Law Enforcement Digest

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HONOR ROLL

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ARTICLE: WASHINGTON STATE'S ADDRESS CONFIDENTIALITY PROGRAM

By Margaret McKinney

Nine years ago, a victim of domestic violence left her abusive partner and moved to a new, confidential location. At a legislative community forum, she shared her concerns that her abuser could use the county's voter registration list to locate her new residence address. Washington's legislature set out to solve the problem that occurs when a good public policy puts citizens at risk. Washington's Open Public Records Act was designed to be a way for the citizens of the state to keep an eye on their government by making its records available for public inspection and copying. See Revised Code of Washington 42.17.260, 42.17.270. However, perpetrators of domestic violence, sexual assault, and stalking can use these records to track their victims. The Address Confidentiality Program is Washington's creative solution to this rather complex problem.

The Office of the Secretary of State administers the Address Confidentiality Program (ACP). See Revised Code of Washington Chapter 40.24. The program is simple and has two basic parts. First, The ACP program provides its participants with a substitute mailing address. Participants may use this address as their legal address when dealing with state and local government agencies. Using the substitute address not only maintains the victim's confidentiality, but also relieves government agencies of the costly obligation to maintain confidential records. ACP staff forwards the participants' mail (TANF checks, food stamps, child support payments, licensing documents, first class correspondence) to their actual location. In this way, the state effectively reduces the victim's risk of being tracked through its public records. It is important to understand that the ACP is not a witness protection program, but rather a security mail forwarding service. The second part of the program provides for the protection of specific records. Currently the program provides confidentiality for voter registration and marriage license records.

Much of the program's success is due to its collaboration with local domestic violence and sexual assault programs. The ACP does not duplicate existing services provided by these programs, but rather works with local programs to increase the safety of victims and their families. Local domestic violence or sexual assault advocates provide intake and orientation services for all ACP program participants. They evaluate the situation, assess the victim's needs, and determine whether the ACP would be a valuable addition to the overall safety plan. Additionally, they assist the victim in completing and mailing the application documents to the Office of the Secretary of State. Neither the local counselors nor the programs incur any costs to provide ACP intake and orientation services. See Office of the Secretary of State, Address Confidentiality Program Report to the Legislature (October 1998).

Currently, Nevada, New Jersey, Florida, Arizona, Rhode Island, Illinois, New York, and California all have Address Confidentiality Programs based on Washington's model. Washington has held some discussion about making the program available to former gang members, law enforcement officers, judges and other people who are being stalked through government records. For more information about Washington's Address Confidentiality Program, contact Margaret McKinney, Program Manager, Address Confidentiality Program, PO Box 257, Olympia, WA 98507-0257. Margaret can be reached by phone at (360) 586-4386 or by email at margaret@secstate.wa.gov.

LED NOTE: *The author of this article, Margaret McKinney, has over 14 years experience in Washington State government. Her work experience ranges from clerical to program management. Currently, Ms. McKinney is the manager of Washington Secretary of State's Address Confidentiality Program. Ms. McKinney graduated from the University of Puget Sound with a Bachelor's degree in Arts Administration.*

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BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

RESTRICTION ON SALE OF ADDRESSES OF RECENTLY ARRESTED INDIVIDUALS DOES NOT VIOLATE THE FIRST AMENDMENT – In Los Angeles Police Department v. United Reporting Publishing Corp., 120 S. Ct. 483 (1999), the United States Supreme Court holds that a California law authorizing the release of addresses of recently arrested individuals only in certain circumstances, and prohibiting release where the address will not be used directly or indirectly to sell a product or service, did not abridge free speech, but simply regulated access to information in the government's hands.

Under a prior version of the law in question, California law enforcement agencies were required to make public the name, address, and occupation of every individual arrested. The publishing company would obtain the names and addresses and provide them to its customers, who include attorneys, insurance companies, drug and alcohol counselors, and driving schools.

The amended version of the law requires that in order to obtain the addresses, the requestor must declare that the request is being made for one of five prescribed purposes, and that the address will not be used directly or indirectly to sell a product or service. The Supreme Court rejects a facial challenge to the constitutionality of the statute based on the First Amendment, stating:

> This is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses. The California statute in question merely requires that if respondent wishes to obtain the addresses of arrestees it must qualify under the statute to do so. Respondent did not attempt to qualify and was therefore denied access to the addresses. For purposes of assessing the propriety of a facial invalidation, what we have before us is nothing more than a governmental denial of access to information in its possession. California could decide not to give out arrestee information at all without violating the First Amendment.

[Citation omitted.]

Result: Reversal of Ninth Circuit ruling in Declaratory Judgment action that the statute unconstitutionally restricts free speech under the First Amendment.

LED EDITORIAL NOTE: The ruling in LAPD would appear to support validity of RCW 42.17.260(a), which provides in part as follows:

> **This chapter shall not be construed as giving authority to any agency…to give, sell or provide access to lists of individuals requested for commercial purposes, and agencies…shall not do so unless specifically authorized or directed by law.**

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BRIEF NOTE FROM THE 9TH CIRCUIT U.S. COURT OF APPEALS

FEDERAL LAW AGAINST LANGUAGE MAKING "VIRTUAL CHILD PORN" HELD UNCONSTITUTIONAL – In Free Speech Coalition v. Reno, 198 F.2d 1983 (9th Cir. 1999), the Ninth Circuit Court of Appeals holds that the First Amendment prohibits Congress from enacting a statute that makes criminal the generation of images of fictitious children engaged in imaginary but explicit sexual conduct.

The Child Pornography Prevention Act of 1996 (CPPA) included language that prohibited a "'visual depiction' that 'is or appears to be, of a minor engaging in sexually explicit conduct.'" Thus, in addition to prohibiting the use of real children, the statute prohibited the use of "virtual children." 18 U.S.C. §2256(8) defines child pornography as:

> [A]ny visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where-
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
>
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct...

[Emphasis added.]

Relying on the United States Supreme Court's decision in New York v. Ferber, 458 U.S. 747 (1982) (interpreting the Protection of Children Against Sexual Exploitation Act of 1977), the Ninth Circuit notes that the Supreme Court specifically focused on harm to children, and has required statutes criminalizing child pornography to limit the offense to "'works that visually depict explicit sexual conduct by children below a specified age.'"

In finding the language overbroad, the Free Speech Court states:

> The language of the statute questioned here can criminalize the use of fictional images that involve no human being, whether that fictional person is over the statutory age and looks younger, or indeed, a fictional person under the prohibited age. Images that are, or can be, entirely the product of the mind are criminalized. The CPPS's definition of child pornography extends to drawings or images that "appear" to be minors or visual depictions that "convey" the impression that a minor is engaging in sexually explicit conduct, whether an actual minor is involved or not. The constitutionality of this definition is not supported by existing case law.

The Court finds that the "articulated compelling state interest cannot justify the criminal proscription when no actual children are involved in the illicit images either by production or depiction." The Court also finds that the language is vague because the two phrases are highly subjective and there is no explicit standard as to what the phrases mean.

The Court holds that the language "appears to be" and "convey[s] an impression" is unconstitutionally vague and overbroad. However, the Court finds that the statute is enforceable against actual (non-virtual) child pornography absent the unconstitutional language, and the Court therefore strikes the language.

Result: Ninth Circuit grants Declaratory Judgment relief striking the language "appears to be" and "convey[s] the impression" from the Act.

LED EDITORIAL NOTE: Washington does not criminalize virtual child pornography. RCW 9.68A.050 uses the language "visual or printed matter that depicts a minor." "Visual or printed matter means any photograph or other material that contains a reproduction of a photograph." RCW 9.68A.011(2). A "[m]inor means any person under eighteen years of age." RCW 9.68A.011(4)(emphasis added).

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) DRE EVIDENCE HELD TO BE ADMISSIBLE UNDER "FRYE" STANDARD FOR ADMITTING SCIENTIFIC EVIDENCE AND UNDER ER 702 RE EXPERT OPINIONS – In State v. Baity, ___ Wn.2d ___, 991 P.2d 1151 (2000), the State Supreme Court rules that the drug recognition protocol used by properly trained DRE officers meets the standard for admissibility of scientific evidence under Frye v. U.S. The Baity Court's unanimous opinion summarizes the Court ruling as follows:

> In summary, after analyzing the DRE protocol and the approach of other courts to its admissibility, we hold the DRE protocol and the chart used to classify the behavioral patterns associated with seven categories of drugs have scientific elements meriting evaluation under Frye. We find the protocol to be accepted in the relevant scientific communities. We emphasize, however, that our opinion today is confined to situations where all 12-steps of the protocol have been undertaken. Moreover, an officer may not testify in a fashion that casts an aura of scientific certainty to the testimony. The officer also may not predict the specific level of drugs present in a suspect. The DRE officer, properly qualified, may express an opinion that a suspect's behavior and physical attributes are or are not consistent with the behavioral and physical signs associated with certain categories of drugs.
>
> Finally, the DRE evidence must also satisfy the predicate two-part inquiry under ER 702 -- whether the witness qualifies as an expert, and whether the testimony would be helpful to the trier of fact -- before the evidence is admissible. A proper foundation for DRE testimony would include a description of the DRE's training, education, and experience in administering the test, together with a showing that the test was properly administered. Practical experience may be sufficient to qualify a witness as an expert.

Result: Reversal of Pierce County District Court rulings refusing to admit DRE evidence in consolidated cases; remand to District Court for evaluation of other evidence questions in the case, and for possible DUI trials after that further review is conducted.

(2) EVIDENCE OF DISSOCIATIVE IDENTITY DISORDER, ALSO KNOWN AS MULTIPLE PERSONALITY DISORDER, SATISFIES FRYE TEST FOR SCIENTIFIC EVIDENCE, BUT NOT EVIDENCE RULE 702 ON GENERAL ADMISSIBILITY OF EXPERT OPINIONS -- In State v. Greene, 139 Wn.2d 64 (1999), the Washington Supreme Court rules that, although dissociative identity disorder (DID) [commonly known as multiple personality disorder] is generally accepted within the psychiatric community as a diagnosable psychiatric condition, under the facts of this case, evidence of this defendant's DID was inadmissible as proof that the defendant was legally insane or had a diminished capacity at the time he committed the crimes.

The Court begins by reviewing the standard for admissibility of scientific evidence, stating that "[w]e determine the admissibility of scientific evidence using a two-part inquiry. First, the proposed testimony must meet the standard for admissibility under Frye v. United States, 293 F. 1013. Second, the testimony must be admissible under ER 702." The Court explains:

> Under the Frye standard, novel scientific evidence is admissible if (1) the scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community of which it is a part; and (2) there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results. . . . In applying the test, however, our purpose is not to second-guess the scientific community. Rather, the inquiry turns on the level of recognition accorded to the scientific principle involved - we look for general acceptance in the appropriate scientific

> community. If there is a significant dispute between qualified experts as to the validity of scientific evidence, it may not be admitted.

The Court concludes that DID is generally accepted within the appropriate psychiatric communities.

The Court then addresses whether the DID evidence is admissible in the present case under ER 702. The Court states:

> Our conclusion that the scientific principles underlying a diagnosis of DID are generally accepted within the scientific community does not necessarily mean, however, that such evidence is admissible in any particular case. Even if generally accepted in principle, proffered scientific evidence is inadmissible under ER 702 unless it is helpful to the trier of fact under the particular facts of the specific case in which the evidence is sought to be admitted. In this case, the trial court found the evidence would not be helpful to the trier of fact and refused to admit it. We agree. Under ER 702, expert testimony will be deemed helpful to the trier of fact only if its relevance can be established. Scientific evidence that does not help the trier of fact resolve any issue of fact is irrelevant and does not meet the requirements of ER 702. The relevant question to be resolved by the jury in this case was whether, at the time he committed the acts in question, Greene's mental condition prevented him from appreciating the nature, quality, or wrongfulness of his actions, or, in the alternative, whether the alleged condition demonstrably impaired Greene's ability to form the mental intent necessary to commit the charged crimes. In order to be helpful to the trier of fact, therefore, it is not enough that, based on generally accepted scientific principles, a defendant may be diagnosed as suffering from a particular mental condition. The diagnosis must, under the facts of the case, be capable of forensic application in order to help the trier of fact assess the defendant's mental state at the time of the crime. Scientific principles that are generally accepted but are nevertheless incapable of forensic application under the facts of a particular case are not helpful to the trier of fact because such evidence fails to reasonably relate the defendant's alleged mental condition to the asserted inability to appreciate the nature of his or her actions or to form the required specific intent to commit the charged crime.

The Court notes that in State v. Wheaton, 121 Wn.2d 347 (1993), it refused to adopt a specific legal standard by which to assess the sanity of a defendant suffering from multiple personality disorder, and that it is in no better position to do so at this time. The Court points to the expert testimony in the present case, as well as the disagreement within the scientific community regarding which "personality" is to be considered when analyzing a defendant's mental condition at the time of a crime (e.g., the "host" personality may be sane, while an "alter" personality may be insane). The Court concludes that, under the facts of the present case, testimony regarding DID was properly excluded because it was not possible to reliably connect the symptoms of DID to the sanity or mental capacity of the defendant, and thus, the testimony did not assist the trier of fact.

Result: Reversal of Court of Appeals decision; reinstatement of Snohomish County Superior Court convictions for indecent liberties and first degree kidnapping against William B. Greene.

(3) WORD "PROFANE" IN BELLEVUE TELEPHONE HARASSMENT ORDINANCE HELD UNCONSTITUTIONAL – In Bellevue v. Lorang, ___ Wn.2d ___ 992 P.2d 496 (2000), the Washington Supreme Court rules 6-2 that the word "profane," in the City of Bellevue "telephone harassment" ordinance is unconstitutionally vague and overbroad.

Result: Reversal of Court of Appeals decision (see April 99 **LED**:14), and reversal of King County District Court conviction of Jon M. Lorang for telephone harassment under Bellevue City Code 10A.84.090(A)(1)(4).

LED EDITORIAL NOTE: Washington State's telephone harassment statute, RCW 9.61.230, also prohibits "profane" calls, among other things. The Lorang ruling means that enforcement action cannot be taken against merely "profane" calls under RCW 9.61.230.

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WASHINGTON STATE COURT OF APPEALS

PROVING RECKLESSNESS IN SECOND DEGREE ASSAULT PROSECUTION: DEFENDANT SHOULD HAVE BEEN ALLOWED TO TESTIFY AS TO HIS SUBJECTIVE BELIEF THAT HIS PUNCH TO THE VICTIM'S FACE WOULD NOT CAUSE SUBSTANTIAL BODILY HARM

State v. R.H.S., 94 Wn. App. 844 (Div. I, 1999)

Facts and Proceedings:

> The State charged R.H.S. with second degree assault after he punched a 15-year-old boy in the face. The victim suffered a serious injury to his eye, which required surgery. In a bench trial, R.H.S. testified that he did not intend to cause the injury, but the court excluded testimony regarding whether he in fact knew that his punch could cause substantial bodily harm. The court convicted R.H.S. as charged and sentenced him within the standard range.

ISSUE AND RULING: Did the trial court err in barring defendant's testimony as to his subjective belief that his punch could not cause substantial bodily harm? (ANSWER: Yes) Result: Reversal of King County Superior Court guilt adjudication of juvenile for second degree assault; remand for re-trial.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Second degree assault requires proof of an intentional assault, which thereby recklessly inflicts substantial bodily harm (RCW 9A.36.021(1)(a)). Substantial bodily harm includes a bodily injury that causes a temporary but substantial disfigurement, substantial impairment of the function of any bodily part, or a fracture of any bodily part (RCW 9A.04.110(4)(b)).
>
> A defendant in a criminal case has a constitutional right to present relevant evidence establishing his version of the facts so that the trier of fact can decide where the truth lies. Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. It is apparent from the record that the trial court incorrectly assumed that R.H.S.'s actual knowledge was irrelevant.
>
> While it is possible that R.H.S.'s testimony is "so incredible that its exclusion is harmless error," we are not the arbiters of credibility. We must take the testimony to be true and evaluate its likely effect on the outcome of the trial. Because the testimony, if believed, would establish a defense to second degree assault, we are unable to declare that the error is harmless beyond a reasonable doubt.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) OREGON STATE POLICE OFFICER WITH WSP COMMISSION BUT NO CJTC CERTIFICATE HELD NOT AUTHORIZED TO TAKE ENFORCEMENT ACTION IN WASHINGTON; EXCLUSION OF EVIDENCE NOT REQUIRED, HOWEVER – In State v. Barker, 98 Wn. App. 439 (Div. II, 1999), the Court of Appeals holds unlawful a stop by an officer of the Oregon State Police (OSP) who had a police commission from the Washington State Patrol, but who lacked a certificate of training from the Washington Criminal Justice Training Commission. The Barker Court rules that the officer lacked authority under RCW chapter 10.93 to make a stop of a DUI/reckless driving suspect that the OSP officer had chased into Washington.

OSP Officer Kathryn Wall was commissioned as a Washington State Patrol officer under the terms of a mutual aid agreement between OSP and WSP. While on patrol in Oregon around midnight on April 18, 1996, Officer Wall tried to stop a driver who was travelling north at approximately 100 miles per hour, following other vehicles too closely, and making unsafe lane changes. The chase took OSP Officer Wall north over the I-205 Columbia River bridge into Washington. The suspect pulled over shortly after getting into Washington. Officer Wall then called WSP for assistance. A WSP trooper ultimately arrested Todd D. Barker for DUI.

After the Clark County Prosecutor charged Barker in District Court with DUI, Barker moved to suppress all evidence resulting from the stop. He argued under RCW 10.93.090 of the Mutual Aid

Peace Officer Powers Act that, because Officer Wall had not completed "a course of basic training prescribed or approved…by the Washington State Criminal Justice Training Commission," she lacked authority to stop him. The District Court agreed and suppressed the evidence. On further review, the Clark County Superior Court affirmed the suppression ruling. The Court of Appeals granted review. That Court now has issued an opinion: 1) which agrees with the lower courts that Officer Wall lacked authority to take enforcement action in Washington, but 2) which holds that a violation of the training requirement of RCW 10.93.090 does not require suppression of evidence.

RCW 10.93.030 defines "specially commissioned Washington peace officer" in relevant part as follows:

> …any officer, whether part-time or full-time, compensated or not, commissioned by a general authority Washington law enforcement agency to enforce some or all of the criminal laws of the state of Washington, who does not qualify under this chapter as a general authority Washington peace officer for that commissioning agency, specifically including reserve peace officers, and specially commissioned full-time, fully compensated peace officers duly commissioned by the states of Oregon or Idaho or any such peace officer commissioned by a unit of local government of Oregon or Idaho…

RCW 10.93.090 addresses the enforcement powers of "specially commissioned Washington peace officer(s)" in relevant part as follows:

> A specially commissioned Washington peace officer who has successfully completed a course of basic training prescribed or approved for such officers by the Washington state criminal justice training commission may exercise any authority which the special commission vests in the officer, throughout the territorial bounds of the state, outside of the officer's primary territorial jurisdiction under the following circumstances:
>
> (1) The officer is in fresh pursuit, as defined in RCW 10.93.120; or
>
> (2) [t]he officer is acting pursuant to mutual law enforcement assistance agreement between the primary commissioning agency and the agency with primary territorial jurisdiction." [Emphasis added]

The Barker Court interprets RCW 10.93.090 as making successful completion of a Washington CJTC-approved course of basic training a prerequisite to any enforcement action by a specially commissioned Washington peace officer. Accordingly, the Barker Court declares: "Because Wall had not completed such training, she was not entitled to exercise authority under a special commission."

However, the Barker Court concludes that suppression of evidence is not the remedy for a violation of the training element of RCW 10.93.090. The Court explains:

> When the Washington legislature enacted RCW 10.93, it intended "that current artificial barriers to mutual aid and cooperative enforcement of the laws among general authority local, state, and federal agencies be modified pursuant to this chapter." It did not intend to vest new statutory rights in individuals, for it expressly stated that "[t]he modification of territorial and enforcement authority of the various categories of peace officers covered by this chapter shall not create a duty to act in extraterritorial situations beyond any duty which may otherwise be imposed by law or which may be imposed by the primary commissioning agency." Accordingly, it did not intend that individuals be able to invoke the exclusionary rule as the remedy for an out-of-state officer's lack of Washington-approved training, or, more specifically, that Barker be able to invoke the exclusionary rule as the remedy for Wall's lack of Washington-approved training. We conclude that the district court's order of suppression must be reversed.

Result: Reversal of Clark County District Court and Superior Court orders suppressing evidence against Todd D. Barker; case remanded for further proceedings. Status: Defendant's petition for review pending in State Supreme Court.

LED EDITORIAL COMMENTS (WITH APOLOGIES FOR THE LEGALESE):

1) Did the Barker Court misread RCW 10.93.090 as limiting both extra-territorial and intra-territorial actions of specially commissioned officers?

To summarize, Division Two's Barker decision interprets RCW 10.93.090 as requiring that all specially commissioned law enforcement officers meet CJTC-approved training requirements before taking any enforcement action, whether the specially commissioned officers are acting within or without the territory of the commissioning agencies. Note that, because WSP was the commissioning agency in Barker, the territory of the commissioning agency is the entire State of Washington. The court goes on to hold, however, that the statute does not require exclusion of evidence where the specially commissioned officer taking enforcement action fails to satisfy only the training requirement of RCW 10.93.090.

While we do not have any problem with Division Two's decision not to apply the "Exclusionary Rule" in Barker, we believe the Court of Appeals has misinterpreted the enforcement-authorizing provisions of the 1985 "Mutual Aid Peace Officer Powers Act" (MAPOPA). It is our belief that the Washington Legislature did not intend to narrow peace officer powers under special commissions granted by Washington law enforcement agencies. We think instead that the Legislature intended the MAPOPA only to expand territorial authority of general authority peace officers and specially commissioned peace officers.

Thus, as to general authority officers, in part to accommodate the grandfathering clause and the grace period provisions of RCW 43.101.200, this category of officers does not need to meet any MAPOPA training requirements if they are acting inside the territory of the primary commissioning-and-employing agency. Only where such general authority peace officers are going outside the jurisdiction of the employing-and-commissioning agency (whether under a consent agreement, under hot pursuit, or otherwise under .090) do they need to meet the training requirements. *[NOTE: That appears to be why the Legislature put the MAPOPA training requirements in .070, rather in the .030 definition of "general authority peace officer." Similarly, as to "specially commissioned officers," because the Legislature, in our view, did not want to impose any MAPOPA training requirement on specially commissioned officers unless they are acting outside the territory of the commissioning agency, the Legislature put the training requirement in .090, rather than in the .030 MAPOPA definitions section. Compare the Barker opinion's footnote 25, where, apparently not understanding the statutory scheme, or at least not taking our view of it, the Court of Appeals says the training requirement of .090 should instead be in the MAPOPA definitions section, .030.]*

As for specially commissioned officers then, we believe the Legislature intended a one-directional-expansion-of-territorial-authority approach, though we would have to concede that section .090 would be clearer in this regard if it contained the same introductory clause as .070 (i.e., legislative purpose would be clearer if .070, like .090, began with the phrase: "In addition to any other powers vested by law, ..."). Thus, we think that what the Legislature intended as to specially commissioned officers is that the specially commissioning agency may use the specially commissioned officers in the territory of the commissioning agency even though the officers do not satisfy the training requirement of .090, but that the officers are not empowered to act outside the territory of the commissioning agency unless the specially commissioned officers have the CJTC-approved training referenced in .090. In our view then, the Barker Court should have ruled that the OSP officer was specially commissioned by WSP to make an arrest throughout Washington, and it doesn't matter what training the officer had, or whether CJTC had approved that training.

At this point, defendant's Petition for Review is pending in the State Supreme Court, so it is possible that the Division Two ruling will ultimately be set aside. We will keep our readers

posted as to any further developments. Meanwhile, we hope that prosecutors faced with similar fact situations will consider arguing the interpretation of the statute we have roughly outlined in our "Comments" above.

2) <u>What if 1998 amendments to chapter 10.89 (Interstate Act on Fresh Pursuit) had been applicable?</u>

If OSP Officer Wall's fresh pursuit of Barker from Oregon into Washington had occurred on or after June 11, 1998, the arrest apparently would have been lawful under RCW 10.89.010 of the Interstate Act on Fresh Pursuit. The 1998 Washington Legislature amended RCW 10.89.010 to expand fresh pursuit authority of out-of-state officers. Prior to June 11, 1998, fresh pursuit from Oregon or Idaho into Washington was limited to felony-pursuits. The 1998 amendments (addressed briefly in the June 1998 <u>LED</u> at page 7) expanded fresh pursuit authority for Oregon and Idaho officers to allow fresh pursuit of:

> **…a person in order to arrest the person on the ground that he or she is believed to have committed a felony in such other state or a violation of the laws of such other state relating to driving while intoxicated, driving under the influence of drugs or alcohol, driving while impaired, or reckless driving…**

Extradition requirements still apply under RCW chapter 10.89; thus, if the Oregon or Idaho officer arrests the violator in Washington for an Oregon or Idaho violation (rather than, as in the <u>Barker</u> case, simply turning the violator over to the arrest on Washington officers for Washington charges), then extradition proceedings must be followed by the State of Oregon or State of Idaho prosecutors before transporting the violator back across state lines.

3) <u>Oregon and Idaho Laws Limit Fresh Pursuit Into Those States To Felony Crimes</u>

Note however that the Oregon and Idaho Legislatures have not amended their Interstate Acts on Fresh Pursuit to match Washington's 1998 amendments. Washington officers are thus authorized under Oregon law and Idaho law to go into those states in fresh pursuit only after felons. Furthermore, as with the Washington Act, once an arrest is lawfully made by a Washington officer in Oregon or Idaho for a Washington felony, extradition procedures must be followed under Oregon or Idaho law, if Washington charges are going to be pursued. The pursuing Washington officer cannot simply transport the Washington violator back to Washington.

(2) APPLICATION FOR ELECTRONIC SURVEILLANCE COURT ORDER UNDER RCW 9.73.090/130 FAILS TO SHOW OTHER INVESTIGATIVE PROCEDURES NOT WORKABLE – In <u>State v. Porter</u>, 98 Wn. App. 631 (Div. III, 1999), the Court of Appeals invalidates a Superior Court order authorizing police to intercept and record a drug purchaser's conversations. The <u>Porter</u> Court holds that the government's application for an electronic intercept court order failed to meet the requirement of RCW 9.73.130(3)(f) that police show why other investigative methods were not workable.

RCW 9.73.090(2) permits police investigating a felony to obtain a court order for a consenting party to intercept private conversations. Among other things, police applying for such a court order must have probable cause to believe that a non-consenting party has committed, is engaged in, or is about to commit a felony. Under RCW 9.73.130(3)(f), police must also provide a:

> "particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ{.} RCW 9.73.130(3)(f).

While this latter statement regarding "need" for electronic surveillance as an investigative tool is not required to establish absolute necessity, and must be given a common sense reading, the police must nonetheless make some showing that other methods of investigation are unworkable.

In <u>Porter</u>, officers were investigating an attorney who they suspected of periodically bartering legal services for methamphetamine. While the <u>Porter</u> Court's explanation is short on detail, apparently the surveillance application's showing of need under RCW 9.73.130(3)(f) included only statements:

1) that police were investigating an ongoing drug distribution conspiracy, the premature disclosure of which might impair the ongoing investigation; and 2) that proof of the suspect's knowledge of what he was doing was necessary for prosecution.

The Porter Court responds to these two points in the application by asserting: 1) that there was no evidence of a conspiracy, just evidence that an attorney was bartering his legal services for illegal drugs for personal use; and 2) there is no requirement that the state prove "knowledge" in a drug possession prosecution. Rejecting these "need" justifications, and finding no other needs for electronic surveillance to have been articulated in the application before it, the Porter Court invalidates the application, suppresses the evidence obtained by police related to the interception, and reverses Porter's conviction.

Result: Reversal of Yakima County Superior Court conviction of Frederick Porter for possession of methamphetamine. Status: State's petition for review pending in State Supreme Court.

LED EDITORIAL COMMENTS: We don't know all of the unreported facts of the Porter case, and we are not second-guessing. But maybe, rather than applying under RCW 9.73.090/130 for court authorization to intercept and record, officers faced with the Porter situation can use supervisor-authorized intercept under RCW 9.73.230. While there are time constraints on section 230 supervisor-authorized drug-conversation intercept orders (24 hours with potential for an additional 48 hours in extensions), such section 230 orders have the advantage over section 090 court orders that the supervisor-authorized orders need not meet the technical requirements of section 090 and 130, particularly the statement-of-need requirement of section 130(3)(f) involved in the Porter case.

(3) INEVITABLE DISCOVERY RULE GIVEN NARROW INTERPRETATION – In State v. Reyes, 98 Wn. App. 923 (Div. II, 2000), Division Two of the Court of Appeals agrees with an earlier decision of Division One of the Court of Appeals that the "inevitable discovery" exception to the Search & Seizure Exclusionary Rule applies under the Washington constitution. But the Reyes Court rules under the facts of the case before it that the evidence at issue does not qualify under the "inevitable discovery" exception.

An officer contacted Tomas Reyes, a suspected drug dealer. The officer requested consent to search Reyes for weapons or narcotics. At the time of the consent search request, the officer had not "seized" Reyes, and the officer had no articulable suspicion that would have justified a seizure. According to the Court of Appeals, the officer's phrasing of his consent request was not sufficient to obtain voluntary consent. **[LED Editorial Note: The Court of Appeals did not describe the phrasing of the consent request. This case did not address how a "street contact" consent request should be phrased.]** In the invalid consent search that followed, the officer found suspected cocaine in one of Reyes' pants pockets.

Subsequent to the officer's discovery of the cocaine, dispatch advised the officer that Reyes had an outstanding arrest warrant. Reyes was charged with possession of cocaine. The trial court denied Reyes' motion to suppress, ruling that, although the consent search was unlawful, the cocaine would inevitably have been discovered in a search incident to arrest once the officer learned of the arrest warrant. Reyes was convicted.

The Court of Appeals declares that the 3-part test for "inevitable discovery" is as follows: 1) The police did not act unreasonably to accelerate the discovery of the evidence in question; 2) proper and predictable investigatory procedures would have been utilized; and 3) those procedures would have inevitably resulted in the discovery of the evidence in question. The Reyes Court declares that the facts of the case before it fail to satisfy any of the three elements of the test. The Court declares its belief that the officer acted unreasonably to accelerate the discovery of evidence, that the evidence did not sufficiently show what procedures the police would have followed had the "consent" search not occurred, and too much speculation was required to reach the conclusion that the warrant would have been discovered while Reyes was still at the scene.

Result: Reversal of Thurston County Superior Court conviction of Tomas Z. Reyes for possession of cocaine.

LED EDITORIAL COMMENT: The case law relating to the "inevitable discovery" exception to the Exclusionary Rule does not appear to be consistent in its application. But consistency among such decisions is difficult to determine, because the doctrine is so fact-specific and context-dependent. We presume that, if the officer had lawfully seized Reyes on "reasonable suspicion" at the time the officer requested consent, the prosecutor might have been able to satisfy the elements of "inevitable discovery" by showing that a radio check would have revealed the arrest warrant (and hence inevitably triggered a search incident to arrest) while Reyes was still at the scene. Officers, of course, should strive to act within the constraints of search & seizure rules, and should not rely on the "inevitable discovery" exception to the Exclusionary Rule.

(4) LATENT EARPRINT EVIDENCE DOES NOT SATISFY FRYE TEST FOR SCIENTIFIC EVIDENCE -- In State v. Kunze, 97 Wn. App. 832 (Div. II, 1999), the Court of Appeals holds that latent earprint evidence is not generally accepted within the scientific community.

An intruder entered the victims' home and bludgeoned a father and son in the head with a blunt object. The father died, and the thirteen-year-old son suffered a skull fracture. A fingerprint technician with the Washington State Crime Laboratory discovered a partial latent earprint on the hallway-side surface of the bedroom door. A criminologist with the Washington State Crime Laboratory compared the latent print with photos of the left side of the defendant's face. Both met with the defendant and obtained earprint exemplars.

Fifteen witnesses testified at the Frye hearing (three for the state and twelve for the defense). (The fingerprint technician declined to testify.) At the conclusion of the Frye hearing, the trial court admitted the earprint evidence, concluding that "'the principle . . . known as 'individualization' through the use of transparent overlay, applied to the comparison of the latent impression in the present case with the known standards of the defendant, is based upon principles and methods which are sufficiently established to have gained general acceptance in the relevant scientific community.'" [Footnote omitted.]

At trial the criminologist testified that "to a reasonable degree of scientific certainty, . . . 'Mr. Kunze's left ear and cheek [were] the likely source of this [ear print] impression at the [crime] scene." [Footnote omitted.] The state also called a Dutch earprint expert who testified "I think it's probable that the defendant's ear is the one that was found on the scene. . . . I'm 100 percent confidant with that opinion." [Footnote omitted.]

The issue on appeal was whether the state's two primary witnesses could lawfully opine that the defendant was the probable maker of the latent earprint. The Court looks at whether the witnesses were relying on scientific, technical, or specialized knowledge in giving their opinions, and, if so, whether that knowledge is generally accepted within the relevant scientific community.

Finding that the witnesses were relying on scientific knowledge, the Court then analyzes whether that knowledge satisfies the Frye standard. The Court first explains the Frye standard:

> Frye provides that novel scientific, technical or other specialized knowledge may be admitted or relied upon only if generally accepted as reliable by the relevant scientific, technical or specialized community. General acceptance may be found from testimony that asserts it, from articles and publications, from widespread use in the community, or from the holdings of other courts. General acceptance may not be found '[i]f there is a significant dispute between qualified experts as to the validity of scientific evidence.' We do not intend the statement in the text to be exclusive. We leave open the possibility that general acceptance can be found in other ways also. When general acceptance is reasonably disputed, it must be shown, by a preponderance of the evidence, at a hearing held under ER 104(a). When general acceptance cannot be reasonably disputed, it may be judicially noticed in the same way as any other adjudicative fact. [Citations omitted.]

In determining that the evidence in the Kunze case does not meet Frye, the Court states: "twelve long-time members of the forensic science community stated or implied that latent earprint identification is not generally accepted in the forensic science community." The Court rejects the criminologist's position that latent earprints are generally accepted, noting:

> He reasoned, essentially, that latent earprints are a form of impression evidence; that other forms of impression evidence are generally accepted in the forensic science community; and thus that latent earprints must be generally accepted in the forensic science community. We reject his premise that latent earprints automatically have the same degree of acceptance and reliability as fingerprints, toolmarks, ballistics, handwriting, and other diverse forms of impression evidence. [Footnotes omitted.]

The Court holds that latent earprint identification is not generally accepted within the forensic science community. However, the Court states that nothing in its holding bars testimony at retrial regarding how the latent print was lifted, how the exemplars were taken, or how the overlays were prepared. Nor is testimony barred regarding visible similarities and differences between the latent print and the overlays, or that, based on a comparison, the defendant cannot be excluded as the maker of the earprint. But the Court states "an opinion of inclusion (e.g., that a particular person made or probably made a latent print) [cannot be given.]" [Footnote omitted, ellipsis and emphasis added.]

Result: Reversal of Clark County Superior Court convictions for aggravated murder, burglary, and robbery against David Wayne Kunze; case remanded for new trial.

(5) COLLECTIVE BARGAINING AGREEMENT PREVAILS OVER CIVIL SERVICE COMMISSION RULE WHERE THE TWO CONFLICT – In City of Spokane and Spokane Police Guild v. Spokane Civil Service Commission, 98 Wn. App. 574 (Div. III, 1999), the Court of Appeals holds that provisions in a collective bargaining agreement (Agreement) that changes the process for promoting patrol officers to sergeant prevail over a contrary civil service commission rule.

In collective bargaining, the City and the Police Guild agreed to changes in the process for promoting patrol officers to sergeants. However, the Civil Service Commission refused to recognize the changes and instead continued to follow its own rules. The facts relating to the changes are as follows:

> Prior to 1996, the Commission had sole responsibility for promoting a uniformed patrolman to sergeant under the City charter. The Commission used a multiple-choice examination to determine who should be promoted and made each promotion based on the "rule of one." Under this rule, the highest ranked candidate on the exam was the person certified to the police department for promotion.
>
> The Guild is the authorized bargaining representative for all Spokane Police Department employees below the rank of lieutenant. In 1996, the City and the Guild entered into a binding collective bargaining agreement (Agreement) in accordance with RCW 41.56. As part of the Agreement, the parties negotiated a new procedure for promoting a uniformed patrolman to sergeant. The City and the Guild agreed that an assessment center, a process to further evaluate candidates, should be used to supplement the Commission's testing procedure. The assessment center would evaluate the leadership and supervisory abilities of the top 12 scorers on the civil service exam and determine who was the best qualified patrolman for promotion.
>
> In November 1997, the City and the Guild informed the Commission about the change in promotion procedure. Under the new system, the Commission was required to provide the names of the top 12 scorers on the exam to the City. The Commission decided to conduct a hearing before complying with the change.
>
> On December 16, 1997, the Commission elected not to recognize the change and chose to follow its normal procedures. The City and the Guild were advised it would not certify the pay for any individual who was promoted to sergeant under the new procedure.

The City of Spokane Court finds that promotions are typically a mandatory subject of bargaining, stating that

> "[u]nder RCW 41.56.100, the City was required to collectively bargain with the Guild on all mandatory subjects, including promotions. The City complied with this duty. But the Commission refused to abide by the Agreement, claiming that its rules, not the Agreement, governed promotion procedure."

The City of Spokane Court further finds that the

> "City lacks the authority to force the Commission to comply with the Agreement. Without the Commission's cooperation, the City cannot abide by the Agreement's terms. There is a statutory conflict and, under RCW 41.56.905, the terms of the Agreement control." [RCW 41.56.905 provides that "if any provision of this chapter conflicts with any other statute, ordinance, rule or regulation of any public employer, the provisions of this chapter shall control."]

Finally, the City of Spokane Court discusses the legislative intent behind the collective bargaining statute, finding that the Legislature intended that the statute supersede the civil service commission rules in the context of this case.

Result: Affirmance of Spokane County Superior Court judgment ordering the Spokane Civil Service Commission to comply with the changes in promotion procedure contained in the Collective Bargaining Agreement.

(6) PHYSICALLY RESTRAINING INMATES IS AN ESSENTIAL FUNCTION OF A CORRECTIONAL OFFICER'S JOB; DOC ALLOWED TO REASSIGN DISABLED CORRECTIONAL OFFICER – In Dedman v. Washington Personnel Appeals Board, 98 Wn. App. 471 (Div. II, 1999), the Court of Appeals holds that physically restraining inmates is an essential function of a correctional officer's job, and that the Department of Corrections (DOC) offer of reassignment to a supply control technician job was a reasonable accommodation.

Plaintiff is a correctional officer for DOC, and was assigned to a number of posts prior to being assigned permanently to the control booth (originally as an accommodation for a knee and back injury). However, her doctor subsequently indicated that she could not perform one of the essential functions of a correctional officer, a job that included "engag[ing] in physical force to subdue an inmate, which may include assisting in the physical movement of an inmate." Based on this information, plaintiff was reassigned to a clerical post and ultimately given the option of accepting a position as a supply control technician. (By the time of the superior court hearing, she had been reinstated to her position as a correctional officer after a physician had found her again able to perform the essential functions of the job.)

The plaintiff argued that physical contact with inmates is not an essential function of a correctional officer's job. She argued that the control booth assignment usually involves no direct inmate contact, and that it would be rare for a control booth operator to be reassigned to another post that would require inmate contact.

The Court flatly rejects this argument, stating:

> Dedman's assignment to the control booth at WCCW was "permanent" only to the extent emergencies, gender searches, and staffing shortages permitted. That Dedman had not yet been called from the control booth on such occasions during her 17-month assignment did not guarantee that she would not be called out of the booth to render such aid in the future. Dedman's limited experience does not overcome the DOC's prima facie showing that inmate contact is an essential job function of a correctional officer. Nor should DOC be required to jeopardize its unique duty to provide prison security in order to accommodate Dedman in the precise way that she requests. '[T]he very reason a corrections officer position exists is to provide safety and security to the public, as well as to [WCCW] employees and inmates; as such, the ability to provide safety and security, including the ability to respond without hesitation or limitation in an emergency is absolutely inherent to that position.'

[Quoting Martin v. State of Kansas, 190 F.3d 1120, 1132 (10th Cir. 1999) (emphasis added)].

The Court holds that the ability to restrain an inmate is an essential function of a correctional officer's job, and that, at the time she was reassigned, plaintiff was unable to perform the job. Accordingly, DOC could not make accommodations to enable her to remain a correctional officer during the period of her disability. DOC's responsibility to accommodate the plaintiff was limited to finding an opening for which she was qualified. The supply control technician job was a reasonable accommodation.

Result: Affirmance of Pierce County Superior Court Order affirming the Personnel Appeals Board conclusion that plaintiff was properly removed from her job as a control booth operator and reassigned to a clerical position.

(7) SEATTLE'S PEDESTRIAN INTERFERENCE LAW NOT IN CONFLICT WITH STATE LAW ON JAYWALKING – In State v. Greene, 97 Wn. App. 473 (Div. I, 1999), the Court of Appeals rules that the Seattle "pedestrian interference" ordinance does not conflict with state law.

While looking directly at an approaching police car, defendant intentionally stepped off the curb into the path of the moving cruiser. The police car had to swerve to miss defendant. The two officers in the car arrested defendant for violating Seattle's pedestrian interference ordinance and found illegal drugs during a search incident to arrest. Defendant was found guilty of unlawful possession of the drugs. He appealed, arguing that the Seattle pedestrian interference ordinance is in conflict with the state law on jaywalking. The Greene Court explains as follows that there is no conflict:

> Municipalities may not enact laws "in conflict with the provisions of [Title 46]." RCW 46.08.020.
>
> Nonetheless, the Legislature did not intend by this language to preempt the entire field of traffic regulation. A city may enact its own traffic laws, as long as they do not conflict with the provisions of Title 46. The test for determining whether a municipal ordinance is "in conflict" with state law is whether the ordinance expressly permits or licenses that which the statute forbids and prohibits, or vice versa.
>
> If a municipal ordinance criminalized behavior amounting to mere jaywalking under state law, the ordinance would run afoul of the uniformity requirement of RCW 46.08.020. Washington's traffic statute defines jaywalking as a traffic infraction, not as a crime.
>
> The Seattle Municipal Code's jaywalking provision proscribes the same behavior as Washington's jaywalking statute. The municipal provision provides that "every pedestrian crossing a roadway at a point other than at designated crosswalks or other than within an unmarked crosswalk at an intersection shall yield right-of-way to all vehicles upon the roadway." SMC 11.40.090(A). Similarly, Title 46 provides that "[e]very pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway." RCW 46.61.240. Like Title 46, the municipal code defines jaywalking as a traffic infraction, not as a criminal offense. SMC 11.31.010.
>
> Seattle's pedestrian interference ordinance criminalizes behavior that is more egregious than mere jaywalking. The municipal provision provides that "[a] person is guilty of pedestrian interference if, in a public place, he or she intentionally [o]bstructs pedestrian or vehicular traffic." SMC 12A.12.015(B)(1). "Obstruct pedestrian or vehicular traffic" means to "walk, stand, sit, lie or place an object in such a manner as to block passage by another person or vehicle, or to require another person or a driver of a vehicle to take evasive action to avoid physical contact." SMC 12A.12.015(A)(4). Pedestrian interference is classified as a misdemeanor under the city code. SMC 12A.12.015(C). Behavior amounting to pedestrian interference is more egregious than jaywalking, because it involves an intent to obstruct traffic.
>
> Like the municipal code, a Washington statute provides that a person who intentionally obstructs vehicular traffic is guilty of a crime: "A person is guilty of disorderly conduct if he . . . intentionally obstructs vehicular . . . traffic without lawful authority." RCW 9A.84.030(1)(c). Disorderly conduct is a misdemeanor. RCW 9A.84.030(2).

[Some text, citations omitted]

The Greene Court then goes on to complete its analysis rejecting Greene's "conflict" argument. Greene's conduct provided probable cause to arrest him under both the Seattle ordinance and state law, the Court explains:

> Thus, if the facts here reveal that the police officers had probable cause to believe that Greene had intentionally obstructed traffic, then probable cause would exist to believe he had committed a crime under both municipal and state law. Probable cause exists when facts and circumstances within the arresting officer's knowledge are sufficient to cause a person of reasonable caution to believe that a crime has been committed.

> The record contains substantial evidence that the officers had probable cause to believe that Greene intended to obstruct traffic. Officer Guenther testified that Greene was "looking directly at us" when he stepped into the roadway. Greene stepped right into the path of the oncoming patrol car. The officers and several other drivers had to swerve to avoid hitting him. This evidence suggests that Greene intended to require the driver of a vehicle "to take evasive action to avoid physical contact," and that he intended to "stop up" traffic. Because both the state's disorderly conduct statute, and Seattle's pedestrian interference ordinance, proscribe this behavior, the two laws are not in conflict.
>
> Officers Guenther and Britt had probable cause to arrest Greene for the crime of pedestrian interference. Thus, Officer Guenther's pat-down search was a search incident to lawful arrest, and the court did not err in admitting the evidence seized from that search.

Result: Affirmance of King County Superior Court (juvenile division) adjudication of guilty of possession of a controlled substance.

(8) PROPERTY OWNER NOT JUSTIFIED IN SHOOTING DOGS CHASING WILD DEER ACROSS HIS PROPERTY – In State v. Long, 98 Wn. App. 669 (Div. II, 2000), the Court of Appeals rejects the appeal of a defendant convicted of first degree malicious mischief for shooting and killing two expensive hunting dogs, Rowdy and Sparkle, who were allegedly chasing a deer across his property.

Defendant's argument on appeal relied in part on the common law right of a property owner to exclude trespassers, including hunters, from his property. The Long Court explains as follows that this limited right does not justify killing the hunting dogs:

> We acknowledge, as Long asserts, that "he has a limited right in the wild game on his property to exclude all other persons from his...property for the purpose of hunting." Long cites a 1928 Attorney General Opinion:
>
> > the land owner or lessee, by acquiring the land by purchase or lease, acquires a property ratione soli, i.e., "by reason of the soil," in the wild animals which maintain their colonies there. This property is absolute as against trespassers, but not as against the state which may license, regulate or prohibit the killing or sale of the animals.
>
> But Long's right to exclude trespassing hunters from his property does not create a corresponding right to kill hunting dogs momentarily crossing his property. Moreover, although Long's right to game on his property is superior to that of trespassers, the State's property right to regulate wildlife is superior to Long's: "Wildlife is the property of the state." RCW 77.12.010. "Game is not a property right appurtenant to land. Game belongs to the State." State v. Quigley, 52 Wn.2d 234 (1958). Long cannot successfully maintain that he killed Rowdy and Sparkle in defense of wildlife or of his property.

Defendant also relied in part on case law and statutory authority indicating that a property owner has a natural right to defend and protect his domestic farm animals, and may kill dogs engaged in injuring or destroying such domestic animals, if there is a reasonable and apparent necessity to do so. See Drolet v. Armstrong, 141 Wash. 654 (1927); RCW 16.08.020. But the Long Court rules that the common law rule which gives a property owner the right to kill dogs chasing domestic farm animals on his or her property does not give a property owner a right to kill dogs chasing State-owned wild animals, such as the wild deer being chased in the Long case.

Result: Affirmance of Clallam County Superior Court conviction of Willis Eugene Long, Jr. for first degree malicious mischief.

(9) EVIDENCE OF "INTENT TO DELIVER" DRUGS HELD SUFFICIENT – In State v. McNeal, 98 Wn. App. 585 (Div. II, 1999), the Court of Appeals addresses a case where a large sum of cash, substantial quantities of methamphetamine distinctively packed, and drug paraphernalia were found in possession of a vehicle operator following two-car head-on motor vehicle accident. The evidence was sufficient to support the driver's conviction for possession of controlled substances with intent to deliver, the McNeal Court holds.

The brief analysis of the McNeal Court on the "intent to deliver" evidence-sufficiency issue is as follows:

In the car McNeal was driving, the police found four plastic baggies full of methamphetamine, a syringe full of liquid amphetamine, a razor blade, a four empty baggies. Police also found $4,250 on McNeal. The presence of empty baggies and a cutting tool, according to Officer Kraemer, indicates that the drugs were being packaged for sale. In addition, Kraemer testified that because the four full baggies were of the same weight, they were likely for sale rather than personal use. Large amounts of cash found in proximity to controlled substances also indicates sale and distribution, according to Officer Mann. Although McNeal argues that the drugs were not his and that the money was not from drug proceeds, credibility determinations are for the trier of fact and the evidence is sufficient to support the conviction for possession with intent to deliver.

Result: Affirmance of Lewis County Superior Court convictions of John Kevin McNeal for vehicular homicide, vehicular assault, and possession of a controlled substance with intent to deliver; affirmance also of exceptional sentence of 440 months.

LED EDITORIAL NOTE: See the February 2000 LED entry re State v. Wade, 98 Wn. App. 328 (Div. II 1999) Feb 00 LED:12 for more detailed analysis and a listing of additional cases on the "intent to deliver" sufficiency-of-evidence issue.

(10) JURY CANNOT REACH VERDICT ON "ARMED WITH A DEADLY WEAPON" UNLESS COURT ALLOWS DEFENDANT TO ARGUE HE DID NOT KNOW OF PRESENCE OF GUN – In State v. Woolfolk, 95 Wn. App. 541 (Div. I, 1999), the Court of Appeals notes that the evidence was debatable as to whether a drug possession defendant or someone else in the car where he was arrested was in possession of a firearm found in the car. Under these circumstances, defendant should have been allowed to argue to the jury that he did not know about the presence of the gun, the Court of Appeals rules, in his defense against a special charge that he committed his drug crime "while armed with a firearm." See RCW 9.94.125.

Result: Reversal of Snohomish County Superior Court firearm enhancement: remand for re-trial of Ira J. Woolfolk on whether he knew he was armed while he was in possession of a controlled substance.

(11) BIGAMY CONVICTION DOESN'T HOLD UP WHERE STATE CAN'T PROVE ALL ELEMENTS OF FIRST MARRIAGE IN MEXICO – In State v. Rivera, 95 Wn. App. 961 (Div. III, 1999), Division Three of the Court of Appeals rules that a bigamy conviction was invalid where the bigamy defendant's first marriage in Mexico could not be proven to have been conducted in full conformity with Mexican laws.

Mexican marriage law requires both a religious ceremony and a civil ceremony, the Rivera Court explains. Because the prosecution did not present evidence of both the religious ceremony and the civil ceremony elements for the first marriage, the charge of bigamy based on the validity of the first marriage was invalid, the Court of Appeals holds. On the matter of proof of the validity of defendant's first marriage, the Court of Appeals indicates that the strict scrutiny given criminal statutes plays a role in the decision. A different approach might be appropriate in a civil case where the validity of a marriage was at issue.

Result: Reversal of Franklin County Superior Court bigamy conviction of Rosalina Rivera, aka Rosalina Larios, aka Rosalina Salinas.

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Law Enforcement Improves In Administrative DUI Hearings

Article by Department of Licensing Staff

About two out of every three driver's license suspensions and revocations resulting from DUI arrests are now sustained by Department of Licensing (DOL) hearing officers, a recent study found. Law enforcement is prevailing in administrative DUI hearings with greater frequency than it has since the passage of the 1995 amendments to the state's DUI law which eliminated the need for police officers to present live testimony at the hearing. The increased rate of sanctions being sustained is generally attributed to police officers' growing familiarity with the current administrative system that does not require their appearance. Officers are writing arrest reports which better detail the probable cause for the initial traffic stop, the reasonable grounds

to believe a driver was under the influence, the provision of the implied consent warnings, and the steps taken to effect an admissible breath or blood test. More DUI training and a better-designed DUI arrest report have also served to increase the rate of administrative sanctions.

While officers may still give live testimony at the hearing, usually the only evidence offered will be the officer's arrest report, and other relevant documents that have been submitted in advance. A decision adverse to the driver may be appealed to the Superior Court in the county of arrest, but the appeal is on the record, and therefore the State's evidence must support the hearing officer's decision.

Of the cases that are dismissed, about one out of three result from the hearing officer not having received a copy of the officer's arrest report. Often the report is not received at all, or sometimes it is received after the hearing because it was misdirected. Without an arrest report, the State has no evidence and the case will automatically be dismissed.

The Report of Breath/Blood Test for Alcohol or Report of Refusal (both commonly referred to as "the sworn report") should be sent to DOL within 72 hours of the arrest. Make certain it is legible. For DOL to act on this report, it must be properly executed, which means that the driver's identity must be set forth, the date of arrest provided, the report signed, and the date and place of signature noted. This is also true for certifying the arrest report that will be introduced as an exhibit in the hearing. RCW 46.20.308(8) requires that the report be submitted under declaration authorized by RCW 9A.72.085. Accordingly, if the arrest report is not properly executed, it will be ruled inadmissible.

About 25% of DUI arrestees request an administrative hearing. For the 75% who don't, the license suspension or revocation takes effect 60 days from the date of arrest. Where a hearing has been requested, DOL will notify the officer who signed the sworn report of the date of the hearing, the name of the hearing officer and where to send the relevant reports and documents. These reports should be mailed or faxed (mail preferred if time allows) as soon as possible so that the hearing officer receives them well before the hearing date.

When assembling your arrest report and other documents for submission to the hearing officer, make certain they can be read. Ensure that the documents are legible. Often, operator certification cards and breath test documents are received that are not legible. If these documents cannot be read, the hearing officer cannot rule that the test was administered in accordance with the Washington Administrative Code, and the case will be dismissed. Before sending your report to the hearing officer, check to see that there are no missing pages, that the report relates to the driver referenced in the notice, and that all necessary boxes are checked. If there is more than one officer involved in the arrest, have the other officers sign a certification form, and attach the form(s) to the full report.

OTHER TIPS FOR DUI ARRESTS

- In the case of the administration of a blood test, you do not have to mark the license as temporary, nor do you have to provide information about the driver's right to a hearing. Also, do not sign the sworn Report of Blood Test until you have received the results back from the toxicology lab, showing that the test was indeed over the legal limit.
- Always include a copy of your BAC operator's permit card with breath test cases.
- If the refusal was based on some type of behavior, describe what occurred. For example, if you think the person was manipulating the test, and not making an earnest attempt to provide a sample, describe what you observed.
- Include information about the mouth check and observation period.

The 21 DOL hearing officers collectively conduct more than 10,000 DUI hearings each year. Due to this volume, it has not been the practice of DOL to routinely send a copy of the final order to the arresting officer. If you wish to know the outcome of a particular case, include a self-addressed, stamped envelope with your arrest report, and a copy of the final order will be sent to you.

DOL Hearings Unit staff are available to speak at officer training sessions. If you would like to request a speaker, or discuss these issues further, feel free to call Jeff Burkhardt, Administrator, at 360-902-3849 in Olympia, or you may call a regional manager in your area:

Mary Pat Casey, Everett - 425-356-2979
Steve Lang, Seattle - 206-706-4265
Jim McNew, Spokane – 509-482-3887

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FOLLOW-UP LED EDITORIAL NOTES RE MARCH BAUER DECISION: CITIZEN INFORMATION SOURCE (A) AS PRESUMPTIVELY CREDIBLE CONFIDENTIAL SOURCE FOR PROBABLE CAUSE PURPOSES; OR (B) AS RELIABLE SOURCE FOR PURPOSES OF ESTABLISHING REASONABLE SUSPICION TO JUSTIFY A "STOP"

After going to press with our March 2000 LED entry on State v. Bauer, 98 Wn. App. 870 (Div. II, 2000) we received two E-mail inquiries pertaining to the question of establishing that a confidential citizen information source is in fact such a source, and therefore entitled to presumptive credibility for purposes of establishing probable cause or reasonable suspicion.

1. Establishing citizen status of source for probable cause purposes.

In LED Editorial notes and comments last month re Bauer, we provided some citations to past LED case entries, and we provided a tip as to how to establish "citizen" status for a confidential information source. The Courts are suspicious that officers will try to conclusorily characterize a criminal-type confidential informant as a "citizen" information source when the officers can't show a good track record of past reports for the informant (and when the officers can't show credibility otherwise, perhaps by showing that the informant gave information against penal interest and/or to work off a pending charge-- see State v. Estorga, 60 Wn. App. 298 (Div. II, 1991) May 91 **LED**:07).

In our comments on Bauer in the March **LED**, we should have mentioned a supporting Washington Supreme Court decision. In State v. Cole, 128 Wn.2d 262 (1995) Feb. 96 **LED**:02, the Washington Supreme Court indicated that an affidavit recounting the following facts, as described by the Cole Court, established "citizen" status of a citizen CI for purposes of the "credibility" prong of the test for informant-based probable cause (remember that the "basis of information" prong, not discussed here, must be met as well):

> (1) the informant lived in the neighborhood of the house that was the subject of the requested search; (2) the informant lived in that neighborhood for several years; (3) the informant worked in the community; (4) the informant had an extended family who lived in the community; (5) the informant did not have a criminal record; (6) the informant came forward voluntarily; (7) the informant did not request compensation (*LED Editorial Note: Bauer held, however, that the mere fact that a "hotline" tip has a potential for compensation does not by itself undercut "citizen" informant status*); and (8) [the affiant-officer] knew the informant's identity.

The Cole Court also noted that the officers in that case corroborated the citizen informant's report (note that officers should always try to corroborate reports from any information source). But we think that the case stands as support for the proposition that, even without corroboration, setting forth the above elements in an affidavit will ordinarily establish "citizen" status, and hence presumed credibility for an information source. The Cole Court expressly held that the fact that the affiant-officer did not state the reason why the citizen sought confidentiality (though this is always a good idea for such affidavits) was not fatal to the government's case.

We have compiled a relatively complete list of Washington appellate court decisions over the past 13 years addressing the question of "citizen" status for confidential information sources (all case names begin with State v.). The cases are: Berlin, 46 Wn. App. 587 (Div. I, 1987) May 87 **LED**:10; Franklin, 49 Wn. App. 106 (Div. III, 1987); Mickle, 53 Wn. App. 39 (Div. III, 1989), March 89 **LED**:08); Dice, 55 Wn. App. 489 (Div. I, 1989) **Dec 89 LED:15**; Payne, 54 Wn. App. 240 (Div. III, 1989) Sept 89 **LED**:18; Wilke, 55 Wn. App. 470 (Div. I, 1989) Dec. 89 **LED**:17; Dobyns, 55 Wn. App. 609 (Div. I, 1989) Jan. 90 **LED**:18; Ibarra, 61 Wn. App. 695 (Div. II, 1991) Nov. 91 **LED**:06; Creelman, 75 Wn. App. 490 (Div. I, 1994) April 95 **LED**:08. As we noted in our comments on Bauer last month, these cases do not appear to be completely consistent with each other in terms of the level of detail and the number of elements necessary to establish "citizen" status of confidential information sources. We stand by our comments in last month's commentary that officer-affiants should try to establish as many elements on our list provided last month as possible. There is suppression danger in taking short cuts, because the cases are fact-specific and context-dependent; prosecutors need all the facts they can get in order to avoid suppression.

2. Establishing reasonable suspicion for Terry stop based on report from victim or witness.

A question related to the probable cause issue in Bauer, but not addressed in our commentary last month, is whether police have established credibility of a citizen information source in relation to a *Terry* stop. This is a highly complex and somewhat unsettled area of law with a number of conflicting court decisions. Also, as with the probable cause issue, the cases are highly fact-specific and context-dependent. But we believe that we can state the following qualified propositions with some confidence.

An anonymous report will almost never meet the "credibility" prong for informant-based reasonable suspicion (note that an informant's "basis of information," a concept not addressed in this note, must also be met to establish reasonable suspicion). The Washington Court decisions do say that the nature of the crime reported may justify relaxing the "reasonable suspicion" standard in certain circumstances. But only if imminent extreme danger to human life is indicated in the report might a *Terry* stop be justified based on an anonymous report. And Washington case law indicates that DUI is not an imminent-danger-to-human-life circumstance which would justify relaxing the "reasonable suspicion" standard. (See State v. Campbell, 31 Wn. App. 833 (Div. I, 1982) Aug. 82 **LED**:04; State v. Jones, 85 Wn. App. 797 (Div. III, 1997) Aug. 97 **LED**:16 (Jones is discussed briefly below).

Note that the U.S. Supreme Court currently has before it a case involving an anonymous report about a "young man with a gun." The Supreme Court heard oral argument on February 29, 2000 in Florida v. J.L., No. 98-1993. The Court is expected to make a decision by June 30 of this year as to whether the Florida Supreme Court erred in a split decision suppressing a concealed gun seized by a Florida officer who was following up an anonymous tip that a young man at a bus stop was carrying a gun. The Florida decision is reported at 727 So.2d 404 (1998).

A telephonic report from someone who identifies himself or herself over the phone as a witness to or victim of a crime, but whose claimed identity is not verified by law enforcement prior to the stop, will be treated by the courts as having little or no more credibility than an anonymous report. See State v. Sieler, 95 Wn.2d 43 (1980). On the other hand, a telephonic report from a person claiming to be a victim or witness may have credibility, depending on other circumstances in the case, if the caller's identity is reasonably verified before the stop.

Also, an in-person report to an officer by a person who claims to be a victim of a crime will generally be given credibility unless there are obvious manifestations that the report is not true. Similarly, an in-person report from a person who claims to be a non-victim witness to a crime arguably should also be given presumed credibility, but the Washington cases are mixed on the credibility to be given in-person reports from unidentified, non-victim witnesses. State v. Jones, 85 Wn. App. 797 (Div. III, 1997) Aug. 97 **LED**:16 involved a passing commercial truck driver who communicated to an officer that a car operator was driving erratically. The Jones Court held that the officer could not give the trucker's report presumed credibility. That is because the officer did not know the truck driver, and the officer did not ascertain the truck driver's identity before acting on his report. The truck driver had left the scene by the time the officer made the stop, and the officer could not identify the truck driver at the time of the suppression hearing. The Jones Court ruled that the officer's stop, based solely on the truck driver's report, was not justified by reasonable suspicion.

In light of the Jones decision, within reason under the circumstances in the field, a Washington officer will want to try to identify the citizen making an in-person report of a crime before the officer makes a stop

based solely on the report. If time does not permit the officer to engage in such prior identification efforts before acting on the report, it might help the officer's later effort to establish the informant's credibility if, before going after the suspect, the officer asks the citizen to please stick around so that the officer can come back in a few minutes and get the full story. At the very least, if the citizen is driving a vehicle, the officer should record the vehicle license number before going after the suspect. Then, if the citizen stays put, the officer can identify the source at the suppression hearing and thus allay an unusually skeptical suppression judge's concern that the officer fabricated the source. In addition, and more important from a logical standpoint, the showing of "informant" credibility may be enhanced by the fact that, following the request, the unknown, in-person citizen reporter of crime did not recant or appear to be leaving the scene as the officer left in pursuit of the suspect.

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LAW ENFORCEMENT MEDAL OF HONOR CEREMONY SET FOR MAY 19, 2000

In 1994, the Washington Legislature passed chapter 41.72 RCW, establishing the Law Enforcement Medal of Honor. This honor is reserved for those police officers who have been killed in the line of duty or who have distinguished themselves by exceptional meritorious conduct. This year's ceremony will take place Friday, May 19, 2000 at the Capitol Rotunda in Olympia, commencing at 1:00 PM. This is the last day of Law Enforcement Week across the nation.

This ceremony is a very special time, not only to honor those officers who have been killed in the line of duty and those who have distinguished themselves by exceptional meritorious conduct, but also to recognize all officers who continue, at great risk and peril, to protect those they serve.

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Funding provided by the Office of Crime Victims Advocacy 4 C.L.E. credits requested

This announcement is also posted on the CJTC Internet Home Page at [http://www.wa.gov/cjt]

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NEXT MONTH

The May LED will include: (1) Part One of our 2000 Washington Legislative Update; and (2) an entry on the decision by the Ninth Circuit Court of Appeals in U.S. v. Lombera-Camorlinga issued March 6, 2000 (a majority of an 11-member panel holds that suppression is not a remedy for a violation of the consular notification provisions of the Vienna Convention-- see our May 99 LED article addressing those provisions).

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INTERNET ACCESS TO COURT DECISIONS, STATUTES, AND COURT RULES

The Washington office of the Administrator for the Courts maintains web sites with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. One address provides just decisions which have been issued within the preceding 14 days [http://www.wa.gov/courts/opinpage/recent.htm]. Two other addresses provide more court information and also include decisions issued within the preceding 90 days [http://www.wa.gov/courts/home/htm] and [http:www.wa.gov/courts/opinpage/home.htm].

United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct]. This web site contains all U.S. Supreme Court opinions issued since 1990 and most significant opinions of the Court issued before 1990.

A good source for easy access to relatively current Washington state agency administrative rules (including WSP equipment rules at Title 204 WAC) can be found at [http://slc.leg.wa.gov/WACBYTitle.htm]. Washington Legislation and other state government

information can be accessed at [http://access.wa.gov/] clicking on “L” and then “legislation” or other topical entries in the “Access Washington Home Page “Index.”

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General’s Office. Questions and comments regarding the content of the **LED** should be directed to Mr. Wasberg at 206 464-6039; Fax 206 587-4290; E Mail [johnw1@atg.wa.gov]. Questions regarding the distribution list or delivery of the **LED** should be directed to Ed Johnson of the Criminal Justice Training Commission (CJTC) at (206) 439-3740, ext. 272; Fax (206) 439-3752; email [EJohnson@cjtc.state.wa.us]. **LED** editorial comment and analysis of statutes and court decisions expresses the thinking of the writers and does not necessarily reflect the views of the Office of the Attorney General or the CJTC. The **LED** is published as a research source only. The **LED** does not purport to furnish legal advice. **LED**’s from January 1992 forward are available on the Commission’s Internet Home Page at:[http://www.wa.gov/cjt].