Law Enforcement Digest

MARCH 2011

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NINTH CIRCUIT, U.S. COURT OF APPEALS

CIVIL RIGHTS ACT LAWSUIT: OFFICERS' WARRANTLESS ENTRY INTO HOME TO INVESTIGATE POSSIBLE SCHOOL-THREAT NOT JUSTIFIED BY EXIGENT CIRCUMSTANCES; TWO OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY BASED ON THEIR REASONABLE BELIEF THAT THEY HAD CONSENT TO ENTER, AND TWO OFFICERS ARE NOT

Huff v. City of Burbank, ___ F.3d ___, 2011 WL 71472 (9th Cir. 2011) (decision filed January 11, 2011)

Facts and Proceedings below:

Four City of Burbank, California, law enforcement officers responded to a call from a high school regarding a rumor about a letter that said "Vincent," a student at the high school, was going to "shoot up" the school. After interviewing the principal and two students, the officers could not confirm the existence of a threatening letter, so they decided to go to Vincent's home. The Ninth Circuit describes the facts upon officers' arrival at the home as follows:

> Upon arrival at the Huff residence, [Officer] Zepeda knocked on the door and announced that the officers were with the Burbank Police Department. When no one responded, [Officer] Ryburn called the home telephone number, and though the officers could hear the telephone ringing inside the house, no one answered. Ryburn then called Maria [the suspect's mother] on her cell phone, which she answered. Ryburn identified himself and indicated he wanted to talk to Maria about her son Vincent [the suspect]. Maria then hung up the phone.
>
> Two minutes later Maria and Vincent came out of the house and stood on the front steps in front of Ryburn and Zepeda. Zepeda told Vincent that the Officer Defendants were there to talk about some threats at the school, to which Vincent replied "I can't believe you're here for that." The officers concede that when they encountered Vincent outside of the Huff residence, they did not have probable cause to enter the home. Ryburn approached Maria and asked if they could go inside the house to talk. She said, "No," because the Officer Defendants did not

have a warrant. Ryburn then asked Maria if there were any guns in the home. Maria testified that she responded that she would go get her husband. Maria then turned around and went into the house.

Ryburn followed Maria into the house. Ryburn acknowledges that, at this point, Maria was not detained or arrested, and that she was free to leave from where she had been standing and speaking with Ryburn and Zepeda. Vincent then entered the residence, followed by Zepeda. Zepeda entered the home because of "officer safety" concerns. Since the officers were there to investigate threats to shoot, he did not want Ryburn to enter the house alone. The other two officers, Munoz and Roberts, had been standing near the sidewalk, unable to hear any of the conversation between Maria, Vincent, Ryburn, and Zepeda. After Ryburn and Zepeda entered the Huff residence, Munoz and Roberts assumed that Maria and Vincent had given consent and entered the home.

After entering the Huff residence, the officers remained in the living room. George [the suspect's father] entered the room and challenged the authority of the police to be in his home. The officers remained inside the Huff home for five to ten minutes, talking with the Huff family. The officers satisfied themselves that the rumors about the threats at [the high school] were untrue. They then left the Huff residence and returned to the school to report their conclusions. At no time while the officers were in the Huff home did they conduct any search of George, Maria, Vincent, or any property.

After the officers returned to [the high school], Ryburn suggested to [the principal] that she send out a notice to the parents . . . informing them that there was no such threat or letter. As a result of speaking with Ryburn about the morning's events, [the principal] sent a letter to parents, which explained that there was no truth to the rumor about a student threatening to shoot anyone.

The plaintiffs [Vincent and his family] filed a lawsuit under 42 U.S.C. § 1983 alleging that the warrantless entry into their home violated their constitutional rights. The officers argued that their entry was justified by the exigent circumstances exception to the warrant requirement. The U.S. District Court granted qualified immunity to all of the officers.

ISSUE AND RULING: Under the facts as alleged by the Huffs, were there exigent circumstances justifying the officers' warrantless entry of the Huff home, or, assuming exigent circumstances were not present, should any of the officers be held entitled to qualified immunity based on the exigent circumstances exception to the Fourth Amendment search warrant requirement? (ANSWER: No, rules a 2-1 majority; the dissenter disagrees on the qualified immunity question)

Result: Affirmance of order of U.S. District Court (Central District of California) granting qualified immunity to Officers Roberts and Munoz based on their reasonable belief that they had consent to enter; reversal of order granting qualified immunity to Officers Ryburn and Zepeda.

ANALYSIS:

Exigent Circumstances

The Ninth Circuit majority opinion concludes that the officers violated the plaintiffs' constitutional rights by entering their home without a warrant because there were no exigent circumstances justifying the entry. The opinion analyzes the exigent circumstances issue as follows:

Because the Officer Defendants had no warrant to search the Huff home, and were not given consent to enter the residence by either Maria or Vincent, their

entry into the house is constitutionally impermissible unless exigent circumstances are present. There are exigent circumstances to justify a warrantless entry by police officers into a home if the officers have a reasonable belief that their entry is "necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." We have stated that "the exigent circumstance does not, however, relieve the police of the need to have probable cause." United States v. Johnson, 256 F.3d 895, 905 (9th Cir. 2001) (en banc). In Johnson, we stated that "when the government relies on the exigent circumstances exception, it . . . must satisfy two requirements: first, the government must prove that the officer had probable cause to search the house; and second, the government must prove that exigent circumstances justified the warrantless intrusion."

The Supreme Court has stated that "the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." We have further explained that police officers can meet their heavy burden only by showing "specific and articulable facts" that justify a finding of exigent circumstances. LaLonde v. County of Riverside, 204 F.3d 947, 957 (9th Cir. 2000) **May 00 LED:12**. Mere speculation is not enough to establish exigent circumstances . . . .

In addition to exigency, officers must have probable cause. "Officers have probable cause for a search when 'the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.'" Probable cause is determined based on "the totality of the circumstances known to the officers at the time."

Here, the police did not have, nor did the district court find, probable cause to believe that an offense had been or was being committed. And "Supreme Court and Ninth Circuit cases unequivocally hold that probable cause is a precondition for any warrantless entry to seize a person in his home." LaLonde, 204 F.3d at 954. Indeed, the police testified that they did not think a crime had been or was being committed and that they had no reason to detain Maria or Vincent. The only arguable way we could find exigent circumstances would be to find that Maria's behavior "would cause a reasonable person to believe that entry . . . was necessary to prevent physical harm to the officers or other persons."

Additionally, there were no exigent circumstances. The Officer Defendants were not pursuing a fleeing felon. The Officer Defendants were not trying to prevent the destruction of contraband or evidence. No crime had been committed. No crime was in progress.

. . .

These facts relied upon by the district court in its legal conclusions amount to mere speculation. They do not satisfy the heavy burden required for a finding of exigent circumstances. That the Huffs did not answer their door or telephone may be "unusual," but it did not create exigent circumstances. The district court was incorrect in finding that Maria Huff's failure to inquire about the reason for the officers' visit, or her reluctance to speak with the officers and answer questions, were exigent circumstances. "[T]o the extent that the officers reasonably perceived [Maria] to be antagonistic, they were still not at liberty to enter [her home] under these circumstances." LaLonde, 204 F.3d at 957 n. 16. Nothing in

the district court's findings of fact states that Maria did not inquire about the reason for the officers' visit or express concern that they were investigating her son. Nothing in the district court's findings of fact indicates that Maria was not free to leave and return to her home, or that any of the officers had indicated that she was either required to answer their questions or restricted from returning to the inside of her house. Additionally, Maria did answer her cell phone when Ryburn called, spoke to him on the telephone, and went outside with her son Vincent upon learning they were present at her residence. She was under no obligation to invite the officers into her home. Indeed, our Constitution protects her decision to refuse the police entry into her home when they did not possess a warrant.

Further, "the officers' assertion of a potential threat to their safety must be viewed in the context of the underlying offense." LaLonde, 204 F.3d at 957 n. 16. Here, there was no underlying offense; the officers were investigating rumors of threats. We have stated that:

> [t]he mere fact that a person owns a rifle and does not like law enforcement officials does not in itself allow police officers to enter the person's home and seize him simply because he is unwilling to step into the public domain for questioning, even if probable cause exists to believe that some offense has been committed.

Id. In LaLonde, we found no exigent circumstances where probable cause existed; *a fortiori,* we should not find exigent circumstances where it is undisputed that no probable cause existed. It is also significant that Munoz and Roberts, two officers fully briefed on the background information preceding the officers' visit to the Huff home and present at the residence during the entire incident, entered the house because they believed they had been given consent, and not because of any perceived exigency. Nor did Ryburn or Zepeda communicate any exigency to Munoz and Roberts. When the officers entered the Huff home, they committed a Fourth Amendment violation. The district court was incorrect in finding that exigent circumstances existed.

Finally, we note that although the officers do not specifically argue that their warrantless entry was justified by emergency circumstances, we would reject such a claim. The emergency doctrine applies when police officers reasonably believe entry is necessary to "protect or preserve life or avoid serious injury." This exception may appear to fit better the facts of this case because the officers need not have probable cause to show a crime has been or is about to be committed; instead, "[t]here must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.". Here, however, there was no "objectively reasonable basis for concluding that there [wa]s an immediate need to protect others or themselves from serious harm". Maria merely asserted her right to end her conversation with the officers and returned to her home. Therefore, as discussed above, any belief that the officers or other family members were in serious, imminent harm would have been objectively unreasonable.

[Some citations omitted]

Qualified Immunity

The Court further holds that the law was clearly established at the time and did not justify the warrantless entry into the plaintiffs' home. A 2-1 majority of the panel rules that Officers Ryburn

and Zepeda are not entitled to qualified immunity because "[a] reasonable officer confronted with this situation may have been frustrated by having a parent refuse them entry, but would not have mistaken such a refusal or reluctance to answer questions as exigent circumstances." The Court does, however, rule that Officers Roberts and Munoz are entitled to qualified immunity because they reasonably believed that they had consent to enter the home.

DELIBERATE TWO-STEP INTERROGATION METHOD WITHOUT CURATIVE WARNING AT STEP TWO VIOLATES MIRANDA RULE OF MISSOURI V. SEIBERT

Thompson v. Runnel, 621 F.3d 1007 (9th Cir. 2010) (decision filed September 8, 2010)

Facts and Proceedings below:

Law enforcement officers first interrogated Antwion Thompson without giving him Miranda warnings. He confessed to killing his girlfriend. He then confessed again once he was properly advised of his rights. He was convicted by a California jury of first-degree murder, mayhem, and personal deadly weapon use. Before the California courts and in this federal habeas proceeding, he has maintained that the admission at trial of his confession violated the privilege against self-incrimination, because the investigating officers deliberately withheld Miranda warnings until after he had confessed to the crime. The U.S. District Court denied the petition. The Ninth Circuit summarizes the facts relevant to the Miranda issue as follows:

> Arie Bivins, Thompson's sometime girlfriend, was murdered between 1:30 and 4:30 p.m. on June 22, 1998. Bivins was seventeen, Thompson eighteen. In the preceding days and months, Bivins had attempted to break up with Thompson, prompting violent reactions from him.
>
> On the day of the murder, Thompson's father saw Thompson and Bivins talking outside his house at 1:30 p.m. Thompson left his father's house at 2:00, not saying where he was going. At about 3:00, a dog in the yard next to Bivins' house barked ferociously. Thompson returned home at 4:00, told his father he was worried about Bivins, and had his father drive him to Bivins' home. There, Thompson found Bivins' front door unlocked and her dead body just inside the door.
>
> When the police arrived, Thompson appeared distraught. Officer Solzman approached Thompson, who said he did not feel well. Solzman offered to let Thompson lie down in the air-conditioned police car, and Thompson agreed. Later, homicide detective Conaty woke Thompson to ask him to go to the police station to talk about finding the body. Thompson responded that he wanted to go home and sleep. When Conaty explained that Thompson's assistance could be critical to the investigation, Thompson agreed to go to the station. Thompson was not placed under arrest at that time.
>
> When Thompson arrived at the station he was placed in a break room, where he waited approximately six hours. Officer Solzman sat outside the break room doing paperwork. Thompson's father testified that he asked to speak to his son but was refused; a police witness denied that there was any such request.
>
> Around 11:00 p.m., Inspectors Conaty and Giacomelli moved Thompson into an interview room containing three chairs and no other furniture. Thompson was not handcuffed and did not ask to go home, but, by then, Conaty considered him "the primary suspect." The ensuing two-hour interview was videotaped.
>
> At the outset, Conaty told Thompson that the interview could be conducted another time in the event Thompson was too tired to do it. No Miranda warnings

were given. Thompson agreed to talk about the incident and gave an initial account of his activities that day with little prompting by the officers. Thompson insisted that he did not go to Bivins' house between 10:30 a.m. and 4:00 p.m.

The tone of the interrogation then became more confrontational: The officers invented an eyewitness account that put Thompson at Bivins' house around 2:30 p.m. and pressed Thompson to explain the apparent contradiction. Thompson suggested that the witness got the time wrong, but Conaty forcefully disagreed: "No, no, no bro. Eight hours we've been up there talking to these people. I've been very clear with them about what we're talking about . . . . Now you've got to help me out with this thing." As Inspector Conaty testified at trial, this fabricated eyewitness account was one of several techniques that he and Giacomelli employed for the purpose of "keep[ing] the interview going" and "hav[ing] the defendant place [himself] at the location."

The breakthrough occurred when the officers tried again to get Thompson to admit that he had been to the house in the early afternoon, this time suggesting that Thompson had lied earlier because he was scared, "understandable," they said, in light of his youth. Thompson thereupon broke into tears and said he went alone to Bivins' house around 2:00 p.m. where he found her dead. Thompson told the officers he was scared and wanted to kill himself.

No Miranda warnings had yet been administered, but the interrogation continued. The officers told Thompson-again, falsely-that they had found "high-velocity blood spatter" on a brown shirt left in his bedroom and his fingerprint in blood on a chair in Bivins' living room. Citing this "evidence" as proof that Thompson was at the scene and that a fight occurred, the officers told Thompson, "What makes or breaks this thing for how it comes out for you is to tell us what the circumstances were . . . . [T]his is your one chance to do that."

Taking the bait, Thompson abandoned his story that Bivins was already dead when he arrived at her house in the afternoon. He admitted to finding her alive and to stabbing her in the chest during an altercation, although he insisted that he did so accidentally. In response to further questions, Thompson then elaborated upon the details of the altercation and the location of the murder weapon and his bloodied clothing. When Conaty asked Thompson whether he felt better after "getting it all off [his] chest," Thompson repeated that he wanted to, and intended to, commit suicide.

At this point, Conaty told Thompson that the decision about what would happen next to Thompson would be up to the District Attorney. Asked after that for more details about the incident-still with no Miranda warnings-Thompson gave a yet more detailed account of the altercation in Bivins' living room. In response to specific questioning about who held the knife, Thompson admitted that Bivins never wielded it. Recounting the altercation once more, he admitted to stabbing her and slitting her throat after she had collapsed on the floor. The officers asked several more questions about Thompson's intent in doing so and about his trip home afterwards.

Only then did the interrogating officers provide the warnings that Miranda specifies. Having done so, they took Thompson back through the day's events. When Thompson reported that he slit Bivins' throat to prevent her from suffering, Conaty corrected him based on a pre-Miranda warning admission: "That, and you didn't want her to necessarily survive and tell on you, isn't that right?" The

officers repeatedly referred back to the previous conversation as Thompson recapitulated his account.

Some time after 1:00 a.m., after receiving the Miranda warnings, Thompson asked to end the interview, saying that he was sleepy and needed to lie down. But the interview continued with a few more questions. The officers then handcuffed Thompson, without telling him that he was under arrest, and, around 2:00 a.m., took him to look for the murder weapon and clothing he had burned. Only after that excursion was Thompson booked into jail. He spent the rest of the night shackled to the floor in a safety cell, on suicide watch.

Stripped to his underwear and without a bed or blankets, Thompson was unable to sleep.

At the jail the next morning Inspectors Conaty and Giacomelli re-advised Thompson of his Miranda rights. After lunch, Thompson participated in a videotaped reenactment of the crime at Bivins' house.

ISSUE AND RULING: The officers deliberately used a two-step interrogation method in which the first step of the interrogation involved custodial questioning without Miranda warnings, and the second, Mirandized, step did not involve curative measures. Did the officers violate Thompson's Miranda rights as interpreted by the U.S. Supreme Court in Missouri v. Seibert, 542 U.S. 600 (2004)? (ANSWER: Yes)

Result: Reversal of order of U.S. District Court (U.S. District Court of California) that denied the habeas corpus petition of Antwion E. Thompson; case remanded to California state courts for re-trial.

ANALYSIS:

In Missouri v. Seibert, 542 U.S. 600 (2004) **Sept 04 LED:04** the United States Supreme Court held that a deliberate two-step interrogation strategy can violate Miranda. "Specifically, when police deliberately withhold warnings until after obtaining an in-custody confession, the warnings are ineffective unless the impact of the prior unwarned confession has been dissipated." The Ninth Circuit begins by examining whether the two-step interrogation was a deliberate strategy, starting with a quote from United States v. Williams, 435 1148 (9th Cir. 2006) **April 06 LED:02**:

> [I]n determining whether the interrogator deliberately withheld the Miranda warning, courts should consider whether objective evidence and any available subjective evidence, such as an officer's testimony, support an inference that the two-step interrogation procedure was used to undermine the Miranda warning . . . . Once a law enforcement officer has detained a suspect and subjects him to interrogation . . . there is rarely, if ever, a legitimate reason to delay giving a Miranda warning until after the suspect has confessed. Instead, the most plausible reason for the delay is an illegitimate one, which is the interrogator's desire to weaken the warning's effectiveness.
>
> . . .
>
> We begin from the state court finding, which California does not contest, that Thompson's interrogation became custodial before he admitted to any wrongdoing. By that point in the interrogation, Thompson had been at the police station for between six and seven hours. The officers had gone forward with their investigation of Thompson's involvement, including talking to Bivins' mother

and Thompson's father about him, showing his photo to neighbors, talking to his probation officer, and searching his home.

By the time of the interrogation, the officers regarded Thompson as the prime suspect. The officers then employed sophisticated interrogation techniques over the course of more than an hour in an admittedly purposeful attempt to "keep the interview going" and obtain incriminating statements.

Even after Thompson began to incriminate himself in the face of these techniques, the officers still did not administer warnings. Rather, they did so only after Thompson admitted to slitting Bivins' throat.

Nor is this in any other respect the exceptional case in which a "legitimate reason" justified withholding warnings until after obtaining a confession. In its brief before us, California suggests that, as in [Oregon v. Elstad, 470 U.S. 298 (1985)] the delay here may be explained by the interrogating officers' uncertainty over whether the interrogation had become custodial. (The officers themselves did not testify to any such explanation.) But, unlike in Elstad, the same interrogation circumstances that prevailed at the time the state court determined Miranda warnings should have been given persisted at the time they actually were given: the location was the same, Thompson had been at the station for many hours, he had not been handcuffed or formally arrested, and the same officers were interviewing him. And although the warnings followed shortly after Thompson gave his most detailed account of the crime, Thompson by that point had already made several highly incriminating statements that did not trigger any warnings. Thus, at the time warnings finally were given, there was no reason to think Thompson was any more or less free to leave than he was before. Any uncertainty regarding whether Thompson was in custody would not explain the delay in complying with Miranda.

After giving the warnings, the officers used Thompson's prior admissions to elicit further detail and hold him to his story: When Thompson claimed he slit Bivins' throat to prevent her from suffering, Conaty corrected him based on a pre-Miranda warning admission: "That, and you didn't want her to necessarily survive and tell on you, isn't that right?" Additionally, Officer Giacomelli repeatedly referred back to Thompson's prewarning account in framing postwarning questions.

The only reasonable inference from this interrogation sequence is that the officers deliberately withheld Miranda warnings until after obtaining a confession.

Seibert directs that we proceed to determine whether the deliberately delayed warnings administered to Thompson were nonetheless effective in apprising him of his rights. [United States v. Williams, 435 1148 (9th Cir. 2006) **April 06 LED:02**] summarized the factors relevant to this determination:

> (1) the completeness and detail of the prewarning interrogation, (2) the overlapping content of the two rounds of interrogation, (3) the timing and circumstances of both interrogations, (4) the continuity of police personnel, (5) the extent to which the interrogator's questions treated the second round of interrogation as continuous with the first and (6) whether any curative measures were taken.

The failure of law enforcement to take any curative measures may be dispositive of the inquiry into the effectiveness of delayed warnings. . . .

We need not decide in this case the precise relationship among the Williams factors. Here, every factor weighs in favor of suppression of Thompson's first postwarning confession.

The prewarning interrogation was highly confrontational and detailed; the two sessions took place in the same small interrogation room, back-to-back, with no break at all; the police personnel were exactly the same; and, as described above, the officers' questioning treated the two sessions as continuous and drew, in one instance, on Thompson's pre-Miranda statement during the second session to ensure that the earlier inculpatory material was reiterated after the requisite warnings were given. And the police took no curative measures whatsoever. The post-confession Miranda warnings could not have been effective in meaningfully apprising Thompson of his rights and enabling him to invoke them.

The second set of warnings, administered the next morning at the jail, before the videotaped reenactment of the crime, presents a closer question. Still, after careful consideration, we are convinced that all of the factors continue to point to the conclusion that it too was ineffective. The completeness and detail of the prewarning interrogation remained unchanged from the time of the first, ineffective, warnings. If anything, Thompson would have perceived the invocation of his rights as even more futile the next morning, having in the interim confessed to murder a second time and shown the inspectors – in the early morning hours after the completion of the late-night interrogation at the station – the place where he tried to dispose of the evidence. In addition, there was almost complete overlap in content between Thompson's first two confessions and the reenactment he was to conduct at Bivins' house later that day. Indeed, the inspectors consistently treated the reenactment as continuous with the previous night's interrogation, making clear to Thompson before allowing him to go to sleep the night before that he would need to participate in the reenactment the next day and telling him immediately before the reenactment, "[A]ll we're gonna do is what we talked about yesterday, is go through what happened."

The timing and circumstances of the second set of warnings, particularly the break in time and change in location, were somewhat more conducive to a knowing and intelligent waiver than in the case of the first warnings. But on balance, this factor does not support the conclusion that the warnings were effective either. At the conclusion of the previous night's interrogation at around 2:00 a.m., Thompson accompanied the police to search for the murder weapon and his bloodied clothing. Afterwards, still distraught and suicidal, he spent the rest of the night shackled to the floor of a suicide-watch room at the main detention facility in Martinez. Stripped to his underwear and deprived of blankets or a bed, Thompson was too cold to sleep.

It was there, at the main detention facility, that Inspectors Conaty and Giacomelli administered the second set of warnings the next morning. Thompson thus spent the night "isolated in an 'unfamiliar,' 'police-dominated atmosphere,' where his captors 'appear[ed] to control [his] fate,'". Under the circumstances, the short break in time and minor change in location did not provide an opportunity for

"further deliberation in familiar surroundings," and do not weigh in favor of finding the warnings effective.

Moreover, there was complete continuity of police personnel during the first confession, the first warning, the second confession, and the second warning. Just as was so the night before, Thompson was alone with Inspectors Conaty and Giacomelli in a jailhouse room when he received these warnings. Faced with the same two people to whom he had repeatedly confessed, Thompson would have found absurd the suggestion that he retained a meaningful right to "remain silent."

Finally, the inspectors failed once more to take any curative measures at all. Particularly after Thompson had already incriminated himself in several unwarned or improperly warned interactions with the inspectors, it was incumbent upon them to give "an additional warning that explain[ed] the likely inadmissibility of the prewarning custodial statement[s]."

In light of all these circumstances, we have little difficulty concluding on de novo review that the officers' deliberate two-step interrogation strategy rendered ineffective the Miranda warnings administered to Thompson. The admission of Thompson's inculpatory statements at trial was reversible error unless harmless.

[Citations and footnotes omitted]

LED EDITORIAL COMMENT: The most recent LED entry on the issue of a deliberate two-step interrogation method was in the discussion of State v. Hickman, 157 Wn. App. 767 (Div. II, 2010) Nov 10 LED:17. In Hickman the Washington State Court of Appeals applied the United States Supreme Court rule in Seibert, as interpreted by the Ninth Circuit in Williams. In the Hickman LED entry, we stated that the best practice is for law enforcement not to use a two-step interrogation process in any such custodial interrogations.

We also stated that where a two-step interrogation practice does occur, courts look, on a case-by-case basis in these deliberate-two-step-questioning cases, at the following: (1) completeness and detail of the pre-warning custodial interrogation; (2) any overlapping content of pre- and post-warning custodial interrogations; (3) the timing (particularly whether there was a significant time gap) and the other circumstances of both custodial interrogations; (4) the continuity of police personnel in the two sessions; (5) the extent to which the interrogator's questions treated the second round of custodial interrogation as continuous with the first; and (6) whether any curative measures were taken, such as advising the suspect to the effect that none of the statements made in the first round of questioning will be admissible. We think that the most important element is the sixth element, i.e., whether the interrogator(s) gave a curative warning prior to Step 2 regarding inadmissibility of the un-Mirandized Step 1 questioning.

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BRIEF NOTES FROM THE NINTH CIRCUIT, U.S. COURT OF APPEALS

(1) CIVIL RIGHTS ACT LAWSUIT: NO BRIGHT LINE RULE FOR TIME OF TERRY DETENTION; OFFICERS MUST DILIGENTLY PURSUE INVESTIGATIONS – In Liberal v. Estrada, ___ F.3d ___, 2011 WL 149348 (9th Cir. 2011) (decision filed January 19, 2011), an officer conducted a traffic stop of the plaintiff purportedly based on the amount of tint in the vehicle's windows (the Ninth Circuit assumes under controlling review standard that the windows were rolled down at the time) and subsequently detained the plaintiff for 45 minutes to

complete the investigation. The plaintiff filed a civil rights lawsuit under 42 U.S.C. § 1983 alleging (among other claims) that the detention amounted to an unreasonable seizure.

The officers argued that because courts had previously approved of 20-minute Terry detentions, they should have at least been entitled to detain the plaintiff for 20 minutes. The Ninth Circuit rejects this argument noting that each case requires a fact specific inquiry. The Court concludes that in this case the officers knew everything that they needed to know about the plaintiff suspect within the first five to ten minutes, and the Court holds that "an objectively reasonable officer responding to the scene of Plaintiff's detention would have known that its duration of 45 minutes without probable cause, during which the officers were not diligently pursuing their investigation was an unlawful detention of unreasonable duration in violation of clearly established Fourth Amendment law."

Result: Affirmance of order of U.S. District Court (Northern District of California) denying officers qualified immunity from § 1983 claims (and affirming District Court on other claims).

(2) CIVIL RIGHTS ACT LAWSUIT: UNDER THE FACTS OF THIS CASE, WHERE NO EMERGENCY EXISTED AND SEVERAL MALE CORRECTIONAL OFFICERS STOOD BY, 6-5 MAJORITY RULES THAT THE "STRIP SEARCH" OF A MALE PRETRIAL DETAINEE BY A FEMALE CADET VIOLATED THE FOURTH AMENDMENT – In Byrd v. Maricopa County Sheriff's Department, ___ F.3d ___, 2011 WL 13920 (9th Cir. 2011) (en banc) (decision filed January 5, 2011), correctional officers strip searched an entire housing unit of male pretrial detainees (including the plaintiff) based on the occurrence of several fights and the suspicion of contraband. It was undisputed that no emergency existed. At the time of the search, several male correctional officers were present and observed the search of the plaintiff by a female cadet, and at least one person video-taped the search. The Ninth Circuit characterizes as a "strip search" the circumstances where the female jail cadet touched the male detainee's inner and outer thighs, buttocks and genital area with her latex gloved hand through very thin boxer shorts, and the cadet moved his penis and scrotum in the process of conducting the search. She also separated the cheeks of his buttocks and ran her gloved hand up to search for contraband in his anus.

The plaintiff filed a lawsuit under 42 U.S.C. § 1983 alleging violations of substantive due process, equal protection and the Fourth Amendment. The Ninth Circuit Court of Appeals rejects the plaintiff's substantive due process and equal protection claims, but holds in a 6-5 vote of the en banc panel that under the facts of this case the search violated the Fourth Amendment. The majority acknowledges that conducting a strip search was itself justified, but the majority opinion concludes that the search of a male detainee by a female officer was not justified under the facts of this case. The Court cites approvingly the June 2009 National Prison Rape Elimination Commission Report, which recommends that correctional facilities try to minimize the occurrence of cross-gender strip searches.

Result: Reversal of order of U.S. District Court (Arizona) that granted judgment as a matter of law in favor of county and officers on the Fourth Amendment claim; affirmance of District Court dismissal of substantive due process and equal protection claims.

(3) CIVIL RIGHTS ACT LAWSUIT: CLAIM BASED ON ALLEGED BRADY VIOLATION CANNOT BE BROUGHT WHERE THE PLAINTIFF WAS NOT CONVICTED OF A CRIME – In Smith v. Almada, 623 F.3d 1078 (9th Cir. 2010) (decision filed October 19, 2010), the plaintiff filed a lawsuit under 42 U.S.C. § 1983 against a police sergeant based, in part, on a claim that the sergeant failed to disclose materially exculpatory evidence in the plaintiff's trial for criminal arson. Specifically, the sergeant investigating the arson failed to disclose the victim's false report of seeing the suspect standing in front of the building gloating subsequent to the fire. The

Ninth Circuit three-judge panel holds that a § 1983 claim based on an alleged violation of Brady v. Maryland cannot be brought in cases where the plaintiff was not convicted of a crime. The panel adds its view that even if a § 1983 claim could be pursued without a conviction, the facts here would not support such a theory.

The Ninth Circuit analyzes the Brady-claim as follows:

> Smith's final claim is that Sergeant Almada violated his due process rights by failing to disclose material exculpatory evidence-in violation of Brady v. Maryland, 373 U.S. 83 (1963).
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> Brady requires both prosecutors and police investigators to disclose exculpatory evidence to criminal defendants. See Tennison v. City & County of San Francisco, 570 F.3d 1078, 1087 (9th Cir. 2009) (allowing § 1983 claim against police inspector for Brady violation) [See **Feb 09 LED:05** reporting on earlier Ninth Circuit panel decision in Tennison]. To state a claim under Brady, the plaintiff must allege that (1) the withheld evidence was favorable either because it was exculpatory or impeaching, (2) the evidence was suppressed by the government, and (3) the nondisclosure prejudiced the plaintiff. Strickler v. Greene, 527 U.S. 263, 281-82 (1999). As to the prejudice prong, the Supreme Court has stated that "strictly speaking, there is never a real 'Brady violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."
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> Here, Smith contends that Sergeant Almada should have disclosed the description of suspects given in the four previous dumpster fires – none of which matched Smith – and Nelson's [the victim] demonstrably false statement that she saw Smith gloating at the crime scene. Smith argues that had Sergeant Almada disclosed this information, the jury in Smith's first trial would have acquitted him (or, at the very least, the judge in Smith's first trial would have dismissed the case immediately after the mistrial), and thus Smith would not have remained in jail for five months until his second trial.
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> Smith makes a novel argument. In most Brady-based § 1983 claims, the plaintiff has suffered a criminal conviction, arguably because the government failed to disclose exculpating evidence. But no jury ever convicted Smith. Instead, Smith says he was injured by the five months he spent in jail after the first trial and until the judge in his second trial dismissed the charges against him.
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> In sum, allowing Brady-based § 1983 claims absent a conviction is not compelled by our circuit's case law, conflicts with other circuits' case law and the central purpose of Brady, would render Brady's materiality standard unworkable, and lacks a limiting principle. We thus decline to allow § 1983 claims for alleged Brady violations by a defendant who is ultimately acquitted.
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> Even if an unconvicted defendant could maintain a Brady-based § 1983 claim, Smith's claim fails because he has not shown that the withheld evidence was material. First, the evidence of the description of suspects in the previous dumpster fires is not material because it does nothing to undermine the strong physical evidence – i.e., the numerous pieces of mail-linking Smith to the February 2003 fire. Nor does it call into question evidence suggesting Smith's motive: Smith admitted that he had a dispute with Nelson less than three weeks before the fire.

Second, numerous differences between the February 2003 fire and the earlier fires undermine the inference that the dumpster arsonist started the February 2003 fire. Although Sergeant Almada stated that one of the dumpster fires appeared to have been started with an incendiary device in a plastic container, the similarities between the fires end there. The dumpster fires occurred in quick succession over a few weeks; the February 2003 fire occurred three months later. The dumpster fires barely damaged the building's interior; the February 2003 fire ravaged it. Witnesses to the dumpster fires described various suspects with very different appearances, suggesting there was no single repeat offender who might have started the February 2003 fire. And Nelson did not identify any of the dumpster fire suspects as having a grudge against her-and thus a motive to target Nelson's store itself.

More importantly, Smith does not show that any failure to disclose the earlier fires had any effect. Even without a prosecution disclosure of the earlier fires, Smith's attorney otherwise knew about the October 15, 2002 fire and sought to introduce evidence of that fire. In response to Smith's offer of evidence regarding the October 15, fire, the prosecutor moved the state trial court to exclude evidence of that fire because there was no "direct or circumstantial evidence linking the third person to the actual perpetration of the crime." The state trial court agreed and excluded the evidence. Smith's attorney knew of at least one earlier fire, and evidence regarding those earlier fires was likely inadmissible in any case. In sum, we cannot say that had Sergeant Almada disclosed the identification evidence of the earlier dumpster fires, the outcome of Smith's first trial would have been different.

We are more troubled by Sergeant Almada's failure to disclose Nelson's demonstrably false account of Smith's gloating at the crime scene. Importantly, Nelson did not testify about the gloating incident at Smith's first trial. Thus, evidence of her false account could have been used only to impeach Nelson's character for truthfulness. See Fed.R.Evid. 608(b)(1). But Nelson's testimony was not crucial at Smith's trial. Although Nelson's account of her business dispute with Smith helped establish a motive for Smith to commit the arson – namely, revenge – Smith's own admission of the dispute came in through Sergeant Almada's testimony about his interviews with Smith. More importantly, even if the jury discredited all of Nelson's testimony, it still had the important and unexplained evidence linking Smith to the fire: the numerous pieces of mail addressed over a five-year period to Smith and his wife at their residence.

We therefore cannot say that, had Sergeant Almada disclosed Nelson's demonstrably false account of Smith's gloating at the crime scene before Smith's first trial, no reasonable juror could have voted to convict Smith. Almada's failure to disclose the evidence does not sufficiently undermine our confidence in the outcome of Smith's trial. Hence, because the evidence that Sergeant Almada failed to disclose was not sufficiently material, we hold that the district court correctly granted summary judgment for Sergeant Almada on Smith's Brady claims.

[Some citations omitted]

Result: Affirmance of order of U.S. District Court (Central District of California) dismissing claims against the sergeant.

(4) CIVIL RIGHTS ACT LAWSUIT: NINTH CIRCUIT APPROVES OF SEATTLE OFFICERS' ARREST AND DETENTION OF MENTALLY UNSTABLE WOMAN ON CRACK COCAINE – In Luchtel v. Hagermann, 623 F.3d 975 (9th Cir. 2010) (decision filed October 7, 2010), the plaintiff filed a lawsuit under 42 U.S.C. § 1983 against Seattle police officers. Her lawsuit alleged arrest without probable cause and excessive force, as well as state law claims for false arrest, negligence and assault and battery. The District Court granted summary judgment in favor of the officers dismissing all claims. The Ninth Circuit affirms. The Ninth Circuit summarizes the facts of the case as follows:

> Karey Luchtel, after using crack cocaine and fearing that her husband was trying to kill her, ran into the street with her young son. Witnesses who called 911 reported that she was screaming for help and threatening to harm herself. She hid under a car until her neighbors provided refuge in their house. The police were summoned by Luchtel's husband and other neighbors who heard her screams. Inside the neighbors' house, the officers confronted Luchtel, and she stated that they were not actual police officers but assassins hired to kill her. Luchtel grabbed her elderly neighbor to use for protection. After using their bodies and handcuffs to detain and arrest Luchtel, the officers took her to a hospital for mental evaluation and treatment of injuries.

The Court concludes: (1) that "[u]nder the totality of the circumstances, a reasonable officer could believe that Luchtel had possessed cocaine in violation of Washington law" and accordingly there was probable cause to arrest her for possession of cocaine; and (2) alternatively, the officers had "reasonable cause" to take Luchtel to the hospital for a mental health evaluation under chapter 71.05 RCW [civil commitment statute].

The Court also concludes that under the totality of circumstances it "was reasonable and necessary for an officer confronted with these circumstances to use force to subdue Luchtel and to prevent injury to Luchtel, the Walds, and the officers themselves." The Court notes that although "[p]olice officers need not use the least intrusive means available to them . . . these officers applied the least amount of force necessary to subdue Luchtel by pinning her to the ground and handcuffing her."

The Court also rejects Luchtel's state law claims under the following analysis:

> Luchtel also asserted state-law tort claims for false arrest, for negligence, and for assault and battery. We affirm summary judgment on the false-arrest claim because the police had probable cause to arrest Luchtel. Probable cause is an absolute defense to a false-arrest claim. We also affirm summary judgment on the negligence claim. Officers cannot be liable for detaining a person for a mental-health evaluation under Washington law if the officers acted with good faith and without gross negligence. Because the officers had reasonable cause to detain and reasonably detained Luchtel, they cannot be liable for negligence. In addition, we affirm summary judgment on the assault-and-battery claim. Under Washington law, a police officer has qualified immunity if the officer "(1) carries out a statutory duty, (2) according to procedures dictated to him by statute and superiors, and (3) acts reasonably." We have concluded that the officers were properly carrying out a statutory duty according to the procedures dictated by Washington law and police training, and we have concluded that the officers acted reasonably in detaining and arresting Luchtel. Accordingly, the officers were entitled to qualified immunity on the assault-and-battery claim.

Result: Affirmance of order of U.S. District Court (Western District of Washington) on summary judgment dismissing all claims.

(5) NO EXIGENT CIRCUMSTANCES JUSTIFIED ENTERING CURTILAGE OF HOME: OFFICERS SHOULD NOT HAVE ENTERED WITHOUT A WARRANT BASED SOLELY ON NEIGHBOR'S REPORT THAT HOMEOWNERS WERE AT WORK AND AN INDIVIDUAL HAD THROWN A BACKPACK OVER THE FENCE AND CLIMBED INTO THE BACKYARD – In United States v. Struckman, 603 F.3d 741 (9th Cir. 2010) (decision filed May 4, 2010), the Ninth Circuit Court of Appeals rejects the government's assertion that police officers had exigent circumstances to enter a fenced backyard, without a warrant, based on 1) "a call from a neighbor reporting that the owners were at work and that a white male wearing a black jacket, age unknown, had thrown a red backpack over the fence and climbed into the backyard," and 2) the officers "visual confirmation that a red backpack was lying against a porch in the backyard and that the person they saw in the yard . . . was a white male wearing a black jacket." The Court concludes that the officers had reasonable suspicion of trespass, but insufficient facts to establish exigent circumstances for warrantless entry of the fenced backyard.

Result: Reversal and vacation of U.S. District Court (Oregon) conviction of Rian Tyler Struckman for felon in possession of firearm.

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WASHINGTON STATE SUPREME COURT

WHERE POLICE DO NOT REQUEST CONSENT TO ENTER RESIDENCE "MERE ACQUIESCENCE" BY RESIDENT TO THEIR ENTRY IS NOT CONSENT UNDER ARTICLE 1, SECTION 7 OF WASHINGTON STATE CONSTITUTION; "EMERGENCY AID EXCEPTION" TO WARRANT REQUIREMENT DOES NOT JUSTIFY NON-CONSENTING WARRANTLESS ENTRY UNDER THE FACTS OF THIS DOMESTIC VIOLENCE CASE

State v. Schultz, ___ Wn.2d ___, ___ P.3d ___, 2011 WL 113791 (2010)

Facts and Proceedings below: (Excerpted from Supreme Court majority opinion)

> On April 4, 2004, [police] received a phone call from a resident of an apartment complex about a yelling male and female. Officers [A and B] responded to the call. Upon arriving at the apartment, [the officers] stood outside and overheard a man and woman talking with raised voices.
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> According to the officers, Officer [A] knocked on the apartment door and Schultz answered. Schultz appeared agitated and flustered. Officer [A] asked Schultz where the male occupant of the apartment was. Schultz denied that anyone else was there. Officer [A] told Schultz that she had heard a male voice in the apartment. Schultz called for Sam Robertson, who emerged from a nearby bedroom. Schultz then stepped back, opened the door wider, and Officer [A] followed Schultz inside.
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> Schultz testified to a slightly different version of events. According to Schultz, after she said no one else was in the apartment, the officers told her they had heard a male voice and were coming in. Schultz said that she stepped to the side because the officers were entering. Under either version, it appears that neither officer requested permission to enter the apartment, nor did the officers inform Schultz or Robertson that they could refuse a search. Neither Schultz nor Robertson asked the officers to leave nor attempted to prevent their entry. The

trial judge found "the defendant acquiesced to their entry," and the Court of Appeals reported that "Schultz did not object."

After entering the apartment, the officers separated Schultz and Robertson. Officer [A] spoke to Schultz inside the apartment while Officer [B] spoke to Robertson outside. About that time, Officer [A] noticed Schultz's neck was red and blotchy. Officer [A] asked Schultz whether anything physical had happened during the argument. Schultz denied anything had and told the officer her neck reddens when she becomes upset. Schultz also explained the argument started because she wanted Robertson to change the locks on the door, but Robertson was instead sitting on the couch. During this time, Schultz was acting "fidgety" and picking things up around the house. Officer [A] asked Schultz to sit in a chair. Schultz complied but continued to fidget and grab at things. Officer [A] warned Schultz she would be handcuffed for officer safety if she did not sit still.

Outside, Robertson told Officer [B] there had been no physical violence and the argument had been about Robertson's failure to change the locks on the apartment door. The discussion outside took between 5 and 10 minutes before Robertson and Officer [B] returned inside to confer with Officer [A].

Meanwhile, Schultz continued to pick up things off a nearby table, including a makeup bag. At that point, Officer [B] noticed a handgun and a marijuana pipe on the table. Officer [B] secured the weapon and unloaded it. He asked Schultz who the pipe belonged to, and Schultz said it belonged to her son who lived in Vermont. Officer [B] asked Schultz if he could search for more narcotics, and Schultz consented.

At that point, Schultz stood up and began picking things up off the table again. Officer [A] handcuffed Schultz to prevent her from grabbing anything but told Schultz that she was not under arrest. Schultz asked for her antianxiety medication. Officer [B] went with Robertson to go find the antianxiety medication. Robertson and Officer [B] talked while searching for the medication. Their talk led to Robertson's arrest for use of drug paraphernalia. Schultz then revoked her consent for a search. Officer [B] sought and received a search warrant by telephone. The officers searched the apartment and discovered methamphetamine. Schultz was charged.

Schultz sought to suppress the methamphetamine, arguing that the officers were not authorized to be in the apartment when they saw the evidence used to justify the search warrant. The trial court concluded that the officers were properly in the apartment on the ground that they needed to talk to the occupants to ensure their safety. The trial court also concluded that "neither [Robertson nor Schultz] told [the officers] to leave and that [Schultz] initially acquiesced to their entry, stepping back and opening the door further, and at no time told or asked them to leave." The trial court denied Schultz's motion to suppress, and Schultz was convicted after a trial on stipulated facts. The Court of Appeals affirmed.

ISSUES AND RULINGS: 1) Where officers did not request consent to enter Schultz's residence, was Schultz's acquiescence to the officers' entry consent? (ANSWER: No, declare five justices; the other four justices do not address the merits of the consent issue); 2) Was the officers' entry into Schultz's residence justified by the emergency aid exception to the search warrant requirement? (ANSWER: No, rules a 5-4 majority)

Result: Reversal of Clallam County Superior Court conviction of Patricia Sue Schultz for possession of illegal drugs.

Status: On February 1, 2011, the State filed a motion for reconsideration. At the March LED deadline, the Supreme Court had not yet acted on the motion.

ANALYSIS: (Excerpted from Supreme Court majority opinion)

Emergency Aid Exception

The State contends that entry was authorized under the emergency aid exception. This exception emerges from the police's "community caretaking function" and "allows for the limited invasion of constitutionally protected privacy rights when it is necessary for police officers to render aid or assistance." Under this court's cases, to justify intrusion under the emergency aid exception, the government must show that "(1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns; (2) a reasonable person in the same situation would similarly believe that there was need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place being searched." The Court of Appeals has suggested three more factors: (4) there is an imminent threat of substantial injury to persons or property; (5) state agents must believe a specific person or persons or property are in need of immediate help for health or safety reasons; and (6) the claimed emergency is not a mere pretext for an evidentiary search. We agree.

The Domestic Violence Context

We determine whether the police encountered an exigent circumstance permitting entry without a warrant on the specific facts presented. Domestic violence presents unique challenges for law enforcement. Domestic violence situations can be volatile and quickly escalate into significant injury. Domestic violence often, if not usually, occurs within the privacy of a home. Our legislature has recognized that the risk of repeated and escalating acts of violence is greater in the domestic context. RCW 10.99.040(2)(a). The legislature has sought to provide "maximum protection" to victims of domestic violence through a policy of early intervention. RCW 10.99.010. The Court of Appeals has recognized that "[p]olice officers responding to a domestic violence report have a duty to ensure the present and continued safety and well-being of the occupants."

This court has not yet specifically addressed the emergency aid exception to the warrant requirement in the context of domestic violence, but the Court of Appeals has. See, e.g., State v. Johnson, 104 Wn. App. 409 (2001) **April 01 LED:09** (emergency aid exception justified a warrantless entry after a report that a victim of domestic violence had locked herself in a bathroom, the defendant had a cut on his wrist and was slow to answer questions about location of the victim); State v. Menz, 75 Wn. App. 351 (1994) **Feb 95 LED:17** (warrantless entry was justified after police received a phone call reporting domestic violence in progress; upon arrival officers observed that the door was ajar, the lights and television were on, and no one responded to knocks or announcements); State v. Raines, 55 Wn. App. 459 (1989)(warrantless entry justified when householder stepped aside and allowed officers in when they asked if they could "look around"); State v. Lynd, 54 Wn. App. 18 (1989) (warrantless entry was justified when a person called 911 and hung up, return calls met a busy signal, defendant admitted outside his home to assaulting the victim, the defendant was packing a

car as if preparing to leave, and the defendant did not want the officer to look in the house). As these cases illustrate, the fact that police are responding to a situation that likely involves domestic violence may be an important factor in evaluating both the subjective belief of the officer that someone likely needs assistance and in assessing the reasonableness of the officer's belief that there is an imminent threat of injury. Domestic violence protection must also, of course, be consistent with the protection the state constitution has secured for the sanctity and privacy of the home. Wash. Const. art. I, § 7; State v. Ferrier, 136 Wn.2d at 103, 112 (1998).

Acquiescence as Waiver

Again, according to the officers' testimony, Officer [A] knocked on the apartment door and Schultz answered. Schultz initially denied anyone was there, and then, Robertson appeared from the bedroom, Schultz stepped back, the door opened wider, and the officers walked inside. Schultz testified she stepped to the side because the officers were coming in. Under either version, it is uncontested that neither officer requested permission to enter nor advised Schultz she could refuse a search. The trial court found only acquiescence; it did not find that Schultz consented to the entry. The Court of Appeals' description of the fact states that "Schultz did not object to [officer A's] presence."

Thus the police, the trial court, and the Court of Appeals seem to be of the view that the protections of article I, section 7 against warrantless intrusions into private affairs and homes are easily waived by silent acquiescence. We disagree. Individuals do not waive this constitutional right by failing to object when the police storm into their homes. Nor do they waive their rights when the police enter their homes without their consent just because they are too afraid or too dumbfounded by the brazenness of the action to speak up. The right not to be disturbed in one's home by the police without authority of law is the bedrock principle upon which our search and seizure jurisprudence is grounded. Wash. Const. art. I, § 7; Ferrier, 136 Wn.2d at 112.

. . .

Ferrier is illustrative of limitations of state authority in the face of constitutional protections. There, officers had a tip of illegal activities but not sufficient grounds for a warrant. They decided to use a "knock and talk" procedure to attempt to obtain Ferrier's consent for a search. Ferrier, 136 Wn.2d 103. We concluded the procedure was inherently coercive to some degree.

> [T]he great majority of home dwellers confronted by police officers on their doorstep or in their home would not question the absence of a search warrant because they either (1) would not know that a warrant is required; (2) would feel inhibited from requesting its production, even if they knew of the warrant requirement; or (3) would simply be too stunned by the circumstances to make a reasoned decision about whether or not to consent to a warrantless search.

Id. at 115. Accordingly, we held that when police officers conduct a "knock and talk" procedure to obtain consent to search a home, they must, prior to entry, inform the person of the right to refuse or revoke consent. Id. at 118. Although the police in Ferrier said they had obtained consent, Ferrier, like Schultz, testified that the police just stepped into the house. Id. at 107-08. We later clarified that

the Ferrier requirement was limited to situations where police request entry into a home to conduct a warrantless search. State v. Khounvichai, 149 Wn.2d 557, 563 (2003) **Aug 03 LED:06** (citing State v. Williams, 142 Wn.2d 17 (2000) **Dec 00 LED:14**).

But neither Williams nor Khounvichai suggests that mere acquiescence is consent. That was not the question before the court in either case. Further, in Khounvichai police actually obtained consent, albeit without the better practice of the Ferrier warning, before entering the residence, and in Williams the police had an arrest warrant and obtained consent of a tenant before entering the residence.

Application

With these principles in mind, we turn to the facts before us. The officers did not have a warrant. The State argues that the warrantless entry into Schultz's apartment was justified under the emergency aid exception. Under that exception, constitutionally protected privacy rights may be intruded upon when officers, among other things, subjectively and reasonably believe the requirements of emergency aid exception have been met. We agree with the court below that the likelihood that a situation involves domestic violence is an important consideration in evaluating the reasonableness of an officer's subjective belief that someone needs safety assistance. The State has the burden of establishing the facts justifying an exception to the rule that law enforcement officers are precluded from intruding upon the privacy a person in their home. We hold that officers may not enter a home based upon acquiescence alone. In the instant case, the State must establish that the police had a reasonable belief that all the elements of the emergency aid exception were satisfied before crossing the threshold of Schulz's apartment.

The facts most favorable to the State are as follows. The police received a phone call from a resident of an apartment complex about a yelling man and woman. The responding officers stood outside and overheard a man and woman talking loudly. The officers heard a man say that he wanted to be left alone and needed his space. The officers knocked on the door. Schultz opened it, appearing agitated and flustered. Officer [A] asked Schultz about the male occupant of the apartment. Schultz told her no one was there, but when confronted with the fact the officers heard voices, summoned Robertson from a nearby bedroom. When Robertson appeared, the officers entered Schultz's apartment based upon her acquiescence only. At the moment the officers crossed the threshold to Schultz's apartment, they did not have enough facts to justify an entry based upon the emergency aid exception to the warrant requirement.

We have no reason to doubt the officers subjectively believed that entry was necessary or that they acted in good faith. But good faith is not enough to satisfy article I, section 7. Some of the evidence relied upon by the State and courts below to justify the entry were obtained after the officers crossed the threshold to Schultz's residence. It was only after entering the apartment that Officer [A] noticed that Schultz's neck was red and blotchy. Similarly, if the officers could not have ascertained the location of the man whose voice they had heard, they would have been entitled to make further inquiries and perhaps enter the home to verify that he was safe. But Robertson appeared before the officers entered. Certainly other facts such as past police responses to the residence, reports of threats, or any other specific information to support a reasonable belief that

> domestic violence had occurred or was likely to occur, or that the circumstances were volatile and could likely escalate into domestic violence, may have justified entry. But upon the record before us, we conclude that the warrantless entry into Schultz's home and subsequent search violated her constitutionally protected right of privacy within her home. Her motion to suppress should have been granted.

[Some citations omitted; footnotes omitted]

Dissent: Justice Fairhurst dissents arguing that the facts support application of the emergency aid exception to the warrant requirement. She is joined in her dissent by three other justices, Owens, Alexander, and Chief Justice Madsen.

LED EDITORIAL COMMENTS: We think that the Schultz majority's mere-acquiescence-is-not-consent holding is probably not significant, and that it is in fact consistent with Fourth Amendment case law. See, for example, U.S. v. Shaibu, 920 F.2d 1423 (9th Cir. 1990) ("Judicial concern to protect the sanctity of the home is so elevated that free and voluntary consent cannot be found by a showing of mere acquiescence to a claim of lawful authority."). If an officer interprets a person's gesture or other physical action as an invitation to step inside, the officer can help to clarify any ambiguity by stating out loud that the officer is interpreting the gesture or action as an invitation to come in, and then waiting a few moments before stepping inside.

We think that the bigger issue in this case is whether the facts justified entry under the emergency aid exception. The majority justices conclude that the facts of this case, known to the officers prior to entry, did not justify the entry under the exception. The majority opinion does not question that the officers in this case were acting in good faith in an effort to protect Schultz, the apparent victim.

As noted above, the State has moved for reconsideration of the Court's decision. We will report on the Supreme Court's resolution of the motion for reconsideration when that resolution occurs.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) IN PROSECUTION FOR SECOND DEGREE THEFT, THE FACT THAT COMPUTER DOES NOT WORK IS NOT MATERIAL EXCULPATORY EVIDENCE SUCH THAT THE STATE IS REQUIRED TO PRESERVE IT – In State v. Valdez, ___ Wn. App. ___, 241 P.3d 1288 (Div. III, 2010), the defendant was charged with second degree theft for stealing a computer from Circuit City. The police photographed the computer and returned it to Circuit City. Circuit City apparently disposed of the computer.

Valdez argued that the computer was material exculpatory evidence because it did not work and that fact supported his version of the events (that he purchased the non-working computer at a flea market and brought it to Circuit City for repair). The Court of Appeals disagrees, noting:

> Second degree theft requires proof that Mr. Valdez took Circuit City's property, intending to deprive Circuit City of the property. The factual issue here was whether Mr. Valdez took the computer, regardless of whether the computer worked or not. Mr. Valdez's version of the events does not rebut the State's showing that he walked into the store without a computer and walked out of the store with a computer.

> The computer itself, then, had little or no exculpatory value. Simply assuming that it would have made Mr. Valdez's version of events more likely is not enough.
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> The computer here was not material exculpatory evidence. The State was not required to preserve it. . . .

[Citations omitted]

Result: Affirmance of Benton County Superior Court conviction of Isidro Uribe Valdez for second degree theft.

(2) PRE-TRIAL DEFENSE INTERVIEWS WITH POLICE OFFICERS ARE NOT "PRIVATE CONVERSATIONS" WITHIN THE MEANING OF CHAPTER 9.73 RCW (PRIVACY ACT) SO CONSENT IS NOT REQUIRED TO TAPE RECORD; HOWEVER, OFFICERS' REFUSAL TO HAVE CONVERSATIONS TAPE RECORDED DOES NOT CONSTITUTE REFUSAL TO DISCUSS THE CASE AND DOES NOT JUSTIFY THE COURT ORDERING A DEPOSITION – In State v. Mankin, ___ Wn. App. ___, 241 P.3d 421 (Div. II, 2010), the defendant was charged with unlawful manufacture of methamphetamine. Mankin's counsel sought interviews with three police officers that were involved in his case. The officers agreed to the interviews, but refused to allow the interviews to be tape recorded. Mankin's counsel terminated the interviews and moved the court for an order "to depose witnesses or in the alternative to record witness interviews" by either audio or video recording under CrR 4.6(a). The court granted the order and the state appealed.

Pre-trial Interviews are not "Private Conversations" under Chapter 9.73 RCW

The Court of Appeals holds that defense interviews with police officers are not private conversations under RCW 9.73.030(1)(b). It notes that police officers performing their public duties do not have a privacy interest in such conversations. The court explains:

> RCW 9.73.030(1)(b) provides that it is "unlawful for any individual . . . or the state of Washington, its agencies, and political subdivisions" to record any "[p]rivate conversation . . . without first obtaining the consent of all the persons engaged in the conversation." (Emphasis added.) . . . .
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> Chapter 9.73 RCW does not define the term "private." But our Supreme Court has previously found that "private" means "'belonging to one's self . . . secret . . . intended only for the persons involved (a conversation) . . . holding a confidential relationship to something . . . a secret message: a private communication . . . secretly: not open or in public.'" When determining whether a communication is "private," courts consider several factors, including but not limited to, (1) the subject matter of the communication, (2) the location of the participants, (3) the potential presence of third parties, (4) the role of the interloper, (5) whether the parties "manifest a subjective intention that it be private," and (6) whether any subjective intention of privacy is reasonable. State v. Christensen, 153 Wn.2d 186, 193 (2004) **Feb 05 LED:09**. Here, the facts show that there was no reasonable subjective expectation of privacy in the officers' interviews.
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> We acknowledge that the interview locations arguably were not "public" and that there did not appear to have been any third parties present at the interviews. Nonetheless, the communications involved defense investigation of actions by public employees, namely police officers, performing their jobs, which investigation led to the public criminal prosecution of Mankin. Even though defense counsel would likely not have had to disclose his pretrial discovery

witness interview notes, his notes and interview summaries could "be subject to disclosure at trial if counsel or the investigator should be called as a witness by the defense for the purpose of impeaching the testimony given by a previously interviewed prosecution witness." Officers regularly participate in pre-trial interviews with both the defense and the prosecution, and they are undoubtedly aware that statements they make during such interviews can and will be used for impeachment purposes.

Caselaw establishes that individuals can tape record conversations with law enforcement in public places. For example, in State v. Flora, 68 Wn. App. 802 (1992) **July 93 LED:17**, the defendant attempted surreptitiously to tape record his contact with police officers arresting him on a public street outside his home. The State charged Flora with violating RCW 9.73.030. On appeal, Flora argued that the conversation was not a private one subject to RCW 9.73.030; Division One of our court agreed.

[Some citations and footnotes omitted]

Deposition Under CrR 4.6(a)

The Court of Appeals also holds that declining to allow a pre-trial interview with defense counsel to be tape recorded is not sufficient to satisfy CrR 4.6(a)'s requirements for ordering a deposition. The Court explains:

> The State next argues that the trial court erred in granting Mankin's motion to depose the police witnesses under CrR 4.6(a). The State asserts that CrR 4.6(a) does not apply when a witness is willing to discuss the case with counsel but refuses to allow counsel to record the interview. Mankin responds that an officer's refusal to be tape recorded during a defense interview is a de facto refusal to discuss the case and that a refusal to give a taped interview interferes with his ability to obtain a fair trial. There are no Washington cases addressing whether an interviewee's refusal to participate in a taped witness interview amounts to a refusal to discuss the case with counsel under CrR 4.6(a). But a plain reading of the rule supports the State's argument.
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> A criminal defendant is not, as a matter of right, entitled to depose prospective witnesses before trial. CrR 4.6(a) establishes that the trial court may order a witness to submit to a deposition *only* when certain conditions exist:
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> > Upon a showing [1] that a prospective witness may be unable to attend or prevented from attending a trial or hearing or *if a witness refuses to discuss the case with either counsel* and [2] that his testimony is material and [3] that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a party and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place.
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> CrR 4.6(a) (emphasis added). . . .
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> . . .
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> CrR 4.6(a)'s plain language does not address instances in which the witness will speak to counsel only under certain circumstances. And Mankin does not direct

us to any other authority authorizing the trial court to order witness depositions in a criminal case. Accordingly, because Mankin failed to meet the CrR 4.6(a) conditions, we hold that the trial court erred when it ordered the depositions.

Mankin also contends that a witness's refusal to give a taped interview interferes with his (Mankin's) right to effective assistance of counsel and his right to a fair trial. He contends, and we agree, that the ability of counsel to obtain evidence and to impeach witnesses effectively is part of his right to a fair trial. But even though the right to adequate trial preparation includes the right to interview witnesses in advance of trial, "[t]he right to interview a witness does not mean that there is a right to have a successful interview." On the contrary, a witness may refuse to give an interview. *[Court's Footnote 10: Interestingly, CrR 4.6(a) appears to undermine a witness's ability to refuse to participate in a defense interview by allowing the trial court to order a deposition if a witness refuses to talk to one of the parties. But even if the parties can compel a witness to participate in an interview or deposition, there is nothing in the rule that requires a successful or cooperative deposition; nor, as we note above, is there anything in the rule requiring that the interview or deposition be taped or video recorded without the witness's consent. And, given this, it is logical to conclude that a witness may also choose under what conditions he or she is willing to give an interview, including whether it should be recorded.]*

[Some citations and footnotes omitted]

Result: Affirmance of Pierce County Superior Court ruling that RCW 9.73.030(1)(b) does not apply to defense interviews of police officers, but reversal of trial court's order requiring police officers to be deposed under CrR 4.6(a). Remand for prosecution of Ronald Clark Mankin for unlawful manufacture of methamphetamine.

LED EDITORIAL COMMENT: The Mankin Court's conclusion that refusal to allow a pre-trial interview to be tape recorded is not grounds for ordering a deposition under CrR 4.6(a) (assuming the witness is otherwise willing to talk to defense counsel) is consistent with prosecutors' and police legal advisors' interpretation of the rule. The Court's conclusion that pre-trial interviews with police officers are not private conversations may be disappointing, but it is consistent with case law holding that police officer conversations while conducting public business are not private. In addition to the Flora decision cited on this point of law in Mankin, see the December 2004 LED entry on the Ninth Circuit's decision in Johnson v. Hawe, 388 F.3d 676 (9th Cir. 2004).

Since pre-trial interviews are not private conversations under RCW 9.73.030(1)(b), there is technically nothing that would prohibit a defense attorney from surreptitiously recording the interviews. That said, witnesses, including police officers, have the ability to place restrictions on pre-trial interviews and those restrictions could include not being tape recorded. If an officer makes such a request, defense counsel should honor it. It is worth noting however, that many prosecutors actually find it beneficial to have pre-trial interviews tape recorded. Most law enforcement agencies leave the decision of whether or not to agree to be tape recorded to individual officers. Officers should discuss this issue within their agencies and with their agency legal advisors.

(3) DEFENSE OF GOOD FAITH CLAIM OF TITLE DOES NOT APPLY TO POSSESSION-OF-STOLEN-PROPERTY CASES – In State v. Hawkins, 157 Wn. App. 739 (Div. III, 2010), the defendant argues that the trial court should have instructed the jury on the defense that "The property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable." RCW 9A.56.020(2)(a). The Court of Appeals

disagrees, holding that the statutory defense of good faith claim of title (available in theft cases) does not apply to possession-of-stolen-property cases.

Result: Affirmance of Douglas County Superior Court convictions of Edwin Troy Hawkins for possession of stolen property and attempted possession of stolen property.

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INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCWS, AND TO WAC RULES

The Washington Office of the Administrator for the Courts maintains a website with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http://www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/court_rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at [http://www.supremecourtus.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Decisions" and then "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. Federal statutes are at [http://www.law.cornell.edu/uscode/].

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's current through 2007, is at [http://www.leg.wa.gov/legislature]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The internet address for the Criminal Justice Training Commission's LED is [https://fortress.wa.gov/cjtc/www/led/ledpage.html], while the address for the Attorney General's Office home page is [http://www.atg.wa.gov].

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to Mr. Wasberg at (206) 464-6039; Fax (206) 587-4290; E Mail [johnw1@atg.wa.gov]. LED editorial commentary and analysis of statutes and court decisions express the thinking of the writers and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LEDs from January 1992 forward

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