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No. 93098-8

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Plaintiff/Petitioner,

v.

CHELAN COUNTY DISTRICT COURT,  
Respondent;

HON. ROY S. FORE,  
Respondent; and

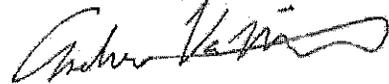
ROBERT J. BOWIE,  
Defendant/Respondent (real party in interest).

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REPLY BRIEF OF PETITIONER

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Douglas J. Shae  
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 ORIGINAL

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**A. ARGUMENT IN REPLY**

- 1. The superior court clearly erred by not issuing the statutory writ because the district court committed probable error that substantially altered the status quo and/or substantially limited the freedom of the State to act.**

In general, the State agrees with Mr. Bowie regarding the legal standard for issuance of a statutory writ of certiorari and that *Holifield* provides the proper framework for analyzing that issue. The State does not, however, agree with Mr. Bowie's application of that standard.

Both sides agree that a statutory writ of review "shall be granted" when an inferior tribunal has, *inter alia*, "act[ed] illegally." RCW 7.16.040. In *Holifield*, this Court explained that an inferior tribunal acts illegally when it:

(1) has committed an obvious error that would render further proceedings useless; (2) has committed probable error and the decision substantially alters the status quo or substantially limits the freedom of a party to act; or (3) has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of revisory jurisdiction by an appellate court.

*City of Seattle v. Holifield*, 170 Wn.2d 230, 244-45, 240 P.3d 1162 (2010).

Specific to this case, the State alleges a violation of the second prong—probable error.

Mr. Bowie argues that the State cannot meet this standard because the substantive issues addressed in its opening brief raise a mere error of law. The State disagrees with that characterization.

There cannot be a mere error of law when there is no clear law to apply. As explained in detail in the State's opening brief, the appellate courts of this state have created a 3-way split of authorities with regard to the standard of suppression to apply for violations of RCW 46.20.308. Furthermore, no court has ever explained what the Legislature meant when it amended § 308 to require warnings in only "substantially the following language" and what, if any, effect that amendment has on our preexisting case law. As noted by Mr. Bowie, *Holifield* looked to the standards for discretionary review under RAP 2.3 for gauging when to issue a statutory writ of review. Pertinently, RAP 2.3(b)(4) states that discretionary review is typically appropriate when "there is substantial ground for difference of opinion." Similarly, RAP 2.3(d)(1) states that discretionary review is appropriate when there is a conflict among decisions. Thus, under the standards relied on in *Holifield* for granting a statutory writ of review, the State has demonstrated more than a mere error of law; the State has demonstrated the existence of multiple actual and apparent conflicts in the law leading to confusion and a lack of clear precedent to apply.

Mr. Bowie argues that the issues raised in this case are like that raised in *Holifield*. In terms of issue comparison, *Holifield* is inapposite. Unlike this case—where there are multiple competing authorities—*Holifield* involved a single issue of statutory interpretation where prior precedent was found to clearly be in line with the plain language of the court rule at issue. *Holifield*, 170 Wn.2d at 239.

The present case is more along the lines of *State v. Whitman County Dist. Court*, 105 Wn.2d 278, 280, 714 P.2d 1183 (1986). In that case, a writ of review was appropriate to answer the open question of whether suppression of breath tests/refusals was merited in cases where officers substituted “shall” in the implied consent warnings, where the statute read “may.” This case is also similar to *City of Mount Vernon v. Mount Vernon Municipal Court*, 93 Wn. App. 501, 504, 973 P.2d 3 (1998). In that case, the issue was whether breath tests could be suppressed when the BAC testing instrument failed to immediately print the test results (i.e. a “stuck ticket”). *Id.* at 502. That case presented a gap in the law and was also found to present an issue of statewide importance. *Id.* at 502, 509. Based upon those interests, this Court chided the superior court for not granting the City of Mount Vernon’s petition for a writ of review. *Id.* at 508-09. *See also State v. Trevino*, 127 Wn.2d 735, 740, 903 P.2d 447 (1995) (writ of review was appropriate where there was an open

question about the timing of when CrRLJ 3.1 warnings and implied consent warnings must be given); *see also State ex rel. Juckett v. Evergreen Dist. Court*, 100 Wn.2d 824, 827-28, 675 P.2d 599 (1984) (writ properly granted on question concerning timing of access to counsel in DUI cases).

Regarding some of Mr. Bowie's other arguments during this section of his brief, he suggests the State is asking this court to abandon *Holifield*. Br. of Respondent at 12-14. The State does not request abandonment of *Holifield*.

Mr. Bowie also claims that this Court in *Holifield* held that suppression of the breath test did not meet the standard "substantially alters the status quo or substantially limits the freedom of a party to act." Br. of Respondent at 12. Mr. Bowie offers no citation to *Holifield* or any other authority for this bald assertion of fact. To the contrary, this Court's decision in *Holifield* was limited to the first prong of that standard—the probable error/mere error of law formula—and did not weigh in on the second prong. *Holifield*, 170 Wn.2d at 246.

Furthermore, this Court has previously held that suppression of evidence does substantially limit the freedom of a party to act, warranting issuance of the statutory writ. *Bushman v. New Holland Div. of Sperry Rand Corp.*, 83 Wn.2d 429, 432, 518 P.2d 1078 (1974) ("[T]he trial

court's alleged erroneous interpretation of the discovery rules would greatly hinder the plaintiff in her investigation of the case and greatly restrict her ability to present evidence at trial. In such an instance, the remedy by appeal could hardly be said to be adequate.”) (granting writ of review).

In assessing whether suppression of evidence substantially alters a party's ability to act, Mr. Bowie directs this Court to *State v. Howland*, 180 Wn. App. 196, 321 P.3d 303 (2014). But *Howland* bears no resemblance to this case. This case involves suppression of evidence, whereas *Howland* involved denial of an evidentiary hearing regarding conditional release for a person found not guilty by reason of insanity. There was no limitation on Howland's ability to act because she was entitled as a matter of right to seek conditional release at least every six months and to present new evidence at each new interval. *Howland*, 180 Wn. App. at 202-03. *Howland* suggests that most errors should be addressed on standard appeal “at the conclusion of the case where they may be considered in the context of the entire hearing or trial.” *Id.* at 207.

This guideline works well in civil appeals and criminal appeals brought by defendants where the aggrieved party will always and eventually be able to appeal as a matter of right. However, this standard is wholly unworkable in criminal cases where the State seeks redress.

Underlying every one of the appellate decisions where the State initially sought a writ of review on suppression of evidence in a DUI case is the tacit acknowledgment that but-for the writ, the State would likely have no redress whatsoever. Due to the fact that the double jeopardy clause prohibits the State from appealing both routine and non-routine errors in the event of an acquittal, the State's only mechanism for seeking redress in a criminal case is interlocutory review via a writ of review. Cases of partial suppression are almost never reviewable as a matter of right because partial suppression often leaves the State with minimally sufficient probable cause to keep the charge alive and get to a jury, but often eliminates the State's best evidence to later prove the charge beyond a reasonable doubt. If the State does prevail at trial, it is no longer an aggrieved party with a right to appeal, and may not necessarily be permitted a cross-appeal if the defendant chooses to appeal.

This Court in *Holifield* and Mr. Bowie have heavily relied on Commissioner Crooks's article on discretionary review to guide their arguments. But, noticeably absent from that article is any acknowledgment of the State's unique inability to appeal in most criminal cases. Without certain allowances being made for writ petitions by the State in criminal cases, the Court sets up an institutional regime where

errors are capable of repetition yet evading review. Such a system cannot be said to be in the interest of justice.

Even where the standards for issuance of a statutory writ are arguably not met, this Court has still held that review on the merits was necessary to resolve issues of substantial public importance. In one case challenging the admissibility of breath tests based on improper certification of the breath testing instrument's thermometer, this Court found it more important to review the merits than to bicker over standards for statutory writs of review. *City of Seattle v. Clark-Munoz*, 152 Wn.2d 39, 43 n. 2 and 3, 93 P.3d 141 (2004) ("The parties dispute whether the superior courts had the authority, under the writ statute and procedural rules, to entertain these cases. We elect to resolve this case on the merits and do not reach whether the superior court should have entertained the writs."). The issues raised by the case at bar are no less important and are of the same state-wide significance.

**2. Both case law and the text of RCW 46.20.308 support application of a "substantial compliance" standard to the advisement of the right to refuse a breath test.**

Mr. Bowie argues that the 2004 "in substantially the following language" amendment to RCW 46.20.308 does not apply to the advisement of the right to refuse. Mr. Bowie's argument is that this

modifier should not apply to the advisement of the “right to refuse” because the modifier appears after the “right to refuse” in the statute.

However, we do not interpret sentences within statutes in isolation of each other. “When we interpret a . . . statute, we strive to determine and carry out the drafter’s intent.” *State v. Stump*, 185 Wn.2d 454, 460, 374 P.3d 89 (2016). “We determine that intent by examining the rule’s plain language not in isolation but in context, considering related provisions, and in light of the statutory or rule-making scheme as a whole.” *Id.* Here, the intent of the 2004 amendments to the DUI laws was to simplify the implied consent process—not for the defendant, but for law enforcement. This is evident from the statement of intent at the beginning of the bill through which the 2004 amendments were enacted. LAWS OF 2004, c 68, § 1 (included at CP 76-77). Given that the goal of the amendment was to make law enforcement’s job easier, the context of that amendment is that it should apply with equal force to each of the warnings within subsection two of RCW 46.20.308, including the two warnings that occur before it in that same subsection (right to refuse and right to additional tests).

Furthermore, in at least one prior case where a deviation from the statutory warnings was upheld on the grounds of substantial compliance it was for a warning that shows up alongside the right to refuse warning (i.e.

earlier in the subsection than the “substantially following language” modifier). *Town of Clyde Hill v. Rodriguez*, 65 Wn. App. 778, 785-86, 831 P.2d 149 (1992). In *Clyde Hill*, it was the warning “of his or her right to have additional tests administered by any qualified person of his or her choosing.” Rather than provide the statutory word “additional,” officers substituted the phrase “one or more.” *Id.* at 779. In upholding this deviation from the strict language of the statute, the court held:

[Washington] cases do not stand for the proposition that use of a linguistic equivalent of the statutory word requires suppression of the test results. Where no different meaning is implied or conveyed, the defendant is not misled. To hold otherwise would exalt form over substance. The language used by *Clyde Hill* in this case is neither inaccurate nor misleading, and does not require suppression of the test results.

*Id.* at 785-86; see also *Jury v. Dep't of Lic.*, 114 Wn. App. 726, 731, 60 P.3d 615 (2002) (holding that an errant semicolon did not render the implied consent warnings misleading and invalid). Given the reasoning in *Clyde Hill* and *Jury*, and the intent behind the 2004 amendments, this Court should make it clear to lower courts that they need to be reviewing challenges to implied consent warnings for substance as well as form.

Mr. Bowie argues that this Court in *State v. Whitman Cnty. Dist. Ct.*, 105 Wn.2d 278, 714 P.2d 1183 (1986), provided an adequate framework for analyzing variations that has worked for decades. Br. of

Respondent at 24. The State agrees. The *Whitman County* decision was the basis for the decision in *Clyde Hill* on which the State relies:

*Whitman* and *Holmberg* stand for the proposition that warnings which are inaccurate or misleading contravene the purpose of the implied consent warning and thus require suppression of the test results. These cases do not stand for the proposition that use of a linguistic equivalent of the statutory word requires suppression of the test results.

*Clyde Hill*, 65 Wn. App. at 780

The only difference between *Whitman* and *Clyde Hill* is who prevailed. The State prevailed in *Clyde Hill* because the phrase “one or more” is not meaningfully different from the word “additional.” The defendant prevailed in *Whitman* because the word “shall” for very obvious and longstanding reasons means something different than the word “may” both legally and colloquially. The question for this Court is not whether to apply *Whitman* or *Clyde Hill*, it is whether the phrase “right to refuse” is meaningfully distinguishable from the word “voluntary.”

**3. There is no meaningful difference between “voluntary” and “right to refuse” as used in this context.**

Mr. Bowie argues that “voluntary” and “right to refuse” are meaningfully different because the court must construe the facts in the light most favorable to Mr. Bowie. Br. of Respondent at 27. This argument lacks merit.

Whether two words or phrases mean the same thing is not a question of fact open to favorable or disfavorable lights. It is a matter of opening up the dictionary, which this Court has always treated as an issue of law. “We review the meaning of a statutory definition de novo, as an issue of law.” *State v. Johnson*, 132 Wn. App. 400, 406, 132 P.3d 737 (2006); *Jury*, 114 Wn. App. at 731 (“The legal sufficiency of implied consent warnings is a question of law. And so our review is de novo.”).

Rather than addressing the actual meaning of these words, Mr. Bowie tries to divert the Court’s attention by arguing that he should prevail by default because the State presented an inadequate record on appeal. This diversion tactic also lacks merit.

The record on appeal is adequate to resolve the issues presented by the State. Because the State does not challenge the district court’s findings of fact, the State did not submit the transcript of the motion hearing. The State simply relies on the district court judge’s finding of fact number 7:

Upon completion of the second observation period, Deputy Morrison asked the defendant if he would provide a voluntary sample, to which time the defendant answered “no.” Deputy Morrison’s statement was not in response to any question by the defendant.

CP 84. Mr. Bowie faults the State for not knowing the exact phraseology that Deputy Morrison used when he asked Mr. Bowie if he would submit a voluntary sample. But, that is not because Deputy Morrison did not remember the exact words he used other than that he had used the word “voluntary.”

**4. Non-constitutional harmless error is a workable and appropriate standard of suppression to apply at the trial court level.**

Mr. Bowie argues that the Court cannot transpose the constitutional versus non-constitutional harmless error standards onto suppression motions because it is not a workable standard. Br. of Respondent at 30. However, this Court has already done so in past cases because it is a workable standard.

When applying the constitutional/non-constitutional harmless error standard we typically do so at the appellate level in the context of an error committed by a trial court. If a constitutional violation has occurred, affirmation is appropriate if the State can show that the error was harmless beyond a reasonable doubt. If a non-constitutional violation has occurred, affirmation is presumed unless the defendant can prove prejudice.

When applied at the trial court level, the standards work just as well when the court reviews errors committed by law enforcement. Depending on the magnitude of the error, either the State will have to

show that the error was harmless (i.e. non-prejudicial) beyond a reasonable doubt, or the defendant will have to prove prejudice. As explained in the State's opening brief, this is exactly what this Court required upon remand in *Bartels* when it cited to *Chapman* and instructed the trial courts to give the State the opportunity to prove harmlessness beyond a reasonable doubt. *State v. Bartels*, 112 Wn.2d 882, 890, 774 P.2d 1183 (1989) (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). As argued in the State's opening brief, the opposite standard was applied in *Storhoff*, *Lynch* and *Grewal*. Br. of Petitioner at 21-22 (discussing *Lynch v. Dep't of Lic.*, 163 Wn. App. 697, 262 P.3d 65 (2011); *Grewal v. Dep't of Lic.*, 108 Wn. App. 815, 33 P.3d 94 (2001); and *State v. Storhoff*, 133 Wn.2d 523, 946 P.2d 783 (1997)).

Not only does Mr. Bowie fail to adequately address these conflicts within our implied consent case law, but he also fails to address the impact of *Templeton* on this and other suppression issues. In *Templeton*, this Court made it clear that non-constitutional errors by law enforcement does not automatically lead to suppression of evidence. Instead, suppression "is an extraordinary remedy and should be applied narrowly." *State v. Templeton*, 148 Wn.2d 193, 221, 59 P.3d 632, 645 (2002). To that end, this Court set forth a four factor test for assessing suppression. *Id.* By ignoring *Templeton* altogether, Mr. Bowie appears to tacitly concede that

there has been a gradual change in our law in terms of how we view suppression as it relates to statutory errors and that this gradual change does not favor his position.

As a final argument, Mr. Bowie claims that this court cannot assess prejudice because the State did not provide an adequate record on appeal. Br. of Respondent at 34. Again, the record on appeal is sufficient to review this claim. This Court is reviewing the trial court's findings of fact to assess whether they support the trial court's conclusions of law, not whether those findings are supported by substantial evidence. In reviewing "a suppression motion, conclusions of law are reviewed de novo and the findings of fact used to support those conclusions are reviewed for substantial evidence." *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). "A trial court's findings of fact must justify its conclusions of law." *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 353, 172 P.3d 688 (2007). The State contends that those findings do not support its ultimate conclusion with respect to prejudice under any standard of suppression. Br. of Petitioner at 27-33.

#### B. CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests this court to grant the relief requested in section D of the Brief of Petitioner.

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

Respectfully submitted,  
Douglas J. Shae  
Chelan County Prosecuting Attorney



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By: Andrew B. Van Winkle WSBA #45219  
Deputy Prosecuting Attorney

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IN THE DISTRICT COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CHELAN

STATE OF WASHINGTON,

Plaintiff,

vs.

ROBERT JAMES BOWIE,

Defendant.

WSSC No. 93098-8  
CCSC No. 16-2-00215-8  
CCDC No. C00029482CHS

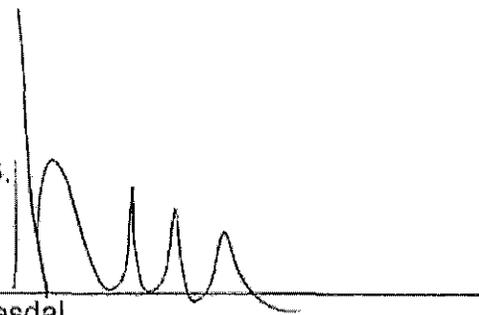
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3  
4 IN THE DISTRICT COURT OF THE STATE OF WASHINGTON  
5 IN AND FOR THE COUNTY OF CHELAN

6 STATE OF WASHINGTON,

7  
8 Plaintiff,

9 vs.

10 ROBERT JAMES BOWIE,

11 Defendant.

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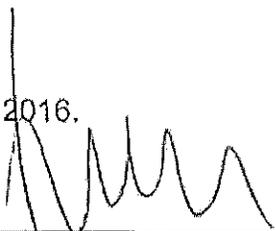
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22 Wenatchee, WA 98801  
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25 DATED this 14<sup>th</sup> day of November, 2016.

  
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Legal Assistant  
Chelan County Prosecuting Attorney's Office

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