COA # 30226-1-III

90245-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

THOMAS M. KLINDWORTH,

Petitioner.

PETITION FOR REVIEW

RESPONDENT'S BRIEF

Respectfully submitted:
SHAWN P. SANT
Prosecuting Attorney

Teresa Chen

by: Teresa Chen, WSBA 31762
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ORIGINAL

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent requests this Court deny the Petition for Review.

III. ISSUES

1. Is any consideration under RAP 13.4(b) met which would permit review?
2. Did the court prevent the Defendant from presenting a defense regarding the lost vial of blood by concluding the CrR 3.6 hearing on the day that the Defendant requested and after considerable time and opportunity for the Defendant to prepare for hearing?
3. Did the court of appeals err in not deciding a question that was not presented to it in any briefing or with notice to the State?

IV. STATEMENT OF THE CASE

On July 22, 2011, the Defendant Thomas Klindworth was convicted by jury of driving under the influence. Pelletier RP 220.

The deputy arrested the Defendant more than four months previously on January 21, 2007 for driving under the influence of *drugs*. Munoz RP 917. There were no indications of alcohol use. Munoz RP 932. The Defendant was transported for a blood draw. RP 939. After reading the implied consent warning numerous times and asking if he could write on the form, the Defendant eventually consented to a blood draw. RP 938-39.

The deputies supplied two vials for the technician to fill and retrieved the vials for evidence. RP 942-43. The Defendant requested that a third vial be drawn; the vial was left with hospital staff for the Defendant to arrange to retrieve. RP 942-44. WSP toxicologist Asa Louis tested the blood in the two vials provided by the State and found a "significant" level of methamphetamine in the blood. Pelletier RP 92, 104-05, 108.

Over the course of four years, the Defendant made multiple pro se motions. The Defendant's motion regarding the testing of the third blood vial was filed on 12/1/09 and, after the Defendant's long absence on a bench warrant, finally set for argument on 7/8/11. CP 185-214. At the beginning of the hearing on July 8, 2011, the court asked the Defendant if he wanted to proceed or if he wanted to

continue the hearing for a few days to allow his standby counsel (who was in trial on another matter) to be present. Munoz RP 709. The Defendant insisted on going forward. *Id.* The court allowed the hearing to be held that afternoon when the jail staff was available to attend the incarcerated Defendant in the courtroom. Munoz RP 710.

When the parties returned that afternoon, the Defendant refused to go forward although the court had especially accommodated him with this special set hearing. Munoz RP 712-17. The court explained that the CrR 3.6 hearing, on the Defendant's motion, had been interrupted by equipment failure, and continued to September 9, 2010, but the Defendant failed to appear and remained on warrant status for many months. Munoz RP 723. Now on the eve of trial, the matter was scheduled to be completed and the State's witness was present for the Defendant's cross-examination. *Id.* At that point, the Defendant refused to cross-examine the witness. "I can't proceed." *Id.* His claim of lack of preparation on a motion filed in 2009 rang false where over a year before, when asking to represent himself and specifically in reference to his blood draw motion, the Defendant was reminded that he "has stated he's attempted to get these motions he's spoken of heard for months, if not years now."

Lang RP 129.

The court then excused the witness, and the parties proceeded to argument. The Defendant again refused to proceed. Munoz RP 729. Although that morning he had asked to proceed without standby counsel, now he was insisting on waiting for standby counsel. *Id.*

The court was exasperated: "Mr. Klindworth, I advised you a year ago that you were being foolish by representing yourself and you ignored that advice." *Id.* The court instructed the prosecutor to present argument. After a lengthy interruption by the Defendant. (Munoz RP 731-35), the court explained:

> I'm denying your request for attorney because you've been going back and forth. At one time you wanted an attorney [ ] AND then you wanted to represent yourself. And then you wanted an attorney. And then you wanted to represent yourself. [ ] So I see this as yet another ploy on your part to undermine your case, to cause delay, and I'm just declining. [ ] You chose a long time ago to represent yourself, and I'm going to make you stand by it.

Munoz RP 735. The court ruled against the Defendant's argument regarding a second blood draw. Munoz RP 741.

> ... as it relates to the second blood draw, he was given ample opportunity to have -- to make arrangements for his own blood draw, and as a matter of fact, an extra vial was taken at his request at Lourdes Hospital and apparently -- I don't know what happened to that

> thereafter, but Mr. Klindworth apparently did not take whatever steps necessary to have it tested or preserved or whatever was necessary there. So I'm going to deny your 3.6 motion.

Munoz RP 741-42. The Defendant then denied that he had made the motion on the blood draw. Munoz RP 742. The Defendant made no motion for reconsideration after meeting with his standby counsel who would be appointed to represent him.

V. ARGUMENT

A. THERE IS NO CONSIDERATION UNDER RAP 13.4(b) WHICH WOULD PERMIT REVIEW.

A petition for review will "only" be accepted if at least one of the provisions of RAP 13.4(b) is met. The Defendant summarily asserts without argument that every provision of RAP 13.4(b) is satisfied. The State disagrees that any consideration under RAP 13.4(b) is met. There is no conflict of laws, no significant constitutional question, and no question of substantial public interest.

The Defendant asserts that he was denied the right to present a defense because he was not ready for the CrR 3.6 hearing despite demanding that the right to proceed pro se, despite demanding the hearing be held immediately, and despite a delay of over four years.

No authority supports this assertion. The Defendant relies on *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010). However, the case is inapplicable, because, unlike Jones, the Defendant was not prevented from testifying, examining witnesses, or presenting evidence. Unpublished Opinion at 16-17.

The Defendant asserts the court of appeals did not consider the applicability of *State v. Gauthier*, raised for the first time in oral argument. Not only does *Gauthier* have no applicability, but no authority supports the Defendant's claim that the court is required to consider this challenge which did appear in any briefing.

B. THE COURT DID NOT VIOLATE THE DEFENDANT'S RIGHT TO PRESENT A DEFENSE BY FOLLOWING THROUGH WITH A PRETRIAL SCHEDULE FOR HEARING MOTIONS.

The Defendant complains that the trial court denied him the right to challenge the blood evidence by forcing him to proceed with the CrR 3.6 hearing. Petition at 11. However, it is clear from the record that the decision to proceed on that day was not the court's, but the Defendant's.

The Defendant had asked to represent himself on March 23, 2010, specifically expecting to argue this motion, and he had been warned that no continuances would be allowed. Lang RP 107-09.

The Defendant had delayed the completion of the hearing by absconding for many months. It was then the eve of trial. He was finally present on the date of the scheduled hearing. He was insisting on having the hearing without the assistance of standby counsel. But then at the moment of the hearing, when all parties and the witness were gathered, he demanded a delay (even while insisting that a delay violated his speedy trial right.)

The court completed the hearing, which the Defendant had himself insisted on holding that very day. That the Defendant refused to either make a cogent CrR 3.6 argument or to permit a short continuance of the hearing to allow his standby counsel to be present does not give rise to judicial error.

The Defendant relies on *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010). There the issue was whether the court had prevented the Defendant from making a defense by refusing to admit evidence of the circumstances surrounding the rape. That is unlike the case here. Mr. Klindworth was not prevented from admitting evidence at trial. In fact, the State presented to the jury the very evidence relevant to the Defendant's complaint, explaining exactly how an extra blood sample had been taken at the Defendant's

request, but never picked up by the defense. Munoz RP 896-905, 942-44. The Defendant had multiple opportunities to question the sergeant. Unpublished Opinion at 17.

The Defendant's motion was to suppress the State's evidence (or dismiss the State's case) under the theory that the State was under some obligation to look after the Defendant's extra vial. The Defendant was permitted to make the motion. It was argued in his 2009 brief. He, however, refused to make the oral argument in 2011. The court did not prevent the Defendant from making his motion or arguing his claim before the jury.

The trial court properly ruled that the cause of the loss of the evidence was the Defendant's neglect, not the State's. Munoz RP 741-42. The court of appeals held that the State "was under no obligation to cover the expenses or otherwise assist in the procurement of the additional blood tests for Mr. Klindworth." Unpublished Opinion at 14, *citing Gonzales v. Dep't of Licensing*, 112 Wn.2d 890, 899, 774 P.2d 1187 (1989). Arresting officers are under no obligation to assist a defendant in making an independent test, but are only obliged not to hinder or obstruct the defendant's efforts. *State v. McNichols*, 128 Wn.2d 424, 906 P.2d 329 (1995).

C. THE COURT OF APPEALS DID NOT ERR IN FAILING TO CONSIDER A CHALLENGE THAT WAS NOT MADE IN THE APPELLANT'S BRIEF.

On appeal, the Defendant challenged the admission of the blood evidence, arguing that he "was not allowed to have an additional test by a person of his own choosing." Appellant's Brief at 1, 38. The appeal did NOT challenge the admission of the blood evidence as being inadmissible absent a search warrant. Appellant's Brief at 1, 36-40. There was no briefing on either *State v. Gauthier*, 174 Wn. App. 257, 298 P.3d 126 (2013) or a 2013 revision to RCW 46.20.308(1).

In the Petition for Discretionary Review (at 15-16), the Defendant argues that under *State v. Gauthier*, 174 Wn. App. 257, 298 P.3d 126 (2013) and newly revised RCW 46.20.308(1) the evidence should have been suppressed because there was no warrant.

There is no consideration under RAP 13.4(b) which would permit the Washington Supreme Court under a petition for discretionary review to consider a challenge which was not raised to the court of appeals, but is made for the first time in the petition.

The Defendant complains that the court of appeals "did not address whether or not Mr. Klindworth is entitled to the benefit of *State v. Gauthier*, *supra*, or the legislative amendment to RCW 46.20.308." Petition for Discretionary Review at 10. The court of appeals did not address the challenge, because it was not in the Appellant's Brief. A petition for review is intended to *review* a decision. There was no decision and could be no decision of a matter not properly raised to the court of appeals.

As a matter of legal fairness, an appealing party must give the responding party fair notice of issues to be reviewed. Under RAP 10.3(a)(4), the appellant should make a concise statement of the assignment of errors. Failure to do so should result in the court's declining to consider the claim. *Ang v. Martin,* 154 Wn.2d 477, 487, 114 P.3d 637 (2005); *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) (refusing to consider a challenge unsupported by any argument in the brief).

Here not only was there no assignment of error on this point, but there was no briefing on this point, and no notice to the State of the challenge. The court of appeals' refusal to consider something

that was not properly raised for review is not in conflict with any court decision or constitutional provision. It is consistent with precedent and court rule. The court's decision does not present an issue of substantial public interest.

The Defendant argues that under *State v. Gauthier*, 174 Wn. App. 257, 298 P.3d 126 (2013) and a 2013 revision to RCW 46.20.308(1), "a search warrant is required whenever a blood draw is requested by law enforcement as a result of the decision in *State v. Gauthier*. ... Sgt. Dickenson did not apply for a search warrant." Petition at 15. Neither authority indicates that consent is not an exception to the warrant clause.

The Defendant consented to the blood draw. Voluntary consent is an exception to the warrant requirement. *State v. Khounvichai*, 149 Wn.2d 557, 562, 69 P.3d 862 (2003). Neither at trial not on appeal did the Defendant challenge the voluntariness of his consent. Therefore he cannot raise the issue for the first time on appeal – much less for the first time in a petition for discretionary review. RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.22 1251 (1995); *State v. Lee*, 162 Wn. App. 852, 857, 259 P.3d 294 (2011), *review denied*, 173 Wn.2d 1017, 272 P.3d 247 (2012).

In *Gauthier*, the defendant was accused of rape. Initially, he agreed to provide a DNA sample. *Gauthier*, 174 Wn. App. at 261. He later withdrew his consent, and police obtained the sample through a warrant. *Id.* At trial, the prosecutor cross-examined Gauthier about his refusal to provide the sample. *Gauthier*, 174 Wn. App. at 262. The court of appeals held that it is impermissible to use the invocation of one's right to refuse a warrantless search as substantive evidence of guilt. *Gauthier*, 174 Wn. App. at 267. The case has no relevance here. Mr. Klindworth did not refuse. He consented. There was no refusal to use against him as evidence of guilt.

The Defendant points to an amendment by Laws of 2013, ch. 35, Second Sp. Sess., sec. 36 (effective September 28, 2013) to RCW 46.20.308(1).

> (1) Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath ~~or blood~~ for the purpose of determining the alcohol concentration, THC concentration, or presence of any drug in his or her breath ~~or blood~~ if arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug or was in violation of RCW 46.61.503. Neither consent nor this section precludes a police officer from obtaining a

search warrant for a person's breath or blood.

This argument is usually framed in the context of *Missouri v. McNeely*, -- U.S. --, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013). There in a DUI arrest, the officer took the defendant's blood without a warrant and after his explicit refusal to consent. *McNeely*, 133 S.Ct. at 1554. The case only regards evidence obtained in the absence of warrant, exigency, ***and*** consent. Consent – voluntary or implied – remains a viable and justifiable exception to the general requirement that any search and seizure be done pursuant to a warrant. *Missouri v. McNeely*, 133 S.Ct. at 1565. The case has no relevance here, because the Defendant consented.

Because driving is a privilege in Washington, *see Dep't of Licensing v. Cannon*, 147 Wn.2d 41, 47, 50 P.3d 627 (2002), the choice whether to submit to or refuse a blood alcohol test is "'a matter of legislative grace.'" *State v. Koch*, 126 Wn. App. 589, 595, 103 P.3d 1280 (2005) (quoting *State v. Bostrom*, 127 Wn.2d 582, 902 P.2d 157 (1995)). All drivers in Washington at the time of Defendant's arrest gave consent to a blood alcohol test the moment they slipped behind the wheel, leaving them only the option to revoke that consent should the test be requested. *State v. Avery*, 103 Wn. App. 527, 533, 13

P.3d 226 (2000). Here the test was requested, the Defendant reviewed his rights at length, and then signed a consent to the blood draw.

Any suggestion that the implied consent statute is intended to give dangerous drivers greater protections than the constitution is ill-informed. Like so many of its sister states, Washington adopted an implied consent statute to help address the serious issue of drug-and/or-alcohol-related driving offenses. *State v. Wetherell*, 82 Wn.2d 865, 869, 514 P.2d 1069 (1973); *State v. Avery*, 103 Wn. App. 527, 532, 13 P.3d 226 (2000); *State v. Smith*, 84 Wn. App. 813, 819, 929 P.2d 1191 (1997). Such laws were "designed to facilitate, not impede, the gathering of chemical evidence to prosecute drunk drivers. [They were] not designed to give greater Fourth Amendment rights to an alleged drunk driver than those afforded other criminal defendants." *State v. Smith*, 84 Wn. App. at 819, 929 P.2d 1191 (citing *State v. Zilke*, 403 N.W.2d 427 (Wis. 1987)).

The amendment to RCW 46.20.308(1) has no relevance here. First, it is not relevant, because it was not effective on the date of the Defendant's arrest. The Defendant "does not dispute that Sgt. Dickenson properly informed him of his implied consent rights."

Petition at 17. Second, the Defendant's consent was *not* implied based on the fact of his driving. He gave actual, informed consent.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court deny the petition.

DATED: May 23, 2014.

Respectfully submitted:

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Dennis W. Morgan nodblspk@rcabletv.com	A copy of this brief was electronically served by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED May 23, 2014, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**

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Please accept for filing the attached State's Response to Petition for Discretionary Review in State v. Thomas Klindworth.

-Teresa Chen

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