



Law Enforcement

MARCH 2011

Digest

Law enforcement officers: Thank you for your service, protection and sacrifice.

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NINTH CIRCUIT, U.S. COURT OF APPEALS

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

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

Facts and Proceedings below:

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

Upon arrival at the Huff residence, [Officer] Zepeda knocked on the door and announced that the officers were with the Burbank Police Department. When no one responded, [Officer] Ryburn called the home telephone number, and though the officers could hear the telephone ringing inside the house, no one answered. Ryburn then called Maria [the suspect's mother] on her cell phone, which she answered. Ryburn identified himself and indicated he wanted to talk to Maria about her son Vincent [the suspect]. Maria then hung up the phone.

Two minutes later Maria and Vincent came out of the house and stood on the front steps in front of Ryburn and Zepeda. Zepeda told Vincent that the Officer Defendants were there to talk about some threats at the school, to which Vincent replied "I can't believe you're here for that." The officers concede that when they encountered Vincent outside of the Huff residence, they did not have probable cause to enter the home. Ryburn approached Maria and asked if they could go inside the house to talk. She said, "No," because the Officer Defendants did not

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

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

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

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

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

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

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

ANALYSIS:

Exigent Circumstances

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

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

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

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

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

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

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

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

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

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

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

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

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

[Some citations omitted]

Qualified Immunity

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

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

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

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

Facts and Proceedings below:

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

Arie Bivins, Thompson's sometime girlfriend, was murdered between 1:30 and 4:30 p.m. on June 22, 1998. Bivins was seventeen, Thompson eighteen. In the preceding days and months, Bivins had attempted to break up with Thompson, prompting violent reactions from him.

On the day of the murder, Thompson's father saw Thompson and Bivins talking outside his house at 1:30 p.m. Thompson left his father's house at 2:00, not saying where he was going. At about 3:00, a dog in the yard next to Bivins' house barked ferociously. Thompson returned home at 4:00, told his father he was worried about Bivins, and had his father drive him to Bivins' home. There, Thompson found Bivins' front door unlocked and her dead body just inside the door.

When the police arrived, Thompson appeared distraught. Officer Solzman approached Thompson, who said he did not feel well. Solzman offered to let Thompson lie down in the air-conditioned police car, and Thompson agreed. Later, homicide detective Conaty woke Thompson to ask him to go to the police station to talk about finding the body. Thompson responded that he wanted to go home and sleep. When Conaty explained that Thompson's assistance could be critical to the investigation, Thompson agreed to go to the station. Thompson was not placed under arrest at that time.

When Thompson arrived at the station he was placed in a break room, where he waited approximately six hours. Officer Solzman sat outside the break room doing paperwork. Thompson's father testified that he asked to speak to his son but was refused; a police witness denied that there was any such request.

Around 11:00 p.m., Inspectors Conaty and Giacomelli moved Thompson into an interview room containing three chairs and no other furniture. Thompson was not handcuffed and did not ask to go home, but, by then, Conaty considered him "the primary suspect." The ensuing two-hour interview was videotaped.

At the outset, Conaty told Thompson that the interview could be conducted another time in the event Thompson was too tired to do it. No Miranda warnings

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

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

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

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

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

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

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

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

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

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

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

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

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

ANALYSIS:

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

[I]n determining whether the interrogator deliberately withheld the Miranda warning, courts should consider whether objective evidence and any available subjective evidence, such as an officer's testimony, support an inference that the two-step interrogation procedure was used to undermine the Miranda warning Once a law enforcement officer has detained a suspect and subjects him to interrogation . . . there is rarely, if ever, a legitimate reason to delay giving a Miranda warning until after the suspect has confessed. Instead, the most plausible reason for the delay is an illegitimate one, which is the interrogator's desire to weaken the warning's effectiveness.

We begin from the state court finding, which California does not contest, that Thompson's interrogation became custodial before he admitted to any wrongdoing. By that point in the interrogation, Thompson had been at the police station for between six and seven hours. The officers had gone forward with their investigation of Thompson's involvement, including talking to Bivins' mother

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

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

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

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

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

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

Seibert directs that we proceed to determine whether the deliberately delayed warnings administered to Thompson were nonetheless effective in apprising him of his rights. [United States v. Williams, 435 F.3d 1148 (9th Cir. 2006) April 06 LED:02] summarized the factors relevant to this determination:

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

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

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

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

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

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

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

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

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

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

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

[Citations and footnotes omitted]

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

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

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

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

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

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

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

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

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

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

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

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

The Ninth Circuit analyzes the Brady-claim as follows:

Smith's final claim is that Sergeant Almada violated his due process rights by failing to disclose material exculpatory evidence-in violation of Brady v. Maryland, 373 U.S. 83 (1963).

Brady requires both prosecutors and police investigators to disclose exculpatory evidence to criminal defendants. See Tennison v. City & County of San Francisco, 570 F.3d 1078, 1087 (9th Cir. 2009) (allowing § 1983 claim against police inspector for Brady violation) [See Feb 09 LED:05 reporting on earlier Ninth Circuit panel decision in Tennison]. To state a claim under Brady, the plaintiff must allege that (1) the withheld evidence was favorable either because it was exculpatory or impeaching, (2) the evidence was suppressed by the government, and (3) the nondisclosure prejudiced the plaintiff. Strickler v. Greene, 527 U.S. 263, 281-82 (1999). As to the prejudice prong, the Supreme Court has stated that "strictly speaking, there is never a real 'Brady violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."

Here, Smith contends that Sergeant Almada should have disclosed the description of suspects given in the four previous dumpster fires – none of which matched Smith – and Nelson's [the victim] demonstrably false statement that she saw Smith gloating at the crime scene. Smith argues that had Sergeant Almada disclosed this information, the jury in Smith's first trial would have acquitted him (or, at the very least, the judge in Smith's first trial would have dismissed the case immediately after the mistrial), and thus Smith would not have remained in jail for five months until his second trial.

Smith makes a novel argument. In most Brady-based § 1983 claims, the plaintiff has suffered a criminal conviction, arguably because the government failed to disclose exculpatory evidence. But no jury ever convicted Smith. Instead, Smith says he was injured by the five months he spent in jail after the first trial and until the judge in his second trial dismissed the charges against him.

...
In sum, allowing Brady-based § 1983 claims absent a conviction is not compelled by our circuit's case law, conflicts with other circuits' case law and the central purpose of Brady, would render Brady's materiality standard unworkable, and lacks a limiting principle. We thus decline to allow § 1983 claims for alleged Brady violations by a defendant who is ultimately acquitted.

Even if an unconvicted defendant could maintain a Brady-based § 1983 claim, Smith's claim fails because he has not shown that the withheld evidence was material. First, the evidence of the description of suspects in the previous dumpster fires is not material because it does nothing to undermine the strong physical evidence – i.e., the numerous pieces of mail-linking Smith to the February 2003 fire. Nor does it call into question evidence suggesting Smith's motive: Smith admitted that he had a dispute with Nelson less than three weeks before the fire.

