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Division III  
State of Washington  
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No. 34711-7-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON,

Appellant

v.

ERICA MAGALLON ALVAREZ,

Respondent

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

NO. 16-1-00070-7

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APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

I. ARGUMENT ..... 1

    A. The improved surface to the right of the fog line is  
    the shoulder ..... 1

    B. *Prado, Jones*, and RCW 46.61.140’s phrase “as  
    nearly as practicable” do not apply to RCW  
    46.61.670..... 4

II. CONCLUSION ..... 8

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<i>City of Kent v. Beigh</i> , 145 Wn.2d 33, 32 P.3d 258 (2001) .....	8
<i>State v. Huffman</i> , 185 Wn. App. 98, 340 P.3d 903 (2014) .....	4, 5, 6, 7
<i>State v. Jones</i> , 186 Wn. App. 786, 347 P.3d 483 (2015) .....	6, 7
<i>State v. Kocher</i> , 199 Wn. App. 336, 400 P.3d 328 (2017) .....	7
<i>State v. Prado</i> , 145 Wn. App. 646, 186 P.3d 1186 (2008) .....	6, 7

### WASHINGTON STATUTES

RCW 46.04.500 .....	3
RCW 46.61.100 .....	4, 5, 6, 7
RCW 46.61.140 .....	4, 5, 6
RCW 46.61.140(1).....	4, 8
RCW 46.61.428 .....	3
RCW 46.61.428(3).....	3
RCW 46.61.670 .....	3, 4, 5, 6, 7, 8, 9

### OTHER AUTHORITIES

Fed. Highway Admin., U.S. Dep't of Transp., Manual on Uniform Traffic Control Devices for Streets and Highways (2009 ed., rev. May 2012) .....	1, 2
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## I. ARGUMENT

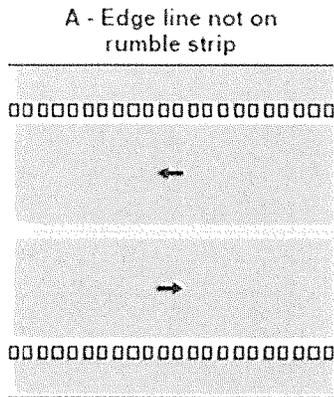
Fundamentally, the defendant asks this Court to take an easily understood term of “shoulder,” make it confusing, and then asks this Court to rewrite the statutes passed by the legislature.

**A. The improved surface to the right of the fog line is the shoulder.**

The defendant maintains the rumble strip is the arbiter of when the roadway ends and the shoulder begins. However, such position is inconsistent with the Manual on Uniform Traffic Control Devices (MUTCD) and Washington statutes. Fed. Highway Admin., U.S. Dep’t of Transp., Manual on Uniform Traffic Control Devices for Streets and Highways (2009 ed., rev. May 2012).

First, regarding rumble strips the MUTCD “contains no provision regarding the design and placement of longitudinal rumble strips. The provisions in this Manual address the use of markings in combination with a longitudinal rumble strip.” MUTCD § 3J.01, Longitudinal Rumble Strip Markings, at 432. However, like I-82 here, the MUTCD does show how

an edge line can be used with a rumble strip in Figure 3J-1.



*Id.* at 432.

Further, while the MUTCD does not regulate rumble strips, it does provide guidance that specifically notes that rumble strips can be placed on the shoulder of a roadway used by bicyclists, when as here, there is room on the shoulder to permit bicyclists. MUTCD § 6F.87, at 618. Accordingly, the rumble strip does not delineate when the roadway ends.

Instead, the white fog line delineates when the roadway ends. Under the MUTCD, the white fog line is an “edge line marking” which is specifically defined as a “white or yellow pavement marking line[] that delineate[s] the right or left edge(s) of a traveled way.” MUTCD §§ 1A.13(58), at 13, 3B.06, at 371. “When used, white markings for longitudinal lines shall delineate . . . B. The right-hand edge of the roadway.” MUTCD § 3A.05, at 348. Thus, here, the white fog line the defendant crossed delineated the right-hand edge of the roadway.

Second, the legislature specifically accounted for these traffic control markings when contemplating the exceptions to the wheels off roadway statute. The wheels off roadway statute, RCW 46.61.670, does not itself discuss shoulders. Instead, the exclusion of the shoulder from the roadway is contained in the definition of roadway in RCW 46.04.500. Yet, the very exception written into the wheels off roadway statute, RCW 46.61.428, is all about shoulders. The legislature specifically wrote that one may not drive “with one wheel or all of the wheels off the roadway thereof, except as permitted by RCW 46.61.428 . . . .” RCW 46.61.670. However, RCW 46.61.428 specifically permits the Department of Transportation to place signs permitting slow-moving vehicles to drive onto improved shoulders so overtaking vehicles can pass. Importantly, these signs “erected to define a driving-on-shoulder zone **take precedence over pavement markings** for the purpose of allowing the movement” onto the shoulder. RCW 46.61.428(3) (emphasis added). It is telling that the legislature specifically had to prioritize which traffic control device controlled in these zones because the driver would be faced with two traffic control devices: a fog line (or white edge line under MUTCD) and a driving-on-shoulder zone sign. The legislature contemplated this and specifically wrote into the exception that the sign took precedence over the

pavement markings. This would have been entirely unnecessary if the fog line could be crossed at will by drivers.

Thus, here, where the defendant was not driving in a marked driving-on-shoulder zone, CP 83, the defendant was not permitted to cross the fog line and drive off the roadway.

**B. *Prado, Jones, and RCW 46.61.140's phrase "as nearly as practicable" do not apply to RCW 46.61.670.***

Finally, the defendant in essence asks this Court to rewrite RCW 46.61.670 by adding the "nearly as practicable" language from RCW 46.61.140. *See* Br. of Resp't at 10-17.

The trial court's conclusion that the defendant was unlawfully stopped relied on the judge's application of RCW 46.61.140(1) to the defendant's driving onto the shoulder. However, as the Court held in *State v. Huffman*, 185 Wn. App. 98, 107, 340 P.3d 903 (2014), Section 140 does not govern every situation where a vehicle travels outside its regular lane of travel. Instead, the legislature separately proscribed driving over the centerline in RCW 46.61.100, *id.*, and it separately proscribed driving onto the shoulder in RCW 46.61.670.

*Huffman* is instructive. In *Huffman*, the Court held that while both Section 100 and Section 140 govern lane travel, neither is superfluous, and both must be given effect. *Huffman*, 185 Wn. App. at 105-07. "[T]he two statutes do not cancel each other out. The statutes' plain meanings are

clear; RCW 46.61.100 requires drivers to stay on the right half of the road unless an exception applies, and RCW 46.61.140 requires drivers to drive within a single lane as nearly as practicable.” *Id.* at 106. “Based on the plain reading of the two statutes and their different objectives, we find that the ‘nearly as practicable’ qualifying language from Section 140 does not apply to RCW 46.61.100.” *Id.* at 107.

Moreover, the Court rejected Huffman’s argument that Section 100 should not be strictly applied for policy reasons, given the practical reality that drivers do not “‘travel in perfect vectors’ down the roadway.” *Id.* at 104-05. Such policy claims, *Huffman* held, are “properly addressed to the legislature,” as courts “are not at liberty to add language to a statute merely because ‘we believe the Legislature intended something else but failed to express it adequately.’” *Id.* at 105. Thus, while Huffman only crossed the centerline once—only “momentarily,” and only by one tire-width—her traffic stop was lawful. *Id.* at 101, 107.

*Huffman*’s analysis applies equally to RCW 46.61.670, in which the legislature expressed its clear objective to require drivers to stay off the shoulder unless an exception applies, and in which the legislature omitted the “‘nearly as practicable’ qualifying language from Section 140.” *See id.* at 107. In addition, while the defendant essentially repeats Huffman’s policy claims, *e.g.*, Br. of Resp’t at 10, that argument is better

addressed to the legislature. As written, RCW 46.61.670 is plain and unambiguous, and the defendant violated its prohibition by driving with two wheels off the roadway.

Furthermore, the defendant's reliance on the *Prado*<sup>1</sup> and *Jones*<sup>2</sup> line of cases is inapt. Those cases exclusively interpret Section 140 and its qualifying language. They do not apply indiscriminately throughout the traffic code.

In *Prado*, the only asserted basis for the stop was RCW 46.61.140, and the Court's analysis focused exclusively on the statute's qualification, "as nearly as practicable." The *Prado* court concluded that "the circumstances here do not create a traffic violation **under the statute.**" *Prado*, 145 Wn. App. at 649 (emphasis added); see also *Huffman*, 185 Wn. App. at 107 ("Our decision in *Prado* is limited to its facts which involved only a violation of RCW 46.61.140, not RCW 46.61.100.").

Similarly, in *Jones*, the only asserted basis for the traffic stop was RCW 46.61.140. While Jones was alleged to have crossed the fog line by one inch on three occasions, the State never argued a violation of RCW 46.61.670—not at the trial court, nor on appeal. *Jones*, 186 Wn. App. at 793 ("The State presented no evidence . . . of any other traffic infraction);

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<sup>1</sup> *State v. Prado*, 145 Wn. App. 646, 186 P.3d 1186 (2008).

<sup>2</sup> *State v. Jones*, 186 Wn. App. 786, 347 P.3d 483 (2015).

*see also* Br. of Resp't, *Jones*, 186 Wn. App. 786 (No. 70620-9-I) (the State's brief never mentioned RCW 46.61.670). Furthermore, in *Jones* the incursion was only by an inch, which would still leave the tire mostly on the fog line and not yet completely crossed it and onto the shoulder, thus making it less clear whether an entire wheel ever left the roadway. In the defendant's case, of course, the State has consistently asserted that the defendant was stopped for violating RCW 46.61.670. *E.g.*, CP 85 ("... the vehicle's wheels were definitely off the roadway.").

Considering these three "lane travel" statutes together,<sup>3</sup> the legislature's intent is clear. Crossing the centerline is extremely dangerous, because it risks head-on collisions. Driving on the shoulder is extremely dangerous, because it risks collisions with pedestrians, bicycles, law enforcement, and disabled or slow-moving vehicles.<sup>4</sup> The legislature therefore strictly forbids drivers from crossing the centerline or crossing onto the shoulder except under limited circumstances—and, accordingly, the legislature has not included the "nearly as practicable" qualifier with these prohibitions. RCW 46.61.670; RCW 46.61.100. Only RCW

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<sup>3</sup> RCW 46.61.100 (interpreted in *Huffman*); RCW 46.61.140 (interpreted in *Prado and Jones*); and RCW 46.61.670 (interpreted in *State v. Kocher*, 199 Wn. App. 336, 400 P.3d 328 (2017)).

<sup>4</sup> CP 83-84 (Trooper Bivins testified the shoulder of I-82 is used by bicyclists, disabled vehicles, and by law enforcement making a stop. He also commented that his patrol vehicle was struck on the shoulder of a freeway about three weeks prior to the hearing.).

46.61.140(1) includes the qualifier. The statute governs vehicle travel when a driver stays entirely on the roadway, and entirely on her side of the centerline. A collision under those circumstances is likely between two vehicles traveling in the same direction at approximately the same speed, and catastrophic damage and death is less likely. Under these circumstances, the legislature has relaxed the strict requirements of RCW 46.61.100 and RCW 46.61.670. Of course, “it is an elementary rule that where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent.” *City of Kent v. Beigh*, 145 Wn.2d 33, 45, 32 P.3d 258 (2001) (internal quotations, citations omitted).

Under the statutory scheme, it is clear that the legislature did not intend the qualifier “as nearly as practicable” to apply to RCW 46.61.670.

## II. CONCLUSION

Fundamentally, Trooper Bivins was quite clear what he saw and why he stopped the defendant. In his own words, he saw her drive “on the shoulder and [come] back into the lane of travel” and that the tires of her vehicle “actually went over, completely over the fog line and hit the rumble strips and you could hear the awful noise of the actual rumble strips in my patrol vehicle.” CP 82. When the defendant did so, her “tire’s [sic] no longer even contact[ed] the fog line” and were “a tire-width to a

tire and a half” over the fog line. *Id.* As stated by Trooper Bivins “the rumble strips are well off the roadway.” *Id.* Thus, when faced with a statute that says a person cannot operate a vehicle with a wheel off the roadway, and having observed that “the vehicle’s wheels were definitely off the roadway,” CP 85, it was reasonable for Trooper Bivins to believe RCW 46.61.670 had been violated. Thus, the traffic stop was lawful.

The State respectfully requests this Court to REVERSE the lower court rulings and REMAND the matter to the trial court for reinstatement of the DUI charge.

**RESPECTFULLY SUBMITTED** this 24th day of April, 2018.

**ANDY MILLER**  
Prosecutor



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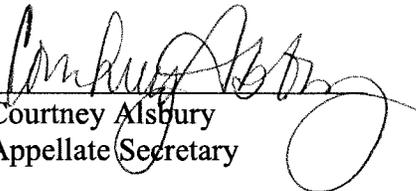
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Signed at Kennewick, Washington on April 24, 2018.

  
Courtney Alsbury  
Appellate Secretary

**BENTON COUNTY PROSECUTOR'S OFFICE**

**April 24, 2018 - 10:59 AM**

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