

STATE OF WASHINGTON
JUL 11 2012
BY: *[Signature]*

No. 40914-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Joseph Hudson,

Appellant.

Grays Harbor County Superior Court Cause No. 09-1-00172-6

The Honorable Judge Mark McCauley

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by admitting Mr. Hudson's custodial statements without finding that they were voluntary.
2. The trial court erred by admitting Mr. Hudson's custodial statements without finding that he had knowingly, intelligently, and voluntarily waived his *Miranda* rights.
3. The trial court erred by admitting evidence obtained in violation of Mr. Hudson's Article I, Section 7 right to privacy and his Fourth Amendment right to be free from unreasonable searches and seizures.
4. The police arrested Mr. Hudson before developing probable cause to believe that he had been the driver of the car.
5. The police unlawfully drew Mr. Hudson's blood without a search warrant or consent, in the absence of probable cause to believe that he was the driver of the car.
6. The unlawful blood draw violated Mr. Hudson's rights under RCW 46.20.308.
7. Mr. Hudson's custodial statements were obtained in violation of his rights under the Fourth Amendment and Article I, Section 7.
8. The trial court erred by admitting an illegally recorded conversation that did not fit within an exception to the Privacy Act.
9. The Grays Harbor County Jail unlawfully recorded Mr. Hudson's telephone call without obtaining prior consent from all parties to the conversation.
10. The prosecution failed to introduce sufficient evidence to *prima facie* establish the validity and admissibility of Mr. Hudson's blood test results.
11. The prosecution attempted to *prima facie* establish the validity and admissibility of Mr. Hudson's blood test results using testimonial hearsay, in violation of Mr. Hudson's Sixth and Fourteenth Amendment right to confrontation.

12. Mr. Hudson was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
13. Defense counsel unreasonably failed to seek suppression of evidence obtained in violation of Mr. Hudson's rights under the Fourth Amendment and Article I, Section 7.
14. Defense counsel unreasonably failed to argue the correct grounds for suppression of Mr. Hudson's statements, which were unlawfully obtained in violation of his right to be free from unreasonable searches and seizures and his right to privacy.
15. Defense counsel unreasonably failed to seek suppression of Mr. Hudson's blood test results, which were unlawfully obtained in violation of his right to be free from unreasonable searches and seizures and his right to privacy.
16. Defense counsel unreasonably failed to seek suppression of a telephone conversation recorded in violation of the Privacy Act.
17. Defense counsel unreasonably failed to object to testimonial hearsay relating to Mr. Hudson's blood test results.
18. Defense counsel unreasonably failed to object to the admission of Mr. Hudson's blood test results, given the prosecution's failure to *prima facie* establish their validity and admissibility.
19. Mr. Hudson's exceptional sentence infringed his Fourteenth Amendment right to due process because the evidence was insufficient to establish beyond a reasonable doubt that he displayed an egregious lack of remorse.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused person's custodial statements are presumed to be coerced and may not be admitted at trial unless the prosecution establishes they were voluntary and preceded by a valid *Miranda* waiver. Mr. Hudson was intoxicated and in shock at the time he waived his *Miranda* rights and provided statements to the police. Did the admission of Mr. Hudson's statements violate his Fifth and Fourteenth Amendment privilege against self-incrimination?

2. The Fourth Amendment and Article I, Section 7 require that arrests be based on probable cause. Here, the police arrested all three survivors of a car accident involving alcohol, because they were uncertain which of the three had been the car's driver. In the absence of probable cause, did the police violate Mr. Hudson's rights under the Fourth Amendment and Article I, Section 7?
3. Police may seize a blood sample without a warrant following a lawful custodial arrest for vehicular homicide or vehicular assault. In this case, the police arrested and drew blood from three people because they were uncertain which of the three had been driving the car. In the absence of probable cause to believe that Mr. Hudson had been the driver, did the warrantless seizure of his blood sample violate his rights under the Fourth Amendment and Article I, Section 7?
4. A recorded telephone conversation is inadmissible in court unless the recording was made with prior consent of all parties to the conversation. In this case, the prosecution introduced a recording made without the prior consent of a party to the conversation. Did the erroneous admission of an illegally recorded telephone call violate Mr. Hudson's rights under the Privacy Act?
5. When seeking a conviction for Vehicular Homicide or Vehicular Assault, the prosecution must introduce sufficient evidence to make a *prima facie* case establishing the validity and admissibility of any blood test results upon which it hopes to rely. In this case, the prosecution failed to make a *prima facie* case that Mr. Hudson's blood test results were valid and admissible. Were the convictions for Vehicular Homicide and Vehicular Assault based on insufficient evidence that the blood test results were valid and admissible?
6. The admission of testimonial hearsay violates an accused person's right to confrontation under the Sixth and Fourteenth Amendments. Here, the prosecution attempted to use

testimonial hearsay to establish the validity and admissibility of Mr. Hudson's blood test result. Did the admission of testimonial hearsay violate Mr. Hudson's Sixth and Fourteenth Amendment right to confrontation?

7. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel in a criminal case. In this case, Mr. Hudson's defense attorney failed to seek (and/or failed to argue the correct grounds for) suppression of prejudicial evidence, including Mr. Hudson's custodial statements, blood test results, and an illegally recorded telephone conversation. Was Mr. Hudson denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

8. To impose an exceptional sentence in this case, the prosecution was required to prove beyond a reasonable doubt that Mr. Hudson displayed an egregious lack of remorse. To do so, the prosecution relied on Mr. Hudson's conduct shortly after the accident, but did not rebut evidence that his conduct stemmed from intoxication, shock, and his failure to realize that he had even been in an accident. Did the exceptional sentence violate Mr. Hudson's Fourteenth Amendment right to due process because it was based on insufficient evidence of his egregious lack of remorse?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Joseph Hudson and his girlfriend Paula Charles went to a casino for drinks on April 4, 2009. RP (6/2/10) 76; RP (6/4/10) 386. They took Ms. Charles's Subaru, with Ms. Charles driving. RP (6/2/10) 76; RP (6/4/10) 385-386. When they left the casino, Ms. Charles again drove the Subaru. RP (6/2/10) 77, 80-81; RP (6/4/10) 386. They went to the Seagate Bar, where they met their friends Leon Butler, Tommy Underwood, and Tommy's sister Nancy Underwood (with whom Mr. Hudson had a child many years earlier). RP (6/2/10) 77, 84, 100.

All of the friends became greatly intoxicated. RP (6/4/10) 442. Neither Ms. Charles nor Mr. Hudson remembered leaving the bar, or what happened next. RP (6/2/10) 76-80; RP (6/4/10) 387-392.

Kenneth Grover, asleep in his mobile home, heard the sounds of an accident. RP (6/2/10) 61-62. He yelled out his window, asking if anyone was hurt, and if he should call 911. He heard a male voice respond, "No." RP (6/2/10) 63. He got up, went out to look at the car, and then called 911. RP (6/2/10) 63, 66.

The Subaru had rolled once or twice off a curve. RP (6/2/10) 39, 122. Mr. Glover saw a man, later identified as Leon Butler, climb out of the back door on the driver's side. The man was frantic, and said that two

of the occupants were missing. RP (6/2/10) 64-65. Tommy Underwood had been thrown from the car, and was pronounced dead by a medic. RP (6/2/10) 56-58. Paula Charles had been thrown from the vehicle and was nearby on the ground. RP (6/2/10) 38, 46.

After some time passed, Grover saw another man, whom he described as nonchalant. This man was Mr. Hudson, who had walked around the area for some time, confused about what had happened, before being drawn by the flashing lights of emergency vehicles. He did not remember that he had been in an accident. RP (6/2/10) 69; RP (6/4/10) 389-392. Shortly after his return to the scene, Mr. Hudson got into a scuffle with Tommy Underwood's daughter, who accused him of having been the driver.¹ RP (1/8/10) 13-14, 19-20; RP (6/2/10) 41-42; RP (6/4/10) 392.

At some point, Ms. Charles told an officer that she had been driving. RP (6/2/10) 80, 82-83. In light of the confusion, WSP Sergeant Ramirez instructed his troopers to arrest all three surviving occupants—Leon Butler, Paula Charles, and Joseph Hudson—for vehicular homicide. RP (6/2/10) 43-44. He was concerned about obtaining blood samples from all three before their blood alcohol dissipated. RP (6/2/10) 43-44.

¹ Shortly thereafter, Mr. Hudson denied that he had been behind the wheel. RP (1/8/10) 17, 20.

Neither he nor any of the other officers first on the scene had looked for the car keys. Nor had they examined the seat position, or sought to discover the name on the vehicle registration. RP (6/2/10) 48-51.

All three suspects were transported for blood draws. Blood was taken and sent to the crime lab for testing. RP (6/2/10) 59; RP (6/4/10) 412. Following the blood draw, Mr. Hudson was returned to the scene and interrogated a second time. RP (1/8/10) 24-25. He was informed that Mr. Butler and Ms. Charles had both been charged with vehicular homicide. RP (6/4/10) 394, 397.² Hearing this, he told Detective Presba that he would “take responsibility,” and that he had been the driver. RP (6/3/10) 200, 201, 261.

Mr. Hudson was charged with vehicular homicide and vehicular assault. CP 1-2. The prosecution also alleged that he displayed an egregious lack of remorse. Notice of Intent to Present Aggravating Factor, Supp. CP.

Mr. Hudson moved to suppress his statements to police. Motion to Suppress, Motion and Affidavit/Declaration (two: both filed 12/10/09), Supp. CP. At the CrR 3.5 hearing, Trooper Blankenship testified that he

² It is not clear from the record which officer told Mr. Hudson about the arrest of the other two survivors. Only Detective Presba specifically denied telling him. RP (6/4/10) 488-489.

secured Mr. Hudson in the back of his patrol car. RP (1/8/10) 14-15. Mr. Hudson was dirty, and had grass tangled in his hair. He told the officer that he had been up the road watching the lights. RP (1/8/10) 14. Blankenship was instructed (by Sgt. Ramirez) to arrest Mr. Hudson for vehicular homicide. RP (1/8/10) 15. He administered *Miranda* rights, and obtained a taped statement. At one point Mr. Hudson told the trooper that he thought Ms. Charles had been driving. RP (1/8/10) 14-16, 15-17, 21. He also stated more than once that he did not remember who drove. RP (1/8/10) 20. According to Blankenship, Mr. Hudson was very drunk during the interview.³ RP (1/8/10) 20.

Detective Presba also testified at the CrR 3.5 hearing. He told the court that he interviewed Mr. Hudson later in the morning. He did not review Mr. Hudson's *Miranda* rights again, but simply asked Mr. Hudson if he still remembered his rights. Mr. Hudson assented. RP (1/8/10) 24. At this point—having been told that his girlfriend had been arrested for vehicular homicide—Mr. Hudson told Presba that he now remembered that he (Mr. Hudson) had been the driver. RP (1/8/10) 25; RP (6/4/10)

³ During his trial testimony, Blankenship said Mr. Hudson was highly intoxicated: he was swaying and unsteady on his feet, and had red eyes, slurred speech and smelled of alcohol. RP (6/3/10) 175-176.

392. Presba said that Mr. Hudson was still clearly intoxicated. RP

(1/8/10) 27.

The court ruled all of Mr. Hudson's statements admissible at trial:

I will find that the State's statements are admissible for 3.5 purposes, that they were given after a warning and they were freely voluntarily given after he was read his right to remain silent and talked. So for 3.5 purposes they are admissible.

RP (3/12/10) 6.

The trial court entered written Findings of Fact and Conclusions of Law. Supp. CP.⁴

At trial, the prosecution introduced the results of Mr. Hudson's blood test (0.19 grams per 100 milliliters). RP (6/3/10) 277. Defense counsel did not contest this evidence.

Paula Charles testified that she did not have a clear memory of all of the details, but that she had been the driver when the accident occurred. RP (6/2/10) 80, 82-83. Leon Butler testified that Mr. Hudson had been the driver, but was impeached with testimony relating that he had named Tommy Underwood as the driver on the morning of the accident. RP (6/2/10) 85; RP (6/4/10) 415. Nancy Underwood testified, over defense objection, that Ms. Charles had said (on the morning of the accident) that Mr. Hudson had been driving. RP (6/2/10) 112-113. Ms. Underwood

⁴ The findings and conclusions are actually captioned "Findings of Facts [sic] and Conclusion [sic] of Law." Supp. CP.

acknowledged that she had been intoxicated at the time of Ms. Charles's statement, and that she had not told police about the statement. RP (6/2/10) 116-117.

The state sought to admit a recording of a telephone call between Mr. Hudson (who was being held at the Grays Harbor County Jail) and Nancy Underwood. The call had been made three days after the accident. RP (6/2/10) 111, 159-161. Mr. Hudson objected to the admission of the recording because it contained prejudicial material. RP (6/2/10) 120, 162-163. The court admitted a redacted version of the recording, and it was played for the jury. RP (6/2/10) 164-166; RP (6/3/10).

A transcript of the recording (attached to the prosecution's trial memorandum) reveals that the call was answered by Mr. Hudson's adult daughter, Alexis. Attachment to State's Trial Brief, Supp. CP. While Alexis was still on the phone, the automated inmate telephone system (Evercom) announced "This call is subject to monitoring and recording. Thank you for using Evercom." Attachment to State's Trial Brief, Supp. CP. Shortly after the announcement was made, Alexis gave the phone to her mother (Ms. Underwood). The automated announcement was not repeated for the rest of the recorded conversation. Nor did Ms. Underwood provide her consent prior to the recording. Attachment to State's Trial Brief, Supp. CP. Despite this, defense counsel did not object

to the admission of the recording under the Privacy Act. RP (6/2/10) 159-166.

During the telephone call, Mr. Hudson told Ms. Underwood that he did not remember what had happened that night, that he was confused and did not remember the accident, and that he remembered coming to while walking down the road. Attachment to State's Trial Brief, Supp. CP; Exhibits 85 and 86, Supp. CP.⁵ He also remembered telling a trooper that he had been the driver, after hearing that Ms. Charles and Mr. Butler were being charged with vehicular homicide. He told Ms. Underwood that when he saw that the wrecked car was the one he shared with Ms. Charles, he "figured [he] had to been drivin [sic]." Attachment to State's Trial Brief, p. 4, Supp. CP. He also relayed what he had been told about Mr. Grover's account of the morning: "I guess I told [Grover] that everything was all right... he came out of his trailer and he asked me is everything all right? I said yeah everything's cool and I walked away." Attachment to State's Trial Brief, p. 7; Exhibits 85 and 86, Supp. CP.

Trooper Blankenship testified that when he approached the scene of the accident, Mr. Hudson had a demeanor "like he didn't care," and that

⁵ Exhibits 85 and 86 are the edited recordings introduced at trial. No redacted transcript was provided for the jury.

he was “passive” and “relaxed.” RP (6/2/10) 143. Defense counsel did not object to this testimony. RP (6/2/10) 143.

The prosecutor also presented the testimony of two accident reconstruction experts, a toxicologist, two forensic scientists, and a pathologist. Using opinion testimony (based on forensic evidence such as the location of blood drops), the state sought to prove that Mr. Hudson had been the driver. Mr. Hudson presented expert testimony contradicting the conclusions of the government witnesses. RP (6/2/10) 211-141; RP (6/3/10) 186-269, 270-283, 284-355, 356-361; RP (6/4/10) 451-488.

Mr. Hudson testified. He told the jury that he had been disoriented and confused following the accident, and that, as time passed, he made some sense of events. RP (6/4/10) 387-394. Although he had told police that he would take responsibility for whatever had happened, he still did not remember who had sat where in the car. RP (6/4/10) 393-394, 396-397, 402.

The jury returned guilty verdicts, and answered “yes” on the special verdict form, indicating that Mr. Hudson had displayed an egregious lack of remorse. Verdict Form (Count 1), Verdict Form (Count 2), Special Verdict Forms (2), Supp. CP. The court affirmed the special verdict finding, and sentenced Mr. Hudson to consecutive terms totaling

150 months. RP (6/30/10) 538-541; CP 5-7, 11. Mr. Hudson timely appealed. CP 20.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. HUDSON'S FIFTH AND FOURTEENTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION BY ADMITTING HIS CUSTODIAL STATEMENTS.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010). A *Miranda* claim is an issue of law requiring *de novo* review. *State v. Daniels*, 160 Wash.2d 256, 261, 156 P.3d 905 (2007).

Findings of fact are reviewed for substantial evidence; conclusions of law are reviewed *de novo*. *State v. Gatewood*, 163 Wash.2d 534, 539, 182 P.3d 426 (2008). In the absence of a finding on a factual issue, the appellate court presumes that the party with the burden of proof failed to sustain its burden on the issue. *State v. Armenta*, 134 Wash.2d 1, 14, 948 P.2d 1280 (1997); *State v. Byrd*, 110 Wash.App. 259, 265, 39 P.3d 1010 (2002).

- B. Custodial statements are presumed to have been obtained in violation of the Fifth and Fourteenth Amendment right to remain silent.

The Fifth Amendment to the U.S. Constitution provides that “No person shall... be compelled in any criminal case to be a witness against himself.” U.S. Const. Amend. V. The privilege against self-incrimination is applicable to the states through the due process clause of the Fourteenth Amendment.⁶ U.S. Const. Amend. XIV; *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

To implement the privilege against self-incrimination and to reduce the risk of coerced confessions, an accused person must be informed of her or his rights prior to custodial interrogation. *Missouri v. Seibert*, 542 U.S. 600, 608, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) (citing *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)); *State v. Nelson*, 108 Wash.App. 918, 924, 33 P.3d 419 (2001). Failure to obtain a valid *Miranda* waiver requires exclusion of any statements obtained. *Seibert*, at 608. It is “clearly established” that statements taken in the absence of counsel are inadmissible unless the government meets its heavy burden of showing that the suspect made a

⁶ Similarly, Article I, Section 9 of the Washington State Constitution provides that “No person shall be compelled in any case to give evidence against himself...” Wash. Const. Article I, Section 9. Despite the difference in wording, both provisions have been held to provide the same level of protection. *State v. Easter*, 130 Wash.2d 228, 235, 922 P.2d 1285 (1996).

voluntary, knowing, and intelligent waiver of her or his rights. *Hart v. Attorney General of Florida*, 323 F.3d 884, 891-892 (C.A.11, 2003) (citing *Miranda*, at 475).

The government must also establish that custodial statements are admissible under the due process “voluntariness” test, which “takes into account the totality of the circumstances to examine ‘whether a defendant’s will was overborne by the circumstances surrounding the giving of a confession.’” *United States v. Gamez*, 301 F.3d 1138, 1144 (9th Cir. 2002) (quoting *Dickerson v. United States*, 530 U.S. 428, 434, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (internal quotations and citation omitted)). The privilege against self-incrimination absolutely precludes use of any involuntary statements against an accused in a criminal trial, for any purpose. *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978).

These standards apply “whether a confession is the product of physical intimidation or psychological pressure and, of course, are equally applicable to [an alcohol or] drug-induced statement.” *Townsend v. Sain*, 372 U.S. 293, 307, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963),⁷ *overruled on*

⁷ In *Townsend*, the defendant was interrogated while suffering withdrawal from heroin. He was treated with phenobarbital and scopolamine, to alleviate his withdrawal symptoms. On review of defendant’s *habeas corpus* petition, the Supreme Court noted that it was “generally recognized that the administration of sufficient doses of scopolamine will

other grounds by Keeney v. Tamayo-Reyes, 504 U.S. 1, 5, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992); *see also* 9 A.L.R. 6th 1, *Sufficiency of Showing that Voluntariness of Confession or Admission Was Affected by Alcohol or Other Drugs—Self-Intoxication*.

- C. The trial court should not have admitted Mr. Hudson’s custodial statements, because it did not find the statements were voluntary and did not find that Mr. Hudson made a knowing, intelligent, and voluntary waiver of his *Miranda* rights.

Following a CrR 3.5 hearing, the court is required to enter written findings of fact and conclusions of law. CrR 3.5(c). The findings must set forth “(1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.” *Id.* In this case, the trial court’s written findings do not support admission of the statement.

First, the trial court did not enter any findings or conclusions that Mr. Hudson’s alleged *Miranda* waiver was knowing, intelligent, and voluntary. Instead, the court found that Mr. Hudson said that he understood his rights and agreed to talk. Findings of Fact and Conclusions of Law, Supp. CP. Nor did the court find that Mr. Hudson’s statements

break down the will.” *Townsend v. Sain* at 309. Accordingly, the Court remanded the case for a hearing to determine whether or not the defendant’s statements were admissible.

were voluntary.⁸ Findings of Fact and Conclusions of Law, Supp. CP. Because the state bore the heavy burden of proof at the CrR 3.5 hearing, the absence of such findings establishes that the prosecution failed to sustain its burden. *Armenta*, at 14; *Byrd*, at 265.

In addition to these basic deficiencies, the court's findings also failed to address the totality of the circumstances surrounding the alleged waiver and statements. The court did not set forth any facts relating to Mr. Hudson's alcohol usage and level of intoxication. Nor did the court find facts relating to the effects of the accident, or Mr. Hudson's rationality and mental capacity at the time of the interrogations. Nor did the court address the amount of pressure or coercion (if any) employed by the officers. Findings of Fact and Conclusions of Law, Supp. CP.

Because the court failed to find facts justifying the admission of Mr. Hudson's custodial statements, those statements should have been suppressed. *Armenta*, *supra*; *Seibert*, *supra*; *Dickerson*, *supra*. Mr. Hudson's convictions must be reversed and the case remanded for a new trial. *Id.*

⁸The court's oral ruling touched on voluntariness: "I will find that the State's statements are admissible for 3.5 purposes, that they were given after a warning and they were freely voluntarily given after he was read his right to remain silent and talked." RP (3/12/10) 6. However, a court's oral findings are provisional, and are superseded by written findings. *See, e.g., State v. Pruitt*, 145 Wash.App. 784, 797, 187 P.3d 326 (2008). In light of the findings and conclusions entered on March 22, 2010, the court's oral ruling cannot be considered. *Id.*; *see also* CrR 3.5(c).

D. The state failed to prove that Mr. Hudson's *Miranda* waiver and his statements were the product of his free will, in light of his alcohol consumption, his pain, the shock of having his friend killed and his girlfriend severely injured, and the other aftereffects of the accident.

Mr. Hudson's statements should not have been admitted at the trial, because the state failed to sustain its heavy burden of establishing that he made a knowing, intelligent, and voluntary decision to speak to the officers.

The evidence suffered from three deficiencies.

First, the state did not provide the court with all of the evidence bearing on the issues. The accident took place close to 1:00 a.m. RP (1/8/10) 12. Mr. Hudson was interrogated twice on the morning of the accident: once about an hour and a half after the accident, and once around 7:00 a.m. RP (1/8/10) 19, 24. Although the two interviews were recorded, the prosecution did not provide the judge with transcripts and did not play the recordings at the CrR 3.5 hearing. RP (1/8/10) 11-28. This deprived the court of the opportunity to gain an impression of Mr. Hudson's level of intoxication. Without these materials, the court could not make an informed decision about the totality of the circumstances surrounding Mr. Hudson's alleged waivers and statements.

Second, the prosecutor failed to establish that Mr. Hudson's waivers and statements were not impacted by his alcohol consumption.

Testimony established that Mr. Hudson had spent hours drinking before the accident. RP (6/2/10) 76, 84, 100; RP (6/4/10) 386-387, 425. The trooper who first interviewed him described him as “highly” intoxicated. RP (1/8/10) 20. The detective who conducted the second interview responded “He had been consuming intoxicants, yes,” when asked about Mr. Hudson’s mental state and intoxication. RP (1/8/10) 27. A blood test administered at 3:53 a.m. revealed a blood alcohol content of 0.19. Exhibit 61, Supp. CP. Extrapolation suggested that his BAC at 3 a.m. would have been closer to 0.21 to 0.24. RP (6/3/10) 277-278.

Despite this, no testimony was introduced establishing that Mr. Hudson was oriented, alert, or rational. RP (1/8/10) 11-28. Neither of the officers testified that he was sober enough to understand the *Miranda* warnings, and neither described his ability to respond to the questions they put to him. RP (1/8/10) 11-28.

Third, the state failed to provide information outlining the effect of the accident on Mr. Hudson’s waivers and statements. Following the accident, Mr. Hudson wandered away from the scene, and did not come back for more than an hour. RP (1/8/10) 13-16, 19-20, 27. When he returned, he was covered in dirt, with grass debris tangled in his hair. RP (1/8/10) 14. He complained of pain in his stomach area, and had visible injuries. RP (1/8/10) 23-24. He was told that one of his friends had died,

and that his girlfriend was seriously injured. RP (6/4/10) 392. For some time, he did not remember or realize that he had been in an accident, and even days later did not remember what had happened. RP (6/4/10) 388-393; *see also* Attachment to State's Trial Brief, Supp. CP.

Fourth, the officers did not describe their approach to interrogating Mr. Hudson. Specifically, neither denied exploiting Mr. Hudson's intoxication, state of shock, or physical discomfort to obtain the alleged waiver and statements. The prosecutor did not ask the officers if they exerted any pressure or coercion to obtain Mr. Hudson's statements. RP (1/8/10) 11-29.

Under these circumstances, the state failed to meet its heavy burden of proving that Mr. Hudson's waiver was knowing, intelligent and voluntary, and that his statements were voluntary. It is likely that his statements were, at least in part, the product of shock, alcohol consumption, and pressure from the officers. The fact that he may have given some coherent answers to questions has no bearing on whether or not his decision to talk was voluntary. *See Townsend at 320* (rejecting the coherency standard).

The failure of proof (and the lack of findings) requires suppression of Mr. Hudson's statements. *Armenta, supra; Seibert, supra; Dickerson,*

supra. His convictions must be reversed, the statements suppressed, and the case remanded for a new trial. *Id.*

II. THE POLICE VIOLATED MR. HUDSON’S RIGHTS UNDER THE FOURTH AMENDMENT AND ARTICLE I, SECTION 7 BY ARRESTING HIM WITHOUT PROBABLE CAUSE.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Schaler, at 282.*

The validity of a warrantless search or seizure is reviewed *de novo*. *State v. Gatewood, at 539.* The existence of probable cause is a question of law, reviewed *de novo*. *State v. Neth, 165 Wash.2d 177, 182, 196 P.3d 658 (2008).*

Although the Court of Appeals “may refuse to review any claim of error which was not raised in the trial court,” the Court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); *see State v. Russell, ___ Wash.2d ___, ___, ___ P.3d ___ (2011).* This includes both nonconstitutional issues and constitutional issues that are not manifest. *Id.*

In addition, an appellant may raise a manifest error affecting a constitutional right for the first time on review. RAP 2.5(a)(3); *State v. Kirwin, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009).* A reviewing court “previews the merits of the claimed constitutional error to determine

whether the argument is likely to succeed.” *State v. Walsh*, 143 Wash.2d 1, 8, 17 P.3d 591 (2001).⁹ An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

B. Evidence seized without a search warrant is generally inadmissible in a criminal trial.

Under the Fourth Amendment to the U.S. Constitution,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.¹⁰ Similarly, Article I, Section 7 of the Washington State Constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

Wash. Const. Article I, Section 7. It is “axiomatic” that Article I, Section 7 provides stronger protection to an individual’s right to privacy than that

⁹ The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wash.2d 595, 603, 980 P.2d 1257 (1999).

¹⁰ The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

guaranteed by the Fourth Amendment to the U.S. Constitution.¹¹ *State v. Parker*, 139 Wash.2d 486, 493, 987 P.2d 73 (1999).

Under both provisions, searches and seizures conducted without authority of a search warrant “are *per se* unreasonable ... subject only to a few specifically established and well-delineated exceptions.” *Arizona v. Gant*, ___ U.S. ___, ___, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted)); see also *State v. Eisfeldt*, 163 Wash.2d 628, 185 P.3d 580 (2008). Without probable cause and a warrant, an officer is limited in what she or he can do. *State v. Setterstrom*, 163 Wash.2d 621, 626, 183 P.3d 1075 (2008).

Exceptions to the warrant requirement are narrowly drawn and jealously guarded. *State v. Day*, 161 Wash.2d 889, 894, 168 P.3d 1265 (2007). The state bears a heavy burden to show the search falls within one of these narrowly drawn exceptions. *State v. Garvin*, 166 Wash.2d 242, 250, 207 P.3d 1266 (2009). The state must establish the exception to the warrant requirement by clear and convincing evidence. *Id.*

¹¹ Accordingly, the six-part *Gunwall* analysis used to interpret state constitutional provisions is not necessary for issues relating to Article I, Section 7. *State v. White*, 135 Wash.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986).

Evidence derived from an unconstitutional search or seizure must be suppressed as fruit of the poisonous tree. *United States v. Williams*, 615 F.3d 657, 668-669 (6th Cir. 2010) (citing *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). Exclusion is required unless the connection between illegal police conduct and the evidence is so attenuated as to dissipate the taint. *Id.* The test is whether the evidence was discovered by exploitation of the illegality, or instead by means sufficiently distinguishable to be purged of the primary taint. *Id.* A reviewing court must consider temporal proximity (between the illegality and discovery of the evidence), the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. *Id.* (quoting *Brown v. Illinois*, 422 U.S. 590, 603-604, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)). The prosecution bears the burden of proving that tainted evidence is admissible. *Taylor v. Alabama*, 457 U.S. 687, 690, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982).

The Fourth Amendment allows officers to conduct warrantless seizures of blood, incident to an arrest for DUI or similar offense.¹²

¹² The Washington Supreme Court has held that such searches do not violate Article I, Section 7; however, it has never conducted a complete analysis of the issue. *State v. Curran*, 116 Wash.2d 174, 187, 804 P.2d 558 (1991), *overruled in part on other grounds by State v. Berlin*, 133 Wash.2d 541, 947 P.2d 700 (1997). The *Curran* court's cursory analysis relied on a case—*State v. Judge*—which predated *Gunwall*, *supra*, and thus did not have the advantage of the Court's subsequent Article I, Section 7 jurisprudence. *State v. Judge*, 100 Wash.2d 706, 675 P.2d 219 (1984). Instead, the *Judge* court relied wholly on *Schmerber*, without conducting any independent analysis under the state constitution.

Schmerber v. California, 384 U.S. 757, 771, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). The dissipation of blood alcohol creates an emergency that makes it reasonable to search without delaying to obtain a warrant. *Id.*, at 770-771. As with all searches incident to arrest, a lawful custodial arrest is a constitutional prerequisite to any such search. *Id.*, at 769-770.

The *Schmerber* rule is codified in Washington by RCW 46.20.308. Under that statute, police may administer a warrantless blood test without consent to any individual arrested for vehicular homicide, vehicular assault, or a DUI accident involving serious bodily injury. RCW 46.20.308. As with the constitutional rule, a lawful arrest is “an indispensable element triggering” this statutory authority. *Clement v. State Dept. of Licensing*, 109 Wash.App. 371, 375, 35 P.3d 1171 (2001) (citing *State v. Wetherell*, 82 Wash.2d 865, 869, 514 P.2d 1069 (1973)).

To be lawful, an arrest must be based on probable cause. Generally, ‘probable cause’ requires a reasonable ground for belief of guilt that is “particularized with respect to the person to be searched or seized.” *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003). There must, in other words, be “a finding of individualized probable cause.” *State v. Grande*, 164 Wash.2d 135, 140, 187 P.3d 248

(2008).¹³ In *Grande*, for example, the Washington Supreme Court reversed a conviction for possession of marijuana and use of drug paraphernalia. The Court invalidated the defendant's arrest, which had been based on the smell of marijuana emanating from a vehicle with two occupants. The Court held that the arrest was not based on probable cause:

Our state constitution protects our individual privacy, meaning that we are free from unnecessary police intrusion into our private affairs unless a police officer can clearly associate the crime with the individual. We cannot wait until the people we are associating with "alleviat[e] the suspicion" from us. Unless there is specific evidence pinpointing the crime on a person, that person has a right to their own privacy and constitutional protection against police searches and seizures.

Grande, at 145-146.

- C. The police lacked probable cause to believe Mr. Hudson was the driver when they arrested him, interrogated him, and drew his blood.

In this case, the officers arrested Mr. Hudson, Ms. Underwood, and Mr. Butler, because they did not know which of them had been driving the car at the time of the accident. RP (6/2/10) 43-44. For the same reason,

¹³ Although the state and federal tests for probable cause are the same, Washington has not embraced the "common criminal enterprise" inference used by the U.S. Supreme Court to justify the arrest of multiple suspects. See *Grande*, at 145 (distinguishing *Pringle*, *supra*).

the police directed that blood be drawn from all three suspects. RP (6/2/10) 43-44. Mr. Hudson's blood was drawn at 4:49 a.m. RP (6/2/10) 59, 178. He was subjected to custodial interrogation both before and after the blood draw. RP (1/8/10) 11-29.

At the time of the multiple arrests, the officers knew only that there had been a fatality accident and that four people had occupied the car. RP (6/2/10) 43-44. Ms. Charles told an officer that she had been the driver. RP (6/2/10) 82-83. Although a family member of the deceased believed Mr. Hudson had been the driver, Mr. Hudson denied being the driver. RP (1/8/10) 17, 20; RP (6/2/10) 41-42, 69; RP (6/4/10) 389-392.

Furthermore, Detective Presba testified that the first time he heard any suggestion that Mr. Hudson was the driver was when Mr. Hudson "confessed;" this occurred after blood had been drawn and Mr. Hudson had been returned to the scene. RP (6/3/10) 261.

These facts were insufficient to provide "a finding of individualized probable cause" that was "particularized with respect to" Mr. Hudson. *Grande*, at 140; *Pringle*, at 371. Other evidence¹⁴—collected in the hours and days that followed—was available for the

¹⁴ This evidence included Mr. Hudson's own subsequent admissions, the statements of other witnesses, and the forensic evidence suggesting Mr. Hudson was the driver. RP (6/2/10) 121-155; RP (6/3/10) 171-361.

prosecutor's use at trial; however, this evidence was not known to the police at the time they drew Mr. Hudson's blood and obtained his statements.

Because Mr. Hudson was arrested and his blood drawn—without his consent and in the absence of a search warrant—at a time when the police did not have probable cause, his blood alcohol content should have been excluded. Similarly, his custodial statements should have been suppressed as “fruits of the poisonous tree.” *Williams, at 668-669; Wong Sun, at 487-88.*

The admission of Mr. Hudson's statements and blood test results violated his rights under the Fourth Amendment, Article I, Section 7, and RCW 46.20.308. His convictions must be reversed, the evidence suppressed, and the case remanded for a new trial.

III. THE TRIAL JUDGE VIOLATED MR. HUDSON'S RIGHTS UNDER THE PRIVACY ACT BY ADMITTING ILLEGALLY RECORDED CONVERSATIONS THAT DID NOT FIT WITHIN THE ACT'S EXCEPTIONS.

A. Standard of Review

Questions of statutory interpretation are reviewed *de novo*. *In re Detention of Martin*, 163 Wash.2d 501, 506, 182 P.3d 951 (2008). The Court of Appeals has discretion to accept review of any issue argued for

the first time on appeal. RAP 2.5(a); *Russell*, at ____ . This includes issues that do not implicate a constitutional right. *Id.*

- B. An accused person has standing to object to the admission of any illegally recorded conversation.

Washington's Privacy Act "puts a high value on the privacy of communications." *State v. Christensen*, 153 Wash.2d 186, 201, 102 P.3d 789 (2004). By enacting the Privacy Act, the legislature "intended to establish protections for individuals' privacy and to require suppression of recordings of even conversations relating to unlawful matters if the recordings were obtained in violation of the statutory requirements." *State v. Williams*, 94 Wash.2d 531, 548, 617 P.2d 1012 (1980).

Recordings made in violation of the Privacy Act are inadmissible in court. RCW 9.73.050. An accused person has standing to object to the admission of any illegally recorded conversation, even if his or her privacy rights were not personally violated. *Williams*, at 544-546. The admission of evidence obtained in violation of the Privacy Act requires reversal unless "within reasonable probability, the erroneous admission of the evidence did not materially affect the outcome of the trial." *State v. Porter*, 98 Wash.App. 631, 638, 990 P.2d 460 (1999).

The Act must be strictly construed in favor of the right to privacy. *Williams*, at 548; *see also Christensen*, at 201.

- C. The recorded conversation did not comply with the Privacy Act's consent provisions.

The Privacy Act prohibits the recording of a private conversation "without first obtaining the consent of all the participants in the communication." RCW 9.73.030(1). Explicit consent is not required if certain conditions are met:

Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.

RCW 9.73.030(3).

The recorded conversation admitted in this case did not comply with the Act's consent provisions for three reasons. First, the Grays Harbor County Jail did not obtain Ms. Underwood's consent prior to recording the conversation. She was a participant in the conversation, but the automated announcement (warning that the call was subject to monitoring and recording) played only one time, before Ms. Underwood took the phone from her daughter. Attachment to State's Trial Brief, p. 1, Supp. CP. Unlike most inmate calling systems, the Evercom system did not repeat the automated announcement throughout the call. Attachment to State's Trial Brief, p. 1-8; Exhibits 85 and 86, Supp. CP.

Second, the Privacy Act creates a presumption of consent “whenever one *party* has announced to all other parties...that such communication or conversation is about to be recorded...” RCW 9.73.030(3) (emphasis added). When the Act is strictly interpreted in favor of the right to privacy, the two parties to the conversation were Mr. Hudson and Ms. Underwood. The Evercom automated system cannot be described as a “party;” accordingly, the Evercom announcement does not trigger the presumption of consent contained in the Act.

Third, the Act requires that a party make an announcement “in any reasonably effective manner, that such communication or conversation is about to be recorded...” *Id.* Here, the announcement was that the “call is *subject to* monitoring and recording.” Attachment to State’s Trial Brief, p. 1, Supp. CP (emphasis added). The phrase “subject to monitoring and recording” did not convey the required information, because it suggested only that recording *might* occur.¹⁵

For all these reasons, the recording violated the Privacy Act, and should not have been admitted at Mr. Hudson’s trial. His convictions

¹⁵ See, e.g., *Dictionary.com*, based on *The Random House Dictionary*, Random House, Inc. 2011. Entry 19 for ‘subject’: “open or exposed (usually followed by *to*): *subject to ridicule*.”

must be reversed and the case remanded to the trial court for a new trial.

Porter, supra.

IV. THE PROSECUTION FAILED TO INTRODUCE SUFFICIENT EVIDENCE TO ESTABLISH THE VALIDITY AND ADMISSIBILITY OF MR. HUDSON'S BLOOD TEST RESULTS, AND RELIED ON TESTIMONIAL HEARSAY IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONTATION.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *Schaler, at 282.*

The Court of Appeals has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); *Russell, at ___*. This includes both nonconstitutional issues and constitutional errors that are not manifest. *Id.* Furthermore, manifest errors affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *Kirwin, at 823.*

B. Blood test results may not be admitted in a Vehicular Homicide or Vehicular Assault trial unless the prosecution introduces sufficient evidence to make a *prima facie* showing of their validity and admissibility.

Blood test results are invalid and inadmissible unless they are obtained in compliance with RCW 46.61.506. That statute requires that the analysis be “performed according to methods approved by the state toxicologist...” RCW 46.61.506(3). The Washington State Toxicologist has promulgated regulations outlining techniques and methods for testing

as directed by RCW 46.61.506(3). WAC 448-14-020. Failure to prove compliance with the regulations requires reversal of any conviction that rests in part on a blood test result. *See State v. Bosio*, 107 Wash.App. 462, 27 P.3d 636 (2001).

The toxicologist's regulations require that samples be stored in "[a] chemically clean dry container consistent with the size of the sample with an inert leak-proof stopper." WAC 448-14-020(3)(a) (2010). The regulation also requires that:

Blood samples for alcohol analysis shall be preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration. Suitable preservatives and anticoagulants include the combination of sodium fluoride and potassium oxalate.

WAC 448-14-020(3)(b) (2010). These uniform procedures help to ensure that the test results will be accurate and reliable. *Bosio*, at 467. Where the state fails to make a *prima facie* case that the sample was properly preserved, the conviction must be reversed. *Bosio*, at 468. In *Bosio*, the state failed to introduce any evidence establishing that the mandatory enzyme poison was added to the sample. Because of this, the conviction was reversed and the case remanded for a new trial. *Bosio*, at 468. Similarly, in *State v. Garrett*, 80 Wash.App. 651, 910 P.2d 552 (1996), the state failed to make a *prima facie* case that the blood sample

was properly preserved with an anticoagulant. Because of this, the defendant's conviction was reversed. *Id.*

- C. The prosecution failed to introduce sufficient evidence to make a *prima facie* case establishing that Mr. Hudson's blood test results were valid and admissible.

In this case, the prosecution did not establish that Mr. Hudson's blood sample was stored in a "[a] chemically clean dry container," or that the container was sealed "with an inert leak-proof stopper," as required under WAC 448-14-020(3) (2010). Without such proof, the state did make a *prima facie* case that the blood test results were valid and admissible.¹⁶ *Bosio*, at 468. Accordingly, Mr. Hudson's convictions must be reversed and the case remanded for a new trial.¹⁷

- D. The prosecution relied on testimonial hearsay to show that Mr. Hudson's blood sample was properly preserved, in violation of his Sixth and Fourteenth Amendment right to confrontation.

The Sixth Amendment to the U.S. Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the right ... to be

¹⁶ Because this is an issue of evidentiary sufficiency, it may be raised for the first time on review. RAP 2.5(a); *State v. Hickman*, 135 Wash.2d 97, 954 P.2d 900 (1998).

¹⁷ Mr. Hudson was convicted under all three alternate means of committing the offense, and the jury completed special verdict forms to that effect. Special Verdict Forms (2), Supp. CP. However, the jury may have relied on Mr. Hudson's blood alcohol level to determine that he drove in a reckless manner, or with disregard for the safety of others. Because of this, the problem with the blood test results requires reversal of the convictions under each of the three alternate means.

confronted with the witnesses against him.” U.S. Const. Amend. VI.¹⁸ A proponent of hearsay evidence bears the burden of establishing that its admission would not violate the confrontation clause. *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

The admission of testimonial hearsay violates the confrontation clause unless the declarant is unavailable and the accused had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004); *see also Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).

Here, the prosecution relied in part on a “Certificate of Compliance” to establish that Mr. Hudson’s blood sample had been properly preserved with an enzyme poison and anticoagulant, as required by WAC 448-14-020(3) (2010). Exhibit 54, Supp. CP. Such certificates are hearsay, and are not admissible under any exception to the hearsay rule. *See, e.g., Brown, at 73.*¹⁹ In addition, the certificate qualifies as “testimonial hearsay” under *Crawford*, and is thus inadmissible under the

¹⁸ This provision is applicable to the states through the due process clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); U.S. Const. Amend. XIV.

¹⁹ In *Brown*, unlike this case, the state presented additional testimony establishing the proper use of a preservative and enzyme poison. *Brown, at 76.*

confrontation clause. *See, e.g., Melendez-Diaz, supra; State v. Jasper*, 158 Wash.App. 518, ___, 245 P.3d 228 (2010).²⁰

The prosecution's reliance on testimonial hearsay to *prima facie* establish the validity and admissibility of the blood test results violated Mr. Hudson's Sixth and Fourteenth Amendment right to confrontation. *Jasper, supra; Melendez-Diaz, supra*. Accordingly, his convictions must be reversed and the case remanded for a new trial. *Id.*

V. MR. HUDSON WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wash.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wash. App. 29, 146 P.3d 1227 (2006).

B. An accused person is constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of

²⁰ The U.S. Supreme Court has recently heard oral argument in a case addressing related issues. *See State v. Bullcoming*, 226 P.3d 1 (N.M. 2010), *certiorari granted sub nom Bullcoming v. New Mexico*, ___ U.S. ___, 131 S.Ct. 62, 177 L.Ed.2d 1152, (2010).

Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir., 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); *see also State v. Pittman*, 134 Wash. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel’s performance.

Reichenbach, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

- C. Defense counsel was ineffective for failing to object to inadmissible and prejudicial evidence.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wash.App. 575, 578, 958 P.2d 364 (1998).

In this case, defense counsel made three critical errors that prejudiced Mr. Hudson.

First, counsel failed to seek suppression of evidence obtained in violation of Mr. Hudson’s rights under the Fourth Amendment and under Wash. Const. Article I, Section 7. The evidence included Mr. Hudson’s

blood test results and his statements to the police.^{21,22} The evidence was inculpatory—it suggested that Mr. Hudson was the driver and that he was intoxicated; accordingly, there was no strategic reason for its admission. Furthermore, a motion to suppress would likely have been granted, as outlined above.

This is especially true in light of the officers' candid admission that all three survivors were arrested and tested because the police couldn't determine who had been driving. A successful motion to suppress would likely have changed the outcome of the trial. Mr. Hudson's claim that he had been the driver, made within hours of the accident, was powerful evidence supporting a guilty verdict. Without such evidence, the jury would likely have voted to acquit. Accordingly, defense counsel's failure to seek suppression deprived Mr. Hudson of the effective assistance of counsel. *Saunders, at 578.*

Second, counsel failed to argue the Privacy Act violation in seeking suppression of Mr. Hudson's recorded telephone call with Ms. Underwood. RP (6/2/10) 114, 120, 159-166. In the call, Mr. Hudson told

²¹ Counsel did move to suppress Mr. Hudson's statements under CrR 3.5. Motion to Suppress, Motion and Affidavit/Declaration (two: both filed 12/10/09), Supp. CP.

²² His statements included his admission (during the second round of interrogation) that he'd been the driver of the vehicle. RP (1/8/10) 25.

Ms. Underwood that he had taken responsibility for the accident (after learning that his girlfriend had been arrested). There was no reason for this portion of the recording to be admitted, because it directly undermined the defense.²³ A motion to suppress would likely have been granted, because Ms. Underwood did not give her consent prior to being recorded, as outlined above. As with Mr. Hudson's second statement to the police, the admission of the recorded conversation repeated for the jury his "confession" that he had been driving at the time of the accident. This directly undermined the defense theory. Had the evidence been excluded, the jury would likely have had a reasonable doubt about Mr. Hudson's guilt. Accordingly, counsel's failure to seek suppression of the illegal recording violated Mr. Hudson's right to the effective assistance of counsel. *Saunders, at 578.*

Third, counsel failed to object to admission of Mr. Hudson's blood test results on hearsay and confrontation grounds. The results were inculpatory, because they showed how intoxicated he was, even hours

²³ Counsel may have made a strategic decision not to contest admission of the redacted recording; however, such a strategic decision would have been objectively unreasonable. Portions of the recording reinforced the defense theory that Mr. Hudson had confessed to driving despite his lack of memory because he wanted to help his girlfriend. Exhibits 85, 86, Supp. CP. But the defense was only required to explain the "confession" because counsel failed to seek its suppression. Had counsel moved to suppress the statements as fruits of the unlawful arrest, there would have been no need to introduce the recording.

after the accident. There was no strategic purpose served by their admission. Furthermore, a hearsay (and confrontation) objection to the certificate would likely have been granted. *Brown, supra*. Furthermore, unlike in *Brown*, the prosecutor in this case did not introduce evidence besides the certificate establishing that the blood sample was preserved using a preservative and an enzyme poison. Finally, a successful objection would likely have changed the outcome of the trial. Although there was other evidence that Mr. Hudson had been drinking, the blood test provided the jury with a hard number, which they could compare to the legal limit – the .08 standard referred to by forensic toxicologist Lisa Noble. RP (6/3/10) 282. Accordingly, defense counsel’s failure to object to the admission of the certificate deprived Mr. Hudson of the effective assistance of counsel. *Saunders, at 578*.

VI. MR. HUDSON’S EXCEPTIONAL SENTENCE VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT HE DISPLAYED AN EGREGIOUS LACK OF REMORSE.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *Schaler, at 282*.

B. The prosecution failed to prove Mr. Hudson's "egregious lack of remorse" beyond a reasonable doubt.

Due process requires the state to prove beyond a reasonable doubt any fact that increases the penalty for a crime. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In this case, the prosecution did not prove beyond a reasonable doubt that Mr. Hudson displayed an egregious lack of remorse.

The prosecution relied on evidence that Mr. Hudson wandered away from the crash following the accident, and did not immediately seek help for his friends. RP (6/4/10) 496. But the evidence suggested that Mr. Hudson's response to the accident resulted from intoxication and shock. RP (1/8/10) 20, 27; RP (6/2/10) 69; RP (6/3/10) 175-176; RP (6/4/10) 389-392; *see also* Attachment to State's Trial Brief, Supp. CP. The prosecution did not prove that his conduct stemmed from a lack of remorse. In fact, the prosecution failed to offer any evidence rebutting Mr. Hudson's statements and testimony that he did not even realize he had been in an accident. RP (6/4/10) 388-393; *see also* Attachment to State's Trial Brief, pp. 3, 4, 8, 9 Supp. CP.

The prosecution failed to establish beyond a reasonable doubt that Mr. Hudson displayed an egregious lack of remorse. Accordingly, the aggravating factor and exceptional sentence must be vacated. Mr.

Hudson's case must be remanded to the trial court for sentencing within his standard range.

CONCLUSION

For the foregoing reasons, Mr. Hudson's convictions must be reversed and his case remanded for a new trial. In the alternative, his exceptional sentence must be vacated, and the case remanded for a new sentencing hearing.

Respectfully submitted on March 14, 2011.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Joseph Hudson, DOC #341716
Stafford Creek Corrections Center
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and to:

Grays Harbor Prosecuting Attorney
102 West Broadway, #102
Montesano, WA 98563

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on March 14, 2011.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 14, 2011.



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