



Law Enforcement

September 2004

Digest

HONOR ROLL

570th Basic Law Enforcement Academy – March 9th through July 14th, 2004

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FEDERAL LEGISLATIVE UPDATE

FEDERAL LEGISLATION (H.R. 218) ADOPTED TO PROVIDE EXEMPTION FOR QUALIFIED CURRENT AND FORMER LAW ENFORCEMENT OFFICERS FROM STATE LAWS ON CARRYING CONCEALED HANDGUNS

LED EDITORIAL INTRODUCTORY NOTE: *On July 22, 2004, President George Bush signed into law H.R. 218, federal legislation exempting under certain circumstances qualified current and former law enforcement officers from State laws that prohibit the carrying of concealed handguns. H.R. 218 applies to local, state and federal law enforcement officers who are “qualified law enforcement officers” as defined in the act. H.R. 218 took effect on July 22, 2004, the date of signing.*

Numerous questions have been raised regarding the effect of this legislation. As best guesses are arrived at by legal experts throughout the United States, we will provide more information in future LEDs. This month, we are providing only the text of the legislation. Section 2 addresses active officers, while section 3 addresses retired officers. We have omitted a few purely clerical amendments in the legislation.

H.R. 218 amends federal law as follows:

SECTION 1. Short title.

This Act may be cited as the “Law Enforcement Officers Safety Act of 2004.”

SECTION 2. Exemption of qualified law enforcement officers from state laws prohibiting the carrying of concealed firearms.

(a) IN GENERAL--Chapter 44 of title 18, United States Code, is amended by inserting after section 926A the following: Sec. 926B. Carrying of concealed firearms by qualified law enforcement officers

(a) Notwithstanding any other provision of the law of any State or any political subdivision thereof, an individual who is a qualified law enforcement officer and who is carrying the identification required by subsection (d) may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce, subject to subsection (b).

(b) This section shall not be construed to supersede or limit the laws of any State that -- (1) permit private persons or entities to prohibit or restrict the possession of concealed firearms on their property; or (2) prohibit or restrict the possession of firearms on any State or local government property, installation, building, base, or park.

(c) As used in this section, the term "qualified law enforcement officer" means an employee of a governmental agency who -- (1) is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers of arrest; (2) is authorized by the agency to carry a firearm; (3) is not the subject of any disciplinary action by the agency; (4) meets standards, if any, established by the agency which require the employee to regularly qualify in the use of a firearm; (5) is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and (6) is not prohibited by Federal law from receiving a firearm.

(d) The identification required by this subsection is the photographic identification issued by the governmental agency for which the individual is employed as a law enforcement officer.

(e) As used in this section, the term "firearm" does not include -- (1) any machinegun (as defined in section 5845 of title 26); (2) any firearm silencer (as defined in section 921); and (3) any destructive device (as defined in section 921).

SECTION 3. Exemption of qualified retired law enforcement officers from state laws prohibiting the carrying of concealed firearms.

(a) IN GENERAL--Chapter 44 of title 18, United States Code, is further amended by inserting after section 926B the following: Sec. 926C. Carrying of concealed firearms by qualified retired law enforcement officers

(a) Notwithstanding any other provision of the law of any State or any political subdivision thereof, an individual who is a qualified retired law enforcement officer and who is carrying the identification required by subsection (d) may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce, subject to subsection (b).

(b) This section shall not be construed to supersede or limit the laws of any State that -- (1) permit private persons or entities to prohibit or restrict the possession of concealed firearms on their property; or (2) prohibit or restrict the possession of firearms on any State or local government property, installation, building, base, or park.

(c) As used in this section, the term "qualified retired law enforcement officer" means an individual who -- (1) retired in good standing from service with a public agency as a law enforcement officer, other than for reasons of mental instability; (2) before such retirement, was authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and had statutory powers of arrest; (3)(A) before such retirement, was regularly employed as a law enforcement officer for an aggregate of 15 years or more; or (B) retired from service with such agency, after completing any applicable probationary period of such service, due to a service-connected disability, as determined by such agency; (4) has a nonforfeitable right

to benefits under the retirement plan of the agency; (5) during the most recent 12-month period, has met, at the expense of the individual, the State's standards for training and qualification for active law enforcement officers to carry firearms; (6) is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and (7) is not prohibited by Federal law from receiving a firearm.

(d) The identification required by this subsection is – (1) a photographic identification issued by the agency from which the individual retired from service as a law enforcement officer that indicates that the individual has, not less recently than one year before the date the individual is carrying the concealed firearm, been tested or otherwise found by the agency to meet the standards established by the agency for training and qualification for active law enforcement officers to carry a firearm of the same type as the concealed firearm; or (2)(A) a photographic identification issued by the agency from which the individual retired from service as a law enforcement officer; and (B) a certification issued by the State in which the individual resides that indicates that the individual has, not less recently than one year before the date the individual is carrying the concealed firearm, been tested or otherwise found by the State to meet the standards established by the State for training and qualification for active law enforcement officers to carry a firearm of the same type as the concealed firearm.

(e) As used in this section, the term “firearm” does not include -- (1) any machinegun (as defined in section 5845 of the National Firearms Act); (2) any firearm silencer (as defined in section 921 of this title); and (3) a destructive device (as defined in section 921 of this title).

UNITED STATES SUPREME COURT

LED EDITORS' INTRODUCTORY COMMENT: *Each of the two U.S. Supreme Court decisions digested below addresses a case where there was no dispute that a Miranda violation occurred. In Seibert, the Miranda violation -- a deliberate failure to warn the suspect until the “cat was out of the bag -- was indisputably in bad faith. In Patane, the violation -- a failure to complete the Mirandizing process after the suspect interrupted the warnings and said he knew his rights -- apparently was inadvertent or at least not in bad faith. In each case, the question was whether evidence should be excluded from the prosecution's case-in-chief under objective or subjective theories. Because these decisions address only exclusionary aspects of the Miranda rule, the decisions are not particularly instructive to Washington law enforcement officers. We would hope that, regardless of the potential exclusionary consequences under federal constitutional doctrine, Washington officers are making good faith efforts to comply with Miranda in every case.*

BAD FAITH, PREMEDITATED, TWO-STEP-INTERROGATION APPROACH OF QUESTIONING FIRST AND THEN MIRANDIZING AND QUESTIONING IMMEDIATELY AFTERWARD VIOLATES MIRANDA; THIS VIOLATION REQUIRES EXCLUSION FROM EVIDENCE OF ALL STATEMENTS OF THE SUSPECT

Missouri v. Seibert, 124 S.Ct. 2601 (2004)

Facts and Proceedings below:

Patrice Seibert feared charges of neglect when her son, afflicted with cerebral palsy and suffering from bedsores, died in his sleep. She was present when two of her sons and their friends discussed burning her family's mobile home to conceal the circumstances of her son's death. Donald, an unrelated mentally ill 18-year-old living with the family, was left to die in the fire, in order to avoid the appearance that Seibert's son had been left unattended.

Five days later, the police arrested Seibert. The officers did not Mirandize her at the time of arrest or immediately after they took her to an interrogation room at the police station. Without giving her Miranda warnings, Officer Hanrahan of the Rolla, Missouri P.D., questioned her for 30 to 40 minutes. Ultimately, she confessed that their homicidal plan had been for Donald to die in the fire. At that point, as had been his strategy all along, Officer Hanrahan gave her a 20-minute break and then returned to Mirandize her for the first time. He obtained a waiver and resumed questioning. During the warned interrogation session, Officer Hanrahan confronted Seibert with her pre-warning confession, and he got her to repeat the confession.

Prior to trial, Seibert moved to suppress both her pre-warning and post-warning statements. Officer Hanrahan testified that, consistent with training he had received on Miranda, he made a conscious decision to withhold Miranda warnings, to instead question first and then Mirandize and repeat the questions from the first session until he got the answers previously given. The trial court suppressed the pre-warning statement but admitted the post-warning one, and Seibert was convicted of second-degree murder. The Missouri Court of Appeals affirmed, finding the case indistinguishable from Oregon v. Elstad, 470 U.S. 298 (1985), in which the U.S. Supreme Court held that a suspect's unwarned inculpatory statement made during a brief exchange with police at his house did not make a later, fully warned stationhouse confession inadmissible.

In its 1985 Elstad decision, the U.S. Supreme Court held that, where a warned interrogation session follows unwarned questioning, the courts should look at the totality of the circumstances to determine whether the waiver prior to the second statement was voluntary. Thus, under Elstad, courts looked at such considerations as whether, between the unwarned questioning and the warned questioning, there was a significant lapse of time, a significant change of location, a change of officers involved in the questioning, and/or a change in the focus of the questioning. Such things may remove the effect of the earlier violation, Elstad held.

The Missouri Supreme Court reversed the Missouri Court of Appeals, holding that, because the two interrogation sessions were nearly continuous, the second statement, which was clearly the product of the invalid first statement, should be suppressed. The Missouri Supreme Court distinguished Elstad on the ground that the warnings had not been intentionally withheld in the Elstad case. The Missouri Supreme Court thus introduced a subjective (i.e., good faith/bad faith) element into the analysis.

ISSUE AND RULING: Were the standard Miranda warnings that Officer Hanrahan gave to Seibert between the improper unwarned session and the Mirandized session effective in making her waiver of rights voluntary, thus making admissible the confession Seibert gave after being Mirandized? (**ANSWER:** No, rules a split Supreme Court).

Result: Affirmance of Missouri Supreme Court decision that: 1) set aside the conviction of Patrice Seibert, 2) suppressed the statements Officer Hanrahan obtained in both stages of the interrogation, and 3) remanded the case for retrial.

ANALYSIS IN LEAD OPINION BY JUSTICE SOUTER

Justice Souter writes the lead opinion and is joined by Justices Stevens, Ginsburg and Breyer. Souter asserts that the midstream recitation of warnings after interrogation and unwarned confession in this case could not have produced a truly voluntary waiver of rights in any reasonable person. Therefore, he concludes, Seibert's post-warning statements are

inadmissible under what he asserts is an objective standard for determining voluntariness of Miranda waiver.

The Souter opinion begins its legal analysis by noting that the failure to give Miranda warnings and obtain a waiver of rights before custodial questioning generally requires exclusion from the prosecution's case-in-chief of any statements obtained. On the other hand, Souter notes, giving the warnings and getting a waiver generally produces a virtual ticket of admissibility, with most litigation over voluntariness ending with a valid waiver finding. This common consequence would not be at all common, he says, unless Miranda warnings were customarily given under circumstances that reasonably suggest a real choice between talking and not talking.

Next, Justice Souter addresses the Supreme Court decision in Dickerson v. United States, 530 U.S. 428 (2002) **Aug 00 LED:02**. He notes that Dickerson reaffirmed Miranda, holding that Miranda's constitutional character prevailed against a federal statute that sought to restore the old police practice of giving no warnings, where courts would then determine, case by case on the totality of the circumstances, whether statements were made voluntarily. The technique of interrogating in successive -- first unwarned and then warned -- phases raises a new challenge to Miranda, he says. Souter notes that officers in a number of jurisdictions have been trained to ignore Miranda in the way that the Missouri officer here was trained. Such training has tried to take advantage of the limits on the Miranda-exclusionary rule by deliberately ignoring Miranda requirements in certain circumstances.

Souter asserts that special attention must be given to the purpose of Miranda and the question-first strategy. The Miranda decision addressed "interrogation practices ... likely ... to disable [an individual] from making a free and rational choice" about speaking, and the 1966 Miranda Court held that a suspect must be "adequately and effectively" advised of the choice the Constitution guarantees. The object of the question-first-warn-later technique, however, is to render Miranda warnings ineffective by waiting to give them until after the cat is out of the bag and the suspect has already confessed. The threshold question in this situation is whether it would be reasonable to find that the warnings could function "effectively" as Miranda requires. There is no doubt about the answer, Souter declares. He says that by any objective measure, it is likely that warnings withheld until after interrogation and confession will be ineffective in preparing a suspect for successive interrogation, close in time and similar in content.

Souter continues by noting that the obvious purpose of the question-first technique is to get a confession the suspect would not make if he understood his rights at the outset. Souter acknowledges that the question of voluntariness of waiver is an objective one. However, where, as here, the warnings are inserted in the midst of coordinated and continuing interrogation, a suspect is going to be misled and deprived of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them. Souter continues by saying that it would be unrealistic to treat carefully orchestrated and integrated back-to-back interrogation sessions as independent interrogations subject to separate evaluation simply because Miranda warnings were given midstream.

The 1985 Elstad decision does not authorize admission of a confession repeated under the question-first strategy, Souter states. The contrast between the Elstad case and Seibert's case reveals relevant facts bearing on whether midstream Miranda warnings could be effective to accomplish their object. Souter points to: the completeness and detail of the questions and answers to the first round of questioning, the two statements' overlapping content, the timing and setting of the first and second rounds, the use of the same interrogator in both sessions, and the degree to which the interrogator's questions treated the second round as continuous with the first.

In Elstad, the stationhouse questioning could reasonably be seen as a distinct experience from a short conversation at home, and thus the Miranda warnings could have made sense as

presenting a genuine choice to the suspect whether to follow up on the earlier admission. Here, however, the unwarned interrogation was conducted in the stationhouse, and the questioning was systematic, exhaustive, and managed with psychological skill. The warned phase proceeded after only a 15-to-20 minute pause, in the same place and with the same officer. Also, the interrogating officer did not advise Seibert that her prior statement could not be used against her, and he used her unwarned statement to interrogate her. Under these circumstances, says Souter, a reasonable person in the suspect's shoes could not have understood the warnings to truly convey a message that she retained a choice about continuing to talk.

Justice Souter suggests that, unless police give a special cat-out-of-the-bag warning in these circumstances, informing the suspect that the unwarned statement cannot be used against her, the mere giving of standard Miranda warnings at this point cannot produce a voluntary waiver under the objective test for waiver.

CONCURRING OPINION BY JUSTICE KENNEDY

Justice Kennedy writes a concurrence that is joined by no other justice. In analysis that would inject a subjective element into the Miranda exclusionary analysis, Justice Kennedy concludes that, when a two-step (unwarned/warned) interrogation technique is deliberately used, post-warning statements related to pre-warning statements must be excluded unless curative measures are taken before the post-warning statement is made.

However, Justice Kennedy indicates that the 1985 U.S. Supreme Court decision in Oregon v. Elstad is still good law for situations where officers did not act in bad faith by deliberately using the two-step approach. He points out that: (A) officers sometimes may not realize that a suspect is in "custody" and that warnings are required; or (B) officers may elicit a response when they do not intend their words or actions to prompt an incriminating response from the suspect (and may be waiting for a more appropriate time to "interrogate" the suspect). Suppressing post-warning statements under such circumstances would serve "neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence," he argues.

In contrast, the technique used in this case distorts Miranda's meaning and furthers no legitimate countervailing interest, Justice Kennedy asserts. The interrogating officer relied on Seibert's prewarning statement in order to obtain the postwarning one used at trial. The facts of this case, Kennedy points out, show the temptations for abuse inherent in the Missouri officer's bad faith, premeditated, two-step technique.

The interrogator's reference to the pre-warning statement was an implicit, and false, suggestion that the mere repetition of the earlier statement was not independently incriminating, Kennedy says, and the Miranda rule would be frustrated were the police permitted to undermine its meaning and effect in this way. Justice Kennedy does say that Souter's opinion goes too far to the extent that it suggests that whenever a two-stage interview occurs, the post-warning statement's admissibility depends on giving some sort of special midstream warnings acknowledging the earlier Miranda violation.

Kennedy argues that the admissibility of post-warning statements should continue to be governed by Elstad's principles unless the two-step strategy is deliberately employed. Only where there has been a bad faith violation, as here, must the post-warning statements be excluded unless curative measures are taken before the continued interrogation, Kennedy asserts. Such measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the Miranda warning and waiver, for example, giving an additional warning explaining the likely inadmissibility of the pre-warning

statement. Because no curative steps were taken in this case, Kennedy asserts, the post-warning statements are inadmissible and the conviction cannot stand.

CONCURRING OPINION BY JUSTICE BREYER

Justice Breyer writes a concurrence that is joined by no other justice, but does not appear to differ markedly from Justice Kennedy's approach. Thus, like Justice Kennedy, Breyer would apply a special cat-out-of-the-bag warnings-and-waiver test where police have violated Miranda in bad faith.

DISSENTING OPINION BY JUSTICE O'CONNOR

Justice O'Connor writes a dissent that is joined by Chief Justice Rehnquist and Justices Scalia and Thomas. She attacks the idea (found in the Missouri Supreme Court opinion and in the Kennedy and Breyer concurrences) that a subjective test should ever be applied to Miranda exclusionary analysis. Her dissenting opinion does not assert that Seibert's warned statements necessarily should have been admitted into evidence. Instead, O'Connor asserts that the case should have been remanded to the Missouri Supreme Court for that Court to apply the objective test of Elstad to determine whether the waiver was voluntary.

PHYSICAL EVIDENCE THAT WAS THE FRUIT OF A CUSTODIAL INTERROGATION HELD ADMISSIBLE EVEN THOUGH THE DEFENDANT WAS NOT PROPERLY MIRANDIZED PRIOR TO THE INTERROGATION

United States v. Patane, 124 S.Ct. 2620 (2004)

Facts and Proceedings below:

Officer Fox was investigating Samuel Patane's apparent violation of a temporary restraining order. A federal agent told Fox's colleague, Detective Benner, that Patane, a convicted felon, was illegally possessing a pistol. Officer Fox and Detective Benner proceeded to Patane's home, where Fox arrested him for violating the restraining order. Detective Benner attempted to advise Patane of his Miranda rights, but Patane interrupted early in the warnings and asserted that he knew his rights. Detective Benner did not attempt further Mirandizing. He then asked about the pistol. Patane gave the detective information that allowed the detective to retrieve and seize the pistol.

Patane was indicted in federal court for possession of a firearm by a convicted felon. The trial court granted his motion to suppress the pistol, reasoning that the officers lacked probable cause to arrest him, and declining to rule on Patane's alternative argument that the gun should be suppressed as the fruit of an unwarned statement. The Tenth Circuit of the U.S. Court of Appeals reversed the probable-cause ruling, but affirmed the suppression order on Patane's alternative theory regarding the Miranda violation.

The Tenth Circuit rejected the Government's argument that Supreme Court case law forecloses application of the fruit-of-the-poisonous-tree doctrine to physical evidence that derives directly from a Miranda violation. That Court reasoned that the prior decisions cited by the government had been effectively overruled by the Supreme Court in Dickerson v. United States, 530 U.S. 428 (2000) **Aug 00 LED:02**, in which the Supreme Court held that Miranda announced a constitutional rule. The Tenth Circuit concluded based on Dickerson that a failure to warn pursuant to Miranda is itself a violation of the suspect's Fifth Amendment rights under the Self-Incrimination Clause, and requires application of the same kind of broad fruit-of-the-poisonous-tree exclusionary approach that is applied to Fourth Amendment violations.

ISSUE AND RULING: Does the exclusionary rule of Miranda require suppression of the physical fruits obtained here as the result of non-compliance with the Miranda warnings-and-waiver requirement for custodial interrogations? (**ANSWER:** No)

Result: Reversal of Tenth Circuit decision; remand of case to the U.S. District Court for trial of Samuel Francis Patane for federal firearms law violation.

ANALYSIS IN LEAD OPINION BY JUSTICE THOMAS

Justice Thomas writes the lead opinion and is joined by Chief Justice Rehnquist and Justice Scalia. He concludes that giving a suspect inadequate Miranda warnings and thus failing to obtain a valid Miranda waiver does not require suppression of the physical fruits of the suspect's unwarned but voluntary statements.

The Thomas opinion begins its legal analysis by noting that the Miranda rule is a limited prophylactic rule employed to protect against violations of the Self-Incrimination Clause of the Fifth Amendment. That Clause's core protection is a prohibition on compelling a criminal defendant to testify against himself at trial. Thomas asserts that this prohibition cannot be violated by the introduction of nontestimonial evidence obtained as a result of voluntary statements.

Thomas explains that the Court has recognized and applied several prophylactic rules designed to protect the core privilege against self-incrimination. For example, the Miranda rule creates a presumption of coercion in custodial interrogations, in the absence of specific warnings, that is generally irrebuttable for purposes of the prosecution's case in chief. But because such prophylactic rules necessarily go well beyond the Self-Incrimination Clause's actual protections, any further extension of one of them must be justified by its necessity for the protection of the actual right against compelled self- incrimination.

After extended discussion, Justice Thomas concludes his opinion by stating that, because police cannot violate the Self-Incrimination Clause itself by the mere taking of unwarned though voluntary statements, a Miranda-based, fruit-of-the-poisonous-tree, exclusionary rule cannot be justified by reference to a deterrence effect on law enforcement. The word "witness" in the constitutional text limits the Self-Incrimination Clause's scope to testimonial evidence, Thomas asserts. And, although the Court requires the exclusion of the physical fruit of actually coerced statements, statements taken without sufficient Miranda warnings are presumed to have been coerced only for certain purposes and then only when necessary to protect the privilege against self-incrimination. Justice Thomas declines to extend the Miranda presumption of coercion further.

CONCURRING OPINION BY JUSTICE KENNEDY

Justice Kennedy writes a concurrence that is joined by Justice O'Connor. His opinion generally agrees with the Thomas opinion, but he offers some elusive qualifying remarks relating to the Miranda exclusionary rule that the LED editors will not attempt to explore in this LED entry.

DISSENTING OPINION BY JUSTICE SOUTER

Justice Souter writes a dissent that is joined by Justices Stevens and Ginsburg. He argues that the majority's ruling gives police an incentive to violate Miranda in order to obtain physical evidence. Justice Souter says that the Court should have excluded the physical evidence by applying a broad, fruit-of-the-poisonous-tree approach like that applied under the Fourth Amendment in search-and-seizure cases.

DISSENTING OPINION BY JUSTICE BREYER

Justice Breyer writes a dissent that is joined by no other justice. Justice Breyer generally agrees with Justice Souter, but he also asserts that the test for admissibility of physical "fruits" of a Miranda violation should turn in part on the good faith or bad faith of the interrogating officer.

BRIEF NOTES FROM THE 9TH CIRCUIT, U.S. COURT OF APPEALS

(1) USING FLASH-BANG DEVICE WAS EXCESSIVE FORCE WHERE ROOM INTO WHICH DEVICE WAS BLINDLY TOSSED WAS LIKELY TO BE OCCUPIED BY INNOCENT BYSTANDERS – In Boyd v. Benton County (Oregon), 374 F.3d 773 (9th Cir. 2004), the Ninth Circuit rules that police deployment of a “flash-bang device” (a non-lethal explosive device) was “excessive use of force” under the circumstances described in the summary judgment pleadings by the plaintiff. The Court holds that use of the device violates a citizen’s Fourth Amendment rights where officers throw it “blindly” into a room likely occupied by innocent bystanders, one or more of whom is injured, and where the officers have not carefully considered beforehand: 1) the strength of the governmental interests that would justify this level of force; 2) alternatives to the use of the flash-bang device; and 3) appropriate measures to reduce the risk of injury when they used the device.

The Boyd Court holds further, however, that the officers are entitled to “qualified immunity” for their October 1997 actions in executing a residential search warrant. The Court concludes that a reasonable officer would not have been on notice in October 1997 that it is unconstitutional to blindly use a flash-bang device inside a dark apartment where five to eight people might be sleeping. Therefore, the officers are entitled to qualified immunity from liability in the injured citizen’s civil rights lawsuit against the officers.

Thus, although the Ninth Circuit holds that the officers violated the plaintiff’s Fourth Amendment rights in the use of the flash-bang device, the officers’ constitutional mistake was reasonable in light of the lack of prior guidance from the courts. Therefore, the officers are entitled to qualified immunity based on the law that existed at the time of the incident. The bottom line of this case, however, is that officers in any state located within the jurisdiction of the Ninth Circuit of the U.S. Court of Appeals (that includes the State of Washington) are forewarned. While the Oregon officers in Boyd were held not liable because the law was unclear as of October 1997 when they used the device in this case, the law is clear now in the Ninth Circuit. Officers must carefully balance all of the circumstances, including the likelihood that innocent bystanders will be injured, when contemplating the use of flash-bang devices.

Result: Affirmance of U.S. District Court decision dismissing lawsuit against the law enforcement agency and officers.

(2) CAR STOP BASED ON ARIZONA DMV COMPUTER DATABASE HELD LAWFUL EVEN THOUGH DATABASE WAS INACCURATE ON THIS OCCASION – In U.S. v. Miguel, 368 F.3d 1150 (9th Cir. 2004), the Ninth Circuit Court of Appeals holds in an alien-smuggling case that Arizona police officers had a reasonable suspicion to support a traffic stop of a defendant’s vehicle: 1) where the officers mistakenly believed that the defendant was driving an unregistered vehicle in violation of state law; 2) their mistake resulted from inaccurate information in an Arizona DMV computer database that the vehicle’s registration had expired; and 3) there was no showing that the officers held their mistaken factual belief in bad faith.

The Miguel Court distinguishes between: (A) a mistake of law by law enforcement officers, which can never justify a Terry stop (whether or not in good faith); and (B) a good faith, reasonable mistake of fact, as here, which can lawfully justify a seizure or arrest.

Result: Affirmance of Arizona U.S. District Court conviction of Leigh Christina Miguel and Norman Jeremiah Johnson for conspiracy to transport illegal aliens, transportation of illegal aliens for financial gain, and placing in jeopardy the lives of illegal aliens.

WASHINGTON STATE SUPREME COURT

QUESTIONING OF SUSPECT ON THE PORCH OF HER TRAILER HOME WAS NOT “CUSTODIAL” FOR MIRANDA PURPOSES; HER “FOCUS”/PC ARGUMENT IS REJECTED

State v. Lorenz, ___ Wn.2d ___, 93 P.3d 133 (2004)

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

[While other officers were executing a search warrant for evidence relating to a wide range of sex crimes against children, a detective and a federal agent] questioned [Pamela Jean] Lorenz out on the porch [of her trailer home]. [The FBI agent] informed Lorenz that she was not under arrest and was free to leave any time, but was not allowed inside the trailer while the search took place. Lorenz claimed that the officers told her "sit here" referring to a chair they placed on the porch. Lorenz told officers that the 15-year-old in the photographs was her neighbor and that she took the photograph of C. holding Holdren's penis. Lorenz signed a written statement acknowledging that she was not under arrest and was free to leave at any time; it reads, in relevant part, "I am fully aware that I am not under arrest and am free to leave at any time. [] I am also advised that I can stop the following written statement at any time." Lorenz's statement explains that Lorenz educated C. about sex by letting her watch Holdren masturbate (on numerous occasions) and also showing her how to masturbate.

The State charged both Holdren and Lorenz with first degree child rape, first degree child molestation, two counts of sexual exploitation of a minor, third degree rape of a child, conspiracy to commit rape, molestation, exploitation of a child, and conspiracy to distribute pornography. Lorenz and Holdren were tried separately.

Lorenz sought to exclude the statements she made during the November 3rd search, claiming that police did not provide her with a Miranda warning. Prior to trial, the trial court conducted a CrR 3.5 hearing to determine the admissibility of her written statement. At the CrR 3.5 hearing, Lorenz testified that one of the detectives told her that if she stopped before completing her written statement, she would be arrested for obstruction of justice. According to Lorenz, [the federal agent] told her he "was going to fuck me up one side and down the other and keep me from seeing my kids, and Mr. Holdren and I could be pen pals in prison for the next 20 years and I'd never see my kids again." Lorenz also claimed that she asked the detectives whether or not she needed a lawyer. However, at the hearing, [the federal agent] denied making any such statements to Lorenz. [The detective], present during the interview and taking of the written statement, testified that he did not hear [the federal agent] make such statements to Lorenz.

The trial court determined that Lorenz's testimony was not credible because she admitted to lying several times during the course of the written statement, and because another detective present for nearly all the questioning testified that [the federal agent] made no threats. The trial court noted that Lorenz's written statement stated "[she had] not been threatened or promised with anything." It concluded that Lorenz's written statement was voluntary. Further, the trial court concluded that Lorenz's written statement was not a custodial interrogation because at all times as memorialized in her written statement, Lorenz was fully aware that she was not under arrest and was free to leave at any time. The trial court ruled Lorenz's written statement was admissible.

The jury found Lorenz guilty of all seven counts. The trial court imposed a total sentence term of 318 months. The Court of Appeals affirmed Lorenz's conviction. Lorenz does not challenge the trial court's CrR 3.5 findings of fact. The matter is now before this court.

ISSUE AND RULING: Where, among other things, officers told Lorenz that she was free at any time to leave or stop giving a statement, were the circumstances "non-custodial" for Miranda purposes regardless of whether the officers had focused on Lorenz as a suspect? (ANSWER: Yes)

Result: Affirmance of King County Superior Court conviction of Pamela Jean Lorenz for first degree child molestation (this was the only count that the Supreme Court reviewed).

ANALYSIS: (Excerpted from Supreme Court opinion)

Miranda warnings were designed to protect a defendant's right not to make incriminating statements while in police custody. State v. Harris, 106 Wn.2d 784 (1986). Miranda warnings are required when an interrogation or interview is (a) custodial (b) interrogation (c) by a state agent.

"Custodial" refers to whether the defendant's movement was restricted at the time of questioning. An objective test is used to determine whether a defendant was in custody -- whether a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest.

Lorenz argues that following State v. Dictado, 102 Wn.2d 277 (1984), we should hold that she was under custodial interrogation at the time the written statement was made because the police had developed probable cause to arrest her for the crimes she was later charged, and had not properly given her Miranda warnings. However, this court explicitly rejected the Dictado approach in State v. Harris when this court adopted the U.S. Supreme Court's approach in Berkemer. It is irrelevant whether the officer's unstated plan was to take Lorenz into custody or that Lorenz was the focus of the police investigation. [The officer's focus or undisclosed subjective intent] is irrelevant [to the question of] whether Lorenz was in a coercive environment at the time of the interview. Thus it is, as the State contends, irrelevant whether the police had probable cause to arrest Lorenz (before or during the interview).

In order for there to be custody, a reasonable person in Lorenz's position would have to believe that he or she was in police custody with the loss of freedom associated with a formal arrest. But in this instance, the trial court correctly concluded that Lorenz was not in custody when the written statement was made. She was not permitted to enter the trailer while the task force searched the trailer, nonetheless she was not required to remain on the premises. Approximately four officers searched the trailer for evidence. Two officers interviewed Lorenz. Police officers explicitly advised Lorenz prior to interviewing her that she was not under arrest and was free to leave at any time. Lorenz explicitly acknowledged in the written statement that she was "fully aware that [she is] not under arrest and am free to leave at any time." Lorenz never asked to leave, never asked task force members to stop questioning her, and never asked for an attorney. Lorenz's circumstances regarding her written statement at issue do not give rise to Miranda safeguards. We hold that under these circumstances the questioning was not custodial; a reasonable person under the circumstances being told by officers verbally and acknowledging in a written statement that she was free to leave would indeed believe she was not in

custody. We affirm the trial court's decision to allow the written statement into evidence.

[Some citations omitted]

NONCOMMISSIONED CITY PARK SECURITY OFFICERS WERE “STATE AGENTS” FOR PURPOSES OF MIRANDA; BUT TERRY STOP WAS NOT “CUSTODIAL” EQUIVALENT OF ARREST, SO NO MIRANDA WARNINGS WERE REQUIRED

State v. Heritage, ___ Wn.2d ___, P.3d ___, 2004 WL 1747369 (2004)

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

On June 18, 2001, two bicycle security officers were on duty in Riverfront Park, a city park in downtown Spokane. Both officers wore shorts and white t-shirts with an emblem of a badge emblazoned with the words "Security Officer." They also carried a "duty bag" containing a radio, pepper spray, handcuffs, and a collapsible baton.

The park manages its security officers, who are city employees but not commissioned police officers. Park security officers perform a variety of functions, which include patrolling for unlawful activities.

While on random patrol, the security officers noticed four juveniles sitting in a public area known among officers as a "hot spot" for illegal activities. The security officers observed one of the persons smoking what appeared to be a marijuana pipe. As the officers approached the group, both officers detected the odor of marijuana, which they are trained to detect. The security officers observed an "Altoids" box on the ground near the person holding the pipe.

The officers told the group that they needed to ask some questions and then they would get them on their way. The officers asked one of the juveniles whether the marijuana pipe belonged to him. When the juvenile denied ownership, the officers addressed the entire group. The officers stated, "Whose marijuana pipe is it?" and "We're Park Security, let's move it along." Heritage responded, "It's my pipe."

The officers also asked the juveniles for identification, took individual pictures of the juveniles, and filled out a trespass form for each. One officer called Spokane police on his cell phone. The security officers continued verbal communication to prevent the juveniles from leaving before the police arrived. Spokane police officers arrived and arrested Heritage.

Heritage moved to suppress her admission to ownership of the pipe, arguing that the officers should have given Miranda warnings. The trial court denied the motion, concluding that the juveniles were not in custody, and the security officers were not agents of the State but rather had the status of private citizens. The trial court, on stipulated facts, found against Heritage on the charge of possession of drug paraphernalia.

Division Three of the Court of Appeals reversed in a published opinion. State v. Heritage, 114 Wn. App. 591 (2002) **Feb 03 LED:10**.

ISSUES AND RULINGS: 1) Were the noncommissioned Spokane City Parks security officers “state agents” for Miranda purposes? (ANSWER: Yes); 2) Was Ms. Heritage in “custody” – i.e.,

the functional equivalent of arrest – for Miranda purposes when the security officers conducted their interrogation: (ANSWER: No)

Result: Reversal of Court of Appeals' decision; reinstatement of Spokane County Superior Court adjudication that juvenile Tiffany Juel Heritage was in possession of drug paraphernalia.

ANALYSIS: (Excerpted from lead opinion for Supreme Court)

1) Introduction

Miranda warnings were developed to protect a defendant's constitutional right not to make incriminating confessions or admissions to police while in the coercive environment of police custody. Miranda warnings must be given when a suspect endures (1) custodial (2) interrogation (3) by an agent of the State. Without Miranda warnings, a suspect's statements during custodial interrogation are presumed involuntary. The first and third requirements to invoke Miranda are at issue on appeal.

2) State Agent Requirement

As a threshold issue, we determine whether the park security officers were state agents for purposes of Miranda. The Court of Appeals, Division Three, held that questioning by any government employee comes within Miranda whenever prosecution of the defendant being questioned is among the purposes, either definite or contingent, for which the information is elicited, and such is the case where " 'the questioner's duties include the investigation or reporting of crimes.' " The court stated, "[A]rrest and prosecution of the juveniles was at least a contingent purpose of the questioning, and one of the duties of the security guards was the investigation of criminal activities in the park." Thus, the court concluded that the park security officers were state agents under Miranda and that their actions invoked the Miranda rule.

Division One of the Court of Appeals took a different approach in State v. Wolfer, 39 Wn. App. 287 (1984), holding that Miranda warnings are required only when the interrogation is by law enforcement officers. The appellate court stated that the security guard at issue in that case was not a state agent because he was not " 'employed by an agency of government, federal, state or local, whose primary mission is to enforce the law.' " Because the state agent in Wolfer was not a "law enforcement officer," Division One concluded that Miranda warnings were not required.

In reaching this decision, Division One broadly read our holding in State v. Valpredo, 75 Wn.2d 368 (1969). In Valpredo, we considered whether *private* retail store security guards are required to give Miranda warnings. We said no. The Wolfer court read Valpredo "to hold that Miranda warnings need not be given by other than law enforcement officers."

Miranda's applicability is not as narrow as the Wolfer court held. The United States Supreme Court in Miranda stated that "[b]y custodial interrogation, we mean questioning initiated by *law enforcement officers* after a person has been ... deprived of his freedom in any significant way." However, the United States Supreme Court since has clarified that "law enforcement officers" encompasses more than just police officers. In Mathis v. United States, 391 U.S. 1 (1968), the United States Supreme Court applied Miranda to an internal revenue agent

conducting a "routine tax investigation." In Estelle v. Smith, 451 U.S. 454, 466 (1981), the United States Supreme Court held that Miranda applies to court ordered psychiatric examinations.

Miranda, therefore, applies not only to law enforcement officers but to any "agent of the state" who "testifie[s] for the prosecution" regarding the defendant's custodial statements.

We have recognized this application in a previous discussion of Miranda. In State v. Warner, 125 Wn.2d 876 (1995) **May 95 LED:08**, we considered application of the Miranda rule to a state-employed counselor in the context of a court ordered sex offender treatment program analogous to group therapy. Under the facts of the case, we found that the counseling session lacked the level of compulsion contemplated in Miranda to constitute "interrogation." Further, we did not find a level of restraint analogous to a custodial situation beyond the fact that the defendant was already incarcerated at the time of the counseling session. Under the unique facts of the case, we reasoned that the counselors at issue were not the type of state employees implicated by the Miranda rule. However, we stated, "It is likely ... any state employee [who] is conducting a 'custodial interrogation' would probably qualify as a state agent for [Miranda] purposes."

Application of Miranda to a broader class of government employees rather than merely law enforcement officers is consistent with other jurisdictions. [The Court discusses here decisions from other jurisdictions – **LED Ed.**]

Further, such an application generally is consistent with our cases deciding when a citizen is entitled to constitutional protections in the criminal context. We determine applicability of constitutional protections by an objective test: the belief of a reasonable person in the defendant's position. Here, the security officers wore bullet proof vests under t-shirts bearing gold badges containing the words "Security Officer." They also wore a duty belt containing pepper spray, a collapsible baton, handcuffs, a radio, and a flashlight holder. The officers approached the juveniles and authoritatively asked questions. A reasonable person in Heritage's position would view such officers to be "law enforcement officers" with authority over him or her.

Based on these above facts, plus the fact that the parties do not dispute the park security officers were acting in their official capacity at the time they confronted the respondent, that their duties included the investigation or reporting of crimes, and that information elicited during interrogation was used to prosecute Heritage, we hold that the park officers were state actors for purposes of Miranda.

3) Custody Requirement

The custody requirement to invoke Miranda is also at issue on appeal. In Miranda, the United States Supreme Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." In Berkemer v. McCarty, 468 U.S. 420 (1984), the United States Supreme Court refined the definition of "custody." The court developed an objective test--whether a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest. Washington has adopted this test. See State v. Short, 113 Wn.2d 35 (1988).

In Berkemer, the United States Supreme Court also held that a brief Fourth Amendment seizure of a suspect, either in the context of a routine, on-the-street Terry stop or a comparable traffic stop, does not rise to the level of "custody" for the purposes of Miranda. Because a routine traffic stop curtails the freedom of a motorist such that a reasonable person would not feel free to leave the scene, a routine traffic stop, like a Terry stop, is a seizure for the purposes of the Fourth Amendment. However, the court recognized that because both traffic stops *and* routine Terry stops are brief, and they occur in public, they are "substantially less 'police dominated' " than the police interrogations contemplated by Miranda. Thus, a detaining officer may ask a moderate number of questions during a Terry stop to determine the identity of the suspect and to confirm or dispel the officer's suspicions without rendering the suspect "in custody" for the purposes of Miranda. Washington courts agree that a routine Terry stop is not custodial for the purposes of Miranda. Thus, we must determine whether a reasonable person in Heritage's position would have believed her freedom was curtailed to a degree associated with arrest at the time she was asked, "Whose marijuana pipe is it?"

In this case, the park security guards approached Heritage and her friends wearing their typical uniform, which included a t-shirt identifying them as park security and a duty belt with handcuffs. The guards did not physically detain or search anyone in the group. They immediately made it clear that they did not have the authority to arrest. Within the first minute or two of questioning they asked to whom the pipe belonged. Heritage admitted it was her pipe. An officer making a Terry stop may ask a moderate number of questions to determine the identity of the suspect and to confirm or dispel the officer's suspicions without rendering the suspect "in custody" for the purposes of Miranda. At the time the officers asked to whom the marijuana pipe belonged they were in the midst of asking a moderate number of questions related to their suspicions that members of the group were smoking marijuana. A reasonable person in Heritage's position would not have believed her freedom was curtailed to a degree analogous to arrest. The encounter was analogous to a Terry stop, not custodial interrogation, at the time Heritage admitted to ownership of the pipe.

Heritage also argues that the encounter amounted to custodial interrogation because she was a minor at the time, and her age made her more susceptible to the belief that she was not free to leave the encounter. Under the facts of this case, Heritage's minority would not ultimately modify this otherwise noncustodial encounter into a custodial one. The questioning occurred in public, Heritage was never isolated from her friends, and any doubts she might have had about the security guards' authority were eliminated by the guards' assurances, before questioning, that they could not arrest her. She admitted to ownership of the pipe after brief questioning directed at the group. Under these facts, even a 16 year old would not reasonably have believed she was detained to a degree analogous to arrest. We decline to decide whether the age of the suspect can ever be taken into account for purposes of the Miranda custody requirement.

[Some citations and footnotes omitted]

CONCURRENCE BY JUSTICE CHAMBERS

Justice Chambers writes a separate concurring opinion, joined by no other justice, stating in full as follows:

I concur with the majority's analysis of state action and agree that these security officers were state agents. I also concur in the result.

CONCURRENCE BY JUSTICE FAIRHURST

Justice Fairhurst writes a separate concurring opinion, joined by no other justice, stating in full as follows:

I concur with the majority's analysis that the defendant was not in custody. Given that assessment, it is not necessary to decide whether the city park security officers were state agents. I concur in the result.

LED EDITORIAL COMMENTS:

1. "Custody" for Miranda purposes does not include Terry detention.

This decision can be added to a long line of Washington court decisions supporting the proposition that a Terry stop is not the functional equivalent of arrest. Miranda warnings are not required prior to questioning during such temporary investigatory seizures. Most questioning by non-law enforcement governmental employees will not qualify as "custodial" under Miranda. Because we do not give legal advice in the LED and because not all prosecutors will have the same view on what constitutes Miranda "custody," as always we urge LED readers to consult their prosecutors and agency legal advisors. (Note also that we have hopes that the Supreme Court will grant the prosecutor's petition for review in the France case, a case involving questioning by a law enforcement officer during a Terry stop; the France decision was digested and criticized as conflicting with the referenced line of cases in the June 04 LED).

2. Other security officers and likely other classes of noncommissioned government employees will also qualify as "state agents" for Miranda purposes.

The following discussion of the issue of "state agent" status under Miranda may not be that useful to our readers in light of the cautious view stated at the end of our "comment" on this point. Readers should keep in mind, however, that even if "state agent" status exists for a noncommissioned government interrogator, Miranda warnings are not required unless the suspect is in "custody" that is the functional equivalent of arrest. As noted above in our Comment No. 1, most questioning by non-law enforcement officers will not be deemed to be "custodial," and hence there will not be a requirement for Mirandizing.

Previously, based on the Wolfer decision involving a school security guard and based on decisions from the U.S. Supreme Court and from most other jurisdictions, it appeared that – with a few narrow exceptions -- a governmental interrogator was not a "state agent" under Miranda if the employer of the interrogator did not have as its primary mission the enforcement of the criminal laws. (But see State v. Nason, 96 Wn. App. 686 (Div. III, 1999) Jan OO LED:14, where the Court of Appeals held that a CPS investigator working a child dependency case involving a jail inmate suspected of child abuse was required to Mirandize before questioning the inmate at the jail). Under the Heritage decision, however, non-law enforcement employees in Washington can no longer take such a narrow view of "state agent" status under Miranda.

The lead opinion in Heritage loosely discusses, without explaining how the elements relate to each other, several elements that, in their totality, lead the Court to conclude that the security officers were "state agents." We have broken the elements into four parts as follows:

A) the parks security guards in this case “wore bullet proof vests under t-shirts bearing gold badges containing the words “Security Officer” . . . and “[t]hey also wore a duty belt containing pepper spray, a collapsible baton, handcuffs, a radio, and a flashlight holder”;

B) the juveniles under these circumstances reasonably viewed the security officers as “law enforcement officers”;

C) the duties of the security officers “included the investigation or reporting of crimes”;

D) the security officers were government employees, and the “information elicited during interrogation was used to prosecute Heritage”.

So what makes someone a “state agent” for purposes of Miranda? What if only some of these four elements exist in a given case? The answer is not disclosed by the loose discussion of the above-noted elements by the Heritage Court. While common sense and standard legal analysis would strongly suggest that the Heritage lead opinion discussed all four elements because all four were relevant to determining “state agent” status, some legal commentators have suggested that the only legally safe conclusion is that element “D” (governmental employee interrogator plus later use of the interrogation results at criminal trial) is dispositive of “state agent” status. While we strongly doubt that the Heritage lead opinion discussed the other three elements for no reason at all, probably the only safe legal course for non-commissioned, governmental security officers at schools, hospitals, and the like is to assume that Miranda warnings are required in those circumstances where: 1) such non-law enforcement personnel have a suspect in “custody” that is the equivalent of arrest (see Heritage lead opinion’s “custody requirement” discussion above and see our first comment above); and 2) they are questioning that suspect about matters that might later be tied to criminal charges.

What about public school administrators? Such classes of persons almost never will be deemed to questioning a suspect in a situation that could be characterized as “custodial.” But it is conceivable that facts could arise where a court would hold a student who is in “custody” for Miranda purposes, taking into account the age of the suspect (see our discussion in the August 2004 LED at pages 6-7, suggesting that age must be taken into account; note that the Heritage Court stated that the Court was “declin[ing] to decide whether the age of the suspect can ever be taken into account for purposes of the Miranda custody requirement.”). Assuming “custody,” perhaps where an “arrest” has already been made by a security officer or law enforcement officer and the arresting officer is present, then probably the only prudent course is to ensure that Mirandizing occurs before the administrator does any questioning.

Again, this approach seems to render the discussion in Heritage of elements A, B, and C superfluous, and we would not be surprised if the Washington Supreme Court held such classes of governmental employees not to be “state agents” in a future case. But the broad interpretation of “state agent” under element D seems the only safe legal course for now.

What about questioning of shoplifting suspects by non-governmental persons – for example, managers, clerks or security officers at private stores? Our reading of the Heritage lead opinion is that the Supreme Court’s Valpredo decision is still good law. We believe that such persons are not “state agents” unless, based on specific facts in the particular case, the detainee could make a credible argument that he or she reasonably believed that the store security person (or other store employee) asking the questions was clearly acting as an agent for a specific governmental entity, for instance where a

store security person interrogates an arrested suspect with a commissioned law enforcement officer standing by at the scene.

3. The arrest and prosecution under drug paraphernalia laws was apparently for use, not mere possession, of drug paraphernalia.

The following comment addresses a matter and issues that were not discussed by the Heritage Court. We have discussed this tangential matter with the deputy prosecutor who handled the appeal in this case. Readers may note in the Heritage Court's description of the facts that the Court says that Ms. Heritage was prosecuted for "possession of drug paraphernalia." Readers may remember that we have noted in several recent LEDs that, while local ordinances may be more broad, there is no crime under State law (RCW 69.50.412) of mere "possession of drug paraphernalia" or "possession of drug paraphernalia with intent to use." See, for example, State v. O'Neill, 148 Wn.2d 564 (2003) April 03 LED:03; State v. Neeley, 113 Wn. App. 100 (Div. III, 2002) Nov 02 LED:05; State v. Tagas, ___ Wn. App. ___, 90 P.3d 1088 (Div. I, 2004) July 04 LED:13. In this case, however, there was evidence that the drug paraphernalia was being used in the presence of the security officers, and therefore Ms. Heritage could be arrested and prosecuted under the State drug paraphernalia law for use of drug paraphernalia.

DOL INFORMATION HELD TO ESTABLISH PROBABLE CAUSE TO ARREST FOR DWLS

State v. Gaddy, ___ Wn. 2d ___, 93 P.3d 872 (2004)

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

In the early morning hours of October 5, 2000, a vehicle driven by Juliet Gaddy was stopped by two police officers of the City of Seattle. The stop was based on the officers' perception that Gaddy failed to signal when making a right turn. Because Gaddy was unable to provide the officers with a valid driver's license, one of them asked her for her name and birth date so that he could verify the status of her driver's license on a mobile data terminal (MDT) located within the police vehicle. One of the police officer's testified that the MDT "returned with DWLS-3, which is Driving While License Suspended, Third Degree, which is a criminal offense." Based on this information, the officers arrested Gaddy for driving a motor vehicle while license suspended.

In a search of Gaddy's vehicle incident to the arrest, the police officers found a purse in which there was a substance they believed was cocaine. A field test was conducted which indicated that the substance was cocaine. When the officers confronted Gaddy about what they had found, Gaddy denied that the purse in which the substance was found belonged to her. Gaddy then informed the police officers, for the first time, that she had a driver's license on her person. The license, which was in one of Gaddy's pants pockets, was retrieved by the officers. Gaddy was eventually charged in King County Superior Court with one count of possession of a controlled substance, to wit: cocaine. She was not charged with driving while license suspended.

The Suppression Hearing

Gaddy filed a motion to suppress the cocaine, arguing that the search conducted by the officers was invalid because they lacked probable cause to arrest her. Specifically, Gaddy contended that the DOL information was incorrect and that the erroneous information did not provide probable cause for her arrest. In support of her argument, Gaddy maintained that her driver's license was not suspended at the time of her arrest. At a hearing on her suppression motion,

Gaddy introduced a copy of an abstract of her driving record which revealed that a driver's license had been issued to her on September 21, 2000.

The State countered by introducing two documents that it believed established that Gaddy's driver's license was in a state of suspension on October 5, 2000, the date of her arrest. One of the documents was a copy of a suspension order which indicated that Gaddy was to stop driving on September 14, 2000, due to the cancellation of her insurance coverage. The other document was a letter from DOL's custodian of records. It stated that on October 5, 2000, the day of Gaddy's arrest, Gaddy had not reinstated her driving privilege. The latter document indicated that a license was issued to Gaddy on September 21, 2000. It did not, however, state whether another suspension order had been entered during the period between September 21, 2000, and October 5, 2000.

The trial court acknowledged that Gaddy's driving record was confusing but concluded that the accuracy of Gaddy's record was not relevant. In its view, the pertinent issue was whether the arresting officers had a reasonable basis to believe that Gaddy was committing the crime of driving with a suspended license at the time they placed her under arrest. It ruled that the combination of Gaddy's inability to produce a valid driver's license at the time of questioning and the officers' receipt of information from the MDT, provided the officers with probable cause to arrest Gaddy for driving while license suspended. It, therefore, denied Gaddy's suppression motion.

The Trial and Appeal

Following a jury trial in King County Superior Court, Gaddy was convicted of the charge of possession of a controlled substance. She was thereafter sentenced to serve two months in jail. Gaddy appealed her conviction to Division One of the Court of Appeals, claiming only that the arresting officers did not have probable cause to arrest her for driving with a suspended driver's license because the DOL information that the officers received via their MDT was not reliable. The Court of Appeals rejected this argument and affirmed Gaddy's conviction reasoning that the information from DOL was "presumptively reliable." State v. Gaddy, 114 Wn. App. 702 (2002) [June 03 LED:13]. It also noted that probable cause for Gaddy's arrest was supported not only by DOL information that was received over the MDT but also by the fact that Gaddy could not produce a driver's license prior to her arrest and that, according to testimony of the arresting officers, her "demeanor was uncooperative and flighty during the encounter."

ISSUE AND RULING: Did the DOL information that the officer obtained from the MDT establish probable cause to arrest Gaddy for DWLS? (**ANSWER:** Yes, rules a unanimous Supreme Court)

Result: Affirmance of Court of Appeals decision that affirmed King County Superior Court conviction of Juliet C. Gaddy for possession of cocaine.

ANALYSIS: (Excerpted from Supreme Court opinion)

Under [the U.S. Supreme Court's Aguilar-Spinelli test for informant-based probable cause], an informant's tip can furnish probable cause for an arrest if the State establishes (1) the basis of the informant's information and (2) the credibility of the informant or the reliability of the informant's information. To satisfy both parts of the Aguilar-Spinelli test, the State must prove the underlying circumstances which the trier of fact "may draw upon to conclude the informant was credible and obtained the information in a reliable manner."

The first prong of the test relates to the informant's basis of knowledge. Here, it is undisputed that the informant, DOL, had a basis to know whether Gaddy's driver's license was suspended on October 5, 2000. DOL, as we have noted above, is the agency which regulates drivers' licenses in this state. Its authority to do so stems from RCW 46.01.030, which provides that DOL "shall be responsible for administering and recommending the improvement of the motor vehicle laws of this state relating to: (1) driver examining and licensing; [and] ... (3) driver records." Another function of DOL is to suspend and revoke drivers' licenses.

The second part of the Aguilar-Spinelli test requires an examination of the credibility of the informant or the reliability of the informant's information. That is the prong that is in contention here. If the identity of an informant is known--as opposed to being anonymous or professional--the necessary showing of reliability is relaxed. This is so because there is less risk of the information being a rumor or irresponsible conjecture which may accompany anonymous informants. Also, an identified informant's report is less likely to be marred by self-interest. Citizen informants are deemed presumptively reliable.

We are satisfied that DOL should be accorded the status of a citizen informant. We reach this conclusion because DOL is governed by extensive statutes and provisions and the Washington Administrative Code, which establishes its reliability. There are many statutes in place that mandate DOL to maintain current and accurate information.

For the reasons we have set forth above, we conclude that the DOL records are presumptively reliable. We conclude, additionally, that Gaddy failed to rebut this presumption. At her suppression hearing, Gaddy argued only that *her* driving records were inaccurate. To prevail on a reliability challenge, it would have been necessary for Gaddy to make at least a prima facie showing that accuracy of the DOL records are affected by systemic problems in maintaining accurate and reliable records of the millions of drivers it oversees. Gaddy did not attempt to make such a showing here. The fact that one driving record may have been inaccurate, if that is the case here, does not establish that DOL records as a whole are unreliable.

Under the Aguilar-Spinelli test, information from DOL is presumptively reliable. That presumption has not been overcome. Thus, the DOL information concerning Gaddy's record that was obtained via an MDT located in the arresting police officer's vehicle provided probable cause to arrest Gaddy for driving with a suspended license.

[Some case citations omitted]

WASHINGTON STATE COURT OF APPEALS

**WARRANTLESS SEARCH OF HOME UPHELD BASED ON DEFENDANT'S ADVANCE
CONSENT AS PARTICIPANT UNDER HER ROOMMATE'S ELECTRONIC HOME-
MONITORING DETENTION AGREEMENT**

State v. Cole, ___ Wn. App. ___, 93 P.3d 209 (Div. II, 2004)

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

Cole lived with her roommate, Brenda Alsup, in one apartment of a multi-apartment house. As a participant in the Pierce County Corrections Electronic Home Detention Program (EHD), Alsup received one day of jail-time credit for every day she spent under EHD house arrest. [Alsup] wore an electronic device around her ankle so that the EHD could monitor whether she left her home, a prohibited activity.

I. Electronic home detention -- advance consent to search

As required under the EHD program, Cole signed a consent-to-search form, which read, in part:

I, Nancy Ann Cole, in consideration for the privilege of entry into the ... Electronic Home Detention Program ... do consent to allow the Pierce County Sheriff's Department, or any other law enforcement agency, *to search my entire premises* (including all outbuildings) *at any time without a warrant.* ...

This search will be for the purpose of ensuring my compliance with the agreement I have executed with the Pierce County Sheriff's Department, Corrections Bureau, and BI Incorporated. This search may be made *without probable cause.* *I understand that I have a constitutional right to not have my premises searched by law enforcement without probable cause, but I waive that right only for the periods I am actually participating in EHD.*

Additionally, I hereby consent to the seizure of any contraband, evidence of a crime, or evidence of a violation of Electronic Home Detention Rules and Conditions that may be found during a search.

Cole's consent-to-search agreement was in effect at the time of the search at issue here. Both Alsup and Cole were required to comply with EHD rules. Any law violations by either Alsup or Cole, including possession or use of illegal drugs or paraphernalia in their apartment, are violations of EHD rules. Any violation of these rules by Cole -- even absent any violation by Alsup -- would result in Alsup's being removed from the EHD and returned to jail.

II. Consensual, warrantless seizure

County Sheriff Deputies Jeff Papen and Byron Brockway had been investigating drug activity in the apartment house where Cole and Alsup were living. Two drug arrestees identified Cole and Alsup's apartment as a place they could get cocaine. A confidential informant arranged and consummated a controlled buy of crack cocaine from Cole in another apartment in the same house.

When Papen also learned that Alsup had recently tested positive for heroin use, in violation of her EHD agreement, he contacted Paul Jones, the corrections officer in charge of home monitoring. Jones explained that the monitoring equipment showed Alsup was at home, but when Papen telephoned Alsup, no one answered. So Papen and another deputy went to Alsup's apartment to check on her. Cole answered the door. Papen asked her about Alsup, whom Cole said was inside sleeping. Papen reminded Cole that she had previously signed the consent form, permitting him to search the residence, and Cole invited the officers inside. Cole told them there was drug paraphernalia in a safe in the

bedroom she shared with Alsup. Inside an open safe in the bedroom Papen found and seized cash, cocaine, marijuana, and a spoon containing heroin.

Papen read Cole her rights. Cole agreed to talk with the officers. She said she (1) sold crack cocaine from her apartment; (2) used to sell cocaine; (3) had never sold heroin; and (4) had used heroin and cocaine within the last 12 hours. She also told the officers the controlled substances they found belonged to her. The officers arrested Cole.

III. Procedure

The State charged Cole with two counts of possession of a controlled substance – cocaine and heroin. Cole moved to suppress the drugs and paraphernalia, arguing that (1) the officers lacked a search warrant; and (2) the search was pretextual in that the officers' real purpose was to obtain evidence that she had sold crack to a confidential police informant, not to monitor Alsup's EHD compliance.

The trial court denied the motion. Following a bench trial on stipulated facts, the court found Cole guilty as charged. Cole appeals.

ISSUE AND RULING: Did defendant give a valid advance consent to the warrantless search of her home when she signed the EHD agreement relating to her roommate's home detention? (**ANSWER:** Yes)

Result: Affirmance of Pierce County Superior Court convictions of Nancy Ann Cole for unlawful possession of heroin and cocaine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Cole argues the officers exceeded the scope of her consent to search in violation of article 1, section 7 of the Washington constitution. We disagree.

Consent is a recognized exception to the general rule that warrantless searches are per se unreasonable and, therefore, unconstitutional. Twenty-five days before the search, Cole had expressly waived her constitutional rights and consented in writing to law enforcement's warrantless search of her entire premises at any time to ensure compliance with the EHD agreement.

The officers had information that both Alsup and Cole were not complying with the EHD agreement: (1) Alsup, who was not supposed to leave or to use drugs in her home, had tested positive for heroin; and (2) Cole had sold drugs from both their apartment and another apartment in the house. Under the terms of the EHD agreement, Cole, Alsup, and their apartment were to remain drug-free and law abiding. Even if Alsup had not tested positive for heroin use, the officers could have searched the apartment based solely on Cole's violations of the EHD agreement.

We hold that Cole waived her constitutional right to be free of warrantless searches when she signed the broad consent to search her home as part of the EHD agreement. The trial court properly denied Cole's motion to suppress.

[Citations and some footnotes omitted]

FENCED BACKYARD IS NOT PART OF “PLACE OF ABODE” FOR PURPOSES OF UNLAWFUL-DISPLAY-OF-A-WEAPON CHARGE UNDER RCW 9.41.270(1)

State v. Smith, 118 Wn. App. 480 (Div. I, 2003)

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

On June 20, 2001, employees from Valley Tow Company were dispatched to the White River Presbyterian Church in Auburn. As they attempted to tow a car from the church parking lot, James Smith yelled at them from the backyard of a house directly behind the lot. Using vulgar language, he demanded that the car be left alone. Smith threatened, 'I'm going to get my 45, and we'll take care of business.'

Smith went inside his house and returned carrying a gun. He initially concealed the weapon in the waistband of his pants and taunted the workers. Displaying empty hands, he inquired, '[D]o I have a gun or don't I?' He then reached behind his back, removed a .45 caliber pistol, and walked toward the fence separating his yard from the church lot. He swung his gun in the air and stated, 'I'm on my own property I can do whatever I want!' Alarmed by Smith's behavior and fearing that he was dangerous and might harm them, one of the tow operators, Eric Perius, called 911 to report the situation. During Perius' conversation with the 911 operator, Smith disappeared briefly behind the fence. He reappeared carrying a four-foot long piece of metal pipe, which he held in a threatening manner. Smith left again and returned carrying a hammer. He swung the hammer over his head and eventually threw it into a tree, where it remained lodged in the wood.

On November 16, 2001, the King County Prosecutor charged Smith with unlawful display of a weapon and possession of a firearm in the first degree. At a bench trial, the parties stipulated to the facts in the police reports. Smith moved to dismiss the charge of unlawful display of a weapon. The trial court denied the motion and convicted him. Smith received an exceptional sentence below the standard range. He appeals.

ISSUE AND RULING: Is a person's backyard part of his "place of abode" for purposes of the display-of-a-weapon prohibition in RCW 9.41.270? (ANSWER: No)

Result: Affirmance of King County Superior Court conviction of James Andrew Smith for unlawful display of a weapon in violation of RCW 9.41.270(1).

ANALYSIS: (Excerpted from Court of Appeals opinion)

Smith contends the trial court erred in ruling that his backyard was not a part of his abode and thereby not excepted from RCW 9.41.270(1). He asserts we should reverse his conviction because criminal statutes are to be construed strictly against the State and in favor of the accused. We disagree. RCW 9.41.270 provides:

(1) It shall be unlawful for any person to carry, exhibit, display, or draw any firearm, dagger, sword, knife or other cutting or stabbing instrument, club, or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.

....

(3) Subsection (1) of this section shall not apply to or affect the following:

(a) Any act committed by a person while in his or her place of abode or fixed place of business;

The Legislature has not defined the phrase 'place of abode' used in RCW 9.41.270(3)(a). In the absence of a statutory definition, words are given their ordinary and usual meaning. The ordinary meaning of abode is: one's home, place of dwelling, residence, and/or domicile.

The exception does not include Smith's backyard because it is limited to 'a person while in his or her place of abode[.]' The word 'in' clearly implies inside, not one's backyard. If the Legislature wanted to enact a broader exception, it could have used 'at' rather than 'in.'

Under Smith's interpretation of the place of abode exception, a person could lawfully display a weapon in an intimidating manner as long as he or she remained on the property upon which his or her dwelling is located.

This interpretation contradicts the purpose of RCW 9.41.270(1), which is to promote public safety by protecting people against those who carry weapons in a threatening manner. The place of abode exception comports with this purpose because one has a legitimate privacy right in his or her home, and the exception does not endanger the public by including behavior that occurs in an area exposed to the public. As the State notes, although a home's curtilage enjoys heightened protection under the Fourth Amendment, 'a person does not have a reasonable expectation of privacy in areas of the curtilage impliedly open to the public.'

A backyard does not satisfy the place of abode exception under RCW 9.41.270. Accordingly, we affirm Smith's conviction.

[Court's footnote: In State v. Haley, 35 Wn. App. 96 (1983), Division Three had to decide whether a deck fell within the 'place of abode' exception. It held that Haley's deck was an extension of his dwelling and therefore a part of his abode. We question that holding but need not decide the issue. And even if Haley were correct, it is distinguishable from this case. Unlike the deck in Haley, the backyard here is not an extension of Smith's residence. While Haley's deck was on the inner part of his property and attached to his residence, yards typically abut neighboring properties. This means that a person's conduct in his or her yard may extend beyond his or her property. Here, Smith's conduct occurred on the outskirts of his backyard where only a fence with breaks in it separated him from the tow operators in the church parking lot. His behavior was not contained to an audience on his property; he intended that his behavior traverse the fence to communicate threats. There is nothing to indicate Smith's yard is similarly situated to the deck in Haley.]

LED EDITORIAL COMMENT: The same analysis would apply to RCW 9.41.050's "place of abode" exception to the concealed pistol license requirement.

NEXT MONTH

The October 2004 LED will digest, among other recent decisions, the Court of Appeals decision in Osburn v. Mason County, __ Wn. App. __, __ P.3d __, 2004 WL 1775921 (Div. II, 2004), an August 10, 2004 ruling that a county sheriff's office can be civilly liable for failing to provide adequate notification to the community regarding a level III sex offender.

INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCW'S, AND TO WAC RULES

The Washington Office of the Administrator for the Courts maintains a web site 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 from 1939 to the present. 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/rules>].

Many United States Supreme Court opinions can be accessed at [<http://supct.law.cornell.edu/supct>]. This web site 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 website at [<http://www.supremecourtus.gov/opinions/02slipopinion.html>]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since January 2000 can be accessed (by date of decision only) by going to the Ninth Circuit home page at [<http://www.ca9.uscourts.gov/>] and clicking on "Opinions." Federal statutes can be accessed 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 January 2004, is at [<http://slc.leg.wa.gov/>]. Information about bills filed in 2003 Washington Legislature is at the same address -- look under "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 WAC amendments is at [<http://slc.leg.wa.gov/wsr/register.htm>]. In addition, a wide range of state government information can be accessed at [<http://access.wa.gov>]. The address for the Criminal Justice Training Commission's home page is [<http://www.cjtc.state.wa.us>], while the address for the Attorney General's Office home page is [<http://www.wa.aqo>].

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]. Questions regarding the distribution list or delivery of the **LED** should be directed to [ledemail@cjtc.state.wa.us]. **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. **LED**'s from January 1992 forward are available via a link on the Commission's Internet Home Page at: [<http://www.cjtc.state.wa.us>].

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