



CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

May 2000

Volume 18, Issue 5

IN THIS ISSUE

Did you know...

... We are introducing a new column that will be written and edited by the DA liaison to CMPD and will be known as the "DA's Corner". This regular feature will relay pertinent information from the DA's perspective. See page 8-9.

... President Clinton recently signed into law a new Federal Asset Forfeiture bill that imposes new burdens on law enforcement? See page 6.

... G.S. 20-28.3 allows for forfeiture of motor vehicles for certain impaired driving offenses? Officers can also seize the vehicle if they learn after arrest and processing that the defendant was driving with an impaired driving license revocation. See page 5.

... We have included an Update on the Authorization to Act as Agent to assist Officers in advising citizens about this process. See page 5.



Forward: In this issue we review significant cases from all the major courts. The **United States Supreme Court** addressed the Fourth Amendment and the physical manipulation and search of soft luggage. The **Fourth Circuit Court of Appeals** revisited the issue of searches at drug checkpoints, finding that the officer **did** have reasonable suspicion to continue the detention of a motorist beyond the checkpoint. The **North Carolina Supreme Court** also addressed DWI checkpoints finding that avoiding a checkpoint justifies an investigatory stop. The **North Carolina Court of Appeals** discussed the resumption of interrogation after a waiver of rights.

HIGHLIGHTS:

UNITED STATES SUPREME COURT:

Fourth Amendment/Search/Physical Manipulation: *In Bond v. United States*, (2000), the Supreme Court found that a Border Patrol Agent's physical manipulation of a bus passenger's carry-on luggage and subsequent consent search revealing a brick of methamphetamine, was a violation of the Fourth Amendment. See page 2.

FOURTH CIRCUIT COURT OF APPEALS:

FOURTH AMENDMENT/DETENTION/DRUG CHECKPOINT: *In United States v. Brugal*, ___F.3d___ (2000) the 4th circuit, rehearing en banc, reversed the panel's earlier decision.

(See Police Law Bulletin, September 1999)

The Court found that the South Carolina officer did have reasonable suspicion for continued detention of a motorist after the purpose of the drug checkpoint was fulfilled. See page 2.

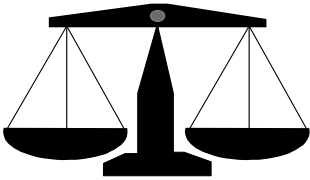
NORTH CAROLINA SUPREME COURT:

DWI Checkpoint/Reasonable Suspicion: *In State v. Foreman*, decided May 5, 2000, the Supreme Court modified the Court of Appeals earlier decision. The Court found that officers monitoring DWI checkpoints may pursue and stop a vehicle that has made a legal turn away from the checkpoint to determine why the driver avoided the checkpoint. This type of investigatory stop is a minimal intrusion upon a motorist. See page 4.

HIGHLIGHTS cont.

NORTH CAROLINA COURT OF APPEALS:

Juvenile/Interrogation/Initiation of Communication after Waiver: *In State v. Johnson*, 525 S.E. 2d. 830, (2000), the Court of Appeals found that the resumption of interrogation of a juvenile after invoking his rights was not a violation of Miranda. The juvenile's mother told the juvenile to speak with the officers and the juvenile nodded affirmatively which initiated further conversation and lawful interrogation. See page 5.



BRIEFS:

UNITED STATES SUPREME COURT:

Fourth Amendment/Search/Physical Manipulation:

Bond v. United States, ___ U.S. ___ (2000).

FACTS: A Border Patrol Agent boarded a bus in Texas to check the immigration status of the passengers. The Border Patrol Agent walked the length of the bus, finding no immigration violations. As he began walking toward the front of the bus, he squeezed soft luggage that was in the overhead bins. The Agent felt

something "brick-like" in Bond's canvas bag. Bond consented to the search of his bag. During the search, the Agent located a brick of methamphetamine in Bond's luggage. Bond moved to suppress the drugs, which was denied. He was found guilty of conspiracy to possess methamphetamine and possession with intent to distribute methamphetamine.

ISSUE: Whether or not the Agent's physical manipulation of the Defendant's luggage was a search that violated the Fourth Amendment?

RULE: YES. The Agent violated Defendant's Fourth Amendment right to be free from unreasonable searches when he physically manipulated Defendant's luggage.

DISCUSSION: The Court found that Bond had a legitimate expectation of privacy in his luggage. Although he may have expected the luggage to be handled by bus employees or by other passengers, the Agent's search of the bag exceeded the type of casual contact that Bond might have expected. The Court's reasoning distinguished a merely visual inspection from the more intrusive and invasive inspection that occurred in this case. An individual has a higher expectation of privacy in a situation that involves tactile searches than visual searches. The law

enforcement officer's state of mind when conducting the search was irrelevant to the determination of the violation of the Fourth Amendment. The lower Court's decision was reversed, in favor of the Defendant.

FOURTH CIRCUIT COURT OF APPEALS

Fourth Amendment/Detention/Drug Checkpoint:

United States v. Brugal, ___ F.3d ___ (2000)

FACTS: Defendants were travelling north from Miami on I-95 through South Carolina, driving a rented vehicle. At 3:30 am, after passing two well-lit decoy drug checkpoint signs, they exited the interstate and were stopped by a South Carolina State Trooper. The driver of the vehicle claimed he was searching for a gas station when he exited the interstate. However, he had just passed an exit with several 24-hour gas stations and also had a quarter of a tank of gas. The Defendants indicated their destination was Virginia Beach, although they had very little luggage.

Upon stopping the vehicle, the trooper obtained the defendant's driver's license and the rental agreement. The driver's license was from New York State and showed a New York City address for the defendant. Although the license and rental agreement appeared to be in order, the

trooper believed that the driver could be transporting drugs. The defendant was requested to pull to the shoulder of the road and the trooper maintained custody of the rental agreement.

The trooper then requested the driver to exit the vehicle and asked for consent to search. The driver consented to a search of the vehicle and the trooper discovered eight kilograms of cocaine and one kilogram of heroin hidden inside luggage.

The evidence was suppressed by the trial court and a panel of the Fourth Circuit upheld the suppression on the basis that further detention of the motorist after determining there was no traffic violation was a violation of the Fourth Amendment. That decision was vacated by the full panel and remanded to allow the admission of the drugs into evidence.

ISSUE # 1: Can police detain a motorist beyond the reason for the checkpoint?

RULE #1: Yes. When an officer seeks to expand the investigation of a motorist beyond the reasons for the checkpoint, the officer must have a reasonable suspicion that the particular person seized is engaged in criminal activity, or obtain consent during the time period the defendant is lawfully seized.

DISCUSSION: A checkpoint stop is

considered a seizure of a person under the Fourth Amendment. Such a seizure is permissible as courts have found that "a brief stop at a checkpoint for the limited purpose of verifying a driver's license, vehicle registration, and proof of insurance is a reasonable intrusion into the lives of motorists and their passengers." Further intrusion must be based on reasonable suspicion of criminal activity, or consent must be obtained during the period of time the person is lawfully detained.

The trooper needed reasonable suspicion of criminal activity to continue the seizure when he asked the driver to pull over to the shoulder. The Court viewed this as one continuous seizure and relied heavily on the factors articulated by the trooper to form his reasonable suspicion. These factors included:

1. I-95 is a major thoroughfare for narcotics trafficking;
2. Defendant exited I-95 after passing two decoy drug checkpoint signs;
3. Defendant had a New York state driver's license;
4. Defendant rented a vehicle in Miami and the rental agreement showed he lived in New York City;
5. It is a common practice for drug couriers to fly to Miami, acquire drugs, rent a vehicle and drive north;
6. Defendant said he exited in search of gas although he had a quarter of a tank and had just passed an

exit with 24 hour gas stations;

7. The area around the exit showed no signs of activity at 3:30 am;
8. Defendants were traveling at 3:30 am;
9. Defendants only had three small bags of luggage with them;
10. The trooper based his observations on his 18 years of experience in law enforcement.

The Court found that a reasonable officer could conclude that the trooper's articulated factors eliminated a substantial portion of innocent travelers. The trooper had reasonable suspicion to continue the initial seizure when he requested the driver to pull over to the shoulder of the road.

ISSUE # 2 Did the officer obtain lawful consent to search the vehicle?

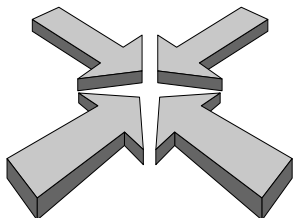
RULE # 2: Yes. "A defendant who voluntarily consents to a search waives his Fourth Amendment rights, and the police officer may conduct the search without probable cause or a warrant."

DISCUSSION: In assessing the voluntariness of an individual's consent, we examine the totality of the circumstances. Appropriate factors to consider include "the characteristics of the accused (such as age, maturity, education, intelligence, and experience) as well as the conditions under which the consent to search was given (such as

the officer's conduct; the number of officers present; and the duration, location, and time of the encounter). The government need not produce evidence that the defendant "knew of his right to refuse consent to prove that the consent was voluntary."

"Because Trooper Lawson possessed reasonable suspicion that criminal activity was afoot, he was constitutionally entitled to direct Brugal to pull his vehicle over to the shoulder of the road. Brugal's subsequent consent to allow Trooper Lawson to search the vehicle was voluntary, therefore, the evidence seized during the search should not have been suppressed by the district court."

Because the continued detention was lawful and the driver's consent to search was voluntary, the drugs were lawfully obtained. The Motion to Suppress should have been denied and the Court vacated the order and remanded for further proceedings.



NORTH CAROLINA SUPREME COURT

DWI Checkpoint/ Reasonable Suspicion:

State v. Foreman, ___
S.E.2d___(2000).

FACTS: Police Officers in New Bern set up and conducted a DWI Checkpoint in accordance with G.S. 20-16.3A. Notice signs were posted one-tenth of a mile prior to the stop and all vehicles were stopped to check for impaired drivers. The defendant made a quick, **legal**, left turn immediately prior to entering the DWI checkpoint. An officer followed her, lost sight of her, and ultimately located the vehicle parked in a residential driveway. The lights and ignition were off and the driver and passengers were crouched down in the vehicle. Defendant was located in the driver's seat with the keys in the ignition. There were open containers of alcohol in the vehicle and the defendant smelled strongly of alcohol. The defendant's Motion to suppress was denied and a jury convicted her of DWI. Her conviction was upheld by the Court of Appeals but they held that a **legal** left turn preceding a DWI checkpoint without more does not justify an investigatory stop of that vehicle. The Supreme Court modified that decision, disagreeing with that particular conclusion.

ISSUE: May an officer

pursue and stop a vehicle that has turned away from a DWI checkpoint to determine why the vehicle turned away?

RULE: YES. Officers may monitor entrances to DWI checkpoints and pursue and stop vehicles that avoid checkpoints to determine the reason for avoiding the checkpoint.

DISCUSSION: DWI checkpoints are constitutional if vehicles are stopped according to a neutral, articulable standard. The Court stated that "the purpose of a checkpoint would be defeated if drivers had the option to "legally avoid," ignore or circumvent the checkpoint by either electing to drive through without stopping or by turning away upon entering the checkpoint's perimeters." The officer in this case, observed sufficient activity to raise a reasonable suspicion to justify a stop. The Court stated, however, that the driver was not "seized" until the officer approached the vehicle after the defendant had voluntarily stopped in the driveway.

An officer may monitor a DWI checkpoint's entrance and the perimeters of the checkpoint, for drivers who are attempting to avoid the checkpoint. It is constitutionally permissible to then pursue and stop the vehicle to determine the reason for avoiding the checkpoint.

NORTH CAROLINA COURT OF APPEALS

**Juvenile/Interrogation/
Initiation of
Communication after**

Waiver:

State v. Johnson, filed March 7, 2000, ___ NC App. ___.

FACTS: Defendant was 15 years old at the time he was charged and convicted in Superior Court of First Degree Murder and Robbery with a Dangerous Weapon. Defendant was arrested for the homicide and taken to the police department in Shelby. He was advised of his Miranda rights in his mother's presence and said he understood and did not want to answer questions. His mother then stated that the matter needed to be straightened out and he would talk with the officers. The defendant then nodded affirmatively toward the officer. The officer asked if he wished to answer questions without a lawyer or parent present and defendant answered yes and signed the waiver form, as did his mother. As he began to confess, he indicated that he wanted to speak without his mother in the room and she subsequently left the room. The motion to suppress his statement was denied and he appealed his conviction.

ISSUE: Whether the resumption of questioning by officers after the defendant stated he did not want to answer any of the officers' questions violated his Miranda rights?

RULE: NO. "An accused in custody is not subject to further interrogation after requesting counsel until

counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the authorities."

DISCUSSION: The Court's analysis centered on whether the officers or the defendant initiated the conversation, following the defendant's statement that he did not wish to answer questions. Unless the defendant initiates a conversation after invoking his rights, any statement given by a defendant is inadmissible against him. The Court found that if the defendant had not made the nodding gesture to the officer after his mother's statement, the questioning could not have continued. The action of defendant's "nod" was viewed by the Court as initiating communication. The Court's analysis was not unique to a juvenile defendant but is applicable to adult defendants as well. The conviction was upheld.



For Your Information:

Trespass Issues/ Authorization to Act as Agent:

The Police Attorney's Office maintains a list of properties in which an Authorization to Act as Agent has been signed by the property owner or authorized agent of the owner. (Forms are available in the Police Attorney's Office.)

Many of these documents requesting Authorization to Act as Agent are missing critical information and we must return them to the property owner.

We would greatly appreciate your assistance in sharing this information with property owners, managers of property, presidents of businesses or other citizens, as you advise them about this process.

Some of the more common items that are omitted or overlooked include the following:

1. Property that is occupied cannot be covered for 24 hours.
2. This type of Authorization cannot cover property, such as apartment buildings that have common areas but some vacant units.
3. The type of property must be specifically described, i.e. commercial business, vacant lot, vacant house, apartment building, etc.
4. If there is more than one owner, they must show proof indicating co-owner's interest in the property, or authority to act for owner, such as power of attorney, trustee for property, or other connection to the property.
5. The individual must provide their title, such as

- owner, manager, president, etc.
- 6. The individual must provide a local phone number and nighttime contact number.
- 7. The precise street address must be provided including apartment numbers if applicable.

**REMINDER:
Procedure for Involuntary Commitments (PIC’S)**

After 3pm and on weekends:

1. Requestor for the petition calls the CMC Behavioral Health Emergency Department at 358-2800 for approval of the PIC. (501 Billingsley Road)
2. If the psychiatrist approves the PIC, then the requestor goes to magistrate’s office.
3. The Magistrate signs the petition and initiates the custody order with the sheriff or CMPD.
4. If necessary, police may bring the person to the BHC ED, as long as the family (requestor) is en route to the magistrate’s office and an officer is also en route with the custody order to CMC Randolph ED. (Only after the psychiatrist approves the PIC)

Regular Business Hours:

1. The Clerk of Court authorizes all PIC’s.
2. Petitioned individuals may then be transported to BHC ED (CMC Randolph) for a psychiatric evaluation.
3. A psychiatrist is on the

premises 24/7 in the Emergency Department.

Questions about this procedure? Call Jennifer Ziccardi, RN, 444-2450, Director of the Emergency Department.

Congress passes Civil Asset Forfeiture Reform Act of 2000 (“CAFRA”)

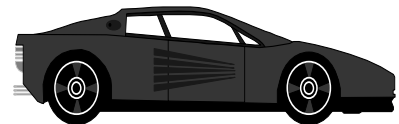
Congress has made substantial changes in the civil asset forfeiture act, which CMPD uses regularly to forfeit the illegal gains of drug dealers.

These changes impact time limits for filing and will cause the U.S. Attorney’s Office in the Western District to raise the threshold value amounts for personal property and real estate, before they will authorize forfeiture or sharing requests from local law enforcement.

Some key provisions of CAFRA include the following:

- A person who held a property interest at the time of the offense must show that he took all reasonable steps to prevent the illegal use of his property. (This includes “calling the police.”)
- ***The U.S. Attorney’s Office has asked that we begin investigating how we could capture this information in the event defendants raise a defense that “we called the police about the problem.”***

- Court appointed attorneys would be provided when the case involves a residence.
- Forfeited funds may be used for restitution to victims.
- Claimants are no longer required to file a cost bond when filing a claim.
- The U.S. Attorney has 90 days from the date the claim is filed to file a civil complaint or criminal indictment or they are forever barred from civilly forfeiting the property.
- The Burden of proof in civil forfeiture cases is now a preponderance of the evidence.



DWI VEHICLE SEIZURE PROCEDURES: (AKA School Seizures)

NCGS 20-28.3 governs the law regarding pretrial seizure and forfeiture of motor vehicles. The local School Board is entitled to all forfeited vehicles, which they may retain or sell at auction.

The School Board takes custody of all vehicles from the local wrecker service. The School Board has a contract with a statewide wrecker service, DGS, and they retrieve the vehicles from the local wrecker companies within a few days

of the original tow. These vehicles are stored in Harnett County until a final determination is made on the forfeiture matter.

The law allows this type of seizure when **two** conditions exist:

1. A driver is charged with an offense involving impaired driving under G.S. 20-4.01(24a), and
2. At the time of the offense, the driver's license is revoked for an impaired driving license revocation per G.S. 20-28.2(a).

THERE ARE TWO EXCEPTIONS to SEIZURES UNDER G.S. 20-28.3:

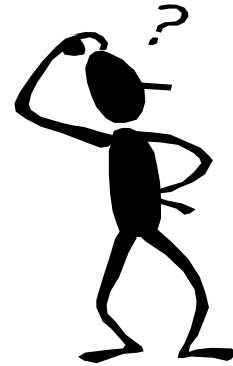
1. If the officer determines *prior* to seizure that the vehicle has been reported stolen, the vehicle **should not** be seized.
2. If the officer determines prior to the seizure that the vehicle is a rental vehicle and is being driven by a person not listed as an authorized driver on the rental contract, the officer **should not** seize vehicle.

The following steps should be followed when an officer has probable cause to believe that a motor vehicle may be subject to forfeiture:

- Impound the vehicle. (Beaty Wrecker has the local contract with DGS, the statewide contractor.)
- Officer **must** complete an affidavit indicating the basis for the seizure and present it to the Magistrate.

- If the Magistrate finds that the seizure was appropriate, an order will be issued to hold the vehicle.
- If Magistrate finds that the seizure was **not** appropriate, an order will be issued to release the vehicle to the owner, after the owner pays the towing and storage costs. (For example, if Magistrate does not find probable cause for the impaired driving arrest and the vehicle has already been seized.)
- **IMPORTANT:** If the Magistrate releases the vehicle to the owner, you must be certain that the Magistrate's Order at the bottom of the Officer's Affidavit for Seizure and Impoundment (AOC-CR-323) is completed. Please notify the wrecker company immediately and provide them a copy of that Order! The Magistrate should also be aware of the requirement that they complete this Order.
- After the seizure, the officer must give notice to DMV within 72 hours of the seizure.
- Within 48 hours of the receipt of a seizure notice, DMV must provide written notice to all vehicle owners and lienholders.
- If an officer discovers at a later time that the vehicle could be subject to seizure, the officer can apply to the Magistrate for authority to seize the vehicle.
- Although the statute does not specify a time limit in which the seizure paperwork should be completed if the impaired driver's license information is discovered after the arrest, a

reasonable time is the best measure. (If an Officer uses this route, there may be an issue of a search warrant if the vehicle is located on private property other than the defendants. Please consult a Police Attorney if you would like assistance with this issue.)



PERSON LESS THAN 21 DRIVING IN VIOLATION OF G.S. SECTION 20-138.3

The Magistrate's Office has requested that the following information be provided to officers regarding G.S. §20-138.3.

- **G.S. §20-138.3 makes it unlawful for a person less than 21 years old to drive:**
 1. while consuming alcohol, or
 2. at any time while he has remaining in his body any alcohol or controlled substance previously consumed.

Although the odor of an alcoholic beverage on the driver's breath is sufficient to charge him with a

violation of the statute, it is not sufficient by itself to convict him, unless he is also offered an alcosensor, intoxilyzer, or blood test and he refuses to provide the required samples.

An officer who has reasonable grounds to believe the statute has been violated may request that the driver submit to:

1. An alcosensor test (roadside),
2. An intoxilyzer test (Intake Center),or
3. A blood test (hospital).

Unlike a refusal on an intoxilyzer or blood test, the driver's refusal to submit to the alcosensor test will not subject his driver's license to the 12-month mandatory revocation.

In addition, in order for a magistrate at the Intake Center to take the individual's license for the immediate 30-day revocation period, the driver must submit to an intoxilyzer test that reveals some alcohol concentration.

The odor of alcohol and/or the results of an alcosensor test are not sufficient for the magistrate to take the driver's license.



“THE DISTRICT ATTORNEY’S CORNER”

*Written and edited by
Steve Ward
DA Liaison to CMPD*

Tired of wondering just what it is that DA's want at papering? Are DA's from Venus and Cops from Mars? Prone to thinking DA's are just looking for reasons to reject cases? Look no further. These may be the clues you need to get your cases on the long road to victory!

TIPS ON PAPERING FELONY CASES

- I. **What is it?**
“Papering” is the screening process that takes place at the District Attorney's to review the evidence in felony cases. Cases are accepted for prosecution only in those situations wherein:
(a) there is probable cause to believe that an offense against the *criminal* law has been committed; (b) the admissible evidence available for presentation will probably be sufficient to obtain a conviction; and (c) a significant State interest will be served by such prosecution. The screening ADA must apply a standard of review whereby the defendant will probably be found guilty of the charges by an unbiased trier of fact, considering all of the circumstances in the case. One of the main purposes of this standard is to ensure that

cases will withstand a defense motion to dismiss at the close of the State's evidence during trial.

II. **Where and When to Go**

Papering hours are as follows:

District Attorney's Office
700 E. Trade Street
Charlotte, NC 28202
347-7891

Drugs: M,W,F 8:30 – 12:00; 1:30 – 5:00

Persons:T & Th 8:00 – 12:00; 2:00 – 5:00

Property: M thru F 8:00 – 12:00; 2:00 – 5:00

Homicide :By appointment only

Child Sexual Abuse: By appointment only

III. **Standard Forms Required**

There are certain forms which will be required in any type of felony case to be papered. Most are on the CMPD computer system and include:

- Prosecution Summary Cover Page
- Papering Verification Form (2 copies)
- Incident Report
- Officer's Supplement
- Witness Subpoena List--MUST list ALL witnesses and addresses/phone numbers
- Property & Case Disposition Sheets---- MUST list property with corresponding control numbers

IV. **Other Required Paperwork**

Witness Statements --- Please obtain statements from everyone connected with the case including

victims, eyewitnesses, neighbors or bystanders who may have seen/heard something, other police officers at the scene, the transporting officer(s), investigators, owners of stolen property, officers who recover stolen property, medical personnel (e.g., medics/nurses/doctors), and so on. **THIS IS VERY IMPORTANT!!! A "statement" means interviewing the person, writing down what they say, having that person review what you have written, and then having the witness sign and date the statement. If you merely summarize your conversation without having that person review and adopt the writing as something he/she said, then it technically is NOT a statement. This can cause us major problems twelve months later at trial when the person's memory has deteriorated.**

If a witness lives outside our jurisdiction, at least try to conduct a phone interview and go through the process of reading your notes of your conversation back to this person. Ask the person if she agrees that your notes accurately reflect her version of the events, and then include documentation of these additional steps in your supplement.

- Copies of Documents Seized
 - >Legible copies of both sides of checks, credit cards, licenses, mail etc.
- Property Sheets
 - >Must be legible & include all pertinent information

- Crime Scene Supplements
 - >Include any diagrams
 - >Include supplements even if they found "nothing" (e.g., dusted for fingerprints but all were smudged & none usable)
- K-9 Supplements
- Statements made by the Defendant
 - >Please, please, please let us know if the def. says ANYTHING to anyone. Give us the quote, his demeanor, to whom it was said, and whether or not the def. had been mirandized at the time. "Statements" are not just CONFESSIONS! The concept encompasses any words coming from the defendant before, during, and after arrest including DENIALS made by the defendant.
- Copies of any Citations Issued in connection with the case
- Defendant's Criminal history (does NOT need to be a certified copy; we'll do that)
- Photographs
- Lab results

V.Add'l Needs for Certain Crimes

- A. Larceny by Employee/Embezzlement
 - >>Please include a statement from the employer regarding the perpetrator's job title, duties, schedule and especially the perp's responsibilities towards the stolen property.
- B. Thefts
 - >>Copies of the offense report for the original theft --- even if from another jurisdiction
- C. Rapes/Sexual Assaults

>>Rape kit & paperwork
 >>Signed Consent Form from victim (or, if a juvenile, from legal guardian) authorizing release of medical records

D. Juvenile Perpetrators
 >>These felony cases should also be papered, regardless of the perpetrator's age. Cases are screened by the appropriate teams (drugs, persons, property, etc) and then forwarded by our folks to our Juvenile Unit.

VI. General Tips

- Think in terms of documenting *everything* because no one will remember the nitty-gritty details twelve months later. You are preserving the facts!
- Familiarize yourself with the elements of the crime under investigation. It will help you to understand what is needed to prosecute a case in court.
- Please use witness names in your statements, not Wit#1, Wit#2, Suspect #3, etc...
- Avoid injecting your personal opinions about a witness into your supplement. Prostitutes really do get raped sometimes, and not all sexual assault victims cry. Just record the facts and tell us your opinions later.

Remember: Everything you put on paper will go to the defense attorney during discovery.