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66201-5  
**ORIGINAL**

No. 66201-5-1

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**COURT OF APPEALS, DIVISION ONE  
STATE OF WASHINGTON**

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**STATE OF WASHINGTON,**

**Respondent,**

**v.**

**DAVID OLSON,**

**Appellant,**

**FILED**  
**COURT OF APPEALS DIV I**  
**STATE OF WASHINGTON**  
**2011 JUL 20 PM 1:22**

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**APPELLANT'S OPENING BRIEF**

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## **I. INTRODUCTION**

An accident occurred in Burlington, WA, in the early evening of October 2, 2008, involving an SUV and a motorcycle. The motorcycle driver sustained a broken bone in his foot. The SUV driver, David Olson, was arrested for DUI and Vehicular Assault. He submitted to a blood alcohol test. The test revealed a blood alcohol level of .22.

Mr. Olson was convicted at trial of Vehicular Assault under the "DUI" prong. RCW 46.61.522(1)(b).

This appeal addresses whether the trial court erred in admitting the blood alcohol test results at trial. Mr. Olson contends the State failed to present prima facie evidence the vials used to collect his blood contained a preservative enzyme sufficient in amount to stabilize the alcohol concentration in the blood as required by administrative rule. Therefore, Mr. Olson seeks a new trial.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in admitting the results of a blood alcohol test. (VRP 9/16 21)

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial judge abuse his discretion by using an incorrect legal standard to rule to admit the blood alcohol evidence at trial?
2. Did the State fail to meet the “prima facie” evidentiary standard required to admit blood alcohol test results at trial where relevant scientific treatises established the vials used to collect his blood needed almost two and a half times more enzyme poison to stabilize the alcohol concentration in his blood for testing? Should the term “sufficient in amount” in WAC 448-14-020(3)(b) be interpreted to require the State to prove the amount of enzyme poison placed in the vials was capable of stabilizing the alcohol concentration in the blood through compliance with relevant standards in the field of toxicology?
3. Does the erroneous admission of blood alcohol evidence in a Vehicular Assault trial require reversal of conviction?

## **IV. STATEMENT OF THE CASE**

### **1. Procedural History.**

The State filed a charge of Vehicular Assault against Mr. Olson stemming from the October accident. (CP 1-2) The case proceeded to trial on September 13, 2010. (VRP 9/13)

Mr. Olson presented a motion to suppress the blood alcohol test which was heard during the course of the trial testimony. (CP 3-8; VRP 9/14 159-160; 190) At the close of trial the judge denied the motion, and admitted the results. (VRP 9/16 21)

## **2. Verdict.**

To obtain a conviction for Vehicular Assault, the State must prove a defendant drove a vehicle: (a) in a reckless manner; or (b) while under the influence of intoxicating liquor as set forth in RCW 46.61.502; or (c) with disregard for the safety of others, while causing substantial harm to another. RCW 46.61.522(1). In this case the jury was instructed it could only find Mr. Olson guilty of Vehicular Assault by either: (1) driving under the influence; or (2) driving with disregard for the safety of others. (CP 1265)

The jury returned a guilty verdict. (CP 1275) The jury was not unanimous that Mr. Olson drove with disregard for the safety of others, but was unanimous he drove while under the influence of intoxicating liquor. (CP 1276)

The court instructed the jury it could find Mr. Olson was “under the influence” of alcohol two ways: (1) that the defendant's blood alcohol level was at least 0.08 within two hours after driving;

RCW 46.61.502(1)(a); or (2) that the defendant was under the influence of or affected by intoxicating liquor. (CP 1268); RCW 46.61.502(1)(a)&(b). The jury was not required to be unanimous.

### **3. The Accident.**

A motorcycle traveled southbound on Burlington Blvd as it approached an intersection. (VRP 9/13 25-29) The motorcycle had a green light. (VRP 9/13 26) An SUV, driven by Mr. Olson and traveling northbound, stopped in the turn lane for the same intersection. Olson pulled out and began to turn left in front of the motorcycle, causing the accident. (VRP 9/13 25; 36)

A State Patrol accident investigator reviewed the scene a year later. (VRP 9/15 110) The light cycle for the intersection showed that Mr. Olson and the motorcycle driver could both have green lights simultaneously, but Mr. Olson would have to yield to on-coming traffic. (VRP 9/15 114)

### **4. DUI/Vehicular Assault Investigation.**

Burlington Police Department Officer Todd Schwiesow investigated the accident. (VRP 9/13 45) Officer Schwiesow contacted Mr. Olson and identified him as the driver. (VRP 9/13 48) The officer detected an odor of intoxicants, issues with speech, and

blood shot watery eyes. (VRP 9/13 49) Mr. Olson admitted to drinking. (VRP 9/13 49) The officer asked Mr. Olson to perform sobriety tests. (VRP 9/13 50-55)

At the conclusion of the tests the officer arrested Mr. Olson for DUI/Vehicular Assault and drove him to a local hospital for a blood test. (VRP 9/13 56-58)

#### **5. Blood Test.**

Ruth McDonough, a phlebotomist at the hospital, collected Mr. Olson's blood. (VRP 9/14 111) The officer provided her with two gray topped vials containing a white powder to obtain Mr. Olson's blood. (VRP 9/13 71)

Ms. McDonough's practice is to use Sepp – an alcohol-free disinfectant – to prep a patient's arm for a blood draw. (VRP 9/14 111) Sepp kills surface area bacteria to sterilize where the blood sample will be withdrawn. (VRP 9/14 115) When she performs blood cultures on patients at the hospital, where according to her testimony "it's very important the surface bacteria is gone," she is required to wait 3 to 4 minutes for the Sepp to dry. (VRP 9/14 116-117) Waiting the additional time makes certain any bacteria on the

skin will be eliminated. (VRP 9/14 119) In this case, however, she waited one minute for the Sepp to dry. (VRP 9/14 116)

#### **6. Storage and Transportation of Blood Sample.**

The officer placed the vials into the "slam" (evidence) locker at the police station the same day as the blood draw. (VRP 9/13 74; 79) The vials were not refrigerated. (VRP 9/13 78)

The police department evidence technician confirmed Officer Schwiesow placed the vials in the evidence locker on October 2, 2008. (VRP 9/14 124) She later placed the vials into a refrigerated locker, but could not recall on what day she did this. (VRP 9/14 123; 135) The technician mailed the vials to the State Toxicology lab on October 7, 2008. (VRP 9/14 123)

#### **7. Testing at State Laboratory**

Brianne O'Reilly is a forensic scientist in the Washington State Patrol Toxicology laboratory. (VRP 9/14 140) Ms. O'Reilly started working at the lab in 2005. (VRP 9/14 165)

The toxicology lab received the vials containing Mr. Olson's blood via the United States Postal Service on October 9, 2008. (VRP 9/14 185) The vials were placed into an evidence vault. (VRP 9/14 144) The vault is not refrigerated. (VRP 9/15 66) Ms. O'Reilly

tested the blood for alcohol concentration on October 14, 2010. (VRP 9/14 158) The result was .22 grams of alcohol per 100 milliliters of blood. (Ex. 46; VRP 9/14 160)

Ms. O'Reilly testified that the vials used by law enforcement contain an anticoagulant<sup>1</sup> and an enzyme poison. (VRP 9/14 157) The manufacturer of the vials certifies that 25 mg (milligrams) of enzyme poison is present in each vial. (VRP 9/14 158) Ms. O'Reilly offered her opinion that this was a sufficient amount of enzyme poison to preserve the blood. (VRP 9/14 158) The two vials in Mr. Olson's case contained a total of 13 ml (milliliters) of blood; a minimum of at least 6 ml per vial. (VRP 9/14 177-8)<sup>2</sup>

Ms. O'Reilly agreed that individuals may have a microbial contamination of their blood sample that can artificially create ethanol in the vial. (VRP 9/14 168) The enzyme poison stops bacteria from creating alcohol out of glucose found in the blood. (VRP 9/14 168) Proper sterilization of the site of the blood draw is necessary to prevent contamination from the skin. (VRP 9/15 26-27) It is possible that a blood sample not containing sufficient

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<sup>1</sup> The sufficiency of anti-coagulant in the vials is not at issue in this appeal.

<sup>2</sup> This converts to a little over 4 mg of enzyme poison per 1 ml of blood in each vial.

enzyme poison can create ethanol based upon factors such as the temperature of the blood sample and the duration of time it is kept at that temperature. (VRP 9/14 169-171)

Ms. O'Reilly was presented with several scientific treatises addressing standards for preserving blood with an enzyme poison. Ms. O'Reilly agreed that these treatises are located in the toxicology lab.

The first was Garriott's Medical-Legal Aspects of Alcohol (4<sup>th</sup> Ed.). (CP 54-66<sup>3</sup>; VRP 9/14 172; VRP 9/15 5) The State Toxicology Laboratory issued a Training Manual in 2007 listing "Reading Assignments" for forensic toxicologists. (CP 123-149<sup>4</sup>; VRP 9/15 8) The manual lists Garriott's as required reading. (VRP 9/15 9-10) Garriott's states the effective amount of enzyme poison needed to preserve a blood sample is 10 mg per 1 ml of blood. (VRP 9/14 180) Ms. O'Reilly admitted she had not reviewed the training manual since receiving it in 2007. (VRP 9/15 70)

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<sup>3</sup> Garriott's was presented to the trial court as an attachment to the pre-trial motion. It was not admitted at trial, but was marked as an exhibit #55.

<sup>4</sup> The training manual was presented to the trial court as an attachment to the pre-trial motion. It was not admitted at trial, but was marked as an exhibit # 57.

The second treatise presented to Ms. O'Reilly was Blood Alcohol Testing in the Clinical Laboratory; Approved Guideline, co-written by Dr. Kurt Dubowski; a prominent researcher in the field of alcohol intoxication. (Ex. 74; CP 172-212; VRP 9/14 176) Ms. O'Reilly considers Dr. Dubowski an expert in the field of blood alcohol testing. (VRP 9/14 188) Dubowski stated that where a blood sample is to be transported or mailed in an un-refrigerated condition, or stored for more than 48 hours in an un-refrigerated state, the amount of enzyme poison needed to preserve blood is 10 mg per 1 ml of blood. (CP 190; VRP 9/14 177; 185-186) Accordingly, each vial of Mr. Olson's blood would need 60 mg of enzyme poison to sufficiently preserve 6 ml of blood; not 25.<sup>5</sup> (VRP 9/14 178)[Emphasis added]

The third treatise presented to Ms. O'Reilly was Principles of Forensic Toxicology by Barry Levine. (CP 283-284<sup>6</sup>; VRP 9/15 6) This treatise was also listed as required reading in the 2007 laboratory training manual. (VRP 9/15 9) Levine's treatise was recommended reading for her master's degree. (VRP 9/15 10-12)

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<sup>5</sup> As stated earlier, each vial contained approximately 6 ml of blood.

<sup>6</sup> Levine was presented to the trial court as an attachment to the pre-trial motion. It was not admitted at trial, but was marked as an exhibit # 56.

This treatise stated the amount of enzyme poison needed to prevent "micro-organism activity" in a blood sample is 10 mgr per 1 ml of blood. (VRP 9/15 7)

Ms. O'Reilly stated she was skeptical of the 10 mg standard found in these treatises based upon an e-mail she read from Dr. Dubowski. (VRP 9/14 188-189; VRP 9/15 13) A colleague at the lab wrote Dr. Dubowski asking if 1.5 mg per 1 ml of enzyme poison was sufficient to preserve a blood sample. (VRP 9/15 15) The e-mail read:

"Dr. Dubowski, I was at the May 21<sup>st</sup>, 2006, Borkenstein alcohol course where you spoke. My co-workers have notes from a previous session you spoke at concerning blood alcohol testing. I wanted to confirm something you said there. In one slide you said that for living subjects 1.5 milligrams per milliliter of sodium fluoride was sufficient for preservation of blood, and that for post-mortem it should be 10 milligrams per milliliter. Is this correct?" (VRP 9/15 15)

Dr. Dubowski's response was, "Yes. That's correct." (VRP 9/15 22) Accordingly Ms. O'Reilly did not believe 10 mg per 1 ml was the appropriate standard. (VRP 9/15 13)

She conceded, however, that the e-mail did not address whether the blood sample was un-refrigerated or tested more than 48 hours after the blood was withdrawn. (VRP 9/15 16-20) She

admitted she would have included this information in the e-mail had she written to Dr. Dubowski. (VRP 9/15 18) She also agreed that Dubowski's treatise states that 1.5 mg per 1 ml is stated as an appropriate standard where the blood sample is refrigerated or tested within 48 hours. (VRP 9/15 16) Otherwise, Dr. Dubowski recommends 10 mg per 1 ml be used. (VRP 9/15 16-17) Therefore, except for the omission of "less than ideal" circumstances for storage of the blood, the e-mail was not inconsistent with Dr. Dubowski's treatise. (VRP 9/15 17-18; 20) In fact, she conceded she did not really know what he meant by his response to the e-mail. (VRP 9/15 23)

Ms. O'Reilly was presented with a peer-reviewed article titled "The Collection and Handling of the Blood Alcohol Specimen" published in The American Journal of Clinical Pathology. (CP 214-219<sup>7</sup>; VRP 9/15 25-26) The author concluded that 10 mg per 1 ml of enzyme poison was needed to preserve blood and prevent fermentation of alcohol. (VRP 9/15 25-26)

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<sup>7</sup> This document was presented to the trial court as an attachment to the pre-trial motion. It was not admitted at trial, but was marked as an exhibit # 62.

Ms. O'Reilly responded by saying there was "quite some debate" in the scientific community regarding the amount of enzyme poison needed to preserve a blood sample. (VRP 9/15 61) She referred to a study by researchers Wineck and Paul, who she considered to be a reputable source, and are cited in the Dubowski treatise. (VRP 9/15 63) Wineck and Paul wrote that analyses of blood obtained under sterile conditions can be delayed as long as 14 days without significant change in alcohol content without regard to refrigeration or the use of a preservative. (VRP 9/15 62-63) In her opinion, based on this study, using less than the 10 mg per 1 ml standard can be sufficient. (VRP 9/15 67)

Defense counsel questioned Ms. O'Reilly on the Wineck and Paul study. (VRP 9/15 71) She agreed that the study presumed a sterile blood draw, and that Dubowski criticized Wineck and Paul for their reliance on this presumption. (VRP 9/15 72) Dubowski's criticism concluded by advising that where a blood sample is to be transported or mailed in an un-refrigerated condition, or stored for more than 48 hours the sample should be preserved with an enzyme poison in a concentration of 10 mg per ml. (VRP 9/15 73) Ms. O'Reilly even conceded she mis-read the results of the study in

that it failed to identify the amount of alcohol increase in each of the blood samples tested without a preservative. (VRP 9/15 78)

Ms. O'Reilly was presented with another study that was cited in the Dubowski treatise, written by Bloom and Lakatua. (CP 168-170<sup>8</sup>; VRP 9/15 79) They recommended using the 10 mg per 1 ml standard. (VRP 9/15 80)

Defense counsel pointed out that the blood in this case was tested 168 hours after it was withdrawn from Mr. Olson.<sup>9</sup> (VRP 9/15 81) It was refrigerated for an unknown period of this time prior to being mailed to the lab, and Ms. O'Reilly had no knowledge as to the condition of the blood when it arrived at the lab. (VRP 9/15 82) Despite all the information presented to Ms. O'Reilly, she maintained her belief the amount of enzyme preservative was sufficient. (VRP 9/15 108)

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<sup>8</sup> This document was presented to the trial court as an attachment to the pre-trial motion.

<sup>9</sup> This is actually *not* true. The testing of the blood occurred 12 days after the blood was withdrawn. This equates to 288 hours.

## **8. Admission of Blood Alcohol Evidence.**

At the conclusion of testimony the trial judge ruled that the State had met foundational requirements to admit the blood test.

He stated orally from the bench:

“The Court has read and re-read and is very mindful of WAC 448-14-010, 020, and 030. The Court believes, based on the record, that there is – that a reasonable jury, or a reasonable finder of fact, based on the testimony of Ms. O’Reilly, that there was sufficient enzyme – anticoagulant and enzyme poison present to prevent clotting and stabilize the alcohol concentration; that there was sodium fluoride, in fact. And that the procedure has the capability of precision and accuracy, and specificity and that appropriate procedure under 020 was found – was given. Protocol was followed. I agree that the defense has a lot to argue about, but that the State has made a prima facie case.” (VRP 9/16 21)

The test results were therefore admitted. Upon conviction Mr. Olson filed this appeal. (CP 1293)

## **V. ARGUMENT**

### **1. Did the trial judge abuse his discretion by using an incorrect legal standard to rule to admit the blood alcohol evidence at trial?**

A trial court abuses its discretion when its decision is manifestly unreasonable or is based upon untenable grounds or

reasons. State v. McEnry, 124 Wn. App. 918, 924, 103 P.3d 857 (2004). An abuse of discretion occurs where the court bases its decision on an incorrect legal standard. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

**A. Prima Facie Standard.**

In order to properly admit blood alcohol evidence at trial the State must present prima facie evidence of compliance with administrative rules written by the state toxicologist (WAC 448-14). State v. Brown, 145 Wn. App. 62, 69, 184 P.3d 1284 (2008); State v. Wilbur-Bobb, 134 Wn. App. 627, 630, 141 P.3d 665 (2006); State v. Hultenschmidt, 125 Wn. App. 259, 263, 102 P.3d 192 (2005); State v. Bosio, 107 Wn. App. 462, 466-467, 27 P.3d 636 (2001); and State v. Garrett, 80 Wn. App. 651, 653, 910 P.2d 552 (1996).

“Prima facie” is an evidentiary burden of production. State v. Aten, 130 Wn.2d 640, 656, 927 P.2d 210 (1996). The State has the burden to prove compliance with the administrative regulations. State v. Brown, 145 Wn. App. at 69-70. According to the legislature,

“prima facie evidence” is evidence of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved. In assessing whether there is sufficient evidence of the foundational facts, the court or administrative

tribunal is to assume the truth of the prosecution's or department's evidence and all reasonable inferences from it in a light most favorable to the prosecution or department. RCW 46.61.506(4)(b).

**B. Incorrect Standard Used By Trial Court.**

The trial judge's oral decision did not apply this standard.

Instead, the judge stated;

The Court believes, based on the record, that there is – that a reasonable jury, or a reasonable finder of fact, based on the testimony of Ms. O'Reilly, that there was sufficient enzyme – anticoagulant and enzyme poison present to prevent clotting and stabilize the alcohol concentration; that there was sodium fluoride, in fact. (VRP 9/16 21) [Emphasis added]

The prima facie standard requires the trial judge to determine whether sufficient evidence has been presented for him or her to rule on the admissibility of evidence. The standard does not permit the judge to view the evidence from the perspective of a "reasonable jury." The "reasonable jury" language typically is used to address sufficiency of evidence claims challenging a conviction. There, courts must speculate how convincing evidence may have been upon the minds of others:

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of

fact could have found guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd 95 Wn.2d 385, 622 P.2d 1240 (1980). From State v. Salinas, 119 Wn.2d 192, 210, 829 P.2d 1068 (1992). [Emphasis added.]

It may certainly be possible a jury could find that, based on Ms. O'Reilly's assertion alone, there was enzyme poison in the vial sufficient in amount to stabilize the blood alcohol concentration. But this isn't the standard. The standard isn't whether it is possible another person or group of people could find that the standard was met; the standard is whether the trial judge finds that the standard was met.

**C. Error Not Harmless; Can Be Reviewed By This Court.**

Application of the wrong standard by the trial judge in this case is not harmless. Here, the practical effect was that the judge drastically watered down the standard for admissibility resulting in admission of the evidence. Courts use a non-constitutional

harmless error standard to review the erroneous admission of evidence. State v. Myers, 49 Wn. App. 243, 249, 742 P.2d 180 (1987). The error is harmless, if, within reasonable probabilities, the outcome of the trial would have been different had the error not occurred. Myers, supra. The erroneous admission of blood alcohol evidence in a DUI/Vehicular Assault is not harmless. See State v. Watson, 51 Wn. App. 947, 952, 756 P.2d 177 (1988) (This court has no way of knowing whether the jury convicted Mr. Watson solely on the basis of the test results or on the other evidence indicating he was under the influence of alcohol.)

In reviewing trial court errors of law pertaining to admission of evidence, the appellate court may review the record to determine whether it is sufficient for the court's independent review under the correct standard. See State v. Donald, 68 Wn. App. 543, 547, 844 P.2d 447 (1993) (If the trial court fails to articulate balancing process on the record (under ER 404(b)), appellate court will review the matter only if the record as a whole is sufficient to allow effective appellate review.); State v. Avila, 78 Wn. App. 731, 735, 899 P.2d 11 (1995) (Record sufficient for court to conduct independent review whether trial court should admit testimony

under child competency rule.); and State v. Bond, 52 Wn. App. 326, 333, 759 P.2d 1220 (1988) (Trial court's failure to state balance test under ER 609 on the record does not impede effective appellate review.)

For the reasons that will be articulated below, the record in this case is sufficient for effective appellate review under the standard whether the State presented prima facie evidence to admit blood alcohol evidence. Furthermore, the record shows the State failed to meet this standard. Therefore, the appropriate remedy is to reverse the conviction and remand for new trial.

- 2. Did the State fail to meet the “prima facie” evidentiary standard required to admit blood alcohol test results at trial where relevant scientific treatises established the vials used to collect his blood needed almost two and a half times more enzyme poison to stabilize the alcohol concentration in his blood for testing? Should the term “sufficient in amount” in WAC 448-14-020(3)(b) be interpreted to require the State to prove the amount of enzyme poison placed in the vials was capable of stabilizing the alcohol concentration in the blood through compliance with relevant standards in the field of toxicology?**

A trial court's ruling on the admission of a blood alcohol test result is reviewed for abuse of discretion. State v. Brown, 145 Wn.

App. 62, 69, 184 P.3d 1284 (2008). A defendant challenging the admission of test results bears the burden of showing an abuse of discretion. Brown, 145 Wn. App. at 69. The trial court abuses its discretion when it admits evidence of a blood test result in the face of insufficient prima facie evidence. Brown, at 69.

**A. Rule Of Strict Compliance For Admissibility.**

The State Toxicologist is required to approve methods for obtaining blood alcohol evidence to be used to prove alcohol intoxication under RCW 46.61.502. See RCW 46.61.506(3)<sup>10</sup>. These rules are found in the Washington Administrative Code. See WAC 448-14.

The State must present prima facie evidence, found through compliance with the WAC, that the test chemicals and blood sample are free from adulteration which could conceivably introduce error. Brown, at 69-70. At issue in this appeal is the

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<sup>10</sup> RCW 46.61.506(3). Analysis of the person's blood or breath to be considered valid under the provisions of this section or RCW 46.61.502 or 46.61.504 shall have been performed according to methods approved by the state toxicologist and by an individual possessing a valid permit issued by the state toxicologist for this purpose. The state toxicologist is directed to approve satisfactory techniques or methods, to supervise the examination of individuals to ascertain their qualifications and competence to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the state toxicologist.

State's compliance with WAC 448-14-020(3)(b). At the time of trial, this rule stated;

Blood samples for alcohol analysis shall be preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration. Suitable preservatives and anticoagulants include the combination of sodium fluoride and potassium oxalate.<sup>11</sup> [Emphasis added]

Strict compliance with this rule is mandatory. State v. Garrett, 80 Wn. App. 651, 653-654, 910 P.2d 552 (1996).

The well recognized rule in Washington State is that a blood alcohol test is admissible to show intoxication under RCW 46.61.502 only when it is performed according to Washington Administrative Code (WAC) requirements. See State v. Brown, at 70; State v. Wilbur-Bobb, 134 Wn. at 627; State v. Reier, 127 Wn. App. 753, 756, 112 P.3d 655 (2005); State v. Hultenschmidt, 125 Wn. App. at 265; State v. Bosio, 107 Wn. App. at 466. If the testing method meets the requirements of the WAC regulations, "there is sufficient assurance of accuracy and reliability of test results to

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<sup>11</sup> Effective 12/31/10, the State Toxicologist changed the word "shall" to "must." WSR 10-24-067.

allow for general admissibility of test results.” State v. Straka, 116 Wn.2d 859, 870, 810 P.2d 888 (1991).

**B. Conflicting Testimony From Toxicologists.**

Appellate courts have addressed several cases where the issue was whether the State could prove any anticoagulant or enzyme poison was placed in the vials. See, Brown, supra; Wilbur-Bobb, supra; Hultenschmidt, supra; Bosio, supra; Garrett, supra; State v. Clark, 62 Wn. App. 263, 814 P.2d 222 (1991); State v. Steinbrunn, 54 Wn. App. 506, 774 P.2d 55 (1989); and State v. Barefield, 47 Wn. App. 444, 735 P.2d 1339 (1987). No court has addressed the issue whether a sufficient quantity of enzyme poison was contained in the vials.

WAC 448-14-020(3)(b) does not require, however, that the vials contain some amount of enzyme poison. The vials must contain enzyme poison “sufficient in amount to ... stabilize the alcohol concentration.” [Emphasis added] Therefore, prior cases addressing merely the “presence” of enzyme poison in the vial do not establish any standard helpful in addressing the issue in Mr. Olson’s case.

The distinction between the mere presence of enzyme poison in the vial as opposed to an amount sufficient to stabilize the blood is critical. Over the years courts have heard conflicting testimony from toxicologists pertaining to the use of enzyme poison in vials containing human blood. In Brown the toxicologist testified that without the enzyme poison alcohol would disappear from the blood samples. Brown, at 71. In Steinbrunn, the toxicologist testified an un-preserved blood sample would result in a lower blood alcohol level; inferring alcohol would dissipate over time. Steinbrunn, at 508. In Clark<sup>12</sup>, the toxicologist testified the blood alcohol concentration would remain unchanged for 30 days. Clark, at 265-266. And in Wilbur-Bobb, the toxicologist testified the enzyme poison prevents the alcohol level in the blood sample from decreasing or increasing. Wilbur-Bobb, at 630.

In the present case, Ms. O'Reilly testified that ethanol can be created from the glucose found in the blood and increase the blood alcohol level. (VRP 9/14 168-171) Therefore, the presence of

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<sup>12</sup> The trial court in Clark found that due to the testimony of the toxicologist the sufficient amount of enzyme poison necessary to comply with WAC 448-14-020 would be "zero." At 266.

sufficient enzyme poison in the vial is necessary to stabilize the blood to prevent this from occurring. (Id.)

**C. Statutory Construction.**

To address the issue of compliance with WAC 448-14-020(3)(b), this Court must first determine what the term “sufficient in amount” means. The trial judge did not expressly address this issue, although it may be inferred the judge found Ms. O’Reilly’s testimony sufficient.

Issues of statutory construction are reviewed de novo. State v. Wentz, 149 Wn.2d 342, 346, 68 P.3d 282 (2003). ‘[R]ules of statutory construction apply to administrative rules and regulations, particularly where ... they are adopted pursuant to express legislative authority.’ ” City of Kent v. Beigh, 145 Wn.2d 33, 45, 32 P.3d 258 (2002). If an administrative rule or regulation is clear on its face, its meaning is to be derived from the plain language of the provision alone. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1020 (2001). Interpretations that give meaning and effect to every word are favored over those that render parts of the statute redundant or superfluous. Parents Involved in Cmty. Sch. v. Seattle School Dist. No. 1, 149 Wn.2d 660, 685, 72 P.3d 151 (2003). A statute should, if

possible, be so construed that no clause, sentence or word shall be superfluous, void, or insignificant. Groves v. Meyers, 35 Wn.2d 403, 407, 213 P.2d 483 (1950).

**D. Interpretation of Technical Terms.**

Any interpretation of a regulation pertaining to the admissibility of blood alcohol evidence must bear a direct relationship to the Supreme Court's pronouncement in Straka;

If the testing method meets the requirements of the WAC regulations, "there is sufficient assurance of accuracy and reliability of test results to allow for general admissibility of test results." State v. Straka, 116 Wn.2d 859, 870, 810 P.2d 888 (1991).

The state toxicology laboratory operates within the field of toxicology. The State Toxicologist drafted a rule requiring a sufficient amount of enzyme must be present in the vial. Therefore, the toxicology lab must be held to the standards applicable within the toxicology field. There is no expressed justification from the toxicology lab to depart from this standard.

In the absence of statutory definitions, standard dictionary definitions generally control. State v. Sullivan, 143 Wn.2d 162, 175, 19 P.3d 1012 (2001) ("Judicial process" defined by dictionary.) However, technical language should be given its technical meaning

when used in its technical field. See City of Spokane ex rel. Wastewater Mgmt. v. WA. Dept. of Revenue, 145 Wn.2d 445, 452, 38 P.3d 1010 (2002). Specifically;

Where an otherwise common word is given a distinct meaning in a technical dictionary or other technical reference and has a well-accepted meaning within the industry, and when the word is used in a rule promulgated by an expert agency familiar with the technical meaning, courts should turn to a technical rather than a general purpose dictionary to resolve ambiguities in its definition. Spokane ex rel. Wastewater Mgmt., at 454.

This rule from Spokane ex rel. Wastewater Mgmt was applied by the Supreme Court in City of Seattle v. Clark-Munoz, 152 Wn.2d 39, 45, 93 P.3d 141 (2004)<sup>13</sup>, in a case relating to the word “traceable” found in an administrative rule for breath alcohol testing. The State Toxicologist adopted a rule for breath testing wherein thermometers on the breath test machine had to be “traceable” to standards maintained by the National Institute of Standards and Technology (NIST). Clark-Munoz, at 42. The toxicologist did not define traceability; although he later conceded he knew it was a “term of art.” Clark-Munoz, at 46. The Court

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<sup>13</sup> The holding in Clark-Munoz was reversed by subsequent legislation. This standard for statutory interpretation is still good law.

concluded the term had a specific meaning within the scientific field and held the term must be interpreted according to this definition.

Clark-Munoz, at 47.

If the citizens of the State of Washington are to have any confidence in the breath-testing program, that program has to have some credence in the scientific community as a whole. Clark-Munoz, at 47.

The term “sufficient in amount” may appear to be subject to common interpretation. However, the requirement that the quantity of enzyme poison must have the capacity to “stabilize the alcohol concentration” in the blood means the term must have a scientific, rather than common, meaning. If the mere presence of any amount of enzyme poison had the capacity to stabilize the alcohol concentration, there would be no reason to have the language “sufficient in amount” in the rule. It would be rendered superfluous.

The required interpretation of WAC 448-14-020(3)(b) must be that the State must prove the sufficiency of enzyme poison placed in the vial based upon recognized standards used in the field of toxicology.

**E. Standard From Relevant Treatises.**

The scientific treatises presented at trial establish a recognized standard of enzyme poison for the stabilization of human blood; 10 mg per 1 mL of blood in a vial. The proper definition of “sufficient in amount” derives from the well-accepted meaning of sufficient enzyme poison used within the relevant scientific field; toxicology. See City of Spokane ex rel. Wastewater Mgmt., supra. Ms. O’Reilly testified that Dr. Dubowski is one of the pre-eminent researchers and authors in the field. (VRP9/14 188) He is the co-author of Blood Alcohol Testing in the Clinical Laboratory Approved Guidelines. (VRP 9/14 176) He states that human blood must be preserved with 10 mg of enzyme poison for every 1 ml of blood. (VRP 9/14 177) This is required when the blood is not refrigerated or tested for more than 48 hours. (Id.) This is required also when absolute sterility of the blood draw cannot be assured. (VRP 9/15 72)

This standard has been adopted in a number of treatises. Garriott’s Medical-Legal Aspects of Alcohol is required reading in the State Toxicology training manual. (VRP 9/15 8) It requires 10 mg of enzyme poison per 1 ml of blood. (VRP 9/14 180) Levine’s

Principles of Forensic Toxicology also required reading in the laboratory, requires 10 mg per 1 ml. (VRP 9/15 7) The American Journal of Clinical Pathology requires 10 mg per 1 ml. (VRP 9/15 25-26) Respected researchers Bloom and Lakatua require 10 mg per 1 ml. (VRP 9/15 80) The Dubowski standard, contained in multiple treatises and peer reviewed articles, is located in the State laboratory. It is required reading in the lab Training Manual. It is found in the required reading for Ms. O'Reilly's master's degree. This standard is found within the collective knowledge of the State Toxicology Laboratory.

The State Toxicologist drafted WAC 448-14-020(3)(b), but omitted any reference to a specific amount of enzyme poison must be present in the vial. Therefore, this case is identical to Clark-Munoz, in that a scientific term is used but not defined. It is appropriate for this Court to review the scientific materials presented and conclude that a standard exists in the field of forensic toxicology for the determination of an amount of enzyme poison sufficient to stabilize human blood; 10 mg per 1 mL of blood collected in a vial.

**F. State's Prima Facie Case.**

The State must present “prima facie” evidence showing compliance with the WAC requirements. Brown, at 69. In Brown, supra, the Court applied a definition for “prima facie” found in RCW 46.61.506(4)(b), which defines “prima facie” as;

“... evidence of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved. In assessing whether there is sufficient evidence of the foundational facts, the court or administrative tribunal is to assume the truth of the prosecution's or department's evidence and all reasonable inferences from it in a light most favorable to the prosecution or department.” RCW 46.61.506(4)(b).

The State, however, does not possess a monopoly over the term “prima facie.” “Prima facie” is an evidentiary burden of production. State v. Aten, 130 Wn.2d 640, 656, 927 P.2d 210 (1996). It is the identical burden used in the context of corpus delicti. There, the State must present independent “prima facie” evidence to show that a criminal act was committed before a defendant's confession or admission to the criminal act will be admitted at trial. State v. Aten, 130 Wn.2d at 655 (2006). “Prima facie” means evidence of sufficient circumstances which would support a logical and reasonable inference of the facts sought to be

proved. Aten, at 656. In determining whether the prima facie standard has been met, courts must assume the truth of the State's evidence and all reasonable inferences from it in a light most favorable to the State. State v. Aten, at 658. The prima facie standard is therefore commonly defined and can be commonly applied to blood alcohol cases.

Most importantly, Aten holds that the State fails to meet the prima facie threshold where its evidence leads to logical and reasonable inferences of both a criminal act and innocence. Aten, at 660. To satisfy prima facie, the evidence “must be consistent with guilt and inconsistent with an hypothesis of innocence.” Aten, at 660. Evidence that simply fails to rule out criminality or innocence does not reasonably or logically support an inference of either. Aten, at 659. Therefore, in the context of a blood alcohol case, the State meets the “prima face” standard when its evidence pertaining to a WAC requirement leads to a logical and reasonable inference the WAC requirement has been satisfied. But, the State likewise fails to meet the prima facie standard where the evidence fails to rule out a logical and reasonable inference of non-compliance.

In Mr. Olson's case the State presented the testimony of toxicologist Brianne O'Reilly to testify that the vials contained sufficient enzyme poison. In its initial offer of proof, Ms. O'Reilly relied upon a letter submitted by the manufacturer stating the vial contained an average of 25 mg of enzyme poison. (VRP 9/14 158) She offered her opinion this amount was sufficient to stabilize the blood in the vials. (VRP 9/14 158)<sup>14</sup>

Defense counsel presented Ms. O'Reilly with four scientific treatises; all stating the standard for stabilizing a blood sample is 10 mg of enzyme poison per 1 ml of blood. (VRP 9/14 172 – Garriott's Medical-Legal Aspects of Alcohol; VRP 9/14 176 – Blood Alcohol Testing in the Clinical Laboratory Approved Guidelines; VRP 9/15 6 – Principles of Forensic Toxicology; and VRP 9/15 25 – The American Journal of Clinical Pathology.) For Mr. Olson's case, each vial contained approximately 6 ml of blood, meaning each vial needed 60 mg of enzyme poison for proper stabilization. (VRP 9/14 178)

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<sup>14</sup> When asked if this was a sufficient amount of enzyme poison, her response was, "In my opinion, yes." (VRP 9/14 158)

The treatises presented to Ms. O'Reilly are relevant in the field of toxicology. Garriott's, for example, was listed as required reading in the toxicology laboratory's training manual. (VRP 9/15 9-10) Ms. O'Reilly did not read this. (VRP 9/15 70) Blood Alcohol Testing in the Clinical Laboratory Approved Guidelines was written in part by Dr. Kurt Dubowski; a person Ms. O'Reilly held in high regard. (VRP 9/14 188) Principles of Forensic Toxicology was required reading for Ms. O'Reilly to obtain her master's degree. (VRP 9/15 11)

The 10 mg to 1 ml standard was further explained by Dubowski. This standard must be used where the blood samples are transported or mailed un-refrigerated, or stored for more than 48 hours un-refrigerated. (Ex. 74; CP 190; VRP 9/14 177) The evidence in the case shows that the vials were initially kept in an un-refrigerated state after the blood was obtained from Mr. Olson and placed into the evidence locker at the police station. The vials were placed in a refrigerator at an unknown date for an unknown period of time. The vials were then mailed, un-refrigerated, to the toxicology laboratory where they were stored for a week un-

refrigerated. The evidence clearly showed the need for the 10 mg to 1 ml standard was present in this case according to Dubowski.

Ms. O'Reilly offered criticisms of the treatises, but ended up retracting her criticisms in each instance. First, she claimed Dr. Dubowski modified the 10 mg to 1 ml standard in an e-mail written to a co-worker in 2006. (VRP 9/15 15) However, she admitted the e-mail was not clear and omitted critical information. (VRP 9/15 16-20) She ultimately conceded she did not know what Dr. Dubowski meant by his e-mail response. (VRP 9/15 23)

Second, she claimed a study by researchers, found in Dubowski's treatise, supported a conclusion blood obtained under sterile conditions could be kept stable with no enzyme poison for up to 14 days. (VRP 9/15 61) However, she admitted that Dubowski criticized the findings, and ultimately conceded she mis-understood the results of the study. (VRP 9/15 78)

Despite this, Ms. O'Reilly maintained her belief the amount of enzyme poison in the vials was sufficient, and concluded there was "quite some debate" in the scientific community regarding the amount of enzyme poison needed to preserve a blood sample.

(VRP 9/15 61) Yet neither in cross examination nor re-direct examination did she elaborate on this "debate."

The inability to support the use of 25 mg as a proper standard, while problematic for the State, is not surprising. For over 20 years state toxicologists have provided conflicting testimony concerning the effects of inadequate enzyme poison on a blood sample. See Brown; Steinbrunn; Clark; and Wilbur-Bobb. The lack of enzyme poison may cause the alcohol concentration to either increase or decrease; or remain un-changed. Due to these inconsistencies, it is impossible to establish a prima facie case based upon the unsubstantiated word of the toxicologist; particularly when scientific evidence is presented clearly expressing a higher standard.

The State's offer of proof failed to meet the prima facie standard for two reasons. First, the State failed to present any evidence that would support a finding that 25 mg of enzyme poison was sufficient to stabilize 6 ml of blood.<sup>15</sup> Second, the evidence presented could not lead to a logical and reasonable inference that 10 mg per 1 ml was not required based on the scientific literature.

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<sup>15</sup> Essentially, a 4 mg per 1 ml ratio.

The State's evidence consisted of Ms. O'Reilly's testimony that the vials each contained approximately 25 mg of enzyme poison. She offered her opinion that this amount was sufficient. However, unlike State v. Clark, supra, she did not re-test the blood samples at a later date to check for any alteration of the blood alcohol level. See Clark, 62 Wn. App. at 271, fn. 6.<sup>16</sup> No independent evidence was offered to corroborate her opinion.

Furthermore, Ms. O'Reilly's opinion is irrelevant where the State fails to present evidence of WAC compliance. In State v. Watson, supra, the State could not establish that a calibration check of the breath test machine had been performed within 90 days of Watson's test; a violation of a WAC requirement. Watson, 51 Wn. App. at 948. Instead, the State's witness testified the machine was checked nine days later and found to be in working order leading the witness to offer his opinion the machine was working properly during Watson's test. Watson, at 948. The Court rejected this "alternative" method for meeting the WAC

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<sup>16</sup> The Court wrote it affirmed the trial court ruling to admit test results based on evidence the vial manufacture states the amount of enzyme poison it places into the vials as well as the fact the blood test results, taken 18 months apart, did not change.

requirement, stating the opinion evidence amounted to reliability evidence related to the machine's performance, but failed to address the WAC requirements for admitting the test results. See Watson, at 950-951.

The State's evidence amounted to nothing more than a bare opinion that a certain amount of enzyme poison was in the vials, but no evidence was presented to support a finding this amount of enzyme poison was "sufficient in amount" to stabilize the alcohol. To meet the prima facie standard, the evidence must lead to a logical and reasonable inference the WAC requirement has been satisfied. Mr. Olson presented un-refuted evidence that the vials needed almost two and a half times the enzyme poison (60 as opposed to 25 mg). This evidence came from scientific treatises found in the state toxicology laboratory. Ms. O'Reilly herself testified there was "debate" in the scientific community regarding the sufficient quantity of enzyme poison needed. (VRP 9/15 61) While this debate appears to be one sided in favor of the 10 mg to 1 ml ratio, even the existence of a "debate" does not save the State. Per Aten, supra, where the evidence leads to a logical and reasonable inference of both compliance and non-compliance with

the WAC, the WAC requirement is not met. Aten, at 660. This is entirely consistent with the decision in Aten, where the Court found the independent evidence, based on a physician's autopsy, could not distinguish the cause of the victim's death as either SIDS or suffocation. Aten, 130 Wn.2d at 659. The Court rejected the analysis of the dissenting opinion from the Court of Appeals, which held that the evidence need only establish the inference of criminality (or compliance) among the many potential conclusions. See Aten, at 659. The Supreme Court was clear that prima facie is met only when the evidence has proven the non-existence of any reasonable hypothesis of innocence. Aten, at 660. Placed in the context of Mr. Olson's case, prima facie is not met when the State fails to present competent evidence to refute that the 10 mg to 1 ml enzyme poison standard is required to stabilize the blood.

The State apparently purchases vials containing 25 mg of enzyme poison. The State is not without options to ensure its compliance with the 10 mg to 1 ml standard to stabilize a blood sample. The State can advise its witnesses to fill the vials with only 2.5 ml of blood. This will meet the standard and allow admission of the test results in a subsequent trial.

For these reasons, the trial court erred in finding the State presented prima facie evidence of compliance with WAC 448-14-020(3)(b).

**3. Does the erroneous admission of blood alcohol evidence in a Vehicular Assault trial require reversal of conviction?**

Error in admitting evidence that does not result in prejudice to the defendant is not grounds for reversal. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Courts apply the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. Bourgeois, at 403. The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. Bourgeois, at 403.

This issue is controlled by State v. Watson. See State v. Watson, 51 Wn. App. 947, 756 P.2d 177 (1988). Watson was convicted of Driving Under the Influence and a breath test result was used to support the conviction. Watson, at 948. The Court of Appeals ruled the trial court erred in admitting the test results. Watson, at 951. The error was not harmless, because the jury was

instructed it could convict Watson if his BAC was over .10 or if he was under the influence of alcohol. Watson, at 952. Due to the wording of this instruction, it was impossible to determine whether the jury convicted Watson based solely on the improperly admitted evidence. Watson, at 952. Therefore, he established prejudice and the case was remanded for new trial.

In Mr. Olson's case, the jury convicted him of Vehicular Assault under the "DUI" prong. RCW 46.61.522(1)(b). The jury was instructed;

A person is under the influence or affected by the use of intoxicating liquor when he or she has sufficient alcohol in his or her body to have an alcohol concentration of 0.08 or higher within two hours of driving as shown by an accurate and reliable analysis of the person's blood or the person's ability to drive a motor vehicle is lessened in any appreciable degree as a result of intoxicating liquor. (CP 1268)[Emphasis added]

The jurors were not instructed they had to be unanimous whether they relied on the blood test results or other evidence of intoxication to find Mr. Olson guilty. As in Watson, it is impossible to determine whether the jury relied solely on the blood test results to convict Mr. Olson. This constitutes prejudicial error that is not

harmless. Therefore, this conviction must be reversed and the case remanded for new trial.<sup>17</sup>

## **VI. CONCLUSION**

The State is required to establish a sufficient amount of enzyme poison was in the vials to stabilize the alcohol concentration. It is not enough to merely prove enzyme poison is present in the vials; the State must meet stabilization requirements recognized in the field of toxicology. Evidence presented at trial established the State fell far short of this standard. No evidence was presented by the State to establish the amount of enzyme poison present in the vial could be sufficient to stabilize the alcohol concentration in the blood.

The trial judge abused his discretion by using the incorrect legal standard to address this issue. The State failed to present prima facie evidence meeting the requirement of WAC 448-14-020(3)(b). It was error to admit the test results. This conviction for Vehicular Assault must be reversed, and the case remanded for new trial.

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<sup>17</sup> Without analysis, the Courts in State v. Bosio, supra, and State v. Hultenschmidt, supra, held the remedy for erroneous admission of blood alcohol evidence was reversal of the trial court convictions and remand for new trial.

RESPECTFULLY SUBMITTED this 20 day of July, 2011.



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

**STATE OF WASHINGTON,**  
  
**Respondent,**  
  
**vs.**  
  
**DAVID OLSON,**  
  
**Appellant.**

**NO. 66201-5-I**

**DECLARATION OF SERVICE**

I certify that on the 20<sup>th</sup> day of July, 2011, I caused the following documents to be served on the Court of Appeals and below parties in the manner indicated below:

- 1. APPELLANT'S OPENING BRIEF
- 2. NOTICE OF ASSOCIATION OF COUNSEL

**Clerk of the Court of Appeals:**  
(Original of documents filed)

Name: Court of Appeals, Div. I  U.S. Mail (Postage Pre-Paid)  
 Delivery Service  
Address: One Union Square  In-person Delivery  
600 University Street  Facsimile  
Seattle, WA 98101-4170

1  
2 **Counsel for Respondent:**

(Copy of documents filed)

3 Name: Skagit County Prosecuting Atty  U.S. Mail (Postage Pre-Paid)  
4 Attorney at Law  Delivery Service  
5  In-Person Delivery

6 Address: 605 Third Street  
7 Courthouse Annex  
8 Mount Vernon, WA 98273

9 **I swear under penalty of perjury under the laws of the State of**  
10 **Washington the foregoing is true and correct.**

11 Signed in Seattle, WA the 20 day of July, 2011.

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14 Ryan B. Robertson, WSBA #28245  
15 Attorney for Mr. Olson  
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