Law Enforcement Digest

MAY 2013

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

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HONOR ROLL

687th Basic Law Enforcement Academy – November 1, 2012 through March 19, 2013

President:	Ashley A. Cavalieri, Olympia PD
Best Overall:	Christopher L. Johnson, Walla Walla County SO
Best Academic:	Mikael F. Daranciang, Seattle PD
Best Firearms:	Michael N. Peters, Stillaguamish Tribal PD
Patrol Partner Award:	Ryan M. Bradley, Seattle PD
Tac Officer:	Officer Mark Best, Tacoma PD

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WASHINGTON LAW ENFORCEMENT MEDAL OF HONOR & PEACE OFFICERS MEMORIAL CEREMONY IS SET FOR FRIDAY, MAY 3, 2013 IN OLYMPIA AT 1:00 P.M.

In 1994, the Washington Legislature passed chapter 41.72 RCW, establishing the Law Enforcement Medal of Honor. The medal honors those law enforcement officers who have been killed in the line of duty or who have distinguished themselves by exceptional meritorious conduct. This year's Medal of Honor ceremony for Washington will take place Friday, May 3,

2013, starting at 1:00 PM, at the Law Enforcement Memorial site in Olympia on the Capitol Campus. The site is adjacent to the Supreme Court Temple of Justice.

This ceremony is a very special time, not only to honor those officers who have been killed in the line of duty and those who have distinguished themselves by exceptional meritorious conduct, but also to recognize all officers who continue, at great risk and peril, to protect those they serve. This ceremony is open to all law enforcement personnel and all citizens who wish to attend. A reception will follow the ceremony.

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NOTE REGARDING THE 2013 LEGISLATIVE UPDATE: In prior years we have included the legislative update over the course of two or more LED editions, generally including legislation as it is passed. This year we are planning to include all of the legislation in a single LED edition, likely a stand alone edition similar to last year's 2012 Subject Matter Index. However, if the Legislature passes any bills of interest to law enforcement that have an immediate effective date we will likely mention them as close to the effective date as possible.

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UNITED STATES SUPREME COURT

FOURTH AMENDMENT AUTHORITY UNDER MICHIGAN V. SUMMERS TO SECURE OCCUPANTS FOUND IN IMMEDIATE VICINITY OF THE PREMISES WHEN EXECUTION OF SEARCH WARRANT BEGINS DOES NOT AUTHORIZE SEIZING THEM IF THEY HAVE LEFT THE IMMEDIATE VICINITY BEFORE EXECUTION OF THE WARRANT BEGINS

Bailey v. United States, ___U.S. ___, 133 S. Ct. 1031 (Feb. 19, 2013)

Facts and Proceedings below: (Excerpted from Supreme Court staff's syllabus of majority opinion; the syllabus of the opinion is not part of the opinion)

> While police were preparing to execute a warrant to search a basement apartment for a handgun, detectives conducting surveillance in an unmarked car outside the apartment saw two men – later identified as petitioner Chunon Bailey and Bryant Middleton – leave the gated area above the apartment, get in a car, and drive away. **[LED EDITORIAL NOTE: *Both men met the general description of a drug trafficker that a confidential informant had told the officers was operating out of the basement apartment and had a gun there.*]** The detectives waited for the men to leave and then followed the car approximately a mile before stopping it. They found keys during a patdown search of Bailey, who initially said that he resided in the apartment but later denied it when informed of the search. Both men were handcuffed and driven in a patrol car to the apartment, where the search team had already found a gun and illicit drugs. After arresting the men, police discovered that one of Bailey's keys unlocked the apartment's door.
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> At trial, the District Court denied Bailey's motion to suppress the apartment key and the statements he made to the detectives when stopped, holding that Bailey's detention was justified under Michigan v. Summers, 452 U.S. 692 (1981), as a detention incident to the execution of a search warrant, and, in the

> alternative, that the detention was supported by reasonable suspicion under Terry v. Ohio, 392 U.S. 1 (1968). Bailey was convicted. The Second Circuit [of the U.S. Court of Appeals] affirmed denial of the suppression motion. Finding that Summers authorized Bailey's detention, it did not address the alternative Terry holding.

[Bracketed sentence added; some citations revised]

ISSUE AND RULING: The 1981 U.S. Supreme Court decision in Michigan v. Summers held that officers may lawfully secure an occupant of a residence if the occupant is contacted in the immediate vicinity of a target residence at the point when execution of a search warrant begins. Does the Summers rule for execution of search warrants authorize either – (1) merely seizing an occupant in place or (2) both seizing him and returning him to his residence – if the occupant has left the immediate vicinity before execution of the search warrant begins? (ANSWER: No, rules a 6-3 majority)

Result: Reversal of decision of Second Circuit U.S. Court of Appeals decision that affirmed the U.S. District Court conviction of defendant, Chunon L. Bailey, for federal drug and gun felonies; remand of case to the U.S. Court of Appeals for that court to address the question of whether the U.S. District Court was correct in its alternative ruling that the stop, detention, frisk and transport of Bailey back to the search house was justified under Terry v. Ohio and related case law.

ANALYSIS: (Excerpted from Supreme Court staff's syllabus of majority opinion; the syllabus of the opinion is not part of the opinion)

> The rule in [Michigan v. Summers, 452 U.S. 692 (1981)] is limited to the immediate vicinity of the premises to be searched and does not apply here, where Bailey was detained at a point beyond any reasonable understanding of the immediate vicinity of the premises in question.
>
> (a) The Summers rule permits officers executing a search warrant "to detain the occupants of the premises while a proper search is conducted," even when there is no particular suspicion that an individual is involved in criminal activity or poses a specific danger to the officers. Detention is permitted "because the character of the additional intrusion caused by detention is slight and because the justifications for detention are substantial." Muehler v. Mena, 544 U.S. 93, 98 (2005) **May 05 LED:02**. In Summers and later cases the detained occupants were found within or immediately outside the residence being searched. Here, however, petitioner left the apartment before the search began and was detained nearly a mile away.
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> (b) In Summers, the Court recognized three important law enforcement interests that, taken together, justify detaining an occupant who is on the premises during the search warrant's execution.
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> The first [interest], officer safety, requires officers to secure the premises, which may include detaining current occupants so the officers can search without fear that the occupants will become disruptive, dangerous, or otherwise frustrate the search. If an occupant returns home during the search, officers can mitigate the risk by taking routine precautions. Here, however, Bailey posed little risk to the officers at the scene after he left the premises, apparently without knowledge of

the search. Had he returned, he could have been apprehended and detained under Summers. Were police to have the authority to detain persons away from the premises, the authority to detain incident to the execution of a search warrant would reach beyond the rationale of ensuring the integrity of the search by detaining those who are on the scene. As for the Second Circuit's additional concerns, if officers believe that it would be dangerous to detain a departing individual in front of a residence, they are not required to stop him; and if officers have reasonable suspicion of criminal activity, they can instead rely on [their authority under Terry v. Ohio to detain suspects]. The risk that a departing occupant might alert those still inside the residence is also an insufficient safety rationale for expanding the detention authority beyond the immediate vicinity of the premises to be searched.

The second law enforcement interest is the facilitation of the completion of the search. Unrestrained occupants can hide or destroy evidence, seek to distract the officers, or simply get in the way. But a general interest in avoiding obstruction of a search cannot justify detention beyond the vicinity of the premises. Occupants who are kept from leaving may assist the officers by opening locked doors or containers in order to avoid the use of force that can damage property or delay completion of the search. But this justification must be confined to persons on site as the search warrant is executed and so in a position to observe the progression of the search.

The third interest is the interest in preventing flight, which also serves to preserve the integrity of the search. If officers are concerned about flight in the event incriminating evidence is found, they might rush the search, causing unnecessary damage or compromising its careful execution. The need to prevent flight, however, if unbounded, might be used to argue for detention of any regular occupant regardless of his or her location at the time of the search, e.g., detaining a suspect 10 miles away, ready to board a plane. Even if the detention of a former occupant away from the premises could facilitate a later arrest if incriminating evidence is discovered, "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." Mincey v. Arizona, 437 U.S. 385, 393 (1978).

In sum, none of the three law enforcement interests identified in Summers applies with the same or similar force to the detention of recent occupants beyond the immediate vicinity of the premises to be searched. And each is also insufficient, on its own, to justify an expansion of the rule in Summers to permit the detention of a former occupant, wherever he may be found away from the scene of the search.

(c) As recognized in Summers, the detention of a current occupant "represents only an incremental intrusion on personal liberty when the search of a home has been authorized by a valid warrant," but an arrest of an individual away from his home involves an additional level of intrusiveness. A public detention, even if merely incident to a search, will resemble a full-fledged arrest and can involve the indignity of a compelled transfer back to the premises.

(d) Limiting the rule in Summers to the area within which an occupant poses a real threat to the safe and efficient execution of a search warrant ensures that the scope of the detention incident to a search is confined to its underlying

> justification. Because petitioner was detained at a point beyond any reasonable understanding of immediate vicinity, there is no need to further define that term here. Since detention is justified by the interests in executing a safe and efficient search, the decision to detain must be acted upon at the scene of the search and not at a later time in a more remote place.
>
> (e) The question whether stopping petitioner was lawful under Terry remains open on remand.

[Some citations omitted or revised; emphasis added]

LED EDITORIAL COMMENT: The U.S. District Court ruled in the alternative in this case that the detention and transport back to the search house was supported by case law under Terry v. Ohio. The U.S. Court of Appeals declined to address the Terry issue. Now, the U.S. Supreme Court has remanded the case for U.S. Court of Appeals to determine whether the District Court was correct in its alternative ruling under Terry.

The District Court decision can be found under most search engines by entering "FindACase" + "United States v. Bailey" + "September 6, 2006". We think the District Court had solid reasoning for the proposition that Terry v. Ohio supported the (1) detention and questioning, (2) frisk (that produced a set of keys that Bailey admitted were his), and (3) transport back to the basement apartment. But the third of these three questions, whether the transport back to the apartment was lawful, is admittedly a close one.

The U.S. District Court ruled that it was reasonable for the officers to believe, based on the information from their confidential informant, that either of the two persons leaving the basement apartment could be the drug trafficker-occupant their informant had described. And because the informant had told officers that the person described was involved in drug dealing and had a handgun, it was reasonable for the officers to frisk Bailey. The scope of the frisk was also reasonable, the District Court ruled.

Finally, the District Court ruled under Terry that transporting Bailey back to the target apartment was lawful based on the officers' reasonable suspicion that Bailey was an occupant of the apartment. This is the most difficult part of the argument for the government, we think, because, while it is lawful in some circumstances to move a detainee under Terry (for instance, for a showup ID on the street where transporting the witness is impractical), such transport is unlawful in some other circumstances (such as transporting the suspect to the police station or jail), because the transport is deemed to convert the seizure into an arrest that requires probable cause. The salient part of the District Court's analysis on this point is as follows:

> **Moreover, under the particular circumstances of this case, the fact that Bailey was escorted a short distance back to his home in a patrol car pending the outcome of the search does not convert this investigative detention into an arrest that requires probable cause. See United States v. Gori, 230 F.3d 44, 56 (2nd Cir. 2000) ("[i]t is well established that officers may ask (or force) a suspect to move as part of a lawful Terry stop"); United States v. Charley, 396 F.3d 1074, 10080 (9th Cir. 2005) ("police may move a suspect without exceeding the bounds of an investigative detention when it is a reasonable means of achieving the legitimate goals of the detention given the specific circumstances of the case") (internal**

quotations and citations omitted); see also Gallegos v. City of Los Angeles, 308 F.3d 987, 990-93 (9th Cir. 2002) (valid investigative stop where police officers pulled over a man they mistakenly believed to be a burglary suspect, ordered him out of his vehicle at gunpoint, handcuffed him, placed him in the back of their patrol car, and brought him back to the scene of the incident for identification); Halvorsen v. Baird, 146 F.3d 680, 684-85 (9th Cir. 1998) (evidence supported finding that Terry stop did not become an arrest where officers handcuffed suspect and drove him to a nearby gas station for questioning); United States v. Vega, 72 F.3d 507, 515 (7th Cir. 1995) (holding that defendant's stop was "not tantamount to an arrest" even though "the officers drew their weapons, asked [the defendant] to accompany them [back to the crime scene] in one of their cars," and kept him in the officer's vehicle for over an hour); . . . .

As the Supreme Court has recognized, "there are undoubtedly reasons of safety and security that could justify moving a suspect from one location to another during an investigatory detention." Florida v. Royer, 460 U.S. 491, 504-05 (1983); see also Halvorsen, 146 F.3d at 685 ("[m]oving a suspect from one location to another does not automatically turn a detention into an arrest, where reasons for safety and security justify moving the person"); 4 Wayne R. LaFave, Search and Seizure, § 9.2(g) at 348 (4th ed. 2004) ("it seems clear that some movement of the suspect in the general vicinity of the stop is permissible without converting what would otherwise be a temporary seizure into an arrest"). Here, for both security and safety reasons, it was reasonable for the detectives to transport Bailey a short distance back to the search site, rather than remain in front of the firehouse during the execution of the search.

The District Court did not suggest that probable cause to arrest Bailey developed before he was transported back to his apartment. If probable cause had developed by that point in the process, then of course there would be no issue concerning the transport.

As always, we urge Washington officers to seek counsel from their own legal advisors and local prosecutors on issues addressed in the LED.

CANINE PROBABLE CAUSE: PROOF OF RESULTS OF FIELD WORK NOT MANDATORY FOR DETERMINING PC; TOTALITY OF CIRCUMSTANCES MUST BE CONSIDERED

Florida v. Harris, ___U.S. ___, 133 S. Ct. 1050 (Feb. 19, 2013)

Facts and Proceedings below: (Excerpted from Court staff's syllabus of the Court's opinion; the syllabus is not part of the opinion; for readability, we broke the Court staff's single paragraph into several paragraphs)

> Officer Wheetley pulled over respondent Harris for a routine traffic stop. Observing Harris's nervousness and an open beer can, Wheetley sought consent to search Harris's truck. When Harris refused, Wheetley executed a sniff test with his trained narcotics dog, Aldo. The dog alerted at the driver's-side door handle, leading Wheetley to conclude that he had probable cause for a search.
>
> That search turned up nothing Aldo was trained to detect, but did reveal pseudoephedrine and other ingredients for manufacturing methamphetamine.

Harris was arrested and charged with illegal possession of those ingredients. In a subsequent stop while Harris was out on bail, Aldo again alerted on Harris's truck but nothing of interest was found.

At a suppression hearing, Wheetley testified about his and Aldo's extensive training in drug detection. **[LED EDITORIAL NOTE: I*ncluding continuing weekly testing.]*** Harris's attorney did not contest the quality of that training, focusing instead on Aldo's certification and performance in the field, particularly in the two stops of Harris's truck. **[LED EDITORIAL NOTE:** [***The Supreme Court's opinion explains that Officer Wheetley testified he did not keep records of all field work, instead keeping records only of field operations where the dog's alert resulted in an arrest; Officer Wheetley further testified that the two alerts Harris's truck probably were to residual odor Harris had transferred to the truck's door handle.]***

The trial court denied the motion to suppress, but the Florida Supreme Court reversed. It held that a wide array of evidence was always necessary to establish probable cause, including field-performance records showing how many times the dog has falsely alerted. If an officer like Wheetley failed to keep such records **[LED EDITORIAL NOTE:** ***as in this case]***, he could never have probable cause to think the dog a reliable indicator of drugs.

ISSUE AND RULING: Despite the government's failure to present any evidence of field performance results of its drug dog, did the government establish probable cause through the drug dog alert based on the dog's training and testing, including continuing weekly testing exercises? (ANSWER BY SUPREME COURT: Yes, the government established probable cause, rules a unanimous Supreme Court)

Result: Reversal of Florida Supreme Court's suppression ruling; remand of case to the Florida courts, presumably for entry of the "no contest" plea of defendant, Clayton Harris, that he entered at the trial court level contingent on his right to appeal.

ANALYSIS: (Excerpted from Court staff's syllabus of opinion; the syllabus is not part of the Court's opinion)

Because training and testing records supported Aldo's reliability in detecting drugs and Harris failed to undermine that evidence, Wheetley had probable cause to search Harris's truck.

(a) In testing whether an officer has probable cause to conduct a search, all that is required is the kind of "fair probability" on which "reasonable and prudent [people] act." [Illinois v. Gates, 464 U.S. 213, 235 (1983)]. To evaluate whether the State has met this practical and common-sensical standard, this Court has consistently looked to the totality of the circumstances and rejected rigid rules, bright-line tests, and mechanistic inquiries.

The Florida Supreme Court flouted this established approach by creating a strict evidentiary checklist to assess a drug-detection dog's reliability. Requiring the State to introduce comprehensive documentation of the dog's prior hits and misses in the field, and holding that absent field records will preclude a finding of probable cause no matter how much other proof the State offers, is the antithesis of a totality-of-the-circumstances approach. This is made worse by the State

> Supreme Court's treatment of field-performance records as the evidentiary gold standard when, in fact, such data may not capture a dog's false negatives or may markedly overstate a dog's false positives. Such inaccuracies do not taint records of a dog's performance in standard training and certification settings, making that performance a better measure of a dog's reliability. Field records may sometimes be relevant, but the court should evaluate all the evidence, and should not prescribe an inflexible set of requirements.
>
> Under the correct approach, a probable-cause hearing focusing on a dog's alert should proceed much like any other, with the court allowing the parties to make their best case and evaluating the totality of the circumstances. If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, the court should find probable cause. But a defendant must have an opportunity to challenge such evidence of a dog's reliability, whether by cross-examining the testifying officer or by introducing his own fact or expert witnesses. The defendant may contest training or testing standards as flawed or too lax, or raise an issue regarding the particular alert. The court should then consider all the evidence and apply the usual test for probable cause – whether all the facts surrounding the alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime.
>
> (b) The record in this case amply supported the trial court's determination that Aldo's alert gave Wheetley probable cause to search the truck. The State introduced substantial evidence of Aldo's training and his proficiency in finding drugs. **[LED EDITORIAL NOTE:** ***including continuing weekly testing].*** Harris declined to challenge any aspect of that training or testing in the trial court, and the Court does not consider such arguments when they are presented for this first time in this Court. Harris principally relied below on Wheetley's failure to find any substance that Aldo was trained to detect. That infers too much from the failure of a particular alert to lead to drugs, and did not rebut the State's evidence from recent training and testing.

[Some citations omitted or revised]

The following text from the Court's opinion provides more detailed explanation of the Court's reasoning (we have broken the text of two paragraphs into three paragraphs for readability):

> [T]he decision below treats records of a dog's field performance as the gold standard in evidence, when in most cases they have relatively limited import. Errors may abound in such records. If a dog on patrol fails to alert to a car containing drugs, the mistake usually will go undetected because the officer will not initiate a search. Field data thus may not capture a dog's false negatives. Conversely (and more relevant here), if the dog alerts to a car in which the officer finds no narcotics, the dog may not have made a mistake at all. The dog may have detected substances that were too well hidden or present in quantities too small for the officer to locate. Or the dog may have smelled the residual odor of drugs previously in the vehicle or on the driver's person. [Court's footnote: *See U.S. Dept. of Army, Military Working Dog Program 30 (Pamphlet 190-12, 1993) ("The odor of a substance may be present in enough concentration to cause the dog to respond even after the substance has been removed. Therefore, when a detector dog responds and no drug or explosive is found, do not assume the dog*

has made an error"); S. Bryson, Police Dog Tactics 257 (2d ed. 2000) ("Four skiers toke up in the parking lot before going up the mountain. Five minutes later a narcotic detector dog alerts to the car. There is no dope inside. However, the dog has performed correctly"). The Florida Supreme Court treated a dog's response to residual odor as an error, referring to the "inability to distinguish between [such] odors and actual drugs" as a "facto[r] that call[s] into question Aldo's reliability." But that statement reflects a misunderstanding. A detection dog recognizes an odor, not a drug, and should alert whenever the scent is present, even if the substance is gone (just as a police officer's much inferior nose detects the odor of marijuana for some time after a joint has been smoked). In the usual case, the mere chance that the substance might no longer be at the location does not matter; a well-trained dog's alert establishes a fair probability – all that is required for probable cause – that either drugs or evidence of a drug crime like the precursor chemicals in Harris's truck) will be found.]

Field data thus may markedly overstate a dog's real false positives. By contrast, those inaccuracies – in either direction – do not taint records of a dog's performance in standard training and certification settings. There, the designers of an assessment know where drugs are hidden and where they are not – and so where a dog should alert and where he should not. The better measure of a dog's reliability thus comes away from the field, in controlled testing environments. [Court's footnote: *See K. Furton, J. Greb, & H. Holness, Florida Int'l Univ., The Scientific Working Group on Dog and Orthogonal Detector Guidelines 1, 61- 62, 66 (2010) (recommending as a "best practice" that a dog's reliability should be assessed based on "the results of certification and proficiency assessments," because in those "procedure[s] you should know whether you have a false positive," unlike in "most operational situations")*.]

For that reason, evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert. If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search. The same is true, even in the absence of formal certification, if the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs. After all, law enforcement units have their own strong incentive to use effective training and certification programs, because only accurate drug-detection dogs enable officers to locate contraband without incurring unnecessary risks or wasting limited time and resources.

LED EDITORIAL COMMENT: Because it is possible that the Washington Supreme Court could interpret article I, section 7 of the Washington Constitution as imposing a more stringent probable cause test for canine-based probable cause, we think that Washington canine officers will want to continue to keep track of field/operational results, along with training and testing records. But the persuasive analysis in the unanimous Harris decision should be very helpful to Washington prosecutors in the event of a Harris-like challenge based on the Washington constitution, as well as in the event of logically-strained arguments: (1) based on field/operational statistics that are subject to interpretation, or (2) based on a newer canine's relative inexperience in the field. Note that the military program and the scientific working group publications cited in the Court's footnotes quoted above are available free on the Internet and easily found with natural word search using most search engines. As always, we urge Washington

officers to seek counsel from their own legal advisors and local prosecutors on issues addressed in the LED.

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BRIEF NOTES FROM THE NINTH CIRCUIT COURT OF APPEALS

(1) BORDER SEARCH: 8-3 MAJORITY CREATES ELCTRONICS-DEVICE EXCEPTION TO BORDER SEARCH EXCEPTION BY REQUIRING REASONABLE SUSPICION TO SUPPORT FORENSIC SEARCH OF COMPUTER; COURT FINDS REASONABLE SUSPICION IN LIGHT OF MOLESTING RECORD, TRAVELS, PASSWORD PROTECTION, AND OTHER FACTS – In United States v. Cotterman, 709 F.3d 952 (9th Cir., March 8, 2011), an 11-judge panel of the Ninth Circuit rules 8-3 that an intensive forensics search of a computer seized by federal officers at the Mexican-American border was lawful, but only because the officers had reasonable suspicion that the computer contained evidence of crime (i.e., child pornography).

The result (reversal of a District Court suppression order), but not the rationale, is the same as in an earlier opinion in United States v. Cotterman, 637 F.3d 1068 (9th Cir. 2011) **Oct 11 LED:04**. In the earlier opinion, a 3-judge Ninth Circuit panel ruled 2-1 that officers did not have reasonable suspicion, but that the Fourth Amendment border search doctrine nonetheless justified seizure of a laptop computer and a forensics search a few days later and almost two hundred miles away in a lab.

The U.S. Supreme Court has recognized in a number of decisions that the federal government possesses inherent authority to seize property at the international border without reasonable suspicion or probable cause or a warrant, in order to prevent the introduction of contraband into the country. Despite its name, a "border search" by federal officers need not take place at the actual international border.

The Ninth Circuit majority opinion of the 11-judge panel in Cotterman explains that computers are vastly different from suitcases in terms of a number of privacy-related considerations. The opinion asserts that this modern reality requires the courts to develop a border search rule that is more protective of computer privacy than the existing rule that permits suitcase searches by federal border officers without any suspicion. Thus, the majority opinion creates a rule requiring reasonable suspicion for border officers to do a forensics search of a computer for child pornography or other evidence of criminal conduct.

The majority opinion finds reasonable suspicion justifying the intensive forensics search that was conducted in this case. This determination of reasonable suspicion is based primarily on combined facts of the defendant's 15-year-old child-molesting conviction, his frequent travels, his present travel from a country known for sex tourism, his extensive collection of electronic equipment, and the password protection on files in the computer (such password protection does not provide reasonable suspicion alone, but it can be considered along with other facts in determining reasonable suspicion).

In two separate opinions concurring in the result, three judges disagree strongly with the majority opinion's creation of an electronics-device exception to the border search exception. They argue that the U.S. Supreme Court cases allowing border searches without any suspicion do not support the majority opinion's new rule. One of the judges also attacks the majority opinion's conclusion that the facts add up to reasonable suspicion.

Result: Reversal of U.S. District Court (Arizona) suppression order; case remanded for trial.

LED EDITORIAL NOTE: Non-federal officers are not authorized to act under the border search doctrine unless they are specially cross-commissioned as federal officers with such authority.

(2) HABEAS CORPUS REVIEW STANDARD REQUIRES REJECTION OF PRISONER'S ARGUMENT THAT SHE WAS IN CUSTODY FOR PURPOSES OF MIRANDA WHEN INTERROGATED FOR NEARLY FOUR HOURS IN THE DEAD OF NIGHT AT A POLICE STATION LOCATED THIRTY MINUTES FROM HER HOME – In Dyer v. Hornbeck, 705 F.3d 1134 (9th Cir., Feb. 6, 2013), a three-judge Ninth Circuit panel concludes that the state court's determination that prisoner was not in custody, and thus no Miranda warnings were required, when she was interrogated for nearly four hours in the dead of night at a police station a half hour from her home, is not an unreasonable interpretation of clearly established federal law. Accordingly, the Ninth Circuit panel denies her petition for writ of habeas corpus challenging her convictions, though with some suggestion that the panel might have found custody if this were not a habeas corpus case.

The Ninth Circuit panel's lead opinion describes the facts as follows:

> Hunter's body was found at approximately 6:00 a.m. He had been shot three times in the head and placed in the bed of his own pickup truck, which had been set on fire. A local business owner found Hunter's cellular telephone nearby, and officers retrieved it later that day. Telephone records revealed a call to Dyer's apartment, which prompted the police to obtain a search warrant for her home in Fowler, California. Officers began executing the warrant at about 10:35 p.m. on March 28, 2002. Dyer was not home at that time, but she arrived five minutes later. The police officers locked her in the rear of a patrol car while they completed their search.
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> The events of the next six hours, adopted as the factual findings underlying the [California] Court of Appeal's decision, were as follows:
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> > [Detective] Chapman arrived at Dyer's apartment after the warrant had been executed. When he arrived, he found Dyer seated in the back seat of Deputy Simpso[n]'s patrol car, which was parked in the alley outside of Dyer's apartment. The doors to the patrol car were closed and Dyer could not open them from the inside of the back seat. Chapman could not recall if the car was unattended at the time he arrived. Chapman contacted Dyer and told her he was conducting an investigation. Neither Chapman nor his partner, Detective Rasmussen, was in uniform. They did not display a firearm to Dyer. Chapman asked her if she would mind coming to the sheriff's Division to speak to "us." She was agreeable. Dyer was transported to the Division and her interview began approximately 30 minutes later. She was in the patrol car for over an hour, at the apartment and in transit from her apartment in Fowler.
> >
> > Dyer was never handcuffed nor was she told she was under arrest. At the outset of the interview, Dyer was told she was not in custody and she was free to leave. The interview room was approximately 15 feet by 15 feet. It contained chairs, a table, and a trash can. Dyer was not under the influence of drugs at the time

> of the interview. The interview lasted 3 hours and 45 minutes. Two breaks were taken during the interview, one at 1:54 a.m. and one at 3:01 a.m. During the first break Dyer got up, left the room, walked to the restroom (approximately 30 yards away), used the restroom, and returned to the interview room. At each break, Dyer said that no promises or threats had been made to her. For the first hour and a half of the interview, Dyer denied all knowledge and involvement. She later admitted that she had some contact with D.J. on the evening of the 21st. Dyer said she wanted to go home. She was arrested.

In majority and concurring opinions, the Court expresses some doubt about whether the defendant was in a non-custodial circumstance during the stationhouse questioning, despite the detectives' admonition at the outset of questioning that she was not in custody and was free to leave. The judges concerns include: (1) the initial 30-minute seizure in a patrol car, followed immediately by (2) a request by the officers for consent to go with the officers for stationhouse questioning, followed immediately by (3) a 30-minute transport and 4-hour questioning in an interrogation room at the stationhouse 30 miles from her home with no transportation and no promise from officers to arrange for transportation or themselves take her home if she chose to stop the interrogation and leave, followed by (4) arrest as soon as she ended the questioning. However, because this case arises from a petition for writ of habeas corpus, the Court must determine whether the state court's decision was an unreasonable application of federal law. If it is not unreasonable, the Court must affirm. In this case the Court holds that the state court's conclusion that the defendant was not in custody for purposes of Miranda is not unreasonable.

Result: Affirmance of United States District Court (E.D. California) denial of Stacey Daniella Dyer's petition for writ of habeas corpus challenging convictions for first degree felony murder, second degree robbery, and kidnapping.

LED EDITORIAL COMMENTS: Deciding whether to use the tactic of non-custodial, un-Mirandized interrogation

We recognize that officers will in rare circumstances make a considered decision, based on all of the factual circumstances, and often relying on a wealth of experience, that un-Mirandized questioning will be more fruitful. This is a difficult decision for officers, because the test for "custody" is an unpredictable, totality-of-the-circumstances test. Another concern in this context is that, while the Washington Supreme Court has to date held that the Washington constitution does not impose greater restrictions on Washington law enforcement officers in relation to Miranda requirements, there is always the chance that the Court will depart from those precedents.

When officers make that difficult decision tactically to conduct a non-custodial interrogation without Miranda warnings, extra effort must be made to make clear to the suspect that the circumstances of questioning are non-custodial. In that regard, we think that officers should first tell the suspect that the suspect does not have to answer the questions and that the suspect can leave at any time. Officers conducting such "tactical" un-Mirandized questioning outside the jail or prison setting generally should be prepared to allow the suspect to go free after the questioning is completed.

Also, in light of some discussion tying the "custody" question to officer-deception in past Washington appellate court decisions, officers probably should not use deception that would be permissible with a Mirandized suspect. For cases touching on the

custody-deception issue, see, for instance, State v. Hensler, 109 Wn.2d 357 (1987) (Miranda not required in non-deceptive, non-custodial questioning regarding illegal drug possession); State v. Walton, 67 Wn. App. 27 (Div. I, 1992) Jan 93 LED:09 (Miranda not required in non-deceptive, non-custodial questioning of MIP suspect); State v. Ferguson, 76 Wn. App. 560 (Div. I, 1995) May 95 LED:10 (Miranda not required in non-deceptive, non-custodial questioning of suspect as scene of MVA). The Washington appellate courts 1) have only occasionally talked about would-be "deception-custody" test; 2) have never explained the source of the test or its specifics for application; and 3) have never excluded a statement based on deception during non-custodial questioning. Nonetheless, the above-noted decisions lead us to suggest that deception be avoided in tactical, non-custodial interrogations.

Custody-determination factors

We close this LED entry with a non-exhaustive list of some of the things, in addition to age of a juvenile suspect, that courts consider in trying to determine whether, balancing all of the objectively evaluated circumstances in their totality, Miranda custody exists –

- **Whether the officers informed the suspect that he was not under arrest and was free to leave;**
- **Whether the officers informed the suspect that he or she did not have to answer their questions;**
- **The place (e.g., how private or public was the setting);**
- **The announced or objectively obvious purpose of the questioning;**
- **The length of the interrogation;**
- **The manner of interrogation (e.g., friendly and low key vs. accusatory);**
- **Whether the suspect consented to speak with law enforcement officers;**
- **Whether the suspect was seized and then asked while in such detention for consent to come in for stationhouse questioning;**
- **Whether the suspect was involuntarily moved to another area prior to or during the questioning;**
- **Whether there was a threatening presence of several officers and/or a display of weapons or physical force;**
- **Whether the officers deprived the suspect of documents or other things he needed to continue on his way;**
- **Whether the officers' express language or tone of voice would have conveyed to a reasonable person that they expected their requests to be obeyed;**
- **Whether the officers revealed to the suspect that he was the focus of their investigation and/or confronted him with the incriminating evidence;**
- **Whether the officers used deception in the questioning;**
- **Whether the officers allowed the suspect to leave at the end of the questioning.**

(3) CONFESSION OF MILDLY MENTALLY RETARDED SUSPECT IS NOT INVOLUNTARY UNDER THE FACTS OF THIS CASE – In United States v. Preston, 706 F.3d 1106 (9th Cir., Feb. 5, 2013), a three-judge Ninth Circuit panel holds 2-1 that the confession of a criminal suspect who is mildly retarded was not involuntary.

The panel majority's analysis is as follows:

> "Involuntary or coerced confessions are inadmissible at trial because their admission is a violation of a defendant's right to due process." Brown v. Horell, 644 F.3d 969, 979 (9th Cir. 2011). "[C]ourts look to the totality of circumstances

to determine whether a confession was voluntary." Withrow v. Williams, 507 U.S. 680, 693 (1993). Factors to be considered in this analysis include "the degree of police coercion; the length, location and continuity of the interrogation; and the defendant's maturity, education, physical condition, mental health, and age." . . .

"[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary.'" Colorado v. Connelly, 479 U.S. 157, 167 (1986). "Coercive police activity can be the result of either 'physical intimidation or psychological pressure.'" Brown, 644 F.3d at 979. Here, the agents did not threaten Preston physically nor use any improper interview techniques to apply "psychological pressure." See Brown, 644 F.3d at 979. The interview lasted about forty-minutes, took place outside of Preston's residence, others were nearby, Preston was told multiple times that he was not under arrest and was free to leave, Preston was not physically restrained, and the agents did not arrest Preston at the conclusion of the interview. . . .

. . .

The agents proceeded with their interview by using such tactics as telling Preston that other evidence could implicate him, making it seem as though confessing could minimize the consequences of his crime, and asking Preston suggestive questions. None of these tactics, however, rises to a constitutional violation. The agents did not use "false evidence ploys," as implied by Preston. The agents referenced witnesses that could place TD at Preston's home on the day of the incident, interviews implicating Preston, and forensic examinations that could be conducted to determine what had occurred. There were several people who could place TD at Preston's home on the day of the incident, the agents had reports of the incident from other interviews, and a forensic examination of TD could be conducted, as it later was. Even if this evidence was misleading, this is not enough to amount to coercion. See Pollard v. Galaza, 290 F.3d 1030, 1034 (9th Cir. 2002) ("[M]isrepresentations made by law enforcement in obtaining a statement, while reprehensible, does not necessarily constitute coercive conduct."). Similarly, the agents' statements to Preston that his confession could stay between them and the United States Attorney, and that they could possibly get help for him if he confessed, were not improper. Agents may use such tactics to induce a confession. See United States v. Coleman, 208 F.3d 786, 791 (9th Cir. 2000) (Agents' promise that they could "tell the prosecutor to give [the suspect] little or no time" did not establish involuntariness). Finally, the agents' use of suggestive questions was not improper. It is not reasonable to expect a person suspected of perpetrating a serious crime to willingly provide a narrative of his criminal action. See Doody v. Ryan, 649 F.3d 986, 1021 (9th Cir. 2011) ("We recognize and acknowledge that police officers are entitled to use, and do use, a variety of techniques to interrogate suspects."); Cunningham v. City of Wenatchee, 345 F.3d 802, 810 (9th Cir. 2003) (finding that "continuing to question a suspect after the suspect claims he is innocent does not constitute coercion and is often necessary to achieve the truth," and though the questions may have "unsettled" the suspect, "mere emotionalism and confusion do not invalidate confessions"). Preston's denial of some suggestions by the agents and his acceptance of others suggests that his will was not overborne by the agents' strategy. Preston also provided the agents with additional facts that were not suggested by their leading questions; for example, his statements regarding how long he placed his penis in TD's anus and TD's reaction thereafter.

Further, tactics used to obtain a confession are only a factor to be weighed when examining the totality of the circumstances. Brown, 644 F.3d at 979. The length, location, and continuity of the interview do not support a conclusion of involuntariness.

Preston contends that a finding of involuntariness is "irrefutable in light of [his] characteristics," specifically his diminished mental capacity. The "personal characteristics of the defendant are constitutionally irrelevant absent proof of coercion," Derrick v. Peterson, 924 F.2d 813, 818 (9th Cir. 1991) (quoting United States v. Rohrbach, 813 F.2d 142, 144 (8th Cir. 1987)) (internal quotation marks omitted). Preston's diminished mental capacity does not so heavily influence the totality of circumstances test that a finding of involuntariness is appropriate.

Preston has an IQ of 65, which means that he suffers from mild mental retardation. Atkins v. Virginia, 536 U.S. 304, 309 n. 3 (2002) ("'Mild' mental retardation is typically used to describe people with an IQ level of 50–55 to approximately 70."). Preston argues that the agents should have known that he was disabled and taken precautionary steps during their interview and, "at least, given him Miranda warnings." Preston presents a valid argument that the agents should have had some idea that he suffered from mental issues, but it could not have been clear to the agents exactly what issues those were. Preston informed the agents that a "tumor" caused "short-term memory loss," and that he had been removed from his high school due to his behavior and not allowed back. Neither of these comments would give the officers reason to believe that Preston could not comprehend their questions or would be susceptible to improper influence. Additionally, Preston's contention that the agents should have provided him with Miranda warnings or required a parent or attorney to be present are legally baseless. Preston was not in custody and makes no argument that he was. . . . Moreover, Preston was not a juvenile.

Finally, the bar for finding that a defendant was coerced in part due to his mental impairment is not insignificant and appears to turn largely on the length of the interrogation. See, e.g., Columbe v. Connecticut, 367 U.S. 568, 620–26 (1973) (noting that mental incapacity was a relevant factor in determining that holding the defendant—a "mental defective . . . with an intelligence quotient of sixty-four"—in effective police custody for four nights and five days, refusing to let the defendant speak with anybody other than his co-defendant and wife, and repeatedly questioning the defendant culminating in a four-and-a-half hour questioning after which he confessed, was coercive); Doody v. Ryan, 649 F.3d 986, 1008 (9th Cir. 2011) (focusing on time as an important factor in concluding that a twelve-hour investigation of a mentally impaired suspect was coercive); Com. of N. Mariana Islands v. Mendiola, 976 F.2d 475, 485–86 (9th Cir. 1992) (determining that the interrogation of a cognitively impaired defendant was coercive when "[p]olice repeatedly informed Mendiola that he would be charged or released within twenty-four hours, they interrogated him on numerous occasions without affording him the comfort of friends, family, employer, or attorney, they repeatedly accused him of lying, and they instructed him to sign statements he could not understand"), overruled on other grounds by George v. Camacho, 119 F.3d 1393 (9th Cir. 1997). Finding unconstitutional coercion here, where the interrogation consisted of forty-five minutes of questioning in Preston's own driveway, would significantly broaden this Court's coercion jurisprudence, at least as it impacts those with cognitive impairments.

> Preston's mental capacity alone is not enough to render his confession involuntary. In the absence of coercive tactics or a coercive atmosphere during the interview, more is required to show that Preston's confession was involuntary.

Result: Affirmance of United States District Court (Arizona) conviction of Tymond J. Preston for abusive sexual contact; remanded for resentencing.

LED EDITORIAL COMMENT: Maybe a Washington court would hold that the factor of officer-deception in questioning would make the circumstances custodial (requiring Miranda warnings) under the totality of the circumstances. See the LED Editorial Comment above in this LED at page 13 in the Dyer entry citing State v. Hensler, 109 Wn.2d 357 (1987) (Miranda not required in non-deceptive, non-custodial questioning regarding illegal drug possession); State v. Walton, 67 Wn. App. 27 (Div. I, 1992) Jan 93 LED:09 (Miranda not required in non-deceptive, non-custodial questioning of MIP suspect); State v. Ferguson, 76 Wn. App. 560 (Div. I, 1995) May 95 LED:10 (Miranda not required in non-deceptive, non-custodial questioning of suspect at scene of MVA).

(4) NINTH CIRCUIT CONCLUDES THAT AN INTERNAL ADMINISTRATIVE INVESTIGATION WHICH IS COMPLETE, BUT FOR WHICH NO FINDINGS HAVE BEEN ISSUED, IS NONETHELESS FAVORABLE TO DEFENDANT FOR PURPOSES OF BRADY; HOWEVER, FAILURE TO DISCLOSE DID NOT CREATE REASONABLE PROBABILITY THAT VERDICT WOULD BE DIFFERENT – In United States v. Olsen, ___ F.3d ___, 2013 WL 71768 (9th Cir., Jan. 8, 2013), a three-judge Ninth Circuit panel holds that an internal administrative investigation which is "complete" but for which no findings have been issued, is Brady material where the investigation reveals misconduct.

Under Brady v. Maryland, 373 U.S. 83 (1963), the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment. Evidence is material under Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.
The defendant was fired from his job after it was discovered that he had printed a document labeled the "Terrorist Encyclopedia" on the office printer. While clearing out his cubicle co-workers "discovered a wealth of internet printouts and books on poisons and methods of harming people and exacting revenge. They also found test tubes and a wide assortment of other chemistry paraphernalia." The employer contacted the sheriff's office, and a detective later took the items to the Washington State Patrol (WSP) crime laboratory where they were examined by forensic scientist.

The scientist's involvement is described by the Court as follows:

> [The scientist] tested the items for the presence of various substances. Among the many items he examined were two test tubes containing an oily residue, a metal cup with a small amount of white "cakey" residue stuck inside of it, a glass bottle with similar residue caked on the bottom of the bottle, a bag of beans later identified as castor beans, and several bottles of medicine, including a bottle of Equate-brand allergy capsules. [The scientist's] discovery that the test tubes contained castor oil, and that the beans appeared to be castor beans, alerted him that some of the substances might contain ricin, a highly deadly poison derived from castor beans. Because the WSP lab did not have the ability to test for ricin, [The scientist] contacted the FBI and arranged for it to analyze the test tubes,

> metal can, glass jar, and beans. [The scientist] then individually sealed each of the items for the FBI.
>
> The FBI in turn sent the test tubes, metal can, and glass jar to the United States Army Medical Research Institute of Infectious Diseases (USAMRIID), which subsequently notified the FBI that each tested positive for ricin. The FBI then took possession of the remaining items from the WSP lab and sent them to USAMRIID. Twelve items from Olsen's cubicle ultimately tested positive for ricin. With respect to the Equate capsules, USAMRIID tested twelve pills for ricin, finding that one had a "high concentration" of the poison while three others also tested positive but "below the level of quantization." Because the capsules had to be liquified for testing, however, it could not be determined whether the ricin was inside the tainted capsules or on their surfaces.
>
> . . . . When USAMRIID confirmed that the first batch of items tested positive for ricin, the FBI took over the investigation.
> . . .
>
> [The scientist] did not provide expert testimony at trial, but he testified about his handling of the items recovered from Olsen's cubicle, the tests he performed on them, the reasons he contacted the FBI for assistance, and his packaging of the items for transfer to the FBI.

During the defendant's prosecution the parties were aware of the pending internal administrative investigation of [the scientist]. The investigation was completed prior to trial, however, the administrative insight – which is only issued if the appointing authority determines, based on the investigation, that some or all of the allegations are proven – had not been issued. The Court concludes that the internal administrative investigation was favorable to the defendant for purposes of Brady. However, the Court concludes that the investigation was not material because, given the overwhelming evidence it is not probable that the disclosure would have led to a different jury verdict.

Result: Affirmance of United States District Court (E.D. Wash.) denial of Kenneth R. Olsen's motion to vacate sentence for knowingly possessing biological agent, toxin, or delivery system for use as weapon.

LED EDITORIAL COMMENT: Most law enforcement agency Brady policies require disclosure of sustained internal administrative investigations, but do not require disclosure of non-sustained or pending internal administrative investigations. We think that most agencies would consider an investigation for which no administrative findings have been issued to be pending nothwithstanding the fact that the investigation itself is technically "complete" in the sense that it is finished. However, the Ninth Circuit panel seems to focus on whether the fact gathering portion of the investigation has been completed. Law enforcement officers should keep in mind that different prosecutors may have different interpretations about when an internal affairs investigation is "complete" such that it triggers their Brady obligation. As always we urge law enforcement officers to consult with their assigned legal advisors and local prosecutors. Additionally, many Brady policies currently provide for disclosure of internal administrative investigations relating to expert witnesses where there is a pattern of unsatisfactory job performance, regardless of whether or not discipline is imposed.

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WASHINGTON STATE COURT OF APPEALS

AFTER WAIVING HIS MIRANDA RIGHTS, SUSPECT DID NOT UNAMBIGUOUSLY INVOKE HIS RIGHT TO ATTORNEY DURING QUESTIONING WHEN HE RESPONDED AS FOLLOWS TO A DETECTIVE'S STATEMENT THAT OFFICERS HAD PROBABLE CAUSE – "I MEAN I GUESS I'LL JUST HAVE TO TALK TO A LAWYER ABOUT IT AND, YOU KNOW, I'LL MENTION THAT YOU GUYS ARE DOWN HERE WITH A STORY"

State v. Gasteazoro-Paniagua, ___Wn. App. ___, 294 P.3d 857 (Div. II, Feb. 20, 2013)

Facts:

Defendant Gasteazoro-Paniagua was arrested for the attempted murder of his former best friend. Detectives obtained a waiver of Miranda rights. As the interrogation proceeded, one of the detectives said: "[W]e don't end up here with you in custody unless we've got probable cause." Defendant responded, "I mean I guess I'll just have to talk to a lawyer about it and, you know, I'll mention that you guys are down here with a story."

The detective did not interpret this statement by defendant to be an unambiguous request for an attorney. So the detectives did not seek clarification, and they proceeded with the interrogation.

Proceedings below: Defendant was charged with first degree attempted murder and two related firearms charges. He moved to suppress the incriminating statements that he had made to the detectives after he said "I guess I'll just have to talk to a lawyer . . . ." The trial court denied his motion. A jury convicted him of the charges.

ISSUE AND RULING: The Miranda rule allows law enforcement officers to continue questioning a suspect who has waived his Miranda rights if, during the Mirandized questioning, the suspect makes only an ambiguous statement regarding his right to an attorney or to silence. Did defendant fail to unambiguously assert his right to an attorney when the defendant responded to the detective's statement that the officers had developed probable cause that defendant had committed the crime: "I mean I guess I'll just have to talk to a lawyer about it and, you know, I'll mention that you guys are down here with a story"? (ANSWER BY COURT OF APPEALS: Yes, defendant's statement was ambiguous, so the detectives did not violate Miranda by continuing the questioning)

Result: Affirmance of Clark County Superior Court convictions of Jose Gasteazoro-Paniagua of (1) first degree attempted murder with a firearm enhancement and (2) first degree unlawful possession of a firearm.

ANALYSIS:

The U.S. Supreme Court's 1966 Miranda opinion declares that where a suspect asserts his or her Fifth Amendment right to counsel or to remain silent during a custodial interrogation, the interrogation must cease immediately. Case law under Miranda, however, has established that where a suspect has initially waived his or her Miranda rights, the suspect's subsequent assertion of the right to counsel or to silence during the interrogation must be unambiguous or the questioning may continue. See Davis v. U.S., 512 U.S. 452 (1994) **Sept 94 LED:02** (ambiguous reference to right to counsel - - "Maybe I should talk to a lawyer"); State v. Radcliffe, 164 Wn.2d 900 ((2008) **Dec 08 LED:18** (ambiguous reference to right to counsel - - "Maybe I should contact

an attorney"); Berghuis v. Thompkins, ___ U.S. ___, 130 S. Ct. 2250 (2010) **July 10 LED:02** (silence in the face of questioning held not to be an implied assertion of right to silence).

In key part, the analysis by the Court of Appeals is as follows:

> Our Supreme Court has held that the statement "maybe [I] should contact an attorney" is clearly an equivocal statement, not an unequivocal request. Radcliffe, 164 Wn.2d at 907-08 (citing Davis, 512 U.S. at 455). In contrast, statements such as "I gotta talk to my lawyer" and "I'm gonna need a lawyer because it wasn't me" are unequivocal requests for an attorney. [State v. Nysta, 168 Wn. App. 30 (Div. I, 2012) **July 12 LED:09**; State v. Pierce, 169 Wn. App. 533 (Div. II, 2012) **Oct 12 LED:13**]
>
> Unlike the statements in Nysta and Pierce, Gasteazoro-Paniagua's statement was not in the present tense and did not refer to his lawyer or any lawyer in particular. Furthermore, "guess" indicates doubt. . . .
>
> Other jurisdictions have determined that using the phrase "I guess" is equivocal and does not invoke a defendant's right to counsel. [Citing numerous cases from other jurisdictions]
>
> Gasteazoro-Paniagua has not cited any persuasive legal authority supporting his position that his statement, "I mean, I guess I'll just have to talk to a lawyer about it, and you know I'll mention you guys are down here with a story" - - was unequivocal. . . . . Here, Gasteazoro-Paniagua did not mention an attorney by name. He also took no action such as providing an attorney's contact information to the detectives that would lead a reasonable officer to believe that he was requesting an attorney.
> . . . .
> Furthermore, Gasteazoro-Paniagua's assertion that "[i]t is clear that Gasteazoro-Paniagua's statement was deferential to the authority of the police" lacks merit. Gasteazoro-Paniagua's assertion has no factual basis in the record. Based on the content of the interview and the detectives' testimony about Gasteazoro-Paniagua's demeanor during the interview, it does not appear that Gasteazoro-Paniagua exhibited any deference to police authority. Throughout the interview Gasteazoro-Paniagua was evasive and unresponsive. The detectives who interviewed Gasteazoro-Paniagua described him as arrogant and cocky. On these facts, it is improbable that his statement was made out of deference to police authority. In addition, Gasteazoro-Paniagua does not cite to any legal authority that supports the argument that an otherwise equivocal request should be considered unequivocal if there is an indication that the defendant was being deferential to general police authority.
>
> [*Court's footnote on defendant's coercion claim:*
>
> > *Obviously, this reasoning would not apply if the police tactics used in the interview were coercive. Statements are inadmissible if the police tactics prevent a defendant from making a rational, independent decision about giving a statement. State v. Unga, 165 Wn.2d 95 (2008)* ***March 09 LED:15****. During the interview, almost immediately after Gasterzoro-Paniagua made his comment about a lawyer, [the detective] made the following statement:*

> *Understand (indiscernible) when we leave here, understand this really clearly, when we leave and go back, we're done with the conversations with you. Okay, there's not going to be a second chance to say, Okay. Let me explain something, let me get something out, let me tell you my side, so on and so on.*
>
> *Under some circumstances, the threat that the suspect would not get another chance to tell his side of the story may be coercive and result in the suspect making an irrational judgment about whether to make statements to the police or whether to assert his right to an attorney. But the facts of this case do not support a conclusion that the detectives' statements had a coercive effect on Gasteazoro-Paniagua.*
>
> *Throughout the interrogation, Gasteazoro-Paniagua continued to deny any involvement in or knowledge about the shooting. Furthermore, at trial, Gasteazoro-Paniagua testified, "I wasn't trying to really cooperate with the police," and, "I didn't make nothin' up, I just didn't really, you know, yeah, I didn't tell them the truth." Because the detectives' statements had no effect on Gasteazoro-Paniagua's decision to make statements to them, and Gasteazoro-Paniagua did not make any incriminating statements, the detectives' statements were not coercive in this case. End of Court's footnote on defendant's coercion claim]*

Considering Gasteazoro-Paniagua's attitude during the interview and his general refusal to cooperate by being unresponsive, a reasonable officer would conclude that if Gasteazoro-Paniagua wanted to speak to an attorney, he would tell them outright he would not answer any more questions without an attorney. Furthermore, neither officer testified that they perceived Gasteazoro-Paniagua's statement to be a request for counsel; in fact, the officer's specifically explained why they did not perceive Gasteazoro-Paniagua's statement to be a request for counsel. Therefore, substantial evidence supports the trial court's finding that Gasteazoro-Paniagua's statement was not an unequivocal request for an attorney. Because Gasteazoro-Paniagua's statement regarding a lawyer was not an unequivocal request for an attorney, the trial court did not err by admitting the statement. Radcliffe, 164 Wn.2d at 908.

Although we hold that Gasteazoro-Paniagua's statement was not an unequivocal request for counsel, we take the opportunity to emphasize that "when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney." Davis, 512 U.S. at 461.

[Some citations omitted or revised]

LED EDITORIAL COMMENTS:

1. Washington's constitution is in step with the federal constitution in interpreting the rights to silence and to an attorney in the context of custodial interrogations. As we have noted in our LED commentary on numerous occasions, the Washington courts have consistently followed the federal constitutional rulings and have never expressly relied on

independent Washington constitutional grounds for rulings in this interrogations subject area as they have in the subject area of arrest, search and seizure. See our most recent comment to this effect, supported by case citations, in follow-up to the U.S. Supreme Court decision in Berghuis v. Thompkins, ___ U.S. ___, 130 S. Ct. 2250 (2010) July 10 LED:02. But we have noted on numerous occasions that the Washington Supreme Court could choose at some point in the future to adopt an independent grounds approach to the interrogations area.

It also should be noted that the question of whether a person has waived or has invoked Miranda rights remains a mixed question of fact and law that is analyzed under the totality of the circumstances of the particular case. The safest legal course for ensuring admissibility of a statement is for interrogators to seek clarification when dealing with a suspect who has manifested that he or she understands the warnings but then says or does something ambiguous that might be construed as asserting the right to an attorney or to silence. The officer might ask, depending on the circumstances, something along the lines of: "Are you telling me that you do want to talk to me further at this time?" or "Are you telling me that you do not want to talk to me any further at this time?" And, if the suspect says that he or she wishes to go forward with the questioning, the officer should re-Mirandize to avoid any appearance of ignoring a possible assertion of Miranda rights. While, under Smith v. Illinois, 469 U.S. 91 (1984), an officer is not allowed to talk a person out of an unambiguous assertion of Miranda rights, and while it is possible that a reviewing court will conclude that the statement was not ambiguous and therefore the questioning should have stopped, it nonetheless appears more fair and reasonable (and thus gives the government a better chance to win on the Miranda-assertion issue) if the officer responds to an ambiguous assertion by clarifying the statement, and then re-Mirandizing.

Finally on this point, as always, law enforcement officers and agencies are urged to consult their own legal advisors and local prosecutors for guidance on legal issues.

2. "Last chance" speech might be a problem

To protect against judicial second-guessing on the issue of voluntariness of confessions on the totality of the circumstances, and to avoid the practical problem of causing a suspect who might become more forthcoming as trial approaches to erroneously believe that he or she will not be allowed or able to re-contact them, detectives should consider whether to say something more along the lines of "right now is your best chance to get ahead of this case and tell us your side" or "this might be your last chance to help yourself by telling us your side" instead of giving the more drastic (and generally not accurate) "this is your last chance" speech that the Court's footnote (double indented and italized above) addresses.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) LEGISLATURE INTENDED TO PUNISH UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE SEPARATELY FROM THEFT OF THE SAME SUBSTANCE; DEFENDANT MAY BE CONVICTED OF BOTH – In State v. Denny, ___ Wn. App. ___, 294 P.3d 862 (Div. II, Feb. 20, 2013), the Court holds that a defendant may be convicted of both unlawful possession of a controlled substance and theft of the same substance.

The defendant, a live in caregiver, was stealing hydrocodone from his patient. The defendant was charged with unlawful possession of a controlled substance as well as theft in the third degree (of the same substance).

The defendant argued that he could not be convicted of both charges based on the same conduct.

The Court explains that generally, a person "cannot be convicted for both theft of property and the possession of that same property[.]" State v. Melick, 131 Wn. App. 835, 840-41, review denied, 158 Wn.2d 1021 (2006). However, when "the legislature intends to criminalize possession of a particular item or substance separately from other crimes relating to property theft, this general rule does not apply. See In re Personal Restraint of Francis, 170 Wn.2d 517, 523 (2010)('Because the legislature has the power to define offenses, whether two offenses are separate offenses hinges upon whether the legislature intended them to be separate.')."

The Court conducts a legislative history and statutory construction analysis of the drug possession statutes and concludes that "the legislature intended to criminalize the unlawful possession of a controlled substance separate from theft of a controlled substance." Accordingly, the defendant may be convicted of both crimes arising from the same conduct.

Result: Affirmance of Thurston County Superior Court convictions of Charles Noel Denny for unlawful possession of a controlled substance and theft in the third degree of the same substance.

(2) PUBLIC RECORDS ACT LAWSUIT: PRA'S ONE YEAR STATUTE OF LIMITATIONS APPLIES EVEN WHERE RECORDS ARE PRODUCED IN A SINGLE INSTALLMENT AND NO EXEMPTIONS ARE CLAIMED; DIVISION TWO DECLINES TO FOLLOW DIVISION ONE'S OPINION IN TOBIN V. WORDEN – In Bartz v. Department of Corrections, ___ Wn. App. ___, 2013 WL 506605 (Div. II, Feb. 12, 2013), Division Two of the Court of Appeals declines to follow the Division One opinion in Tobin v. Worden, 156 Wn. App. 507 (2010) and instead holds that the PRA's one year statute of limitations period applies where only one "installment" of records is produced and where no exemptions are claimed. In doing so the Court creates a division split between divisions I and II of the Court of Appeals.

RCW 42.56.550(6) is the PRA's statute of limitations and provides: "Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis."

In Tobin, Division One of the Court of Appeals held that because RCW 42.56.550(6) only specifically applied where there was a claim of exemption or last production of a record on a partial or installment basis, that the one year statute of limitations did not apply where no exemption is claimed and where only a single production is made. Division Two declines to follow Tobin, opting for a more common sense approach. The court explains:

> Division One of this court faced a similar fact pattern in Tobin v. Worden, 156 Wn. App. 507 (2010). Similar to [Johnson v. Dep't of Corrections, 154 Wn. App. 769, 775 (2011), review denied, 173 Wn.2d 1032 (2012)], **[LED EDITORIAL NOTE: Johnson is a Division Two case]** an agency provided a single document in response to Tobin's PRA request, without claiming exemptions. Tobin, 156 Wn. App. at 510. Division One held that the one-year statute of limitations was never triggered because the single document received was the "requested record in its entirety, not a partial production of a larger set of

requested records." Id. at 514. The Tobin court ruled that "production of a record on a partial or installment basis" in RCW 42.56.550(6) could be construed to apply only to production of a record that is "part of a larger set of requested records." Tobin, 156 Wn. App. at 514 (quoting RCW 42.56.080).

DOC argues that (1) we should disagree with and reject Division One's holding in Tobin, (2) the logical conclusion is that the legislature intended single productions of records to "fall within the scope of 'last production on a . . . partial basis"' for purpose of the PRA statute of limitations, and (3) we should hold that the one-year PRA statute of limitations barred Bartz's claim. For further support, DOC cites case law favoring this interpretation. We agree. Rather than following Division One's holding in Tobin, we adhere to our reasoning in Johnson: The legislature intended that the PRA's one-year statute of limitations would apply to PRA requests completed by an agency's single production of records. Johnson, 164 Wn. App. at 777. Although a literal reading of RCW 42.56.550(6) does not encompass documents disclosed in a single production, we need not follow a literal reading of a statute if it would yield an absurd result. [Cannon v. Dep't of Licensing, 147 Wn.2d 41, 57 (2002)]. On the contrary, we reiterate that we avoid readings that lead to absurd results. Cannon, 147 Wn.2d at 57. Accordingly, under Johnson, we hold that the PRA one-year statute of limitations barred Bartz's second complaint and, therefore, the superior court properly dismissed it with prejudice as untimely.

[Footnotes and some citations omitted]

Result: Affirmance in part; reversal in part of Thurston County Superior Court order in favor of DOC.

Status: A petition for review has been filed with the Washington State Supreme Court.

LED EDITORIAL COMMENT: As noted above, the decision in this case results in a division split between Divisions I and II of the Court of Appeals.

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NEXT MONTH

The **June 2013 LED** will digest, among other recent decisions: (1) the recent United States Supreme Court decision in Missouri v. McNeely, ___ U.S. ___, 2013 WL2013 WL 1628934 (April 17, 2013) where the Court holds that whether exigent circumstances justify a warrantless non-consensual blood draw in DUI case must be determined on a case by case basis, (2) the recent United States Supreme Court decision in Florida v. Jardines, ___ U.S. ___, 2013 WL 1196577 (March 26, 2013) where the Court holds that the use of a drug detection canine on the front porch constituted a search under the Fourth Amendment to the United States Constitution, thus requiring a warrant, because it was a trespassory invasion of curtilage (see State v. Dearman, 92 Wn. App. 630 (1998) where the Court of Appeals made a similar holding under article 1, section 7 of the Washington State Constitution); and (3) the recent Washington State Supreme Court decision in State v. Ortega, ____Wn.2d ___, 2013 WL 1163954 (March 21, 2013) where the Court holds the fellow officer rule does not allow for an arrest for a gross misdemeanor crime that does not fall within any of the exceptions to the misdemeanor-presence rule set forth in RCW 10.31.100.

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

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

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

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

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The Law Enforcement Digest is edited by Assistant Attorney General Shannon Inglis of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to AAG Inglis at Shannon.Inglis@atg.wa.gov. Retired AAG John Wasberg provides assistance to AAG Inglis on the LED. LED editorial commentary and analysis of statutes and court decisions express the thinking of the editor and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LEDs from January 1992 forward are available via a link on the CJTC Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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