71613-1

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NO. 71613-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ERIC ARMSTRONG,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE ANDREA DARVAS

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Constitutional Provisions

Statutes

Rules and Regulations

Washington State:

Other Authorities

A. ISSUES PRESENTED

1. Appellant Armstrong caused a fatal collision on a rural road in South King County. Police staffing levels in the area were minimal and all available officers responded to investigate and control the collision scene. There was no cellular telephone service in the area. Law enforcement officers were aware that Armstrong would be transported to the hospital for medical treatment for his injuries, and that the treatment may interfere with an accurate blood-alcohol test. At police direction, Armstrong's blood was drawn by a paramedic at the scene. Does substantial evidence in the record support the trial court's finding that it was not possible to obtain a warrant in the amount of time necessary to prevent the destruction of evidence? Did the trial court properly conclude that, considering the totality of circumstances, exigent circumstances justified the warrantless seizure of Armstrong's blood?

2. At the time Armstrong's blood was seized, nonconsensual warrantless blood draws conducted pursuant to Washington's implied consent statute were determined to be constitutional if there was a clear indication that the blood draw would reveal evidence of intoxication, and if the draw was performed in a reasonable manner. Following the blood draw in this case, the United States Supreme Court determined that the federal constitution requires warrantless blood draws to be justified by

exigent circumstances individual to each case. The exclusionary rule of the federal constitution does not apply to evidence obtained by police who acted in objectively reasonable reliance upon a statute authorizing a warrantless search. Should the good faith exception to the federal constitution's warrant requirement be applied because Armstrong's blood draw was conducted pursuant to a statute that had been found constitutional?

3. With the exception of State v. Martines,[1] no case law or court rule has ever required a separate, express judicial authorization to test a blood sample lawfully obtained by law enforcement. Instead, courts treat the extraction of blood for testing and the testing of the blood as a single event for Fourth Amendment purposes. Because all searches must be reasonable, the testing of blood samples for properties wholly unrelated to the crime would be legally – and as a policy matter – indefensible, and the fruits of any such search must be suppressed under existing law. Where Martines was wrongly decided, should this Court refuse to follow it, and instead conclude that no warrant was required to test Armstrong's blood, lawfully obtained by the police, to determine its alcohol content?

4. With the exception of prior convictions and facts admitted by the defendant, any fact that increases the penalty for a crime beyond the

[1] 182 Wn. App. 519, 331 P.3d 105 (2014), review granted, __ Wn.2d __, 339 P.3d 634 (2014).

prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. The prior conviction exception encompasses recidivist facts that follow necessarily or as a matter of law from the fact of the prior conviction itself. With respect to deferred prosecutions, procedural safeguards are in place to ensure that individuals innocent of the conduct for which they were charged do not receive an enhanced sentence in a subsequent, unrelated conviction. Should this Court conclude that the existence of Armstrong's prior deferred DUI prosecution is a recidivist fact that the trial court may properly find?

B. STATEMENT OF THE CASE

Shortly before 12:30 a.m. on February 19, 2012, Appellant Michael Armstrong drove his pickup truck southbound through an intersection in rural South King County without stopping. CP 69-70 (Findings of Fact 3, 7). A sign positioned 500 feet before the intersection warned southbound traffic of the impending need to stop. CP 70 (Finding of Fact 5). Additionally, a stop sign and a blinking red light were positioned at the intersection itself, directing both southbound and northbound traffic to stop. Id. Westbound and eastbound traffic through the intersection were not required to stop. CP 70 (Finding of Fact 6).

Despite the signs and blinking red light, Armstrong proceeded through the intersection at approximately 50-55 miles per hour, slamming into the passenger side of a Dodge Magnum that was traveling westbound through the intersection. CP 69-70, 72 (Findings of Fact 1, 7, 22). The force of the impact was substantial. The Dodge rotated clockwise and was driven west into a drainage ditch. CP 70 (Finding of Fact 7). Armstrong's pickup truck crushed the frame of the Dodge inward, causing massive injuries to the head and torso of 61-year-old Mary Ross, who was seated in its passenger seat. CP 69-70 (Findings of Fact 1, 8). Despite the best efforts of paramedics to save her life, Ross died at the scene. CP 70 (Finding of Fact 8). Ross's daughter, who had been driving the Dodge, suffered substantial injuries – a grade three liver laceration and fractures of her spine and ribcage. CP 70 (Finding of Fact 9).

The force of the collision caused Armstrong's truck to flip upside down onto its roof and then slam into a tree in a nearby yard. CP 70 (Finding of Fact 7). The impact was so severe that one of the wheels broke free from the truck and crashed into a home located at the southwest corner of the intersection. CP 70 (Finding of Fact 10). After feeling her house shake, the occupant of the home went outside and discovered a male in the driver's seat of the pickup; she smelled alcohol on him. CP 70-71 (Finding of Fact 10).

Another individual who lived nearby approached the pickup truck and saw that the driver had crawled out. CP 71 (Finding of Fact 13). She heard him attempting to coax his passenger out, telling her, "Come on we have to go, I'm in so much trouble, we have to go." Id. She smelled a strong odor of alcohol. Id.

King County Sheriff's Deputy Pritchett was one of the first responders to arrive at the scene. CP 71 (Finding of Fact 15). Armstrong admitted to Pritchett that he had been driving the black pickup truck. CP 71 (Finding of Fact 16). Deputy Cory Stanton also responded, and ultimately contacted Armstrong, who was sitting in the back of an ambulance. CP 71-72 (Finding of Fact 17). Deputy Stanton observed that Armstrong smelled of alcohol and heard him slur his speech. Id. Although Armstrong stated something to the effect of, "Take care of the others, I don't deserve it," he refused to answer Deputy Stanton's question about whether he had been drinking. Id.

Testing by the Washington State Toxicology Laboratory revealed that the ethanol concentration of Armstrong's blood was 0.17 ± 0.014 g/100mL (k=3, 99.7% confidence level). CP 72 (Finding of Fact 20).

On April 4, 2012, Armstrong was charged in King County Superior Court with Vehicular Homicide and Vehicular Assault. CP 1-2. Following the United States Supreme Court's decision in Missouri v.

McNeely,[2] Armstrong moved to suppress the results of the blood test, arguing that a warrant had been required to draw his blood.[3] RP 3.[4] Following briefing, testimony, and argument, the Honorable Judge Andrea Darvas denied Armstrong's suppression motion, finding that exigent circumstances supported the warrantless blood draw. CP 23-33.

After the trial court determined that the blood testing results were admissible, Armstrong agreed to have his guilt decided by way of stipulated facts. CP 64-68; RP 280-90. On January 24, 2014, the trial court found Armstrong guilty as charged of Vehicular Homicide and Vehicular Assault, and entered written findings of fact and conclusions of law to that effect. CP 69-74.

On February 28, 2014, the court sentenced Armstrong to concurrent standard-range base sentences of 41 months for the Vehicular Homicide charge, and 14 months for the Vehicular Assault charge. CP 82; RP 345. Pursuant to RCW 9.94A.533(7), the court also imposed two consecutive 24-month periods of confinement, based on its finding that Armstrong had two prior qualifying offenses. CP 80, 82; RP 317, 345. Armstrong now appeals. CP 87-88.

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[2] __ U.S. __, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013).

[3] Armstrong also made a motion to suppress the results of the blood testing on other grounds not relevant to the issues on appeal. CP 15-18; RP 110.

[4] The State adopts the Appellant's designation of the Verbatim Report of Proceedings.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY CONCLUDED THAT EXIGENT CIRCUMSTANCES JUSTIFIED THE WARRANTLESS SEIZURE OF ARMSTRONG'S BLOOD.

Considering the totality of circumstances, the trial court properly concluded that exigent circumstances justified the warrantless seizure of Armstrong's blood. Substantial evidence in the record supports the trial court's finding that it was not possible to obtain a warrant in the amount of time necessary to prevent the destruction of evidence – destruction that would occur: (1) as a result of the body's natural absorption of alcohol in the bloodstream; and (2) from the necessity for Armstrong to be transported to the hospital for medical treatment that could potentially interfere with an accurate blood-alcohol test result.

a. Additional Facts From The Pretrial Suppression Hearing.

Deputy Stanton was assigned to the City of Maple Valley on the night of the collision. RP 12. Police staffing in the entire South King County area was minimal at that time, and based on Stanton's awareness of that fact, and because he knew that traffic control at the accident scene would be necessary, he responded even though it was outside of his assigned area. RP 15, 17-19. Deputy Stanton arrived at 12:43 a.m.,

approximately 12 minutes after he heard the original call over the radio. RP 17-18.

Immediately upon his arrival, Stanton observed that the collision was very serious, and he determined that it was necessary to stop traffic to ensure that the scene was safe for the responders. RP 20-23. He positioned his patrol car across the roadway to block both lanes of traffic, and he placed flares on the road to warn vehicles to stop. RP 23-24. After he was finished, Stanton spoke to Deputy Pritchett and learned that the driver of the truck was being treated in one of the aid cars. RP 25. At that time, Stanton had no reason to think that alcohol or drugs were involved in the collision. RP 26. Stanton, a certified Drug Recognition Expert ("DRE"), went to the aid car to contact Armstrong. RP 8, 25-26.

Armstrong was sitting in the back of the ambulance, crying and talking to an Emergency Medical Technician ("EMT"). RP 26-27. Also in the ambulance was a woman Stanton believed had been a passenger in Armstrong's truck, sitting with a blank stare and appearing to be in shock. Id. Although Stanton could see that Armstrong was answering the EMT's questions, when Stanton tried to speak with him, Armstrong would not respond. RP 27-28. Instead of answering Stanton's questions, Armstrong simply repeated words to the effect of, "Don't help me," "help them," and "I don't deserve it." RP 28. Stanton observed that Armstrong had watery,

bloodshot eyes. Id. Armstrong's speech was slurred. RP 28. When the EMTs moved Armstrong onto a gurney and placed him onto a backboard, Stanton was able to smell alcohol on Armstrong's breath. RP 28-29.

After his interaction with Armstrong in the ambulance, Stanton resumed traffic control duties; he set up crime scene tape and additional flares, and attempted to maintain the integrity of the scene until Sergeant Jencks arrived at 1:01 a.m. RP 30-33. Stanton was aware that Armstrong was going to be transported to the hospital, and would thus be unavailable for a breath test. RP 29, 31-32. Although he knew that there were injuries to the occupants of the other vehicle, at that point Stanton did not know how serious those injuries were. RP 29. Thus, when Deputy Stanton first spoke to Sergeant Jencks, he did not know whether he would seek Armstrong's consent to draw blood, or whether he would have Armstrong's blood drawn regardless of his consent, pursuant to his arrest for Vehicular Assault or Homicide. RP 31-32, 66; Pretrial Ex. 8. Regardless, Stanton and Sergeant Jencks discussed the possibility of having Armstrong's blood drawn at the scene, due to the presence of a paramedic unit; paramedics are the only individuals outside of a hospital setting qualified to take a blood sample. RP 32-34, 54.

While talking to Sergeant Jencks, at 1:09 a.m., Deputy Stanton learned that Ross had died of her injuries. RP 34-35. Because Deputy

Stanton then had probable cause to arrest Armstrong for Vehicular Homicide, he concluded that Armstrong's blood would be drawn pursuant to the implied consent statute, whether Armstrong agreed or not. RP 34-35, 66; Pretrial Ex. 8. Based on the status of the law at that time, Deputy Stanton believed that a warrantless blood draw was legally appropriate. He was not thinking of the presence or absence of any exigent circumstances. RP 64, 66.

Stanton found a paramedic on scene who agreed to assist with a blood draw, and beginning at 1:16 a.m., Stanton advised Armstrong that he was under arrest for Vehicular Homicide, and read him his constitutional rights, as well as the "special evidence" warnings for a nonconsensual blood draw. RP 34-35, 39-42; Pretrial Exs. 7, 8. At the time he was advised of his rights, Armstrong was in the back of an ambulance, strapped to a backboard, in a neck collar, with medical tape over his head. RP 37-38. Deputy Stanton did not know what Armstrong's injuries were, but based on the seriousness of the collision, he was surprised that Armstrong was still at the scene and that he had not yet been transported to the hospital. RP 38. Armstrong appeared awake and alert as Stanton advised him of his rights, but he did not respond to Stanton at all. RP 40-42. Armstrong's blood was drawn at 1:19 a.m. RP 43, 46.

Armstrong was transported to St. Elizabeth's Hospital in Enumclaw 10 to 15 minutes later. RP 65.

b. Given The Totality Of Circumstances, Exigency Justified The Warrantless Seizure Of Armstrong's Blood.

The Fourth Amendment and Article I, section 7 of the Washington State Constitution prohibit most warrantless searches aside from a narrow set of exceptions. State v. Tibbles, 169 Wn.2d 364, 368-69, 236 P.3d 885 (2010). "Exigent circumstances" is one of those exceptions. Id. at 369. It applies 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." State v. Smith, 165 Wn.2d 511, 517, 199 P.3d 386 (2009) (quoting State v. Audley, 77 Wn. App. 897, 907, 894 P.2d 1359 (1995)).

At the time of this offense, Washington law provided that a person under arrest for Vehicular Homicide was subject to a mandatory blood test, regardless of his consent. Former RCW 46.20.308(3) (2008). The nonconsensual drawing of blood for testing in such a situation is a search and seizure under both the Fourth Amendment and Article I, section 7 of the Washington Constitution. State v. Curran, 116 Wn.2d 174, 184, 804 P.2d 558 (1991); State v. Judge, 100 Wn.2d 706, 711-12, 675 P.2d 219

(1984). Nonetheless, at the time of Armstrong's crime, the law provided that so long as an arresting officer had a clear indication that the blood test would reveal evidence of intoxication, and so long as the test was performed in a reasonable manner, a suspect's constitutional rights were protected. Curran, 116 Wn.2d at 184-85.

In 2013, the United States Supreme Court established that a nonconsensual blood draw is a compelled physical intrusion beneath a person's skin that must be authorized by a search warrant, unless there are exigent circumstances to justify its absence. McNeely, 133 S. Ct. at 1558-59. In so holding, the Court rejected an argument that the natural metabolism of alcohol in the bloodstream is a *per se* exigency justifying a warrantless search in all drunken driving cases. Id. at 1563. Rather, exigency in such a context is determined on a case-by-case basis, considering the totality of circumstances. Id. at 1559. McNeely agreed that although not dispositive in every case, the body's natural ability to absorb alcohol and the consequent loss of evidence are important and appropriate factors to consider when determining whether exigent circumstances justify a warrantless search. McNeely, 133 S. Ct. at 1561 ("[S]ome circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test.").

See also Schmerber v. California, 384 U.S. 757, 770, 88 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) (given that a person's alcohol level decreases soon after he stops drinking, further delay to secure a warrant after officer had already spent time investigating the scene and transporting suspect to the hospital for treatment threatened the destruction of evidence and justified the absence of a warrant).

Indeed, the "biological certainty" that alcohol dissipates from the bloodstream at a rate of 0.01 percent to 0.025 percent per hour means that "[e]vidence is literally disappearing by the minute." McNeely, 133 S. Ct. at 1570-71 (Roberts, J., concurring in part and dissenting in part). Thus, the body's natural absorption of alcohol cannot be ignored when considering whether circumstances exist which threaten the destruction of evidence so as to justify a warrantless blood draw.

Other factors to be considered when judging exigent circumstances include the delay in obtaining a sample of the blood (a suspect must usually be transported to a hospital or other medical facility to obtain the blood draw), as well as the delay encountered in the warrant application process itself. McNeely, 133 S. Ct. at 1562. How long it would generally take to obtain a warrant is a factor for the reviewing court to consider:

> Telephonic and electronic warrants may still require officers to follow time-consuming formalities designed to create an adequate record, such as preparing a duplicate

> warrant before calling the magistrate judge. And improvements in communications technology do not guarantee that a magistrate judge will be available when an officer needs a warrant after making a late-night arrest.

Id. (internal citations omitted). Additionally, while it is possible for an expert to "work backwards" from the blood-alcohol content at the time a sample was taken to determine a suspect's blood-alcohol content at the time of the offense, the longer such an interval, the more questions that may be raised about the accuracy of that calculation. McNeely, 133 S. Ct. at 1653. "For that reason, exigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process." Id.

In sum, McNeely confirms that the natural absorption of alcohol in the bloodstream remains an important factor in analyzing whether the totality of circumstances support a finding of exigency. Indeed, McNeely approved of Schmerber's conclusions that the time spent investigating an accident and transporting an injured suspect to the hospital causes delay, obtaining a warrant results in further delay, and that such delay threatens the destruction of evidence. McNeely, 133 S. Ct. at 1559-60.

When considering the presence of exigent circumstances, a reviewing court should assess the facts "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of

hindsight." McNeely, 133 S. Ct. at 1564, n.7 (quoting Rayburn v. Huff, __ U.S. __, 132 S. Ct. 987, 992, 181 L. Ed. 2d 966 (2012) (*per curiam*)).

A trial court's denial of a suppression motion is reviewed for substantial evidence. State v. Shultz, 170 Wn.2d 746, 753, 248 P.3d 484 (2011). Specifically, the reviewing court considers whether any challenged factual findings of the trial court are supported by substantial evidence in the record, and if so, those facts are binding on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Evidence is substantial when it is enough to persuade a fair-minded person of the truth of the stated premise. Id. at 644. Unchallenged findings are verities on appeal. Id. The trial court's legal conclusions are reviewed *de novo*. Shultz, 170 Wn.2d at 753.

Here, the trial court properly concluded that exigent circumstances justified the warrantless seizure of Armstrong's blood. Unlike McNeely, which involved a routine DUI arrest, Armstrong was involved in a significant motor vehicle collision that resulted in the death of one person and serious injury to another. CP 23-24 (Pretrial Finding of Fact 1); RP 15, 34, 38. The collision occurred in a remote area of unincorporated King County where police staffing levels were low, and where every available unit was either assisting with the accident or involved with another call. CP 24 (Pretrial Finding of Fact 3); RP 10-12, 15, 17-18, 44.

Deputy Stanton was one of only four officers, in addition to Sergeant Jencks, who responded to the chaotic scene. RP 20, 24, 50-51. Stanton was the only DRE at the scene. CP 25 (Pretrial Finding of Fact 6); RP 26.

Upon his arrival, Deputy Stanton immediately assisted with traffic control and placed flares. CP 24 (Pretrial Finding of Fact 5); RP 23-24. Then, after his initial contact with Armstrong, Stanton performed further traffic control and crime scene preservation duties, and ran Armstrong's identity through his dispatcher. CP 26 (Pretrial Finding of Fact 11); RP 30, 33. Deputy Stanton did not learn that Ms. Ross had died until 40 minutes had passed since the collision. CP 26-27 (Pretrial Finding of Fact 12); RP 34.

Stanton was aware that Armstrong was going to be transported to the hospital for treatment. RP 29. Although he did not know the extent of Armstrong's injuries, Stanton knew that Armstrong had been involved in a serious collision, could see that Armstrong was strapped to a backboard wearing a neck collar, and with medical tape covering his head. CP 27 (Pretrial Finding of Fact 14); RP 37-38. Stanton was aware that Armstrong might receive medical care at the hospital (such as fluids and medications) that would interfere with an accurate blood-alcohol test. CP 29 (Pretrial Finding of Fact 20); RP 44. Moreover, based on Deputy Stanton's experience, if the blood draw was done at the hospital, it would

be delayed until after Armstrong's treatment, and would have taken at least an additional 30 to 40 minutes after his arrival at the hospital. CP 28 (Pretrial Finding of Fact 20). And because "the entire southeast King County [Sheriff's Office] was tied up" at the time, someone would have had to cease their duties at the accident scene to accompany Armstrong to the hospital. RP 44.

Moreover, while the availability of a telephonic warrant is a factor to consider when determining the presence of exigent circumstances,[5] Deputy Stanton's cellular phone coverage at the location of the collision and "most of that area out there," was non-existent. CP 29 (Pretrial Finding of Fact 21); RP 56-57. Stanton knew of no mechanism by which he could use his police radio to make a telephonic warrant application. RP 57. Even if it had been physically possible, it would have required tying up a radio channel for an extended period of time, which Stanton did not believe was feasible. CP 29 (Pretrial Finding 21); CP 57-58.

Additionally, in his experience, Stanton testified that it took an hour and a half to two hours to procure a warrant for a routine DUI arrest where the suspect was in police custody and not being treated at the hospital. CP 27 (Pretrial Finding of Fact 13); RP 71, 76. This was not a routine DUI arrest; there was a serious injury accident scene to be

[5] State v. Raines, 55 Wn. App. 459, 466, 778 P.2d 538 (1989).

controlled and investigated, Armstrong was required to be transported to the hospital for his injuries, and police staffing levels were minimal. Moreover, even if it had only taken one and a half to two hours to procure a warrant, by that time Armstrong would have received treatment at the hospital, which could have interfered with an accurate blood-alcohol test. Viewed from the perspective of a reasonable officer on the scene, due to the time it would take to get a warrant, there was a real risk that the results of a blood test would be adulterated by fluids and/or medications that Armstrong might receive at the hospital for treatment. CP 29 (Pretrial Finding of Fact 23); RP 46-47. Moreover, had Stanton left the scene to go to a different location with telephone coverage and a printer to obtain a warrant, another officer would have had to accompany Armstrong to the hospital and stay with him. RP 43-44. It was unclear to Stanton, given police staffing levels, whether any officer would have been available. Id. In short, the totality of circumstances demonstrated that an exigency existed that threatened the destruction of evidence. The seizure of Armstrong's blood at the scene of the collision without a warrant was justified.

Armstrong challenges findings of fact 21, 22, and 23. However, Armstrong cannot overcome the trial court's findings (which are

supported by substantial evidence in the record) with his own speculation and conjecture.

With respect to finding of fact 21 (that Deputy Stanton could not make a telephonic[6] warrant application at the scene), Deputy Stanton's testimony was clear about the lack of cellular telephone coverage, and the court's finding in that regard is properly supported. RP 56-57, 74. Armstrong's claim that Stanton was required to have actually tried to use his cellular telephone that night in order for the court's finding to be sufficient is without merit. As to Armstrong's contention that Stanton could have used his police radio to make a telephonic warrant application, Stanton plainly testified that, "There's no way for me to talk to somebody on the phone through my radio." RP 57. Armstrong's sheer speculation that a police dispatcher could shirk his or her duties for the period of time necessary to obtain a search warrant through some form of potential three way radio/telephone call is not sufficient to overcome the substantial evidence in the record that supports the trial court's finding that Deputy Stanton was unable to telephonically apply for a warrant at the scene.

Although Armstrong challenges the importance of finding of fact 22 (which relates to Stanton's knowledge of available judges), it is

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[6] Armstrong appears to concede that substantial evidence supports the court's finding that Deputy Stanton could not prepare a *written* warrant affidavit, and argues instead that this finding is irrelevant because a telephonic application could have been made.

nevertheless a factual finding, and is supported by substantial evidence. See RP 74-75. Moreover, the trial court specifically stated in its legal conclusions that exigent circumstances existed *even assuming* a judge was available to consider a warrant application. CP 32 (Conclusion of Law 7). Thus, Armstrong's argument that Stanton should have known whether a judge was available is irrelevant.

Finally, the trial court determined in finding of fact 23 that it was not feasible to obtain a warrant in a reasonable period of time given the substantial risk that the evidence would be destroyed, due to either the natural dissipation of alcohol in the bloodstream and/or the potential for medical treatment to interfere with an accurate test result. CP 29. Armstrong ignores the substantial evidence in the record to support this finding, and instead posits a number of factual assertions completely unsupported by the record. Without citation to the record, Armstrong claims that King County District Court judges are always available for warrants, that a dispatcher could have easily connected Deputy Stanton to a judge, that dispatchers have lists of judges available to review warrants, that obtaining a warrant would have only taken five to ten minutes, that Deputy Stanton would have had available (and could have quickly used) a "form" warrant – despite the requirement a search warrant be particularized to the individual circumstances presented, State v. Perrone,

119 Wn.2d 538, 545, 834 P.2d 611 (1992) – all in the time before Armstrong was transported to the hospital and potentially subjected to treatment that would destroy the State's evidence. Brf. of Appellant at 22-23. But where there is substantial evidence in the record supporting the challenged facts, those facts are binding on this Court. Hill, 123 Wn.2d at 647. Armstrong cannot speculate about a series of *different* facts to defeat the trial court's factual findings which are supported by substantial evidence.

The trial court properly concluded that exigent circumstances justified the warrantless seizure of Armstrong's blood. This Court should affirm.

2. ALTERNATIVELY, THE RESULTS OF THE BLOOD TESTING WAS ADMISSIBLE PURSUANT TO THE GOOD FAITH EXCEPTION TO THE WARRANT REQUIREMENT.

Even if this Court concludes that the warrantless blood draw was not supported by exigent circumstances, the good faith exception to the Fourth Amendment's warrant requirement should be applied to affirm the admission of the blood testing results because the blood draw was conducted pursuant to a statute that had been found constitutional at the time it occurred.

Prior to McNeely, the Washington State Supreme Court determined that nonconsensual warrantless blood draws conducted pursuant to the implied consent statute are reasonable under Article I, section 7 of the Washington Constitution when there is a clear indication that the blood draw would reveal evidence of intoxication, and the draw is performed in a reasonable manner. Curran, 116 Wn.2d at 184-85.

McNeely is based entirely on the Fourth Amendment. The United States Supreme Court has recognized a good faith exception to the warrant requirement under the Fourth Amendment. Under this exception, the exclusionary rule does not apply to evidence obtained by police who acted in objectively reasonable reliance upon a statute authorizing a warrantless search. Illinois v. Krull, 480 U.S. 340, 350, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987). In Krull, a police officer conducted a warrantless search of the defendant's place of business pursuant to a state statute authorizing warrantless administrative searches of licensees. Id. at 344. The statute was subsequently held to be unconstitutional due to inadequate standards for exercising discretion. Id. In applying the exclusionary rule, the Court explained that it weighs the likelihood that exclusion will have a deterrent effect on unlawful police conduct against the cost of withholding reliable information from the truth-seeking process. Id. at 347. The Court stated:

> Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written.

Id. at 349-50. The Court concluded that the officer's reliance on the Illinois statute was objectively reasonable, and the good faith exception to the warrant requirement allowed admission of evidence seized pursuant to reliance on that statute. Id. at 358.

In the present case, Deputy Stanton's reliance on the Washington statute authorizing a warrantless blood draw in these circumstances was objectively reasonable. The statutory scheme he relied on was held to be reasonable under both the state and federal constitutions in Curran. 116 Wn.2d at 184-85. Thus, the "good faith" exception to the *Fourth Amendment's* exclusionary rule should apply to this alleged *Fourth Amendment* violation, and the blood draw obtained pursuant to a statute previously ruled to be constitutional should not be suppressed. See also Davis v. U.S., __ U.S. __, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011) (approving Krull and applying good faith exception).

Even if Armstrong could make an argument that his rights under Article I, section 7 were violated – an argument foreclosed by Curran –

Washington courts have previously allowed admission of evidence based on reasonable reliance on a statute that is subsequently held to be unconstitutional. In State v. Brockob, 159 Wn.2d 311, 341, 150 P.3d 59 (2006), the defendant was arrested pursuant to former RCW 46.20.289, a statute regarding the suspension of driver's licenses. That statute was subsequently ruled unconstitutional. Upon arresting the defendant, the officer found multiple bottles of ephedrine and coffee filters. Brockob, 159 Wn.2d at 321. The defendant admitted that he had purchased the ephedrine for another individual who would use it to make methamphetamine. Id. The defendant was prosecuted for attempted manufacture of methamphetamine. Id. at 322-23. The Washington Supreme Court held that the officer reasonably relied on DOL information that the defendant's license was suspended pursuant to RCW 46.20.289, and that evidence obtained pursuant to that arrest was properly admitted. Id. at 343

Likewise, in State v. Potter, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006), the court held under similar circumstances that evidence obtained as the result of the defendant's arrest under RCW 46.20.289 was admissible. The court noted the general rule that "police are charged to enforce laws until and unless they are declared unconstitutional" unless a statute is "so grossly and flagrantly unconstitutional" that any reasonable

person would not rely on it. Potter, 156 Wn.2d at 842-43. But see State v. Afana, 169 Wn.2d 169, 184, 233 P.3d 879 (2010) (rejecting the good faith exception based on the officer's reasonable reliance on *decisional* law).

Indeed, the language of Article I, section 7 supports the application of the good faith exception based on reasonable reliance on a statute that had been held to be constitutional at the time of the search. The constitutional provision reads, "No person shall be disturbed in his private affairs, or his home invaded, *without authority of law.*" WA CONST. art. I, § 7 (emphasis added). At the time that the blood draw was performed here, Deputy Stanton was acting under authority of law – a law that the Washington Supreme Court had ruled was constitutional. Thus, even if the Washington Supreme Court were to reverse itself and hold that Article I, section 7 now prohibits warrantless blood draws under the implied consent statute, Deputy Stanton was acting under authority of law that was valid at the time of the search. As such, Article I, section 7 does not mandate suppression of this evidence.

Finally, the State respectfully submits that to the extent this Court may interpret Afana as precluding application of the good faith exception in *all* cases, even those in which the officer was relying on a *statute* that had been ruled to be constitutional at the time, that decision is incorrect and harmful. The court "must have and exert the capacity to change a rule

of law when reason so requires." State v. Barber, 170 Wn.2d 854, 248 P.3d 494 (2011). Such a broad application of Afana is incorrect for the reasons argued above. Moreover, it is harmful by excluding very probative and reliable evidence from the truth-seeking process with no systemic benefit to the criminal justice system, such as deterring unlawful police conduct.

Because the blood draw in this case was conducted pursuant to a statute determined to be constitutional prior to McNeely, it was admissible under the good faith exception to the warrant requirement.

3. NO WARRANT WAS REQUIRED TO ANALYZE ARMSTRONG'S LAWFULLY-SEIZED BLOOD FOR ITS ALCOHOL CONTENT.

Though not raised below, Armstrong contends that the forensic toxicologist's examination of his blood should have been suppressed because the State failed to obtain a search warrant specifically authorizing the testing. In support of this argument, he relies solely on this Court's decision in Martines, supra. However, Martines was wrongly decided. No such search warrant is required. Rather, once the police lawfully have evidence in their custody, no judicial authorization is needed to examine the evidence more closely and determine its evidentiary value.

As noted above, the Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). "A search occurs for Fourth Amendment purposes when 'an expectation of privacy that society is prepared to consider reasonable is infringed.'" State v. Young, 123 Wn.2d 173, 189, 867 P.2d 593 (1994) (citations omitted). Article I, section 7 of the Washington constitution provides greater protection in some areas than does the federal constitution. State v. Surge, 160 Wn.2d 65, 70, 156 P.3d 208 (2007). That provision prohibits government intrusion upon private affairs without authority of law. WASH. CONST. art. I, § 7. Under Article I, section 7, a search occurs when there is an intrusion into "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." State v. Rose, 128 Wn.2d 388, 400, 909 P.2d 280 (1996) (citations and internal quotation marks omitted). For the intrusion to constitute a search, it must be an unreasonable intrusion. State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990).

Here, the taking of a blood sample constitutes a search and seizure for purposes of the Fourth Amendment and Article I, section 7. State v. Kalakosky, 121 Wn.2d 525, 534, 852 P.2d 1064 (1993); Judge, 100 Wn.2d at 711. However, as outlined above in Section C. 1,

Deputy Stanton lawfully seized the blood pursuant to the exigent circumstances exception to the warrant requirement. CP 30-32.

Armstrong does not appear to dispute that there was probable cause to believe that he had caused death or injury to another while driving a car under the influence of alcohol, and that evidence of the crime of Vehicular Homicide could be found in his blood; indeed his briefing appears to concede as much. Brf. of Appellant at 23. Instead, Armstrong contends that the results of the blood testing must be suppressed because, separate and apart from any exigent circumstances which justified the *seizure* of his blood, the State did not procure a warrant which authorized the *testing* of his blood. However, apart from Martines, there are no Washington cases that support Armstrong's argument. Instead, the weight of authority – both in Washington and across the country – is to the contrary. This Court should conclude that Martines was wrongly decided, and that no separate warrant authorizing testing of lawfully seized evidence is required.

The Martines court separated the act of seizing a sample of a person's blood from the act of examining the seized substance, holding that the latter is a search for which a warrant is required, and the failure to secure a warrant that specifically refers to testing is a constitutional violation that must result in suppression of evidence. 182 Wn. App.

at 522. This broad holding is inconsistent with Washington cases, as well as cases from other jurisdictions, and creates great uncertainty for law enforcement regarding what types of forensic analysis require judicial authorization. This Court should decline to follow it.

First, the holding in Martines conflicts with other decisions of the Court of Appeals and the Washington Supreme Court. Division II permitted the forensic examination of a computer, seized pursuant to a valid search warrant, outside of the ten-day period in which the warrant was to be executed. State v. Grenning, 142 Wn. App. 518, 174 P.3d 706 (2008), aff'd, 169 Wn.2d 47 (2010). In doing so, that court observed that "it is generally understood that a lawful seizure of apparent evidence of a crime using a valid search warrant includes a right to test or examine the seized materials to ascertain their evidentiary value."[7] Id. at 532 (citing 2 Wayne R. LaFave, Search and Seizure § 4.10(e), at 771 (4th ed. 2004)).

Similarly, the state supreme court has concluded that law enforcement may forensically examine evidence without further authorization because, once the evidence is lawfully in police custody, the suspect's expectation of privacy in that evidence is so reduced that no protectable interest remains under either the federal or state constitution. State v. Cheatam, 150 Wn.2d 626, 634-44, 81 P.3d 830 (2003)

[7] Although the Martines court took pains to distinguish a number of cases on which the State relied, it did not mention Grenning at all.

(concluding that an arrested defendant lost any privacy interest in his shoes once they were lawfully in police custody); State v. Gregory, 158 Wn.2d 759, 820-29 & n.36, 147 P.3d 1201 (2006) (relying on People v. King, 232 A.D.2d 111 (N.Y. App. Div. 1997), for the conclusion that "[p]rivacy concerns are no longer relevant once the sample has already lawfully been removed from the body, and the scientific analysis of a sample does not involve any further search and seizure of a defendant's person").

Moreover, this notion is embedded in the court rules. Criminal Rule 4.7 provides that the trial court may require a defendant to submit to "the taking of samples of or from the defendant's blood, hair, and other materials of the defendant's body including materials under the defendant's fingernails which involve no unreasonable intrusion thereof." CrR 4.7(b)(2)(vi). The rule contains no express authorization for testing. Surely the Washington Supreme Court did not intend for superior courts to routinely authorize seizures of blood simply to compile stocks of blood vials in police evidence rooms. Instead, it must have intended that the seizure of blood or other biological samples includes subjecting that evidence to relevant forensic analysis, or the seizure was pointless.

Other jurisdictions have reached similar results. See, e.g., State v. Price, 270 P.3d 527 (Utah 2012) (holding, on facts nearly identical to

those presented in Martines, that a suspect has no reasonable expectation of privacy in the presence of contraband in his lawfully obtained blood); Harrison v. Commissioner of Public Safety, 781 N.W.2d 918 (Minn. Ct. App. 2010) ("[W]hen the state has lawfully obtained a sample of a person's blood . . . specifically for the purpose of determining alcohol concentration, the person has lost any legitimate expectation of privacy in the alcohol concentration derived from analysis of the sample"); Wright v. State, 579 S.E.2d 214, 222 (Ga. 2003) (determining that development of film in a camera need not be authorized by warrant, as it is "akin to a laboratory test on any lawfully seized object"); Patterson v. State, 744 N.E.2d 945, 947 (Ind. Ct. App. 2001) (concluding that there is no reasonable expectation of privacy in a blood sample lawfully obtained by police); State v. Wallace, 910 P.2d 695 (Haw. 1996) (determining that the chemical testing of evidence already within police custody does not invade any legitimate expectation of privacy); State v. Petrone, 468 N.W.2d 676, 681 (Wisc. 1991) (holding that police may develop film seized during execution of a search warrant because a "search warrant does not limit officers to naked-eye inspections of objects lawfully seized"), overruled on other grounds by State v. Greve, 468 N.W.2d 676 (Wisc. 1991); State v. Moretti, 521 A.2d 1003, 1009 (R.I. 1987) ("No principle of constitutional law requires any law enforcement official to obtain a

warrant prior to testing any item seized during a valid search"), abrogated on other grounds by Advisory Opinion to the Governor (Appointed Counsel), 666 A.2d 813 (1995); see also United States v. Edwards, 415 U.S. 800, 803-06, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974) ("Indeed, it is difficult to perceive what is unreasonable about the police's examining and holding as evidence those personal effects of the accused that they already have in their lawful custody as the result of a lawful arrest.").

Indeed, on facts nearly identical to this case, the Supreme Court held in Schmerber, supra, that police may *obtain and test* a blood sample from a suspected drunk driver without a search warrant if exigent circumstances are present. 384 U.S. at 771-72. And, in United States v. Snyder, 852 F.2d 471 (9th Cir. 1988), the Ninth Circuit confronted an argument identical to the one Armstrong raises here. In rejecting Snyder's claim that a warrant was needed in order to test the alcohol content of his blood (which was lawfully seized pursuant to exigent circumstances, as authorized by Schmerber), the court explained that Schmerber "viewed the right to seize the blood as encompassing the right to conduct a blood-alcohol test at some later time." Snyder, 852 F.2d at 474. Thus, as long as a blood sample is lawfully obtained, "[t]he subsequent performance of a blood-alcohol test has no independent significance for fourth amendment purposes." Id.

Numerous additional examples exist of the general proposition that "a lawful seizure of apparent evidence of crime pursuant to a search warrant carries with it a right to test or otherwise examine the seized materials to ascertain or enhance their evidentiary value." 2 LaFave § 4.10(e) at 988-93 & nn.231-34 (citing cases); see also Josh Goldfoot, The Physical Computer and the Fourth Amendment, 16 Berkeley J. Crim. L. 112, 149-54 & nn.153-72 (2011) (explaining that "so long as . . . objects come into law enforcement's possession lawfully, courts do not require additional Fourth Amendment justification before police subject [those objects] to examination," and citing cases relating to examination of blood, film, clothing, cars, carpet fibers, purses, paper, videotapes, and the defendant's hands).

Against this bulwark of authority, Martines alone concludes that express judicial authorization is required to forensically analyze evidence lawfully in the possession of law enforcement. However, Martines attempted to use the reasoning of Skinner v. Ry. Labor Execs.' Assn., 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989), and Robinson v. City of Seattle, 102 Wn. App. 795, 822 n.105, 10 P.3d 452 (2000), to conclude that the taking of a biological sample and the analysis of a biological sample are separate events for purposes of the Fourth Amendment and article I, section 7.

These cases do not support Martines' holding. The administrative searches in these cases were analyzed under the "special needs" doctrine, meaning that the searches were not supported by probable cause or individualized suspicion. Further, although the cases make some distinction between the privacy interest in the taking of the sample and the privacy interest in the analysis of the sample, that distinction makes no difference to the outcome of the cases – rendering it dicta. Skinner, 489 U.S. at 616; Robinson, 102 Wn. App. at 822 n.105. Moreover, the dissent in Skinner drew a distinction between extraction of blood and its subsequent analysis, and would have placed the same constitutional limitations on each individually. 489 U.S. at 642-43 (Marshall, J., dissenting). However, the majority opinion concludes that a single rationale supported *both* the seizure of the sample *and* its later analysis. Id. at 633. Thus, instead of supporting the court's conclusion in Martines, the holding in Skinner contradicts it. Finally, while these cases recognize that different privacy interests may be at stake in the acquisition of evidence and in the analysis of it, neither holds that the testing alone is an unreasonable intrusion into an individual's privacy.[8]

[8] Martines also cited to additional special needs cases: Ferguson v. City of Charleston, 532 U.S. 67, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001); State v. Olivas, 122 Wn.2d 73, 856 P.2d 1076 (1993); United States v. Mitchell, 652 F.3d 387 (3d Cir. 2011); United States v. Weikert, 504 F.3d 1 (1st Cir. 2007). The application of any of these cases to the question raised suffers from the same infirmities discussed above.

Here, the police had lawful custody of Armstrong's blood; they obtained it pursuant to the exigent circumstances exception to the warrant requirement. Accordingly, subjecting it to further examination to support a prosecution for Vehicular Homicide and Vehicular Assault did not violate Armstrong's rights under either the Fourth Amendment or Article I, section 7.

This is not to say that courts should turn a blind eye to a forensic examination that intrudes into sensitive areas unrelated to any possible crime under investigation. Courts have a role to play if the police, instead of looking for evidence of intoxication, analyze a suspect's blood for "evidence of disease, pregnancy, and genetic family relationships or lack thereof." Martines, 182 Wn. App. at 530. But here, law enforcement did no such thing. Its analysis of Armstrong's blood looked solely at evidence of impairment relevant to the crime of Vehicular Homicide and Vehicular Assault. Because the concerns of law enforcement overreaching expressed in Martines were hypothetical and not raised in that case, the court should not have relied on them to issue a broad ruling inconsistent with Washington precedent. Compare State v. Athan, 160 Wn.2d 354, 367-68, 158 P.3d 27 (2007) (declining to address the fact that DNA testing of abandoned saliva "has the potential to reveal a vast amount of personal

information" when law enforcement used it solely for the limited purpose of identification). This Court should not do so in this case either.

The Martines court apparently believed that a new "express authorization rule" was required in order to reject an argument by the State that law enforcement should be permitted to do whatever it wants with a biological sample taken pursuant to a search warrant. 182 Wn. App. at 524-25, 529. However, the State does not assert that law enforcement may rummage through sensitive biological information at will. The "*per se* rule" that Martines appears to have understood the State to advocate for is already prohibited by binding Supreme Court authority. In Schmerber, the Supreme Court limited its holding to *reasonable* testing.

> [T]he Fourth Amendment's proper function is to constrain, not against all intrusion as such, but *against intrusions which are not justified in the circumstances, or which are made in an improper manner.*

Schmerber, 384 U.S. at 768. The Court set forth three requirements critical to determining the reasonableness of the intrusion: "First, there must be a 'clear indication' that in fact the desired evidence will be found. Second, the test chosen to measure defendant's blood alcohol level must be a reasonable one. Third, the test must be performed in a reasonable manner." Judge, 100 Wn.2d at 711-12 (quoting Schmerber, 384 U.S. at 770-71). All three of these criteria presume a nexus between the forensic

testing and the criminal behavior under investigation. The first factor refers to the "desired evidence," which clearly means evidence of intoxication. The second factor establishes that the test used to measure intoxication must be reasonable. If a test must be reasonable, then it seems that a test for something wholly unrelated to criminal activity – like paternity tests or HIV testing – would certainly be deemed *un*reasonable. Justice Brennan warned that the court was not granting *carte blanche* to all intrusions.

> It bears repeating . . . that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Schmerber, 384 U.S. at 772. Thus, any testing must be reasonable under Schmerber, and the results of an unreasonable test will be suppressed.

In short, once Deputy Stanton had lawfully obtained Armstrong's blood, further forensic examination required no judicial authorization.

4. THE TRIAL COURT PROPERLY ENHANCED ARMSTRONG'S SENTENCE BASED ON ITS FINDING THAT HE HAD A PRIOR DEFERRED PROSECUTION FOR DRIVING UNDER THE INFLUENCE.

Armstrong alleges that pursuant to Apprendi v. New Jersey[9] and Blakely v. Washington,[10] a jury – rather than the trial court – was required to find the "fact" of his prior deferred DUI prosecution before it could be used to enhance his sentence.[11] Armstrong raised this issue below and it was rejected by the trial court. This Court should affirm.

Under Washington law, a defendant convicted of Vehicular Homicide while under the influence of intoxicating liquor shall have a period of 24 months added to his sentence for each "prior offense" as defined in RCW 46.61.5055. RCW 46.61.520(2); RCW 9.94A.533(7). A "prior offense" is defined in relevant part as "a conviction for a violation of RCW 46.61.502 [DUI] or equivalent local ordinance," or as "a deferred prosecution under chapter 10.05 RCW granted in a

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[9] 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

[10] 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

[11] Additionally, in his "Issues related to Assignments of Error," Armstrong alleges that the trial court erred when it "enhance[ed] the Defendant's sentence based on a prior DUI deferred adjudication *without alleging this as an enhancement in the Information*. . . ." Brf. of Appellant at 4 (emphasis added). However, Armstrong's brief contains no argument or citation to relevant authority relating to a notice claim. This Court should refuse to consider Armstrong's bare assertion. See State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990) (appellate court will not address issue unsupported by argument or relevant authority); RAP 10.3(a)(5) (appellate brief should contain argument supporting issues presented for review, citations to legal authority, and references to relevant parts of the record).

prosecution for a violation of RCW 46.61.502 [DUI] . . . or equivalent local ordinance." RCW 46.61.5055(14)(a)(i).

Armstrong candidly admitted at sentencing that he had previously received a deferred prosecution for DUI. RP 305, 328. In fact, he admits as much on appeal. Brf. of Appellant at 25. However, he argues that the trial court was not allowed to find the existence of that deferred prosecution under Blakely, Apprendi, and Alleyne v. United States, __ U.S. __, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). Armstrong's argument should be rejected because: (1) the trial judge is permitted to make factual findings related to recidivist facts which bear no relation to the elements of the current offense; and (2) Armstrong admitted that he had received a prior deferred DUI prosecution.

The United States Supreme Court has held that prior criminal history need not be proved beyond a reasonable doubt to a jury. Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L.Ed.2d 350 (1998). The sentencing enhancement at issue in Almendarez-Torres was not based simply on the existence of a prior conviction; rather, the enhancement required findings that the defendant committed the prior crime, that the crime qualified as an "aggravated felony," and that the crime was committed prior to the defendant's deportation. 523 U.S. at 226-27. The Almendarez-Torres Court recognized that recidivism does

not relate to the commission of the offense itself and is instead "a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." Almendarez-Torres, 523 U.S. at 243.

Two years after Almendarez-Torres, the Supreme Court determined that, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. In so holding, the Apprendi Court refused to overturn Almendarez-Torres, recognizing the certainty that procedural safeguards are inherent in "any fact of prior conviction." Apprendi, 530 U.S. at 488. So long as such assurances are present, the determination of what legal consequences are imposed as a result of the defendant's conduct, such as the fact of conviction, is properly made by a judge rather than a jury. Id.

Although the United States Supreme Court has recognized that the Sixth Amendment right to a jury trial applies to factual findings required for certain sentence enhancements, the Court has been careful to recognize an exception for facts relating to prior convictions. Alleyne, 133 S. Ct. at 2160, n.1; United States v. Booker, 543 U.S. 220, 244, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005); Blakely, 542 U.S. 296 at 301; Ring v. Arizona, 536 U.S. 584, 600, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). In Shepard v.

United States, 544 U.S. 13, 125 S. Ct. 1254, 161 L. Ed. 2d (2005), the Court reaffirmed the "prior conviction" exception and held that sentencing courts may consider certain documents, in addition to the judgment of conviction, in order to determine whether a prior conviction involved certain underlying facts justifying an enhanced sentence. There, the issue was whether the defendant's prior convictions for burglary involved entering a building or enclosed space. The Court held that the sentencing court was not limited to the fact of the prior conviction or the judgment and sentence. Rather, the sentencing court could make the relevant factual determinations by looking to the court's charging documents, the plea agreement, plea colloquy, or "some comparable judicial record of this information." Shepard, 544 U.S. at 26.

Additionally, Washington law has long been consistent with the reasoning of Almendarez-Torres. The Washington Supreme Court observed more than 50 years ago that, "It would seem to need no citation of authority to support the proposition that a court, in passing sentence upon a convicted person, may take into consideration other offenses committed by the same person." Seattle v. Gardner, 54 Wn.2d 112, 114, 338 P.2d 125 (1959).

Moreover, in 2006, after Blakely and after Apprendi, the Washington Supreme Court recognized that sentencing courts could make

factual findings of prior convictions. State v. Hughes, 154 Wn.2d 118, 201-02, 110 P.3d 192 (2005). The court also concluded that judicial fact-finding was constitutionally permissible when deciding whether a defendant was on community placement at the time he committed his instant offense for purposes of adding a point to his offender score and thus increasing his standard sentencing range. State v. Jones, 159 Wn.2d 231, 149 P.3d 636 (2006). The court recognized that

> probation is a direct derivative of the defendant's prior criminal conviction or convictions and the determination involves nothing more than a review of the defendant's status as a repeat offender. In this regard, the community placement conclusion does not implicate the core concern of Apprendi and Blakely – that is the determination does not involve in any way a finding relating to the present offense conduct for which the State is seeking to impose criminal punishment and/or elements of the charged crime or crimes. To give effect to the prior conviction exception, Washington's sentencing courts must be allowed as a matter of law to determine not only the fact of a prior conviction but also those facts "intimately related to [the] prior conviction" such as the defendant's community custody status.

Id. at 241. Thus, the court concluded that the prior conviction exception encompasses facts that follow from the fact of the prior conviction. Id. at 243.

Many courts have recognized that the "prior conviction exception" includes more than just the fact of the prior conviction, and includes facts

concerning the prior crime and the sentence for the prior conviction.[12] For example, the Second Circuit has held that a federal sentencing provision providing for additional points if the length of the defendant's sentence for the prior conviction exceeded a certain amount of time falls under the "prior conviction" exception. United States v. Barrero, 425 F.3d 154, 157-58 (2nd Cir. 2005) (finding that the length of the prior sentence was sufficiently interwoven with the fact of the prior crime as to fall within the "prior conviction" exception). Similarly, several states have statutes that provide for sentencing enhancements based upon some fact concerning the defendant's prior sentence and their appellate courts have frequently recognized that these findings fall under the "prior conviction" exception.[13]

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[12] The federal courts have repeatedly rejected Blakely challenges to a federal sentencing provision, the Armed Career Criminal Act, which mandates an enhanced sentence upon a finding that the defendant has three previous convictions for three "violent" felonies committed on "different occasions." The federal courts have held that whether the prior convictions qualify as violent and whether they occurred on different occasions fall under the "prior conviction" exception. United States v. Santiago, 268 F.3d 151 (2nd Cir. 2001); United States v. Thompson, 421 F.3d 278 (4th Cir. 2005); United States v. Burgin, 388 F.3d 177 (6th Cir. 2005); United States v. Strong, 415 F.3d 902, 906-08 (8th Cir. 2005); United States v. Moore, 401 F.3d 1220, 1224-25 (10th Cir. 2005).

[13] See People v. Thomas, 110 Cal. Rptr.2d 571, 579 (Cal. Ct. App. 2001) (holding that Apprendi does not apply to an enhancement requiring a finding that the defendant served two prior prison terms); Tillman v. State, 900 So.2d 633 (Fla. Dist. Ct. App. 2005) (holding that an enhancement requiring that the charged offense occur within five years of the defendant's prior felony conviction or his release from imprisonment imposed for that conviction is not subject to Blakely); Jones v. State, 769 A.2d 1015, 1023 (Md. 2001) (holding that Apprendi does not apply to a finding that the defendant served a specific term of incarceration resulting from a prior conviction).

Thus, the "prior conviction" exception to the general rule of Apprendi and Blakely is broader than a narrow reading of its language might suggest. This Court should conclude that the exception encompasses the recidivist fact of a prior completed and dismissed deferred DUI prosecution, as defined in RCW 46.61.5055(14)(a)(vii).

An analysis of the deferred prosecution statute supports this conclusion. Pursuant to RCW 10.05.010(1), "In a court of limited jurisdiction a person charged with a misdemeanor or gross misdemeanor may petition the court to be considered for a deferred prosecution program." The requirements for such a petition, as well as for the findings a court must make prior to granting the petition, are contained in RCW 10.05.020 and set forth here in relevant part as follows:

> (1) Except as provided in subsection (2) of this section, the petitioner shall allege under oath in the petition that the wrongful conduct charged is the result of or caused by alcoholism, drug addiction, or mental problems for which the person is in need of treatment and unless treated the probability of future recurrence is great
>
> . . .
>
> (3) Before entry of an order deferring prosecution, a petitioner shall be advised of his or her rights as an accused and execute, as a condition of receiving treatment, a statement that contains: (a) An acknowledgment of his or her rights; (b) an acknowledgment and waiver of the right to testify, the right to a speedy trial, the right to call witnesses to testify, the right to present evidence in his or her

> defense, and the right to a jury trial; (c) *a stipulation to the admissibility and sufficiency of the facts contained in the written police report;* and (d) an acknowledgment that the statement will be entered and used to support a finding of guilty if the court finds cause to revoke the order granting deferred prosecution. . . . He or she shall also be advised that the court will not accept a petition for deferred prosecution from a person who: (i) Sincerely believes that he or she is innocent of the charges;

RCW 10.05.020(1), (3) (emphasis added). For a deferred prosecution to be granted, however, it is not enough that the petitioner make the above averments. The court must also make specific findings before granting the deferred prosecution. Those required findings are set forth as follows:

> (4) Before entering an order deferring prosecution, the court *shall make specific findings that: (a) The petitioner has stipulated to the admissibility and sufficiency of the facts as contained in the written police report*; (b) the petitioner has acknowledged the admissibility of the stipulated facts in any criminal hearing on the underlying offense or offenses held subsequent to revocation of the order granting deferred prosecution; (c) the petitioner has acknowledged and waived the right to testify, the right to a speedy trial, the right to call witnesses to testify, the right to present evidence in his or her defense, and the right to a jury trial; and (d) *the petitioner's statements were made knowingly and voluntarily.* Such findings shall be included in the order granting deferred prosecution.

RCW 10.05.020(4) (emphasis added).

In short, the procedural safeguards mandated by RCW 10.05.020 surrounding the entry of a deferred prosecution are quite similar to those

required for entry of a valid guilty plea, despite the fact that the former does not result in a "conviction." Those safeguards work to ensure that individuals innocent of the conduct for which they were charged and who enter into a deferred prosecution are not later given enhanced sentences based on something they did not do.

The latter point is driven home forcefully in the instant context by considering the actual court documents entered in Armstrong's deferred prosecution. In Armstrong's Petition for a Deferred Prosecution ("Petition"), he affirmatively stated:

> I consumed a large quantity of alcohol while golfing October 2, 2005 and then attempted to drive home from Enumclaw to my home in Kent. I was stopped for "speeding" and "unsafe passing" and then investigated for Driving while Under the Influence of Alcohol. I was stopped by a Black Diamond Police Officer and investigated for D.U.I. *I admit that I had consumed too much alcohol to be driving that evening*
>
> . . . .
>
> *I admit the facts contained in the arresting officer's report which constitutes the elements of the offense of D.U.I.*
>
> . . .
>
> This Officer's incident report is attached to my Petition. *These facts will allow the Court to find me guilty of Driving Under the Influence of Alcohol in the event this matter is brought to trial in Black Diamond Municipal Court.*

CP 123-24. In a separate document titled "Statement of Defendant For Deferred Prosecution of Pending DUI Charge" ("Statement"), Armstrong swore under penalty of perjury to much the same thing, specifically that

"the written police reports, including alcohol influence report forms, if applicable, are accurate and that the facts therein stated are admissible into evidence against me if the order deferring prosecution herein is revoked." CP 155. The procedural safeguards in place to ensure the reliability of using the deferred prosecution to enhance a sentence in a subsequent, unrelated conviction are further evidenced and reinforced by the factual findings and legal conclusions made by the Black Diamond Municipal Court upon granting Armstrong's petition. Specifically, that court found that Armstrong "stipulates to the accuracy and admissibility of the police report(s)" and that his "admissions, statements, [sic] are being made knowingly and voluntarily." CP 158.

Armstrong argues that a deferred prosecution is not a "conviction," and its existence must therefore be determined by a jury. However, based on the procedural protections in place, Armstrong's notarized and/or sworn admissions in documents presented to and filed with the court, and the court's findings and conclusions at the time the deferred prosecution was granted, it was proper for the court to enhance Armstrong's Vehicular Homicide sentence on the basis of his prior deferred DUI prosecution.

Use of a prior deferred DUI prosecution to enhance a defendant's sentence has previously withstood due process and other constitutional challenges outside the Blakely context. E.g., City of Bremerton v. Tucker,

126 Wn. App. 26, 103 P.3d 1285 (2005); State v. Preuett, 116 Wn. App. 746, 67 P.3d 1105 (2003); Michel v. City of Richland, 89 Wn. App. 764, 950 P.2d 10 (1998). See also City of Walla Walla v. Greene, 154 Wn.2d 722, 116 P.3d 1008 (2005) (prior conviction for Reckless Driving, originally filed as DUI, properly used to enhance Vehicular Homicide conviction despite defendant's claim that due process prohibited the use of a prior "unproven" DUI). Although Armstrong claims that these cases are overruled by Alleyne, he makes no effort to explain how that is so. Indeed, those cases do not even address the question of whether a judge (instead of a jury) may find the existence of the prior deferred prosecution.

Armstrong's argument that Blakely, Apprendi, and Alleyne prohibited the trial court from finding the fact of his prior deferred prosecution for DUI must be rejected as its existence is a recidivist fact having no bearing on Armstrong's present conduct or the elements of the charged crimes.

Finally, even if this Court finds that Armstrong's prior deferred DUI prosecution does not fall within the "prior conviction exception," there is no requirement of a jury finding as to facts that a defendant admits: "[T]he 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." Blakely, 542

U.S. at 303 (emphasis in original) (citations omitted). Here, Armstrong consistently admitted that he had received a prior deferred prosecution for DUI. In his statement on submittal of stipulated facts and waiver of jury trial, Armstrong specifically acknowledged his understanding that the State would argue that his prior deferred DUI prosecution from Black Diamond Municipal Court would count as a predicate offense for enhancement purposes, and that he disagreed that it qualified. CP 66-67. At sentencing, during his argument to the court about whether the deferred prosecution could be relied on for purposes of the sentencing enhancement, Armstrong stated:

> The State places great reliance on and underlines and emphasizes the fact that *at the time of Mr. Armstrong's deferred he agreed, apparently willingly, voluntarily and intelligently,* that the police reports contained facts sufficient . . . to support a finding of guilt perhaps? That's apparently the argument. But there's no admission of guilty. And there's no admission of guilt. *There was an admission that the police reports are sufficient.*

RP 305 (emphasis added). Because Armstrong admitted the existence of the prior deferred DUI prosecution, the judge did not err when it imposed an enhancement based on it.

D. CONCLUSION

For the above stated reasons, this Court should affirm the trial court's conclusion that exigent circumstances justified the warrantless blood draw, that once the blood was in the lawful custody of law enforcement no further judicial authorization was required to analyze it for its alcohol content, and that the trial court properly imposed a 24-month sentencing enhancement based on its finding that Armstrong had a prior deferred DUI prosecution. Armstrong's convictions and sentence should be affirmed.

DATED this 26th day of January, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
AMY MECKLING, WSBA #28274
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Allen, the attorney for the petitioner, at Allen, Hansen & Maybrown, P.S., 600 University St., Suite 3020, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. MICHAEL ERIC ARMSTRONG, Cause No. 71613-1 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 26 day of January, 2015

Name
Done in Seattle, Washington