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STATE OF WASHINGTON

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CITY

No. 34332-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Nicholas Baxley,

Appellant.

Clallam County Superior Court

Cause No. 05-1-00162-2

The Honorable Judge George L. Wood

Appellant's Opening Brief

(Corrected Copy)

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES vi

ASSIGNMENTS OF ERROR x

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR xiv

1. Were the convictions based on insufficient evidence that Mr. Baxley had an alcohol concentration of .08 or higher within two hours of driving? Assignments of Error Nos. 1-3..... xiv

2. Is it impossible to determine from the general verdicts whether the jury believed that Mr. Baxley’s ability to drive was “appreciably lessened,” or whether they determined he had an alcohol concentration of .08 or higher within two hours of driving? Assignments of Error Nos. 1-3..... xiv

3. If the case is retried, is the state prohibited from proceeding on the theory that Mr. Baxley had an alcohol concentration of .08 or higher within two hours of driving? Assignments of Error Nos. 1-3. xiv

4. Is a valid blood test result required to prove driving “under the influence” using the .08 BAC *per se* alternative means of committing Vehicular Homicide or Vehicular Assault? Assignments of Error Nos. 4-8..... xv

5. When based on the .08 BAC *per se* alternative means, does the “under the influence” element of Vehicular Homicide and Vehicular Assault require proof to a jury beyond a reasonable doubt that a qualified person collected the blood sample from which the test result was obtained? Assignments of Error Nos. 4-8. xv

6. When based on the .08 BAC *per se* alternative means, does the “under the influence” element of Vehicular Homicide and Vehicular Assault require proof to a jury beyond a reasonable doubt that the blood sample (from which the test result was obtained) was properly stored? Assignments of Error Nos. 4-8. xv
7. Were the convictions for Vehicular Homicide and Vehicular Assault based on insufficient evidence that a qualified person collected the blood sample from which the test result was obtained? Assignments of Error Nos. 4-8. xv
8. Were the convictions for Vehicular Homicide and Vehicular Assault based on insufficient evidence that the blood sample (from which the test result was obtained) was properly stored? Assignments of Error Nos. 4-8. xv
9. Were the convictions for Vehicular Homicide and Vehicular Assault based on insufficient evidence of a valid blood test? Assignments of Error Nos. 4-8. xv
10. Did the trial court’s instructions relieve the prosecution of its burden of proving every element beyond a reasonable doubt? Assignments of Error Nos. 9-16..... xvi
11. Did the trial court’s instructions violate due process because they allowed the jury to convict without proof beyond a reasonable doubt that the blood test result was valid? Assignments of Error Nos. 9-16..... xvi
12. Does the legislature’s failure to define an essential element of vehicular homicide constitute a violation of separation of powers? Assignments of Error Nos. 17-20. xvi
13. Does the judiciary’s development of definitions for an essential element of vehicular homicide encroach on a core legislative function and violate the separation of powers doctrine? Assignments of Error Nos. 17-20. xvi

14. Was Mr. Baxley convicted under an unconstitutional judicial and statutory scheme? Assignments of Error Nos. 17-20. xvi

15. Was Mr. Baxley’s constitutional right to due process violated by the prosecutor’s decision to add charges in retaliation for his decision to go to trial? Assignments of Error Nos. 21-22. xvi

16. Did the trial court violate Mr. Baxley’s constitutional right to confront witnesses by refusing to allow impeachment of former sheriff’s deputy Hayden? Assignment of Error No. 24. xvii

17. Did the trial court violate Mr. Baxley’s constitutional right to a jury determination of every fact used to increase his sentence above the standard range? Assignment of Error No. 25. xvii

18. Did the 48-month enhancement imposed without a jury determination of the validity of Mr. Baxley’s blood test results violate his constitutional right to a jury determination of the facts underlying his aggravated sentence? Assignment of Error No. 25. xvii

19. Did the 48-month enhancement imposed without a jury determination that Mr. Baxley had two prior DUI convictions violate his constitutional right to a jury determination of the facts underlying his aggravated sentence? Assignment of Error No. 25. xvii

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 1

ARGUMENT..... 5

I. Mr. Baxley’s vehicular homicide and vehicular assault convictions were based on insufficient evidence. 5

A. There was no evidence that Mr. Baxley’s blood sample was obtained within two hours of the accident..... 6

B.	There was insufficient evidence that Mr. Baxley drove while “under the influence” under the .08 BAC <i>per se</i> alternative means of committing the charged crimes.	7
1.	Compliance with RCW 46.61.506 is a substantive requirement that must be proved to a jury beyond a reasonable doubt in order to establish the .08 BAC <i>per se</i> alternative means of committing vehicular homicide and vehicular assault.....	10
2.	The prosecution failed to establish that Mr. Baxley was “under the influence” because it did not prove to the jury beyond a reasonable doubt that the blood sample was obtained and stored in compliance with RCW 46.61.506.	14
II.	The court’s instructions were constitutionally deficient because they allowed conviction without proof of an essential element of the <i>per se</i> offense.	15
III.	The statute criminalizing vehicular homicide violates the separation of powers doctrine because it fails to define the essential elements of the offense and requires judicial encroachment on a core legislative function... 	17
IV.	Counts III and IV must be dismissed, and Counts I and II must be remanded to the trial court for possible dismissal, because the prosecution engaged in vindictive prosecution (by adding charges in retaliation for Mr. Baxley’s decision to exercise his constitutional right to trial).....	20
V.	The trial court should have allowed Mr. Baxley to impeach former sheriff’s deputy Duane Hayden with evidence that he had been fired from the sheriff’s department for misconduct.....	24

VI. The trial court violated Mr. Baxley’s constitutional right to a jury trial by imposing an aggravated sentence without a jury determination that he had prior DUI convictions (argument included for preservation of error)..... 27

CONCLUSION 30

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Almendarez-Torres v. United States</i> , 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998).....	28
<i>Blackledge v. Perry</i> , 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974)	21
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).....	27
<i>Bordenkircher v. Hayes</i> , 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978).....	21
<i>Davis v. Alaska</i> , 415 U.S. 308, 94 S.Ct. 1105 (1974).....	24
<i>Hardwick v. Doolittle</i> , 558 F.2d 292 (5th Cir., 1977) <i>cert. denied</i> , 434 U.S. 1049, 54 L. Ed. 2d 801, 98 S. Ct. 897 (1978).....	21
<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) 5, 11	
<i>Morrison v. Olson</i> , 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988)	18
<i>North Carolina v. Pearce</i> , 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).....	21
<i>Shepard v. United States</i> , --- U.S. ----, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005).....	28
<i>Thigpen v. Roberts</i> , 468 U.S. 27, 104 S. Ct. 2916, 82 L. Ed. 2d 23 (1984)	21
<i>U.S. v. Bass</i> , 404 U.S. 336, 92 S.Ct. 515 (1971).....	18
<i>U.S. v. Gaudin</i> , 515 U.S. 506, 115 S.Ct. 2310 (1995).....	16
<i>United States v. Goodwin</i> , 457 U.S. 368, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982).....	21, 22

STATE CASES

Hartley v. State, 103 Wn.2d 768, 698 P.2d 77 (1985)..... 19

Smith v. Whatcom County Dist. Court, 147 Wn.2d 98, 52 P.3d 485 (2002)
..... 22

State v. Barnes, 54 Wn.App. 536, 774 P.2d 547 (1989)..... 25

State v. Bosio, 107 Wn.App. 462, 27 P.3d 636 (2001)..... 8, 9, 10

State v. Clark, 143 Wn.2d 731, 24 P.3d 1006, *cert. denied*, 534 U.S. 1000,
151 L. Ed. 2d 389, 122 S. Ct. 475 (2001)..... 26

State v. Colquitt, ___ Wn.App. ___, ___ P.3d ___ (2006) 5

State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002)..... 25

State v. DiLuzio, 121 Wn.App. 822, 90 P.3d 1141 (2004) 17

State v. Fernandez, 89 Wn. App. 292, 948 P.2d 872 (1997)..... 7, 15

State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998)..... 24

State v. G.S., 104 Wn.App. 643, 17 P.3d 1221 (2001) 5, 15

State v. Garrett, 80 Wn.App. 651, 910 P.2d 552 (1996) 9, 10

State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983) 25

State v. Hultenschmidt, 125 Wn. App. 259, 102 P.3d 192 (2004)..... 10

State v. Jackson, 61 Wn.App. 86, 809 P.2d 221 (1991) 13

State v. Jackson, 87 Wn.App. 801, 944 P.2d 403 (1997) 16

State v. Keller, 98 Wn.App. 381, 990 P. 2d 423 (1999) 12

State v. Korum, 120 Wn. App. 686, 86 P.3d 166 (2004) .. 20, 21, 22, 23, 24

State v. McDonald, 90 Wn.App. 604, 953 P.2d 470 (1998) 19

State v. McGee, 122 Wn.2d 783, 864 P.2d 912 (1993)..... 13

<i>State v. McSorley</i> , 128 Wn. App. 598, 116 P.3d 431 (2005).....	26
<i>State v. Michielli</i> , 81 Wn.App. 773, 916 P.2d 458 (1996).....	13
<i>State v. Moreno</i> , 147 Wn.2d 500, 58 P.3d 265 (2002)	17, 20
<i>State v. Mounts</i> , 130 Wn.App. 219, 122 P.3d 745 (2005)	28
<i>State v. Randhawa</i> , 133 Wn.2d 67, 941 P.2d 661 (1997).....	14
<i>State v. Reed</i> , 101 Wn.App. 704, 6 P.3d 43 (2000)	25
<i>State v. Smith</i> , 155 Wn.2d 496, 120 P.3d 559 (2005)	5
<i>State v. Stein</i> , 94 Wn.App. 616, 972 P.2d 505 (1999)	16, 17
<i>State v. Stephenson</i> , 89 Wn. App. 217, 948 P.2d 1321 (1997).....	7, 15
<i>State v. Teal</i> , 152 Wn.2d 333, 96 P.3d 974 (2004).....	5
<i>State v. Wadsworth</i> , 139 Wn.2d 724, 991 P.2d 80 (2000).....	18, 20
<i>State v. York</i> , 28 Wn.App. 33, 621 P.2d 784 (1980).....	25, 26, 27

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI	15
U.S. Const. Amend. XIV	15, 20, 24
Wash. Const. Article I, Section 22.....	24
Wash. Const. Article II, Section 1	17
Wash. Const. Article III, Section 2	17
Wash. Const. Article IV, Section 1	17

STATUTES

RCW 46.61.502	6, 7, 8, 11, 14, 15, 18
---------------------	-------------------------

RCW 46.61.506 x, xvi, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17
RCW 46.61.520 7, 10, 11, 18, 20
RCW 46.61.522 7

OTHER AUTHORITIES

ER 608 26
WAC 448-14-020..... 8, 9

ASSIGNMENTS OF ERROR

1. The vehicular homicide conviction was based on insufficient evidence.
2. The vehicular assault convictions were based on insufficient evidence.
3. The prosecution failed to establish when Mr. Baxley's blood sample was obtained, and thus was unable to prove beyond a reasonable doubt that his blood alcohol concentration was greater than .08 within two hours of the accident.
4. The prosecution failed to establish that Mr. Baxley's blood test result was "valid" within the meaning of RCW 46.61.506.
5. The prosecution failed to establish that Mr. Baxley's blood sample was stored in a chemically clean dry container.
6. The prosecution failed to establish that Mr. Baxley's blood sample was stored in a container with an inert leak-proof stopper.
7. The prosecution failed to establish that Mr. Baxley's blood sample was preserved with an anticoagulant and an enzyme poison.
8. The prosecution failed to establish that a qualified person drew Mr. Baxley's blood for testing.
9. The trial court's instructions were constitutionally deficient.
10. The trial court erred by giving Instruction No. 9, which reads as follows:

A person drives while under the influence of intoxicating liquor when he drives a motor vehicle while he is under the influence of or affected by intoxicating liquor, or while he has sufficient alcohol in his body to have an alcohol concentration of .08 or higher within two hours of driving.

A person [is] under the influence of or affected by the use of intoxicating liquor if the person's ability to drive a motor vehicle is lessened in any appreciable degree.

Instruction No. 9, Supp. CP.

11. The trial court erred by giving Instruction No. 12, which reads as follows:

To convict the Defendant of the crime of VEHICULAR HOMICIDE as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 16th day of April, 2005, the Defendant drove or operated a motor vehicle;
- (2) That the Defendant's driving proximately caused injury to another person;
- (3) That at the time of causing the injury, the Defendant was operating a motor vehicle while under the influence of intoxicating liquor.
- (4) That the injured person died within three years as a proximate result of the injuries; and
- (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Instruction No. 12, Supp. CP.

12. The trial court erred by giving Instruction No. 13, which reads as follows:

To constitute VEHICULAR HOMICIDE, there must be a causal connection between the death of a human being and the criminal conduct of a defendant so that the act done was a proximate cause of the resulting death.

The term "proximate cause" means a cause which, in a direct sequence, unbroken by any new independent cause, produces the death, and without which the death would not have happened.

There may be more than one proximate cause of a death.
Instruction No. 13, Supp. CP.

13. The trial court erred by giving Instruction No. 15, which reads as follows:

To convict the Defendant of the crime of VEHICULAR ASSAULT as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 16th day of April, 2005, the Defendant drove or operated a motor vehicle;
- (2) That the Defendant's driving caused substantial bodily harm to Darcy Hylton;
- (3) That at the time of causing the injury, the Defendant was operating a motor vehicle while under the influence of intoxicating liquor; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Instruction No. 15, Supp. CP.

14. The trial court erred by giving Instruction No. 16, which reads as follows:

To convict the Defendant of the crime of VEHICULAR ASSAULT as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (5) That on or about the 16th day of April, 2005, the Defendant drove or operated a motor vehicle;
- (6) That the Defendant's driving caused substantial bodily harm to Jason Tupuola;
- (7) That at the time of causing the injury, the Defendant was operating a motor vehicle while under the influence of intoxicating liquor; and
- (8) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Instruction No. 16, Supp. CP.

15. The trial court erred by failing to properly define the *per se* offense of Vehicular Homicide.
16. The trial court erred by failing to properly define the *per se* offense of Vehicular Assault.
17. Mr. Baxley was convicted of Vehicular Homicide under an unconstitutional statute.
18. The trial court erred by entering a judgment of guilty of Vehicular Homicide based on an unconstitutional statute.
19. The legislature's failure to define an element of Vehicular Homicide violates the separation of powers.
20. The judicial definition of proximate cause encroaches on a core legislative function and violates the separation of powers.
21. Mr. Baxley's constitutional right to due process was violated.
22. The prosecutor acted vindictively by amending the Information to add two charges in retaliation for Mr. Baxley's decision to exercise his constitutional right to a jury trial.
23. Mr. Baxley was denied his constitutional right to confront the witnesses against him.
24. The trial court erred by refusing to allow Mr. Baxley to impeach former Deputy Hayden with evidence that he'd been fired from the sheriff's department for misconduct.
25. The trial court violated Mr. Baxley's constitutional right to a jury trial by removing from the jury's consideration a fact that increased the penalty for beyond the standard range for the offense.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Nicholas Baxley was charged with Vehicular Homicide and two counts of Vehicular Assault. To establish that Mr. Baxley drove while under the influence of alcohol, the prosecution introduced an exhibit showing that analysis of a blood alcohol sample yielded a result of .14 g/100 mL. The prosecution did not introduce any evidence establishing when the blood sample was taken, or that it was within two hours of the accident.

The jury was instructed that a person is under the influence of alcohol if he is "affected by intoxicating liquor, [or] has sufficient alcohol in his body to have an alcohol concentration of .08 or higher within two hours of driving."

The jury's verdicts were general verdicts.

1. Were the convictions based on insufficient evidence that Mr. Baxley had an alcohol concentration of .08 or higher within two hours of driving? Assignments of Error Nos. 1-3.

2. Is it impossible to determine from the general verdicts whether the jury believed that Mr. Baxley's ability to drive was "appreciably lessened," or whether they determined he had an alcohol concentration of .08 or higher within two hours of driving? Assignments of Error Nos. 1-3.

3. If the case is retried, is the state prohibited from proceeding on the theory that Mr. Baxley had an alcohol concentration of .08 or higher within two hours of driving? Assignments of Error Nos. 1-3.

The parties stipulated that a qualified analyst properly performed the analysis of the blood sample, and that the blood alcohol test result was admissible. The stipulation did not address the collection of the sample or the manner in which the sample was stored prior to analysis; nor did the parties stipulate that the blood test result was valid.

The prosecution did not introduce any evidence establishing that a qualified person collected the sample. Nor did the prosecution introduce any evidence establishing how the sample was stored prior to analysis.

4. Is a valid blood test result required to prove driving “under the influence” using the .08 BAC *per se* alternative means of committing Vehicular Homicide or Vehicular Assault? Assignments of Error Nos. 4-8.

5. When based on the .08 BAC *per se* alternative means, does the “under the influence” element of Vehicular Homicide and Vehicular Assault require proof to a jury beyond a reasonable doubt that a qualified person collected the blood sample from which the test result was obtained? Assignments of Error Nos. 4-8.

6. When based on the .08 BAC *per se* alternative means, does the “under the influence” element of Vehicular Homicide and Vehicular Assault require proof to a jury beyond a reasonable doubt that the blood sample (from which the test result was obtained) was properly stored? Assignments of Error Nos. 4-8.

7. Were the convictions for Vehicular Homicide and Vehicular Assault based on insufficient evidence that a qualified person collected the blood sample from which the test result was obtained? Assignments of Error Nos. 4-8.

8. Were the convictions for Vehicular Homicide and Vehicular Assault based on insufficient evidence that the blood sample (from which the test result was obtained) was properly stored? Assignments of Error Nos. 4-8.

9. Were the convictions for Vehicular Homicide and Vehicular Assault based on insufficient evidence of a valid blood test? Assignments of Error Nos. 4-8.

The court did not instruct the jury that the validity of the blood test result was a factual determination to be made only upon proof beyond a reasonable doubt, did not provide guidance to the jury in evaluating the blood test’s validity, and did not instruct the jury of the prosecution’s duty to prove beyond a reasonable doubt that the blood sample was obtained and stored in compliance with the requirements of RCW 46.61.506.

10. Did the trial court's instructions relieve the prosecution of its burden of proving every element beyond a reasonable doubt? Assignments of Error Nos. 9-16.

11. Did the trial court's instructions violate due process because they allowed the jury to convict without proof beyond a reasonable doubt that the blood test result was valid? Assignments of Error Nos. 9-16.

In criminalizing vehicular homicide, the legislature failed to define an essential element—proximate cause. To fill the void, courts have defined the element by importing a confusing web of concepts from tort law, encompassing ideas relating to factual and legal causation. Courts have also developed terminology such as “concurring cause” and “superseding intervening cause” to define the limits of liability.

12. Does the legislature's failure to define an essential element of vehicular homicide constitute a violation of separation of powers? Assignments of Error Nos. 17-20.

13. Does the judiciary's development of definitions for an essential element of vehicular homicide encroach on a core legislative function and violate the separation of powers doctrine? Assignments of Error Nos. 17-20.

14. Was Mr. Baxley convicted under an unconstitutional judicial and statutory scheme? Assignments of Error Nos. 17-20.

After Mr. Baxley rejected a plea offer, the prosecutor announced that she would be adding charges because Mr. Baxley was not taking responsibility for the crimes. By the time of trial, the prosecutor had doubled the number of charges, adding a second Vehicular Assault charge and a Driving While License Suspended in the Second Degree.

15. Was Mr. Baxley's constitutional right to due process violated by the prosecutor's decision to add charges in retaliation for his decision to go to trial? Assignments of Error Nos. 21-22.

At trial, the defense sought to impeach former sheriff's deputy Duane Hayden with information that he'd been fired from the sheriff's

department for misconduct, including sexual activity while on duty and using a work cell phone for lengthy personal calls. The trial court refused. Former Deputy Hayden was the first officer on the scene of the accident, and testified to important details about the time and circumstances of the crash.

16. Did the trial court violate Mr. Baxley's constitutional right to confront witnesses by refusing to allow impeachment of former sheriff's deputy Hayden? Assignment of Error No. 24.

Following the jury trial, the prosecutor documents to establish that Mr. Baxley had two prior DUI convictions. By a preponderance of the evidence, the sentencing judge found that Mr. Baxley had two prior DUI convictions, and imposed a 48-month enhancement on top of his standard range sentence.

17. Did the trial court violate Mr. Baxley's constitutional right to a jury determination of every fact used to increase his sentence above the standard range? Assignment of Error No. 25.

18. Did the 48-month enhancement imposed without a jury determination of the validity of Mr. Baxley's blood test results violate his constitutional right to a jury determination of the facts underlying his aggravated sentence? Assignment of Error No. 25.

19. Did the 48-month enhancement imposed without a jury determination that Mr. Baxley had two prior DUI convictions violate his constitutional right to a jury determination of the facts underlying his aggravated sentence? Assignment of Error No. 25.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In the early morning hours of April 16, 2005, four people returning to a party were involved in a single-vehicle accident. Stephanie Cox, seated in the front passenger seat, died at the scene. The car's other three occupants-- Nicholas Baxley, Darcy Hylton and Josh Tupuola-- were all injured. RP (12-13-05) 79-80, 91-92, 105. According to Tupuola, the four of them left the party at around 4:00 a.m., went straight to a nearby convenience store, and then left the store to return to the party. RP (12-13-05) 86.

A man named Timothy Bolding drove by the accident at approximately 4:00 a.m. He called 911, but left the scene because Mr. Baxley, dazed and incoherent, kept approaching his car and making him uncomfortable. RP (12-13-05) 11-12. At some point between 5:30 and 6:30 a.m., Alan Watkins and Tom Butler arrived. RP (12-13-06) 25-26, 39-40. While Watkins assisted Hylton, Butler left to call 911 from the nearby store, and then returned to attempt to resuscitate Cox. RP (12-13-05) 28, 43-44, 46. After starting to perform CPR on Cox, Butler noticed Tupuola sitting calmly in the back seat. He had not seen Tupuola there when he entered the car to assist Cox. RP (12-13-05) 46, 51-53.

Former sheriff's deputy Duane Hayden was the first officer on the scene, arriving at 6:05 a.m. RP (12-13-05) 131-132. He saw skid marks on the road, and when he arrived Tupuola was in the back seat on the passenger side. RP (12-13-05) 124, 127-128, 132. Hayden claimed that Mr. Baxley just looked at him without responding when asked who the driver had been. RP (12-13-05) 128. Hayden also claimed that Mr. Baxley smelled of alcohol, and described Mr. Baxley as dazed and confused. RP (12-13-05) 129, 136.

Mr. Baxley was initially charged with Vehicular Homicide and one count of Vehicular Assault. Supp. CP, Criminal Information (4-18-05). At a hearing on August 12, 2005, the state notified the court that an additional count of vehicular assault would be added:

I'm giving Mr. Baxley official notice as I did to his counsel during the plea negotiations that I will be adding another count of Vehicular Assault to this (sic) three (sic) current charges for his inability to take responsibility for his actions.
RP (8-12-05), 2.

The following week, the state made good on its threat:

Your Honor, this is cause number 05-1-00162-2. Last week Mr. Baxley was here. He refused our plea offer and we did state on the record that we would move to amend the information to include the second victim of the Vehicular Assault, Jason Tupuola, and have done so and provided a copy to Mr. Mulligan.
RP (8-19-05) 2.

On the first day of trial, the State added one count of Driving While License Suspended in the Second Degree. CP 18.

At trial, defense counsel sought to impeach former sheriff's deputy Hayden with information that he'd recently been terminated from his employment at the Clallam County Sheriff's Department for having sexual relations while working, for watching television and making personal visits (in uniform) while working, and for making lengthy personal calls with his work cell phone. RP (12-13-05) 115-117. The trial court excluded the evidence, holding that Hayden's credibility was not at issue and that his testimony did not impact the case. RP (12-13-05) 121.

The prosecution did not present any testimony establishing when blood was drawn from Mr. Baxley. Nor was there any evidence showing who drew the blood or how it was stored (other than a reference in Mr. Baxley's tape-recorded statement that a blood sample had been placed in gray-topped tubes (*see* Exhibit 37 (transcript), p. 6, Supp. CP.).¹ The parties stipulated that the crime lab properly analyzed the sample, and that the blood test result (.14 g/100 mL) was admissible. Exhibit 1, Supp. CP. The stipulation did not address the validity of the test result. Exhibit 1, Supp. CP.

¹ There was no testimony introduced to show what significance, if any, should be attached to the gray-topped tubes.

The court instructed the jury that

A person drives while under the influence of intoxicating liquor when he drives a motor vehicle while he is under the influence of or affected by intoxicating liquor, or while he has sufficient alcohol in his body to have an alcohol concentration of .08 or higher within two hours of driving.

A person [is] under the influence of or affected by the use of intoxicating liquor if the person's ability to drive a motor vehicle is lessened in any appreciable degree.

Instruction No. 9, Supp. CP.

The court's instructions to the jury did not require the jury to find that the blood test results were valid in order to convict Mr. Baxley of the crimes under the .08 BAC alternative means of driving "under the influence." Supp. CP.

Mr. Baxley was convicted as charged, and sentenced on January 17, 2006. Defense counsel had previously agreed that the jury would not determine Mr. Baxley's prior DUI history for purposes of enhancements. RP (12-12-05) 16. The prosecution provided copies of two prior DUI convictions, and the court added 48 months to Mr. Baxley's standard sentence range. CP 6-17.

Mr. Baxley appealed.² CP 5.

² A motion for a new trial, based on newly discovered evidence, is pending as of this writing.

ARGUMENT

I. MR. BAXLEY'S VEHICULAR HOMICIDE AND VEHICULAR ASSAULT CONVICTIONS WERE BASED ON INSUFFICIENT EVIDENCE.

In a criminal prosecution, due process requires the state to prove every element of the charged crime beyond a reasonable doubt. *State v. Smith*, 155 Wn.2d 496 at 502, 120 P.3d 559 (2005), citing *State v. Teal*, 152 Wn.2d 333, 96 P.3d 974 (2004) and *In re Winship*, 397 U.S. 358, 361-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Because this is a constitutional requirement, a challenge to the sufficiency of the evidence may be raised for the first time on appeal. *State v. Colquitt*, ___ Wn.App. ___, ___ P.3d ___ (2006). Evidence is sufficient if, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements beyond a reasonable doubt. A reviewing court draws all reasonable inferences in favor of the state. *State v. G.S.*, 104 Wn.App. 643 at 651, 17 P.3d 1221 (2001). If a reviewing court finds insufficient evidence to prove an element of a crime, reversal is required; retrial following reversal for insufficient evidence is unequivocally prohibited and dismissal is the remedy. *Smith, supra*, at 504-505.

A. There was no evidence that Mr. Baxley's blood sample was obtained within two hours of the accident.

Vehicular homicide and vehicular assault both require proof that the defendant operated a motor vehicle "[w]hile under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502..." One means of proving intoxication involves showing that "the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506." RCW 46.61.502(1)(a).

In this case, there was no proof that the blood sample was taken within two hours. Conflicting testimony showed that the accident occurred sometime between 4:00 a.m. and 6:30 a.m. RP (12-13-05) 11, 25-26, 39-40, 85-86, 123, 131-32, 166; RP (12-14-05) 15. Mr. Baxley was transported from the hospital to the jail at 9:45 a.m. RP (12-13-05) 170. Taking this evidence in a light most favorable to the prosecution, this testimony establishes a window of time greater than three hours during which the blood sample could have been taken; hence, the state did not prove beyond a reasonable doubt that Mr. Baxley's alcohol concentration was greater than .08 within two hours after driving.

Because of this, the evidence was insufficient to sustain Mr. Baxley's convictions for Counts I-III. It is impossible to determine

whether the jury's general verdicts were based on a determination that Mr. Baxley was "affected by" alcohol, or on a belief that his blood alcohol was greater than .08 within two hours of driving. Because of this, the convictions must be reversed. Furthermore, since the evidence was insufficient to establish that Mr. Baxley had an alcohol concentration of .08 or higher within two hours of driving, he may not be retried on that theory. *See, e.g., State v. Fernandez*, 89 Wn. App. 292 at 300, 948 P.2d 872 (1997); *State v. Stephenson*, 89 Wn. App. 217 at 226, 948 P.2d 1321 (1997).

B. There was insufficient evidence that Mr. Baxley drove while "under the influence" under the .08 BAC *per se* alternative means of committing the charged crimes.

RCW 46.61.520, quoted above, defines the crime of vehicular homicide. RCW 46.61.522 defines the crime of vehicular assault. As charged here, both statutes require proof that the driver was operating a motor vehicle "While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502..." RCW 46.61.520; RCW 46.61.522. Referred to in both statutes, RCW 46.61.502 defines intoxication to include "an alcohol concentration of 0.08 or higher as shown by analysis of the breath or blood made under RCW 46.61.506."

Thus RCW 46.61.506 is at the heart of the so-called “per se” offense, whether the charge is DUI, vehicular homicide, or vehicular assault. RCW 46.61.506 provides (in relevant part) as follows:

(3) Analysis of the person's blood or breath to be considered valid under the provisions of this section or RCW 46.61.502 or 46.61.504 shall have been performed according to methods approved by the state toxicologist... The state toxicologist is directed to approve satisfactory techniques or methods...

...

(5) When a blood test is administered under the provisions of RCW 46.20.308 [the implied consent statute], the withdrawal of blood for the purpose of determining its alcoholic or drug content may be performed only by a physician, a registered nurse, a licensed practical nurse, a nursing assistant..., a physician assistant..., a first responder..., an emergency medical technician..., a health care assistant..., or any technician trained in withdrawing blood...

RCW 46.61.506.

The Washington State Toxicologist has promulgated regulations outlining techniques and methods for testing as directed by RCW 46.61.506(3). WAC 448-14-020. Failure to prove compliance with the regulations requires reversal. *State v. Bosio*, 107 Wn.App. 462, 27 P.3d 636 (2001).

The regulations include the following requirements for storing samples:

- (a) A chemically clean dry container consistent with the size of the sample with an inert leak-proof stopper shall be used.
- (b) Blood samples for alcohol analysis shall be preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol

concentration. Suitable preservatives and anticoagulants include the combination of sodium fluoride and potassium oxalate.

WAC 448-14-020(3).

These uniform procedures help to ensure that the test results will be accurate and reliable. *State v. Bosio, supra*, at 467. Where the state fails to make a *prima facie* case that the sample was properly preserved, the conviction must be reversed. *Bosio*, at 468. In *Bosio*, the state failed to introduce any evidence establishing that the mandatory enzyme poison was added to the sample. Because of this, the conviction was reversed and the case remanded for a new trial. *Bosio*, at 468. Similarly, in *State v. Garrett*, 80 Wn.App. 651, 910 P.2d 552 (1996), the state failed to make a *prima facie* case that the blood sample was properly preserved with an anticoagulant. Because of this, the defendant's conviction was reversed.

In this case, the parties stipulated that the blood test result was *admissible*, but did not stipulate that it was *valid*. Furthermore, there was no evidence that the sample was drawn by a qualified person (under RCW 46.61.506(5)) and stored in accordance with WAC 448-14-020(3) (as required by RCW 46.61.506(3)). The parties' stipulation and the absence of proof on these points squarely presents the question of whether RCW 46.61.506 is only a limitation on admissibility, or whether it also imposes substantive requirements that must be established to a jury by proof

beyond a reasonable doubt to prove the *per se* offense. This is an issue of first impression.³

As an initial matter, it is clear that RCW 46.61.506(3) and (5) can (at a minimum) be interpreted to impose a threshold requirement for admissibility. Numerous cases apply the statute to questions of admissibility, reversing convictions and excluding evidence where the basic foundation has not been met. *See, e.g., Bosio, supra, Garrett, supra, and Hultenschmidt, supra.* None of the cases preclude the possibility that the statute also imposes substantive requirements that go beyond the issue of admissibility.

1. Compliance with RCW 46.61.506 is a substantive requirement that must be proved to a jury beyond a reasonable doubt in order to establish the .08 BAC *per se* alternative means of committing vehicular homicide and vehicular assault.

As noted above, a person is guilty of vehicular homicide or vehicular assault if (among other things) the person was driving “while under the influence of intoxicating liquor...” RCW 46.61.520. RCW

³ This Court was presented with a related question in *State v. Hultenschmidt*, 125 Wn. App. 259, 102 P.3d 192 (2004). In that case, the defendant argued that compliance with RCW 46.61.506 was an essential element of vehicular homicide and should therefore have been included in the court’s instructions to the jury. Division II reversed the defendant’s conviction, holding that the blood test results were improperly admitted, but declined to reach the instructional issue since no instruction had been requested in the trial court. *Hultenschmidt* at 269.

46.61.506 is the final piece in a chain of statutes defining what it means for a person to drive under the influence: RCW 46.61.520 incorporates the definition set forth in RCW 46.61.502, which requires that analysis of blood be done “under RCW 46.61.506.” Since driving “under the influence” is an element of vehicular homicide as charged, and since the phrase “under the influence” is defined with reference to RCW 46.61.506, it follows that the prosecution must prove compliance with RCW 46.61.506 in order to meet its burden (under the due process clause) of proving every element of the crime by proof beyond a reasonable doubt. *In re Winship, supra.* (This is no different from requiring the prosecution to prove that a building meets the definition of a “residence” in a residential burglary case, or that a weapon meets the definition of “deadly weapon” in a prosecution for assault in the second degree.) As with all essential elements of the offense, the prosecution is required to prove that a driver is “under the influence”-- and hence is required to prove compliance with RCW 46.61.506-- by proof beyond a reasonable doubt to a jury.

This conclusion is bolstered by analysis of the language of the statute. Where the legislature uses different words in the same statute to deal with related matters, a court must presume that the words have

different meanings. *State v. Keller*, 98 Wn.App. 381, 990 P. 2d 423 (1999). Such is the case here.

RCW 46.61.506(3) does not speak merely in terms of admissibility; instead, the legislature specifically adopted language requiring compliance with the statute and regulations in order for test results “to be considered valid.” RCW 46.61.506(3). This is in contrast to the language used in the very next section of the same statute, which deals specifically with breath test results. RCW 46.61.506(4) provides that

A breath test performed by any instrument approved by the state toxicologist *shall be admissible* at trial or in an administrative proceeding if the prosecution or department produces prima facie evidence [of compliance with the statutory procedure.]... ‘[P]rima facie evidence’ is evidence of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved. In assessing whether there is sufficient evidence of the *foundational facts*, the court or administrative tribunal is to assume the truth of the prosecution's or department's evidence and all reasonable inferences from it in a light most favorable to the prosecution or department.
RCW 46.61.506(4), *emphasis added*.

Applying the rule that different words have different meanings (as set forth in *Keller, supra*), the reference to *validity* in section RCW 46.61.506(3) must be given a different meaning than the references to *admissibility* and *foundational facts* in RCW 46.61.506(4).

This interpretation is also supported by the rule of lenity, which requires that criminal statutes capable of more than one interpretation be

construed “strictly against the state and in favor of the accused.” *State v. Michielli*, 81 Wn.App. 773 at 778, 916 P.2d 458 (1996); *State v. Jackson*, 61 Wn.App. 86 at 93, 809 P.2d 221 (1991). The policy underlying the rule of lenity is “to place the burden squarely on the Legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are.” *Jackson, supra*, at 93. “Due process ‘requires that citizens be given fair notice of conduct forbidden by a penal statute...’ and the rule of lenity prevents such statutes from trapping the innocent.” *State v. McGee*, 122 Wn.2d 783 at 800, 864 P.2d 912 (1993), *Justice Johnson, dissenting; citations omitted*. Applying the rule of lenity to this statute, RCW 46.61.506(3) and (5) must be interpreted to provide an additional hurdle for the state to overcome to obtain a conviction. Requiring the prosecution to prove to a jury compliance with the statute beyond a reasonable doubt will ensure that convictions are obtained for the *per se* offense only where the test results cannot be doubted.

For all these reasons, the “under the influence” element of vehicular homicide and vehicular assault can only be established where the prosecution proves to the jury beyond a reasonable doubt that the

defendant is actually “affected by” alcohol⁴ (RCW 46.61.502(1)(b)), or where the prosecution establishes the *per se* offense by introducing a blood test result and proving to the jury (beyond a reasonable doubt) that the samples were obtained, stored, and tested in compliance with RCW 46.61.506 (RCW 46.61.502(1)(a)).

2. The prosecution failed to establish that Mr. Baxley was “under the influence” because it did not prove to the jury beyond a reasonable doubt that the blood sample was obtained and stored in compliance with RCW 46.61.506.

In this case, the prosecution sought to establish the *per se* offense through the stipulation introduced as Exhibit 1. Although the stipulation included the defendant’s agreement that the sample was “properly retrieved from the crime vault [sic]” and “properly analyzed” by a qualified analyst, the stipulation did not contain any information regarding who drew the blood or how it was stored. Exhibit 1, Supp. CP. Nor did the state present any other evidence showing that the blood was drawn by a qualified person and stored in a chemically clean, dry container, with an inert leak-proof stopper containing an anticoagulant and an enzyme poison.

⁴ Proof of this alternative means requires a showing that the defendant’s ability to drive a motor vehicle is lessened to an appreciable degree. See Instruction No. 9, Supp. CP; see also, e.g., *State v. Randhawa*, 133 Wn.2d 67 at 75, 941 P.2d 661 (1997).

In the absence of this evidence, the prosecution failed to establish the *per se* offense beyond a reasonable doubt. Even taking all the evidence in a light most favorable to the state, no reasonable jury could conclude beyond a reasonable doubt that the prosecution proved compliance with RCW 46.61.506. *State v. G.S., supra.*

It is impossible to determine whether the jury's general verdict was based on a determination that Mr. Baxley was actually "affected by" alcohol (under RCW 46.61.502(1)(b)), or on a belief that his blood alcohol was greater than .08 within two hours of driving (under RCW 46.61.502(1)(a)). Because of this, the convictions in Counts I-III must be reversed. Since the evidence was insufficient to establish compliance with RCW 46.61.506, Mr. Baxley may not be retried for the *per se* offense. *See, e.g., Fernandez, supra; Stephenson, supra.*

II. THE COURT'S INSTRUCTIONS WERE CONSTITUTIONALLY DEFICIENT BECAUSE THEY ALLOWED CONVICTION WITHOUT PROOF OF AN ESSENTIAL ELEMENT OF THE *PER SE* OFFENSE.

The Sixth Amendment guarantees a criminal defendant the right to a jury trial. U.S. Const. Amend. VI. The Fourteenth Amendment's due process clause requires that the State establish all elements of a criminal charge by proof beyond a reasonable doubt. U.S. Const. Amend. XIV. Together, the two constitutional provisions guarantee a criminal defendant the right to have a jury determine, beyond a reasonable doubt, every

essential element of guilt. *State v. Jackson*, 87 Wn.App. 801 at 812-813, 944 P.2d 403 (1997); *U.S. v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310 (1995).

A jury instruction that omits an element of the charged crime presents an error of constitutional magnitude, which may be raised for the first time on review. *State v. Stein*, 94 Wn.App. 616 at 623, 972 P.2d 505 (1999). Instructional error of this sort is presumed to be prejudicial; the burden is on the State to affirmatively demonstrate that the error is harmless. *Stein, supra* at 625.

As outlined above, the *per se* alternative means of establishing that a defendant was “under the influence” requires proof that the blood sample was obtained and stored in compliance with RCW 46.61.506. As with all essential elements, the prosecution is required to show that the defendant is “under the influence” by proof beyond a reasonable doubt, and the jury must be so instructed. *Stein, supra*. This necessarily includes instruction on the statutory meaning of that phrase.

In this case, the court instructed the jury that the defendant could be found guilty of vehicular homicide and vehicular assault if he had an alcohol concentration of .08 or higher within two hours of driving. Instruction No. 9, Supp. CP. The instructions did not require the prosecutor to establish that the blood was obtained and stored in

compliance with the requirements of RCW 46.61.506. Without explaining this to the jury, the court did not ensure that the jurors correctly analyzed the evidence for the *per se* means of driving “under the influence.” The omission requires reversal of the conviction. *Stein, supra*. If retrial is permitted on this theory, the jury must be instructed that the prosecution is required to prove beyond a reasonable doubt that the blood sample was obtained and stored in compliance with RCW 46.61.506.

III. THE STATUTE CRIMINALIZING VEHICULAR HOMICIDE VIOLATES THE SEPARATION OF POWERS DOCTRINE BECAUSE IT FAILS TO DEFINE THE ESSENTIAL ELEMENTS OF THE OFFENSE AND REQUIRES JUDICIAL ENCROACHMENT ON A CORE LEGISLATIVE FUNCTION.

The doctrine of separation of powers comes from the constitutional distribution of the government's authority into three branches. *State v. Moreno*, 147 Wn.2d 500 at 505, 58 P.3d 265 (2002). The State Constitution divides political power into legislative authority (Article II, Section 1), executive power (Article III, Section 2), and judicial power (Article IV, Section 1). *Moreno*, at 505. Each branch of government wields only the power it is given. *Moreno*, at 505; *State v. DiLuzio*, 121 Wn.App. 822 at 825, 90 P.3d 1141 (2004).

The purpose of the doctrine of separation of powers is to prevent one branch of government from aggrandizing itself or encroaching upon the “fundamental functions” of another. *Moreno*, at 505. A violation of

separation of powers occurs whenever “the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” *Moreno*, at 506, *citations omitted*. Judicial independence is threatened whenever the judicial branch is assigned or allowed tasks that are more properly accomplished by other branches. *Moreno at 506, citing Morrison v. Olson*, 487 U.S. 654 at 680-681, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

It is the function of the legislature to define the elements of a crime. *State v. Wadsworth*, 139 Wn.2d 724 at 734, 991 P.2d 80 (2000). This is so “because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community... This policy embodies ‘the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.’” *U.S. v. Bass*, 404 U.S. 336 at 348, 92 S.Ct. 515 (1971), *citations omitted*.

The legislature has criminalized vehicular homicide in RCW 46.61.520, which reads in relevant part as follows:

Vehicular homicide--Penalty

- (1) When the death of any person ensues within three years as a proximate result of injury proximately caused by the driving of any vehicle by any person, the driver is guilty of vehicular homicide if the driver was operating a motor vehicle:
 - (a) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502...
- RCW 46.61.520.

The legislature has not defined the phrases “proximate result” and “proximately caused.” Instead, the courts have been forced to struggle with the meaning of this language: over time, a complicated web of definitions has evolved, imported in part from tort law. The Supreme Court has acknowledged that issues relating to proximate cause “frequently defy precise demarcation,” because of a “historical imprecision in terminology and the interrelationship of concepts” such as “causation, intervening events, duty [and] foreseeability...” *Hartley v. State*, 103 Wn.2d 768 at 779-780, 698 P.2d 77 (1985).

In criminal cases, there are two elements of proximate cause: factual causation and legal causation. *State v. McDonald*, 90 Wn.App. 604 at 612, 953 P.2d 470 (1998). Factual causation has at least two alternate definitions: “but for” causation and “substantial factor” causation. *McDonald* at 612; *Meekins, supra* at 396-397. Legal causation “rests on policy considerations as to how far the consequences of defendant's acts should extend, [and is] dependent on mixed considerations of logic, common sense, justice, policy, and precedent.” *McDonald* at 616.

Thrown into the mix are judicially created definitions for “superseding intervening causes” (which absolve the defendant of liability) and “concurring causes” (which do not). *Meekins*, at 398-399;

Roggenkamp, at 631. Neither superseding intervening causes nor concurring causes are mentioned by the statute. RCW 46.61.520.

Because the legislature failed to define an essential element of vehicular homicide, the judiciary has stepped in to fill the vacuum and has undertaken to define the crime, relying heavily on authority from tort law.⁵ This violates the separation of powers; the silence of the legislature has forced the judiciary to encroach on a core legislative function. *Moreno, supra; Wadsworth, supra*. The statutory and judicial scheme under which Mr. Baxley was convicted is unconstitutional; his conviction must be reversed and the case dismissed with prejudice. *Moreno*.

IV. COUNTS III AND IV MUST BE DISMISSED, AND COUNTS I AND II MUST BE REMANDED TO THE TRIAL COURT FOR POSSIBLE DISMISSAL, BECAUSE THE PROSECUTION ENGAGED IN VINDICTIVE PROSECUTION (BY ADDING CHARGES IN RETALIATION FOR MR. BAXLEY'S DECISION TO EXERCISE HIS CONSTITUTIONAL RIGHT TO TRIAL).

Under the Due Process clause of the Fourteenth Amendment, a prosecutor may not vindictively file additional crimes in retaliation for a defendant's lawful exercise of a procedural right. U.S. Const. Amend. XIV; *State v. Korum*, 120 Wn. App. 686 at 709, 86 P.3d 166 (2004). Under certain circumstances--such as when a convicted misdemeanant

⁵ In *Meekins*, for example, Division II alternates between quoting Washington courts and the Restatement of Torts. *Meekins, supra*.

demands a trial *de novo*, or when a defendant is resentenced following a successful appeal-- vindictiveness is presumed if the prosecutor acts to increase the penalty. *Thigpen v. Roberts*, 468 U.S. 27 at 30-31, 104 S. Ct. 2916, 82 L. Ed. 2d 23 (1984); *Blackledge v. Perry*, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974); *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

The *Blackledge* presumption does not apply when charges are enhanced as part of normal pretrial plea negotiations. *United States v. Goodwin*, 457 U.S. 368, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982), *citing Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978). But even prior to trial, “there are constitutional constraints on a prosecutor’s exercise of discretion in charging crimes: ‘...[O]nce a prosecutor exercises his discretion to bring certain charges against a defendant, neither he nor his successor may, without explanation, increase the number of or severity of those charges in circumstances which suggest that the increase is retaliation for the defendant’s assertion of statutory or constitutional rights.’” *Korum, supra*, at 702, *quoting from Hardwick v. Doolittle*, 558 F.2d 292 at 301 (5th Cir., 1977) *cert. denied*, 434 U.S. 1049, 54 L. Ed. 2d 801, 98 S. Ct. 897 (1978).

Prior to trial, a prosecutor acts vindictively when charges are added solely as a result of the defendant’s “exercise of a protected legal right,

rather than the prosecutor's normal assessment of the societal interest in prosecution.” *Goodwin*, at 380 n.11. When charges are added prior to trial, vindictiveness is established by proof that the prosecutor acted in retaliation-- penalizing a defendant for his choice to go to trial-- rather than as part of normal plea negotiations. *Goodwin*, at 380 n.12.

The difference between plea negotiations and vindictive retaliation is similar to the difference between criminal contempt (which is punitive), and civil contempt (which is coercive). *See, e.g., Smith v. Whatcom County Dist. Court*, 147 Wn.2d 98 at 105, 52 P.3d 485 (2002). When a prosecutor threatens to add charges to convince a defendant to plead guilty, the prosecutor is engaged in the give-and-take of plea negotiation, “so long as the accused is free to accept or reject the prosecution's offer.” *Goodwin*, at 378. But when the prosecutor adds charges to punish a defendant for exercising his right to trial, the prosecutor crosses the line into vindictiveness. *Goodwin*, at 378-379.

The remedy for prosecutorial vindictiveness is dismissal of the added charges, and remand for the trial court to dismiss additional charges. *Korum*, at 718-719. Dismissal of the original charges may be warranted to provide a deterrent to future acts of prosecutorial vindictiveness: “If in cases of vindictive prosecution the trial court judge

may only dismiss the additional charge, the prosecutor will have nothing to lose by acting vindictively.” *Korum*, at 719, n. 42, *citation omitted*.

In *State v. Korum, supra*, Division II found “a realistic likelihood of vindictiveness,” based on the prosecutor’s actions after the defendant withdrew his guilty plea and demanded a jury trial. *Korum*, at 718. This finding was based on the fact that the state doubled the number of charges, increased its sentencing recommendation 10-fold, inappropriately stacked multiple charges, and failed to cite any legitimate, articulable, objective reasons for the additional charges. The end result was a gross disparity between the defendant’s sentence and those of his codefendants. *Korum*, at 718.

In this case, as in *Korum*, the record establishes that a retaliatory motive prompted the prosecutor to add charges vindictively. First, the prosecutor announced in open court her reason for filing additional charges:

I’m giving Mr. Baxley official notice as I did to his counsel during the plea negotiations that I will be adding another count of Vehicular Assault to this (sic) three (sic) current charges *for his inability to take responsibility for his actions*.
RP (8-12-05) 2, *emphasis added*.

...He refused our plea offer and we did state on the record that we would move to amend the information to include the second victim of the Vehicular Assault, Jason Tupuola, and have done so and provided a copy to Mr. Mulligan.
RP (8-19-05) 2.

Although the prosecutor's initial statement was couched in terms of "responsibility," the clear import was that Count III (and later Count IV) was added to penalize Mr. Baxley, because he insisted on going to trial. Second, as in *Korum*, the prosecutor here doubled the number of charges Mr. Baxley was facing, from two to four. These facts demonstrate that the prosecutor acted vindictively and retaliated against Mr. Baxley for his decision to go to trial. Accordingly, Counts III and IV must be dismissed. *Korum*, at 718-719. In addition, the case must be remanded to the trial court to determine whether or not the original charges should be dismissed as well. *Korum*, at 719.

V. THE TRIAL COURT SHOULD HAVE ALLOWED MR. BAXLEY TO IMPEACH FORMER SHERIFF'S DEPUTY DUANE HAYDEN WITH EVIDENCE THAT HE HAD BEEN FIRED FROM THE SHERIFF'S DEPARTMENT FOR MISCONDUCT.

A criminal defendant has a constitutional right to confront witnesses against him. U.S. Const. Amend VI; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 22. The primary and most important aspect of confrontation is the right to conduct meaningful cross-examination of adverse witnesses. *State v. Foster*, 135 Wn.2d 441, 455-56, 957 P.2d 712 (1998); *Davis v. Alaska*, 415 U.S. 308 at 315, 94 S.Ct. 1105 at 1110 (1974).

Our Supreme Court has stated that the purpose of cross-examination

...is to test the perception, memory, and credibility of witnesses. Confrontation therefore helps assure the accuracy of the fact-finding process. Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question. As such, the right to confront must be zealously guarded. *State v. Darden*, 145 Wn.2d 612 at 620, 41 P.3d 1189 (2002), *citations omitted*.

When credibility is at issue, the defense must be given wide latitude to explore matters that affect credibility. *State v. York*, 28 Wn.App. 33, 621 P.2d 784 (1980). The only limitations on the right to confront adverse witnesses are (1) that the evidence sought must be relevant and (2) that the right to admit the evidence “must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the trial.” *Darden*, at 621.

The threshold to admit relevant evidence is very low, and even minimally relevant evidence is admissible unless the State can show a compelling interest to exclude prejudicial or inflammatory evidence. *Darden*, at 621. Where evidence is highly probative, no state interest can be compelling enough to preclude its introduction. *State v. Hudlow*, 99 Wn.2d 1 at 16, 659 P.2d 514 (1983); *State v. Reed*, 101 Wn.App. 704 at 709, 6 P.3d 43 (2000); *State v. Barnes*, 54 Wn.App. 536 at 538, 774 P.2d 547 (1989).

Under ER 608(b), a defendant may explore specific instances of a witness's prior misconduct, if probative of the witness's truthfulness. ER 608(b). Refusal to allow such cross-examination is an abuse of discretion if the witness is important and the misconduct is the only available impeachment. *York, supra*, at 36-37. *cited with approval* in *State v. Clark*, 143 Wn.2d 731, 24 P.3d 1006, *cert. denied*, 534 U.S. 1000, 151 L. Ed. 2d 389, 122 S. Ct. 475 (2001), and in *State v. McSorley*, 128 Wn. App. 598 at 611-612, 116 P.3d 431 (2005).

In *York*, the witness had been fired from his job as a sheriff's trainee "because of irregularities in his paper work procedures, and his general unsuitability for the job." *York*, at 34. The Court of Appeals held that impeachment should have been allowed and reversed the conviction.

In this case, former Deputy Hayden was the first police officer to arrive at the accident scene. He provided critical evidence, including his precise arrival time (6:05 a.m.), his observations that there were skid marks on the road and that when he arrived Tupuola was in the back seat on the passenger side. RP (12-13-05) 124, 127-128, 132. He also claimed that Mr. Baxley just looked at him without responding when asked who the driver had been, and that Mr. Baxley smelled of alcohol and was dazed and confused. RP (12-13-05) 128, 129, 136.

The misconduct that defense counsel sought to introduce was the only impeachment evidence available, and was even more probative than the misconduct in *York, supra*. No state interest justified exclusion of this evidence; the prosecution's only argument was that the evidence was not relevant. RP (12-13-05) 119. The trial court's decision excluding the evidence violated Mr. Baxley's constitutional right to confront the witnesses against him. The conviction must be reversed and the case remanded for a new trial; upon retrial, Mr. Baxley must be allowed to cross-examine former Deputy Hayden on his termination from employment at the sheriff's department, and the reasons for that termination. *York, supra*.

VI. THE TRIAL COURT VIOLATED MR. BAXLEY'S CONSTITUTIONAL RIGHT TO A JURY TRIAL BY IMPOSING AN AGGRAVATED SENTENCE WITHOUT A JURY DETERMINATION THAT HE HAD PRIOR DUI CONVICTIONS (ARGUMENT INCLUDED FOR PRESERVATION OF ERROR).

In *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the U.S. Supreme Court held that a defendant's punishment may only be enhanced beyond the standard sentencing range if a jury finds facts to justify the enhancement based on proof beyond a reasonable doubt. The Supreme Court left intact an exception for prior convictions; however, the continuing validity of that exception is in doubt. *See, e.g., State v. Mounts*, 130 Wn.App. 219 at 220 n. 9. 122 P.3d 745

(2005), quoting Justice Thomas' observation in *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254 at p. 1264, 161 L.Ed.2d 205 (2005) that *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which underlies the exception for prior convictions, "has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided."

It now appears that five members of the U.S. Supreme Court (Justices Scalia, Stevens, Souter, and Ginsberg, all of whom dissented from *Almendarez-Torres*, and Justice Thomas, who authored a concurring opinion urging a broader rule in *Apprendi*) believe that prior convictions which enhance the penalties for a crime must be proved to a jury beyond a reasonable doubt.

In this case, the trial court found that Mr. Baxley had two prior DUI convictions and added 48 months to the standard range sentence.⁶ The finding was presumably made using a preponderance standard. This violated Mr. Baxley's constitutional right to due process and to a jury trial under the Sixth and Fourteenth Amendments to the U.S. Constitution. The

⁶ Although defense counsel purported to agree that the DUI convictions could be found by the court, there is no indication that the defendant personally waived his right to a jury determination of these facts.

aggravated sentence must therefore be vacated, and the case remanded for sentencing within the standard range.

CONCLUSION

For the foregoing reasons, the convictions must be reversed. Counts III and IV must be dismissed for vindictive prosecution, and Counts I and II must be remanded for consideration of whether or not dismissal is appropriate (as a deterrent to vindictive prosecution). In the alternative, if dismissal is not ordered, Mr. Baxley may not be retried on the theory that he committed vehicular homicide or vehicular assault under the *per se* alternative means, because the prosecution produced insufficient evidence of that alternative.

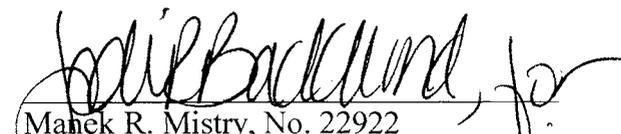
If the convictions are not reversed, the 48-month enhancement must be vacated because it was imposed in violation of Mr. Baxley's Sixth Amendment right to a jury trial.

Respectfully submitted on July 26, 2006.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief (Corrected Copy) to:

Nicholas D. Baxley, DOC #890878
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326-9723

and to:

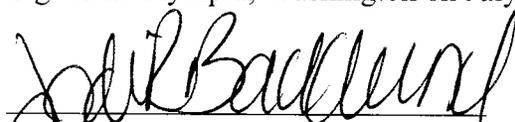
Clallam County Prosecuting Attorney
223 East 4th Street
Port Angeles, WA 98362

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on July 26, 2006.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 26, 2006.


~~Marick R. Mistry, WSBA No. 22922~~
Attorney for the Appellant

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