Law Enforcement Digest

January 1998

HONOR ROLL

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467th Session, Basic Law Enforcement Academy - September 3rd through November 26th, 1997

President:	Cari V. Mealing - Nisqually Tribal Police Department
Best Overall:	Shawn M. Boyle - Yakima Police Department
Best Academic:	Shawn M. Boyle - Yakima Police Department
Best Firearms:	Donald E. Greany - University of Washington Police Department
Tac Officer:	Officer J. R. Hall - King County Department of Public Safety

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468th Session, Basic Law Enforcement Academy - September 4th through November 25th, 1997
100th Session Conducted At Spokane Police Academy

Highest Achievement in Scholarship:	Janice L. Oliver - Spokane Police Department
Highest Achievement in Night Mock Scenes:	Thomas A. Keene - Chelan County Sheriff's Office
Outstanding Officer:	Justin E. Brunson - Richland Police Department
Highest Achievement in Pistol Marksmanship:	Chad E. Eastep - Rosalia Police Department
Best Overall Firearms:	Chad E. Eastep - Rosalia Police Department

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NINTH CIRCUIT, U.S. COURT OF APPEALS

Vera Cruz v. City of Escondido, 126 F.3d 1214 (9th Cir. 1997)

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

> 1992 did not start well for Robert Vera Cruz. After drinking more than two six-packs of beer on New Year's Day, he headed over to the local Del Taco restaurant. The Del Taco employees were cleaning up after closing and refused to serve Vera Cruz, who then challenged them to a fight. When the challenge was declined, Vera Cruz angrily hit the restaurant window and went home.
>
> Just after returning home, Vera Cruz's thirst also returned and so he set out for the liquor store, which happened to be next door to the Del Taco. Before leaving, Vera Cruz strapped a knife to his hip -- to protect himself from the Del Taco employees, he explained.
>
> Responding to a call from said employees, Escondido Police Officer Eric Distel and his K-9 companion were the first to arrive at the scene. Distel spotted Vera Cruz in a doorway at the rear of the Del Taco throwing objects out of the building. When the officer identified himself, Vera Cruz began walking away. Distel then warned Vera Cruz to stop or he would release the dog; Vera Cruz started running. After giving another warning, Distel released the dog, who bit Vera Cruz on the right arm, bringing him to the ground. After disarming Vera Cruz, Distel ordered the dog to release his bite, and the dog immediately complied. Vera Cruz sustained a large laceration and several puncture wounds on his upper right arm; he required surgery and eight days of hospitalization.
>
> Vera Cruz sued the City of Escondido, its chief of police and several police officers, including Distel, under 42 U.S.C. § 1983, claiming he was the subject of an unreasonable seizure in violation of the Fourth Amendment. The jury found by way of a special verdict that the officer had not used excessive force. Vera Cruz moved for a new trial, arguing that the district court erred in refusing to instruct the jury on the deadly force rule of [Tennessee v. Garner]. The Court there announced that police may only use deadly force "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others[.]" The district court denied the motion, holding that "the evidence presented in this case would not permit a reasonable jury to find that the force applied against the plaintiff was deadly force."

ISSUE AND RULING: (1) For purposes of Federal Civil Rights Act civil lawsuits, is the term "deadly force" under Tennessee v, Garner and the Fourth Amendment narrowly limited to those methods of force which are reasonably likely to cause death? (ANSWER: Yes) (2) Is the use of a K-9 to seize a suspect "deadly force" under the U.S. Supreme Court decision in Tennessee v, Garner? (ANSWER: No) Result: Affirmance of U.S. District Court (S.Dt.Calif.) judgment against plaintiff on jury verdict.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> While the Supreme Court in Garner [Tennessee v. Garner, 471 U.S. 1 (1985) **June '85 LED:08**] established a special rule concerning deadly force, it did not explain what it meant by that phrase. In fact, what the phrase means is far from

obvious. Given the frailty of the human body, and the wide variety of conditions under which the police must operate, almost any use of force is potentially deadly: A suspect may slip, fall and sustain a lethal head injury, even though the police used only moderate force; a small cut, if left untreated, might become infected and cause death. Yet we do not read Garner as covering all uses of force that might result in death, no matter how remote the possibility. The question is, how likely must death be in order to consider the force deadly?

Vera Cruz urges us to adopt the Model Penal Code's definition of deadly force. According to the MPC, deadly force means "force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury." Model Penal Code § 3.11(2) (1962). Vera Cruz argues that he was entitled to a deadly force instruction because he presented evidence that police dogs can cause serious bodily injury.

We … reject the MPC definition as inapposite to the Fourth Amendment context. The MPC definition and Garner's deadly force rule serve entirely different purposes: The MPC is designed to govern criminal liability; Garner's deadly force rule sets the boundaries of reasonable police conduct under the Fourth Amendment. We decline to put police doing their jobs in the same category as criminals doing theirs. Because criminal activities serve no legitimate purpose, there is no reason to spare criminals from even remote consequences of their actions; deterrence, by forcing criminals to assume responsibility for all the harm they cause by their anti-social conduct, is the very essence of criminal law. Law enforcement personnel, by contrast, serve important purposes; the risk of personal liability, if taken beyond its proper scope, may make police timid and deter activities necessary for our protection. Criminals, moreover, can largely control the circumstances of their crimes, and can thus minimize the risk that force will be necessary; law enforcement personnel must take the situation as they find it.

The MPC's definition of deadly force is also at loggerheads with Fourth Amendment caselaw. A central consideration under the MPC's definition -- the subjective intent of the actor -- is an impermissible consideration in the Fourth Amendment context: While it makes perfect sense for criminal law purposes to consider whether "the actor uses [the force] with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury," the question in police brutality cases is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Moreover, the MPC formulation, containing the disjunctive "or," would turn the deadly force rule into a "serious bodily injury" rule, rendering Garner's distinction between ordinary force and deadly force a virtual nullity. This is plainly not what the Supreme Court had in mind in Garner.

As we read Garner, deadly force is that force which is reasonably likely to cause death. While there are few enough clues in Garner, our interpretation does find support in the Court's reasoning there. First, Garner noted that use of deadly force actually frustrates the interest of the criminal justice system because it's a "self-defeating way of apprehending a suspect.... If successful, it guarantees that

[the criminal justice] mechanism will not be set in motion." Second, the Court concluded that any law enforcement benefits, such as discouraging escape attempts, don't outweigh a nonviolent suspect's fundamental interest in his own life. Both of these considerations hinge on the assumption that the use of deadly force threatens a suspect's life. Were this assumption relaxed -- say, by positing that deadly force need only cause serious bodily injury -- these concerns would be implicated to a far lesser degree and the Court may well have struck the balance differently.

Vera Cruz presented no evidence that properly trained police dogs are reasonably capable of causing death. In fact, Vera Cruz presented no evidence at trial that police dogs can kill under any circumstances.

Nevertheless, we will assume that a properly trained police dog could kill a suspect under highly unusual circumstances. In judging whether force is deadly, we do not consider the result in a particular case -- be it that the suspect was killed or injured -- but whether the force used had a reasonable probability of causing death. Were the rule otherwise, all uses of force would be subject to Garner's deadly force requirements because almost any use of force could cause death under peculiar enough circumstances. To be entitled to a deadly force instruction, a plaintiff must present evidence that the force used, in the circumstances under which it was used, posed more than a remote possibility of death.

[COURT'S FOOTNOTE:
Whether a particular use of force is reasonably likely to cause death is a function of two factors: (1) the degree of force and (2) the accuracy with which it is directed at a vulnerable part of the human anatomy. The greater the force, the less accurately it need be directed to cause death. Thus, a bullet has such killing capacity that it will be deemed lethal if deliberately discharged in the general direction of the victim. But a bullet shot in the air as a warning will not be deemed deadly even if it accidentally hits a tree branch which falls and kills the suspect below.]

LED EDITOR'S COMMENT: Washington's criminal defense for justifiable homicide by a peace officer, RCW 9A.16.050, turns on a definition of "deadly force" in RCW 9A.16.010(2), which reads as follows:

> **"Deadly force" means the intentional application of force through the firearms or any other means reasonably likely to cause death or serious use of physical injury.**

This Washington criminal code definition of "deadly force", like the criminal code definition discussed in the Vera Cruz case above in one respect, is broader than the Fourth Amendment definition. Thus, a Washington peace officer defending against a criminal prosecution for unlawful application of deadly force would be under a different standard (reasonable likelihood of causing death or serious physical injury by the means used), than would an officer being sued in Fourth Amendment Civil Rights Act litigation (where the standard, per Vera Cruz, would be reasonable likelihood of causing death by the means used).

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

WARRANT "INCORPORATING" AFFIDAVIT INVALID WHERE AFFIDAVIT NOT ATTACHED – In U.S. v. McGrew, 122 F.3d 847 (9th Cir. 1997), the Ninth Circuit of the U.S. Court of Appeals invalidates a search warrant: 1) which failed to specify any type of criminal activity suspected or any type of evidence sought; 2) which, in the space provided for such information, referred the reader to the "attached affidavit which is incorporated herein;" and 3) which, when served, did not actually have the affidavit attached. The Court of Appeals holds that, because the referenced affidavit was not attached as stated in the warrant, the warrant failed the particularity requirements of the Fourth Amendment for failure to specify the crime suspected or the type of evidence sought. Result: Reversal of several Guam U.S. District Court convictions for methamphetamine felonies.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) CRIMINAL STATUTES ON WARRANTLESS POLICE SEARCHES INTERPRETED AS ALLOWING FOR CONSTITUTIONAL EXCEPTIONS TO WARRANT REQUIREMENT BUT AS NOT REQUIRING PROOF OF BAD FAITH OR ANY OTHER MENTAL STATE ON THE OFFICER'S PART – In State v. Groom, 133 Wn.2d ___ (1997), the State Supreme Court interprets the criminal statutes on warrantless police searches (RCW 10.79.040 and 10.79.045) as incorporating constitutional exceptions to warrant requirements, but not including a "bad faith" requirement or any other mental state element.

Defendant Larry Groom was Chief of Police for Soap Lake when he searched the trailer home of one of his officers under arguably questionable circumstances. Groom was later charged in district court with making an illegal warrantless search of the home in violation of RCW 10.79.040 and .045 (as well as with certain other charges not addressed here.) The two statutes provide as follows:

> **RCW 10.79.040**
> It shall be unlawful for any policeman or other peace officer to enter and search any private dwelling house or place of residence without the authority of a search warrant issued upon a complaint as by law provided.
>
> **RCW 10.79.045**
> Any policeman or other peace officer violating the provisions of RCW 10.79.040 shall be guilty of a gross misdemeanor.

Defendant Groom moved to dismiss the case, arguing that the State did not have sufficient evidence to prove its case. He argued that: 1) his search was justified under the exigent circumstances exception to the constitutional search warrant requirement, and 2) his search was conducted in good faith (not, as alleged by the prosecutor, to improperly investigate an internal affairs matter).

The district court dismissed the warrantless search charge for lack of evidence, but the superior court later reinstated the charge. The Court of Appeals then affirmed the reinstatement of the charges, but the Court of Appeals interpreted RCW 10.79.040 and .045 as requiring proof of "bad faith" by defendant Groom in his decisions to search. See 80 Wn. App. 717 (Div. III, 1996) **Aug '96 LED:19.**

Now the State Supreme Court has agreed with the two latter courts that the charges can be pursued, but the Supreme Court employs different analysis than the Court of Appeals. These little-if-ever-used 1921 statutes have never been directly at issue in a published appellate decision, so the Groom Court has wide latitude in construing the statutes. Bad faith and mental state of the officer have no relevance under RCW 10.79.040 and .045, the lead opinion by Justice Madsen explains. However, Justice Madsen's opinion (joined by six other justices) goes on to explain that the constitutional exceptions to the search warrant requirement (e.g. exigency, emergency, hot pursuit, consent) must be read into the statutes. Thus, the Court remands the

case for a trial in which Groom will be permitted to argue that his warrantless search fits under one of the recognized constitutional exceptions to the warrant requirement.

Justice Durham writes a concurring opinion in which she argues that the Court should have held that only a peace officer's "knowingly unlawful search" violates the statute. Justice Sanders also writes a concurring opinion; he argues to the other extreme that the statute should be interpreted to criminally bar all warrantless police searches, whatever the circumstances.

Result: Affirmance of Court of Appeals decision, which had affirmed a Grant County Superior Court decision allowing prosecution under RCW 10.79.040 and .045.

LED EDITOR'S COMMENT: We would hope that the Legislature will be asked to amend RCW 10.79.040 and .045 to expressly narrow the scope of the statutes. The interpretation in Justice Madsen's lead opinion represents a good faith effort to interpret a 1921 statute that has never been directly interpreted in any published court decisions. However, we think that it is patently unfair to make law enforcement officers subject to criminal liability whenever their residential searches fall short of the often-confusing rules governing searches.

(2) PUBLIC RECORDS LAW: "INVESTIGATIVE RECORDS" EXCEPTION EXEMPTS ACTIVE LAW ENFORCEMENT INVESTIGATION FILES IN THEIR ENTIRETY – In State v. Newman, 133 Wn.2d ___ (1997), the State Supreme Court rules, 5-4, that Washington law enforcement agency agency investigative files, in their entirety, are exempt from public disclosure, so long as the particular investigations are active and open.

The Public Disclosure Act (PDA) mandates disclosure of government records unless an express exception in the Act permits nondisclosure. The PDA exception at issue in this case is that at RCW 42.17.310 (1)(d) which exempts:

> Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy.

Ordinarily, when a government agency asserts that a PDA exception applies to a record, the agency cannot protect the entire record. Instead, the agency must delete portions of the record to which the exception directly applies and then disclose the remainder of the record. However, the State Supreme Court majority in Newman explains as follows why this approach does not apply to a law enforcement agency's assertion of the "investigative records" exception, where records relating to active investigations are at issue:

> This approach cannot be followed in this case because the statute does not define or establish any guidelines to limit the scope of the exemption. The ongoing nature of the investigation naturally provides no basis to decide what is important. Requiring a law enforcement agency to segregate documents before a case is solved could result in the disclosure of sensitive information. The determination of sensitive or nonsensitive documents often cannot be made until the case has been solved. This exemption allows the law enforcement agency, not the courts, to determine what information, if any, is essential to solve a case. The language used in the statute protects law enforcement agencies from disclosure of the contents of their investigatory files.

The majority opinion is authored by Justice Johnson, who is joined by Justices Dolliver, Smith, Guy, and Talmadge. A dissenting opinion is authored by Justice Alexander, who is joined by Justices Madsen, Sanders, and Durham. The dissent argues that the Court should have held that the language and spirit of the PDA do not authorize the withholding of entire files.

Result: Reversal of King County Superior Court order which had directed in camera review of open and active King County Police investigation file on the 1969 murder of civil rights leader Edwin Pratt; file in its entirety held exempt from disclosure.

(3) CAUSATION RULE FOR VEHICULAR HOMICIDE MAINTAINED; BUT SPEEDING RECKLESSNESS INFERENCE INSTRUCTION INAPPROPRIATE ON EVIDENCE OF MODERATE SPEEDING – In State v. Randhawa, 133 Wn.2d 67 (1997), the State Supreme Court addresses several issues on its way to reversing Harmit Randhawa's conviction for vehicular homicide.

1) "To Convict" Instructions on Causation

One issue on which Randhawa was unsuccessful was his challenge to the court's "to convict" instruction on causation related to driving under the influence of alcohol. The key portions of the Court's "to convict" instruction read that, in order to convict defendant of vehicular homicide, the jury must find each of the following elements beyond a reasonable doubt:

> "To convict the defendant, HARMIT P. SINGH RANDHAWA, of the crime of VEHICULAR HOMICIDE, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> "(1) That on or about the 5th day of December, 1993, the defendant operated a motor vehicle;
>
> "(2) That the Defendant's driving proximately caused injury to another person;
>
> "(3) That at the time of causing the injury, the defendant was operating the motor vehicle
> "(a) while under the influence of intoxicating liquor or
> "(b) in a reckless manner;
>
> "(4) That the injured person died as a proximate result of the injuries; and
>
> "(5) That the acts occurred in Whatcom County, Washington."

The Supreme Court quickly disposes of Randhawa's challenge to the "to convict" instruction as follows:

> Randhawa … contends that the trial court's "to convict" instruction, which we have set out above, was incomplete in that it did not require the jury to find that Randhawa's intoxication was the proximate cause of Dhadda's death. We recently addressed this precise issue and determined that the State is not required to prove a causal connection between the driver's intoxication and the ensuing fatality. See State v. Salas, 127 Wn.2d 173 (1995) **[Oct '95 LED:04]**; State v. Rivas, 126 Wn.2d 443 (1995) **[Aug '95 LED:12]**. We decline Randhawa's invitation to overrule those decisions.

2) Speeding/recklessness inference instruction

The trial court gave the jury the following instruction in relation to the evidence which, in the words of the Supreme Court, showed that defendant was driving at 10 to 20 mph over the posted 50 mph speed limit at the time of the accident:

> A person who drives in excess of the maximum lawful speed at the point of operation may be inferred to have driven in a reckless manner.
> This inference is not binding upon you, and it is for you to determine what weight, if any, such inference is to be given.

In significant part, the Supreme Court's explanation of its holding against the giving of this instruction under the facts of this case is as follows:

> Permissive inference instructions are unconstitutional "unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."
>
> Viewing the facts here in light of the test we pronounced in [two prior cases], we cannot say with substantial assurance that the inferred fact, Randhawa's reckless driving, more likely than not flowed from the proved fact -- Randhawa's speed. That is so because the facts relating to Randhawa's speed were not nearly as egregious as those in [the two prior cases]. The most that can be said is that Randhawa was traveling between 10 to 20 m.p.h. over the posted speed limit of 50 m.p.h. just before the accident. That speed is not so excessive that one can infer solely from that fact that the driver was driving in a rash or heedless manner, indifferent to the consequences. In short, although it was essentially undisputed that Randhawa was speeding, we cannot say with substantial assurance that the inferred fact of reckless driving flowed from the evidence of speed alone.
>
> We do not, however, retreat from the view we expressed in [the two prior cases] that there are instances when the fact of speed alone may permit a jury to infer that a driver was recklessly driving. It will, however, be the rare case where speed alone will justify the giving of the permissive inference instruction such as that under review here. Although the State points to evidence other than speed in arguing that the jury instruction was proper, the flaw in that argument is that the challenged instruction invited the jury to draw an inference of reckless driving based solely on speed. Under these facts, the trial court erred in giving the instruction here.

Result: Reversal of Whatcom County Superior Court conviction of vehicular homicide; case remanded for retrial.

(4) 7-11 HAD GENERAL DUTY RE PARKING LOT ROWDIES BUT NO SPECIFIC DUTY TO HIRE GUARDS – In Nivens v. Hoagy's Corner, 133 Wn.2d 192 (1997), the State Supreme Court rules 8-1 that, while a Tacoma 7-11 store had a general duty to take reasonable steps to protect its customers from foreseeable criminal acts by parking lot gatherings of teenage rowdies, the store did not have a specific duty to hire security guards.

Plaintiff in this personal injury lawsuit against the Southland Corporation (7-11) had been attacked by a large group of teenagers gathered in a south Tacoma 7-11 parking lot. They attacked him because he refused to buy beer for them. Plaintiff sued 7-11 on a theory that in light of the fact that parking lot gatherings of rowdy, drinking teenagers had been occurring at the 7-11 for many years on a regular basis. His theory was that the store had a duty at law to provide security personnel to protect its customers.

The State Supreme Court rules, 8-1, that, while the business did have a legal responsibility to take reasonable steps to provide protection for its customers from the gatherings of rowdies, the store did not have a duty to provide security personnel. Plaintiff chose to litigate his appeal on an all-or-nothing theory. He argued that he could not go forward with his case unless he was allowed by the trial court to present evidence that the business should have provided security guards. The State Supreme Court agrees with the trial court that the case must be dismissed, because there is no specific duty to provide security personnel.

In part, the analysis of the Nivens' majority on the general duty to protect business invitees is as follows:

> A special relationship exists between a business and an invitee because the invitee enters the business premises for the economic benefit of the business. As with physical hazards on the premises, the invitee entrusts himself or herself to the control of the business owner over the premises and to the conduct of others on the premises. Such a special relationship is consistent with general common law principles. We discern no reason not to extend the duty of business owners to invitees to keep their premises reasonably free of physically dangerous conditions in situations in which business invitees may be harmed by third persons.

…

> A public utility or other possessor of land who holds it open to the public for entry for his business purposes is not an insurer of the safety of such visitors against the acts of third persons, or the acts of animals. He is, however, under a duty to exercise reasonable care to give them protection. In many cases a warning is sufficient care if the possessor reasonably believes that it will be enough to enable the visitor to avoid the harm, or protect himself against it. There are, however, many situations in which the possessor cannot reasonably assume that a warning will be sufficient. He is then required to exercise reasonable care to use such means of protection as are available, or to provide such means in advance because of the likelihood that third persons, or animals, may conduct themselves in a manner which will endanger the safety of the visitor.... Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

[Citations omitted]

The majority implies that Nivens could have taken his case to a jury based on this special relationship of the business to its customers. However, Nivens chose to let his case ride entirely on his theory that the business had a duty to provide security personnel. The majority explains why it rejects Nivens' theory that such a duty exists:

> To do so would unfairly shift the responsibility for policing, and the attendant costs, from government to the private sector.

Justice Talmadge is author of the majority opinion. Justice Sanders writes a lone dissent in which he argues that the majority has misconstrued plaintiff's theory, and that plaintiff should have been allowed at trial to present evidence of the alleged need for security personnel.

Result: Affirmance of Pierce County Superior Court order dismissing Nivens' complaint for damages.

(5) DNA EVIDENCE TESTIMONY – EXPERT MAY GIVE UNIQUE-PROFILE CONCLUSION – In State v. Buckner, 133 Wn.2d 63 (1997), the State Supreme Court rules that, under certain circumstances, expert testimony, couched in terms of statistical probabilities, may lawfully state that a defendant has been uniquely identified by DNA analysis as the source of a forensic sample.

The State Supreme Court had disapproved of such "unique-profile" opinion testimony in a previous opinion in this case. However, the Court has now changed its mind in light of a 1996 report of the National Research Council's Commission on DNA Forensic Science, *The Evaluation of Forensic DNA Evidence.* According to the report, "[t]he match probability computed in forensic analysis refers to a particular evidentiary profile. That profile might be said to be unique if it is so rare that it becomes unreasonable to suppose that a second person in the population might have the same profile." The State Supreme Court also notes that another basis for its earlier decisions – that statistical probability testimony had to be given in accord with the "ceiling principle" – has been put in question by its opinion in State v. Copeland, 130 Wn.2d 244 (1997) **Jan '97 LED:11**.

Result: Affirmance of Court of Appeals decision which had affirmed Stevens County Superior Court conviction for first degree felony murder.

(6) CIVIL RIGHTS SUIT AGAINST SHERIFF'S DEPUTIES DISMISSED; UNDER TOTALITY OF CIRCUMSTANCES, DEPUTIES' ASSISTANCE TO LANDLORD WAS NOT UNREASONABLE SEARCH – In Kalmas v. Wagner, 133 Wn.2d 210 (1997), the State Supreme Court rules, 6-3, that under the totality of the complex circumstances of this case, the limited assistance given by two sheriff's deputies to a landlord in the landlord's dispute with a tenant did not constitute an unreasonable search against the tenant.

LED EDITOR'S COMMENT: Because your LED Editor could not decipher a defining principal in the majority opinion's intertwined discussion of the facts and the law, and because there is great risk in police intervention in purely civil landlord-tenant disputes without benefit of a court order (there was none here), we do not feel comfortable trying to summarize a defining principle in this case. Officers may wish to consult their legal advisors, city attorneys, or county prosecutors.

Result: Reversal of Court of Appeals decision which in turn had reversed the Pierce County Superior Court's dismissal of the lawsuit; in other words, case dismissed.

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WASHINGTON STATE COURT OF APPEALS

STROUD RULE ON SEARCH INCIDENT TO ARREST ALLOWS SEARCH OF PURSE LEFT IN CAR BY DISEMBARKING PASSENGER; SEITZ CASE DISTINGUISHED

State v. Parker, 88 Wn. App. ___ (Div. III, 1997) [944 P.2d 1081]

Facts and Findings: (Excerpted from majority opinion)

> September 19, 1995, Trooper Ron Nordman of the Washington State Patrol stopped Timothy Thomas for speeding on State Route 395. His check of the status of Mr. Thomas' driver's license revealed it was revoked. Trooper Nordman arrested Mr. Thomas for first degree driving while license revoked, searched his person, and placed him in the back of the patrol car.
>
> Trooper Connelly was in his vehicle traveling ahead of Trooper Nordman, when Trooper Nordman stopped Mr. Thomas. He returned to the location to assist. Trooper Connelly approached Ms. Parker, who was sitting in the front passenger seat of Mr. Thomas' vehicle. He observed an open container on the passenger side. He decided to run a breath test on Ms. Parker before he released the car to her. She voluntarily exited the vehicle, took the test and passed it.
>
> Trooper Nordman conducted a search of the passenger compartment of Mr. Thomas' automobile after Ms. Parker got out of it. He did not begin this search until some 15 to 20 minutes after he had placed Mr. Thomas in the back of his patrol car. Trooper Nordman testified there was an open purse with a large amount of cash lying loosely on top of it in the front passenger seat. Trooper Nordman also testified the car contained a "felony forest" -- there were "a large number of Christmas tree shaped air fresheners in the passenger area hanging from the vents in the passenger area, as well as in the purse in the passenger's seat...." He observed a hand held scanner under the armrest. He did not explain whether these items are typically used in the drug trade, nor did he indicate they played any role in his decision to examine the contents of the purse.
>
> Trooper Nordman asked Ms. Parker about the money, and she answered she had received it from the purchaser of a car she had sold. When he separately asked

> Mr. Thomas about the money, he answered it was his, and stated he placed it on Ms. Parker's purse after the stop. Mr. Thomas later explained he knew he was driving with a revoked license; he expected the trooper would arrest him for that offense, and he placed the cash on top of the purse because he knew Ms. Parker would need bail money to obtain his release. Ms. Parker then admitted the money belonged to Mr. Thomas.
>
> Trooper Nordman removed the purse from the car and placed it on the trunk. He asked Ms. Parker if Mr. Thomas had placed anything else in her purse. She said, "no." He proceeded to examine the contents of the purse. Inside he found a small closed coin purse. He opened it and discovered the methamphetamine in a plastic baggie.
>
> The State charged Ms. Parker with possession of methamphetamine. She moved to suppress the evidence. Following a CrR 3.6 hearing, the trial court concluded the search was incident to a lawful arrest [based on the State Supreme Court decision in State v. Stroud, 106 Wn.2d 144 (1986) **Aug '86 LED:01**].

ISSUES AND RULINGS: (1) Is the search of a purse lawful (a) when the passenger has stepped out of the vehicle, leaving her purse behind, and (b) when that search is conducted incidental to a lawful custodial arrest of the driver? (ANSWER: Yes); (2) In conducting a search incident to arrest, may police look inside an unlocked container absent grounds to believe that they will find evidence, contraband, or a weapon inside the container? (ANSWER: Yes, the authority to inspect the contents of containers is "bright line", so case-specific grounds are not required); (3) Does a delay of 15-20 minutes between an arrest and a search purportedly "incident" to the arrest per se invalidate the search? (ANSWER: No) Result: Affirmance by 2-1 vote of Franklin County Superior Court suppression order; case remanded for trial.

ANALYSIS BY MAJORITY:

The Parker majority begins its analysis by describing the holdings in the leading cases. In New York v. Belton, 453 U.S. 454 (1981) **Sept '81 LED:03**, the U.S. Supreme Court established a "bright line", per se rule for search of a motor vehicle incident to arrest. The Belton decision held that, immediately following a custodial arrest of an occupant of a vehicle, as an "incident" of the arrest, police may automatically search all areas of the vehicle's passenger compartment, but police may not search the vehicle's trunk.

In State v. Stroud, 106 Wn.2d 144 (1986) **Aug '86 LED:01** the State Supreme Court held in essence that Belton's "bright line" rule applies under article 1, section 7 of the Washington State Constitution, except that the Washington rule on such motor vehicle searches does not allow searches of locked containers or locked compartments located in the passenger area. The Parker majority then turns to the specific case before it.

1) Passenger's property left in vehicle

The Parker majority notes and agrees with the decisions of almost all courts from other jurisdictions which have addressed similar fact patterns. Such other courts have generally held that the searches of purses left in motor vehicles come within the "bright line" rule of Belton, because the purses in such circumstances are located within the MV at the time of the searches.

The Parker Court also finds support for upholding the search in the recent Washington Court of Appeals decision in State v. Seitz, 86 Wn. App. 865 (1997) **Nov '97 LED:17**. While Seitz involved different facts, and therefore required a different result, its discussion is helpful. In Seitz, the purse was taken from the vehicle by the passenger as she disembarked. The Seitz Court, which held against the purse search under those facts, suggested that a search would be lawful under the Parker-type fact pattern; i.e., where the passenger steps outside and leaves the purse in the vehicle. The Parker majority agrees.

2) Search of coin purse

Defendant Parker argued that the police should not have looked in her coin purse, because the police had no cause to believe that the coin purse contained evidence, contraband, or a weapon. The Parker Court rejects her argument based on the "bright line" nature of the rule that governs searches "incident to arrest."

The Parker majority thus explains that the 1981 Belton Court cited the 1973 U.S. Supreme Court decision in U.S. v. Robinson, 414 U.S. 218 (1973) in rejecting the idea that police need case-specific reasons for looking inside containers otherwise subject to search under the "incident to arrest" rationale. The Parker majority declares:

> Belton rejected this reasoning. Belton cited with approval the holding in Robinson that justification for the search is the arrest itself and "does not depend upon what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found." Ms. Parker makes no separate argument the state constitution places greater limits on the scope of these types of searches. Consequently, we hold Trooper Nordman acted properly when he searched the coin purse.

3) Timing of search

In rejecting Ms. Parker's argument that the search should be held unlawful because it was not conducted "immediately after arrest, " the Parker majority explains its reasoning:

> The State relies upon State v. Smith, 119 Wn.2d 675 (1992) [**Nov '92 LED:04**], which held that a delay of 17 minutes between the arrest and the search was not unreasonable where the delay was not "caused by unnecessarily time-consuming activities unrelated to the securing of the suspect and the scene."
>
> The Smith court held that a delay of 17 minutes is not per se unreasonable. Nor do we find the delay of 15 to 20 minutes in this case per se unreasonable. That time period is short enough that it cannot by itself invalidate the search. In these circumstances, it was incumbent upon Ms. Parker to offer some evidence supporting her argument the delay was caused by activities unrelated to the arrest. She has not done so, and we refuse to so hold.

DISSENT: Judge Thompson (retired and acting in temporary status) asserts that the Court should have held that, as a matter of Washington constitutional law under article 1, section 7, police conducting a motor vehicle search incident to arrest should not be allowed to search any personal property which is known to belong to a passenger.

ANTICIPATORY WARRANT STRUCK DOWN – NO "SURE COURSE" TO SEARCH SITE

State v. Goble, 88 Wn. App. ___ (Div. II, 1997) [945 P.2d 263]

Facts and Proceedings: As the result of an investigation initiated by the Morton Police Department, a federal postal inspector obtained a lawful search warrant authorizing the search of a package addressed to David Goble at P. O. Box 338 in Morton. The inspector found methamphetamine in the package. The drugs were then re-packaged, and a plan was developed to deliver the package to the P. O. Box. The Morton Police Department investigator then applied for an anticipatory search warrant to search Goble's home.

In addition to describing the above-noted facts, the affidavit for the search warrant described the prior investigation. A confidential informant had provided police with information that Goble had previously received illegal drugs through the mail. The affidavit also recounted information about Goble selling illegal drugs. However, nothing in the affidavit linked any of the illegal activity to Goble's home.

A Lewis County magistrate issued a search warrant for Goble's home, but the magistrate placed an express condition in the warrant to the effect that the search could be conducted only if the package was first delivered to the house.

The Court of Appeals describes what happened after that:

> [Officers] Pfefer and Mortensen delivered the package of drugs to the Morton Post Office, and Goble picked it up on June 9 at 10:37 a.m. He then walked toward his house while a Morton police officer "maintained nearly constant surveillance." The officer failed to see Goble enter the house with the package, but he soon saw Goble come out of the house, talk briefly with a person on the street, then re-enter the house.
>
> On June 9 at approximately 11:10 a.m., Mortensen, Pfefer and other officers executed the warrant. They found methamphetamine.
>
> On February 28, 1995, the State charged Goble with possession of methamphetamine with intent to deliver. Goble filed a motion to suppress, claiming that the magistrate had issued the search warrant without probable cause to believe that illegal drugs were in the house. The trial court denied the motion and, after a bench trial, entered a judgment of guilty.

ISSUE AND RULING: Did the affidavit establish probable cause to search Goble's home under the anticipatory search warrant? (ANSWER: No) Result: Reversal of Lewis County Superior Court conviction for possession of methamphetamine with intent to deliver.

ANALYSIS: The Court of Appeals begins its analysis with a thorough discussion of the case law on "anticipatory search warrants" (your **LED** Editor's term, not the Court's). The Court declares that evidence need not be presently located at a particular place in order for a warrant to issue, so long as the affidavit establishes PC that the evidence will be located there at the time of the

search. However, the Goble Court then proceeds as follows to reject the State's argument that the Goble magistrate had probable cause to believe that the drugs would be located in Goble's house when the warrant was served:

> In our view, he did not. When the magistrate issued the warrant, the had no information that Goble had previously dealt drugs out of his house, rather than out of a different place (for example, a tavern, his car, or a public park). He had no information that Goble had previously stored drugs at his house, rather than in some other place (for example, in his car, at his place of employment, at a friend's house, or buried in the woods). He had no information that Goble had previously transported drugs from P.O. Box 338 to the house, or that Goble had previously said he intended to do so. In sum, he had no information from which to infer, at the time he issued the warrant, that Goble would take the package from the post office to his house, or that the package would probably be found in the house when the warrant was executed.
>
> This conclusion is supported by the federal cases dealing with anticipatory warrants issued for a defendant's home. Generally, the federal courts have approved the nexus between the item to be seized and the place to be searched when, at the time of the issuance of the warrant, the magistrate knew that the police or their agents would soon deliver drugs to the defendant's home. Generally, however, the federal courts have disapproved the nexus when, at the time of the issuance of the warrant, the magistrate knew only that the defendant would pick up the package at a location remote from his home, and had no information concerning whether the defendant would then take the package to his home or to some other place. This case falls in the latter category, and we conclude that the motion to suppress should have been granted.
>
> [Citations omitted]

WARRANT FOR "CONTROLLED SUBSTANCES" JUST PASSES MUSTER IN "GROW OP"

State v. Chambers, 88 Wn. App. ___ (Div. II, 1997) [945 P.2d 1172]

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

> [A police detective] applied for a search warrant for Mark Chambers's residence. In the affidavit of probable cause supporting the application, [the detective] recited facts that caused him to believe that Chambers was growing marijuana at the residence. A superior court judge issued the search warrant.
>
> The warrant had the following caption: SEARCH WARRANT FOR FRUITS/INSTRUMENTALITIES OF A CRIME: VIOLATION OF THE UNIFORM CONTROLLED SUBSTANCE ACT. The warrant allowed the police to search for "any and all controlled substances," along with related items such as those used for growing, selling, storing, ordering, transporting, manufacturing, purchasing, and distributing controlled substances; proceeds from the manufacture, possession, and distribution of controlled substances; weapons and ammunition for the protection of the premises from law enforcement; and indicia of ownership or

dominion and control of the premises. The warrant did not expressly incorporate the affidavit by reference.

[Police] executed the warrant and seized more than 40 grams of marijuana, various items of drug paraphernalia, $3,000 in cash, and a number of weapons. The affidavit was not physically attached to the warrant at the time of execution.

Following a CrR 3.6 hearing, the trial court found the affidavit to be adequate but held that the warrant was facially invalid because it did not specify marijuana as the particular controlled substance to be seized. The court also declined to find in Washington law a good faith exception to the exclusionary rule. Thus, it granted Chambers's suppression motion and dismissed the marijuana possession charge.

ISSUE AND RULING: Does a search warrant which is directed at a marijuana grow operation, but which expressly authorizes a search for "controlled substances", satisfy the particularity requirement of the Fourth Amendment? (ANSWER: Yes, rules a 2-1 majority) Result: Reversal of Kitsap County Superior Court suppression order; case remanded for trial.

ANALYSIS BY MAJORITY: (Excerpted from Court of Appeals opinion)

The Fourth Amendment requires that warrants be based "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The particularity requirement serves to prevent general searches; the seizure of objects on the mistaken assumption they fall within the issuing magistrate's authorization; and the issuance of warrants on loose, vague, or doubtful bases of fact.

The required degree of particularity depends upon the nature of the materials sought and the circumstances of each case. Courts are to evaluate search warrants in a commonsense, practical manner, rather than in a hypertechnical sense.

We review a warrant describing physical objects with less scrutiny than we use for a warrant for documents because the former involves less potential for intrusion into personal privacy.

In addition, courts evaluating alleged particularity violations have distinguished between property that is "inherently innocuous" and property that is "inherently illegal." A lesser degree of precision may satisfy the particularity requirement when a warrant authorizes the search for contraband or inherently illicit property. Thus, a warrant describing property alleged to have been stolen must be more specific than one describing controlled substances.

There is a sound rationale for this distinction -- the risk of an invasion of constitutionally protected privacy is minimal when there is probable cause to search for a controlled substance. Officers executing a warrant for marijuana are authorized to inspect virtually every aspect of the premises. If, during their search they discover another illegal substance, the nonspecified substance would be subject to seizure under the plain view doctrine. Thus, officers executing the

warrant at hand had no broader discretion to search than they would have had if the warrant had specified "marijuana."

…[T]he warrant here contained the caption, "Violation of the Uniform Controlled Substance Act." It then further indicated the crime under investigation by identifying, as items to be seized, "any and all controlled substances." RCW 69.50.401(a) is the statute that criminalizes the manufacture, delivery, or possession of controlled substances, including marijuana. Reading the warrant as a whole and in a commonsense, nonhypertechnical manner, it is clear that RCW 69.50.401(a) was the crime under investigation and that the search was circumscribed by reference to the crime.

Further, the warrant here limits the items subject to seizure. In seven of its nine subparagraphs, the items subject to seizure relate to controlled substances, drug paraphernalia, drug transactions, or drug manufacturing. The other two subparagraphs specifically relate to necessary proof of the crime under investigation.

We agree with the reasoning of the court in a similar case, State v. Christiansen, 40 Wn. App. 249 (1985) [**Sept '85 LED:08**]. In Christiansen, the police had probable cause to believe there was a marijuana grow on the defendant's property, but the search warrant authorized the search and seizure of "all evidence and fruits of the crime(s) of manufacturing, delivering or possessing controlled substances...." [and the Court of Appeals upheld the warrant.]
…

Christiansen is in accord with the decisions of numerous courts from other jurisdictions. Applying reasoning similar to ours, these courts have concluded that a warrant for controlled substances does not allow for "abuse and unbridled discretion by law enforcement personnel or allow[ ] for a 'general search'...." The courts have upheld these warrants based upon their determination that a hypertechnical reading would not further the purpose of the Fourth Amendment. The situation is the same here: to reject the warrant because it used the word "marijuana" instead of the phrase "controlled substance" would elevate form over any substantive enhanced privacy protection. Thus, we conclude that the warrant here satisfies constitutional particularity requirements.

Notwithstanding the above holding where the police have probable cause to believe that a specific controlled substance will be found at a location, the preferred practice is to identify that substance specifically. Under the circumstances here, however, the failure to do so was not constitutionally fatal.

Because we hold the warrant satisfied the particularity requirement, we need not address the State's alternative argument that the good faith exception to the exclusionary rule should apply.

We reverse the trial court's ruling granting Chambers's motion to suppress and dismissing the charge against him and remand for trial.

[Most citations omitted; bolded emphasis added by **LED** Editor]

LED EDITOR'S COMMENT: In addition to the Court of Appeals' suggestion for greater particularity, emphasized in bold above, we would add the following suggestion: Incorporate the affidavit in the warrant and attach the affidavit to the warrant; if the search warrant incorporates the affidavit by reference, and if the affidavit is attached to the warrant, then the affidavit can be used to defeat a particularity challenge.

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BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS

CITIZEN WHO POINTED GUN AT SHERIFF'S SURVEILLANCE HELICOPTER NOT ALLOWED TO ASSERT PRIVACY CLAIM: MIERZ EXCEPTION TO EXCLUSIONARY RULE APPLIED – In State v. McKinlay, 87 Wn. App. 394 (Div. III, 1997), the Court of Appeals rules, 2-1, that a citizen who pointed a gun at an overhead sheriff's office surveillance helicopter forfeited his right to challenge the legality of the overflight.

In State v. Mierz, 127 Wn.2d 460 (1995), **Nov '95 LED:06**, the State Supreme Court held that when an individual assaults a police officer whose intrusion allegedly violates the Fourth Amendment, evidence regarding the individual's assault is not protected by the Fourth Amendment exclusionary rule. The majority in McKinlay applies the Mierz rule to McKinlay's act of pointing a gun at the overhead helicopter. Accordingly, the McKinlay majority declares it won't address defendant McKinlay's argument that the helicopter was flying so low that the police surveillance violated his privacy rights. [See, for example, Florida v. Riley, 488 U.S. 445 (1989) **May '89 LED:03**.]

Judge Schultheis dissents, pointing out that the evidence did not show whether defendant McKinlay knew that the helicopter was that of a law enforcement agency or of a private individual. Judge Schultheis argues that the Mierz rule should not apply where the assaulting individual does not know whether the intruder is a law enforcement officer. The majority opinion does not address this question raised by Judge Schultheis.

Result: Affirmance of Pend Oreille Superior Court convictions for manufacturing a controlled substance (one count) and possessing a controlled substance with intent to deliver (one count). [Note that a search warrant had been originally obtained to search for the gun pointed at the aerial investigators, and that a marijuana grow operation had been found in the ensuing search.]

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DOL BULLETIN #1: ADMINISTRATIVE DUI HEARINGS: WHY CASES ARE DISMISSED

LED EDITOR'S NOTE: The following DOL bulletin regarding DOL hearings in DUI law administrative proceedings was authored by Heather Hamilton, DOL Driver Services, Hearing and Interviews Administrator.

In September of 1995, the DUI law went into effect. This law made several changes to the Department of Licensing (DOL) administrative hearing process. One of the most significant of these changes is that law enforcement officers are no longer required to appear at a DOL hearing

where a driver is contesting an administrative sanction imposed as a result of a DUI arrest. This change saves money because law enforcement no longer has the burden of the overtime expenses associated with these hearings when officers were required to appear and give testimony. However, where the officers are not present, there is no one to offer rebuttal and/or clarifying testimony, and the hearing specialist is often left with an incomplete or distorted view of the case. Because they are not present, police officers rarely receive feedback on the result of a hearing or about shortcomings in their certified arrest reports which are offered as evidence. In an attempt to provide some feedback, I would like to discuss some of the more common reasons why cases are being dismissed.

- About 40% of all dismissals are based on the failure of Department of Licensing (DOL) to receive a certified copy of the officer's arrest report before the date of the hearing. It is crucial that officers send their reports immediately and directly to the hearing specialist upon the Department's request. Without an arrest report, the State has no evidence and the case will be dismissed.

- The Report of Breath/Blood Test Refusal or Test Results must be sent/faxed to the DOL's Drivers Mandatory Suspension Section within 72 hours of the arrest. For the Department to admit this report as evidence at the hearing, it must be properly executed. To be properly executed, the report must have the appropriate box(es) checked, it must be signed, it must include the place (county or city), the date it was signed, and it must be legible. Proper execution is also required for certifying the arrest report if a person requests a hearing. If the arrest report(s) from each officer involved is not properly executed it will be ruled as inadmissible.

- Another cause for dismissals is one which I will broadly define as the "lacked evidence" category. This includes things such as illegible operator certification card, illegible breath test documents, missing pages, or omissions in the arrest report. Often an officer will simply neglect to check a box such as the box that refers to mouth check or 15 minute observation period. "Lacked evidence" might also include a situation where a petitioner testified that an officer did or said something that is not on the officer's report. For example, a driver might testify that there was a discussion with the officer regarding the consequences of a refusal and that the officer gave an improper response. Because the report is silent on the issue, the hearing specialist has no basis to disbelieve the petitioner's testimony.

- Finally, "evidence problems" account for about 16% of the dismissals. This category includes those cases where the breath test document reflects information that does not meet the criteria for precision and accuracy as set forth in WAC 448-13-080. It would also include a situation where the operator was not certified to operate the machine or the operator's certification had expired. Occasionally, an officer's report is not well-written or is confusing regarding important facts and the information included is insufficient to support a finding that all elements required in the statute have been met.

There are still some instances where a law enforcement officer(s) will be subpoenaed by either the department or the driver to be present to provide testimony for the DUI hearing. If you receive a subpoena, please make every effort to attend to ensure to a good hearing outcome.

After two years of experience, we are all doing better in administering this law. The appellate courts are beginning to make decisions on 1995 law cases. The Department's scheduling process has improved. With more arrest reports and fewer errors in the certification process,

dismissals will continue to go down. Clear reports with a summarization of the facts which are relevant to the hearing will also make a difference.

Any law enforcement individual or group wishing to discuss these issues further, by telephone or in person, may call Heather Hamilton, Hearing and Interviews Administrator at 360 902-3868, or call one of the following Hearing Officer Managers:

Steve Lang, Seattle 206 545-7012
Alan Verme, Olympia 360 902-3864
Jim McNew, Spokane 509 482-3887

COMMON REASONS FOR DISMISSAL	JUN 97	JUL 97	AUG 97	SEP 97	OCT 97	5 MONTH AVERAGE
1. SWORN REPORT ONLY	34%	45%	39%	35%	32%	37%
2. SWORN REPORT INADMISSIBLE	13%	10%	07%	05%	06%	09%
3. REPORT CERTIFICATION INADMISSIBLE	11%	08%	12%	06%	06%	09%
4. EVIDENCE CREDIBILITY	07%	08%	07%	09%	07%	08%
5. LACKED EVIDENCE	26%	23%	27%	26%	38%	28%
6. EVIDENCE PROBLEMS	15%	14%	13%	21%	17%	16%

NOTE: Some cases are dismissed for more than one reason

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DOL BULLETIN #2: CCDR'S, BLACK AND WHITES, AND CUSTODIAN OF RECORD

LED EDITOR'S NOTE: The following DOL bulletin was authorized by Deborah Brittain, DOL Driver Services, Law and Justice Support, Technical Reporting Section.

Effective January 2, 1998 DOL will no longer be providing the certified ADR with the CCDR packets, or providing certified abstracts (CADR) on clear/reinstated status. The certified cover letter and accompanying notice of suspension/revocation for DWLS/R and DUI cases will not change. DOL will continue sending out a certified cover letter for any (a) NVOL's, (b) no-endorsement-for-Motorcycle, and (c) CDL cases.

This decision was based on a recent successful pilot with 7 counties. The ADR was not included in the CCDR packet during this pilot study. Positive feedback from prosecutor's offices around the state indicates the ADR is only for sentencing, and may be obtained from the court's DISCIS System if needed.

Another recent study was conducted to determine if DOL receives more CCDR requests from law enforcement or prosecutor/city attorney offices. DOL found that 35% of the requests were from law enforcement. To help eliminate duplicate requests and facilitate the process, DOL would prefer that law enforcement not order CCDR's. Prosecutors/city attorneys can order the necessary CCDR (many offices have been ordering their own for over a year). If the preference is to have law enforcement order the CCDR, please have the mailing address of the prosecutor/city attorney office on the request.

Also in January, DOL will be changing how Black and Whites are processed/developed. They will no longer be printed on glossy 5"x7" paper; instead they will be on 8 1/2" x11" paper. This

change is a result of consolidating DOL staff and equipment at one location, which will improve accessibility and efficiency, and is a move toward future digitized photos. Because photos will not match current montages DOL can assist and provide these as needed. Please contact the Black and White Unit at (360) 902-3915 for further information.

Agencies wishing to designate a representative as a Custodian of Record to certify ADR's may write to: Driver Services, Attention Kathy Strand, PO Box 9030, Olympia WA 98507-9030.

DOL will assist with these changes in any way we can. Please call Deborah Brittain with any questions or concerns at (360) 902-3921.

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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.