WASHINGTON DEFENDER ASSOCIATION

**PRACTICE TOOL** | **5/5/2023** | Sheri M. Oertel

# SHERI'S SIDEBAR EDITION # 5

Happy Friday everyone.

I am back again with things I wish I had known during practice, things that have changed, interesting tidbits, and random tips for practice. Welcome back to:

# SHERI'S SIDEBAR


HAPPY CINCO DE MAYO! Sorry DUI Attorneys, this is for us all…

1. **Are you aware that even the higher courts don't agree with or follow their own or higher precedent on whether the "Old Chief" rule applies in any way in Washington?**

> **Federal *Old Chief* rules *not* binding in Washington.** The federal courts have detailed rules about when a party (typically the prosecution) is and is not required to accept an offer from the opposing party (typically the defendant) to stipulate to certain facts. These rules are often referred to in a short-hand way as the *Old Chief* rules. These federal rules, however, are not binding in Washington. Washington may develop its own rules and is in the process of doing so. *In re Detention of Turay*, 139 Wn.2d 379, 986 P.2d 790 (1999), as amended on denial of reconsideration, (Dec. 22, 1999) (discussed immediately above).

But see….



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**DIV 2:**

Just prior to the Washington State Supreme Court in 1999 stating Old Chief is a federal rule not binding in WA, Div. 2 applied it in *State v. Johnson*, 90 Wn. App. 54, 950 P.2d 981 (**1998**).

*State v. Garcia*, 177 Wn. App. 769, 777, 313 P.3d 422, 426 **(2013)(holding** Garcia's stipulation that he had been convicted of a serious offense triggered application of this rule, and precluded mention that his prior serious offense was for first degree robbery. As a result, there is no dispute that giving a jury instruction suggesting that Garcia had been convicted of first degree robbery was an irregularity that was "serious enough to materially affect the outcome of the trial.") citing *Hopson,* 113 Wn.2d at 286, 778 P.2d 1014 (1989)(pre-ruling that it is not binding in WA).

More oddly, the Washington State Supreme Court applies it in this case below, after ruling it is not binding in WA in 1999:

*State v. Taylor*, 193 Wn.2d 691, 700, 444 P.3d 1194, 1199 (**2019**)(finding the "Old Chief" rule is limited in Washington to apply only to prior conviction data).

I have not yet found the case where the Supreme Court said something like, the WA. rule has changed to be sufficiently like the federal rules such that we now agree that the Old Chief rules are binding in WA. Div. 2 allows it regardless, and now there is RECENT Supreme Court case law limiting it to the original use….????

***Old Chief* held inapplicable on other grounds than prior conviction**

In *State v. Taylor*, 193 Wn.2d 691, 693, 444 P.3d 1194, 1196 (2019), D was charged with felony violation of a no-contact order. Before trial, D offered to stipulate that a domestic violence no-contact order was in place and that he knew of the order. The trial court rejected D's offered stipulation and admitted the no-contact order into evidence at trial.

- Old Chief requires a trial court to accept a defendant's offered stipulation *to the fact of a prior felony conviction* in a felon-in-possession prosecution. Taylor limits Old Chief to that stipulation of a prior felony conviction.

**Are you ready to FIGHT BACK on Sexual Assault Cases with DNA & P30 testing? DO YOU OR THE STATE *REALLY KNOW* WHAT THE FLUID IS? DOES THE JURY???**




2. **Do you know that science has updated their requirements on P30 testing to include a showing of spermatozoa to prove the P30 is from semen, and not from other bodily fluids?**

   a. Read the attachment on P30, it comes from many female bodily fluids common in the genital area, and things like urine in both genders.

   b. CHECK FOR CONTAMINATION when male tech's do not properly wash their hands after using the bathroom and get their/male DNA mixed into the sample. Depending on timing, the P30 could be the tech's from urine or other bodily fluids as well. Same for human amylase…
   c. See attachments:
      a. https://defensenet.org/wp-content/uploads/2023/07/p30-psa-in-vaginal-fluids-and-other-body-fluids.pdf
      b. https://defensenet.org/wp-content/uploads/2023/07/Human-Amylase-IS-FOUND-IN-VAGINAL-FLUID-mSphere-2020-Nunn-e00943-20.full_.pdf
      c. https://defensenet.org/wp-content/uploads/2023/07/Human-Amylase-in-vaginal-fluids-not-just-saliva.pdf
   d. See Forensic Science: The Role of the Acid Phosphatase Spot Test in Sexual Assault Prosecutions

https://1.next.westlaw.com/Document/Ia294d70a485c11e1b09f0000837bc6dd/View/FullText.html?listSource=Search&navigationPath=Search%2fv1%2fresults%2fnavigation%2fi0ad62aee00000187b5e8ea90022c5ec8%3fppcid%3d84e33a0d3d53431b8fdc94414620ab4a%26Nav%3dANALYTICAL%26fragmentIdentifier%3dIa294d70a485c11e1b09f0000837bc6dd%26parentRank%3d0%26startIndex%3d41%26contextData%3d%2528sc.Search%2529%26transitionType%3dSearchItem&list=ANALYTICAL&rank=52&listPageSource=f016e8f470a47d38adf1c33add67cbbf&originationContext=docHeader&contextData=(sc.DocLink)&transitionType=Document&needToInjectTerms=False&enableBestPortion=True&docSource=761280baed934f4681f2259f98fa44c8&ppcid=234e9a5dbeda4cb2b7422d6b7d9fb372

**Do you remember 2019, pre-covid, before things like this…**




3. **Are you aware in 2019 the higher court also clarified or confirmed that refusal of a PBT test is not admissible to show or infer guilt?**

Apparently, ethical attorneys (defense) already knew PBT results and refusals were not admissible, but the State continued to try to get them in through another evidence rule. ER 402 Conduct constitution an admission is relevant and admissible. This means conduct that is inconsistent with the party's position at trial is usually relevant to rebut the position taken by that party. However, the right to refuse a PBT is a constitutional right such that refusal cannot be admitted. *City of Vancouver v. Kauffman*, 10 Wn. App.2d 747, 450 P.3d 196 (Div. 2 2019)(DUI conviction reversed).

BUT SEE DICTA in *State v. Gray*, 13 Wn. App.2d 1143 (2020)(Div. 3 unpublished-not precedential)(finding that a brief mention of the PBT refusal wasn't a manifest constitutional error because it was given only brief mention, and the Sheriff testified the defendant was exercising his rights (WHAT?!) and even if it was a manifest constitutional error, the error was harmless). Come on Div. 3!

By the way, why do prosecutors forget that just because something might be admissible under ONE rule of evidence, it must ALSO be admissible under all other rules of evidence, and the constitution???? Do we forget about the opposite?

4. **When in trial, if the state objects to admissibility and you lose, do you know it could still be admitted under another evidence rule or authority? (As long as you don't lose the first objection to relevance).**

- Most often used is evidence may not be admissible under other rules but will be relevant and admissible as impeachment evidence.
- If you have something you know will be objected to for admissibility, research other avenues for admissibility.
- Similarly, if you object to the State admitting something and are overruled, try to apply other evidence rules or authority to the objection. THIS WORKS. Admissibility can be rule specific. Remember the chart from 1-2 editions ago?
- If the State alleges cross examination or expert evidence related to voluntary intoxication is not relevant because it is not a defense (in an Assault 2 case with mens rea  ), and the expert cannot testify about it because he lacked personal experience and was only made aware by hearsay evidence (9 year veteran DPA, I swear it happened!)
    - Remember to argue it is admissible under: 1) evidence related to the mens rea and ability to form the mens rea; and 2) expert opinion testimony related to the ability to form a mens rea is admissible even if based on otherwise inadmissible evidence, such as hearsay.

**4b. The Rape Shield Law. Did you know it only applies to *admissibility* in trial/proceedings?**

- It does not apply to discovery.
    - RCW 9A.44.020 – the plain language discusses the admissibility of such evidence, not defense being unable to discover it.

- The State cannot prevent you from asking the questions in an interview.
    - If they try, and the witness refuses to answer, I have won a motion to depose on those grounds previously. Excerpt below:

> Washington State provides defendants the *right* to a pretrial witness interview. *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976)(emphasis added). Defense counsel has a duty to interview witnesses in a criminal case. *See, e.g., State v. Ray*, 116 Wn.2d 531, 548 (1991) ("Failure to investigate or interview witnesses, or to properly inform the court or the substance of their testimony, is a recognized basis upon which a claim of ineffective assistance of counsel may rest."); *State v. Jury,* 19 Wn. App. 256, 264 (1978) (Sixth Amendment violated where defense counsel failed to interview the State's witnesses). *See also In re Rice*, 118 Wn.2d 876, 909 (1992)("[f]ailure to engage in reasonable investigation often results in effective assistance of counsel").
>
> As the Washington Supreme Court has explained:
>
> > [T]he defendant's right to compulsory process includes the right to interview a witness in advance of trial.
> >
> > The attorney for the defendant not only had the right, but it was his plain duty towards his client, to fully investigate the case and to interview and examine as many as possible of the eye-witnesses to the assault in question, together with any other persons who might be able to assist him in ascertaining the truth

> concerning the event in controversy . . . The defendant . . . has the constitutional right to have compulsory process for obtaining witnesses to testify in his behalf. He has also the right to either personally or by attorney to ascertain what their testimony will be.

*State v. Burri*, 87 Wn. 2d 175, 181, 550 P.2d 507, 512 (1976) (quoting, *State v. Papa*, 32 R.I. 453, 459 (1911)).

**The Court has authority to grant depositions where witnesses with material testimony refuse to speak with attorneys.** CrR 4.6(a)(2). **Likewise, since 2012, when the Court finds good cause, it can order a witness to attend a deposition.** CrR 4.6(a)(3). What's more, the state cannot interfere with the defense's efforts to interview state witnesses. *See State v. Hofstetter,* 75 Wn. App. 390, 402 (1994) ("it is improper for a prosecutor to instruct or advise a witness not to speak with defense counsel except when a prosecutor is present"). Accordingly, the state should not be permitted to place limitations on the defense's ability to interview or to depose its main witness in person.

### 5. Did you know there is a limitation on the police testifying as to observed demeanor?

- There are times when an officer's testimony about the demeanor of the defendant is considered a violation of the defendant's right to remain silent.
- Put this in your MIL or 3.5 hearing as the defendant's demeanor as described by the officer in the report/at the 3.5 hearing is a testimonial statement.
- *State v. Holmes*, 122 Wn. App. 438, 93 P.3d 212 (2004)(**held officer testimony that the defendant did "not appear surprised" violated the defendant's right to remain silent upon arrest; said testimony invited the jury to infer guilt from the defendant's failure to assert his innocence upon arrest**). ER 701 - Objections based on constitutional considerations.
    - If you have a judge that does not allow "speaking objections," i.e., you have to name the rule then sidebar or have the jury removed to argue the substance of the objection, know this rule to name so you don't get held in contempt or chastised in front of the jury.

### 6. Did you know this issue continues to arise in various jurisdictions, despite precedential case law against the response: Police departments refusing to provide PRA requests "due to ongoing investigation."

- As a prosecutor I was TAUGHT to tell police records to not provide investigation reports until the prosecution was completed. WRONG!
- Thanks to Timothy H. who reminded us most recently about the case you can fight this response with – and potentially sue if you feel like it to get some money for the days refused from the original request…THAT would make the cops stop this reply!

**To qualify for a categorical exemption, documents must be part of an open, ongoing investigation related to law enforcement proceedings**. *Koenig v. Thurston County,* 175 Wn.2d 837, 843, 287 P.3d 523 (2012) (The investigation must be ' "one designed to ferret out criminal activity or to shed light on some other allegation of malfeasance.' " (quoting *Columbian Publ'g Co. v. City of Vancouver,* 36 Wn. App. 25, 31, 671 P.2d 280 (1983))); *Newman,* 133 Wn.2d at 573 (an investigation must be "leading toward an enforcement proceeding"). **The exemption ceases to apply once an investigation is ended.** *See Cowles Publ'g Co. v. Spokane Police Dep't,* 139 Wn.2d 472, 479, 987 P.2d 620 (1999) ("[**W]e hold in cases where the suspect has been arrested and the matter referred to the prosecutor, any potential danger to effective law enforcement is not such as to warrant categorical nondisclosure of all records in the police** investigative file."); *accord Sargent,* 179 Wn.2d at 389 (exemption did not apply where department had concluded its investigation and had referred requestor's case to the prosecutor for a charging decision). *Thomas v. Pierce Cnty. Prosecuting Attorney's Off.,* 190 Wn. App. 1036 (2015)(unpublished but can cite under GR 14.1(a) or cite to the published case this case cites instead for precedential value)

7. **FROM A LISTSERV QUESTION LAST WEEK – CLARIFICATION AND MY ERROR: Did you know that there is only a limited circumstance when a person may invoke the right to counsel if they are not in custody/in a custodial interview/interrogation.**

- A question arose on listserv last week. I worked off list with the attorney and *discovered my error advising a person has a right to counsel once invoked, even if not in custody.*
- The right to an attorney is NOT generally available without the interview being custodial.
    - In hindsight, I believe the right to remain silent was the issue was my thought, not the right to counsel…and the issue below was present in the case I was thinking of.
- So, if you have a case wherein statements were made in what is typically considered a non-custodial interview, review all of the facts, use a totality of the circumstances type of analysis to see if you can argue PC existed and therefore Miranda was required, and the statements must be suppressed.
    - Some factors to look for and argue for coercion, involuntary, overzealous police practices, and official overbearing of one's will.
        - Multiple officers
        - Uniforms and guns
        - Tone
        - Surrounded or physical limitations by police – blocked between police and a wall for a "friendly chat"
        - PC admitted prior to interview
        - Has the general investigation ceased and the very low threshold of PC has been met but the police are still fishing for more

- This happens often where the low threshold of PC is established for a DUI but voluntary FST's are still requested to gather more incriminating evidence.

- Other factors similar to arguing detention has occurred

Although defendant, who came to interview with investigator in prosecutor's office voluntarily and of his own free will, who was never placed under arrest, and who was free to terminate interview and leave whenever he chose, was not in "physical custody," interview was nevertheless "custodial interrogation" subject to Miranda protections where there was probable cause to arrest defendant for securities violations.

Interrogating officer may not utilize guise of clarification of equivocal assertion of right to counsel as subterfuge for eliciting a waiver of previously invoked right. U.S.C.A.Const.Amend. 6

*State v. Lewis*, 32 Wn. App. 13, 645 P.2d 722 (1982); U.S.C.A.Const.Amend. 5.

**Notwithstanding the fact that Lewis was not technically in custody, we do find that the interview was custodial interrogation subject to Miranda protections. Interrogation becomes "custodial" for Miranda purposes when the questioning officer already has probable cause to justify an arrest for the offense which is the subject of inquiry, regardless of whether the suspect is actually placed under physical arrest or not.** *State v. Creach*, 77 Wn.2d 194, 461 P.2d 329 (1969); *State v. Hilliard*, 89 Wn.2d 430, 573 P.2d 22 (1977).

**'Custodial interrogation' certainly includes all station-house or police-car questioning initiated by the police, for there the 'potentiality for compulsion' is obvious**. Whether it also reaches police inquiries made of a suspect on the street or at his own home was left unanswered by the Court and has been much debated. *Precise refinements of the terms 'custody' and 'interrogation' will have to be developed on a case-by-case basis.* Thus, our present task is to determine whether the atmosphere surrounding the brief police questioning on the sidewalk near the car was characterized by 'official overbearing' or 'overzealous police practices' which, as the Court pointed out, could preclude the individual's making a rational decision whether to speak to the police or remain silent. *Creach* at 197-98, abrogated on other grounds (related to whether only the statements get suppressed or evidence derived from the statements also get suppressed (no)).

It is difficult to set forth an all inclusive rule covering every possible situation, but ***once an investigating officer has probable cause to believe that the person **332 confronted has committed an offense, the officer cannot be expected to permit the suspect to leave his presence. At that point, interrogation becomes***

***custodial, and the suspect must be warned of his rights***. *Creach*, at 198; citing *People v. Ceccone*, 260 Cal.App.2d 886, 67 Cal.Rptr. 499 (1968). See *Mathis v. United States*, 391 U.S. 1, 4, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968).

In a recent decision rendered after oral argument in the instant case, Miranda was deemed applicable to interrogation of a suspect questioned in his bed in his own room by four police officers at 4 a.m. One of the officers testified that the defendant 'was under arrest and not free to leave when he was questioned in his bedroom in the early hours of the morning.' *Orozco v. Texas*, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969). Orozco does not extend the rules of Miranda. It simply applies the rule to a specific factual situation, completely different from the instant case. *Creach*, at 198.

**8. Finally, were you aware that people judge *your height* on Zoom and Teams???**

- I had 5 people at the annual Defender Conference tell me I was taller than they thought/expected. I had only met these 5 people virtually on a Zoom or Teams meeting previously. YOU KNOW WHO YOU ARE! 
- I could only ask if my head is smaller on video or something. With all of my analytical ability, I could not immediately understand how height was considered by sitting video meeting.
- **IN THEIR DEFENSE**, but not nearly as amusing, my office/house/money pit is still under construction. After subconscious musings on the issue, I recalled that the virtual background I am using, until construction is finished, is such that I probably look short in comparison to the virtual background desk placement.

**Remember everyone, many trainings coming soon. Check the WDA Training Calendar Here: https://defensenet.org/training/upcoming-trainings/**

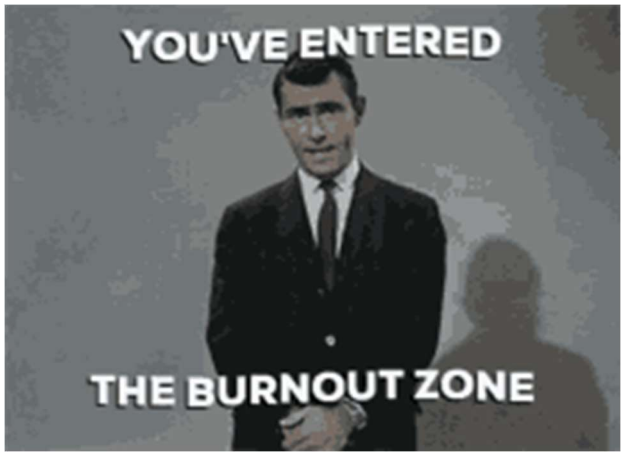
**We have a 7 week (not consecutive) webinar lunchtime Discovery Series coming soon, starting in July, one date in August (leaving vacation times open 😉 You're welcome!), two sessions in Sept. and two in Oct. 2023.**

**CHECK THE TRAINING CALENDAR OFTEN FOR AS MUCH ADVANCE NOTICE AS POSSIBLE – WE DO MANY, MANY TRAININGS THROUGHOUT THE YEAR.**

As I often remind myself, set aside the motion and review it again in a day or two; walk away from trial prep for more than a 5-minute meal over the sink; and talking to yourself is ok as long as you don't argue with yourself…oh wait, wrong topic! You get the jist. Take a break, it benefits you, your case and the client's effective representation! Win-Win-Win.

*"When we are tired, we are attacked by ideas we conquered long ago." ~ Friedrich Nietzche*

It was 82 degrees here in beautiful Walla Walla Tues., 85 degrees on Wednesday…forecast for Sat. is 61 degrees with 40% chance of rain. Garden planting options have changed, but Spring Release Weekend is the first weekend in May every year – plan ahead for next year!!






**Have a great weekend all.**

**Sheri**