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SUPREME COURT

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No. 73929-8

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CITY OF KENT,

Respondent/Plaintiff

v.

COREY COBB,

Petitioner/Defendant.

PETITION FOR REVIEW TO THE WASHINGTON SUPREME COURT

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A. IDENTITY OF PETITIONER

Corey Cobb, by and through counsel of record, David Iannotti, asks this court to accept review of the Court of Appeals decision designated in part B of this response.

B. DECISION

Cobb respectfully requests pursuant to RAP 13.4 that this court grant his Petition for Discretionary Review of the October 31, 2016 Court of Appeals Unpublished Opinion, City of Kent v. Corey Cobb, No. 73929-8-I, 2016 WL 6534892, at *1 (Wash. Ct. App. Oct. 31, 2016), which affirmed the conviction of Corey Cobb for Driving Under the Influence. A copy of the decision is in the Appendix as Ex. 1. The decision of the Court of Appeals is in conflict with prior decisions of the Supreme Court, is in conflict with published decisions of the Court of Appeals, and as the City stated in its motion to publish, is both a significant question of law under the Constitution of the State of Washington and it involves an issue of substantial public interest that should be determined by the Supreme Court.

C. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals declined to address two Constitutional issues raised for the first time on appeal. Both issues were "manifest" and

truly of constitutional dimension which would result in overturning an existing law and dismissal of Cobb's case. The City had no objection to the issues being addressed and they were fully briefed. Was it error for the Court of Appeals to refuse to review these issues?

A. Whether RCW 46.61.502(1)(b) and the accompanying statutes are a valid exercise of the state's police powers?

B. Whether Initiative I-502 was in violation of Washington Constitution, Article II, Section 19, the single-subject rule for ballot measures?

2. The Court of Appeals held that RCW 46.61.502(1)(b) and the accompanying statutes, as adopted pursuant to Initiative Measure No. 502, are not a violation of Cobb's 14th Amendment Right to due process. Was this error?

D. STATEMENT OF THE CASE.

Factual History

A City of Kent police officer made a traffic stop after observing a car commit several traffic violations. The officer discovered that the driver, Corey Cobb, was driving with a suspended license (DWLS) and was wanted for two DWLS warrants. The officer placed Cobb under arrest.

The officer observed that Cobb smelled of marijuana and had bloodshot eyes. Cobb told the officer that he had smoked marijuana 5-6 hours before and stated that he had a medical marijuana card. When the officer asked if he would perform field sobriety tests, Cobb first consented

but then said that his medical marijuana paperwork instructed him to only take drug tests at the police station.

Cobb consented to a drug influence evaluation (DIE) at the station. During the DIE, the Officer believed Cobb showed signs of marijuana impairment including droopy eyelids, muscle tremors, and inappropriate giggling. Cobb stated that he smoked marijuana "'a couple of hours'" before. Clerk's Papers (CP) at 463. He later said that he smoked marijuana at 8:30 that morning. The arresting officer informed Cobb that he believed Cobb was under the influence of marijuana. According to the officer, Cobb replied "Of course I am, but I got my card and I'm being legal about it." CP at 456.

Cobb voluntarily gave a blood sample. Analysis of the blood sample determined that Cobb's level of THC was 5.9 nanograms per milliliter (ng/mL).

Procedural History

Cobb was charged with Driving while Under the Influence of Marijuana and Driving while License Suspended in the Third Degree in the Kent Municipal Court.

Prior to trial, Cobb moved to preclude the City from proceeding under the per se prong of the DUI statute, RCW 46.61.502(1)(b). Cobb argued

that the per se statute is void for vagueness because it does not provide adequate notice of what conduct is proscribed. Specifically, Cobb asserted that there is no way for a person who consumes marijuana to determine his/her THC level. Cobb also argued that the statute was not a valid exercise of the State's police powers because there is no correlation between a person's level of THC in blood and the amount of THC consumed, the amount of THC affecting the person's brain and the amount impairing driving.

The trial court denied Cobb's motion. The court rejected Cobb's vagueness argument and did not rule on Cobb's police powers argument. The King County Superior Court denied Cobb's request for a writ of certiorari and the Court of Appeals declined to accept discretionary review, determining that review would be more appropriate after trial.

The matter proceeded to trial. The City dismissed the affected by allegation under RCW 46.61.502(1)(c) and proceeded only on the per se prong of the DUI statute, RCW 46.61.502(1)(b) and the Driving while License Suspended Charge. Cobb was convicted.

Cobb appealed and moved for direct review to the Supreme Court, who assigned the case to the Division 1 Court of Appeals. In its ruling, the Supreme Court stated that "this claim implicates an issue closely

related to vagueness: that a person could unforeseeably run afoul of a law because of its unfairness, arbitrariness, or capriciousness."

In his appeal, Cobb addressed the vagueness issue and readdressed the police powers argument as it dealt with the issue the Supreme Court noted in its ruling as to the law's unfairness, arbitrariness and capriciousness. Cobb also raised an issue for the first time on appeal that the statute was in violation of the Single Subject rule. The City of Kent had no objection to addressing these additional issues and made a record of that to the Court of Appeals. All the issues were thoroughly briefed and argued.

In its October 31, 2016 decision, the Court of Appeals rejected Cobb's vagueness argument. The Court declined to rule on the police powers argument, finding that because of an absence of a ruling by the trial court, the issue was not ripe for review. The Court also did not rule on the Single Subject rule because it was raised for the first time on appeal.

E. ARGUMENT IN SUPPORT OF ASSIGNMENTS OF ERROR

1. The Court of Appeals erred when it refused to rule on two Constitutional issues raised for the first time on appeal which were "manifest" and truly of constitutional dimension.

A party may raise a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3) requires that an error raised for the

first time on appeal must be "manifest" and truly of constitutional dimension. *State v. WWJ Corp.*, 138 Wash.2d 595, 602, 980 P.2d 1257 (1999); *State v. Scott*, 110 Wash.2d 682, 688, 757 P.2d 492 (1988). "Manifest" in RAP 2.5(a)(3) means that the defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. It is this showing of actual prejudice that makes the error "manifest," allowing appellate review. *State v. McFarland*, 127 Wash.2d 322, 333-34, 899 P.2d 1251 (1995); *Scott*, 110 Wash.2d at 688, 757 P.2d 492; *State v. Kirkman*, 159 Wash. 2d 918, 926–27, 155 P.3d 125, 130 (2007). The court previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed. *WWJ Corp.*, 138 Wash.2d at 603, 980 P.2d 1257.

To demonstrate actual prejudice, there must be a plausible showing "that the asserted error had practical and identifiable consequence in the trial of the case." *Kirkman*, 159 Wash.2d at 935. In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim. *State v. O'Hara*, 167 Wash.2d 91, 99, 217 P.3d 756 (2009).

All three issues raised by Cobb to the Court of Appeals were constitutional issues. If Cobb had been successful on any one of them, the

law would have been found unconstitutional and the case would have been dismissed. This is the very definition of a "manifest" error and an "identifiable consequence".

Further, the case went to trial and the factual record is complete. Issues of constitutional interpretation and waiver are questions of law, which courts review de novo. *City of Redmond v. Moore*, 151 Wash.2d 664, 668, 91 P.3d 875 (2004). Regardless of what the City of Kent Municipal Court ruled in this case, the Court of Appeals would have reviewed the issues de novo. The Court of Appeals erred by refusing to rule on these issues.

A. Whether RCW 46.61.502(1)(b) and the accompanying statutes are a valid exercise of the state's police powers?

Every legislative enactment must promote a legitimate state interest. The Washington State Constitution provides: "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights." Const. art. 1, § 1. From this declaration comes the state's police power. When legislation goes far beyond what is reasonably necessary to achieve a legitimate purpose, it constitutes an abuse of the

police power, and the conviction must be reversed and dismissed. *Seattle v. Ross*, 54 Wn.2d 655, 662, 344 P.2d 216 (1959).

The issue presented here is whether the criminalization of THC concentrations of 5.0 ng/ml or higher in blood bears a reasonable and substantial relationship to the State's legitimate interest is preventing driving while under the influence. The State has a substantial interest in reducing the risk posed by intoxicated drivers, and laws that limit the consumption of alcohol by operators of motor vehicles are clearly within the province of the Legislature. *State v. Franco*, 96 Wn.2d 816, 824, 639 P.2d 1320 (1982).

The legislature can penalize the excessive consumption of intoxicants associated with the operation of a motor vehicle. *State v. Brayman*, 110 Wn.2d 183, 193, 751 P.2d 294 (1988). In *Crediford*, the Court held that, "it was the Legislature's prerogative to determine that there is a relevant relationship between a driver's alcohol concentration of 0.10 percent or greater, as detected by an analysis of that person's breath or blood within two hours of driving, and the ability of that driver to have safely operated a motor vehicle within the previous two hours." *State v. Crediford*, 130 Wn.2d 747, 754-55, 927 P.2d 1129, 1132-33 (1996). The Court also recognized that the statute did not exceed the police powers because a

sufficient nexus exists between persons who consume sufficient quantities of alcohol which result in a 0.10% BAC and to impaired driving. *Crediford*, 130 Wn.2d at 755-56.

The per se law is based on the assumption that a correlation exists between the level of THC in blood and its effect on a person's ability to drive. That assumption is in error, no correlation exists between the quantity of THC in a person's blood and the effect it has on their ability to drive.

Science has established a direct correlation between a person's breath or blood alcohol concentration (hereinafter BAC), and their level of consumption, and intoxication. [1] When a person drinks alcohol, it evenly saturates their lungs and blood. Measuring the volume of alcohol in the blood can predictably determine how much alcohol is in any part of the body, including how much is affecting the brain. There is a direct correlation between the percentage of alcohol consumed and a person's BAC. There is a known rate at which the alcohol is metabolized by the body, giving a person the ability to determine when it is safe to drive. It is possible to calculate backwards in time to determine how high a person's

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[1] Alcohol Toxicology for Prosecutors: Targeting Hardcore Impaired Drivers. American Prosecutors Research Institute, (July 2003).
http://www.ndaa.org/pdf/toxicology_final.pdf , Appendix 5 of Opening Brief.

BAC level was hours earlier. It is also possible to estimate BAC based on how much a person consumed. This is why the law can establish the two hour window after driving in which it is still a violation for a person's BAC to be at or above .08%.[2]

For THC, the level at which a person's driving is impaired is based on the amount of THC a person consumes and the active amount of THC affecting the person's brain.[3] Unlike alcohol, the measurement of THC in a person's blood is not an accurate estimation of how much THC is in other parts of the human body including the amount affecting the brain.[4]

No science supports the conclusion that you can determine the level of THC consumed based on the measurement of THC in a person's blood. Scientists do not know the rate at which THC is transferred from blood to fat.[5] Once a person consumes THC, it is rapidly transferred at an unknown rate from the blood into fat and the fatty tissue in the brain. [6]

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[2] *Id.*

[3] Sewell, R. A., Poling, J., & Sofuoglu, M., The effect of cannabis compared with alcohol on driving. Am J Addict., (2009) 18(3): 185-193. *See* Appendix 24 of the Opening Brief.

[4] Grotenhermen, F., Leson, G., Berghaus, G., Drummer, O. H., Krüger, H. P., Longo, M., Moskowitz, H., Perrine, B., Ramaekers, J. G., Smiley, A., and Tunbridge, R., Developing limits for driving under cannabis. Addiction, (2007) 102(12): 1910-1917. *See* Appendix 15 of the Opening Brief.

[5] *Id.*

[6] Schwilke, E., karschner, Lowe, R., Gordon, A., Cadet, J., Herning, R., & Huestis, M., Intra- and Intersubject Whole Blood/Plasma Cannabinoid Ratios Determined by 2-Dimensional, Electron Impact GC-MS with Cryofocusing. Clin Chem. 55(6):1188-1195 (2009). Appendix 30 of Opening Brief.

The rate at which the THC transfers is also entirely different from person to person.[7] Because the rate at which THC is absorbed into fat is unknown, scientists are unable to determine how much THC the person consumed based on the measurement of THC in a person's blood.

Unlike alcohol, where .08% BAC is an accurate representation of how much alcohol is affecting the person and an indication of excessive consumption, the 5 ng/ml measurement of THC in blood is not an accurate representation of the percentage of THC affecting the person. A single inhale, puff or hit of a marijuana cigarette can result in THC concentrations in blood of 7 to 18 ng/mL, with no measurable impact on a person's driving.[8] The typical preferred dose for users to achieve the desired psychological effect of marijuana ranges between 194-524 ng/ml THC.[9]

The THC DUI blood measurements are not measuring an accused's concentration of THC in the body; it measures the traces of THC flowing through the blood after the fat has already absorbed it at an unknown rate.

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[7] *Id.*

[8] NHTSA Drug and Human Performance Fact Sheet: Cannabis / Marijuana (Δ 9 - Tetrahydrocannabinol, THC); http://www.nhtsa.gov/PEOPLE/INJURY/research/job185drugs/cannabis.htm , Appendix 10 in Opening Brief.

[9] Robbe, H. & O'Hanlon, J., Marijuana and Actual Driving Performance, Executive Summary. National Highway Traffic Safety Administration (1993). *See* Appendix 29 of Opening Brief.

The Opening Brief cited several studies that demonstrated the highly variable rate at which THC is transferred from blood to fat. Two people smoking the same amount of THC (500 ng/ml THC) had initial THC concentrations in their blood ranging from 7.9 to 244.8 ng/ml five minutes after consumption.[10] The rate at which they drop is entirely unknown and different from person to person.

Similarly sized individuals could consume different amounts of marijuana and have the same levels of THC concentrations in their blood. Another study dosed individuals with a high (2.93%THC) and low (1.74% THC) amount of THC.[11] Within 20 minutes of smoking nearly twice the amount of THC, the participants' average THC concentration fell to within a 0.60 ng/ml difference of each other. Over a two hour period, the difference fluctuated between a 0.50 ng/ml and 0.25 ng/ml. At the two hour mark, the low dose THC blood concentration was actually higher than the high dose THC blood concentration.

[10] Toennes, S., Ramaekers, J., Theunissen, E., Moeller, M., & Kauert, G., Comparison of Cannabinoid Pharmacokinetic Properties in Occasional and Heavy Users Smoking a Marijuana or Placebo Joint. Journal of Analytical Toxicology, (2008) Vol. 32 470-477. Appendix 31 of the Opening Brief.

[11] Papafotious, K., Carter, J.D., and Stough, C. An evaluation of the sensitivity of the Standard Field Sobriety Tests (SFSTs) to detect impairment dud the marijuana intoxication. Psychopharmacology (2005) 180: 107–114. Appendix 45 of the Reply Brief.

Using THC measurements in blood, to determine impairment, is further complicated by the fact that THC can remain in the blood as it is transferred through the body long after any detectable impairing effects. One study had a participant with a THC concentration of 10.7 ng/ml eight hours after smoking.[12] In another study, two subjects had THC concentrations of 3 and 2.2 ng/ml seven days after last use.[13] In another recent 2015 study[14], eleven of 21 subjects had blood THC levels above 5.0 ng/ml five hours after the last reported use; Nine of the 21 subjects had blood THC levels above 5.0 ng/ml on the second day, 24 hours or more after the last reported use; Six subjects were above 5.0 ng/ml beyond 48 hours after their last reported use; Three subjects were above 5.0 ng/ml three days after their last use; and one subject had a blood THC concentration above 5.0 ng/ml 5 days and 9 hours after last use. A 2013 study,[15] detected THC in blood up to one month after last smoking.

Many notable scientists and organizations have also weighed in on the inadvisable use of a per se level of THC in blood as a measurement for

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[12] Toennes, S, et. al., (2008).
[13] Karschner, E. et al., (2009).
[14] M. Odell, et. al., Residual cannabis levels in blood, urine and oral fluid following heavy cannabis use, Forensic Science International 249(2015) 173-180. Appendix 33.
[15] M. Bergamaschi, et. al., Impact of prolonged cannabinoid excretion in chronic daily cannabis smokers' blood on per se drugged driving laws. Clin Chem. 59 (2013) 519-526. Appendix 34 of the Opening Brief.

DUIs. Barry Logan, retired head of the Washington State Toxicology Lab, summarized the pharmacokinetics of THC in the human body quite succinctly in a recent study. He states that,

> The evidence was very clear that 5 ng/ml was not a good discriminator of impairment. There are reasonable pharmacokinetic characteristics of this drug that would make that finding unsurprising. For water-soluble drugs that have a long half-life of the order of several hours or days, the drug profile in the blood roughly mirrors the kinetics of the drugs distribution into the central nervous system, so the blood concentration is a good surrogate for the concentration in the brain, or at least the course of the effect from the onset through peak effect to recovery. For drugs like THC that are lipid-soluble and have a short distribution half-life, the drug is taken up rapidly into the brain and other fatty tissues where it concentrates while the concentration in the blood declines rapidly. Consequently, **the blood concentration is not a useful surrogate for the effect experienced by the subject, especially as the time between ingestion and specimen collection increases beyond a few minutes.** The practical reality of identifying evaluating, arresting, and sampling suspected impaired drivers means that **the THC concentration measured in the blood specimen reflects neither the concentration in the subject's blood at the time of arrest, nor the concentration of active drug in the brain.**[16] **[emphasis added].**

[16] Logan, B., Kacinko, S., Beirness, D., (May 2016). An evaluation of Data from Drivers Arrested for Driving Under the Influence in Relation to Per Se Limits for Cannabis. AAA Foundation for Traffic Safety, https://www.aaafoundation.org/sites/default/files/EvaluationOfDriversInRelationToPerSeReport.pdf (Last viewed June 3, 2016). See Appendix 46 of the Reply Brief.

Barry Logan and the AAA are not the only ones to come to this conclusion. The same organizations that conducted the research and Policy proposals for the alcohol per se law have also been involved in working on the THC per se law. Robbe and O'Hanlon conducted one of the larger and more in depth studies on marijuana and driving, which was sponsored by the National Highway Traffic Safety Administration (hereinafter "NHTSA").[17] One of the major conclusions from the study was that "[i]t appears not possible to conclude anything about a driver's impairment on the basis of his/her plasma concentrations of THC and THC-COOH determined in a single sample."[18]

Dr. Jeffrey Michael, Associate Administrator for Research and Program Development at NHTSA testified before the US House of Representatives, Committee on Oversight and Government Reform, on July 31, 2014. He stated that "The available evidence does not support the development of an impairment threshold for THC (in blood) which would be analogous to that (of) alcohol."[19] This statement is consistent with the NHTSA Drug and Human Performance Fact Sheet on Marijuana which is

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[17] Robbe & O'Hanlon, (1993).
[18] *Id.*
[19] US House of Representatives, Committee on Oversight and Government Reform, July 31, 2014 at 1:11:30, https://oversight.house.gov/hearing/planes-trains-automobiles-operating-stoned/ , Appendix 9 of the Opening Brief.

regularly used as a reference by Washington State Toxicologist It states that "[i]t is difficult to establish a relationship between a person's THC blood or plasma concentration and performance impairing effects... [i]t is inadvisable to try and predict effects based on blood THC concentrations alone."[20]

The Governor's Highway Safety Association also expressed this opinion on a per se level for THC in its 2015 report on Drugged Driving authored by Dr. Jim Hedlund, formerly a senior official with NHTSA:

> Per se laws with a limit greater than zero are modeled after alcohol per se laws, set at a BAC of 0.08 in the United States. They are apparently straightforward but conceal some thorny issues. The most fundamental is that setting a positive per se limit, such as 5 ng for THC, implies that the limit is related to impairment and that all, or most, drivers have their abilities impaired at concentrations above the limit. **The scientific evidence to establish such an impairment threshold for drugs simply does not exist, and may never exist.[21] [emphasis added].**

There is no correlation between the per se level and consumption; there is no correlation between the per se level and to the amount of THC affecting the brain; there is no correlation between the per se level and

[20] NHTSA Drug and Human Performance Fact Sheet, Appendix 10 of the Opening Brief.
[21] Dr. Jim Hedlund, Drug-Impaired Driving: A Guide for What States Can Do. Governor's Highway Safety Association, (September 2015), http://www.ghsa.org/html/files/pubs/GHSA_DruggedDriving2015_R7_LoResInteractive.pdf at pg 20. Appendix 12 of the Opening Brief.

impairment on driving; and there is no meaningful way for a person to know whether they are at or above the legal limit. The per se level is entirely arbitrary and can be achieved by consuming any amount of marijuana and a person can remain at this level for several days. For these reasons, the law is a violation of police powers. The Court of Appeals erred by not considering this issue.

B. Whether Initiative I-502 was in violation of Washington Constitution, Article II, Section 19, the single-subject rule for ballot measures?

Article II, section 19 of the Washington State Constitution provides, "No bill shall embrace more than one subject, and that shall be expressed in the title." This provision is to be liberally construed in favor of the legislation. *Amalgamated Transit Union Local 587 v. State*, 142 Wash.2d 183, 205, 11 P.3d 762, 27 P.3d 608 (2000); *Wash. Fed'n of State Emps. v. State*, 127 Wash.2d 544, 556, 901 P.2d 1028 (1995). The purpose of this prohibition is to prevent logrolling or pushing legislation through by attaching it to other legislation. *Id.* Therefore, even if an initiative is approved by a majority of voters, it will be struck down if it violates Washington's constitution. *Id.*

In determining whether legislation contains multiple subjects, the court should determine whether the title is general or restrictive; "in other words, broad or narrow, since the legislature in each case has the right to determine for itself how comprehensive shall be the object of the statute." *Gruen v. State Tax Comm'n*, 35 Wash.2d 1, 22, 211 P.2d 651 (1949), overruled in part on other grounds by *State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wash.2d 645, 384 P.2d 833 (1963).

The title of I-502 is not general as it addresses every law the initiative intends to change, except for the penalization of Driving Under the Influence. If the title is not restrictive, it is misleading. The title of I-502 implies that it only deals with the legalization of marijuana and adjusting the law to implement this change.

If the Court determines that the initiative is general, then the criminalization of driving under the influence of marijuana with a THC concentration of 5.0 ng/ml or higher does not have a rational unity with the title. The subject of I-502 clearly deals with the legalization of marijuana and its regulation. The imposition of a penalty for driving under the influence of marijuana for an initiative that implies that it is legalizing marijuana use does not have a rational unity. The Court of Appeals erred by not considering this issue.

2. **Whether RCW 46.61.502(1)(b) and the accompanying statutes, as adopted pursuant to Initiative Measure No. 502, are a violation of Cobb's 14th Amendment Right to due process?**

In order to satisfy the Fourteenth Amendment of the U.S. Constitution and Article 1, Section 3 of the Washington State Constitution guarantee of procedural due process, a statute must set forth clear legal standards so that citizens may know how to conduct themselves in conformity with the law. *State v. Williams,* 144 Wash.2d 197, 203, 26 P.3d 890 (2001). Statutes must employ words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them. *State v. Dougall*, 89 Wash. 2d 118, 122, 570 P.2d 135, 137 (1977). Due process requires that a reasonable person be able to understand how to act in conformity with the law based on "common understanding and practice." *Matter of Powell*, 92 Wash. 2d 882, 888-89, 602 P.2d 711, 714 (1979).

The *Franco* and *Brayman* decisions clearly state that the per se prong for alcohol DUIs is not vague because a person can estimate their BAC level using a formula similar to *Widmarks* or know they are close or over the legal limit because they drank excessive amounts of alcohol. *Franco,* 96 Wash.2d at 824-25; *Brayman*, 110 Wn.2d at 196. With all the potential variables discussed above, a person of common intelligence has no ability

to estimate with any degree of certainty what their THC concentration may be.

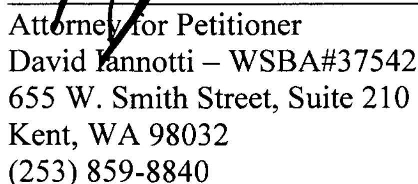
For the same reasons that the law is a violation of police powers, RCW 46.61.502(1)(b) and the accompanying statutes, are a violation of Cobb's 14th Amendment Right to due process. The Court of Appeals took the position that if you smoke you should know. But when the law legalized marijuana and created a per se level for driving, a more precise method of determining liability is required. For these reasons the Court of Appeals erred and review by the Supreme Court is respectfully requested.

F. CONCLUSION

For the reasons indicated in Part E above, Cobb respectfully requests the Washington Supreme Court grant his request for discretionary review pursuant to RAP 13.4, so Cobb may argue his position in support of reversal of the Court of Appeals Opinion in this case finding RCW 46.61.502(b) constitutional.

DATED: January 11, 2017.

Respectfully Submitted,



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G. APPENDIX

Exhibit 1: October 31, 2016 Court of Appeals Unpublished Opinion, City of Kent v. Corey Cobb, No. 73929-8-I, 2016 WL 6534892, at *1 (Wash. Ct. App. Oct. 31, 2016).

No. 73929-8

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CITY OF KENT,

Respondent/Plaintiff

v.

COREY COBB,

Petitioner/Defendant.

Exhibit 1

RICHARD D. JOHNSON,
Court Administrator/Clerk

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of the
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The officer observed that Cobb smelled of marijuana and had bloodshot eyes. Cobb told the officer that he had smoked marijuana 5-6 hours before and stated that he had a medical marijuana card. When the officer asked if he would perform field sobriety tests, Cobb first consented but then said that his medical marijuana paperwork instructed him to only take drug tests at the police station. Cobb consented to a drug influence evaluation (DIE) at the station.

During the DIE, Cobb showed signs of marijuana impairment including droopy eyelids, muscle tremors, and inappropriate giggling. He stated that he smoked marijuana "'a couple of hours'" before. Clerk's Papers (CP) at 463. He later said that he smoked marijuana at 8:30 that morning. The arresting officer informed Cobb that he believed Cobb was under the influence of marijuana. According to the officer, Cobb replied "'Of course I am, but I got my card and I'm being legal about it.'" CP at 456.

Cobb voluntarily gave a blood sample. Analysis of the blood sample determined that Cobb's level of THC was 5.9 nanograms per milliliter (ng/mL). The City charged Cobb with driving under the influence (DUI) under RCW 46.61.502 because he was driving while affected by marijuana or had a THC level of 5.0 ng/mL or greater within two hours of driving.[2]

Prior to trial, Cobb moved to preclude the City from proceeding under the per se prong of the DUI statute, RCW 46.61.502(1)(b). Cobb argued that the per se statute is void for vagueness because it does not provide adequate notice of

[2] The City also charged Cobb with driving with license suspended. The DWLS charge and conviction is not at issue in this appeal.

what conduct is proscribed. Specifically, Cobb asserted that there is no way for a person to determine his THC level based on the amount of marijuana he has consumed. Cobb also argued that the statute was not a valid exercise of the State's police powers because there is no correlation between THC level and impaired driving. Cobb relied on several scientific studies to support both arguments. For the purposes of the motion, the parties stipulated to the facts detailed in the police report.

The trial court denied Cobb's motion. The court rejected Cobb's vagueness argument and did not rule on Cobb's police powers argument. The King County Superior Court denied Cobb's request for a writ of certiorari and this court denied Cobb's petition for discretionary review.

The matter proceeded to trial. Because the parties agreed to treat the case as a test of the constitutionality of the per se THC limit, the City dismissed the affected by allegation under RCW 46.61.502(1)(c) and proceeded only on the per se prong of the DUI statute, RCW 46.61.502(1)(b). Cobb was convicted as charged. He appeals the denial of his motion to declare the per se THC prong of RCW 46.61.502 unconstitutional.[3]

DISCUSSION

Cobb argues that the trial court erred in denying his motion to declare the per se THC statute, RCW 46.61.502(1)(b), unconstitutionally vague.

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[3] Cobb filed a notice of appeal requesting direct review by the Supreme Court. The Supreme Court transferred the case to this court.

When the legislature legalized recreational marijuana, it also made a legislative judgment that a person's driving is affected by marijuana if he or she has a THC blood level of 5.0 ng/mL. RCW 46.61.502(1)(b). A statute is presumed to be constitutional. Haley v. Medical Disciplinary Bd., 117 Wn.2d 720, 739, 818 P.2d 1062 (1991) (citing Seattle v. Eze, 111 Wn.2d 22, 26, 759 P.2d 366 (1988)). To overcome this presumption, the challenger has the burden of proving unconstitutionality beyond a reasonable doubt. Id. We review the constitutionality of a statute de novo. State v. Watson, 160 Wn.2d 1, 6, 154 P.3d 909 (2007) (citing Kitsap County v. Mattress Outlet, 153 Wn.2d 506, 509, 104 P.3d 1280 (2005)).

The due process clause of the Fourteenth Amendment requires statutes to provide fair notice of conduct that is prohibited. Id. (citations omitted). Unless a vagueness challenge involves First Amendment rights, we evaluate the statute for vagueness as applied to the actual facts of the case. Id. (citing State v. Coria, 120 Wn.2d 156, 163, 839 P.2d 890 (1992)). See also City of Spokane v. Douglass, 115 Wn.2d 171, 182-83, 795 P.2d 693 (1990) (in an as applied analysis, a law "is tested for unconstitutional vagueness by inspecting the actual conduct" of the challenging party). Because driving does not implicate First Amendment rights, we evaluate Cobb's challenge as applied to the facts of his case.

A statute is impermissibly vague if (1) it does not define a criminal offense with sufficient clarity that ordinary people can understand what conduct is

prohibited or (2) it fails to provide ascertainable standards of guilt to protect against arbitrary enforcement. Id. (citing State v. Williams, 144 Wn.2d 197, 203, 26 P.3d 890 (2001)). Cobb challenges the statute under only the first prong. He asserts that the per se THC statute is unconstitutionally vague as applied to him because, absent a blood test, there was no way for him to know when he crossed from legally driving after consuming a small amount of marijuana to unlawfully driving with a THC level in excess of the statutory limit.[4]

We reject this argument. While a statute must define prohibited conduct in terms that an ordinary person can understand, due process does not require "'impossible standards of specificity.'" State v. Evans, 177 Wn.2d 186, 204, 298 P.3d 724 (2013) (quoting State v. Sullivan, 143 Wn.2d 162, 181-82, 19 P.3d 1012 (2001)). It is not necessary for a statute to define with precision the moment when conduct becomes unlawful, as a person "'who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.'" Id. at 203 (quoting Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340, 72 S.Ct. 329, 96 L.Ed. 367 (1952)).

Drivers in Washington are presumed to know that it is illegal to drive while under the influence of marijuana and that a blood THC level of 5.0 ng/mL is proof that a driver is under the influence. State v. Patterson, 37 Wn. App. 275, 282, 679 P.2d 416, 422 (1984) (citing State v. Spence, 81 Wn.2d 788, 792, 506 P.2d

[4] The Washington Association of Criminal Defense Lawyers and the Washington Foundation for Criminal Justice support this position in their joint amicus brief. The Washington Attorney General filed an amicus brief in support of the City of Kent.

291 (1973) rev'd on other grounds, 418 U.S. 405, 94 S. Ct. 2727, 41 L.Ed.2d 842 (1974). In this case, Cobb consumed marijuana, showed signs of impairment, and acknowledged that he was under the influence of marijuana. Nevertheless, he chose to drive. In so doing, Cobb accepted the risk that he might be driving with a THC blood level in excess of 5.0 ng/mL. Having taken that risk, he cannot now argue he was not on notice that he might be driving in violation of the statute. The statute as applied to Cobb is not unconstitutionally vague.

Cobb raises several other challenges to the constitutionality of the per se THC statute. Although he acknowledges that his vagueness challenge must be evaluated as applied to the facts of his case, he appears to assert that the statute is facially vague.[5] But because the per se THC statute, RCW 46.61.502(1)(b), does not implicate First Amendment rights, we do not consider Cobb's claim of facial vagueness. Watson, 160 Wn.2d at 6.

Cobb also argues that the statute exceeds the State's police powers. But the trial court concluded that Cobb struck his police powers argument and therefore did not rule on the issue. Cobb did not object to this ruling below, move to reconsider the issue, identify the issue in his notice of appeal, or assign error to the court's failure to address the issue. Nonetheless, both Cobb and the City urge us to consider the argument on appeal. We decline to do so because in the

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[5]Cobb points to some expert opinions asserting no correlation between THC blood level and impairment. Thus, he argues it is possible for a person to have a THC blood level in excess of 5.0 ng/mL and whose driving ability is unaffected. But because those are not the facts of this case, it is irrelevant to an as applied analysis.

absence of a ruling by the trial court, the issue is not ripe for review.[6] RAP 2.2. See State v. Cates, 183 Wn.2d 531, 534, 354 P.3d 832 (2015) (an issue is not ripe for review until the challenged action is final) (citing State v. Sanchez Valencia, 169 Wn.2d 782, 786-91, 239 P.3d 1059 (2010)). See also Matheson v. Gregoire, 139 Wn. App. 624, 637, 161 P.3d 486 (2007) (declining to consider an issue not decided by the trial court as not ripe for review).

Finally, Cobb argues that the marijuana initiative, I-502, violates Washington's single subject rule for ballot measures. Cobb did not raise this argument below. "An argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal." Sourakli v. Kyriakos, Inc., 144 Wn. App. 501, 509, 182 P.3d 985 (2008) (quoting Sneed v. Barna, 80 Wn. App. 843, 847, 912 P.2d 1035 (1996)).

Affirmed.

Spearman, J.

WE CONCUR:

Appelwick, J.

Cox, J.

[6] At oral argument, the parties also argued that the trial court's failure to rule on the police powers argument was manifest constitutional error that may be raised for the first time on appeal under RAP 2.5. They urged us to rule on whether the trial court erred in failing to address the issue and on the merits of the argument. But neither issue was identified in the notice of appeal and no error was assigned to the trial court's failure to rule on the police powers issue. Thus, the issue is not within the scope of review. Clark County v. Western Washington Growth Management Hearings Review Bd., 177 Wn.2d 136, 144-45, 298 P.3d 704 (2013) (the scope of review is determined by the decisions designated in the notice of appeal and further specified by the assignments of error and arguments of the parties).

CERTIFICATE OF SERVICE

I certify that on the 11th day of January, 2017, I caused a true and correct copy of this Petition for Review to the Washington Supreme Court to be served on the following in the manner indicated below:

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By: ____________________
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