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THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 77629-6
	)	
vs.	)	(Court of Appeals No. 54905-7-D)
	)	
MARK PHILLIP NELSON,	)	<del>APPELLANT'S</del> REPLY BRIEF
	)	PETITIONER'S
Petitioner.	)	
	)	
	)	
	)	

I. ARGUMENT

A. The License Revocation Upon Which Mr. Nelson's Suspended License Conviction Is Based Occurred In Violation Of His Constitutional Due Process Rights.

Even though the Department of Licensing (DOL) technically complied with the statutory requirements pertaining to how it is to designate and maintain a licensee's address of record, the revocation of Mr. Nelson's license violated his constitutionally guaranteed rights. As applied to

1 petitioner Nelson, what could be an otherwise constitutional statutory scheme failed. City of  
2 Redmond v. Arroyo-Murillo, 149 Wn.2d 607, 70 P.3d 947 (2003).

3 United States Supreme Court precedent in Robinson v. Hanrahan, 409 U.S. 38, 93 S. Ct.  
4 30, 34 L. Ed. 2d 47 (1972) unequivocally establishes that if the government knows that a target  
5 of a property seizure is jailed, the government must attempt to notify that citizen of its intent to  
6 take her property at place of incarceration, not an unreachable residence. The April 25, 2006  
7 United States Supreme Court decision in Jones v. Flowers squarely affirmed this very principle:

8 In Robinson v. Hanrahan, we held that notice of forfeiture proceedings sent to a vehicle  
9 owner's home address was inadequate when the State knew that the property owner was  
in prison.

10 Jones v. Flowers, 126 S. Ct. 1708, 1716; 164 L. Ed. 2d 415 (2006); Mullane v. Central Hanover  
11 Bank & Trust Co., 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

12 Because its single letter mailed to Kirkland was not reasonably calculated to reach  
13 Nelson, the DOL failed to give Mr. Nelson constitutionally adequate notice. Despite the  
14 apparent statutory compliance, the underlying revocation was faulty, the trial court was wrong  
15 in finding to the contrary, and the DWLS1 conviction must now be reversed.

16 B. The State's Attempt To Have This Court Take Additional Evidence Does  
17 Not Change The Fact That The Underlying Attempt At Notice Was  
Constitutionally Inadequate.

18 Almost four years into this appeal, the respondent State has now gone to great lengths to  
19 suggest that Mr. Nelson or his appellate counsel have engaged in some sort of subterfuge.  
20 Nothing could be further from the truth; all of Mr. Nelson's appellate arguments have been  
21 consistent with the trial record. The State's brief includes as attachments portions of Mr.  
22 Nelson's DOL records that were not offered to the trial court.<sup>1</sup>

23 \_\_\_\_\_  
<sup>1</sup> The Court Commissioner has informed the parties that the issue of taking new evidence has been "passed to the  
merits" for consideration by the Court on the day of oral argument, June 27, 2006. Appellant Nelson has addressed

1           Regardless of how the Court rules on the State's motion to take new evidence, the  
2 critical points remain unchanged. Nothing in the papers the State has attached changes or even  
3 contradicts the fact that the DOL failed to give Mr. Nelson constitutionally adequate notice.  
4 Perhaps the only difference is that the additional evidence the State wants discussed highlights  
5 the prejudice suffered by Mr. Nelson due to the inadequate notice.

6           1)     Mr. Nelson Was In Government Custody When DOL Sought To Revoke  
7                    Him As A Habitual Traffic Offender.

8           The DOL letter stating their intent to declare Mr. Nelson to be a Habitual Traffic  
9 Offender (HTO) was mailed by the Department on March 16 of 2001. CP 33-34. At the time,  
10 Mr. Nelson was in custody because of his December 2000 DUI arrest. RP 7 (King County Jail  
11 Booking Records).

12           2)     The DOL Knew Mr. Nelson Was In Jail.

13           Both Mr. Nelson and the DUI sentencing court so informed the DOL that Mr. Nelson  
14 was in jail. CP 79-80, 84-92 (Mr. Nelson's "Driver's License Inquiry Form"; State Supp. App. 7  
15 (DOL Court Judgment Information indicating conviction for a "refusal DUI" with an arrest date  
16 of December 10, 2001 and Mr. Nelson's status as someone who is "in custody.") There is no  
17 need to impute to the DOL knowledge that Mr. Nelson was in custody, when this was a fact that  
18 both he and the sentencing court directly communicated to the DOL. Moreover, DOL is an  
19 agency necessarily familiar with the sentencing repercussions of major traffic violations,  
20 including subsequent DUIs that carry mandatory jail sentences.

21           Another one of the State's proffered supplemental records suggests that Mr. Nelson was  
22 at NRF until May 4, 2001. State Supp. App. 14. This "Substance Treatment Report" was

23           this issue in a May 5, 2006 Motion to Strike as well as a May 26, 2006 filing, Petitioner's Answer to State's Motion  
To Supplement The Record For Review. The following discussion of the papers now inserted by the State in its  
appendices is made without any waiver to the objection to the taking of this new evidence.

1 mailed to the DOL from NRF and shows that Mr. Nelson was there from January 4, 2001 and  
2 that he was in compliance with treatment when he transferred out on May 4, 2001. This  
3 document also confirms that upon his release from NRF, Mr. Nelson's address was not in  
4 "Kirkland," but in "Kenmore." State Supp. App. 14. Of course, as discussed before, the DOL  
5 made no effort to inform Mr. Nelson of the HTO revocation at the "Kenmore" address either,  
6 even though it treated this "Kenmore" address as the appropriate place for communicating with  
7 Mr. Nelson about his need to continue with substance abuse treatment. State Supp. App. 15.

8 3) With Minimal Effort, The DOL Could Have Given Mr. Nelson Actual  
9 Notice at NRF.

10 While actual notice is not constitutionally required and Mr. Nelson does not ask this  
11 Court to adopt that standard, the ease with which Mr. Nelson was reachable at NRF is  
12 noteworthy. The DOL wrote to Mr. Nelson about an unrelated revocation (for a breath test  
13 refusal) at the NRF address. State Supp. App. 6. In this letter from January 25, 2001, the DOL  
14 told Mr. Nelson that he was already revoked for having been convicted of a DUI. The DOL told  
15 him that he would soon be revoked for having refused a breath test. But, the DOL did not tell  
16 him that the agency would soon try to revoke him under the HTO statute.<sup>2</sup>

17 The State suggests that the DOL's effort would have been futile because Mr. Nelson was  
18 at NRF temporarily. If they had tried and failed, then this case would be a different one.

19 Dusenbery v. United States, 534 U.S. 161, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002) (actual  
20 notice not required, but FBI agents sending three notices – including one to a federal prison  
21 where the property owner was held, sufficiently adequate for constitutional purposes.)

22 Unfortunately, the DOL did not try at all.

23 \_\_\_\_\_  
<sup>2</sup> The underlying prosecution is based on the March 15, 2001 HTO order of revocation and that order alone. CP 33-35.

1           The State also tries to muddy the waters by implying that there is significance in the fact  
2 that the DOL HTO revocation letter returned to DOL after Mr. Nelson may have left NRF. The  
3 letter was sent to Kirkland when he was at NRF. Moreover, even though the letter indicates that  
4 it was returned to DOL on April 16, 2001, that does not mean that a delivery was attempted on  
5 that date. CP 33-35. In fact, handwritten marks on the returned envelope appear to be dates  
6 "3/17/01" and "3/28" both of which fall well within the window of when Mr. Nelson was in  
7 custody according to the King County Jail booking records. RP 7. Again, the State must bear  
8 the burden of proving that the underlying revocation comported with due process. And nothing  
9 in the trial record – or the documents that the State now wants to take as additional evidence –  
10 shows that the DOL sought to notify Mr. Nelson at NRF where it would have been most  
11 reasonable to reach him.<sup>3</sup>

12           The DOL's inaction cannot be excused. The NRF address was literally at their  
13 fingertips. The Kenmore address was available to them less than one month after the HTO  
14 revocation returned undelivered and unclaimed. It was inexcusable and unreasonable for the  
15 DOL to mail only one revocation letter and to fail to follow-up once the first attempt at notice  
16 had clearly failed, when there were reasonably available alternatives, such as sending the notice  
17 to NRF and/or Kenmore.

18           The State clings to their argument that it would not have been responsible of the DOL to  
19 effectuate an address change based upon his driver status inquiry form from NRF. That is not  
20 the issue. The issue is whether it was reasonable for them to ignore an address that appeared to  
21 have been an effective way to communicate with Mr. Nelson, in favor of only a stale address

22 \_\_\_\_\_  
23 <sup>3</sup> The State also writes that "the only known notice returned to DOL "unclaimed" was the March 15, 2001 HTO  
notification." State response brief at P.20. This is because that was the only certified mailing sent out by the  
Department. It begs reason to suggest that the other letters sent by DOL to Mr. Nelson's Kirkland address when he  
was in jail were somehow forwarded by U.S.P.S. to NRF.

1 that was inaccessible to him. Two revocation letters should have been sent. Even if the letter of  
2 the statutory scheme allowed DOL to do send only one letter to a stale address without running  
3 afoul of the Revised Code of Washington, the United States Constitution does not.

4 4) If The DOL Had Notified Mr. Nelson Of The HTO Proceedings, He  
5 Would Have Been Eligible To Argue For A Stay.

6 It is ill-fated that Mr. Nelson served jailtime as a result of this underlying conviction  
7 based on an unconstitutional license revocation. Another unfortunate aspect of this case that has  
8 not been explored to date is that if he had been given a hearing on the HTO issue, he may have  
9 very well avoided the imposition of this status altogether. RCW 46.65.060 gives the DOL the  
10 authority to stay an HTO revocation:

11 [T]he department **may stay the date of the revocation** if it finds that **the traffic offenses**  
12 **upon which it is based were caused by or are the result of alcoholism and/or drug**  
13 **addiction** as evaluated by a program approved by the department of social and health  
14 **services, and that since [the driver's] last offense he or she has undertaken and**  
15 **followed a course of treatment for alcoholism and/or drug treatment** in a program  
16 approved by the department of social and health services; such stay shall be subject to  
17 terms and conditions as are deemed reasonable by the department. Said stay shall  
18 continue as long as there is no further conviction for any of the offenses listed in RCW  
19 46.65.020(1).

20 RCW 46.65.060 (emphasis added)

21 If Mr. Nelson had the opportunity to be heard, he could have presented evidence of his  
22 participation in the NRF program that would have qualified as 60-plus days of rehabilitation in a  
23 state approved alcohol/drug treatment program and possibly obtained a stay. As State's Supp.  
App. 18 shows, Mr. Nelson dutifully continued with alcohol treatment after leaving NRF. He  
began treatment with an agency called "Alternatives" on June 13, 2001. He successfully  
"completed treatment and aftercare program" on October 21, 2003.

1 C. All Controlling Authority Commands Reversal.

2 In a United States Supreme Court decision published just one month ago, Chief Justice  
3 Roberts plainly re-affirmed the long line of precedent that commands reversal of Mr. Nelson's  
4 DWLS1 conviction:

5 In prior cases, **we have required the government to consider unique information**  
6 **about an intended recipient regardless of whether a statutory scheme is reasonably**  
7 **calculated to provide notice in the ordinary case.** In Robinson v. Hanrahan, we held  
8 that notice of forfeiture proceedings sent to a vehicle owner's home address was  
9 inadequate when the State knew that the property owner was in prison. 409 U.S., at 40,  
10 93 S. Ct. 30, 344 L. Ed. 2d 47.

11 Jones v. Flowers, 126 S. Ct. 1708, 1716 (2006). (emphasis added)

12 In Jones v. Flowers, the United States Supreme Court reversed the ruling of the Arkansas  
13 Supreme Court in a case involving a forced governmental tax sale, specifically because the pre-  
14 deprivation attempt at notice was constitutionally deficient.

15 We hold that when mailed notice of a tax sale is returned unclaimed, the State must take  
16 additional reasonable steps to attempt to provide notice to the property owner before  
17 selling his property, if it is practicable to do so. Under the circumstances presented here,  
18 additional reasonable steps were available to the State.

19 Jones v. Flowers, 126 S. Ct. 1708, 1713 (2006).

20 The Mullane, Robinson, and Dusenbery line of authority has been previously discussed in  
21 detail in appellant Nelson's opening brief. The outcome in Jones v. Flowers was all but foretold.

22 Similarly, the Jones v. Flowers holding foreshadows how this appeal must be resolved:

23 We conclude that, under the circumstances presented, the State cannot simply ignore that  
information in proceeding to take and sell the owner's property -- any more than it could  
ignore the information that the owner in Robinson was in jail.

Jones v. Flowers, 126 S. Ct. 1708, 1720 (U.S. 2006)

This case is not about globally re-defining the duties and obligations of the Department of  
Licensing vis-à-vis all drivers. It is but one driver's response to this Court's invitation for "as

1 applied” due process challenges to an extremely broad statutory license revocation scheme. City  
2 of Redmond v. Arroyo-Murillo, 149 Wn.2d 607, 70 P.3d 947 (2003). This case is about not  
3 shutting one’s eyes to that which is plain to see. It is not reasonable for the government to skimp  
4 on \$3.74 in postage and thus take advantage of a jailed man’s inability to protect what is his.

5  
6 DATED this 26th day of May, 2006.

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9 Mick Woynarowski, WSBA #32801  
10 Attorney for Appellant Nelson  
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CERTIFICATION OF SERVICE BY MAIL

Today I deposited in the mails of the United States of America, via postage prepaid, a properly stamped envelope directed to:

Deanna Jennings Fuller, the attorney of record for respondent State at the following address:

King County Prosecutor's Office  
516 3<sup>rd</sup> Avenue, Suite W554  
Seattle, WA 98104-2385

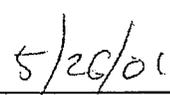
In addition, I emailed a copy of this motion to the same attorney at her office at Deanna.Fuller@metro.kc.gov

The email and the mailed envelope contained a copy of the Petitioner's Reply Brief, Cause #77629-6, in the Supreme Court of the State of Washington.

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



Mick Woynarowski  
Done in Seattle, Washington



Date: May 26, 2006