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NO. 69613-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

MARK MECHAM,

Appellant.

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

The Honorable Palmer Robinson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying appellant's motion to suppress and admitting evidence appellant invoked his constitutional right to refuse consent to field sobriety testing.

2. The trial court erred by refusing to give appellant's proposed jury instruction that evidence of refusal to participate in field sobriety testing could not be considered as evidence of guilt.

3. The trial court erred by admitting evidence appellant asserted his constitutional right to refuse the officer entry into his car without a warrant and permitting the State to rely on that assertion as evidence of guilt.

4. The trial court erred in instructing the jury it had a "duty to convict" if it found all the elements of the offense beyond a reasonable doubt.[1] CP 105 (Instruction 14).

5. The trial court violated appellant's constitutional right to confront the witnesses against him when it admitted Exhibit 17, which included a sworn statement certifying the order revoking his driver's license was mailed to his address.

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[1] This Court rejected the argument raised here in State v. Meggyesy, 90 Wn. App. 693, 958 P. 2d 319, rev. denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005). Counsel respectfully contends Meggyesy was incorrectly decided. Because Mecham must include a Gunwall analysis or risk waiver of the issue, the Meggyesy argument is included in its entirety.

6. The trial court erred in finding appellant's license had been revoked in the absence of admissible evidence that notice was provided. CP 148 (Finding of Fact 6).

7. The trial court erred in finding appellant guilty of driving while license suspended/revoked in the first degree.

Issues Pertaining to Assignments of Error

1. A criminal defendant may not be penalized for exercising the right to refuse consent to a search by having that refusal used as evidence of guilt at trial. The trial court admitted evidence appellant declined voluntary field sobriety testing, and the prosecutor argued that decision was evidence of guilt. The court also admitted evidence appellant declined the officer's offer to secure his car. Did the use of this refusal evidence at trial violate appellant's constitutional right to refuse consent to a search under the Fourth Amendment and Article I, Section 7 of Washington's constitution?

2. In a criminal trial, does a "to-convict" instruction violate the right to a jury trial under the state and federal Constitutions when it informs the jury it has a duty to return a verdict of guilty if it finds the elements have been proven beyond a reasonable doubt?

3. The certification of mailing in Exhibit 17 was prepared solely in anticipation of litigation. Did the trial court err in determining it

was not testimonial hearsay and its admission did not violate appellant's right to confront the witnesses against him?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Mark Mecham with one count of felony driving under the influence of intoxicating liquor (DUI), one count of driving while license suspended/revoked in the first degree, and one count of driving in violation of the ignition interlock device requirement. CP 45.

After the court denied Mecham's motion to bifurcate the trial to prevent the jury hearing about his prior DUI convictions, Mecham stipulated he had previously been convicted of DUI on four occasions. 1RP[2] 24; CP 49. The court granted Mecham's motion for a bench trial on driving while license suspended/revoked and violating the ignition interlock device requirement. 1RP 105-07, 119.

The court denied repeated defense motions to suppress Mecham's refusal to engage in field sobriety testing.[3] 1RP 92; 2RP 6-11, 39-45. The

[2] There are five volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Oct. 23, 24, 2012; 2RP – Oct. 25, 29, 2012; 3RP – Oct. 30, 2012; 4RP – Oct. 31, 2012; 5RP – Nov. 1, 8, 19, 2012.

[3] Counsel initially moved to suppress Mecham's refusal to engage in field sobriety testing under the Fifth Amendment privilege against coerced self-incrimination. CP 25-26; 1RP 39-40. The trial court's written findings of fact and conclusions of law address only this argument. CP 143-46. However, in a motion to reconsider, counsel also argued

court also rejected defense counsel's proposed instruction that Mecham's refusal could not be used as evidence of guilt. 4RP 95-98; CP 69. The court ruled that even if the field sobriety test amounts to a search, it was justified by probable cause. 2RP 45.

The court also declined to give the defense proposed "to-convict" instruction on the elements of felony DUI, which alters the pattern instruction to remove the "duty to convict" language, replacing it with language stating, "In order to return a verdict of guilty, you must unanimously find from the evidence that each of these elements has been proved beyond a reasonable doubt." 4RP 82-85, 89; CP 71.

The jury found Mecham guilty of felony DUI, and the court found him guilty of driving while license suspended/revoked in the first degree and violating the ignition interlock device requirement. CP 87, 135. CP 147-49. The court imposed a standard range sentence of 29 months on the DUI charge, to be served consecutively with consecutive 364-day sentences on the two misdemeanors for a total of 53 months confinement. CP 130, 135. Notice of appeal was timely filed. CP 114.

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admission of the refusal violated Mecham's privacy rights under the Fourth Amendment and Article I, Section 7 of Washington's constitution. CP 51-55; 2RP 39-44. The court rejected this argument in an oral ruling without entering a corresponding written conclusion of law. 2RP 45; CP 143-46.

2. Substantive Facts

Mecham was pulled over in Bellevue after officer Scott Campbell ran a random license check on his car and noticed an outstanding warrant. 1RP 49. Campbell testified Mecham's driving was entirely safe and he committed no infraction. 3RP 15-16. During the process of arresting Mecham, Campbell noticed the odor of intoxicants on his breath. 3RP 20. Campbell also testified Mecham's movements were sluggish, his speech was slurred and repetitive, and he appeared intoxicated. 3RP 20.

Campbell then requested Mecham perform voluntary field sobriety tests, namely, the horizontal gaze nystagmus looking for involuntary jerking of the eye, the one-leg stand, and the turn and walk test, in order to gauge Mecham's ability to listen, follow directions, and perform simple tasks involving balance. 3RP 21-22. Campbell testified these tests are a useful tool in investigating DUI. 3RP 22. Mecham did not perform the tests. 3RP 21.

Campbell asked if Mecham wanted the officer to secure his car for him. 3RP 23. Campbell noted the doors were unlocked and Mecham's keys were in the ignition. 3RP 23. Mecham told Campbell just to shut the doors, but not to go in his car. 3RP 23. When Campbell approached to shut the doors, he noticed an open beer can with a straw in it behind the passenger seat. 3RP 23.

Campbell brought Mecham to the police station, read him the implied consent warnings, and requested he submit to a breath test for alcohol. 3RP 27-29. Mecham was advised he had the right to refuse, but if he refused, his license would be suspended and his refusal could be used against him in a criminal trial. 3RP 29-31. Campbell asked Mecham to take the breath test three times. 3RP 31-32. Mecham once did not answer and twice stated simply that his attorney advised him not to answer any more questions. 3RP 32, 99.

Officer Darrell Moore assisted Campbell by drafting an application for a search warrant to take Mecham's blood. 3RP 33. Moore also testified Mecham appeared intoxicated based on the odor of intoxicants, slurred speech, and glazed, bloodshot eyes. 4RP 16. While Moore sat near Mecham working on the warrant, he heard Mecham comment that Campbell, "must love his job." 4RP 16-17.

Officer Moore also commented on Mecham's refusal to perform the field sobriety tests. He testified, "I would always like to see someone take sobriety tests, see what they're going to perform like so I have a better picture of . . . what could be happening at the scene." 4RP 32-33. He explained, "When you look at a situation where someone refuses a sobriety test, that person has limited my ability to obtain more evidence." 4RP 32.

Debra McArthur drew Mecham's blood at Overlake Hospital approximately three hours after his arrest. 3RP 124, 134. She did not smell intoxicants or alcohol. 3RP 136-37. Nor did she notice bloodshot or watery eyes. 3RP 138. She noticed no signs of impairment whatsoever. 3RP 135-36. Both McArthur and Moore testified Mecham was at first clearly unhappy about the blood test and angry at the officers, but his mood improved with the nurse's gentle ribbing. 3RP 135, 145; 4RP 66. Moore testified, based on the change in Mecham's demeanor that "he was impaired and limiting my ability to take sobriety tests." 4RP 39.

The forensic toxicologist testified Mecham's blood ethanol content was .050 grams per 100 milliliters. 5RP 19. Taking into account the margin of error, this could have been as low as .04. 5RP 58. She testified that, while alcohol affects people differently, most people cannot safely drive with a blood alcohol content of .05. 5RP 25-27. She also testified blood alcohol content continues to increase for roughly half an hour after consumption stops. 5RP 28-29. To give the person the benefit of the doubt, she does not extrapolate backwards until two hours have passed. 3RP 35. After that time, alcohol is metabolized or burned off at a rate of roughly .015 g/100 ml per hour. 5RP 30. The rate varies by individual, between a high rate of .03 g/100 ml per hour and a low rate of .01 g/100 ml per hour. 5RP 30.

Mecham's blood was taken roughly three hours after he was arrested. 3RP 35. The toxicologist, therefore, extrapolated backwards for one hour. 5RP 33. Taking the highest rate of burn off, she testified Mecham's blood alcohol level could have been as high as .08. 5RP 35. Taking the low end of the spectrum, it could have been as low as .065. 5RP 35.

The State argued in closing that Mecham was impaired based on the officers' testimony about slurred speech, sluggish movements, and the odor of intoxicants and his blood alcohol content. 5RP 88. The State also argued Mecham's refusal to participate in field sobriety testing was an attempt to frustrate and delay the investigation. 5RP 84. Repeatedly, both in the initial closing argument and again in rebuttal, the prosecutor argued Mecham refused the sobriety tests because he knew they would reveal his guilt. 5RP 84, 89, 113, 115.

At the subsequent bench trial, the court admitted exhibit 17, the order revoking Mecham's driver's license. 5RP 135. The court also heard testimony from the Department of Licensing custodian of records. 5RP 121. At the bottom of the revocation order is a statement, certified under penalty of perjury, that a copy of the order was mailed to Mecham at his address of record. Ex. 17. The signer of this certification did not testify. Mecham objected to exhibit 17 on the grounds that he had a right to confront this person. 5RP 134-35. The court ruled his right to confrontation was limited

to the records custodian and did not include the person who certified having mailed the copy. 5RP 135.

C. ARGUMENT

1. MECHAM WAS UNFAIRLY PENALIZED FOR EXERCISING HIS CONSTITUTIONAL RIGHT TO REFUSE CONSENT TO A WARRANTLESS SEARCH.

Evidence that an individual has refused consent to a warrantless search may not be admitted as evidence of guilt without violating both the Fourth Amendment and Article I, Section 7 of Washington's constitution. State v. Gauthier, ____ Wn. App. ____, 298 P.3d 126, 130-32 (2013); see also State v. Jones, 168 Wn.2d 713, 725, 230 P.3d 576 (2010). Mecham was asked to perform field sobriety tests, but declined, as was his right. 3RP 21-22; City of Seattle v. Personeus, 63 Wn. App. 461, 465-66, 819 P.2d 821 (1991).[4] The trial court denied his motion to suppress and rejected his proposed jury instruction limiting the jury's consideration of his refusal. 1RP 92; 2RP 6-11, 39-45; 4RP 95-98; CP 69. The court also admitted evidence Mecham declined Campell's offer to secure his car and told him not to go in his car.[5] 3RP 23. His refusals were then used as evidence of guilt at trial, in violation of the constitutional privacy protections of our state

[4] The statute implying consent to chemical testing for breath or blood alcohol content does not extend to field sobriety testing. RCW 46.20.308.

[5] Mecham's objections to the statements about securing his car did not raise the Fourth Amendment or Article I, section 7. 1RP 90. However, this argument can be raised for the first time on appeal as manifest constitutional error. RAP 2.5(a)(3); Gauthier, ____ Wn. App. at ____, 298 P.3d at 132.

and federal constitutions. 5RP 84, 89, 113, 115; Gauthier, ____ Wn. App. at ____, 298 P.3d at 130-32. This violation of Mecham's constitutional rights requires reversal.

The trial court's conclusions of law and its application of law to the facts in ruling on a suppression motion are reviewed de novo. State v. Meneese, 174 Wn.2d 937, 942, 282 P.3d 83 (2012). The trial court erred in denying the suppression motion because the field sobriety tests are a search, a state invasion of constitutionally protected privacy. Even assuming the existence of both probable cause and an exception to the warrant requirement, Mecham had a constitutional right to refuse voluntary consent to a search. Permitting the State to use refusal of consent as evidence of guilt violated his constitutional privacy rights and taints all supposedly consensual searches as coerced by the threat of incrimination.

a. Field Sobriety Testing Is a Search Under the Fourth Amendment and Under Article I, Section 7 of Washington's Constitution.

The standard field sobriety tests include the horizontal gaze nystagmus test, in which the person must follow a moving object with the eyes while the officer looks for involuntary jerking movements. 4RP 26. It also includes the "walk and turn," in which a person must take nine steps on a line, placing each heel directly in front of the other toe while counting out loud, then turn, and take nine more steps to return. 4RP 28-29. Finally, it

also includes standing on one leg while counting out loud. 4RP 30-31. Officer Moore testified the tests are "psychophysical tests, meaning they test the body and the mind simultaneously." 4RP 26.

Washington courts have not yet considered whether field sobriety tests are a search under the Fourth Amendment or under Article I, Section 7.[6] However, Oregon and several other states have concluded that this type of test amounts to a search because it reveals private information about the person's physical and mental condition that is not normally exposed to the public. State v. Nagel, 320 Or. 24, 31-35, 880 P.2d 451 (1994).[7] This Court should likewise conclude that field sobriety tests are a search.

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[6] Several Washington cases have held the refusal to perform field sobriety tests or the person's performance on the tests are not testimonial statements and do not implicate Fifth Amendment protection against coerced self-incrimination. See, e.g., City of Seattle v. Stalsbroten, 138 Wn.2d 227, 233, 978 P.2d 1059 (1999); Heinemann v. Whitman County Dist. Court, 105 Wn.2d 796, 801, 718 P.2d 789 (1986). Nor does the detention to perform the tests amount to a custodial arrest. City of College Place v. Staudenmaier, 110 Wn. App. 84143 P.3d 43 (2002). Mecham does not challenge these comments under the Fifth Amendment or as an illegal seizure, but as an unconstitutional comment on his right to refuse consent to a search.

[7] See also People v. Carlson, 677 P.2d 310, 316–17 (Colo. 1984); Ackerman v. State, 774 N.E.2d 970, 980 (Ind. Ct. App. 2002); Blasi v. State, 167 Md. App. 483, 505, 893 A.2d 1152, 1164 (2006) (field sobriety tests are a search because they expose aspects of an individual not otherwise observable by the public and disclose private facts about an individual's physical or psychological condition); Hulse v. State, Dep't of Justice, Motor Vehicle Div., 289 Mont. 1, 18-19, 961 P.2d 75, 85 (1998) (field sobriety tests are a search under the Fourth Amendment and the Montana Constitution because protected privacy interests are implicated in both the process of conducting the tests and in the information disclosed).

i. Field Sobriety Tests Are a Search Under Article I, Section 7 Because They Reveal a Person's Private Affairs.

Article 1, section 7 of Washington's constitution provides, "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." "[I]t is well established that article I, section 7 qualitatively differs from the Fourth Amendment and in some areas provides greater protections than does the federal constitution."[8] State v. Surge, 160 Wn.2d 65, 70, 156 P.3d 208 (2007). Article 1, section 7 protects against warrantless searches and seizures with no express limitations. Robinson v. City of Seattle, 102 Wn. App. 795, 809, 10 P.3d 452 (2000).

The protections of article I, section 7 are triggered when a person's private affairs are disturbed. City of Seattle v. McCready, 123 Wn.2d 260, 270, 868 P.2d 134 (1994). "A disturbance of a person's private affairs generally occurs when the government intrudes upon 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from government trespass.'" McCready, 123 Wn.2d at 270 (quoting State v. Boland, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990)). Field sobriety tests are searches under article I, section 7 because they reveal private information

[8] Accordingly, analysis under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) (setting forth factors for evaluating whether an issue merits independent state constitutional interpretation) is unnecessary for the reviewing court to undertake an independent state constitutional analysis. State v. Snapp, 174 Wn.2d 177, 194 n.9, 275 P.3d 289 (2012) (describing the point as "settled") (citing State v. Athan, 160 Wn.2d 354, 365, 158 P.3d 27 (2007); State v. McKinney, 148 Wn.2d 20, 29, 60 P.3d 46 (2002)).

that is not voluntarily exposed to public view; they afford the police an intrusive method of viewing that private information; and they are designed to elicit evidence.

In determining whether a certain interest is a private affair deserving article I, section 7 protection, a central consideration is the nature of the information sought, whether the information reveals intimate or discrete details of a person's life. See, e.g., State v. Jackson, 150 Wn.2d 251, 260, 262, 76 P.3d 217 (2003) (finding a search in part due to nature of information revealed by tracking device placed on defendant's car); Boland, 115 Wn.2d at 578 (finding a search due in part to nature of private information revealed by defendant's garbage); accord Nagel, 320 Or. at 29-30 (finding field sobriety tests a search by analogy to case where police attached radio transmitter to defendant's car). There is "no doubt that the privacy interest in the body and bodily functions is one Washington citizens have held, and should be entitled to hold, safe from governmental trespass." Robinson, 102 Wn. App. at 819, 822 n. 105 (holding pre-employment urine testing was a search in part because it would disclose medical conditions).

Field sobriety tests are a search because they reveal intimate, private information about a person's bodily function. Nagel, 320 Or. at 30. "By requiring defendant to perform a series of unusual maneuvers and acts, the officer was able to detect certain aspects of defendant's physical and

psychological condition that were not detectable through simple observation." Id. Like the medical information revealed by the urine testing in Robinson, the tests in this case are a search because they reveal private discrete information pertaining to the functioning of the person's body and mind.

Information that is voluntarily exposed to the public is not considered part of a person's private affairs. State v. Young, 123 Wn.2d 173, 182, 867 P.2d 593 (1994). But the information gleaned through field sobriety testing is not voluntarily exposed to public view merely by driving a car on a public street. Nagel, 320 Or. at 31 (field sobriety tests are "designed to elicit information that defendant would not have exposed to the public without the officer's direction."). Drivers do not regularly "stand alongside a public road reciting the alphabet, count backward from 107, stand upon one leg while counting from 1001 to 1030, or walk a line, forward and back, counting steps and touching heel to toe." Id. at 34-35.

The intrusive nature of the police conduct is also a consideration in determining whether a search has occurred. Young, 123 Wn.2d at 182-83 ("[A] particularly intrusive method of viewing, may constitute a search" under article I, section 7). Use of an infrared thermal detection device to detect heat distribution patterns in a home was held to be an unconstitutional invasion of privacy under article I, section 7. Id. at 184. The device was

"particularly intrusive" because it allowed officers to "see through the walls" of the home to learn, for example, which rooms a resident is heating, which may reflect such things as a financial inability to heat the entire home and the existence and location of energy-consuming and heat-producing items. Id. at 183-84.

Field sobriety tests are intrusive because they require a person to engage in unusual physical conduct. Like the infrared device in Young, these tests are invasive procedures designed to expose information officers could not obtain using their senses. Nagel, 320 Or. at 30.

The tests should also be deemed a search because they require the individual to engage in specific conduct for the sole purpose of eliciting incriminating information. See City of Seattle v. Mesiani, 110 Wn.2d 454, 755 P.2d 775 (1988). In Mesiani, the court held unconstitutional a sobriety checkpoint program, in which all drivers at a given place and time were stopped and asked to produce identification so officers could check for signs of intoxication. Id. at 455-56. The checkpoints were deemed a search in part because police were "attempting to elicit evidence of lack of dexterity by asking for a license." Id. at 458-59. Field sobriety tests are an even more invasive way of forcing individuals to reveal the extent of their dexterity by requiring them to, for example, stand on one leg.

Field sobriety tests use invasive methods to reveal private information that the person would not otherwise disclose to the public in order to obtain incriminating evidence. Therefore, they constitute an article I, section 7 search under the analysis applied in Mesiani, Young, and Robinson.

ii. Field Sobriety Tests Are a Search Under the Fourth Amendment Because They Physically Intrude on the Person to Reveal Private Information.

The Fourth Amendment safeguards "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fourth Amendment protects "people, not places." Katz v. United States, 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). Information that a person reasonably expects to keep private, even in an area accessible to the public, may be protected. Id. The Fourth Amendment protects any area in which an individual has a reasonable expectation of privacy. Kyllo v. United States, 533 U.S. 27, 32-33, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001). But the Fourth Amendment is not limited to the reasonable expectation of privacy. Florida v. Jardines, ____ U.S. ____, 133 S. Ct. 1409, 1417, ____ L. Ed. 2d ____ (2013). A search occurs whenever "'the Government obtains information by physically intruding' on persons." Jardines, ____ U.S. at ____, 133 S. Ct. at 1414 (quoting United States v. Jones, 565 U.S. ——, ——, n. 3, 132 S. Ct. 945, 950–951, n. 3, 181

L. Ed. 2d 911 (2012)). Field sobriety tests are a search because they are a physical intrusion upon the person, through which officers learn information that would not otherwise be exposed to public view.

In Jardines, the Court held that bringing a drug-sniffing dog to the front doorstep of a home was a search under the Fourth Amendment. Jardines, ____ U.S. at ____, 133 S. Ct. at 1416-17. Justice Scalia summarized the correct Fourth Amendment analysis: "That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred." Jardines, ____ U.S. at ____, 133 S. Ct. at 1417.

The Nagel court illustrated the physical intrusion of field sobriety tests by reference to Arizona v. Hicks, 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987), in which the court found a search when police officers lifted up a piece of stereo equipment to reveal the serial number underneath. Nagel, 320 Or. at 35. The physical manipulation of the individual's property in order to reveal information that was not freely exposed was held to be a search. Hicks, 480 U.S. at 323-25. By conducting field sobriety testing, officers also learn, via a physical intrusion, information they could not otherwise access. Rather than manipulating property, the field sobriety tests manipulate the body of the individual by requiring specific and unusual movements.

The Nagel court also held the tests were a Fourth Amendment search because the type of information they reveal (about a person's "coordination, psychological condition, and physical capabilities") is information in which individuals have a reasonable expectation of privacy. 320 Or. at 36 (discussing Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 617, 109 S. Ct. 1402, 1413, 103 L. Ed. 2d 639 (1989)).

Police officers need not "shield their eyes" from what ordinary persons could observe in a "physically non-intrusive manner." Jardines, 133 S. Ct. at 1415. But they may not, without a warrant, observe what a layperson could not. Id. A layperson could not require a motorist to perform the specific tasks of the field sobriety tests such as the one-leg stand. It is only by administering these tests that the police officer gains the information sought. That is enough to establish that a search occurred under the Fourth Amendment. Jardines, ____ U.S. at ____, 133 S. Ct. at 1417.

b. Mecham Had a Constitutional Right to Refuse Consent.

Both the Fourth Amendment and Article I, Section 7 safeguard the right to refuse to consent to a warrantless search. Schneckloth v. Bustamante, 412 U.S. 218, 227, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); State v. Gauthier, ____ Wn. App. ____, 298 P.3d 126, 130 (2013). Consent of the person to be searched is an exception to the general requirement that

searches are unconstitutional absent probable cause and a search warrant. Illinois v. Rodriguez, 497 U.S. 177, 181, 110 S. Ct. 2793, 2797, 111 L. Ed. 2d 148, 156 (1990); State v. Ferrier, 136 Wn.2d 103, 111, 960 P.2d 927, 931 (1998). But that consent must be freely given; it must be voluntary. Id.

The State may argue that other exceptions to the warrant requirement existed in this case. For example, the Nagel court concluded the tests in that case did not violate either the Fourth Amendment or the Oregon Constitution because the officer had probable cause and the dissipation of alcohol in the bloodstream created exigent circumstances. Nagel, 320 Or. at 33, 37. The State may also argue the officer could also have approached Mecham's car without a warrant under the "community caretaking" exception to the warrant requirement. See, e.g., State v. Kinzy, 141 Wn.2d 373, 385-87, 5 P.3d 668 (2000). This Court should reject any such arguments.

First, the existence of exigent circumstances or the community caretaking exception in this case is doubtful. Exigency must be determined on a case-by-case basis. There are no "per se" exigent circumstances based solely on the fact that blood alcohol levels decrease with time:

> [W]hile the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, . . . it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.

Missouri v. McNeely, ____ U.S. ____, 133 S. Ct. 1552, 1563, ____ L. Ed. 2d ____ (2013). In this case, there were no exigent circumstances, as evidenced by the fact that the officer had time to apply for and obtain a search warrant to take a sample of Mecham's blood. 3RP 33-34. And there was no need for community caretaking of Mecham's car because, when he was arrested, his car was safely and legally parked. 3RP 16, 43.

But more importantly, the existence of an exception to the warrant requirement does not negate the right to refuse consent. The State may have authority to search, but it may not force an individual to consent. See, e.g, Schneckloth, 412 U.S. at 222 (consent must be voluntary).[9]

c. The Comments on Mecham's Refusal of Consent to Field Sobriety Testing Improperly Penalized Him for Exercising a Constitutional Right.

Recently in State v. Gauthier, this Court held that exercising the right to refuse consent to a search is inadmissible as substantive evidence of guilt; and the use of refusal evidence to show guilt violates the constitution by improperly penalizing the individual for the lawful exercise of a constitutional right. State v. Gauthier, ____ Wn. App. ____, 298 P.3d 126, 130-32 (2013). In that case, Gauthier refused a police officer's request for a DNA sample. Id. at 129. At trial, the prosecutor argued he would not have

[9] Accord State v. Reid, 98 Wn. App. 152, 159, 161, 988 P.2d 1038 (1999) (Refusal to participate in field sobriety testing is not probable cause to arrest for DUI).

refused unless he were guilty. Id. This Court reversed his conviction, finding manifest constitutional error. Id. at 128, 132.

This case directly parallels Gauthier and calls for the same result. Mecham refused to participate in voluntary field sobriety testing. 3RP 21. He also refused the officer's offer to secure his car and told him not to go in. 3RP 23. Both of these instances were presented as evidence against Mecham in the State's case in chief. During closing argument, the prosecutor specifically relied on Mecham's refusal to perform field sobriety tests. 5RP 84, 89.

The use of this evidence violated Mecham's rights under the Fourth Amendment and Article I, section 7. Gauthier, ____ Wn.2d at ____, 298 P.3d at 132. The exception allowing for impeachment evidence cannot apply here because Mecham did not testify. See id. (citing State v. Burke, 163 Wn.2d 204, 222, 181 P.3d 1 (2008) (impeachment is evidence offered solely to show a witness is not truthful).

This constitutional error requires reversal unless the State proves beyond a reasonable doubt that any reasonable juror would have come to the same conclusion without the error. Gauthier, ____ Wn.2d at ____, 298 P.3d at 133 (citing Burke, 163 Wn.2d at 222). It cannot do so here. This was not a case where the evidence of DUI was overwhelming. The officer did not observe any bad driving. 3RP 15. Mecham responded appropriately to

being pulled over. 3RP 44. He followed directions. 3RP 46. The odor of intoxicants was stale, not fresh. 3RP 47. His blood alcohol level was .05, well under the per se limit. 5RP 19. The toxicologist testified that all people are affected by alcohol at the .08 level, but only "most" are affected at .05. 5RP 24, 25. She also testified Mecham's blood alcohol content could have been as low as .04 at the time he was stopped based on the margin of uncertainty. 5RP 58. The evidence of intoxication was contested, and the argument that Mecham must be guilty because he refused the field sobriety tests is likely to have contributed to the jury's verdict.

Use of his refusals as evidence of guilt deprived him of his "right to invoke with impunity the protection of the Fourth Amendment and article I, section 7." Gauthier, ___ Wn.2d at ____, 298 P.3d at 132. Mecham's DUI conviction should be reversed because he was improperly penalized for exercising his constitutional rights.

2. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY IT HAD A "DUTY TO RETURN A VERDICT OF GUILTY."

The "to-convict" instruction listing the elements of felony DUI stated: "If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, it will be your duty to return a verdict of guilty." CP 105. This is standard language from the pattern instructions. 11A Washington Practice: Pattern Jury Instructions: Criminal, WPIC 35.13,

36.51, 60.02, 300.17 (3d Ed. 2011). But these instructions misstate the law. A jury always has the power to acquit, and the court never has the power to direct or coerce a verdict. While the jury need not be notified of its power to acquit despite the evidence, it is a misstatement of the law to instruct the jury this power does not exist.

Jury instructions must clearly communicate the relevant law to the jury and must not be misleading. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Constitutional violations and jury instructions are reviewed de novo. Id. at 307; City of Redmond v. Moore, 151 Wn.2d 664, 668, 91 P.3d 875 (2004). The trial court erred in refusing to give the defense proposed instruction omitting the "duty to convict" language. 4RP 89; CP 71.

a. The "Duty to Convict" Instruction Violates the Right to a Jury Trial Under the United States Constitution.s

The right to a jury trial is fundamental in our criminal justice system. Indeed this is the only right enumerated in both the original United States Constitution of 1789 and in the Bill of Rights. U.S. Const. art. 3, § 2, 3; U. S. Const. amend. 6; U.S. Const. amend. 7. It is further guaranteed by the due process clauses of the Fifth and Fourteenth Amendments. Duncan v. Louisiana, 391 U.S. 145, 156, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); City of Pasco v. Mace, 98 Wn.2d 87, 94, 653 P.2d 618 (1982). Thomas Jefferson

wrote of the importance of this right in a letter to Thomas Paine in 1789: "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." The Papers of Thomas Jefferson, Vol. 15, 269 (Princeton Univ. Press, 1958).

In addition to being a valued right afforded criminal defendants, the jury trial is also an allocation of political power to the citizenry:

> [T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Duncan, 391 U.S. at 156.

While some federal courts have concluded an instruction on the duty to convict "probably" does not divest the jury entirely of its power to acquit, the courts have also warned against "language that suggests to the jury that it is obliged to return a guilty verdict." United States v. Bejar-Matrecios, 618 F.2d 81, 85 (9th Cir. 1980) (citing United States v. Atkinson, 512 F.2d 1235 (4th Cir. 1975) and United States v. Garaway, 425 F.2d 185 (9th Cir. 1970)).

b. Under a Gunwall Analysis, the Duty to Convict Instruction Violates the Greater Protection Afforded the Jury Trial Right by the Washington Constitution.

Washington's constitution provides greater protection than the federal constitution in some areas. State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). Analysis of the six Gunwall factors demonstrates Washington's constitution is substantially more protective of the jury trial right than the federal constitution.

i. Textual Language and Differences from Federal Constitutional Provisions

The Washington State Constitution goes further than the federal constitution, declaring the right to a trial by jury shall be held "inviolate." Const. art. 1, § 21.

> The term "inviolate" connotes deserving of the highest protection . . . . Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assault to its essential guarantees.

Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989).

The difference in language suggests the drafters meant something different from the federal Bill of Rights. See Hon. Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 515 (1984) (Utter).

The framers added other constitutional protections to this right. A court is not permitted to convey to the jury its own impression of the evidence. Const. art. 4, § 16. ("Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."). Even a witness may not invade the province of the jury. State v. Black, 109 Wn.2d 336, 350, 745 P.2d 12 (1987). The right to jury trial also is protected by the due process clause of article I, section 3.

While this Court in Meggyesy may have been correct when it found there is no specific constitutional language that addresses this precise issue, what language there is indicates the right to a jury trial is so fundamental that any infringement violates the constitution.

ii. State Constitutional and Common Law History

Washington based its Declaration of Rights on the Bills of Rights of other states, which relied on common law and not the federal constitution. Utter, 7 U. Puget Sound L. Rev. at 497. This difference supports an independent reading of the Washington Constitution.

iii. Preexisting State Law

Since article I, section 21, "preserves the right [to jury trial] as it existed in the territory at the time of its adoption," it is helpful to look at the preexisting state law. Sofie, 112 Wn.2d at 645; Pasco, 98 Wn. 2d at 96. In

Leonard v. Territory, the Supreme Court reversed a murder conviction and set out the jury instructions given in the case. Leonard v. Territory, 2 Wash. Terr. 381, 7 Pac. 872 (1885). These instructions provide a view of the law before the adoption of the Constitution:

> If you find the facts necessary to establish the guilt of defendant proven to the certainty above stated, then you may find him guilty of such a degree of crime as the facts so found show him to have committed; but if you do not find such facts so proven, then you must acquit.

Id. at 399.

The court thus acknowledged, and incorporated into the jury instructions, the threshold requirement that each element be proved beyond a reasonable doubt to permit a conviction; but any reasonable doubt required acquittal. Because this was the law regarding the scope of the jury's authority at the time of the adoption of the Constitution, it was incorporated into Const. art. 1, § 21, and remains inviolate. Sofie, 112 Wn.2d at 656; Pasco, 98 Wn.2d at 93, 96.

Pre-existing state law also recognized a jury's unrestricted power to acquit: "[T]he jury may find a general verdict compounded of law and fact, and if it is for the defendant, and is plainly contrary to law, either from mistake or a willful disregard of the law, there is no remedy." Hartigan v. Territory, 1 Wash. Terr. 447, 449 (1874).

The Meggyesy court disregarded Leonard on the basis that Leonard "simply quoted the relevant instruction. . . ." Meggyesy, 90 Wn. App. at 703. But the Meggyesy court missed the point; at the time the Constitution was adopted, courts instructed juries using the permissive "may" as opposed to the current practice of requiring the jury to make a finding of guilt. The instructions from Leonard demonstrate the pre-existing law at the time of the adoption of the Washington Constitution did not require a finding of guilt.

iv. Differences in Federal and State Constitutions' Structure

State constitutions were originally intended to be the primary devices to protect individual rights, with the United States Constitution a secondary layer of protection. Utter, 7 U. Puget Sound L. Rev. at 497; Utter & Pitler, Presenting a State Constitutional Argument: Comment on Theory and Technique, 20 Ind. L. Rev. 637, 636 (1987). Accordingly, state constitutions were intended to give broader protection than the federal constitution. An independent interpretation is necessary to accomplish this end. The Meggyesy court acknowledged this factor nearly always weighs in favor of independent interpretation of the state constitution. 90 Wn. App. at 703.

v. Matters of Particular State Interest or Local Concern

Criminal law is a local matter. State v. Russell, 125 Wn.2d 24, 61, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). There is no need

for national uniformity in criminal law. Until the Fourteenth Amendment was interpreted to apply the United States Bill of Rights in state court proceedings, all matters of criminal procedure were considered a matter of state law. See, e.g., Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); State v. Gibbons, 118 Wash. 171, 203 P. 390 (1922). This factor also weighs in favor of an independent state constitutional analysis. The Gunwall factors show the "inviolate" Washington right to jury trial was more extensive than the jury trial right protected by the federal constitution when it was adopted in 1789. Pasco, 98 Wn.2d at 99.

c. A Jury Should Not Be Instructed It Has a Duty to Convict Because No Such Duty Exists.

The court has no power to compel or direct a jury to return a specific verdict. Garaway, 425 F.2d 185 (directed verdict of guilty improper even where no issues of fact are in dispute); State v. Holmes, 68 Wash. 7, 12-13, 122 Pac. 345 (1912). If a court improperly withdraws a particular issue from the jury's consideration, it may deny the defendant the right to jury trial. United States v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995) (improper to withdraw issue of "materiality" of false statement from jury's consideration); see Neder v. United States, 527 U.S. 1, 8, 15-16, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (omission of element in jury instruction subject to harmless error analysis).

The constitutional protections against double jeopardy also protect the right to a jury trial by prohibiting a retrial after a verdict of acquittal. U.S. Const. amend. 5; Const. art. I, § 9 . A jury verdict of not guilty is thus not reviewable.

Also well established is "the principle of noncoercion of jurors," established in Bushell's Case, Vaughan 135, 124 Eng. Rep. 1006 (1671). Edward Bushell was a juror in the prosecution of William Penn for unlawful assembly and disturbing the peace. When the jury refused to convict, the court fined the jurors for disregarding the evidence and the court's instructions. Bushell was imprisoned for refusing to pay the fine. In issuing a writ of habeas corpus for his release, Chief Justice Vaughan declared that judges could neither punish nor threaten to punish jurors for their verdicts. See generally Alschuler & Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 912-13 (1994).

If there is no ability to review a jury verdict of acquittal, no authority to direct a guilty verdict, and no authority to coerce a jury in its decision, there can be no "duty to return a verdict of guilty." Indeed, there is no authority in law that suggests such a duty.

> We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence. . . . If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of

> the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision.

United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969).

Washington courts have also recognized that a jury may always vote to acquit. A judge cannot direct a verdict for the state because this would ignore "the jury's prerogative to acquit against the evidence, sometimes referred to as the jury's pardon or veto power." State v. Primrose, 32 Wn. App. 1, 4, 645 P.2d 714 (1982). See also State v. Salazar, 59 Wn. App. 202, 211, 796 P.2d 773 (1990) (relying on jury's "constitutional prerogative to acquit" as basis for upholding admission of evidence).

This is not to say there is a right to instruct a jury it may disregard the law in reaching its verdict. See, e.g., United States v. Powell, 955 F.2d 1206, 1213 (9th Cir. 1991) (reversing conviction on other grounds). However, if the court may not tell the jury it may disregard the law, it is at least equally wrong for the court to direct the jury it has a duty to return a verdict of guilty if it finds certain facts to be proved.

Although a jury may not determine what the law is, it does have a role in applying the law of the case that goes beyond mere fact- finding. In Gaudin, the Court rejected limiting the jury's role to mere fact-finding. Gaudin, 515 U.S. at 514-15. Historically the jury's role has never been so limited: "[O]ur decision in no way undermined the historical and

constitutionally guaranteed right of a criminal defendant to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts." Id. at 514.

Prof. Wigmore described the roles of the law and the jury in our system:

> Law and Justice are from time to time inevitably in conflict. That is because law is a general rule (even the stated exceptions to the rules are general exceptions); while justice is the fairness of this precise case under all its circumstances. And as a rule of law only takes account of broadly typical conditions, and is aimed at average results, law and justice every so often do not coincide . . . . We want justice, and we think we are going to get it through "the law" and when we do not, we blame the law. Now this is where the jury comes in. The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case. Thus the odium of inflexible rules of law is avoided, and popular satisfaction is preserved. . . . That is what a jury trial does. It supplies that flexibility of legal rules which is essential to justice and popular contentment. . . . The jury, and the secrecy of the jury room, are the indispensable elements in popular justice.

Wigmore, A Program for the Trial of a Jury, 12 Am. Jud. Soc. 166 (1929).

Furthermore, if such a "duty" to convict exists, it cannot be enforced. If a jury acquits, the case is over, the charge dismissed, and there is no further review. In contrast, if a jury convicts when the evidence is insufficient, the court has a legally enforceable duty to reverse the conviction or enter a judgment of acquittal notwithstanding the verdict. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v.

Green, 94 Wn.2d 216, 616 P.2d 628 (1980); State v. Carlson, 65 Wn. App. 153, 828 P.2d 30 (1992). The "duty" to return a verdict of not guilty is genuine and enforceable by law.

But a more accurate description of the jury's role in a guilty verdict is to say that a legal "threshold" exists before a jury may convict, not that a jury has a duty to convict. A guilty verdict in a case that does not meet this evidentiary threshold is contrary to law and will be reversed. A jury must return a verdict of not guilty if there is a reasonable doubt; however, it may return a verdict of guilty if, and only if, it finds every element proven beyond a reasonable doubt.

d. Meggyesy Was Wrongly Decided Because It Focused on the Proposed Remedy Rather than the Error.

The Meggyesy court did not dispute that the court has no power to direct a guilty verdict in a criminal trial. 90 Wn. App. at 699. Instead it focused on the remedy proposed by the appellant in that case, namely, an instruction that the jury "may" convict if it finds all the elements of the charged offense beyond a reasonable doubt. The Meggyesy court rejected this remedy, interpreting it as informing the jury of its power to nullify or acquit despite the evidence. Id. The Court concluded there was no right to have the jury so instructed. Id. at 699-700.

But a deficiency in the proposed remedy neither resolves nor eliminates the problem. The jury has no "duty" to convict, and, therefore, it is misleading to say that it does. This problem can be remedied without implicitly informing the jury of its power to nullify with the permissive "may." For example, the jury could be accurately instructed, as the defense requested in this case, regarding the threshold necessary to return a guilty verdict: "In order to return a verdict of guilty, you must unanimously find from the evidence that each of these elements has been proved beyond a reasonable doubt." CP 71. This puts the duty in its proper place.

The instruction given in Mecham's case provided a measure of coercion for the jury to return a guilty verdict. When the trial court told the jury it had a duty to return a guilty verdict based merely on finding certain facts, the court took from the jury its constitutional authority to apply the law to the facts to reach a general verdict. This instruction was an incorrect statement of law and violated Mecham's right to a jury trial.

3. THE CERTIFICATION OF MAILING IS TESTIMONIAL HEARSAY AND ITS ADMISSION VIOLATED MECHAM'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

Mecham's conviction for driving while license suspended/revoked in the first-degree must be reversed because the court admitted exhibit 17, the Department's order of revocation over Mecham's objection and in violation

of his constitutional right to confront witnesses. The custodian of records testified, but the revocation order contains a certification of mailing at the bottom, which reads:

> I certify under penalty of perjury under the laws of the state of Washington that I caused to be placed in a U.S. Postal Service mail box, a true and accurate copy of this document to the person named herein at the address shown which is the last address of record. Postage prepaid on September 14, 2010 in Olympia, WA.

Ex. 17. The person who signed the certification did not testify. The trial court ruled Mecham had a right to confront the records custodian, but not the person who signed the certification of mailing. 5RP 135.

This ruling was incorrect because the certification of mailing is testimonial hearsay prepared for the purpose of litigation and used to establish an essential fact at trial. See Crawford v. Washington, 541 U.S. 36, 51-52, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). A person accused of a criminal offense has the right to confront the witnesses against him. U.S. Const. amend. 6;[10] Const. art. 1, § 22;[11] Crawford, 541 U.S. at 42; State v.

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[10] The Sixth Amendment to the United States Constitution provides in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

[11] Article I, section 22 of the Washington Constitution provides:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county

Jasper, 174 Wn.2d 96, 109, 271 P.3d 876 (2012). Confrontation clause violations are reviewed de novo. Jasper, 174 Wn.2d at 108.

The confrontation clause is principally directed at the use of ex parte examinations and affidavits as substitutes for live witness testimony in criminal cases. Crawford, 541 U.S. at 51. The core class of testimonial statements includes:

> ex parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Id. at 51-52 (internal quotations and citations omitted). Crawford also noted that reports prepared for the purpose of litigation are testimonial. See id. at 47 n.2 & 49-50 (discussing State v. Campbell, 1 Rich. 124, 1844 WL 2558 (S.C. 1844)). The framers intended the Confrontation Clause to avoid the evils of criminal convictions based on affidavits by government witnesses who do not testify. As the Supreme Court recognized, "[i]nvolvement of government officers in the production of testimony with an eye toward trial

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in which the offense is charged to have been committed and the right to appeal in all cases.

presents a unique potential for prosecutorial abuse." Crawford, 541 U.S. at 56 n.7.

Following Crawford, the Court addressed the issue of statements by laboratory analysts who declared a substance contained cocaine. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 307, 129 S. Ct. 2527, 174 L.Ed.2d 314 (2009). The court held the certificates of analysis were testimonial because they were equivalent to live, in-court testimony and were "made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial." Id. at 310-11 (quoting Crawford, 541 U.S. at 52). Admission of the statements violated the constitution, the Court concluded, because the Sixth Amendment does not allow the state to prove its case through ex parte out-of-court affidavits. Melendez-Diaz, 557 U.S. at 329. Melendez-Diaz distinguished between authentication of otherwise admissible business records, which could be admitted without violating the confrontation clause, and creation of a record for the purpose of providing evidence, which could not. Id. at 322.

Washington has now applied the principles of Melendez-Diaz specifically in the context of Department of Licensing records. See Jasper, 174 Wn.2d at 111-16. In Jasper, the court held that certifications declaring the existence or non-existence of public records are testimonial statements subject to the constitutional right to confront witnesses. Id. at

100. The court explained that testimony is typically a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." Id. at 109 (quoting Crawford, 541 U.S. at 51). The court concluded that the certifications required the right to confront the witness who created them because, "They were created, and in fact used, for the sole purpose of establishing critical facts at trial," and "Because each certificate was 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" Jasper, 174 Wn.2d at 115 (quoting Melendez–Diaz, 129 S. Ct. at 2532).

The certification of mailing is testimonial hearsay and violates the confrontation clause for two reasons. First, it contains an ex parte statement made for the purpose of establishing the essential fact that the order of revocation was mailed to Mecham. Second, it was sworn under penalty of perjury in anticipating of proving the fact of mailing in a trial.

In a prosecution for driving with a revoked or suspended license, the State must prove beyond a reasonable doubt that the revocation complied with due process. State v. Dolson, 138 Wn2d 773, 777, 982 P.2d 100 (1999). Due process requires notice reasonably calculated to inform the affected party and the opportunity to be heard prior to revocation. Id. Under

Dolson, the fact that the revocation order was mailed to Mecham's address was an essential fact the State had to prove at trial.

The certification of mailing is testimonial hearsay because a government officer, in anticipation of litigation, prepared it. Jasper, 174 Wn.2d at 115; Crawford, 541 U.S. at 56 n.7. The affidavit adds the "formality and solemnity" of testimonial statements to the record of mailing. Williams v. Illinois, ____ U.S. ____, 132 S. Ct. 2221, 2255, 183 L. Ed. 2d 89 (2012) (Thomas, J. concurring in judgment). The Department might keep records of mailing for internal record-keeping, but the only reason to create a sworn statement is in anticipation of proving in court that the mailing occurred. The fact that the statement of mailing was made "under penalty of perjury" would lead a reasonable person to anticipate it would be used to provide evidence in a legal proceeding. Ex. 17; Crawford, 541 U.S. at 51-55.

This violation of Mecham's confrontation rights requires reversal unless the State can prove beyond a reasonable doubt that the constitutional error did not contribute to the verdict. Jasper, 174 Wn.2d at 117. It cannot do so. The confrontation clause required exclusion of the certification. Without it, the evidence was insufficient to show that the order of revocation was mailed to Mecham's address as required under Dolson. The proper

remedy is reversal of the conviction and remand for a new trial. Jasper, 174 Wn.2d at 120.

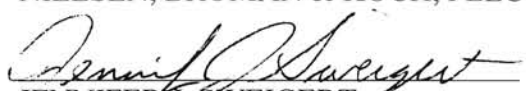
D. CONCLUSION

Mecham's conviction for felony DUI should be reversed because he was unfairly penalized for exercising his constitutional right to refuse consent to field sobriety testing and because of the erroneous instruction that the jury had a "duty to convict." His conviction for driving while license suspended should be reversed because he was deprived of the constitutional right to confront the witnesses against him.

DATED this 9th day of May, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Attorney for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 69613-1-I
	)	
MARCH MECHAM,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 9TH DAY OF MAY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] MARCH MECHAM
NO. 212006140
REGIONAL JUSTICE CENTER
620 W. JAMES
KENT, WA 98032

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF MAY 2013.

X Patrick Mayovsky