SUPREME COURT NO. 92944-1
COA NO. 72260-3-I

IN THE SUPREME COURT
OFTHE STATE OF WASHINGTON

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STATE OF WASHINGTON

Petitioner

v.

DARREN J. ROBISON,

Respondent

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# PETITION FOR REVIEW

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MARK K. ROE
Prosecuting Attorney

ANDREW E. ALSDORF
Deputy Prosecuting Attorney
Attorney for Petitioner

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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## I. IDENTITY OF THE PETITIONER

The State of Washington, petitioner, petitions the Court for review of a decision of the Court of Appeals in State v. Darren Robison, no. 72260-3-I, filed February 16, 2016.

## II. COURT OF APPEALS DECISION

The Court of Appeals filed a published opinion on February 16, 2016, affirming the superior court's reversal of Darren Robison's district court DUI conviction. A copy of the Court of Appeals' decision is attached to this petition as appendix A.

## III. ISSUE

In giving implied consent warnings, a police officer omitted language that could not possibly have any rational impact on a person's decision to take the test. Does this omission require suppression of the ensuing test results?

## IV. STATEMENT OF THE CASE

The facts of this case are not in dispute and were properly summarized by the Court of Appeals. Briefly, the defendant was stopped for traffic violations on June 29, 2013. The State Trooper smelled intoxicants and marijuana, and the defendant admitted smoking marijuana a couple of hours earlier. The defendant was arrested for DUI. The Trooper requested a breath sample to

measure alcohol concentration. The breath test is incapable of measuring THC concentration. In giving the implied consent warnings, the Trooper omitted any reference to THC concentration in a person's blood because he was not seeking a sample of the defendant's blood. The defendant agreed to take the breath test, which revealed alcohol concentration results above the legal limit.

The defendant was convicted of DUI following a district court bench trial. The Court of Appeals affirmed the Superior Court's reversal of that conviction, holding that the officer did not have the discretion to omit the irrelevant language from the warnings, and that the defendant need not demonstrate any prejudice to justify suppression. State v. Robison, 72260-3-I, 2016 WL 664111 (Div. 1, Feb. 16, 2016) (hereinafter "Slip Opinion"). The State seeks review of the Court of Appeals' decision.

## V. ARGUMENT

No one disputes that breath tests are technologically incapable of measuring THC concentration, or detecting THC at all. A blood test is the only available method used by law enforcement to measure THC. When the arresting officer in this case decided to seek only a breath sample despite evidence that the defendant had also consumed marijuana, he eliminated any rational connection

between marijuana consumption and the choice facing the defendant - whether to take or refuse a breath test.

In so doing, the arresting officer omitted a potentially confusing set of THC-related warnings that did not apply to the defendant's choice. Despite the fact that no rational connection exists between the information omitted and the test being offered, the Court of Appeals reversed a DUI conviction on the baffling theory that the defendant might have refused the *breath* test if only the Trooper had told him about what happens when a *blood* test yields certain THC concentrations.

The opinion's import extends far beyond the particular combination of omitted warnings and the inexplicable theory offered by the court. The decision also dispenses with the long-recognized doctrine of substantial compliance. It embraces suppression of evidence as a just remedy even without a demonstration of prejudice. The court refused to characterize the ruling as one of suppression, instead casting it as a failure to lay foundation for the admissibility of a breath test. In this respect, the court ignored the legislature's list of BAC foundational requirements set forth in RCW 46.61.506(4), which this Court endorsed in City of Fircrest v. Jensen, 58 Wn.2d 384, 143 P.3d 776 (2006). If left untouched as

binding precedent, the opinion may be used to justify suppression of large numbers of breath tests based on technicalities. This rule is incompatible with the legislature's consistent plea for breath tests to be admissible absent demonstrable prejudice.

**1. The Decision Conflicts With Other Decisions Of The Court Of Appeals Holding That The Substantial Compliance Doctrine Applies To Implied Consent Warnings, And That A Defendant Must Demonstrate Prejudice To Justify Suppression.**

To support its conclusion that an officer has "no discretion with regard to the wording he used to warn the accused," the Court of Appeals relied primarily on a 1995 case and a 1986 case. Slip Opinion at 8-11, citing State v. Whitman Cty. Dist. Court, 105 Wn.2d 278, 285, 714 P.2d 1183 (1986), and State v. Bostrom, 127 Wn.2d 580, 587, 902 P.2d 157 (1995). The court failed to recognize that in 2004, the legislature modified the officers' mandate to one of substantial compliance. See Laws of 2004, ch. 68, §2(2) ("The officer shall warn the driver, in substantially the following language, that:..."); RCW 46.20.308(2). And while the court did note the legislature's 2015 amendment deleting the statutory warnings' reference to THC blood concentration, it declined to address another 2015 amendment. That amendment clarified that officers only need to read those warnings applicable to the facts and

circumstances of each driver's situation. See Laws of 2015, 2d Sp. Sess., ch. 3, §5(5)(d)(ii) ("That after receipt of ((~~the~~)) any applicable warnings required by subsection (2)...").

"Substantial compliance has been defined as actual compliance in respect to the substance essential to every reasonable objective of a statute. In the cases where substantial compliance has been found, there has been actual compliance with the statute, albeit procedurally faulty." City of Seattle v. Pub. Employment Relations Comm'n, 116 Wn.2d 923, 928, 809 P.2d 1377 (1991) (internal citations omitted). Analysis of an aggrieved party's prejudice from procedural faults has long been an essential component of determining whether substantial compliance has occurred. See, e.g., Mut. Life Ins. Co. of New York v. Phinney, 178 U.S. 327, 337, 20 S.Ct. 906, 44 L.Ed. 1088 (1900); State v. Tingdale, 117 Wn.2d 595, 600, 817 P.2d 850 (1991).

The notion of substantial compliance with the implied consent statute is apparent in the text of the statute itself. It instructs officers to use "substantially the following language" and anticipates that they will provide only the "applicable" warnings. RCW 46.20.308(2) & (5)(d)(ii). This Court has recognized the legislature's intent to apply the doctrine of substantial compliance to

an officer's reading of the implied consent warnings. City of Fircrest v. Jensen, 158 Wn.2d 384, 411, 143 P.3d 776 (2006) (J. Sanders, dissenting) ("[The 2004 amendments to RCW 46.20.308]...reduce[d] the requirements of implied consent warnings to require only substantial compliance by police...").

Division Three of the Court of Appeals has held that the doctrine of substantial compliance applies to implied consent warnings. Merseal v. State Dep't of Licensing, 99 Wn. App. 414, 422-23, 994 P.2d 262 (2000) ("Under the 'substantial compliance doctrine,' we will not reverse for a merely technical error that does not result in prejudice. The doctrine applies in this case."). The Court of Appeals opinion in this case directly conflicts with the holding in Merseal on this issue.

Divisions One and Two of the Court of Appeals also hold that it is the defendant's burden to demonstrate prejudice when challenging an inaccurate implied consent warning:

> The result of a breath test must be suppressed if (1) the inaccurate warning deprives the driver of the opportunity to make a knowing and intelligent decision, and (2) the driver demonstrates that she was actually prejudiced by the inaccurate warning.

Lynch v. State Dep't of Licensing, 163 Wn. App. 697, 707, 262 P.3d 65 (Div. 2, 2011); State Dep't of Licensing v. Grewal, 108 Wn. App. 815, 822, 33 P.3d 94, 97 (Div. 1, 2001). In the present case, the court dismissed the value of the Grewal opinion by criticizing the State for "fail[ing] to distinguish between omitted warnings required by statute and additional warnings not required by the language of the implied consent statute. Slip Opinion at 12-13. This criticism is unfounded.

Lynch and Grewal distill the reviewing court's task in determining the adequacy of implied consent warnings to a consideration of legal accuracy, potential to mislead, and a requirement of prejudice. The cases do not create a separate analysis or shift the burden of demonstrating prejudice depending on whether the inaccuracy derived from an omission of statutory language, the addition of non-statutory language, or even a slight alteration in form from statutory language. There are innumerable ways in which an officer could modify the implied consent warnings as he delivers them in the real world to an arrested driver. By focusing on a semantic distinction (omission) rather than on legal accuracy and resulting prejudice, the court avoided discussing the

fact that the omitted reference to THC blood concentration has absolutely no impact on a driver's decision to take a breath test.

Division One's opinion in this case appears to require that officers provide warnings completely unrelated to the breath sample they seek to obtain. This new requirement departs from the same court's previous holding on that issue:

> While the court in *Bartels* used the phrase "breath or blood test" in its recitation of the warning, in so doing *it was not mandating that both tests be mentioned every time the warning is given....*
>
> [T]he language on which Rodriguez relies must be read to require only that *the police shall inform the driver that he or she has a right to refuse the type of test the police actually intend to administer.* It would be both confusing and unavailing to do otherwise.

Town of Clyde Hill v. Rodriguez, 65 Wn. App. 778, 782-783, 831 P.2d 149 (1992) (*emphasis* added). In Rodriguez, Division One rejected the defendant's argument that "law enforcement is required to use the *exact* words of the statute, regardless of whether the modification in wording impacts the driver's understanding of the implied consent warning. We find no such requirement in the cases interpreting and applying the implied consent statute." Id. at 785 (court's emphasis).

The established precedent of the Court of Appeals is to analyze the provided warnings for both accuracy and potential to mislead. This precedent demands that the defendant demonstrate prejudice in order to obtain suppression. Any warnings provided after the 2004 amendment must be analyzed for substantial compliance. The holding in this case conflicts with the Court of Appeals precedent in Merseal, Lynch, Grewal, and Rodriguez.

**2. The Decision Of The Court Of Appeals Conflicts With Decisions Of This Court.**

The Court of Appeals' greatest departure from precedent lies in its interpretation of State v. Bartels, 112 Wn.2d 882, 774 P.2d 1183 (1989). In Bartels, this Court determined that a DUI suspect is afforded an opportunity to make an intelligent decision about taking or refusing the breath test if the officer's warning covers four essential components:

> 1) "you have the right to refuse the breath or blood test;" 2) "if you refuse to submit to the test your privilege to drive will be revoked or denied;" 3) "your refusal to take the test may be used in a criminal trial;" and 4) "if you take the breath or blood test, you have the right to additional tests administered by any qualified person of your own choosing."

Id. at 886. No one disputes that the officer in this case provided each of the four warnings required under Bartels.

The Court of Appeals erred in holding that the Bartels court "did not require the drivers receiving improper warnings to prove prejudice." Slip Opinion at 13. This interpretation is irreconcilable with this Court's own interpretation of Bartels: "Ultimately, our opinions in both Bartels and Gonzales[1] required a showing of prejudice." State v. Storhoff, 133 Wn.2d 523, 531, 946 P.2d 783 (1997). The prejudice requirement flows naturally from this Court's reluctance to allow those who commit serious crimes to escape culpability "due to a minor procedural error that did not actually prejudice" them. Id. at 531-532.

Instead of demanding that the defendant show prejudice, the Court of Appeals held that the burden was upon the State to demonstrate that the incomplete warning was harmless beyond a reasonable doubt. Slip Opinion at 13-14. Even though the Court of Appeals incorrectly placed the burden on the State, it ultimately did attempt to provide the elusive answer to the question posed throughout this case: Exactly how does a reference to THC concentration in blood impact a driver's decision to take or refuse a breath test incapable of measuring THC concentration in blood? Binding legal precedent should confront this crucial question head

[1] Gonzales v. Department of Licensing, 112 Wn.2d 890, 774 P.2d 1187 (1989).

on, including explanations of a rational driver's thought process as he or she hears the incomplete warning. Many cases have taken this approach. See, e.g., State v. Bartels, 112 Wn.2d at 887-888; State v. Bostrom, 127 Wn.2d 580, 586-87, 902 P.2d 157 (1995). Instead, the Court of Appeals offered an explanation with no insight into how the altered warnings might have changed the defendant's thinking:

> ...Robison smelled of marijuana when arrested and admitted smoking marijuana to the arresting officer. Under these circumstances, we cannot conclude beyond a reasonable doubt that Robison would have agreed to take the breath test had he received the THC warning."

Slip Opinion at 14. The "How" or "Why" aspects of this conclusion are lacking, and only serve to highlight the departure from precedent. There is no suggestion that the officer was *required* to seek a blood test as soon as he became aware of the defendant's marijuana consumption. The officer has the discretion to limit his own investigation by determining whether to seek a breath or blood sample, even if that limiting decision prevents the State from credibly arguing at trial that marijuana played any role in the driver's impairment. See State v. Entzel, 116 Wn.2d 435, 441, 805 P.2d 228 (1991).

The court also implied that the State has a burden to demonstrate a full, verbatim reading of the statutory warnings as a matter of foundation prior to admitting a breath test result. Slip Opinion at 14-15, citing State v. Morales, 173 Wn.2d 560, 575, 269 P.3d 263 (2012) (placing "squarely on the State" the burden of proving the warnings were administered, but declining to adopt an evidentiary standard of proof for evaluating such efforts). The reliance on Morales is unhelpful, because Morales involved a problem in proving that a Spanish translation of the warnings adequately conveyed its terms. Morales at 565–566. In essence, the State had zero evidence that the driver heard any of the implied consent warnings.

Until now, no court has used the Morales case to add verbatim recitation of implied consent warnings to the list of foundational elements necessary for the admission of a breath test. This Court has already ruled that those foundational elements are within the legislature's power to establish. City of Fircrest v. Jensen, 158 Wn.2d 384, 399, 143 P.3d 776 (2006). Those foundational requirements are set forth in RCW 46.61.506(4). Implied consent warnings are not among them. The same statute contemplates *prima facie* evidence as the evidentiary standard for breath test

foundational elements. RCW 46.61.506(4). The Robison court disregarded this statute's list of foundational elements and the evidentiary standard to be applied, but it also extended the Morales logic past the point of reason. Using this logic, any minor deviation from the statutory form of the warnings would render the State incapable of laying the foundation for a breath test.

This result, if allowed to stand, would undermine this Court's deference to the separation of powers in this important intersection of public safety and criminal law: "The legislature has made clear its intention to make BAC test results fully admissible once the State has met its prima facie burden. No reason exists to not follow this intent." City of Fircrest v. Jensen, 158 Wn.2d at 399.

**3. The Decision Of The Court Of Appeals Involves An Issue Of Public Interest That Should Be Decided By The Supreme Court.**

The carnage left in the wake of the crime of DUI has vexed courts, and the public, for decades. "The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield." Breithaupt v. Abram, 352 U.S. 432, 439, 77 S.Ct. 408, 1 L.Ed.2d 448 (1957). This Court has both lamented the menace of drunk driving and

noted that few crimes have received more public attention. State v. Bostrom, 127 Wn.2d 580, 591, 902 P.2d 157 (1995).

The Washington Legislature has expressed similar sentiments repeatedly along with its desire that blood and breath tests be admissible in DUI cases. Laws of 2004, ch. 68, §1. Part of this effort included a 2004 revision of Washington's implied consent statute, RCW 46.20.308, to clarify that verbatim recitation of the implied consent warnings was not necessary as long as the arresting officer substantially complied with the statute's terms. RCW 46.20.308(2); Laws of 2004, ch. 68, §2.

In 2012, the citizens of Washington legalized adult recreational use of marijuana through the passage of Initiative 502. The same Initiative called for the establishment of a maximum level of THC in a person's *blood*, above which a person could be found in per se violation of our DUI laws. In explaining the initiative to voters, the Attorney General stated:

> This measure would also amend the law that prohibits driving under the influence. It would specifically prohibit driving under the influence of marijuana. Consent to testing to determine whether a driver's **blood** contains alcohol or any drug would specifically apply to marijuana as well. State law that currently specifies a level of **blood** alcohol concentration for driving under the influence would be amended to also specify a level of the active ingredient in marijuana. A person who drives with a higher **blood**

> concentration of that active ingredient, or who is otherwise under the influence of marijuana, would be guilty of driving under the influence. For persons under 21, any level of the active ingredient of marijuana would be prohibited.[2]

Accordingly, effective December 6, 2012, the implied consent statute was amended as directed by Initiative 502 to include the disputed warnings involved in this case, which refer only to THC concentration in a person's blood. Laws of 2013, ch. 3, §31(2).

However, effective September 28, 2013, the legislature eliminated the implied consent statute's reference to blood draws as an available method of testing under that statute. Laws of 2013, 2d Sp. Sess., ch. 35, §36(1). This amendment stated that blood draws were only available "pursuant to a search warrant, a valid waiver of the warrant requirement, or when exigent circumstances exist." Id. at §36(3). However, the legislature did not remove the warnings' reference to the per se THC limit applicable to blood tests. Id. at §36(2).

The most recent change to the implied consent statute, effective September 26, 2015, was passed in conjunction with the legislature's expressed intent to "provide appropriate sanctions"

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Initiative Measure No. 502 Explanatory Statement, available at: https://wei.sos.wa.gov/agency/osos/en/press_and_research/Previouselections/2012/General-Election/Pages/Online-Voters-Guide.aspx (last visited March 9, 2016)(**emphasis** added).

and "increase punishment" for DUI offenders. Laws of 2015, 2d Sp. Sess., ch. 3, §1. The same bill included two changes to the implied consent statute which are particularly important in this case.

First, the legislature removed any reference to THC blood concentration from the warnings officers shall provide to the driver. Id. at §5(2)(c)(i) and (ii). In other words, officers are no longer directed to warn DUI suspects about anything related to THC concentration in their blood, because the current implied consent statute applies only to breath tests. Breath tests are incapable of measuring THC concentration.

Second, the legislature corrected any ambiguity regarding whether the mandated warnings must be read verbatim in every instance. As discussed above, strict verbatim compliance is not required. Id. at §5(5)(d)(ii).

This most recent amendment codifies the persistent intent of the legislature to hold DUI offenders accountable despite discretionary omissions of warnings completely inapplicable to some drivers. For example, portions of the implied consent warnings apply only to those under the age of 21. RCW 46.20.308(2)(c)(ii) and (iii). The defendant conceded that law enforcement officers routinely exercise discretion in deciding,

based on the driver's age, whether to read the "under 21" portion of the statutory warning.[3]

While the defendant justified this widely-accepted practice as "relatively simple to exempt,"[4] the Court ultimately held that officers have no discretion at all to omit inapplicable portions of the warnings. This holding would preclude officers from omitting even the "relatively simple" under 21 language as has been the practice for over 20 years.

The Court of Appeals' opinion in this case represents a dramatic departure from the notions of substantial compliance and prejudice, each of which are necessary to prevent DUI offenders from escaping criminal liability based on technical, procedural defects in the warnings they receive. The resulting injustice is a matter of great public concern. This Court should accept review of this important issue.

The decision of the Court of Appeals conflicts with the Court of Appeals decisions in Lynch, Grewal, Merseal, and Rodriquez. It also conflicts with this court's decisions in Bartels, Storhoff, and

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[3] Wash. Court of Appeals oral argument, State v. Robison, No. 72260-3-I (Nov. 2, 2015), at 06:53 – 07:05 (available at https://www.courts.wa.gov/content/OralArgAudio/a01/20151102/1.%20State%20v.%20Robison%20%20%20722603.wma).

[4] Id. at 08:13 – 08:24.

Jensen. It presents an issue of great public importance. Review should be granted under RAP 13.4(b)(1), (2), and (4).

## VI. CONCLUSION

For the reasons stated above, this court should grant review, reverse the decision of the Court of Appeals, and reinstate the conviction.

Respectfully submitted on March 17, 2016.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

ANDREW E. ALSDORF WSBA #35574
Deputy Prosecuting Attorney
Attorney for Petitioner

# APPENDIX A

## Court of Appeals Published Opinion: Filed February 16, 2016

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

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| STATE OF WASHINGTON,<br><br>Petitioner,<br><br>v.<br><br>DARREN J. ROBISON,<br><br>Respondent. | ) | No. 72260-3-I<br><br>DIVISION ONE<br><br>PUBLISHED OPINION<br><br>FILED: February 16, 2016 |

LEACH, J. — Before an officer gives a breath test to a person reasonably believed to be driving under the influence, an officer must provide that driver with certain warnings required by statute. Here, the State asks this court to reverse a superior court decision suppressing breath test results because the officer omitted the statutorily required warnings about marijuana. The State contends that a defendant must show prejudice before a court can suppress breath test results because of incomplete warnings. Thus, because the breath test administered to Darren J. Robison could not measure the active ingredient in marijuana, tetrahydrocannabinol (THC), the State claims that he cannot show that the officer's omission prejudiced him. Because the applicable statute required the marijuana warning and Robison was not required to show prejudice caused by its omission, we affirm the superior court.

FACTS

On June 29, 2013, Washington State Patrol Trooper B.S. Hyatt stopped Darren J. Robison for traffic violations. Trooper Hyatt smelled intoxicants and marijuana. Trooper Hyatt asked how long it had been since Robison had smoked marijuana. Robison responded that it had been a couple of hours. Trooper Hyatt arrested Robison. At the Tulalip Police Department, officers read Robison an "Implied Consent Warning for Breath" form, which Robison stated he understood and signed. The form included warnings only about alcohol and did not include any marijuana-related warnings. The two breath tests given Robison both produced results over the legal limit.

The State charged Robison with driving under the influence. Robison asked the district court to suppress evidence based on an illegal stop and to suppress the breath test because Robison did not receive all required implied consent warnings. The district court denied the motion. It concluded that Trooper Hyatt had probable cause to stop Robison. The district court also took judicial notice that the breath test used cannot detect THC. It noted that Trooper Hyatt's warning specified that the purpose of the test was to determine the alcohol concentration in Robison's breath. The district court decided that the implied consent warnings given accurately informed Robison of the consequences of the breath tests, which "were all the warnings that were legally

required on the date of violation given the decision facing the defendant." The district court found Robison guilty but stayed his sentence pending his appeal.

Robison appealed to the superior court. The superior court reversed the district court. It found that the marijuana-related warnings were a significant part of the required implied consent warnings and the failure to give these warnings under the circumstances made the warnings given incomplete and misleading. The superior court suppressed the test results and remanded the case to the district court for further proceedings consistent with its decision.

This court granted the State's request for discretionary review of the superior court's decision.

## STANDARD OF REVIEW

We review de novo a superior court's legal conclusions about suppression of evidence.[1] We also review de novo the legal sufficiency of implied consent warnings.[2]

## ANALYSIS

The State contends that a court measures the sufficiency of statutorily required implied consent warnings by deciding if, based on a case's circumstances, the warnings given allow the recipient to knowingly and intelligently decide whether to take a breath test. The State claims this means an

[1] State v. Chacon Arreola, 176 Wn.2d 284, 291, 290 P.3d 983 (2012).
[2] State v. Morales, 173 Wn.2d 560, 567, 269 P.3d 263 (2012).

officer has discretion to tailor the warnings by omitting language he decides is "irrelevant." It also means that the warning recipient must show prejudice before a court can suppress test results. We disagree because we cannot ignore the plain language of a statute adopted by Washington voters.

We begin our analysis by reviewing the general framework of Washington's implied consent statute. We then look at the language of the applicable statute, RCW 46.20.308, in effect at the time of Robison's arrest.

Before giving a breath test to a person reasonably believed to be driving under the influence, an officer must provide that person with certain warnings required by statute. Specifically, an officer must inform the driver of his right to refuse the test or to have additional tests done.[3] The officer's warning must also state that refusal to take the test will result in license revocation, that the refusal may be used at a criminal trial, and that the driver may be eligible for an ignition interlock license.[4] Pertinent to this case, the officer must also warn about the consequences of certain test results. This warning has changed several times in recent years.

On November 6, 2012, Washington voters enacted Initiative 502, legalizing some uses of marijuana.[5] This initiative also amended the test result

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[3] RCW 46.20.308(2).
[4] RCW 46.20.308(2)(a), (b), (d).
[5] LAWS OF 2013, ch. 3 (effective Dec. 6, 2012).

warning in former RCW 46.20.308(2) by adding a warning about marijuana test results:

> The officer shall warn the driver, in substantially the following language, that:
>
> . . . .
>
> (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 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 or blood is 0.08 or more or that the THC concentration of the driver's blood is 5.00 or more.[6]

The legislature again amended RCW 46.20.308, effective September 28, 2013, to omit the language "or blood" from the quoted section as well as other references to implied consent for a blood test.[7] Later, the legislature again amended this statute, effective September 26, 2015, to eliminate a driver's implied consent to a test for THC or any other drug and the warning language at issue in this case, "or that the THC concentration of the driver's blood is 5.00 or more."[8]

Before giving Robison the challenged breath tests, Trooper Hyatt read to Robison an "Implied Consent Warning for Breath" form. It provided the following warnings about test results:

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[6] LAWS OF 2013, ch. 3, § 31.
[7] LAWS OF 2013, 2d Spec. Sess., ch. 35, § 36.
[8] RCW 46.20.308(2)(c)(i).

> FURTHER, YOU ARE NOW BEING ASKED TO SUBMIT TO A TEST OF YOUR BREATH WHICH CONSISTS OF TWO SEPARATE SAMPLES OF YOUR BREATH, TAKEN INDEPENDENTLY, TO DETERMINE ALCOHOL CONCENTRATION.
>
> . . . .
>
> 2. YOU ARE FURTHER ADVISED THAT IF YOU SUBMIT TO THIS BREATH TEST, AND THE TEST IS ADMINISTERED, YOUR DRIVER'S LICENSE, PERMIT, OR PRIVILEGE TO DRIVE WILL BE SUSPENDED, REVOKED, OR DENIED BY THE DEPARTMENT OF LICENSING FOR AT LEAST NINETY DAYS IF YOU ARE:
>
> (A) AGE TWENTY-ONE OR OVER AND THE TEST INDICATES THE ALCOHOL CONCENTRATION OF YOUR BREATH IS 0.08 OR MORE, OR YOU ARE IN VIOLATION OF RCW 46.61.502, DRIVING UNDER THE INFLUENCE, OR RCW 46.61.504, PHYSICAL CONTROL OF A VEHICLE UNDER THE INFLUENCE.

Thus, Trooper Hyatt warned Robison about the consequences of test results showing a certain level of alcohol concentration in his breath, but not the consequences of results showing a prohibited level of THC concentration in his blood. The superior court suppressed the test results because of this omission.

The State asks this court to reverse the superior court, claiming that an officer has discretion to omit "irrelevant" information from implied consent warnings and that defendant must show prejudice before a court can suppress breath test results because of incomplete warnings. The State reasons that because the breath test administered to Robison could not measure THC levels,

the THC warning was irrelevant and he cannot show prejudice caused by Trooper Hyatt's omission of the warnings about THC test result consequences. Robison responds that the statute's plain language says that an officer "shall warn" the accused, leaving Trooper Hyatt without discretion to omit any part of the statutory warning. He further responds that he does not have to show prejudice.

When interpreting a statute, this court has the primary goal of carrying out legislative intent.[9] When the language of a statute is unambiguous, this court may not change the statute's plain meaning by construction.[10] Following this rule, Washington cases have "consistently required strict adherence to the plain language of the implied consent statute."[11] Two Supreme Court cases show this history.

In State v. Whitman County District Court,[12] officers warned accused drivers that a refusal to submit to a breath test "shall" be used against them at trial instead of the statutory language "may." The Supreme Court affirmed the district court's suppression of the breath test results. The court stated that the implied consent statute used the word "may" and the statute was "worded in the mandatory sense." This meant that "the officer had no discretion with regard to

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[9] City of Seattle v. St. John, 166 Wn.2d 941, 945, 215 P.3d 194 (2009).
[10] State v. Bostrom, 127 Wn.2d 580, 586-87, 902 P.2d 157 (1995).
[11] Bostrom, 127 Wn.2d at 587.
[12] 105 Wn.2d 278, 714 P.2d 1183 (1986).

the wording he used to warn the accused."[13] The court also noted that the word "shall" conveyed a different meaning than the word "may" and had a "more coercive impact."[14]

In State v. Bostrom,[15] the Supreme Court reviewed consolidated district court cases in which the district court suppressed breath test results of drivers who took the test and evidence of refusal by drivers who did not. Each driver received all the warnings required by the implied consent statute. The drivers who refused to take the test claimed that they also should have been warned that they risked enhanced penalties if convicted of driving while intoxicated. The district court agreed. The Supreme Court reversed, holding that the additional warning was not required and noting that the statutory warning sufficiently alerted drivers that a refusal could be used at any phase of a criminal trial.[16]

The drivers who took the test claimed that the officers' failure to warn them about new administrative consequences of certain test results deprived the drivers of the opportunity to make an informed decision about taking the test. Again, the district court agreed, and the Supreme Court did not.[17] The Supreme

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[13] Whitman, 105 Wn.2d at 285.
[14] Whitman, 105 Wn.2d at 285-86.
[15] 127 Wn.2d 580, 902 P.2d 157 (1995).
[16] Bostrom, 127 Wn.2d at 586.
[17] Bostrom, 127 Wn.2d at 586-87.

Court's reasons for reversing the district court bear directly on the State's position in this case.

The drivers supported their position with the Supreme Court's observation in Whitman[18] and Gonzales v. Department of Licensing[19] that the legislature intended the implied consent statute to provide drivers with an opportunity to make an informed decision about taking a breath test.[20] The court stated that this observation did not mean that this purpose "was a requirement which overrode the plain language of the statute."[21] It then stated the applicable rule of statutory construction: "When the language of a statute is unambiguous, courts may not alter the statute's plain meaning by construction."[22] The court noted that consistent with this rule, "Washington case law has consistently required strict adherence to the plain language of the implied consent statute."[23]

Significantly, the Bostrom opinion expressly disapproves of any suggestion that Washington courts will approve warnings in language other than that stated in the statute because the statutory language denies an arrested

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[18] Whitman, 105 Wn.2d at 281.
[19] 112 Wn.2d 890, 897, 774 P.2d 1187 (1989).
[20] Bostrom, 127 Wn.2d at 586.
[21] Bostrom, 127 Wn.2d at 586.
[22] Bostrom, 127 Wn.2d at 586-87.
[23] Bostrom, 127 Wn.2d at 587.

driver the opportunity to exercise an intelligent judgment.[24] When considering the State's arguments against suppression, we must follow Bostrom.

Officer Discretion To Modify Statutory Warning

We first address the State's claim that an officer has discretion to omit from an implied consent warning a part of the statutory language that he decides is irrelevant in a particular case. The State relies exclusively on State v. Richardson[25] to support this claim. It does not.

In Richardson, the court considered if the implied consent statute required that an arresting officer advise a driver not only "of his right to have additional tests administered by a qualified person of his own choosing, but also that he advise that such a person may be a physician, qualified technician, chemist or registered nurse."[26] Although the statute did not require the second warning, the drivers claimed they needed it to understand their rights. The court held sufficient a warning in the language of the statute. The case did not involve any claim that an officer can omit from a warning language the statute required. It provides no support for the State's position.

The State's briefing does not address our Supreme Court's statement in Whitman that the mandatory language of the implied consent statute meant "the

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[24] Bostrom, 127 Wn.2d at 587.
[25] 81 Wn.2d 111, 112, 499 P.2d 1264 (1972).
[26] Richardson, 81 Wn.2d at 112.

officer had no discretion with regard to the wording he used to warn the accused."[27] We must heed this observation. Additionally, the State cites no case where a Washington appellate court has accepted the proposition that an arresting officer has discretion to edit implied consent warnings as he deems appropriate to the facts of a case.

Finally, as we noted earlier, in 2015 the legislature deleted from the statutory warning the reference to THC concentration. The legislature engaged in a meaningless amendment of the statute if an officer was not required to include this reference before the amendment. Our decision gives meaning to the amendment.

Consequence of Warning Omission

We next consider the State's claim that "[l]egally accurate warnings do not trigger suppression, even if elements or adverse consequences are left out," so long as the warnings given provide the driver with "'an opportunity to knowingly and intelligently decide whether to take an evidentiary breath test.'"[28]

The State claims Bostrom and Grewal v. Department of Licensing[29] support its claim that an officer may omit from implied consent warnings elements of the statutory language or adverse consequences. We disagree.

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[27] Whitman, 105 Wn.2d at 285.
[28] State v. Koch, 126 Wn. App. 589, 594, 103 P.3d 1280 (2005).
[29] 108 Wn. App. 815, 33 P.3d 94 (2001).

In Bostrom, the court considered claims that an arresting officer must give warnings in addition to those required by the implied consent statute. The court rejected these claims, stating that it was "not free to graft onto the implied consent statute any additional warnings not contained in the plain language of that statute."[30] The court never considered any claim that the arresting officer could omit some part of the statutorily required warning.

In Grewal, the court considered a driver's claim that the arresting officer must include in his warnings a description of the elements of the crime for which he arrested the driver.[31] The officer gave Grewal the implied consent warnings required by statute and informed Grewal that he was arrested for violating RCW 46.61.503, "'[b]eing under 21 years of age and driving or being in actual physical control of a motor vehicle after consuming alcohol.'"[32] Grewal claimed this warning was insufficient because the officer did not also tell Grewal that violation of this provision required proof that his blood alcohol concentration was more than 0.02, but less than 0.08.[33]

This court rejected Grewal's claim. It did not consider, much less decide, if an arresting officer could omit any part of a warning required by the implied consent statute. Once again, the State fails to distinguish between omitted

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[30] Bostrom, 127 Wn.2d at 587.
[31] Grewal, 108 Wn. App. at 821.
[32] Grewal, 108 Wn. App. at 821 (alteration in original).
[33] Grewal, 108 Wn. App. at 821.

warnings required by statute and additional warnings not required by the express language of the implied consent statute.

The State also contends that incomplete warnings should result in suppression of breath test results only if the driver can demonstrate it prejudiced him. The State relies on State v. Bartels,[34] State v. Elkins,[35] and Grewal.

In Bartels, the court considered the admissibility of breath tests given after the arresting officer included additional language in the implied consent warning not contained in the statute. The officer told Bartels about his right to an additional test "'at your own expense.'"[36] The court held this additional language improper.[37] It remanded the consolidated cases before it to allow the State to prove if any defendant had the financial ability to obtain an additional test at the time of arrest.[38] Unless the State proved this, the breath tests were to be suppressed.

Thus, the court did not require the drivers receiving improper warnings to prove prejudice. Instead, the State had to prove the improper warning was "'harmless beyond a reasonable doubt.'"[39] Additionally, in each case, the officer

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[34] 112 Wn. 2d 882, 774 P.2d 1183 (1989).
[35] 152 Wn. App. 871, 220 P.3d 211 (2009).
[36] Bartels, 112 Wn.2d at 884.
[37] Bartels, 112 Wn.2d at 889.
[38] Bartels, 112 Wn.2d at 890.
[39] Bartels, 112 Wn.2d at 890 (quoting Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

gave the warning required by statute but added additional language not found in the statute.[40]

Here, the State cannot prove that the incomplete warning was harmless. As the superior court concluded, Robison smelled of marijuana when arrested and admitted smoking marijuana to the arresting officer. Under these circumstances, we cannot conclude beyond a reasonable doubt that Robison would have agreed to take the breath test had he received the THC warning.

In Elkins, the court considered a claim that the trial court should not have admitted evidence of Elkins's refusal to take the breath test because the statutory implied consent warnings did not fully inform her of the consequences of refusing the test. This court disagreed and held the refusal admissible. This court specifically noted that the arresting officer had no authority to add warnings "'not contained in the plain language of the implied consent statute.'"[41] Elkins provides no support for the State's position.

As previously explained, Grewal did not involve an incomplete implied consent warning. It provides no support for the State's position.

The State's position ignores the requirement that it prove the facts required for the admission of a breath test. The Supreme Court has interpreted the implied consent statute to place "squarely on the State the burden of proving"

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[40] Bartels, 112 Wn.2d at 886-87.
[41] Elkins, 152 Wn. App. at 877 (quoting Koch, 126 Wn. App. at 594).

implied consent warnings were given before a court admits test results.[42] The defendant has no obligation to present evidence or show prejudice.[43]

Because the State cannot show that an officer gave Robison all the statutorily required warnings, it cannot establish the foundation required for admission of the breath tests given to him. While cases have characterized this result as suppression, when the State cannot show that it complied with the implied consent statute, the State has failed to meet its burden of proof for admission of evidence it offers to prove guilt. The defendant does not have to show prejudice in this circumstance.

## CONCLUSION

RCW 46.20.308 requires that before an officer gives a breath test to a person reasonably believed to be driving under the influence, an officer must provide that driver with certain warnings required by that statute. Here, the State cannot show that an officer gave all the required warnings to Robison.

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[42] Morales, 173 Wn.2d at 575; see also Whitman, 105 Wn.2d at 283.
[43] Morales, 173 Wn.2d at 575.

Therefore, the superior court correctly decided that the breath tests given to Robison were not admissible as evidence of his guilt. We affirm.

Leach, J.

WE CONCUR:

Dwyer, J.

Schindler, J.

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

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|---|---|
| THE STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>DARREN J. ROBISON,<br><br>Appellant. | No. 72260-3-I<br><br>DECLARATION OF DOCUMENT FILING AND E-SERVICE |

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The undersigned certifies that on the 17th day of March, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

PETITION FOR REVIEW

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Thomas M. Kummerow, Washington Appellate Project, tom@washapp.org; and wapofficemail@washapp.org.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 17th day of March, 2016, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

# SNOHOMISH COUNTY PROSECUTOR

## March 17, 2016 - 12:14 PM

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