Law Enforcement Digest

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597th Basic Law Enforcement Academy – May 16, 2006 through September 21, 2006

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Tac Officer:	Officer Rich Peterson – Seattle Police Department

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NINTH CIRCUIT OF THE U.S. COURT OF APPEALS

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U.S. v. Hartz, 458 F.3d 1011 (9th Cir. 2006) (Decision issued August 17, 2006)

Facts and Proceedings below:

Two Pierce County deputy sheriffs made a lawful "Terry stop" of a pickup truck based on reasonable suspicion (but not yet probable cause at the time of the stop) that the vehicle had been car-jacked earlier that evening. The Ninth Circuit opinion describes as follows what happened after that:

> As [the deputy sheriff] approached the driver's side of the truck, he saw both bullets and a knife on the dashboard. He then asked the driver, Reese Hinkle, to step out of the truck, told Pebley that there were bullets on the dashboard, and instructed Pebley to remove the passenger from the truck. Hartz was the passenger, and as he stepped out of the truck, [the deputy sheriff] saw a gun sitting on the seat. After frisking Hinkle for weapons, [the deputy sheriff] decided to frisk Hartz as well. At a suppression hearing in Washington state court, [the deputy sheriff] testified that he frisked Hartz because the gun inside the truck suggested that Hartz might be armed. While frisking Hartz, [the deputy sheriff] found, in a front pocket of Hartz's pants, an Altoids container and a golf-ball-sized bundle of cellophane wrapped with duct tape. [The deputy sheriff] testified in state court that when he felt the Altoids container and the wad of duct-tape wrapped cellophane together, he thought they were a weapon or that they might

> contain a weapon. Inside the Altoids tin, [the deputy sheriff] found a bundle of pills, but no information identifying them.
>
> After that the officer found evidence that (per the Ninth Circuit opinion), together with the pills he had discovered, provided probable cause for arrest. A search of Hartz's person incident to his arrest then turned up jewelry and paperwork that later helped convict him of a jewelry store robbery in Bellevue.
>
> After Hartz was charged in federal district court with the jewelry store robbery, he moved to suppress evidence seized and observed during the stop of the pickup truck. One of the issues he raised was whether the officer exceeded the permissible scope of a frisk when the officer took items out of Hartz's pocket after patting the items through the outside of the pocket. The district court rejected all suppression challenges, and Hartz was convicted of conspiracy, robbery (with firearm) and being a felon in possession of a firearm.

ISSUE AND RULING: Was the officer within the lawful scope of a Terry frisk, based on the officer's objective concern that items in Hartz's pocket could be or could contain weapons, in taking the items out of his pocket and in opening the Altoids tin? (ANSWER: Yes)

Result: Affirmance of U.S. District Court (Washington) conviction of Tommy Owen Hartz for conspiracy, robbery, and being a felon in possession of a firearm.

ANALYSIS: (Excerpted from 9th Circuit opinion)

The Ninth Circuit opinion explains as follows why the Court concludes that the officer did not exceed the lawfully permitted scope of a frisk in taking items out of the suspect's pocket:

> The decision to frisk Hartz was reasonable. As [the deputy sheriff] conducted the patdown search, he felt three items: an Altoids tin, containing prescription pills without a prescription; a marijuana pipe, made of a brass pipe fitting and plastic tubing; and golf-ball-sized celophane bundle wrapped in duct tape. [The deputy sheriff] testified that he thought each of these items could be, or could conceal, a weapon.
>
> Relying on our decision in United States v. Miles, 247 F.3d 1009 (9th Cir. 2001), Hartz urges that [the deputy sheriff] exceed the scope of a permissible patdown search under Terry. But Miles is inapposite here. In Miles, we suppressed evidence discovered during a patdown search, noting that: "The government suggests that the officer might legitimately have been looking for a tiny pen knife, needle, or other slender weapon. But the officer did not testify to such a motivation." **Here, however, [the deputy sheriff] did testify that he thought the items in Hartz's pockets might be weapons. Consequently, we conclude that [the deputy sheriff] conducted a valid patdown search under Terry**.

[Bolding added]

LED EDITORIAL COMMENT: This decision illustrates the point that the details, clarity, and reasonableness of officers' explanations for their actions (in their reports and in

their testimony) will often make the difference in whether evidence is held admissible or not.

WHERE OFFICERS CONDUCTING A "CONSENT" SEARCH OF A CAR DIRECTED THE DISEMBARKED, NOT-YET-SEIZED, CAR OCCUPANTS NOT TO WATCH THE SEARCH, THE OFFICERS MAY HAVE DESTROYED THE CONTINUING VOLUNTARINESS, AND HENCE THE VALIDITY OF, THE CONSENT

U.S. v. McWeeney, 454 F.3d 1030 (9th Cir. 2006) (Decision issued July 21, 2006)

Facts and Proceedings below:

During a lawful traffic stop of a car that Nicholas McWeeney's grandmother had loaned to McWeeney, a Las Vegas police officer became suspicious of possible criminal activity. Although the officer did not yet have objective "reasonable suspicion" that would have allowed him to seize the occupants under Terry v. Ohio. The officer orally asked McWeeney and his companion (the companion had been operating the vehicle) for consent to search the vehicle "for anything that [the occupants] were not supposed to have." They orally consented and got out of the car at the officer's request.

After backup arrived, the officers searched the car. They found nothing in the passenger area, but they then found a gun in the trunk, which led to McWeeney's arrest for being a felon in possession of a firearm.

Earlier, before the car search began, one of the officers directed McWeeney and his companion to stand behind the stopped car, facing away from it toward the front of the patrol car that had stopped them. At one point during the search, one of the officers noticed that either McWeeney or his companion was looking back to observe what the officers were doing, and one of the officers told whoever was looking back to "face forward and stop looking back."

McWeeney was charged in federal district court with being a felon in possession of a firearm. He moved to suppress the results of the search, but his motion was denied, and he pled guilty to the firearm charge, reserving his right to appeal on the suppression issue.

ISSUE AND RULING: A person being asked for consent to search has a right to refuse consent, a right to restrict the scope of the search, and a right to retract the consent. Where the officers directed the not-yet-subject-to-lawful-seizure McWeeney and his companion to look away from the search, did the officers destroy the voluntariness of the consent-to-search by, in effect, coercing McWeeney and his companion into not exercising their rights to revoke their consent to the search? (ANSWER: This question cannot be answered on the record in this case; the case must be remanded for the district court to take more evidence and to then decide the coercion question).

Result: Case remanded to U.S. District Court (Nevada) for an evidentiary hearing to determine whether coercion destroyed the would-be "consent" search and thus requires suppression of the firearm and reversal of McWeeney's conviction for being a felon in possession of a firearm.

ANALYSIS: (Excerpted from 9th Circuit lead opinion)

The lead opinion for the Ninth Circuit explains the majority's reasons for determining that the case must be remanded for the district court to determine whether there was coercion that tainted the consent to search:

> No doubt McWeeney and Lopez gave *general* consent to search the car. However, they had a constitutional right to modify or withdraw their general consent at anytime, including the point at which the officers prevented them from observing the search. It is possible, however, that the officers in this case improperly coerced McWeeney and Lopez into believing that they had no right to withdraw or limit their consent.
>
> [T]he right to withdraw consent [would] be valueless if law enforcement officers are permitted deliberately to coerce a citizen into believing that he or she had no authority to enforce that right.
>
> By turning around to view the search, McWeeney and Lopez implicitly made clear their desire to determine whether the search comported with the consent they had given. Perhaps it is true, as the government argues, that when the officers prevented them from turning around, McWeeney and Lopez should have realized that the search exceeded the scope of their consent and immediately withdrawn it. The government would like us to hold that, by failing to withdraw consent when they were asked to turn around, McWeeney and Lopez implicitly consented to the search. This we will not do.
>
> **As the government readily admitted at oral argument, prior to finding the handgun, the officers had no probable cause to handcuff McWeeney and Lopez and no probable cause to require that they sit in the back of a patrol car. Rather, the officers were relying on McWeeney and Lopez's consent, as free citizens, to aid in the officers' law enforcement duties . . .**
>
> At no time during their encounter with the officers were McWeeney and Lopez under a duty to submit to a search . . .
>
> However, when McWeeney or Lopez turned around to watch the search, they may have been asserting their right to delimit or withdraw their consent and coercively not been permitted to do so when instructed by the officers to turn back around. It is unclear whether the general atmosphere, or the officers' decision to prevent the observation of the search, was coercive. The district court made no finding with respect to coercion and there is nothing in the record which conclusively establishes that the officers' actions created a coercive atmosphere. Coercion, however, is the linchpin in this case. Absent coercion, McWeeney and Lopez simply failed to exercise their right to withdraw consent and the search was entirely proper. On the other hand, if the officers did coerce McWeeney and Lopez into believing that they had no authority to withdraw their consent, the officers violated McWeeney and Lopez's Fourth Amendment rights and the search was illegal.
>
> Whether or not McWeeney and Lopez were coerced into believing that they had no authority to withdraw their consent is a question of fact and must be decided by the district court in the first instance. The inquiry is essentially identical to the one required of the district court in assessing a Fourth Amendment seizure

> question. We thus adopt the reasoning used in Fourth Amendment seizure cases and hold that the district court must determine whether the officers created a setting in which the reasonable person would believe that he or she had no authority to limit or withdraw their consent. . .
>
> Under this analysis, the district court must determine whether the officers' conduct is objectively recognizable as intimidation directed mostly (or exclusively) at coercing McWeeney and Lopez into believing that they had no right to withdraw or delimit their consent once it was given, and whether a reasonable person faced with the officers' conduct would have believed that no such right existed. The non-exhaustive list of objective factors the district court should consider includes: (1) the language used to instruct the suspect; (2) the physical surroundings of the search; (3) the extent to which there were legitimate reasons for the officers to preclude the suspect from observing the search; (4) the relationship between the means used to prevent observation of the search and the reasons justifying the prevention; (5) the existence of any changes in circumstances between when consent is obtained and when the officers prevent the suspect from observing the search; and (6) the degree of pressure applied to prevent the suspect either from observing the search or voicing his objection to its proceeding further.

[Some citations and footnotes omitted; bolding added]

Judge Betty Fletcher writes a separate opinion. She disagrees with the majority judges as to whether there was a need to remand the case for a further hearing. She argues in vain her view that the officers clearly coerced McWeeney and his companion, and that the firearm should therefore be suppressed as the product of an illegal warrantless search.

LED EDITORIAL COMMENTS:

1) No issue was addressed in this case as to whether the request for consent turned a lawful non-investigatory "contact" into an unlawful Terry seizure.

Some Ninth Circuit decisions that have been grounded in the Fourth Amendment have questioned whether an officer making a traffic stop, having no suspicion as to criminal activity by a vehicle operator, may lawfully ask for consent to search the operator's vehicle. The Washington Court of Appeals held in State v. Cantrell, 70 Wn. App. 340 (Div. II, 1993) Oct 93 LED:21 (a decision also apparently grounded in the Fourth Amendment) that requesting consent to search in such suspicionless circumstances turns the stop into an unlawful criminal investigatory seizure. See our discussion of this question and related questions as to what constitutes a "seizure" in the April 2005 LED at pages 2-7 and in the March 2005 LED at pages 3-6. This issue (whether a consent request transforms a routine traffic stop into a "seizure" requiring reasonable suspicion of criminal activity) was not addressed in any way in the McWeeney decision of the Ninth Circuit.

2) The McWeeney decision does NOT mean that an ARRESTEE who has consented to a search of his or her vehicle cannot be handcuffed and held in the backseat of a patrol car while the consent search is ongoing.

In our excerpts from the McWeeney Court's "analysis" above, we used bold print on a paragraph in the opinion where the Court notes that this was not a circumstance where the suspects could lawfully have been - - based on probable cause or reasonable suspicion - - handcuffed and secured in a patrol car while the search was ongoing. We would suggest that in that very different circumstance - - i.e., where such lawful securing of an arrestee in a patrol car has occurred - - officers conducting a consent search of the detainee's vehicle, if logistics and the number of personnel on scene permit, have an officer keep on eye on the consenting suspect such that the officer can later testify that the suspect made no attempt to revoke consent during the search.

SCREEN DOOR IS NONETHELESS A DOOR FOR FOURTH AMENDMENT PRIVACY PURPOSES, BUT OFFICERS HAD EXIGENT CIRCUMSTANCES AND THEREFORE WERE JUSTIFIED IN OPENING THE SCREEN DOOR AND GOING INTO RESIDENCE WITHOUT A WARRANT

U.S. v. Arellano-Ochoa, 461 F.3d 1142 (9th Cir. 2006) (Decision issued August 31, 2006)

Facts and Proceedings below: (Excerpted from 9th Circuit opinion)

> Wyoming police caught an illegal alien headed to Arizona with $15,000 cash in the car. The car was registered to Daniel Priego of 640 Birch Lane, Billings, Montana. The driver, an illegal alien, claimed that he had been hired to drive the car to Arizona, deliver it to a woman who was going to "do something" with it, and then drive it to Montana and deliver it to the address on the car registration. He also said that there was an illegal alien at the Montana address. The police called U.S. Border Patrol in Montana to tell them that there was probably an illegal alien at the address at which the car was registered.
>
> The Border Patrol agent went to the address for what he called a "knock and talk." Because he did not want to be without backup and he thought drugs might be involved, he got a couple of Montana state narcotics investigators to go with him. All three investigators were in plainclothes and used unmarked cars. A young woman was sitting on the steps of the trailer smoking a cigarette and watching her two toddlers play. The Border Patrol agent identified himself and asked her if anyone else was there. She called into the trailer for "Daniel" or "Danny."
>
> The screen door to the trailer was closed, though the solid door behind it was wide open. The screen door was mesh on the top half but solid metal on the bottom half, so visibility was limited to what could be seen through the top half. One of the narcotics detectives noticed that the usual furniture, such as a kitchen table, was missing - a fact that he found odd in a house with toddlers. As the Border Patrol agent went to knock, a man came toward the door. But instead of talking to the officers, the man swung the solid door almost shut, dodged quickly out of sight behind it, and the officers saw the blinds at the front window shut.
>
> The Border Patrol agent immediately opened the screen door, pushed open the partially shut solid door, and started in. One of the narcotics detectives saw a .45 semi-automatic on the floor at the doorjamb (where the solid bottom half of the closed screen door had blocked it from view) and said "gun." The Border Patrol agent saw the man make a move toward the gun, and stepped between him and

the gun. The agents quickly entered, subdued the man after a brief scuffle, and handcuffed him. A protective sweep of the house revealed evidence of drug dealing, so the officers obtained a search warrant and found cocaine, methamphetamine, a sawed-off rifle, and $1,000 in small bills.

It turned out that "Daniel Priego" was really appellant Jose Luis Arrellano-Ochoa, an illegal alien. The border patrol agent opened the screen door because the man's "furtive" movements made the agent concerned for officer safety and the safety of the woman and toddlers nearby. After the man was subdued, the border patrol agent asked where he was born, and Arrellano-Ochoa said "Mexico." The agent asked for identification, and Arellano-Ochoa pointed to the counter, where he had a Mexican driver's license, a Mexican border crossing card, and a permit for extension of the border crossing card. The border patrol agent then knew that a crime was probable, because non-immigrant aliens, legal or not, generally are not permitted to possess firearms.

ISSUES AND RULINGS: 1) Were the law enforcement officers required to have a search warrant or to be able to invoke a search warrant exception in order to justify going through the screen door into the residence? (ANSWER: Yes); 2) Did the officers have exigent circumstances justifying forcible, warrantless entry of the residence in light of the background information they possessed on the suspect, when this information is combined with his evasive, furtive, and ominous actions in response to the presence of the police? (ANSWER: Yes)

Result: Affirmance of U.S. District Court (Montana) conviction of Jose Luis Arellano-Ochoa for federal drug crime.

ANALYSIS: (Excerpted from 9th Circuit opinion)

1) Screen Door Privacy

We first address whether opening the screen door has any Fourth Amendment significance. Whether opening a screen door breaches a reasonable expectation of privacy depends on the circumstances. During winter in a cold climate, people ordinarily keep the solid door shut. About the only way for mail and package delivery people, solicitors, missionaries, children funding school trips, and neighbors to knock on the door is to open the screen door and knock on the solid door. People understand that visitors will need to open the screen door, and have no expectation to the contrary. The reason why people do not feel that their privacy is breached by opening the screen door to knock is that it isn't; the solid door protects their privacy.

In the summer, when people leave their solid doors open for ventilation, the screen door is all that separates the inside from the outside. People can get a resident's attention by knocking on the screen door without opening it. Where the solid door is wide open, the screen door is what protects the privacy of the people inside - not just their visual privacy, which it protects only partially, but also their privacy from undesired intrusion. Where the solid door is open so that the screen door is all that protects the privacy of the residents, opening the screen door infringes upon a reasonable and legitimate expectation of privacy. That is what happened here.

The police cannot breach the reasonable expectation of privacy that people have in their homes without consent or a search warrant, unless one of the exceptions to the search warrant requirement applies. Once the screen door was open and the officers spotted the gun, the legal distance to a justified entry was short indeed. But the gun was not spotted until after the agent opened the screen door. Where the screen door is the only barrier between the inside of the house and the outside, the police cannot open the screen door without consent or some exception. Arrellano-Ochoa did not consent.

We are satisfied, though, that exigent circumstances justified opening the screen door. Exigent circumstances justify a warrantless intrusion into a home where a reasonable officer "would believe that entry . . . was necessary to prevent physical harm to the officers or other persons." Whether exigent circumstances exist in a given case is a fact-specific inquiry that depends on the totality of the circumstances. Opening the screen door, spotting the gun, and rushing in between the gun and Arrellano-Ochoa was not a "protective sweep," because it did not require the officers to search the premises or the area outside Arrellano-Ochoa's reach after they subdued him. The critical warrantless intrusion in this case was opening the screen door, which occurred before the officers spotted the gun.

2) Exigent Circumstances

This intrusion was justified by exigency, which was supplied by the background information on Arellano-Ochoa and his "furtive" movements. His quick dodge behind the door and closing of the blinds made it reasonable for the officers to conclude that there was a likelihood of danger to themselves, the woman, and the children. Arrellano-Ochoa did not say "I prefer not to talk with you" or "You may not come in." He acted rather than talking. And he acted in a way that would suggest, even before they saw the gun, that the officers faced a risk of bullets flying where officers, a woman, and her toddlers were all within range. Screen doors do not stop bullets.

. . .

In this case, a reasonable officer could have concluded (and did) that Arellano-Ochoa was a threat to them, the woman, and the toddlers out front. Their entry was therefore justified by exigency.

[Some citations omitted]

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WASHINGTON STATE COURT OF APPEALS

HIGH CRIME AREA WITH HISTORY OF VEHICLE PROWLS IN THE PAST, PLUS MIDNIGHT HOUR AND SUSPECT'S NERVOUS MANNER DO NOT ADD UP TO PARTICULARIZED "REASONABLE SUSPICION" THAT WOULD JUSTIFY A TERRY STOP

State v. Martinez, __ Wn. App. __ , 2006 WL 2773030 (Div. III, 2006)

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

> [A Richland police officer] was patrolling on foot the grounds of the Columbia Park Apartments. The apartments are in a high crime neighborhood and several vehicle prowls had been reported there. The parking lot was unlit. [The officer] was working alone.
>
> At 12:46 a.m., [the officer] spotted Jeremiah Martinez walking in the shadows from an area where several cars were parked in front of one of the apartment buildings. Mr. Martinez was walking briskly and looked around nervously. [The officer] followed him. [The officer] called out from about 25 yards away, identified himself as a police officer, and asked Mr. Martinez whether he lived in the apartments. Mr. Martinez responded that he did not. [The officer] ordered him to sit down on a utility box while he radioed dispatch him to identify him.
>
> [The officer] patted Mr. Martinez down for weapons. He felt a hard, rectangular object he thought was large enough to conceal a weapon. He removed the container. It held methamphetamine. [The officer] read Mr. Martinez his Miranda rights and then arrested Mr. Martinez for possession. He searched him incident to the arrest. He found methamphetamine and a glass methamphetamine pipe in Mr. Martinez's pocket.
>
> The State charged Mr. Martinez with possession of methamphetamine.
>
> Mr. Martinez moved to suppress the evidence. He argued that the facts did not support a reasonable suspicion that he was engaged in criminal activity, and that the officer had acted on a constitutionally impermissible hunch. The State responded that the stop and search were reasonable because, under the totality of the circumstances, it was reasonable to suspect that Mr. Martinez was prowling cars. The court concluded that the totality of the circumstances justified the stop and frisk and denied the motion to suppress. A stipulated facts trial followed. And the court convicted Mr. Martinez of possession of methamphetamine.

ISSUE AND RULING: Does the totality of the circumstances – 1) the high crime area with a history of vehicle prowls, 2) the midnight hour, and 3) the nervous manner of the suspect – add up to particularized reasonable suspicion justifying a Terry seizure of the suspect? (ANSWER: No, the seizure was not justified)

Result: Reversal of Benton County Superior Court conviction of Jeremiah Ignacio Martinez for possession of methamphetamine; charge is ordered dismissed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Mr. Martinez argues that the officer here did not have the "particularized suspicion" necessary to stop him. He was stopped simply for walking in a public place after dark.
>
> The State responds that the totality of the circumstances justified a brief investigative stop. It was late at night. The neighborhood was rated "high crime."

Vehicle prowls had been reported. The parking area was dark. Mr. Martinez was on private property. He looked nervous and walked quickly away from the officer. Taken together with the officer's experience, these facts established a substantial possibility that Mr. Martinez was prowling vehicles.

"No person shall be disturbed in his private affairs, or his home invaded, without authority of law." CONST. article I, section 7. The privacy protection provided by article I, section 7 is greater than that of the Fourth Amendment to the United States Constitution. **[LED EDITORIAL COMMENT: This is a misleading oversimplification by the Martinez Court. The reasonable suspicion standard in this Terry seizure context is the same under Washington and federal constitution.]** Under article I, section 7, warrantless searches and seizures are presumed unreasonable unless one of the narrow, "jealously-guarded" exceptions applies.

Mr. Martinez challenges the trial court's conclusion that the stop and search were reasonable, and thus constitutional . . .

A stop and frisk is a seizure subject to the Fourth Amendment. Terry v. Ohio, 392 U.S. 1 (1968). [The officer] "seized" Mr. Martinez when he ordered him to sit on the utility box and wait. The issue is whether the officer acted under "authority of law" and specifically whether this investigatory stop satisfied some exception to the warrant generally required by article I, section 7.

Article I, section 7 permits police to conduct brief investigatory stops of limited scope and duration. To justify such a stop, the officer must be able to " 'point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.' " The facts must give rise to " 'a substantial possibility that criminal conduct has occurred or is about to occur.' "

We evaluate the totality of the circumstances known to the officer at the time when passing on the propriety of this warrantless stop and search. Presence in a high crime area at night is not enough. The circumstances must suggest a substantial possibility that the particular person has committed a specific crime or is about to do so.

Innocuous facts do not justify a stop. The officer may, however, rely on experience in evaluating arguably innocuous facts. The question here is whether arguably innocuous facts plus the officer's experience amount to an articulable suspicion or merely an inchoate hunch.

In State v. Laskowski, police responded to a report of a possible vehicle prowl. State v. Laskowski, 88 Wn. App. 858 (1997) **May 98 LED:04**. They stopped the defendant and his companions, who matched the dispatcher's description of the suspects. The court upheld the stop and subsequent search, concluding that "Laskowski was part of a group reported to be acting suspiciously, and the officer could reasonably consider all facts known or observed about any number of the group." But in Laskowski the officer was investigating a reported prowl in progress.

Here, vehicle prowls had been reported in the past at the Columbia Park Apartments, but not on the night [the officer] saw Mr. Martinez walking through the lot.

Again, in State v. Ozuna, an actual vehicle prowl had been reported. State v. Ozuna, 80 Wn. App. 64 (1996) **Sept 96 LED:13**. But the officers had no information, such as a description, tying the defendants to the crime. The prowl suspects had been reported running away from the location of the defendants' car. On appeal, the court concluded that this stop and search were not constitutionally justifiable.

State v. O'Neill, 148 Wn.2d 564 (2003) **April 03 LED:03** is not a vehicle prowl case, but the facts are helpful here. The O'Neill court held that it was reasonable and, therefore, lawful for an officer to approach a car parked in the lot of a business at 1:15 A.M., an hour after the business closed. The business had been burglarized twice in the previous month. And the car's windows were fogged. This suggested that the car was occupied and had been there a while. The occupant of the car was not "seized," the court held, until the officer ordered him out of the car. And at that point the circumstances supported a Terry stop.

Here, [the officer] was patrolling this parking lot because of past problems, not in response to a crime in progress report. He had no description or other information linking Mr. Martinez to any prowling that evening or, for that matter, at any time. The State argues that Mr. Martinez's reaction to the officer's presence aroused suspicion and the officer observed nothing to suggest any legitimate reason for Mr. Martinez's presence in the shadows late at night. But that is not the test.

A stop and frisk is a seizure subject to the Fourth Amendment. Accordingly, the officer must have articulable grounds for a stop at its inception. Mr. Martinez was not required to articulate a reason not to stop him. The police may not stop and question citizens on the street simply because they are unknown to the police or look suspicious, or because their "'purpose for being abroad is not readily evident.'"

The problem here is not with the officer's suspicion; the problem is with the absence of a *particularized* suspicion. That is, there must be some suspicion of a particular crime or a particular person, and some connection between the two. General suspicions that Mr. Martinez may have been up to no good are not enough to warrant the stop here.

We reverse the conviction and dismiss the case.

[Some citations omitted]

INMATE RECEIVING VISITOR AT JAIL VIOLATED NO-CONTACT ORDER; ALSO, CIRCUMSTANCES SURROUNDING AN ASSAULT IN A CAR SUPPORT A SEPARATE UNLAWFUL IMPRISONMENT CONVICTION

State v. Washington, __ Wn. App. __ , 2006 WL 2716131 (Div. I, 2006)

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

While visiting friends, Washington and his wife Harmoni entered into a heated argument. Harmoni was seven months pregnant at the time. One of the friends, concerned for her, phoned Harmoni's mother, who contacted police.

Federal Way police officers Crawford and Hatfield arrived at the residence and found Washington and Harmoni standing beside a disabled vehicle in the driveway. Harmoni was visibly upset and appeared to be on the verge of crying. Her face was red and swollen, and there were red marks on each side of her throat. Officer Crawford took photographs of her injuries.

Harmoni initially denied anything was wrong. But soon afterward, she described assaultive and abusive conduct, explaining that she originally said nothing happened because she was afraid of Washington. Harmoni told Officer Crawford that Washington became extremely upset during their visit and asked her to accompany him outside. They walked to the car, and Washington ordered Harmoni to get inside. She left the door open, apparently further enraging Washington, who ordered her to shut the door. She attempted to leave, but Washington grabbed her clothing, pulled her into the vehicle, and punched her in the stomach, causing her to buckle over in pain and eventually vomit. He then reached over and pulled the door shut. He straddled her, placed his hands around her neck, and started squeezing. Just when Harmoni thought she would lose consciousness, Washington released his grip and moved off her. He told her to put her head against a door window so that he could break her jaw, then hit her face with his open hand and slammed her head against the window. He told her she had "disrespected" him for the last time, and that he was going to "really fuck her up." At some point, Harmoni surreptitiously mouthed "help me" to her friend, who called police. Harmoni signed a domestic violence report detailing these events.

Police also obtained several eyewitness statements generally consistent with Harmoni's account. Washington was taken into custody and charged with assault in the third degree, unlawful imprisonment, and felony harassment.

On March 25 2003, the superior court issued an order prohibiting Washington from having any contact, either "directly or indirectly, in person, in writing, or by telephone, personally or through any other person with" Harmoni for a period of three years, and informing him that he could "be arrested and prosecuted even if the person protected by this order invites or allows you to violate this order's prohibitions." The no-contact order, which was signed by Washington, further advised him: "You have the sole responsibility to avoid violating this order's provisions."

On April 8, 2003, Harmoni visited Washington in jail, apparently not for the first time. Authorities interrupted the visit after about 10 minutes, telling Harmoni and Washington that there was a no-contact order in place and that Washington was violating the terms of that order. Over the next week or so, Washington arranged to speak with Harmoni by phone on at least 10 occasions.

Washington was thereafter charged by amended information with one count of assault in the second degree (domestic violence), one count of unlawful imprisonment (domestic violence), one count of misdemeanor harassment (domestic violence), 11 counts of felony violation of a court order (domestic violence), and one count of witness tampering.

At the jury trial, Harmoni recanted. She testified she lied to police, and that Washington never forced her into the car or prevented her from leaving. She acknowledged that Washington had a history of domestic violence, but denied that he hit or threatened her on the day in question. She also testified that her apparent injuries were not caused by Washington, saying she was ill and tended to bruise easily. Other witnesses, however, testified that Washington yelled at Harmoni to shut the car door and when she didn't, he hit her in the stomach, pulled her completely inside the car, and shut the door, that they were in the vehicle for at least 10 minutes, and one witness heard "smacks" while they were in the car. Several photographs of Harmoni were admitted into evidence. Others testified about Washington's efforts to contact Harmoni from jail.

The jury found Washington guilty of third degree assault, unlawful imprisonment, misdemeanor harassment, and 11 counts of felony violation of a no-contact order.

ISSUES AND RULINGS: 1) Where the defendant had been in jail when the person protected by a no-contact order visited him on several occasions, was his conduct "willful" such as to support his conviction for violating the no-contact order? (ANSWER: Yes); 2) Was the defendant's activity of "restraint" during the assaults in the car merely "incidental" to the assaults such that the defendant could not also be convicted of unlawful imprisonment? (ANSWER: No)

Result: Affirmance of King County Superior Court convictions of Guy Henry Washington for third degree assault, unlawful imprisonment, misdemeanor harassment, and 11 counts of felony violation of a no-contact order; reversal and remand on a sentencing issue not addressed in this **LED** entry.

ANALYSIS:

1) Willful violation of no-contact order

As charged here, the crime of willful violation of a court order has three essential elements: "the willful contact with another; the prohibition of such contact by a valid no-contact order; and the defendant's knowledge of the no-contact order." State v. Clowes, 104 Wn. App. 935 (2001). Willfulness requires a purposeful act. State v. Sisemore, 114 Wn. App. 75 (2002) **Jan 03 LED:16**. "[N]ot only must the defendant know of the no-contact order; he must also have intended the contact."

Washington contends his contact with Harmoni at the jail was not willful. He points out that "since he was in jail and unable to control whom he saw or how long a visit lasted, the violation of the no-contact order was not the result of his willful behavior," noting that "the jail would not permit [Harmoni] to visit if there was a no-contact order."

This argument fails for several reasons. To begin with, nothing indicates that Washington was aware of the jail policy at the time he had contact with Harmoni. There was a valid court order prohibiting Washington from having contact with Harmoni, issued only a few weeks before and signed by Washington. Nor was their contact accidental. Harmoni testified to almost daily visits to the jail, ending only when interrupted by jail staff. This was sufficient evidence to allow a reasonable jury to convict Washington of willful violation of the order. *See* Sisemore, 114 Wn. App. at 78 (defendant violated the no-contact order "if he knowingly acted to contact or continue contact after an original accidental contact.").

2) Unlawful imprisonment

A person commits unlawful imprisonment if "he knowingly restrains another person." RCW 9A.40.040(1). To restrain someone is to restrict their movements "without consent and without legal authority in a manner which interferes substantially with [her] liberty." RCW 9A.40.010(1). A substantial interference is a " 'real' or 'material' interference with the liberty of another as contrasted with a petty annoyance, a slight inconvenience, or an imaginary conflict." The presence of a means of escape may help to defeat a prosecution for unlawful imprisonment unless "the known means of escape .·.·.·present[s] a danger or more than a mere inconvenience."

Washington contends he did not substantially interfere with his wife's freedom of movement. Relying on State v. Green, 94 Wn.2d 216 (1980), he argues that any interference was merely incidental to the ongoing assaults, and cannot support a separate charge of unlawful restraint. In Green, the defendant stabbed a young girl on the sidewalk of her apartment complex and dragged her around the back of the building, where he left her in a stairwell. The Supreme Court held there was insufficient evidence of the aggravating factor of kidnapping because Green's acts of moving and restraining the victim were merely incidental to and not independent of the murder.

The facts here are not similar. Washington ordered Harmoni into the car. She got in, but left the door open. He told her to shut the door. She tried to leave, but he grabbed her by her clothes and pulled her back inside. Clearly, she was restrained. He then assaulted her by punching her in the stomach, choking her, and hitting her head against the window.

Washington chiefly contends his restraint of Harmoni was merely incidental to his assaults upon her. But while Washington was already upset, the evidence indicates that the assaults on Harmoni were acts of rage triggered by her brief act of independence in leaving the car door open. In other words, the assaults were a reaction to Harmoni's resistance to the restraint. The evidence thus supports the conclusion that the restraint was not merely incidental to the assaults.

[Some citations omitted]

INVOLUNTARY BLOOD DRAW UPHELD IN RESPONSE TO DEFENDANT'S NON-CONSTITUTIONAL CHALLENGE UNDER RCW 46.20.308, BECAUSE, AT THE TIME OF

ARREST, THE OFFICER HAD PROBABLE CAUSE TO BELIEVE THAT THE SUSPECT HAD COMMITTED VEHICULAR ASSAULT OR VEHICULAR HOMICIDE

State v. Mee Hui Kim, 134 Wn. App. 27 (2006)

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

> Shortly after 2:00 a.m. on September 28, 2003, Mee Hui Kim was in Seattle driving her Kia Sephia the wrong way on Highway 99. Kim was traveling at 40 miles per hour going northbound in the southbound lanes of Highway 99. At that location in the downtown Seattle area, Highway 99 is a divided, limited access highway. Just after exiting the Battery Street tunnel north of downtown Seattle, Kim's car collided head-on with a Honda Civic driven by Harrison Yu.
>
> The closest points to enter Highway 99 the wrong way and travel northbound in the southbound lanes were all south of downtown and several miles from of the collision. For all of the potential entry points, there are signs and significant physical barriers to prevent cars from entering Highway 99 in the wrong direction. A witness reported Kim was driving the wrong way for a considerable distance before entering the Battery Street tunnel.
>
> The three occupants of the two cars were trapped until the police and medics arrived. After the police and medics arrived, Kim, her passenger, Dong Lee, and Yu were transported to Harborview Medical Center. Yu suffered catastrophic injuries and died a few days after the accident. *[Court's footnote: Yu died as a result of a severe neck fracture.]* Lee sustained serious injuries, including a traumatic brain injury, a dislocated hip, a tibia fracture, and injuries to his hand and knee. Kim suffered the least significant injuries, principally a compound ankle fracture.
>
> Seattle Police Officer J.D. Huber responded to the scene of the collision and went to Harborview with the injured occupants. After Kim was treated by the emergency medical staff, Officer Huber introduced himself and told Kim she was under arrest for vehicular assault. Officer Huber told her she could also face charges for vehicular homicide. Kim kept interrupting Officer Huber to ask about Lee. Because Lee was nearby screaming in pain, Officer Huber bent down to talk to Kim. When Officer Huber bent down, he smelled alcohol on Kim's breath. Officer Huber advised Kim of her Miranda rights, and gave her the implied consent warnings for obtaining a mandatory felony blood draw, and told her that she had the right to an independent testing. Kim said she wanted a lawyer. Officer Huber told Kim he would not ask her any questions but she did not have the right to refuse giving a blood sample for testing and she could talk to a lawyer later.
>
> Kim's blood sample was taken at 3:45 a.m., within two hours of the collision. A forensic toxicologist at the WSTL tested Kim's blood sample using the Head Space gas chromatography method. The results showed a blood alcohol level of 0.20g/100 ml, which is two and a half times the legal limit.
>
> . . .

> The State charged Kim with vehicular homicide under RCW 46.61.522(1)(b), for driving while under the influence of alcohol and causing Yu's death, and with vehicular assault under RCW 46.61.520(1)(a), for driving under the influence of alcohol and causing Lee's injuries.
>
> . . .
>
> The trial court [in a non-jury trial] found Kim guilty of vehicular homicide and vehicular assault as charged and entered findings of fact and conclusions of law. The court imposed a standard range sentence of 41 months. Kim appeals.

PRELIMINARY NOTE REGARDING THE ISSUES: This case did not involve a constitutional challenge to the involuntary blood draw. Under both the federal and Washington constitutions, in order to forcibly draw blood without a warrant, an officer generally must have probable cause to believe that the suspect both 1) was operating a vehicle under the influence of alcohol or drugs and 2) committed vehicular assault or vehicular homicide. See, for example, State v. Dunivin, 65 Wn. App. 501 (Div. II, 1992) Jan 93 LED:19; State v. Merritt, 91 Wn. App. 969 (Div. I, 1998) Apr 99 LED:18; and see also discussion in the December 2001 LED at page 14. There was no constitutional issue in the Kim case, because, before the blood testing was done, the officer clearly had probable cause to believe that defendant Kim had caused the serious injury/possibly fatal accident while under the influence of alcohol (alcohol on breath plus fact that suspect had driven a considerable distance the wrong way before crashing head-on on a one-way highway just after the 2:00 a.m. closing time for bars).

ISSUES AND RULINGS: 1) Does an officer have authority under RCW 46.20.308 to forcibly obtain a blood test from a suspect who is lawfully under arrest for vehicular assault even if the officer does not smell alcohol or otherwise have cause to believe the suspect is under the influence of alcohol or drugs? (ANSWER: Yes – but see our note above regarding constitutional limits on forcibly drawing blood following arrest for vehicular assault or vehicular homicide).

2) Alternatively, even if probable cause to believe that Kim was driving under the influence were a required element for forcible blood testing in this case under RCW 46.20.308, did the officer (before leaning down and smelling alcohol on Kim's breath) have probable cause to believe that Kim was under the influence of alcohol where the officer was aware that, shortly after the 2 a.m. closing time for bars, Kim had been involved in a head-on collision after having driven the wrong way a considerable distance on a divided, limited-access highway? (ANSWER: Yes)

Result: Affirmance of King County Superior Court conviction of Mee Hui Kim for vehicular homicide and vehicular assault.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Kim relies on RCW 46.20.308(1) to argue the trial court erred in denying her motion to suppress the WSTL's blood alcohol test results. Under RCW 46.20.308(1) a police officer can obtain a blood sample taken without consent if "at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug·.·.·." Kim contends

Officer Huber did not have reasonable grounds to believe she was driving under the influence of alcohol until he smelled alcohol on her breath after placing her under arrest for vehicular assault and, therefore, was not entitled to obtain a blood sample without her consent.

Kim's reliance on RCW 46.20.308(1) ignores the independent statutory authority to obtain a blood sample under RCW 46.20.308(3) and ignores her concession below. Under RCW 46.20.308(3) a police officer can obtain a blood sample for testing without consent when an individual is under arrest for vehicular assault or vehicular homicide. RCW 46.20.308(3) provides in pertinent part:

> *If an individual is unconscious or is under arrest for the crime of* vehicular homicide as provided in RCW 46.61.520 or *vehicular assault as provided in RCW 46.61.522*, or if an individual is under arrest for the crime of driving while under the influence of intoxicating liquor or drugs as provided in RCW 46.61.502, which arrest results from an accident in which there has been serious bodily injury to another person, *a breath or blood test may be administered without the consent of the individual so arrested*

Kim conceded below that based on her disregard for the safety of others, she was lawfully under arrest for vehicular assault. An arrest for vehicular assault is in and of itself a proper basis to obtain a blood draw for testing. RCW 46.20.308(3). Because Kim was concededly under arrest for vehicular assault before Officer Huber smelled alcohol, he had the authority to obtain a blood sample under RCW 46.20.308(3) without Kim's consent.

In addition, we agree with the trial court that given the circumstances of the collision, Officer Huber had reasonable grounds to believe Kim was driving under the influence of alcohol or drugs under RCW 46.20.308(1) before he smelled alcohol on her breath and obtain a blood sample without her consent. The collision occurred shortly after the bars closed at 2:00 a.m.; Kim had to overcome a number of significant physical barriers to get onto Highway 99 and drive in the wrong direction; and she drove the wrong way for some distance.

[Some citations omitted]

FATHER'S DEFENSES OF CORPUS DELICTI, CONSENT AND RELIGIOUS FREEDOM REJECTED IN ASSAULT-OF-CHILD PROSECUTION THAT AROSE FROM HIS ATTEMPT AT DO-IT-HIMSELF, AMATEUR CIRCUMCISION OF HIS 8-YEAR-OLD SON

State v. Baxter, __ Wn. App. __, 141 P.3d 92 (Div. II, 2006)

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

> After pondering chapter 17 of Genesis for several weeks, *[Court's footnote: The passage in question recounts God's order to Abraham that all males must be circumcised or their souls will be cut off from the people and their covenant with God broken.]* Edwin Baxter concluded that God was directing him to circumcise his eight-year-old son, E.N.B. Baxter explained to E.N.B. that, although he normally should not let people touch his private parts, this was different. Baxter,

> who had no medical training, then numbed E.N.B.'s penis with ice and attempted to remove the boy's foreskin with a hunting knife. Afterward, he attempted to control the bleeding with an animal wound cauterizing powder. When this failed, he called 911, acknowledging that his son was eight years old.
>
> Responding to the scene, medical and law enforcement personnel found E.N.B. lying in a dirty bathtub bleeding from the penis. The child's mother was also present. An ambulance took E.N.B. to a hospital, where a physician closed the laceration with sutures. The physician concluded that there would likely be scarring, but no permanent impairment.
>
> The State charged Baxter with second degree assault of a child. . . The jury convicted Baxter of second degree assault of a child.

ISSUES AND RULINGS: 1) Does sufficient evidence, aside from defendant's confession itself, meet the corpus delicti evidentiary requirement - - i.e., make a showing that someone committed assault of a child - - where the evidence included: a) the child's wound, which was a fairly clean, circular incision completely around the foreskin, consistent with a wound inflicted as part of a ritual circumcision, and inconsistent with a wound that was self-inflicted by the child or by accident? (ANSWER: Yes); 2) Considering the age of the child-victim and the other circumstances, did the trial court's preclusion of a consent defense violate the defendant's constitutional due process rights? (ANSWER: No); 3) Did the trial court's preclusion of a religious defense violate defendant's constitutional due process rights? (ANSWER: No)

Result: Affirmance of Clark County Superior Court conviction of Edwin Bruce Baxter for second degree assault of a child.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Corpus Delicti

> Washington follows the traditional corpus delicti rule. State v. Aten, 130 Wn.2d 640 (1996) **March 97 LED:06**. To establish the corpus delicti, the State must show "a certain act or result forming the basis of the criminal charge and the existence of a criminal agency as the cause of such act or result." The perpetrator's identity is not part of the corpus delicti. A defendant's confession is insufficient to establish the corpus delicti; but if there is independent evidence of the crime, the confession may "be considered in connection therewith and the *corpus delicti* established by a combination of the independent proof and the confession." The corpus delicti rule protects defendants from unjust convictions based entirely on confessions of questionable reliability. The independent evidence need not be sufficient to establish the corpus delicti beyond a reasonable doubt, or even by a preponderance of proof. The standard is a prima facie showing, meaning "there is 'evidence of sufficient circumstances which would support a logical and reasonable inference' of the facts sought to be proved."
>
> Baxter relies on State v. Aten, where the court held that "the corpus delicti is *not* established when independent evidence supports reasonable and logical inferences of both criminal agency and noncriminal cause." In that case, an infant was found dead in the morning, after being left in the defendant

babysitter's care overnight. There was evidence that the babysitter had awakened the infant upon her arrival the night before and then put her back down. The autopsy concluded that the infant had died of Sudden Infant Death Syndrome (SIDS) or acute respiratory failure. Although manual interference could have caused acute respiratory failure, it was impossible to diagnose this from the autopsy. No inference of human action was raised until the defendant admitted to suffocating the infant. The defendant was convicted of second degree manslaughter. Noting that, without these confessions, the only evidence of cause of death was an autopsy report that was as consistent with an innocent death as with a criminal one, we reversed the conviction for failure to establish the corpus delicti.

Baxter finds his case analogous. He claims that, absent his statements, the evidence equally supports any one of three causes of E.N.B.'s injury: accident, self-infliction, or the actions of another person. He reasons, therefore, that counsel should have made a corpus delicti objection. We disagree.

Contrary to Baxter's assertion, the independent evidence was less consistent with accidental or self-inflicted causes than with a criminal agency. Aten "suggests that where there is more than one reasonable and logical inference as to the cause . . . if one inference is more consistent with the independent evidence than another, it might make the other inference less likely or reasonable." Here, the independent evidence showed not simply a cut to E.N.B.'s foreskin, but a "fairly clean," circular incision completely around the foreskin. The notion that an accident caused the injury is not reasonable or logical. Nor is it reasonable or logical to infer that an eight-year-old child chose to perform this procedure on himself. The more logical and reasonable inference from the injury itself, which was consistent with ritual circumcision, is that another individual caused it.

2) Consent

Baxter argues that his right to a fair trial, as guaranteed by article 1, section 3 of the Washington Constitution and the Fourteenth Amendment of the U.S. Constitution, was violated when the trial court excluded evidence of his motive and the child's consent. The decision to proceed with the circumcision was a religious one, according to Baxter, to which his son consented. Because of this, Baxter contends that the trial court should have permitted him to argue consent.

In determining whether consent is a defense in a criminal case, the courts have considered the particular act, the surrounding circumstances, and society's interest in the activity involved. *See, e.g.,* State v. Dejarlais, 136 Wn.2d 939 (1998) **March 99 LED:09** (consent not a defense to violation of domestic violence protection order because the public has an interest in preventing domestic violence); State v. Hiott, 97 Wn. App. 825 (1999) **Feb 2000 LED:09** (consent not a defense to a game of shooting BB guns at each other because the game was not a generally accepted athletic contest and was against public policy); State v. Shelley, 85 Wn. App. 24 (1997) **June 97 LED:14** (consent not a defense to punching another player during a basketball game where the contact was not foreseeable behavior in the play of the game).

In addition, courts have considered the individual minor's capacity to understand and appreciate the consequences of the consented-to conduct. *See, e.g.,* Smith v. Seibly, 72 Wn.2d 16 (1967). In Seibly, the court approved an instruction that, in deciding whether a married 18-year-old could consent to a vasectomy, the jury should consider his "age, intelligence, maturity, training and experience, marital status, control or the absence thereof by his parents, whether he was dependent or self-supporting and whether his general conduct was that of an adult or that of a child." Seibly.

In determining, then, whether a child can legally consent to an assault, we consider the particular act, the surrounding circumstances, society's interest in the activity, and the particular child's capacity to understand and appreciate the consequences of the act. Applying these factors to Baxter's attempted circumcision of his eight-year-old son, we hold that the trial court properly rejected Baxter's consent defense.

First, the great weight of authority disfavors the defense of consent in assault cases. See Shelley. In Hiott, for example, the defendant and the victim were playing a game in which they shot BB guns at each other. The victim lost an eye, and the defendant was convicted in juvenile court of third degree assault. Noting that assaults in general are breaches of the public peace, and distinguishing this game from socially accepted athletic contests, we held that the defense of consent was not available. Similarly, "a child cannot consent to hazing, a gang member cannot consent to an initiation beating, and an individual cannot consent to being shot with a pistol."

Second, although Baxter analogizes the act here to ritual circumcisions that have been performed for thousands of years and have never been held contrary to public policy, there are obvious distinctions. In the Hebrew faith, for example, ritual circumcisions are performed by mohels who are trained medical professionals or have at least been trained in the craft through apprenticeship. . .Mohels must be qualified to perform the procedure and in some places are certified by hospitals. . . The law holds the mohel to "the professional standards of skill and care prevailing among those who perform circumcisions." The mohel uses special equipment, including a "finely honed blade of surgical steel" and a "non-restricting guard." And the ritual circumcision is performed at infancy, where the procedure is simpler.

By contrast, Baxter attempted to circumcise his eight-year-old son in a dirty bathtub, with no medical training, using a hunting knife and animal wound cauterizing powder as his tools. Even when performed by trained professionals, circumcision has been criticized by some for the pain it causes and its inherent risk of complications. Given these risks, performing a circumcision as Baxter did here violates public policy.

Third, the law disfavors the notion that a child can consent to medical treatment. The age at which individuals are entitled to make their own medical decisions is 18 years. . . The age of majority at common law was 21 years. If the capacity of an eight-year-old to consent to treatment by medical professionals is questionable, then the court should be highly doubtful of his capacity to consent to a medical procedure performed by a layman in unsanitary conditions.

Finally, the record attributes to E.N.B. none of the indicia of capacity that would suggest an understanding and appreciation of the consequences of consenting to this procedure. That Baxter felt it necessary to explain to E.N.B. the difference between this procedure and an improper touching of his private areas suggests that E.N.B. lacked the capacity to consent. The point is reinforced by comparing this incident to the facts of Seibly, where a married, employed 18-year-old, with children and a high school diploma, visited two physicians to discuss a vasectomy, went home to discuss the operation with his wife, and returned with a signed consent form, and still was able to raise a question whether he could consent.

Moreover, there is a difference between consent and obedience. When a parent harms a child, and later says the child willingly agreed to the harmful activity, we view with skepticism the parent's claim that the child freely consented.

In conclusion, considering E.N.B.'s age and the circumstances surrounding the incident, the trial court did not err in precluding Baxter from asserting a consent defense.

3) Religious Freedom

In a related claim, not discussed in his brief but raised by Baxter's counsel at oral argument, Baxter contends he should have been permitted to explain to the jury that his actions were motivated by religious exercise and the control of his son's upbringing. The parents' right to control their children's upbringing is cardinal. But the State, as parens patriae, may limit this right in the general interest of the youth's well-being. The State may interfere with the parents' rights to raise their children only where it "seeks to prevent harm or a risk of harm to the child." When parents defy the State's actions in protecting children, criminal liability may attach, even when the parents are acting in the interest of the child's religious upbringing. "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." And criminal liability may be imposed when parents voluntarily cause physical harm to their children for religious purposes. Here, the harm Baxter inflicted on his son triggered the State's right to impose criminal liability, and the religious motive did not affect the criminality of the act.

[Some citations omitted]

"DOUBLE JEOPARDY" STATUTE, RCW 10.43.040, AS AMENDED IN 1999, DOES NOT APPLY TO BAR CRIMINAL PROSECUTION IN THE STATE COURT WHERE MILITARY HAS SANCTIONED THE DEFENDANT ONLY WITH NON-JUDICIAL PUNISHMENT FOR THE SAME OFFENSE

State v. Stivason, __ Wn. App. __, 142 P.3d 189 (Div. II, 2006)

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

The federal government called Stivason, a member of the Washington Army National Guard, to active duty in September 2003. From mid-September 2003 to late February 2004, Stivason was stationed with his activated unit at North Fort Lewis, Washington.

On January 26, 2004, in Thurston County, Washington, the State arrested and charged Stivason for driving under the influence (DUI) under RCW 46.61.502. The military disciplined Stivason for this charge under the non-judicial punishment provisions of 10 U.S.C. § 815 (Art. 15, U.C.M.J.). Subsequently, Stivason moved the district court to dismiss the State's DUI charge, arguing that RCW 10.43.040's double jeopardy protections precluded the State's criminal prosecution because the military had already prosecuted, convicted, and punished him for the same crime. The district court granted Stivason's motion, concluding that State v. Ivie, 136 Wn.2d 173 (1998) **Jan 99 LED:09**, and RCW 10.43.040 barred the State from prosecuting Stivason.

The State appealed the district court's ruling to the superior court, successfully arguing that (1) 1999 amendments to RCW 10.43.040 overruled Ivie's extension of double jeopardy protection to Article 15 proceedings; (2) military discipline under Article 15 is not a "judicial proceeding" under the current, post-Ivie version of RCW 10.43.040 and therefore is not afforded double jeopardy protection; and (3) the plain language of a new section in current RCW 10.43.040 expressly allows subsequent state prosecution of a crime when the defendant has previously received only nonjudicial punishment for the same crime.

ISSUES AND RULINGS:

Does RCW 10.43.040 bar criminal prosecution in the State of Washington courts where the military has sanctioned the defendant only with non-judicial punishment? (ANSWER: No)

Result: Affirmance of Thurston County Superior Court decision that reversed a Thurston County District Court ruling and held that Jeffery Guy Stivason may be prosecuted in District Court for DUI.

KEY STATUTORY LANGUAGE

RCW 10.43.040 currently provides as follows:

> Whenever, upon the trial of any person for a crime, it appears that the offense was committed in another state or country, under such circumstances that the courts of this state had jurisdiction thereof, and that the defendant has already been acquitted or convicted upon the merits, in a judicial proceeding conducted under the criminal laws of such state or country, founded upon the act or omission with respect to which he is upon trial, such former acquittal or conviction is a sufficient defense. Nothing in this section affects or prevents a prosecution in a court of this state of any person who has received administrative or nonjudicial punishment, civilian or military, in another state or country based upon the same act or omission.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The United States Constitution prevents one sovereign entity from prosecuting twice for the same offense, but it does not prevent a sovereign entity from prosecuting an offense under its law where a separate sovereign entity has prosecuted a defendant for an offense with the same elements under its law. Similarly, although the Washington Constitution prevents the State from prosecuting the same offense twice, it does not prevent the State from prosecuting an offense where a separate sovereign entity has already prosecuted the defendant under its law for an offense with the same elements.

But former and current RCW 10.43.040 expand the double jeopardy protections conferred in both the United States and Washington Constitutions by prohibiting state prosecution of a defendant who has already been prosecuted for the same offense by a separate sovereign entity.

Former RCW 10.43.040 stated:

> Whenever, upon the trial of any person for a crime, it appears that the offense was committed in another state or country, under such circumstances that the courts of this state had jurisdiction thereof, and that the defendant has already been acquitted or convicted upon the merits, upon a criminal prosecution under the laws of such state or country, founded upon the act or omission with respect to which he is upon trial, such former acquittal or conviction is a sufficient defense.

In Ivie, our Supreme Court held that former RCW 10.43.040 barred state prosecution of a crime following the imposition of nonjudicial punishment for the same crime under Article 15. In reaching this conclusion, the Court explained that for purposes of former RCW 10.43.040, the military qualifies as "another state or country" and that Article 15 nonjudicial punishment constitutes a "criminal prosecution." Thus, Ivie would have prohibited the State's prosecution of its DUI charge against Stivason because the military had already prosecuted Stivason under Article 15's provisions.

But in 1999, the legislature substantially amended RCW 10.43.040 in response to Ivie. The legislature added a second sentence to the statute. Current RCW 10.43.040, the statute that applies to Stivason, provides:

> Whenever, upon the trial of any person for a crime, it appears that the offense was committed in another state or country, under such circumstances that the courts of this state had jurisdiction thereof, and that the defendant has already been acquitted or convicted upon the merits, *in a judicial proceeding conducted under the criminal laws of such state or country,* founded upon the act or omission with respect to which he is upon trial, such former acquittal or conviction is a sufficient defense. *Nothing in this section affects or prevents a prosecution in a court of this state of any person who has received administrative or nonjudicial punishment, civilian or military, in another state or country based upon the same act or omission.*

(Emphasis added.)

> Moreover, the legislature replaced the phrase "upon a criminal prosecution" with "in a judicial proceeding conducted." In doing so, the legislature presumably intended (1) to supersede our Supreme Court's holding that Article 15 nonjudicial punishment constitutes a "criminal prosecution" under former RCW 10.43.040; and (2) to imply that Article 15 nonjudicial punishment does not constitute a "judicial proceeding."
>
> Although the military, which is considered "another state or country" in Washington, has already prosecuted Stivason for the DUI charge, it imposed only nonjudicial punishment. 10 U.S.C. § 815 (Art. 15, U.C.M.J.). Thus, RCW 10.43.040 does not preclude the State's prosecution of Stivason.

[Some citations omitted]

WORDING OF MILITARY MIRANDA WARNINGS HELD SUFFICIENT FOR WAIVING OF RIGHTS FOR PURPOSES OF STATE COURT PROSECUTION

State v. Hopkins, __ Wn. App. __ , 2006 WL 2552814 (Div. II, 2006)

Facts and Proceedings below:

Defendant, Ms. Hopkins, was in the U.S. Army when she was questioned by an Army officer regarding her suspected molesting of a 13-year-old daughter of a fellow soldier. The officer first gave Ms. Hopkins military Miranda warnings that included the following admonition regarding Ms. Hopkins' right to an attorney:

> I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. This lawyer can be a civilian lawyer I arrange for at no expense to the Government or a military lawyer detailed for me at no expense to me, or both.

Ms. Hopkins waived her rights and made incriminating statements to the questioning officer. After Ms. Hopkins was charged in state court with sex crimes against the child, she moved to suppress. She claimed that the wording of the military Miranda warning was insufficient or misleading as to her rights to an attorney in relation to possible non-military charges. The trial court denied her motion, and she was convicted on multiple counts for committing sex crimes against the 13-year-old girl.

ISSUE AND RULING: Was the wording of the military Miranda warning insufficient or misleading as to Ms. Hopkins' rights to an attorney in relation to possible non-military charges? (ANSWER: Yes)

Result: Affirmance of Lewis County Superior Court conviction of Devonn Shontellle Hopkins for second degree child molestation (four counts) and second degree rape of a child (one count).

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Hopkins now argues that this warning was misleading because it does not say that she had a right to a public civilian attorney and because it did not explain the

difference between a military lawyer and civilian lawyer. But Hopkins cites no authority that Miranda requires a civilian attorney. Neither the rationale nor the language of Miranda suggests that an appointed attorney must be a civilian. The Miranda court reasoned that the presence of an attorney was needed to negate the coercive atmosphere of an interrogation. A military attorney is as suited to that goal as a civilian one.

The warnings Acosta used clearly conveyed that Hopkins had the right to consult an attorney. Moreover, though Hopkins argues that a military attorney may not have the same confidentiality requirements, the warning stressed that the conversation with the attorney would be private. Accordingly, the warnings reasonably conveyed Hopkins's rights.

Two additional factors weigh against her position. First, the rules expressed in Miranda govern criminal interrogations by military authorities. United States v. Tempia, 16 C.M.A. 629, 635 (1967). Tempia specifically required that if the accused is *"indigent a lawyer will be appointed to represent him."* Tempia, 16 C.M.A. at 637. In explicitly addressing Hopkins's claim that a military lawyer may not have the same loyalty and confidentiality requirements, we turn to Tempia where the court stated that an accused is entitled to a

> lawyer who is peculiarly and entirely the accused's own representative; who owes him total fidelity; to whom full disclosure may be safely made in a privileged atmosphere; .·.·.·a legal advisor of his own-not one .·.·.·who cannot protect the accused with the attorney-client privilege.

Tempia, 16 C.M.A. at 639-40. Thus, as the military court in Tempia noted, the same duty binds a military lawyer as binds a civilian attorney.

Second, the form Acosta used specifically informed Hopkins that the appointed military lawyer would be "detailed *for me."* Therefore, she was told explicitly that the military lawyer's duty would be to her, not the military.

. . .

Case law does not support Hopkins's assertions that she needed to understand the difference between a civilian and a military attorney, and that the rights form was inaccurate and misleading.

[Some citations omitted]

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INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCW'S, 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].

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 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://insideago].

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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]. Questions regarding the distribution list or delivery of the **LED** should be directed to [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. **LED**s from January 1992 forward are available via a link on the CJTC Internet Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]