

April, 1993

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*Best Academic: Officer Kristi L. Bucklin - Tacoma Police Department*  
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*Corrections Officer Academy - Class 179 - February 8 through March 5, 1993*

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*Highest Written: Officer Darren E. Gooding - Clallam Bay Corrections Center*  
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*Highest Defensive Tactics: Officer Melissa K. Andrewjeski - Coyote Ridge Corrections Center*  
*Officer Steven E. DeMars - Clallam Bay Corrections Center*

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## **"INITIATION OF CONTACT" RULES**

### **UNDER FIFTH AND SIXTH AMENDMENTS**

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#### **I. INTRODUCTION**

The following article updates a June 1989 LED article of the same title. This article covers just one of the many areas covered in our overview article in the September 1988 LED entitled "CONFESSIONS AND INTERROGATIONS UNDER THE FIFTH AMENDMENT (RIGHT TO COUNSEL AND RIGHT AGAINST SELF-INCRIMINATION) AND THE SIXTH AMENDMENT (RIGHT TO COUNSEL)." Later this year, we will provide an article updating our September 1988 overview of confessions and interrogations.

As always, we caution our law enforcement readers to consult their legal advisors or prosecutors for legal advice. However, prosecutor advice in this particular subject area can be particularly difficult to formulate, not only because the law is unsettled on several of the sub-questions in this area, but also because prosecutors are subject to a general ethical obligation to not make direct or indirect ex parte contacts with parties who are represented by legal counsel.

The fuzzy lines of the ethical restrictions on prosecutors contacting criminal defendants and other parties in pending cases are beyond the scope of this article. (See Green, "Communications With Defendants: What Are The Limits?" 24 CrL Bull. 283 (1988) and see "Proposed Justice Department Rule On Communications With Represented Persons," 52 CrL 2023 (12/09/92) for discussions regarding the ethical limits of prosecutor contacts with criminal defendants. *Note* as to the latter item: the proposed Justice Department rule was withdrawn with the change of Presidential administrations). We will simply note here that law enforcement investigators are not subject to the ethical restrictions on prosecutors, and that even where there might be an ethical violation by a prosecutor, otherwise voluntary statements made after valid Miranda warnings and waiver will generally be admissible. See State v. Nicholson, 77 Wn.2d 415 (1969), and see Proposed Justice Department Rule, noted above, at 52 CrL 2023 (1992).

#### **II. FIFTH AMENDMENT INITIATION OF CONTACT RULE**

##### **A. TWO RULES: RIGHT TO SILENCE AND RIGHT TO COUNSEL**

The Miranda opinion declares very clearly that where suspects assert their Fifth Amendment right to counsel or to remain silent during a custodial interrogation, the interrogation must cease immediately. The "initiation of contact" cases deal with the issue of whether police may resume interrogation with a suspect who has asserted one of these rights during custodial interrogation and who has since remained in continuous custody. (Note that the initiation of

contact rule is not triggered where the rights are asserted in non-custodial questioning). There are two lines of cases regarding the initiation of further interrogation after suspects have stopped custodial questioning by asserting their rights.

In Michigan v. Mosley, 423 U.S. 96 (1975) the U.S. Supreme Court held that in some circumstances it is permissible for police to initiate further contact with a suspect in custody who has previously asserted the right to silence. On the other hand, in Edwards v. Arizona, 447 U.S. 903 (1981) May-Aug. '81 LED:04, the U.S. Supreme Court created a "bright line" rule prohibiting police from initiating contact with a suspect who remains in continuous custody after stopping questioning by asserting the right to an attorney.

## B. MICHIGAN V. MOSLEY -- ASSERTION OF RIGHT TO SILENCE

### 1. Michigan v. Mosley Decision

In Michigan v. Mosley the U.S. Supreme Court ruled that police did not violate an incarcerated arrestee's Fifth Amendment rights where, two hours after the arrestee had terminated an interrogation with one officer by asserting his right to silence on one crime, a second officer approached him and obtained a waiver of rights on an unrelated crime. The court held that the statements made on the unrelated crime were admissible because: (1) Miranda warnings were carefully given on each contact, (2) the first officer immediately ceased questioning when Mosley asked him to do so, (3) there was a significant time lapse between the two contacts, and (4) the second contact concerned an unrelated crime.

Language in the Mosley opinion, and in most cases applying it, supports the view that even if the resumed questioning concerns the same offense, rather than an unrelated crime, the questioning will nonetheless be lawful if: (a) there is a significant time lapse between contacts (e.g., several hours), (b) both sets of warnings are given in a non-coercive manner, and (c) the defendant freely waives his or her rights on the second occasion.

### 2. Initiation Of Contact By The Suspect

The Mosley restriction is lifted if the suspect "initiates" contact with the officer. See discussion at II.C.2 below regarding what constitutes "initiation of contact" by the suspect -- the identical question is addressed there under the "right to counsel" prong of the rule. It is important to remember, however, as indicated in the preceding paragraph, that waiver must be obtained before proceeding. And, while in other interrogation contexts waiver may be "implied" (e.g. suspect implies that he is willing to talk by beginning to do so, after hearing the warnings and acknowledging that he understands, but before stating expressly that he wishes to waive his rights), officers should make a special effort to obtain an express waiver in this context. Thus, we recommend that before proceeding with the suspect who has earlier asserted the right to silence (or to counsel -- see below), but has since initiated contact with police, officers try to get that suspect to say expressly that he understands his rights and that he is willing to talk.

### 3. Other Circumstances Lifting The Bar To Contact

In light of the less restrictive nature of this prong of the rule, as compared to the right-to-counsel prong, discussed below, we are confident that the restriction does not apply to new crimes, and also that it would be lifted under any circumstances which would lift the bar of the right-to-counsel prong of the Fifth Amendment rule, e.g. by a break-in-custody or by sentencing.

See discussion in subsection II.C. below.

## C. EDWARDS V. ARIZONA -- ASSERTION OF RIGHT TO COUNSEL

### 1. The Edwards And Roberson Decisions

In the 1981 Edwards v. Arizona decision, Edwards initially was given warnings by an arresting officer. When Edwards asserted his right to an attorney, the officer stopped the questioning immediately and Edwards was booked into jail. The next morning two detectives sent a jailer to Edwards' cell to bring him for possible interrogation. Edwards asserted to the jailer that he had told the arresting officer the night before that he wanted a lawyer, but the jailer told Edwards that he "had to go" see the detectives anyway.

Edwards was taken to see the detectives. After the detectives administered the Miranda warnings, Edwards apparently changed his mind, because he then waived his rights and confessed. The U.S. Supreme Court ruled, 6-3, that it was a *per se* violation of Edwards' Fifth Amendment right to counsel for police to re-initiate contact with him after he had requested an attorney, before he had been able to consult one, and while he had remained in continuous custody.

The majority opinion in Edwards explains the different results in Mosley and Edwards as follows: where a suspect in custody says he wants to talk to an attorney, he is saying in effect that he cannot cope with the situation by himself and needs legal assistance; however, where a suspect in custody merely says that he doesn't want to talk, he is not necessarily indicating the same need for outside assistance. Accordingly, only the assertion of the right to counsel by a custodial suspect requires a *per se* bar broadly prohibiting any initiation by police of further contact with the suspect while he remains in continuous custody.

In Arizona v. Roberson, 486 U.S. 675 (1988) (see page 1 of September 1988 LED), the U.S. Supreme Court restated this rationale and took the bar a step further when it held that Edwards' "no initiation of contact" rule applies to initiation of contact with suspects regarding unrelated prior crimes, as well as the crime on which the rights were initially asserted. By asking for an attorney during an initial interrogation request, Roberson was indicating his inability to deal with questions on any crimes under investigation, Roberson held. Therefore, no police personnel should have tried to re-contact him to question him on either related or unrelated prior crimes while he remained in continuous custody.

The Roberson decision also makes clear that the initiation of contact restriction applies even if the officers who initiate contact are not aware of the suspect's earlier assertion of the right to counsel to other officers; without exception, all officers from all agencies are conclusively presumed to be aware of an assertion of rights to any other officer from any other agency. In light of this fact and in light of the marked distinction in the duration of restriction of the initiation-of-contact bar where there is an (a) assertion of right to silence as opposed to an (b) assertion of right to counsel (i.e. officers may recontact the "won't talk" arrestee in many circumstances where they may not recontact the "want a lawyer" arrestee), officers confronted with a suspect who says merely that he doesn't want to talk to them would probably be well-advised to record his exact words, and to stop questioning, but to not seek clarification of whether the suspect is also asserting the right to counsel.

### 2. Initiation Of Contact By The Suspect

There is little case law on the issue of what constitutes "initiation of contact" by the suspect under the Edwards rule. In Oregon v. Bradshaw, 462 U.S. 1039 (1983) [Sept. '83 LED:02], the U. S. Supreme Court held that a suspect who had stopped questioning a few minutes before with an assertion of the right to counsel had "initiated contact" under Edwards where he subsequently asked, "What's going to happen to me now?" Therefore, the officer in Bradshaw lawfully could make another attempt to obtain a waiver of rights from the arrestee, the Bradshaw Court held. Bradshaw, as well as the limited case law on what constitutes "initiation," suggests that the concept of "initiation" by the suspect will be broadly interpreted and will generally be construed in favor of the government. Note, however, that as we noted above at 3 in our discussion of the Mosley right-to-silence rule, when contact is initiated by the arrestee, an express waiver of rights should be obtained before proceeding with interrogation.

Also, as we have already noted, where a suspect states that he or she wishes to consult counsel, an officer must stop questioning immediately and also must not try to change the suspect's decision. However, at the point in the interrogation when the suspect asserts the right to counsel, the officer probably is permitted to give the suspect a business card and/or to inform the suspect that the officer is not permitted to talk to the suspect about the charge again unless the suspect initiates the contact. That is as far as the officer can go with the reticent suspect. The officer clearly may not communicate to the suspect at this point that he or she: (a) has made a "wrong" decision, or (b) will suffer adverse consequences because of that decision.

### 3. Non-Custodial, Non-Interrogation Situations Not Covered

In both Edwards v. Arizona and Arizona v. Roberson, the Supreme Court had before it defendants who had asserted the right to counsel during custodial interrogation. In McNeil v. Wisconsin, 115 L.Ed.2d 158 (1991) [Sept. '91 LED:10] [see also discussion of McNeil below in Part III at 9 regarding the Sixth Amendment initiation-of-contact rule] the United States Supreme Court held that the assignment of counsel at arraignment on one charge triggers a Sixth Amendment "initiation of contact" rule (see discussion in Part III below), but does not trigger the person's Fifth Amendment rights as to any crimes. In a footnote, the majority in McNeil also suggested that a person cannot ever trigger the Fifth Amendment "initiation of contact" rule by making a request for counsel outside a custodial interrogation setting. This latter point is still open to debate, but there is case law to support the view that a defendant cannot bar later initiation of contact under the Fifth Amendment by asserting in any non-custodial setting, whether in court or out, that he doesn't want to talk to police without counsel. See U.S. v. Wright, 962 F.2d 953, 955 (9th Cir. 1992).

In any event, it is clear that the Fifth Amendment "initiation of contact" rule is not triggered by an attorney's request to the police that police not question the suspect. Moreover, the police need not even tell the suspect of the attorney's request. The Fifth Amendment right is that of the suspect, not of the attorney. Accordingly, police may obtain a valid waiver of Fifth Amendment rights from a suspect without telling the suspect that an attorney has contacted them to ask that they not talk to the suspect in the absence of counsel. See State v. Earls, 116 Wn.2d 364 (1991) [May '91 LED:02].

What about the defendant who checks a box requesting an attorney when he fills out a public defender form at the jail in post-arrest, pre-hearing screening by the public defender's office. In State v. Greer, 62 Wn. App. 779 (Div. I, 1991) [Feb. '92 LED:05] the Court of Appeals ruled that this does not trigger the Fifth or Sixth Amendment initiation-of-contact bars, but that the

form request does trigger the non-constitutional protections of Washington Court Rule, CrR 3.1. However, our reading of Greer is that CrR 3.1 does not establish a strict Edwards- or Jackson-like bar. Instead, we believe that if officers learn of the pre-hearing public defender request, they can still initiate contact. However, in light of Greer, we suggest that when encountering this situation, in addition to Mirandizing the defendant, officers also expressly ask the defendant if he wishes to talk to them in light of the his earlier request for a public defender. Likewise, whenever interrogators are aware that a defendant has tried to contact an attorney following arrest, they should make a similar inquiry in addition to giving Miranda warnings.

#### 4. New Crimes Not Covered

It is our view that the Edwards/Roberson rule does not apply where a suspect commits new crimes after having asserted the right to counsel in a custodial interrogation, and has since remained in continuous custody, so long as he is contacted only regarding the new crimes. Thus, for example, if a person in jail assaults another prisoner or tries to intimidate witnesses after having asserted the right to counsel in an earlier custodial interrogation, police may initiate contact on the new crimes so long as they: (a) obtain a Miranda waiver and (b) limit their inquiry to the new crimes. See U.S. v. Roberts, 869 F.2d 70 (2nd Cir. 1989). If, in the course of this inquiry, the suspect initiates discussion of the earlier matter, then police may inquire into that crime as well. However, as previously noted, when the suspect initiates this discussion, the officer should, before proceeding with questions, assure that the suspect has expressly waived the previously asserted Fifth Amendment right.

#### 5. Break In Custody Lifts Bar

The weight of authority from other jurisdictions is that a non-pretextual "break in custody" lifts the Edwards/Roberson restriction, and that contact therefore may be initiated after a suspect has been released from custody. The break in custody lifts the bar even if suspect has not actually consulted counsel during the time period between the date of the release and the new contact. See Dunkins v. Thigpen, 854 F.2d 394 (11th Cir. 1988); see also State v. Norris, 768 P.2d 296 (Kansas Sup. Ct. 1989) and U.S. v. Hines, 963 F.2d 255 (9th Cir. 1992).

#### 6. Guilty Plea, Conviction, Sentencing May Lift Bar

The U. S. Supreme Court presently has before it the case of United States v. Green. In the earlier appellate court proceedings in that case (see 592 A.2d 985), the District of Columbia Court of Appeals held that a guilty plea does not lift the Fifth Amendment "initiation of contact" rule where the person still awaits sentencing after the guilty plea. Oral argument has been heard in that case and a decision is anticipated in early 1993. Our guess is that the U. S. Supreme Court will hold that a guilty plea does not lift the bar. We think that the Court may suggest that sentencing after a guilty plea or conviction will lift the bar, but that the guilty plea or the conviction does not. In light of the fact that the District of Columbia Court of Appeals' ruling above is the only decision on point at this time, the better approach for now would be to assume that the bar continues after the conviction or plea, and to avoid initiation of contact post-conviction, waiting at least until the person is sentenced.

#### 7. Consultation with Counsel Won't Lift Bar

In our article in the June 1989 LED, we stated our view that if an arrestee who has asserted the right to counsel during custodial interrogation subsequently consults counsel, then

the bar on police initiation of contact is lifted. **We were wrong.** In Minnick v. Mississippi, 112 L. Ed.2d 489 (1990) [Feb. '91 LED:01] the U. S. Supreme Court held that consultation with counsel, regardless of how extensive the consultation may be, during the time that a person remains in continuous custody following assertion of the right, does not lift the bar on initiation of contact.

### III. SIXTH AMENDMENT INITIATION OF CONTACT RULE

#### A. ONE MAJOR CASE - MICHIGAN V. JACKSON

There is one major Sixth Amendment case establishing a bar on police-initiated contact with a defendant after rights are triggered under that amendment. In Michigan v. Jackson, 475 U.S. 625 (1986) [briefly noted, May '86 LED:04] the U.S. Supreme Court held that where a defendant was assigned counsel at an arraignment, police could not lawfully initiate contact with the defendant to obtain a waiver of Sixth Amendment rights on the crime charged. Jackson makes clear that the same rule would apply where, in such a proceeding, a defendant informs the court that he has retained private counsel.

The Jackson decision is expressly grounded in the same express rationale as the Edwards rule -- i.e., the Court believes that by accepting an attorney assignment (or informing the Court that he is represented by counsel) as to the crime charged, defendant has impliedly communicated a need for legal assistance in dealing with the authorities. Jackson also makes clear that the restriction applies even if the officers who initiate the later contact are not aware of the suspect's assertion of the right to counsel at arraignment.

The Jackson decision expressly declined to address the issue of whether assignment of counsel or assertion of the right to counsel in court triggers the Fifth Amendment restriction on "initiation of contact," and hence bars contact on unrelated crimes under the Fifth Amendment rule. However, this issue was resolved in favor of the government in McNeil v. Wisconsin, 115 L.Ed. 158 (1991) [Sept. '91 LED:10], and therefore the Jackson initiation of contact bar is limited to the specific charged crime on which the right is asserted in court.

#### B. ELEMENTS OF THE SIXTH AMENDMENT BAR

##### 1. Trigger To Sixth Amendment "Initiation Of Contact"

The Jackson rule apparently applies to any formal court proceeding (arraignment, preliminary hearing, etc.) on the charged matter where a charged defendant is assigned counsel or asserts the right to counsel. However, the mere fact that formal charges have been filed does not trigger this bar, although it does trigger a general Sixth Amendment right to counsel (*among other things, this general Sixth Amendment waiver requirement protects the defendant against undercover eliciting of incriminating statements as to the charged matter, because even non-custodial questioning as to the charged matter requires a waiver of rights*). Because the Jackson rule does not bar initiation of contact based solely on the filing of charges, police may initiate contact with a person against whom charges have been filed (e.g. where a warrant arrest is made), but who has not yet appeared in court. In this pre-hearing situation, the police may gain a pre-hearing waiver of Sixth Amendment rights through the same Miranda warnings which effect a Fifth Amendment waiver. See State v. Royer, 58 Wn. App. 778 (Div. II, 1990) [Nov. '90 LED:05]; State v. Visitacion, 55 Wn. App. 166 (Div. I, 1989) [Jan. '90 LED:13].

While there is scant case law under the Sixth Amendment on the following point, we believe that, just as in the Fifth Amendment area (see above at 4), the Sixth Amendment restriction is not triggered by an attorney's request to police, outside of the courtroom, that they not contact the defendant. This is because the right is that of the defendant, not the attorney, and the right may be voluntarily waived by the client without knowledge of the attorney's request to police, and without the attorney's participation, so long as the Jackson "initiation of contact" restriction is not violated. See Fifth Amendment rulings in Moran v. Burbine, 475 U.S. 412 (1986) [May '86 LED:01]; and State v. Earls, 116 Wn.2d 364 (1991) [May '91 LED:02]. However, because of the lack of case law directly on point, and based on a subjective feeling about the difference between the Sixth Amendment and Fifth Amendment rights, we believe it would be safer to advise the defendant of the attorney's request when obtaining the Sixth Amendment waiver in this circumstance.

In regard to the question of what constitutes an assertion of the Sixth Amendment counsel right, in U.S. Ex. Rel. Farrell v. Haws, 739 F. Supp. 1237 (C.D. Ill. 1990), a federal district court held that the Sixth Amendment rule was not triggered where a non-indigent defendant simply answered "yes" when asked at arraignment whether he intended to hire an attorney. Something more explicit must be asked or uttered in order to trigger the rule, the court held. The weight of federal court opinions is to the contrary, however, as discussed in Haws, and we would therefore suggest that officers take the cautious approach of assuming that a request for counsel has been made whenever an arraignment or preliminary hearing has already been held. In this situation, unless an officer knows that the defendant has declared in court that he will defend himself, the officer probably should assume that the Jackson bar exists.

## 2. Initiation Of Contact By The Defendant

While we know of no case law addressing the question of what constitutes an "initiation of contact" by the defendant under the Sixth Amendment rule, the parallel development of the Fifth and Sixth Amendment rules strongly suggests that the Fifth Amendment definition would apply. Any contact by the defendant (a) not elicited by the police, and (b) indicating a desire to talk about the case would likely lift the bar. As in the Fifth Amendment setting, however, when this happens, officers should first get an express waiver of rights before proceeding with questioning.

## 3. New Crimes, Unrelated Earlier Crimes Not Covered

In light of the discussion in the U. S. Supreme Court opinion in Maine v. Moulton, 474 U.S. 159 (1985) [Feb. '86 LED:02], we have no question that a defendant's assertion of the Sixth Amendment right to counsel at an arraignment on one crime does not prevent police from initiating contact with the defendant on a crime which is committed thereafter and has not been charged (for example, subsequent crimes such as intimidating or tampering with witnesses on the underlying charge).

On the other hand, prior to 1991, there was some question as to whether police could lawfully initiate contact on previously committed, unrelated, and uncharged crimes in this context. Law enforcement has prevailed on this issue. The U. S. Supreme Court decision in McNeil v. Wisconsin, 115 L.Ed.2d 158 (1991) [Sept. '91 LED:10] conclusively establishes that the Sixth Amendment "initiation of contact" restriction does not apply to contacts on any unrelated crimes. Whether the crimes occurred before or after the assertion of the Sixth Amendment right under Jackson, contact may be made unless the Fifth Amendment rule independently bars such contact. Officers making contacts on such unrelated matters must carefully avoid raising the subject of the

charged matter, however. And if the suspect himself initiates discussion of that subject, express waiver of Sixth Amendment rights as to the pending charge should be obtained before proceeding to question him about that matter.

#### 4. Break In Custody Doesn't Lift Bar

In our discussion of the Fifth Amendment bar above, we cited several cases supporting the view that a break in custody lifts the Fifth Amendment bar. And in the June 1989 LED, we stated our view that a break in custody lifts the Sixth Amendment bar. **However, we've now changed our view on the Sixth Amendment bar.** Although we have found no case law directly on point, we believe that the Sixth Amendment right to counsel is more protective than the Fifth Amendment right against self-incrimination in this context, and therefore that the initiation-of-contact bar remains even after a release from custody prior to trial.

#### 5. Guilty Plea, Conviction, Sentencing May Lift Bar

While we can find no cases on point, we believe, just as we do in the Fifth Amendment setting (see above at 4), that the entry of a guilty plea or a conviction does not lift the Sixth Amendment restriction. (For cases indicating that the Sixth Amendment may not apply at all to post-conviction interviews, see Brown v. Butler, 811 F.2d 938 (5th Cir. 1987); Baumann v. U.S., 692 F.2d 565 (9th Cir. 1982); Cahill v. Rushen, 678 F.2d 791 (9th Cir. 1982); but for a contrary view by the Washington Supreme Court, see State v. Sargent, 111 Wn.2d 641 (1988) [Jan. '89 LED:04]. It may also be argued that in some circumstances a plea agreement impliedly waives Fifth and Sixth Amendment rights because such an agreement necessarily contemplates that the defendant will cooperate with investigators or prosecutors. See U.S. v. Roberts, noted above at 7. Nonetheless, we believe that only an express waiver of rights in the plea bargain will lift the Sixth Amendment bar.

Our guess, based on very little authority, is that sentencing after a guilty plea or a conviction will lift the Sixth Amendment bar. We made the same guess in the Fifth Amendment context; we hope for some guidance on this issue when the U.S. Supreme Court decides the case of U.S. v. Green this term. See discussion of Green above at 6-7.

#### 6. Consultation With Counsel Won't Lift Bar

If consultation with counsel does not lift the Fifth Amendment initiation-of-contact bar (see discussion of Minnick v. Mississippi above at section II.C.6.) then surely the Sixth Amendment bar is not lifted by such a consultation either. **Thus, we've concluded that we predicted wrong on this point in our views on this element of both the Fifth and Sixth Amendment rules in our June 1989 LED article.**

### IV. EXCLUSION OF EVIDENCE BASED ON INITIATION VIOLATIONS

Statements obtained in violation of the basic Miranda warning rule generally are excluded from evidence in the State's case-in-chief. Such statements are, however, admissible to impeach a defendant who takes the witness stand and testifies at his own trial. See Harris v. New York, 401 U.S. 222 (1971). This same impeachment exception to exclusion applies to violations of the initiation-of-contact rules under the Sixth Amendment, see Michigan v. Harvey, 494 U.S. 344

(1990) [May '90 LED:07], and, presumably, under the Fifth Amendment.

## V. CONCLUSION

Edwards v. Arizona and Arizona v. Roberson clearly establish a **Fifth Amendment** rule that, where a suspect asserts his "right to counsel" during custodial interrogation, police must not only immediately cease their interrogation efforts, but they must also refrain from initiating further interrogation contacts with the suspect on all matters other than newly arising crimes. We do not believe that Edwards and Roberson are to be read without limitation, however. Thus, we believe that this Fifth Amendment restriction is triggered only in the custodial interrogation context and that the restriction is apparently lifted upon: (a) the suspect's release from custody, or (b) the suspect's sentencing. And, under Michigan v. Mosley, a less restrictive bar in terms of duration is imposed by the assertion of the "right to silence" during custodial interrogation.

Michigan v. Jackson clearly establishes a **Sixth Amendment** rule that, where a charged defendant asserts his right to counsel at arraignment or other formal court proceedings, police may not initiate interrogation contacts with the defendant on the crime charged. However, police may initiate contacts with the defendant on all uncharged, unrelated matters (whether occurring before or after the assertion), so long as the defendant's Fifth Amendment rights are not thereby violated. We believe further that the Sixth Amendment contact restriction is lifted upon the defendant's sentencing on the underlying charges.

Postscript Note: For a prosecutor's article on this topic, see the article, "Can We Talk" by Devallis Rutledge, pages 7-11 of The Practical Prosecutor, 1989 Volume, National College of District Attorneys, University of Houston. See also an analysis of Minnick v. Mississippi in the September '91 FBI Law Enforcement Bulletin.

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## WASHINGTON STATE COURT OF APPEALS

### **SEARCH OF OCCUPANT'S PANTS DURING NARCOTICS WARRANT EXECUTION UNLAWFUL**

State v. Lee, 68 Wn. App. 253 (Div. I, 1992)

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

While searching a house pursuant to a premises warrant, [a law enforcement officer] entered a bedroom and encountered defendant Hill standing at the foot of a bed, naked. Hill had already been handcuffed by other officers before [the officer] arrived. A partly clad female, Debra Lee, was on the bed. [The officer] had entered the room to make sure the occupants were secured and to remove them to an area that had already been searched for contraband.

[The officer] asked Hill where his clothes were so that Hill could put them on before being taken out of the bedroom. Hill gestured toward a pair of pants across the room on the floor. [The officer] initially patted down the pants but did not feel any weapons. He then carefully inspected the pants, looking for identification,

contraband, or weapons. He testified that he used a "specific technique" to search the pockets, pulling them out slowly "because of possible needles or razor blades." [The officer] saw what he recognized as fragments of rock cocaine and removed them before handing the pants to Hill. [The officer] testified that there was nothing specific about Mr. Hill or "the situation" to make him concerned about his safety. Rather, he did not hand the pants to Hill immediately because of general concern about officer safety and because "the purpose of the search warrant is to search for contraband."

The trial court denied Hill's motion to suppress, finding as an undisputed fact that, although it was not clear whether defendant's ownership of the pants was obvious to the officer before he search the pants, the pants were "not obviously associated with the defendant." The court concluded that the officer could search the pants before handing them to Hill because they were properly within the scope of the search warrant and Hill did not appear to the officer "to be a mere visitor; by appearing naked in the room he evinced more of a connection with the premises than a mere visitor." The court also concluded that the officer's concern about razor blades and needles "was not unreasonable." Hill was found guilty of possession of cocaine in violation of the Uniform Controlled Substances Act.

[Footnote omitted; some text omitted; bracketed phrases inserted]

ISSUES AND RULINGS: (1) Was the search of Hill's pants within the scope of the warrant authorization? (ANSWER: No); (2) Was the search of Hill's pants reasonable for officer safety reasons? (ANSWER: No) Result: King County Superior Court convictions (two counts) for possession of cocaine affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

#### (1) Scope of Warrant

The warrant in this case authorized the search of the house in which Hill was found for "cocaine, and other controlled substances, records of dominion and control over the premise, money from the sale of controlled substances, firearms, papers of narcotics sales and customers." There is no indication that the warrant was issued on the basis of any information about occupants of the premises or Hill in particular.

In general, a warrant authorizing a search of a premises justifies a search of the occupant's personal effects that are plausible repositories for the objects specified in the warrant. However, a warrant to search premises does not authorize officers to conduct a personal search of individuals found at the site but not described in the warrant. State v. Worth, 37 Wn. App. 889 (1984). Personal effects worn or held also fall outside of the ambit of a warrant to search premises. Although a premises warrant gives law enforcement officials authority to detain occupants while they conduct the search, a search of an individual's person requires additional "independent factors" tying the individual "to the illegal activities being investigated." State v. Broadnax, 98 Wn.2d 289 (1982).

Had Hill been wearing his pants when the officers rushed in, the rules enunciated

in Worth and Broadnax would unquestionably apply to establish a Fourth Amendment violation. In this case, however, the State argues that the pants could be searched because, from the officers' perspective, they were a mere household item and a likely receptacle for the contraband described in the warrant.

Subject to the scope of the warrant, the police are entitled to assume that objects within the premises that are capable of containing the sought contraband are lawfully subject to search as part of a premises warrant. However, since the officers in this case had notice that the pants belonged to Hill, this case is controlled by State v. Worth.

In Worth, officers executed a warrant authorizing a search of the premises and person of John Folkerts for items related to pharmacy robberies, including clothing, cosmetics, weapons, and narcotics. While on the premises, the officers searched the purse of the defendant, Penny Jean Worth, who lived with Mr. Folkerts in the house. When the police encountered Ms. Worth, she was sitting in the living room, her purse resting against her chair. The searching officer found cocaine in the purse, and Worth was convicted of possession.

The Court of Appeals upheld the suppression of the cocaine, ruling that the search of Worth's purse constituted an impermissible search of her person that violated her Fourth Amendment rights. The court explained that it was apparent to the searching officer that Worth's purse "was not just another household item which police could search by virtue of their warrant. . . . Because Worth's purse rested against the chair on which she was seated, it was clear that she owned the purse and sought to maintain its privacy. It was an extension of her person." The court applied Fourth Amendment protections to "readily recognizable personal effects . . . which an individual has under his control and seeks to preserve as private."

As in Worth, the defendant in this case was not named in the warrant, and the officers knew that the pants belonged to him before the search. Initially, unlike Worth's purse, Hill's pants were across the room from him and, as the trial court found, "not obviously associated with defendant." However, when the officer asked Hill where his clothes were, and Hill identified his pants, it became clear to the officer that the pants were his. In fact, the officer carefully searched the pants because he was about to restore them to Hill. At that point, the officer could no longer consider the pants "just another household item."

In assessing the scope of a premises warrant, the Worth court refused to adopt a per se rule narrowly focusing on whether a person is holding or wearing an item such as a purse when a search is underway, for to do so would "undercut the purpose of the Fourth Amendment and leave vulnerable readily recognizable personal effects". Similarly, we decline to premise a person's Fourth Amendment protections on whether he or she happens to be clothed when police officers arrive. We hold, therefore, that upon notice to the officer that the pants were Hill's, the pants were not within the scope of the warrant.

The State attempts to vindicate the search on the grounds that the officers had no notice that Hill was a visitor. Thus, the State argues, the officers were entitled to search him as an "occupant". We believe that this case does not turn on the

occupant/visitor distinction urged by the State. In Worth the defendant was clearly more than a mere visitor; she lived in the house with her son. Moreover, even assuming Hill was an "occupant", the State cites no authority for such an intrusive invasion of an occupant's person, and we are aware of none. In fact, the Supreme Court in Broadnax counseled otherwise, observing that "while occupants of private residences may be 'seized' while a proper search of the premises is conducted, any search of those occupants or others on the premises" must meet the standards of Ybarra v. Illinois, 444 U.S. 85 (1979). That is, a search must be justified by a reasonable belief that the individual is armed and dangerous or independent probable cause to search. The record in this case demonstrates neither.

## (2) Officer Safety

Finally, the State attempts to justify the search as necessary for officer protection. However, the one case cited by the State in support of this argument, State v. Lomax, 24 Wn. App. 541 (1979), is plainly distinguishable. In Lomax, upon breaking down the door to a residence, the police observed defendant with her hand in her pocket. The court held that this provided the officers with a reasonable belief that defendant might be armed and justified a pat-down search for weapons. In this case, the officer did not testify to any belief that weapons might be in the pants pockets. In fact, the officer testified he had no specific safety concern. Thus, although a pat down might well be justified in these unusual circumstances, once the officer did pat down the pants and felt nothing, he had no reason, and therefore, no authority, to search further. It follows, therefore, that the officer's search of the contents of the pockets was constitutionally impermissible.

[Citations, footnotes omitted]

## **VEHICLE SEARCH NOT JUSTIFIED AS IMPOUND-INVENTORY OR AS SEARCH INCIDENT**

State v. Hill, 68 Wn. App. 300 (Div. III, 1993)

Facts: (Excerpted from Court of Appeals opinion)

On May 4, 1991, around 10:35 p.m., [a] Washington State Patrol Trooper stopped an oncoming vehicle that had only a single headlight on Wenatchee Avenue in Wenatchee. The driver pulled the vehicle off the road into a commercial area in front of Al's Auto Supply store. Approaching the driver, Dennis Hill, [the trooper] observed neither the driver nor his passenger, Dennis Gomes, was wearing a seatbelt; smelled intoxicants emanating from the vehicle; and he saw an open container, later determined to contain lemonade and vodka. A warrant check disclosed three out-standing felony warrants for Mr. Gomes alleging controlled substance charges. Between 10:35 and 10:42 p.m., and after [a WSP sergeant] had arrived, Mr. Gomes was arrested, handcuffed and placed in the back of a patrol car. After administering Breathalyzer and gaze nystagmus field tests, [the trooper] concluded Mr. Hill's reading of .02 indicated he was not legally intoxicated, but he remained concerned about Mr. Hill's ability to operate the vehicle. Because of the presence of alcohol, the trooper asked Mr. Hill if he could search the car. Mr. Hill refused; when asked a second time, he again refused to consent to a

search.

[The two troopers], after a discussion, decided to impound the vehicle. Mr. Hill was informed of the decision and did not object. The trooper found paper bindles containing cocaine in a jacket lying on the backseat and a zippered tape cassette case between the front seats. The search halted, the vehicle was sealed and towed to the Washington State Patrol office where, pursuant to a warrant, the search continued. Mr. Hill was arrested and charged with unlawful possession of a controlled substance with the intent to deliver, RCW 69.50.401. [Some text omitted; bracketed phrases inserted]

Proceedings:

Hill's pre-trial motion to suppress the cocaine was denied. He was convicted of possession of a controlled substance, and he was sentenced to 15 days of confinement.

ISSUES AND RULINGS: (1) Was the cocaine seized in the course of a lawful impound and inventory of the vehicle? (ANSWER: No, the impound was unlawful because reasonable alternatives to impoundment were not considered); (2) Was the cocaine seized in the course of a lawful search incident to arrest? (ANSWER: No, the delay between Gomes' arrest and the search disqualified the search as a search incident to arrest.) Result: Chelan County Superior Court UCSA conviction reversed. Status: prosecutor's petition for discretionary review pending in the State Supreme Court.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) IMPOUND-INVENTORY

A. Community Caretaking Function. Here, the vehicle was neither abandoned, nor impeding traffic, but was partly blocking a sidewalk. [The trooper] testified to the threat of vandalism because at the time it was the Saturday of Wenatchee's annual Apple Blossom Festival. There is no evidence the trooper attempted to determine whether a friend was available to be responsible for the vehicle.

B. RCW 46.32.060. The State argues the impoundment was justified by RCW 46.32.060, providing, in part:

Any vehicle operating upon the public highways of this state and at any time found to be defective in equipment in such a manner that it may be considered unsafe shall be an unlawful vehicle and may be prevented from further operation until such equipment defect is corrected and any peace officer is empowered to impound such vehicle until the same has been placed in a condition satisfactory to vehicle inspection.

The trooper's decision to impound is discretionary. "Discretion necessarily involves sound judgment based upon the particular facts and circumstances confronting the officer".

It is undisputed the vehicle had defective equipment. But [the trooper] testified he would not have impounded for "simple a [head]light violation." The trooper

acknowledged that had there been a sober person present, that person would have been permitted to drive. However, the troopers concluded the darkness, Mr. Hill's odor of intoxicants, and Apple Blossom weekend created a heightened risk the car was unsafe to drive.

Although authorized by statute, impoundment must nonetheless be reasonable under the circumstances to comport with constitutional guaranties. Article 1, section 7 of the Washington Constitution may provide greater protection than the Fourth Amendment in this area.

The trial court concluded the more recent case of Colorado v. Bertine, 479 U.S. 367 (1987) does not require police officers to determine the vehicle's occupants' preferred alternatives to disposition or consider all alternatives. The Colorado Supreme Court had premised its decision on the United States Constitution. Bertine held that under the United States Constitution the police were not required to determine whether the driver wanted an inventory after lawful impoundment and the decision "does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." The decision to impound was upheld based on the exercise of discretion

in light of standardized criteria, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it. There was no showing that the police chose to impound Bertine's van in order to investigate suspected criminal activity.

We decide this case under [WASHINGTON CONSTITUTION] art. 1, § 7, which provides "heightened protection" to our citizens' privacy rights.

In Washington, impoundment is inappropriate when reasonable alternatives exist. In State v. Hardman, 17 Wn. App. 910 (1977), the court stated that although an officer is not required to exhaust all possible alternatives before deciding to impound, the officer must show he "at least thought about alternatives; attempted, if feasible, to get from the driver the name of someone in the vicinity who could move the vehicle; and then reasonably concluded from his deliberation that impoundment was in order." Houser held: "It is unreasonable to impound a citizen's vehicle . . . where a reasonable alternative to impoundment exists."

[The trooper] testified he did not ask Mr. Hill if anyone else could drive, suggest a telephone call to someone, or ask if he wanted his car parked and left in the adjacent parking lot. The troopers made no attempt to determine reasonable alternatives. Here, unlike Bertine, there are no regulations in the record. The trooper did testify the impoundment was performed pursuant to normal or standard police procedure: not allowing the park and lock alternative in the commercial parking lot; not allowing a trooper to drive the vehicle off the sidewalk; and not asking Mr. Hill if he wanted an inventory performed.

[The trooper], on cross examination, testified he was unclear of the exact circumstances which made the impoundment normal. He stated he would not impound based on a single beer, a simple headlight violation, or if a sober person were available to drive the vehicle.

In Washington, "the mere showing that the vehicle would otherwise have been left on private property for an unknown length of time is not sufficient to allow the impoundment . . .". RCW 46.55.070 prohibits towing a vehicle on nonresidential private property or in a public parking facility for less than 24 hours unless an impoundment warning sign is posted. Hardman stated in dicta, "the absence of circumstances to justify an impoundment should be a conclusive defense to any claim against the police for vandalism or theft of the vehicle after it was locked and allowed to remain legally parked." Therefore, [the trooper's] testimony the park and lock alternative was not available because the parking lot was private property and there was a threat of vandalism provides extremely weak justification.

Here, the troopers stated they would have released the vehicle to a sober person once a violation of RCW 46.61.502 and .504 was ruled out. There was ample parking adjacent to the auto parts store. The trooper decided to impound only after asking twice to search the vehicle and made no inquiries as to the availability of another driver coming to pick up the car. The impoundment was unreasonable.

## (2) SEARCH INCIDENT TO ARREST

A search of the passenger compartment of a vehicle, excluding locked containers, immediately after arrest for weapons or destructible evidence is valid even when a passenger, not the driver, is arrested, State v. Stroud, 106 Wn.2d 144 (1986) . . . . The difficulty here is all the testimony relates to impoundment, not to searching the vehicle incident to Mr. Gomes' arrest. Moreover, a search incident to arrest is valid under the Fourth Amendment only if the delay between the arrest and search is reasonable. Delay is unreasonable if it involves "unnecessary time-consuming activities unrelated to the securing of the suspect and the scene."

Here, Mr. Gomes was arrested and placed in the patrol car. Two sobriety tests were administered to Mr. Hill, which ruled out an illegal intoxication level. The troopers discussed whether a blue bag found in the car belonged to Mr. Gomes. They asked Mr. Hill twice if he would consent to a search of the vehicle. Faced with Mr. Hill's refusal, the troopers decided to impound the car and proceeded to search the vehicle. They did not search the vehicle as a result of Mr. Gomes' arrest.

[Some citations, one footnote omitted]

### **LED EDITOR'S COMMENTS:**

#### **(1) This case should not have been decided under the Washington Constitution.**

**In a footnote at the outset of its opinion, the Court of Appeals explains that the defendant did not rely on the Washington Constitution in his arguments:**

**Mr. Hill bases his complaint on a violation of the Fourth Amendment and article 1, section 7 of the Washington Constitution. Mr. Hill does not specifically ask us whether article 1, section 7 offers greater protection than the Fourth Amendment, nor does he brief the six Gunwall factors, State v.**

Gunwall, 106 Wn.2d 54 (1986).

However, for some unexplained reason, the Court of Appeals addresses the "independent grounds" issue on the impound-inventory question, even though the Gunwall case cited by the Court stands for the proposition that, as a matter of judicial restraint, the appellate court should not address "independent grounds" unless a party fully briefs the issue. How can the State respond to an argument that the defendant doesn't make? With all due respect to the Court of Appeals, the Court's decision to address the state constitutional issue is inexplicable. The Court of Appeals should at least explain why Gunwall doesn't apply.

Turning to the substance of the impound issue, we would note that even though we have long advised that officers looking at the impound question should always consider whether there are reasonable alternatives to impoundment, we also believe there is a reasonable argument under the U.S. Supreme Court decision in Colorado v. Bertine that this is not uniformly required under the Fourth Amendment. There is also a reasonable argument that the State Constitution does not require such an approach either. All State of Washington appellate cases cited in Hill were actually decided by earlier Washington appellate panels which had an erroneous view of the Fourth Amendment; those cases were not decided under the Washington Constitution. However, until a reported Washington appellate court decision announces that Colorado v. Bertine controls, Washington officers should assume that all reasonable alternatives to impoundment should be considered prior to impounding a vehicle in circumstances similar to those confronting these officers.

(2) Search incident ruling subject to question.

The Court of Appeals judges may have manifested a mistaken impression that the search incident rule has a subjective component when they say that the officers "did not search the vehicle as a result of Mr. Gomes' arrest." From the Court's description of the facts, we don't know enough about the facts of this case regarding the length of time and the circumstances of the delay between the arrest and the search of the vehicle. We would need more detail to tell whether this was or was not a lawful search incident to arrest. However, we are certain that it is a closer question than the result-oriented Court of Appeals' opinion suggests.

Passenger Gomes was arrested for a felony, and while Hill and Gomes were still at the scene, the troopers searched the passenger area of the vehicle. Under the objective standard for search incident to arrest, as long as the search of the vehicle was reasonably contemporaneous with the arrest, it should be entirely irrelevant that the troopers first asked Hill for consent to search the vehicle. For recent cases on the objective nature generally of the search-and-seizure inquiry, see State v. Brantigan, 59 Wn. App. 481 (Div. I, 1990) Feb. '91:05, April '91 LED:19 (holding that even though the officer did not intend to make a custodial arrest at the time that he searched the front seat of a suspect's vehicle, the fact that a reasonable officer would have then had probable cause to make a custodial arrest justified the search as a search incident to arrest); State v. Goodin, 67 Wn. App. 623 (Div. II, 1992) March '93 LED:17 (declaring that where officers had a search warrant to search for and arrest a named person, it was irrelevant that they also believed that they would discover drugs in the premises while searching for the person named in the warrant); State v. Lewis, 62 Wn. App. 350 (Div. II, 1991) Dec. '91 LED:11 (declaring that if

officers had had PC to arrest but believed they did not, the arrest would have been lawful).

If there is a lesson in this case on the search-incident-to-arrest issue, the lesson would be that if officers are certain that they have authority to search a vehicle incident to the arrest of a vehicle occupant, then they should do so as quickly after the arrest as is safe and practicable. Whether it is a good idea to first ask for consent to search in this circumstance is debatable, but if consent is requested and denied, the search incident to arrest should then be effected as soon as practicable.

## **ASSAULT OUTSIDE RESIDENCE IS NOT "ASSAULT THEREIN" UNDER BURGLARY STATUTE**

State v. Gilbert, 68 Wn. App. 379 (1993)

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

At about noon on February 7, 1991, Gilbert and accomplice Damon Clarke broke into Toni Ciccanti's house in Seattle. A third accomplice waited in a car in the driveway. Charles Mastro and Mianne Heltberg were walking by and noticed the unfamiliar car in the driveway. Mastro co-owned the house with his estranged wife, Ciccanti, but no longer lived in the house.

Mastro walked up the driveway to investigate, and saw a CD player and several CD's belonging to Ciccanti in the backseat of the car. Mastro took the keys out of the car's ignition as Gilbert emerged from the house with Ciccanti's jewelry box in hand. Mastro was standing between the car and the house when he verbally confronted Gilbert and Clarke. They both responded by beating Mastro with their fists and a rock. Heltberg distracted Gilbert and Clarke long enough for Mastro to break free and throw the car keys into the bushes. Gilbert and Clarke immediately retrieved the keys and drove away.

The police apprehended Gilbert and Clarke the next day, and Mastro and Heltberg positively identified Gilbert in a lineup. Gilbert was charged by information with first degree burglary. At a bench trial on May 9, 1991, Gilbert objected to the sufficiency of the evidence for a finding of guilt, arguing that the assault did not take place either in the house, or against an occupant of the house. Judge Carmen Otero rejected the argument, and found Gilbert guilty as charged beyond a reasonable doubt.

ISSUE AND RULING: Was the assault outside the burgled residence an "assault therein" under the burglary statute? (ANSWER: No) Result: King County Superior Court conviction for first degree burglary reversed; case remanded for sentencing on lesser included offense of residential burglary.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Burglary in the first degree. (1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a dwelling and if, in entering or

while in the dwelling or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person therein.

RCW 9A.52.020. Since the assault concededly took place outside the dwelling, Gilbert urges that he cannot be found guilty of first degree burglary because he did not assault "any person therein". In State v. Gilbert, 33 Wn. App. 753 (1983) (involving a different Gilbert), Division Three of this court reached a contrary conclusion:

We perceive the Legislature's intent in passing the first degree burglary statute as seeking to outlaw burglaries where the perpetrator is either armed with a deadly weapon or assaults someone during the course of the crime. Therefore, we hold the words "assaults any person therein" refer to any person who is assaulted while the perpetrator is entering the dwelling, while he is in the dwelling, or while he is in immediate flight from the dwelling.

Stating the matter succinctly, this holding strikes "therein" from the statute. With all due respect, we do not find this analysis persuasive. The court cites no legislative history in support of its finding of legislative intent but merely decides on the basis of the language of the statute that the Legislature must have meant something other than what it said. The prior burglary statute did include assaults committed during flight as an aggravating circumstance raising second degree burglary to first degree burglary. Changes in statutory wording are presumed to indicate a change in legal rights. A fortiori there is a change in legal rights when the new language is directly contrary to the old language.

The State urges that the statute is internally inconsistent because the language "if, in entering or while in the dwelling or in immediate flight therefrom" encompasses a broader range of conduct than that provided by "assaults any person therein". RCW 9A.52.020(1). While more meticulous draftsmanship would easily have avoided the problem by using separate sentences to describe the two alternative aggravating circumstances: (1) being armed with a deadly weapon or (2) assaulting any person therein, that furnishes no reason to completely ignore the specific limitation on the assault prong.

...

[W]e find no reason to believe our interpretation frustrates the intent of the Legislature. The Legislature chose the words "assaults any person therein". It seems perfectly reasonable to us that the Legislature might choose to make an assault within the dwelling, always the central object of protection in a burglary statute, an element elevating the crime to first degree, while at the same time believing that assaults in flight therefrom can adequately be dealt with as independent assaults subject to the penalties prescribed in the assault statutes. Our interpretation will not result in assaults such as Gilbert's going unpunished. Here, Gilbert could have been charged and convicted of residential burglary and second degree assault. In that case, the burglary antimerger statute would have permitted the court to impose punishment for residential burglary and for second

degree assault.

[Some citations omitted]

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## **BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS**

(1) "**IRRESISTIBLE IMPULSE**" VARIATION ON INSANITY DEFENSE REJECTED -- In State v. Potter, 68 Wn. App. 134 (Div. II, 1992) Division II of the Court of Appeals rejects defendant's argument that the trial court erred in his murder prosecution by refusing his "deific command" (or God-made-me-do-it) insanity instruction.

Defendant's proposed deific command instruction read in part as follows:

If you find that the defendant did suffer from a mental disease or defect, and that the defendant believed that he was acting under the direct command of God, and that the defendant's free will was totally subsumed by the deific command, you need not address whether the defendant understood the nature and quality of his act, or whether or not the defendant knew what he was doing was right or wrong.

This proposed instruction appears to conflict with the insanity statute, RCW 9A.12.010, which defines insanity as follows:

At the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that: (a) He was unable to perceive the nature and quality of the act with which he is charged; or (b) He was unable to tell right from wrong with reference to the particular act charged.

...

but the proposed instruction finds some support in the language of recent State Supreme Court decisions discussed in Potter.

The focus in this case was on the defendant's ability to tell right from wrong, not on his ability to perceive the nature and quality of his act. For that reason, the Court's analysis focuses on subsection (a) of the statute, and on the question of whether lack of volitional control based on a deific command would excuse criminal activity even though one knew the act was both morally and legally wrong.

After a detailed analysis of the statute, of pertinent State Supreme Court decisions, and of case law elsewhere, the Court of Appeals concludes that the trial court was correct in rejecting the defendant's proposed insanity instruction. The defendant's proposed instruction is a variation on the "irresistible impulse" insanity defense which Washington's statute does not embrace. The Court declares that the insanity test under RCW 9A.12.010 makes relevant only the proof of the effect of a perceived command from God on one's cognitive abilities. The effect of such a command on one's volitional control is irrelevant.

Accordingly, the Court holds that a criminal defendant who has the cognitive ability to know that an act is legally and morally wrong, but who lacks the volitional control to keep from doing the act

because the defendant believes that the act is done under a direct command of God, is not legally insane. Thus, the Court holds that legal insanity is established on the basis of a "deific decree" delusion only if the defendant's cognitive ability to distinguish right from wrong with respect to the act has been destroyed as a result of his psychotic delusion that God has commanded the act.

Result: Grays Harbor County Superior Court conviction for second degree murder affirmed.

**(2) "INNOCENT OWNER" DEFENSE OF GAME FORFEITURE STATUTE APPLIES IF OWNER CAN SHOW EITHER (A) NO KNOWLEDGE OR (B) NO CONSENT; J.M.S. FARMS COULD SHOW NEITHER** -- In J.M.S. Farms v. Dept. of Wildlife, 68 Wn. App. 150 (Div. III, 1992) Division III of the Court of Appeals rejects the innocent owner defense of a corporation claiming "innocent" ownership of a corporation vehicle seized under the Wildlife forfeiture statute at RCW 77.12.101.

J.M.S. Farms is a family farm corporation. Stanley Long is the vice-president of the corporation, owning 35 to 40% of the stock. He is employed by the corporation and lives and works on the farm. He used a corporation Toyota pickup to poach an elk.

Stanley's parents, Melvin and Jackie Long, own the remaining stock (60 to 65%), and they are president and secretary/treasurer respectively and the only other corporate directors. They do not live on the farm but actively participate in its management. They were aware of their son's use of the corporate vehicle to poach and did nothing to prevent continued illegal usage other than to tell Stanley not to do it anymore.

The Court of Appeals rejects the argument of the Department of Wildlife that the innocent ownership exception to forfeiture under RCW 77.12.101 requires that the claimant show both (A) lack of knowledge of and (B) lack of consent to the illegal use. Instead, based primarily on its reading of federal drug law forfeiture cases, the Court of Appeals holds that the exception is established if the claimant can show either (A) lack of knowledge or (B) lack of consent.

The Court of Appeals goes on to rule that the corporation here failed to meet the requirements of the innocent owner exception under either test. First, the Court holds that knowledge of the illegal activity is imputed to the corporation by the fact that Stanley, the poacher, was an officer, director, and shareholder in the corporation. Second, the Court of Appeals indicates that lack-of-consent exception would apply only if the parents of Stanley could show that they "had done everything reasonable to prevent further illegal use of the truck." Of course, Stanley's parents did nothing to prevent the illegal use in this case, other than to tell him not to do it, and therefore they would not qualify -- they impliedly consented to his illegal use of the truck by doing nothing to prevent it.

Result: Columbia County Superior Court forfeiture order affirmed.

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

**The innocent owner exception of the Wildlife forfeiture statute is virtually identical to the innocent owner exception of the drug law forfeiture statute at RCW 69.50.505. Accordingly, the ruling in this case will be cited by claimants in drug forfeiture cases. Officers pursuing forfeiture under either statutory forfeiture scheme should assume that the either-or rule of J.M.S. Farms applies. However, this should not be a major problem for agencies pursuing forfeiture. In light of the stringent test for proving lack of consent (did the owner with knowledge do "everything reasonable to prevent" the use), we doubt that**

**the either-or test will produce a different result in more than a handful of cases. Owners who are proven to have "knowledge" will be hard-pressed to prove lack of consent.**

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