



LEGAL DEFENSE TRUST TRAINING BULLETIN

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RUBY RIDGE FBI SHARPSHOOTER TO BE PROSECUTED IN IDAHO COURTS FOR MANSLAUGHTER

AGENT HORIUCHI NOT ABSOLUTELY IMMUNE FROM STATE CRIMINAL CHARGES

On June 5, 2001, a sharply divided (6 to 5) *en banc* panel of the Ninth Circuit Court of Appeals ruled that FBI Special Agent and sharpshooter Lon Horiuchi can be prosecuted on state manslaughter charges for the shooting death of Vicki Weaver, wife of Randy Weaver, a separatist who was sought on an arrest warrant, during a reconnaissance mission upon the Weaver property at Ruby Ridge in 1992. Idaho authorities charged Horiuchi with the killing of Weaver, without malice, "in a reckless, careless or negligent manner", by shooting at Kevin Harris, his intended target, without "determining whether any person other than his intended target was present...". This case presented the question of whether the Supremacy Clause cloaks federal officers with immunity from state prosecutions, and if so, under what circumstances?

In the early morning of August 21, 1992, six U.S. Marshals conducted an operation on the Weaver property at Ruby Ridge. At about 1030, a firefight erupted, during which Randy Weaver's son, Samuel,

and Deputy Marshal William Degan, were killed. It was believed that Kevin Harris shot Degan.

Later, Horiuchi and other FBI men arrived after a briefing, during which they were instructed that if they could get a shot at any armed adult without endangering children in the Weaver cabin, they were to take the shot. These were the "Rules of Engagement" for that operation, which everyone now agrees were unconstitutional. Horiuchi (a designated sniper) was in a position to see Kevin Harris, Randy Weaver and Sara Weaver venture out of the Weaver cabin to a nearby shed where they had earlier placed Samuel Weaver's body. An FBI helicopter appeared somewhere overhead, and Horiuchi said he saw Randy Weaver (armed with a rifle or shotgun) look up at the helicopter as if to shoot at it. Horiuchi shot Weaver, wounding him only, but alerted the others to the presence of the snipers, which caused them to take cover. Before long, they bolted for the cabin door which was open, with Vicki Weaver standing behind the open door, cradling an infant in her

arms. Harris was the last of the three to make it to the open door, and as he disappeared behind it, Horiuchi fired, not knowing Vicki Weaver was behind the door. Horiuchi's bullet struck Vicki Weaver in the head, and she died instantly. The bullet passed through Vicki Weaver and found its target, Kevin Harris, who survived.

The U.S. Department of Justice investigated the incident, and decided there was insufficient cause to prosecute Horiuchi under federal law, setting the stage for the state prosecution.

Once Horiuchi was charged in Idaho court, he opted to remove the case to the federal district court. (*See: 28 USC §1441 (a)[1]*). Once there, Horiuchi moved the court to dismiss the state charges, as a violation of the Supremacy Clause of Article IV which declares that states are bound by federal law, and that state laws that are inconsistent with federal constitutional or statutory laws are invalid. Because a state prosecution of a federal officer arising out of the officer's performance of federal duty arguably is an interference with the operation of the federal government, the Supremacy Clause would not permit, it was argued, this prosecution by Idaho of Horiuchi.

The federal district judge agreed, and dismissed the charges against Horiuchi. Idaho appealed. A three-judge panel of the Ninth Circuit affirmed. (*State of Idaho v. Lon T. Horiuchi*, 215 F.3d 986 [9th Cir. 2000].) Idaho petitioned for rehearing and rehearing *en banc*, which was granted. The 11-judge *en banc* panel (Schroeder, Hug, Kozinski, Rymer, Kleinfeld, Hawkins, Thomas,

Silverman, Graber, Fletcher and Paez; dissents by Fletcher (partial) and Hawkins, joined by

Schroeder, Rymer, Silverman and Graber) reversed and remanded the case to the federal district judge, holding that while the Supremacy Clause clothes federal officers with immunity from state prosecutions if they act responsibly in carrying out their duties, the majority articulated "six components" of Horiuchi's claim that he acted reasonably in shooting at Harris, although he unintentionally killed Vicki Weaver.

Horiuchi's motion to dismiss the charges (granted by the trial court) could only be sustained if the six facts ("components") of his immunity claim were not in dispute:

1. Horiuchi heard the FBI helicopter and reasonably believed it was vulnerable to rifle fire from the Weaver cabin;
2. Horiuchi fired in order to stop the threat to the helicopter and occupants, and *not* in obedience to the (unconstitutional) Rules of Engagement;
3. Horiuchi reasonably believed that giving a warning and chance to surrender would have been futile and/or dangerous;
4. At the time he shot, Horiuchi reasonably, albeit mistakenly, believed his intended target (Harris) was the same person (Randy Weaver) he had seen make menacing gestures at the helicopter;
5. Horiuchi had no reason to know anyone (including Vicki Weaver) was behind the cabin door when he fired at Harris; and
6. Horiuchi believed that if Harris had made it into the cabin, he would be able to escape and harm others.

It is important to note Horiuchi apparently believed, apart from the Rules of Engagement, that he had lawful authority to shoot any armed person regardless of the absence of "immediate threat". Yet, he claimed he fired at Harris because of the threat to the helicopter, and not because he was following the Rules of Engagement. Six of the eleven circuit judges say "... there is doubt about whether Horiuchi is making up the helicopter story to cover up his real reason for the shooting, which was to follow the orders he had been given to shoot any armed man on sight."

Reading through the opinion, we see other strong indications that this majority believes each of Horiuchi's "component facts" lack the "proverbial ring of truth"; for example, "Even if Horiuchi's *story* about his concern for the helicopter is believed, it still does not explain why...". Like the Senate Subcommittee Report on Ruby Ridge, the judges are highly critical of the FBI and Horiuchi in particular.

However it turns out, the case promises to be a spectacle. Idaho hired our local civil rights celebrity, Stephen Yagman of Venice, as its Special Prosecutor in *Idaho v. Horiuchi*; Yagman named former Attorney General Ramsey Clark as his Special Assistant.

Local law enforcement lives under the ever-present spectre of a federal criminal prosecution (18 USC §242) for actions taken under color of state law (*See: United States v. Koon, et al., sub. nom. Koon v. United States*, 518 U.S. 81 (1996)). Here, the flipside has occurred: a federal officer is prosecuted under

state law for acts done in the course and scope of federal duties. Stay tuned, and stay safe...

Stay safe!
-Michael P. Stone-

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