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SUPREME COURT  
STATE OF WASHINGTON

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RECEIVED BY E-MAIL *bjh*

STATE OF WASHINGTON,

Respondent,

v.

MARK MECHAM,

Appellant,

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BRIEF AMICUS CURIAE OF  
WASHINGTON FOUNDATION FOR CRIMINAL JUSTICE  
(AMENDED)

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On Behalf of the Washington Foundation for Criminal Justice:  
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## **I. IDENTITY AND INTEREST OF AMICUS**

The Washington Foundation for Criminal Justice (“WFCJ”) is a non-profit organization dedicated to educating criminal defense attorneys who represent citizens accused of impaired driving crimes. Since 1983, the WFCJ has held an annual seminar to educate lawyers on pertinent issues related to the defense of citizens accused of DUI.

The WFCJ has an interest in protecting the right of citizens accused of DUI and DUI related crimes to receive a fair trial. Roadside sobriety testing plays an important role for both law enforcement officers making arrest decisions involving impaired drivers, and for lawyers defending clients accused of DUI crimes. The WFCJ is committed to advocating for the proper assessment of roadside sobriety testing in criminal prosecutions.<sup>1</sup>

## **II. STATEMENT OF THE CASE**

This case involves the State’s use of field sobriety testing “refusal” evidence to argue consciousness of guilt.

A police officer stopped Mecham for reasons unrelated to impaired driving and ultimately arrested him because a warrant existed for his

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<sup>1</sup> WFCJ wishes to recognize the contributions of several members contained in this amicus brief: in particular Ted Vosk, Eric Gaston, William Kirk, and George Bianchi.

arrest.<sup>2</sup> The officer suspected Mecham was impaired by alcohol and asked him to perform voluntary sobriety tests.<sup>3</sup> Mecham refused.<sup>4</sup>

The officer described these tests as “standardized” tests created by the National Highway Traffic Safety Administration (NHTSA).<sup>5</sup> They are (1) the gaze nystagmus test, (2) the walk and turn test, and (3) the one leg stand test.<sup>6</sup> The gaze nystagmus test involves the officer checking the suspect’s eyes for involuntary jerking.<sup>7</sup> The walk and turn and one leg stand tests involve the officer testing the suspect’s ability to both comprehend instructions and then perform specific physical actions.<sup>8</sup>

During closing arguments, the prosecutor addressed Mecham’s refusal to perform these tests. “[T]he defendant refused them because he knew what they would reveal. They would reveal impairment.”<sup>9</sup>

Mecham was convicted, and the Court of Appeals affirmed the conviction. See *State v. Mecham*, 181 Wn. App. 932, 331 P.3d 80 (2014). The Court assumed, without deciding, that sobriety testing was a search under the Fourth Amendment and Art. I, §7 of the State Constitution.

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<sup>2</sup> 1 RP 49-51. This information was not provided to the jury. 3 RP 11.

<sup>3</sup> 3 RP 21

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> 5 RP 89

### III. ISSUE PRESENTED ON AMICUS

#### **Does NHTSA Testing Disturb Recognized Privacy Interests Under Art. I, §7 of the State Constitution?**

The following amicus brief addresses what is missing in the briefs submitted to this Court; a thorough description of NHTSA “standardized” testing. Such a description is essential to properly assess this evidence in the context of privacy rights protected under the State Constitution.

The purpose of an amicus brief is to help the court with points of law. *Ochoa Ag. Unlimited, LLC v. Delanoy*, 128 Wn. App. 165, 172, 114 P.3d 692 (2005). However, this Court may accept facts from amici in resolving legal questions. See *New Meadows Holding Co. v. Wash. Power Co.*, 102 Wn.2d 495, 502, 687 P.2d 212 (1984). Courts may consider relevant scholarly works, scientific studies, and social facts as “legislative facts.” *Wyman v. Wallace*, 94 Wn.2d 99, 102, 615 P.2d 452 (1980).

Here, the parties fail to adequately describe the standardized tests that drivers perform in Washington State when suspected of DUI.<sup>10</sup> The tests being used were created by NHTSA researchers. NHTSA

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<sup>10</sup> The State referred to such tests as “simple maneuvers, such as walking, turning and standing on one leg.” Supplemental Brief of Respondent, pg. 10. Mecham provided a slightly more specific description; describing the tests as “reciting the alphabet, count[ing] backward from 107, stand[ing] upon one leg while counting from 1001 to 1030, or walk[ing] a line, forward and back, counting steps and touching heel to toe.” Supplemental Brief of Appellant, pg. 15; citing *State v. Nagel*, 320 Or. 24, 34-35, 880 P.2d 451 (Or. 1994).

acknowledges that these tests do not (and cannot) directly measure driving impairment; instead NHTSA asserts that test performance correlates solely to predicting blood-alcohol content (BAC) in order to assist law enforcement officers in making arrest decisions. To assume such tests mimic common observations of drunkenness ignores this limitation and distorts the issue before this Court.

The WFCJ contends that the development and analysis of NHTSA standardized testing establishes that these tests amount to an intrusion of private affairs and thus fall under the warrant protection of the federal and state constitutions. The information provided herein is critical to address the issue raised by the State; whether sobriety testing is a “search” under the Fourth Amendment and Article I, §7.<sup>11</sup>

#### **IV. ARGUMENT**

Traditionally speaking, a “search” involves “some exploratory investigation...a looking for or seeking out.”<sup>12</sup> The Washington State Constitution, Art. I, §7, shields citizens from searches that disturb one’s private affairs conducted without authority of law.

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<sup>11</sup> See State’s Answer to Petition for Review, pg. 7; asking this Court to find that sobriety testing is not a search.

<sup>12</sup> W. LAFAVE, SEARCH AND SEIZURE § 2.1(a), at 429 (4<sup>th</sup> ed. 2004).

To determine whether a private affair has been disturbed, first it must be determined whether a privacy interest exists. The “private affairs” inquiry focuses on “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.” *State v. Surge*, 160 Wn.2d 65, 71, 156 P.3d 208 (2007). Courts consider (1) the nature and extent of the information which may be obtained as a result of the government conduct and (2) the historical treatment of the interest asserted to determine the existence of a privacy interest deserving constitutional protection. *State v. Hinton*, 179 Wn.2d 862, 869, 319 P.3d 9 (2014).

**A. Development of Standardized Field Sobriety Tests.**

In 1977 NHTSA published a study establishing a three test battery of “sobriety” tests to help police officers make arrest decisions involving impaired drivers.<sup>13</sup> The study observed that a primary difficulty in making an arrest decision was that, “*Individual differences in impairment at a given BAC are a function of such variables as drinking history, age,*

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<sup>13</sup> U.S. Dept. of Transportation, NHTSA, Psychophysical Tests for DWI Arrest, June 1977, Final Report. This study associated impairment as a blood alcohol level of .10%.

*physical condition, illness, disability and fatigue. Also, intoxication may be confused with a variety of other causes of impaired behavior.”*<sup>14</sup>

At the time, law enforcement lacked standards for performance and interpretation of roadside tests.<sup>15</sup> NHTSA undertook to create a testing procedure to discriminate drivers based upon blood alcohol concentration levels to aid officers in deciding whether to arrest a driver suspected of DUI.<sup>16</sup> While six separate roadside tests were investigated, the combination of gaze nystagmus, walk and turn, and one leg stand tests was reported to have an accuracy rate of 84% in discriminating drivers with a BAC level above or below .10% in a controlled environment.<sup>17</sup>

A follow-up study in 1983 affirmed the reported effectiveness of the three test battery to discriminate drivers above or below .10% outside the laboratory setting.<sup>18</sup> Subsequent studies affirmed the reported effectiveness of the three test battery to discriminate drivers with BAC

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<sup>14</sup> Id., pg. 11. See also pg. 33; where the study’s authors recognized that inexperienced drinkers may show signs of “impairment” after drinking a small amount of alcohol; and certain diseases, neurological impairment, and age affect performance.

<sup>15</sup> Id., pg. 12.

<sup>16</sup> Id., pg. 17; 32; 35; 85 (Appendix 3).

<sup>17</sup> Id., pg. 44-48. Please note: the members of the WFCJ do not concede to the accuracy of NHTSA statistics regarding accuracy of sobriety testing to predict BAC levels. Rather, these statistics are cited merely to show how NHTSA represents the alleged scientific nature of the tests.

<sup>18</sup> U.S. Dept. of Transportation, NHTSA, Field Evaluation of a Behavioral Test Battery for DWI, September 1983; pg. 12.

levels above or below .08%<sup>19</sup> and .05%.<sup>20</sup> Again, these studies were intended to aid officers in making arrest decisions based solely on the reported ability to correlate test performance to a particular blood-alcohol level defining a DUI crime.<sup>21</sup>

A 1998 study evaluated the three battery test for discriminating drivers at the .08% level.<sup>22</sup> This study reaffirmed the limitation inherent in the standardized tests to evaluate for predictive BAC levels only.

“Many individuals, including some judges, believe that the purpose of a field sobriety test is to measure driving impairment. For this reason, they tend to expect tests to possess “face validity,” that is, tests that appear to be related to actual driving tasks. Tests of physical and cognitive abilities, such as balance, reaction time, and information processing, have face validity, to varying degrees, based on the involvement of these abilities in driving tasks; that is, the tests seem to be relevant “on the face of it.” Horizontal gaze nystagmus lacks face validity because it does not appear to be linked to the requirements of driving a motor vehicle. The reasoning is correct, but it is based on the incorrect assumption that field sobriety tests are designed to measure driving impairment.

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<sup>19</sup> U.S. Dept. of Transportation, NHTSA, A Florida Validation Study of the Standardized Field Sobriety Test (SFST) Battery, 1997; pg. 12.

<sup>20</sup> U.S. Dept. of Transportation, NHTSA, A Colorado Validation Study of the Standardized Field Sobriety Tests (SFST) Battery, 1995.

<sup>21</sup> NHTSA, DWI Detection and Field Sobriety Testing; Participant Guide, March 2013 Ed., Session 8, pg. 11. These studies reported a correct arrest decision as one where a subsequent BAC test corroborated the officer’s prediction. An arrest decision was deemed to be incorrect if the BAC level was below the per se level, regardless if the officer felt the subject was otherwise impaired.

<sup>22</sup> U.S. Dept. of Transportation, NHTSA, Validation of the Standardized Field Sobriety Test Battery at BAC’s Below 0.10 Percent, 1998.

Driving a motor vehicle is a very complex activity that involves a wide variety of tasks and operator capabilities. It is unlikely that complex human performance, such as that required to safely drive an automobile, can be measured at roadside. The constraints imposed by roadside testing conditions were recognized by the developers of NHTSA's SFST battery. As a consequence, they pursued the development of tests that would provide statistically valid and reliable indications of a driver's BAC, rather than indications of driving impairment. The link between BAC and driving impairment is a separate issue, involving entirely different research methods. Those methods have found driving to be impaired at BACs as low as 0.02 percent, with a sharp increase in impairment at about 0.07 percent (Moskowitz and Robinson, 1988; Stuster, 1997). Thus, SFST results help officers to make accurate DWI arrest decisions even though SFSTs do not directly measure driving impairment."<sup>23</sup>

**B. Description of Three Test Battery.**

The administration of standardized tests is outlined in detail within a training manual created by NHTSA.<sup>24</sup>

**i. Horizontal and Vertical Gaze Nystagmus.**

Nystagmus refers to an involuntary jerking of the eyes.<sup>25</sup> NHTSA instructs that "gaze nystagmus" is caused by alcohol consumption,<sup>26</sup> and

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<sup>23</sup> Id., pg. 27-28.

<sup>24</sup> NHTSA, DWI Detection and Field Sobriety Testing; Participant Guide, March 2013; Session 8.

<sup>25</sup> Id.; Session 8, pg. 11.

<sup>26</sup> It is generally recognized that nystagmus results from a variety of other causes. See *United States v. Horn*, 185 F.Supp.2d 530, 556 fn.45 (D. Md. 2002) (The court

becomes more distinct with higher BAC values.<sup>27</sup>

Officers are instructed to look for three specific “clues” with each eye, for a total of six clues possible:<sup>28</sup> (1) lack of smooth pursuit as the eye follows an object from side to side; (2) sustained observation of nystagmus in the eye at maximum deviation (looking farthest to the side); and (3) onset of nystagmus at 45° from center.<sup>29</sup> NHTSA states that the presence of four clues correlates to a predictive BAC above .08%.<sup>30</sup>

NHTSA points out, however, that several medical issues may be detected by the officer through performance of this test. Officers must first

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recognized the following causes or possible causes of nystagmus: problems with the inner ear labyrinth; irrigating the ears with warm or cold water; influenza; streptococcus infection; vertigo; measles; syphilis; arteriosclerosis; Korchaff's syndrome; brain hemorrhage; epilepsy; hypertension; motion sickness; sunstroke; eye strain; eye muscle fatigue; glaucoma; changes in atmospheric pressure; consumption of excessive amounts of caffeine; excessive exposure to nicotine; aspirin; circadian rhythms; acute head trauma; chronic head trauma; some prescription drugs; tranquilizers, pain medication, and anti-convulsant medicine; barbiturates; disorders of the vestibular apparatus and brain stem; cerebellum dysfunction; heredity; diet; toxins; exposure to solvents; extreme chilling; eye muscle imbalance; lesions; continuous movement of the visual field past the eyes; and antihistamine use. 664 A.2d at 77. The fact that there are many other causes of nystagmus in the human eye also is the type of adjudicative fact that may be judicially noticed under Rule 201. Thus, the defendant in a DWI/DUI case may ask the court to judicially notice this fact, once the government has proved the causal connection between alcohol ingestion and exaggerated nystagmus. Alternatively, the defendant may seek to prove the non-alcohol related causes of nystagmus by other means, such as the testimony of an expert witness, cross examination of any such witness called by the government or through a properly admitted learned treatise. (Fed. Rules of Evid. Rule 803(18)).

<sup>27</sup> Id., Session 8, Pg. 19.

<sup>28</sup> When checking for vertical nystagmus, the officer simply tracks the eyes moving up and down. Id., Session 8, pg. 39.

<sup>29</sup> Id., Session 8, pg. 19.

<sup>30</sup> Id., Session 8, pg. 26; 37.

check each eye for pupil size, equal tracking, and “resting” nystagmus.<sup>31</sup> These observations may indicate the existence of a medical problem, such as a brain tumor or disorder, head injury, or neurological disorder.<sup>32</sup> The presence of vertical nystagmus, but no horizontal nystagmus, could also be a sign of a medical condition.<sup>33</sup> Finally, the presence of “clues” in only one eye is an indication of a medical condition.<sup>34</sup>

**ii. Walk and Turn Test.**

The Walk and turn test is a divided attention test which requires a person to perform both mental and physical tasks at the same time.<sup>35</sup> NHTSA advises that persons 65 or older, or who have leg or back injuries, or who have inner ear problems may have difficulty performing the test.<sup>36</sup>

The officer must instruct the person to stand in a specific heel-toe stance while the test is explained, and not start the test until told to.<sup>37</sup> The officer instructs the person to (1) walk nine steps heel-to-toe; (2) after the ninth step turn back with the lead foot on the line and making small steps with the other foot; (3) watch your feet and count your steps; and (4) do

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<sup>31</sup> Id., Session 8, pg. 18.

<sup>32</sup> Id., Session 8, pg. 16-17.

<sup>33</sup> Id., Session 8, pg. 15.

<sup>34</sup> Id., Session 8, pg. 25.

<sup>35</sup> Id., Session 8, pg. 47.

<sup>36</sup> Id., Session 8, pg. 41.

<sup>37</sup> Id., Session 8, pg. 42.

not stop once started.<sup>38</sup>

The officer must look for eight clues: (1) loss of balance during explanation; (2) starts test too soon; (3) stops walking; (4) misses heel-to-toe; (5) steps off line; (6) uses arms for balance; (7) makes an improper turn (not as instructed); and (8) walks an incorrect number of steps (9).<sup>39</sup> According to NHTSA, the presence of two or more clues permits the officer to predict a BAC of .08% or greater.<sup>40</sup>

An officer's observation of "clues," however, must follow a rigid criteria. The clue of losing balance during the explanation phase is present only if the person breaks the heel-to-toe stance; swaying or using arms for balance is not a clue.<sup>41</sup> The clue of missing heel-to-toe is only present if the person walks with a gap greater than half an inch between steps.<sup>42</sup> The clue of using arms for balance while walking is present only if the arms are raised more than six inches.<sup>43</sup> Officers are instructed that a clue can be counted only once no matter how many times it occurs during the test.<sup>44</sup>

### **iii. One Leg Stand Test.**

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<sup>38</sup> Id., Session 8, pg. 43.

<sup>39</sup> Id., Session 8, pg. 44-46.

<sup>40</sup> Id., Session 8, pg. 47.

<sup>41</sup> Id., Session 8, pg. 45.

<sup>42</sup> Id., Session 8, pg. 46.

<sup>43</sup> Id., Session 8, pg. 46.

<sup>44</sup> NHTSA, DWI Detection and Field Sobriety Testing; Instructor Guide, March 2013 Ed., Session 8, pg. 73.

The one leg stand test is a divided attention test which requires a person to perform both mental and physical tasks at the same time.<sup>45</sup> NHTSA advises that persons 65 or older, or who have leg or back injuries, or who have inner ear problems, or who are more than 50 lbs. overweight may have difficulty performing the test.<sup>46</sup>

The officer must instruct the person to stand with feet together and arms at their sides.<sup>47</sup> Before explaining the test the officer must tell the person not to start until told to.<sup>48</sup> The officer instructs the person to (1) stand with feet together and arms at their sides; (2) raise either foot six inches off the ground; (3) keep both legs straight; (4) count ‘one thousand one, one thousand two ...’ until told to stop; and (5) watch their feet.<sup>49</sup>

The officer must look for four specific clues: (1) swaying; (2) using arms for balance; (3) hopping; and (4) putting foot down before 30 seconds elapse.<sup>50</sup> According to NHTSA, the presence of two or more clues permits the officer to predict a BAC of .08% or greater.<sup>51</sup>

An officer’s observation of “clues,” however, must follow a rigid

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<sup>45</sup> NHTSA, *DWI Detection and Field Sobriety Testing; Participant Guide*, March 2013 Ed., Session 8, pg. 53.

<sup>46</sup> *Id.*, Session 8, pg. 49.

<sup>47</sup> *Id.*, Session 8, pg. 50.

<sup>48</sup> *Id.*, Session 8, pg. 50.

<sup>49</sup> *Id.*, Session 8, pg. 50.

<sup>50</sup> *Id.*, Session 8, pg. 51-52.

<sup>51</sup> *Id.*, Session 8, pg. 53.

criteria. For example, the clue of swaying is not present if the person displays slight tremors in the foot or body.<sup>52</sup> The clue of using arms for balance is present only if the arms are raised more than six inches.<sup>53</sup> Finally, the clue of putting a foot down is not present if the person's foot is put down after 30 seconds have elapsed even if they haven't counted to 30 yet.<sup>54</sup> Finally, officers are instructed that a clue can be counted only once no matter how many times it occurs during the test.<sup>55</sup>

**C. NHTSA Standardized Tests Invade Recognized Privacy Interests.**

“[T]he touchstone of Fourth Amendment analysis has been the question whether a person has a . . . reasonable expectation of privacy.” *Oliver v. United States*, 466 U.S. 170, 177, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). “Unlike in the Fourth Amendment, [however,] the word ‘reasonable’ does not appear in Article I, § 7 of the Washington Constitution.” *State v. Morse*, 156 Wn.2d 1, 9, 123 P.3d 832 (2005). Article I, §7 differs in that it clearly recognizes an individual's right to privacy “with no express limitations.” *State v. Hinton*, 179 Wn.2d at 877. Thus, while Art. I, §7 “analysis encompasses those legitimate privacy

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<sup>52</sup> Id., Session 8, pg. 51.

<sup>53</sup> Id., Session 8, pg. 52.

<sup>54</sup> Id., Session 8, pg. 53.

<sup>55</sup> Id., Session 8, pg. 51.

expectations protected by the Fourth Amendment [it] is not confined to the subjective privacy expectations of modern citizens who...are learning to expect diminished privacy in many aspects of their lives...Rather, it focuses on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass.”<sup>56</sup> *State v. Myrick*, 102 Wn.2d 506, 510-11, 688 P.2d 151 (1984).

This Court has shown a commitment to protect privacy rights where a search will yield intimate details regarding a person’s life. In *State v. Boland*,<sup>57</sup> this Court recognized a privacy right in garbage placed in a can intended for pick-up and delivery to a refuse station. “Garbage” comprised of material that would reveal personal information about the homeowner; such as bills, tax documents, magazines, and things that would reveal much about a person’s activities, associations, and beliefs. At 578. In *State v. Jackson*,<sup>58</sup> this Court recognized a privacy interest to be free was warrantless GPS tracking of a vehicle. GPS tracking revealed extensive and intimate information about a person’s life; such as where one goes to eat, worship, engage in politics, and whom one might

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<sup>56</sup> In this context, “[a] private affairs interest is...a matter personal to an individual such that any intrusion on it would offend a reasonable person.” *State v. Hepton*, 113 Wn. App. 673, 680, 54 P.3d 233 (2002) (citing, *State v. Goucher*, 124 Wn.2d 778, 784, 881 P.3d 210 (1994)).

<sup>57</sup> 115 Wn.2d 571, 800 P.2d 1112 (1984).

<sup>58</sup> 150 Wn.2d 251, 76 P.3d 217 (2003).

associate with. At 260-261. In *State v. Jordan*,<sup>59</sup> this Court recognized a privacy interest in the contents of a hotel registry. The registry contained intimate details about the person renting a hotel room; such as the existence of sexual liaisons, business associations, as well as the identity of any persons in the room with the registered guest. At 129. Most recently, in *State v. Hinton*,<sup>60</sup> this Court recognized a privacy interest in text messaging on a cell phone. Text messages contain a “wealth” of information regarding a person’s private life; such as family, political, religious, and sexual information. This intimate information was no different than the content of a phone conversation. At 870-871.

Court decisions recognize the privacy interest in a person’s medical history and overall health. “Nothing...is more important or more intimate to man than the health of his mind and body.” *Hammonds v. Aetna Cas. & Sur. Co.*, 243 F.Supp. 793, 801 (N.D.Ohio 1965). “Information about one’s body and state of health is matter which the individual is ordinarily entitled to retain within the ‘private enclave where he may lead a private life.’” *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3<sup>rd</sup> Cir. 1980). “If there is a quintessential zone of

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<sup>59</sup> 160 Wn.2d 121, 156 P.3d 893 (2007).

<sup>60</sup> 179 Wn.2d 862, 319 P.3d 9 (2014).

human privacy it is the mind. Our ability to exclude others from our mental processes is intrinsic to the human personality.” *Long Beach City Employees Assn. v. City of Long Beach*, 41 Cal.3d 937, 944, 719 P.2d 660 (Cal. 1986).

Washington recognizes the common law right of privacy. *Cowles Pub. Co. v. State Patrol*, 109 Wn.2d 712, 721, 748 P.2d 597 (1988).

“Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget. When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest.”

*Id.*; see also *White v. Township of Winthrop*, 128 Wn. App. 588, 116 P.3d 1034 (2005).

This right is manifested in the statutory protections found in the physical-patient privilege. RCW 5.60.060; see *Youngs v. PeaceHealth*, 179 Wn.2d 645, 651, 316 P.3d 1035 (2014). The privilege protects patients from the embarrassment or scandal that might result from disclosure of medical information. *Id.* This Court has recognized that

inherent in the right of privacy is the right to nondisclosure of intimate personal information, or confidentiality. *O'Hartigan v. Dept. of Personnel*, 118 Wn.2d 111, 117, 821 P.2d 44 (1991).

The United States Supreme Court recognizes a right of privacy in the collection and testing of urine for drug or alcohol concentration. See *Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602, 617, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). “[The] chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic.” *Id.* Likewise, our courts have held that, in the context of urine testing for drug or alcohol concentration, “[t]here is thus no doubt that the privacy interest in the body and bodily functions is one Washington citizens have held, and should be entitled to hold, safe from governmental trespass.” *Robinson v. City of Seattle*, 102 Wn. App. 795, 819, 10 P.3d 452 (2000).

Certainly, the mere fact that NHTSA standardized testing requires the officer to place the driver in unique and specific positions to both commence and perform the tests and that the officer must look for specific “clues” as opposed to general observations of intoxication compels distinguishing these tests from any “open view” or “plain view” analysis. See *State v. Seagull*, 95 Wn.2d 898, 632 P.2d 44 (1981) (Observation in

open view from a lawful vantage point is not a “search” under Art. I, §7.); *Arizona v. Hicks*, 480 U.S. 321, 325, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987) (Movement of stereo equipment to reveal serial number a violation of privacy notwithstanding officer’s lawful right to be in apartment.) In performing the tests the driver has not willingly exposed signs of impairment; instead he or she has merely followed the officer’s instructions. Standardized sobriety tests invade a privacy interest because they are designed to get the human body to reveal evidence that can only be revealed through performance of the tests in the manner described.

More importantly, however, NHTSA standardized tests invade the right of privacy relating to disclosure of intimate information of one’s health and medical history. NHTSA recognizes that performance of the gaze nystagmus test may reveal evidence of brain injury and other neurological disorders.<sup>61</sup> The officer must engage in several pre-test observations of the driver’s eyes to assess whether any medical issue may compromise the test. NHTSA further recognizes that performance of divided attention tests, such as the walk and turn and one leg stand tests,

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<sup>61</sup> NHTSA, *DWI Detection and Field Sobriety Testing; Participant Guide*, March 2013 Ed., Session 8, pg. 16-18.

may be compromised if the driver has back, leg, or inner ear problems.<sup>62</sup> Officers are instructed to ask drivers prior to performing divided attention tests whether they have any physical problems or disabilities.<sup>63</sup> Finally, all divided attention tests require the officer to evaluate the driver for errors in mental comprehension, processing of information, and memory recall;<sup>64</sup> all of which are indicative of cognitive disabilities; such as Attention Deficit Hyperactivity Disorder (ADHD).<sup>65</sup>

## **V. CONCLUSION**

In sum, NHTSA testing requires the driver to reveal, and the officer to assess, intimate medical information in order for the tests to fulfill their intended purpose; to evaluate whether a driver may have a

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<sup>62</sup> NHTSA, DWI Detection and Field Sobriety Testing; Participant Guide, March 2013 Ed., Session 8, pg. 41; 49.

<sup>63</sup> NHTSA, DWI Detection and Field Sobriety Testing; Instructor Guide, March 2013 Ed., Session 8, pg. 73.

<sup>64</sup> NHTSA, DWI Detection and Field Sobriety Testing; Participant Guide, March 2013 Ed., Session 8, pg. 47.

<sup>65</sup> See [www.webmd.com/add-adhd/guide/adhd-symptoms](http://www.webmd.com/add-adhd/guide/adhd-symptoms). (Viewed January 29, 2015) A person with ADHD may have some or all of the following symptoms: (1) Difficulty paying attention to details and tendency to make careless mistakes in school or other activities; producing work that is often messy and careless; (2) Easily distracted by irrelevant stimuli and frequently interrupting ongoing tasks to attend to trivial noises or events that are usually ignored by others; (3) Inability to sustain attention on tasks or activities; (4) Difficulty finishing schoolwork or paperwork or performing tasks that require concentration; (5) Frequent shifts from one uncompleted activity to another; (6) Procrastination; (7) Disorganized work habits; (8) Forgetfulness in daily activities (for example, missing appointments, forgetting to bring lunch); (9) Failure to complete tasks such as homework or chores; (10) Frequent shifts in conversation, not listening to others, not keeping one's mind on conversations, and not following details or rules of activities in social situations.

BAC of a particular level to aid in an arrest decision. This Court recognizes that citizens of this State have a reasonable expectation of privacy in their medical history, as well as in their body and bodily functions, and the State may not intrude upon these areas of privacy without authority of law.

The WFCJ encourages this Court to formally extend the privacy protections of Art. I, §7 to standardized NHTSA sobriety testing, and hold that the State may only compel such tests with authority of law. The WFCJ further joins Appellant Mecham in advocating that a driver's refusal to consent to NHTSA testing, absent authority of law, should not be admissible evidence against the defendant at trial. See *State v. Gauthier*, 174 Wn. App. 257, 267, 298 P.3d 126 (2013).

Respectfully submitted the 13<sup>th</sup> day of February, 2015.

A handwritten signature in black ink, appearing to read 'R. Robertson', written over a horizontal line.

Ryan B. Robertson, WSBA #28245  
Attorney at Law  
On Behalf of Washington Foundation  
for Criminal Justice

SUPREME COURT  
STATE OF WASHINGTON

RECEIVED BY E-MAIL

STATE OF WASHINGTON,            )  
Respondent,                        )  
  )  
v.                                     )  
  )  
MARK MECHAM,                    )  
Appellant.                         )

No. 90598-3

DECLARATION OF  
SERVICE

\*\*\*\*\*

I certify that on February 13, 2015, I deposited in the mail of the United States of America a properly stamped and addressed envelope containing a copy of:

- 1) Letter to State Supreme Court Law Library
- 2) Letter signed by Court Commissioner Narda Pierce
- 3) Copies of the following:
  - U.S. Dept. of Transportation, NHTSA, Psychophysical Tests for DWI Arrest, June 1977, Final Report.
  - U.S. Dept. of Transportation, NHTSA, Field Evaluation of a Behavioral Test Battery for DWI, September 1983.
  - U.S. Dept. of Transportation, NHTSA, A Florida Validation Study of the Standardized Field Sobriety Test (SFST) Battery, 1997.
  - U.S. Dept. of Transportation, NHTSA, A Colorado Validation Study of the Standardized Field Sobriety Tests (SFST) Battery, 1995.
  - U.S. Dept. of Transportation, NHTSA, Validation of the Standardized Field Sobriety Test Battery at BAC's Below 0.10 Percent, 1998.

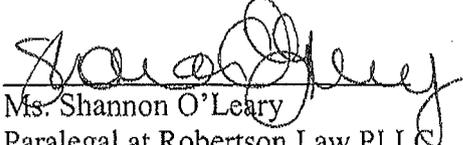
And mailed said documents to:      Washington State Law Library  
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  Olympia, WA 98504-0751

I further certify that on this same date I prepared copies of the same documents, and in addition thereto prepared a copy of the amended Brief Amicus Curiae of Washington Foundation for Criminal Justice, to be served via legal messenger, to

Counsel for Respondent: Ms. Ann Summers,  
Senior Deputy Prosecuting Attorney  
King County Prosecutor's Office  
King County Courthouse  
516 Third Avenue, W-554  
Seattle, WA 98104.

Counsel for Appellant: Ms. Jennifer Sweigert  
Nielsen, Broman, and Koch  
1908 E. Madison  
Seattle, WA 98122.

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

 2/13/15  
\_\_\_\_\_  
Ms. Shannon O'Leary Signed in Seattle, WA on this date  
Paralegal at Robertson Law PLLC

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**To:** Shannon O'Leary  
**Cc:** Ryan Robertson; sweigertj@nwattorney.net; ann.summers@kingcounty.gov; paoappellateunitmail@kingcounty.gov  
**Subject:** RE: State of WA v. Mark Mecham, Case #90598-3

Received 2-13-2015

Supreme Court Clerk's Office

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Dear Clerk,

Attached for filing in this matter, State of Washington v. Mark Mecham, Case #90598-3, are the following documents:  
(1) AMENDED Brief Amicus Curiae of Washington Foundation for Criminal Justice  
(2) Declaration of Service

All other parties are being served a hard copy of these items by Legal Messenger or by US Mail. Please contact us if there are any problems with the attachment coming through in this submission.

Shannon O'Leary, Paralegal

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# THE SUPREME COURT

STATE OF WASHINGTON

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FEB 12 2015  
Ronald R. Carpenter  
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February 12, 2015

RE: *State of Washington v. Mark T. Mecham*, Cause No. 90598-3

Dear Counsel:

The Chief Justice has granted the following motions to file amicus curiae briefs in this case:

The motion by Cynthia B. Jones, Sarah A. Dunne, Nancy L. Talner and Douglas B. Klunder, on behalf of the American Civil Liberties Union of Washington. Your brief has therefore been filed.

The motion by Suzanne L. Elliott and D. Jack Guthrie, on behalf of the Washington Association of Criminal Defense Attorneys. Your brief has therefore been filed.

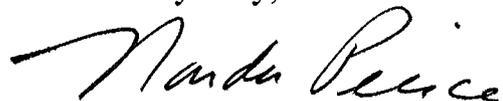
The motion by Ryan B. Robertson, on behalf of the Washington Foundation for Criminal Justice, but the proposed amicus curiae brief filed with the motion has been rejected for filing because it includes an appendix that does not conform to RAP 10.3(a)(8). An amended brief without an appendix may be served and filed no later than February 18, 2014. If the movant believes the material in the proposed appendix may not be readily available to the court the State Law Librarian will accept the material and maintain it on file in the State Law Library until 30 days after a decision in this case is final. Such materials should be mailed to the State Law Library in hard copy accompanied by a copy of this letter to the following address:

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Olympia, WA 98504-0751

Copies of any materials sent to the State Law Library shall be mailed on the same date to counsel for the parties.

Counsel for the parties are informed by this letter that March 5, 2015, will be the due date for any answers to these briefs. The case will be heard on March 17, 2015, as currently scheduled.

Yours very truly,

A handwritten signature in black ink that reads "Narda Pierce". The signature is written in a cursive, flowing style.

Narda Pierce  
Commissioner

NP:hl

cc: Jennifer J. Sweigert  
Ann M. Summers  
Clerk

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## Lyons, Heidi

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**Lyons, Heidi**

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