Law Enforcement Digest

JULY 2012

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

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BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

(1) CIVIL RIGHTS ACT LAWSUIT: UNITED STATES SUPREME COURT REVERSES NINTH CIRCUIT DECISION THAT DENIED QUALIFIED IMMUNITY TO TEMPORARY-CONTRACT-ATTORNEY FOR CITY OF RIALTO, CALIFORNIA; NINTH CIRCUIT ERRED IN BASING DENIAL OF QUALIFIED IMMUNITY ON MERE FACT THAT THE ATTORNEY WAS NOT AN EMPLOYEE OF THE CITY – In Filarsky v. Delia, ___ U.S. ___, 132 S. Ct. 1657 (April 17, 2012) the United States Supreme Court reverses one of the rulings in a Ninth Circuit decision (reported at 621 F.3d 1069 (9th Cir., Sept. 9, 2010) **Nov 10 LED:03**) and holds that a temporary city employee (attorney) who was retained to assist with an investigation into potential wrongdoing is entitled to seek qualified immunity from damages in civil rights case.

Facts, Proceedings Below and Holding: (Excerpted from summary prepared by the Court's Reporter of Decisions; note that the summary is not part of the Court's opinion)

> Respondent Delia, a firefighter employed by the City of Rialto, California, missed work after becoming ill on the job. Suspicious of Delia's extended absence, the City hired a private investigation firm to conduct surveillance on him. When Delia was seen buying fiberglass insulation and other building supplies, the City initiated an internal affairs investigation. It hired petitioner Filarsky, a private attorney, to interview Delia. At the interview, which Delia's attorney and two fire department officials also attended, Delia acknowledged buying the supplies, but denied having done any work on his home. To verify Delia's claim, Filarsky asked Delia to allow a fire department official to enter his home and view the unused materials. When Delia refused, Filarsky ordered him to bring the materials out of his home for the official to see. This prompted Delia's attorney to threaten a civil rights action against the City and Filarsky. Nonetheless, after the interview concluded, officials followed Delia to his home, where he produced the materials.
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> Delia brought an action under 42 U.S.C. § 1983 against the City, the Fire Department, Filarsky, and other individuals, alleging that the order to produce the building materials violated his Fourth and Fourteenth Amendment rights. The District Court granted summary judgment to the individual defendants on the basis of qualified immunity. The Court of Appeals for the Ninth Circuit affirmed with respect to all individual defendants except Filarsky, concluding that he was not entitled to seek qualified immunity because he was a private attorney, not a City employee.
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> Held*:* A private individual temporarily retained by the government to carry out its work is entitled to seek qualified immunity from suit under § 1983.

Result: Reversal of Ninth Circuit Court of Appeals decision denying qualified immunity to Filarsky.

LED EDITORIAL NOTE: The U.S. Supreme Court did not review, and therefore leaves in place, the precedential Fourth Amendment ruling by the Ninth Circuit (addressed in the November 2010 LED) that, while the City officials were entitled to qualified immunity because the law under the Fourth Amendment was not clearly established at the time that they ordered Delia to go into his house and retrieve items, the order that the officials gave him violated his Fourth Amendment rights. The Ninth Circuit's Fourth Amendment ruling was that the officials' giving of the order was the equivalent of the officials

unlawfully entering his home themselves without a search warrant or other lawful justification under the Fourth Amendment.

(2) EVERY PERSON ARRESTED AND HELD TEMPORARILY AT HOLDING OR OTHER JAIL FACILITY MAY, PRIOR TO ENTERING THE GENERAL POPULATION, BE SUBJECTED TO ROUTINE CLOSE VISUAL INSPECTIONS WHILE UNDRESSED, SO LONG AS IT INVOLVES ONLY VISUAL INSPECTION WITHOUT TOUCHING OR ABUSIVE GESTURES – In Florence v. Board of Chosen Freeholders of County of Burlington, ___ U.S. ___, 132 S. Ct. 1510 (April 2, 2012) a 5-4 majority of the United States Supreme Court holds that a jail facility policy requiring close visual inspection of all detainees, while undressed (i.e., strip searching), entering the facility, regardless of the nature of the crime of arrest or dangerousness, did not violate the Fourth or Fourteenth Amendments to the United States Constitution. The Court concludes that the search procedures at the facility "struck a reasonable balance between inmate privacy and the needs of the institution[]."

Several opinions were issued in the case, including two separate concurring opinions by justices in the five-justice majority. In light of the language in the majority and concurring opinions, the ruling upholding a blanket strip search policy appears to be limited to cases where detainees will be placed in the general population.

Result: Affirmance of Third Circuit Court of Appeals decision reversing district court order granting summary judgment to detainee.

LED EDITORIAL COMMENT: Washington has a statutory scheme – RCW 10.79.060-170 – imposing standards and restrictions on strip searching and body cavity searching in booking admittees to jails, as compared to the blanket strip search policy at issue in the Florence case. In light of the existence of the Washington statutory scheme, we do not think it is fruitful to provide more details on the U.S. Supreme Court decision in Florence. But we remind readers that the ruling in Florence upholding strip searching appears to be limited to cases where the newly admitted detainee will be placed in the general population of a jail.

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

(1) NINTH CIRCUIT SUA SPONTE WITHDRAWS OPINION IN A.D. V. MARKGRF, CALIFORNIA HIGHWAY PATROL – On April 11, 2012, the Ninth Circuit sua sponte (on its own initiative) ordered that its opinion in A.D. v. Markgraf, California Highway Patrol be withdrawn. The withdrawn opinion was published at 636 F.3d 555 (9th Cir., April 6, 2012) **Nov 11 LED:03** (Civil Rights Act lawsuit: officer who fatally shot driver, who rammed her vehicle into police vehicles at end of high speed chase, is entitled to qualified immunity from due process-based liability). The Court ordered the parties to submit supplemental briefing. The Court will issue a new opinion.

(2) NINTH CIRCUIT GRANTS MOTION FOR REHEARING EN BANC IN UNITED STATES V. COTTERMAN – On March 19, 2012, the Ninth Circuit granted a motion for rehearing en banc (by the full Court) in United States v. Cotterman, 637 F.3d 1068 (9th Cir., March 30, 2011) **Oct 11 LED:04** (Despite ICE's lack of reasonable suspicion of criminal conduct by the previously convicted child molester coming back to the United States from Mexico, border search doctrine held to justify taking laptop computer 170 miles to lab and searching it over a two-day period for child porn). The panel decision may no longer be cited.

(3) DEATH PENALTY SET ASIDE BECAUSE STATE OF CALIFORNIA KNOWINGLY PRESENTED FALSE TESTIMONY OF KEY WITNESS THAT SHE HAD NOT BEEN PROMISED LENIENCY – In Philips v. Ornoski, 673 F.3d 1168 (9th Cir., Mar. 16, 2012, amended May 25, 2012) a 2-1 majority holds that the State of California violated the defendant's due process rights by presenting false testimony of a key witness that she had not been promised leniency in exchange for her testimony (and by not informing the defense of the deal). The majority opinion concludes that the death penalty, but not the underlying convictions for first degree murder and other crimes, must be set aside because of the violation.

Result: Grant of habeas relief from California state court imposition of death penalty.

(4) CALIFORNIA'S ALL FELONY-ARRESTEE DNA LEGISLATION SURVIVES FOURTH AMENDMENT CONSTITUTIONAL CHALLENGE – Haskell v. Harris, 669 F.3d 1049 (9th Cir., Feb. 23, 2012) the Ninth Circuit holds that California's DNA and Forensic Identification Data Base and Data Bank Act, which requires law enforcement officers to collect DNA samples from all adults arrested for felonies, does not violate the Fourth Amendment to the United States Constitution.

Result: Affirmance of United States District Court's (Northern District California) denial of arrestees' motion for preliminary injunction.

LED EDITORIAL COMMENT: In Washington, DNA may only be collected from offenders convicted of an offense listed in RCW 43.43.754(1).

(5) CIVIL RIGHTS ACT LAWSUIT: CALIFORNIA SHERIFF GETS QUALIFIED IMMUNITY IN DEMOTION OF LIEUTENANT WHO RAN FOR SHERIFF AGAINST HIM – In Hunt v. County of Orange, 672 F.3d 606 (9th Cir., Feb. 13, 2012), a three-judge panel rules, 2-1: (1) that a lieutenant in the County of Orange Sheriff's Department (who acted as the "Chief of Police" over a contract city in the county) was not a "policy-maker" within the meaning of Civil Rights Act First Amendment case law (the majority opinion characterizes this as a "highly fact-based" determination); (2) that therefore Sheriff Carona's demotion of Lieutenant Hunt for things that Hunt said, including accusations of corruption, in a campaign for sheriff against Sheriff Carona were protected under the First Amendment from retaliatory employment action; (3) but that Sheriff Carona is entitled to qualified immunity from Civil Rights Act liability because he could have reasonably made the mistake, under then-existing case law, of thinking that Lieutenant Hunt was a policymaker. The dissenting judge disagrees with the majority's determination that Lieutenant was not a policymaker for First Amendment purposes, and he argues that the panel should have ruled for Sheriff Carona on that basis.

Result: Affirmance of U.S. District Court (Central District of California) order dismissing lawsuit.

LED EDITORIAL NOTE: Another lawsuit that arose in the aftermath of the same sheriff's office campaign was noted in the LED entry on the Ninth Circuit decision in Bardzik v. County of Orange, 635 F.3d 1138 (9th Cir., March 28, 2011) October 11 LED:06. The ruling in Bardzik was that Sheriff Carona was entitled to qualified immunity for his reasonable though legally mistaken action of transferring Lieutenant Bardzik out of a policy-making position for supporting Lieutenant Hunt's campaign, but that qualified immunity does not protect Sheriff Carona from Lieutenant Bardzik's Civil Rights Act lawsuit for alleged retaliation after the transfer occurred.)

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WASHINGTON STATE SUPREME COURT

COURT OVERRULES STATE V. DAVIS AND HOLDS THAT STATEMENTS TO POLICE ARE NOT INADMISSIBLE AT TRIAL MERELY BECAUSE STATE FAILS, WITHOUT EXPLANATION, TO CALL A SECOND POLICE OFFICER TO CORROBORATE DEFENDANT'S WAIVER OF MIRANDA RIGHTS

State v. Abdulle, ___ Wn.2d ___, 275 P.3d 1113 (May 3, 2012)

Facts and Proceedings: (Excerpted from Supreme Court majority opinion):

> In August 2008, [two detectives] of Bellevue Police Department arrested Abdulle at the Expedia Building in Bellevue where he was working as a security guard. He was then charged in King County Superior Court with two counts of forgery and one count of first degree theft. At a confession hearing held pursuant to CrR 3.5, Detective [A] testified that Detective [B] drove their police car to the police station while [detective A] and Abdulle sat in the backseat of the car. [Detective A] said that the car was a regular sedan with no screen between the front and back seats. [Detective A] indicated that he read Abdulle his rights under the Miranda decision and told him he had been arrested for taking checks from Puget Sound Security. Abdulle initially denied taking the checks. Detective [A] then told Abdulle they had photographs of him attempting to deposit the checks. At this point, Abdulle said he wanted to talk to an attorney. Detective [A] testified that a few minutes later Abdulle "said he would talk to me but he wanted a cigarette and a glass of water first."
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> The police detectives then parked the police car in a fenced area of the police station parking garage, and [detective B] was dispatched to fetch Abdulle the cigarette and glass of water. Detective [A] testified that Abdulle told him "they were out to get him, Puget Sound Security, and that they fired him for no reason, that he was mad and needed some money and so he took a check and that he tried to cash that check at a bank in Chinatown." [Detective A] also testified that Abdulle acknowledged that he was the person in the bank's surveillance photos and that he had attempted to cash the checks.
>
> Abdulle also testified at the CrR 3.5 hearing. His testimony differed from Detective [A]'s on a number of important points. According to Abdulle, [detective A] continued questioning him after he had asked for a lawyer. Abdulle also denied agreeing to make a statement in exchange for a glass of water and a cigarette. Abdulle said that when they arrived at the police station, he asked the officers to return a cigarette they had taken from him. The State acknowledged that if the judge accepted Abdulle's version of events, the statement he gave to the police officers should be suppressed.
>
> The superior court judge presiding at the confession hearing admitted Abdulle's statement after concluding that the State had met its burden of showing by a preponderance of the evidence that Abdulle made the statement attributed to him knowingly, intelligently, and voluntarily. No one raised the fact that Detective [B], who was present throughout much of Detective [A]'s and Abdulle's interactions, was not called to testify at the CrR 3.5 hearing. The jury trial on the charges against Abdulle commenced the same day. The jury heard Detective [A] testify

that Abdulle admitted that he took the checks and attempted to deposit them. Abdulle was found guilty of all three charges.

On appeal to the Court of Appeals, Abdulle argued for the first time that the State had not met the burden it had under [State v. Davis, 73 Wn.2d 271 (1968)] of showing that his confession was voluntary. The argument was based on the fact that Detective [B]'s] failure to testify was not explained as required by Davis. The State responded that Abdulle waived a Davis challenge because he had not raised the issue at the trial court. The Court of Appeals rejected the State's waiver argument and concluded that the trial court erred in admitting Abdulle's statements, reasoning that "it is the State's burden to present available corroborating evidence or explain its absence. By failing to do either, the State failed to present sufficient evidence of waiver." It then reversed and remanded for a new trial.

The State petitioned for review on the sole issue that Davis was "erroneous in light of later clarification [of Miranda] by the United States Supreme Court." We granted the State's petition.

ISSUE AND RULING: Should the Court overrule its decision in State v. Davis, 73 Wn.2d 271 (1968) which held that "at a hearing to determine the admissibility of a defendant's statement, that if the defendant denies waiving his Miranda rights and the State fails, without explanation, to call other police officers who witnessed the interrogation in order to corroborate the waiver, the defendant's custodial statements are inadmissible"? (ANSWER BY SUPREME COURT: Yes, rules a 5-4 majority (Justices Alexander (serving as a justice pro tem), Chief Justice Madsen, and Justices Owens, James Johnson and Wiggens) (Justices Stephens Charles Johnson, Chambers and Fairhurst dissent).

Result: Reversal of Court of Appeals decision reversing King County Superior Court conviction of Yussuf Hussein Abdulle for first degree theft and first degree forgery.

ANALYSIS: (Excerpted from majority opinion)

Seven years after Miranda, the United States Supreme Court clarified that the State's "heavy burden" could be met by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477 (1972). . . . In State v. Braun, 82 Wn.2d 157, 162 (1973), . . . this court followed Lego in holding that "[t]he state bears the burden of proving voluntariness by a preponderance of the evidence."

We agree with the State that Davis is incorrect in light of the United States Supreme Court's clarification in Lego of Miranda's "heavy burden." Whether in Davis this court misunderstood Miranda, it is certainly true that the result in Davis is not mandated by Miranda's progeny. We also agree that the rule we adopted in Davis is harmful because it keeps relevant evidence from the trier of fact. Accordingly, we overrule Davis insofar as it holds that the prosecution can never meet its burden of proving a valid waiver of Miranda rights if it fails, without explanation, to call as corroborating witnesses all officers who witnessed the defendant's interrogation.

We hold that Abdulle's statements were not inadmissible at trial merely because the State failed, without explanation, to call a second officer to corroborate Abdulle's waiver of Miranda rights. A court is, however, free to draw a negative

> inference from the second officer's absence, but is not required to do so. We, therefore, reverse the Court of Appeals and affirm Abdulle's convictions.

[Footnotes omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) COURT FINDS FAILURE TO DISCLOSE PHOTOGRAPHS AND FBI FILE THAT STATE HAD ACCESS TO BUT DID NOT DISCLOSE UNTIL 2009 AMOUNTS TO A BRADY VIOLATION AND REVERSES FIRST DEGREE AGGRAVATED MURDER CONVICTION AND DEATH SENTENCE – In State v. Stenson, ___ Wn.2d ___, 2012 WL 1638035 (May 10, 2012), after 18 years of appeals and six personal restraint petitions, the Washington State Supreme Court, in an 8-1 decision, finds that the state committed a Brady violation. Accordingly, the Court reverses defendant's aggravated first degree murder conviction and death sentence and remands for a new trial.

Under Brady v. Maryland, 373 U.S. 83 (1963), the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment. Evidence is material under Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.

Two critical pieces of evidence – (1) gunshot residue (GSR) in the front right pocket of the jeans that Stenson was wearing when the deaths occurred and (2) blood splatter on those jeans – connected Stenson to the shooting deaths of Stenson's wife and Stenson's business partner. The Supreme Court majority concludes, based on the record and some deferential inferences given to findings by the superior court in a recent hearing on the Brady issue, that some photographs and an FBI investigative file were not properly shared by the government with the defense at the time of trial.

The photographs showed a detective wearing Stenson's jeans with the right pocket turned out and showing the detective's ungloved hands, thus making it theoretically possible that the detective was the person who transferred the GSR into the pocket. And the FBI file in question indicated that an agent who testified at trial was not the person who performed a gunshot residue test, even though testimony at trial implied that he had.

The majority opinion concludes as follows that Stenson is entitled to a retrial:

> Our conclusion that Stenson did suffer prejudice is shaped largely by the fact that only two pieces of forensic evidence formed the basis for Stenson's conviction -- GSR and blood spatter. Judge Williams concluded after the first reference hearing that "[h]ad the ungloved handling and the turning out of the pockets been known to the trial court and an appropriate objection made, the GSR testimony would have been excluded [at trial]." Both items of evidence were instrumental to the State's case and, since the discovery of the FBI file and photographs, cumulative reliability of the forensic evidence in this case has been greatly undermined. Had the defense trial team been privy to the suppressed evidence at issue here, the integrity and quality of the State's entire investigation, evidence handling procedures and case presentation would have been called into question.

Dissent: Justice James Johnson is the lone dissenter.

Result: The Court grants Darold Ray Stenson's personal restraint petition, reverses the Clallam County Superior Court conviction for aggravated first degree murder, reverses the death sentence, and remands for new trial.

LED EDITORIAL COMMENT: While this case is a death penalty matter, officers should remember that Brady obligations are the same regardless of the severity of the criminal charge or the harshness of the potential sentence.

(2) CITY DOES NOT HAVE AUTHORITY TO PROSECUTE STATE LAW CRIMES THAT IT HAS NOT ADOPTED IN ITS MUNICIPAL CODE – In City of Auburn v. Gauntt, ___ Wn.2d ___, 274 P.3d 1033 (April 19, 2012) the Washington State Supreme Court holds that a city does not have authority to prosecute state law crimes that it has not adopted, either explicitly or by incorporation, in its City Code.

Result: Affirmance of Court of Appeals (see 160 Wn. App. 567 (Div. I, March 14, 2011) (**May 11 LED:22**) and King County Superior Court (on RALJ appeal) reversal of Auburn Municipal Court conviction of Dustin B. Gauntt for misdemeanor possession of marijuana and unlawful use of drug paraphernalia.

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WASHINGTON STATE COURT OF APPEALS

MIRANDIZED SUSPECT HELD TO HAVE MADE AN "UNEQUIVOCAL" REQUEST FOR AN ATTORNEY DURING CUSTODIAL INTERROGATION SUCH THAT QUESTIONING SHOULD HAVE STOPPED; STATE'S CONTEXT-BASED ARGUMENT IS REJECTED

State v. Nysta, ___Wn. App. ___, 275 P.3d 162 (Div. I, May 7, 2012)

Facts and Proceedings below:

During a Mirandized, custodial interrogation, defendant Daven Nysta persistently denied any memory of having doing anything wrong, other than remembering slapping his then-girlfriend before "going blank" until he was being placed in handcuffs. One of the two detectives in the interrogation asked Nysta if he would be willing to take a polygraph. Initially, Nysta indicated he was willing to take the polygraph.

After some back and forth about the polygraph idea, the detective explained: "Alright [a polygraph] can tell me if you're bein' truthful or not; alright it is very very accurate. And if you decide you wanna take that I will set that up and make sure it happens but again it's voluntary. I don't wanna waste my time if you're saying 'no I don't wanna do it.'"

Nysta immediately responded by bringing up the idea of talking to an attorney, which led to further back and forth. Nysta's attorney reference and the follow-up exchange is quoted by the Court of Appeals from the interrogation transcript (with emphasis added) as follows:

> The Defendant: Um hmm (pause) shit man I gotta talk to my lawyer someone.
>
> Detective: Okay.
>
> The Defendant: (inaudible) man if it's cool which you then I take it then.

Detective: Okay.

The Defendant: If it's not, f[---] it.

Detective: Okay fair enough. This is what I'll do I'll leave my number in your property.

The Defendant: Um hmm.

Detective: And if you decide that you wanna take that all you gotta do is call me or have your attorney call me and I'll set it up alright?

The defendant: Man that's crazy why people wanna f[---]in' put shit on me man. (pause) This is f[----]in' bullshit man.

The detective continued with more questions, which yielded no additional incriminating statements beyond Nysta's earlier admission of slapping his girlfriend and then "going blank."

In a pre-trial hearing, the trial court determined that Nysta did not unequivocally invoke his right to an attorney at any point during the Mirandized questioning. The trial court found that when Nysta said he wanted to speak with an attorney, it was only in reference to making a decision whether to take a polygraph examination, and not for the purpose of ending the interrogation.

Nysta was convicted of one felony count each of first degree rape, second degree rape, and felony harassment. He was also convicted of two misdemeanor counts each of violation of a court order and tampering with a witness, and he was sentenced to a total of 450 months.

ISSUE AND RULING: During a Mirandized, custodial interrogation, defendant Daven Nysta denied any memory of having committed certain heinous criminal acts, other than remembering slapping his girlfriend and "going blank" until he was being placed in handcuffs. A detective asked if he would take a polygraph. After initially indicating he might agree to be polygraphed, Nysta said, "shit man I gotta talk to my lawyer." Was Nysta's "gotta talk to my lawyer" declaration an unequivocal invocation of his right to an attorney such that the interrogation should have stopped, or instead should the "gotta talk" declaration by Nysta be considered in its full context as relating only to the topic of taking a polygraph? (ANSWER BY COURT OF APPEALS: The statement was an unequivocal invoking of Nysta's right to an attorney, and the State's contextual argument fails; however, the error by the trial court in allowing testimony about the post-invocation interrogation was harmless, because Nysta's post-invocation statements were no more incriminating than his pre-invocation statements.)

Result: Affirmance of King County Superior Court convictions of Daven Nysta for one felony count each of first degree rape, second degree rape, and felony harassment; plus two misdemeanor counts each of violation of a court order and tampering with a witness; also affirmance of Nysta's sentence to a total of 450 months imprisonment.

ANALYSIS:

The Court of Appeals analyzes as follows the issue of whether the interrogation should have stopped once Nysta said "I gotta talk to my lawyer":

Under the Fifth Amendment to the United States Constitution, no person "shall be compelled in any criminal case to be a witness against himself." To secure the privilege against self-incrimination, a person in custody must be advised before questioning begins that he has the right to the presence of an attorney. The defendant may waive this right, but there can be no questioning if he "indicates in any manner or at any stage of the process that he wishes to consult with an attorney before speaking." Miranda v. Arizona, 384 U.S. 436 (1966) (emphasis added). A waiver of Miranda rights "may be contradicted by an invocation at any time." Berghuis v. Thompkins, ___ U.S. ___, 130 S.Ct. 2250 (2010) **July 10 LED:02**. If the individual being questioned unequivocally states that he wants an attorney, interrogation must cease until an attorney is present. Thompkins; Davis v. United States, 512 U.S. 452 (1994) **Sept 94 LED:02**. The rule that questioning must cease if the suspect asks for a lawyer "provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information." Davis. . . .

To successfully invoke the right to counsel, a suspect must do so "unambiguously." Davis. That is, the suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Davis. In Davis, the Court held the police had no obligation to stop questioning a suspect who, about an hour and a half into the interrogation, said, "Maybe I should talk to a lawyer." Davis; compare State v. Radcliffe, 164 Wn.2d 900 (2008) **Dec 08 LED:18** (defendant's statement that "maybe I should contact an attorney" was equivocal).

The State contends that Nysta's request for an attorney was "equivocal" because, considering that the topic under discussion at that moment was whether he wanted to take a polygraph, what his words really meant was that he was willing to continue the interview without the assistance of counsel, but he wanted to consult with counsel before making a final decision about whether or not to take a polygraph. The State does not cite authority that supports giving such an elaborate contextual interpretation to words as plain as "I gotta talk to my lawyer." "Interpretation is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous." Connecticut v. Barrett, 479 U.S. 523, 529 (1987).

Nysta did not say "maybe" or "perhaps." He did not use conditional or obfuscating words such as "if" and "or." . . . . "I gotta talk to my lawyer" is plain language. "Using 'context' to transform an unambiguous invocation into open-ended ambiguity defies both common sense and established Supreme Court law." Anderson v. Terhune, 516 F.3d 781, 787 (9th Cir. 2008) **April 08 LED:09**.

Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease. Smith v. Illinois, 469 U.S. 91, 98 (1984). The interrogator may not proceed on his own terms as if the defendant had requested nothing. Smith. If the interrogator does continue, the suspect's post-request responses "may not be used to cast retrospective doubt on the clarity of the initial request itself." Smith. So the fact that Nysta went on responding to questions and agreed at the end of the interview that his statements had all been voluntary does not support a finding that "I gotta talk to my lawyer" was an equivocal statement.

> We conclude the trial court erred in determining that Nysta did not effectively invoke his right to counsel.

[Some citations shortened or omitted]

As noted above in the section describing the "Issue and Ruling" by the Court of Appeals, the Court of Appeals goes on to hold that the error by the trial court in allowing testimony about the post-invocation interrogation was harmless because Nysta's post-invocation statements added no incriminating evidence beyond that in his pre-invocation statements.

LED EDITORIAL COMMENT: We think that the invocation question on these facts is much closer than does the Court of Appeals. And we think that the Court of Appeals is misleading in its apparent suggestion that context is not an important factor that must be considered in determining whether a person has invoked his or her Miranda rights.

We repeat here our suggestion in past LEDs that, while Davis v. United States, 512 U.S. 452 (1994) Sept 94 LED:02 and State v. Radcliffe, 164 Wn.2d 900 (2008) Dec 08 LED:18 hold that an interrogator need not clarify an ambiguous statement by a Mirandized suspect about invoking his or her Miranda rights, clarifying seems the safest legal approach even though an academically logical argument can be made to the contrary. Here, while we think that the detective proceeded reasonably in light of Davis and Radcliffe, it might have helped if the detective had immediately clarified with Nysta that his reference to talking to his lawyer was narrowly limited to Nysta's concern about getting help on deciding whether to take the polygraph.

UNSUPPORTED "SEIZURE" FOUND IN FOLLOW-UP, LATE-NIGHT CONTACT WHERE, IN SECOND CONTACT, TWO OFFICERS ESSENTIALLY CORNERED WOMAN BEHIND LAUNDROMAT AND ASKED HER FOR IDENTIFYING INFORMATION

State v. Young, ___Wn. App. ___, 275 P.3d 1150 (Div. II, May 1, 2012)

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

> On January 28, 2010, [Officer A] noticed Young inside a Safeway supermarket at approximately 10:45 pm. When Young left the supermarket, [Officer A] stopped her and asked her name, which she gave voluntarily. [Officer A] explained that her "behavior was suspicious to [him]" because "most people that come to the store buy something, they don't just see a cop and then take off towards the door." Young did not have identification, declined to give [Officer A] her date of birth, and left when [the officer] said she was free to leave.
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> [Officer A] drove his patrol vehicle next to [Officer B's] patrol vehicle and told him about his contact with Young. [Officer A] ran a "local check" for arrest warrants, which came back negative. [Officer B] indicated to [Officer A] that Young had walked behind a closed laundromat business across the street from the supermarket.
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> [The two officers] drove their separate patrol vehicles to the street behind the laundromat. [Officer B] arrived first, exited his vehicle, and approached Young. [Officer A] arrived a few minutes later. The officers stood approximately 5 feet from Young, each at 45-degree angles from her. Young was on her cell phone

"saying that she was being harassed" by the police. She told the officers that she was "walking through going over by the [neighboring] trailer park." [Officer A] asked Young for the last four digits of her social security number, which she gave in reverse order.

[Officer A] testified that he thought Young was lying about her identity because, although she was not breaking any laws, "the totality of everything was very awkward, very suspicious," "most people don't walk behind a closed business and stand up against the wall," and "[s]he could have been planning on breaking into the place for all I know." [Officer A] further testified that Young's lack of identification was suspicious because "[m]ost people carry identification on them." [Officer A] also testified that Young was "argumentative" and "evasive" but that she opened her bag to show the officers its contents and the officers did not see anything stolen from the Safeway.

Young walked away once again. The officers repositioned their vehicles so they could observe her while they ran a statewide warrant search with the last four digits of her social security number. The officers lost sight of Young just as they learned that the Fife Police Department had an arrest warrant for Young for a narcotics-related crime. [Officer A] looked for Young outside of a hotel while [Officer B] went inside a neighboring bar. A bartender informed [Officer B] that a woman matching Young's description had recently walked inside and was in the restroom. [Officer B] radioed [Officer A] that Young was "most likely" inside the bar's restroom.

The officers arrested Young and led her out of the bar to the parking lot. [Officer A] searched Young while she stood next to a patrol vehicle. A third officer arrived to assist and asked Young if there was anything in her purse the police "needed to know about." Young said "she had needles in her bag." The officer then emptied the contents of Young's purse on the hood of [Officer A's] patrol vehicle.

The State charged Young with unlawful possession of methamphetamine. RCW 69.50.4013(1). Young moved to suppress "evidence obtained as the result of a warrantless seizure," arguing that the officers seized her behind the laundromat and that the following warrantless search of her purse was unlawful. Following a CrR 3.6 hearing, the trial court denied Young's motion, finding that the "initial contacts" outside the Safeway and behind the laundromat were reasonable and that the officers' search of Young's purse was valid as incident to her arrest.

Young waived her right to a jury trial. [T]he trial court found Young guilty as charged . . .

[Footnotes and subheadings omitted]

ISSUE AND RULING: Did the two officers "seize" Young, within the meaning of State and federal constitutional restrictions, when, shortly after a social contact with her by one of the officers, they each approached her and stood approximately 5 feet away at 45-degree angles from her while she stood with her back to the wall of the Laundromat, and they then questioned her about her activities and asked her for the last four digits of her social security number? (ANSWER BY COURT OF APPEALS: Yes, this was a seizure, and the seizure was unlawful because it was not supported by reasonable suspicion)

Result: Reversal of Clallam County Superior Court conviction of Jessica Lynn Young for possessing methamphetamine. RCW 69.50.4013(1).

ANALYSIS: (Excerpted from Court of Appeals opinion)

> [An exception to the warrant requirement] is an investigative Terry stop, based upon less evidence than is needed for probable cause to make an arrest, which permits the police to briefly seize an individual for questioning based on specific and articulable objective facts that give rise to a reasonable suspicion that the individual has been or is about to be involved in a crime. . . .
>
> "'[A] police officer's conduct in engaging a defendant in conversation in a public place and asking for identification does not, alone, raise the encounter to an investigative detention.'" State v. Harrington, 167 Wn.2d 656, 665 (2009) **Feb 10 LED:17** (alteration in original) (internal quotation marks omitted) (quoting State v. Young, 135 Wn.2d 498, 511 (1998) **Aug 98 LED:02**). Article I, section 7 permits such "social contacts." A person is seized if, when in an objective view of all the circumstances, a reasonable person would not have felt free to leave, decline to answer questions, or terminate the encounter with police. . . . . There is no seizure when police ask questions of an individual as long as the officers do not convey that compliance with their requests is required. In such a case, the encounter is consensual and no reasonable suspicion is required.
>
> An encounter may lose its consensual nature and become a seizure for Fourth Amendment or article I, section 7 purposes if "'the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.'" . . . . [quoting from Terry v. Ohio, 392 U.S. 1, 19 n. 16 (1968]. Examples of police showing authority include "'the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.'" Harrington, 167 Wn.2d at 664 (internal quotation marks omitted) (quoting Young, 135 Wn.2d at 512). "If police unconstitutionally seize an individual prior to arrest, the exclusionary rule calls for suppression of evidence obtained via the government's illegality." Harrington.
>
> Here, the record shows that Young gave her correct name to [Officer A] when asked in front of the Safeway. [The officer] ran a "local check" for warrants that came back clear. Despite the clear warrant check, [the officer] radioed for assistance and continued to watch Young as she crossed the street and walked behind a business. Then, for no articulated reason, [the two officers] drove in separate patrol vehicles toward Young. They stood approximately 5 feet from Young, each at 45-degree angles from her while her back was to a wall, and asked for the last four digits of her social security number. Young gave the officers the numbers, albeit in reverse order, and even opened her bag to show the officers she had not shoplifted. . . . .
>
> These facts are insufficient to justify a Terry stop. There is no evidence in the record before us that the officers had any reason to suspect that Young was or would be engaged in criminal wrongdoing. . . . Any reasonable person in Young's position, with her back to a wall and police officers on either side of her, would not have felt free to walk away without first answering the officers' questions. . . .

> [Officer A] testified that he was suspicious of Young because she was "awkward," had no identification, and walked behind a closed business while talking on a cell phone when he believed "most people" did not walk behind closed businesses and stand against a wall to speak on a cell phone. But Washington law does not require Young to carry identification on her person at all times. Young may also walk on public roads, behind or in front of closed businesses at night, while talking on a cell phone on her way to see a friend. We find no authority holding that "awkward" behavior, alone, is sufficient to establish reasonable suspicion, let alone probable cause.
>
> [Officer A's] mere suspicion of Young, wholly unsupported by articulable facts, is insufficient to justify seizing her. Neither does [Officer A's] testimony that Young's "evasive" attitude made him "suspicious" satisfy the "specific and articulable objective facts" requirement to support a reasonable suspicion that Young had been or was about to be involved in a crime. Accordingly, we hold that substantial evidence does not support the trial court's finding that the contact behind the laundromat was not a seizure. The trial court erred, therefore, in concluding that the unlawful seizure was reasonable. Because the police unconstitutionally seized Young behind the laundromat, the evidence of her social security number tainted the discovery of the arrest warrant and the methamphetamine evidence must be suppressed. Accordingly, we reverse Young's conviction, vacate her sentence, and remand for further proceedings. [Court's footnote: *Because we reverse Young's conviction and vacate her sentence, we do not address the parties' remaining arguments regarding the officers' warrantless search of Young's purse or her sentence.*] If, on remand, the State is unable to produce other untainted evidence to prove beyond a reasonable doubt that Young possessed methamphetamine in violation of RCW 69.50.4013(1), we instruct the trial court to dismiss the charge.

[Some citations shortened or omitted]

LED EDITORIAL COMMENT: The question of whether the re-contact by the two officers constituted a "seizure" of Ms. Young was a close one. Where the basis of suspicion is less than reasonable suspicion, officers should try to make field contacts consensual by their words and actions.

LED EDITORIAL NOTE: The appellate briefing in this case did not explore the Exclusionary Rule issue of whether, assuming an unlawful seizure occurred, the arrest of Ms. Young should nonetheless be held lawful in light the release of Ms. Young (1) after the re-contact behind the laundromat and (2) before receipt of the arrest warrant information. Discussion in State v. Dugas, 52 Wn. App. 832, 835 (1988) appears to support an Exclusionary Rule argument that evidence seized in the post-release warrant arrest is admissible despite the unlawfulness of the earlier unlawful Terry seizure.

CORPUS DELICTI – PRIMA FACIE EVIDENCE INDEPENDENT OF DEFENDANT'S STATEMENTS ESTABLISHING THAT VICTIM DIED FROM CRIMINAL ACT – HELD ESTABLISHED IN MURDER CASE WHERE BODY OF VICTIM HAS NEVER BEEN FOUND, BUT SHE DISAPPEARED WITHOUT WARNING UNDER SUSPICIOUS CIRCUMSTANCES

State v. Hummel, 166 Wn. App. 749 (Div. I, Jan. 3, 2012)

Facts and Proceedings below:

Alice Hummel disappeared in 1990 and has not been seen since, alive or dead. At the time she was married to Bruce Hummel. Many years later, while Bruce was incarcerated in the Whatcom County Jail, he told his cellmate, Donald Cargill, that he had helped his wife Alice "get to a better place" by mixing a handful of ground up pills in apple cider and giving it to Alice to drink.

Based on this statement and considerable other evidence, the State prosecuted Hummel for first degree murder. The trial court denied Hummel's motions to bar the admission of his statements to Cargill and to dismiss the charge, arguing there was insufficient evidence of the corpus delicti of the crime. The jury convicted Hummel as charged.

The opinion by the Court of Appeals in this case provides the following bullet points to set out the evidence that provided the corpus delicti for the crime of murder of Alice Hummel:

> ● At the time Hummel's wife Alice disappeared, their youngest daughter, Shanalyn, was twelve years old, and Hummel had been molesting her for years.
>
> ● Hummel and Alice would bicker "constantly".
>
> ● Shanalyn talked with her mother every day. Her mother twice asked if anything "inappropriate" had happened with Hummel.
>
> ● Shanalyn told her mother about the molestation a few days before her birthday.
>
> ● Alice was "upset" at the news of the molestation. Shanalyn believed her mother would take action.
>
> ● Just a couple of days after Shanalyn told her mother about the abuse, her mother disappeared.
>
> ● Shanalyn came home from school and only [Hummel] was there when she arrived home.
>
> ● Alice never mentioned leaving to Shanalyn, and Shanalyn did not see her pack any bags.
>
> ● Alice left behind her personal belongings, including medication, purse, wallet, identification, and bank cards.
>
> ● At the time she disappeared, Alice was working on a computer project for Wayne Terry. She never completed it nor spoke to Terry about abandoning the work. This was contrary to her previous work for Terry, which had always been completed on a timely basis.
>
> ● Alice had made special plans to attend a ballet with Shanalyn for Shanalyn's birthday, and never gave any indication she could not make it.
>
> ● Shanalyn helped Hummel pack her mother's purse, clothes, makeup, medication, and other personal items, allegedly to send to her mother, who had secured a new job in California. Hummel never sent the items, however, but instead sold them at a garage sale later that year.
>
> ● Shanalyn never saw her mother again. She never received a telephone call from her mother.

● Shanalyn did receive typewritten letters purportedly from her mother, including one letter saying her mother had met a new man who had no interest in children. But those letters did not read as if they were written by her mother.

● A forensic scientist who examined the signature on the various pieces of correspondence allegedly sent by Alice after her disappearance testified there were indications the signatures were made by Hummel, not Alice.

● Hummel would throw "temper tantrums" if he caught Shanalyn and her brother [Sean] attempting to get the mail to see if their mother had sent a letter.

● Sean Hummel and his mother had a history of leaving notes for each other in a "special place" – in a false ceiling of their basement. Sean checked the false ceiling after his mother disappeared but found nothing. About a year later, however, Sean discovered a "suicide letter" in the space. The letter was in his father's handwriting.

● Sean Hummel once received a Christmas card purportedly from his mother after her disappearance, but the check inside was signed by his dad.

● After Alice's disappearance, Hummel kept molesting Shanalyn.

● After Alice disappeared, Hummel immediately began stealing her disability payments. Hummel pled guilty to twelve counts of federal wire fraud for the theft of the disability payments.

ISSUE AND RULING: Does the evidence support the corpus delicti of murder – prima facie evidence that a criminal act caused the death of Alice Hummel – such that Bruce Hummel's statement to a fellow jail inmate is admissible? (ANSWER BY COURT OF APPEALS: Yes)

Result: Reversal (on public-trial-right grounds not addressed in this LED entry) of Whatcom County Superior Court conviction of Bruce Allen Hummel for first degree murder; case remanded for retrial.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> [The corpus delicti rule] requires the State to produce sufficient evidence to establish the corpus delicti of the charged crime before a defendant's statements may be admitted into evidence. The corpus delicti of a homicide case is proved by evidence, independent of a defendant's statements, establishing the fact of death and a causal connection between the death and a criminal act. We conclude that there was sufficient independent evidence to establish the corpus delicti and that Hummel's statements were properly admitted into evidence.
>
> . . . .
>
> It is also well settled that only two elements are necessary to establish the corpus delicti in a homicide case: the fact of death and a causal connection between the death and a criminal act. . . . . The independent evidence may be either direct or circumstantial and need not be of such character as would establish the corpus delicti beyond a reasonable doubt or even by a preponderance of the evidence. It is sufficient if it prima facie establishes the corpus delicti. "Prima facie" in the context of the corpus delicti rule means "'evidence of sufficient circumstances which would support a logical and reasonable inference' of the facts sought to be proved." There is no requirement that the evidence establish the identity of the perpetrator. In analyzing whether there is sufficient evidence to support the corpus delicti of the crime, this court "assumes the truth of the State's evidence

and all reasonable inferences from it in a light most favorable to the State." The causal connection between the death and the defendant's acts cannot be based on mere conjecture and speculation.

. . . .

Relying on [State v. Aten, 130 Wn.2d 640 (1996) **March 97 LED:06**, State v. Dow, 168 Wn.2d 243 (2010) **May 10 LED:23**, and State v. Brockob, 159 Wn.2d 311 (2006) **Feb 08 LED:08**], Hummel argues that [the evidence set forth in the bullet points above] is insufficient to establish the corpus delicti for first degree murder. Hummel contends that these cases stand for the proposition that if the independent evidence supports hypotheses of both guilt and innocence, it is insufficient to satisfy the corpus delicti rule. And further that the independent evidence must prove every element of the crime charged including, the requisite mental state. Hummel contends that here, since Alice's body was never found, the independent evidence does not eliminate the possibility that she simply left or died of natural causes. He further argues that, even assuming that Alice is deceased, the independent evidence does not establish every element of the charged crime, specifically, that her death was caused by a person with the requisite mental state for first degree murder, premeditated intent. Hummel misconstrues these cases and ignores the decades of case law explaining the application of the corpus delicti rule in homicide cases in the State of Washington. We reject his arguments and affirm the trial court's ruling that the corpus delicti was sufficiently established by the independent evidence and that Hummel statements were admissible. **[LED EDITORIAL NOTE: The Court of Appeals then expands on the paragraph immediately above and explains in 19 additional paragraphs of detailed analysis, omitted from this LED entry due to space limits, why the Court rejects Hummel's arguments that he bases on Aten, Dow, and Brockob. Included in this analysis is the Court's explanation that the evidence in this case is analogous in some respects to that in State v. Thompson, 73 Wn. App. 654 (Div. I, 1994) Nov 94 LED:18, where the Court of Appeals relied in part on the victim's habits regarding housework, patterns of contact with her friends, and her care of her pets, as well as evidence that she disappeared suddenly and without warning, as creating a strong inference that she died a sudden death due to criminal homicide.]**

[Some citations omitted]

LED EDITORIAL NOTE: Among the corpus delicti decisions addressed in Hummel and not included in the excerpts in this LED entry are State v. Vangerpen, 125 Wn.2d 782 (Div. I, 1995) May 95 LED:06 (attempted murder of a police officer) and State v. Rooks, 130 Wn. App. 787 (Div. I, 2005) April 06 LED:15 (murder).

SPLIT COURT HOLDS THAT INDEPENDENT SOURCE AND ATTENUATION EXCEPTIONS TO THE EXCLUSIONARY RULE APPLY TO ALLOW TESTIMONY OF ASSAULT VICTIMS THAT OFFICERS INADVERTENTLY DISCOVERED AFTER RANDOM, WARRANTLESS SEARCH OF MOTEL REGISTRY FOR ARREST WARRANT SUBJECTS

State v. Smith, 165 Wn. App. 296 (Div. II, Dec. 6, 2011)

Facts (Excerpted from Court of Appeals majority opinion):

On October 22, 2006, a Lakewood Police Officer . . . stopped at the Golden Lion Motel as part of the [Crime Free Motel Program] CFMP. The CFMP was a

> voluntary program that permitted a motel owner to allow police to check the 10 most recent entries on a guest registry to determine if those individuals had outstanding warrants. [The officer] performed a warrant check at the Golden Lion Motel and discovered that Christopher Smith, a guest, had an outstanding warrant.
>
> [The officer], assisted by other officers, knocked on Smith's motel room door. Smith opened the door, stepped outside, and was placed under arrest. After the arrest, the motel door remained open naturally and was not propped open by anyone. As [the officer] was leading Smith away, other officers saw Quianna Quabner, who at a subsequent hearing testified that she had been unable to get to a phone to call police for help, inside the motel room "limping toward the door, sobbing a little bit" and holding a bloodied towel to her head. Officers entered the room to perform "community caretaking" duties and assist her because of the "immediately obvious" head trauma that had occurred.
>
> Quabner informed the officers that she and Smith had gotten into an argument and that he had tied her to the refrigerator and assaulted her with a metal candlestick and a picture frame. Quabner also reported that Smith had sexually assaulted her 12–year–old daughter, L.S., and had tied them both up. Although Quabner's two-year-old son was also in the room during the incident, there were no allegations of abuse or injury inflicted on him. L.S. informed officers that the items Smith had used to tie them up were in a motel dumpster. The dumpster is open to the public and not secured. Officers found two bags of blood-stained items in the dumpster that appeared to have come from Smith's room.
>
> After Quabner and L.S. were taken away for medical treatment, the officers searched the motel room and seized physical evidence. The officers failed to request a warrant before this search and seizure.

Proceedings below: After Smith was charged with several crimes against Quabner and L.S., the Washington Supreme Court decided State v. Jorden, 160 Wn.2d 121 (2007) **July 07 LED:19**, holding that absent a valid exception to the search warrant requirement, random checks of motel registries are unlawful. Smith moved to suppress evidence, including the testimony of the two alleged victims. A jury convicted Christopher Leon Smith for first degree rape, second degree child rape, two counts of first degree kidnapping, two counts of felony harassment, and first degree assault.

ISSUES AND RULINGS: Do the independent source and attenuation exceptions to the exclusionary rule apply to allow the testimony of the victims who the officers inadvertently discovered in the motel room after the officers unlawfully made a random check of the motel registry to look for persons with outstanding arrest warrants? (ANSWER BY COURT OF APPEALS: Yes, both exceptions apply, rules a 2-1 majority, with Judge Armstrong in dissent)

Result: Affirmance of Pierce County Superior Court convictions of Christopher Leon Smith for first degree rape, second degree child rape, two counts of first degree kidnapping, two counts of felony harassment, and first degree assault.

ANALYSIS: (Excerpted from Court of Appeals majority opinion)

> Evidence seized during illegal searches and evidence derived from illegal searches is subject to suppression under the exclusionary rule. State v. Gaines, 154 Wn.2d 711, 716–17 (2005) **Oct 05 LED:04**. The exclusionary rule applies to

evidence derived directly and indirectly from illegal police conduct. State v. Le, 103 Wn. App. 354, 361 (2000) **Feb 01 LED:07**. Derivative evidence will be excluded unless it was obtained without exploiting the original illegality or by means sufficiently distinguishable to be purged of the primary taint. To prove that evidence has been purged of taint, the State must show either that: (1) intervening circumstances have attenuated the link between the illegality and the evidence or (2) the evidence was discovered through a source independent from the illegality. State v. McReynolds, 117 Wn. App. 309, 322 (2003) **Oct 03 LED:14**.

Independent Source

. . . .

The independent source exception to the exclusionary rule was initially applied under a Fourth Amendment analysis. See Gaines, 154 Wn.2d at 717–18. But the independent source exception has long been accepted both by the United States Supreme Court and the Washington Supreme Court. Murray v. United States, 487 U.S. 533, 537 (1988); Gaines, 154 Wn.2d at 717. Our Supreme Court has repeatedly held that the independent source rule is compatible with article I, § 7. Gaines, 154 Wn.2d at 717–18; see State Winterstein, 167 Wn.2d 620 (2009) **Feb 10 LED:24**.

Under the independent source doctrine, evidence tainted by unlawful government action is not subject to suppression under the exclusionary rule if officers ultimately obtain it using "a valid warrant or other lawful means independent of the unlawful action." Gaines, 154 Wn.2d at 718 (emphasis added); State v. Hilton, 164 Wn. App. 81 (2011) **March 12 LED:24**. An unlawful search does not invalidate a subsequent search if the subsequent search is based on untainted independently obtained information, and the State's decision to search is not motivated by the previous unlawful search and seizure. The independent source doctrine recognizes that probable cause may exist based on legally obtained evidence; the tainted evidence, however, is suppressed. Winterstein, 167 Wn.2d at 634.

The independent source doctrine differs from the inevitable discovery doctrine. Whereas the inevitable discovery doctrine requires a speculative analysis of whether the police would have ultimately obtained the same evidence by other lawful means, the independent source exception contains no similar speculative considerations. Hilton, 164 Wn. App. at 91–92. Rather than considering whether the police would have found the same evidence by lawful means, the independent sources exception requires considering if evidence is tainted by earlier unlawful government actions. This is not a speculative question and instead requires a review of "what the police were doing and what motivated them to take the action they did" when they found the evidence.

Furthermore, the independent source doctrine, unlike inevitable discovery, is not based on the need to deter unlawful police conduct; rather it is based on individual privacy rights. See Winterstein, 167 Wn.2d at 634. Also, the rationale for the independent source rule is "that the police should not be in a worse position than they otherwise would have been because of the error." Hilton, 164 Wn. App. at 90.

Here, the officers' decision to enter the motel room was based on independent, untainted information because Quabner sought their assistance as community

caretakers after the officers had arrested Smith and were preparing to leave. Quabner's obvious need for assistance, and the officers' community caretaking responsibilities, was a supervening intervening factor that allowed an emergency aid exception to the warrant requirement. In addition, the subsequent search was not motivated by a continuation of the registry search. [The officer] had already arrested Smith on the warrant and was leading Smith away when Quabner limped to the door sobbing and holding a bloody towel to her head.

The officers' entry into the motel room was a valid exercise of their community caretaking functions and, as such, was a valid emergency aid exception to the warrant requirement. A proper community caretaking function is divorced from a criminal investigation. State v. Kinzy, 141 Wn.2d 373, 386–88 (2000) **Sept 00 LED:07**, cert. denied, 531 U.S. 1104 (2001). The emergency aid exception to the warrant requirement applies when (1) the officer subjectively believed that someone likely needed assistance for health or safety reasons, (2) a reasonable person in the same situation would similarly believe that there was a need for assistance, and (3) there was a reasonable basis to associate the need for assistance with the place searched. The State must establish that the police had a reasonable belief that all the elements of the emergency aid exception were satisfied before entering a residence. State v. Schultz, 170 Wn.2d 746, 759–60 (2011) **March 11 LED:16**.

In Schultz, our Supreme Court held that officers did not have enough facts to justify an entry based on the emergency aid exception. Officers responded to a call about a man and woman yelling, and they overheard a man and woman talking loudly while outside Schultz's apartment. Schultz, 170 Wn.2d at 760. Schultz answered the door and appeared flustered. She initially told officers no one else was there, but the male occupant soon came to the door. When he did, officers entered the apartment. Our Supreme Court held that at the time they entered, officers did not have enough evidence to justify an entry because they did not notice red marks on Schultz's neck until after they entered, the male occupant appeared at the door before officers entered, and there was no evidence that police had responded to the residence in the past nor that the situation was volatile and escalating.

Here, the officers had reason to believe all three requirements to the emergency aid exception were met before they entered the motel room. Unlike the officers in Schultz, the officers here saw Quabner limp to the door sobbing and holding a bloody towel to her head. The officers subjectively believed she needed medical assistance, because of her "immediately obvious" head trauma, and a reasonable person would have concurred. Furthermore, the officers' entry into the motel room was unrelated to Smith's arrest for the outstanding warrant and, thus, was divorced from that criminal investigation. Therefore, it was reasonable for officers to enter the motel room to assist Quabner. Accordingly, Quabner's and L.S.'s testimonies were the product of an independent source and not subject to suppression under the exclusionary rule.

Attenuation

The State also argues that the victims' trial testimonies were sufficiently attenuated from the illegal police conduct and are, therefore, admissible. In light of our Supreme Court's recent split decision in State v. Eserjose, 171 Wn.2d 907 (2011) **Sept 11 LED:06**, whether the attenuation exception to the search warrant requirement is permitted under our state constitution remains an open question.

> But assuming that the attenuation exception is permitted in our state, we agree with the State's argument that the attenuation exception also supports the admissibility of the victims' trial testimonies in this case.
>
> Relevant factors we consider in determining whether the witness's testimony is sufficiently attenuated from the police misconduct are: (1) the length of the "road" between the unlawful police conduct and the witness's testimony; (2) the degree of free will the witness exercised; and (3) whether exclusion would permanently disable the witness from testifying about relevant and material facts, even though her testimony might be unrelated to the original illegal search's purpose or the evidence discovered during it. State v. Childress, 35 Wn. App. 314, 316, review denied, 100 Wn.2d 1031 (1983). Additional factors we consider to determine attenuation between police misconduct and witness testimony are: (1) the witnesses' stated willingness to testify; (2) the role the illegally-seized evidence played in gaining the witnesses' cooperation; (3) the proximity between the illegal behavior, the witnesses' decisions to cooperate, and the actual trial testimony; and (4) the police motivation in conducting the search. State v. Stone, 56 Wn. App. 153, 162 (1989).
>
> **[LED EDITORIAL NOTE: The next three paragraphs of the majority opinion's analysis are omitted from this LED entry to save space. The majority opinion explains in those three paragraphs the majority judges' view that the seven factors of Childress and Stone support application of the attenuation exception to the exclusionary rule.**]
>
> Moreover, even if Quabner's and L.S.'s testimonies were the result of a constitutional violation, both federal courts and Washington courts have held that witness testimonies are not subject to suppression because of the constitutional violation. A witness's free will in testifying attenuates "any taint that led to the discovery of the witness."
>
> Thus, we hold that the State has carried its burden to show that the victims' trial testimonies were sufficiently attenuated from the illegal search.

[Footnotes and some citations omitted]

Judge Armstrong's dissent: Judge David Armstrong argues that under article I, section 7: (1) the attenuation exception to the exclusionary rule does not apply, and (2) the independent source exception does not apply under the facts of this case.

PUBLIC DUTY DOCTRINE REQUIRES DISMISSAL OF LAWSUIT BROUGHT BY ESTATE OF MISSING PERSON WITH HISTORY OF SEIZURE DISORDERS, WHERE CITIZEN CALLED 911 TO REPORT ERRATIC DRIVING BY VEHICLE MATCHING THE DESCRIPTION OF THE MISSING PERSON'S VEHICLE, 911 OPERATOR ACCURATELY INFORMED CITIZEN THAT THE AGENCY WOULD "NOTIFY TROOPERS", AND MISSING PERSON WAS FOUND DEAD A WEEK AND A HALF LATER

Johnson v. State of Washington, 164 Wn. App. 740 (Div. II, Nov. 8, 2011)

Facts: (Excerpted from Court of Appeals opinion)

> . . . On January 27, 2007, Beverly drove her vehicle away from her local library. Her family reported to the Beaverton, Oregon Police Department that she was "missing with a history of seizure disorder," which "caused her to be severely disoriented while appearing to function normally," especially at that time, when Beverly's "medications that normally controlled her condition were not functioning

> because of a flu virus." At 7:03 pm, the Beaverton Police Department reported Beverly as a "missing person endangered with history of seizures" in the National Crime Information Center (NCIC) and provided her physical description, a description of the clothes she was last seen wearing, and the description and license plate number of her vehicle. The Beaverton Police Department did not request "automatic notification of any sighting of [Beverly's] vehicle."
>
> At 8:41 pm, Tyler Trimble advised a Grays Harbor 911 operator that he was driving on a Washington state highway and observing a car driving erratically in front of him at about 20 miles below the speed limit. Trimble reported the vehicle's color, license plate number, location, slow speed, and erratic movement. Because the vehicle was travelling on a state highway, Grays Harbor 911 transferred Trimble to the Washington State Patrol (WSP), to whom Trimble repeated the same information.
>
> WSP advised Trimble that it was going to "notify troopers." Trimble stayed on the line as the erratic vehicle turned off the state highway into the City of Elma; Trimble continued on the state highway. When the call between WSP and Trimble ended, WSP put out a dispatch to local patrol that "the erratically driven [vehicle] . . . just enter[ed] Elma at this time, slow rate lane travel, NCIC indicates that this vehicle is associated with a missing person endangered and a seizure history." Four WSP troopers acknowledged this call.
>
> WSP also advised Grays Harbor 911 that the reported vehicle was then in Elma and that "NCIC shows that vehicle [is] associated with a missing and endangered person who has a history of seizures." Neither WSP nor Grays Harbor 911 passed on this information to Trimble. About one and a half weeks after the Beaverton Police Department reported Beverly missing, Grays Harbor Sheriff's Department deputies discovered her vehicle and her body near Wynoochee Lake Dam in the Olympic National Forest.

[Footnotes omitted]

Procedure below: The personal representative of the estate of Beverly Johnson sued Grays Harbor County and WSP on a negligence theory. The Superior Court dismissed the lawsuit on grounds that the public duty doctrine barred the suit.

ISSUE AND RULING: Does the public duty doctrine bar the family's negligence-based lawsuit? (ANSWER BY THE COURT OF APPEALS: Yes)

Result: Affirmance of Grays Harbor County Superior Court order dismissing plaintiffs' lawsuit.

ANALYSIS:

The lawsuit alleged in part that the WSP's and Grays Harbor County's failures to tell Good Samaritan Trimble that Beverly had been listed as Missing and Endangered was an error that proximately caused and substantially contributed to Beverly's death. Trimble alleges that had he been told, as a Good Samaritan, he would have stayed with the vehicle, providing updated information until an available patrol unit could contact the vehicle.

In order to maintain a negligence action, a plaintiff must establish a duty of care that runs from the defendant to the plaintiff. The public duty doctrine serves as a framework for courts to use

when determining when a governmental entity owes either a statutory or common law duty to a plaintiff suing in negligence. According to the public duty doctrine, in negligence actions against a government entity, no liability may be imposed unless it is shown that the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general.

In order to establish that defendants owed Beverly a duty, the estate must to show that one of four exceptions to the public duty doctrine applies: (1) legislative intent; (2) a failure to enforce; (3) the rescue doctrine; or (4) a special relationship. The Court of Appeals provides detailed analysis to support its rejection of application of any of the exceptions.

The legislative intent exception to the public duty doctrine applies where a regulatory statute evidences a clear legislative intent to identify and protect a particular and circumscribed class of persons. The estate contends that the Legislature intended RCW 70.96A.120(2) to protect persons such as Beverly. Subject to certain exceptions, RCW 70.96.120(2) provides, in part:

> [Any] person who appears to be incapacitated or gravely disabled by alcohol or other drugs and who is in a public place or who has threatened, attempted, or inflicted physical harm on himself, herself, or another, shall be taken into protective custody . . . as soon as practicable, but in no event beyond eight hours brought to an approved treatment program for treatment. If no approved treatment program is readily available he or she shall be taken to an emergency medical service customarily used for incapacitated persons.

The Court of Appeals explains that Washington Supreme Court precedent holds that this statute does not evidence a clear legislative intent to identify and protect persons such as Beverly. Rather, the statute is narrowly drawn as to reach only certain individuals incapacitated by alcohol and in need of treatment. And RCW 70.96.120(2) specifically excludes "a person who may be apprehended for possible violation of laws relating to driving or being in physical control of a vehicle while under the influence of intoxicating liquor or any drug." The Court of Appeals holds that because Beverly was "driving . . . a vehicle" while apparently intoxicated, her circumstances are outside the ambit of the statute. Thus, the "legislative intent" exception to the public duty doctrine does not apply.

Next, the Court of Appeals explains that the failure to enforce exception to the public duty doctrine applies where government agents fail to enforce a statute, and the plaintiff is within the class of persons the statute is designed to protect. The Johnson family relies on RCW 70.96A.120(2) to invoke this exception, but the Court of Appeals rejects that argument for the same reason it rejects the legislative intent argument, i.e., that Beverly is not within the class of persons the statute is designed to protect.

The Court then turns to the rescue exception, which applies if a governmental entity or its agent (1) undertakes a duty to aid or warn a person in danger, (2) fails to exercise reasonable care, and (3) the offer to render aid is relied upon by either the person to whom the aid is to be rendered or by another who, as a result of the promise, refrains from acting on the victim's behalf. Integral to this exception is that the rescuer gratuitously assumes the duty to warn the endangered parties of the danger and breaches this duty by failing to warn them. The Court explains, among other things, (A) that Grays Harbor 911 did nothing more than transfer Trimble to WSP, (B) that WSP was carrying out a public duty and hence did not act gratuitously, and (C) that, in any event, WSP did not make a promise to render aid to any specific person but only explained that troopers would be notified. So the rescue exception does not apply, the Court of Appeals holds.

Finally, as to the special relationship exception to the public duty doctrine, the Court of Appeals explains that this exception applies when (1) there is direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public, and (2) there are express assurances given by a public official, which (3) gives rise to justifiable reliance on the part of the plaintiff. The Court of Appeals asserts that the family conceded that the exception does not fit this case, and that, in any event, the exception would not apply because plaintiffs did not specifically seek and the government did not expressly give assurances that the government would act in a specific manner.

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BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS

IN MALICIOIUS HARASSMENT PROSECUTION COURT HOLDS THAT DEFENDANT INTENTIONALLY AND MALICIOUSLY THREATENED THE VICTIM BECAUSE OF HER RACE, AND EVIDENCE IS SUFFICIENT TO ESTABLISH A TRUE THREAT – In State v. Read, 163 Wn. App. 853 (Div. I, Sept. 19, 2011) the Court of Appeals affirms the malicious harassment conviction of an enraged, large male defendant who uttered numerous racial epithets while he verbally threatened and also drove his pickup truck, tires screeching, in a threatening manner toward a much smaller female Ethiopian parking attendant who had given him a ticket.

The Court of Appeals explains that to convict Read of malicious harassment, the State must prove beyond a reasonable doubt that he maliciously and intentionally threatened the victim and placed her in fear of harm because of his perception of her race, ancestry, or national origin. RCW 9A.36.080. Words alone cannot constitute malicious harassment (1) "unless the context or circumstances surrounding the words indicate the words are a threat," and (2) it is apparent that the person can carry out the threat. The intent of the malicious harassment statute, the Read Court explains, is not to punish bigoted speech or thought, "but rather the act of victim selection." State v. Talley, 122 Wn.2d 192, 206 (1993) **Dec 93 LED:18**. The Court concludes that the defendant intentionally and maliciously threatened the victim because of her race, and that the threat constituted a true threat.

Result: Affirmance of King County Superior Court conviction of Charles Raymond Read of malicious harassment.

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

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

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

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

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

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