No. 31515-1-III

COURT OF APPEALS

DIVISION III

OF

THE STATE OF WASHINGTON

State of Washington,
Respondent

v.

Joseph J. Goggin,
Appellant

Appeal from the Superior Court of Spokane County

BRIEF OF APPELLANT

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I. INTRODUCTION

A Spokane County Superior Court jury convicted Joseph J. Goggin of Felony Driving Under the Influence returning a verdict of guilty on February 28, 2013. (RP 631) The court sentenced Mr. Goggin on March 14, 2013 (RP 636-663) and the defendant filed a timely appeal.

II. ASSIGNMENTS OF ERROR and ISSUE STATEMENTS

1. Whether the court committed error in allowing the admission of a mandatory blood draw taken after a search warrant where the defendant was not advised of his right to an additional blood draw?
2. Whether there was insufficient evidence as a matter of law as to the Felony DUI charge requiring dismissal of the Felony DUI charge?
3. Whether the trial court committed reversible error in admitting "certified judgments and sentences" without requiring court testimony to satisfy Article I § 22 Confrontation Clause?

III. STATEMENT OF THE CASE

Joseph Goggin was charged with felony driving under the influence on December 17, 2011. (CP 1-2) On April 26, 2012 a pretrial motion was held before the Honorable Annette Plese in Spokane County Superior Court. (VRP 4/26/12 p. 1) At the hearing the defense sought suppression of an involuntary blood test drawn based upon a warrant. (CP 7-15) (VRP 4/26/12 p. 1-15)

The defense argued that when a mandatory blood test is taken RCW 46.20.308 and 46.61.506 requires that the defendant be given notice of the right to an additional blood test. Requirement of notice of a right to an additional blood test is a statutory and due process right. (VRP 4/26/12 p. 5) (CP 7-15) The court denied the motion to suppress holding the blood draw with a warrant was not a mandatory blood test. (VRP 4/26/12 p. 18 lines 1-4, 12-18) (CP 22-24)

A jury trial was held before the Honorable Annette Plese on February 25, 2013. The trial was preceded by a 3.5 hearing. At the hearing, Officer Taj Wilkerson testified that he responded and contacted Mr. Goggin. (VRP 2/25/13 p. 40) Mr. Goggin asked if he could park his car and go home. (VRP 2/25/13 p. 42 lines 10-11) Mr. Goggin was not given *Miranda* warnings and was not free to leave. (VRP 2/25/13 p. 45-46) The officer kept Mr. Goggin's keys for his vehicle and his driver's license. (VRP 2/25/13 p. 47-48) Officer Wilkerson gave the license and keys to Trooper Marcus when he arrived. (VRP 2/25/13 p. 50-51)

Trooper Marcus asked Mr. Goggin to exit his vehicle to do field sobriety tests. (VRP 2/25/13 p. 56-57) *Miranda* warnings were only read after Mr. Goggin was handcuffed and placed in Trooper Marcus' squad car. (VRP 2/25/13 p. 59-60) Mr. Goggin did not waive his rights at that

time. (VRP 2/25/13 p. 61) No attorney was contacted. (VRP 2/25/13 generally)

At the BAC room Mr. Goggin was still not allowed a phone call. (VRP 2/25/13 p. 64, see generally) After Implied Consent, Mr. Goggin refused the test but was still not allowed a phone call. (VRP 2/25/13 p. 64-66) Mr. Goggin signed a waiver when read his constitutional rights at the Public Safety Building. (VRP 2/25/13 p. 66)

Pretrial the defense objected to the state's failure to timely disclose the documents needed to prove prior convictions. (VRP 2/25/13 p. 99-106) The court orders the state provide the documents intended to prove the prior convictions to the defense. (VRP 2/25/13 p. 109) Defense counsel objects to the use of the documents that were not provided more than a week before trial. (VRP 2/25/13 p. 111-113) The defense sought a continuance to prepare for late disclosure of documents. The court denied. (VRP 2/25/13 p. 146) Prosecution responds that Kevin Creighten from Kootenai County Probation will appear to testify that he supervised Mr. Goggin while he was on probation. (VRP 2/25/13 p. 127)

Pretrial defense renewed the objection to the introduction of the blood test for failure to advise the defendant of the right to additional blood test (VRP 2/25/13 p. 129) and objects to the use of the Idaho conviction as not a comparable statute to Washington's State DUI law.

(VRP 2/25/13 p. 129) Defense argues that prior offense is an element that must be proven to the jury beyond a reasonable doubt. (VRP 2/25/13 p. 154) The state conceded that the prior offenses had to be proven by the state to the jury. (VRP 2/25/13 p. 155)

Defense argues whether an offense is comparable is a jury question. (VRP 2/25/13 p. 170-172) The trial court ruled that it is a threshold decision for the court and not the jury. (VRP 2/25/13 p. 173-174) Pretrial defense objected to the introduction of prior convictions without testimony from a person presenting the documents. (VRP 2/25/13 p. 175-177) The state conceded that since they had no fingerprints there will be testimony from officers to support the documents. (VRP 2/25/13 p. 177-178) The prosecution states there will be live testimony to verify the identity of Mr. Goggin in the Idaho case. (VRP 2/25/13 p. 177-179)

At trial the state introduced testimony that Mr. Goggin was followed by Jason Berezay before his vehicle stopped. (VRP 2/26/13 p. 207-211) Officer Taj Wilkerson with the Liberty Lake Police Department responded and detained Mr. Goggin until Trooper Barry Marcus arrived. (VRP 2/26/13 p. 294) Officer Wilkerson said Mr. Goggin was not free to leave after he arrived. (VRP 2/26/13 p. 298)

Trooper Barry Marcus of Washington State Patrol (WSP) testified that he arrested Mr. Goggin on December 17, 2011. (VRP 2/27/13 p. 315)

He conducted field sobriety tests with Mr. Goggin. (VRP 2/27/13 p. 342-344) Then the court admitted evidence that Mr. Goggin refused the breath test. (VRP 2/27/13 p. 356-357)

At trial the state sought to admit a blood test drawn after a search warrant was obtained. (VRP 2/27/13 p. 365) The defense objected to the introduction of the blood test based upon the earlier argued motion. (See VRP 4/26/12) (VRP 2/27/2013 p. 365) (CP 7-15) The Trooper testified the time from driving to blood draw was about three hours. (VRP 2/27/13 p. 374) The Trooper testified that the implied consent warnings for blood were not read in this case. (VRP 2/27/13 p. 398-399)

The defense objected to the introduction of the blood test results. (VRP 2/27/13 p. 444-445; 450) (VRP 4/26/12 p.5) (CP 7-15) Over defense objection, the state introduces the reading of .32 with testimony that it is more than four times the .08 legal limit. The defense objected to this as a violation because of the lack of presumptive limit allegation in this case. (VRP 2/27/13 p. 452 lines 15-25)

Outside of the presence of the jury, the parties argued regarding the state exhibits offered to prove prior convictions. Exhibit 5 (P 5) was a certified judgment and sentence from Kootenai County Idaho. The defense argues that a witness is required to verify and connect the document to Mr. Goggin. (VRP 2/28/13 p. 502) The state had previously conceded that they

must prove the defendant is connected with the document. (VRP 2/25/13 p. 177-179; 155-157) Defense objected to the admission of the documents P5-P11 as violating *Crawford v. Washington* and the right of confrontation. (VRP 2/28/13 p. 508, 512) The state responds that it is their burden to prove the prior convictions and the identity of the person convicted. (VRP 2/28/13 p. 513) The state acknowledges that if they cannot prove these two elements there will be a "motion at the half or at the end of the States' case to deal with that." (VRP 2/28/13 p. 513 lines 18-24)

The Court at hearing outside of the presence of the jury found that *Crawford* does not apply and RCW 5.44.010 addresses certified court records. (VRP 2/28/13 p. 519-520) The booking photos do not fall under that exception and the state must lay a foundation. Even if the booking photos are public records they require a person to identify them. (VRP 2/28/13 p. 520-521) The court advises the prosecution "That would not be, but the other ones will be admissible. You will need to do it in front of the jury noting your objections." The prosecutor states Mr. Creighton is coming to identify Mr. Goggin as the person identified in the judgment and sentences and the state acknowledges they must prove the identity of the person arrested. (VRP 2/28/13 p. 526 lines 5-14)

The jury returns to the courtroom and the state calls Taj Wilkerson. The state introduces a copy of Mr. Goggin's identification card seized on December 17, 2011. (VRP 2/28/13 p. 529) Court admitted P14. (P 14) Officer Clinton Gibson was called and he testified he arrested Mr. Goggin on March 13, 2003 for driving under the influence. (VRP 2/28/13 p. 533-535) The court admitted a photo of Mr. Goggin from March 14, 2003 as P6. (P6) (VRP 2/28/13 p. 535) The government called Deputy Chad Ruff who testified he arrested Mr. Goggin on January 19, 2004 and admitted booking photo of Mr. Goggin. (P 8) (VRP 2/28/13 p. 536-538) Ray Bourgeois was called and he testified that he assisted in the arrest of Joseph Goggin in July of 2006 and he identifies (P 10) as a photo of Joseph Goggin. (VRP 2/28/13 p. 544-546) The state then rested its case. (VRP 2/28/13 p. 546 line 24) The jury is allowed to exit the courtroom. (VRP 2/28/13 p. 547)

The defense moves the court, outside of the presence of the jury, for dismissal because the state provided no evidence of the Idaho allegation of the DUI. (VRP 2/28/13 p. 548) The defense argued even if there was a certified document there would be insufficient evidence as a matter of law. (VRP 2/28/13 p. 548-549) The state has not proven the felony and they are left with the misdemeanor charge. (VRP 2/28/13 p.

549) The defense pointed out that there was no identification of Mr. Goggin as the person arrested in Idaho. (VRP 2/28/13 p. 549)

The state concedes that they failed to admit the judgment and sentences before the jury. (VRP 2/28/13 p. 549) The defense argues that the judgment and sentences were never offered or admitted before the jury. (VRP 2/28/13 p. 550-551) The court at this point must consider based upon the evidence admitted to the jury and must find insufficient evidence as a matter of law. (VRP 2/28/13 p. 551-553) The court then rules that it is admitting those documents when the jury comes back. (VRP 2/28/13 p. 553) The court then rules there is sufficient evidence and that at this time I am admitting the judgment and sentence. (VRP 2/28/13 p. 554 lines 5-11) Court then denies the motion to dismiss the felony DUI. (VRP 2/28/13 p. 554-555)

The jury then re-enters the courtroom. (VRP 2/28/13 p. 558) The state moves to re-open "for the purpose of indicating exhibits that were admitted outside the presence of the jury." (VRP 2/28/13 p. 558 lines 16-20) The court then granted leave to re-open. (VRP 2/28/13 p. 558) The state moves to admit P5 (P 5), P7 (P 7), P9 (P 9), and P11 (P 11). (VRP 2/28/13 p. 559) The defense objects citing the argument made previously. The court notes the objection and admits (VRP 2/28/13 p. 599) P5 (P 5), P7 (P 7), P9 (P 9), and P11 (P 11). (VRP 2/28/13 p. 559) The defense then

rested without presenting a case. (VRP 2/28/13 p. 559 line 23) The defense renews the motion to dismiss based upon insufficiency of the evidence. The defense points out that there was no person who came in to identify Mr. Goggin as the person arrested or prosecuted in Idaho. (VRP 2/28/13 p. 560-561) The court then denies the defense motion to dismiss. (VRP 2/28/13 p. 561-562)

IV. ARGUMENT

Issue 1: The court committed reversible error in allowing admission of a mandatory blood draw taken after a search warrant where the defendant was not advised of his right to an additional blood draw.

The Revised Code of Washington at 46.61.506 (6) states: "The person tested may have a physician, or qualified person of his or her own choosing, administer one or more tests in addition to any test administered by law enforcement officer." The implied consent statute at RCW 46.20.308 (2) states: "The officer shall inform the person of his or her right....to have additional test administered by any qualified person of his choosing as provided in RCW 46.61.506."

The Washington State Supreme Court ruled in *State v. Turpin*, 94 Wn.2d 820, 826-827, 620 P.2d 990 (1980) that the failure to inform a vehicular homicide defendant of her right to an additional test required suppression of the states' blood test. Also the failure to advise the defendant of the right to additional test denied Ms. Turpin the opportunity

to garner potentially exculpatory evidence in her case. Id. at 826. In making its ruling the court held the blood test was inadmissible because the "state cannot be allowed to use evidence which the defendant is unable to rebut because she was not advised of her right to independent testing." Id. at 826.

In another case addressing the right to additional blood test the Washington Supreme Court held that RCW 46.61.506 (5) provides a right to additional blood test. *State v. Bartels*, 112 Wn.2d 882, 886, 774 P.2d 1183 (1989) The court ruled the statute "permits a driver to obtain evidence with which to impeach the results of the state-administered test. *State v. Bartels*, 112 Wn.2d 882, 886, 774 P.2d 1183 (1989) citing *State v. Stannard*, 109 Wash.2d 29, 35, 742 P.2d 1244 (1987) The court noted further, "The statutory requirement demonstrates an important protection of the subject's right to fundamental fairness which is built into our implied consent procedure." citing *State v. Canaday*, 90 Wash.2d 808, 817, 585 P.2d 1185 (1978)

Most recently in *State v. Morales*, 173 Wn.2d 560, 568-569, 269 P.3d 263 (2012) the court ruled that "before administering a mandatory blood alcohol test of a person suspected of vehicular assault, the arresting officer must advise the suspect of his right to have additional test administered by any qualified person of the arrestee's choosing." The

court ruled the defendant has an opportunity to gather potentially exculpatory evidence, regardless of the fact that there is no right to refuse a mandatory blood test. Id at 569 citing *State v. Turpin*, 94 Wash.2d 820, 826, 620 P.2d 990 (1980)

It is significant that the court noted the importance of the right to independent blood samples to address transiency of intoxication. *Morales* at 575. Secondly, "That he may have his own tests made if he fears the accuracy or fairness of the test given by law enforcement officers." *Morales* at 576 citing *State v. Richardson*, 81 Wash.2d 111, 116, 499 P.2d 1264 (1972); *State v. Carranza*, 24 Wash.App. 311, 318, 600 P.2d 701 (1979) Thirdly, the court "observed that in a DUI case the right to independent testing "is in keeping with a defendant's constitutional due process right to gather evidence in his own defense." *Morales* at 576 citing *State v. McNichols*, 128 Wash.2d 242, 250-51, 906 P.2d 329 (1995)

The court should suppress the blood test because the defendant was denied his right to obtain an additional blood test. *Turpin*, 94 Wn.2d at 822. As in *Turpin* the defendant was told he had no choice but to take the blood test but not advised of a right to an additional test. The failure of the police to advise of his right to an additional test prevented the accused from obtaining evidence to use in his defense. *Turpin*, 94 Wn.2d at 822. Trooper Barry Marcus failed to advise Mr. Goggin of his right to

additional blood test after obtaining the warrant and marked off the warnings for blood (CP14-15) (CP 22-24) (VRP 2/27/13 p. 398-399) which mandates suppression of the blood test. *State v. Morales*, 173 Wn.2d 560, 568-569, 269 P.3d 263 (2012) The defense seeks suppression of the blood test and a new trial on the misdemeanor charge.

Issue 2: There was insufficient evidence as a matter of law as to a felony DUI requiring dismissal of the felony charge.

There was insufficient evidence in this case to establish that the defendant had four or more prior offenses within the last ten years. (VRP 2/28/13 p. 595) The defense at trial moved for dismissal of the felony DUI charge after the state rested. (VRP 2/28/13 p. 548-549) The defense argued that the state's failure to introduce the prior convictions resulted in insufficient evidence for the felony DUI. (VRP 2/28/13 p. 549 lines 1-10) Additionally, there was no identification of Mr. Goggin as the person arrested in the Idaho case. (VRP 2/28/13 p. 549) The defense sought dismissal of the felony DUI charge. The defense pointed out that the prior felony judgment and sentences were not offered or admitted before the jury. (VRP 2/28/13 p. 550-552) The state conceded that they failed to admit the judgment and sentences before the jury. (VRP 2/28/13 p. 550-551)

When reviewing a challenge to the sufficiency of the evidence, the appellate court must determine "whether, after viewing the evidence in the

light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed. 560 (1979) The purpose of this standard of review is to ensure that the trial court fact finder "rationally applied" the constitutional standard required by the due process clause of the Fourteenth Amendment, which allows conviction of a criminal offense only upon proof beyond a reasonable doubt. *Jackson*, 443 U.S. at 317-318, 99 S. Ct. 2781; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed. 368 (1970) In other words, the *Jackson* standard is designed to ensure that the defendant's due process right in trial court was properly observed. Sufficient evidence supports a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Hosier*, 157 Wash.2d 1, 8, 133 P.3d 936 (2006)

At issue here is whether the state proved that the defendant was convicted of four prior qualifying offenses. The state failed to prove any of the prior offenses when it rested before introducing any of the judgment and sentences into evidence. (VRP 2/28/13 p. 548-549; see also VRP generally) The defense moved for dismissal arguing that the state's failure to introduce the prior convictions resulted in insufficient evidence for the

felony DUI. (VRP 2/28/13 p. 547-549) The defense argued even if the prior judgment and sentences were admitted, the evidence is insufficient because there was no identification of Mr. Goggin in the Idaho case. (VRP 2/28/13 p. 549) The court then allowed the state to reopen, over defense objection, and introduce the judgment and sentences after the state rested. (VRP 2/28/13 p. 558-559)

There was insufficient evidence to prove the four prior DUI convictions required by RCW 46.61.506 because the government failed to introduce any of the four prior judgment and sentences before resting its case in chief. (VRP 2/28/13 p. 546-549) The defense argued that there had been no identification of Mr. Goggin as the person arrested in Idaho....There's just a total insufficient evidence on the Idaho DUI certainly as to the evidence admitted to this court." (VRP 2/28/13 p. 549) (VRP 2/28/13 p. 560-561)

The state must prove the identity of the person arrested in the prior cases was indeed the person charged before this court. *State v. Hill*, 83 Wash.2d 558, 560, 520 P.2d 618 (1974) See also *United States v. Jackson*, 368 F.3d 59, 63-64, (2nd Cir. 2004); *United States v. Allen*, 383 F.3d 644, 649 (7th Cir. 2004) "To sustain this burden when criminal liability depends on the accused's being the person to whom a document pertains.....the State must do more than authenticate and admit the document; it also must

show beyond a reasonable doubt "that the person named therein is the same person on trial." Because in many instances men bear identical names, the State cannot do this by showing "identity of names alone." Rather, it must show, by evidence independent of the record, that the person named therein is the defendant in the present action." *State v. Huber*, 119 P.3d 388, 390, 119, 129 Wn.App. 499 502 (2005)

The court in *Huber* made suggestions of how the state can meet the burden of demonstrating that the person is the person identified by documents including "otherwise – admissible booking photographs, citing *State v. Murdock*, 91 Wash.2d 336, 338-340, 588 P.2d 1143 (1979); *State v. Johnson*, 33 Wash.App. 534, 538, 656 P.2d 1099 (1982); booking fingerprints citing *State v. Murdock*, 91 Wash.2d 336, 340, 288 P.2d 1143 (1979); *State v. Johnson*, 33 Wash.App. 534, 538, 656 P.2d 1099 (1982); eyewitness identification or distinctive personal information. *State v. Huber*, 129 Wash.App. 499, 503, 119 P.3d 388, 390 (2005)

The court in *State v. Huber*, 129 Wash.App. 499, 503, 504, 119 P.3d 388, 391 (Div. 2 2005) held that merely producing documents "but no evidence to show 'that the person named therein is the same person on trial'.....concluding that the evidence is insufficient to support a finding that the person on trial is the person named in the state's exhibits, we reverse and remand with directions to dismiss the bail jumping charge

with prejudice." The same occurred in the Goggin case. The state only admitted judgment and sentence from Idaho without any further evidence to demonstrate the identity of the individual arrested in Idaho. Without more, the case must be dismissed for insufficient evidence as to the felony DUI charge.

Issue 3: The trial court committed reversible error in admitting "certified judgment and sentences" without requiring court testimony to satisfy Article I § 22 Confrontation Clause.

Pretrial the defense objected to the introduction of the prior convictions without testimony from a person presenting the documents. (VRP 2/25/13 p. 175-177) The state conceded that since they had no fingerprints there will be testimony to support the documents. (VRP 2/25/13 p. 177-178) The prosecution states there will be live testimony to verify the identity of Mr. Goggin in the Idaho case. (VRP 2/25/13 p. 177-179) Ultimately, the defense renewed the objection to the failure to bring any witness with the Idaho judgment and sentence. (VRP 2/28/13 p. 502) The defense argued that the failure to bring a person to prove the defendant is the person connected to the document violated his right of confrontation. (VRP 2/28/13 p. 513) The court held that RCW 5.44.010 addressed certified documents requiring no person to identify the court documents. (VRP 2/28/13 p. 519-520) The state acknowledges that they must prove the identity of the person arrested (VRP 2/28/13 p. 559) and

the defense renewed the objections but the court admitted the documents. (VRP 2/28/13 p. 599)

Washington State Constitution at Article I § 22 addresses "Rights of the Accused", it specifically states: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel,.....to meet with witnesses against him face to face." The amendment provides the accused persons protections greater than the Sixth Amendment including not "before final judgment be compelled to advance money or fees to secure the rights herein guaranteed."

Article I § 22 affords defendants greater protection than does the Sixth Amendment. Accordingly, Mr. Goggin asks the court to hold that the state must bring a person to admit the judgment and sentences consistent with his right in a criminal trial "to meet the witnesses against him face to face."

An examination of the *Gunwall* factors consistent with *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986) requires consideration "(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern."

In looking at factors one and two, it is obvious that the text of the Sixth Amendment is not identical to Article I § 22. The provision in our

state constitution reads, in pertinent part, that an accused appear and defend in person.....to meet witnesses against [and] to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend VI, on the other hand, merely provides that an accused has the right "to a speedy and public trial....to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor." It is readily observable that our state's confrontation clause provides several rights that are not specifically set for the in the Sixth Amendment, namely: the right to appear and defend in person, the right to have a copy of the charge, the right to testify in one's own behalf, to meet witnesses against him face to face, and right to appeal in all cases. The first and second factors weigh in favor of an independent analysis of the Confrontation Clause. The Washington Supreme Court has previously ruled that factors one and two weigh in favor of an independent analysis of the Confrontation Clause of the state constitution. *State v. Martin*, 171 Wn.2d 521, 531, 252 P.3d 872 (2011)

In considering factor three, which is the constitutional history and common law history, it appears that little is known about what the drafters of Article I § 22 intended in 1889. It is known that shortly after statehood, the State Supreme Court acknowledged that Article I § 22 provided defendants the right to meet the witnesses against them face to face and to

cross-examine those witnesses in open court. *State v. Martin*, 171 Wn.2d 521, 531, 252 P.3d 872 (2011) citing *State v. Stentz*, 30 Wash. 134, 142, 70 P. 241 (1902) It was found significant that the federal constitution did not provide such broad protection to defendants at the time Washington became a state. *Martin*, supra. Ultimately, the Washington Supreme Court in *Martin* supra at 531 found that the history that the third *Gunwall* factor weighs in favor of independent analysis.

The fourth factor which must be considered in applying the *Gunwall* analysis is preexisting state law. Again the Supreme Court in *State v. Martin*, 171 Wn.2d 521, 533, 252 P.3d 872 (2011) found that the state law "may be responsive to concerns of citizens long before they are addressed by analogous constitutional claims. Citing *Gunwall*, 106 Wash.2d at 62, 720 P.2d 808. Noting that federal law under the Sixth Amendment did not afford a defendant the right to testify until 1961. Citing *Ferguson v. Georgia*, 365 U.S. 570, 596, 81 S. Ct. 756, 596, 81 S. Ct. 756, 5 L.Ed.2d 783 (1961) Ultimately, the Supreme Court found that this ? to weigh in favor of an independent analysis of Article I § 22. *State v. Martin*, 171 Wn.2d 521, 533, 252 P.3d 872 (2011)

The fifth factor is the structural difference which weighs clearly toward an independent analysis. The language of Article I § 22 requires a "face to face" meeting of witnesses in a criminal prosecution. There is

nothing requiring such specific rights in the Sixth Amendment. The structure of the language of Article I § 22 weighs in favor of independent analysis here, as in *State v. Martin*, 171 Wn.2d 521, 533, 252 P.3d 872 (2011). The court should grant independent review.

The defense maintains that the right of confrontation under Article I § 22 clearly mandates that there must be more than documentary evidence to support the conviction. Article I §22 mandates and requires a face to face meeting to support the identification of the defendant in a criminal prosecution.

V. CONCLUSION

There was insufficient evidence on the question of the prior convictions and this mandates dismissal of the felony DUI. The introduction of the blood test where the defendant was not advised of his right to an additional test requires a new trial on the misdemeanor charge. This court should remand for a new trial on the misdemeanor charge alone.

Respectfully submitted this 10 day of January, 2014

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