

MAKING THE RECORD:

MOTIONS *IN LIMINE* AND MISCONDUCT

Kathryn A. Russell Selk
RUSSELL SELK LAW OFFICE
Appellate Public Defense
KARSdroit@proton.me

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, TANDA COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

FAMILIUS K. NO, (DOB 4/10/1985)

Defendant,

CAUSE NO: 25-1-55757-2

DECLARATION FOR DETERMINATION
OF PROBABLE CAUSE

DEWEY CHARGUM, declares under penalty of perjury:

That I am a deputy prosecuting attorney for Tanda County and I am familiar with the police report and/or investigation conducted by the TANDA POLICE DEPARTMENT, incident number 123456;

That the police report provided the following information:

On the 10th day of April, 2005, in Pierce County, Washington, the defendant did commit the crime/s/ of:
CHILD MOLESTATION IN THE FIRST DEGREE:

TPD was dispatched to 111 Neighborhood Way, Tanda City, WA., after John Doe called 9-1-1 and reported that his 15 year old daughter C.M. (D.O.B. 4/1/2000) had been improperly touched when she was five by his younger brother, FAMILIUS K. NO (D.O.B. 4/10/1985). TPD Officer Adams arrived at 9:10 p.m. and spoke to DOE who said his daughter had just disclosed that when she was about 5 NO had put his hands down her pants into her underwear when everyone else was upstairs for dinner. DOE was very upset as was C.M., who was crying and repeated what DOE said. ADAMS went next door, where NO lived and arrested him without incident. Subsequent investigation revealed that NO was convicted of theft 2 in 2023.

CONTRARY T RCW 9A.44.083, and against the peace and dignity of the State of Washington.

Dated this 20th day of April, 2025.

Dewey Chargum, WSBA 60000

Deputy Prosecuting Attorney

CHARGE: CHILD MOLESTATION 1

ALLEGATION: HAPPENED IN 2005

AV: WAS 5, NOW 15

CLIENT WAS 20, NOW 30

NO CONTEMPORANEOUS REPORTS

DECLARATION ON PROBABLE CAUSE - 1

CLIENT: FAMILIUS K. NO

DURING YOUR INTERVIEW, THE LEAD OFFICER SAYS:

HE THINKS THE ALLEGED VICTIM IS CREDIBLE

DUE TO BRAIN DEVELOPMENT, CHILDREN ARE INCAPABLE OF LYING ABOUT SEXUAL THINGS HAPPENING TO THEM WHEN THEY WERE YOUNG

95 PERCENT OF SEX OFFENSES ARE COMMITTED BY SOMEONE WHO IS RELATED TO THE VICTIM

NO ONE WOULD GO THROUGH ALL THE TRAUMA OF COMING FORWARD JUST TO LIE.

PRESERVATION OF ISSUES

COURT'S REASONS

- judicial economy –
- facilitates appeal by creating full record-
- ensures “good faith”-
- gives trial court opportunity to correct-

CLIENT'S INTERESTS

- ARTICLE 1, § 22**
- full, fair, and meaningful appeal-
 - ineffective assistance if unintentionally “waive”-
 - more favorable standard (rare)-

SYSTEMIC INTERESTS

“The right to appeal is an essential tool for preventing erroneous conviction and maintaining the integrity of the criminal justice system[.]”

City of Seattle v. Klein, 161 Wn.2d 554, 556 (2007)

REDRESS SYSTEMIC ISSUES VS. PRESIDING OVER A TRIAL

ADDRESSING RACISM AND BIAS:

State v. Sum, 199 Wn.2d 627, 643 (2022) (“seizure”)

State v. Bagby, 200 Wn.2d 777, 791 (2023) (misconduct)

- CONSISTENCY –

- SINGLE JUDGE SYNDROME–

- CHECK ON CONCENTRATED
POWER-

- THREE JUDGES–

“The principal reason for having appellate courts is to provide an opportunity for several minds to check the trial decisions made by one[.]”

ABA, Section of Judicial Administration,
Internal Operating Procedures of
Appellate Courts 14 (1961)

GENERAL RULE OF PRESERVATION - ER 103

(a) Error may not be predicated upon a ruling which admits or excludes evidence unless **a substantial right of the party** is affected, and

(1) In case the ruling is **one admitting evidence**, a timely objection or motion to strike is made, stating the specific ground of the objection, if the specific ground was not apparent from the context; or

(2) In case the ruling is **one excluding evidence**, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

PRESERVATION : TWO COMPONENTS

- **MAKING SUFFICIENTLY CLEAR AND SUPPORTED WRITTEN OR ORAL OBJECTION**
- **YOU OR YOUR CLIENT DO NOT SOMEHOW “WAIVE”**

MAKING SUFFICIENT OBJECTION: MOTIONS IN LIMINE

“The purpose of a motion *in limine* is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation.”

State v. Kelly, 102 Wn.2d 188, 193 (1984)

**THREE
“OFFICIAL”
GOALS OF A
MOTION *IN*
*LIMINE***

ADMIT

favorable evidence

LIMIT

unfavorable evidence

EXCLUDE

favorable evidence

**IS THERE A
COMPLEX
EVIDENTIARY
ISSUE (NOT
OTHERWISE
GOVERNED)?**

NO
Yes



**IS THERE A
CONSTITUTIONAL
ARGUMENT?**

NO
Yes



**WILL IT TAKE
MORE THAN A
BRIEF
DISCUSSION TO
EXPLAIN/
PERSUADE?**

NO
Yes



**IS THE
RELEVANT ISSUE
LIKELY TO REQUIRE
TIME TO
CONSIDER?**

NO
Yes



MOTION IN LIMINE

**IS THE RULE
OR RELEVANT
LAW OFTEN
APPLIED TOO
EXPANSIVELY/
RESTRICTIVELY?**

NO
Yes

**IS THERE ANY
PREJUDICIAL
EVIDENCE THE
PROSECUTOR
IS LIKELY TO
TRY TO ELICIT
MID-TRIAL?**

NO
Yes

**STRATEGIC
BENEFIT FROM
PRESENTING
DIFFERENT
VERSION OF
THE CASE TO
JUDGE?**

NO
Yes

**Objecting at trial
probably enough**

MOTION IN LIMINE

MAKING A SUFFICIENT OBJECTION: MOTIONS IN LIMINE

DESCRIBE WHAT EVIDENCE YOU WANT TO EXCLUDE, LIMIT, OR ADMIT “WITH SUFFICIENT SPECIFICITY TO ENABLE THE TRIAL COURT TO” RULE ON THE ISSUES PRESENTED AND APPLY THE RELEVANT LAW

Fenimore v. Donald M. Drake Const. Co, 87 Wn.2d 85, 91 (1976)

**RAISE ALL THE
RELEVANT ISSUES**

**MAKE AN OFFER
OF PROOF**

PRESERVATION: NOT WAIVING THE ISSUE

You move *in limine* to exclude evidence of HC's prior drug convictions in an unrelated case. GRANTED.

On cross-examination, the prosecutor asks HC if he was high the night of the incident.

HC responds, "no, I used to be high all the time but I got convicted for it too much and so now I don't do it any more"

WAIVED

On direct examination, you ask your client about whether he has ever used drugs and HC says he has never, ever taken drugs.

OPENED THE DOOR

State v. Rushworth, 12 Wn. App. 2d 466, 473 (2020)

PRESERVATION: NOT WAIVING ISSUES RAISED *IN LIMINE*

Trial court's rulings are final where the judge "did not indicate that any further objections would be necessary during trial," even if it made some "comments to the effect that its rulings were subject to revision."

State v. Powell, 126 Wn.2d 244, 246 (1995)

"Unless the trial court indicates further objections are required when making its ruling, the decision is final, and the party losing the motion *in limine* has a standing objection."

State v. Kelly, 102 Wn.2d 188, 193 (1983)

PRESERVATION: NOT WAIVING ISSUES RAISED *IN LIMINE*

**IF IT IS RESERVED, IT IS
NOT PRESERVED**

WAS THE RULING ON THE MOTION *IN LIMINE* TENTATIVE?

If the ruling is “tentative,”
you waive an evidentiary
challenge if you fail to
raise it later

State v. Riker, 123 Wn.2d 351, 369 (1993)

“OK, well, I don’t have
enough information
yet, so we’ll discuss it
more later.”

“As with all my rulings,
if either of you ask I
will look at them again
in terms of both nature
and extent.”

State v. Powell, 126 Wn.2d 244, 248 (1995)

“I’m inclined to admit
it, depending on what
comes out at trial.”

“I’m going to admit it
but counsel, if you can
provide caselaw to the
contrary, I will
reconsider.”

“I believe the Court is prepared to rule at this point in time. This may be subjected to further action and objection as testimony is actually taken. But at this point I am going to deny the defense motion.”

State v. Dillon, 12 Wn. App.2d 133, 147 (2020) Division One

“Based on the offer of proof, I’m not going to suppress the text messages at this time.”

State v. Roosma, 19 Wn. App.2d 941, 949-50 (2021) Division Two

HE THINKS THE ALLEGED VICTIM IS CREDIBLE

GRANTED

**DUE TO BRAIN DEVELOPMENT, CHILDREN ARE INCAPABLE OF LYING
ABOUT SEXUAL THINGS HAPPENING TO THEM WHEN THEY WERE
YOUNG**

**RESERVED FOR
FOUNDATION**

**95 PERCENT OF SEX OFFENSES ARE COMMITTED BY SOMEONE WHO
IS RELATED TO THE VICTIM**

DENIED

**NO ONE WOULD GO THROUGH ALL THE TRAUMA OF COMING
FORWARD JUST TO LIE**

**DENIED/
GRANTED**

**YOU MOVE TO
EXCLUDE AND
WIN**



**WITNESS/
PROSECUTOR
COMMITTS
MISCONDUCT/
INTRODUCES**



**YOU MUST
RAISE WHEN
OCCURS**

**DO YOU HAVE TO
OBJECT OR RAISE
AGAIN AT TRIAL?**

**IF YOU WIN,
YOU MUST
RAISE
AGAIN**

**YOU MOVE TO
ADMIT AND
WIN**



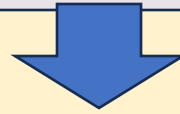
**JUDGE LATER
LIMITS/EXCLUDES**



**YOU MUST
RAISE WHEN
OCCURS**

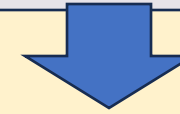
**DO YOU HAVE
TO OBJECT OR
RAISE AGAIN
AT TRIAL?**

**YOU MOVE TO
EXCLUDE AND
LOSE**



**STANDING
OBJECTION TO
ADMISSION IF
RULING IS "FINAL"**

**YOU MOVE TO
ADMIT AND LOSE**



**STANDING
OBJECTION IF
RULING IS "FINAL"**

“Unless the trial court indicates further objections are required when making its ruling, the decision is final, and the party losing the motion *in limine* has a standing objection.”

State v. Kelly, 102 Wn.2d 188, 193 (1983)

HE THINKS THE ALLEGED VICTIM IS CREDIBLE - GRANTED

NOT PRESERVED

DUE TO BRAIN DEVELOPMENT, CHILDREN ARE INCAPABLE OF LYING ABOUT
SEXUAL THINGS HAPPENING TO THEM WHEN THEY WERE YOUNG –RESERVED
FOR FOUNDATION

NOT PRESERVED

95 PERCENT OF SEX OFFENSES ARE COMMITTED BY SOMEONE WHO IS
RELATED TO THE VICTIM – DENIED

PRESERVED

State v. Petrich, 101 Wn.2d 566, 576 (1984)

NO ONE WOULD GO THROUGH ALL THE TRAUMA OF COMING FORWARD JUST
TO LIE –DENIED/GRANTED

**PRESERVED
AND NOT
PRESERVED**

WHAT ABOUT PREJUDICE?

“decades of . . . research in which jurors have repeatedly been found to not disregard inadmissible evidence when they are instructed to do so.”

Sandberg et al, *Can Jurors Disregard Inadmissible Evidence?* (2025) (in materials)

Don't object in front of jury but move for a mistrial at “earliest opportunity” sufficient to preserve.

State v. Koch, 126 Wn. App. 589, 597 (2005)

PRESERVATION: NOT WAIVING ISSUES RAISED *IN LIMINE*

SPECIAL RULES ABOUT IMPEACHMENT

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, TANDA
COUNTY
STATE OF WASHINGTON,
Plaintiff,
vs.
FAMILIUS K. NO,
Defendant

CAUSE NO: 25-1-55757-2

DECLARATION FOR DETERMINATION
OF PROBABLE CAUSE

DEWEY CHARGUM, declares under penalty of perjury:

That I am a deputy prosecuting attorney for Tanda County and I am familiar with he police report and/or investigation conducted by the TANDA POLICE DEPARTMENT, incident number 123456;

That the police report provided the following information:

On the 10th day of April, 2005, in Pierce County, Washington, the defendant did commit the crime/s/ of:
CHILD MOLESTATION IN THE FIRST DEGREE:

TPD was dispatched to 111 Neighborhood Way, Tanda City, WA., after John Doe called 9-1-1 and reported that his 15 year old daughter C.M. (D.O.B. 4/1/2000) had been improperly touched when she was five by his younger brother, FAMILIUS K. NO (D.O.B. 4/10/1985). TPD Officer Adams arrived at 9:10 p.m. and spoke to DOE who said his daughter had just disclosed that when she was about 5 NO had put his hands down her pants into her underwear when everyone else was upstairs for dinner. DOE was very upset as was C.M., who was crying and repeated what DOE said. ADAMS went next door, where NO lived and arrested him without incident.

Subsequent investigation revealed that NO was convicted of theft 2 in 2023.

Dated this 20th day of April, 2025.

Dewey Chargum, WSBA 60000
Deputy Prosecuting Attorney

DECLARATION ON PROBABLE CAUSE - 1

MOTION *IN LIMINE* TO
EXCLUDE PRIOR
CONVICTIONS OR
IMPEACHMENT FOR
CLIENT OR POTENTIAL
DEFENSE WITNESS AND
YOU LOSE:

THE CLIENT/
WITNESS MUST
TESTIFY

State v. Shierman, 192
Wn.2d 577, 667-68 (2018)

State v. Kimp, 87 Wn.
App. 281, 282 (1997)

MISCONDUCT: MISTRIAL MOTION?

Violation of a pretrial order by a witness is a serious irregularity which will support a motion for mistrial

State v. Gamble, 168 Wn.2d 161, 178 (2010)

Duty to instruct coupled with witness misconduct

State v. Taylor, 18 Wn. App. 2d 568 (2021)

WAS IT INTENTIONAL?

WAS IT A “PROFESSIONAL” WITNESS?

WAS IT A FORESEEABLE RESULT OF PROSECUTOR’S ACTS/QUESTIONS?

State v. Escalona, 49 Wn. App. 251, 255 (1987)

RPC 3.4 attorney must not allude to inadmissible evidence

YOUR CLIENT, A GROCERY STORE OWNER, SAYS HE WAS AFRAID FOR HIS LIFE WHEN HE SHOT SOMEONE OUTSIDE HIS STORE, BECAUSE EVERYONE AROUND THERE WAS IN A GANG AND THREATENING

PROSECUTOR MOVES TO EXCLUDE - GRANTED

Having prevailed by motion in limine in its effort to preclude objective evidence” which would have supported the fear, “it was misconduct for the prosecutor to imply in argument to the jury that Kassahun was being untruthful because he failed to offer objective evidence to support his belief that his business was being overrun by gangs.”

State v. Kassahun, 78 Wn. App. 938, 951 (1994)

Kathryn A. Russell Selk
RUSSELL SELK LAW OFFICE
Appellate Public Defense
KARSdroit@proton.me