



# Law Enforcement

January 1999

# Digest

## HONOR ROLL

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### **486<sup>th</sup> Session, Basic Law Enforcement Academy - September 9 through December 4, 1998**

President: Herman J. Cyrus - Central Washington University Police Department  
Best Overall: Ron Evans - Elma Police Department  
Best Academic: Scott Haney - Pasco Police Department  
Best Firearms: Scott E. Bain - Clark County Sheriff's Office  
Tac Officer: Clark Wilcox - Renton Police Department

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### **485<sup>th</sup> Session, Basic Law Enforcement Academy, Seattle Police Department - June 15 through November 17, 1998**

President: Mark Garth-Green - Seattle Police Department  
Best Overall: Mark Garth-Green - Seattle Police Department  
Best Academic: Kevin Jones - Seattle Police Department  
Best Firearms: Aaron P. Keating - Seattle Police Department  
Tac Officer: Robert N. Nibler - King County Sheriff's Office

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### **498<sup>th</sup> Session, Basic Law Enforcement Academy, Spokane Police Academy - September 2 through November 24, 1998**

Highest Achievement in Scholarship: Frank C. Beatty III - Pend Oreille County Sheriff's Office  
Highest Achievement in Night Mock Scenes: Stacy D. Flynn - Adams County Sheriff's Office  
Outstanding Officer (Effort and Attitude): Steven D. White, Jr. - Twisp Police Department  
Highest Achievement in Pistol Marksmanship: Jared L. Quinlan - Toppenish Police Department  
Best Overall Firearms: D. Allen Montgomery - Granger Police Department  
Best Tactical Firearms: Steven D. White, Jr. - Twisp Police Department

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### **Corrections Officer Academy - Class 281 - November 3 through December 4, 1998**

Highest Overall: Curtis Seevers - Pierce County Sheriff's Office Jail  
Highest Academic: Jason Robison - Geiger Corrections Center  
Charles Woohead - Pierce County Sheriff's Office Jail  
Highest Practical Test: Curtis Seevers - Pierce County Sheriff's Office Jail  
Highest in Mock Scenes: Niall Dolan - DOC Division of Community Corrections  
Elias Castillo - Washington State Penitentiary  
Highest Defensive Tactics: Scott Reger - Clallam Bay Corrections Center

**Corrections Officer Academy - Class 282 - November 2 through December 4, 1998**

Highest Overall: Ryan Marshall - Whatcom County Jail  
Highest Academic: John Wilson - Washington State Penitentiary  
Highest Practical Test: Ryan Marshall - Whatcom County Jail  
Kimberly Roberts - Chelan County Regional Jail  
Highest in Mock Scenes: Steven Warren - Washington State Penitentiary  
Deborah Welker - Clallam Bay Corrections Center  
Highest Defensive Tactics: Delano Dumo - Kirkland Police Department

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**WASHINGTON STATE SUPREME COURT**

**VIOLATION OF LEACH RULE REQUIRING CONSENT FROM ALL PRESENT COHABITANTS DOESN'T REQUIRE EXCLUSION OF EVIDENCE AGAINST THE CONSENTING COHABITANT**

State v. Walker, \_\_\_ Wn.2d \_\_\_ (1998) [965 P.2d 1079]

Facts and Proceedings: (Excerpted from majority opinion)

Ellen's 12-year-old nephew was caught at Hoquiam Middle School with a bag of marijuana. Following a telephone call by school authorities to the Hoquiam Police Department, a police officer was dispatched to the school. The investigating officer was told by Ellen's nephew that he lived with Ellen and her husband, that he had obtained the marijuana from their home and that "there was more there at the residence." After the boy was arrested and taken to the Hoquiam Police Department, Ellen was called at her place of work and asked to come to the police station. Upon her arrival, [officers] informed her that they thought they had probable cause to obtain a search warrant authorizing a search of her home. They explained that an alternative for Ellen was to consent to a limited search of her home. Ellen then signed a permission to search form that was presented to her by the officers. It provided as follows:

PERMISSION TO SEARCH

*I, Ellen J. Walker 7-1-62, have been informed by [officers' names] who made proper identification as (an) authorized law enforcement officer(s) of the Hoquiam Police Department of my CONSTITUTIONAL RIGHT not to have a search made of the premises and property owned by me and/or under my care, custody and control, without a search warrant.*

*Knowing of my lawful right to refuse to consent to such a search, I willingly give my permission to the above named officer(s) to conduct a complete search of the premises and property, including all buildings and vehicles, both inside and outside of the property located at [property address].*

*The above said officer(s) further have my permission to take from my premises and property, any letters, papers, materials or any other property or things which they desire as evidence for criminal prosecution in the case or cases under investigation.*

*This written permission to search without a search warrant is given by me to the above officer(s) voluntarily without any threats or promises of any kind, at 2:30 p.m. on this 1 day of February 1995, at HQPD....*

*/s/ Ellen Walker*

The police officers then drove Ellen to her home. Shortly after they arrived at her house but prior to entering it, Ellen's husband, Gus Walker (Gus), arrived at the premises. Without speaking to Gus, Ellen led [one of the officers] to a bedroom she shared with Gus. She then retrieved a bag of marijuana from a closet and handed it to him. [The officer] then searched the closet himself and found another bag of marijuana.

While the search was being conducted, another officer informed Gus that Ellen had given them permission to search the home. Although Gus was not asked to consent to a search of the house, he did not voice any objection to the officer's activities. Gus later gave his oral consent to a search of the garage, but no evidence was seized there.

The State charged Ellen and Gus Walker separately with possession of marijuana in excess of 40 grams. RCW 69.50.401. Shortly after the charges were filed, the cases were consolidated for purposes of trial. The defendants then filed a joint motion to suppress the marijuana obtained in the search of their bedroom. Following a hearing on their motion, the trial court entered findings of fact and concluded, therefrom, that although Ellen had voluntarily consented to the search of the house, Gus had not. Consequently, it granted Gus's suppression motion and dismissed the charge against him. It denied Ellen's motion. At a bench trial, Ellen was found guilty of the charge.

The State appealed the trial court's order granting Gus's motion. Ellen appealed the order denying her motion. The Court of Appeals affirmed suppression of the evidence in the case against Gus, but reversed the trial court's order denying Ellen's motion to suppress and remanded with directions to dismiss the charge against her. [State v. Walker, 86 Wn. App. 857 (Div. II, 1997) **Nov 97 LED:10**]. The State sought review of the latter decision contending that the Court of Appeals erred in concluding that the written consent to search that was signed by Ellen and given to the Hoquiam police officers was vitiated by the failure of the police to seek and obtain the consent of her husband who was present at the home at the time it was searched.

[Officer's names deleted]

**ISSUE AND RULING:** The Leach rule requires that consent to search be obtained from all cohabitants of fixed premises who are present on the premises at the time of the search. Where officers fail to request consent from all present cohabitants, is exclusion of evidence required as to a cohabitant who in fact did consent to the search? (**ANSWER:** No) **Result:** Reversal of Court of Appeals decision which had reversed Ellen Walker's Grays Harbor County Superior Court conviction for possession of a controlled substance.

**ANALYSIS:** (Excerpted from majority opinion)

Clearly, as a cohabitant with common authority over the premises, Ellen had authority to consent to the search and that consent was valid as against an absent, nonconsenting person with whom that authority was shared. The more pertinent question and the one before us is whether her authority to consent to a search evaporated when her cohabitant, Gus, arrived at the premises just before the search was conducted.

The State contended in its petition for review and in argument to this court that the Court of Appeals incorrectly concluded that a consent to search given by an inhabitant of a dwelling is vitiated by the failure of the police to obtain the consent of any cohabitant who was present at the time the consent was obtained. In concluding that the failure of the Hoquiam police to obtain Gus's consent to the search essentially vetoed Ellen's otherwise voluntary consent, the Court of Appeals purported to rely on our decision in [State v. Leach, 113 Wn.2d 735 (1989) **Feb 90 LED:03**]. In Leach, the police obtained consent to search from the defendant's girlfriend who had equal control over the business premises where the search was conducted. The record showed that when the officers arrived at the place to be searched (a travel agency), the defendant, Leach, was present. The officers arrested and handcuffed Leach and placed him in a chair while they conducted the search of the premises. When Leach was charged, he moved to suppress the evidence seized in the search, arguing that he had not consented to the search. The trial court denied his motion. On review, the Court of Appeals concluded that the search was invalid, absent Leach's consent to it, and it remanded for an evidentiary hearing to determine if he had consented. This court affirmed the Court of Appeals in Leach, concluding that while a person with equal control of a premise may consent to a search in the absence of the defendant, "the police must obtain the consent of a cohabitant who is present and able to object in order to effect a valid warrantless search."

We can understand how this quote from Leach, when viewed out of context (i.e., that the evidence obtained in the search was entered into evidence against the nonconsenting cohabitant), might give some solace to Ellen. It does not, however, avail her here because Leach does not stand for the proposition advanced by Ellen. Rather, the case supports the proposition that "[w]here the police have obtained consent to search from an individual possessing, at best, equal control over the premises, that consent remains valid against a cohabitant, who also possesses equal control, only while the cohabitant is absent." It follows from that opinion that because Ellen and Gus were cohabitants and both present during the search, Ellen's consent to the search was invalid as to Gus. Indeed the Court of Appeals so ruled in the State's appeal from the trial court's order granting Gus's suppression motion and the State did not seek review of that decision here.

The dissent asserts that this court squarely answered the question at issue here when we stated in Leach that the police must obtain the consent of a cohabitant who is present in order to effect a valid warrantless search. The dissent contends that this means that since the Hoquiam Police failed to obtain Gus's consent to the search, it was invalid as to Ellen. This conclusion misconstrues our holding in Leach. We did not, as the dissent suggests, state there that a search is invalid as to the person who gave consent, if that person's cohabitant did not consent to the search or merely kept silent. It does not follow, therefore, that the officers' failure to ask Gus to consent to the search makes Ellen's consent invalid as to her.

We believe, in short, that the Court of Appeals incorrectly extended our holding in Leach when it concluded that a cohabitant who is present at the time a search is conducted may revoke the other cohabitant's voluntary waiver of his or her Fourth Amendment rights. Such a holding, as we have noted, misinterprets Leach and flies in the face of settled law that Fourth Amendment rights are personal rights that cannot be vicariously asserted.

Although we recognize that the Court of Appeals expressed concern that by failing to ask for Gus's permission to search, the police officers denied Ellen an opportunity to

revoke her consent based on his response, we believe that view is somewhat patronizing toward Ellen. We should not presume, as did the Court of Appeals, that Ellen would defer to Gus's lack of consent, particularly in light of this record which reveals that Ellen voluntarily signed a consent to search form that fully informed her of her right not to consent to the search. It also discloses that Ellen knew that Gus was at their home when the search was conducted. She did not, however, endeavor to speak to him before taking the police officers to the closet where the controlled substance was found. While we hesitate to draw any conclusions about what Ellen was thinking at that time, it is logical to presume that she felt capable of making up her own mind about whether or not to consent to the search. Although Ellen clearly had rights of privacy under the Fourth Amendment that deserved to be respected, her decision to give up those rights should also be respected.

[Some citations and footnotes omitted]

**DISSENT:** Justice Sanders dissents, joined by Justice Johnson. The dissent's primary point is that the same search should not be viewed as being lawful as to some persons and not lawful as to others. Of course, a very similar anomaly is presented when the issue is "standing," so the result here is not as remarkable as Justice Sanders suggests.

#### **LED EDITOR'S COMMENT:**

1. **Complexities of Leach, Cantrell, and Walker:** We believe the State Supreme Court has created an unnecessarily complicated set of rules as it has tried to factually distinguish its ruling in State v. Leach, 113 Wn.2d 735 (1989) Feb. 90 LED:03. In State v. Cantrell, 124 Wn.2d 183 (1994) Sept. 94 LED:05, the Court held that a search of a motor vehicle was not subject to the rule. Thus, (i) where the two occupants of the vehicle in Cantrell both had authority to consent to a search of the vehicle, (ii) the officer asked only one of them for consent to search the vehicle, and (iii) the other vehicle occupant did not object to the search, the Court held that the search was lawful. The Cantrell ruling limited the all-parties-present consent rule of Leach to fixed premises, such as a house or a business office.

Now, Walker holds that the search of a house in violation of the all-parties-present, fixed premises consent requirement of Leach applies only against the non-consenting party. Neither the Cantrell exception (for non-fixed premises) nor the Walker exception (for the consenting party at fixed premises) makes a lot of sense if one accepts the Leach rule.

However, we have difficulty finding common sense in the Leach rule, and we hope that prosecutors will look for a good case to re-visit the Leach rule itself. We believe that the better view, as reflected in some of the other-state cases cited in a footnote in the Walker majority opinion, is that a present, non-objecting party should not be able to object to a search conducted with consent of a co-occupant, at least where the non-objecting party was aware of the other party's consent before the search began. For now, of course, Washington law enforcement officers must adhere to the all-parties-consent requirement of Leach, subject to the exceptions noted above in this commentary.

2. **Does the Walker decision have any Ferrier implications?** A few months ago, the State Supreme Court ruled in State v. Ferrier, 136 Wn.2d 103 (1998) [Oct. 98 LED:02 & Nov. 98 LED:20] that, in a "knock and talk" search at a residence, officers cannot obtain valid consent unless they first advise the resident of his or her rights to: (A) refuse consent, (B) restrict scope, and (C) retract the consent. In Walker, the officers advised Mrs. Walker of her right to refuse consent, but they apparently did not advise her of her right to restrict scope or

to retract consent at any time. The Walker majority nonetheless did not question the procedure by which consent was obtained from Mrs. Walker.

If we were acting as a government attorney arguing a case, we might try to use this fact to argue that consent to search a house other than in a “knock and talk” situation can be obtained without giving the three Ferrier warnings. However, from our detached station as LED Editor, we would not give this fact much significance. Ferrier is not even mentioned by either the majority or the dissent in Walker. Until a Washington appellate court squarely addresses how Ferrier applies to non-“knock and talk” situations, we urge adherence to the Ferrier 3-part warnings requirement in all consent procedures at fixed premises. Once again, we urge officers to check with their prosecutors and/or legal advisors for advice on the scope of the Ferrier decision.

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### **BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT**

(1) **DISPATCHER STATEMENT IN 911 CALL AND LACK OF DISPATCH CREATES JURY QUESTION UNDER “PUBLIC DUTY DOCTRINE”** -- In Beal v. City of Seattle, 134 Wn.2d 769 (1998), a 6-3 majority of the State Supreme Court rules that the following facts were sufficient to support a lawsuit against the City of Seattle under the “public duty doctrine.”

On June 1, 1989, Melissa Fernandez was killed by her estranged husband, Fernando, when she went to his apartment to get some of her family's belongings. At the time, Ms. Fernandez had a protective order against her husband. When she arrived at the apartment building, Melissa Fernandez was accompanied by her mother and brother. She went to a neighbor's apartment, from which they called 911. During the call they told the operator that Ms. Fernandez's husband was next door, and that he would not let her get her property out of the apartment. The operator asked if Ms. Fernandez had a court order authorizing her to take the property. She said no, and added that her husband beat her up the previous Sunday, went to jail, and was out on bail. She said he had been harassing her and threatening her, and she had been told in order not to break the no contact order she needed “a civil standby” to come out. Ms. Fernandez told the operator that she had heard Fernando had been seen with a gun, though she did not know for sure if he had one. She gave the operator Fernando's name and description when asked. She also said that Fernando had taken her welfare check from the mailbox that day. The operator told her that “we're going to send somebody there” and “ [w]e'll get the police over there for you okay?” Ms. Fernandez said she would wait outside in front with her mom.

About 20 minutes later, Fernando approached the truck in which she was waiting and shot and killed Ms. Fernandez and then himself. By the time of the shootings, no police officer had been dispatched in response to the call for stand-by assistance.

A wrongful death action was filed in behalf of the minor children. The City of Seattle filed motions to dismiss the lawsuit based on a procedural issue, as well as on the substantive issue of whether the City was exempt from liability under the “public duty doctrine.” The trial court granted the City's motion on the procedural issue but denied the motion on the public duty doctrine issue. Both sides appealed. The Court of Appeals affirmed the trial court's dismissal on the procedural issue and did not address the substantive issue under the public duty doctrine.

On further review, a majority of the Supreme Court holds that a question of material fact was presented on plaintiffs' negligence theory against the City of Seattle. The majority rules under the “public duty doctrine” that there was evidence that, because of the 911 operator's assurance to the deceased, the City owed a special duty to protect the deceased. That duty was not merely the duty owed by the City to the general public, and therefore the wrongful death claim could be taken to trial.

The Supreme Court majority explains its ruling in part as follows:

Under the public duty doctrine, recovery from a municipal corporation in tort is possible only where plaintiff shows that the duty breached was owed to an individual, and was not the breach of a general obligation owed to the public in general, i.e., a duty owed to all is a duty owed to none. Chambers-Castanes v. King County, 100 Wn. 2d 275 (1983). Liability may exist, however, where

a relationship exists or has developed between the plaintiff and the municipality's agents giving rise to a duty to perform a mandated act for the benefit of a particular person or class of persons. Such special relationship arises where (1) there is direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public, and (2) there are express assurances given by a public official, which (3) gives rise to justifiable reliance on the part of the plaintiff. Thus, an actionable duty to provide police services can arise if these requirements are met.

The City maintains these requirements have not been met. The City contends that no express assurances were made, contrasting this case with Chambers-Castanes. In that case, 11 phone calls were made for police assistance within a 1-hour, 20-minute period. The court concluded in Chambers-Castanes that explicit assurances of protection had been made.

Here, the following portion of the transcription of the 911 call contains the assurances relied upon:

911: Okay. Well, I'll tell you what, we're going to send somebody there. Are you going to wait in the number 4 (another apartment) until we get there?

CALLER: I'll be waiting outside in the front with my mom.

911: Okay. We'll get the police over there for you, okay?

CALLER: Alright [sic], thanks.

Contrary to the City's position, as in Chambers-Castanes express assurances were made that police would be dispatched to assist.

**Result:** Reversal of King County Superior Court and Court of Appeals rulings on the procedural issue (not addressed here); affirmance of trial court denial of summary judgment on the public duty doctrine issue and remand of case for trial.

**(2) NO MIRANDA WARNING REQUIRED FOR "BACKGROUND" QUESTION** – In Personal Restraint of Pirtle, 136 Wn. 2d 467 (1998), a unanimous Washington Supreme Court again rejects double-murderer Blake Pirtle's challenge to his convictions and death penalty.

One of Pirtle's many theories on further review of this case was that the arresting police officer should have given him Miranda warnings before asking – "Do you know why you were arrested?" – to which Pirtle answered – "Of course I do, you might as well shoot me now."

The Supreme Court briefly explains as follows its view that the question by arresting officer was a mere "background" question, not "interrogation", and therefore did not require Miranda warnings:

Deputy Walker asked Pirtle if he knew why he was being arrested, which occurred at the time of the arrest. The expected response to Deputy Walker's question was likely "yes" or "no" and falls into the background questioning category under which Miranda warnings are not applicable. See State v. Bradley, 105 Wn.2d 898 (1986); State v. Walton, 64 Wn. App. 410 (1992); State v. Franklin, 48 Wn. App. 61 (1987). [Court of Appeals footnote: *In Franklin*, the Court of Appeals concludes an officer's question as to whether an inmate awaiting extradition "understood what he had been charged with in Washington" was not designed to elicit an incriminating response and did not constitute an interrogation even though the inmate responded by saying he was surprised he was being charged with murder since he had only committed robbery.]

**Result:** Denial of personal restraint petition of double murderer Blake Pirtle.

**(3) FAILING TO REPORT TO WORK CREW DUTY PER CRIMINAL SENTENCE IS "ESCAPE"** -- In State v. Guy; State v. Ammons, 136 Wn.2d 453 (1998), a 6-3 majority of the State Supreme Court rules that a defendant who fails to report to work crew duty to which he has been sentenced following a criminal conviction is guilty of "escape."

The Supreme Court thus agrees with a decision of the Court of Appeals that the term "escape from custody" in chapter 9A.76 RCW must be read in light of the definition of "custody" in that chapter (see March '98 **LED** entry on Court of Appeals decision at pp. 21-22). "Custody" includes "any period of service on a work crew." RCW 9A.76.020(1). The Supreme Court majority rules that it does not matter whether a defendant sentenced to work

crew duty a) reports to a work crew and walks away; or b) as here, simply fails to even report to work crew duty. Either act constitutes “escape,” the Court holds in these consolidated cases.

Justices Madsen, Johnson and Sanders dissent by separate opinion.

**Result:** Affirmance of Clark County Superior Court first degree escape conviction of Troy Lee Guy and Joey Allen Ammons.

**(4) “DIMINISHED CAPACITY” DEFENSE MADE EASIER** – In State v. Ellis, 136 Wn.2d 498 (1998), a 7-2 majority of the Washington Supreme Court relaxes the non-statutory standards for presenting the court-created “diminished capacity” defense. The majority overrules in part the precedent of State v. Edman, 26 Wn. App. 98 (1981), which stated a 9-part test for admission of diminished capacity evidence.

All that is required, the Ellis majority appears to hold, is that defendant present otherwise admissible expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant’s ability to form the specific intent to commit the crime charged. Justice Talmadge writes a dissent challenging both: A) the majority view that the testimony satisfied the pertinent evidence rules in relation to the non-statutory defense of “diminished capacity”; and B) the very idea that, as a matter of statutory interpretation, defendants should ever be allowed to present expert testimony on “diminished capacity” other than under the statutory “insanity” defense. Justice Durham joins Talmadge’s view on the first point but not the second.

**Result:** Reversal of Pierce County Superior Court order granting State’s motion to preclude defendant’s presentation of expert testimony on diminished capacity; case remanded for trial on charges that defendant bludgeoned his mother and half-sister to death with a breadboard.

**(5) WASHINGTON STATUTE BARRING DOUBLE JEOPARDY INCLUDES MILITARY NONJUDICIAL PUNISHMENT AS A PRIOR PROSECUTION** – In State v. Ivie, 136 Wn.2d 173 (1998), the State Supreme Court rules, 5-4, that where a state court DUI defendant has already been subjected to military “nonjudicial punishment” for DUI under Article 15 of the Uniform Code of Military Justice (UCMJ), RCW 10.43.040 bars state court prosecution DUI for the same conduct.

Neither the state nor the federal constitution bars multiple prosecutions for the same conduct by separate sovereigns. Hence, there is no constitutional restriction on multiple prosecutions by separate states or federal (including military) jurisdictions. However, the State of Washington statutorily limits double jeopardy under RCW 10.43.040, which reads:

Whenever, upon the trial of any person for a crime,. . . the defendant has already been acquitted or convicted upon the merits, upon a criminal prosecution under the laws of {another} state or country, founded upon the act or omission with respect to which he is upon trial, such former acquittal or conviction is a sufficient defense.

The majority and dissent agree in Ivie that RCW 10.43.040 would bar a state court prosecution following a military criminal prosecution for the same conduct. However, the Ivie dissenters -- Justices Guy, Talmadge, Dolliver and Smith -- argue that a “nonjudicial punishment” under Article 15 of the UCMJ should be considered a “criminal prosecution” for purposes of the statute.

**Result:** Reversal of Kitsap County Superior Court order which had reversed a district court dismissal order; DUI prosecutions against James E. Ivie and Steve Taylor dismissed.

**LED EDITOR’S NOTE:** Look for a legislative proposal in the 1999 session to close this loophole.

**(6) PARTS OF INTERPRETER ACT STRICKEN AS IMPROPERLY ADOPTED** – In Patrice v. Murphy, \_\_\_ Wn. 2d \_\_\_ (1998) [1998 WL 79 8713] [966 P.2d 1271], a unanimous Washington Supreme Court strikes down two subsections of the Washington statute on “interpreters in legal proceedings.”

Jeanette Patrice sued certain police officers and their agencies, claiming, among other things, that her rights had been violated under Washington’s statute regarding interpreters, chapter 2.42 RCW. Ms. Patrice is a deaf person who was arrested following police investigation of a domestic violence (DV) incident. The officers did not have an interpreter available to interview her at the time of their response to the DV call, so they had used a written interview method.

Ms. Patrice claimed in her lawsuit that the officers’ written interview method had violated her rights under subsections (4) and (5) of RCW 2.42.120, which provide as follows:

- (4) If a law enforcement agency conducts a criminal investigation involving the interviewing of a hearing impaired person, whether as a victim, witness, or suspect, the appointing authority shall appoint and pay for a qualified interpreter throughout the investigation. Whenever a law enforcement agency conducts a criminal investigation involving the interviewing of a minor child whose parent, guardian, or custodian is hearing impaired, whether as a victim, witness, or suspect, the appointing authority shall appoint and pay for a qualified interpreter throughout the investigation. No employee of the law enforcement agency who has responsibilities other than interpreting may be appointed as the qualified interpreter.
- (5) If a hearing impaired person is arrested for an alleged violation of a criminal law the arresting officer or the officer's supervisor shall, at the earliest possible time, procure and arrange payment for a qualified interpreter for any notification of rights, warning, interrogation, or taking of a statement. No employee of the law enforcement agency who has responsibilities other than interpreting may be appointed as the qualified interpreter.

A unanimous Washington Supreme Court rules in Patrice that the two above-quoted subsections of RCW 2.42.120 were unconstitutionally adopted by the 1985 Washington Legislature. The Supreme Court therefore invalidates the subsections. The Court holds under the legislative bill title requirements of the Washington constitution that the 1985 bill title did not adequately suggest that these interpreter provisions were covered in the bill. Accordingly, the two subsections of RCW 2.42.120 are void, and Ms. Patrice's cause of action against the police under RCW 2.42.120 (4) and (5) cannot stand.

Result: Ms. Patrice's action under interpreter act dismissed; case returned to federal court for further proceedings on Ms. Patrice's other theories of liability.

**(7) PUBLIC RECORDS ACT HELD TO EXEMPT PROSECUTOR RECORDS WHICH WOULD BE PROTECTED FROM CIVIL DISCOVERY BY "WORK PRODUCT" DOCTRINE** – In Limstrom v. Ladenburg, 136 Wn.2d 595 (1998), a 5-4 majority of the State Supreme Court grants a generally favorable ruling to a county prosecutor on a Public Records Act (PDA) question.

At issue was the following PDA exemption at RCW 42.17.310(1)(j):

[r]ecords which are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts.

A private attorney (Owen Limstrom) had sought access to certain criminal litigation files of the county prosecutor. The Supreme Court majority rules in Limstrom that the more protective civil discovery rules, including what is known as the (attorney) "work product" rule, apply to disclosure of both civil and criminal litigation files under the PDA. The Court remands the case to the trial court for review of the records and a determination of which records must be disclosed.

Result: Reversal of Court of Appeals decision favorable to Limstrom; remand to trial court for hearings.

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**WASHINGTON STATE COURT OF APPEALS**

**IMPOUNDING PASSENGER-LESS CAR DRIVEN BY SUSPENDED DRIVER REASONABLE UNDER THE TOTALITY OF THE CIRCUMSTANCES, BUT REYNOSO/COSS RULE OF REASONABLENESS RETAINED**

State v. Peterson, \_\_\_ Wn. App. \_\_\_ (Div. III, 1998) [964 P.2d 1231]

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

Ralph John Peterson was the driver and sole occupant, but not the owner, of a car that was pulled over at 2:00 A.M. by Officer Richard Carroll for expired license tabs. Mr. Peterson was unable to locate the registration or proof of insurance. A radio check revealed Mr. Peterson's license was suspended. Officer Carroll learned through the Department of Licensing that the car was owned by John Brady. Without further inquiry of Mr. Peterson, and without attempting to contact Mr. Brady, Officer Carroll decided to impound the car. He instructed Mr. Peterson to exit the car, and he

searched it. During the search, the officer discovered a small blue pouch next to the driver's seat with a syringe sticking out of it. Inside the pouch was cocaine. Mr. Peterson was arrested for possession of a controlled substance.

Prior to trial, Mr. Peterson moved to suppress the items found in the car. The court found the search was proper, pursuant to a lawful impoundment, and was reasonable considering Mr. Peterson's suspended license, the expired car license, the lack of insurance or registration and the lack of testimony that another driver was available to move the car. Following a jury trial, Mr. Peterson was convicted of two counts of possession of a controlled substance.

**ISSUE AND RULING:** Did the officer lawfully impound Peterson's car? (**ANSWER:** Yes, rules a 2-1 majority, because it was reasonable under the totality of the circumstances)

**Result:** Affirmance of Spokane County Superior Court conviction of possession of a controlled substance (two counts).

**ANALYSIS:** (Excerpted from Court of Appeals opinion)

The reasonableness of a particular impoundment must be determined from the facts of each case. Three circumstances justify impounding a vehicle: (1) as evidence of a crime; (2) as part of the police "community caretaking function," if removal of the vehicle is necessary; and (3) as part of the police function of enforcing traffic regulations, if the driver has committed a traffic offense for which the Legislature has authorized impoundment.

The State contends that since Mr. Peterson was operating the vehicle while his license was suspended, the officer was justified in impounding the car pursuant to former RCW 46.20.435(1). That statute provided: "Upon determining that a person is operating a motor vehicle ... with a suspended or revoked license in violation of RCW 46.20.342 or 46.20.420, a law enforcement officer may immediately impound the vehicle that the person is operating." *[COURT'S FOOTNOTE: This statute is now codified at RCW 46.55.113 (1997) and provides: "[A] police officer may take custody of a vehicle and provide for its prompt removal to a place of safety under any of the following circumstances:*

*"...  
"(7) Upon determining that a person is operating a motor vehicle ... with a suspended or revoked license in violation of RCW 46.20.342 or 46.20.420." Former RCW 46.20.435 was in effect in May 1996 when the car was impounded.]*

Police officers are to exercise discretion when deciding to impound a vehicle. *State v. Reynoso*, 41 Wn. App. 113 (1985). "Discretion necessarily involves sound judgment based upon the particular facts and circumstances confronting the officer." Former RCW 46.20.435 was meant to prevent a continuing violation of RCW 46.20.021. Accordingly, "[i]f a validly licensed driver is available to remove the vehicle, a reason to impound must be shown."

In *State v. Coss*, 87 Wn. App. 891 (1997) [**Feb 98 LED:17**] the driver had a suspended license, but several other passengers were present but not afforded the opportunity to drive the car from the scene. Here, Mr. Peterson was in the car alone at 2:00 A.M. The officer pulled him over because the vehicle had expired tabs. Subsequently, Mr. Peterson could not locate the registration or proof of insurance. Upon learning of Mr. Peterson's suspended license, the officer decided to impound the car, but not arrest Mr. Peterson for driving with a suspended license. The record reflects the officer's intention to impound the car rather than arrest Mr. Peterson in order to insure **[sic – Do they mean "ensure against?" -- LED Editor]** the further use of the car by Mr. Peterson.

*Coss* followed *Reynoso*, wherein this court ruled the statutory impound authorization was permissive and, therefore, the police's exercise of discretion to impound the vehicle must be reasonable and used to prevent further violations of the traffic code. The State argues this approach adds additional requirements not found in the statute. The State asks us to reconsider our decision in *Reynoso*. Having followed the *Reynoso* holding last year in *Coss*, we decline to reconsider it.

The facts of this case and *Coss* are distinguishable by the presence of the other passengers. It was unreasonable for the officer to impound the vehicle in *Coss* without determining whether these passengers could legally have driven the car from the scene or safely made other arrangements for it. Here, the owner was not present to authorize a licensed and insured driver to remove the vehicle or to authorize leaving the vehicle by the side of the road. The decision of the trial court is consistent with

Reynoso. The impoundment was the best approach to protect the police and the property owner and was reasonable under these circumstances.

[Some citations omitted]

**DISSENT:** Judge Schultheis dissents, arguing that the impoundment was unreasonable because the officer did not consider all reasonable alternatives to impoundment. Among other things, Judge Schultheis asserts:

By his own admission [the officer] did not attempt to contact the registered owner of the vehicle or ask Mr. Peterson if there was someone with a valid driver's license who would be willing to move the vehicle prior to calling for a tow truck. Although an officer is not required to exhaust all possibilities, the officer must at least consider alternatives to impoundment. If no remedy can be found after this deliberation, impoundment is proper.

Because I believe the officer should have taken some reasonable step toward contacting the owner of the car prior to calling the tow truck, the impoundment was unreasonable and thus unlawful. As such, there was no justification for the inventory search.

[Citation, officer's name omitted]

**LED EDITOR'S COMMENTS:** As we have suggested in our past LED Editor's Comments" on the Court of Appeals decision in Coss (Feb 98 LED at 19-20) and the State Supreme Court decision in State v. White, 135 Wn.2d 761 (1998) (September 98 LED at 13 and November 98 LED at 20), several questions remain unresolved regarding the impounding of vehicles driven by suspended or revoked drivers.

First, Judge Schultheis' dissent in Peterson suggests that impounding officers must demonstrate that they actually considered and rejected all reasonable alternatives to impoundment. The majority judges in Peterson hold, however, that there need not be proof of actual consideration of reasonable alternatives, nor need the impoundment decision be compared against all reasonable alternatives. Rather, the decision to impound need only meet a general reasonableness inquiry.

Second, the deletions and additions of language under 1988 amendments to the current impound-authorizing statute, RCW 46.55.113, have created a new issue under the Reynoso/Coss/Peterson line of cases. Is impound to prevent continued driving while suspended or revoked presently a lawful police action in the absence of an authorizing local ordinance or state-agency-specific regulation on point? [See note below in this LED at page 23 regarding Seattle's recent adoption of a remedial impound ordinance under chapter 203, Laws of 1998.] Check with your prosecutor and/or legal advisor regarding your present authority to impound—for the purpose of preventing a continuing violation of the law-- a vehicle driven by a suspended or revoked driver.

#### **BROAD SEARCH WARRANT AUTHORIZATION FOR "CONTROLLED SUBSTANCES", AND AFFIDAVIT'S "NEXUS" GENERALIZATIONS CRITICIZED; BUT WARRANT UPHELD**

State v. Thein, 91 Wn. App. 476 (Div. I, 1998)

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

On April 14, 1995, King County Narcotics Task Force officers served a search warrant on Thein's residence at 3921 S.W. Austin in Seattle where they discovered a large marijuana grow operation and a power diversion. Prior to trial, Thein moved to suppress the results of that search on the ground that the warrant was not supported by probable cause. The affidavit on which the search warrant was based recited that on April 13, 1995, police had served a search warrant on a residence at 316 S. Brandon and placed the resident, Laurence McKone, under arrest after finding approximately half a pound of marijuana in a freezer and materials commonly used to package it nearby. [*COURT'S FOOTNOTE: The affidavit in support of the search warrant obtained for McKone's residence was attached to and incorporated into the affidavit in support of the search warrant for Thein's residence.*] In a storage area in the basement of 316 S. Brandon, adjacent to an area that served as a wood workshop, police also found materials commonly associated with cultivating marijuana, including grow lights, plant trays, fertilizer, potting soil, and a humidifier. Next to the materials they found a packing slip for a "Clean-air" system indicating that it had been shipped to "Stephen Thein, 316 So. Brandon" six months earlier. In the woodworking portion of the shop, police found a receipt on a work bench from the Tacoma Screw Company with the address "3921 S.W.

Austin" written on it. Police also found several boxes of nails under the work bench; Steve Thein's name and the S.W. Austin address was on one of the boxes. Upstairs in the residence, police found money orders from McKone to Thein with the notation "rent."

The affidavit went on to recite that, after finding these items, police contacted the Department of Licensing and learned that "Steve Thein" was the registered owner of a 1994 Toyota pickup truck. Police had found two boxes of oil filters in the basement marked "Toyota" along with a used oil filter in a plastic bag that contained potting soil. Police read McKone his rights but he declined to give them any information about Thein. While police were there, Michael Terebesi, a neighbor, came by and told them that McKone's source for marijuana was a white male approximately 40 years old who drove a black Lexus and periodically visited 316 S. Brandon. A little later, Sheila Hegge arrived to buy marijuana and told police that McKone's supplier was his landlord who was a man named "Steve." [COURT'S FOOTNOTE: The information that "Steve" was McKone's landlord was arguably contradicted by other information police had (described in the affidavit submitted in support of the search warrant for McKone's residence) which identified the owner as a Mrs. Ray Bade, but it was supported by the money orders found in McKone's residence.] She told police McKone met Steve through an old boyfriend of hers eleven years earlier and that only Steve used and controlled the basement area of the house. She also stated that she had seen Steve drive a black Lexus to 316 S. Brandon. The affidavit recited that Don Mitchell, the citizen informant who gave police the tip on which the search warrant for 316 S. Brandon was based, also told police that the landlord drove a black Lexus-type vehicle. When police checked with the Department of Licensing a second time, they learned that Thein was the registered owner of a black 1994 Acura Legend and that his address was listed as 3921 S.W. Austin. In his affidavit supporting the S. Brandon search, Mitchell also said McKone told him he would be getting another supply of marijuana soon.

In addition to facts specific to Thein, the affidavit also included a number of general observations about the habits of marijuana growers based on the affiant police officer's training and experience.

For example, the affidavit stated that

- **It is common for marijuana growers to secret contraband, proceeds of sales and records of transactions in secure locations within their residences for ready access, and to conceal them from police.**
- **Persons involved in large scale marijuana growing operations often conceal within their residence, caches of drugs, large amounts of cash, financial instruments ...**

Based on the facts in the affidavit, the officer stated he believed Thein was currently involved in the manufacture and distribution of marijuana and that evidence of that activity was located at his residence at 3921 S.W. Austin. The search warrant authorized police to search both Thein and his residence at 3921 S.W. Austin and to seize the following:

**Controlled substances**, including but not limited to marijuana including all containers, implements, fruits of the crime, fixtures used or kept for illegal manufacture, sale, barter, exchange, furnishing or otherwise disposing of said controlled substances; evidence of ownership to such property or rights of ownership or control of said property; narcotics records including any notebooks or written instruments associated with the manufacture, sale, exchange and furnishing of narcotic substances; any firearms found in violation of RCW 9.41.098(c).

The trial court denied Thein's motion to suppress. At the conclusion of a trial on stipulated facts, the court found Thein guilty of one count of possession of a controlled substance with intent to deliver and one count of defrauding a public utility.

[Bolding added by LED Editor]

ISSUE AND RULING: 1) Was the warrant's general authorization to search for "controlled substances" overbroad, in light of the fact that the only controlled substance described in the affidavit was marijuana? (ANSWER: Question not answered definitively – the Court criticizes the broad reference to "controlled substances" even though the authorization also specified "marijuana"); 2) Assuming that the search warrant authorization was overbroad, if the phrase, "controlled substances, including but not limited to," is severed from the warrant, should the search be upheld based on the remaining language in the warrant? (ANSWER: Yes); 3) Did the affidavit provide a sufficient nexus (link) between the illegal activities described and the house at "3921 SW Austin" to provide probable cause to search the house? (ANSWER: Yes, although some of the officer's allegations about "typical" drug dealer activity are subject to question)

Result: Affirmance of King County Superior Court convictions for possession of controlled substances with intent to deliver and defrauding a public utility.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) AUTHORIZATION TO SEARCH FOR "CONTROLLED SUBSTANCES"

Thein argues that the search warrant was constitutionally overbroad because by authorizing officers to search for drugs other than marijuana, it allowed a general search that exceeded any probable cause established in the affidavit supporting the search warrant. A search warrant must describe the items to be seized with particularity. "The purposes of the search warrant particularity requirement are the prevention of general searches, prevention of the seizure of objects on the mistaken assumption that they fall within the issuing magistrate's authorization, and the prevention of the issuance of warrants on loose, vague, or doubtful bases of fact." The particularity requirement is intended to prevent " 'general, exploratory rummaging in a person's belongings' " by law enforcement officials. We examine the warrant de novo and must evaluate it in a commonsense, practical way rather than being hypertechnical. Where there is a logical, reasonable basis for redacting an overbroad portion of the warrant, it may be severed from the remaining valid portion and evidence seized based on the latter is not subject to the exclusionary rule.

2) HARMLESS ERROR

Even if we assume the warrant was too general, there is no reason not to sever the arguably overbroad phrase "controlled substances, including but not limited to" from the remainder of the search warrant. This is not a case like Perrone [State v. Perrone, 119 Wn.2d 538 P.2d (1992) **Nov 92 LED:04**] involving materials presumptively protected by the First Amendment "where extensive 'editing' throughout the clauses of the warrant is required to obtain potentially valid parts." Here, redacting the warrant to exclude seven words neither renders it meaningless nor reduces the valid portion to an "insignificant part" of the warrant when compared to the redacted portion. As redacted, the warrant clearly authorizes the police to do exactly what they, in fact, did: search for marijuana, items used to grow and distribute it, records and proceeds of the operation and weapons that may be associated with protecting it.

While we join Division II of this court in urging more precision in wording search warrants, even for controlled substances, we hold that this is a proper case for severing the general from the specific terms of the warrant. As redacted, it does not authorize a broad, general search that offends the Fourth Amendment or Article 1, Section 7 of the Washington Constitution. [COURT'S FOOTNOTE: We also agree with the State's observation that, because the warrant properly authorized police to look for papers, records and weapons, they could legitimately search drawers and smaller containers than those associated with growing and storing large quantities of marijuana. These are the same places one would expect to find caches of other controlled substances like cocaine, heroin and prescription drugs.]

3) PC NEXUS TO 3921 SW AUSTIN RESIDENCE

An affidavit is sufficient to establish probable cause to support a search if it contains facts from which an ordinary, prudent person would conclude that a crime has occurred and evidence of the crime could be found at the location to be searched.

Thein argues that the affidavits supporting the warrant to search his house do not establish a nexus between this residence and the suspected drug trafficking. " '[T]hat nexus may be established either through direct observation or through normal inferences as to where the articles sought would be located.' " For that reason, a "warrant may be upheld when the nexus between the items to be seized and the place to be searched rests not upon direct observation, but on the type of crime, nature of the items, and normal inferences [about] where a criminal would likely hide contraband."

Washington courts have held that "a nexus is established between a suspect and a residence if the affidavit provides probable cause to believe the suspect is involved in drug dealing and the suspect is either living there or independent evidence exists that the suspect may be storing records, contraband, or other evidence of criminal activity at the residence." But the general observations

must be based on some specific facts which support an inference that the particular individual is involved in drug dealing and evidence of that activity is likely to be found at the place to be searched.

**While generalizations about the typical behavior of drug traffickers aid in interpreting facts and determining what is a reasonable inference, they do not serve as a substitute for adequate investigation and facts specific to the particular individual whose residence is the subject of the search warrant. Some police officers have testified that drug traffickers typically keep relevant evidence in their homes; other officers who are familiar with the practices of drug traffickers have also testified in court that the opposite may be true. [COURT'S FOOTNOTE: See, e.g., *State v. Gonzales*, 78 Wn. App. 976 (1995) ("individuals who deal large amounts of illegal substances typically do not keep them on their person or in their homes"). *Gonzales* illustrates the problem with relying on generalizations rather than facts specific to the suspect and his activities. Police cannot rely on generalizations about what is "typical" that are opposite to one another depending on what kind of search warrant they want to get. Two opposites can't both be "typical", even if sometimes one and sometimes the other is true in specific circumstances.]**

While somewhat circuitous, the two affidavits the issuing magistrate considered did contain evidence which, when combined with logical inferences, made it more likely than not that evidence of marijuana distribution and/or a growing operation would be found at Thein's house. First, taken together, the statements of the three informants were sufficient to establish that Thein was involved in distributing marijuana. [COURT'S FOOTNOTE: See, *State v. Lair*, 95 Wn.2d 706 (1981) (veracity prong established by showing an informant has previously supplied accurate information) (Don Mitchell); *State v. Kennedy*, 107 Wn.2d 1 (1986) (citizen informants generally reliable) (Michael Terebesi); *State v. Gunwall*, 106 Wn.2d 54 (1986) (statement against penal interest makes informant's information more reliable) (Sheila Hegge); *State v. Jackson*, 102 Wn.2d 432 (1984) (the basis of knowledge prong of the *Aquillar-Spinelli* test requires explanation of how informant claims to have gotten the information provided.)]

Those statements together told the magistrate that "Steve" was the landlord who had sole control over the basement of the 316 S. Brandon house and that the landlord was McKone's marijuana source. Mitchell also told police McKone said he would be getting a new shipment from his supplier soon. All three informants said "Steve" drove a black Lexus-type car. When police checked with the Department of Motor Vehicles, they discovered that Thein owned a black Acura, a car similar to a Lexus.

Second, when police searched the part of the house over which the landlord had sole control, they found many items commonly associated with marijuana grow operations and at least two items with Thein's name and the S.W. Austin address on them. One of those, the receipt for the "Clean-air" system delivered to Thein's home, was for equipment commonly associated with cultivating marijuana, an item made necessary by the plants' rather distinctive odor. When they found the money orders from McKone to Thein for "rent," there could be little doubt that he was the landlord/marijuana supplier about whom the informants had spoken.

Even without relying on the generalized statements about drug dealers' habits in the affidavits, two logical inferences from evidence police already had establish probable cause to believe evidence would be found at 3921 S.W. Austin. Thein was a supplier, but no grow operation or large supply was found in the basement of 316 S. Brandon. Therefore, it was likely that the source of the marijuana "Steve" used to supply McKone would be found at the other place Thein controlled -- his home. If McKone was expecting another supply from his source soon, it was likely that the supplier had it or evidence of his ability to deliver it at the only other place anyone knew it could be -- his home.

The proximity of the air cleaner receipt to the other marijuana grow evidence coupled with Thein's sole control of the basement establish a connection between Thein and a marijuana grow operation at this home. His position as McKone's supplier, from whom McKone was expecting an imminent delivery, and the absence of a grow operation or any marijuana supply other than what McKone already had at 316 S. Brandon, establish the probability that the supply was located at the address found in the landlord's basement. These facts and the logical inferences from them supply sufficient probable cause to believe there was evidence of Thein's drug activities at his home. The warrant was valid.

**To illustrate a point, we have not relied on the affidavit's general statements about drug dealers' habits in performing this analysis. Thein contends that it appears police, perhaps in reliance on our opinions in *Gross* [*State v. Gross*, 57 Wn. App. 549 (Div. I, 1990) Aug 90**

LED:13] and O'Neil [State v. O'Neil, 74 Wn. App. 820 (Div. I, 1994) Sept 95 LED:17], have substituted these generalized statements for the investigation necessary to establish a nexus between drug dealing and the place they want to search. We agree. Here, police certainly had sufficient information to justify further investigation of Their's residence. They could have obtained power records and/or asked the power company to investigate whether power was being diverted. They could also have observed the appearance of his home to determine whether there were blocked windows, the smell of growing marijuana or other indicia of a grow operation. But the affidavit does not reflect that police conducted any further investigation to determine either the extent of Their's drug trafficking activities or to identify facts what would support the inference that there was a nexus between those activities and his home. Because, as the Gonzales case illustrates, general statements about drug dealers' habits can go two ways, we encourage police and magistrates who issue search warrants to require more investigation into the particular suspect and where evidence of drug activity may be located rather than relying too heavily on the officers' general experience in issuing a search warrant. Had they done so here, this appeal would not have been necessary.

[Some footnotes and citations omitted; bolding by LED Editor]

#### **AFFIDAVIT ESTABLISHES PC FOR SEARCH OF SUSPECTED "SAFE HOUSE" LOCATION**

State v. Perez, 92 Wn. App. 1 (Div. I, 1998)

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

On November 11, 1994, Seattle police detectives executed a search warrant for a house at 3021 SW Thistle in Seattle. The warrant was based on an affidavit by Detective David C. Unger who was conducting an investigation into the activities of Agapito Avila-Arias, aka "Felix." Based on observations made in the course of that investigation, Detective Unger believed that 3021 SW Thistle was a "safe-house" used by Felix to store drugs and money. **LED EDITOR'S NOTE: The critical facts regarding the allegations of the affidavit are set forth in the Court's "analysis" below.** When police served the search warrant and entered the house, they encountered Robert Perez and Regina Villalovos. Perez told police where both cocaine and money were located. Police found 60 grams of cocaine, \$8,200 in cash and a .40 caliber Glock semiautomatic pistol on the premises. Perez admitted he was holding the cash for his wife's brother-in-law, the man known to police as "Felix." He also admitted he had been selling cocaine for about two months.

On January 3, 1996, Perez was charged with possession of cocaine with intent to deliver. At the CrR 3.6 hearing held October 10, 1996, Perez moved to suppress the evidence seized at 3021 SW Thistle on the ground that the search warrant was invalid. The trial court denied his motion. Perez was convicted as charged.

**ISSUE AND RULING:** Was a sufficient connection made between the activities of "Felix" and the 3021 SW Thistle address to establish probable cause to search that location as a "safe house"? (ANSWER: Yes) Result: Affirmance of King County Superior Court conviction for possession of cocaine with intent to deliver.

**LED EDITOR'S INTRODUCTORY NOTE:** The description in the excerpted "analysis" below regarding the affidavit's factual allegations is necessarily complex. On one day of surveillance, from the time that the suspected drug dealer left his apparent residence at 9816 20<sup>th</sup> SW, #101 until he returned there later in the day: A) he made nine stops at seven different locations; B) he made two car switches; and C) he went into and out of a suspected "safe house" location at 3021 SW Thistle three different times. We recommend that LED readers scrutinizing the PC question of this case prepare either a flow chart map or a time line, or both, with focus on the 3021 SW Thistle address. Such a flow chart or time line would help illustrate why the officers were suspicious of the possible "safe house". To help you follow this busy drug dealer, we have bolded the "3021 SW Thistle" references in the excerpts below, and we have underlined the other location references.

The Court of Appeals analysis of the PC "safe house" issue is as follows:

In determining the validity of a search warrant, we consider whether the affidavit on its face contained sufficient facts for a finding of probable cause. An affidavit is sufficient to establish probable cause to support a search if it contains facts from which an ordinary, prudent person would conclude that a crime has occurred and that evidence of the crime could be found at the location to be searched. We

examine the warrant de novo and evaluate it in a commonsense, practical manner, rather than hypertechnically. Issuance of a search warrant is a matter of judicial discretion, and great deference is accorded a magistrate's determination of probable cause. That deference, however, is not boundless and we will not defer to a magistrate's decision if the information on which it is based is not sufficient to establish probable cause. We resolve any doubts in favor of the validity of the warrant.

Perez contends there was insufficient evidence to support the search warrant because the facts did not establish a nexus between Felix and **3021 SW Thistle**. An affidavit in support of a search warrant must state facts which establish a nexus between the place to be searched and the evidence sought. Washington courts have held that "a nexus is established between a suspect and a residence if the affidavit provides probable cause to believe the suspect is involved in drug dealing and the suspect is either living there or independent evidence exists that the suspect may be storing records, contraband, or other evidence of criminal activity at the residence." "That nexus may be established either through direct observation or through normal inferences as to where the articles sought would be located." For that reason, "a warrant may be upheld when the nexus between the items to be seized and the place to be searched rests not upon direct observation, but on the type of crime, nature of the items, and normal inferences [about] where a criminal would likely hide contraband."

Perez argues that the required nexus was not established because there were no facts in the affidavit to support the inference that Felix used **3021 SW Thistle** as a safe house. We disagree. First, the affidavit recites that police received information from a reliable informant **[LED EDITOR'S NOTE: No challenge was made to the affidavit's allegations establishing the informant's credibility and basis of suspicion.]** within two weeks before the warrant was issued about a large quantity cocaine dealer known as Felix. The informant gave police Felix's pager number and told them that when Felix is paged, he will bring only the amount of cocaine needed and meet the customer at various locations to complete the transaction. Police directed the informant to page Felix and arrange a controlled buy. Felix returned the page and a narcotics transaction was arranged. Police established surveillance at the location where it was to take place. The informant completed a successful controlled buy. Police then followed Felix as he drove directly to 9816 20th SW # 101 where surveillance ended thirty minutes later. Police observed his pickup parked near # 101 several times during the next couple of days.

Four days before the warrant was issued, the same informant contacted Detective Unger and told him that Felix was contacting his customers and telling them he had just received a large shipment of narcotics. The following day, police saw Felix leave #101 alone and again asked the informant to page him to request narcotics. The informant did so. Felix returned the page and agreed to a time and location for the narcotics transaction. Following this page, Felix drove directly to **3021 SW Thistle** and entered the house. After about 10 minutes he left the house alone and drove directly to a house at 9445 25th SW, a prior address for Avila-Arias at which a vehicle belonging to John Villalovos Jr. had been parked within the previous couple of days. Felix entered the house, left again a short time later, and drove directly to the location at which he had agreed to meet the informant. A second successful controlled buy was completed. Felix then drove directly back to **3021 SW Thistle** and again entered the house. About 20 minutes later, he left the house with four others and drove directly to an apartment building located at 1050 SW 151st in a car registered to Robert Perez. Felix and another man entered the building on foot. Felix emerged about 15 minutes later and got back into the car. Police then followed it directly to the corner of 4th Ave. S. and S. Michigan where Felix and two others got out of the car, met another person, and walked to a car in the parking lot which they entered. They drove that car directly to **3021 SW Thistle** where Felix got out of the car and into his pickup. Both vehicles then drove back to the apartment building at 1050 SW 151st. This time everyone in both vehicles went inside and entered a room police later determined had just been rented that morning. Felix left in his pickup about ten minutes later followed by a man in the second car. Both drove to a nearby store. Felix then left alone and drove directly to 9445 25th SW and entered the house. When he left about twenty minutes later, he drove directly to another location where an unidentified man was waiting for him. Felix parked the pickup next to the man who approached the driver's side of the vehicle. They talked for about two minutes, and police saw something pass between them. Detective Unger noted in his affidavit that this was consistent with a narcotics transaction. Felix then drove directly to 9816 20th SW #101 where the surveillance ended. In addition to reciting these facts, the affidavit states that the quantities of narcotics sold to the informant showed that Felix was the large quantity dealer the informant had reported.

Perez's argument that these facts are insufficient to establish the required nexus between Felix's illegal drug activity and the house at **3021 SW Thistle** is without merit. We agree with Perez that "standing alone, an officer's belief that [drug dealers] hide evidence at other premises under their

control does not authorize a warrant to search those places." In contrast to Olson [State v. Olson 73 Wn. App. 348 (Div. I, 1994) **March 95 LED:15**], however, here the detective's belief was supported both by specific information provided to police by the informant, i.e., that Felix carries only the amount of cocaine needed for each transaction, and by their direct observations of Felix's activity following the informant's page to arrange a controlled buy. In the context of the information they had received from the informant, that pattern of activity clearly supported an inference that both 9445 25th SW and **3021 SW Thistle** were safe houses -- places where Felix kept contraband, proceeds or other evidence of his drug dealing activities. In addition, police were also aware, based on a prior arrest report for Agapito Avila-Arias, that there was no cocaine found in his house on the same day that he made two narcotics sales to an undercover detective. All this provided a factual basis to which the detective could apply his knowledge and experience to infer that Felix was the kind of large scale drug dealer who typically uses various locations to avoid detection of his illegal operations, products and proceeds.

In addition, the informant had reported that some of Sherry Villalovos's sisters were involved in selling narcotics provided by her husband Felix. Police then discovered that a Regina Villalovos was connected with an address Sherry had previously used and that she listed Felix's current address on her Washington driver's license. These facts supported an inference that the Regina Villalovos who was billed, along with Robert Perez, for electricity at **3021 SW Thistle** was one of Sherry's sisters.

All these facts, taken together, were more than sufficient to establish the required nexus between the suspected criminal activity and the house at **3021 SW Thistle**.

[Some citations omitted, bolding and underlining by LED Editor]

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#### **FEDERAL BRADY LAW'S INSTANT CHECK SYSTEM TAKES EFFECT**

On November 30, 1998 the Federal Brady Law's Instant Check system went into effect. We won't attempt to summarize here the extensive relevant: (A) current provisions of Federal laws and regulations; (B) recent Federal agency (ATF and FBI) communications on this subject, or (C) relevant Washington law provisions in chapter 9.41 RCW. Instead, we will provide our readers with a November 23, 1998 letter (slightly modified for the LED) written to Washington Firearms Dealer Licensees by Joe Vincent, Jr., Washington Department of Licensing Firearms Program Manager:

*By now you should have received information from the Bureau of Alcohol Tobacco, and Firearms (BATF) regarding the implementation of the permanent provisions of the Brady Act, specifically the National Instant Check System or NICS. These provisions require criminal history checks through the NICS for all firearm sales. Representatives from local law enforcement, Washington State Patrol, BATF, FBI, DOL and the Office of the Attorney General have been working cooperatively to help clarify the way these changes shall effect us all.*

*Below are some guidelines for you to follow that should address most of the concerns and situations you will encounter.*

*Reminder: All handgun sales require the state application, whether the purchaser is a CPL holder or not.*

#### **PISTOL TRANSFERS TO WASHINGTON CONCEALED PISTOL LICENSE (CPL) HOLDERS**

- *BATF has indicated that Washington law regarding the issuance of a CPL does not meet the qualifications for Brady alternative status under the permanent provisions of Brady effective November 30, 1998.*
- *Therefore CPL's issued on November 30, 1998 and beyond **will not qualify** the holder for immediate transfer and possession as a NICS alternative. However, those licenses have met the state criteria and you may contact **NICS directly** for these purchasers.*

- *BATF has indicated CPL's issued between July 1, 1996 and November 29<sup>th</sup>, 1998 shall be "grandfathered" and will qualify as NICS alternatives until expiration, thereby waiving any additional NICS checks or waiting period.*

*The enclosed chart should be used in determining how to process **all firearm transfers** for CPL holders, and whether a CPL is considered Brady or NICS alternative, which qualifies the holder for waiver of any waiting period or any NICS check requirement.*

**FIREARM TRANSFERS TO CONCEALED PISTOL LICENSE HOLDERS**

<b>Issue Or Replacement Date</b>	<b>Color</b>	<b>Expiration Date</b>	<b>Brady/NICS Alternative</b>	<b>Not Brady Alternative - Contact NICS Directly</b>
Pre July 1996	Buff or Yellow	Up to July 2001		X
July 1996 to November 29, 1998	White	July 2001 to November 29, 2003	X	
November 30, 1998 and beyond	White	November 30, 2003 and beyond		X

**PISTOL TRANSFERS TO NON-CPL HOLDERS**

*Handgun sales to non-CPL holders shall not be affected by the institution of the federal NICS system. Since state law regarding handgun transfers has not changed, you will continue to follow current procedures and waiting periods. **Do not contact NICS directly on these sales.** The background check conducted by the buyer's local law enforcement agency shall incorporate the NICS check, thereby determining both state and federal eligibility.*

**RIFLE AND SHOTGUN TRANSFERS TO NON-CPL HOLDERS**

*Transfers of rifles and shotguns are now subject to a NICS check. You will contact NICS directly for these transfers. Please follow any recording instructions you have received from BATF.*

**PAWN REDEMPTION**

*The transfer of any firearm to a pawn ticket holder is subject to a NICS check. Contact NICS directly for these transfers. Other questions regarding holds, denials, or other responses from NICS on these transactions should be directed to BATF.*

*We hope this clarifies any confusion regarding this issue. If you have any questions regarding NICS you should contact the NICS center at 1 (877) 444-6427.*

*If you have any questions regarding CPL's, processes, or forms you may contact DOL at (360) 753-2803, or your local law enforcement agency.*

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**MEDICAL MARIJUANA INITIATIVE TAKES EFFECT**

December 3, 1998, is the effective date of Initiative 692, informally known as the "Medical Marijuana Initiative." The text of the initiative was provided in the Voter's Pamphlet published by the Secretary of State, and it is currently accessible on the Internet at the Secretary of State's Internet home page at [<http://www.wa.gov/sec>], as well as the sponsors' home page at [<http://www.eventure.com/l692>]. A number of law enforcement questions have been raised, the answers to some of which are not clear. We will attempt to address here some of the most common and significant questions. Any opinions which we express here represent the informal views of the LED Editor alone, as we state in our disclaimer on the last page of each LED.

Question: What is the effective date of the initiative? Answer: December 3, 1998.

Question: Can the Washington Legislature amend the law as enacted under the initiative? Answer: During the next two years, the Legislature can amend or repeal this law only by a 2/3 vote. After that point, the Legislature would be able to amend or repeal the law by majority vote.

Question: In simple terms, what is the effect of the initiative in relation to the crimes of possessing or manufacturing marijuana? Answer: The initiative provides an affirmative defense in Title 69 RCW to the criminal charge of possessing or manufacturing marijuana, as well as to a forfeiture action. The defense is available to a “primary caregiver” or “qualifying patient” with “valid documentation” from a “physician,” as those terms are defined under the initiative, where such patient and caregiver, either alone or in combination with each other, are in possession of no more than a “60 day supply.”

Question: What is a “60 day supply?” Answer: This term is undefined under the initiative and therefore will no doubt be the subject of litigation in the courts. At the January 1999 LED deadline, this term was under study by prosecutors and law enforcement interests seeking to find some rule of reason which might guide them in the interpretation of this term.

Question: Are there limits on what kinds of medical practitioners may authorize possession of medical marijuana? Answer: Only practitioners licensed under RCW chapters 18.71 (physicians) and 18.57 (osteopaths) may do so.

Question: Are there limits on the kinds of medical conditions for which the physician or osteopath may authorize the use of marijuana? Answer: Yes, certain specific conditions are listed in the definition of “terminal or debilitating condition,” but the definition of this term also contains a somewhat vague reference to “intractable pain, limited for the purpose of this chapter to mean pain unrelieved by standard medical treatments and medications.”

Question: Is there a standardized format for the medical authorization? Answer: No; it need only be either: (a) a separate written statement signed by the medical provider, or (b) a statement in the qualifying patient's medical records to the effect that, in the provider's professional opinion, the “potential benefits... would likely outweigh the health risks for a particular qualifying patient.”

Question: May a medical provider make the authorization open-ended as to duration? Answer: The initiative is silent in this regard, but the apparent answer is “yes.” However, the provider apparently may also place time limits on the authorization's duration, and the provider could probably revise a previously issued open-ended authorization or revoke it altogether.

Question: The initiative requires that when questioned by law enforcement a qualifying patient must present the physician's authorizing statement, along with “proof of identity such as a Washington state driver's license or identicard, as defined in RCW 46.20.035.” How will a law enforcement officer know that the person presenting the proof of identity is the person referred to in the physician's authorizing statement? Answer: Good question; because there is no standardized format for the provider's statement, there is no standardized way for the provider to establish the identity of the person authorized. A rule of reason is the best we can suggest for now.

Question: May a primary caregiver have more than one patient to care for, and may a patient have more than one primary caregiver at any one time? Answer: The initiative clearly limits caregivers to one patient at a time; it seems to imply as well that patients can have only one primary caregiver at a time.

Question: May the qualifying patient use the medical marijuana publicly, or may the qualifying patient or primary caregiver display the medical marijuana in a manner or place that is open to the general public? Answer: No, either circumstance is a misdemeanor as provided under the initiative; this prohibition would appear to preclude the defense for one who uses or displays the marijuana as a passenger in a motor vehicle located on a roadway or other public place.

Question: Is the affirmative defense under the initiative available to a person charged with DUI? Answer: Not to the extent any driving occurs on a street, road, or highway. The initiative provides that no defense is available to one who uses “in a way that endangers the health or well-being of any person through the use of a motorized vehicle on a street, road, or highway.”

Question: Is there a separate crime specified in the initiative for one who fraudulently produces or tampers with what purports to be “valid documentation,” as that term is defined under the initiative? Answer: Yes, this is a class C felony.

Question: Does an officer have probable cause to arrest a person who is in possession of marijuana, even if the person appears to qualify under the initiative as a “qualifying patient” or “designated primary caregiver,” as those terms are defined under the initiative? Answer: Arguably yes, because the initiative merely creates an affirmative

defense to be put forward at trial; however, officers and/or their agency administrators should seek clarification from the offices of their legal advisors and local prosecuting attorneys as to the recommended arrest standards and procedures in this regard. There will probably be some obvious sympathetic situations involving "qualifying patients" and/or their caregivers in which arrest will be ill-advised.

Question: Does this initiative affect federal law prohibiting possession and manufacture of marijuana? Answer: No, federal prohibitions are not affected, and hence federal agencies are free to investigate and prosecute violations under their existing laws, procedures, and policies.

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### **VEHICLE IMPOUND ORDINANCE ADOPTED IN SEATTLE**

The City of Seattle has adopted an ordinance to implement Chapter 203, Laws of 1998 (ESHB 1221), covered in the June 1998 LED at pages 5-6. Chapter 203 allows local jurisdictions to adopt punitive ordinances, and state agencies to adopt remedial regulations, authorizing impound-as-sanction for vehicles driven by suspended drivers. Seattle's impound-as-sanction ordinance also addresses additional scofflaw situations, but the Seattle ordinance appears to be adaptable as a local ordinance focusing solely on remedial impound for revoked and suspended drivers.

Attorneys and law enforcement personnel for city, county or state agencies seeking copies of the Seattle ordinance or wishing to discuss it may contact: Leo Poort, Legal Advisor, Seattle Police Department, 610 3<sup>rd</sup> Ave., Room 1001, Seattle, WA, 98104; FAX: (206) 684-5525; PHONE: (206) 684-5577.

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### **DUI LAW CHANGES TAKE EFFECT**

On January 1, 1998, a number of DUI law changes took effect, including: (A) the change under Chapter 213, Laws of 1998 (ESB 6257), to a .08 BAC standard for driving and boating under the influence; and (B) the change to administrative revocation under implied consent and DUI statutes under Chapter 209, Laws of 1998 (ESB 6142). In very brief form, we addressed the law changes in the June 1998 LED at pages 5-9. We won't attempt to address the law changes again. The Washington Traffic Safety Commission and the Washington Department of Licensing have done an excellent job of communicating in great detail the changes in pertinent laws and the changes in the pertinent paperwork through seminars conducted in forums throughout the state over the past few months.

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### **PLEASE EXCUSE THE EYE STRAIN**

From time to time, we digest some LED materials in a smaller print. For the next few months, we will be using a smaller print on a greater number of entries as we work on a backlog of digest materials and work within the space limitations of the LED. Our apologies for the eye strain as we play catch-up.

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### **NEXT MONTH**

Among other items, the February 1999 LED will digest the December 8, 1998 unanimous (and unsurprising) decision of the U.S. Supreme Court in Knowles v. Iowa, 1998 WL 840933. Knowles holds that, where law enforcement officers exercise their discretion under state law and issue a citation instead of making a custodial arrest, the officers do not have constitutional authority to conduct a search incident to arrest.

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Training Commission. The LED is published as a research source only and 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>