No. _____

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In The

SUPREME COURT of the UNITED STATES

October Term, 2020

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BRIAN SMITH,

*Petitioner*,

vs.

THE STATE OF WASHINGTON,

*Respondent*.

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On Petition for a Writ of Certiorari
to the Supreme Court of the State of Washington

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**APPENDIX TO**
**PETITION FOR WRIT OF CERTIORARI**
**pp. 1a-199a**

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**APPENDIX**

# APPENDIX A

# THE SUPREME COURT OF WASHINGTON

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>BRIAN J. SMITH,<br><br>Petitioner. | ) | No. 96847-1<br><br>**O R D E R**<br><br>Court of Appeals<br>No. 76340-7-I |

Department I of the Court, composed of Chief Justice Stephens and Justices Johnson, Owens, González, and Yu, considered at its March 3, 2020, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is denied. Review of the issues raised in the State's cross-petition is also denied.

DATED at Olympia, Washington, this 4th day of March, 2020.

For the Court

CHIEF JUSTICE

# APPENDIX B

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

| | | |
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| STATE OF WASHINGTON, Respondent, v. BRIAN J. SMITH, Appellant. | ) | DIVISION ONE |
| | ) | No. 76340-7-I |
| | ) | UNPUBLISHED OPINION |
| | ) | FILED: December 3, 2018 |

DWYER, J. — Brian Smith appeals from a jury's verdict finding him guilty of vehicular homicide and obstructing a law enforcement officer. He asserts that the trial court erred by admitting evidence obtained from a blood draw, that his lawyers provided constitutionally ineffective representation, and that he was harmed when the jury was provided constitutionally deficient instructions on superseding causes. None of his contentions merit appellate relief. We affirm.

I

While driving home on the evening of December 5, 2014, Smith attempted to turn left off of a state highway and collided with Jason Schuylman's motorcycle as it was driving in the opposite direction. The impact from the collision threw Schuylman onto the hood of Smith's SUV. His head struck the windshield. Schuylman was transported to the hospital, where he subsequently died from his injuries. Because Smith's appeal primarily asserts error in the trial court's pretrial

rulings, the facts set forth herein are those established through testimony during those hearings unless explicitly stated otherwise.

Washington State Patrol Trooper Brad Beattie arrived at the collision scene after some of the medical personnel had left to transport Schuylman to the hospital. Other paramedics had begun attending to Smith. Beattie approached Smith and, noticing signs that Smith may have been intoxicated, asked him to perform field sobriety tests. Smith's performance on the tests led Beattie to request that Smith undergo a portable breath test, on which Smith's breath sample read .145. Beattie arrested Smith.

Beattie read Smith his Miranda[1] warnings, handcuffed him, and placed him in the back of his patrol car. Following the warnings, Smith immediately asked when he would be able to speak with an attorney. Beattie informed Smith that he could not put him in contact with an attorney at the scene, that he could do so once they arrived at the jail, and that he would not ask Smith any questions before putting him in contact with an attorney.[2]

Beattie waited approximately half an hour for another trooper to arrive at the scene before leaving with Smith.[3] While waiting, Beattie kept Smith handcuffed in the patrol car, without access to a telephone. Before departing,

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[1] Miranda v. Arizona, 384 U.S. 436, 88 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[2] Beattie testified during pretrial hearings that his standard procedure for providing access to an attorney was to allow access at the jail because he lacked the resources necessary to provide access in the field.

[3] Beattie testified at pretrial hearings that while other police officers were at the scene of the collision when he arrested Smith, he was the only officer at the scene from the Washington State Patrol. He further explained that the other officers were members of the Everson Police Department and were not trained to investigate the type of collision that had occurred. Thus, he was instructed via dispatch to wait at the scene until another trooper arrived to take over supervising the scene.

Beattie learned that Schuylman's injuries were serious and that he was being taken into surgery.

Given that Beattie was concerned that the collision might result in a felony charge and that it was department policy to obtain a blood sample in felony cases involving intoxicated driving, Beattie drove Smith to a hospital rather than to the jail. After arriving at the hospital, Beattie obtained a search warrant for Smith's blood. Beattie did not provide Smith with access to an attorney while he was obtaining the warrant because he did not plan to ask Smith any questions and because he was focused on ensuring that he could obtain a blood sample before the alcohol in Smith's blood dissipated.[4]

When Smith was informed that he would undergo a blood draw he stated that he would not allow it. Beattie explained to Smith that he had a search warrant for Smith's blood and tried to give the warrant to Smith to review. Smith said that he did not want to see it. Without prompting, Smith stated that blood draws were against his religion, that he was afraid of needles, and that if they tried to draw his blood he would not allow it. At this time, Beattie uncuffed Smith and allowed him to use the restroom, but did not provide him access to a telephone in order to call an attorney.

Concerned that Smith would physically struggle to prevent the blood draw, hospital staff and Beattie moved Smith to a padded room containing a bed with restraints attached to it. After entering the room, Beattie told Smith to get on the

[4] Beattie testified at pretrial hearings that the Washington State Patrol generally tries to obtain a blood sample within two hours of a collision and that over an hour had already passed between Smith's arrest and Beattie and Smith arriving at the hospital.

bed but Smith refused and physically resisted attempts to force him onto the bed and into the restraints. Only after Beattie placed his stun gun on Smith's chest and threatened to use it if he did not get on the bed did Smith comply and allow himself to be restrained.

When the phlebotomist attempted to draw blood, Smith again physically resisted. Even when hospital security officers and troopers attempted to hold Smith down, he tensed up, flailed, and kicked as much as the restraints would allow. Concerned that the needle might break off or stab someone because of Smith's resistance, the phlebotomist concluded that she was not comfortable continuing to try to draw his blood.

After a short break, during which the phlebotomist and Beattie discussed potential next steps with a hospital doctor, Dr. Oleg Ravitsky, it was decided that they would make another attempt. Immediately prior to this attempt, Beattie read Smith the special evidence warnings, including a statement that Smith had the right to seek additional independent testing of his blood. The second attempt, however, proved as futile as the first due to Smith's continued resistance. Again, the phlebotomist decided that she was uncomfortable continuing.

After the second attempt, the phlebotomist told Beattie and Dr. Ravitsky that she was unwilling to try again because of Smith's resistance. Someone suggested sedating Smith as a possible means of enabling the safe completion of the blood draw.[5] By this time, Beattie had been informed that Schuylman had

[5] The record is not entirely clear as to who first suggested sedating Smith. Beattie testified at pretrial hearings that it was Dr. Ravitsky who mentioned it during the discussion held after the second blood draw attempt. However, Dr. Ravitsky testified that his medical examiner told him that the decision to sedate Smith had already been made by someone else (although he

died as a result of his injuries. Because he was concerned about obtaining evidence of Smith's blood alcohol content for a potential vehicular homicide case, Beattie agreed to sedation.

After observing the second attempt to complete the blood draw, Dr. Ravitsky believed that Smith was behaving in an unusual manner because drugs or alcohol consumption had induced a psychotic manner. Due to Smith's behavior and because of the risk that Smith may have suffered trauma during the collision, Dr. Ravitsky believed that Smith should be sedated to enable a medical examination to clear him for admittance to jail. Dr. Ravitsky decided that, due to the drug or alcohol induced psychotic manner he had observed, Smith lacked the capacity to consent and that sedation was necessary for Smith's safety and the safety of hospital staff. Dr. Ravitsky believed that sedating Smith was a proper course of action in that it dramatically reduced the risk that Smith would seriously injure himself or others by struggling against the next blood draw attempt.

When Dr. Ravitsky informed Smith that he was going to be sedated, Smith replied that sedation was not possible because he was allergic to the sedative.[6] Smith then claimed that he was allergic to all sedatives. Dr. Ravitsky briefly left the room in order to check Smith's medical records (so as to attempt to verify Smith's claims). While they were waiting, Beattie gave Smith his cell phone to allow him to call an attorney. Beattie did not provide Smith with a telephone

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did not know by whom). Regardless, Dr. Ravitsky believed that such sedation was necessary and testified during pretrial hearings that he had had the final say on sedating Smith.

[6] The pretrial record is unclear as to which sedative Smith first claimed to be allergic.

number for an attorney and Smith did not attempt to call an attorney but, rather, called his wife.

Dr. Ravitsky's search of Smith's medical records did not verify Smith's claimed allergies to sedatives. Dr. Ravitsky ordered that Smith be given an injection of Haldol, with a secondary of Atvian or Benadryl.[7] Smith physically resisted the administration of the sedative, tensing and kicking at hospital staff who attempted to inject him. Accordingly, Smith was distracted so that the nurse could safely perform the injection.

The sedative made Smith calm and sleepy, but did not render him unconscious. While Smith was sedated, Dr. Ravitsky was able to perform a medical assessment of him and hospital staff successfully performed the blood draw. Smith did not exhibit any negative side effect from the sedative.

Following the execution of the warrant to obtain a sample of Smith's blood, Beattie took Smith to the Whatcom County Jail for booking. Beattie presumed that Smith would be granted access to a telephone to call an attorney as part of the booking process, as he believed that such was the jail's standard procedure. The record, however, does not indicate whether this occurred.

Smith was charged with vehicular homicide and obstructing a law enforcement officer. Smith filed pretrial motions to suppress the evidence of his performance on the field sobriety tests and the result of the blood test, and to preclude testimony regarding various statements Smith had made while at the

[7] At the time he gave this order, Dr. Ravitsky had 13 years of experience in administering these sedatives and knew that the potential side effects are usually mild and easily managed and also knew that Smith would be monitored for any side effects.

hospital on the night of the collision. Following extensive pretrial hearings, the trial court ruled that evidence of the result of the blood test and the statements made by Smith while at the hospital were admissible.

At trial, the State's witnesses from pretrial hearings testified in keeping with their pretrial testimony. To explain Smith's behavior in resisting the blood draw, the defense, relying on trial testimony from Smith himself, argued that Smith was terrified of needles.[8] The defense also offered an alternative explanation for the cause of the collision, claiming that the headlight on Schuylman's motorcycle was off when Smith had looked to see if it was safe to turn left, and that this relieved Smith of culpability.[9]

At the close of the evidence, the trial court gave the following jury instructions regarding superseding causes:

> Instruction No. 8
>
> To constitute vehicular homicide, there must be a causal connection between the death of a human being and the driving of a defendant so that the act done was a proximate cause of the resulting death.
>
> The term "proximate cause" means a cause which, in a direct sequence, unbroken by any new independent cause, produces the death, and without which the death would not have happened.

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[8] At trial, Smith testified that he does not "do well with needles," but denied that he had ever stated that he was allergic to all sedatives or that blood draws were against his religion. Smith did not present any other witnesses at trial who possessed firsthand knowledge of the veracity of Smith's statements at the hospital claiming a fear of needles. No other witnesses at trial corroborated Smith's testimony regarding his statements pertaining to religious objections to blood draws and allergies. Similarly, during pretrial hearings, no witness with firsthand knowledge testified to Smith's fear of needles, allergies to sedatives, or religious issues with blood draws. Smith did not testify at the pretrial proceedings.

[9] Smith also argued at trial that problems with the design of the motorcycle's shifting mechanism could have been a superseding cause, but even Smith's own expert witness admitted that he had no reason to believe that the shifting mechanism had anything to do with the collision. The record shows that Smith did not present any evidence tending to show that the shifting mechanism was in any way a cause of the collision. We therefore will not consider this argument further.

There may be more than one proximate cause of a death.

Instruction No. 9

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

However, if a proximate cause of the death was a new independent intervening act of the deceased 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. An intervening cause is an action that actively operates to produce harm to another after the defendant's act 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 falls within the general field of danger which the defendant should have reasonably anticipated.

The wording of these instructions was taken from Washington Pattern Jury Instructions 90.07 and 90.08. 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 90.07, 90.08, at 276, 278 (4th ed. 2016) (WPIC).

Following closing arguments, the jury found Smith guilty of both the crime of vehicular homicide and the crime of obstructing a law enforcement officer. Smith appeals.

II

On appeal, Smith primarily contends that the evidence obtained from the drawing and testing of his blood should have been excluded from trial. This is so, he asserts, because the evidence was obtained in violation of his rights

pursuant to our federal and state constitutions and a court rule regarding the right to counsel in criminal cases. We disagree.

Because Smith challenges only the trial court's legal conclusions, we consider factual findings from the pretrial hearings as verities on appeal. See State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). We review the challenged conclusions of law de novo. State v. Inman, 2 Wn. App. 2d 281, 290, 409 P.3d 1138, review denied, 190 Wn.2d 1022 (2018).

A

Smith first asserts that evidence obtained from the blood draw should have been excluded because the manner in which the police executed the warrant to obtain his blood violated his right to due process pursuant to the Fourteenth Amendment and his right not to be subject to unreasonable searches and seizures pursuant to the Fourth Amendment of the United States Constitution. Specifically, Smith objects to the conduct of the police in restraining him to a hospital bed and sedating him in order to conduct the blood draw, without his consent and without a warrant explicitly authorizing the use of sedatives. In response, the State asserts that such measures were permissible, particularly because they became necessary only after Smith physically resisted the judicially authorized blood draw. The State has the better argument.

Before the Fourth Amendment to the United States Constitution was incorporated via the Fourteenth Amendment to apply to the states, the United States Supreme Court analyzed state police searches and seizures intruding into a defendant's body solely through the due process clause of the Fourteenth

Amendment. See Rochin v. California, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952). In Rochin, the Court held that evidence obtained as a result of police unlawfully breaking into a suspect's house, forcibly attempting to open and remove items from the suspect's mouth, and ultimately forcibly extracting the contents of the suspect's stomach, was inadmissible. 342 U.S. at 167, 174. The Court held that such behavior, by agents of government, shocked the conscience and were "methods too close to the rack and the screw to permit of constitutional differentiation." Rochin, 342 U.S. at 172.

Although Rochin has never been overruled, following the incorporation of the Fourth Amendment to apply to the states, the Supreme Court has shifted its analysis of state police conduct during searches and seizures to a reasonableness analysis under the Fourth Amendment. County of Sacramento v. Lewis, 523 U.S. 833, 849 n.9, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1988) (acknowledging that if Rochin arose subsequent to incorporation it "would be treated under the Fourth Amendment [analysis], albeit with the same result").[10] This Fourth Amendment search or seizure reasonableness analysis encompasses issues pertaining to the right to refuse medical treatment, procedures, or medication, even though in other contexts the right to refuse medical treatment is typically analyzed under the Fourteenth Amendment's due

[10] Occasionally, a court has relied upon the Rochin analysis when confronted with a case in which the police had searched inside a suspect's body, but Rochin "cannot be said to be flourishing as an authority in that there has not been any tendency to apply it in any general way." Yanez v. Romero, 619 F.2d 851, 856 (10th Cir. 1980). Cf. Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978), overruled by Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (holding by Second Circuit based on a Rochin analysis overruled by Supreme Court using Fourth Amendment reasonableness analysis).

process clause. See e.g., Winston v. Lee, 470 U.S. 753, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985) (considering whether it was reasonable for Fourth Amendment purposes to compel a defendant to undergo surgery to remove a bullet); United States v. Husband, 226 F.3d 626 (7th Cir. 2000) (considering whether it was reasonable for Fourth Amendment purposes to administer an intravenous anesthetic to sedate a resisting suspect to retrieve contraband believed to be hidden in the suspect's mouth).

"[T]he Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." Schmerber v. California, 384 U.S. 757, 768, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). In Schmerber, the Court considered whether, in a drunk driving case, evidence obtained from a blood draw administered at a hospital without a warrant, and without the suspect's consent, violated the suspect's Fourth Amendment rights. 384 U.S. at 758-59, 768-70. In affirming the admissibility of the evidence, the Schmerber Court explained that "the questions we must decide in this case are whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness." 384 U.S. at 768. The Court held that, on the record therein, there was probable cause to believe that the blood draw would effectively produce evidence of a crime.[11] The Court

[11] The Schmerber Court specifically recognized that blood tests are "a highly effective means of determining the degree to which a person is under the influence of alcohol." 384 U.S. at 771.

also reasoned that the blood draw was a safe and common procedure performed by medical personnel at a hospital, there was insufficient time to obtain a warrant, and, thus, a compelled, warrantless, blood draw constituted a reasonable search and seizure under the Fourth Amendment. Schmerber, 384 U.S. at 770-71. The Court explicitly restricted its ruling to the facts before it and noted that different circumstances, particularly if the suspect had requested alternative testing on the grounds of "fear, concern for health, or religious scruple," might require a different analysis. Schmerber, 384 U.S. at 771.

In Winston v. Lee, 470 U.S. at 761-62, the Supreme Court identified three factors considered in Schmerber that should be considered, in addition to a finding of probable cause, when determining the reasonableness of any search or seizure involving a compelled bodily intrusion. Therein, the Court weighed the "extent to which the procedure may threaten the safety or health of the individual" and the "extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity" against "the community's interest in fairly and accurately determining guilt or innocence." Winston, 470 U.S. at 761-62. Emphasizing, as it had in Schmerber, that a reasonableness analysis required a case-by-case approach, the Court in Winston held that the record before it showed that the State's requested compelled surgery was unreasonable. 470 U.S. at 766. The Court explained that the State had failed to demonstrate a compelling need for the evidence the surgery would have provided, and that the collection of merely useful, but not necessary, evidence was insufficient to overcome the uncertain medical risks of the surgery and the severe intrusions on

the defendant's privacy interests that such surgery would entail. Winston, 470 U.S. at 766.

In analyzing the Winston factors, we first note that the police herein sought a blood sample pursuant to a valid warrant. Second, as in Schmerber, the risk to Smith's health from participating in the blood draw was very low because a blood draw is a safe and common procedure.[12] Similarly, the pretrial record is clear that the risk of harm to Smith's health from the use of the sedative was also very low.[13]

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[12] Smith asserts that he falls within the special category of persons who object to the administration of a blood draw out of "fear, concern for health, or religious scruple." See Schmerber, 385 U.S. at 771. He contends that his fear of needles requires us to view the blood draw differently than the Court did in Schmerber. However, the pretrial record provides no support for his assertion of fear. The trial court did not find that Smith had a fear of needles, nor could it have so found from the evidence presented. No witness with firsthand knowledge of the fact testified during pretrial hearings that Smith had a fear of needles. Instead, the witnesses testified to only their firsthand knowledge of his utterances to that effect. Indeed, Beattie was explicitly asked during pretrial hearings whether he knew what Smith's fears were on the night of the collision and he answered that he did not know.

Citing to civil cases, Smith contends that the combination of the trial court's finding that Smith made statements at the hospital claiming to be afraid of needles and the trial court's absence of a finding that Smith's statements were not credible requires us to conclude that the trial judge credited Smith's claim of fear. However, the trial judge had to make a finding identifying statements Smith made at the hospital so that he could determine whether such statements were voluntary or the product of custodial interrogation in order to resolve the issues raised in the pretrial CrR 3.5 motion. The judge made a finding that certain statements were made but made no explicit finding as to their veracity. That the judge found as a fact that Smith uttered a statement about a fear of needles does not indicate that the judge believed the statement was true. Indeed, the context indicates quite strongly that the opposite is true. To be sure, for us to apply Smith's desired reasoning would require us to also conclude that the trial judge credited the truth of Smith's other statements at the hospital, including the statements concerning his religious scruples regarding blood draws and his allergies to all sedatives. Such a conclusion is illogical given that the record clearly shows that Dr. Ravitsky attempted to verify Smith's claimed allergies to all sedatives and that nothing in Smith's medical records supported the claim. It would be patently unreasonable to conclude that the trial judge credited Smith's statement claiming that he was allergic to sedatives when that statement was so clearly discredited soon after it was uttered. Smith failed to present even a scintilla of evidence during pretrial hearings that any of the statements at the hospital were truthful. We therefore decline Smith's invitation to force upon the trial judge a set of factual findings that the judge plainly did not make.

[13] In fact, the trial court found that attempting to execute the warrant without sedating Smith would have risked placing him in greater harm than did sedating him because Smith's struggling may have broken off a needle inside of Smith's arm.

Third, unlike the risk of harm to his health, the harm to Smith's dignitary interests was more substantial because he was forcibly sedated to undergo a medical procedure without his consent. However, the harm was not as severe as that threatened by the police in Husband or Winston because Smith was not sedated to the point of unconsciousness. Additionally, it is pertinent to our analysis that Smith was sedated (thus increasing the otherwise minimal harm to his dignitary interests presented by a routine blood draw) only because of his physical resistance. Smith had the opportunity to avoid sedation by cooperating with the police and hospital staff who were attempting to obtain a blood sample as authorized by a valid judicial warrant, but chose not to do so. It is plain that suspects would be improperly incentivized to resist the execution of warrants if, by doing so, they could force the State to employ more intrusive measures that would then be held to be violations of the suspect's constitutional rights.[14] We therefore conclude that the dignitary harm posed by Smith's forced sedation was substantially mitigated by the fact that Smith himself created the need for such sedation.

Lastly, the community interest in obtaining the evidence garnered by the blood draw was extremely high. Schuylman died from his injuries, making Smith a suspect in a vehicular homicide case. Furthermore, highly relevant evidence

[14] This does not mean that there are no limits to the manner in which police officers may execute a warrant. Rather, it simply means that a defendant's resistance may make otherwise unnecessary methods of execution reasonable in certain circumstances. Nothing we state should be understood as disagreeing with the proposition that the execution of a warrant must always be reasonable under the circumstances. State v. Hampton, 114 Wn. App. 486, 494, 60 P.3d 95 (2002).

germane to his guilt or innocence was quickly dissipating as time passed.[15,16] Additionally, because Smith was resisting the execution of the warrant, he threatened society's interest in seeing that judicial warrants are obeyed. We conclude that the very low risks to Smith's health, and the moderate harm to Smith's dignitary interests caused solely by Smith's refusal to cooperate with less invasive procedures, were outweighed by the community's interest in obtaining the evidence resulting from the blood draw and in ensuring compliance with judicial warrants. The administration of a low risk sedative by medical personnel at a hospital, who continuously monitored Smith, was, under the circumstances, a reasonable method of executing the warrant.

B

Smith next contends that the administration of the sedative in order to conduct the blood draw violated his rights pursuant to article I, section 7 of the state constitution because the police lacked authority of law to sedate him. Smith asserts that a second warrant was required that specifically authorized the execution of the first warrant by use of sedation. We disagree.

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[15] Smith's assertion that the relatively recent case of Missouri v. McNeely, 569 U.S. 141, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013), prohibits us from considering the dissipation of alcohol in Smith's blood when determining the reasonableness of the search and seizure is based on a misreading of McNeely. All McNeely holds is that the dissipation of alcohol in a suspect's blood is not a per se exigency excusing the need for a warrant before drawing blood from a suspect. As the police herein had secured a warrant to obtain Smith's blood, McNeely's holding regarding exigent circumstances is inapplicable.

[16] Smith asserts that because he resisted the blood draw for several hours, there was plenty of time for the police to obtain another warrant authorizing his sedation rather than investing time forcing him to be sedated. According to Smith, this logic renders the decision to forcibly sedate him unnecessary, and, thus, unreasonable. Such an argument presumes that Smith would have complied with a second warrant, but nothing in the record indicates that the existence of a warrant made any difference to Smith's level of resistance. Smith refused to cooperate when informed about the first warrant and nothing in the record supports an assertion that he would have cooperated with a second one.

Article I, section 7 of our constitution states that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Our Supreme Court has explained that "[t]he 'authority of law' required by article I, section 7 is satisfied by a valid warrant." York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 306, 178 P.3d 995 (2008). Article I, section 7 prohibits only "unreasonable searches and seizures." State v. Curran, 116 Wn.2d 174, 184, 804 P.2d 558 (1991), abrogated on other grounds by, State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997).

Our Supreme Court has been clear: when a warrant's purpose is to authorize the collection of evidence, "[i]t is not sensible to read the warrant in a way that stops short of obtaining that evidence." State v. Figeroa Martines, 184 Wn.2d 83, 93, 355 P.3d 1111 (2015). Search warrants are "to be tested and interpreted in a commonsense, practical manner." State v. Perrone, 119 Wn.2d 538, 549, 834 P.2d 611 (1992). The reasonable execution of a valid warrant satisfies the authority of law requirement. State v. Hampton, 114 Wn. App. 486, 494, 60 P.3d 95 (2002).

Here, Smith does not contest the validity of the warrant relied upon by the police to obtain a sample of his blood. As previously discussed, the manner of execution of the warrant was reasonable under the circumstances. It is not sensible to read the warrant, issued for the purpose of enabling the police to obtain and test Smith's blood, as prohibiting the reasonable manner of execution under the circumstances that was required in order to obtain the blood sample needed to test Smith's blood alcohol content. See Figeroa Martines, 184 Wn.2d

at 93. Therefore, the warrant provided the necessary authority of law under the circumstances to authorize sedating Smith to enable hospital staff to perform the blood draw.

C

Smith next contends that he was improperly denied his right to counsel pursuant to CrR 3.1. He asserts that by denying his right to counsel, the police deprived him of an advocate before, during, and for several hours after the blood draw, thereby depriving him of any legal advice regarding the right to seek an independent blood test.

CrR 3.1 provides, in pertinent part:

> **(b) Stage of Proceedings.**
> (1) The right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest.
>
> . . . .
>
> **(c) Explaining the Availability of a Lawyer.**
>
> . . . .
>
> (2) At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer.

CrR 3.1 goes "beyond the constitutional requirements of the fifth and sixth amendments to the United States Constitution" by providing a more immediate right to counsel upon arrest. State v. Templeton, 148 Wn.2d 193, 218, 59 P.3d 632 (2002). If there is a violation of the court rule right to counsel, any evidence that was tainted as a result of the violation must be suppressed. State v. Schulze, 116 Wn.2d 154, 162, 804 P.2d 566 (1991).

However, we have previously held that the rule does not "compel police to postpone routine prebooking procedures or the execution of a search warrant when an arrestee expresses the desire to consult an attorney." State v. Mullins, 158 Wn. App. 360, 369, 241 P.3d 456 (2010). Citing approvingly to Mullins, our Supreme Court recently held that a defendant's rights pursuant to CrR 3.1 are not violated when law enforcement's "investigative duties and . . . security measures and policies precluded an earlier meeting with an attorney." State v. Scherf, No. 88906-6, slip op. at 21 (Wash. Nov. 8, 2018) http://www.courts.wa.gov/opinions/pdf/889066.pdf.

Here, Smith requested to speak to an attorney several times between his arrest and booking at the jail. During this time, Beattie was supervising the collision scene, driving Smith to the hospital and to the jail, and attempting to obtain and execute a search warrant for a blood sample. CrR 3.1 did not require Beattie to postpone the completion of his routine duties, including supervising the scene of the collision until another trooper arrived to ensure the safe and effective management of the scene, transporting an arrested suspect by patrol vehicle, and obtaining and executing a valid search warrant. Therefore, there was no CrR 3.1 violation.

Even if there had been a violation of Smith's rights pursuant to CrR 3.1, however, he would still not be entitled to appellate relief. "Because the asserted error is a violation of a court rule (rather than a constitutional violation), it is governed by the harmless error test." State v. Robinson, 153 Wn.2d 689, 697, 107 P.3d 90 (2005). Thus, reversal is appropriate only when, within reasonable

probabilities, "'[if] the error [had] not occurred, the outcome of the [trial] would have been materially affected.'" Robinson, 153 Wn.2d at 697 (first two alterations in original) (internal quotation marks omitted) (quoting Templeton, 148 Wn.2d at 220).

When evidence is obtained through a blood draw in violation of CrR 3.1, that evidence is not tainted if an attorney could have done nothing other than instruct the defendant to submit to the blood test. Schulze, 116 Wn.2d at 164.

Nevertheless, Smith asserts that an attorney could have arranged for him to undergo an independent blood test if not for his sedation and the long delay in giving him access to an attorney following his arrest.[17] Smith avers that he had a right to an independent test pursuant to RCW 46.61.506(7), and that the denial of access to counsel prevented him from exercising that right because defense counsel could have advised him to undergo an additional test.

Smith's contention is unavailing because the record is devoid of any indication that Smith would have wanted to, or would have even been willing to, undergo an independent blood test. The record shows that Smith, after being read the special evidence warnings, which included a statement that Smith had the right to seek an independent test, did not request such a test. During pretrial hearings, Smith did not testify that he would have sought an independent test

[17] Smith also asserts that an attorney could have ensured that the police obtained a second warrant authorizing sedation or could have suggested doing a breath test instead of a blood test. Such arguments are patently meritless. As discussed, a second warrant was unnecessary, and, furthermore, nothing in the record indicates that Smith would have stopped resisting the blood draw if a second warrant had been obtained. Also, because the officers had a valid warrant to obtain Smith's blood, they did not need to offer a breath test as an alternative. Even if an attorney had been contacted, Smith could only have been properly advised to submit to the blood draw pursuant to the warrant.

had he been able to discuss the subject with counsel. At trial, he again failed to assert that he would have sought an independent test.[18] Thus, even if there had been a violation of CrR 3.1, a violation premised on the denial of his right to be counseled regarding his right to seek an independent blood test would be harmless error.

None of Smith's contentions merit reversing the trial court's decision to admit the evidence obtained from Smith's blood sample.

III

Smith next contends that his statements at the hospital, as testified to by the officers and hospital staff, should have been ruled inadmissible as violating his Fifth Amendment rights. This is so, Smith asserts, because his statements were the product of police coercion and were not voluntary. We disagree.

The Fifth Amendment "protects a person from being compelled to give evidence against himself or herself." State v. Unga, 165 Wn.2d 95, 100-01, 196 P.3d 645 (2008). A statement of the defendant is coerced when it is obtained by promises or misrepresentations made by law enforcement that overcome the defendant's free will. State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997). "If statements are freely given, spontaneous and not the product of custodial interrogation, they are considered voluntary." State v. Peerson, 62 Wn. App. 755, 774, 816 P.2d 43 (1991).

Smith asserts that we should follow the reasoning from the following

[18] Furthermore, Smith "stuck to his guns" at trial as to his claimed fear of needles. There is no reason to believe that he would have voluntarily undergone an additional blood test on the night of the collision—an act that would have undercut his claim of fear.

passage in Schmerber that discussed the possibility of the prosecution obtaining incriminating statements during the administration of physical tests.

> Such incriminating evidence may be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction or opposes it on religious grounds. If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forgo the advantage of any *testimonial* products of administering the test . . . . [T]here may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer confession to undergoing the "search," and nothing we say today should be taken as establishing the permissibility of compulsion in that case.

Schmerber, 384 U.S. at 765 n.9.

Smith admits that the officers at the hospital did not explicitly interrogate him, but avers that, as suggested by the Court in Schmerber, his statements made while he was being physically tested, confronted with needles, and "beaten and drugged," were not voluntary. But the applicability of Smith's proffered passage from Schmerber is not supported by the record herein. A blood draw is, as the Court in Schmerber recognized, a common procedure and, for most people, involves virtually no risk, trauma, or pain. 384 U.S. at 771. There was no testimony presented at pretrial hearings to support a finding that Smith's claimed fear of needles was genuine. Thus, there was no reason to find that the procedure posed an exceptional likelihood of inducing a confession. And, indeed, Smith made no such confession. Additionally, all of the statements made by Smith at the hospital that were admitted at trial were uttered prior to Smith's sedation. During pretrial hearings, Beattie testified that Smith, without prompting from any officer, volunteered his comments about a fear of needles, religious

opposition to a blood draw, and allergies to sedatives. The statements were properly admitted.

IV

Smith next contends that his counsel were constitutionally ineffective because they failed to assert that the admission of the statements Smith made at the hospital violated his statutory physician-patient privilege.

"A defendant is denied effective assistance of counsel if the complained-of attorney conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different *but for* the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993) (citing Strickland v. Washington, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). If counsel's conduct was a conceivable tactical decision that a reasonable attorney might have made, then it cannot constitute ineffective assistance of counsel. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

The physician-patient privilege is statutory, derived from RCW 5.60.060(4), and is applied in the criminal context via RCW 10.58.010. State v. Smith, 84 Wn. App. 813, 820, 929 P.2d 1191 (1997). The privilege protects statements made in the course of treatment. State v. Salas, 1 Wn. App. 2d 931, 950, 408 P.3d 383, review denied, 190 Wn.2d 1016 (2018). However, even when the privilege applies, the party asserting it can waive the privilege by the nature of the defense asserted. Smith, 84 Wn. App. at 822. A person waives the privilege by voluntarily placing his or her physical condition at issue in a judicial

proceeding. Carson v. Fine, 123 Wn.2d 206, 213-14, 867 P.2d 610 (1994).

Smith's assertion of ineffective assistance of counsel fails because Smith waived the physician-patient privilege by placing his physical condition at issue, and such waiver is explainable as a conceivable tactical decision of a reasonable attorney. Given that Smith claimed in a pretrial motion that the evidence of the blood draw should have been suppressed because he was sedated in order to obtain the evidence, he necessarily placed his physical condition at issue. There is no way that the trial court could have ruled on the reasonableness of sedating Smith without hearing testimony from the doctor who determined that sedating him would be safe and effective. Furthermore, moving to suppress evidence of a blood test in a vehicular homicide case on the ground that the blood was obtained in an unlawful manner is a conceivable tactical decision that a reasonable attorney would make. Smith's counsel was not constitutionally ineffective.

V

Finally, Smith contends that the trial court's instructions to the jury on the burden of proof regarding superseding causes violated his right to due process and that such error was prejudicial. Specifically, Smith urges us to follow the recent decision of Division Two in State v. Imokawa, 4 Wn. App. 2d 545, 555, 422 P.3d 502 (2018), which held that, in a vehicular homicide case, jury instructions that failed to unambiguously explain that the State has the burden of proof regarding the absence of superseding causes violated due process. In response, the State asserts that we should apply a different analysis, that

expressed in our decision in State v. Roggenkamp, 115 Wn. App. 927, 64 P.3d 92 (2003), aff'd, 153 Wn.2d 614, 106 P.3d 196 (2005), and that, even were we to follow Imokawa, any error in the jury instructions constituted harmless error. We agree with Smith that the Imokawa analysis is correct. But the State is correct that the error was harmless.

A

"Instructions satisfy the requirement of a fair trial when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case." State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). A trial court's decision regarding a jury instruction is reviewed for an abuse of discretion if the decision is based on the factual record but is reviewed de novo if the decision is based on issues of law. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).[19]

The Imokawa court held that the defense of a superseding cause necessarily negates the essential element of proximate cause for the crime of vehicular homicide and that the jury therein was not unambiguously informed of the State's burden of proof in this regard. 4 Wn. App. 2d at 556-57. In so holding, Division Two relied upon our Supreme Court's decision in State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014). Therein, the court explained that instructions violate a defendant's right to due process when they place the

[19] This issue, raised for the first time on appeal, is properly before us pursuant to RAP 2.5(a), which permits review of manifest errors affecting constitutional rights. See State v. Kalebaugh, 183 Wn.2d 578, 583-84, 355 P.3d 253 (2015) (explaining that an improper jury instruction that misstated the burden of proof to the jury by incorrectly defining reasonable doubt could be challenged for the first time on appeal).

burden of proving a defense on the defendant when that defense necessarily negates an essential element of the crime charged. W.R., 181 Wn.2d at 762. In such cases, the State "must prove the absence of the defense as part of proving all essential elements of the crime beyond a reasonable doubt." Imokawa, 4 Wn. App. 2d at 553. Furthermore, when the State has the burden to prove the absence of a defense, the jury must be unambiguously informed that the State has to prove the absence of the defense beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 621, 683 P.2d 1069 (1984). While an explicit instruction to this effect is preferable, it is not required as long as the instructions, "taken as a whole, make it clear that the State has the burden." Acosta, 101 Wn.2d at 621.

Applying this "negates an element" analysis, the Imokawa court held that a superseding cause necessarily negates the essential element of proximate cause for the crime of vehicular homicide. 4 Wn. App. 2d at 556-57. The court explained that "it is impossible for the defendant's driving to be a proximate cause of the injury or death *and* for there to also be a superseding cause of the injury or death. Therefore, the two cannot coexist and a superseding cause negates proximate cause." Imokawa, 4 Wn. App. 2d at 555.

The trial court in Imokawa gave standard Washington Pattern Jury Instructions related to proximate cause and superseding causes, specifically WPIC 90.07 and WPIC 90.08. 4 Wn. App. 2d at 552. These instructions did not include any language requiring the State to prove the absence of a superseding cause, nor did any other instruction provided by the trial court provide language indicative of the State's burden. Imokawa, 4 Wn. App. 2d at 552. Therefore, the

court concluded, the pattern jury instructions failed to unambiguously inform the jury of the State's burden, thereby violating the defendant's due process rights. Imokawa, 4 Wn. App. 2d at 557.

We decline the State's invitation to apply the analysis used in Roggenkamp. The Roggenkamp analysis relies on a decision of our Supreme Court, State v. Camara, 113 Wn.2d 631, 781 P.2d 483 (1989), that was overruled in W.R. 181 Wn.2d at 762. The Imokawa court correctly followed the decision in W.R.

Here, the jury instructions for proximate cause and superseding causes were taken from WPIC 90.07 and WPIC 90.08 and were practically identical to those given in Imokawa. Also similarly to Imokawa, no other instructions provided to the jury here indicated that the State bore the burden of proving the absence of a superseding cause beyond a reasonable doubt. Applying the analysis employed in Imokawa, we conclude that the instructions at issue herein were constitutionally deficient.

B

"Jury instructions that violate a defendant's right to due process require reversal unless the State can prove that the error was harmless beyond a reasonable doubt." Imokawa, 4 Wn. App. 2d at 559 (citing State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002)). An error is harmless if it is clear beyond a reasonable doubt that the outcome of the trial would have been the same even in the absence of the error. State v. Souther, 100 Wn. App. 701, 709-10, 998 P.2d 350 (2000). In a vehicular homicide case, if the defendant presents evidence

that could establish a superseding cause, and the only issue related to the evidence was a question of credibility for the jury, then the erroneous jury instructions were not harmless. Imokawa, 4 Wn. App. 2d at 559. A superseding cause is an intervening cause that is not reasonably foreseeable. Roggenkamp, 115 Wn. App. at 945. "An intervening cause is a force that operates to produce harm *after* the defendant has committed the act or omission" of which he has been accused. Roggenkamp, 115 Wn. App. at 945.

In Souther, we held that any potential error from the constitutionally insufficient jury instructions issued therein was harmless. 100 Wn. App. at 711. Therein, the defendant asserted that speeding and improper display of a left hand turn signal by the victim were superseding causes. Souther, 100 Wn. App. at 710. In rejecting this assertion, the court explained that even if the victim was speeding or had a turn signal on when the victim was not turning, such actions could not be considered intervening causes because they did not occur *after* Souther's act of turning left in front of the motorcycle. Souther, 100 Wn. App. at 710.

Here, Smith presented evidence that he claimed showed that there were potential superseding causes for the collision between his car and Schuylman's motorcycle, but which showed only circumstances that existed prior to Smith's act of turning left. In closing argument, Smith's attorney argued that the headlight on Schuylman's motorcycle may have been out prior to and at the time of the collision, and that this operated as a superseding cause because it made the motorcycle invisible to Smith. The crux of Smith's argument was that Smith

was unable to see the motorcycle prior to making his turn. Thus, Smith's argument was based on an event that occurred prior to Smith's act while driving (turning left) that caused the collision. Such a prior event cannot be a superseding cause. Therefore, because Smith did not present any evidence of a superseding cause, the failure to provide a constitutionally sufficient superseding cause instruction to the jury was harmless beyond a reasonable doubt. The deficient jury instructions do not require reversal.

Affirmed.

Dwyer, J.

We concur:

Leach, J.

Appelwick, C.J.

# APPENDIX C

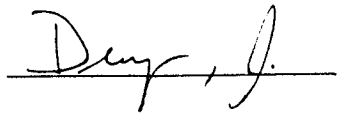
**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>BRIAN J. SMITH,<br><br>Appellant. | DIVISION ONE<br><br>No. 76340-7-I<br><br>ORDER DENYING MOTION FOR RECONSIDERATION |

The appellant, Brian Smith, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:



# APPENDIX D

SUPERIOR COURT OF WASHINGTON
COUNTY OF WHATCOM

| | |
|---|---|
| STATE OF WASHINGTON, Plaintiff,<br><br>vs.<br><br>BRIAN J. SMITH, Defendant.<br><br>DOB: February 19, 1983<br><br>PCN: 900,652,810<br>SID: 18053023 | No. 14-1-01457-3<br><br>JUDGMENT AND SENTENCE<br>(JDSWC)<br><br>PRISON<br>[XX] CLERK'S ACTION REQUIRED-para 2.1, 4.1 , 5.7<br>(DOL)[XX] Defendant Used Motor Vehicle |

## I. HEARING

1.1 The court conducted a sentencing hearing **January 18, 2017** and the defendant, **Brian J. Smith**, the defendant's lawyer, **Jon Rands/Mark Kaiman**, and the Chief Criminal Deputy Prosecuting Attorney, **Eric J. Richey**, were present.

1.2 **RESTRAINT:** The defendant is [ ] in custody and (has)(has not) waived his right to be unrestrained at the time of sentencing. The defendant is [ ] out of custody and is unrestrained.

## II. FINDINGS

There being no reason why judgment should not be pronounced in accordance with the proceedings in this case, the Court **FINDS**:

2.1 **CURRENT OFFENSE(S):** The defendant is guilty of the following offenses based upon a **JURY - VERDICT** on the 23rd day of November, 2016:

| COUNT | CRIME | RCW | CLASS | DATE OF CRIME |
|---|---|---|---|---|
| I | VEHICULAR HOMICIDE | 46.61.520,<br>46.61.506 | FA | December 5, 2014 |
| II | OBSTRUCTING A LAW ENFORCEMENT OFFICER | 9A.76.020 | GM | December 5, 2014 |

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C), GM (Gross Misdemeanor), M (Misdemeanor)
(If the crime is a drug offense, include the type of drug in the second column.)

The jury returned a special verdict or the court made a special finding with regard to the following:
[XX]Count I is a felony in the commission of which the defendant used a motor vehicle RCW 46.20.285.

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

| CRIME | DATE OF SENTENCE | SENTENCING COURT (County & State) | A or J | TYPE OF CRIME | DV* YES |
|---|---|---|---|---|---|
| NO FELONY HISTORY | | | | | |

* *Domestic Violence was pled and proved*

**[XX] The defendant agrees and stipulates that the above stated criminal history and the below stated offender score and sentencing range are accurate.**

2.3 SENTENCING DATA:

| COUNT NO. | OFFENDER SCORE | SERIOUSNESS LEVEL | STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements) | PLUS Enhancements * | TOTAL STANDARD RANGE (standard range including endhancements) | MAXIMUM TERM |
|---|---|---|---|---|---|---|
| **I** | **0** | **XI** | **78 to 102 Months** | | **78 to 102 Months** | **Life/$50,000** |
| **II** | | | **0 to 364 Days** | | **0 to 364 Days** | **1 yr/$5,000** |

**(F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone,(RPh) Robbery of a pharmacy, (VH) Veh. Hom, see RCW 46.61.520,(JP) Juvenile present, (SM) Sexual Motivation, RCW 9.94A.533(8), (SCF) Sexual conduct with a child for a fee, RCW.94A.533(9), (CSG) Criminal Street Gang Involving a Minor, (AE) Endangerment While Attempting to Elude(ALF) assault law enforcement with firearm, RCW 9.94A.533(12), (P16), Passenger(s) under age 16.*

[ ] For violent offenses, most serious offenses, or armed offenders, recommended **sentencing agreements or plea agreements** are [ ] attached [ ] as follows: _____

2.4

2.5 LEGAL FINANCIAL OBLIGATIONS/RESTITUTION. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160). This court makes the following specific findings:

[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

_____

_____

[ ] The defendant has the present means to pay costs of incarceration, RCW 9.94A.760:
[ ] (Name of Agency) _____'s costs for its emergency response are reasonable RCW 38.52.430 (effective August 1, 2012).

## III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1.

[ ] The Court DISMISSES Count(s)

## IV. SENTENCE AND ORDER

**IT IS ORDERED:**

4.1 **CONFINEMENT OVER ONE YEAR.** The court sentences the defendant to total confinement as follows:

(a) **CONFINEMENT.** RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

78 ~~102~~ MONTHS for Count I, 364 days with 363 days suspended II,

**Actual total confinement ordered is:** ~~102~~ 78 MONTHS for Count I 364 days with 363 days suspended for Count II,

OTHER: _____

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above in section 2.3, and except for the following counts which shall be served CONSECUTIVELY:

This sentence shall run consecutively with the sentence in the following cause number(s) _____ but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589

Confinement shall commence IMMEDIATELY unless otherwise set forth here: _____
(should be a Monday if possible) between 1:00 p.m. and 4:00 p.m.

(c) **Credit for Time Served.** The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The jail shall compute time served.

(d) [ ] **Work Ethic Program.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for a work ethic program. The court recommends that the defendant serve the sentence at a work ethic program. Upon completion of work ethic program, the defendant shall be released on a community custody for any remaining time of total confinement, subject to the conditions in Section 4.2, Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of confinement.

4.2 **COMMUNITY CUSTODY.** (To determine which offenses are eligible for or required for community custody, see RCW 9.94A.701, RCW 10.95.030(3))

(A) The defendant shall be on community custody for:

18 MONTHS FOR COUNT I

**Note: combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum. RCW 9.94A.701.**

While on community custody the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while on community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; and (9) for sex offenses, submit to electronic monitoring if imposed by DOC; and (10) abide by any additional conditions imposed by DOC under RCW 9.94A.704 AND .706. **The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody.**

Defendant shall report to Department of Corrections, 1400 N. Forest Street, Bellingham, WA 98225, not later than 72 hours after release from custody.

**THE COURT ORDERS THAT DURING THE PERIOD OF SUPERVISION THE DEFENDANT SHALL:**

- [XX] not possess or consume alcohol.
- 
- [ ] remain the specified geographic boundaries, to-wit: ;
- [ ] Not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age.
- [ ] Not reside within 880 feet of the facilities or grounds of a public or private school (community protection zone). RCW 9.94A.030.
- [ ] participate in an education program about the negative cots of prostitution.
- [XX] participate in the following crime-related treatment or counseling services:
  **Drug and alchol evaluation and treatment**
- [XX] undergo an evaluation for treatment for.
  [ ] Domestic Violence, [ ] Substance Abuse, [ ] Mental Health, [ ] Anger Management and fully comply with all recommended treatment.
- [XX] comply with the following crime-related prohibitions:
  **defendant prohibited from entering or remaining in an establishment whose primary purpose is selling alcohol. .**
- Other conditions:

[XX] not to drive motor vehicles unless they are equipped with an ignition interlock device. BR ORD

**Court Ordered Treatment:** If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

4.3 **Legal Financial Obligations:** The defendant shall pay to the clerk of this court:

| *JASS CODE* | | | | |
|---|---|---|---|---|
| PCV | $500.00 | Victim Assessment | | RCW 7.68.035 |
| CRC | $450.00 | Court costs, including: | | RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190 |
| | | Criminal filing fee | $200.00 | FRC |
| | | Witness costs | $ | WFR |
| | | Sheriff service fees | $ | SFR/SFS/SFW/WRF |

| | | | | |
|---|---|---|---|---|
| | | Jury demand fee | $250 | JFR |
| | | Extradition costs | | EXT |
| | | Other | $ | |
| PUB | $ | Fees for court appointed attorney | | RCW 9.94A.760 |
| WFR | $ | Court appointed defense expert and other defense costs | | RCW 9.94A.760 |
| FCM | $ | Fine | | RCW 9A.20.021 |
| LDI | $ | VUCSA Fine | [ ] VUCSA additional fine deferred due to indigency RCW 69.50.430 | |
| MTH | $ | Meth Lab Cleanup | [ ] VUCSA additional fine deferred due to indigency RCW 69.50.401(2)(B) | RCW 69.50 |
| CDF/LDI/ FCD/NTF/ | $ | Drug enforcement fund | | RCW 9.94A.760 |
| SAD/SDI | $ | DUI Fines, Fees and Assessments | | |
| CLF | | Crime lab fee | [ ] Suspended due to indigency | RCW 43.43.690 |
| DN2 | $100.00 | Felony DNA Collection Fee | | [ ] Not imposed due to hardship |
| FPV | $ | Specialized Forest Products | | RCW 76.48.140 |
| PPI | $ | Trafficking/Promoting prostitution/Commercial sexual abuse of minor fee (may be reduced by no more than two thirds upon a finding of inability to pay.) | | RCW 9A.40.100, 9A.88.120, 9.68A.105 |
| DEF | $ | Other fines or costs for Emergency response costs ($1000 maximum, $2,500 max. effective August 1, 2012.) Agency: | | RCW 38.52.430 |
| | $ _____ | **TOTAL** | | RCW 9.94A.760 |

| | | |
|---|---|---|
| RTN/RJN | $ | Restitution to: (Name and Address – address may be withheld and provided confidentially to Clerk of the Court's office.) |
| RTN/RJN | ~~$20,000.00~~ TBD | Restitution to: CRIME VICTIMS' COMPENSATION PROGRAM(Name and Address – address may be withheld and provided confidentially to Clerk of the Court's office.) |
| | | |

[XX] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:
[ ] shall be set by the prosecutor
[ ] is scheduled for _____.

[XX] Defendant waives any right to be present at any restitution hearing (sign initials): _____

[XX] RESTITUTION. Schedule attached
All payments shall be made in accordance with the policies, procedures and schedules of the Whatcom County Clerk **as supervision of legal financial obligations has been assumed by the Court.** RCW 9.94A.760

[ ] PAYMENT IN FULL: Defendant agrees and is hereby ordered to make payment in full within days after the imposition of sentence to the Whatcom County Clerk for the amount due and owing for legal financial obligations and restitution.

[XX] **MONTHLY PAYMENT PLAN**: The defendant agrees and is hereby ordered to enter into a monthly payment plan, with the Whatcom County Clerk for the amounts due and owing for legal financial obligations and restitution, immediately after sentencing. The Court hereby sets the defendant's monthly payment amount at $100.00, which will remain in effect until such time as the defendant executes a payment plan negotiated with the Collections Deputy. The first payment of $100.00 is due immediately after imposition of sentence or release from confinement, whichever occurs last. (RCW 9.94a.760(7)(b))

During the period of repayment, the Whatcom County Clerk's Collections Deputy may require the defendant to appear for financial review hearings regarding the appropriateness of the collection schedule. The defendant will respond truthfully and honestly to all questions concerning earning capabilities, the location and nature of all property or financial assets and provide all written documentation requested by the Collections Deputy in order to facilitate review of the payment schedule. RCW 9.94A. The defendant shall keep current all personal information provided on the financial statement provided to the Collections Deputy. Specifically, the defendant shall notify the Whatcom County Superior Court Clerk's Collection Deputy, or any subsequent designee, of any material change in circumstance, previously provided in the financial statement, i.e. address, telephone or employment within 48 hours of change.

[XX] **DEFENDANT MUST MEET WITH COLLECTIONS DEPUTY PRIOR TO RELEASE FROM CUSTODY.**

[XX] The defendant shall pay the cost of services to collect unpaid legal financial obligations, which include monitoring fees for a monthly time payment plan and/or collection agency fees if the account becomes delinquent. (RCW 36.18.190)

[ ] The court orders the defendant to pay costs of incarceration at the rate of $_____ per day, (actual costs not to exceed $100 per day). (JLR) RCW 9.94A.760 (This provision does not apply to costs of incarceration collected by DOC under RCW 72.09.111 and 72.09.480.).

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090.

An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160

4.4 [XX]**DNA TESTING.** The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. This paragraph does not apply if it is established that the Washington State Patrol crime laboratory already has a sample from the defendant for a qualifying offense. RCW 43.43.754.

4.6 **OTHER:**

[ ] Defendant is to be released immediately to set up jail alternatives.
[ ] DEPORTATION. If the defendant is found to be a criminal alien eligible for release to and deportation by the United States Immigration and Naturalzation Service, subject to arrest and reincarceration in accordance with law, then the undersigned Judge or Prosecutor consent to such release and deportation prior to the expiration of the sentence. RCW 9.94A.280

4.7 **OFF-LIMITS ORDER** (Known drug trafficker), RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

_____

4.8 **EXONERATION:** The Court hereby exonerates any bail, bond and/or personal recognizance conditions.

## V. NOTICES AND SIGNATURES

5.1 **COLLATERAL ATTACK ON JUDGMENT.** If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial, or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100, RCW 10.73.090

5.2 **LENGTH OF SUPERVISION.** If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to ten years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional ten years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purposes of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606

5.4 **COMMUNITY CUSTODY VIOLATION.**

(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.634.

(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.714.

5.5a **FIREARMS. You may not own, use or possess any firearm, and under federal law any firearm or ammunition,** unless your right to do so is restored by the court in which you are convicted or the superior court in Washington State where you live, and by a federal court if required. **You must immediately surrender any concealed pistol license.** (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047

5.5b [ ]**FELONY FIREARM OFFENDER REGISTRATION.** The defendant is required to register as a felony firearm offender. The specific registration requirements are in the "Felony Firearm Offender Registration" attachment.

5.7 **[XX]DEPARTMENT OF LICENSING NOTICE:** The court finds that Count 1 is a felony in the commission of which a motor vehicle was used. **Clerk's Action -** The clerk shall forward an Abstract of Court Record (ACR) to the DOL, which must revoke the Defendant's driver's license. RCW 46.20.285.

**Findings for DUI, Physical Control, Felony DUI or Physical Control, Vehicular Assault, or Vehicular Homicide (ACR information) (Check all that apply):**

[XX]Within two hours after driving or being in physical control of a vehicle, the defendant had an alcohol concentration of breath or blood (BAC) of_____.
[ ]No BAC test result.
[ ]BAC Refused. The defendant refused to take a test offered pursuant to RCW 46.20.308.
[ ]Drug Related. The defendant was under the influence of or affected by any drug.
[ ]THC level was _____ within two hours after driving.
[ ]Passenger under age 16. The defendant committed the offense while a passenger under the age of sixteen was in the vehicle.

5.8 OTHER: SENTENCE SHALL BE STAYED PENDING APPEAL ONCE DEFENDANT POST $100,000 APPELLATE BOND.

DONE in Open Court and in the presence of the defendant this date: **January 18, 2017.**

DEFENDANT
Print name: BRIAN J. SMITH

JUDGE

Chief Criminal Deputy Prosecuting Attorney
WSBA # 22860
Print name: ERIC J. RICHEY

Attorney for Defendant
WSBA #
Print name: JON RANDS/MARK KAIMAN

***Voting Rights Statement:*** I acknowledge that my right to vote has been lost due to felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (Not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations.

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.
**Defendant's signature:**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

| | | |
|---|---|---|
| THE STATE OF WASHINGTON, | ) | |
| | ) | |
| Plaintiff. | ) | No. 14-1-01457-3 |
| | ) | |
| vs. | ) | JUDGMENT AND SENTENCE |
| | ) | (FELONY) – APPENDIX E |
| BRIAN J. SMITH, | ) | SCHEDULE OF RESTITUTION |
| | ) | |
| Defendant. | ) | |

4.1 (c) The defendant is to make restitution to the following person(s) in the following amounts and sequences, payable in installments approved by (the Community Corrections Officer) (and) (or) (the Court):

| | |
|---|---|
| *CRIME VICTIMS' COMPENSATION PROGRAM*<br>P.O. BOX 44835<br>Olympia, WA. 98504 - 44835<br><br>RE: Claim ID: VN 50593<br>Claimant: JASON SCHUYLEMAN<br>Injury date: 1/7/ 15 | ~~$20,000.00~~ |
| **TOTAL** | TO BE DETERMINED<br>~~$20,000.00~~ |

Said restitution shall be paid through the registry of the Clerk of the Whatcom County Superior Court, who shall disburse the same to the above-named person as funds become available.

Restitution may be amended at a future date should there be additional damages, loss or medical claims.

SUPERIOR COURT OF WASHINGTON
COUNTY OF WHATCOM

| | |
|---|---|
| STATE OF WASHINGTON, Plaintiff,<br><br>vs.<br><br>BRIAN J. SMITH, Defendant.<br><br>DOB: February 19, 1983 | No. 14-1-01457-3<br><br>WARRANT OF COMMITMENT |

THE STATE OF WASHINGTON

TO: THE SHERIFF OF WHATCOM COUNTY

The defendant, **BRIAN J. SMITH**, has been convicted in the Superior Court of the State of Washington of the crime or crimes of **VEHICULAR HOMICIDE and OBSTRUCTING A LAW ENFORCEMENT OFFICER** and the Court has ordered that the defendant be punished by serving the determined sentence of ~~102~~ 78 Months for Count I, 364 days with 363 days suspended for Count II,

The defendant shall receive credit for time served prior to sentencing, as long as the time served was solely on that cause number, including time spent in transport, if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court.

YOU, THE SHERIFF, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence.

By Direction of the HONORABLE

DATED: January 18, 2017

JUDGE

DAVID L. REYNOLDS, Clerk

By: _____
Deputy Clerk

BRIAN J. SMITH
CAUSE NUMBER of this case: **14-1-01457-3**

## IDENTIFICATION OF DEFENDANT

SID No. **WA18053023**
(If no SID complete a separate Applicant card
(form FD-258) for State Patrol)

Date of Birth: 02/19/83

FBI No. **757990CB9**

Local ID No. _____

PCN No. **900652810**

Other _____

Alias name, SSN, DOB:

Race: Caucasian

Sex: Male
Ethnicity: [XX] Non-Hispanic

Defendant's Last Known Address: 706 COLTON LN., EVERSON, WA 98247

**FINGERPRINTS** I attest that I saw the same defendant who appeared in Court on this document affix his fingerprints and signature thereto.

Clerk of the Court: _____, Deputy Clerk. Dated: **January 18, 2017**

DEFENDANT'S SIGNATURE: _____

| Left Thumb | Right Thumb |
|---|---|
|  |  |

z

WHATCOM COUNTY SUPERIOR COURT
Bellingham WA
DAVID L REYNOLDS
WHATCOM COUNTY CLERK

Rcpt. Date: 01/18/2017
Acct. Date: 01/18/2017
Receipt #: 2017-01-00309
Cashier ID: BCE
Time: 09:40 AM

| Item | Case Number | Amount |
|---|---|---|
| 01 | 14-1-01457-3 | $290.00 |
| 1116: Fee-Appellate Filing | | |
| $AFF | | |
| ST VS SMITH | | |
| Total Due: | | $290.00 |
| Check Tendered: | | $290.00 |
| Change Due: | | $0.00 |

Paid By: LENELL, NUSSBAUM

# APPENDIX E

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
**FOR WHATCOM COUNTY**

| | |
|---|---|
| **THE STATE OF WASHINGTON,** **Plaintiff.** **vs.** **BRIAN J. SMITH,** **Defendant.** | **No.: 14-1-01457-3** **FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING ADMISSIBILTY OF EVIDENCE** |

**FIELD SOBRIETY TESTS:**

FINDINGS OF FACT

1. Field sobriety tests are generally recognized as acceptable by the courts as evidence of a person's physical condition at the time and to determine a whether a subject is under the influence of intoxicating liquor or drugs.

2. Field sobriety tests have been used for years by law enforcement across the country.

3. The specific field sobriety tests used in this case have been accepted by Washington Courts.



Whatcom County Prosecuting Attorney
311 Grand Avenue, Suite #201
Bellingham, WA 98225
(360) 778-5710
(360) 778-5711 Fax

4. There is no evidence that the field sobriety tests in this case departed from testing standards.

CONCLUSIONS OF LAW

1. Any departure from a national standard goes to weight, not admissibility.

2. Evidence of field sobriety tests is admissible.

**DEFENDANT'S STATEMENTS UNDER CrR 3.5**

FINDINGS OF FACT

1. The defendant made preliminary statements to the investigating officers at the scene.

2. After conducting field sobriety tests, the defendant was arrested and read his Miranda Rights.

3. After arrest and Miranda being given, the defendant was not questioned.

4. While at the hospital, the defendant spontaneously made voluntary statements during the attempted blood draw.

5. While at the hospital, the defendant asked to speak to his attorney.

6. During a break, the defendant was given his cell phone and he called his wife. The evidence did not reveal the substance of the call or its purpose. At some point the call was terminated.

CONCLUSIONS OF LAW



Whatcom County Prosecuting Attorney
311 Grand Avenue, Suite #201
Bellingham, WA 98225
(360) 778-5710
(360) 778-5711 Fax

1. Prior to arrest and Miranda being read, the defendant was not in-custody associated with formal arrest.

    a. The statements made prior to arrest were not a result of custodial interrogation and are therefore admissible.

2. After arrest and Miranda being read, the defendant was not interrogated by police.

    a. The defendant spontaneously and voluntarily made statements that were not a result of interrogation and are therefore admissible.

3. The defendant was not prejudiced by not having an opportunity to speak to an attorney because the State Patrol did not ask the defendant any questions.

4. All statements made by the defendant are admissible.

**ACCESS TO AN ATTORNEY UNDER CrR 3.1**

FINDINGS OF FACT

1. Defendant was under investigation for and arrested initially for DUI, then for Vehicular Assault and then later Vehicular Homicide.

2. Defendant asks that his blood result be suppressed for not being able to speak to an attorney.

3. The location of the accident was deep in the County, away from normal places where one might be given an opportunity to speak to counsel.



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(360) 778-5710
(360) 778-5711 Fax

4. There is no conclusive evidence regarding where the defendant's cell phone was at the time, or whether cell service was available.

5. Once the defendant was arrested for DUI and it then being learned that the other driver suffered serious injury, the investigation changed to Vehicular Assault and the decision was made to take the defendant to the hospital for a blood draw for purposes of testing for blood alcohol level.

6. A search warrant was granted for the defendant's blood.

7. At the hospital the defendant asked numerous times to speak to an attorney. He was given his phone and he called his wife.

8. The defendant was not given a phone book or an attorney list that might be available at night while at the hospital.

9. Testimony from corrections staff was that the jail procedure when someone is booked is to place that person in a room with a telephone and list of attorneys, or if the person is placed in a single cell to provide them with a "roll-around" with a telephone and attorney list within 40 to 45 minutes of booking.

## CONCLUSIONS OF LAW

1. If there were any violation for not providing an opportunity to speak with counsel, no prejudice has been shown.



Whatcom County Prosecuting Attorney
311 Grand Avenue, Suite #201
Bellingham, WA 98225
(360) 778-5710
(360) 778-5711 Fax

2. The defendant was arrested and a search warrant for blood warrant was granted. Under State v. Schultz, the assistance of an attorney would be likely be limited to advice that a blood draw was required and would be done pursuant to the warrant.

3. The evidence was not tainted by any delay.

4. The blood evidence is admissible.

**SERVICE OF THE WARRANT**

FINDINGS OF FACT

1. Trooper Beattie asked the defendant if he wanted to see the warrant.

2. The defendant said that he didn't want it.

3. Eventually, Trooper Beattie placed the warrant on the defendant.

CONCLUSIONS OF LAW

1. Service of the warrant was not defective and does not render the subsequent search invalid.

2. Evidence of the blood draw is admissible.

**SPECIAL EVIDENCE WARNINGS**

FINDINGS OF FACT

1. Special evidence warnings were provided to the defendant.



Whatcom County Prosecuting Attorney
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(360) 778-5710
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2. The special evidence warning was provided after the first attempt to draw blood but before the actual blood draw.

CONCLUSIONS OF LAW

1. The method and procedure of providing the defendant with a special evidence warning complies with law.

2. The blood evidence is admissible.

**RETROGRADE EXTRAPOLATION**

FINDINGS OF FACT

1. Retrograde extrapolation relies upon certain assumptions.

2. People have different body chemistries which make burn-off rates different.

3. The assumed burn-off rate is designed to be in favor of the defendant.

4. Retrograde extrapolation is generally accepted in Washington.

CONCLUSIONS OF LAW

1. Evidence of retrograde extrapolation is admissible.

2. Any questions about retrograde extrapolation shall go to the weight, not the admissibility.

**REASONABLE EXECUTION OF THE WARRANT**

FINDINGS OF FACT



Whatcom County Prosecuting Attorney
311 Grand Avenue, Suite #201
Bellingham, WA 98225
(360) 778-5710
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1. The State Patrol used a standard search warrant for blood.

2. The search warrant was specific enough under the circumstances.

3. The State Patrol was not required to offer a breath test pursuant to RCW 46.20.308.

4. The defendant flailed about and tensed his body so that any attempts to draw blood were dangerous to both the defendant and hospital staff.

5. Doctor Ravitsky suggested sedating the defendant in order to draw blood and Trooper Beattie concurred. The defendant was formally admitted to the hospital for the purposes of administering the sedative and to evaluate him for injuries due to his behavior.

6. The court considered how the procedure may threaten the safety or health of the individual, and the intrusion upon the individual's dignity and privacy interests, balanced against the community's interest in fairly and accurately determining guilt or innocence of the defendant.

7. Sedating presented a low safety and health risk for the defendant, was necessary and was the only safe way that the blood draw could be done.

8. The community's interest in determining guilt or innocence is high in a Vehicular Homicide case.

## CONCLUSIONS OF LAW

1. The warrant was executed reasonably.



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Bellingham, WA 98225
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(360) 778-5711 Fax

2. The blood evidence is admissible.

DATED this 15 day of ~~January~~ March, 2017.

HONORABLE JUDGE CHARLES SNYDER

ERIC J. RICHEY, WSBA #22860
Chief Criminal Deputy Prosecuting Attorney

JONATHAN RANDS WSBA #
Attorney for Brian Smith



Whatcom County Prosecuting Attorney
311 Grand Avenue, Suite #201
Bellingham, WA 98225
(360) 778-5710
(360) 778-5711 Fax

# APPENDIX F

**(ORDER LIST: 589 U.S.)**

**THURSDAY, MARCH 19, 2020**

**ORDER**

In light of the ongoing public health concerns relating to COVID-19, the following shall apply to cases prior to a ruling on a petition for a writ of certiorari:

**IT IS ORDERED** that the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. See Rules 13.1 and 13.3.

**IT IS FURTHER ORDERED** that motions for extensions of time pursuant to Rule 30.4 will ordinarily be granted by the Clerk as a matter of course if the grounds for the application are difficulties relating to COVID-19 and if the length of the extension requested is reasonable under the circumstances. Such motions should indicate whether the opposing party has an objection.

**IT IS FURTHER ORDERED** that, notwithstanding Rules 15.5 and 15.6, the Clerk will entertain motions to delay distribution of a petition for writ of certiorari where the grounds for the motion are that the petitioner needs additional time to file a reply due to difficulties relating to COVID-19. Such motions will ordinarily be granted by the Clerk as a matter of course if the length of the extension requested is reasonable under the circumstances and if the motion is actually received by the Clerk at least two days prior to the relevant distribution date. Such motions should indicate whether the opposing party has an objection.

**IT IS FURTHER ORDERED** that these modifications to the Court's Rules and practices do not apply to cases in which certiorari has been granted or a direct appeal or original action has been set for argument.

These modifications will remain in effect until further order of the Court.

# APPENDIX G

SCANNED 2



**IN THE WHATCOM COUNTY SUPERIOR COURT**
**STATE OF WASHINGTON**

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Plaintiff,<br><br>vs.<br><br>BRIAN J. SMITH,<br><br>Defendant. | **No. 14-1-01457-3**<br><br>***MOTIONS TO SUPPRESS EVIDENCE PURSUANT TO CrR 3.6, AND DECLARATION IN SUPPORT***<br><br>ORIGINAL |

**THE DEFENDANT, MR. BRIAN J. SMITH,** by and through his attorneys of record, Jonathan Rands and Mark Kaiman, moves this Court to grant the following motions and issue order/s pursuant to the State and Federal Constitutions, **CrRLJ 3.6, and a review of the case law on forced sedation for purposes of search and seizure :**

1. Motion To Suppress The Seizure and Search Of Mr. Smith By Way Of A Blood Draw And Its Fruits, In The Form Of Search By Analyses Of The Seizure, Due To:

   a. The Defendant was sedated, knocked unconscious and such execution of a search warrant goes beyond the standards of reasonableness and is such outrageous government conduct that it shocks the conscious and thus is a violation of Mr. Smith's due process rights; and



***JONATHAN D. RANDS***
Attorney at Law
1200 Old Fairhaven Pkwy, Suite 303
Bellingham, WA 98225
Ph. 360.306.8136 Fax. 360.656.8316

**b.** The warrant is void for vagueness. The warrant sets no limit on the parameters of the search. In cases alleging intoxication a warrant for blood must set limits upon the time from to execute, and this warrant had none.

These motions are based on the records and testimony of WSP Trooper Beattie under oath last week in a preliminary pre-trial hearing.

## CERTIFICATION OF COUNSEL

I, Jonathan Rands, am an attorney for Defendant, Mr. Smith, charged under the above-stated cause number. I make this declaration in support of these motions above. It was just last week via sworn testimony of the issue of sedation being the idea of the actors in the form of doctors, nurses, and WSP troopers. I have done preliminary research and require to time to brief the issues, but thus far I have a good faith reason to believe that the execution of a search warrant must be reasonable, and those limits in this case appear to be exceeded.

Furthermore, I have had the warrant application transcribed and there is no verbal limit on the search and seizure and there also being no written limitation on the written warrant, the scope of the warrant is void for vagueness. Notwithstanding this, the typical time authorized to obtain a blood draw was exceed by more than an hour in this case.

The Defense will provide legal analyses in the form of a Memorandum of Law to be filed, but given its length will require permission to exceed local rule page limits.

**I HEREBY CERTIFY UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF**

Dated this 24th day of October 2016 and respectfully submitted by

Jonathan D. Rands
WSBA No. 32793
Attorney for Defendant



***JONATHAN D. RANDS***
Attorney at Law
1200 Old Fairhaven Pkwy, Suite 303
Bellingham, WA 98225
Ph. 360.306.8136 Fax. 360.656.8316

# APPENDIX H

NO. 76340-7-I

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

---

STATE OF WASHINGTON,

Respondent,

v.

BRIAN J. SMITH,

Appellant.

---

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

The Honorable Charles R. Snyder, Judge

---

# BRIEF OF APPELLANT

---

LENELL NUSSBAUM
Attorney for Appellant

2125 Western Ave., Suite 330
Seattle, WA 98121
(206) 728-0996

## TABLE OF CONTENTS

**TABLE OF CONTENTS (cont'd)**

**TABLE OF CONTENTS (cont'd)**



APPENDICES

## TABLE OF AUTHORITIES

WASHINGTON CASES

## TABLE OF AUTHORITIES (cont'd)

WASHINGTON CASES (cont'd)

**TABLE OF AUTHORITIES (cont'd)**

OTHER JURISDICTIONS

## TABLE OF AUTHORITIES (cont'd)

OTHER JURISDICTIONS (cont'd)



STATUTES AND OTHER AUTHORITIES

## TABLE OF AUTHORITIES (cont'd)

STATUTES AND OTHER AUTHORITIES (cont'd)

A. ASSIGNMENTS OF ERROR

1. The trial court erred by admitting evidence of the blood test when the State unreasonably executed the search warrant for blood. U.S. Const., amend. 4, 14; Const., art. I, §§ 3, 7.

2. The trial court erred admitting evidence of the blood test obtained by administering an antipsychotic drug to sedate the defendant without his consent and without authority of law. U.S. Const., amends. 4, 14; Const., art. I, §§ 3, 7.

3. The trial court erred by admitting evidence of the blood test when the State denied the defendant his right to counsel before, at the time of, and after the blood draw. CrR 3.1; U.S. Const., amends. 5, 14; Const., art. I, §§ 9, 22.

4. The trial court erred by admitting evidence of the blood test when the State interfered with the defendant's right to have an independent test done.

5. Appellant assigns error to Finding of Fact 4 regarding Defendant's Statements Under CrR 3.5: "While at the hospital, the defendant spontaneously made voluntary statements during the attempted blood draw." CP 329; App. C.

6. Appellant assigns error to Finding of Fact 2 regarding Execution of the Warrant: "The search warrant was specific enough under the circumstances." CP 334; App. C.

7. Appellant assigns error to Finding of Fact 3 regarding Execution of the Warrant: "The State Patrol was not required to offer a breath test pursuant to RCW 46.20.308." CP 334; App. C.

8. Appellant assigns error to Finding of Fact 7 regarding Execution of the Warrant: "Sedating presented a low safety and health risk for the defendant, was necessary and was the only safe way that the blood draw could be done." CP 334; App. C.

9. The trial court erred in concluding appellant's statements made at the hospital while people were strapping him down, holding him down, beating him, and drugging him without his consent, were voluntary and so admissible. U.S. Const., amend. 5; Const., art. I, § 9; CrR 3.1.

10. Admitting appellant's statements to a doctor, nurse or their agent violated his statutory privilege.

11. Appellant was denied effective assistance of counsel for not moving to exclude his statements in the emergency room under his statutory physician/nurse/patient privilege.

Issues Pertaining to Assignments of Error

1. Does a routine warrant to obtain a blood sample provide authority of law to inject a person with an antipsychotic drug to sedate him against his will?

2. Where the State obtains a search warrant for a blood draw, but the suspect is phobic of needles, did the State reasonably execute the warrant when it restrained him by ankles and wrists, had 4-5 large officers hold him down, beat him with a baton and ultimately drugged him to unconsciousness for several hours to take his blood?

3. Where a suspect is needle phobic and cannot tolerate a routine blood draw, does a routine search warrant for a blood draw provide authority of law to physically restrain, beat, and ultimately drug the suspect in order to draw blood?

4. Was denying the defendant his right to consult counsel, despite his unequivocal request to

do so, at the time of his arrest and until several hours after the blood draw, harmless error?

5. Were appellant's statements in an emergency room while people were strapping him down, holding him down, beating him and drugging him without his consent "voluntary" and admissible?

6. Did appellant have a statutory privilege requiring his consent for a doctor, nurses, and their agents to testify to information obtained in their professional interactions with him?

7. Was appellant denied effective assistance of counsel when his lawyer did not object to the medical personnel testifying in violation of his statutory privilege?

B. STATEMENT OF THE CASE

1. THE COLLISION

On December 5, 2014, Brian Smith, age 31, met his wife Katie and five small children at the Lynden Fairgrounds for the family Christmas party of his employer, BP. They left about 7:15 p.m. and stopped with Brian's sister and brother-in-law at the Rusty Wagon for a burger-and-fries dinner. Brian had no alcohol at the party or at the restaurant. RP 1421-25.

After dinner, Katie sat with the children in her minivan to nurse their infant before driving home. Brian sat with her and the children while she nursed. Katie had picked up some beer and a movie for later at home. Brian drank one of the beers in the van. Brian then returned to his Suburban and headed home, Katie a few vehicles behind. RP 1425-27, 1470.

Eastbound on State Road 544, Brian slowed as he approached the entrance to their development. He waited as an oncoming vehicle passed, then began his left turn onto Christopher Lane. RP 1427-28.

To his shock, something crashed into his windshield, shattering it. His air bag exploded. Brian carefully completed the turn and pulled to the curb of the side street. RP 1428-30. It was about 8:45 p.m. RP 1403-05, 1546.

The driver's door was jammed. Climbing out of his vehicle on the passenger's side, Brian was horrified to find a man on the hood. He had collided with a motorcyclist. He got up next to the man, said he was sorry and reassured him he would be okay. RP 1429-31.

Elizabeth Diaz, a nurse in the car behind Brian's, told her husband to call 911 as she ran to help. She held the victim's hand, deciding not to move him. He was conscious and talking. Brian stayed with them, repeatedly saying he was sorry. He looked as shocked and scared as Ms. Diaz felt. RP 538-556.

Ms. Diaz's husband was a former military police officer, always alert to issues of drinking and driving. He saw no problem with Brian's driving as he followed him before the collision. At the scene, Brian was upset and badly shaken, as was he. RP 1403-20. Neither Ms. Diaz nor her husband saw any sign that Brian was intoxicated. They stayed at the scene until first responders arrived. RP 556-59, 1409-12, 1419-20.

Everson police officer Tiemersma, first on the scene, asked who drove the Suburban. Brian Smith said he did. Tiemersma took his driver's license and told him to stay close by; Brian said he would. RP 562-75.

Medics took the victim to the hospital. After field sobriety tests at the scene, Trooper Beattie arrested Brian Smith for DUI. Beattie later

learned the victim was seriously injured and obtained a search warrant for Brian's blood. The victim died later that night. RP 50-56, 562-81, 649, 654-55, 1141-50.

2. CHARGES

The state charged Brian Smith with Count I, vehicular homicide, RCW 46.61.520, alleging he

> did drive a motor vehicle while under the influence of intoxicating liquor and/or any drug; and/or had, within two hours after driving, an alcohol concentration of .08 or higher as shown by analysis of his blood made under RCW 46.61.505; and the driving of said motor vehicle did proximately cause the injury of Jason L. Schuylman, such injuries proximately causing that person's death within three years ... .

and Count II, obstructing a law enforcement officer, RCW 9A.76.020, alleging he

> did willfully delay, hinder or obstruct a law enforcement officer in the discharge of his or her powers or duties ...

CP 1-2, 84-85.

3. PRETRIAL MOTIONS

The defense moved *inter alia* to exclude the blood test and all statements made after advice of rights. CP 3-9, 13-27, 30-60, 132, 150-57.

Pretrial evidence was taken at multiple hearings spanning more than a year.[1]

a. *At the Collision Scene*

When Trooper Beattie[2] arrived at the scene the victim had been removed to the hospital. RP 55-57. Officer Tiemersma gave Beattie Brian's license. RP(11/3/15) 23. Seeing two men near the ambulance, Beattie asked who was the driver. Brian said he was. Beattie asked him what happened. Brian said he was with his family at the BP Christmas party then the Rusty Wagon for dinner. He was on the way home eastbound on 544. He waited for an oncoming vehicle to pass before turning left onto Christopher Lane. He began the turn when a motorcycle struck the front of his car. Beattie asked how much he had to drink; Brian said he had no alcohol. RP(11/3/15) 23-28, 35-36.

Trooper Beattie asked Brian for his registration and insurance. Brian went to his

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[1] RP 10-58 (10/27/15); RP(11/3/15); RP 73-173 (10/17/16); RP 174-226 (10/24/16); RP 240-303 (11/7/16). The transcript of 11/3/15 is in a separate volume, paginated separately from the rest of the trial record.

[2] Trooper Beattie had been a commissioned law enforcement officer only 6 months. RP 822-23.

vehicle to get it, but returned without it, having locked the doors. When Beattie asked why he did that, he said he didn't know. RP (11/3/15) 29-34. Beattie administered field sobriety tests. Brian blew a portable breath test. RP(11/3/15) 39-43; RP 73-77. Beattie arrested him at 9:33 p.m., cuffed him and put him in his patrol car. RP 79-81.

Trooper Beattie read Brian his rights which said he had the right to speak to an attorney "now." Brian's only question was when he could talk to an attorney. Beattie told him he couldn't get him in contact with an attorney "at that point," but could once they got to the jail. RP 82-83, 144, 149.

Trooper Beattie stayed at the scene until another WSP unit arrived. He left with Brian at 10:22 p.m. By then, he knew the victim was in serious condition. He began work on a search warrant for Brian's blood. RP 84-87.

b. *At the Hospital*

Trooper Beattie did not tell Brian the victim's condition or that he was taking him to the hospital for a blood test instead of to the jail where he could call a lawyer. RP 126. They

arrived at the hospital at 10:41 p.m. He did not let Brian use a phone; he wanted the blood sample as soon as possible, and decided he would not question him in the meantime. RP 87-89.

It takes on average 15-20 minutes to get a telephonic search warrant. RP 88-89. Trooper Beattie's telephonic testimony to the judge occurred at 10:52 p.m. CP 143.

Trooper Williams was already at the hospital on another case. He took Brian inside while Trooper Beattie printed the search warrant in his car. RP 90-91.[3]

The phlebotomist came into the room where Brian sat with Trooper Williams. Brian said he would not allow a blood draw. Trooper Beattie told him he had a search warrant for his blood. Brian said he was afraid of needles, it was against his religion,[4] he would not permit it. He was not cuffed and he was not combative; he was calm and

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[3] A copy of the search warrant is attached as Appendix A. Ex. 9. The recorded testimony to obtain it is attached as Appendix B. CP 143-49.

[4] Brian testified at trial he did not say it was against his own religion, but was asking what alternatives are used for people when it is against their religion. RP 1443-44.

compliant. Beattie let him leave to use the bathroom. He did not offer him a phone. RP 91-94.

Brian expressed his concerns only verbally. He was not yelling. He did not react physically until they approached him with a needle. RP 140.

c. *Strapped to the Bed*

When Brian returned, they put him in another room with padded walls and a bed with restraints. Brian again said he would not permit a blood draw; he was afraid of needles and he wanted his attorney present. Trooper Beattie told him to get onto the bed where they could secure him to take his blood. Brian then physically resisted and said he would not permit the restraints. RP 95-97.

The troopers physically put Brian on the bed, where he balled up his arms and legs. He was kicking and flailing. Beattie drew his taser, put it to Brian's chest, and warned he would tase him if he didn't get on the bed and allow the restraints. Brian then allowed them to strap down his arms and legs. RP 96-100, 272-76.

They again tried to get a blood draw. About ten people in the room included security, nurses, doctors, and police. RP 98. In addition to the

ankle and wrist restraints, two hospital security officers and two troopers held him down. The four or five people on him were all about the size of Trooper Beattie: 6'3", 220 pounds. Even thus restrained at 5'8" and 165 pounds, Brian tensed, flailed, turned, and kicked whenever a needle came near him. RP 272-76. The phlebotomist stopped trying. RP 101-02.

Trooper Beattie conferred with Dr. Ravitsky. They decided to sedate Brian. RP 101-02.

Dr. Ravitsky first said Brian was brought in for a "legal blood draw," but later claimed he was also there for "trauma" -- although Trooper Beattie testified Brian was not injured and was cleared by medics at the scene. The doctor was not asked to see him until after Brian resisted the first blood draw attempt. RP 243-48; CP 145 (App. B at 3).

Trooper Beattie told Brian they planned to sedate him. Brian refused sedation; he said he was allergic to all sedatives. Brian was able to talk to the doctor, but then became very agitated and aggressive. He was calmer when there was no needle near him. RP 104, 252, 285.

While the doctor checked records, Trooper Beattie gave Brian the cell phone he had taken from him. He intended for Brian to contact his attorney, but he didn't give him any lawyers' phone numbers. Brian called his wife. RP 105-06. Trooper Beattie terminated Brian's call. RP 139, 790.

Unable to confirm an allergy, Dr. Ravitsky concluded Brian's behavior appeared to be induced psychosis from alcohol or drugs -- although he was not present when Brian was speaking on the phone to his wife. He decided to inject him with Haldol and Benadryl or Ativan. Brian also resisted that needle. While an officer painfully beat his leg with his baton to distract him, they injected it into his shoulder. RP 246-48, 252, 791-92, 1129, 1134-35, 1181-82.[5]

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[5] Brian recalled at trial the officer struck him five times on his shin, then drove the baton into his leg just above his kneecap, causing him to scream. He thought that was when they injected him with the sedative. RP 1448-49.

Dr. Ravitsky had never sedated someone for a blood draw before. RP 244-46.[6]

It took 30 minutes for the sedative to take effect. RP 108-09. Blood was drawn at 1:30 a.m., about 2-1/2 hours after the warrant. RP 135. The sedative usually lasts "an hour or two." RP 249.[7]

Dr. Ravitsky testified a person sedated with Haldol is not competent to give consent. RP 256.

The warrant did not authorize a sedative or antipsychotic medications. Ex. 9 (App. A).[8]

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[6] He testified at trial the charge nurse told him the court and the medical examiner requested that he sedate him. RP 666-67. The ER charge nurse testified at trial Brian was brought in for a legal blood draw, not for medical purposes. She acknowledged Brian's fear of needles; he did not fight unless they approached him with a needle; his fear of needles caused his behavior. She got the administrator's permission to use restraints, but they still couldn't do a draw. She then told the doctor the police said they had no option. After talking with the officers and others, "[w]e determined that yes, we could sedate to draw blood." RP 685-92, 708-11.

[7] At trial, Dr. Ravitsky testified the sedative usually lasts hours. Brian slept while he was sedated. Brian was able to walk out of the emergency room about two hours after the sedative, but he was still sedated. RP 678-80, 917-21.

[8] When the prosecutor claimed the doctor's job was to follow the court's directions and so he sedated him, the trial court clarified the court did not order anyone to sedate him. RP 624-25.

Trooper Beattie took Brian to the jail from the hospital. Lawyer calls are routinely made from the breath test room next to the booking area. Beattie did not give Brian that option. RP 145-46.

The trial court found Brian asked to speak to his attorney at the hospital; he was not questioned by police, but made spontaneous voluntary statements while they tried to draw blood. It concluded those statements were not the result of interrogation, and so were admissible; and he was not prejudiced by not having an opportunity to speak to an attorney because the State Patrol did not ask him any questions. CP 329-30 (App. C).

The trial court found there was no evidence of whether the defendant could have called a lawyer from the scene on a cell phone. He asked numerous times at the hospital to speak to an attorney. He was given his phone and called his wife, but he was not given a phone book or attorney list. The police terminated the call to his wife. The court concluded if there was any violation of the right to counsel, no prejudice was shown.

> [T]he assistance of an attorney would be likely be [sic] limited to advice that a blood draw was required and would be done pursuant to the warrant.

CP 331-32 (App. C at 4-5).[9]

d. *Medical Personnel Privilege*

Following these hearings, the defense moved to limit the doctor's trial testimony to what he saw and heard; counsel asserted Brian's privilege to prevent testimony to any of Brian's medical records he reviewed and to any diagnosis he reached, e.g., that Brian was "psychotic from drugs or alcohol." The court ruled the doctor could testify that he looked at records and there was no record of allergies. The court ruled a diagnosis was not privileged. It noted the defense's standing objection. RP 623-28.

The defense did not assert Brian's statutory privilege regarding doctors, nurses, and their agents testifying regarding information they acquired by treating him. RCW 5.60.060(4), 5.62.020.

4. TRIAL TESTIMONY

Brian testified he saw no headlight coming when he began his turn. RP 1429-30. The motorcycle's headlamp was wired with the ignition;

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[9] The defense told the court counsel could also advise him how to get his own test to preserve exculpatory evidence, *inter alia*. RP 1385-89.

it did not have a separate on/off switch. When the WSP investigator tried it after the collision, it worked and then stopped working. He didn't test it for intermittent failure. RP 1114-16, 1120-21. Another investigator found it operated intermittently when powered. RP 1272.

Trooper Beattie testified he gave Brian his cell phone at the hospital. Outside the jury's hearing, the defense objected to any comment on his right to counsel. The State agreed Beattie would only say he offered it to calm him. RP 786-88.

Brian testified Trooper Beattie did not offer him access to a lawyer in the 30-45 minutes after arrest and reading his rights, as he sat in the patrol car. The prosecutor objected, saying in front of the jury, "He doesn't have a right to talk to an attorney at this point." The court sustained the objection. RP 1436-37.

When the troopers confronted him at the hospital with the warrant, Brian testified he was scared, he wanted to talk to an attorney. The State objected again that he had no right to counsel; this time the court overruled the objection. RP 1445-46.

When Brian called his wife, he told her he needed to talk to an attorney. The trooper took the phone and ended the call. RP 1447-48.

Brian testified his problem was the needles. He kept asking for alternatives. RP 1448-49. When sedated, he lost consciousness. When he woke up, his pants were gone. He was taken to the jail without pants or shoes. RP 1449-50.

Dr. Ravitsky and two registered nurses from the emergency room testified to their interactions with Brian. Nurse Thomas admitted Brian as a patient. He was assessed by Dr. Ravitsky. RP 717-26. Judy Magneson, the charge nurse, handled Brian's treatment and blood draw with the phlebotomist. RP 683-717. Dr. Ravitsky testified largely as he had pretrial. RP 664-82. Trooper Beattie also testified to events and statements Brian made in the emergency room. RP 654-63, 782-820, 896-903, 909-26.

The ER phlebotomist draws blood every ten minutes for eight hours a day. She encounters needle phobias four or five times a week. One can't force someone through the phobia; it takes time to keep the person calm and gain their trust.

The trooper demanded blood immediately from Brian, not helping the situation. She detected no sign of intoxication; except for the phobia, Brian communicated well with her. RP 1339-51, 1356-63.

Brian's blood tests showed an alcohol content of 0.051 and 0.050. RP 1003. Applying retrograde extrapolation, the toxicologist estimated Brian's blood alcohol content two hours after the collision was .08-.11. RP 1030, 1058.

5. CLOSING ARGUMENTS

The State argued Brian's conduct in the emergency room demonstrated his intoxication and his desire to hide evidence. RP 1552-54, 1586-88.

6. DELIBERATIONS AND VERDICTS

The jury deliberated over two days. On the first day, it sent the court an inquiry:

> At what point was Smith entitled to contact an attorney?

The court responded: "The jury instructions set out the issues that the jury must decide. You have all the evidence at this time." CP 110.

The jury found Brian guilty of vehicular homicide and obstructing an officer. CP 111.

7. SENTENCING

Members of the community wrote many letters to the Court about Brian. CP 162-306, 318-27. He not only did not have any criminal history; the court noted he lived an "exemplary life" as an "outstanding member" of the community. It imposed a sentence of 78 months in prison, the bottom of the range.[10] It set a bond for his release pending appeal. RP 1611-34; CP 307-17.

C. ARGUMENT

1. THE STATE VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS AND UNREASONABLE SEARCHES AND SEIZURES WHEN IT USED UNREASONABLE FORCE TO OBTAIN HIS BLOOD, DRUGGED HIM WITHOUT CONSENT OR A WARRANT, DENIED HIM HIS RIGHT TO COUNSEL, AND PRECLUDED HIM FROM OBTAINING AN INDEPENDENT BLOOD TEST.

a. *The Totality of Circumstances Demonstrates the State Violated Due Process and the Fourth Amendment's Requirement of Reasonableness.*

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

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[10] The court concluded it could not impose a Parenting Sentence Alternative because the crime of conviction was a violent offense. RP 1634; RCW 9.94A.655, 9.94A.030(55)(a).

U.S. Const., amend. 4. "[N]or shall any State deprive any person of life, liberty, or property without due process of law ... ." U.S. Const., amend. 14, § 1. "No person shall be deprived of life, liberty, or property, without due process of law." Const., art. I, § 3.

Within the Fourth Amendment, searching a person's body and seizing blood is

> a compelled physical intrusion beneath [a person]'s skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'

*Missouri v. McNeely*, 569 U.S. 141, 148, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013). Here the police obtained a warrant for the blood draw. But that doesn't end the constitutional inquiry.

> The ultimate touchstone of the Fourth Amendment is "reasonableness."

*Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006). The Fourth Amendment requires that both the purpose and manner of seizure be reasonable.

> [T]he Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the

> circumstances, or which are made in an improper manner.

*Schmerber v. California*, 384 U.S. 757, 768, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). Whether a search or seizure is reasonable "must be determined case by case based on the totality of the circumstances." *McNeely*, *supra*, 569 U.S. at 144. In *McNeely*, the Court specifically noted one such circumstance is how quickly a warrant can be obtained. *Id.* at 152.[11]

The *Schmerber* Court held a blood test administered **without the use of force** in a hospital was warranted and reasonable. Nonetheless, the Court carefully limited its holding to the facts before it: the defendant refused a breathalyzer test and the blood test, but the officer directed a doctor to take a blood sample without a warrant. The Court specifically noted the defendant was not

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[11] "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Id.* at 152. "Judges have been known to issue warrants in as little as five minutes ...," and email warrants can be signed and emailed back to officers in less than 15 minutes - consistent with Trooper Beattie's testimony. *Id.* at 172 (Kennedy, J., concurring).

phobic about needles - which might require a different outcome.

> [F]or most people the procedure involves virtually no risk, trauma, or pain. Petitioner is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the 'breathalyzer' test petitioner refused . . . .

*Id.* at 771.

> It would be a different case if the police initiated the violence, refused to respect a reasonable request to undergo a different form of testing, or responded to resistance with inappropriate force.

*Id.* at 760 n.4.

> It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

*Id.* at 772.

"Convictions cannot be brought about by methods that offend 'a sense of justice.'" *Rochin v. California*, 342 U.S. 165, 173, 72 S. Ct. 205, 96 L. Ed. 183 (1952); *Schmerber*, at 760. In *Rochin*, the police repeatedly used intrusive force, jumped

on the suspect, took him to the hospital in cuffs, and directed a doctor to obtain drug evidence from the suspect's body. The doctor forced an emetic solution into the suspect's stomach to produce vomiting. The Court reversed the conviction as violating due process.

In *Winston v. Lee*, 470 U.S. 753, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985), the Court affirmed the denial of an order to surgically remove a bullet from a suspected robber's body as violating due process.

> In this case, ... the Commonwealth proposes to take control of respondent's body, to 'drug this citizen--not yet convicted of a criminal offense--with narcotics and barbiturates into a state of unconsciousness,' ... and then to search beneath his skin for evidence of a crime.

*Winston*, 470 U.S. at 765. The Court expressly noted the matter was brought as a motion to the court, "afford[ing] respondent the benefit of a full adversary presentation and appellate review." Thus it did not reach the question whether the State may compel a suspect to undergo a surgical search of this magnitude for evidence absent such procedural protections. *Id.* at 763 n.6.

At the hospital, without counsel, Brian Smith did not have these procedural protections before the State took control of his body, "drug[ged] this citizen--not yet convicted of a criminal offense ... into a state of unconsciousness," and then "search[ed] beneath his skin for evidence of a crime."

In *Schmerber* and *Winston*, the Court

> identified three primary factors courts should weigh in deciding the reasonableness of a body search. Those factors are (1) 'the extent to which the procedure may threaten the safety or health of the individual,' (2) 'the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity,' and (3) 'the community's interest in fairly and accurately determining guilt or innocence.'

*George v. Edholm*, 752 F.3d 1206, 1217 (9th Cir. 2014), citing *Winston* at 761-62.

> When a search intrudes into the body, the search must meet three showings in addition to meeting the warrant requirement or meeting an exception. ... First, there must be a "'clear indication'" that the evidence will be found; second, the search method must be reasonable; and third, the search must be performed in a reasonable manner. ... The State must make these showings ***and*** satisfy the warrant requirement ....

*State v. Baird*, 187 Wn.2d 210, 221 n.3, 386 P.3d 239 (2016) (Court's emphasis), citing *State v. Garcia-Salgado*, 170 Wn.2d 176, 240 P.3d 153 (2010).

In this case, the blood draw was substantially more intrusive than in *Schmerber*. It included trauma, pain, and ultimately drugging to incompetence. Unlike Mr. Schmerber, Brian gave the requested breath sample. He asked to speak with an attorney, to have an attorney present. He is "one of the few" phobic about needles. He asked the trooper for another way to proceed than with a needle; what did they do when one's religion prohibited drawing blood?

The trooper responded with a threat to tase him. Police shackled his arms and legs to a hospital bed. Four or five burly officers held him down. And when he still was unable to submit to a blood draw, they beat him to forcibly administer an injected sedative against his will. The sedative then disabled him from being able to contact a lawyer for several hours and prevented him from obtaining an independent test.

These circumstances offend one's sense of justice. They are unreasonable under the Fourth

Amendment and denied Brian Smith his liberty without due process of law.

b. *Other Courts Have Reversed For Similar Facts.*

The federal courts have condemned similar forcible intrusions into a person's body.

> [W]e and other courts have characterized as unwarranted intrusions on dignitary interests. In *United States v. Cameron*, a suspect underwent a digital rectal exam and two enemas before being forced to drink a liquid laxative. 538 F.2d at 258. In an opinion by then-Judge Kennedy, we held that search unreasonable. *Id.* at 258-60. In *Ellis v. City of San Diego*, 176 F.3d 1183 (9th Cir. 1999), we held that the plaintiff had alleged a clear Fourth Amendment violation when he claimed that doctors sedated him, took blood samples, and inserted a catheter into his penis. *Id.* at 1186, 1191-92; *see also Booker*, 728 F.3d at 547 (sedation, intubation, and anal probing are 'an affront to personal dignity...categorically greater' than surgery in *Winston*); ... *United States v. Husband*, 226 F.3d 626, 632 (7th Cir. 2000) (sedation and reaching into suspect's mouth 'constitute a serious invasion of ... personal privacy and liberty interests'); ... *State v. Payano-Roman*, 290 Wis. 2d 380, 714 N.W.2d 548, 560 (2006) (being forced to drink a laxative is a 'significant intrusion').

*George v. Edholm*, 752 F.3d at 1218-19.

Other states also hold such use of force is unconstitutional.

In *State v. Sisler*, 114 Ohio App. 3d 337, 683 N.E.2d 106 (1996), Mr. Sisler was arrested for DUI and taken to the hospital for a head injury. He consented to a blood draw. But when the hospital technician approached to draw the blood, although handcuffed to a bed, he struggled violently. Two police officers, two hospital security officers, a physician and a nurse held him down. "Several efforts to insert a needle into his veins were unsuccessful, but blood was finally drawn." *Id.* at 340. The Ohio court reversed the conviction, holding the search violated both due process and the Fourth Amendment.

> It offends a fundamental sense of justice, at least as this court views that concept, that an accused who has been shackled to a hospital bed is held down by six persons while a seventh jabs at his arm with a needle in order to withdraw his blood at the direction of the state's officers. Such conduct is beyond that supportable as a measure necessary for effective law enforcement.

*Sisler*, 683 N.E.2d at 111 (1995).

The New Jersey Supreme Court held the same.

> To obtain defendant's blood, Officer Sullivan and hospital personnel had to restrain defendant. Defendant's legs and his left arm were strapped to a table, and several persons ... held him down. The record is undisputed that defendant screamed and struggled to free himself as

> the nurse drew his blood. Defendant later testified that he had said repeatedly, "I'm afraid of needles. I have no problem giving you a Breathalyzer sample if that's what you want but do not take my blood."

*State v. Ravotto*, 169 N.J. 227, 233, 777 A.2d 301 (2001). The *Ravotto* court held the "totality of the circumstances" made a blood draw unreasonable and so unconstitutional.

Similarly, in *People v. Kraft*, 3 Cal. App. 3d 890, 84 Cal. Rptr. 280 (1970), the defendant began to submit to a blood draw, then resisted. Two officers tried to take him to a bed, but all three men went to the floor. There the officers immobilized the defendant, face down on the floor, at least one officer on top of him. The doctor performed the blood draw while they remained in this position. The California Court of Appeals reversed the conviction, holding the blood test results were obtained in violation of the Fourth Amendment.

Other courts also recognize that fear of needles is a compelling circumstance, an exception to the norm. *Wessell v. DOJ, Motor Vehicle Div.*, 277 Mont. 234, 921 P.2d 264 (1996) (fear of needles made defendant incapable of providing blood test;

license suspension for refusing test reversed); *In re Griffiths*, 113 Idaho 364, 372, 744 P.2d 92 (1987) (fear of needles sufficient cause for refusing blood test; no suspension if suspect told officer of fear and requested another test).

While none of these cases involved vehicular homicide, also none of them involved a beating with a baton and drugging with an antipsychotic medication. As in these cases, this case should be reversed and dismissed.

c. *Injecting a Suspect with an Antipsychotic Medication Without a Warrant or His Consent and Beating Him In Order to Inject the Anti-Psychotic Drug Violated Due Process.*

Haldol, one of the drugs injected into Brian, is an antipsychotic medication. *Harper v. State*, 110 Wn.2d 873, 876 n.3, 759 P.2d 358 (1988), *rev'd on other grounds*, *Washington v. Harper*, 494 U.S. 210, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990).

> The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty. ... The purpose of the [antipsychotic] drugs is to alter the chemical balance in a patient's brain, leading to changes, intended to be beneficial, in his or her cognitive processes. ... While the therapeutic benefits of antipsychotic drugs are well documented, it is also true that the

> drugs can have serious, even fatal, side effects.

*Id.*, 494 U.S. at 229.[12] The *Harper* Court held forcing antipsychotic medications into convicted mentally ill prison inmates satisfied due process where the State required a decision by a committee of a psychiatrist, a psychologist, and the prison superintendent, and the inmate still had the ability to challenge that decision in court.

In contrast, due process requires a court order to force antipsychotic medications on an unconvicted suspect incompetent to stand trial. *Sell v. United States*, 539 U.S. 166, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003).

In *United States v. Husband, supra*, the police believed a drug dealing suspect hid something in his mouth. They obtained a warrant to search his "body" for illegal drugs, weapons, or contraband. The suspect refused to submit to the search at the hospital. As here, the doctor decided to sedate the suspect. As here, the warrant did not authorize sedation. The doctor testified it was necessary to medicate him in case he had swallowed

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[12] The Court examined the long list of potential side effects. *See id.*

drugs and overdosed. While sedated, three baggies of cocaine were removed from his mouth. The trial court denied the motion to suppress the evidence. The Court of Appeals reversed and remanded.

> Under these circumstances, it is beyond question that the police's actions in sedating the defendant and removing the drugs from his mouth constitute a serious invasion of the defendant's personal privacy and liberty interests.
>
> ...
>
> [T]he proper inquiry is whether anything about the facts and circumstances of this case made the search unreasonable. ... In this regard, **it is significant that the warrant obtained by the police only authorized a search of the defendant's body.** There is no dispute in this case that the warrant included the authority to conduct a body cavity search, but the defendant claims that the method of conducting the search--rendering the defendant unconscious--was unreasonable in light of the circumstances. That is, the defendant argues that the police should not have rendered him unconscious for the purposes of executing the warrant for a search of his body absent prior judicial approval of the use of a general anesthesia.

*Husband*, 226 F.3d at 632, 634 (emphasis added). The court found the record inadequate to resolve the issue. There was no evidence on record that the drug administered was dangerous, but also no assurance it was completely safe or the precise magnitude of the risk. The record did not clearly

indicate how imminent police regarded the potential loss of evidence. And lastly,

> the record is ambiguous as to the extent of the medical emergency faced by the defendant at the time he was administered the anesthetic. Although there is evidence that the doctor involved was concerned about the defendant's health, and there exists a doctor's statement that the anesthetic was administered both to facilitate the search and to treat the patient, there is no evidence that the medical emergency had reached the point where serious harm to the defendant was an immediate possibility.

*Id.* at 635.

Brian Smith was not convicted of any crime. He was not seen by a psychiatrist, psychologist, or any mental health professional. He was entitled to have a court determine, by means of a warrant, whether the State could forcibly inject him with antipsychotic medications.

Trooper Beattie testified he was concerned with getting the blood draw as soon as possible because Brian's body was burning off the alcohol. In *McNeely*, the Court rejected the dissipation of blood alcohol evidence as a *per se* exigency to excuse the need for a warrant. When a warrant can be obtained in 15-20 minutes, the relative dissipation is slight. Here the choice of physical

battle and ultimate drugging took another 2-1/2 hours after the warrant to draw the blood. Seeking a second warrant for drugging the defendant would have been more efficient than the course the police chose.

d. *The Statute Permitted Either a Blood or Breath Test.*

When Brian was arrested, RCW 46.20.308(3) provided:

> **46.20.308. Implied consent -- Test refusal -- Procedures.**
>
> ...
>
> (3) Except as provided in this section, the test administered shall be of the breath only. If an individual ... is under arrest for the crime of ... vehicular homicide ... or vehicular assault ... **a breath or blood test may be administered** without the consent of the individual so arrested pursuant to a search warrant, a valid waiver of the warrant requirement, or when exigent circumstances exist.

(Emphasis added.) Thus the Legislature contemplated a breath test even for a vehicular assault or vehicular homicide case. When the problems with the blood test arose here, the trooper could have obtained a breath test in far less time than the 2-1/2 hours it took to forcibly compel the blood draw after beating and drugging him.

A lawyer could have helped avoid the lengthy and violent melee in this case and drugging Brian. She could have: (1) asked the trooper to administer the breath test instead of the blood test; (2) asked the trooper to seek another warrant to administer antipsychotic drugs to Brian or proceed with a breath test; (3) advocated for Brian with the magistrate to preclude antipsychotic drugs, offer an oral sedative, or allow a breath test instead; or (4) assured Brian of his obligation to obey the warrant, helped him stay calm if possible, and helped him obtain an independent test afterwards.[13]

Proceeding with the physical force and drugging that occurred in this case, rather than considering the legal alternative procedures, deprived Brian Smith of his liberty without due process of law. This court should reverse the conviction and dismiss the charge.

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[13] Brian still had the right to an independent test. Former RCW 46.61.506(6) (2014); *Kent v. Kandler*, 199 Wn. App. 22, 397 P.3d 921 (2017). *See* argument, *infra*.

2. THE COURT ERRED BY ADMITTING THE BLOOD TEST BECAUSE IT WAS OBTAINED BY SEDATING APPELLANT WITHOUT LAWFUL AUTHORITY UNDER THE MORE PROTECTIVE ARTICLE I, SECTION 7.

> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Constitution, art. I, § 7.

> Thus, where the Fourth Amendment precludes only "unreasonable" searches and seizures without a warrant, article I, section 7 prohibits any disturbance of an individual's private affairs "without authority of law."
>
> ...
>
> Our inquiry under article I, section 7 requires a two-part analysis:
>
> > First, we must determine whether the state action constitutes a disturbance of one's private affairs. ... Second, if a privacy interest has been disturbed, the second step in our analysis asks whether authority of law justifies the intrusion. The "authority of law" required by article I, section 7 is satisfied by a valid warrant, limited to a few jealously guarded exceptions.

*State v. Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009).

> Any exceptions to the warrant requirement are to be drawn carefully and interpreted jealously, with the burden placed on the party asserting the exception.

*Seattle v. Pearson*, 192 Wn. App. 802, 811, 369 P.3d 194 (2016).

a. *Injecting Brian Smith with Antipsychotic Medication to Render Him Incompetent Required a Separate Warrant under Constitution, Article I, Section 7.*

In *Valdez*, a valid search of a car incident to arrest did not permit a second warrantless search of the car with a drug dog. The Court reaffirmed *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986), to the extent it limited a search incident to arrest to a vehicle and unlocked containers. But a locked container demonstrated an increased privacy, and so required a separate "authority of law." *Accord*: *State v. Monaghan*, 165 Wn. App. 782, 266 P.3d 222 (2012) (search and seizure of locked safe in trunk required warrant; went beyond consent to search passenger compartment).

By analogy, the warrant to seize Brian Smith's blood was authority of law equivalent to a search of a vehicle incident to arrest. The magistrate, prosecutor and trooper no doubt anticipated a routine blood test. They did not know of Brian's needle phobia. But when the phlebotomist could not accomplish the blood draw as everyone anticipated, injecting antipsychotic medications was a further "disturbance" of Brian's even more private affairs.

It required a second warrant under article I, section 7.

As in *Valdez*, the blood test obtained from this second disturbance and without authority of law requires reversal and suppression of the evidence seized.

b. *A Doctor's Decision to Sedate a Person Does Not Make the Procedure Constitutional.*

There is no private search doctrine under the Washington Constitution. *State v. Eisfeldt*, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008). That is, if private citizen A invades citizen B's private affairs, A's consent is not "lawful authority" to pass the product of that invasion to the State. Here, even if the doctor decided to override Brian's consent for some medical purpose, that decision did not authorize the State to participate in that procedure to obtain the blood draw. "As an unconstitutional search, the evidence secured" must be suppressed. *Id.*, 163 Wn.2d at 641.

In *George v. Edholm*, *supra*, the court held a doctor's actions can be attributed to the State if the doctor functioned at the State's request and urging. In *George*, the police took the suspect to

the hospital to have a doctor remove a plastic baggy from the suspect's anus. The police restrained the suspect as the doctor penetrated his anus, sedated him intravenously, and flushed out his GI tract. The court reversed summary judgment that was based on police immunity for the doctor's actions.

> Private action may be attributed to the state, however, if "there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" ... Such a nexus may exist when, for instance, private action "results from the State's exercise of 'coercive power,'" or "when the State provides 'significant encouragement, either overt or covert,'" to the private actor.

*Id.*, 752 F.3d at 1215.

Here the police took Brian Smith to the hospital not for medical treatment but for a blood draw pursuant to the warrant. The police insisted on strapping him to a bed in restraints. The police threatened him with a taser to get him on the bed. The police got on top of him, assisted by security personnel, to hold him down. The police continued to restrain him and to beat him with a baton to facilitate injecting him with the antipsychotic drugs. They remained with him and

obtained the blood draw once he was sedated. This process was unconstitutional State action.

3. THE STATE'S DENIAL OF COUNSEL UNREASONABLY INTERFERED WITH APPELLANT'S RIGHT TO ADDITIONAL TESTING, LED TO ANOTHER CHARGE, AND CREATED HIGHLY PREJUDICIAL EVIDENCE USED AT TRIAL.

a. *Brian Smith Had a Right to Contact Counsel Immediately Upon Arrest and a Right to an Independent Test.*

CrR 3.1,[14] provides in relevant part:

> **(b) Stage of Proceedings.**
> (1) The right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest.
> ...
> **(c) Explaining the Availability of a Lawyer.**
> (1) When a person is taken into custody that person shall immediately be advised of the right to a lawyer. ...
> (2) At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place him or her in communication with a lawyer.

CrR 3.1 confers a right to counsel "immediately upon arrest," going "beyond the constitutional requirements of the fifth and sixth amendments to

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[14] CrR 3.1(b)(1) and (c)(2) are essentially the same as CrRLJ 3.1(b)(1) and (c)(2), cited in some cases.

the United States Constitution." *State v. Templeton*, 148 Wn.2d 193, 218, 59 P.3d 632 (2002).

A criminal defendant has a constitutional due process right to gather evidence in his own defense. *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984). This right is guaranteed by statute:

> The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his or her own choosing administer one or more tests in addition to any administered at the direction of a law enforcement officer. The test will be admissible if the person establishes the general acceptability of the testing technique or method. The failure or inability to obtain an additional test by a person shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer.

Former RCW 46.61.506(6) (2014); *State v. Morales*, 173 Wn.2d 560, 569-70, 575-76, 269 P.3d 263 (2012); *State v. McNichols*, 128 Wn.2d 242, 250-51, 906 P.2d 329 (1995).

> [W]hether the State has unreasonably interfered with a DWI suspect's right to additional testing under the implied consent laws must be determined on a case by case basis.

*McNichols*, 128 Wn.2d at 252.

b. *By Denying Contact With Counsel, the State Interfered With and Ultimately Denied Appellant His Right to An Independent Test.*

There is no dispute that the police in this case did not provide Brian Smith

> access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, [or] any other means necessary to place him ... in communication with a lawyer.

CrR 3.1(c)(2). *See* Finding of Fact No. 8, CP 331. The State thus denied him his right to counsel.

But beyond failing to provide the immediate access the rule required, by drugging him the State destroyed with his ability to access counsel and to obtain an independent test.

For many years, the courts analyzed the right to a timely independent test and to counsel in DUI cases based on the due process right to gather exculpatory evidence. If the State actively misled or interfered with a person consulting counsel or getting an independent test during the relatively short time when a test could be exculpatory, the court reversed and dismissed the charge. *See, e.g.*: *Tacoma v. Heater*, 67 Wn.2d 733, 409 P.2d 867 (1966) (police policy of preventing DUI suspects from phoning counsel for four hours after arrest);

*State v. Fitzsimmons*, 93 Wn.2d 436, 610 P.2d 893 (1980), *vacated and remanded, Washington v. Fitzsimmons*, 449 U.S. 977, 101 S. Ct. 390, 66 L. Ed. 2d 240 (1980), *aff'd on remand*, 94 Wn.2d 858, 620 P.2d 999 (1980) (indigent suspect denied counsel upon arrest despite advice of right to counsel); *Blaine v. Suess*, 93 Wn.2d 722, 728, 612 P.2d 789 (1980) (suspect requested independent test; trooper said would take to hospital for test, but instead took to jail where held overnight); *Seattle v. Box*, 29 Wn. App. 109, 627 P.2d 584 (1981) (suspect called counsel upon arrest, counsel said would be there in 20 minutes; officer would not wait, noted refusal of test, took suspect to jail where held several hours; police told counsel client left in cab).

The Washington Supreme Court adopted CrR 3.1 to guarantee precisely the right that was denied in *Heater* and here.

> One purpose [of the rule] is to ensure that arrested persons are aware of their right to counsel before they provide evidence which might tend to incriminate them. The other purpose is to ensure that persons arrested know of their right to counsel in time to decide whether to acquire exculpatory evidence such as disinterested witnesses or alternative blood alcohol concentration tests.

*Templeton*, 148 Wn.2d at 217.

The right to counsel is essential to assuring the right to an independent test.

> Defense counsel, not the State, is the appropriate person to advise the DWI suspect of the best means of gathering potentially exculpatory evidence because a DWI suspect is entitled to be advised of his or her right to counsel prior to a state-administered test. ... CrRLJ 3.1(a) and (b).
>
> ... Had McNichols wanted explicit information on how to make the necessary arrangements to obtain an independent blood test, counsel could have provided him with that information.

*McNichols*, 128 Wn.2d at 249. In *McNichols*, the defendant had "unlimited access to the telephone" and spoke with the public defender. The State did not interfere with his right to an independent test. *Id.* at 252-53.

After *McNeely*, the Legislature amended RCW 46.20.308(2). It no longer requires police to advise a suspect of his right to an independent test when a blood test is taken.[15] Thus the right to contact counsel is the only method by which a suspect can learn of his right, much less arrange to take, an independent test.

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[15] *See Kent v. Kandler*, *supra*, 199 Wn. App. at 26-27.

The Legislature left intact a person's right to an independent test. RCW 46.61.506(6). It remains part of the "fundamental fairness" of the implied consent statute to allow a person to gather potentially exculpatory evidence.

> [I]n a DUI case the right to independent testing is in keeping with a defendant's constitutional due process right to gather evidence in his own defense.

*Morales*, 173 Wn.2d at 569.

Although the *Morales* Court resolved the case on statutory grounds without reaching possible constitutional implications, it reiterated the importance of the statutory rights:

> We have noted the importance of the right to independent testing of blood samples when the subject might be charged with crimes even more serious than DUI:
>
> > It is in just such cases that the need to protect the defendant's right to proof is most important. The transiency of the defendant's allegedly intoxicated condition is an important factor in negligent homicide cases, since evidence which can help prove or disprove the charge will disappear within a relatively short time. ...
>
> ... [I]n a DUI case the right to independent testing "is in keeping with a defendant's constitutional due process right to gather evidence in his own defense."

*Morales*, 173 Wn.2d at 575-76, citing *State v. Turpin*, 94 Wn.2d 820, 620 P.2d 990 (1980), and *McNichols*, *supra*.

The statutory right to an independent test "demonstrates an important protection of the subject's right to fundamental fairness which is built into our implied consent procedure." *State v. Bartels*, 112 Wn.2d 882, 886, 774 P.2d 1183 (1989); *State v. Canaday*, 90 Wn.2d 808, 817, 585 P.2d 1185 (1978); *Morales*, 173 Wn.2d at 569-70. It is so vital the Court suppressed breath tests, blood tests and refusals in *Bartels*, *supra*, because officers inaccurately advised indigent suspects they could have such a test "at your own expense" when CrR 3.1(f) provided for reimbursement.

> While law enforcement authorities have no duty to volunteer to arrange for testing, they must not thwart an accused's attempts to make such arrangements.

*McNichols*, *supra*, 128 Wn.2d at 251, quoting *Blaine v. Suess*, *supra*, 93 Wn.2d at 728. *See also Seattle v. Box*, *supra* (officer let suspect call counsel, then removed suspect from where counsel could reach him; reversed and dismissed).

Injecting Brian with antipsychotic medications precluded him from contacting counsel even once he had access to a telephone. He was not competent to make such contact until long after any independent test would have been useful. This interference is far more draconian than merely instructing someone inaccurately.

Dismissal is the proper remedy when the police unreasonably interfere with and so deny a suspect his right to counsel. *Heater*, *Fitzsimmons*, *Suess*, *Box*, *supra*. This Court should dismiss.

c. *An Attorney Could Have Done Many Things Had Brian Been Able To Contact One Before the Blood Draw.*

The trial court here erred when it concluded there could be no prejudice from denying Brian his right to counsel because counsel could not have done anything but advise him to submit to the blood draw. It relied on *State v. Schulze*, 116 Wn.2d 154, 804 P.2d 566 (1991).

In *Spokane v. Kruger*, 116 Wn.2d 135, 147, 803 P.2d 305 (1991), decided the same day as *Schulze*, the Court held the denial of counsel under the court rule required suppression of "any evidence

obtained after he was denied counsel, including his refusal to take the Breathalyzer test."

*Schulze* involved a vehicular homicide charge. The defendant requested counsel before the blood test. He refused to consent to the blood test but did not physically resist it. *Schulze*, 116 Wn.2d at 157. He was not phobic about needles; police did not threaten him with tasers, place him in restraints on a bed, climb on top of him and hold him down, beat him with a baton, or inject him with antipsychotic medication, rendering him incompetent for several hours. After the blood draw, Mr. Schulze was taken to the police station and contacted his attorney.

The *Schulze* Court concluded the blood test was not "tainted" by denying him counsel before the blood draw

> because, even if Schulze had contacted his attorney [before the blood test], the attorney could have done nothing but instruct Schulze to submit to the mandatory blood test. The attorney advice or lack thereof was completely irrelevant.

*Id.*, 116 Wn.2d at 164.

The facts here are dramatically different from *Schulze*. The police methods to obtain Brian's blood

went far beyond what the law permitted. Despite the warrant for a blood draw, Brian's needle phobia presented a significant change of circumstances from what was presented to the court for the warrant. Those new facts required another review by the magistrate.

Counsel could have: advocated with her client and the troopers on how Brian could comply with the warrant without force or violence; offered a breath test instead of the blood test; requested another warrant be obtained in order to drug Brian; and advocated for Brian with the magistrate to preclude antipsychotic drugs, offer an oral sedative, or allow a breath test instead. If contacted immediately, she could have arranged for a timely independent test.

Unlike *Schulze*, drugging Brian prevented him from contacting counsel until hours after the collision, more than two hours after the blood draw, and so from any chance of obtaining a useful independent test. This effect was the same as the police policy preventing phone calls for four hours in *Heater*; taking a blood draw without informing the defendant in *Turpin*; promising then denying an

independent test in *Suess*; and actively interfering with counsel in *Box*. It requires dismissal.

d. *The Statute Does Not Excuse the State's Interference With an Independent Test.*

> The failure or inability to obtain an additional test by a person shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer.

Former RCW 46.61.506(6) (2014).[16] This statute does not permit admission of the blood test when the State interferes with the independent test.

> Read in context, [this] sentence ... applies only when circumstances not under the State's control interfere with a driver's ability to obtain an additional test.

*Bartels*, 112 Wn.2d at 889 (citing *Turpin* and *Suess*, *infra*).[17]

Here the State took complete control of Brian's body and mind, by drugging him to a state of incompetence. In such a condition, he could not avail himself of his right to counsel or arrange

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[16] This same language is now in RCW 46.61.506(7).

[17] At the time of *Bartels*, this was the second sentence of RCW 46.61.506(5).

for an independent test. These circumstances were entirely within the State's control.

In *State v. Turpin*, the defendant was injured in a collision that led to a charge of vehicular homicide. At the hospital, the trooper did not tell her she was under arrest or advise her of her right to an independent test, but directed the medical staff to take a blood sample for analysis. Ms. Turpin didn't learn the draw had occurred until three days later -- too late to obtain a comparable test. The Supreme Court reversed her conviction, holding the blood test results must be excluded for the State failing to advise her of her statutory right to an independent test.

> From the fact that the defendant cannot object to ***State*** testing it does not inexorably, or even logically, follow that the defendant must also be kept ignorant of his right to ***independent*** testing. The statute itself merely states that the State may administer its test without consent; it in no way implies that the right to independent testing or the right to be aware of independent testing is thereby lost. The requirement that the "officer ... inform the person ... of his right to have additional tests" is based on the ***independent*** statutory right to additional testing found in RCW 46.61.506(5) ... .

*Turpin*, 94 Wn.2d at 824-25 (Court's emphases). As quoted above, the Court held this right was not

lost because the defendant is charged with negligent homicide instead of DUI: "It is in just such cases that the need to protect the defendant's right to proof is most important." *Id.*, 94 Wn.2d at 826. *See also Blaine v. Suess*, *supra*.

By denying Brian access to counsel and then drugging him for several hours after the test, the police prevented him from contacting counsel and so from any means of obtaining an independent test. These circumstances were entirely under the State's control. The test in inadmissible.

4. THE DENIAL OF HIS RIGHT TO COUNSEL REQUIRED THE COURT TO EXCLUDE STATEMENTS APPELLANT MADE AT THE HOSPITAL.

The Fifth Amendment[18] includes the right to consult or have counsel present for any questioning. While the officers here did not explicitly interrogate Brian, police actions other than questioning can compel statements from a person, violating their right to counsel. *See*: *Brewer v. Williams*, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977) (officers agreed not to

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[18] "[N]or shall [any person] be compelled in any criminal case to be a witness against himself ..." U.S. Const., amend. 5. "No person shall be compelled in any criminal case to give evidence against himself ... ." Const., art. I, § 9.

question suspect, but their long speech about needing a "Christian burial" for the missing child evoked a confession, violating Fifth Amendment).

The *Schmerber* Court anticipated this possibility. It observed in considering the Fifth Amendment that the State may obtain self-incriminating evidence in the course of administering a physical test.

> Such incriminating evidence may be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction or opposes it on religious grounds. **If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forgo the advantage of any *testimonial* products of administering the test -- products which would fall within the privilege.** Indeed, there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer confession to undergoing the "search," and nothing we say today should be taken as establishing the permissibility of compulsion in that case.

*Schmerber*, 384 U.S. at 765 n.9 (Court's italics; bold emphases added).

Brian's statements at the hospital in the course of being confronted with needles, held down, beaten and drugged, were not "voluntary."

There was no way for Brian to "confess" to a blood alcohol content. But at trial the court admitted extensive evidence of Brian's statements during the compelled blood test that supported the obstructing charge. Under *Schmerber*, that evidence should have been excluded.

Those statements also were prejudicial to the vehicular homicide conviction. The officers and some of the hospital personnel contradicted what Brian testified he said at the hospital. The jury could interpret those contradictions as evidence that Brian was intoxicated, and so affected by the alcohol; or as evidence of his lack of credibility.

This error requires reversal and retrial excluding Brian's statements made at the hospital.

5. THE DENIAL OF HIS RIGHT TO COUNSEL WAS PREJUDICIAL AND REQUIRES REVERSAL OF BOTH CONVICTIONS.

The violation of the court rule right to counsel requires reversal if "within reasonable probabilities," had the error not occurred, the outcome of the trial would have been materially affected. *Templeton*, 148 Wn.2d at 220.

In *Templeton*, the error was harmless because the defendants did not request counsel at any time.

In contrast, Brian Smith requested counsel immediately and repeatedly.

The trial court here did not consider the many facts peculiar to this case: Brian's phobia of needles, which the magistrate did not know of; the police use of force beyond what the warrant authorized; and the effect of the sedation for hours after blood was taken. Counsel could have helped get a blood draw more promptly without force, or helped provide a breath test, and still obtained an independent test.

The police active interference with, and ultimate denial of, Brian's right to counsel and to get an independent test, requires dismissal under *Heater*, *Suess*, and *Box*.

But the denial of counsel also injected into the trial the issue of Brian's right to counsel. The trial court gave inconsistent rulings on objections. The jury's inquiry shows it was left pondering what Brian's, or any person's, right to counsel is. It was left to deliberate without direction.

Under *Morales*, this case must at least be reversed and remanded for retrial without the

results of the blood test or any evidence gathered after his right to counsel was denied. That includes all the testimony of what happened in the emergency room. The charge of obstructing a public officer turned entirely on those events. That conviction, therefore, also must be reversed.

6. ADMITTING APPELLANT'S STATEMENTS AT THE HOSPITAL VIOLATED HIS PHYSICIAN/PATIENT AND NURSE/PATIENT PRIVILEGE. HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO CHALLENGE THIS EVIDENCE ON THIS GROUND.

A defendant is denied his constitutional right to counsel if trial counsel's performance is deficient and prejudicial. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); U.S. Const., amends. 6, 14; Const., art. I, § 22.

Physicians and nurses may not testify "as to any information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient." RCW 5.60.060(4), 10.58.010; RCW 5.62.020.[19]

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[19] Statutory exceptions do not apply to this case. *See also*: RCW 5.62.030 (exceptions for physician/patient privilege also apply to nurses).

> All information, including but not limited to, statements of the patient and oral evidence of the physician is covered by the privilege.

*State v. Gibson*, 3 Wn. App. 596, 476 P.2d 727, *review denied*, 78 Wn.2d 996 (1971).

The privilege also extends to anyone acting as the physician's or nurse's agent. In *Gibson*, it was error to admit a police guard's testimony of what the defendant said while being medically examined on the way to jail. The officer became the physician's agent and the patient's communications remained protected by the privilege as against him.

In *State v. Salas*, ___ Wn. App. ___, ___ P.3d ___ (No. 74209-4-I, 1/8/2018), the defendant claimed self-defense to a murder charge. The arresting officer took Salas to the hospital for medical clearance before going to the jail. As here, the officer cuffed Salas to a bed and remained in the room while medical staff examined him. At trial, the officer testified when the doctor asked Salas how he was wounded, he answered, "I don't know, on barbed wire or a tree." The doctor asked if he'd been assaulted; Salas

"chuckled and he said-he said, no, I killed somebody." Slip Op. at 15.

This court held Salas was denied effective assistance of counsel when counsel failed to challenge this testimony before trial based on his statutory privilege. The issue can be raised for the first time on appeal. *Salas*, *supra*; *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Here the State called Dr. Ravitsky at pretrial hearings and trial; and two registered nurses at trial. Furthermore, Trooper Beattie testified extensively to events in the ER, including Brian's statements regarding his health. There was no suggestion that Brian waived his privilege regarding information acquired while assessing and treating him. Their testimony all should have been excluded under the statutes. If counsel had moved to suppress, the law required the court to exclude their testimony. As in *Salas*, failing to raise the issue was deficient performance.

The information was also very prejudicial. Dr. Ravistky's pretrial testimony contributed enormously to the court's rulings admitting evidence. Dr. Ravitsky portrayed Brian as

"psychotic" from alcohol or drugs when there was never any evidence drugs were used. The court could not have addressed the safety and health risk of administering the antipsychotic medication without Dr. Ravistky's pretrial testimony.

The events in the emergency room were the entire basis for Count II, the obstruction charge. But it also contributed enormously to Count I, contributing to the question of whether Brian was "under the influence" or credible as to events.

This error requires reversal and retrial without testimony from the medical personnel.

D. CONCLUSION

The State so unreasonably executed the search warrant here as to offend justice and violate due process. The conviction should be reversed and dismissed.

The search warrant did not authorize drugging Brian Smith with antipsychotic medication to obtain the blood sample. This error requires reversal and exclusion of the blood test.

The denial of counsel included the denial of any ability to gather exculpatory evidence, in violation of due process. It requires dismissal.

In the alternative, denial of counsel requires reversal and exclusion of all evidence obtained after the violation, i.e., all evidence obtained after Brian requested counsel.

Brian Smith's statements at the hospital in response to being strapped down, held down, threatened with a taser, and drugged were not "voluntary." Admitting his statements requires reversal and retrial without this evidence.

Denial of effective assistance of counsel and violation of Brian Smith's statutory privilege requires reversal and exclusion of all testimony of medical personnel and the blood test.

DATED this 10th day of January, 2018.

Respectfully submitted,

LENELL NUSSBAUM
WSBA No. 11140
Attorney for Brian Smith

# APPENDIX A

# SEARCH WARRANT

STATE OF WASHINGTON )
) ss.
COUNTY OF WHATCOM )

EVENT #: 14-022124
CRIME: Vehicular Assault

**TO ANY PEACE OFFICER:**

**THIS MATTER having come on before me this day, with sworn testimony having been taken and incorporated herein by this reference, it appears that there is probable cause to believe that, evidence of intoxicating liquor, marijuana, or any drug as defined by RCW 46.61.540, in violation of the laws of the State of Washington, is concealed in, about or upon the suspect's person, who is in the custody of law enforcement, and you are hereby commanded to extract a sample of blood, consisting of one or more vials, from:**

The person of Brian Jeffery Smith Caucasian Male, Brown Hair, Brown Eyes, 5'08", 165 lbs., DOB: 2-19-83

**Said sample shall be submitted to the custody of the Washington State Toxicology Laboratory for appropriate forensic testing to determine the suspect's blood alcohol level and/or to detect the presence and/or levels of any drugs.**

**You are further commanded to execute the Search Warrant within TEN (10) days from the date of issuance. Following execution of this warrant, a return of said warrant shall promptly be made to the undersigned District/Superior Court Judge/Commissioner.**

**ISSUED UNDER MY HAND this 5th day of December, 2014.**

Brian Busk
**Signature of Peace Officer Authorized To Affix Judge's Signature**

Commissioner Hendrich
**Superior/~~District Court Judge~~/Commissioner for Whatcom County, Washington.**

Distribution--Original (Prosecutor); 1 copy (Officer), 1 copy (person from whom the blood is extracted).

# APPENDIX B

State of Washington v. Brian Jeffery Smith

Telephone call regarding blood search warrant

Cause No: 14-1-01457-3

Present: Commissioner Alfred Heydrich, Eric Richey, Trooper Brad Beaty

Date of Call: December 5, 2014

Transcription date: September 29, 2015

RICHEY: All right. This is Eric Richey from the Whatcom County Prosecutor's Office and today is the 5th day of December 2014. It is approximately 10:52 p.m. I have on the telephone Trooper Beaty of the Washington State Patrol and Commissioner Fred Heydrich of Whatcom County Superior Court. We are seeking a search warrant. Judge can you place the witness under oath?

HEYDRICH: Yes. Trooper would you raise your right hand?

BEATY: Yes.

HEYDRICH: Do you swear to tell the truth, the whole truth, and nothing but the truth?

BEATY: I do.

HEYDRICH: Okay, would you state your name for the record please?

BEATY: My name is Brad Beaty.

HEYDRICH: Okay Mr. Richey, go ahead and question the trooper please.

RICHEY: Thank you. Trooper, are you investigating a crime at this time?

BEATY: I am.

RICHEY: And what crime is that?

BEATY: A vehicular assault.

RICHEY: Okay and do you have an event number?

BEATY: Yes it is 14-022124.

RICHEY: All right, can you tell us about the investigation?

BEATY: Yes sir. Tonight at approximately 9:15 p.m. I was advised of a motorcycle versus vehicle collision on State Route 544 at Coltan Lane. I arrived on scene and the occupant of the motor cycle had already been transported to the hospital. Um, I contacted the – I contacted the driver of the vehicle that struck the motorcycle and um, upon contacting him I noticed he had bloodshot, watery eyes and I could smell the faint odor of intoxicants about his person. I asked if he would be willing to perform some voluntary field sobriety tests and he agreed. In the HGN test he had 6 of 6 [inaudible]. In the walk the turn test he had 3 [inaudible], he used his arms throughout the test. On his second set of 9 steps he missed heel to toe on steps 4 and he stepped off the line on step 3. On the one leg stand he had two – he put his foot down at seven seconds and used his arms to balance throughout the test. He was placed under arrest for DUI. I was then contacted by Trooper Williams who was at the hospital and [inaudible] advised that the occupant of the motorcycle was in serious condition and had flat lined. They were able to bring him back to life and he is currently in the operating room.

RICHEY: Okay let me ask you a few questions. You indicated that . . .

BEATY: Okay.

RICHEY: You indicated that you had a driver. How do you know that this person was driving?

BEATY: He admitted to driving. When I arrived on scene there were multiple Everson police units that identified him as the driver of the vehicle, and he is also the registered owner of the vehicle and the driver's seat was adjusted to someone of his stature.

RICHEY: Okay, do you know if he was in his vehicle when other officers arrived?

BEATY: I believe that um, aid had already been taking care of him. I did not have a chance to talk to the aid crews that were on the scene. I believe they arrived before the police officers um, arrived so he was already being treated in the rear of an ambulance.

RICHEY: Okay all right, and did he have any injuries that would have been consistent with being a driver?

BEATY: To the driver I [inaudible].

RICHEY: Yes.

BEATY: [Inaudible] does not have any injuries. He was cleared by aid.

RICHEY: Okay all right. Um all right, and you indicate he was the registered owner of the vehicle. Is that correct?

BEATY: Yes sir.

RICHEY: All right, do you know where the keys were at the time?

BEATY: I am not sure where the keys were at the time sir. The vehicle was completely locked when I arrived at the scene. I wasn't able to access it.

RICHEY: Okay all right. Um okay, and what was this person's name?

BEATY: This individual's name is Brian Jeffery Smith.

RICHEY: Okay and do you have a warrant in front of you?

BEATY: I do.

RICHEY: And could you read into the record what it is that you would like to search?

BEATY: Yes um, do you want me to read the whole warrant sir?

RICHEY: Well it would be – part . . .

BEATY: Or just . . .

RICHEY: I think so, yeah.

BEATY: Okay.

RICHEY: Yeah there is a lot of boiler plate.

BEATY: Before we just . . .

RICHEY: Okay go ahead.

HEYDRICH: Before we get to that, can you tell me how we know – I understand your basis of knowledge for why the guy was the driver, but how do we know the vehicle that he was driving was involved in striking the motorcycle that you talked about? What is your evidence for that please.

BEATY: Okay sir, so there is extensive front end damage to – let me get the type of the vehicle. It is a – it is a Chevrolet and there was extensive front end damage to it. Um the windshield was completely shattered and then one of the um, let me get the Everson officer's name -- Officer Tiemersma, he advised me that when he arrived the victim was laying on the hood of the vehicle.

HEYDRICH: Okay where was the motorcycle?

BEATY: Then motorcycle was in the – on State Route 544 at the intersection um, and it is completely destroyed. There was [inaudible] everywhere.

HEYDRICH: Okay and was there anything else about the scene that allowed you to conclude that the vehicle the defendant was driving had struck the motorcycle? Anything else about that that made it seem logical to you that these two things hit each other?

BEATY: Yes sir, the position of the vehicle with what the defendant told me um happened. The positioning of his vehicle would be consistent with him striking the motorcycle um, and the damage – the damage was towards the front left – the extensive damage was to the front left of his vehicle and -- can you hear me [inaudible] sir?

HEYDRICH: Yeah I can.

BEATY: Okay sorry. Um the damage to his vehicle was the front left area and he had been – he stated he had been taking a left turn into um his cul de sac and the damage to that – say that again sir?

HEYDRICH: I didn't say anything.

BEATY: Oh okay sorry, I must be hearing something. Um but no, the damage – the damage on the vehicle, the motorcycle was heading east and that would have been consistent with the defendant's vehicle striking him with the front left portion of his vehicle.

HEYDRICH: Oh okay great. Thank you.

BEATY: Yes sir.

HEYDRICH: Mr. Richey you can continue.

RICHEY: All right, so I was asking you about the warrant that you had and I was . . .

BEATY: Yes sir.

RICHEY: I was going to ask you to go ahead and read it, but there's a – there is a -- some boiler plate, so I was going to just say can you just tell us what it is that you want to search and describe the person that you want to search?

BEATY: Yes sir. I would like to search the person of Brian Jeffery Smith, caucasian male, brown hair, brown eyes, 5'8", 165 pounds, date of birth 2/19/83.

RICHEY: All right, and you want to search him for blood. Is that correct?

BEATY: Yes sir.

RICHEY: And the process of searching for blood would include two vials. Is that correct?

BEATY: Yes sir.

RICHEY: Okay and um, is there any other – are there any other details regarding the process for colleting that blood?

BEATY: Um yes sir. I will read this portion. Said sample shall be submitted to the custody of the Washington State Toxicology Laboratory for appropriate forensic testing to determine the suspect's blood alcohol level, and/or to detect the presence and/or levels of any drugs.

RICHEY: Okay all right, so you want to search the blood – okay you want to search this person to obtain blood and then to have that blood tested. Is that correct?

BEATY: Yes sir.

RICHEY: All right, and would that aid in your investigation of the crime of vehicular assault?

BEATY: Yes it would sir.

RICHEY: Okay all right. I don't think I have any other questions your honor.

HEYDRICH: All right thank you. I will find that there is probable cause to believe that Mr. Smith was driving the described vehicle this evening and was involved in a collision with the motorcycle, and that further there is probable cause to believe that he was operating his vehicle while under the influence, and I think it is appropriate to allow the state to search and seize blood samples from him for the purposes stated by the trooper.

RICHEY: Okay all right, so trooper this is Commissioner Heydrich of Whatcom County Superior Court. Heydrich is HEYDRICH.

BEATY: Okay.

RICHEY: All right, and I think we are done here. So I am going to take us off the record. It is . . .

BEATY: Okay.

RICHEY: 11:02 p.m.

**No. 76340-7-I**

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

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**STATE OF WASHINGTON, Respondent,**

**v.**

**BRIAN SMITH, Appellant.**

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# BRIEF OF RESPONDENT

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vehicular homicide and there was no warrant authorizing the blood draw. Id. at 304. While the defendant did physically resist the blood draw due to a stated fear of needles, he actually offered to take a breath test while at the hospital. Id. In addition, there was a state statute that prohibited law enforcement from forcibly taking a breath or blood test where a defendant resists. Id. at 305. In concluding that the force used to extract the blood from the defendant was unreasonable, the court noted defendant's professed and real fear of needles, that the charge was quasi-criminal and did not involve death or injury to anyone else, that without the evidence the state had a strong case against the defendant, and that he had expressed a willingness to take a breath test. Similarly, State v. Sisler, 683 N.E.2d 106 (Ohio 1995), did not involve a vehicular assault or homicide, the draw was not based on a warrant, and the state had a very strong case without the blood evidence before they sought the blood test.

f. *Any error in admission of the blood test results was harmless given the other evidence of Smith's intoxication.*

Here, even if the blood test result had not been admitted there was sufficient evidence to establish beyond a reasonable doubt that the jury would have reached the same result. "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the

error." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). Smith had performed poorly on the FSTs, had bloodshot and watery eyes and was behaving oddly at the scene. In addition to this evidence the trooper observed at the scene, the waitress, and independent witness, testified that Smith appeared intoxicated, right before he left the Rusty Wagon to drive home. The jury could also consider the evidence of his refusal[23] and physical resistance to having his blood drawn, and the fact that he said it was against his religion but wouldn't tell hospital staff what religion. Smith also lied to the officer about not having anything to drink, and the evidence from the collision indicated his driving was impaired because he tried to cut the corner way too soon as he turned left and he didn't even see Schuyleman's motorcycle.

**3. The search warrant provided the authority of law required under Art. 1 §7 and a separate warrant was not necessary to address the manner of its execution, particularly given the exigent circumstances.**

Relying upon cases involving searches of cars incident to arrest or based on consent, *exceptions* to the warrant requirement, Smith argues that a separate warrant was required under Art. 1 §7 in order to make a more

[23] A defendant does not have a 5th Amendment right to refuse to take a DUI blood test, and it does not violate due process to use such refusal as evidence of guilt. South Dakota v. Neville, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983).

# APPENDIX I

SCt No. _____
COA NO. 76340-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

BRIAN J. SMITH,

Appellant.

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

The Honorable Charles R. Snyder, Judge

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# PETITION FOR REVIEW

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**TABLE OF CONTENTS**

**TABLE OF CONTENTS (cont'd)**



APPENDICES

## TABLE OF AUTHORITIES

WASHINGTON CASES

**TABLE OF AUTHORITIES (cont'd)**

WASHINGTON CASES (cont'd)

**TABLE OF AUTHORITIES (cont'd)**

WASHINGTON CASES (cont'd)



OTHER JURISDICTIONS

**TABLE OF AUTHORITIES (cont'd)**

OTHER JURISDICTIONS (cont'd)

## TABLE OF AUTHORITIES (cont'd)

OTHER JURISDICTIONS (cont'd)



STATUTES AND OTHER AUTHORITIES

**TABLE OF AUTHORITIES (cont'd)**

STATUTES AND OTHER AUTHORITIES (cont'd)

A. IDENTITY OF PETITIONER

Brian Smith petitions this Court for review of the Court of Appeals opinion identified in part B.

B. COURT OF APPEALS OPINION

Petitioner seeks review of the Court of Appeals opinion filed 12/3/2018 (App. A). The Court denied reconsideration 1/15/2019 (App. B).

C. ISSUES PRESENTED FOR REVIEW

1. Where a suspect voluntarily gave a breath test, and verbally and physically expresses his needle phobia when faced with a routine warrant for a blood draw, may the State threaten him with a taser, strap him in four-point restraints on a table, have four or five large men on top of him and up to ten people try to hold him still, and ultimately inject him with antipsychotic medication to sedate him to the point of incompetence for hours, to draw his blood? U.S. Const., amend. 4; Const., art. I, § 7.

2. What degree of force does a search warrant for a "routine" blood draw authorize in order to obtain a needle-phobic suspect's blood? U.S. Const., amend. 4; Const., art. I, § 7.

3. In a blood alcohol case, where the suspect repeatedly requested counsel but the State denied him counsel for hours then sedated him, leaving him unable to contact counsel, was this denial under CrR 3.1 harmless error?

4. Were statements petitioner made while undergoing these forced procedures "voluntary" and admissible, although denied counsel? U.S. Const., amend. 5.

5. Was petitioner denied effective assistance of counsel when his lawyer did not object to medical personnel testifying in violation of his statutory privilege? U.S. Const., amend. 6; Const., art. I, § 22.

6. In this vehicular homicide case in which the trial court instructed on superseding cause, did due process require the court unambiguously to instruct the jury that the State bore the burden to prove the absence of a superseding cause? U.S. Const., amend. 14; Const., art. I, § 3.

D. STATEMENT OF THE CASE

Brian Smith, a 31-year-old husband and father of five with no criminal record, was on his way home after an evening with his family and dinner of

burgers and fries. His wife drove with the children a few vehicles behind him. About 8:45 p.m. he slowed on the highway to allow an oncoming car to pass. As he turned left, a motorcycle struck his vehicle. Paramedics medically cleared Brian at the scene. The motorcyclist died later that night of his injuries. RP 562-81, 1146, 1403-05, 1421-30; RP(11/3/15) 23; CP 145.

1. PRETRIAL HEARING

Brian identified himself as the driver to Trooper Beattie. He described his actions before the collision. At Beattie's request, Brian performed field sobriety tests and blew a portable breath test. Beattie arrested him at 9:33 p.m. He advised him of his right to speak to an attorney "now." Brian asked to speak to an attorney. Beattie said he couldn't then, but could at the jail. They remained at the scene until 10:22 p.m. Beattie learned the motorcyclist was seriously injured. He prepared a search warrant for Brian's blood. Beattie did not tell Brian they were going to a hospital for a blood draw before jail. RP 55-57, 73-83, 126, 144, 149; RP(11/3/15) 23-28, 35-43.

At the hospital at 10:41 p.m., Beattie obtained a telephonic search warrant for Brian's blood in 15-20 minutes. When a phlebotomist approached, Brian explained he was afraid of needles, he would not permit a draw. He was not cuffed. He was calm and compliant, not combative. He expressed his concerns only verbally. He did not yell. He did not physically react until approached with a needle. RP 87-94, 140.

Beattie let Brian leave the room to use the restroom. Officers then placed him in a room with padded walls and a bed with restraints. Brian reiterated his fear of needles and again asked for a lawyer. Beattie told him to get on the bed to be restrained. When Brian resisted, officers put him on the bed. Beattie put his taser on Brian's chest and threatened to tase him if he didn't allow them to strap him down. Brian complied with the restraints. RP 91-100, 272-76.

Despite four-point restraints, whenever a needle came near, Brian tensed and flailed. Four or five very large officers got on top of Brian to hold him down, with a total of ten people trying to hold him still. RP 98, 272-76.

It was decided Brian would be sedated against his consent. The doctor had never sedated someone for a blood draw. While still restrained and "distracted,"[1] Brian was injected with antipsychotic drug Haldol and Ativan or Benedryl at 1:00 a.m. The sedation made Brian incompetent for "an hour or two." They drew his blood at 1:30 a.m. He went to jail still sedated. RP 112, 135, 244-49, 256.

2. MEDICAL PERSONNEL PRIVILEGE

The defense moved to limit the doctor's trial testimony to what he saw and heard, asserting a privilege in his medical records and any diagnosis. The court denied the motion. RP 623-28. The defense did not assert the statutory privileges of RCW 5.60.060(4) and 5.62.020 at trial or pretrial.

3. SUPERSEDING CAUSE

At trial, Brian testified he saw no headlight coming when he began his turn. An investigator found the motorcycle's headlight operated

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[1] Although not described in detail at the pretrial hearing, in addition to the people on top of him, a trooper testified at trial that he struck Brian's leg "as a pain compliance technique" to distract him while a nurse injected him with the sedative. Resp. Br. at 43; RP 791-92, 1181-82.

intermittently. RP 1429-30, 1114-16, 1120-21, 1272. The motorcycle also had an after-market hand lever clutch, called a "suicide clutch" or "suicide shifter." Instead of the usual pedal clutch, the driver had to remove his right hand from the handlebar throttle and reach down to shift gears. Removing a hand from the handlebars reduces a rider's stability and his ability to make an evasive maneuver if he needs to. RP 1268-71.

The court instructed the jury on superseding cause. The parties argued this evidence and issue. The court did not clearly instruct that the State bore the burden of proving there was no superseding cause. CP 95-98; RP 1543-45, 1571-74, 1578-80.

E. GROUNDS FOR REVIEW AND ARGUMENT

1. THE COURT OF APPEALS OPINION UPHOLDING THE STATE'S METHOD OF SEARCHING PETITIONER'S BODY AND SEIZING HIS BLOOD CONFLICTS WITH OPINIONS OF THE SUPREME COURT AND THE COURT OF APPEALS, PRESENTS A SIGNIFICANT QUESTION OF LAW UNDER THE U.S. AND WASHINGTON CONSTITUTIONS, AND INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THIS COURT SHOULD DECIDE. RAP 13.4(b)(1), (2), (3), (4).

The Constitution does not sanction "methods too close to the rack and the screw." *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952). Four or five large men on top of a

smaller young man in four-point restraints as others try to take his blood with a needle and ultimately inject him with anti-psychotic drugs to sedate him, bears little difference. Assuming a warrant does not *sub silentio* authorize the State to kill a suspect in order to obtain his blood,[2] the issue is what level of force is constitutional.

a. *The Opinion Presents a Significant Constitutional Issue Under the Fourth Amendment.*[3] *RAP 13.4(b)(3).*

> [Seizing blood is] a compelled physical intrusion beneath [a person]'s skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'

*Missouri v. McNeely*, 569 U.S. 141, 148, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013). Despite a warrant the Fourth Amendment requires that both the purpose and the manner of seizure be reasonable.

> [T]he Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against

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[2] The Court of Appeals concluded: "It is not sensible to read the warrant in a way that stops short of obtaining that evidence." Slip Op. at 16, quoting *State v. Figeroa Martines*, 184 Wn.2d 83, 93, 355 P.3d 1111 (2015), which did not involve a second intrusion into the suspect's body.

[3] Constitutional texts are in Appendix C.

> intrusions which are not justified in the circumstances, or which are made in an improper manner.

*Schmerber v. California*, 384 U.S. 757, 768, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). Whether a search or seizure is reasonable "must be determined case by case based on the totality of the circumstances." *McNeely, supra*, 569 U.S. at 144.

The *Schmerber* Court held a blood test administered **without the use of force** in a hospital was reasonable. The Court carefully limited its holding to the facts before it: the defendant refused both breathalyzer and blood test, but a blood sample was taken without a warrant. The Court specifically noted the defendant was not phobic about needles - which might require a different outcome.

> [F]or most people the procedure involves virtually no risk, trauma, or pain. Petitioner is not one of the few who on **grounds of fear**, concern for health, or religious scruple **might prefer some other means of testing, such as the 'breathalyzer' test** petitioner refused...

*Id.* at 771 (emphases added).[4]

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[4] Other courts also recognize the significance of needle phobia. *See, e.g.*: *State v. Sisler*, 114 Ohio App. 3d 337, 683 N.E.2d 106 (1996) (conviction reversed where due to needle fear, defendant "shackled to a hospital bed is held

> It would be a different case if the police initiated the violence, refused to respect a reasonable request to undergo a different form of testing, or responded to resistance with inappropriate force.

*Id.* at 760 n.4.

This is the "different case:" (1) Brian did not refuse a breath test, but gave one when asked at the scene; (2) Brian informed the police he was needle phobic;[5] (3) the police did not offer an

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down by six persons while a seventh jabs at his arm with a needle in order to withdraw his blood at the direction of the state's officers"); *State v. Ravotto*, 169 N.J. 227, 233, 777 A.2d 301 (2001) ("To obtain defendant's blood, Officer Sullivan and hospital personnel had to restrain defendant. Defendant's legs and his left arm were strapped to a table, and several persons ... held him down. The record is undisputed that defendant screamed and struggled to free himself as the nurse drew his blood." Held: fear of needles made procedure unconstitutional when could have given breath test.); *People v. Kraft*, 3 Cal. App. 3d 890, 84 Cal. Rptr. 280 (1970) (three officers held defendant face down on floor while doctor drew blood; conviction reversed); *Wessell v. DOJ*, 277 Mont. 234, 921 P.2d 264 (1996) (fear of needles made defendant incapable of providing blood test; license suspension for refusing test reversed); *In re Griffiths*, 113 Idaho 364, 372, 744 P.2d 92 (1987) (fear of needles valid cause for refusing blood test; no suspension if suspect told officer of fear and requested another test).

[5] The Court of Appeals struggled to conclude the pretrial record "provides no support for his assertion of fear." Slip Op. at 13 n.12. *But see* RP 92, 96, 108, 270, 275, & 285 (Brian conveyed his fear verbally and by his behavior). The trial court did not find Brian's fear was not genuine. The appellate court's different

alternative breath test; (4) the police engaged in inappropriate physical force; and (5) the State ultimately drugged the defendant into incompetence against his will.

The Court of Appeals concluded Brian was sedated only because he "chose" not to cooperate with the blood draw. Slip Op. at 14. Courts acknowledge that needle phobia is not a "choice."[6] Injection phobia is a recognized mental disorder in the DSM characterized by "avoidance behavior and intense, irrational fear."[7]

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credibility determination conflicts with *State v. W.R.*, 181 Wn.2d 757, 770, 336 P.3d 1134 (2014) ("it is the function of the trial court and not [the appellate] court to consider the credibility of witnesses and to weigh the evidence"); and case law that presumes a fact not found was not proven by the party with the burden of proof: *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997); *State v. Beaver*, 184 Wn. App. 235, 250-51, 336 P.3d 654 (2014); *State v. Jacobson*, 36 Wn. App. 446, 450, 674 P.2d 1255 (1983). Moreover, notice to officers should be sufficient to consider needle phobia, not subsequent proof that the fear was genuine, when a suspect has no way of presenting that proof when confronted with a blood test. For this reason too, this Court should grant review. RAP 13.4(b)(1), (2).

[6] *See* cases cited at note 4, *supra*.

[7] Wani, A.L., Ara, A., & Bhat, S.A., *Blood Injury and Injection Phobia: The Neglected One*, 2014 BEHAV. NEUROL. 471340 (June 24, 2014) (https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4094700/, last visited 6/5/2018); DIAGNOSTIC AND STATISTICAL

> Blood tests are significantly more intrusive [than breath tests], and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test.

*Birchfield v. North Dakota*, ___ U.S. ___, 136 S. Ct. 2160, 2184, 195 L. Ed. 2d 560 (2016). A suspect's consent to a less intrusive breath test can make a forced blood test unreasonable under the Fourth Amendment, as it reduces "to insignificance" the State's need to draw blood. *Hammer v. Gross*, 932 F.2d 842, 846 (9th Cir. 1991) (en banc).

This Court should review this case to decide how the Fourth Amendment applies to blood tests for a needle-phobic suspect.

b. *This Court Should Decide Whether This State's Policy is to Avoid Violent Confrontations Between Police and Suspects in Our Emergency Rooms - an Issue of Substantial Public Interest. RAP 13.4(b)(4).*

The basic premise of a nation of laws is that people and the State use words to resolve differences rather than engage in violence.

> Although it is possible for a subject to be forcibly immobilized so that a [blood] sample may be drawn, many States prohibit

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MANUAL OF MENTAL DISORDERS (5th Ed. 2013) (DSM-5) at 197-202.

> drawing blood from a driver who resists since this practice helps 'to avoid violent confrontations.'

*Birchfield*, *supra*, 136 S. Ct. at 2167.[8] This Court should decide whether a warrant issued without notice of a suspect's needle phobia allows the State to forcibly compel a blood draw, without offering a breath test, when a suspect tells officers of his needle phobia or resists; or whether they must seek a warrant addendum advising the magistrate of the new circumstances - particularly before drugging the suspect with antipsychotics or other sedatives.[9]

In *Winston v. Lee*, 470 U.S. 753, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985), the State wanted to surgically remove a bullet from the defendant's chest. Advised the procedure would require a local

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[8] *See e.g. South Dakota v. Neville*, 459 U.S. 553, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983).

[9] Due process requires a court order to force antipsychotic medications on an unconvicted suspect incompetent to stand trial. *Sell v. United States*, 539 U.S. 166, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003). Considering dart gun tranquilizers veterinarians use to pacify large animals: "**Such intrusions on humans would, of course, be constitutionally objectionable.**" *Carleton v. Superior Court*, 170 Cal. App. 3d 1182, 1191, 216 Cal. Rptr. 890 (1985) (emphasis added).

anaesthetic, the court ordered the procedure. When it became evident the procedure would require a general anaesthetic, the State returned to the court with this additional information to order this more intrusive procedure. The court declined. The Supreme Court affirmed.

> The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.

*Id.* at 761.

> When conducted with the consent of the patient, surgery requiring general anesthesia is not necessarily demeaning or intrusive. In such a case, the surgeon is carrying out the patient's own will concerning the patient's body and the patient's right to privacy is therefore preserved. **In this case, however, the Court of Appeals noted that the Commonwealth proposes to take control of respondent's body, to 'drug this citizen--not yet convicted of a criminal offense--with narcotics and barbiturates into a state of unconsciousness,' ... and then to search beneath his skin for evidence of a crime. This kind of surgery involves a virtually total divestment of respondent's ordinary control over surgical probing beneath his skin.**

*Id.* at 765. *See also*: *United States v. Husband*, 226 F.3d 626, 632 (7th Cir. 2000) (warrant for body search did not authorize sedation).[10]

The people of Washington need this Court to address this issue. RAP 13.4(b)(4).

c. *The Court of Appeals Opinion Conflicts with this Court's Opinions Applying Article I, Section 7 and Presents a Significant Question of Constitutional Law. RAP 13.4(b)(3).*

> No person shall be disturbed in his private affairs...without authority of law.

Article I, section 7 provides greater protection of a person's privacy rights than the Fourth Amendment. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980); *State v. Mayfield*, ___ Wn.2d ___ (Slip Op. No. 95632-4, 2/7/2019).[11] This increased protection requires warrants more often, with far more limited exceptions. It requires a second "authority of law" to go beyond the limited scope

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[10] Without authority, the Court of Appeals distinguished these cases because Brian was only incompetent, not "unconscious." Slip Op. at 14.

[11] Here the Court of Appeals held "Article I, section 7 prohibits only 'unreasonable searches and seizures.'" Slip Op. at 16. But "reasonableness" is the touchstone of the Fourth Amendment; it "qualitatively differs from" Art. I, § 7. "Its primary purpose is to protect the individual right to privacy and to provide a certain remedy when that right is violated." *Mayfield* at 8, 11.

of an exception, and when police learn of new facts beyond the scope of an initial warrant.[12] Police frequently obtain addenda to expand the scope of a search warrant when they learn of new circumstances while executing a warrant.[13] Needle phobia is a significant new circumstance.[14]

Here police obtained a warrant not knowing Brian was needle phobic. Thus the warrant did not

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[12] *See, e.g.*: *State v. Thompson*, 151 Wn.2d 793, 92 P.3d 228 (2004) (community caretaking exception); *State v. Ferrier*, 136 Wn.2d 103, 114, 960 P.2d 927 (1998) (consent search); *State v. White*, 135 Wn.2d 761, 768, 958 P.2d 982 (1998) (automobile inventory searches limited to unlocked compartments); *State v. Williams*, 102 Wn.2d 733, 698 P.2d 1065 (1984) (community caretaking function); *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986) (exigent circumstances for automobile search); *State v. Chrisman*, 100 Wn.2d 814, 676 P.2d 419 (1984) (search incident to arrest); *Mayfield* (attenuation doctrine); *State v. Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009) (search of car incident to arrest did not permit search of locked container); *State v. Monaghan*, 165 Wn. App. 782, 266 P.3d 222 (2012) (search and seizure of locked safe in trunk required warrant; went beyond consent to search passenger compartment).

[13] *See, e.g.*: *State v. Besola*, 184 Wn.2d 605, 608, 359 P.2d 799 (2015) (addendum for child pornography seen while executing search warrant for drugs); *Snohomish Reg'l Drug Task Force v. Real Property*, 151 Wn. App. 743, 747-48, 214 P.3d 928 (2009), *review denied*, 168 Wn.2d 1019 (2010) (while executing search warrant for barn, found evidence of marijuana in home and shed; obtained telephonic addendum to extend search to residence and shed).

[14] *See* authorities at note 4, *supra*.

cover this eventuality. The hospital ordeal took more than enough time to get a second warrant if a magistrate would approve sedation under these circumstances.[15]

The Court of Appeals concluded there was no need for a second warrant unless Smith showed he would have complied with it. Slip Op. at 15 n.16. But the Constitution requires a magistrate's permission to "disturb [his] private affairs," i.e., here to sedate him to incompetence with antipsychotic drugs. The Constitution does not have an exception, and the Court of Appeals did not cite one, saying a warrant is not required if the suspect would not comply with it anyway.

This Court should decide whether Article I, section 7 permits the State to conduct a second intrusion into a person's body to drug him with antipsychotics without a second warrant.

2. THE COURT OF APPEALS CONCLUSION THAT DENIAL OF COUNSEL WAS HARMLESS ERROR CONFLICTS WITH SUPREME COURT AND COURT OF APPEALS OPINIONS AND PRESENTS A SIGNIFICANT PUBLIC INTEREST ISSUE THIS COURT SHOULD DECIDE. RAP 13.4(b)(1), (2), (4).

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[15] *McNeely*, *supra* (if time allows, warrant should be obtained); *see also Winston*, *supra* (order authorizing general anaesthetic denied).

The trial court found the police did not comply with CrR 3.1. CP 331. This unchallenged finding is a verity on appeal.[16] Nonetheless, the Court of Appeals concluded the State did not deny Brian his right to counsel under CrR 3.1; and if it did, it was harmless error. Slip Op. at 17-20.[17]

In *Mullins*, the defendant had access to telephones before he waived his right to counsel and talked to detectives. He "was not restrained in close custody" before he spoke. *Id.* at 370. Here Brian was not only in closed custody, but strapped to a bed and then sedated. He was not given access to telephones with contact information for defense lawyers. The trial court was correct. Brian was denied counsel under CrR 3.1.

The Court of Appeals nonetheless concluded any denial of counsel was harmless because "an attorney could have done nothing other than instruct the defendant to submit to the blood test." Slip Op.

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[16] Resp. Br. at 56; *State v. Ruem*, 179 Wn.2d 195, 217, 313 P.3d 1156 (2013).

[17] Citing *State v. Mullins*, 158 Wn. App. 360, 369, 241 P.3d 456 (2010), *review denied*, 171 Wn.2d 1006 (2011), and *State v. Schulze*, 116 Wn.2d 154, 804 P.2d 566 (1991).

at 19. This conclusion conflicts with opinions by this Court and the Court of Appeals.

Statutes guarantee a person the right to an independent BAC test.[18]

> [W]hether the State has unreasonably interfered with a DWI suspect's right to additional testing under the implied consent laws must be determined on a case by case basis.

*McNichols*, 128 Wn.2d at 252. When the State denies BAC suspects the right to counsel, it denies them an independent test.[19]

> We have noted the importance of the right to independent testing of blood samples when the subject might be charged with crimes even more serious than DUI:

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[18] Former RCW 46.61.506(6) (2014); *State v. Morales*, 173 Wn.2d 560, 269 P.3d 263 (2012); *State v. McNichols*, 128 Wn.2d 242, 906 P.2d 329 (1995).

[19] *See, e.g.*: *Tacoma v. Heater*, 67 Wn.2d 733, 409 P.2d 867 (1966) (police policy prevented DUI suspects from phoning counsel for four hours after arrest); *State v. Fitzsimmons*, 93 Wn.2d 436, 610 P.2d 893 (1980), *vacated and remanded, Washington v. Fitzsimmons*, 449 U.S. 977, 101 S. Ct. 390, 66 L. Ed. 2d 240 (1980), *aff'd on remand*, 94 Wn.2d 858, 620 P.2d 999 (1980) (suspect denied counsel upon arrest); *Blaine v. Suess*, 93 Wn.2d 722, 728, 612 P.2d 789 (1980) (suspect requested independent test; trooper said would take to hospital for test, but instead took to jail where held overnight without counsel); *Seattle v. Box*, 29 Wn. App. 109, 627 P.2d 584 (1981) (suspect called counsel upon arrest, counsel said would be there in 20 minutes; officer would not wait, noted refusal of test, took suspect to jail where held several hours; police told counsel client left in cab).

> It is in just such cases that the need to protect the defendant's right to proof is most important. The transiency of the defendant's allegedly intoxicated condition is an important factor in negligent homicide cases, since evidence which can help prove or disprove the charge will disappear within a relatively short time. ...
> ... [I]n a DUI case the right to independent testing "is in keeping with a defendant's constitutional due process right to gather evidence in his own defense."

*Morales*, 173 Wn.2d at 575-76.

In *Spokane v. Kruger*, 116 Wn.2d 135, 147, 803 P.2d 305 (1991), decided the same day as *Schulze*, this Court held the denial of counsel under the court rule required suppression of "any evidence obtained after he was denied counsel, including his refusal to take the Breathalyzer test."

*Schulze* does not make this error harmless. Mr. Schulze was not needle phobic. He did not resist the blood test. Police did not threaten him with tasers, place him in restraints on a bed, climb on top of him and hold him down, or drug him with antipsychotics rendering him incompetent for several hours. After a calm blood draw, Mr. Schultze was able to contact his attorney.

In contrast, Brian asked for counsel before the blood test. Counsel could have advocated with her client and the troopers on how Brian could comply with the warrant without violence; suggested a breath test instead; demanded another warrant to drug Brian; and advocated for Brian with the magistrate to preclude antipsychotic drugs, offer an oral sedative, or allow a breath test instead. Contacted promptly, she could have obtained a timely independent test.

Unlike *Schulze*, drugging Brian prevented him from contacting counsel until hours after the collision and more than two hours after the blood draw. This effect was precisely that of police policy condemned in *Heater*, *Suess*, and *Box*. This Court should review it. RAP 13.4(b)(1), (2).

3. THIS COURT SHOULD REVIEW WHETHER THE DENIAL OF COUNSEL AND THE FORCE USED AT THE HOSPITAL RENDERED PETITIONER'S STATEMENTS INVOLUNTARY UNDER THE FIFTH AMENDMENT. RAP 13.4(b)(3).

The *Schmerber* Court anticipated the State may obtain involuntary self-incriminating evidence in the course of administering a blood test.

> Such incriminating evidence may be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction or

> opposes it on religious grounds. **If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forgo the advantage of any *testimonial* products of administering the test -- products which would fall within the privilege.** Indeed, there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer confession to undergoing the "search," and nothing we say today should be taken as establishing the permissibility of compulsion in that case.

*Schmerber*, 384 U.S. at 765 n.9 (Court's italics; bold emphases added).[20]

Brian's statements at the hospital while confronted with needles, strapped down, held down and drugged, were not "voluntary" under the Fifth Amendment. They were prejudicial to both the obstructing and the vehicular homicide charges. Under *Schmerber*, that evidence should have been excluded.

4. COUNSEL'S FAILURE TO ASSERT PETITIONER'S MEDICAL PRIVILEGE PRESENTS A CONSTITUTIONAL ISSUE AND CONFLICTS WITH AN OPINION BY THE SUPREME COURT AND COURT OF APPEALS. RAP 13.4(b)(1), (2), (3).

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[20] *See also Brewer v. Williams*, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977) (officers' long speech about needing a "Christian burial" for the missing child evoked a confession, violating Fifth Amendment).

A defendant is denied his constitutional right to counsel if trial counsel's performance is deficient and prejudicial.[21]

Physicians and nurses may not testify "as to any information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient."[22]

> All information, including but not limited to, statements of the patient and oral evidence of the physician is covered by the privilege.

*State v. Gibson*, 3 Wn. App. 596, 476 P.2d 727, *review denied*, 78 Wn.2d 996 (1971). The privilege extends to anyone acting as the physician's or nurse's agent. In *Gibson*, it was error to admit a police guard's testimony of what the defendant said while being medically examined on the way to jail.

In *State v. Salas*, 1 Wn. App. 2d 931, 408 P.3d 383, *review denied*, 190 Wn.2d 1016 (2018), the defendant was charged with murder. An officer testified to incriminating statements the defendant

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[21] *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995); U.S. Const., amends. 6, 14; Const., art. I, § 22.

[22] RCW 5.60.060(4), 10.58.010; RCW 5.62.020. Statutory exceptions do not apply to this case.

made to a doctor while being medically cleared for jail. The court held Salas was denied effective assistance of counsel when they failed to challenge this testimony before trial based on his statutory privilege. The issue can be raised for the first time on appeal. *Id.* at 947-48; *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Here the State called a doctor at pretrial hearings and trial; two registered nurses at trial; and officers testified pretrial and at trial to events in the ER, including Brian's statements regarding his health. If counsel had moved to suppress, the law required the court to exclude their testimony. As in *Salas*, failing to raise the issue was deficient performance.

Here the Court of Appeals concluded Brian waived his privilege "by placing his physical condition at issue." Slip Op. at 23, citing *Carson v. Fine*, 123 Wn.2d 206, 213-14, 867 P.2d 610 (1994). But *Carson* was a medical malpractice case, a specific exception to the statute. RCW 5.60.060(4)(b) (a patient who files a personal injury claim waives the privilege). Brian brought no such claim. The Court of Appeals opinion thus

also conflicts with *Salas*, *Gibson*, and *Carson*, *supra*, calling for review. RAP 13.4(b)(1),(2),(3).

5. THE COURT OF APPEALS OPINION PRESENTS A SIGNIFICANT CONSTITUTIONAL ISSUE AND CONFLICTS WITH *STATE v. IMOKAWA*, NOW BEFORE THIS COURT. RAP 13.4(b)(2), (3).

The Court of Appeals recently held that jury instructions essentially identical to those given here violated due process "by failing to instruct the jury that the State had the burden to prove the absence of a superseding cause." *State v. Imokawa*, 4 Wn. App. 2d 545, 422 P.3d 502 (2018), *review granted*, ___ Wn.2d ___ (No. 96217-1, 1/10/2019). A superseding cause negates the element of proximate cause for vehicular homicide in the same way that self-defense negates the element of intent for assault or murder.

Here the Court of Appeals agreed the instructions were "constitutionally deficient." Slip Op. at 26. It then concluded the error was harmless "beyond a reasonable doubt," addressing only the malfunctioning headlight. It rejected completely the evidence and argument regarding the motorcycle's shifting mechanism. Slip Op. at 7 n.9, 23-28.

As with self-defense, a party is entitled to instructions that the State bears the burden to prove the lack of superseding cause if he presents "some" evidence to support the defense.

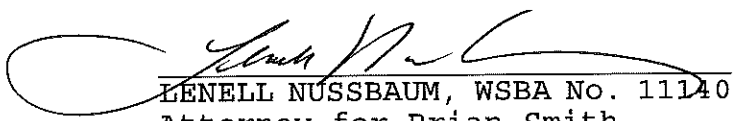
> Although it is essential that some evidence be admitted in the case as to self-defense, there is no need that there be the amount of evidence necessary to create a reasonable doubt in the minds of jurors on that issue.

*State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993); *State v. Thysell*, 194 Wn. App. 422, 374 P.3d 1214 (2016) (only evidence of self-defense was a deputy's testimony of what the defendant said).

The expert's testimony was "some" evidence that the motorcycle's design caused the rider's right hand to not be on the handlebar and throttle, after Mr. Smith turned his vehicle, making him unable to avoid the collision. Due process required an instruction unequivocally telling the jury the State bore the burden of proving it wasn't. *Imokawa, supra.*

DATED this 14th day of February, 2019.

Respectfully submitted,



LENELL NUSSBAUM, WSBA No. 11140
Attorney for Brian Smith

# APPENDIX J

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF WHATCOM

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|---|---|
| STATE OF WASHINGTON,<br>Plaintiff,<br><br>vs.<br><br>BRIAN J. SMITH,<br>Defendant. | COA No. 76340-7<br><br>Cs. No. 14-1-01457-3<br><br><br>VOLUME I<br><br><br>PAGES 1-60 |

VERBATIM REPORT OF PROCEEDINGS

FRIDAY, DECEMBER 12, 2014

**

THURSDAY, JULY 8, 2015

**

TUESDAY, OCTOBER 27, 2015

THOMAS J. VERGE, COURT COMMISSIONER

- and -

THE HONORABLE CHARLES R. SNYDER, JUDGE

---

RHONDA JENSEN, CSR

OFFICIAL COURT REPORTER

WHATCOM COUNTY SUPERIOR COURT

BELLINGHAM, WASHINGTON

(360) 778-5608

(Proceedings of October 27, 2015.)

THE COURT: Good morning.

MR. HULBERT: Your Honor, good morning.

THE COURT: I'm not sure from looking at the note for docket what exactly you are anticipating putting on this morning. So you have an hour.

MR. HULBERT: I understand, and I think that if it's okay with counsel, maybe I will sort of frame the issues where we are for the court.

MR. RANDS: Yes.

MR. HULBERT: The -- we're working, we have been working in good faith towards this November 9th trial date, and you know, we have tried our best to be able to secure some time to be able to pursue some pretrial issues, rather than just leaving them to the morning of trial, because the issues that, that are raided by the Defendant in this case. There's a lot of them, and so we've been endeavoring to do that. I know that the Court has had an opportunity to look at the briefing.

THE COURT: I have.

MR. HULBERT: And I think that, that we only have an hour this morning, and we have a disagreement about the nature of the issues that are raised that I think the Court is going to need to make some decisions on first before we decide how to budget our time. I would

characterize the disagreement as this: I think that there are some issues that are raised by the Defendant that are, are, are more traditional pretrial hearing issues. There's a 3.5 issue that we need to go through the record on and make the Court have rulings on Miranda and custody and traditional things of that nature. There's an argument about access to counsel under Court Rule, I believe it's 3 point --

MR. RANDS: 3.1.

MR. HULBERT: 3.1 that I think we need to have some testimonial record made. There is a presentment argument that was a new one to me, but I think that, again, a testimonial record needs to be made for the Court to rule on that stuff pretrial.

I think that those are what I would view as the traditional 3.5 and 3.6 hearings where we would have testimony and evidentiary hearings.

There are other issues that have been raised that I think are -- well, you've read my briefing. I think that the items that, that the issues that are raised, the field sobriety tests, the blood draw, and the retrograde extrapolation testimony are just trial issues, and I think that those are admissible without, without, without testimony being taken and without an evidentiary hearing.

So I think that the Court is -- and if, if the Court

decides that evidentiary hearings and testimony needs to be taken regarding the admissibility of the latter three, then I imagine a much longer hearing than we have, than we have time for, and what I was going to do is, is -- and I know that counsel has, has sought to secure some of the witnesses for that type of a, that type of an evidentiary hearing. If that's necessary, you know, I would -- there's probably evidence that I would want to put on myself. I really haven't gone to that step yet because I figured that we had enough to do with the traditional pretrial motions. So I guess that's the way I would frame the issues.

The Court is going to need to make some decisions about that in light of the research and decide how we want to proceed in the hour that we have today.

THE COURT: Mr. Rands, how do you see it?

MR. RANDS: Your Honor, I prepared for this hearing for my motion, Number -- the retrograde extrapolation issue that I felt came under a relevance issue, and also under Evidence Rule 104 for a hearing on the question of admissibility, generally, even the facts of this particular case in terms of the timing. That was what I came prepared for. I brought in a toxicologist. She should be here -- she had another matter down in Everett that she needs to testify for, and so an hour for this for

her was perfect.

I prepared for this once I learned when we noted it that we only had an hour, and I think both parties agreed that we knew we only had an hour, but when it was noted, we sort of forgot about it. So I came prepared today for just dealing with one issue.

If Mr. Hulbert is correct and Your Honor wants to make a finding on whether that's necessary or not, I think it is, because I think it's important to get to the testimony and determine whether the toxicologist's testimony regarding retrograde extrapolation -- I think that should be done outside the jury, so whether it's during trial and takes up time in a separate hearing, or whether it's before trial, I obviously think it's appropriate to do before trial.

THE COURT: Is that in the nature of a Frye hearing as to whether it's admissible in general, or as to this particular case?

MR. RANDS: It's a little bit of both. I expect her to testify that under, essentially, in a Frye context, the theory of retrograde extrapolation if done with as much information as possible has been accepted. That would be the expected testimony, but in this particular case, I also expect her testimony to be very limited in terms of what she knows. Therefore, whether she can employ the

theory of not.

THE COURT: It seems to me that the threshold determination is whether it meets the Frye standard, and if she says she thinks it does, it's properly supported, and it seems to me that the case law would seem to say that. Then it appears to me that the question is whether or not her testimony is believable to the jury. It's a matter not of admissibility but of weight.

MR. RANDS: I think it's more a question of whether it's helpful to the jury, Your Honor, or if it's not scientifically accepted under the umbrella that she would be giving it, it wouldn't be appropriate under the rule.

THE COURT: I guess there's an argument to be made, I suppose, that in a specific situation, it's not, it doesn't meet the Frye test, but it seems to me that the idea of Frye is that if the general scientific principle is accepted, then the testimony is admissible, and then it's all about whether or not there's enough evidence or enough background information in this particular case to make that a believable opinion rather than to make it an admissible opinion, but you know, if you see it differently, but I think Mr. Hulbert is right, he has the right to bring forth his own expert to deal with that.

Now, if she's going to be here, and we can take that testimony today, then the good thing about being in a

pretrial hearing is Mr. Hulbert has his opportunity later to address it later at another time if he wants to provide his own expert before the Court.

MR. HULBERT: Well, I think that puts the cart before the horse. I think it's my witness, and I think that I get to decide how to proceed. Again, I'm of the position that it's admissible. I can show prima facia -- she said to me that it is well settled in the scientific community, and it's admissible in this case.

I spoke with Dr. Goldfogel who is the medical examiner --

THE COURT: And I saw your briefing.

MR. HULBERT: -- and he said --

THE COURT: -- and I think that's the basic premise is it's admissible evidence.

MR. HULBERT: Right.

THE COURT: In a particular case --

MR. HULBERT: Right.

THE COURT: -- it seems to me whether that evidence is credible to the jury depends --

MR. HULBERT: Absolutely.

THE COURT: -- on whether or not all those foundations can be laid, and if they can't, the jury can go we don't have any reason to believe that. All that stuff is missing, and so we won't accept the extrapolation.

MR. HULBERT: I agree. I think it absolutely goes to the weight, and all the briefing and all the science and stuff like that, that's all the cross-examination and stuff that gets done. I think the law is clear that it's admissible evidence.

THE COURT: There's not a lot of case law on that. You cited me a case which in dicta seems to indicate that. I found a law review article that also indicates that this generally comes up in the context of defense wishing to bring this information.

MR. HULBERT: Right, I mean I can't --

THE COURT: And it's always admissible for the defense to do that, and if that's the case, because it's generally accepted --

MR. HULBERT: Yeah.

THE COURT: -- it seems to me then either party can bring it forward if they wish, and the challenge would be what you said on cross-examination.

MR. HULBERT: I can't, I can't cite you case law that says that I'm absolutely entitled to a rebuttal argument either. Some things are just so well settled since the 1970s and 1960s, that there's just not a lot of case law on it.

And when the courts start talking, albeit in dicta, about it being a well-settled -- you know, you don't see

that very often, a well-settled forensic technique that's used in trial courts every single day, you know, you don't really see that very much in something that is novel science.

What he's asking to do is a reverse Frye hearing, and say, well, it's well-settled in the scientific community, and I want to have a hearing in which I can make it unsettled.

THE COURT: Well, I think what Mr. Rands is saying, he wants an opportunity to present a hearing and present testimony to this Court so this Court can determine whether it meets the necessary threshold as being useful information for the jury to determine.

MR. HULBERT: Right.

THE COURT: And that is a pretrial issue perhaps.

MR. RANDS: What I don't want is speculative information to go before a jury, because it would be subject to a speculation objection, but ultimately, the testimony in terms of what I expect her to employ with what she knows would be a speculative opinion, and speculative opinions, even though it might be premised on something that is universally decided, in this particular case, wouldn't be.

THE COURT: I don't know what the State is intending to present. I'm in a vacuum here.

MR. HULBERT: I was mindful that there were two hearings, right, and so I'm ready to go on the 3.5/3.6 with my officers.

If you're going to require me to lay foundation outside the presence of the jury before offering this evidence, I don't think it's proper for my -- for the other side to subpoena my witnesses and then cross-examine that person.

I think the proper order of things is for me to call the person and lay the foundation and then there to be cross-examination, and you know, I'm not prepared to do that today in the short time that we have.

I'm also going to get Dr. Goldfogel onboard, and he's going to testify that this is well-settled science, and that it can be reliably utilized in this case.

THE COURT: That may be something that we have to do the morning of trial, the morning before we start picking a jury.

MR. HULBERT: Well, I don't know that that's really that feasible. This is a case, you know, it's a vehicular homicide case. It's a very important case where we have, we have the Defendant who fought tooth and nail for two and a half hours to delay the blood alcohol test.

THE COURT: I read that.

MR. HULBERT: And now they're arguing that it's wildly speculative for me to be able to offer retrograde

extrapolation testimony, when really that's the only way to get to the per se prong from where the Defendant put us.

THE COURT: I'm prepared to allow the Defense to present to this Court as an offer of proof evidence that would indicate that whether or not the Court should consider allowing this expert to testify on the basis of whether this expert has sufficient information to make it a viable expert opinion. I'm prepared to allow that to be done pretrial and outside the presence of the jury.

I can tell you right now my inclination is that it's admissible, unless something really strong comes along that says it shouldn't be.

MR. HULBERT: All right.

THE COURT: And my belief is that in general, it is an acceptable mechanism under the Frye test. It's acceptable in testimony in courts.

If there can be sufficient evidence shown to the Court that the particular use of it in this particular case makes it essentially irrelevant, because it doesn't have the ability to prove anything to the jury, then that would be the question that Mr. Rands would try to convince the Court.

MR. HULBERT: So what I want to do is -- you know, I was not, and we've done the best we can in trying to

prepare our own issue, and I don't fault Mr. Rands for this, but the first time that I knew the tox was coming for this hearing was this morning. I didn't know that there was, that she had been subpoenaed.

THE COURT: What time is she expected?

MR. HULBERT: I'm not ready to do that hearing this morning.

MR. RANDS: She's here at 8:30. I think she's in the hallway. However, she has another matter in Everett that she needs to be testifying for. She told me I think 10:30, so having an hour would be fine.

Given the situation that we're in right now. I can offer up a situation. I'm fine with stepping back from that issue, letting Mr. Hulbert and I pick a date given what Your Honor's ruling was on this particular issue and sort of reset that.

He has two officers here, one trooper, one police officer. I can certainly deal with the 3.5 issue today. We can take testimony on that, and potentially, one of the other issues in terms of the events leading up to the arrest and the custody issue. That's probably all we're going to get done in the next 45 minutes.

THE COURT: I'm good with that.

MR. HULBERT: Can we -- while we're scheduling, you know, I think that I had -- now this is a little bit of an

unusual situation. There are two lawyers that I'm dealing with. I spoke with Mr. Kaiman yesterday regarding the trial date and regarding the feasibility of that.

You know, I'm sort of privy to the other cases that are set to go. I know that -- I think Your Honor is going to be doing State v. Chabuk. I don't know if you know which case that is.

THE COURT: I know which case it is.

MR. HULBERT: I think that -- I think the prospects of us getting out on November 9th are not great at this point.

THE COURT: There are four departments.

MR. HULBERT: There are two of them that have been affidavited in this case.

THE COURT: You all do that to yourselves. I don't why. I don't really have a whole lot that I can offer you when those things get done.

MR. HULBERT: I understand that, but I think what we're talking about is given the timing of this, that we might be asking the Court to adjust the trial date, and so I don't know if we want to talk about that now.

THE COURT: Which department is available besides this one for this case?

MR. HULBERT: Four.

MR. RANDS: Four.

THE COURT: She's starting a civil case today which is going to last into next week, but she would probably be available the following week.

MR. HULBERT: But the issue then becomes -- do we just have another hour?

MR. RANDS: Yes.

THE COURT: You have an hour set for the 3rd.

MR. HULBERT: Uh-huh.

THE COURT: Tuesday next week.

MR. HULBERT: Right, and I think that that's where, that's where we would like to have it. If the evidence gets adjusted, you know, we might need to take a little bit more time. So we may be asking the Court to adjust the trial date.

MR. RANDS: Well, following up with that, Your Honor, Mr. Kaiman and I have are in contact with this case daily as well as if there's any conversation with Mr. Hulbert, Mr. Kaiman has passed onto me. There isn't going to be any objection from us if we need to adjust some time. When this case was set for trial for the week that we had, I -- my schedule and Mr. Kaiman's schedule, we had asked for a particular date. For whatever reason, Judge Uhrig found fit to put it on the week that Mr. Hulbert requested. Immediately after that when I got back to my office, I realized that I had vacation that was planned

that I didn't see on my calendar. So my position is at least from that perspective alone, I'm not available for that week, and also, it's a week where we have a holiday in the middle of a trial where we wouldn't be doing much on a Monday morning. We do motions in limine. A jury is picked Monday morning. Monday afternoon, we start. We go to trial Tuesday. Wednesday, we're off. Thursday we have trial, and Friday is not a court day. So it's a very interrupted schedule from a court perspective, and I think we probably are going to need another, at least another hour or two, notwithstanding today's issues.

MR. HULBERT: I think, I think that's correct. I think that, I think that if we litigate the -- to create a record for the retrograde extrapolation, I think we're going to need more than an hour.

So I guess what I want to do is I want to ask the Court, we'll do the 3.5 and 3.6 hearings today. We'll get as much done as we can.

I think it will be productive for Mr. Rands and I to have some discussions and maybe see if maybe we can crystalize what the issues are regarding the retrograde extrapolation, but I think that what we're going to have to do is continue the case into January.

MR. RANDS: And Mr. Kaiman and I looked at both of our calendars. The third week is what we were originally

proposing, because it's again a holiday on Monday, the Martin Luther King date. The week after, both of us are wide open.

THE COURT: Why don't you just write those into your calendar, and then we'll talk about that at another time. I think we're going to need to look at other things.

MR. RANDS: We do have status tomorrow as well, Your Honor, so we certainly --

MR. HULBERT: If we can do it today, we don't have to come back for status and clog up the calendar.

Did you not want to set it on the 20th?

MR. HULBERT: I don't care about that.

MR. RANDS: We're going to have 20, 21, 22. Then Friday is off, right?

MR. HULBERT: Yeah. Would the Court be okay with the 26th of January?

THE COURT: Why would we pick a Tuesday?

MR. RANDS: I think this is 2015.

MR. HULBERT: My bad. Would the Court be okay with that?

THE COURT: If the Defense is ready, if it's okay with Defense. We really have a speedy trial issue. Is the Defense willing to waive?

MR. RANDS: We are. That's a date that Mr. Kaiman and I both looked at, and also checked with potential experts

in our case.

THE COURT: That would give you a status on the 13th.

MR. HULBERT: All right. We'll complete an order before the end of court today.

With respect to the time that we have to take testimony, I think that all of the testimony regarding the -- all three of the issues that I characterized can be taken at once, other than doing it in a disjointed fashion, and that would be my preference.

I don't know if the Court or counsel have any feeling on that.

MR. RANDS: I think that the 3.1 and the 3.5 are sort of, are joined at the hip. So from the point of essentially Trooper Beattie's contact through the arrest probably takes us through 45 minutes and covers those two issues.

THE COURT: So I guess, because the suppression issue really is about the, the use of the extrapolation testimony, right? That's your primary suppression issue?

MR. RANDS: There's also a question as to -- for the next hour, there's another question as to the admissibility of field sobriety tests based upon the circumstances they were done, and the manner they were done.

THE COURT: You can inquire on that when you have the

officer go --

MR. RANDS: Okay.

THE COURT: Why don't you let your toxicologist go so she can head for Everett, and we'll start here with the State's first witness.

You can call your first witness, Mr. Hulbert.

MR. HULBERT: Could I ask a question?

THE COURT: Certainly.

MR. HULBERT: Is the Court ruling that the Defendant is entitled to take testimony on the issue of field sobriety tests as well?

THE COURT: I think he can certainly ask the officer about how they were taken and things of that nature. If he wishes to make an argument that they were done inappropriately --

MR. HULBERT: Isn't that just a trial issue?

THE COURT: It may be. It depends on what the issues are. If they were, I think we can hear from the officer about that, and Mr. Rands can question him about that.

MR. HULBERT: Well, I mean the Defendant is -- has moved to exclude all of the State's evidence. Let's be honest. He's moved to exclude all of the State's evidence, and he wants to have a pretrial -- he wants me to try the case twice, essentially. He wants to hear from the blood draw, regarding the blood draw on a pretrial

basis. He wants to hear about the field sobriety tests on a pretrial basis. He wants to litigate each and every issue twice.

And I guess that I kind of feel -- I don't know if the Court has made a firm ruling that that is what is going to be allowed. I've tried to give the Court all the case law that I, that I found that said that these are not novel scientific issues, that he's not entitled to a Frye hearing.

THE COURT: I agree, he's not entitled to Frye hearing, but I think he may be entitled to raise issues about whether or not there might be something around the circumstances of giving those tests that would justify those being excluded on testimony.

MR. RANDS: The case law on the scientific -- or on the field sobriety tests is if they're done correctly, they would be admissible. The question is --

THE COURT: And that is --

MR. RANDS: -- were they done correctly.

THE COURT: -- generally an issue for the trial.

However, if you have something in mind that you want to raise as to whether or not the evidence should be totally excluded, then you may raise those issues while he's on the stand.

MR. HULBERT: But they haven't been raised yet. They

haven't, I haven't been --

THE COURT: They haven't articulated it for me, but maybe there's something there.

MR. HULBERT: But aren't I entitled to know that before the testimony?

THE COURT: Yes.

MR. HULBERT: And I haven't been told how they're deficient. I've been put on notice that someone is going to come -- that an expert --

THE COURT: I read something in here what I recall -- maybe you all haven't talked about it, something about the, the lighting situation and the general noise and confusion and things of that nature going on around this incident and the fact that --

MR. RANDS: There are issues such as that that under the circumstances for the --

THE COURT: The Defendant's state of mind.

MR. HULBERT: Well, I --

MR. RANDS: As far as the HGN goes, it's the most scientific of them, and if it's done correctly with a quiet background and things of that nature, that would I think create the phenomena that the officers --

THE COURT: I think that's generally a cross-examination issue at trial, but if you wish to inquire, I will let you just in case there's something that you can