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No. 92930-1  
(consolidated with 92944-1)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

JUDITH MURRAY, and  
DARREN ROBISON,

Respondents.

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ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Richard T. Okrent  
The Honorable George N. Bowden

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ANSWER TO *AMICUS CURIAE* WASHINGTON STATE  
ASSOCIATION OF MUNICIPAL ATTORNEYS

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## A. ARGUMENT

**For breath tests to be admissible in a criminal matter, the implied consent warnings given must be complete and accurate.**

1. *Warnings included in the statute are required to be given.*

Implied consent warnings must strictly adhere to the plain language of the statute. *State v. Bostrom*, 127 Wn.2d 580, 587, 902 P.2d 157 (1995). The exact words of the implied consent statute are not required “so long as the meaning implied or conveyed is not different from that required by the *statute*.” *Jury v. Dep’t of Licensing*, 114 Wn.App. 726, 732, 60 P.3d 615 (2002) (emphasis added). RCW 46.20.308(2) required the police to advise drivers of the THC warning. (“The officer *shall warn* the driver . . .”). The term “shall” indicates a mandatory duty. *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994).

While arguing that courts have upheld breath tests where the police read the warning in *substantially* the language used in the statute, *amicus* admits that in those decisions where courts reversed breath tests for inadequate warnings “the inadequate warnings either omitted a portion of the warnings the implied consent statute mandated (related to the required test) or were legally inadequate.” Brief of

*Amicus* at 9. This admission undercuts *amicus* argument that the police did not err here in omitting the THC warning. The police here omitted a portion of the warning required under the then existing statute.

Further, *amicus* argument leaves the determination of what warnings to give to the discretion of the police. This is simply not good policy for a number of reasons. First, this would allow the police to unilaterally edit the warnings which can lead to disparate warnings and disparate outcomes depending on the warning given. Second, as argued in the Supplemental Brief of Respondents, creating a bright line rule that requires the warning include everything in the statute simplifies matters for the police officer on the street mandated with carrying out the law and making split second decisions.

The warnings here were inadequate because they omitted a portion of the statutory requirements. *Amicus* argument should be rejected.

2. *Prejudice is not required to be shown where the warnings omit a portion of the statutory mandate.*

While it is true that courts have required a showing of prejudice where the warnings were not inaccurate or misleading, *Lynch v. Dep't of Licensing*, 163 Wn.App. 697, 700, 262 P.3d 65 (2011), *amicus* rests its argument on its conclusion that the warnings given to Ms. Murray

and Mr. Robison were accurate. Brief of *Amicus* at 13-15. Yet as has been argued, the warnings were not complete or accurate. The statute mandated that the police advise drivers of the THC warning. RCW 46.20.308(2). The police improperly edited the ICW and failed to give the THC warnings.

*Amicus* reliance on this Court's decision in *Gonzales v. Dep't of Licensing*, does not provide support for its argument. 112 Wn.2d 890, 774 P.2d 1187 (1989). *Gonzales* involved a case where the warnings required by the statute *were* given but the officer added an additional warning onto the required warnings. 112 Wn.2d at 895-96. The drivers in *Gonzales* relied on the inclusion of this additional language to argue the warnings were inaccurate, thus the suspension of their licenses was improper. *Id* at 896. This Court ruled the warnings were complete but inaccurate, but that the inclusion of the additional language was not prejudicial. *Id* at 899.

The distinction between *Gonzales* and the cases here is that the warnings here were not accurate or complete where they left out the THC warning mandated in the statute. *Gonzales* also is a warning for those who wish to leave the adequacy of the warnings to the police. While this Court in *Gonzales* upheld the license suspensions, the Court

did find that the officer using his or her discretion to add language was improper. *Gonzales*, 112 Wn.2d at 898-99. As a consequence, where drivers could have shown prejudice, the license suspensions would have been invalidated.

*Grewal v. Dep't of Licensing*, also relied upon by *amicus*, is similar and also fails to support its argument. 108 Wn.App. 815, 33 P.3d 94 (2001). In that case, the police officer gave the driver all of the warnings required by the statute. *Id* at 821. The driver, who was under the age of 21, was warned that “[b]eing under 21 years of age and driving or being in actual physical control of a motor vehicle after consuming alcohol,” but was not informed that violation of this provision required proof that his blood alcohol concentration was more than 0.02, but less than 0.08, a requirement of the juvenile statute. *Id* at 821. The Court of Appeals concluded the warnings given were complete and accurate. *Id* at 822. Thus, any discussion of a prejudice requirement was *dicta* and not necessary to the decision. *Grewal*, 108 Wn.App. at 822 (“[E]ven if the warnings were inaccurate or misleading, *Grewal* cannot demonstrate that he was prejudiced”).

Contrary to the argument of *amicus*, this Court has held that where a police officer deviates from the warnings required by the

statute, he or she does so at their own risk. Thus, taking the discretion regarding warnings away from police officer and mandating that drivers be given of all the warnings *required by the statute* will rarely end up with those warnings being questioned by the courts.

Thus, prejudice is not, and should not, be required where the warnings given are incomplete or inaccurate because they omit warnings that are mandated by the statute.

#### B. CONCLUSION

The warnings given in these consolidated cases were neither complete nor accurate. Ms. Murray and Mr. Robison ask this Court to affirm the Court of Appeals decision.

DATED this 11<sup>th</sup> day of October 2016.

Respectfully submitted,

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