Covering cases published in June 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.
LED Author: James Schacht

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.

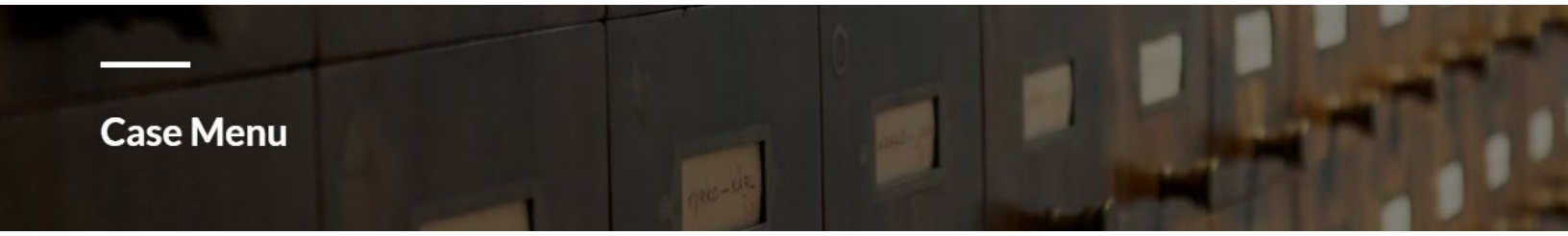
WASHINGTON LEGAL UPDATES

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.



Case Menu

1. *Grants Pass v. Johnson*, 23-175 (U.S. Supreme Court, June 28, 2024)
2. *Garland v. Cargill*, 22-976 (U.S. Supreme Court, June 14, 2024)
3. *United States v. Rahimi*, 22-915 (U.S. Supreme Court June 21, 2024)
4. *Calonge v. City of San Jose*, 22-16495 (Ninth Circuit June 7, 2024)
5. *Grimes v. Phillips*, 21-56353 (Ninth Circuit June 26, 2024)
6. *State v. Allah*, 85149-7-1 (WA Court of Appeals, June 17, 2024)
7. *State v. Calloway*, 57226-5-2 (WA Court of Appeals, June 11, 2024)

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.

Grants Pass v. Johnson, No. 23-175 (U.S. Supreme Court, June 28, 2024)

Factual Background

This case came before the U.S. Supreme Court from a civil injunction issued by a federal judge against the city of Grants Pass, Oregon. The case was brought by several individuals said to be living homeless in the city. The case was certified as a class action and therefore included all similarly situated homeless people in the city. The basis for the injunction was a prior Ninth Circuit decision from 2018 known as ***Martin v. City of Boise***. That decision is worth reading for a complete understanding of the *Grants Pass* decision and the struggles local communities in the Ninth Circuit have had with homeless camps.

The *Martin* decision (which was repeatedly referred to by the court as the *Martin* "experiment") began with a quote that foreshadowed the court's public policy view about homelessness. The quote and the gist of the *Martin* decision was as follows:

> "The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread."
>
> — Anatole France, The Red Lily

> We consider whether the Eighth Amendment's prohibition on cruel and unusual punishment bars a city from prosecuting people criminally for sleeping outside on public property when those people have no home or other shelter to go to. We conclude that it does. Martin Slip Opinion, p. 4. [Id]

The notion that the cruel and unusual punishment restricts regulation of camping on public property was new. And its effect was far reaching. By instituting a constitutional prohibition against regulation of camping, the Ninth Circuit took away the ability to respond to important community safety issues, such as drug encampments and sanitary contamination, from state and local governments. The *Martin* decision was used by homeless "advocates" to seek injunctions from federal judges throughout the Ninth Circuit against local and state government officials and officers. The threat of federal court civil litigation had the expected result; curtailed enforcement against drug camps and other noxious "homeless" behavior.

The history of the *Grants Pass* decision, having arisen from an injunction, meant that facts specific to the litigants were scant. Instead, the opinion drew from an extraordinary number of amicus briefs to provide an overview of homelessness as a social issue in the Ninth Circuit. Notable statistics and social science study references were included in the overview. For example, the court cited the Washington Association of Sheriffs and Police Chiefs and stated that, "[B]y one estimate, more than 40 percent of the shootings in Seattle in early 2022 were linked to homeless encampments." Slip Opinion, p. 3.

The court also stated, "The city of Seattle, for example, reports that roughly 60 percent of its offers of shelter have been rejected in a recent year [and] officials in Portland, Oregon, indicate that, between April 2022 and January 2024, over 70 percent of their approximately 3,500 offers of shelter beds to homeless individuals were declined." Slip Opinion, p.5.

And finally, citing studies from San Francisco, the court stated, "With encampments dotting neighborhood sidewalks, adults and children in these communities are sometimes forced to navigate around used needles, human waste, and other hazards to make their way to school, the grocery store, or work." Slip Opinion, p. 4.

Analysis of the Court

The *Grants Pass* decision was not unanimous. The majority opinion was written by Justice Gorsuch and joined by a total of six justices. The dissent, joined by three justices, was written by Justice Sotomayor. The holding of the court was simply that the Eighth Amendment's cruel and unusual punishments clause was not violated by state and local laws that regulate and enforce restrictions on camping in public areas. The dissent by contrast would have continued the Ninth Circuit's experiment.

The Gorsuch opinion began with review of the purposes of the cruel and unusual punishment clause. "The Cruel and Unusual Punishments Clause focuses on the question what 'method or kind of punishment' a government may impose after a criminal conviction, not on the question whether a government may criminalize particular behavior in the first place or how it may go about securing a conviction for that offense." Slip Opinion, p. 16.

Furthermore, the court observed that the fines and punishments authorized by the city ordinances could hardly be viewed either as cruel or unusual. They were similar to countless other penalties imposed by state and local jurisdictions for minor offenses, none of which are thought to be cruel or unusual.

Having reviewed the Grants Pass ordinances against the traditional understanding of the cruel and unusual punishments clause, the Gorsuch opinion then turned its attention to whether prior Supreme Court cases supported the "*Martin* experiment."

The discussion included whether the Grants Pass ordinances created status crimes. In a prior decision, the court had invalidated a California status crime that made it unlawful to simply be a drug addict. The opinion found no support in that decision for the *Martin* experiment because the Grants Pass ordinances did not create status crimes. The ordinances did not outlaw the status of being homeless. They outlawed only behaviors related to camping in public spaces.

The three dissenting justices would have extended the drug addict decision to include homelessness. They would have held that prosecuting homeless camp individuals for actions related to camping would be the same as prosecuting them for the status of being homeless. This viewpoint was joined by only three justices and for now does not constitute the decision of the court.

Having found no support for the Martin experiment in the Eighth Amendment or in the court's prior cases, the court also commented on the impact of the Ninth Circuit's improper use of the cruel and unusual punishments clause on democratic processes:

> Yes, people will disagree over which policy responses are best; they may experiment with one set of approaches only to find later another set works better; they may find certain responses more appropriate for some communities than others. But in our democracy, that is their right. Nor can a handful of federal judges begin to "match" the collective wisdom the American people possess in deciding "how best to handle" a pressing social question like homelessness... The Constitution's Eighth Amendment serves many important functions, but it does not authorize federal judges to wrest those rights and responsibilities from the American people and in their place dictate this Nation's homelessness policy. The judgment below is reversed, and the case is remanded for further proceedings consistent with this opinion. Slip Opinion, pp. 34-35 (citation omitted)

The Supreme Court's gentlemanly rebuke of the Ninth Circuit and its *Martin* experiment opens the door to the city of Grants Pass at long last enforcing its anti-camping ordinances. Other jurisdictions, including those located in Washington, are sure to do the same. The injunction and threat of the federal litigation were removed as a reason (or perhaps an excuse) for not tackling homelessness.

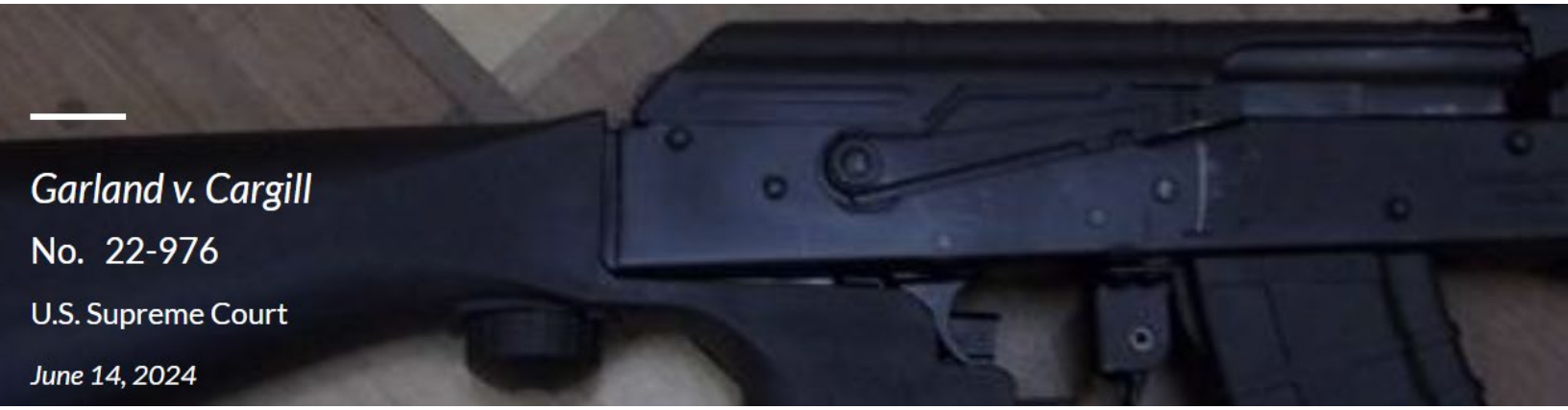
Training Takeaway

State and local camping laws and ordinances vary greatly across the states in the Ninth Circuit, including Washington. So too do the directives from city, county, and state public officials and policy makers to law enforcement officers, and agencies. As a result of the Ninth Circuit's 2018 *Martin* case there has been a great deal of uncertainty about what can be done to address homeless drug camps and other noxious homeless encampment problems.

It is likely that jurisdictions throughout Washington will review and begin adopting or implementing homeless policies and regulations. These will inevitably involve law enforcement. Officers and supervisors will need to keep close contact with their agency's leadership concerning the impact of the Grants Pass decision in their communities.

The primary takeaway from the *Grants Pass* decision is wait and see. Viewing the Grants Pass decision as authorization to immediately begin enforcing anti-camping laws would be a mistake. Law enforcement officers and agencies should provide input to influence the adoption of rational policies and initiatives but should await guidance as their jurisdictions exercise their new-found freedom to respond to homeless camps that has been provided by the U.S. Supreme Court.

EXTERNAL LINK: View the Court Document



Garland v. Cargill, No. 22-976 (U.S. Supreme Court, June 14, 2024)

Factual Background

This case involves rule making by the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") concerning bump stocks. The federal National Firearms Act of 1934 defined a machine gun as any firearm which can be fired "automatically more than one shot, without manual reloading, by a single function of the trigger." Under its rule-making authority, the ATF had consistently classified bump stock-equipped, semi-automatic firearms as not meeting the definition of a machine gun. This is because a bump stock causes the trigger to function repeatedly, albeit rapidly, rather than a single "function."

A mass shooting in 2017 in Las Vegas caused the agency to change its regulations. The shooting was carried out by a gunman who was able to fire hundreds of rounds from several bump stock-equipped firearms. The shooting left 58 people dead and more than 500 wounded. Political pressure led to multiple bills being introduced in Congress to modify the firearms act. None of them passed. But the ATF passed its changed rule in 2018.

The amended rule included bump stock equipped firearms in the definition of machine guns under ATF regulations. The amended regulations also required surrender of bump stocks to the ATF, or else have them destroyed.

The *Cargill* case came before the court as a result of a lawsuit by a gun owner who surrendered several bump stocks in compliance with the amended regulations. The basis for the lawsuit included that the ATF did not have authority to issue the amended rule and that the rule conflicted with the statutory definition of machine gun. The federal district court sided with the ATF, but the circuit appellate court reversed and sided with the gun owner.

As is often the case with the U.S. Supreme Court, it accepted review in order to resolve different decisions among the federal circuit courts. Some of the circuits had sided with gun owners and some with the ATF.

Analysis of the Court

Justice Thomas delivered the opinion of the court and was joined by five other justices. Three justices dissented with Justice Sotomayor writing for the dissenters. Justice Alito also filed a separate concurring opinion.

The majority opinion included a lengthy description of the function of a semiautomatic firearm and how it differs from a "machine gun." (Included in the discussion were diagrams of the functional parts of such firearms.) It is sufficient for this discussion to note that a semiautomatic requires that the trigger be pulled for each shot. Whereas a machine gun fires multiple rounds with a single trigger pull. The purpose of a bump stock is to use recoil to cause the trigger to be pulled more rapidly than by muscle power. Accomplished shooters can use bump stocks (or a variety of other means) to achieve rates of fire that can approach the capability of a machine gun.

After reviewing the operation of a semiautomatic and the effect of a bump stock, the majority opinion concluded that a bump stock did not cause a semiautomatic to fire "automatically" with a "single function of the trigger." Instead, it allowed the shooter to cause the trigger to "function" more rapidly than by the use of simple trigger finger pressure on the trigger.

A final aspect of the majority opinion is worth discussion. Justice Thomas dispelled the notion that Congresses intent was to include bump stocks in the definition of machine guns. This was in response to an argument the definition would be ineffective to achieve the Congressional purpose. To this the majority responded:

> In any event, Congress could have linked the definition of "machinegun" to a weapon's rate of fire, as the dissent would prefer. But it instead enacted a statute that turns on whether a weapon can fire more than one shot "automatically . . . by a single function of the trigger." ... And "it is never our job to rewrite . . . statutory text under the banner of speculation about what Congress might have done." Slip Opinion, p. 428

Training Takeaway

The *Cargill* case was entirely related to the National Firearms Act of 1934 and the ATF regulations promulgated from it. It does not affect Washington's laws. In Washington, the definition of unlawful firearms was amended in 2018 by the Washington legislature to include bump stocks. See Laws 2018, Ch. 7, p. 96.

The new legislation made it a separate felony to use a bump stock in the commission of a felony. *Id.* Thus in Washington, our legislature made the necessary legislative changes to address the deadly capabilities of bump stock-equipped semiautomatics, unlike Congress and the ATF. Washington's statutory amendments are consistent with the *Cargill* opinion, or perhaps even exactly what the opinion required.

EXTERNAL LINK: View the Court Document

United States v. Rahimi, No. 22-915 (U.S. Supreme Court, June 21, 2024)

Factual Background

This case came before the court from a prosecution for unlawful possession of a firearm ("UPOF") under the United States Code. The specific provision under which the defendant was indicted prohibited the defendant from possessing a firearm while being subject to a domestic violence restraining order. The federal provision is similar but not identical to the UPOF statute in Washington [*See for example* Unlawful Possession of a Firearm.]

The defendant in *Rahimi* could be described as a violent drug dealer in addition to a DV offender. In 2019 he perpetrated a violent incident with his girlfriend that included shots fired. She obtained a restraining order against him. The court's findings when it issued the restraining order included findings that the defendant had committed family violence, that the violence was likely to reoccur, and that the defendant presented a credible threat to the physical safety of the girlfriend.

After the order was issued the defendant committed a number of additional violent incidents. These included five additional shootings and drug distribution-related offenses. The *Rahimi* opinion is unclear as to the outcome of any prosecutions of the gun and drug crimes. It focused on the single offense prosecuted in federal court, UPOF premised on the restraining order obtained by the girlfriend.

The defendant brought a motion to dismiss the UPOF charge. The motion was heard before the U.S. Supreme Court issued its *Bruen* [*See New York State Rifle & Pistol Ass'n v Bruen*], Second Amendment decision in 2022. The appellate history of the case ultimately resulted in the 5th Circuit overturning the defendant's conviction. That decision in turn led to the U.S. Supreme Court granting review.

Analysis of the Court

The *Rahimi* opinion was joined by eight of the justices. There were two concurring opinions and one dissent by Justice Thomas. The courts analysis began with review of the *Bruen* case and a discussion of how courts should apply the standard announced in that case in Second Amendment challenges. In short, the court stated, "In *Bruen*, we directed courts to examine our "historical tradition of firearm regulation" to help delineate the contours of the right. … We explained that if a challenged regulation fits within that tradition, it is lawful under the Second Amendment." Slip Opinion, p. 6.

For law enforcement, the historical tradition analysis would be nearly impossible for any officer to apply in any particular case. The test is directed at appellate courts, both state and federal, which are called upon to review Second Amendment challenges on appeal. Nevertheless, the *Rahimi* opinion suggests that reasonable firearm regulation, such as regulation directed at domestic violence offenders, will pass the test.

After its discussion of the Second Amendment standard, the *Rahimi* court had no difficulty upholding the defendant's UPOF conviction. The court confined its decision to the section of the federal UPOF statute that prohibits firearm possession by a restraining order offender if the restraining order includes a finding that the defendant poses a credible threat to the physical safety of others.

The *Rahimi* court included a good deal of historical discussion about the regulation of firearms in the early years of our country's history. It concluded that the UPOF statute is consistent with the historical tradition of firearms regulation. The opinion also dispelled the objection of Justice Thomas in his dissent by stating that current firearm provisions need not be identical to historical firearm provisions.

The court's analysis left it room to maneuver in the future. It stated:

> In Heller, McDonald, and Bruen, this Court did not "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment." . . . Nor do we do so today. Rather, we conclude only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment. Slip Opinion, p. 17 (citation omitted)

Training Takeaway

The reservation of room to maneuver by the U.S. Supreme Court leaves law enforcement with a degree of uncertainty. As that court and state courts further refine and apply the Second Amendment analysis required by *Bruen*, there is no way to guarantee that any particular arrest or investigation of UPOF or other weapon-related offenses will pass the test.

As with so many constitutional issues, the prudent law enforcement officer and agency should review policies with their legal advisors and local prosecutors and be aware of the potential impact of the Second Amendment on firearm and other weapon-related cases.

In light of *Rahimi*, there is a specific issue that law enforcement should review with their legal advisors and local prosecutors. That is whether the former DV orders used by the courts in their jurisdiction include the findings that were of importance in *Rahimi*. Review of DV orders for compliance will be an important step in assuring compliance with the new analysis required in Second Amendment cases.

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.

Calonge v. City of San Jose, No. 22-16495 (Ninth Circuit, June 7, 2024)

Factual Background

This case came before the court from an excessive force lawsuit brought under 42 U.S.C. §1983. It was brought by the mother of a suspect shot and killed by a San Jose officer. The case was dismissed on summary judgement by the trial court. The Ninth Circuit was therefore reviewing the propriety of the dismissal. It reversed and remanded the case to the trial court for further proceedings and likely for trial.

The basic facts involved the officer having been dispatched to reports of a man with a gun near a high school. The gun proved to be a BB gun after the shooting. The information provided by the dispatcher included that the gun was being carried in the suspect's waistband.

The officers arrived and saw the suspect and the gun in his waistband. He walked away from the officers. They gave commands, which the Ninth Circuit

panel found were conflicting. This finding and several others was the result of the court's review of the record and conflicting evidence contained in the record which caused it to make several assumptions. The court assumed that the suspect was not commanded to get on the ground or otherwise commanded to stop. Plus, the panel assumed that the suspect was not drawing the BB gun or otherwise making a threatening gesture when he was shot. And finally, the panel assumed that there were no bystanders in the vicinity of the suspect.

The officer who fired the shot challenged the suspect and gave him commands. He testified that he fired the fatal shot because the suspect had made a gesture with his arm as if he were drawing a gun from his waistband. He also testified that there were bystanders or students from a nearby high school who he feared could be taken hostage at gunpoint.

Analysis of the Court

In excessive force cases a court balances the degree of force against the need for that force. The panel in *Calonge* explained that, "We conduct that balancing 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.' " Slip Opinion, p. 11 (citations omitted). On appellate review from a summary judgment dismissal however, the court considers the facts and evidence in the light most favorable to the plaintiff. *Id.*, p. 12.

The panel stated that the mere possession of a firearm in a suspect's waistband does not justify deadly force if the suspect does not reach for it or otherwise make a hostile gesture. And further, the panel stated, that officers must give understandable warnings whenever possible prior to using deadly force. The court's application of these principles led it to hold that, "When a man is walking down the street carrying a gun in his waistband, posing no immediate threat, police officers may not shout conflicting commands at him and then kill him." Slip Opinion, p. 16.

In its analysis of whether the law was "clearly established," the court noted that prior case law had resolved the issue: "We have held over and over that a suspect's possession of a gun does not itself justify deadly force. . . We have also previously recognized that a person cannot be considered non-compliant when he fails to obey conflicting commands. . . We have also previously held that continuing to walk as Calonge did is not fleeing." Slip Opinion, pp.17-20.

Training Takeaway

Excessive force lawsuits are likely to be fact and evidence dependent. The discussion here of the facts and the court's analysis should be read with caution. The case was litigated in California and did not involve any discussion of civil and criminal standards that apply to Washington law enforcement in Washington excessive force cases.

Officers and supervisors should consider the broad assertions and assumptions of the Ninth Circuit panel as reason to review department policies in use of force cases where suspects appear to be carrying firearms in public.

EXTERNAL LINK: View the Court Document

Grimes v. Phillips, No. 21-56353 (Ninth Circuit, June 26, 2024)

Factual Background

This case came before the court on a *habeas corpus* petition from a California inmate who had been convicted of murder. His petition challenged the admissibility of statements to an undercover jailhouse informant after he had allegedly invoked his Sixth Amendment right to counsel during custodial interrogation by homicide detectives.

The murder occurred after a parking lot dispute between the defendant and a family. The defendant's car accidentally contacted the victim's car, which led to a confrontation and punching of the defendant by the driver's fiancée. A short time later the defendant's car rolled up on the victim's car. Several shots were fired, and the fiancé was mortally wounded.

The investigation led to the arrest of the defendant. He was questioned by detectives. He asked to have his lawyer present before the interrogation began but he also eventually agreed to speak with the detectives without a lawyer. During the questioning he admitted having been present at the scene but denied involvement in the shooting.

After the interrogation the detectives arranged for an undercover informant posing as an inmate to be placed in custody with the defendant. During conversations with the informant the defendant made admissions that were later introduced into evidence at trial. The statements included information that could have been known only to the shooter.

After the defendant was convicted, he appealed his conviction in the California appellate courts. The California courts held that the statements to the undercover informant were properly admitted at trial. Having exhausted his state appeals, the defendant brought the *habeas corpus* action in the federal courts. He challenged the admissibility of his statements to the undercover informant.

Analysis of the Court

The standards applied by federal courts in *habeas corpus* proceedings are highly favorable to the prosecution. The defendant was required to show that admitting the statements to the informant was contrary to clearly established federal law as articulated by the U.S. Supreme Court.

The Ninth Circuit panel reviewed U.S. Supreme Court decisions under *Miranda* concerning the re-initiation of questioning after a suspect invokes his right to counsel. The panel determined that although the Supreme Court had held that re-interrogation after *Miranda* and an invocation of the right to counsel was impermissible, it had also determined that an undercover officer need not provide *Miranda* warnings prior to initiating conversation with an inmate. Thus, it could not be said that clearly established precedent invalidated the obtaining of statements by the undercover informant.

Training Takeaway

A U.S. Supreme Court informant decision played a central role in *Grimes*. It is worth reviewing. See *Illinois v. Perkins*, 496 U.S. 292(1990)[1]. In *Grimes*, the deferential standard that applies to *habeas corpus* cases, combined with the U.S. Supreme Court not having ruled on the specific issue led the panel to rule against the defendant.

But caution should be the rule for any detective contemplating the use of an undercover officer or informant under similar circumstances. Washington courts frequently deviate from the decisions of federal courts on search and seizure, interrogation, and the like. This case should not be viewed as a guide to how a Washington court would view the same issue.

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[1] *Illinois v. Perkins*. There is reason to be cautious in this area. Another U.S. Supreme Court case not discussed by the Ninth Circuit panel could be viewed as contrary to the panel's reliance on *Illinois v. Perkins*: *United States v. Henry*.

State v. Allah, No. 85149-7-1 (WA Court of Appeals, June 17, 2024)

Factual Background

This case came before Division One of the Washington Court of Appeals from a conviction for Unlawful Possession of a Firearm ("UPOF"). The defendant was convicted by a jury and sentenced to 41 months in prison. His appeal challenged the lawfulness of the seizure of the firearm.

The defendant was on probation for a prior UPOF conviction. He was stopped by a patrol officer for suspicion of a suspended driver's license. During the stop the officer checked his criminal history and learned of his probation status. The officer then contacted the Department of Corrections and requested that a CCO respond. The CCO did so and checked the defendant's probation conditions. He determined that the defendant had been driving in an area that he was prohibited from frequenting because the defendant had a security threat group status related to gang activity.

The CCO spoke with the defendant and then searched his car for a firearm without a warrant. During the search he recovered a firearm. The defendant was arrested and subsequently charged with a UPOF offense. He brought a suppression motion in which he argued that the search was unlawful. The trial court denied the motion.

Analysis of the Court

The Court of Appeals began its analysis, as is usually the case, by stating the general rule that warrantless searches are *per se* unlawful, and that in Washington they are subject to a few jealously guarded exceptions. The exception at issue in this case applies to defendants on probation. It is a statute-based exception. *See* RCW 9.94A.631. A warrantless search is permitted upon reasonable suspicion that the probationer has violated his probation conditions.

The probation exception is subject to a further requirement beyond reasonable suspicion. This requirement is derived from the Washington Constitution. A warrantless probation search is permitted only where there is a "nexus" between the probation condition and the area searched.

The court's analysis of the nexus requirement found fault with the CCO's reason for the search. The CCO testified at the suppression hearing that the probation condition at issue was the condition which required the defendant to stay out of the area where he was driving when stopped. The trial judge had determined that (1) the probation condition plus, (2) the defendant's prior convictions provided the necessary nexus. But the Court of Appeals disagreed.

The court reviewed prior cases which applied the nexus requirement and found that the facts in this case did not support it. The court therefore determined that the probation condition, the defendant's criminal history, and the circumstances of the stop did not provide a nexus sufficient to satisfy the Washington constitution. The court reasoned:

> [T]here is here, by way of examples only, no report someone saw Allah with a firearm, no report Allah had been threatening someone with a firearm, and no reference to a firearm on social media. Except for Allah's prior conviction and associations, there is no additional fact providing a foundation for a nexus between the geographic probation violation and the search of the car. Under *Jardinez*, the CCO's express reliance on his criminal history is insufficient.

Training Takeaway

Despite there being a statute authorizing probation searches, the authority of a CCO to conduct a probation search is not unlimited. Between the patrol officer and the CCO in *Allah* it is certainly possible that there were additional facts that were not included in the court's analysis. While it is generally prudent to include references to criminal history in the investigation of a case, criminal history and probation status alone should not be viewed as complete insofar as a probation search is concerned.

The possible additional facts referenced by the court above would be one way in which the investigation would have been more sustainable. There are others. For example, the case might have gone differently if there was evidence of the officer's knowledge of crime bulletins referencing gun violence in the area by the particular set to which the defendant reportedly belonged.

Knowing that the nexus requirement is a constitutional mandate, all investigations which rely on a warrantless probation search should fully articulate why the search was conducted and what the search had to do with the defendant's probation status.

EXTERNAL LINK: View the Court Document

State v. Calloway, No. 57226-5-2 (WA Court of Appeals, June 11, 2024)

Factual Background

This case came before Division Two of the Court of Appeals from a felony harassment conviction. The defendant was prosecuted for felony harassment and stalking. He was acquitted of the stalking charge but convicted of the harassment charge. His appeal was pending at the time a U.S. Supreme Court decision was handed down which involved First Amendment limitations on harassment crimes.[See *Counterman v. Colorado*, 143 S.Ct. 2106(2023)]

The facts in this case arose from a DV relationship. The defendant and victim had a prior relationship which the victim broke off. In 2021, the defendant contacted the victim "out of the blue" and sought to re-start the relationship. When his attempts to woo her were rejected, he began to call her names and eventually threatened to kill her. The victim sought aid from a male friend and law enforcement in an effort to scare the defendant off.

The male friend and police both had phone contact with the defendant in which he repeated versions of the death threats. Also, patrol officers were at the victim's house when the defendant drove by without stopping. The defendant was stopped by the officers a short distance away. He made statements to the officer in which he claimed that *he* was the harassment victim and that he was in the area of her residence because he wanted to fight her boyfriend.

The defendant put on a case at trial. He and his witnesses minimized his conduct and blamed the victim for harassing him.

Analysis of the Court

The primary argument on appeal was that the *Counterman* case invalidated Washington's harassment statute. The court therefore reviewed the impact of *Counterman*.

According to the Court of Appeals, the thrust of *Counterman* is that a true threat is not protected by the First Amendment. And a true threat in turn is a serious expression conveying that the speaker means to commit an act of unlawful violence. Slip Opinion, p. 8. Furthermore, the mental state must be recklessness, that is that the defendant knew a threat would be perceived as a serious threat of violence and made the threat anyway. *Id.*, p.9.

With these principals in mind, the court reviewed Washington's harassment statute. The mental state required by Washington's statute was knowledge. Under prior cases the statute had been interpreted to also require a criminal negligence standard for how harassing statements must affect the victim. The court acknowledged that the criminal negligence standard was insufficient under *Counterman* but that did not mean that the statute had to be invalidated. Instead, the courts could interpret the statute to require the requisite recklessness standard.

The court summarized its view of the impact of *Counterman* on Washington's harassment statute as follows:

> Given that there is no direct conflict between the statutory language and the *Counterman* articulation of what amounts to a true threat, we need not declare the harassment statute unconstitutional. We need only hold, consistent with *Counterman*, that the State must prove the defendant was at least "aware 'that others could regard [the] statements as' threatening violence and '[delivered] them anyway.' " Slip Opinion, p. 12-13 (citation omitted)

The court did not invalidate the harassment statute, and it also did not overturn the defendant's conviction despite jury instructions that did not fully comply with the new requirements from *Counterman*. The court held that the faulty jury instructions were harmless error.

Training Takeaway

The recklessness requirement for a true threat can be difficult to apply. It focuses on the effect of a threat on the victim and the defendant's knowledge and disregard of the effect of the threat.

Documenting the words used to convey the threat is only the beginning of a harassment investigation. A true threat inevitably has consequences and manifests itself in the emotions and behavior of the victim. Documenting the emotional impact of the threat, the actions and behaviors which the threat caused, and the observations of nearby witnesses are all ways in which the defendant's reckless conduct can be proved.

Law enforcement should always bear in mind in harassment cases that the impact of the threatening words separates idle threats from true threats.

EXTERNAL LINK: View the Court Document

Cases & Reference

1. *Grants Pass v. Johnson*, 23-175 (U.S. Supreme Court, June 28,2024)
   - *Grants Pass v. Johnson*
   - *Martin v. City of Boise*
2. *Garland v. Cargill*, 22-976 (U.S. Supreme Court, June 14,2024)
   - *Garland v. Cargill*
   - 2018 Session Laws
3. *United States v. Rahimi, 22-915 (U.S. Supreme Court, June 21,2024)*
   - *United States v. Rahimi*
   - Unlawful Possession of a Firearm
   - *New York State Rifle & Pistol Ass'n v Bruen*
4. *Calonge v. City of San Jose, 22-16495 (Federal Ninth Circuit Court of Appeal, June 7, 2024)*
   - *Calonge v. City of San Jose*
5. *Grimes v. Phillips, 21-56353 (Federal Ninth Circuit Court of Appeal, June 26. 2024)*
   - Grimes v. Phillips
   - Illinois v. Perkins
   - United States v. Henry
6. *State v. Allah, 85149-7-1, (WA Court of Appeals, June 17,2024)*
   - *State v. Allah*
   - RCW 9.94A.631
7. *State v. Calloway, 57226-5-2 (WA Court of Appeals, June 11, 2024)*
   - *State v. Calloway*
   - *Counterman v. Colorado*

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.

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]