Law Enforcement Digest

August 2015

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

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HONOR ROLL

717th Basic Law Enforcement Academy – March 10, 2015 through July 15, 2015

Best Overall:	Brian T. Hornback, Wahkiakum Police Department
Best Academic:	Brian T. Hornback, Wahkiakum Police Department
Patrol Partner Award:	Christopher L. Carlson, Mount Vernon Police Department
Tac Officer:	Mark Best, Tacoma Police Department
	Trenton Chapel, Mountlake Terrace Police Department

718th Basic Law Enforcement Academy – March 31, 2015 through August 5, 2015

Best Overall:	Tyler D. DeZeeuw, Whatcom County Sheriff's Office
Best Academic:	Thomas J. Groom, Pasco Police Department
Patrol Partner Award:	Nigel M. Hunter, Chelan County Sheriff's Office
Tac Officer:	Joe Winters, King County Sheriff's Office
	Russ Hicks, Fife Police Department

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THE NINTH CIRCUIT COURT OF APPEALS

BRADY: PROSECUTION'S FAILURE TO DISCLOSE PLEA DEAL THAT THE WITNESS WOULD NOT SUBMIT TO A MENTAL COMPETENCY EVALUATION IN EXCHANGE FOR DISMISSAL OF MURDER CHARGES AGAINST THE WITNESS VIOLATED *BRADY*
Shelton v. Marshall, __ F.3d __, 2015 WL 4664530 (August 7, 2015).

In 1981, three men (the defendant, Silva, and Thomas) kidnapped two college students. The three men took the college students to the defendant's cabin. The male college student was killed with a machine gun near the cabin. The female college was later shot to death.

Thomas was later arrested for violating his probation. He then "told the police about the murders." The State charged the defendant, Silva, and Thomas with murder and other felony offenses.

Thomas' attorney learned that "Thomas had suffered a severe motorcycle accident resulting in an extended coma[.]" Consequently, Thomas' attorney thought his client "was either unable to cooperate in his own defense, or insane." Before trial, Thomas' attorney and the prosecutor "reached a plea agreement in which [Thomas' attorney] would refrain from having Thomas psychiatrically examined, Thomas would testify against [the defendant] and Silva, and [the prosecutor] would drop murder charges against Thomas." This deal was not disclosed to the defendant or Silva's attorney.

In the subsequent trial, the defendant and Thomas gave conflicting accounts of the defendant's role in the male college student's murder:

> According to [the defendant],(1) he thought that he was taking [the male college student] up the hill in order to conceal him and that Silva went to get more chains; (2) he did not know that [the male college student] would be killed; (3) he was surprised when Silva opened fire on [the male college student] and had to jump out of harm's way himself; and (4) he shot at [the male college student] only after Silva had already felled him with

> forty-five bullets (a clip and a half) and only because he believed that Silva would shoot him on the spot if he did not comply with his order.
>
> By contrast, Thomas testified that (1) [the defendant] guarded [the male college student] knowing that Silva was going to retrieve a machine gun; (2) [the defendant] returned from the hill in order to turn up the stereo - indicating that he knew in advance that [the male college student] would be shot and tried to conceal the sound; (3) while waiting for Silva's return, [the defendant] told [the male college student] to "look at the mountain, because it was the last thing he would see"; and (4) [the defendant] laughed while recounting [the male college student's] murder. Thomas also described [the defendant] as *taking* the gun from Silva in order to shoot [the male college student], rather than being ordered to do so or risk being shot himself.

The jury convicted the defendant of first degree murder and other charges.

Years later, the defendant learned of the plea deal between Thomas and the prosecution. The defendant then brought a habeas petition arguing that the prosecution's failure to disclose the plea deal violated *Brady*. The Ninth Circuit Court of Appeals agreed.

A *Brady* violation involves: (1) suppression by the government (either willfully or inadvertently); (2) of favorable evidence (i.e., impeachment or exculpatory evidence); (3) that is material. To determine if evidence is material, a court evaluates "whether the government's evidentiary suppression undermines confidence in the outcome of the trial."

In this case, the Ninth Circuit found all three elements of a *Brady* violation. First, the prosecution conceded that it failed to disclose the plea agreement to the defense. Second, the plea agreement provided impeachment evidence of Thomas' mental capacity and account of the male college student's death. Third, the undisclosed plea agreement was material because "Thomas' testimony supplied the only direct evidence that [the defendant] deliberated and premediated [the male college student's] murder [i.e., had the requisite mens reas to commit first degree murder], as opposed to acting on Silva's command and in fear for his life." As a result, the Ninth Circuit directed the district court to order the prosecution to retry the defendant or "resentence him based on the remaining convictions."

CIVIL RIGHTS LAWSUIT: SHERIFF'S DEPUTY NOT ENTITLED TO QUALIFIED IMMUNITY FOR ARRESTING A PUBLIC DEFENDER WHO REFUSED TO OBEY A JUDGE'S ORDER TO RETURN TO COURT Demuth v. County of Los Angeles, __ F.3d __, 2015 WL 4773429 (August 14, 2015).

A public defender reports to court. She speaks to the judicial officer and opposing counsel about her case. She tells opposing counsel that she plans to return to court at around 1:30 p.m. She then returns to her office located in the courthouse.

The judicial officer decides to call the public defender's case before 1:30 p.m. The judicial officer has the public defender paged and called. The public defender does not respond to the pages or the calls. The judicial officer then tells a sheriff's deputy "Alright, I order [the public defender] to come to this court room. If she refuses, then [her supervisor] will have to come in and explain to me why this is happening."

The sheriff's deputy goes to the public defender's office. At the time, the public defender was in her office with her supervisor. The sheriff's deputy repeatedly tells the public defender that she had to go to court. The public defender tells the sheriff's deputy "[if] you want me to come right

now, you'll have to arrest me." The sheriff's deputy then places the public defender in handcuffs and escorts her to court. Once in the courtroom, he removes the handcuffs. "The arrest lasted some 11 minutes."

The public defender then sued the sheriff's deputy under 42 U.S.C. § 1983 (Section 1983) and argued that he violated her Fourth Amendment rights by arresting her. The Ninth Circuit Court of Appeals agreed and found that the sheriff's deputy was not entitled to qualified immunity.

A law enforcement officer is entitled to qualified immunity under Section 1983 if: (1) the officer did not violate a constitutional right; or (2) the officer did not violate a clearly established constitutional right at the time of the event.

In this case, the Court found that the officer's actions violated the public defender's clearly established constitutional rights. The Court reasoned the sheriff's deputy "could not reasonably have believed that he had one of the usual Fourth Amendment justifications for the arrest: He had no warrant; [the public defender] was not suspected of a crime; he was not in hot pursuit or performing a community care-taking function[.]" Additionally, the judicial officer's order did not provide the sheriff's deputy authority to arrest the public defender. The judicial officer instructed the sheriff's deputy to get the public defender or bring her supervisor back to court. "No reasonable officer could have understood the [judicial officer] as ordering that [the public defender] be forcibly brought into court." "An unreasonable mistake of fact does not provide the basis for qualified immunity." As such, the sheriff's deputy is not entitled to qualified immunity.

CIVIL RIGHTS LAWSUIT: POLICE OFFICERS ENTERING AREA OF MOTEL THAT IS OPEN TO THE PUBLIC IS NOT A SEARCH WITHIN MEANING OF THE FOURTH AMENDMENT Patel v. City of Montclair, __ F.3d __, 2015 WL 4899632 (August 18, 2015).

Police officers enter the public area of a motel and observe code violations in plain view. The officers cite the motel owner for these code violations. The motel owner then sues the officers under 42 U.S.C. § 1983 (Section 1983) by arguing that the officer's entry into the public area of the motel was an illegal search under the Fourth Amendment. The Ninth Circuit Court of Appeals disagreed. In short, there is no reasonable expectation of privacy in the areas of a business that are open to the public. Consequently, "no search occurs when police officers enter those areas."

CIVIL RIGHTS LAWSUIT: IN 1984 AND 1991, NINTH CIRCUIT PRECEDENT CLEARLY ESTABLISHED THAT *BRADY*'S OBLIGATION TO DISCLOSE FAVORABLE AND MATERIAL EVIDENCE TO THE DEFENSE EXTENDED TO POLICE OFFICERS Carrillo v. County of Los Angeles, __ F.3d __, 2015 WL 5024010 (August 26, 2015).

This opinion involves two separate civil rights lawsuits against officers who investigated homicide cases. In both lawsuits, the Plaintiffs alleged that the detectives violated *Brady* by failing to disclose favorable and material evidence before their criminal trials

In the first case, the Plaintiff, Frank O'Connell, was arrested and convicted of murdering a man who was shot in front of his apartment building and involved "in a heated battle over the custody of his children with his ex-wife[.]" The murder and investigation occurred in 1984. The conviction was later overturned in a habeas proceeding that found the investigating officers violated *Brady*. O'Connell then filed a 42 U.S.C. § 1983 (Section 1983) lawsuit against the officers.

O'Connell claimed that the investigating detectives violated *Brady* by failing to disclose to the defense: (1) the first witness' initial inability to identify the suspect and request for hypnosis to help his recollection; (2) the first witness noting that the shooter did not have a mustache, but every person in the photo montage, presented by the detectives, had facial hair; (3) the detectives' notes indicating that the second witness picked out two photos from a photo montage; (4) the third witness' hesitancy to identify O'Connell as the shooter in the photo montage; and (5) the officers' handwritten notes of an interview with the victim's attorney indicating that the victim's ex-wife "along with another man [who resembled the shooter's description], had previously made an attempt on [the victim's] life." The Ninth Circuit Court of Appeals agreed that this information was favorable and material to the defense and the nondisclosure violated *Brady*.

The Court reasoned that: (1) the first witness' "request for hypnosis, observation that the shooter - unlike every person depicted in the lineup - did not have a mustache, and uncertainty regarding his identification would have cast serious doubt on his identification of O'Connell at trial"; (2) the second witness' "choice of *two* men from the photo lineup would have undermined his identification of O'Connell;" (3) the third witness' "hesitancy and uncertainty when shown the photo lineup would have undercut [the detective's testimony] that [the third witness] readily chose O'Connell's photo from the lineup and was prevaricating on the stand"; and (4) the "evidence that another man who resembled the eyewitness description of the killer had previously tried to kill the victim . . . would have cast doubt on O'Connell's culpability[.]"

In the next case, the Plaintiff, Francisco Carrillo, was charged and convicted of murdering a man "killed in a drive-by shooting." The murder and investigation occurred in 1991. The first trial resulted in a hung jury. The second trial resulted in a conviction. The conviction was later overturned in a habeas proceeding based on the investigating officer's failure to disclose *Brady* material to the defense.

Carrillo then filed a Section 1983 lawsuit against the officer. The lawsuit claimed that the officer violated *Brady* by not disclosing that: (1) a 16-year old witness "initially chose several other photos from a 'gang book'" that were not photos of Carrillo; (2) when the witness chose the other photos, the officer told the witness that the person in the photo "could not be the suspect shooter"; (3) when the witness identified Carrillo's photo from the gang book, the officer "affirmed [Carrillo's photo] as the right choice"; and (4) the officer threatened the witness with consequences if he recanted his testimony in the second trial. The Court agreed that the officer's failure to disclose this information violated *Brady*.

The Court reasoned:

> (1) disclosing the officer's "suggestive comments" during the witness' review of the photo montage and the witness choosing other photos would have allowed the defense "to impeach [the witness'] identification at the first trial and bolster his recantation at the second trial";
>
> (2) "this evidence would also have undercut [the officer's] testimony at the second trial that [the witness] was 'absolutely certain' of his identification of Carrillo;"
>
> (3) the officer's testimony "to paint [the witness'] selection as unequivocal implicitly recognizes that evidence of hesitancy and earlier misidentification would have been very helpful to the defense in impeaching [the witness'] original identification, not to mention supporting the veracity of [the witness'] recantation";

(4) evidence that the officer "had coached [the witness'] identification would have contradicted [the officer's] testimony that [the witness] independently selected Carrillo from the gang book and photo lineup and cast serious doubt on [the officer's] testimony that the [witness'] recantation was not genuine;" and

(5) "evidence that [the officer] threatened [the witness] with negative consequences if he recanted would have further undermined [the officer's] rebuttal of [the witness'] recantation."

In both of these lawsuits, the officers claimed qualified immunity and argued that the law was not well settled in 1984 or 1991 that the *Brady* obligation to disclose favorable evidence to the defense applied to police officers. The Court disagreed and cited cases pre-dating the investigations that imposed the *Brady* obligation on police officers. Consequently, the officers were not entitled to qualified immunity.

LED EDITORIAL COMMENT: This case also raises the issue of problematic approaches to photo montages and lineups. For more information on this topic, please see John R. Wasberg's (Retired Senior Counsel, Officer of the Washington State Attorney General) article "*Eyewitness Identification Procedures: Legal and Practical Aspects*". The article can be found on the Criminal Justice Training Commission's website under Publications and Resources, Law Enforcement Digests.

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THE WASHINGTON STATE SUPREME COURT

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THE CrR 3.1 RULE-BASED RIGHT TO COUNSEL DOES NOT PROVIDE FOR ABSOLUTE PRIVACY WHEN AN IMPAIRED DRIVING SUSPECT SPEAKS WITH AN ATTORNEY OVER THE PHONE AT A BREATH TEST FACILITY State v. Fedorov, __ Wn.2d __, __ P.3d __, 2015 WL 4647871 (August 6, 2015).

A Trooper's radar shows a vehicle driving 119 mph on the freeway. When the Trooper pursues the vehicle, the vehicle accelerates "to 130 mph, avoiding traffic by driving on the far right shoulder and then suddenly exit[s] [the freeway], running several red lights . . . [and travels] the wrong way down Pacific Avenue." Eventually, the vehicle shuts off its lights and drives into a parking lot.

After the Trooper stops the vehicle, the driver exits and resists the Trooper's direction to lie on the ground. The Trooper observes indicia of the driver's intoxication "including blood shot eyes and poor coordination." The Trooper arrests the driver and takes him to the local jail for a breath alcohol concentration (BAC) test. The local jail is the closest facility with a BAC machine.

The local jail is "run by only one officer." "The building is basically one large windowless room, . . . [and measures about] 29 feet by 17 feet[.]" Officers who use the jail's BAC machine are "personally responsible for their arrestees." "A telephone is located at one end of the room[.]"

After arriving at the jail, the Trooper reads the driver implied consent warnings and begins the 15-minute observation period before the driver takes the breath test. The driver asks to speak with an attorney and the Trooper calls a public defender.

The public defender asks the Trooper to provide "complete privacy" during his phone call with the driver. The Trooper "responded that because he could not observe [the driver] from outside the jail, he could not provide [the driver] with complete privacy."

When an arrestee asked for privacy during a phone call with an attorney, the Trooper's practice was to "walk to the other side of the room near the washing machine to give as much privacy as he could while keeping the arrestee in view." The Trooper "would not have been able to hear [the driver's] conversation at the far side of the room unless [the driver] spoke loudly." There is no indication that the Trooper "interrupted or interfered" with the driver's phone call to the public defender. After speaking with the public defender, the driver took the BAC test with results of ".096 and .095."

The driver was convicted and appealed by arguing that the Trooper's presence in the room during the phone call with the public defender violated his CrR 3.1 right to counsel. The Washington Supreme Court disagreed.

The Court rejected the argument that CrR 3.1's rule-based right to counsel "provides the same right to private consultations as" the Sixth Amendment right to counsel. Rather, the Court held "that the rule-based right to counsel does not provide for a right to absolute privacy for conversations between attorney and client." When an attorney is contacted for an arrestee, "privacy between the arrestee and attorney may be balanced against legitimate safety and practical concerns, and challenges alleging such violations are reviewed under the totality of the circumstances."

When a court evaluates whether an officer's presence in the room during the phone call violated the rule-based right to counsel, courts may consider: "concerns for the safety of police, prevention of harm to police property, the need to comply with testing protocols, and the physical setting where the events take place." The Court specifically noted a "special concern may be the safety of the arrestee: arrestees can pose dangers to themselves, be in danger from substances they may have taken, or have pressing medical conditions both related and unrelated to the crime of arrest."

In this case, the Trooper did not violate the driver's rule-based right to counsel: (1) the driver disobeyed the Trooper's instructions during arrest and presented legitimate safety concerns; (2) due to the jail's layout, the Trooper would have to leave the jail (and end the 15-minute observation period) to give the driver complete privacy; and (3) the Trooper gave the driver "sufficient privacy by moving to the other side of the room, out of earshot, and [there is] no evidence that [the Trooper] interfered, or even so much as paid attention to, [the driver's] conversation." Since the Trooper did not violate the driver's rule-based right to counsel, the conviction stands.

<u>LED EDITORIAL COMMENT</u>: This case focused on an arrestee's CrR 3.1 (and CrRLJ 3.1) rule-based right to counsel. This right attaches upon the suspect's arrest. The Sixth Amendment right to counsel attaches at or after the initiation of criminal judicial proceedings such as the filing of formal charges, a preliminary hearing, arraignment, or indictment. Under the Sixth Amendment, the defendant has a constitutional right to privately consult with an attorney. However, in many impaired driving investigations (like this case) the suspect is taken to a BAC room *before* the filing of criminal charges. As such, an officer's obligation under the rule-based right is to provide a reasonable amount of privacy when an arrestee speaks with an attorney on the phone.

When an arrestee or attorney requests privacy in these situations, it is prudent for the officer to document in the report the reasons why he or she could not leave the room such as the need to continue the 15-minute observation period (and there's no window to the room where the arrestee is speaking to the attorney), or safety concerns. It is also prudent for the report to document what actions the officer took to provide some privacy such as walking to other side of the room. As always, officers are encouraged to speak to their legal advisors about these issues.

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THE WASHINGTON STATE COURT OF APPEALS

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TWO-STEP INTERROGATION OF ASKING UN-*MIRANDIZED* IN-CUSTODY SUSPECT QUESTIONS AND THEN READING THE SUSPECT *MIRANDA* AND ASKING SIMILAR QUESTIONS VIOLATED SUSPECT'S FIFTH AMENDMENT RIGHTS State v. Rhoden, __ Wn. App. __, __ P.3d __, 2015 WL 4627592 (August 4, 2015).

Sheriff's deputies serve a search warrant on a house. While executing the search warrant, the deputies handcuff the residents. The handcuffed residents are not read *Miranda* warnings. Later that day, while the residents are still in handcuffs in the living room, a deputy asks the residents "if there were any drugs or guns in the residence."

One resident, Kirk Rhoden, tells the deputy "that there would be a small amount of drugs in his bedroom and at least [one] gun." The deputy takes Rhoden to the kitchen, reads *Miranda* warnings, and asked "pretty much the same questions that he had asked Rhoden in the living room before giving the *Miranda* warnings." Rhoden again tells the deputy "that there was about a gram of methamphetamine located in the dresser on the left side of his bed and that he had been smoking methamphetamine for approximately the last two to three months."

A search of Rhoden's bedroom located drugs and drug paraphernalia. Rhoden was charged and convicted of unlawful possession of a controlled substance. Rhoden appealed the conviction by arguing that the deputies' "two-step interrogation" (i.e., (1) asking him questions before *Miranda*, and (2) after he gave incriminating statements, the deputy reading him *Miranda* warnings and asked similar questions) violated his Fifth Amendment rights. The Court of Appeals, Division Two, agreed.

Miranda rights attach to a suspect when: (1) the suspect is in custody; (2) the suspect is being interrogated; and (3) the interrogation is conducted by a law enforcement officer (or other "agent of the State"). "Absent effective *Miranda* warnings, a suspect's custodial statements are presumed to be involuntary, and, therefore, cannot be used against the suspect at trial."

When an officer questions an in-custody suspect without *Miranda* warnings, and then reads *Miranda* warnings and continues the interrogation, a court evaluates: (1) "whether the interrogating officer deliberately used the two-step procedure to undermine the effectiveness of *Miranda* warnings"; and (2) if the officer deliberately used the two-step procedure, "whether the midstream warning adequately and effectively apprised the suspect that he had a genuine choice whether to follow up on [the] earlier admission."

First, to determine whether an officer deliberately used the two-step procedure, a court considers "whether objective evidence and any available subjective evidence, such as the officer's testimony, support an inference that the two-step interrogation procedure was used to

undermine the *Miranda* warnings." This evidence could "include the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre and postwarning statements."

Second, to determine whether the "midstream" *Miranda* warning adequately explained that the suspect had a choice on whether or not to speak with the officer, a court evaluates "whether any curative measures were taken to insure the suspect's understanding of his or her *Miranda* rights . . . [such as] a significant break in time and place between the pre- and post-*Miranda* questioning or an additional warning that the suspect's pre-*Miranda* statements could not be used against the suspect in a subsequent criminal prosecution."

In this case, the Court found that the deputy's two-step interrogation violated Rhoden's Fifth Amendment rights. First, the objective evidence of the deputy asking the handcuffed suspects about drugs in the house and, after Rhoden admitted to having drugs in his bedroom, then taking Rhoden to the kitchen and reading him *Miranda* indicate that the two-step procedure was deliberate.

Second, the *Miranda* warnings did not effectively nor adequately inform Rhoden that he had a choice not to answer the questions. Taking Rhoden from the living room to the kitchen "was not a significant break in time or place between the pre- and post- *Miranda* interrogation." Additionally, the deputy "did not take any additional measures to insure that Rhoden understood his *Miranda* rights, such as advising him that his pre-*Miranda* statements could not be used against his." Consequently, the Court reversed the conviction and remanded the case back to the trial court for a new trial.

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The Law Enforcement Digest (LED) is edited by Assistant Attorney General Shelley Williams of the Washington Attorney General's Office. Questions and comments regarding the content of the LED are welcome and should be directed to Ms. Williams at ShelleyW1@atg.wa.gov. 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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