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SUPREME COURT
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

On Certiorari to the Colorado Court of Appeals
Case No. 17CA1896

Petitioner,

THE PEOPLE OF THE STATE OF COLORADO,

v.

Respondent,

CHARLES RAIDER, JR..

▲ **COURT USE ONLY** ▲

Case No. 2021SC119

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PEOPLE'S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

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☒**For each issue raised by the petitioner,** 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.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Brian M. Lanni

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ISSUE PRESENTED FOR REVIEW

Whether the court of appeals erred in interpreting the Expressed Consent Statute to provide DUI suspects with protection from the use of physical restraint in the execution of a valid search warrant or court order.

STATEMENT OF THE CASE AND FACTS

A police officer contacted defendant, who was behind the wheel of an illegally-parked SUV with the keys in the ignition and the engine running. (TR 12/4/17, pp 18–19, 128–29). Defendant had bloodshot eyes and slurred speech, smelled of alcohol, and "seemed visibly intoxicated." (TR 12/4/17, pp 130:4–10, 133:8–15).

Defendant denied that he had consumed any alcohol and declined to perform roadside maneuvers. (TR 12/4/17, pp 132–33). The officer advised defendant of the expressed consent law and asked whether he would prefer a blood or a breath test, but defendant told the officer he was "wasting [his] time" and refused to answer. (TR 12/4/17, pp 134–35). After discovering defendant's five prior DUI convictions, the officer

placed him under arrest and took him to a hospital while another officer obtained a search warrant for a blood draw. (TR 12/4/17, pp 135–36; CF, pp 77, 51–52, 54–55). The warrant commanded the officers to draw a sample of defendant's blood and authorized the use of reasonable force. (CF, p 54). Defendant became combative and resisted efforts to draw a sample of his blood, but ultimately it was drawn by a hospital technician while police officers restrained him. (TR 12/4/17, pp 137–40, 219–20; *see also* Env, People's EX 1, "Lang 5"). Testing of defendant's blood revealed a blood-alcohol level of 0.188. (TR 12/4/17, pp 186–87).

Defense counsel filed a motion to suppress the results of the test, alleging that the officers' use of force violated a provision within subsection (3) of the Expressed Consent Statute, which permits officers to physically restrain an uncooperative DUI suspect to obtain a blood sample but only when the person is suspected of one of four enumerated offenses, none of which were at issue here. (CF, pp 76–80); § 42-4-1301.1(3), C.R.S. (2020).

The trial court denied the motion in a written order, concluding that the provision in question did not apply because the blood draw was

not a warrantless search governed by the provisions of the Expressed Consent Statute, but was a search conducted pursuant to a valid search warrant. (CF, p 137).

Defendant proceeded to trial where he was convicted of felony DUI and obstructing a police officer. (CF, pp 324–25, 354–55).

A division of the court of appeals reversed. In a published opinion, the division interpreted subsection (3) of the Expressed Consent Statute to apply not just to the collection of a biological sample pursuant to the statute, but to the collection of any biological sample from a DUI suspect,[1] including the collection of a sample pursuant to a valid search warrant or court order. *See generally People v. Raider*, 2021 COA 1. Because the officers had used physical restraint in the collection of a blood sample from defendant, and because he was suspected of DUI but not one of the other four enumerated offenses, the division suppressed

[1] The Expressed Consent Statute generally applies where the suspected offense is DUI or one of several other related offenses: DUI per se, DWAI, etc. For purposes of concision, the People will refer to these offenses collectively as "DUI" in this brief.

the results of the blood test, reversed both of defendant's convictions, and remanded the case for a new trial. *Raider*, ¶40.

SUMMARY OF THE ARGUMENT

The purposes of the Expressed Consent Statute are to facilitate cooperation in the enforcement of highway safety and to more readily obtain scientific evidence of intoxication so as to curb drunk driving through prosecution. Enacted before it was possible for police to obtain a search warrant electronically and remotely within the relatively short timeframe of a DUI investigation, the statute seeks to accomplish these goals by establishing an alternative means of collecting scientific evidence from DUI suspects without the need for a search warrant. It prohibits police from using physical restraint to collect a sample from a person who has refused voluntary testing, unless the person is suspected of an enumerated offense involving injury or death, in which case it grants police the authority to physically restrain that person to collect a blood sample without a warrant.

The court of appeals interpreted this provision governing the use of physical restraint to apply not only to the warrantless collection of a blood sample pursuant to the procedures set forth in the Expressed Consent Statute, but also to the collection of a blood sample from a DUI suspect pursuant to a valid search warrant. In doing so, the division failed to adhere to principles of statutory construction. Its interpretation fails to account for the provision's context, conflicts with another statutory scheme governing the issuance and execution of search warrants, contravenes the purposes of the Expressed Consent Statute, and illogically grants DUI suspects a unique and extraordinary immunity from a regular and judicially-preferred investigatory process.

This Court should reverse, and should hold that subsection (3) of the Expressed Consent Statute applies only to the warrantless collection of evidence that is the subject of the statute itself. This interpretation would properly account for the provision's context, effectuate the purposes of the Expressed Consent Statute rather than frustrate them, harmonize the statute with the statutory scheme governing the issuance and execution of search warrants, and eliminate

the absurdities that arise as a result of the court of appeals' erroneous interpretation.

ARGUMENT

The court of appeals' analysis failed to comport with principles of statutory construction.

I. Preservation and Standard of Review

This issue is preserved. (CF, p 137). This Court "review[s] statutory interpretation by lower courts de novo." *People v. Smith*, 254 P.3d 1158, 1161 (Colo. 2011).

II. Overview of the Expressed Consent Statute

The United States and Colorado Constitutions protect individuals from unreasonable searches and seizures. U.S. Const. amend. IV.; Colo. Const. art. II, § 7. A blood draw is a search. *Missouri v. McNeely*, 569 U.S. 141, 148 (2013).

A warrantless search is presumptively unreasonable, whereas a search conducted pursuant to a valid search warrant issued by a neutral magistrate generally satisfies the Fourth Amendment's reasonableness requirement. *See People v. Gall*, 30 P.3d 145, 149 (Colo.

2001); *People v. Marko*, 2015 COA 139, ¶145; *see also Ornelas v. United States*, 517 U.S. 690, 699 (1996) ("The Fourth Amendment demonstrates a strong preference for searches conducted pursuant to a warrant."); *Schmerber v. California*, 384 U.S. 757, 770 (1966) ("The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.").

Thus, "the police must, whenever practicable, obtain advance judicial approval of searches … through the warrant procedure." *Terry v. Ohio*, 392 U.S. 1, 20 (1968); *see also McNeely*, 569 U.S. at 152 ("In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.").

"With the rise of motor vehicle usage in the twentieth century, states found themselves confronting a grave problem: the devastating consequences of drunk drivers on the nation's roadways." *People v. Hyde*, 2017 CO 24, ¶11 (citing *Birchfield v. North Dakota*, 136 S. Ct.

2160, 2167 (2016)). But laws prohibiting drunk driving were not enough to curb the problem, *id*., and prior to the relatively recent enactment of laws permitting electronic warrant applications, it was impractical for police to obtain a warrant for chemical testing within the relatively short timeframe of a DUI investigation. *See McNeely*, 569 U.S. at 154; *see also City of Missoula v. Williams*, 406 P.3d 8, 15 (Mont. 2017) (noting that "DUI investigations are time-sensitive by nature because the evidence of the offense metabolizes out of the driver's bloodstream simply by the passage of time").

Thus, in order to facilitate the collection of evidence necessary for securing DUI convictions, states began to enact implied or expressed consent laws designed to encourage drivers to submit to blood-alcohol tests without the need for a search warrant. *See Hyde*, ¶11. Colorado enacted an implied consent statute in 1967, and its current version is the Expressed Consent Statute, codified at section 42-4-1301.1, C.R.S. (2020). *Hyde*, ¶12.

The purposes of the statute are to "facilitate cooperation in the enforcement of highway safety," *Riley v. People*, 104 P.3d 218, 220 (Colo.

2004), and to "obtain scientific evidence of the amount of alcohol in the bloodstream in order to curb drunk driving through prosecution for that offense." *Turbyne v. People*, 151 P.3d 563, 569 (Colo. 2007); *see also Calvert v. State, Dep't of Revenue, Motor Vehicle Div.*, 519 P.2d 341, 343 (Colo. 1974) (the implied consent statute "was enacted to assist in the prosecution of the drinking driver"); *Eggleston v. Dep't of Revenue, Motor Vehicle Div., State of Colo.*, 895 P.2d 1169, 1171 (Colo. App. 1995) (the "legislative purpose in adopting the express consent statute" was "protecting the general public from drunk drivers throughout the state").

To achieve these goals, the Expressed Consent Statute establishes a process for the warrantless collection of a blood or breath sample from a DUI suspect, and imposes penalties for a suspect's refusal to cooperate in the process.

Subsection (1) of the statute provides that any person who drives a motor vehicle on a public road "shall be deemed to have expressed such person's consent to the provisions of this section." § 42-4-1301.1(1), C.R.S. (2020).

Subsection (2) of the statute grants police officers the authority to invoke the statute by asking a driver to submit to a chemical test if the officer has probable cause to believe the driver has committed one of several DUI-related offenses. § 42-4-1301.1(2)(a)(I), (2)(b)(I); *see also Riley*, 104 P.3d at 220. And it grants the driver the right to choose between a blood or breath test in response to the officer's invocation. § 42-4-1301.1(2)(a)(I).

While the statute does not confer upon drivers a right to revoke their previously-given consent to such a test, *Fitzgerald v. People*, 2017 CO 26, ¶11, it does recognize the reality that some drivers will nevertheless refuse to cooperate. § 42-4-1301.1(2)(a)(II). To encourage cooperation, two penalties are imposed upon a driver who refuses to cooperate: the driver's license is suspended for one year, § 42-2-126(1)(a), C.R.S. (2020), and the driver's refusal may be admitted into evidence at trial. § 42-4-1301(6)(d), C.R.S. (2020).

Subsection (3) of the Expressed Consent Statute provides that a person's noncooperation in the actual collection of a sample by medical staff is equivalent to a refusal. § 42-4-1301.1(3). This subsection

further authorizes warrantless, involuntary blood draws, accomplished through the use of physical restraint, but only if the police have probable cause to believe the suspect has committed one of four enumerated offenses:

> No law enforcement officer shall physically restrain any person for the purpose of obtaining a specimen of such person's blood, breath, saliva, or urine for testing except when the officer has probable cause to believe that the person has committed criminally negligent homicide … vehicular homicide … assault in the third degree … or vehicular assault … and the person is refusing to take or to complete, or to cooperate in the completing of, any test or tests, then, in such event, the law enforcement officer may require a blood test.

§ 42-4-1301.1(3).

In this case, a division of the court of appeals interpreted the provision above to prohibit the use of physical restraint not just in the warrantless collection of a biological sample pursuant to the Expressed Consent Statute, but in *any* collection of a biological sample from a DUI suspect, including the collection of a blood sample pursuant to a valid

search warrant. *See Raider*, ¶¶9–31. In reaching this erroneous result, the division failed to follow several principles of statutory construction.

III. In context, this provision applies only to the warrantless searches that are governed by the Expressed Consent Statute.

The "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Burton v. Colorado Access*, 2018 CO 11, ¶23 (citation omitted). Words and phrases within a statute must be read in the context in which they appear, including "the specific context in which [the] language is used, and the broader context of the statute as a whole." *People v. Diaz*, 2015 CO 28, ¶13 (citation omitted). A statute must be "read and considered as a whole and should be construed to give consistent, harmonious, and sensible effect to all of its parts." *AviComm, Inc. v. Colorado Pub. Utilities Comm'n*, 955 P.2d 1023, 1031 (Colo. 1998).

Here, the court of appeals considered the context surrounding this provision only selectively, resulting in an erroneously broad interpretation.

When read literally and in isolation from its context, the provision prohibits police from using physical restraint in the collection of *any* biological specimen from *any* person who is not suspected of one of the four enumerated offenses. *See* § 42-4-1301.1(3). Read this way, it would frustrate several other statutes and rules providing for the court-ordered collection of biological samples that are unrelated to DUI. For example, it would render police helpless to collect a court-ordered buccal swab or blood sample from a murder suspect for purposes of non-testimonial identification. *See* Crim. P. 41.1(h)(2) (authorizing court-ordered blood testing as a means of nontestimonial identification); *see also* § 16-3-303.8(2), (3)(a), C.R.S. (2020) (authorizing court-ordered blood testing for communicable diseases); § 16-23-103(5), C.R.S. (2020) (requiring police to collect a biological sample from a person arrested for a felony); § 18-3-415, C.R.S. (2020) (requiring the collection of a biological sample from persons charged with certain sex offenses).

But the meaning of this provision is informed by its immediate and broader context. *Diaz*, ¶13. The Expressed Consent Statute, at its outset, applies only to DUI suspects. That is, it applies only to a person who "drives any motor vehicle upon the streets and highways and elsewhere throughout this state," and who is "required to take and complete, and to cooperate in the taking and completing of, any test or tests of the person's breath or blood … when so requested and directed by a law enforcement officer having probable cause to believe that the person was driving a motor vehicle in violation of the prohibitions against DUI, DUI per se, DWAI, or UDD." § 42-4-1301.1(2).

The first sentence of subsection (3) of the statute refers back to this same category of people:

> *Any person who is required to take and to complete, and to cooperate in the completing of, any test or tests*, shall cooperate with the person authorized to obtain specimens of such person's blood, breath, saliva, or urine, including the signing of any release or consent forms required by any person, hospital, clinic, or association authorized to obtain such specimens.

§ 42-4-1301.1(3) (emphasis added). When read in the context of the Expressed Consent Statute as a whole, subsection (3) is not referring to *any* person who is required to take *any* test. It is referring to people suspected of DUI, and it is referring to the blood or breath tests those people have agreed to take upon an officer's request as set forth in subsection (2). *See Turbyne*, 151 P.3d at 568 (interpreting the phrase "test or tests" within section 42-2-126(2)(a)(II) to mean one of the two voluntary tests described in subsection (2) of the Expressed Consent Statute).

This same context must inform the meaning of the subsequent provision within subsection (3) governing the use of physical restraint with respect to "any person." Despite its literal wording, this provision does not prohibit officers from using physical restraint in the collection of a biological sample from *any* person; it prohibits them from using physical restraint in collecting a sample from a DUI suspect. The division apparently considered the provision's context in this regard, because it appropriately cabined the applicability of this provision to DUI suspects. *See Raider*, ¶31 (holding that the provision protects

"DUI and DWAI suspects" from the use of physical restraint). However, the division failed to account for the same context in determining *when* this provision applies.

A blood draw conducted pursuant to a judicially-authorized search warrant is not one of the "tests" that the Expressed Consent Statute addresses. Like a murder suspect who is required to submit to a blood draw pursuant to a Crim. P. 41.1 court order, a DUI suspect who is required to submit to a blood draw pursuant to a search warrant is not a "person who is required to take and to complete, and to cooperate in the completing of, any test or tests" for purposes of subsection (3) of the Expressed Consent Statute. Rather, that DUI suspect, like the murder suspect, is required to submit to an evidence-collection procedure that has nothing to do with the Expressed Consent Statute, but is authorized and governed by an entirely different source. *See supra*, Part IV. Thus, the provisions of the Expressed Consent Statute, including subsection (3), do not apply. In concluding otherwise, the division failed to account for the provision's immediate context as well as the "broader context of the [Expressed Consent Statute] as a whole."

Burton, ¶23 (citation omitted); *see also Metzner v. State*, 462 S.W.3d 650, 656–57 (Ark. 2015) ("When viewed in isolation, the phrase 'no chemical test shall be given' seemingly supports Metzner's position that no test whatsoever may be given [after a refusal]. However, when viewed in its proper context by considering the language preceding the phrase, it is abundantly clear that the phrase specifically refers only to the test requested by an officer pursuant to section 5–65–202, which authorizes a warrantless test based on implied consent. Therefore, construing the plain language of section 5–65–205(a) as a whole, it is apparent that the test that may not be given is limited to the warrantless test authorized by section 5–65–202."); *State v. Smith*, 134 S.W.3d 35, 40 (Mo. Ct. App. 2003) (provision within implied consent statute stating that, upon refusal, "no test shall be given," did not preclude police from obtaining a search warrant for a blood draw because the statute codifies the procedures under which an officer could collect a sample without a warrant).

The division should have considered this provision's context fully, rather than selectively, and interpreted it to apply only to the

warrantless collection of evidence from DUI suspects that is the subject of the Expressed Consent Statute itself.

IV. The division failed to harmonize the provision with a conflicting statutory scheme, even though an alternative interpretation would have harmonized the two.

"Statutes should be interpreted, if possible, to harmonize and give meaning to other potentially conflicting statutes." *People in Int. of D. L. E.*, 645 P.2d 271, 274 (Colo. 1982); *see also People v. James*, 497 P.2d 1256, 1257 (Colo. 1972) ("If two acts of the legislature may be construed so that an inconsistency will be avoided, *it is our duty to so construe them*.") (emphasis added).

Section 16-3-301(2)(e), C.R.S. (2020), authorizes the issuance of a warrant to search for and seize anything that "would be material evidence in a subsequent criminal prosecution." Section 16-3-304(3)(b), C.R.S. (2020), provides that "*every* search warrant authorizes the officer executing the same" to "use and employ such force as is reasonably necessary in the performance of the duties commanded by the warrant." Section 16-3-305(5), C.R.S. (2020), provides that a police officer "into

whose hands a search warrant comes" is not only authorized to ensure that it is executed, but is duty-bound to do so. And the General Assembly has enacted a statute permitting search warrants to be applied for and issued electronically. *See* § 16-1-106, C.R.S. (2020).[2] None of these statutes include any exception for DUI suspects.

The division's interpretation of subsection (3) of the Expressed Consent Statute conflicts with this statutory scheme in that it precludes police from using physical restraint in the execution of a search warrant for a blood sample from a DUI suspect, even though section 16-3-304(3) expressly authorizes the use of reasonable force in the execution of a search warrant without any exception for DUI suspects.

The division was required to interpret subsection (3) of the Expressed Consent Statute, if possible, so as to avoid any potential conflict with the statutes governing the issuance and execution of search warrants. *D. L. E.*, 645 P.2d at 274; *James*, 497 P.2d at 1257. It sidestepped this obligation by declining to discuss these statutes at all.

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[2] Crim. P. 41 also contains analogues to each of these statutory provisions. *See, e.g.,* Crim. P. 41(b)(5), (c)(3), (d)(3), (d)(5)(IV).

See Raider, ¶¶12–31. Yet, it was entirely possible for the division to harmonize the two. Had the division interpreted subsection (3) to apply only to the warrantless tests that are the subject of the Expressed Consent Statute, there would no conflict here, and both subsection (3) and the statutes governing the issuance and execution of search warrants would be given effect. Police would be prohibited from forcing a person to submit to a warrantless blood test absent probable cause for an enumerated offense, pursuant to section 42-4-1301.1(3), but would also retain their authority to apply for and execute a search warrant for material evidence of a crime pursuant to section 16-3-301 *et seq*. Because a harmonizing interpretation was possible, the division should have adopted it.

V. The division's interpretation contravenes the purposes of the Expressed Consent Statute and leads to absurd results.

When construing a statute, a court's "primary purpose is to ascertain and effectuate the intent of the General Assembly." *People v. Diaz*, 2015 CO 28, ¶12. It is presumed that the General Assembly

intended a "just and reasonable result." *AviComm*, 955 P.2d at 1031 (citation omitted). Thus, although courts "must give effect to the statute's plain and ordinary meaning … the intention of the legislature will prevail over a literal interpretation of the statute that leads to an absurd result." *Id.*; *see also State v. Nieto*, 993 P.2d 493, 505 (Colo. 2000) ("An interpretation that defeats the legislative intent or leads to an absurd result will not be followed."); *cf. Smith*, 254 P.3d at 1161. A court must "avoid interpreting a statute in a way that creates absurd results 'if alternative interpretations consistent with the legislative purpose are available.'" *Burton*, ¶23 (citation omitted).

Here, although the division could have interpreted subsection (3) of the Expressed Consent Statute to effectuate the statute's purposes, it interpreted it instead in a manner that contravenes those purposes.

First, the division's interpretation frustrates the statute's "primary purpose" of facilitating cooperation in the enforcement of highway safety. *Turbyne*, 151 P.3d at 569; *Riley*, 104 P.3d at 220. Granting DUI suspects immunity from the execution of search warrants does not facilitate cooperation. It makes noncooperation a more

attractive option, because it empowers a drunk driver to refuse with total confidence that no scientific evidence of his or her intoxication will be obtained by any means. For this reason, it makes noncooperation a particularly attractive option for the most dangerous offenders—those who drive while extremely intoxicated or those who habitually drive drunk. *See Birchfield*, 136 S. Ct. at 2179 (observing that "license suspension alone is unlikely to persuade the most dangerous offenders, such as those who drive with a BAC significantly above the current limit of 0.08% and recidivists, to agree to a test that would lead to severe criminal sanctions").[3]

[3] The defendant in this case fell into both of these categories. More than an hour after his arrest, his blood still contained 0.188 grams of alcohol per 100 milliliters. (TR 12/4/17, pp 186–87, 217:19, 219:20). This was his sixth DUI conviction, and he was still on probation for his fifth. (CF, pp 354–55; TR 12/3/18, p 3:17–21). His license had not only already been suspended due to refusals at the time of his refusal in this case, but it had been revoked due to his status as a habitual offender. (*See* CF, p 357; Exhibits, p 8). Indeed, defendant's recidivist history of drunk driving was the reason the investigating officer decided to apply for a search warrant, apparently in accordance with a Fort Collins Police Department policy. (TR 12/4/17, pp 135–36; CF, pp 77, 51–52, 54–55).

Conversely, if DUI suspects are subject to search warrants like everyone else, they will be more likely to cooperate for two reasons. First, the existence of a search warrant or court order inherently increases the likelihood of cooperation. *See Illinois v. Gates*, 462 U.S. 213, 236 (1983) ("[T]he possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct, by assuring 'the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.'") (quoting *United States v. Chadwick*, 433 U.S. 1, 9 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565, 579 (1991)); *Pena v. State*, 684 P.2d 864, 869 (Alaska 1984) ("When a search warrant has been issued by a neutral magistrate … much of the potential for conflict is reduced. The accused is made aware that a judicial officer has ordered the search; he therefore knows he is not being singled out for persecution by a police officer. Citizens are expected to submit peacefully to such court orders.") (Compton, J., dissenting).

Second, the possibility that the police can obtain a search warrant despite a suspect's refusal creates additional incentive for cooperation in the first place, because the refusing suspect risks facing scientific evidence of his or her intoxication *in addition to* the administrative penalties imposed for the refusal to honor his or her previously-given consent. By foreclosing this possibility, the division's interpretation impedes, rather than facilitates, cooperation in the enforcement of highway safety.

The division's interpretation also frustrates the statute's purpose of "obtain[ing] scientific evidence of the amount of alcohol in the bloodstream in order to curb drunk driving through prosecution for that offense." *Turbyne*, 151 P.3d at 569. The division's interpretation has drastically reduced the ability of police to obtain scientific evidence of DUI by granting DUI suspects unprecedented immunity from a long-established, judicially-preferred method of collecting evidence. As this case itself illustrates, the result of the division's interpretation is that *less* scientific evidence of intoxication will be obtained and *less* drunk

driving will be successfully prosecuted—precisely the opposite of what the Expressed Consent Statute seeks to accomplish.

While the division purported to reject the People's argument that interpreting subsection (3) to apply to chemical testing beyond the scope of the Expressed Consent Statute itself would grant DUI suspects an extraordinary immunity that is afforded to no other criminal suspect, *Raider*, ¶28, that is unquestionably the result of its decision.

To illustrate the absurdity of this result, imagine a police officer sees a man staggering down the sidewalk, visibly intoxicated, with a liquor bottle in one hand and a gun in his waistband. The officer suspects the man is committing illegal possession of a weapon. *See* § 18-12-106(1)(d), C.R.S. (2020) (it is a class 2 misdemeanor to possess a firearm while under the influence of alcohol). He asks the man to voluntarily submit to a blood draw. The man refuses, so the officer quickly obtains a search warrant for a blood draw and transports the man to a hospital. The man refuses to cooperate, so the officer physically restrains him while a medical professional draws his blood.

In this situation, the officer has done nothing improper or illegal; he was authorized to obtain a warrant for a sample of the man's blood, § 16-3-301(2)(e), he was authorized to use force in executing that warrant, § 16-3-304(3)(b), and he did not run afoul of the Expressed Consent Statute as interpreted by the division in this case, because he did not suspect the man of DUI.

Now imagine the same hypothetical, the only difference being that when the man sees the police officer, he stumbles into his nearby vehicle, peels away, and crashes into a telephone pole. Now the officer suspects the man has committed not just illegal possession of a weapon, but also the more serious offense of DUI. Under the division's holding in this case, however, the officer's only option is to request a consensual test and hope for the man's cooperation. The moment the man got into his car and drove it—significantly elevating the culpability of his conduct and the danger he posed to the public—he gained immunity from the execution of a search warrant, courtesy of the Expressed Consent Statute as interpreted by the court of appeals in this case.

It is illogical and absurd to believe that the General Assembly intended to bestow this extraordinary protection upon DUI suspects when enacting a statute intended to curb drunk driving. *See Pena*, 684 P.2d at 869 ("[T]o proscribe the use of search warrants as a means of obtaining evidence of a driver's insobriety, would be to place allegedly drunken drivers in an exalted class of criminal defendants, protected by the law from every means of obtaining the most important evidence against them. It is incredible that the legislature could have intended such a result.") (Compton, J., dissenting). This result is neither "just" nor "reasonable." *AviComm*, 955 P.2d at 1031. The division has interpreted the provision such that it curbs the investigation and prosecution of drunk driving rather than drunk driving itself. The overall intent of the statute should have prevailed over a literal reading of the provision governing the use of physical restraint without regard to its context. *Smith*, 254 P.3d at 1161.

This is not the only illogical result here. Under the division's interpretation, subsection (3) leaves intact an officer's authority to obtain a warrant for a blood sample from a DUI suspect, but prohibits

him from using "physical restraint" in executing it. An officer who obtains such a warrant is then commanded by statute and judicial order to execute the warrant by the use of force, if necessary, § 16-3-304(3)(b); § 16-3-305(5), but simultaneously prohibited by another statute from using any "physical restraint" in its execution.

Had the legislature intended to prevent police from "circumventing" the Expressed Consent Statute by obtaining a search warrant, *Raider*, ¶31, it could have amended section 16-3-301 to preclude an officer from obtaining such a warrant in the first place, rather than leaving intact his authority to obtain one but hamstringing his ability to execute it. Or it could have amended section 16-3-304 to exempt DUI suspects from its universal grant of authority to use reasonable force in the execution of search warrants, expressly granting them the protection that the court of appeals has circuitously granted them in this case. It makes no sense for the legislature to have achieved this result instead by indirectly abrogating section 16-3-301(2)(e) through the enactment of a different statute, located in the motor vehicle code, which makes no mention of search warrants at all.

See § 42-4-1712, C.R.S. (2020) (stating that the foregoing provisions of the motor vehicle code "shall govern all police officers in making arrests without a warrant … for violations of this article … but the procedure described in this article shall not otherwise be exclusive of any other method prescribed by law for the arrest and prosecution of a person for an offense or infraction of like grade").

Moreover, while the division relied on section 16-3-303.8, C.R.S. (2020), to support its reading of subsection (3), this statute actually serves to demonstrate another illogical result of the division's interpretation. The division highlighted this statute, entitled "Testing for communicable diseases—court order required—definitions," as an example of a statute where the legislature has "allow[ed] officers to seek a warrant requiring testing under certain circumstances if the suspect refuses to consent to it." *Raider*, ¶18. The division reasoned that this statute therefore demonstrated the legislature's intent to forego a similar "exception" for search warrants in subsection (3) of the Expressed Consent Statute. *Id.*

But this statute, like the Expressed Consent Statute, has nothing to do with search warrants at all. It applies where there is probable cause that a person has committed first, second, or third-degree assault, and where there is probable cause to believe that the person's blood or other bodily fluid has come into contact with a victim or an emergency responder. § 16-3-303.8(2), (3). If these conditions are met, police must ask the person to voluntarily submit to a blood draw for purposes of testing for communicable diseases. § 16-3-303.8(2). If the person refuses, then upon the filing of an affidavit, a court must issue an order requiring the person to submit to a blood draw. § 16-3-303.8(3), (4).

But while this statute provides for the issuance of a court order[4] for the collection of an uncooperative suspect's blood, it does not include any provision that would override the sweeping protection that the division has granted to DUI suspects by virtue of the Expressed

[4] The court orders authorized by this statute are distinct from search warrants, most importantly because they are not issued for the purpose of collecting evidence for a criminal prosecution. In fact, a court is not even permitted to disclose the results of any testing pursuant to these orders to anyone other than the exposed victim. § 16-3-303.8(6).

Consent Statute. Thus, under the division's holding in this case, it would seem that a person who commits DUI *and* first-degree or second-degree assault against the arresting officer in a manner that exposed the officer to bodily fluids—an entirely foreseeable occurrence—*cannot* be forced to submit to a court-ordered blood test under section 16-3-303.8, because subsection (3) of the Expressed Consent Statute prohibits the use of physical restraint in collecting his blood for that purpose.

These absurdities would not exist, and none of the Expressed Consent Statute's purposes would be contravened, if subsection (3) were interpreted to apply only to the warrantless tests that are the subject of the Expressed Consent Statute. For this reason, the division should have adopted that interpretation.

VI. The division's interpretation rests on unfounded premises.

In addition to the foregoing errors in the division's statutory interpretation analysis, the division also rested its interpretation of subsection (3) on flawed or unfounded premises.

First, the division relied in part on the fact that a blood draw is an intrusion that requires a piercing of the subject's skin. *Raider*, ¶23. This is obviously true, but the division did not explain how this fact had any bearing on its interpretation of the statute, other than to presume that the General Assembly intended to "balance" this consideration against the objective of protecting the public from drunk drivers. *See id*. at ¶¶21–23. It was improper for the division to impute its own presumption upon the General Assembly. *See* § 2-4-201(1), C.R.S. (2020) ("In enacting a statute, it is presumed that … [p]ublic interest is favored over any private interest.").

As the United States Supreme Court observed more than fifty years ago, the "[e]xtraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol," and "[s]uch tests are a commonplace in these days of periodic physical examination and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." *Schmerber*, 384 U.S. at 771.

And even assuming the intrusive nature of a blood draw would justify curtailing a police officer's existing authority to collect a blood sample from an entire class of criminal suspects pursuant to a search warrant, it makes no sense that the legislature would extend this protection to DUI suspects alone. It makes even less sense that it would do so through a statute aimed specifically at curbing DUI and making scientific evidence of DUI more readily available.

Second, the division reasoned that the legislature must have intended to grant DUI suspects protection from search warrants because it "minimizes potentially violent confrontations between law enforcement officers and drivers who are unwilling to submit to a test." *Raider*, ¶24. Notably, the division relied exclusively on authority from other states for this proposition; it cited nothing suggesting that Colorado's statute was enacted for this purpose. *Id.* The division's reasoning is undermined by the fact that the General Assembly has elsewhere expressly authorized the use of reasonable force, without qualification, in the execution of *all* search warrants regardless of the circumstances. This demonstrates that the legislature does not view

the potential for violent confrontation between a police officer and an uncooperative suspect as a basis to curtail the officer's investigative authority. Nor would it make any sense for the legislature to take such a significant step aimed at minimizing the potential for violent confrontations between police and suspected drunk drivers to the exclusion of all other criminal suspects.

Finally, central to the division's view of subsection (3) was the premise that a DUI suspect's refusal to submit to voluntary chemical testing must be "meaningful;" that is, that the General Assembly must have intended to confer some benefit upon the refusing DUI suspect in exchange for the penalties it exacts upon him. *See Raider*, ¶29 (reasoning that a DUI suspect's refusal and the attendant penalties would not "mean anything … if officers could override it by obtaining a warrant").

But *any* person's refusal to consent to a search ceases to "mean anything" once a search warrant has been issued. That is the nature of the Fourth Amendment. *See Hadley v. Williams*, 368 F.3d 747, 749 (7th Cir. 2004) (the existence of a warrant "mak[es] consent irrelevant").

And the division provided no source or support for its premise that the General Assembly intended for a DUI suspect's refusal to have special "meaning" in this regard. *Raider*, ¶29; *see Brown v. State*, 774 N.E.2d 1001, 1007 (Ind. Ct. App. 2002) ("We decline to infer that the legislature must have intended to preclude the use of a search warrant to obtain chemical test evidence simply because it has provided that a chemical test refusal is admissible into evidence."). To the contrary, the fact that the legislature has imposed administrative penalties for a DUI suspect's noncooperation, notwithstanding the possibility that the police may still obtain a search warrant for a blood draw, is entirely consistent with the purposes of the Expressed Consent Statute. This premise—that a DUI suspect's refusal must have special "meaning"—is unfounded and does not justify the division's overly-broad interpretation of the provision within subsection (3) governing the use of physical restraint.

Moreover, even assuming a DUI suspect's non-cooperation must be "meaningful," it remains so to the extent that it is only a *possibility* that police will be able to obtain a warrant within the necessary timeframe. In other words, a DUI suspect *might* successfully avoid

chemical testing altogether by refusing to cooperate, but it is not an entirely safe bet. *See McAllister v. State*, 754 S.E.2d 376, 379 (Ga. App. 2014) ("Practically speaking, the ['no test shall be given'] language to which McAllister points also is not meaningless simply because the State may now apply for a warrant to perform the test because it is only a possibility, and in the face of a refusal the officer must be able to present sufficient evidence of probable cause to a magistrate in order to obtain a warrant for the test. Thus, if the officer does not have sufficient cause to obtain the warrant, then no warrant could be issued and such a test will not be authorized.").

In addition to the errors in its statutory interpretation analysis, the division relied on these flawed or unfounded premises to justify its interpretation of the Expressed Consent Statute. For this additional reason, this Court should reverse.

VII. To the extent the division interpreted this provision to preclude police from obtaining a warrant in the first place, it improperly added language to the statute.

Apart from the question of whether police may use physical restraint in the execution of a search warrant with respect to a DUI suspect, it is unclear from the division's opinion whether it interpreted subsection (3) to also prohibit police from even obtaining a search warrant in the first place. At least one part of the opinion suggests that the court envisioned police obtaining a warrant but not using physical restraint in its execution, while another part suggests it intended to foreclose the police from obtaining a warrant at all. *Compare Raider*, ¶16 (holding that "even if police obtain a warrant," their conduct is restricted by subsection (3)) *with id.* at ¶29 (holding that police may not "override" a DUI suspect's refusal "by obtaining a warrant").

In interpreting a statute, a court "must accept the General Assembly's choice of language and not add or imply words that simply are not there." *People v. Benavidez*, 222 P.3d 391, 393–94 (Colo. App. 2009) (citing *Turbyne*, 151 P.3d at 567–68).

Here, assuming *arguendo* that the division was correct in its conclusion that subsection (3) prohibits police from using physical restraint on a DUI suspect in the execution of a search warrant, nothing in that provision or elsewhere in the statute supports a conclusion that police are prohibited from obtaining a search warrant in the first place. *See Raider*, ¶15 (acknowledging that "the Expressed Consent Statute does not refer to warrants"). To the extent it reached that additional conclusion, the court of appeals erroneously added an entire provision to the statute that does not exist.

This error matters; the words that the division added cut even further against the Expressed Consent Statute's purposes. *See Rutter v. Shumway*, 26 P. 321, 322 (Colo. 1891) ("the courts cannot justly add words which would tend to defeat or restrict the manifest purpose of the statute"); *State v. Geiss*, 70 So. 3d 642, 648–49 (Fla. Dist. Ct. App. 2011) ("[B]ecause the legislature did not expressly prohibit seeking a search warrant to obtain blood upon a suspect's refusal; because we should not add that language to the implied consent law ourselves … we hold that police may obtain blood via search warrant, when authorized to do so by

the search warrant statute, independent from the implied consent statute.")

The ability for police to obtain a search warrant for a DUI suspect's blood sample furthers the Expressed Consent Statute's purposes, even if they are prohibited from using physical restraint. Again, obtaining a search warrant may convince an otherwise uncooperative suspect to cooperate without the use of any physical restraint at all. *See Gates*, 462 U.S. at 236; *Pena*, 684 P.2d at 869 (Compton, J., dissenting). Moreover, a DUI suspect who refuses to allow the collection of a sample pursuant to a search warrant, such that the police are unable to collect it without the use of physical restraint, could be charged with obstruction, creating additional incentive for cooperation. *See* § 18-8-104(1)(a), C.R.S. (2020).

Indeed, both the General Assembly and this Court have specifically provided for the issuance of search warrants that do not authorize the use of force, at the issuing court's discretion. *See* § 16-3-304(3) (providing that every search warrant authorizes the use of

reasonable force "unless the court otherwise directs"); Crim. P. 41(d)(3) (same).

Moreover, even if the Expressed Consent Statute actually did purport to prohibit the issuance of a search warrant with respect to a DUI suspect—which it does not—that provision would conflict with a rule of criminal procedure. *See* Crim. P. 41(a), (b). Because the issuance of search warrants is a matter of procedure, rather than substance, the rule would control in the event of a conflict. *People v. G.S.*, 2018 CO 31, ¶32; *see also* Colo. Const. art. VI, § 21 (the supreme court "shall make and promulgate rules governing practice and procedure in … criminal cases, except that the general assembly shall have the power to provide simplified procedures in county courts for the trial of misdemeanors."); *State v. Fields*, 530 P.2d 284, 286 (Wash 1975) ("It is well-established that the issuance of a search warrant is part of the criminal process."). Thus, even if the Expressed Consent Statute did contain the language that the division has added to it, Crim. P. 41 would negate that language.

Even if the division was right about the scope and applicability of the provision governing the use of physical restraint, to the extent it went a step further and foreclosed the police from obtaining a warrant in the first place, it did so without any basis in the statute and contrary to the statute's purposes. This requires reversal.

VIII. The test results in this case should not have been suppressed, and neither of defendant's convictions should have been reversed.

For the foregoing reasons, the court of appeals erred in its interpretation of the Expressed Consent Statute, and erred in suppressing the blood draw results in this case due to a violation of the statute as interpreted. But even if the division was correct in its application of subsection (3) to a search conducted pursuant to a valid warrant, it still should not have suppressed the test results here.

"Evidence which is otherwise admissible in a criminal proceeding shall not be suppressed by the trial court if the court determines that the evidence was seized by a peace officer … as a result of a good faith mistake or of a technical violation." § 16-3-308(1), C.R.S. (2020).

"It is hereby declared to be the public policy of the state of Colorado that, when evidence is sought to be excluded from the trier of fact in a criminal proceeding because of the conduct of a peace officer leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question was taken in a reasonable, good faith belief that it was proper, and in such instances the evidence so discovered should not be kept from the trier of fact if otherwise admissible." § 16-3-308(4)(a).

"It shall be prima facie evidence that the conduct of the peace officer was performed in the reasonable good faith belief that it was proper if there is a showing that the evidence was obtained pursuant to and within the scope of a warrant, unless the warrant was obtained through intentional and material misrepresentation." § 16-3-308(4)(b).

Here, the search warrant authorizing a blood draw was not obtained through any intentional or material misrepresentation. (CF, pp 51–53); § 16-3-308(4)(b). And the fact that the blood sample was obtained pursuant to a search warrant is prima facie evidence that the police were acting with the reasonable good faith belief that their

conduct was proper. § 16-3-308(4)(a). Thus, even if its subsequent interpretation of subsection (3) was correct, the court of appeals erred in holding that the test results in this case should have been kept from the trier of fact and that defendant is therefore entitled to a new trial. § 16-3-308(4)(a); *see also* § 18-8-104(2) (it is not a defense to obstructing a police officer that the officer was acting in an illegal manner if he was acting under color of his or her official authority).

CONCLUSION

For the foregoing reasons and authorities, the court of appeals' interpretation of subsection (3) of the Expressed Consent Statute is erroneous. It fails to account for the subsection's context, conflicts with at last one other statutory scheme, contravenes the purposes of the Expressed Consent Statutes, and leads to absurd results. To avoid all of these problems, the division should have interpreted subsection (3), including its provision governing the use of physical restraint, to apply only to the warrantless procedures that the Expressed Consent Statute itself addresses. This Court should reverse and clarify that subsection

(3) of the Expressed Consent Statute has no bearing on the execution of a valid search warrant or court order.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **OPENING BRIEF** upon **LAURA E. H. HARVELL** via Colorado Courts E-filing System (CCES) on December 6, 2021.

/s/ Tiffiny Kallina