Supreme Court No. 96074-7
COA No. 76206-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT TERRANCE JACKSON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Julie Spector
The Honorable Laura Inveen

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

A. IDENTITY OF PETITIONER

Mr. Jackson was the appellant in COA No. 76206-1-I

B. COURT OF APPEALS DECISION

Jackson seeks review of the May 7, 2018 decision. Appx. A, B.

C. ISSUES PRESENTED ON REVIEW

1. The court erred in denying Mr. Jackson's motion to exclude a facially invalid 1998 judgment from consideration in his criminal history.

2. The court erred in denying the motion for a change of venue.

3. The evidence of vehicular homicide by DUI was insufficient.

4. The court erred in denying exclusion of the blood test results.

5. Mr. Jackson's Sixth Amendment jury trial right was violated.

D. STATEMENT OF THE CASE

1. Facts. Following a vehicle crash in which Robert Jackson's fiancé and passenger Lindsay Hill was killed, Mr. Jackson was charged with vehicular homicide, and hit and run-felony. CP 1-8, 95-96.

Mr. Jackson had been erroneously released from prison early by DOC, in August, 2015. On November 12, he was the driver of a vehicle that crashed off a road in Bellevue and struck a utility box. CP 376-77. Hill was ejected from the vehicle and died from head injuries. CP 377.

Jackson's blood alcohol range was allegedly .135g/100mL to .22g/100mL. CP 377-78; 7/19/16RP at 558-67. He allegedly had 5.6 - 20

nanograms THC in his blood. CP 377; 7/19/16RP at 558. Accident reconstructionists claimed the crash was a result of high speeds just under 80 mph in a 25 mph zone, causing the car to become airborne. CP 379.

Prior to trial Jackson sought a change of venue. 2/1/16RP at 12-36; CP 13; CP 112. He subsequently chose to represent himself, and waived jury because venue change was denied. 7/7/16RP 215; CP 144-46. Highly inflammatory news coverage continued beyond the time counsel sought venue change in February, prior to Mr. Jackson waiving counsel and a jury. 7/7/16RP at 215-19; CP 144, 146; CP 15. Mr. Jackson renewed the argument via a motion to dismiss styled, in part, as a CrR 8.3(b) motion for government misconduct, focusing on the Crudup factor of government officials being involved – here, repeatedly - in issuing the negative publicity. 4/11/16RP at 119; 5/2/16RP at 129; CP 53-74.

The court also denied Jackson's motion to exclude the blood test results. CP 90-91; 7/7/16RP at 228, 264-70; 7/26/16RP at 815-35.

2. Sentencing. The court found Jackson guilty of vehicular homicide under the reckless driving and DUI alternatives. 8/2/16RP at 973; CP 376-84. The court then sentenced Jackson as a Persistent Offender, erroneously rejecting the defense arguments of facial invalidity of a prior conviction. 12/9/16RP at 1; CP 590-99. He appealed. CP 1103. The Court of Appeals affirmed. Appx. A, B.

E. ARGUMENT

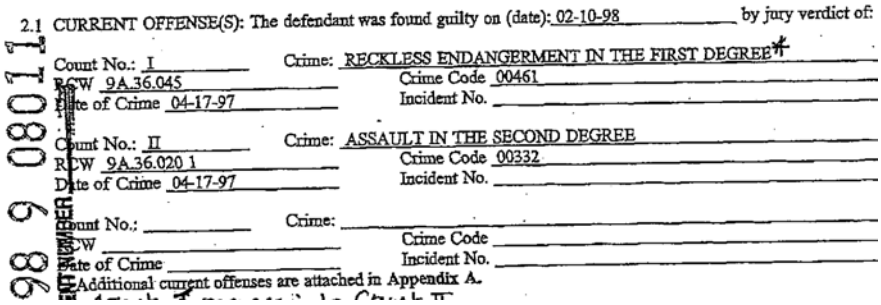
1. Jackson's prior judgment for assault is facially invalid.

a. Review is warranted under RAP 13.4(b)(1) where the 1998 judgment was plainly invalid under *Ammons* and its progeny. An appellate court reviews de novo a court's decision to consider a prior conviction as a most serious offense for persistent offender purposes. State v. Thiefault, 160 Wn.2d 409, 414, 158 P.3d 580 (2007). Below, Mr. Jackson challenged the inclusion of a prior conviction from 1998 in his criminal history, arguing that the conviction was facially invalid because it entered judgment for an offense, RCW 9A.36.020(1), that no longer existed at the time of the offense date set forth in the judgment, and it could therefore not be employed as a strike offense. CP 440-53; 12/9/16RP at 663-76. The State responded by agreeing that the judgment cited a non-existent crime, but contended that it could elaborate on the judgment with the old outside documents (the information and the jury instructions) and rehabilitate the document. 12/9/16RP at 663-65; CP 551-86, CP 600-634; CP 1121-30 (Post-trial Exhibits 1, 2, 3). The court concluded that the information and the jury instructions from the 1998 trial showed that a valid assault statute had originally been charged in the case, and that the jury had been instructed on the elements of that statute. 12/9/16RP at 677. The issue warrants review under RAP 13.4(b)(1), as it

conflicts with this Court's case law on facial invalidity under State v. Ammons, 105 Wn.2d 175, 187-88, 713 P.2d 719 (1986) and its progeny.

b. The State's sentencing document enters judgment on a non-existent statutory offense. A judgment is invalid on its face under RCW 10.73.090(1) where the trial court exceeded its statutory authority in entering the judgment or sentence. In re Pers. Restraint of Coats, 173 Wn.2d 123, 135, 267 P.3d 324 (2011); Ammons, at 187-88. The State need not affirmatively prove a prior offense was constitutionally obtained, but a judgment that is facially invalid may not be employed, and does not meet the State's sentencing burden. Ammons, at 195-88.

Here, on page 1 of the 1998-dated document submitted by the King County Prosecuting Attorney for Mr. Jackson's sentencing hearing, it is inscribed that Jackson was convicted for an offense committed on April 17, 1997 pursuant to "RCW 9A.36.020 1."


2.1 CURRENT OFFENSE(S): The defendant was found guilty on (date): 02-10-98 by jury verdict of:

Count No.: I Crime: RECKLESS ENDANGERMENT IN THE FIRST DEGREE*
RCW 9A.36.045 Crime Code 00461
Date of Crime 04-17-97 Incident No.

Count No.: II Crime: ASSAULT IN THE SECOND DEGREE
RCW 9A.36.020 1 Crime Code 00332
Date of Crime 04-17-97 Incident No.

Count No.: Crime:
RCW Crime Code
Date of Crime Incident No.

Additional current offenses are attached in Appendix A.

98 9 08017 1

CP 559 (page 1 of CP 559-67). However, in 1997, there was no such crime of second degree assault in Washington under "RCW 9A.36.020" or any subsection of any such statute. See former RCW 9A.36.020

(Repealed by Laws 1986, ch. 257, § 9, eff. July 1, 1988); see State v. Olmsted, 187 Wn. App. 1023 (Div. 2, 2015) (2015 WL 2085567), at p. 9 n. 12 and State v. Thrasher, 182 Wn. App. 1044 (Div. 1, 2014) (2014 WL 3843788), at p. 2 n. 2 (recognizing dates of repeal) (both unpublished, cited for informational purposes only pursuant to GR 14.1(a)).

Since 1988 and therefore during the period of commission of the alleged crime in 1997, RCW 9A.36.021 has defined second degree assault as occurring, inter alia, when the actor intentionally assaults another and inflicts harm, or assaults another with a deadly weapon. RCW 9A.36.021(1)(a), (c) (per Laws 1988 ch. 266 § 2 (effective July 1, 1988)) Mr. Jackson's 1998 judgment and sentence enters judgment on the then-repealed RCW 9A.36.020(1), under which a defendant could be guilty of second degree assault, for example, for knowingly inflicting harm without a weapon. Former RCW 9A.36.020(1), supra.

Because the 1998 judgment is facially invalid, Mr. Jackson's persistent offender sentence must be reversed and his case remanded to the trial court for resentencing within the standard range.

c. The prosecutor persuaded the sentencing court to adopt a rule that the elements listed in a trial court's 'to-convict' jury instruction are the measure of constitutional facial invalidity of a judgment. Below, the State expressly conceded that Mr. Jackson's 1998

judgment and sentence, which entered conviction on a repealed statutory offense, "appears on its face that there's some facial invalidity." 12/9/16RP at 666-67 (also conceding that there was "misstatement on the face sheet."). However, the prosecutor argued that the information and the presence of elements 'to-convict' jury instruction showed the elements of the crime convicted, and that the judgment's "face" could be ignored as a mere scrivener's error, and the court agreed. 12/9/16RP at 667-94.

However, a sentencing court may only impose a life without parole sentence on a persistent offender. RCW 9.94A.570. A persistent offender is a defendant convicted of a most serious offense and has two prior most serious offenses. RCW 9.94A.030(37)(a); RCW 9.94A.570. Convictions that are invalid on their face cannot form the basis for a prior "strike."

The issue is facial validity, thus the contention that the deficiency can be dismissed as a scrivener's error is per se untenable. First, the State is not required to affirmatively prove a prior conviction was constitutionally obtained before it can be used at sentencing. Ammons, 105 Wn.2d at 188. As a general rule, the defendant has no right to contest priors at a later sentencing where they are criminal history, because of the availability of other specific avenues of challenge. Id. at 188; In re Scott, 173 Wn. 2d 911, 915, 271 P.3d 218 (2012) ("errors must be addressed on direct review or in a timely personal restraint petition or not at all.'").

However, if a prior conviction is constitutionally "invalid on its face," it cannot be considered at any later sentencing, as a matter of Due Process. Ammons, 105 Wn.2d at 187-88; see, e.g., State v. Webb, 183 Wn. App. 242, 333 P.3d 470 (2014). As the Webb Court explained,

> "On its face" includes the judgment and sentence and documents signed as part of a plea bargain. State v. Thompson, 143 Wn. App. 861, 866–67, 181 P.3d 858 (2008). A conviction is facially invalid if constitutional invalidities are evident without further elaboration.

(Footnote omitted.) State v. Webb, 183 Wn. App. at 250; see State v. Phillips, 94 Wn. App. 313, 317, 972 P.2d 932 (1999) (plea documents can show invalidity if signed as part of the conviction).

Of course, the rule "without further elaboration," does not prevent looking to statutes' dates of enactment and repeal. See, e.g., In re Pers. Restraint of Hemenway, 147 Wn.2d 529, 532, 55 P.3d 615 (2002) (judgment and sentence facially invalid when defendant pleaded guilty and was sentenced under a statute that did not exist until two years after offense occurred); In re PRP of Thompson, 141 Wn.2d 712, 719, 10 P.3d 380 (2000); Webb, 183 Wn. App. at 250.

In Webb, the Court of Appeals agreed with Webb that his 1992 assault conviction - looking to the judgment document - was facially constitutionally invalid. Webb, 183 Wn. App. at 247, 250. The information had cited former RCW 9A.36.020(1)(b), an assault alternative

based on grievous bodily harm from the same statute, the provision of which went into effect in 1979 and expired in 1987. Webb, at 250. But the pivotal fact rendering the conviction facially invalid under the Ammons caveat was the face of the judgment document:

> This invalidity is clear from the face of the judgment. It states the date of the crime, April 21, 1992, but cites to and specifies the elements of a statute, former RCW 9A.36.020, repealed in 1987. LAWS OF 1986, ch. 257, § 9, § 12.

Webb, at 250.[1]

d. The constitutional facial invalidity of a judgment may not be rehabilitated by reference to the jury instructions, nor, contrary to the Court of Appeals, can it be rehabilitated by reference to a charging document. The Supreme Court has made clear that a seemingly valid judgment can be deemed invalid by reference to other documents that conclusively show the impossibility of a valid judgment, such as charging document with a date beyond the crime's statute of limitations, or one alleging a crime that did not exist.

> For example, a judgment for a crime charged after the statute of limitations has run is not valid on its face. [citing PRP of Stoudmire, 141 Wn.2d 342, 5 P.3d 1240 (2000)].. . . Similarly, a judgment for a crime that did not exist when charged is not valid on its face. [citing Thompson, at 717-19].. . . In both Stoudmire and Thompson, the error was not apparent without consulting the charging documents, which we did not hesitate to do.

[1] Contrary to the State's assertion in oral argument, Webb reasoned only in the alternative and in *dicta*, that the plea was "involuntary." Webb, at 250-51.

In re Scott, 173 Wn. 2d at 915-17. For the Court, therefore, consulting additional documents was (within certain limitations) permissible if doing so conclusively showed a valid judgment to be necessarily invalid.

But when a judgment's "face sheet" shows "facial invalidity" (to use the prosecutor's language) because it enters judgment on a non-existent crime, the conviction is invalid on its face, *without further elaboration*. A judgment and sentence is invalid on its face when, without further elaboration, it displays the constitutional error. See also In re Clark, 168 Wn.2d 581, 585-86, 230 P.3d 156 (2010).

The State asserted below that the *information* rendered Mr. Jackson's invalid judgment valid, but it is well-understood that no charging document alleging one crime can of itself authorize later entry of judgment on a different crime. See generally, State v. Recuenco, 163 Wn.2d 428, 434, 442, 180 P.3d 1276 (2008). For example, in Stoudmire, 141 Wn.2d at 353-54, the defendant could show that the offense was not charged within any possibly timely charging period in contrast to the statute of limitations, but no defendant would be permitted to claim a judgment's facial invalidity on ground that the information failed to list all the elements. The latter is an argument properly made in the trial court, or (with more difficulty) on appeal, but definitely not at a subsequent

sentencing hearing. See also In re Scott, supra, 173 Wn. 2d at 915; see generally, State v. Kjorsvik, 117 Wn.2d 93, 109-11, 812 P.2d 86 (1991).

Even more untenable was the assertion below that the jury instructions from the old case could be dredged up to contradict the prior conviction's facial invalidity. This cannot be done in a later sentencing, even where the assertion of the party proposing to do so is **in**validity:

> Thus, the general rule is that a judgment and sentence is not valid on its face if the trial judge actually exercised authority (statutory or otherwise) it did not have. Verdict forms, plea agreements, and charging documents may be consulted if they show that the court lacked authority and the judgment and sentence is not valid on its face.. . . We hold that charging documents and verdict forms, **but not the jury instructions**, may be consulted to determine whether a judgment and sentence is valid on its face.

(Footnote omitted.) In re Scott, at 915-17. For obvious reasons, no Court allows the jury instructions from a trial to be employed as a basis of determining the facial validity or invalidity of a judgment later entered. A defendant who contends that the jury instructions at trial failed to properly state 'all the essential elements' of the crime must raise that constitutional challenge on direct appeal from that conviction, or in a timely collateral attack. See State v. Brown, 147 Wn.2d 330, 340, 58 P.3d 889 (2002). Any other rule would turn later sentencing hearings into untimely appeals.

Mr. Jackson is entitled to re-sentencing. State v. Delgado, 148 Wn.2d 723, 63 P.3d 792 (2003) (where prior conviction was categorically not includable as "strike" offense, defendant is entitled to remand for

resentencing to a standard range term).

2. Mr. Jackson was entitled to a change of venue.

a. Review is warranted under RAP 13.4(b)(1) where the media coverage in King County, calling for sanction in order to punish the defendant and the system that released him early, required venue change under *Crudup*. Beginning the day of the accident, media covering the Bellevue and Seattle areas began reporting on the crash, including the names of both Ms. Hill and Mr. Jackson. The media dwelled at length on Mr. Jackson's criminal history and allegations of a domestic violence relationship between Ms. Hill and Mr. Jackson. Media reports continued, with local news articles on November 18, 2015 and November 22, 2015. CP 13-34 (Motion for Change of Venue).

Eventually, the media coverage became dominated by two highly prejudicial themes -- calls for justice and punishment by government officials, including Governor Jay Inslee, because of the defendant's past, his conduct, and in particular, because of blame, directed with anger, at the system that allowed Jackson to be mistakenly released early by the Department of Corrections. CP 13-34 (Motion for Change of Venue).

As the story unfolded about the miscalculated early release of some DOC prisoners from custody, with particular media attention to those who reoffended, Mr. Jackson became the first identified releasee.

Mr. Jackson's case was publicized nationally, but the bulk of the publicity was in King County. This publicity included statements by trial prosecutor Amy Freedheim, who would later prosecute Jackson. CP 15-16 (Motion for Change of Venue, at pp. 3-4).[2]

b. The *Crudup* factors required a change of venue under due process, in particular the involvement of government officials with the publicity. Due process requires that the accused a fair trial free from prejudicial publicity. Sheppard v. Maxwell, 384 U.S. 333, 362, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); U.S. Const. amend. XIV. In this case, the trial court abused its discretion because of the unique publicity, precluding any possibility of a fair jury trial. See State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The key factors were government involvement in the publicity, which was *uniquely* inflammatory:

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[2] Under Crudup the Court examines nine nonexclusive factors to determine whether the trial court abused its discretion in denying a motion to change venue:

> (1) [T]he inflammatory or noninflammatory nature of the publicity; (2) the degree to which the publicity was circulated throughout the community; (3) the length of time elapsed from the dissemination of the publicity to the date of trial; (4) the care exercised and the difficulty encountered in the selection of the jury; (5) the familiarity of prospective or trial jurors with the publicity and the resultant effect upon them; (6) the challenges exercised by the defendant in selecting the jury, both peremptory and for cause; (7) the connection of government officials with the release of publicity; (8) the severity of the charge; and (9) the size of the area from which the venire is drawn.

State v. Crudup, 11 Wn. App. 583, 587, 524 P.2d 479 (1974); see Appellant's Opening Brief. The trial motions cited herein, and the Appellant's Opening Brief, provided a detailed assessment of the Crudup factors, all of which arguments are relied on here. CP 13-34.

Washington officials called for Jackson to be punished as a means of sanctioning the administrative agency that negligently released him early.

Crudup Factor 1: The inflammatory nature of the publicity.

As counsel argued below, the publicity surrounding Mr. Jackson's case was extraordinarily because of the involvement of government officials. The Governor himself called for action and blame in response to the event. DOC secretary Pacholke weighed in in favor of the victim - who the defendant at trial would plausibly argue was the cause of the accident - painting her as innocent presumptively. Jackson was reported to be a felon with a dangerous past, and a violent temperament, who should have been in prison at the time of the incident. This destroyed any presumption of innocence, and called for action to rebuke and punish all those involved. The publicity was prejudicial against Jackson to the point that he could not have a fair trial within King County.

Crudup Factor 7: The connection of government officials with the release of publicity. The media reports included the Governor's comment on the erroneous release of Mr. Jackson, calling for conviction. See, e.g., http://www.kirotv.com/news/news/driver-flees-scene-fatal-crash-bellevue/npLq4/. Notably, in this case, of course, the aggravating factor of "rapid recidivism" would keep the early release in jurors' minds. CP 96. Officials sought conviction as a remedy, including by the

Governor's comment, "We must make sure that nothing like this ever happens again."

http://www.king5.com/story/news/local/2015/12/28/offender-early-release-fatal-crash/77980556/

As Mr. Jackson's counsel argued, because of the highly publicized nature of this case, most citizens of King County, would be well aware of the erroneous release of DOC inmates and the apparent wrongs that resulted from letting a bad person like Mr. Jackson out of prison. As addressed in Crudup Factor 4, this matter was not only extraordinarily highly publicized, but government officials were also greatly responsible for issuing much of the publicity setting blame and regret, and calling for retributive, and corrective action:

> **Offender accused in fatal DUI crash after mistaken early release**
> December 28, 2015
> http://www.king5.com/story/news/local/2015/12/28/offender-early-release-fatal-crash/77980556/
> Governor Jay Inslee released the following statement: "Today's news from DOC is absolutely gutwrenching and heart-breaking. I spoke with Lindsay Hill's family today and let them know that Washingtonians' hearts are with them during these very difficult days. There is nothing that can right this horrible wrong. We must make sure nothing like this happens again.''

This type of government comment and its pervasiveness was fatal to any hope of a fair trial. Both the Governor, and DOC secretary Dan Pacholke, and the trial prosecutor, publically commented on the tragedy, and had taken a firm stance on ensuring that this incident would not happen again.

http://komonews.com/news/local/doc-prisoner-mistakenly-released-early-went-on-to-kill-woman-in-DUI-crash. Yet government officials made no comments regarding a desire to see a fair trial. These officials urged any jury to find Mr. Jackson guilty, to cure multiple errors and ills. Due Process required that venue be taken out of King County.

3. The evidence of vehicular homicide by DUI was insufficient.

The evidence was insufficient to prove DUI. In his *pro se* Statement of Additional Grounds (SAG), Mr. Jackson argued that the evidence of vehicular homicide was insufficient, an argument as to which appellant strongly asserts the trial court had inadequate basis for conviction. SAG, at pp. 1-3. This Court should review the decision rejecting Jackson's sufficiency argument, under RAP 13.4(b)(3). The evidence must be sufficient to convict. U.S. Const. amend. XIV.

In this bench trial where the trial court concluded that the defendant was guilty under, inter alia, the driving while intoxicated alternative of RCW 46.61.502(1) (see oral ruling 8/2/16RP at 868-72), the Court of Appeals determined that the toxicologist's testimony provided sufficient evidence to support the verdict. Decision, at pp. 11-12. But consistent with Jackson's motion to dismiss the DUI alternative, 7/21/16RP at 765-70; *see also* SAG, at p. 2, the evidence affirmatively showed that the toxicologist could not state Jackson was under the

influence at the time of the crash. See 7/19/16RP at 569. Toxicologist Nguyen (1) first admitted that his assertion was opinion, and (2) second, agreed that he could not conclusively determine intoxication at the relevant time, which was ten hours after the incident:

> Q. So that's not conclusive?
> A. It is not conclusive, that's not conclusive a hundred percent you were impaired.
> Q. Thank you.

7/19/16RP at 569. This evidence fails to show impairment; contrary to the Court of Appeals decision, and the case of State v. Hill does not provide support for affirmance based on sufficiency. Decision, at p. 12 (citing State v. Hill, 48 Wn. App. 344, 252-53, 739 P.2d 707 (1987) (toxicologist testimony was adequate to show impairment at the time of accident three hours prior)). Because the evidence was insufficient, Mr. Jackson's conviction violated his Due Process rights. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amend. XIV.

4. Mr. Jackson was not advised by police of his Due Process right to obtain independent tests of his blood.

a. Review is warranted under RAP 13.4(b)(3). Mr. Jackson contended below that he had a right to be advised by the police of a right to additional blood tests under Due Process. CP 90-91. The prosecution argued that there was no independent constitutional right to advisement.

7/7/16RP at 228, 264-65. The trial court held that the matter did not present a "constitutional issue." 7/7/16RP at 228, 264-70. Mr. Jackson argues the issue does present one of Due Process, and that review is warranted under RAP 13.4(b)(3).

b. Mr. Jackson's right to Due Process was violated. The Fourteenth Amendment provides a criminal defendant with a due process right to a fair trial, which includes the right to gather exculpatory evidence and present a defense. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)); U.S. Const. amend. XIV. A person accused of driving while under the influence is entitled to a reasonable opportunity to gather evidence in his defense. State v. Morales, 173 Wn.2d 560, 576, 269 P.3d 263 (2012).

Washington courts have not held that the formerly-existing statutory right to be apprised of independent blood testing is a Due Process right, but some have suggested this is the case. Morales, at 576 (citing State v. McNichols, 128 Wn.2d 242, 250, 906 P.2d 329 (1995); cf. State v. Carranza, 24 Wn. App. 311, 316, 600 P.2d 701 (1979) (no constitutional right to be advised); see also State v. Bartels, 112 Wn.2d 882, 886, 774 P.2d 1183 (1989); accord, State v. Canaday, 90 Wn.2d 808, 817, 585 P.2d 1185 (1978). The recent case of State v. Sosa, 198 Wn. App. 176, 183,

393 P.3d 796 (2017), review denied, 398 P.3d 1137 (2017), summarily rejected appellant's due process argument, reasoning that the blood samples can simply be retested later by the defendant, as part of pre-trial discovery under WAC 448-14-020. But timing is crucial, and this is why the right to discovery during the later trial process – many months away, like in Mr. Jackson's case – is vital if a functional right to collect evidence and present a defense is to be protected under Chambers.

This is so given that the botched taking or mishandling of sampled blood can result in inaccurate results. Later testing is inadequate, because both alcohol and marijuana markers can *increase* in blood over time. See, e.g., State v. Smith, 478 S.W. 3d 551, 554 (Mo. App. 2015) (defendant prejudiced by refusal of instruction that would allow jury to credit expert testimony that mishandled blood sample can result in fermentation and conversion of blood glucose to alcohol); see also Abstract: Biochem Med (Zagreb), February, 2015 in NIH - US National Library of Medicine, Comparison of Blood Ethanol Stabilities in Different Storage Periods, (ethanol concentration can increase during storage of blood due to microbial conversion of glucose to ethanol through fermentation), at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4401314/; Abstract: Clinical Chemistry, July 2013 in NIH - US N.L.M., In Vitro Stability of Free and Glucuronidated Cannabinoids in Blood and Plasma Following

Controlled Smoked Cannabis (detailing increases and decreases in THC in blood samples during varying conditions of sample storage over time), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3844293/.

This Court should hold that Mr. Jackson's right to due process was violated when he was not advised, by the police, of a right to independent testing, and should reverse and dismiss the vehicular homicide charge.

5. Mr. Jackson's life sentence violated his federal Sixth Amendment jury trial rights.

a. Any fact which increases the penalty for a crime must be found by a jury beyond a reasonable doubt. The Sixth and Fourteenth Amendments guarantee the right to a trial by a jury. U.S. Const. amends. VI; XIV; Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); see Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); see also Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed 2d 556 (2002).

b. The U.S. Supreme Court has retreated from the *Almendarez-Torres* exception allowing judicial factfinding where recidivism is concerned. Mr. Jackson was subject to a sentence that was not merely increased, but that changed from one type (a determinate period of time, with the possibility of early release) to another type (a life term, with no possibility of release, based on status as a Persistent Offender).

Washington's Persistent Offender statute creates a status based on prior offenses of a certain class and then sets a non-discretionary "minimum" of life without possibility of parole, effectively adding new elements that creates a unique offense, thus requiring a jury trial. See Alleyne v. United States, __ U.S. __, 133 S.Ct. 2151, 2155, 186 L.Ed.2d 314 (2013); see Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). Therefore, under the logic of Apprendi and its progeny, Mr. Jackson was entitled to a jury determination of his Persistent Offender status, with proof beyond a reasonable doubt.

F. CONCLUSION

Based on the foregoing, this Court should accept review.

Respectfully submitted this 10th day of July, 2018.

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

STATE OF WASHINGTON, Respondent, v. ROBERT TERRANCE JACKSON, JR., Appellant.	No. 76206-1-I UNPUBLISHED OPINION FILED: May 7, 2018

VERELLEN, J. — Following a crash that killed Robert Jackson's passenger, Jackson's blood was drawn to test for alcohol and drugs. Jackson's constitutional right to investigate his case does not require advisement about the right to independent blood testing under due process or equal protection.

There was significant media coverage following Jackson's arrest. Because Jackson does not show a probability of prejudice from pretrial publicity, the trial court did not abuse its discretion when it denied Jackson's motion for a change of venue from King County to Snohomish County.

The trial court determined Jackson was a persistent offender based on two prior convictions for "most serious offenses." The judgment and sentence for one of the prior convictions cites to the wrong statute. Because the charging documents from the prior conviction showed the State properly charged and

convicted Jackson under the correct statute, the trial court did not err in considering the prior judgment.

The trial court determined Jackson was a persistent offender. He asserts a jury should have decided the fact of prior convictions. Under the Persistent Offender Accountability Act,[1] a judge may find the fact of a prior conviction. We conclude the trial court did not violate Jackson's Sixth Amendment right to a jury trial.

Therefore, we affirm.

FACTS

On November 12, 2015, Jackson was driving through a 25 mile per hour speed zone at a high rate of speed when he lost control of his vehicle. He crashed into a utility box. Jackson's passenger, Lindsay Hill, died after being ejected from the vehicle.

Jackson was transported to the hospital and his blood was drawn for testing. The test showed Jackson had alcohol and THC[2] in his blood. The State charged Jackson with vehicular homicide, felony hit and run, and unlawful imprisonment.

Before trial, Jackson moved for a change of venue to Snohomish County and to suppress the blood test results. The court denied both requests. Moving forward, Jackson chose to represent himself and waived his right to a jury. During

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[1] RCW 9.94A.570.

[2] Tetrahydrocannabinol (marijuana).

trial, a forensic scientist testified that based on the level of alcohol in Jackson's blood at the time of the draw, his blood alcohol level was likely between .13 and .22 at the time of the crash.

Following a bench trial, the court found Jackson guilty of vehicular homicide and felony hit and run. Because he had two prior convictions for most serious offenses, the court found Jackson was a persistent offender and sentenced him to life imprisonment without parole.

Jackson appeals.

ANALYSIS

I. Blood Test

Jackson contends the trial court erred in denying his motion to suppress the results of his blood test. Jackson argues admission of the results violated his rights to due process and equal protection because the State did not advise him of the right to independent testing.

Prior to 2013, RCW 46.20.308 provided that "[a]ny person who operates a motor vehicle within this state is deemed to have given consent . . . to a test or tests of his or her breath or blood."[3] The statute required law enforcement officers to inform individuals subjected to breath or blood tests of their right to independent blood testing.[4] Following a United States Supreme Court decision, the Washington legislature removed any reference to blood from the informed consent

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[3] Former RCW 46.20.308(1) (2012).

[4] Former RCW 46.20.308(2) (2012)

statute.[5] The statute in effect when Jackson was arrested in 2015 only required advisement of the right to independent testing for a breathalyzer.[6]

Jackson argues the due process right to collect evidence and present a defense includes the right to advisement of the right to independent blood testing. Although Jackson suggests case law is consistent with this argument, he cites exclusively to cases decided before the 2013 amendment.

Following the 2013 amendment, in State v. Sosa, Division Three of this court considered whether criminal defendants had a separate constitutional right to advisement about independent blood testing.[7] The court determined "[t]he fact that a defendant has a constitutional right to investigate his or her case and develop evidence does not provide an independent basis for requiring an advisement about independent blood testing. . . .There are no due process problems with eliminating this requirement."[8]

Jackson also argues he has a right under equal protection to advisement about independent blood testing. He contends he is similarly situated to individuals whose breath is tested and no rational basis supports different

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[5] State v. Sosa, 198 Wn. App. 176, 181-82, 393 P.3d 796 (2017); see Missouri v. McNeely, 569 U.S. 141, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013) ("We hold that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.").

[6] Former RCW 46.20.308(1) (2013).

[7] 198 Wn. App. 176, 183, 393 P.3d 796 (2017).

[8] Id.

treatment. But he provides no authority applying equal protection in a similar situation. In Sosa, the court concluded, the defendant could not "show he is similarly situated to individuals whose breath is tested for alcohol concentration, as required for an equal protection challenge. Blood and breath testing are different for a variety of reasons. . . . These differences warrant different statutory treatment."[9] Even if blood samples degrade over time, as argued by Jackson, he had the opportunity to retest the blood sample soon after his arrest and appointment of counsel.

We follow Sosa and conclude there is no due process or equal protection right to advisement about independent blood testing. For this reason, the trial court did not err in denying Jackson's motion to suppress the blood test results.

II. Change of Venue

Jackson argues the trial court abused its discretion in denying his request for a change of venue to Snohomish County.

A trial court's decision to deny a motion for a change of venue is reviewed for abuse of discretion.[10] We consider nine factors to determine whether the court abused its discretion:

> "(1) the inflammatory or noninflammatory nature of the publicity; (2) the degree to which the publicity was circulated throughout the community; (3) the length of time elapsed from the dissemination of the publicity to the date of trial; (4) the care exercised and the difficulty encountered in the selection of the jury; (5) the familiarity of

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[9] Id. at 184.

[10] State v. Jackson, 150 Wn.2d 251, 269, 76 P.3d 217 (2003).

> prospective or trial jurors with the publicity and the resultant effect upon them; (6) the challenges exercised by the defendant in selecting the jury, both peremptory and for cause; (7) the connection of government officials with the release of publicity; (8) the severity of the charge; and (9) the size of the area from which the venire is drawn."[11]

"A motion for change of venue should be granted when necessary to effectuate a defendant's due process guaranty of a fair and impartial trial but a defendant must show a probability of unfairness or prejudice from pretrial publicity."[12]

Jackson was one of 3,200 individuals mistakenly released early due to a Department of Corrections error. Jackson should have been in custody when the crash occurred in November 2015. As a result, there was significant media coverage following Jackson's arrest.

Under the first factor, although Jackson's arrest did receive media attention, the publicity primarily focused on the error by Department of Corrections in releasing him early. Although the coverage emphasized the tragedy of Hill's death, Jackson's prior convictions, and his status as a "felon," the information was factual.

As to the second factor, in the days after the accident, the coverage was confined to local news outlets. Although most of the articles came out of King County, Jackson admits these reports received statewide coverage, which would

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[11] Id. at 270 (quoting State v. Crudup, 11 Wn. App. 583, 587, 524 P.2d 479 (1974)).

[12] Hoffman, 116 Wn.2d 51, 71, 804 P.2d 577 (1991).

include Snohomish County. Over a month later, national and international news organizations published articles about the crash and Jackson's arrest.

Neither the first nor the second factor shows a probability of prejudice from pretrial publicity. At a minimum, Jackson fails to show, under either factor, that a change of venue to Snohomish County would have mitigated any alleged prejudice.

Similarly, the third factor does not support a change of venue because the coverage appears to be limited to the two months following the crash. There is no evidence in the record of specific incidents of continued publicity between December 2015 and the hearing on the motion for change of venue in February 2016. Additionally, the trial court acknowledged that Jackson could renew the motion if there was additional publicity between the hearing and trial. Jackson did not renew his motion, and he failed to present evidence of continued publicity between February 2016 and the bench trial in July 2016.

The fourth, fifth, and sixth factors relate to jury selection and are not relevant in this case because Jackson waived his right to a jury trial.

Under the seventh factor, both the governor and the Department of Corrections secretary publicly commented on Hill's death. The comments expressed regret over Jackson's early release. The record does not support Jackson's argument that the officials urged conviction or expressed an endorsement of the State's case against Jackson. Jackson does not establish a probability of prejudice under this factor.

As to the eighth factor, the State charged Jackson with vehicular homicide, felony hit and run, and unlawful imprisonment. The State concedes these are serious charges, but courts have denied motions for change of venue involving charges of similar severity.[13]

And finally, the ninth factor does not support a change of venue because King County has a large population from which a venire could have been drawn.

We conclude the trial court did not abuse its discretion when it denied Jackson's motion for a change of venue.

III. Persistent Offender

Jackson argues he is not a persistent offender because his prior judgment for second degree assault is facially invalid. Jackson contends the trial court erred in denying his motion to exclude the prior judgment.

A "persistent offender" is an individual who has been convicted of any felony considered a "most serious offense" and has previously "been convicted . . . on at least two separate occasions . . . of felonies that under the laws of this state would be considered most serious offenses."[14] Under the Persistent Offender Accountability Act, "all adult offenders convicted of three 'most serious offenses' are sentenced to life in prison without the possibility of release."[15]

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[13] See Jackson, 150 Wn.2d at 273 (first degree murder); Crudup, 11 Wn. App. at 559 (second degree murder); Hoffman, 116 Wn.2d at 73 (first degree aggravated murder and first degree assault).

[14] RCW 9.94A.030(38)(a)(i), (ii).

[15] State v. Witherspoon, 180 Wn.2d 875, 888, 329 P.3d 888 (2014).

"[A] prior conviction that is unconstitutionally invalid on its face may not be considered at sentencing."[16] A conviction is invalid on its face when it evidences infirmities of a constitutional magnitude "without further elaboration."[17] In the context of consideration of a prior conviction at sentencing for a subsequent crime, the court may consider statutory history and charging documents when determining validity of the prior judgment and sentence.[18]

Here, the trial court determined Jackson was a persistent offender based on two prior convictions for "most serious offenses," a 1998 conviction for second degree assault, and a 2011 conviction for second degree robbery. The judgment and sentence for the 1998 conviction improperly cites to repealed RCW 9A.36.020. At the time Jackson committed the offense, second degree assault was defined in RCW 9A.36.021.

During sentencing in the current case, the State presented the jury instructions and charging documents from the 1998 case to show that Jackson was properly charged and convicted under RCW 9A.36.021. In the context of consideration of a prior conviction at sentencing for a subsequent crime, no case has relied on jury instructions to determine the validity of the prior judgment and

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[16] State v. Webb, 183 Wn. App. 242, 250, 333 P.3d 470 (2014).

[17] State v. Ammons, 105 Wn.2d 175, 188, 713 P.2d 719 (1986).

[18] Webb, 183 Wn. App. 250-51.

sentence.[19] Even without considering the jury instructions, the charging documents were sufficient to show Jackson's 1998 prior conviction was under RCW 9A.36.021.

We conclude the trial court did not err in denying Jackson's motion to exclude his prior judgment. The court properly sentenced Jackson as a persistent offender.

IV. Right to a Jury Trial

Jackson contends the court violated his Sixth Amendment right to a jury trial when it determined he was a persistent offender.

In Apprendi v. New Jersey, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increased the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[20] Consistent with Apprendi, our Supreme Court has "held that for the purposes of POAA, a judge may find the fact of a prior conviction by a preponderance of the evidence."[21]

Jackson does not present any compelling argument challenging this existing precedent. We conclude the court did not violate Jackson's Sixth Amendment right to a jury trial.

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[19] We do not rely upon the dicta in cases cited by the State for the proposition that the court may also consider jury instructions when determining facial validity.

[20] 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

[21] Witherspoon, 180 Wn.2d at 892.

V. Statement of Additional Grounds

In his statement of additional grounds, Jackson asks this court to reverse and dismiss his conviction for vehicular homicide. Jackson appears to argue there was insufficient evidence that he was "under the influence of or affected by intoxicating liquor or any drug."[22]

"'The sufficiency of the evidence is a question of constitutional law that we review de novo.'"[23] To determine whether there is sufficient evidence to sustain a conviction, we review the evidence in the light most favorable to the State and ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[24] "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom."[25]

RCW 46.61.520 provides:

> (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; or
>
> (b) In a reckless manner; or
>
> (c) With disregard for the safety of others.

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[22] Former RCW 46.61.502(1)(c) (2011).

[23] State v. Hummel, 196 Wn. App. 329, 352, 383 P.3d 592 (2016) (quoting State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016)).

[24] State v. Elmi, 166 Wn.2d 209, 214, 207 P.3d 439 (2009).

[25] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Here, Jackson's blood was drawn 10 hours after the accident. David Nguyen, a forensic scientist at the Washington State Patrol Toxicology Laboratory, testified that based on the level of alcohol in Jackson's blood at the time of the draw, his blood alcohol level was likely between .13 and .22 at the time of the crash.

Similarly, in State v. Hill, the State presented evidence that Hill had a .18 percent blood alcohol level over three hours after the accident, and a toxicologist testified that she had a .23 percent at the time of accident.[26] Division Three of this court held the blood test results and toxicologist's testimony was sufficient evidence that Hill was intoxicated.[27]

Viewed in the light most favorable to the State, the fact finder could reasonably infer from Nguyen's testimony and the blood test results that Jackson was under the influence of alcohol at the time of the crash. We conclude that the State presented sufficient evidence to support Jackson's vehicular homicide conviction.

Next, Jackson asks this court to reverse and dismiss his conviction for felony hit and run because he was physically incapable of complying with the statute.

Under RCW 46.52.020(1), "A driver of any vehicle involved in an accident resulting in the injury to or death of any person . . . shall immediately stop such

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[26] 48 Wn. App. 344, 352, 739 P.2d 707 (1987).

[27] Id. at 352-53.

vehicle at the scene of such accident . . . and in every event remain at, the scene of such accident." Jackson was convicted under RCW 46.52.020(4), which provides that any driver failing to stop is guilty of felony hit and run. But RCW 46.52.020(4)(d) states, "This subsection shall not apply to any person injured or incapacitated by such accident to the extent of being physically incapable of complying with this section." Jackson has the burden of proving this statutory affirmative defense.[28]

Jackson elicited testimony from Dr. James Boehl, the treating emergency room doctor, that Jackson suffered a head injury as a result of the crash and that people "with head injuries . . . do and say things they normally would not do had they not suffered a severe blunt trauma to the head."[29] Malikai Hill, the victim's son, testified that shortly after the accident, Jackson looked like he had a concussion. Evidence that people with concussions may have difficulty functioning did not compel the trial court, in this bench trial, to find that Jackson's injuries rendered him physically incapable of staying at the scene of the accident.

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[28] See State v. W.R., Jr., 181 Wn.2d 757, 762, 336 P.3d 1134 (2014) ("The legislature does not violate a defendant's due process rights when it allocates to the defendant the burden of proving an affirmative defense when the defense merely 'excuse[s] conduct that would otherwise be punishable.'") (alteration in original) (internal quotation marks omitted) (quoting Smith v. United States, 586 U.S. 106, 110, 133 S. Ct. 714, 184 L. Ed. 2d 570 (2013)).

[29] RP (July 14, 2016) at 168.

Stated another way, the possibility of a concussion and possibility of impairment do not establish Jackson was physically incapable of complying with the hit and run statute.

Therefore, we affirm.

WE CONCUR:

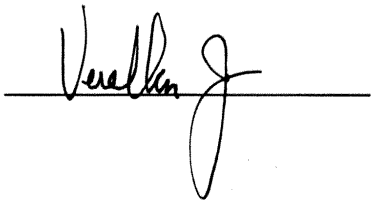
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. ROBERT TERRANCE JACKSON, JR., Appellant.	)	No. 76206-1-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant filed a motion for reconsideration of the court's May 7, 2018 opinion. Following consideration of the motion, the panel has determined the motion for reconsideration should be denied. Now, therefore, it is hereby

ORDERED that the appellant's motion for reconsideration is denied.

FOR THE PANEL:



DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 76206-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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MARIA ANA ARRANZA RILEY, Legal Assistant Date: July 10, 2018
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

July 10, 2018 - 4:12 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	76206-1
Appellate Court Case Title:	State of Washington, Respondent vs. Robert Terrance Jackson Jr., Appellant
Superior Court Case Number:	15-1-05809-2

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