OMB APPROVAL NO. 43-R0525
EXPIRATION DATE 6-30-74

U. S. DEPARTMENT OF JUSTICE
LAW ENFORCEMENT ASSISTANCE ADMINISTRATION

DISCRETIONARY GRANT
PROGRESS REPORT

TEE: Nevada Commission on Crime, Delinquency & Corrections	LEAA GRANT NO. 73DF-09-0042	DATE OF REPORT 9/9/74	REPORT NO.
IMPLEMENTING SUBGRANTEE: North Las Vegas Police Department	TYPE OF REPORT: ☐ REGULAR QUARTERLY ☐ SPECIAL REQUEST XX FINAL REPORT		
SHORT TITLE OF PROJECT: Police Legal Advisor	GRANT AMOUNT: $11,250.00		
REPORT IS SUBMITTED FOR THE PERIOD 7/1/73	THROUGH 6/30/74		
SIGNATURE OF PROJECT DIRECTOR	TYPED NAME & TITLE OF PROJECT DIRECTOR: C. A. Davison, Chief of Police		

COMMENCE REPORT HERE (*Add continuation pages as required.*)

This project is a continuation effort of the position of Police Legal Advisor which was established with approval of Grant #71-DF-859.

The need for a Police Legal Advisor has been recognized as far back as 1934 when a study of police administration in Boston recommended that a staff of lawyers be included in the Police Department. Nearly 30 years later, the then Chicago Police Superintendent, O. W. Wilson reemphasized the need for a legal unit to furnish advise to staff and field personnel and to survey departmental orders and practices in the light of actual or proposed changes in the law.[1] These needs are still evident in todays modern police operations. This need was filled for North Las Vegas Police by the Federal Funding of this program.

During the first year of this program some difficulty was encountered due to poor selection of the first legal advisor. While this man's qualifications seemed most sufficient, he proved to be quite incompetent and was released from employment. This change of personnel

[1] The Police Yearbook 1971, IACP, p. 62

25189

RECEIVED BY GRANTEE STATE PLANNING AGENCY (*Official*) Carol I Neva — DATE 9-15-74
9-10-74

LEAA FORM 4587/1(REV. 1-73) REPLACES LEAA-OLEP-159, WHICH IS OBSOLETE. DOJ—1973—05

did create a void within the program but this was quickly corrected by the employment of Attorney John Squires. John Squires had the necessary background and the desire to do a good job. By the end of the first year John Squires had become an asset to the program and to the department. His expertise was recognized by the Clark County Community College and he was hired by them to conduct legal classes during his own time.

Shortly after the start to the second year of the project, John Squires accepted a position with the City Legal Department and another selection had to be made for the Legal Advisor Program. Attorney Richard Davenport was hired and has proved very capable. Personal contact with officers that have requested informal opinions from Richard Davenport have all commented very favorable on the results of their request and the personal concern and attention given their request by Mr. Davenport.

To provide a better evaluation during this second year of the project we adapted the Police Legal Unit Activity Report as published in the International Association of Chiefs of Police publication "Guidelines for a Police Legal Unit". This activity report breaks down the Legal Advisor's activities to sub-units which allow for a detailed accounting of his activities both by number and hours. One needs only to brouse through this activity report to see that our legal advisor has indeed been very busy and has produced the quality work and efforts necessary to achieve our goals of:

1. Upgrading the legal training of police personnel.

2. Providing the availability of legal advise before an arrest is made or a search or arrest warrant is obtained.
3. Providing comprehensive instructional legal material.
4. Monitoring legal decisions and anticipating legal trends to better formulate long range law enforcement procedures and plans.
5. Provide other necessary legal services not available through existing offices and departments.

The following accounting will demonstrate the efforts of the Legal Advisor in achieving these goals:

1. TRAINING:

   Over 215 hours of training was provided which covered areas of (a) pre-service lectures, (b) in-service lectures, (c) training conferences, (d) training bulletins, and (e) legal bulletins.

2. AVAILABILITY OF LEGAL ADVISE:

   This goal was satisfied upon the employment of the legal advisor as his presence provided the immediate availability of legal advise.

3. PROVIDING COMPREHENSIVE LEGAL INSTRUCTIONAL MATERIAL:

   Numerous bulletins were produced along with inter-office memos which were actually legal instructional material. These materials were produced spontaneously and upon request. Legal opinions that would produce noted effect on police operations were readily recognized by Mr. Davenport and he fulfilled his responsibilities by placing this information in readable/under-

standable bulletins.

4. MONITORING LEGAL DECISIONS AND ANTICIPATING LEGAL TRENDS TO BETTER FORMULATE LONG RANGE LAW ENFORCEMENT PROCEDURES AND PLANS:

In addition to the performance under above paragraph #3, Mr. Davenport was most valuable in guideing the department during the development of an extensive department manual which contains both rules, regulations, and policy.

5. PROVIDE OTHER NECESSARY LEGAL SERVICES NOT AVAILABLE THROUGH EXISTING OFFICES AND DEPARTMENTS:

Legal services provided by the Police Legal Advisor were not normally available on an acceptable level through the City Attorney's Office. This is due to the fact that most of the City Attorney's work is of a civil nature, not criminal. Added to this is the fact that he must also serve all other City functions which created a priority problem. The Legal Advisor eliminated these problems and placed needed legal advise at the finger tips of the Chief as well as the officers.

The seven (7) catagories of the Police Legal Unit Activity Report will be commented on as follows:

A. ADMINISTRATION:

Normal operation of his office and coordination with the office of the Chief of Police and the City Attorney required over 112 hours of recordable items.

B. RESEARCH:

93 hours of research were devoted to reviewing of new legislation and memoranda of law. In addition, at least 1 hour each day was devoted to review of court decisions, law journals, and periodicals. These figures are also considered minimal due to the difficulty of keeping record of such activity.

C. CASE WORK:

The hours recorded in this catagory readily indicate that our legal advisor was working far in excess of the normal 8 hour day due to trials and complaints. The trials attended and the interrogations made or observed were very instrumental in giving the legal advisor a base to use for instruction of our officers. Over 900 trials were attended and over 65 interrogations were made or observed. Search Warrant preparation did not require participation by the Legal Advisor due to his instruction and the development of a guideline manual in the Detective Bureau.

D. TRAINING:

The training itemized on the activity reports do not include all training. Things such as telephone opinions are actually training as well as legal opinions. Concentrating on the itemized training we find that in excess of 215 hours were devoted to training.

E. FIELD WORK:

This catagory is broken into 5 sub-catagories of which

no activity was recorded for the first two. The remaining three catagories create a problem of when to distinguish between the three. Basically all three catagories of crime scenes viewed, field investigations, and field observations are forms of investigations. There was in excess of 90 hours attributable to this catagory.

F. CORRESPONDENCE AND REPORTS:

It is true that "The job isn't finished till the paper work is done". Figures in this catagory do not include the time required for research before doing the paperwork. These figures are also not the time required by the Legal Advisor's secretary to type his written work, but account only for his time required to write his opinions or findings. Over 93 hours were devoted to formal written opinions and Intra-departmental correspondence. In addition at least 1 hour per day was spent giving telephone and informal opinions.

G. OTHER MATTERS:

Other matters consist only of (1) assist other agencies, and (2) assist other legal units. These two catagories received in excess of 21 and 32 hours respectively.

When the above catagories are studied and compiled, it is quite obvious that the Legal Advisor has provided our police department with services that fully meet our goals. The Legal Advisor is being kept as part of the City's Criminal Justice System by providing city funds for the continued operation of his office.

In addition to the above activities of the Legal Advisor he is scheduled to teach classes in Laws of Arrest and Search and Seizure to our newly formed Crime Reduction Team.

Attached are copies of written matters from the Office of the Legal Advisor, as well as copies of the Legal Advisor's Activity Reports.

POLICE LEGAL UNIT ACTIVITY REPORT

SUMMARY FROM MARCH to AUGUST, 1974.
(Approximate)

ACTIVITY	NUMBER	HOURS
A. ADMINISTRATION:		
1. Orders and Directives Written	7	10 hrs.
2. Orders and Directives Reviewed	15	8 hrs.
3. Personnel Matters (City Attorney's Office, Criminal Division)	15	15 hrs.
4. Chief's Office Matters	4	2 hrs.
5. City Attorney Matters (Criminal Div.)	Each day	6 hrs.
6. Staff Meetings Attended	7	3 1/2 hrs.
B. RESEARCH:		
1. Court Decisions Reviewed	Each day	1/2 hr.
2. Law Journals and Periodicals Reviewed	Each day	1/2 hr.
3. Legislation Reviewed		2 hrs.
4. Legislation Drafted	None	
5. Legislative Reports Submitted	None	
6. Memoranda of Law Written	7	10 hrs.
C. CASE WORK:		
1. Prosecutor's Office Matters	Each day	6 hrs.
2. Case Consultations	Each day	2 hrs.
3. Hearings Attended	6	---
4. Trials Attended	325 plus	20 + hrs.
5. Depositions Attended	None	
6. Line-ups Attended	None	
7. Interrogations Made or Observed	25 +	
8. Arrest Complaints	Each day	2 1/2 hrs.
9. Search Warrants	None	
10. Electronic Surveillance Applications Orders	None	
D. TRAINING:		
1. Pre-Service Lectures	2	
2. In-Service Lectures	4	20 + hrs.
3. Training Conferences	4	20 + hrs.
4. Training Bulletins Written	6	
5. Legal Bulletins Written	6	
E. FIELD WORK:		
1. Raids Attended	None	
2. Civic Disturbances and Protests	None	
3. Crime Scenes Viewed	6	6 + hrs.
4. Field Investigations	5	5 + hrs.
5. Field Observations	5	5 + hrs.
F. CORRESPONDENCE AND REPORTS:		
1. Intra-Departmental Correspondence	3	1 1/2 hrs.
2. Extra-Departmental Correspondence	---	
3. Evaluation Reports	---	
4. Formal Written Opinions	4	2 hrs.
5. Telephone Opinions (Approximate)	Numerous	1 hr./day
6. Informal Opinions	Numerous	1 hr./day
G. OTHER MATTERS (SPECIFIED):		
1. Assist Other Agencies	7	7 + hrs.
2. Assist Other Legal Units		20 + hrs.

ACTIVITY	NUMBER	HOURS
A. ADMINISTRATION:		
1. Orders and Directives Written	3	5 Hrs.
2. Orders and Directives Reviewed	None	
3. Personnel Matters (City Atty's Office, Criminal Div.)	10	15 Hrs.
4. Chief's Office Matters	None	
5. City Attorney Matters (Criminal Div.)	Each Day	6 Hrs/Day
6. Staff Meetings Attended	4	8 Hrs.
B. RESEARCH:		
1. Court Decisions Reviewed	Each Day	1/2 Hr/Day
2. Law Journals and Periodicals Reviewed	Each Day	1/2 Hr/Day
3. Legislation Reviewed	All New Bills	8 Hrs.
4. Legislation Drafted	None	
5. Legislative Reports Submitted	None	
6. Memoranda of Law Written	6	20 Hrs.
C. CASE WORK:		
1. Prosecutor's Office Matters	Each Day	6 Hrs/Day
2. Case Consultations	Each Day	2 Hrs/Day
3. Hearings Attended	4	7 Hrs.
4. Trials Attended	300 Plus	16 Hrs/Week
5. Depositions Attended	None	
6. Line-Ups Attended	None	
7. Interrogations Made or Observed	20 Plus	20 Plus Hrs.
8. Arrest Complaints	Numerous	2 Hrs/Day
9. Search Warrants	1	1/2 Hr.
10. Electronic Surveillance Applications/Orders	None	
D. TRAINING:		
1. Pre-Service Lectures	None	
2. In-Service Lectures	4	20 Plus Hrs.
3. Training Conferences	4	20 Plus Hrs.
4. Training Bulletins Written	2	10 Plus Hrs.
5. Legal Bulletins Written	6	25 Plus Hrs.
E. FIELD WORK:		
1. Raids Attended	None	
2. Civil Disturbances and Protests	None	
3. Crime Scenes Viewed	6	3 Plus Hrs.
4. Field Investigations	3	3 Hrs.
5. Field Observations	3	30 Plus Hrs
F. CORRESPONDENCE AND REPORTS:		
1. Intra-Departmental Correspondence	2	2 Plus Hrs.
2. Extra-Departmental Correspondence	None	
3. Evaluation Reports	None	
4. Formal Written Opinions	4	16 Plus Hrs.
5. Telephone Opinions (Approximate)	Numerous	1 Hr/Day
6. Informal Opinions	Numerous	1 Hr/Day
G. OTHER MATTERS (SPECIFIED):		
1. Assist Other Agencies	8	4 Plus Hrs.
2. Assist Other Legal Units	12	6 Plus Hrs.

POLICE LEGAL UNIT ACTIVITY REPORT.

SUMMARY FROM 9-73 to 3-74, 1974.
(Approximate)

	ACTIVITY	NUMBER	HOURS
A.	ADMINISTRATION:		
1.	Orders and Directives Written	3	5 hrs.
2.	Orders and Directives Reviewed	2	
3.	Personnel Matters (City Attorney's Office, Criminal Division)	15	15 hrs.
4.	Chief's Office Matters	2	
5.	City Attorney Matters (Criminal Div.)	Each day	6 hrs./day
6.	Staff Meetings Attended	5	4 hrs.
B.	RESEARCH:		
1.	Court Decisions Reviewed	Each day	1/2 hr./da
2.	Law Journals and Periodicals Reviewed	Each day	1/2 hr./da
3.	Legislation Reviewed	All new bills	18 hrs.
4.	Legislation Drafted	None	
5.	Legislative Reports Submitted	None	
6.	Memoranda of Law Written	6	35 hrs.
C.	CASE WORK:		
1.	Prosecutor's Office Matters	Each day	6 hrs./day
2.	Case Consultations	Each day	2 hrs./day
3.	Hearings Attended	5	
4.	Trials Attended	300 plus	20 hrs./wee
5.	Depositions Attended	None	
6.	Line-ups Attended	None	
7.	Interrogations Made or Observed	20 plus	20 plus hrs
8.	Arrest Complaints	Numerous	2 hrs./day
9.	Search Warrants	None	
10.	Electronic Surveillance Applications/ Orders	None	
D.	TRAINING:		
1.	Pre-Service Lectures	1	
2.	In-Service Lectures	4	20 plus hrs
3.	Training Conferences	4	20 plus hrs
4.	Training Bulletins Written	4	25 plus hrs
5.	Legal Bulletins Written	6	35 plus hrs
E.	FIELD WORK:		
1.	Raids Attended	None	
2.	Civic Disturbances and Protests	None	
3.	Crime Scenes Viewed	2	4 plus hrs
4.	Field Investigations	4	4 hrs.
5.	Field Observations	4	30 plus hr
F.	CORRESPONDENCE AND REPORTS:		
1.	Intra-Departmental Correspondence	4	2 plus hr
2.	Extra-Departmental Correspondence	None	
3.	Evaluation Reports	None	
4.	Formal Written Opinions	4	16 plus hr
5.	Telephone Opinions (Approximate)	Numerous	1 hr./day
6.	Informal Opinions	Numerous	1 hr./day
G.	OTHER MATTERS (SPECIFIED):		
1.	Assist Other Agencies	6	4 plus hr
2.	Assist Other Legal Units	14	6 plus hr

CITY OF NORTH LAS VEGAS

INTER - OFFICE MEMORANDUM

Date: December 10, 1973

To: CHIEF OF POLICE C. DAVISON and THE DETECTIVE DIVISION Department:

From: RICHARD L. DAVENPORT Department: LEGAL DEPT.

Subject:

FELONY-MURDER RULE.

A murder committed in the course of the perpetration of a felony is murder on the theory that the element of malice may be implied from the fact of the commission of the felony, even though the killing is unintentional and accidental. Ex Parte Dela, 25 Nev. 346, 60 P. 217.

The felony-murder rule does not apply unless the killing occurs during the commission of or the attempt to commit the felony. There is a conflict of authority as to when the felony is deemed terminated for the purpose of this rule. Some Courts hold that an escape by the criminal after the commission of a felony is not part of the felony and that a killing committed during the attempt to escape is not within the felony-murder rule. (citations omitted) Other Courts hold that when the escape is made with stolen property, the asportation is a continuing offense so that a killing during the escape occurs while committing a felony. State v. McCarthy,, 160 Or. 196, 83 P.2d 801. Several jurisdictions have ruled that an act committed immediately or closely after the commission of the felony brings the killing resulting therefrom within the felony-murder rule even though there is no element of asportation and the defendant is in the process of escaping. State v. Adams, 339 Mo. 926, 98 S.W. 2d 632; Commonwealth v. Almeida, 362 Pa. 596, 68 A.2d 595.

The rule as to escape homicides is influenced by the rule followed as to the time when the homicide must occur. By Courts which include the escape within the felony-murder rule, it is held that it is not necessary that the killing take place at the same time as the felony. Commonwealth v. Almeida, supra. The rule has also been held applicable when the defendant set fire to a building to commit arson, although the death of a fireman in attempting to extinguish the fire did not occur until there was

an explosion some time later, after the defendant had set the fire and had left the premises. State v. Glover, 330 Mo. 709, 50 S.W.2d 1049.

For the felony-murder rule to apply, it is necessary that the homicide be a natural and probable consequence of the commission or attempt to commit the felony; that the homicide be so closely connected with such other crime as to be within the res gestae thereof; or the natural or necessary result of the unlawful act; or that it be one of the causes. State v. Diebold, 152 Wash. 68, 277 P. 394; People v. Kerrick, 86 Cal. App. 542, 261 P. 756; State v. Schaeffer, 96 Ohio St. 215, 117 N.E. 220; State v. Glover, 330 Mo. 709, 50 S.W.2d 1049. It is not necessary that the defendant believed or foresaw that death would result from his act. Thus, it has been held that one who fires so close to a boat carrying persons on the water, for the purpose of frightening the occupants, that he causes one of them to jump overboard and overturn the boat, thereby causing others to drown, is guilty of involuntary manslaughter. Letner v. State, 156 Tenn. 68, 299 S.W. 1049.

Something more than a mere coincidence of time and place between the wrongful act and the death is necessary. It must appear that there was such actual legal relation between the killing and the crome committed or attempted that the killing can be said to have occurred as a part of the perpetration of the crime, or in furtherance of an attempt or purpose to commit it. People v. Kerrick, 86 Cal. App. 542, 261 P. 756.

Similar rules of causation apply when the fatal act was committed by a fellow conspirator of the defendant. In such case it is held that in order to impose criminal responsibility on the fellow conspirators, the accidental felony must be in furtherance of a common design of the conspirators and must have been the ordinary and probable or foreseeable and probable result or effect of the execution of the conspiracy. People v. Boss, 210 Cal. 245, 290 P. 881; State v. Furney, 41 Kan. 115, 21 P. 213. It is immaterial, however, that the homicide was not in fact foreseen or contemplated by the co-conspirators, or that the conspirators had agreed or directed that no one should be killed. People v. Friedman, 205 N.Y. 161, 98 N.E. 471.

Under the general rule, it is immaterial whether the person killed was the intended victim of the original felony, an officer or a civilian seeking to stop or arrest the defendant, an innocent bystander, a person trying to check the damage caused by the defendant, or one of the defendant's fellow conspirators. People v. Sutton, 17 Cal. App. 2d. 561, 62 P.2d 397; People v. Thomas, 135 Cal. App. 654, 27 P.2d 765; People v. Vasquez, 49 Cal. 560; State v. Glover, 330 Mo. 709, 50 S.W.2d 1049; People v. Cabaltero, 31 Cal. App. 2d 52, 87 P.2d 364

Listed below are brief accounts of cases decided by the Nevada Supreme Court as they pertain to the felony-murder rule. Note that several of the decisions discuss the "res gestae" of a particular event. Res gestae is defined in part by Black's Law Dictionary, 4th Ed. Rev., as follows:

> "Things done. McClory v. Schneider, Tex. Civ. App., 51 S.W. 2d 738, 741. . . . The whole of the transaction under investigation and every part of it . . ."

> "Intent to kill is not essential to crime of murder in either degree in every case because, under Sec. 21, ch. 28, Stats. 1861 (cf. N.R.S. 200.070), involuntary killing is murder if committed in prosecution of felonious intent, and under sec. 17, ch. 28, Stats. 1861 (cf. N.R.S. 200.030), if felony intended is arson, rape, robbery or burglary, killing is first degree murder. State v. Harris, 12 Nev. 414 (1877), cited, State v. Hymer, 15 Nev. 49, at 54 (1880)

> "Under sec. 17, ch. 28, Stats. 1861 (cf. NRS 200.030), which declares that killing committed in perpetration of, or attempt to perpetrate, arson, rape, robbery or burglary shall be deemed first degree murder, the occasion of killing does not raise conclusive presumption of premeditation, but malice which is implied from circumstances of killing, whether voluntary or not, stands in place of express malice, the deliberate intention unlawfully to take life of fellow creature, which is, in all other cases, essential to crime of first degree murder. State v. Harris, 12 Nev. 414 (1877), cited, State v. Gee Jon, 46 Nev. 418, at 431, 211 Pac. 676, 217 Pac. 587 (1923), State v. Randolph, 49 Nev. 241, at 247, 242 Pac. 697 (1926)

"Under B § 2327 (cf. N.R.S. 200.010) there may be murder without any intent to kill. Involuntary killing which is committed in prosecution of felonious intent is murder, and under B § 2323 (cf. N.R.S. 200.030), if felony attempted is arson, rape, robbery or burglary, it is murder in the first degree. State v. Lopez, 15 Nev. 407 (1880), cited, Ex parte Curnow, 21 Nev. 33, at 35, 24 Pac. 430 (1890), State v. Williams, 28 Nev. 395, at 407, 82 Pac. 353 (1905)

"In prosecution for murder, where defendant testified that he entered store with intention of committing robbery, but abandoned intention when proprietor refused to keep still, and was endeavoring to leave premises immediately before proprietor seized defendant's gun and was shot in ensuing struggle, trial court properly refused to instruct jury upon theory of abandonment by defendant of his felonious attempt, because abandonment of attempt caused by fear of detection is not defense if attempt has progressed sufficiently to be per se indictable before such abandonment. State v. Gray, 19 Nev. 212, 8 Pac. 456 (1885)

"In prosecution for murder, court properly instructed jury that under provisions of sec. 17, Ch. 28, Stats. 1861 (cf. N.R.S. 200.030), relating to degrees of murder, all murder committed in perpetration of robbery is of first degree. State v. Williams, 28 Nev. 395, 82 Pac. 353 (1905)

" Where homicide occurred as part of continuous assault, lasting from robbery to shooting, and was apparently committed to prevent detection of robbery, evidence was sufficient to justify verdict of murder in the first degree, although shooting did not happen until about 2 minutes after robbery. State v. Williams, 28 Nev. 395, 82 Pac. 353 (1905), cited, Payne v. State, 81 Nev. 503, at 507, 406 P.2d 922 (1965)

"Killing committed in perpetration of robbery is presumed to have been willful, deliberate and premeditated. State v. Mangana, 33 Nev. 511, 112 Pac. 693 (1910)

"In prosecution for murder, where evidence showed that regardless of circumstances of first beating defendant had intentionally and without any considerable provocation beaten victim a second time, inflicting injuries whose natural effect would be at least to hasten death, for purpose of overcoming resistance to taking automobile belonging to victim, all elements of willful and malicious killing in perpetration of robbery were shown, and judgment of trial court finding defendant guilty of murder in the first degree was affirmed. State v. Sala, 63 Nev. 270, 169 P.2d 524 (1946), cited, State v. Fouquette, 67 Nev. 505, at 527, 221 P.2d 404 (1950)

"Under NCL § 10068 (cf. N.R.S. 200.030), defining degrees of murder, killing done in perpetrating or attempting to perpetrate robbery or other enumerated felony is murder in first degree, without proof that it is wilful, deliberate and premeditated. State v. Sala, 63 Nev. 270, 169 P.2d 524 (1946), cited, State v. Fouquette, 67 Nev. 505, at 527, 221 P.2d 404 (1950)

"In prosecution for murder of service station attendant killed during robbery, it made no difference whether accused killed deceased unintentionally or intentionally, because one who kills another in perpetration or attempt to perpetrate any arson, rape, robbery or burglary is guilty of murder in first degree by force of provisions of 1943 NCL § 10068 (cf. N.R.S. 200.030). State v. Fouquette, 67 Nev. 505, 221 P.2d 404 (1950), cited, Archibald v. State, 77 Nev. 301, at 305, 362 P.2d 721 (1961), Walker v. State, 78 Nev. 463, at 473, 376 P.2d 137 (1962)

"Where homicide was clearly within res gestae of robbery because it was so connected and associated with robbery as virtually and effectively to become part of it, it could not be said, under any possible theory, that homicide was committed as independent act which was disassociated from robbery. It was certain that homicide was committed in perpetration of robbery within true intent and fair meaning of 1943 NCL § 10068 (cf. N.R.S. 200.030). State v. Fouquette, 67 Nev. 505, 221 P.2d 404 (1950), cited, Archibald v. State, 77 Nev. 301, at 305, 362 P.2d 721 (1961), Walker v. State, 78 Nev. 463, at 473, 376 P.2d 137 (1962)

"In determining under N.R.S. 200.030 whether murder was committed in perpetration of felony, test of causation is applied, requiring that killing be part of continuous transaction, which begins where indictable attempt is reached and ends where chain of events is broken. Latter point is question for jury. Pay v. State, 81 Nev. 503, 406 P.2d 922 (1965)

Respectfully submitted,

RICHARD L. DAVENPORT
Deputy City Attorney

rld/jt

Municipal Judge can sign search Warrants

3-4-74

SEARCH WARRANTS

179.015 Definition of property. As used in NRS 179.025 to 179.115, inclusive, the term "property" includes documents, books, papers and any other tangible objects.
(Added to NRS by 1967, 1458)

179.025 Authority to issue warrant. A search warrant authorized by NRS 179.015 to 179.115, inclusive, may be issued by a magistrate of the State of Nevada.
(Added to NRS by 1967, 1458)

179.035 Grounds for issuing search warrant. A warrant may be issued under NRS 179.015 to 179.115, inclusive, to search for and seize any property:
1. Stolen or embezzled in violation of the laws of the State of Nevada, or of any other state or of the United States; or
2. Designed or intended for use or which is or has been used as the means of committing a criminal offense; or
3. When the property or things to be seized consist of any item or constitute any evidence which tends to show that a criminal offense has been committed, or tends to show that a particular person has committed a criminal offense.
(Added to NRS by 1967, 1458)

179.045 Issuance, contents of search warrant.
1. A search warrant shall issue only on affidavit or affidavits sworn to before the magistrate and establishing the grounds for issuing the warrant. If the magistrate is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he must issue a warrant identifying the property and naming or describing the person or place to be searched.
2. The warrant shall be directed to a peace officer in the county where the warrant is to be executed. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified.
3. The warrant shall direct that it be served in the daytime, unless the magistrate, upon a showing of good cause therefor, inserts a direction that it be served at any time.
4. It shall designate the magistrate to whom it shall be returned.
(Added to NRS by 1967, 1459)

179.055 Officer may break door to serve warrant after admittance refused; breaking of door, windows to liberate officer or person acting in aid of officer; use of reasonable and necessary force.
1. The officer may break open any outer or inner door or window

169.015 Short title. This Title may be known and cited as the Nevada Criminal Procedure Law.
(Added to NRS by 1967, 1398)

169.025 Scope. This Title governs the procedure in the courts of the State of Nevada and before magistrates in all criminal proceedings, but does not apply to proceedings against children under chapter 62 of NRS.
(Added to NRS by 1967, 1398)

169.035 Purpose; construction. This Title is intended to provide for the just determination of every criminal proceeding. Its provisions shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.
(Added to NRS by 1967, 1398)

169.045 Definitions. As used in Title 14, unless the context otherwise requires, the words and terms defined in NRS 169.055 to 169.205, inclusive, have the meaning ascribed to them in such sections.
(Added to NRS by 1967, 1398)

169.055 "Criminal action" defined. "Criminal action" means the proceedings by which a party charged with a public offense is accused and brought to trial and punishment. A criminal action is prosecuted in the name of the State of Nevada, as plaintiff.
(Added to NRS by 1967, 1398)

169.065 "Defendant" defined. "Defendant" means the party prosecuted in a criminal action.
(Added to NRS by 1967, 1398)

169.075 "District attorney" defined. "District attorney" includes any deputy district attorney.
(Added to NRS by 1967, 1398)

169.085 "Law" defined. "Law" includes statutes and judicial decisions.
(Added to NRS by 1967, 1398)

169.095 "Magistrate" defined. "Magistrate" means an officer having power to issue a warrant for the arrest of a person charged with a public offense and includes:
1. Justices of the supreme court;
2. Judges of the district courts;
3. Justices of the peace;
4. Police judges; and

GENERAL PROVISIONS

5.010 Municipal court held by police judge. A municipal court shall be held by a judge who shall be designated as police judge, and the court shall be held at such place in the city within which it is established as the government of such city may by ordinance direct.

[35:19:1865; B § 940; BH § 2454; C § 2535; RL § 4855; NCL § 8397]

5.020 Police judges; elections; terms of office; oath. The police judges shall be chosen by the electors of their respective cities on a day to be fixed by the government of such cities, and shall hold their offices for 1 year, unless a longer period be fixed in the acts incorporating such cities; in which case, for such period fixed. Before entering upon their duties they shall take the constitutional oath of office.

[36:19:1865; B § 941; BH § 2454; C § 2536; RL § 4856; NCL § 8398]

5.025 Courses of instruction for municipal, police judges. The clerk of the supreme court of Nevada shall, at the direction of the chief justice, arrange for the giving of instruction, at the National College of State Trial Judges in Reno, Nevada, or elsewhere:

1. In court procedure, record-keeping and the elements of substantive law appropriate to a municipal court, to each police judge or municipal judge who is first elected or appointed to office after July 1, 1971, and to other such judges who so desire and who can be accommodated, between each election designated for the election of such judges and the date of entering office.
2. In statutory amendments and other developments in the law appropriate to a municipal court, to all such judges at convenient intervals.

(Added to NRS by 1971, 838)

5.026 Attendance required at courses of instruction; penalty for unexcused absence.

1. Each police judge or municipal judge who is first elected or appointed to office after July 1, 1971, shall attend the instruction provided pursuant to NRS 5.025, on the first occasion when such instruction is offered after his election or appointment, unless excused by written order of a judge of the district court in and for the county where such city is situated, which shall be filed with the clerk of the supreme court. Such order is final for all purposes.
2. If a police judge or municipal judge fails to attend such instruction without securing a written order pursuant to subsection 1, he forfeits his office.

(Added to NRS by 1971, 838)

5.030 Compensation of police judges. The police judges shall receive compensation, to be fixed by the charter, or, when not so fixed,

Asst. Chief Arrance

CITY OF NORTH LAS VEGAS

INTEROFFICE MEMORANDUM

Date: August 29, 1974

To: North Las Vegas Police Dept.

From: Richard L. Davenport Dept: Legal

Subject: Submission to Physical Examination or Test as a Violation of Constitutional Rights

Persons complaining that their constitutional rights have been invaded by the use against them, in a criminal case, of evidence secured by means of a compulsory physical examination or other invasions of their bodily integrity have most frequently relied upon the privilege against self-incrimination, or against being compelled to give testimony against oneself in a criminal case, contained in the United States Constitution. The contention has met with little favor in recent proceedings in the state courts, most of which have continued to draw the distinction between "real" and "verbal" evidence, holding that the privilege protects only against "testimonial compulsion." 25 ALR 2d 1407.

Note the following collection of criminal cases dealing with the self-incrimination problem:

"Taking of blood from accused by physician at state officer's direction despite accused's refusal to consent thereto, and admission in evidence of analysis report indicating intoxication, did not violate accused's privilege against self-incrimination, deny accused due process of law, or violate his right to be free of unreasonable searches and seizures. Schmerber v California, 384 US 757, 16 L ed 2d 908, 86 S Ct 1826.

"Physical examination of defendant, and removal of narcotics from his rectum, involved no violation of privilege against self-incrimination, was not unreasonable search and seizure, and did not deny due process. Blackford v U. S. (CA9 Cal) 247 F2d 745.

"Neither field sobriety test of suspected drunken driver nor prosecutor's comment in closing argument as to refusal of defendant to take a blood test constituted self-incrimination in violation of federal Fifth Amendment. Newhouse v Misterly (CA9 Cal) 415 F2d 514, cert den 397 US 966, 25 L Ed 2d 258, 90 S Ct 1001.

"Self-incrimination privilege is limited to giving of oral testimony, and is not violated by use of urine specimen, in criminal prosecution, to show whether defendant was under influence of alcohol at time specimen was given. U. S. v. Nesmith (DC Dist Col) 121 F Supp 758.

"Accused in rape case was not forced to give incriminating evidence against himself when blood sample, tissue scrapings, and saliva samples were taken and used in evidence. Brent v White (DC La) 276 F Supp 386.

"Taking of 'smears' from genitals of accused in rape case did not violate privilege against self-incrimination, especially where there was no objection to examination. Myhand v. State, 259 Ala 415, 66 So2d 544.

"Voluntary taking of intoximeter test is not testimonial compulsion and does not violate privilege against self-incrimination. People v Sykes, 238 Cal App 2d 156, 47 Cal Rptr 596.

"Taking of blood sample from suspect who was unconscious did not violate his rights against self-incrimination and unlawful search and seizure where sample was taken by qualified physician in approved manner, and where officer had reasonable cause to believe accused was intoxicated and had been driving automobile involved in head-on collision. People v Bustos, 247 Cal App 2d 422, 55 Cal Rptr 603.

"Certain well-known field sobriety tests, such as walking heel-to-toe on an imaginary line, finger-to-nose test, and several balance exercises which were administered to defendant near scene where he had been stopped, were not violative of defendant's rights against self-incrimination. Whalen v Municipal Court of Alhambra, 274 Cal App 2d 809, 79 Cal Rptr 523.

"Taking of blood samples from accused and introducing into evidence results of such test were not violative of privilege against self-incrimination. Wilson v. State (Fla) 225 So 2d 321.

"In prosecution for manslaughter and drunk driving, trial court did not err in refusing to instruct that evidence of blood test could be considered only after it was found that defendant knowingly consented to taking of blood sample, where presumption that defendant's consent to test was freely given was not rebutted. Wells v State (Ind) 158 NE2d 256.

"Taking of hair and saliva specimens from accused does not violate his privilege against self-incrimination. Simms v. State, 4 Md App 160, 242 A2d 185 (citing annotation).

"Breath test authorized under implied-consent law violates neither privilege against self-incrimination nor substantive due process of law. Blydenburg v David (Mo) 413 SW2d 284.

"Privilege against self-incrimination is limited to giving of oral testimony and does not extend to defendant's body, nor to secretions therefrom, nor to introduction in evidence of chemical analysis. State v Hagen, 180 Neb 564, 143 NW2d 904 (urinalysis for alcoholic content under implied-consent law).

"Since taking of defendant's blood to determine sobriety, being physical test, is not covered by privilege against self-incrimination, defendant need not be informed that he can refuse to allow test because results may be used against him. State v. Blair, 45 NJ 43, 211 A2d 196.

"Neither taking of a sample of defendant's blood nor admission of evidence relating to analysis of the blood sample were in violation of federal or state constitution where criminal defendant had been driver of automobile involved in a wreck in which three people had been killed and was taken unconscious to hospital with the odor of alcohol on him, defendant having had no blood pressure and the doctor ordering that a blood alcohol test be made, and defendant subsequently objecting to admission of results thereof in evidence in the manslaughter action against him. State v. Bryant, 5 NC App 21, 167 SE2d 841.

"Taking of handwriting exemplar in criminal case was not violative of privilege against self-incrimination contained in Fifth Amendment to Federal Constitution. State v Hughes (Or) 449 P2d 445.

"Withdrawal of blood from patient's arm while he was disoriented was not violation of his constitutional rights against self-incrimination notwithstanding some of the blood was given several hours later to coroner to be tested for alcohol. Commonwealth v Tanchyn, 200 Pa Super 148, 188 A2d 824.

"Admission in evidence of report of defendant's blood sample to show its alcoholic content, which sample was drawn by a physician at hospital by direction of an officer despite refusal of defendant to consent thereto, did not deny defendant due process of law under Fourteenth Amendment against unreasonable searches and seizures, nor violate defendant's right to assistance of counsel under Sixth Amendment or his privilege against self-incrimination under the Fifth Amendment. State v Werlinger (SD) 170 NW2d 470.

"Admission of evidence obtained from application of paraffin to defendant's hands, to determine whether he had recently fired gun or pistol, did not violate self-incrimination privilege. Henson v. State, 159 Tex Crim 647, 266 SW2d 684.

"Testimony as to intoxication indicated by blood test was not inadmissible in drunk driving prosecution on ground that defendant was under arrest when blood sample was taken and was not given statutory warning as to confessions before executing written consent to taking of blood specimen, confession statute having no application to consent to taking of blood specimen for analysis. Owens v State (Tex Crim) 301 SW2d 653.

"Consensual taking of blood sample from accused did not violate his constitutional rights. State v Goyet (Vt) 132 A2d 623.

"In negligent homicide prosecution arising out of automobile accident, introduction of evidence as to alcohol in defendant's blood, shown by blood test, did not violate defendant's self-incrimination privilege. State v Kroening, 274 Wis 266, 79 NW2d 810 (citing annotation), reh den (Wis) 80 NW2d 816."

CONTRA

"Proper ground of attack on reception in evidence of physical test taken involuntarily is self-incrimination rather than illegal search and seizure; state constitutional provision against compelling accused to give evidence which will incriminate him includes real as well as oral testimony. Cox v State (Okla Crim) 395 P2d 954 (citing annotation).

"Testimony as to alcoholic content to defendant's blood was inadmissible, where blood was taken without his consent; admissibility without violation of the privilege against self-incrimination requires consent of person in question. Trammell v State (Tex Crim) 287 SW2d 487."

The cases which have passed on the question of such "real" evidence have shown little sympathy with the claim that the use of evidence secured by means of physical examination of the accused in a criminal case violates state or federal constitutional provisions providing for due process of law. 25 ALR 2d 1410.

The following are recent decisions involving the due process argument:

"Although result of blood test based on sample taken, at police request, by physician from accused while he was unconscious as result of automobile accident was admitted in evidence at trial, state conviction of involuntary manslaughter arising from collision involving automobile driven by accused while intoxicated could not be attacked as violating due process in that introduction of test result was self-incriminatory or that the taking was result of unreasonable search and seizure, or shocked conscience or offended sense of justice. Breithaupt v Abram, 352 US 432, 1 L ed 2d 448, 77 S Ct 408.

"Neither due process nor guaranty against unreasonable search and seizure was violated by police officials who administered emetic, causing defendants to vomit, and permitting heroin which they had swallowed to be recovered. U. S. v Michel (DC Tex) 158 F Supp 34 (citing annotation).

"Blood test to determine alcohol content of defendant's blood did not violate due process. People v Haeussler, 41 Cal 2d 252 260 P2d 8.

"Police officers' physical examination, over defendant's protests, and removal from defendant's rectum of narcotics secreted therein, did not offend due process. People v Woods, 139 Cal App2d 515, 293 P2d 901.

"In manslaughter prosecution, admission of evidence of test of defendant's blood for alcoholic content--defendant having given oral and written consent thereto--did not deny due process. State v Haley (Mont) 318 P2d 1084."

CONTRA

"Admission of testimony as to blood on genitals of defendant in carnal knowledge case was denial of due process where evidence relating to presence of blood was obtained by police officers by force. U. S. v Townsend (DC Dist Col) 151 F Supp 378.

"Physical examination conducted by duress or force is violative of due process. State v Munroe, 22 Conn Supp 321, 171 A2d 419 (by implication)."

Other constitutional provisions: illegal search and seizure:

"Drunkometer test did not violate search and seizure provision of state or Federal Constitution. State v. Berg, 73 Ariz 96, 259 P2d 261.

"Taking of blood sample from accused by private laboratory technician did not amount to unreasonable search and seizure where technician did not act at direction of police or by prearrangement with them. Walker v State, 244 Ark 1150, 429 SW2d 121.

"Taking of blood sample incident to and contemporaneous with legal arrest for intoxication, and voluntarily consented to by person arrested, was reasonable and hence did not violate constitutional protection from unreasonable search and seizure. State v Johnson (Iowa) 135 NW2d 518.

"Defendant's constitutional right against self-incrimination was not violated by use of results of breathalyzer test where defendant consented to test. State v. Miller (ND) 146 NW2d 159.

CONTRA

"Where blood was taken from accused without his consent while he was undergoing surgical procedures in hospital, such taking constituted a prohibited search and seizure justifying reversal of the drunk-driving conviction. Mitchell v State (Fla App) 227 So 2d 728.

"Search and seizure provision of state constitution was violated by admission, in negligent homicide prosecution, of evidence of alcohol in defendant's blood, where blood was taken from defendant while unconscious. Lebel v Swincicki, 354 Mich 427, 92 NW2d 281."

Constitutional rights may be waived by the accused's consent to a physical examination. Note the following:

"Constitutional questions as to self-incrimination and due process did not arise where there was no proof that defendant's blood was taken to determine alcohol content without his consent. State v Sanders (SC) 107 SE2d 457 (citing annotation.)

"Defendant who voluntarily submitted to taking and analysis of blood sample waived constitutional right to have evidence of intoxication, determined from blood test, excluded in drunk-driving prosecution. Sioux Falls v Ugland (SD) 109 NW2d 144 (citing annotation.)

"Consent to taking of blood for analysis need not be given in writing. Abrego v. State 157 Tex Crim 264, 248 SW2d 490."

Richard L. Davenport

RICHARD L. DAVENPORT

RLD/slj

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Chief Davidson

CITY OF NORTH LAS VEGAS

INTER - OFFICE MEMORANDUM

Date: July 22, 1974

To: North Las Vegas Police Dept. Department:

From: Richard L. Davenport Department: Legal

Subject: Memo of June 17, 1974, re City of Cincinnati v. Karlan, 298 N.E. 2d 573 (1973)

With regard to the above-referenced memo, note the following decision rendered by the United States Supreme Court on February 20, 1974.

Lewis v. City of New Orleans, 39 L.Ed 2d 214, 94 Sup. Ct. ____ #72-6156 (1974).

SUMMARY

"After affirmance in the state courts of a conviction for addressing spoken words to a police officer in violation of a New Orleans ordinance making it unlawful and a breach of the peace 'for any person wantonly to curse or revile or to use obscene or approbrious language toward or with reference to' a city policeman while in the actual performance of his duties, the United States Supreme Court remanded the case to the Supreme Court of Louisiana (408 US 913, 33 L Ed 2d 321, 92 S Ct 2499) for reconsideration in light of the decision in Gooding v Wilson, 405 US 518, 31 L Ed 2d 408, 92 S Ct 1103, which held that a state criminal statute under the First and Fourteenth Amendments where the state courts had not construed the statute as being limited to 'fighting words,' which by their very utterance tended to incite an immediate breach of the peace. Upon remand, the Supreme Court of Louisiana again sustained the defendant's conviction under the ordinance, holding that the ordinance, as written, was narrowed to 'fighting words' uttered to specific persons at a specific time (263 La 809, 269 So 2d 450).

"On appeal, the United States Supreme Court reversed and remanded. In an opinion by BRENNAN, J., expressing the view of 5 members of the Court, it was held that (1) the ordinance, as construed by the Supreme Court of Louisiana, was susceptible of application to protected speech, and thus was overbroad and facially unconstitutional under the First and Fourteenth Amendments, since the state court had not narrowly defined

the words of the ordinance so as to limit its application to 'fighting words,' the proscription of 'opprobrious language,' at the least, embracing words which merely conveyed disgrace, and (2) it was immaterial that the defendant's language in the case at bar might have been punishable under a properly limited ordinance.

"POWELL, J., concurred in the result, expressing the view that (1) the ordinance was facially overbroad since the Louisiana Supreme Court's construction created a per se rule that whenever obscene or approbrious language was used toward a policeman, such language constituted 'fighting words,' and hence a violation without regard to the facts and circumstances of the particular case, (2) a properly trained officer could reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to 'fighting words,' and (3) the virtually open-ended interpretation of the ordinance afforded opportunity for abusive application.

"BLACKMUN, J., joined by BURGER, Ch. J., and REHNQUIST, J., dissented on the grounds that (1) the ordinance, which reflected a legitimate community interest in the harmonious administration of its laws, and which posed no significant threat to protected speech, had been properly limited to 'fighting words' by the Louisiana Supreme Court, (2) the defendant's speech in the instant case fell within the state court's construction of the statute, and (3) the defendant should not be allowed to prevail on the theory that the ordinance was unconstitutional as applied to others, since the courts were capable of stemming selective, abusive application of the ordinance."

Richard L. Davenport

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CITY OF NORTH LAS VEGAS

INTER - OFFICE MEMORANDUM

Date: July 9, 1974

To: North Las Vegas Police Dept. Department:

From: Richard L. Davenport Department: Legal

Subject: MIRANDA

In State v. Bennett, 517 P.2d 1029 (Utah 1973), both defendant and the victim were drunk and were placed alone together in the local jail's "drunk tank." Several hours later, a deputy sheriff, checking the cell, found the victim lying in a pool of blood on the floor, awakened the defendant, and asked him, "What happened?" The defendant replied, "I killed the son of a bitch last night; he would not shut up." A few minutes later defendant began shouting, "Call the newspapers, the police did it." Defendant appealed his murder conviction, claiming "violation of his so-called Miranda rights," as the court put it. In sustaining the conviction, the court held:

"The Miranda case, despite the mischief it has wrought, offers no aid to the defendant. Even in courts where it is thought to be valid [emphasis added] it would not apply to the facts of this case. The defendant was not in custody at the time for the crime of murder. He was being detained on another charge. The officer simply wanted to know what had occurred."

Richard L. Davenport

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CITY OF NORTH LAS VEGAS

INTER - OFFICE MEMORANDUM

Date: June 26, 1974

To: North Las Vegas Police Dept. Department:

From: Richard L. Davenport Department: Legal

Subject: Miranda Decision and Recent Developments

The following contains excerpts from an article appearing in the June 24, 1974, issue of "Time" magazine:

"The fondest hope of many a Warren Court critic has been that the Burger Court would overturn the 1966 Miranda decision. That momentus piece of 'strict construction' requires police to inform suspects of their rights to silence, to a lawyer--and to free counsel if they are indigent; it also bars the use in court of any statement obtained without a reminder of those rights. But instead of reversing Miranda outright, the new majority has opted for trimming, undercutting or blunting its reach.

"In recent years the court has held that an improperly obtained confession can be used to attack the credibility of a defendant who takes the stand to deny his guilt. It has also upheld a defendant's guilty plea, even though he did not know that the confession he had given was inadmissible at a full trial. Last week the court nibbled at Miranda again.

"Accused rapist Thomas W. Tucker had been told of his rights to silence and counsel--but not that he could have a court-appointed lawyer if he was unable to pay for one. His interrogation came before the Miranda decision. His trial came afterward, and none of his statements at the time of arrest were introduced. But damaging evidence came from a witness who, Tucker had told his police questioners, was a friend who would corroborate his alibi. Tucker's attorneys argued that the name of the witness had been obtained as the 'fruit' of the improper interrogation and so should be barred.

"Speaking for the majority, Justice William Rehnquist declared that the law 'cannot realistically require that policemen investigating serious crimes make no errors whatsoever.'

Barring Tucker's statements at the trial was a sufficient response to the police failure to tell him he could have a free lawyer. The testimony of Tucker's friend, Rehnquist concluded, could properly be used because it served the trial purpose of discovering the pertinent facts. Moreover, banning the testimony was not likely to deter similar police misconduct in this case preceded Miranda."

Another recent Miranda decision involved the Supreme Court of Ohio. On January 23, 1974, this Court, in Ohio v. Jones, 306 N.E.2d 409 (1974) held that when a suspect, after being fully apprised of his Miranda rights, indicates an understanding of those rights but subsequently acts in a way to alert reasonably the interrogating officer that the warnings have been misapprehended, the officer before any further questioning must ensure that the suspect fully understands his constitutional privilege against self-incrimination.

The Court stated as follows:

"We don't require police officers to probe a suspect's motives after his Miranda rights have been clearly explained, he indicates an understanding of them, and then demonstrates a willingness to speak. What we do require, however, is that when a defendant subsequently acts in such a way as to reasonably alert an interrogating officer that the warning given has been misapprehended, before any further questioning, insure that the defendant fully and correctly understands his Fifth Amendment rights."

This was not done in this case and the court ruled that because the state had not met its "heavy burden . . . to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel," the statement by the defendant was not admissible.

SUBJECT: FOURTH AMENDMENT RIGHTS

In United States v. Edwards, 415 U.S.___, 94 S.Ct. 1234 (1974), decided March 26, 1974, the U. S. Supreme Court held that there was no violation of the Fourth Amendment in the warrantless search of the clothing of a prisoner made approximately ten hours after his arrest.

Edwards was arrested in Lebanon, Ohio, on the right of May 31, 1970, and charged with attempting to break into the local post office.

"An investigation revealed that the attempted entry had been made by prying up a window and that paint chips had been left on the window sill. The next morning the police purchased trousers and a T-shirt for the prisoner and took the clothing he had been wearing as evidence. Examination showed paint chips on the clothing that matched the samples of paint found at the post office window. The clothing was entered in evidence at the trial over his objection that the seizure was invalid under the Fourth Amendment.

"The Sixth Circuit reversed, 474 F. 2d 1206 (1973).

"Mr. Justice White reversed the court of appeals, saying that one exception to the Fourth Amendment requirement of search warrants permits a search incident to a lawful custodial arrest. The arrest of Edwards took place late at night, the Court pointed out. '[N]o substitute clothing was then available for Edwards to wear, and it would certainly have been unreasonable for the police to have stripped petitioner of his clothing and left him exposed in his cell throughout the night. When the substitutes were purchased the next morning, the clothing he had been wearing at the time of arrest was taken from him and subjected to laboratory analysis. This was no more than taking from petitioner the effects in his immediate possession that constituted evidence of crime. This was and is a normal incident of a custodial arrest, and reasonable delay in effectuating it does not change the fact that Edwards was no more imposed upon than he could have been at the time and place of the arrest or immediately upon arrival at the place of detention.' " American Bar Association Journal, June 1974, p. 727

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CITY OF NORTH LAS VEGAS

INTER - OFFICE MEMORANDUM

Date: June 17, 1974

To: North Las Vegas Police Dept. Department:

From: Richard L. Davenport Department: Legal

Subject:

The following cases appeared in the May 1974 issue of AELE Law Enforcement Legal Liability Reporter:

EMPLOYMENT RIGHTS SUITS:

RIGHT TO DISCIPLINE AN OFFICER FOR HIS FAILURE TO MAKE AN ARREST QUALIFIED BY COURT.

"Clarence F. Kerr was suspended as sergeant from the Chicago Police Department for failing to have a motorist arrested whose car hit a service station and a house. The Police Board had decided that Kerr should have arrested the driver as D.W.I. and by not doing so had failed to carry out his duties. The sergeant sued to regain his position and the reviewing court ruled in his favor. The basis for the court's decision was that the initial incident over the auto accident had produced no evidence that the driver was actually intoxicated or had violated a traffic regulation and therefore the officer could not be released from his job for dereliction of duty." Kerr v. Police Board, 299 N.E. 2d 160 (Ill. App. 1973). LR #1715

EXCESSIVE FORCE SUITS:

$169,500 VERDICT AGAINST TOWN MARSHAL AFFIRMED ON APPEAL.

"James Cockrum was driving through Twin Bridges, Montana in September, 1966 when Whitney, the town marshal, chased him, claiming that he was speeding and driving erratically. By the time the marshal caught up with him, Cockrum had reached Sheridan, Montana and parked his car. Whitney pulled up in front of the parked car.

"Meanwhile, Cockrum got out of his car and stood by the open door. Whitney had been driving un unmarked car, a 1954 Buick, and was wearing old clothes and an old hat. His badge and gun were covered by his coat. When he approached Cockrum, he allegedly failed to identify himself but told Cockrum to come with him.

Cockrum, unaware of the marshal's identity, grabbed a wine bottle and hit Whitney in the head. When Cockrum turned to get back in his car, the marshal shot him.

"In addition to being town marshal, Whitney was a deputy sheriff who was on duty only on special occasions or when serving process. Cockrum sued both Whitney and Sheriff Loucks in a federal civil rights action. After a three day trial, the suit was dismissed against the sheriff, but the jury returned a verdict of $169,500 in damages against the marshal. On appeal, the U.S. Court of Appeals upheld the dismissed verdict against Sheriff Louks.

"The court stated that it was a question of fact for the jury to determine whether or not Whitney was justified in the shooting. The decision directed the District Court to decide whether or not Whitney should have a new trial." Cockrum v. Whitney et al, 479 F. 2d 84 (4th Cir., 1973),
LR #1702

CONSTABLE'S ATTACK ON SHERIFF'S PRISONER BRINGS A $5,500 CIVIL RIGHTS VERDICT; COURT RULES A LAWMAN CAN 'UNCONSCIOUSLY' ACT 'UNDER COLOR OF LAW.'

"Larry Henry was arrested by two deputy sheriffs following an election night argument in a Tennessee cafe. Constable Cagle found out that Henry's father had allegedly fired a shot at Cagle's son, Danny. So he came to the area where the deputies were questioning Henry and attached him.

"Henry, who received a near fatal knife wound, testified that Constable Cagle struck him and that his son, Danny knifed him. He testified 'I was trying to protect myself; me and him got into a scuffle. While we was scuffling, his son, Danny Cagle, jumped out of the car and come around behind the county patrol car and started cutting me with a knife.' Henry further testified that the two defendant deputies stood by and did nothing.

"Cagle's legal argument was that he was acting 'under color of any statute' (42 U.S.C. 1983) in allegedly violating Henry's civil rights, since he was not taking any part in the arrest and he considered the fight to be a private matter. A ruling in favor of the victim was appealed by the constable and the lower court's decision was reversed.

However, the Circuit Court reinstated the verdict finding that ' there was evidence that Constable Cagle consciously or unconsciously used his official position so as to be able to commit a wholly unofficial assault and that Danny Cagle acted in concert with him." An award of $5,500 was made to Henry for his injuries. Henry v. Cagle et al, 482 F.2d. 137 (6th Cir. 1973). LR #1703

RICHARD L. DAVENPORT

RLD/slj

June 18, 1974

M E M O

TO: POLICE DEPARTMENT

FROM: RICHARD L. DAVENPORT, Deputy City Attorney

SUBJECT: BAIL BONDSMAN AND THE LAW OF ARREST.

GENERAL PROVISIONS:

Sureties on a bail or recognizance are entitled to take the principal into custody for the purpose of surrendering him in exoneration of their liability. Such right has been likened to the re-arrest by the sheriff of an escaping prisoner. Taylor v. Taintor, 16 Wall 366, 21 L.Ed. 287. But this right is not derived from the state through subrogation; it is an original right arising from the relationship between the principal and his bail. And the right exists in the case of a bail bond given on an appeal from a conviction. Crain v. State, 66 Okla. Crim. 228, 90 P. 2d 954.

The right of bail in civil cases to arrest a principal is the same as in criminal cases.

In the absence of statutory limitations sureties on a bail bond may deputize others of suitable age and discretion to take the principal into custody. Crain v. State, supra. However, where a statute provides the manner in which the power of arrest may be delegated by the bail bondsman, that provision must be followed or the re-arrest is invalid. Dickson v. Mullings, 66 Utah 282, 241 P. 840. The person empowered by the bondsman to arrest a principal may not delegate his authority.

Where the surety on a bail bond procures the re-arrest of his principal by a sheriff, or other peace officer, it is the general rule that the officer is empowered to make the arrest as an agent of the surety, not as an officer per se.

TIME OF ARREST.

The right of sureties on a bail bond or recognizance to take the principal into custody for the purpose of surrendering him in exoneration of their liability may, in general, be exercised whenever they choose, prior to final discharge of the principal, and prior to termination of the effectiveness of the bond by forfeiture or otherwise. Crain v. State, supra; Dickson v. Mullings, supra.

The case of Hudson v. State of Oklahoma, (Okl.Cr.), 375 P. 2d 164 (1962) dealt with this situation and provided, in pertinent part, on page 166, as follows:

> "In American Jurisprudence, Vol. 6, p. 112, Sec. 165, it is said:
>
> " 'The surety, in assuming the obligation of bail, becomes in law the jailer of his principal and has custody of him. This custody is merely a continuance of the original imprisonment. The sureties are subrogated to all the rights and means which the state possess to make this control effective. Whenever they choose to do so, the sureties may seize their principal and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent.'
>
> "And in Section 167 we find this statement:
>
> " 'At common-law no process is necessary to authorize the arrest of the principal by his bail. The statutory requirements vary in this connection according to the jurisdiction, in some of which it is provided by statute that the bail may arrest the principal on a bailpiece or certified copy of the recognizance.' Annotation: 3 A.L.R. 188; 73 A.L.R. 1370.
>
> "In 8 Corpus Juris Secundum, Bail § 87, page 170, we find this language:
>
> " 'This right may properly be conferred by statute, and, indeed, it has been held that statutes authorizing the surety to surrender his principal are merely declaratory of the common-law. Bail on appeal from a conviction may also surrender their principal and be

> "relieved from liability on the undertaking, except that, where the undertaking of bail is to pay the fine, or such part thereof as the appellate court may direct, a surrender to serve sentence, or imprisonment until the fine is paid, cannot discharge such express undertaking to pay the fine.'
>
> "In the case of McIntosh v. State, 97 Okl. 134, 224 P. 702, the Supreme Court held:
>
> " 'A certified copy of the bond in a criminal case delivered to the sheriff constitutes due process and authorizes the officer to apprehend and arrest the defendant, and, when arrested and detained by the sheriff, the sheriff becomes the custodian of the defendant, and the bondsmen are exonerated from liability on the bond.' "

The more recent case of Bean v. County of Los Angeles, 60 Cal. Rptr. 804 (1967), provided that the rights and liabilities of sureties on bail bonds differ in important respects from those of sureties on ordinary bonds or commercial contracts, and stated at page 807, as follows:

> "The sureties on a bail bond can at any time discharge themselves from liability, while sureties on ordinary bonds and commercial contracts can only be released by payment of the debt or performance of the act stipulated., (Bail and Recognizance, 7 Cal. Jur. 2d 585 and 586.) Upon the release of a person on bail he is in the custody of the sureties, and the consideration of the bond, accruing to the sureties, is his freedome from any other custody. The responsibility of the sureties is based upon their custody of the principal (the person bailed), and their rights and powers under such custody. If they are at any time fearful that he may not appear, they can have him arrested and surrendered, or he may surrender himself, and in either event they are exonerated. (People v. McReynolds, 102 Cal. 308, 311, 36 P. 590; Pen.Code, §1300, County of Los Angeles v. Maga, 97 CalApp. 688, 690, 276 P. 352.)

There is authority for the proposition that the principal may be taken by the bail at night or on Sunday, but arrests should not be made at night or on Sunday except in the case of pressing necessity. 5 Am. Jur. 2d, Arrest § 79.

PLACE OF ARREST.

The right of sureties on a bail bond or recognizance to take the principal into custody for the purpose of surrendering him in exoneration of their liability may, in general, be exercised wherever they choose, or anyplace within the State. Crain v. State, supra; State v. Pelley, 222 N.C. 684, 24 S.E. 2d 635.

Generally, the power of arrest of the principal by the bail may not be exercised outside the territory of the United States, but the re-arrest of the defendant by bail is not dependent on process nor is it a matter of criminal procedure, and hence bail may pursue the defendant into a sister state and detain him for the purpose of returning him to the state from which he fled and there surrendering him. Taylor v. Taintor, supra; Fitzpatrick v. Williams, (C.A.5) 46 F.2d 40, 73 A.L.R. 1365; Golla v. State, 50 Bel. 497, 135 A.2d. 137, cert. den. 355 U.S. 965, 2 L. Ed. 2d, 539, 78 S.Ct. 555. The following is stated in 8 Am. Jur. 2d, Bail and Recognizance § 117:

> "The right of bail to cross state lines and remove an escaped prisoner from another state is not a right enjoyed by state officers, except as provided by statutes, although an officer may, as the duly authorized agent of bail, under authority of a bail-piece, pursue defendant to any state within the United States and arrest and return him without extradition. These principles are applicable equally to civil and criminal cases. In arresting the principal in another jurisdiction, there can be no interference with the interests of other persons who have arrested such principal. They cannot take the principal from the custody of officers of the other state, but they may request the officers to hold the principal following termination of such custody. Or the sureties may obtain an order in the court of the other state to hold the principal at the termination of the detention therein, and the principal may thereupon be re-arrested and returned to the jurisdiction of the court that released him to bail."

FORCIBLE ENTRY.

Since arrest of a criminal defendant by his bail is regarded as in the nature of arrest and detention of a criminal rather than as service of process, sureties on a bail bond are entitled to break open the doors of the home of the principal to affect his arrest where the principal refuses to surrender himself on notice to do so. Taylor v. Taintor, supra.

The 1971 United States District Court case of Smith v. Rosenbaum, 333 F. Supp. 35 (1971), ruled as follows:

> "(6) The common law would appear clear that a surety on a bail bond, or his appointed deputy, may take his principal into custody wherever he may be found, without process, in order to deliver him to the proper authority so that the surety may avoid liability on the bond. So long as the bounds of reasonable means needed to effect the apprehension are not transgressed, and the purpose of the recapture is proper in the light of the surety's undertaking, sureties will not be liable for returning their principles to proper custody. Curtis v. Peerless Insurance Company, 299 F.Supp. 429 (D.C.Minn. 1969). See generally, 8 Am. Jur. 2d, Bail and Recognizance §§ 114-119 (1963); 8 C.J.S. Bail § 87c (1962)."

Where the sureties on a bail bond or recognizance commit acts not authorized by law, for the purpose of arresting the principal, they may be subjected to liability for the actual damages they cause thereby.

NECESSITY OF PROCESS.

For the purpose of re-arrest by bail, the common law rule of process is not necessary, or at least that a bailpiece or endorsed copy of the bond is sufficient process for the purpose, is generally recognized. Statutory requirements are sometimes held to be merely cumulative to the common law right to arrest without process. Carr v. Sutton, 70 W.Va. 417, 74 S.E. 239.

On the ground that the right to take the principal into custody and surrender him results from the nature of the undertaking by the bail, the rule permitting arrest without process has even been applied to the right to arrest the principal in another state. Fitzpatrick v. Williams, supra; Golla v. State, supra.

The Nevada Revised Statutes that pertain to this particular situation, are set out, in part, below.

> "178.522 Exoneration of Bail.
> 2. A surety may be exonerated by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody.
> (Added to NRS by 1967, 1453; A 1969, 10)

> "178.526 Sureties may arrest and surrender defendant. For the purpose of surrendering the defendant, the sureties, at any time before they are finally discharged, and at any place within the state, may themselves arrest him, or by a written authority, endorsed on a certified copy of the undertaking may empower any person of suitable age and discretion to do so.
> (Added to NRS by 1967, 1454)

* * * * * * * *

STATE OF NEVADA

MIKE O'CALLAGHAN
Governor

FILE
LEGAL ADVISOR

CARROL T. NEVIN
Director

JOHN W. PEEVERS
Chief

File #400

DEPARTMENT OF LAW ENFORCEMENT ASSISTANCE

PLANNING AND TRAINING DIVISION

STATE CAPITAL, 1209 JOHNSON STREET
CARSON CITY, NEVADA 89701
TELEPHONE (702) 882-7114

** M E M O R A N D U M **

DATE: June 25, 1974

TO: All Police Agencies

FROM: Paul L. Wilkin, Criminal Justice Specialist, Police

RE: Use of Disorderly Language Against Police Officer

* *

The information contained in the attached memo may be of interest to the police agencies of the State, as a means or way of justifying an arrest for disorderly conduct.

Heretofore we were somewhat limited in this area.

PLW/lab

Chief Duncan

CITY OF NORTH LAS VEGAS

INTER - OFFICE MEMORANDUM

Date: June 17, 1974

To: North Las Vegas Police Dept. Department:

From: Richard L. Davenport Department: Legal

Subject:

The following is a recent case out of the State of Ohio I felt might be of interest.

In City of Cincinnati v. Karlan, 298 N.E. 2d 573 (1973), the Court stated as follows:

> "Hurling four letter word epithets at a police officer in a public place constituted the use of 'fighting words' and was prosecutable under a disorderly conduct ordinance. (Section 901-d 4, Cincinnati Municipal Code) proscribing conduct in a 'boisterous, rude, insulting or other disorderly manner,' with intent to abuse or annoy any person."
>
> "These were "fighting words' even though the police officer was not moved to anger or violence, but, in fact, merely blushed."

The Court, quite sensibly, focused not on a subjective test--i.e., how the subject of the remarks actually reacted--but, rather, on an objective test, i.e., whether the average person (not the average police officer) would be provoked into a retalitatory breach of the peace.

Richard L. Davenport

RLD/slj

Chief Davenport

CITY OF NORTH LAS VEGAS

INTEROFFICE MEMORANDUM

DATE: June 14, 1974

TO: NORTH LAS VEGAS POLICE DEPT.

FROM: RICHARD L. DAVENPORT DEPT.: LEGAL

Recently there have been several arrests made charging individuals with X-Felon Failure to Change Address and X-Felon Failure to Register, wherein these persons have had in their possession a Petition and Order for Discharge from Probation or such document has been on file with Records.

Attached hereto is a copy of such Petition and Order to serve as an example. Note that it provides in part, as follows:

> "IT IS THEREFORE ORDERED that the said Probationer's plea of Guilty be changed to that of Not Guilty, and the Information herein dismissed."

Note also N.R.S. 176.225 which states in part, the following:

> "1. Every defendant who:
>
> "(c) Has demonstrated his fitness for honorable discharge but because of economic hardship, verified by a parole and probation officer, has been unable to make restitution as ordered by the court, may at any time thereafter be permitted by the court to withdraw his plea of guilty or nolo contendere and enter a plea of not guilty; or, if he has been convicted after a plea of not guilty, the court may set aside the verdict of guilty; and in either case, the court shall thereupon dismiss the indictment or information against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted." (Emphasis added.)

In removing "all penalities and disabilities" this negates the necessity for such persons to register and change addresses as ex-felons.

Richard L. Davenport

RICHARD L. DAVENPORT

RLD/slj

Enclosure

Form 10

Petition and Order for Discharge from Probation:

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WHITE PINE

* * *

THE STATE OF NEVADA, Plaintiff

vs.

RICHARD JENNINGS PETTY Defendant

Case No. 1121

Department

FILED

APR 8 1963

B. [illegible] Clerk

By Deputy

PETITION

To the Honorable Judge JON R. COLLINS, of the Seventh Judicial District Court of the State of Nevada, in and for the County of White Pine, the Undersigned Chief Probation Officer for the State of Nevada now reports as follows concerning the above Defendant: Said Defendant was placed on probation by order of this Court for a term of two years, said Order being dated the 11th day of April, 1961. Said Probationer has satisfactorily completed all of the conditions of probation, while under supervision in the State of Nevada. Restitution has been paid in full.

THEREFORE, the undersigned recommends that said Probationer be discharged from further supervision.

Dated this 8th day of April, 19 63

[signature]
Chief Probation Officer

* * * * * * * *

ORDER DISCHARGING PROBATIONER

At a session of said Court held at the County Courthouse in the City of Ely, Nevada, in said County, on the day of April, 19 63

Before, the Honorable Jon R. Collins, District Judge, In this cause it appearing that the above-named Defendant was heretofore placed on probation in charge of the Board of Pardons and Paroles Commissioners and the Chief Probation Officer of the State of Nevada, and it further appearing from the petition of said Probation Officer that the period of such probation expired on April 11, 1963. IT IS THEREFORE ORDERED that the said Probationer's plea of Guilty be changed to that of Not Guilty, and the Information herein dismissed.

IT IS FURTHER ORDERED that said Probationer be, and is hereby discharged from supervision and from any obligation respecting the conditions of said probation heretofore imposed by this Court in accordance with the statute in such cases made and provided.

[signature]
District Judge

Dated this 8th day of April, 19 63

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CITY OF NORTH LAS VEGAS

INTER - OFFICE MEMORANDUM

To: Chief of Police Clarke Davison
Patrolman Sam R. Smith - Grave Shift.

Date May 10, 1974

Department: NLVPD

From: Richard L. Davenport

Department: Criminal Division

Subject:

TEAR GAS DEVICES

N.R.S. 202.380 (1) provides as follows:

"(1) Every person, firm or corporation who within the State of Nevada knowingly sells or offers for sale, possesses or transports any form of shell, cartridge or bomb containing or capable of emitting tear gas, or any weapon designed for the use of such shell, cartridge or bomb, except as permitted under the provisions of N.R.S. 202.370 to 202.440, inclusive, shall be guilty of a gross misdemeanor." (Emphasis added)

Subsection (2) of said N.R.S. 202.380 exempts members of police departments, sheriffs departments and military or naval forces from the effect of Subsection (1).

N.R.S. 202.400 provides for the lawful issuance of permits for such devices by the Chief of the Nevada Highway Patrol. Every person, firm or corporation to whom a permit is issued shall either carry the same upon his person or keep the same in the place described in the permit. The permit shall be open to inspection by any peace officer. N.R.S. 202.420.

The Nevada case of Harris v. State, 83 Nev. 404, 432 P. 2nd 929 (1967), dealt with this problem, and stated, in part, as follows:

"1. As his first assignment of error Harris challenges the constitutionality of N.R.S. 202.380, as an infringement of the Second Amendment of the U. S. Constitution. The Amendment read: 'A well-regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.'

> "That Amendment applies only to the Federal Government and does not restrict state action. (Citations omitted) The right to bear arms does not apply to private citizens as an individual right. (Citations omitted)
>
> ". . . Tear gas pens are a proper subject for state regulation. . ." (Emphasis added)

Further, it is stated in Harris at page 931 as follows:

> ". . . Possession statutes require no particular scienter, only knowledge of the presence and character of the object. It is not necessary that there be knowledge on the defendant's part that possession was in violation of a statute." (Emphasis added) (Citations omitted)

Thus, the law seems abundantly clear in this area. Perhaps a copy of this memo to certain individuals would result in speedy compliance.

Richard L. Davenport

RICHARD L. DAVENPORT
Deputy City Attorney

rld/jc

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RICHARD L. DAVENPORT
Deputy City Attorney

rld/jt

MEMORANDUM

TO: NORTH LAS VEGAS POLICE DEPARTMENT

FROM: RICHARD L. DAVENPORT

DATE: March 15, 1974.

MODEL RULES FOR LAW ENFORCEMENT: Searches, Seizures and Inventories of Motor Vehicles.

In December, 1973, the United States Supreme Court in United States v. Robinson, No. 72-936 (December 11, 1973), held that a full search of a person after a custodial arrest, based on probable cause, that defendant was driving an auto while his license was revoked, was not only an exception to the Fourth Amendment Search Warrant requirement but was also a reasonable search under the Fourth Amendment. Police regulations require that a person operating his vehicle without a license be arrested.

In Gustafson v. Florida, No. 71-1669 (December 11, 1973), decided the same day as Robinson, the Court upheld a search of a person in the same circumstances as Robinson, and determined that it was of no constitutional significance that the police were not required to arrest a person operating a car without a driver's license.

Subsequent to these landmark decisions, the Criminal Law Bulletin, Volume 10, No. 1 (January-February 1974), set out Model Rules (hereinafter Rules) which established procedures for searches, seizures, and inventories of motor vehicles. Because seizures and inventories are treated differently as a matter of administration, they are made the subject of separate Rules. A search is an examination of a person, place, motor vehicle, or any other thing, with a view toward discovery of evidence (contraband, weapons, things used in committing a crime, loot, and other evidence of crime). A seizure involves taking the vehicle into custody itself.

An inventory is an examination of a motor vehicle in police custody to account for objects in the vehicle for which the police are responsible.

The Rules on searches are grouped in terms of common situations in which search opportunities arise;

(1) Where evidence is found in plain view or open view;

(2) Where an arrest is made (either non-custodial, as in a minor traffic case, or, more typically, as in full custody arrest, when the suspect is taken to a detention facility or before a judicial officer);

(3) Where a search of an unoccupied vehicle is desired; and

(4) Where consent from the owner or driver is sought.

RULE ONE. Seizure of items in plain view or open view in a vehicle.

Plain View; Open View.

An officer lawfully in any place may, without obtaining a search warrant, seize from a motor vehicle any item which he observes in plain view or open view. (including items observed through the use of a flashlight), if he has probable cause to believe that the item is contraband, a weapon, anything used in committing a crime, loot, or other evidence of crime.

Commentary: Courts have long noted that no "search" is involved when an officer fortuitously views evidence from a position he has a lawful right to be in. Harris v. United States, 390 U.S. 234, 236, (1968)There being no search, such discoveries are not within the purview of the Fourth Amendment.

It is well established that an officer viewing the interior of a vehicle through its windows have not conducted a search. Nunez v. United States, 370 F. 2d 538 (5th Cir. 1967). The use of artificial light (typically a flashlight) to enhance the observation is proper. United States v. Lee, 274 U.S. 559, (1927); Marshall v. United States, 422 F. 2d 185 (5th Cir. 1970).

RULE TWO. Searches connected with arrests.

Commentary: This topic poses several analytical problems, involving as it does several distinct police activities following the stopping of a vehicle:

(1) No formal enforcement action is taken.

(2) A citation is issued at the scene, and the driver is permitted to leave.

(3) The driver is asked to follow the officer to the station (for issuance of a citation, or, in unusual cases, booking).

(4) The driver is taken into full custody for a vehicle code violation and then taken before a judicial officer or to a detention facility.

(5) The driver (or a passenger) is taken into custody for a non-traffic offense, and probable cause for a full search of the vehicle is absent.

(6) The driver (or passenger) is taken into custody for a non-traffic offense, and there is probable cause for a full search of the vehicle.

These distinctions all play a part in the limitations contained in the following Model Rules.

Full Custody Arrest.

Whenever an officer makes a full custody arrest of a person in a motor vehicle, he may conduct a full warrantless search of the arrested person's garments and the surface of his body in a manner designed to reveal the presence of seizable items. The officer may also conduct a warrantless search of those areas of the vehicle within which the arrested person might readily reach for a weapon or other seizable items at the time of his arrest. The search must be conducted at the time and place of arrest in the immediate presence of the arrested person.

Commentary:

A full custody arrest involves physical custody, rather than mere interference with freedom of movement. It very often is marked by the placing of restraints, such as handcuffs, on the suspect. A full custody arrest always separates the suspect from the vehicle in which he was riding.

This Rule permits a body search of the arrested person for weapons or other seizable items whenever there is a full custody arrest. No distinction is made between felony arrests, non-traffic misdemeanor arrests, misdemeanor traffic arrests for the purpose of transporting the arrestee to a magistrate, and misdemeanor traffic arrests, with or without a warrant, for purposes of detention.

The Rules take this approach because of the validity of a search for weapons on or within reach of a person arrested for other than a traffic violation traditionally has not depended upon the nature of the crime for which the arrest was made.

The proper emphasis should be on the danger posed by the proximity of the officer to the arrested person, not on the severity of the offense arrested for.

In addition to the body search, the Rule authorizes a limited vehicle search. The extent of this search depends upon two factors:

(1) Whether the offense involves such seizable items as instrumentalities, contraband, loot, or mere evidence; and

(2) If the offense is of the kind, whether there is probable cause to believe the vehicle contains such items.

Traffic offenses generally yield no seizable items. For most full custody traffic offenses, search of the vehicle is limited to those areas within reach of the arrestee which could contain a weapon.

Full custody arrest of traffic law violators.

Whenever an officer makes a full custody arrest of a person in a motor vehicle for a traffic law violation, he may "frisk" the person for weapons. The officer may also conduct a warrantless search of those areas of the vehicle within which the arrested person might readily reach for seizable items or weapons at the time of his arrest.

Commentary:

This particular Rule fully complies with another recent opinion from the District of Columbia, United States v. Wheeler, 459 F. 2d 1228 (D.C. Cir. 1972). The Court upheld the seizure of a loaded revolver found following the stopping of a vehicle. Whether this discovery was preceded by full custody arrest of

CONTINUED

1 OF 2

the motorise or merely by the initial traffic stop arrest is unclear. As the Court related them, the facts were:

> "Wheeler was initially arrested for driving without a proper permit and was advised of his rights. During a 'pat down' at the scene of the arrest, five .38 caliber bullets were discovered. In response to a question regarding the presence of a gun, Wheeler indicated that it was under the front seat of the car; the police officer discovered a loaded .38 caliber under the driver's seat."

Stop followed by citation.

A. Street Citation. A person who is "stopped" by an officer and then is given a warning or issued a citation - but who is not placed under full custody arrest, should not be searched, nor should any vehicle used by such person be searched, unless the officer reasonably suspects the person to be armed. In that case, the officer may "frisk" the person for weapons.

B. Station House Citation. Traffic violators and other persons who are asked to follow an officer to a police facility, but who are not placed under full custody arrest, should not be searched; nor should their vehicle be searched. If the officer making the stop reasonably suspects the person to be armed, he may "frisk" him for weapons.

Commentary:

Traffic stops involve a vast number of law abiding citizens who resent unnecessary police intrusions. Routine searches in traffic cases would also absorb tremendous amounts of police energy and time with only the most sporadic results. Therefore, this Rule forbids motor vehicle searches during routine traffic stops but permits "frisks" during the unusual traffic stop when the officer reasonably fears for his safety. An example of this is found in State v. McCrary, 478 S.W. 2d, 349 (Mo. 1972). There an officer writing out a citation for a taillight violation was alarmed by the motorist's suddenly reaching for his own right hip pocket. After grabbing the motorist's arm and handcuffing him, the officer then reached into the pocket. He withdrew, not a weapon, but two condoms of heroin. The Court upheld the police action.

This Rule should not restrict search activities in connection with such traffic offenses as driving under the influence of alcohol or narcotics. Full custody arrests almost invariably accompanies the discovery of these violations.

Wider search when probable cause exists to believe seizable items are in vehicle.

A. When permitted. Whenever a full custody arrest is made of a person in a motor vehicle or of a person in close proximity to a vehicle from which he has just departed, or into which he is about to enter, and the arresting officer has probable cause to believe that the vehicle contains seizable items, the vehicle may be searched for those items without a warrant as soon as practicable.

B. Scope of the Search. An officer making a motor vehicle search, may search only those areas of the vehicle which could physically contain the evidence sought.

Example: A vehicle is stopped, pursuant to a radio broadcast, for a suspect wanted in connection with a homicide in which the deceased was struck with a baseball bat. The officer is not permitted to search the locked grove compartment because a baseball bat could not be found there. He may, however, search the trunk. If there is some other small item of missing evidence, such as a blood stained shirt of the suspect, the glove compartment may then be searched.

C. Manner of the Search. Whenever possible, an officer shall open a locked trunk or glove compartment by means of a key rather than by force.

D. Time and place of the search. Searches under this Rule should be conducted at the scene of the arrest as soon as the prisoner is placed in secure custody. It is not necessary to keep the prisoner near the vehicle during this type of search, however. In those cases when it is not feasible to conduct the search at the scene of the arrest, the vehicle may be secured in police custody at all times until it is searched, and the search shall be conducted as soon as is practicable.

E. Search of vehicle passengers. If following a search of a motor vehicle under this Rule, the officer has not found the seizable items sought, he may search the occupants of the vehicle if:

(1) The item he is seeking could be concealed on the person, and

(2) He has reason to suspect that a passenger has the item.

This search may be made even though the officer does not have probable cause to arrest the passenger.

F. Frisk of vehicle passengers. If the officer reasonably suspects that a passenger in the motor vehicle is armed he may "frisk" him for weapons.

Use of search warrant.

When special circumstances exist, a search warrant should be obtained before searching a vehicle in connection with an arrest.

A. Special circumstances: Arrest and search of vehicle preplanned. A search warrant should be obtained when there is adequate time to obtain the warrant before the arrest of a suspect and it is anticipated that the "target" vehicle specified will be at the location where the arrest and search will occur.

B. Special circumstances: Ease of obtaining a warrant. A search warrant should be obtained when the "target" vehicle has come into police custody and can be readily secured while the warrant is sought, and delay in the search will not be detrimental to the investigation.

Commentary:

The belief that police may undertake a warrantless search of a vehicle whenever probable cause for such search exists was

laid to rest in Coolidge v. New Hampshire, 403 U.S. 443, (1971). The Court there, noting that the word "automobile" is not a talisman in whose presence the Fourth Amendment fades away, held that absent "exigent circumstances", warrantless vehicle searches violate the Fourth Amendment.

When a vehicle becomes an object of police concern, the following factors have usually qualified as exigent circumstances:

(1) The vehicle is occupied, and the delay involved in obtaining a warrant may allow the vehicle to be removed from the jurisdiction or the seizable items within the vehicle to be destroyed.

(2) The vehicle is on a public thoroughfare.

(3) The vehicle is being used for an illegal purpose, e.g., transporting contraband, concealing stolen property, or facilitating flight from detection or apprehension.

Absent to these factors, there should be a requirement for a warrant before a search may occur.

RULE THREE. Searches of vehicles not connected with an arrest.

Searches not connected with an arrest.

If an officer has probable cause to believe that a vehicle, either locked or unlocked, contains seizable items, all those areas of the vehicle which could contain such items may be searched without a search warrant unless:

(1) The vehicle does not appear to be movable or easily rendered movable by minor repairs, and

(2) The officer concludes there is adequate time in which to obtain a search warrant before the vehicle is moved or the seizable items removed.

In those circumstances a search warrant must be obtained.

Example: An officer is told by a neighborhood merchant that he observed a person placing a sawed-off shotgun in the trunk of a vehicle one-half hour earlier. The merchant accompanied the officer to the vehicle, which appears to be operational except for a flat rear tire. The officer may immediately search the trunk of the vehicle without a search warrant because he has probable cause to believe that the shotgun is there and the vehicle may be easily removable by a minor repair. (If, however, the vehicle has been stripped of its wheels, the officer should obtain a search warrant prior to searching the trunk if time permits).

Commentary: This rule authorizes warrantless search of a vehicle with no connection to an arrest, when probable cause to search exists, and the officer reasonably believes the vehicle was capable of being removed. The mobility of vehicles very often establishes the "exigent circumstances" that justify quick action and excuse the failure to obtain a search warrant.

RULE FOUR. Consent searches of motor vehicles.

Motor vehicle searches by consent of the owner or driver.

Whenever an officer desires to make a motor vehicle search not authorized by these rules and is unable to obtain a search warrant, he may, as a last resort, request consent to search from the person (s) in control of the vehicle. No consent search may be made unless the person consenting signs a written consent form and the officer is satisfied that the person consenting read and understood it.

Commentary:

The Model Rules do not encourage "consent searches" of motor vehicles. The reasons are both legal and practical.

First, consent searches are disfavored by many courts. Consent to a search is essentially a waiver of constitutional rights and must be unequivocal, intelligent, and uncoerced. Stoner v. California, 376 U.S. 483, (1964).

The difficulties are compounded by the question of who may give consent to search a place or vehicle.

RULE FIVE. Seizures of motor vehicles.

A motor vehicle is "seized" or "impounded" when officers take custody of it, and either remove it to a police facility or arrange its removal to a private storage facility. An "inventory" is an administrative process by which items of property in a seized vehicle are lifted and secured. An inventory is not to be used as a substitute for a search. Vehicles coming into custody of the police department shall be classified for purposes of these Rules into six categories:

Seizures for forfeiture;

Seizures as evidence;

Prisoners' property;

Traffic impoundment;

Abandonment;

And other non-criminal impoundment.

The procedures for carrying out the seizures, the need for a warrant, the right to search or inventory a vehicle, and the time and scope of any such inventory depend upon how the vehicle is classified.

Seizures for forfeiture: Vehicle used illegally.

A. When permitted. When an officer has probable cause to believe a vehicle has been used in the commission

of any felony, he shall take the vehicle into custody and classify it as a "seizure for forfeiture". No "seizure for forfeiture" shall be made without approval of a superior.

C. Necessity for search warrant. An officer shall obtain a "seizure for forfeiture" whenever the vehicle to be seized is on private property and it is not likely that the vehicle will be removed or tampered with while the warrant is being obtained. This is the only situation in which a search warrant is necessary for a "seizure for forfeiture".

Seizures as evidence.

A. When permitted. When an officer has probable cause to believe that a vehicle had been stolen or used in a crime or is otherwise connected with a crime, he may take the vehicle into custody and classify it as "seizure as evidence".

B. Exception for minor traffic offenses. A vehicle involved in a minor traffic offense shall not be seized as evidence merely because it was used to commit the traffic offense.

C. Necessity for a search warrant. An officer shall obtain a search warrant prior to making a "seizure as evidence" when the vehicle to be seized is on private property and it is not likely to be removed or tampered with while a warrant is being obtained. This is the only situation in which a search warrant is necessary for a "seizure as evidence".

Prisoners' property.

A. Definition. When a person is arrested in a vehicle which he owns or is authorized to use, and the vehicle is not otherwise subject to seizure, it shall be classified as "prisoners' property".

B. Disposition of "prisoners' property". A prisoner shall be advised that his vehicle will be taken to a police facility or private storage facility for safekeeping unless he directs the officer to dispose of it in some other lawful manner. In any case where a prisoner requests that his vehicle be lawfully parked on a public street, he shall be not required to indicate his request in writing.

If the vehicle is found to be the property of a person having no criminal involvement in the offense, such person shall be notified of the location of the vehicle as soon as practicable.

Traffic or parking impoundments, impoundment of abandoned motor vehicles, and other non-criminal impoundments shall not be covered herein.

Procedure for any inventory.

Whenever an officer is authorized to inventory a vehicle under these Rules, he may examine the passenger compartment, the glove compartment and the trunk, whether or not locked. Any container, such as boxes or suitcases, found within the vehicle may be opened. Immediately upon completion of the inventory, the officer shall, if possible, roll up the windows and lock the doors and the trunk.

* * * * *

A P P E N D I X

CONSENT TO SEARCH OF VEHICLE.

DATE _____

LOCATION OF SEARCH _____

VEHICLE I.D. _____

CASE NO. _____

I, hereby freely and voluntarily give my consent to officers of the North Las Vegas Police Department to conduct a search of (Insert description of vehicle to be searched) for evidence of (Insert common name of crime being investigated).

I understand that the officers have no search warrant authorizing this search, and that I have a constitutional right to refuse permission for them to conduct the search.

_____

WITNESS:

_____

_____

CITY OF NORTH LAS VEGAS

INTER - OFFICE MEMORANDUM

Date: August 30, 1974

To: Chief of Police C. Davison Department: Police

From: Richard L. Davenport Department: Legal

Subject: INMATE'S FEAR OF SEXUAL ATTACKS CAN BE DEFENSE TO ESCAPE CHARGE.

"A prison inmate who can establish some basis for his claimed fear of homosexual attacks by other prisoners may assert that fear to establish a duress defense against an escape charge, the Michigan Court of Appeals holds. 'The time has come when we can no longer close our eyes to the growing problem of institutional gang rapes in our prison system.' (People v. Harmon, 5/30/74, released 7/24/74.

"The court points out that the state has a duty to assure the safety of inmates. Holt v. Sarver, 300 F.Supp. 825 (E.D. Ark. 1969). Those persons in charge of prisons and jails are obliged to take reasonable precautions in order to provide a place of confinement where a prisoner is safe from gang rapes and beatings at the hands of fellow inmates and from intentional placement into situations where an assault of one type or another is likely to result. If the prison system fails to live up to its responsibilities in this regard, the court says, 'we should not, indirectly, countenance such a failure by precluding the presentation of a defense based on those facts.'

"Accordingly, the court concludes that an 18-year-old inmate whose testimony established that he had twice been beaten for refusing the sexual advances of older inmates, that he had expressed the fear that this type of thing might happen to him, and that there was an admitted homosexual problem in the particular institution, was entitled to a jury instruction of duress.

"To establish a duress defense, the court notes, the defendant must show that the violation for which he stands accused was necessitated or caused by threatening conduct of another which resulted in the defendant harboring a reasonable fear of imminent or immediate death or serious bodily harm. The facts in the instant case were more than sufficient to require this submission of the duress question to the jury.

Richard L. Davenport

RICHARD L. DAVENPORT

END

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