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CRIMINAL DIVISION
KING COUNTY PROSECUTOR'S OFFICE

No. 72142-9

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

State of Washington, Respondent,
v.
Njuguna Gishuru, Appellant,

ON DISCRETIONARY REVIEW FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S AMENDED OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Assuming the validity of an administrative license revocation order is a threshold matter of admissibility for the trial court, the Superior Court erred in affirming the trial court's failure to apply a beyond a reasonable doubt standard of proof to its threshold determination that the administrative revocation order in the instant case comported with statutory requirements.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. What standard of proof must trial courts apply when determining the validity of an administrative order revoking a driver's license as a threshold matter?

C. STATEMENT OF THE CASE

On August 19, 2011, Mr. Gishuru was stopped by officer Thomas Warwick of the University of Washington Police Department while driving on Pacific Street near Montlake Avenue due to expired tabs on his vehicle. CP 361-62. Mr. Gishuru provided his driver's license to officer Warwick upon request, and Warwick sent Mr. Gishuru's licensing information to his police dispatch. CP 364-365. An unnamed dispatcher informed Warwick that Mr. Gishuru's license was

suspended in the second degree. CP 367. Warwick then arrested Mr. Gishuru, who did not make any statements. CP 367-68.

On July 3, 2012, the State of Washington charged Mr. Gishuru with Driving While License Suspended in the Second Degree based on the above incident. CP 208. On March, 21, 2013, Mr. Gishuru moved to dismiss the prosecution pursuant to *State v. Dolson*, 138 Wn.2d 773, 982 P.2d 100 (1999), on the basis that the Department of Licensing (hereinafter "DOL"), in revoking his driver's license, failed to comply with RCW 46.20.245 or procedural due process requirements. CP 177-181. Mr. Gishuru specifically alleged that the State could not establish actual mailing of notice in compliance with RCW 46.20.245 because:

The DOL's record of its form notice of revocation, which contains the general certification that the letter was mailed, would be the same whether or not the letter was sent because the certification is included on the document itself. The DOL's certification of mailing therefore establishes only that the notice of revocation was created, not that it was mailed.

CP 180. Mr. Gishuru further alleged that because of DOL's failure to mail his letter, he had not requested a hearing to contest his license suspension. CP 178.

At a pre-trial hearing on March 29, 2013, Kevin Taylor, a customer service specialist employed by the DOL's suspensions unit, testified as the only witness. CP 216-235. Mr. Taylor testified that he

conducted a licensing search of Mr. Gishuru's licensing history using Mr. Gishuru's driver's license number and reviewed a "Notice of Revocation" and an address history. CP 221. Through Mr. Taylor, the State laid the foundation for admission of the administrative order revoking Mr. Gishuru's license, i.e. the "Notice of Revocation." CP 437-440; CP 491.

The Notice of Revocation contains the following sworn statement by Liz Luce, identified therein as an "Agent for the Department of Licensing":

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 mailbox, a true and accurate copy of this document to the person named herein at the address shown, which is the last address of record.

CP 491; see also CP 178. The document contains what appears to be Ms. Luce's handwritten signature under the sworn statement. CP 440; CP 491. Mr. Taylor testified that Ms. Luce was actually the director of the Department of Licensing in March of 2011. CP 441. Taylor further testified that, in spite of this sworn statement, Luce had no part in generating or mailing revocation letters generally or specifically in the case of the letter allegedly sent to Mr. Gishuru. CP 229-30, 234. He did

not elaborate on how exactly Ms. Luce had “caused” the letter to be placed in the mail on March 9, 2011.

Mr. Taylor described the process that the DOL uses to generate such revocation orders, notify the licensee of the order, and store the revocation in a database called the “imaging system.” CP 216-22. When the DOL receives an arrest report from a police officer, employees check to see what driver was involved, pull up the relevant record, and, depending on the type of offense, enter a suspension code onto the driver’s record. CP 217. The Notice of Revocation in Mr. Gishuru’s file cites RCW 46.20.3101 as the basis for Mr. Gishuru’s suspension. CP 491. When a suspension code is entered into an individual’s DOL record, an electronic document is created and either sent to a distribution center for printing or held for manual mailing. CP 231. When DOL employees create orders, such as the one relating to Mr. Gishuru, the sworn statement is generated automatically at the time the letter is created. CP 234. Mr. Taylor did not specify whether Mr. Gishuru’s letter was automatically sent for distribution or held for manual mailing. Mr. Taylor also did not know the name of the person who generated the Notice of Revocation he found in DOL’s records database associated with Mr. Gishuru. CP 230-31.

Revocation orders are usually automatically generated overnight and mailed to that individual's last known address, although Mr. Taylor did not offer further specifics regarding the relative frequency of automatic versus manual generation. CP 222-223. A notice that is generated automatically is printed and mailed at Consolidated Mail Services (hereinafter "CMS"), a separate facility from the DOL. CP 231. While there have been errors with printing at CMS, if there is an error transmitting a notice to the mailing service, the DOL is notified and the notice is regenerated at a later date. CP 232.

The trial court denied the defendant's pre-trial motion to dismiss, finding by a preponderance of the evidence that the DOL followed protocol and the only inference it could draw based on the evidence presented was that the DOL had mailed notice to Mr. Gishuru of his license revocation. CP 244.

At trial, Mr. Gishuru moved in limine to exclude the sworn statement of Liz Luce for the reason that it was testimonial. CP 63-64; see also CP 272-73. Mr. Gishuru renewed this objection during trial, and the trial court admitted the sworn statement contained in the revocation order over the defense objection. CP 388.

Mr. Gishuru proposed an instruction that a revocation is not in effect unless the State provides notice and an opportunity for a hearing. CP 72; CP 408. The trial court declined to instruct the jury on the defendant's theory that an order is not "in effect" absent mailing of notice. CP 81-94 ("Court's Instructions to the Jury"). The trial court further prohibited Mr. Gishuru's counsel from arguing said theory of the case in closing argument. CP 429-30.

Following his conviction at trial, Mr. Gishuru appealed challenging the trial court's denial of his pre-trial motion to dismiss, its denial of his motion to dismiss for insufficient evidence at trial, its admission of testimonial hearsay in violation of his right to confrontation, and its restriction of defense counsel's closing argument at trial. CP 454. In his reply to the Respondent's Brief on RALJ, Mr. Gishuru argued that the State must prove compliance with statutory and procedural due process beyond a reasonable doubt when challenged by a defendant prior to trial. CP 499. On June 16, 2014, the superior court affirmed Mr. Gishuru's conviction. CP 501-505. On December 29, 2014, this court granted discretionary review of the superior court's ruling.

D. ARGUMENT

1. THE SUPERIOR COURT ERRED IN AFFIRMING THE TRIAL COURT'S FAILURE TO APPLY THE BEYOND A REASONABLE DOUBT STANDARD OF PROOF TO THE QUESTION OF WHETHER AN ORDER REVOKING MR. GISHURU'S LICENSE COMPORTED WITH DUE PROCESS.
 - a. In a prosecution for violation of RCW 46.20.342, the State must prove that the revocation of an individual's privilege to operate a motor vehicle comported with due process.

An administrative revocation of a driver's license must comply with procedural due process. *State v. Storhoff*, 133 Wn.2d 523, 527, 946 P.2d 783, 785 (1997) (citing *Bell v. Burson*, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589, 29 L.Ed.2d 90 (1971)). A State that seeks to terminate an individual's driving privileges must provide 1) notice and 2) an opportunity to be heard before the termination becomes effective. *Id.* Notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Jones v. Flowers*, 547 U.S. 220, 227, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)); see also *City of Redmond v. Arroyo-Murillo*, 149 Wn.2d 607, 612, 70 P.3d 947 (2003). Notice is reasonably calculated if

“[t]he means employed [are] such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.”
Jones, 126 S.Ct. at 1715 (quoting *Mullane*, 339 U.S. at 315, 70 S.Ct. 652).

It is well settled that a legally valid revocation of an individual’s privilege to operate a motor vehicle is a predicate to prosecution for driving during the period of such a revocation. *State v. Dolson*, 138 Wn.2d 773, 777, 982 P.2d 100 (1999). It is similarly well settled that the State bears the burden of proving the existence of this legally valid predicate. *Id*; *Arroyo–Murillo*, 149 Wn.2d at 612. This court has recently held that the legal validity of a revocation order is a threshold determination that must be made by the trial court. *State v. Mecham*, 181 Wn.App. 932, 951, 331 P.3d 80, 89 review granted, 337 P.3d 325 (2014) (citing *State v. Miller*, 156 Wn.2d 23, 31, 123 P.3d 827 (2005)).

The procedural safeguards applicable to this threshold determination are not well established by case law. RCW 46.20.245 codifies the procedures the DOL must follow when revoking an individual’s license or privilege to operate a motor vehicle in order to ensure compliance with procedural due process:

Whenever the department proposes to withhold the driving privilege of a person or disqualify a person from operating a

commercial motor vehicle and this action is made mandatory by the provisions of this chapter or other law, the department must give notice to the person in writing by posting in the United States mail, appropriately addressed, postage prepaid, or by personal service. Notice by mail is given upon deposit in the United States mail. Notice given under this subsection must specify the date upon which the driving privilege is to be withheld which shall not be less than forty-five days after the original notice is given.

RCW 46.20.245(1). RCW 46.20.205 further requires that the department of licensing maintain an “address of record” for licensees and send notice of any licensing changes or revocation to the current address of record as maintained by the DOL according to its own internal procedures. The Washington Supreme Court has distinguished the notice requirements imposed by RCW 46.20.205 and .245 – i.e. statutory due process – from an “as-applied” challenge to the notice procedures employed by DOL – i.e. procedural due process. *State v. Nelson*, 158 Wn.2d 699, 704, 147 P.3d 553 (2006) (“We agree with Nelson that the State's statutory compliance does not preclude Nelson from bringing this as-applied procedural due process challenge.”)

The Washington Supreme Court has articulated a clear rule that defendant’s wishing to challenge notification procedures as applied must “articulate a violation.” *State v. Smith*, 144 Wn.2d 665, 678, 30 P.3d 1245 (2001), *superseded by statute on other grounds as*

recognized by State v. Varga, 151 Wn.2d 179, 86 P.3d 139 (2004). In *Smith*, the defendant raised no objections or motions at the trial level regarding the procedures employed by the DOL to notify him of the revocation of his license, but instead simply asserted on appeal that the State had failed to establish compliance with procedural due process in its case in chief because it failed to establish how the DOL obtained the address to which it sent defendant notice of the revocation of his license. *Id.* at 677-78. The Supreme Court held that the State had made a prima facie showing during trial by introducing a certification from DOL that it had mailed the revocation notice to the appellant's address of record. *Id.* at 678 ("All the State had to show in order to prove compliance with RCW 46.65.065 is that DOL mailed the revocation notice to Dorsey's "address of record." This was proved when the prosecutor properly introduced into evidence DOL's certification that the revocation notice was sent to Dorsey's address of record.") The Supreme Court further held that this showing satisfied the State's burden under RCW 46.65.065 absent some further articulation of a due process violation by the defense. *Id.* ("Because Dorsey's counsel did not properly articulate a due process challenge, it was not necessary to require the State to provide more evidence than it did at trial.")

In the instant case, the defendant filed a motion to dismiss his prosecution under RCW 46.20.342 for the reason that the State had provided him with insufficient proof that the DOL had complied with statutory requirements of notice. The trial court held a hearing on the matter in question on March 29, 2013 and thus, under clearly established law, the State bore the burden of establishing that the revocation of defendant's license complied with statutory requirements. CP 245.

- b. Per the rule of *Green*, the validity of an administrative license revocation order involves a question of both fact and law.

The first question that this Court must answer is whether a pre-trial challenge to an administrative license revocation order presents a mixed question of law and fact. Appellate courts have typically held that threshold determinations in criminal matters analogous to the instant case involve mixed questions of law and fact. *See Thompson v. Keohane*, 516 U.S. 99, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995) (whether or not a suspect is in custody, requiring Miranda warnings prior to interrogation, is a mixed question of law and fact); *State v. S.M.*, 100 Wn.App. 401, 409, 996 P.2d 1111 (2000) (ineffective assistance of counsel claims present mixed questions of law and fact reviewed de

novo); *State v. Vasquez*, 109 Wn.App. 310, 318, 34 P.3d 1255, 1259-60 (2001) *affirmed by* 148 Wn.2d 303, 59 P.3d 648 (2002) (probable cause is a mixed question of law and fact). On the other hand, a determination of the validity of a judicial order in a prosecution for its violation is purely a question of law. *State v. Miller*, 156 Wn.2d 23, 123 P.3d 827 (2005).

The State may rely on *State v. Mecham*, 181 Wn.App. 932, 331 P.3d 80, *review granted*, 337 P.3d 325 (2014), to assert that the validity of an administrative license revocation order, like a judicial no-contact order, is purely a question of law. Such an argument is inapposite for two reasons. First, the procedural safeguards described in *Dolson* and *Smith* in the previous section, require proof of facts as opposed to mere legal determinations, hence the assignment of a burden of proof. *See Arroyo–Murillo*, 149 Wn.2d at 612. From this assignment of a burden of proof, one can infer that the threshold determination of the validity of an administrative licensing revocation order is a mixed question of law and fact requiring proof of facts from which a trial court may draw legal conclusions.

Second, the *Mecham* Court's acceptance of the State's characterization of the validity of a license revocation order as a legal

conclusion was misplaced, albeit understandably so given the briefing of the parties. In *Mecham*, this Court, relying on *State v. Miller*, 156 Wn.2d 23, 123 P.3d 827 (2005), held that whether an order of revocation had been mailed was not a fact that the State must prove at trial in a prosecution for driving while license suspended. *Mecham*, 181 Wn.App. at 951. In *Miller*, the defendant asserted that prosecution for violation of a domestic violence court order under RCW 26.50.110 required the State to prove the validity of the underlying judicial order allegedly violated, including the facts giving rise to the issuance of the order. *Miller*, 156 Wn.2d at 28. The Supreme Court held that the validity of a judicial order was not an element, express or implied, of the crime of violation of such an order and was therefore a collateral matter of “applicability” for the court to resolve in deciding whether to admit the order into evidence. *Id.* at 31. The Court further noted that: “[t]he legislature likely did not include validity as an element of the crime because issues concerning the validity of an order normally turn on questions of law. Questions of law are for the court, not the jury, to resolve.” *Id.*

On appeal, *Mecham* claimed that mailing of notice of a license revocation was a material fact at trial. *Mecham*, 181 Wn.App. at 951.

Mecham, however, presented no authority for the proposition beyond a bare, single sentence assertion by counsel. See Brief of Appellant at 38-39, *State v. Mecham*, 181 Wn.App. 932, 331 P.3d 80 (2014) (No. 69613-1-I). The State responded by asserting that constitutional challenges are a question of law, not fact. Brief of Respondent at 35-36, *State v. Mecham*, 181 Wn.App. 932, 331 P.3d 80 (2014) (No. 69613-1-I). In support of this assertion, the State incorrectly recited the elements of the crime of driving while license suspended, omitting the critical statutory requirement that the order of revocation be “in effect.” *Id.* at 35; see RCW 46.20.342(1). Neither party, nor the *Mecham* court itself, referenced this critical distinction between RCW 46.20.342 and the statute at issue in *Miller*, RCW 26.50.110, which contains no analogous language regarding the effectiveness or validity of the judicial order. Nor did either party draw the *Mecham* court’s attention to the recent holding of this Court in *State v. Green*, 157 Wn.App. 833, 239 P.3d 1130, 1135 (2010), that administrative orders shall not receive the same deference in criminal proceedings as judicial orders, or established authority from the Court of Appeals for Division Two holding that the State must present evidence of mailing of notice at trial in a prosecution for driving while license suspended. *State v. Thomas*, 25 Wn.App. 770,

772, 610 P.2d 937, 939 (1980) (“It has been established that the state need not prove actual receipt of a notice of suspension as an element of the misdemeanor of driving with a suspended license; it must only present evidence that notice was mailed to the defendant.”)

The validity of a non-judicial, administrative order, as it pertains to statutory compliance by the issuing agency, is not a pure legal conclusion and therefore must be proven beyond a reasonable doubt. *Green*, 157 Wn. App. at 845. In *Green*, the State prosecuted the defendant for criminal trespass under RCW 9A.52.070 on the theory that she unlawfully entered her child’s elementary school in violation of a letter sent to her by school administrators revoking her statutory license to enter the premises. *Id.* at 841. A determination of the lawfulness of the State’s administrative order involved both the finding of facts and the application of statutory law to said facts: although Ms. Green had a statutory license to enter the premises of her child’s school, the school revoked this license pursuant to statutory authority outlining circumstances in which administrators had such authority and process required before such a revocation could take effect. *Id.* at 839; see RCW 28A.605.020. This Court held that “[t]o prove that the revocation of Green’s right to access campus was lawful, the school

district was required to prove that Green had disrupted a classroom procedure or learning activity.” *Id.* at 851. This Court summarized the issue and rule as follows:

The State seeks to treat the notice of trespass as functionally equivalent to judicial orders [...]. Judicial orders generally may not be challenged in a subsequent proceeding for the violation of such an order. Instead, a judge determines the validity of these orders as a matter of law when determining whether to admit them into evidence. Violation of the judicial order gives rise to criminal punishment *without evidence regarding the facts underlying the order*, because those facts have already been established in a prior judicial proceeding. The notice of trespass issued by the school district is not a judicial order and was not issued with the same procedural protections as a judicial order. The school district's notice of trespass is not entitled to the same deference as a judicial order.

Id. 845-46 (emphasis added). The court further noted that the Washington Supreme Court had previously declined to extend such deference to the ex parte legal determination of a police officer. *Id.* at 850 (citing *City of Bremerton v. Widell*, 146 Wn.2d 561, 569, 51 P.3d 733 (2002)).

In contrast, the Supreme Court has recently augmented the deference afforded judicial orders in criminal prosecutions by applying the collateral bar rule to criminal prosecutions. *City of Seattle v. May*, 171 Wn. 2d 847, 852, 256 P.3d 1161 (2011). The collateral bar rule

holds that where a judicial order is not void¹, any defects within the order simply go to whether the order was “merely erroneous, however flagrant,” and it cannot be collaterally attacked. *Id.* at 853. An exception exists only if there is “an absence of jurisdiction to issue the type of order, to address the subject matter, or to bind the defendant.”

Id. The United States Supreme Court enunciated the principle underlying this rule over 60 years ago:

The rule of law [...] followed in this case reflects a belief that in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion.

Walker v. City of Birmingham, 388 U.S. 307, 320-21, 87 S. Ct. 1824, 1832, 18 L. Ed. 2d 1210 (1967). The holding of *May* is the logical extension of this principle that the citizenry may not violate judicial orders they, in their own legal analysis, deem to be erroneous.

When read together, *Green*, *Miller*, and *May* stand for the proposition that the deference accorded an order in subsequent criminal proceedings for its violation should depend upon the level of

¹ Lest the State be tempted to argue that *May*'s use of the term “void” is analogous to the use of said term in the context of a license suspension that does not comport with due process, it should be noted that the *May* court used the term void to connote an order issued by a court generally lacking the jurisdiction to issue such an order. See *May*, 171 Wn.2d at 853 (“For an order to be void, the court must lack the power to issue the *type* of order.”). The DOL has the general authority to revoke licenses, thus the concept of voidness as applied in *May* is not analogous to that applied in *Dolson*.

procedural protection attendant to its becoming effective. The mere existence of a judicial order establishes certain safeguards inherent in judicial proceedings themselves; the finding of underlying facts, proper notice, and an opportunity for a hearing are all typically documented within the record made by a judge in a court of law. On the other hand, an administrative order lacks such inherent safeguards; the validity of an administrative license revocation depends upon on a police officer's ex parte decision to arrest an individual and subject them to a breath test and a DOL employee's ex parte act of mailing a letter notifying the individual of the proposed revocation and providing an opportunity for a hearing.² The revocation of Mr. Gishuru's license is more akin to a trespass order issued by an elementary school administrator than a judicial no-contact order issued after careful consideration of facts and law by a judge in recorded proceedings subject to the inherent procedural safeguards of open court proceedings. A police officer's determination of probable cause to arrest for violation of RCW 46.61.502 – the event triggering Mr. Gishuru's license revocation – and the DOL's misleading assertion that it provided pre-deprivation notice

² See RCW 46.20.3101; see also State's Exhibit 1 citing RCW 46.20.3101 as the basis for revoking Mr. Gishuru's license. (CP 491).

should not be afforded the same deference as a judicial order made in a court of law.

- c. The effectiveness of a license revocation order is an element of the criminal act prohibited by RCW 46.20.342, and therefore facts underlying the legal validity of said order must be proven beyond a reasonable doubt.

Courts construe a statute by first looking at its plain language. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). A statute's “[p]lain meaning ‘is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.’ ” *Id.* (quoting *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009)). If the statute is unambiguous upon reviewing its plain meaning, courts shall conduct no further inquiry. *Id.* “If a statute is subject to more than one reasonable interpretation, it is ambiguous; and the rule of lenity [requires] us to interpret an ambiguous criminal statute in the defendant's favor absent legislative intent to the contrary.” *State v. Mandanas*, 168 Wn.2d 84, 87–88, 228 P.3d 13 (2010). A statute is not ambiguous merely because different interpretations are conceivable. *State v. Gonzalez*, 68 Wn.2d 256, 263, 226 P.3d 131 (2010).

Only where a statute is ambiguous may courts resort to canons of statutory construction. *State v. Fisher*, 139 Wn.App. 578, 583, 161 P.3d 1054 (2007). Statutes should be construed to effect their purpose, and strained, unlikely, or absurd consequences resulting from a literal reading are to be avoided. *State v. Leech*, 114 Wn.2d 700, 708–09, 790 P.2d 160 (1990). Courts may not construe a statute to reach an absurd result, because they must not presume that the legislature intended absurd results. *State v. Vela*, 100 Wn.2d 636, 641, 673 P.2d 185 (1983). If a statute is ambiguous, we apply the rule of lenity in favor of the accused. *State v. Lively*, 130 Wn.2d 1, 14, 921 P.2d 1035 (1996); *State v. Stratton*, 130 Wn.App. 760, 764–65, 124 P.3d 660 (2005).

As noted previously, in contrast to the crime of violation of a court order under RCW 26.50.110, the legislature included the language “in effect” as an essential element of the crime as defined in RCW 46.20.342. It stands to reason that an order is not “in effect” if it is void. The legislature has seen fit to require that “[w]henver the department proposes to suspend or revoke the driving privilege of any person or proposes to impose terms of probation on a person's driving privilege or proposes to refuse to renew a driver's license, notice and an opportunity for a driver improvement interview shall be given *before*

taking such action [...].” RCW 46.20.322(1) (emphasis added). The explicit requirement that the DOL may not revoke a license without giving notice renders any order given without notice *statutorily* void (as opposed to constitutionally void), and therefore within the purview of the “in effect” provision of RCW 46.20.342.

Several related statutes further reveal this legislative intent. The legislature has enumerated circumstances which shall not affect whether an order is “in effect.” RCW 46.20.320. The legislature conspicuously chose not to enact any similar provision stating that an order of revocation shall be in effect notwithstanding the provision of notice. The plain language of RCW 46.20.245 requires that whenever the Department of License proposes to revoke the license of an individual, it *shall* give notice by mail or personal service no less than forty five days prior to the effective date of the proposed revocation. RCW 46.20.245 (emphasis added). The legislature similarly used the word “effective” in describing such notice procedures in RCW 46.20.205(b):

Any notice regarding the cancellation, suspension, revocation, disqualification, probation, or nonrenewal of the driver's license, commercial driver's license, driving privilege, or identicard mailed to the address of record of the licensee or identicard holder is effective notwithstanding the licensee's or identicard holder's failure to receive the notice.

“Effective” means in operation at a given time. Black's Law Dictionary (10th ed. 2014). The use of the word “effective” in RCW 46.20.245 indicates a requirement that notice be of sufficient quality to have an impact broader than mere satisfaction of the requirements of RCW 46.20.245. Had this provision been intended as a qualitative measure of whether notice procedures merely complied with the internal directive of RCW 46.20.245 that the legislature shall send notice, the legislature would have used the word “adequate” or “sufficient.” “Sufficient” means adequate; of such quality, number, force, or value as is necessary for a given purpose. Black's Law Dictionary (10th ed. 2014).

Finally, the Washington Supreme Court’s holding in *Smith*, discussed supra, supports the conclusion that mailing is a fact to be found beyond a reasonable doubt (whether by the jury or the court as a threshold matter). *Smith* raised the issue of statutory compliance for the first time on appeal. *Smith*, 144 Wn.2d at 677. In spite of *Smith*’s failure to raise the issue below, the Court did not summarily dismiss the claim out of hand as one would expect if the State bore no burden at trial. Instead, the Court held:

In this case, Dorsey argues the State had the burden of producing evidence at trial that DOL sent a revocation notice to

an address provided by Dorsey. [...] RCW 46.65.065 requires that DOL send the notice of revocation to the address of record. All the State had to show in order to prove compliance with RCW 46.65.065 is that DOL mailed the revocation notice to Dorsey's "address of record." This was proved when the prosecutor properly introduced into evidence DOL's certification that the revocation notice was sent to Dorsey's address of record. Dorsey did not allege that DOL sent the revocation notice to an address other than that of record. Dorsey's only argument was that the State had not met its burden. Dorsey needed to allege at least that DOL failed to comply with the statute by sending the notice to an address other than Dorsey's address of record. Because Dorsey's counsel did not properly articulate a due process challenge, it was not necessary to require the State to provide more evidence than it did at trial.

Id. at 677-78. The Washington Court of Appeals for Division Two has also recognized this requirement of proof of mailing as discussed *supra*, at 27. *Thomas*, 25 Wn.App. at 772.

Any other interpretation of the term "in effect" would yield an absurd result. The instant case perfectly illustrates this potential absurdity: where the DOL failed to send notice, a defendant would not know whether or why this happened; he would simply know that he never received any notice and that he was arrested for unwittingly committing the crime of driving with a suspended license. Even investigation by defense counsel following the filing of criminal charges may not reveal whether or why the DOL did not send proper notice. Moreover, the DOL's preprinted certification appears

intentionally designed to obfuscate the lack of documentation of how, when, and whether its letters are actually mailed or by whom. The idea that notice merely requires proof that DOL “probably” or “more likely than not” mailed a letter to the licensee is clearly not within either the plain meaning of RCW 46.20 or the intent of its drafters.

- d. Where the validity of an administrative order is an element of the crime charged and a determination of the validity of said order is a mixed question of law and fact, a beyond a reasonable doubt standard of proof must apply to any fact-finding.

Undersigned counsel is aware of no Washington case addressing the standard of proof applicable to a threshold determination of the validity of a driver’s license revocation. Washington appellate courts have applied a range of standards of proof in other pre-trial, threshold determinations to be made by trial courts. *See State v. Campos-Cerna*, 154 Wn.App. 702, 709, 226 P.3d 185 (2010) (the State must show a knowing, intelligent, and voluntary waiver of *Miranda* rights by a preponderance of the evidence); *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009) (the State must establish an exception to the warrant requirement by clear and convincing evidence); *Florida v. Harris*, ___ U.S. ___, 133 S.Ct. 1050, 1055-56, 185 L.Ed. 2d 61 (2013) (Existence of probable cause cannot be reduced to a precise

quantification such as proof beyond a reasonable doubt or a preponderance of the evidence; instead it is the fair probability on which reasonable and prudent people, rather than legal technicians, would act); *State v. Swindell*, 93 Wn.2d 192, 196-97, 607 P.2d 852 (1980) (Constitutional validity of predicate conviction in prosecution under RCW 9.41.040 must be proven beyond a reasonable doubt at trial).³

The Washington Supreme Court in *Swindell* construed RCW 9.41.040 – the Washington statute criminalizing the possession of firearms by felons – to require proof of the Constitutional validity of predicate convictions beyond a reasonable doubt. *Swindell*, 93 Wn.2d at 196-97. The Washington Supreme Court later enunciated the procedure for this determination as follows:

First, a defendant may raise a defense to such a prosecution by alleging the constitutional invalidity of a predicate conviction, and second, upon doing so, the State must prove beyond a reasonable doubt that the predicate conviction is constitutionally sound.

³ Most analogous to the validity of a DOL revocation order is the validity of an administrative order revoking a defendant's license to enter an elementary school. See *State v. Green*, 157 Wn. App. 833, 239 P.3d 1130, 1135 (2010) (the validity of an administrative trespass order issued pursuant to statutory authority rendering defendant's presence unlawful must be proven beyond a reasonable doubt at trial.) See argument *infra* that the validity of a DOL order is an element of the crime. It is noteworthy in this context that the validity of the administrative order revoking a license in *Green* required proof beyond a reasonable doubt.

State v. Summers, 120 Wn.2d 801, 812, 846 P.2d 490 (1993). This Court has applied a similar statutory construction to predicate convictions for the crime of felony violation of a domestic violence court order. *State v. Carmen*, 118 Wn.App. 655, 668, 77 P.3d 368 (2003), *overruled on other grounds by State v. Miller*, 156 Wn.2d 23123 P.3d 827 (2005) (“[T]he court, not the jury, must determine the validity of the predicate convictions for purposes of RCW 26.50.110(5).”)

A critical distinction between the standards of proof at various types of threshold hearings is the rights implicated by their subject matter; a hearing on a *Miranda* waiver implicates a prophylactic rule rather than a defendant’s Fifth Amendment privilege itself and thus logically requires a lower standard of proof. A suppression hearing typically implicates a defendant’s rights under either the Fourth Amendment or Article I, section 7, although does not necessarily implicate an essential element of the crime charged, and therefore requires a heightened standard of proof. A predicate conviction or license revocation typically implicates a defendant’s right to due process of law or right to counsel and, if deemed admissible, generally establishes a *prima facie* showing of an essential element of the crime

charged. Thus, the highest standard of proof should apply to such a threshold determination.

Finally, that RCW 46.20.342 is a strict liability crime only highlights the reasonableness and appropriateness of a beyond a reasonable doubt standard of proof. In the case of a judicial no-contact order, prosecution requires knowledge (see RCW 26.50.110), and an individual who knows of an improper judicial order has avenues for relief. Mr. Gishuru does not ask this Court to resolve whether the State must prove at trial his underlying conduct triggering the revocation pursuant to RCW 46.20.3101. Nor does he assert that the State must prove that he actually received notice. He simply demands proof that the DOL actually mailed him notice as required by statute. The State proposes as a general matter that the law allows it to prosecute a diligent licensee, i.e. one who faithfully apprises the DOL of his current address in the event DOL needs to communicate with him, for a strict liability crime so long as the State can establish, under relaxed rules of evidence, the mere probability of an attempt to inform the licensee that future conduct would be criminal.

- e. The interest of the defendant and the public in ensuring the reliability of DOL notice procedures through the application of the procedural safeguard of a beyond reasonable doubt standard of proof outweighs any

minimal administrative or financial burdens that the imposition of such a standard would incur.

The Washington Supreme Court has recently rejected and then subsequently approved of the application of the balancing test enunciated in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), to state criminal procedural rules. *See State v. Brousseau*, 172 Wn. 2d 331, 362, 259 P.3d 209, 224 (2011) (balancing test applied to presumption contained within child hearsay statute related to pretrial evidentiary hearing); *see also State v. Heddrick*, 166 Wn.2d 898, 904, 215 P.3d 201, 204 (2009) (“[T]he Mathews balancing is not appropriate in criminal cases.”) Under the *Mathews* framework, a court determines the procedural safeguards to which an individual is entitled by balancing (1) the significance of the private interest to be protected; (2) the risk of erroneous deprivation of that interest through the procedures used; and (3) the fiscal and administrative burdens that the additional procedural safeguards would entail. *Brousseau*, 172 Wn.2d at 346 (internal citations omitted).

The private interest in the instant case is the right to be free from criminal conviction predicated upon the revocation of a driver’s license in violation of the notice requirements contained within RCW 46.20.205 and .245. *See Brousseau*, 172 Wn.2d at 347 (“The interest to

be protected is a criminal defendant's right to be free from a conviction based on incompetent evidence.”)

The risk of error given the procedures employed in the instant case is high. RCW 46.20.342 creates a set of strict liability crimes. Although the legislature may lawfully enact strict liability proscriptions, strict liability crimes are strongly disfavored. *State v. Anderson*, 141 Wn.2d 357, 367, 5 P.3d 1247, 1252 (2000). Moreover, while RCW 46.20.342 creates a strict liability offense, the legislature has provided for a means of ensuring that licensees who diligently maintain current address info with the DOL will not be unwittingly deprived of their license without notice and opportunity for a hearing; specifically, the legislature has adopted a series of simple rules in RCW 46.20.205 and .245 that embody the minimum requirements of due process. Where the department proposes to revoke an individual's license, it *shall* send written notice by mail or effect personal service. RCW 46.20.245. Written notice is effective when sent to a licensee's address of record as maintained by the DOL. RCW 46.20.205. These statutes evince a clear intent by the legislature to ensure that diligent licensees will be reasonably free from prosecution for an unwitting malum prohibitum. Given the addition of this safeguard to an otherwise

strict liability offense, it seems absurd to consider the possibility that the legislature intended for this safeguard to function at a low level of certainty such as “probably” or “more likely than not.”

Under the *Mathews* test, this Court must consider the burden on the State to prove compliance with statutory procedures beyond a reasonable doubt. The cost of such compliance would be minimal; the automated system employed by the State for mailing letters would merely need to employ some mechanism to electronically verify printing and mailing (or produce a testifying witness with more robust knowledge of the procedures currently employed). Even the trial court itself, having heard the evidence presented by the State, agreed with this premise:

COURT: You know Mr. Wolf, I, I don't disagree with you that this leaves-- to be desired. And frankly, I think the DWLS process could be significantly more thorough without a whole lot of expenditure of resources.

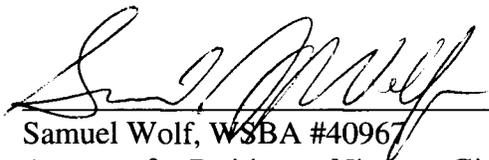
CP 244. Given that the DOL already employs an apparently automated system, the costs of modifying such a system to verify the specific date and occurrence of mailing would be minimal.

E. CONCLUSION

For the foregoing reasons, this Court should reverse Mr. Gishuru's conviction and remand Mr. Gishuru's case for proceedings consistent with its rulings.

Dated this 18th day of May, 2015

Respectfully submitted,



Samuel Wolf, WSBA #40967
Attorney for Petitioner, Njuguna Gishuru

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

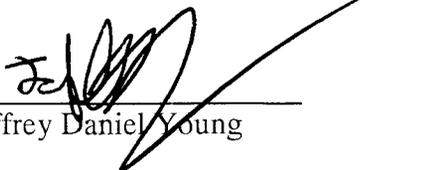
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Respondent,)	
)	Declaration of
v.)	Document Filing
)	And Service
Njuguna Gishuru, Petitioner)	
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STATE OF WASHINGTON
2015 MAY 18 PM 12:59

I, Jeffrey Young declare under penalty of perjury of the laws of the State of Washington that the following is true and correct:

I am over 18 years of age; that on May 18, 2015, I caused the original **Brief of Appellant** to be filed in the **Court of Appeals – Division One** and personally served the attorney for Respondent with a true copy of the same, by delivering it to the King County Prosecutor’s Office, W-554 King County Courthouse, 516 Third Avenue, Seattle, Washington 98104.

Signed in Seattle, Washington this 18th day of May, 2015.



Jeffrey Daniel Young