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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 Appeal; Gilpin District Court Honorable Dennis Hall Case Number 2018CR212	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant ROBERT S. SCHWEIZER	
Megan A. Ring, Colorado State Public Defender EMILY HESSLER 1300 Broadway, Suite 300 Denver, Colorado 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #51205	Case Number: 2019CA1019
OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 9,492 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(a)(7)(A).

For each issue raised by the Defendant-Appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

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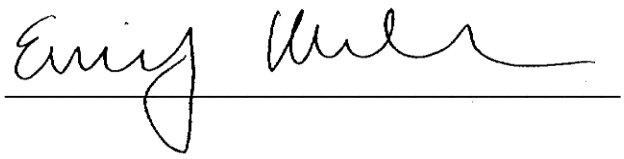

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STATEMENT OF THE FACTS AND CASE

Early one morning in September 2018, Gilpin County Sheriff's Deputy Grant Collins was patrolling the mountain roads outside Central City. TR 3/11/19, pp.136-137, 140-141; EX(Trial) 1, 2. He saw a blue van driving under the speed limit, going about 30 miles per hour in a 45 zone, with two cars following close behind. TR 3/11/19, p.141:17-25. When Collins passed the van he also noted it did not have license plates, so he initiated a traffic stop. TR 3/11/19, pp.143-144.

The van immediately and safely pulled over when Collins turned on his overhead lights and before he used his siren. TR 3/11/19, pp.144:9-13, 200:15-17. Collins approached the car and spoke to the driver and sole occupant, Robert

Schweizer. TR 3/11/19, pp.144-145. Schweizer readily produced his driver's license when asked. TR 3/11/19, p.145:20-24. However, he told Collins he bought the van two weeks prior and had not yet registered it; he also explained that he had insurance but did not have proof with him. TR 3/11/19, p.146:1-15.

While speaking with Schweizer, Collins noticed his pupils were dilated, he was sweating despite the cool morning, and his speech was slurred. TR 3/11/19, p. 147:3-17. A few minutes later, when Collins returned to the car after ensuring Schweizer's license was valid and he had no outstanding warrants, Collins found that Schweizer had fallen asleep. TR 3/11/19, pp. 147-148. Collins asked Schweizer to exit the car and observed that he lost his balance stepping out of the van. TR 3/11/19, p.148:15-18.

At this point, Collins suspected Schweizer was under the influence of drugs, specifically methamphetamine. TR 3/11/19, p.150:16-20. Collins asked Schweizer to do roadside sobriety tests. The horizontal gaze nystagmus test indicated to Collins that Schweizer was under the influence of a central nervous system stimulant, but not alcohol. TR 3/11/19, pp.155-156. Schweizer performed unsatisfactorily on the walk and turn test, one leg stand test, and a modified Romberg maneuver designed to test ability to correctly estimate the passage of time. TR 3/11/19, pp.156-163.

Collins arrested Schweizer, who was cooperative while being handcuffed and "didn't fight, resist, anything like that." TR 3/11/19, p.164:8-14. After placing Schweizer in the back of the patrol car, Collins advised him of Colorado's expressed consent statute and requested he take a blood test. TR 3/11/19, p.164:14-24. Schweizer asked to speak to a lawyer, but Collins said he did not have the right to consult an attorney. TR 3/11/19, p.165:12-21. Schweizer then refused to consent to a blood test. TR 3/11/19, pp.165-166.

Collins searched Schweizer's van, saw a sunglasses case on the driver's floorboard, opened it, and found a glass pipe and a baggie containing a clear crystal substance. TR 3/11/19, pp.190-172; EX(Trial) 3-5. Later testing confirmed that the clear substance, which weighed .99 grams, contained methamphetamine. TR 3/11/19, p.225:1-14, 230:13-18; EX(Trial) 14.

The State charged Schweizer with: possession of a schedule II controlled substance, a level 4 drug felony under section 18-18-403.5(1), (2)(a), C.R.S. (2018)[1]; driving under the influence, an unclassified misdemeanor under section 42-4-1301(1)(a), C.R.S.; failure to provide proof of insurance, a class 1 traffic offense under section 42-4-1409(3), C.R.S.; and driving an unregistered vehicle, a class B

[1] As of March 1, 2020, under section 18-18-403.5(2)(c), C.R.S., possession of certain controlled substances, including schedule II drugs, in any quantity not exceeding four grams is a level 1 drug misdemeanor.

traffic infraction under section 42-3-121(1)(a), C.R.S. CF, 22-23. Schweizer tried his case to a jury.

At trial, the State relied heavily on the testimony of a blind expert in drug recognition, Chris Lussier, an investigator in the Gilpin County Sheriff's Office. TR 3/11/19, p.243:16-22. He testified extensively about the effects of central nervous system (CNS) stimulants on the body. In particular, Lussier described how CNS stimulants can improve coordination and thinking, mimicking the body's "fight or flight" response. TR 3/11/19, pp.244-245. He testified there are "about 20 different symptoms that someone can exhibit under the influence of CNS stimulants," including: sweating, dilation of the pupils, poor concentration, and rigid muscle tone resulting in balance issues. TR 3/11/19, pp.248-250. (Though Lussier listed sweating as an indicator, the Advanced Roadside for Impaired Driving Enforcement manual on which he was trained did not list that symptom. TR 3/11/19, p.255:17-21.) Lussier also testified that a CNS stimulant can cause either a slowed perception of time or the misperception that time is sped up, depending on whether a person is in the "up" or "downside" stage. TR 3/11/19, pp.250-251, 253-254.

The defense emphasized that Collins failed to record audio of the stop despite having the technology to do so. TR 3/11/19, p.180:12-18. Collins claimed that he did not remember Schweizer asking to record the encounter on his cellphone. TR

3/11/19, p.180:19-24. Other details were left out of Collins's report. TR 3/11/19, pp.191-192, 206-207. For example, Collins did not check boxes in the sobriety examination report indicating that Schweizer was sweating, acted unusually, or lacked coordination. TR 3/11/19, pp.195-196. The defense also focused on anomalies in the timing of Collins's investigation. Specifically, Collins radioed dispatch he was beginning the roadside testing at 5:06 a.m. and then advised dispatch he was putting Schweizer in handcuffs at 5:09 a.m.—an impossibly short window to explain and administer the battery of roadsides. TR 3/11/19, pp.186-188.

Finally, the defense emphasized that methamphetamine use results in numerous physical indicia—hyperactivity, euphoria, talkativeness, teeth grinding, pupillary reaction to light, insomnia—that were *not* observed by Collins; at the same time, some of Collins's observations were contrary to methamphetamine use (e.g., sleeping), or were not indicative of methamphetamine use (e.g., slurred speech). TR 3/11/19, pp.260-264.

The jury convicted Schweizer as charged. CF, 262-265.

At sentencing, the defense asked the court to impose probation, emphasizing that Schweizer—who was 58 years old—had no prior felony convictions, had served in the military before being honorably discharged, maintained steady employment, and wanted to resume his role as a provider for his son. TR 4/19/19, pp.2-4. The

court sentenced Schweizer to two years on probation, with 180 days in jail as a condition of probation, and fines on the traffic offenses. TR 4/19/19, pp.15-17.

SUMMARY OF THE ARGUMENT

Evidence obtained via an illegal search of the car should have been suppressed. The United States and Colorado Constitutions prohibit unreasonable seizures and searches. Under those constitutional protections, officers do not have free rein to search a car after a driver is arrested, but instead have limited authority under narrowly defined exceptions to the warrant requirement.

As the Supreme Court held in *Arizona v. Gant*, under the Fourth Amendment, police may search the passenger compartment of a car after an occupant has been arrested only if one of two conditions is met: (1) the arrestee is within reaching distance of the passenger compartment at the time of the search, or (2) it is reasonable to believe the vehicle contains evidence of the offense of arrest. 556 U.S. 332, 351 (2009). Here, there is no dispute that the first condition was inapplicable; Schweizer was handcuffed and in the back of a police car at the time of the search. The second condition also went unmet. At the suppression hearing, the prosecution presented no evidence that Collins had particularized reason beyond an inchoate hunch to believe there would be evidence of the offense of arrest in Schweizer's car when he searched it. The search was unconstitutional.

Even assuming there was reasonable suspicion to justify the search, the Colorado Constitution should be interpreted to provide greater protection than the Fourth Amendment in this context. Under our state constitution, a warrantless, unconsented-to search of a vehicle must be supported by probable cause. The second branch of *Gant* permitting a full search on lesser grounds is contrary to our constitution. The prosecution did not prove, or even allege, Collins had probable cause to search Schweizer's car. The search was illegal.

The trial court should have granted Schweizer's motion to suppress. Because the erroneous admission of illegally obtained evidence—namely, the methamphetamine—was not harmless beyond a reasonable doubt, reversal of the possession and DUI convictions is required.

The court erroneously admitted evidence of Schweizer's invocation of constitutional rights, and permitted the prosecutor to use it to prove guilt. Under the Fourth Amendment, a blood draw is a search requiring a warrant, or else must be justified by an exception to the warrant requirement. Though Colorado's expressed consent law purports to provide an exception to the warrant requirement, such statutorily deemed consent cannot suffice. Under the circumstances here, Schweizer was free to refuse a warrantless blood draw. Similarly, under either the federal or Colorado constitution, a person has a right to consult with counsel when

arrested and asked to choose whether to submit to chemical testing. Schweizer properly invoked that right. Because the court here allowed the prosecution to use evidence of Schweizer's invocation of his constitutional rights against him, and because that error was not harmless, reversal is required.

The court reversibly erred in giving a legally inaccurate refusal instruction. It is generally improper for courts to give jury instructions highlighting particular evidence for the jury's attention. Here, even assuming the admissibility of the refusal evidence, the court needlessly gave an instruction incorrectly informing the jury it could consider Schweizer's refusal to submit to a warrantless blood test when determining his "guilt or innocence." The instruction was not just unnecessary, but also misleading and legally wrong. Because the error was not harmless, reversal of the DUI conviction is required.

ARGUMENT

I. The trial court reversibly erred in failing to suppress evidence found as a result of an illegal search of Schweizer's car conducted incident to his arrest.

A. Preservation and standard of review

This issue is preserved. Relying on the United States and Colorado Constitutions, Schweizer moved to suppress the evidence found during the search of his car. CF, 77-78, 81-82, 84-85. The court denied that motion after a hearing. TR 2/8/19, pp.46-55.

A trial court's ruling on a motion to suppress raises mixed questions of law and fact. *People v. Chavez-Barragan*, 2016 CO 66, ¶ 18. A reviewing court defers to the trial court's findings of historical fact if they are supported by competent record evidence. *People v. Syrie*, 101 P.3d 219, 222 (Colo. 2004). "The legal conclusions of the trial court are subject to de novo review and reversal if the court applied an erroneous legal standard or came to a conclusion of constitutional law that is inconsistent with or unsupported by the factual findings." *Id.*

Appellate courts review errors of constitutional dimension for constitutional harmless error. *Hagos v. People*, 2012 CO 63, ¶ 11. Under that standard, this Court must reverse if "there is a reasonable *possibility* that the [error] might have contributed to the conviction." *Id.* (quoting *Chapman v. California*, 386 U.S. 18, 24

(1967)). The State must prove the error was harmless beyond a reasonable doubt. *Id.*

B. After a hearing at which Deputy Collins was the only witness, the court concluded the search of Schweizer's car was legal and denied the motion to suppress.

Before trial, the defense moved to suppress the evidence obtained from Deputy Collins's search of Schweizer's car. CF, 77-85. At the subsequent suppression hearing, Collins was the sole witness called by the prosecution.

Collins testified that he initially pulled Schweizer's van over because it did not have plates and because he was impeding traffic by driving below the speed limit. TR 2/8/19, pp.6-8. When he approached the car, Collins noted Schweizer was sweating, his pupils were dilated, and his speech was slurred. TR 2/8/19, pp.9-10. After running clearances on Schweizer and his car, Collins returned to find Schweizer had fallen asleep. TR 2/8/19, pp.11-12. The deputy asked Schweizer to get out of the car and he complied, but lost his balance when stepping out. TR 2/8/19, pp.13-14. Suspecting that Schweizer was under the influence of methamphetamine, the deputy asked when he last used; he answered, "I never use that stuff." TR 2/8/19, p.14:1-8. Nevertheless, based on Schweizer's subsequent performance in roadside sobriety testing, Collins concluded Schweizer was likely "under the influence of a drug." TR 2/8/19, p.19:19-25.

Collins then arrested Schweizer, handcuffing him and putting him in the back of the patrol car. TR 2/8/19, pp.20-21, 36-37. Collins decided to search Schweizer's car "for any evidence related to the crime of DUID, driving under the influence of a drug." TR 2/8/19, p.21:5-7. After he opened the driver's door, he saw a black sunglasses case on the floorboard, "grabbed the case, opened [it], noticed a clear glass pipe" and a "plastic baggie with a clear crystal substance inside which [he] suspected to be methamphetamine." TR 2/8/19, p.21:7-13. Collins explained that he specifically homed in on the glasses case because, in his training and experience, "people like to hide their drugs and paraphernalia in little cases." TR 2/8/19, pp.21-22, 35-36.

Collins did not collect any other evidence from the car. TR 2/8/19, p.22:19-22. The deputy left the van on the side of the highway with Schweizer's permission, then took Schweizer to jail. TR 2/8/19, p.34:20-22.

At the suppression hearing, defense counsel argued that the deputy had illegally searched Schweizer's car incident to his arrest because Collins did not articulate any particular reason to believe there would be evidence of DUID in the vehicle. TR 2/8/19, pp.38-43. Among other cases, the defense relied on *People v. Chamberlain*, 229 P.3d 1054 (Colo. 2010), for the proposition that the nature of the offense of arrest cannot, standing alone, justify a search of a car incident to arrest.

The court found that Collins had probable cause to arrest Schweizer for DUID. TR 2/8/19, pp.49-50. Regarding the search of the car, the court reasoned that

> the question is when a driver is arrested for driving under the influence of drugs, does that give the officer reasonable cause to believe that there is evidence relative to that crime in the car? And here, I think there is. The officer testified that in his experience, people who use central system stimulants like methamphetamine often times have evidence of that drug or the paraphernalia necessary to use the drug in their car. And I think it's also important to note here that the search conducted by the officer was a very limited one. He only searched the car in the area of the driver's compartment and only the floor in front of the driver's seat where he found a case which he said the kind of thing commonly used to conceal illegal drugs.

TR 2/8/19, pp.51-52. The court purported to distinguish this case from *Chamberlain* because the offense of arrest "would create reason to believe that evidence relative to the crime of DUID might be found in the vehicle." TR 2/8/19, p.55:10-19.

C. The court erred in denying the motion to suppress because the prosecution failed to prove the officer had any articulable, particularized reason to believe there would be evidence of the offense of arrest in the car.

The United States and Colorado Constitutions protect against unreasonable searches. U.S. Const. amends. IV, XIV; Colo. Const. art. II, § 7. Warrantless searches are presumptively unreasonable; the prosecution must overcome that presumption by demonstrating such conduct falls within one of the "specifically established and clearly articulated exceptions to the warrant requirement." *People*

v. Rodriguez, 945 P.2d 1351, 1359 (Colo. 1997); *see People v. Winpigler*, 8 P.3d 439, 443 (Colo. 1999).

One such exception permits a warrantless search conducted incident to arrest. In the context of vehicle searches, the United States Supreme Court held in *Gant* that police may search a car after an occupant has been arrested only if one of two conditions is met: (1) the arrestee is within reaching distance of the passenger compartment at the time of the search, or (2) "it is reasonable to believe the vehicle contains evidence of the offense of arrest." 556 U.S. at 351.

Here, Schweizer was handcuffed, in the patrol car, and therefore unable to reach the passenger compartment of his van at the time of Collins's search. Thus, the second *Gant* rationale—the so-called "evidence-gathering rationale"—is the only one at issue.

In interpreting the second branch of *Gant*, the Colorado Supreme Court has made two important clarifications. First, the *Gant* Court's "reasonable to believe" standard requires "a degree of articulable suspicion commensurate with that sufficient for limited intrusions like investigatory stops." *People v. McCarty*, 229 P.3d 1041, 1046 (Colo. 2010); *see also Perez v. People*, 231 P.3d 957, 961 (Colo. 2010). This standard demands articulable suspicion, under the specific facts of the case, "beyond an inchoate and unparticularized hunch." *People v. Mason*, 2013 CO

32, ¶ 11. It is not sufficient that it "may have been possible" for the officer to find evidence of the offense in the car. *Chamberlain*, 229 P.3d at 1058; *see McCarty*, 229 P.3d at 1046 (holding officer's observation of defendant purchasing drug paraphernalia was insufficient to provide reasonable, articulable suspicion that additional evidence of that offense might be found in his car); *see also People v. Crum*, 2013 CO 66, ¶¶ 3, 7 (holding there was a reasonable, articulable suspicion additional contraband would be found in defendant's car where he made furtive movements and where the drugs found before the vehicle search were packaged for distribution).

Second and relatedly, the Colorado Supreme Court eschewed a categorical approach to *Gant*—that is, an approach under which certain offenses, by their nature alone, always authorize a search of an arrestee's vehicle. *Chamberlain*, 229 P.3d at 1056-57. As the court explained, "The nature of the offense of arrest is clearly intended to have significance, and in some cases it may virtually preclude the existence of real or documentary evidence, but a broad rule automatically authorizing searches incident to arrest for all other offenses cannot be reconciled with the actual holding of *Gant*." *Id.* at 1057.

Although the Colorado Supreme Court has not addressed a vehicle search incident to a DUI arrest under *Gant*, courts in other jurisdictions have held a DUI

arrest does not automatically justify a search. *United States v. Reagan*, 713 F. Supp. 2d 724, 732-33 (E.D. Tenn. 2010); *United States v. Grote*, 629 F. Supp. 2d 1201, 1204 (E.D. Wash. 2009), *aff'd*, 408 F. App'x 90 (9th Cir. 2011) (unpublished); *United States v. Taylor*, 49 A.3d 818, 826 (D.C. 2012); *Taylor v. State*, 137 A.3d 1029, 1033-34 (Md. App. 2016); *State v. Eversole*, 2017-Ohio-8436, ¶ 28. This approach comports with our supreme court's pronouncement in *Chamberlain* that, though certain offenses may always preclude an evidence-gathering search under *Gant*, no offense always justifies an evidence-gathering search under *Gant*.

In *People v. Kessler*, 2018 COA 60, a division of this Court concluded that officers legally searched the defendant's car incident to his arrest for DUI because there was reason to believe there might be evidence of that offense inside. There, after stopping the defendant for speeding, an officer saw a half-empty bottle of alcohol in the backseat. *Id.* at ¶ 2. The officer subsequently noticed indicia of intoxication and the defendant failed to perform roadside tests as a sober person would. *Id.* at ¶ 3. The defendant initially denied having been drinking, but later admitted he had drunk from the open bottle in the backseat—and a preliminary breath test indicated he had an elevated blood alcohol content. *Id.* After arresting the defendant for DUI, officers searched his car and found cocaine in the center console area. *Id.* at ¶ 4.

The division concluded the search of the car was lawful under the evidence-gathering branch of *Gant*. Specifically, the division relied on four factors that, in its view, provided reason to believe the car would contain additional alcohol: (1) the officers had probable cause to arrest Kessler for DUI; (2) Kessler's initial dishonesty about drinking made it more likely that additional evidence would be found in the car; (3) "[o]ne of the two officers who searched the vehicle stated, based on his training and experience, it was 'more common than not' to find bottles of alcohol in a vehicle of someone arrested for driving under the influence;" and (4) an officer had seen the half-empty bottle in the car. *Id.* at ¶¶ 27-28.

Here, in contrast to *Kessler*, the basis for Collins's search was purely a generalized, inchoate hunch. At the time of the search, Schweizer had not made any incriminating statements regarding his intoxication or drug use—he had only denied using methamphetamine. And Collins did not see any drugs or paraphernalia in the car before the search. *Cf. People v. Revoal*, 2012 CO 8, ¶ 11 (in assessing whether reasonable suspicion existed, a court may consider only "the facts and circumstances known to the officer at the time of the intrusion").

Most significantly, contrary to the trial court's finding and unlike in *Kessler*, Collins provided no testimony that in his experience people driving under the influence of drugs often have drugs in the car. The court said Collins "testified that

in his experience, people who use [CNS] stimulants like methamphetamine often times have evidence of that drug or the paraphernalia necessary to use the drug in their car." No, Collins did not. He said that people "like to hide drugs in cases" like the sunglasses case found on the floorboard. TR 2/8/19, pp.21:14-25, 35:13-16. Collins explained that he suspected there might be drugs in the sunglasses case after he began the search, but he *never* identified *any* particular reason he suspected there would be evidence of DUID *in the van*.

At bottom, the trial court essentially employed a categorical approach despite precedent from our supreme court rejecting that analysis. And, contrary to the trial court's conclusion, it is irrelevant that the search was limited in scope. Either a full-scale search of the passenger compartment was allowed, or no search was. There is no limited middle ground for a limited search. Here, no search was allowed.

The prosecution failed to demonstrate that the warrantless search of Schweizer's car was reasonable, and the trial court relied on incorrect factual findings and incorrect legal analysis in concluding the search was lawful. The motion to suppress should have been granted.

D. Under the Colorado Constitution, this Court should adopt a more stringent standard than the Supreme Court's and require that, where an arrestee cannot access the interior of a vehicle, only probable cause can justify a full-scale search of his car.

Colorado's appellate courts have long recognized their responsibility to "interpret the Colorado Constitution in a manner consistent with and more protective of the liberty interests of Colorado citizens than might otherwise be required under federal standards." *People v. Hillman*, 834 P.2d 1271, 1280 (Colo. 1992) (Quinn, J., dissenting). In other words, "Colorado's constitutional provisions are independent of, and may extend beyond, the federal constitution to offer greater protection for the people of Colorado." *People v. Rodriguez*, 112 P.3d 693, 698 (Colo. 2005); *see California v. Greenwood*, 486 U.S. 35, 43 (1988).

Under the Colorado Constitution, "[t]he people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing." Colo. Const. art. II, § 7. The supreme court has repeatedly recognized this provision provides greater protections than its federal counterpart. *People v. Galvadon*, 103 P.3d 923, 927 (Colo. 2005) (noting that the Colorado Constitution provides "a broader definition of what constitutes a legitimate expectation of privacy from government intrusion" than that

recognized under the federal constitution); *see People v. McKnight*, 2019 CO 36, ¶ 42; *People v. Oates*, 698 P.2d 811 (Colo. 1985); *People v. Corr*, 682 P.2d 20 (Colo. 1984); *People v. Sporleder*, 666 P.2d 135 (Colo. 1983); *Charnes v. DiGiaocomo*, 612 P.2d 1117 (Colo. 1980). Consistent with this principle, this Court should conclude that the second, "evidence-gathering" branch of *Gant* is contrary to the Colorado Constitution.

The Supreme Court in *Gant* set out to clarify—and ultimately hem in—*New York v. Belton*, in which the Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile," inclusive of "the contents of any containers found within the passenger compartment." 453 U.S. 454, 460 (1981) (footnote omitted). Lower courts interpreted *Belton* to allow a search of the passenger compartment of a recent arrestee's car, even when there was no possibility that the arrestee could access the car at the time of the search.

But the *Gant* Court rejected that broad rule, stating it would create "a serious and recurring threat to the privacy of countless individuals"—the threat that police officers would have the "unbridled discretion to rummage at will among a person's private effects." 556 U.S. at 345. Instead, the Court reiterated the search incident

to arrest exception originated to promote two purposes: "protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy." *Id.* at 339. Hence the first branch of *Gant*: the search of a recent arrestee's car is justified "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Id.* at 343.

But the Court's second pronouncement—that an officer may also search the passenger compartment of a recent arrestee's car if it is reasonable to believe evidence of the offense of arrest is inside—was completely divorced from the search incident to arrest holding. Indeed, the Court recognized that the evidence-gathering rationale was untethered to its precedent authorizing searches incident to arrest. *Id.* at 343 (noting the rule "does not follow from" *Chimel v. California*, 395 U.S. 752 (1969)). That is, allowing officers to search an arrestee's car even after he is out of reach of the vehicle does not further either purpose for the search incident to arrest exception to the warrant requirement. And the *Gant* Court offered little by way of explanation for creating this new rule, stating only that "circumstances unique to the vehicle context" served as its justification. *Id.*

The second branch of *Gant* has come under serious criticism. "[T]he vehicle search apparently authorized by the second branch of *Gant* is one with uncertain scope limits and without any requirement of probable cause that evidence will be

found," and there is substantial "reason to doubt that there is a doctrinal basis for" the rule. Wayne LaFave, 3 Search & Seizure § 7.1(d) (6th ed.). "[A]s a general matter the Fourth Amendment has been construed not to permit a search for evidence (as compared to a search for a weapon or for a person in the interest of officer safety) absent probable cause, at least absent 'special needs beyond the normal need for law enforcement.'" *Id.* (footnotes omitted). *Gant* authorizes precisely such otherwise illegal and indefensible evidence-gathering searches.

Our supreme court has indicated that Colorado's constitution provides greater protection than the Fourth Amendment in this context. "*In Colorado*, a police officer may conduct a warrantless search of an automobile if: (1) there is probable cause to believe that it contains evidence of a crime; and (2) the circumstances create a practical risk of the vehicle's unavailability if the search is postponed until a search warrant is obtained." *People v. Edwards*, 836 P.2d 468, 471-72 (Colo. 1992). And there is no other area of the law in which our constitution allows a full-fledged warrantless search on less than probable cause absent some true exigency or special need. Such an exception would risk swallowing the rule. "Although the constitutional requirement of a warrant can be excused under exigent circumstances, the probable cause requirements are 'at least as strict in warrantless searches as in

those [executed] pursuant to a warrant.'" *Mendez v. People*, 986 P.2d 275, 280 (Colo. 1999) (quoting *People v. Thompson*, 523 P.2d 128, 131 (Colo. 1974)).

Moreover, as our supreme court has noted, the "goal" of the search incident to arrest exception "was to develop a rule that would allow police officers to protect themselves and to preserve evidence" without "eviscerating" the constitutional rights of arrestees. *People v. Hufnagel*, 745 P.2d 242, 247 (Colo. 1987). The first branch of *Gant* furthers that objective. The second does not—it undermines it. Allowing a vehicle search incident to arrest solely to facilitate expeditious evidence-gathering seriously diminishes Coloradans' right to privacy.

At least one other jurisdiction's highest court has held that *Gant*'s second branch is contrary to the state constitution. In *State v. Gaskins*, the Iowa Supreme Court "decline[d] to adopt *Gant*'s alternative evidence-gathering rationale for warrantless searches incident to arrest under the Iowa Constitution because it would permit the [search incident to arrest] exception to swallow completely the fundamental textual rule…that searches and seizures should be supported by a warrant." 866 N.W.2d 1, 13 (Iowa 2015). The court recognized that the evidence-gathering rule in *Gant* amounted to a "[p]olice entitlement" that was "incompatible with Iowans' robust privacy rights." *Id.* This Court, like that in *Gaskins*, should

recognize that the evidence-gathering rationale of *Gant* is "repugnant" to our state constitution. *See id.* at 14.

Because the evidence-gathering branch of *Gant* is anathema to article II, section 7 of the Colorado Constitution, this Court should reject it as a basis for upholding the search of Schweizer's car here. The search was illegal because it was not authorized by a warrant or supported by probable cause, and the evidence obtained therefrom should have been suppressed.

E. Reversal is required.

Evidence obtained in violation of the constitutional protections against unreasonable searches and seizures cannot be introduced against the aggrieved person during trial. *People v. Gutierrez*, 222 P.3d 925, 941 (Colo. 2009); *see Wong Sun v. United States*, 371 U.S. 471, 485-88 (1963). Because the court erroneously denied Schweizer's motion to suppress, the prosecution was able to introduce the drugs obtained via the unconstitutional search of his car. The State cannot show that the improperly introduced evidence was harmless beyond a reasonable doubt as to the drug possession and DUI convictions.

Reversal is required.

II. The trial court reversibly erred in admitting, in violation of his right to due process, evidence of Schweizer's invocation of his constitutional rights to refuse a warrantless search and to consult with counsel.

A. Preservation and standard of review

This issue is preserved. At the suppression hearing, defense counsel argued that Schweizer's refusal to consent to a warrantless blood test and his request for counsel would be inadmissible. TR 2/8/19, pp.44-45. The court disagreed. TR 2/8/19, pp.49-50. At trial, defense counsel renewed her argument, but alternatively asked that if the refusal came in, Schweizer's requests for an attorney also be admitted to provide context. TR 3/11/19, pp.18-19, 124-125. The court again concluded that evidence of Schweizer's refusal and his requests for an attorney would be admissible. TR 3/11/19, pp.19-20.

Legal questions, including statutory and constitutional interpretation, are reviewed de novo. *Fitzgerald v. People*, 2017 CO 26, ¶ 8. This Court also reviews de novo whether a due process violation occurred. *People v. Burlingame*, 2019 COA 17, ¶ 11. The State must prove a constitutional error was harmless beyond a reasonable doubt. *Hagos*, ¶ 12.

B. A person is entitled to refuse a warrantless search of his blood.

The federal and state constitutions protect people from unreasonable searches. U.S. Const. amends. IV, XIV; Colo. Const. art. II, § 7. "Fourth Amendment

constraints apply to DUI investigations just as they would to any other crime." *Fitzgerald*, ¶ 23.

"[T]he taking of a blood sample...is a search." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016). Indeed, "[s]uch an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *Missouri v. McNeely*, 569 U.S. 141, 148 (2013) (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985)); *see People v. Williams*, 557 P.2d 399, 406 (Colo. 1976) (noting "the special insult to human dignity involved when police seek evidence in...bodily fluids").

"[A] warrantless search of the person is reasonable only if it falls within a recognized exception." *McNeely*, 569 U.S. at 148. "One such exception exists for consent: If an individual consents to a search, the government need not obtain a warrant." *People v. Davis*, 2019 CO 24, ¶ 16. When the prosecution relies on the consent exception, it must "demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973); *see People v. Delage*, 2018 CO 45, ¶ 1. Consent is voluntary only when "the product of an essentially free and unconstrained choice by its maker." *People v. Berdahl*, 2019 CO 29, ¶ 20 (quoting *People v. Munoz-Gutierrez*, 2015 CO 9, ¶ 16).

Nevertheless, according to our supreme court, in the context of a DUI investigation Colorado's expressed consent statute—not an individual's voluntary consent—"satisfie[s] the consent exception to the Fourth Amendment warrant requirement." *People v. Hyde*, 2017 CO 24, ¶ 3; *see People v. Simpson*, 2017 CO 25, ¶ 2. Under this view, "[t]he prosecution's use of a defendant's refusal to consent to a blood…test as evidence of guilt, in accordance with the terms of Colorado's Expressed Consent Statute, does not violate the Fourth Amendment." *Fitzgerald*, ¶ 27; *see* § 42-4-1301.1, C.R.S.; *see also People v. King*, 2017 CO 44.

The interpretation embraced by our supreme court in *Fitzgerald*, *Hyde*, and *Simpson* is wrong. The theory that the State can pass a law "deeming" the consent of people it wants to search would spell the end of our constitutional protections against unreasonable searches. Such "deemed" consent lacks the actual voluntariness that justifies the exception. *See Schneckloth*, 412 U.S. at 243; *Delage*, ¶ 7.

Our supreme court's erroneous rulings would bind this Court but for intervening United States Supreme Court authority rejecting the statutory consent theory. In *Mitchell v. Wisconsin*, the government conducted a warrantless blood draw of a DUI suspect. 139 S. Ct. 2525, 2532 (2019) (plurality opinion). The Wisconsin state court "conclude[d] that consent given by drivers whose conduct falls

within the parameters of [the state's implied consent statute] is constitutionally sufficient consent to withstand Fourth Amendment scrutiny." *State v. Mitchell,* 2018 WI 84, ¶ 60. The Supreme Court vacated the state court's decision and made clear it has never accepted the statutory consent theory: "[O]ur decisions have not rested on the idea that these [implied consent] laws do what their popular name might seem to suggest—that is, create actual consent to all the searches they authorize." 139 S. Ct. at 2533; *see id.* at 2545 (Sotomayor, J., dissenting) ("[S]tate statute, however phrased, cannot itself create the actual and informed consent that the Fourth Amendment requires."). Ultimately, because *Mitchell* involved an unconscious driver, the Court thought exigent circumstances might justify the warrantless search and remanded for further proceedings. *Id.* at 2539 (plurality opinion).

Here, Collins sought to draw Schweizer's blood without a warrant under the expressed consent statute. But when the State "attempts to justify a search on the basis of [a person's] consent," it must "demonstrate that the consent was in fact voluntarily given." *Schneckloth,* 412 U.S. at 248. Schweizer did not give his consent. That was his right under the federal and state constitutions.

C. A person is entitled to consult with an attorney before choosing whether to submit to a blood test.

In the context of chemical testing under the expressed consent statute, the Colorado Supreme Court stated in *Calvert v. Colo. Dep't of Revenue* that "[a]s a matter of law" there is no "constitutional right to talk with an attorney before choosing whether to submit to the test." 519 P.2d 341, 343 (Colo. 1974). Notably, the appellant there did not argue there was any such right—instead, in that appeal from an administrative revocation of his driver's license, the appellant argued that he had not actually refused to submit to chemical testing within the meaning of section 42-2-126(2)(h), C.R.S., by asking to speak to an attorney after being advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Though the *Calvert* court cited Supreme Court and other Colorado precedent for its statement that there is no right to consult with counsel before choosing whether to submit to a chemical test, the authorities cited for that proposition—*Schmerber v. California*, 384 U.S. 757 (1966), *People v. Brown*, 485 P.2d 500 (Colo. 1971), and *People v. Sanchez*, 476 P.2d 980 (Colo. 1970)—do not actually support it.

Despite the paucity of legal reasoning in *Calvert*, Colorado's appellate courts have not seriously readdressed the court's statement on the right to counsel; they also have not applied it in a criminal DUI prosecution. *See generally Haney v. Colo. Dep't of Revenue*, 2015 COA 125, ¶ 18 (collecting administrative review cases).

The distinction between civil administrative proceedings and criminal DUI proceedings is significant. *See, e.g.*, *Mills v. Bridges*, 471 P.2d 66, 69 (Idaho 1970) ("The weight of authority is to the effect that because an administrative proceeding for the suspension of a driver's license is a civil proceeding, and not a criminal prosecution, a defendant does not have a constitutional right to consult with an attorney before deciding whether to accede to an officer's request to submit to a blood test."). In the criminal context, other state courts have held that a person *does* have a limited right to speak with an attorney before choosing whether to submit to chemical testing. *See, e.g.*, *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 833 (Minn. 1991); *State v. Spencer*, 750 P.2d 147, 156 (Or. 1988). This appears to be the prevailing view, whether the right is constitutional or derived from a state statute or rule. *See Mogard v. City of Laramie*, 2001 WY 88, ¶ 24 (compiling cases).

Under both the Sixth Amendment and its Colorado counterpart, the "accused" has a right to counsel at all critical stages. U.S. Const. amend. VI ("In all criminal prosecutions the accused shall enjoy the right…to have the assistance of counsel for his defense."); Colo. Const. art II, § 16 ("In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel."). Though the Sixth Amendment right generally "attaches only once charges are filed," *People v. Vickery*, 229 P.3d 278, 280 (Colo. 2010), the Supreme Court has held the right

applies before formal charging when a police investigation has "ceased to be a general investigation of 'an unsolved crime,'" and instead focuses on a particular suspect, *Escobedo v. Illinois*, 378 U.S. 478, 485 (1964) (quoting *Spano v. New York*, 360 U.S. 315, 327 (1959) (Stewart, J., concurring)). Under either the federal or state constitution, a person is an "accused" facing criminal prosecution at such a time because

> [a] person taken into formal custody by the police on a potentially criminal charge is confronted with the full legal power of the state, regardless of whether a formal charge has been filed. Where such custody is complete, neither the lack of a selected charge nor the possibility that the police will think better of the entire matter changes the fact that the arrested person is, at that moment, ensnared in a "criminal prosecution."

Spencer, 750 P.2d at 155-56. When a person is arrested and asked to submit to chemical testing, he is "accused," at a critical stage of the prosecution, and has a right to consult counsel.[2] *See Friedman*, 473 N.W.2d at 833 ("We believe that a driver who has been stopped for a possible DWI violation and has been asked to submit to a chemical test is at a 'critical stage' in DWI proceedings, thus triggering the right to counsel."); *see also State v. Juarez*, 775 P.2d 1140, 1145 (Ariz. 1989).

[2] This constitutional analysis comports with Colorado statutory requirements. *See generally* § 16-3-402(1), C.R.S.; § 16-3-403, C.R.S.

Moreover, courts have recognized a due process right to consult with an attorney even where neither the Fifth nor Sixth Amendment would guarantee the right to counsel.[3] "A person has an independent right, protected...by the general due process clause of the Fourteenth Amendment and its State counterpart, to seek legal advice or representation at any time, on any matter, and for any reason. This is especially so when the person perceives that civil or criminal litigation against him may be in the offing." *Hunter v. State*, 573 A.2d 85, 91 (Md. App. 1990) (internal citations omitted). A person therefore has a due process right to consult with counsel, especially after being taken into custody, prior to deciding whether to submit to chemical testing. *See, e.g.*, *Sites v. State*, 481 A.2d 192, 200 (Md. App. 1984) ("[W]e think to unreasonably deny a requested right of access to counsel to a drunk driving suspect offends a sense of justice which impairs the fundamental fairness of the proceeding.").

Here, when Schweizer was arrested, he repeatedly asked to speak to an attorney before choosing whether to submit to a warrantless test of his blood. Under either the federal or Colorado Constitution, Schweizer had the right to assistance of counsel and properly invoked that right.

[3] Under the federal constitution, the Fifth Amendment right to counsel "applies only when the defendant is subjected to a custodial interrogation." *Vickery*, 229 P.3d at 280.

D. Reversal is required because the prosecution introduced and heavily relied on Schweizer's invocation of his constitutional rights as evidence of guilt.

At trial, the prosecution extensively used Schweizer's exercise of his constitutional rights against him. As early as opening statements, the prosecutor highlighted that Schweizer refused a blood test after asking for an attorney. TR 3/11/19, p.132:14-19. During direct examination of Deputy Collins, the prosecutor asked about the expressed consent advisement, Schweizer's response ("A: He refused.... He said he wanted a lawyer."), and whether a person is "allowed" to speak to an attorney before deciding whether to submit to chemical testing. TR 3/11/19, pp.164-166. To the last point, Collins responded, "No; per the Colorado Express Consent law, you are not entitled to a lawyer prior to responding to an officer or my request to submit to a chemical test." TR 3/11/19, p.165:17-19.

The trial court also admitted a copy of an "Express Consent Affidavit" filled out by Collins at the jail, which indicated that Schweizer again refused testing, would not sign the form, and instead stated, "I want a lawyer." EX(Trial) 12; *see* TR 3/11/19, pp. 167-169. In closing argument, the prosecutor explicitly urged the jury (via a burden-shifting argument) to consider Schweizer's refusal: "He refuses that test. He gives up his driver's license instead of letting you know what's in his blood....There would be one way to know exactly what is in his blood at that

moment. You don't have it." TR 3/12/19, p.40:6-15; *see also* TR 3/12/19, p.53:6-12. And the jury was instructed that it could consider the refusal evidence, and that a person does not have a right to talk to an attorney before deciding whether to take a chemical test. CF, 277.

The introduction and prosecutorial use of this evidence violated Schweizer's rights to a fair trial and to due process of law. U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§ 16, 23, 25; *see Morgan v. Illinois*, 504 U.S. 719, 727 (1992); *Oaks v. People*, 371 P.2d 443, 447 (Colo. 1962). Constitutional protections would be meaningless if, whenever a person relied on them, the invocation could be used as evidence of guilt. *See Apodaca v. People*, 712 P.2d 467, 473 (Colo. 1985) ("A constitutional right may be said to be impermissibly burdened when there is some penalty imposed for exercising the right."); *People v. Perry*, 68 P.3d 472, 476 (Colo. App. 2002). "It is well settled that a person should not be penalized for exercising a constitutional privilege." *People v. Pollard*, 2013 COA 31M, ¶ 25.

Here, the prosecution was allowed to use Schweizer's invocation of his rights as evidence he committed the DUI offense. Because that evidence was a key part of the prosecution's case, the State cannot show the error was harmless under any standard.

Reversal is required.

III. The trial court reversibly erred in giving an instruction unnecessarily focusing the jury's attention on a single piece of inculpatory evidence—Schweizer's refusal to consent to chemical testing—and telling the jury to consider the evidence in determining "guilt or innocence."

A. Preservation and standard of review

This issue is preserved. Defense counsel strongly objected to the refusal instruction tendered by the prosecutor and ultimately given by the court. TR 3/11/19, pp.276-278; TR 3/12/19, pp.6-15; CF, 277.

This Court reviews instructions de novo to determine whether they accurately informed the jury of the law. *Riley v. People*, 266 P.3d 1089, 1092 (Colo. 2011). This Court must reverse unless the State shows the erroneous instruction was harmless. *People v. Garcia*, 28 P.3d 340, 344 (Colo. 2001).

B. Over defense counsel's repeated objection, and despite the prosecutor's concession that such an instruction was disfavored, the court specially instructed the jury it could consider Schweizer's refusal as evidence of guilt.

The prosecutor's tendered jury instructions did not contain any refusal instruction. *See* CF, 109-136. But at the outset of trial, the court asked the prosecutor whether there "was an instruction in the book on the jury's considerations of a defendant's refusal to submit to a test." TR 3/11/19, p.20:5-7. The prosecutor replied, "There is, Judge. I can tell you that when I was in county court it sort of fell out of favor I would say with a number of the judges because it highlighted a specific piece of evidence and that's why they excluded it." TR 3/11/19, p.20:8-12. Defense

counsel explained the instruction was improper because it highlighted one piece of evidence and elevated that evidence as deserving of special comment from the judge. TR 3/11/19, pp.276-277. The prosecutor said he "generally…would agree," but thought the instruction was warranted here because Schweizer had asked for an attorney before refusing chemical tests. TR 3/11/19, p.277:12-18.

During the final jury instructions conference, the court asked what the authority was for giving a refusal instruction, and the prosecutor acknowledged he did not think it was in the model jury instructions. TR 3/12/19, pp.4-5. He explained that it was an instruction "generated automatically" for DUI cases in the district attorney's case management system. TR 3/12/19, p.5:2-10. Defense counsel again objected, reiterating that the instruction was not from COLJI, needlessly drew attention to inculpatory evidence, and was not an accurate statement of the law insofar as it did not communicate that an officer needed probable cause to invoke the expressed consent statute. TR 3/12/19, pp.6-11.

The court gave the following instruction:

INSTRUCTION NO. 11

You are instructed that any person who drives a motor vehicle in the State of Colorado may be required to submit to a chemical test for the purpose of determining whether the person is driving the vehicle under the influence of drugs or alcohol. If a person refuses to submit to such chemical test, then the jury may consider such refusal along with all other competent evidence in determining the defendant's guilt or innocence.

A driver who is required to submit to a blood or breath test does not have the right to consult with an attorney prior to deciding whether to submit to the test.

If you find that the defendant refused to take a chemical test of the defendant's blood or breath, you may consider this refusal along with other evidence in determining whether the defendant is guilty of the offense of Driving Under the Influence of Drugs or Driving While Ability Impaired.

CF, 277; TR 3/12/19, pp.11-14.

C. The court erred in giving the jury an instruction that unnecessarily highlighted one piece of evidence the jury could use in determining "guilt or innocence."

Due process requires a trial court to correctly instruct the jury on the applicable law. *People v. Jurado*, 30 P.3d 769, 771 (Colo. App. 2001) ("It is an essential feature of a fair trial that the trial court correctly instruct the jury on all matters of law."); *see People v. Weinreich*, 119 P.3d 1073, 1076 (Colo. 2005); *see also* U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§ 16, 23, 25. Within that

broad duty, Colorado appellate courts have also made clear that trial courts have a duty not to "give the jury an instruction which...unduly emphasizes some part of the evidence." *People v. Mandez*, 997 P.2d 1254, 1270 (Colo. App. 1999); *see also Krueger v. Ary*, 205 P.3d 1150, 1157 (Colo. 2009) ("[W]e disfavor instructions emphasizing specific evidence."); *People v. Gwinn*, 2018 COA 130, ¶ 36; *People v. Nerud*, 2015 COA 27, ¶ 43; *People v. Inman*, 950 P.2d 640, 645 (Colo. App. 1997) (stating that a court should not give an instruction that "simply calls attention to specific points of evidence"). Such instructions constitute impermissible comment, from the trial judge, on the weight of particular evidence and thus invade the province of the jury. *See Mandez*, 997 P.2d at 1270; *Atkins v. State*, 26 A.3d 979, 983-84 (Md. 2011); *Bartlett v. State*, 270 S.W.3d 147, 152 (Tex. Crim. App. 2008) ("Even a seemingly neutral instruction may constitute an impermissible comment on the weight of the evidence because such an instruction singles out that particular piece of evidence for special attention."); *see also Starr v. United States*, 153 U.S. 614, 626 (1894) ("[T]he influence of the trial judge on the jury is necessarily and properly of great weight, and...his lightest word or intimation is received with deference, and may prove controlling.").

In a DUI trial, Colorado statute allows for the admission of evidence that a person did not consent to or cooperate with chemical testing. § 42-4-1301(6)(d); *see*

§ 42-4-1301.1. Consistent with the statute (and notwithstanding the constitutional implications raised above), the court here admitted extensive evidence of Schweizer's refusal to submit to a warrantless blood test. The jury may consider all evidence admitted, and the jury here was properly instructed on this principle in multiple instructions. *See* CF, 267, 270, 280-281. Those instructions directed the jury to consider the evidence that Schweizer refused to submit to testing of his blood.

Instruction 11 thus needlessly singled out Schweizer's refusal to submit to chemical testing, unduly emphasizing that inculpatory evidence to the jury. The instruction was improper because it bolstered one part of the State's case and misled the jury about the significance of that evidence. *See People v. Sabell*, 2018 COA 85, ¶ 11 ("Instructional error occurs when an instruction misleads or confuses the jury."). It was an improper comment on the evidence.

Courts in other jurisdictions have held that it is error to specifically instruct the jury on the defendant's refusal of chemical testing. *See, e.g.*, *Ham v. State*, 826 N.E.2d 640, 642 (Ind. 2005); *Bartlett*, 270 S.W.3d at 152-54. In *Bartlett*, the jury was instructed that it could consider the defendant's refusal in determining guilt. 270 S.W.3d at 150. Under Texas statute, evidence that a defendant refused to submit to chemical testing is admissible at trial, but the statute does not assign such evidence particular weight or significance. *See id*. at 152-53; *see also Ham*, 826 N.E.2d at

642 (observing that the state's expressed consent statute "only says that a refusal is admissible into evidence, not that it is evidence of intoxication," and refusal evidence is probative only to explain why no chemical test was performed). The court observed:

> That the statute expressly makes the evidence admissible does not, by itself, also authorize the trial court to single it out for the jury's particular attention. A statute or rule that merely declares a certain species of evidence admissible without assigning any particular degree of weight to that evidence or otherwise limiting the scope of the jury's ability to consider it does not call for a jury instruction.

Bartlett, 270 S.W.3d at 153 (footnote omitted). Thus, the court held that it was error to give an instruction on refusal to submit to chemical testing. *See id*. at 154.

The same result is required under Colorado law. "Because a presumption of consciousness of guilt from the refusal to submit to a breath test 'is not an explicit legal tool for the jury[,]' it was error for the trial court to have instructed the jury with respect to available inferences that may derive from that evidence." *Id*. at 153 (quoting *Brown v. State*, 122 S.W.3d 794, 803 (Tex. Crim. App. 2003)).

Moreover, the instruction was legally incorrect for the reason that defense counsel identified—it did failed to state that a person is required to submit to chemical testing only if an officer has probable cause. *See* § 42-4-1301.1(2)(a)(I). And, more seriously still, the instruction told jury it could use the refusal evidence

in determining Schweizer's "guilt *or innocence*." A jury's role is not to determine whether a person is guilty or innocent—it is to determine whether the prosecution has met its burden of proof beyond a reasonable doubt. The false dichotomy between guilt and innocence in the instruction was erroneous as a matter of constitutional law and undercut the prosecution's burden. *See Leonard v. People*, 369 P.2d 54, 61 (Colo. 1962); *see also* U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§ 16, 23, 25.

And, as also argued by defense counsel, there is no instruction on refusal to submit to chemical testing in Colorado's pattern criminal jury instructions. *See People v. Flockhart*, 2013 CO 42, ¶ 12 (noting that, though pattern jury instructions are not binding, "they are grounded in our longstanding practice and are regularly consulted to determine whether jury instructions are erroneous"). Similarly, there is no case law squarely approving instructions such as the one given here. To the extent there is any support for such an instruction, it derives from non-controlling dicta in *Cox v. People*, 735 P.2d 153 (Colo. 1987), and *People v. Mersman*, 148 P.3d 199 (Colo. App. 2006). This Court need not, and should not, follow that dicta.

The supreme court in *Cox* resolved consolidated cases; in so doing, the court conflated one defendant's argument that evidence of his refusal to submit to testing was improperly admitted with the other defendant's argument that the trial court

erred by instructing the jury it could consider the refusal along with the other evidence. *See* 735 P.2d at 157 ("The arguments, although phrased differently, are essentially the same."). The court's analysis focused on the admissibility question. The court then stated—in one sentence, and without analysis—that the trial court did not err in giving a refusal instruction. *Id.* at 157-59. (Seemingly contradicting that conclusion, the court in *Cox* also recognized that "[t]he weight to be given the evidence of refusal is for the jury to determine." *Id.* at 159.)

Similarly, in *Mersman*, a division of this Court reviewed the sufficiency of the evidence in a DUI prosecution, which included evidence of the defendant's refusal to submit to chemical testing. 148 P.3d at 201. While addressing that sufficiency claim, the division noted "it is proper to instruct a jury that it can consider a driver's refusal to take a blood or breath test, along with other evidence, in determining his or her guilt of driving under the influence." *Id.* at 201 (citing *Cox*, 735 P.2d 153). It is not clear there was even a refusal instruction given in *Mersman*. *Id.* at 201-02. As in *Cox*, the *Mersman* division's passing comment was dicta and should not be followed.

"Whether a defendant's refusal to submit to a chemical test is evidence of intoxication or merely that the defendant refused to take the test is for the lawyers to argue and the jury to decide. An instruction from the bench one way or the other

misleads the jury by unnecessarily emphasizing one evidentiary fact." *Ham*, 826 N.E.2d at 642. The court here erred in giving the misleading and inaccurate refusal instruction.

D. Reversal is required.

Because the court's duty to correctly instruct the jury is rooted in the defendant's due process right, this Court should review for constitutional harmless error. *See Jurado*, 30 P.3d at 771. Regardless, the improper instruction requires reversal under any standard because the State cannot prove it was harmless let alone harmless beyond a reasonable doubt. *See James v. People*, 2018 CO 72, ¶¶ 17-18 (the burden of proving a preserved error was harmless is on the State).

The erroneous instruction likely affected the verdict on the DUI count. The State's case on that charge consisted of the direct observations of one officer about Schweizer's alleged intoxication, and the evidence of impaired driving was weak—the driving conduct that caught the officer's attention was Schweizer's low speed, and Schweizer immediately and safely parked his car. He was otherwise polite and compliant with the officer. And, of particular import here, Schweizer's refusal to submit to testing was based on his desire to speak to an attorney.

Under these circumstances, the challenged instruction encouraged the jury to infer Schweizer's intoxication from his refusal to take a chemical test. While the

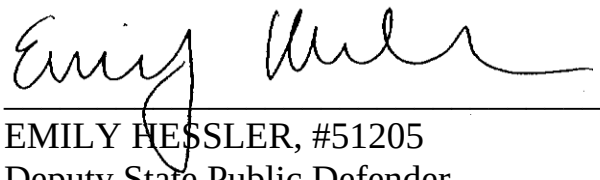
jury could have otherwise concluded that refusal to give a blood sample was a reasonable response to a police officer's demand, Instruction 11 encouraged the jury to instead consider it evidence of "guilt or innocence."

Reversal of the DUI conviction is required.

CONCLUSION

For the reasons and authorities presented, Schweizer respectfully asks this Court to reverse his convictions for possession of a controlled substance and driving under the influence.

MEGAN A. RING
Colorado State Public Defender



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CERTIFICATE OF SERVICE

I certify that, on October 16, 2020, a copy of this Opening Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on L. Andrew Cooper of the Attorney General's office through their AG Criminal Appeals account.