

Law Enforcement Digest



Covering cases published in March 2024

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Cases in the Law Enforcement Digest are briefly summarized, with emphasis placed on how the rulings may affect Washington law enforcement officers or influence future investigations and charges. Each cited case includes a hyperlinked title for those who wish to read the court's full opinion. Links have also been provided to key Washington State prosecutor and law enforcement case law reviews and references.

The materials contained in the LED Online Training are for training purposes. All officers should continue to consult with their department legal advisor for guidance and policy as it relates to their particular agency.

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Each month's Law Enforcement Digest covers court rulings issued by some or all of the following courts:

- **Washington Courts of Appeals.** The Washington Court of Appeals is the intermediate level appellate court for the state of Washington. The court is divided into three divisions. Division I is based in Seattle, Division II is based in Tacoma, and Division III is based in Spokane.
- **Washington State Supreme Court.** The Washington Supreme Court is the highest court in the judiciary of the U.S. state of Washington. The court is composed of a chief justice and eight justices. Members of the court are elected to six-year terms.
- **Federal Ninth Circuit Court of Appeals.** Headquartered in San Francisco, California, the United States Court of Appeals for the Ninth Circuit (in case citations, 9th Cir.) is a federal court of appeals that has appellate jurisdiction over the district courts in the western states, including Washington, Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, and Oregon.
- **United States Supreme Court:** The Supreme Court of the United States is the highest court in the federal judiciary of the United States of America.

WASHINGTON LEGAL UPDATES

The following training publications are authored by Washington State legal experts and available for additional caselaw review:

- [Legal Update for WA Law Enforcement](#) authored by retired Assistant Attorney General, John Wasberg
- **Caselaw Update** - WA Association of Prosecuting Attorneys [[2018-2021](#)] | [[2022-2023](#)] [[2024](#)]

Case Review

The [Washington State Judicial Opinions](#) website provides free public access to the precedential, published appellate decisions from the Washington State Supreme Court and Court of Appeals.

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General Disclaimer: The case digests presented here are owned by the Washington State Criminal Justice Training Commission. They are created from published slip opinions^[1] and are general and may not apply to specific issues in specific cases or investigations. They are published as a research and training resource for law enforcement officers, investigators, detectives, supervisors, agencies, and other interested law enforcement-related parties.

The digests do not constitute legal advice, nor does their publication create or imply an attorney client relationship with any law enforcement agency or officer or party. All law enforcement personnel, parties, and agencies must review the actual published case opinions and consult their agencies' legal advisors, union counsel, and local prosecutors for specific guidance on the application of the opinions to specific issues in specific cases or investigations.

[1] Slip opinions are frequently revised after initial publication and after the creation of these case digests. In any specific case or investigation, it is necessary to review the final version of the opinion published by the Washington State Judicial Opinions website.

QUESTIONS?

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Note: You will see *Id* used throughout this LED. It is used to refer to the immediately preceding citation.



State v. Stearns

No. 101502-0

Washington Supreme Court

March 28, 2024

State v. Stearns, No. 101502-0, Washington Supreme Court, March 28, 2024

Factual Background

This case came before the court on an appeal from a murder and rape conviction. The issue addressed by the Supreme Court was whether pre-charging delay constituted a due process violation. The Court of Appeals had held that it did and ordered the case and the charges dismissed. The Supreme Court granted review of that decision.

The murder was committed in 1998. The victim had been raped and severely beaten and left for dead in a park. She had been a drug addict and sex worker. There were several friends or companions nearby who gave statements and testified. The incident was investigated, and an initial suspect named Horner was identified based on the victim's companion's statements. However, Horner was not charged because exculpatory DNA evidence ruled him out as the donor of DNA collected from the victim's vaginal swabs.

The defendant was identified as a suspect as a result of a 2004 crime lab DNA match to the defendant. The defendant was serving the equivalent of a life sentence at the time. However, for reasons that were admitted to have been negligence by both law enforcement and the prosecution, the defendant was not charged until 2017, some twelve years later.

During the twelve-year delay, one of the sex worker witnesses died. That witness had given a statement to LE in which she said that the victim had left the area with a man at 6:30 am. Another witness had identified Horner as the man who left with the victim but indicated that the time frame was several hours earlier.

The defendant brought a pretrial due process motion to dismiss. He stated that his defense was prejudiced by the death of the sex worker witness. The defendant's defense was that he admitted having had consensual sex with the victim but denied killing her. He maintained that the victim was murdered by another customer after his consensual contact with her.

The trial court denied the dismissal motion. The case then went to trial. The two surviving sex worker witnesses testified to the victim's contacts with customers on the night of her murder. They did not identify the defendant as one of them. The evidence, however, also included two prior violent rape and strangulation incidents committed by the defendant. The victims of those incidents testified about the defendant having strangled them incident to the two prior rapes. The strangulation testimony was similar to testimony from the victim's autopsy, which included strangulation injuries.

The defendant was convicted of the rape murder. His appeal was first heard by the Court of Appeals. That court overturned the conviction and held that the pre-charging delay of twelve years constituted a due process violation. That decision was then reviewed by the Supreme Court.

Analysis of the Court

The Supreme Court reversed the Court of Appeals decision and reinstated the defendant's conviction. It reviewed and applied prior decisions both state and federal concerning what is referred to by courts as "preaccusatorial delay," to the twelve-year delay in this case.

Preaccusatorial delay can constitute a due process violation whether it is committed by LE investigators or prosecutors. The violation is related to the more general due process right of a criminal defendant to present a defense. "Due process preserves a defendant's 'ability to present an effective defense.'" [Stearns Slip Opinion](#), p.9

Courts apply a three-part test when reviewing cases involving preaccusatorial delay. The first part of the test is a review of whether the defendant suffered "actual prejudice" from the delay. Stearns Slip Opinion, p. 10. The second part is a review of the reasons for the delay, and the third is a balancing of the prejudice versus the reasons for the delay. Stearns Slip Opinion, p. 10.

In applying the test and balancing the reasons for delay versus the prejudice to the defendant, the court noted that, "[The defendant] must demonstrate that the prejudice he experienced is substantial enough to conclude that allowing the prosecution would violate 'fundamental conceptions of justice' . . . which define 'the community's sense of fair play and decency.'" Stearns Slip Opinion, p. 16

In its application of the three-part test, the court accepted the prosecution's concession that the delay had been the result of negligence. But it also disagreed with the Court of Appeals that negligence was sufficient to support

dismissal. While there was no specific evidence that was developed during the delay, the prosecution stated that the importance of the prior rape evidence took on added importance during the delay. Plus, the loss of the sex worker's evidence did not necessarily exculpate the defendant. "[B]ut even accepting as fact that [the deceased sex worker witness] saw Williams and a man enter the park around 6:30 a.m., such evidence is not dispositive to Stearns's defense. The State correctly observes that it would prove simply that Williams was with another man at 6:30 a.m., not that the man killed her then." Stearns Slip Opinion, p. 18

The Stearns court's application of preaccusatorial delay standards resulted in the reinstatement of the murder and rape convictions. The court applied a more forgiving analysis than might have been the case if there had been intentional delay. It stated in that regard, "As we held in *Oppelt*, when the 'State's reason for delay is mere negligence, establishing a due process violation requires greater prejudice to the defendant than [in] cases of intentional bad faith delay.'" Stearns Slip Opinion, p. 19

Training Takeaway

The discussion by the Supreme Court of the reasons for the delay in charging was somewhat sympathetic. The prosecution's admission of its own negligence, and the frank description of a lost or misplaced investigative file, and turnover in the assigned detectives are all examples of concessions that would likely have been difficult to make. There is no way to evaluate how such candor by LE and the prosecution contributed to a favorable outcome in this case, but it is certainly worth bearing in mind.

In preaccusatorial delay cases the gravity of the offense likely plays a part. It would not be surprising for there to have been a different outcome if the charges had been less serious. The decision was a unanimous nine-justice decision in a murder rape case involving a defendant who had prior violent rape convictions. Under such circumstances it may have been relatively easy for the court to determine that the delay did not "violate 'fundamental conceptions of justice' . . ." [Stearns Slip Opinion](#), p. 19. But LE should not take the favorable outcome of this case as an indication of how negligent delay would be viewed in a more garden-variety case.

[EXTERNAL LINK: View the Court Document](#)



State v. Houser

No. 57808-5

Division Two, Washington Court of Appeals

March 5, 2024

State v. Houser, No. 57808-5, Division Two, Washington Court of Appeals, March 5, 2024

Factual Background

This case came before the court on appeal from convictions for child molestation and incest. The defendant was charged and convicted of several instances of sexual contact with his daughter who was six years old at the time of the abuse. The issues addressed by the court included child competency and child hearsay.

The victim was six years old at the time of the abuse and eight at the time of the trial proceedings. The trial proceedings included a pretrial hearing concerning whether the victim had sufficient capacity to testify as a competent witness, and whether hearsay (out of court) statements to her mother's boyfriend, her mother, a forensic child interviewer, and a nurse practitioner were admissible under Washington's Child Hearsay Statute. The trial court ruled in favor of the prosecution on both issues.

The appellate court devoted considerable attention to the details of the child's initial disclosures and the nuances of the testimony of each of the witnesses. Officers and detectives who work such cases would do well to read the court's account of these details because they illustrate common issues in child sex abuse cases where a victim is unable or unwilling to verbalize the full details of the abuse.

A brief summary of the sequence and timing of the child's disclosures and the subsequent investigation will be sufficient to support an understanding of the court's analysis of the competency and hearsay issues.

The abuse occurred when the victim was six years old. Her mother and father, the defendant, were separated and she spent nights at the defendant's residence. The residence consisted of a detached garage. Mattresses were laid on the floor for sleeping. The defendant's girlfriend was also present at times when the victim would sleep over at her father's.

The victim's first disclosure was to her mother's boyfriend. The boyfriend

responded to an incident involving sexual play between the victim and her brother. The boyfriend inquired and the victim disclosed touching by the defendant. The boyfriend and the victim's mother made further inquiry and took the victim to the emergency room for treatment. LE was alerted by the medical staff.

The investigation included a forensic interview by a child interviewer employed by the prosecutor's office. This was videotaped and included some detail of the abuse. In particular the child pointed to her genital area when during her description of her father "touching her 'where he's not supposed to.'" [Houser Slip Opinion](#), p. 2. The victim was also examined by a sexual assault nurse practitioner and made additional disclosures during the examination. The sexual assault detectives also interviewed the mother and boyfriend and documented details of the statements the victim had made during her disclosures to them.

Before the court proceedings, the defense interviewed the victim. The interview was audio recorded and included questions and answers in which the victim stated that her father never touched her.

The child competency and child hearsay hearing was conducted before the trial more than two years after the first disclosure. The victim testified as did her mother, her mother's boyfriend, the child interviewer, and the nurse practitioner. The victim's testimony included almost no detail concerning the abuse and that she did not remember because she was sleeping. She was however able to describe details of where the abuse had happened and details of trips to the San Juan Islands that occurred near in time to the abuse. The hearing also included inconsistencies between the victim's and the mother's and the boyfriend's investigative statements, compared to their in court testimony.

The trial court struggled with its ruling on competency and child hearsay. But it ultimately admitted the evidence and supported its ruling with written findings of fact and conclusions of law. At trial, the witnesses testified for a second time, this time before the jury. Again, the victim was able to verbalize very little detail about the abuse.

Her testimony was characterized by the court as follows: "And when she was initially asked what her father did to her, A.H. did not give a verbal response, and in cross-examination, she seemed to say that she did not remember her father doing anything to her. But in other portions of her testimony, A.H. said she remembered telling her mother and Cooley about what her "dad had been

doing to [her].” And again, the mother and boyfriend’s testimony included inconsistency compared to their investigative statements and their testimony at the pretrial hearing.

The jury found the defendant guilty of three child sexual abuse felonies. The defendant was sentenced to an indeterminate term of 224 months to life.

Analysis of the Court

The court articulated the standards required to be applied to both child competency and child hearsay issues. As to competency the court noted, “The bar for competency is low; all witnesses, including children, are presumed competent to testify unless proved otherwise by a preponderance of the evidence.” [Houser Slip Opinion](#), p.19 Furthermore, the burden of proof is on the defendant to show that a witness is not competent. And finally, a trial court’s decision will be upheld unless the decision is “manifestly unreasonable.” These are forgiving standards compared to many others applied by our appellate courts.

After articulating the review standards, the court applied the test for competency. The specific test includes five factors which courts must weigh.

They are that the child must be shown to have:

- (1) an understanding of the obligation to speak the truth on the witness stand,
- (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it,
- (3) a memory sufficient to retain an independent recollection of the occurrence,
- (4) the capacity to express in words his memory of the occurrence, and
- (5) the capacity to understand simple questions about it.

[Houser Slip Opinion, p.19](#)

The appellate court’s analysis was deferential to the trial court’s judgment concerning the weight of the evidence. That in part explains the favorable outcome. The court reviewed the testimony at the point where the prosecution turned the child’s attention to the sexual abuse. It observed that, “[I]t is true that at the evidentiary hearing the State introduced the word “bad” in its question to A.H. The State asked A.H., ‘My understanding is that something bad happened with your dad. Is that correct?’ . . . But A.H. expressly agreed with the use of the word “bad” by responding, ‘Yes,’ to the State’s question. . . Substantial evidence supports the trial court’s finding that A.H. remembered something ‘bad’ happened at her father’s residence.” [Houser Slip Opinion, p. 22](#)

The court also reviewed testimony in which the victim accurately described the San Juan excursions and the layout of the place where the sexual abuse occurred. While these details were not details of the sexual abuse itself, they were evidence that the child had imprinted memories close in time to when the abuse had occurred. Under the deferential review standards, the child's abilities were sufficient to satisfy the forgiving competency requirements.

The child hearsay ruling was also upheld. Child hearsay requires courts to apply a nine-factor analysis to determine if the hearsay is sufficiently reliable. In addition, the prosecution must provide notice of the statements before the hearing or trial. The test is known as the *Ryan* factors after a Supreme Court case of that name.

The factors are:

1. Whether there is an apparent motive to lie
2. The general character of the declarant
3. Whether more than one person heard the statements
4. The spontaneity of the statements
5. The timing of the declaration and the relationship between the declarant and the witness
6. Whether the statement contained express assertions of past fact
7. Whether the declarant's lack of knowledge could be established through cross-examination
8. The remoteness of the possibility of the declarant's recollection being faulty
9. Whether the surrounding circumstances suggested the declarant misrepresented the defendant's involvement

As to notice, the defendant argued that since the mother and boyfriend added some detail to their description of the victim's statements there was a lack of notice. But the court pointed out that the additional details came to light before the hearing and in any event the defendant had not objected to a number of the additions. The court therefore held that notice had been sufficient.

As to reliability, the court also ruled that the statements were reliable. The defendant argued that the statements were not reliable because the mother and boyfriend were not credible. But that argument was unpersuasive because it is the reliability of the child victim that was important. While the mother

and boyfriend had given additional details of the child's statements, that did not undermine the reliability of the victim's statements to them. This was particularly true since the court determined that the victim was competent as a witness.


This summary of the child competency and child hearsay issues focuses on the issues most of concern to law enforcement. The court addressed several other issues that may be of interest to sex abuse investigators and can be reviewed in the slip opinion. Competency and child hearsay are frequently the most vigorously contested issues in a child sex abuse prosecution. The investigation here and the weaknesses of the witnesses were not unusual but fortunately were not sufficient to derail the admissibility of the evidence in the eyes of the trial judge and the appellate court.

Training Takeaway

The most important take away from this case is the specific factors to be applied as to competency and child hearsay. The tests listed in the previous analysis section should be kept in mind during the investigation. Officers and investigators should be aware that the specific sexual abuse allegations are only part of the necessary evidence.

It was significant in this case that the child was able to accurately describe the location and circumstances where the abuse happened, and other events that coincided with the time of the abuse. The investigation thereby provided facts that could be independently verified as a means to showing that the child was competent and that her statements were reliable.

[EXTERNAL LINK: View the Court Document](#)



State v. Clare

No. 57332-6

Division Two, Washington Court of Appeals

March 12, 2024

State v. Clare, 57332-6, Division Two, Washington Court of Appeals (March 12, 2024)

Factual Background

This case came before the court on an issue of the right to bail. The defendant had been charged and arraigned and released on several counts of non-violent property crimes. His conditions of release were set during the time when COVID orders from the Supreme Court were in effect. He was directed to be supervised by a pretrial services office and to return to court for a trial readiness hearing.

The defendant failed both to attend pretrial services and to reappear. On the motion of the prosecutor the court issued a bench warrant. It set a no bail hold on the warrant. Subsequently the defendant was arrested and held on the warrant and brought back to court within 48 hours. The court then set a \$1,000 bail.

The defendant was convicted of the underlying crimes. On appeal he challenged on state constitutional grounds the setting of the no bail hold for crimes that were not capital offenses.

Analysis of the Court

The Court of Appeals upheld the no bail hold against the defendant's argument that he had a constitutional right to bail at all times. The court also rejected his claim that the no bail hold was a due process violation.

As to the right to bail, the court applied prior Supreme Court authority indicating that the right to bail is a right to a judicial determination of bail or release within 48 hours of detention, not a right to have bail set in the warrant itself. "We do not interpret *Westerman* as requiring that every bench warrant provide for a bail amount each time a judge issues a bench warrant for the defendant's failure to appear after the probable cause determination in non-capital cases. Rather, after the defendant is arrested on the bench warrant, *Westerman* requires that a bail determination be made as soon as possible, no later than 48 hours after that arrest." [Clare Slip Opinion](#), p. 8. The

court declined to extend the right to bail so as to include the time from detention until the court appearance as long as that period of time was 48 hours or less.

The court also upheld the no bail warrant against a due process challenge. “We hold that the practice of issuing no-bail bench warrants due to the accused’s failure to appear in a non-capital case does not violate procedural due process provided the defendant arrested on said warrant receives a bail determination as soon as possible, no later than 48 hours after that arrest.” *Clare Slip Opinion*, p. 11-12.

Training Takeaway

The setting of bail in warrants and at booking and the judicial determination of bail within 48 hours are procedural requirements that must be observed. Although the defendant’s challenge in *Clare* was rejected, the court acknowledged that there is a constitutional requirement at stake. In short, that requirement is a judicial determination of bail specific to the defendant within 48 hours.

[EXTERNAL LINK: View the Court Document](#)



State v. Morales Sanchez

No. 57354-7

Division Two, Washington Court of Appeals

March 19, 2024

State v. Morales Sanchez, 57354-7, Division Two, Washington Court of Appeals (March 19, 2024)

Factual Background

This case came before the court on an appeal from a conviction for violation of a no contact order. The allegation was that the prosecutor had committed prosecutorial error by misstating the mental state elements of the crime. Thus, the opinion considered the requirements for the mental state of no contact order violations.

The facts were not complicated. The victim reported that the defendant came to her residence in person, and subsequently also made contact with her through electronic messaging in violation of a no contact order. The messaging contact included accusations that the victim was preventing the defendants' children from seeing him.

During the trial, the prosecution emphasized the mental state knowledge element of the crime. The prosecutor repeatedly argued that proof of knowledge of the order was sufficient not that the defendant knew he was violating a specific provision of the order. On appeal these arguments were said to constitute prosecutorial error which relieved the state from proving beyond a reasonable doubt the mental element of the crime.

Analysis of the Court

The Court of Appeals agreed with the defendant. The distinction concerning the mental element of the crime is subtle but important to bear in mind during investigation of no contact order cases. The court explained the element as requiring both a willful act and a knowing violation of the order. In short “[T]he defendant must have knowledge of the no-contact order and *know that their willful conduct violated the no-contact order.*” [Morales Sanchez Slip Opinion](#), p. 6 (italics supplied by the court).

The court applied the mental element requirements to the prosecutor’s

argument and found the argument to be error. The argument permitted the defendant to be convicted even if he did not know that his conduct violated the order. This error was of such significance that the conviction was overturned, and the case was remanded to the trial court for re-trial.

Training Takeaway

Considering that a no contact order's basic purpose is to keep the defendant from having contact with the victim, knowledge of the existence of the order might seem sufficient. However, the knowledge element also requires that the defendant know his conduct was a violation of the order and that he willfully engaged in the conduct anyway.

The distinction is important to know for law enforcement when investigating a no contact order violation. Asking whether the suspect knew that the order existed is important but not complete. The additional question is also important, namely whether the suspect knew his actions violated the order, and why. An admission of that aspect of knowledge accompanied by documentation of behavior or actions consistent with guilty knowledge would provide a more complete investigation.

[EXTERNAL LINK: View the Court Document](#)



State v. Miller

No. 38969-3

Division Three, Washington Court of Appeals

March 28, 2024

State v. Miller, 38969-3, Division Three, Washington Court of Appeals (March 28, 2024)

Factual Background

This case came before the court on an appeal from a misdemeanor conviction for a firearm violation. The case was investigated by Department of Fish and Wildlife (“DFW”) officers. The court reviewed the denial of a suppression motion in the trial court which was upheld during a review by the superior court. Both the district court and superior court denied the suppression motion and ruled that the stop of the defendant’s vehicle was lawful.

The incident took place during hunting season. The DFW officers were patrolling a “green dot” road, which is a roadway, “managed by DFW for use by a ‘wide variety of recreationalists’ to access ‘camping, hunting, wildlife viewing, and ATV [all-terrain vehicle] and off-road vehicle riding, while protecting sensitive habitat from damage caused by motorized vehicles.” [Miller Slip Opinion](#), p. 2-3

The officers saw the defendant driving slowly on the green dot road. He was wearing an orange sweatshirt. They stopped him because they believed that he was “engaged in ... hunting activities.” *Miller Slip Opinion*, p. 3. Upon approaching the defendant’s vehicle, the officers saw two long guns, a rifle, and a shotgun on the seat. They checked to see if they were loaded and found that there was a shotgun shell in the chamber of the shotgun.

The defendant was cited for the firearm offense. During the proceedings in the district court, he brought a motion to suppress evidence from the stop. His motion included a constitutional claim, but the motion was denied because a specific DFW statute was believed by the lower courts to authorize the stop. See [RCW 77.15.080](#)

The defendant appealed to the superior court, which is the first level of appeal from convictions for misdemeanor offenses. The superior court upheld the decision of the district court as to the validity of the stop. The defendant then appealed to the Court of Appeals.

Analysis of the Court

The Court of Appeals began by deciding that it did not need to reach the constitutional issue because the stop violated the DFW statute. The pertinent provision of the statute reads as follows:

Based upon articulable facts that a person is engaged in fishing, harvesting, or hunting activities, fish and wildlife officers and ex officio fish and wildlife officers have the authority to temporarily stop the person and check for valid licenses, tags, permits, stamps, or catch record cards, and to inspect all fish, shellfish, seaweed, and wildlife in possession as well as the equipment being used to ensure compliance with the requirements of this title. . . .

[RCW 77.15.080](#)

The court's introduction summarized its reasons for deciding the stop was unlawful. It said, "By its plain terms, RCW 77.15.080 permits an investigative stop only when the totality of the circumstances demonstrates a substantial possibility that the target of the stop is actively engaged in hunting. Rarely, if ever, will a person in the act of driving a vehicle be 'engaged in . . . hunting activities.'" [Miller Slip Opinion](#), p. 1

A prior decision of the same court was discussed in the court's analysis. See [Schlegel v. Department of Licensing](#).^[1] In that case, the court had upheld a stop based on the same statute under very similar circumstances. However, in *Miller* the court disapproved its decision in *Schlegel*. It stated, "Hunting and driving are incompatible. To the extent this court's prior opinion in [*Schlegel*] states otherwise, we respectfully disagree with that decision." *Miller Slip Opinion*, p. 1

The court in *Miller* noted that it is permitted to disagree with one of its prior opinions. A result of the court's disagreement with itself is that the statute, which expressly permits fish and wildlife officers to conduct a stop to "check for valid licenses, tags, permits, stamps, or catch record cards," will "rarely" authorize a vehicle stop because in the court's view hunting and driving are not compatible. According to the court's reasoning, the statute does not, or will only rarely, apply to persons "engaged in fishing, harvesting, or hunting activities" who are driving to or from their activities. See RCW 77.15.080

[1] Free access to Washington State judicial opinions can be obtained through the Washington State Judicial Opinions Public Access Web site here: [Free Washington Case Law Access](#). For example, to access the *Schlegel* case, or any other Washington judicial opinion, type the citation in the search box. For *Schlegel*, an officer would type in "137 Wn. App. 364".

Training Takeaway

The primary takeaway from *Miller* is that although there is a statute that seems to permit investigative stops to check for “valid licenses, tags, permits, stamps, or catch record cards,” that statute does not necessarily authorize stopping a vehicle to make such a check. As in this case, court interpretation of such seemingly obvious terms as “engaged in ... hunting activities” can make what appears to be black and white, some shade of gray.

A secondary takeaway is that the court did not reach the constitutional issue. Therefore, the decision applies directly only to cases involving fish and wildlife officers who seek to apply this particular fish and wildlife enforcement provision. However, since the statute incorporates the constitutional *Terry* stop standard, it may well lead to challenges of a constitutional nature.

[EXTERNAL LINK: View the Court Document](#)

Federal cases should be reviewed by Washington law enforcement with caution. There are many issues of interest to Washington law enforcement, to include criminal procedure, search and seizure, application of evidence rules, and uses of force, and other constitutional issues, that are decided differently by Washington courts compared to their federal counterparts.

All law enforcement personnel, parties, and agencies must review the actual published case opinions in these cases and consult their agencies' legal advisors, union counsel, and local prosecutors for specific guidance on whether the application of federal cases should be applied to specific issues in specific cases or investigations.



Lindke v. Freed, 22-611, United States Supreme Court (March 15, 2024)

Factual Background

This case came before the court on review of a federal civil rights lawsuit involving the First Amendment and Facebook free speech activity. It is not about a law enforcement officer or agency but may be of interest to any law enforcement personnel who speak on behalf of their department, or who post information from their LE position on a personal social media platform. As with all cases from the federal courts that involve federal questions, caution should be exercised because Washington courts frequently depart from their federal brethren.

The case involved a Michigan city manager. He had a private Facebook page and used it to post personal and family information. As his career progressed, he also posted information related to his work. This continued as he was elevated to the position of city manager. The posts would include information and commentary on matters related to municipal government affairs. The account began as a personal account but was converted to a public account as his followers became more numerous and his position became more public and locally important.

The case became a court matter when a citizen came into conflict with the city manager. The conflict centered on comments posted by the citizen and the response to those comments by the city manager. The conflict was mostly about the citizen's dissatisfaction with the response of the municipality and the city manager to the COVID pandemic.

As summarized by the *Lindke* court, the case boiled down to this:

Like most of those Americans, [the city manager] occasionally received unwelcome comments on his posts. In response, [he] took a step familiar to Facebook users: He deleted the comments and blocked those who made them.

For most people with a Facebook account, that would have been the end of it. But [the citizen], one of the unwelcome commenters, sued [the city manager] for violating his right to free speech. [Lindke Slip Opinion](#), p. 1

The case was filed as a federal civil rights lawsuit in federal court in Michigan. In the trial court, the city manager won a summary judgment motion. The trial court ruled that the city manager's Facebook activity was not "state activity" and therefore could not constitute a constitutional violation. The Sixth Circuit Court of Appeals affirmed, and the Supreme Court granted review because there were differing approaches to such issues in the federal circuit courts of appeals.

Analysis of the Court

The court's decision was unanimous and can be considered a narrowing of the right to bring federal civil rights claims for alleged First Amendment violations by public officers.

The court began with the text of the statute: "Section 1983 provides a cause of action against '[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State' deprives someone of a federal constitutional or statutory right." *Lindke Slip Opinion*, p.194. The requirement of "under color of" law, regulation, custom or usage is referred to generally as the state action requirement.

The court reviewed its precedents and articulated the standard to be applied to decide if an action by a public officer constitutes state action in regard to social media. "[A] public official's social-media activity constitutes state action under §1983 only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on

social media.” Lindke Slip Opinion, p. 198. The court also elaborated on this by saying, “unless it is traceable to the State’s power or authority. Private action no matter how ‘official’ it looks lacks the necessary lineage.” Id.

The court then applied the state action requirement to the civil rights lawsuit against the city manager. The court determined that his Facebook activity was not state action because:

The alleged censorship must be connected to speech on a matter within [the city manager]’s bailiwick. For example, imagine that [the city manager] posted a list of local restaurants with health-code violations and deleted snarky comments made by other users. If public health is not within the portfolio of the city manager, then neither the post nor the deletions would be traceable to [the city manager]’s state authority because he had none. For state action to exist, the State must be “responsible for the specific conduct of which the plaintiff complains.” Lindke Slip Opinion, p.199

A further requirement for state action is that the speech must have been done in an official capacity to carry out a public duty. The court said, “ ‘[G]enerally, a public employee’ purports to speak on behalf of the State while speaking ‘in his official capacity or’ when he uses his speech to fulfill ‘his responsibilities pursuant to state law.’ ” Lindke Slip Opinion, p. 201. The court applied this standard and concluded that the city manager’s posts did not constitute state action under this standard.

The court also added a comment and somewhat of a free speech safe haven. This was in connection with differentiating speech which fulfills a public responsibility from private speech. It stated, “Had [the city manager]’s account carried a label (e.g., ‘this is the personal page of James R. Freed’) or a disclaimer (e.g., ‘the views expressed are strictly my own’), he would be entitled to a heavy (though not irrebuttable) presumption that all of the posts on his page were personal.” Thus, a prominent disclaimer carries weight in keeping posts that are intended to be private actually private.

Training Takeaway

The *Lindke* case is worth reading as a cautionary tale. Although the city manager prevailed, there is nothing in the Supreme Court’s opinion that removes all possibility of a civil rights lawsuit regarding social media activity. It is easy to imagine that a law enforcement officer’s posting about a high publicity case that an officer participated in investigating could under the

right circumstances be deemed state action. For this reason, most or all departments have social media policies that should be consulted and adhered to.

A second takeaway is from the discussion of labels and disclaimers. They should not be considered fool proof but are certainly worth considering. Keeping one's private social media life intentionally and explicitly separate from one's professional life could be desirable.

[EXTERNAL LINK: View the Court Document](#)

Estate of Hernandez v. Los Angeles

No. 21-55994

Federal Ninth Circuit Court of Appeals

March 21, 2024

Estate of Hernandez v. Los Angeles, 21-55994, Ninth Circuit (March 21, 2024)

Factual Background

This case came before the court from an appeal from a California federal civil rights excessive force lawsuit. The lawsuit was filed after a 2020 fatal shooting of a suspect who was armed with a box cutter at the time of the confrontation.

This case should be read with caution. It involves federal civil rights causes of action and should be reviewed for general educational purposes. The legal standards do not necessarily reflect Washington criminal or civil rights laws and standards.

The incident occurred in April 2020. Two officers were on patrol and encountered a multiple vehicle collision. They stopped to investigate and were informed that the suspect had been driving a pickup truck, was armed with a “knife,” and had caused the collisions. The officers directed their attention to the truck and saw the suspect climb out of it and begin to approach them.

The suspects actions included coming toward the officers and yelling. The officers could see what appeared to be a knife in his hand. They shouted commands to stop and to drop the knife. The suspect did not comply and continued to come toward the officers.

One of the officers fired at the suspect a total of six times. The court reviewed the evidence, which included video footage, and determined that the suspect advanced to within 44 feet of the officers. The six shots included two while the suspect was on his feet and advancing, two more after the suspect had been shot and was attempting to get back on his feet, and two more while the suspect was on the ground. The court noted that the suspect had the “knife” in his hand throughout and that it proved to be a box cutter.

The trial court granted summary judgment in favor of the law enforcement officer defendant and the municipal government defendants on all claims. The

Ninth Circuit affirmed as to the federal civil rights claims against the officer but reversed on certain state law claims against the municipal defendants.

Analysis of the Court

The Ninth Circuit panel first reviewed the Fourth Amendment excessive force causes of action. It applied several standards that are applied in the review of such claims. The standards included that an application of deadly force against a suspect must be objectively reasonable, and reasonableness is determined from the perspective of the officer in light of all of the relevant circumstances. [Hernandez Slip Opinion](#), p.11

The court further noted that reasonableness is to be viewed from the perspective of the officer under the stressful circumstances of such encounters. It observed that, “First, ‘[t]he ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.’ . . . Second, ‘[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.’ ” Hernandez Slip Opinion, p.12

The panel’s application of the standards to the facts led it to conclude that some of the shots were objectively reasonable. The court concluded that the first two shots were objectively reasonable. As to the distance, the court stated, “While Plaintiffs emphasize that Hernandez was still approximately 40 feet away from McBride when she fired, ‘[t]here is no rule that officers must wait until a [knife-wielding] suspect is literally within striking range, risking their own and others’ lives, before resorting to deadly force.’ ” Hernandez Slip Opinion, p.13

As to the third through sixth shots, the court differentiated between them. It noted that, “On that score, [a prior case] holds that, ‘if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.’ . . . We have cautioned, though, that ‘terminating a threat doesn’t necessarily mean terminating [a] suspect.’ ” Hernandez Slip Opinion, p.14 (italics provided by the court). Applying this standard, the court determined that the third and fourth shots were reasonable but the fifth and sixth were not necessarily reasonable.

Having determined that some of the shots fired may not have been reasonable,

the court went on to review the dismissal under what is known as the clearly established statutory or constitutional rights standard. This standard applies when there is no prior reported case that would make it clear to an officer that their actions constitute a violation of rights. “The doctrine of qualified immunity shields officers from civil liability so long as their conduct ‘does not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known.’ ” Hernandez Slip Opinion, p.15 (italics provided by the court).

The court applied the clearly established standard and concluded that the federal civil rights claims against the officer did not meet the standard. Thus qualified immunity applied and the claims were properly dismissed by the trial court. This part of the court’s opinion also included analysis of a Fourteenth Amendment claim for loss of companionship, which also did not meet the clearly established standard.

It is worth noting that the decision in favor of the officer did not extend to the municipal defendants. The court determined that summary judgment should not have been granted as to the claims against those entities.

Training Takeaway

The federal civil rights claims and standards that were at issue in *Hernandez* may be different from the standards that apply to criminal or civil liability in Washington. It is helpful to view this case as being limited to the specific claims and standards that apply to a federal civil rights lawsuit that originated in California. Washington courts might well apply different standards to a similar case under Washington state law.

A second takeaway is from the court’s application of the clearly established standard. It is worth noting that logically that standard is a creature of the court’s prior decisions. Case by case and opinion by opinion that standard may protect an officer currently without providing lasting protection in the future.

[EXTERNAL LINK: View the Court Document](#)

Cases & References

1. *State v. Stearns*, 101502-0, Washington Supreme Court (March 28, 2024)
 - [Stearns Slip Opinion](#)
2. *State v. Houser*, 57808-5, Division Two, Washington Court of Appeals (March 5, 2024)
 - [Houser Slip Opinion](#)
3. *State v. Clare*, 57332-6, Division Two, Washington Court of Appeals (March 12, 2024)
 - [Clare Slip Opinion](#)
4. *State v. Morales Sanchez*, 57354-7, Division Two, Washington Court of Appeals (March 19, 2024)
 - [Morales Sanchez Slip Opinion](#)
5. *State v. Miller*, 38969-3, Division Three, Washington Court of Appeals (March 28, 2024)
 - [Miller Slip Opinion](#)
 - [Schlegel v. Department of Licensing](#)
 - [RCW 77.15.080](#)
6. *Lindke v. Freed*, 22-611, United States Supreme Court (March 15, 2024)
 - [Lindke Slip Opinion](#)
7. *Estate of Hernandez v. Los Angeles*, 21-55994, Federal Ninth Circuit Court of Appeals (March 21, 2024)
 - [Hernandez Slip Opinion](#)

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For example, to access the *Schlegel* case, or any other Washington judicial opinion, type the citation in the search box. For *Schlegel*, an officer would type in “137 Wn. App. 364”.

Case Review

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WA Legal Updates

For further reading, the following training publications are authored by Washington State legal experts and available for additional caselaw review:

- [Legal Update for WA Law Enforcement](#) authored by retired Assistant Attorney General, John Wasberg
- **Caselaw Update** by WA Association of Prosecuting Attorneys [[2018-2021](#)] | [[2022-2023](#)] [[2024](#)]