

**SEPTEMBER 2018**  
**LAW ENFORCEMENT**  
**DIGEST**



# LAW ENFORCEMENT ONLINE TRAINING DIGEST



Welcome to the new **Law Enforcement Digest Online Training!** This refreshed edition of the LED continues the transition to an online training resource created with the Washington law enforcement officer in mind. Select court rulings from the previous month are summarized briefly, arranged by topic, with emphasis placed on the practical application of legal changes to law enforcement practices.

Each cited case includes a hyperlinked title for those who wish to read the court's full opinion. Links have also been provided to additional Washington State prosecutor and law enforcement case law reviews and references.

*The materials contained in this document are for training purposes. All officers should consult their department legal advisor for guidance and policy as it relates to their particular agency.*

# LAW ENFORCEMENT ONLINE TRAINING DIGEST

SEPTEMBER 2018 Edition

*Covering Select Cases Issued in August 2018*

1. **Arrest Warrant; No Contact Orders; 4<sup>th</sup> Amendment Right to Privacy**
2. **§ 1983 Claim; Qualified Immunity; *Brady***
3. **Search Warrants; Digital Evidence; Possession of Child Sexual Abuse Images**
4. **Additional Resource Links:** Legal Update for Law Enforcement (WASPC, John Wasberg) & Prosecutor Caselaw Update (WAPA, Pam Loginsky)

\*\*Due to the large number of relevant cases issued in the month of August, the September LED training has been split into two editions for ease of use.



# 1 Search Warrant; Warrant Service; 4<sup>th</sup> Amendment

ROBBERY; NO CONTACT ORDER VIOLATION  
[United States v. Schram](#), No. 17-30055 (Aug. 21, 2018)  
9<sup>th</sup> CIRCUIT COURT OF APPEALS

## FACTS:

Defendant was the suspect in a bank robbery. A records check revealed a no contact order with his girlfriend. Having no other address associated with the suspect, the officers went to the girlfriend's residence to look for him. Once there, officers entered the home without a warrant and presumably without the girlfriend's consent. The suspected was located and placed under arrest. Officers then secured a search warrant and searched the home.

The defendant, charged with the bank robbery, moved to suppress the evidence found in his girlfriend's home. The motion was denied, and the defendant plead guilty pending the filing of this appeal of the motion.

# 1 Search Warrant; Warrant Service; 4<sup>th</sup> Amendment

ROBBERY; NO CONTACT ORDER VIOLATION  
[United States v. Schram](#), No. 17-30055 (Aug. 21, 2018)  
9<sup>th</sup> CIRCUIT COURT OF APPEALS

## TRAINING TAKEAWAY:

**A person who is barred from entering a residence by a no contact order has no legitimate expectation of privacy in the residence, and cannot challenge its warrantless search.**

**A person who is on property that the law prevents him from entering – such as burglars, trespassers, and squatters – has no reasonable expectation of privacy in that place.**

- The girlfriend's "consent" for the defendant to be in her house doesn't override the no-contact order that made that very act unlawful in the first place.
- The court also dismisses the defendant's claim that [Byrd v. US](#) supports his position, noting that the US Supreme Court specifically said that if they had believed Mr. Byrd was a car "thief" instead of a car "borrower," then he would have had no reasonable expectation of privacy in the vehicle he was driving.

# 2 § 1983 CLAIM; QUALIFIED IMMUNITY; *BRADY*

HOMICIDE

Mellen v. Winn, No. 17-55116 (Aug. 17, 2018)  
9<sup>th</sup> CIRCUIT COURT OF APPEALS

## PROCEDURAL FACTS:

The respondent in this case is a seasoned homicide detective, who at the time of the alleged incident, had investigated over 100 homicides. This case was brought by a woman convicted of Murder who, after 17 years of imprisonment, was released after a successful petition for habeas relief of her conviction.

She then filed a civil rights claim under 42 USC §1983 against the detective, claiming the detective's withholding of material evidence in the original trial violated her civil rights. The district court dismissed the claim against the detective on qualified immunity grounds. The exonerated prisoner now appeals that ruling to the 9<sup>th</sup> Circuit.

# 2 § 1983 CLAIM; QUALIFIED IMMUNITY; *BRADY*

HOMICIDE

Mellen v. Winn, No. 17-55116 (Aug. 17, 2018)  
9<sup>th</sup> CIRCUIT COURT OF APPEALS

## FACTS:

Detective Winn (respondent) was the primary investigator on the original homicide case involving Mellen (petitioner). She became aware of Mellen when a witness called in to report that Mellen had confessed her involvement in the crime to this witness. The detective interviewed the witness, and wrote a witness statement on her behalf. The statement's content was later disputed by the witness, who claimed she and the detective argued about what the witness felt were inaccuracies, and potential embellishments, added by the detective, but admitted that she ultimately just signed the statement as the detective had written it. None of the other witnesses in the case implicated Mellen in the murder, and there was no physical evidence that tied her to the crime.

# 2 § 1983 CLAIM; QUALIFIED IMMUNITY; *BRADY*

HOMICIDE

Mellen v. Winn, No. 17-55116 (Aug. 17, 2018)  
9<sup>th</sup> CIRCUIT COURT OF APPEALS

## FACTS, CONT.:

At some point, the detective is alleged to have had a phone call with the witness's sister. (In her current testimony, the detective denies the call occurred, and no written record appears to have been made. The sister was a police officer in a different jurisdiction, and confirmed in her testimony that she had spoken with the detective prior to the original criminal trial. The sister reports that she told the detective that her sister was not a reliable witness, and had a past history of dishonesty, impersonating another sister, harassment and threat convictions where the police officer sister was the victim, multiple prior contacts with law enforcement, and previously served as an informant for multiple police agencies.

The detective apparently did not pass along this information to the prosecutor, and it was therefore not disclosed to the defense at the time of the original trial. The detective also did not reach out to any agencies to get details about the witness's potential prior status as a paid informant, or otherwise follow up on any information provided to her by the police officer sister.

# 2 § 1983 CLAIM; QUALIFIED IMMUNITY; *BRADY*

HOMICIDE

Mellen v. Winn, No. 17-55116 (Aug. 17, 2018)

9<sup>th</sup> CIRCUIT COURT OF APPEALS

## FACTS, CONT.:

At the criminal trial, the witness presented testimony that was significantly different from what was in the witness statement she'd originally signed, as well as from the testimony presented in the pretrial hearing. The detective was present throughout the trial and witnessed this. When the prosecution tried to rehabilitate the witness's credibility, she claimed that she was telling the truth now, and before she had just been withholding certain facts before as a way to not disclose the personal, potentially embarrassing, things Mellen had said when she confessed.

Even when this seemingly glaring example of the witness's possible untruthfulness came up, the detective did not talk to anyone about the information she had learned from the police officer sister that would have directly related to the possible credibility and truthfulness of the state's key witness.

# 2 § 1983 CLAIM; QUALIFIED IMMUNITY; *BRADY*

HOMICIDE

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## FACTS, CONT.:

There were several other indicators that the witness was not telling the truth about Mellen's involvement in the murder, including some that could be disproven by the physical evidence. Three witnesses testified in the original trial on behalf of Mellen, and all provided evidence that Mellen had not been involved in the murder. Mellen was ultimately convicted of 1<sup>st</sup> Degree Murder and sentenced to life in prison without the possibility of parole.

# 2 § 1983 CLAIM; QUALIFIED IMMUNITY; *BRADY*

HOMICIDE

Mellen v. Winn, No. 17-55116 (Aug. 17, 2018)  
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## FACTS, CONT.:

In 2009, a man originally named in the warrant, but never arrested in the course of the murder investigation, confessed to a friend that he had participated in the murder, and that Mellen had not been involved. In 2013, that friend contacted Innocence Matters, a nonprofit seeking to overturn wrongful convictions. The friend passed a polygraph, as did Mellen. Additional investigation by the group resulted in additional confirmations from those involved that Mellen was not a part of the murder. This wrongful conviction investigation was the first time that the defense learned that the state's only witness had over 800 contacts with law enforcement between 1988 and 2002, and having on several occasions made false claims about others' criminal activity to law enforcement.

The investigation also revealed the witness's police officer sister had spoken with the detective prior to the trial, corroborating this information and telling the detective that her sister was a pathological liar who has been convicted of threatening her, and was not a reliable witness.

# 2 § 1983 CLAIM; QUALIFIED IMMUNITY; *BRADY*

HOMICIDE

Mellen v. Winn, No. 17-55116 (Aug. 17, 2018)  
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## FACTS, CONT.:

With this new information, Mellen filed a petition for a writ of habeus corpus to overturn the sentence. The state agreed that there was no credible evidence on which to base Mellen's guilt. Her conviction was overturned, and she was released from prison.

Mellen then filed a §1983 civil rights claim against the detective for violating her rights by withholding the information about her interview of the witness's police officer sister. The detective denied having the conversation with the witness's police officer sister, and in the alternative, if she did have that information, no reasonable officer would have known that *Brady* would have required the information to be turned over to the prosecutor and defense.

The district court ruled that the detective was entitled to qualified immunity and dismissed the claim against her on summary judgment. Mellen is now appealing the dismissal in favor of the detective to the 9<sup>th</sup> Circuit Court of Appeals.

# 2 § 1983 CLAIM; QUALIFIED IMMUNITY; *BRADY*

HOMICIDE

Mellen v. Winn, No. 17-55116 (Aug. 17, 2018)  
9<sup>th</sup> CIRCUIT COURT OF APPEALS

## TRAINING TAKEAWAY:

**An officer is not entitled to qualified immunity where she intentionally withheld material impeachment evidence in a murder trial.**

The Brady rule requires the state turn over any material evidence - exculpatory or impeachment - that if believed, would influence a finding of guilt, impact the defendant's charge or sentence, or reduce the credibility of any witness.

The court will examine the facts of the case and the undisclosed evidence to determine whether there was a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have differed.

# 2 § 1983 CLAIM; QUALIFIED IMMUNITY; *BRADY*

HOMICIDE

Mellen v. Winn, No. 17-55116 (Aug. 17, 2018)  
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## TRAINING TAKEAWAY:

**Impeachment evidence is especially likely to be material when it casts doubt on the testimony of a witness critical to the prosecution's case.**

- The potential existence of other avenues of impeaching a witness doesn't excuse the prosecution of its obligation to disclose any other material evidence.

The detective's failure to disclose to either the prosecutor or defense that she had interviewed the witness's sister prior to Mellen's trial for Murder was especially important because that information was coming from a highly reliable source: an immediate family member of the witness with firsthand knowledge of the allegations who was also a police officer.

Because the prosecutor's entire case against Mellen rested on the witness's testimony that Mellen had confessed to her, information calling into question the witness's credibility was highly material.

# 2 § 1983 CLAIM; QUALIFIED IMMUNITY; *BRADY*

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## PRACTICE POINTERS:

**Officers should err on the side of disclosing for the prosecutor's review any potentially exculpatory or impeachment evidence.**

Ultimately it is the prosecutor, as the Government's representative, who is held responsible by the court for complying with discovery obligations.

As you're well aware, a *Brady* violation can have an extremely damaging impact on your career. It's not worth that risk to gamble on whether something may or may not be necessary to turn over.

# 2 § 1983 CLAIM; QUALIFIED IMMUNITY; *BRADY*

HOMICIDE

Mellen v. Winn, No. 17-55116 (Aug. 17, 2018)  
9<sup>th</sup> CIRCUIT COURT OF APPEALS

## PRACTICE POINTERS:

**Failing to look into potentially exculpatory or impeachment evidence that comes to your attention may be seen by the court as the same as knowledge.**

Choosing to ignore a lead, like the detective did when she failed to follow up on the police officer sister's claims about her sister's prior law enforcement involvement and informant status, could be seen as a deliberate action to avoid confirming suspicions.

# 2 § 1983 CLAIM; QUALIFIED IMMUNITY; *BRADY*

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The detective in this case violated all best practices for the handling of potential *Brady* evidence.

Instead, follow these key steps:

## DOCUMENTATION

Document the source and nature of any claims of potential material exculpatory or impeachment evidence as soon as you learn of it

## DILIGENCE

Diligently investigate whether the possible *Brady* evidence exists, and gather evidence as to the likelihood of its reliability and/or relevance to the case

## DISCLOSURE

Alert the prosecutor and turn over any potential *Brady* evidence as soon as possible.

The prosecutor's responsibility is to:

- Review the information
- Decide if it meets the requirements for disclosure, and if so,
- Timely provide the evidence to defense

# 3 SEARCH WARRANTS; DIGITAL EVIDENCE

## Possessing Images of a Minor Engaged in Sexual Conduct

State v. Friedrich, COA No. 35099-1-III (Aug. 23, 2018)  
COURT OF APPEALS, DIVISION III

### FACTS:

The National Center for Missing and Endangered Children (“NCMEC”) received a tip from Microsoft that it had become aware that a Skype user had uploaded a media file believed to depict a minor engaging in sexually explicit conduct. Microsoft’s search of Skype users revealed 3 matching user names associated with the name “Jay Friedrich.” One user profile indicated a Walla Walla, WA address. NCMEC’s additional internet searches turned up 3 matches to the user name, including one on a dating site, which described the user as a “51 year old bisexual single male living in Walla Walla, WA” who was “6’1” and of ‘average build.’” After determining that the IP address likely originated in Walla Walla, the information was relayed to the Walla Walla County Sheriff’s Department for investigation. The assigned detective reviewed the file and confirmed that it appeared to depict a 9-11 year old girl engaged in sexually explicit conduct.

# 3 SEARCH WARRANTS; DIGITAL EVIDENCE

## Possessing Images of a Minor Engaged in Sexual Conduct

[State v. Friedrich](#), COA No. 35099-1-III (Aug. 23, 2018)  
COURT OF APPEALS, DIVISION III

### FACTS, CONT.:

The detective applied for and was granted a search warrant to Charter Communications to get the subscriber information for the IP address. Charter Communications provided the name “Jay Jensen” as the name of the subscriber. A search of police records showed that Jay Jensen had reported finding “child pornography” on his roommate’s computer a few year prior. The roommate, Jay Friedrich, was not prosecuted in that case due to a lack of evidence. The detective viewed the images associated with that case and confirmed that they were also of preteen and/or teen girls.

The detective’s investigation revealed that Jay Friedrich was a registered sex offender, whose physical description, address, and age all matched with the previously discovered information. He also learned that the Skype user name in question aligned with Friedrich’s initials and date of birth.

# 3 SEARCH WARRANTS; DIGITAL EVIDENCE

## Possessing Images of a Minor Engaged in Sexual Conduct

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### FACTS, CONT.:

The detective compiled all of this information, a description of his training and experience, and an extensive explanation of the process by which electronic and internet service providers (“ISP”) monitor their users’ activity to prevent their services from being used to conduct illegal activity. The 22-page search warrant affidavit to search the defendant’s residence included an explanation of how the ISP maintains a database of unique hashtag identifiers for individual image and video files suspected to contain images of child sexual exploitation as prohibited by federal law, which they then scan against any image or video files that pass through the ISP’s system. The detective also stated that federal law required ISPs to turn over any such evidence to NCMEC “as soon as reasonably possible.”

# 3 SEARCH WARRANTS; DIGITAL EVIDENCE

## Possessing Images of a Minor Engaged in Sexual Conduct

[State v. Friedrich](#), COA No. 35099-1-III (Aug. 23, 2018)  
COURT OF APPEALS, DIVISION III

### FACTS, CONT.:

The affidavit requested to search for a detailed 2-page list of evidence related to the possession of the illegal images, divided out between two lists: one for digital devices, files, and records, and one for physical evidence. It was granted, and the search warrant execution resulted in the seizure of multiple laptops and computers, a cell phone, and many digital storage devices. Examination of these items turned up the same file that Microsoft had flagged, as well as numerous other files of a similar nature.

The defendant moved to suppress all of the evidence, claiming the search warrant affidavit didn't meet the particularity requirement of the 4<sup>th</sup> Amendment. His motion was denied, and the defendant was convicted on multiple counts relating to the possession and dealing of images of child sexual exploitation. He now appeals his convictions the trial court's decision to deny his suppression motion.

# 3 SEARCH WARRANTS; DIGITAL EVIDENCE

## Possessing Images of a Minor Engaged in Sexual Conduct

[State v. Friedrich](#), COA No. 35099-1-III (Aug. 23, 2018)  
COURT OF APPEALS, DIVISION III

### TRAINING TAKEAWAY – SEARCH WARRANT BASICS

**Both the 4<sup>th</sup> Amendment of the US Constitution and Art. 1, Sec. 7 of the WA State constitution require that the issuance of a search warrant be based on a determination of probable cause.**

[See, State v. Vickers \(2002\)](#)

Probable cause is established when a search warrant affidavit provides sufficient facts for a reasonable person to believe there is a probability that:

1. The defendant is involved in the criminal activity, and
2. There is evidence of the crime at a certain location.

The court issuing the search warrant is allowed to make reasonable inferences based on the information provided in the affidavit.

When there are potential doubts as to the existence of probable cause, they are generally resolved in favor of issuing the warrant (which is a tool for furthering reasonable investigation of the possible criminal activity).

# 3 SEARCH WARRANTS; DIGITAL EVIDENCE

Possessing Images of a Minor Engaged in Sexual Conduct

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## TRAINING TAKEAWAY – SEARCH WARRANT BASICS

Both the 4<sup>th</sup> Amendment of the US Constitution and Art. 1, Sec. 7 of the WA State Constitution require that the issuance of a search warrant be based on a determination of probable cause.

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- Probable cause is established when a search warrant affidavit provides sufficient facts for a reasonable person to believe there is a probability that:
  1. The defendant is involved in the criminal activity, and
  2. There is evidence of the crime at a certain location.
- The court issuing the search warrant is allowed to make reasonable inferences based on the information provided in the affidavit.

# 3 SEARCH WARRANTS; DIGITAL EVIDENCE

Possessing Images of a Minor Engaged in  
Sexual Conduct

State v. Friedrich, COA No. 35099-1-III (Aug. 23, 2018)  
COURT OF APPEALS, DIVISION III

## TRAINING TAKEAWAY – SEARCH WARRANT BASICS

When there are potential doubts as to the existence of probable cause, they are generally resolved in favor of issuing the warrant (which is a tool for furthering reasonable investigation of the possible criminal activity).

- **Probable cause requires more than suspicion or conjecture, but it does not require certainty.**

# 3 SEARCH WARRANTS; DIGITAL EVIDENCE

## Possessing Images of a Minor Engaged in Sexual Conduct

State v. Friedrich, COA No. 35099-1-III (Aug. 23, 2018)  
COURT OF APPEALS, DIVISION III

### TRAINING TAKEAWAY #1 – Search Warrant Staleness

**A search warrant is not stale when the affidavit offers evidence of criminal activity relating to images of child sexual exploitation, and generalized but reliable support for the likelihood that the possession of the evidence is ongoing.**

- The affidavit explained industry practices used to identify and report possible images of child sexual exploitation, which were reasonable for the judge to rely on.
- This information supported a belief that Microsoft's notification to NCMEC would likely have been "prompt" after discovery of the original file.
- He also (1) noted that digital files remain even after they are deleted from a computer, and (2) gave insight into the general habits of possessors of these illegal materials.

Generalizations extended to an category of offender are generally disfavored by the courts, but in child sexual exploitation cases have been held by several courts to be reasonably reliable for establishing probable cause.

# 3 SEARCH WARRANTS; DIGITAL EVIDENCE

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## TRAINING TAKEAWAY #2 – Search Warrant Particularity

**A search warrant will meet the particularity requirement where it uses statutorily defined and precisely explained terminology to best limit the seizure of evidence outside the scope of, or unsupported by probable cause.**

**Evidence should be defined as well as reasonably possible, but some ambiguity is allowed.**

The detective noted that the seizure of all devices capable of storing or processing data in digital form was necessary because the only way to determine if those devices contained illegal material was to seize them so they could be examined.

➤ This distinguished them from the requested search for physical media that could be examined at the time and a determination made as to its compliance with the warrant.

Even if a search warrant is overbroad, the remedy is to strike the overbroad section and exclude that evidence – not to throw away the rest of the warrant and evidence that was sufficiently particular and supported by probable cause. (This is called the Severability Doctrine.)

# 3 SEARCH WARRANTS; DIGITAL EVIDENCE

Possessing Images of a Minor Engaged in  
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## PRACTICE POINTER:

“Child pornography” is only commonly used, casual terminology for these materials, but it is not the correct legal term you should be using in your affidavit!

Use the statutory definitions from [RCW 9.68A.011](#) and thorough descriptions of the evidence to establish sufficient particularity.

As recent WA cases have demonstrated, simply citing to the statute under which the evidence is sought will not provide sufficient particularity. You need to use the statutory language to describe in detail the evidence you are seeking and relate it to the crime. See, [State v. McKee](#) ([April 2018 LED](#))

# 3 SEARCH WARRANTS; DIGITAL EVIDENCE

## Possessing Images of a Minor Engaged in Sexual Conduct

State v. Friedrich, COA No. 35099-1-III (Aug. 23, 2018)  
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### PRACTICE POINTER:

A search warrant affidavit in cases involving images of child sexual exploitation should note that often perpetrators of these crimes are “collectors” – the images and videos are illegal to obtain and possess, difficult to come by, highly monitored, and socially stigmatized, so offenders often hoard them.

Be familiar with the various methods of file retention, and note in your affidavit that historically, cases and use patterns of similar offenders indicate that they typically maintain their illicit collections in the privacy of their homes, and through a variety of digital records, external devices, and physical material such as photos, videos, and magazines.

# 3 SEARCH WARRANTS; DIGITAL EVIDENCE

Possessing Images of a Minor Engaged in  
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## PRACTICE POINTER:

Take advantage of [specialized live and online training offered via NCMEC](#) (sometimes offered in conjunction with our numerous WA State technology and ISP services) to ensure your training and experience provides the most current information on trends and methods used by perpetrators of child exploitation crimes. The knowledge and use of deeply encrypted technologies by these offenders will often require the assistance of specialized computer forensic experts.

# FURTHER READING

For further cases of interest to law enforcement, please see the comprehensive monthly Legal Update for Law Enforcement prepared by Attorney John Wasberg (former longtime editor of the original LED), which is published on the WASPC Law Enforcement Resources webpage:

**<http://www.waspc.org/legal-update-for-washington-law-enforcement>**

The Washington Prosecutor's Association publishes a comprehensive weekly summary of a wide range of caselaw geared toward the interests of Washington State Prosecutors. This resource is authored by WAPA Staff Attorney Pam Loginsky.

**<http://70.89.120.146/wapa/CaseLaw.html>**

# Questions?

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