No. 33859-2-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JOSE LUIS SOSA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WALLA WALLA COUNTY

The Honorable M. Scott Wolfram

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Jose Luis Sosa was charged with vehicular assault after he was in a two-car collision with Mark Gomes, whom was injured.

Mr. Sosa appeals his conviction on grounds that his constitutional rights were violated under the due process and equal protection clauses because law enforcement failed to advise him of his right to additional blood testing (after his blood sample was taken with a warrant and his arrest). Mr. Sosa also appeals on the grounds that his defense counsel was ineffective for failure to move for suppression or object to the admissibility of the blood test results, failure to object to the admissibility of PBT refusal evidence, and failure to propose a standard WPIC instruction. Mr. Sosa also asserts the prosecutor committed misconduct by appealing to the jury's passion and prejudice in closing argument when she spoke about the accident and the effect on the victim's family.

Mr. Sosa asserts the sum of these errors is cumulative error.

Mr. Sosa appeals the trial court's imposition of a DUI fine. He also preemptively objects to any appellate costs, should the State be the prevailing party on appeal.

For these errors Mr. Sosa respectfully requests the case be dismissed, or reversed and remanded.

B. ASSIGNMENTS OF ERROR

1. The defendant's constitutional right to due process was violated when he was not informed of his right to additional blood testing.

2. The defendant's constitutional right to equal protection of the laws was violated when he was not informed of his right to additional blood testing.

3. The defendant was denied effective assistance of counsel because trial counsel failed to move to suppress or object to the blood test result's inadmissibility.

4. The defendant was denied effective assistance of counsel because trial counsel failed to object to admissibility of the portable breathalyzer test (PBT) refusal.

5. The defendant was denied effective assistance of counsel when defense counsel did not propose a standard jury instruction.

6. The State committed misconduct in closing argument by appealing to the jury's sympathy for the victim and his family.

7. The trial court erred by imposing the discretionary legal financial obligation of a DUI fine when the defendant is indigent.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether Mr. Sosa's constitutional rights to due process or equal protection were violated when he was not advised of his right to obtain an independent test of his blood and such evidence was admitted at trial.

Issue 2: Whether the defendant received ineffective assistance of counsel when trial counsel failed to move to suppress or object to the admissibility of the blood draw evidence because the defendant was not advised of his statutory and/or constitutional right to obtain an independent test of his blood.

Issue 3: Whether trial counsel was ineffective for failure to object to admissibility of the portable breathalyzer test (PBT) refusal when no *Frye* hearing was held and the state toxicologist has not approved PBT's for use in measuring the alcohol in an individual's breath.

Issue 4: Whether trial counsel was ineffective for failure to research the law and request standard jury instruction (WPIC 92.16—Evaluation of Blood or Breath Test Results) which instructs the jury to consider whether a blood test was accurate and reliable.

Issue 5: Whether the prosecutor committed misconduct during closing argument by appealing to the jury's sympathy for the victim and his family.

Issue 6: Whether the cumulative error doctrine requires reversal and remand for a new trial in this case.

Issue 7: Whether the trial court's finding of ability to pay present or future discretionary legal financial obligations and imposition of a DUI fine was unsupported by statute and the record, thereby requiring resentencing.

Issue 8: Whether this Court should refuse to impose costs on appeal.

D. STATEMENT OF THE CASE

On March 9, 2014, law enforcement and emergency personnel responded to the scene of a two-car collision on Highway 12 east of Touchet, Washington. (RP 116-117). Jose Luis Sosa was the driver of one of the vehicles, and, after extricating himself from his vehicle, Mr. Sosa called 911 call for help, stating he had fallen asleep at the wheel and believed he had hit another car. (RP 110-114, 447-448). He spoke to law enforcement at the scene but was not advised of any statutory or constitutional rights. (RP 117-121). Mr. Sosa was transported to the hospital by ambulance. (RP 121).

The State charged Mr. Sosa with vehicular assault, alleging he caused substantial bodily harm to the driver of the other car, Mark Gomes (CP 11-12). The case proceeded to a jury trial. (RP[1] 107-463). Witnesses testified consistent with the facts stated above. (RP 107-463).

[1] Several volumes were transcribed in this case. Appellant's reference to "RP" includes Volumes I-IV, which were transcribed by Tina Driver with trial dates from 9/9/15 through 9/14/15. (Ms. Driver also transcribed jury selection and opening statements in a separate volume dated 9/9/15, but that volume will not be referred to in appellant's opening brief.)

A deputy and trooper testified at the 3.5 suppression hearing.[2] (RP 52-61, 90-97). At the hospital, the trooper read Mr. Sosa his constitutional rights, consisting of standard *Miranda* warnings. (RP 91, 95-96). Later, the trooper obtained a search warrant to procure a sample of Mr. Sosa's blood and read the search warrant to Mr. Sosa. (RP 93; CP 66-67, 76-80). The trooper testified he considered Mr. Sosa to be under arrest, but did not place him in handcuffs. (RP 92, 93).[3] The trooper obtained the blood sample pursuant to the search warrant and departed. (RP 93). Upon leaving the hospital, Mr. Sosa was taken straight to the county jail. (RP 65, 228).

At the suppression hearing and at trial, no law enforcement officer testified that Mr. Sosa had been informed of his right to independent blood alcohol testing under RCW 46.20.308. (RP 52-61, 90-97, 107-114, 114-131, 164-189, 190-212, 212-228, 262-263, 396-409). Neither of the search warrants nor the supporting affidavits indicated Mr. Sosa was advised of his right to independent blood alcohol testing. (CP 66-72, 76-82). Defense counsel did not file a suppression motion or object to the admission of the blood test results on the basis that Mr. Sosa had not been informed of his right to independent testing or that the evidence had not been presented at trial. (CP 1-169; RP 413-416).

[2] The defendant is not seeking review of defense counsel's suppression motion. (CP 62-67).
[3] The deputy also testified Mr. Sosa was likely going to be placed under arrest. (RP 56).

Also while at the hospital, the trooper requested Mr. Sosa take a portable breathalyzer test ("PBT"). (RP 168, 173). Mr. Sosa did not respond to the request. (RP 168, 173). Defense counsel did not object to the admission of the PBT refusal. (RP 173).

Mr. Sosa testified about the accident and events leading up to it. (RP 417-463). Due to his prior military service and two Iraqi tours, he had been accustomed to being awake for long stretches of time without sleep. (RP 420-422). Two days before the accident, Mr. Sosa drove from Walla Walla to Lacey to visit a military friend and did not sleep much the evening of March 7th. (RP 427, 429-430). Over the course of the next day (March 8th) and night, Mr. Sosa did not sleep or take any naps, and admitted to consuming some alcohol. (RP 430-442). He stopped to see a friend later in the evening on March 8th in the Tri-Cities, but felt fine to drive home early on the morning of March 9 at around 5:00 a.m. (RP 443-444).

At the time of the accident, Mr. Sosa testified he had been awake for nearly 24 hours, but had experience being awake for long periods of time due to his military service. (RP 445). When the car began to get cold on the drive home, he testified he turned on the heater and fell asleep at the wheel. (RP 446-447). He then saw headlights and heard a loud boom, later realizing he had struck someone. (RP 446, 448). Mr. Sosa testified

"I don't believe I was under the influence of alcohol. I believed it was more tired, that I did not realize how tired I was until I turned the heater on and it knocked me clean out." (RP 452).

Mr. Sosa's vehicle had struck Mark Gomes' car, injuring Mr. Gomes. (RP 231-233, 243-244, 248-249). Mr. Gomes' wife, Dawn, and daughter, Nicole, were also in the car. (RP 231).

At trial, the toxicologist testified Mr. Sosa had a blood alcohol content of .12 grams (per 100 milliliters) at 10:00 a.m., which was about three and a half hours after the accident. (RP 333, 343).

Defense counsel challenged the reliability and accuracy of the blood alcohol test while questioning witnesses. (RP 154-162 , 333-334, 344-350, 362-371, 377-381, 388-392, 392-393, 394-395, 413-414). Defense counsel questioned whether the lab technician properly inverted the blood collection vials. (RP 154-162). Counsel also questioned whether the toxicologist could be certain that the proper amounts of anticoagulant and enzyme poison were present in the blood collection vials, (RP 377-378), and challenged whether chain of custody was properly established. (RP 413-415). In closing argument, defense counsel again questioned the accuracy and reliability of the blood test results. (RP 494-496, 508-511).

The prosecutor stated the following during closing argument:

> And as it turns out, we know from Dr. Field's testimony that Mark Gomes was a dead man if he hadn't been operated on. If Dr. Field hadn't operated on him, Nicole would have lost her father at 15, Dawn would not have a husband, and we would be here in a vehicular homicide trial and not vehicular assault.
>
> But fortunately, you know, this time it is not how it turned out.

(RP 483).

The prosecutor also argued Mr. Sosa's refusal to take the PBT in the hospital was evidence of his guilt—that he was driving while intoxicated. (RP 519-520).

The court instructed the jury with the elements of vehicular assault and other relevant instructions. (R P470-482; CP 98-116). However, the jury was not instructed with WPIC 92.16 (Evaluation of Blood or Breath Test Results), which states as follows:

> In determining the accuracy and reliability of a [breath] [blood] test, you may consider the testing procedures used, the reliability and functioning of a testing instrument, maintenance procedures applied to a testing instrument, and any other factors that bear on the accuracy and reliability of the test.

WPIC 92.16 Evaluation of Blood or Breath Test Results; (*Id*.). Defense counsel did not request the trial court give WPIC 92.16 as a jury instruction. (CP 96-97, 121-123; RP 467-469).

The jury found Mr. Sosa guilty of vehicular assault via all three of the charged alternatives (operating a vehicle in a reckless manner,

operating a vehicle while under the influence of intoxicating liquor or drugs, and operating a vehicle with disregard for the safety of others). (RP 527; CP 118).

At sentencing, the trial court ordered Mr. Sosa to pay a DUI Fine of $1,041.90. (CP 129). Mr. Sosa's ability to pay and his desire to pay restitution were presented. (RP 536-537). Mr. Sosa was employed during sentencing and the court determined he could pay $100 a month towards restitution and other financial obligations; although defense counsel argued that the large restitution amount ($179,280.32) made it unlikely Mr. Sosa would ever be able to pay the full amount. (RP 536-538; CP 129). The trial court also denied Mr. Sosa's request for work release and ordered nine months of full confinement. (RP 543). The trial court did waive many of the fines and fees, stating: ". . . I have waived based on the amount of restitution that has to be been paid back some of the waivable fines and fees." (RP 542).

The Judgment and Sentence contains the following language:

> ¶ 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. (RCW 9.94A.760) The court has considered the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court specifically finds that the defendant has the ability or likely future ability to pay the legal financial obligations ordered herein.

(CP 128).

The judgment and sentence states that "An award of costs on appeal against the defendant may be added to the total legal financial obligations." (CP 130).

An order of indigency on file indicates Mr. Sosa's impoverished status. (CP 160).

Mr. Sosa timely appealed. (CP 146–163).

E. ARGUMENT

Issue 1: Whether Mr. Sosa's constitutional rights to due process or equal protection were violated when he was not advised of his right to obtain an independent test of his blood and such evidence was admitted at trial.

The issue of whether or not a vehicular assault suspect must be informed of his right to an independent blood test when the officer obtains a search warrant for blood is an issue of first impression in Washington.

Although Mr. Sosa's trial counsel did not move to suppress or object to the admission of the blood alcohol test results on the basis that Mr. Sosa was not properly advised of his right to additional testing, review of the issue for the first time on appeal is proper under RAP 2.5(a)(3).

A party may challenge a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3). To meet this test, "an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). "[T]he appellant must

"identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial." *Id*. (alteration in original) (quoting *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007)). In order for an error to be "manifest" under RAP 2.5(a)(3), a showing of actual prejudice is required. *Id*. at 99 (quoting *Kirkman*, 159 Wn.2d at 935). "To demonstrate actual prejudice, there must be a plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." *Id*. (internal quotation marks omitted) (alteration in original) (quoting *Kirkman*, 159 Wn.2d at 935).

A. Whether Mr. Sosa's right to due process was violated when he was not advised of his right to independent blood testing, rendering the blood alcohol results inadmissible at trial.

The Sixth and Fourteenth Amendments provide a criminal defendant with a due process right to a fair trial, which includes the right to gather exculpatory evidence and present a defense. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (citing *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). A person accused of driving while under the influence of alcohol is entitled to a reasonable opportunity to gather evidence in his or her defense. *State v. Morales*, 173 Wn.2d 560, 576, 269 P.3d 263 (2012) *as corrected on denial of reconsideration* (Mar. 7, 2012) (citation omitted).

An individual arrested for driving under the influence of intoxicating liquor must be informed of his right to obtain additional independent testing. RCW 46.20.308(2); RCW 46.61.506(6). The statute requires that an "officer shall inform the person of his or her right to refuse the breath test, and of his or her right to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506." RCW 46.20.308(2). RCW 46.61.506(6) also provides:

> The person tested may have a . . . qualified person of his or her own choosing administer one or more tests in addition to any administered at the direction of a law enforcement officer.

RCW 46.61.506(6). Recent case law in the United State Supreme Court and Washington State legislation make it unclear how the current law applies to those suspects whose blood samples are obtained for evidence of driving under the influence. *Missouri v. McNeely,* 133 S. Ct. 1552, 1556, 185 L. Ed. 2d 696 (decided in April 2013); RCW 46.20.308 (Laws of 2013, 2nd sp. sess., ch. 35, § 36) (legislative update in Sept. 2013 removed references to "blood" tests in RCW 46.20.308); *see also* RCW 46.61.506.[4] Although, it is clear that those individuals whose breath

[4] In *Missouri v. McNeely*, the United States Supreme Court determined that in drunk-driving cases, the natural dissipation of alcohol in the bloodstream that occurs is not a per se exigency to justify an exception to the warrant requirement under the Fourth Amendment. 133 S. Ct. at 1556. Due to that decision, portions of Washington State's implied consent statute under RCW 46.20.308 were invalidated as the statute could no

samples are taken for evidence are entitled to be warned of their statutory right to independent testing. RCW 46.20.308 (current) *and* RCW 46.61.506 (current). Ultimately, the implied consent statute (RCW 46.20.308) does not contain direct guidance on whether a blood sample obtained with a search warrant also requires law enforcement to inform a suspect of his right to additional testing. RCW 46.20.308 (current) *and* RCW 46.61.506 (current); *but cf.* RCW 46.20.308 (Laws of 2013, 2nd sp. sess., ch. 35, § 36) (removing "blood" tests in subsections (1) and (2)).

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longer authorize law enforcement to obtain a warrantless blood sample from drivers suspected of vehicular assault. RCW 46.20.308 (Laws of 2013, 2nd sp. sess., ch. 35, § 36). Presumably, the Washington legislature updated the statute to adopt consistency with *Missouri v. McNeely*. 133 S. Ct. at 1556; RCW 46.20.308 (Laws of 2013, 2nd sp. sess., ch. 35, § 36). However, in doing so the legislature also removed most references to blood tests in the statute, and left it unclear whether RCW 46.20.308(2) still requires a law enforcement officer to advise a suspect of his right to additional testing if a blood sample has been taken. RCW 46.20.308(2) (*current*) ("The *test or tests of breath* shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or any drug or the person to have been driving or in actual physical control of a motor vehicle while having alcohol in a concentration in violation of RCW 46.61.503 in his or her system and being under the age of twenty-one. Prior to administering a *breath* test pursuant to this section, the officer shall inform the person of his or her right under this section to refuse the breath test, and of his or her right to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506") (emphasis added).
However, it should be noted that RCW 46.61.506 remains largely unchanged in recent years, and the Washington Supreme Court has interpreted it, in conjunction with RCW 46.20.308, as containing the requirement that suspects have a statutory right to be informed of their right to obtain additional testing. *State v. Turpin*, 94 Wn.2d 820, 824-25, 620 P.2d 990 (1980) (citing RCW 46.20.308 and RCW 46.61.506(5)); *see also* RCW 46.61.506 (Laws of 2016, ch. 203, § 8; Laws of 2015, 2nd sp. sess., ch. 3, § 22; Laws of 2013, ch. 3, § 37 (Initiative Measure No. 502, approved November 6, 2012); Laws of 2004, ch. 68, 2004 c 68 § 4, eff. June 10, 2004 (renumbering relevant portion of statute from subsection (5) to subsection (6)).

It is clear the State may not circumvent the implied consent warnings (RCW 46.20.308) by obtaining a voluntary blood test instead of asking for a breath test. *State v. Avery*, 103 Wn. App. 527, 535, 13 P.3d 226 (Div. II 2000) ("where the implied consent statute applies, the State cannot avoid complying with the statute by obtaining a driver's "voluntary" consent to a blood test). Whether a defendant has the right to refuse testing is also not determinative of whether the suspect is entitled to be informed of his right to independent testing: "An accused must be apprised of the 308 warning so that the accused has the opportunity to gather potential exculpatory evidence, *regardless of the fact that there is no right*[5] *to refuse the mandatory blood test*." *Morales*, 173 Wn.2d at 569 (citing *State v. Turpin*, 94 Wn. 2d 820, 826, 620 P.2d 990 (1980) (footnote and emphasis added).

Prior to these recent legislative changes,[6] a vehicular assault suspect's statutory right to be informed of additional testing had been strongly supported by the courts' interpretation of the statute. *Morales*, 173 Wn. 2d at 574 (citations omitted) (finding blood test inadmissible where State failed to prove at trial defendant was properly informed of

[5] The decision in *State v. Morales*, 173 Wn.2d 560, 569, 269 P.3d 263 (2012) predates the United States Supreme Court decision of *Missouri v. McNeely*, 133 S. Ct. 1552, 1556, 185 L. Ed. 2d 696 (decided in April 2013), as well as the legislative update in September 2013, which removed references to "blood" tests in RCW 46.20.308. RCW 46.20.308 (Laws of 2013, 2nd sp. sess., ch. 35, § 36).
[6] *See* fn. 1.

statutory right to additional independent testing); *Turpin*, 94 Wn.2d at 825-27 (finding statutory requirement to advise negligent homicide defendant of right to additional testing even though defendant could not revoke statutorily implied consent to blood test, citing RCW 46.20.308 and RCW 46.61.506) (citations omitted).

Although Washington courts have not yet held that the statutory right to be apprised of independent blood testing is a due process right, courts have strongly suggested such is the case. *Morales*, 173 Wn.2d at 576 (citing *State v. McNichols*, 128 Wn.2d 242, 250-51, 906 P.2d 329 (1995) (other citation omitted). *But see State v. Carranza*, 24 Wn. App. 311, 316, 600 P.2d 701 (1979) (Division III held there was no constitutional right to be advised of right to independent blood test); *cf. State v. Turpin*, 94 Wn.2d at 824-25, 620 P.2d 990 (1980) (finding reasoning in *Carranza* unpersuasive one year later). The importance of the statutory requirement is the protection of the accused's right to fundamental fairness. *McNichols*, 128 Wn.2d at 248 (citing *State v. Bartels*, 112 Wn.2d 882, 886, 774 P.2d 1183 (1989); *accord State v. Canaday*, 90 Wn.2d 808, 817, 585 P.2d 1185 (1978); *accord State v. Morales*, 173 Wn.2d at 569-570. An accused must be apprised of his right to independent blood testing so he has the opportunity to gather potentially exculpatory evidence, regardless of whether there is a right to refuse a

blood test. *Morales*, 173 Wn. 2d at 569 (citing *Turpin*, 94 Wn.2d at 826). Appellate courts especially recognize the importance of the right to independent testing of blood samples when a suspect might be charged with crimes more severe than a DUI (driving under the influence). *Morales*, 173 Wn.2d at 575; *Turpin*, 94 Wn.2d at 826.

At least one other jurisdiction has held the accused must be informed of his right to independent blood alcohol testing and the failure to do so is a due process violation. *State v. Minkoff*, 308 Mont. 248, 250, 42 P.3d 223 (2002) (holding dismissal was the appropriate remedy) (citing *State v. Strand*, 286 Mont. 122, 127, 951 P.2d 552 (1997)). The Montana appellate court also noted an accused has a right to be informed of independent testing, regardless of whether the accused consents to a test designated by the officer. *Strand*, 286 Mont. at 127. *See also State v. Geselbracht*, 310 S.W.3d 402 (Tenn. Crim. App. 2009) (holding that police officer's denial of defendant's request for a blood test, after he had completed an alcohol breath test, violated defendant's due process and statutory rights.).

Notably, Washington appellate courts also have looked unfavorably on those instances where law enforcement interfered with a suspect's right to obtain independent testing. *City of Blaine v. Suess*, 93 Wn.2d 722, 612 P.2d 789 (1980) (dismissal appropriate where client

attempts to implement his/her right to an independent blood test and the officer unreasonably interferes or attempts to thwart it); *Bartels*, 112 Wn.2d at 886-887 (informing suspect the right to obtain additional test would be "at your own expense" is grounds for suppression of blood test if suspect did not have financial ability to pay for additional independent testing). *See also In re Newbern*, 175 Cal.App.2d 862, 1 Cal.Rptr. 80, 78 A.L.R. 901 (1959) (holding it is a denial of due process to refuse the request of a person charged with drunkenness to make a phone call to arrange for a blood test at his own expense).

In *Turpin*, the suspect was arrested for negligent homicide and the arresting officer obtained a blood sample pursuant to the mandatory blood draw or *per se* exigency provision of RCW 46.20.308[7] without advising the suspect of the right to an independent blood test. *Id*. The Court suppressed the blood test results, reasoning:

> [T]he fact that the defendant cannot object to state testing it does not inexorably, or even logically, follow that the defendant must also be kept ignorant of his right to independent testing. The statute itself merely states that the state may administer its test without consent; it in no way implies that the right to independent testing or the right to be aware of independent testing is thereby lost.

[7]See fn. 1. *Turpin* predates *Missouri v. McNeely*, 133 S. Ct. at 1556 (decided in April 2013); RCW 46.20.308 (Laws of 2013, 2nd sp. sess., ch. 35, § 36) (this legislative update in Sept. 2013 removed references to "blood" tests in RCW 46.20.308).

Id. at 824-25. Similarly, in *Morales*, the Court held RCW 46.20.308(2) requires the State to administer the 308 warning to a person under arrest for vehicular assault; and there the blood test result was inadmissible because the State did not prove *at trial* that Mr. Morales was informed of his statutory right to an independent blood test. 173 Wn.2d at 574, 269 P.3d 263. The Court emphasized the State "*must* demonstrate at trial the [308] warning was read." *Morales*, 173 Wn. 2d at 574-575, 269 P.3d 263 (citing *Turpin*, 94 Wn.2d. at 824-25) (other citations omitted). It is the State's burden to prove the 308 warning was actually read to the defendant, and "substantial compliance is not enough." *Id*. (citations omitted).

At trial here, the State failed to present any evidence that Mr. Sosa was informed of his right to obtain additional blood testing. None of the testifying law enforcement officers stated he was informed. (RP 107-114, 114-131, 164-189, 190-212, 212-228, 262-263, 396-409). Neither of the search warrants nor their supporting affidavits reflect Mr. Sosa was properly advised. (CP 66-72, 76-82).

In addition, at a pretrial 3.5 suppression hearing (unrelated to the current legal issue here), a trooper stated he read Mr. Sosa his constitutional rights. (RP 91). When asked to read into the record exactly which rights Mr. Sosa was informed of, the trooper only referenced the

standard *Miranda* rights. (RP 95-96). No statutory rights were mentioned. (*Id.*).

Law enforcement testified Mr. Sosa was effectively under arrest in the hospital for vehicular assault, and Mr. Sosa was transported to the county jail immediately following his hospital release. (RP 56, 65, 92-93, 228). An arrest typically triggers the warnings to be read under RCW 46.20.308, since a suspect who is not free to leave is unable to procure an independent blood test. *Cf. State v. Rivard*, 131 Wn.2d 63, 77, 929 P.2d 413 (1997) (law enforcement was not required to advise suspect of right to independent blood testing as suspect was free to leave and thus able to arrange independent blood test).

The fact that Mr. Sosa was suspected of driving under the influence, was under arrest for vehicular assault and was unable to leave should have triggered the RCW 46.20.308 warnings as a right to due process. Although a search warrant was issued for Mr. Sosa's blood draw, courts have still determined a defendant has a right to be informed of the right to an additional test even if the defendant has no ability to revoke consent. *Morales*, 173 Wn.2d at 569 (citing *Turpin*, 94 Wn.2d at 826). Here, Mr. Sosa did not have the ability to revoke consent—a search warrant authorized the withdrawal of his blood—but he still should have been properly informed of his right to additional testing. It is

fundamentally unfair to do otherwise. *See McNichols*, 128 Wn.2d at 248; *Morales*, 173 Wn.2d at 569 (citing *Turpin*, 94 Wn.2d at 826).

Moreover, because of the seriousness of the allegations, it was even *more* critical that Mr. Sosa be advised of his right to independent testing. *Morales*, 173 Wn.2d at 575; *Turpin*, 94 Wn.2d at 826. It was fundamentally unfair to fail to inform Mr. Sosa of his right to additional testing when he has a constitutional right to gather potentially exculpatory evidence, especially when blood alcohol content quickly dissipates and his freedom to move was restrained. *See McNichols*, 128 Wn.2d at 248 (citing *Bartels*, 112 Wn. at 886; *accord Canaday*, 90 Wn.2d at 817; *accord Morales*, 173 Wn.2d at 569-570 (citing *Turpin*, 94 Wn.2d at 826); *McNeely*, 133 S.Ct. at 1563 (discussion of natural dissipation of intoxicating substances). Failure to advise Mr. Sosa of his right to independent blood testing was a due process violation under the Sixth and Fourteenth Amendments of the United States Constitution.

Based on the law herein, this Court should find Mr. Sosa's right to due process was violated when he was not advised of independent testing and dismiss the vehicular assault charges against Mr. Sosa. *Minkoff*, 308 Mont. at 254-55 (dismissal is the appropriate remedy as "[s]uppressing the State's breath test and allowing a new trial would leave [the accused] unable to rebut the field sobriety test evidence through an independent

blood test—the right to which he was effectively denied. We conclude suppression of the breath test results is insufficient to remedy the deprivation of that right . . . .").

If this Court will not dismiss the vehicular assault charge, Mr. Sosa respectfully requests this Court exclude the results of the blood test and remand the case. *Turpin*, 94 Wn.2d at 826-27 (exclusion appropriate remedy for violation of defendant's statutory rights); *Morales*, 173 Wn.2d at 578 (same remedy).

B. Whether Mr. Sosa's right to equal protection was violated when he was not afforded the same statutory right to be informed of independent blood testing as an individual whose breath is tested for alcohol content under RCW 46.20.308.

The right to equal protection guarantees that similarly situated persons receive like treatment under both the federal and state constitutions. U.S. Const. amend. XIV; Wash. Const. art. I, § 12; *State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473 (1996). "A valid law, administered in a manner that unjustly discriminates between similarly situated persons, violates equal protection." *State v. Gaines*, 121 Wn. App. 687, 705, 90 P.3d 1095 (2004) (citation omitted).

"When a statutory classification implicates physical liberty, it is subject to rational basis scrutiny unless that classification also affects a semisuspect class." *State v. Witherspoon*, 171 Wn. App. 271, 303-304,

286 P. 3d 996, 1012 (2012), *aff'd on other grounds*, 180 Wn. 2d 875, 329 P.3d 888 (2014), *as corrected* (Aug. 11, 2014) (citation omitted). A statute is constitutional under the rational basis test if "(1) the legislation applies alike to persons within a designated class, (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not, and (3) there is a rational relationship between the classification and the purpose of the legislation." *Id*. at 304 (citing *State v. Smith*, 117 Wn.2d 263, 279, 814 P.2d 652 (1991)); *State v. Manussier*, 129 Wn.2d 652, 673, 921 P.2d 473 (1996) (under the rational basis test, a legislative classification will be upheld unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives) (citation omitted).

The burden is on the party challenging the classification to show that it is purely arbitrary. *Witherspoon*, 171 Wn. App. at 304 (citation omitted).

In Washington any person under arrest for the suspicion of operating a motor vehicle under the influence of alcohol has given implied consent to a breath test to determine alcohol concentration. RCW 46.20.308(1). Although the driver may choose to refuse such breath tests, the driver must still be informed of his statutory rights by law enforcement. RCW 46.20.308(2); *also* RCW 46.61.506(6). As noted

previously,[8] RCW 46.20.308 no longer allows law enforcement to obtain warrantless blood draws from individuals suspected of vehicular assault while driving under the influence. RCW 46.20.308 (current); *cf.* RCW 46.20.308 (Laws of 2013, 2nd sp. sess., ch. 35, § 36).[9] Thus, in order to test the blood alcohol level of a vehicular assault suspect, law enforcement must obtain a warrant. *See* RCW 46.20.308 *and McNeely*, 133 S. Ct. at 1556.

Due to the recent removal of references to "blood" tests in RCW 46.20.308 (2013), the statute does not explicitly require law enforcement to advise a vehicular assault suspect whose blood has been drawn to also advise the suspect of his right to independent blood testing. RCW 46.20.308 (Laws of 2013, 2nd sp. sess., ch. 35, § 36); *but see* RCW 46.61.506(6) (suspect may choose to have additional tests administered by person of his own choosing).

Because of the recent legislative updates to RCW 46.20.308, the legislature has created more protection for those whose breath is tested for alcohol content versus those individuals whose blood is tested for alcohol content. RCW 46.20.308 (current) *and* (Laws of 2013, 2nd sp. sess., ch. 35, § 36). The statute does not apply in the same manner to persons within the same class. RCW 46.20.308 (1) & (2). Individuals suspected

[8] *See* fn 1.
[9] *See* fn 1.

of driving under the influence can be treated differently based solely upon whether law enforcement seeks a breath test or a blood test. *Id*. If an officer opts to request a breath test from a DUI suspect, then the officer is required by statute to inform the suspect of his right to independent testing. RCW 46.20.380(1) & (2). If the officer opts instead to seek a warrant[10] to draw blood, then the statute does not clearly require the officer to advise the suspect of his right to independent blood testing. RCW 46.20.308(1) & (2) (drivers suspected of being under the influence have given implied consent to breath testing only). Thus, similarly situated individuals are to be treated completely differently based upon whether law enforcement decides to obtain evidence with a breath test or blood test. *See also* RCW 46.61.522(1)(b) (vehicular assault via driving under the influence; also referring to "driving under the influence" definition found in RCW 46.61.502); RCW 46.61.502 ("driving under the influence" defined). The independent testing advisement in RCW 46.20.308(1) & (2) does not apply equally to all individuals suspected of

[10] While the statute does state officers can obtain a warrant for blood alcohol testing under RCW 46.20.308(4), the statute does not clearly indicate whether a suspect must also be informed of the right to independent testing:

> (4) Nothing in subsection (1), (2), or (3) of this section precludes a law enforcement officer from obtaining a person's blood to test for alcohol . . . pursuant to a search warrant . . . . Any blood drawn for the purpose of determining the person's alcohol . . . is drawn pursuant to this section when the officer has reasonable grounds to believe that the person is in physical control or driving a vehicle under the influence . . . .

RCW 46.20.308(4).

driving under the influence. RCW 46.20.308(1) & (2). The inequality also affects those suspected of vehicular assault and vehicular homicide by driving under the influence. RCW 46.61.522(1)(b) and RCW 46.61.520(1)(a).

No reasonable grounds exist for distinguishing (1) a person suspected of driving under the influence and whose arresting officer opted to obtain evidence via a breath test and (2) a person suspected of driving under the influence whose arresting officer opted to obtain evidence via a blood test. *See Witherspoon*, 171 Wn. App. at 304. There are also no reasonable grounds to distinguish a driving under the influence suspect from a vehicular assault or vehicular homicide suspect accused of driving under the influence. Case law has pointed out the importance of advising those charged with more serious crimes of their right to independent blood testing. *Morales*, 173 Wn.2d at 575; *Turpin*, 94 Wn.2d at 826. This is because the right to obtain an independent blood test is part of the constitutional right to obtain exculpatory evidence in one's defense. *Morales*, 173 Wn. 2d at 569 (citing *Turpin*, 94 Wn.2d at 826); *see also State v. Jones*, 168 Wn. 2d at 720 (citation omitted).

There is no rational distinction between driving under the influence suspects whose alcohol content is tested by breath (and therefore has a statutory right to be advised of independent testing), and the suspect

whose blood sample is taken with a warrant (and does not have the statutory right to be advised of his right to independent testing). *Witherspoon*, 171 Wn. App. at 304. There is no legislative purpose in giving breath test individuals more protection than blood test individuals—especially when those suspected of more serious crimes are more likely to have their blood drawn for evidentiary purposes. *See Morales*, 173 Wn.2d at 575; *Turpin*, 94 Wn.2d at 826.

Mr. Sosa's right to equal protection of the laws was violated when he was not advised of his right to independent blood testing. Individuals suspected of driving under the influence whose blood alcohol levels were tested by breath should not have more statutory rights than individuals suspected of vehicular assault while driving under the influence and whose blood alcohol content was tested by a blood sample. There is no legitimate state objective in making this arbitrary distinction. *Witherspoon*, 171 Wn. App. at 304 (citation omitted).

The record reflects that Mr. Sosa was not advised of his right to obtain independent blood alcohol testing. (RP 52-61, 90-97, 107-114, 114-131, 164-189, 190-212, 212-229, 262-263, 396-409). Because RCW 46.20.308 violated Mr. Sosa's right to equal protection of the laws for its failure to require advisement of the right to independent blood alcohol testing to all individuals suspected of driving under the influence—

particularly those individuals suspected of vehicular assault and whose blood was obtained via a warrant—Mr. Sosa respectfully requests his case be dismissed. In the alternative, Mr. Sosa requests the blood evidence in his case be suppressed and the case remanded.

Issue 2: Whether the defendant received ineffective assistance of counsel when trial counsel failed to move to suppress or object to the admissibility of the blood draw evidence because the defendant was not advised of his statutory and/or constitutional right to obtain an independent test of his blood.

To demonstrate ineffective assistance of counsel, a defendant must prove that counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness, and that the deficient representation prejudiced the defendant. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). A defendant suffers prejudice if there is a reasonable probability that, but for counsel's performance, the result would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The competency of counsel is based on the entire record, and there is a strong presumption that counsel's performance was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). However, "strategy must be based on reasoned decision-

making[.]" *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007).

Trial counsel has a duty to research relevant law. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citation omitted). Although trial counsel is not expected to advance "novel" legal theories in defense of a client, *State v. Brown*, 159 Wn. App. 366, 371-72, 245 P.3d 776 (2011), trial counsel is expected to represent clients in an objectively reasonable manner. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999) (deficiency present when representation falls below objective standard of reasonableness). Failure to research and apply relevant law constitutes deficient performance when it falls "below an objective standard of reasonableness based on consideration of all the circumstances." *Kyllo*, 166 Wn.2d at 868 (citations and quotations omitted).

Despite the recent changes in RCW 46.20.308(1) and (2) (Laws of 2013, 2nd sp. sess., ch. 35, § 36), there is nothing novel about the many years in which the statute clearly afforded an accused the right to be informed about additional and independent testing. *State v. Turpin*, 94 Wn.2d 820, 620 P.2d 990 (1980); *State v. Morales*, 173 Wn.2d 560, 569, 269 P.3d 263 (2012). A driving under the influence suspect's right to be informed of independent testing spans decades, and the failure to advise a

suspect of that right clearly resulted in inadmissibility of blood tests for years. *Id*. Although the statute is now unclear as to what happens to those individuals whose blood is currently tested under RCW 46.20.308, that does not mean trial counsel should not have challenged the blood evidence on the grounds that the defendant was not properly advised of his constitutional right to gather exculpatory evidence. *Morales*, 173 Wn. 2d at 569 (citing *Turpin*, 94 Wn.2d at 826); *Jones*, 168 Wn. 2d at 720 (citing *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)).

Also, trial counsel could have used *Morales* and *Turpin* case precedent to challenge the blood draw admissibility. First, in *Morales* the Court emphasized that the State "*must* demonstrate at trial the [308] warning was read." *Morales*, 173 Wn. 2d at 574-575 (citing *Turpin*, 94 Wn.2d. at 824-25). It is the State's burden to prove the 308 warning was actually read to the defendant, and "substantial compliance is not enough." *Id*. (citations omitted). Trial counsel could have objected to the admissibility of the blood test based on the mere fact that the State never presented evidence at trial that Mr. Sosa was informed of his right to independent testing. (RP 107-114, 114-131, 164-189, 190-212, 212-229, 262-263, 396-409; CP 66-72, 76-82).

Second, in *Turpin* the Court acknowledged a specific provision of RCW 46.61.506, which states a suspect may have a qualified individual of his choosing administer additional tests independent of any tests administered at the direction of law enforcement. *Id*. at 824-25 (citing RCW 46.61.506(6)). The Court noted the provisions of RCW 46.20.308 "are explicitly subject to the provisions of RCW 46.61.506" including the right to independent testing. *Id*. at 825 (citations and quotations omitted). Moreover, the Court reasoned the "[S]tate cannot be allowed to use evidence which the defendant is unable to rebut because she was not apprised of her right to independent testing." *Id*. at 826. Trial counsel could have used those points in *Turpin* to argue Mr. Sosa's right to be informed of additional blood testing was violated under the state statutes and under constitutional principles, as argued above.

The *Turpin* Court also noted that whether a defendant can object to the State's testing of his blood does not also affect whether he can be advised of his right to independent testing. *Id*. at 824; s*ee also State v. Avery*, 103 Wn. App. 527, 535, 13 P.3d 226 (2000) ("where the implied consent statute applies, the State cannot avoid complying with the statute by obtaining a driver's 'voluntary' consent to a blood test"). Mr. Sosa could not stop the State from using a warrant to draw his blood, but under

Turpin he still had the right to be advised of the ability to obtain exculpatory evidence. *Id*. at 824.

The revised RCW 46.20.308 may not explicitly require a suspect tobe apprised of his right to additional testing. Subsection (4) of RCW 46.20.308 states:

> (4) Nothing in subsection (1), (2), or (3) of this section precludes a law enforcement officer from obtaining a person's blood to test for alcohol, marijuana, or any drug, pursuant to a search warrant, a valid waiver of the warrant requirement, when exigent circumstances exist, or under any other authority of law. *Any blood drawn for the purpose of determining the person's alcohol*, marijuana levels, or any drug, *is drawn pursuant to this section* when the officer has reasonable grounds to believe that the person is in physical control or driving a vehicle under the influence or in violation of RCW 46.61.503.

RCW 46.20.308(4) (emphasis added). Nonetheless, this statutory language can be interpreted to mean that any blood drawn from a suspect is also subject to the rest of the statutory provisions of RCW 46.20.308(2). RCW 46.20.308(2) requires an officer to inform DUI suspects of their right to additional testing under RCW 46.61.506: "the officer shall inform the person of his or her right . . . to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506." RCW 46.20.308(2). Though subsection (2) has the precursor of applying to those DUI suspects who are administered breath tests, the

remaining portion of that sentence also acknowledges the statutory right to additional independent testing. RCW 46.20.308(2); RCW 46.61.506.

Trial counsel's representation fell below the objective standard of reasonableness in this case. Mr. Sosa was not informed of his right to additional testing, and trial counsel should have known about or easily discovered the rich body of case law holding that blood test results are inadmissible at trial when a person suspected of driving under the influence is not advised of his right to additional independent testing. *See State v. Turpin*, 94 Wn.2d 820, 620 P.2d 990 (1980); *State v. Morales*, 173 Wn.2d 560, 569, 269 P.3d 263 (2012); RCW 46.20.308(1) & (2) (Laws of 2013, 2nd sp. sess., ch. 35, § 36).

Trial counsel had a duty to research such case law and there is no legitimate tactical reason for failing to file a motion to suppress the evidence or object to the admissibility of the blood test results. Trial counsel should have and could have challenged the admission of such blood draw evidence by either a suppression motion or objecting to the admissibility of the evidence at trial. *Turpin*, 94 Wn.2d at 822, 826 (finding blood test should have been suppressed); *Morales*, 173 Wn.2d at 576-77 (blood test results erroneously admitted where State failed to prove at trial that 308 warning was read to defendant). There was no tactical reason for trial counsel not to challenge the blood draw evidence—trial

counsel could not have harmed the case by presenting a motion which had a good chance of winning in the trial court level. *Id*. The failure to raise any legal defense theories as to why the blood should have been suppressed or inadmissible due the defendant's failure to be informed of the right to independent testing was deficient performance and demonstrates trial counsel did not perform his duty to research relevant case law. *Kyllo*, 166 Wn. 2d at 862. Because trial counsel failed to recognize this issue and raise it at the trial level, the defendant received ineffective assistance of counsel.

The blood evidence in this case was crucial to the State's case. The blood sample showed Mr. Sosa's blood alcohol content was .12, which was above the legal limit, and its admission was prejudicial. (RP 333, 343). Mr. Sosa testified he had been awake for many hours prior to the accident, which made him sleepy, and that it was exhaustion that led him to fall asleep behind the wheel. (RP 445, 452). If the blood evidence was deemed inadmissible, there is a substantial likelihood the jury's verdict would have been different.

Mr. Sosa respectfully requests this case be reversed and remanded for a new trial on the grounds of ineffective assistance of counsel.

Issue 3: Whether trial counsel was ineffective for failure to object to admissibility of the portable breathalyzer test (PBT) refusal when no *Frye* hearing was held and the state toxicologist has not approved PBT's for use in measuring the alcohol in an individual's breath.

At trial the State presented evidence that Mr. Sosa had refused to take a portable breathalyzer test ("PBT"), and argued it was evidence of guilt. (RP 168, 173, RP 519-520). Trial counsel did not object. (RP 173).

Mr. Sosa adopts and incorporates herein his previous arguments as to what constitutes ineffective assistance of counsel. *State v. Aho,* 137 Wn.2d 736, 745, 975 P.2d 512 (1999) (to demonstrate ineffective assistance of counsel, a defendant must prove that counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness, and that the deficient representation prejudiced the defendant).

Breath tests are valid only if administered in accordance with procedures adopted by the state toxicologist. *State v. Smith*, 130 Wn.2d 215, 221, 922 P.2d 811 (1996) (citing RCW 46.61.506(3)). The state toxicologist has not approved PBT's for use in measuring alcohol in a person's breath. WAC 448-16-020 (2016); *see Smith,* 130 Wn.2d at 221 (citing the previous version of WAC 448-13-020 (1996 Supp.) wherein state toxicologist also did not approve use of PBT's). "[E]vidence deriving from a scientific theory or principle is admissible only if that

theory or principle has achieved general acceptance in the relevant scientific community." *State v. Cauthron*, 120 Wn.2d 879, 886, 846 P.2d 502 (1993) (citing *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). Thus, without a proper *Frye* hearing or specific approval of PBT testing by the state toxicologist, "the result garnered from the PBT is inadmissible for any purpose, and the State employs such unapproved devices at its peril if it attempts to use evidence they generate to establish probable cause." *Smith*, 130 Wn.2d at 222.

Defense counsel was ineffective for failing to object to the admission at trial of Mr. Sosa's refusal to take a PBT. The law is clear on the point that PBT's are not admissible at trial. *Smith*, 130 Wn.2d at 222. Because they are not admissible for any purpose, it was improper for the State to present evidence that Mr. Sosa refused to take the test. *Id*. Trial counsel could not have had any legitimate tactical reason for failing to object, as admission of the PBT refusal was not helpful to his client's case. A defendant's refusal to take a PBT would appear to the jury to be evidence of guilt, and the State presented closing argument to sway the jury on this very point. (RP 519-520). Had trial counsel objected, a proper *Frye* hearing would have determined that the evidence was inadmissible. The mere reference to the PBT would have been inadmissible because the test is not an approved method for testing

whether a person is intoxicated. RCW 46.61.506(3); WAC 448-16-020 (2016); *Smith*, 130 Wn.2d at 222.

The admission of the PBT refusal prejudiced Mr. Sosa as the refusal was used as evidence of his guilt in the State's closing argument. (RP 519-520). The refusal to take the test was contrary to Mr. Sosa's claims that he had fallen asleep at the wheel because he was tired from driving for more than 24 hours—and not because he was intoxicated. (RP 445, 452). Trial counsel was ineffective for failure to object to the PBT refusal's admission. (RP 173).

The defendant respectfully requests this Court remand the case for a new trial for ineffective assistance of counsel.

Issue 4: Whether trial counsel was ineffective for failure to research the law and request standard jury instruction WPIC 92.16—Evaluation of Blood or Breath Test Results--which instructs the jury to consider whether a blood test was accurate and reliable.

As noted previously and adopted herein, to demonstrate ineffective assistance of counsel, a defendant must prove that counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness, and that the deficient representation prejudiced the defendant. *State v. Aho,* 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

Trial counsel has a duty to research relevant law. *State v. Kyllo,* 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citation omitted). Failure to research and apply relevant law constitutes deficient performance when it

falls "below an objective standard of reasonableness based on consideration of all the circumstances." *Id*. at 868 (citations and quotations omitted). "If instructional error is the result of ineffective assistance of counsel, the invited error doctrine does not preclude review." *Id*. at 861 (citations omitted).

In *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987), the defendant alleged her trial counsel was ineffective for failing to propose a diminished capacity instruction for the crime of attempting to elude a police vehicle. *Thomas*, 209 Wn.2d at 223, 226-29. The Court agreed and reversed. *Id*. at 229. At trial, defense counsel had argued the defendant was too intoxicated to formulate the required wanton or willful disregard necessary to commit the crime, while the prosecution argued the defendant's intoxication caused her mental state. *Id*. at 227. The court determined that, had the jury been given the proper instruction, it was possible the jury could have found the defendant's extreme intoxication negated the required wantonness or willfulness. *Id*. 229.

Similarly, in *Kyllo*, trial counsel was found ineffective for proposing a standard WPIC instruction that incorrectly conveyed the law on self-defense. 166 Wn.2d at 866-67, 871. The court determined that at the time the WPIC instruction was given, there were "several cases that should have indicated to [the defendant's trial] counsel that the pattern

instruction was flawed." *Id*. at 866. The court reversed and remanded for a new trial due to this ineffective assistance of trial counsel. *Id*. at 871.

It is well-established that "a blood sample analysis is admissible to show intoxication under RCW 46.61.502 only when it is performed according to WAC requirements." *State v. Hultenschmidt*, 125 Wn. App. 259, 265, 102 P.3d 192 (2004) (citing *State v. Bosio*, 107 Wn. App. 462, 466–67, 27 P.3d 636 (2001)); RCW 46.61.502; *also* WAC 448-14-020 (2016) (Operational discipline of blood samples for alcohol). The State must present "prima facie proof that the test chemicals and the blood sample are free from any adulteration which could conceivably introduce error to the test results." *State v. Brown*, 145 Wn. App. 62, 69-70, 184 P.3d 1284 (2008) (citation and quotation omitted). *See State v. Bosio*, 107 Wn. App. 462, 468, 27 P.3d 636 (2001) (blood test results were deemed inadmissible because State did not present evidence that enzyme poison was added to the blood sample); WAC 448-14-020(3)(b).

Vehicular assault can be committed by driving "[w]hile under the influence of intoxicating liquor… as defined by RCW 46.61.502" and inflicting substantial bodily harm on another. RCW 46.61.522(1)(b). A person is guilty of driving under the influence when "within two hours after driving, an alcohol concentration of 0.08 or higher" is shown by the analysis of a blood sample conducted under RCW 46.61.506. *See* RCW

46.61.506(3) (blood analysis must be performed in accordance with state toxicologist's approved methods). A defendant is entitled to challenge "the reliability or accuracy of the test, the reliability or functioning of the instrument, or any maintenance procedures." RCW 46.61.506(4)(c). Furthermore, a jury may properly consider the defendant's challenges to the blood analysis. RCW 46.61.506(4)(c) ("challenges may be considered by the trier of fact in determining what weight to give to the test result").

Here, the State charged Mr. Sosa with committing vehicular assault for driving while "under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502." (CP 11); *see also* RCW 46.61.522(1)(b). A crucial piece of the State's evidence supporting that charge was Mr. Sosa's blood sample, which showed Mr. Sosa had a .12 blood alcohol content a few hours after the accident. (RP 333, 343). This placed Mr. Sosa's blood alcohol content above the legal limit of .08. RCW 46.61.502(1)(a).

Trial counsel spent a significant amount of time challenging the reliability and accuracy of the blood alcohol content of the test. (RP 154-162 , 333-334, 344-350, 362-371, 377-381, 388-392, 392-393, 394-395, 413-414). For example, trial counsel questioned whether the lab technician properly inverted the blood collection vials. (RP 154-162). Trial counsel also questioned whether the toxicologist could be certain that

the proper amounts of anticoagulant and enzyme poison were present in the blood collection vials. (RP 377-378). Trial counsel challenged whether chain of custody was properly established. (RP 413-415). These challenges to the accuracy and reliability of the blood alcohol results were part of the defendant's defense to the crime. (RP 494-496, 508-511).

Because challenging the blood alcohol result was a substantial part of the defense's theory of the case, there is no feasible tactical reason why trial counsel would not propose WPIC 92.16. WPIC 92.16 (Evaluation of Blood or Breath Test Results); (RP 494-496, 508-511). WPIC 92.16 specifically calls upon the jury to consider whether a blood test is accurate and reliable:

> In determining the accuracy and reliability of a [breath] [blood] test, you may consider the testing procedures used, the reliability and functioning of a testing instrument, maintenance procedures applied to a testing instrument, and any other factors that bear on the accuracy and reliability of the test.

WPIC 92.16[11]; *also* RCW 42.61.506(4)(c)("trier of fact" may consider the defendant's challenges to the accuracy and reliability of the test in "determining what weight to give the test result"). This instruction was available for use in June of 2014, which was more than a year prior to the start of trial on September, 9, 2015. WPIC 92.16; (RP 107-465). Had trial

[11] According to the comments, this instruction is to be given when "there is a challenge to the accuracy and reliability of the defendant's breath or blood test." WPIC 92.16.

counsel conducted proper research, he would have proposed this instruction. *Kyllo*, 166 Wn. 2d at 862, 868; *Thomas*, 209 Wn.2d at 223, 226-29.

Failure to propose WPIC 92.16 prejudiced the defendant, as the lack of instruction failed to inform the jury of how it could consider the blood evidence. WPIC 92.16. Had the jury been given proper instruction, there is a reasonable probability the jury would have found the blood test results inaccurate and unreliable so as to affect its verdict.

Trial counsel's performance fell below the objective standard of reasonableness, and that deficiency prejudiced the defendant. *Aho*, 137 Wn.2d at 745. Mr. Sosa respectfully requests this case be reversed and remanded for a new trial.

Issue 5: Whether the prosecutor committed misconduct during closing argument by appealing to the jury's sympathy for the victim and his family.

"To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks omitted) (*quoting State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). If the defendant fails to properly object to the misconduct, "a defendant cannot raise the issue of prosecutorial

misconduct on appeal unless the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered." *State v. O'Donnell*, 142 Wn. App. 314, 328, 174 P.3d 1205 (2007) (internal quotation marks omitted) (*quoting State v. Munguia*, 107 Wn. App. 328, 336, 26 P.3d 1017 (2001)).

"Prosecuting attorneys are quasi-judicial officers who have a duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant." *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009) (*citing State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)). "[B]ald appeals to passion and prejudice constitute misconduct." *Id*. at 747 (citing *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988)). "Although reference to the heinous nature of a crime and its effect on the victim can be proper argument, the prosecutor's duty is to ensure a verdict free of prejudice and based on reason." *State v. Claflin*, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984) (internal citations omitted) (citing *State v. Huson*, 73 Wn.2d 660, 662, 440 P.2d 192 (1968)). A prosecutor may not urge a jury to convict based upon an appeal to the jury's sympathy for the victim. *See id*. at 849-51.

In closing argument, the prosecutor argued the following to the jury:

> And as it turns out, we know from Dr. Field's testimony that Mark Gomes *was a dead man* if he hadn't been

> operated on. If Dr. Field hadn't operated on him, Nicole *would have lost her father* at 15, Dawn *would not have a husband*, and *we would be here in a vehicular homicide trial and not vehicular assault*.
>
> But fortunately, you know, *this time it is not how it turned out.*

(RP 483) (emphasis added).

Arguing what "might have happened" was misconduct; this argument improperly appealed to the jury's passions and prejudices. *See Fisher*, 165 Wn.2d at 747 (citing *Belgarde*, 110 Wn.2d at 507-08); *Claflin*, 38 Wn. App. at 849-51. A prosecutor must seek a conviction in a manner that is fair to the defendant and with a verdict was based solely on the facts presented. Here, the prosecutor's reference to how the victim would have been "a dead man" without surgery and how the victim's death would have impacted his wife and child were not proper arguments. These arguments encouraged the jurors to think of the impact on the family while deliberating, rather than only focusing on the presented facts and elements of the charged crimes.

The prosecutor also made an improper reference to the possibility of future crimes when she implied that "fortunately, this time" there was not a vehicular homicide. (RP 483). That particular comment refers to a crime not relevant or charged, and also encouraged the jury to consider what might happen *next time* the defendant is driving—that *next time* he

could kill someone. These statements appealed to the passion and prejudice of the jury by evoking emotional responses of fear, sadness, and anger.

The prosecutor was only permitted to argue those facts presented as they were related to proving the elements of vehicular assault, and therefore her statements were improper. The prosecutor's misconduct during closing argument "'was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered.'" *O'Donnell*, 142 Wn. App. at 328 (*Munguia*, 107 Wn. App. at 336).

Even if defense counsel objected at the time and received a curative instruction, it remains unlikely the jury would have forgotten or ignored the prosecutor's admonition that it was fortunate that "this time" no one was killed. (RP 483).

If the defendant is to now have a criminal record for vehicular assault, this Court should ensure that such a conviction only stands upon a fair presentation of facts rather than improper argument by the prosecutor. The only fair and just remedy in this situation is a new trial.

Issue 6: Whether the cumulative error doctrine requires reversal and remand for a new trial in this case.

Even if this Court could determine that one or more of the errors are not prejudicial enough to warrant reversal, the cumulative effect of the prejudicial errors in this case warrants reversal. *See e.g. State v. Greiff*,

141 Wn.2d 910, 929, 10 P.3d 390 (2000) (holding, "a series of errors, each of which is harmless, may have a cumulative effect that is prejudicial.")

"It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless." *State v. Lopez,* 95 Wn. App. 842, 857, 980 P.2d 224 (1999). *"*Analysis of this issue depends on the nature of the error. Constitutional error is harmless when the conviction is supported by overwhelming evidence." *Id*. "Under this test, constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error." *Id*. Nonconstitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial." *Id*.

For the reasons listed herein, Mr. Sosa received an unfair trial. The blood alcohol test was improperly admitted because the State never presented evidence Mr. Sosa was advised of his right to independent testing, which was a violation of due process and equal protection. Mr. Sosa's defense counsel was ineffective for failing to move to suppress or object to the admissibility of the blood test because Mr. Sosa was never properly advised of his rights, did not object to the admissibility of the PBT refusal, and did not propose a standard WPIC instruction instructing

the jury to consider the reliability and accuracy of the blood test and testing methods. The State committed misconduct by appealing to the passion and prejudice of the jury.

Given the cumulative effect of these errors, it cannot be said that any reasonable jury would have reached the same conclusion. It is within at least reasonable probabilities that the errors materially affected the outcome of this trial. The matter should be remanded for a new trial.

Issue 7: Whether the trial court's finding of ability to pay present or future discretionary legal financial obligations and imposition of a DUI fine was unsupported by statute and the record, thereby requiring resentencing.

"A defendant who makes no objection to the imposition of discretionary LFOs [legal financial obligations] at sentencing is not automatically entitled to review." *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Instead, "RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right . . . [and] [e]ach appellate court must make its own decision to accept discretionary review." *Id*. at 834-35. Mr. Sosa requests this Court exercise its discretion under RAP 2.5(a) to decide the LFO issue for the first time on appeal. *See id*.

A court may order a defendant to pay legal financial obligations (LFOs), including costs incurred by the State in prosecuting the defendant. RCW 9.94A.760(1); RCW 10.01.160(1), (2). "Unlike mandatory

obligations, if a court intends on imposing *discretionary* legal financial obligations as a sentencing condition, such as court costs and fees, it must consider the defendant's present or likely future ability to pay." *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013) (emphasis in original). The applicable statute states:

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3).

Before imposing discretionary LFOs, the sentencing court must consider the defendant's current or future ability to pay based on the particular facts of the defendant's case. *Blazina*, 182 Wn.2d at 834. The record must reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay, and the burden that payment of costs imposes, before it assesses discretionary LFOs. *Id*. at 837–39. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including any restitution. *Id*. at 838–39.

"[T]he court *shall* take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." *Id*. at 838 (quoting RCW 10.01.160(3)). "[T]he court *shall not* order a

defendant to pay costs unless the defendant is or will be able to pay them." *Id*. (quoting RCW 10.01.160(3)). If a defendant is found indigent, such as if his income falls below 125 percent of the federal poverty guideline and thereby meets "the GR 34 standard of indigency, courts should seriously question that person's ability to pay LFOs." *Id*. at 839.

The *Blazina* court specifically acknowledged the many problems associated with imposing LFOs against indigent defendants, including increased difficulty reentering society, increased recidivism, the doubtful recoupment of money by the government, inequities in administration, the accumulation of collection fees when LFOs are not paid on time, defendants' inability to afford higher sums especially when considering the accumulation at the current rate of twelve percent interest, and long-term court involvement in defendants' lives that may have negative consequences on employment, housing and finances. *Blazina*, 182 Wn.2d at 834–837. "Moreover, the state cannot collect money from defendants who cannot pay, which obviates one of the reasons for courts to impose LFOs." *Id*. at 837.

A trial court must consider the defendant's ability to pay before imposing discretionary LFOs, but it is not required to enter specific findings regarding a defendant's ability to pay discretionary court costs. *Lundy*, 176 Wn. App. at 105 (citing *State v. Curry*, 118 Wn.2d 911, 916,

829 P.2d 166 (1992)). However, where the trial court does make the unnecessary finding that the defendant has the ability to pay, "perhaps through inclusion of boilerplate language in the judgment and sentence," its finding is reviewed under the clearly erroneous standard. *Id*. (citing *State v. Bertrand*, 165 Wn. App. 393, 404 n.13, 267 P.3d 511 (2011)). "A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a 'definite and firm conviction that a mistake has been committed.'" *Id*. (internal quotations omitted). Ultimately, a finding of fact must be supported by substantial evidence in the record. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)).

RCW 46.61.5055 authorizes the court to impose a fine for those persons convicted of driving under the influence with an alcohol concentration of less than 0.15. RCW 46.61.5055(1)(a)(ii). The fine shall be between $350 to $5000, and the fine may be suspended if the court finds the offender indigent. *Id*.

Here the trial court ordered the defendant pay $1,041.90 for a "DUI Fine." (CP 129). However, the judgment and sentence does not indicate what statutory authority the court used to impose this fine. (CP 129). Furthermore, the DUI fine statute of RCW 46.61.5055 does not list

vehicular assault (RCW 46.61.522) as a crime for which the DUI fines apply. RCW 46.61.5055(1) (statute applicable to those convicted of driving under the influence or physical control). The trial court erred in imposing the statutory DUI fine when there was no legal authority for it. RCW 46.61.5055.

Even if this Court were to find the trial court had statutory authority to impose the $1,041.90 DUI fine, the trial court erred when it imposed the fine due to Mr. Sosa's inability to pay.

The court and defense counsel discussed Mr. Sosa's ability to pay and his desire to pay restitution. (RP 536-537). Although Mr. Sosa did have a job at the time of sentencing and it was determined he could pay $100 a month towards restitution and other financial obligations, defense counsel pointed out that the large restitution amount ($179,280.32) made it unlikely Mr. Sosa would ever be able to pay the full amount. (RP 536-538; CP 129). The trial court also denied Mr. Sosa's request for work release and ordered nine months of full confinement, affecting his ability to pay financial obligations while incarcerated. (RP 543). The trial court did waive many of the fines and fees, stating: ". . . I have waived based on the amount of restitution that has to be been paid back some of the waivable fines and fees." (RP 542). The court signed an order of indigency. (CP 160). Yet, the court also entered the boilerplate finding

that the defendant had the ability or likely future ability to pay the legal financial obligations imposed herein. (CP 128).

Because the record shows that Mr. Sosa would likely not be able to pay the full restitution, and because the trial court entered an order of indigency and declined to impose other waivable fines (CP 129), the court erred in imposing the discretionary DUI fine. RCW 46.61.5055(1)(a)(ii); *see Lundy*, 176 Wn. App. at 103; RCW 10.01.160(3); *Blazina*, 344 P.3d at 839. Substantial evidence does not support the imposition of the DUI fine of $1,041.91, and the record actually indicates the contrary to what the court imposed, that Mr. Sosa does not have the ability to pay discretionary LFOs. *See Brockob*, 159 Wn.2d at 343 (citing *Nordstrom Credit, Inc.*, 120 Wn.2d at 939).

Mr. Sosa requests this Court strike the erroneous discretionary LFO (the DUI fine) and remand for resentencing. *See Blazina*, 182 Wn.2d at 839 (setting forth this remedy).

Issue 8: Whether this Court should refuse to impose costs on appeal.

Mr. Sosa preemptively objects to any appellate costs should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016), and pursuant to this Court's General Court Order issued on June 10, 2016. (CP 130).

Mr. Sosa likely remains indigent and unable to pay costs that may be imposed on appeal. Appellate counsel anticipates filing a report as to Mr. Sosa's continued indigency and likely inability to pay an award of costs, no later than 60 days following the filing of this brief, as required by this Court's General Court Order issued on June 10, 2016. (See CP 160).

There is no support in the record at this time that the defendant/appellant has the ability to pay costs on appeal. Also, these costs would be a detrimental barrier to this Appellant's successful reentry into society and imposition of them would be inconsistent with those principles enumerated in *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015).

For these reasons, along with the anticipated filing of the form regarding Mr. Sosa's ongoing indigency, Mr. Sosa respectfully requests that no costs on appeal be assigned to him.

F. CONCLUSION

Mr. Sosa's rights to due process and equal protection were violated because he was not informed of his right to obtain independent blood alcohol testing. He respectfully requests his conviction be dismissed, or the blood evidence be deemed inadmissible and the case reversed and remanded.

Mr. Sosa's right to effective assistance of counsel was also violated when his attorney failed to move to suppress or object to the admissibility of the blood evidence at trial, failed to object to the admissibility of the PBT refusal, and failed to propose a WPIC instruction. Mr. Sosa respectfully requests his case be reversed and remanded.

The State committed misconduct when it appealed to the jury's passion and prejudice in closing argument. On these grounds, Mr. Sosa requests his case be reversed and remanded because he was deprived of a jury verdict based solely upon the facts and not emotional response.

All of these cumulative errors deprived Mr. Sosa of a fair trial, and for these reasons the Court should reverse and remand this case.

Finally, the trial court erred by imposing a DUI fine, and Mr. Sosa objects to any appellate costs should the State prevail on appeal.

Respectfully submitted this 30th day of June, 2016.

Laura M. Chuang, WSBA #36707

/s/ Kristina M. Nichols
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Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
Plaintiff/Respondent	)	COA No. 33859-2-III
vs.	)	
	)	
JOSE LUIS SOSA	)	
	)	PROOF OF SERVICE
Defendant/Appellant	)	
	)	

I, Kristina M. Nichols, of Nichols Law Firm, PLLC, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on June 30, 2016, I deposited for first-class mailing with the U.S. Postal Service, postage prepaid, a true and correct copy of the Appellant's opening brief and motion to file over-length brief to:

Jose Luis Sosa
616 White Street
Walla Walla, WA 99362

Having obtained prior permission from the Walla Walla County Prosecutor's Office, I also served the same on the Respondent State of Washington at tchen@co.franklin.wa.us using Division III's e-service feature.

Dated this 30th day of June, 2016.

/s/ Kristina M. Nichols__
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