

-1993

CASES DETERMINED IN THE

SUPREME COURT

-1996

OF

WASHINGTON

2003

[No. 72588-8. En Banc.]

Argued May 22, 2003. Decided February 5, 2004.

Case caption/  
title

*In the Matter of the Personal Restraint of VINCENT PETER GRASSO, Petitioner.*

catch line

[1] Personal Restraint — Scope — Limitation — In General. A personal restraint petition is not a substitute for direct appeal, and availability of collateral relief is limited.

headnote  
body

[2] Personal Restraint — Grounds — Burden and Degree of Proof. To prevail on a claim not previously raised, a personal restraint petitioner must demonstrate by a preponderance of the evidence either (1) constitutional error causing actual and substantial prejudice or (2) nonconstitutional error constituting a fundamental defect inherently resulting in a complete miscarriage of justice.

[3] Personal Restraint — Petition — Timeliness — Statutory Limits — Exceptions — Significant Change in Law — Test. Under RCW 10.73.100(6), a personal restraint petition is not time barred under RCW 10.73.090(1) if the petition is based solely on the ground that there has been a significant change in the law and (1) the change in the law is material to the petitioner's case and (2) sufficient reasons exist to retroactively apply the changed legal standard to the petitioner's case.

[4] Personal Restraint — Petition — Timeliness — Statutory Limits — Exceptions — Significant Change in Law — Appel-

late Decision. An appellate court decision that effectively overturns a prior appellate court holding that was originally determinative of a material issue in a case constitutes "a significant change in the law" within the meaning of RCW 10.73.100(6), under which the one-year limitation period of RCW 10.73.090 for filing a postconviction petition or motion for collateral relief does not apply if there has been a significant change in the law and the change is material to the judgment or sentence and applies retroactively.

[5] **Sexual Offenses — Evidence — Statement of Child Victim — "Testify" — What Constitutes — Significant Change in Law — Postconviction Petition for Collateral Relief.** The Supreme Court's decision in *State v. Rohrich*, 132 Wn.2d 472 (1997), which "disapproved" *State v. Boland*, 57 Wn. App. 7 (1990), and redefined the word "testifies" for purposes of RCW 9A.44.120(2)(a), the child hearsay statute, constitutes "a significant change in the law" within the meaning of RCW 10.73.100(6), under which the one-year limitation period of RCW 10.73.090 for filing a postconviction petition or motion for collateral relief does not apply if there has been a significant change in the law and the change is material to the judgment or sentence and applies retroactively.

[6] **Personal Restraint — Petition — Timeliness — Statutory Limits — Exceptions — Significant Change in Law — Materiality — In General.** Under RCW 10.73.100(6), "a significant change in the law" may warrant judicial consideration of a postconviction petition or motion for collateral relief filed after the one-year time limitation of RCW 10.73.090 has expired if the change in the law is material to the petitioner's conviction in that a material issue in the case was decided under the prior law.

[7] **Personal Restraint — Petition — Timeliness — Statutory Limits — Exceptions — Significant Change in Law — Retroactivity — Supreme Court Construction of Statute.** For purposes of RCW 10.73.100(6), under which the one-year limitation period of RCW 10.73.090 for filing a postconviction petition or motion for collateral relief does not apply if there has been a significant change in the law and the change is material to the judgment or sentence and applies retroactively, there is no issue of retroactivity if the significant change in the law involves the construction of a statute by the Supreme Court; the Supreme Court's construction of a statute is deemed to be what the statute has meant from the date of its enactment.

[8] **Personal Restraint — Petition — Timeliness — Statutory Limits — Exceptions — Significant Change in Law — Retroactivity — Constitutionally Based Change.** For purposes of RCW 10.73.100(6), under which the one-year limitation period of RCW 10.73.090 for filing a postconviction petition or motion for collateral relief does not apply if there has been a significant change in the law and the change is material to the judgment or sentence

and applies retroactively, a new rule based on constitutional principles for the conduct of criminal prosecutions is applied retroactively to all cases pending on direct review or not yet final. A case on appeal is not yet final if the appellate court has not yet issued its mandate.

[9] **Personal Restraint — Multiple Petitions — "Successive" Petition — What Constitutes — Issue or Argument Not Previously Addressed.** A personal restraint petition is not "successive" for purposes of RAP 16.4(d) if the merits of the issue or argument raised in the petition have not previously been addressed by a court.

[10] **Personal Restraint — Scope — Issues Not Raised at Trial — Statutorily Based Argument — Relationship to Fundamental Constitutional Right.** A claim based on the interpretation of a statute may be raised in a postconviction petition or motion for collateral relief despite the petitioner's failure to object at trial on statutory grounds if the statutorily protected right is closely akin to a fundamental constitutional right.

[11] **Sexual Offenses — Evidence — Statement of Child Victim — Hearsay — Right of Confrontation — "Testify" — Statutory Requirement — Nature of Right.** The "testifies at the proceedings" requirement of RCW 9A.44.120, under which a child's hearsay statement relating an act of sexual contact may be admitted in court if the statement contains adequate indicia of reliability and the child either testifies at the proceedings or is unavailable as a witness, is, itself, fundamentally constitutional in nature.

[12] **Sexual Offenses — Evidence — Statement of Child Victim — "Testify" — What Constitutes — "I Don't Want To Talk About It."** A child witness who answers "I don't want to talk about it" to a prosecution question at trial concerning an alleged act of sexual contact does not "testify at the proceedings" for purposes of admitting the child's hearsay statements about the alleged act under RCW 9A.44.120, which permits the admission of a child's hearsay statement relating an act of sexual contact if the statement contains adequate indicia of reliability and the child either testifies at the proceedings or is unavailable as a witness; nor does the child's answer satisfy the requirements of the Sixth Amendment confrontation clause for admitting a hearsay statement against a criminal defendant.

[13] **Sexual Offenses — Evidence — Statement of Child Victim — "Testify" — What Constitutes — "I Can't Remember."** A child witness who answers "I can't remember" to a prosecution question at trial concerning an alleged act of sexual contact and who is exposed to full cross-examination about the alleged contact "testifies at the proceedings" for purposes of admitting the child's hearsay statements about the alleged act under RCW 9A.44.120, which permits the admission of a child's hearsay statement relating an act of sexual contact if the statement contains adequate indicia of reliability and

the child either testifies at the proceedings or is unavailable as a witness; the child's answer also satisfies the requirements of the Sixth Amendment confrontation clause for admitting a hearsay statement against a criminal defendant.

[14] **Criminal Law — Evidence — Review — Alternative Grounds — In General.** A criminal defendant is not prejudiced by the admission of evidence on an erroneous basis if the record supports admission of the evidence on a valid alternative basis.

[15] **Criminal Law — Evidence — Hearsay — Right of Confrontation — Reliability — Hearsay Exception — "Firmly Rooted" Exception — Rationale.** The Sixth Amendment confrontation clause is not violated by the admission of a hearsay statement against a criminal defendant if the statement has sufficient guarantees of reliability to come within a firmly rooted exception to the rule against hearsay. A hearsay statement admitted under a firmly rooted hearsay exception satisfies the confrontation clause because it is so trustworthy that adversarial testing can be expected to add little to its reliability.

[16] **Criminal Law — Evidence — Hearsay — Right of Confrontation — Reliability — Hearsay Exception — "Firmly Rooted" Exception — Medical Diagnosis or Treatment.** The medical diagnosis or treatment exception of ER 803(a)(4) to the rule against hearsay is a "firmly rooted" exception under which a hearsay statement may be admitted against a criminal defendant without violating the defendant's Sixth Amendment right to confront adverse witnesses.

[17] **Evidence — Hearsay — Medical Diagnosis — Statement to Therapist.** Statements made to a therapist may be admitted under the medical diagnosis or treatment exception of ER 803(a)(4) to the rule against hearsay.

[18] **Evidence — Hearsay — Medical Diagnosis — Relevance to Diagnosis or Treatment.** The medical diagnosis or treatment exception of ER 803(a)(4) to the rule against hearsay applies to hearsay statements only insofar as they are reasonably pertinent to diagnosis or treatment. Generally, to establish reasonable pertinence (1) the declarant's motive in making the statement must be to promote treatment and (2) the health professional must have reasonably relied on the statement for purposes of treatment.

[19] **Evidence — Hearsay — Medical Diagnosis — Children — Understanding of Medical Purpose — Necessity.** A child's statement to a health professional may be admitted under the medical diagnosis or treatment exception of ER 803(a)(4) to the rule against hearsay even though the child did not understand that the statement was needed for treatment purposes if the statement has other indicia of reliability. If corroborating evidence supports the hearsay statement of a very young child and it appears unlikely that

the child would have fabricated the cause of the injury, then the statement may be admitted under the medical diagnosis or treatment exception, even without evidence that the child understood the purpose of his or her statements.

[20] **Evidence — Hearsay — Medical Diagnosis — Children — Child Abuse — Identity of Perpetrator — In General.** A statement made to a health professional by a child victim of physical abuse as to the identity of the abuser may be admitted under the medical diagnosis or treatment exception of ER 803(a)(4) to the rule against hearsay.

**Note: Only three Justices concur in all of the above statements.**

MADSEN and FAIRHURST, JJ., concur by separate opinion; SANDERS, J., ALEXANDER, C.J., and JOHNSON and CHAMBERS, JJ., dissent by separate opinion.

**Nature of Action:** An offender convicted of first degree rape of a child and first degree child molestation sought relief from personal restraint on a claim that the child victim did not "testify" within the meaning of the child hearsay statute and that, as a result, the admission of her hearsay statements violated his constitutional right to confront adverse witnesses.

**Court of Appeals:** By an order dated May 8, 2002, the court *dismissed* the petition as untimely and successive.

**Supreme Court:** The court *denies* the petition. Three Justices hold that the petition was not time barred, that the petition was not successive, that certain hearsay statements made by the victim were admissible under the child hearsay statute without violating the petitioner's right to confront adverse witness, and that certain other statements should not have been admitted under the child hearsay statute, but that such statements were alternatively admissible under the medical diagnosis or treatment exception to the rule against hearsay. Two Justices hold that the improper interpretation of the child hearsay statute that occurred at trial constituted nonconstitutional error that did not result in a complete miscarriage of justice.

majority opinion signature concurring/dissenting Justices

summary paragraphs

*Suzanne L. Elliott*, for petitioner.  
*Janice E. Ellis*, Prosecuting Attorney, and *Kathleen Webber*, Deputy, for respondent.

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LEXIS Publishing™ Research References

2004 Wash. LEXIS 67  
Robert H. Aronson, *The Law of Evidence in Washington* (4th ed.)  
Washington Rules of Court Annotated (LexisNexis ed.)  
Annotated Revised Code of Washington by LexisNexis

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OWENS, J. — Vincent Grasso was convicted of first degree child rape and first degree child molestation in 1994. The victim, Grasso's five year old daughter, R.G., took the stand at his trial. In his personal restraint petition, Grasso argues that because the prosecutor gave R.G. permission to answer some questions with "I don't want to talk about it," R.G. did not "testify" within the meaning of the child hearsay statute, and admission of her hearsay statements violated his right of confrontation. We hold that Grasso's petition is not procedurally barred and the prosecutor's instruction was indeed improper. Yet, setting aside the interchanges where R.G. answered, "I don't want to talk about it," the remainder of her testimony was sufficient to support admission of most of her hearsay statements. The remaining hearsay statements were admissible on alternative grounds. Thus, we hold that the improper instruction did not result in actual or substantial prejudice and we deny the petition.

FACTS

In April 1993, R.G. was living with her aunt, Tucker Copple. Copple and a friend found R.G. and their other young children engaging in sexualized play. As a result, Copple asked R.G. if she had ever been touched on her "private parts." 4 Verbatim Report of Proceedings (VRP) at 543. Initially, R.G. answered, "No." *Id.* After Copple reas-

sured R.G. that she was not in trouble, R.G. began crying and answered, "Yes." *Id.* When Copple asked who touched her, R.G. answered, "My dad." *Id.*

On May 4, 1993, Elaine Metz, a child interview specialist, interviewed R.G. Metz knew only R.G.'s name, her age, and the type of charge involved. On a drawing of a child, R.G. marked the places where her dad had touched her, and told Metz that her father had touched her on six occasions under her clothes. She indicated that her dad had touched her chest and rubbed her vaginal area, and that he had inserted his hand inside her vagina and rectum. R.G. stated that she was three when her dad first touched her in this way.

On June 3, 1993, Jean Bourget, a pediatric nurse practitioner, examined R.G. R.G. told Bourget that her dad had touched her front private part once with his hands and it hurt. Bourget's colposcopic exam revealed that R.G. had an unusually large hymenal opening and a notch in her hymenal tissue, symptoms that are diagnostic of sexual abuse.

The State charged Grasso with one count of first degree rape of a child and one count of first degree child molestation. Before trial, the court conducted a child hearsay hearing pursuant to RCW 9A.44.120, under which a statement made by a child when under the age of 10, describing any act of sexual contact performed on the child by another, is admissible if the court finds (1) sufficient indicia of reliability and (2) the child either (a) testifies or (b) is unavailable, but there is other corroborative evidence of the abuse. Judge Gerald L. Knight admitted the statements R.G. made to Metz and Bourget pursuant to the statute. Although he initially excluded the disclosure to Copple, Judge Knight eventually ruled that the defense had opened the door to admission of those statements. Despite difficulty getting her to take the stand, R.G. testified at trial but denied her dad had abused her. The trial ended with a hung jury.

Before Grasso's second trial, R.G. made additional statements about the abuse in the course of therapy with Kathy

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131 Wn.2d 523-640

No. 8

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Notice of  
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[No. 62943-9. En Banc.]

Argued June 11, 1996. Decided February 20, 1997.

SANDRA S. NELSON, Appellant, v. McCLATCHY  
NEWSPAPERS, INC., ET AL., Respondents.

By an order dated May 8, 1997, the Supreme Court modified the opinion in the above captioned case reported at 131 Wn.2d 279-309. The opinion is republished at 131 Wn.2d 523-546; it will be omitted from the permanent bound volume at 131 Wn.2d 279.

*Notice of Amendment  
and Republication*

## Notices of Attorney Discipline

[No. 32574. En Banc. March 3, 2006.]

*In the Matter of the Disciplinary Proceeding Against NEIL  
W. JACKSON, an Attorney at Law.*

By an order dated March 3, 2006, the Supreme Court, in accordance with ELC 9.2(c), (e), and 13.2, suspended the above named attorney from the practice of law for 60 days effective March 10, 2006.

[No. 4977. En Banc. March 9, 2006.]

*In the Matter of the Disciplinary Proceeding Against  
GRAEME H. STRICKLAND, JR., an Attorney at Law.*

By an order dated March 9, 2006, the Supreme Court, in accordance with ELC 9.2(c), (e), and 13.2, suspended the above named attorney from the practice of law for one year effective March 16, 2006.

[No. 16030. En Banc. March 9, 2006.]

*In the Matter of the Disciplinary Proceeding Against F.  
DALE JURDY, an Attorney at Law.*

By an order dated March 9, 2006, the Supreme Court, in accordance with ELC 7.1, suspended the above named attorney from the practice of law during the pendency of disciplinary proceedings.

[No. 26569. En Banc. March 9, 2006.]

*In the Matter of the Disciplinary Proceeding Against  
VICTORIA N. SMITH, an Attorney at Law.*

By an order dated March 9, 2006, the Supreme Court, in accordance with ELC 9.1(c)(2), 13.2, and 13.9(i), suspended the above named attorney from the practice of law for one year effective March 16, 2006.

# Proposed Rules of Court

Proposed-1

## PROPOSED RULES OF COURT

(Published for comment *only*)

[Pursuant to an order of the Supreme Court dated March 9, 2006, and in accordance with GR 9(g), the following proposed changes to the Rules of Court are published for comment by any interested party. Comments should be submitted to the Clerk of the Supreme Court by either U.S. mail or Internet e-mail no later than July 10, 2006. Comments may be sent to the following addresses: P.O. Box 40929, Olympia, WA 98504-0929, or Camilla.Faulk@courts.wa.gov. Comments submitted by e-mail may not exceed 1,500 words.

The cover sheet information as to purpose required by GR 9(e) is included herein solely for information purposes.

Proposed adoptions of rules are: **CrR 4.11** and **CrRLJ 4.11**.

Proposed amendments are: **CrR 4.6(a)** and **CrRLJ 4.6(a)**.

Additions and deletions are indicated by underlining and lining out respectively, except where the entire rule is new.]

CrR 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 or does not agree to allow his or her interview by, or statement to, either counsel to be recorded by audiotape or other means of verbatim recording, including a court reporter, and that ~~his or her~~ such testimony is material and that it is necessary to take ~~his or her~~ the witness's 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 or her~~ the witness's testimony be taken by deposition and that any designated books, papers,

AMENDMENTS TO  
RULES OF COURT

[By an order dated March 9, 2006, the Supreme Court amended CrR 4.2(g), made the following changes to the Rules of Court, effective April 11, 2006.]

By an order dated March 9, 2006, the Supreme Court amended GR 15 and 22, effective July 1, 2006.

Additions and deletions are indicated by underlining and lining out respectively, except where the entire rule is new.]

GR 15

**DESTRUCTION, AND SEALING, AND REDACTION OF COURT RECORDS**

(a) **Purpose and Scope of the Rule.** This rule sets forth a uniform procedure for the destruction, and sealing, and redaction of court files, cases, records, or specified documents or material in a court file or record at all court levels records. This rule shall apply to court files, cases, records, documents, or materials in any form or format, including but not limited to hard copy, microfilm, microfiche, and automated information system format. The clerk shall maintain all documents and materials filed with the court, and shall make available for public examination all files, cases, records, documents, or materials which have not been ordered destroyed or sealed. applies to all court records, regardless of the physical form of the court record, the method of recording the court record, or the method of storage of the court record.

**(b) Definitions and Construction of Terms.**

(1) "Court file" means the pleadings, orders, and other papers filed with the clerk of the court under a single or consolidated cause number(s).

(2) "Court record" is defined in GR 31(c)(4).

(2)(3) *Destroy.* To destroy means to obliterate a court file, case, document, or material record or file in such a

way as to make it permanently irretrievable. A motion or order to expunge shall be treated as a motion or order to destroy.

(1)(4) *Seal.* To seal means to protect from examination by the public or non and unauthorized court personnel. Sealing of a hard copy, microfilm, or microfiche is accomplished by enclosing with a fastening which must be broken before access can be obtained. Sealing of an automated information system file or record is accomplished by restricting access to authorized court personnel only. The existence of a sealed file, unless protected by statute, is available for viewing by the public on court indices, but is limited to the case number, names of the parties, the notation "case sealed", the case type in civil cases and the cause of action or charge in criminal cases. The contents of sealed documents or records within a case are not available for viewing by the public. Sealed files, documents or records may be examined by the public only, after the files, documents, or records have been ordered unsealed pursuant to section (d) of this rule. A motion or order to delete, purge, remove, excise, erase, or redact shall be treated as a motion or order to seal.

(5) *Redact.* To redact means to protect from examination by the public and unauthorized court personnel a portion or portions of a specified court record.

(6) Restricted Personal Identifiers are defined in GR 22 (b)(6).

(9)(7) *Strike.* A motion or order to strike is not a motion or order to seal or destroy.

(8) *Vacate.* To vacate means to nullify or cancel.

**(c) Grounds and Procedure for Requesting the Sealing or Destruction of Court Records.**

**(1) Criminal Cases or Juvenile Proceedings:**

(A) Destruction of Files or Records. On motion of any interested person in a criminal case or juvenile proceeding, or on the court's own motion, and after a hearing, the court may order the files and records in

# Roll of Attorneys

XXXV

## ROLL OF ATTORNEYS

Admitted to Practice in the Supreme Court of Washington  
Between November 19, 2004 and March 31, 2005.

Abbott Jr., Charles F.  
Abram-Kolodenko, Lisa D.  
Adams, Ronald T.  
Aldrich, Kelly C.  
Allen, Jaime Drozd  
Allen, James N.  
Allen, Robert S.  
Alfred, Natacha D.  
Altman, William J.  
Anderson, Aaron  
Anderson, Nicholas O.  
Andrews, Rebecca L.  
Arai, Leslie Haruko  
Ault, Robert James

Babic, Meliha  
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Baugh, Erica Anne  
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Bhachech, Tamsen Schultz  
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Blue, Alfred I.  
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Cooke, John T.  
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Durbin, Kara  
Dytag, Sarah A.

Judicial History Alphabetical Listing<sup>xlv</sup>  
of Justices

JUSTICES AND CHIEF JUSTICES OF THE  
SUPREME COURT OF WASHINGTON

1889 to 2004

1. ABEL, DON G. — Term of Office: November 7, 1946 (temporary appointment pursuant to Laws of 1941, ch. 201, § 2) to September 10, 1947 (resigned).
2. ALEXANDER, GERRY L. — Term of Office: January 9, 1995 (elected) to (presently serving). Chief Justice: January 8, 2001 to (presently serving).
3. ANDERS, THOMAS J. — Term of Office: November 11, 1889 (elected) to January 10, 1905 (retired). Chief Justice: November 11, 1889 to January 9, 1893.
4. ANDERSEN, JAMES A. — Term of Office: July 24, 1984 (appointed) to January 6, 1995 (retired). Chief Justice: January 11, 1993 to January 6, 1995.
5. ASKREN, WILLIAM D. — Term of Office: January 12, 1925 (elected) to November 30, 1928 (resigned).
6. BAUSMAN, FREDERICK — Term of Office: October 26, 1915 (appointed) to November 20, 1916 (resigned).
7. BEALS, WALTER B. — Terms of Office: April 16, 1928 (appointed) to October 1, 1946 (war service); September 10, 1947 to September 10, 1951 (retired). Chief Justice: January 9, 1933 to January 14, 1935; January 8, 1945 to December 18, 1945; May 7, 1946 to October 1, 1946.
8. BEELER, ADAM — Term of Office: September 30, 1930 (appointed) to May 23, 1932 (resigned).
9. BLAKE, BRUCE — Term of Office: December 1, 1932 (elected) to August 31, 1946 (resigned). Chief Justice: January 9, 1939 to January 13, 1941.
10. BRACHTENBACH, ROBERT F. — Term of Office: November 20, 1972 (appointed) to January 6, 1995 (retired). Chief Justice: January 12, 1981 to January 10, 1983.
11. BRIDGE, BOBBE J. — Term of Office: January 5, 2000 (appointed) to (presently serving).
12. BRIDGES, JESSE B. — Term of Office: June 1, 1919 (appointed) to April 14, 1927 (died).

13. CALLOW, KETHN M. — Term of Office: January 2, 1985 (appointed) to January 14, 1991 (retired). Chief Justice: January 5, 1989 to January 14, 1991.
14. CHADWICK, STEPHEN J. — Term of Office: December 3, 1908 (appointed) to June 1, 1919 (resigned). Chief Justice: January 13, 1919 to June 1, 1919.
15. CHAMBERS, TOM — Term of Office: January 8, 2001 (elected) to (presently serving).
16. CONNELLY, EDWARD M. — Term of Office: April 22, 1946 (appointed) to January 13, 1947 (resigned).
17. CROW, HERMAN D. Term of Office: January 19, 1905 (appointed pursuant to Laws of 1905, ch. 5, permanently increasing the number of justices) to October 22, 1915 (died). Chief Justice: January 13, 1913 to January 11, 1915.
18. DAMICK, CAROLYN R. — Term of Office: January 2, 1981 (appointed) to January 14, 1985 (resigned).
19. DOLLIVER, JAMES M. — Term of Office: May 6, 1976 (appointed) to January 11, 1999 (retired). Chief Justice: January 14, 1985 to January 12, 1987.
20. DONWORTH, CHARLES T. — Term of Office: September 12, 1949 (appointed) to December 31, 1967 (retired). Chief Justice: July 6, 1956 to January 14, 1957.
21. DOKE, FRED H. — Term of Office: January 2, 1981 (appointed) to January 10, 1993 (retired). Chief Justice: January 14, 1991 to January 8, 1993.
22. DRIVER, SAMUEL M. — Terms of Office: May 9, 1940 (appointed) to November 21, 1942 (war service); December 1, 1945 to April 22, 1946 (resigned). Chief Justice: December 18, 1945 to April 22, 1946.
23. DUNBAR, RALPH O. — Term of Office: November 11, 1889 (appointed) to September 19, 1912 (died). Chief Justice: January 9, 1893 to January 14, 1895; June 1, 1900 to January 14, 1901; January 9, 1911 to September 19, 1912.
24. DURHAM, BARBARA — Term of Office: January 14, 1985 (appointed) to September 30, 1999 (retired). Chief Justice: January 9, 1995 to January 11, 1999.

25. ELLIS, OVERTON G. — Term of Office: May 10, 1911 (appointed) to May 11, 1918 (resigned). Chief Justice: January 8, 1917 to May 11, 1918.
26. FAIRHURST, MARY E. — Term of Office: January 1, 2003 (elected) to (presently serving).
27. FINLEY, ROBERT C. — Term of Office: January 8, 1951 (elected) to March 23, 1976 (died). Chief Justice: January 9, 1961 to January 14, 1963; January 9, 1967 to January 13, 1969.
28. FOSTER, HARRY ELSWORTH — Terms of Office: July 8, 1956 (appointed) to December 6, 1956; January 14, 1957 to December 5, 1962 (died).
29. FRENCH, WALTER M. — Term of Office: January 10, 1927 (elected) to September 13, 1930 (died).
30. FULLERTON, MARK A. — Term of Office: January 9, 1899 (elected) to September 21, 1931 (died). Chief Justice: January 12, 1903 to January 9, 1905; April 16, 1928 to January 14, 1929.
31. ГЕВРАГНТЪ, JAMES M. — Term of Office: August 15, 1933 (appointed) to April 29, 1940 (died).
32. GOODLOE, WILLIAM C. — Term of Office: January 14, 1985 (elected) to July 17, 1988 (resigned).
33. GORDON, MERRITT J. — Term of Office: January 14, 1895 (elected) to June 1, 1900 (resigned). Chief Justice: January 9, 1899 to June 1, 1900.
34. GOSF, MACK F. — Term of Office: January 11, 1909 (appointed) to January 11, 1915 (resigned).
35. GRADY, THOMAS E. — Terms of Office: November 25, 1942 (temporary appointment pursuant to Laws of 1941, ch. 201, § 2) to November 30, 1945; January 10, 1949 (elected) to January 10, 1955 (retired). Chief Justice: January 12, 1953 to January 10, 1955.
36. GUY, RICHARD P. — Term of Office: November 1, 1989 (appointed) to January 8, 2001 (retired). Chief Justice: January 11, 1999 to January 8, 2001.
37. HADLEY, HERMAN E. — Terms of Office: March 20, 1901 (temporary appointment pursuant to Act of March 18, 1901)

to October 7, 1902; January 12, 1903 (elected) to January 11, 1909 (resigned). Chief Justice: January 14, 1907 to January 11, 1909.

38. HALE, FRANK — Term of Office: January 14, 1963 (appointed) to January 13, 1975 (retired). Chief Justice: January 8, 1973 to January 13, 1975.

39. HAMILTON, OVRIS L. — Term of Office: January 22, 1962 (appointed) to January 8, 1979 (retired). Chief Justice: January 11, 1971 to January 8, 1973.

40. HAMLEY, FREDERICK G. — Term of Office: September 6, 1949 (appointed) to July 6, 1956 (resigned). Chief Justice: January 10, 1955 to July 6, 1956.

41. HERMAN, HENRY E.T. — Term of Office: September 23, 1931 (appointed) to December 1, 1932 (resigned).

42. HICKS, FLOYD V. — Term of Office: January 10, 1977 (elected) to January 17, 1982 (resigned).

43. HILL, MATTHEW W. — Term of Office: January 13, 1947 (elected) to December 31, 1969 (retired). Chief Justice: January 14, 1957 to January 12, 1959.

44. HOLCOMB, OSCAR R. — Terms of Office: January 11, 1915 (elected) to January 10, 1927; April 22, 1927 (appointed) to January 9, 1939 (retired). Chief Justice: June 1, 1919 to January 10, 1921.

45. HOROWITZ, CHARLES — Term of Office: January 13, 1975 (elected) to December 31, 1980 (retired).

46. HOVEY, C.R. — Term of Office: September 14, 1921 (appointed) to January 8, 1923 (resigned).

47. HOYT, JOHN P. — Term of Office: November 11, 1889 (elected) to January 11, 1897 (resigned). Chief Justice: January 14, 1895 to January 11, 1897.

48. HUNTER, ROBERT T. — Term of Office: October 11, 1957 (appointed) to January 10, 1977 (retired). Chief Justice: January 13, 1969 to January 11, 1971.

49. IRELAND, RALPH — Term of Office: January 11, 1999 (elected) to (presently serving).

50. JEFFERS, CLYDE G. — Term of Office: January 9, 1939 (elected) to August 8, 1949 (retired). Chief Justice: January 10, 1949 to August 8, 1949.

51. JOHNSON, CHARLES W. — Term of Office: January 14, 1991 (elected) to (presently serving).

52. MACKINTOSH, KENNETH — Term of Office: March 30, 1918 (appointed) to April 16, 1928 (retired). Chief Justice: January 10, 1927 to April 16, 1928.

53. MADSEN, BARBARA A. — Term of Office: January 11, 1993 (elected) to (presently serving).

54. MAIN, JOHN F. — Term of Office: September 27, 1912 (appointed) to October 13, 1942 (died). Chief Justice: May 11, 1918 to January 13, 1919; January 8, 1923 to January 12, 1925.

55. MALLERY JOSEPH A. — Term of Office: November 9, 1942 (appointed) to January 15, 1962 (retired). Chief Justice: January 13, 1947 to January 10, 1949.

56. MCGOVERN, WALTER T. — Term of Office: January 8, 1968 (appointed) to May 13, 1971 (resigned).

57. MILGARD, WILLIAM J. — Terms of Office: December 1, 1928 (appointed) to January 10, 1949; December 6, 1956 (elected) to January 14, 1957. Chief Justice: January 14, 1935 to January 11, 1937; October 17, 1946 to January 13, 1947.

58. MITCHELL, JOHN R. — Term of Office: May 11, 1918 (appointed) to January 11, 1937 (retired). Chief Justice: January 14, 1929 to January 12, 1931.

59. MORRIS, GEORGE E. — Term of Office: February 26, 1909 (appointed pursuant to Laws of 1909, ch. 24, permanently increasing the number of justices) to March 30, 1918 (died). Chief Justice: January 11, 1915 to January 8, 1917.

60. MOUNT, WALLACE — Term of Office: January 14, 1901 (elected) to September 4, 1921 (died). Chief Justice: January 9, 1905 to January 14, 1907; September 27, 1912 to January 13, 1913.

61. NEILL, MARSHALL A. — Term of Office: April 24, 1967 (appointed) to November 16, 1972 (resigned).

62. OLSON, RALPH O. — Term of Office: September 10, 1951 (appointed) to January 15, 1955 (died).
63. OYF, RICHARD B. — Term of Office: January 24, 1955 (appointed) to March 31, 1967 (retired). Chief Justice: January 14, 1963 to January 11, 1965.
64. OWENS, SUSAN — Term of Office: January 8, 2001 (elected) to (presently serving).
65. PARKER, EMANUET N. — Term of Office: February 26, 1909 (appointed pursuant to Laws of 1909, ch. 24, permanently increasing the number of justices) to August 15, 1933 (retired). Chief Justice: January 10, 1921 to January 8, 1923.
66. PEARSON, VERNON R. — Term of Office: January 18, 1982 (appointed) to October 31, 1989 (retired). Chief Justice: January 12, 1987 to January 5, 1989.
67. PEKELIS, ROSSELLIE — Term of Office: April 25, 1995 (appointed) to December 12, 1995 (resigned).
68. PEMBERTON, WILLIAM H. — Term of Office: January 8, 1923 (elected) to January 12, 1925 (resigned).
69. REAVTS, JAMES BRADLY — Term of Office: January 11, 1897 (elected) to January 12, 1903. Chief Justice: January 14, 1901 to January 12, 1903 (resigned).
70. ROBINSON, JOHN S. — Term of Office: January 11, 1937 (elected) to May 21, 1951 (retired). Chief Justice: January 13, 1941 to January 11, 1943.
71. ROOT, MILO A. — Term of Office: January 19, 1905 (appointed pursuant to Laws of 1905, ch 5, permanently increasing the number of justices) to December 2, 1908 (resigned).
72. ROSELLINI, HUGH J. — Term of Office: January 10, 1955 (elected) to November 26, 1984 (died). Chief Justice: January 11, 1965 to January 9, 1967.
73. RUDKIN, FRANK H. — Term of Office: January 10, 1905 (elected) to February 14, 1911 (resigned). Chief Justice: January 11, 1909 to January 9, 1911.
74. SANDERS, RICHARD B. — Term of Office: December 12, 1995 (elected) to (presently serving).

75. SCHWELLENBACH, E. W. — Term of Office: September 3, 1946 (appointed) to September 22, 1957 (died). Chief Justice: January 8, 1951 to January 12, 1953.
76. SCOTT, ELMON — Term of Office: November 11, 1889 (elected) to January 9, 1899 (resigned). Chief Justice: January 11, 1897 to January 1, 1899.
77. SHARP, MORELL E. — Terms of Office: May 28, 1970 (appointed) to January 11, 1971 (resigned), May 13, 1971 (appointed) to December 17, 1971 (resigned).
78. SIMPSON, GEORGE B. — Term of Office: September 20, 1937 (appointed) to January 8, 1951 (resigned). Chief Justice: January 11, 1943 to January 8, 1945; August 8, 1949 to January 8, 1951.
79. SMITH, CHARLES Z. — Term of Office: July 18, 1988 (appointed) to December 31, 2002 (retired).
80. STAFFORD, CHARLES F. — Term of Office: January 1, 1970 (appointed) to July 3, 1984 (died). Chief Justice: January 13, 1975 to January 10, 1977.
81. SPENNER, WILLIAM J. — Term of Office: May 23, 1932 (appointed) to September 12, 1949 (retired). Chief Justice: January 11, 1937 to January 9, 1939.
82. STILES, THEODORE L. — Term of Office: November 11, 1889 (elected) to January 14, 1895 (resigned).
83. TALMADGE, PHILIP A. — Term of Office: January 9, 1995 (elected) to January 8, 2001 (resigned).
84. TOLMAN, WARREN W. — Term of Office: May 11, 1918 (appointed) to September 20, 1937 (retired). Chief Justice: January 12, 1925 to January 10, 1927; January 12, 1931 to January 9, 1933.
85. UTTER, ROBERT F. — Term of Office: December 20, 1971 (appointed) to April 24, 1995 (retired). Chief Justice: January 8, 1979 to January 12, 1981.
86. WEAVER, FRANK P. — Term of Office: May 21, 1951 (appointed) to May 21, 1970 (retired). Chief Justice: January 12, 1959 to January 9, 1961.
87. WEBSTER, J. STANLEY — Term of Office: November 20, 1916 (appointed) to May 11, 1918 (resigned).

88. WHITE, WILLIAM H. — Term of Office: June 1, 1900 (appointed) to January 14, 1901; March 20, 1901 (temporary appointment pursuant to Act of March 18, 1901) to October 7, 1902.

89. WILLIAMS, WILLIAM H. — Term of Office: January 8, 1979 (elected) to January 14, 1985 (retired). Chief Justice: January 10, 1983 to January 14, 1985.

90. WRIGHT, CHARLES T. — Term of Office: January 11, 1971 (elected) to November 6, 1980 (died). Chief Justice: January 10, 1977 to January 8, 1979.

## Judicial History Table

### SUPREME COURT JUSTICES BY YEAR

	POSITION 1	POSITION 2	POSITION 3	POSITION 4	POSITION 5	POSITION 6	POSITION 7	POSITION 8	POSITION 9	
1889	Anders	Scott	Dunbar	Stiles	Hoyt					1889
1890	Anders	Scott	Dunbar	Stiles	Hoyt					1890
1891	Anders	Scott	Dunbar	Stiles	Hoyt					1891
1892	Anders	Scott	Dunbar	Stiles	Hoyt					1892
1893	Anders	Scott	Dunbar	Stiles	Hoyt					1893
1894	Anders	Scott	Dunbar	Stiles	Hoyt					1894
1895	Anders	Scott	Dunbar	Stiles/Gordon	Hoyt					1895
1896	Anders	Scott	Dunbar	Gordon	Hoyt					1896
1897	Anders	Scott	Dunbar	Gordon	Hoyt/Reavis					1897
1898	Anders	Scott	Dunbar	Gordon	Reavis					1898
1899	Anders	Scott/Fullerton	Dunbar	Gordon	Reavis					1899
1900	Anders	Fullerton	Dunbar	Gordon/White	Reavis					1900
1901	Anders	Fullerton	Dunbar	White/Mount	Reavis	White	Hadley			1901
1902	Anders	Fullerton	Dunbar	Mount	Reavis	White	Hadley			1902
1903	Anders	Fullerton	Dunbar	Mount	Reavis/Hadley					1903
1904	Anders	Fullerton	Dunbar	Mount	Hadley					1904
1905	Anders/Rudkin	Fullerton	Dunbar	Mount	Hadley	Root	Crow			1905
1906	Rudkin	Fullerton	Dunbar	Mount	Hadley	Root	Crow			1906
1907	Rudkin	Fullerton	Dunbar	Mount	Hadley	Root	Crow			1907
1908	Rudkin	Fullerton	Dunbar	Mount	Hadley	Root/Chadwick	Crow			1908
1909	Rudkin	Fullerton	Dunbar	Mount	Hadley/Chadwick	Chadwick/Gose	Crow	Morris	Parker	1909
1910	Rudkin	Fullerton	Dunbar	Mount	Chadwick	Gose	Crow	Morris	Parker	1910
1911	Rudkin/Ellis	Fullerton	Dunbar	Mount	Chadwick	Gose	Crow	Morris	Parker	1911
1912	Ellis	Fullerton	Dunbar/Main	Mount	Chadwick	Gose	Crow	Morris	Parker	1912
1913	Ellis	Fullerton	Main	Mount	Chadwick	Gose	Crow	Morris	Parker	1913
1914	Ellis	Fullerton	Main	Mount	Chadwick	Gose	Crow	Morris	Parker	1914
1915	Ellis	Fullerton	Main	Mount	Chadwick	Gose/Holcomb	Crow/Bausman	Morris	Parker	1915
1916	Ellis	Fullerton	Main	Mount	Chadwick	Holcomb	Bausman/Webster	Morris	Parker	1916
1917	Ellis	Fullerton	Main	Mount	Chadwick	Holcomb	Webster	Morris	Parker	1917
1918	Ellis/Tolman	Fullerton	Main	Mount	Chadwick	Holcomb	Webster/Mitchell	Morris/Mackintosh	Parker	1918
1919	Tolman	Fullerton	Main	Mount	Chadwick/Bridges	Holcomb	Mitchell	Mackintosh	Parker	1919
1920	Tolman	Fullerton	Main	Mount	Bridges	Holcomb	Mitchell	Mackintosh	Parker	1920
1921	Tolman	Fullerton	Main	Mount/Hovey	Bridges	Holcomb	Mitchell	Mackintosh	Parker	1921
1922	Tolman	Fullerton	Main	Hovey	Bridges	Holcomb	Mitchell	Mackintosh	Parker	1922
1923	Tolman	Fullerton	Main	Hovey/Pemberton	Bridges	Holcomb	Mitchell	Mackintosh	Parker	1923
1924	Tolman	Fullerton	Main	Pemberton	Bridges	Holcomb	Mitchell	Mackintosh	Parker	1924
1925	Tolman	Fullerton	Main	Pemberton/Askren	Bridges	Holcomb	Mitchell	Mackintosh	Parker	1925
1926	Tolman	Fullerton	Main	Askren	Bridges	Holcomb	Mitchell	Mackintosh	Parker	1926
1927	Tolman	Fullerton	Main	Askren	Bridges/Holcomb	Holcomb/French	Mitchell	Mackintosh	Parker	1927
1928	Tolman	Fullerton	Main	Askren/Millard	Holcomb	French	Mitchell	Mackintosh/Beals	Parker	1928

	POSITION 1	POSITION 2	POSITION 3	POSITION 4	POSITION 5	POSITION 6	POSITION 7	POSITION 8	POSITION 9	
1929	Tulman	Fullerton	Mann	Millard	Holcomb	French	Mitchell	Beals	Parker	1929
1930	Tulman	Fullerton	Mann	Millard	Holcomb	French/Boeter	Mitchell	Beals	Parker	1930
1931	Tulman	Fullerton/Herman	Mann	Millard	Holcomb	Beeder	Mitchell	Beals	Parker	1931
1932	Tulman	Herman/Blake	Mann	Millard	Holcomb	Hester/Steinert	Mitchell	Beals	Parker	1932
1933	Tulman	Blake	Mann	Millard	Holcomb	Steinert	Mitchell	Beals	Parker/Geraghty	1933
1934	Tulman	Blake	Mann	Millard	Holcomb	Steinert	Mitchell	Beals	Geraghty	1934
1935	Tulman	Blake	Mann	Millard	Holcomb	Steinert	Mitchell	Beals	Geraghty	1935
1936	Tulman	Blake	Mann	Millard	Holcomb	Steinert	Mitchell	Beals	Geraghty	1936
1937	Tulman/Simpson	Blake	Mann	Millard	Holcomb	Steinert	Mitchell/Kobinson	Beals	Geraghty	1937
1938	Simpson	Blake	Mann	Millard	Holcomb	Steinert	Kobinson	Beals	Geraghty	1938
1939	Simpson	Blake	Mann	Millard	Holcomb/Jeffer	Steinert	Kobinson	Beals	Geraghty	1939
1940	Simpson	Blake	Mann	Millard	Jeffer	Steinert	Kobinson	Beals	Geraghty/Driver	1940
1941	Simpson	Blake	Mann	Millard	Jeffer	Steinert	Kobinson	Beals	Driver	1941
1942	Simpson	Blake	Mann/Mallery	Millard	Jeffer	Steinert	Kobinson	Beals	Driver/Grady	1942
1943	Simpson	Blake	Mallery	Millard	Jeffer	Steinert	Kobinson	Beals	Grady	1943
1944	Simpson	Blake	Mallery	Millard	Jeffer	Steinert	Kobinson	Beals	Grady	1944
1945	Simpson	Blake	Mallery	Millard	Jeffer	Steinert	Kobinson	Beals	Grady/Driver	1945
1946	Simpson	Blake/Schwollenbach	Mallery	Millard	Jeffer	Steinert	Kobinson	Beals/Abe	Driver/Connellly	1946
1947	Simpson	Schwollenbach	Mallery	Millard	Jeffer	Steinert	Kobinson	Beals/Abe	Cumelly/Hill	1947
1948	Simpson	Schwollenbach	Mallery	Millard	Jeffer	Steinert	Kobinson	Beals	Hill	1948
1949	Simpson	Schwollenbach	Mallery	Millard/Grady	Jeffer/Hamley	Steinert/Donworth	Kobinson	Beals	Hill	1949
1950	Simpson	Schwollenbach	Mallery	Grady	Hamley	Donworth	Kobinson	Beals	Hill	1950
1951	Simpson/Finley	Schwollenbach	Mallery	Grady	Hamley	Donworth	Kobinson/Weaver	Beals/Olson	Hill	1951
1952	Finley	Schwollenbach	Mallery	Grady	Hamley	Donworth	Weaver	Olson	Hill	1952
1953	Finley	Schwollenbach	Mallery	Grady	Hamley	Donworth	Weaver	Olson	Hill	1953
1954	Finley	Schwollenbach	Mallery	Grady	Hamley	Donworth	Weaver	Olson	Hill	1954
1955	Finley	Schwollenbach	Mallery	Grady/Sosellini	Hamley	Donworth	Weaver	Olson/Ott	Hill	1955
1956	Finley	Schwollenbach	Mallery	Rosellini	Hunter/Foster/Millard	Donworth	Weaver	Ott	Hill	1956
1957	Finley	Schwollenbach/Hunter	Mallery	Rosellini	Foster/Millard	Donworth	Weaver	Ott	Hill	1957
1958	Finley	Hunter	Mallery	Rosellini	Foster	Donworth	Weaver	Ott	Hill	1958
1959	Finley	Hunter	Mallery	Rosellini	Foster	Donworth	Weaver	Ott	Hill	1959
1960	Finley	Hunter	Mallery	Rosellini	Foster	Donworth	Weaver	Ott	Hill	1960
1961	Finley	Hunter	Mallery	Rosellini	Foster	Donworth	Weaver	Ott	Hill	1961
1962	Finley	Hunter	Mallery/Hamilton	Rosellini	Foster	Donworth	Weaver	Ott	Hill	1962
1963	Finley	Hunter	Hamilton	Rosellini	Hale	Donworth	Weaver	Ott	Hill	1963
1964	Finley	Hunter	Hamilton	Rosellini	Hale	Donworth	Weaver	Ott	Hill	1964
1965	Finley	Hunter	Hamilton	Rosellini	Hale	Donworth	Weaver	Ott	Hill	1965
1966	Finley	Hunter	Hamilton	Rosellini	Hale	Donworth	Weaver	Ott	Hill	1966
1967	Finley	Hunter	Hamilton	Rosellini	Hale	Donworth	Weaver	Ott/Neil	Hill	1967
1968	Finley	Hunter	Hamilton	Rosellini	Hale	McGovern	Weaver	Neil	Hill	1968
1969	Finley	Hunter	Hamilton	Rosellini	Hale	McGovern	Weaver	Neil	Hill	1969

JUSTICES BY YEAR

	POSITION 1	POSITION 2	POSITION 3	POSITION 4	POSITION 5	POSITION 6	POSITION 7	POSITION 8	POSITION 9	
1970	Finley	Hunter	Hamilton	Rosellini	Hale	McGovern	Weaver/Sharp	Neil	Stafford	1970
1971	Finley	Hunter	Hamilton	Rosellini	Hale	McGovern/Sharp/Utter	Sharp/Wright	Neil	Stafford	1971
1972	Finley	Hunter	Hamilton	Rosellini	Hale	Utter	Wright	Neil/Brachtenbach	Stafford	1972
1973	Finley	Hunter	Hamilton	Rosellini	Hale	Utter	Wright	Brachtenbach	Stafford	1973
1974	Finley	Hunter	Hamilton	Rosellini	Hale	Utter	Wright	Brachtenbach	Stafford	1974
1975	Finley	Hunter	Hamilton	Rosellini	Hale/Horowitz	Utter	Wright	Brachtenbach	Stafford	1975
1976	Finley/Dolliver	Hunter	Hamilton	Rosellini	Horowitz	Utter	Wright	Brachtenbach	Stafford	1976
1977	Dolliver	Hunter/Hicks	Hamilton	Rosellini	Horowitz	Utter	Wright	Brachtenbach	Stafford	1977
1978	Dolliver	Hicks	Hamilton	Rosellini	Horowitz	Utter	Wright	Brachtenbach	Stafford	1978
1979	Dolliver	Hicks	Hamilton/Williams	Rosellini	Horowitz	Utter	Wright	Brachtenbach	Stafford	1979
1980	Dolliver	Hicks	Williams	Rosellini	Horowitz	Utter	Wright	Brachtenbach	Stafford	1980
1981	Dolliver	Hicks	Williams	Rosellini	Dore	Utter	Dimmick	Brachtenbach	Stafford	1981
1982	Dolliver	Hicks/Pearson	Williams	Rosellini	Dore	Utter	Dimmick	Brachtenbach	Stafford	1982
1983	Dolliver	Pearson	Williams	Rosellini	Dore	Utter	Dimmick	Brachtenbach	Stafford	1983
1984	Dolliver	Pearson	Williams	Rosellini	Dore	Utter	Dimmick	Brachtenbach	Stafford/Andersen	1984
1985	Dolliver	Pearson	Williams/Goodloe	Callow	Dore	Utter	Dimmick/Durham	Brachtenbach	Andersen	1985
1986	Dolliver	Pearson	Goodloe	Callow	Dore	Utter	Durham	Brachtenbach	Andersen	1986
1987	Dolliver	Pearson	Goodloe	Callow	Dore	Utter	Durham	Brachtenbach	Andersen	1987
1988	Dolliver	Pearson	Goodloe/Smith	Callow	Dore	Utter	Durham	Brachtenbach	Andersen	1988
1989	Dolliver	Pearson/Guy	Smith	Callow	Dore	Utter	Durham	Brachtenbach	Andersen	1989
1990	Dolliver	Guy	Smith	Callow	Dore	Utter	Durham	Brachtenbach	Andersen	1990
1991	Dolliver	Guy	Smith	Johnson	Dore	Utter	Durham	Brachtenbach	Andersen	1991
1992	Dolliver	Guy	Smith	Johnson	Dore	Utter	Durham	Brachtenbach	Andersen	1992
1993	Dolliver	Guy	Smith	Johnson	Madsen	Utter	Durham	Brachtenbach	Andersen	1993
1994	Dolliver	Guy	Smith	Johnson	Madsen	Utter	Durham	Brachtenbach	Andersen	1994
1995	Dolliver	Guy	Smith	Johnson	Madsen	Utter/Pekelis/Sanders	Durham	Alexander	Talmdage	1995
1996	Dolliver	Guy	Smith	Johnson	Madsen	Sanders	Durham	Alexander	Talmdage	1996
1997	Dolliver	Guy	Smith	Johnson	Madsen	Sanders	Durham	Alexander	Talmdage	1997
1998	Dolliver	Guy	Smith	Johnson	Madsen	Sanders	Durham	Alexander	Talmdage	1998
1999	Dolliver	Guy	Smith	Johnson	Madsen	Sanders	Durham	Alexander	Talmdage	1999
2000	Ireland	Guy	Smith	Johnson	Madsen	Sanders	Bridge	Alexander	Talmdage	2000
2001	Ireland	Owens	Smith	Johnson	Madsen	Sanders	Bridge	Alexander	Chambers	2001
2003	Ireland	Owens	Fairhurst	Johnson	Madsen	Sanders	Bridge	Alexander	Chambers	2003
2004	Ireland	Owens	Fairhurst	Johnson	Madsen	Sanders	Bridge	Alexander	Chambers	2004

JUSTICES BY YEAR

Official Advance Sheets

# Washington Reports

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# SUMMARY OF SUPREME COURT ISSUES

## MAY TERM 2005

(As of April 13, 2005)

The cases set for argument in this court's May 2005 term appear to present the issues classified and listed below. Hearing dates—which are subject to change—are shown parenthetically. If review is from a published Court of Appeals decision, that decision is cited.

Please note that the Justices have not reviewed or approved this list, and there can be no guarantee that the court's opinions will address these precise issues.

Attorneys who represent organizations wishing to file amicus curiae briefs are urged to move to do so as early as possible, so that amicus briefs and answers may be scheduled to permit full consideration by the court. *Please note that RAP 10.2(f) and RAP 10.6 now require amicus curiae briefs to be received by the court and counsel not later than 30 days before oral argument.*

These issue summaries also now appear on the internet. Readers are encouraged to check the following address periodically for updates:  
[http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/issues/](http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/)

Geoffrey Crooks,  
Supreme Court Commissioner

Steven M. Goff,  
Deputy Commissioner

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Administrative Law—Rules—Interpretive Rules—Agency Authority—  
Legal Effect

Whether the Washington Department of Revenue had either statutory or inherent authority to adopt rules interpreting sections of the tax code, and if so, whether the rules are nonbinding or have the force of law.

No. 75623-6, *Ass'n of Washington Bus. (petitioner) v. Dept of Revenue* (respondent). (5/17/05)  
121 Wn. App. 766 (2004)

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## Constitutional Law—Freedom of Speech—Prior Restraint

Whether an antiharassment order prohibiting petitioner from posting information on the internet about the low-income housing center where he formerly lived or about its staff or residents was an unconstitutional prior restraint on speech.

No. 75977-4, *In re Trummel* (petitioner) v. *Mitchell* (respondent); *Mitchell* (respondent) v. *Trummell* (petitioner). (6/23/05)

## Constitutional Law—Supremacy &amp; Commerce Clauses—Sovereign Immunity—Statutory Interpretation—Mixed Radioactive &amp; Nonradioactive Hazardous Waste

Whether the “Cleanup Priority Act,” enacted by the voters as Initiative 297 and codified as chapter 70.105E RCW, can be interpreted in various particulars so as to avoid either violating on its face the supremacy and commerce clauses of the U.S. Constitution or overstepping the United States’ waiver of sovereign immunity in the Resource Conservation and Recovery Act, 42 U.S.C. § 6961(a).

No. 76629-1, *United States* (plaintiff) v. *Hoffman* (defendant). (5/19/05)  
Certified Questions from U.S. District Court, Eastern District of Wash.

## Criminal Law—First Degree Driving While License Suspended or Revoked—Elements—Habitual Traffic Offender Status—Evidence—Sufficiency

Whether a Department of Licensing document stating that a defendant’s license has been “revoked in the first degree” is sufficient to support a conviction for first degree driving with a revoked license, which is committed by driving with a license that has been revoked because the driver was a habitual offender.

No. 75928-6, *State* (respondent) v. *Smith (Calvin)* (petitioner). (6/23/05)  
122 Wn. App. 699 (2004)

## Criminal Law—Former Jeopardy—Effect of Hung Jury

Whether a guilty verdict on a lesser-included offense, entered after the jury expressly deadlocks on the greater offense, bars retrial on the greater offense.

No. 75784-4, *State* (petitioner) v. *Linton* (respondent). (5/26/05)  
122 Wn. App. 73 (2004)

## Criminal Law—Homicide—Justifiable Homicide—Prevention of Felony

Whether the trial court erred by failing to instruct the jury that a homicide is justified if committed to prevent a robbery.

No. 72919-1, *State* (respondent) v. *Brightman* (petitioner). (see also Criminal Law—Trial—Right to Public Trial—). (6/9/05)  
112 Wn. App. 260 (2002)—(published in part)

## Criminal Law—Insanity—Confinement—Release from Confinement—Mental Disease or Defect

Whether a diagnosis that an insanity acquittee suffers from polysubstance abuse and a “personality disorder not otherwise specified,” coupled with a finding that she will become dangerous if released, constitutes sufficient grounds to deny her petition for unconditional release under chapter 10.77 RCW.

No. 75715-1, *State* (respondent) v. *Klein* (petitioner). (6/7/05)

## Criminal Law—Punishment—Sentence—Outside Standard Range—Validity

Whether, under *Blakely v. Washington*, \_\_ U.S. \_\_, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), a jury must decide whether the multiple offense policy of the Sentencing Reform Act results in a presumptive sentence that is too lenient, thus justifying an exceptional sentence, for a defendant whose offender score is greater than nine.

No. 75635-0 (cons. w/76195-7), *State* (respondent) v. *Brown* (petitioner); *Personal Restraint Petition of Brown*, Byron Lee Brown (petitioner); *State* (respondent) (see also Criminal Law—Search & Seizure—Vehicle Passenger—). (5/10/05)

## Criminal Law—Right to Assistance of Counsel—Effective Assistance of Counsel—Failure to Object to Jury Instruction

Whether counsel represented the defendant ineffectively by agreeing to instructions that lowered the victim age requirement of third degree rape to conform to evidence that the victim was younger than specified by the third degree rape statute.

No. 75830-1, *State* (respondent) v. *Smith (William)* (petitioner). (5/12/05)



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THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF PARAGRAPH NUMBERING )
FOR OPINIONS PUBLISHED IN THE )
WASHINGTON REPORTS )

ORDER

NO. 25700-B-447

The Supreme Court considered the matter of adding paragraph numbers to the opinions published in the Washington Reports and the Washington Appellate Reports at its November 4, 2004, en banc conference and unanimously agreed that the following order should be entered.

Now, therefore, it is hereby

ORDERED:

Beginning with the first opinion in 153 Wn.2d, Washington Reports advance sheets and bound volumes shall include sequential paragraph numbers for all Supreme Court opinions. Beginning with the first opinion in 124 Wn. App., Washington Appellate Reports advance sheets and bound volumes shall include sequential paragraph numbers for all Court of Appeals published opinions.

The paragraph numbers published in the Washington Reports and the Washington Appellate Reports are the official paragraph numbers for the case. Although the text of unpublished Court of Appeals opinions is not included in the Washington Appellate Reports, publishers of unpublished Court of Appeals opinions may include sequential paragraph numbers in accordance with the standards set forth in this order.

Each paragraph shall be numbered, starting with ¶1 in the majority opinion's first paragraph and proceeding sequentially through all paragraphs in all concurring and dissenting opinions.

The following format shall be used:

Precede each paragraph number with the paragraph symbol ("¶"). Indent the paragraph symbol one pica. Do not include a space between the paragraph symbol and the paragraph number. Do not surround the paragraph symbol and number with parentheses or brackets. Insert two spaces between the paragraph number and the first word of the paragraph. Example:

¶15 Xx xxxx xxx xxxxxx . . . .

When a paragraph is preceded by a boldface bracketed headnote number, proceed as follows: Indent one pica, boldface bracketed headnote number(s), two spaces, paragraph symbol, paragraph number, two spaces, first word of paragraph. Examples:

[1] ¶13 Xxx xxxxxx xxxxxx . . . .
[14-16] ¶104 Xx xxxxxxxx, xxxxxxxx . . . .

Paragraph numbers are added within typeset appendices and other addenda at the end of an

opinion but not within graphic material (e.g., photographs, diagrams, maps, charts).

Paragraph numbers are not added for the following opinion elements:

- footnotes
- headings (regardless of whether they include words or are no more than a number or a letter)
- indented block quotations
- numbered lists
- bulleted items

Paragraph numbers are not added for editorial material extraneous to the opinion, including:

signature lines at the end of an opinion; example:

Johnson, Madsen, Ireland, Owens, and Fairhurst, JJ., concur.

subsequent history lines at the end of an opinion; examples:

Motion for reconsideration denied September 30, 2003.

Review denied at 151 Wn.2d 1036 (2004).

bracketed opinion amendment statements preceding an opinion; example:

[As amended by order of the Supreme Court April 5, 2004.]

reporter's notes

When an indented block quotation is from a source that uses numbered paragraphs, the paragraph numbers from the source may be used in the citation to the source but are not included within the indented block quotation.

Pinpoint citations to Supreme Court and published Court of Appeals opinions are made as follows:

Before an opinion is published in the official reports, a pinpoint citation should be made to the slip opinion page or to a Westlaw "star page":

*Woodard v. Gramlow*, No. 22039-7-III, slip op. at 2 (Wash. Ct. App. July 8, 2004).

*Woodard v. Gramlow*, No. 22039-7-III, 2004 WL 1524714, at \*1 (Wash. Ct. App. July 8, 2004).

After an opinion is published in the official reports, a pinpoint citation should be made to page numbers in the official reports, to paragraph numbers from the official reports, or to both. Examples:

citation to page numbers in official reports:

*State v. Kilburn*, 151 Wn.2d 36, 51, 84 P.3d 1215 (2004).

*State v. Kilburn*, 151 Wn.2d 36, 51 n.6, 84 P.3d 1215 (2004).

citation to paragraph numbers in official reports:

*State v. Kilburn*, 151 Wn.2d 36, ¶ 18, 84 P.3d 1215 (2004).

*State v. Kilburn*, 151 Wn.2d 36, n.6, 84 P.3d 1215 (2004).

citation to page numbers and paragraph numbers in official reports:

*State v. Kilburn*, 151 Wn.2d 36, 51, ¶ 18, 84 P.3d 1215 (2004).  
*State v. Kilburn*, 151 Wn.2d 36, 51 n.6, 84 P.3d 1215 (2004).

Pinpoint citations to unpublished Court of Appeals opinions are made as follows:

If the source has paragraph numbers, a pinpoint citation should be made to the paragraph numbers; a Westlaw citation may be added but do not include a "star page" reference:

*Renz v. Dep't of Soc. & Health Servs.*, noted at 120 Wn. App. 1052, ¶¶ 18-23 (2004).  
*Renz v. Dep't of Soc. & Health Servs.*, noted at 120 Wn. App. 1052, ¶¶ 18-23, 2004 WL 629401.

If the source does not have paragraph numbers, a pinpoint citation should be made to the slip opinion page or to a Westlaw "star page":

*Edel v. Amway Corp.*, noted at 121 Wn. App. 1004, slip op. at 14 (2004).  
*Edel v. Amway Corp.*, noted at 121 Wn. App. 1004, 2004 WL 792331, at \*9.

When a court order adds one or more paragraphs to an opinion, the new paragraphs are indicated by using the paragraph number immediately preceding the addition followed by a lowercase letter. For example, two new paragraphs added after paragraph 17 are numbered ¶17a and ¶17b.

When a court order deletes one or more paragraphs from an opinion, the paragraph numbers are skipped and a bracketed statement explaining the deletion is added. Example when paragraphs 18 and 19 are deleted:

¶17 XXXXXXXX XXXXXXXX XXXX XX . . . .  
 [¶¶18, 19 deleted by order of the Supreme Court April 5, 2004.]  
 ¶20 Xxx xxxxxxxx xxxxxx . . . .

DATED at Olympia, Washington this 8th day of November 2004.

For the Court

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**CHIEF JUSTICE**

---

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# Exhibit D

## Office of Reporter of Decisions STYLE SHEET

*This style sheet is effective September 20, 2005 and is subject to revision.*

### GENERAL PRINCIPLES

1. The Eighteenth Edition of *The Bluebook: A Uniform System of Citation* is the basic citation resource for Washington appellate court opinions except as noted below.
2. Ignore the Bluepages sections and tables of the *Bluebook* (at 3-43 on light blue paper) except for (1) section B10, at 19-22 (court and litigation documents, a topic not covered elsewhere in the *Bluebook*) and (2) table BT.1, at 25-26 (abbreviations for court documents).
3. The latest edition of *The Chicago Manual of Style* is the authority for punctuation and style matters not covered by the *Bluebook*.
4. *Webster's Third New International Dictionary of the English Language* is the authority for spelling, including spacing and hyphens between nouns (e.g., boyfriend, girl friend, day care, baby-sitter). Where two or more spellings are listed, use *Webster's* preferred spelling rather than the variant.
5. For matters not covered by the *Bluebook*, *The Chicago Manual of Style*, or *Webster's*, the Office of Reporter of Decisions applies formal, traditional, noncolloquial English.

### ABBREVIATIONS

The following abbreviations are used for citing to primary Washington legal materials. The list replaces the list of abbreviations for Washington materials found in *Bluebook* table T.1, at 239.

TITLE	ABBREVIATION
Washington Constitution	Const. art. VI, § 1
Revised Code of Washington (Official)	RCW
Revised Code of Washington Annotated (West)	RCWA
Annotated Revised Code of Washington (LEXIS)	ARCW
Session Laws	Laws of 2002, ch. 107, § 3
special sessions	Laws of 1995, 2d Spec. Sess., ch. 14, § 21
extraordinary sessions	Laws of 1963, 1st Ex. Sess., ch. 26
Washington Reports, 1st & 2d Series	Wash.; Wn.2d
Washington Territory Reports	Wash. Terr.
Washington Appellate Reports	Wn. App.
Washington Administrative Code	WAC
Washington State Register	Wash. St. Reg.

#### Early Statutes

Ballinger Code	Bal. Code
Code of 1881	Code of 1881
Hill's Code of Procedure	Hill's Code of Proc.
Hill's General Statutes	Hill's Gen. Stat.
Pierce's Code	Pierce's Code
Remington's Revised Statutes	Rem. Rev. Stat.
Remington's 1915 Code	Rem. 1915 Code

Note: In citations, "Const.," "Laws," and the names of codes are printed in the official reports in large and small caps, but ordinary typeface is acceptable in manuscript opinions. In text, both the official reports and manuscript opinions use ordinary typeface.

## EXCEPTIONS TO BLUEBOOK

1. Exception to *Bluebook* rules 2.1 & 2.2, at 54-57: Ignore rules about using roman type for case names. Case names should be in italics no matter where or how they are used.
2. Exception to *Bluebook* rule 5.3(b)(iv) at 71: The deletion of matter after the final punctuation of a sentence may be indicated by a three-dot ellipsis.
3. Exceptions to *Bluebook* rule 6.2(a) at 73-74: In text, spell out numbers zero to nine. Use arabic numerals for higher numbers. Use commas in numbers 1,000 and higher (e.g., 9,876) except when citing a page number in a case or court document.
4. Exception to *Bluebook* rule 6.2(d) at 74: In text, always write out "percent" rather than using a percentage sign (%).
5. Exception to *Bluebook* rule 8, at 76-78: Ignore this section. The Reporter's Office generally follows *The Chicago Manual of Style* to resolve capitalization issues although, other than capitalizing proper nouns and maintaining consistency throughout the opinion, the judicial author's preference governs.
6. Exception to *Bluebook* rule 10.2.1(a) at 82: When a case has both an adversary and a nonadversary name, cite to the first case name in the official reports caption only.
7. Exception to *Bluebook* rule 10.3.1, at 86-87 and table T.1: Cite official reports and regional reporters for all cases for which official reports are published. For California, Illinois, and New York, include the state specific reporter (Cal. Rptr. 3d, Ill. Dec., N.Y.S.2d) in addition to the official reports and regional reporters. For Washington cases, pinpoint citations are made to Wn.2d or Wn. App. pages, paragraph numbers, or both; pinpoint citations to P., P.2d, or P.3d pages are optional; pinpoint citations should not be made to P.3d paragraph numbers. For non-Washington cases, pinpoint citations are made to the official report or the unofficial report. Maintain consistency throughout the opinion.
8. Exception to *Bluebook* rule 10.7.1(c) at 93-94: "Overruled by" (or "abrogated by") is appropriate when a case explicitly repudiates (or effectively overrules or departs from) an earlier decision of a lower court as well as an earlier decision of the same court.
9. Exception to *Bluebook* rule 12.3.2, at 105-06: Do not add the year in parentheses after a citation to a presently effective version of a statute or code.
10. Exception to *Bluebook* rule 12.8.2, at 110: Do not add "Wash." for codes and ordinances of Washington local governments. Do not add the year in parentheses after a citation to a presently effective version of a local code or ordinance.
11. Exception to *Bluebook* table T.1, at 193: Cite United States Supreme Court cases as follows:  
\_\_ U.S. \_\_, \_\_ S. Ct. \_\_, \_\_ L. Ed. or L. Ed. 2d \_\_ (year).

## ADDITIONS TO BLUEBOOK

1. Subsequent history of cases. For *review denied* and *review granted* of Washington cases, cite to Wash. or Wn.2d; citing P., P.2d, or P.3d in addition to Wash. or Wn.2d is optional. For non-Washington cases, cite to the regional reporter; citing the official report in addition to the regional reporter is optional. For *cert. granted* or *cert. denied* in the United States Supreme Court, cite only to U.S. if therein; otherwise, cite to one of the following: S. Ct., L. Ed. or L. Ed. 2d, or U.S.L.W. in that order of preference. When subsequent history results in an opinion (such as *aff'd*, *rev'd*, *vacated*, *overruled by*, and *abrogated by*), use a full case cite.
2. Add the following to the list of short citations to cases from the *Bluebook* rule 10.9(a)(i) at 98: *Smith*, 123 Wn.2d 51.
3. When a case is amended and has a single Wn.2d or Wn. App. citation but two Pacific Reporter citations, cite as follows: *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 882 P.2d 703, 891 P.2d 718 (1994). Use the year that the opinion was filed, not the year of the amendment.

**STATE OF WASHINGTON  
OFFICE OF THE REPORTER OF DECISIONS**

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PO Box 40929  
Olympia, WA 98504-0929**

**REQUEST FOR PROPOSALS  
RFP0701**

**APPENDIX E  
OPINION FOR SAMPLE ADVANCE SHEET**

**FILED**

MAY 04 2006

In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STEVEN CORK, a single man, LISA	)	No. 23228-0-III
BRIGMAN, a single woman,	)	
	)	
Appellants,	)	Division Three
	)	
v.	)	
	)	
WASHINGTON STATE LIQUOR	)	
CONTROL BOARD, and STATE OF	)	<b>PUBLISHED OPINION</b>
REVENUE and THE STATE OF	)	
WASHINGTON,	)	
	)	
Respondents.	)	

**BROWN, J.**—Steven Cork and Lisa Brigman appeal the trial court’s summary judgment dismissal of their petition for return of tobacco products and certain personal property seized by the State as contraband. We reject their constitutional, statutory, and exemption contentions involving Ms. Brigman’s Indian status, and affirm.

**FACTS**

On January 14, 2004, Trooper Joe Pass stopped a van traveling westbound on Interstate 90 for a traffic violation. Trooper Pass had been given a description of a white van suspected of transporting untaxed cigarettes from Idaho, which matched the vehicle. Trooper Pass questioned the driver, Steven Cork, about cardboard boxes in

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the back of the van. Allegedly, Mr. Cork admitted he was transporting untaxed cigarettes. Trooper Pass arrested Mr. Cork and impounded the van.

Pursuant to a search warrant, the Washington State Liquor Control Board (Board) found 30,600 assorted packs of unstamped, untaxed cigarettes. The Board seized the van and cigarettes, and notified Mr. Cork and Lisa Brigman (the owner of the van) the property would be forfeited.

Mr. Cork and Ms. Brigman filed a petition in Spokane County Superior Court to recover the seized property. When deposed, Mr. Cork and Ms. Brigman refused to answer any questions about the shipment, based on the Fifth Amendment. However, according to Ms. Brigman's briefing at the trial court, she is a member of the Spokane Tribe and has an American Indian business license. According to Ms. Brigman, the cigarettes were in route from Plummer, Idaho to the Spokane Indian Reservation at the time of the stop.

The Board filed a CR 12(b)(6) motion to dismiss the petition. The court granted the Board's motion on all issues, except whether chapter 82.24 RCW violates the Commerce Clause. The Board successfully moved for summary judgment on that remaining issue. Mr. Cork and Ms. Brigman appeal.

#### ANALYSIS

The issue is whether the court erred in granting summary judgment dismissal of Mr. Cork's and Ms. Brigman's petition for the return of the alleged contraband seized by the State. Mr. Cork and Ms. Brigman contend the property is not contraband because, as an Indian, the statutory scheme does not apply to Ms. Brigman in view of federal law

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and constitutional principles. Alternatively, they contend that if state law does apply, Ms. Brigman is entitled to an exemption.

Summary judgment is appropriate when "the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." CR 56(c); *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Our inquiry is the same as the trial court when reviewing summary judgment issues. *See id.* The facts and reasonable inferences from the facts are viewed in the light most favorable to the nonmoving party. *See Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). Questions of law are reviewed de novo. *Id.*

Washington imposes an excise tax on all cigarettes sold, used, consumed, handled, possessed or distributed within the state. RCW 82.24.020. The State collects the tax through the sale of cigarette stamps, which must be "affixed on every package of cigarettes" implicated by RCW 82.24.020. RCW 82.24.030(2).

Mr. Cork's and Ms. Brigman's main contention is that Washington's cigarette tax, as applied to Indians, is contrary to federal and constitutional law. They contend federal law prevents the State from taxing Indians, the tax is an impermissible burden on interstate and Indian commerce, differing treatment of military cigarette sales violates equal protection and state privileges and immunities guarantees, and the tax violates the State's constitutional guarantee of uniform taxation.

States lack the power to tax Indian tribes, Indian reservation lands or tribal members residing on Indian reservations without federal statutory authority. *County of*

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*Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 258, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992). This state does not have a grant of federal authority to tax on-reservation activities. See 4 U.S.C. § 109; see also WAC 458-20-192(5) (recognizing that the State may not tax Indians or Indian tribes in Indian country). Accordingly, Washington's cigarette excise tax scheme does not apply to Indians purchasing or selling cigarettes on the reservation of a tribe of which they are enrolled members. RCW 82.24.040, .900. However, non-Indians and non-tribal Indians, those not enrolled with the tribe where they are doing business, must pay tax on cigarette retail sales on reservations. WAC 458-20-192(2)(a), (5). And, off-reservation activities are subject to taxation. See RCW 82.24.040, .900.

Washington's cigarette excise tax scheme has been upheld by the United States Supreme Court. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 139, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980), several Indian tribes challenged Washington's imposition of a cigarette tax on non-member Indians and non-Indians. The Court upheld the tax: "Federal statutes, even given the broadest reading to which they are reasonably susceptible, cannot be said to pre-empt Washington's power to impose taxes on Indians not members of the Tribe." *Id.* at 160-61. This type of tax is valid so long as the incidence of the tax does not fall on members of the Indian tribe where the sales are taking place. *Id.* at 159.

Mr. Cork and Ms. Brigman argue *Colville* is no longer good law in view of statutory changes. However, because the current version of the statutory scheme does not impose a tax on member Indians, it remains valid under federal law. See *Nevada v.*

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*Hicks*, 533 U.S. 353, 362, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001); *Oklahoma Tax Comm'n v. Citizen Band Potawatami Indian Tribe of Oklahoma*, 498 U.S. 505, 512, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991); *United States v. Baker*, 63 F.3d 1478 (9th Cir. 1995); *Bercier v. Kiga*, 127 Wn. App. 809, 820, 103 P.3d 232 (2004), *review denied*, 155 Wn.2d 1015 (2005). For example, Ms. Brigman's Indian status does not prevent the State from imposing an excise tax on her activities off-reservation. See *Colville*, 447 U.S. at 159-61.

Mr. Cork and Ms. Brigman broadly assert Washington's cigarette excise tax violates the Commerce Clause. The Commerce Clause, article I, section 8, Clause 3 of the United States Constitution, limits the power of the states to impose substantial burdens on interstate commerce. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87-88, 104 S. Ct. 2237, 81 L. Ed. 2d 71 (1984). A state law impermissibly burdens interstate commerce if it facially discriminates against interstate commerce in favor of state economic interests. *State v. Heckel*, 143 Wn.2d 824, 832, 24 P.3d 404 (2001). If the statute is facially neutral, the benefits must be balanced against the burdens on interstate commerce. *Id.* Where a legitimate public interest exists, the statute "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 832-33 (quoting *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970)).

Chapter 82.24 RCW does not openly discriminate against interstate commerce in favor of Washington state interests; the statute applies evenly to in-state and out-of-state transactions. Further, the statutes promote a legitimate state interest, the

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generation of revenue. As argued by the Board, the burden on interstate commerce is minimal, because the tax burden always falls on the consumer.

Without analysis, Mr. Cork and Ms. Brigman assert the Indian Commerce Clause (U.S. CONST. art. I, § 8, cl. 3) is violated. State taxes which discriminate against Indian commerce are invalid. *Dep't of Fisheries v. De Watto Fish Co.*, 100 Wn.2d 568, 572, 674 P.2d 659 (1983). The Commerce Clause does not bar all state taxation of matters touching the economic interests of Indian tribes, but it prohibits undue discrimination against, or burdens on, Indian commerce. *Colville*, 447 U.S. at 159-61. Here, Washington's tax scheme does not unduly burden or discriminate against Indian commerce because the incidence of the tax is on non-Indian or non-tribal Indian consumers. *See id.*

Mr. Cork and Ms. Brigman argue Washington's cigarette excise tax statutes violate equal protection principles by exempting transactions on military bases but not Indian reservations. While the United States Supreme Court has upheld taxes for on-reservation cigarette sales to non-Indians or non-tribal Indians, it has specifically prohibited state taxes on cigarettes sold to federal instrumentalities, like military bases. *See Colville*, 447 U.S. at 160; *Hancock v. Train*, 426 U.S. 167, 178-79, 96 S. Ct. 2006, 48 L. Ed. 2d 555 (1976). Washington's tax scheme simply recognizes this prohibition. For these reasons, the Ninth Circuit has specifically rejected an identical equal protection argument. *See Baker*, 63 F.3d at 1490-91.

Mr. Cork and Ms. Brigman argue a violation of the Washington State Constitutional guarantee of equal privileges. Under article I, section 12, "[n]o law shall

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be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." Apparently, this argument is also based on the exemption of military base transactions from the cigarette tax scheme. However, as discussed, the State is prohibited from taxing federal instrumentalities. *Hancock*, 426 U.S. at 178-79.

Mr. Cork and Ms. Brigman assert the uniform taxation requirements of Article VII, section 1 of the Washington State Constitution are offended. Taxes must be uniformly applied to the same class of property so that the burdens of taxation are uniformly distributed. *Bond v. Burrows*, 103 Wn.2d 153, 157, 690 P.2d 1168 (1984). However, the uniformity requirement does not apply to excise taxes, such as Washington's cigarette tax. See *Black v. State*, 67 Wn.2d 97, 100, 406 P.2d 761 (1965).

Without sufficient analysis, Mr. Cork and Ms. Brigman contend chapter 8.24 RCW conflicts with the Treaty of Medicine Creek, the Treaty of Point Elliot, and the Yakima Treaty. However, Mr. Cork and Ms. Brigman fail to demonstrate how any of these treaties preclude the State from imposing a cigarette excise tax on the off-reservation activities of non-licensed wholesalers. The *Colville* Court specifically rejected a claim that Washington's excise tax scheme was preempted by these treaties. See *Colville*, 447 U.S. at 156.

In sum, Mr. Cork and Ms. Brigman fail to persuade us that Washington's tax scheme is invalid as applied to Indians generally. Accordingly, we shift our focus to their alternative contention that unresolved genuine fact issues remain as to whether Mr. Cork qualifies for statutory exemptions.

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A Washington licensed wholesaler may possess unstamped cigarettes for a reasonable time to affix the stamps. RCW 82.24.040(2)(b), .260(1). And, a Washington licensed wholesaler who pays a surety bond may possess extra "stock" to conduct business. RCW 82.24.040(2)(b). Ms. Brigman argues she is a licensed wholesaler. However, the statute exempts wholesalers licensed in Washington. RCW 82.24.040, .260(1). Even when viewed in the light most favorable to Mr. Cork and Ms. Brigman, the facts merely show she has an American Indian business license; this is not a Washington state cigarette wholesaler's license.

Ms. Brigman cites cases she says support her contention the State cannot require her to obtain a cigarette wholesaler's license. However, the cited cases do not support her position. See *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976) (holding an *on-reservation* vendor license fee to be impermissible); *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) (challenge to truck license and overweight permit fees).

Further, the statutes exempt sales by Indian tribal organizations to enrolled members of the tribe from the stamping requirements. Mr. Cork and Ms. Brigman contend Ms. Brigman is an Indian tribal organization. An Indian tribal organization is statutorily defined as "a federally recognized Indian tribe, or tribal entity, and includes an Indian wholesaler or retailer that is owned by an Indian who is an enrolled tribal member conducting business under tribal license or similar tribal approval within Indian country." RCW 82.24.010(3). Ms. Brigman alleges she is a member of the Spokane Indian tribe. However, Ms. Brigman does not show she was conducting business under tribal license

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or approval or in Indian country. Thus, this exemption does not apply as a matter of law.

The statutes exempt the transportation of unstamped cigarettes by a licensed wholesaler in the wholesaler's own vehicle (RCW 82.24.250(1)(a)), or any individual who has given advance notice to the Board (RCW 82.24.250(1)(b)). Mr. Cork and Ms. Brigman are not licensed wholesalers in Washington. They did not give any notice to the Board. As a matter of law, Mr. Cork and Ms. Brigman do not qualify for this exemption. See also RCW 82.24.500.

While Mr. Cork and Ms. Brigman argue the RCW 82.24.250 notification requirements are unconstitutionally vague, they never attempted to give the Board notification of the shipment. They have repeatedly asserted they were not required to give notice. Under the circumstances, they do not have standing to challenge its legality. See *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (standing requires an interest within the zone of interests being regulated and that the challenged action caused an "injury in fact.").

In sum, Mr. Cork and Ms. Brigman possessed, transported and intended to sell non-exempt, unstamped cigarettes. Thus, the seized cigarettes are contraband subject to forfeiture. See RCW 82.24.130(1)(a), (1)(b). A court may refuse to return seized property if it is contraband or subject to forfeiture by statute. *State v. Alaway*, 64 Wn. App. 796, 798, 828 P.2d 591 (1992). The cigarettes and other seized property were, under these facts, therefore, subject to statutory forfeiture.

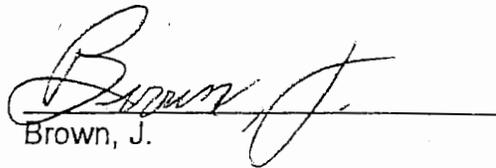
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*Cork, et al v. Washington State Liquor Control Board*

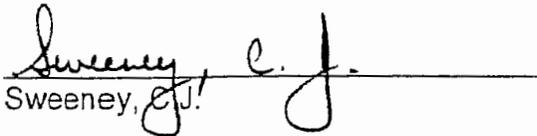
We hold the trial court did not err in granting the Board's motion for summary judgment.

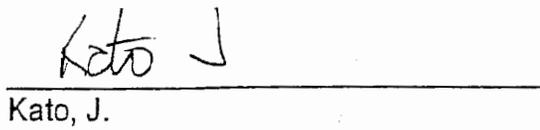
Affirmed.

~~A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.~~

  
Brown, J.

WE CONCUR:

  
Sweeney, C.J.

  
Kato, J.

Court of Appeals Division Three  
State of Washington

Opinion Information Sheet

Docket Number: 23228-0-III  
Title of Case: Steven Cork, et al v. Washington State Liquor  
Board, et al  
File Date: 05/04/2006

SOURCE OF APPEAL

Appeal from Superior Court of Spokane County  
Docket No: 04-2-00418-1  
Judgment or order under review  
Date filed: 07/27/2004  
Judge signing: Hon. Kathleen M O'Connor

JUDGES

Authored by Stephen M Brown  
Concurring: Dennis J. Sweeney  
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