Covering cases published in January 2025

This information is for REVIEW only. If you wish to take this course for CREDIT toward your 24 hours of in-service training, please contact your training officer. They can assign this course in Acadis.

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 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

This month's training incudes four cases from the Washington courts and two from our friends on the Ninth Circuit. The state cases include an interesting mix of defamation, felony harassment, exceptions to the warrant requirement, and actual innocence. The federal cases include issues arising from parking tickets (from a constitutional perspective) and the Arizona victims' bill of rights. There is nothing here that one would call ground-breaking but overall, the courts have not been too troublesome for law enforcement to start out 2025.

Case Menu

1. *Thurman v. Cowles Company*, 102791-5, Washington Supreme Court (January 30, 2025)
2. *State v. Johal*, 58980-0, Washington Court of Appeals, Division Two (January 14, 2025)
3. *State v. Howard*, 39665-7, Washington Court of Appeals, Division Three (January 28, 2025)
4. *Brock v. State of Washington*, 86617-6, Washington Court of Appeals, Division One (January 13, 2025)
5. *Grimm v. City of Portland*, 23-35335, Ninth Circuit Court of Appeals (January 3, 2025)
6. *Arizona Attorneys for Criminal Justice v. Mayes*, 22-16729, Ninth Circuit Court of Appeals

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.

Thurman v. Cowles Company, 102791-5, Washington Supreme Court (January 30, 2025)

Factual Background

This case is of interest because it arose out of a lawsuit brought by a former law enforcement officer against a newspaper publishing company for defamation. The case came before the court on an appeal from denial of a dismissal motion filed by the publishing company. The publishing company asserted a defense based on a statute intended to protect against civil rights litigation being used to stifle constitutionally protected speech. Such statutes are known nationally by the acronym SLAPP, which stands for strategic lawsuits against public participation. Washington's current version is known by the acronym UPEPA, which stands for the 2021 Uniform Public Expression Protection Act.

The facts were drawn from the pleadings and submissions filed in the dismissal motion. The officer's defamation claim was not spelled out in any detail. The flavor of the claim was summarized by the court as follows: "Former Spokane police officer Jeffery Thurman was the subject of a June 13, 2019, article published in the *Spokesman-Review* newspaper... The article headline stated that "Spokane County sheriff's sergeant fired for racial slur, sexual harassment, talk of killing black people." *Thurman Slip Opinion, p. 2.* Two years after publication of the allegedly defamatory articles, the officer brought a defamation lawsuit. The lawsuit was filed on June 14, 2021.

The date the lawsuit was filed was crucial to the court's decision. This was because the UPEPA went into effect after that date. The UPEPA allows for summary dismissal of such lawsuits if they "are brought with the intent to deter the defendant [the publishing company] from public participation by subjecting them to costly and extensive litigation." *Thurman Slip Opinion, p. 6.* The UPEPA includes procedural requirements and deadlines for filing of a pre-trial motion to dismiss claims that are covered by the statute. *See* RCW 4.105.010(opens in a new tab), *et.seq.*

The publishing company in Thurman sought to interpose Washington's UPEPA as a defense against the Spokane officer's lawsuit. It filed the dismissal motion despite the statute not having been in effect at the time the defamation lawsuit was filed. The trial court ruled against the publishing company and the publishing company appealed that ruling first to the court of appeals and then to the supreme court.

Analysis of the Court

The Supreme Court decided the issue purely on statutory interpretation grounds. The court determined that the wording of the statute did not permit the UPEPA statute to be applied to a case filed before the effective date of the statute. "The UPEPA was enacted to be construed broadly to protect the exercise of freedom of speech and of the press… Thurman's narrow interpretation of the UPEPA's transitional provision offers fewer protections to those fighting SLAPP lawsuits. While a court should consider the legislature's call for the statute to be broadly construed, there is also a strong presumption that statutes apply only prospectively unless the legislature explicitly states otherwise." *Thurman Slip Opinion, pp. 13-14.* Since there was no specific retroactivity clause, it followed that the act did not apply to lawsuits brought before its effective date.

The statutory interpretation basis for the court's decision in *Thurman* is of less interest than the potential effect of the UPEPA statute on future defamation cases. There is no indication in the court's discussion that UPEPA would not apply to defamation lawsuits against press entities brought by law enforcement so long as the defamation case was "asserted" after its effective date. Likewise, there is no indication from the court's discussion as to whether the defamation claims were factually valid or invalid, nor whether the factual validity of the claims would affect the application of UPEPA as a defense.

Defamation claims by law enforcement officers, or former officers, against media companies are not unheard of. The former officer in *Thurman* was successful in avoiding the application of UPEPA to his cause of action but that is not a reason to believe that future cases would obtain the same favorable result. UPEPA represents one of many barriers to recovery of damages in defamation cases, particularly in highly publicized cases involving alleged law enforcement wrongdoing.

Training Takeaway

Many officers targeted by publicity by a news organization have probably given thought to pursuit of a defamation claim. This case discusses a recently enacted statutory barrier to such lawsuits. Defamation claims against news media organizations are fraught with numerous perils. UPEPA is one barrier to relief among many.

Law enforcement officers and their legal representatives must tread with extreme caution in this area no matter how factually meritorious a defamation claim may be. The constitutional and legal barriers to successful legal enforcement of such claims can be substantial.

EXTERNAL LINK: View the Court Document

State v. Johal, 58980-0, Washington Court of Appeals, Division Two (January 14, 2025)

Factual Background

This case involves interpretation of the felony harassment statute, which requires proof of a threat to kill. The case came before the court on an appeal from a conviction for felony harassment arising from a Domestic Violence (DV) altercation. The altercation started between the defendant and his baby's mother. The baby was six weeks old at the time of the incident.

The incident began when the defendant and his baby's mother dropped the baby off at a babysitter's residence. By 2 a.m. relations between the couple had deteriorated. The defendant forcefully dragged the baby's mother out of a convenience store. He subsequently went to the babysitter's residence and demanded the baby. He took the baby to his apartment along with the mother.

Law enforcement officers were dispatched to the defendant's residence. The baby's mother was allowed to leave the residence shortly after the officers arrived at the scene. The officers were then able to enter the residence and found the defendant holding the baby.

The defendant yelled at the officers to leave his residence and threatened to kill the baby if they did not leave. He was holding the baby and grabbed a hammer. A standoff ensued. The defendant threatened to kill the baby by hitting it in the head with the hammer and made gestures toward the baby with the hammer. He also walked toward a balcony and threatened to throw the baby off the balcony. These threats were directed at the baby but calculated to get the officers to leave the apartment.

Before the defendant could carry out the threats the officers were able to subdue him and rescue the baby. The defendant was taken into custody and was eventually charged with several felonies, including one count of felony harassment.

The wording of the harassment charge was important to the outcome of the case. The baby was identified as a victim but so were the law enforcement officers who were confronting the defendant. The defendant's threats to kill were threats to cause the death of the baby but the defendant's obvious intent was to induce the officers to back off. The charging language from the Information included that the defendant "did threaten to kill another, immediately or in the future, to-wit: [the baby,] S.J. . . . and/or *Vancouver Police Department Corporal Gregory Catton, and/or Vancouver Police Department Corporal William Pardue, and/or Vancouver Police Department Officer Justin Reiner*, or any other person; and the Defendant, by words or conduct, placed the person threatened in reasonable fear that the threat would be carried out...." *Johal Slip Opinion, p. 2* (italics added by the court).

The case went to trial. The trial was heard by a judge rather than a jury. The trial judge found the defendant guilty of multiple felonies, including the felony harassment charge. The court later entered findings of fact and conclusions of law. A crucial finding as to the felony harassment charge stated, "The Defendant became angry and yelled at the officers to leave. He picked up a hammer from the kitchen, drew his arm back, and said he was going to kill the baby. Corporal Pardue, Corporal Catton, and Officer Reiner heard the Defendant threaten to kill the baby and believed he would use the hammer to kill the baby. Their belief was reasonable under the circumstances." *Johal Slip Opinion, pp. 3-4*. The court for obvious reasons did not indicate whether the six-week-old baby also reasonably believed that the defendant would take his life.

The defendant appealed the felony harassment conviction. His argument on appeal was that in a felony harassment case, the person threatened with death (meaning the baby) must be the same person who reasonably believed that the threat would be carried out.

Analysis of the Court

The court began its analysis with the text of the felony harassment statute. *See* RCW 9A.46.020. The court stated:

> Under RCW 9A.46.020(1), a person is guilty of harassment if:
> (a) Without lawful authority, the person knowingly threatens:
> (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; [and]
> . . . .

> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.
>
> Harassment is a gross misdemeanor unless the harassment involves "threatening to kill the person threatened or any other person." … Harassment involving a death threat is a class C felony. *Johal Slip Opinion, pp. 4-5.*

The court pointed out that the threat element is phrased in terms of causing bodily injury to the person threatened, "or to any other person." The court determined that the statute itself does not require that the person to whom bodily injury is threatened must be the same person who is placed "in reasonable fear that the threat will be carried out."

The court reviewed several prior cases which had held that the same way. One such case from the Supreme Court held, "The statute also contemplates that a person may be threatened by harm to another. An example that comes readily to mind is a communication of intent to harm the child of the person threatened." *See* State v. J.M., 144 Wn. 2d 472 (2001)(opens in a new tab). The *Johal* court agreed that the purpose of the statute was broad enough to include threats to kill one person that in turn constitute threats or coercion directed at another person.

Another case stated the legal principle this way: "As the court's hypothetical [in J.M.] points out, the target of coercion or intimidation when a parent is threatened with bodily injury to a child can clearly be the parent. If so, the second element of the State's case would require proof that the parent, not the child, was reasonably placed in fear." *Johal Slip Opinion, p. 6,* (quoting the opinion in *State v. Morales*, 174 Wn. App. 370(2013)(opens in a new tab).)

The prior cases involved parents rather than law enforcement. But the court also discussed the importance of the law enforcement officers having been named as victims in the charging document. Because the officers were specifically identified as victims of the harassment, the prosecution had made clear that the threat to cause the death of the baby was also a threat directed at the officers to get them to leave the apartment. Although the defendant never directed a threat of violence or death toward the officers, they were threatened, as anyone would be, by the threat to kill an innocent six month old baby and were thus themselves victims of felony harassment.

The court in *Johal* upheld the defendant's conviction of felony harassment. "Here, a rational trier of fact could determine that Johal's threats to kill SJ were both directed at and an attempt to coerce or intimidate the officers on the scene. He wanted the officers to leave his apartment and to abandon their attempt to arrest him, and threatening to kill SJ was his way of accomplishing that end. Therefore, based on RCW 9A.46.010, the officers were the "person[s] threatened" under RCW 9A.46.020(1)(a)." *Johal Slip Opinion, pp. 7-8*

Training Takeaway

Most officers will be aware that an element of the crime of felony harassment is that the victim be placed "in reasonable fear that the threat will be carried out." But many officers may not consider themselves victims if they are not the direct target of a suspect's threat.

This case stands for the proposition that a threat to kill one person can be used simultaneously to threaten a police officer or other third person not directly the target of threat. When a threat to one person is used to coerce action by a second person, the threat is directed at two victims. In such cases the threat can sustain a felony harassment charge against the second "victim" even if the second "victim" is a responding police officer.

EXTERNAL LINK: View the Court Document

State v. Howard, 39665-7, Washington Court of Appeals, Division Three (January 28, 2025)

Factual Background

This case involves two exceptions to the warrant requirement for a search of a vehicle during a temporary investigative detention. The case came before the court on an appeal from convictions for drive-by shooting and unlawful possession of a firearm (UPOF). The appeal focused on a pre-trial suppression motion in which the defendant challenged the lawfulness of the seizure of a handgun from the backseat of a vehicle during an investigative stop.

The facts included a law enforcement officer responding to a report of a trespasser at a rural residence. The report was from a 911 call. The first reports included that the trespasser had been at the house and that shots had been fired. Upon arrival the officer drove up a long driveway and as he did so, he saw a suspect vehicle turn and drive toward him from the residence.

The officer stopped his vehicle and rolled down his window to talk to the occupants of the suspect car. The driver was the defendant. He claimed that he had just picked up his two passengers from the residence and was leaving. He also claimed that the gunshots had been from nearby hunters.

While the officer was talking to the defendant, he heard from dispatch that the 911 caller was on the phone and could see the officer talking to the occupants of the suspect vehicle. The caller stated that it was the driver who had fired the shots. This prompted the officer to get out of his car and direct the occupants of the suspect vehicle to raise their hands. He also called for backup and waited for a second officer to arrive on the scene. Once he had backup, he directed the occupants to get out of the vehicle and detained them, not in handcuffs, but under the control of the backup officer.

While waiting for backup, the officer asked about whether there was a gun in the vehicle. The driver denied that there was. The officer looked in the vehicle and could see an axe. Once the occupants were detained outside the vehicle, the officer

frisked them for weapons and decided to frisk the vehicle also. "Deputy Russell believed that a gun could be easily concealed in the car and, if produced during a confrontation, would present a mortal threat. He decided to check the Pontiac for a concealed gun. After about one minute, he found a handgun in the backseat, hidden under a shirt and case of soda pop. Deputy Russell did not touch or move the gun and left it on the back seat." *Howard Slip Opinion, p. 3.* The decision to frisk the vehicle was the focus of the pre-trial suppression motion and the appeal.

The suppression motion was heard by the trial court. The trial court denied the motion and the case went to trial. The facts and motive for the shooting were not discussed in the court's opinion. But the defendant was charged with two counts of assault, drive-by shooting, and UPOF. The jury convicted him of the drive-by and UPOF charges but acquitted him of the two assault charges. On appeal the defendant challenged the trial court's ruling which upheld the lawfulness of the search that led to the seizure of the gun.

Analysis of the Court

The court began its analysis with the U.S. Constitution's Fourth Amendment. It acknowledged that Fourth Amendment protection extends to both the person and vehicle of a criminal detainee. But it also acknowledged that there are exceptions. "Exceptions to the warrant requirement fall into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative stops." *Howard Slip Opinion, p. 4*

The two exceptions in this case were related to investigative detentions (*Terry* stops) or searches incident to lawful arrest. The court articulated the extent of a lawful *Terry* stop and frisk of a vehicle under the federal Fourth Amendment. "A police officer may extend his 'frisk' for weapons into the passenger compartment of the vehicle if he has a 'reasonable suspicion that the suspect is dangerous and may gain access to a weapon in the vehicle.' " *Howard Slip Opinion, p. 6*

The rationale for this rule was described by the U.S. Supreme Court as follows:

> During any investigative detention, the suspect is in the control of the officers in the sense that he may be briefly detained against his will. Just as a Terry suspect on the street may, despite being under the brief control of a police officer, reach into his clothing and retrieve a weapon, so might a Terry suspect in [the defendant]'s position break away from police control and retrieve a weapon from his automobile.

> In addition, if the suspect is not placed under arrest, he will be permitted to reenter his automobile, and he will then have access to any weapons inside. Or, as here, the suspect may be permitted to reenter the vehicle before the Terry investigation is over, and again, may have access to weapons. In any event, we stress that a Terry investigation, such as the one that occurred here, involves a police investigation at close range, when the officer remains particularly vulnerable in part because a full custodial arrest has not been effected, and the officer must make a quick decision as to how to protect himself and others from possible danger. *Howard Slip Opinion, p.6, quoting* *Michigan v. Long, 463 U.S.1032(1983)*(opens in a new tab)

The court also observed that Washington's Constitution differs from the federal Fourth Amendment. "Under article I, section 7 of the Washington Constitution, 'No person shall be disturbed in his private affairs, or his home invaded, without authority of law.' The phrase 'private affairs' includes automobiles and their contents." *Howard Slip Opinion, p. 4.* Nevertheless, the court did not differentiate the Washington vehicle frisk standard from the federal standard.

The court's analysis of the officer's decision to frisk the vehicle is worth reading in its entirety. The court stated:

> Here, once Howard and his passengers exited the Pontiac, the next step of Deputy Russell's investigation was to talk with the 911 caller, who was near the house at the end of the long driveway. The 911 caller had reported that the Pontiac's driver had shot at him, and, if this was true, the gun almost certainly remained in the car. Deputy Russell knew that once he drove down the driveway to speak with the caller, the second deputy would be left alone with a reported shooter and two trespassers likely in close proximity to a gun. Given this context, we conclude that Deputy Russell's warrantless car frisk was reasonably based on officer safety concerns. *Howard Slip Opinion, p. 7*

The court's common-sense view of the officer's search decision did not end its inquiry. It also considered the defendant's argument that search incident to *arrest* cases had undermined the rule from the *Michigan v. Long* case. A search incident to arrest differs from a frisk during a brief investigative detention. The court quoted the late Justice Scalia from *Long* as to why the two exceptions are not the same. "Where no arrest is made, we have held that officers may search the car if they reasonably believe 'the suspect is dangerous and . . . may gain immediate control of weapons.' ... In the no-arrest case, the

possibility of access to weapons in the vehicle always exists, since the driver or passenger will be allowed to return to the vehicle when the interrogation is completed. The rule of *Michigan v. Long* is not at issue here." *Howard Slip Opinion, p. 8*

Having rejected the defendant's search incident to arrest argument, the court upheld the trial court's decision. It held that the search and seizure of the gun from the back seat of the vehicle was lawful as a vehicle frisk incident to a brief investigative detention.

Training Takeaway

This case presents a number of important training takeaways. The first is that the two exceptions at issue are not governed by the same legal standards. The court's discussion of search incident to arrest versus search incident to an investigative detention, and in particular its quotation from Justice Scalia, illustrates that the two search and seizure exceptions have different purposes and apply in different scenarios. Officers should be aware of the differences and articulate whether one or the other was the basis for a particular warrantless search.

A second takeaway is the standard for a search of a suspect vehicle incident to a brief investigative detention. Articulating the reasons why the search was undertaken in furtherance of the safety of officers and the detainees is crucial. Officers should not assume that courts will be aware of all officer safety concerns that are readily apparent to officers confronting potentially dangerous and armed suspects during a detention. Articulating in reports and in court testimony, the myriad safety concerns is crucial.

In this case the officer's articulation of the danger posed to the backup officer who was left guarding three possible suspects (who were not in handcuffs) once he drove down the driveway to talk to the 911 caller was key to the court's decision upholding the lawfulness of the search.

EXTERNAL LINK: View the Court Document

Brock v. State of Washington, 86617-6, Washington Court of Appeals, Division One (January 13, 2025)

Factual Background

This case is of interest to law enforcement not so much because it will affect future investigations but because it is an example of how criminal cases that are serious and result in lengthy prison sentences, especially those resulting in a life sentence, can never be said to be over.

The case came before the court on an appeal from a civil action under Washington's 2013 Wrongly Convicted Persons Act (WCPA). The original criminal investigation was a sexual abuse case from a single incident of molestation of an 11-year-old child. The defendant was convicted in 1995 and sentenced to life in prison without parole. The wrongly convicted persons case went to trial in 2022, some 27 years after the original criminal trial.

The facts that led to the child molestation criminal case stemmed from a single overnight stay by the defendant in the victim and her parent's apartment. The victim's mother had a chance encounter in the community with the defendant, who she knew previously. Although he had been to prison, she invited him to visit the family at their home, a one-bedroom apartment. The victim's family included two siblings, her mother, and her mother's boyfriend. The defendant socialized during the evening and was invited to stay the night because of a curfew at the shelter where he was staying.

During the night, the defendant unexpectedly got up, used the bathroom, and left the apartment. He left even though the shelter where he was staying was closed. The eleven-year-old victim also woke up and disclosed that the defendant had molested her by touching her vagina before leaving. The mother and boyfriend each heard the allegations and immediately reported the incident to the police. They also took the victim to the hospital for a sexual assault examination. The physical exam did not reveal any sexual injury but the victim's statements to the medical provider were consistent with the disclosure she had made to her parents.

The sexual assault investigation included law enforcement interviews of both the victim and the defendant. As to the victim, the detective reported that the victim had "stated 'I was laying down on my bed and I woke up and he, my pants were down and my underpants were down and his hands was in my pants. . . then he took off, he got on his clothes and he left.' R.R. clarified that Brock had touched her vagina. Officer Brown then drove [the mother and the boyfriend] and R.R. to St. Peter Hospital for a sexual assault examination. R.R. recounted the incident to the sexual assault nurse examiner." *Brock Slip Opinion, p. 3*

The defendant's interview was less consistent. The detective interviewed him the same night and at first was given a denial of anything having happened. That changed. "When Detective Hovda asked if R.R. could have misunderstood Brock's actions in some way, Brock agreed that it was possible because, while lying on the couch, his arm may have fallen off the edge and bumped into her. He later stated, 'all right. I'll tell you the truth. I had three beers. She's a fast girl. She kept looking at me.' He continued on to say he had touched R.R.'s face and back, but repeatedly denied touching her vagina." *Brock Slip Opinion, p. 4*

The defendant was charged with one count of child molestation. The case proceeded to trial, and he was convicted. His life sentence was affirmed. He subsequently challenged his conviction via personal restraint petitions several times in the years after his 1995 conviction. Those prior challenges were not sustained.

The challenge that did end up being sustained was filed in 2012. It was brought after the victim recanted the allegations. The context for her recantation was that she learned from her mother that the defendant was still in prison. This was 17 years after the criminal trial. The recantation was investigated by defense attorneys. They obtained a sworn declaration from the victim documenting her new story. She claimed that she had made up the original allegations to gain attention from her mother.

The 2012 recantation led to what is called a reference hearing. The court of appeals referred the factual issues to the trial court for an evidentiary hearing. The trial court found that the victim's recantation was "credible and reliable by a preponderance of the evidence." *Brock Slip Opinion, p. 6.* It ordered the conviction vacated and dismissed the case. That decision in turn led to the civil action for money compensation filed by the defendant after 2014. That case went to trial in 2022.

In contrast to the reference hearing, the wrongly convicted persons trial went against the defendant. The victim was unable or unwilling to testify and the victim's mother had died in 2017. This led the defendant to offer hearsay testimony from the defense investigators concerning the recantation, which was allowed by the trial court. The defendant also testified. The state's attorneys offered transcripts of the testimony from the original trial together with the evidence from the sexual assault examination.

At the 2022 trial, the trial judge found against the defendant on his compensation claim. The judge ruled that the defendant had not met his burden of proof. "The court found some elements of Brock's testimony to be credible, but other pieces to be unreliable. Finding that the totality of the evidence more strongly supported the original inculpatory trial testimony than the recantation, the court ruled that Brock did not carry his burden of proving clearly and convincingly that he was actually innocent. The court denied Brock's WCPA claim." *Brock Slip Opinion, pp. 7-8*

Analysis of the Court

The court of appeals reviewed the denial of the WCPA compensation claim. The defendant's primary argument was that the recantation by itself should have been sufficient evidence of actual innocence. The appellate court rejected that argument. The court first held that its standard of review was whether there was substantial evidence to support the trial judge's ruling. It then turned to the elements of a WCPA claim.

The elements included an actual innocence requirement. The court quoted the statute in this regard as follows: "(c)(ii) [t]he claimant's judgment of conviction was reversed or vacated and the charging document dismissed on the basis of *significant new exculpatory information* . . . [and] (d) [t]he claimant *did not engage in any illegal conduct* alleged in the charging documents...." *Brock Slip Opinion, p. 10* (italics supplied), *quoting* RCW 4.100.060(opens in a new tab)

The court determined that substantial evidence supported the trial judge's finding that the defendant had not sufficiently proved actual innocence. The court acknowledged the significance of the victim's recantation but stated the credibility of the defendant's testimony was also significant. "And while this included Brock's bolstering of R.R.'s recantation and his consistent declarations of innocence, it also included how Brock left Rush's apartment in the early morning hours despite knowing he would likely not have a bed at his

shelter, how R.R. somehow knew that he would 'go back to prison' if she told the police what happened, and how Brock himself admitted to touching R.R.'s face and back and labeled her a 'fast girl.' " *Brock Slip Opinion, p. 12*

The court determined that the trial judge's ruling should be sustained. But it also discussed an evidence issue. The WCPA includes a provision that allows the court to loosen the rules of evidence if the compensation claim is weakened by a loss of evidence not the fault of the defendant. This was how the hearsay and opinion testimony from the defense legal team was admitted. The court held that the trial judge had properly applied that provision when he admitted hearsay in lieu of live testimony in recognition that the mother had passed away before the compensation trial.

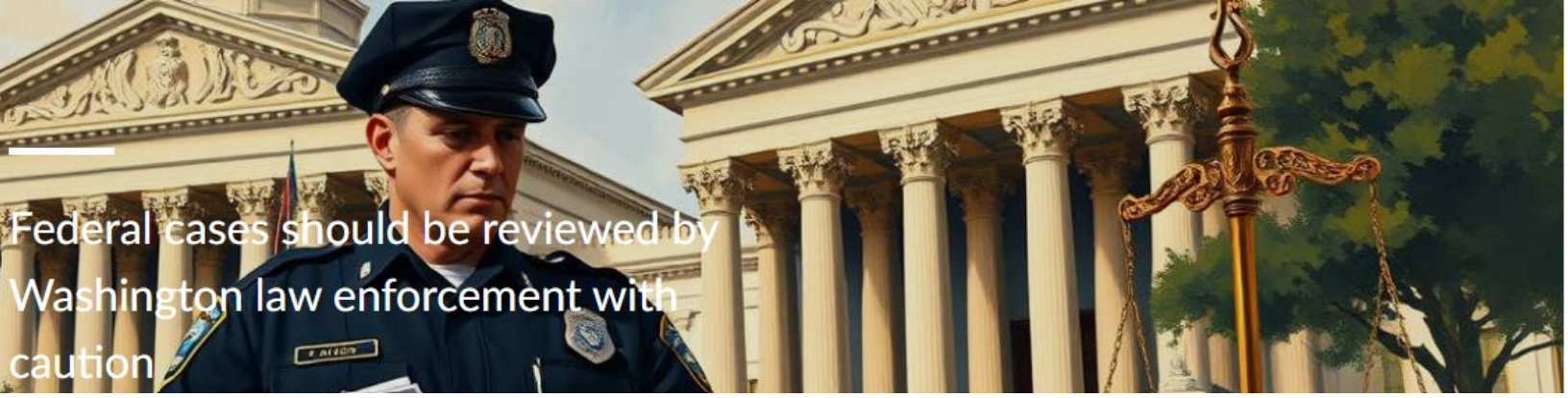
The court of appeals sustained the trial judge's ruling against the defendant's compensation claim. The outcome of the case turned on the defendant's burden of proof in establishing the statutory actual innocence elements of the claim. In short, the mere recantation by a child sex abuse victim years after the original allegations and trial was insufficient to entitle the defendant to compensation.

Training Takeaway

This case is an example of the numerous appellate legal remedies afforded a defendant in Washington. There was no defect noted concerning the law enforcement investigation, no defect in the in-court prosecution of the case in 1995, no defect in the direct appeal, nor in the prior personal restraint petitions. Nevertheless, a statute permitted a defendant to have another day in court on a compensation claim for "actual innocence" 27 years after the original trial.

For law enforcement, the takeaway is that investigations and criminal prosecutions must be meticulously thorough, complete, and consistent with legal standards to withstand the test of time. But even so, there are legal avenues for a criminal defendant to seek to overturn his conviction or even ask for monetary compensation that are available no matter how well law enforcement or prosecution do their work.

EXTERNAL LINK: View the Court Document



Federal cases should be reviewed by Washington law enforcement with caution

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.

Grimm v. City of Portland, 23-35335, Ninth Circuit Court of Appeals (January 3, 2025)

Factual Background

This case is of interest to any officers involved with parking enforcement. It concerns due process notice requirements for parking tickets and towing of a vehicle. The parking enforcement officers were originally defendants in the plaintiff's civil rights lawsuit but were dismissed for qualified immunity. The case proceeded against the city after the dismissal.

The case began in 2017 when the plaintiff parked his Honda on a downtown city street. He paid for a few hours parking using a mobile app but left the car there for seven days. During the seven days, parking officers ticketed the car four times. After the fourth time, they also added a notice of intent to tow. The first tow notice was two days before a second notice. The second notice was followed up with the actual tow.

The court's wry view of the tickets and notices included this comment:

> On December 21, seven days after Grimm had parked the car, a parking enforcement officer issued a final citation for parking unlawfully and placed it on top of the other citations. The cherry on top of this pile was another red slip, this time displaying the word "TOW" in large print on one side, and an order to tow the car on the other. After placing the red tow slip, the officer contacted Retriever Towing, which towed the car. *Grimm Slip Opinion, p. 6*

The notices placed on the car were not the only notices. The city also mailed notice of the tow to the registered owner's address. This evidently aroused the interest of the plaintiff, who retrieved the Honda from the tow company at a cost of more than $500 and sued the city and the parking officers in federal court for an alleged Fourteenth Amendment due process civil rights violation.

The procedural history of the case included two trips to the Ninth Circuit. The first resulted in a decision in favor of the plaintiff. This case was the second. This case was an appeal from a federal district court decision dismissing the civil rights lawsuit.

Analysis of the Court

The plaintiff's federal constitutional Fourteenth Amendment due process claim alleged that the pre-tow notice was inadequate. The court began with a discussion of the legal standard for such claims. The standard was established in the 1950's and requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Grimm Slip Opinion, p. 7*

The U.S. district court judge applied this standard and concluded that the city had provided adequate notice. The contention from the plaintiff on appeal in this case was that the city had to do more because it was "practicable" to do so. The Ninth Circuit disagreed.

The Ninth Circuit discussed prior cases in which it had held that parking tickets themselves provided sufficient notice. It also reviewed the facts from this case and stated, "Here, the City provided Grimm with all the notice that the Fourteenth Amendment requires. The red warning slip placed on the car's windshield five days after Grimm had parked the car was reasonably calculated to inform him that the car would be towed... Although the subsequent tow slip was placed on the windshield the same day the car was towed, the warning slip provided two days' advance notice that the car would be removed from the city street." *Grimm Slip Opinion, p. 11*

The Ninth Circuit also rejected an argument from the plaintiff that notice of a vehicle tow should be treated the same as a notice in a real estate enforcement action. "A standard requiring the City to mail out a notice, send an email, or make a phone call in addition to leaving a warning slip would strike the wrong balance between the 'interest of the State' and 'the individual interest sought to be protected by the Fourteenth Amendment.' " *Grimm Slip Opinion, p.12*

Training Takeaway

The training takeaway from *Grimm*, like so many of the new cases published by the courts, depends on an officer's perspective. Parking enforcement officers and city official responsible for parking enforcement can take comfort in the commonsense outcome of this case. Ticketing a vehicle and a two-day notice of intent to tow proved adequate in this federal court civil rights lawsuit.

For other officers involved in other types of police work, the takeaway is more nuanced. Impound tows, particularly tows for purposes for preservation of evidence or that involve inventory searches, involve very different standards. This case resulted in a favorable outcome in favor of the city, but it should not be viewed as a relaxation of other due process search and seizure standards.

EXTERNAL LINK: View the Court Document

Arizona Attorneys for Criminal Justice v. Mayes, 22-16729, Ninth Circuit Court of Appeals

Factual Background

This case involves a First Amendment challenge to a victims' rights statute in Arizona. (It is worth noting that Washington law in this area differs substantially from Arizona and caution about relying on the favorable decision in this case should be maintained.)

The case came before the court on an appeal from a federal civil rights lawsuit brought by criminal defense attorneys. The court reversed a decision from a district court judge that had ruled that the statute was unconstitutional.

The challenged statute was adopted to implement a state constitutional provision under the Arizona victims bill of rights. The statute prohibits criminal defense attorneys and their investigators and agents from direct contact with crime victims. Such contact must be arranged through the prosecutor's office. The defense attorneys sought to have the provision declared unconstitutional as an overbroad infringement on their First Amendment speech rights.

There were several specific details from the facts that proved important to the court's resolution of the case. First, the attorneys' challenge was a facial challenge, which meant that they claimed it was invalid as to all potential claimants. Such challenges are quite difficult to prove and require that the claimants show that the challenged provision applies to a "substantial amount" of speech.

The second important detail is that the defense attorneys did not challenge a separate and similar Arizona court rule. The rule provided similar protection compared to the challenged statute. Thus, the impact on speech from the statute alone was considered in the context of a nearly as far reaching court rule.

As to the facts, at trial the defense attorneys submitted evidence that they wished to have contact with victims for personal free speech reasons. Their reasons for wanting to do so were presented as altruistic rather than as part of their professional investigation and preparation of the case on behalf of a defendant:

> At trial, the Attorneys offered testimony that, absent the Victim Contact Limit, they would share information about the criminal legal system with crime victims. For example, one defense attorney would explain to victims that the death penalty process takes years and involves continued contact with the legal system that can be retraumatizing…In doing so, the defense attorney hoped to help victims make a more informed decision about participation in the case… Other defense attorneys would share their beliefs about justice and punishment with victims, investigate offenses, gather mitigation evidence in death penalty cases, and answer victims' questions about the defendant, the case, and the legal system. *Arizona Attorneys for Criminal Justice Slip Opinion, p. 8-9*

The trial was concluded with a decision in favor of the defense attorneys. The federal trial judge issued an injunction invalidating the particular provisions of the victim's rights statute. That decision was appealed to the Ninth Circuit.

Analysis of the Court

The court began its analysis by sorting out the legal standard that should apply to the challenge. This included whether the provision infringed on free speech at all, and whether strict scrutiny or some lesser standard should apply to the challenge. The court resolved those issues by assuming that there was a free speech impact and that the challenge was a facial challenge.

Since the challenge was a facial challenge, the standard required that the defense attorneys show that it impacted a substantial number of the universe of possible claimants. "Or, as the Supreme Court has more recently characterized the standard, 'the ratio of unlawful-to-lawful applications' must be 'lopsided enough to justify the 'strong medicine' of facial invalidation for overbreadth." *Arizona Attorneys for Criminal Justice Slip Opinion, p. 11*

The court then analyzed the impact of the law on theoretically possible claimants. This was where the defense attorneys' decision not to challenge the court rule concerning victim interviews was important. The court reasoned that those contacts would be a large part of the possible contacts between

criminal defense teams and crime victims. It followed that since the court rule was assumed to be valid and constitutional it could be said that the ratio of "unlawful-to-lawful applications" favored lawful.

The court reasoned that the "altruistic" contacts between defense teams and victims would be few. Therefore, "Considering the full scope of the Victim Contact Limit against the limited contacts here challenged, its assumedly unconstitutional applications are insubstantial relative to its assumedly valid ones. The Victim Contact Limit's primary applications to victim-interview requests are, absent a challenge, its "legitimate sweep." Therefore, the Attorneys' facial challenge must fail." *Arizona Attorneys for Criminal Justice Slip Opinion, p. 16*

The Ninth Circuit panel reversed the federal district court judge's decision. Under the framing of the issues in this case, the Arizona provision survived the First Amendment challenge and was not unconstitutionally overbroad.

Training Takeaway

For Washington law enforcement, the challenge to the Arizona victims' rights statute is not directly related to investigations. It may be of interest for officers and detectives who have contact with violent crime or sexual assault victims who may have many questions about how the criminal trial process will play out.

Concern about unwanted contact from a defendant' legal team is a common concern for victims who generally have little prior knowledge of the criminal justice system. Considering the decision in this case, suggestions that the defense team has a constitutional right to have direct contact with a victim or their family could be said to be overstated.

It is also important to remember that this case concerned an Arizona statute. Washington has its own crime victims bill of rights and its own well-developed jurisprudence concerning contact between defense counsel and crime victims. *See* RCW 7.69.030.(opens in a new tab) Careful officers and detectives should review this provision (there is a test question about it) and rely on advice from their legal advisors and local prosecutors concerning the parameters of limits in this area in Washington. Statements to victims and their families about defense interviews and the like should be vetted by legal advisors and prosecutors.

EXTERNAL LINK: View the Court Document

Law Enforcement Digest – January 2025
Cases & References

Thurman v. Cowles Company, 102791-5, Washington Supreme Court (January 30, 2025)

- *Thurman Slip Opinion*
- RCW 4.105.010

State v. Johal, 58980-0, Washington Court of Appeals, Division Two (January 14, 2025)

- Johal Slip Opinion
- RCW 9A.46.020
- State v. J.M., 144 Wn. 2d 472 (2001)
- State v. Morales, 174 Wn. App. 370(2013)

State v. Howard, 39665-7, Washington Court of Appeals, Division Three (January 28, 2025)

- Howard Slip Opinion
- Michigan v. Long, 463 U.S.1032(1983)

Brock v. State of Washington, 86617-6, Washington Court of Appeals, Division One (January 13, 2025)

- Brock Slip Opinion
- RCW 4.100.060

Grimm v. City of Portland, 23-35335, Ninth Circuit Court of Appeals (January 3, 2025)

- *Grimm Slip Opinion*

Arizona Attorneys for Criminal Justice v. Mayes, 22-16729, Ninth Circuit Court of Appeals

- *Arizona Attorneys for Criminal Justice Slip Opinion*
- RCW 7.69.030

Free access to Washington State judicial opinions can be obtained through the Washington State Judicial Opinions Public Access Web site here: Free Washington Case Law Access

---

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