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Supreme Court No. 85608-7

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

DARRIN LOUTHAN,

Petitioner.

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SUPPLEMENTAL BRIEF OF PETITIONER

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ORIGINAL

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## A. INTRODUCTION

Petitioner Darrin Louthan's car was searched without a warrant after he was in custody and secured in the back of a patrol car. Louthan did not pose a threat to officer safety, and there was no concern at the time the search was conducted that the vehicle contained evidence of the crime of arrest that could be concealed or destroyed. This case is therefore controlled by State v. Snapp, 174 Wn.2d 177, 275 P.3d 289 (2012). The evidence discovered during the search must be suppressed, and Louthan's conviction reversed.

In its published opinion below, the Court of Appeals majority displayed astonishing contempt for this Court's primacy in deciding matters of state law and setting precedent. Rather than follow this Court's precedents, they pronounced them "dicta," "unworkable," and not "fully justif[ied]." The court found that Louthan waived his challenge to the search, and that the search in any event was justified by "exigent circumstances" that were not supported by the record, and never argued by the State.

Louthan asks this Court to reverse the Court of Appeals and hold that (1) the Court of Appeals' refusal to follow this Court's controlling decisions was contrary to principles of *stare decisis* and its constitutional mandate; and (2) the warrantless search of Louthan's car lacked authority

of law under Snapp. Should this Court choose to reach these additional issues, this Court should also hold that MMC 8.22.040 conflicts with and is preempted by state law, and is therefore unconstitutional, and that probable cause did not otherwise exist for Louthan's arrest. Finally, in light of article I, section 7's unique protection of individual privacy, this Court should also reaffirm its "nearly categorical" exclusionary rule.

B. ISSUES PRESENTED FOR REVIEW

1. Must the Court of Appeals follow this Court's precedent?
2. Was the warrantless search incident to Louthan's arrest, conducted after Louthan had been arrested and secured in the back of a police car, unconstitutional under State v. Snapp, 174 Wn.2d 177, 275 P.3d 289 (2012), and unjustified by any exception to the warrant requirement?
3. Article 11, section 11 prohibits local authorities from enacting laws that conflict with state laws. In the Uniform Controlled Substances Act ("UCSA" or "the Act"), the Legislature preempted the field of setting penalties for violations of the Act and barred local authorities from enacting laws that are not consistent with the provisions of the Act. The UCSA does not prohibit the possession of drug paraphernalia and this Court has held that this conduct may not support an arrest. Is MMC 8.22.040, which criminalizes the possession of drug paraphernalia,

preempted by state law and unconstitutional under article 11, section 11?

Was Louthan's arrest for a violation of this ordinance invalid?

4. Division Two created a post hoc justification for the arrest that was not relied upon by the arresting officer and not investigated until after Louthan was arrested. Should this Court hold that Louthan's arrest was not supported by probable cause?

5. Article I, section 7 requires authority of law for any invasion of privacy. Should this Court reaffirm that the "authority of law" requirement precludes courts from creating post hoc justifications for arrests where those reasons were neither relied upon nor investigated by law enforcement? Is this practice unfair to litigants, who have not had the opportunity to argue the issue below, and contrary to the judiciary's duty to uphold the constitution?

6. Should this Court reject and disavow Division Two's efforts to dilute article I, section 7's "nearly categorical" exclusionary rule?

### C. STATEMENT OF THE CASE

#### 1. Louthan's arrest and illegal search.

On December 12, 2007, Montesano police officer D. Hayden was stationed at Highway 107 and Main Street. CP 11. A part of Highway 107 had been closed due to flooding and high water. *Id.* At approximately 10:30 p.m., Hayden saw a car approach him from the

closed area. Hayden stopped the vehicle and asked the driver, petitioner Darrin Louthan, where he had come from. Id. Louthan admitted that he had driven around a barricade and on the closed portion of the road, but stated he had been living in the area “for years” and did that “all the time.” Id.

Louthan provided Hayden with his driver’s license and a bill of sale establishing the vehicle was his. Id. When asked for his proof of insurance, however, he handed Hayden his 2006 tax return. Id. Hayden noted that Louthan’s speech was slurred and his pupils constricted, and that his eyes did not fluctuate when shined with a flashlight. Id. Louthan did not smell of intoxicants and denied drinking. CP 11, 13. Hayden believed that Louthan was under the influence of controlled substances, but he did not investigate this potential offense.<sup>1</sup> Instead he returned to his vehicle to prepare citations for traffic infractions. Id.

Hayden approached Louthan from the driver’s side to issue the citations while a second officer, D. Blundred, approached from the passenger’s side. CP 11. From his vantage point Blundred observed a small plastic jug with a hose sticking out of it, which was attached with electrical tape. CP 11, 13. Blundred believed the item to be drug

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<sup>1</sup> A “drug recognition expert” arrived at the scene only after Louthan’s arrest, and that officer (Washington State Patrol Trooper Stewart) processed Louthan for DUI. CP 12.

paraphernalia and notified Hayden of this. CP 13. Hayden directed Louthan to exit the vehicle and arrested him for possession of drug paraphernalia, contrary to Montesano Municipal Code (MMC) 8.22.040. CP 11. After searching Louthan's person, he secured him in his patrol car. Id. He and Blundred then searched Louthan's vehicle incident to his arrest, discovering, *inter alia*, three small bindles of methamphetamine.

2. Trial court and appeals proceedings.

Louthan was charged in Grays Harbor Superior Court with possession of methamphetamine. He moved for suppression pursuant to CrR 3.6, arguing that his arrest was unlawful because MMC 8.22.040 conflicts with and is therefore preempted by the UCSA, and consequently that the search incident to his arrest was also improper. CP 6-9. The trial court declined to reach the merits of Louthan's preemption claim, and instead ruled that the police had probable cause to arrest him for use of drug paraphernalia. RP 8-9; CP 16-17. Louthan was convicted as charged following a stipulated facts trial, and appealed.

While Louthan's appeal was pending, the Supreme Court issued its opinion in Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), and this Court decided State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009), and State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1326 (2009). Division Two requested supplemental briefing from the parties on

those decisions. A majority of the court ultimately issued an opinion expressly repudiating a number of this Court's controlling decisions. Like the trial court, the court did not reach the merits of Louthan's preemption argument, but contrived yet a third reason for Louthan's arrest, i.e., the DUI that was only investigated after Louthan was in custody. Having rationalized the arrest, the court then found the search of the car incident to Louthan's arrest lawful by applying an exigent circumstances theory neither articulated below nor argued by the State, and not supported by the record. This Court has granted review.

D. ARGUMENT

1. **All lower courts must follow this Court's decisions.**

"Once this Court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by this court." State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Even if the Court of Appeals disagrees with this Court's precedents, it is not at liberty to depart from them. State v. Hairston, 133 Wn.2d 534, 539, 946 P.2d 397 (1997); see also In re Heidari, 174 Wn.2d 288, 293, 274 P.3d 366 (2012) ("even if we had not cited authority for our holding, the Court of Appeals is not relieved from the requirement to adhere to it").

As is extensively discussed in Louthan's petition for review<sup>2</sup> and elaborated in arguments 2 and 4, *infra*, in Division Two's published opinion, the court criticized and refused to follow at least four controlling decisions from this Court, including State v. Tibbles, 169 Wn.2d 364, 236 P.3d 885 (2010); State v. Afana, 169 Wn.2d 169, 233 P.3d 879 (2010); State v. Buelna Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009); and Winterstein. In its opinion in this case, this Court should reiterate the importance of *stare decisis* to the rule of law and remind Division Two that it is bound to follow this Court's precedents.

**2. The warrantless search of Louthan's car when he was handcuffed in the back of a patrol car was contrary to *Snapp* and cannot be salvaged under an "open view" or "exigent circumstances" theory.**

This Court's recent decision in Snapp establishes that the search of Louthan's car "incident to" his arrest, after he had already been handcuffed and placed in the back of Hayden's patrol vehicle, violated article I, section 7.

a. The search of Louthan's car was unlawful under *Snapp*.

Washington does not recognize the Fourth Amendment's "automobile exception" to the warrant requirement. Snapp, 174 Wn.2d at 192; Patton, 167 Wn.2d at 386 n. 4. Thus, in Washington, a search of a

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<sup>2</sup> Pet. at 1-3, 6-14.

vehicle incident to the arrest of a recent occupant is unlawful “absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search.” Snapp, 174 Wn.2d 190; Patton, 167 Wn.2d at 395; accord Afana, 169 Wn.2d at 175-76. Where these concerns are not present, a warrantless search of a vehicle is unconstitutional.

“[W]hen a search can be delayed to obtain a warrant without running afoul of” concerns for the safety of the officer or to preserve evidence of the crime of arrest from concealment or destruction by the arrestee” (and does not fall within another applicable exception), the warrant must be obtained.

Snapp, 174 Wn.2d at 195 (quoting Buelna Valdez, 167 Wn.2d at 773, emphasis in Snapp).

Here, the search was conducted after Louthan was placed in custody and secured in the back of Hayden’s patrol car. It was not justified by concerns for officer safety or preservation of evidence, and was unconstitutional.

b. Neither “open view” nor the “exigent circumstances” exception to the warrant requirement authorized the search.

Division Two acknowledged that Louthan was safely in custody when the search was conducted. State v. Louthan, 158 Wn. App. 732, 739, 242 P.3d 954 (2010). The Court nevertheless concluded the officers

were entitled to seize the “bong” because it was in “open view,” and that exigent circumstances, specifically, “natural disasters, such as possible flash floods, lahars, or tsunamis,” entitled the officers to enter the vehicle and conduct a warrantless search. Id. at 746-47.

As dissenting Judge Bridgewater properly found, while the “bong” may have been in open view, this fact did not justify its seizure without a warrant. Louthan, 158 Wn. App. at 754-55 (Bridgewater, J., dissenting); Tibbles, 169 Wn.2d at 369 (“Probable cause is not a recognized exception to the warrant requirement, but rather the necessary basis for obtaining a warrant”).

Further, and again as Judge Bridgewater emphasized, “[t]he record contains no evidence” to support the exigent circumstances exception to the warrant requirement. Louthan, 158 Wn. App. at 755 (Bridgewater, J., dissenting). The exigent circumstances exception applies only where “obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence.” Tibbles, 169 Wn.2d at 370 (setting forth nonexclusive list of circumstances that could, under the totality of the circumstances, be termed exigent).

Here, the record is simply devoid of facts to support a finding that the search was justified by exigent circumstances. Perhaps for this reason,

the State never advanced this theory in the trial court, court of appeals, or in its supplemental brief to this Court.<sup>3</sup>

There was no evidence that Hayden was “monitoring the closed road and surrounding area because of ongoing public safety concerns related to the flooding and high water,” as asserted by the Division Two majority. Louthan, 158 Wn. App. at 747. Rather, Hayden was monitoring the closure in his normal capacity as a traffic officer. CP 11.<sup>4</sup>

As Judge Bridgewater noted, Louthan was not driving on the closed portion of the road when he was stopped. Louthan, 158 Wn. App. at 755 n. 13 (Bridgewater, J., dissenting); CP 11 (“The direction that the vehicle came from was an area that was closed ...”). There was no indication in either Hayden or Blundred’s report of a risk of “natural disasters,” such as flash floods, let alone lahars or tsunamis.<sup>5</sup>

Further undermining any claim that obtaining a warrant to seize the “bong” was impracticable due to impending “natural disasters,” Louthan

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<sup>3</sup> Rather than defend the Court of Appeals’ exigent circumstances theory, the State devotes its supplemental brief to arguing that Snapp was wrongly decided and, despite this Court’s opinion in State v. Robinson, 171 Wn.2d 292, 253 P.3d 84 (2011), that Louthan’s challenge to the search incident to his arrest is waived because he did not make this specific argument below. See State’s supplemental brief at 2-6.

<sup>4</sup> The reference in Hayden’s report to the barricades and cones on the roadway appears to have been included for the purpose of demonstrating that Louthan knowingly drove on a closed road. See CP 11.

<sup>5</sup> As noted in Louthan’s petition for review, there have been no lahars or tsunamis in Washington for several hundred years. Pet. at 12 n. 1.

was processed by the DRE officer for DUI at the scene. CP 12.

Meanwhile, the officers conducted an exhaustive search of Louthan's vehicle. CP 12, 14. Surely if the officers were so concerned about flash floods as to seize Louthan's "bong" from his car without the modest inconvenience of obtaining a warrant, they would have hastened to leave the scene. In short, the Court of Appeals majority's determination that "exigent circumstances" existed makes a mockery of the exception and guts the warrant requirement. The evidence should have been suppressed.

c. Robinson forecloses Division Two's waiver theory.

To the extent that Division Two determined Louthan waived his challenge to the search because it was not raised below, this too is precluded by this Court's decisions. State v. Robinson, 171 Wn.2d 292, 305-06, 253 P.3d 84 (2011) (the "failure to invoke the right [to suppression of evidence obtained during a warrantless vehicle search incident to an arrest] prior to its existence [is] not knowing, intelligent, and voluntary"). Louthan appeared in court in 2008, prior to the decisions in Gant, Patton, Buelna Valdez, Afana, and Snapp. As in Robinson, his failure to specifically litigate the propriety of his search during the CrR 3.6 hearing did not waive the right.

d. Remand for further fact-finding would be inappropriate.

In both of the consolidated cases in Robinson, the defendants did not bring a motion to suppress evidence. Robinson, 171 Wn.2d at 298, 300. This Court concluded that “because neither the petitioners nor the State had the incentive or opportunity to develop the factual record before the trial court,” the “appropriate remedy” was remand for further fact-finding. Id. at 306.

In this case, by contrast, Louthan filed a CrR 3.6 motion. In the motion, Louthan specifically argued, “[b]ecause the arrest was unlawful the search incident to arrest was unlawful.” CP 9. Rather than present live testimony, the parties stipulated to the police reports for purposes of the hearing. CP 15. As dissenting Judge Bridgewater correctly noted, Louthan’s motion to suppress “generated a record sufficient ... to determine whether the search was unlawful.” Id. at 753. This Court should conclude that remand for further factfinding is unnecessary.

**3. MMC 8.22.040, permitting arrest, prosecution, and punishment for possession of drug paraphernalia, is preempted by and conflicts with state law, and could not have supported Louthan’s arrest.**

This Court can resolve this case under Snapp without reaching any other issues presented for review. See Washington State Farm Bureau Federation v. Gregoire, 162 Wn.2d 284, 307, 174 P.3d 1142 (2007) (“Principles of judicial restraint dictate that if resolution of an issue

effectively disposes of a case, [this Court] should resolve the case on that basis without reaching any other issues that might be presented””) (citations omitted). If this Court nevertheless decides to reach the question of whether Louthan’s arrest was lawful, this Court should conclude that MMC 8.22.040 conflicts with and is preempted by state law, that probable cause did not otherwise exist for Louthan’s arrest, and that Division Two’s invention of a new reason for the arrest that was not investigated by the officers is contrary to State v. Moore, 161 Wn.2d 880, 885, 169 P.3d 469 (2007) and Robinson, and undermines article I, section 7’s requirement of authority of law.

- a. Article 11, section 11 prohibits local authorities from enacting laws that conflict with general laws.

Under article 11, section 11 of the Washington Constitution, counties, cities, town, and townships may only enact and enforce “such local police, sanitary and other regulations as are not in conflict with general laws.” Const. art. 11, § 11. Interpreting this section, this Court has held:

In determining whether an ordinance is in ‘conflict’ with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa. . . . Judged by such a test, an ordinance is in conflict if it forbids that which the statute permits.

City of Bellingham v. Schampera, 57 Wn.2d 106, 111, 356 P.2d 292

(1960).

“An ordinance must yield to a statute on the same subject ... if the statute preempts the field, leaving no room for concurrent jurisdiction, or if a conflict exists between the two that cannot be harmonized.” City of Tacoma v. Luvene, 118 Wn.2d 826, 833, 827 P.2d 1374 (1992).

b. MMC 8.22.040 is preempted by and conflicts with the UCSA.

RCW 69.50.608, entitled, “State Preemption,” states:

The state of Washington fully occupies and preempts the entire field of setting penalties for violations of the controlled substances act. Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to controlled substances that are consistent with this chapter. Such local ordinances shall have the same penalties as provided for by state law. Local laws and ordinances that are inconsistent with the requirements of state law shall not be enacted and are preempted and repealed...

RCW 69.50.608.<sup>6</sup>

This Court construed this statute in Luvene and discerned a legislative intent to accord “some measure of concurrent jurisdiction to municipalities,” provided that local laws are consistent with the UCSA. 118 Wn.2d at 834. On this basis, this Court declined to find Tacoma’s drug loitering ordinance, which prohibited the same conduct as state criminal statutes, was preempted by the UCSA. Id. at 835; cf., also, State

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<sup>6</sup> Copies of pertinent statutes and MMC 8.22.040 are attached as Appendix A.

v. Kirwin, 165 Wn.2d 818, 826-27, 203 P.3d 1044 (2009) (finding no violation of article 11, section 11 where local littering ordinance was “nearly identical” to state statute and Legislature did not express an intent to preempt the field).

In City of Seattle v. Williams, 128 Wn.2d 341, 908 P.2d 359 (1995), this Court struck down a Seattle DUI ordinance that permitted arrest and prosecution for a lower blood alcohol level than state law, finding the ordinance contravened the legislative directive that traffic laws be uniform statewide: “the offense as defined by the local jurisdiction’s ordinance is ... not uniformly applied throughout the state because that ordinance is applied only within the jurisdiction’s boundaries and not beyond its geographic limits.” 128 Wn.2d at 351.<sup>7</sup> In so holding, this Court appraised the “mischief” wrought upon a hypothetical driver who would be confronted with potentially different DUI standards in each jurisdiction. Id. This Court noted, “[o]ne can easily imagine the problems that such balkanization of our traffic laws would cause motorists[.]” Id.

In State v. Fisher, 132 Wn. App. 26, 130 P.3d 382, review denied, 158 Wn.2d 1021 (2006), purporting to apply Luvene, Division One concluded that Snohomish County’s provision criminalizing the

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<sup>7</sup> This Court did not reach the article 11, section 11 challenge raised by Williams, because the case was resolved on statutory grounds,

possession of drug paraphernalia with intent to use, SCC 10.48.020, was not preempted by RCW 69.50.608. Id. at 31 (“RCW 69.50.608 preempts only the setting of penalties for acts that violate the Act”). The Court then reasoned that the ordinance was neither inconsistent with nor in conflict with RCW 69.50.412, asserting, “RCW 69.50.412(1) does not forbid possession of drug paraphernalia with intent to use, but it does not expressly or impliedly license such possession.” Id. at 32.

The Court in Fisher glossed over the last three sentences of RCW 69.50.608, which prohibit the enactment of any law or ordinance that is not “consistent with” state law and require local drug-related ordinances to have the same penalties as prescribed by state law. This result runs counter to settled principles of statutory construction.

When construing a statute, this Court does not read words in isolation. City of Auburn v. Gauntt, 174 Wn.2d 321, 330, 274 P.3d 1033 (2012). “[C]ourts should avoid a statutory construction which nullifies, voids, or renders meaningless or superfluous any section or words.” State ex rel. Gallwey v. Grimm, 146 Wn.2d 446, 464, 48 P.3d 274 (2002). Division One’s undue emphasis on the first sentence of the preemption statute renders the remainder of the statute superfluous. It also slights the maxim of “*expressio unius est exclusio alterius*,” which is “the law in

Washington, barring a clearly contrary legislative intent.”<sup>8</sup> Mason v. Georgia-Pacific Corp., 166 Wn. App. 859, 865, 271 P.3d 381 (2012) (citation omitted).

The UCSA specifically defines “drug paraphernalia” and criminalizes its use only, RCW 69.50.412, thereby impliedly licensing conduct that does not fall within this proscription. In keeping with this statutory directive, this Court has held that the mere possession of drug paraphernalia cannot support a valid arrest. State v. O’Neill, 148 Wn.2d 564, 584 n. 8, 62 P.3d 489 (2003). It is an exercise in the absurd to parse local ordinances that prohibit the possession of drug paraphernalia, such as MMC 8.22.040, from their punishments.<sup>9</sup>

As this case demonstrates, local ordinances criminalizing the possession of drug paraphernalia are not merely “inconsistent” with the UCSA; they are in direct conflict with it. Louthan was stopped at Highway 107 and Main Street, which happens to be within the city of

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<sup>8</sup> According to the principle of “*expressio unius est exclusio alterius*,” where a statute specifically designates the things or classes of things on which it operates, this Court infers that the omission of other things or classes of things was intentional. Mason, 166 Wn. App. at 864 (citing Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1, 77 Wn.2d 94, 98, 459 P.2d 633 (1969)).

<sup>9</sup> A person convicted in Montesano Municipal Court of possessing drug paraphernalia, without regard to their intent to use it, faces up to 90 days in jail and up to a \$1,000 fine. MMC 8.22.040.

Montesano.<sup>10</sup> The portion of Highway 107 that lies to the south – i.e., the area that was the subject of the road closure – is in unincorporated Grays Harbor County. Hayden was able to arrest Louthan solely because he had the misfortune of crossing past the Montesano city limits.

The arrest was particularly troubling because when the arrest occurred, this Court and appellate courts had pronounced that simple possession of drug paraphernalia cannot support a valid custodial arrest. O’Neill, 148 Wn.2d at 584 n. 8; State v. Neeley, 113 Wn. App. 100, 107, 52 P.3d 439 (2002); State v. McKenna, 91 Wn. App. 554, 563, 958 P.2d 1017 (1998). See State v. Brockob, 159 Wn.2d 311, 342 n. 19, 150 P.3d 59 (2006) (“police officers may rely on the presumptive validity of statutes in determining whether there is probable cause to make an arrest unless the law is ‘so grossly and flagrantly unconstitutional’ by virtue of a prior dispositive judicial holding that it may not serve as the basis of a valid arrest”) (quoting State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1992) (emphasis added)).

While the UCSA does not have a uniformity requirement like the traffic code, Williams nevertheless illustrates the harms done by a local ordinance that criminalizes what is permitted under state law. Citizens

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<sup>10</sup> A map showing the boundaries of the City of Montesano is attached as Appendix B. Courts routinely take judicial notice of maps. State v. Nichols, 161 Wn.2d 1, 5 n. 1, 162 P.3d 1122 (2007).

encounter a “balkanization” of laws state-wide, and face detention, arrest, prosecution, and punishment in local jurisdictions that could not occur in unincorporated parts of Washington. It is easy to imagine the chaos that would ensue if this Court were to follow Division One’s reading of RCW 69.50.608. Under the dubious theory that such ordinances were “not inconsistent with” state law, local jurisdictions would be free to expand the definition of drug paraphernalia, or to criminalize the possession of valerian, nutmeg, or catnip, thereby expanding the authority of local police to arrest and obtain warrants, and local authorities to prosecute and punish.

This Court should conclude that in RCW 69.50.408, the Legislature preempted the field of setting penalties for drug offenses, and prohibited local authorities from enacting laws inconsistent with the UCSA. MMC 8.22.040 runs afoul of both proscriptions, and is unconstitutional. Louthan’s arrest on this basis was invalid.

**3. Probable cause did not exist to arrest Louthan for DUI, and where this crime was not investigated by the officers and was not the real reason for the arrest, a post hoc fiction which justifies the arrest on this basis undermines article I, section 7’s authority of law requirement, denies litigants an opportunity to fairly contest the constitutionality of their seizures, and tarnishes the role of the judiciary.**

Both the trial court and Court of Appeals ducked the preemption issue raised by Louthan, and instead upheld the arrest on alternative bases

that were not identified or investigated by the arresting officers. The trial court concluded the officers could have arrested Louthan for use of drug paraphernalia. RP 8-9; CP 16-17. The Court of Appeals hypothesized that the officers could have arrested Louthan for DUI.

RCW 10.31.100 directs that except with regard to specifically enumerated offenses, an officer may only make a warrantless arrest for a misdemeanor if the crime was committed in his or her presence. There was no evidence that Louthan used drug paraphernalia in the officers' presence, and the record did not establish probable cause for a warrantless arrest on this basis.

The Court of Appeals' post hoc justification of DUI likewise had little support in the record. More importantly, however, the practice is contrary to this Court's holdings in Moore and Robinson, and undermines article I, section 7's requirement of authority of law.

- a. Article I, section 7 requires "authority of law" for any intrusion into private affairs.

Unlike the Fourth Amendment, which proscribes only "unreasonable" warrantless searches and seizures, article I, section 7 prohibits any disturbance of an individual's private affairs "without authority of law." Buelna Valdez, 167 Wn.2d at 772; Const. art. I, § 7. The state constitutional provision "is declaratory of the common-law right

of the citizen not to be subjected to search or seizure without warrant.” State v. Ringer, 100 Wn.2d 686, 691, 674 P.2d 1240 (1983) (citation omitted). Recognized exceptions to the warrant requirement “constitute authority of law justifying a search in the absence of a warrant, but only as carefully drawn and narrowly applied.” Snapp, 174 Wn.2d at 195; see also State v. Morse, 156 Wn.2d 1, 12, 123 P.3d 832 (2005) (holding Fourth Amendment’s “apparent authority” rule invalid under article I, section 7, which requires “actual authority”).

“Article I, section 7 is a jealous protector of privacy.” Buelna Valdez, 167 Wn.2d at 777. It is for this reason that actual authority of law is a precondition of any intrusion into private affairs. “Authority of law” confers rights upon law enforcement as it concomitantly diminishes individual privacy.

b. Probable cause did not exist to arrest for DUI.

The parties stipulated to the police reports for purposes of the CrR 3.6 hearing. CP 15. Hayden, the primary officer, indicated in his report that he observed Louthan’s pupils were constricted and his speech was slurred, and he suspected that he was under the influence of a controlled substance. CP 11. Hayden recorded no observations regarding Louthan’s driving that suggest he was affected by drugs. Nor did Hayden conduct an

investigation to confirm or dispel his suspicions. Instead he returned to his vehicle to prepare citations for moving violations. Id.

Hayden in fact arrested Louthan for possession of drug paraphernalia. Id. The crime of DUI was not investigated until after Louthan's arrest, when Washington State Patrol Trooper Stewart, a "drug recognition expert," arrived at the scene. CP 12. The Court of Appeals nevertheless held that "Officer Hayden had probable cause to arrest Louthan for driving while under the influence of a controlled substance and seizing evidence of that crime he found in open view." Louthan, 158 Wn. App. at 744.

In Moore, this Court held that a crime which was not investigated by arresting officers could not supply a valid basis for an arrest after the fact. 161 Wn.2d at 885-86. This rule has particular force in a case such as this, where the new theoretical basis for the arrest was advanced for the first time on appeal.<sup>11</sup> Ambushed in this way by a brand new theory of admissibility, Louthan was unfairly denied the opportunity to develop the record and argue his case below. At the same time, the Court of Appeals dismissed legitimate concerns regarding the officers' authority of law to

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<sup>11</sup> This Court's recent decision in State v. Rose, \_\_ Wn.2d \_\_, \_\_ P.3d \_\_, No. 85791-1 (August 9, 2012), does not compel a different result, as in that case, the officer testified that he suspected a glass smoking pipe he saw in plain view before the arrest contained either methamphetamine or cocaine. See Rose, ¶ 24. Here, as noted, DUI was not investigated until after Louthan's arrest.

arrest by supplying such “authority” after the fact, undermining the judiciary’s function of upholding the constitution and providing guidance to law enforcement.

DUI was not investigated or relied upon by the arresting officers as a basis for the arrest, and probable cause did not exist to arrest for this offense. This Court should hold it may not excuse the otherwise-unlawful seizure.

**4. This Court should repudiate the Court of Appeals’ efforts to weaken article I, section 7’s exclusionary rule.**

Although it was not necessary to the court’s opinion, the Court of Appeals majority took the opportunity to criticize this Court’s decisions regarding article I, section 7’s exclusionary rule, before declining to follow them altogether:

The Supreme Court began applying the exclusionary rule directly to violations of article I, section 7 recently and has done so without fully justifying its applicability under the principles underlying the long-standing judicially-created remedy. In this case we review and apply only exclusionary rule principles that have been fully developed in the law.

Louthan, 158 Wn. App. at 749 n. 7.

Article I, section 7 “clearly recognizes an individual’s right to privacy with no express limitations. Winterstein, 167 Wn.2d at 632 (quoting White, 97 Wn.2d at 110). Because the framers’ intent was to

protect personal rights, rather than curb government action, “whenever the right is unreasonably violated, the remedy must follow.” Winterstein, 167 Wn.2d at 632 (citing cases). This Court has consistently applied article I, section 7’s “nearly categorical” exclusionary rule, id. at 646, and has resisted efforts to diminish the privacy right “by the judicial gloss of a selectively applied exclusionary remedy.” White, 97 Wn.2d at 110.

Division Two wrongly characterized article I, section 7’s exclusionary rule as “judicially created.” Louthan, 158 Wn. App. at 748; cf., Winterstein, 167 Wn.2d at 632; State v. Chenoweth, 160 Wn.2d 454, 472 n. 14, 158 P.3d 595 (2007) (article I, section 7’s exclusionary rule is “constitutionally mandated”). While it conceded that this Court has steadfastly refused to create a “good faith” exception, the court invented a new exception, which it termed the “legitimate reason threshold test”<sup>12</sup>:

Under this legitimate reason threshold test, an appellate court looks to the law in effect at the time the search was conducted and at the time the evidence was admitted at trial. If both actions were lawful at the time they occurred, courts have no exclusionary rule authority to suppress relevant evidence and deprive a party of the right to present its case in court.

Louthan, 158 Wn. App. at 749.

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<sup>12</sup> A Westlaw search for “legitimate reason threshold test” uncovered no other federal or state case that employs such a test.

The State made a nearly identical argument in Afana,<sup>13</sup> which this Court rejected:

Deputy Miller's reliance on pre-Gant case law had nothing to do with probable cause. By overlooking this, the State has attempted to shift the reasonableness test built into the determination of probable cause to the question of whether the exclusionary rule is the appropriate remedy for a violation of a person's right of privacy under article I, section 7, and there it is out of place.

...

In effect, the State asks us to make an exception to the exclusionary rule for illegally obtained evidence by analogy to cases in which the evidence was obtained legally. This we will not do. We reject the State's argument that the "good faith" exception is [in]consistent with our past decisions, and hold that it is incompatible with the nearly categorical exclusionary rule under article I, section 7.

Afana, 169 Wn.2d at 183-84.

It is not clear why, in light of Afana and this Court's many decisions resisting efforts to undo article I, section 7's exclusionary rule, the Court of Appeals issued a published opinion refusing to follow these binding precedents. In its decision in this matter, this Court should reiterate the importance of appellate courts adhering to this Court's decisions.

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<sup>13</sup> The State advances a similar argument here. See State's supplemental brief at 2-3.

E. CONCLUSION

The warrantless search of Louthan's car was contrary to this Court's decision in Snapp. Louthan's conviction should be reversed and dismissed.

DATED this 17<sup>th</sup> day of August, 2012.

Respectfully submitted:

  
#39042  
\_\_\_\_\_  
SUSAN F. WILK (WSBA 28250)  
Washington Appellate Project (91052)  
Attorneys for Petitioner

State v. Louthan, No. 85607-8

Appendix A

## Chapter 8.22 Controlled Substances

### Sections:

- 8.22.010 Minor's presence prohibited--Display or sale room.
- 8.22.020 Paraphernalia sale and display rooms.
- 8.22.030 Nuisance.
- 8.22.040 Drug paraphernalia--Possession prohibited.
- 8.22.900 Statutes incorporated by reference.

#### **8.22.010 Minors' presence prohibited--Display or sale room.**

A. No owner, manager, proprietor or other person in charge of any room in any place of business where any device, contrivance, instrument or paraphernalia which is primarily designed for or intended to be used for the smoking, ingestion or consumption of marijuana, hashish, PCP or any controlled substance, other than prescription drugs and devices to ingest or inject prescription drugs, is sold, or displayed for the purpose of sale, may allow or permit any person under the age of eighteen years to be in, remain in, enter or visit such room unless such minor person is accompanied by one of his or her parents or his or her legal guardian.

B. Minors Excluded. No person under the age of eighteen years may be in, remain in, enter or visit any room in any place used for the sale or displaying for sale of devices, contrivances, instruments or paraphernalia which are primarily designed for or intended to be used for the smoking, ingestion or consumption of marijuana, hashish, PCP or any controlled substance, other than prescription drugs and devices to ingest or inject prescription drugs unless such person is accompanied by one of his or her parents or his or her legal guardian. (Ord. 1423 §1(part), 1999; Ord. 1418 §1(part), 1999).

#### **8.22.020 Paraphernalia sale and display rooms.**

No person may maintain in any place of business to which the public is invited, the display for sale or the offering to sell of devices, contrivances, instruments or paraphernalia which are primarily designed for or intended to be used for the smoking, ingestion or consumption of marijuana, hashish, PCP or any controlled substance other than prescription drugs and devices to ingest or inject prescription drugs unless within a separate room or enclosure to which minors not accompanied by a parent or legal guardian are excluded. Each entrance to such a room or enclosure shall be posted with a sign in reasonably visible and legible words to the effect that items which are defined as drug paraphernalia under this chapter are being offered for sale in such a room and that minors, unless accompanied by a parent or legal guardian, are excluded. (Ord. 1423 §1(part), 1999).

#### **8.22.030 Nuisance.**

The distribution or possession for the purpose of sale, exhibition or display, in any place of business from which minors are not excluded as set forth in this chapter of devices, contrivances, instruments or paraphernalia which are primarily designed for or intended to be used for the smoking, ingestion or consumption of marijuana, hashish, PCP or any controlled substance other than prescription drugs and devices to ingest or inject prescription drugs is declared to be a public nuisance and may be abated by the city. This remedy shall be in addition to any other remedy provided the law including the penalty provision applicable for the violation of the terms an provision of this chapter. A second or subsequent conviction of any combination of Sections 9.22.010 through 9.22.020, inclusive, for charges arising within any twelvemonth period may result in revocation of the business license of the place of business where the

violations occurred. (Ord. 1423 §1(part), 1999).

**8.22.040 Drug paraphernalia--Possession prohibited.**

It shall be unlawful for any person to possess any drug paraphernalia as defined in RCW [69.50.102](#). Possession of drug paraphernalia is a misdemeanor criminal offense and any person convicted of such offense shall be subject to a jail sentence of not more than ninety days and a fine of not more than one thousand dollars, or both such fine and imprisonment. (Ord. 1423 § 1(part), 1999).

**8.22.900 Statutes incorporated by reference.**

The following statutes are incorporated in this chapter by reference:

RCW [9.47A.010](#) (Definitions [Inhaling toxic fumes])  
RCW [9.47A.020](#) (Unlawful inhalation--Exceptions)  
RCW [9.47A.030](#) (Possession of certain substances prohibited--When)  
RCW [9.47A.040](#) (Sale of certain substances prohibited--When)  
RCW [9.47A.050](#) (Penalty)  
RCW [69.41.030](#) (Possession of Legend Drug)  
RCW [69.50.101](#) (Definitions)  
RCW [69.50.102](#) (Drug Paraphernalia: Definitions)  
RCW [69.50.401](#)(e)(Possession of Marijuana)  
RCW [69.50.412](#) (Drug Paraphernalia: Penalties)  
RCW [69.50.4121](#) (Drug Paraphernalia: Giving or Selling)  
(Ord. 1493 § 1, 2006; Ord. 1423 § 1(part), 1999; Ord. 1418 1(part), 1999).

**This page of the Montesano Municipal Code is current through Ordinance 1560, passed May 22, 2012.**

Disclaimer: The City Clerk's Office has the official version of the Montesano Municipal Code. Users should contact the City Clerk's Office for ordinances passed subsequent to the ordinance cited above.

City Website: <http://www.montesano.us/>  
(<http://www.montesano.us/>)  
City Telephone: (360) 249-3021  
Code Publishing Company  
(<http://www.codepublishing.com/>)  
eLibrary (<http://www.codepublishing.com/eLibrary.html>)

RCW 69.50.102  
Drug paraphernalia — Definitions.

\*\*\* CHANGE IN 2012 \*\*\* (SEE 6095.SL) \*\*\*

(a) As used in this chapter, "drug paraphernalia" means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance. It includes, but is not limited to:

- (1) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing, or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;
- (2) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances;
- (3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance;
- (4) Testing equipment used, intended for use, or designed for use in identifying or in analyzing the strength, effectiveness, or purity of controlled substances;
- (5) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;
- (6) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose, used, intended for use, or designed for use in cutting controlled substances;
- (7) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marijuana;
- (8) Blenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding controlled substances;
- (9) Capsules, balloons, envelopes, and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;
- (10) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances;
- (11) Hypodermic syringes, needles, and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body;
- (12) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as:
  - (i) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
  - (ii) Water pipes;
  - (iii) Carburetion tubes and devices;
  - (iv) Smoking and carburetion masks;
  - (v) Roach clips: Meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;
  - (vi) Miniature cocaine spoons, and cocaine vials;
  - (vii) Chamber pipes;
  - (viii) Carburetor pipes;
  - (ix) Electric pipes;

- (x) Air-driven pipes;
- (xi) Chillums;
- (xii) Bonges; and
- (xiii) Ice pipes or chillers.

(b) In determining whether an object is drug paraphernalia under this section, a court or other authority should consider, in addition to all other logically relevant factors, the following:

- (1) Statements by an owner or by anyone in control of the object concerning its use;
- (2) Prior convictions, if any, of an owner, or of anyone in control of the object, under any state or federal law relating to any controlled substance;
- (3) The proximity of the object, in time and space, to a direct violation of this chapter;
- (4) The proximity of the object to controlled substances;
- (5) The existence of any residue of controlled substances on the object;
- (6) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this chapter; the innocence of an owner, or of anyone in control of the object, as to a direct violation of this chapter shall not prevent a finding that the object is intended or designed for use as drug paraphernalia;
- (7) Instructions, oral or written, provided with the object concerning its use;
- (8) Descriptive materials accompanying the object which explain or depict its use;
- (9) National and local advertising concerning its use;
- (10) The manner in which the object is displayed for sale;
- (11) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;
- (12) Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;
- (13) The existence and scope of legitimate uses for the object in the community; and
- (14) Expert testimony concerning its use.

[1981 c 48 § 1.]

Notes:

**Severability -- 1981 c 48:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1981 c 48 § 4.]

## RCW 69.50.412

## Prohibited acts: E — Penalties.

(1) It is unlawful for any person to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance. Any person who violates this subsection is guilty of a misdemeanor.

(2) It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance. Any person who violates this subsection is guilty of a misdemeanor.

(3) Any person eighteen years of age or over who violates subsection (2) of this section by delivering drug paraphernalia to a person under eighteen years of age who is at least three years his or her junior is guilty of a gross misdemeanor.

(4) It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia. Any person who violates this subsection is guilty of a misdemeanor.

(5) It is lawful for any person over the age of eighteen to possess sterile hypodermic syringes and needles for the purpose of reducing bloodborne diseases.

[2012 c 117 § 368; 2002 c 213 § 1; 1981 c 48 § 2.]

## Notes:

**Severability -- 1981 c 48:** See note following RCW 69.50.102.

RCW 69.50.608  
State preemption.

The state of Washington fully occupies and preempts the entire field of setting penalties for violations of the controlled substances act. Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to controlled substances that are consistent with this chapter. Such local ordinances shall have the same penalties as provided for by state law. Local laws and ordinances that are inconsistent with the requirements of state law shall not be enacted and are preempted and repealed, regardless of the nature of the code, charter, or home rule status of the city, town, county, or municipality.

[1989 c 271 § 601.]

State v. Louthan, No. 85607-8

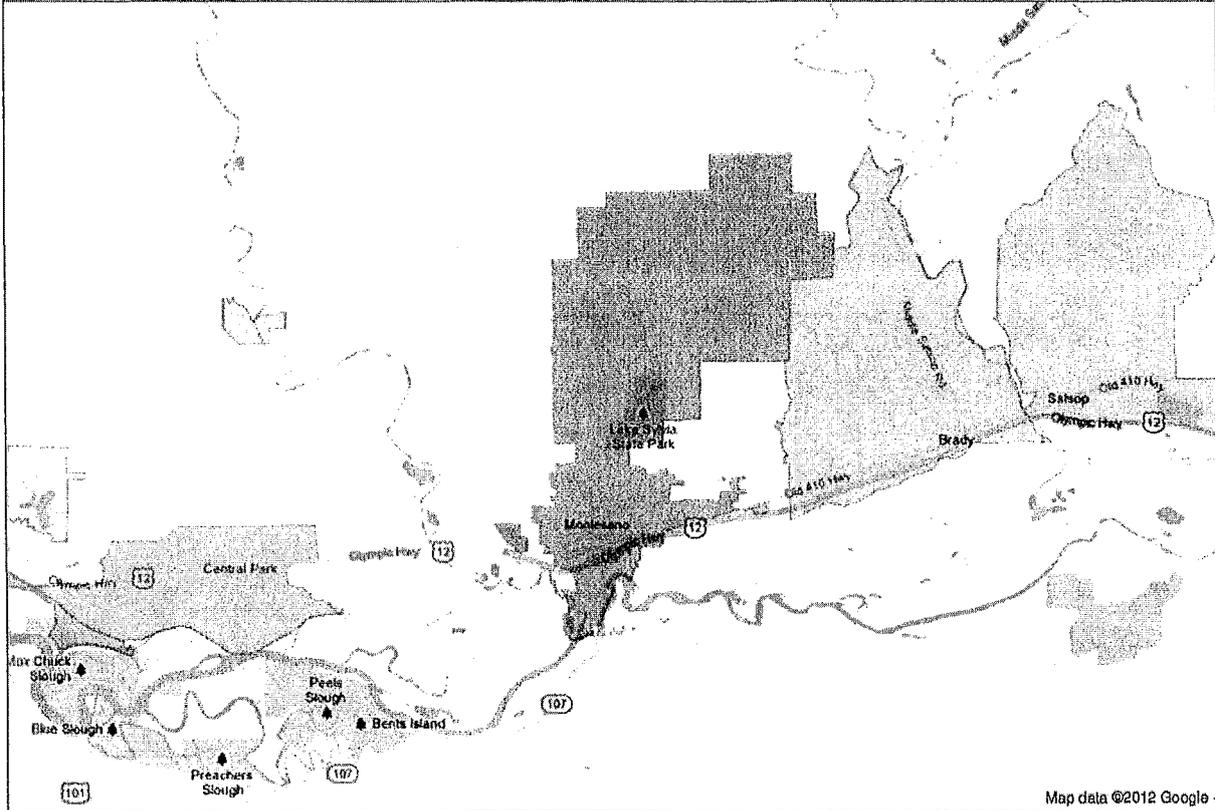
Appendix B

U.S. City and State: Montesano

WA

# Map of Montesano, Washington

Map Overview, Technical Details, and Usage Notes • [Purchase Information \(/map\\_product\\_finder.php\)](#)



This page shows a boundary map for Montesano, Washington (47.01472473, -123.58570862), and surrounding cities, including [Brady \(/city/Brady/WA\)](#), [Satsop \(/city/Satsop/WA\)](#), [Central Park \(/city/Central Park/WA\)](#), [Elma \(/city/Elma/WA\)](#), [Junction City \(/city/Junction City/WA\)](#), and [Aberdeen Gardens \(/city/Aberdeen Gardens/WA\)](#).

View a different version of this map: [ZIP Code Boundary Map \(/map\\_tools\\_zip\\_boundary\\_maps.php?lat=47.01472473&lon=-123.58570862\)](#) [ZIP Code Area Map \(/map\\_tools\\_zip\\_area\\_maps.php?lat=47.01472473&lon=-123.58570862\)](#) [US Cities \(/map\\_tools\\_cities.php?lat=47.01472473&lon=-123.58570862\)](#) [US Counties \(/map\\_tools\\_counties.php?lat=47.01472473&lon=-123.58570862\)](#)

## U.S. City Visualizer Overview

The MapTechnica.com U.S. City Visualizer is a free online tool that overlays the U.S. city and city-equivalent (towns, boroughs, districts, etc.) boundaries tabulated by the U.S. Census Bureau over a Google Map. To use the tool, enter a city name and hit "go."

## Tool Usage and Purchase Information

Usage of this online tool is free of charge, but is limited to a reasonable number of page views per day. If you require the U.S. City and City-Equivalent tile overlays for your custom mapping application, the tile set is available for purchase from [MapTechnica.com's Products Page \(/map\\_product\\_finder.php\)](#).

## Technical Details

The U.S. City Visualizer displays city and city-equivalent boundaries for the entire Continental United States, Alaska, Hawaii, and Puerto

Rico. The tile set includes city maps supporting a maximum Google Maps zoom level of 12.

The underlying data was rendered from the [U.S. Census Bureau's 2009 TIGER/Line® Shapefiles \(http://www.census.gov/geo/www/tiger/tgrshp2009/tgrshp2009.html\)](http://www.census.gov/geo/www/tiger/tgrshp2009/tgrshp2009.html).

The entire MapTechnica.com U.S. City and City-Equivalent tile set consists of nearly 1 million tiles totalling over 3 Gigabytes of data. (If you're wondering, we're capably hosted by [MediaTemple \(http://www.mediatemple.net/go/order/?refdom=stringersites.com\)](http://www.mediatemple.net/go/order/?refdom=stringersites.com).)

For more technical information and details about MapTechnica.com, please visit our [About MapTechnica.com page \(/about.php\)](#) or visit our [Frequently Asked Questions \(/map\\_faq.php\)](#) page.



**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 85608-7
	)	
DARRIN LOUTHAN,	)	
	)	
PETITIONER.	)	

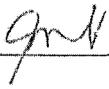
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17<sup>TH</sup> DAY OF AUGUST, 2012 I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/>	GERALD FULLER, DPA	<input checked="" type="checkbox"/>	U.S. MAIL
	GRAYS HARBOR CO PROSECUTOR'S OFFICE	<input type="checkbox"/>	HAND DELIVERY
	102 W. BROADWAY AVENUE, ROOM 102	<input type="checkbox"/>	_____
	MONTESANO, WA 98563-3621		
<input checked="" type="checkbox"/>	DARRIN LOUTHAN	<input checked="" type="checkbox"/>	U.S. MAIL
	110 MINKLER RD	<input type="checkbox"/>	HAND DELIVERY
	MONTESANO, WA 98563	<input type="checkbox"/>	_____

**SIGNED** IN SEATTLE, WASHINGTON THIS 17<sup>TH</sup> DAY OF AUGUST, 2012.

x. \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
☎(206) 587-2711

## OFFICE RECEPTIONIST, CLERK

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**To:** Maria Riley  
**Cc:** 'Gfuller@co.grays-harbor.wa.us'  
**Subject:** RE: 856087-LOUTHAN-SUPPLEMENTAL BRIEF

Rec. 8-17-12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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**From:** Maria Riley [<mailto:maria@washapp.org>]  
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**Subject:** 856087-LOUTHAN-SUPPLEMENTAL BRIEF

**State v. Darrin Louthan**  
**No. 85608-7**

Please accept the attached documents for filing in the above-subject case:

### **SUPPLEMENTAL BRIEF OF PETITIONER**

Susan F. Wilk - WSBA 28250  
Attorney for Petitioner  
Phone: (206) 587-2711  
E-mail: [susan@washapp.org](mailto:susan@washapp.org)

By

**Maria Arranza Riley**  
**Staff Paralegal**  
**Washington Appellate Project**  
**Phone: (206) 587-2711**  
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