KING COUNTY DISTRICT COURT
EAST DIVISION, BELLEVUE COURTHOUSE

CITY OF BELLEVUE_____)	
_____)	
Plaintiff)	
)	
vs.)	**Case No. _2Z0894955**
)	
JESSICA A. BRAMBLE_____)	**ORDER ON MOTION**
_____)	**TO SUPPRESS EVIDENCE**
Defendant.)	
_____)	

THIS MATTER having come on for hearing before the undersigned Judge of the above entitled Court on Defendant's Motion to Suppress Evidence, the Court having considered the evidence presented at the motion hearing held July 2, 2013, and being fully advised, now makes and enters the following:

I. FINDINGS OF FACT:

1.That on or about November 24, 2012, City of Bellevue Police Officer Parrott responded to the Overlake Hospital to investigate the driver of a car that had been involved in a 1-car accident. Prior to contacting the Defendant, Officer Parrott had been advised of the following:

a. Defendant had been in a car that had been involved in a 1-car accident;
b. Defendant admitted being the driver of the car;
c. Defendant admitted to having been out drinking with a friend and having consumed four or more beers;
d. Defendant had a significant contusion to her forehead, it appearing that the driver of the car had struck her forehead against the windshield during the accident.
e. Defendant had been transported to Overlake Hospital for treatment of a possible concussion.

2. Officer Parrott read Defendant her Miranda warnings (0103 hours) and her Implied Consent warnings (0106 hours). When initially asked whether she would submit to a blood test, Defendant answered "yes." When the blood technician arrived, Defendant stated that she hated needles and would not take the blood test. Officer Parrott re-read the implied consent warnings and asked Defendant if she knew she was refusing. Defendant stated clearly that she would not take the blood test. Officer Parrott then read the Implied Consent warnings

a third time, again asking Defendant if she knew she was refusing. Defendant again stated that she knew she was refusing, but would not take a blood test.

3. On the Implied Consent form, both the "yes" and "no" boxes are marked in answer to the question, "Will you now submit to a blood test?" The "no" box is marked in answer to the question, "Did subject express any confusion regarding the implied consent warnings?" The form then asks for an explanation if confusion is present---Officer Parrott wrote, "1st said 'Yes." Then when preparing for blood draw stated she couldn't do it and stated she refused. I reread warnings twice and Bramble still stated she refused."

4. At some point during this process, Defendant asked whether she could take a breath test. No breath testing machine is located at Overlake Hospital. While Defendant was released sometime after this processing, she was at all times relevant under a doctor's care at Overlake Hospital and could not be transported to a location where a breath testing machine was available.

5. The Court is satisfied that Officer Parrott followed all of the required protocols necessary to implicate the implied consent warnings/consequences and that Defendant did, in fact, refuse to take a blood test when asked to do so.

6. Defendant first asserts that the refusal to take a blood test should be suppressed based on her "confusion" regarding the implied consent warnings and an assertion that Officer Parrott failed to clarify that confusion. The Court is satisfied that Defendant did not exhibit confusion to Officer Parrott such that he would be required to take affirmative steps to clarify. In fact, however, Officer Parrott did take the appropriate steps to re-read the rights and warnings a second and third time. The Court finds that no apparent confusion existed in this case.

II. ISSUE PRESENTED.

Is evidence of the Defendant's refusal to take the blood test admissible as substantive evidence in the City's case in chief? The Court answers this question "no." May such refusal evidence be used for purposes of impeachment if properly raised at trial? The Court answers this question "maybe."

III. APPLICABLE STATUTES[1]

"RCW 46.61.517: The refusal of a person to submit to a test of the alcohol or drug concentration in the person's blood or breath under RCW 46.20.308 is admissible into evidence at a subsequent criminal trial."

[1] **Relevant provisions of Engrossed Second Substitute Senate Bill 5912 would have absolutely required Officer Parrot to secure a search warrant for blood---but were not in effect when this incident occurred.**

IV. MEMORANDUM OPINION:

A.ISSUE OF CONFUSION.

1.The issue of confusion is a question of fact." *Gonzales v. Dept. of Licensing*, 112 Wash.2d 890, 906, 774 P.2d 1187 (1989). Indecision does not constitute confusion. *Gonzales*, 112 Wash.2d at 906, 774 P.2d 1187. *Vance v. State, Dept. of Licensing*, 116 Wash.App. 412, 418, 65 P.3d 668, (Wash.App. Division 1, 2003)

> **There are a host of authorities that discuss the issue of a whether a defendant was confused by the ICW's. Most of these authorities expressly find that the defendant did not express confusion about the ICW's, or that the totality of the evidence did not support the conclusion that the defendant was confused about the actual warnings. *See e.g,. Martin v. State Dept. of Licensing*, __Wash.App.__, __ P.3d__, 2013 WL 3361239 (Wash.App. Div. 2, 2013)(Defendant did not express any confusion regarding the implied consent warnings and submitted two breath tests that measured his breath above the legal limit); *Allen v. State, Dept. of Licensing*, 169 Wash.App. 304, 279 P.3d 963, (Wash.App. Div. 1,2012)(Defendant did not express any confusion regarding the implied consent warnings, checked the box below his signature that he was agreeing to take the tests, and checked the box that he had no confusion about the ICW's); *Leininger v. Washington State Dept. of Licensing*, 120 Wash.App. 68, 83 P.3d 1049, (Wash.App. Div. 3, 2004)(While "police may be required to clarify and 'objective and unequivocal' confusion of the consequences of a refusal to take a breath test", however, defendant did not express confusion over the specific implied consent warnings, but rather over what he should do with respect to contacting an attorney); *Vance v. State, Dept. of Licensing*, 116 Wash.App. 412, 65 P.3d 668, (Wash.App. Div. 1,2003). (Driver did not express confusion with respect to the meaning of the implied consent warning for breath, rather over whether or not he should not confusion. Court held that this is not confusion that the officer is required to clarify); *Maloney v. State, Dept. of Licensing*, 106 Wash.App. 1053, Not Reported in P.3d, 2001 WL 738373 (Wash.App. Div. 2, 2001)(Driver who was confused by his own reading of the rights form had the burden of showing that he objectively and clearly manifested confusion to the officer. The refusal of the blood test cannot be excused upon the failure to make any confusion clear). *Thompson v. State Dept. of Licensing*, 91 Wash.App. 887, 960 P.2d 475 (Wash.App. Div. 2, 1998)(Driver signed both forms and did not express any confusion to the officer).**

The Court finds no basis in law or fact to suppress Defendant's refusal to take the blood test based on confusion.

B. HISTORICAL TREATMENT OF REFUSAL EVIDENCE:

2,RCW 46.61.517 expresses a clear legislative intent to make refusal evidence probative of guilt or innocence and admissible in a prosecution's case in chief. State v. Long, 113 Wn.2d 226, 728 P.3d 1027 (1989) traces the historical development of this statute and concluded that there was "no credible reason why this legislative development should not be honored." Id. at 778 P.3d 1027, 1030. The Court noted, however, that applicability of the state constitution had not been properly briefed nor argued and was not considered in reaching its determination that refusal evidence was admissible.[2]

3. In City of Seattle v. Stalsbroten, 138 Wn.2d 227, 978 P.3d 1059 (1999), the Court again addressed the admissibility of refusal evidence, ruling that the refusal to perform FSTs was not testimonial and not compelled, and thus not protected by the right against self-incrimination---an analysis made under the Fifth Amendment (and Article 1, section 9 of the Washington Constitution). The Court further held that Article 1, section 9 did not provide greater protections than that provided under the federal constitution.

4. In State v. Cohen, 125 Wn.App. 220, 104 P.3d 70 (2005), the Court again affirmed that refusal evidence was admissible in the state's case in chief in that "a refusal to take the test demonstrates the driver's consciousness of guilt." Id. The Cohen analysis deals with the legal relevance of refusal evidence as to whether a refusal demonstrates consciousness of guilt, deciding that it did. The Cohen court did not conduct either a Fourth or Fifth Amendment analysis. The viability of that conclusion of admissibility is suspect under a Fourth Amendment analysis. The Cohen court was constrained by the Washington State Supreme Court's decision in State v. Long, supra, which, as noted was a challenge made under the Fifth Amendment, not Fourth Amendment (and Art. 1, sec. 7) as is made here.

5. Lastly, the Washington State Supreme Court has recently address our state's Implied Consent laws in State v. Morales, 173 Wn.2d 560, 269 P.3d 263 (2012). In dicta, the Court observes:

> Courts review the implied consent warning not on a constitutional basis, but rather as a right granted as a matter of grace through the statutory process. Gonzales v. Dep't of Licensing, 112 Wn.2d 890, 896, 774 P.2d 1187 (1989); State v. Whitman County Dist. Court, 105 Wn.2d 278, 281, 714 P.2d 1183 (1986). There is a clear distinction between a defendant's testimony translated through an interpreter and an interpreter's translation to the defendant of a statutory right to have a blood sample independently tested. A defendant has a much greater constitutional right in an accurate translation of his or her own words. *See* State v. Carranza, 24 Wn.App. 311, 315-16, 600 P.2d 701 (1979)(failure to give a suspect special notice of right to independent blood test "does not rise to the level of a constitutional denial of due process"). A statutory right to notice does not impose as demanding a burden of proof on the State as

[2] **Interestingly, the constitutional reference made therein was to Article 1, section 9 of the Washington Constitution, whereas here the challenge is being made under Article 1, section 7.**

constitutionally required warnings. [FN4]. We resolve this case on statutory grounds, although the statutory warning implicates constitutional issues. [FN 5].

[FN 4]. Omitted.

[FN 5]. "The United States Supreme Court has held that (1) taking a blood sample and admitting its analysis does not violate a defendant's Fifth Amendment privilege against self-incrimination; (2) blood alcohol content analysis is not "testimonial or communicative" in nature but, rather, constitutes "real or physical evidence"; and (3) the taking of a blood sample is analogous to fingerprinting, photographing, or taking measurements of a suspect, where the suspect/donor's participation is irrelevant to analysis. Schmerber v. California, 384 U.S. 757, 761, 764 -65, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1996)."

Again, this analysis, and citation to authority, appear to be based on a Fifth Amendment analysis, not the Fourth Amendment challenge that is made here.

C. REQUEST FOR BLOOD TEST IS A "SEARCH":

6. Since all of the cases cited discuss admissibility of refusal evidence in terms of a Fifth Amendment (and Art. 1, sec. 9 of the Washington Constitution) analysis, is a different analysis appropriate when, as here, the challenge is made under the Fourth Amendment (and Art. 1, sec. 7 of the Washington Constitution)? And, if so, is a different result mandated?

7. Both the Fourth Amendment to the United States Constitution and Article 1, section 7 of the Washington Constitution, prohibit warrantless searches unless one of the narrow exceptions to the warrant requirement applies. State v. Bonds, ___ Wn.App. ___, 299 P.3d 663 (2013); State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Article 1, section 7, provides more extensive privacy protections than the Fourth Amendment and creates "an almost absolute bar to warrantless arrests, searches, and seizures." State v. Valdez, 167 Wn.2d 761, 772, 224 P.3d 751 (2009)(quoting State v. Ringer, 100 Wn.2d 686, 680, 674 P.2d 1240 (1983), *overruled in part by* State v. Stroud, 106 Wn.2d 144, 150-51, 710 P.3d 436 (1986); State v. Bonds, supra. The government bears the burden of proving an exception to the warrant requirement. State v. Westvang, ___ Wn.App. ___, 2013 WL 2217326 (2013); State v. Ortega, 177 Wn.2d 116, 297 P.3d 57 (2013). Accordingly, if this case established that a search or seizure has occurred by the request for a blood test, the City must establish some legal justification for that request that satisfies both the Fourth Amendment and Article 1, section 7.

8. Two cases have changed the legal landscape of this discussion. First, in Missouri v. McNeely, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), the United States Supreme Court clearly held that the natural metabolization of alcohol in the bloodstream does not present a per se exigency that justifies an exception to the Fourth Amendment's search requirement for nonconsensual blood testing in all drunk driving cases. Implicit in that ruling is that a request for a blood draw from a suspected impaired driver is a search and that basic Fourth Amendment protections apply.

9. When a determination is made that the Fourth Amendment to the United States Constitution applies, it is clear that Article I, section 7, can provide no less protection, but might provide greater privacy protection in a given case. State v. Jackson, 150 Wn.2d 251, 76 P.3d 217 (2003). In this case, it is unnecessary to examine application of our State Constitution since the Fourth Amendment resolves the question of privacy in Defendant's favor. Defendant has an expectation of privacy in his/her own body---an invasive taking of blood clearly invades that right of privacy, and the Fourth Amendment and Article 1, section 7 apply.

10. Since the Fourth Amendment applies, we are then asked to find some exception that would justify the invasion of a person's privacy. Historically, that exception has been found in the consent exception to the warrant requirement. Under RCW 46.20.308, there is implied consent to a breath/blood test that can be withdrawn (with penalties) following proper advisement of a person's rights. As noted, as part of this state's Implied Consent laws, by enactment of RCW 46.61.517, the legislature has provided that the act of such refusal is admissible into evidence at a subsequent trial. In the absence of further pronouncement by the Washington State Supreme Court, this court would normally rely upon case law honoring the legislative directive that refusal evidence is admissible.

B. APPLICATION OF STATE v. GAUTHIER:

11. The second case that has changed the legal landscape in this discussion is State v. Gauthier, 174 Wn.App. 257, 298 P.3d 126 (2013), wherein the Washington Court of Appeals (Div. I), ruled that in circumstances where a defendant had a constitutional right to refuse consent to providing a DNA sample, the State's introduction of the evidence of his refusal and its argument that the refusal was evidence of his guilt violated the defendant's state and federal constitutional rights. In addressing the issue of Fourth Amendment application, the Court held:

> "A blood test or cheek swab to procure DNA evidence constitutes a search and seizure under the Fourth Amendment and article I, section 7 of the Washington Constitution. *State v. Garcia–Salgado*, 170 Wash.2d 176, 184, 240 P.3d 153 (2010); *State v. Curran*, 116 Wash.2d 174, 184, 804 P.2d 558 (1991), *overruled on other grounds by State v. Berlin*, 133 Wash.2d 541, 947 P.2d 700 (1997). Because taking a DNA sample constitutes a search, a warrant or court order is first required. *Garcia–Salgado*, 170 Wash.2d at 184, 186, 240 P.3d 153. As a result, individuals have a constitutional right to refuse consent to warrantless sampling of their DNA. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 228, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *State v. Morse*, 156 Wash.2d 1, 13, 123 P.3d 832 (2005).

The request to provide a DNA sample is not constitutionally different from a request to provide a blood sample. Clearly, this ruling is based on a Fourth Amendment analysis.

12. Combined with Missouri v. McNeely, this pronouncement from Gauthier makes it clear that, under Fourth Amendment analysis, when blood is being taken from a defendant, a search is being conducted. Under Gauthier, such a search requires the government to justify that demand by establishing one of the recognized exceptions to the warrant requirement. In the future, that analysis will be satisfied by the recent enactment of E2SSB 5912, where a blood test can ONLY be obtained with the issuance of a search warrant.

13. The Gauthier court discussed the issue of "consciousness of guilt" by reference to the Ninth Circuit decision in United States v. Prescott, 581 F.3d 1343 (9th Cir. 1978), where the Court disallowed evidence that the defendant refused consent to search, giving a variety of reasons why such evidence should not be admitted as substantive evidence, holding that if the government could use such refusal against an individual, "it would place an unfair and impermissible burden upon the assertion of a constitutional right." The Ninth Circuit in Prescott analogized to a defendant's exercise of a Fifth Amendment right of silence, but really held that it was the exercise of a constitutional right that made admissibility of refusal evidence problematic.[3]

14. Addressing the general issue of refusal evidence, the Gauthier Court commented on the Washington State Supreme Court's response to this conflict as follows:

> "The Washington Supreme Court has also indicated, though not explicitly held, that using refusal to consent to a search as evidence of guilt is unconstitutional. *State v. Jones*, 168 Wash.2d 713, 725, 230 P.3d 576 (2010). In *Jones*, a police officer testified that the defendant refused to take a DNA test and only provided a cheek swab after court order. *Id.* at 718, 230 P.3d 576. In closing, the State reiterated and emphasized that refusal. *Id.* at 718, 725, 230 P.3d 576. Jones argued on appeal that these comments constituted prejudicial misconduct. *Id.* at 725, 230 P.3d 576. The Supreme Court reversed Jones's conviction on other grounds. *Id.* at 720, 724–25, 230 P.3d 576. But, at the end of the opinion, the court addressed Jones's misconduct argument. *Id.* at 725, 230 P.3d 576. The court explained that the comments were improper because Jones had "a Fourth Amendment right to refuse to provide a DNA swab sample." *Id.* The court continued, emphatically, "We go so far as to say that the court's imprimatur is now upon the State and that such argument is improper and should not be repeated on remand." *Id.* This language indicates that the Washington Supreme Court considers such comments to be a constitutional violation.

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[3] The Court held that in addition to the Ninth Circuit, at least four other federal circuit courts and 15 states have reached the same conclusion. The Fifth Circuit noted that "circuit courts that have directly addressed this question have unanimously held that a defendant's refusal to consent to a warrantless search may not be presented as evidence of guilt." United States v. Runyan, 290 F.3d 223, 249 (5th Cir. 2002).

15. Lastly, in Gauthier, the State acknowledged application of Fifth Amendment principles, but asserted that there was no violation of Defendant's Fourth Amendment rights. The Court rejected that argument, holding:

> But, the State misses the point. The constitutional violation was that Gauthier's lawful exercise of a constitutional right was introduced against him as substantive evidence of his guilt. Whether defendants invoke their Fifth Amendment rights or their Fourth Amendment rights, exercising a constitutional right is not admissible as evidence of guilt. *See Griffin*, 380 U.S. at 614, 85 S.Ct. 1229; *Burke*, 163 Wash.2d at 212, 181 P.3d 1. Moreover, the Washington Supreme Court has shown no tendency to distinguish between the Fourth and Fifth Amendments in such cases. *See Jones*, 168 Wash.2d at 725, 230 P.3d 576, Indeed, the *Burke* court, analyzing the Fifth Amendment, stated that "[c]ourts are appropriately reluctant to penalize anyone for the exercise of *any* constitutional right." 163 Wash.2d at 221, 181 P.3d 1 (emphasis added).
>
> We hold that the prosecutor's use of Gauthier's invocation of his constitutional right to refuse consent to a warrantless search as substantive evidence of his guilt was a manifest constitutional error properly raised for the first time on appeal. The error deprived Gauthier of his right to invoke with impunity the protection of the Fourth Amendment and article I, section 7. To hold otherwise would improperly penalize defendants for the lawful exercise of a constitutional right. [Footnotes omitted].

E. CONSTITUTIONALITY OF RCW 46.612.517:

16. The Court finds no way to distinguish Gauthier from the facts in this case and must therefore address the constitutionality of RCW 46.61.517 in light of this opinion. The Gauthier court clearly held that "whether defendants invoke their Fifth Amendment rights or their Fourth Amendment rights, exercising a constitutional right is not admissible as evidence of guilt. Id at 267. This Court agrees with Gauthier and Prescott. Under appropriate Fourth Amendment analysis, any individual may refuse to consent to a search--- A person's refusal to submit to a breath/blood test does not, in fact, prove consciousness of guilt. Under Gauthier and McNeely, that refusal may not be used to prove consciousness of guilt.

17. Courts look to the plain and ordinary meaning of statutory language to determine legislative intent. State v. Sanchez, ___ Wn.2d ___, ___ P.3d ___ (2013); Dep't of Ecology v. Campbell & Guinn, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). If possible, courts will construe a statute's language so as to find it constitutional. Id., City of Seattle v. Montana, 129 Wn.2d 583, 589-90, 919 P.2d 1218 (1996). This Court takes that obligation very seriously. Nonetheless, this is a case of first impression in Washington wherein admissibility of refusal evidence is challenged under the Fourth Amendment and Article 1, section 7.

The Court must wrestle with the clear conflict between protection of an individual's right of privacy and the clear legislative pronouncement that is in conflict. When statutes collide with constitutional protections, the statute must yield.

18. There is no question here of confusion over legislative intent---the language of the statute (and case law interpreting it) is very clear. However, to the extent that RCW 46.61.517 attempts to make such evidence admissible in opposition to a Defendant's Fourth/Fifth Amendment right, it is unconstitutional. It is axiomatic that a state statute cannot take away a constitutional right. Prior case law holding that refusal evidence is admissible at trial cannot withstand current analysis under the Fourth Amendment and must yield to each individual's right of privacy under Article 1, section 7, of the Washington State Constitution.

F. USE OF REFUSAL FOR IMPEACHMENT PURPOSES:

19. This leaves open the question of whether a person's refusal can be used for impeachment purposes. Under traditional Fourth and Fifth analysis, the answer has always been "yes." United State v. Havens, 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980)(Illegally seized evidence can be used for impeachment purposes if such impeachment constitutes proper cross-examination); Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed.2d 503 (1954)(Evidence from an illegal search admissible to impeach); Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1975)(Confession without Miranda warnings may be used in cross-examination to impeach statements made on direct, if otherwise voluntary and defendant's direct testimony is inconsistent.

20. The Court in Gauthier addressed the use of refusal evidence for purposes of impeachment as follows:

> "The State argues, in the alternative, that evidence of Gauthier's refusal to consent was properly introduced for impeachment purposes. Impeachment evidence may be offered solely to show the witness is not truthful, usually in the form of prior inconsistent statements. *Burke*, 163 Wash.2d at 219, 181 P.3d 1. But, such evidence may not be used to argue that the witness is guilty. *Id.* at 217, 181 P.3d 1. The *Burke* court acknowledged that when a defendant testifies at trial, his prearrest silence may be used for impeachment. *Id.* Federal circuit courts have held the same for refusal to consent to a search under certain circumstances. For instance, in *United States v. Dozal*, the defendant's refusal to consent to a search was admissible to impeach his testimony that he did not have dominion or control over the premises. 173 F.3d 787, 794 (10th

Cir.1999). In *Leavitt v. Arave,* the defendant's testimony that he fully cooperated with police could be impeached by evidence of his refusal to consent to a search. 383 F.3d 809, 827 (9th Cir.2004). In *United States v. McNatt*, the defendant's refusal to consent to a warrantless search of his truck was admissible to impeach his testimony that police planted drugs there at the time of his arrest.[FN3] 931 F.2d 251, 258 (4th Cir.1991).

"However, here, use of the refusal evidence for impeachment purposes is not supported by the record. The prosecutor told the court before trial that she wished to introduce Gauthier's refusal, because it was inconsistent with the actions of someone who is innocent. She believed that if Gauthier's prostitution story were true and he had nothing to hide, then "he should be giving up DNA samples right and left." [FN4] This is the same argument the *Prescott* court rejected—that if the defendant had nothing to hide, he would consent to the search. 581 F.2d at 1352. And, the State makes this same strained argument on appeal: "If Gauthier had in truth had consensual sexual intercourse with T.A., it would have made no sense to withhold his DNA—identification would be irrelevant." But, if identification were irrelevant, then Gauthier's prior refusal to take the identifying test was also irrelevant, because Gauthier admitted to intercourse with T.A.

"Moreover, Gauthier did not make any false claims on direct examination about his refusal to provide DNA evidence, which would have allowed the prosecutor to impeach his testimony on that basis. Rather, Gauthier testified that he tried to get in touch with the King County Sheriffs Office when he heard they were looking for him. He explained that he spoke with Detective Knudsen on the phone. He testified that Knudsen told him about his DNA on the sleeve of a reported rape victim and explained the gravity of the situation. No other testimony was elicited on direct about Gauthier's conversation with Knudsen. He never said that he fully cooperated with Knudsen or that he agreed to provide his DNA immediately upon request.

But, on cross-examination, the prosecutor asked Gauthier numerous questions about his phone conversation with Detective Knudsen. Gauthier admitted that Knudsen let him speak and take his time to answer questions. Then the prosecution asked, "And he also asked if you would provide a DNA sample, right?" Gauthier responded, "Yes." Then the prosecution followed up, "And isn't it true that you told him no, I'm not going to provide. Initially you said you would and then...." Gauthier denied that he initially agreed to provide a DNA sample. The prosecutor then proceeded for two more pages in the record to ask about Gauthier's refusal to provide his DNA upon the advice of counsel. And, the prosecutor reiterated Gauthier's refusal on cross the following day, "Yesterday you told us that you recalled the conversation with Detective Knudsen as in part you saying no way, no how am I going to provide a DNA sample."

"Evidence of Gauthier's refusal did not impeach any of his testimony invited on direct examination. Rather, the prosecutor elicited the testimony for the primary purpose of encouraging the jury to infer guilt based on Gauthier's refusal to provide a DNA sample. She had made this intention explicit during pretrial motions. If such evidence is admissible for impeachment every time the defendant's version of events is different from the State's—as the State implied at oral argument—it would eviscerate any protection from warrantless searches the Fourth Amendment and article I, section 7 provide. This was not impeachment and therefore cannot save the State from the constitutional violation. [Footnotes omitted].

21. The Gauthier Court did not completely rule out use of refusal evidence for impeachment purposes, holding merely that its usage here was not truly impeachment, but a further attempt to use that evidence as evidence of guilt.

So---in this case, if properly raised as an issue of impeachment, this court would have to rule that refusal evidence can still be used for truly impeachment purposes. Given the language from Gauthier above, impeachment use must be VERY clear to the extent that Defendant opens the door to that usage.

V. RULING:[4]

Pursuant to the foregoing analysis, the Court now makes and enters the following Rulings:

1. **Notwithstanding the provisions of RCW 46.61.517, Defendant Bramble's refusal to submit to a blood test may not be used in the City's case in chief as substantive evidence of guilt.**
2. **RCW 46.61.517 is declared unconstitutional to the extent that it makes the exercise of a constitutional right admissible as substantive evidence at trial in violation of defendant's Fourth Amendment and Article 1, section 7, rights.**
3. **If properly raised as an issue of impeachment, and within the framework of State v. Gauthier, such evidence would be admissible for impeachment purposes.**

DONE IN OPEN COURT this _____ day of July, 2013.

ROBERT E. McBETH, JUDGE PROTEM

[4] **This Court's analysis is limited to the question of admissibility of refusal evidence in the context of a CRIMINAL trial. This Court expresses no opinion as to the applicability of its analysis in the context of a civil context of license revocation with DOL.**