

FILED  
Aug 26, 2015  
Court of Appeals  
Division I  
State of Washington

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

In re Personal Restraint	)	
Petition of	)	
	)	No. 73186-6-I
	)	
EDWARD J. HILLS,	)	STATE'S RESPONSE TO
	)	PERSONAL RESTRAINT
Petitioner.	)	PETITION
_____	)	

A. AUTHORITY FOR RESTRAINT OF PETITIONER

Petitioner Edward J. Hills is restrained pursuant to Judgment and Sentence in King County Superior Court No. 07-1-03980-1 SEA. Appendix A.

B. ISSUE PRESENTED

1. Whether the new Fourth Amendment rule of criminal procedure announced in Missouri v. McNeely, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1552, 185 L. Ed.2d 696 (2013) may be applied retroactively to this case.

STATE'S RESPONSE TO  
PERSONAL RESTRAINT PETITION

C. STATEMENT OF THE CASE

Edward Hills drove his Ford Taurus through a red light into an intersection in West Seattle. Steven Laffery, a plumber driving his work van, had the green light. Laffery tried unsuccessfully to avoid a collision; he struck the passenger side of the Taurus, killing Hills's 19-year-old passenger, Lindsey Austin. Marijuana was found in the car, and a statutorily-authorized blood draw revealed THC at a level of 1.6 ng/mL in Hills's blood. Appendix B (unpublished opinion in No. 60911-4-I) at 2-3.

The State charged Hills by information and amended information with one count of Vehicular Homicide (Lindsey Austin) and one count of Vehicular Assault (Steven Laffery). Appendix C. Hills opted for a bench trial. Appendix D. The trial court found that the blood draw was proper under former RCW 46.20.308(3). Appendix E at 2. Finding that Hills drove in a reckless manner, with disregard for the safety of others, and while under the influence of drugs (marijuana), the court found Hills guilty as charged. Appendix F. The court imposed a sentence at the high end of the standard range. Appendix A at 2, 4.

The convictions were affirmed on appeal. Appendix B (unpublished opinion in No. 60911-4-I). The mandate issued on November 18, 2009. Appendix G.

Hills has filed three previous personal restraint petitions. Each has been dismissed by the Court of Appeals. Appendix H (Certificates of Finality in Nos. 61299-9-I, 65440-3-I, 70882-1-I).

Hills initially filed the current collateral attack in the superior court as a motion for relief from judgment pursuant to CrR 7.8, on November 20, 2014. The superior court transferred the motion to this Court, pursuant to CrR 7.8(c)(2), for consideration as a personal restraint petition. Appendix I.

D. ARGUMENT

To obtain relief through a personal restraint petition, a petitioner must show either that he was actually and substantially prejudiced by a violation of his constitutional rights, or that a nonconstitutional error amounting to a fundamental defect inherently resulted in a complete miscarriage of justice. In re Personal Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). The petitioner must carry this burden by a preponderance of the evidence. Id. at 814.

A personal restraint petition is not a substitute for a direct appeal, and the availability of collateral relief is limited. In re Personal Restraint of St. Pierre, 118 Wn.2d 321, 328-29, 823 P.2d 492 (1992). "Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes

costs society the right to punish admitted offenders." In re Personal Restraint of Hagler, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982).

**1. THIS PETITION SHOULD BE DISMISSED AS  
UNTIMELY.**

Hills argues that, because his blood was taken pursuant to the implied consent statute (former RCW 46.20.308(3)), without his consent and without a warrant or a specific showing of exigent circumstances, retroactive application of Missouri v. McNeely, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1552, 185 L. Ed.2d 696 (2013) requires vacation of his convictions. In support of his argument for retroactive application, Hills contends that the new rule announced in McNeely is one that is "implicit in the concept of ordered liberty." PRP at 16. For the reasons set out below, McNeely cannot be applied retroactively to this case. This petition should be denied and dismissed.

"No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction." RCW 10.73.090(1). A judgment becomes final for purposes of this statute on "[t]he date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction." RCW 10.73.090(3)(b).

The mandate in this case issued on November 18, 2009. Hills filed the current collateral attack five years later. Thus, this petition is presumptively untimely.

Hills attempts to rely on a statutory exception to the one-year time limit where:

There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

RCW 10.73.100(6).<sup>1</sup> To avoid the time bar on this basis, Hills must show that the Supreme Court's decision in McNeely is retroactive to his case.

A judgment is final for purposes of retroactivity analysis when the time for a petition for certiorari has elapsed or a petition for certiorari finally denied. In re Personal Restraint of St. Pierre, 118 Wn.2d 321, 327, 823 P.2d 492 (1992) (citing Griffith v. Kentucky, 479 U.S. 314, 321 n.6, 107 S. Ct. 708, 93 L. Ed.2d 649 (1987)). A petition for certiorari must be filed within 90 days after

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<sup>1</sup> The statutory retroactivity language has been interpreted consistently with the Teague analysis. State v. Evans, 154 Wn.2d 438, 448, 114 P.3d 627 (2005); State v. Abrams, 163 Wn.2d 277, 291-92, 178 P.3d 1021 (2008).

entry of the judgment of the state court of last resort (not from the date of the mandate). U.S. Supreme Court Rule 13.1, 13.3.

The Washington Supreme Court entered its order denying Hills's petition for review on September 9, 2009. Appendix G. Thus, Hills's judgment was final for purposes of retroactivity analysis 90 days after that date – December 8, 2009. The United States Supreme Court issued its decision in McNeely on April 17, 2013. Thus, the McNeely decision will not apply to Hills's case unless it is retroactive.

“The law favors finality of judgments, and courts will not routinely apply ‘new’ decisions of law to cases that are already final.” State v. Evans, 154 Wn.2d 438, 443, 114 P.3d 627 (2005). Washington courts have consistently followed the lead of the United States Supreme Court in deciding whether to give retroactive effect to newly-articulated legal principles. Id. at 444; In re Personal Restraint of Haghghi, 178 Wn.2d 435, 441, 309 P.3d 459 (2013). Under the federal common law retroactivity analysis, a new rule for the conduct of criminal prosecutions will be applied retroactively to all cases that are still pending on direct review (i.e., not yet final). Evans, 154 Wn.2d at 444. A new rule will *not* be retroactively applied to cases on collateral review *except* where: (1) the rule places certain kinds of primary, private individual conduct beyond the power of the state to proscribe; or (2) the rule requires

observance of procedures that are implicit in the concept of ordered liberty. Id. (citing Teague v. Lane, 489 U.S. 288, 311, 109 S. Ct. 1060, 103 L. Ed.2d 334 (1989)).

Critical to this analysis is the definition of a “new” rule. A “new” rule breaks new ground, or imposes a new obligation on the State. Evans, 154 Wn.2d at 444 (citing Teague, 489 U.S. at 301). “If before the opinion is announced, reasonable jurists could disagree on the rule of law, the rule is new.” Evans, at 444 (citing Beard v. Banks, 542 U.S. 406, 411, 124 S. Ct. 2504, 159 L. Ed.2d 494 (2004)).

In McNeely, the Supreme Court held that the natural metabolization of alcohol in the bloodstream does not present a *per se* exigency that justifies an exception to the Fourth Amendment’s warrant requirement for nonconsensual blood testing in all drunk-driving cases; rather, exigency in this context must be determined on a case-by-case basis, using the totality of the circumstances. 133 S. Ct. at 1556.

Prior to McNeely, Washington courts had long held that warrantless, nonconsensual blood testing was indeed justified in arrests for certain driving crimes. See State v. Wetherell, 82 Wn.2d 865, 869-70, 514 P.2d 1069 (1973) (warrantless blood draw justified on grounds that it was incident to lawful arrest coupled with a reasonable emergency, “*i.e.*, the progressive diminution of the

blood-alcohol level during the time interval incident to obtaining a search warrant”) (citing Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed.2d 908 (1966)); State v. Baldwin, 109 Wn. App. 516, 525, 37 P.3d 1220 (2001) (“The implied consent statute reflects the Legislature’s recognition that the exigencies of a DUI drug arrest and investigation warrant the search and seizure of a suspect’s blood.”). In the wake of McNeely, our courts have recognized the change in the law that McNeely brought about. See State v. Martines, 182 Wn. App. 519, 527, 331 P.3d 105 (in light of McNeely, exigency exception to Fourth Amendment warrant requirement no longer categorically applies in drunk driving investigations), rev. granted, 339 P.3d 634 (2014).

The legislature has also recognized the change in the law. Prior to McNeely, the law provided that, where a person was under arrest for vehicular homicide or vehicular assault, a blood test could be administered “without the consent of the individual so arrested.” Former RCW 46.20.308(3). The law was recently changed to comply with the McNeely decision, and now allows a blood test pursuant to arrest for vehicular homicide or vehicular assault “without the consent of the individual so arrested *pursuant to a search warrant, a valid waiver of the warrant requirement, or when exigent circumstances exist.*” RCW 46.20.308(3) (Laws 2013, 2<sup>nd</sup> sp.s. ch. 35, § 36) (italics added).

Indeed, the Supreme Court itself recognized that it was changing the law in some jurisdictions. The Court noted that it had granted certiorari “to resolve a split of authority,” noting cases on both sides of the issue. McNeely, 133 S. Ct. at 1558 and 1558 n.2.

Prior to McNeely, reasonable jurists could and did disagree as to what the law required in this context. The McNeely rule imposed a new obligation on the State to obtain a search warrant in many instances where a warrant had been deemed unnecessary under the prior rule. The rule arising out of McNeely is thus a new constitutional rule of criminal procedure for purposes of retroactivity analysis.

Hills nevertheless contends that the McNeely rule may be applied retroactively because the rule is “implicit in the concept of ordered liberty.” PRP at 16; see Evans, 154 Wn.2d at 444. “A rule that qualifies under this exception must not only improve accuracy, but also ‘alter our understanding of the *bedrock procedural elements*’ essential to the fairness of a proceeding.” Evans, 154 Wn.2d at 445 (quoting Sawyer v. Smith, 497 U.S. 227, 242, 110 S. Ct. 2822, 111 L. Ed.2d 193 (1990)) (italics in original).

The Supreme Court has “repeatedly emphasized the limited scope” of this exception. Beard v. Banks, 542 U.S. 406, 417, 124 S. Ct. 2504, 159 L. Ed.2d 494 (2004). A qualifying rule would be central to an *accurate determination of guilt or innocence*. Id. The

Court has concluded that it is “unlikely that many such components of basic due process have yet to emerge.” Id.

Beyond his bare assertion and some conclusory statements, Hills makes little effort to explain exactly how the McNeely rule qualifies under the second Teague exception. A rule that allows a defendant in an impaired-driving case to gain suppression of the alcohol or drugs that may be present in his blood hardly improves the accuracy of the determination of guilt or innocence. The McNeely rule, which regulates the *procedure* by which police may obtain such evidence, is a far cry from the only rule that the Supreme Court has held up as an example of a rule that is “implicit in the concept of ordered liberty” – Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed.2d 799 (1963) (right of indigent defendant to counsel at public expense). The McNeely rule is not retroactive.

Courts in other jurisdictions have concluded that the rule announced in McNeely does not apply retroactively to cases on collateral review. See Siers v. Weber, 851 N.W.2d 731 (S.D. 2014); O’Connell v. State, 858 N.W.2d 161 (Minn. Ct. App. 2015), *rev. granted* (March 25, 2015); Sanders v. Dowling, 594 Fed. Appx. 501 (10<sup>th</sup> Cir. 2014)<sup>2</sup>. Other courts that have purported to apply

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<sup>2</sup> This unpublished opinion is cited pursuant to GR 14.1 (allowing citation to unpublished opinion if such is permitted under the law of the jurisdiction of the issuing court) and Fed. Rule App. Proc. 32.1 (allowing citation to unpublished

McNeely “retroactively” have actually limited the rule’s application to cases that are not yet final on direct review. See State v. Adkins, 221 N.J. 300, 113 A.2d 734 (2015); State v. Foster, 360 Wis. 2d 12, 856 N.W. 2d 847 (2014); Cole v. State, 454 S.W.3d 89 (Tex. Ct. App. 2014), *rev. granted* (April 22, 2015). The State has found no case that has applied the McNeely rule retroactively to a case on collateral attack.

E. CONCLUSION

The new rule announced in McNeely is not retroactive to this case, which was already final on direct appeal when the Supreme Court issued its opinion. This petition is untimely. For all of the foregoing reasons, the petition should be denied and dismissed.

DATED this 26th day of August, 2015.

Respectfully Submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

by   
DEBORAH A. DWYER, #18887  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office ID #91002

Appellate Unit  
W554 King County Courthouse  
516 Third Avenue  
Seattle, WA 98104  
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opinions issued after January 1, 2007). A copy of this opinion is attached as Appendix J.

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
	)	
	)	No. 07-1-03980-1 SEA
Plaintiff,	)	
	)	
Vs.	)	JUDGMENT AND SENTENCE
	)	FELONY
EDWARD JAMES HILLS	)	
	)	
Defendant,	)	

I. HEARING

I.1 The defendant, the defendant's lawyer, ERIC WESTON, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: Steve Laffery - victim's brother; Debbie Miles - victim's aunt; Mary Danielle Austin - victim's sister-in-law; Bob Austin - victim's father

II. FINDINGS

There being no reason why judgment should not be pronounced, the court finds:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 10/17/2007 by bench trial of:

Count No.: I Crime: VEHICULAR HOMICIDE (DUI)  
 RCW 46.61.522 (1) (a) 1 (b) 1 (c) Crime Code: 07606  
 Date of Crime: 10/16/2006 Incident No. \_\_\_\_\_

Count No.: II Crime: VEHICULAR ASSAULT (DUI)  
 RCW 46.61.522 (1) (a) 1 (b) 1 (c) Crime Code: 07615  
 Date of Crime: 10/16/2006 Incident No. \_\_\_\_\_

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

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

Additional current offenses are attached in Appendix A

APPENDIX A

A-1

**SPECIAL VERDICT or FINDING(S):**

- (a)  While armed with a **firearm** in count(s) \_\_\_\_\_ RCW 9.94A.510(3).
- (b)  While armed with a **deadly weapon** other than a firearm in count(s) \_\_\_\_\_ RCW 9.94A.510(4).
- (c)  With a **sexual motivation** in count(s) \_\_\_\_\_ RCW 9.94A.835.
- (d)  A V.U.C.S.A offense committed in a **protected zone** in count(s) \_\_\_\_\_ RCW 69.50.435.
- (e)  **Vehicular homicide**  **Violent traffic offense**  **DUI**  **Reckless**  **Disregard**.
- (f)  **Vehicular homicide** by DUI with   1   prior conviction(s) for offense(s) defined in RCW 41.61.5055, RCW 9.94A.510(7).
- (g)  **Non-parental kidnapping** or unlawful imprisonment with a minor victim. RCW 9A.44.130.
- (h)  **Domestic violence** offense as defined in RCW 10.99.020 for count(s) \_\_\_\_\_.
- (i)  Current offenses **encompassing the same criminal conduct** in this cause are count(s) \_\_\_\_\_ RCW 9.94A.589(1)(a).

**2.2 OTHER CURRENT CONVICTION(S):** Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): \_\_\_\_\_

**2.3 CRIMINAL HISTORY:** Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):

Criminal history is attached in **Appendix B**.

One point added for offense(s) committed while under community placement for count(s) \_\_\_\_\_

**2.4 SENTENCING DATA:**

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
Count I	10	IX	129 TO 171	+24 MONTHS	153 TO 195 MONTHS	LIFE AND/OR \$50,000
Count II	11	IV	63 TO 84		63 TO 84 MONTHS	10 YRS AND/OR \$20,000
Count						
Count						

Additional current offense sentencing data is attached in **Appendix C**.

**2.5 EXCEPTIONAL SENTENCE (RCW 9.94A.535):**

Substantial and compelling reasons exist which justify a sentence above/below the standard range for Count(s) \_\_\_\_\_. Findings of Fact and Conclusions of Law are attached in **Appendix D**. The State  did  did not recommend a similar sentence.

**III. JUDGMENT**

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and **Appendix A**.

The Court **DISMISSES** Count(s) \_\_\_\_\_

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 RESTITUTION AND VICTIM ASSESSMENT:

- Defendant shall pay restitution to the Clerk of this Court as set forth in attached Appendix E.
- Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.753(2), sets forth those circumstances in attached Appendix E.
- Restitution to be determined at future restitution hearing on (Date) \_\_\_\_\_ at \_\_\_\_\_ m.
- Date to be set.
- Defendant waives presence at future restitution hearing(s).
- Restitution is not ordered.

Defendant shall pay Victim Penalty Assessment pursuant to RCW 7.68.035 in the amount of \$500.

4.2 OTHER FINANCIAL OBLIGATIONS: Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

- (a)  \$ \_\_\_\_\_, Court costs;  Court costs are waived; (RCW 9.94A.030, 10.01.160)
- (b)  \$100 DNA collection fee;  DNA fee waived (RCW 43.43.754)(crimes committed after 7/1/02);
- (c)  \$ \_\_\_\_\_, Recoupment for attorney's fees to King County Public Defense Programs;  Recoupment is waived (RCW 9.94A.030);
- (d)  \$ 50, Fine;  \$1,000, Fine for VUCSA;  \$2,000, Fine for subsequent VUCSA;  VUCSA fine waived (RCW 69.50.430); Title 46 fee
- (e)  \$ \_\_\_\_\_, King County Interlocal Drug Fund;  Drug Fund payment is waived; (RCW 9.94A.030)
- (f)  \$ \_\_\_\_\_, State Crime Laboratory Fee;  Laboratory fee waived (RCW 43.43.690);
- (g)  \$ \_\_\_\_\_, Incarceration costs;  Incarceration costs waived (RCW 9.94A.760(2));
- (h)  \$ \_\_\_\_\_, Other costs for: \_\_\_\_\_

4.3 PAYMENT SCHEDULE: Defendant's TOTAL FINANCIAL OBLIGATION is: \$ 550 + restitution. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms:  Not less than \$ \_\_\_\_\_ per month;  On a schedule established by the defendant's Community Corrections Officer or Department of Judicial Administration (DJA) Collections Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. **The Defendant shall remain under the Court's jurisdiction to assure payment of financial obligations: for crimes committed before 7/1/2000, for up to ten years from the date of sentence or release from total confinement, whichever is later; for crimes committed on or after 7/1/2000, until the obligation is completely satisfied.** Pursuant to RCW 9.94A.7602, if the defendant is more than 30 days past due in payments, a notice of payroll deduction may be issued without further notice to the offender. Pursuant to RCW 9.94A.760(7)(b), the defendant shall report as directed by DJA and provide financial information as requested.

- Court Clerk's trust fees are waived.
- Interest is waived except with respect to restitution.

4.4 CONFINEMENT OVER ONE YEAR: Defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing:  immediately;  (Date): \_\_\_\_\_ by \_\_\_\_\_, m.

195 months/days on count I; \_\_\_\_\_ months/days on count \_\_\_\_\_; \_\_\_\_\_ months/day on count \_\_\_\_\_

84 months/days on count II; \_\_\_\_\_ months/days on count \_\_\_\_\_; \_\_\_\_\_ months/day on count \_\_\_\_\_

The above terms for counts I & II are consecutive  concurrent.

The above terms shall run  CONSECUTIVE  CONCURRENT to cause No.(s) \_\_\_\_\_

The above terms shall run  CONSECUTIVE  CONCURRENT to any previously imposed sentence not referred to in this order.

In addition to the above term(s) the court imposes the following mandatory terms of confinement for any special WEAPON finding(s) in section 2.1: \_\_\_\_\_

which term(s) shall run consecutive with each other and with all base term(s) above and terms in any other cause. (Use this section only for crimes committed after 6-10-98)

RCW 9.94A.533

The enhancement term(s) for any special WEAPON findings in section 2.1 is/are included within the term(s) imposed above. (Use this section when appropriate, but for crimes before 6-11-98 only, per In Re Charles)

The TOTAL of all terms imposed in this cause is 195 months.

Credit is given for  208 days served  days as determined by the King County Jail, solely for confinement under this cause number pursuant to RCW 9.94A505(6).

E.H. 5 NO CONTACT: For the maximum term of life years, defendant shall have no contact with family of Lindsey Austin; Steve Lafferty; Lisa, Bob, Mary, and

4.6 DNA TESTING. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in APPENDIX G.

HIV TESTING: For sex offense, prostitution offense, drug offense associated with the use of hypodermic needles, the defendant shall submit to HIV testing as ordered in APPENDIX G.

4.7 (a)  COMMUNITY PLACEMENT pursuant to RCW 9.94A.700, for qualifying crimes committed before 7-1-2000, is ordered for \_\_\_\_\_ months or for the period of earned early release awarded pursuant to RCW 9.94A.728, whichever is longer. [24 months for any serious violent offense, vehicular homicide, vehicular assault, or sex offense prior to 6-6-96; 12 months for any assault 2°, assault of a child 2°, felony violation of RCW 69.50/52, any crime against person defined in RCW 9.94A.411 not otherwise described above.] APPENDIX H for Community Placement conditions is attached and incorporated herein.

(b)  COMMUNITY CUSTODY pursuant to RCW 9.94.710 for any SEX OFFENSE committed after 6-5-96 but before 7-1-2000, is ordered for a period of 36 months or for the period of earned early release awarded under RCW 9.94A.728, whichever is longer. APPENDIX H for Community Custody Conditions and APPENDIX J for sex offender registration is attached and incorporated herein.

- (c)  **COMMUNITY CUSTODY** - pursuant to RCW 9.94A.715 for qualifying crimes committed after 6-30-2000 is ordered for the following established range:
- Sex Offense, RCW 9.94A.030(38) - 36 to 48 months—when not sentenced under RCW 9.94A.712
  - Serious Violent Offense, RCW 9.94A.030(37) - 24 to 48 months
  - Violent Offense, RCW 9.94A.030(45) - 18 to 36 months
  - Crime Against Person, RCW 9.94A.411 - 9 to 18 months
  - Felony Violation of RCW 69.50/52 - 9 to 12 months

or for the entire period of earned early release awarded under RCW 9.94A.728, whichever is longer.  
Sanctions and punishments for non-compliance will be imposed by the Department of Corrections pursuant to RCW 9.94A.737.

**APPENDIX H** for Community Custody conditions is attached and incorporated herein.  
 **APPENDIX J** for sex offender registration is attached and incorporated herein.

4.8  **WORK ETHIC CAMP:** The court finds that the defendant is eligible for work ethic camp, is likely to qualify under RCW 9.94A.690 and recommends that the defendant serve the sentence at a work ethic camp. Upon successful completion of this program, the defendant shall be released to community custody for any remaining time of total confinement. The defendant shall comply with all mandatory statutory requirements of community custody set forth in RCW 9.94A.700. **Appendix H** for Community Custody Conditions is attached and incorporated herein.

4.9  **ARMED CRIME COMPLIANCE, RCW 9.94A.475, 480.** The State's plea/sentencing agreement is  attached  as follows:

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The defendant shall report to an assigned Community Corrections Officer upon release from confinement for monitoring of the remaining terms of this sentence.

Date: November 9, 2007

*Paris Kallas*  
JUDGE  
Print Name: JUDGE PARIS K. KALLAS

Presented by:

*Amy J. Friedheim*  
Deputy Prosecuting Attorney, WSBA# 19897  
Print Name: AMY J. FRIEDHEIM

Approved as to form:

*Eric Weston* 21357  
Attorney for Defendant, WSBA #  
Print Name: ERIC WESTON

FINGERPRINTS

BEST AVAILABLE IMAGE POSSIBLE



RIGHT HAND  
FINGERPRINTS OF:

DEFENDANT'S SIGNATURE: E. J. Hills  
DEFENDANT'S ADDRESS: \_\_\_\_\_

EDWARD JAMES HILLS

DATED: November 9, 2007  
Barisk-coltz  
JUDGE, KING COUNTY SUPERIOR COURT

ATTESTED BY: BARBARA MINER,  
SUPERIOR COURT CLERK  
BY: Andre Jones  
DEPUTY CLERK

CERTIFICATE

I, \_\_\_\_\_,  
CLERK OF THIS COURT, CERTIFY THAT  
THE ABOVE IS A TRUE COPY OF THE  
JUDGEMENT AND SENTENCE IN THIS  
ACTION ON RECORD IN MY OFFICE.  
DATED: \_\_\_\_\_

OFFENDER IDENTIFICATION

S.I.D. NO. WA15811055  
DOB: APRIL 14, 1974  
SEX: M  
RACE: B

\_\_\_\_\_  
CLERK

BY: \_\_\_\_\_  
DEPUTY CLERK

**SUPERIOR COURT OF WASHINGTON FOR KING COUNTY**

STATE OF WASHINGTON,	)	
	)	
	) Plaintiff,	No. 07-1-03980-1 SEA
	)	
vs.	)	JUDGMENT AND SENTENCE,
	)	(FELONY) - APPENDIX B,
EDWARD JAMES HILLS	)	CRIMINAL HISTORY
	)	
	) Defendant,	
	)	

2.2 The defendant has the following criminal history used in calculating the offender score (RCW 9.94A.525):

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
VUCSA: POSSESS METH	04/19/2002	ADULT	011093602	KING CO
PROMOTING PROSTITUTION 2	04/19/2002	ADULT	011093602	KING CO
UNLAWFUL POSSESSION OF A FIREARM 2	10/16/1998	ADULT	971057481	KING CO
TAKING MOTOR VEHICLE WITHOUT PERMISSION	05/04/1992	ADULT	921008391	KING CO
ROBBERY 2	05/04/1992	ADULT	911067429	KING CO
RECKLESS DRIVING <i>(amended from DUI)</i>	05/15/2004	ADULT	C00520268	WA DIST COURT
TAKING MOTOR VEHICLE WITHOUT PERMISSION	02/27/1990	JUVENILE	908005056	KING CO
NARCOTIC POSSESSION	08/15/1989	JUVENILE	898025037	KING CO
TAKING MOTOR VEHICLE WITHOUT PERMISSION	06/23/1988	JUVENILE	888026817	KING CO
BURGLARY 2	01/21/1988	JUVENILE	870042873	KING CO
MALICIOUS MISCHIEF 2	09/05/1986	JUVENILE	868032314	KING CO
BURGLARY 2	06/24/1985	JUVENILE	858015705	KING CO

[ ] The following prior convictions were counted as one offense in determining the offender score (RCW 9.94A.525(5)):

Date: Nov 9, 2007 *Patrick K. [Signature]*  
JUDGE, KING COUNTY SUPERIOR COURT

**SUPERIOR COURT OF WASHINGTON FOR KING COUNTY**

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	No. 07-1-03980-1 SEA
	)	
vs.	)	APPENDIX G
	)	ORDER FOR BIOLOGICAL TESTING
EDWARD JAMES HILLS	)	AND COUNSELING
	)	
Defendant,	)	
	)	

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(1) **DNA IDENTIFICATION (RCW 43.43.754):**

The Court orders the defendant to cooperate with the King County Department of Adult Detention, King County Sheriff's Office, and/or the State Department of Corrections in providing a biological sample for DNA identification analysis. The defendant, if out of custody, shall promptly call the King County Jail at 296-1226 between 8:00 a.m. and 1:00 p.m., to make arrangements for the test to be conducted within 15 days.

(2)  **HIV TESTING AND COUNSELING (RCW 70.24.340):**

(Required for defendant convicted of sexual offense, drug offense associated with the use of hypodermic needles, or prostitution related offense.)

The Court orders the defendant contact the Seattle-King County Health Department and participate in human immunodeficiency virus (HIV) testing and counseling in accordance with Chapter 70.24 RCW. The defendant, if out of custody, shall promptly call Seattle-King County Health Department at 205-7837 to make arrangements for the test to be conducted within 30 days.

If (2) is checked, two independent biological samples shall be taken.

Date: NW 9, 2007

  
\_\_\_\_\_  
JUDGE, King County Superior Court

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, )
)
Plaintiff, ) No. 07-1-03980-1 SEA
)
vs. ) JUDGMENT AND SENTENCE
) APPENDIX H
EDWARD JAMES HILLS ) COMMUNITY PLACEMENT OR
) COMMUNITY CUSTODY
Defendant, )

The Defendant shall comply with the following conditions of community placement or community custody pursuant to RCW 9.94A.700(4), (5):

- 1) Report to and be available for contact with the assigned community corrections officer as directed;
2) Work at Department of Corrections-approved education, employment, and/or community service;
3) Not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
4) Pay supervision fees as determined by the Department of Corrections;
5) Receive prior approval for living arrangements and residence location;
6) Not own, use, or possess a firearm or ammunition. (RCW 9.94A.720(2));
7) Notify community corrections officer of any change in address or employment; and
8) Remain within geographic boundary, as set forth in writing by the Department of Corrections Officer or as set forth with SODA order.

OTHER SPECIAL CONDITIONS:

- [X] The defendant shall not consume any alcohol.
[X] Defendant shall have no contact with: family of Lindsey Austin; Steve Lafferty
[ ] Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to wit:
[X] The defendant shall participate in the following crime-related treatment or counseling services: substance abuse
[X] The defendant shall comply with the following crime-related prohibitions: Attend DUI-victim penalty, No driving w/o valid license + insurance, Ignited Interlock Device (set at .02) as ordered by DCU
[ ] No moving violations

Other conditions may be imposed by the court or Department during community custody.

Community Placement or Community Custody shall begin upon completion of the term(s) of confinement imposed herein or when the defendant is transferred to Community Custody in lieu of earned early release. The defendant shall remain under the supervision of the Department of Corrections and follow explicitly the instructions and conditions established by that agency. The Department may require the defendant to perform affirmative acts deemed appropriate to monitor compliance with the conditions [RCW 9.94A.720] and may issue warrants and/or detain defendants who violate a condition [RCW 9.94A.740].

Date: Nov 9, 2007
Boris K. Kolt
JUDGE



## FACTS

At approximately noon on October 16, 2006, Edward James Hills was driving his 1998 four-door silver Ford Taurus in West Seattle. Nineteen-year-old Lindsey Austin was in the front passenger seat of the car. Hills and three other cars stopped at the red light at Delridge Way SW and SW Orchard Street. Steven Laffery, a plumber, was driving his Ford work van through the green light at the intersection when, inexplicably, Hills drove his car through the red light into the intersection. Laffery unsuccessfully tried to avoid the collision, but the front of his van struck the passenger side of the Ford Taurus. Hills and Austin were trapped inside the car. An off-duty fireman, Brian Smith, got into the car to check on the driver and the passenger. Smith made efforts to try and keep Austin's airway open. To extract Hills and Austin from the car, the firemen had to cut through the roof of the car and remove the driver's side door. Hills and Austin were taken to Harborview Medical Center (Harborview). Austin suffered severe internal injuries to her aorta, lungs, and liver from the collision and was not expected to survive. Laffery's right ankle was fractured and he suffered soft tissue injuries.

The Seattle police found a clear small bag of marijuana in the side panel of the driver's door of the Ford Taurus. The police also found marijuana in a black bag on the back seat.

Seattle police officer Eric Michl arrived at Harborview around one o'clock p.m. Officer Michl said that Hills had no visible injuries but noted that he "had watery, bloodshot eyes." Shortly after Officer Michl arrived at Harborview, Austin died.

Officer Michl informed Hills that he was under arrest for vehicular homicide and vehicular assault. Office Michl advised Hills of his constitutional rights and the special

evidence warning for a blood sample. Hills admitted that he had a previous drug conviction and told Officer Michl that he had used marijuana the night before. Hills also told Officer Michl that the light was green when he drove into the intersection.

Officer Michl obtained a blood sample from Hills at approximately 1:30 p.m. The results of the blood test revealed "a THC level of 1.6 ng/mL" indicating that Hills had smoked marijuana within three to four hours of the blood draw. Hills's cell phone records also showed that he was talking on his cell phone at the time of the collision.

On April 9, 2007 the State charged Hills with vehicular homicide. The State alleged that Hills proximately caused the death of Austin by driving his car while under the influence of drugs, in a reckless manner, and with disregard for the safety of others, in violation of RCW 46.61.520(1)(a), (b) and (c). Hills was arraigned on April 18.

At the first omnibus hearing on June 1, and at each hearing thereafter until trial, Hills expressed the strongly held belief that there was evidence that would show the off-duty fireman caused Austin's death. Hills made six motions to appoint new counsel and at one point, made a motion to proceed pro se. The chief criminal judge considered and denied each of the motions to substitute counsel and the motion to proceed pro se.

Shortly before the trial on October 9, the State filed an amended information charging Hills with a second count of vehicular assault based on the injuries to Laffery.

During the four day bench trial, Laffery, eyewitnesses, police officers, the medical examiner, and the toxicologist testified. The medical examiner testified that Austin's death was caused by "multiple rib fractures and the lacerations of the aorta, lungs, liver and other viscera due to the blunt force injuries sustained in the collision."

The toxicologist testified that based on the level of THC in the blood sample, Hills had smoked marijuana three or four hours before the blood draw at 1:30 p.m. on October 16, 2006. However, on cross examination, the toxicologist admitted that he could not say with certainty what the actual THC level was at the time of the collision.

Darnice Madison, a close family friend, and Hills testified on behalf of the defense. Madison testified that the light was green when Hills drove into the intersection. Hills also testified that the light was green, "I remember stopping, and I don't know, just waiting till the light turned green. When the light turned green, that's when I proceeded." Hills testified that after the collision, he called Austin's name. Hills said that Austin did not respond but that she was still breathing. Hills testified that an off-duty fireman then got in the car "and he grabbed her head and had it up and held it back, and he held it back until the fire department showed up."<sup>1</sup>

In closing argument, Hills's attorney argued that the State did not prove beyond a reasonable doubt that Hills was driving under the influence of drugs or that he was impaired at the time of the collision. The attorney also relied on Hills's testimony to argue that:

[F]rom his perception, as he was sitting there immediately following the accident, that Ms. Austin was still alive, that she was breathing okay, and that her impairment of breathing did not happen until the off-duty good Samaritan paramedic arrived, and that after he started moving Ms. Austin around, it was then that her body started demonstrating the distress that was her impending death. Mr. Hills firmly believes that 'if it were not for the EMT doing that to her, Ms. Austin would still be alive today.'

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<sup>1</sup> Hills's attorney made a strategic decision to not call the off-duty fireman based on the concern that the testimony would undermine Hills's theory and testimony at trial.

The trial court found Hills guilty of vehicular homicide and vehicular assault. The court rejected the argument that the State did not prove Hills was under the influence of drugs and impaired at the time of the collision.

At the time of the driving, the defendant was under the influence of marijuana and impaired from his consumption of marijuana. The defendant's blood was properly and legally drawn at 1:38 p.m. The blood was then tested at the Washington State Toxicology Laboratory by licensed analyst and forensic toxicologist, Justin Knoy. There is no evidence that the blood was tampered with, altered, or contaminated with in any way. The testing was done according to the procedures approved by the State Toxicologist and those procedures are accepted in the scientific community.

The results show a THC level of 16 ng/mL and carboxy THC level of 16.6 ng/mL. Based on how THC is processed in the body, the defendant smoked the marijuana within 3-4 hours of the blood draw. His THC level would have been higher in the hours before the blood draw. Based on the carboxy-THC, the defendant was an infrequent user of marijuana and would have felt the effects of the drug more pronounced than a more frequent user. Marijuana impairs driving by distorting time and space and delayed reaction time and decreased vigilance. The consumption of marijuana by the defendant impaired his ability to perform the complex divided attention tasks involved in driving.

DRE Officer Michl also provided a basis for the Court to find that the defendant was impaired by marijuana. The defendant's eyes were bloodshot and watery and no other facts were presented to credibly explain this symptom of marijuana impairment. Additionally, the facts of the collision, stopping at and then running the red light, and failing to take any evasive action, both demonstrate that he was impaired by the marijuana he had consumed.

The defendant's ability to drive was lessened to an appreciable degree and he was under the influence of marijuana and impaired by his consumption of marijuana.

The court also rejected the argument that the collision was not the proximate cause of Austin's death and Laffery's injuries. The trial court expressly found that Hills's driving proximately caused the injuries and death of Austin and the substantial

bodily harm to Laffery. The court also found that Hills drove his car in a reckless manner and with disregard for the safety of others.

The defendant intentionally drove his car while impaired and drove it with a young teenage passenger. His conduct was rash and heedless and indifferent to the consequences and far greater than ordinary negligence and with a disregard for the safety of others.

The court imposed a high-end standard range sentence for vehicular homicide and vehicular assault. The sentence included a mandatory 24-month enhancement under RCW 46.61.520(2) based on a prior conviction for reckless driving that was originally charged as a DUI.

#### ANALYSIS

##### Motions to Substitute Counsel

Hills argues that he was denied his constitutional right to counsel because of an irreconcilable conflict with his attorney. Hills made a number of motions seeking to substitute counsel based on his mistaken belief there was evidence that the off-duty fireman caused Austin's death. Hills contends the court erred in concluding there was not an irreconcilable conflict and denying his motions for new counsel.

A defendant does not have an absolute, Sixth Amendment right to choose any particular advocate. State v. DeWeese, 117 Wn.2d 369, 375-76, 816 P.2d 1 (1991) (citing Wheat v. United States, 486 U.S. 153, 159 n.3, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)). A defendant dissatisfied with appointed counsel has the burden to show good cause, such as an irreconcilable conflict or a complete breakdown in communication to warrant substitution of counsel. State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997) (Stenson I). In determining whether an irreconcilable

conflict exists, the court must consider: (1) the reasons given for the dissatisfaction, (2) the court's own evaluation of counsel's representation, and (3) the effect of any substitution on the scheduled proceedings. Stenson I, 132 Wn.2d at 734.

Unsupported allegations are not enough to require substitution and a defendant cannot rely on a general loss of confidence or trust to justify appointment of new counsel. State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004); State v. Schaller, 143 Wn. App. 258, 268, 177 P.3d 1139 (2007), rev. denied, 164 Wn.2d 1015 (2008). However, "[i]f the relationship between the lawyer and client completely collapses," refusal to substitute counsel violates a defendant's constitutional right to effective assistance of counsel. In re Personal Restraint of Stenson, 142 Wn.2d 710, 722, 16 P.3d 1 (2001) (Stenson II) (citing United States v. Moore, 159 F.3d 1154, 1158 (9th Cir. 1998)).

In determining whether the trial court abused its discretion in concluding there was not an irreconcilable conflict on appeal, we must consider: (1) the extent of the conflict, (2) the adequacy of the court's inquiry, and (3) the timeliness of the motion. Stenson II, 142 Wn.2d 723-24.

At each of the omnibus hearings and on the day of trial, the chief criminal judge considered and rejected Hills's motions to substitute counsel. The crux of Hills's concern was his dissatisfaction with his attorney's strategy because of his strongly held belief that there was evidence to prove Austin's death was caused by the off-duty fireman.

At the first omnibus hearing, on June 1, Hills asked the court to appoint new counsel because he did not receive a complete copy of the discovery until a month

after the arraignment. Hills also claimed that there were critical documents, such as the autopsy report, that were missing.

THE COURT: Well he can't provide it until it is vetted by the State, by court rule, so I don't –

DEFENDANT HILLS: I understand that, your Honor. I understand that, but there is a lot of documents missing, and I informed him prior to him giving me the discovery. He has yet to produce the copies -- the documents that -- . . . I believe that these are critical documents that can prove my innocence, and he has failed to obtain them. He has given me the runaround saying that the State hasn't provided him -- . . . he got one page and don't have two pages . . .

THE COURT: What documents do you think that Mr. Weston has that you don't have yet provided?

DEFENDANT HILLS: The autopsy report. That goes directly to the charge that I am being charged with. Ambulance reports. The fire department's report that was on the scene. There was an off-duty fire department individual that jumped in my vehicle, and he is not even in any of the reports. I don't have any initial police reports. All these documents can prove my innocence.

The prosecutor objected to providing Austin's medical records to Hills on the ground that the medical records "including autopsy, are not records that become part of redacted discovery that go into the defendant's hands . . . ." After the court denied the motion for new counsel and Hills's request for an unredacted copy of the autopsy report, Hills stated that he was going to file a bar complaint against his attorney with the American Bar Association. Following a lengthy discussion about the need for further investigation by the defense, the court continued the omnibus hearing to June 15.

On June 15, Hills renewed his request for new counsel. Hills's attorney also expressed some concern about his inability to communicate with Hills. Characterizing the request as one for a second opinion, the attorney joined in Hills's motion.

MR. WESTON: There is some change of circumstance between then and now, including -- I would actually join in this one. I don't often, but the reason I would be willing -- the reason that I do join in this motion is Mr. Hills is in a very precarious and serious situation. There is practically no information going between us, and I wouldn't exactly say that that is -- I wouldn't say that that is voluntary on his part. It seems like we're just not communicating, and I would say that Mr. Hills ought to have a second opinion. I would characterize this like a very serious surgery. I am telling him certain information. Mr. Hills wants a second opinion, and I have kind of -- we are kind of at loggerheads in our communication. And again I say it is not because he doesn't want to hear, I mean I don't perceive this as a voluntary thing, so -- and Mr. Hills wishes to address the Court.

Hills then interrupted, and told the judge that he had a conflict not only with his attorney, but with all of the court-appointed attorneys who had represented him in the past.

DEFENDANT HILLS: If I may, your Honor? Good afternoon. Yes, there is a conflict of interest with -- just not the attorney, but with also all of the agencies -- past tense. . . . All of these court-appointed attorney agencies I have had conflicts of interest. I'm sorry I didn't address the issue with you June 1. I am bringing the issue now to the Court, and I do ask the Court to appoint private counsel.

Hills's attorney addressed the bar complaint and Hills's misperception about the discovery.

MR. WESTON: I think that part of what Mr. Hills is talking about, in terms of the conflict of interest, Mr. Hills filed a bar complaint against me, which was -- I don't know what the term would be, dismissed or -- and he has also filed complaints against attorneys in every agency.

THE COURT: And I noticed that two of the attorneys mentioned are OPD private counsel appointees . . .

MR. WESTON: And also what Mr. Hills is talking -- it is his opinion that the State needs to provide all of the discovery by arraignment, and part of his complaint with me is that they didn't do that, and so I did not file—I did not have a probable cause hearing on it.

Based on Hills's mistaken belief that his attorney had not timely provided discovery, his history of conflicts with court appointed and private attorneys, and the fact that the bar complaint against his attorney had been dismissed, the court denied Hills's motion to substitute counsel.

THE COURT: Mr. Hills, as both lawyers know, is just wrong about that—that there is an ongoing duty to provide discovery as it is obtained and I have no reason to believe that that hasn't happened. I also don't think Mr. Hills would get along better with any other lawyer. There is nothing here that is indicating to me that Mr. Weston has caused a problem here -- that Mr. Hills has, from his own words, never been satisfied with counsel on any of his cases -- that there is no indication that the communication would be any better with any other lawyer or that anything that Mr. Weston has done is in any way inappropriate.

At the omnibus hearing on August 24, Hills made another motion before a different judge for new counsel or to proceed pro se. The judge continued the motion to the following week to be heard by the chief criminal judge.

At the hearing the following week before the chief criminal judge, the prosecutor notified Hills that the State planned to amend the information to add an additional count of vehicular assault. Hills again expressed concern about missing discovery, and renewed his motion for new counsel or to proceed pro se. Hills reiterated his belief that his attorney was withholding evidence that would prove the off-duty fireman caused Austin's death. Hills also complained that his attorney had only met with him one time since the arraignment.

The prosecutor addressed the evidence concerning the cause of Austin's death. According to the prosecutor, there was no evidence that the fatal injuries were related to any of the off-duty fireman's efforts to assist Austin. The prosecutor stated that

Austin's death was caused by internal injuries that were "within her torso, so it had nothing to do with her neck."

Nonetheless, Hills continued to insist that his attorney "has been withholding critical, crucial information that proves my innocence, as I have been stating from day one." Hills also expressed frustration that his attorney had not yet interviewed the off-duty fireman.

[W]ho . . . grabbed my friend's head, held it back, and so I believe that her cause of death wasn't directly from the accident, and I believe he knows this and that is why he has never come to see me, never come to reveal the report to me --

Hills's attorney also told the court that "[t]here is nothing in the police reports substantiating what Mr. Hills said." But the attorney said that he had subpoenaed records from the fire department and that the defense investigator was seeking to identify and interview the off-duty fireman and others. The attorney also addressed the concern about only meeting with Hills one time between the arraignment and the omnibus hearing.

THE COURT: And I just have one question [for Mr. Weston]: Have you -- Is your understanding the same as Mr. Hills, you have only seen him one time?

MR. WESTON: That is true. I have only seen him one time. However, I also sent to him -- he has received redacted copies of the discovery. I have reviewed with him the first five pages of the autopsy. I did not get the last three until -- I believe it was the July. I have sent to him every piece of new information that my investigator has gotten, through the mail, and I have invited him to give me a call to discuss what's going on.

At the end of the hearing, the court asked Hills why he did not want an attorney. Hills told the court that he did want an attorney but he wanted one that was "sufficient

in representing me." The court denied Hills's motion for new counsel. And based on the colloquy with Hills, the court denied the motion to proceed pro se because the request was "certainly not unequivocal."

At the last omnibus hearing on September 21, after the court arraigned Hills on the amended information charging one count of vehicular homicide as to Austin and one count of vehicular assault as to Laffery, Hills renewed his motion for new counsel.

DEFENDANT HILLS: Yes, your Honor. Good morning. I had just spoke to Mr. Weston and informed him that I would like to have an independent retesting of my blood at the state crime lab, and he informed me that that is not something that he is willing to do, so I am asking the Court to direct him to do such, because I think it is very pertinent to my case.

And I would also like to inform the Court of another serious concern. Mr. Weston came and visited me -- I believe it was last week -- and offered to finally show me the autopsy reports, which were incomplete. And I asked Mr. Weston, before handing them over to me, if it was incomplete, please don't waste my time, and yet he did it anyway, so he is still hiding information from me. I am still uncomfortable with his representation, and I would like to also reiterate that past -- in the past when I had first informed you that I had conflicts of interest with all of the Office of Public Defense in the past, I recall that you said there is no need to change attorneys, and I feel that there is quite a need -- it is a very good concern to change attorneys, and possibly have the Court appoint a private counsel rather than somebody from the Office of Public Defense who I have clearly had conflicts of interest with in the past -- and it wasn't at all my doing. It was the way that the attorneys were handling what they do. It was the way that I was taking things. So I think that this is a very high-profile case that renders such an appointment of private counsel--.

When the court asked whether the attorney had reviewed the autopsy report with Hills, the attorney explained that he attempted to review the entire autopsy report with Hills but Hills questioned whether the report was complete or authentic. The court denied the motion to substitute counsel.

THE COURT: We have been through this argument before. Whether -- the question of whether the defense is going to ask for retesting by the tox lab is certainly within the discretion of trial counsel. The motion again is denied.

Before trial began on October 9, Hills again asked the chief criminal judge to appoint new counsel. The court denied the motion,

THE COURT: I have made this ruling before . . . . There is nothing new that has been raised.

Hills again expressed concern about not reading the police reports or the autopsy report. In response, the chief criminal judge told Hills, "I am satisfied that Mr. Weston is doing an admirable job for you. Thank you."

On appeal, Hills argues that the conflict with his attorney was irreconcilable and the chief criminal judge erred in refusing to grant his motions to appoint new counsel. The record shows that any conflict between Hills and his attorney was based on Hills's strongly held, but mistaken belief, that the off-duty fireman caused Austin's death. The undisputed evidence established that Austin died from severe internal injuries caused by the collision. As in Stenson I, a defendant's dissatisfaction with his attorney based on unsubstantiated claims is not grounds to find an irreconcilable conflict. Stenson I, 132 Wn.2d at 734-35. The record also shows that Hills had a history of conflicts with appointed counsel and filing bar complaints against his lawyers. As the court noted, a new attorney would not overcome Hills's concerns.

Hills also emphasizes the fact that his attorney visited him only once between the arraignment in April and the omnibus hearing in August. But the record shows that the attorney communicated with Hills, provided Hills with discovery, and offered to talk by phone. And even if the relationship was strained, the record does not establish a

complete breakdown in communication that warranted substitution of counsel. Stenson II, 142 Wn.2d at 723.

Hills also argues that by pointing out that his attorney was "doing an admirable job," the court did not properly focus on whether there was an irreconcilable conflict. However, determining "the breakdown's effect on the representation the client actually receives" is part of the inquiry the court should make. Stenson II, 142 Wn.2d at 724.

Hills cites United States v. Nguyen, 262 F.3d 998 (9th Cir. 2001), to argue that the court's inquiry into the conflict was inadequate because the court did not privately question either Hills or his attorney. The facts in Nguyen are different.

In Nguyen a non-English speaking defendant, Nguyen, asked to substitute private counsel because he had stopped communicating with his appointed attorney. Nguyen also sought to present testimony from other witnesses about the breakdown in communication. On appeal, the Ninth Circuit held that the trial court abused its discretion in denying the motion for new counsel without the defendant present and in refusing to schedule a hearing. Nguyen, 262 F.3d at 1004. The court noted that the trial court's decision was based more on keeping to the court's schedule than engaging in an appropriate inquiry concerning Nguyen's motion to substitute. Nguyen, 262 F.3d at 1005.

Here, unlike in Nguyen, the criminal presiding judge engaged in a lengthy colloquy with Hills and questioned Hills, his attorney, and the prosecutor in seeking to ascertain whether there was irreconcilable conflict. The dispute between Hills and his attorney over trial strategy, and Hills's dissatisfaction was not a sufficient reason to grant the motions for new counsel. The record supports the court's determination that

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there was not an irreconcilable conflict and that Hills did not show good cause to appoint new counsel. The record also supports the conclusion that the judge made adequate inquiries about the alleged conflict.<sup>2</sup>

Motion to Proceed Pro Se

Hills also contends the court erred in denying his motion to represent himself pro se in violation of the Sixth Amendment of the United States Constitution and article 1, section 22 of the Washington State Constitution.

A defendant has a "constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so." Faretta v. California, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). But "[e]xercising the right of self-representation requires waiving the right to counsel. A defendant may represent himself only when he 'knowingly and intelligently' waives the lawyer's assistance that is guaranteed by the Sixth Amendment." Indiana v. Edwards, 128 S. Ct. 2379, 2391, 171 L. Ed.2d 345 (2008) (Scalia, J., dissenting) (quoting Faretta, 422 U.S. at 835). The Supreme Court in Faretta also recognized the "tension between a defendant's autonomous right to choose to proceed without counsel and a defendant's right to adequate representation." De Weese, 117 Wn.2d at 376. See Faretta 422 U.S. at 832 ("right of an accused to conduct his own defense seems to cut against the grain" of the right to assistance of counsel).

Courts should also "indulge every reasonable presumption against finding that a defendant has waived the right to counsel." State v. Vermillion, 112 Wn. App. 844, 851,

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<sup>2</sup> The record also shows that the attorney effectively represented Hills during the trial, and that Hills was able to present his theory that the off-duty fireman caused Austin's death.

51 P.3d 188 (2002). And "to protect trial courts from manipulative vacillations by defendants regarding representation, we require a defendant's request to proceed in propria persona, or pro se, to be unequivocal." DeWeese, 117 Wn.2d at 376. Whether the request to proceed pro se is unequivocal must be determined in the context of the record as a whole. State v. Woods, 143 Wn.2d 561, 586, 23 P.3d 1046 (2001). While a request to proceed pro se may be made in the alternative to a request for new counsel, a conditional request must still be unequivocal. Stenson I, 132 Wn.2d at 741. Woods, 143 Wn.2d at 586. .

Here, after unsuccessfully trying to obtain new counsel at the omnibus hearing on August 31, Hills made a motion to proceed pro se.

DEFENDANT HILLS: Today I have in mind to go pro se, to manage and plead my own case, and I am also asking the Court to have the State turn over every critical, crucial, important document that shows my innocence, due to the Brady Doctrine. Substitute of counsel, I don't think I am going to address, because it seems that I most likely won't get it. I recall you saying that you wouldn't allow me to change counsels -- even though I expressed to you how I felt about this counsel. Mr. Eric Weston -- I have been incarcerated for over 120 days. Mr. Weston has been to visit me one time out of that 120 days, has failed to keep me informed of anything pertinent to my case, and I have still yet had an opportunity to view the autopsy report, which they both have been, the State and Mr. Weston, have been so diligently hiding from me. And so today, your Honor, I would like to pose this motion to you, to go pro se to manage my own case, and to also allow me--

The court considered Hills's request to proceed pro se. The court engaged in a lengthy colloquy with Hills in an effort to apprise him of the seriousness of the charges, the complexity of the evidence, and the risks and responsibilities of self-representation. See State v. Vermillion, 112 Wn. App. 844, 851, 51 P.3d 188 (2002) ("the trial court should assume responsibility for assuring that the defendant's

decision is made with at least minimal knowledge of what the task entails. . . .”).

During the colloquy, Hills reiterated his belief that his attorney “has been withholding critical, crucial information that proves my innocence, as I have been stating from day one.” At the end of the colloquy, and after questioning Hills and his attorney, the court asked Hills “[w]hy don’t you want an attorney?” In response Hills told the court:

Well, I would like an attorney, one that is -- would be, you know, sufficient in representing me. I mean, your Honor, if you was in my position, an attorney -- you have been locked up for 120 days and your so-called counsel has not come and seen you but for one time to inform you that you are going to go into court to continue your case even further, I mean I thought I had a 60 day speedy trial right. You know, I have been shown that I don't even have a 60-day speedy trial right, according to the rules, so Mr. Weston has not been playing fair by the rules.

Based on the colloquy and the record as a whole, the court found that Hills’s request to proceed pro se was not unequivocal.

THE COURT: -- and therefore -- there is not a basis for counsel, and it is not an unequivocal request, so we have finished this issue.

On appeal, Hills concedes that his first choice was substitution of counsel, but argues that his alternative request to proceed pro se was unequivocal. Hills primarily relies on State v. Barker, 75 Wn. App. 236, 881 P.2d 1051 (1994), to support his argument that the request was unequivocal. Barker is distinguishable.

The court in Barker did not engage in a proper colloquy or “any analysis by the court of the facts and circumstances of the case.” Barker, 75 Wn. App. at 241-42. Here, unlike in Barker, when the criminal presiding judge engaged in a proper colloquy and asked Hills why he did not want a lawyer, Hills repeated his desire for new counsel rather than an unequivocal desire to represent himself. Based on the

record as a whole, we conclude the trial court did not err in concluding Hills's request to represent himself was not equivocal.

Sentence Enhancement

In the alternative, Hills seeks to vacate the mandatory two-year sentence enhancement that was imposed based under former RCW 46.61.520(2) and RCW 46.61.5055(13)(a)(v).<sup>3</sup> Relying primarily on this court's decision in State v. Shaffer, 113 Wn. App. 812, 55 P.3d 668 (2002) overruled by, City of Walla Walla v. Greene, 154 Wn.2d 722, 116 P.3d 1008 (2005), and the United States Supreme Court decisions in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), Hills contends that RCW 46.61.5055(13)(a)(v) violates due process, the separation of powers doctrine, equal protection, and his constitutional right to notice. Hills asserts that an enhancement based on a prior DUI charge that the State did not prove beyond a reasonable doubt is unconstitutional.

Upon conviction of vehicular homicide under RCW 46.61.520, the legislature mandates imposition of an additional two-year enhancement for a prior offense as defined in RCW 46.61.5055. RCW 46.61.520(2) states:

(2) Vehicular homicide is a class A felony punishable under chapter 9A.20 RCW, except that, for a conviction under subsection (1)(a) of this section, an additional two years shall be added to the sentence for each prior offense as defined in RCW 46.61.5055.<sup>4</sup>

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<sup>3</sup> All references in this opinion are to former RCW 46.61.5055(13)(a)(v). Effective January 1, 2009, the same language is now codified at RCW 46.61.5055(14)(a)(v). Laws of 2008, ch. 282, § 14.

<sup>4</sup> (Emphasis added).

RCW 46.61.5055(13)(a) defines what prior offenses are subject to the sentence enhancement under RCW 46.61.520(2). RCW 46.61.5055(13)(a)(v) provides in pertinent part:

(a) A "prior offense" means any of the following:

...  
(v) A conviction for a violation of RCW 46.61.5249 [negligent driving-first degree], RCW 46.61.500 [reckless driving], or RCW 9A.36.050 [reckless endangerment] or an equivalent local ordinance, if the conviction is the result of a charge that was originally filed as a violation of RCW 46.61.502 [DUI] or RCW 46.61.504 [physical control of vehicle under the influence], or an equivalent local ordinance, or of RCW 46.61.520 [vehicular homicide] or RCW 46.61.522 [vehicular assault].<sup>5</sup>

There is no dispute that Hills was previously charged with driving while under the influence of alcohol (DUI) in violation of RCW 46.51.502 and 46.51.504 and that Hills pleaded guilty to reckless driving in violation of RCW 46.51.500. In the Statement of Defendant on Plea of Guilty to reckless driving conviction, Hills admitted that "on May 15, 2004, within King County, Washington, I drove a motor vehicle on a public street in a manner displaying a willful and wanton disregard for the safety of property after consuming alcohol."

Based on the evidence at sentencing, the court concluded that the reckless driving conviction was a prior offense under RCW 46.61.5055(13)(a)(v), and imposed the mandatory two-year sentence enhancement as required by RCW 46.61.520(2).

Relying on Shaffer, Hills argues that the mandatory sentence enhancement violates his Fourteenth Amendment right to due process. In Shaffer, this court held that former RCW 46.61.5055(12)(a)(v) violated the due process right of a conviction

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<sup>5</sup> (Emphasis added).

based on proof beyond a reasonable doubt because the statute allowed imposition of a sentence enhancement for an unproven DUI charge. Shaffer, 113 Wn. App. at 817-818. But in Greene, 154 Wn.2d at 722, the Washington Supreme Court reversed the decision in Shaffer. The court rejected Greene's due process challenge to the DUI sentence enhancement statute because the statute, former RCW 46.61.5055(12)(a)(v), requires a conviction for negligent driving or other listed offense originating from a DUI charge.

[T]he statute requires the State to establish that a prior driving conviction involved use of intoxicating liquor or drugs. Thus, due process is satisfied for the purposes of this mandatory enhancement if the prior conviction exists and the prosecution can establish that intoxicating liquor or drugs were involved in that prior offense.

Greene, 154 Wn.2d at 728.

Because Greene controls, we reject Hills's reliance on Shaffer. Here, there is no dispute that Hills was charged with the crime of DUI in violation of RCW 46.51.502 and RCW 46.61.504, and that he pleaded guilty to reckless driving in violation of RCW 46.51.500. Nor is there any dispute that in the Statement of Defendant on Plea of Guilty, Hills admitted that he drove a "in a manner displaying a willful and wanton disregard for the safety of property after consuming alcohol." Because Hills was convicted of reckless driving while admittedly under the influence of alcohol, we reject his due process challenge to RCW 46.61.5055(13)(a)(v).

Hills's reliance on Apprendi and Blakely is also misplaced. Under Apprendi, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and

proved beyond a reasonable doubt.” Apprendi, 530 U.S. at 490. In Blakely, the Court clarified Apprendi, and held that the statutory maximum means the maximum sentence that a judge can impose “solely on the basis of the facts reflected in the jury verdict or admittedly by the defendant.”<sup>6</sup> Blakely, 542 U.S. at 303.

In State v. Hughes, 154 Wn.2d 118, 137, 110 P.3d 192 (2005), overruled on other grounds, Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), our supreme court held that the existence of a prior conviction need not be proved to a jury beyond a reasonable doubt. Consequently, a sentencing court must only find that the prior conviction exists by a preponderance of the evidence. State v. Wheeler, 145 Wn.2d 116, 121, 34 P.3d 799 (2001). And in Shepard v. United States, 544 U.S. 13, 16, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005), the Court held that in examining a prior conviction, the sentencing court can consider the charging documents, written plea agreement, the plea colloquy, and factual findings stipulated to by the defendant. Here, because there is no dispute Hills was convicted of reckless driving and admitted he was driving recklessly after consuming of alcohol, the two-year sentence enhancement does not violate Apprendi or Blakely.

We also reject Hills’s argument that the two-year sentence enhancement under RCW 46.61.5055(13)(a)(v) violates the separation of powers doctrine. Except for constitutional restrictions, the legislature’s power to define criminal punishments is plenary. State v. Varga, 151 Wn.2d 179, 193, 86 P.3d 139 (2004).

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<sup>6</sup> (Emphasis omitted).

As the United States Supreme Court recently noted in a decision rejecting the application of Apprendi and Blakely to the determination of whether to impose a concurrent or consecutive sentence,

Beyond question, the authority of States over the administration of their criminal justice systems lies at the core of their sovereign status. See, e.g., Patterson, 432 U.S. at 201, 97 S. Ct. 2319 (“It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government.”). We have long recognized the role of the States as laboratories for devising solutions to difficult legal problems. See New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 52 S. Ct. 371, 76 L. E. 747 (1932) (Brandeis, J., dissenting). This Court should not diminish that role absent impelling reason to do so.

Oregon v. Ice, 129 S. Ct. 711, 718-19, 172 L. Ed. 2d 517 (2009).

Hills’s claim that the DUI sentence enhancement violates the equal protection statute also fails. The Fourteenth Amendment guarantees that “persons similarly situated with respect to the legitimate purpose of the law must receive like treatment.” State v. Manussier, 129 Wn.2d 652, 672, 921 P.2d 473 (1996). “When a physical liberty alone is involved in a statutory classification,” we apply the rational relationship test, which “requires only that the means employed by the statute be rationally related to a legitimate State goal, and not that the means be the best way of achieving that goal.” Manussier, 129 Wn.2d at 673. Here, the legislature’s decision to impose a sentence enhancement related to certain prior DUI-related convictions is rationally related to the legitimate State objective of protecting the public. RCW 9.94A.010(4).

Hills also claims that his sentence enhancement violates his constitutional right to notice under the Sixth Amendment, and article I, section 22 of the Washington Constitution. Hills relies on State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276

(2008), to argue that the sentence enhancement is an element of the charged crime that must be included in the charging document. But because the sentence enhancement is a penalty and is not an element of the crime, formal notice in the charging documents is not required. State v. Crawford, 159 Wn.2d 86, 96, 147 P.3d 1288 (2006).

Statement of Additional Grounds for Review

Hills raises four other issues in his Statement of Additional Grounds. First, Hills argues that his attorney provided ineffective assistance of counsel. To prevail, Hills must show both deficient performance and resulting prejudice. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). “[E]xceptional deference must be given when evaluating counsel’s strategic decisions.” State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

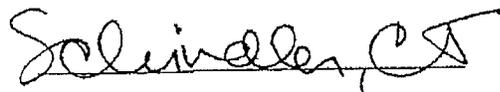
Hills contends that the sentencing memorandum written by his attorney shows that his attorney had a conflict of interest because the attorney expressed sympathy for the families of the victims. However, in context, the memorandum demonstrates that Hills’s attorney was seeking to ensure the court would not sentence Hills based on sympathy for the families.

Hills also asserts that his attorney provided deficient performance by not pursuing his theory that Austin’s death was caused by asphyxiation, and by refusing to seek an independent laboratory test of his blood sample. The record shows that his attorney thoroughly investigated alternative causes of death. And because the defense theory at trial was that the blood sample was adulterated and thus inadmissible, the failure to seek an independent test was not deficient. McNeal, 145 Wn.2d at 362.

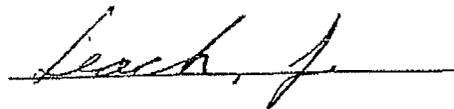
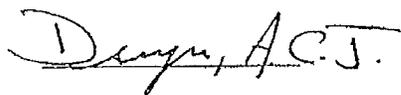
Next, Hills argues that the court abused its discretion in admitting drug laboratory reports that were not properly certified under CrR 6.13(b). However, there was no objection below on this ground. RAP 2.5(a); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Hills also argues that the State violated his Fourteenth Amendment due process rights by failing to preserve exculpatory evidence. Based on the premise that Austin's death was caused by asphyxiation, Hills asserts that the State destroyed exculpatory evidence by allowing Austin's body to be cremated. But the evidence conclusively established that Austin's death was caused by internal injuries from the collision and not from asphyxiation or spinal cord injuries. On this record, there is no constitutional violation. California v. Trombetta, 467 U.S. 479, 488-89, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984).

Last, Hills argues that the court imposed a sentence based on a miscalculated offender score. Hills contends that under State v. Smith, 144 Wn.2d 665, 30 P.2d 1245 (2001), juvenile convictions could not be used to calculate his offender score. But after Smith, the legislature amended the sentencing laws so that prospectively previously "washed out" convictions are included when calculating an offender score. RCW 9.94A.525; Varga, 151 Wn.2d at 202.

We affirm.



WE CONCUR:



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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

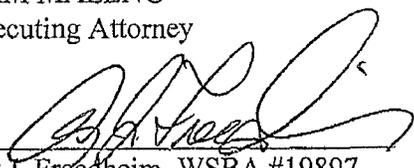
THE STATE OF WASHINGTON, )  
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 ) Plaintiff, )  
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 ) v. ) No. 07-1-03980-1 SEA  
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 ) EDWARD JAMES HILLS, ) INFORMATION  
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 ) Defendant. )

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse EDWARD JAMES HILLS of the crime of **Vehicular Homicide**, committed as follows:

That the defendant EDWARD JAMES HILLS in King County, Washington, on or about October 16, 2006, did drive a motor vehicle which proximately caused injury to Lindsey Austin, a person who died within three years on or about October 16, 2006, as a proximate result of the injury; and that at said time the defendant was operating the vehicle (a) while under the influence of intoxicating liquor, or any drug as defined in RCW 46.61.502 and (b) in a reckless manner and (c) with disregard for the safety of others;

Contrary to RCW 46.61.520(1)(a), 1(b) and 1(c), and against the peace and dignity of the State of Washington.

NORM MALENG  
Prosecuting Attorney

By:   
Amy J. Freedheim, WSBA #19897  
Senior Deputy Prosecuting Attorney

INFORMATION - 1

Norm Maleng, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000  
FAX (206) 296-0955

APPENDIX C

C-1

CAUSE NO. 07-1-03980-1 SEA



SEATTLE  
POLICE  
DEPARTMENT

**CERTIFICATION FOR DETERMINATION  
OF PROBABLE CAUSE**

INCIDENT NUMBER	06-439504
UNIT FILE NUMBER	TCIS 06-141

That Karen Belshay is a Detective with the Seattle Police Department and has reviewed the investigation conducted in Seattle Police Department Case Number 06-439504;

There is probable cause to believe that Edward J. HILLS, DOB/04-14-1974 committed the crime(s) of Vehicular Homicide, RCW 46.61.520 within the City of Seattle, County of King, State of Washington.

This belief is predicated on the following facts and circumstances:

On Monday, October 16<sup>th</sup>, 2006, at approximately 1205 hours, HILLS was the operator of WA #447VMY, a silver 1998 Ford Taurus 4-door, within the City of Seattle, County of King, State of Washington. V/ AUSTIN was the front seat passenger. HILLS was traveling W/B on SW Orchard Street. HILLS initially stopped for the solid red light at Delridge Way SW, but then proceeded through the red light into oncoming traffic. At the same time Vehicle 2, was traveling S/B on Delridge Way SW with the green light. Vehicle 2 struck the right passenger side of HILLS' vehicle as he ran the red light and drove in front of Vehicle 2. HILLS' brother (JAMES) was interviewed by the media and said he was talking to HILLS on his cell phone at the time of the collision. Cell phone records indicate that HILLS was on the cell phone at the time of the collision.

AUSTIN suffered life-threatening injuries. AUSTIN was transported to HMC, where she was pronounced DOA shortly thereafter. While Officer MICHL, a DRE (Drug Recognition Expert) was enroute to HMC, Officer WIND advised him via police radio that he had found a large amount of cash on HILLS' person, a copy of a DUI citation issued to him over two years earlier, literature on search and seizure law and the passenger (V/ AUSTIN) was listed as an endangered missing person. A computer check revealed to MICHL that HILLS had a previous VUCSA conviction and a breath / blood test refusal on his DOL abstract. I advised MICHL via cell phone that a clear small baggie of suspected marijuana had been found in clear view in the driver's door mesh panel. MICHL contacted HILLS at HMC and observed that his eyes were watery and bloodshot. MICHL arrested HILLS for Vehicular Homicide and read him his Miranda Rights. MICHL advised HILLS of the Special Evidence Warning. Stephen SANTAELLA, RN, drew the blood. MICHL witnessed the blood draw that was completed within 3 hours of the collision.

The blood sample taken from HILLS was analyzed at the Washington State Toxicology Lab by Justin L. KNOY and completed on November 27, 2006. The test was performed in accordance with the provisions of RCW 46.61.506. The test was performed in a manner approved by the Washington State Toxicologist, and KNOY possessed a valid permit to perform such tests. KNOY completed a Toxicology Report, which documented his findings of the analysis conducted on HILLS' blood sample. Ann Marie GORDON M.S., the Laboratory Manager, countersigned the Toxicology Report. The Toxicology Report indicated the following: Blood Ethanol was negative. Blood test results were recorded as follows: 1.6 ng/mL THC, 16.6 ng/mL Carboxy-THC, 0.53 mg/L Diazepam, 0.01 mg/L Morphine and positive for Nicotine/Cotinine and Caffeine.



SEATTLE  
POLICE  
DEPARTMENT

**CERTIFICATION FOR DETERMINATION  
OF PROBABLE CAUSE**

INCIDENT NUMBER	06-439504
UNIT FILE NUMBER	TCIS 06-141

HILLS' WA driver's license status at the time of the incident was reinstated, expiring 04/10, including Financial Responsibility.

HILL is currently at large.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct to best of my knowledge and belief. Signed and dated by me this 5<sup>th</sup> day of MARCH, 2007, at Seattle, Washington.

K. Bilshup

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7 CAUSE NO. 07-1-03980-1 SEA

8 PROSECUTING ATTORNEY CASE SUMMARY AND REQUEST FOR BAIL AND/OR  
9 CONDITIONS OF RELEASE

10 The State incorporates the Certification for Determination of Probable Cause signed by  
11 Seattle Police Department Detective Karen Belshay in incident #06-439504.

12 On Monday, October 16, 2006, the defendant, thirty-two year old Edward Hills, was  
13 driving his car with nineteen<sup>4</sup> Lindsey Austin in the front passenger seat. He was driving in a  
14 West Seattle neighborhood just after noon. He stopped at a red light, but then suddenly drove  
15 into the intersection right in front of a box van that had the right of way.

16 The box van driver, fifty-seven year old Steven Lafferry, could not stop in time and  
17 struck the defendant's car. As a result of the collision, Ms. Austin suffered catastrophic injuries  
18 and died that afternoon at the hospital.

19 The defendant's brother told the media that he had been speaking to the defendant on  
20 their cell phones when the crash occurred. A listing of calls made and received on the  
21 defendant's cell phone corroborate that he was on the cell phone at the time. Responding police  
22 found marijuana, cocaine, and drug paraphernalia consistent with selling drugs. A drug  
23 recognition expert (DRE) officer evaluated the defendant and found signs that he was impaired  
from drugs. A legal blood draw was done within two hours of the crash. The Washington State  
Toxicology Lab found that he had recently ingested marijuana which would account for the  
impairment observed by the DRE.

The defendant's driver's license had been recently reinstated.

REQUEST FOR BAIL

The State is requesting bail in the amount of \$200,000. Additional conditions requested  
include no use or possession of alcohol or any non-prescribed drugs, no entering any business  
where alcohol is the primary commodity for sale, no driving without a valid license, insurance,

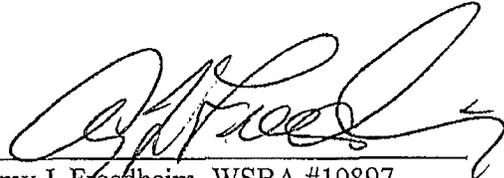
Prosecuting Attorney Case  
Summary and Request for Bail  
and/or Conditions of Release - 1

Norm Maleng, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000  
FAX (206) 296-0955

1  
2 and an ignition interlock device (set at .02), no moving violations, no violations of any  
3 conditions ordered in SW Dist Ct #C00520268 (reckless driving), and no contact with the family  
4 of Lindsey Austin.

5 The defendant had a pending Driving Under the Influence (DUI) when this collision  
6 occurred. He has since pleaded to the amended charge of Reckless Driving and is pending  
7 sentencing on 4/11/2007 (SWD #C00520268). He FTA'd a pending DWLS 2°. He is a  
8 convicted felon Robbery 2° (3/30/1992), TMV (3/30/92), VUFA 1° (5/18/98), Promoting  
9 Prostitution/VUCSA (3/15/2002), he has several misdemeanor convictions including Assault  
10 (9/12/1991), Obstruction (6/8/1995), Negligent Driving reduced from Reckless (10/1/1992), and  
11 numerous moving violations including Failure to Stop (2/13/2002), Speeding (11/28/2003,  
12 6/14/2006), Failure to Yield (10/29/2005), and **26 convictions** related to driving with a  
13 suspended or invalid license. He has several FTA's. The defendant is a danger to the community  
14 and inconsistent with his court appearances.

15 Signed this 9 day of April, 2007.

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Amy J. Freedheim, WSBA #19897

Prosecuting Attorney Case  
Summary and Request for Bail  
and/or Conditions of Release - 2

Norm Maleng, Prosecuting Attorney  
W554 King County Courthouse  
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Seattle, Washington 98104  
(206) 296-9000  
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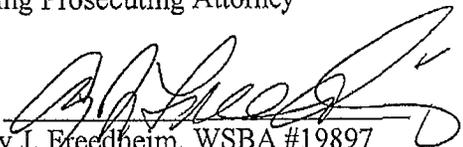


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2 That the defendant EDWARD JAMES HILLS in King County, Washington, on or about  
3 October 16, 2006, did drive or operate a vehicle in a reckless manner and while under the  
4 influence of intoxicating liquor or any drugs, as defined by RCW 46.61.502, and did drive or  
5 operate a vehicle with disregard for the safety of others and caused substantial bodily harm to  
6 Steve Lafferry;

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Contrary to RCW 46.61.522(1)(a), 1(b) and 1(c); and against the peace and dignity of the  
State of Washington.

NORM MALENG  
Prosecuting Attorney  
DANIEL T. SATTERBERG  
Acting Prosecuting Attorney

By:   
Amy J. Freedheim, WSBA #19897  
Senior Deputy Prosecuting Attorney

AMENDED INFORMATION - 2

Norm Maleng, Prosecuting Attorney  
Daniel T. Satterberg, Acting Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000, FAX (206) 296-0955

C-7

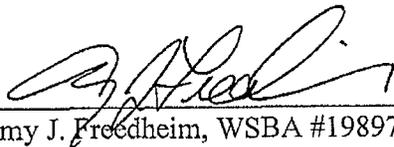
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CAUSE NO. 07-1-03980-1 SEA

SUPPLEMENTAL PROSECUTING ATTORNEY CASE SUMMARY

Steve Lafferry went to Harborview Medical Center after the collision and was found to have an avulsion fracture at the tip of his right medial malleolus. This is the area where the tibia meets the ankle and is consistent with his slamming on the brakes at the time of the collision. He had additionally suffered serious soft tissue and muscle injury in his neck and shoulders. The injury had interrupted his sleep, work, and daily activities and caused him to vomit daily over a period of several months.

Signed this 21<sup>st</sup> day of <sup>Sept</sup>~~June~~, 2007.

  
\_\_\_\_\_  
Amy J. Freedheim, WSBA #19897

**FILED**

KING COUNTY, WASHINGTON

OCT 10 2007

SUPERIOR COURT CLERK  
BY THERESA SPENCER  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

STATE OF WASHINGTON  
Plaintiff,  
v.

*Edward James Hills*  
Defendant.

No. *07-1-03980-1 SEA*

WAIVER OF JURY TRIAL

SCOMIS CODE WVJTD

My attorney and I have discussed my right to a trial by jury. I understand that I have the right to have a jury of 12 persons hear my case. I further understand that all 12 persons would have to agree that the elements of the crime(s) of which I have been charged have been proved beyond a reasonable doubt before I could be found guilty. After discussing this right with my attorney, I have decided to waive my right to a jury trial.

Dated this 10 day of October, 2007.

*Edward Hills*

DEFENDANT

*CAUCHESTER 21357*

COUNSEL FOR DEFENDANT

**ORDER**

The court finds that defendant knowingly, voluntarily and intelligently waived his right to a jury trial. The court therefore consents to the waiver of trial by jury and orders that the cause be tried to the court without a jury.

Dated this 10 day of October, 2007.

*Paris Kallas*

JUDGE PARIS K. KALLAS

Interpreter's Declaration

I am a certified interpreter or have been found otherwise qualified by the court to interpret in the \_\_\_\_\_ language, which the defendant understands, and I have interpreted the Waiver of Jury Trial order for the defendant from English into that language. I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Interpreter Signature \_\_\_\_\_ Dated \_\_\_\_\_

**FILED**  
KING COUNTY COURT

NOV - 9 2007

SUPERIOR COURT CLERK  
ANDRE JONES  
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
	)	
	)	Plaintiff,
	)	No. 07-1-03980-1SEA
vs.	)	
	)	
EDWARD HILLS,	)	WRITTEN FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW ON CrR 3.6
	)	MOTION TO SUPPRESS PHYSICAL,
	)	ORAL OR IDENTIFICATION
	)	EVIDENCE
	)	
	)	

A hearing on the admissibility of physical, oral, or identification evidence was held on October 9, 2007 before the Honorable Judge Paris Kallas. After considering the evidence submitted by the parties and hearing argument, to wit: Eric Michl,

the court makes the following findings of fact and conclusions of law as required by CrR 3.6:

1. THE UNDISPUTED FACTS:

Seattle Police Officer Eric Michl contacted the defendant at HMC on 10/16/2006 at approximately 1:00 p.m. He is a Drug Recognition Expert and has expertise in driving under the influence. Ofc. Michl contacted Seattle Firefighter/Paramedic Randy Foy who conveyed that the defendant's passenger was not expected to survive. Ofc. Michl noted that there were no obvious signs of injury to the defendant. The officer knew the following information based on his own research and discussions with the primary detective and officers at the scene of the collision: The defendant had run a red light, causing a collision. This behavior is consistent with disregard for the safety of others (dso) and consistent behavior for persons who have consumed marijuana. Found in the defendant's car were a large amount of cash, a DUI citation, and in the driver's door, marijuana. The defendant had a conviction for VUCSA and his DOL abstract showed he

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 1

Norm Maleng, Prosecuting Attorney  
Daniel T. Satterberg, Interim Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000, FAX (206) 296-0955

APPENDIX E

E-1

1 had a prior refusal. The defendant had bloodshot watery eyes, consistent with marijuana  
2 consumption.

3 He advised the defendant that he was under arrest for vehicular homicide and vehicular  
4 assault. A mandatory blood draw followed.

5 3. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE EVIDENCE  
6 SOUGHT TO BE SUPPRESSED:

7 a. PHYSICAL EVIDENCE

8 The facts above establish probable cause to arrest the defendant for vehicular  
9 assault/vehicular homicide. Pursuant to RCW 46.20.308(3), a person under arrest  
10 for vehicular assault or vehicular homicide is subject to a mandatory blood draw.

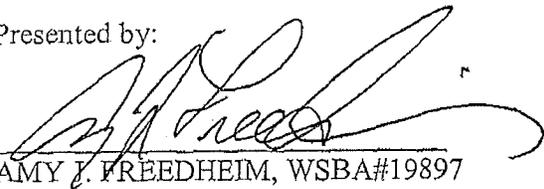
11 The defendant was lawfully arrested and the blood draw was mandatory.

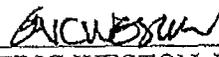
12 In addition to the above written findings and conclusions, the court incorporates  
13 by reference its oral findings and conclusions.

14 Signed this 9 day of ~~October~~ <sup>November</sup>, 2007.

15   
16 JUDGE PARIS KALLAS

17 Presented by:

18   
19 AMY J. FREEDHEIM, WSBA#19897  
20 Senior Deputy Prosecuting Attorney

21   
22 ERIC WESTON, WSBA#21357  
23 Attorney for Defendant

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 2

Norm Maleng, Prosecuting Attorney  
Daniel T. Satterberg, Interim Prosecuting Attorney  
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516 Third Avenue  
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(206) 296-9000, FAX (206) 296-0955

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**FILED**  
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SUPERIOR COURT  
ANDRE JONES  
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
	)	
	)	No. 07-1-03980-1SEA
	)	
vs.	)	
	)	FINDINGS OF FACT AND
EDWARD HILLS,	)	CONCLUSIONS OF LAW
	)	PURSUANT TO CrR 6.1(d)
	)	
	)	
	)	

THE ABOVE-ENTITLED CAUSE having come on for trial from October 9-16, 2007 before the undersigned judge in the above-entitled court; the State of Washington having been represented by Deputy Prosecuting Attorney Amy Freedheim; the defendant appearing in person and having been represented by his attorney, Eric Weston; the court having heard sworn testimony and arguments of counsel, and having received exhibits, now makes and enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

I.

The following events took place within King County, Washington:

On October 16, 2006, the defendant, Edward Hills, drove a car with 19yO Lindsey Austin in his front passenger seat. The defendant caused a collision at Delridge Way SW and SW Orchard St in Seattle, Washington at approximately noon. The collision involved the defendant's car and a truck driven by Steven Lafferry.

The collision occurred in the intersection in the southbound lanes of Delridge Way SW and the westbound lanes of SW Orchard St. and was caused by the defendant running a red light. The defendant had come to a complete stop at the red light along with three

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
PURSUANT TO CrR 6.1(d) - 1

Norm Maleng, Prosecuting Attorney  
Daniel T. Satterberg, Interim Prosecuting Attorney  
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(206) 296-9000, FAX (206) 296-0955

1 other cars in the westbound lanes of SW Orchard St. Suddenly and shockingly, the  
2 defendant took off through the red light. Mr. Lafferry had a green light and attempted to  
steer right to evade the collision. The defendant did nothing to avoid the collision. The  
3 truck struck the passenger side of the defendant's car.

4 The testimony of Steve Lafferry, Victoria Tang, P.J. Redmond, Ebony Nearing, and Ethel  
Dreher is credible. The testimony of Darnice Madison and the defendant is not credible.

5 At the time of the driving, the defendant was under the influence of marijuana and  
6 impaired from his consumption of marijuana. The defendant's blood was properly and  
legally drawn at 1:38 p.m. The blood was then tested at the Washington State  
7 Toxicology Laboratory by licensed analyst and forensic toxicologist, Justin Knoy. There  
is no evidence that the blood was tampered with, altered, or contaminated with in any  
8 way. The testing was done according to the procedures approved by the State  
Toxicologist and those procedures are accepted in the scientific community.

9 The results show a THC level of 1.6 ng/mL and carboxy-THC level of 16.6 ng/mL.  
10 Based on how THC is processed in the body, the defendant smoked the marijuana within  
3-4 hours of the blood draw. His THC level would have been higher in the hours before  
11 the blood draw. Based on the carboxy-THC, the defendant was an infrequent user of  
marijuana and would have felt the effects of the drug more pronounced than a more  
12 frequent user. Marijuana impairs driving by distorting time and space and delayed  
reaction time and decreased vigilance. The consumption of marijuana by the defendant  
13 impaired his ability to perform the complex divided attention tasks involved in driving.

14 DRE Officer Michl also provided a basis for the Court to find that the defendant was  
impaired by marijuana. The defendant's eyes were bloodshot and watery and no other  
15 facts were presented to credibly explain this symptom of marijuana impairment.  
Additionally, the facts of the collision, stopping at and then running the red light, and  
16 failing to take any evasive action, both demonstrate that he was impaired by the  
marijuana he had consumed.

17 The defendant's ability to drive was lessened to an appreciable degree and he was under  
the influence of marijuana and impaired by his consumption of marijuana.

18 The defendant intentionally drove his car while impaired and drove it with a young  
19 teenage passenger. His conduct was rash and heedless and indifferent to the  
consequences and far greater than ordinary negligence and with a disregard for the safety  
20 of others.

21 The defendant's driving proximately caused injuries to Steve Lafferry that included a  
fracture in his right ankle and soft tissue injury that he continues to suffer from a year  
22 after the collision and has resulted in a limited ongoing ability to turn his neck.

23 The defendant's driving proximately caused injuries to Lindsey Austin which caused her  
death on October 16, 2006. Her injuries included multiple rib fractures, fractured right

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
PURSUANT TO CrR 6.1(d) - 2

Norm Maleng, Prosecuting Attorney  
Daniel T. Satterberg, Interim Prosecuting Attorney  
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516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000, FAX (206) 296-0955

F-2

1 collar bone, lacerated descending aorta, lacerations to the liver and spleen. These injuries  
2 were due to the blunt force trauma sustained in the collision and caused her death.

*The Court's oral findings are incorporated.*

3 II.

4 And having made those Findings of Fact, the Court also now enters the following:

5 CONCLUSIONS OF LAW

6 I.

7 The above-entitled court has jurisdiction of the subject matter and of the defendant  
8 Edward Hills in the above-entitled cause.

9 II.

10 The following elements of the crimes charged have been proven by the State beyond a  
11 reasonable doubt:

12 On October 16, 2006, in Seattle, Washington;

13 The defendant drove a motor vehicle;

14 The defendant's driving proximately caused injury to Lindsey Austin, who died within three  
15 years as a result of the injuries;

16 The defendant's driving proximately caused substantial bodily harm to Steven Lafferry;

17 At the time of the driving, the defendant was driving in a reckless manner, with disregard for the  
18 safety of others (dso), and under the influence of drugs (dui), specifically marijuana.

*The Court's oral conclusions are incorporated.*

19 III.

20 The defendant is guilty of the crime of vehicular homicide as charged in count I of the  
21 Amended Information.

22 At the time of the driving, the defendant was driving in a reckless manner, with disregard  
23 for the safety of others, and under the influence of drugs.

The defendant is guilty of the crime of vehicular assault as charged in count II of the  
Amended Information.

At the time of the driving, the defendant was driving in a reckless manner, with disregard  
for the safety of others, and under the influence of drugs.

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IV.

Judgment should be entered in accordance with Conclusion of Law III.

DONE IN OPEN COURT this 9 day of <sup>November</sup> ~~October~~, 2007.

Paris Kallas  
JUDGE PARIS KALLAS

Presented by:

  
AMY J. FREEDHEIM, WSBA#19897  
Deputy Prosecuting Attorney

\_\_\_\_\_  
Defendant

  
ERIC WESTON, WSBA#21357  
Attorney for Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
PURSUANT TO CrR 6.1(d) - 4

Norm Maleng, Prosecuting Attorney  
Daniel T. Satterberg, Interim Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000, FAX (206) 296-0955

COPY TO COUNTY JAIL NOV 19 2009

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

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 EDWARD JAMES HILLS, )  
 )  
 Appellant. )

No. 60911-4-I

MANDATE

King County

Superior Court No. 07-1-03980-1.SEA

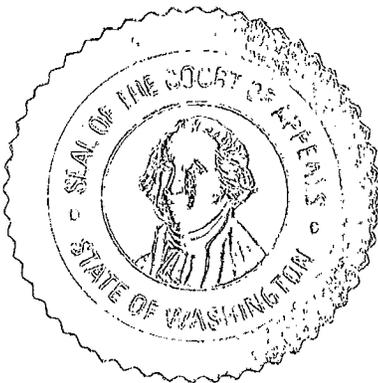
**FILED**  
KING COUNTY, WASHINGTON  
NOV 19 2009  
SUPERIOR COURT CLERK

**THE STATE OF WASHINGTON TO:** The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on April 20, 2009, became the decision terminating review of this court in the above entitled case on November 18, 2009. An order denying a motion for reconsideration and motion to take judicial notice was entered on June 3, 2009. An order denying a petition for review was entered in the Supreme Court on September 9, 2009. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the decision.

Pursuant to RAP 14.4, costs in the amount of \$5,945.23 are awarded against judgment debtor EDWARD JAMES HILLS as follows: costs in the amount \$5,878.84 are awarded in favor of judgment creditor WASHINGTON OFFICE OF PUBLIC DEFENSE, INDIGENT DEFENSE FUND and costs in the amount of \$66.39 are awarded in favor of judgment creditor KING COUNTY PROSECUTOR'S OFFICE.

c: Lila Silverstein  
Andrea Vitalich  
Hon. Paris Kallas  
Indeterminate Sentencing Review Board



**IN TESTIMONY WHEREOF**, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 18th day of November, 2009.

A handwritten signature in black ink, appearing to read "Richard D. Johnson", is written over a horizontal line.

**RICHARD D. JOHNSON**  
Court Administrator/Clerk of the Court of Appeals,  
State of Washington, Division I.



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

In the Matter of the Personal	)	
Restraint of:	)	No. 61299-9-1
	)	
	)	
EDWARD JAMES HILLS,	)	ORDER LIFTING STAY
	)	AND DISMISSING
	)	PERSONAL RESTRAINT PETITION
Petitioner.	)	
<hr style="width: 30%; margin-left: 0;"/>		

Edward Hills filed this personal restraint petition challenging the sentence imposed following his conviction for vehicular assault and vehicular homicide in King County No. 07-1-03980-1.<sup>1</sup> Consideration of the petition was then stayed pending final resolution of Hills' appeal in No. 60911-4-1. Because that decision is now final, the stay should be lifted.

But in order to obtain collateral relief by means of a personal restraint petition, Hills must demonstrate either an error of constitutional magnitude that gives rise to actual prejudice or a nonconstitutional error that "constitutes a fundamental defect which inherently results in a complete miscarriage of justice." In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). Because he fails to make any showing that that he can satisfy this threshold burden, the petition is dismissed.

Hills alleges that the sentencing court miscalculated his offender score by including juvenile convictions that should not have been considered. See State v. v. Smith, 144 Wn.2d 665, 30 P.3d 1245 (2001). But this court considered and rejected an identical contention in Hills' direct appeal, noting that after Smith, the legislature

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<sup>1</sup> Hills initially filed this matter in King County Superior Court, which transferred it for consideration as a personal restraint petition. See CrR 7.8.

No. 61299-9-1/2

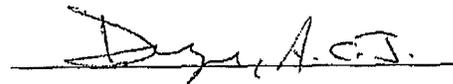
amended the sentencing statutes to require that previously "washed out" convictions be included in the calculation of an offender score. See State v. Hills, noted at 149 Wn. App. 1052 (citing RCW 9.94A.525; State v. Varga, 151 Wn.2d 179, 202, 86 P.3d 139 (2004)), review denied, 166 Wn.2d 1030 (2009). This court will generally not review issues that were raised and rejected on direct appeal. Hills has not demonstrated any other error in the calculation of his offender score or a basis for reconsidering the argument raised on appeal. See In re Pers. Restraint of Lord, 123 Wn.2d 296, 303, 868 P.2d 835 (1994).

Now, therefore, it is hereby

ORDERED that the stay previously imposed is lifted; and, it is further

ORDERED that the personal restraint petition is dismissed under RAP 16.11(b).

Done this 22<sup>nd</sup> day of December, 2009.



Acting Chief Judge

FILED  
CLERK OF SUPERIOR COURT  
STATE OF WASHINGTON  
2009 DEC 22 AM 8:33



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

IN THE MATTER OF THE	)	
PERSONAL RESTRAINT OF:	)	No. 65440-3-I
EDWARD J. HILLS,	)	
	)	ORDER OF DISMISSAL
_____Petitioner.	)	

Edward Hills alleges that he is unlawfully restrained by his convictions of vehicular assault and vehicular homicide in King County Superior Court No. 07-1-003980-1 SEA. Hills now files this personal restraint petition raising two claims. He contends that the medical examiner who testified at trial should not have been allowed to testify because he did not personally perform the autopsy, and further, that the toxicology report regarding the amount of THC in Hills' blood was not properly certified under CrR 6.13. To prevail here, however, Hills bears the burden of showing either actual and substantial prejudice arising from constitutional error, or nonconstitutional error that inherently results in a "complete miscarriage of justice." In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990); In re Pers. Restraint of Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). Having failed to meet either standard, Hills' petition shall be dismissed.

1. Medical Examiner Testimony

Hills first contends that Dr. Brian Mazrim should not have been allowed to testify because he was merely improperly testifying to the contents of the autopsy report prepared by another medical examiner. The record belies this claim, showing that Dr. Mazrim clearly testified based on his own personal knowledge as he was personally involved in the autopsy.

Hills cites State v. Heggins, 55 Wn. App. 591, 779 P.2d 285 (1989) and State v. Lui, 153 Wn. App. 304, 314, 221 P.3d 948, (2009), review granted, 168 Wn.2d 1018, 228 P.3d 17 (2010), in support of his claim, but neither case helps him. In Heggins, the court addressed the applicability of the business record exception in the context of a medical examiner's testimony based on an autopsy report about an autopsy conducted by another doctor. Heggins, 55 Wn. App. at 596–97. But the record here shows that Dr. Mazrim testified of his own personal knowledge because of his personal involvement in conducting the autopsy.

Similarly, Lui involved a challenge to a pathologist's testimony that was based in part on testimonial support provided by others, giving rise to the defendant's claim that those witnesses were merely surrogates for the true witnesses against the defendant. Lui, 153 Wn. App. at 319–320. Again, here there is no showing in the record whatsoever that Dr. Mazrim relied on tests conducted by others that he did not personally witness.

In reply, Hills asks for a reference hearing to determine whether Dr. Mazrim "made" the autopsy report in this case. Petitioner's Reply to State Response at 5. To obtain a reference hearing or transfer to superior court a petitioner must provide a particularized statement of the facts he or she would prove that would entitle him to relief:

If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. The affidavits, in turn, must contain matters to which the affiants may competently testify. In short, the petitioner must present evidence showing that his factual allegations are based on more than speculation, conjecture, or inadmissible hearsay.

State v. Roche, 114 Wn. App. 424, 441, 59 P.3d 682 (2002) (citation omitted).

Given that the trial record does not show that Dr. Mazrim relied on anything other than his personal observations and Hills has not provided any admissible evidence to the contrary, it is irrelevant whether Dr. Mazrim "made" the autopsy report. Accordingly, resolution of the fact question Hills proposes to settle in a reference hearing is unnecessary because it would not result in a factual determination that would entitle Hills to relief.

2. CrR 6.13(b)

Next, Hills contends that the testimony of State Crime Lab toxicologist Justin Knoy should have been excluded because of a failure to comply with the certification requirements for admitting a test result in lieu of live testimony under CrR 6.13(b). As the State notes, this claim was rejected in Hills' direct appeal, and Hills has failed to demonstrate that the interests of justice require that he be allowed to relitigate this claim here. See In re Pers. Restraint of Taylor, 105 Wn.2d 683, 687, 717 P.2d 755 (1986).

Moreover, it is clear that Hills' issue in this regard is as frivolous as his first claim because, by its own terms, CrR 6.13 deals only with admissibility of test reports when no live witness is called to testify. Here, Knoy personally testified regarding the blood test he conducted that showed significant levels of THC in Hills' blood when it was tested after the accident. Accordingly, the provisions of CrR 6.13 were not implicated in any way.

Hills' claims for relief are both frivolous. The petition therefore must be dismissed.

Now, therefore, it is hereby

ORDERED that the personal restraint petition is dismissed under RAP 16.11(b).

Done this 17<sup>th</sup> day of NOVEMBER, 2010.

Leach A. C. J.  
Acting Chief Judge

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2010 NOV 17 AM 9:36

COPY TO COUNTY JAIL DEC 30 2013

FILED

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

DEC 27 PM 12:58

IN THE MATTER OF THE  
PERSONAL RESTRAINT OF:

EDWARD J. HILLS,

Petitioner.

No. 70882-1-I

CERTIFICATE OF FINALITY

King County

Superior Court No. 07-1-03980-1 SEA

KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in  
and for King County.

This is to certify that the order of the Court of Appeals of the State of Washington,  
Division I, filed on October 29, 2013, became final on December 20, 2013.

c: Edward Hills



IN TESTIMONY WHEREOF, I  
have hereunto set my hand  
and affixed the seal of  
said Court at Seattle, this 20th  
day of December, 2013.

Richard D. Johnson  
Court Administrator/Clerk of the  
Court of Appeals, State of  
Washington Division I

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

IN THE MATTER OF THE  
PERSONAL RESTRAINT OF:

EDWARD J. HILLS,

Petitioner.

No. 70882-1-1

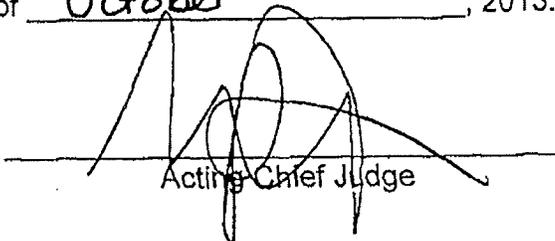
ORDER OF DISMISSAL

Edward Hills filed a motion in this court seeking the appointment of counsel for the purpose of challenging his judgment and sentence in King County No. 07-1-03980-1 SEA. Hills has now filed a motion to withdraw, in order to avoid the possibility that his motion will be treated as a personal restraint petition. In light of Hills' request, the motion should be dismissed without prejudice. Should Hills wish challenge his convictions, he must do so by means of a personal restraint petition, and such a petition must comply with all relevant substantive and procedural rules, including RCW 10.73.090, in effect at the time of filing.

Now, therefore, it is hereby

ORDERED that the motion is dismissed without prejudice.

Done this 29<sup>th</sup> day of October, 2013.

  
Acting Chief Judge

2013 OCT 29 PM 2:11

FILED

14 DEC 01 PM 3:33

KING COUNTY  
SUPERIOR COURT CLERK  
E-FILED  
CASE NUMBER: 07-1-03980-1 SEA

IN THE SUPERIOR COURT OF WASHINGTON  
FOR KING COUNTY

STATE OF WASHINGTON,

) Case No. 07-1-03980-1 SEA

Plaintiff,

) ORDER TRANSFERRING MOTION TO

v.

) COURT OF APPEALS

EDWARD JAMES HILLS,

Defendant.

This matter came before the Court on the motion of Defendant Edward James Hills, acting *pro se*, seeking relief from the criminal judgment and sentence under CrR 7.8(c)(2) (a copy is attached). Mr. Hills contends that under the U.S. Supreme Court's decision in Missouri v. McNeely, 81 U.S.L.W. 4250, 133 S. Ct. 1552, 185 L.Ed.2d 696 (2013), his conviction should be overturned.

CrR 7.8(c)(2) provides that this Court "shall transfer" a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the Court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

This Court concludes that under CrR 7.8(c)(2), this matter must be transferred to the Court of Appeals, Division I, for consideration as a personal restraint petition.

King County Superior Court  
516 Third Avenue, Room C-203  
Seattle, Washington 98101  
(206) 477-1537

ORDER - 1

APPENDIX I

I-1

Based on the foregoing, it is hereby ORDERED that Mr. Hills' motion for relief from judgment is hereby transferred to the Court of Appeals, Division I.

Dated this 1st day of December, 2014.

\s\ (E FILED)

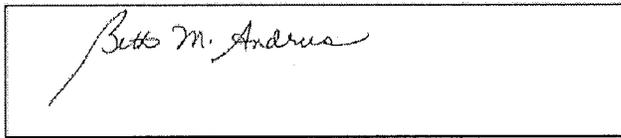
**JUDGE BETH M. ANDRUS**  
**KING COUNTY SUPERIOR COURT**

King County Superior Court  
Judicial Electronic Signature Page

Case Number: 07-1-03980-1  
Case Title: STATE OF WASHINGTON VS HILLS, EDWARD JAMES

Document Title: ORDER TRANSFERRING MOTION TO COA

Signed by: Beth Andrus  
Date: 12/1/2014 3:33:07 PM



Judge/Commissioner: Beth Andrus

This document is signed in accordance with the provisions in GR 30.

Certificate Hash: D92F76D12132FF531AF16720A721F097AC7A50B6  
Certificate effective date: 7/29/2013 12:26:48 PM  
Certificate expiry date: 7/29/2018 12:26:48 PM  
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O=KCDJA, CN="Beth  
Andrus:dE53Hnr44hGmww04YYhwmw=="

Westlaw.

Page 1

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**H**  
This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 10th Cir. Rule 32.1.

United States Court of Appeals,  
Tenth Circuit.  
Doyle M. SANDERS, Petitioner–Appellant,  
v.  
Janet DOWLING, Warden, Respondent–Appellee.

No. 14–7084.  
Dec. 12, 2014.

**Background:** Following affirmance of a petitioner's conviction for second-degree felony murder, 60 P.3d 1048, the petitioner sought federal habeas relief. The District Court for the Eastern District of Oklahoma, 2014 WL 4952286, denied relief and refused to issue a certificate of appealability (COA).

**Holding:** The petitioner requested a COA. The Court of Appeals, Bobby R. Baldock, Circuit Judge, held that the Supreme Court's decision in *Missouri v. McNeely* did not apply retroactively to cases on collateral review.

Request denied and appeal dismissed.

West Headnotes

Courts 106  100(1)

106 Courts

106II Establishment, Organization, and Procedure

106II(H) Effect of Reversal or Overruling

106k100 In General

106k100(1) k. In general; retroactive or prospective operation. Most Cited Cases

Even assuming that the Supreme Court's decision in *Missouri v. McNeely*, which held that the

natural dissipation of alcohol in the bloodstream did not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant, recognized a new constitutional right, the right did not apply retroactively to cases on collateral review, for purposes of a defendant's time-barred habeas claim, where the rule in *McNeely* was procedural, not substantive, and the rule was not necessary to prevent an impermissibly large risk of an inaccurate conviction. 28 U.S.C.A. § 2244(d)(1)(C).

\*502 Doyle M. Sanders, Helena, OK, pro se.

Diane L. Slayton, Oklahoma City, OK, for Respondent–Appellee.

Before KELLY, BALDOCK, and BACHARACH, Circuit Judges.

**ORDER DENYING CERTIFICATE OF APPEALABILITY AND DISMISSING APPEAL**  
BOBBY R. BALDOCK, Circuit Judge.

Doyle Sanders, an Oklahoma state prisoner appearing pro se, seeks to appeal the district court's denial of his 28 U.S.C. § 2254 petition. We construe pro se filings liberally. See *Garza v. Davis*, 596 F.3d 1198, 1201 n. 2 (10th Cir.2010). The district court dismissed Sanders's petition as time-barred under 28 U.S.C. § 2244 and denied his request for a certificate of appealability (“COA”). Sanders now asks us to grant him a COA and hear his appeal. He argues the Supreme Court in *Missouri v. McNeely*, — U.S. —, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), recognized a new constitutional right that applies retroactively to cases on collateral review and therefore his petition, which relies on *McNeely*, is timely under § 2244(d)(1)(C). He is mistaken. Even assuming *McNeely* recognized a new constitutional right, the right does not apply retroactively to cases on collateral review. Sanders's appeal is therefore clearly time-barred. Accordingly, we deny his application for a COA,

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APPENDIX J

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and dismiss his appeal.

A more thorough recitation of the facts underlying Sanders's state convictions can be found in *Sanders v. State*, 60 P.3d 1048 (Okla.Crim.App.). What matters for our purposes is that Sanders's state convictions stem, at least in part, from the fact that (1) he "was the driver of a vehicle involved in an accident, which caused the death of four people and caused severe injuries to a fifth person," and (2) the results of his blood alcohol test, which were admitted at trial, "showed his blood alcohol content to be .188." *Id.* at 1149. Sanders challenged the admission of his blood alcohol test results in state court, but to no avail, and his convictions were affirmed on December 19, 2002. *See id.*

Sanders does not challenge the reality that his petition would be untimely under § 2244(d)(1)(A), (B), and (D). He argues only that, insofar as his petition relies on a new constitutional right recognized in *McNeely*, the petition is timely under § 2244(d)(1)(C), which allows for a one-**503** year limitation period, running from "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." In *McNeely*, Supreme Court held 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." 133 S.Ct. at 1568. But even assuming this amounts to the recognition of a new constitutional right for purposes of § 2244(d)(1)(C), that right would not apply retroactively to cases on collateral review.

Indeed, we have held that a new rule "will apply retroactively [to cases on collateral review] only if it falls within one of the two narrow exceptions to the retroactivity bar outlined in [*Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) ]." *United States v. Chang Hong*, 671 F.3d 1147, 1156–57 (10th Cir.2011). Under *Teague*, "[a] new rule applies retroactively in a col-

lateral proceeding only if (1) the rule is substantive, or (2) the rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.* at 1157 (quotation marks omitted). A substantive rule is one that alters the range of conduct or the class of persons that the law punishes. By contrast, a procedural rule regulates only the manner of determining the defendant's culpability. *Id.*

The rule in *McNeely* is procedural, not substantive. It regulates only the manner in which law enforcement can perform nonconsensual blood testing during drunk-driving investigations consistent with the Fourth Amendment. *See McNeely*, 133 S.Ct. at 1568. "Thus, only the second *Teague* exception might apply here—as a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Chang Hong*, 671 F.3d at 1157. "To surmount this 'watershed' requirement, a new rule (1) must be necessary to prevent an impermissibly large risk of an inaccurate conviction, and (2) must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Id.* (emphasis added).

*McNeely* cannot clear the first hurdle of the "watershed" test. *McNeely* deemed warrantless nonconsensual drawing of a suspect's blood potentially problematic because it implicates a suspect's "most personal and deep-rooted expectations of privacy" against "compelled physical intrusion beneath [the suspect's] skin and into his veins." *McNeely*, 133 S.Ct. at 1558, 1560. The opinion nowhere implies that the nonconsensual drawing of a suspect's blood during a drunk-driving investigation might create even a slight risk of an inaccurate conviction, and we fail to see how such a risk could arise. As such, the rule in *McNeely* is in no way necessary to prevent an impermissibly large risk of an inaccurate conviction. Given that the rule in *McNeely* cannot surmount the first hurdle of the "watershed" test, we need not address the second.

In sum, because *McNeely* states, at most, a pro-

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cedural rule that in no way implicates a risk of inaccurate conviction, “[i]t is not within either of the extremely narrow *Teague* exceptions to the retroactivity bar.” *Chang Hong*, 671 F.3d at 1159. Sanders's sole timeliness argument is therefore wholly without merit, and his petition is indeed clearly time-barred under § 2244(d)(1).

For the reasons set forth above, Sanders's request for a COA is DENIED and his appeal is DISMISSED.

C.A.10 (Okla.),2014.  
Sanders v. Dowling  
594 Fed.Appx. 501

END OF DOCUMENT

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Edward J. Hills**, the petitioner, at the following address: **DOC #991753, Monroe Corrections Center, P.O. Box 777, Monroe, WA 98272**, containing a copy of the **States Response to Personal Restraint Petition**, in In re Personal Restraint Petition of Edward J. Hills Cause No. **73186-6-I**, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name *U Brame*

Date *8/26/15*

Done in Seattle, Washington