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No. 95749-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

TIM EYMAN,

Respondent/Cross-Appellant,

and

MICHAEL J. PADDEN,

Intervenor-Respondent/Cross-Appellant,

vs.

KIM WYMAN, in her capacity as Secretary of State,

Defendant

WASHINGTON STATE LEGISLATURE,

Appellant/Cross-Respondent,

and

DE-ESCALATE WASHINGTON, and

CYRUS HABIB, Lieutenant Governor of the State of Washington,

Intervenor-Appellant/Cross-Respondents

**MEMORANDUM OF AMICI CURIAE WASHINGTON
ASSOCIATION OF SHERIFFS AND POLICE CHIEFS,
WASHINGTON COUNCIL OF POLICE AND SHERIFFS, AND
THE FRATERNAL ORDER OF POLICE**

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I. IDENTITY AND INTEREST OF AMICI CURIAE

A. Identity of Amici Curiae.

Amici Curiae Washington Association of Sheriffs and Police Chiefs (“WASPC”), Washington Council of Police and Sheriffs (“WACOPS”) and the Fraternal Order of Police (“FOP”) represent law enforcement officers and officials employed by federal and state agencies, general local governments (counties, cities, and towns), and special purpose districts. Amici monitor and participate in legislative actions related to their missions.

WASPC is a Washington non-profit association organized under Chapter 24.03 RCW. Under Washington law, RCW 36.28A.010, WASPC has been defined as a “combination of units of local government...” WASPC consists of members of executive and top management personnel from Washington State law enforcement agencies, including all 39 county sheriffs, more than 230 police chiefs of Washington cities and towns, executives of the Washington State Patrol and Department of Corrections, and representatives of various federal law enforcement agencies. Formed in 1963, the mission of WASPC is to lead collaboration among law enforcement executives in the state to enhance public safety.

In furthering its goals, WASPC maintains partnerships with Washington State University (Criminal Justice Institute and Division of Governmental Studies and Services), the State Criminal Justice Training Commission (“Commission”), the Washington Association of Prosecuting Attorneys, the Washington Association of County Officials, the Association of Washington Cities, WACOPS, the Washington State Sheriffs’ Association, and numerous state agencies, including the State Patrol, Department of Corrections and The Traffic Safety Commission.

WASPC accredits law enforcement agencies to professionalize law enforcement and create “industry best practices and standards.” In its accreditation and other programs, WASPC deals with issues involving use of force. WASPC and its members are involved in many issues regarding recruitment, training, supervision, discipline and defense of law enforcement officers in this state.

WACOPS was first organized as the Police Legislative Committee, Inc. in 1962. In 1986, it was incorporated as the Washington State Council of Police Officers. In 1997, it was incorporated as the Washington Council of Police and Sheriffs. WACOPS represents more than 100 member law enforcement organizations in Washington. These organizations employ over 4,300 municipal, county, and state law enforcement officers (e.g., Department of Fisheries and Wildlife agents), prosecuting attorneys and others. WACOPS serves as their primary voice and advocate regarding

legislation and policies affecting the conduct of their duties.

WACOPS communicates with its members using all manner of media, including online social networks, electronic newsletters, quarterly meetings, email, and other means.

FOP is a fraternal organization representing sworn law enforcement officers nationwide. Nationally, it represents more than 325,000 law enforcement officers organized into 2,100 local chapters, state lodges and the national Grand Lodge. In Washington State, FOP provides labor services to, and directly represents, more than 2,500 law enforcement officers. In addition to traditional union representation, FOP provides direct legal defense services to law enforcement officers facing potential or actual criminal charges filed against them due to actions occurring in the conduct of their duties. It also represents such officers in internal investigations and disciplinary proceedings. As a result of this representation, FOP and its members are directly affected by any modification of existing legal standards for officer conduct.

B. Interest of Amici Curiae.

The stated primary intent of Initiative 940 (“I-940” and “the Initiative”) “is to make our communities safer.” Chapter 11, Laws of 2018 (“Chapter 11”), Section 2.

Chapter 11 (the enacted Initiative), and the legislation amending it, Engrossed Substitute House Bill 3003 (“ESHB 3003”), Chapter 10, Laws

of 2018 (“Chapter 10”), deal with issues involving law enforcement officer training, de-escalation of use of force in violent situations, resolution by a law enforcement officer of conflicts without the use of physical or deadly force, standards for the use of force, requirements for providing first aid to people harmed by the use of force, and review of police action in force situations. (Chapter 10 is attached as Appendix A to this brief).

These are important issues not only here, but nationally. The United States Supreme Court has emphasized “the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.” *Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).

Law enforcement officers, criminal suspects, and bystanders are all at risk in situations that may involve the use of force, especially deadly force. “Officer-involved shootings put bystanders, officers and suspects at extreme risk, and the consequences of these incidents often shake communities to their very core.” Bryan Vila, et al., “Developing a Common Metric for Evaluating Police Performance in Deadly Force Situations,” National Institute of Justice and Washington State University (2012), (“Vila”), 1.

Of critical importance is “teaching officers to make sound decisions in deadly force confrontations – despite the fact that they often occur in

complex, fast-paced, ambiguous, and low-information situations ...” Vila,

2. Performance standards and instructional materials on the use of deadly force must set out clear and unmistakable standards:

Deadly force performance standards need to be clear, unambiguous, measurable, comprehensive and consistent.... In order to be attainable, deadly force performance standards must be based on a clear understanding of the real-world challenges presented by deadly force situations, and the limits of human performance.

Id. (internal citation omitted).

“The frequency of police use-of-force events that may be defined as justified or excessive is difficult to estimate.” National Institute of Justice, *Police Use of Force* (2016), 1, citing Geoffrey P. Alpert, et al., *Understanding Police Use of Force: Officers, Suspects, and Reciprocity* (2004). Regardless of the frequency of such events, “[l]aw enforcement officers should use only the amount of force necessary to mitigate an incident, make an arrest, or protect themselves or others from harm.” *Id.*

Amici supported the passage of ESHB 3003, because it clarified the objective standards to be followed in events involving use of force. We desire that this Court’s decision here will help to protect both law enforcement officers and the people they serve when they are confronted with the perilous events that necessitate intervention of the officers.

II. ISSUES OF THE CASE

Amici agree with the statements of issues found in the Opening Brief of the Washington State Legislature, p. 3; Opening Brief of Cyrus

Habib, 3; De-Escalate Washington’s Opening Brief, 2-3; and Brief of Respondents and Cross-Apellants, 4.

III. ARGUMENT

A. 2018 Legislative Background.

1. 2018 Legislative Session: Negotiations

Because of its interest in the matters raised by I-940, WASPC (in collaboration with WACOPS, FOP and other law enforcement and prosecution agencies) participated in the 2018 legislative session discussions and negotiations regarding I-940 and related legislation. Those discussions and negotiations resulted in adoption by the Legislature of I-940 and the passage of ESHB 3003. Law enforcement agencies testified in both House and Senate committees supporting passage of ESHB 3003. It is “in the Legislative hearing process, [that] all views and problems in measures [can] be identified and addressed by decision makers.” Philip A. Talmadge, *Initiative Process in Washington*, 24 Seattle U. L. Rev. 1017, 1020 (2001).

Amici were concerned that a general election campaign involving I-940, whether standing by itself or alongside an alternative proposed by the Legislature, could result in a divisive and unnecessarily contentious campaign. We understood also that the particular process used in drafting initiatives bypasses “the processes of informed deliberation, refinement, compromise, and consensus-building that exist in any passably functional

legislature...” Kenneth Miller, *Courts as Watchdogs of the Washington State Initiative Process*, 24 Seattle U. L. Rev. 1053, 1063 (2001). We concluded that a better and more efficient course of action was to have De-Escalate Washington and law enforcement organizations agree on sensible and workable solutions to the issues raised by the Initiative. As a result, these groups negotiated the provisions of ESHB 3003.¹

2. 2018 Legislative Action

There is no question that the 2018 Legislature “enacted” both HI 940 and SI 940, the bills incorporating I-940². Although the trial court concluded that this “enactment” was in fact a “rejection”, we agree with the Legislature, the Lieutenant Governor, and De-Escalate Washington that the Legislature “enacted” the Initiative and the trial court erred in concluding the contrary. As a result of this enactment, I-940 became Chapter 11, Laws of 2018. Because I-940 was not enacted by a popular vote, the Legislature is, and was, free to amend Chapter 11, and did so here. The Legislature did this by passing ESHB 3003, Chapter 10. Chapter 10 did two things. It enacted provisions not found in, but nevertheless consistent with, the Initiative. It also amended prospectively and contingently certain provisions of Chapter 11 (the former Initiative).

¹ The Initiative sponsors should have been aware that, by filing their proposal with the Legislature, it would be open to suggested improvements.

² Initiatives to the Legislature are introduced with bill numbers. In the Senate, the text of I940 was introduced as SI 940; in the House, HI 940.

The enacting clause of ESHB 3003 provides for a contingent effective date occurring after the effective date of Chapter 11. The “date of enactment” of a statute may refer to the date of legislative passage or to a later “effective date”. See, *State v. Gibbons*, 118 Wash. 171, 203 P. 390 (1922). In this case, it refers to the effective date. See *Hallin v. Trent*, 94 Wash. 671, 619 P. 2d 357 (1980).

In recognition of the critical importance of the issues raised by I-940, and the need to have clear and objective standards for law enforcement officers and officials, the Amici worked with De-Escalate Washington and other interested parties during the 2018 legislative session to improve and clarify provisions of I-940. None of the provisions of the House bill negated or undercut the Initiative; all of them improved and complemented the original Initiative language.

B. ESHB 3003 Improved and Complemented I-940.

The following is provided in order to understand the complementarity and refinement of the I-940 provisions represented by Chapter 10. The pertinent sections of Chapter 10 are set out below.

First, we discuss those sections that amend Chapter 11, and later, those sections that stand alone.

1. Amendments

a. Chapter 10, Section 1.

Section 1 of Chapter 10 amends Section 5 of Chapter 11 (I-940) in two respects. First, it deals with the minimum requirements for the rules mandated to be adopted by the Commission. In particular, it removes the requirement that the eventual training regulation serve “as a condition of maintaining certification” of Washington State law enforcement officers. This matter, rather, is dealt with in later language in Chapter 10.

Second, it amends one of the elements that the Commission is to consider in developing training curricula. In particular, the amendment provides as follows:

(f) Alternatives to the use of physical or deadly force so that de-escalation tactics and less lethal alternatives are part of the decision making process leading up to the consideration of deadly force (~~is used only when unavoidable and as a last resort~~);...

Chapter 10, Section 1(2)(f).

This change refocuses the Commission training regulations to emphasize de-escalation tactics and alternatives other than the use of deadly force in critical law enforcement situations. It is a clarification, not a negation, of the Initiative’s language.

b. Chapter 10, Section 2.

Section 2 of Chapter 10 amends Section 6 of Chapter 11 (I-940) in primarily two ways.

First, it clarifies the Initiative’s language “that all law enforcement personnel must render first aid to save lives” to the more precise language

that “all law enforcement personnel must provide or facilitate first aid such that it is rendered at the earliest safe opportunity to injured persons at a scene controlled by law enforcement.” This refocuses the language on whether a scene is controlled by law enforcement, and specifies that aid should “be rendered at the earliest safe opportunity...” This is more specific and clear than the original language, and better accomplishes the purpose of the Initiative’s intent.

Second, it changes the factors that must be included in the guidelines to be adopted by the Commission for the rendering of first aid at a law enforcement scene.”

The guidelines must: (a) Adopt first aid training requirements; (b) address best practices for securing a scene to facilitate the safe, swift, and effective provision of first aid to anyone injured in a scene controlled by law enforcement or as a result of law enforcement action; and (c) assist agencies and law enforcement offices in balancing ~~((competing public health and safety duties; and (c) establish that law enforcement officers have a paramount duty to preserve the life of persons whom the officer comes into direct contact with while carrying out official duties, including providing or facilitating immediate first aid to those in agency care of custody at the earliest opportunity))~~ the many essential duties of officers with the solemn duty to preserve the life of persons with whom officers come into direct contact.

Chapter 10, Section 2(2).

The reference to “best practices for securing a scene to facilitate the safe, swift, and effective provision of first aid to anyone injured in a scene controlled by law enforcement or as a result of law enforcement action;...”

will aid the Commission in its rule-making authority. The new language removes the original language referring to “competing public health and safety duties...,” which “duties” were neither defined nor described in the original Initiative.

Chapter 10 also removes the language “that law enforcement officers have a paramount duty to preserve the life of persons whom the officer comes into direct contact with while carrying out official duties...” (Emphasis added.) Rather, it emphasizes that the Commission guidelines should acknowledge the sometimes competing duties presented to law enforcement officers, which include the “the solemn duty to preserve the life of persons with whom officers come into direct contact.” This change more clearly describes the often critical balancing act that officers must perform at crime scenes, rather than impose on them “a paramount duty” to accomplish only one of the duties. The “paramount duty” language is inflexible. Chapter 10 recognizes that the balancing of duties in varied situations requires particularity and discretion.

These amendments improve the original language of the Initiative and do not frustrate its intent.

c. Chapter 10, Section 3.

Section 3 of Chapter 10 amends Section 7 of Chapter 11 (I-940). It does so in a number of respects.

First, it changes the reference to a “law enforcement officer” to a “peace officer”.

It also removes the reference to an officer needing to meet “the good faith standard adopted in this section”, and rather, states that an “officer shall not be held criminally liable for using deadly force in good faith, where ‘good faith’ is an objective standard which shall consider all of the facts, circumstances, and information known to the officer at the time to determine whether a similarly situated officer would have believed that the use of deadly force was necessary to prevent death or serious physical harm to the officer or another individual.” Chapter 10, Section 3 (4). This change to the original language retains the notion of “good faith” but places it within the context of an objective standard that can be applied universally.

Consistent with the above, Chapter 10 also deletes the language of the original Chapter 11, Section 7 (5) that set forth a “good faith standard” with a bifurcated test for whether an officer had acted in “good faith”, by applying both an “objective good faith test” and a “subjective good faith test”. The amending language provides an objective, definable standard.

Chapter 10 also deletes language requiring “an independent investigation” in certain situations where deadly force is employed, by providing a new Section 5 that, in more detail, requires independent investigations, and describes how they must be conducted.

Finally, Section 3 deletes the original language of Chapter 11, Section 7 (6), which defined for Section 7 only the term “law enforcement officer”. Existing Washington State law defines “criminal justice personnel”, “law enforcement personnel”, “correctional personnel”, and “peace officer”. RCW 43.101.010. An additional definition, made without reference to the existing definitions of RCW 43.101.010, presented a possibility of confusion.

In all these respects, Chapter 10 improved the language of the Initiative and better carried out its intent.

d. Chapter 10, Section 4.

Chapter 10, Section 4 amends Section 9 of Chapter 11 (I-940). Under the original Initiative language, the Commission was required to “seek input” from a number of officials and agencies in “carrying out all rule making under” the initiative. Those specified were the Attorney General, “law enforcement agencies”, “tribes”, and “community stakeholders.” The amending language specifies additional organizations and persons to be consulted by the Commission: “the Washington council of police and sheriffs, the Washington state fraternal order of police, the council of metropolitan police and sheriffs, the Washington state patrol troopers association, at least one association representing law enforcement who represent traditionally under represented communities, including the

black law enforcement association of Washington, de-escalate Washington,..."

This representation does not weaken the original language or intent of the initiative, but rather strengthens it, and provides a broader group of organizations, representing a broader group of interests, which were not specified in the original initiative language.

The other primary change deletes language requiring that the rules adopted by the Commission must apply procedures under new RCW 9A.16.040(5)(d) "completely independent of the agency whose officer was involved in the use of deadly force;..." Chapter 10, section 4. It also deletes language requiring that the rules have special provisions when "deadly force is used on a tribal member,..." Id.

With respect to the above, RCW 9A.16.040 concerns justifiable homicide or use of deadly force by public officers, police officers and persons aiding a victim of deadly force. The amending language here simply deletes a reference to a new subsection for RCW 9A.16.040 that was set out in the original initiative, and whose reference is now moot. With respect to the language regarding situations involving a "tribal member", Chapter 10 sets out a more detailed and comprehensive new Section 6 regarding situations involving tribal members. This new section is discussed below.

The amending language improves the Initiative's original language, and better carries out its intent.

2. New Sections.

a. Chapter 10, Section 5.

Section 5 of Chapter 10 imposes a requirement for an “independent investigation” on “whether the use of deadly force met the good faith standard established in RCW 9A.16.040 and satisfied other applicable laws and policies.” It specifies that the investigation must “be completely independent of the agency whose officer was involved in the use of deadly force.” It requires the Commission to adopt rules “establishing criteria to determine what qualifies as an independent investigation pursuant to this section.” It provides for an exemption to the independent investigation requirement in those cases where there may be separate requirements “by federal consent decree, federal settlement agreement, or federal court order.”

This new Section 5, therefore, expands on the original language of the Initiative, and, in so doing, both reaffirms the language and improves it.

b. Chapter 10, Section 6.

The new Section 6 deals with the application of force in situations of force involving tribal members. The original Initiative language referred simply to “a tribal member”. The new section more specifically uses the term “a person who is an enrolled member of a federally recognized Indian tribe,…” The new section also requires notification in deadly force situations be given to the “governor’s office of Indian affairs.” It imposes a

time requirement for the notification, and requires that the agency notifying the Governor's Office of Indian Affairs provide sufficient information for that office "to attempt to identify the deceased person and his or her tribal affiliation." It also requires that office to "establish a means to receive the notice required under this section, including outside of regular business hours", and to "immediately notify the tribe of which the person was enrolled."

This new section, therefore, does not change the original intent of the Initiative, but better defines the persons who are the subject of it, namely, enrolled members of federally recognized tribes, and delineates a structure under which notifications must be made. This was absent in the original Initiative and helps to carry out the intent of the original Initiative.

c. Chapter 10, Section 7.

New Section 7 adds a new section to Chapter 9A.16 RCW and deals with a matter not covered by the Initiative at all. In this respect, no one can argue that the Legislature was without authority to adopt new Section 7 as a stand-alone amendment to existing state law.

The section deals with situations of deadly force, when "a peace officer who is charged with a crime is found not guilty or charges are dismissed by reason of justifiable homicide or use of deadly force" under existing state law. It also covers situations where a peace officer acted "by

reason of self-defense, for actions taken while on duty or otherwise within the scope of his or her authority as a peace officer,..."

It also provides that the state will reimburse a defendant in such a situation "for all reasonable costs, including loss of time, legal fees incurred, and other expenses involved in his or her defense." Furthermore, it specifies when a judge is authorized to determine the amount of an award to a police officer in such situations. It includes provisions that require a judge to "consider the same questions as must be answered in the special verdict under subsection 4 of this section". The special verdict provision deals with when "the issue of justifiable homicide, justifiable use of deadly force, or self-defense under this section has been submitted to a jury, and the jury has found the defendant not guilty..." There are other provisions of this section, but the section's main intent is cover situations where a law enforcement officer has been found not guilty of charges because of justifiable homicide, justifiable use of deadly force, or self-defense.

None of these matters was covered by Chapter 11. The Legislature was fully free to enact a statute concerning them.

d. Chapter 10, Section 10.

Section 10 of Chapter 10 provides for a contingent effective date.

IV. CONCLUSION

Law enforcement officers and officials are fully aware of the dangers to themselves, and to the people that they serve, of the use of force

– especially deadly force – in perilous and threatening situations. Although they must follow sensible and safety-minded standards, the scenes into which they are frequently thrust are dangerous and unpredictable. These scenes do not follow scripts. They include domestic disputes, crimes in progress, physically threatening behavior, et al. For any officer, any day might include multiple events, none the same and none simple.

Both officers and the public want law enforcement behavior in these situations to be as professionally-based and publicly protective as possible. “Law enforcement agencies manage the use of deadly force by establishing performance standards, holding people accountable for meeting those standards and training them how to do so.” Vila, *supra* at 2.

Amici submit that the coupled provisions of Chapters 10 and 11, Laws of 2018, will assist their members and the people they serve to better confront – and emerge safely from – the difficult enforcement situations that occur unfortunately all too frequently.

We know of no party that contends that the 2018 session amendments weakened the Initiative or contravened its intent. To the contrary, Chapter 10 improved Chapter 11 – in some respects through clarification, in others by providing more specificity. Senator Padden himself concedes that “the compromise proposal was supported by the initiative sponsors, the Legislature as a whole, even myself.” Padden, “Report from Olympia,” “Ruling sends I-940 to fall ballot – a victory for

constitutional rights” (May 9, 2018). It is the legislative means, not the statutory end, to which he and Mr. Eyman object.

Amici respectfully ask this Court to be aware that its ruling here will affect the lives of many members of the public, as well as of the officers they trust to keep them safe. We believe that the safety of those lives would be protected best by a ruling that the 2018 Legislature enacted the Initiative (Chapter 11), and also that the Legislature amended its provisions, with those amendments to take effect after the effective date of the Initiative.

If this Court rules otherwise, we would prefer that the Court rule that the Initiative has been enacted will not be placed on the general election ballot, allowing it to be amended in a subsequent legislative session – either special or regular – by simple majorities of both houses.

Respectfully submitted this 22nd day of May, 2018.

SMITH ALLING, P.S.

By



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V. APPENDIX

CERTIFICATION OF ENROLLMENT
ENGROSSED SUBSTITUTE HOUSE BILL 3003

Chapter 10, Laws of 2018

65th Legislature
2018 Regular Session

LAW ENFORCEMENT--DEADLY FORCE--TRAINING

EFFECTIVE DATE: June 8, 2018 (Contingent)

Passed by the House March 7, 2018
Yeas 73 Nays 25

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate March 8, 2018
Yeas 25 Nays 24

CYRUS HABIB

President of the Senate

Approved March 8, 2018 5:10 PM

JAY INSLEE

Governor of the State of Washington

CERTIFICATE

I, Bernard Dean, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE HOUSE BILL 3003** as passed by House of Representatives and the Senate on the dates hereon set forth.

BERNARD DEAN

Chief Clerk

FILED

March 9, 2018

**Secretary of State
State of Washington**

ENGROSSED SUBSTITUTE HOUSE BILL 3003

Passed Legislature - 2018 Regular Session

State of Washington 65th Legislature 2018 Regular Session

By House Public Safety (originally sponsored by Representatives
Goodman and Hayes)

READ FIRST TIME 03/06/18.

1 AN ACT Relating to law enforcement; amending RCW 43.101.---,
2 36.28A.---, and 9A.16.040; amending 2018 c ... s 9 (uncodified);
3 adding a new section to chapter 9A.16 RCW; adding a new chapter to
4 Title 10 RCW; and providing a contingent effective date.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 **Sec. 1.** RCW 43.101.--- and 2018 c ... s 5 (Initiative Measure
7 No. 940) are each amended to read as follows:

8 (1) Within six months after June 7, 2018, the commission must
9 consult with law enforcement agencies and community stakeholders and
10 adopt rules for carrying out the training requirements of RCW
11 43.101.--- and 43.101.--- (sections 3 and 4, chapter . . .
12 (Initiative Measure No. 940), Laws of 2018). Such rules must, at a
13 minimum:

14 (a) Adopt training hour requirements and curriculum for initial
15 violence de-escalation trainings required by chapter . . .
16 (Initiative Measure No. 940), Laws of 2018;

17 (b) Adopt training hour requirements and curriculum for initial
18 mental health trainings required by chapter . . . (Initiative Measure
19 No. 940), Laws of 2018, which may include all or part of the mental
20 health training curricula established under RCW 43.101.227 and
21 43.101.427;

1 (c) Adopt annual training hour requirements and curricula for
2 continuing trainings required by chapter . . . (Initiative Measure
3 No. 940), Laws of 2018;

4 (d) Establish means by which law enforcement officers will
5 receive trainings required by chapter . . . (Initiative Measure No.
6 940), Laws of 2018; and

7 (e) Require compliance with chapter . . . (Initiative Measure No.
8 940), Laws of 2018's training requirements (~~as a condition of~~
9 ~~maintaining certification~~)).

10 (2) In developing curricula, the commission shall consider
11 inclusion of the following:

12 (a) De-escalation in patrol tactics and interpersonal
13 communication training, including tactical methods that use time,
14 distance, cover, and concealment, to avoid escalating situations that
15 lead to violence;

16 (b) Alternatives to jail booking, arrest, or citation in
17 situations where appropriate;

18 (c) Implicit and explicit bias, cultural competency, and the
19 historical intersection of race and policing;

20 (d) Skills including de-escalation techniques to effectively,
21 safely, and respectfully interact with people with disabilities
22 and/or behavioral health issues;

23 (e) "Shoot/don't shoot" scenario training;

24 (f) Alternatives to the use of physical or deadly force so that
25 de-escalation tactics and less lethal alternatives are part of the
26 decision-making process leading up to the consideration of deadly
27 force (~~is used only when unavoidable and as a last resort~~);

28 (g) Mental health and policing, including bias and stigma; and

29 (h) Using public service, including rendering of first aid, to
30 provide a positive point of contact between law enforcement officers
31 and community members to increase trust and reduce conflicts.

32 (3) The initial violence de-escalation training must educate
33 officers on the good faith standard for use of deadly force
34 established by chapter . . . (Initiative Measure No. 940), Laws of
35 2018 and how that standard advances violence de-escalation goals.

36 (4) The commission may provide trainings, alone or in partnership
37 with private parties or law enforcement agencies, authorize private
38 parties or law enforcement agencies to provide trainings, or any
39 combination thereof. The entity providing the training may charge a
40 reasonable fee.

1 **Sec. 2.** RCW 36.28A.--- and 2018 c ... s 6 (Initiative Measure
2 No. 940) are each amended to read as follows:

3 (1) It is the policy of the state of Washington that all law
4 enforcement personnel must (~~render first aid to save lives~~) provide
5 or facilitate first aid such that it is rendered at the earliest safe
6 opportunity to injured persons at a scene controlled by law
7 enforcement.

8 (2) Within one year after June 7, 2018, the Washington state
9 criminal justice training commission, in consultation with the
10 Washington state patrol, the Washington association of sheriffs and
11 police chiefs, organizations representing state and local law
12 enforcement officers, health providers and/or health policy
13 organizations, tribes, and community stakeholders, shall develop
14 guidelines for implementing the duty to render first aid adopted in
15 this section. The guidelines must: (a) Adopt first aid training
16 requirements; (b) address best practices for securing a scene to
17 facilitate the safe, swift, and effective provision of first aid to
18 anyone injured in a scene controlled by law enforcement or as a
19 result of law enforcement action; and (c) assist agencies and law
20 enforcement officers in balancing (~~competing public health and~~
21 safety duties; and (~~e~~) establish that law enforcement officers have a
22 paramount duty to preserve the life of persons whom the officer comes
23 into direct contact with while carrying out official duties,
24 including providing or facilitating immediate first aid to those in
25 agency care or custody at the earliest opportunity)) the many
26 essential duties of officers with the solemn duty to preserve the
27 life of persons with whom officers come into direct contact.

28 **Sec. 3.** RCW 9A.16.040 and 2018 c ... s 7 (Initiative Measure No.
29 940) are each amended to read as follows:

30 (1) Homicide or the use of deadly force is justifiable in the
31 following cases:

32 (a) When a public officer applies deadly force in obedience to
33 the judgment of a competent court; or

34 (b) When necessarily used by a peace officer meeting the good
35 faith standard of this section to overcome actual resistance to the
36 execution of the legal process, mandate, or order of a court or
37 officer, or in the discharge of a legal duty; or

1 (c) When necessarily used by a peace officer meeting the good
2 faith standard of this section or person acting under the officer's
3 command and in the officer's aid:

4 (i) To arrest or apprehend a person who the officer reasonably
5 believes has committed, has attempted to commit, is committing, or is
6 attempting to commit a felony;

7 (ii) To prevent the escape of a person from a federal or state
8 correctional facility or in retaking a person who escapes from such a
9 facility;

10 (iii) To prevent the escape of a person from a county or city
11 jail or holding facility if the person has been arrested for, charged
12 with, or convicted of a felony; or

13 (iv) To lawfully suppress a riot if the actor or another
14 participant is armed with a deadly weapon.

15 (2) In considering whether to use deadly force under subsection
16 (1)(c) of this section, to arrest or apprehend any person for the
17 commission of any crime, the peace officer must have probable cause
18 to believe that the suspect, if not apprehended, poses a threat of
19 serious physical harm to the officer or a threat of serious physical
20 harm to others. Among the circumstances which may be considered by
21 peace officers as a "threat of serious physical harm" are the
22 following:

23 (a) The suspect threatens a peace officer with a weapon or
24 displays a weapon in a manner that could reasonably be construed as
25 threatening; or

26 (b) There is probable cause to believe that the suspect has
27 committed any crime involving the infliction or threatened infliction
28 of serious physical harm.

29 Under these circumstances deadly force may also be used if
30 necessary to prevent escape from the officer, where, if feasible,
31 some warning is given, provided the officer meets the good faith
32 standard of this section.

33 (3) A public officer covered by subsection (1)(a) of this section
34 shall not be held criminally liable for using deadly force without
35 malice and with a good faith belief that such act is justifiable
36 pursuant to this section.

37 (4) A (~~law enforcement~~) peace officer shall not be held
38 criminally liable for using deadly force (~~if such officer meets the~~
39 ~~good faith standard adopted in this section~~) in good faith, where
40 "good faith" is an objective standard which shall consider all the

1 facts, circumstances, and information known to the officer at the
2 time to determine whether a similarly situated reasonable officer
3 would have believed that the use of deadly force was necessary to
4 prevent death or serious physical harm to the officer or another
5 individual.

6 ~~(5) ((The following good faith standard is adopted for law~~
7 ~~enforcement officer use of deadly force:~~

8 ~~(a) The good faith standard is met only if both the objective~~
9 ~~good faith test in (b) of this subsection and the subjective good~~
10 ~~faith test in (c) of this subsection are met.~~

11 ~~(b) The objective good faith test is met if a reasonable officer,~~
12 ~~in light of all the facts and circumstances known to the officer at~~
13 ~~the time, would have believed that the use of deadly force was~~
14 ~~necessary to prevent death or serious physical harm to the officer or~~
15 ~~another individual.~~

16 ~~(c) The subjective good faith test is met if the officer intended~~
17 ~~to use deadly force for a lawful purpose and sincerely and in good~~
18 ~~faith believed that the use of deadly force was warranted in the~~
19 ~~circumstance.~~

20 ~~(d) Where the use of deadly force results in death, substantial~~
21 ~~bodily harm, or great bodily harm, an independent investigation must~~
22 ~~be completed to inform the determination of whether the use of deadly~~
23 ~~force met the objective good faith test established by this section~~
24 ~~and satisfied other applicable laws and policies.~~

25 ~~(6) For the purpose of this section, "law enforcement officer"~~
26 ~~means any law enforcement officer in the state of Washington,~~
27 ~~including but not limited to law enforcement personnel and peace~~
28 ~~officers as defined by RCW 43.101.010.~~

29 ~~(7))~~) This section shall not be construed as:

30 (a) Affecting the permissible use of force by a person acting
31 under the authority of RCW 9A.16.020 or 9A.16.050; or

32 (b) Preventing a law enforcement agency from adopting standards
33 pertaining to its use of deadly force that are more restrictive than
34 this section.

35 **Sec. 4.** 2018 c ... s 9 (Initiative Measure No. 940) (uncodified)
36 is amended to read as follows:

37 (1) Except where a different timeline is provided in ((this act))
38 chapter . . . (Initiative Measure No. 940), Laws of 2018, the
39 Washington state criminal justice training commission must adopt any

1 rules necessary for carrying out the requirements of (~~this act~~)
2 chapter . . . (Initiative Measure No. 940), Laws of 2018 within one
3 year after June 7, 2018. In carrying out all rule making under (~~this~~
4 ~~act~~) chapter . . . (Initiative Measure No. 940), Laws of 2018, the
5 commission shall seek input from the attorney general, law
6 enforcement agencies, the Washington council of police and sheriffs,
7 the Washington state fraternal order of police, the council of
8 metropolitan police and sheriffs, the Washington state patrol
9 troopers association, at least one association representing law
10 enforcement who represent traditionally underrepresented communities
11 including the black law enforcement association of Washington, de-
12 escalate Washington, tribes, and community stakeholders. The
13 commission shall consider the use of negotiated rule making. (~~The~~
14 ~~rules must require that procedures under RCW 9A.16.040(5)(d) be~~
15 ~~carried out completely independent of the agency whose officer was~~
16 ~~involved in the use of deadly force; and, when the deadly force is~~
17 ~~used on a tribal member, such procedures must include consultation~~
18 ~~with the member's tribe and, where appropriate, information sharing~~
19 ~~with such tribe.))~~

20 (2) Where (~~this act~~) chapter . . . (Initiative Measure No.
21 940), Laws of 2018 requires involvement of community stakeholders,
22 input must be sought from organizations advocating for: Persons with
23 disabilities; members of the lesbian, gay, bisexual, transgender, and
24 queer community; persons of color; immigrants; noncitizens; native
25 Americans; youth; and formerly incarcerated persons.

26 NEW SECTION. **Sec. 5.** Except as required by federal consent
27 decree, federal settlement agreement, or federal court order, where
28 the use of deadly force by a peace officer results in death,
29 substantial bodily harm, or great bodily harm, an independent
30 investigation must be completed to inform any determination of
31 whether the use of deadly force met the good faith standard
32 established in RCW 9A.16.040 and satisfied other applicable laws and
33 policies. The investigation must be completely independent of the
34 agency whose officer was involved in the use of deadly force. The
35 criminal justice training commission must adopt rules establishing
36 criteria to determine what qualifies as an independent investigation
37 pursuant to this section.

1 NEW SECTION. **Sec. 6.** Whenever a law enforcement officer's
2 application of force results in the death of a person who is an
3 enrolled member of a federally recognized Indian tribe, the law
4 enforcement agency must notify the governor's office of Indian
5 affairs. Notice by the law enforcement agency to the governor's
6 office of Indian affairs must be made within a reasonable period of
7 time, but not more than twenty-four hours after the law enforcement
8 agency has good reason to believe that the person was an enrolled
9 member of a federally recognized Indian tribe. Notice provided under
10 this section must include sufficient information for the governor's
11 office of Indian affairs to attempt to identify the deceased person
12 and his or her tribal affiliation. Nothing in this section requires a
13 law enforcement agency to disclose any information that could
14 compromise the integrity of any criminal investigation. The
15 governor's office of Indian affairs must establish a means to receive
16 the notice required under this section, including outside of regular
17 business hours, and must immediately notify the tribe of which the
18 person was enrolled.

19 NEW SECTION. **Sec. 7.** A new section is added to chapter 9A.16
20 RCW to read as follows:

21 (1) When a peace officer who is charged with a crime is found not
22 guilty or charges are dismissed by reason of justifiable homicide or
23 use of deadly force under RCW 9A.16.040, or by reason of self-
24 defense, for actions taken while on duty or otherwise within the
25 scope of his or her authority as a peace officer, the state of
26 Washington shall reimburse the defendant for all reasonable costs,
27 including loss of time, legal fees incurred, and other expenses
28 involved in his or her defense. This reimbursement is not an
29 independent cause of action.

30 (2) If the trier of fact makes a determination of justifiable
31 homicide, justifiable use of deadly force, or self-defense, the judge
32 shall determine the amount of the award.

33 (3) Whenever the issue of justifiable homicide, justifiable use
34 of deadly force, or self-defense under this section is decided by a
35 judge, or whenever charges against a peace officer are dismissed
36 based on the merits, the judge shall consider the same questions as
37 must be answered in the special verdict under subsection (4) of this
38 section.

1 (4) Whenever the issue of justifiable homicide, justifiable use
2 of deadly force, or self-defense under this section has been
3 submitted to a jury, and the jury has found the defendant not guilty,
4 the court shall instruct the jury to return a special verdict in
5 substantially the following form:

6 answer
7 yes or no

- 8 1. Was the defendant on duty or
9 otherwise acting within the scope
10 of his or her authority as a peace
11 officer?
- 12 2. Was the finding of not guilty based
13 upon justifiable homicide,
14 justifiable use of deadly force, or
15 self-defense?

16 (5) Nothing in this section precludes the legislature from using
17 the sundry claims process to grant an award where none was granted
18 under this section or otherwise where the charge was dismissed prior
19 to trial, or to grant a higher award than one granted under this
20 section.

21 NEW SECTION. **Sec. 8.** If any provision of this act or its
22 application to any person or circumstance is held invalid, the
23 remainder of the act or the application of the provision to other
24 persons or circumstances is not affected.

25 NEW SECTION. **Sec. 9.** Sections 5 and 6 of this act constitute a
26 new chapter in Title 10 RCW.

27 NEW SECTION. **Sec. 10.** This act takes effect June 8, 2018, only
28 if chapter . . . (Initiative Measure No. 940), Laws of 2018, is
29 passed by a vote of the legislature during the 2018 regular
30 legislative session and a referendum on the initiative under Article
31 II, section 1 of the state Constitution is not certified by the
32 secretary of state. If the initiative is not approved during the 2018
33 regular legislative session, or if a referendum on the initiative is
34 certified by the secretary of state, this act is void in its
35 entirety.

Passed by the House March 7, 2018.
Passed by the Senate March 8, 2018.
Approved by the Governor March 8, 2018.
Filed in Office of Secretary of State March 9, 2018.

--- END ---

CERTIFICATE OF SERVICE

I hereby certify that I have caused the document to which this Certificate is attached to be filed with the Clerk of the Supreme Court of the State of Washington, and served upon counsel of record by email pursuant to stipulation as follows:

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DATED this 22nd day of May, 2018, at Tacoma, Washington.



Jennifer Dravis Trettin

SMITH ALLING, P.S.

May 22, 2018 - 4:30 PM

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