Covering cases published in June 2025

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Cases in the Law Enforcement Digest are briefly summarized, with a focus on how the rulings may impact Washington law enforcement officers or shape future investigations and charges. Each cited case features a hyperlinked title for those interested in reading the court's full opinion. Additionally, links to key Washington State prosecutor and law enforcement case law reviews and references are provided.

The materials included in the LED Online Training are for training purposes only. All officers should continue to consult with their department's legal advisor regarding guidance and policies relevant to their specific 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 by WA Association of Prosecuting Attorneys

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.

Case Menu

Summary of this Month's Cases

The cases this month will be quite interesting. A court of appeals case (Hribar) drills into the nuances of premeditation in a first-degree murder case. What could be more interesting than that? A Ninth Circuit case (Hernandez) re-visits a fatal use of force from a civil rights lawsuit involving an officer confronted with a suicidal suspect armed with a box cutter. All officers will likely be keenly interested in the outcome of that decision. Other issues this month include Miranda, search warrants, and parolee searches. There is something for everyone here.

Case Menu

- *State v. Butler,* No. 40152-9 Washington Court of Appeals, Division Three (June 10, 2025)
- *Earl v. Campbell,* No. 59220-7, Washington Court of Appeals, Division Two (June 17, 2025)
- *State v. Hribar*, No. 58982-6, Washington State Court of Appeals, Division Two (June 3, 2025)
- *United States v. Keller*, No. 23-656, Ninth Circuit Court of Appeals (June 27, 2025)
- *United States v. Barry*, No. 23-2101, Ninth Circuit Court of Appeals (June 17, 2025)
- *Estate of Hernandez v. Los Angeles*, No 21-55994, Ninth Circuit Court of Appeals (June 2, 2025)

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.

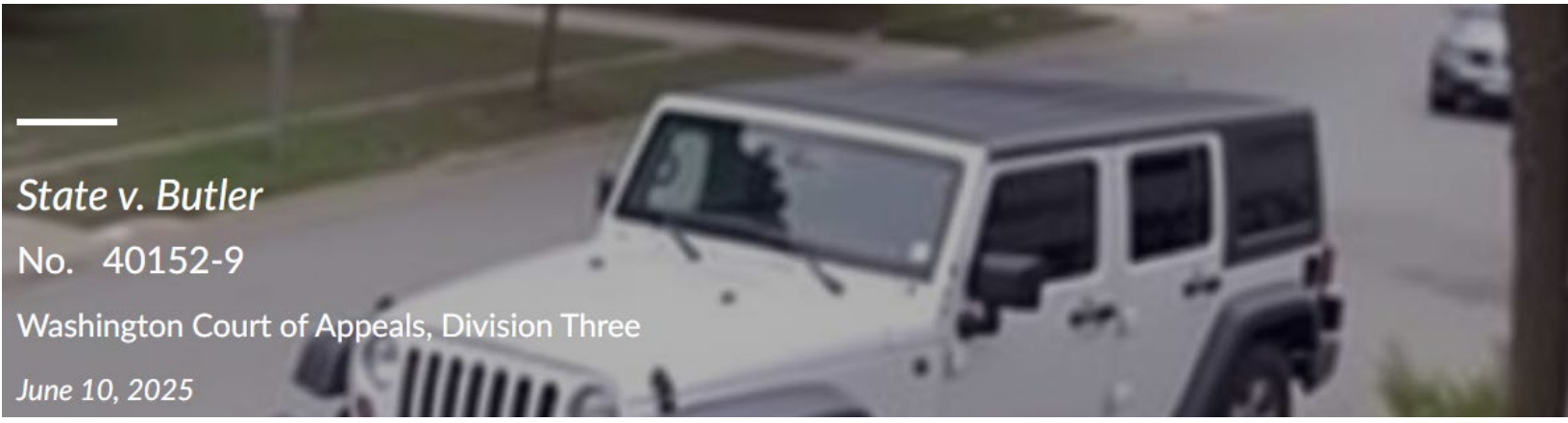
The digests do not constitute legal advice, nor does their publication create or imply an attorney client relationship with any law enforcement agency or officer or party. All law enforcement personnel, parties, and agencies must review the actual published case opinions and consult their agencies' legal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

Questions?

Please contact your training officer if you want this training assigned to you. Visit the ACADIS portal page for status, news and **resources** for organizations, officers and training managers news, updates, and links.

Note: You may see *Id* at the end of some paragraphs in this LED. It is used to refer to the immediately preceding citation.

[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.



State v. Butler, No. 40152-9 Washington Court of Appeals, Division Three (June 10, 2025)

Factual Background

The Fifth Amendment privilege against self-incrimination is familiar to everyone in law enforcement. This case involves two issues. The first is a booking question issue, and the second is an attempt to conjoin a girlfriend's lack of cooperation with the defendant's right to remain silent.

The case arose from a shooting incident in 2022. The victim was the former boyfriend of Jasmin Bailon, and the defendant was her new boyfriend. Ms. Bailon and the victim had ended their relationship approximately a year before the shooting. But on the date of the shooting, the victim began receiving messages from a social media account belonging to Ms. Bailon. He thought the messages were from her. The messages resulted in the victim agreeing to meet at his residence.

The victim went outside and saw Ms. Bailon's Jeep parked on the street. He went toward the street and was confronted by a male suspect whom he did not know. The suspect was later identified as the defendant. The defendant told the victim that Ms. Bailon was expecting a baby and that the defendant was the father. The defendant demanded that the victim stop talking to her. The victim stated that he did not know that Ms. Bailon was seeing someone. He then turned to go back into his house.

The defendant abruptly drew a handgun and fired six shots at the victim. The victim sustained gunshot wounds to a thigh and upper glute muscle. They were not fatal injuries, and he recovered after treatment at the hospital.

The police investigation started with an officer contacting the victim at the scene. The victim reported that the Jeep belonged to Ms. Bailon, and the officer found her address via a police database. The investigating officer obtained surveillance video of Ms. Bailon's residence. The video showed the Jeep coming and going from the residence and a suspect going inside. It also showed that the suspect left the residence a short time later in a second vehicle, a white Camry, belonging to Ms. Bailon.

The officers sought to question Ms. Bailon. They determined that she was in the residence, but she refused to come to the door. They therefore pursued the investigation by other means. Meanwhile several days later through social media images, the victim identified the defendant as the suspect who had shot him. Thus, the police were on the lookout for the defendant and the white Camry.

The detective assigned to the case continued to attempt contact with Ms. Bailon. She evaded contact but eventually met with the detective at her apartment. She was evasive and untruthful. She claimed not to know the defendant.

The defendant was arrested approximately a month after the shooting. He was advised of his *Miranda* rights and responded by invoking his right to remain silent. The officer who made the arrest was the same officer who had gone to Ms. Bailon's residence on the night of the shooting after contacting the victim at the scene.

The arresting officer transported the defendant to the jail. The officer completed a standard booking form, which included a question about the defendant's mailing address. The defendant answered the question by giving Ms. Bailon's address.

The defendant was charged with attempted murder and first-degree assault. He went to trial. At trial the prosecution introduced the booking form, including the mailing address question. The prosecution also called Ms. Bailon as a hostile witness. She was questioned about her lack of cooperation with the investigation: "The State also presented evidence that Bailon tried to protect Butler throughout the investigation. She failed to appear for her first meeting with the detective, failed to return the detective's telephone calls, and testified she did not give Butler permission to drive her black Jeep or know whether he was staying at her apartment at the time of the shooting." *Butler Slip Opinion, p. 6*

On appeal, the defendant's main appellate issues were the admission of the booking form question, the questioning and argument about Ms. Bailon's lack of cooperation, and the reasons therefore.

Analysis of the Court

The court began with the issue of the booking question. It began by quoting the Fifth Amendment, which provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." *Butler Slip Opinion, p. 7.* The court then stated that the amendment means that, "Once a suspect invokes his right to remain silent, the interrogation must cease." *Id.*

With the broad Fifth Amendment legal standard in mind, the court then turned to the booking form question. The issue was whether the booking form question was an interrogation under Fifth Amendment legal standards.

To answer the question, the court noted that routine booking questions do not ordinarily violate the Fifth Amendment. This is because they are related to incarceration, security, and administrative issues and are not generally incriminating. However, such questions can violate the Fifth Amendment when they are likely to elicit an incriminating response. "This is an objective test where the subjective intent of the questioner is relevant but not conclusive. . . This will turn on the particular facts of each case, and questions that 'relate, even tangentially, to criminal activity' are interrogations. . . Courts 'should carefully scrutinize the factual setting of each encounter of this type' because even a 'relatively innocuous series of questions may, in light of the factual circumstances and the susceptibility of a particular suspect, be reasonably likely to elicit an incriminating response.' "*Butler Slip Opinion, p.8-9*

The court applied the objective test to the booking question related to the defendant's mailing address. It concluded that because the officer was involved in the investigation from the start, the importance of the mailing address would have been apparent. "Given the nature of his involvement with the investigation, Officer Oliveri should have known that questioning Butler about his address was reasonably likely to elicit an incriminating response tying Butler to Bailon." *Butler Slip Opinion, p.9-10*

The court held that asking the booking question in this case violated the Fifth Amendment. However, the court also reviewed the issue as harmless error. Error of constitutional magnitude is presumed prejudicial but if there is "overwhelming untainted evidence" the conviction need not be overturned. The court listed fifteen bullet points summarizing the untainted evidence that it determined constituted overwhelming untainted evidence. Accordingly, the conviction was not overturned.

It is important not to conflate harmless error with no error at all. The court held that the officer who booked the defendant had violated the defendant's Fifth Amendment right by asking about his mailing address after the defendant had invoked his right to remain silent. The harmless error part of the decision merely let the court uphold the conviction.

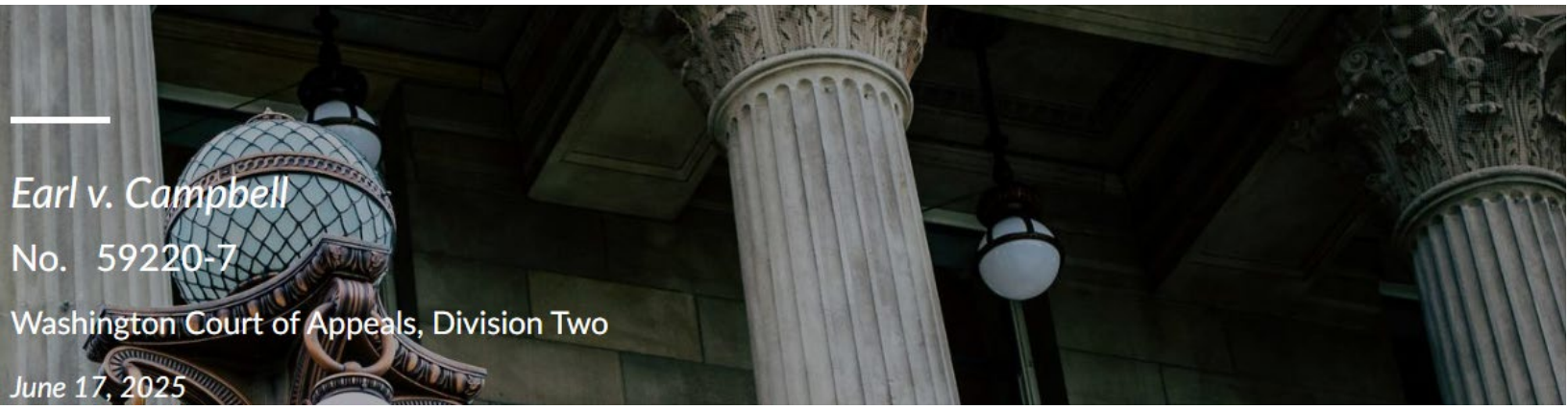
The second alleged error was held not to be an error at all. It involved a claim from the defendant that the prosecutor's examination of Ms. Bailon and arguments he made about her reasons for being uncooperative violated his Fifth Amendment rights. The court rejected that argument, saying, "Here, the prosecutor used a nondefendant witness's reluctance to talk with a detective as substantive evidence of the defendant's guilt. There is no constitutional right implicated here. The Fifth Amendment protects the accused from self-incrimination. It does not protect the accused from being incriminated by a nondefendant witness, even if the incriminating evidence is that witness's reluctance to speak with a detective." *Butler Slip Opinion, p. 19*

Training Takeaway

The analysis of the booking question issue presents a dilemma for officers. Booking questions are generally not interrogation and not subject to suppression for a *Miranda,* or Fifth Amendment violation. They are also routine and may be given little thought. For officers booking suspects, it is valuable to know that booking questions can be deemed to violate *Miranda* or the Fifth Amendment even if they generally do not do so.

It is also worth noting that trial prosecutors make the final decision as to whether to introduce a booking question into evidence during trial. For officers called in to testify, there can be no harm in asking the trial prosecutors whether to include the booking question in the officer's testimony. Police and prosecutors should always be willing to cooperate to avoid trial errors.

EXTERNAL LINK: View the Court Document



Earl v. Campbell, No. 59220-7, Washington Court of Appeals, Division Two (June 17, 2025)

Factual Background

Cases of interest to law enforcement usually involve substantive questions of criminal or constitutional law or criminal procedure. This case is of interest for a different reason. It is the procedural history here that is of importance.

The case was a civil rights lawsuit that arose from a fatal use of force shooting. The defendants prevailed in federal court but were subsequently sued in state court. The disposition and allowance of separate and distinct claims in the two court systems illustrates the reasons why federal cases do not always provide reliable policy or training guidance for Washington law enforcement.

The case began with an investigation in 2016. Two officers were following up on a tip concerning a suspect with outstanding warrants. They came upon the suspect in a car driven by the suspect's girlfriend, Jacqueline Salyers. According to the discovery evidence, the two officers approached the vehicle. They were positioned with one on the driver's side and one on the passenger side of the vehicle.

The officer on the driver's side gave commands and struck the driver's side window with his gun. As he did so Ms. Salyers began accelerating. The two officers then described what happened: "Joseph [the officer near the driver's side] stated, '[w]ithin a few seconds of the car accelerating, I heard gunshots and saw the muzzle flash from the gun.'... Campbell [the officer near the passenger side] explained that Salyers accelerated the car in his direction, causing him to jump backwards and rapidly move away from the car. At that point, he 'fired a volley of shots at the driver,' ultimately hitting Salyers with four bullets and killing her." *Earl Slip Opinion, p.3.* The officer's statements indicated that Officer Joseph had not fired his gun.

The death of Ms. Salyers led to a federal civil rights lawsuit filed in federal district court. This was in 2017. Ms. Salyers' mother filed the lawsuit. After two years of litigation in federal court the federal trial judge dismissed the case in 2019.

That decision was reconsidered and reversed as to state law claims after a Washington Supreme Court opinion was handed down in June 2019. *See Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537(2019)(opens in a new tab). The federal court allowed the state law claims to proceed but continued the dismissal of the federal claims. Because the federal claims were dismissed, the federal court dismissed the federal case altogether, but it was permitted to be re-filed in state court for further litigation of the state law claims.

The reasons for the federal court's dismissal of the federal lawsuit are not described in any detail in the opinion in this case. The opinion states simply, "The [federal] court concluded that 'Campbell is entitled to qualified immunity on the Estate's excessive force claim, Plaintiffs fail to submit sufficient evidence to establish any substantive due process claim, and Plaintiffs have failed to establish their negligence claims as asserted in the complaint.' " *Earl Slip Opinion, p. 4.* This account of the federal court ruling indicates that the federal claims were dismissed both because of qualified immunity and because the wrongfulness of the officers' actions under federal law was not proven.

The civil rights lawsuit was re-filed in state court in 2021. The state court action included claims against both officers and the City of Tacoma. Further litigation in the state court raised a legal procedure issue involving one particular claim against the city. That was the issue certified to the Court of Appeals and decided in this opinion.

Analysis of the Court

The precise issue resolved by the court of appeals was related to an employment claim known as negligent retention. That claim asserts that an employer could be held liable for negligence by one of its employees if the employee should have been fired for other misdeeds in the past. The resolution of that claim is of little interest to law enforcement officers, and the court's analysis can be reviewed in the slip opinion.

What is of more interest is that negligence claims against the officers could proceed in state court even though the federal court had ruled that qualified immunity applied and that there was a lack of evidence.

The history of the litigation in this case, from 2017 through 2023, in two separate court systems, illustrates a difficult reality for officers and their departments concerning civil rights lawsuits. The legal standards and defenses that apply to the federal and state law claims may not be the same.

In this case, the dismissal of the federal claims and the federal lawsuit did not bring an end to the case. The case was refiled in state court and is currently pending a final resolution.

Training Takeaway

The lack of harmony between federal legal standards and Washington state standards in civil rights cases is an inherent difficulty in use of force cases. Among many other problems is the reality that a federal court's decision in such cases may or may not prove to be reliable guidance to officers, their legal advisors, and their departments. The *Earl* case is one example among many of the need for caution in relying on federal cases for guidance or direction in particular circumstances.

EXTERNAL LINK: View the Court Document

State v. Hribar, No. 58982-6, Washington State Court of Appeals, Division Two (June 3, 2025)

Factual Background

Intent to kill and premeditation are the two key ingredients of first-degree, premeditated murder. This case discusses the premeditation element in a review of a case where the defendant admitted intent to kill. It is a partially published case, with the premeditation part of the opinion having been published. But the court also discussed the sufficiency of the evidence in the unpublished part of the opinion. Although the unpublished part of the opinion does not have the same binding authority as the published part, both parts are well worth reviewing.

The incident took place in 2023 in the Pe Ell area of Lewis County. The defendant knew the victim because the victim had been in a relationship with the defendant's sister. The defendant lived in a trailer that caught fire in January 2023. The defendant and the sister broke off the relationship shortly after the fire. The evidence showed that the defendant blamed the sister and her brother, the shooting victim, for the fire.

The defendant was vocal about blaming the victim for the fire. He made statements to various people about his suspicions, and the statements at times included threats of violence and death threats. Also, at the time of the fire, the defendant made statements to law enforcement in which he blamed the victim for the fire and said that the victim had set the fire because he disapproved of the relationship with his sister.

The defendant's statements provided abundant evidence of motive. There was also abundant evidence of identity. The killing was accomplished with a shotgun. Several people in the area at the time heard the shots and went to investigate. One witness saw part of the shooting and identified the defendant as the shooter.

Added to the eyewitnesses was a statement from the victim before he died, identifying the defendant as his killer. The victim survived the three shots from the shotgun long enough to identify the defendant by name to one of the eyewitnesses. He later died from his wounds.

Evidence related to premeditation also came from the choice of weapon. The shotgun was a pump-action shotgun, which required the shooter to manually cycle another shell before the second and third of three total shots. And the medical examiner testified that any of the three shots would have caused death.

The defendant was arrested for the murder and gave a statement. He did not testify at trial, but his statement served as his defense. He admitted killing the victim but claimed that he was trying to wound Kowalsky, not kill him. "Kowalsky fell out of his vehicle, and Hribar drove away." *Hribar Slip Opinion, p. 5.* During the trial, the defendant admitted that he had the intent to kill but claimed that his intent was not premeditated. The jury rejected the argument and convicted him of first-degree murder.

Analysis of the Court

The defendant's challenge on appeal focused on the definition of premeditation in the jury instructions. Thus, the court started with a review of the definition of premeditation. That definition includes a statutory limitation involving time. *See* RCW 9A.32.020(opens in a new tab)(1). The statute states that, "As used in this chapter, the premeditation required in order to support a conviction of the crime of murder in the first degree must involve more than a moment in point of time." *Id.*

The court then reviewed prior court authorities concerning the proper definition of premeditation. These included the pattern jury instruction for premeditation, which was adopted by the trial court and given to the jury as part of its instruction packet. The jury instructions stated:

> Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed. *Hribar Slip Opinion, p. 6*
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> See also Washington Pattern Instructions Criminal (WPIC), § 26.01.01

The defendant's argument on appeal was that the jury instruction's time limitation was shorter than the time period in the statute. The court rejected the argument. It first noted that the pattern jury instruction had been repeatedly upheld by the Washington Supreme Court and Courts of Appeals. But it acknowledged that the two key phrases in the statute and pattern instruction had never been expressly interpreted by those prior cases. Those two phrases were: (1) "more than a moment in point of time" from the statute; versus (2)_ "some time, however long or short, in which a design to kill is deliberately formed" from the pattern instruction.

The court dissected the two phrases word by word. The court then pointed out that the pattern instruction states the statutory standard: 'Premeditation must involve more than a moment in point of time.' And the last sentence follows. The last sentence reasonably can be understood as explaining only the phrase 'a moment in point of time'; a moment in point of time can be very short. With this understanding, the last sentence necessarily incorporates the 'more than' requirement of the previous sentence. Premeditation requires more than some time, however short." *Hribar Slip Opinion, p. 11*

The court concluded that the pattern instruction was not inconsistent with the statute. The last sentence of the instruction merely explained the "more than a moment in point of time" phrase in the statute. The court also rejected a somewhat related argument that the jury instruction was a judicial comment on the evidence. However, since the instruction was a proper statement of the law, it could not constitute a comment on the evidence.

The court's holding on the jury instruction issue validated the pattern jury instruction that has been used for decades. Its explanation that the instruction did not shorten the time limitation in the statute meant that the trial court's jury instructions were proper, and the defendant's conviction was upheld.

The court next turned to the sufficiency of the evidence issue. This was the issue addressed in the unpublished part of the opinion. The court stated that there are "Four characteristics [that] are relevant to proving premeditation: 'motive, procurement of a weapon, stealth, and the method of killing.' " *Hribar Slip Opinion, p. 14.* The court analyzed these characteristics in light of the evidence introduced during the trial.

The court's analysis is well worth reviewing in the slip opinion. It includes discussion of issues that recur frequently in firearm premeditated murder cases.

Key highlights from the analysis are as follows:

- "[A] rational juror could find beyond a reasonable doubt that Hribar acted with premeditation because he parked in the brush along SR 6 for the purpose of confronting and killing Kowalsky." *Hribar Slip Opinion, p. 15*
- "[A] rational juror could find beyond a reasonable doubt that Hribar acted with premeditation because he paused after shooting Kowalsky once and then some time passed before he fired the next two shots." *Hribar Slip Opinion, p. 16*
- "Hribar had a clear motive to kill Kowalsky – he blamed Kowalsky for burning down his trailer and in fact had threatened to kill Kowalsky. And he procured a weapon – he brought his shotgun with him when he went back to his vehicle. Hribar admits that these two factors support an inference of premeditation. And the manner of killing is discussed above – Hribar fired three shots with a pause after the first shot." *Hribar Slip Opinion, p. 17*

Considering all the evidence and the correct jury instructions, the court had no difficulty upholding the defendant's first-degree murder conviction.

Training Takeaway

The statutory phrase "more than a moment in point of time" might suggest to some that there is not much difference between premeditated murder and intentional murder. Few murders occur so spontaneously that there is not "more than a moment in point of time" involved in the killing. But to conclude that most intentional murders are therefore premeditated would be a mistake.

The entire jury instruction tells the jury that a key decision is not just how much time elapsed but whether the killing was "thought over beforehand." By all accounts, the three shotgun blasts fired at the victim in this case happened very quickly. But since there was more than a moment in point of time between the shots, that alone could have allowed for premeditation.

A pause between shots is a tempting basis for premeditation. However, the evidence of the defendant's actions in the time leading up to the fatal encounter was likely of greater importance to the jury, just as it was to the Court of Appeals. The jury may well have believed, as did the Court of Appeals, that those facts showed that the defendant had thought over beforehand that he wanted to end the victim's life.

EXTERNAL LINK: View the Court Document

United States v. Keller, No. 23-656, Ninth Circuit Court of Appeals (June 27, 2025)

> 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.

Factual Background

Whether or not a particular item of evidence is within the scope of a search warrant is an issue common to both federal and Washington state courts. The precise standards applied in the two court systems are differently worded, but in broad terms, the principles are similar. This case involves the seizure of a handwritten ledger kept by an over-prescribing physician and seized as evidence under a DEA search warrant.

The court began by describing the defendant's history of overprescribing. The defendant was "in the '99th percentile of pain specialists' 'in terms of the amount [of opioids] he [was] prescribing per patient per day.' " *Keller Slip Opinion, p. 5.* He was reported for over prescribing by a psychiatrist and investigated by the DEA. One case from the investigation involved the death of a woman for whom the defendant had prescribed massive amounts of opiates during pregnancy and while she was nursing. The victim committed suicide in 2017, and the defendant was prosecuted in state court for her death.

The federal case concerned over prescription under the federal controlled substance law. The evidence introduced at trial included a handwritten journal which had patient and medical information. The journal included information relevant to the overdose death case and corroborated other evidence of over prescription. It was found, not at the defendant's medical clinic, but at his personal residence.

The defendant brought a motion to suppress the journal. His argument in the trial court was that the journal was not authorized to be seized under the search warrant. The trial court denied the motion. The defendant went to trial, and the journal was introduced into evidence. After the defendant was convicted, he appealed his conviction and the denial of the suppression motion.

Analysis of the Court

The Ninth Circuit three-judge panel reviewed the denial of the suppression motion. It applied federal caselaw and upheld the trial court's decision. In its opinion, the court analyzed two issues that are of interest to Washington law enforcement. Namely, whether there was probable cause for seizure of the journal, and whether the trial court should have held an evidentiary hearing. At the hearing, the defendant claimed that the journal was indecipherable to the investigators.

The court began with the probable cause issue. The court articulated the well-established constitutional standards that apply in federal court to search warrant probable cause issues. "Probable cause exists where the totality of the circumstances indicates a 'fair probability that . . . evidence of a crime will be found in a particular place.' " *Keller Slip Opinion p. 10.* The court also re-stated several well-established appellate review standards: (1) that the decision of judge who signed the search warrant is entitled to "great deference"; and (2) that the search warrant affidavit must include "a substantial basis" for probable cause. *Id.*

The court applied these standards to the seizure of the journal under the search warrant. The court noted that the warrant was supported by both surveillance observations and the agent's experience with similar investigations. The court also considered it to be a "commonsensical" fact that doctors engaged in over prescription would be tempted to remove from their office incriminating documents and transport them to their residences.

For these reasons, the court had no difficulty with the probable cause issue. The court rejected an argument that the journal was personal rather than professional. "The relevant seized document was immediately identifiable as a journal, which Keller's counsel conceded at oral argument. And while Keller attempts to distinguish between professional 'journals and ledgers' and what he describes as his 'personal, handwritten diary,' the warrant itself makes no such distinction." *Keller Slip Opinion, p. 12-13*

The court then turned to the evidentiary hearing issue. The argument from the defendant was that the journal was indecipherable to the agents and, therefore, it was not clear to the agents that the journal was within the scope of the warrant. The court rejected the argument, saying: "But the fact that it took such study to *completely* decipher the journal does not negate the fact that - as the district court found - relevant target words in the journal were immediately discernible to agents perusing it. The issue of total legibility advanced by Keller is distinct from whether specific words or phrases would have demonstrated to an agent that at least some of the journal's contents related to the prescription of relevant drugs and thus made the journal seizable pursuant to the warrant." *Keller Slip Opinion, p. 15*

Training Takeaway

Ensuring that items of evidence seized under a search warrant are authorized to be seized is fundamental to search warrant investigations. The impression from this case and the language used by the court in its analysis could lead one to believe that the defendant was relying on rather weak arguments. Nevertheless, scope of the warrant issues can jeopardize perfectly valid investigations and should not be overlooked.

It is also worth noting that scope of the warrant issues can often be solved by applying for an amendment or extension of a warrant. Since warrants are generally reviewed electronically, and most jurisdictions have made on-call warrant judges available to law enforcement, an application for an amendment or extension of a warrant is well worth considering.

EXTERNAL LINK: View the Court Document

United States v. Barry, No. 23-2101, Ninth Circuit Court of Appeals (June 17, 2025)

Factual Background

A recognized federal exception to the warrant requirement is a parolee search. Parole conditions vary greatly from state to state and among the federal courts. Nevertheless, when supported by probable cause a valid parole search condition may overcome the presumption that a warrantless search is unreasonable and unconstitutional.

This began with an informant's tip. The tip included a first name, an apartment complex and apartment number, a vehicle description, and an allegation that the suspect sold drugs out of the apartment. A Los Angeles police officer was assigned to investigate.

The officer reviewed police databases and learned of a parolee, the defendant, with the same first name. The defendant had a different address than the address in the tip listed with his parole supervision. He also had no driver's license. Although the officer had little or nothing connecting the defendant to the apartment identified by the tipster, he conducted surveillance at the apartment.

While surveilling the apartment, the officer spotted the defendant. He was leaving the apartment and got in a vehicle that matched the description of the vehicle from the tip. The officer followed the defendant to a convenience store and approached him in the vehicle. He immediately saw the defendant with a drug baggie in his hands. He seized the baggie from the defendant and observed that it contained methamphetamine.

The officer detained the defendant in handcuffs and informed him that they were "going to search his apartment on Emelita Avenue next." Barry Slip Opinion, p. 5. The defendant did not deny that the apartment was his, nor act surprised, and he provided the key. He was also cooperative and answered officer safety questions about who was in the apartment, dogs, and weapons. The officer searched both the vehicle and the apartment and recovered drugs and guns from both.

The defendant was indicted on drug and gun offenses in federal court. He brought a suppression motion challenging the lawfulness of the searches. The federal trial judge denied the motion. The defendant then pleaded guilty but reserved the right to appeal the suppression motion.

Analysis of the Court

The Ninth Circuit Court of Appeals began with the broad constitutional standard that warrantless searches are presumed unreasonable. But the court acknowledged that one of the few and jealously guarded exceptions was for a search of a parolee consistent with parole conditions.

A foundational requirement for a valid parolee search is probable cause. In this case the probable cause challenge was to the sufficiency of the information that showed that the defendant resided at the apartment address that had been identified by the tip. "For the parolee-search condition exception to apply under California law, 'law enforcement officers must have probable cause to believe that the parolee is a resident of the house to be searched.' " *Barry Slip Opinion, p. 7.* Furthermore, the quantum of evidence or information is "the kind of fair probability on which reasonable and prudent people, not legal technicians, act." *Id.*

The court applied and discussed these standards. Most of its discussion centered on the search of the apartment rather than the vehicle. The court discussed three separate aspects of the officer's investigation that supported the lawfulness of the searches:

- First, the defendant's answers to the officer's questions showed that the defendant lived at the suspect address because he had "intimate knowledge" of the location and had the key in his possession.
- Second, the officer's investigation corroborated the informant's tip and pointed with some specificity to the defendant as residing in the suspect's apartment.
- Third, the defendant's possession of the key and his showing of which specific key was the key to the apartment, and several other details confirmed that it was his residence.

Barry Slip Opinion, pp. 9-11

The court also contrasted the facts in this case with a prior, similar Ninth Circuit case. See *United States v. Grandberry*, 730 F.3d 968 (9th Cir. 2013)(opens in a new tab). It found that there were sufficient circumstances in this case to distinguish it from *Grandberry:* "All in all, the factual differences distinguish this case from *Grandberry*. Considering the totality of the circumstances, the facts available to Officer Espinoza established probable cause to believe that Barry resided at the Emelita apartment." *Barry Slip Opinion, p. 11.*

Training Takeaway

The court's decision upholding the lawfulness of the search was supported by all of the panel judges. But there is reason to believe that the court could, in the future, modify its standards for parolee searches. In one concurring opinion, two judges discussed the appropriateness of loosening the standards, while in another concurrence, one of the judges discussed tightening them. Such division among judges in a case that so closely matched the facts in the *Grandberry* case is an example of why officers must be cautious in parolee search cases.

The court's description of the facts in this case versus the *Grandberry* case is instructive. The two cases are quite close factually and yet resulted in different outcomes. This is a challenge for law enforcement. It can be difficult, or maybe even impossible, to know for certain whether a particular parolee search will be upheld or not. And that note of caution does not even include the difficulties inherent when there is disagreement among the judges as to the standard that they should apply in parolee cases.

Uncertainty, as seen in these two cases, is inherent in warrantless search cases. The answer to such uncertainty can be either to get a warrant or, if not, to document as many details as possible that support probable cause. It can never hurt to go overboard in the reporting of facts that support probable cause.

EXTERNAL LINK: View the Court Document

Estate of Hernandez v. Los Angeles, No 21-55994, Ninth Circuit Court of Appeals (June 2, 2025)

Factual Background

This case came before the court on an appeal from a civil rights, excessive force lawsuit. This is the second published opinion in the same case from the Ninth Circuit; the first opinion was filed in March 2024 by a three-judge panel. Under circuit court procedure, a decision by a three-judge panel is sometimes reviewed by the court *en banc. En banc* means by the court as a whole. A decision by the *en banc* court is therefore a decision that supersedes the decision of the three-judge panel.

The decision by the three-judge panel in this case was previously summarized in these digests. The March 2024 digest summary of the three-judge panel's decision and the slip opinion can be reviewed in these two links: (1) Law Enforcement Digest - March 2024(opens in a new tab); and (2) Three Judge Panel Opinion(opens in a new tab). Because the three-judge panel decision has now been superseded, the digest of the three-judge panel decision should be read for historical purposes only.

The court's recitation of the facts was similar to the three-judge panel's fact statement. The incident originated with a multiple-vehicle collision. Two officers stopped to investigate. The officers were informed by both dispatch and bystanders that the suspect was in a black truck and that he was armed with a knife. The bystanders also stated that the suspect was threatening to kill himself.

The suspect climbed out of the truck. The officers communicated with each other concerning less lethal force before the shooting. But the suspect came around the truck and began approaching one of the officers. She shouted commands to stop and "Stay right there" and "Drop the knife." The suspect continued to advance. She then commanded again, "Drop the knife. Drop the knife." *Hernandez Slip Opinion, p. 11*

The suspect continued to advance and got to within 36 feet. The court stated, "McBride yelled 'Drop it!' and without pausing fired two rounds at him." *Hernandez Slip Opinion, p. 11.* The first two shots caused the suspect to go to the ground. But he did not stay down. He began to get up. The officer fired again. The court stated, "This second volley caused him to fall onto his back and curl up into a ball with his knees against his chest and his arms wrapped around them. As he rolled away from McBride onto his left side, she fired two more rounds. The third volley caused Hernandez to collapse on the ground and remain down." *Hernandez Slip Opinion, p. 12*

The court noted that the time between the first two shots and the second two shots was a mere 2.4 seconds. The court also noted that 1.4 seconds elapsed between the second two shots and the third two shots. The court further noted that the final shot was fatal because it was a shot to the suspect's head.

The *en banc* panel recited the procedural history in the trial court and the proceedings before the three-judge panel. The trial court had granted summary judgement in favor of the defendants on each of the plaintiffs' claims. The three-judge panel reversed that decision in part. The three-judge panel determined that the reasonableness of the last two shots was an issue of fact that should be decided by a jury and overturned the trial court's decision. However, the panel also determined that the officer was entitled to qualified immunity because her final two shots "did not violate clearly established law." *Hernandez Slip Opinion, p. 14*

Analysis of the Court

The decision of the *en banc* court changed the three-judge panel's decision on the second issue, the issue of clearly established law/qualified immunity issue. But before it did so, the court articulated its own analysis of the reasonableness of the final two shots from the involved officer.

The court's analysis on the reasonableness issue was similar to the three-judge panel's decision. It determined that a jury could view the final two shots as unreasonable, and that therefore trial court erred by granting the defendants' motion.

The court summarized the legal standards that apply to unreasonable use of force cases. The court's summary included: (1) "In determining whether the seizure comports with the Fourth Amendment, the critical question is whether the use of force was objectively reasonable … " and (2) "Although we determine reasonableness objectively, we do so 'from the perspective of a

reasonable officer on the scene, rather than with the 20/20 vision of hindsight'…" and (3) "We must allow for an officer's need '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. 15-16*

The court's application of these standards centered on the final two shots. The court articulated two additional legal standards that apply where a suspect is injured: "[I]f 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... A suspect who 'is on the ground and appears wounded . . . may no longer pose a threat; a reasonable officer would reassess the situation rather than continue shooting.' " *Hernandez Slip Opinion, p. 19*

The court determined that there was a material question of fact in whether the final two shots were fired when the suspect no longer posed a threat. "When McBride fired the third volley of shots, Hernandez was rolling away from her, balled up in a fetal position. Viewing the video footage in the light most favorable to plaintiffs, Hernandez did not constitute an immediate threat, and McBride could have and should have first reassessed the situation to see whether he had been subdued." *Hernandez Slip Opinion, p. 20*

Having determined that the officer's third volley could be found to be unreasonable, the court next turned to the clearly established/qualified immunity issue. This general legal standard is that, "Unless the officer 'violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known,' she is entitled to qualified immunity." *Hernandez Slip Opinion, p. 22.* This standard recognizes that qualified immunity protects, "all but the plainly incompetent or those who knowingly violate the law..." *Id.*

The court held against the officer on the clearly established/qualified immunity issue. The court reviewed and quoted its own precedent and determined that, "In 2020, it had been clearly established for several years that an officer cannot reasonably 'continue shooting' a criminal suspect who 'is on the ground,' 'appears wounded,' and 'shows no signs of getting up' unless the officer first 'reassess[es] the situation' - 'particularly . . . when the suspect wields a knife rather than a firearm' - because the suspect 'may no longer pose a threat.' " *Hernandez Slip Opinion, p. 23.* The court compared the officer's use of force in this case with its prior cases and determined that she could have been deemed to have violated clearly established rights of the suspect.

The *en banc* decision included separate concurring and dissenting opinions. In the first, four judges concurred with the qualified immunity decision, but on the first issue of reasonableness, also would have held that the officer's use of force was not unreasonable. In the second separate opinion, five judges dissented as to the qualified immunity issue and articulated additional reasons why the officer was entitled to the benefit of qualified immunity. And in the third separate opinion, one judge offered additional reasons for why the officer's use of force was not unreasonable.

The third opinion included a different take on the facts. The judge stated:

> This should have been a straightforward case. Daniel Hernandez charged an officer with a blade, ignored warnings to stop, and closed within a few dozen feet of the officer. The officer began shooting. In the end, the officer shot six times in six seconds. The officer had no reasonable opportunity to ensure her safety or the safety of the many civilians surrounding Hernandez in that short time. Under the totality of the circumstances, the officer didn't use excessive force in stopping an obvious threat. *Hernandez Slip Opinion, Dissent of Bumatay, p. 77*

Training Takeaway

The differences of opinion among the *en banc* judges in this case may be the most important takeaway for law enforcement. Review of the discussion and analysis in the three opinions indicates that the judges were unanimous (or close to unanimous) in their view of the first two shots but not the rest.

It was the second and third volleys that generated most of the disagreement. Because the majority opinion stated that the time between the first volley and the second was 2.4 seconds, and the time between the second and third volley was 1.4 seconds, the judges were debating the constitutional and legal consequences of events taking place in less than four seconds.

The fact that so short a time can generate such debate among such highly placed judicial officers is a reality to be considered by officers and their departments, weapons instructors, legal advisors, and guild legal advisors. It suggests that use of force policies and trainings might need to err on the side of caution.

EXTERNAL LINK: View the Court Document

Law Enforcement Digest – June 2025
Cases & References

State v. Butler, No. 40152-9 Washington Court of Appeals, Division Three (June 10, 2025)

- *Butler Slip Opinion*

Earl v. Campbell, No. 59220-7, Washington Court of Appeals, Division Two (June 17, 2025)

- *Earl Slip Opinion*
- *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537(2019)

State v. Hribar, No. 58982-6, Washington State Court of Appeals, Division Two (June 3, 2025)

- *Hribar Slip Opinion*
- *RCW 9A.32.020(1)*
- *Washington Pattern Instructions Criminal (WPIC), § 26.01.01*

United States v. Keller, No. 23-656, Ninth Circuit Court of Appeals (June 27, 2025)

- *Keller Slip Opinion*

United States v. Barry, No. 23-2101, Ninth Circuit Court of Appeals (June 17, 2025)

- *Barry Slip Opinion*
- *United States v. Grandberry*, 730 F.3d 968 (9th Cir. 2013)

Estate of Hernandez v. Los Angeles, No 21-55994, Ninth Circuit Court of Appeals (June 2, 2025)

- *Hernandez Slip Opinion*
- Law Enforcement Digest - March 2024
- Three Judge Panel Opinion

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- Legal Update for WA Law Enforcement authored by retired Assistant Attorney General, John Wasberg
- Caselaw Update by WA Association of Prosecuting Attorneys
