

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
CLERK'S OFFICE

E

No. 93098-8

Oct 12, 2016, 1:21 pm

RECEIVED ELECTRONICALLY

hjh

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

CHELAN COUNTY DISTRICT COURT,
HON. ROY S. FORE, and

ROBERT JAMES BOWIE
(real party in interest),

Respondents.

BRIEF OF RESPONDENT BOWIE

RYAN BOYD ROBERTSON
WSBA No. 28245
ROBERTSON LAW PLLC
1000 Second Avenue Suite #3670
Seattle, Washington 98104
Ph - (206) 395-5257
Fax - (206) 905-0920
ryan@robertsonlawseattle.com

FILED AS
ATTACHMENT TO EMAIL



ORIGINAL

TABLE OF CONTENTS

<u>Heading</u>	<u>Page No.</u>
I. INTRODUCTION	1
II. COUNTER-STATEMENT OF ISSUES FOR REVIEW	2-3
III. STATEMENT OF THE CASE	3-7
A. Procedural History	3
B. Facts Material to Suppression Motion	4-5
C. Superior Court Ruling to Deny Writ of Review	5-6
D. State's Failure to Assign Error	6-7
IV. ARGUMENT	7-35
A. The State has failed to establish it is entitled to a statutory writ.	7-20
1. This Court must uphold clear precedent in <i>Seattle v. Holifield</i> . A statutory writ is not the appropriate method for challenging a perceived "mere error of law."	9-14
2. This Court must interpret the criteria for granting a writ consistent with this Court's "overarching dogma" that writs are "extraordinary" and granted only "sparingly."	14-20
a. The suppression ruling was not "probable error."	15-16
b. The State has provided no argument that the suppression ruling has "substantially altered the status quo" or "substantially limited the freedom of	

<u>Heading (cont.)</u>	<u>Page No.</u>
[the State] to act."	16-20
B. The officer's request that Mr. Bowie submit to a voluntary test conveyed a different meaning than the "right to refuse" advisement in RCW 46.20.308(2).	20-30
1. The 2004 amendment to RCW 46.20.308(2), adding the language "in substantially the following language" does not apply to the mandatory advisement regarding the right to refuse.	21-23
2. The State has advanced no reason to abandon this Court's analysis from <i>State v. Whitman Cty</i> . A warning is misleading when it conveys a meaning different than that specified by the statute to the extent it alters the consequences for submitting to or refusing a breath test.	23-26
3. A request to submit to a voluntary search carries with it the implicit recognition that a refusal will not be used against the defendant at trial.	27-30
C. Precedent establishes a clear standard that prejudice exists, warranting suppression, where an officer provides misleading information to the driver which alters the consequences intended by statute, and impacts the opportunity to exercise an intelligent judgment whether to submit to a breath test or refuse.	30-35
V. CONCLUSION	35-36

TABLE OF AUTHORITIES

<u>Washington Cases</u>	<u>Page No.</u>
<i>City of Seattle v. Holifield</i> , 150 Wn. App. 213, 208 P.3d 24 (2009)	9
<i>City of Seattle v. Holifield</i> , 170 Wn.2d 230, 240 P.3d 1162 (2010)	7-14, 16- 18
<i>Cooper v. Dept of Licensing</i> , 61 Wn. App. 525, 810 P.2d 1385 (1991)	16, 25
<i>Dept of Licensing v. Lax</i> , 125 Wn.2d 818, 888 P.2d 1190 (1995)	31
<i>Grewal v. Dept of Licensing</i> , 108 Wn. App. 815, 33 P.3d 94 (2001)	33
<i>Grundy v. Thurston Cty.</i> , 155 Wn.2d 1, 117 P.3d 1089 (2005)	29
<i>In re Rights to Waters of Stranger Creek</i> , 77 Wn.2d 649, 466 P.2d 508 (1970)	13
<i>Lynch v. Dept of Licensing</i> , 163 Wn. App. 697, 262 P.3 65 (2011)	33
<i>Michaels v. CH2M, Inc.</i> , 171 Wn.2d 587, 257 P.3d 532 (2011)	15
<i>Moffitt v. City of Bellevue</i> , 87 Wn. App. 144, 940 P.2d 695 (1997)	26
<i>State v. Baird-Adams</i> , #90419-7 (argued May 12, 2015)	28
<i>State v. Barber</i> , 170 Wn.2d 854, 248 P.3d 494 (2011)	13
<i>State v. Bartels</i> , 112 Wn.2d 882, 774 P.2d 1183 (1989)	16, 25, 31, 32
<i>State v. Bostrom</i> , 127 Wn.2d 580, 902 P.2d 157 (1995)	28
<i>State v. Delgado</i> , 148 Wn.2d 723, 63 P.3d 792 (2003)	22
<i>State v. Fedorov</i> , 183 Wn.2d 669, 355 P.3d 1088 (2015)	5
<i>State v. Gauthier</i> , 174 Wn. App. 257, 298 P.3d 126 (2013)	29

<u>Washington Cases (cont.)</u>	<u>Page No.</u>
<i>State v. Haydel</i> , 122 Wn. App. 365, 95 P.3d 760 (2004)	17, 18
<i>State v. Howland</i> , 180 Wn. App. 196, 321 P.3d 303 (2014)	17, 18, 19
<i>State v. Johnson</i> , 113 Wn.2d 482, 54 P.3d 155 (2002)	4, 27
<i>State v. Jones</i> , 168 Wn.2d 713, 230 P.3d 576 (2010)	29
<i>State v. Morales</i> , 173 Wn.2d 560, 269 P.3d 263 (2012)	23
<i>State v. Otton</i> , --- Wn.2d ---, --- P.3d --- (#91669-1 June 9, 2016)	13
<i>State v. Ruem</i> , 179 Wn.2d 195, 313 P.3d 1156 (2013)	28
<i>State v. Skuza</i> , 156 Wn. App. 886, 235 P.3d 842 (2010)	5
<i>State v. Storhoff</i> , 133 Wn.2d 523, 946 P.2d 783 (1997)	32, 33
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004)	20
<i>State v. Whitman County District Court</i> , 105 Wn.2d 278, 714 P.2d 1183 (1986)	16, 24, 26, 28, 30-34
<i>Town of Clyde Hill v. Rodriguez</i> , 65 Wn. App. 778, 831 P.2d 149 (1992)	26
<i>Welch v. Dept of Licensing</i> , 13 Wn. App. 591, 536 P.2d 172 (1975)	16, 25
<i>Weyerhaeuser v. Tacoma-Pierce Cty Health Dept.</i> , 123 Wn. App. 59, 96 P.3d 460 (2004)	5, 27
<u>Federal Cases</u>	<u>Page No.</u>
<i>Birchfield v. North Dakota</i> , --- U.S. ---, --- S.Ct. --- (14-1468 issued June 23, 2016)	28
<i>Skinner v. Ry. Labor Executives' Ass'n</i> , 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989)	28
<i>United States v. Prescott</i> , 581 F.2d 1343 (9th Cir. 1978)	29

Washington Statutes

RCW 7.16.040
RCW 46.20.308(2)

Page No.

8, 11
20-22, 26

Washington Court Rules

CrRLJ 8.3(b)
RALJ 2.2
RAP 2.3(b)
RAP 13.5(b)

Page No.

9, 10
7
8, 11, 18
8, 11

Other Authorities

Geoffrey Crooks, *Discretionary Review of Trial Court
Decisions Under the Washington Rules of Appellate
Procedure*, 61 Wash. L.Rev. 1541(1986)

Page No.

11, 18, 19,
20

<http://www.merriam-webster.com/dictionary/possible>
(viewed Oct. 10, 2016)

15

<http://www.merriam-webster.com/dictionary/probable>
(viewed Oct. 10, 2016)

15

I. INTRODUCTION

This case is before this Court on direct review of the Chelan County Superior Court's ruling to deny the State a writ of review. A writ is an "extraordinary remedy" and should be issued "sparingly."¹ It should not be issued here.

Noticeably absent from the State's brief is any citation to *Seattle v. Holifield*. *Holifield* involves an identical fact pattern to the present case. A prosecutor sought a writ to reverse a trial court's suppression ruling in a DUI case. This Court, in a unanimous decision, rejected the use of the statutory writ to seek interlocutory review. This Court stated that even if the trial court had erred it would constitute at most "a mere error of law"² and without more would not justify issuance of a writ. Not once does the State address this clear precedent.

Here, the trial judge suppressed a breath test refusal and further held the State possesses enough remaining evidence to prosecute Mr. Bowie for DUI. This Court must affirm the Superior Court's rejection of a writ and order the State to return to Chelan County and provide Mr. Bowie his day in court to defend against this charge.

¹ *Seattle v. Holifield*, 170 Wn.2d 230, 239-240, 240 P.3d 1162 (2010).

² *Holifield*, at 246.

II. COUNTER-STATEMENT OF ISSUES FOR REVIEW

A. The State has failed to establish it is entitled to a statutory writ.

1. This Court must uphold clear precedent in *Seattle v. Holifield*. A statutory writ is not the appropriate method for challenging a perceived "mere error of law."

2. This Court must interpret the criteria for granting a writ consistent with this Court's "overarching dogma" that writs are "extraordinary" and granted only "sparingly."

a. The suppression ruling was not "probable error."

b. The State has provided no argument that the suppression ruling has "substantially altered the status quo" or "substantially limited the freedom of [the State] to act."

B. The officer's request that Mr. Bowie submit to a voluntary test conveyed a different meaning than the "right to refuse" advisement in RCW 46.20.308(2).

1. The 2004 amendment to RCW 46.20.308(2), adding the language "in substantially the following language" does not apply to the mandatory advisement regarding the right to refuse.

2. The State has advanced no reason to abandon this Court's analysis from *State v. Whitman Cty*. A warning is misleading when it conveys a meaning different than that specified by the statute to the extent it alters the consequences for submitting to or refusing a breath test.

3. A request to submit to a voluntary search carries with it the implicit recognition that a refusal will not be used against the defendant at trial.

C. Precedent establishes a clear standard that prejudice exists, warranting suppression, where an officer provides misleading information to the driver which alters the consequences intended by statute, and impacts the opportunity to exercise an intelligent judgment whether to submit to a breath test or refuse.

III. STATEMENT OF THE CASE

A. Procedural History.

The Chelan County prosecutor has charged Mr. Bowie with one count of Driving Under the Influence (DUI).³ The District Court held a pre-trial hearing to address Mr. Bowie's motion to suppress his alleged refusal to submit to a breath-alcohol test.⁴ The court heard testimony from the arresting officer, reviewed the officer's arrest report, and granted the suppression motion.⁵ The State filed a motion to reconsider.⁶ The trial judge affirmed his prior ruling.⁷

The State filed for a Writ of Review (RCW 7.16) in the Superior Court.⁸ The Court denied the request.⁹ The State filed for review in this Court.¹⁰ Review was granted.¹¹

³ CP 25; 29-30

⁴ CP 26; 52-56

⁵ CP 26; 62-66

⁶ CP 68-81

⁷ CP 83-88

⁸ CP 1-4

⁹ CP 194; 195-196

¹⁰ CP 197-206

¹¹ Supreme Court Order, dated June 29, 2016.

B. Facts Material to Suppression Motion.

The State is the moving party and carries the burden to perfect the record.¹² Here, the State has not provided a copy of the officer's testimony before the trial court.¹³ Instead, the record is cobbled together from an arrest report¹⁴ and the recollections of those present at the hearing.¹⁵

For example, the State provided this Court with the transcript of the motion to reconsider hearing heard by the trial judge.¹⁶ Defense counsel recalled the officer saying, "I asked him if he wanted to take a voluntary test.' It couldn't be more clear what the facts are."¹⁷ The prosecutor never disagreed.¹⁸

In re-affirming his suppression ruling, the trial judge stated,

"... as the Court understood the Deputy's testimony, he basically handed the breath tube to the Defendant and made a statement which indicated that it was a voluntary choice whether to blow or not. Now the Court's somewhat handicapped because I don't know exactly what the Deputy actually said on that occasion, I don't believe he actually remembered, but he did concede multiple times that he referred to it as voluntary."¹⁹ (Emphasis added)

¹² *State v. Johnson*, 113 Wn.2d 482, 491 fn. 23, 54 P.3d 155 (2002).

¹³ CP 26. The prosecutor's affidavit stated his office has made effort to obtain a transcript.

¹⁴ CP 35-36

¹⁵ The prosecutor represents that the officer apparently could not recall his exact words to Mr. Bowie. Brief of Petitioner, pg. 4, fn. 1.

¹⁶ Motion for Discretionary Review, Appendix I (filed May 4, 2016)

¹⁷ Motion for Discretionary Review, Appendix I, pg. 16-17.

¹⁸ Id.

¹⁹ Motion for Discretionary Review, Appendix I, pg. 20.

The State does not assign error to any findings of fact entered by the trial judge, and they are verities on appeal.²⁰ The trial judge's findings state that the officer read Mr. Bowie a proper implied consent warning and Mr. Bowie agreed to take a breath test. After some delay (due to Mr. Bowie applying lip balm) the officer asked Mr. Bowie if he would provide a voluntary sample, and Mr. Bowie said no. The officer entered a refusal test.²¹ On appeal, these findings must be viewed in a light most favorable to Mr. Bowie.²²

C. Superior Court Ruling to Deny Writ of Review.

The State refers to both the Superior Court's written decision as well as the clerk's minutes to describe the court's ruling to deny the writ.²³ Generally, a court's written ruling controls over any apparent inconsistency with its earlier oral ruling.²⁴ Here, however, it is necessary to review both to understand the actual ruling entered by the judge.

²⁰ *State v. Fedorov*, 183 Wn.2d 669, 674, 355 P.3d 1088 (2015).

²¹ CP 63-64; 84-85

²² *Weyerhaeuser v. Tacoma-Pierce Cty Health Dept.*, 123 Wn. App. 59, 96 P.3d 460 (2004).

²³ Brief of Petitioner, pg. 7.

²⁴ *State v. Skuza*, 156 Wn. App. 886, 898, 235 P.3d 842 (2010).

According to the State the Superior Court judge only found that the State failed to meet the "probable error" standard.²⁵ The clerk's minutes establish that the judge ruled against the State on both criteria for a writ.

The Court found the State has burden of showing probable error that substantially altered the status quo. The Court found state met burden of possible error and that the status quo was altered but has not shown probable error or was substantially altered.²⁶ (Emphasis added)

This distinction is crucial because the State has not assigned any error to the Superior Court's conclusion that it failed to establish any substantial alteration to the status quo or limited its ability to act.²⁷

The State also baldly claims that Superior Court Judge T.W. Small was confused regarding the correct standard to apply.²⁸ The clerk's notes establish the judge was not confused. Rather, he accurately recognized there is a "higher burden" for issuing a writ than simply disagreeing with the trial judge's suppression ruling.²⁹

D. State's Failure to Assign Error.

The State has failed to assign error to the trial judge's amended conclusion of law #10. This conclusion states;

²⁵ Brief of Petitioner, pg. 7.

²⁶ CP 194

²⁷ Brief of Petitioner, pgs. ii-iii, "Argument."

²⁸ Brief of Petitioner, pg. 7.

²⁹ CP 194

The practical effect of this ruling does not effectively terminate the case for purposes of RALJ 2.2 because there is still sufficient admissible evidence for the State to try the charge of Driving Under the Influence.³⁰

The State has failed to assign error to the Superior Court ruling that it failed to establish the trial court decision "substantially alters the status quo or substantially limits the freedom of a party to act."³¹ Further, the State has failed to present any argument to this Court that the trial court ruling "substantially alters the status quo or substantially limits the freedom of a party to act."³²

IV. ARGUMENT

A. The State has failed to establish it is entitled to a statutory writ.

In 2010, this Court, in a unanimous decision, established a "specific and stringent" and "simple and straightforward" standard for granting a statutory writ.³³ This Court's purpose in adopting such a standard was clear: to resolve uncertainty in prior case law and declare that the statutory writ was intended to address issues greater than "mere

³⁰ CP 87

³¹ Brief of Petitioner, pgs. ii-iii, "Argument."

³² *Id.*

³³ *Holifield*, 170 Wn.2d at 245.

errors of law."³⁴ These standards apply to the present case, and the State has failed to meet them.

Grounds for issuing a statutory writ of review are:

A writ of review shall be granted by any court, except a municipal or district court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.³⁵ (Emphasis added)

This Court in *Holifield* held that the standard for determining whether a tribunal has "acted illegally" is the same standard for seeking interlocutory review under RAP 13.5(b) and RAP 2.3(b).³⁶ Pertinent here, this standard is comprised of two parts.

- (1) Whether the tribunal has committed probable error.
- (2) Whether the decision substantially alters the status quo or substantially limits the freedom of a party to act.³⁷

The State has failed to address these standards. The State cannot meet these standards. Its arguments must be rejected.

³⁴ *Holifield*, at 239-246.

³⁵ RCW 7.16.040.

³⁶ *Holifield*, at 244-245.

³⁷ *Id.*

1. This Court must uphold clear precedent in *Seattle v. Holifield*. A statutory writ is not the appropriate method for challenging a perceived "mere error of law."

This Court has already concluded that a writ is not the appropriate method for the State to challenge a "mere legal issue." This precedent must be upheld.

In *Seattle v. Holifield*,³⁸ this Court addressed the same type of issue the State raises here. There, the trial judge suppressed the results of a breath-alcohol test in a DUI prosecution. The trial judge ruling was based on misconduct arising from the state toxicology lab's mishandling of test certifications.³⁹ The judge found that CrRLJ 8.3(b), a court rule addressing the court's authority to dismiss a prosecution for misconduct, impliedly gave the court authority to suppress evidence as an alternative remedy.⁴⁰

The prosecutor sought a writ in Superior Court, which was denied.⁴¹ The prosecutor sought review in the Court of Appeals, which reversed the trial judge's "legal error."⁴²

³⁸ *Supra*.

³⁹ *Holifield*, at 235.

⁴⁰ *Id.*

⁴¹ *Holifield*, at 236.

⁴² *Id.*; *City of Seattle v. Holifield*, 150 Wn. App. 213, 228, 208 P.3d 24 (2009).

This Court granted the defendant's request for review, and reversed the Court of Appeals.⁴³ This Court's ruling was broken into two parts. The Court first addressed the interpretation of CrRLJ 8.3(b).⁴⁴ This Court upheld the trial judge's interpretation of the rule, and held that the rule provided authority to suppress evidence as an alternative remedy to dismissal.⁴⁵

This Court then addressed the prosecutor's use of the statutory writ to challenge the trial judge's ruling.⁴⁶ Noting the lack of clarity in existing case law interpreting the writ statute and requirements, this Court undertook the task to create a standard that was "specific and stringent" and "simple and straightforward."⁴⁷

The key issue to resolve was how to interpret the phrase "acting illegally" in RCW 7.16.040.⁴⁸ Prior appellate opinions conflicted on whether this phrase contemplated a broad scope of review including lower court legal errors, or required a restricted scope of review limited to court action exceeding its jurisdiction.⁴⁹

⁴³ *Id.*

⁴⁴ *Holifield*, at 236-237.

⁴⁵ *Holifield*, at 239.

⁴⁶ *Id.*

⁴⁷ *Holifield*, at 245.

⁴⁸ *Holifield*, at 241.

⁴⁹ *Holifield*, at 241-244.

This Court resolved this conflict by reviewing statutory writs from an historical perspective. The source for this perspective was a law review article written by former Supreme Court Commissioner Geoffrey Crooks.⁵⁰ Appellate court rules (RAP's) were adopted in the 1970's to replace all prior rules governing appellate procedure; including interlocutory review via writs.⁵¹ The intent was to apply these new rules to interlocutory review deriving from the lower courts.⁵² Crooks wrote,

"By applying the standards espoused in the RAPs to courts of limited jurisdiction, we ensure the principles governing review are consistent throughout the review process. It would make little sense to apply a much different standard, because the RAPs themselves were adopted, in part, to streamline and clarify the writ morass."⁵³

This Court adopted Crooks' analysis.⁵⁴ This Court applied the RAP standards for interlocutory review found in RAP 2.3(b) and RAP 13.5(b) to define the phrase "acting illegally" in RCW 7.16.040.⁵⁵

"We hold that, for purposes of RCW 7.16.040, an inferior tribunal, board or officer, exercising judicial functions, acts illegally when that tribunal, board, or officer (1) has committed an obvious error that would render

⁵⁰ *Holifield*, at 245; Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 Wash. L.Rev. 1541 (1986).

⁵¹ *Holifield*, at 345; Crooks, 61 Wash. L.Rev. at 1541.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Holifield*, at 244-245.

⁵⁵ *Id.*

further proceedings useless; (2) has committed probable error and the decision substantially alters the status quo or substantially limits the freedom of a party to act; or (3) has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of revisory jurisdiction by an appellate court."⁵⁶ (Emphasis added)

This Court concluded the *Holifield* opinion with perhaps the most crucial sentence of all.

"Here, suppression was proper but even if it were not, it would constitute at most a mere error of law that, without more, would not justify issuance of a writ of review."⁵⁷

This sentence crystallized the inherent deficiency in the prosecutor's case in *Holifield*; the suppression ruling was a "mere legal issue" and the prosecutor failed to explain how the issue "substantially alter[ed] the status quo or substantially limit[ed] the freedom of [the prosecutor] to act."⁵⁸ Therefore, the prosecutor was not entitled to a writ even if the trial judge had erred.

In the present case, the State has not cited to *Holifield*.⁵⁹ It is unclear whether the State is willfully ignoring the case or is impliedly

⁵⁶ *Id.*

⁵⁷ *Holifield*, at 246.

⁵⁸ The prosecutor lost breath test evidence to prosecute the defendant for DUI. This loss would impact the litigation in the same ways argued by the State here. It cannot be seriously argued that the State is in any way "more" prejudiced by the loss of refusal evidence.

⁵⁹ Brief of Petitioner, pgs. iv-viii.

seeking its reversal. This Court, however, must uphold *Holifield* as stare decisis.

"Stare decisis is a doctrine developed by courts to accomplish the requisite element of stability in court-made law, but is not an absolute impediment to change."⁶⁰ The issue is not whether this Court should review precedent as if it were a matter of first impression, but rather whether the prior decision is so problematic that it must be rejected, despite the many benefits of adhering to precedent—"promoting] the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contributing] to the actual and perceived integrity of the judicial process."⁶¹

This Court does not "take lightly" a party's express invitation to reject a prior decision.⁶² Any implied invitation to reconsider *Holifield* in this case should not be taken seriously at all. This Court will only reject a prior holding upon "a clear showing that an established rule is incorrect and harmful."⁶³

⁶⁰ *State v. Otton*, --- Wn.2d ---, --- P.3d --- (#91669-1 June 9, 2016); citing *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

⁶¹ *Otton*, supra; citations to authority omitted.

⁶² *Otton*, supra; citing *State v. Barber*, 170 Wn.2d 854, 863, 248 P.3d 494 (2011).

⁶³ *Otton*, supra.

Holifield is binding authority on this case. The State has not articulated any argument to ignore or reject the opinion. Therefore, any review of the State's request for a writ of review must apply the standards set forward in *Holifield*. The State fails to meet these standards.

2. This Court must interpret the criteria for granting a writ consistent with this Court's "overarching dogma" that writs are "extraordinary" and granted only "sparingly."

This Court in *Holifield* made it clear that its "overarching dogma" is that a writ of review is an "extraordinary remedy" and should be issued "sparingly."⁶⁴ Therefore, any interpretation of the standards for a writ must be consistent with this clear directive. A writ is extraordinary and rare, not ordinary and common.

Here, because the State does not address *Holifield*, there is no discussion whether its request for a writ coincides with this overarching dogma. Yet, in pleadings before the Superior Court the State argued that the second part of the standard, whether a decision substantially altered the status quo or substantially limited the freedom of a party to act, "is not a high bar."⁶⁵ Such thinking is incompatible with this Court's clear holding.

⁶⁴ *Holifield*, at 246.

⁶⁵ CP 20

a. The suppression ruling was not "probable error."

Under basic rules of statutory construction, undefined common statutory terms should be interpreted according to their common dictionary meaning.⁶⁶ "Probable" is defined as "likely to happen or be true but not certain."⁶⁷ Here, the Superior Court judge both correctly interpreted this term and adhered to this Court's admonition that a writ is rare and should be issued sparingly when he distinguished "probable error" from "possible error" in his ruling.⁶⁸

The clerk's notes bear this out. Judge Small stated the burden for granting a writ was higher than simply disagreeing with the trial judge's ruling.⁶⁹ "Possible" may be defined as "being within the limits of ability, capacity, or realization."⁷⁰ It is certainly possible for two reasonable judges to disagree on a legal issue. However, it is quite another thing to contend that another judge's ruling is likely to be wrong.

As will be discussed later, this Court and the Court of Appeals have addressed several instances where an officer either misstates the implied consent warning or provides incorrect information to a DUI

⁶⁶ *Michaels v. CH2M, Inc.*, 171 Wn.2d 587, 600, 257 P.3d 532 (2011).

⁶⁷ <http://www.merriam-webster.com/dictionary/probable> (viewed Oct. 10, 2016)

⁶⁸ CP 194; 195-196

⁶⁹ *Id.*

⁷⁰ <http://www.merriam-webster.com/dictionary/possible> (viewed Oct. 10, 2016)

suspect.⁷¹ Despite the State's many disagreements with these cases, it has failed to cite a single case overruling these cases. Therefore, it is a stretch to consider a trial judge's ruling, which is based on this precedent, to constitute probable error.

A writ is not the proper appellate method to challenge and reverse existing law. A writ is meant to correct a judge's erroneous ruling where such ruling has a substantial impact on the aggrieved party. Here, consistent with *Holifield*, the trial judge's ruling simply isn't the type of ruling meant to be challenged through a writ.

b. The State has provided no argument that the suppression ruling has "substantially altered the status quo" or "substantially limited the freedom of [the State] to act."

Perhaps the State's greatest omission is the failure to articulate any explanation how the trial judge's ruling has substantially altered the status quo or substantially limited the freedom of the State to act.⁷² As this Court stated in *Holifield*, "a mere legal error ... without more, would not justify [a writ]."⁷³

⁷¹ *State v. Whitman Cty District Court*, 105 Wn.2d 278, 714 P.2d 1183 (1986); *State v. Bartels*, 112 Wn.2d 882, 774 P.2d 1183 (1989); *Welch v. Dept of Licensing*, 13 Wn. App. 591, 536 P.2d 172(1975); *Cooper v. Dept of Licensing*, 61 Wn. App. 525, 810 P.2d 1385 (1991).

⁷² Brief of Petitioner.

⁷³ *Holifield*, at 246.

Before the Superior Court, the State cited *State v. Haydel*,⁷⁴ a 2004 case.⁷⁵ There, without analysis the Court found the State satisfied this standard where the State found itself in a catch-22 situation. Because the trial court allowed a defendant to withdraw his guilty plea, the State had no other option to challenge the withdrawal, except by writ, because both a conviction and acquittal to the underlying charge would preclude appellate review.⁷⁶ This led the State here to suggest that this standard was a "simple matter of establishing harm," and was "not a high bar."⁷⁷

This Court's *Holifield* ruling establishes this standard carries a much higher bar. This Court must reject *Haydel* because it pre-dates *Holifield*. Instead, this Court must apply the analysis found in the 2014 appellate case *State v. Howland*.⁷⁸

Howland addresses a request for interlocutory review of a decision denying Howland conditional release from confinement related to a not guilty by reason of insanity verdict in a murder trial.⁷⁹ Lacking any evidence to support the release, the superior court summarily denied the

⁷⁴ 122 Wn. App. 365, 95 P.3d 760 (2004).

⁷⁵ CP 19-20

⁷⁶ The *Haydel* Court cited to no authority to describe how this particular standard is met.

⁷⁷ CP 19-20

⁷⁸ 180 Wn. App. 196, 321 P.3d 303 (2014).

⁷⁹ *Howland*, at 199.

request without a hearing.⁸⁰ Howland asserted the court's denial was probable error and substantially impacted her ability to seek conditional release in the future.⁸¹ The Court of Appeals rejected her arguments and affirmed the superior court ruling.⁸²

Howland is the appropriate case because it defines the standard - "substantially alters the status quo" or "substantially limits the freedom of a party to act" - based on Geoffrey Crooks' article; the same article relied upon by this Court in *Holifield*.⁸³ The Crooks' article provides a clear uniform standard consistent with the admonition that a writ is extraordinary and rare.

The Court in *Howland* understood what the Court in *Haydel* did not: that any discussion of the standards for interlocutory review must be consistent with the reality that interlocutory review should be rarely granted.⁸⁴ According to the Crooks article the standard at issue (RAP 2.3(b)(2)) was intended to apply "primarily to orders pertaining to injunctions, attachments, receivers, and arbitration, which have formerly

⁸⁰ *Howland*, at 200.

⁸¹ *Howland*, at 206.

⁸² *Howland*, at 204-207.

⁸³ *Howland*, at 206.

⁸⁴ *Id.*

been appealable as a matter of right."⁸⁵ A request for interlocutory review must be based on a manifestation of harm consistent with the type of harm where an injunction is ordered.⁸⁶

As Crooks described, this harm must be manifested "outside the courtroom."⁸⁷

"For example, when a party is compelled by court order to remove a structure, the order, if given effect, quite literally alters the status quo. Or if a court restrains a party from disposing of his or her private property, the party's freedom to act to conduct his or her affairs, is at least arguably, substantially limited. In each example, the court's action has effects beyond the parties' ability to conduct the immediate litigation. ... But where a trial court's action merely alters the status of the litigation itself or limits the freedom of a party to act in the conduct of the lawsuit, even if the trial court's action is probably erroneous, it is not sufficient to invoke review under RAP 2.3(b)(2)."⁸⁸

In *Howland*, the harm Howland faced, if any, was restricted solely to her request for release; "it has no effect beyond her immediate litigation."⁸⁹ Therefore, even if Howland could prove probable error, she was not entitled to review.⁹⁰

⁸⁵ *Howland*, at 207.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Howland*, at 207-208.

⁹⁰ *Howland*, at 206.

The State has made no argument how it might be harmed by the suppression ruling; either in the litigation or outside the courtroom.⁹¹ The trial judge ruled the State has sufficient admissible evidence remaining to prosecute Mr. Bowie, and has not assigned error to this ruling.⁹² The trial judge was in the best position to review the State's evidence including the officer's live testimony in making this ruling, and it should be entitled to strong deference by any appellate court.⁹³

The standard that must be applied to a request for a writ is "specific and stringent" and "simple and straightforward." This includes demonstrating that any error "substantially altered the status quo" or "substantially limited the freedom of [the State] to act." As Crooks clearly explains, this requires proving harm outside the courtroom and beyond the State's ability to conduct litigation. Here, the State has ample ability to prosecute the DUI offense. The request for a writ must be denied.

B. The officer's request that Mr. Bowie submit to a voluntary test conveyed a different meaning than the "right to refuse" advisement in RCW 46.20.308(2).

The State calls into question the validity of thirty years of case law based on the Legislature's 2004 amendment to the Implied Consent

⁹¹ Brief of Petitioner.

⁹² CP 87 (#10); Brief of Petitioner.

⁹³ *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

Statute.⁹⁴ While it is true the legislature modified certain "warning" requirements under RCW 46.20.308(2), it does not apply to the issue the State raises. The State has the obligation to provide a driver with a warning that is not misleading. Here, the officer fundamentally altered the meaning of the warning by telling Mr. Bowie the test was "voluntary." The trial judge did not err in suppressing Mr. Bowie's refusal from trial.

1. The 2004 amendment to RCW 46.20.308(2), adding the language, "in substantially the following language," does not apply to the mandatory advisement regarding the right to refuse.

In 2004, the Legislature amended, among other things, sub-section two of RCW 46.20.308. Pertinent here, the statute now reads,

... Prior to administering a breath test pursuant to this section, the officer shall inform the person of his or her right under this section to refuse the breath test, and of his or her right to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506. The officer shall warn the driver, in substantially the following language, that:

- (a) If the driver refuses to take the test, the driver's license, permit, or privilege to drive will be revoked or denied for at least one year; and
- (b) If the driver refuses to take the test, the driver's refusal to take the test may be used in a criminal trial; and
- (c) If the driver submits to the test and the test is administered, the driver's license, permit, or privilege to drive will be suspended, revoked, or denied for at least

⁹⁴ Brief of Petitioner, pg. 8; 12.

- ninety days if: (i) The driver is age twenty-one or over and the test indicates either that the alcohol; concentration of the driver's breath is 0.08 or more; or (ii) The driver is under age twenty-one and the test indicates either that the alcohol concentration of the driver's breath is 0.02 or more; or (iii) The driver is under age twenty-one and the driver is in violation of RCW 46.61.502 or 46.61.504; and
- (d) If the driver's license, permit, or privilege to drive is suspended, revoked, or denied the driver may be eligible to immediately apply for an ignition interlock driver's license.

The State argues the inclusion of the phrase, "The officer shall warn the driver, in substantially the following language," applies to all required warnings in the section.⁹⁵ This is not true.

A rule of statutory construction, "expressio unius est exclusio alterius,"⁹⁶ is applicable here. Two warnings are listed prior to the "in substantially the following language" modifier: the right to refuse and the right to an independent test. This Court must presume that the legislature intended to exclude these warnings from the list of warnings that follow the modifier.⁹⁷ Thus, the legislature intended to treat the two sets of warnings differently. Otherwise, all warnings would have been placed together.

⁹⁵ Brief of Petitioner, pg. 11.

⁹⁶ *State v. Delgado*, 148 Wn.2d 723, 728-729, 63 P.3d 792 (2003) ("To express one thing in a statute implies the exclusion of the other.")

⁹⁷ *Delgado*, at 729.

Advisements regarding the right to refuse and the right to an independent test are essential components to the statute.⁹⁸ These warnings should be given in a clear and concise manner. Therefore, it is appropriate for the legislature to address these warnings separate from the myriad of warnings containing information about license suspensions and ignition interlock devices. This Court should reject the State's argument.

2. The State has advanced no reason to abandon this Court's analysis from *State v. Whitman Cty.* A warning is misleading when it conveys a meaning different than that specified by the statute to the extent it alters the consequences for submitting to or refusing a breath test.

Regardless of this distinction with statutory construction, the State offers no real distinction how this Court should treat cases where an officer has altered the meaning of the warning given to a driver. The State re-casts the issue as whether the "fundamental meaning" of the warning has been provided.⁹⁹ But as the State's argument subsequently reveals, the standard the State seeks already exists in case law.¹⁰⁰

⁹⁸ *State v. Morales*, 173 Wn.2d 560, 569, 269 P.3d 263 (2012) (A defendant must be advised of the opportunity to gather potentially exculpatory evidence under the statute.)

⁹⁹ Brief of Petitioner, pg. 11.

¹⁰⁰ Brief of Petitioner, pg. 13-14.

This Court, in *State v. Whitman Cty District Court*,¹⁰¹ articulated a standard for evaluating implied consent warning issues that is practical, based on common sense, has been relied upon in subsequent cases for thirty years; and importantly, was applied in this case.¹⁰² According to *Whitman Cty*, a warning is misleading when it conveys a meaning different than that specified by the statute to the extent it alters the consequences for submitting to or refusing a breath test.¹⁰³ This places an undue burden on the decision-making process of the driver.¹⁰⁴

In *Whitman Cty.*, defendants were advised that a refusal to submit to a breath test "shall" be used at trial, whereas the statutory warning said a refusal "may"¹⁰⁵ be used as trial. According to this Court, the word "shall" over-stated the consequences of refusing the test, placing undue pressure on the defendant to avoid these consequences by submitting to the test.¹⁰⁶ Such a warning denied the defendant the opportunity to exercise an intelligent judgment whether to exercise the statutory right of refusal.¹⁰⁷

¹⁰¹ 105 Wn.2d 278, 714 P.2d 1183 (1986).

¹⁰² CP 86; Brief of Petitioner, pg. 13.

¹⁰³ *Whitman Cty*, at 285-286.

¹⁰⁴ *Id.*

¹⁰⁵ *Whitman Cty*, at 280.

¹⁰⁶ *Id.*

¹⁰⁷ *Whitman Cty*, 286-287.

This analysis has been repeatedly used in subsequent cases. In *State v. Bartels*,¹⁰⁸ the State altered the warning given drivers regarding the right to an independent test. The warning stated that if a driver sought an independent test it would be “at your own expense.”¹⁰⁹ To indigent drivers (i.e. those who could obtain an independent test for free) the warning was not merely misleading in a technical sense; it placed undue pressure to forego the opportunity to obtain their own test.¹¹⁰

This standard has also been applied in Court of Appeals' decisions. In *Welch v. Dept of Licensing*,¹¹¹ a warning was misleading because it told drivers they “could” face a license revocation for refusing a test; rather than using the mandatory term “shall.” In *Cooper v. Dept of Licensing*,¹¹² a warning was misleading where it conveyed the possibility the revocation period for a refusal could be less than one year. Contrary to the State’s assertion, these cases did not compel “automatic” reversal;¹¹³ the courts simply focused on the practical impact the misleading warning had on the driver’s decision-making process.¹¹⁴

¹⁰⁸ 112 Wn.2d 882, 774 P.2d 1183 (1989).

¹⁰⁹ *Bartels*, at 884.

¹¹⁰ *Bartels*, at 898.

¹¹¹ 13 Wn. App. 591, 592, 536 P.2d 172(1975).

¹¹² 61 Wn. App. 525, 528, 810 P.2d 1385 (1991).

¹¹³ Brief of Petitioner, pg. 8.

¹¹⁴ *Cooper*, at 528.

Court of Appeals' decisions have likewise applied the *Whitman Cty* standard and held that altered warnings were neither inaccurate nor misleading. In *Town of Clyde Hill v. Rodriguez*,¹¹⁵ the warning contained additional language addressing how to obtain an independent test; but the court concluded the alteration did not change the meaning intended by the statute.¹¹⁶

"These cases do not stand for the proposition that use of a linguistic equivalent of the statutory word requires suppression of the test results. Where no different meaning is implied or conveyed, the defendant is not misled. To hold otherwise would exalt form over substance."¹¹⁷

Therefore, this Court has already developed a functioning standard to determine whether an alteration of statutory warnings changes its "fundamental meaning." The statutory changes to RCW 46.20.308(2), while not applicable to this case, nonetheless do not compel this Court to abandon the *Whitman Cty* standard.

¹¹⁵ 65 Wn. App. 778, 831 P.2d 149 (1992).

¹¹⁶ See also *Moffitt v. City of Bellevue*, 87 Wn. App. 144, 940 P.2d 695 (1997). (The Court cautioned officers to refrain from grafting onto the warning additional information. But where no different meaning is implied or conveyed the defendant is not misled.)

¹¹⁷ *Clyde Hill*, at 785-786.

3. A request to submit to a voluntary search carries with it the implicit recognition that a refusal will not be used against the defendant at trial.

The State argues that the officer's use of the word "voluntary" is synonymous with the statutory "right to refuse" provided in the warning.¹¹⁸ The State is wrong. Considering the facts in the light most favorable to Mr. Bowie, the officer's statement amounted to a fundamental change in meaning related to the consequences for refusing the test. The trial judge did not err in suppressing the refusal evidence from trial.

The State seeks to use the imperfect record in this matter to its advantage by stating;

"We do not know what [the officer] said exactly at that point, other than he used the word "voluntary" when he asked Mr. Bowie if he would provide a sample of his breath."¹¹⁹

The bears the burden to perfect the record.¹²⁰ Here, the trial judge construed the officer's testimony as meaning he told Mr. Bowie, "it was a voluntary choice whether to blow or not."¹²¹ When reviewing this issue, the evidence must be construed in a manner favorable to Mr. Bowie.¹²²

¹¹⁸ Brief of Petitioner, pg. 13.

¹¹⁹ Brief of Petitioner, pg. 15.

¹²⁰ *State v. Johnson*, 113 Wn.2d 482, 491 fn. 23, 54 P.3d 155 (2002).

¹²¹ Motion for Discretionary Review, Appendix I, pg. 20.

¹²² *Weyerhaeuser v. Tacoma-Pierce Cty Health Dept.*, 123 Wn. App. 59, 96 P.3d 460 (2004).

According to *Whitman Cty.*, an officer's statement is misleading where it alters the structure of consequences contained in the statutory warning.¹²³

"If an individual is informed that it is more likely that negative consequences will follow a certain decision, it seems obvious that more pressure is being brought to bear on the accused to make that decision which would avoid the negative consequences."¹²⁴

Describing the breath test as a "voluntary" test alters the structure of consequences associated with the "right to refuse" advisement in the statutory warning. The "right to refuse" contemplated in the Implied Consent law exists as a statutory right which carries with it a set of consequences; in particular the admissibility of the refusal at trial.¹²⁵ A request to submit to a voluntary test, however, carries no such consequence.

A breath test is a search.¹²⁶ This Court recognizes that a person has the right to revoke consent to a search at any time.¹²⁷ Absent a warrant or

¹²³ *Whitman Cty.*, at 286.

¹²⁴ *Id.*

¹²⁵ *State v. Bostrom*, 127 Wn.2d 580, 590, 902 P.2d 157 (1995); RCW 46.20.308(2).

¹²⁶ *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); but see *Birchfield v. North Dakota*, --- U.S. ---, --- S.Ct. --- (14-1468 issued June 23, 2016) (Warrantless breath test reasonable under the Fourth Amendment.) Note; this issue, argued under State Constitutional grounds (Art. I, §7), is pending in *State v. Baird-Adams*, #90419-7 argued May 12, 2015).

¹²⁷ *State v. Ruem*, 179 Wn.2d 195, 207, 313 P.3d 1156 (2013).

an exception to the warrant requirement, the State may not use a person's refusal to give consent as evidence at trial.¹²⁸ The refusal to voluntarily consent to a warrantless search is privileged conduct that cannot be considered as evidence of criminal wrongdoing.¹²⁹

When the officer asked Mr. Bowie to submit to a voluntary test, the structure of consequences associated with revoking consent changed. Accordingly, the trial judge concluded Mr. Bowie was led to believe that the negative consequences associated with refusal did not apply, and influenced his decision to refuse.¹³⁰

The State argues that case law treats the terms "voluntary" and "right to refuse" interchangeably.¹³¹ However, the use of these terms in these cases is "obiter dictum" and irrelevant to the issue here.¹³²

There is a clear definable difference between the consequences associated with refusing a test under the Implied Consent law and withdrawing consent to a warrantless search. The officer's choice to

¹²⁸ *State v. Gauthier*, 174 Wn. App. 257, 264-266, 298 P.3d 126 (2013); citing *United States v. Prescott*, 581 F.2d 1343 (9th Cir. 1978); *State v. Jones*, 168 Wn.2d 713, 725, 230 P.3d 576 (2010).

¹²⁹ *Gauthier*, *supra*.

¹³⁰ CP 86

¹³¹ Brief of Petitioner, pg. 15.

¹³² *Grundy v. Thurston Cty.*, 155 Wn.2d 1, 9, 117 P.3d 1089 (2005) ("Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed.")

characterize the breath test as a voluntary test misled Mr. Bowie as to the application of these consequences to his decision to refuse. Consistent with *Whitman Cty.*, the trial judge was correct to suppress the test refusal from trial.

C. Precedent establishes a clear standard that prejudice exists, warranting suppression, where an officer provides misleading information to the driver which alters the consequences intended by statute, and impacts the opportunity to exercise an intelligent judgment whether to submit to a breath test or refuse.

The State asks this Court adopt a non-constitutional harmless error standard to assess whether a misleading warning should result in the suppression of evidence.¹³³ A non-constitutional harmless error standard requires a court to evaluate an evidentiary error (the admission of evidence) against the likelihood it materially affected the outcome of the trial.¹³⁴ This is not a workable standard where, as here, a trial has yet to occur and the full evidentiary record is not known. Rather, the standard for suppression found in *Whitman Cty* adequately addresses "prejudice" in the context of the implied consent law, and should be maintained by this Court.

¹³³ Brief of Petitioner, pg. 20.

¹³⁴ Brief of Petitioner, pg. 23; citing *State v. Barry*, 183 Wn.2d 297, 303, 352 P.3d 161 (2015).

The creation of the Implied Consent law sought to address three objectives: (1) to discourage individuals from driving an automobile while under the influence of intoxicants, (2) to remove the driving privileges from those individuals disposed to driving while inebriated, and (3) to provide an efficient means of gathering reliable evidence of intoxication or non-intoxication.¹³⁵ Because a multitude of consequences flow from the decision to submit to the test or refuse, the warning is meant to provide drivers the opportunity of exercising an intelligent judgment concerning whether to exercise the statutory right of refusal.¹³⁶ Understanding this, this Court in *Whitman Cty* focused on the impact a misleading warning had on the opportunity to exercise an intelligent judgment as the basis to determine whether suppression of a breath test refusal was the appropriate remedy.¹³⁷

Later, in *Bartels*, this Court again addressed suppression in terms of how a misleading warning affects a driver's opportunity to exercise an intelligent judgment.¹³⁸ However, the ability of the warning to actually

¹³⁵ *Dept of Licensing v. Lax*, 125 Wn.2d 818, 824, 888 P.2d 1190 (1995).

¹³⁶ *Whitman Cty.*, at 281.

¹³⁷ *Whitman Cty.*, at 286-287. ("We find that the defendants in the "shall" category of cases were denied the opportunity of exercising an intelligent judgment concerning whether to exercise the statutory right of refusal. The suppression of the results of the Breathalyzer test in this category of cases is the appropriate remedy.")

¹³⁸ *Bartels*, at 888.

impact a driver this way was limited to the specific issue of indigency. Thus, the Court gave the State the opportunity to admit the evidence if it could show a driver was not indigent.¹³⁹ While it is unclear why the Court referenced the constitutional "harmless beyond a reasonable doubt" standard to describe this, it is clear that the factual issue of indigency had to be resolved in order to invoke the suppression remedy consistent with *Whitman Cty.*

The word "prejudice" was not used to address suppression in the implied consent context until *Storhoff*.¹⁴⁰ There, the Court stated that suppression would not be appropriate without a showing of "actual prejudice" to the driver.¹⁴¹ However, this Court cited *Whitman Cty.*, *Bartels*, and *Welch*, as examples of cases where "actual prejudice" resulted to the driver due to the misleading warning.¹⁴² Evaluating each case, this Court concluded that the misleading warnings prejudiced the defendants specifically because it deprived them the opportunity to exercise an intelligent judgment.¹⁴³

¹³⁹ *Bartels*, at 890.

¹⁴⁰ *State v. Storhoff*, 133 Wn.2d 523, 946 P.2d 783 (1997).

¹⁴¹ *Storhoff*, at 531.

¹⁴² *Storhoff*, at 530, fn. 6.

¹⁴³ *Id.*

Therefore, the standard first enunciated in *Whitman Cty* did not change. Instead, the terminology changed. After *Storhoff*, prejudice results from a misleading warning which alters the consequences of submitting to a test or refusing and deprives a driver the opportunity to exercise an intelligent judgment. Reference to a particular constitutional or non-constitutional standard to determine suppression is irrelevant.

The State's citation to *Lynch*¹⁴⁴ and *Grewal*¹⁴⁵ do not alter this standard for suppression.¹⁴⁶ The critical difference is that in both *Lynch* and *Grewal* the courts found that the warnings were not misleading.¹⁴⁷ The court in *Lynch* distinguished the case from other cases, such as *Whitman Cty*, noting that in those cases courts first found the warning misleading before addressing whether the warning was prejudicial.¹⁴⁸ *Lynch* ultimately re-affirmed the standard in *Whitman Cty*; stating “that [warnings] that are neither inaccurate not misleading do not result in prejudice to the driver in civil proceedings.”¹⁴⁹

¹⁴⁴ *Lynch v. Dept of Licensing*, 163 Wn. App. 697, 262 P.3d 65 (2011)

¹⁴⁵ *Grewal v. Dept of Licensing*, 108 Wn. App. 815, 33 P.3d 94 (2001).

¹⁴⁶ Brief of Petitioner, pg. 20.

¹⁴⁷ *Lynch*, at 708-709; *Grewal*, at 822.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

The State ultimately argues that Mr. Bowie was required to present proof he was prejudiced.¹⁵⁰ This is wrong. As discussed in prior sections, the officer provided a misleading warning that altered the consequences of refusing the test. The trial judge correctly linked the misleading warning to Mr. Bowie's opportunity to make a knowing and intelligent decision.¹⁵¹ This satisfied the prejudice standard necessary to suppress the breath test refusal from trial.

Finally, the State alleges that it is impossible to find prejudice because of Mr. Bowie's prior experiences with DUI arrests and the Implied Consent law.¹⁵² While the State apparently provided some record of this to the trial judge,¹⁵³ there is no record before this Court what warnings may have been provided to Mr. Bowie in past cases, and whether an officer misstated any information in the warning. Lacking this record there is no basis to challenge the trial judge's determination that the State's argument is speculative and unpersuasive.¹⁵⁴

The suppression standard in *Whitman Cty* properly addresses the issue of prejudice in the specific context of the Implied Consent law. This

¹⁵⁰ Brief of Petitioner, pg. 27.

¹⁵¹ CP 86

¹⁵² Brief of Petitioner, pg. 29.

¹⁵³ CP 86

¹⁵⁴ *Id.*

standard was applied by the trial judge here. The State's argument to abandon thirty years of case law addressing this standard should be rejected.

VI. CONCLUSION

The State's request to reverse the suppression ruling must ultimately fail because it has failed to prove that a writ is warranted in this case. The Superior Court, which denied the writ, found the State failed to prove either probable error in the suppression ruling, or that the ruling substantially altered the status quo or substantially limited the freedom of the State to act. The State has presented no argument to suggest that either ruling was incorrect. Even if the suppression ruling was wrong, a writ is still impermissible because there is no proof the State has been harmed beyond the immediate litigation. Mere error without more does not justify issuance of a writ.

However, the trial judge did not err in suppressing the refusal evidence. Our Courts have developed clear standards for evaluating misleading information provided to drivers related to implied consent warnings and whether suppression is the appropriate remedy. These standards were applied by the trial judge. The State's request to abandon these standard is unnecessary and should be rejected by this Court.

For the foregoing reasons, Mr. Bowie asks this Court to affirm the Superior Court's denial of the writ of review, and remand this matter to the trial court for trial.

RESPECTFULLY SUBMITTED this 12th day of October, 2016.

A handwritten signature in black ink, appearing to read 'R. Robertson', written over a horizontal line.

Ryan B. Robertson, WSBA #28245
Attorney for Mr. Bowie

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
Petitioner,)
)
v.)
)
CHELAN COUNTY DISTRICT)
COURT, HON. ROY S. FORE, and)
ROBERT JAMES BOWIE)
(real party in interest),)
Respondents.)

No. 93098-8

DECLARATION
OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on October 12, 2016, I served a copy of Respondent Robert Bowie's response brief on the following parties by depositing in the United States Mail a properly stamped and addressed envelope containing said document directed to:

1. Counsel for Petitioner: Mr. Andrew B. Van Winkle, Chelan County Prosecutor's Office, P.O. Box 2596, Wenatchee, WA 98807.
2. Respondent Hon. Roy S. Fore: Chelan County District Court, P.O. Box 2687, Wenatchee, WA 98807.
3. Former Counsel for Resp. Bowie: John Brangwin, Woods & Brangwin PLLC, 517 Mission St., Ste 2A, P.O. Box 4378, Wenatchee, WA 98807.

Furthermore, due to the expedited nature of this proceeding, I served Mr. Van Winkle a copy of Mr. Bowie's answer by email at: Andrew.VanWinkle@co.chelan.wa.us; and I served Mr. Brangwin at: John@wblawfirm.com.

Signed in SEATTLE, WA the 12th day of October, 2016.

A handwritten signature in black ink, appearing to read 'R. Robertson', with a large, sweeping flourish at the end.

Ryan B. Robertson, WSBA #28245
Attorney for Mr. Bowie

OFFICE RECEPTIONIST, CLERK

From: Ryan Robertson <ryan@robertsonlawseattle.com>
Sent: Wednesday, October 12, 2016 1:16 PM
To: OFFICE RECEPTIONIST, CLERK; Andrew VanWinkle
Subject: #93098-8 - State v. Bowie - Respondent's Brief
Attachments: 2016.10.12 - Respondents Brief.pdf

Good afternoon,

Please accept for filing Mr. Bowie's response brief.

- Ryan Robertson

--

ROBERTSON
LAW^{PC}

Ryan Robertson

1000 2nd Ave #3670
Seattle, WA 98104
w (206) 395-5257
f (206) 905-0920