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DIVISION II

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY  DEPUTY

STATE OF WASHINGTON, APPELLANT

v.

CLARK MANKIN, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Susan K. Serko

No. 08-1-02352-6

CORRECTED RESPONSE TO STATE'S CORRECTED OPENING BRIEF

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ORIGINAL

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A. IDENTITY OF RESPONDENT

Respondent, Clark Mankin, requests the court to uphold the superior court's order for a CrR 4.6 deposition to allow the defense to depose officers Stephen, Warner and Judge.

B. ISSUES PRESENTED

1. Whether an officer's refusal to be recorded during a defense interview is a de facto refusal to speak with counsel thereby invoking the provisions of CrR 4.6 and allowing the trial court to order depositions?
2. Whether a law enforcement officer acting as a state's witness determines whether a defense interview is a private conversation?

C. STATEMENT OF THE CASE

The defense accepts the state's recitation of the statement of the facts and procedural history of the case.

D. ARGUMENT

1. AN OFFICER'S REFUSAL TO BE RECORDED DURING A DEFENSE INTERVIEW IS A DE FACTO REFUSAL TO SPEAK TO COUNSEL WHICH INVOKES CrR 4.6 ALLOWING THE TRIAL COURT TO ORDER DEPOSITIONS.

CrR 4.6(a) reads as follows:

- (a) *When taken.* Upon a showing that a prospective witness may be unable to attend or prevented from attending a trial or hearing or if a witness refuses to discuss the case with either counsel and that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a party and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place.

The questions before the superior court were whether the witnesses have refused to discuss the case with counsel, whether the witnesses have

information that is material, and whether taking the officers' deposition will prevent a failure of justice. CrR 4.6(a). The superior court found that the circumstances warranted a deposition.

i. The witnesses have information that is material to the case.

Officers Stephen, Warner and Judge have information that is material to the case. The officers were responding to allegations that there was a possible "meth lab" at the trailer in question. *See State's Motion for Discretionary Review, Appendix A.* The officers' investigation included receiving information from an employee of the City of Tacoma Waste Management Unit regarding a possible meth lab. *Id.* That information included visual observations, the location of the trailer and other perceptions and observations. The officers then went to the location and made additional observations. The officers saw a person later identified as Clark Mankin exit the trailer. *Id.* The officers applied for and obtained a search warrant. *Id.* The officers searched the trailer. *Id.* The actions of the officers seem to fall squarely within their duties as police officers: investigating alleged criminal activity and making reports regarding that activity. They are expected to testify regarding their investigation and observations. The information held by the officers is clearly material to the defense's case.

ii. A deposition is necessary to prevent a failure of justice.

The defendant has constitutional rights to a fair trial, to interview witnesses, and compulsory process. *See St. v. Burri*, 87 Wn. 2d 175, 550 P. 2d 507 (1976) and *St. v. Wilson*, 149 Wn. 2d 1, 12, 65 P. 3d 657 (2003). For a

witness to arbitrarily place limits that serve no useful purpose frustrates the search for truth and violates Mr. Mankin's due process rights by obstructing the defense's preparation for trial. If the attorney for the defendant allows the state's witnesses to frustrate a proper investigation, the defendant's right to effective assistance of counsel may be violated.

Both the Sixth Amendment to the United States Constitution as well as article I, section 22 (Amendment 10) of the Washington State Constitution guarantee the right to effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S.Ct.2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). Counsel is ineffective when his or her performance falls below an objective standard of reasonableness and the defendant thereby suffers prejudice. *Strickland v. Washington*, 466 U.S. at 687-88. Prejudice is established when "there is a reasonable probability that, but for counsel's errors, the result of trial would have been different." *Hendrickson*, 129 Wn.2d at 78 (citing *State v. Thomas*, 109 Wn.2d 22, 226, 743 P.2d 816 (1987)).

If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel. *State v. Goldberg*, 123 Wn. App 848, 99 P.3d 924 (Division 3, 2004); *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280(2002) (citing *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)). However, the deference owed to strategic judgments is cemented in the adequacy of the investigation supporting those judgments:

[S]trategic choices made after *thorough investigation of law and facts* relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (quoting *Strickland v. Washington*, 466 U.S. at 690-691, 104 S.Ct. 2052) (emphasis added).

The adequacy of counsel's performance is determined by whether counsel's assistance was reasonable considering all of the circumstances. *Strickland*, 466 U.S. at 689 – 90, 104 S.Ct. 2052. To provide constitutionally adequate assistance, "counsel must, at a minimum, *conduct a reasonable investigation* enabling [counsel] to make informed decisions about how best to represent [the] client." *In Re Brett*, 142 Wn.2d 868, 16 P.2d 601, 604 (2001)(*emphasis in the original*); *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir.1994)(citing *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052); *see also: State v. Visitacion*, 55 Wn.App. 166, 776 P.2d 986 (1989) (trial counsel's failure to interview witnesses based upon their police statements fell below the prevailing professional norms) and *State v. Jury*, 19 Wn.App 256, 576 P.2d 1302, *review denied*, 90 Wn.2d 1006 (1978) (counsel's failure to acquaint himself with the facts of the case by interviewing witnesses was an omission which no reasonably competent counsel would have committed.); ABA Standards for Criminal Justice: Defense Function Standard 4-4.1, 4-6.1;

National Legal Aid and Defender Association Performance Guidelines for Criminal Defense Representation, Guideline 4.1 (1997) (“Investigation”); RPC 1.

When interviewing a witness, not only does the questioner learn information from the witness, but the witness learns the questions that the questioner is likely to ask, and potentially tailor his answers to the question and the desired result and to potentially lie without being required to be held to his or her own words. Such permission frustrates the court’s function of ascertaining the truth.

In the current case, there is no direct evidence that Mr. Mankin was manufacturing methamphetamine. No one saw him do it. There are no allegations that a confidential informant purchased controlled substances from Mr. Mankin. There are significant search issues. The trailer in which the alleged laboratory was allegedly found did not belong to Mr. Mankin. The State’s case is based entirely on circumstantial evidence and the observations of the officers. The officers must be held to their actual words used to describe the scene and the circumstances. The defense believes that it is absolutely necessary to have an *accurate* transcript of the interview of these witnesses to provide effective assistance of counsel. Otherwise, if an officer is so disposed, the officer is free to change statements. Impeachment by a third party based on written notes is substantially less effective and not as persuasive before a jury as relying on the witnesses’ own words. Moreover, if the interview is transcribed, the defense will not be able to argue that the officer is mistaken in

what was said in an interview. It is in the interest of both the defense and the officers themselves to have an accurate transcript of the interview. A court reporter is not a sufficient solution because of the added cost and because the inflections, pauses and other non-verbal communication is lacking. By refusing to be recorded, the officers are frustrating the defense's legitimate investigation and trial preparation, and have done so without reasonable justification.

Despite the significant issues related to the investigation, the officers have unreasonably refused to be recorded. If the interview is not recorded, the defense has three options. First, to rely on memory, in which case there is no effective means of impeachment should the officer, either intentionally or accidentally, testify differently at trial than during the interview. Such a choice seems to constitute ineffective assistance of counsel as it is the functional equivalent of not conducting an interview, and potentially worse because it tells the state and the witness what questions the defense will ask.

Defense counsel's second option is to have an investigator or other defense assistant take notes. However, it is virtually impossible for a person to take accurate much less verbatim handwritten notes during an interview. The note-taker will be obliged to summarize the witness's statements, and words may be recorded inaccurately. The witness may further complicate the note-taking process by speaking quickly, changing topics suddenly, being vague, or by any number of other methods that could complicate the note-taking process. Even if the witness was not intentionally complicating the process, a

nervous witness may speak much too quickly to allow accurate notes. It may be difficult to track the train of thought of a nervous witness. The witness may use vague pronouns, making it difficult to understand exactly who did what. It is prejudicial to the defendant to not have an accurate account of the interview because the defense cannot hold the witness to the witness' own words. Impeachment becomes meaningless.

A third option is that the defense can take a court reporter to every interview. This option is much more expensive and unwieldy than recording an interview. Even if the transcript is not purchased, the defendant must pay a sitting fee and spend additional time in coordinating and scheduling. Additionally, since a court reporter generally records the interview in order to ensure that the transcript is accurate, presumably the witness will still refuse. Under that situation, the court reporter cannot confirm that the transcript is accurate.

On the other hand, if the interview is simply recorded, the defense can review the recording at a later time, obtain a transcript, if desired, and can compare the transcript to the recording to confirm its accuracy. The witness can also confirm the transcript is accurate by comparing it to the recording. If there is a question about inflection, pauses or other non-verbal communication, the recording can be referred to.

Additionally, even if a court reporter is enlisted to take verbatim notes, the court reporter does not capture pauses or inflection. For instance, if the witness is asked the question, "did you see the defendant at the scene?" If the

witness answers, “yes, I am pretty sure that I saw the defendant at the scene,” but the answer is not recorded, a court reporter would write down the stated sentence. But if the witness answers with a long pause, such as, “yes, ...I am *pretty* sure that I saw the defendant at the scene,” that pause contains a lot of information about the credibility of the statement. A juror or judge may attach a lot of importance regarding credibility to the length of such a pause. The tone used by the witness is also important. If the defense must rely on handwritten notes, and the word “pretty” is not written down, or if it is written down by only some people, at trial, the witness may deny having said the word “pretty.” The absence of that word and the absence of the pause substantially alters the meaning of the answer. A recording eliminates such ambiguity and the jury or the judge is in a much better position to assess the credibility of the witness.

Because of the added cost to enlist the services of a court reporter at every interview, and because handwritten notes are ineffective as an impeachment tool, and because, even with a court reporter, the meaning of an answer may be ambiguous, the defense should be allowed to record a defense interview of a police officer when that interview is related to an investigation and testimony by that officer, in order to ensure the ends of justice is met.

iii. Unreasonably refusing to be recorded is a de facto refusal to be interviewed.

It is unreasonable for a witness to refuse to be recorded if there is no legitimate reason for that refusal. To record an interview does not interfere with any right of a witness. Recording an interview does not inconvenience the witness, who is not required to bring the recording device or to pay for the

recording. The recording should not alter an answer given by the witness, unless that witness was intending to lie. Generally, recording an interview does not lengthen the interview; rather, it shortens the interview. A witness may record the interview as well, should the witness be concerned that the recording may be tampered with. Likewise, it is in the witnesses' best interest to be recorded so that the defense will not misconstrue or misrepresent, either intentionally or by accident, answers given by the witness. If the witness is concerned about potential issues related to confidential informants, retaliation or other concerns of that type, the state or the witness may seek a protective order. The witness has no basis to object to having the interview recorded, unless the witness desires to change his or her answers.

Recording an interview ensures that it is accurate. If an interview is recorded, one does not have to rely on notes, which can be inaccurate as the note-taker generally summarizes what that person believes was meant by the witness. Handwritten notes are clearly less accurate than recording, not to mention time consuming and costly. The more accurate the note-taker tries to be, the more time the interview requires. Interviews are much more efficient if they can be done at a conversational pace with a conversational tone. Slowing the pace to ensure more accurate notes decreases the flow of the interview and increases the likelihood that a follow-up question is missed, or that in the time it takes to write an answer, the witness having time to think about the implications of a certain answer may change the answer, thereby potentially frustrating the search for truth.

The defense should be allowed to video record the interview, if it so chooses. The difference in impact on the witness between audio recording and video recording is immaterial. Although the words that a witness uses are important, the facial expressions and body language of a witness are likewise

very important. *See Lord v. Wood*, 184 F.3d 1083, 1095 (9th Cir. 1999) ("A witness's testimony consists not only of the words he speaks or the story he tells, but of his demeanor and reputation. A witness who appears shifty or biased and testifies to X may persuade the jury that not-X is true, and along the way cast doubt on every other piece of evidence proffered by the lawyer who puts him on the stand. But counsel cannot make such judgments about a witness without looking him in the eye and hearing him tell his story.").

A defendant has a constitutional right to a fair trial. U.S. Const. Amend. 6, Washington State Const. art. 1, sect. 22; *State v. Burri* 87 Wn.2d 175, 550 P.2d 507 (1976). "A fair trial contemplates the defendant will not be prejudiced by the denial to him of his right to counsel and compulsory attendance of witnesses." *Burri*, 87 Wn.2d at 180. "[T]hese rights include the opportunity to prepare for trial." *Id.* "The constitutional right to have the assistance of counsel, Art. I, sect. 22, carries with it a reasonable time for consultation and preparation...[I]t was the duty of appointed counsel to make a full and complete investigation of both the facts and the law in order to advise his client and prepare adequately and efficiently to present any defenses he might have to the charges against him." *Burri*, 87 Wn.2d at 180. "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies...T his right is a fundamental element of due process of law." *Id.* at 180-

81, 550 P.2d 511-12 (citations omitted). “The guaranty of compulsory process is a ‘fundamental right and one ‘which the courts should safeguard with meticulous care.’” *Id.* “Moreover,...the defendant’s right to compulsory process includes the right to interview a witness in advance of trial.” *Id.*

The attorney for the defendant not only had the right, but it was his plain duty towards his client, to *fully investigate the case and to interview and examine as many as possible of the eye-witnesses to the assault in question, together with any other persons who might be able to assist him in ascertaining the truth concerning the event in controversy...* The defendant...has the constitutional right to have compulsory process for obtaining witnesses to testify in his behalf, he has also the right either personally or by attorney to ascertain what their testimony will be.

Id. at 181 (emphasis added).

“The violation of defendant’s constitutional right to counsel and the right to compulsory process is presumed to be prejudicial.” *Id.* Even if the prosecution thought the actions were lawful. *Id.* “Moreover, an error of constitutional proportions will not be held harmless unless the appellate court is ‘able to declare a belief that it was harmless beyond a reasonable doubt.’”

Id.

Under *Burri*, the defense has the right to a pretrial interview of all of the witnesses in this matter, but especially law enforcement witnesses. The witnesses do not have a right to refuse to be interviewed and do not have a right to refuse to be recorded. It is not the witness’ interview. It is a defense interview. The purpose of the interview is to investigate a case that the state

brought against Mr. Mankin. Mr. Mankin has the right to *compel* the witnesses' to be interviewed before trial as part of the defense' preparation of its case. *Burri*, 87 Wn.2d at 180. There is no right to refuse to be interviewed. Effective assistance of counsel includes the right to be prepared for trial, which includes cross-examination of the state's law enforcement witnesses. Cross-examination includes impeachment. It is fundamentally unfair to allow a professional law enforcement witness to manipulate the preparation of the defense's case by unreasonably dictating the conditions of a defense preparatory interview. It frustrates impeachment and therefore cross-examination, and consequently frustrates the search for truth.

Because the defendant has the right to the effective assistance of counsel, and the right to prepare for trial, which right includes cross-examination and the opportunity for *effective* impeachment. Effective impeachment requires an accurate, verbatim transcript of a pretrial interview. It is the exact words of the witness that need to be scrutinized. And, in some cases, it is the exact tone of voice, inflection, pauses, and body language that need to be examined in order to fairly evaluate credibility. A verbatim transcript that is obtained in the most cost-effective manner possible is considerably more effective and fair than relying on memory, handwritten notes, and an explanation of those notes by a defense impeachment witness. To disallow a verbatim transcript and, when necessary, the exact answer a witness has given previously, including pauses, tone of voice, inflection, and even body language in the context of

video recording, is to frustrate the search for truth, the fairness courts seek to ensure and the fundamental protections afforded in the Washington State Constitution, by law and statute.

To allow the state to prepare for trial in such a way that allows a witness to be able to curtail that search by allowing a witness to hide their answers in the vagaries and ambiguities inevitably resulting from handwritten notes and explanations of notes is to legitimize government unfairness and to frustrate the purposes of the law and the quest for truth and justice. It renders the interview useless. In fact, it is worse than useless because it allows a witness to anticipate the questions and types of questions that are likely to be asked by the defense at trial. It then allows the witness to prepare for those questions and tailor their answers. It is the equivalent of suppressing evidence that is favorable to the defense, and constitutes a due process violation. *See e.g. City of Seattle v. Fettig*, 10 Wn.App. 773, 519 P.2d 1002 (1974) (Suppression by the police or prosecution of material evidence favorable to a criminal defendant violates his due process protections, despite the fact that such suppression was not deliberate. Evidence is material if it rebuts evidence offered by the prosecution; it is favorable to the defendant if there is a reasonable possibility that it would rebut prosecution evidence or corroborate that of the defense.) Effective impeachment is evidence that is favorable to the defense and the defendant should have the opportunity to present evidence favorable to his or her case.

By allowing a law-enforcement witness to change an answer without being held accountable for that change is to effectively suppress evidence favorable to the defense as the defense is then unable to present that evidence. That is the functional equivalent to not allowing the defense to prepare for trial, which is equivalent to not conducting an interview. The defense does not know what the witness will testify to.

2. A LAW ENFORCEMENT OFFICER WHEN ACTING AS A STATE'S WITNESS DOES NOT DETERMINE WHETHER A DEFENSE INTERVIEW IS A PRIVATE CONVERSATION

The State cites *State v. Hofstetter*, 75 Wn.App. 390, 878 P.2d 474 (1994) (review denied 125 Wn.2d 1012, 889 P.2d 499), and *State v. Wilson*, 108 Wn.App. 774, 31 P.3d 43 (2001) to address the limits of a defense interview of a state witness under state law. These cases are not on point.

a. State law

Hofstetter states, in *dicta*:

According to the American Bar Association *Standards for Criminal Justice*, “[a] prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel.” 1 American Bar Ass’n, *Standards for Criminal Justice* Std. 3-3.1(c), at 3.36 (2d ed. 1980) (hereinafter *ABA Standards for Criminal Justice*.) According to an explanatory comment:

Prospective witnesses are not partisans. They should be regarded as impartial and as relating the facts as they see them. Because witnesses do not belong to either party, it is improper for a prosecutor, defense counsel, or anyone acting for either to suggest to a witness that the witness not submit to an interview by opposing counsel. It is not only proper but it may be the duty of the prosecutor and defense counsel to interview any person who may be called as a witness in the case (except that the prosecutor is not entitled to interview a defendant represented by counsel). In the event a witness asks

the prosecutor or defense counsel, or a member of their staffs, whether it is proper to submit to an interview by opposing counsel or whether it is obligatory, the witness should be informed that, although there is no legal obligation to submit to an interview, it is proper and may be the duty of both counsel to interview all persons who may be witnesses and that it is in the interest of justice that the witness be available for interview by counsel.

Hofstetter, 75 Wn.App. at 395-96.

The *Hofstetter* court also states:

The equal right of the prosecution and the defense in criminal proceedings to interview witnesses before trial is clearly recognized by the courts. No right of a defendant is violated when a potential witness freely chooses not to talk; a witness may of his own free will refuse to be interviewed by either the prosecution or the defense. However, when the free choice of a potential witness to talk to defense counsel is constrained by the prosecution without justification, this constitutes improper interference with a defendant's right of access to the witness.

Id. at 397.

In *Hofstetter*, the prosecutor advised two witnesses not to speak with the defense unless a prosecutor was present and threatened that if they did, the state would withdraw its plea bargain with the witnesses. On appeal, the court held that the prosecutor should not have required that a prosecutor be present when the defense attorney interviewed the prosecution's witnesses, but that such conduct was harmless. The issue addressed in *Hofstetter* was whether such conduct constituted prosecutorial misconduct warranting dismissal. *Hofstetter*, 75 Wn.App. at 390. The current case does not allege prosecutorial misconduct in scheduling the interviews. *Hofstetter* is not on point.

Notably, the *Hofstetter* court did not address compulsory process, right to counsel, nor did it discuss *Burri*. *Hofstetter* therefore, is not useful authority. The language that the State often relies upon is *dicta*, and to the degree that *Hofstetter* addresses a defendant's right to compulsory process, the right to interview witnesses, and to adequately prepare for trial, its reasoning was flawed, even though the holding may be correct.

In addition to *Hofstetter*, the State cites *Wilson*, 108 Wn.App. 774 for the proposition that a witness has the right to refuse to speak to the defense. Like *Hofstetter*, *Wilson* is a case on prosecutorial misconduct and concerned whether the prosecutor acted appropriately. This was not a case holding that the actions of the *witness* were proper or improper.

In *Wilson*, the court ordered the State set up interviews of certain witnesses. Those witnesses refused to cooperate and be interviewed by a certain time. The time limits were not met. The issue was whether dismissal for prosecutorial misconduct was appropriate. Again, *Wilson* is not on point. The *Wilson* appellate court, in *dicta*, states, “[a]s the defendant has no absolute right to interview potential State witnesses...” *see State v. Hofstetter*, 75 Wn.App. 390, 397, 878 P.2d 474, *review denied*, 125 Wn.2d 1012, 889 P.2d 499 (1994). Again, other than the citation to *Hofstetter*, *Wilson* does not address compulsory process or other constitutional rights that the defendant may have in conducting a pretrial interview, and to the degree that it relied upon the claim that a defendant does not have a right to the pretrial interview of a state's witness, such reliance is misplaced, as is

shown by the Washington Supreme Court's treatment of the appellate decision. *See State v. Wilson*, 149 Wn.2d 1, 65 P.3d 657 (2003).

The Supreme Court in *Wilson* affirmed the lower court decision, but not its reasoning regarding pretrial interviews. The court addressed the issue of whether there was prosecutorial misconduct when, through no fault of the prosecution, the defense interview of a state witness did not occur in violation of the trial court's order. The Supreme Court found no prosecutorial misconduct and addressed whether the dismissal of the case by the trial court was proper where the State was not complicit in the failure to procure the interviews. *Id.* The Court acknowledged the defendant's right to a fair trial and to compulsory process, which includes a pretrial interview. The Court said that "[b]ecause no prosecutorial misconduct occurred, we need not reach the issue of whether the defendants suffered prejudice affecting their right to a fair trial. However, we recognize that *the defendant's right to compulsory process includes the right to interview a witness in advance of trial. State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976)." *Id.* at 7 (emphasis added). The state ignores this language in its briefing and in its logic.

Additionally, to force a defendant to choose between the right to a speedy trial and the right to adequately prepared counsel because an interview has not occurred by the speedy trial expiration does materially affect a defendant's right to a fair trial such that prejudice results." *Id.*

The State Supreme Court has *not* said that a witness has the right to refuse to speak to the defense. Rather, it has said the opposite. The right to a fair trial includes the right of compulsory process. Compulsory process means the ability to *compel*. Compel by definition means to go against one's will. Consequently, such a right would be meaningless if a witness could defeat a defendant's constitutional right to compulsory process by simply saying, "I don't want to." *See generally Wilson*, 149 Wn.2d 1, *Burri*, *Supra*.

b. Federal law

Even if under federal law a witness has a right to refuse to be interviewed pretrial, under *Burri* and art. I, sect. 22 of the State Constitution provides that compulsory process includes a pretrial interview. Moreover, as noted above, the impact a recording has on a witness is negligible. The "cost" to the witness is essentially nothing.

The witnesses at issue here are law enforcement officers. It is their job to investigate crimes and to testify about that investigation in court. The witnesses are trained not only in the law and investigation, but also in testifying and being interviewed. These are professional witnesses whose investigation led to the state charging Mr. Mankin of a crime. Once a person is charged, the proceedings are public. The information obtained in an interview will be used in a public forum. The witnesses are not protecting a private conversation.

i. The interview is not a private conversation.

A defense attorney has the right to question witnesses prior to trial and failure to do so can be considered deficient representation. *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976) (en banc). The defendant's right to compulsory process includes the right to interview a witness in advance of trial. *Id.* The witness is then subject to cross-examination and impeachment at trial should his testimony be at odds with his prior statements. *See State v. Campbell*, 103 Wn.2d 1, 19, 691 P.2d 929 (1984) (en banc). Although nonverbatim witness statements are admissible at trial for purposes of impeachment, *id.*, their value at trial can be marginal in comparison to a verbatim statement. *See id.* The witnesses in this case state that a an interview in preparation for trial is a private conversation that is subject to the Washington Privacy Act.

The Washington Privacy Act prohibits the recording of *private conversations* without the permission of all concerned.¹ *Johnson v. Hawe*, 388 F.3d 676, 682 (9th Cir. 2004). Law enforcement cannot preclude a person from video taping a law enforcement officer performing his official duties. *Id.* A defense interview of a government employee regarding a public prosecution by the government, where the police reports are subject to public disclosure via the Public Records Act by virtue of being public, is anything but a "private" conversation.

¹“Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any... [p]rivate conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation. RCW 9.73.030

It is well-established that non-private conversations and communications are "outside the purview of the [Privacy Act,]" *Id.* ; *State v. D.J.W.*, 76 Wn. App. 135, 140, 882 P.2d 1199, 1202 (1994), and that "private" has its "ordinary and usual meaning" under the Act, i.e., "'belonging to one's self . . . secret . . . intended only for the persons involved (a conversation) . . . holding a confidential relationship to something . . . a secret message: a private communication . . . secretly: not open or in public.'" *Johnson v. Hawe*, 388 F.3d at 682; *State v. Forrester*, 21 Wn. App. 855, 587 P.2d 179, 184 (1978) (quoting Webster's Third New International Dictionary (1969) (alterations in original)). To determine whether a conversation is private, Washington courts "consider the intent or reasonable expectations of the participants as manifested by the facts and circumstances of each case." *Id.* "A person's right to keep private his affairs including his conversation depends on whether he has a reasonable expectation of privacy at the time and under the circumstances involved." *Johnson* at 682; *State v. Bonilla*, 23 Wn. App. 869, 872-73, 598 P.2d 783, 785-86 (1979) (citing *Jeffers v. City of Seattle*, 23 Wn. App. 301, 597 P.2d 899, 907 (1979)).

If defense counsel had proceeded with the interview where law enforcement and the state seem to argue that to record the interview without consent violates the state's privacy act, defense counsel then opens himself up to being charged with a crime. *See RCW 9.73.030*. He must then bear the cost of a defense. This would chill the efforts defense attorneys expend in providing a constitutionally adequate defense.

Washington courts have refused "to transform the privacy act into a sword available for use against individuals by public officers acting in their official capacity." *Johnson* at 682; *State v. Flora*, 68 Wn. App. 802, 845 P.2d 1355, 1357-58 (rejecting police officers' assertion of a privacy interest under the Act in statements they made on a public thoroughfare while effectuating an arrest.)

"Determining whether a particular conversation is private is a question of fact. However, where the pertinent facts are undisputed and reasonable minds could not differ on the subject, the issue of whether a particular conversation is private may be determined as a matter of law." *Johnson* at 683; *D.J.W.*, 882 P.2d at 1202 (citations omitted). The language of *Flora*, as to "public officers acting in their official capacity", does not exclude any conduct other than an actual arrest, but encompasses other conduct that is public and official. *Johnson* at 683; *see Flora* at 1357.

There is no reasonable expectation of privacy in a pretrial witness interview. "[E]ven where a conversation is not "public" in that it is not monitored or heard by the public, it may be "public" in that the subject of the conversation is strictly of a public business nature. *Johnson* at 684 (*quoting* Op.Wash. Att'y Gen. No. 11 (1988), *available at* 1988 Wash. AG LEXIS 73, 1988 WL 404817, at *2-3)

It is unreasonable for the witnesses to agree to be interviewed only if the interview is not recorded. A defendant has a constitutional right to confront the witnesses against him and the opportunity to effectively cross examine witnesses

against him. By not being allowed to record a pre-trial interview, the defendant is denied his opportunity to *effectively* cross-examine the witnesses against him. A transcript used to impeach a witness is a more effective tool than a private investigator testifying from notes and memory. It is not reasonable for a witness to place such a restriction upon an interview. It allows a witness to lie and it frustrates the search for truth.

The State argues that this court violated RCW 9.73.030(1)(b), the state's privacy act, which prohibits the electronic recording of a private conversation without the consent of all parties, when it ordered that the witnesses may be deposed. The State cites *State v. Hofstetter*, Supra, for the proposition that "the decision of whether an interview is private rests neither with defense counsel nor the prosecutor, but with the witness." *State v. Hofstetter* 75 Wn.App. at 399." See State's motion for reconsideration, pg. 6. The State argues that as "private conversation" is not defined by statute, the court should look to the ordinary meaning of the term. *Id.* The State refers to Webster's dictionary for the ordinary meaning, and writes that "private" means "intended for or restricted to the use of a particular person or group or class of person: not freely available to the public." *Id.* pg. 6. Again, the State relies on dicta in a case regarding prosecutorial misconduct. *Hofstetter* seems to posit that it is up to the witness to determine if the conversation is private or not. The *Hofstetter* court cites *Mota v. Buchanan*, 26 Ariz.App. 246, ___, 547 P.2d 517, 522 (1994). There are no other cites or authority supporting that proposition.

Moreover, it is very important to note that the *Hofstetter* court does not address or even mention Washington's privacy act. There is no cite to the act. There is no analysis of what a private conversation is under the act. There is no discussion of Arizona's law relating to what constitutes a private conversation. There is merely a one-sentence statement in dicta that appears contrary to common sense. The absence of such a discussion is likely because the case is not one regarding a private conversation. The holding has nothing to do with a private conversation. Moreover, compulsory process, the right to a fair trial, due process, nor any other right regarding a fair trial and fair pretrial-preparation is addressed by that court. The State in the current case is relying on unsupported dicta in a case that relies on an out-of-state appellate decision for an interpretation of a Washington statute. Such authority should never be controlling.

A witness interview is not a private conversation. Even accepting the State's use of a dictionary definition of the term "private," a defense interview of a witness is not a private conversation. The purpose of an interview is to obtain information that will potentially be used in a court of law, which is a public forum. Once a question is asked and an answer is given, it would be unreasonable for a witness, or anyone else, to expect that information would be kept private.

ii Due process is violated if the witness can dictate that the interview cannot be recorded.

Mr. Mankin's due process rights would be violated if the witness can dictate that the interview cannot be recorded. Recording is clearly more

accurate than handwritten notes, cross-examination is limited and substantially less effective. When a witness is subject to impeachment, it is better, more effective and more likely to expose the truth when a witness can be confronted with his own words and not the words of another. There can be mistakes as to meaning and intent when the words that are spoken by the witness are construed or interpreted by another person (perhaps an investigator) and then written down and then explained to another (the attorney) to be explained to yet another (the jury). Subtle pauses, inflection and intonation, word choice and omitted words are all very important in allowing a judge, jury, or interviewer to assess a witness' meaning and credibility. Video recording is even more accurate because it captures facial expressions, body language and other behaviors that assist in communicating. The jury is entitled to see the witness to help assess credibility. Likewise, in the case of impeachment, those same principles apply. The jury should be able to see the witness as well as hear the words used.

It would violate Mr. Mankin's due process rights to not allow the more accurate recording of the interview instead of note taking. Due process is not a technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands. Accordingly, resolution of the issue whether the administrative procedures are constitutionally sufficient requires analysis of the governmental and private interests that are affected. More precisely, identification of the specific dictates of due process generally

requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, L.Ed. 2d 18 (1976).

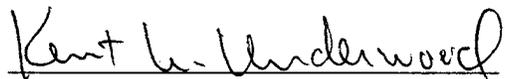
In the current case, the superior court properly exercised its discretion and ordered that the witnesses be deposed. The state has not shown that the superior court obvious error. There is no indication that the further proceedings would be useless. The state has not shown that the superior court has committed probable error. The state has not shown that the superior court abused its discretion.

E. CONCLUSION

The trial court did not abuse its discretion when it ordered a CrR 4.6 deposition when a witness refuses to be recorded. Unreasonably refusing to be recorded is the functional equivalent to refusing to be interviewed. Such action is an unreasonable restriction on the defense's preparation and violates Mr. Mankin's due process rights by denying him the opportunity for effective

cross-examination, his right to confront witness and his to a fair trial.

RESPECTFULLY SUBMITTED this 24th day of November, 2009.



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NO. 38977-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, APPELLANT

v.

CLARK MANKIN, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Susan K. Serko

No. 08-1-02352-6

MOTION FOR DISCRETIONARY REVIEW

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Appendix A

A rectangular stamp with the word "COPY" in a bold, sans-serif font. The letter "C" is enclosed in a small square box.

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A. IDENTITY OF PETITIONER

Respondent, State of Washington, requests the relief designated in Parts C through F below. This motion is brought by Stephen Trinen, Deputy Prosecuting Attorney for Pierce County on behalf of Gerald Home, Prosecutor.

B. DECISION BELOW

The State seeks review of the trial court's oral ruling of February 10, 2009 granting the defendant's motion for a deposition of two witnesses.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court exceeded its authority when it ordered a deposition where the witnesses were willing to "talk" to defense counsel about the case and be interviewed, but were unwilling to be tape recorded?
2. Whether the trial court lacks authority to order that the interviews be tape recorded or transcribed where the witness controls the interview and where case law establishes that witnesses determine whether a conversation is private and none of the statutory conditions authorizing the court to order a private conversation be tape recorded were present?

D. STATEMENT OF THE CASE.

1. Procedure

On May 15, 2008 Clark Mankin was charged and arraigned with one count of unlawful manufacturing of a controlled substance, methamphetamine. *See* Appendix A (Information). This was based on an incident that occurred on May 14, 2008. *See* Appendix B (Probable Cause Declaration).

Defense counsel Kent Underwood substituted in on July 10, 2008. *See* Appendix C (Notice of Appearance). Defense counsel Underwood arranged to interview three Tacoma Police Officers involved with the case on January 16, 2009.¹ *See* Appendix E, p. 2 (Memorandum in Support of Motion); Appendix I, p. 2 (Affidavit of Marcus Miller). Defense counsel Underwood sought to make a tape recording of each interview. *See* Appendix E, p. 2; Appendix I, p. 2. The officers refused to have the interview tape recorded. Appendix E, p. 2; Appendix I, p. 2. However, the officers were otherwise agreeable to participating in the interview and answering questions from defense counsel. Appendix I, p. 2. Defense counsel Underwood terminated each interview because the officers would not agree to be tape recorded. Appendix I, p. 2.

¹ The Memorandum in support of the motion contains a typographical error and incorrectly lists the date of the interview as January 16, 2009.

The defense subsequently filed a motion to depose the witnesses, which motion was supported by a memorandum. *See* Appendix D (Motion to Depose Witnesses); Appendix E. The State filed a response opposing the defense motion. *See* Appendix F (State's Response to Defense Motion to Depose Witnesses). The court issued an oral ruling in which it ordered depositions on February 10, 2009. *See* Appendix H (Transcript of Proceedings), p. 16-19. To date, a written order and findings of fact and conclusions of law have not been entered.

The State filed its Notice for Discretionary Review on March 10, 2009. *See* Appendix G (Notice for Discretionary Review). Trial is currently scheduled for May 14, 2009.

2. Facts

Clark Mankin was charged on January 29, 2008, in Count I with unlawful manufacturing of a controlled substance, methamphetamine. *See* Appendix A. According to the probable cause declaration filed in the case, the City of Tacoma Waste Management staff conducted a site survey at 1849 E. 34th ST in Tacoma where the officer observed tubing connected to a propane tank that led to a cooler outside of a trailer parked on City of Tacoma property. *See* Appendix B, p. 1. Officers arrived and observed a pile of waste that appeared to include rock salt dumped at the steps of the

trailer. *See* Appendix B, p. 1. Mankin was observed leaving the trailer. *See* Appendix B, p. 1. Officers obtained a warrant to search the trailer and found a number of items related to the manufacture of methamphetamine, including items that tested positive for ephedrine and methamphetamine. *See* Appendix B, p. 1. At the time, Mankin was on supervision with the Department of Corrections. *See* Appendix B, p. 1.

E. ARGUMENT.

1. THE TRIAL COURT'S ORDER VIOLATES CrR 4.6(a) WHERE THE WITNESSES WERE WILLING TO DISCUSS THE CASE WITH EITHER COUNSEL.

Rule 4.6 DEPOSITIONS

(a) When Taken. Upon a showing that a prospective witness may be unable to attend or prevented from attending a trial or hearing or if a witness refuses to discuss the case with either counsel and that his testimony is material and that it is necessary to take his deposition order to prevent a failure of justices, the court any time after the filing of an indictment or information may upon motion of a party and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place.

“[T]he scope of discovery allowable through depositions in criminal cases historically has been more limited than in civil cases.”

State v. Gonzalez, 110 Wn.2d 738, 744, 757 P.2d 925-(1988). The court in *Gonzales* went on to note as an example that in a criminal case a court

order is necessary before a deposition can be held, while in a civil case it is not. *Gonzalez*, 110 Wn.2d at 744 (comparing CrR 4.6(a) with CR 26(b)). The court in *Gonzalez* did note that the Washington rule on criminal depositions was a little broader than the federal rule inasmuch as the Washington rule has an additional provision that allows for depositions where a witness is unwilling to talk to either attorney, so that under the federal rule criminal depositions are used primarily for preservation of testimony, not discovery. *Gonzalez*, 110 Wn.2d at 744-45 (citing Fed. R. Crim. P. 15(a); 2 C Wright, Federal Practice § 241, at 4 (2d ed. 1982)). When the Washington rule was originally adopted it was the same as the federal standard. *Gonzalez*, 110 Wn.2d at 745 (citing Proposed Rules, Comments to rule 4.6(a), at 68). While the rule was subsequently amended so that depositions can be ordered in cases where witnesses refuse to talk with an attorney, the court in *Gonzalez* noted that the rule has not been amended to loosen materiality requirements in the same manner as CR 26(b). *Gonzalez*, 110 Wn.2d at 745. Because of these *significant* differences in the civil and criminal rules, the court in *Gonzalez* went on to decline to read the “reasonably calculated to lead to the discovery of admissible evidence” language of CR 26(b) into CrR 4.6(a). *Gonzalez*, 110 Wn.2d at 745.

At issue here is the language of CrR 4.6(a) that depositions may be taken where witnesses refuse to talk with either attorney. Nearly all the cases that consider CrR 4.6 address the issue of witness unavailability. The few that discuss witnesses' refusal to discuss the case with counsel merely note that the rule contains that provision, but do not further elaborate upon or interpret it. See *State v. Hutchinson*, 135 Wn.2d 863, 893, n. 5, 959 P.2d 1061 (1998); *Gonzalez* is the case that gives it anything more than passing reference, but even the discussion in *Gonzalez* is only slightly more than passing mention. See *Gonzalez*, 110 Wn.2d at 744-45.

Where the Washington rule was originally modeled upon the Federal, it too does not generally serve discovery purposes, but rather preservation purposes like the federal rule. See *Gonzalez*, 110 Wn.2d at 744-45. The one narrow exception to this is where a witness refuses to "talk" with defense counsel. In that limited circumstance only, the Washington rule also serves the purpose of discovery.

When interpreting court rules, the court approaches the rules as if they were drafted by the legislature and applies principles of statutory construction in interpreting the rule(s). See *State v. Chhom*, 162 Wn.2d 451, 458-59, 173 P.3d 234 (2007); *State v. Greenwood*, 120 Wn.2d 585, 592, 845 P.2d 971 (1993). Interpretation of a statute is a question of law

reviewed de novo. *Millay v. Cam*, 135 Wn.2d 193, 198, 955 P.2d 791 (1998). “[T]he fundamental object of statutory interpretation is to ascertain and give effect to the intent of the legislature “which is done by ‘first look[ing] to the plain meaning of words used in a statute.’” *State v. Sweet*, 138 Wn.2d 466, 477-78, 980 P.2d 1223 (1999). When words in a statute are plain and unambiguous, further statutory construction is not necessary and the statute is applied as written. *Sweet*, 138 Wn.2d at 478; *Enterprise Leasing, Inc v. City of Tacoma*, 139 Wn.2d 546, 552, 988 P.2d 961 (1999). If the statute does not define a term, the plain and ordinary meaning should be determined from a standard dictionary. *State v. Mullins*, 128 Wn. App. 633, 642, 116 P.3d 441 (2005). However, if a statute is ambiguous, the court refers to methods of statutory construction. *Rettkowski v. Department of Ecology*, 128 Wn.2d 508, 515, 910 P.2d 462 (1996). A statute is ambiguous if it is susceptible to more than one reasonable interpretation. *Vashon Island Comm. For Self-Gov’t v. State Boundary Review Bd.*, 127 Wn.2d 759, 771, 903 P.2d 953 (1995). But it is not ambiguous simply because different interpretations are conceivable and the court does not search for ambiguity by imagining a variety of alternative interpretations. *Mullins*, 128 Wn. App. at 642.

CrR 4.6 specifies when witnesses refuse to “talk” to counsel. It does not say when they refuse to be “recorded” or “transcribed” by

counsel. By the plain language of the rule, the trial court's ruling does not fall within the plain language of the rule, and is an abuse of discretion.

Here, the witnesses are willing to "talk" with defense counsel and discuss the case. The witnesses' only unwillingness is for defense counsel to tape record or have a verbatim transcription of the interview made. Because the primary purpose of criminal depositions is not discovery, and because both the witnesses are willing to talk with defense counsel, the conditions of the rule are not met, and defense counsel is not entitled to a deposition. The rule does not permit either defense counsel or the trial court to impose a tape recording or transcription upon the witnesses.

For this reason the State requests the court to hold that the trial court's ruling is does not comply with the requirements of CrR 4.6(a) and to reverse the trial court's order that defense counsel can depose the witnesses.

2. THE WITNESSES' RIGHT TO CONTROL THE INTERVIEW DERIVES FROM THEIR RIGHT TO REFUSE TO BE INTERVIEWED AND THEIR RIGHT NOT TO AGREE TO A RECORDING OF A PRIVATE CONVERSATION.

- a. Although the witnesses here have agreed to be interviewed, they have a right to refuse the interview which also establishes their right to control the interview.

It is well established under both Washington and Federal law that while a defendant has the right to attempt to interview any witness, the witness has an equal right to refuse to be interviewed. *State v. Wilson*, 108 Wn. App. 774, 777-781, 31 P.3d 43 (2001); *State v. Hofstetter*, 75 Wn. App. 390, 397, 878 P.2d 474, review denied, 125 Wn.2d 1012, 889 P.2d 499 (1994); *United States v. Black*, 767 F.2d 1334 (9th Cir. 1985); *United States v. Pinto*, 775 F.2d 150, 152 (10th Cir. 1985); *United States v. Bittner*, 728 F.2d 1038, 1041 (8th Cir. 1984); *Kines v. Butterworth*, 669 F.2d 6, 9 (1st Cir. 1981), cert denied, 456 U.S. 980 (1982); *United States v. Rice*, 550 F.2d 1634, 1374 (5th Cir. 1977); *United States v. Scott*, 518 F.2d, 261, 268 (6th Cir. 1974); *Gregory v. United States*, 125 U. S. App. D.C. 140, 369 F.2d 185 (1966); *Byrnes v. United States*, 327 F.2d 825, 833 (9th Cir. 1964). A government witness who does not wish to speak or be interviewed by the defense prior to trial may not be required to do so. *United States v. Benson*, 495 F.2d 475, 479 (5th Cir 1972). All that the

defendant is entitled to is access to the witness, but such access may not lead to an actual interview. *Rice*, 550 F.2d at 1374; *Scott*, 518 F.2d at 268.

Because the witness has a right to refuse to be interviewed and the court cannot compel the witness to speak, the necessary logical corollary is that the witness also has the right to set any conditions on the interview that the witness chooses. And indeed the courts have upheld the refusal of witnesses to speak to defense except upon the conditions set by the witness. See *Byrnes*, 327 F.2d at 833 (holding that the refusal to testify unless government or private attorneys were present by government employees who were witnesses was within the rights of the witnesses). Washington law has also recognized the right of witnesses to set conditions on the interview: “The decision as to whether the interview be private is neither for the prosecutor nor the defense counsel but rests with the witness.” *State v. Hofstetter*, 75 Wn. App. at 399 (quoting *Mota v. Buchanan*, 26 Az. App. 246, 249, 547 P.2c 517, 520 (1976)).

Because the witness has a right to refuse to be interviewed, the witness also has the right to refuse to be interviewed except on those conditions set forth by the witness.

- b. The court's cannot order that the interview be recorded as such an order would violate the private conversation statute.

The court's order that the interview be recorded expressly violates RCW 9.73.030(1)(b) which prohibits the electronic recording of any private conversation without the consent of all the parties. The decision of whether an interview is private rests neither with defense counsel nor the prosecutor, but with the witness. *See State v. Hofstetter*, 75 Wn. App. at 399.

"Private conversation" is not defined within the Chapter, so as a matter of statutory interpretation the court should look to the ordinary dictionary meaning of the word. "Private" means "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public." Webster's Third New International Dictionary Of The English Language Unabridged, Merriam-Webster, Inc. c. 2002. "Conversation" means "oral exchange of sentiments; observations, opinions, ideas." Webster's Third New International Dictionary Of The English Language Unabridged, Merriam-Webster, Inc. c. 2002. In interpreting RCW 9.73.030, at least one court has held that "private conversation" is an all-embracing term, broad enough to include a conversation between a defendant and his attorney or a police officer. *State v. Grant*, 9 Wn. App. 260, 511 P.2d 1013, *review denied*, 83 Wn.2d

1003 (1973), *cert. denied*, 419 U.S. 849, 95 S. Ct. 87, 42 L. Ed. 2d 78 (1974).

Nor does the court here have authority to issue an order contrary to RCW 9.73.030. Per RCW 9.73.040 the superior court may issue orders permitting private conversations to be recorded only when those orders are applied for by an attorney general or prosecuting attorney and must be based upon specified reasons. None of those conditions are satisfied in this case, so that the court lacks authority under the statute to order a tape recording of the interview.

- c. The state may advise the witness of the witness's right's at the interview, so long as the state does not advise or encourage the witness as to how to exercise those rights.

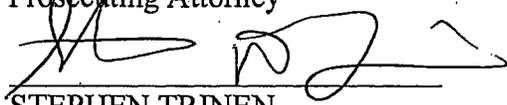
The witness is not a partisan and belongs to neither party. Therefore, it is improper for the State to advise the witness not to speak to defense counsel, or to advise the witness not to consent to an interview unless a prosecutor is present. *Hofstetter*, 75 Wn. App. at 402; *Black*, 767 F.2d at 1337-1338. However, it is not improper for a prosecutor to correctly inform the witness of their rights. Nor is it improper for the prosecutor to request to be present at the interview. *Hofstetter*, 75 Wn. App. at 402; *Black*, 767 F.2d at 1338.

F. CONCLUSION.

The trial court's order exceeded its authority. Unlike civil cases, depositions generally serve no discovery function and depositions may only be ordered where witnesses refuse to talk to attorneys for either side. Here the witnesses were willing to talk to defense counsel. Their only refusal was to have the interviews tape recorded. The court had no authority to order the witnesses tape recorded because case law establishes that the witness, not the attorneys, control the interview and because none of the statutory conditions were present that authorize the court to order a recording of a private conversation. Accordingly, the court's order should be reversed.

DATED: March 23, 2009

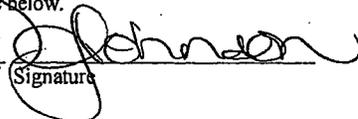
GERALD A. HORNE
Pierce County
Prosecuting Attorney



STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/23/09 
Date Signature

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7 IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

8
9 STATE OF WASHINGTON,

10 Respondent,

11 v.

12
13 CLARK MANKIN,

14 Appellant.

NO.

SUP. CT. CA# 08-1-02352-6

AFFIDAVIT OF MARCUS MILLER

15 STATE OF WASHINGTON)

16 : ss.

17 COUNTY OF PIERCE)

18 The undersigned, being first duly sworn upon oath, deposes and says:

19 1. That I am an attorney licensed to practice in the State of Washington and
20 currently employed by the Pierce County Prosecutor's Office.

21 2. That I am the deputy assigned to handle this case at the pre-trial and trial
22 level in Pierce County Superior Court.

23 3. On May 15, 2008, Clark Mankin was charged with Unlawful
24 Manufacturing of a Controlled Substance. Upon the request of defense counsel, the State
25 arranged the interviews of Officers Patrick Stevens, Rich Warner and Diana Judge on

AFFIDAVIT OF OF MARCUS MILLER

Aff_Marcus_Miller.doc

Page 1

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

1 Friday January 16th, 2009. The interviews were to take place in the prosecutor's
2 conference room. All Officers appeared for the interviews, as did the undersigned Deputy
3 Prosecuting Attorney, Defense Counsel, and Defense Counsel's legal assistant. Each
4 Officer exercised their right to not to be tape recorded. The Officers did consent to be
5 interviewed and did agree to answer questions. The defense attorney terminated each
6 Officer's interview, as the Officers would not consent to being tape recorded.

7
8 I would also note that at the motion hearing, defense counsel, Kent Underwood
9 advised the court that he records almost all of his interviews and that officers outside the
10 Tacoma Police Department almost always agree to be recorded. I have only once
11 previously had an officer agree to be tape recorded, although in my experience it has been
12 rare for a defense attorney to request to record the interview. I am aware of several other
13 cases with our office in which Mr. Underwood was the defense attorney where officers
14 from other agencies have refused to have their interviews recorded. This has included
15 officers from Lakewood Police Department, as well as officers from the Pierce County
16 Sheriff's department. Some officers take this position because they operate in an
17 undercover capacity and are concerned that voice recordings could compromise their
18 safety or ability to perform that work. Other officers have refused to have interviews
19 recorded out of a more general mistrust as to how defense attorneys might use, or secure
20 the recordings. Different officers from these same agencies have agreed to be recorded.

21
22 As a Deputy Prosecutor, I attempt to advise all witnesses, including police officers
23 that I cannot give them legal advice during the interviews, but that I can inform them of
24 what their legal rights are. Without giving legal advice, I generally encourage witnesses to
25 agree to tape recordings for reasons of convenience. My practice in this regard is

1 consistent with that of all my colleagues of whose practices I am aware. Nonetheless,
2 many witnesses, including many officers refuse to agree to have their interviews tape
3 recorded.

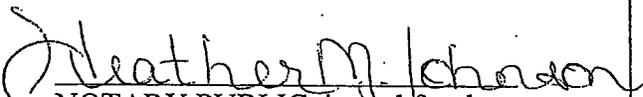
4 Further your affiant sayeth naught.

5
6 
MARCUS MILLER

8 SUBSCRIBED AND SWORN to before me this 18TH day of March 2009 .



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NOTARY PUBLIC, in and for the
State of Washington, residing
at King Co.
My Commission Expires: 5/20/12

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or (ABC-LMI) delivery to the attorney of record for the appellanta and appellant s/o his or her attorney or to the attorney of record for the respondent and respondent c/o his or her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/18/09 Heather M. Johnson
Date Signature

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on 24th day of November, 2009, I did serve a true and correct copy of the following documents:

CORRECTED RESPONSE TO STATE'S CORRECTED OPENING BRIEF, WITH APPENDIX CERTIFICATE OF SERVICE

to the following:

- 1. Stephen Trinen
PIERCE CO. PROSECUTING ATTORNEY'S OFFICE
County-City Building
930 Tacoma Ave. S.
Rm. 946
Tacoma, WA 98402, via personal service;
- 2. Clark Mankin
PIERCE COUNTY JAIL
910 Tacoma Ave. S.
Tacoma, WA 98402, via regular US POST;
- 3. Travis Stearns, WSBA # 29335
WASHINGTON DEFENDER ASSOCIATION
110 Prefontaine Pl. S., Suite 610
Seattle, WA 98104, via regular US POST;
- 4. Suzanne Elliot, WSBA # 12634
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1151 Third Ave., Suite 503
Seattle, WA 98101, via regular US POST;

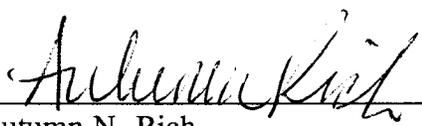
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5. Lori Smith
LEWIS CO. PROSECUTING ATTORNEY'S OFFICE
345 W. Main St. Floor 2
Chehalis, WA 98532-4802, via regular US POST.

Signed this 24th day of November, 2009.


Autumn N. Rich
1111 Fawcett Ave, Suite 101
Tacoma, WA 98402