

No. 71219-5-I

**IN THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

---

YURI PROSTOV, an individual,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LICENSING,  
a Washington governmental agency,

Respondent.

---

**BRIEF OF APPELLANT**

---

Attorneys for Appellant:

LIVENGOOD ALSKOG, PLLC

Gregory A. McBroom, WSBA No. 33133

121 Third Avenue,  
P.O. Box 908  
Kirkland, WA 98083-0908  
Phone: (425) 822-9281

FILED  
COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON  
2014 SEP 10 PM 3:24

**TABLE OF CONTENTS**

	<u>Page</u>
I. INTRODUCTION .....	1
II. ASSIGNMENTS OF ERROR .....	3
III. STATEMENT OF THE CASE.....	5
IV. ARGUMENT .....	10
A. The Trial Court Used the Wrong Standard of Review .....	10
1. The Statute Requires the DOL to Prove that the Licensee “Has Committed” Criminal Statutory Fraud, Which Can Only Be Established Using the Criminal Standard of Review.....	10
2. Mr. Prostov’s Fourteenth Amendment Due Process Rights Have Been Violated.....	15
3. Alternatively, at the Very Least, the Clear, Cogent and Convincing Evidence Standard Should Apply .....	18
B. Substantial Evidence Does Not Support the Decision Below .....	22
C. The DOL Failed to Prove an Essential Element of the Criminal Allegation – an “Application” for Licensure .....	26

**TABLE OF CONTENTS**

	<u>Page</u>
D. Mr. Prostov Was Deprived of his Constitutional Right to Have the Case Tried to a Jury .....	27
E. Mr. Prostov Should Be Awarded Reasonable Attorneys' Fees Under Washington's Equal Access to Justice Act, RCW 4.84.350 .....	28
F. Mr. Prostov Should Be Awarded His Reasonable Attorneys' Fees and Costs on Appeal Under RAP 18.1 .....	34
V. CONCLUSION.....	35
APPENDIX A.....	A-1

**TABLE OF AUTHORITIES**

**Page**

**Washington Cases**

*Am. Cont'l Ins. Co. v. Steen*,  
151 Wn.2d 512, 91 P.3d 864 (2004)..... 11, 32

*Born v. Thompson*,  
154 Wn.2d 749, 117 P.3d 1098 (2005)..... 19

*Campbell v. Dep't of Soc. & Health Servs.*,  
150 Wn.2d 881, 83 P.3d 999 (2004)..... 29

*Cobra Roofing Servs., Inc. v. Dep't of Labor & Indus.*,  
157 Wn.2d 90, 135 P.3d 913 (2006)..... 32, 33

*Costanich v. Washington State Dep't of Soc. & Health Servs.*,  
164 Wn.2d 925, 194 P.3d 988 (2008)..... 29, 30, 31, 32, 33

*Dep't of Motor Vehicles v. Andersen*,  
84 Wn.2d 334, 525 P.2d 739 (1974)..... 2, 19, 21, 27, 33

*Evergreen Freedom Found. v. Wash. Educ. Ass'n*,  
140 Wn.2d 615, 999 P.2d 602 (2000)..... 11, 32

*Forsyth v. Davis*,  
152 Wash. 595, 278 P. 676 (1929)..... 18

## TABLE OF AUTHORITIES

	<u>Page</u>
<i>Helman v. Sacred Heart Hospital,</i> 62 Wn.2d 136, 381 P.2d 605 (1963).....	22, 26
<i>Kaye v. Dep't of Licensing,</i> 34 Wn. App. 132, 659 P.2d 548 (1983).....	26
<i>Morgan v. Johnson,</i> 137 Wn.2d 887, 976 P.2d 619 (1999).....	12, 32
<i>State v. Campbell &amp; Gwinn,</i> 146 Wn.2d 1, 43 P.3d 4 (2002).....	11
<i>State v. Gutierrez,</i> 92 Wn. App. 343, 961 P.2d 974 (1998).....	13
<i>State v. Liden,</i> 118 Wn. App. 734, 77 P.3d 668 (2003).....	11
<i>State v. McCraw,</i> 127 Wn.2d 281, 898 P.2d 838 (1995).....	12
<i>State v. Odom,</i> 83 Wn.2d 541, 520 P.2d 152 (1974).....	16

**TABLE OF AUTHORITIES**

**Page**

*State v. Wicke*, 91  
Wn.2d 638, 591 P.2d 452 (1979)..... 27, 28

*Thompson v. State, Dep't of Licensing*,  
138 Wn.2d 783, 982 P.2d 601 (1999)..... 13, 14

*Wynn v. Earin*,  
163 Wn.2d 361, 181 P.3d 806 (2008)..... 13

**Washington Statutes**

Chapter 34.05 RCW ..... 29, 30, 31, 32, 33

Chapter 4.84 RCW ..... 30

RCW 34.05.010 ..... 29, 31

RCW 34.05.030 ..... 33

RCW 34.05.510 ..... 29, 33

RCW 4.84.340 ..... 29, 30, 31

RCW 4.84.350 ..... 3, 5, 10, 28, 30, 34

RCW 46.20.091 ..... 6, 14, 26

RCW 46.20.0921 ..... 1, 2, 4, 5, 6, 12, 19, 26, 34

RCW 46.20.0921(1)(e) ..... 1, 2, 4, 5, 6, 12, 19, 20, 26, 34

**TABLE OF AUTHORITIES**

	<u>Page</u>
RCW 46.20.117 .....	26, 27
RCW 46.20.120, .181 & .185 .....	6, 26
RCW 46.20.291 .....	6, 12, 15
RCW 9.04.100 .....	13
RCW 9A.20.010.....	13

**Secondary Authorities**

<i>Black's Law Dictionary</i> 266 (7th Ed. 1999).....	12
<i>Black's Law Dictionary</i> 852 (7th Ed. 1999).....	32
<i>The Allocation of Burdens in Determining the Amount in Controversy</i> , 14AA Fed. Prac. & Proc. Juris. § 3702.2 (4th ed.).....	25
<i>Webster's Third New International Dictionary</i> 457 (1986) .....	12

**Constitution**

Article I, Section 21 of the Washington State Constitution.....	28
Article III, Section 12 of the Washington State Constitution .....	33
Fourteenth Amendment of the United States Constitution.....	16, 28
Sixth Amendment of the United States Constitution.....	28

## TABLE OF AUTHORITIES

### Page

#### Federal Cases

*Addington v. Texas,*

441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979)..... 19

*In re Winship,*

397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970)..... 16, 17, 18

*Mathews v. Eldridge,*

424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)..... 19

#### Out of State Cases

*Brown v. Firestone,*

382 So. 2d 654 (Fla. 1980)..... 33

## I. INTRODUCTION

This appeal arises from judicial review of the Department of Licensing's (the "DOL") suspension of Appellant Yuri Prostov's ("Mr. Prostov") driving privileges based upon the DOL's allegation that he committed criminal statutory fraud under RCW 46.20.0921(1)(e).<sup>1</sup> Specifically, the DOL alleges that in January 2009 Mr. Prostov fraudulently obtained a renewal driver's license for his identical twin brother, Geirman Prostov ("GP").<sup>2</sup> The DOL's claim is based only upon nine photos (five of Mr. Prostov and four of GP) taken years earlier. The photos from years early were taken under a variety of photographic conditions (lighting, distance, position, clarity, etc.). The DOL presented no expert testimony, no lay witness testimony, and no documentary evidence to support its photo allegations. The trial court also found the DOL failed to establish any motive or intent. In fact, although repeatedly portraying GP as a "victim," the DOL confirmed it had never even spoken with GP. Mr. Prostov denied the claims and testified that each of the

---

<sup>1</sup> The DOL asserted two claims of criminal statutory fraud, one allegedly occurring in June 2001 and the other in January 2009. The trial court dismissed the 2001 criminal allegation as unfounded, CP 19, which the DOL has not appealed.

<sup>2</sup> The DOL brought the criminal allegations after the photos were flagged by facial recognition software that commonly flags identical twins. The trial court appropriately excluded any inference of culpability based upon the facial recognition software or any inference therefrom and used the information "solely for the purpose of giving background on how the case was initiated." CP 17.

photos identified as him were him, and that each of the photos identified as GP were GP.

The trial court also used the wrong standard of review. Although the DOL had to prove that Mr. Prostov “has committed” criminal statutory fraud under RCW 46.20.0921(1)(e), the trial court used the lower preponderance standard argued by the DOL. Mr. Prostov asserted that the beyond a reasonable doubt standard should be applied for the allegation of criminal conduct. Alternatively, at a minimum, because the criminal allegations of fraudulent representation are at least tantamount to civil fraud and because Washington courts have long recognized the constitutional due process notions impacted by the wrongful denial of driving privileges, *Dep’t of Motor Vehicles v. Andersen*, 84 Wn.2d 334, 339-40, 525 P.2d 739 (1974), the trial court should have at least used the clear, cogent and convincing evidence standard.

Nevertheless, using the lower preponderance standard, disregarding the lack of competent evidence, and ignoring its own finding that the DOL failed to establish any evidence of motive or intent, and using the fact that the DOL failed to call GP as witness *as a factor weighing against Mr. Prostov*, the trial court found the 2009 criminal statutory fraud claim committed. The trial court also denied Mr. Prostov’s request for reasonable attorneys’ fees and costs under Washington’s Equal

Access to Justice Act, RCW 4.84.350, for the DOL's wrongful 2001 allegation of criminal fraud dismissed by the trial court.

## II. ASSIGNMENTS OF ERROR

**Assignment of Error 1.** The trial court erred when it found that Mr. Prostov appeared on January 28, 2009; presented himself as GP; and obtained a renewal license in the name of GP. CP 16 (FF ¶ 2).

**Assignment of Error 2.** The trial court erred when it found Mr. Prostov's nose is straighter than GP's nose when there was no competent evidence presented to support any such finding. CP 17 (FF ¶ 7).

**Assignment of Error 3.** The trial court erred when it found that Mr. Prostov's April 29, 2008 photo (Ex. 1R, 1S) and GP's January 21, 2010 photo (Ex. 1V) "confirmed" that the January 28, 2009 photo of GP (Ex. 1T, 1U) was Mr. Prostov. CP 17 (FF ¶ 8).

**Assignment of Error 4.** The trial court erred when it found that GP's January 29, 2009 photo (Ex. 1T, 1U) was significantly different than GP's January 21, 2010 (Ex. 1V) and contained the same scar and nose as Mr. Prostov's April 29, 2008 photo (Ex. 1R, 1S). CP 17-18 (FF ¶ 9).

**Assignment of Error 5.** The trial court erred when it considered the DOL's failure to call GP as a witness *as a factor weighing against Mr. Prostov*. VRP 172-73.

**Assignment of Error 6.** The trial court erred by not dismissing

the case after it found that the DOL failed to show any motive or other *mens rea* to support its claims. VRP 173.

**Assignment of Error 7.** The trial court erred by taking background procedural matters that were not evidence in the case and making them findings of fact. CP 18 (FF ¶ 10-12).

**Assignment of Error 8.** The trial court erred by concluding that the DOL only had to prove that Mr. Prostov had committed criminal statutory fraud under the preponderance standard. CP 18-19 (CL ¶ 5).

**Assignment of Error 9.** The trial court erred by not providing Mr. Prostov with a right to a trial by jury.

**Assignment of Error 10.** The trial court erred by concluding that Mr. Prostov had committed criminal statutory fraud under RCW 46.20.0921(1)(e) on January 28, 2009 and by suspending Mr. Prostov's license for 364 days. CP 19 (CL ¶¶ 7, 11).

**Assignment of Error 11.** The trial court erred in denying Mr. Prostov's request for reasonable attorneys' fees and costs under Washington's Equal Access to Justice Act for the DOL's wrongful 2001 allegation of criminal fraud dismissed by the trial court. CP 60-61.

**Issue 1.** Did the trial court error in concluding that Mr. Prostov committed criminal statutory fraud under RCW 46.20.0921(1)(e) on January 28, 2009 with only a few photos taken many years earlier without

anything else as the supporting evidence submitted by the DOL?

**Issue 2.** Did the trial court error when it used the preponderance standard of review where the DOL had to prove the commission of criminal statutory fraud under RCW 46.20.0921(1)(e)?

**Issue 3.** Did the trial court error by denying Mr. Prostov's claim for reasonable attorneys' fees and costs under Washington's Equal Access to Justice Act, RCW 4.84.350?

### **III. STATEMENT OF THE CASE**

Mr. Prostov has a wife, an identical twin brother (GP), a sister and a deceased mother and father. VRP 81. In May 1992, Mr. Prostov began conducting business in Washington as the owner of Prostov Trade International, Inc. VRP 81. In June 2004, Mr. Prostov obtained his MBA from Seattle University. *Id.* Then, in July 2007, Mr. Prostov obtained an investment license in Washington and became licensed and registered with the Financial Industry Regulatory Authority (FIRA). VRP 81-83. Since that time, he has worked as a personal financial planner, an investment adviser and a business consultant, providing financial consulting services to many businesses including Microsoft. VRP 82-83. Mr. Prostov explained that having a reputation of trustworthiness and honesty is vital to his business practice. VRP 83.

This appeal arises from judicial review of the DOL's allegation that Mr. Prostov has committed criminal statutory fraud under RCW 46.20.0921(1)(e) in January 2009 by obtaining a license for GP.<sup>3</sup> VRP 12; 126. The motor vehicle statutes distinguish between new applications for licensure (RCW 46.20.091) and renewals (RCW 46.20.120, .181 & .185).<sup>4</sup> VRP 167. RCW 46.20.091 provides the process for applying for a new driver's license. RCW 46.20.0921 makes it a crime to commit certain acts against the motor vehicle statute. One such act is the commission of criminal statutory fraud that applies to applications for licensure. RCW 46.20.0921(1)(e). The DOL can also suspend a driver's license upon a showing that a licensee "[h]as committed" criminal statutory fraud. RCW 46.20.291(7), which is what the trial court concluded for the DOL's January 2009 allegation of criminal fraud and sustained the suspension of Mr. Prostov's license for 364 days. CP 19.

The DOL alleged that the "evidence will show that Mr. Prostov obtained two fraudulent licenses for a period, he had those licenses in his possession for over ten years, that he committed the first fraudulent

---

<sup>3</sup> Mr. Prostov petitioned for judicial review of the DOL's decision. The DOL asserted two counts of criminal statutory fraud, one allegedly occurring in June 2001 and the other in January 2009. The trial court dismissed the June 2001 allegation as unfounded, CP 19 (CL ¶ 8), and the DOL has not appealed the decision. Therefore, this appeal only concerns the DOL's January 2009 allegation of criminal statutory fraud.

<sup>4</sup> See also DOL website at <http://www.dmv.org/wa-washington/renew-license.php>

activity at the age of 39, and there was a victim in this case.”<sup>5</sup> VRP 12. Although the DOL repeatedly referred to GP as a “victim” throughout trial, *see* VRP 12, 24, 30, 54, 55, 57, 58, 59, 61, 138, 153 and 173, it later confirmed it had never even spoken with GP. VRP 54. The DOL had only sent a preliminary notification letter to GP, but never received a response and never followed up with any phone call or other form of communication. VRP 54. The trial court found that GP has lived in the local area for at least the past 10-years. VRP 81 & 169. The trial court also concluded that the DOL failed to present any evidence of any motive or intent on the part of Mr. Prostov, but that no such showing was required. VRP 161 & 173. The DOL specifically argued that it was not required to prove any motive or intent for the crime. VRP 153.

The DOL only offered five photos of Mr. Prostov and four photos of GP taken years apart to support its criminal allegation.<sup>6</sup> True and accurate copies of the photo exhibits are attached as Appendix A.

---

(last visited June 6, 2014).

<sup>5</sup> Respondent’s counsel later flipped his position and argued that the DOL did not have to show any victim or proof of motive. VRP 153. In fact, although the DOL had the burden of proof and failed to call GP as a witness, the trial court inexplicably used GP not being called as a factor weighing against Mr. Prostov. VRP 172-73. Respondent’s counsel also argued that the DOL did not have to prove the criminal statutory fraud statute because the DOL statute only “correlates and cites to” that statute. VRP 146. He further argued that the DOL did not need to prove fraud at all, VRP 147, and that the DOL did not have to prove all the elements of the statute. VRP 152.

<sup>6</sup> The DOL also offered Mr. Prostov’s 1991 record of license application as Exhibit J, which Mr. Prostov confirmed to be a true and accurate. VRP 84-85. No other

<b>Year</b>	<b>Name</b>	<b>Height</b>	<b>Weight</b>	<b>Trial Exhibit</b>
April 5, 1995	Yuri Prostov	6' - 04"	225	Ex. K
Jan. 15, 1999	Yuri Prostov	6' - 04"	225	Ex. M
June 10, 1999	GP	6' - 04"	210	Ex. L
June 25, 2001	GP	6' - 04"	210	Ex. N
Jan. 15, 2003	Yuri Prostov	6' - 04"	225	Ex. O & P
Dec. 29, 2005	Yuri Prostov	6' - 04"	225	Ex. Q

Exs. K-Q (Exs. O & P are the same photo)

**Photos Relied Upon by Trial Court the for 2009 Claim**

<b>Year</b>	<b>Name</b>	<b>Height</b>	<b>Weight</b>	<b>Trial Exhibit</b>
April 29, 2008	Yuri Prostov	6' - 04"	225	Ex. R & S
Jan. 28, 2009	GP	6' - 04"	210	Ex. T & U
Jan. 21, 2010	GP	N/A	N/A	Ex. V <sup>7</sup>

Exs. R-V (Exs. R & S and T & U are the same photo).

The DOL never explained the large gap of time of about eight years between GP's June 2001 license (Exhibit N, expired on January 10, 2004) and his January 28, 2009 license (Exhibit T/U). When a driver's license has been expired for a period of five years or more, the DOL requires the licensee to start the written application process anew. RCW

---

applications for licensure or renewal applications were offered by the DOL.

<sup>7</sup> The DOL did not admit a copy of GP's signed driver's license, which would have

46.20.181. However, the DOL admittedly never offered into evidence GP's January 2009 application for licensure. VRP 55.

In addition, the DOL never offered any expert or lay person testimony to support its photo allegations—nobody to identify any of the individuals in the photos or their signatures. VRP 16-79. Although having facial recognition and hand writing experts, the DOL did not present any such testimony—just the stand alone photos. *Id.* Although the DOL's licensing employees are *specifically trained* to look for identity fraud during the licensing process, nothing was found here. VRP 71-72; 77; 168. The DOL witness testified that June 1999 photo of GP (Exhibit L) was the only established photo on record of GP. VRP 56. She also testified that although she knew that the DOL had video cameras in the licensing offices, she never looked into any video footage. VRP 78.

Mr. Prostov testified that each of the photos and signatures identified as him were him, and that each of the photos and signatures identified as GP were GP. VRP 85-89. Mr. Prostov testified that he and his twin brother GP have striking similarities in size, weight, and stature. VRP 117. Mr. Prostov testified that although he has a scar on the right side of his face extending from the outside of his lip to his nose and that

---

allowed a comparison of signatures. VRP 55.

GP does not, VRP 101 & 106, throughout their lives, people have regularly confused the identical twins. VRP 117. Of significant importance, Mr. Prostov also testified to the many inconsistencies in the nine photos (lighting, distance, position, posture, clarity, etc.), which is detailed and cited in Section IV.B below.

The trial court dismissed the DOL's 2001 allegation of criminal fraud, but found the January 2009 criminal fraud claim committed. CP 19. After reassignment, the new judge denied Mr. Prostov's request for reasonable attorneys' fees and costs under the Washington Equal Access to Justice Act, RCW 4.84.350, for the trial court's dismissal of the DOL's wrongful 2001 allegation of criminal statutory fraud. CP 60-61.

#### **IV. ARGUMENT**

##### **A. The Trial Court Used the Wrong Standard of Review.**

###### **1. The Statute Requires the DOL to Prove that the Licensee "Has Committed" Criminal Statutory Fraud, Which Can Only Be Established Using the Criminal Standard of Review.**

The plain and unambiguous language of the statute requires the DOL to prove that the licensee "has committed" criminal statutory fraud, which can only be established using the beyond a reasonable doubt standard of review. Although the DOL has accused Mr. Prostov of committing criminal fraud, which, *inter alia*, carries the heavy stigma

associated with any crime of moral turpitude,<sup>8</sup> the trial court disregarded the normal canons of statutory construction and used the preponderance standard applicable to garden variety civil claims. CP 18-19 (CL ¶ 5).

The interpretation of a statute is reviewed *de novo*. *State v. Liden*, 118 Wn. App. 734, 738, 77 P.3d 668 (2003). The objective of statutory interpretation is to execute the intent of the legislature, which must be primarily determined from the language of the statute itself. *Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 140 Wn.2d 615, 630, 999 P.2d 602 (2000). The statute is interpreted from its wording, the context of the specific statute and the statutory scheme as a whole. *State v. Campbell & Gwinn*, 146 Wn.2d 1, 10–12, 43 P.3d 4 (2002). If a statute provides no definition for a term, its meaning shall be ascertained using the standard dictionary definition. *Am. Cont'l Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004). A reviewing court will not strain to find ambiguity where the language of the statute is clear. *Evergreen Freedom Found.*, 140 Wn.2d at 632. When words are plain and unambiguous, the

---

<sup>8</sup> Such an accusation, if proven, could profoundly impact the individual's ability to run for public office or to obtain or perform certain jobs. If the individual were to run for political office, his or her character could be easily impeached. It is also commonplace for employers to ask whether prospective employees have committed crimes or other acts of moral turpitude. The heavy stigma associated with this crime could impair an individual's ability to obtain or provide services in any public or private sector that relies upon justice, honesty or good morals. In other words, the DOL's criminal accusation here goes well above and beyond the run-of-the-mill civil claim.

reviewing court assumes the legislature meant exactly what it said and applies the statute as written. *Id.* at 631; *see also Morgan v. Johnson*, 137 Wn.2d 887, 891–92, 976 P.2d 619 (1999) (“[T]he court should assume that the legislature means exactly what it says.”) (quoting *State v. McCraw*, 127 Wn.2d 281, 288, 898 P.2d 838 (1995)).

RCW 46.20.291 requires the DOL to prove that the licensee “[h]as committed” a prohibited criminal act under RCW 46.20.0921. Specifically, the DOL alleged here that in 2009 Mr. Prostov committed criminal statutory fraud under RCW 46.20.0921(1)(e). VRP 159; CP 18-19. The ordinary dictionary definition of the term “commit[ed]” means “to carry into action deliberately: PERPETUATE <commit a crime>.” *Webster’s Third New International Dictionary* 457 (1986). Similarly, Black’s defines “commit[ed]” as “[t]o perpetuate (a crime).” *Black’s Law Dictionary* 266 (7th Ed. 1999). Therefore, under its plain and ordinary meaning, RCW 46.20.291(7) requires the DOL to prove that the licensee perpetuated a criminal fraud under RCW 46.20.0921(1)(e).

RCW 46.20.0921(1)(e) provides, “[i]t is a *misdemeanor* for any person: . . . [1] [t]o use a false or fictitious name in any application for a driver’s license or identicard or [2] to knowingly make a false statement or to knowingly conceal a material fact or otherwise commit a fraud in any such application.” RCW 46.20.0921(1)(e) (emphasis added). It is

undisputedly a criminal statute. See RCW 9A.20.010 (classifications of crimes, including misdemeanors). It is also well settled that “[e]very element of every [criminal] offense must be proven beyond a reasonable doubt.” *State v. Gutierrez*, 92 Wn. App. 343, 347, 961 P.2d 974 (1998); see also RCW 9.04.100 (codifying the beyond a reasonable doubt standard of review applicable to criminal statutes). “The legislature is presumed to know the law in the area in which it is legislating.” *Wynn v. Earin*, 163 Wn.2d 361, 371, 181 P.3d 806 (2008).

The DOL relied upon *Thompson v. State, Dep't of Licensing*, 138 Wn.2d 783, 797, 982 P.2d 601 (1999) for its misguided proposition that the Court created a bright line rule that the preponderance of the evidence standard applies to any and all allegations brought by the DOL. CP \_\_\_\_ (Sub No. 13, Sept. 11, 2013 at pp. 4-5); VRP 126-27. However, the only issue in *Thompson* was whether the suppression of the blood alcohol content (BAC) results in a criminal proceeding had preclusive effect in a subsequent administrative action—it was not addressing a global standard of review as argued by the DOL. *Thompson*, 138 Wn.2d at 785. The criminal case was dismissed because of the suppressed BAC results. *Id.* at 787. The DOL, however, continued with its “disqualification”

administrative proceeding.<sup>9</sup> *Id.* Washington’s Supreme Court held that the DOL was collaterally estopped from using the suppressed BAC results. *Id.* at 800. The *Thompson* Court never created a bright line rule that the preponderance standard applied to every allegation asserted by the DOL, whether criminal or not. The only place the Court even mentioned the standard of review was in response to one of the DOL’s arguments where the Court disagreed with the DOL and found that a difference in the standards of proof controlling the final outcome of a case was wholly irrelevant to the evidentiary issue as to the admissibility of the BAC results. *Id.* at 798. In fact, the Court indicated *in dicta* the opposite of DOL’s contention—that the ordinary preponderance standard does not apply when otherwise required by statute or due process of law. *Id.*

The trial court’s reasoning was equally misplaced. First, without even citing to a single case, the trial court stated that it was “fairly well settled” that “references” to the criminal code in a regulatory statute do not import the beyond a reasonable doubt standard. VRP 160. The statute’s requirement that the DOL prove that the licensee has committed criminal fraud is not a mere reference. Appellant’ counsel is aware of no cases to

---

<sup>9</sup> Under RCW 46.20.091(1), the DOL may disqualify an operator if it “receives a report from a law enforcement agency that a holder of commercial driver’s license was driving a commercial motor vehicle with a blood alcohol content of 0.04 or more, or refused to take a breath test.” *Id.* The DOL’s disqualification is not based upon a

support the DOL's claimed bright line preponderance rule and neither the DOL nor the trial court have ever provided a single authority to support such a misguided proposition as it relates to a criminal accusation.

Second, although recognizing the statute authorizes the DOL to take action when "the driver has committed a crime," VRP 160, according to the trial court, if the Legislature wanted to import a higher standard of proof, it would have used the phrase "has been convicted" as it did in RCW 46.20.291(3). VRP 161. This arbitrary distinction is without merit. RCW 46.20.291(3) addresses *a pattern of prior convictions or committed traffic infractions* that warrants action by the DOL. It is not based upon the establishment that the licensee "has committed" criminal statutory fraud as required under RCW 46.20.291(7). As discussed previously, the standard dictionary definition of the term "committed" is to prove that the licensee has perpetuated a crime. Therefore, the trial court's ruling on the DOL's 2009 allegation of criminal fraud should be reversed.

**2. Mr. Prostov's Fourteenth Amendment Due Process Rights Have Been Violated.**

The trial court's refusal to apply the appropriate beyond a reasonable doubt standard violates Mr. Prostov's due process rights protected under the Fourteenth Amendment of the United States

---

determination that the operator has committed a criminal statutory act.

Constitution. The bedrock of the criminal justice system rests upon the long established principle that a party alleged to have committed a crime is presumed innocent until proven guilty and his guilt must be proved by competent evidence beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); *State v. Odom*, 83 Wn.2d 541, 548, 520 P.2d 152 (1974). Proof beyond a reasonable doubt is a constitutional due process requirement. *Id.*

Both Washington and federal courts have long rejected “civil labels” characterizing a criminal allegation as something else. For example, in the touchstone case of *In re Winship*, a 12-year old boy was charged with delinquency for taking \$112 from a woman’s pocketbook. 397 U.S. at 359-60. The trial court judge acknowledged that the conduct might not have been proven beyond a reasonable doubt, but rejected that such proof was required under the Fourteenth Amendment and determined that the boy could be adjudged under the preponderance standard. *Id.* at 360. But, the U.S. Supreme Court (Brennan, J.) disagreed and held that “[l]est there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause *protects the accused* against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *Id.* at 364 (emphasis added). The Court rejected the

argument that the delinquency status is not a crime and the proceedings not criminal. *Id.* at 365. The Court of Appeals had attempted to distinguish the proceeding as not affecting any right or privilege, including the right to hold office or to obtain a license. *Id.*

The *In re Winship* Court firmly rejected what it phrased as a “civil label-of-convenience.” *Id.* at 365. It similarly rejected the purported distinction in the remedy applicable to the criminal law stating, “civil labels and good intentions do not themselves obviate the need for criminal due process safeguards.” *Id.* The U.S. Supreme Court further found that the higher standard of proof would not have any adverse effect on the policies of the criminal laws or the informality, flexibility, or speed of the hearing at which the fact finding takes place. *Id.* The Court noted the importance of not subjecting the accused to the heavy stigma of a finding that he or she violated a criminal law and the possibility of loss of life, liberty or property upon insufficient proof. *Id.*

Like the lower court in *In re Winship*, the trial judge here struggled with the appropriate standard to apply, taking a long break and asking many questions demonstrating uncertainty. *See, e.g.*, VRP 158-59 (“I want to ponder a little bit about this burden of proof issue, because it is obviously a very significant issue.”). The trial court later ruled that a “reference” to the criminal code cannot import the beyond a reasonable

doubt standard into the proceeding. VRP 160. But, it is not a mere reference; it is an allegation that Mr. Prostov “has committed” criminal statutory fraud. Like the juvenile in *In re Winship*, Mr. Prostov stands to be subjected to the heavy stigma of a wrongful finding that he violated a crime of moral turpitude, damaging and detrimental to himself and his financial consulting business—which is founded upon a strong reputation of trustworthiness and honesty. VRP 83. That the DOL wants to now characterize its allegation of criminal statutory fraud as something less than a criminal allegation is nothing more than the “civil labels-of-convenience” firmly rejected in *In Re Winship* and its progeny.

**3. Alternatively, at the Very Least, the Clear, Cogent and Convincing Evidence Standard Should Apply.**

Even assuming *arguendo* that the beyond a reasonable doubt standard was inapplicable, because the allegation of criminal fraud is tantamount to civil fraud, the clear, cogent and convincing evidence standard should apply. Washington courts have long required the clear, cogent and convincing evidence standard for claims of fraudulent representation. *See, e.g., Forsyth v. Davis*, 152 Wash. 595, 598, 278 P. 676 (1929). Determining the appropriate standard is a due process inquiry for the reviewing court requiring a balancing of the interests at stake and the risks of an erroneous decision. *Born v. Thompson*, 154 Wn.2d 749,

754, 117 P.3d 1098 (2005); *Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979); *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

Washington’s Supreme Court has already detailed the important constitutional interests that stand to be impacted by a wrongful loss of a motor vehicle license. In *Andersen*, the Court specifically held that “the possession of a motor vehicle operator’s license, *was of sufficient dignity and value to bring into play due process notions*, which deserved and entitled the licensee to a ‘full’ de novo hearing in the superior court.” 84 Wn.2d at 339 (emphasis added). This includes “*a full and independent judicial, evidentiary, and factual review embracing, on appropriate demand, a jury trial.*” *Id.* at 340 (emphasis added). In addition to the loss of an important property interest that allows Mr. Prostov to carry on his Washington business activities, the allegation of criminal fraud carries the heavy stigma warranting a heightened standard of review.

The trial court even found the last phrase of RCW 46.20.0921(1)(e) (“or otherwise commit a fraud in any such application”) meets the definition of civil fraud. VRP 161. The criminal fraud statute is entirely based upon fraudulent representations: “It is a misdemeanor for any person: . . . [1] *[t]o use a false or fictitious name* in any application for a driver’s license or identocard or [2] *to knowingly make a false statement*

or to knowingly conceal a material fact or otherwise commit a fraud in any such application.” RCW 46.20.0921(1)(e) (emphasis added).

The risk of an erroneous deprivation of Mr. Prostov’s motor vehicle license and the serious allegation of criminal statutory fraud balances heavily in favor of a heightened standard of review. Mr. Prostov has a family and runs a business and the risk of an erroneous deprivation is substantial. It would be a gross miscarriage of justice to require clear, cogent and convincing evidence in a civil fraud matter, but then requiring a lower preponderance standard of review in a matter with much more serious interests at stake including the stigma associated with the criminal fraud allegation. It is even more important today where the dissemination of such public information is commonplace. Therefore, if the beyond a reasonable doubt standard is not used, at a minimum, this Court should require the clear, cogent and convincing evidence standard.

The trial court’s reasoning for not applying the clear, cogent and convincing evidence standard is misplaced. Although the trial court acknowledged that the DOL refers to fraud in its brief, VRP 161, it found that the clear, cogent and convincing evidence standard to be inappropriate *because the elements for criminal fraud do not exactly align with the elements of civil fraud.* VRP 161. It found that the criminal statute did not require a showing of intent, reliance or damages, nor would it make

sense to require the DOL prove all the elements of civil fraud. *Id.* at 161-62. The trial court indicated that the criminal statute contained no motive or intent requirement. *Id.* According to the trial court, the commission of criminal fraud is analogous to the firing of an employee without his or her contractual right to severance pay based upon false information submitted in an employment application or to a claim under the Consumer Protection Act. VRP 163-64. But, a fully contractual claim or a claim involving misconduct against consumers is not at all the same as the DOL's allegation of criminal fraud. The latter carries a heavy stigma associated with the charge, and the significant deprivation of an important societal and personal interest. *Andersen*, 84 Wn2d at 339.

It is not uncommon for employers to ask prospective employees whether they have been found to have committed crimes or other acts of moral turpitude. Mr. Prostov operates a financial consulting business and has clients such as Microsoft and others that demand the highest level of honesty and trustworthiness. The DOL's wrongful allegation based upon nothing more than a few photos with Mr. Prostov and his identical twin brother stands to place Mr. Prostov's occupation in jeopardy. These, along with the important interests enunciated by the *Andersen* Court and the longstanding heightened standard of review applied by Washington

courts for allegations of fraudulent misrepresentations warrants a heightened standard of review for the DOL's criminal allegation.

**B. Substantial Evidence Does Not Support the Decision Below.**

Even assuming *arguendo* that the preponderance standard applied, substantial evidence does not support the trial court's decision on the DOL's January 2009 criminal fraud allegation. Substantial evidence means evidence in "sufficient quantum" to persuade a fair-minded, rational person of the truth of the allegation being presented. *Helman v. Sacred Heart Hospital*, 62 Wn.2d 136, 147, 381 P.2d 605 (1963).

Mr. Prostov, the only person with first hand personal knowledge, testified that each of the photos and the signatures on the driver's licenses identified as him were him, and that each of the photos and signatures identified on the driver's license as GP were GP. VRP 85-89. What the DOL did was throw out five photos of Mr. Prostov and four photos of GP, claimed that the June 1999 photo was the only photo on record verified to be GP, and then alleged that Mr. Prostov had committed criminal fraud. In fact, there was no more evidence supporting the trial court's dismissal of the DOL's June 2001 allegation as there was to support the alleged commission of criminal fraud in January 2009.

In fact, the trial court's decision was based upon only three photos—the January 21, 2010 photo of GP (Ex. V), the January 2009

photo of GP (Ex. T/U), and the April 2008 photo of Mr. Prostov (Ex. R/S). CP 17-18 (CL ¶¶ 8-9). Inexplicably, the trial court disregarded the other two established photos of GP in June 1999 (Ex. L) and June 2001 (Ex. N). This occurred even though the DOL's own witness testified that the January 1999 photo of GP (Ex. M) was the only known established photo of GP. VRP 56. In addition, even if one were to ignore the significant elapsed time between each photo and the similarities between the identical twin brothers, Mr. Prostov also identified substantial inconsistencies in the photos that lead one to confuse the two brothers:

- Exhibits K and M. The April 1995 and January 1999 photos of Mr. Prostov do not show a scar. VRP 108-09.
- Exhibit L. The June 1999 photo of GP, the only confirmed photo of GP according to the DOL (VRP 56), shows facial creases between his nose and lip, similar in location and size to Mr. Prostov's scar and facial features. VRP 109.
- Exhibit L & V. The June 1999 and January 2010 photos of GP show similar facial features. VRP 110.
- Exhibit M and O/P. The January 1999 and January 2003 photos of Mr. Prostov show substantial differences in the photo lighting. VRP 112.

- Exhibit L, N, T/U, V. The June 1999, June 2001, and January 2010 photos of GP (Exs. L, N & V) show similar facial features as those in the January 2009 photo of GP (Exs. T/U).
- Exhibit U and V. The January 2009 and January 2010 photos of GP are different, Exhibit V showing much more of the neck line than Exhibit U and Exhibit U had the head tilted more upward in comparison to Exhibit V. VRP 112.
- Exhibits L and N. The June 1999 and June 2001 pictures of GP both show significant facial creases between the lip and the nose and the lighting is different. VRP 113.
- Exhibit Q. The January 2003 photo of Mr. Prostov does not show his birth scar due. VRP 113.
- Exhibit Q. The January 2005 photo of Mr. Prostov shows his birth scar. VRP 114.
- Exhibit R. The April 2008 photo of Mr. Prostov shows his birth scar more clearly than Exhibit Q (the December 2005 photo of Mr. Prostov) due to lighting or other photographic conditions. VRP 114.
- Exhibits Q and R. The December 2005 and April 2008 photos of Mr. Prostov show the April 2008 photo being a more close-up photo than the December 2005 photo. VRP 115.

- Exhibits L and V. The June 1999 and January 2010 photos of GP show more of s neckline in the 2010 photo. VRP 115.
- Exhibits N and V. The June 2001 and January 2010 photos of GP show different lighting conditions and a different positioning and with more of the neckline shown in the January 2010 photo. VRP 116.
- Exhibits T/U and V. The January 2009 and January 2010 photos of GP are taken under different lighting, but each appear similar to each other. VRP 121.
- Exhibits L & V. The June 1999 and January 2010 photo of GP are taken under different lighting and photographic conditions, making them appear different. VRP 124. The June 1999 photo (Exhibit L) is what the DOL describes as its only confirmed photo of GP. VRP 56.

The DOL offered no other evidence other than the few photos, and the DOL's allegations were firmly denied by Mr. Prostov. An allegation of evidence by the defendant refuted by the plaintiff amounts to nothing more than a classic "he said, she said" situation insufficient to satisfy the preponderance of the evidence standard. *The Allocation of Burdens in Determining the Amount in Controversy*, 14AA Fed. Prac. & Proc. Juris. § 3702.2 (4th ed.). The photos of the two identical twin brothers taken years

apart under a variety of photographic conditions without anything more does not provide the quantum of evidence necessary to persuade a fair-minded, rational person that Mr. Prostov has committed criminal fraud even under the preponderance standard. *See Helman*, 62 Wn.2d at 147. For these reasons, this Court should reverse the trial court's decision.

**C. The DOL Failed to Prove an Essential Element of the Criminal Allegation – an “Application” for Licensure.**

There was no proof of a fraudulent “application” for licensure or identicard, which is a required element for proving the DOL’s allegation of criminal fraud.<sup>10</sup> The DOL has the burden of proving each element of the criminal offense. *Kaye v. Dep’t of Licensing*, 34 Wn. App. 132, 133, 659 P.2d 548 (1983). The plain language of the statute requires the DOL to prove fraud in an “application” for a driver’s license or identicard. It states, “[i]t is a misdemeanor for any person: . . . to use a false or fictitious name *in any application* for a driver’s license or identicard or to knowingly make a false statement or to knowingly conceal a material fact or otherwise commit a fraud *in any such application*. RCW 46.20.0921(1)(e) (emphasis added).

---

<sup>10</sup> The statutory scheme distinguishes between applications for licensure (RCW 46.20.091) and renewals (RCW 46.20.120, .181 & .185). Under its plain terms, the criminal statutory fraud statute only applies to applications for licensure. *See* RCW 46.20.0921(1)(e) (referring to applications for licensure). The statutory scheme also has a separate defined application process for an identicard. RCW 46.20.117. An identicard

The DOL only offered Mr. Prostov's 1991 record of license application, Exhibit J, which was confirmed as true and accurate. VRP 84-85. The DOL admitted that it had not offered any application for licensure for GP. VRP 55. There is roughly an eight year time period between GP's June 2001 license (expired in January 10, 2004)<sup>11</sup> and his license issued on January 28, 2009.<sup>12</sup> When a license has been expired for five years or more, the DOL requires that the licensee submit a new application. RCW 46.20.181. But, the January 28, 2009 application for GP was never offered into evidence. In fact, no applications showing fraud were ever offered into evidence. Therefore, because the DOL failed to offer any "application" for licensure, a required element for criminal fraud, the trial court's decision should be reversed.

**D. Mr. Prostov Was Deprived of his Constitutional Right to Have the Case Tried to a Jury.**

It is well settled that a party charged by the DOL with allegations of criminal fraud has a right to a jury trial. *Andersen*, 84 Wn2d at 340 (*de novo* review includes the right to a jury trial). Mr. Prostov never waived his right to a jury trial. CrR 6.1(a) (requiring waivers to be in writing); *State v. Wicke*, 91 Wn.2d 638, 642, 591 P.2d 452 (1979) (same).

---

is another form of picture identification that the DOL may issue. *Id.*

<sup>11</sup> See Exhibit N

Although King County normally issues case schedules with deadlines for a jury demand, LCR 4(e) & 38(b)(2), the case schedule did not even mention a right to demand a jury trial. CP \_\_\_ (Sub No. 2, dated March 13, 2013). In addition, when a case involves allegations of committing a criminal offense, both the Sixth Amendment of the United States Constitution, applied through the due process clause of the Fourteenth Amendment of the United States Constitution, and Article I, Section 21 of the Washington State Constitution provide the right to a jury trial. *Wicke*, 91 Wn.2d at 642. Therefore, the case should be reversed and remanded.

**E. Mr. Prostov Should Be Awarded Reasonable Attorneys' Fees Under Washington's Equal Access to Justice Act.**

The trial court erred in denying reasonable attorneys' fees and costs under Washington's Equal Access to Justice Act (the "EAJA") for the DOL's dismissed June 2001 allegation of criminal fraud. Mr. Prostov has prevailed in the court's judicial review of DOL's licensing action. The EAJA states that "a court shall award a qualified party that prevails in a *judicial review* of an *agency action* fees and other expenses, including reasonable attorneys' fees." RCW 4.84.350(1) (emphasis added). The

---

<sup>12</sup> See Exhibit T/U

EAJA provides that “judicial review” and “agency action” are defined by Chapter 34.05 RCW.<sup>13</sup> RCW 4.84.340.

Interpreting the EAJA, however, Washington’s Supreme Court has held that chapter 34.05 RCW does not define judicial review, and “because the [EAJA] statute is ambiguous [on what constitutes judicial review], [a reviewing court] must discern and implement the legislature’s intent.”<sup>14</sup> *Costanich v. Washington State Dep’t of Soc. & Health Servs.*, 164 Wn.2d 925, 929-30, 194 P.3d 988 (2008) (citing *Campbell v. Dep’t of Soc. & Health Servs.*, 150 Wn.2d 881, 894, 83 P.3d 999 (2004)). The *Costanich* Court then stated the legislative intent: “[i]n 1995, the

---

<sup>13</sup> The EAJA defines “agency action” as being defined by Chapter 34.05 RCW. RCW 4.84.340(2). RCW 34.05.010 defines “agency action” broadly to include “**licensing**, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits. This statutory definition is all inclusive and places no restrictions on judicial review of “licensing” matters. The EAJA makes a similar broad definition for the term “agency,” which clearly and unambiguously includes the DOL. RCW 4.84.340(1). Therefore, the DOL’s suspension of Mr. Prostov’s driver’s license is unequivocally agency action as defined under Ch. 34.05 RCW.

<sup>14</sup> The only place in the definition section of Washington’s APA that refers to judicial review is that for a “Party to Judicial Review,” which is broadly defined to include any person filing, named as, or participating in any judicial review. RCW 34.05.010(13). Washington’s APA refers to both judicial review under the provisions of Chapter 34.05 RCW and judicial review authorized by “other provision of law.” RCW 34.05.510 (Section entitled “Relationship between this chapter and other judicial review authority.”) (emphasis added). It states, in the case of judicial review authorized by “other provision of law,” the APA is not the “exclusive means” of judicial review. *Id.* Washington’s APA also expressly recognizes judicial review authorized by other statutes requiring “de novo review or jury trial review of agency action.” RCW 34.05.510(3). In addition, the EAJA also defines “agency action” under Chapter 34.05 RCW. RCW 4.84.340. RCW 34.05.010 defines “agency action” broadly to include all “**licensing**, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits.” (bold added).

legislature enacted the EAJA, Chapter 4.84 RCW, to ensure citizens a better opportunity to defend themselves from inappropriate state agency actions.”<sup>15</sup> *Id.* at 929 (citing Laws of 1995, ch. 403, § 901).

At issue in *Constanich* was the interpretation of judicial review under the EAJA, RCW 4.84.350(1). *Constanich*, 164 Wn.2d at 930. The agency argued that judicial review under the EAJA only encompassed judicial review at the superior court level as defined by Chapter 34.05 RCW. *Id.* at 930-31. Washington’s Supreme Court rejected such a narrow interpretation, holding that Chapter 34.05 RCW did not define judicial review and, therefore, the legislative intent controlled. *Id.* Quoting the explicit 1995 finding of legislative intent (Laws of 1995, ch. 403 § 901), the Court stated that the intent was “to provide equal access to the courts to private litigants defending against government

---

<sup>15</sup> Below is the full text of the 1995 finding of legislative intent:

The legislature finds that certain individuals, smaller partnerships, smaller corporations, and other organizations may be deterred from seeking review of or defending against an unreasonable agency action *because of the expense involved in securing the vindication of their rights in administrative proceedings*. The legislature further finds that *because of the greater resources and expertise of the state of Washington, individuals, smaller partnerships, smaller corporations, and other organizations are often deterred from seeking review of or defending against state agency actions because of the costs for attorneys, expert witnesses, and other costs*. The legislature therefore adopts this equal access to justice act *to ensure that these parties have a greater opportunity to defend themselves from inappropriate state agency actions and to protect their rights*.

RCW 4.84.340, Notes: Findings—1995 c 403 (quoting House Bill 1010, Chapter 403, Sec. 901 (1995)) (emphasis added); *Constanich*, 164 Wn.2d at 931.

action...[b]ased upon this explicit statement of intent, to ensure the public has the ability to contest and appeal agency decisions and rule making....” *Id.* at 931. Therefore, although Ch. 34.05 RCW only referred to judicial review at the superior court level, the EAJA encompassed all types of judicial review including review at both the Court of Appeals and the Washington State Supreme Court. *Id.* at 932-33.

Similarly, the EAJA’s definition of “agency action” also includes judicial review of the DOL’s licensing actions. The EAJA defines “agency action” as being defined by Chapter 34.05 RCW. RCW 4.84.340(2). RCW 34.05.010 defines “agency action” to include “**licensing** the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits. (bold added). This broad definition of “agency action” applies to judicial review of all agency licensing actions regardless of the source. The EAJA similarly provides a broad definition for the term “agency,” which includes the DOL. RCW 4.84.340(1). Therefore, judicial review Mr. Prostov’s driver’s license suspension is irrefutably “agency action” as defined by the EAJA.

---

Like *Constanich*, nothing in the plain language of the EAJA or legislative history for 1995 House Bill 1010 indicated any intent to exclude the DOL from the EAJA. If the Legislature had intended this result, it would have said so. *Evergreen Freedom Found.*, 140 Wn.2d at 631; *Morgan*, 137 Wn.2d at 891–92. Also, if a statute provides no definition for a term or phrase, its meaning is ascertained using the standard dictionary definition. *Am. Cont'l Ins. Co.*, 151 Wn.2d at 518. *Black's* defines judicial review as “[a] court’s power to review the actions of other branches or levels of government” and “[a] court’s review of a lower court’s or an administrative body’s factual or legal findings.” *Black’s Law Dictionary* 852 (7th Ed. 1999). This ordinary definition encompasses judicial review of the DOL’s licensing actions.

Appellant anticipates that the DOL may attempt to rely upon *Cobra Roofing Servs., Inc. v. Dep’t of Labor & Indus.*, 157 Wn.2d 90, 98, 135 P.3d 913 (2006), for its argument that the DOL is immune from all action under the EAJA. DOL is wrong—both under the APA’s express terms and controlling precedent. *Constanich* is the controlling precedent.<sup>16</sup>

---

<sup>16</sup> *Constanich*, which held that the APA did not define judicial review as used in the EAJA, was decided more than two years after *Cobra Roofing*. In addition, *Cobra Roofing* did not concern a DOL allegation of a citizen alleged to have committed a criminal act and it also had flawed legal reasoning that was clarified in *Constanich*. For example, as discussed above, Washington’s APA refers to both judicial review as provided under the provisions of Ch. 34.05 RCW and judicial review as defined by other

Interpreting the EAJA, the Court in *Constanich* held that Chapter 34.05 RCW does not define the phrase judicial review and, therefore, Washington courts must discern and implement the legislative intent. *Costanich*, 164 Wn.2d at 929. As discussed in *Constanich*, the Legislature wanted to put Washington citizens on equal footing for the purpose of vindicating their rights and promoting justice. *Constanich*, 164 Wn.2d at 929 (citing Laws of 1995, ch. 403, § 901). Given the explicit 1995

---

provisions of law. RCW 34.05.510. The *Constanich* Court made clear that Ch. 34.05 RCW contained no definition of judicial review and, due to this ambiguity, judicial review under the EAJA must be interpreted to further the explicit 1995 intent of the legislature. Thus, although some agency matters are excluded from the judicial review procedural “provisions” of Washington’s APA, *see* RCW 34.05.030(2), that does not mean that the Legislature intended to exclude those judicial review matters from the meaning of judicial review under the EAJA. The APA only exempts the DOL only from the procedural provisions governing judicial review under the APA. RCW 34.05.030(2)(b). Among the procedural differences between APA judicial review proceedings generally and DOL licensing judicial review proceedings is the *de novo* judicial review for the DOL’s licensing actions. *Andersen*, 84 Wn.2d at 339 (de novo judicial review includes “a full and independent judicial, evidentiary, and factual review embracing, on appropriate demand, a jury trial.”). Nevertheless, the DOL’s licensing actions are still “agency action” as defined under the EAJA and subject to judicial review for purposes of the EAJA. RCW 34.05.010(13) makes reference to “judicial review,” defining a “party” to include, among other persons, one who files a “petition for judicial review.” It does not restrict “party” status to judicial review under RCW 34.05.410 through 34.05.598. The EAJA addresses substantive rights, not mere procedure. In addition, *Cobra Roofing* also erroneously relied upon a 1997 veto for interpreting the 1995 EAJA. *Cobra Roofing*, 157 Wn.2d at 101. Constitutional veto power is an act of nullification or modification of existing legislation, not a pronouncement of legislative intent of statutes codified years earlier. *See* WASH. CONST., Art. III, Section 12; *see also Brown v. Firestone*, 382 So.2d 654, 664 (Fla. 1980) (“the veto power is intended to be a negative power, the power to nullify, or at least suspend, legislative intent. It is not designed to alter or amend legislative intent.”). The legal error in relying upon a 1997 veto to interpret the intent of the 1995 EAJA is similar to the *Constanich* Court’s rejection of the notion that a proposed 1996 legislative amendment could be used to interpret the 1995 EAJA. *Constanich*, 164 Wn.2d at 932. As found by the *Constanich* Court, the meaning of judicial review in the EAJA must be interpreted “to discern and implement the legislature’s intent.” *Constanich*, 164 Wn.2d at 930.

statement of legislative intent for the EAJA and the plain terms of the EAJA, this Court should reject the DOL's argument that it is immune from any and all actions under the EAJA. When enacting the EAJA in 1995, the Legislature did not intend to exclude a citizen from being wrongfully accused by the DOL of having committed a criminal act.<sup>17</sup>

Therefore, the 1995 finding of legislative intent along with ordinary meaning of "judicial review" and the meaning of "agency action" warrant application of the EAJA to the trial court's dismissal of the DOL's wrongful 2001 allegation of criminal fraud.

**F. Mr. Prostov Should Be Awarded His Reasonable Attorneys' Fees and Costs on Appeal.**

Pursuant to RAP 18.1, for the same reasons stated in Section IV.E above, Mr. Prostov should be awarded his reasonable attorneys' fees on appeal under Washington's Equal Access to Justice Act, RCW 4.84.350.

---

<sup>17</sup> The DOL may argue that the EAJA does not apply because it was "substantially justified" in bringing the June 2001 allegation of criminal fraud. This is without merit. "Substantially justified" means justified to a degree that would satisfy a reasonable person, and it requires a showing that its position has a reasonable basis in law and fact. Here, all the DOL had were nine photos – nothing more – and it failed to even offer any applications for licensure as required under RCW 46.20.0921(1)(e). It did not even offer a single witness to testify to any of the photos and it failed to make any legitimate attempt to contact GP even though it repeatedly referred to him as a "victim" at trial.

## V. CONCLUSION

For the foregoing reasons, the trial court's decision should be reversed and reasonable attorneys' fees and costs awarded.

Dated this 10th day of June, 2014.

LIVENGOOD ALSKOG, PLLC



---

Gregory A. McBroom, WSBA No. 33133  
Attorneys for Appellant Yuri Prostov

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the United States of America and the State of Washington that on the date specified below, I filed and served the foregoing as follows:

Division I Court of Appeals 600 University St. One Union Square Seattle, WA 98101-1176 Phone: 206-464-7750	Messenger Service <input type="checkbox"/> First Class U.S. Mail <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile <input type="checkbox"/>
Jeremy Gelms Assistant Attorney General Licensing & Admin. Law Division 800 Fifth Avenue, Suite 200 Seattle, WA 98104 Phone: (206) 587-4211 JeremyG1@atg.wa.gov	Messenger Service <input type="checkbox"/> First Class U.S. Mail <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile <input type="checkbox"/>

DATED: June 9, 2014, at Kirkland, Washington

  
\_\_\_\_\_  
Karen H. Suggs

FILED  
COURT OF APPEALS, DIV. I  
STATE OF WASHINGTON  
2014 JUN 10 PM 3:24

# APPENDIX A

**TRIAL EXHIBIT J**

State of Washington - Department of Licensing  
 Record of Application Case Number: 91269122538

3B T

Appl type: 31 Exam Fee #: B001669 Exam Fee Date: 12-26-91 CTL #: 2783171622

Social Security #: 104-76-0719 Expiration Date: 01-10-95  
 Name: PROSTOV, YURI L Sex: MALE Birthdate: 01-10-1962  
 Address: 8226 22ND AVE NW Height: 6-04 Weight: 225 Eyes: BLU  
 City: SEATTLE ST: WA Zip: 98117-0000 County code: 17  
 History: License #: PROSTYL385BS Military: NO

Birthplace: USSR

Are you a twin or triplet? YES Mothers Maiden Name: SHPARLO

Telephone: 784-9608

Have you had a license before? YES

If YES, where? NY1 Under what name?

Has your driver license or driving privilege ever been suspended, revoked, cancelled, or denied? NO If YES, where: When?

Why?

Do you take medication for or are you under the care of a physician for any medical condition(s)? NO

If YES, describe:

Do you have, or have you had, any physical or mental disabilities? NO

If YES, describe:

ID presented: P1857794423744083962

Remarks: VALID NY DL, SS CARD

I certify that the information I have provided on this application is true and correct.

FULL NAME SIGNATURE

*Yuri L. Prostov*

I certify that I am the legal guardian of the above named person who is applying for a Washington Instruction Permit or Driver's License. I grant the Department of Licensing permission to consider this application with the understanding this permission cannot be withdrawn.

SIGNED \_\_\_\_\_

ADDRESS: \_\_\_\_\_

Signature(s) witnessed by: \_\_\_\_\_

EXAMINER

*McKenzie*

IDENTIFICATION: \_\_\_\_\_

SCREENING TESTS

ACUITY	BOTH	RIGHT	LEFT	FUSION	FIELD	COLOR	HEARING
WITHOUT CORRECTION	20/030	20/030	20/030	SATIS	or		
WITH CORRECTION	20/	20/	20/	UNSATIS	S	S	S

EXPIRATIONS

EXPIRES:	_____	_____	_____	_____	_____	_____	_____
EXPIRES:	03/01/92	03/01/92	03/01/92	03/01/92	03/01/92	03/01/92	03/01/92
EXPIRES:	03/01/92	03/01/92	03/01/92	03/01/92	03/01/92	03/01/92	03/01/92

RESTRICTIONS: 000000

ENDORSEMENTS: 0000

CDL CLASS:

1

**TRIAL EXHIBIT K**

**WASHINGTON**

**DRIVER'S  
LICENSE**

NUMBER

EXPIRES

CTL

PROSTYI 385RS | 011099 | 095AM1039

-\*\*\*-

PROSTOV, YURI I

8026 22ND AVE NW

SEATTLE

WA 98117

SEX

DATE

HEIGHT

WEIGHT

CLASS

CLASS

CLASS

CLASS

CLASS

CLASS

M 011062 | 6-04 225 BIU 040595

*Yuri Prostov*

2

**TRIAL EXHIBIT L**



**TRIAL EXHIBIT M**



# **TRIAL EXHIBIT N**

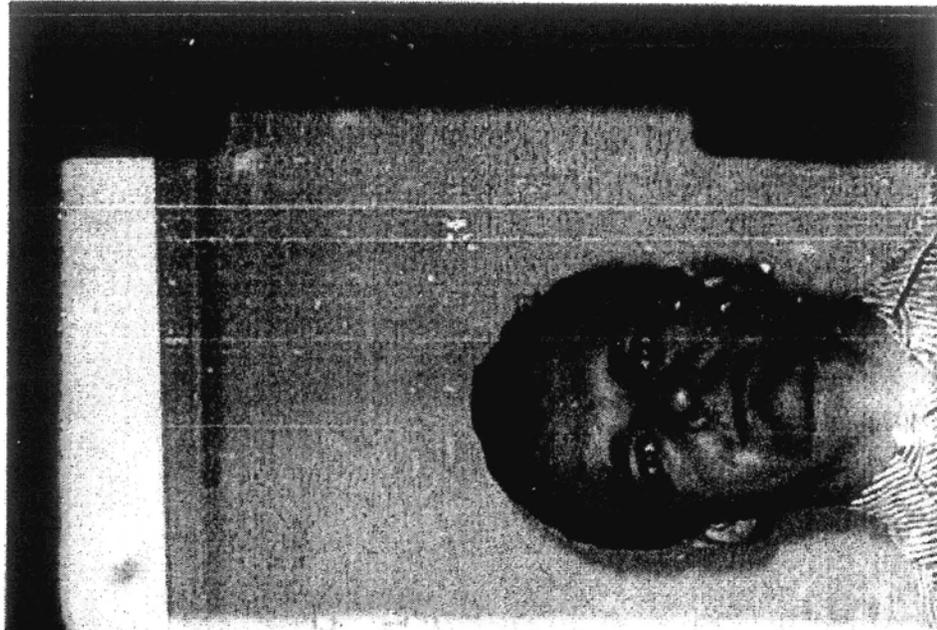
DRIVER'S  
LICENSE

WASHINGTON

NUMBER	ISSUE DATE	EXPIRES		
PROSTGL386BS	062501	011004		
COL END RES				
SEX	HEIGHT	WEIGHT	EYES	BIRTHDATE
M	6-04	210	BLU	011062
				176BJ1602

PROSTOV, GEIRMAN LEVOVICH  
23130 52ND PL S  
KENT WA 98032

X *Signature*



# **TRIAL EXHIBIT O**

# Department Of Licensing - IDL System

Picture Number: PROSTYL385BS

Control Number: 030153A1341

Name: PROSTOV, YURI I

Issue Date: 01-15-2003

Production Status: Mailed - 01-19-2003

Report Date: Jul 27, 2012 7:10:56 AM

## **WASHINGTON** DRIVER LICENSE

LIC # **PROSTYL385BS** EXP **01-10-2008**

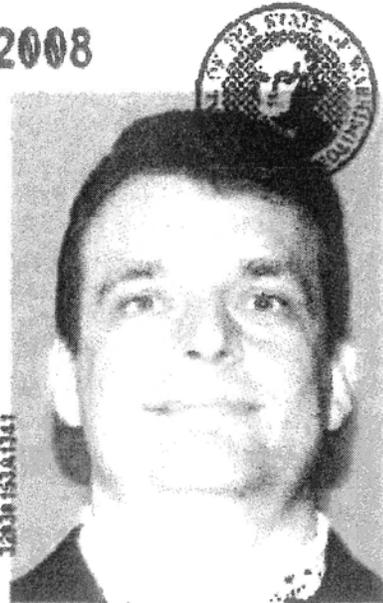
**PROSTOV, YURI I**  
**8026 22ND AVE NW**  
**SEATTLE WA 98117-0000**

<b>CDL</b>	<b>END</b>	<b>RES</b>	
<b>SEX</b>	<b>HT</b>	<b>WT</b>	<b>EYES</b>
<b>M</b>	<b>6-04</b>	<b>225</b>	<b>BLU</b>

**ISSUE DATE 01-15-2003**

**DOB 01-10-1962**

*Yuri Prostov*



6

# **TRIAL EXHIBIT P**

# Department Of Licensing - IDL System

Picture Number: PROSTYI 38538

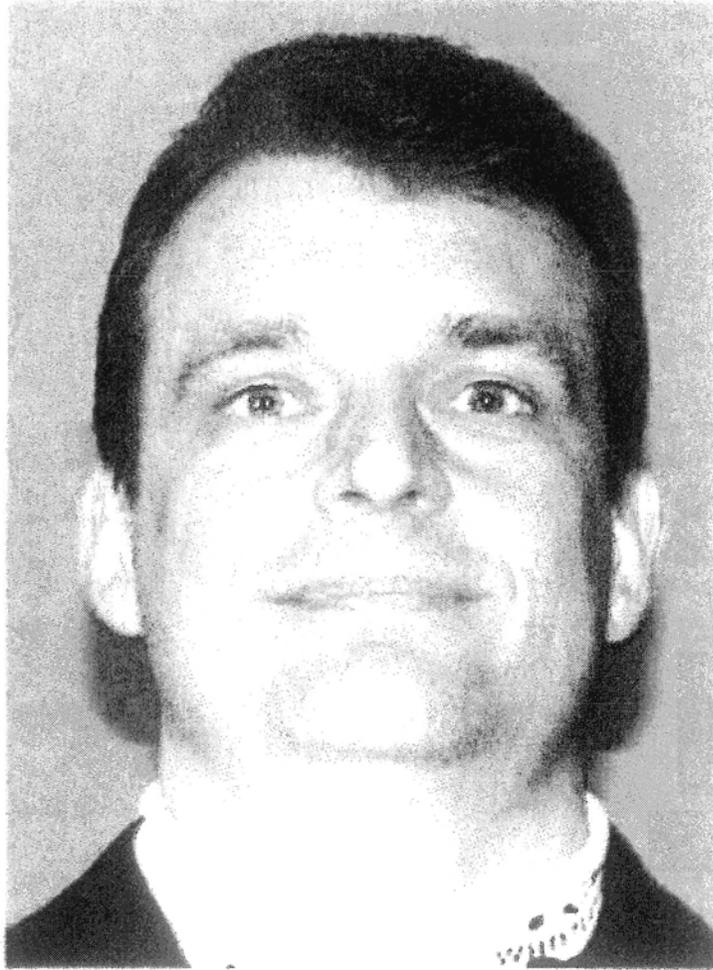
Control Number: 030153A1341

Name: PROSTOV, YURII

Issue Date: 01-15-2003

Production Status: Mailed - 01-19-2003

Report Date: Jul 27, 2012 7:10:48 AM



*Yura Proso*

7

**TRIAL EXHIBIT Q**

# Department Of Licensing - IDL System

Picture Number: PROSTYL385BS  
Control Number: 053633A1024  
Name: PROSTOV, YURI I  
Issue Date: 12-29-2005  
Production Status: Mailed - 01-02-2006  
Report Date: Jul 27, 2012 7:11:02 AM

## **WASHINGTON** DRIVER LICENSE

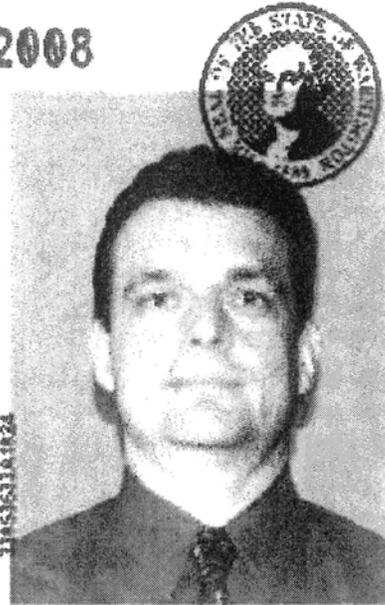
LIC # **PROSTYL385BS** EXP **01-10-2008**

**PROSTOV, YURI I**  
**8026 22ND AVE NW**  
**SEATTLE WA 98117-0000**

<b>CDL</b>	<b>END</b>	<b>RES</b>	
<b>SEX</b>	<b>HT</b>	<b>WT</b>	<b>EYES</b>
<b>M</b>	<b>6-04</b>	<b>225</b>	<b>BLU</b>

**ISSUE DATE 12-29-2005**

**DOB 01-10-1962**



# **TRAIL EXHIBIT R**

# Department Of Licensing - IDL System

Picture Number: PROSTYL385BS

Control Number: 081203E1335

Name: PROSTOV, YURI L

Issue Date: 04-29-2008

Production Status: Mailed - 05-03-2008

Report Date: Jul 27, 2012 7:11:08 AM

## **WASHINGTON** DRIVER LICENSE

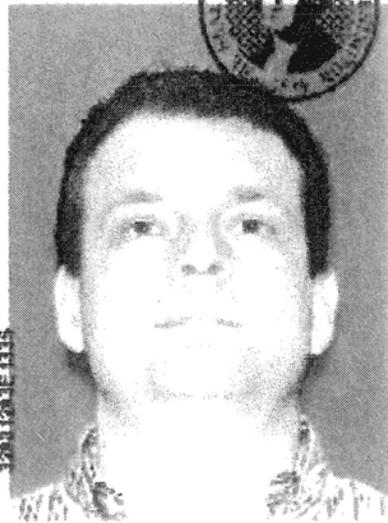
LIC # **PROSTYL385BS** EXP **01-10-2013**

**PROSTOV, YURI L**  
**8026 22ND AVE NW**  
**SEATTLE WA 98117-4339**

CDL	END	RES	SEX	HT	WT	EYES
			<b>M</b>	<b>6-04</b>	<b>225</b>	<b>BLU</b>

ISSUE DATE **04-29-2008**

DOB **01-10-1962**



**TRIAL EXHIBIT S**

# Department Of Licensing - IDL System

Picture Number: PROSTYL385BS

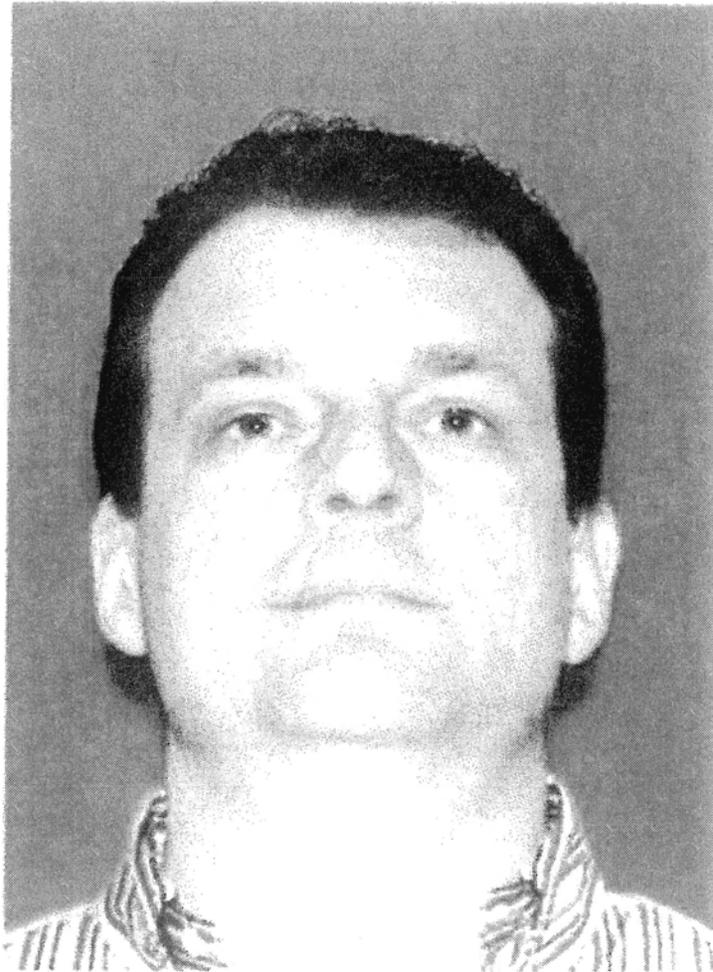
Control Number: 08120311335

Name: PROSTOV, YURI

Issue Date: 04-29-2008

Production Status: Mailed - 05-03-2008

Report Date: Jul 27, 2012 7:10:29 AM



*Yuri Prostov*

10

**TRIAL EXHIBIT T**

# Department Of Licensing - IDL System

Picture Number: PROSTGL386BS  
Control Number: 09028311421  
Name: PROSTOV,GEIRMAN LEVOVICH  
Issue Date: 01-28-2009  
Production Status: Mailed - 02-01-2009  
Report Date: Jul 27, 2012 7:11:34 AM

## **WASHINGTON** DRIVER LICENSE

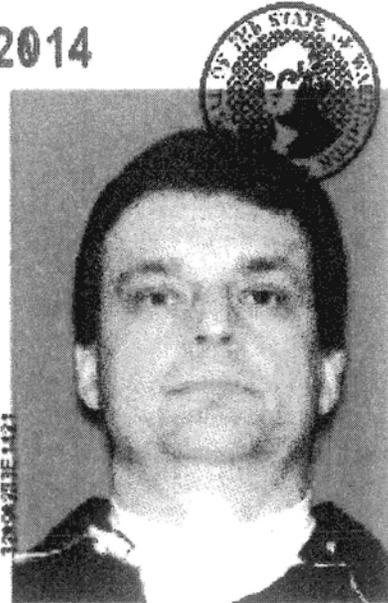
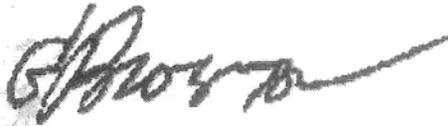
LIC # **PROSTGL386BS** EXP **01-10-2014**

**PROSTOV,GEIRMAN LEVOVICH**  
**23130 52ND PL S**  
**KENT WA 98032-3354**

CDL	END	RES	SEX	HT	WT	EYES
			<b>M</b>	<b>6-04</b>	<b>210</b>	<b>BLU</b>

ISSUE DATE **01-28-2009**

DOB **01-10-1962**



**TRIAL EXHIBIT U**

# Department Of Licensing - IDL System

Picture Number: PROSTGI386BS

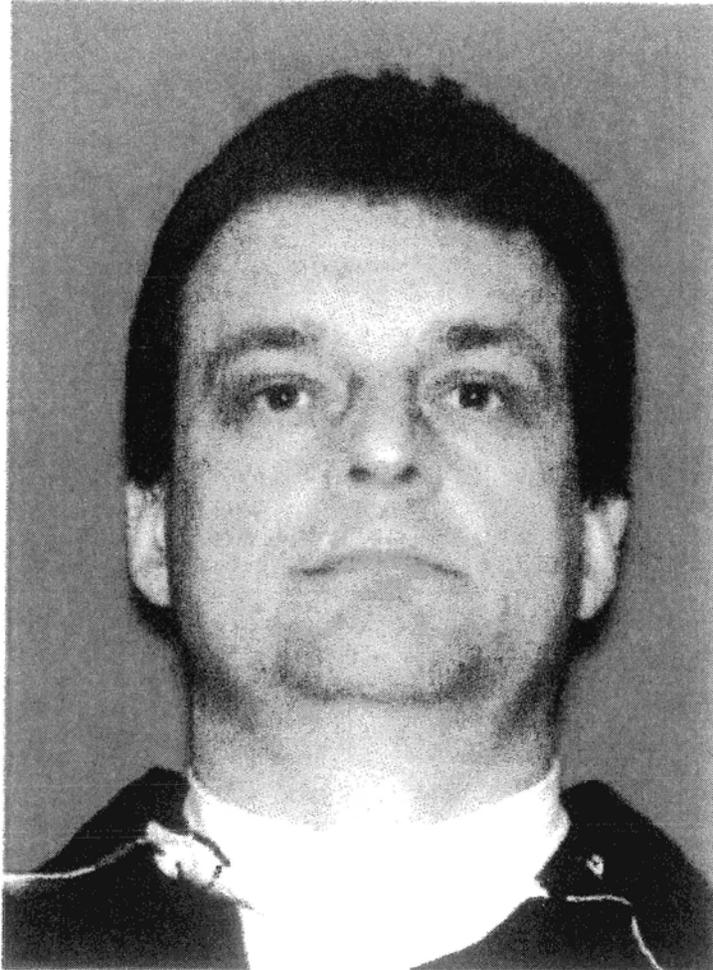
Control Number: 09028311421

Name: PROSTOV, GERMAN I VOVICH

Issue Date: 01-28-2009

Production Status: Mailed - 02-01-2009

Report Date: Jul 27, 2012 7:11:56 AM



*Prostov*

**TRIAL EXHIBIT V**

# Department Of Licensing - IDL System

Picture Number: PROS1GI386BS

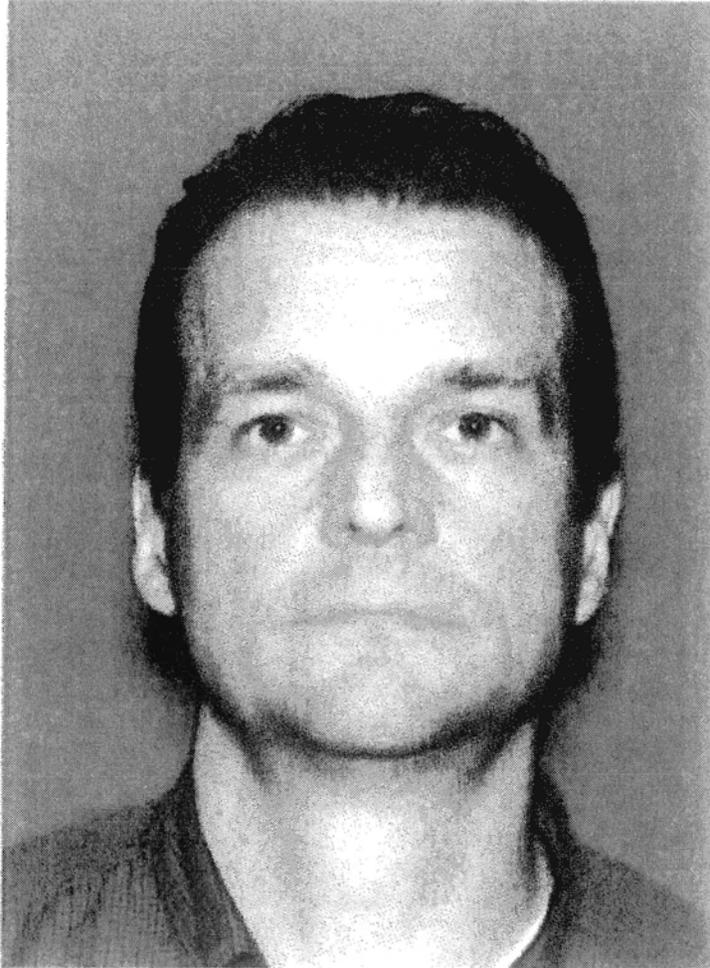
Control Number: 100233A1607

Name: PROS1OV, GERMAN LEVOVICH

Issue Date: 01-21-2010

Production Status: Mailed - 01-25-2010

Report Date: Jul 30, 2012 8:47:05 AM



13