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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 26789-0-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

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**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**FREDERICK DAVID RUSSELL,**

Defendant/Appellant.

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**APPELLANT'S BRIEF**

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## ASSIGNMENTS OF ERROR

1. The trial court's Conclusions of Law 5, 6, 7, 9, 10, 11, 12 and 13 relating to the arrest of Frederick David Russell in Idaho are legally erroneous and/or are not supported by the Findings of Fact. (CP 975; Appendix "A")

2. The Interstate Mutual Aid Agreement (IMAA) is invalid. (Pre-trial Exhibit 1)

3. The trial court's Conclusions of Law 2 and 3 relating to probable cause to arrest are legally erroneous and/or are not supported by the Findings of Fact. (CP 970; Appendix "B")

4. The trial court's Conclusion of Law 3 relating to the sufficiency of the search warrant affidavit is legally erroneous and/or is not supported by the Findings of Fact. (CP 980; Appendix "C")

5. The trial court's Conclusion of Law 2 in connection with the scope of the search warrant is legally erroneous and/or is not supported by the Findings of Fact. (CP 993; Appendix "D")

6. The trial court's Conclusions of Law 3, 4, 6, 7, 8, 9, 10 and 11 concerning the admissibility of the blood draw under RCW 46.20.308 are

either not supported by the findings of fact or are legally erroneous. (CP 1006; Appendix “E”)

7. A. The State did not establish a complete chain of custody as to Mr. Russell’s blood samples.

B. Mismanagement of Mr. Russell’s blood samples at the Washington State Toxicology Laboratory (Lab) requires suppression of the blood test results.

8. The trial court impermissibly closed the jury selection process in violation of Const. art. I, § 10, as well as in violation of Mr. Russell’s constitutional rights under Const. art. I, § 22 and the Sixth Amendment to the United States Constitution.

9. The trial court erroneously overruled Mr. Russell’s *Batson*<sup>1</sup> challenges.

10. The trial court erred when it failed to grant challenges for cause to Jurors 8 and 16.

11. The prosecuting attorney committed misconduct during defense counsel’s opening statement.

12. A. Hearsay testimony concerning the contents of the gray-topped vials used for storage of Mr. Russell’s blood was improperly admitted.

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<sup>1</sup> *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed.2d 69, 106 S. Ct. 1712 (1986).

B. The State did not establish a proper foundation for admission of the blood test results in the absence of the hearsay testimony.

13. The State failed to establish, beyond a reasonable doubt, that Mr. Russell's consumption of alcohol was the proximate cause of the accident.

14. The trial court should not have allowed the State to introduce testimony from an expert retained by Mr. Russell's prior attorney.

15. Trooper Spangler improperly commented upon the credibility of Detectives Snowden and Fenn.

16. Instructions 14 and 20 are not an accurate statement of the law as it pertains to a superseding/intervening event. (CP 1224; CP 1230; Appendices "F" and "G")

17. The trial court's Conclusions of Law 1, 2, 3, 4, 5 and 7 concerning credit for time served in Ireland are legally erroneous and/or not supported by the Findings of Fact. (CP 1394; Appendix "H")

#### **ISSUES RELATING TO ASSIGNMENTS OF ERROR**

1. Was Mr. Russell lawfully arrested in Idaho?
2. Does failure to record the IMAA make it invalid?
3. Does Chapter 10.89 RCW have any application to an arrest outside the State of Washington?

4. Did Trooper Murphy comply with the provisions of Idaho Code §§ 19-701 *et seq.*?

5. Was Trooper Murphy in “fresh pursuit” of Mr. Russell as that phrase is defined by the common law?

6. Did the seizure of the serum blood test results contained in Mr. Russell’s medical records exceed the scope of the search warrant?

7. Does RCW 46.20.308(1) have any application to the facts and circumstances of Mr. Russell’s case since he was unlawfully arrested in Idaho?

8. Was there a break in the chain of custody such as to require suppression of the blood test analysis done by the Lab?

9. Was mismanagement at the Lab so pervasive as to require suppression of the blood test results?

10. Did the trial court impinge upon Mr. Russell’s right to a public trial under Const. art. I, § 10

11. Did the trial court violate Mr. Russell’s rights under Const. art. I, § 22 and the Sixth Amendment to the United States Constitution when it

a. denied his *Batson* challenges; and/or

b. denied his challenges for cause to Jurors 8 and 16?

12. Does prosecutorial misconduct during defense counsel’s opening statement require reversal of Mr. Russell’s convictions and remand for a new trial?

13. Was hearsay testimony concerning the manufacturer's certificate and the gray-topped vials improperly admitted, and if so, did the State otherwise fail to present a sufficient foundation for admissibility?

14. What was the proximate cause of the accident?

15. Did the trial court improperly allow expert testimony, from an accident investigator hired by Mr. Russell's prior attorney, in violation of the attorney/client privilege and the attorney work product rule?

16. Was there an improper comment upon the credibility of the detectives who conducted the accident investigation?

17. Did Instruction 14 and/or 20 misstate the law and, if so, is Mr. Russell entitled to a new trial?

18. Does the effect of cumulative error require a new trial?

19. Did the trial court improperly deny Mr. Russell credit for pre-trial detention in Ireland?

#### **STATEMENT OF THE CASE**

Brandon Clements died in a traffic accident on June 4, 2001.

Stacy Morrow died in a traffic accident on June 4, 2001.

Ryan Sorenson died in a traffic accident on June 4, 2001.

(RP 3011, ll. 15-20; RP 3013, ll. 6-13; ll. 21-24; RP 3014, ll. 7-10; RP 3022, ll. 10-17)

Sameer Ranade was seriously injured in a traffic accident on June 4, 2001. (RP 3042, ll. 2-4; ll. 22-23)

Kara Eichelsdoerfer was seriously injured in a traffic accident on June 4, 2001. (RP 3210, ll. 1-4; RP 3211, ll. 1-12)

John Matthew Wagner was seriously injured in a traffic accident on June 4, 2001. (RP 3330, ll. 11-17)

Ms. Morrow, Mr. Sorenson, Ms. Eichelsdoerfer and Mr. Ranade were rear seat passengers in the car driven by Mr. Clements. Mr. Wagner was sitting in the middle of the front seat. Eric Haynes was the other front seat passenger. (RP 3014, ll. 7-10; RP 3224, ll. 1-6; RP 3226, ll. 9-13; RP 3228, ll. 3-12)

The accident occurred at approximately 10:45 p.m. on SR 270 (aka the Moscow-Pullman Highway) near the Washington/Idaho state line. At least five (5) different vehicles had a role in the accident. (RP 3055, ll. 6-13; RP 3712, ll. 3-7)

Alecia Lundt was driving westbound (WB) in a green Geo. (RP 4074, ll. 21-23)

Jill Baird was immediately behind Ms. Lundt driving a Honda which was not involved in the actual accident. (RP 3060, l. 12; RP 3831, l. 10; ll. 19-20)

Mr. Clements was driving a white Cadillac and following Ms. Baird. (RP 3356, ll. 4-16)

Vihn Tran was in a red Geo behind the Cadillac. (RP 3063, ll. 5-7; RP 3460, l. 3)

Robert Hart was on his way to work at the University Inn in Moscow. He left Pullman at approximately 10:35 p.m. As he drove eastbound (EB) in his Subaru Brat he saw blinking headlights rapidly approaching in his rearview mirror. (RP 3584, ll. 10-11; RP 3585, ll. 12-15; RP 3588, ll. 17-21, l. 24; RP 3590, ll. 15-21)

Mr. Russell was also driving EB in his Chevrolet Blazer (SUV). Jacob McFarland was his passenger. The SUV had been modified with a four (4") inch lift kit. It sat considerably higher than a normal sized car. (RP 3508, ll. 11-24; RP 3989, ll. 7-10)

The lift kit on the SUV raised the bumper to such a degree that it would cause increased damage when hitting another object; *e.g.*, the Cadillac. The side of a 1978 Cadillac is substantially more vulnerable than the front. (RP 3988, l. 19 to RP 3989, l. 2; RP 4051, ll. 6-18; RP 4051, l. 23 to RP 4052, l. 7; RP 4053, ll. 7-9)

Mr. Russell's SUV collided with Ms. Lundt's Geo in the WB lane. The point of impact (POI) was near the crest of a hill in a no passing zone.

Upon impacting and sideswiping the Geo the SUV's left front tire was torn from the wheel. The right front tire and wheel were canted inward. (RP 3976, ll. 6-15; RP 3978, ll. 8-11; RP 3983, ll. 5-11; RP 4697, l. 15 to RP 4698, l. 2; Exhibits 51, 52, 62)

The SUV moved back toward the EB lane leaving gouge and tire marks on the roadway. The gouge marks from the left rim and the tire marks from the right front tire were four (4) to four and a half (4 ½) feet apart. The normal distance would be approximately six (6) feet. This is an indication that the right tire and rim was pushed back and inward. (RP 4717, l. 15 to RP 4718, l. 10)

Ms. Baird pulled onto the shoulder of the highway as the SUV came back into the WB lane. She watched the green Geo cross the highway and come to a stop on the EB shoulder. (RP 3059, ll. 2-4; RP 3832, ll. 14-22; RP 3834, ll. 6-10; Exhibits 41, 42, 43, 49, 50)

The impact between the SUV and the Cadillac was catastrophic. Both vehicles were demolished. The rear-end of the Cadillac was shoved into a rock wall as both it and the SUV rotated counterclockwise. The SUV was then going backwards as it collided with Mr. Tran's Geo near the centerline of SR 270. (RP 3471, ll. 11-12; RP 3522, ll. 11-17; RP 3924, ll. 1-13; RP 4723, l. 14 to RP 4724, l. 4; Exhibits 3, 4, 56, 60)

Brad and Kami Raymond stopped at the accident scene. They contacted Mr. Russell, Mr. McFarland and Mr. Tran. Mr. Russell admitted driving the SUV. Mr. Raymond smelled the odor of alcohol on Mr. Rus-

sell. (RP 2839, ll. 3-7; RP 2841, ll. 1-5; RP 2863, ll. 22-23; RP 2870, ll. 17-23; RP 2893, ll. 19-21)

Kayce Ramirez also spoke with Mr. Russell following the accident. He was smoking a cigarette at the time. (RP 3407, ll. 10-14)

Mr. Russell was transported to Gritman Medical Center in Moscow, Idaho. He was examined in the ER by Dr. Kloepfer. (RP 2934, ll. 8-10; ll. 13-15)

Dr. Kloepfer noted that Mr. Russell was alert; his speech was coherent (even though he had a split lip); he was oriented to time, place, person and events; and his face was not flushed. (PTRP<sup>2</sup> 66, l. 19 to PTRP 67, l. 4; RP 2848, ll. 15-19; RP 2978, ll. 19-24; RP 2979, ll. 14-16; RP 2995, ll. 12-16)

After Mr. Russell told Dr. Kloepfer that he had been drinking a medical (serum) blood draw was ordered. The blood draw was done at 12:30 a.m. by an RN. Dr. Kloepfer did not see if the RN used iodine, betadine or alcohol to swab Mr. Russell's arm. The hospital lab results were .128. (RP 2967, ll. 4-14; RP 2974, ll. 2-3; RP 2981, ll. 15-22; RP 2984, ll. 1-7)

Trooper Murphy of the Washington State Patrol (WSP) arrived at the accident scene. He conducted a preliminary walk-through before going to the hospital. He noted the location of the vehicles, the presence of three (3) bodies, as well as the road and weather conditions. (RP 3053,

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<sup>2</sup> PTRP – pretrial report of proceedings (Allred)

l. 15; RP 3057, ll. 10-11; RP 3057, l. 18 to RP 3058, l. 10; RP 3059, ll. 2-4; ll. 7-11; ll. 11-13; ll. 17-25; RP 3060, l. 24 to RP 3061, l. 5; RP 3061, ll. 17-18)

Trooper Murphy met with Tony Catt (one of the EMTs who transported Mr. Russell to the hospital). Mr. Catt told the trooper there was a heavy odor of alcohol coming from Mr. Russell. (RP 3876, ll. 8-11; RP 3877, ll. 11-17; RP 3880, ll. 16-18; l. 21)

Trooper Murphy then spoke with Mr. McFarland and Mr. Tran before contacting Mr. Russell. (RP 3062, l. 10 to RP 3063, l. 2; RP 3063, ll. 5-7; ll. 11-13)

The trooper noted that Mr. Russell's eyes were bloodshot and watery. There was an odor of intoxicants. Mr. Russell admitted he had been drinking. (RP 3064, ll. 1-2; RP 3065, ll. 16-19)

Mr. Russell told the trooper he swerved to avoid a small sporty car. A collision occurred and he lost control of his SUV. Mr. Russell had previously stated to Kayce Ramirez (at the accident scene) as well as Brian Parrish and Chad Whetzel (volunteer firefighters who were also at the accident scene), that he looked up, saw headlights coming at him and swerved. He made a similar statement to Mr. Catt on the way to the hospital. (RP 3066, ll. 4-8; ll. 19-20; RP 3402, l. 23 to RP 3403, l. 2; RP 3409, ll. 17-19; RP 3740, ll. 11-12; RP 3751, ll. 17-21; RP 3769, ll. 21-22; RP 3781, ll. 1-4; RP 3882, ll. 5-7)

It is common that an individual who is involved in a motor vehicle accident will not always recall the exact details of what occurred. (RP 3125, ll. 4-8)

Trooper Murphy contacted Detective Snowden and Robert Hart by telephone from Gritman Hospital after his initial discussion with Mr. Russell. (RP 3068, ll. 14-16; RP 3069, ll. 17-25)

Based upon his investigation Trooper Murphy believed probable cause existed to arrest Mr. Russell for vehicular homicide and vehicular assault due to multiple deaths, multiple injuries, passing in a no passing zone near the crest of a hill, and the odor of alcohol. (RP 3077, ll. 22-23; RP 3078, ll. 2-6; RP 3096, ll. 21-23; RP 3097, l. 20 to RP 3098, l. 9)

In the course of his investigation Trooper Murphy did not have contact with anyone who claimed that Mr. Russell was intoxicated or appeared to be intoxicated. Trooper Murphy arrested Mr. Russell based on crossing the centerline; not intoxication. (RP 3091, ll. 1-4; RP 3092, ll. 1-24)

Trooper Murphy removed a blood evidence kit from his patrol car prior to going into the hospital. After he arrested Mr. Russell for vehicular homicide he requested a blood draw. He gave the kit to Judi Clark, a hospital medical technician. (RP 3061, ll. 23-25; RP 3070, ll. 7-10; RP 3161, ll. 7-12; RP 3165, ll. 4-7)

The blood draw occurred at 1:34 a.m. Ms. Clark used either iodine or betadine to swab Mr. Russell's arm before drawing blood into the vials

from the trooper's kit. The vials had gray tops and contained a white powder. The gray-topped vials indicate the presence of an anticoagulant. They are received from the manufacturer with the powder inside. The trooper is provided the kit by the Lab. (RP 3072, ll. 15-18; RP 3073, l. 7; ll. 17-18; RP 3074, l. 21 to RP 3075, l. 1; RP 3076, ll. 15-18; RP 3171, ll. 8-11, RP 4105, ll. 15-18; RP 4106, ll. 8-10)

The manufacturer of the gray-top vials is Becton-Dickenson. A certificate accompanies the vials. The manufacturer's certificate does not contain information as to the amounts of either the anticoagulant or an enzyme poison. Specific amounts of each chemical are required to be put into each vial. (RP 4105, ll. 19-22; RP 4203, ll. 1-10; RP 4203, ll. 1-15)

Ms. Clark gave the vials back to Trooper Murphy after completing the blood draw. He repackaged them and delivered them to Detective Fenn the next day. Detective Fenn placed the vials into evidence at the WSP District Office in Spokane. (RP 3076, l. 23 to RP 3077, l. 8; RP 3077, ll. 19-20; RP 3078, ll. 16-19; RP 3172, ll. 7-19; RP 4005, ll. 20-23)

While Trooper Murphy was conducting his investigation, Detectives Snowden and Fenn were at the accident scene. They employed an instrument known as the total station to take measurements and create a diagram of the scene. (RP 3894, l. 6; RP 3963, ll. 15-16; Exhibit 75)

Measurements from the total station show the following:

1. The POI with Ms. Lundt's Geo was approximately three and a half (3 ½) feet into the WB lane. (RP 3976, ll. 6-15);

2. The SUV traveled two hundred and eight (208+) plus feet to the POI with the Cadillac. This occurred in the WB lane. (RP 3913, ll. 8-10);

3. The Cadillac was braking and steering to the right. (RP 4666, ll. 10-24; RP 4667, ll. 7-11);

4. Gouge marks from the SUV's left front wheel initially go back toward the EB lane and then veer significantly back into the WB lane prior to the impact with the Cadillac. (RP 3916, ll. 18-25; RP 3918, ll. 11-25; RP 3940, ll. 2-7; RP 3978, ll. 13-22; RP 3979, ll. 10-14)

5. The SUV traveled approximately sixty (60) additional feet before colliding with Mr. Tran's Geo. (RP 3993, ll. 9-12);

Detective Fenn, Richard Chapman (an accident reconstructionist) and Detective Spangler all concluded that the SUV was exceeding the speed limit of fifty-five (55) miles per hour. (RP 3969, ll. 7-19; RP 4004, ll. 14-16; RP 4635, ll. 3-9; RP 4636, ll. 1-21; RP 4704, ll. 18-23; RP 4859, ll. 13-16)

In addition, the two (2) detectives noted:

1. The travel patterns of each vehicle after the respective collisions. (RP 3914, ll. 8-10; RP 3915, ll. 6-10; Exhibits 46, 48, 75);

2. The absence of braking or skid marks by the SUV prior to the initial impact. (RP 3918, ll. 6-8; RP 3978, ll. 8-11);

3. The lack of any evidence to indicate braking by the SUV after the impact. (RP 3981, ll. 6-12; RP 4697, ll. 10-14)

Evidence concerning Mr. Russell's consumption of alcohol and observations of his state of sobriety on June 4, 2001 consisted of the following:

1. Mr. Russell was not intoxicated at the time he purchased one-half (1/2) gallon of vodka. (RP 3420, l. 16; RP 3423, ll. 1-12)

2. Drinking a vodka slushy in Moscow, Idaho at Nicole Cline's (amount unknown; but one-half (1/2) gallon vodka consumed by six (6) people). (RP 3512, ll. 4-7; RP 3514, ll. 14-20; RP 3515, ll. 10-12; RP 3551, ll. 3-14; RP 3553, ll. 13-16; RP 3554, ll. 4-6);

3. Two (2) Guinness pints at My Office Tavern in Pullman between 8:30 p.m. and 10:00 p.m. (RP 3285, ll. 20-21; RP 3286, ll. 1-3; ll. 7-14; RP 3287, l. 1; RP 3289, ll. 12-23; RP 3290, ll. 5-15; ll. 21-23)

4. Mr. Russell was polite, normal, did not exhibit any signs of intoxication, and called the bartender's attention to the fact that he was given the wrong change when he paid his bill. (RP 3299, ll. 15-22; RP 3302, ll. 15-18; RP 3310, ll. 4-9; RP 3311, ll. 2-11)

5. Defendant's admissions to drinking. (RP 2962, ll. 11-12; l. 16; RP 3067, ll. 17-19)

6. No evidence of lack of coordination. (RP 3111, ll. 6-22)

7. Serum blood test result of .128. (RP 3174, ll. 9-10)

8. Lab blood test result of .12. (RP 4114, l. 9)

An Information was filed on June 7, 2001 charging Mr. Russell with three (3) counts of vehicular homicide and three (3) counts of vehicu-

lar assault. The driving while under the influence (DUI) alternative was not included in the Information. (CP 3)

An Amended Information was filed on June 19, 2001. It added the DUI alternative to each count. (CP 14)

Detective Fenn submitted a search warrant affidavit to Judge Hamlett, a Latah County, Idaho magistrate. The search warrant was issued on June 26, 2001. Judge Hamlett interlineated the following language on the search warrant concerning Mr. Russell's medical records:

“Which detail or identify Mr. Russell's injuries and any medications administered by Gritman Hospital personnel or attending physicians.”

He deleted the words “without limitation.” (CP 72; CP 75)

The medical records seized pursuant to the search warrant were all of Mr. Russell's medical records pertaining to his treatment. This included the results of the serum blood draw. (CP 27)

A suppression motion was filed on September 13, 2001 challenging the blood test results. The motion also addressed whether or not the seizure of the serum blood draw results exceeded the scope of the search warrant. (CP 26)

The trial court denied the suppression motion on October 12, 2001. Findings of fact and conclusions of law were not entered until September

21, 2007. (RP 125, l. 5 to RP 126, l. 20; RP 129, l. 4 to RP 133, l. 1; RP 182, l. 11 to RP 183, l. 7)

Mr. Russell's jury trial was scheduled to commence November 5, 2001. He signed a speedy trial waiver through that date. (CP 23; CP 24)

Mr. Russell failed to appear for a readiness hearing on October 26, 2001. An order issuing bench warrant was entered. The bench warrant was signed for nationwide extradition. (CP 202; CP 204)

Mr. Russell was eventually located in Ireland. Extradition proceedings were conducted. He was re-arraigned on November 13, 2006. He was returned to the United States and a pre-trial detention order was entered on November 16, 2006. (RP 23, ll. 12-18; RP 3869, ll. 10-11; RP 3871, ll. 4-9; l. 25; RP 3872, ll. 2-5; CP 227)

Various waivers were signed in order to allow new counsel to adequately prepare for trial. (RP 48, ll. 1-16; RP 63, ll. 1-19; RP 65, l. 10 to RP 67, l. 3; CP 212; CP 223; CP 232)

Mr. Russell's new attorneys filed another motion to suppress evidence. (CP 226)

On July 23, 2007 a Second Amended Information was filed. It corrected the statutory citations with regard to the various offenses. (RP 86, ll. 10-18; CP 712)

Some time after Mr. Russell absconded the Lab destroyed the blood samples that had been obtained by Trooper Murphy while Mr. Rus-

sell was at Gritman Hospital. (RP 101, ll. 3-5; ll. 11-18; RP 102, ll. 10-16; RP 119, l. 24 to RP 120, l. 3; CP 426)

Ann Marie Gordon, the manager at the Lab, was the person responsible for preserving evidence. She was also the person responsible for the destruction of the samples. (RP 97, l. 17; RP 102, ll. 22-23; RP 108, ll. 20-25; RP 119, ll. 1-5; ll. 16-21; RP 625, ll. 13-17; RP 641, ll. 16-21; RP 656, ll. 12-14)

Mr. Russell's samples were destroyed even though there were procedures in place at the Lab for preservation of samples upon the request of a prosecuting attorney. (RP 94, ll. 13-17; RP 95, l. 3 to RP 96, l. 15; RP 98, ll. 3-24; RP 99, ll. 1-11; ll. 16-17; RP 639, ll. 1-10; RP 646, ll. 19-25; RP 647, ll. 5-22; RP 648, ll. 11-12; ll. 22-25; RP 959, ll. 7-24; RP 961, ll. 19-23)

Mr. Russell's trial was moved from Whitman County to Cowlitz County pursuant to an agreed change of venue. (RP 1207, l. 23 to RP 1208, l. 1; RP 1212, l. 7; RP 1213, ll. 8-9; RP 1263, ll. 14-15; RP 1264, ll. 5-7)

On September 21, 2007 the trial court entered its findings of fact and conclusions of law regarding the following:

1. Probable cause to arrest;
2. The arrest in Idaho;
3. The sufficiency of the search warrant affidavit;
4. The scope of the search warrant; and

5. The serum blood draw.

Prior to commencement of trial on October 15, 2007 the State filed a Third Amended Information. It corrected certain language by deleting the “disregard for the safety” language in Counts IV through VI. (RP 1294, ll. 11-24; RP 1296, ll. 1-2; CP 1092)

After four (4) days during which the jury was selected and additional pre-trial motions were argued, testimony finally commenced on October 19, 2007.

During the defense attorney’s opening statement the prosecuting attorney objected stating that the trial court had already ruled in the State’s favor on a particular issue. The trial court instructed the jury to disregard the prosecuting attorney’s comment. Nevertheless, the prosecuting attorney again made the same objection and statement which was also overruled. (RP 2823, ll. 11-23; RP 2824, l. 18 to RP 2825, l. 3)

The trial court denied Mr. Russell’s motion in limine concerning prospective testimony from Cristin Capwell. The testimony pertained to Mr. Russell’s anti-smoking attitude and the amount of alcohol he regularly consumed. (RP 3478, l. 20 to RP 3479, l. 5; RP 3481, ll. 23-25; RP 3482, ll. 14-18)

Ms. Capwell testified that Mr. Russell does not smoke and that he was a frequent drinker. She did not recall ever seeing Mr. Russell showing signs of intoxication even after consuming as many as six (6) drinks. (RP 3491, ll. 20-22; RP 3492, ll. 9-17)

The prosecuting attorney, in closing argument stated that the reason Mr. Russell was smoking a cigarette was to cover up the odor of alcohol on his breath. There was no testimony presented that smoking masks the odor of alcohol. (RP 5145, ll. 19-20)

The trial court also overruled Mr. Russell's motion in limine concerning testimony from Eugene Schwilke, a forensic toxicologist. Mr. Schwilke was allowed to testify that all individuals are affected at a .05 blood alcohol level based upon time reaction studies. (RP 4090, l. 7 to RP 4093, l. 24; RP 4096, ll. 14-16; l. 20)

Mr. Russell's motion to dismiss the *per se* prong of the respective counts was denied after the State completed its case. (RP 4309, l. 24 to RP 4310, l. 20)

The jury found Mr. Russell guilty of all counts. It answered a special interrogatory that he was both under the influence of intoxicating liquor and driving in disregard for the safety of others. (CP 1241; CP 1242; CP 1243; CP 1244; CP 1246; CP 1248; CP 1250; CP 1251; CP 1252)

Mr. Russell signed a waiver of speedy sentencing on November 30, 2007. (CP 1253)

Forgery and theft convictions under Whitman County Cause No. 02 1 00040 6 were dismissed with prejudice prior to sentencing. The State asserted there was probable cause at the time the charges were filed; but subsequent events precluded the State from proving the charges beyond a reasonable doubt. (RP 5298, ll. 8-17)

Judgment and Sentence was entered on January 2, 2008. The trial court sentenced Mr. Russell to one hundred and seventy-one (171) months on each of Counts I through III and eighty-four (84) months on each of Counts IV through VI. The time was run concurrent on all counts. The Court denied credit for pre-trial detention time served in Ireland. (CP 1285)

Mr. Russell filed his Notice of Appeal on January 18, 2008. (CP 1296)

A motion to reconsider the denial of pre-trial detention time was filed on January 22, 2008. It was denied on February 4, 2009. (CP 1298; CP 1394)

### **SUMMARY OF ARGUMENT**

Mr. Russell was arrested in Idaho. §§ 19-701 *et seq.* of the Idaho Code do not establish that Mr. Russell was lawfully arrested.

Neither Chapter 10.89 RCW nor the common law doctrine of “fresh pursuit” are applicable under the facts and circumstances of Mr. Russell’s case.

The IMAA does not validate Mr. Russell’s arrest because it was never recorded in Washington or Idaho. The mutual aid agreement is not divisible.

The seizure of the serum blood draw results exceeded the scope of the search warrant. The results should have been suppressed.

RCW 46.20.308(1), the implied consent law, does not apply since Mr. Russell was unlawfully arrested in Idaho. The blood test results should have been suppressed.

Moreover, the chain of custody concerning the vials containing Mr. Russell's blood was not fully established through the testimony of Detective Fenn or the Lab representatives.

Multiple errors during the selection of the jury violated Mr. Russell's rights under Const. art. I, §§ 10 and 22, as well as the Sixth Amendment to the United States Constitution. The trial court erred when it refused to accept two (2) for cause challenges as well as a *Batson* challenge.

Misconduct by the prosecuting attorney during defense counsel's opening statement unduly prejudiced Mr. Russell's right to a fair and impartial trial.

Hearsay testimony relating to the chemicals (enzyme poison and anticoagulant) necessary for a valid blood test impermissibly established the foundational requirements for admissibility.

Mr. Russell's actions were not the proximate cause of the accident.

The trial court's rulings on attorney-client privilege involving attorney work product unfairly impacted Mr. Russell's right to a fair and impartial trial.

An improper comment involving expert witness credibility violated Mr. Russell's constitutional rights and invaded the province of the jury.

Instructional error relieved the State of its burden of proof and adversely affected Mr. Russell's right to have the jury properly informed on the law.

The combination of errors deprived Mr. Russell of a fair and constitutional trial.

Mr. Russell is entitled to credit for pre-trial detention while awaiting extradition from Ireland.

## **ARGUMENT**

### **I. PRE-TRIAL**

#### **A. Arrest**

##### **(1) Mutual Aid Agreement**

Mr. Russell was initially arrested, without a warrant, in the State of Idaho. "... [T]he law of the state where an arrest without warrant takes place determines its validity." *United States v. DiRe*, 332 U.S. 581, 589, 68 S. Ct. 222, 92 L. Ed. 210 (1948).

Mr. Russell challenged the validity of his arrest. The trial court concluded that Trooper Murphy's arrest of Mr. Russell in Idaho was a lawful arrest. The trial court entered findings of fact and conclusions of

law on September 21, 2007. Mr. Russell has assigned error to the trial court's Conclusions of Law 5, 6, 7, 9, 10, 11, 12 and 13.

In addition to Trooper Murphy's testimony the trial court relied upon the IMAA between the Idaho State Police and the Washington State Police dated November 17, 2000.

Mr. Russell contends that the trial court's reliance upon that agreement does not support the conclusion that his arrest was valid. The agreement was entered into pursuant to Chapter 39.34 RCW and Chapter 10.93 RCW, as well as Sections 67-2328 and 19-701 *et seq* of the Idaho Code.

Mr. Russell is only addressing the applicable Washington statutes. He asserts that they are dispositive on the issue of the validity of the IMAA.

It does not appear that the agreement was ever recorded as required by former RCW 39.34.040 which states, in part: "Prior to its entry into force, an agreement made pursuant to this chapter shall be filed with the county auditor. ..."

The interrelationship of Chapter 10.93 RCW and Chapter 39.34 RCW was addressed in *State v. Plaggemeier*, 93 Wn. App. 472, 476-480, 969 P.2d 519 (1999). The *Plaggemeier* Court began its analysis by stating:

The Fourth Amendment and Article I, section 7 of the Washington State Constitution require a police officer to act under lawful

authority. *City of Wenatchee v. Durham*, 43 Wn. App. 547, 549-50, 718 P.2d 819 (1986). **An arrest made beyond an arresting officer's jurisdiction is equivalent to an arrest without probable cause.** *State v. Rasmussen*, 70 Wn. App. 853, 855, 855 P.2d 1206 (1993); *Durham*, 43 Wn. App. at 550.

*State v. Plaggemeier, supra*, 476. (Emphasis supplied.)

The Court then went on to find that:

A corollary of RCW 10.93.130 is that **mutual law enforcement assistance agreements must comply with RCW 39.34 and obtain legislative ratification.** Legislative ratification of mutual aid agreements is necessary because such agreements involve the allocation of fiscal resources that properly fall under the function of local legislative bodies.

*State v. Plaggemeier, supra*, 478-79. (Emphasis supplied.)

The IMAA presented to the trial court does not bear any information concerning recording in either Latah County or Whitman County. Moreover, there is no proof that any legislative authority approved the agreement.

Mr. Russell recognizes that the *Plaggemeier* Court concluded that a mutual aid agreement does not impact the provisions of RCW 10.93.070(6) which provides that a general authority Washington peace officer may enforce the traffic or criminal laws when in "fresh pursuit" of a person as that phrase is defined in RCW 10.93.120. *State v. Plaggemeier, supra* 479.

RCW 10.93.120(2) states:

The term “fresh pursuit,” as used in this chapter, includes, without limitation, fresh pursuit as defined by the common law. Fresh pursuit does not necessarily imply immediate pursuit, but pursuit without unreasonable delay.

When considering the statutory definition of “fresh pursuit” Washington Courts have limited it to “fresh pursuit” within the State of Washington. *See: Sheimo v. Bengston*, 64 Wn. App. 545, 549, 825 P.2d 343 (1992) (interpreting RCW 10.93 as expanding the authority of law enforcement officers to act throughout the state); *Vance v. Dep’t of Licensing*, 116 Wn. App. 412, 415-16, 65 P.3d 668 (2003) (police officers are allowed to enforce traffic laws throughout the “territorial boundaries of this state.”).

Given the fact that Chapter 10.93 RCW is limited to mutual aid within the State of Washington, the trial court’s Conclusions of Law 9, 10 and 11 are erroneous due to the failure of the WSP and ISP to record the IMAA as required by RCW 39.34.040.

**(2) RCW 10.89.050**

The trial court also relied upon the Uniform Act of Fresh Pursuit. The Act is codified in Chapter 10.89 RCW and under Idaho Code Sections 19-701 through 19-707.

The trial court’s reliance upon Chapter 10.89 RCW is flawed. “By its terms, Washington’s fresh pursuit statute is inapplicable to arrests made

in other states.” *License Suspension of Richie*, 127 Wn. App. 935, 940, 113 P.3d 1045 (2005)

Thus, the trial court’s Conclusions of Law 5, 6, 7, 12 and 13 are all dependent upon Idaho law. The *Richie* case specifically supports Mr. Russell’s argument.

Idaho Code § 19-701 provides, in part:

Any member of a duly organized state ... peace unit of another state of the United States who enters this state in fresh pursuit and continues within this state in such fresh pursuit, of a person in order to arrest him on the ground that he is believed to have committed a felony in such other state, shall have **the same authority to arrest and hold such person in custody**, as any member of any duly organized state ... peace unit of this state ....

(Emphasis supplied.)

Thus, if Trooper Murphy was in “fresh pursuit” of Mr. Russell, then the arrest would be lawful, but only if the trooper otherwise complied with Idaho law.

Idaho Code § 19-705 states, in part:

**The term “fresh pursuit” as used in this act shall include fresh pursuit as defined by the common law**, and also the pursuit of a person who has committed a felony or who was reasonably suspected of having committed a felony. ... [F]resh pursuit as used herein shall not necessarily imply instant pursuit, but pursuit without unreasonable delay.

(Emphasis supplied.)

What the trial court failed to consider in its analysis is that the Idaho “fresh pursuit” provisions are contained in a single chapter of the Idaho Code. § 19-702 of that code states, in part:

**If an arrest is made in this state by an officer of another state in accordance with the provisions of section one of this act he shall without unnecessary delay take the person arrested before a magistrate of the county in which the arrest was made ....**

(Emphasis supplied.)

Trooper Murphy did not comply with § 19-702. Rather, he indicated that the arrest in Idaho was made for the sole purpose of securing the blood draw from Mr. Russell. He told Mr. Russell he was under arrest while he was in the emergency room at the hospital. Mr. Russell was not, however, taken before a magistrate as required by Idaho law.

Noncompliance with the requirement to take Mr. Russell immediately before a magistrate invalidates the arrest.

“Arrest is a prerequisite for application of the implied consent statute, RCW 46.20.308.” *State v. Rivard*, 131 Wn.2d 63, 77, 929 P.2d 413 (1997). *See also: State v. Steinbrunn*, 54 Wn. App. 506, 510, 774 P.2d 55 (1989).

There are varying definitions of arrest. *Kilcup v. McManus*, 64 Wn.2s 771, 777, 394 P.2d 375 (1964) defines an arrest as deprivation of liberty and movement or freedom to remain by one using physical force, threats, or by conduct. In *State v. Sullivan*, 65 Wn.2d 47, 51, 395 P.2d 745 (1964), the rule is stated that a person is under arrest

when he is deprived of his liberty by an officer who intends to arrest him. It is not always necessary for an officer to make a formal declaration of arrest. *See*: 1 Varon, Searches, Seizures and Immunities 75 (1961); *Henry v. United States* (1959), 361 U.S. 98 [4 L. Ed.2d 134, 80 S. Ct. 168]; *United States v. Boston* (1964), 330 F.(2d) 937, 939.

*State v. Byers*, 88 Wn.2d 1, 6, 559 P.2d 1334 (1977) added, "Appellants were under arrest from the moment they were not, and knew they were not free to go."

...

The rule from the cases seems to be that it is the fact of an arrest, and not the communication of it, that is decisive. ... Even the arresting officer may be mistaken as to whether the defendant is under arrest, but a defendant is so long as his liberty of movement is substantially restricted. *State v. Ward*, 24 Wn. App. 761, 765, 603 P.2d 857 (1979). [Citations omitted.]

*State v. Turpin*, 25 Wn. App. 493, 498-500, 607 P.2d 885 (1980).

Mr. Russell was not lawfully arrested in accord with Idaho law.

### **(3) Consent**

Mr. Russell distinguishes the facts and circumstances of his case from the *Plaggemeier* Court's severance analysis which determined that the particular agreement under consideration was divisible and a consent provision was valid. *State v. Plaggemeier, supra*, 482-83.

The IMAA contains a consent provision under SECTION 3. There is no indication in the IMAA to indicate that it is divisible. No severability clause is included in the agreement.

Whether a contract is divisible depends upon its terms and the intention of the parties. *Saletic v. Stammes*, 51 Wn.2d 696, 699, 321 P.2d 547 (1958). Generally, a contract is not divisible if its terms show that the parties intended all its parts to be interdependent. *Id.*

*Coronado v. Orona*, 137 Wn. App. 308, 318, 153 P.3d 217 (2007).

Another reason that the agreement in this case does not survive a consent analysis is due to the fact that Trooper Murphy did not fully comply with the appropriate provisions of the agreement. Even though he had an ISP trooper on standby, it does not appear from the record that that trooper did anything further in conjunction with the investigation or arrest of Mr. Russell. (PTRP 64, ll. 13-16)

As previously argued, the IMAA does not comply with the provisions of Chapter 39.34 RCW.

In *State v. Barker*, 98 Wn. App. 439, 447, 990 P.2d 438 (1999) the Court analyzed remedies in conjunction with a statutory violation involving RCW 10.93.090. Mr. Russell maintains that the *Barker* analysis is applicable to his case.

**When a violation of law is statutory but not constitutional**, the court's initial task is the same as it always is when determining the meaning **and** effect of a statute: To carry out the legislature's intent ... If **the leg-**

**islature failed to address the question of remedy, or failed to manifest an intent that can be discerned, it left a void in the law that a court must cope with by analyzing and applying common law.**

(Emphasis supplied.)

**(4) Common law**

It is Mr. Russell's position that the validity of his arrest must be decided solely under the common law. Since Chapter 10.93 RCW is limited to arrests within the State of Washington, it has no application to his arrest in Idaho.

The five (5) common law elements of fresh pursuit are:

... (1) that a felony occurred in the jurisdiction; (2) **that the individual sought must be attempting to escape to avoid arrest or at least know he is being pursued;** (3) that the police pursue without unnecessary delay; (4) that the pursuit must be continuous and uninterrupted, though there need not be continuous surveillance of the suspect nor uninterrupted knowledge of his location; and (5) that there be a relationship in time between the commission of the offense, commencement of the pursuit, and apprehension of the suspect.

*City of Wenatchee v. Durham*, 43 Wn. App. 547, 550-51, 718 P.2d 819 (1986). (Emphasis supplied.)

At issue in Mr. Russell's case is the second factor. There is no evidence in the record of any attempt to escape or avoid arrest. There is no evidence in the record to indicate that Mr. Russell knew he was being

pursued by Trooper Murphy. Rather, Mr. Russell was being transported from the accident scene in an ambulance.

The common law definition of “fresh pursuit” cannot be established by the State.

#### **B. Search Warrant**

The trial court entered findings of fact and conclusions of law regarding the sufficiency of the search warrant affidavit and the scope of the search warrant. The findings of fact in each document mirror one another.

Conclusion of Law 2 on the scope of the search warrant and Conclusion of Law 3 on the sufficiency of the search warrant affidavit are not supported by the findings of fact.

“... [C]onclusions of law from an order pertaining to the suppression of evidence [are reviewed] *de novo*.” *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002).

The trial court correctly recognized that Judge Hamlett limited the documents to be seized under the search warrant. The search warrant was attached and incorporated by reference in Finding of Fact 4 on each set of findings and conclusions. (CP 980; CP 993; Appendix “I”)

The trial court ignored the limitation when it concluded that the documents containing the results of the serum blood draw were properly seized and that the results were admissible.

Since the seizure of the medical records occurred in Idaho, Idaho law controls. This is given further support by the fact that the search war-

warrant was issued in Idaho. Const. art. I, § 17 of the Idaho Constitution provides:

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 warrant shall issue without probable cause shown by affidavit, **particularly describing the** place to be searched and the person or **thing to be seized.**

(Emphasis supplied.)

Id. Const. art. I, § 17 parallels the Fourth Amendment to the United States Constitution.

The search warrant affidavit requested Mr. Russell's medical records to include: "The emergency room report/notes, chart notes, doctor's notes and discharge summary."

The search warrant originally contained language allowing seizure of medical records without limitation. Mr. Russell contends that once Judge Hamlett recognized that the warrant was overbroad, he provided a more precise and particularized description. He took immediate steps to ensure that the class of items to be seized would not offend the particularity requirement of either the Fourth Amendment to the United States Constitution or Id. Const. art. I, § 17. The warrant, as issued, authorized seizure of only those medical records pertaining to Mr. Russell's injuries and any medications he may have received.

It is highly unlikely that a judge would make such a change to a warrant unless compelled by the constitution or legal precedent. It is also illogical to infer that a judge would make the changes made by Judge Hamlett unless absolutely necessary. By identifying and specifically listing certain documents, Judge Hamlett told the executing officer what documents could be permissibly seized.

Under the particularity requirement of Id. Const. art. I, § 17 and the Fourth Amendment to the United States Constitution only the specified medical records should have been seized.

“... [T]he description of the property to be seized is limited to the language of the warrant itself.” *State v. O’Campo*, 103 Id. 62, 66, 644 P.2d 985 (Ct. App. 1982).

Clearly, that portion of Mr. Russell’s medical records relating to the medical blood draw were beyond the scope of the warrant. The warrant makes no mention whatsoever of laboratory analyses or test results.

Under the “mere evidence” rule, to which the particularity requirement applies, search warrants are not authorized for “mere evidence” in the absence of the specificity required by the Fourth Amendment to the United States Constitution. *See: Warden v. Hayden*, 387 U.S. 294, 308, 87 S. Ct. 1642, 18 L. Ed.2d 782 (1967).

### **C. Serum Blood Draw/Implied Consent**

Former RCW 46.20.308(1) is known as the implied consent law. It states, in part:

Any person who operates a motor vehicle within this state is deemed to have given consent ... to a test or tests of his or her breath or blood for the purpose of determining the alcohol concentration ... in his or her breath or blood if arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving ... a motor vehicle while under the influence of intoxicating liquor ....

Former RCW 46.20.308(2) provides further explanation of the implied consent law. It provides, in part:

The test or tests ... shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving ... a motor vehicle within this state while under the influence of intoxicating liquor .... ... [I]n those instances where ... the person is being treated in a hospital ... a blood test shall be administered by a qualified person as provided in RCW 46.61.506(5). ...

Moreover, former RCW 46.20.308(3) authorizes a blood test if the person is placed under arrest for the crime of vehicular homicide or vehicular assault without requiring any consent from the individual.

Mr. Russell acknowledges that the RN and Ms. Clark are qualified individuals. They both meet the definition of a qualified individual under RCW 46.61.506(4). *See: State v. Merritt*, 91 Wn. App. 969, 974-76, 961 P.2d 958 (1998).

Insofar as the serum blood draw is concerned Mr. Russell contends that, in addition to the results being unlawfully seized under the warrant, they were also improperly seized due to his unlawful arrest.

The trial court's Conclusions of Law 3, 4, 6, 7, 8, 9, 10 and 11 relating to the implied consent blood draw are not supported by the facts due to the unlawful nature of Mr. Russell's arrest. The unlawfulness of the arrest taints the seizure of the blood.

Moreover,

[b]lood tests are admissible on a driving under the influence or vehicular homicide trial if the offering party makes a *prima facie* showing that **the blood sample was free of any adulteration** and that the test results were without error. *State v. Clark*, 62 Wn. App. 263, 270, 814 P.2d 222 (1991). To that end, the offering party must lay the following statutorily mandated foundation: (1) the test was performed according to methods approved by the state toxicologist; (2) the test was performed by an individual possessing a valid permit issued by the state toxicologist; (3) the blood sample was stored in a chemically clean, dry and sealed container; and (4) **the blood sample was "preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration."** WAC 448-14-020(3)(b); *see also* RCW 46.61.-506(3). Under WAC 448-14-020(3)(b), "[s]uitable preservatives and anticoagulants include the combination of sodium fluoride and potassium oxalate." Once *prima facie* evidence of these requirements has been presented, the test results are admissible and any other concerns about the blood or the test go solely to the weight given the results.

*State v. Hultenschmidt*, 125 Wn. App. 259, 270, 102 P.3d 192 (2004).  
(Emphasis supplied.)

Mr. Russell contends that the foundational requirements for the serum blood draw were not met. There was uncertainty as to what the RN used to swab Mr. Russell's arm (possible contamination if alcohol used). The blood test was performed in a hospital laboratory in Idaho. Ms. Clark, the person performing the test, did not have a valid permit issued by the Washington State Toxicologist. *See: State v. Donahue*, 105 Wn. App. 67, 74, 18 P.3d 608 (2001); *State v. Charley*, 136 Wn. App. 58, 65-66, 147 P.3d 634 (2006); (RP 3175, l. 5).

Even though the *Donahue* and *Charley* cases indicate that the serum blood draw evidence is generally admissible, (as other evidence of a person being under the influence of intoxicating liquor), it is still subject to a determination of whether or not Mr. Russell was lawfully under arrest. It must also meet all foundational requirements for admissibility.

As announced in *State v. Smith*, 84 Wn. App. 813, 818-19, 929 P.2d 1191 (1997):

... [T]he implied consent statute is not controlling. **Nothing in the statute allows the State to seize and test blood taken by a physician when the defendant was not under arrest.**

...

... [S]uch evidence may be seized in accordance with general search and seizure law, and may be admitted at trial.

(Emphasis supplied.)

The serum blood draw occurred before Trooper Murphy told Mr. Russell he was under arrest.

If, as Mr. Russell contends, he was unlawfully arrested and/or the seizure of the serum blood draw records was beyond the scope of the search warrant, then, in either event, the serum blood draw evidence was inadmissible.

The serum blood draw evidence was also inadmissible due to the State's failure to meet foundational requirements.

#### **D. Toxicology Lab Results**

Dr. Logan, the State Toxicologist, testified that there were only two (2) cases in the history of the Lab where blood samples were destroyed. Mr. Russell's was one (1) of those cases. (PTRP 141, l. 14 to PTRP 142, l. 3)

Sergeant Lankford works for the risk management division of the WSP. She conducts annual audits and spot inspections with regard to evidence storage and control. (RP 1030, ll. 1-4; RP 1034, ll. 2-5; RP 1035, ll. 1-6)

Sergeant Lankford found one hundred and twenty-one (121) broken or missing blood tubes with no documentation in the Lab files to explain what occurred. An additional one hundred and twenty-two (122)

tubes were destroyed as a result of being frozen in a block of ice. Five hundred and thirty-eight (538) tubes were either destroyed or missing. Approximately three hundred (300) of the missing tubes had documentation. The remaining tubes which were missing lacked documentation. (RP 1070, l. 24 to RP 1071, l. 19; RP 1072, ll. 11-21)

“... [C]onduct of employees of the crime laboratory, which is lacking in due diligence, constitutes actions on the part of the State [for purposes of CrR 8.3(b)].” *State v. Woods*, 143 Wn.2d 561, 583, 23 P.3d 1046 (2001).

Mr. Russell’s blood samples were destroyed by the Lab. No opportunity existed to determine whether or not they were in the same condition as when the samples were taken from Mr. Russell at Gritman Hospital.

Sergeant Lankford further indicated that there was no justification for improperly destroying blood samples as a result of understaffing, an excessive number of samples, or overworked staff. (RP 1081, ll. 16-24)

Sergeant Lankford also concluded that the Lab was “severely deficient” in its recordkeeping and preparation of quarterly audits. (RP 1095, ll. 20-22)

When the overall procedures that were in effect at the Lab in 2001 are considered in light of Sergeant Lankford’s testimony, the trial court should have granted the suppression motion as to the blood test results.

The trial court ruled that the Lab's change in procedures showed "good faith." Washington Courts do not recognize the "good faith" exception to State agent misconduct. *See: State v. Crawley*, 61 Wn. App. 29, 34-5, 808 P.2d 773 (1991); *State v. Morse*, 156 Wn.2d 1, 12, 123 P.3d 832 (2005); (RP 1157, ll. 14-17).

Additionally, ER 407 precludes introduction of remedial measures to prove "negligence or culpable conduct in connection with the event." Mr. Russell asserts that the converse of ER 407 applies to the Lab's negligence.

In the absence of the "good faith" exception, and applying ER 407 to the Lab's remedial measures, the trial court's determination that misconduct did not preclude admission of the blood test results cannot be supported.

**E. CrR 8.3(b)**

Mr. Russell's motion to dismiss and/or suppress evidence under CrR 8.3(b) was denied.

CrR 8.3(b) states, in part:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial ....

As an alternative to outright dismissal, a trial court has authority to suppress certain evidence under specific circumstances. *See: State v. Garza*, 99 Wn. App. 291, 295, 994 P.2d 868 (2000).

Suppression is required as the minimum remedy when considering the trial court's denial of Mr. Russell's desire to call Ms. Gordon to the stand and impeach her, along with the problem of mismanagement in the Lab and the mishandling of Mr. Russell's blood samples,. (RP 4294, ll. 7-10)

Under the Fourteenth Amendment [to the United States Constitution], failure to preserve "potentially useful" evidence does not constitute a denial of due process unless a criminal defendant can show bad faith on the part of the State.

*State v. Wittenbarger*, 124 Wn.2d 467, 477, 880 P.2d 517 (1994).

Mr. Russell asserts that the Lab either acted in "bad faith," or so negligently that his ability to challenge the blood analysis was all but obliterated.

## **II. TRIAL**

### **A. Jury Selection**

#### **(1) Closure**

On the first day of trial a meeting occurred in the jury room with the Judge, Court Clerk, prosecuting attorneys, defense attorneys, and Mr. Russell. The purpose of the meeting was to discuss juror questionnaires

and hardship issues. (RP 1294, ll. 5-10; RP 1303, ll. 6-10; RP 1306, l. 22 to RP 1307, l. 18; RP 1309, ll. 21-24; RP 1310, ll. 3-9)

On the second day of trial the judge and attorneys, along with the Court Clerk and Mr. Russell, again retired to the jury room to discuss hardship requests by an additional fifteen (15) jurors. (RP 1570, ll. 11-16; RP 1572, ll. 1-8; ll. 12-14; RP 1573, ll. 6-22)

The record is devoid of any announcement to the public that the adjournment to the jury room was going to occur.

The record does not indicate any waiver by Mr. Russell with regard to his right to a public trial.

Jurors 7, 10, 12, 17, [Marks], 26, 34, 51, 55, 56, 57, 60, 68 and 72 were excused on the first day. Jurors [McFarland], 79, 84, 80, 91 and 92 were excused on the second day.

Const. art. I, § 22 guarantees, in part, that a defendant “shall have the right ... to have a speedy public trial.”

The Sixth Amendment to the United States Constitution contains a similar provision.

The guarantee of open criminal proceedings extends to “[t]he process of juror selection,” which “is itself a matter of importance, not simply to the adversaries but to the criminal justice system.”

*Personal Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) quoting *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed.2d 629 (1984). (Emphasis supplied.)

Mr. Russell can conceive of no valid reason for an adjournment to the jury room to consider hardship issues. In fact, not all hardship issues were discussed in the jury room.

Jurors 4, 6, 22, 35, 37, 42, 44, 45, 46, 59, 62, 64, 71, 75, and 86 were all properly excused before individual *voir dire* commenced. (RP 1327, to RP 1372; RP 1373, l. 5 to RP 1383, l. 10; RP 1572 to RP 1594)

In *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) the Court set forth the requisite criteria that need to be considered before closure can occur. The criteria are specific to the requirement of Const. art. I, § 10 that "... [j]ustice in all cases shall be administered openly." The *Bone-Club* analysis mirrors *Waller v. Georgia*, 467 U.S. 39, 45-47, 104 S. Ct. 2210, 81 L. Ed.2d 31 (1984). The guidelines set forth in the *Bone-Club* decision are:

1. The proponent of closure ... *must* make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.
2. Anyone present when the closure motion is made *must* be given an opportunity to object to the closure.
3. The proposed method for curtailing open access *must* be the least restrictive means available for protecting the threatened interests.
4. The court *must* weigh the competing interests of the proponent of closure and the public.
5. The order *must* be no broader in its application or duration than necessary to serve its purpose.

*Personal Restraint of Orange, supra*, 806-807.

Juror hardship is an unlikely basis for a compelling State interest.

Mr. Russell's case was a high profile case. The media was present. There is no indication the media was given an opportunity to raise any objection to the adjournment to the jury room. (RP 1387, ll. 4-14)

There does not appear to have been any discussion of alternative means for conducting hardship inquiries.

The record does not reflect who asked for the closure. It appears the trial court may have acted on its own initiative.

The trial court failed to enter any order setting forth findings for closure of this portion of Mr. Russell's public trial.

The appellate court reviews a closure issue *de novo*. See: *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

Under the facts and circumstances of Mr. Russell's case, and as clearly indicated by both the *Bone-Club* and *Orange* decisions, prejudice must be presumed. *State v. Bone-Club, supra*, 261-62; *Personal Restraint of Orange, supra*, 814.

## **(2) Peremptory Challenges**

The State exercised peremptory challenges against Jurors 3, **25**, **27**, **31**, **38**, and **39**. It used its alternate peremptories on Jurors 50 and 66. (CP 1135) (Emphasis supplied.)

Mr. Russell exercised his peremptories on Jurors 1, 16, 21, 24, 32, and 41. His peremptory challenges on alternates were as to Jurors 48 and 49. (CP 1135) (Emphasis supplied.)

Mr. Russell objected to the State's use of peremptory challenges as to Jurors 25 and 39. They were both minority females. The State claimed Juror 39 did not want to serve. The trial court overruled the objection(s). (RP 2700, ll. 1-6; RP 2703, l. 22 to RP 2709, l. 8)

A total of sixteen (16) jurors responded that they did not want to be on Mr. Russell's jury. Jurors 25 and 39 were two (2) of those jurors. The State did not remove Jurors 18 and 53 who were also part of this group. (RP 1670, ll. 12-24; RP 1671, ll. 5-10)

Mr. Russell later added a third challenge concerning another minority female (Juror 31). It was also denied. (RP 2715, ll. 13-18)

The State's response was that Mr. Russell also removed minorities. (RP 2716, l. 24 to RP 2717, l. 9)

In *State v. Wright*, 78 Wn. App. 93, 99-100, 896 P.2d 713 (1995) the Court stated:

Since *Batson*, courts have refined the concept of "other relevant circumstances" which support a *prima facie* case. Courts have articulated the following examples:

1. Striking a group of jurors that are "otherwise 'heterogeneous as the community as a whole', sharing race as their only common characteristic". *People v. Hope*, 137 Ill.2d 430, 453, 560 N.E.2d 849, 859 (1990) (quoting *People v. McDonald*, 125 Ill.2d 182, 530 N.E.2d 1351 (1988)), *modified on other*

*grounds*, 147 Ill.2d 315, 589 N.E.2d 503 (1992); *see also Keeton v. State*, 749 S.W.2d 861, 867 (Tex. Ct. App. 1988).

2. **Disproportionate use of strikes against a group.** *Hope*, at 463.

3. The level of a group's representation in the venire as compared to the jury. *Hope*, at 463.

4. Race of the defendant and the victim. *Hope*, at 464.

5. Past conduct of the state's attorney in using peremptory challenges to excuse [specifically identified jurors] from the jury venire. *Keeton*, at 867.

6. Type and manner of state's questions and statements during venire. *Keeton*, at 867.

7. **Disparate impact**, all or most of the challenges used to remove minorities from jury. *Keeton*, at 867.

8. **Similarities between those individuals who remain on the jury and those who have been struck.** *Hope*, at 465.

(Emphasis supplied.)

The jurors removed by the State, and subject to the *Batson* challenge, all shared a common characteristic – minority females.

Mr. Russell maintains that the State used these peremptory challenges in a disproportionate manner. Gender-based peremptory challenges were originally condemned in *State v. Burch*, 65 Wn. App. 828, 834, 830 P.2d 357 (1992):

In *DeGross* [*United States v. DeGross*, 960 F.2d 1433 (9<sup>th</sup> Cir. 1992) (*en banc*), *reversing and remanding* 913 F.2d 1417 (1990)], the Ninth Circuit held that equal protection principles prohibit the use of gender-based challenges to exclude women from the petit jury.

The *Burch* Court continued to rely upon the *DeGross* decision and ruled at 835-36:

... [A]ll the evils associated with racially discriminatory peremptory challenges also result from peremptory challenges based on gender. *DeGross*, at 1437-38. ... [G]ender-based challenges harm the defendant by violating his or her right to be tried by a jury chosen pursuant to nondiscriminatory criteria. *DeGross*, at 1438. ... [G]ender-based peremptory challenges, like those based on race, harm the excluded venire person because discriminatory challenges are based on group membership, not upon an individual's qualifications. *DeGross*, at 1438-39 (citing *Batson*, 476 U.S. at 87). Further ... gender-based exclusions from the jury undermine public confidence in the fairness in the criminal justice system and act as "a stimulant to community prejudice which impedes equal justice ...." *DeGross*, at 1438 ....

... [G]ender-based challenges are not founded on a party's sudden impression of a particular venire person's ability to be impartial, but rather, like challenges based on race, "are based either on the false assumption that members of a certain group are unqualified to serve as jurors, ... or on the false assumption that members of certain groups are unable to consider impartially the case against a member or a nonmember of their group." ... *DeGross*, at 1439.

... Thus, we also conclude that the federal constitution's equal protection guaranty prohibits peremptory challenges exercised on the basis of a venire person's gender.

(Emphasis supplied.)

The *Batson* challenge was adequately substantiated and should have been allowed.

### (3) Challenge for Cause

Mr. Russell challenged Jurors 8 and 16 for cause. The State opposed removal of these jurors. The trial court denied the challenges. The challenge to Juror 8 was based upon the juror's response that one (1) drink would impair anyone's ability to drive. Juror 16's response was in a similar vein, *i.e.*, a person should not drive after even one (1) drink. (RP 2596, l. 21 to RP 2597, l. 11; RP 2601, l. 23 to RP 2602, l. 7; RP 2605, ll. 10-20; RP 2621, ll. 7-25; RP 2633, l. 24 to RP 2641, l. 16; RP 2644, l. 1 to RP 2646, l. 18; RP 2650, ll. 18-23)

Juror 8 eventually was seated on the jury. (RP 2701, l. 22 to RP 2703, l. 19)

Mr. Russell asserts that his challenge of the jurors for cause was appropriate under RCW 4.44.170(2) which provides, in part, that a challenge may be made:

**For** the existence of a state of mind on the part of a juror in reference to the action ... which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this code as **actual bias**.

(Emphasis supplied.)

RCW 4.44.190 does not obviate the challenge for actual bias. The latter statute specifically states that a juror who has been challenged will not be disqualified on the basis that he “has formed or expressed an opinion upon what he or she may have heard or read.”

Juror 8 was not expressing an opinion on something that he had heard or read. He was expressing a fixed opinion that one (1) drink impairs anyone’s ability to drive. This is highly prejudicial when the evidence was clearly going to establish that Mr. Russell had consumed more than one (1) drink. The prejudice is further enhanced when Mr. Schwilke’s testimony, that any person with a .05 blood alcohol level is affected by what he/she has had to drink, is considered.

**It is a fundamental tenet of our judicial system that inherent in a jury trial is a right to an unbiased jury. ... The denial of a challenge for cause lies within the discretion of the trial court which will not be reversed absent a manifest abuse. *State v. Gilcrist*, 91 Wn.2d 603, 590 P.2d 809 (1979). **If a juror should have been excused for cause, but was not, the remedy is reversal. *Miles v. F.E.R.M. Enters., Inc.*, 29 Wn. App. 61, 64, 627 P.2d 564 (1981).****

*Cheney v. Grunewald*, 55 Wn. App. 807, 810, 780 P.2d 1332 (1989).

(Emphasis supplied.)

Mr. Russell is aware that actual bias cannot be presumed. Nevertheless, Juror 8 stuck “to his guns” with regard to his perception of the amount of alcohol a person could consume. This was obviously a juror whose frame of mind was not free from bias.

The fact that Mr. Russell otherwise used his peremptory challenges does not preclude him from raising this issue on appeal.

... [T]o require a defendant to use a peremptory challenge to strike a juror who should have been removed for cause, in order to preserve the claim that the for-cause ruling impaired the defendant's right to a fair trial [cannot be sanctioned].

*United States v. Martinez-Salazar*, 528 U.S. 304, 305, 120 S. Ct. 774, 145 L. Ed.2d 792 (2000).

Mr. Russell used a peremptory challenge to remove Juror 16. Nevertheless, having to use a peremptory challenge to remove a juror who should have been removed for cause places Mr. Russell in an unfair and untenable position known as a Hobson's choice. *See: State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997); (RP 2715, ll. 19-24; RP 2716, ll. 3-8)

By being forced to exercise a peremptory challenge to Juror 16, Mr. Russell was in essence limited to five (5), as opposed to six (6) initial peremptories.

#### **B. Prosecutorial Misconduct**

The prosecuting attorney objected to part of defense counsel's opening statement. The following exchange occurred:

MR. DUARTE: ... And then they're going to talk to you about a medical blood test. They're going to tell you look, this

means that he was under the influence and you should hold him responsible for this, right? They're going to tell you this. And yet they haven't disclosed and you will find out ... — what machines they used for the testing, what procedures they followed —

MS. TRATNIK: Your Honor this is inappropriate. **This is a legal judgment. The Court has already made in the State's favor. That is a misrepresentation.**

...

MR. DUARTE: Your Honor I have to take issue with this particular attorney, prosecutor, telling this jury right now that that's a misrepresentation when in fact we know what the truth is.

THE COURT: Alright. At this time ... — I'm going to ask the jury to disregard — Ms. Tratnik's statement but — I am going to ask Mr. Duarte to move on to a different line of his statement here.

MR. DUARTE: ... Whatever I say to you is not evidence and what I'm telling you

now is a summary of what I expect you will be hearing today and for the following days and maybe for the following weeks ...

... [I]n this trial we intend to present evidence to you that no information has been provided about the method used at that hospital, the procedures that they were supposed to follow.

MS. TRATNIK: Your Honor **I'm going to renew my objection. This is a discovery ruling. He's doing exactly what you just said he couldn't do.**

...

THE COURT: No. I'm going to allow the — I'm going to overrule and allow him proceed in the manner you are.

(RP 2823, l. 3 to RP 2825, l. 3) (Emphasis supplied.)

In judging of what constitutes misconduct, each case involving such question must stand by itself and must be considered in the light of all its particular facts and circumstances, to the end that verdicts properly arrived at shall not be disturbed and that those verdicts which have been induced by prejudice or by something beyond the issues shall not stand. *State v. Navone*, 186 Wash 532, 58 P.(2d) 1208.

*State v. Hart*, 26 Wn.(2d) 776, 794, 175 P.2d 944 (1946).

The only logical conclusion to draw from this exchange during opening statement is that the jury was now told that the trial court already determined that the serum blood test results were reliable. Thus, any evidence pertaining to the actual testing procedures and their reliability was severely undercut.

... “Argument and inflammatory remarks have no place in the opening statement.” *State v. Kroll*, 87 Wn.2d 829, 835, 558 P.2d 173 (1976). ... It is the prosecutor’s duty to “seek a verdict free of prejudice and based on reason.” *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968) *cert. denied*, 393 U.S. 1096 (1969).

*State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993).

The prosecuting attorney violated the spirit of the law by the speaking objection used. The harm to Mr. Russell’s case is self-evident.

### **C. Hearsay**

Mr. Schwilke was allowed to testify, over Mr. Russell’s objection, that the normal contents of the gray-top vials are sodium fluoride (an enzyme poison) and potassium oxalate (an anticoagulant). (RP 4107, l. 19 to RP 4109, l. 25; RP 4110, l. 22 to RP 4111, l. 10; RP 4113, l. 20 to RP 4114, l. 4)

The manufacturer’s certificate was not admitted into evidence. Mr. Schwilke testified that the certificate contains the information with regard to the required contents (amounts and types of chemicals) in each

of the gray-topped vials. The testimony constituted hearsay. *See: State v. Brown*, 145 Wn. App. 62, 73-75 (2008) (applying ER 801(c), ER 803, ER 703 and ER 705 to conclude such a certificate is inadmissible).

ER 803(a)(6) provides that the business records exception contained in RCW 5.45.020 does not constitute hearsay.

Mr. Russell contends that the manufacturer's certificate does not constitute a business record of the Lab. Moreover, failure to present the actual certificate as evidence violated his right of confrontation under the Sixth Amendment to the United States Constitution.

The business records exception permits admission of a record containing double hearsay only if the third party is a member of the business organization and has a duty to supply the information on the form.

*State v. Mason*, 31 Wn. App. 680, 684, 644 P.2d 710 (1982).

The Lab is not a part of the manufacturing firm. The Lab may have a duty to maintain the manufacturer's certificate; but it was not provided to the Court.

**If hearsay in a business record goes to the heart of an issue at trial** so that, when believed by the jury, it could be regarded as proof on that issue, the hearsay should be rejected.

*State v. Barringer*, 32 Wn. App. 882, 885, 650 P.2d 1129 (1982). (Emphasis supplied.)

The presence of the appropriate amounts of the enzyme poison and anticoagulant in the gray-topped vials is crucial to any prosecution involving blood alcohol testing. As the Court noted in *State v. Wilbur-Bobb*, 134 Wn. App. 627, 631, 141 P.3d 665 (2006):

This court has decided two cases in which the enzyme poison evidence was held to be insufficient: *State v. Bosio*, 107 Wn. App. 462, 467-68, 27 P.3d 636 (2001), and *State v. Hultenschmidt*, 125 Wn. App. 259, 267, 102 P.3d 192 (2004). In *Bosio*, while there was evidence gray topped vials were used, there was no evidence that those vials contained an enzyme poison. In *Hultenschmidt*, while there was testimony that the gray topped vials contained sodium fluoride, there was no testimony that sodium fluoride was an enzyme poison. ... The labels on the vials showed that they contained sodium fluoride.

The Court did not suppress the evidence in the *Wilbur-Bobb* case because the labels on the vials showed that they contained sodium fluoride.

There was no evidence from Trooper Murphy that the labels on the vials indicated the presence of either an enzyme poison or an anticoagulant. He merely testified that the labels were within appropriate expiration dates.

It is Mr. Russell's position that the trial court improperly admitted this testimony from Mr. Schwilke. The testimony amounted to an expert opinion that was invalid in the absence of the manufacturer's certificate.

The court's decision to admit expert testimony is reviewed for abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 715, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). A court abuses its discretion when its decision is based on untenable grounds or is manifestly unreasonable or arbitrary. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). This includes when its discretionary decision is contrary to law. *State v. Williamson*, 100 Wn. App. 248, 257, 996 P.2d 1097 (2000).

*State v. Nation*, 110 Wn. App. 651, 661-62, 41 P.3d 1204 (2002).

The *Nation* Court was addressing ER 703 and ER 705 insofar as testimony involving notes, testing data and reports by a non-testifying witness. The *Nation* Court determined that the admission of the testimony was improper and reversed controlled substance convictions. It concluded at 662: "... ER 705 may not be used as a mechanism for admitting otherwise inadmissible evidence as an explanation of an expert's opinion."

As the Court noted in *State v. Hultenschmidt, supra.*, the anticoagulant (potassium oxalate) must be present to prevent clotting and the enzyme poison (sodium fluoride) must be present to stabilize the alcohol concentration

There were no photos of the vials. There was no testimony as to the amounts of the respective chemicals placed inside these particular vials.

The State did not establish the necessary foundation for admission of the blood analysis done by the Lab.

#### **D. Chain of Custody**

Mr. Russell contends that the State failed to establish a complete and unbroken chain of custody concerning his blood samples.

Detective Fenn testified that he obtained the samples from Trooper Murphy in Colfax. He then transported him to the WSP District Office in Spokane. (RP 4005, ll. 19-23)

Detective Fenn filled out paperwork and placed it with the blood samples in a lockbox at the WSP District Office. (RP 4006, ll. 20-25)

Eugene Schwilke testified that blood samples were received from the WSP at the Lab on June 8, 2001. He believed they came by “certified mail.” (RP 4102, l. 22 to RP 4103, l. 4)

The State did not introduce any documentation to reflect the transmittal of the blood samples from the WSP to the Lab.

The State did not produce any documentation in support of the method by which the Lab received the samples.

An exhibit is sufficiently identified when it is identified as being the same object and when it is declared to be in the same condition as at the time of its initial acquisition by the state.

*State v. Potts*, 1 Wn. App. 614, 616, 464 P.2d 742 (1969).

According to Sergeant Lankford, who audited Mr. Russell’s case file, the chain of custody at the Lab was nonexistent after his blood sample arrived. (RP 4369, ll. 3-4; RP 4380, ll. 8-15)

### **E. Proximate Cause – Jury Instructions**

QUERY: What did Robert Hart do on the evening of June 4, 2001 to cause the accident between Mr. Russell's SUV and the other cars?

Mr. Hart's testimony at trial is highly suspect. He stated that

1. He swerved to the right onto the shoulder as the SUV was within eight (8) to ten (10) feet of his car. (RP 3591, ll. 10-13; RP 3640, ll. 2-4);

2. Even though he had been continually checking in his mirror he did not see the SUV pass him. (RP 3589, ll. 17-21; RP 3592, ll. 14-19);

3. He saw the SUV swerving and driving parallel to the WB fog line in the wrong lane. (RP 3593, ll. 5-8);

4. The SUV seemed to accelerate, then returned to the EB lane but sideswiped a car in the WB lane as it was pulling to the shoulder. (RP 3594, ll. 2-4; ll. 13-18);

5. The SUV then collided with the Cadillac and Mr. Tran's Geo. (RP 3595, ll. 10-15; RP 3596, l. 14 to RP 3597, l. 3).

Interestingly enough, no other witness seems to recall Mr. Hart. Mr. Hart did not remain at the scene to provide information to any investigating officer, EMT, or fire personnel. (RP 3601, ll. 7-23)

Neither Ms. Eichelsdoerfer nor Mr. Ranade have any recollection of the accident. (RP 3344, ll. 4-5; RP 3365, ll. 23-25)

Mr. Haynes recalls seeing the SUV approaching in the EB lane with blue sparks being emitted from the driver's side tire. The SUV then cut toward the Cadillac. There was no time to react. (RP 3230, ll. 9-19)

Mr. Wagner saw the SUV pull out and hit Ms. Lundt's Geo. He also saw blue sparks as the SUV went back into its own lane. The SUV then came directly at the Cadillac. (RP 3353, ll. 13-18)

Neither Mr. Haynes nor Mr. Wagner mention Mr. Hart's Subaru Brat.

Neither Detective Snowden nor Detective Fenn located any evidence supporting Mr. Hart's version of what he did prior to the accident.

Mr. Genter testified that Mr. Hart's version of what occurred at the accident scene did not fit any scenario and that there was a lack of evidence to support what he said occurred. (RP 4974, l. 8 to RP 4976, l. 9; RP 5010, l. 7 to RP 5011, l. 2)

There is no evidence of a car being on the gravel portion of the EB shoulder. There is no evidence of a car being in the gravel turnout near the accident scene. (RP 4734, ll. 7-18; Exhibit 102)

There is no physical evidence of the evasive maneuvers as described by Mr. Hart.

Mr. Chapman testified that there would be no need for a car to cross the centerline if another car was parked completely on the EB shoulder of a highway. (RP 4761, ll. 18-23)

Mr. Chapman also described that an automatic response by the driver of a car when a vehicle pulls from the shoulder back onto the highway is to steer away from that other vehicle. This is known as an “avoidance response.” (RP 4786, l. 12 to RP 4787, l. 5; RP 4787, ll. 14-17)

He also opined that since the response was automatic it would not necessarily be impacted by what a person had to drink. (RP 4787, ll. 21-23; RP 4788, ll. 1-19)

In addition to the “avoidance response” a driver would accelerate in an attempt to pass the car and return to the correct lane as soon as possible. (RP 4790, ll. 1-6)

In *State v. Rivas* [126 Wn.2d 443, 896 P.2d 57 (1995)], the Supreme Court held that the only causal connection the State needs to prove in a vehicular homicide case “is the connection between the act of driving and the acts.” In other words, “causation between intoxication and death is not an element of vehicular homicide.” ... Proof of a superseding, intervening event allows an intoxicated defendant to avoid responsibility for the death. It breaks the causal connection between the defendant’s act of driving in violation of the statute and the victim’s injury, and the intervening act becomes the superseding cause of injury. “[T]o be a superseding cause, the intervening act must have occurred after the defendant’s act or omission.”

*State v. Morgan*, 123 Wn. App. 810, 815-16, 99 P.3d 411 (2004).

“... [T]he court’s specific wording of its instructions to the jury [is reviewed] for abuse of discretion.” *State v. Trout*, 125 Wn. App. 403, 416, 105 P.3d 69 (2005).

WPIC 90.08 provides the definition of proximate cause for purposes of informing a jury of the necessary burden of proof. The instruction accurately portrays the language of the *Rivas* decision. (Appendix “J”)

However, the trial court elected not to use WPIC 90.08 as drafted. The trial court denied Mr. Russell’s proposed Instruction No. 7 and crafted its own definitional instructions which were given over Mr. Russell’s objection. (RP 4795, l. 19 to RP 4796, l. 12; RP 4797, l. 1 to RP 4798, l. 23; RP 5057, l. 7 to RP 5058, l. 2; RP 5063, ll. 3-23; Instructions 14 and 20)

“A superseding, intervening event is an event independent of the defendant’s conduct that occurs without which death would not have occurred.” *State v. Morgan, supra*, 817.

There is no argument that Mr. Russell was exceeding the fifty-five (55) mile per hour speed limit. The question is whether or not the speed of the SUV was the ultimate proximate cause of the accident.

An appropriate analysis of proximate cause could indicate that

1. The deaths of Mr. Clements, Ms. Morrow and Mr. Sorenson, and the serious injuries of Ms. Eichelsdoerfer, Mr. Ranade and Mr. Wagner resulted from the collision between the SUV and the Cadillac.

2. The collision between the Cadillac and the SUV occurred due to the loss of the left front tire of the SUV, the inward cant of the right front

tire and the loss of steering control. (RP 3940, l. 23 to RP 3941, l. 3; RP 4716, l. 6 to RP 4717, l. 7)

3. The damage to the SUV resulting in the loss of steering control was caused by the impact with Mr. Lundt's Geo. The condition of the SUV following the impact with Ms. Lundt's Geo, created a high speed cutting instrument due to the lift kit. It sliced open and demolished the Cadillac. (RP 4711, ll. 2-8)

4. The impact with Mr. Lundt's Geo can be attributed to any one or more of the following:

- a.) Mr. Hart's actions;
- b.) The speed of the SUV; and/or
- c.) The fact that Mr. Russell had been drinking.

In a driving while under the influence of intoxicating liquor prosecution the Court in *State v. Komoto*, 40 Wn. App. 200, 205, 697 P.2d 1025 (1985) stated: "The defendant's physical condition is by definition a critical element of the crime."

Other than the serum blood test and the Lab blood analysis the State did not present any evidence that Mr. Russell's physical condition was impaired to any degree.

Other than the odor of intoxicating liquor, no witness at the accident scene, or who transported Mr. Russell to the hospital, saw any indication of a physical deficiency.

Trooper Murphy conceded that the odor of alcohol does not indicate how much a person has had to drink. The odor of alcohol does not mean that a person is intoxicated. (RP 3083, l. 21 to RP 3084, l. 4; RP 3084, ll. 21-22)

Instructions 14 and 20 deleted the following significant language from WPIC 90.08:

If you are satisfied beyond a reasonable doubt that the ... driving of the defendant was a proximate cause [of death] [serious bodily injury], it is not a defense that the driving of another may also have been a proximate cause ....

By removing the “beyond a reasonable doubt” language the trial court in fact reduced the State’s burden of proof on proximate cause. This created an ambiguity with the beyond a reasonable doubt instruction. (CP 1210; Instruction 5; Appendix “K”)

#### **F. Expert Witness/Discovery**

CrR 4.7(f)(1) provides:

**Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of investigating or prosecuting agencies** except as to material discoverable under subsection (a)(1)(iv).

(Emphasis supplied.)

CrR 4.7(a)(1)(iv) pertains to the prosecutor's obligations with regard to discovery. There is no similar provision under the defendant's discovery obligations. CrR 4.7(b).

The trial court allowed the testimony of Geoffrey Genter over Mr. Russell's objection. Mr. Russell objected on the basis of attorney work product and that Mr. Genter was a consulting witness. (RP 4908, l. 14 to RP 4931, l. 5)

Mr. Genter was hired by Mr. Russell's former attorney. Even though the former attorney provided a copy of Mr. Genter's report to the State, the State did not indicate an intent to use Mr. Genter until late in the trial.

The trial court ruled that there was a waiver of attorney/client privilege and that Mr. Genter's report was not attorney work product. The trial court is in error.

The attorney work product doctrine ... is intended "to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion from his adversaries." *United States v. Adlman*, 134 F.2d 1194, 1196 (2d Cir. 1998) (quoting *Hickman v. Taylor*, 829 U.S. 495, 510-11, 67 S. Ct. 385, 91 L. Ed. 451 (1947)).

*Soter v. Cowles Publishing Company*, 131 Wn. App. 882, 893, 130 P.3d 140 (2006).

Mr. Russell's trial attorneys did not intend to use Mr. Genter as a witness. The trial attorneys did not intend to use Mr. Genter's report in connection with the defense case. Mr. Genter had previously reviewed the accident scene and the WSP investigation. He did not conduct an independent accident reconstruction.

Mr. Russell's trial attorneys retained an independent accident reconstruction expert for trial testimony.

At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that **attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.**

*United States v. Nobles*, 422 U.S. 225, 238-39, 95 S. Ct. 2160, 45 L. Ed.2d 141 (1975). *See also: State v. Pawlyk*, 115 Wn.2d 457, 476, 800 P.2d 338 (1990). (Emphasis supplied.)

CrR 4.7(f) distinctly recognizes the exception with regard to investigator's reports. The fact that a prior attorney has revealed an expert's report in violation of the attorney/client privilege, especially when current counsel does not intend to use that report, does not condone introduction into evidence of the expert's opinions.

As the *Soter* Court stated at 894:

Work product documents need not be prepared personally by counsel; they can be prepared by or for the party or the party's representative, so long as they are prepared in anticipation of litigation.

The attorney/client privilege applies to any information generated by a request for legal advice. *See: Dietz v. Doe*, 131 Wn.2d 835, 846, 935 P.2d 611 (1997).

The trial court's reliance upon *State v. Pawlyk*, *supra* and *State v. Hamlet*, 133 Wn.2d 314, 944 P.2d 1026 (1997) is misplaced. The two (2) cases involved insanity/diminished capacity defenses as opposed to accident reconstruction.

Furthermore, only the client is in the position to waive the attorney/client privilege. *See: State v. Emmanuel*, 42 Wn.(2d) 799, 815, 259 P.(2d) 845 (1953).

#### **G. Comment on Credibility**

The State cannot indirectly vouch for a witness by eliciting testimony from an expert or a police officer concerning the credibility of a crucial witness. It is misconduct for the prosecutor to ask a witness whether he or she believes another witness .... Such an opinion invades the province of the jury.

*State v. Chavez*, 76 Wn. App. 293, 299, 884 P.2d 624 (1994).

Mr. Russell contends that the prosecuting attorney, during the State's rebuttal case, improperly asked Detective Spangler to comment upon the investigative techniques of Detectives Fenn and Snowden. The

inquiry was allowed over Mr. Russell's objection. Detective Spangler testified that both detectives exercised integrity and that there was no investigative bias. (RP 4887, ll. 18-25; RP 4894, ll. 5-9)

### **III. POST-TRIAL/SENTENCING**

#### **A. Pre-trial Detention**

When Mr. Russell was sentenced the trial court declined to give him credit for pre-trial detention while awaiting extradition from Ireland.

As set forth in the trial court's findings of fact and conclusions of law entered on February 4, 2009, Mr. Russell spent three hundred and eighty-four (384) days confinement in Ireland while the extradition proceedings were pending.

The trial court reasoned that the theft and forgery charges which were filed by the Whitman County Prosecutor after Mr. Russell had fled the jurisdiction precluded granting credit for pre-trial detention.

The trial court's Finding of Fact 17 states: "On January 2, 2008, the State dismissed the forgery and theft second degree charges."

Moreover, Finding of Fact 20 states: "The defendant received no credit against any sentence for the 384 days he spent in pretrial confinement in Ireland."

The trial court reasoned that RCW 9.94A.505(6) precludes credit for pre-trial detention while awaiting extradition. Conclusions of Law 1, 2, 3, 4 and 5, and 7 are erroneous.

Pre-trial detention in connection with extradition proceedings entitles an individual to credit for time served. *See: State v. Brown*, 55 Wn. App. 738, 757, 780 P.2d 880 (1989).

Mr. Russell's motion for reconsideration on this issue was also denied by the Court.

The issue presented is whether or not Mr. Russell's pre-trial detention comes within the ambit of RCW 9.94A.505(6).

RCW 9.94A.505(6) states:

The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.

RCW 9.94A.030(11) defines "confinement" as either total or partial confinement. There is no dispute that Mr. Russell was totally confined in Ireland pending extradition proceedings.

Even though forgery and theft offenses were pending under Whitman County Cause Number 02 1 00040 6, they were not filed until March 6, 2002. This was after Mr. Russell had fled the jurisdiction.

It is highly unlikely that a nationwide warrant would generally issue for forgery and theft offenses. Furthermore, it is even more unlikely that a person would be extradited from a foreign country in connection with such offenses.

It should also be kept in mind that there was a bail jumping charge issued under Whitman County Cause Number 01 1 00173 1 and a federal

complaint for unlawful flight to avoid prosecution. (CP 1394; Appendix “L”)

Fundamental fairness in the avoidance of discrimination and possible multiple punishment dictate that an accused person, unable to or precluded from posting bail or otherwise procuring his release from confinement prior to trial should, upon conviction and commitment to a state penal facility, be credited as against a maximum and a mandatory minimum term with all time served in detention prior to trial and sentence.

*Reanier v. Smith*, 83 Wn.2d 342, 346, 517 P.2d 949 (1974).

Mr. Russell recognizes that the *Reanier* case pre-dates the Sentencing Reform Act (SRA). Nevertheless, the concept of fundamental fairness was not eliminated by the SRA.

Const. art. I, § 32 provides: “A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.”

It does not appear that Const. art. I, § 32 has ever been fully addressed in the criminal context. *See: Wheeler School Dist. No. 152 v. Hawley*, 18 Wn.(2d) 37, 137 P.2d 1010 (1943) (addressing an education act and separation of powers); *Brower v. State*, 137 Wn.2d 44, 969 P.2d 42, *certiorari denied* 526 U.S. 1088, 119 S. Ct. 1498, 143 L. Ed.2d 652 (involving election laws); *State v. Howell*, 107 Wash. 167, 181 P. 920 (1919) (election laws).

Even though there is no case discussing art. I, § 32 in a sentencing proceeding, Mr. Russell contends that the excerpt from *Reanier*, as well as the cases of *In re Phelan*, 97 Wn.2d 590, 647 P.2d 1026 (1982) (*Phelan I*) and *State v. Phelan*, 100 Wn.2d 508, 671 P.2d 1212 (1983) (*Phelan II*), underscore his argument that this particular constitutional provision must be considered when sentencing is involved.

As the Court declared in *Phelan II* at 517: "... [W]e hold that the State must give a prisoner credit for all jail time in connection with a conviction for which he or she is eventually sentenced to prison." *See also: State v. Williams*, 59 Wn. App. 379, 382, 796 P.2d 1301 (1990) (time spent on parole violation not granted on robbery conviction as two (2) separate sentences); 13B Wash. Prac., Criminal Law, Fine and Ende, § 3603 (if an offender is confined on two (2) charges simultaneously any time not credited towards one (1) must be credited towards the other).

Mr. Russell was never convicted of the theft and forgery charges. The bail jumping and flight from prosecution charges were dismissed in order to effect Mr. Russell's extradition from Ireland.

Thus, the three hundred and eighty-four (384) days spent in detention pending extradition remain in limbo.

Mr. Russell asserts that the trial court's determination that RCW 9.94A.505(6) is discretionary is contrary to the statutory language. The word "shall," as used in the statute, is mandatory.

If the trial court's conclusions are accepted, then an anomaly exists. A person can be convicted of multiple offenses under multiple cause numbers and never receive credit for any time served as to any single cause number. This is an obviously absurd result. It could not be the result contemplated by the Legislature when it enacted the statute.

A statute is ambiguous if it is susceptible to two or more reasonable interpretations. [Citations omitted.] If a statute is ambiguous, we look to other sources of legislative intent. [Citations omitted.] If there is no contrary legislative intent, we apply the rule of lenity, which resolves statutory ambiguities in favor of the criminal defendant. [Citation omitted.]

*State v. VanWoerden*, 93 Wn. App. 110, 116, 967 P.2d 14 (1998).

As previously indicated, an obvious ambiguity exists. The Legislature could not have intended that a person be entirely deprived of pre-detention credit. Such a result is not only absurd, but runs counter to the requirement of fundamental fairness.

“A statute must be read to avoid absurd results.” *State v. Bailey*, 52 Wn. App. 42, 46, 757 P.2d 541 (1988).

The denial of pre-detention credit in Mr. Russell's case increases his penalty by denying him credit for time he actually served. “Penal statutes are construed against the State in favor of an accused.” *State v. Sass*, 94 Wn.2d 721, 726, 620 P.2d 79 (1980).

The *Sass* Court also stated at 726 that a "... court should not interpret a criminal statute so as to increase the penalty imposed absent clear evidence of legislative intent to do so."

## CONCLUSION

Mr. Russell was unlawfully arrested by Trooper Murphy in the State of Idaho.

The IMAA does not validate Trooper Murphy's arrest since it was never recorded as required by RCW 39.34.040.

Chapter 10.89 RCW, the Uniform Act on Fresh Pursuit, is inapplicable under the facts and circumstances of Mr. Russell's case. It is applicable only to arrests within the State of Washington.

Trooper Murphy did not comply with Idaho Code § 19-702. He was required to immediately take Mr. Russell before a committing magistrate for a probable cause determination.

Mr. Russell's arrest in Idaho cannot be justified under the common law definition of "fresh pursuit."

The seizure of the serum blood draw records exceeded the scope of the search warrant issued by Judge Hamlett. The seizure occurred in violation of the Fourth Amendment to the United States Constitution and Id. Const. art. I, § 17.

The results of the blood analysis performed by the Lab should be suppressed for the following reasons:

1. Unlawful arrest;
2. Break in the chain of custody;
3. Mismanagement at the Lab;
4. Failure to meet all foundational requirements for admissibility;
5. Use of inadmissible hearsay to establish foundation.

If neither the serum blood draw nor the Lab blood analysis are available there is no independent evidence of Mr. Russell being under the influence of or affected by intoxicating liquor.

... [W]hen a driver suspected of inebriation is not under arrest at the time of an official request for the administration of a sobriety test, no consent thereto on the part of such driver can be implied and no administrative suspension of license for refusal can be imposed.

*State v. Wetherell*, 82 Wn.2d 865, 869, 514 P.2d 1069 (1973).

Jury selection in Mr. Russell's case violated Const. art. I, §§ 10 and 22 and the Sixth Amendment to the United States Constitution.

The trial court erroneously overruled Mr. Russell's *Batson* challenges as they pertained to the State's use of peremptories against Jurors 25, 31 and 39.

Mr. Russell's right to a fair and impartial jury was impaired when the trial court failed to grant his "for cause" challenges to Jurors 8 and 16.

Prosecutorial misconduct during defense counsel's opening statement unfairly prejudiced Mr. Russell's right to a jury free from outside influences.

The total station merely takes measurements and then provides a printout of the accident scene denoting those measurements and the location of physical evidence post-accident.

Accident reconstruction provides additional information over and above the total station measurements. Accident reconstruction is "determining what happened from what's left." (RP 4643, ll. 8-9)

Yet, even the combination of the total station measurements and the accident reconstruction do not provide a complete picture of what caused the accident.

The uncertainty concerning proximate cause was compounded by the trial court's instructional errors on the definition of supervening and/or intervening events.

The impermissible comment upon detective credibility placed undue emphasis on Detective Snowden's and Detective Fenn's testimony.

Whether considered independently or in combination, the errors set forth by Mr. Russell require that his convictions be reversed and the case remanded for a new trial.

It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. [Citations omitted.] Analysis of

this issue depends on the nature of the error. Constitutional error is harmless when the conviction is supported by overwhelming evidence. [Citations omitted.] Under this test, constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error. [Citations omitted.] Nonconstitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial. [Citations omitted.]

*State v. Lopez*, 95 Wn. App. 842, 857, 980 P.2d 224 (1999).

The errors in Mr. Russell's case are both constitutional and non-constitutional.

The evidence concerning proximate cause was not overwhelming. Rather, there was a plethora of conflicting evidence insofar as the underlying basis for Mr. Russell's SUV to veer into the WB lane of SR 270.

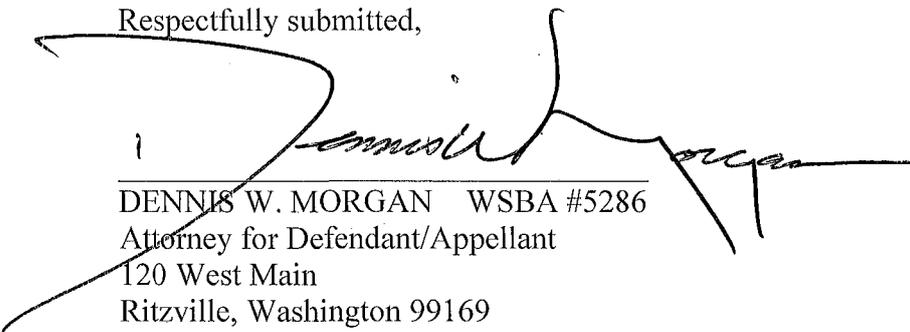
The nonconstitutional error alleged materially impacted the outcome of Mr. Russell's trial. In particular, issues involving the lawfulness of his arrest, seizure of the serum blood draw results, validity of the Lab blood analysis, and various evidentiary errors combined to make the outcome questionable in the mind of a reasonable person.

Finally, the jury selection process was so flawed that a new trial is mandatory under Const. art. I, §§ 10 and 22 and the Sixth Amendment to the United States Constitution.

In the event that the Court determines that Mr. Russell's convictions should stand, then he is entitled to credit for time served in Ireland while awaiting extradition.

DATED this 14<sup>th</sup> day of July, 2009.

Respectfully submitted,



DENNIS W. MORGAN WSBA #5286  
Attorney for Defendant/Appellant  
120 West Main  
Ritzville, Washington 99169  
(509) 659-0600

## APPENDIX "A"

(5) When Trooper Murphy followed the ambulance carrying the defendant from Washington into Idaho, ~~he had a reasonable suspicion that the defendant had committed a felony or was reasonably suspected of having committed a felony.~~ Trooper Murphy had a reasonable suspicion that an occupant of the ambulance had committed a felony.

(N)  
(MT)

(6) When Trooper Murphy followed the ambulance carrying the defendant from Washington into Idaho, he was engaged in a lawful fresh pursuit of the defendant.

(7) Trooper Murphy's pursuit and arrest of the defendant was authorized by Idaho Code Sections 19-705 through 19-707.

(9) A mutual assistance agreement between the Washington State Patrol and the Idaho State Patrol was in effect on June 4, 2001.

(10) The mutual assistance agreement which existed between the Washington State Patrol and the Idaho State Patrol gave Trooper Murphy the authority to enter Idaho to conduct an investigation, arrest the defendant, and obtain a blood draw from him.

(11) The Uniform Act of Fresh Pursuit and the mutual aid agreement between the Washington State Patrol and the Idaho State Patrol each provide separate and independent legal basis which gave Trooper Murphy the authority to enter Idaho to conduct an investigation, arrest the defendant, and obtain a blood draw from him.

(12) Trooper Murphy's arrest of the defendant in Idaho was lawful.

(13) The result of the blood draw obtained by Trooper Murphy after his lawful arrest of the defendant is admissible.

## APPENDIX "B"

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(2) Trooper Murphy had probable cause to arrest the defendant.

(3) All evidence obtained pursuant to and after Trooper Murphy's arrest of the defendant is admissible.

## APPENDIX "C"

(3) All records seized pursuant to the search warrant signed by Judge Hamlett on June 26, 2001, including those records documenting the medical blood draw results, are admissible.

## APPENDIX "D"

(2) All records seized pursuant to the search warrant signed by Judge Hamlett on June 26, 2001, including those records documenting the medical blood draw results, are within the scope of the search warrant and are therefore admissible.

## APPENDIX "E"

(3) Pursuant to RCW 46.20.308, a person must be lawfully arrested for a crime specified in RCW 46.20.308 before a breath or blood test can be taken from the person without his consent.

Vehicular homicide is one of the crimes specified in RCW 46.20.308 which allows a breath or blood test to be taken from a suspect without consent.

(4) An arrest can be made for a limited purpose, such as obtaining a blood sample from a vehicular homicide suspect.

(6) Trooper Murphy's arrest of the defendant was lawful.

(7) After lawfully placing the defendant under arrest for vehicular homicide, Trooper Murphy fully and accurately advised him of his special evidence warnings prior to obtaining a blood sample from him.

(8) After Trooper Murphy advised the defendant that he was under arrest for vehicular homicide the defendant was not free to leave.

(9) After Trooper Murphy advised the defendant that he was under arrest for vehicular homicide the defendant understood that he was under arrest and that he was not free to leave.

(10) At the time that Trooper Murphy read the defendant his special evidence warnings and obtained a sample of his blood the defendant was lawfully under arrest for vehicular homicide.

(11) The results of the blood test taken pursuant to RCW 46.20.308 are admissible.

## APPENDIX "F"

Instruction No. 14

With respect to a charge of Vehicular Homicide, conduct of a defendant is not a "proximate cause" of death if death is caused by a superseding, intervening event.

A superseding, intervening event is a new, independent intervening act of another person, which the defendant, in the exercise of ordinary care, should not reasonably have anticipated as likely to happen. An intervening cause is an action that actively operates to produce harm to another after the defendant's act has been committed or began.

However, if in the exercise of ordinary care, the defendant should reasonably have anticipated the intervening cause, that cause does not supersede the defendant's original act, and the defendant's act is a proximate cause. It is not necessary that the sequence of events or the particular injury be foreseeable. It is only necessary that death fall within the general field of danger which the defendant should have reasonably anticipated.

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## APPENDIX "G"

**Instruction No. 20**

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3 With respect to a charge of Vehicular Assault, the conduct of a defendant is not a  
4 "proximate cause" of serious bodily injury if serious bodily injury is caused by a  
5 superseding, intervening event.

6 A superseding, intervening event is a new, independent intervening act of another  
7 person, which the defendant, in the exercise of ordinary care, should not reasonably have  
8 anticipated as likely to happen. An intervening cause is an action that actively operates to  
9 produce harm to another after the defendant's act has been committed or began.

10 However, if in the exercise of ordinary care, the defendant should reasonably have  
11 anticipated the intervening cause, that cause does not supersede the defendant's original  
12 act, and the defendant's act is a proximate cause. It is not necessary that the sequence of  
13 events or the particular injury be foreseeable. It is only necessary that serious bodily  
14 injury fall within the general field of danger which the defendant should have reasonably  
15 anticipated.  
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## APPENDIX "H"

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(1) RCW 9.94A.505(6) provides as follows: "The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced."

(2) A defendant must receive credit for presentencing confinement time only if the confinement was "solely in regard to the offense for which the offender is being sentenced."  
RCW 9.94A.505(6).

(3) RCW 9.94A.505(6) gives the trial court discretion to deny a defendant credit for time served if he is held in confinement on more than one charge. (Defendant objects to this finding).

(4) During the time the defendant was confined in Ireland he was being held on forgery and theft in the second degree charges as charged in Whitman County Cause No. 02-1-00040-6.

(5) The defendant was not confined in Ireland "solely" because of the vehicular homicide and assault charges; the defendant was also confined because of the state forgery and theft charges. (Defendant objects to this finding).

(7) The defendant's Motion for Reconsideration is denied.

## APPENDIX "I"

(4) On June 26, 2001, Latah County Magistrate Judge William C. Hamlett signed the search warrant which authorized the seizure of “[a]ny and all records pertaining to Frederick D. Russell, d.o.b. 12-20-78, regarding to or related to a motor-vehicle collision on June 4, 2001, including, emergency department reports and notes, chart notes, doctor’s notes and discharge summary which detail or identify Russell’s injuries and any medications administered by Gritman Hospital personnel or attending physicians.” *See Attachment B.*

# Attachment B

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

In the Matter of the )  
Application for a Search ) Case No. \_\_\_\_\_  
Warrant for Gritman Medical )  
Center, 700 S. Main, Moscow, )  
Latah County, Idaho. )  
SEARCH WARRANT

TO: ANY PEACE OFFICER AUTHORIZED TO ENFORCE OR ASSIST IN  
ENFORCING ANY LAW OF THE STATE OF IDAHO.

Bruce Fager, having given me proof, upon oath, this day showing  
probable cause establishing grounds for issuing a search warrant  
and probable cause to believe property consisting of:

- Any and all records pertaining to Frederick D. Russell, dob 12-20-78, regarding or related to a motor vehicle collision on June 4, 2001, including, without limitation, emergency department reports and notes, chart notes, doctor's notes and discharge summary WHICH DETAIL OR IDENTIFY Russell's INJURIES AND ANY MEDICATIONS ADMINISTERED by Gritman Hospital personnel or attending physicians
- is located in or upon the following described premises, located in Latah County, State of Idaho, its grounds and out buildings, and certain vehicles and conveyances, to-wit:

Gritman Medical Center is located at 700 S. Main in Moscow City, County of Latah, State of Idaho.

SEARCH WARRANT: Page -1-

EXHIBIT NO. "B"

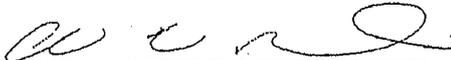
PAGE NO. 1

COPY

YOU ARE THEREFORE COMMANDED TO SEARCH the above-described premises and persons for the property described above, TO SEIZE it if found and to bring it promptly before the Court above named. THIS WARRANT SHALL BE EXECUTED WITHIN ONE DAYS OF ISSUANCE, AND IS AUTHORIZED FOR DAYTIME ~~AND NIGHTTIME~~ SERVICE, AND UNDER THE FOLLOWING SPECIAL DIRECTIONS:

*Secure Documentation AUTHORIZED AND HOLD FOR DISPOSITION TO REQUESTING AGENCY.*

GIVEN UNDER MY HAND and DATED this 26<sup>th</sup> day of June, 2001, at 10<sup>15</sup> A.M.

  
W.C. Hamlett  
MAGISTRATE JUDGE

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE  
OF IDAHO, IN AND FOR THE COUNTY OF LATAH

IN THE MATTER OF )  
THE APPLICATION )  
FOR A SEARCH WARRANT FOR )  
Gritman Medical Center, 700 S. )  
Main, Moscow, Latah County, Idaho )

Case No. \_\_\_\_\_

RECEIPT AND  
INVENTORY OF WARRANT

On the 26 day of JUNE, 2001, at approximately 1030 o'clock

A .M., the following peace officers: Sgt. BRUCE FAGER

served the Search Warrant heretofore issued upon the place and/or person(s) described therein as  
directed in said Search Warrant. Entrance was obtained by: SERVED BY HAND

@ Gritman Medical Records Dept. - open door -

The person(s) found in said place were: Jayne Strong - Medical  
Records File Clerk.

The property found and taken and the location within or upon said place and/or person(s) are  
as follows:

DESCRIPTION OF PROPERTY

LOCATION/PERSON

① ADMISSION RECORD DATED 6/4/01  
@ 2359 hrs for FRED RUSSELL  
(5 pages)

GRITMAN MEDICAL RECORDS

RECEIPT AND INVENTORY

PAGE 1 OF 3 PAGES

EXHIBIT NO. "C"

PAGE NO. 1

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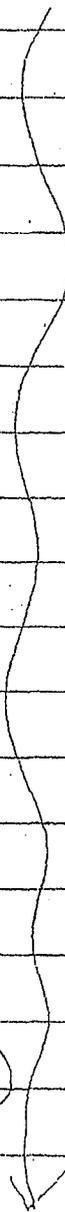
\* All Documents ARE FOR FRED RUSSELL  
 AND RELATE TO ER. GY. LY ROOM  
 VISITS FOR THE ACCIDENT ON 6/4/01

*RF*

DESCRIPTION OF PROPERTY

LOCATION/PERSON

- | DESCRIPTION OF PROPERTY  | LOCATION/PERSON         |
|--|-------------------------|
| 2) 5 page EMERGENCY DEPARTMENT REPT.<br>Dated 6/4/01   | GRITMAN MEDICAL RECORDS |
| 3) 1 page EMERGENCY DEPARTMENT REPT.<br>Dated 6/5/01 - For FRED RUSSELL<br>ADDENDUM FOR 6/4/01 |                         |
| 4) 2 pages MEDICAL IMAGING REPORT<br>Dated 6/5/01 0004   |                         |
| 5) 2 Pages Outpatient Summary Report<br>one Dated 6/5/01 0630<br>one Dated 6/5/01 1034         |                         |
| 6) One Patient Care Report<br>One Emergency and Outpatient Record                              |                         |
| 8) one Unsigned Consent Form   |                         |
| 9) one Admission Record dated 6/7/01 (4 page)  |                         |
| 10) one 2 page Emergency Dept. Record dated 6/7/01   |                         |
| 11) one Emergency and Outpatient Record & Consent Form (Date 6/7/01)                           |                         |
| 12) One 4 page Admission Record Dated 6/9/01   |                         |
| 13) One 2 page Emergency Department Report Dated 6/9/01  |                         |
| 14) One Emergency and Outpatient Record & Consent Form (6/9/01)                                |                         |



This Receipt and Inventory was made in the presence of: JAYME STRONG

\_\_\_\_\_

\_\_\_\_\_

A copy hereof was given to the following named person(s) on the 26 day of JUNE, 2001:

JAYME STRONG

\_\_\_\_\_

\_\_\_\_\_

A copy hereof was left on this date in a conspicuous place in the place searched, there being no person(s) present during said search: N/A

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

WITNESS

Sgt. Bruce R. Jager  
PEACE OFFICER

The undersigned person(s) hereby acknowledge receiving a copy hereof on this 26 day of June, 2001:

Jayme L. Strong

\_\_\_\_\_

\_\_\_\_\_

## APPENDIX "J"

WPIC 90.08

VEHICULAR HOMICIDE AND ASSAULT—CONDUCT  
OF ANOTHER

If you are satisfied beyond a reasonable doubt that the [[act] [or] [omission]] [driving] of the defendant was a proximate cause of [the death] [substantial bodily harm to another], it is not a defense that the [conduct] [driving] of [the deceased] [or] [another] may also have been a proximate cause of the [death] [substantial bodily harm].

[However, if a proximate cause of [the death] [substantial bodily harm] was a new independent intervening act of [the deceased] [the injured person] [or] [another] which the defendant, in the exercise of ordinary care, should not reasonably have anticipated as likely to happen, the defendant's act is superseded by the intervening cause and is not a proximate cause of the [death] [substantial bodily harm]. An intervening cause is an action that actively operates to produce harm to another after the defendant's [act] [or] [omission] has been committed [or begun].]

[However, if in the exercise of ordinary care, the defendant should reasonably have anticipated the intervening cause, that cause does not supersede the defendant's original act and the defendant's act is a proximate cause. It is not necessary that the sequence of events or the particular injury be foreseeable. It is only necessary that the [death] [substantial bodily harm] fall within the general field of danger which the defendant should have reasonably anticipated.]

NOTE ON USE

Use this instruction only when there is evidence of an intervening cause such that defendant's driving would not be proximate cause of the death or injury.

Use bracketed material as applicable. For directions on using bracketed phrases, see the Introduction to WPIC 4.20.

Use this instruction with WPIC 90.07, Vehicular Homicide and Assault—Proximate Cause—Definition, including the last paragraph

## APPENDIX "K"

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**Instruction No. 5**

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

## APPENDIX "L"

(5) Defendant was charged by Information with bail jumping, and on November 7, 2001, an arrest warrant was issued for that charge under Whitman County Cause No 01-1-00173-1. The warrant specified the area of extradition as "nationwide."

(8) On November 5, 2001, the United States Attorney's Office filed a complaint charging the defendant with unlawful flight to avoid prosecution and issued a federal arrest warrant.

**FILED**

JUL 15 2009

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**NO. 26789-0-III**

**COURT OF APPEALS**

**STATE OF WASHINGTON**

**DIVISION III**

---

**STATE OF WASHINGTON,**

Plaintiff,  
Respondent,

vs.

**FREDERICK DAVID RUSSELL,**

Defendant,  
Appellant.

---

**ADDITIONAL STATEMENT OF AUTHORITIES**

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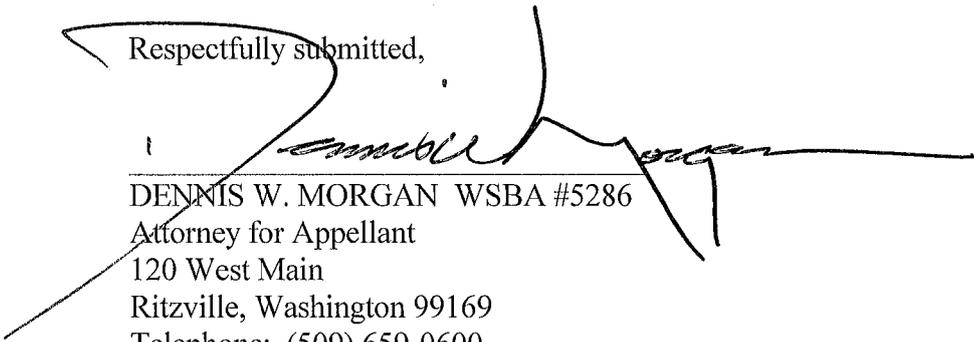
DENNIS W. MORGAN WSBA #5286  
Attorney for Appellant  
120 West Main  
Ritzville, Washington 99169

COMES NOW, FREDERICK DAVID RUSSELL, by and through  
the undersigned attorney, and requests the Court to consider the following  
additional authorities in connection with his appeal:

*State v. Heath, slip opinion* 36885-4-II (May 12, 2009)  
(reaffirming the validity of *State v. Erickson*, 146 Wn. App.  
200, 189 P.3d 245 (2008) as it relates to the application of  
the *Bone-Club* [*State v. Bone-Club*, 128 Wn.2d 254, 906  
P.2d 325 (1995)] factors to questioning prospective jurors  
outside the courtroom).

DATED this <sup>21</sup>18 day of May, 2009.

Respectfully submitted,



DENNIS W. MORGAN WSBA #5286

Attorney for Appellant  
120 West Main  
Ritzville, Washington 99169  
Telephone: (509) 659-0600

ADDITIONAL STATEMENT OF AUTHORITIES

**FILED**

**OCT 21 2009**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**NO. 26789-0-III**

**COURT OF APPEALS**

**STATE OF WASHINGTON**

**DIVISION III**

---

**STATE OF WASHINGTON,**

Plaintiff,  
Respondent,

vs.

**FREDERICK DAVID RUSSELL,**

Defendant,  
Appellant.

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**SECOND ADDITIONAL STATEMENT OF AUTHORITIES**

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DENNIS W. MORGAN WSBA #5286  
Attorney for Appellant  
120 West Main  
Ritzville, Washington 99169

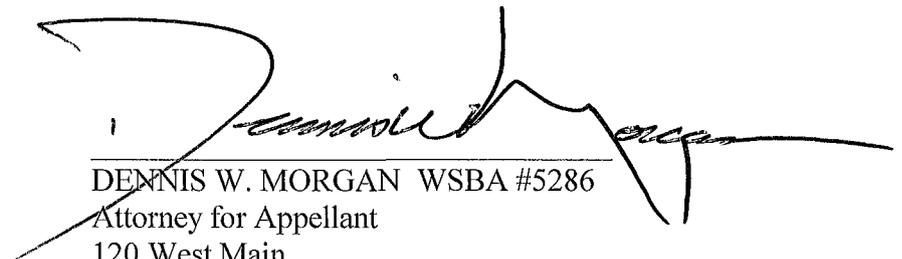
COMES NOW, FREDERICK DAVID RUSSELL, by and through the undersigned attorney, and requests the Court to consider the following additional authorities in connection with his appeal:

*State v. Strobe, slip opinion* 80849-0 (10/08/09) (structural error occurs requiring reversal of a conviction and remand for a new trial when the trial court fails to properly analyze the *Bone-Club* [*State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995)] factors, weigh competing interests, and enter appropriate findings of fact concerning the reasons behind the closure of the courtroom for individual juror *voir dire*);

*State v. Momah, slip opinion* 81096-6 (10/08/09) (no structural error occurs when a criminal defendant affirmatively assents to closure, argues for its expansion, has an opportunity to object but does not, actively participates in the closure proceedings and benefits from it - the factors used in invited error analysis are appropriate for making a determination as to whether or not the error is structural).

DATED this 20<sup>th</sup> day of October, 2009.

Respectfully submitted,



DENNIS W. MORGAN WSBA #5286  
Attorney for Appellant  
120 West Main  
Ritzville, Washington 99169  
Telephone: (509) 659-0600



**FILED**

**MAY 04 2010**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
B. *[Signature]*

**NO. 26789-0-III**

**COURT OF APPEALS**

**STATE OF WASHINGTON**

**DIVISION III**

---

**STATE OF WASHINGTON,**

Plaintiff,  
Respondent,

vs.

**FREDERICK DAVID RUSSELL,**

Defendant,  
Appellant.

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**THIRD ADDITIONAL STATEMENT OF AUTHORITIES**

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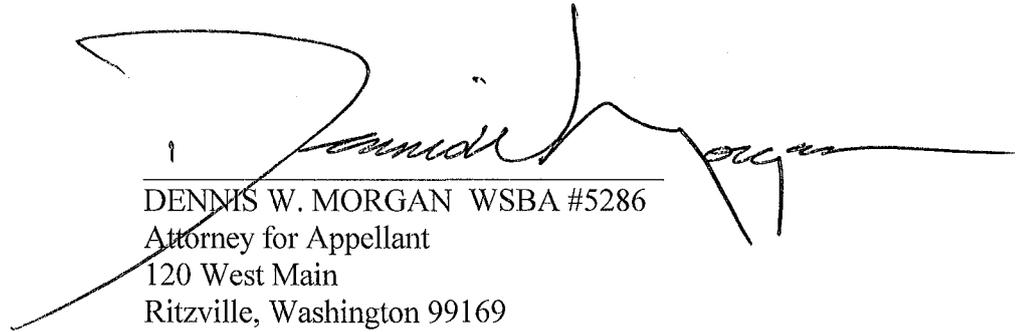
DENNIS W. MORGAN WSBA #5286  
Attorney for Appellant  
120 West Main  
Ritzville, Washington 99169

COMES NOW, FREDERICK DAVID RUSSELL, by and through  
the undersigned attorney, and requests the Court to consider the following  
additional authority in connection with his appeal:

*State v. Paumier, slip opinion* 36346-1-II (04/27/2010)  
(establishing *Presley v. Georgia*, 558 U.S., 130 S. Ct. 721,  
\_\_\_ L. Ed.3d (2010) as controlling the public trial issue in  
the State of Washington and requiring a *Bone-Club* [*State v.*  
*Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995)] analysis  
whenever there is a courtroom closure).

DATED this 3<sup>d</sup> day of May, 2010.

Respectfully submitted,



DENNIS W. MORGAN WSBA #5286  
Attorney for Appellant  
120 West Main  
Ritzville, Washington 99169  
Telephone: (509) 659-0600



**FILED**

**AUG 4 2010**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: *[Signature]*

**NO. 26789-0-III**

**COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III**

---

**STATE OF WASHINGTON,**

Plaintiff,  
Respondent,

vs.

**FREDERICK DAVID RUSSELL,**

Defendant,  
Appellant.

---

**FOURTH ADDITIONAL STATEMENT OF AUTHORITIES**

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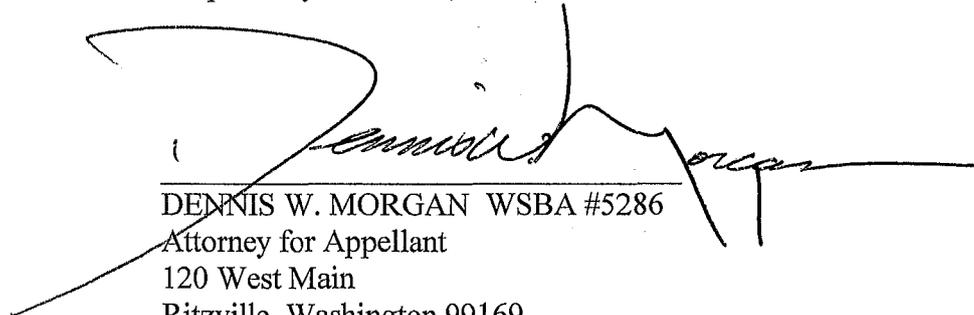
DENNIS W. MORGAN WSBA #5286  
Attorney for Appellant  
120 West Main  
Ritzville, Washington 99169

COMES NOW, FREDERICK DAVID RUSSELL, by and through  
the undersigned attorney, and requests the Court to consider the following  
additional authorities in connection with his appeal:

*State v. Bowen, Slip Opinion 39096-5-II (7/20/2010)*  
(concluding that conducting individual questioning of jurors  
in chambers without compliance with the *Bone-Club* factors  
[*State v. Bone-Club*, 128 Wn. 2d 254, 906 P. 2d 325 (1995)]  
violates a criminal defendant's constitutional right to a public  
trial).

DATED this 22<sup>d</sup> day of July, 2010.

Respectfully submitted,



DENNIS W. MORGAN WSBA #5286  
Attorney for Appellant  
120 West Main  
Ritzville, Washington 99169  
Telephone: (509) 659-0600

ADDITIONAL STATEMENT OF AUTHORITIES



**FILED**  
OCT 21 2010  
COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: *[Signature]*

**NO. 26789-0-III**

**COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III**

---

**STATE OF WASHINGTON,**

Plaintiff,  
Respondent,

vs.

**FREDERICK DAVID RUSSELL,**

Defendant,  
Appellant.

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**FIFTH ADDITIONAL STATEMENT OF AUTHORITIES**

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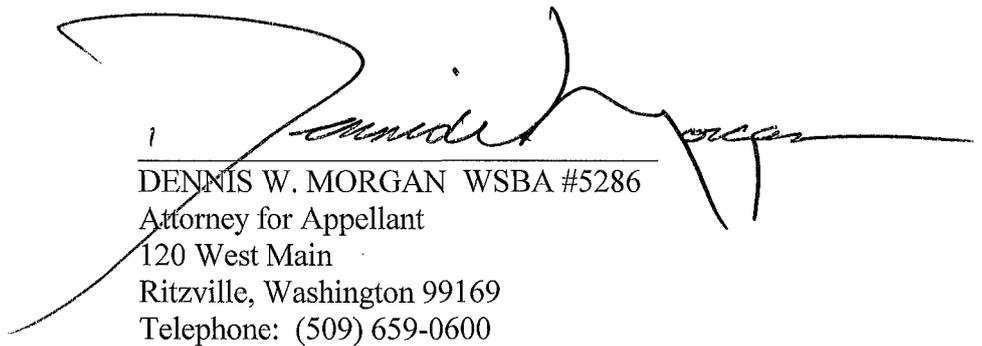
DENNIS W. MORGAN WSBA #5286  
Attorney for Appellant  
120 West Main  
Ritzville, Washington 99169

COMES NOW, FREDERICK DAVID RUSSELL, by and through  
the undersigned attorney, and requests the Court to consider the following  
additional authorities in connection with his appeal:

*State v. Leyerle, slip opinion 37086-7-II (10/05/2010)*  
(conducting any portion of voir dire outside of the courtroom  
is impermissible).

DATED this 20<sup>th</sup> day of October, 2010.

Respectfully submitted,



DENNIS W. MORGAN WSBA #5286  
Attorney for Appellant  
120 West Main  
Ritzville, Washington 99169  
Telephone: (509) 659-0600

**FILED**

FEB 01 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By *[Signature]*

**NO. 26789-0-III**

**COURT OF APPEALS**

**STATE OF WASHINGTON**

**DIVISION III**

---

**STATE OF WASHINGTON,**

Plaintiff,  
Respondent,

vs.

**FREDERICK DAVID RUSSELL,**

Defendant,  
Appellant.

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**SIXTH ADDITIONAL STATEMENT OF AUTHORITIES**

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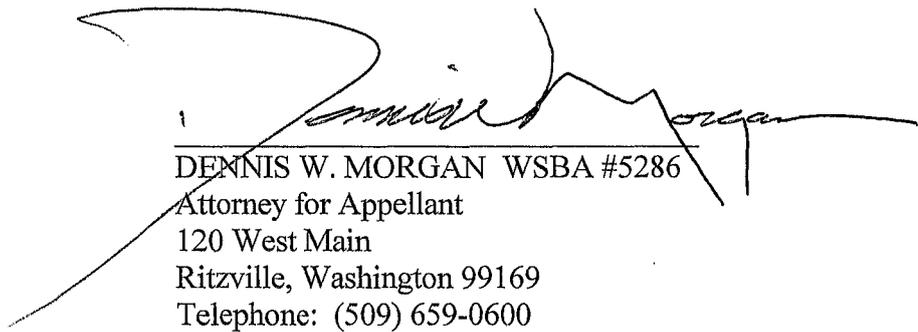
DENNIS W. MORGAN WSBA #5286  
Attorney for Appellant  
120 West Main  
Ritzville, Washington 99169

COMES NOW, FREDERICK DAVID RUSSELL, by and through  
the undersigned attorney, and requests the Court to consider the following  
additional authorities in connection with his appeal:

*State v. Irby, slip opinion 82665-0 (01/27/2011) (discussing  
release of potential jurors for hardship issues in the absence  
of attorneys and the defendant by the Court administrator).*

DATED this 31<sup>st</sup> day of January, 2011.

Respectfully submitted,



DENNIS W. MORGAN WSBA #5286  
Attorney for Appellant  
120 West Main  
Ritzville, Washington 99169  
Telephone: (509) 659-0600



WHITMAN COUNTY PROSECUTOR'S OFFICE

Attn: Dennis Tracy  
PO Box 30  
Colfax, Washington 99111

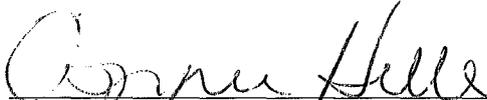
OFFICE OF THE ATTORNEY GENERAL

Attn: Melanie Tratnik  
800 5<sup>th</sup> Ave, Suite 2000  
Seattle, Washington 98104-3188

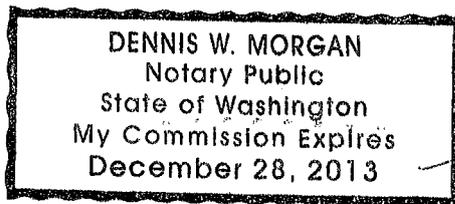
FREDERICK DAVID RUSSELL #314145

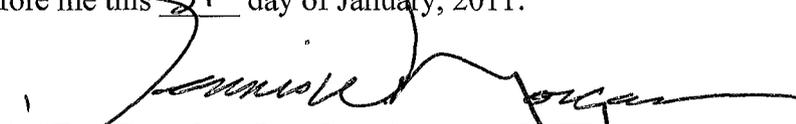
Coyote Ridge Correction Center  
PO Box 769, IB-33L  
Connell, Washington 99326-0769

Containing a copy of *SIXTH ADDITIONAL STATEMENT OF AUTHORITIES*.

  
\_\_\_\_\_  
CONNIE HILLE

SUBSCRIBED AND SWORN to before me this 31<sup>ST</sup> day of January, 2011.



  
\_\_\_\_\_  
NOTARY PUBLIC in and for the State of  
Washington, residing at Ritzville.  
My commission expires: 12/28/2013.

AFFIDAVIT OF MAILING