Law Enforcement Digest

July 1998

HONOR ROLL

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474th Session, Everett - Basic Law Enforcement Academy - February 2nd through May 5th, 1998

President:	Jeraud J. Irving - Everett Police Department
Best Overall:	William J. Geoghagan - Snohomish County Sheriff's Office
Best Academic:	B. Scott Wells - Snohomish County Sheriff's Office
Best Firearms:	Bryce B. Anthony - Snohomish County Sheriff's Office
Tac Officer:	Rod Sniffen - Everett Police Department

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477th Session, Basic Law Enforcement Academy - March 11th through June 3rd, 1998

President:	Brian L. Jones - Moses Lake Police Department
Best Overall:	Douglas Kazensky - Longview Police Department
Best Academic:	Douglas Kazensky - Longview Police Department
Best Firearms:	Bruce M. Sinnott - Monroe Police Department
Tac Officer:	Clark Wilcox - Renton Police Department

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1998 WASHINGTON LEGISLATIVE UPDATE – PART TWO

LED EDITOR'S INTRODUCTORY NOTE: This is Part Two of a two-part update of the 1998 Washington State legislative enactments of interest to law enforcement. We believe that we included in Part One most of the significant 1998 enactments of special interest to law enforcement. Consistent with past practice, our update will only selectively digest sentencing, tax, budget, worker benefits, and retirement legislation. Part Two provides: (A) follow-up notes on Part One enactments; (B) information regarding any enactments of interest that were not digested in Part One; and (C) an index of the 1998 enactments addressed in Parts One and Two. There will probably also be follow-up entries in LED's in the months that follow.

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

SAME SEX MARRIAGE

CHAPTER 1 (ESHB 1130) Effective Date: June 11, 1998

Amends RCW 26.04.010 and .020 to clarify that same-sex marriages, whether contracted in Washington or elsewhere, are not recognized as valid under Washington law.

DELIVERY-TRUCK BACKUP MIRRORS

CHAPTER 2 (2SSB 5727) Effective Date: September 30, 1998

Amends RCW 46.37.400 to provide in subsection (3):

> Every truck registered or based in Washington that is equipped with a cube-style, walk-in cargo box up to eighteen feet long used in the commercial delivery of goods and services must be equipped with a rear crossview mirror or back up device to alert the driver that a person or object is behind the truck.

The rear crossview mirrors and back up devices required under RCW 46.37.400 must be of a type approved by WSP.

CONTEMPT OF COURT

CHAPTER 3 (HB 1082) Effective Date: June 11, 1998

Amends RCW 7.21.020 to clarify that a commissioner of a court of limited jurisdiction, like commissioners of other courts, has power to impose the sanction of contempt of court.

MINORS AND ALCOHOL – PENALTIES

CHAPTER 4 (HB 1117) Effective Date: June 11, 1998

Amends the MIP statute, RCW 66.44.270, subsections (1) and (2), to provide that the furnishing and the MIP crimes provided in this statute are gross misdemeanors. No changes are made in the elements of the crimes.

ANIMAL HEALTH

CHAPTER 8 (ESB 6123) Effective Date: June 11, 1998

Comprehensively overhauls the civil and criminal provisions of chapter 16.36 RCW (relating to animal diseases, quarantine, and garbage feeding of animals) and chapter 16.44 RCW (relating to diseases of sheep), both of which chapters are administered by the Washington Department of Agriculture. Among the many changes in this legislation is a repeal of RCW 9.08.020 (a broad misdemeanor provision relating to acts involving diseased animals) and its replacement with more specific prohibitions in various sections of chapters 16.36 and 16.44 RCW.

BACKGROUND CHECKS

CHAPTER 10 (SSB 6136) Effective Date: June 11, 1998

Amends the background check provisions of RCW 43.43.830, 834, and 842 to define "crimes relating to drugs" and to bring such crimes within the coverage of those "background check" statutes which are intended to protect children and vulnerable adults.

CIGARETTE/TOBACCO TAX ENFORCEMENT

CHAPTER 18 (SB 6483) Effective Date: June 11, 1998

Amends RCW 66.44.010 to transfer responsibility for enforcing cigarette and tobacco tax laws from the Department of Revenue to the Liquor Control Board.

PROOF OF IDENTITY

CHAPTER 24 (SHB 1077) Effective Date: June 11, 1998

Adds a new chapter to Title 19 RCW providing as follows:

> (1) Any person or entity, other than those listed in subsection (2) of this section, issuing an identification card that purports to identify the holder as a resident of this or any other state and that contains at least a name, photograph, and date of birth, must label the card "not official proof of identification" in fluorescent yellow ink, on the face of the card, and in not less than fourteen-point font. The background color of the card must be a color other than the color used for official Washington state driver's licenses and identicards.
>
> (2) This section does not apply to the following persons and entities:
>
> (a) Department of licensing;
> (b) Any federal, state, or local government agency;

(c) The Washington state liquor control board;
(d) Private employers issuing cards identifying employees;
(e) Banks and credit card companies issuing credit, debit, or bank cards containing a person's photograph; and
(f) Retail or wholesale stores issuing membership cards containing a person's photograph.

(3) Failure to comply with this section is a class 1 civil infraction.

HAZARDOUS DEVICES -- EXEMPTION

CHAPTER 40 (HB 1308) Effective Date: June 11, 1998

Amends RCW 70.74.191 to insert a new subsection (5) exception to the coverage of state hazardous devices laws and regulations. The exception applies to:

> A hazardous devices technician when carrying out normal and emergency operations, handling evidence, and operating and maintaining a specially designed emergency response vehicle that carries no more than ten pounds of explosive material or when conducting training and whose employer possesses the minimum safety equipment prescribed by the federal bureau of investigation for hazardous devices work. For purposes of this section, a hazardous devices technician is a person who is a graduate of the federal bureau of investigation hazardous devices school and who is employed by a state, county, or municipality.

DRIVERS' LICENSE LAW CLEANUP

CHAPTER 41 (SSHB 15010 Effective Date: July 1, 1998

Makes a number of merely technical or clarifying corrections to a dozen statutory sections relating to drivers' licenses. One of the amendments clarifies that RCW 46.61.503 bars persons under age 21 from "being in physical control of" as well as "driving" a MV with a .02 or greater alcohol concentration.

CIGARETTE SEIZURE

CHAPTER 53 (SHB 2973) Effective Date: March 18, 1998

Amends tax law at RCW 82.24.135 to clarify the role of the Liquor Control Board relating to seizure and forfeiture of cigarettes for violation of state tax laws.

RCW CLEANUP

CHAPTER 55 (SSB 6258) Effective Date: June 11, 1998

Merely technical corrections are made under this act. Among other things, it amends RCW 9A.40.060 (custodial interference) to correct a typographical error (substituting "or" for "of"; and amends RCW 10.99.045 (DV) to correct a typographical error (striking certain references in subsections (1) and (2) of 10.99.020.)

VENUE: UNLAWUFL ISSUANCE OF CHECKS

CHAPTER 56 (SB 6299) Effective Date: June 11, 1998

Amends the venue provisions of RCW 4.12.025 to clarify that:

> An action upon the unlawful issuance of a check or draft may be brought in any county in which the defendant resides or may be brought in any division of the judicial district in which the check was issued or presented as payment.

SEX OFFENDER REGISTRATION: WSP INFORMATION

CHAPTER 67 (EHB 2350) Effective Date: June 30, 1998

Amends RCW 43.43.500 to clarify that the Washington crime information center of the WSP shall provide Washington law enforcement agencies with access to the "sex offender central registry" as well as the other information sources already addressed in that section.

METHAMPHETAMINE MANUFACTURING

CHAPTER 78 (HB 2628) Effective Date: July 1, 1998

Amends RCW 9.94A.320 to increase the sentencing classification for "manufacturing," as opposed to "delivering" or "possessing with intent to deliver," methamphetamines.

FOOD STAMP BENEFITS – ELECTRONIC TRANSFERS

CHAPTER 79 (HB 2692) Effective Date: June 11, 1998

Amends criminal and civil law provisions relating to food stamps (including RCW 9.91.140) to clarify that the provisions cover "food stamps benefits electronically transferred."

FUGITIVES AND WELFARE

CHAPTER 80 (SHB 2634) Effective Date: June 11, 1998

Amends "public assistance" provisions of RCW 74.05.005 to provide a new subsection (6)(h) as follows:

> No person may be considered an eligible individual for general assistance with respect to any month if during that month the person:
>
> (i) Is fleeing to avoid prosecution of, or to avoid custody or confinement for conviction of, a felony, or an attempt to commit a felony, under the laws of the state of Washington or the place from which the person flees; or
>
> (ii) Is violating a condition of probation, community supervision, or parole imposed under federal or state law for a felony or gross misdemeanor conviction.

METHAMPHETAMINE LABS – LOCAL TOXICS CONTROL ACCOUNT

CHAPTER 81 (EHB 2791) Effective Date: June 11, 1998

Amends RCW 70.105D.070 to provide that funds from the "local toxic control account" may be used by local government agencies (by loan or grant from the Department of Ecology) to:

> assist in the assessment and cleanup of sites of methamphetamine production, but not to be used for the initial containment of such sites, consistent with the responsibilities and intent of RCW 69.50.511.

AMPHETAMINE PENALTIES

CHAPTER 82 (ESB 6139) Effective Date: June 11, 1998

Amends RCW 9.94A.320 to increase the sentencing classification of crimes relating to amphetamines; also amends RCW 69.50.401 (a)(1)(ii) to provide that amphetamine crimes are included in the coverage of the statute.

SEX OFFENDERS IN INMATE WORK PROGRAMS

CHAPTER 83 (EHB 2707) Effective Date: March 20, 1998

Adds new section to chapter 72.09 RCW providing:

> Administrators of work programs described in RCW 72.09.100 shall ensure that no inmate convicted of a sex offense as defined in chapter 9A.44 RCW obtains access to names, addresses, or telephone numbers of private individuals while performing his or her duties in an inmate work program.

JUVENILE OFFENDER RESTITUTION

CHAPTER 86 (SHB 2790) Effective Date: July 1, 1998

Amends RCW 13.40.150 to set a time limit (180 days from date of disposition hearing) on the holding of restitution hearings in juvenile offender cases, but allowing juvenile courts to continue restitution hearings for "good cause."

REQUIRING MV USE PERMITS ON FISH AND WILDLIFE FACILITIES

CHAPTER 87 (ESHB 2819) Effective Date: January 1, 1998

Amends RCW 77.32.380 to authorize the Department of Fish and Wildlife to require vehicle use permit decals on motor vehicles when the MV operators are using clearly identified Department-improved access facilities.

UNSOLICITED E-MAIL – SPAMMING

CHAPTER 149 (ESHB 2752) Effective Date: June 11, 1998

Adds a new chapter to Title 19 RCW to make it a (civil) consumer protection act violation to send commercial E-mail messages: (a) using a 3rd party's Internet domain name without permission; (b) misrepresenting the message's point of origin; or (c) containing untrue or misleading information in the subject line. Statutory or actual damages may be pursued in a civil action.

Also, the legislation establishes a task force to further study commercial E-mail legal issues.

VOLUNTEER FIREFIGHTER LINE-OF-DUTY DEATH BENEFITS

CHAPTER 151 (SB 5217) Effective Date: March 25, 1998

Amends RCW 41.24.160 to increase from $2,000 to $152,000 line-of-duty death benefits provided under that section to volunteer fire fighters.

PERS LAW ENFORCEMENT OFFICER BENEFITS FOR DEATH AND DISABILITY

CHAPTER 157 (ESB 6305) Effective Date: March 25, 1998

Amends chapters 41.20 and 41.40 RCW to add provisions relating to death and disability benefits for certain general authority peace officers covered under PERS.

TRAFFIC: BICYCLE SAFETY EDUCATION, ACCIDENT REPORTING

CHAPTER 165 (ESHB 2439) Effective Date: June 11,1998 (except accident reporting provisions take effect January 1, 1999)

Amends various sections in Title 46 to require that DOL and driver education instructional materials and information address "bicyclists' and pedestrians' rights and responsibilities."

Amends RCW 46.52.070, effective January 1, 1999, to add a new police accident reporting requirement:

> (2) The police officer shall report to the department [DOL], on a form prescribed by the director [of DOL]: (a) When an accident has occurred that results in a fatality or serious injury; (b) the identity of the operator of a vehicle involved in the accident when the officer has reasonable grounds to believe the operator who caused the fatality or serious injury may not be competent to operate a motor vehicle; and (c) the reason or reasons for such belief.

Amends RCW 46.20.305, effective January 1, 1999, by adding the following three new subsections:

> (2) The department shall require a driver reported under RCW 46.52.070(2), when a fatality occurred, to submit to an examination. The examination must be completed no later than one hundred twenty days after the accident report required under RCW 46.52.070(2) is received by the department unless the department, at the request of the operator, extends the time for examination.
>
> (3) The department may require a driver reported under RCW 46.52.070(2) to submit to an examination, or suspend the person's license subject to RCW 46.20.322, when a serious injury occurred. The examination must be completed no later than one hundred twenty days after the accident report required under RCW 46.52.070(2) is received by the department.
>
> (6) The department may require payment of a fee by a person subject to examination under this section. The department shall set the fee in an amount that is sufficient to cover the additional cost of administering examinations required by this section.

Amends RCW 46.37.280 (3), effective June 11, 1998, to permit "light-emitting diode flashing taillights on bicycles." Amends RCW 46.61.780, effective June 11, 1998: (a) to permit such taillights "visible from a distance of 500 feet to the rear," and (b) to require that the red reflector required on the rear of bicycles for use in hours of darkness be visible "up to 600 feet to the rear when directly in front of lawful lower beams on head lamps of a motor vehicle."

ACCIDENT REPORT AVAILABILITY

CHAPTER 169 (SHB 1211) Effective Date: June 11, 1998

Amends RCW 46.52.060 to provide that WSP may provide accident reports to the traffic safety commission and "other public entities," in addition to those previously specified in the statute.

COMMERCIAL MOTOR VEHICLES

CHAPTER 172 (HB 2141) Effective Date: June 11, 1998

Amends RCW 46.32.100 to provide for a $500 penalty for the following types of violations by commercial vehicle operators: (a) controlled substances/alcohol use and testing; (b) driver disqualifications, and (c) prematurely moving a MV previously placed out of service.

GUN SAFES -- TAX EXCEPTION

CHAPTER 178 (HB 2969) Effective Date: July 1, 1998

Adds sections to chapters 82.08 and 82.12 RCW to provide sales and use tax exceptions for "gun safes."

LICENSING DEPARTMENT RECORD USE

CHAPTER 218 (SHB 1083) Effective Date: June 11, 1998

Amends RCW 46.52.120 to make DOL "case record[s]" on drivers admissible in criminal cases in some circumstances.

TRACKING RECIDIVISTS -- HITS

CHAPTER 223 (SHB 1781) Effective Date: June 11, 1998

Adds a new section to chapter 43.10 RCW reading as follows:

> (1) There is created, as a component of the homicide investigative tracking system, a supervision management and recidivist tracking system called the SMART system. The office of the attorney general may contract with any state, local, or private agency necessary for implementation of and training for supervision management and recidivist tracking program partnerships for development and operation of a state-wide computer linkage between the attorney general's homicide investigative tracking system, local police departments, and the state department of corrections. Dormant information in the supervision management and recidivist tracking system shall be automatically archived after seven years. The department of corrections shall notify the attorney general when each person is no longer under its supervision.
>
> (2) As used in this section, unless the context requires otherwise:
>
> (a) "Dormant" means there have been no inquiries by the department of corrections or law enforcement with regard to an active supervision case or an active criminal investigation in the past seven years.
>
> (b) "Archived" means information which is not in the active data base and can only be retrieved for use in an active criminal investigation.

FIREARMS CRIMES SENTENCING

CHAPTER 235 (ESB 5695) Effective Date: June 11, 1998

Amends several sections in chapter 9.94A RCW to clarify sentence enhancements in relation to crimes involving firearms.

JUVENILE PLACEMENT IN COMMUNITY FACILITIES – FOLLOW-UP

CHAPTER 269 (ESSSB 6445) Effective Date: September 1, 1998

In the June '98 **LED**, we noted as to this act only that it requires that DSHS establish a process for community involvement in siting of Juvenile Rehabilitation Administration (JRA) group homes. A number of additional subject areas were addressed in this comprehensive act, including:

Requiring that DSHS develop a process to work with local community placement oversight committees to address local community placement of juveniles... Requiring that DSHS adopt a policy to try to protect non-JRA children in group homes from certain classes of dangerous JRA juveniles...

Requiring that DSHS develop a policy defining serious infractions and serious violations...Requiring that DSHS adhere to requirements under this act for: (a) re-institutionalizing juveniles who commit serious infractions and violations; (b) keeping juveniles institutionalized for a minimum period prior to community placement; (c) carefully screening juveniles prior to community placement, and also notifying local law enforcement prior to such return to the community; (d) maintenance of records of all infractions and violations...

Requiring that community placement service providers report infractions and violations to DSHS, on pain of monetary penalties and contract sanctions...Requiring that DSHS maintain a staffed 24-hour toll-free phone line to receive violation reports from providers and others...Requiring background screening of employees and volunteers in community placement facilities, as well as requiring timely reporting of certain convictions by such employees and volunteers to their supervisors...

Requiring that juveniles placed by DSHS in school, work, or volunteer situations be subject to monitoring agreements...

Requiring that DSHS request education records to assist in evaluating first-time juvenile offenders...Requiring that local prosecutors or probation departments request education records prior to trial of juveniles who have one or more previous convictions/adjudications...Requiring that schools respond to such requests by timely providing certain education records to the extent permitted under federal law...

Directing a comprehensive study of JRA community placement of juveniles to be conducted by the Washington State Institute for Public Policy.

DOMESTIC VIOLENCE VICTIM INSURANCE

CHAPTER 301 (SSB 6565) Effective Date: June 11, 1998

Adds new section to chapter 48.18 RCW of the Insurance Code to provide qualified insurance protection of innocent persons who are victims of domestic violence. Such persons have a qualified right to obtain insurance coverage, and they have a qualified right to receive insurance benefits under an existing policy where property loss has been caused by an act of "domestic abuse" (as defined in the act) by another insured under the policy. The victim of the domestic abuse must be innocent, must file a police report, and cooperate in the investigation.

E-911 FUNDING

CHAPTER 304 (SHB 1126) Effective Date: January 1, 1999

Makes certain changes in the system for funding of E-911 systems in the state.

CAPITAL MURDER – AGGRAVATING CIRCUMSTANCES OF HARASSMENT, DV

CHAPTER 305 (HB 1297) Effective Date: June 11, 1998

Amends the capital murder statute at RCW 10.95.020 to add a death-penalty qualified, aggravated circumstances first degree murders where:

> (13) At the time the person committed the murder, there existed a court order, issued in this or any other state, which prohibited the person from either contacting the victim, molesting the victim, or disturbing the peace of the victim, and the person had knowledge of the existence of that order;

(14) At the time the person committed the murder, the person and the victim were "family or household members" as that term is defined in RCW 10.99.929(1), and the person had previously engaged in a pattern or practice of three or more of the following crimes committed upon the victim within a five-year period, regardless of whether a conviction resulted:

(a) Harassment as defined in RCW 9A.46.020; or
(b) Any criminal assault.

RESERVE LAW ENFORCEMENT OFFICERS – DEATH AND DISABILITY BENEFITS

CHAPTER 307 (SHB 1939) Effective Date: June 11, 1998

Allows reserve law enforcement officers to participate in the death and disability benefits system of the Volunteer Firefighters' Relief and Pension Act.

LED EDITOR'S NOTE: Joe Faubion, Executive Secretary of the Board for Volunteer Firefighters, provides the following additional information regarding chapter 307:

THERE IS A PROBLEM

In amending HB 1939, the bill was inadvertently changed so that reserve law enforcement officers can only be covered under the disability and death provisions and cannot be covered for medical benefits. (We have been assured that legislation to fix this problem will be introduced in the 1999 session.) This means that in order to be eligible for the $150,000 death benefits, reserve officers will have to forgo any medical coverage under the Volunteer Firefighters' Relief and Pension Act or any other state program. **Medical coverage, if provided, will have to be through a private insurance company.**

EFFECTIVE DATE AND COST

Reserve officers may be covered under the disability and death provisions of the VFR&PA effective June 11, 1998 and the cost for 1998 will be $50.00 per officer.

If you need additional information or have any questions regarding reserve officers' participation on the Volunteer Firefighters' Relief and Pension Act, call the Board for Volunteer Firefighters at (360) 753-7318, write to [the Board] at P.O. Box 114, Olympia, WA 98507, or FAX at (360) 586-1987.

CHILD ABUSE PREVENTION, TREATMENT

CHAPTER 314 (SHB 2556) Effective Date: June 11, 1998

Among other things, this enactment makes several changes in Washington's laws relating to child abuse, dependency and adoption to bring Washington state law into conformance with federal law.

DRUG PARAPHERNALIA CIVIL INFRACTION--FOLLOW-UP

CHAPTER 317 (HB 2772) Effective Date: June 11, 1998

In the June '98 LED, we provided some information about this new law creating a civil infraction in chapter 26.28 RCW, prohibiting sale or delivery of drug paraphernalia. Three differences between this new law and the pre-existing drug paraphernalia law in the Uniform Controlled Substances Act (chapter 69.50 RCW) are the new law's: (A) slightly less inclusive list of possible items of drug paraphernalia; (B) civil, rather than criminal sanctions, and hence (i) no right to jury trial for an accused, and (ii) a preponderance standard of proof; and (C) lack of a separate mental state element regarding the violator's knowledge that the recipient plans to use the item with illegal drugs.

Your LED Editor believes that this new civil statute's omission of any mental state requirement is somewhat illusory. The statute's definition of "drug paraphernalia," requires that the item be [1] "used," [2] "intended for use," or [3] "designed for use," with illegal drugs. Based on caselaw from other jurisdictions in vagueness/overbreadth challenges to anti-paraphernalia laws, we believe that the Washington courts are likely to rule that these terms mean respectively: [1] [USED means] "the particular item itself has actually been used with illegal drugs;" [2] [INTENDED FOR USE means] "the seller intends that the buyer use the particular item with illegal drugs;" [3] [DESIGNED FOR USE--this will be likely focal point of controversy, with dispute over whether some items can be shown by experts to be "single-use" items, and whether, in any event, common sense inferences can be drawn from the design of items, but we guess the courts will restrictively hold that this phrase means] "the seller or seller's agent designed the item with intent that it be used with illegal drugs."

If the Washington courts interpret this civil statute in the manner that we predict in the preceding paragraph, then, just as with the criminal drug paraphernalia law in chapter 69.50 RCW, law enforcement agency investigations will require undercover buys, with the undercover operatives seeking incriminating admissions from store employees while making the buys. Trials will generally require the government's presentation of expert testimony, as well as testimony from the undercover operatives. We strongly recommend that law enforcement agencies consult their city attorneys or prosecutors before proceeding with enforcement under this new law.

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ENACTMENTS DIGESTED IN JUNE LED

ENACTMENTS DIGESTED IN JULY LED

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TACOMA ADOPTS PROCEDURE FOR DEALING WITH PERSONAL PROPERTY SEIZURE

LED EDITOR'S INTRODUCTORY NOTE: In Perkins v. City of West Covina, 113 F.3d 1004 (9th Cir. 1997) Aug '97 LED:14, the Ninth Circuit of the Federal Court of Appeals held, in a case involving a seizure of personal property under a search warrant, that police must give a certain level of notice regarding the procedure for return of such property. In May of 1998, the U.S. Supreme Court granted

review of the Ninth Circuit decision; a decision by the U.S. Supreme Court is expected by the spring of 1999.

Meanwhile, in response to the West Covina decision, some Washington law enforcement agencies are revising or formalizing procedures for giving notice regarding return of seized personal property. We have been given permission by Tacoma Police Department to set forth that Department's response to the West Covina decision. Key components of that response are set out below.

DOCUMENT I: GENERAL ORDER Date of Issue Effective Date No:

SUBJECT: Procedure Update for Handling, Processing and Releasing Property

1. Officers must have available in the field a **PROPERTY NOTICE CARD.**

2. Whenever property is taken into evidence, any person **on the scene** who has a known interest in the property should be provided a **PROPERTY NOTICE CARD** with the police incident number and the officer's identification number. (The only exception will be for property which is seized to be forfeited, and the notice of seizure and intended forfeiture is served.) Persons to be served would be persons **on the scene** who are:
    a) the owner of the property,
    b) the person in charge of the property,
    c) any person having a community property interest, and
    d) any person having any other *known* right to, or interest in, the property.

3. If no persons are present on the scene, the **PROPERTY NOTICE CARD** should be left at the scene in a conspicuous place. Officers are not mandated to seek out and serve absent property owners or interested parties.

DOCUMENT II: 8 ½" by 11" Two-sided Claim Form Document

A. Side One of Claim Form – "Instructions for Filing Property Claim Form"

Please Note: If the property taken is contraband, property that is illegal to possess, it will be destroyed. Property which is taken and needed as evidence in a criminal investigation cannot be released until the criminal proceedings have concluded or the prosecuting authority determines that it can be released. Property subject to forfeiture can only be returned pursuant to the procedures set forth in the notice of seizure and intended forfeiture and applicable state law.

You can seek return of your property by completing and signing the form on the reverse side of this notice. You must return this form in person to any Tacoma Police station or substation or directly to the Tacoma Police Department at 930 Tacoma Avenue South, fourth floor of the County-City building Monday through Friday between the hours of 8:30 a.m. and 4:30 p.m. The review process may take up to four weeks; however, it will be expedited by accurate and complete information being provided. If the form is incomplete, your claim may be rejected. **YOU WILL BE CONTACTED DURING BUSINESS HOURS WHEN A DECISION HAS BEEN MADE AS TO WHETHER OR NOT THE CLAIMED PROPERTY CAN BE RELEASED.**

If your property is being held as evidence in a pending criminal matter, you should contact the prosecuting authority for a determination as to whether or not your property can be released to you. If the offense charged or pending review is a misdemeanor, then contact the City Prosecutor's Office which is located at 930 Tacoma Avenue South, Room 236, second floor of the County-City building. If the offense charged or pending review is a felony, then contact the County Prosecutor's Office which is located at 930 Tacoma Avenue South, ninth floor of the County-City building. If you have been charged with a crime and are represented by an attorney, please have your attorney contact the appropriate prosecuting authority.

If the property was seized pursuant to a search warrant, you may also be able to seek return of the property by filing a motion for return of property pursuant to Superior Court Criminal Rule 2.3(e) under the cause number assigned to the warrant. You can obtain the cause number by contacting the Pierce County Superior Court Clerk at 930 Tacoma Avenue South, Room 110 between 8:30 a.m. and 4:30 p.m., Monday through Friday except court holidays. You must provide the clerk with the date when and location where the warrant was served. You may need the assistance of an attorney to obtain this information and in filing a motion for return of property.

Please Note: any property not claimed may be disposed of in accordance with Chapter 63.32 of the Revised Code of Washington. The return of firearms is controlled by Chapter 9.41 of the Revised Code of Washington which prohibits possession of firearms by convicted felons, persons convicted of prescribed domestic violence offenses, and persons subject to particular court orders.

B. Side Two of Claim Form – "Tacoma Police Department Property Claim Form"

Name, Last:_____ First:_____; Day/Message Phone_____

Address: _____

Date Property Taken: _____ Police Incident No. _____

Are criminal charges pending against you or any other persons arising from this incident? Yes___ No____

Describe the criminal charges that have been filed or are pending and the corresponding cause numbers: _____

_____

_____

Name of County/City prosecutor assigned to the case: _____

Has an appeal been filed pertaining to these charges? Yes ____ No ____

Describe the property sought to be released: _____

_____

_____

_____

_____

_____

Describe your legal interest in the property: _____

_____

_____
_____

I, the above named, declare under penalty of perjury under the laws of the state of Washington that I have a possessory interest in or am the owner of the aforementioned property and am entitled to lawful possession of such property and that the information provided herein is true and correct.

Signed in _____ this _____ day of _____ 19_____.

Official Use Only: Date Claim Received: _____ Date Reviewed: _____

Decision: Release to Claimant: Yes ____ No ____. Explain: _____

_____
_____

_____
_____

_____
_____

DOCUMENT III: 3" by 5" Two-Sided Property Notice Card

Tacoma Police Department
NOTICE -
RETURN OF PROPERTY

Incident No. _____

ID# _____

The Tacoma Police Department has taken custody of personal property which may belong to you or in which you may have an interest. The property is being held by the Tacoma Police Department at the County-City property room located in the basement of the County-City building at 930 Tacoma Avenue South, Tacoma, Washington.

You can seek return of this property by following the directions in the ***PROPERTY CLAIM FORM*** which can be obtained in person during regular business hours at any Tacoma Police station or substation listed below:

Sector 1: **1224 Martin Luther King Way**

Sector 3: **38th Street Station,**
3737 South Puget Sound Ave.

Sector 4: **3524 McKinley Avenue**

County City Building:
930 Tacoma Avenue South,
Fourth floor

--Side 1--

You may also obtain a ***PROPERTY CLAIM FORM*** by sending a request for a property claim form with a stamped self addressed envelope addressed to:

TACOMA POLICE DEPARTMENT
PROPERTY CLAIM FORM
930 TACOMA AVENUE SOUTH
FOURTH FLOOR COUNTY CITY BUILDING
TACOMA WA 98402

***NOTE:**

- Property that is contraband will not be released and will be destroyed at the conclusion of any criminal proceedings.
- Property held as evidence will not be released until the conclusion of the criminal proceedings unless prior authorization is obtained from the prosecuting authority.
- Property not claimed in a timely manner will be disposed of in accordance with Chapter 63.32 of the Revised Code of Washington.
- To seek return of property seized for forfeiture, you must comply with the procedures set forth in a notice of seizure and intended forfeiture and applicable state law.

--Side 2--

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BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

(1) HIGH SPEED POLICE PURSUIT DOES NOT TRIGGER CONSTITUTIONAL PROTECTION UNDER DUE PROCESS CLAUSE UNLESS IT "SHOCKS THE CONSCIENCE" -- In County of Sacramento v. Lewis, 1998 WL 259980 (May 26, 1998), the U.S. Supreme Court rules that high speed chases by police do not implicate constitutional due process protections unless the chases are conducted in an intentionally unlawful manner which "shocks the conscience." Therefore, lawsuits based on police pursuits may not be brought under Federal civil rights statutes unless the police conduct "shocks the conscience."

The plaintiffs in the Lewis case were the parents of a teenage motorcycle passenger who died following a crash. The teenage operator was fleeing from the police after the police had observed the motorcycle being driven at a very high rate of speed. In conducting the pursuit of the traffic law violator, the pursuing police officer had allegedly failed to adhere to several elements in an agency "general order" for conducting such pursuits (he did not report to dispatch, and he may have failed to engage in proper balancing of the seriousness of the offense and of risks during the pursuit). The motorcycle tipped over during the chase, and the pursuing officer was unable to stop his police car before crashing into and killing the passenger who lay in the street following the motorcycle tip-over.

A Federal civil rights lawsuit can be brought only if the government has injured a person through a constitutional violation. The U.S. Supreme Court had previously held that the occupants of a fleeing vehicle could not sue police on a Fourth Amendment theory because the police do not make a "seizure" in a flight situation until either: (A) the operator complies with a police directive to stop, or (B) the police intentionally and successfully apply force to the subject(s) of the pursuit. See Brower v. County of Inyo, 489 U.S. 593 (1989) (in addition, of course, any "seizure" must be shown to be unreasonable and a proximate cause of injury to plaintiffs).

Now, in the Lewis decision, the Supreme Court has generally foreclosed the only other likely constitutional ground for a civil rights lawsuit in this factual setting. The Lewis Court holds that, unless the police conduct in a chase evidences unlawful intent by police to physically harm the subject(s) of the pursuit, and thereby "shocks the conscience," the due process clause of the constitution will not provide a basis for a civil rights lawsuit regarding the pursuit.

The Lewis decision has no effect on lawsuits grounded in state law negligence theories. Police officers and their agencies may still be sued under state common law negligence theories. Most states are like Washington, however, and plaintiffs in such cases cannot recover punitive damages or attorney fees, both of which forms of relief are available in Federal civil rights actions, in addition to actual damages. Hence, the Lewis decision effectively limits Washington plaintiffs to actual damages in high speed pursuit cases.

Result: Reversal of Ninth Circuit Court of Appeals decision which would have allowed the case to go to trial on a theory that the deputy's pursuit showed "deliberate indifference to, or reckless disregard for" safety; Federal civil rights action dismissed.

(2) MILITARY EVIDENCE RULE BARRING ALL POLYGRAPH EVIDENCE SURVIVES REVIEW – In U.S. v Scheffer, 118 S.Ct.1261 L.Ed.2d ___ (1998), an 8-1 majority of the United States Supreme Court upholds a military evidence rule (#707) which provides, in relevant part:

> (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

In a military court-martial in which he stood accused of illegal drug use, Scheffer had sought to submit evidence that he had passed a lie detector test concerning his claim that his positive drug test for methamphetamine use must be due to an unknown ingestion of the drug. The lie detector test had been performed by a military-certified examiner.

Justice Thomas writes a lead opinion joined by the three other justices. The Thomas opinion points out that controversy remains regarding the general reliability of polygraph evidence. For this reason alone, the Thomas opinion implies, a per se rule against admission of polygraph evidence in criminal cases would not violate a defendant's Sixth Amendment right to present a defense.

The Thomas opinion distinguishes factually the U.S. Supreme Court decision in Rock v. Arkansas, 483 U.S. 44 (1987) (addressing admissibility of a defendant who wished to testify following hypnosis.) The 1987 Rock Court had held that the defendant had a Sixth Amendment right to testify in her own defense despite an Arkansas rule (similar to the rule in Washington) which excluded all hypnotically affected testimony. The Rock defendant was allegedly able to remember the facts of the killing only after having her memory hypnotically refreshed. The Rock Court had held that, under the Sixth Amendment's confrontation clause, the defendant could not be barred from telling her story to the jury. Rock's hypnotically refreshed testimony from a defendant is different from situation in Scheffer, the Thomas opinion asserts. With a per se bar on unstipulated polygraph evidence, one does not prevent defendant from telling his story to the jury; one merely prevents defendant's presentation of "expert" testimony to bolster his story.

Justice Kennedy writes a separate concurring opinion joined by three other justices. He agrees with Justice Thomas that the continuing controversy over reliability of polygraph evidence justifies the military's per se rule against polygraph evidence. Justice Kennedy also agrees with Justice Thomas' distinction of the 1987 Rock decision. However, Justice Kennedy does not join in Justice Thomas' critical review of polygraphs. Justice Kennedy states that he disagrees with the wisdom of a per se rule of exclusion, even though he doesn't think it so arbitrary as to be unconstitutional.

Justice Stevens files a lone dissenting opinion. He argues for the reliability of polygraph tests, and he asserts that he would hold that defendants do have a qualified constitutional right to submit evidence that they have taken and passed polygraph tests.

Result: Reversal of Federal Court of Appeals ruling, and reinstatement of court-martial results adverse to Scheffer.

LED EDITOR'S COMMENT: The Washington rule regarding admissibility of polygraph evidence in criminal cases has been developed by case law. The rule is that such evidence is admissible only by stipulation of all parties. See e.g. State v. Renfro, 96 Wn.2d 902 (1982). The Scheffer decision will protect this Washington rule from a Sixth Amendment challenge.

In addition, Washington follows the rule of Frye v. U.S., 293 F.1013 (D.C. Ct. App. 1923) regarding admission of novel scientific evidence in criminal cases. See State v Riker, 123 Wn.2d 51 (1994) July '94 LED:07. Some other jurisdictions have abandoned the Frye standard in both civil and criminal cases. In some of those jurisdictions, the courts have held polygraph evidence admissible despite "per se" precedent against it, on grounds that the evidence is "reliable," regardless of whether a stipulation exists. However, Washington has dropped the Frye rule only in civil cases. Because we believe that polygraph evidence is unlikely to meet the "general acceptance" standard of Frye in the near future, we don't see any likely change in the Washington stipulation-only rule on admission of polygraph evidence in criminal cases.

(3) SAME-SEX SEXUAL HARRASSMENT SUBJECT TO SEX DISCRIMINATION LAWSUIT UNDER FEDERAL CIVIL RIGHTS ACT – In Oncale v. Sundowner Offshore Servs., Inc., 118 S.Ct. 998 (1998), the U.S. Supreme Court rules that nothing in the sex discrimination provisions of the Federal Civil Rights Act bars a sex harassment lawsuit merely because the plaintiff and the person accused of harassment are of the same sex. Mr. Oncale was a male roustabout on an oil platform. He claimed that male co-workers subjected him to severe verbal abuse, as well as a physical assault, all of a sexual nature. Oncale also claimed that when he reported the abuse to supervisors, they did nothing. The Supreme Court holds that Oncale may pursue a sex harassment suit against the employer.

Result: Reversal of decisions of Federal Court of Appeals and District Court; case remanded for trial.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) INMATE "SNITCH" NOT GOVERNMENT AGENT FOR SIXTH AMENDMENT PURPOSES – In In Re Personal Restraint Petition of Benn, 134 Wn.2d 868 (1998), the State Supreme Court rejects a capital murder defendant's argument, among many other arguments, that his Sixth Amendment rights had been violated by a jailhouse informant.

Defendant Gary Benn was charged with murder in the February 1988 shootings of two men – one was his half-brother and the other was his long-time friend. While Benn was in jail awaiting trial, he made incriminating statements to a fellow jail inmate, Roy Patrick.

At trial, Benn challenged Patrick's testimony on grounds that the police had violated Benn's Sixth Amendment rights by intentionally using a "state agent" to elicit an uncounseled incriminating statement. Under the Sixth Amendment's case-specific right to counsel (and under the Fifth Amendment's "custodial interrogation" rule), police may direct a jailhouse informant to act as a purely passive "listening post" in relation to a charged inmate. However, the Sixth Amendment bars police from using such an informant to engage in conversation deliberately designed to elicit the defendant's incriminating remarks as to the charged crime. (Note that the Sixth Amendment imposes no restrictions to use of undercover operatives to get statements as to uncharged matters, and the Fifth Amendment restricts only custodial interrogations by identified government agents.)

Benn had no direct evidence that the police had directed Patrick to contact him on the crime. Benn's only evidence in relation to Patrick's police-connection was: A) that Patrick had been used as an informant in the past, and B) the police had on occasion in other cases in the past expressly directed informers in the jail to elicit incriminating statements from pre-trial detainees.

The Supreme Court analyzes the Sixth Amendment issue as follows:

> The fact that an inmate has an existing relationship with law enforcement, has previously been an informant, or has received some benefit for reporting a defendant's statements may be evidence of his status as a government agent. None of these factors is dispositive, however. Similarly, the informant's understanding, either from past conduct as an informant or from the prison environment, that cooperation with the authorities may prove beneficial does not necessarily make the informant an agent. For there to be an agency relationship, there must be at least an implicit agreement between the parties with respect to the current undertaking. Furthermore, the principal must have the ability to control that undertaking.
>
> Following this analysis, federal circuit courts have declined to find agency relationships with long-standing police informants who expected a benefit from their information because "there was no evidence that the government had directed or steered the informant toward the defendant." Courts have also declined to find agency, even when the informant and the defendant were placed in the same cell, because there were no prior agreement between the government and the informant.
>
> There is also no such evidence here. [Corrections officer A] stated only that "on occasions in the past, known snitches" were intentionally placed with particular inmates to elicit information from them. When asked to identify cases in which this had

> happened, however, [Corrections officer A] could name none. He also said he had no knowledge that this had occurred in the defendant's case.
>
> The defendant has also presented defense attorney Charlotte Cassady's statement that during her conversation with Mr. Patrick, he told her that "informants were placed in cells with inmates by the police 'all the time.'" Ms. Cassady did not say that Mr. Patrick told her he was placed in a cell with the defendant, however. At the reference hearing, Mr. Patrick and all of the detectives and jailers involved in the case testified that the defendant was not placed with Mr. Patrick, nor was there any agreement between Mr. Patrick and the government regarding his attempt to elicit information from the defendant. The evidence thus supports the superior court's finding that Mr. Patrick was not used as an agent in this case.

[Emphasis added; some citations omitted; witness name deleted]

Result: Denial of personal restraint petition of Benn (Pierce County Superior Court conviction of two counts of aggravated first degree murder and death sentence allowed to stand.)

(2) DECECPTION IN POLICE QUESTIONING NOT NECESSARILY IMPROPER - In State v. Furman, 122 Wn.2d 440 (1993), in a decision by the State Supreme Court issued almost five years ago, the Court rejected a murder defendant's argument that a detective improperly obtained the defendant's confession when, during interrogation, the detective made a false statement that the police had found evidence linking defendant to the murder. **[LED EDITOR'S NOTE: The Furman decision was made over five years ago; ordinarily, we report all reported appellate court decisions involving Fifth and Sixth Amendment interrogations issues. We inadvertently overlooked this decision when it was announced in 1993.]**

In response to defendant's argument that his Mirandized statement should be inadmissible due to the detective's deception, the Supreme Court noted in Furman that "[m]isleading statements about the strength of the State's evidence do not render an otherwise valid confession involuntary." It is sometimes said by legal experts and courts summarizing this constitutional issue that the issue is whether the lie by the police (or other "coercive" conduct) is so bad that it would cause an innocent person to confess to something that he or she did not do.

The Furman Court cites the leading U.S. Supreme Court decision in Frazier v. Cupp, 394 U.S. 731 (1969) (holding that a detective's false statement that a fellow suspect had incriminated the defendant did not render the otherwise admissible confession inadmissible). In addition, the Furman Court cites a Washington Supreme Court decision in State v. Braun, 82 Wn.2d 157 (1973) (holding to the same effect as in Frazier v. Cupp, where defendant had been told erroneously that a co-defendant's confession would be admissible against him in court).

In the 1973 decision of the Washington Supreme Court in Braun, the Supreme Court gave some examples of what kinds of lies or statements go over the line and what do not:

> Confessions have been held to be involuntary when the police have misrepresented that the accused's wife would be taken into custody if he did not confess, or that a friend would lose his job if the accused did not confess... On the other hand, a confession has been held to be voluntary even through the suspect was falsely told his polygraph examination showed gross deceptive patterns, or that a co-suspect had named him as the triggerman...

Result: Affirmance of Kitsap County Superior Court conviction for aggravated first degree murder; reversal of death sentence on issue not addressed here; and imposition of sentence of life imprisonment without possibility of parole or release.

LED EDITOR'S COMMENT:

Beware. After recounting the case law that allows a substantial amount of deception in interrogation, the California Peace Officers Legal Sourcebook (at page 7.63--California case citations omitted), authored by California Deputy Attorney General, Joel Carey, warns as follows:

> **You should be careful with this technique, however. The courts frown on it, and your lie is actually considered as one factor weighing toward inadmissibility. It's just that the deception, by itself, won't necessarily render the statement inadmissible. Rather, the court will first consider all of the circumstances and determine how close a connection there was between the deception (and any other coercive technique) and the confession.**
>
> **Another problem with the technique is that by the time a good defense attorney finishes cross-examining you, the jury may wonder whether, since you lied to the defendant, you might lie to them as well.**

(3) INFANCY DEFENSE: ELEVEN-YEAR-OLD LACKED CAPACITY TO COMMIT RAPE OF CHILD – In State v. J.P.S., ___ Wn.2d ___ (1998) [954 P.2d 894], a unanimous State Supreme Court agrees with the Court of Appeals that the eleven-year-old in the case before it lacked capacity to commit the crime of rape of a child (in this case, the victim was a three-year-old).

The Supreme Court begins its analysis by describing the legal standards for the infancy defense:

> At common law, children below age 7 were conclusively presumed to be incapable of committing a crime and children over the age of 14 were presumed to be capable. Children between those ages were rebuttably presumed incapable of committing a crime. Washington codified these presumptions, changing the age of incapacity to 7 and younger and the age of presumed capacity to 12 and older. RCW 9A.04.050 provides, in pertinent part, that children between the ages of 7 and 12 are presumed incapable of committing a crime:
>
> > Children under the age of eight years are incapable of committing crime. Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong.
>
> This statute applies to juvenile adjudications, and the State has the burden to rebut the presumption of incapacity by clear and convincing evidence.
>
> A capacity determination must be made in reference to the specific act charged. The legal test is whether J.P. had knowledge of the wrongfulness of the act at the time he committed the offense and not that he realized it was wrong after the fact. Capacity must be found to exist separate from any mental element of the offense. Capacity is not an element of the crime; rather it is a general determination that the child understood the act and its wrongfulness.

The Court explains next that the question of the child's understanding of the "wrongfulness" of the act does not look at the child's understanding of the law. The law looks only at the child's understanding in terms of morality or social rules. However, the Court hastens to add, the nature of the crime charged is highly relevant – and when the crime is sexual misconduct, it is more difficult for the State to prove that the child knew the conduct was wrong.

Other nonexclusive factors which may be considered beyond 1) the nature of the crime (and their presence or absence in this case) are as follows:

2) The child's age, maturity, experience, training and understanding: J.P.S. was a significantly mentally retarded 11 year-old who tested at first grade level and had a first-grader's cognitive ability. A probation officer and J.P.S.'s mother testified that they did not believe that J.P.S. knew his sexual conduct was wrong. There was no evidence that he had been so instructed at school or at home.

3) Whether the child desired secrecy: There was limited evidence to this effect, because the 11-year-old went to a shed with the 3-year-old, and he sent away his 5-year-old brother when the 5-year-old interrupted his activity.

4) Whether the child warned the victim not to tell: There was no such evidence.

5) Prior conduct similar to that charged: There was no evidence of prior sexual misconduct by J.P.S., nor of other misconduct.

6) Knowledge of consequences attached to the conduct, and acknowledgment that the behavior was wrong: The Court notes that while J.P.S. had ultimately admitted to the investigating police officer that he had done "wrong," this occurred only after repeated attempts at questioning over a several-week period. The Court explains:

> The recognition of wrongful conduct made by a child after the child has been taught that his or her conduct was wrong is not particularly probative of whether the child understood conduct was wrong at the time it occurred. A child's after-the-fact acknowledgment that he or she understood the conduct was wrong is insufficient, standing alone, to overcome the presumption of incapacity by clear and convincing evidence.

[Citations omitted]

The Supreme Court sums up its significantly fact-based analysis as follows:

> The record reflects no prior training or education of J.P. about sexually prohibited behavior. It shows J.P. had never previously been in trouble for any sexually inappropriate conduct. Further, it shows that J.P. has limited cognitive ability and generally functions at the level of a first grader.
>
> We agree with the Court of Appeals that the State failed to show by clear and convincing evidence that J.P. understood the act of sexual intercourse or that it was wrong. We affirm the Court of Appeals holding which reversed the finding of capacity.

Result: Affirmance of Court of Appeals decision which had reversed a Yakima County Superior Court determination that the 11-year-old had capacity to be prosecuted for the juvenile offense of first degree rape of a child.

(4) PRIOR MILITARY COURTS-MARTIAL COUNT AS CONVICTIONS UNDER WASHINGTON SENTENCING LAW, INCLUDING ITS PERSISTENT OFFENDER "THREE-STRIKES" AND "TWO-STRIKES" PROVISIONS – In State v. Morley, 134 Wn.2d 588 (1998), two unrelated cases consolidated for purposes of appeal, a 5-4 majority of the State Supreme Court rules that: 1) prior general military courts-martial are prior criminal convictions for purposes of the Sentencing Reform Act (SRA); 2) such prior courts-martial are included in calculating a defendant's offender score under the SRA by determining the Washington offenses to which they are comparable; and 3) such inclusion applies under the "three strikes" provision (and presumably the "two strikes" provisions as well) of the SRA's Persistent Offender Accountability Act.

Result: Affirmance of Snohomish County Superior Court sentence of Martin Joseph Morley to life without parole under "three strikes" law; reversal of King County Superior Court conviction and sentence of David Lee James and remand to trial court to allow him to withdraw guilty plea in light of his exposure to "three strikes" sentence.

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