



# Law Enforcement

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# Digest

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## **BRIEF NOTES FROM THE UNITED STATES SUPREME COURT**

(1) UNDER THE 4<sup>TH</sup> AND 5<sup>TH</sup> AMENDMENTS OF THE U.S. CONSTITUTION, A DOMESTIC VIOLENCE SUSPECT WHO REFUSED TO IDENTIFY HIMSELF WHILE LAWFULLY BEING HELD IN A TERRY STOP COULD BE CONVICTED UNDER THE CLEAR WORDING OF A NARROW NEVADA “STOP-AND-IDENTIFY” STATUTE (BEWARE -- WASHINGTON STATE HAS NO SUCH STATUTE) -- In Hiibel v. Sixth Judicial District of Nevada, Humboldt County, \_\_ S.Ct. \_\_, 2004 WL 1373207 (2004), the United States Supreme Court rules, 5-4, that Larry D. Hiibel’s conviction under a Nevada stop-and-identify statute did not violate Hiibel’s rights under the Fourth or Fifth Amendments of the United States Constitution.

**Preliminary LED Editorial Note:** In our comments on pages \_\_\_ below, following our description of the Hiibel decision, we explain our view that this U.S. Supreme Court decision will not affect enforcement actions of Washington officers. Our primary reason for that view is that Washington does not have a stop-and-identify statute like the Nevada statute at issue in Hiibel. There may also be constitutional barriers to enforcement of such a law under the Washington constitution, though questions in that regard would have to be tested in the Washington appellate courts if a similar stop-and-identify statute were to be adopted by the Washington Legislature.

### Factual and procedural background

A Nevada county deputy sheriff responded to a call regarding a possible domestic violence situation. He approached the suspect who was standing near a vehicle parked alongside the roadway. The officer directed the suspect to identify himself, and the suspect repeatedly refused to do. After warning the suspect that he would be arrested if he continued in his refusal, the officer arrested the suspect under a Nevada stop-and-identify statute that reads in relevant part as follows:

1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.

.....

3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.

Hiibel was convicted based on his failure to identify himself, and he was fined \$250. Hiibel appealed and lost in the Nevada appellate court system. He then obtained review of his conviction by the U.S. Supreme Court. The U.S. Supreme Court affirmed his conviction.

### Majority opinion

Justice Kennedy authors the majority opinion and is joined by Chief Justice Rehnquist and Associate Justices Scalia, Thomas, and O’Connor. He begins his analysis by explaining that 20 other states (Washington is not among them) have stop-and-identify statutes that require persons seized in Terry stops to identify themselves. The majority opinion then traces some of the history of U.S. Supreme Court opinions in this sub-area of constitutional law. That history does not produce a clear answer, as past opinions could be read to support arguments on either side of the issue in Hiibel. The opinion indicates that one thing that does appear to be fairly clear is that, in order to be constitutional, stop-and-identify statutes must be clearly and narrowly written (for instance, along the lines of the clear and narrow Nevada statute). The opinion then

proceeds to explain the current thinking of the Supreme Court majority on the Fourth and Fifth Amendment issues in the Hiibel case.

Under the *Fourth* Amendment, the Hiibel majority opinion explains, it does not constitute a “seizure” for an officer merely to ask a person (whether in a mere contact or a Terry stop) standing on the roadside to identify himself. A person against whom an officer does not have at least reasonable suspicion that would justify a Terry stop cannot be compelled to provide identification. On the other hand, a lawfully seized suspect can be so compelled. Thus, the Terry detainee can be convicted for violating a stop-and-identify statute: (1) if the statute is sufficiently narrow and clear; (2) the officer has made the Terry stop based on reasonable suspicion; and (3) the officer’s request that the suspect identify himself is reasonably related to the circumstances that justified the stop. In Hiibel, all three requirements were met, the majority holds. The statute was proper, the officer has reasonable suspicion as to DV, and the officer’s request for ID was a commonsense inquiry during investigation of the potential domestic violence situation.

Under the *Fifth* Amendment, the Hiibel majority explains, there is protection against compelled, self-incriminating testimonial statements and acts. While asking a person to identify himself probably does call for a testimonial act, the opinion continues, the nature of the information requested almost never will be, in and of itself, incriminating. Here, defendant Hiibel was not being asked for incriminating information, as the only basis for his refusal appeared to be his belief that his identity was none of the deputy’s business. Therefore, the Fifth Amendment of the U.S. Constitution was not implicated, the Hiibel majority holds.

#### Dissenting opinions

Justice Stevens writes a dissenting opinion arguing that Hiibel’s *Fifth* Amendment right against self-incrimination was violated by his conviction under the Nevada statute. Justice Breyer writes a dissenting opinion (joined by Justices Ginsburg and Souter) arguing that Hiibel’s *Fourth* Amendment rights were violated.

Result: Affirmance of Nevada conviction of Larry D. Hiibel for violating the Nevada stop-and-identify statute.

#### **LED EDITORIAL COMMENTS:**

In State v. White, 97 Wn.2d 92 (1982), the Washington Supreme Court invalidated parts of the former “obstructing” statute at RCW 9A.76.020, discussing, but not resolving, some of the Fourth Amendment issues that were addressed in Hiibel. The White majority opinion primarily focused on the unconstitutional vagueness of the former obstructing statute and on the Washington constitution’s exclusionary remedy barring admission of the fruits of an arrest made under an unconstitutional statute. It is not clear whether, over two decades later, the Washington Supreme Court would come out differently from the U.S. Supreme Court’s Fourth and Fifth Amendment constitutional rulings in Hiibel based on “independent grounds” under the Washington Constitution. However, at this point, we think that is an academic question. That is because Washington does not have a narrowly drawn stop-and-identify statute like the Nevada statute that was before the Supreme Court in Hiibel.

Because Washington State does not have a stop-and-identify statute like Nevada’s statute requiring identification during Terry stops, we think that Washington officers lack statutory authority to arrest for “obstructing” or for any other current Washington crime in this circumstance. Washington officers are, however, free to ask suspects in Terry stops to identify themselves or to show ID documents, and also may do so when conversing with pedestrians during non-Terry “citizen-contacts” (however, as to

requesting ID from non-violator MV passengers, see the Washington Supreme Court's Rankin decision digested below in this month's LED at 7-13).

As always, officers should check with their local prosecutors and legal advisors for their views on the issues discussed here.

(2) IN HABEAS REVIEW, MIRANDA "CUSTODY" QUESTIONS RELATING TO THE RELEVANCE OF YOUTH AND INEXPERIENCE OF SUSPECTS DISCUSSED BUT NOT FULLY RESOLVED BY THE SUPREME COURT -- In Yarborough v. Alvarado, 124 S.Ct. 2140 (2004), a 5-4 majority of the United States Supreme Court rejects a request for habeas relief sought by a defendant convicted of second degree murder and robbery. Defendant argued that he should have been given Miranda warnings prior to station-house questioning by police. The focus of the case at the U.S. Supreme Court was the defendant's age (seventeen-and-a-half) and his relative inexperience with the criminal justice system.

#### Habeas review standard

Under federal statutes governing habeas corpus review (federal court review after state court review is completed), a person challenging a state court conviction on federal constitutional grounds cannot prevail merely by showing that a prejudicial error was committed in the state courts. Rather, the habeas challenger must show that the state courts unreasonably failed to apply established federal constitutional standards. This is a difficult standard to meet. Here, the Alvarado majority rules that defendant failed to meet the standard.

#### Factual and procedural background

Alvarado helped Paul Soto try to steal a truck. During the robbery attempt, Soto shot and killed the truck's owner. About a month later, Detective Cheryl Comstock contacted Alvarado's parents and asked them if they would bring him in for questioning. Alvarado was 17-and-a-half years old at the time. His parents brought him to the police station and waited in the lobby during the interview.

Before questioning began, Detective Comstock told Alvarado and his parents that the questioning would not take too long (the parents later testified that they asked to be present for the interview and that Comstock rebuffed them). Comstock took Alvarado to a small room where only the two of them were present for the consenting recorded session. The interview was conducted in a relatively friendly, low-key style. It lasted about two hours. Alvarado was not given Miranda warnings, nor was he told that he was free to leave or that he did not have to answer questions. But Detective Comstock twice asked Alvarado if he needed a break.

At first Alvarado denied being present at the shooting, but with some low-key prodding from the detective that focused on Soto's role as instigator and leader of the crime, Alvarado slowly began to change his story. He finally admitted that he had helped Soto try to steal the victim's truck and that Alvarado had hidden the gun after Soto shot and killed the owner. When the interview was over after about two hours, Comstock returned Alvarado to his parents, who drove him home.

After the State of California charged Alvarado with murder and attempted robbery, the trial court denied his motion to suppress his interview statements on Miranda grounds. In affirming Alvarado's conviction, the District Court of Appeal ruled that Miranda warnings were not required because Alvarado had not been in custody during the interview. The Court of Appeals concluded that a reasonable person would have felt at liberty to terminate the questioning and to leave. The Federal District Court agreed with the state court on habeas review, but the Ninth Circuit Court of Appeals reversed, holding that the state court erred in failing to account for Alvarado's youth and inexperience when evaluating whether a reasonable person in his position would have felt free to leave the interview. The Ninth Circuit Court of Appeals held that the state

court's error warranted habeas relief under the federal habeas statute because state court review "resulted in a decision that . . . involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court."

#### Justice Kennedy's lead opinion

Justice Kennedy writes an opinion joined by Chief Justice Rehnquist and Justices Scalia, Thomas and O'Connor. The opinion indicates that, under the facts of this case (the details of which are discussed at considerably greater length in the opinion than they are in this LED entry), the questioning could have been reasonably determined to be either custodial or non-custodial for Miranda purposes. Whether "custody" exists is a purely objective question, not depending on the uncommunicated subjective beliefs of the officer or of the person being questioned. "Custody" exists where "a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." The opinion asserts that it was not unreasonable for the California state courts to conclude that Alvarado was not in custody when Detective Comstock questioned him.

**The Ninth Circuit's opinion had focused on two things – Alvarado's youth and his inexperience with the criminal justice system. Justice Kennedy suggests that focus on age and inexperience is never appropriate when looking at the question of "custody," because this leads one into largely subjective considerations that would be difficult for police to assess at the time of questioning when trying to determine whether Miranda warnings were required. Age and inexperience are relevant considerations when considering voluntariness of waiver or voluntariness of confessions, the opinion indicates, but not when looking at "custody." At least, considering the case in light of the deferential habeas review standard, it was reasonable under established law for the California courts not to focus on age and inexperience of the suspect in their "custody" analysis.**

#### Justice O'Connor's concurring opinion

Justice O'Connor gives mixed and vague signals by signing onto the Kennedy opinion but then writing a concurrence that concedes that in some unspecified circumstances the age of a suspect may be a relevant factor in determining whether a suspect is in "custody" per Miranda.

#### Justice Breyer's dissenting opinion

Justice Breyer writes a dissenting opinion joined by Justices Souter, Stevens, and Ginsburg. The dissent argues that youth of a suspect is a factor that must be taken into account in deciding whether a suspect was in "custody." The dissent accuses the majority of raising a "red herring" with its discussion of the "inexperience" factor. In this discussion of the "inexperience" question, it is arguable that the dissent concedes that inexperience of a suspect does not bear on the "custody" question.

**Result: Reversal of Ninth Circuit Court of Appeals decision; reinstatement of second degree murder and attempted robbery conviction of Michael Alvarado.**

#### LED EDITORIAL COMMENTS:

##### **1) General comments about "tactical" un-Mirandized questioning**

We recognize that officers will sometimes make a considered decision, based on all of the circumstances and on their wealth of experience, that un-Mirandized questioning will be more fruitful. When officers make that difficult decision, extra effort must be made to

make clear to the suspect that the circumstances of questioning are non-custodial. In that regard, we think that officers are on pretty thin ice -- regardless of the age of their suspects -- in conducting such un-Mirandized interrogations at the police station unless they first tell their suspects (who, by definition under our assumed scenario, are voluntarily there in the first place) that the suspects do not have to answer the questions and that they can leave at any time. Officers conducting such “tactical” un-Mirandized questioning should be prepared to allow the suspect to leave after the questioning is completed. Also, in light of some discussion tying the “custody” question to officer-deception in past Washington appellate court decisions (see, for instance, State v. Hensler, 109 Wn.2d 357 (1987) (non-deceptive, non-custodial questioning regarding illegal drug possession); State v. Walton, 67 Wn. App. 27 (Div. I, 1992) Jan 93 LED:09 (non-deceptive, non-custodial questioning of MIP suspect); State v. Ferguson, 76 Wn. App. 560 (Div. I, 1995) May 95 LED:10 (ok to engage in non-deceptive, non-custodial questioning of suspect as scene of MVA), officers probably should not use deception that would be permissible with a Mirandized suspect. The Washington appellate courts 1) have only occasionally talked about “deception” and custody; 2) have never explained the source of the test or its specifics for application; and 3) have never excluded a statement based on deception during non-custodial questioning. Nonetheless, the above-noted decisions lead us to suggest that deception be avoided in tactical, non-custodial interrogations.

## 2) Specific comments about “custody” and suspects’ youth and inexperience

For a number of reasons, we suggest caution by Washington officers reading the Alvarado decision. Washington officers would be well-advised to consider both juvenile status and experience of juvenile suspects in deciding whether a situation is “custodial” such that Miranda warnings are needed. We will provide three reasons for giving this cautious suggestion.

First, it must be noted that the decision was rendered in a habeas corpus case; arguably (though not likely), the Supreme Court could vote differently where a pure “custody” question was raised in a direct appeal where the deferential review standard for habeas corpus review did not apply.

Second, while purporting to follow federal standards, at least two Washington Court of Appeals decisions have previously considered youth in determining “custody” of juveniles. Thus, in State v. D.R., 84 Wn. App. 832 (Div. III, 1997) May 97 LED:10, Division Three of the Court of Appeals took age into account in deciding that un-Mirandized police questioning of a 14-year-old incest suspect in the school principal’s office was custodial; while the officer told the student that he did not have to answer the officer’s questions, the officer did not tell the student that he was free to leave at any time, and the officer’s questions were pointedly accusatory. Division Three also appeared to take age of the suspect into account when it held in State v. Heritage, 114 Wn. App. 591 (Div. III, 2002) Feb. 03 LED:10 (review pending in Washington Supreme Court) that questioning was “custodial” where city park security officers: 1) informed a female juvenile and members of her group that the officers smelled fresh marijuana smoke and wanted answers to their questions about its source; 2) told the juveniles that they were not under arrest; but then 3) belied this statement of intent not to make an arrest by calling in police officers to arrest one of the juveniles after she responded that the marijuana pipe in question was hers.

Third, the Washington appellate courts, while having purported to be following federal interpretations on Miranda issues to date, have previously deviated (without explaining the legal authority for doing so) from the U.S. Supreme Court standard in one sub-area of

**Miranda.** Thus, contrary to U.S. Supreme Court precedent, Washington precedent requires that police clarify “waiver” before proceeding with questioning if a suspect makes an equivocal statement that might be an assertion of rights. We fear that the Washington appellate courts could at some point expressly and categorically split away from federal doctrine on Miranda issues (as they have on search-and-seizure issues). Such a split might be based either on a revised reading of the Washington constitution (as it was for search-and-seizure issues) or it might be based on a creative reading of the Washington Rules of Court. In our view, nowhere under the broad array of Miranda issues is there a bigger risk that this might happen than on the delicate issue of questioning of juveniles. So caution is urged in pressing the “custody” question where juvenile suspects are involved.

### **LED TRAINING NOTE – “CUSTODY” FACTORS**

We close this LED entry with a non-exhaustive list of some of the things that courts consider in trying to determine whether, balancing all of the objectively evaluated circumstances in their totality, Miranda custody exists –

- Whether the officers informed the suspect that he was not under arrest and was free to leave;
- Whether the officers informed the suspect that he did not have to answer their questions;
- The place (e.g., how public was the setting);
- The announced or objectively obvious purpose;
- The length of the interrogation;
- The manner of interrogation (e.g., friendly and low key vs. accusatory);
- Whether the suspect consented to speak with law enforcement officers;
- Whether the suspect was involuntarily moved to another area prior to or during the questioning;
- Whether there was a threatening presence of several officers and/or a display of weapons or physical force;
- Whether the officers deprived the suspect of documents or other things he needed to continue on his way;
- Whether the officers’ express language or tone of voice would have conveyed to a reasonable person that they expected their requests to be obeyed;
- Whether the officers revealed to the suspect that he was the focus of their investigation and/or confronted him with the incriminating evidence;
- Whether the officers used deception in the questioning;
- Whether the officers allowed the suspect to leave at the end of the questioning.

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### **WASHINGTON STATE SUPREME COURT**

**UNDER WASHINGTON STATE CONSTITUTION’S ARTICLE I, SECTION 7, OFFICER’S ROUTINE REQUEST TO NON-VIOLATOR PASSENGER TO SHOW ID DURING VEHICLE STOP IS “SEIZURE” REQUIRING INDEPENDENT JUSTIFICATION**

State v. Rankin, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2004 WL 1274490 (2004)

Facts and Proceedings below: (Excerpted from majority opinion)

#### State v. Rankin

On September 17, 1999, a vehicle driven by Karena Gunn was stopped by a . . . deputy. The deputy did so because he observed Gunn's vehicle "roll over a marked stop line," a noncriminal traffic offense. James Rankin was a passenger

in Gunn's vehicle. Although the deputy did not observe Rankin engaged in any criminal activity on this occasion, he recalled that he had arrested Rankin approximately a month earlier for possession of a stolen vehicle and possession of controlled substances.

The deputy requested Gunn's driver's license, and then asked Rankin if he had any identification on his person. Rankin and Gunn each responded by providing the deputy with identification cards. The deputy used the personal information from the cards to run a check to see if there were warrants outstanding for either of the individuals. He learned that there were no warrants for Gunn but that there was an outstanding warrant for Rankin's arrest for allegedly violating a no-contact order. Consequently, he placed Rankin under arrest. During a search incident to the arrest, the deputy discovered a knife and about one ounce of methamphetamine on Rankin.

Rankin was charged in Snohomish County Superior Court with possession of a controlled substance. Rankin then moved to suppress the evidence that was seized from him at the time of his arrest. The trial court granted the motion and suppressed the evidence, concluding that the encounter was a seizure. It then dismissed the case, concluding that the State possessed insufficient evidence to maintain the charges against Rankin.

#### State v. Staab

On March 3, 1999, a [law enforcement officer] stopped a vehicle for the traffic offense of not having a license plate light. The officer asked the driver and his passenger, Kevin Staab, to produce their driver's licenses. Staab testified that the officer "was not politely asking when he wanted to see my driver's license," an assertion that the officer did not deny. When Staab reached into his shirt pocket for his identification card, a clear plastic bag containing a white chalky substance fell out. Staab then put the bag back in his pocket and told the officer his name. After determining that there were no outstanding warrants for Staab, the officer arrested Staab based on his belief that the plastic bag contained cocaine. Staab admitted to the officer that the bag contained approximately three grams of cocaine.

Staab was thereafter charged in King County Superior Court with a violation of the Uniform Controlled Substances Act, chapter 69.50 RCW. At a subsequent hearing on the admissibility of the cocaine, the trial court determined that an officer may ask a passenger for identification even if the officer lacks a reasonable suspicion that the passenger is engaged in criminal activity. Consequently, it denied Staab's motion to suppress the cocaine. Staab was later found guilty of the charge.

#### At the Court of Appeals

Staab appealed his conviction to Division One of the Court of Appeals. The State appealed the order suppressing evidence in Rankin's case to that same court. The Court of Appeals consolidated the appeals and held that while an officer may not *require* a passenger to provide identification, unless there are independent grounds to question the passenger, the officer may *request* identification. State v. Rankin, 108 Wn. App. 948 (2001) **Jan 02 LED:04**. It, therefore, affirmed Staab's conviction and reversed the trial court's suppression of evidence in Rankin's case, remanding the latter case for trial.

**ISSUE AND RULING:** May police making traffic stops routinely request that non-violator passengers voluntarily show ID? (**ANSWER:** No, police need independent justification, such as officer safety reasons, to make the request to the non-violator passenger)

**Result:** Reversal of Court of Appeals decision and thus affirmance of Snohomish County Superior Court dismissal of methamphetamine possession charge against James Bruce Rankin, and reversal of King County Superior Court cocaine possession conviction against Kevin D. Staab.

**ANALYSIS BY MAJORITY:** (Excerpted from majority opinion authored by Justice Alexander and joined by Justices Sanders, Johnson, Chambers and Owens)

Rankin and Staab both contend that the officers' requests for identification violated article I, section 7 of the Washington Constitution.

"It is well settled that article I, section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment to the United States Constitution."

The Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. This provision protects "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." Indeed, a warrantless search or seizure is considered per se unconstitutional unless it falls within one of the few exceptions to the warrant requirement. When analyzing police-citizen interactions, we must first determine whether a warrantless search or seizure has taken place, and if it has, whether the action was justified by an exception to the warrant requirement. Here, the State does not contend that the encounters were justified by any exception to the warrant requirement. The State argues only that no seizure occurred.

"[N]ot every encounter between a police officer and a citizen is an intrusion requiring an objective justification." However, a seizure occurs, under article I, section 7, when considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority. This determination is made by objectively looking at the actions of the law enforcement officer. State v. Young, 135 Wn.2d 498 (1998) **Aug 98 LED:02**. Moreover, it is elementary that all investigatory detentions constitute a seizure.

An automobile passenger is not seized when a police officer merely stops the vehicle in which the passenger is riding. State v. Mendez, 137 Wn.2d 208 (1999) **March 99 LED:04**. Under article I, section 7, however, passengers are unconstitutionally detained when an officer requests identification "unless other circumstances give the police independent cause to question [the] passengers." State v. Larson, 93 Wn.2d 638 (1980). In Larson, officers observed several individuals sitting in an illegally parked automobile. As the officers drove up to the parked automobile, the driver of the automobile began to drive it away. The officers then activated their emergency lights and stopped the automobile. Upon confronting the driver and his passengers, the officers "asked" for their identification. When one of the passengers attempted to comply with the request by opening her purse to locate her identification, an officer observed a plastic bag of marijuana in the purse. After the passenger was arrested for possession of a controlled substance, she moved to suppress the evidence that was obtained as a result of "the request for identification."

The trial court ordered suppression, reasoning that the police officers did not have any legal justification for "requesting" identification from the passenger. The Court of Appeals reversed the trial court's decision, determining that "the police may ask for identification from passengers as well as the driver." This court reversed the Court of Appeals, concluding

that the police officer who detained the petitioner for the purpose of requiring her to identify herself did so in violation of the fourth amendment to the United States Constitution and Const. art. 1, § 7, because none of the circumstances preceding the officer's detention of petitioner justified a reasonable suspicion that she was involved in criminal conduct.

Larson, 93 Wn.2d at 645. Although in Larson we referred to the officer's interaction as a "demand" in some sections of the opinion, the decision must be read in light of the facts of that case, which were that the officer merely "asked" the passenger for the identification. [*Court's footnote: Even the dissenters in Larson read the majority opinion as prohibiting officers from requesting identification without an independent reason. Larson, 93 Wn.2d at 654 (Horowitz, J., dissenting). The dissenters stated: "Petitioner contends that even if the officers had sufficient grounds to stop the car and ask the driver for his identification, they had no grounds to ask [the defendant-passenger] for her identification. The majority agrees with this contention. I cannot." (emphasis added).*] Moreover, we determined that the officer's request for identification amounted to a "detention" of the passenger for investigative purposes. As noted above, all investigative detentions constitute seizures.

The dissent relies heavily on Young where we held that asking for identification from a pedestrian does not constitute a seizure. Significantly, Young did not overrule or even mention our decision in Larson. We think there are good reasons for making a distinction between pedestrians and passengers. As we have said, " 'many [individuals] find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel.' " Indeed, a passenger faced with undesirable questioning by the police does not have the realistic alternative of leaving the scene as does a pedestrian. As the noted commentator Professor LaFave observed, the passenger is forced to abandon his or her chosen mode of transportation and, instead, walk away into a frequently foreign location thereby risking the departure of his or her ride while away. See Wayne R. LaFave, *The Present and Future Fourth Amendment*, 1995 U. Ill. L.Rev. 111, 114-15. Despite the dissent's suggestions to the contrary, Larson is consistent with Young.

Washington is not alone in holding that a mere request for identification from a passenger for investigatory purposes constitutes a seizure unless there is a reasonable basis for the inquiry. **[LED Editorial Note: Here, the majority discusses decisions from Massachusetts, New Jersey, Minnesota, and New Mexico that agree with the majority's no-routine-ID-request rule, as well as a Colorado decision to the contrary. Concerns about the breadth of police discretion and "profiling" were expressed in some of those opinions.]**

In our view, there is no reason to abandon a right that passengers have enjoyed in this state since at least 1980 when such requests for identification from passengers were deemed by this court to be in violation of article I, section 7 of our state constitution. In the absence of a compelling justification for stripping

this right from the people, our constitutional jurisprudence requires us to uphold this right. Therefore, we conclude that under article I, section 7, law enforcement officers are not permitted to request identification from a passenger for investigatory purposes unless there is an independent basis to support the request.

In each of the cases before us, a police officer asked a passenger for identification for the sole purpose of conducting a criminal investigation, notwithstanding the fact that the officer lacked any articulable suspicion of criminal activity. Applying Larson, we conclude that both individuals were seized as a matter of law when the officers made the request or demand for identification. Because both individuals were seized without the benefit of a warrant and the State does not contend that the seizures were justified by any exception to the warrant requirement, the evidence obtained as a result of the seizures must be suppressed. *[Court's footnote: Under the particular facts before us, the requests for identification were not reasonably related to officer safety. If there were issues of officer safety, the result might have been different.]*

In conclusion, we hold that the freedom from disturbance in "private affairs" afforded to passengers in Washington by article I, section 7 prohibits law enforcement officers from requesting identification from passengers for investigative purposes unless there is an independent reason that justifies the request. This is not to imply that officers may not engage passengers in conversation. They may do this. However, once the interaction develops into an investigation, it runs afoul of our state constitution unless there is justification for the intrusion into the passenger's private affairs. Because the Court of Appeals concluded otherwise, we reverse its decision to overturn the suppression of the evidence seized from Rankin as well as its affirmation of Staab's conviction.

[Some text, citations and footnotes omitted]

#### CONCURRING OPINION BY JUSTICE FAIRHURST:

Justice Fairhurst writes a lengthy concurring opinion, the analysis of which does not appear to differ much from that of the majority opinion of Justice Alexander. Justice Fairhurst's concurrence does, however, offer some practical guidance as to circumstances where ID requests (among other things) will be permitted as to passengers in cars at traffic stops:

Many circumstances that might be reasonably related to the original circumstances for the stop can justify an officer's request for a passenger's identification. For example, if a vehicle is stopped because a passenger or passengers are not wearing seatbelts, a request for the passenger's identification would be appropriate. Similarly, if an officer observed a passenger acting in a way that suggested involvement in criminal activity (using drugs, hiding something, or pulling out a weapon), the officer would be justified in asking for identification. If an officer felt his safety was at risk, he might need to know with whom he is interacting. However, none of these circumstances existed in this case. Neither Rankin nor Staab committed any traffic infractions. The officers in both cases testified that neither Rankin nor Staab did anything suspicious during the stops. The officers were unaware of any criminal activity until they checked Rankin's and Staab's records *after* obtaining their identification. Both officers expressed no concern about their safety during the stops.

Examples of other reasons that might justify an officer's request for identification are the need to obtain witnesses to an infraction, the need to know whether the driver of the vehicle is permissibly driving with another of suitable age and authority (i.e., minors), or the need to determine if anyone in the vehicle has a valid license to remove the vehicle from the premises. None of those circumstances existed in this case.

**DISSENTING OPINION BY JUSTICE IRELAND:**

Justice Ireland authors a strongly worded dissent. She is joined by Justices Bridge and Madsen. The dissent argues that there is no precedential support for the majority's ruling, and that the ruling placing restrictions on requests for passenger ID is not needed. Among other things, the dissent points out that past decisions have not provided the majority opinion's clear line of distinction between: 1) ID requests directed at pedestrians (WHICH THE RANKIN MAJORITY RECOGNIZES ARE NOT "SEIZURES") and 2) ID requests directed at vehicle passengers (WHICH THE RANKIN MAJORITY HOLDS ARE "SEIZURES" REQUIRING JUSTIFICATION).

**LED EDITORIAL COMMENTS:** This ruling leaves several questions to which we will suggest some possible answers.

**Q-1:** What if the officer just asks for the passenger's name (not for ID or D.O.B or address) – Is that distinguishable from the Rankin/Staab circumstances?

**Answer:** We think that most government attorneys would say no, because the Court would view this as an attempt to get around the Rankin ruling. But the question admittedly is a very close one; officers who would try to get names under circumstances where ID requests are barred by Rankin would want to make it clear that the person had a choice not to provide the answer.

**Q-2:** What if, before asking for ID, the officer first advises the passenger that he or she is not under investigation and is free to not answer the officer's questions and free to not provide identification? Is this scenario legally distinguishable from the Rankin/Staab circumstances?

**Answer:** Probably not. Logically, one would think that an officer could adequately advise a passenger to make clear that the person is not in custody and is free to decline the officer's request. However, it appears to us that the Rankin majority was trying to limit police discretion by categorically barring police from expanding the nature of the traffic stop. The Court did not want officers to make routine requests for voluntary identification of non-violator passengers without special, fact-based justification. Thus, we think that there is nothing that the officer can do to take the encounter with the non-violator passenger out of "seizure" status.

**Q-3:** Assume the driver is arrested and the vehicle is subject to impoundment if there are no reasonable alternatives to impoundment. In assessing reasonableness of possible alternatives to impoundment, may an officer condition the transfer of control of the vehicle on a check for a valid ID driver's license of a passenger designated by the driver to take control of the car?

**Answer:** Probably. The Washington Supreme Court held in State v. Mennegar, 114 Wn.2d 304 (1990) May 90 LED:12, June 90 LED:08 that an officer's "community caretaking function" permits asking a potential substitute driver for his or her drivers' license in this circumstance. We think that Mennegar is still good law after the Rankin decision, though we believe that some prosecutors and legal advisors may disagree. Justice Fairhurst's concurring opinion suggests that this is permissible under Rankin.

**Q-4: What are some officer-safety circumstances envisioned by the Rankin majority as justifying ID requests from non-violator passengers?**

**Answer:** We think ID can be requested of passengers if the circumstances meet the unfortunately vague “heightened awareness of danger” test for directing non-violator passengers to stay in or get out of the vehicle under State v. Mendez, 137 Wn.2d 208 (1999) March 99 LED:04. Thus, observation of furtive gestures, suspicious bulges in clothing, weapons, holsters, or knife sheaths would likely qualify, as would danger-indicating intelligence or past experience regarding a particular passenger. As with all such officer-safety rationales, the officer should clearly articulate in any attendant report the objective factors that supported the decision to make the request.

**Q-5: What are some other circumstances when an officer would be justified in asking for ID from a non-violator passenger?**

**Answer:** Justice Fairhurst’s concurring opinion suggests that, if the driver has a learner’s permit, passengers can be asked if someone can produce a driver’s license. Age restrictions under state law on drivers as to the ages of persons who can be in the car presumably would justify a request for ID. And, as Justice Fairhurst’s concurring opinion indicates, if it is reasonable under the circumstances to believe that passengers may be witnesses in future proceedings, then ID can be requested; the question of whether an officer can use the “possible witness” rationale would turn on how reasonable the reviewing court thinks it was for the officer to think he or she needed to ID witnesses.

As always we urge law enforcement officers to consult with their local prosecutors and legal advisors.

**STATE LOSES ON ISSUES OF 1) FORCED ENTRY TO ENFORCE CIVIL WARRANT BASED ON RCW 10.31.040; 2) “COMMUNITY CARETAKING” ENTRY; AND 3) HARMLESS ERROR; STATE WINS ON ISSUES OF 4) CO-OCCUPANT STATUS FOR PURPOSES OF CONSENT SEARCH AND 5) “FRUIT OF THE POISONOUS TREE”**

State v. Thompson, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2004 WL 1403323 (2004)

Facts and Proceedings below: (Excerpted from majority opinion)

Thompson lived on his parents' property on Fox Island. He resided in a 22-foot travel trailer, owned by his parents, while his parents lived in a house on the property. Also on the property was a boathouse that had housed a boat owned by the elder Thompsons.

In June of 2000, Thompson's father, John, wanted Thompson removed from his property because John suspected that Thompson was involved in illicit drug activity. John contacted the Pierce County Sheriff's Office and reported that Thompson had an outstanding warrant for his arrest. Deputy [A] from the sheriff's office testified that he confirmed such warrant existed and it was for Thompson's failure to pay child support.

On June 5, 2000, Deputies [A] and [B] went to the trailer where Thompson was living to arrest him on the outstanding warrant. Upon arrival at the travel trailer, Deputy [A] announced, "[T]his is the sheriff[']s office, I have a warrant for James['] arrest." The deputies then heard movement and scuffling inside the trailer, and after waiting approximately 10 seconds, the deputies opened the door of the trailer. The deputies immediately saw Thompson and ordered him out of the

trailer and to put his hands onto the trailer. Thompson was then handcuffed by Deputy [B].

The deputies also observed that there was another individual inside the trailer and ordered him to come out also. Sund was patted down to make sure he was unarmed and told to leave the area. Before leaving, Sund told the deputies that he needed his jacket from inside the trailer. Deputy [A] entered the trailer to retrieve Sund's jacket and to make sure that no one else was inside. While inside the trailer, Deputy [A] observed that the oven was open and in it "was a container that had white crystalline residue cooked onto it." He also testified that he smelled a strong chemical similar to paint thinner. Based on his experience and training, Deputy [A] was concerned that the odor he detected was methamphetamine related so he quickly left the trailer.

After leaving the trailer, Deputy [A] placed Thompson in the back of the patrol car and Deputy [B] read Thompson his Miranda rights. Based on the odor observed in the trailer, Deputy [A] went toward the elder Thompsons' home to look for Sund and to inform John Thompson of his son's arrest. Deputy [A] acknowledged that he wanted to arrest Sund because he was in the trailer where the deputy observed the suspicious items.

The elder Thompsons informed Deputy [A] that no one had come to the house. John Thompson then asked Deputy [A] to search the attached garage. Deputy [A] did not find anyone in the garage and asked John about the detached boathouse. The elder Thompson said that the boathouse was his, that James used it, and answered " 'Please do,' " when Deputy [A] asked for permission to look inside.

Deputy [A] did not find Sund in the boathouse, but he did find items that were consistent with a methamphetamine lab in a living area on the second floor. After this observation, Deputy [A] asked the elder Thompsons to sign a consent form for a search of the boathouse, which they both did. Deputy [A] did not seek Thompson's consent either before or after the search.

At some point during his time on the property, Deputy [A] called for a team of methamphetamine lab investigators. Deputy [C], a clandestine lab investigator, responded to the call. After conferring with Deputy [A], Deputy [C] entered the trailer to make sure that the oven was turned off. Deputy [C] then inspected a burn barrel and a couple of burn piles outside the trailer that contained material consistent with the production of methamphetamine. He also checked the safety of a corroded propane tank that was located in front of the trailer. Finally, Deputy [C] looked inside the boathouse and observed the same items found by Deputy [A] earlier. After determining that the property appeared to be a methamphetamine lab but that it was a "fairly safe environment," Deputy [C] secured the premises. Deputy [C] returned the next day with a search warrant to process the evidence.

Thompson was charged with one count of unlawful manufacture of a controlled substance, methamphetamine. See former RCW 69.50.401(a)(1)(ii) (1998). He sought to suppress the evidence obtained following his arrest. Pierce County Superior Court denied his motion to suppress evidence found in the trailer but concluded that Thompson's consent was necessary before the search of the boathouse. Despite finding the search of the boathouse invalid, the trial court convicted Thompson as charged following a bench trial on stipulated evidence.

In a published decision, Division Two of the Court of Appeals affirmed Thompson's conviction. State v. Thompson, 112 Wn. App. 787 (2002) **Oct 02 LED:07**. Regarding the issue of forcible entry on a civil warrant, the Court of Appeals concluded that the knock and wait statute (RCW 10.31.040) could be applied to the service of such warrant because the deputies involved could not determine whether the warrant was for a criminal or civil matter, and thus, the officers had not acted unreasonably under the circumstances. Thompson, 112 Wn. App. at 795 ("[W]e decline to require officers at the scene of an arrest to anticipate the nature of any resulting court proceeding.").

With regard to the retrieval of Sund's jacket from the trailer, the Court of Appeals held that it was a valid exercise of the officer's community caretaking function. Finally, the Court of Appeals concluded that the officers did not need to obtain the consent of Thompson to search the boathouse because the boathouse was a place "where one cohabitant might receive a visitor without the other cohabitant's consent."

**ISSUES AND RULINGS:** Does RCW 10.31.040 (the knock-and-wait statute) authorize police to forcibly enter a private premises to serve a civil arrest warrant issued in a civil contempt proceeding? (**ANSWER:** No, the statute authorizes forced entry only in relation to criminal actions); 2) Does the "community caretaking function" justify the officer's warrantless entry into the trailer to retrieve occupant Sund's jacket? (**ANSWER:** No); 3) Did defendant Thompson have co-occupant status as to the boathouse such that the officer should have asked his consent to search the boathouse? (**ANSWER:** No); 4) Excluding the information in the search warrant affidavit gained in the unlawful entry of the trailer, was sufficient untainted evidence described in the search warrant to establish probable cause to search the Thompson property? (**ANSWER:** Yes); 5) Was the trial court's error in admitting evidence that was seized from the trailer harmless? (**ANSWER:** No). [**Note:** All 9 justices are in agreement on the answers to the first two issues; three justices (Sanders, Chambers and Fairhurst) dissent from the ruling on the third (co-occupant status) issues; four justices also dissent from the majority reaching the consent issue as to the boathouse search arguing that the "fruit of the poisonous tree" doctrine precluded reaching that issue.]

**ANALYSIS BY MAJORITY:** (Excerpted from majority opinion)

1) RCW 10.31.040 (Opening door of trailer)

Thompson argues that police officers should not be permitted, under the authority of RCW 10.31.040 (the "knock and wait" statute), to forcibly enter a private dwelling to serve a civil arrest warrant in a civil contempt procedure. We agree.

The "knock and wait" statute provides:

To make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building, or any other inclosure, if, after notice of his office and purpose, he be refused admittance.

RCW 10.31.040 (emphasis added).

The plain language of RCW 10.31.040 is clear. Its unambiguous language does not encompass the enforcement of civil arrest warrants. Because we cannot add words or clauses to an unambiguous statute, we are prohibited from reading into the statute "civil actions." Thus, we presume that the legislature intended to

exclude "civil actions" from RCW 10.31.040. Therefore, we hold that RCW 10.31.040 does not allow forcible entry into dwellings to execute civil warrants.

In the present case, there was a bench warrant for Thompson's arrest for failure to appear at a show cause hearing regarding his failure to pay child support. This warrant was issued under RCW 26.18.050, which provides that a civil bench warrant may be issued in such circumstances. RCW 26.18.050(3). In light of our holding today, the deputies erred in forcibly opening the trailer door when executing the civil warrant. The "knock and wait" statute does not encompass the execution of civil arrest warrants.

2) Community caretaking function (Entering trailer to retrieve jacket)

It has long been held that warrantless searches are per se unreasonable under the Fourth Amendment of the United States Constitution. State v. Kinzy, 141 Wn.2d 373 (2000) **Sept 00 LED:07**. However, there are exceptions to this warrant requirement. The State bears the burden of showing a warrantless search falls within one of these exceptions.

The community caretaking function, which is divorced from the criminal investigation, is one such exception to the warrant requirement. Kinzy at 385. This exception allows for the limited invasion of constitutionally protected privacy rights when it is necessary for police officers to render aid or assistance or when making routine checks on health and safety. Such invasion is allowed only if (1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns; (2) a reasonable person in the same situation would similarly believe that there was need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place being searched. "Whether an encounter made for noncriminal noninvestigatory purposes is reasonable depends on a balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform a 'community caretaking function.'"

The State argues that Deputy [A] was properly exercising the community caretaking function when he entered the trailer to retrieve Sund's jacket. The State contends that if Sund were to enter the trailer on his own to retrieve his jacket, there was a risk that Sund could destroy evidence, retrieve a weapon, or even steal items that belonged to Thompson. This argument is not persuasive.

When Deputy [A] entered the trailer to retrieve Sund's jacket, there is no evidence in the record to indicate that Deputy [A] believed Sund was armed, his jacket contained a weapon, or that Sund would have entered the trailer to destroy evidence. Absent such beliefs, a reasonable person would conclude that there was no immediate need for assistance for health or safety concerns. Further, the need to retrieve Sund's jacket from the trailer does not outweigh Thompson's privacy interest in the trailer. Thus, Deputy [A] was not properly using the community caretaking function when he retrieved Sund's jacket from the trailer.

The State fails to meet its burden of proving that retrieval of Sund's jacket was a proper use of the community caretaking function as an exception to the warrant requirement. Therefore, evidence obtained from this entry into the trailer should have been suppressed.

3) Consent and purported co-occupancy (Defendant's relationship to boathouse)

Another exception to the warrant requirement is consent to search. State v. Walker, 136 Wn.2d 678 (1998) **Jan 99 LED:03**. It is the State's burden to establish that a consent to search was lawfully given. In order to meet this burden, three requirements must be met: (1) the consent must be voluntary, (2) the person consenting must have the authority to consent, and (3) the search must not exceed the scope of the consent. Here there is no question that the consent to search the boathouse given by Thompson's father was voluntary; nor is there any argument that the search that followed entry exceeded the scope of the consent. Thus, the sole issue in determining the validity of the consent here is the requirement for the person consenting to have the authority to consent.

In United States v. Matlock, 415 U.S. 164 (1974), the Supreme Court held that consent of an individual who possesses "common authority" over the area being searched is valid even though another person with whom that authority is shared is absent from the premises and therefore unable to consent. This court adopted the Matlock common authority standard in State v. Mathe, 102 Wn.2d 537 (1984). To establish lawful consent by virtue of common authority: (1) a consenting party must be able to permit the search in his own right and (2) it must be reasonable to find that the defendant has assumed the risk that a co-occupant might permit a search. The Mathe court further elaborated on this standard by stating that the two elements are closely intertwined. "If a person [consenting to the search] has joint control over an area, it may be proper to presume that the defendant reasonably assumes the risk that the joint control may be authorized to allow a search."

In Mathe, the defendant and his girlfriend rented two bedrooms from a landlord's home. The landlord consented to the police search of his house in which the defendant--a burglary suspect--and his girlfriend were found in one of the bedrooms. The bedroom was exclusively used by the defendant, and the defendant paid rent for the use of the bedroom. The landlord neither used nor had possessions stored in that room. This court found that in those circumstances the landlord could not consent to a search because the tenant was in undisputed sole possession of the premises. Therefore, the landlord could not be deemed a co-occupant under the common authority standard and he was not able to permit a search in his own right.

The consent rule enunciated in Matlock, and adopted by Mathe, applies to the validity of the consent of one holding common authority with an absent, nonconsenting individual. However, in State v. Leach this court held that if "the cohabitant be present and able to object, the police must also obtain the cohabitant's consent." In Leach, the defendant and his girlfriend ran a travel agency together. Although the defendant was the owner and operator of the agency, his girlfriend had a key to the office, performed minor tasks for the agency, her name appeared on the lease of the premises, and her name also appeared on business cards as an "owner." The girlfriend informed the police that the defendant was responsible for the rash of burglaries that occurred in the complex where the travel agency was located. She escorted the police into the agency's office using her key. The defendant was present when police arrived and was placed under arrest. During their search, the police discovered stolen property linked to the reported burglaries. This court held that the search was improper because the police should have obtained the defendant's consent since

he possessed at least equal control over the premises and was present at the time of the search.

This issue was further examined in Walker where the nephew of a married couple was caught with a bag of marijuana at school. The nephew told police that he lived with his aunt and uncle and obtained the marijuana from their home. He also told police that more marijuana could be found in the home. The aunt signed a consent form to search the home and accompanied police to her home. Before the police entered the home, the uncle arrived. Without obtaining his consent, the police entered the home and found additional marijuana. This court held that while the consent was valid against the aunt, it was not valid against the uncle since he was a co-occupant, with equal control over the premises, and had not given his consent.

Given the evidence at hand, under the common authority standard as enunciated in Matlock and Mathe we conclude that Thompson was not a co-occupant of the boathouse with equal control over those premises and, that unlike the circumstances in both Leach and Walker, his consent was not required to validate the search.

To qualify as a co-occupant, it must be shown that Thompson had equal control over the premises with his parents, i.e., that he would have been able to permit the search in his own right. To be able to permit a search in his own right, it must be established that Thompson had joint access or control of the boathouse for most purposes. The record does not support such a conclusion. The boathouse was on property owned by Thompson's parents. Thompson was living on another part of his parents' property in a travel trailer that was also owned by them. He did not pay rent to his parents, and as testimony proved, he neither occupied the boathouse nor was it available to him for his exclusive use. Although his parents allowed Thompson to store items in the boathouse, his parents did as well, and there is no evidence in the record to show that Thompson was ever in exclusive control of the boathouse. Thompson's use of the boathouse was clearly dependent upon the permission of the owners, i.e., his parents. Thus, while Thompson and his parents each had access to the boathouse, his right to access, as a nonoccupying nonowner, was subordinate to his parents. Therefore, under the common authority standard, Thompson does not qualify as a co-occupant who had equal access and control over the boathouse.

By contrast, it is clear that the parties in Leach and Walker were co-occupants since they possessed equal control and access over the searched premises. Although in Leach the defendant was the employer of the girlfriend and was the sole owner of the travel agency, the couple held her out to be "co-owner" of the premises and she was a signatory to the lease of the searched premises. Therefore, to an observer, the defendant and his girlfriend had joint control and access over the searched premises. In Walker, joint control and access was apparent because the husband and wife defendants were owners of the searched home and the room being searched was their joint bedroom. Here, however, Thompson does not enjoy such status. Thompson, an adult son, was living on a portion of his parents' property rent free. This type of relationship does not equate to Thompson possessing joint control over all his parents' property. As stated above, his access to the boathouse was contingent upon his parents' permission. Because he lacked the authority to do so, Thompson could not have permitted the search in his own right. [Court's footnote: Since it is clear

*that Thompson cannot permit a search of the boathouse in his own right, it is unnecessary to examine the second prong of the common authority standard.]* Therefore, we find that Thompson did not possess common authority over the boathouse and that his consent was not necessary to the validity of the search.

4) Suppression

Following the elder Thompsons' consent, Deputy [C] entered the boathouse and conducted an initial scan of the premises for officer safety. In plain view, he observed the following: small jars containing different types of liquid; coffee filters; mason jars containing coffee filters and "white powder"; electric hot plates; tubing; rock salt; pie plates with white residue; bottles of liquid ammonia; glassware; starting fluid; empty HCl gas generator; five-gallon buckets containing unknown fluid, one with a syringe floating in it; bag containing "rough" pseudoephedrine tablets; and an empty bottle of isopropyl alcohol. Based on his experience, Deputy [C] suspected that the boathouse was being used as a methamphetamine lab, discontinued further observation, and sought a search warrant.

Deputy [C] also observed certain items in open view in other parts of the property. "The mere observation of that which is there to be seen does not necessarily constitute a search." State v. Seagull, 95 Wn.2d 898 (1981). It is clear that the police with legitimate business may enter areas of curtilage which are impliedly open. In so doing, the police are free to use their senses. Here, Deputy [C] observed a propane tank with a bluish corrosion on the valve near the front of Thompson's trailer. Deputy [C] testified that such a corrosion indicates the tank had been illegally used to store anhydrous ammonia, which is a necessary chemical used in the production of methamphetamine. Deputy [C] also found charred blister packs from pseudoephedrine packaging in a burn barrel located on the property near the trailer. Deputy [C] further observed other burn piles on the property which contained stripped lithium battery pieces and some empty bottles of pseudoephedrine that had the bottoms removed. Both lithium metal and pseudoephedrine are main ingredients in methamphetamine production. Deputy [C] was able to view all of these items from a lawful vantage point.

The items discovered in the boathouse following a lawful consent to search by Thompson's father together with the items found in open view on the property clearly established probable cause for the search warrant independent of items discovered in Thompson's trailer. Therefore, the evidence obtained through the valid search warrant should not have been suppressed at trial.

5) Harmless error?

Thompson's conviction was based, at least in part, on evidence found within the trailer--evidence we here conclude is inadmissible. This constitutional error may be considered harmless if we are convinced beyond a reasonable doubt that any reasonable trier of fact would have reached the same result despite the error. To make this determination, we utilize the "overwhelming untainted evidence" test. Under this test, we consider the untainted evidence *admitted at trial* to determine if it is so overwhelming that it necessarily leads to a finding of guilt.

In this case, evidence from the boathouse which should have been considered by the trial court was not admitted. Therefore, there is no other untainted evidence upon which we can rely on to conclude that Thompson's conviction

should be affirmed. Therefore, it is impossible for us to find that the error in this case was harmless.

Because the introduction of the evidence found in the trailer does not constitute harmless error, we vacate Thompson's conviction for unlawful manufacture of a controlled substance and remand for a new trial consistent with this opinion.

**DISSENT:** Justice Sanders authors the dissent and is joined by Justices Chambers and Fairhurst. The dissent argues that the Court should have held: 1) that the “fruit of the poisonous tree” doctrine barred any evidence seized from the boathouse and under a subsequently executed search warrant because, in his opinion, these searches would not have occurred if the trailer had not been unlawfully entered; and 2) that the consent search was unlawful because James Thompson had sufficient dominion and control over the boathouse to qualify as a co-occupant, present at the scene, whose consent should have been requested.

#### **LED EDITORIAL COMMENTS:**

**1) Court’s reliance on RCW 10.31.040 avoids constitutional question regarding authority to enter under non-criminal arrest warrant.**

Under the Thompson Court’s ruling, RCW 10.31.040 bars forced entry to execute a non-criminal arrest warrant under non-exigent circumstances. We think that if the warrant had been a criminal warrant, whether for a misdemeanor, gross misdemeanor, or felony offense, not only would RCW 10.31.040 permit forced entry to arrest, but also, the Fourth Amendment rule of Payton v. New York, 445 U.S. 573 (1980) would permit forced entry to execute the arrest warrant so long as the officer had probable cause to believe the arrestee was inside his own residence. Our very recent research of case law nationally discloses that the great weight of authority is that the Payton rule allowing forced entry to execute an arrest warrant is not limited to felony warrant execution. Remember, however, that if the would-be arrestee is inside a third party’s residence, then a search warrant is required in order to make a lawful non-consenting, non-exigent entry to execute the arrest warrant.

**2) The majority’s assertion that the non-rent-paying Thompson son had no authority to consent to a boathouse search in his own right could be problematic for law enforcement in future cases where the consent is obtained from the freeloading son and not the indulgent parents.** Law enforcement officers should be aware of the majority’s conclusion that the adult son did not have authority in his own right to consent to a search of the boathouse. The mere facts that a) the son was living on a portion of his parents’ property rent free, and b) had permission from the parents to use the parents’ boathouse did not give him dominion and control over the boathouse sufficient to consent to a search of it, the majority concludes. The majority’s conclusion would mean that, if the search instead had been done under the son’s consent, anything found in the search would have been inadmissible against the parents.

#### **EVIDENCE HELD SUFFICIENT TO SUPPORT CONVICTION FOR POSSESSING METHAMPHETAMINE**

State v. Goodman, 150 Wn.2d 774 (2004)

Facts and Proceedings below: (Excerpted from Supreme Court opinion)

On August 7, 2001, the Tri City Metro Drug Task Force (Metro) executed a controlled buy which involved a confidential informant (CI) and one Yvonne Estavillo. Metro verified before the controlled buy that the CI did not possess any controlled substances either on his person or in his automobile. The CI and

Estavillo, under Metro surveillance, traveled to a house after meeting at Westgate Elementary School. After leaving the residence the CI returned to Metro four baggies of white powder. The four baggies, each bearing a green "Playboy" bunny logo, tested positive for methamphetamine, totaling 2.0 grams. This led Metro to procure and execute a search warrant for the house at which the controlled buy took place. The search warrant extended to all rooms in the house.

Goodman, though not the owner of the house, lived in the southeast bedroom. *[Court's footnote: The parties stipulated that the owner of the house, Wilma Mitchell, would have testified that Goodman lived in that room. The police also found documents in the room belonging to Goodman.]* During the search the police found an Altoids tin which contained six baggies of a white powder substance, weighing a total of 2.8 grams. The Washington State Crime Laboratory tested only three of those baggies, but each tested positive for methamphetamine. Detectives also found another tin in the bedroom, which contained a substance later determined to be methamphetamine. Moreover, detectives discovered a safe in the room containing more baggies, a scale, a blue cloth, and a package labeled "accessory kit."

The State charged Goodman in its first information of "the crime of, POSSESSION WITH INTENT TO DELIVER A CONTROLLED SUBSTANCE, METHAMPHETAMINE."

Goodman waived his right to a jury and a bench trial was held on October 15, 2001, with the parties stipulating to the facts. The court found Detective Didion would testify that 3.5 grams (one-eighth of an ounce, otherwise known as an "eight-ball") was the upper-limit of personal consumption, yet it was still common for sales to involve quantities below that amount. The court relied on the August 7 sale which involved only 2.0 grams to infer the amount of methamphetamine found in Goodman's bedroom (2.8 grams) was consistent with the sale of methamphetamine. The court found the evidence seized from Goodman's room--the baggies, scale, individually packaged methamphetamine, and the linkage between the August 7 sale and the evidence from Goodman's bedroom--were "consistent with the sale of methamphetamine." Though Goodman argued the evidence was insufficient to support the element of intent, the court found Goodman guilty of possession with intent to deliver methamphetamine in violation of former RCW 69.50.401(a). The court sentenced Goodman to 65 months, an enhanced sentence for violating the Uniform Controlled Substances Act within a protected zone.

**ISSUE AND RULING:** Is the evidence in the record sufficient to support the conviction for possessing with intent to distribute? (**ANSWER:** Yes)

**Result:** Affirmance of Court of Appeals' decision that affirmed Benton County Superior Court conviction of Jay Lawrence Goodman for possessing methamphetamine with intent to distribute.

**ANALYSIS:** (Excerpted from Supreme Court opinion)

At issue here is whether the evidence was sufficient to prove intent to deliver. Goodman argues the stipulated facts are insufficient to prove intent. The statutory elements of possession of controlled substance with intent to deliver are (1) unlawful possession of (2) a controlled substance with (3) intent to deliver.

Goodman primarily argues "that a sizeable amount of drugs must be a starting point in any analysis of intent to deliver." This argument lacks merit. First, it has never been suggested by any court that a large amount of a controlled substance is required to convict a person of intent to deliver. It is firmly established Washington law that mere possession of a controlled substance is generally insufficient to establish an inference of intent to deliver. Rather, at least one additional factor must be present. In State v. Zunker, 112 Wn. App. 130 (Div. III, 2002) **Aug 02 LED:23** the Court of Appeals affirmed the conviction of a man arrested while possessing only 2.0 grams of methamphetamine. While recognizing the amount of methamphetamine was insufficient by itself to prove the intent to deliver element, the court cited the "scales bearing meth residue, notebooks with names and credit card numbers, a cell phone battery, and meth ingredients" as sufficient evidence to support a conviction. Even though evidence may be consistent with personal use, it is the duty of the fact finder, not the appellate court, to weigh the evidence.

Here the police found six baggies of a white powder substance totaling 2.8 grams; three baggies tested positive for methamphetamine. The police also found a scale, additional baggies, and an accessory kit in a safe located in Goodman's bedroom. The police also found three vials and another small baggie, which contained another 0.5 grams of methamphetamine. Moreover, the trial court found a link between the August 7 controlled buy and the items seized from Goodman's room, namely baggies with identical logos involved in each instance. The amount of methamphetamine alone may not have been sufficient to convict Goodman, but the evidence as a whole was sufficient to allow a rational jury to convict Goodman beyond a reasonable doubt.

[Some citations omitted]

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**BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT**

**(1) BREATH TEST INSTRUMENTS THAT WERE CERTIFIED UNDER A FORMER PROTOCOL DID NOT MEET TESTING STANDARDS OF WAC 448-13-035** -- In Seattle v. Clark-Munoz, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2004 WL 1468585 (2004), a unanimous State Supreme Court holds (in three consolidated cases) that in order for breath test results to be admissible at trial, the thermometers used in the breath test instruments must be tested against "a thermometer traceable to standards maintained by NIST [National Institute of Standards and Technology]." The Court holds that "[t]o be traceable, the uncertainties must be measured and recorded at each level" and such testing did not occur in any of the three cases consolidated for review before the Supreme Court.

**Result:** Affirmance of superior court ruling that affirmed district court rulings suppressing breath test results in three DUI cases.

**LED EDITORIAL NOTE:** More than a year ago, after district and municipal courts began suppressing breath test results based on the above grounds, the thermometers used in the DataMaster instruments were recertified using reference thermometers traceable to NIST, and did include measurement and recording of the uncertainties at each level. This was completed between June and September 2003, depending on location. Accordingly, tests performed after the thermometer on a particular DataMaster was certified should be admissible.

**(2) UPDATE RE REDMOND V. MOORE:** Last month, we digested City of Redmond v. Moore, \_\_ Wn.2d \_\_, \_\_P.3d \_\_, 2004 WL 1207870 (2004), the Washington State Supreme Court decision holding unconstitutional (on due process grounds) the statutory system under which DOL suspends certain types of drivers' licenses automatically upon being notified by a court that a person has "failed to respond to a notice of traffic infraction, failed to appear a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a notice or traffic infraction or citation, other than for a standing, stopping, or parking violation."

In last month's entry, 1) we provided a website address for DOL information regarding certain aspects of driver's license revocations and suspensions --

<http://www.dol.wa.gov/forms/551233.pdf>

2) we noted that the City of Redmond planned to file a motion for reconsideration (the City did so, and several supporting amicus briefs were also filed);

and 3) we provided the following "LED EDITORIAL NOTE":

Prosecutors, police agency legal advisors and other governmental attorneys are all conferring as they struggle to assess the ramifications of this decision. We believe that there is unanimity that officers should not cite or arrest for DWLS 3 offenses covered by the Moore decision. Beyond that, however, we will not try to describe the various views on a variety of questions, for instance, as to whether officers should make Terry stops for DWLS 3 and/or DWLS 2. Officers will need to follow the guidance of their local prosecutors and of their respective agency legal advisors. We expect to provide additional information on Moore ramifications in next month's LED, but we anticipate that it will likely be several years before anyone will know the full fall-out of the Moore decision (assuming the decision is not set aside on a motion for reconsideration).

Unfortunately, at this time, we have no new information or insights to share.

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### NEXT MONTH

The September 2004 LED will digest, among other recent decisions, two June 28, 2004 United States Supreme Court decisions, each decided by a 5-4 vote. The cases are:

Missouri v. Seibert, \_\_ S.Ct. \_\_, 2004 WL 1431864 (2004), holding that, where a police investigator in bad faith used a premeditated two-stage interrogation method, first questioning a custodial suspect without Miranda warnings and then immediately following that interrogation session with Mirandized interrogation, the statements of the suspect obtained in both sessions were per se inadmissible in the prosecution's case in chief; and

U.S. v. Patane, \_\_ S.Ct. \_\_, 2004 WL 143 1768 (2004), holding that, where a police investigator failed to complete the Miranda warnings after the suspect interrupted the investigator by saying he knew his rights, and the investigator then proceeded to interrogate the suspect without full warnings and waiver, this was a Miranda violation requiring suppression of the suspect's statement, but the violation did not require suppression of physical evidence (a gun) of which the officer learned during the interrogation.

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## **INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCW'S, AND TO WAC RULES**

The Washington Office of the Administrator for the Courts maintains a web site with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [<http://www.courts.wa.gov/>]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [<http://legalwa.org/>] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions from 1939 to the present. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [<http://www.courts.wa.gov/rules>].

Many United States Supreme Court opinions can be accessed at [<http://supct.law.cornell.edu/supct>]. This web site contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. another website for U.S. Supreme Court opinions is the Court's website at [<http://www.supremecourtus.gov/opinions/02slipopinion.html>]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since January 2000 can be accessed (by date of decision only) by going to the Ninth Circuit home page at [<http://www.ca9.uscourts.gov/>] and clicking on "Opinions." Federal statutes can be accessed at [<http://www4law.cornell.edu/uscode>]

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2004, is at [<http://slc.leg.wa.gov/>]. Information about bills filed in 2003 Washington Legislature is at the same address -- look under "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent WAC amendments is at [<http://slc.leg.wa.gov/wsr/register.htm>]. In addition, a wide range of state government information can be accessed at [<http://access.wa.gov>]. The address for the Criminal Justice Training Commission's home page is [<http://www.cjtc.state.wa.us>], while the address for the Attorney General's Office home page is [<http://www.wa/ago>].

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the **LED** should be directed to Mr. Wasberg at (206) 464-6039; Fax (206) 587-4290; E Mail [[johnw1@atg.wa.gov](mailto:johnw1@atg.wa.gov)]. Questions regarding the distribution list or delivery of the **LED** should be directed to [[ledemail@cjtc.state.wa.us](mailto:ledemail@cjtc.state.wa.us)]. **LED** editorial commentary and analysis of statutes and court decisions express the thinking of the writers and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The **LED** is published as a research source only. The **LED** does not purport to furnish legal advice. **LED's** from January 1992 forward are available via a link on the Commission's Internet Home Page at: [<http://www.cjtc.state.wa.us>].