



# Law Enforcement

JULY 2014

# Digest

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

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## HONOR ROLL

### **699<sup>th</sup> Basic Law Enforcement Academy – December 4, 2013 through April 15, 2014**

President:	Brandon P. Fabian, Spokane PD
Best Overall:	Andrew S. Mellema, Whatcom County SO
Best Academic:	Andrew S. Mellema, Whatcom County SO
Best Firearms:	Brandon P. Fabian, Spokane PD
Patrol Partner Award:	Brandon P. Fabian, Spokane PD
Tac Officer:	Sergeant Lisa Neymeyer, Port of Seattle PD

### **700<sup>th</sup> Basic Law Enforcement Academy – January 7 through May 14, 2014**

President:	Matthew P. Sutton, Yakima PD
Best Overall:	Aaron L. Sanchez, Lynnwood PD
Best Academic:	Aaron L. Sanchez, Lynnwood PD
Best Firearms:	Zachary D. Yates, Lynwood PD
Patrol Partner Award:	Justin J. Watts, Pierce County SO
Tac Officer:	Officer Mark Best, Tacoma PD

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**NOTE REGARDING THE 2014 LEGISLATIVE UPDATE:** In prior years we have included the legislative update over the course of two or more LED editions, generally including legislation as it is passed. Beginning last year, we have included all of the legislation in a single stand-alone LED edition, similar to the Subject Matter Index. The 2014 Legislative Update is now available on the Criminal Justice Training Commission’s LED webpage under “Subject Matter Indexes.”

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**UNITED STATES SUPREME COURT**

**OFFICERS’ USE OF DEADLY FORCE AGAINST FLEEING DRIVER WHO WAS ENGAGING IN “OUTRAGEOUSLY RECKLESS DRIVING” FOR AN EXTENDED PERIOD AND WHO POSED A “GRAVE PUBLIC SAFETY RISK” DID NOT VIOLATE FOURTH AMENDMENT**

Plumhoff v. Rickard, \_\_\_ U.S. \_\_\_, 134 S. Ct. 2012 (May 27, 2014)

Facts and Proceedings below: (Excerpted from United States Supreme Court’s syllabus of opinion, which is a summary prepared by Court staff and is not part of the Court’s opinion)

Donald Rickard led police officers on a high-speed car chase that came to a temporary halt when Rickard spun out into a parking lot. Rickard resumed maneuvering his car, and as he continued to use the accelerator even though his bumper was flush against a patrol car, an officer fired three shots into Rickard’s car. Rickard managed to drive away, almost hitting an officer in the process. Officers fired 12 more shots as Rickard sped away, striking him and his passenger, both of whom died from some combination of gunshot wounds and injuries suffered when the car eventually crashed.

Rickard's minor daughter filed a 42 U. S. C. §1983 action, alleging that the officers used excessive force in violation of the Fourth and Fourteenth Amendments. The District Court denied the officers' motion for summary judgment based on qualified immunity, holding that their conduct violated the Fourth Amendment and was contrary to clearly established law at the time in question. After finding that it had appellate jurisdiction, the Sixth Circuit [of the United States Court of Appeals] held that the officers' conduct violated the Fourth Amendment. [The Sixth Circuit] affirmed the District Court's order, suggesting that [the Court] agreed that the officers violated clearly established law.

ISSUES AND RULINGS: 1) Did the officers' use of deadly force against the fleeing driver who was engaging in "outrageously reckless driving" for an extended period and who posed a "grave public safety risk" violate the Fourth Amendment? (ANSWER BY SUPREME COURT: No);

2) Assuming for the sake of argument that the officers violated the Fourth Amendment, are they entitled to qualified immunity because case law at the time of their actions was not clearly established against their actions at the time? (ANSWER BY SUPREME COURT: Yes)

NOTE: Seven justices join fully in the described rulings and in all elements of the Court's opinion authored by Justice Alito. Justice Ginsburg joins in the judgment and in the qualified immunity analysis, but not in the analysis of the substance of the Fourth Amendment. Justice Breyer joins in the judgment, but not in a portion of the analysis of the substance of the Fourth Amendment. Neither Justice Ginsburg nor Justice Breyer authors a separate opinion.

Result: Reversal of Sixth Circuit of the United States Court of Appeals, which had affirmed a District Court decision denying the summary judgment motion of the law enforcement officer defendants.

ANALYSIS: (Excerpted from Supreme Court's syllabus of opinion, which is a summary prepared by Court staff and is not part of the Court's opinion)

ISSUE 1: The officers' conduct did not violate the Fourth Amendment

(a) Addressing this question first will be "beneficial" in "develop[ing] constitutional precedent" in an area that courts typically consider in cases in which the defendant asserts a qualified immunity defense . . . .

(b) [Rickard's daughter's] excessive-force argument requires analyzing the totality of the circumstances from the perspective "of a reasonable officer on the scene." Graham v. Connor, 490 U. S. 386, 396 (1989). [Rickard's daughter] contends that the Fourth Amendment did not allow the officers to use deadly force to terminate the chase, and that, even if they were permitted to fire their weapons, they went too far when they fired as many rounds as they did.

(1) The officers acted reasonably in using deadly force. A "police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." Scott v. Harris, 550 U.S. 372, 385 (2007) **June 07 LED:08**. Rickard's outrageously reckless driving—which lasted more than five minutes, exceeded 100 miles per hour, and included the passing of more than two dozen other motorists—posed a grave public safety risk, and the record conclusively disproves that the chase was over

when Rickard's car came to a temporary standstill and officers began shooting. Under the circumstances when the shots were fired, all that a reasonable officer could have concluded from Rickard's conduct was that he was intent on resuming his flight, which would again pose a threat to others on the road.

(2) [The officers] did not fire more shots than necessary to end the public safety risk. It makes sense that, if officers are justified in firing at a suspect in order to end a severe threat to public safety, they need not stop shooting until the threat has ended. Here, during the 10-second span when all the shots were fired, Rickard never abandoned his attempt to flee and eventually managed to drive away.

A passenger's presence does not bear on whether officers violated Rickard's Fourth Amendment rights, which "are personal rights [that] may not be vicariously asserted." . . . .

**ISSUE 2: The officers are, in any event, entitled to qualified immunity.**

An official sued under §1983 is entitled to qualified immunity unless it is shown that the official violated a statutory or constitutional right that was "clearly established" at the time of the challenged conduct. . . . Brosseau v. Haugen, 543 U. S. 194, 201 (2004) **Feb 05 LED:06**, where an officer shot at a fleeing vehicle to prevent possible harm, makes plain that no clearly established law precluded the officer's conduct there. Thus, to prevail, [Rickard's daughter] must meaningfully distinguish Brosseau or point to any "controlling authority" or "robust 'consensus of cases of persuasive authority,'" . . . , that emerged between the events there and those here that would alter the qualified-immunity analysis. [Rickard's daughter] has made neither showing. If anything, the facts here are more favorable to the officers than the facts in Brosseau; and [Rickard's daughter] points to no cases that could be said to have clearly established the unconstitutionality of using lethal force to end a high-speed car chase.

[Some citations omitted, some citations revised; subheadings revised]

**LED EDITORIAL COMMENT: The Plumhoff decision under the federal Civil Rights Act generally has no effect on lawsuits grounded in state common law theories. Law enforcement officers and their agencies may still be vulnerable to lawsuits under these facts under state common law theories. Most states are like Washington, however, and plaintiffs in such cases generally cannot recover punitive damages or attorney fees under state common law theories, both of which forms of relief are available in Federal civil rights actions in addition to actual damages.**

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**BRIEF NOTE FROM THE UNITED STATES SUPREME COURT**

**CIVIL RIGHTS ACT LAWSUIT: FIFTH CIRCUIT'S AFFIRMANCE OF SUMMARY JUDGMENT FOR OFFICER IN DEADLY FORCE CASE REVERSED BECAUSE THE FIFTH CIRCUIT DID NOT APPLY REVIEW STANDARD THAT FAVORS PLAINTIFFS** – In Tolan v. Cotton, \_\_\_ U.S. \_\_\_, 134 S. Ct. 1861 (May 5, 2014), the Supreme Court summarily reverses a Civil Rights Act deadly force decision of the Fifth Circuit of the United States Court of Appeals. The Fifth Circuit had upheld a District Court grant of summary judgment to a law enforcement officer on the rationale that the officer was entitled to qualified immunity for his shooting of the plaintiff. The

Fifth Circuit concluded that any reasonable officer in the officer's position would have concluded at the point of the shooting that the plaintiff presented an immediate threat to the safety of the several officers at the scene. The Supreme Court rules that the Fifth Circuit failed to follow the legal standard for considering summary judgment motions. In ruling on a motion for summary judgment, the courts (1) must believe all of the evidence presented by the plaintiff, and (2) must draw all inferences from the evidence in favor of the plaintiff.

The Tolan decision does not offer any guidance as to whether the officer's actions were reasonable, or as to what facts justify the use of deadly force by an officer.

Result: Reversal of decision of Fifth Circuit of the United States Court of Appeals and remand of case to the Fifth Circuit for that Court to follow the correct summary judgment standard.

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### **BRIEF NOTES FROM THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS**

#### **(1) CONFESSION OF 18-YEAR-OLD SUSPECT WITH 65 IQ HELD INVOLUNTARY UNDER THE TOTALITY OF THE CIRCUMSTANCES, INCLUDING OFFICERS' FALSE PROMISES OF LENIENCY AND OF CONFIDENTIALITY, AND THEIR DECEPTION ABOUT THE PURPOSE OF THE QUESTIONING BEING OTHER THAN CRIMINAL INVESTIGATION –**

In United States v. Preston, F.3d \_\_\_, 2014 WL 1876269 (9<sup>th</sup> Cir., May 12, 2014), an 11-judge panel of the Ninth Circuit reverses a U.S. District Court sexual abuse conviction and remands for a new trial, holding that under the totality of the circumstances, including the eighteen-year-old defendant's intellectual disability, the confession that resulted from police questioning was involuntary and under constitutional due process protections should not have been admitted at trial. **[LED EDITORIAL NOTE: Previously, a three-judge panel had held in a 2-1 decision that the confession was voluntary (see the report on that decision at May 13 LED:14), but the Ninth Circuit then withdrew that decision for the 11-judge panel's review; that review resulted in the new decision digested here.]**

#### Lead Opinion

The lead opinion for the 11-judge panel does not hold that any of the tactics used by the officers were inherently coercive, but instead holds that the law enforcement tactics were coercive in light of what the opinion characterizes as a serious and obvious intellectual disability of the 18-year-old suspect with an IQ of 65.

An eight-year-old acquaintance of the defendant accused him of sexual molestation. An FBI agent and a tribal police investigator did a tape-recorded interview of the defendant outside his home. The interview took place alongside a police vehicle. No Miranda warnings were given (note that defendant did not argue in this case that he was in custody and should have been Mirandized). The interview took 38 minutes. Neither the location and length of the questioning, nor the absence of Miranda warnings, were factors in the Court's determination that the confession was involuntary. The lead opinion concludes, however, that defendant's will was overborne and his statement rendered involuntary in light of other factors, particularly:

- Defendant's severe intellectual impairment that was obvious to the officers in their interview and obvious on the tape recording. The lead opinion notes that it was undisputed that Preston's IQ was 65. Expert testimony from a psychologist was that, because of his low intelligence and other personality traits, Preston was (1) very impaired in his ability to understand everyday communications; and (2) highly suggestible and easy to manipulate. The Court does not hold that the suspect's low IQ

and high suggestibility alone made his confession involuntary, but the Court declares that these facts must be considered together with the officers' questioning methods.

- The use of the tactic of giving two alternative guilt-options in a number of their questions. Under the tactic both choices are highly incriminating, but one option gives the person a chance to save some face. Thus, the lead opinion notes that the officers asked if he molested the victim as a one-time thing, or if instead he was a repeat child molester (a monster), which they noted would be much worse. They also asked: (1) “[I]s it because you wanted to have sex? . . . Or is it he’s the one that came onto you?” (2) “[I]s it something . . . where you forced the issue or is it something that he wanted?” (3) “[D]id he pull away or did you pull out?” (4) “Did you . . . put your penis in all the way or just a little bit?” (5) “Did you do it a lot or just that one time?” The lead opinion notes that this tactic in questioning is common and not unacceptable generally, but with a “severely” intellectually disabled person, it can result in an involuntary confession. The lead opinion notes that a law enforcement training guide for interrogators (the Inbau, Reid and Buckley book, Criminal Interrogations and Confessions, instructing on what is known as the “Reid method”) indicates that this method should not be used with persons of seriously impaired mental ability.
- The officers' multiple deceptions about the purpose of the interrogation and how the statement would be used and their related implied promises of leniency and confidentiality. On this point, the lead opinion states that in some of their questioning they promised Preston that they would not “tell this to anybody,” and that the statement would never leave the U.S. Attorney’s file. Later, they told him that the statement they would write up was just an apology note to the child, just a way to say “sorry” to the child: “Do you want to write any — usually what we do is we write a statement. If, like, you wanted to say sorry or something like that, you could definitely do that. And we can provide that to him.” Also, the lead opinion asserts, some of the questions used in the two-guilty options technique suggested that if the defendant was just a one-time violator, they could “move on,” i.e., let it go with no prosecution. The lead opinion notes that Criminal Interrogations and Confessions instructing on the Reid method suggests that interrogators steer away from deception and implications of providing leniency when interrogating persons of very low intelligence.
- The investigators' repetitive leading questioning on the same few points, attempting to get the defendant to adopt their particular narrative, and implying that the questioning would continue however long was needed until he answered all of their questions to their satisfaction. For instance, he was told that he would be free to go only “after the interview,” and that the officers would return as many times as needed to get answers to all of their questions. **[LED EDITORIAL NOTE: As noted above, the lead opinion notes that the defendant did not argue that he was in custody for Miranda purposes at the time of the questioning, so the Court does not address whether Miranda warnings were required. None were given.]**

The lead opinion concludes that, even if the Court would reach a different conclusion regarding someone of normal intelligence, the officers' use of these tactics overall confused and compelled an involuntary confession from the intellectually disabled and highly suggestible eighteen-year-old.

#### Concurring opinions

Specially concurring in the result, Judge Graber writes a lengthy opinion. She agrees with the lead opinion that the officers' deceptions about the purpose of the interrogation and how the statement would be used and their related implied promises of leniency and confidentiality, coupled with the defendant's severe intellectual disability, coerced the defendant into confessing. But Judge Graber states that the lead opinion misreads the record in favor of the defendant on a number of other points, for instance, on the point about the officers' implications that the questioning would continue indefinitely. She points out that the tape recording evidences that the officers told defendant at the start of the questioning that he did not have to answer their questions and that he was free to stop the questioning and leave their presence at any time, and that the officers' statements later in the questioning did not negate this initial admonition. She also argues that the other tactics employed by the officers were not coercive even in light of the defendant's intellectual disability.

Also specially concurring in the result, Judge Gould writes that the case does not need elaborate analysis. He writes that the confession was involuntary because of the confluence of the defendant's severe intellectual disability combined with (1) the officers' two-guilty-choices ploy and (2) the officers' false promises that what the defendant said would be kept private. Implicit in Judge Gould's short opinion is that he does not think that other tactics were coercive even in light of the defendant's intellectual disability.

Result: Reversal of United States District Court (Arizona) conviction of Tymond J. Preston for abusive sexual conduct; remanded for retrial.

**LED EDITORIAL COMMENT:** We think that the lead opinion goes a little overboard in the breadth of its criticisms of the interrogation methods used in Preston. But many of the points seem well taken in relation to limits on interrogations of persons with obvious severe intellectual disability and high suggestibility (not just below-average intelligence). And the lead opinion is signed by nine judges of the 11 on the panel, so officers would be well advised to consider the opinion. The lead and concurring opinions together are lengthy, and we have only summarized the key points of the opinions here. As noted in the "Internet access" information at the close of every LED, Ninth Circuit decisions are publicly accessible by going to the home page of the Ninth Circuit [<http://www.ca9.uscourts.gov>], clicking on "opinions," and searching for opinions by date of decision or by case name.

**(2) CIVIL RIGHTS ACT LAWSUIT: EVEN THOUGH PLAINTIFF WAS EVENTUALLY CONVICTED OF MURDER IN RE-TRIAL, AGENCY MAY BE SUED UNDER MONELL BASED ON DETECTIVE'S ADMITTEDLY ROUTINE "PLOY" IN HIS INTERROGATIONS IN THE 1990s, A PLOY IN WHICH HE DID NOT GIVE MIRANDA WARNINGS IN CUSTODIAL INTERROGATIONS WHEN HE FELT THAT THE SUSPECT WOULD NOT WAIVE** – In Jackson v. Barnes, 749 F.3d 755 (9<sup>th</sup> Cir., April 15, 2014), a three-judge panel of the Ninth Circuit rejects the arguments of the Ventura (California) County Sheriff's Office and holds, in an opinion authored by Judge Reinhardt, that a jury must decide whether a detective and his agency may be held liable under the Civil Rights Act for the detective's failure to Mirandize a suspect during a custodial interrogation about a murder.

A detective conducted three custodial interrogations of murder suspect Jackson between the time of a 1992 murder and Jackson's 1995 first trial for the murder. In the first two interrogations, the detective Mirandized Jackson and did not obtain helpful admissions from Jackson. The second interrogation ended when Jackson told the detective that he did not want to talk to him. About a year later, the detective sought again to interview Jackson who was then



incarcerated on convictions for several unrelated charges. This time the detective did not Mirandize Jackson before questioning him.

The Ninth Circuit opinion in Jackson indicates that in later proceedings the detective admitted that, at the time of the third interrogation session (some time in the early 1990s), he routinely questioned custodial suspects without Miranda warnings if he sensed that the person was likely to assert his Miranda rights if warned. **[LED EDITORIAL COMMENT: In California Attorneys v. Butts, 195 F.3d 1039 (9<sup>th</sup> Cir. 1999) Jan 00 LED:03, the Ninth Circuit panel reported that in the early 1990s some law enforcement agencies in southern California were, to some extent with the blessing of their local prosecutors, intentionally violating Miranda on the rationale that statements taken in mere “technical” violations of Miranda can be admitted to impeach defendants who take the stand, a strategy that deters defendants from taking the witness stand. The strategy also tends to offend the sensibilities of many judges.]**

Also, in light of the procedural posture of the case, there is no question for purposes of this 2014 opinion in Jackson that this third interview was custodial, and that the detective said nothing to Jackson to try to make it non-custodial. **[LED EDITORIAL NOTE: Note that interrogations of persons incarcerated under conviction are not necessarily custodial based merely on the fact of the person’s incarceration. Maryland v. Shatzer, 559 U.S. 98 (2010) April 10 LED:03. There is no discussion of Schatzer in Jackson.]** The detective began the third interrogation by telling Jackson that it would be in Jackson’s best interest to change his mind about his decision a year earlier and to now talk to the detective about the murder. Jackson told the detective repeatedly in response to the detective’s persistent requests that Jackson still did not want to talk. Finally, Jackson said: “Yeah, well, you know, I didn’t do this. You know, I just happened to be there.”

At Jackson’s first trial in 1995, his admission to the detective that “I just happened to be there” was a key part of the prosecutor’s argument to the jury. Jackson was convicted in 1995 of first degree murder in his first trial. The California appellate courts then rejected Jackson’s Miranda argument, concluding that his “I just happened to be there” statement was “volunteered” and, somehow, for that reason admissible. On federal court habeas corpus review, however, a 2004 Ninth Circuit decision (Jackson v. Giurbino, 364 F.3d 1002 (9<sup>th</sup> Cir. 2004)) concluded that the detective had violated Jackson’s Miranda rights by interrogating him in the third session without first giving Miranda warnings, and that the murder case therefore must be retried. In 2005, on remand, a California jury again convicted Jackson of first degree murder, this time without hearing anything about Jackson’s admission or about the third interview. That conviction is apparently now final.

Prior to his 2005 criminal trial, Jackson filed a Civil Rights Act lawsuit in federal district court against the detective and the sheriff’s office based on the Miranda violation. His lawsuit focused on his first conviction that was based on evidence obtained in the third interrogation. The United States District Court granted a motion of the detective and the sheriff’s office to dismiss the lawsuit. Taking the factual allegations in the best light for the plaintiff Jackson, however, as the appellate court must in reviewing summary judgment dismissal of a Civil Rights Act lawsuit, the Ninth Circuit has reversed the District Court decision and remanded the case for trial.

Detective’s potential liability under the Civil Rights Act: The detective’s main argument against being sued was that Jackson was ultimately convicted of the crime. Under Heck v. Humphrey, 512 U.S. 477 (1994), to put the principles in simplified terms, a person generally may not sue for a Civil Rights Act violation where the lawsuit depends on a theory that in effect challenges plaintiff’s outstanding criminal conviction. The Jackson Court rules, however, that Jackson’s conviction in his second trial was not based on his admissions to the detective, so his lawsuit

does not depend on a theory that undercuts his outstanding criminal conviction (in his second trial) for purposes of Heck v. Humphrey.

Agency's potential liability under the Civil Rights Act: Under the United States Supreme Court decision in Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), again putting the principles in simplified terms, a government body may not be separately held liable as an agency based merely on wrongful conduct of an employee. Only if the employee was following official policies, whether policies of action or inaction, may the government be held liable. The Jackson Court rules that the detective's testimony in earlier proceedings that he routinely used the "ploy" of not Mirandizing custodial suspects when he felt that the suspects would not waive their rights was sufficient evidence of a policy of inaction, i.e., evidence of the agency not developing adequate affirmative policies and supervising detectives' Miranda practices, for purposes of Monell. A jury could conclude from this evidence, the Jackson Court concludes: (1) that the failure to Mirandize was not an isolated instance of error by the detective, (2) that the agency should have known of the detective's routine unlawful practice, and (3) that the agency was not doing its job for purposes of Monell.

A second requirement of Monell is that the plaintiff claiming injury due to an agency's policy of inaction establish that the existence of an reasonable policy could have prevented the harm. The Jackson Court concludes that this Monell requirement is met under the allegations and pleadings in this case, and therefore the case must be remanded for trial.

Result: Reversal of United States District Court (Central District, California) orders that ruled for the detective and the sheriff's office, remand of case for possible trial.

**LED EDITORIAL COMMENTS: 1. Civil Rights Act liability for a Miranda violation. In Chavez v. Martinez, 538 U.S. 760 (2003) Sept 03 LED:02, the United States Supreme Court declared that failure to Mirandize custodial suspects, as well as other Miranda violations cannot provide the basis for a Civil Rights Act lawsuit unless the statements unlawfully obtained in the interrogation are subsequently used in a criminal case against the suspect. We have no statistical data, but we believe that litigation since Chavez over Miranda violations has been sparse. The few appellate decisions have primarily focused on what constitutes "use" of such a statement in a criminal case. See, for example, Stoot v. City of Everett, 582 F.3d 910 (9<sup>th</sup> Cir. 2009) Oct 09 LED:08 (the Ninth Circuit holds, contrary to the rulings in several other federal circuits, that use in a trial is not required to support such a lawsuit; use in a preliminary proceeding is sufficient). We believe that such litigation over technical Miranda violations has been limited for three main reasons: (1) because of the rule of Heck v. Humphrey described above; (2) because of the "use" requirement of Chavez; and (3) because, in most circumstances where Heck or Chavez does not independently bar the lawsuit, the officer would be able to meet the qualified immunity standard for Civil Rights Act liability by showing that a reasonable officer would have believed that, under the facts, the officer was following the Miranda requirements.**

**2. What are the damages for this convicted murderer? The detective and the sheriff's office also argued that plaintiff could not prove damages because, in light of his incarceration under long-term sentences on convictions for unrelated crimes in place by the time of his 1995 trial, his length of time in prison was not affected by his 1995 murder conviction that was set aside. The Jackson Court, however, points out that a jury can award "nominal" damages for a constitutional violation. Unfortunately for law enforcement agencies, nominal damages in Civil Rights Act lawsuits are usually accompanied by requests from the plaintiff for not-so-nominal attorney fees.**

**(3) NINTH CIRCUIT PANEL UPHOLDS FIREARMS STORAGE AND AMMUNITION SALES ORDINANCES AGAINST SECOND AMENDMENT CHALLENGE** – In Jackson v. City and County of San Francisco, 746 F.3d 953 (9<sup>th</sup> Cir., March 24, 2014), a three-judge panel of the Ninth Circuit holds that two San Francisco firearm and ammunition ordinances are constitutional.

Handgun owners and gun rights advocacy organizations brought action against city and county, challenging validity of city ordinances regulating handgun storage and ammunition sales as impermissible violations of the right to bear arms under the Second Amendment.

The Ninth Circuit Court Staff Summary (which constitutes no part of the opinion) summarizes the opinion as follows:

The panel affirmed the district court’s denial of plaintiffs’ motion to preliminarily enjoin two San Francisco firearm and ammunition regulations in an action alleging that the regulations were impermissible violations of the right to bear arms under the Second Amendment.

The panel held that the first regulation, San Francisco Police Code section 4512(a), (c)(1), which requires handguns to be stored in a locked container at home or disabled with a trigger lock when not carried on the person, burdened the rights protected by the Second Amendment because such storage regulations were not part of a long historical tradition of proscription. Nevertheless, the panel determined that section 4512 was not a substantial burden on the Second Amendment right itself because it did not prevent an individual from possessing a firearm in the home. Applying intermediate scrutiny, the panel held that San Francisco had shown that section 4512’s requirement that persons store handguns in a locked storage container or with a trigger lock when not carried on the person was substantially related to the important government interest of reducing firearm-related deaths and injuries.

The panel held that the second regulation, San Francisco Police Code section 613.10(g), which prohibits the sale of hollow-point ammunition within San Francisco, may burden the core Second Amendment right of self-defense and the record contained no persuasive historical evidence suggesting otherwise. The panel therefore held that section 613.10(g) regulated conduct within the scope of the Second Amendment. Applying intermediate scrutiny, the panel held that San Francisco carried its burden of establishing that section 613.10(g) was a reasonable fit to achieve its goal of reducing the lethality of ammunition.

The panel held that because San Francisco’s regulations did not destroy the Second Amendment right, and survived intermediate scrutiny, the district court did not abuse its discretion in concluding that plaintiffs would not succeed on the merits of their claim.

**Result:** Affirmance of United States District Court (Northern District California) order denying motion for preliminary injunction preventing enforcement of ordinances.

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**WASHINGTON STATE SUPREME COURT**

**SUSPECT'S STATEMENT DURING INTERROGATION THAT "I DON'T WANT TO TALK RIGHT NOW, MAN" MUST BE VIEWED IN CONTEXT OF WHAT WAS SAID AND DONE BEFORE THAT, AND WAS MERELY HIS WAY OF SAYING HE WAS CHOOSING TO MAKE POLICE-AIDED WRITTEN STATEMENT OVER MAKING TAPE-RECORDED STATEMENT**

State v. Piatnitsky, \_\_\_Wn.2d \_\_\_, 325 P.3d 167 (May 8, 2014)

Facts:

Piatnitsky was arrested at a residence in the early-morning for a suspected criminal homicide plus an assault on a second person, both by shotgun. The attack had occurred a few hours earlier at a nearby house party. The arresting officer Mirandized Piatnitsky, who admitted to shooting the two victims. Witnesses also identified him as the shooter. He was booked into jail.

Later that morning, two detectives interviewed Piatnitsky about the shooting. After about an hour of questioning, during which Piatnitsky indicated he was willing to give a taped confession, the detectives turned on a tape recorder. The recorded conversation is quoted by the Supreme Court majority opinion as follows:

DET: Okay, and earlier you were advised of your Miranda rights. Do you remember that, your Constitutional rights by the officer, do you remember that?  
SUS: Yeah; I have a right...  
DET: Did you understand those?  
SUS: I have a right to remain silent.  
DET: Right. I'm gonna go ahead and. . .  
SUS: That's the, that's the only one I remember.  
DET: Okay. I'm gonna read 'em for you again.  
SUS: That's the one I, I should be doing right now.  
DET: Well, you know, like we told you, you don't have to talk to us. Okay. You've already admitted to this thing. We want to go on tape, and because it's an important part of this, and we talked about that, and that's the part when you go back to get the shotgun. Before we do any of that, I want to read you.  
SUS: What are you guys talking about, man?  
DET: I want to read you your rights, okay. Do you understand that you have the right to remain silent?  
DET2: You gotta answer out loud, SAM.  
SUS: I'm not ready to do this, man.  
DET2: You just told us that you wanted to get it in your own words on tape. You asked us to turn the tape on; remember?  
SUS: I just write it down, man. I can't do this. I, I, I just write, man. I don't, I don't want...  
DET: Okay.  
SUS: I don't want to talk right now, man.

The detectives Mirandized Piatnitsky again, and he signed a waiver form. **LED EDITORIAL NOTE: RCW 9.73.090(1)(b), as interpreted by the Washington courts, requires that officers taping a custodial interrogation of an arrestee Mirandize the arrestee on tape even if the arrestee has already waived his or her Miranda rights prior to the recorder being turned on. See State v. Courtney, 137 Wn. App. 376 (Div. III, 2007) May 07 LED:08.**] During the recording, the detectives clarified their understanding of the situation:

DET2: Are you sure you don't want to do it on tape like you said you did; you want to get in your own words?

SUS: Yes, sir.

DET2: Okay.

DET: So you'd rather take a written statement, do a written one.

SUS: Yes. I don't know (unintelligible)[.]

DET: Okay, it's too hard to talk about; you'd rather write it.

The Supreme Court majority opinion describes as follows what happened next:

Both detectives testified that the unintelligible portion of the recording was Piatnitsky stating once again that he did not want to make an audio recorded confession. The detectives complied with that request and stopped recording. Instead, one of the detectives wrote down Piatnitsky's version of the events, which Piatnitsky edited. At some point, Piatnitsky did not like where the questioning was going and he told detectives he was finished and cut off the interview. The detectives stopped asking questions and finished the statement. Piatnitsky then reviewed everything that had been written, requested some changes, and signed the corrected statement.

#### Proceedings below:

Piatnitsky was charged with murder in the first degree and other crimes. He lost a suppression motion challenging the admissibility of his written statement. A jury found Piatnitsky guilty of murder in the first degree, attempted murder in the first degree, possessing a stolen firearm, and unlawful possession of a firearm in the second degree.

ISSUE AND RULING: Piatnitsky had waived his Miranda rights to an officer at the time of arrest and made some admissions to the arresting officer. Later that morning, he talked to detectives for a while, telling the detectives that he was willing to give a tape-recorded statement. But after the detectives turned on the tape recorder, Piatnitsky apparently changed his mind about the tape recording when he said, "I'm not ready to do this, man?" and then, when a detective reminded Piatnitsky that he had moments earlier agreed to give a recorded statement, Piatnitsky said: "I just write it down, man. I can't do this. I, I, I just write, man. I don't, I don't want . . . I don't want to talk right now, man."

Under the United States Supreme Court's Miranda-based precedents, should Piatnitsky's statement, "I don't want to talk right now, man" be placed in the context of all that had occurred up to that point and viewed as Piatnitsky not exercising his right to silence but instead merely explaining his choice of making a police-aided written statement over making a tape-recorded statement? (ANSWER BY SUPREME COURT: Yes, rules a 5-4 majority).

Result: Affirmance of Division One Court of Appeals decision (see State v. Piatnitsky, 170 Wn. App. 195 (Div. I, Aug. 20, 2012) **Nov 12 LED:11**) that affirmed the King County Superior Court convictions of Samuel Mikhail Piatnitsky for murder in the first degree, attempted murder in the first degree, possessing a stolen firearm, and unlawful possession of a firearm in the second degree.

#### ANALYSIS BY SUPREME COURT MAJORITY:

Case law under the United States Supreme Court's 1966 Miranda opinion requires that when a suspect asserts his or her Fifth Amendment right to counsel or to remain silent during a custodial

interrogation, the interrogation must cease immediately. The case law, however, has established that where a suspect has initially waived his or her Miranda rights, the suspect's subsequent assertion of the right to counsel or to silence during the interrogation must be unambiguous. If ambiguous, then the questioning may continue. See Davis v. United States, 512 U.S. 452 (1994) **Sept 94 LED:02** (ambiguous reference to right to counsel - - "Maybe I should talk to a lawyer"); State v. Radcliffe, 164 Wn.2d 900 ((2008) **Dec 08 LED:18** (ambiguous reference to right to counsel - - "Maybe I should contact an attorney"); Berghuis v. Thompkins, 560 U.S. 370 (2010) **July 10 LED:02** (silence in the face of questioning held not to be an implied assertion of right to silence).

Under the U.S. Supreme Court precedent of Smith v. Illinois, 469 U.S. 91 (1984), law enforcement officers are not allowed to talk a person out of an unambiguous assertion of Miranda rights. The proper focus in the Piatnitsky case, therefore, is on what was said and done up to Piatnitsky's statement, "I don't want to talk right now, man," before the detectives responded to it.

The majority opinion in Piatnitsky concludes after analysis of the facts and the law that when viewed in context, Piatnitsky's statement that "I don't want to talk right now" was expressing his decision to give a written statement, as opposed to giving a tape recorded statement. His statement was not an unambiguous assertion of his right to silence, the majority justices conclude.

#### DISSENT:

Justice Wiggins writes a dissent that is joined by Justices Fairhurst, Stephens and Gordon McLoud. The dissent argues that the defendant unambiguously asserted his right to silence.

**LED EDITORIAL COMMENTS:** The majority opinion in Piatnitsky notes that defendant made an argument to the Supreme Court that the Court should interpret the Washington constitution as providing greater protection than the federal constitution. The majority opinion states that the Court refuses to address this argument in this case because defendant did not raise the argument earlier in the litigation. We have noted in our LED commentary on numerous occasions, the Washington courts have consistently followed the federal constitutional rulings and have never expressly relied on independent Washington constitutional grounds for rulings in this interrogations subject area as they have in the subject area of arrest, search and seizure. See our most recent comment to this effect, supported by case citations, in follow-up to the U.S. Supreme Court decision in Berghuis v. Thompkins, 560 U.S. 370 (2010) July 10 LED:02. But we have noted on numerous occasions that the Washington Supreme Court could choose at some point in the future to adopt an independent grounds approach to the interrogations area.

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

should have stopped, it nonetheless appears more fair and reasonable (and thus gives the government a better chance to win on the Miranda-assertion issue) if the officer responds to an ambiguous assertion by clarifying the statement, and then re-Mirandizing.

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

**WASHINGTON OFFICERS LAWFULLY OBTAINED MIRANDA WAIVER BECAUSE MIRANDA-BASED INITIATION-OF-CONTACT BAR WAS NOT TRIGGERED WHERE: (1) SUSPECT EARLIER ASSERTED CANADIAN CHARTER RIGHT TO ATTORNEY TO CANADIAN OFFICERS INVESTIGATING CANADIAN CRIME, AND (2) THE CANADIAN OFFICERS WERE NOT ACTING AS AGENTS OF THE WASHINGTON OFFICERS**

State v. Trochez-Jimenez, \_\_\_ Wn.2d \_\_\_, 325 P.3d 175 (May 8, 2014)

Facts and Proceedings below:

Trochez-Jimenez is a Mexican national. He shot and killed a man in King County, Washington. He fled to Canada. He was arrested by Canadian officers on suspicion of entering Canada unlawfully. He was advised of his right to an attorney under the “Canadian Charter of Rights and Freedoms.” Trochez-Jimenez requested an attorney (The trial court record is unclear as to whether Trochez-Jimenez ever got an attorney in response to his request.)

Canadian officers learned that Trochez-Jimenez was a suspect in the King County homicide. They contacted the King County Sheriff’s Office and advised detectives of his situation. Two King County detectives drove to Vancouver and contacted Trochez-Jimenez at the Canadian jail after waiting for Canadian investigators to finish questioning him on the immigration matter. The King County detectives Mirandized him. The detectives were aware of his assertion to the Canadian officers that he wanted an attorney, but they were not aware of whether he had been provided with one. He waived his rights and made incriminating statements.

He was charged with first degree murder in King County Superior Court. The trial court rejected his suppression motion, ruling that detectives had not violated Miranda by initiating contact with defendant. Trochez-Jimenez was convicted of second-degree murder while armed with a firearm and sentenced to 294 months.

ISSUE AND RULING: Does the Miranda-based initiation-of-contact rule make unlawful the King County detectives’ action of seeking a Miranda waiver of rights to silence and counsel while Trochez-Jimenez remained in continuous custody following his request for an attorney under the Canadian Charter’s right to attorney, a request that he made to Canadian officers investigating solely a possible violation of Canadian immigration law? (ANSWER BY SUPREME COURT: No; the Court is unanimous in holding that the King County detectives were not barred from initiating contact with defendant to obtain a waiver of his Miranda rights)

Result: Affirmance of Court of Appeals decision (see State v. Trochez-Jimenez, 173 Wn. App. 423 (Div. I, Feb. 12, 2013) **April 13 LED:19**) that affirmed the King County Superior Court conviction of Cesar E. Trochez-Jimenez for second degree murder.

ANALYSIS:

The Court explains that the combined effect of the U.S. Supreme Court decisions in Edwards v. Arizona, 451 U.S. 477 (1981) and Arizona v. Roberson, 486 U.S. 675 (1988) is that officers

subject to United States constitutional requirements, such as the King County detectives here, generally may not lawfully contact a suspect to seek a waiver of Miranda rights where the suspect (1) has asserted the Miranda right to an attorney **during a custodial interrogation situation to which Miranda applies**, and (2) has since remained in continuous custody. The Court holds, however, “that a suspect’s invocation of a right to counsel under a foreign charter, in a foreign investigation conducted solely by foreign authorities without United States involvement, does not trigger the prophylactic protections of Edwards.” Miranda does not apply to such questioning by foreign officials, the Court explains, so the initiation-of-contact rule of Edwards was not triggered by what defendant said to the Canadian officers who were not acting as agents of the King County detectives. The Court cites decisions from other jurisdictions rejecting similar arguments to that of defendant.

The Court also explains that, to the extent that Trochez-Jimenez’s argument suggests that his earlier request for an attorney to Canadian officers should have alerted the King County detectives of his wishes, even though the detectives had not yet contacted him, the argument would conflict with the United States Supreme Court decisions holding that Miranda rights cannot be anticipatorily asserted. See Montejo v. Louisiana, 556 U.S. 778 (2009) **July 09 LED:15**; McNeil v. Wisconsin, 501 U.S. 171 (1991).

**LED EDITORIAL NOTE: For a discussion of the Miranda-based initiation-of-contact rules under Edwards/Roberson for continuous custody suspects, see the article “Initiation Of Contact Rules Under The Fifth Amendment” (by John Wasberg, current through July 1, 2013) on the Criminal Justice Training Commission’s Internet LED page under “Special Topics.”**

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

**AREA UNDER HOME HELD TO BE PART OF DWELLING UNDER BURGLARY STATUTES EVEN THOUGH: (1) IT WAS NOT A LIVING AREA AND NO ONE LIVED IN THE AREA, AND (2) THE AREA WAS NOT DIRECTLY ACCESSIBLE FROM THE LIVING AREA ABOVE**

State v. Moran, \_\_\_ Wn. App. \_\_\_, 324 P.3d 808 (Div. I, May 19, 2014)

Facts: (Excerpted from introductory summary by Court of Appeals)

Kevin Moran was charged with and convicted of residential burglary after tampering with a sewage pipe at the house of his ex-wife, Karen Moran. Kevin cut open the sewage pipe and filled it with foam that hardens and expands once it contacts air, which caused the toilet and the bathtub to back up. To carry out his act of sabotage, Kevin crawled underneath the deck, through an access door set in the house’s foundation, and into a lighted area beneath the house with access to the pipe. [The area was not a living area, and no one lived there; and the area was not directly accessible from the living area above.]

Proceedings below:

Kevin Moran was convicted of residential burglary.

**ISSUE AND RULING:** To carry out an act of sabotage on a sewage pipe of his ex-wife’s home to which he had no right of possession, defendant crawled underneath the deck, opened an access door set in the house’s foundation, and went into a lighted area beneath the house to



get access to the sewage pipe. Did the area that defendant unlawfully entered with intent to commit a crime constitute a dwelling for purposes of the residential burglary statute, even though the area was not a living space, no one lived in the area, and the area was not directly accessible from the living area above it? (ANSWER BY THE COURT OF APPEALS: Yes)

Result: Affirmance of Snohomish County Superior Court conviction of Kevin John Moran for residential burglary.

ANALYSIS:

As enacted by our state legislature, the crime of residential burglary is as follows:

(1) A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.

(2) Residential burglary is a class B felony. . . .

RCW 9A.52.025 (emphasis added). “Dwelling” is defined as “any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging.” RCW 9A.04.110(7) (emphasis added).

We first inquire which building or structure is at issue here. The record, as well as the parties’ briefing, reveals that the only building or structure at issue is the house.

We next inquire as to the use of the house. The record establishes that the house was being used for lodging. Kevin does not contest this.

We finally inquire whether Kevin entered a portion of the house and, if he did, whether his entry was unlawful. The record establishes that Kevin did, in fact, enter a portion of the house. In order to access the area at issue, Kevin would have had to first remove the lattice that hung down from the deck to the ground and then crawl under the deck to reach the access door, which was set in the foundation of the building. Once through the access door, Kevin would have entered a lighted area with plastic covering the floor, which was large enough for him to stand up in. Clearly, this enclosed area beneath the living space, regardless of what moniker is assigned to it, was a portion of the house. The access door was set in the house’s foundation, the house’s utilities were accessible from the area, and access could only be gained by crawling underneath the deck of the house. Therefore, when Kevin entered the area, he entered a portion of the house.

Furthermore, the record establishes that Kevin’s entry was unlawful. Although Kevin had ownership rights in the house, Karen was awarded sole possession of the house in the divorce decree. Kevin could only enter the premises after obtaining Karen’s permission. On the day in question, the record shows that he did not obtain her permission. Accordingly, his entry was unauthorized and, hence, unlawful.

Nevertheless, in support of his contention that the area at issue did not constitute a dwelling, Kevin argues that (1) no one was living in the area at issue, and (2) it

was inaccessible from inside the residence. We have already considered and rejected Kevin's first argument. State v. Neal, 161 Wn. App. 111, 114-15 (2011) **Sept 11 LED:10** (although no one was living in a tool room contained within an apartment building, the tool room constituted a "portion" of a building that was used for lodging). With respect to Kevin's second argument, the plain language of the statute does not require an area such as this to be accessible from inside the living space of a residence in order to be a "portion" of the "dwelling." Moreover, although no court in Washington has considered Kevin's second argument, courts in other jurisdictions have considered similar arguments and rejected them. See, e.g., Burgett v. State. 314 N.E.2d 799, 803 (Ind. 1974) ("Being under the same roof, functionally interconnected with and immediately contiguous to other portions of the house, it requires considerable agility to leap over this fulsome interrelationship to a conclusion that a basement is not part of a dwelling house because no inside entrance connects the two.").

[Some citations revised for style]

### **MIRANDA WARNINGS DID NOT BECOME STALE IN 3.5 HOURS DESPITE FACT THAT INTERROGATORS CHANGED**

State v. Fedorov, \_\_\_ Wn. App. \_\_\_, 324 P.3d 784 (Div. I, May 12, 2014)

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

On October 7, 2012, [Officer A] stopped Fedorov for speeding. Fedorov had no driver's license. [Officer A] asked him for his name and date of birth. He identified himself as Zachary Anderson with an August 31, 1984 birth date. A computer search showed multiple arrest warrants for an individual named Zachary Anderson, born on August 30, 1984. [Officer A] decided the match was sufficiently close and arrested Fedorov on the warrants. [Officer B] read Fedorov his Miranda rights in [Officer A's] presence. Fedorov said he understood those rights and was willing to talk to the officers.

Still not convinced that Fedorov was who he claimed to be, officers took his fingerprints and compared them to the known prints for Zachary Anderson. Officers determined Fedorov's true name was Vadim Fedorov. At trial, [Officer C] testified that he contacted Fedorov in the booking area [three to three-and-a-half hours after the Mirandizing by Officer B] after learning about the fingerprint results:

Q. You took that information. You went out to that area?

A. Yes. And I walked up by one of the deputy stations and I called for, I think it was a Zachary and then an Anderson. And then finally I called for Fedorov, and Mr. Fedorov raised his hand. I motioned him to come up to me, and he came up. And I said, "You know, it really pisses me off. You waste our time like this. Why didn't you just tell me who you were?" I said, "Do you think we're stupid?" And he says, "Yeah." I said, "Go sit down."

.....

The State charged Fedorov with second degree identity theft, alleging he used the identity of Zachary Anderson, born on August 30, 1984, to mislead a public servant. A jury found Fedorov guilty as charged.

ISSUE AND RULING: Federov was in custody when he was Mirandized by Office B. He remained in continuous custody, and, as much as three-and-a-half hours later, Officer C questioned Federov without re-Mirandizing him. In light of the passage of time and change of interrogators, had the Miranda warnings become stale at the time of the questioning by Officer C? (ANSWER BY COURT OF APPELAS: No, the warnings had not become stale)

ANALYSIS: (Excerpted from Court of Appeals opinion)

The United States Supreme Court “has eschewed per se rules mandating that a suspect be re-advised of his rights in certain fixed situations in favor of a more flexible approach focusing on the totality of the circumstances.” United States v. Rodriguez-Preciado, 399 F.3d 1118, 1128 (9th Cir. 2005) **May 05 LED:07**. Generally, “[w]here a defendant has been adequately and effectively warned of his constitutional rights, it is unnecessary to give repeated recitations of such warnings prior to the taking of each separate in-custody statement.” State v. Duhaime, 29 Wn. App. 842, 852 (1981) (fresh warnings held unnecessary where the defendant signed a written waiver of constitutional rights less than two hours before the challenged questioning occurred).

Fedorov argues fresh warnings were necessary partly because three-and-a-half hours passed between the initial advice of rights and the challenged questioning. But courts have upheld confessions in the face of far lengthier delays. See 2 Wayne R. LaFave et al, Criminal Procedure § 6.8(b) at 805 (3d ed. 2007) (collecting cases supporting proposition that fresh warnings are generally unnecessary “after the passage of just a few hours”). In Rodriguez-Preciado, for example, the court held fresh warnings were unnecessary even though the police resumed questioning 16 hours after advising the defendant of his rights. . . . The interval here—three and a half hours—was brief by comparison.

Fedorov also contends fresh warnings were necessary due to the “change in personnel.” He relies on Zappulla v. New York, 391 F.3d 462 (2d Cir. 2004), but that case is distinguishable. In Zappulla, the court concluded the defendant’s confession violated due process where

- (1) 24-hours had lapsed between the giving of Miranda warnings and the questioning of Zappulla about [the victim’s] murder;
- (2) Zappulla was not in continuous police custody between the initial giving of Miranda warnings and the subsequent interrogation; and
- (3) the second interrogation concerned a crime unrelated to that for which he was initially arrested.

Here, the “lapse” was relatively short, and Fedorov remained in police custody after the issuance of Miranda warnings. Finally, although [Officer C] questioned Fedorov about a crime arguably unrelated to the arrest warrants, significantly, both [officers] asked questions for the same purpose—to determine Fedorov’s true identity. The mere lapse of time and change of interrogator does not render Miranda warnings “stale” necessitating repetition of rights before a voluntary statement may be made. Wvrick v. Fields, 459 U.S. 42, 48-49 (1982) . . . . **LED**

**EDITORIAL NOTE:** The Court of Appeals also rejects Fedorov’s argument that “the securing of the fingerprint comparisons” constituted a change in circumstances necessitating fresh warnings, both because he offered no supporting case law authority and because the Court concludes that the argument lacks merit.].

[Some citations omitted, others revised for style]

**LED EDITORIAL COMMENT:** Totality-of-the-circumstances tests are always a little dicey because court precedents with varying facts can be difficult to compare. But the decision in this case seems solid under the precedents. The lapse-of-waiver issue is whether a reasonable person would have forgotten the warnings or believed that the waiver was no longer in effect. Where there is a break in questioning following a waiver of rights, courts look at (1) the length of time of the break (cases have held that even several days do not cause a lapse where other factors are favorable to the State), (2) change of location, (3) change in officers, and (4) change in topic. Also a factor against the State is where a Miranda waiver was initially obtained but no questions were asked at that point, and then a considerable lapse of time occurred before questioning first began. Another factor against the State is a temporary release from custody and then re-arrest. Always a factor in favor of the State is that the person was reminded in general terms of the prior warnings and waiver, and asked, even in a leading way, if he or she remembered being advised and agreeing to talk.

**“PLACE OF ABODE” EXCEPTION IN DISPLAY OF WEAPON STATUTE, RCW 9.41.270, DOES NOT APPLY TO DISPLAY OF WEAPON IN ONE’S BACK YARD**

State v. Owens, \_\_\_ Wn. App. \_\_\_, 324 P.3d 757 (Div. II, April 29, 2014)

Facts: (Excerpted from Court of Appeals opinion)

On the evening of September 3, 2011, Owens had an altercation with his 16-year-old son, CO, at their home in rural Jefferson County. CO’s mother, Tammy, intervened and Owens began arguing with her about interrupting him while he was disciplining their son. At that point, CO went outside and called 911.

CO told the 911 operator that Owens may have been drinking earlier in the evening and that Owens was yelling and hitting Tammy and him. CO also informed the operator that the family kept a number of rifles in the house. Owens came outside to talk with CO at some point during the 911 call, and CO put his phone in his pocket without hanging up. Owens told CO that really hurt his feelings to have his son disrespect him in front of his wife. Owens also said, “You call the cops? Are they coming here? Well, good. I’ll get the gun.”

A number of Jefferson County Sheriff’s deputies responded to the scene. Because a locked gate prevented vehicular access to the house, deputies had to park a quarter mile away and approach the home on foot. As the deputies came around the back corner of the house, they saw Owens come out of the back door carrying a rifle. The deputies announced their presence, yelling, “Sheriff’s office, drop the gun.” Owens ignored the request and continued walking toward the detached garage, 20 to 30 feet away from the house. He then ducked down behind a car outside the garage and, after 30 seconds or so, stood up and

walked towards the deputies with his hands in the air. The deputies arrested Owens.

Proceedings below:

The Jefferson County District Court jury convicted defendant for unlawful display of a firearm under RCW 9.41.270. But the Superior Court reversed, ruling that the jury should have been instructed that a person's yard is part of his or her "place of abode" for purposes of the exception of subsection (3) of RCW 9.41.270.

ISSUE AND RULING: Was defendant's back yard area part of his or her "place of abode" for purposes of RCW 9.41.270? (ANSWER BY COURT OF APPEALS: No)

Result: Reversal of Jefferson County Superior Court order and reinstatement of District Court conviction under RCW 9.41.270 against Mark Francis Owens.

STATUTORY LANGUAGE AT ISSUE:

RCW 9.41.270 reads in relevant part as follows:

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

. . . .

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

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

ANALYSIS: (Excerpted from Court of Appeals opinion)

The statute does not define the term "abode." Therefore, this court will give the term its plain and ordinary meaning ascertained from a standard dictionary. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 4 (1969) defines "abode" as the "place where one abides or dwells" and lists "residence" and "home" as synonyms.

Given this definition, we hold that, contrary to Owens's assertions, a plain meaning analysis dictates that the exception found in RCW 9.41.270(3)( a) only applies to situations where a person is in his or her home or residence. Here, it is undisputed that Owens displayed the rifle outside his home.

Division Three and Division One of this court have previously addressed the scope of the exception to the unlawful display of a weapon statute at issue in this case. . . . [U]nder either decision, Owens's conviction for unlawful display should be reinstated.

In State v. Haley, 35 Wn. App. 96 (1983), Division Three of this court addressed the situation where a juvenile defendant, who "was target practicing with a BB

gun from the deck area at the rear of his family residence,” scared two other children who had inadvertently wandered on to the edge of his family’s property. Noting that the legislature did not define the words “place of abode” used in RCW 9.41.270(3)( a), the court applied the ordinary meaning of “abode” and determined that “[ t]he ordinary meaning of abode is: one’ s domicile.” Haley, 35 Wn. App. at 98. . . . It then held that “the [attached] deck was an extension of the dwelling and therefore a part of the abode.”

In Smith, the defendant threatened tow truck workers with a gun when they were attempting to tow a vehicle on adjacent property. At the time, the defendant was “on the outskirts of his back yard where only a fence with breaks in it separated him from the tow operators.” [State v. Smith, 118 Wn. App. 480 (2003) **Sept 04 LED:23**] After accepting the Haley court’s definition of “abode,” Division One concluded that the “word ‘in’ clearly implies inside [the abode], not one’s back yard. If the Legislature wanted to enact a broader exception, it could have used ‘at’ rather than ‘in.’” Accordingly, Division One held that a back yard does not satisfy the place of abode exception under RCW 9.41.270.

Here, it is undisputed that Owens was neither inside his residence nor on a structure attached to his residence when he unlawfully displayed his rifle to police. Accordingly, under the holding in either Smith or Haley, RCW 9.41.270(3)(a) is inapplicable to this case and the district court did not err in refusing to give Owens’s proposed instruction.

[Some citations omitted, others modified; footnotes omitted]

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

**(1) IN TASER-DART-TRAINING CASE, COURT OF APPEALS ALLOWS A TROOPER TO SUE THE WASHINGTON STATE PATROL, APPLYING THE EMPLOYER-INTENT EXCEPTION TO THE WORKERS’ COMPENSATION STATUTORY PROVISIONS THAT GENERALLY GIVE EMPLOYERS IMMUNITY FROM EMPLOYEE LAWSUITS FOR INJURIES AT WORK** – In Michelbrink v. Washington State Patrol, \_\_\_Wn. App. \_\_\_, 323 P.3d 620 (Div. II, April 23, 2014), the Court of Appeals applies the employer-intent exception of the workers’ compensation statutory provisions that generally give employers immunity from employee lawsuits for injuries at work. The Washington State Patrol (WSP) trooper in the case alleges that he suffered fractured vertebrae and a bulged disc as a result of being shot with a Taser dart.

In 1995, in Birklid v. Boeing Company, 127 Wn.2d 853 (1995), a toxic chemicals exposure case, the Washington Supreme Court interpreted the deliberate intention exception of RCW 51.24.020 to reach beyond intentional assaults. Birklid held that the phrase “deliberate intention” in RCW 51.24.020 means (1) “the employer had actual knowledge that an injury was certain to occur” and (2) the employer “willfully disregarded that knowledge.” The Birklid court put limits on its holding, declaring that a cause of action would not be permitted if the employer knew that injury was only “substantially certain” to occur, or if “the employer had an opportunity consciously to weigh the consequences of its act and knew that someone, not necessarily the plaintiff specifically, would be injured. Disregard of a risk of injury is not sufficient to meet the first Birklid prong, certainty of actual harm must be known and ignored.

At the time of the training incident, all troopers going through Taser training were required to be shot by Taser darts as part of the training. The Michelbrink Court holds that under the first prong of Birkliid, the element of actual employer knowledge of certain injury has no minimum threshold for the extent or type of injury, and therefore the fact that the employer knew that Taser darts would pierce the skin and cause temporary incapacity is sufficient to meet the first prong. And because WSP knew that these injuries would occur to all employees participating in the Taser training, the “willful disregard” prong of the test is also met.

Result: Affirmance of Grays Harbor County Superior Court order denying WSP’s motion for summary judgment dismissal; case remanded for trial.

Status: the Court of Appeals denied WSP’s motion for reconsideration on May 21, 2014; at LED deadline, time remained for WSP to petition the Washington Supreme Court for discretionary review.

**(2) CUSTODIAL INTERFERENCE CHARGE BASED ON WEEKEND RETENTION UPHELD –** In State v. Cline, \_\_\_Wn. App. \_\_\_, 323 P.3d 614 (Div. II, April 22, 2014), Division Two of the Court of Appeals rules that evidence that a person who allegedly intentionally and without authority took and kept a 14-month-old child for a weekend is sufficient to support a prosecution for custodial interference in the first degree.

A parent or person acting under the parent’s direction is guilty of custodial interference in the first degree under RCW 9A.40.060(3) if the parent or other person intentionally retains or conceals a child, with the intent to deprive the other parent from access to the child for a “protracted period.” The Cline Court concludes that a weekend may constitute a “protracted period” for a 14-month-old child within the meaning of RCW 9A.40.060(3).

Result: Reversal of Cowlitz County Superior Court order that vacated the State’s charge against Teresa Lynn Cline for custodial interference in the first degree.

**(3) REFUSAL TO PERFORM FIELD SOBRIETY TESTS HELD ADMISSIBLE –** In State v. Mecham, \_\_\_Wn. App. \_\_\_, 323 P.3d 1088 (Div. I, April 21, 2014), Division One of the Court of Appeals rules that the prosecution may introduce, as evidence of guilt, that a DUI suspect refused to perform a field sobriety test (FST).

The Mecham Court explains that FSTs are a brief and reasonable method for determining whether an individual is intoxicated, and a request to perform FSTs is justified under the Terry stop exception to the warrant requirement. A defendant does not have a constitutional right to refuse to perform FSTs as part of a lawful Terry stop (though of course he cannot be compelled by force to perform them). Accordingly, the Mecham Court holds, the prosecution may comment on the defendant’s refusal to perform the tests.

Result: Affirmance of King County Superior Court conviction of Mark Tracy Mecham for felony DUI.

**(4) CONFRONTATION CLAUSE VIOLATED IN ALLOWING PROOF OF SCHOOL BUS STOP LOCATION THROUGH AERIAL MAP WITHOUT PRESENTING SCHOOL DISTRICT OFFICIAL –** In State v. Pearson, \_\_\_Wn. App. \_\_\_, 321 P.3d 1285 (Div. III, April 10, 2014), the Court of Appeals rules under the Sixth Amendment right to confrontation that the trial court correctly set aside a jury’s special finding for sentencing purposes that defendant’s delivery of a controlled substance occurred in a school zone

Under the Sixth Amendment right to confrontation, as interpreted in Crawford v. Washington, 541 U.S. 36 (2004) **May 04 LED:20** and subsequent decisions, “testimonial” hearsay statements may not be introduced against a defendant at trial unless the proponent of the evidence shows (1) the declarant witness is unavailable and (2) the defendant had a prior opportunity to cross-examine the declarant witness. Hearsay evidence generally is testimonial under this standard if a purpose of its preparation is for use in a criminal proceeding. The Pearson Court holds that admission of a map overlay showing the bus stop in this case violated confrontation principles because there was no testimony from a school district official, and because one of the purposes of generating the digital map is for potential use in a criminal proceeding. The Court rules that in this circumstance, a school district official must testify to the bus stop locations on the alleged date of the crime.

Result: Affirmance of Yakima County Superior Court vacation of jury’s special finding that Mark Tracy Mecham; the Court of Appeals does not address defendant’s conviction for delivery of a controlled substance (hydrocodone), which stands.

**(5) WARRANTLESS SEARCH OF PURSE WITHOUT SUSPECT’S CONSENT OR APPLICABILITY OF OTHER EXCEPTION TO WARRANT REQUIREMENT UNLAWFUL WHERE THERE WAS EVIDENCE SHE HAD POSSESSORY INTEREST IN THE PURSE –** In State v. Hamilton, \_\_\_ Wn. App. \_\_\_, 320 P.3d 142 (Div. II, March 11, 2014), the Court of Appeals rules that the warrantless search of a purse was invalid without the defendant’s consent, and that she did not abandon her privacy interest in the purse by leaving it in her own home.

The defendant’s husband had a protection order against her. When he came home, he discovered that his wife was inside and that she had placed some of her personal effects, including a purse, inside the house. He called police to come and serve his wife with the order. When the police arrived at the threshold, the husband brought them a purse that he said contained drug paraphernalia.

Officers searched the purse and found a glass pipe whose contents tested positive for methamphetamine. The wife was present but the officers did not ask her for consent to search the purse. When officers initially asked her if the purse was hers, she said no, but then she added that she had recently found the purse, thought it was cute, and had put her own rings in the purse. The Court of Appeals rules that the defendant had exercised a sufficient possessory interest in the purse to have a reasonable expectation of privacy, and that her husband had no possessory or ownership interest in the purse, so his consent to a search of the purse was invalid as to his wife.

Result: Reversal of Lewis County Superior Court conviction of Jessica Sophia Hamilton for unlawful possession of controlled substance.

**(6) IDENTITY THEFT STATUTE REQUIRES KNOWLEDGE THAT IDENTIFICATION INFORMATION BELONGS TO ANOTHER PERSON –** In State v. Zeferino-Lopez, 179 Wn. App. 592 (Div. I, Feb. 24, 2014), the Court of Appeals reverses a conviction of identity theft in the second degree, where the defendant used a Social Security card that he purchased for \$100 bearing his own name but a number belonging to someone else. The Court holds that the crime of identity theft under chapter 9.35 RCW required the State to prove that the defendant knew that the Social Security number that he used to open a bank account for himself, and that he had been fraudulently using for many years, was the number assigned to another person.



RCW 9.35.020(1) provides: “(1) No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.” (Emphasis added.)

Defendant testified that he had purchased the fake social security card many years earlier for \$100. The card was created with his own name on it. He testified that he had used the card ever since with no idea that the number on the card was assigned to another person. Because the defendant testified that he did not know the number on his fake Social Security card belonged to someone else, and the State had no evidence otherwise, the “knowingly” element of the charge of identity theft in the second degree is unsupported by the evidence.

The Court concludes:

The statute required the State to prove that Zeferino knew the Social Security number he was using actually belonged to someone else. Zeferino was using a Social Security number assigned to a minor in California. The Social Security card on which it appeared listed his name, not the owner’s. The only evidence about how and when Zeferino obtained the card was his own testimony that he bought it from someone for \$100 in order to be able to work in the United States. He used it openly for a number of years for that purpose and then to open a bank account. His testimony does not support an inference that he knew the number on it belonged to another person.

Result: Reversal of Skagit County Superior Court conviction of Felipe Zeferino-Lopez for identity theft in the second degree.

**LED EDITORIAL COMMENT: The Court’s analysis on the identity theft issue seems strong. We think that prosecutors may differ on whether, instead of identity theft, forgery might be charged for using a fake social security card to open a bank account. Any investigator who wishes to try to make such a case for prosecutor review will want to make a concerted effort to get the suspect (1) to give specifics about obtaining the card in the first place, and (2) to admit that he or she knew that the card was fake. The prosecutor will also need to be satisfied that, as a matter of legal interpretation, fraudulently obtaining a bank account causes some measure of loss or damage to the bank.**

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

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

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

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

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

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