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NO. 28610-6 II  
COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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State of Washington - **Respondent,**

**vs.**

Carrisa Marie Daniels- **Appellant.**

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Reply Brief of Appellant

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TABLE OF CONTENTS

STATEMENT OF THE CASE ..... 1

ARGUMENT ..... 3

    I    THE SUPREME COURT SHOULD NOT  
          ABANDON THE POSITION TAKEN IN IN RE PRP  
          OF ANDRESS ..... 3

    II   THE CASE LAW IN THE STATE OF  
          WASHINGTON IS CLEAR THAT ANDRESS  
          SHOULD APPLY TO THIS CASE AS IT WAS  
          DECIDED WHILE MS. DANIEL’S CASE WAS  
          PENDING REVIEW. .... 3

    III  REGARDLESS OF WHETHER THE TRIAL  
          COURT CITED THE MOST RECENT LAW, THE  
          EVIDENCE WAS SUFFICIENT TO SHOW THAT  
          A REASONABLE PERSON IN THE POSITION OF  
          THE DEFENDANT WOULD NOT HAVE  
          BELIEVED THAT SHE WAS FREE TO GO. .... 4

    IV  EVEN IF THE TRIAL COURT WAS WRONG IN  
          SUPPRESSING THE SEPTEMBER 20<sup>TH</sup>  
          STATEMENTS, THE STATE FAILED TO  
          ADEQUATELY PRESERVE THE RECORD TO  
          SHOW HARM, THEREFORE, THE ERROR, IF  
          ANY, WAS HARMLESS... .... 18

CONCLUSION ..... 22

TABLE OF AUTHORITIES

Cites:

*Berkemer v. McCarty* 468 U.S. 420, 82 L.Ed.2d 317, 104 S.Ct. 3138, (U.S.1984) ..... 5, 6, 9, 10, 11, 13

*Bernal v. American Honda Motor Co., Inc.* , 87 Wash.2d 406, 553 P.2d 107 (1976) ..... 5

*California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983) ..... 12, 14

*City of Seattle v. Boulanger*, 37 Wn.App. 357, 680 P.2d 67 (1984) ... 21

*Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) ..... 4

*Heinemann v. Whitman County of Wash., Dist. Court*, 105 Wash.2d 796, 718 P.2d 789 (1986) ..... 9

*In re Personal Restraint of Andress* ,147 Wash.2d 602, 56 P.3d 981 (2002), reconsideration denied March 14, 2003 ..... 3, 4

*In re Personal Restraint of St. Pierre*, 118 Wash.2d 321, 325-26, 823 P.2d 492 (1992) ..... 4

*Johnson v. United States*, 520 U.S. 461, 467, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) ..... 4

*Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct., 1602 (1966) 5

*Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977) ..... 12, 14

*State v. Birnel*, 89 Wash.App. 459, 467, 949 P.2d 433 (1998), review denied, 138 Wash.2d 1008, 989 P.2d 1141 (1999) ..... 16

*State v. Breedlove*, 79 Wash.App. 101, 112, 900 P.2d 586 (1995) ..... 16

State v. Britton, 27 Wash.2d 336, 341, 178 P.2d 341 (1947) . . . . .	19
State v. Burri, 87 Wash.2d 175, 182, 550 P.2d 507 (1976) . . . . .	21
<i>State v. Contreras</i> , 92 Wash.App. 307, 966 P.2d 915 (1998) . . . . .	20
State v. Cunningham, 93 Wash.2d 823, 831, 613 P.2d 1139 (1980) . . . . .	21
<i>State v. D.R.</i> , 84 Wash.App. 832, 930 P.2d 350 (1997) . . . . .	17
<i>State v. Gamble</i> , ___ Wn. 2d ___, 72 P.3d 1139 (2003) . . . . .	4
State v. Golladay, 78 Wash.2d 121, 470 P.2d 191 (1970) . . . . .	19
<i>State v. Harris</i> , 106 Wash.2d 784, 789, 725 P.2d 975 (1986) . . . . .	12
<i>State v. Heritage</i> , 114 Wash.App. 591, 61 P.3d 1190 (2002) . . . . .	15
<i>State v. Madarash</i> , 116 Wn.App. 500, 66 P.3d 682 (2003) . . . . .	3
<i>State v. McFarland</i> , 127 Wash.2d 322, 899 P.2d 1251(1995) . . . . .	20
<i>State v. McNeal</i> , 98 Wash.App. 585, 991 P.2d 649 (1999) . . . . .	20
<i>State v. Riggins</i> , 34 Wn.App. 463, 662 P.2d 395 (1983) . . . . .	18
<i>State v. Riley</i> , 121 Wash.2d 22, 31, 846 P.2d 1365 (1993) . . . . .	20
<i>State v. Short</i> , 113 Wash.2d 35, 41, 775 P.2d 458 (1989) . . . . .	13
<i>State v. Solomon</i> , 114 Wash.App. 781, 60 P.3d 1215 (2002) . . . . .	12, 13
State v. Wanrow, 88 Wash.2d 221, 559 P.2d 548 (1977) . . . . .	19
<i>State v. Watkins</i> , 53 Wash.App. 264, 274, 766 P.2d 484 (1989) . . . . .	13
Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) . . . . .	8

*Thompson v. Keohane*, 516 U.S. 99, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995)  
..... 12, 13, 15

United States v. Brignoni-Ponce, 422 U.S. 873, 881, 95 S.Ct. 2574, 2580, 45  
L.Ed.2d 607 (1975) ..... 8

Secondary Sources

LaFave, "Street Encounters" and the Constitution: Terry, Sibron, Peters, and  
Beyond, 67 Mich.L.Rev. 39, 99 (1968)..... 6

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State of Washington	)	
	)	
<b>Respondent,</b>	)	<b>REPLY BRIEF</b>
<b>vs.</b>	)	<b>OF APPELLANT</b>
	)	
Carissa Marie Daniels	)	
	)	
<b>Appellant.</b>	)	
_____	)	

**STATEMENT OF THE CASE**

State's brief page 11 says that "Defendant reported that DK had not been seen by a doctor since leaving the hospital. RP 560." However, that is not what was testified to. What he said was as follows:

Q. In fact, you wrote in your medical report that the baby has not been seen -- has not seen a doctor since being sent home from the hospital seven weeks ago, isn't that --

A. That's what's been written in. (RP 560)

He did not say he got this from the defendant, but that was written in his report. The source of that information was not presented in evidence. There is no evidence that she attempted to defraud the doctor. In fact, the record was clear that she had taken the baby to doctors on a regular basis, this was

just the first time the baby had been taken to Group Health due the state's changing her insurance.(RP 349-351)

In regard to the State's cross appeal, the following facts are pertinent.

On the day after the funeral for the baby, September 20, 2000, Carissa met with the officers for an interview.(RP 56) (CP 92) Carissa was 17 years of age at this time.(RP 56)(CP 92) Although she was accompanied by her father, the detectives refused to allow him to go back with them to conduct the interview.(CP 92) At the time of the interview there were no suspects other than Carissa and her boyfriend. (RP 58) The interview was conducted in a small, 8' x 10' room.(CP 92) The interview was conducted by two detectives, Detective Berg and Detectives Estes.(CP 92) The interview lasted approximately one hour and 39 minutes.(CP 92) The record is absolutely silent regarding what statements Carissa made to the officers during this time.

Carissa was never given her Miranda warnings until towards the end of the interview.(CP 92) Following the receipt of Miranda warnings she made no further statements.(RP 57-58) (CP 93) Following the interview she was placed in a holding cell until after the interview of her boyfriend. (CP 93) They did this because they were concerned that she might become violent because she was very upset.(CP 93)

Following the hearing for the reconsideration motion, the judge said that he felt he needed to look at the totality of the circumstances and based on that he made the correct decision in his original ruling. (RP 58)

**ARGUMENT**

I.

THE SUPREME COURT SHOULD NOT ABANDON THE POSITION TAKEN IN IN RE PRP OF ANDRESS

The decision in *In re Personal Restraint of Andress*, 147 Wash.2d 602, 56 P.3d 981 (2002), reconsideration denied March 14, 2003, was a well considered decision, which has already been reconsidered and upheld. There is no need for the court to reconsider it's position again.

II.

THE CASE LAW IN THE STATE OF WASHINGTON IS CLEAR THAT ANDRESS SHOULD APPLY TO THIS CASE AS IT WAS DECIDED WHILE MS. DANIEL'S CASE WAS PENDING REVIEW.

In regard to retroactivity, it should be noted that this court has already followed Andress in the case of *State v. Madarash*, 116 Wn.App. 500, 66 P.3d 682 (2003). Furthermore, the retroactivity argument of the State fails as this court, Division 2, has already specifically ruled on their exact

argument in *State v. Gamble*, \_\_\_ Wn. 2d \_\_\_, 72 P.3d 1139 (2003). On page

1140 of that case the court stated:

A new rule announced by the state or federal Supreme Court applies to all cases pending direct review at the time the rule is announced. *In re Personal Restraint of St. Pierre*, 118 Wash.2d 321, 325-26, 823 P.2d 492 (1992); *Johnson v. United States*, 520 U.S. 461, 467, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)). Thus, *Andress* controls and mandates that we vacate Gamble's second degree felony murder conviction.

Therefore, it is clear that *Andress* does apply in this case and should be applied again by this court.

### III.

REGARDLESS OF WHETHER THE TRIAL COURT CITED THE MOST RECENT LAW, THE EVIDENCE WAS SUFFICIENT TO SHOW THAT A REASONABLE PERSON IN THE POSITION OF THE DEFENDANT WOULD NOT HAVE BELIEVED THAT SHE WAS FREE TO GO

The State argues that the incorrect standard was used by the court, however, the trial court did state that he was using a totality of the circumstances test to determine if Miranda warnings should have been applied which is a valid test. The Court of Appeals can uphold the trial court on appeal even if it utilized the wrong standard, as long as it reached the right

conclusion. (See *Bernal v. American Honda Motor Co., Inc.*, 87 Wash.2d 406, at 411, 553 P.2d 107, at 110 (1976)) The trial court had evidence sufficient to determine that Carissa would have believed she was not free to go.

First of all, it is important to bear in mind what the court was intending to do in the case of *Berkemer v. McCarty* 468 U.S. 420, 82 L.Ed.2d 317, 104 S.Ct. 3138, (U.S.1984) and how have our courts and even the U.S. Supreme Court subsequently interpreted it. In *Berkemer*, the court stated their purpose in accepting review was:

We granted certiorari to resolve confusion in the federal and state courts regarding the applicability of our ruling in *Miranda* to interrogations involving minor offenses and to questioning of motorists detained pursuant to traffic stops. (At 426-427, 3144)

It should be immediately apparent that the case of Carissa Daniels is not such a case; it is neither a traffic case, nor is in a minor offense. The court continued it's analysis by stating:

Thus, we must decide whether a traffic stop exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights.

Two features of an ordinary traffic stop mitigate the danger that a person questioned will be induced "to speak where he

would not otherwise do so freely," *Miranda v. Arizona*, 384 U.S., at 467, 86 S.Ct., at 1624. First, detention of a motorist pursuant to a traffic stop is presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes. A motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he most likely will be allowed to continue on his way. In this respect, questioning incident to an ordinary traffic stop is quite different from stationhouse interrogation, which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek. See *id.*, at 451, 86 S.Ct., at 1615. [FN27] (at 437-438, 3148 - 3149)

Footnote 27 reads:

FN27. The brevity and spontaneity of an ordinary traffic stop also reduces the danger that the driver through subterfuge will be made to incriminate himself. One of the investigative techniques that *Miranda* was designed to guard against was the use by police of various kinds of trickery--such as "Mutt and Jeff" routines--to elicit confessions from suspects. See 384 U.S., at 448-455, 86 S.Ct., at 1614-1617. A police officer who stops a suspect on the highway has little chance to develop or implement a plan of this sort. Cf. LaFare, "Street Encounters" and the Constitution: *Terry, Sibron, Peters, and Beyond*, 67 Mich.L.Rev. 39, 99 (1968). (at 438, 3149)

It first should be noted, that unlike the *Berkemer* case, Carissa Daniel's case was a stationhouse interrogation. Her interview did involved two officer's who were quite capable of carrying out a "Mutt and Jeff"

routine. Her's was not a short interview, nor something that she reasonably could have expected to have been a brief encounter with the police.

The court continued it's analysis by stating:

Second, circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police. To be sure, the aura of authority surrounding an armed, uniformed officer and the knowledge that the officer has some discretion in deciding whether to issue a citation, in combination, exert some pressure on the detainee to respond to questions. But other aspects of the situation substantially offset these forces. Perhaps most importantly, the typical traffic stop is public, at least to some degree. Passersby, on foot or in other cars, witness the interaction of officer and motorist. *This exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear that, if he does not cooperate, he will be subjected to abuse.* The fact that the detained motorist typically is confronted by only one or at most two policemen further mutes his sense of vulnerability. In short, the atmosphere surrounding an ordinary traffic stop is substantially less "police dominated" than that surrounding the kinds of interrogation at issue in *Miranda* itself, see 384 U.S., at 445, 491-498, 86 S.Ct., at 1612, 1636-1640, and in the subsequent cases in which we have applied *Miranda*. (at 438-439, 3149 - 3150) (emphasis added)

In the case of Carissa Daniels, her father was not allowed to go with her into the interview, she was forced to go alone, a 17-year-old girl. This is certainly a fact that is distinguishable from the situation the court was describing above where the individual is on a public street with passersby coming and going.

This is more consistent with the situation where officers are questioning someone with the intent to obtain an incriminating statement.

The court concluded it's analysis by stating:

In both of these respects, the usual traffic stop is more analogous to a so-called "Terry stop," see *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), than to a formal arrest. Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose "observations lead him reasonably to suspect" that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to "investigate the circumstances that provoke suspicion." *United States v. Brignoni-Ponce*, 422 U.S. 873, 881, 95 S.Ct. 2574, 2580, 45 L.Ed.2d 607 (1975). "[T]he stop and inquiry must be 'reasonably related in scope to the justification for their initiation.'" *Ibid.* (quoting *Terry v. Ohio*, *supra*, 392 U.S., at 29, 88 S.Ct., at 1884.) Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released. The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that Terry stops are subject to the dictates of *Miranda*. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not "in custody" for the purposes of *Miranda*. (at 439-440, 3150)

Carissa Daniel's case was clearly not analogous to a Terry stop. She was not responding to a few brief questions posed by the officers to determine

whether or not there was probable cause for her further detention or arrest, they were questioning her as one of two suspects in a murder investigation. This was very clearly a coercive environment and not on point with a brief traffic stop.

In *Heinemann v. Whitman County of Wash., Dist. Court*, 105 Wash.2d 796, 718 P.2d 789 (1986), our State Supreme Court gave the following analysis to the *Berkemer* case:

Washington courts, therefore, have in the past enunciated two rationales for recognizing a custodial situation requiring *Miranda* warnings: (1) to protect the individual from the potentiality of compulsion or coercion inherent in in-custody interrogation, and (2) to protect the individual from deceptive practices of the interrogation. *Again, the existence of probable cause is relevant both as an objective indication of the reasonableness of defendant's belief that he was in custody and subject to coercion and as an indication that the officers' interrogation might turn from one with a general investigatory purpose to one with a deceptive purpose of eliciting statements about the probable cause crime.*

The United States Supreme Court recently reiterated that the main thrust of *Miranda* was to address the "problem of how the privilege against compelled self-incrimination guaranteed by the Fifth Amendment could be protected from the coercive pressures that can be brought to bear upon a suspect in the context of custodial interrogation." *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 3145, 82 L.Ed.2d 317 (1984). In a factual setting very similar to the one at bar, the Court considered only one of the concerns expressed by Washington courts.

....

The Supreme Court held that the roadside questioning of a motorist detained pursuant to a routine traffic stop does not constitute "custodial interrogation" for purposes of *Miranda*:

[W]e reject the contention that the initial stop of respondent's car, by itself, rendered him "in custody." And respondent has failed to demonstrate that, at any time between the initial stop and the arrest, he was subjected to restraints comparable to those associated with a formal arrest.... Although [the trooper] apparently decided as soon as respondent stepped out of his car that respondent would be taken into custody and charged with a traffic offense, [the trooper] never communicated his intention to respondent. A policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation. *Berkemer*, 104 S.Ct. at 3151-52.

The Court concluded that McCarty was not in custody until he was formally arrested. Consequently, the statements he had made prior to that point were admissible against him. In holding that McCarty was not in custody because he was not subjected to restraints comparable to those associated with a formal arrest, the Court concluded that McCarty, as a reasonable man, would not have understood his situation to be custodial and, therefore, would not have felt coerced. The Court rejected the existence of probable cause as a factor in the determination of custody and in so doing it reaffirmed that its focus was on the possibility of coercion alone and not on the possibility of deception. *Berkemer*, 104 S.Ct. at 3148 n.

22. Under its analysis the Court looked solely to the surrounding circumstances and found the restraints insufficient to require concern for the possibility of coercion.

The *Berkemer* decision is important to our analysis of the coercive aspects of a detention. We, too, hold that a request for the performance of field sobriety tests during a routine traffic stop does not *alone* indicate that the motorist would feel subjected to coercive restraints comparable to those associated with a formal arrest. We do, however, note that our additional concern for the deceptive nature of a custodial interrogation requires additional analysis in determining whether an interrogation would be custodial.(at 806-808, 794 - 795)(emphasis added)

Basically our State Supreme Court has stated that the purposes of Miranda warnings in the State of Washington are to protect the accused against giving both coerced statements and statements that are obtained deceptively. The Berkemer court only dealt with statements in the context of whether or not they are coerced, but the court did not deal with the deceptive aspect of obtaining a statement. The court therefore felt that in Washington there is additional analysis that needs to be done in determining whether the accused was in custody and that Miranda warnings should be given.

Please note that in the first paragraph the court clearly stated that probable cause was still a factor to be considered especially in determining whether the interview turns from one of an investigative nature, to one

designed to elicit incriminating statements. In this regard, the trial court in Carissa's case clearly considered in its analysis that once there was probable cause, Carissa should have been given her Miranda warnings.

Next, in *State v. Solomon*, 114 Wash.App. 781, 60 P.3d 1215 (2002), Division 3 considered a more recent U.S. Supreme Court case which concludes that the determination of in custody is a mixed question of law and fact. The court there stated:

A defendant is in custody for purposes of *Miranda* when his or her freedom of action is curtailed to a "degree associated with formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983) (citing *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977)); see also *State v. Harris*, 106 Wash.2d 784, 789, 725 P.2d 975 (1986). Whether the defendant was in custody is a mixed question of fact and law. *Thompson v. Keohane*, 516 U.S. 99, 112-13, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995). The factual inquiry determines "the circumstances surrounding the interrogation." *Id.* at 112, 116 S.Ct. 457. The legal inquiry determines, given the factual circumstances, whether "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." *Id.* This second, legal, inquiry "calls for application of the controlling legal standard to the historical facts." *Id.* at 113, 116 S.Ct. 457. As the *Thompson* court summarized: "Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve 'the ultimate inquiry': '[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest.'" *Id.* (quoting *Beheler*, 463 U.S. at 1125, 103 S.Ct. 3517 (quoting *Mathiason*, 429 U.S. at 495, 97 S.Ct. 711)).

To date, no Washington appellate court has cited *Thompson*, which holds the custody determination is a mixed question of law and fact. *Thompson*, 516 U.S. at 113, 116 S.Ct. 457. Relying partly on a pre- *Thompson* United States Supreme Court opinion, the Washington Supreme Court held that the "sole inquiry" was "whether the suspect reasonably supposed his freedom of action was curtailed." *State v. Short*, 113 Wash.2d 35, 41, 775 P.2d 458 (1989) (citing *State v. Watkins*, 53 Wash.App. 264, 274, 766 P.2d 484 (1989)); *see also Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) (quoted with approval in both *Short* and *Watkins* ). The United States Supreme Court has since clarified that the custody inquiry is more complex, requiring first an exploration of the historical facts and then, relying on those facts, an objective determination of the defendant's view of his or her situation. *Thompson*, 516 U.S. at 112- 13, 116 S.Ct. 457. ( at 787-788)

Therefore, in making a determination of whether or not a person is in custody for purposes of triggering the requirement for Miranda warnings, the court must first considered the circumstances surrounding the making of the statement. This is essentially what the trial judge was doing when he stated that he was looking at the totality of the circumstances in making his decision. This appears to be both appropriate and in line with what is required.

The *Thompson* case cited by the court in *Solomon*, involved an Alaska decision. In that case, the defendant was requested to come to the police station to identify property belonging to his murdered wife. Following a 2

hour interview without Miranda warnings, he confessed and the court allowed in the confession. The officers advised the man during the interview that he was free to go, but they continued to interview him in a small room alone with the two interviewing officers. He was allowed to leave after the interview, and was arrested 2 hours later. The Supreme Court granted review and remanded to the lower federal court for a factual determination, viewing cases involving Miranda warnings as ones that require a mixed determination of law and fact rather than cases that are simply reviewed based upon the finding by the state court. In reaching its determination, the court stated:

The ultimate "in custody" determination for *Miranda* purposes, we are persuaded, fits within the latter class of cases. Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve "the ultimate inquiry": "[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983) (*per curiam*) (quoting *Mathiason*, 429 U.S., at 495, 97 S.Ct., at 714). The first inquiry, all agree, is distinctly factual. State-court findings on these scene- and action-setting questions attract a presumption of correctness under 28 U.S.C. § 2254(d). The second inquiry, however, calls for application of the controlling legal standard to the historical facts. This ultimate determination, we hold, presents a "mixed question of law

and fact" qualifying for independent review.(at 112-113, 465)

It is interesting to note that the facts of the Thompson case are very similar to those of Carissa, except there was no evidence that she was ever told she was free to leave at any time; Carissa was a juvenile age 17 whereas Thompson was an adult; and Carissa was placed in a holding cell at the end of the interview whereas Mr. Thompson was arrested two hours later. In the Thompson case the court felt that the facts were compelling enough to require the trial court to hold further hearings to properly make it's determination.

The case of *State v. Heritage*, 114 Wash.App. 591, 61 P.3d 1190 (2002) involved several youth who were questioned by park security officers. The park security were in the area of the park that was known as a hot spot. The officer's recognized the odor of burnt marijuana and saw one youth in the group with a marijuana pipe in his hand. They approached and he cupped his hand around the pipe to conceal it. They told him they saw what he was doing. They told the group that they were not going to arrest anyone, they just wanted their questions answered and to get everyone moving on their way. They asked the group who the pipe belonged to and the defendant, Ms. Heritage, told them it was her's. The park security then called Spokane police who came and arrested her for drug paraphernalia. The trial court

concluded that the park security were the equivalent of private citizens and that Miranda warnings were not necessary prior to questioning. The Court of Appeals reversed, holding that the park security were agents of the state and that Miranda warnings were necessary.

In holding that Miranda warnings were necessary, the court state:

For *Miranda* purposes, an officer's questions are interrogation if they are "reasonably likely to elicit an incriminating response." (*State v. Breedlove*, 79 Wash.App. 101, 112, 900 P.2d 586 (1995)); see *State v. Birnel*, 89 Wash.App. 459, 467, 949 P.2d 433 (1998), review denied, 138 Wash.2d 1008, 989 P.2d 1141 (1999). An officer's question about the ownership of obviously illicit paraphernalia is reasonably likely to elicit an incriminating response. The question satisfies *Miranda's* interrogation requirement.(at 598)

In concluding that the defendant was in custody, the court stated the following:

There is evidence to support a conclusion that a reasonable person-- particularly a juvenile--in Ms. Heritage's situation would believe her freedom was significantly restrained under the circumstances. The officers were wearing bullet-proof vests under T-shirts bearing gold badges with the words "Security Officer" on them. Although they did not carry firearms, each officer also wore a duty belt containing pepper spray, a collapsible baton, handcuffs, a radio, and a flashlight holder. Although the officers said they did not "arrest" anyone, one testified:

I don't recall saying "You're not free to leave." I recall asking them, you know, "Whose pipe is this," "Whose marijuana is this," "I need to see identification," "I'm just going to get your names and we'll get you on your way." (at 599)

In this case the court viewed the questioning of a juvenile in a public park to be a custodial interview. In making this determination the court looked at it from the perspective of a reasonable juvenile and how she would view the situation.

In the case of *State v. D.R.*, 84 Wash.App. 832, 930 P.2d 350 (1997), the court also considered the age of the defendant along with the circumstances of his confession to determine that Miranda warnings needed to be given. In that case, the defendant was called to the principal's office and was there interviewed by a plainclothes officer. The defendant gave a confession which was used in court against him. It ruling that the confession was inadmissible due to the failure to give Miranda warnings the court stated:

The facts of *Loredo* are strikingly similar to those in this case. The most significant difference is that D.R. was not told he was free to leave, a factor on which the Oregon court relied heavily in both *Loredo* and *Killitz*. We agree this factor is significant, and conclude that D.R. was in custody, in light of Detective Matney's failure to inform him he was free to leave, D.R.'s youth, the naturally coercive nature of the school and principal's office environment for children of his age, and the obviously accusatory nature of the interrogation. Detective Matney was required to formally advise D.R. of his rights under *Miranda*, and the trial court erred in admitting D.R.'s inculpatory statements.(at 838)

In Carissa's case, there is no evidence that she was ever advised that she was free to leave. She was a 17-year-old high school girl. If the school principal's office is a coercive environment, a police station interview in a small room with two police officers is more coercive. Clearly under all the facts of this case, Carissa was in an environment that was coercive under circumstances where a reasonable 17-year-old girl would have felt that she was not free to leave (indeed, her father was not even free to come in with her, how could she be free to come and go as she chose, and in the end, she was placed in a cell). Under all the circumstances of this case, the totality of the circumstances as considered by the trial judge, Carissa should have been given her Miranda warnings prior to the interview and the trial court should be upheld.

#### IV.

EVEN IF THE TRIAL COURT WAS WRONG IN SUPPRESSING THE SEPTEMBER 20<sup>TH</sup> STATEMENTS, THE STATE FAILED TO ADEQUATELY PRESERVE THE RECORD TO SHOW HARM, THEREFORE, THE ERROR, IF ANY, WAS HARMLESS.

First of all, even if error occurs, the court will not reverse unless the error causes prejudice. In considering whether an error requires reversal the court in *State v. Riggins*, 34 Wn.App. 463, 662 P.2d 395 (1983) stated:

Once the reviewing court is satisfied that the error is of constitutional dimension, the remaining issue is whether the error is prejudicial or harmless.

A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case....

\* \* \*

A prejudicial error is an error which affected the final result of the case and was prejudicial to a substantial right of the party assigning it.

State v. Britton, 27 Wash.2d 336, 341, 178 P.2d 341 (1947). State v. Golladay, 78 Wash.2d 121, 470 P.2d 191 (1970); State v. Wanrow, 88 Wash.2d 221, 559 P.2d 548 (1977). (at 466)

In order to get this reversed, the State bears the burden of proving that if the statements were admitted into evidence, they would have made a difference as to the outcome of the Homicide by Abuse charge. However, in this case there is no proof of what the statements were, so how is the court to determine that the error in refusing to allow the admission of the statements prejudiced the State and that their admission would have effected the outcome of the trial?. If the statements were just repeats of what was

admitted, where's the prejudice to the State's case? If the only statement they wanted in was the one that did come in, what harm did their case suffer?

I have been unable to find anything in the record stating what statements the State wished to admit against Carissa in the trial that were not admitted. The state failed to provide a transcript of the original motion and there was nothing in the motion for reconsideration that provided any offer of proof to the court regarding what statements they wished to admit and the significant of those statements. There is nothing in any of the court papers provided that gives any indication as to what those statements were. The court allowed statements to be used in rebuttal, and indeed, one statement from September 20<sup>th</sup> was admitted. (RP 1259)

In *State v. McNeal*, 98 Wash.App. 585, 991 P.2d 649 (1999) the court stated:

"When an adequate record exists, the appellate court may carry out its long-standing duty to assure constitutionally adequate trials by engaging in review of manifest constitutional errors raised for the first time on appeal." *Contreras*, 92 Wash.App. at 313, 966 P.2d 915. But "if the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." *McFarland*, 127 Wash.2d at 333, 899 P.2d 1251 (citing *State v. Riley*, 121 Wash.2d 22, 31, 846 P.2d 1365 (1993)). (at 594-595)

Based upon this, the State cannot show prejudice is they have not provided an adequate record for the court. If they cannot show prejudice, they cannot show that the error was not harmless and there should be no new trial.

In the case of *City of Seattle v. Boulanger*, 37 Wn.App. 357, 680 P.2d 67 (1984) the defendant was the one who was challenging the admission of evidence admitted at trial. However, the court had ordered the city to provide the transcript of the trial and they had failed to provide the transcript. As a result, the court granted the defendant's request for a new trial stating:

The City also contends that the error, if any, was harmless because the evidence of guilt was overwhelming, and the error was nonconstitutional. "[E]rror is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Cunningham*, 93 Wash.2d 823, 831, 613 P.2d 1139 (1980). The City has not provided this court with a written transcript of the trial, although requested by the court to do so. Without this record, it is impossible for this court to determine whether the error was harmless. *State v. Burri*, 87 Wash.2d 175, 182, 550 P.2d 507 (1976). We are also unable to determine whether a limiting instruction could have cured the error. (at 359-360)

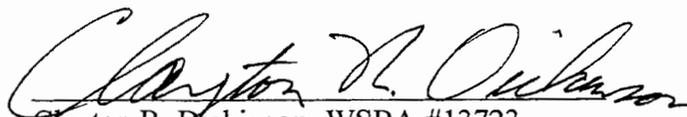
Because the State has failed to adequately provide the record for the court to determine if the admission of the suppressed statements would have

changed the outcome of the trial, the court should rule that such error, if any, was harmless and affirm the trial court.

**CONCLUSION**

For above-stated reasons, it is clear that this case must be reversed as to the conviction for felony murder and the trial court should be affirmed in it's decision to suppressed the statements made by the defendant prior to being given her Miranda warnings.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of September, 2003.

A handwritten signature in cursive script that reads "Clayton R. Dickinson".

Clayton R. Dickinson, WSBA #13723  
Attorney for Appellant

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STATE OF WASH.  
BY \_\_\_\_\_  
DEPUTY

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

State of Washington, )  
                                  **Respondent,** )  
                                  ) **NO. 28610-6 II**  
                                  ) **AFFIDAVIT OF SERVICE**  
**and** )  
                                  ) )  
                                  ) )  
Carrisa Marie Daniels, )  
                                  **Appellant.** )

I DECLARE AND STATE AS FOLLOWS:

I, Tasha Ollmann, a person over 18 years of age, served Kathleen Proctor , attorney for Respondent, a true copy of the Reply Brief of Appellant via ABC Legal Messenger on September 23, 2003.

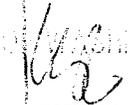
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Fircrest, Washington this the 23<sup>rd</sup> day of September, 2003.

  
\_\_\_\_\_  
Tasha Ollmann  
Legal Secretary

AFFIDAVIT OF SERVICE

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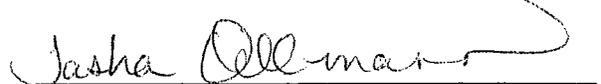
COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

8 State of Washington ) NO. 28610-6 II  
9 Respondent, )  
10 vs. ) DECLARATION OF SERVICE  
11 Carissa Marie Daniels, )  
Appellant. )

12 I, Tasha Ollmann, legal secretary for Clayton R. Dickinson, attorney for appellant, declare  
13 under penalty of perjury of the laws of the state of Washington that the foregoing is true and  
14 correct:

15 On September 23, 2003, that I delivered to US Postal Service the Brief of Appellant to  
16 cause delivery of the same to the Appellant, Carissa Marie Daniels, at WCCW, PO Box 17 MS:  
17 WP-04, 9601Bujacich Rd NW, Gig Harbor, Washington 98335-0017.

18 SIGNED at Fircrest, Washington, this the 4<sup>th</sup> day of February, 2003.

19  
20   
21 Tasha Ollmann

22  
23  
24  
25 DECLARATION OF SERVICE

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