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<tr><td>COURT OF APPEALS,
STATE OF COLORADO

Ralph L. Carr Judicial Center
2 East 14th Avenue
Denver, CO 80203

Appeal; Gilpin County District Court
Honorable Dennis Hall
and Case Number 2018CR212</td><td rowspan="2">DATE FILED: April 8, 2021 1:05 PM
FILING ID: A5E658A3D0181
CASE NUMBER: 2019CA1019</td></tr>
<tr><td>Plaintiff-Appellee
THE PEOPLE OF THE
STATE OF COLORADO

v.

Defendant-Appellant
ROBERT S. SCHWEIZER</td></tr>
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Atty. Reg. #51205</td><td>Case Number: 2019CA1019</td></tr>
<tr><td colspan="2">REPLY BRIEF</td></tr>
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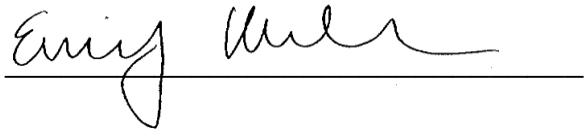
CERTIFICATE OF COMPLIANCE

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 and formatting requirements set forth in C.A.R. 28(g).

It contains 4,851 words.

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



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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. The prosecution failed to prove that, prior to the search, the officer had any articulable, particularized, reasonable belief there would be evidence of the offense of arrest in the van. The motion to suppress should have been granted.

Implicitly, the State recognizes the deputy said nothing during the suppression hearing to show he had reasonable suspicion that the van would contain evidence of the offense of arrest when he searched it. In fact, the State agrees with Schweizer that the trial court clearly erred when it found Deputy Collins said people who use drugs "often times have evidence of that drug or the paraphernalia necessary to use the drug in the car." AB, 15; TR 2/8/19, p 52:3-7; *see People v. Syrie*, 101 P.3d 219, 222 (Colo. 2004) (stating a trial court's findings of historical fact must be supported by competent record evidence). Contrary to the court's finding, the deputy did not say that at all. He testified that he believed, based on his experience, the *sunglasses case* likely contained evidence:

> [Prosecutor:] [O]nce you go back to the defendant's car, where were you able to see this black case?
>
> [Collins:] Once I opened the driver's door, it was right there on the floorboard.
>
> Q. And that was where the defendant was sitting?

> A. Yes.
>
> Q. And explain why you found this case in particular suspicious?
>
> A. Because normally based on my training and experience, people like to hide their drugs and paraphernalia in little cases.
>
> …
>
> Q. So based on your training and experience, can you explain whether this was consistent with a case that individuals use to conceal drugs and paraphernalia?
>
> A. They use many different cases; but yes, I believe there was paraphernalia and drugs inside.
>
> Q. And so at that point, you believed that there would be drugs within that specific case; is that right?
>
> A. Yes.

TR 2/8/19, pp. 21-22; *see* TR 2/8/19, p. 35:13-23. Collins provided no factual basis for any reasonable belief that the *van* contained evidence of the DUI offense.

The State instead takes the position that "[b]ecause the deputy had ample grounds to believe Schweizer was driving under the influence of a drug, and since Schweizer was the only person in the van, the deputy could make a rational inference that some evidence of Schweizer's current drug intoxication could be found in the van," so "testimony concerning this reasonable inference was not required." AB, 15-16.

At bottom, the State's argument boils down to this: the officer had probable cause to arrest Schweizer for driving under the influence. AB, 13-14. But probable cause to arrest is a necessary, *not* a sufficient, basis for a search incident to arrest. Put another way, that Collins had probable cause to arrest Schweizer was a foundational requirement for any search incident to arrest, not a factor contributing to the reasonableness of the subsequent search. *See United States v. Reagan*, 713 F. Supp. 2d 724, 733 (E.D. Tenn. 2010) ("[I]t is not reasonable to believe that evidence of DUI is inside the passenger compartment of a vehicle based solely upon the nature of the charge or the existence of evidence that the vehicle's driver is intoxicated.").

Just like the trial court, the State employs exactly the categorical approach the Colorado Supreme Court rejected in *People v. Chamberlain*, 229 P.3d 1054 (Colo. 2010). 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 [*Arizona v. Gant*, 556 U.S. 332 (2009)]." *Id.* at 1057. Tellingly, the State ignores *Chamberlain*.

Rather, the State unsurprisingly tries to liken this case to *People v. Kessler*, 2018 COA 60. And again, as in *Kessler*, ¶ 27, the deputy here had probable cause

to arrest. AB, 13-14. But the State ignores the determinative distinctions between this case and *Kessler*. There, officers observed alcohol in the car *before* the search, the defendant was dishonest about his intoxication, and the officers actually testified that based on their experience more alcohol would likely be in the car. *Kessler*, ¶¶ 27-30. Here, the deputy gave *no* specific articulation of why he believed there might be evidence of a DUI offense in the car. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968) ("[T]he police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.").

Notably, even had the deputy said what the trial court believed he did (and what the State says this Court can infer) about his past experience, that still could not have justified the search. Reliance on generalized training or experience with DUI arrests, absent any observations specific to this case, could not give rise to reasonable suspicion. *See Kessler*, ¶¶ 55-56 (Dailey, J., concurring in part and dissenting in part) ("[T]he officers did not give any details about their training or experience with DUI arrests or provide any particularized reason based on that experience or training to believe that Kessler's vehicle might contain evidence of even more consumed alcohol."); *see also Reagan*, 713 F. Supp. 2d at 734 (concluding the officer's "general prior experience alone was not enough to establish

a reasonable belief that evidence of DUI was contained within the Defendant's vehicle"); *United States v. Taylor*, 49 A.3d 818, 827 (D.C. 2012) (concluding that "relying uncritically" on an officer's conclusory statement that someone arrested for DUI "typically" has alcohol in the car "would amount to endorsing a *per se rule* governing DUI cases"); *State v. Eversole*, 2017-Ohio-8436, ¶ 37 (stating that an officer's "general prior experience alone is not enough to establish a reasonable belief").

Finally, the State, like the trial court, says the search was limited. AB, 15. But the State ascribes no legal significance to the purportedly limited nature of the search—because there is none. The problem is the search was unconstitutional from its inception. Limiting the scope of an unlawful search does not retroactively make it lawful.

The State does not argue the erroneous denial of Schweizer's motion to suppress was harmless beyond a reasonable doubt. *See* AB, 16. Reversal is required.

B. The defense sufficiently raised the argument that probable cause was required under the Colorado Constitution. Alternatively, the error was plain.

The State contends Schweizer failed to preserve his claim that the warrantless search violated the Colorado Constitution because the state constitution provides broader protections in the context of a vehicle search incident to arrest. *See* AB, 6-

7. The State further says this Court cannot address an argument raised for the first time on appeal. AB, 7, 16-17. On both counts, the State is wrong.

First, the defense preserved this argument. Defense counsel specifically argued in the motion to suppress and at the suppression hearing that probable cause was required to conduct a search of the car. CF, 81-82; TR 2/8/19, pp. 37-38. And defense counsel relied on the federal *and* state constitutions. CF, 78, 85. The State even acknowledges the motion to suppress "also rested on the Colorado Constitution." AB, 6.[1]

To preserve an error for appellate review, a defendant must allow the trial court a chance to prevent or correct the error and create a record for appellate review. *See People v. Melendez*, 102 P.3d 315, 322 (Colo. 2004); *People v. Pahl*, 169 P.3d 169, 182-83 (Colo. App. 2006); *cf. People v. Samuels*, 228 P.3d 229, 238 (Colo. App. 2009) (observing, in dicta, that a suppression argument was not preserved by a "cryptic" and "boilerplate" contention when the defense also did not present any evidence or argument in support at a hearing). The defense did that here.

[1] The State seems to think that defense counsel raised the Colorado Constitution claim in a reply brief. *See* AB, 6. But the record citation it provides is to the motion to suppress filed in the trial court, CF, 85, and Schweizer obviously raised this issue in his opening brief on appeal—hence why the State responds to it in its answer.

In fact, the trial court was evidently on notice of the defense's argument that the search had to be justified by probable cause. It asked the prosecution for its position on the applicable standard during the suppression hearing, and the prosecutor argued that the probable cause standard was met. TR 2/8/19, pp. 45-46. (Likewise, the defense argued the search was unconstitutional regardless of the level of suspicion required. TR 2/8/19, pp. 38-44.) Ultimately, the court concluded reasonable suspicion, not probable cause, was required. TR 2/8/19, p. 51:6-9. This issue was brought to the court's attention, and is thus preserved.

The State also argues that, if the issue was not preserved, this Court may decline review. AB, 16. Not so. Even assuming the issue was not preserved, this Court must review for plain error.

Crucially, the State does not say the claim was waived; the record could not support any assertion of waiver. And the State provides no reason why this claim, unlike the many unpreserved claims this Court addresses, *see* Crim. P. 52(b), should be immunized from appellate review.

Instead, the State relies exclusively on *Martinez v. People*, 244 P.3d 135 (Colo. 2010). There, the defendant challenged on appeal the prosecutor's use of tailoring arguments during closing. At trial, the defense had lodged general objections to the misconduct, saying only that the arguments were "improper"

without citing *any* constitutional provisions. *Id.* at 137-39. The court concluded the defense had not preserved any constitutional arguments and, citing *People v. Cagle*, 751 P.2d 614 (Colo. 1988), declined to reach a claim under the state constitution raised for the first time on appeal. *Martinez*, 244 P.3d at 139-40.

Martinez is inapposite because here the defense moved to suppress under the state and federal constitutions, but the case is also contrary to the supreme court's more recent, binding pronouncements. It is now clear that this Court must review unpreserved constitutional claims for plain error. *See Scott v. People*, 2017 CO 16, ¶ 11 (rejecting and characterizing as dicta the statement in *Cagle*, 751 P.2d at 619, that appellate courts will not review unpreserved constitutional claims). Two recent cases, *Phillips v. People*, 2019 CO 72, and *Cardman v. People*, 2019 CO 73, are particularly instructive. In both, the supreme court made clear that suppression claims defense counsel negligently failed to raise in the trial court are merely forfeited, not waived. *Cardman*, ¶¶ 10-18; *Phillips*, ¶¶ 16-22, 37-38. Such claims are therefore reviewed for plain error.

This issue is actually particularly well suited to appellate review even absent preservation because this Court considers the trial court's legal determination de novo. That is, "[t]he 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." *Syrie*, 101 P.3d at 222; *cf. People v. Maloy*, 2020 COA 71, ¶ 14 n.3 (noting, in addressing an unpreserved equal protection claim, that the appellate court did not "require[] a more fully developed record to assess the as-applied challenge"). The present record is sufficient for review.

This Court has "a responsibility to engage in an independent analysis of our own state constitutional provision in resolving a state constitutional question." *Rocky Mountain Gun Owners v. Polis*, 2020 CO 66, ¶ 34. This Court must—or at the very least should—address Schweizer's claim under the Colorado Constitution.

Turning to the merits of the claim, Schweizer argued at length in the opening brief that the second branch of *Gant* is indefensible. OB, 18-23. And the State does little to defend it. *See* AB, 17. The State relies only on a footnote in *People v. Taylor*, 2012 COA 91, a case since abrogated, *see People v. Folsom*, 2017 COA 146M, ¶¶ 19-21. In *Taylor*, a division of this Court considered whether officers constitutionally searched the defendant's cellphone call history incident to arrest. The division noted that "Colorado has not departed in any significant way from federal analysis of searches incident to arrest." *Taylor*, ¶ 8 n.3. But it is not clear the defendant there argued on appeal that the Colorado Constitution provided greater protections, and in any event *Taylor* did not address vehicle searches incident to

arrest. Finally, to the extent *Taylor* stands for what the State says it does and remains good law, it is not binding on this Court. *City of Steamboat Springs v. Johnson*, 252 P.3d 1142, 1147 (Colo. App. 2010) (noting divisions of this Court "are not bound to follow a prior division's ruling").

The second branch of *Gant* has been seriously criticized as unprincipled and doctrinally unsound. *See* Wayne LaFave, 3 Search & Seizure § 7.1(d) (6th ed.) (describing the inexplicable ruling and stating "*Gant* would thus appear to be one of the most two-faced Supreme Court decisions of all time, as the Court simultaneously embraces and rejects the teachings of" *Chimel v. California*, 395 U.S. 752 (1969)). Under the automobile exception, a warrantless vehicle search is permitted if supported by probable cause; there is no doctrinal reason, supported by Colorado case law interpreting the state constitution, to expand the automobile exception to allow searches based on reasonable suspicion solely in the interest of evidence-gathering expediency. *See People v. Edwards*, 836 P.2d 468, 471-72 (Colo. 1992); *see also State v. Snapp*, 275 P.3d 289, 299 (Wash. 2012). "[I]t is quite a jump" to conclude that, in the context of vehicle searches, a warrant is unnecessary *as is* "the probable cause that would be needed for a warrant. This is especially true when, again, it is considered that outside the 'special needs' area there is not precedent for permitting evidence searches on mere reasonable suspicion." LaFave, § 7.1(d).

This Court is "not bound by the United States Supreme Court's interpretation of the Fourth Amendment when determining the scope of state constitutional protections." *People v. Sporleder*, 666 P.2d 135, 140 (Colo. 1983); *see People v. McKnight*, 2019 CO 36, ¶ 38 (noting a state constitution may "impos[e] more stringent constraints on police conduct than does the Federal Constitution" (quoting *California v. Greenwood*, 486 U.S. 35, 43 (1988)). Because the evidence-gathering branch of *Gant* is offensive to the Colorado Constitution, this Court should reject it.

The State does not try to argue the prosecution proved the search was supported by probable cause or that the error was harmless. This Court must reverse.

And even if this Court reviews for plain error, reversal is still required. First, the error was obvious. As Schweizer argued, probable cause has long been required to search a vehicle in Colorado. *Edwards*, 836 P.2d at 471-72. "[T]he 'plainness' of the error can depend on well-settled legal *principles* as much as well-settled legal *precedents*." *People v. McBride*, 228 P.3d 216, 222 (Colo. App. 2009) (quoting *United States v. Brown*, 352 F.3d 654, 664 (2d Cir. 2003) (emphasis in original)). The well-settled principle that probable cause is needed to justify an automobile search in Colorado—along with the absence of any indication prior to *Gant* that police could constitutionally search a vehicle on reasonable suspicion alone—makes the error obvious.

The error was also substantial because the prosecution's case absolutely hinged on the illegally obtained evidence. The admission of that unconstitutionally gathered evidence so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. *See Hagos v. People*, 2012 CO 63, ¶ 14.

Under any standard, the erroneous admission of illegally obtained evidence requires reversal.

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. The court erred in admitting evidence of Schweizer's refusal to consent to a warrantless search.

The State does not contest the two relevant, foundational constitutional principles: (1) a blood draw is a search that must be conducted pursuant to a warrant or an exception to the warrant requirement, *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016); and (2) when the State relies on the consent exception to the warrant requirement, it "must prove by a preponderance of the evidence that [the] search was consented to voluntarily," *People v. Delage*, 2018 CO 45, ¶ 1; *see Schneckloth v. Bustamante*, 412 U.S. 218, 243, 248 (1973).

Still, the State relies on *Fitzgerald v. People*, 2017 CO 26, and related cases in which the Colorado Supreme Court held that the prosecutor's use of the

defendant's refusal to consent to a blood test does not violate the Fourth Amendment. AB, 23-25. As Schweizer argued, those cases are based on the incorrect premise that the legislature can pass a statute preemptively deeming consent to a search. OB, 24-27.

Contrary to that premise, the United States Supreme Court recently clarified that 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." *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2533 (2019) (plurality opinion). And *Mitchell* did not break new ground on this point. Neither *Missouri v. McNeely*, 569 U.S. 141 (2013), nor *Birchfield*, 136 S. Ct. 2160, upheld a warrantless search on the theory that a statute deeming a driver to have consented was a constitutionally acceptable substitute for true, voluntary consent.

The State treats *Mitchell* as a narrow case applying only to situations involving unconscious drivers. AB, 26. But *Mitchell* matters here because the Supreme Court vacated the state court's judgment, which relied on the consent exception through the fiction of statutory consent, *see State v. Mitchell*, 914 N.W.2d 151, 165 (Wis. 2018), and remanded for consideration of the exigent circumstances exception, *see Mitchell*, 139 S. Ct. at 2539 (plurality opinion). Resort to the exigent circumstances

exception was necessary precisely because seven Justices—those in the plurality and three in dissent—agreed that state statutes *do not satisfy the consent exception*. Put another way, if the Court had embraced the statutory consent idea, then it would not have needed to consider whether some other exception to the warrant requirement justified the search there; but the Court has never embraced the statutory consent theory, so it *did* need to consider an exception to the warrant requirement.

The trial court erred in admitting evidence of Schweizer's refusal to submit to a warrantless search of his blood.

B. The court erred in admitting evidence of Schweizer's invocation of his right to counsel.

Relying on misguided dicta from *Calvert v. Colo. Dep't of Revenue*, the State says that a constitutional right to talk with an attorney before choosing whether to submit to a chemical test "does not exist." 519 P.2d 341, 343 (Colo. 1974). AB, 27. And the State says that other case law has followed suit. AB, 27-28. As Schweizer explained in his opening brief, none of the cases cited stand for the proposition that a person does not have the constitutional right to consult counsel before choosing whether to submit to a blood test. OB, 28.

The State also ignores that the Colorado authority on which it relies is exclusively from the civil realm. That is a mistake, because the difference between civil administrative proceedings and criminal proceedings is significant. Requesting

an attorney constitutes a refusal for purposes of license privileges. *See Drake v. Colo. Dep't of Revenue*, 674 P.2d 359, 361 (Colo. 1984). But what constitutes a refusal for purposes of revocation of a driver's license has no bearing on whether a person has a constitutional right to speak to an attorney before deciding whether to submit to testing that may furnish the State crucial evidence to be used in subsequent criminal prosecution.

Otherwise, the State does not respond to the authority Schweizer cited holding that a person *does* have a right to speak to an attorney before submitting to a chemical test. OB, 28-31. That authority, though not binding, is persuasive and well reasoned.

The trial court erred in admitting evidence of Schweizer's invocation of his right to counsel.

C. Reversal is required.

The State does not dispute that "a person should not be penalized for exercising a constitutional privilege" or that "a person's refusal to consent to a search may not be used by the prosecution—either through the introduction of evidence or by explicit comment—to imply the person's guilt of a crime." *People v. Pollard*, 2013 COA 31M, ¶¶ 25, 32; *see Apodaca v. People*, 712 P.2d 467, 473 (Colo. 1985). Nor does the State dispute that the prosecution used Schweizer's refusal of the warrantless search and invocation of his right to counsel against him. Finally, the

State does not argue that the error was harmless as to the DUI conviction; rather, the State seems to concede any error requires reversal. AB, 30; *see People v. Jackson*, 2020 CO 75, ¶ 60 (considering the State's silence on whether the error was plain an "implicit concession of the issue").

The prosecution extensively used Schweizer's invocation of his right to refuse a warrantless blood test and his right to counsel against him, so 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. The refusal instruction was erroneous.

The State argues that *Cox v. People*, 735 P.2d 153 (Colo. 1987), and *People v. Mersman*, 148 P.3d 199 (Colo. App. 2006), conclusively held that a court does not err by instructing the jury to consider evidence of a defendant's refusal to consent to chemical testing. AB, 37-38. As Schweizer explained in the opening brief, the language on which the State relies was dicta. OB, 40-41.

At any rate, neither *Cox* nor *Mersman* considered whether a refusal instruction impermissibly highlighted inculpatory evidence. Like those decisions, the State just does not address whether a court can draw the jury's attention to one piece of admitted evidence—and, in particular, one piece of evidence that is very bad for the defendant and very good for the prosecution.

So the State is wrong to say that the out-of-state authority on which Schweizer relied "contradicts Colorado case law." AB, 37-38. That authority instead addresses an area of law on which Colorado's appellate courts have not spoken: whether a refusal instruction constitutes an impermissible comment on the weight of a particular piece of evidence. On that point, *Bartlett v. State*, 270 S.W.3d 147 (Tex. Crim. App. 2008), is persuasive, and actually in keeping with Colorado precedent. *See People v. Nerud*, 2015 COA 27, ¶ 43; *People v. Mandez*, 997 P.2d 1254, 1271 (Colo. App. 1999) ("Such an instruction would be an improper interference with the jury's function to determine the weight of the evidence."); *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"). Really, it is the State that ignores binding cases disapproving jury instructions that unduly highlight particular evidence. *See Krueger v. Ary*, 205 P.3d 1150, 1157 (Colo. 2009) ("[W]e disfavor instructions emphasizing specific evidence."); *cf. Castillo v. People*, 2018 CO 62, ¶¶ 59-61.

Ultimately, the State does not, and could not, point to another area of law in which this Court has sanctioned jury instructions drawing attention to a particular type of admitted evidence.

And, while the State is correct that the instruction referenced in *Cox* said that the evidence could be considered in determining "guilt or innocence," again the court did not specifically address that part of the instruction, let alone decide whether that language lowered the prosecution's burden of proof. *See* 735 P.2d at 159. As Schweizer argued, the jury's job is never to determine "guilt or innocence." *See Kansas v. Marsh*, 548 U.S. 163, 194 (2006) (Scalia, J., concurring) ("While a not guilty finding is sometimes equated with a finding of innocence, that conclusion is erroneous. Courts do not find people guilty or innocent." (quoting *People v. Smith*, 708 N.E.2d 365, 371 (Ill. 1999)); *see also United States v. Mendoza-Acevedo*, 950 F.2d 1, 4 (1st Cir. 1991) ("[W]ithin our criminal justice system, we think the difference between 'not guilty' and 'innocent' is more than semantics."). The instruction was thus legally inaccurate in addition to being unfairly misleading.

The State further asserts that the instruction "mirrored the language of the express-consent statute." AB, 38. Compare the instruction with that statute:

Instruction 11	**Section 42-4-1301.1(2)(b)(I), C.R.S**
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	Any person who drives any motor vehicle upon the streets and highways and elsewhere throughout this state shall be required to submit to and to complete, and to cooperate in the completing of, a test or tests of such person's blood, saliva, and urine for the

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.	purpose of determining the drug content within the person's system 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 or DWAI and when it is reasonable to require such testing of blood, saliva, and urine to determine whether such person was under the influence of, or impaired by, one or more drugs, or one or more controlled substances, or a combination of both alcohol and one or more drugs, or a combination of both alcohol and one or more controlled substances.

The instruction did not track statutory language. Even assuming it did, generally speaking, courts are not supposed to instruct the jury using language plucked from statutes or cases. *People v. Jurado*, 30 P.3d 769, 771 (Colo. App. 2001) ("In preparing jury instructions, trial courts should generally abstain from giving abstract statements of law or taking language out of context from cases or unrelated statutes."). And even if the instruction correctly stated the law, legal accuracy is always a necessary—but rarely a sufficient—condition for jury instructions. *Cf. Holley v. Huang,* 284 P.3d 81, 85 (Colo. App. 2011) (concluding the court erred in

instructing on habit testimony because "[a]lthough the instruction contains a correct statement of law, that statement was never intended to guide jury deliberations").

The trial court erred in specifically instructing the jury to consider the refusal evidence in deciding Schweizer's "guilt or innocence."

B. The error was not harmless.

As for harm, the State points to what it considers "overwhelming" evidence. AB, 40-41. But, as Schweizer argued, the driving conduct here was not particularly indicative of impairment, the arresting officer had credibility problems, and the "drug recognition expert" testified about conflicting indicia of meth use, some of which were observed here and many of which were not. OB, 4-5, 42-43. The evidence was not overwhelming.

Regardless, under nonconstitutional harmless error review, "[t]he proper inquiry" focusses not on whether there was sufficient evidence to support the verdict absent the error, but "whether the error substantially influenced the verdict or affected the fairness of the trial proceedings." *Yusem v. People*, 210 P.3d 458, 469 (Colo. 2009) (quoting *People v. Gaffney*, 769 P.2d 1081, 1088 (Colo. 1989)). Even the trial court recognized the probable impact of the instruction, noting that without it the jury would likely view the refusal evidence differently, or at least place less emphasis on the evidence. TR 3/12/19, pp. 11-14.

The State has not met its burden of proving harmlessness here. *See James v. People*, 2018 CO 72, ¶¶ 17-18. The instruction affected the verdict and undermined the fairness of trial. Reversal is required.

CONCLUSION

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

MEGAN A. RING
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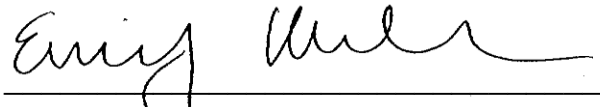

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CERTIFICATE OF SERVICE

I certify that, on April 8, 2021, a copy of this Reply Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on Daniel J. DeCecco of the Attorney General's office.