No. 31515-1-III

COURT OF APPEALS

DIVISION III

OF

THE STATE OF WASHINGTON

State of Washington,
Respondent

v.

Joseph J. Goggins,
Appellant

Appeal from the Superior Court of Spokane County

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page No.
I. ISSUES ON REPLY	1
II. ARGUMENT ON REPLY	1-5
III. CONCLUSION	5-6

I. ISSUES ON REPLY

1. The admission of a mandatory blood draw after a search warrant where the defendant is not advised of his right to an additional blood draw requires suppression of the blood test results.

2. The insufficient evidence of the prior convictions requires the dismissal of the felony charge for insufficient evidence.

3. The admission of the "certified judgment and sentences" without requiring courtroom testimony to satisfy Article I § 22 Confrontation Clause was an error.

II. ARGUMENT ON REPLY

1. The admission of a mandatory blood draw after a search warrant where the defendant is not advised of his right to an additional blood draw requires suppression of the blood test results.

The government's argument improperly focuses upon the implied consent language in RCW 46.61.308(4) and ignores the language of RCW 46.61.506(5) which provides a defendant charged with DUI the right to an additional blood test. The language of RCW 46.20.308(2) states: "The officer shall inform the person of his or her right....to have an additional test administered by any qualified person of his choosing as provided in RCW 46.61.506." The right to an additional blood test comes from RCW 46.61.506(5).

The right to an additional blood test is a right flowing from RCW 46.61.506(5) as the Washington Supreme Court held in *State v. Canaday*,

90 Wash.2d 808, 817, 585 P.2d 1185 (1978) That ruling was later affirmed in *State v. Burtels*, 112 Wn.2d 882, 886, 774 P.2d 1183 (1989) where the court ruled improper warnings required suppression of the breath test. The court held in *State v. Canaday*, 90 Wash.2d 808, 817, 585 P.2d 1185 (1978) that the "statutory requirement demonstrates an important protection of the subject's right to fundamental fairness which is built into our implied consent procedure." The Supreme Court has held the right to an additional blood test "is in keeping with a defendant's constitutional due process right to gather evidence in his own defense." *State v. Morales*, 173 Wn.2d 560, 576, 269 P.3d 263 (2012) citing *State v. McNichols*, 128 Wash.2d 242, 250-51, 906 P.2d 329 (1995)

The State Supreme Court in *State v. Turpin*, 94 Wn.2d 820, 827, 620 P.2d 990 (1980) ruled that failure to inform of the right to independent blood test under RCW 46.61.506 (5) required suppression of the blood test. In *Turpin supra* a blood draw was taken under a provision for mandating blood draws in cases of homicide. The *Turpin* court noted that the statutory language was added after the State Supreme Court ruled in *State v. Wetherell*, 82 Wash.2d 865, 514 P.2d 1069 (1973); *State v. Krieg*, 7 Wash.App. 20, 497 P.2d 621 (1972) that defendant's must be advised of their right to additional blood test.

The error here is both a violation of RCW 46.61.506(5) and a violation of the defendant's due process rights. The violation of constitutional due process rights requires the suppression of the breath test. The officer must advise the defendant of the right to an additional blood test when blood is drawn based upon a warrant or any other mandatory blood draw. The breath test must be suppressed as law enforcement failed to advise Mr. Goggin he had a right to get an additional blood test when blood is taken pursuant to a search warrant.

2. The insufficient evidence of the prior convictions requires the dismissal of the felony charge.

The government's response fails to address the question of the failure of the prosecution to prove the prior convictions. In order to prove the prior convictions the prosecution must do more than introduce "certified copies" of prior convictions. The state must prove the identity of the person arrested in the prior cases was indeed the person 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, (2d. Cir. 2004); *United States v. Allen*, 383 F.3d 644, 649 (7th Cir. 2004)

The court in *United States v. Aaron L. Jackson*, 368 F.3d 59, 70-75 (2nd Cir. 2004) went through extensive case history noting the decision of the 3rd Circuit in *United States v. Weiler*, 385 F.2d 63 (3rd Cir. 1967)

finding insufficient evidence of prior conviction. In *Gravatt v. United States*, 260 F.2d 498 (10th Cir. 1958) the court found insufficient a proof of prior conviction based solely on a certified copy of judgment and sentence from Oklahoma state court without more was insufficient. Other states have made similar findings including Florida in *Miller v. State*, 573 So.2d 450, 406 (Flo. Dist. Ct. App. 1991) and Oregon in *State v. Garrett*, 281 Or. 281, 574 P.2d 639, 640 (1978)

Here the government has failed to address that the only evidence admitted as to the defendants identity for the Idaho conviction was the certified judgment and sentence. The government has completely ignored the failure of proof as to the defendant's prior convictions and as such the court must find insufficient evidence as a matter of law on the felony driving under the influence charge. The felony DUI charge should be dismissed by the appellate court.

3. **The admission of the "certified judgment and sentences" without requiring courtroom testimony to satisfy Article I § 22 Confrontation Clause was an error.**

The government's response fails to address the Article I § 22 requirement of the Washington State Constitution that requires in a criminal case the defendant "meet the witness against him face to face". To admit a certified copy of the judgment and sentence without more violates the defendant's right to confront witnesses against him face to

face. Indeed no witness appeared before the court to introduce the certified judgment and sentence documents. (VRP 2/28/13 p. 553) The defendant objected and the government responded that they would prove the identity of the person arrested by calling Mr. Creighton his probation officer. (VRP 2/28/13 p. 526 lines 5-14) The government never called Mr. Creighton or any other witness to verify Mr. Goggin's identity. (See VRP generally) The state's failure to provide testimony violated the defendant's rights under Article I § 22 because there was no face to face confrontation as required by Washington State Constitution.

The denial of the face to face confrontation requires a new trial consistent with the Washington State Supreme Court's holding in *State v. Jasper*, 174 Wn.2d 96, 117, 271 P.3d 876 (Wash. 2012). Here as in *Jasper, supra* the use of the Idaho judgment and sentence may not be harmless error beyond a reasonable doubt. The jury would be unable to find Joseph Goggin guilty of felony driving under the influence without the judgment and sentence from Idaho state.

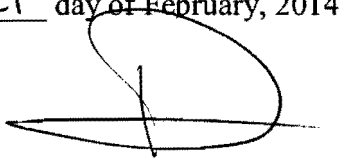
III. CONCLUSION

The governments reply fails to address the insufficient evidence as to the prior convictions based only upon the certified judgment and sentence. The mandatory blood draw should not have been admitted where the government did not comply with the requirements of RCW 46.61.506

(5) requiring the defendant have a right to an additional test. Then the government may not consistent with Article I § 22 admit a judgment and sentence without face to face testimony.

The errors here require dismissal of the felony charge and remand for retrial on the misdemeanor charge of driving under the influence.

Respectfully submitted this 21 day of February, 2014



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