFIED CIVIL RIGHTS IMMUNITY; ONLY PUBLIC ENTITIES GET ANY IMMUNITY – In Richardson v. McNight, 61 CrL 2198 (1997), the U.S. Supreme Court rules 5-4 that prison guards employed by a private, for-profit company contracting with the state of Tennessee to manage a state prison are not entitled to qualified immunity from a federal civil rights lawsuit brought under 42 U.S.C. § 1983.

State and local governmental employees working in prisons and jails are entitled to qualified immunity under the federal civil rights law. "Qualified immunity" means that the state and local governmental employees generally are not subject to civil rights act liability where they act in good faith. After considering the public policy considerations which support qualified immunity under 42 U.S.C. § 1983 for public agency employees, the majority opinion by Justice Breyer concludes that public policy considerations support distinguishing between public employees and private employees in this area of the law.

Result: Affirmance of federal court rulings allowing civil rights suit to go to trial.

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BRIEF NOTE FROM THE NINTH CIRCUIT, U.S. COURT OF APPEALS

SEX OFFENDER REGISTRATION, NOTIFICATION PROVISIONS OF WASHINGTON'S VERSION OF "MEGAN'S LAW" SURVIVES CONSITUTIONAL CHALLENGE – In Russell v. Gregoire, ___ F.3d ___ (1997), the Ninth Circuit of the U.S. Court of Appeals upholds against a broad-based constitutional challenge the Washington laws that the Court of Appeals refers to as Washington's version of "Megan's Law." This law involves two main parts. RCW 9A.44.130 requires registration of convicted sex offenders and certain other categories of convicted offenders. Under certain circumstances, RCW 4.24.550 authorizes Washington governmental agencies to notify the public upon release of sex offenders and certain other categories of dangerous persons.

The Russell case involved a broad-based constitutional challenge to these statutes. The challenge was brought by two convicted sex offenders whose offenses had been committed prior to the time of 1990 adoption of these statutes by the Washington Legislature as part of the 1990 Community Protection Act. The Ninth Circuit rejects challenges based on: 1) an ex post facto argument; 2) a "right of privacy" claim; and 3) a due process argument.

Result: Affirmance of decision of U.S. District Court for Western Washington upholding constitutionality of sex offender registration and notification laws.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) BASED ON 1957 NISQUALLY TRIBE RESOLUTION, STATE HAD JURISDICTION TO TRY ENROLLED MEMBERS OF NISQUALLY TRIBE FOR CONDUCT ON RESERVATION LAND – In State v. Squally, 132 Wn.2d 333 (1997), the State Supreme Court rules that the Thurston County Superior Court had jurisdiction to hear criminal charges against two enrolled members of the Nisqually Indian Tribe. The tribal member defendants had argued that because the tribe had not consented to the State's assumption of criminal jurisdiction over the reservation land on which the acts were allegedly committed, the superior court lacked jurisdiction.

In 1957, the tribe issued a resolution expressing a desire to have the State assume criminal jurisdiction, and the State later issued a proclamation accepting jurisdiction. The tribe then added land to the reservation, but did not request that the State assume jurisdiction over the newly acquired land. The alleged offenses occurred on the new land. The Squally Court ruled that when the State assumed jurisdiction following the 1957 tribal request, the State obtained jurisdiction over the entire reservation, including any land to be added at a later date.

Result: Reversal of Court of Appeals decision which had held that the Thurston County courts did not have jurisdiction to try Lewis Squally, Sr., and John Kalama on various charges; cases remanded to reinstate a second degree burglary conviction against Squally and to reinstate other charges against Squally and defendant Kalama for possible trial.

(2) REVERSAL ON DUE PROCESS GROUNDS OF SCHOOL ZONE ENHANCEMENT FOR DELIVERING COCAINE NEAR DOWNTOWN SEATTLE BUILDING WITH K-12 PROGRAM -- In State v. Becker, 132 Wn.2d 54 (1997), the State Supreme Court rules, 8-1, that it violated the due process rights of drug defendants, Donald Becker and Nelson Gantt, to apply the UCSA "school zone" provision to enhance their sentences.

The majority opinion by Justice Sanders describes the facts in part as follows:

> Defendants were arrested in downtown Seattle on the corner of Second Avenue and Yesler Way after selling two rocks of cocaine to an undercover police officer in violation or RCW 69.50.401(a)(1)(I), a section under the Uniform Controlled Substance Act (UCSA). The information alleged that the crime occurred "within 1000 feet of the perimeter of school grounds, to-wit: Youth Employment Education Program school [sic] under the authority of RCW 69.50.435(a)."
>
> This street corner is within 1,000 feet of the Alaska Building, a commercial office building at the corner of Second and Cherry Streets. On a portion of the third floor of the Alaska Building is the Youth Education Program. YEP is a general

> equivalency degree (GED) program for students who are not able to complete a traditional high school curriculum. YEP has six classrooms, five certified teachers, two or three classified staff, and serves about 80 students. There is no sign identifying the program on the outside of the building. There is, however, a bright purple banner at the third floor reception desk that reads "Seattle Public Schools Youth Education Program" (not school). The lobby directory also lists YEP as a tenant without identifying it as a school.
>
> YEP is administered by the Seattle School District, and its curriculum is governed by the Office of the Superintendent of Public Instruction (OSPI). It is funded with state money. The curriculum at YEP includes language arts, mathematics, social studies and science, as well as drug and alcohol education, teen parenting, conflict resolution, and health awareness classes concerning AIDS and sexuality. Some of these classes are taught by employees of the Youth Services Bureau, certified drug and alcohol facilitators, and nurses. YEP serves grades 9 through 12, providing services for students up to 21 years of age. While credit for YEP courses will transfer to a traditional high school students cannot earn a high school diploma at YEP.
>
> Defendants presented considerable evidence at trial that YEP does not have many of the attributes of a traditional school otherwise required by law. YEP does not have a United States flag displayed anywhere on premises, nor does it require students to recite the pledge of allegiance. The program manager for the Interagency School, which is operated by the Seattle Public School District as an umbrella agency for seven alternative programs including YEP, testified that she did not know whether YEP offered any instruction concerning United States or Washington history or United States or Washington Constitutions. YEP has no sports teams, library, or lunchroom.
>
> OSPI does not identify YEP on its list of school buildings, nor has YEP ever been listed with OSPI as a public school. However, OSPI does list the headquarters of the Interagency School, located approximately two miles from the Alaska Building.

Then the majority explains its vagueness/due process ruling:

> Vagueness challenges to enactments which do not involve First Amendment rights are evaluated "in light of the particular facts of each case." Here there are no readily available or ascertainable means by which defendants could have determined the existence of the YEP school grounds. Given the complete lack of information available regarding YEP's status as a school, the reasonable person could not determine YEP is a school…
>
> YEP is located on the third floor of the Alaska Building in downtown Seattle. The building has no flag, surrounding sports fields, playgrounds, or other signs that would indicate to a person of reasonable intelligence that a school is housed therein.
>
> The only signs that even reference YEP (the listing on the Alaska Building's lobby directory and the banner on the third floor) do not identify YEP as a school. At

> most the signs reference the Seattle Public School's Youth Education Program. Knowledge of a "program" located in an office building is not notice of a school.
>
> Moreover, the State produced no evidence that a person calling the Seattle School District would be informed that a school is located in the Alaska Building. Instead, the custodian of records for OSPI testified that YEP is not listed as a school in OSPI records. A person who calls OSPI, which our state constitution art. III, § 22 places in charge of all public schools in this State, would not be told that a school existed at YEP's location. This is the exact opposite of the situation in [State v Coria, 120 Wn.2d 156 (1992)], whose defendants could have readily called OSPI and obtained the specific locations of bus stops because OSPI had such information on file.
>
> **While defendants' actual lack of knowledge of the protected zone around YEP is irrelevant to culpability, a readily available means by which they or others of ordinary intelligence could have determined the existence of the protected school zone is a constitutional necessity. Defendants were deprived liberty without that process which is due.**

[Emphasis added and some citations omitted]

Result: Reversal of Court of Appeals' affirmances of two defendants' UCSA school zone sentence enhancements; cases remanded to the King County Superior Court for resentencing without the enhancements.

(3) DSHS CIVIL PROCEEDING RE OVERPAYMENT DOES NOT BAR CRIMINAL PROSECUTION FOR SAME ACTS; HOWEVER, DURESS/BATTERED WOMAN DEFENSE ALLOWABLE – In State v. Williams, 132 Wn.2d 248 (1997), the State Supreme Court rules that the fact that DSHS cleared a public assistance recipient, Ms. Williams, of wrongful receipt of benefits (DSHS finding that the recipient had made an inadvertent household error) did not bar the State from later prosecuting her criminally for the same acts relating to the overpayments. Public policy considerations outweigh defendant's **collateral estoppel** (or issue preclusion) argument, the Supreme Court holds.

However, the Supreme Court reverses the defendant's conviction on grounds that the trial court should have given the jury an instruction on **duress** under RCW 9A.16.060(1). The facts relating to duress are described by the Supreme Court as follows:

> Wellen worked as a merchant seaman and returned home about every two weeks when his ship was in port. He closely controlled the household finances, carefully reviewing the joint account upon each return. Wellen required Williams to record every purchase and became furious if she failed to do so. Wellen verbally and physically abused Williams throughout their relationship, and police responded to reports of domestic violence at least twice.

The Supreme Court analyzes the duress instruction issue as follows:

> Williams admitted to receiving public assistance overpayments. Her sole defense at trial was that her actions were the result of duress. The defense of duress, codified at RCW 9A.16.060(1), provides:

> In any prosecution for a crime, it is a defense that:
>
> (a) The actor participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the actor that in case of refusal he or another would be liable to immediate death or immediate grievous bodily injury; and
>
> (b) That such apprehension was reasonable upon the part of the actor;
>
> (c) That the actor would not have participated in the crime except for the duress involved.
>
> The trial court was satisfied there was sufficient evidence that Williams suffered from battered woman's syndrome and that she had a reasonable apprehension of harm from Wellen. Nonetheless, the trial court refused to submit the proposed instruction, finding that the harm was not immediate. This was error.
>
> The trial court reasoned that it would not be possible for Wellen, who was often away at sea, to inflict "immediate" harm. However, the duress statute does not require that it actually be possible for the harm to be immediate. Rather, it directs the inquiry at the defendant's belief and whether such belief is reasonable. Granted, in many if not most cases, the reasonableness of such belief would be foreclosed by the impossibility of the harm being immediate. Therefore, it may be appropriate in other circumstances for the trial court to refuse to give a duress instruction when the evidence establishes the impossibility of immediate harm.
>
> However, in the battered person context, we have allowed expert testimony to show how severe, ongoing abuse can affect the defendant's perceptions and reactions in ways that may not be apparent to the average juror. Such evidence is introduced to explain not only the defendant's subjective mental state, but also the reasonableness of the defendant's actions. Thus, the reasonableness of the defendant's perception of immediacy should be evaluated in light of the defendant's experience of abuse. Each side is entitled to have the jury instructed on its theory of the case if there is evidence to support that theory. Failure to so instruct is reversible error. We hold that Williams introduced sufficient evidence to entitle her to a duress instruction.

[Citations omitted]

Result: Reversal of Snohomish County Superior Court conviction for welfare fraud (first degree theft); case remanded for retrial.

(4) ADULT ENTERTAINMENT ORDINANCE UPHELD AGAINST CONSTITUTIONAL ATTACK – In Ino Ino, Inc. v. Bellevue, 132 Wn.2d 103 (1997), a unanimous State Supreme Court upholds against constitutional attack certain portions of a City of Bellevue adult entertainment ordinance. Key provisions of the Bellevue "adult cabaret" ordinance which were upheld against state and federal constitutional free speech challenges included the following: (1) a requirement that nude or semi-nude stage dancers perform on an elevated stage at least eight feet from patrons; (2) a requirement that dancers in nonstage areas (e.g. those doing "table dances" and "couch dances")

remain at least four feet from any member of the public; (3) a requirement for a certain level of lighting; and (4) a requirement that adult cabarets close from 2 a.m. to 10 a.m. every day. The Supreme Court does strike down, as an unconstitutional prior restraint on free speech, a requirement of a 14-day processing period for managers' licenses with no provision for issuance of temporary licenses.

Result: Affirmance in part of King County Superior Court ruling on validity of ordinance; reversal in part.

(5) NO DOUBLE JEOPARDY IN DUI PROSECUTIONS FOR DUI DEFENDANTS PREVIOUSLY ISSUED PROBATIONARY LICENSES IN RELATION TO THE SAME INCIDENTS – In State v. McClendon (and others), 131 Wn.2d 853 (1997), the State Supreme Court rules, 7-2, that the probationary license scheme of the "1994 Omnibus Drunk Driving Act" does not set up a double jeopardy violation. The 1994 Act established that a DUI arrestee registering .10% or above on a BAC test would: (a) be prosecuted for DUI; and (b) also be immediately issued a temporary license, triggering an administrative process by which DOL would place the driver in a five-year probationary status. Subsequent DUI offenses while in probationary license status would result in enhanced punishment for the driver.

The Supreme Court majority opinion authored by Justice Smith concludes that the probationary license scheme serves a remedial purpose, and, therefore, a person issued a probationary license under the 1994 Act may also be prosecuted for DUI in relation to the same incident. Justice Sanders writes a spirited dissent, arguing, among other things, that the probationary license scheme of the 1994 Act is purely punitive. Justice Alexander agrees with this portion of Justice Sanders' dissent.

Result: Reversal of Whitman County Superior Court order dismissing DUI charges against eight defendants; cases remanded for trial.

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WASHINGTON STATE COURT OF APPEALS

LEACH RULE OF ALL-PARTIES-PRESENT CONSENT APPLIED TO VOID SEARCH OF HOME AS TO BOTH NONCONSENTING COHABITANT AND CONSENTING COHABITANT

State v. Walker(s), 86 Wn. App. 857 (Div. II, 1997)

Facts and Proceedings: (Excerpted from Court of Appeals opinion – some names deleted)

> A middle-school principal called the police because J.W. ("the child") had brought a bag of marijuana with him to school. The child told [officer #1] that he got the marijuana from his house where he lived with his aunt and uncle, Ellen and Gus Walker. The child also said there was more marijuana at home.
>
> [Officer #1] took the child to the police station and Ellen Walker arrived some time later. After some discussion about the marijuana, Ellen signed a written consent to search form.

> [Officer #1] drove to the Walker home in his patrol car with Ellen. [Officer #2] and another officer, [officer #3], followed in a second car. [Officer #1] testified that, while driving to the Walker residence, Ellen pointed out her husband Gus, who happened to be driving by. [Officer #1] then testified that Gus followed him to the home and arrived at about the same time. [Officer #1] also stated that [officers #2 and 3] were talking to Gus when he and Ellen entered the home.
>
> Once inside, Ellen directed [officer #1] to the bedroom closet, where he seized two bags of marijuana. [Officer #2], meanwhile, was outside, explaining to Gus that Ellen had signed a consent to search form. [Officer #2] testified that when he asked Gus if they could go inside, Gus replied, "Yeah, let's go." Gus denied granting permission.
>
> The State charged Ellen and Gus with possession of marijuana. The two defendants moved to suppress the evidence. The trial court suppressed the evidence against Gus and dismissed the information. The court, however, denied the suppression motion with regard to Ellen and convicted her of marijuana possession.

ISSUES AND RULINGS: (1) Does the Leach rule for fixed premises consent searches apply such that the officers were required to request consent from both spouses (both of whom were present before the search began) before entering the home? (ANSWER: Yes); (2) Did Gus consent to the search by saying, “Yeah, let’s go” to the officers’ question whether they could go inside? (ANSWER: No) (3) Were Ellen’s rights violated by the officers’ failure to ask Gus for consent, even though Ellen had consented to the search? (ANSWER: Yes) Result: Reversal of Grays Harbor County Superior Court conviction of Ellen J. Walker for marijuana possession; affirmance of trial court suppression order/dismissal of charges in case against Gus D. Walker. Status: the prosecutor has petitioned the State Supreme Court for review of Ellen Walker’s case; the petition will be acted upon January 6, 1998.

ANALYSIS:

(1) Did Leach rule require consent from Gus? In significant part, the Court of Appeals’ analysis of the issue of whether consent was required from Gus is as follows:

> A warrantless search of a residence is per se unreasonable unless the search falls within "a few specifically established and well-delineated exceptions." Consent to a search is one such established exception. State v. Leach, 113 Wn.2d 735 (1989) **[Feb. ’90 LED:03]**.
>
> The State argues that the trial court erred in refusing to suppress the evidence against Gus. The State maintains that Gus arrived after Ellen had provided a valid consent to search the home and that Gus subsequently consented to the search.
>
> In United States v. Matlock, 415 U.S. 164 (1974), the United States Supreme Court held that the consent of one who possesses common authority over premises is valid against absent, nonconsenting persons with whom that authority is shared. An individual assumes the risk that a cohabitant may permit a search of a commonly shared area in the individual's absence. In State v. Mathe, 102 Wn.2d

537 (1984) **[Feb. '85 LED:12]**, the [Washington Supreme Court] expressly adopted the Matlock standard for determining consent issues under article 1 section 7 of the Washington Constitution.

The Leach court then addressed the applicability of Matlock to cases where the defendant is present at the time of a search to which a cohabitant has consented. The [Washington Supreme Court] noted that when the police have obtained consent to search from an individual possessing equal control over the premises, the consent remains valid against a cohabitant, who also possesses equal control, only while the cohabitant is absent. If the cohabitant is present and able to object, the police must also obtain the cohabitant's consent. The court noted that any other rule would elevate expediency over an individual's Fourth Amendment rights.

Here, Ellen consented to the search at the police station. Because she was a cohabitant of the home, her consent was valid against Gus, an equal cohabitant, only while Gus was absent. If Gus was present and able to object, the police had to obtain his consent. And the absence of an objection by Gus is insufficient to justify the search under Leach; the police must affirmatively request Gus's consent when he is present. . .

. . . [T]he testimony shows that Gus arrived while Ellen and [officer #1] were either approaching the door or were at the doorway. Gus, therefore, had arrived and was present before [officer #1] entered into the home. Furthermore, [officer #1] knew that Gus was immediately behind him as he drove to the Walker residence and approached the home.

Gus was also able to object--he had seen his wife in the patrol car, followed the car to his home, and was not given an opportunity to talk to Ellen before she and [officer #1] entered the home. Because Gus was present and able to object, the police had to obtain his consent prior to searching the home.

[Citations, some names deleted]

(2) Did Gus consent to police entry of his home? The Court of Appeals then explains as follows that the trial court's finding of lack of consent must stand:

But the State argues that Gus consented to the search by failing to object after [officer #2] explained that his wife had consented to the search. Although the trial court noted that [officer #2] explained that the police were going to search the home, and that Gus responded, "Let's go," the trial court found that [officer #2] did not specifically ask for permission to search. And the court found that Gus's response did not demonstrate his consent. The State does not challenge these findings of fact and, therefore, they are verities on appeal.

The State has the burden of proving that consent was voluntarily given by clear and convincing evidence. The failure of the officers to ask specifically for permission to search the home does not satisfy this burden and, therefore, the trial court's conclusion that Gus did not consent is supported by the findings.

[Citations, some names deleted]

(3) Was there a violation of Ellen's rights? Finally, the Court of Appeals explains as follows its view that Ellen's rights were violated by the search even though she had consented to the search:

> In general, Fourth Amendment rights, including the right against unreasonable search and seizures, are personal rights that may not be vicariously asserted. These rights may be enforced "only at the instance of one whose own protection was infringed by the search and seizure." A defendant may challenge a search or seizure only if he or she has a personal Fourth Amendment privacy interest in the area searched or the property seized. Without such a showing, a criminal defendant cannot benefit from the exclusionary rule's protections because one cannot invoke the Fourth Amendment rights of others.
>
> As the Leach court noted, however, the consent of one person does not eliminate the need for the consent of other persons who are present, able to object, and possess equal rights to the premises.
>
> > When two or more persons have equal use of a place in which both are present, the consent of one does not normally eliminate the need for the consent of the other(s) before a search is made; ordinarily, persons with equal "rights" in a place would accommodate each other by not admitting persons over another's objection while he was present.
>
> As both Ellen and Gus were present, the police were required to gain consent from both Ellen and Gus.
>
> Ellen clearly had a privacy interest in the home she shared with Gus. Although Ellen consented and thus waived her privacy interest, such a waiver was contingent upon a corresponding waiver by Gus, her cohabitant possessing equal rights, once he was present. This is so because the requirement that consent be gained from all present co-occupants is predicated on the idea that one co-occupant would defer to the wishes of another who refuses consent.
>
> Because we presume Ellen would defer to Gus's lack of consent, it follows that Ellen is entitled to know whether or not Gus would consent. If he does not, Ellen is then able to revoke her consent, and the police may not search their home without a warrant. But the failure to ask Gus for permission to search the home deprived Ellen of the opportunity to know if he would consent and, if he did not, to revoke her own.
>
> Just as Gus could have challenged the voluntariness of Ellen's consent even if he had not been present, so too Ellen can challenge the lack of consent by Gus once he was present. Thus, because Gus did not consent to the search, the trial court erred in denying the suppression of the evidence against Ellen.

[Citations omitted]

LED EDITOR'S COMMENTS:

(1) All-parties-present consent rule of Leach--It must be followed by Washington officers, but is it a correct reading of the Fourth Amendment case law? The Walker Court correctly notes that in the State Supreme Court's 1989 decision in State v. Leach, that Court held that the Fourth Amendment requires consent from all persons with dominion and control over fixed premises, to the extent that any such persons are present at the time that police initiate their search. The Colorado Supreme Court recently pointed out that such a rule appears to be an incorrect reading of the leading 1974 U.S. Supreme Court third-party consent decision in U.S. v. Matlock. See State v. Sanders, 904 P.2d 1311 (1995) (Colorado Supreme Court: (a) holding, based on Matlock, that one party's consent was sufficient to validate search as to present housemate who was not asked for consent; (b) citing numerous cases in support of its reading of Matlock; and (c) expressly criticizing the Washington Supreme Court's Leach decision for having overlooked the facts in Matlock).

Of course, Washington officers must assume that Leach is controlling and must follow its all-parties-present consent rule until such time as the appellate courts announce otherwise. However, we would hope that if a case with "good facts" arises, a prosecutor will test Leach. Some suggestion that the State Supreme Court might eventually overrule Leach is found in that Court's decision in State v. Cantrell, 124 Wn.2d 183 (1994) Sept. '94 LED:05. In Cantrell, a case involving a search of a motor vehicle, the State Supreme Court held that the Leach rule of all-party consent was limited to the context of FIXED PREMISES. Cantrell held that consent from one of two persons present with dominion and control over a MOTOR VEHICLE was sufficient, even though the other person had not been asked for consent. Because it is logically difficult to justify the State Court's distinction in consent search rules for vehicles vs. fixed premises, and because the Leach rule is not really supported by Matlock, we have hope: (i) that Leach will some day be expressly overruled by the State Supreme Court, (note that the 1989 Leach decision was decided by a 5-4 vote, and that three of the majority justices are no longer on the court) or (ii) that Leach will be impliedly overruled by a U.S. Supreme Court decision directly on point.

(2) Did Gus consent? We see the question as to whether Gus himself consented as being a close one. However, under our understanding of the facts as described by the Court of Appeals, Gus probably did not consent. Permission was never requested by the officers. If, as appears to have happened here, law enforcement officers state that they intend to go into a protected private area and they do not at least strongly imply a request for permission to do so, an occupant's response of "let's go," and "go ahead on it," or the like, is not a consent.

(3) Were Ellen's rights violated? The prosecutor's petition for review now pending in the State Supreme Court challenges only the ruling as to Ellen Walker. We have a difficult time with the logic of the Court of Appeals. It is highly speculative for the Court to suggest that: (1) if asked for consent, Gus would have objected; and (2) Ellen would then have deferred to his objection. We think that in regard to Ellen Walker's rights, the Court of Appeals should have looked to what happened when Ellen herself was asked for consent, not what might have happened had Gus been asked for consent. We could find no case law directly on point, and there may be none, because it appears that most other jurisdictions do not follow the all-parties-present consent rule of Leach. Nonetheless, common sense tells us the State Supreme Court will grant the petition for review and eventually will reverse the Court of Appeals ruling in Ellen Walker's case. Such a ruling

would not affect the general rule of Leach, however, as review was not sought in Gus's case.

WHERE TELEPHONIC SEARCH WARRANT RECORDING FAILS, RECONSTRUCTION OF AFFIDAVIT DEPENDS ON JUDGE'S MEMORY, NOT OFFICER'S MEMORY

State v. Smith, (Thomas Whitcomb), ___ Wn. App. ___ (Div. I, 1997)

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

> On April 5, 1994, Officer Madison obtained three telephonic search warrants from a superior court judge authorizing the search of Smith, his home, and his car. After the judge issued the telephonic warrants, Madison contacted the communications facility in charge of recording the conversation between the judge and Madison. The dispatcher told Madison that the recording had failed, but that "they could take the recording of that conversation off of that master file." Madison decided that he would not call the judge again or repeat the hearing. The search warrant was executed on April 5, 1994. A few days later, Madison discovered that the "master recording" had also failed and that there was no record of his conversation with the judge.
>
> Based upon evidence recovered during the search of Smith's house, he was charged with possession of a controlled substance. Smith moved to unseal the search warrant. Because there was no record of the conversation between Madison and the judge, the State attempted to "reconstruct" the telephonic affidavit.
>
> On August 15, 1994, a "reconstruction hearing" was held before another superior court judge. Madison testified that he had made detailed notes of the information pertaining to probable cause before he called the judge. He also testified that because his notes were so detailed, he simply read them verbatim to the judge. These notes were admitted into evidence without objection.
>
> The judge who had authorized the search warrant testified that he did not remember many details from the conversation. He recalled that it was his impression that the officer had been reading from a prepared statement. He also recalled having asked the officer some questions relating to probable cause, but he could not recall either the questions or the officer's answers. Based upon the judge and Madison's testimony, the "reconstruction" court ruled that Madison's notes were "the best evidence of that reconstructed hearing."

ISSUE AND RULING: Was the failed recording of the telephonic affidavit properly reconstructed? (ANSWER: No, because there was no evidence that the warrant-issuing judge or any other disinterested person could remember what was said over the phone). Result: Reversal of Pierce County Superior Court conviction for unlawful possession of a controlled substance.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Although the recording of Officer Madison's "telephonic affidavit" failed, the State contends that it successfully "reconstructed" the affidavit through the testimony of Madison and the judge and by introducing Madison's notes into evidence.

The Supreme Court has held that when the tape recording relating to a telephonic search warrant omits testimony:

> Parties may reconstruct sworn telephonic testimony at a later hearing, based on the testimony of witnesses including police officers, only if the reconstruction does not impair the reviewing court's ability to assess what evidence the magistrate considered and found when he determined probable cause existed.

State v. Myers, 117 Wn.2d 332 (1991) **[Nov. '91 LED:03]**. But where the recording fails entirely and there is no recorded testimony, reconstruction of an entire sworn statement is permitted "only if detailed and specific evidence of a disinterested person, like the magistrate or court clerk, corroborates the reconstruction."

In Myers, the "reconstruction" was based almost entirely upon the officer's testimony. The officer discovered that the recording had failed the day after the warrant was issued. Upon learning that there was no record of his conversation with the magistrate, the officer wrote down what he was able to recall of the conversation. At the subsequent suppression hearing, the issuing magistrate testified that he had no independent recollection of the conversation. Specifically, he could not recall any of the details that persuaded him that probable cause existed.

The Supreme Court reversed, holding "that the 'reconstruction' of the affidavit offered at the suppression hearing did not safeguard Myers' rights under the Fourth Amendment and Const. art. 1, section 7 because it impaired this court's ability to review the basis of the magistrate's probable cause determination."

Even assuming Madison's notes were sufficient to establish probable cause, because he is not a "disinterested person," they cannot be used by themselves to reconstruct the affidavit. The only "disinterested person" to testify was the judge. We must determine whether the judge's testimony provided sufficient corroboration to establish that the information in Madison's notes was what the judge considered in determining that probable cause existed.

Here, the judge testified more than four months after he issued the disputed warrant. He did not take any notes relating to the disputed warrant, and testified from present memory. He did not recall to which officer he spoke, but he did remember that he placed the officer under oath. The judge also testified that it "appeared" that the officer "was speaking from something that he had already written out...."

The judge related what he could recall of his conversation with the officer: (1) that an informant, whose name the judge did not recall, told the police that Smith was involved in drug activity; (2) that the confidential informant told the police that

> Smith was going "somewhere near Tacoma" to "participate in some drug transaction"; and (3) that the police followed Smith to Tacoma and observed him engage in what they believed was a drug transaction. The judge admitted that his recollection of the details was "foggy."
>
> The "reconstruction" judge erred in ruling that Madison's notes constituted a reconstructed affidavit and that the "reconstruction" was proper. First, Madison's notes are not the kind of "detailed and specific evidence of a disinterested person" required by Myers. Second, although the issuing judge's testimony supports the inference that Madison was reading from a document, it does not establish that the information in Madison's notes was actually presented to the judge.
>
> Even assuming that Madison's notes and testimony provide enough information to support a finding of probable cause, Myers notes that because police officers are interested and not impartial parties, courts may not rely on their testimony to reconstruct an entire sworn statement. Without independent evidence from a disinterested person establishing the details upon which the judge determined that probable cause existed, it is impossible to conduct meaningful review. We hold that the reconstructed affidavit is invalid.

[Some citations omitted]

LED EDITOR'S NOTE: In a footnote, the Court of Appeals explains how a failed recording might be reconstructed in this context:

> **The more appropriate course of action in these circumstances is for the officer or prosecutor to contact the issuing magistrate, inform him or her that the recording failed, and either: (1) repeat the hearing and record the testimony if the warrant has not yet been served; or (2) where the recording failure is discovered after the warrant is served, ask the magistrate to make notes of what he or she recalls of the conversation. In the latter case, it is assumed that the issuing magistrate will be able to testify in sufficient detail at a CrR 3.6 hearing about what he or she considered in finding that probable cause existed.**

KNOCK-AND-ANNOUNCE RULE MET: PLAINCLOTHES OFFICERS WERE NOT REQUIRED TO WAIT FOR PERMISSION TO ENTER FOLLOWING FACE-TO-FACE ANNOUNCEMENT

State v. Richards, ___ Wn. App. ___ (Div. I, 1997)

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

> On April 4, 1990, at about 5:55 p.m., Mercer Island Police officers executed a search warrant at Grant Richards' apartment. Detectives Erickson and Herst, who were dressed to resemble drug dealers, approached a sliding glass door on the west side of the apartment with guns drawn. The detectives had information that this was the entrance Richards used most frequently. The detectives did not display badges or any other readily identifiable symbol of their official capacity. When the detectives reached the door, they found the glass door open and the screen door closed. Through the screen door, Detective Erickson could see

> Richards and another man inside the apartment. Richards was kneeling on the floor with his back to the officers. Detective Erickson shouted, "Hey, Grant," and Richards turned and looked at him. At that point, Detective Erickson opened the screen door, shouted, "Police. We have a search warrant," and walked into the apartment. Uniformed police officers, who had been standing away from the door so that the apartment's occupants could not see them at the time the announcement was made, entered a few steps behind the two plain-clothes detectives. Richards showed the detectives where he kept cocaine and confessed to selling the drug in small quantities. Police recovered a total of seven bindles of cocaine and various drug paraphernalia from Richards' home. They also found other controlled substances in the apartment that Richards claimed were for his personal use. Richards was charged with possession of cocaine with intent to deliver.
>
> Richards moved to suppress the evidence on the ground that the officers violated the knock and announce rule when they entered his home. The trial court denied the motion to suppress, in the words of the Court of Appeals, [finding "that the officers had announced their identity and purpose before entering the apartment, and concluded that the police were not required to wait for Richards to permit or deny them entry because Richards made eye contact with the officers when they called his name and announced their purpose and "knew who they were and why they were there."] Richards was found guilty at a stipulated facts trial.

ISSUES AND RULINGS: Where police officers have announced their presence and purpose and such is recognized by an occupant of a home which is the subject of a search warrant, must the officers wait for the occupant to grant or deny entrance before entering to execute the warrant? (ANSWER: No) Result: Affirmance of King County Superior Court conviction of Grant Myron Richards for possession of cocaine with intent to deliver.

ANALYSIS:

The Court of Appeals first explains as follows its general approval of immediate entry following the knock-and-announce which is coupled with recognition of police by an occupant:

> "The knock-and-wait rule is part of the constitutional requirement that search warrants be reasonably executed." As codified in Washington, the rule provides that in order to make an arrest in a criminal action, police officers may forcibly enter a home or building if they are refused admittance after giving notice of their identity and purpose. RCW 10.31.040. The rule applies to searches as well as arrests, not just when force is used to gain entry, but whenever police enter without permission of the occupants.
>
> To determine whether police have complied with the knock and announce rule, the court must decide whether the police procedure complied with the purposes of the rule, which are: (1) to reduce the potential for violence to both police and occupants arising from an unannounced entry; (2) to prevent destruction of property; and (3) to protect the occupants' right to privacy. Strict compliance with the rule is required unless the State can demonstrate that one of two exceptions to the rule applies: exigent circumstances or futility of compliance. The State does

> not contend that an exception to the knock and announce rule applies in this case; therefore, strict compliance with the rule must be shown.
>
> We are satisfied that the police officers in this case strictly complied with the knock and announce rule. Calling Richards' name was the equivalent of a knock, in that the apartment's occupants were clearly visible through the screen door. Shouting "Hey, Grant" was designed to get their attention just as a knock would have. When Richards turned and looked at the detectives, one of the detectives said, "Police. We have a search warrant," thereby identifying the detectives as police officers and announcing that the purpose of their visit was to execute a search warrant. This was the equivalent of a demand for entry.
>
> Although the detectives did not wait for Richards to grant or deny them permission to enter before opening the screen door and entering the apartment, waiting would have served none of the purposes of the rule in this case. Because an occupant, in the face of a valid search warrant, has no right to refuse admission to police, no interest served by the knock and announce rule would be furthered by requiring police officers to stand at an open doorway for a few seconds in order to determine whether the occupant means to admit them. . . .[P]olice need not wait to be permitted or denied admittance "provided that the purposes of the knock-and-wait rule have been fulfilled" at the time of entry.

[Some text, some citations omitted]

The Court goes on to explain that the fact that the officers were in plain clothes does not make a difference under the facts of this case. The officers verbally identified themselves to Richards before entering, and they entered during daylight hours. Under these facts, their lack of a uniform did not significantly increase the likelihood of Richards' reasonable disbelief of their identity and of a violent confrontation, the Court concludes.

****

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) UNDER STROUD RULE, LAWFUL ARREST OF CAR'S DRIVER DOESN'T JUSTIFY "INCIDENTAL" SEARCH OF PURSE HELD BY PASSENGER AFTER SHE GOT OUT OF CAR – In State v. Seitz, ___ Wn. App. ___ (Div. II, 1997), the Court of Appeals invalidates a search of a purse held by a car's passenger. The passenger had gotten out of a vehicle with her purse after the driver of the vehicle had been arrested for driving on a suspended license.

The Court of Appeals explains why this search of the passenger's purse did not qualify as a "search incident" to the arrest of the driver:

> The State argues that Napoleon's arrest, which was concededly valid, justified the search of Seitz' purse. Like the trial court, we hold it did not. The valid arrest of a driver justifies a search of the car's passenger compartment, not including locked containers (State v. Stroud, 106 Wn.2d 144 (1986) **[Aug. '86 LED:01]**). The valid arrest of a passenger justifies a search of the car's passenger compartment, not including locked containers (State v. Cass, 62 Wn. App. 793 (1991) **[Nov. '92 LED:06]**). The valid arrest of either the driver or passenger justifies a search of a

> purse found in the car, (State v. Fladebo, 113 Wn.2d 388 (1989) **[Jan. '90 LED:04]**) and without so holding, we assume this is true regardless of whether the purse belongs to the driver or the passenger. It is our view, however, that the valid arrest of a driver does not justify the search of a purse known to belong to a passenger, where the purse is not in the car at the time of the search, but rather is on the passenger's person and the passenger is outside the car. Thus, Napoleon's concededly valid arrest did not justify the search of Seitz' purse.

[Citations, footnotes omitted]

Finding no other justification for the search of the passenger's purse, the Court of Appeals rules that the search violated her Fourth Amendment rights.

Result: Reversal of Pierce County Superior Court conviction for possession of methamphetamine.

(2) AFFIDAVIT FAILS TO LINK PROPERTY TO METH LAB ACTIVITY, SO WARRANT FAILS – In State v. Gebaroff, 87 Wn. App. 11 (Div. II, 1997), the Court of Appeals rules that a search warrant affidavit failed to make the necessary probable cause link between: (a) the real property described as property to be searched under the search warrant and (b) the illegal drug activity described in the affidavit.

There were two probable cause defects in the affidavit. First, the affidavit described how the informant had gone to the mobile home of a meth dealer who was living in a rural area. However, the affidavit's description of the property where the informant had gone to make his purchase did not match up with the warrant's description of the property to be searched. Thus, the warrant was not based upon particularized probable cause to search the premises described.

A second probable cause defect in the affidavit was its failure to provide a sufficient linkage between : (a) the described illegal drug activity and (b) a trailer located in close proximity to the suspected meth dealer's mobile home. The trailer was occupied by a different person who had not been expressly implicated in the drug deal described in the affidavit. On this issue, the Court of Appeals explains:

> Judges looking for probable cause in an affidavit may draw reasonable inferences about where evidence is likely to be kept, including nearby land and buildings under the defendant's control. In this case, however, the mobile home and the travel trailers were not under the same person's control. We agree with Gebaroff that the warrant authorizes a search of his trailer without any supporting facts in the affidavit; the affidavit does not mention the trailer except to request a search of it.
>
> We considered a variant of this issue in State v. Kelley, 52 Wn. App. 81, (1988) **[Jan. '89 LED:12]**. The warrant in Kelley authorized the search of a residence with attached carport, but the police searched some outbuildings as well. We noted in Kelley the general principles that the police must execute a search warrant strictly within the bounds set by the warrant, and that a warrant describes a place with sufficient particularity " 'if it identifies the place to be searched adequately enough so that the officer executing the warrant can, with reasonable care, identify the place intended.'" Moreover, if a warrant authorizes the search of a house

> without mentioning outbuildings, either in the warrant itself or by incorporating such a reference in the affidavit, a search of the outbuildings is outside the scope.
>
> A corollary to this rule, which applies here, is that probable cause to search outbuildings does not furnish probable cause to search a house--and vice versa, if the outbuildings are under the control of other persons. Thus, even if probable cause had existed for a search of the main residence, it did not exist for the search of Gebaroff's separately occupied trailer.

[Some citations omitted]

Result: Reversal of Grays Harbor County Superior Court convictions of Elden Gebaroff, Jr. for possessing methamphetamine and heroin.

(3) AERIAL SURVEILLANCE SPEED TRAP LAW NOT MET BY STATE'S AFFIDAVIT – In State v. Smith (Jason W.), ___ Wn. App. ___ (Div. I, 1997), the Court of Appeals rules that the affidavit submitted by the State in an aerial traffic surveillance case failed to meet statutory proof requirements. The Court summarizes the case as follows:

> This case concerns the admissibility, under the "speed trap" statute, of a Washington State Patrol pilot's report. The pilot, using stopwatches in conjunction with aerial surveillance traffic marks (ASTMs) painted on the highway, determined that Jason Smith was speeding. As a prerequisite to admitting the pilot's report, the speed trap statute requires that the distance between the ASTMs be "accurately measured off, or otherwise designated or determined." RCW 46.61.470(2). This being an infraction case, which does not require live testimony, the pilot did not personally appear at trial. He submitted an affidavit:
>
> > [The ASTMs] are a series of white marks, painted or otherwise permanently affixed to the road surface at one-half mile intervals, by the Washington State Department of Transportation for the purpose of determining vehicle speeds from an aircraft.
>
> The pilot's affidavit does not resolve whether the pilot assumed, rather than knew, that the ASTMs were "accurately measured off, or otherwise designated or determined." Because the State failed to demonstrate the pilot's personal knowledge, it did not satisfy the speed trap admissibility statute, and we dismiss the speeding citation.

Result: Reversal of King County Superior Court and District Court decisions that Smith violated the speeding law.

LED EDITOR'S NOTE: We assume that the error found in the trooper pilot's affidavit in this case will be an easy one to correct in future affidavits. The Court of Appeals found no other problems with the affidavit.

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NEXT MONTH

The December 1997 LED will include our subject matter index for the year 1997. We will also include a brief discussion of two 1997 Washington Legislative enactments that we overlooked in our "Legislative Updates" earlier this year; chapters 265 and 266, Laws of 1997: (A) amend various statutes to try to give public K-12 schools greater power to deal with "gang" (as defined in the enactments) participants, among others; and (B) added a new crime of "criminal gang intimidation" (by a public or alternative school student) as a new section in chapter 9A.46 RCW.

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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. LED's from January 1996 forward are available on the Commission's Internet Home Page at: http://www.wa.gov/cjt.