

65527-2

65527-2

No. 65527-2-I

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

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STATE OF WASHINGTON,

Respondent,

v.

HECTOR SERANO SALINAS,

Appellant.

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COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2011 JUN 29 PM 4:48

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

The Honorable Charles R. Snyder

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BRIEF OF APPELLANT

---

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to suppress evidence obtained in violation of the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution.

2. In violation of Salinas' right to due process of law secured by the Fourteenth Amendment and article I, section 3, the trial court erred in admitting testimony concerning a dog "track."

3. Trial counsel denied Salinas the effective assistance of counsel to which he was entitled under the Sixth Amendment by failing to request an instruction cautioning the jury on the unreliability of dog track evidence.

4. In violation of the Fourteenth Amendment and article I, section 3 guaranty of due process of law, the trial court erred in refusing to suppress the impermissibly suggestive in-court identification of Salinas by the complainant.

5. In violation of the right to be free from double jeopardy secured by the Fifth Amendment and article I, section 9, the trial court erred in imposing sentence on count four of the information.

6. The trial court erred in failing to find the three counts of rape were the same criminal conduct.

7. In violation of Salinas' right to due process and equal protection secured by the Fourteenth Amendment and article I, section 3, and right to a jury trial secured by the Sixth Amendment and article I, section 22, the trial court erred finding by a preponderance of the evidence that Salinas had suffered two qualifying prior offenses and imposing sentence of life without the possibility of parole.

8. In violation of the Fourteenth Amendment and article I, section 3 guarantee of due process of law, the State presented insufficient evidence to prove Salinas committed robbery in the second degree in Chelan County, a qualifying offense under the Persistent Offender Accountability Act.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. As a function of article I, section 7's requirement that all invasions of privacy be done with authority of law, the Supreme Court has decreed a search incident to an arrest may not precede the arrest itself. Salinas was seized, his wallet taken from his pocket and searched. Only after police discovered a warrant after searching the identity information located in the wallet was Salinas arrested. Must the evidence acquired as a result of the unconstitutional search be suppressed? (Assignment of Error 1)

2. Following a custodial arrest, police may inventory personal items, but an inventory search may not serve as a blind for a general exploratory search. Salinas's clothes were seized. They were then sent to the Washington State Patrol Crime Laboratory ("WSPCL") and searched for forensic and DNA evidence. Did this search exceed the lawful scope of an inventory search? (Assignment of Error 1)

3. A search incident to arrest is circumscribed by the justifications that brought it into existence: officer safety and preservation of evidence of the crime of arrest that might be concealed or destroyed. Where Salinas was arrested on a felony probation warrant, were law enforcement unjustified in seizing and transporting his clothes for analysis to the WSPCL? (Assignment of Error 1)

4. Even assuming without conceding that police could lawfully seize Salinas' clothes in order to prevent the destruction of any evidence that might be upon them, were they nonetheless required to obtain a warrant before the evidence could be forensically analyzed by the WSPCL? (Assignment of Error 1)

5. Alternatively, must the evidence be suppressed because the police did not comply with RCW 10.31.030's unequivocal

mandate that a person be advised of his right to post bail when he is arrested on a warrant? (Assignment of Error 1)

6. The Fourteenth Amendment guarantee of due process requires that the evidence used to convict a criminal defendant be reliable. Where the State failed to show that a dog that allegedly “tracked” to Salinas (1) had a proven record of successful tracks, (2) followed the track of the guilty party, or (3) tracked within sufficient time to ensure a fresh track, did the trial court err in finding the dog track evidence admissible? (Assignment of Error 2)

7. An accused person is guaranteed the right to the effective assistance of counsel by the Sixth Amendment. Because of the uncertain reliability of dog track evidence, Washington courts require the jury be instructed to view the track with caution where such an instruction is requested. Where identity was the sole contested issue at trial, and the State relied heavily on the dog track evidence to corroborate its other evidence allegedly connecting Salinas to the crime, did trial counsel deny Salinas the effective assistance of counsel to which he was constitutionally entitled by failing to request a cautionary instruction regarding the evidence? (Assignment of Error 3)

8. Principles of due process require exclusion of an identification where suggestive procedures give rise to an irreparable likelihood of misidentification. The complainant did not identify Salinas as her assailant when shown a montage containing his photograph, and told investigating officers that she did not believe she would recognize her assailant except by his clothing. Nevertheless, nearly two years after the incident, the complainant was permitted to identify Salinas as her assailant in open court. Where the circumstances plainly suggested to the complainant that the State believed Salinas was guilty, and the complainant's certainty was likely to strongly influence the jury's assessment of Salinas' culpability, should the identification have been excluded? (Assignment of Error 4)

9. The Fifth Amendment's protection against double jeopardy requires that when two convictions merge, the lesser conviction must be vacated from the judgment and sentence. The trial court concluded that Salinas' conviction for kidnapping merged into his rape convictions, but nevertheless imposed sentence on all four criminal counts. Does the double jeopardy clause require Salinas' conviction for kidnapping to be vacated from the judgment and sentence? (Assignment of Error 5)

10. Under the SRA, crimes must be treated as the “same criminal conduct” where they involve the same objective intent, were committed at the same time and place, and involve the same victim. Salinas was convicted of three counts of rape based on oral, anal, and vaginal penetration of the same victim at her campsite during a continuous assault. Should the three crimes have been treated as the same criminal conduct? (Assignment of Error 6)

11. The Sixth and Fourteenth Amendment rights to a jury trial and due process of law guarantee an accused person the right to a jury determination beyond a reasonable doubt of any fact necessary to elevate the punishment for a crime above the otherwise-available statutory maximum. Were Salinas’ Sixth and Fourteenth Amendment rights violated when a judge, not a jury, found by a preponderance of the evidence that he had suffered two qualifying offenses under the Persistent Offender Accountability Act, elevating his punishment from the otherwise-available statutory maximum to life without the possibility of parole? (Assignment of Error 8)

12. The Equal Protection clauses of the Fourteenth Amendment to the United States Constitution and article I, section

12 of the Washington constitution require that similarly situated people be treated the same with regard to the legitimate purpose of the law. The Legislature has enacted statutes authorizing greater penalties for specified offenses based on recidivism. In certain instances, however, the Legislature has labeled the prior convictions 'elements,' requiring they be proven to a jury beyond a reasonable doubt, and in other instances has termed them 'aggravators' or 'sentencing factors,' permitting a judge to find the prior convictions by a preponderance of the evidence. Where no rational basis exists for treating similarly-situated recidivist criminals differently, and the effect of the classification is to deny some recidivists the Sixth and Fourteenth Amendment protections of a jury trial and proof beyond a reasonable doubt, does the arbitrary classification violate equal protection? (Assignment of Error 7)

13. Principles of due process impose the burden to prove criminal history upon the State. Should this Court conclude that the State presented insufficient evidence to prove Salinas' identity with regard to a 1994 alleged conviction from Chelan County?  
(Assignment of Error 8)

### C. STATEMENT OF THE CASE

In June 2008, Deborah Pellett was homeless and had been living on the streets for several months. Trial RP 36. She had erected a makeshift shelter for herself out of tarp on Dupont Street in Bellingham, near Maritime Heritage Park, and slept there in her sleeping bag. Trial RP 37, 44.

On the night of June 30, 2008, after she had been sleeping for several hours, Pellett was awoken by a smell of body odor, and saw a man sitting quite close to her, next to her backpack. Trial RP 44-46. The man reached over and kissed her, and then showed her a billfold that contained a \$20 bill and a \$10 bill. Trial RP 49-50. Pellett got up, and the man began to hit her in the face with a closed fist. Trial RP 50-51. Pellett could see that he had a knife in his hand. Id.

The man hit her multiple times. Trial RP 52. Then he shoved her over and pulled off her sneakers and sweatpants. Trial RP 53. Pellett was wearing Depends undergarments and the man pulled these off too. Trial RP 54-55. He then forced her to perform oral sex on him and penetrated her anally. Trial RP 56-59.

Due to cervical cancer, Pellett had a radiation implant and severe scarring in her vagina. Trial RP 60. Pellett's vagina was

surgically closed as a result of the radiation implant. Trial RP 61.

The man attempted to fully penetrate Pellett's vagina but was unsuccessful. Trial RP 62.

The man then pulled Pellett off of her sleeping bag and dragged her down some concrete steps into Maritime Heritage Park. Trial RP 67. He forced her to walk across the Whatcom Creek wooden bridge, and made her lie down on his jacket, under some trees. Trial RP 68-69. He pulled her shirt up and licked the side of her breast. Trial RP 69. He then wiped off his genitals with some tissue. Id. The man put the knife away and asked Pellett if she needed money. Trial RP 70. She nodded yes, and he handed her \$10. Id.

Pellett found her way back to her campsite, where she retrieved her sleeping bag, clothing, and sneakers. Trial RP 73, 77. She flagged down a police car and told police that she had been raped. Trial RP 78, 183. She described her attacker as dark-skinned, possibly Hispanic, with facial hair, a black stocking cap, and wearing what may have been a leather jacket. Trial RP 87, 193. Pellett was taken to the hospital where she was treated for her injuries. Trial RP 81.

Approximately half an hour after Pellett flagged down the police, Bellingham police officer Jeremy Woodward, a K-9 handler, arrived with his dog, Justice, to attempt a K-9 track. Trial RP 341, 403. Justice led police in a different direction from the path described by Pellett. Trial RP 403-10. In the park, under a bench, Justice came across some tissue that appeared to have blood on it. Trial RP 407. Justice kept tracking. Id.

During the track, the officers encountered a transient woman and man. Trial RP 344, 410. They provided information regarding the direction of travel of a man they had seen earlier and Justice continued to track in that direction. Trial RP 413. Eventually he began to “air scent” and act animated, and he led the officers to a Hispanic man, later identified as appellant Hector Salinas, sleeping in a sleeping bag. 3/10/08 RP 111; Trial RP 345, 422-23.

Woodward identified himself as police and told Salinas to show his hands. Trial RP 424. According to Woodward, Salinas stood and, with the sleeping bag wrapped around his head and face, began to walk away. Trial RP 425. Woodward continued to order Salinas to stop, and eventually Salinas took off running. Trial RP 346, 426. Salinas claimed, however, that he fled when he heard voices yelling, and did not realize that he was being pursued

by police. RP 1218. He fell on some rocks by the beach and police placed him into custody. RP 1218, 1222. While he was being searched, Justice bit him. RP 1222.

Salinas was patted down and a wallet seized from his right pants pocket and searched prior to his arrest. 3/8/10 RP 115. Police determined that Salinas had a felony warrant out of Wenatchee and he was placed in custody on the warrant. 3/8/10 RP 113-15.

When Pellett was shown a photographic montage containing Salinas' photo, she did not identify Salinas as her attacker. Trial RP 110. She started to cry and told the detective who showed her the montage, "It doesn't look like any of them." Trial RP 1011. She also told the detective she had never seen her assailant before. Trial RP 1062. She said she would not be able to identify her assailant except by his clothing. Trial RP 104. The description of Salinas that Pellett gave to the detective also was inconsistent with Salinas' appearance when he was arrested. Trial RP 108-13.

The DNA analysis that was conducted by the WSPCL suffered from several deficiencies. For example, the case analyst calculated a match even though one locus did not correspond to the reference sample obtained from Salinas. Trial RP 1090. The

test sample was also of marginal utility. The WSPCL analyst believed he identified between one and three individual spermatozoa. Trial RP 1092. Salinas' DNA expert explained that normal ejaculate should contain 500 million, and that it was possible the analyst had mistaken yeast cells for sperm. Trial RP 1092-93. The weak sample also affected the accuracy of the analysis. Trial RP 1093. Additionally, there was troubling evidence of contamination of the sample. Trial RP 1100-06.

Salinas was nevertheless charged and convicted of three counts of rape in the first degree and one count of kidnapping in the first degree. CP 40-41; 127-29. Based on two prior qualifying offenses, Salinas was sentenced to life imprisonment without the possibility of release. CP 9; 6/8/10 RP 48. Salinas appeals.

#### D. ARGUMENT

1. THE POLICE LACKED AUTHORITY UNDER THE ARTICLE I, SECTION 7 AND THE FOURTH AMENDMENT TO SEARCH SALINAS' WALLET, TO SEIZE AND CONDUCT A SEARCH OF HIS CLOTHING, AND TO HOLD HIM IN CUSTODY WITHOUT ADVISING HIM OF HIS RIGHT TO BAIL ON THE ARREST WARRANT.

Under article I, section 7 of the Washington Constitution, “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. art. I, § 7. This

language has been construed as creating “an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions. . . .” State v. Buelna Valdez, 167 Wn.2d 761, 772, 224 P.3d 751 (2009) (quoting State v. Ringer, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983)). The Fourth Amendment likewise prohibits unreasonable searches and seizures without a warrant. U.S. Const. amend. IV.

Thus, warrantless searches are presumptively invalid unless one of the narrow exceptions to the warrant requirement applies. Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999); U.S. Const. amend. IV; Const. art. I, § 7. “Exceptions to the warrant requirement are to be ‘jealously and carefully drawn.’” State v. Morse, 156 Wn.2d 1, 7, 123 P.3d 832 (2005) (citation omitted). The State bears the burden of establishing an exception to the warrant requirement by clear and convincing evidence. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

Salinas’ privacy rights were violated in three ways: first, the police lacked a constitutional predicate to reach into his pocket and remove or search his wallet, because Salinas was not under arrest. Second, the seizure and subsequent transmittal of his clothes to

the Washington State Patrol Crime Laboratory (“WSPCL”) without a warrant violated article I, section 7. Third, because Salinas was arrested on a warrant issued for a probation violation and not advised of his right to bail, after-acquired evidence must be suppressed.

a. The warrantless seizure and search of Salinas’ wallet violated article I, section 7 and the Fourth Amendment.

When Salinas was stopped by Bellingham police officers, he was ordered to lie down on the ground and was handcuffed. 3/8/10 RP 147-48. An officer then retrieved Salinas’ wallet from his right pants pocket and searched it, recovering photo identification which ultimately was used to ascertain that Salinas had a felony probation warrant from Wenatchee. 3/8/10 RP 112-13, 115. Salinas was arrested on the warrant. 3/8/10 RP 113, 149, 163, 187.

i. The search preceded Salinas’ arrest, in violation of article I, section 7. Under article I, section 7, “a lawful custodial arrest is a constitutionally required prerequisite to any search incident to arrest.” State v. O’Neill, 148 Wn.2d 564, 585, 62 P.3d 489 (2003). The Court in O’Neill explained that “[i]t is the fact of arrest itself that provides the ‘authority of law’ to search,” thus, “in the absence of a lawful custodial arrest a full blown search,

regardless of the exigencies, may not validly be made.” Id. In a subsequent decision, State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009), the Court explained:

[A] valid custodial arrest is a condition precedent to a search incident to arrest, and it is not enough that officers have probable cause to effectuate an arrest. [In O’Neill we] underscored the importance of not allowing a drift from the threshold requirements given that a search incident to arrest is not merely an exception to the warrant requirement, but allows a suspicionless, warrantless search. We held that an actual custodial arrest is necessary to provide “authority of law” under article I, section 7 for such a search.

167 Wn.2d at 393.

Salinas was not formally arrested until the police discovered that he had a felony probation warrant from Wenatchee. 3/8/10 RP 149. In the trial court’s oral ruling on Salinas’ motion to suppress,<sup>1</sup> however, the court found that when Salinas was stopped by the officers, he was “under the equivalent of formal arrest, and whether he’s formally arrested or not for the rape, there is probable cause[.]” 3/9/10 RP 60. “The equivalent of formal arrest” is an after-the-fact fiction. The officers made it plain that Salinas was arrested and booked on the warrant. 3/8/10 RP 113, 149, 163, 187.

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<sup>1</sup> The court did not enter written findings of fact and conclusions of law in support of its motion to suppress.

Further, the fact that the police may have had probable cause to arrest Salinas for a crime is irrelevant. The Supreme Court has refused to permit probable cause to suffice as an exception to the warrant requirement. “Probable cause is not a recognized exception to the warrant requirement, but rather the necessary basis for obtaining a warrant.” State v. Tibbles, 169 Wn.2d 364, 369, 236 P.3d 885 (2010); Patton, 167 Wn.2d at 393. The search was done before Salinas was arrested, and lacked authority of law.

ii. The after-acquired evidence must be suppressed. The Washington Supreme Court has held that the language used by the framers of the Washington Constitution “mandate[s] that the right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy.” State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). Rather, because the intent of the exclusionary rule is to protect privacy rather than deter unlawful government action, “whenever the right is unreasonably violated, the remedy must follow.” Id.; see also State v. Day, 161 Wn.2d 889, 894, 168 P.3d 1265 (2007). “The constitutionally mandated exclusionary rule provides a remedy for individuals whose rights have been violated and protects the

integrity of the judicial system by not tainting the proceedings with illegally obtained evidence.” State v. Winterstein, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009).

Further, all evidence flowing from the unlawful search must be suppressed. “When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes ‘fruit of the poisonous tree’ and must be suppressed.” Ladson, 138 Wn.2d at 359. Here, at a minimum, the “fruit of the poisonous tree” includes all the evidence derived from Salinas’ arrest.

Any assertion that the evidence should be admissible because it would have been discovered based on the officers’ “probable cause” to arrest Salinas for the crimes of rape or assault depends on an iteration of the inevitable discovery rule. But in Winterstein, the Court rejected the Fourth Amendment’s inevitable discovery rule “because it is incompatible with the nearly categorical exclusionary rule under article I, section 7.” Winterstein, 167 Wn.2d at 636. In O’Neill, the Court refused to apply the inevitable discovery rule, finding it would leave “no incentive for the State to comply with article I section 7’s requirement that the arrest precede the search.” O’Neill, 148 Wn.2d at 592. Here, similarly, the State cannot salvage the illegal search with the claim that the

police had probable cause to arrest Salinas for the offenses of rape and assault because they did not first arrest him. The order denying Salinas' motion to suppress must be reversed.

b. The seizure and search of Salinas' clothes were not justified by any exception to the warrant requirement. Following Salinas' arrest, the police took his clothes without his consent. 3/8/10 RP 129-31, 139. Salinas' clothing was subsequently transported to the WSPCL and searched for DNA and other evidence without a warrant. Trial RP 705-26. The trial court ruled:

I think there being probable cause for the rape and assault at [the time of arrest], the Court would find it to be the circumstances that the search incident to the arrest could include the seizure of his clothing at that time.

3/9/10 RP 61. The court accordingly refused to suppress the clothing or the forensic testing results derived from the testing of the clothing. 3/9/10 RP 62. Under article I, section 7, the search was unconstitutional and the trial court's ruling refusing to suppress must be reversed.

i. The search was not a valid inventory search.

Under the Fourth Amendment, "it is not 'unreasonable' for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his

possession, in accordance with established inventory procedures.”  
Illinois v. LaFayette, 462 U.S. 640, 648, 103 S.Ct. 2605, 77 L.Ed.2d  
65 (1983); State v. Smith, 76 Wn. App. 9, 15, 882 P.2d 190 (1994)  
(applying Fourth Amendment). “A so-called inventory search is not  
an independent legal concept but rather an incidental administrative  
step following arrest and preceding incarceration.” Lafayette, 462  
U.S. at 644. An inventory search is narrow in scope, and is  
governed by the following objectives:

- (1) to protect the arrestee’s property while he is in jail;
- (2) to protect the police from groundless claims that  
they have not adequately safeguarded the  
defendant’s property; (3) to safeguard the detention  
facility by preventing the introduction therein of  
objects which could be used to attempt an escape or  
by which harm might be done to some prisoner; and
- (4) to ascertain or verify the identity of the person  
being incarcerated.

State v. Garcia, 35 Wn. App. 174, 177, 665 P.2d 1381, rev. denied,  
100 Wn.2d 1019 (1983); see also State v. Roberts 158 Wn. App.  
174, 183, 240 P.3d 1198 (2010) (assuming a valid arrest, “where  
the search is not made as a general exploratory search for the  
purpose of finding evidence of crime but is made for the justifiable  
purpose of finding, listing, and securing from loss, during the  
arrested person’s detention, property belonging to him, then we  
have no hesitancy in declaring such inventory reasonable and

lawful, and evidence of crime found will not be suppressed”)  
(citation omitted).

But the search may not be made “as a general exploratory search for the purpose of finding evidence of crime.” State v. Morales, 154 Wn.2d 26, 48, 225 P.3d 311 (2010). Assuming that Salinas’ clothes were taken from him under the pretext of an inventory search, anything other than the incidental discovery of evidence from this limited search must be suppressed. Further, the inventory search does not excuse the warrantless search for DNA and other forensic evidence by the WSPCL. As discussed below, this search was unconstitutional and the evidence derived from the search should have been suppressed.

ii. The search was not a valid search incident to Salinas’ arrest. Under the Fourth Amendment, “once arrested there is a diminished expectation of privacy of the person” which may justify a warrantless search. See e.g. State v. Whitney, 156 Wn. App. 405, 410-11, 232 P.3d 582 (2010). “It is the fact of the lawful arrest which establishes the authority to search, and . . . in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that

Amendment.” United States v. Robinson, 414 U.S. 218, 235, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973) (emphasis added). However even this search incident to arrest is circumscribed by the exigencies that brought it into being. “The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial.” Id. at 234 (emphasis added).

But under article I, section 7, a warrantless search is permissible under the search incident to arrest exception only “when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest.”

Buelna Valdez, 167 Wn.2d at 777 (emphasis added); Patton, 167 Wn.2d at 395-96. This search is limited in scope:

A warrantless search in this situation is permissible only to remove any weapons the arrestee might seek to use in order to resist arrest or effect an escape and to avoid destruction of evidence by the arrestee of the crime for which he or she is arrested.

Ringer, 100 Wn.2d at 699; see also Chimel v. California, 395 U.S. 752, 762-63, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

The Court in Buelna Valdez elaborated on the necessity requirement thusly:

[N]ecessity justifies why the search need be conducted at all. It is necessary to permit a search for weapons or destroyable evidence where a risk is posed because, should a weapon be secured or evidence of the crime destroyed, the arrest itself may likely be rendered meaningless -- either because the arrestee will escape physical custody or because the evidence implicating the arrestee will be destroyed . . . . Second, necessity justifies the search incident to arrest being done without a search warrant. Quite simply, time is of the essence. In some circumstances, a delay to obtain a search warrant might be shown to provide the opportunity for the arrestee to procure a weapon or destroy evidence of the crime.

Buelna Valdez, 167 Wn.2d at 773; Chimel, 395 U.S. at 762-63 (same).

In this case, three separate intrusions occurred. First, Salinas' person was searched; this search turned up the wallet discussed in argument section E1, infra. Second, Salinas' clothing was seized and again, assumedly, subjected to a visual and manual search for weapons and other evidence. Third, Salinas' clothing was transported to the WSPCL for forensic analysis.

To the extent the seizure of Salinas' clothing exceeded the necessary justifications of ensuring officer safety and securing evidence of the crime of arrest that might otherwise be destroyed, the search was impermissible. Even if some justification could be imagined for this search there is no constitutional basis to permit

the warrantless search of Salinas' clothing by the WSPCL. The after-acquired evidence must be suppressed.

c. The Bellingham police lacked authority of law to conduct the search because they did not advise Salinas of his right to post bail on the probation warrant. As noted supra, it is uncontested that Salinas was arrested only on the probation warrant out of Wenatchee. In addition, Salinas was not advised why he was being detained. 3/8/10 RP 164. Instead, the search of his clothing occurred without the police ever informing Salinas of his right to post bail. The search violated RCW 10.31.030 and was done without authority of law.

According to statute, when an officer arrests a person on a warrant,

The officer making an arrest must inform the defendant that he or she acts under authority of a warrant, and must also show the warrant: PROVIDED, That if the officer does not have the warrant in his or her possession at the time of arrest he or she shall declare that the warrant does presently exist and will be shown to the defendant as soon as possible on arrival at the place of intended confinement: PROVIDED, FURTHER, That any officer making an arrest under this section shall, if the person arrested wishes to deposit bail, take such person directly and without delay before a judge or before an officer authorized to take the recognizance and justify and approve the bail, including the deposit of a sum of money equal to bail. Bail shall be the

amount fixed by the warrant. Such judge or authorized officer shall hold bail for the legal authority within this state which issued such warrant if other than such arresting authority.

RCW 10.31.030.

Construing this statute, the Court of Appeals has held that police must afford arrested persons a sufficient opportunity to post bail prior to conducting an inventory search. State v. Smith, 56 Wn. App. 145, 150, 783 P.2d 95 (1989), rev. denied, 114 Wn.2d 1019 (1990). The Court has emphasized that this is a bright-line rule. State v. Caldera, 84 Wn. App. 527, 528, 929 P.2d 482 (1997) (terming RCW 10.31.030's mandate "unequivocal"); see also State v. Ross, 106 Wn. App. 876, 883, 26 P.3d 298 (2001) (reiterating statute's application to inventory searches conducted prior to booking); State v. Carner, 28 Wn. App. 439, 624 P.2d 204 (1981) (search incident to arrest unlawful where it was determined prior to search that defendant would be released).

The trial court rationalized its ruling on the basis that there was probable cause to believe Salinas had committed a serious crime, i.e., rape. 3/9/10 RP 61-62. However Salinas was not arrested for this offense, nor was he booked on it.

Salinas had to be advised of his right to post bail on the warrant. The inventory search lacked authority of law and the evidence derived therefrom must be suppressed.

2. THE ADMISSION OF UNRELIABLE “DOG TRACK” EVIDENCE VIOLATED SALINAS’ FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

a. Over Salinas’ objection, the trial court admitted evidence of a “dog track”. Prior to trial Salinas moved to exclude evidence of the “dog track” that led to his arrest. CP 87-90. At a pretrial hearing, patrol officer Dale Wubben testified that at 2:03 a.m. on June 30, 2008, he and his partner were flagged down by Pellett, who reported that she had been raped. 3/8/10 RP 23-24. He admitted that he was unable to form an impression, based upon his conversations with Pellett, regarding when in relation to the report the attack had happened. 3/8/10 RP 32.

A canine track did not commence until 2:29 a.m. Trial RP 353. Woodward brought his dog Justice to Pellett’s campsite and gave him the tracking command. 3/8/10 RP 46. Inside the park, Justice tracked to an area that Woodward believed could have been the second crime scene, as there were some tissues under a bench that appeared to have blood on them. 3/8/10 RP 47. Justice

continued to track, eventually leading Woodward to two people who were sleeping in the park. 3/8/10 RP 48. They reported having seen a Hispanic man go past about 15 minutes earlier. 3/8/10 RP 49. Justice tracked in the direction they said he had gone and eventually started pulling on his leash and “air scenting.” 3/8/10 RP 51, 54. He then led Woodward to Salinas. 3/8/10 RP 54-55.

Woodward testified that he completed a 500-hour training course with Justice that had commenced in January 2007. 3/8/10 RP 36-38. He stated that in 2008 Justice had been placed on “application tracks”<sup>2</sup> a total of 71 times. 3/8/10 RP 40. Woodward stated that Justice had a “success of 57, and that included contacts and arrests.” Id. He stated that in 2007 Justice’s tracks resulted in 19 arrests.

Another witness, Jason Nyhus, a so-called “master” canine handler, testified that Justice was “reliable” in human tracks, but did not provide any information to corroborate this other than Justice having completed a certification process. 3/8/10 RP 121, 126.

b. Reliability is the cornerstone of due process, which is essential to a fair trial. An accused person has the due process right to a fair trial, and this right includes the guarantee that the

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<sup>2</sup> Woodward distinguished “application tracks” from “training tracks.” 3/10/08 RP 40.

evidence used to convict him will meet elementary requirements of fairness and reliability in the ascertainment of guilt or innocence. U.S. Const. amend. XIV; Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); see also, State v. Ahlfinger, 50 Wn. App. 466, 472-73, 749 P.2d 190 (1988) (upholding exclusion of polygraph evidence, although relevant and helpful to accused's defense, given "the State's legitimate interest in excluding inherently unreliable testimony."). "Due process does not permit a conviction based . . . on evidence so unreliable and untrustworthy that it may be said that the accused had been tried by a kangaroo court." California v. Green, 399 U.S. 149, 187 n. 20, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) (Harlan, J., concurring).

c. The "dog track" evidence lacked the essential foundation for admissibility. In Washington, dog track evidence is admissible only if a sufficient evidentiary foundation is laid to demonstrate the evidence's reliability. State v. Loucks, 98 Wn.2d 563, 568, 656 P.2d 480 (1983). The proponent of the evidence must show:

- (1) the handler was qualified by training and experience to use the dog, (2) the dog was adequately trained in tracking humans, (3) the dog has, in actual cases, been found by experience to be reliable in pursuing human track, (4) the dog was

placed on track where circumstances indicated the guilty party to have been, and (5) the trail had not become so stale or contaminated as to be beyond the dog's competency to follow.

Id. (quoting State v. Socoloff, 28 Wn. App. 407, 411, 623 P.2d 733 (1981)).

The Court emphasized,

The dangers inherent in the use of dog tracking evidence can only be alleviated by the presence of corroborating evidence identifying the accused as the perpetrator of the crime. Police dogs cannot be conclusively relied on to follow the trail of one individual if other human trails cross this one, or even come near it. [citation omitted.] While a dog's trainer may be available for cross examination, he obviously will be unable to answer many questions bearing on the reliability of the dog's conclusions.

98 Wn.2d at 567.

Here, although Woodward was trained as a canine handler and Justice had completed a certification course, the State did not present sufficient evidence to establish that Justice was reliable in pursuing human tracks and that the scent trail was not stale or contaminated.

For example, in actual applications, as opposed to training tracks, Justice was "successful" only 57 out of 71 times. 3/8/10 RP 40. In addition, Woodward's definition of "success" was extremely loose. "Successful" tracks were not limited to arrests leading to

convictions, or even simply to arrests. Id. A “successful” track could be a track that simply resulted in a contact. Id. Thus, there was no independent corroboration offered of the correctness of Justice’s tracks. If a conviction may not stand on the evidence of a dog track alone because dog track evidence is unreliable, dog tracks resulting merely in arrests or “contacts”, without more, cannot be deemed reliable.

Further, the fact that Justice began to “track” did not establish that Justice was tracking the scent of the guilty party. This conclusion is underscored by the 30 minute minimum lapse in time between when the assault was likely to have occurred and when the track commenced, and by the fact that although there was a secondary assault scene, Justice did not locate this scene. This Court should conclude that State failed to meet the requirements set forth in Louck for admission of the dog track evidence. As set forth in argument 4, infra, Salinas’ convictions should be reversed.

3. DEFENSE COUNSEL’S FAILURE TO REQUEST A JURY INSTRUCTION TELLING THE JURY TO CONSIDER THE DOG TRACK EVIDENCE WITH CAUTION DENIED SALINAS HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

a. An accused person is constitutionally entitled to the effective assistance of counsel. An accused person has the right under the Sixth Amendment and article I, section 22 of the Washington Constitution to the effective assistance of counsel. U.S. Const. amend. VI; Const. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). A claim of ineffective assistance of counsel has two components: (1) deficient performance and (2) resulting prejudice, i.e., that but for counsel's deficient performance, there is a reasonable probability that the verdict would have been different. Strickland, 466 U.S. at 687. An ineffective assistance of counsel claim is reviewed de novo. A.N.J., 168 Wn.2d at 109.

b. Salinas would have been entitled to an instruction telling the jury to view the dog track evidence with caution if he had requested one. Recognizing the possibility that such evidence may be of questionable reliability, Washington requires a limiting instruction be given when dog track evidence is introduced that tells the jury to view such evidence with caution. State v. Wagner, 36 Wn. App. 286, 673 P.2d 678 (1983); accord State v. Bockman, 37

Wn. App. 474, 682 P.2d 925 (1984). In Wagner, such an instruction was requested by defense counsel, but refused by the trial court.<sup>3</sup> Wagner, 36 Wn. App. at 287. This Court held that the failure to give the instruction created an impermissible risk that the conviction rested on the dog track evidence alone, and reversed Wagner's conviction. Id. at 288.

Many other jurisdictions similarly require the jury be given a cautionary instruction when dog tracking evidence is admitted. See e.g. People v. Mitchell, 110 Cal. App. 4th 722, 2 Cal.Rptr 3d 49, 60 (2003) (citing CALJIC No. 2.16, which advises the jury that dog tracking evidence is "not by itself sufficient to permit an inference that the defendant is guilty"); State v. Bridge, 60 Ohio App. 3d 76, 78-79, 573 N.E.2d 762 (1989) (instruction admonishes jury that dog track evidence is of "slight probative value" and should be viewed with the "utmost caution"); State v. Taylor, 118 N.H. 855, 858, 395 A.2d 505 (1978) (instruction must inform the jury to view dog track

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<sup>3</sup> Wagner's proposed instruction would have informed the jury:

Evidence of tracking by bloodhounds or other trained dogs should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such evidence alone.

36 Wn. App. at 287.

evidence with caution and that conviction may not rest on such evidence alone).

These decisions make evident the courts' acknowledgment that while dog tracking evidence may be relevant, trial courts must take pains to ensure the evidence on its own cannot lead to conviction, because it is insufficiently reliable. Indeed, the dog tracking evidence admitted here illustrated this principle. As noted, Justice's "success" rate is not measured in convictions but in "contacts" and "arrests." 3/8/10 RP 40. Although Woodward kept a log book recording all of Justice's tracks, the log book in this instance unusually omitted the salient details that Justice responded to a "fresh" scent or began tracking. Trial RP 484. Given the equivocal evidence and the settled law entitling an accused person to an instruction such as the proposed instruction in Wagner, if Salinas' counsel had proposed an instruction it would have been given.

c. Defense counsel's failure to request a jury instruction that would have told the jury to view the dog track evidence with caution was deficient performance that prejudiced Salinas. As noted, the Strickland test requires an accused person to establish that his attorney's performance was deficient and that

he was prejudiced by his lawyer's error or omission. Strickland, 466 U.S. at 689-90. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688. The focus is on whether counsel's decision "was itself reasonable." Wiggins v. Smith, 539 U.S. 510, 523, 125 S.Ct. 2527, 176 L.Ed.2d 471 (2003). For example, if it can be concluded that counsel's omission "resulted from inattention, not reasoned strategic judgment" then it was not reasonable. Id. at 526.

In this case, identity was the sole issue. Pellett did not identify Salinas as her attacker when shown a montage immediately after the incident. In fact, she told the case detective that none of the persons pictured in the montage resembled her attacker. Trial RP 1011. The DNA testing suffered from substantial and troubling defects. Thus, any evidence that tended to corroborate the State's theory that Salinas was Pellett's attacker was of critical importance. The dog track evidence was presented to the jury without any effort by Salinas' lawyers to temper their consideration of it with an instruction telling them that the evidence should be evaluated with caution. Salinas' lawyers' omission was deficient performance that prejudiced Salinas.

4. PELLETT'S IN-COURT IDENTIFICATION OF SALINAS VIOLATED OF THE FOURTEENTH AMENDMENT'S GUARANTEE THAT EVIDENCE MUST BE RELIABLE, AND SHOULD HAVE BEEN EXCLUDED.

a. Pellett's in-court identification violated the reliability guarantee of the due process clause. “[R]eliability [is] the linchpin in determining admissibility of identification testimony” under a “standard of fairness that is required by the Due Process Clause of the Fourteenth Amendment.” Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); U.S. Const. amend. XIV. “The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.” United States v. Wade, 388 U.S. 218, 228, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). An identification must be excluded “if it is so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.” State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002).

It is well-demonstrated through empirically validated research that a witness who is given confirming information regarding the “correctness” of an identification is both more likely to make a misidentification and will display a significantly higher degree of certainty in his or her identification than one who is not.

G. Wells, & A. Bradfield, 'Good, You Identified the Suspect':  
Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. Applied Psychol. 360, 370-74 (1998). A  
identification may be irreparably tainted when the confrontation  
occurs under circumstances that label the accused as a criminal  
defendant. See e.g. Thigpen v. Cory, 804 F.2d 893, 896-97 (6th  
Cir. 1986) (encounter between witness and defendant  
impermissibly suggestive where witness failed to identify defendant  
in lineup, but claimed he recognized him when he attended co-  
defendant's trial); Green v. Loggins, 614 F.2d 219, 223-24 (9th Cir.  
1980) (accidental confrontation between witness and defendant  
impermissibly suggestive where witness initially failed to identify  
defendant but made an identification after encountering defendant  
in a jailhouse cell under circumstances that identified defendant  
specifically as State's suspect); United States v. Ballard, 534  
F.Supp. 749, 752 (D.C. Ala. 1982) (substantial likelihood of  
misidentification created where witness "was able to identify Ballard  
only after he had seen Ballard in a lineup and after they had both  
regularly appeared for a series of court proceedings . . . two  
circumstances which together were clearly and strongly suggestive  
to [witness] that Ballard had become a prime suspect").

Additionally, one-on-one show-ups are demonstratively unreliable, and identifications resulting from these procedures will only be admissible if they satisfy certain guidelines.

[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

State v. King, 31 Wn. App. 56, 639 P.2d 809 (1982) (citing inter alia Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)). Like show-up identifications, "identifications performed in open court provide no meaningful test of witnesses' memory, and all but guarantee the identification of the person sitting in the defendant's seat." Dan. A. Simon, The Limited Diagnosticity of Criminal Trials, 64 Vand. L. Rev. 143, 160 (2011).

This case presents the extraordinary circumstance of a witness who not only could not identify her attacker at the time of the incident, but when shown a montage containing Salinas' photograph, began to cry and said, "it doesn't look like any of them." Trial RP 1011. Pellett also told the case detective that she

would not be able to identify her assailant except by his clothing.

Trial RP 104.

Pellett testified nearly two years after the assault. The criminal charges and the trial were a powerful endorsement that Salinas was Pellett's attacker. Indeed, it is hard to imagine more suggestive confirmatory feedback than a formal criminal accusation. Given Pellett's initial failure to identify her attacker, her inconsistent descriptions of him, and the extraordinary elapse of time between the attack and the trial, this Court should conclude that the in-court identification was incurably unreliable, in violation of due process.

b. The error was prejudicial. In response, the State may claim that because Salinas' counsel was able to challenge the reliability of Pellett's in-court identification through cross-examination, any prejudice was ameliorated. The Supreme Court has noted, however, that "even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability." Wade, 388 U.S. at 235.

Further, the certainty of Pellett's "identification" of Salinas doubtless strongly influenced the jury's perception of its accuracy. See Gary L. Wells, Deah S. Quinlivan, Suggestive Eyewitness

Identification Techniques and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later, 33 Law & Hum. Behav. 1, 12 (2009) (noting that "suggestive confirmatory effect is stronger for mistaken eyewitnesses than it is for accurate eyewitnesses, thereby making inaccurate eyewitnesses look more like accurate eyewitnesses").

Indeed, it has been conclusively established through empirical research that jurors tend to overvalue confidence as a meaningful prognosticator of accuracy, creating a real risk of wrongful conviction. As one commentator recently observed:

A considerable amount of research finds that factfinders place a great deal of weight on witnesses' confidence in their identifications. One study found that eyewitness confidence was a stronger predictor of jurors' decisions than the actual accuracy of the identifications. Simulated jurors have been found to trust identifications by confident witnesses twice as often as unconfident witnesses. Witnesses who testified that they were "completely certain" were three times more likely to be judged accurate than those who reported being "somewhat uncertain." In another study, conviction rates were almost fifty percent higher when the prosecution eyewitness stated that he was "100% confident" than when he "could not say that he was 100% confident."

Simon, supra, 64 Vand. L. Rev. at 157-58 (internal citations omitted).

Given the troubling defects with the DNA evidence and Pellett's initial inability to make an identification, this Court should conclude that the admission of the identification testimony prejudiced Salinas.

5. THE IMPOSITION OF SENTENCE ON COUNT FOUR VIOLATED CONSTITUTIONAL DOUBLE JEOPARDY PROHIBITIONS.

The trial court determined that Salinas' conviction for kidnapping in the first degree, as charged in count four, merged into his rape convictions. 6/8/10 RP 49. However, the court ruled that the issue was "moot" in light of Salinas' three-strikes sentence. Id. The Court accordingly imposed sentence on each count. CP 9. The sentence violated double jeopardy prohibitions.

The Fifth Amendment to the United States Constitution assures that no "person [shall] be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Article I, section 9 of the Washington constitution guarantees that "[n]o person shall be . . . twice put in jeopardy for the same offense." Const. art I, § 9. The Washington Supreme Court has held the protections of the state constitutional provision are coextensive with the protections provided by the federal

constitution. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

Like the federal courts, Washington Courts apply the Blockburger<sup>4</sup> test to determine whether multiple prosecutions violate double jeopardy prohibitions. Gocken, 127 Wn.2d at 104-07. In the absence of express legislative intent for multiple punishments, this test provides a double jeopardy violation will be found where multiple convictions are the same in fact and in law. United States v. Dixon, 509 U.S. 688, 696-97, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993); Whalen v. United States, 445 U.S. 684, 692, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). If two convictions violate double jeopardy protections, the remedy is to vacate the conviction for the crime that forms part of the proof of the other. State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005).

In State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007), the Supreme Court held that a trial court that has determined multiple convictions violate double jeopardy has an affirmative obligation to vacate from the judgment convictions that have been found to violate double jeopardy prohibitions. Id. at 659-61. The trial court has this duty even if it has not imposed sentence on the count that

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<sup>4</sup> Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

offends double jeopardy. Id. The Supreme Court recently reaffirmed this holding in In re Personal Restraint of Strandy, \_\_\_ Wn.2d \_\_, \_\_ P.3d \_\_ 2011 WL 2409664 (June 16, 2011) (holding trial court erred when, despite having found that convictions merged, it did not vacate the lesser of the merged convictions).

In this case, the trial court properly determined that Salinas' conviction for kidnapping merged into his rape convictions. 6/8/10 RP 49; see State v. Johnson, 92 Wn.2d 671, 678-81, 600 P.2d 1249 (1979). However the court erroneously concluded that the issue was "moot" because of Salinas' sentence. 6/8/10 RP 49. The court's ruling was contrary to the holdings of Womac and Strandy. Salinas' conviction for kidnapping must be vacated.

6. THE THREE COUNTS OF RAPE IN THE FIRST DEGREE SHOULD HAVE BEEN SENTENCED AS THE SAME CRIMINAL CONDUCT.

Prior to sentencing, Salinas asked the court to find that the three counts of rape were the same criminal conduct under RCW 9.94A.525. CP 36. Reiterating its belief that any double jeopardy or merger issue was "moot," the court did not expressly rule upon the same criminal conduct issue. The trial court was incorrect; the

issue was not “moot” and the three counts of rape were the same criminal conduct.<sup>5</sup>

According to statute,

[W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. “Same criminal conduct,” as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

RCW 9.94A.589(1)(a).

In the context of multiple prosecutions for rape in the first degree based upon ongoing events, the Supreme Court has found that where acts are committed in a short time frame and involve an uninterrupted course of conduct, they must be treated as the same criminal conduct. State v. Tili, 139 Wn.2d 107, 124, 985 P.2d 365 (1999). Similarly, this Court concluded that where two acts of

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<sup>5</sup> Because the trial court did not make a finding of same criminal conduct, Salinas is serving consecutive sentences of life without the possibility of parole. Further, if Salinas’ persistent offender sentence were reversed, a correct determination whether the charged events were the same criminal conduct would be relevant for purposes of resentencing.

forcible penetration occurred at the same place and nearly at the same time, involved the same victim, and were committed with the same purpose of sexual intercourse, they were the same criminal conduct. State v. Walden, 69 Wn. App. 183, 188, 847 P.2d 956 (1993).

Here, Pellett testified to three forcible sexual acts that all occurred at Pellett's campsite: oral penetration, anal penetration, and vaginal penetration. Trial RP 56-62. Although Pellett's attacker then dragged her into the park, he did not attempt sexual intercourse of any kind there. Thus, the relevant three acts of sexual intercourse that took place satisfy all of the elements of the "same criminal conduct" rule. As in Tili, all three sexual acts occurred within a very short time frame of one another, possibly within a few minutes. They all involved the same victim. They all were committed at Pellett's campsite. And they all were committed with the apparent common purpose of sexual intercourse. This Court should conclude that the three rape convictions should have been treated as the same criminal conduct.

7. SALINAS HAD THE SIXTH AND FOURTEENTH AMENDMENT RIGHT TO HAVE HIS PRIOR CONVICTIONS PROVEN TO A JURY BEYOND A REASONABLE DOUBT.

a. Due process requires a jury find beyond a reasonable doubt any fact that increases a defendant's maximum possible sentence. The due process clause of the United States Constitution ensures that a person will not suffer a loss of liberty without due process of law; U.S. Const. amend. XIV. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amend. VI. Thus, it is axiomatic that a criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. Blakely v. Washington, 542 US. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The constitutional rights to due process and a jury trial "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime beyond a reasonable doubt.'" Apprendi, 530 U.S. at 476-77.

b. Whether Salinas' prior convictions constituted "strike" crimes had to be determined by the jury beyond a

reasonable doubt. RCW 9.94A.570 states: “Notwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent offender shall be sentenced to a term of total confinement for life without the possibility of parole[.]” In addition to suffering two convictions for most serious offenses, Salinas was convicted of two California offenses, which may or may not been included in his SRA offender score. Assuming that they would have been proven to be comparable to felonies, in which case Salinas’ offender score would have exceeded nine points, Salinas would have faced consecutive sentences of 240-318 months on each count of rape. RCW 9.94A.510; .515; .525.

The persistent offender allegation, based upon Salinas having suffered two qualifying prior convictions,<sup>6</sup> transformed his punishment to life imprisonment without the possibility of parole. RCW 9.94A.570 recognizes that the statutory maximum no longer applies for persistent offenders and they must be sentenced to life imprisonment once the two qualifying prior convictions are found. Thus, Salinas’ prior convictions were facts which increased the maximum penalty for the crimes charged and as such, the jury was required to find the existence and comparability of the prior

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<sup>6</sup> The State alleged that Salinas was convicted of assault in the second degree in 1998 and robbery in the first degree in 1994.

convictions, and that they were most serious offenses, beyond a reasonable doubt. Apprendi, 530 U.S. at 482-83. This Court should reverse Salinas's persistent offender sentence.

8. THE FAILURE TO CLASSIFY THE PERSISTENT OFFENDER FINDING AS AN "ELEMENT" VIOLATES THE RIGHT TO EQUAL PROTECTION GUARANTEED BY THE FOURTEENTH AMENDMENT AND ARTICLE ONE, SECTION TWELVE OF THE WASHINGTON CONSTITUTION.

a. The arbitrary allocation of lesser due process protections in persistent offender sentencing as contrasted to where recidivism is classified as an "element" violates due process. Even though under the Sixth and Fourteenth Amendments, all facts necessary to increase the maximum punishment must be proven to a jury beyond a reasonable doubt, Washington courts have declined to require that the prior convictions necessary to impose a persistent offender sentence of life without the possibility of parole be proven to a jury. State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003), cert. denied, 124 S.Ct. 1616 (2004); State v. Wheeler, 145 Wn.2d 116, 123-24, 34 P.2d 799 (2001).

The Supreme Court recently held, however, that where a prior conviction "alters the crime that may be charged," the prior conviction "is an essential element that must be proved beyond a

reasonable doubt.” State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). While conceding that the distinction between a prior-conviction-as-aggravator and a prior-conviction-as-element is the source of “much confusion,” the Court concluded that because the latter “actually alters the crime that may be charged,” the prior conviction is an element and must be proven to the jury beyond a reasonable doubt. Id. But further scrutiny reveals that this is a false distinction.

In Roswell the Court considered the crime of communication with a minor for immoral purposes. Id. at 191. The Court found that in the context of this and related offenses,<sup>7</sup> proof of a prior conviction functions as an “elevating element,” thereby altering the substantive crime from a misdemeanor to a felony. Id. at 191-92. But in each of these circumstances, the “elements” of the substantive crime remain the same, save for the prior conviction “element.”

In fact, the Legislature has expressly provided that the purpose of the additional conviction “element” is to elevate the penalty for the substantive crime: see RCW 9.68.090

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<sup>7</sup> Another example of this type of offense is violation of a no-contact order, which is a misdemeanor unless the defendant has two or more prior convictions for the same crime. Roswell, 165 Wn.2d at 196 (discussing State v. Oster, 147 Wn.2d 141, 142-43, 52 P.3d 26 (2002)).

("Communication with a minor for immoral purposes – Penalties"). But there is no rational basis for classifying the punishment for recidivist criminals as an 'element' in certain circumstances and an 'aggravator' in others. The difference in classification, therefore, violates the equal protection clauses of the Fourteenth Amendment and Washington Constitution.

Under the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. Bush v. Gore, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); State v. Thorne, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994). A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless the classification also affects a semi-suspect class. Thorne, 129 Wn.2d at 771. This Court has held that "recidivist criminals are not a semi-suspect class," and therefore where an equal protection challenge is raised, the court will apply a "rational basis" test. Id.

Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for

distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation. The classification must be “purely arbitrary” to overcome the strong presumption of constitutionality applicable here.

State v. Smith, 117 Wn.2d 263, 279, 814 P.2d 652 (1991).

This Court has described the purpose of the POAA as follows:

[T]o improve public safety by placing the most dangerous criminals in prison; reduce the number of serious, repeat offenders by tougher sentencing; set proper and simplified sentencing practices that both the victims and persistent offenders can understand; and restore public trust in our criminal justice system by directly involving the people in the process.

Thorne, 129 Wn.2d at 772.

The use of a prior conviction to elevate a substantive crime from a misdemeanor to a felony and the use of the same conviction to impose a persistent offender sentence share the purpose of punishing the recidivist criminal more harshly. But in the former instance, the prior conviction is called an “element” and must be proven to a jury beyond a reasonable doubt. In the latter circumstance, the prior conviction is called an “aggravator” and need only be found by a judge by a preponderance of the evidence.

So, for example, where a person previously convicted of rape in the first degree communicates with a minor for immoral purposes, in order to punish that person more harshly based on his recidivism, the State must prove the prior conviction to the jury beyond a reasonable doubt. But if the same individual commits, for example, the crime of rape of a child in the first degree, both what quantum of proof the State must muster and to whom this proof must be submitted are altered – even though the purpose of imposing harsher punishment remains the same.

In its recent decision in State v. Langstead, 155 Wn. App. 448, 228 P.3d 799, rev. denied, 170 Wn.2d 1009 (2010), this Court rejected arguments similar to Salinas' arguments here, but the opinion was based on false premises. First, this Court assumed a distinction between Langstead and the "comparison group" of recidivists that does not exist. Second, this Court misread pertinent statutory provisions, and consequently drew erroneous conclusions regarding their application to this issue. Third, this Court omitted consideration whether a rational relationship exists between the classification and the legislation's purpose. The classification is wholly arbitrary.

b. There is no rational basis to distinguish between offenders whose prior offenses constitute an element of the crime and offenders sentenced under the POAA. In Langstead, this Court acknowledged that in Roswell, the Supreme Court held that certain offenders are entitled to have prior convictions proven to a jury beyond a reasonable doubt because in some instances, prior convictions are labeled “elements.” Id. at 454-55. Yet, in the circumstance of persistent offender sentencing, prior convictions are considered “aggravators” and the State must prove their existence merely by a preponderance of the evidence. This Court concluded, however, that “recidivists like Langstead are not situated similarly to recidivists like Roswell” because “[t]he recidivists whose prior felony convictions are used as aggravators necessarily must have prior felony convictions before they commit the current offense.” Id. at 455.

The distinction is neither correct nor relevant. Initially, this Court erred by limiting itself to crimes which are elevated to felonies from misdemeanors based upon prior criminal history. There is no reason why these offenders should be afforded greater due process than Salinas.

But, assuming for the sake of argument that the “comparison group” consists of offenders prosecuted for unlawful possession of a firearm in the first degree (“UPFA 1”), these recidivists too “necessarily must have prior felony convictions before they commit the current offense.” See RCW 9.41.040(1) (elevating crime of unlawful possession of firearm based upon prior conviction for a “serious offense”). According to RCW 9.41.010(16),

“Serious offense” means any of the following felonies or a felony attempt to commit any of the following felonies, as now existing or hereafter amended:

(a) Any crime of violence;

(b) Any felony violation of the uniform controlled substances act, chapter 69.50 RCW, that is classified as a class B felony or that has a maximum term of imprisonment of at least ten years;

(c) Child molestation in the second degree;

(d) Incest when committed against a child under age fourteen;

(e) Indecent liberties;

(f) Leading organized crime;

(g) Promoting prostitution in the first degree;

(h) Rape in the third degree;

(i) Drive-by shooting;

(j) Sexual exploitation;

(k) Vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner;

(l) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;

(m) Any other class B felony offense with a finding of sexual motivation, as "sexual motivation" is defined under RCW 9.94A.030;

(n) Any other felony with a deadly weapon verdict under RCW 9.94A.602; or

(o) Any felony offense in effect at any time prior to June 6, 1996, that is comparable to a serious offense, or any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a serious offense.

RCW 9.41.010.

All of these predicate offenses are felonies. Thus, the Court of Appeals' ultimate conclusion – that "recidivists whose conduct is inherently culpable enough to incur a felony sanction are, as a group, rationally distinguishable from persons whose conduct is felonious only if preceded by a prior conviction for the same or a

similar offense”<sup>8</sup> – is based on a false premise. Recidivists prosecuted for UPFA 1 have engaged in conduct that is “inherently culpable enough to incur a felony sanction”. But these individuals are entitled to have their prior convictions proven to a jury beyond a reasonable doubt.

c. Langstead’s analysis of possession of a firearm rests on an incorrect interpretation of RCW 9.41.040. Curiously, this Court acknowledged that UPFA prosecutions present the same arbitrary distinction as Roswell. Langstead, 155 Wn. App. at 455-56. But the Court disregarded this fissure in its analytical foundation by finding “there would be no crime at all if there were no prior conviction.” Id. at 456.

This assertion is simply incorrect. In the circumstance of prosecutions for UPFA 2, the existence of a prior felony conviction is but one of the means of committing the offense. RCW 9.41.040(2). Other means include possession of a firearm while under the age of eighteen, and possession of a firearm while having previously been committed for mental health treatment. See RCW 9.41.040(2)(a)(ii), (iii). Thus, UPFA squarely presents the constitutional difficulty with treating certain recidivist offenders

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<sup>8</sup> 155 Wn. App. at 456-57.

differently based on whether their prior conviction is categorized as an “element” or an “aggravator.” In both instances, the legislative purpose is the same, yet where the prior conviction is an “element,” the offender is entitled to a jury trial and proof beyond a reasonable doubt. Where it is an “aggravator,” the offender is denied these protections.

d. There is no rational relationship between the differing classifications and their legislative purpose. The more significant issue that this Court did not address in Langstead is the lack of any rational basis to afford offenders less due process where they are facing confinement for life without the possibility of parole as opposed to conviction for a specified offense. If, as this Court conceded, the legislative purpose of both classifications is to punish recidivists more harshly, then it would make sense to afford the greatest due process safeguards to those offenders facing the most substantial deprivation of their liberty.

But in fact the classifications operate the opposite way. Thus, a person convicted of first-degree rape is entitled to have that offense proven to a jury beyond a reasonable doubt to punish him for the crime of indecent exposure. That same offender is denied these added safeguards when the offender faces conviction for a

qualifying offense under the POAA. Likewise, had Salinas himself been prosecuted for UPFA 1, his prior convictions would have been submitted to the jury and proven beyond a reasonable doubt. But because Salinas was prosecuted for other offenses, Salinas' prior offenses were proven to a judge by a preponderance of the evidence.

Based upon this diluted standard, Salinas was confined to spend the rest of his natural life in prison. Where the legislative purposes of deterrence through enhanced punishment and protecting the public are the same, there is no rational basis to deny Salinas the due process he would have received if his prior convictions were classified as "elements" of substantive crimes. This Court should reconsider its erroneous decision in Langstead and hold that the arbitrary classification denied Salinas due process.

9. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE SALINAS' IDENTITY WITH RESPECT TO THE CHELAN COUNTY 1994 ROBBERY CONVICTION.

a. Principles of due process impose the burden to prove criminal history on the State. It is the State's burden and obligation to prove criminal history and to assure that the record

before the sentencing court supports the criminal history determination. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). The burden is on the State “because it is ‘inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.’” State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999) (quoting In re Personal Restraint of Williams, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)). “This reflects fundamental principles of due process, which require that a sentencing court base its decision on information bearing ‘some minimal indicium of reliability beyond mere allegation.” Mendoza, 165 Wn.2d at 920. (emphasis in original, citation deleted).

b. The State presented insufficient evidence to prove Salinas’ identity with regard to the 1994 conviction for second degree robbery. The State sought to have Salinas sentenced as a persistent offender based upon two alleged prior offenses: a 1998 Douglas County assault in the second degree conviction and a 1994 Chelan County robbery in the first degree conviction. CP 37-38. With respect to the 1994 conviction, the fingerprints appearing on the Chelan County judgment and sentence were of such poor quality that a fingerprint examiner hired by the prosecution could

not testify that the person convicted and Salinas were one and the same person. 6/8/10 RP 35. The sole evidence that the State offered to prove Salinas' identity was the testimony of the victim from the 1994 matter, who claimed that he recognized Salinas as an individual who jabbed a screwdriver at him and stole his sunglasses and hat on July 23, 1994. 6/8/10 RP 4-7.

The witness made this claim despite not having seen his attacker for 16 years and having told police that the person who robbed him was a black male. 6/8/10 RP 8-10. Salinas was the only person in the courtroom who was black or Hispanic, the only person in custody, and the only person at counsel table being sentenced. 6/8/10 RP 11.

As discussed in argument 4, supra, the limitations and weaknesses of eyewitness identification testimony are firmly rooted in experimental foundation, derived from decades of psychological research on human perception and memory as well as peer review literature. Henry F. Fradella, Why Judges Should Admit Testimony on the Unreliability of Eyewitness Testimony, 2006 Fed. Cts. L. Rev 1, 3 (June, 2006). Where cross-racial identification is implicated, these problems are amplified, as the reliability of the identification is diminished by several empirically demonstrated factors. Chief

among these is the “own-race” effect or “own-race” bias, in which witnesses experience “cross-racial impairment” when asked to identify suspects of another race. John P. Rutledge, They All Look Alike: The Inaccuracy of Cross-Racial Identifications, 28 Am. J. Crim. L. 207, 211 (2001).

The research findings show:

witnesses often make mistakes, that they tend to make more mistakes in cross-racial identifications as well as when the events involve violence, that errors are easily introduced by misleading questions asked shortly after the witness has viewed the simulated happening, and that the professed confidence of the subjects in their identifications bears no consistent relation to the accuracy of these recognitions.

1 McCormick, Evidence, § 206 (6th Ed. 2006).

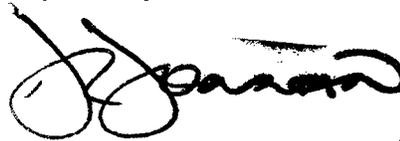
It simply strains credulity to conclude by any standard of proof, even by a preponderance of the evidence, that the witness who briefly saw an assailant during an armed robbery in 1994 would be able to recognize that person 16 years later. Beyond this “identification” testimony, there was nothing to tie Salinas to the prior robbery except a unity of names. This Court should conclude that the State failed to meet its due process burden to prove identity at sentencing.

E. CONCLUSION

This Court should reverse Salinas' convictions. In the alternative, this Court should reverse Salinas' persistent offender sentence, vacate his conviction for kidnapping in the first degree, and remand with direction that he receive a standard range sentence for a single count of rape in the first degree.

DATED this 29<sup>th</sup> day of June, 2011.

Respectfully submitted:

 (19271) for:

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Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 65527-2-I
	)	
HECTOR SALINAS,	)	
	)	
APPELLANT.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29<sup>TH</sup> DAY OF JUNE, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |      |   |                   |                                     |
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| [X ] | HECTOR SALINAS<br>726671<br>WASHINGTON STATE PENITENTIARY<br>1313 N 13 <sup>TH</sup> AVE<br>WALLA WALLA, WA 99362 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 29<sup>TH</sup> DAY OF JUNE, 2011.

X \_\_\_\_\_  
*[Handwritten Signature]*

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