



# Law Enforcement

APRIL 2008

# Digest

620<sup>th</sup> Basic Law Enforcement Academy – October 11, 2007 through February 25, 2008

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**NINTH CIRCUIT, UNITED STATES COURT OF APPEALS**

**NO MIRANDA CUSTODY IN PHONE CONVERSATION BETWEEN JAILED SUSPECT AND POLICE WHERE SUSPECT INITIATED THE PHONE CALL**

Saleh v. Fleming, 512 F.3d 548 (9<sup>th</sup> Cir. 2008) (decision filed January 3, 2008)

Facts and Proceedings below:

Elizabeth Edwards was the manager of the Seattle, Washington apartment complex in which she lived. On July 9, 1996, she failed to report to work. Edwards's maintenance supervisor, Joel Keller, went to her apartment to check on her and discovered Edwards lying seriously injured on the living room floor. Keller called 911 and soon thereafter the police and paramedics arrived. Edwards had suffered blows to the head and face, two of which left indentations in her skull. Her sinus cavities were crushed and bone fragments were driven into her brain. She died of complications caused by the attack a week later.

After initially suspecting a recent boyfriend of Edwards as the murderer, the police eventually focused their investigation on Edwards's former husband, Habib Saleh. On March 3, 1998, a Seattle Police Detective went to the King County Jail to interview Saleh, who was serving a jail sentence for assaulting his son-in-law. Detective Ramirez took Saleh to an interview room in the jail and interrogated him after reading him his Miranda rights. On March 25, 1998, Detective Ramirez returned to the jail to interview Saleh again. After the detective presented Saleh with a written copy of his Miranda rights, Saleh asked for an attorney. Detective Ramirez asked Saleh what he wanted to do, and Saleh began to cry and said that he wanted the electric chair so he could join Edwards. He also said that he had nothing to do with Edwards's death.

The next day, Saleh placed a collect call from the jail to Detective Ramirez, and the two of them discussed the Edwards case. Saleh again told Detective Ramirez that he wanted the electric chair so he could be with Edwards, and again denied killing Edwards.

The State charged Saleh with first degree murder. At trial, the evidence presented included the following: that Saleh had a history of “verbal and physical” confrontations with Edwards; that within an hour of the attack on Edwards, Saleh had attacked his son-in-law in similar fashion to Edwards's attack; that blood spatter on a fascia board outside Edwards's apartment was consistent with Saleh's DNA and with his lowering himself onto Edwards's lanai from the roof; that, at 1:42 a.m. on July 9, Saleh received treatment for a laceration on his

forearm; and that the scar from that wound matched the shape of the stain outside Edwards's apartment.

At trial, the State tried to introduce certain statements (concerning his love for Edwards and his desire to be executed) that Saleh had made to police during the conversations that had taken place in March 1998. The trial court suppressed Saleh's statements of March 3, 1998, finding that the State had failed to demonstrate that Saleh had understood his Miranda warning. Additionally, because the statements made on March 25, 1998, were part of a custodial interrogation and were made after Saleh had asked for counsel, those statements were suppressed. The court also found that the March 25, 1998, statements, though inadmissible, were not the product of coercion but were voluntary. The court concluded, however, that the statements made to Detective Ramirez during the phone call that Saleh initiated on March 26, 1998, were admissible.

The Jury found Saleh guilty of first degree murder, and the trial court sentenced him to 320 months in prison.

On direct appeal, the Washington Court of Appeals affirmed Saleh's conviction. Saleh's petition for review in the Washington Supreme Court was denied, concluding his direct appeal in state court. Saleh then filed a collateral attack on his conviction in state court (a personal restraint petition), which the Washington Court of Appeals denied. He thereafter filed a motion for discretionary review in the Washington Supreme Court, but the Commissioner of that court denied the motion.

On November 13, 2003, Saleh filed his federal habeas petition with the district court arguing multiple grounds for relief. On April 14, 2004, the magistrate judge issued her Report and Recommendation recommending that Saleh's petition be denied. On June 2, 2004, the district court adopted the Report and Recommendation of the magistrate judge, and denied Saleh's petition with prejudice. Saleh timely appealed, and a motions panel of this court issued a certificate of appealability on five issues.

ISSUES AND RULINGS: 1) Where defendant initiated a collect call from the jail to the detective investigating his possible commission of a murder, was the conversation a custodial interrogation under Miranda v. Arizona requiring Miranda warnings and waiver? (ANSWER: No); 2) Where the two prior custodial interrogations of the defendant were held violative of Miranda because defendant had not understood the warnings on the first occasion, and defendant had invoked his right to an attorney on the second occasion, were the statements that defendant made in his noncustodial phone call to the detective admissible because the prior Miranda-violative conversations were not coerced and not the product of intentional violations of Miranda by the detective? (ANSWER: Yes)

Result: Affirmance of the decision of the U.S. District Court (Western District of Washington) denying Habib Tawfez Saleh's petition for habeas relief from his Washington conviction for first degree murder.

ANALYSIS: (Excerpted from 9<sup>th</sup> Circuit opinion)

1) Phone-call custody issue

Saleh argues that the state trial court erred in admitting the statements he made to the police in the March 26, 1998, phone call. The Washington Court of Appeals held that although Saleh was in jail during the phone call, because he initiated the call and was free to end the conversation at any time, it was not “custodial,” and thus no Miranda warnings were required. Saleh argues that the Court of Appeals's decision was contrary to the Supreme Court's decision in Mathis v. United States, 391 U.S. 1 (1968).

In Mathis, the Supreme Court did indeed hold that “nothing in the Miranda opinion . . . calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody.” But the facts of Mathis were unlike the facts here in significant respects. First, the interrogation in Mathis was initiated by a federal agent, who interviewed Mathis while he was in state prison, here, the conversation in question was a phone conversation initiated by Saleh. Second, there is no indication in Mathis that the prisoner was free to end the interrogation with the agent; here, it is undisputed that Saleh could have terminated the phone call he had begun at any time. Thus, Mathis's dependence upon Miranda's discussion of custody as relating to a deprivation of freedom by the authorities, 391 U.S. at 5, is of no help to Saleh here, where he freely placed the phone call and his freedom to terminate the discussion of Edwards's murder was unaffected by his unrelated incarceration.

We agree with the Eighth Circuit that “incarceration does not *ipso facto* render an interrogation custodial,” and that the need for a Miranda warning to the person in custody for an unrelated matter will only be triggered by “some restriction on his freedom of action in connection with the interrogation itself.” Leviston v. Black, 843 F.2d 302 (8th Cir.1988); see also Cervantes v. Walker, 589 F.2d 424 (9th Cir.1978) (rejecting a per se requirement of Miranda warnings for all persons interrogated while incarcerated). Accordingly, the Washington Court of Appeals's determination that the March 26, 1998, phone conversation was not custodial for purposes of Miranda was not contrary to clearly established Supreme Court precedent.

2) Cat-out-of-the-bag issue

Saleh also argues that the March 26, 1998, statements should have been suppressed under the “cat out of the bag” theory set forth in United States v. Bayer, 331 U.S. 532 (1947) (“[A]fter an accused has once let the cat out of the bag by confessing . . . he is never thereafter free of the psychological and practical disadvantages of having confessed . . . . In such a sense, a later confession always may be looked upon as fruit of the first.”). Saleh argues that the statements made on March 26 were substantially similar to the ones he made in the earlier conversations on March 3, 1998, and March 25, 1998, in which his Miranda rights were violated. He contends, in effect, that these cats could not be put back in the bag.

However, that argument is foreclosed by Medeiros v. Shimoda, 889 F.2d 819 (9th Cir.1989). In Medeiros, we held that, under Oregon v. Elstad, 470 U.S. 298 (1985), the “cat out of the bag” theory does not apply where a confession is

voluntarily made, under circumstances not requiring a Miranda warning, subsequent to a technical Miranda violation. Rather, the relevant inquiry is whether the suspect “made his second statement voluntarily.”

Here, the Washington Court of Appeals affirmed the trial court's conclusion that the March 25, 1998, statements, though obtained in violation of Miranda, were voluntary. [*Court's footnote: The trial court also explicitly noted that the March 3, 1998, statements, though not obtained in compliance with Miranda, were not the product of coercion.*] In light of its conclusion that the March 26, 1998, phone conversation was not a custodial interrogation (and therefore did not require a Miranda warning), it concluded that under Elstad's reasoning, there was no reason to treat the March 26 statements as tainted.

Saleh seemingly does not challenge the state courts' determination that his March 3, 1998, and March 25, 1998, statements were voluntary. Nor does he contest that he initiated the March 26, 1998, phone call and that he was free at all times to end it. [*Court's footnote: Saleh's reliance upon Missouri v. Seibert, 542 U.S. 600 (2004) **Sept 04 LED:04** (plurality opinion), is misplaced in light of his initiation of the March 26 phone call. In Seibert, the Court distinguished Elstad to address what a majority saw as a deliberate, two-step interrogation designed to undermine Miranda's protections. (“The technique of interrogating in successive, unwarned and warned phases raises a new challenge to Miranda.”) (Souter, J., concurring); (“The police used a two-step questioning technique based on a deliberate violation of Miranda.”) (Kennedy, J., concurring in the judgment). Here, the conversation that was admitted was not part of a deliberate police interrogation, but a phone call freely placed by Saleh. We also note that in Seibert, Justice Kennedy (who provided the decisive fifth vote) concurred separately in part to note that in his view “Elstad was correct in its reasoning and its result.” Seibert, 542 U.S. at 620; see also United States v. Williams, 435 F.3d 1148, 1161 (9th Cir.2006) **April 06 LED:02** (holding that Elstad remains applicable after Seibert to circumstances in which an interrogator does not deliberately withhold an initial Miranda warning). Although this case is distinguishable from Elstad inasmuch as there was no intervening Miranda warning between the March 25 interrogation and the March 26 phone call, because the latter was not a custodial interrogation, no such warning was required. See Medeiros, 889 F.2d 819 (holding that “the fundamental constitutional principles” underlying Elstad require its application even where there is no intervening Miranda warning).*

Accordingly, Elstad's “relevant inquiry . . . whether, in fact, the second statement was also voluntarily made” must be answered in the affirmative. We therefore conclude that the Washington Court of Appeals's decision was correct; in any event, we cannot conclude that it was contrary to clearly established Supreme Court precedent.

[Subheadings added; one footnote omitted; some citations omitted]

**LED EDITORIAL NOTE:** For a Washington appellate court decision holding that a phone conversation initiated by a jailed person to a law enforcement officer is not “custodial,” see State v. Denton, 58 Wn. App. 251 (Div. I, 1990). The analysis and result probably would be different if the officer initiated a phone call to the jailed person. For a

Washington appellate decision holding that the very different circumstance of a police-initiated call to a person in his residence is not custodial and does not require Miranda warnings, see State v. Mahoney, 80 Wn. App. 495 (Div. III, 1996) May 96 LED:08.

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

(1) **TOTALITY-OF-THE-CIRCUMSTANCES STANDARD HELD TO LIMIT TERRY STOPS FOR “PREVIOUSLY COMMITTED” GROSS MISDEMEANORS AND MISDEMEANORS THAT DO NOT HAVE POTENTIAL FOR ONGOING OR REPEATED DANGER OR ANY RISK OF ESCALATION** - - In U.S. v. Grigg, 498 F.3d 1076 (9<sup>th</sup> Cir. 2007) (decision filed August 22, 2007), a 3-judge panel of the Ninth Circuit holds unlawful a Terry stop of a car where the stop was made to investigate a citizen’s complaint of a previously committed noise ordinance violation. Holding the stop unlawful, the Court accordingly suppresses a machine gun that an officer saw in plain view after making the stop.

The Grigg Court notes that Nampa, Idaho police had been called to investigate a citizen’s complaint that, on several occasions over recently preceding days, a neighbor had been playing music too loudly on a car’s sound system. As the officers were talking to the complainant, a car pulled out of a driveway down the street and drove by the officers with no music playing. The complainant told the officers that this car and its driver were the subject of his complaint. For reasons not disclosed in the Grigg opinion, the Ninth Circuit panel appears to assume that at that point the officers had only reasonable suspicion, and not probable cause, as to the previously committed noise law violation by the driver of the vehicle. One of the officers followed the suspect car and activated his overhead lights to pull it over. The officer saw and seized a machine gun that was on the front passenger seat.

In its analysis, the Ninth Circuit panel recognizes that under the federal constitution’s Fourth Amendment a Terry stop is permitted based on reasonable suspicion for a misdemeanor committed in a police officer’s presence. **LED EDITORIAL NOTE: While the Ninth Circuit refers only to “misdemeanors” throughout its opinion, the context makes clear that the reference extends to both gross misdemeanors and misdemeanors as those terms are defined under Washington law.]** And the panel acknowledges that the U.S. Supreme Court held in U.S. v. Hensley, 469 U.S. 221 (1985) that a Terry stop may be made based on reasonable suspicion for any previously committed felony. But the panel also notes that discussion by the U.S. Supreme Court in the Hensley opinion left room for the U.S. Supreme Court to adopt - - in a future case presenting applicable facts - - a more restrictive standard governing Terry stops for previously committed misdemeanors. As to such crimes, which by definition have been designated by a legislative body as less serious than felonies, the Grigg Court establishes, for the first time in the Ninth Circuit, a standard that is more limiting on police Terry stops based on reasonable suspicion. The Grigg Court states its standard for misdemeanor Terry stops for previously committed misdemeanors as follows:

We adopt the rule [governing Terry stops for previously committed misdemeanors] that a reviewing court must consider the nature of the misdemeanor offense in question, with particular attention to the potential for ongoing or repeated danger (e.g., drunken and/or reckless driving), and any risk of escalation (e.g., disorderly conduct, assault, domestic violence). An assessment of the “public safety” factor should be considered within the totality of the circumstances, when balancing the privacy interests at stake against the

efficacy of a Terry stop, along with the possibility that the police may have alternative means to identify the suspect or achieve the investigative purpose of the stop.

Applying its test, the Grigg Court characterizes the suspected noise law offense in this case as an “exceedingly harmless past misdemeanor.” And the Court states that, instead of stopping the suspect’s car to learn his identity, the officers should have gone to the house associated with suspect’s car, as pointed out by the complainant. Also, the Grigg Court is troubled that a routine license check was not done when an officer got behind the suspect’s car. Accordingly, in light of the lack of any threat to public safety and the failure of the officers to pursue alternative available means to learn the identity of the suspect, the Grigg Court holds the Terry stop of the car to be unlawful.

Result: Reversal of federal district court (Idaho) conviction of Justin Grigg for possession of a machine gun in violation of federal law.

**LED EDITORIAL COMMENTS**: No Washington appellate court decision has addressed the issue decided in Grigg, and very few federal and state courts have either, though some other jurisdictions have made a similar interpretation of the Fourth Amendment. We doubt that the U.S. Supreme Court would adopt the Grigg Court’s vague totality of the circumstances test, and we would not be surprised to see the U.S. Supreme Court, despite its qualifying language in the Hensley opinion, adopt a bright line rule permitting stops for all previously committed misdemeanors. But for now, law enforcement agencies (particularly those in the Ninth Circuit, which includes agencies in Washington) must try to assess how to apply Grigg’s standard.

First, while the Grigg Court does not say so, we think that a Washington officer may stop a vehicle based on probable cause (as opposed to reasonable suspicion) for a previously committed gross misdemeanor or misdemeanor, even though, under RCW 10.31.100 or other Washington law provisions, the officer might not be able to make a lawful custodial arrest or issue a citation. The definitional line between “reasonable suspicion” and “probable cause” is not that great in most circumstances, so prosecutors may be able to make the case for probable cause when misdemeanor stops are challenged based on Grigg. We note, however, that the Grigg opinion neither (1) addresses why the Court apparently assumed that the information possessed by the officers prior to the stop did not establish probable cause (we think it did); or (2) expressly states, as a bright line rule (that is, without need to show threat to public safety), that a Terry stop may be made whenever officers have probable cause as to a misdemeanor violation.

Second, while some of the discussion in the Grigg opinion cuts against it, an argument can be made that, in RCW 10.31.100’s designation of gross misdemeanors for which custodial arrest may be made based on probable cause (even though not committed in the officer’s presence), the Washington Legislature has in effect identified the more serious gross misdemeanors for which Terry stops can be made based on reasonable suspicion of past commission.

Third, the phrase “previously committed” in the Grigg Court’s standard is not clear. Does it mean the same thing as “not committed in the officer’s presence”? It might be argued that something else is meant by the phrase, but to legally safe, officers probably should assume that is the meaning until further guidance is provided by the courts.

Fourth, it is unclear what the Court means when it says that officers should consider “the possibility that the police may have alternative means to identify the suspect or achieve the investigative purpose of the stop.” In Grigg, the officers were responding to a neighborhood dispute where it would have been easy to investigate without immediately stopping the suspect’s vehicle. No doubt there will be complaints about minor offenses where the only alternative to letting a suspected violator go on his or her way is to make the stop.

Fifth, non-seizure social contacts are not precluded under Grigg.

Of course, we can only wait and see on the fallout of Grigg. As always, we urge law enforcement agencies and officers to consult their legal advisors and local prosecutors.

**(2) OFFICER SHOULD HAVE CLARIFIED SUSPECT’S AMBIGUOUS RESPONSE OF “I’M GOOD FOR TONIGHT” THAT IMMEDIATELY FOLLOWED OFFICER’S QUESTION WHETHER THE JUST-MIRANDIZED SUSPECT WISHED TO TALK TO OFFICER - -** In U.S. v. Rodriguez, \_\_\_ F.3d \_\_\_, 2008 WL 623982 (9<sup>th</sup> Cir. 2008) (decision filed March 10, 2008), the Ninth Circuit rules that the “clear assertion” rule of Davis v. U.S., 512 U.S. 452 (1994) **Sept 94 LED:02** applies only after the police have already obtained an unambiguous waiver of Miranda rights and are already in the process of questioning the custodial suspect.

In the 1994 U.S. Supreme Court decision in Davis v. U.S., the U.S. Supreme Court addressed a situation where an in-custody suspect had waived his rights to silence and to counsel and was being interrogated. During the questioning, the suspect made an “ambiguous” statement about his right to counsel. The Davis Court held that in the absence of a “clear statement” of rights by the suspect, the officer was not required to stop the questioning to clarify the suspect’s wishes. The officer could lawfully continue questioning without stopping to clarify whether the suspect wished to consult counsel. The same rule applies to ambiguous statements about the right to silence in this context. Coleman v. Singletary, 30 F.3d 1420 (11<sup>th</sup> Cir. 1994). In State v. Walker, 129 Wn. App. 258 (Div. I, 2005) **Nov. ’05 LED:19**, the Washington Court of Appeals for Division One held, contrary to several prior published Washington appellate court decisions, that because the Washington and U.S. constitutions have the same meaning when it comes to Miranda rights, the Davis rule controls for local and State law enforcement officers in Washington. In State v. Radcliffe, 139 Wn. App. 214 (Div. II, 2007) **Aug. ’07 LED:10**, Division Two held the same as Walker.

In Rodriguez, a National Park Service Ranger arrested a known felon who was unlawfully in possession of firearms. After administering Miranda warnings and obtaining defendant’s acknowledgement that he understood his rights, the officer asked him if he wanted to talk. The defendant responded, “I’m good for tonight.” The Rodriguez Court rejects the defendant’s argument that this was an unambiguous statement of rights, but the Court rules that this was an ambiguous statement about the right to silence. The Rodriguez Court holds that when, as here, an ambiguous statement regarding the right to silence or the right to counsel is made in response to the warnings before interrogation begins, the Davis rule permitting continuation of questioning without seeking clarification does not apply. Instead, the officer must seek and obtain clarification from the suspect before proceeding with interrogation. The Ninth Circuit asserts that its ruling interpreting Davis is supported by rulings of other federal and state courts that have addressed the issue.

The Rodriguez Court recognizes that there can be an implied waiver of Miranda rights. The Court gives as an example a suspect’s blurting out of a confession after receiving and understanding the

warnings but before the officer has presented a specific question. But this case did not present an implied waiver, the Court concludes. Here, the interrogating officer did not have a waiver, express or implied, and was under a duty to clarify what Rodriguez meant when he said "I'm good for tonight."

Result: Reversal of the U.S. District Court (Nevada) conviction and sentence on conditional guilty plea; case remanded for retrial.

**LED EDITORIAL COMMENTS**: The Rodriguez ruling on pre-questioning ambiguous assertions of rights must be followed. Before waiver has occurred, if the custodial suspect has responded to the Miranda warnings with an ambiguous response regarding the right to an attorney or the right to silence, clarification is required before proceeding with interrogation.

For Davis situations - - i.e., post-waiver, mid-interrogation ambiguous statements by the defendant regarding the right to an attorney or right to silence - - things are not so clear cut. In our summary above, we note that in State v. Walker, 129 Wn. App. 258 (Div. I, 2005) Nov. 05 LED:19, and in State v. Radcliffe, 139 Wn. App. 214 (Div. II, 2007) Aug. 07 LED:10, two divisions of the Washington Court of Appeals held that the Davis rule controls for local and State law enforcement officers in Washington. There is still some chance, though it seems slim, that the Washington Supreme Court will at some point accept review in another case and will disagree with Walker and Radcliffe. But even if that does not happen, we believe that the safest approach legally, whenever a Mirandized custodial suspect makes a mid-interrogation ambiguous statement about the right to silence or to counsel, is to pause and clarify the suspect's wishes. A court later reviewing an officer's actions might be influenced by the officer's clarifying efforts in the court's assessment of whether the suspect's statement constituted a clear assertion of rights.

**(3) AFTER TWO ATTEMPTS DURING CUSTODIAL INTERROGATION TO ASSERT HIS RIGHT TO SILENCE, SUSPECT TOLD INTERROGATING OFFICER: "I PLEAD THE FIFTH" - - APPEALS COURT HOLDS THAT, AT THAT POINT, THE QUESTIONING SHOULD HAVE STOPPED AND THAT THE OFFICER'S RESPONSE OF "PLEAD THE FIFTH, WHAT'S THAT?" WAS NOT A CLARIFYING QUESTION** - - In Anderson v. Terhune, \_\_\_ F.3d \_\_\_, 2008 WL 399199 (9<sup>th</sup> Cir. 2008) (decision filed February 15, 2008), the majority of a 15-judge panel of the Ninth Circuit sets aside a murder conviction based in part on the majority's conclusion that an interrogating officer failed to honor an arrestee's invocation of his right to silence.

Under the Fifth Amendment of the U.S. Constitution, if a suspect unambiguously invokes his right to an attorney during a custodial interrogation officers must stop interrogating. Davis v. U.S., 129 L.Ed.2d 362 (1994) **Sept 94 LED:02**. The Anderson majority concludes that the same rule applies to invocation of the right to silence, and that the rule was violated in this case. The majority opinion capsulizes its analysis as follows:

Anderson twice attempted to stop police questioning, stating "I don't even wanna talk about this no more," and "Uh! I'm through with this." After questioning continued, Anderson stated unequivocally, "I plead the Fifth." Instead of honoring this unambiguous invocation of the Fifth Amendment, the officer queried, "Plead the Fifth. What's that?" and then continued the questioning, ultimately obtaining a confession. It is rare for the courts to see such a pristine

invocation of the Fifth Amendment and extraordinary to see such flagrant disregard of the right to remain silent.

The state court held that Anderson's statement, "I plead the Fifth," was ambiguous and that the officer asked a legitimate clarifying question. Under even the narrowest construction of the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d) ("AEDPA"), the state court erred in failing to recognize this constitutional violation. The continued questioning violated the Supreme Court's bright-line rule established in Miranda. Once a person invokes the right to remain silent, all questioning must cease:

If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.

Miranda v. Arizona, 384 U.S. 436 (1966); see also Michigan v. Mosley, 423 U.S. 96 (1975) (explaining that once a defendant has invoked his right to remain silent, that right must be "scrupulously honored") (quoting Miranda, 384 U.S. at 479).

An examination of the interrogation transcript reveals that the state court's conclusion that Anderson's invocation was ambiguous was an unreasonable application of Miranda and based on an unreasonable determination of the facts. Only one reasonable conclusion can be gleaned from his statements, especially his last declaration, "I plead the Fifth": Anderson invoked his right to remain silent and wanted to end the interrogation. Construing the officer's statement, "Plead the Fifth? What's that?", as asking what Anderson meant is also an unreasonable determination of the facts. These errors were not harmless and, accordingly, we reverse the judgment of the district court and remand with directions to grant the writ of habeas corpus.

[Footnotes, some citations omitted]

Result: Grant of habeas corpus relief to convicted California murderer Jerome Alvin Anderson.

**(4) COURT HOLDS IN CIVIL RIGHTS LAWSUIT THAT OFFICERS LACKED PROBABLE CAUSE TO ARREST MAN SUSPECTED OF PASSING COUNTERFEIT BILLS** - - In Rodis v. City and County of San Francisco, 499 F.3d 1094 (9<sup>th</sup> Cir. 2007) (decision filed August 28, 2007), a three-judge panel of the Ninth Circuit rules 2-1 that officers lacked probable cause when they arrested for counterfeiting a man who presented a \$100 bill that store personnel questioned, but that later was determined to be genuine. Therefore, because the Ninth Circuit determines that the arrest was without probable cause, the Court rules that the officers (as defended by their agency) are without qualified immunity from civil liability under 42 United States Code, section 1983. The majority opinion describes the factual and procedural background of the case as follows:

Rodis is an attorney and an elected public official who sits on the Community College Board of the San Francisco City College. On February 17, 2003, Rodis

entered a drugstore near his office to purchase a few items. He tendered to the cashier a \$100 bill, and she examined it for authenticity. Because it was an old bill (a 1985 series), and because it appeared to have a texture different than bills with which the cashier was familiar, she asked the store manager for assistance. The manager came to the counter and examined the bill. Suspecting that it might be counterfeit, the manager took the bill to an office in the back of the store to compare it to other \$100 bills from the store's safe.

While the manager was examining the bill, Rodis pulled another \$100 bill from his wallet and paid the cashier. After determining that the second bill was authentic, the cashier gave Rodis his change, receipt, and items. Rodis then waited for the manager to return with his bill. After comparing Rodis's bill with similar bills, the manager returned to the front of the store and tested the bill with a counterfeit detector pen, which indicated it was authentic. Nevertheless, the manager remained suspicious because of the bill's appearance and texture. The manager told Rodis he thought the bill might be fake and he was going to call the police so that they could settle the issue. Rodis was frustrated with the delay but remained in the store willingly until the officers arrived.

Sergeant Jeff Barry and officer Barbara Dullea arrived first on the scene. Officers Michelle Liddicoet and James Nguyen arrived soon thereafter. The drugstore's employees conveyed to the officers their suspicions regarding the bill. The manager told Nguyen he had compared the bill to another and was uncertain about the bill's authenticity. The officers also examined the bill themselves. They concluded it was probably counterfeit, but because they were not certain, the officers decided it would be necessary to call the United States Secret Service to get an expert opinion. *Before doing so*, however, they arrested Rodis for violating 18 U.S.C. section 472, which criminalizes the possession and/or use of counterfeit currency, because the officers believed it would be easiest to continue the investigation from the police station. Notably, no effort was made to investigate whether Rodis intended to use an ersatz bill or whether he believed the bill to be counterfeit. Furthermore, the officers never asked to see the other \$100 bill Rodis had used to complete the purchase, nor did they ask to see the bills the manager stated he had compared with the bill in question.

Liddicoet and Nguyen handcuffed and transported Rodis in the back of a squad car to the police station. Once they arrived, the officers restrained Rodis in a holding area while Nguyen called the Secret Service. Unable to speak with an agent right away, Nguyen left a message requesting assistance, and after twenty to thirty minutes, a Secret Service agent returned the call. Nguyen and the agent discussed the details of the bill in question for five to ten minutes, during which the agent confirmed that the bill was in fact *genuine*. The officers released Rodis from custody, and Nguyen drove him back to the drugstore.

On October 1, 2003, Rodis filed suit against the City and County of San Francisco, then Chief of Police Alex Fagan, Sergeant Barry, and Officer Liddicoet. The complaint alleged false arrest and excessive force in violation of Rodis's Fourth Amendment rights, conspiracy to violate Rodis's rights, injunctive relief, and several state law claims, including false arrest and intentional and negligent infliction of emotional distress.

On February 11, 2005, the defendants moved for summary judgment, and on March 22, 2005, the district court granted the motion as to Rodis's conspiracy, municipal liability, and injunctive relief claims. The district court denied the motion in all other respects, holding that because the officers lacked evidence regarding Rodis's intent to defraud, probable cause was lacking and the arrest was unlawful. The court also found Barry and Liddicoet not entitled to qualified immunity because the illegality of the arrest was clearly established at the time.

Result: U.S. District Court order affirmed; case remanded to U.S. District Court (Northern District of California) for trial.

**LED EDITORIAL COMMENT: The debate between the majority judges and the dissenting judge in this case centers on whether the suspect's intent in passing the suspect bill must be taken into account by officers considering an arrest for passing a counterfeit bill. In our view, while the dissent may have a debatable point on that arcane question, and, while we do not know all of the evidence, we have our doubts that the officers had probable cause to arrest for counterfeiting even if the dissent is correct on the intent-element probable cause question.**

**(5) UNDER AIRPORT-SEARCH RULE, AFTER PASSENGER PLACES ITEMS ON THE CONVEYOR BELT AND WALKS THROUGH THE MAGNETOMETER, THE PASSENGER CANNOT CHOOSE TO LEAVE AIRPORT TO AVOID SEARCH** - - In U.S. v. Aukai, 497 F.3d 955 (9<sup>th</sup> Cir. 2007) (decision filed August 10, 2007), an en banc panel of 15 Ninth Circuit judges rules unanimously that an airport search was lawful despite the refusal by searchers to allow the passenger to change his mind about flying and to leave the airport.

The Court holds that, although a prospective airline passenger informed airport security personnel that he no longer wished to board the airplane and told the security personnel that he wanted to leave the airport, a non-consenting administrative search with a magnetometer wand resulting in discovery of metal items and methamphetamine in his pants pockets was constitutionally reasonable. That was because: (1) the passenger had attempted entry into a secured area of the airport by placing items on the conveyor belt of an x-ray machine and by initially walking through a magnetometer; (2) the nature of the wand search is minimally intrusive; (3) the hand search of his pocket was reasonable given the suspect's obviously false denial that any object was in his bulging pocket; and (4) the short detention was not prolonged beyond the time that was reasonable to rule out weapons or explosives.

The Court also clarifies its view that the airport search rule is based solely on special governmental needs for public safety. The rule is not based on any sort of consent or implied consent theory, the Court states.

Result: Affirmance of U.S. District Court (Hawaii) conviction of Daniel Kuualoha Aukai for possession of methamphetamine with intent to deliver.

**(6) COURT REJECTS A VARIETY OF THEORIES ARGUED BY AN OFFICER WHO CHALLENGED BEING FIRED FOR MAINTAINING A SEXUALLY EXPLICIT WEBSITE** - - In Dible v. City of Chandler (Arizona), \_\_\_ F.3d \_\_\_, 2008 WL 269508 (9<sup>th</sup> Cir. 2008) (decision filed September 5, 2007; amended February 1, 2008), a 3-judge panel of the Ninth Circuit rules that a police officer's First Amendment freedom of speech was not violated when his employer fired him for maintaining a sexually explicit website featuring himself and his wife.

The lead opinion for the Ninth Circuit is not a model of clarity, but it appears that the two judges on that opinion deem it important that Mr. and Mrs. Dible's activities (1) did not address any matters of public concern, and (2) significantly undermined the public's respect for and confidence in the Chandler Police Department. It does not matter to these two judges that the Dibles' website did not communicate his association with the Police Department. The third judge, who writes a concurring opinion, argues that the latter fact makes Dible's activity protected as free speech. The third judge concurs in the result (dismissal of Dible's suit), however, because that judge concludes that Dible was properly fired for lying and for telling a co-worker to lie during the Department's inquiry into his internet activity.

The Dible Court also rules that the officer's firing did not violate his constitutional right to privacy or to freedom of association. Nor did his firing constitute an unjustified intentional infliction of emotional distress, the Court rules.

Result: Affirmance of U.S. District Court (Arizona) summary judgment ruling for the City of Chandler.

**(7) IN INTERNAL AFFAIRS INVESTIGATION FOLLOWING USE-OF-FORCE INCIDENT, OFFICERS' FOURTH AMENDMENT AND FIFTH AMENDMENT RIGHTS WERE NOT VIOLATED** - - In Aguilera v. Baca, 510 F.3d 1161 (9<sup>th</sup> Cir. 2007) (decision filed December 27, 2007), a 3-judge panel of the Ninth Circuit rules 2-1 that Los Angeles County sheriff's deputies were not seized for Fourth Amendment purposes during an internal investigation immediately following a use-of-force incident. The officers were ordered by a supervisor to remain at a designated location for questioning about their possible official misconduct. The questioning was later followed by a criminal investigation, but the only sanction the officers faced for non-compliance with the original order to stay for questioning was job loss or demotion.

The Aguilera majority opinion also holds that the deputies did not suffer constitutional violations by being subsequently reassigned to different shifts and duties in response to their refusal to provide statements.

Result: Affirmance of U.S. District Court (Central District of California) order granting summary judgment to the Los Angeles County Sheriff and other defendants.

**LED EDITORIAL NOTE: This very brief LED summary addresses a detailed decision in a complex area of law. The LED entry does not attempt to capture the detailed analysis of the majority and dissenting opinions.**

**(8) WHERE 1) TENANT OF STORAGE UNIT WAS ALLOWING MURPHY TO LIVE THERE AND 2) MURPHY HAD REFUSED TO CONSENT TO A SEARCH, THE TENANT COULD NOT LAWFULLY CONSENT TO A SEARCH TWO HOURS LATER** - - In U.S. v. Murphy, \_\_\_ F.3d \_\_\_ (9<sup>th</sup> Cir. 2008) (decision filed February 20, 2008), a three-judge panel of the Ninth Circuit rules that consent to search storage unit by their rent-paying tenant did not justify a warrantless police search of the units. The tenant was allowing defendant Stephen Murphy to live in the two storage units. While at the units by himself, Murphy refused a police officer's request for consent to search the units for a meth lab. Officers arrested Murphy and took him to jail. Police contacted the tenant two hours later. He consented to a search of the units. Evidence found in the search could not be used against Murphy, the Ninth Circuit holds, because Murphy had refused consent a few hours earlier.

The Murphy Court treats the tenant and his live-in guest as co-tenants with shared dominion and control over the premises. The Court concludes that after Murphy had refused consent and

had been arrested and taken away, the officers could not obtain lawful consent to search from the co-tenant. In part, the Murphy Court's analysis is as follows:

We find support for our holding in the Randolph Court's treatment of the related issue of police removal of a tenant from the scene for the purpose of *preventing* him from objecting to a search. [Georgia v. Randolph, 574 U.S. 103 (2006) **May 06 LED:05**]. The Court held that third party consent to a search is valid only "[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection." If the police cannot prevent a co-tenant from objecting to a search through arrest, surely they cannot arrest a co-tenant and then seek to ignore an objection he has already made. Nor, more generally, do we see any reason to limit the Randolph rule to an objecting tenant's removal by police. Once a co-tenant has registered his objection, his refusal to grant consent remains effective barring some objective manifestation that he has changed his position and no longer objects. The rule that Randolph establishes is that when one co-tenant objects and the other consents, a valid search may occur only with respect to the consenting tenant. It is true that the consent of either co-tenant may be sufficient in the absence of an objection by the other, either because he simply fails to object or because he is not present to do so. Nevertheless, when an objection has been made by either tenant prior to the officers' entry, the search is not valid as to him and no evidence seized may be used against him. [*Court's footnote: Refusing to grant consent and objecting to the search are one and the same for Fourth Amendment purposes. The terms are used interchangeably throughout this opinion, as they are in Randolph.*]

Rather, as in this case, in the absence of exigent circumstances, the police must obtain a warrant before conducting the search.

Result: Reversal of U.S. District Court (Oregon) conviction of Stephen Wayne Murphy for federal drug manufacturing offense.

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### **BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT**

(1) **TO ESTABLISH TELEPHONE HARASSMENT, STATE MUST PROVE INTENT TO HARASS THE VICTIM WAS FORMED WHEN THE DEFENDANT INITIATED THE CALL** - - In State v. Lilyblad, \_\_ Wn.2d \_\_, \_\_ P.3d \_\_, 2008 WL 324355 (2008), the Supreme Court holds in a unanimous opinion that the telephone harassment statute requires proof that the defendant formed the intent to harass the victim at the time the defendant initiated the call to the victim. The jury was not properly instructed in this regard in the Lilyblad case, but there was evidence that could have supported a conviction under a proper instruction. Therefore, the Court remands the case to the superior court for retrial.

The telephone harassment statute, RCW 9.61.230, provides in pertinent part:

(1) Every person who, with intent to harass, intimidate, torment or embarrass any other person, shall make a telephone call to such other person:

- (a) Using any lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act; or
- (b) Anonymously or repeatedly or at an extremely inconvenient hour, whether or not conversation ensues; or
- (c) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household; is guilty of a gross misdemeanor, except as provided in subsection (2) of this section.

Emphasis added.

Subsection (2)(b) provides that one is guilty of a felony if “[t]hat person harasses another person under subsection (1)(c) . . . by threatening to kill the person threatened or any other person.”

The Supreme Court’s Lilyblad opinion focuses on the word “make” and concludes that its usage requires focus on the initiation of the call and the intent of the initiator at the time of placing the call. Among other things, the Court notes that its interpretation achieves consistency throughout the statute:

The statute provides three different ways of committing the crime of telephone harassment. Indeed, requiring the intent to form at the initiation of a call provides the only consistent interpretation in the context of the entire statute. Under RCW 9.61.230(1)(b), the crime is completed when a call is made “[a]nonymously or repeatedly or at an extremely inconvenient hour, *whether or not conversation ensues*” (emphasis added). A caller makes a call under this subsection at the point of initiation of the call. The subsection does not contemplate any further action beyond the initiation of the call. Therefore, the intent required for this subsection can form only at the initiation of the call.

The Lilyblad decision agrees with the decision in this case by Division Two of the Court of Appeals (see **Oct 06 LED:20**). The Supreme Court overrules the Division One Court of Appeals decision in Redmond v. Burkhardt, 99 Wn. App. 21 (Div. I, 2000) **June 2000 LED:18**. The Lilyblad decision may also require reversal of the recent Division One Court of Appeals decision (and remand for retrial) in State v. Alphonse, \_\_ Wn. App. \_\_, 174 P.3d 684 (Div. I, 2008), where Division One recently upheld the convictions of Edison Alphonse for both felony and misdemeanor harassment for threatening phone calls to an Everett police officer.

Result: Affirmance of Court of Appeals decision that reversed the Cowlitz County Superior Court conviction of Stephanie Rena Lilyblad (aka Stephanie Rena Paris) for felony telephone harassment; remand for retrial.

**(2) JUVENILE COURT’S FAILURE AT TIME OF EARLIER ADJUDICATION TO NOTIFY DEFENDANT OF BAR TO FIREARMS POSSESSION PRECLUDES HIS SUBSEQUENT CONVICTION FOR GUN POSSESSION UNDER RCW 9.41.040** - - In State v. Minor, \_\_ Wn.2d \_\_, 174 P.3d 162 (2007), the Washington Supreme Court rules that where, at the time of his 2003 adjudication in juvenile court for residential burglary, the juvenile court did not comply with RCW 9.41.047 by advising Mr. Minor orally and in writing that his 2003 adjudication barred him from future possession of firearms, Mr. Minor could not be convicted under RCW 9.41.040 for his possession of a firearm.

A concurring opinion by Justice Madsen (joined by now-former Justice Bridge) states as follows her view that the Supreme Court’s ruling does not mean that every person who is or has been

adjudicated or convicted of a predicate crime under RCW 9.41.040 will be able to avoid later prosecution if he or she was not advised by the adjudicating/convicting court as required under RCW 9.41.047. The concurrence explains as follows:

The parties agree that petitioner Jacob Minor was not given oral or written notice of loss of firearm rights, the court that sentenced him for the predicate offense failed to notify him of the loss of firearm rights, and a box next to a preprinted notification of the loss of firearm rights on the order on adjudication and disposition for the predicate offense was not checked. Under these circumstances, I concur in the majority's conclusion that Mr. Minor was affirmatively misled into believing he had not lost these rights. The appropriate remedy is, as the majority holds, reversal of the adjudication for unlawful possession of a firearm.

However, failure to check a box on a preprinted order on adjudication form will not always result in reversal. The crux of the matter is whether the individual was affirmatively misled, because “[i]gnorance of the law is generally no defense, although a narrowly defined class of cases has determined that affirmative, misleading information from a governmental entity is a violation of due process.” State v. Sweeney, 125 Wn. App. 77 (Div. III, 2005) **March 05 LED:22** (citing State v. Leavitt, 107 Wn. App. 361 (Div. II, 2001) **Nov 01 LED:17**).

For example, in State v. Moore, 121 Wn. App. 889, 896, 91 P.3d 136 **Div. III, 2004 Oct 04 LED:18**, the Court of Appeals affirmed the trial court's dismissal of an unlawful possession of a firearm charge because the defendant was not advised of loss of firearm rights and the trial court affirmatively misled him into believing those rights were not lost when the court told him that “he could put the ordeal behind him if he stayed out of trouble.” In Leavitt, the Court of Appeals reversed a conviction for unlawful firearm possession where the totality of the court's actions and inactions affirmatively misled the defendant into believing that his firearm possession restriction was limited to one year.

But if the individual has actual knowledge of the law or actual notice of the loss of firearm rights, in whatever form, the individual cannot legitimately claim he or she justifiably believes that firearm rights were not lost and therefore cannot claim to have been misled. An example of facts that would lead to the conclusion that the individual had actual knowledge or notice is found in State v. Carter, 127 Wn. App. 713 (2005). There, the defendant was charged with unlawful possession of a firearm based on a prior juvenile burglary offense, but in the interim between the juvenile offense and the possession charge the defendant had been convicted of a felony and notified at that time that he was disqualified from possessing firearms.

Individuals who have actual knowledge of the law or actual notice of the loss of firearm rights cannot show they were affirmative misled by a failure to advise of the loss of firearm rights, and they are not entitled to reversal of an adjudication or conviction of unlawful possession of a firearm.

[Some citations omitted]

Result: Reversal of Court of Appeals decision that affirmed the Grays Harbor County Superior Court adjudication of Jacob L. T. Minor for first degree unlawful possession of a firearm. The Court of Appeals decision is digested at **Sept 06 LED:19**.

**LED EDITORIAL COMMENT**: We do not believe that an officer's probable cause to arrest is affected by the possibility that a previously convicted person possessing a firearm might be able to defend against a charge under RCW 9.41.040 based on the rationale of the Minor decision.

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### **WASHINGTON STATE COURT OF APPEALS**

**REASONABLE SUSPICION SUPPORTED TERRY STOP OF POSSIBLE PROWLER WHO WAS FOUND INSIDE STORAGE UNIT AREA AT 2:30 A.M., WAS DRIVING WITHOUT CAR LIGHTS, AND WAS KNOWN FROM PAST CONTACTS NOT TO BE A RENTER; ALSO, DURATION OF TERRY DETENTION WAS REASONABLE**

State v. Bray, \_\_\_ Wn. App. \_\_\_, 177 P.3d 154 (Div. III, 2008)

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

On September 12, 2006, Richland Police Officer Brice Henry patrolled an area behind City View Storage because of a number of recent burglaries in the vicinity. He saw a minivan driving slowly, without lights, inside City View's fenced storage compound at 2:30 in the morning. Officer Henry recognized the van and its driver, Troy Jude Bray, from two encounters with Mr. Bray a few weeks earlier in the vicinity of the storage units.

Officer Henry had talked to Mr. Bray on those two separate occasions. The first time Mr. Bray said he was sleeping in his van near the storage compound because his van was out of gasoline. Mr. Bray gave no explanation for his presence in the area when Officer Henry talked to him the second time earlier in August.

Officer Henry suspected that Mr. Bray was involved in a burglary, and he called for backup. Richland Police Officer Kevin Barton arrived and went to a different part of the storage compound. He saw Mr. Bray's unoccupied van parked in the center of the compound, with its lights off. He saw Mr. Bray walking inside the compound looking at the doors of various storage units. Officer Barton concluded that Mr. Bray was prowling and reported that to Officer Henry.

Officer Barton had the first contact with Mr. Bray on the night of September 12. Officer Barton called to Mr. Bray from *outside* the fence and ordered Mr. Bray to the ground. Officer Henry was seconds from Mr. Bray. He arrived immediately and asked Mr. Bray whether he had any weapons. Mr. Bray responded that he had a pocket knife and some tools.

Officer Henry could see that Mr. Bray had wire cutters protruding from a back pocket, a flashlight in another pocket, twine around his wrist, wire in his hands, and a miner's lamp around his neck. And Mr. Bray wore gloves and camouflage clothing. Officer Henry knew that wire cutters had been used to cut a chain link fence in an earlier burglary near the storage facility.

The officers handcuffed Mr. Bray, checked him for other weapons, and called for other officers to search the area. Additional officers arrived and found an open and empty storage unit with a cut lock across from Mr. Bray's parked van. The unit had been broken into. Officer Henry questioned Mr. Bray about his presence in the storage area. Mr. Bray said he was delinquent on a payment for a storage unit he rented in the compound and the business owners had changed his lock. Officer Henry did not believe Mr. Bray's explanation because Mr. Bray had never mentioned that he rented a storage unit in the compound during the other contacts. Officer Henry checked Mr. Bray's criminal history and found that he had been arrested for possession of burglary tools. Thirty to thirty-five minutes elapsed from the time police stopped Mr. Bray and his arrest.

The police then searched Mr. Bray's van incident to arrest. They found shoes, copper tubing, and aluminum wire. Officers later matched a pair of shoes to footprints found at one of the prior burglary locations. Mr. Bray admitted he stole the copper tubing, gasoline, and aluminum wire from area businesses. The State charged him with second degree burglary and third degree possession of stolen property.

Mr. Bray moved to suppress the physical evidence found in his van and the statements made to police. He argued the police lacked adequate justification to stop or arrest him. The court concluded that the officer had both reasonable suspicion to stop him and probable cause to arrest him and denied his motion to suppress the physical evidence and the statements to police. The court concluded that Mr. Bray was guilty as charged after a bench trial.

ISSUES AND RULINGS: 1) Police knew of the defendant from previous contacts in the area of some storage units. They knew that he was not a renter of a unit. They spotted him inside the enclosed storage units at 2:30 in the morning driving around slowly in the dark with his car's lights off. They knew of recent burglaries within 1,000 feet of the storage units. It was nighttime. They saw the defendant looking at the doors of some of the storage units in the compound. He appeared to be prowling. Did the officers have reasonable suspicion to seize Bray as a burglary suspect? (ANSWER: Yes)

2) Was the duration of the stop (30 to 35 minutes) unreasonable? (ANSWER: No, because the officers were reasonably pursuing the investigation during the period)

Result: Affirmance of Benton County Superior Court convictions of Troy Jude Bray for second degree burglary and third degree possession of stolen property.

ANALYSIS: (Excerpted from Court of Appeals opinion)

#### REASONABLE SUSPICION TO DETAIN

...

Police may stop a citizen to investigate with less than probable cause to believe a crime has been committed. But the stop is permissible only if the officer "has a reasonable suspicion, grounded in specific and articulable facts, that the person stopped has been or is about to be involved in a crime." We look at the totality of the circumstances known to the officer to decide whether the stop meets these

criteria. The level of articulable suspicion necessary to support an investigatory detention is “a substantial possibility that criminal conduct has occurred or is about to occur.” The reasonableness of a stop is a matter of probability not a matter of certainty. Again, the police may stop a suspect and ask for identification and an explanation of his or her activities if they have a well-founded suspicion of criminal activity.

In Martinez, police saw the defendant walking at night in an apartment building parking lot open to the public. Martinez [135 Wn. App. 174 (Div. III, 2006) **Oct 06 LED:09**]. Vehicle prowling had been reported in the past but not on the night Mr. Martinez was stopped. A police officer stopped Mr. Martinez and searched him for weapons. The officer found methamphetamine. We concluded the stop was not justified. The officer had no particularized suspicion of any criminal activity and no particularized suspicion that Mr. Martinez was involved in any criminal activity. We reversed the order denying Mr. Martinez's motion to suppress.

But Martinez is easily distinguishable from this case. Officer Henry knew Mr. Bray from previous contacts in the area of these storage units. Officer Henry knew of recent burglaries within 1,000 feet of the storage facility. Police saw Mr. Bray drive his van slowly through the enclosed storage facility. His car lights were off even though it was nighttime. Officer Barton saw Mr. Bray looking at the doors of various storage units in the compound. Mr. Bray wore gloves and camouflage clothing. He appeared to be prowling. These facts easily support the reasonable suspicion of criminal activity necessary to justify a Terry stop.

#### LENGTH OF THE DETENTION

Mr. Bray next argues that police detained him longer than necessary to dispel any suspicion, even assuming a proper Terry stop. The trial court made no findings or conclusions that address this assignment of error. But that is understandable given that Mr. Bray first assigns error to the scope of the detention here on appeal. Specifically, Mr. Bray argues that the Terry stop, even if initially justified, exceeded its permissible scope when he “was detained for reasons not related to the investigation of an alleged crime scene and for longer than was necessary for officers to dispel their suspicion that he was engaged in criminal conduct.”

The scope of a permissible Terry stop will vary with the facts of each case. An investigative detention must last no longer than is necessary to satisfy the purpose of the stop. We ask whether “it [was] reasonably related *in scope* to the circumstances which justified the interference in the first place.” The scope and duration of the stop may be extended if the investigation confirms the officer's suspicions.

Mr. Bray argues that officers exceeded the scope of the Terry stop by handcuffing him and investigating the scene for 30 minutes before arresting him. But Mr. Bray's explanation of what he was doing did nothing to dispel the officers' suspicions that he was involved in a burglary. Their continued investigation to check Mr. Bray's criminal history and determine whether other storage units had been broken into was therefore justified.

The court properly refused to suppress Mr. Bray's statements to police or the goods found in his van. We affirm the convictions.

[Some citations omitted]

**FATHER WHO FORCED HIS SON AND DAUGHTER, WHILE BOTH WERE UNDER THE AGE OF CRIMINAL RESPONSIBILITY, TO HAVE SEX IS GUILTY OF RAPE AND INCEST**

State v. Bobenhouse, \_\_\_ Wn. App. \_\_\_, 177 P.3d 289 (Div. III, 2008)

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

Phillip J. Bobenhouse forced his children, John Doe (age six to eight during the relevant period) and Jane Doe (age four to seven during the relevant period), to engage in sexual intercourse with each other. Mr. Bobenhouse also forced his son John to suck on his penis, and Mr. Bobenhouse also put his finger in John's anus. Child Protective Services referred the matter to the Asotin County Sheriff's Office in August 2005 after the two children reported that their father had sexually abused them.

Mr. Bobenhouse had pleaded guilty in January 2005 to third degree assault of a child and tampering with a witness. Following a bench trial in November 2005, a judge also found him guilty of two counts of second degree assault of a child and one count of second degree assault. All of these convictions were for assaults on his wife and children. The court sentenced him to a total of 102 months for the November 2005 convictions.

While he was serving his sentence on the 2005 convictions, the State charged Mr. Bobenhouse with two counts of first degree rape of a child and two counts of first degree incest. The State amended the information on the date of trial to include an additional count of first degree rape of a child. Ultimately the State charged Mr. Bobenhouse with:

[Court provides a detailed list of all charges, omitted from this **LED** entry.]

The jury found him guilty of all charges on August 1, 2006. The court found the necessary aggravating facts to support an exceptional minimum sentence and sentenced Mr. Bobenhouse to a minimum of 600 months on each rape count, to run concurrently.

ISSUE AND RULING: Where children under the age of eight legally cannot commit a crime, and where defendant Bobenhouse did not have sex with the children, was he lawfully held criminally liable for rape and incest as an accomplice based on the sex that he forced the children to engage in? (ANSWER: Yes)

Result: Affirmance of Asotin County Superior Court convictions of Phillip J. Bobenhouse for multiple counts of child rape and incest; also affirmance of minimum sentences of 600 months on each rape count, running concurrently.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Mr. Bobenhouse contends he was improperly charged with first degree rape of a child (counts 2 and 3) and first degree incest (count 5). He asserts the acts

alleged in these counts did not constitute crimes because he did not have sexual intercourse with the children; the children had sexual intercourse with each other. He argues then that he cannot legally be an accomplice to a crime because no crime was committed. And he also argues that there was no crime he could be an accomplice to because the children, both under the age of eight, were incapable of committing crimes. And indeed, that is what RCW 9A.04.050 says.

Mr. Bobenhouse's challenges to these convictions essentially argue the legal impossibility of satisfying the elements of first degree rape of a child or first degree incest because the actual perpetrators of the acts were children. And children cannot legally commit the crimes of rape or incest as charged here. . . .

In counts 2 and 3, the State charged Mr. Bobenhouse with first degree rape of a child. The elements of this crime are (1) sexual intercourse with another (2) who is less than 12 years old and (3) not married to the perpetrator, and (4) the perpetrator is at least 24 months older than the victim. RCW 9A.44.073(1). John and Jane were both younger than 12 and were not married. Mr. Bobenhouse did not have sexual intercourse with either of them. And neither of them was 24 months older than the other. Incest, as charged in count 5, requires proof that a person engaged in sexual intercourse with a person he or she knew to be related by family. RCW 9A.64.020.

But Mr. Bobenhouse's criminal culpability does not rest on a showing of actual sexual contact with these children, at least for these charges. The State claimed and proved that he effected the child rape and the incest as an accomplice.

"A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable." RCW 9A.08.020(1). A person is legally accountable when "[a]cting with the kind of culpability that is sufficient for the commission of the crime, he causes an innocent or irresponsible person to engage in such conduct." RCW 9A.08.020(2)(a).

Mr. Bobenhouse caused John to have sexual intercourse with Jane. Both children were innocent or irresponsible persons. RCW 9A.08.020(2)(a). He argues, nonetheless, that no crime was committed because the jury could not find beyond a reasonable doubt that the principal for the crime - John or Jane - was 24 months older than the victim (the other child). And he says that these children were incapable of committing a crime, in any event, because they were under the age of eight. RCW 9A.04.050. (children under the age of eight are incapable of committing a crime).

Mr. Bobenhouse's culpability is based on forcing innocent people (his children) to engage in conduct that would constitute a crime if Mr. Bobenhouse engaged in the same conduct. RCW 9A.08.020(2)(a). See State v. BJS, 72 Wn. App. 368 (1994) (although the defendant did not personally touch the victims, she was legally accountable for child molestation committed by one three-year-old against another) abrogated on other grounds by State v. Lorenz, 152 Wn.2d 22 (2004). Mr. Bobenhouse used these children as instruments for his own criminal conduct. He effectively reduced the children to instruments that achieved the desired end: sexual intercourse with a child. The State proved the necessary elements of these crimes by accomplice liability.

## **EVIDENCE HELD SUFFICIENT TO SUPPORT KIDNAPPING CONVICTIONS AS TO TWO CHILDREN DESPITE DEFENDANT'S STATUS AS A CUSTODIAL PARENT OF ONE CHILD AND ARGUABLE STATUS AS A GUARDIAN OF THE OTHER CHILD**

State v. Lopez, \_\_ Wn. App. \_\_, 174 P.3d 1216 (Div. I, 2007)

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

On the morning of July 28, 2005, Lopez and two male friends surprised Yvonne and the children at Gonzales's apartment. Around 10 a.m., Emily answered the door to find two men she had never seen. Lopez jumped out of the bushes and rushed into the apartment. He told Emily not to move. When Yvonne awoke to find Lopez in the room, she screamed, and before she could jump up from the couch, Lopez jumped over the coffee table, pushed her into the couch, and forcefully covered her mouth. She testified that he told her he would kill her if she did not stop screaming. He told Yvonne and Emily that he had the apartment surrounded and had been trailing them for three days. Lopez took Yvonne to the back bedroom to talk with her, and Emily heard shouting. A neighbor came by the apartment asking if everyone was okay. Although Jessica said, "yes" she shook her head "no."

Yvonne testified that Lopez threatened to kill her and to then kill himself if she did not pack up the children and leave with him. A short time later, Lopez and his friends packed the family in two vehicles and left the apartment. Lopez told his daughter Jessica that she had betrayed him by leaving him and that she was "dead" to him. As punishment Lopez told Jessica she could not have contact with him and left her with her mother, Reyna. Lopez told Reyna and Jessica he was taking the others back to Miami.

Over the next few hours, the two vehicles carrying Lopez, Yvonne, the children, and the two males made several stops at homes and businesses. At one point, Lopez split up Yvonne and Emily in different vehicles and left the two men behind. Lopez told Yvonne to follow him and warned her she was being followed. After they left the home of Joye McMullen, one of Lopez's acquaintances, McMullen called 911 and reported Lopez had kidnapped Yvonne and the two children. An Amber Alert was later issued.

As the two cars headed toward Fife, Yvonne noticed about 20 police cars surrounding the vehicle she was driving with Jalina as her passenger. The police stopped Yvonne, handcuffed her, but released her when they realized she was one of the victims. Lopez left the scene and drove Emily around, seeking her help in locating a man named Carlos, who Lopez believed was Yvonne's new boyfriend. Later that night, Lopez checked into a motel where he and Emily stayed for the night. The next morning, an anonymous tip led police to find Lopez and Emily at an auto repair shop where Lopez was arrested.

The State charged Lopez with three counts of second degree kidnapping-domestic violence, one count of felony harassment-domestic violence, and two counts of second degree assault-domestic violence. The jury found him guilty on all but the felony harassment charge. The jury also found that he committed one of the assault counts with a deadly weapon. At sentencing, the court imposed

high end, concurrent standard range sentences and the mandatory deadly weapon enhancement.

**ISSUE AND RULING:** Where defendant was a custodial parent of one child and was arguably a guardian of the other child, could he be lawfully convicted of kidnapping either or both of the children? (**ANSWER:** Yes as to both, because he took the children by force with the intent to compel the other parent or guardian to something against her will.)

**Result:** Affirmance of King County Superior Court convictions and sentencing of Justo Farias Lopez (aka Justo Lopez Farias) except for a requirement of mental health evaluation (this sentencing question is not addressed in this LED entry).

**ANALYSIS:** (Excerpted from Court of Appeals opinion)

A person commits kidnapping in the second degree if he or she intentionally abducts another person under circumstances not amounting to kidnapping in the first degree. [RCW 9A.40.030(1); RCW 9A.40.020(1)] The statute defines “abduct” to mean “to restrain a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force.” [RCW 9A.40.010(2)].

“Restrain” means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his liberty. Restraint is “without consent” if it is accomplished by (a) physical force, intimidation, or deception, or (b) any means including acquiescence of the victim, if he [or she] is a child less than sixteen years old . . . and if the parent, guardian, or other person or institution having lawful control or custody of [the child] has not acquiesced. [RCW 9A.40.010(1)]

A parent acts without legal authority within the meaning of RCW 9A.40.010(1) when he threatens to take a child from the custodial parent by force in order to coerce the custodial parent to do something against her will. [Court's footnote: *State v. Tuitasi*, 46 Wn. App. 206, 209, 729 P.2d 75 (1986)].

The use or threat to use deadly force need not be directed toward the kidnapping victim. A person can kidnap a victim by directing the force or threat of deadly force against the victim's guardian. [Court's footnote: *State v. Taylor*, 90 Wn. App. 312, 318, 950 P.2d 526 (1998)] Moreover, one can threaten or use deadly force during a kidnapping without using a deadly weapon. [Taylor]

Lopez argues that he, as well as Yvonne, was Emily's guardian because Emily's parents gave them both permission to take Emily into their home in Miami, and Emily's mother extended that permission upon learning she moved to Washington. Thus, as her guardian, Lopez argues he had lawful control over Emily, and because he acquiesced in her move back to Miami, he did not restrain her.

Similarly, Lopez contends that a parent may not be convicted of second degree kidnapping of his own child, three year old Jalina, without evidence showing his parental rights have been limited by a court. [Court's footnote: *State v. LaCaze*, 95 Wn.2d 760, 761, 630 P.2d 436 (1981)] He contends the State failed to prove

he restrained Jalina without consent because he, as a co-parent with equal control over her, acquiesced.

But the flaw in Lopez's argument is that he fails to recognize that a parent has equal rights to custody of his child only in the absence of misconduct. [LaCaze] In State v. Tuitasi, we addressed the question of whether a parent could be guilty of kidnapping his own child. In that case, the defendant told his former wife that if she did not have sex with him, he would take their baby daughter away and she would never see the girl again. We ruled that a parent who engages in misconduct affecting the child's well-being does not have an equal right to custody. We held that where a parent threatens to take the child with the sole intent to compel the other parent to do something against her will, the statutory right to equal custody does not give a parent legal authority to engage in such conduct.

The record contains ample evidence supporting the jury's finding that Lopez's primary purpose in taking the children was to compel Yvonne to return with him. For example, Lopez instructed Yvonne to drive one vehicle with Jalina, and he drove in a separate vehicle with Emily. The State argued that he split up the children because he knew Yvonne felt responsible for Emily and would not flee without her. The State also argued that Lopez's decision to effectively disown his daughter, Jessica, and leave her in Washington with her biological mother rather than move her back to Miami with the others undercut his claim that Lopez's motivation was custodial. This evidence provides a sufficient basis for a jury to determine that, despite being one of Jalina's custodial parents and arguably one of Emily's guardians, Lopez restrained both children "without consent and without legal authority."

Furthermore, the record contained evidence that Lopez's conduct affected Jalina's well-being. For example, a police officer testified that when police pulled Yvonne over for driving a vehicle that was involved in an Amber Alert, Jalina was "extremely terrified." Jalina was crying, screaming, and hanging on to her mother when police approached the vehicle with guns drawn to handcuff Yvonne and investigate the situation. Lopez's conduct placed Yvonne and Jalina in this situation.

The record also contains evidence from which the jury could have found that Lopez restrained Emily "without consent and legal authority" by intimidating her into leaving. Emily testified that she was scared of Lopez. She said Lopez had a mean face and looked "very, very angry" when he arrived at the house with two unknown men who blocked the door. She testified that her stomach turned upside down when Lopez surprised them at Reyna's apartment. Emily also said she had seen Lopez push and yell at Yvonne before. After Lopez packed them up and drove them away from the apartment, she said she and Yvonne discussed trying to get away.

Finally, we also conclude that the record supports the jury's finding that Lopez abducted Emily and Jalina by using or threatening to use deadly force. The jury heard testimony that Lopez threatened to use deadly force against Yvonne by pointing a gun at her head and threatening to kill her if she and the girls refused to leave with him. The jury need only have believed that force was used against

Yvonne, the children's parent and guardian, to convict. [Court's footnote: See Taylor, 90 Wn. App. at 318-19.]

On all of these grounds, we conclude there was sufficient evidence in the record to support the jury's verdict on the kidnapping counts.

[Some footnotes omitted; some citations omitted or shortened]

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

**(1) RCW 9.94A.533(5) DRUGS-IN-JAIL SENTENCING ENHANCEMENT DOES NOT APPLY TO ARRESTEE WHO HAD METHAMPHETAMINE IN HIS SOCK THAT WAS DISCOVERED IN SEARCH WHEN HE WAS BOOKED INTO JAIL - -** In State v. Eaton, \_\_\_ Wn. App. \_\_\_, 177 P.3d 157 (Div. II, 2008), the Court of Appeals rules that RCW 9.94A.553(5), which provides an enhanced sentence for illegal drug possession that occurs in a jail, does not apply where a person is arrested outside the jail with illegal drugs hidden on his person, and the drugs are discovered only after the arrestee has been transported to jail.

Result: Vacation of Clark County Superior Court sentence enhancement of Thomas Harry Eaton on his conviction for possession of methamphetamine.

**(2) VANDALIZING A POLICE VEHICLE WAS NOT “USE” OF THE VEHICLE IN A FELONY, AND THEREFORE THE DRIVER’S LICENSE OF THE VANDAL MAY NOT BE REVOKED UNDER RCW 46.20.285(4) - -** In State v. B.E.K., 141 Wn. App. 742 (Div. II, 2007), the Court of Appeals reverses the driver’s license revocation by a juvenile court against B.E.K. in his malicious mischief case. RCW 46.20.285 requires revocation of a driver’s license for one year where a driver has a final conviction for “any felony in commission of which a motor vehicle is used.” The B.E.K. Court concludes that committing felony malicious mischief by spray painting a police vehicle does not constitute “use” of the vehicle in the commission of the crime. The Court distinguishes some other decisions applying the statute in different circumstances, including State v. Batten, 140 Wn.2d 362 (2000) **July 2000 LED:04**. In Batten, the Supreme Court held that keeping a gun and drugs in a vehicle (not on one’s person) falls within RCW 46.20.285(4).

Result: Reversal of Pierce County Superior Court suspension of driver’s license of B.E.K. in relation to his juvenile adjudication of guilty of malicious mischief in the second degree.

**(3) ADMINISTRATIVE INCONVENIENCE FOR A VERY SMALL CITY DOES NOT EXCUSE CITY’S FAILURE TO STRICTLY COMPLY WITH THE PUBLIC RECORDS ACT - -** In Zink v. City of Mesa, 140 Wn. App. 328 (Div. III, 2007), the Court of Appeals rules, among other things, (1) that the small size and limited resources of a city does not provide an excuse for not strictly complying with the sometimes onerous governmental responsibilities for compliance with the Public Records Act; and (2) the City could not lawfully limit the requestors’ access to the public records to one hour per day.

Result: Reversal of Franklin County Superior Court ruling in favor of the City of Mesa; case remanded to Superior Court for findings on the issues raised by the requestors and determination of any penalties, costs and attorney fees.

Status: Decision final.

**(4) EVIDENCE THAT WAS SUPPRESSED BECAUSE STATE'S WARRANTLESS-EMERGENCY-SEARCH RATIONALE WAS REJECTED MAY BE ADMISSIBLE BASED ON AFFIDAVIT'S INFORMATION THAT WAS NOT OBTAINED IN THE UNLAWFUL WARRANTLESS SEARCH** - - In State v. Leffler, \_\_ Wn. App. \_\_, 173 P.3d 293 (Div. II, 2007), the Court of Appeals withdraws the opinion that was reported at 140 Wn. App. 223, and was digested in the **October 2007 LED**. The Court does not revise its ruling that the evidence indicating to investigating officers that a methamphetamine lab may be on the premises searched failed to establish an emergency. Thus, the Court's revised opinion continues to state that the warrantless search was unlawful.

In its revised opinion the Leffler Court does, however, add analysis and a ruling on an Exclusionary Rule issue relating to the fact that the search warrant affidavit contained some information that was untainted by the officers' warrantless search (i.e., (1) an anonymous complaint regarding chemical smells on the property, (2) the officers' own detections of strong odors before they made their search, (3) Leffler's DOC warrant, and (4) Leffler's pre-search statements to the officers that there was some muriatric acid and a gasser inside a fifth wheel trailer). The Court of Appeals does not resolve that issue, but instead remands the case to the trial court for that court to determine (1) whether police would have sought the search warrant if they had not made the unlawful warrantless search, (2) whether the warrant would have established probable cause with only this evidence, and (3) which areas of the property could have been searched on the basis of that evidence.

Result: Reversal of Pierce County Superior Court conviction of Fred Irvine Leffler for manufacturing methamphetamine; case remanded for further proceedings.

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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 from 1939 to the present. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [[http://www.courts.wa.gov/court\\_rules](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 website at [<http://www.supremecourtus.gov/opinions/opinions.html>]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since January 2000 can be accessed (by date of decision only) by going to the Ninth Circuit home page at [<http://www.ca9.uscourts.gov/>] and clicking on "Opinions." Opinions

from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address. Federal statutes can be accessed at [<http://www.law.cornell.edu/uscode/>].

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2006, is at [<http://www1.leg.wa.gov/legislature>]. Information about bills filed since 1997 in the Washington Legislature is at the same address. "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's home page 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>].

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the **LED** should be directed to Mr. Wasberg at (206) 464-6039; Fax (206) 587-4290; E Mail [[johnw1@atg.wa.gov](mailto:johnw1@atg.wa.gov)]. Questions regarding the distribution list or delivery of the **LED** should be directed to [[ledemail@cjtc.state.wa.us](mailto:ledemail@cjtc.state.wa.us)]. **LED** editorial commentary and analysis of statutes and court decisions express the thinking of the writers and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The **LED** is published as a research source only. The **LED** does not purport to furnish legal advice. **LEDs** from January 1992 forward are available via a link on the Criminal Justice Training Commission's Internet Home Page [<https://fortress.wa.gov/cjtc/www/led/ledpage.html>]