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

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

Appeal; Larimer District Court;
The Honorable Stephen Howard;
Case Number 2016CR2686</td><td rowspan="2">DATE FILED: April 4, 2019 9:13 AM
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<tr><td>Plaintiff-Appellee
THE PEOPLE OF THE
STATE OF COLORADO

v.

Defendant-Appellant
MICHAEL F. MAESTAS</td></tr>
<tr><td>Megan A. Ring,
Colorado State Public Defender
JEANNE SEGIL
1300 Broadway, Suite 300
Denver, Colorado 80203

Phone: (303) 764-1400
Fax: (303) 764-1479
Email: PDApp.Service@coloradodefenders.us
Atty. Reg. #50898</td><td>Case Number: 2017CA2202</td></tr>
<tr><td colspan="2">OPENING 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:

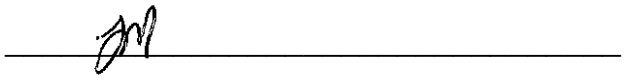
This brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 9,449 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.

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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II. Whether the trial court should have excluded evidence of Mr. Maestas's initial refusal to take the blood test under CRE 403 because the prosecution introduced the actual blood test results.

III. Whether the admission of the ChemaTox laboratory report containing testimonial hearsay violated Mr. Maestas's Confrontation Clause rights.

IV. Whether the trial court violated Mr. Maestas's right to a jury trial and due process when it imposed the wrong burden of proof and allowed the trial court to prove an element of the offense to the bench, rather than the jury.

STATEMENT OF THE CASE

The prosecution charged Michael Maestas with one count of felony driving under the influence ("DUI"),[1] and one count of driving under restraint.[2] CF, p 16. The prosecution alleged three prior offenses for purposes of the Felony DUI count. CF, p 17. The prosecution dismissed the driving under restraint charge, and a jury

[1] § 42-4-1301(1)(a), C.R.S. (F4).
[2] § 42-2-138(1)(d), C.R.S. (M).

convicted Mr. Maestas of the lesser-included offense of driving while ability impaired ("DWAI"). TR 8/16/17, pp 32-33; CF, p 191.

In a separate proceeding, the court found, by a preponderance of the evidence, that Mr. Maestas had three prior DWAI convictions. TR 8/17/17, pp 20, 40. Based upon that finding, the court convicted Mr. Maestas of felony DWAI.[3] CF, p 229; TR 8/17/17, p 40:18-20. The court sentenced Mr. Maestas to four years of probation, with 120 days of jail to be served through a work-release program. CF, p 229; TR 10/16/17, p 9:12-23. Mr. Maestas filed a timely notice of appeal of his conviction and sentence, thus perfecting his right to appeal. C.A.R. 4(b).

STATEMENT OF THE FACTS

Around midnight on December 2, 2016, Michael Maestas, age 53, drove his friend home from a bar, in a green Chevrolet Blazer. TR 8/15/17, pp 145, 147-48, 158-59, 189; CF, p 1. On their way home, they stopped at D.P. Dough's to get some pizza.

At 12:17 a.m., Officer Koski of the Fort Collins Police Department responded to a REDDI ("Report Every Drunk Driving Immediately") call regarding two men who appeared intoxicated at the D.P. Dough's parking lot near a green Chevrolet Blazer. TR 8/15/17, pp 147-48. Mr. Maestas and his friend

[3] § 42-4-1301(1)(b), C.R.S. (F4).

drove away in the Chevrolet, and Koski followed as they drove north on South College Avenue. Id., pp 148-49. *See e.g.*, Id., pp 150-51; EX 1.

Koski testified that the Chevrolet did not finish getting into the right-hand turning-lane before the light turned red, and then the Chevrolet took a wide turn. Id., pp 152. He testified that the car weaved while traveling down Mulberry Street. Id., pp 154-55. Koski turned on his lights and siren, and the Chevrolet pulled over. Id., pp 155-56.

According to Koski, Mr. Maestas moved slowly, and had bloodshot, watery eyes. Id., p 157. Mr. Maestas told Koski that he had not had anything to drink and was trying to take his friend home from the bar. Id., p 158. Koski testified that he did not believe Mr. Maestas had been drinking alcohol, though he wrote in his initial report that he smelled alcohol on Mr. Maestas's breath. Id., pp 159, 181, 189.

When Koski asked if he was on any medication, Mr. Maestas said that he took two 5 mg oxycodone pills at 11 a.m. Id., p 161. Mr. Maestas explained that he saw a doctor on a weekly basis to address injuries to his leg, back, and neck. Id., p 161. Mr. Maestas also told Koski that he was very tired. Id., p 188.

After Koski asked if he would volunteer to do roadside maneuvers, Mr. Maestas said that he had trouble with balance, but he was willing to give it a try.

Id., p 161. According to Koski, Mr. Maestas did not complete the tests "as a sober person would." TR 8/15/17, pp 168-171.

Koski asked Mr. Maestas if he would be willing to take a blood test. Id., p 172. Mr. Maestas declined the test. Id. Koski then arrested Mr. Maestas and took him to the hospital. Id., pp 172-73. Koski received a search warrant for a blood test. Id.

At trial, Isaac Avram, a forensic toxicologist analyst at ChemaTox Laboratory, testified that Mr. Maestas had a level of 190 nanograms of Zolpidem per milliliter of blood. Id., pp 202, 206. Zolpidem is the generic drug for Ambien. Id., p 201:20-24. The test results came back negative for any other drug or alcohol. EX 4.

The defense argued that Mr. Maestas was tired and sore that night, but he was not under the influence or impaired. TR 8/16/17, pp 13-14, 20-21. The defense also argued that Koski misinterpreted Mr. Maestas's actions based upon Koski's preconceived notion that Mr. Maestas was drunk. Id., pp 13-16. The prosecution argued that Mr. Maestas was under the influence, or at least impaired. Id., pp 12-13.

SUMMARY OF THE ARGUMENT

I. The prosecution failed to produce sufficient evidence identifying Mr. Maestas as the person who suffered the DWAI conviction from 1983. Accordingly, his conviction for felony DWAI must be vacated. In addition, the judge abandoned his role as a neutral factfinder when he recessed the proceedings and conducted his own investigation into the validity of the 1983 prior conviction. The judge then relied upon the information he uncovered to find sufficient proof that Mr. Maestas had received this prior conviction. This Court must vacate the felony DWAI conviction, or in the alternative, reverse and remand for a new trial.

II. Because the trial court admitted the actual blood test results at trial, the evidence of Mr. Maestas's initial refusal to take the test was inadmissible under CRE 403. As the test results served as more substantive proof, the marginal probative value of the refusal evidence was low. And this marginal probative value was substantially outweighed by the danger of unfair prejudice. The improper admission of the evidence requires reversal.

III. The admission of a laboratory report violated Mr. Maestas's Confrontation Clause rights. The report contained inadmissible testimonial hearsay because the scientists who certified the results did not testify at trial. The lab report

impermissibly bolstered the testimony of the one ChemaTox analyst, and the error requires reversal.

IV. The statutory provisions elevating a misdemeanor drinking-and-driving-related offense to a felony unambiguously make prior convictions elements of the crime. By treating proof of Mr. Maestas's prior convictions as a sentence enhancer that may be tried to the court instead of an element that must be proved to a jury beyond a reasonable doubt, the trial court violated Mr. Maestas's constitutional rights to due process and to a trial by jury.

ARGUMENT

I. The prosecution presented insufficient evidence identifying Mr. Maestas as the person previously convicted of the 1983 misdemeanor conviction, and the trial court impermissibly acted as an advocate by conducting its own research.

A. Standard of Review

De novo review applies to sufficiency claims. *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005). And while unnecessary for appellate review of this claim, *see People v. Duncan*, 109 P.3d 1044, 1045 (Colo. App. 2004), defense counsel preserved this claim. TR 8/17/17, pp 30-33.

Furthermore, the trial court impermissibly acted as an advocate during the bench trial on the prior convictions. De novo review applies to whether a constitutional violation occurred. *See Vasquez v. People*, 173 P.3d 1099 (Colo.

2007); *United States v. Serrano*, 406 F.3d 1208 (10th Cir. 2015). The defense preserved this claim. TR 8/17/17, pp 39-40.

B. Applicable Facts

At the bench trial on the prior convictions, the prosecution alleged three prior DWAI convictions from 1983, 1988, and 2012. TR 8/17/17, pp 15-17. The court took judicial notice of the 1988 and 2012 convictions without objection. Id., p 20:1-3. However, the defense argued that the prosecution did not present sufficient evidence to prove the 1983 conviction beyond a reasonable doubt or by a preponderance of the evidence. Id., pp 19-20, 31-33.

The prosecution presented a CCIC driver's history for Michael Frank Maestas that included his date of birth, 6/26/1963, social security number, and Colorado pin number. EX 5; Id., pp 6-10, 13. This driver's history listed a conviction from Larimer County for a DWAI on 10/25/1983. EX 5; TR 8/17/17, p 13:7-20. The investigator from the district attorney's office went to the Larimer County courthouse and received a certified copy of a DWAI conviction for a Michael Frank Maestas entered on 10/25/1983. TR 8/17/17, pp 13-15, 28; EX 7. That 1983 copy of conviction did not list a date of birth, social security number, Colorado pin number, or any personal information other than a name. TR 8/17/17, p 21:15-23; EX 7.

The defense introduced evidence from a Colorado Bureau of Investigations ("CBI") driver's query of Michael Frank Maestas, with a birthdate 6/26/1963, and a social security number that matched the CCIC driver's query. TR 8/17/17, pp 22-24; Def's EX A. The CBI query did not report a DUI or DWAI arrest or conviction in 1983. Id. In addition, the Department of Motor Vehicles could not find any driving records for Michael Maestas, DOB, 6/26/1963. Id., pp 25-26; Def's. EX B.

The defense argued that the prosecution presented insufficient evidence because the CBI query did not list this 1983 conviction, and the only link between the 1983 certificate of conviction and Mr. Maestas was the name. Id., pp 31-33.

The court initially ruled that it could take judicial notice of the 1983 offense based on the copy of conviction because it was a Larimer County case. Id., p 36:5-10. The court stated that it was "familiar with the certification on this record and that certification is – the person who signed off is a clerk in the records department. I am familiar with her and what her signature is." Id., p 36:11-14. The trial court made the following statement:

> I am not, however -- frankly, **I would like to get more evidence if possible of the 1983 conviction**. Because what bothers me is it does not appear when I go into our index system here, Mr. Maestas's other offenses appear, but the 1983 offense does not. And the case number does not appear. So that troubles me somewhat. **And I am not going to make a final ruling until I have a chance to look and see**. It seems to me since this is a Larimer County case it shouldn't be very difficult to determine once and for all whether that conviction is, in

> fact, Mr. Maestas. So I am going to take a recess and take a look at that.

Id., p 37:9-20. (emphases added). After the recess, the court announced that it went down to the records department and printed the complete court file. Id., p 39:17-19. The court stated that the summons and complaint found in the court file listed Michael Frank Maestas, date of birth 6/26/1963, as the defendant. Id., p 39:19-20. The court took judicial notice of these findings and the prior conviction. Id., p 39:24. The court stated that defense counsel could review the additional documentation, although it did not introduce the paperwork into evidence. Id., pp 39-40.

The defense objected and stated, "I object to the Court looking for additional information beyond what was presented during today's hearing. The purpose of today's hearing was for the Prosecution to meet its burden. And I think the Court should be bound by the evidence the Prosecution presented." Id., p 40:4-8. The court responded that there was enough evidence prior to conducting its research, and that it only consulted the court file because "it might possibly help Mr. Maestas." Id., p 40:14-17. The court took judicial notice of the convictions and entered a judgment of conviction for felony DWAI. Id., pp 39-40.

C. Discussion

1. The prosecution presented insufficient evidence to prove the alleged 1983 DWAI conviction.

A defendant's constitutional right to due process requires the prosecution to prove every element of a charge beyond a reasonable doubt. U.S. Const. amends. V, XIV; Colo. Const. art. II, §§ 23, 25; *In Re Winship*, 397 U.S. 358, 364 (1970); *Griego v. People*, 19 P.3d 1, 7 (Colo. 2001).[4] In a sufficiency claim, this Court views the record in the light most favorable to the prosecution, and a conviction can stand only if this Court is convinced that the evidence "is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge…." *People v. Bennett,* 515 P.2d 466, 469 (Colo. 1973). A verdict must be based on more than "a modicum of relevant evidence" or "guessing, speculation, or conjecture." *People v. Sprouse*, 983 P.2d 771, 778 (Colo. 1999).

The prosecution presented insufficient evidence to prove the alleged 1983 prior conviction for DWAI. Before impermissibly conducting outside research, *see infra* pp 12-16, the trial court relied on the following: 1) the CCIC driver's query that included a 1983 DWAI conviction from Larimer County entered on October

[4] As will be argued in further detail, the prior convictions in a felony DWAI case are elements that require proof beyond a reasonable doubt. *See infra* Argument IV. However, even if this Court applies a preponderance of the evidence standard, the prosecution still failed to present sufficient evidence to prove the alleged 1983 conviction.

25, 1983; and 2) a 1983 certified conviction record for a DWAI in Larimer County entered on October 25, 1983. However, the only personal information to establish identity from the 1983 conviction record was the name, Michael Frank Maestas.

For evidence of identity to be sufficient, the prosecution must show an "essential connecting link" between the accused and the evidence of prior convictions. *DeGesualdo v. People*, 364 P.2d 374, 379 (Colo. 1961). In *DeGesualdo*, the prosecution submitted authenticated copies of prior convictions to prove a habitual criminal charge. *Id*. at 378. The Supreme Court held that the evidence was legally insufficient because it failed to link these convictions to the defendant. *Id*. at 378, 379. The Court specified that proof that a defendant has the same name was not enough to satisfy the identity requirement; rather, "strict proof" was required. *Id.* at 378. Likewise, in *People v. Cooper*, 104 P.3d 307 (Colo. App. 2004), this Court held that "the fact that defendant has the same name and date of birth as the person previously convicted is insufficient." *Id.* at 312. Here, only a name connected the 1983 conviction to Mr. Maestas. EX 5. Ultimately, the prosecution failed to establish the "essential connecting link" between Mr. Maestas and the evidence of the 1983 prior conviction. *DeGesualdo*, 364 P.2d at 379.

Whether under a standard of proof of beyond a reasonable doubt or a preponderance of the evidence, the evidence of the 1983 conviction was

insufficient. Without sufficient proof of all three predicate offenses, Mr. Maestas was not subject to the charge of felony DWAI. § 42-4-1301(1)(b). The conviction for felony DWAI must be vacated. *Burks v. U.S.*, 437 U.S. 1, 11 (1978) ("The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."); *Duncan*, 109 P.3d at 1047 (if rational trier of fact could not have found all elements of the crime, conviction must be vacated). Mr. Maestas respectfully requests that this Court vacate his conviction for felony DWAI, enter a judgment for misdemeanor DWAI, and order resentencing for that offense.

2. The trial court violated Mr. Maestas's due process rights when it conducted outside research.

Because the role of the judiciary "is one of impartiality," *People v. Hrapski*, 718 P.2d 1050, 1054 (Colo. 1986), a trial court cannot abdicate its role as neutral arbiter and assume the role of prosecutor. *People v. Martinez*, 523 P.2d 120, 120-21 (Colo. 1974); *People v. Adler*, 629 P.2d 569, 573 (Colo. 1981) (judge must take "great care to insure that he [or she] does not become an advocate…"); U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25. Indeed, "[t]he semblance of due process is a sham when the judge is both prosecutor and judge." *Harthun v. District Court*, 495 P.2d 539, 542 (Colo. 1972).

In particular, evidence "must be produced by the prosecution, not the judiciary." *Martinez,* 523 P.2d at 121. According to the ABA Standards for Criminal Justice, Commentary on Standard 6-1.1(a) (3rd ed. 2000), "trial judges should not take an active role in developing the facts" in a criminal trial. *See State v. Gauthreaux*, 64 So. 680, 682 (La. 1913) (Trial judge cannot "participate in the development of facts which he [or she] may think will be of advantage to one side or the other, and which, but for his interference, might remain undeveloped."). Like a jury, a judge sitting as trier of fact must base its decisions solely on the evidence presented at trial. *See People v. Perea,* 74 P.3d 326, 331 (Colo. App. 2002). A judge "may analyze and dissect the evidence, but he may not either distort it or add to it." *Quercia v. United States*, 289 U.S. 466, 470 (1933).

Here, the court abdicated its role as a neutral arbiter when it searched the court index, stated that it would like more evidence to prove the alleged 1983 prior conviction, proceeded to conduct its own investigation, and then relied upon this additional information in convicting Mr. Maestas. The impropriety of each of these actions is self-evident.

As defense counsel argued, "[t]he purpose of today's hearing was for the Prosecution to meet its burden," and the court "should be bound by the evidence the Prosecution presented." TR 8/17/17, p 40:4-8. After consulting the court index

where the 1983 conviction was not listed, the court said it was "trouble[d]" by the lack of evidence of the alleged 1983 conviction. Id., p 37:9-20. If it was troubled by the evidence such that it felt that the prosecution did not meet its burden, then there was only one proper response: the judge must find that the prosecution did not prove the alleged prior conviction. *See Roybal v. People*, 496 P.2d 1019, 1021 (Colo. 1972) ("Proof that stands no higher than the level of suspicion, surmise or conjecture has no substance and cannot form the basis of a conviction under our system of criminal justice…").

The court violated its duty to be impartial by assuming the role of the prosecutor and adding new evidence. *Quercia*, 289 U.S. at 470; *Martinez*, 523 P.2d at 120-21; *Harthun*, 495 P.2d at 542. Instead of ruling that the prosecution had not proven the prior conviction, the court made the extraordinary decision to conduct its own research. The court uncovered the summons and complaint which included Mr. Maestas's date of birth, strengthening the link between the 1983 conviction and Mr. Maestas. TR 8/17/17, p 39:19-20.

The court then relied upon this new evidence in finding that the prosecution proved the conviction. Id., pp 39-40. Though the court tried to argue that it already found sufficient proof prior to conducting its own research, its own words belie that statement. Id., p 40:12-17. Prior to conducting research, the court explicitly

stated that it wanted more evidence and would not make a final ruling until it looked for additional information. Id., p 37:9-18.

As explained above, the evidence presented by the prosecution was insufficient to prove the conviction. *See supra* pp 10-12. The court could not respond to this insufficient evidence by finding additional evidence. *See e.g.*, ABA Standards for Criminal Justice, Commentary on Standard 6-1.1(a) (3rd ed. 2000); *Martinez*, 523 P.2d at 121. Furthermore, the court did not introduce the summons and complaint into evidence. The defense, thus, could not challenge the information. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). The court also could not rely on facts not in evidence. *Querica*, 289 U.S. at 470. Ultimately, the "semblance of due process" became a "sham." *Harthun*, 495 P.2d at 542.

Courts "must meticulously avoid any appearance of partiality, not merely to secure the confidence of the litigants immediately involved, but to retain public respect and secure willing and ready obedience to their judgments." *Hrapski*, 718 P.2d at 1054; *see also People v. Rogers*, 800 P.2d 1327, 1329 (Colo. App. 1990) ("We cannot…condone this deviation by the trial judge from [its] role as arbiter in the case."). Here, the court abandoned both its role as a neutral arbiter and all pretenses of impartiality.

Because the evidence was insufficient to prove the 1983 conviction without the court's impermissible outside research, the appropriate remedy for this error is to vacate the felony DWAI conviction. *Supra*, pp 11-12.

In the alternative, because this conduct violated Mr. Maestas's due process rights and right to a fair trial, constitutional harmless error applies. *See Hagos v. People*, 2012 CO 63, ¶ 11. The test for reversal is "whether the trial judge's conduct so departed from the required impartiality as to deny the defendant a fair trial." *People v. Rodriguez*, 209 P.3d 1151, 1162 (Colo. App. 2008), *aff'd*, 238 P.3d 1283 (Colo. 2010); *see also People v. Vialpando*, 809 P.2d 1082, 1085 (Colo. App. 1990) (appellate courts must establish safeguards to prevent unfair trials). Instances of judicial bias can "preclude[ ] the proper administration of justice." *Id.* Furthermore, but for the trial court's improper investigation, Mr. Maestas would have been acquitted of felony DWAI. *Supra*, pp 11-12, 15. Here, the acts of judicial bias denied Mr. Maestas a fair trial and precluded the administration of justice. This Court should vacate the conviction, or in the alternative, reverse the felony DWAI conviction and remand for a new trial.

II. Because the court admitted the blood test results, evidence of Mr. Maestas's initial refusal to take the test should have been excluded under CRE 403.

A. Standard of Review

Courts review de novo a due process violation. *United States v. Nickl*, 427 F.3d 1286, 1296 (10th Cir. 2005); *Bloom v. People*, 185 P.3d 797, 806 (Colo. 2008) (applying totality of the circumstances test to due process violation). A defendant's due process rights may be violated when "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair." *Payne v. Tennessee*, 501 U.S. 808, 809 (1991). This Court reviews evidentiary claims for an abuse of discretion. *People v. Stewart*, 55 P.3d 107, 122 (Colo. 2002). This claim is preserved. TR 8/15/17, p 6:6-18.

B. Applicable Facts

After the trial court ruled that the test results from the blood draw were admissible pursuant to the search warrant, the defense objected, under CRE 403, to the admission of evidence that Mr. Maestas refused to take a blood test. TR 8/15/17, p 6:6-18. The defense argued that the refusal evidence should not be admitted under CRE 403 because a refusal is relevant only in cases where the prosecution does not have test results to admit. Id., pp 6, 11-12. The defense further argued that the intent of the statute is satisfied when a test is completed. Id.,

pp 11-12. The prosecution argued that the refusal evidence was admissible under subsection 42-4-1301(6)(d), C.R.S. The court ruled that the evidence was admissible under the statute and under *Cox v. People*, 735 P.2d 153 (Colo. 1987). Id., p 14:1-5.

Mr. Maestas's refusal to take a blood test factored heavily in the prosecution's case. During voir dire, the prosecution asked veniremembers whether they would refuse to take a test if they were pulled over and were sober. Id., pp 98-99. The prosecution further explained that they would lose their licenses if they refused the test. Id. After the prosecution explained the consequences, the veniremembers all said they would take the test if they were sober. Id.

During opening statements, the prosecution argued that Mr. Maestas refused to submit to a blood test and Koski had to request a search warrant. Id., p 137:12-19. In its case-in-chief, the prosecution elicited this same testimony from Koski. Id., pp 172-74. During closing argument, the prosecution reiterated that Mr. Maestas refused to take a blood test. TR 8/16/17, p 11:2-4. Finally, in rebuttal closing, the prosecution stated:

> The refusal, yes, Officer Koski got a search warrant signed by a judge after the fact. But the fact is when the defendant had an opportunity to take a blood test to show there nothing in his system, he refused. During voir dire we talked about that. And after you learned about express consent, everyone said if you could take a blood test to show

> nothing was in your system, you would take it. You get to consider his refusal as a consciousness of guilt.

Id., p 23:10-17. Ultimately, the prosecution relied upon the refusal evidence at all stages of the trial: voir dire, opening statements, its case in chief, closing argument, and rebuttal closing argument.

C. Argument

Due process affords criminal defendants the right to a fair trial by an impartial jury. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25; *Bloom*, 185 P.3d at 805-06. This right requires that a jury determine guilt or innocence based solely on properly admitted evidence at trial. *Domingo-Gomez v. People*, 125 P.3d 1043 (Colo. 2005). A jury "misled by inadmissible evidence or argument cannot be considered impartial." *Oaks v. People*, 371 P.2d 443, 447 (Colo. 1962). When evidence is introduced that is so unduly prejudicial, it "renders the trial fundamentally unfair." *Bloom*, 185 P.3d at 805-06.

Evidence, although relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. CRE 403. When assessing the probative value of evidence, courts must consider the "scarcity or abundance of other evidence on the same point." *People v. Saiz*, 32 P.3d 441, 446 (Colo. 2001). Under CRE 403, "probative value" refers to the marginal or

incremental probative value of evidence relative to the other evidence in the case. *Id.*

In *Old Chief v. U.S.*, 519 U.S. 172 (1997), the Supreme Court held that the trial court abused its discretion under Federal Rule of Evidence 403 by rejecting a stipulation to a prior offense in a possession of a weapon by a previous offender case. *Id.* at 192. The Court explained that the stipulation was conclusive to establish the status element. *Id*. Thus, evidence of the specific prior conviction had only minimal probative value and it was outweighed by the prejudice. *Id.* Though *Old Chief* relied upon a federal evidentiary rule, FRE 403 and CRE 403 are nearly identical. *Compare* CRE 403, *with* FRE 403. In addition, Colorado has consistently looked to *Old Chief* when conducting CRE 403 analyses. *See e.g.*, *People v. Rath*, 44 P.3d 1033, 1041 (Colo. 2002); *People v. Brown*, 2014 COA 130M, ¶¶ 25-26; *People v. Morales*, 2012 COA 2, ¶¶ 8-10, Here, the refusal evidence had only marginal probative value that was substantially outweighed by the danger of unfair prejudice.

1. The refusal evidence only had marginal probative value relative to the test results.

The admission of Mr. Maestas's refusal to take a blood test when his actual blood test results were introduced violated CRE 403. Similar to *Old Chief*, here,

the refusal was only minimally probative because the test results served as conclusive proof of the level of drugs active in Mr. Maestas's system.

Though Colorado courts have upheld the admission of the refusal to take such tests under the express consent statute, *see e.g.*, *Cox*, 735 P.2d at 159; *Fitzgerald v. People*, 2017 CO 26, ¶ 21; *People v. Maxwell*, 2017 CO 46, ¶10, it is an issue of first impression whether a refusal can be admitted under CRE 403 when the actual test results are admitted. Under *Cox*, when the prosecution did not have a test result to introduce, the refusal evidence was probative to show consciousness of guilt. 735 P.2d at 159. However, a refusal is less probative to show consciousness of guilt when the test results are admitted because the results conclusively show the amount of drugs in a defendant's system.

As the United States Supreme Court made clear in *South Dakota v. Neville*, 459 U.S. 553 (1983), "the State wants [the suspect] to choose to take the test, for the inference of intoxication arising from a blood-alcohol test is far stronger than that arising from a refusal to take the test." *Id.* at 564; *see also McGuire v. People*, 749 P.2d 960, 963 n.4 (Colo. 1988) (same). Here, the actual test results were far stronger evidence and obviated the need for the refusal evidence. As probative value is determined by the marginal or incremental value added, the probative value of the refusal evidence in such circumstances is exceedingly low.

2. The danger of unfair prejudice substantially outweighed any minimal probative value.

Even if there was minimal probative value, it was substantially outweighed by the danger of unfair prejudice. CRE 403. The refusal to take the test was treated as akin to an admission of guilt. In fact, the prosecution explicitly argued that the jury should use the refusal as evidence of consciousness of guilt. TR 8/16/17, p 23:10-17.

Furthermore, the prosecution explained that the police had to get a search warrant because Mr. Maestas refused to take the blood test. TR 8/15/17, pp 172-74. In other circumstances, Colorado courts have held testimony that police officers received search warrants or arrest warrants violates CRE 403. *See People v. Mullins*, 104 P.3d 299, 301 (Colo. App. 2004); *People v. Mendenhall*, 2015 COA 107M, ¶ 62. Evidence that the police received a search warrant from a judge is irrelevant because it has no rational tendency to prove whether a defendant committed an offense. *Mullins*, 104 P.3d at 301. Such testimony also is unfairly prejudicial because it communicates to the jury that a judge thought there was probable cause to justify a search warrant. Details about the pretrial screening process imply that "only guilty parties are charged with crimes and thus the defendant must be guilty." *Mendenhall*, ¶ 62. Thus, this testimony violates a defendant's right to be "armored with the presumption of innocence." *Oaks*, 371

P.2d at 447. This presumption of innocence must be protected to preserve "the very essence of a fair criminal trial." *Id.*

Because the refusal evidence had only minimal probative value that was substantially outweighed by the danger of unfair prejudice, the evidence was inadmissible. *Mullins*, 104 P.3d at 301; *Oaks*, 371 P.2d at 447.

3. The error requires reversal.

The error in the admission of the refusal testimony requires reversal. Here, because the error deprived Mr. Maestas of his right to a fair trial, this Court should apply constitutional harmless error review. Under this standard, the prosecution bears the burden of proving the error harmless beyond a reasonable doubt. *People v. Clark*, 214 P.3d 531, 540 (Colo. App. 2009). Reversal is required if "there is a reasonable possibility that the [error] might have contributed to the conviction." *Hagos v. People*, 2012 CO 63, ¶ 10 (internal citations omitted).

However, even if this Court applies a non-constitutional harmless error analysis, the result is the same. Under this test, reversal is still required because "the error substantially influenced the verdict or affected the fairness of the trial proceedings." *Yusem v. People*, 210 P.3d 458, 469 (Colo. 2009).

First, the evidence of guilt was far from overwhelming. The test results only indicated a level of 190 nanograms of Zolpidem per milliliter of blood, which may

not have been a level that would impair Mr. Maestas's driving. As the defense argued in closing, "[y]ou were not given any context for that number. Nothing to tell you whether 190 is high. Whether that is low. Whether that's something that has really any meaning beyond the fact that there was enough to verify that that there was Zolpidem in Mr. Maestas's system." TR 8/16/17, p 19:10-15. Because the prosecution failed to present evidence about how much Zolpidem could cause impairment, the prosecution instead relied upon the prejudicial and inadmissible refusal evidence to argue Mr. Maestas's guilt.

Further, the defense argued that Koski misinterpreted Mr. Maestas's driving abilities and roadside maneuver abilities because he had the preconceived notion that Mr. Maestas was intoxicated based on the REDDI report. Koski noted that he smelled alcohol on Mr. Maestas's breath, even though test results did not reveal any signs of alcohol in his system. Id., pp 159, 181, 189.

The prosecution exacerbated the prejudice of this evidence by referencing it at every stage of the trial: voir dire, opening statements, direct examination, closing argument, and rebuttal closing argument. The prosecution referred back to its voir dire in its rebuttal closing arguments, stating, "everyone said if you could take a blood test to show nothing was in your system, you would take it." TR 8/16/17, p 23:10-17. *See Domingo-Gomez*, 125 P.3d at 1052 ("[r]ebuttal closing is the last

thing a juror hears from counsel before deliberating, and it is therefore foremost in their thoughts."). The repeated emphasis on the refusal evidence and the search warrant unfairly tipped the balance in favor of the prosecution. This Court should reserve Mr. Maestas's conviction and remand for a new trial.

III. The ChemaTox laboratory report contained testimonial hearsay, and its admission violated Mr. Maestas's Confrontation Clause rights.

A. Standard of Review

This Court reviews de novo whether the admission of evidence violates the Confrontation Clause. *People v. Barry*, 2015 COA 4, ¶ 65. The defense preserved this issue for appeal by filing the notice of request for laboratory employees or technicians, pursuant to section 16-3-309(5), C.R.S. CF, p 48; TR 5/17/17, pp 2-4. If this Court finds that the defense did not preserve the argument, then plain error review applies. *Barry*, ¶ 65.

B. Applicable Facts

After defense filed its notice, the prosecution filed a response arguing that it only had to put on a supervisor who "approved and certified" the results. CF, p 56 (citing *People v. Medrano-Bustamante*, 2013 COA 139, ¶ 28). The court denied the defense's motion to the extent that it required all employees and technicians to testify. TR 5/17/17, pp 3-4.

During the trial, Mr. Avram, a forensic toxicologist analyst at ChemaTox laboratory, testified to the blood test results. TR 8/15/17, pp 191-92. He explained that a different analyst did the initial screening tests which revealed positive indicators for oxycodone and Zolpidem. Id., pp 200-02. Avram reviewed the results by conducting the confirmation testing and analysis, and found 190 nanograms of Zolpidem per milliliter of blood. Id. He did not find a detectable amount of oxycodone. Id., p 202:7-19. Avram explained that after the confirmation testing is complete, "there's a secondary scientist that will go through and review all that data, then that result is certified by a certifying scientist, and then all that information can be sent out in a report." Id., p 197:12-16.

The prosecution admitted EX 4, the ChemaTox laboratory report, through Avram. Id., pp 199-200. He stated that the report was a copy and contained sections that looked like they were "added post printing." Id., p 200:22-24. The report indicated that A. Jackson, an analyst, performed the initial screenings and Avram performed the confirmation testing. EX 4. The report stated that it was "approved by" Sarah S. Urfer, M.S., D-ABFT-FT, and she signed the line above her name. Id. The report also indicated that the certifying scientist was Lauren Wiles. Id.

C. Argument

1. The Confrontation Clause is violated when a laboratory report is introduced into evidence without testimony from the certifying scientist.

The Confrontation Clause grants defendants the right to confront and cross-examine witnesses. U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§ 16, 25; § 16-3-309(5), C.R.S. To comport with this right, testimonial hearsay from a non-testifying declarant must be excluded when the declarant is unavailable and the defendant had no prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68 (2004); *Bullcoming v. New Mexico*, 564 U.S. 647, 657-58 (2011); *People v. Fry*, 92 P.3d 970, 976-77 (Colo. 2004). Forensic lab reports are testimonial hearsay subject to Confrontation Clause requirements. *Bullcoming*, 564 U.S. at 652; *Marshall v. People*, 2013 CO 51, ¶ 15; *People v. Barry*, 2015 COA 4, ¶ 75.

"The Confrontation Clause is violated where a laboratory analyst who has signed a report that is admitted into evidence does not testify at trial." *Barry*, ¶ 75; *Bullcoming*, 564 U.S. at 661 ("the analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess 'the scientific acumen of Mme. Curie and the veracity of Mother Teresa.'") (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 n.6 (2009)). In *Barry*, a

division of this Court held that the trial court violated the defendant's Confrontation Clause rights by admitting a blood test certification signed by an EMT when the EMT did not testify at trial. *Id.*, ¶¶ 75, 79.

2. The admission of the ChemaTox laboratory report violated Mr. Maestas's Confrontation Clause rights and statutory rights pursuant to § 16–3–309(5).

Barry compels the same result here. Because Avram did not certify or sign the final report, the trial court erred in admitting the report. *Barry*, ¶ 79. Avram testified that the results were reviewed by a secondary scientist and then certified by a certifying scientist. Id., p 197:12-16. According to the report, Lauren Wiles appears to be the "certifying scientist" and Sarah Urfer approved and signed the report. EX 4. Because neither Wiles or Urfer testified, the report was a hearsay testimonial statement, and its admission violated Mr. Maestas's Confrontation Clause rights and statutory rights. *Crawford*, 541 U.S. at 68; *Bullcoming*, 564 U.S. at 657-58; U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§ 16, 25; § 16-3-309(5), C.R.S.

The trial court also violated Mr. Maestas's statutory rights, pursuant to section 16–3–309(5), because the person who "accomplished" the analysis must testify in order to admit the report. In order to "accomplish" the analysis, a person must "perform the final and necessary step" in the testing process. *Marshall*, ¶ 22;

Medrano-Bustamante, ¶ 28; *People v. Fuerst*, 2019 CO 2, ¶¶ 35-36. Because the "final and necessary step" was to certify and sign the report, Avram did not "accomplish" the analysis. Hence, the admission of the report violated Mr. Maestas's statutory rights. § 16–3–309(5).

3. Reversal is required.

The error in the admission of the report requires reversal. The defense preserved the issue by filing its notice requesting the testimony of all employees or technicians of the laboratory "who accomplished each and every scientific analysis." CF, p 48; TR 5/17/17, pp 3-4. In *Barry*, the Court found that the section 16-3-309(5) notice was insufficient to preserve the Confrontation Clause claim because the EMT in question was not employed by any criminalistics laboratory. *Id.*, ¶¶ 69-70. In contrast, here, the certifying scientists worked at a criminalistics laboratory. Id., p 197:12-16. Hence, the request was specific enough to alert the trial court to the fact that the defense demanded in-person testimony from all laboratory employees involved, including the certifying scientists. *See People v. Melendez*, 102 P.3d 315, 322 (Colo. 2004) (This Court does not require that parties use "talismanic language" to preserve an argument for appeal.). Consequently, the trial court received an adequate opportunity to address the matter notwithstanding defense counsel's failure to object to the admission of the exhibit. *Cf. People v.*

Tardif, 2017 COA 136, ¶¶ 10, 29-33 (defense counsel preserved instructional issues where he tendered instructions that did not contain the defects complained of on appeal even though he did not raise the issues at the instructional conference).

Because this error was preserved and violated Mr. Maestas's Confrontation Clause rights, this Court should apply constitutional harmless error review. Under this standard, the prosecution bears the burden of proving the error harmless beyond a reasonable doubt. *Clark*, 214 P.3d at, 540. Reversal is required if "there is a reasonable possibility that the [error] might have contributed to the conviction." *Hagos*, ¶ 11 (internal citations omitted).

To decide if the error was harmless, this Court considers the following factors: (1) the importance of the evidence to the prosecution's case; (2) whether the evidence was cumulative; (3) the presence or absence of corroborating or contradictory testimony on the material points of the evidence; (4) the extent of the cross-examination otherwise permitted; and, (5) the overall strength of the prosecution's case. *Fry*, 92 P.3d at 980.

Here, the prosecution relied on the blood test results throughout trial. *See e.g.*, TR 8/15/17, p 202: 16-17; TR 8/16/17, pp 22-23. While Avram could testify to the test results because he performed the confirmation testing, the report

impermissibly served to bolster his testimony. *Golob v. People*, 180 P.3d 1006, 1010–11 (Colo. 2008). In *Golob*, the Court held that an expert's testimony that another expert confirmed her findings was inadmissible hearsay that served to bolster findings and provide additional support. *Id.*; *see also People v. Griffin*, 985 P.2d 15, 18 (Colo. App. 1998). Similarly, here, Avram testified that other scientists approved and certified the findings. TR 8/15/17, p 197:12-16. The report signed by Urfer and Wiles then impermissibly served to bolster Avram's critical testimony.

Furthermore, this bolstering evidence was not cumulative. The report signed by Urfer and Wiles was the only indication that these scientists verified and corroborated Avram's test results. In addition, the defense did not have the ability to cross-examine the certifying scientists and question them about the report's reliability. Avram testified that the report was a copy and contained additions. Id., p 200:22-24. The defense did not have the ability to probe this potential problem further without the certifying scientists. Finally, as previously mentioned, the evidence in this case was far from overwhelming. *Supra*, p 23. Because there was a reasonable possibility that the error contributed to the conviction, reversal is required.

Even if this Court chooses to analyze this claim under plain error, the erroneous admission of the laboratory report requires reversal because it was an

obvious and substantial error that so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the conviction. *Hagos*, ¶ 14. The error was an obvious and substantial error it contravened a clear statutory command and federal and Colorado case law. *See e.g.*, § 16–3–309(5); *Crawford*, 541 U.S. at 68; *Bullcoming*, 564 U.S. at 657-58; *Fry*, 92 P.3d at 976-77; *Barry*, ¶ 79. Furthermore, the erroneous admission of the report undermined the fundamental fairness of the trial by impermissibly bolstering Avram's testimony about the test results. *See supra*, p 30. The admission of the report violated Mr. Maestas's statutory and constitutional rights, and the error requires reversal.

IV. The trial court violated Mr. Maestas's right to a jury trial and due process rights when it imposed the wrong burden of proof and allowed the trial court to prove an element of the offense to the bench, rather than the jury.

A. Standard of Review

Appellate courts review de novo whether a statutory provision is a sentence enhancer or a substantive element of the offense. *People v. Riley*, 2016 COA 76, ¶ 39. Courts also review a constitutional challenge to sentencing de novo. *People v. Mountjoy*, 2016 COA 86, ¶ 10.

The claims raised in this issue are preserved. First, the defense preserved the claim that the prior convictions are elements that the jury should find beyond a reasonable doubt. CF, pp 41-47; TR 5/7/17, pp 5-11; TR 8/15/17, p 5:5-23. The

court denied the defense's motion and conducted a separate bench trial on the prior convictions. Id. Second, the defense argued that the standard of proof during the bench trial should be beyond a reasonable doubt. TR 8/17/17, pp 30-31. The court ruled against the defense and found the three prior convictions based upon a preponderance of the evidence standard. Id., pp 34-36

B. Argument

Both Colorado statute and constitutional law dictate that prior convictions are elements of the felony DWAI statute, thereby requiring a finding by a jury of proof beyond a reasonable doubt. The trial court violated Mr. Maestas's constitutional rights to due process and to a jury trial when it found his prior convictions by a preponderance of the evidence. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 25. Thus, there were two errors committed by the court: failing to submit proof of the prior convictions to the jury and applying the wrong burden of proof.

1. The legislature intended prior DWAI convictions to be an element of felony DWAI.

When interpreting a statute, the primary purpose is "to ascertain and give effect to the General Assembly's intent." *Cowen v. People*, 2018 CO 96, ¶ 12. When statutory language is clear, "we apply its plain and ordinary meaning,"

Hunsaker v. People, 2015 CO 46, ¶ 10, and the court "need not look further." *State v. Nieto*, 993 P.2d 493, 500 (Colo. 2000).

The legislature has the power to designate prior convictions as sentence enhancers or elements. *See U.S. v. O'Brien*, 560 U.S. 218, 225 (2010); *Copeland v. People*, 2 P.3d 1283, 1286 (Colo. 2000). Elements must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. *Jones v. U.S.*, 526 U.S. 227, 232 (1999).

Before 2015, DWAI was a misdemeanor in Colorado. With H.B. 15-1043, however, the General Assembly created new felonies. *See* Ch. 262, 2015 Colo. Sess. Laws 990, 990-1000. The statute provides:

> (b) A person who drives a motor vehicle or vehicle while impaired by alcohol . . . commits driving while ability impaired. **Driving while ability impaired is a misdemeanor, but it is a class 4 felony if the violation occurred after three or more prior convictions** . . . .

§ 42-4-1301(1)(b) (emphasis added). The elemental description of the offense contains the requirement of proof of three prior convictions. This statute follows a well-established practice of making proof of a prior crime an element of a new offense. *See People v. Hopkins*, 2013 COA 74, ¶ 15, n.1 (remarking "the General Assembly can make and has made proof of prior convictions an element of crimes"). For example, the crime of possession of a weapon by a previous offender

("POWPO") makes the defendant's prior conviction an element of the offense. § 18-12-108(1), C.R.S.; *People v. Fullerton*, 525 P.2d 1166, 1167 (Colo. 1974).

Other offenses place the prior convictions in a separate subsection and make the fact of a prior conviction a sentence enhancer. For instance, section 18-7-302, C.R.S., defines the crime of indecent exposure in subsection (1), states that it is a misdemeanor in subsection (2), and then makes clear in subsection (4) that the crime is a class 6 felony if committed after two prior convictions. Hence, subsection (4) creates a sentence enhancer. *See People v. Schreiber*, 226 P.3d 1221, 1223 (Colo. App. 2009). Likewise, the child-abuse statute, section 18-6-401, C.R.S., splits offense definitions from recidivist penalties enhancements, and the prior conviction is thus considered a sentence enhancer. *See People v. Becker*, 2014 COA 36, ¶¶ 8-15 (citing 18-6-401(1)(a), (7)(b),(e)).

The legislature could have structured felony DUI similarly to the indecent-exposure or child-abuse statutes. It did not, thereby showing that it intended the prior convictions to serve as an element of the felony offense. *See LaFond v. Sweeney*, 343 P.3d 939, 943 (Colo. 2015) ("Courts presume the legislature is aware of its own enactments and existing case law precedent.").

Likewise, the legislature has expressly authorized trial courts to serve as factfinders of prior convictions in the habitual criminal statute, *see* § 18-1.3-

803(1), C.R.S., and in the prior version of the habitual domestic violence statute, *see* § 18-6-801(7), C.R.S. (2015). The legislature here could have expressly authorized trial courts to serve as factfinders, but it did not. Again, this shows that the legislature intended juries to find the proof of prior convictions beyond a reasonable doubt under the felony DUI statute.

Moreover, the felony DUI provisions require the prosecution to plead the prior convictions in the indictment or information. § 42-4-1301(1)(j). While sentencing factors do not need to be pled in the indictment or information, *see* § 42-4-1307(9)(b)(II), C.R.S., elements of a crime must be. *Jones*, 526 U.S. at 232; *Cervantes v. People*, 715 P.2d 783, 786 (Colo. 1986). By requiring that the prosecution set forth the prior convictions in the charging document, the legislature established the convictions as elements.

Further, the Colorado Supreme Court held that a person charged with a felony DUI has a right to a preliminary hearing. *In re People v. Tafoya*, 2019 CO 13, ¶ 28. Though the Court left open the question of whether the prior offenses were elements or sentence enhancers, it distinguished felony DUI from cases where the defendant was charged with a misdemeanor but faced habitual counts that would raise the level of the offense to a felony. *Id.*, ¶¶25-26. The Court refused

to categorize the prior offenses in a felony DUI solely as sentence enhancers. *Id.*, ¶¶ 27, 28.

Also, section 42-4-1307 covers penalties for DUI offenses. Instead of amending this section—as would make sense if the legislature solely wanted to increase the level of punishment—the legislature created a new substantive felony in section 1301. *See* 2015 Colo. Sess. Laws. at 990-91. The legislature deliberately created this new felony crime that is only distinguishable as a separate offense if the prior convictions are elements.

While a division of this Court in *People v. Gwinn*, 2018 COA 130, held that the prior convictions in a felony DUI case were sentence enhancers that could be proven to a trial court, this Court should decline to follow *Gwinn*. *See People v. Thomas*, 195 P.3d 1162, 1164 (Colo. App. 2008) (one division not bound by another). *Gwinn* failed to recognize that the legislature expressly placed the prior convictions within the definition of the offense rather than in the penalties subsection. *Supra*, pp 7-8. Instead of conducting this analysis, *Gwinn* relies upon *Schreiber*'s proposition that a court determines whether a statutory provision creates an element or a sentence enhancer based on "whether its proof, while raising the felony level of an offense, is not necessarily required to secure a conviction." *Schreiber*, 226 P.3d at 1223 (internal citations omitted). This rule

from *Schreiber* does not apply in a felony DUI/DWAI context. Here, the prior convictions were, in fact, necessary to secure this conviction of felony DWAI. Also, the Supreme Court's ruling in *Tafoya* calls into doubt *Gwinn*'s analysis that the prior offenses were sentence enhancers. *See supra*, pp 36-37.

If this Court finds the felony DUI statute ambiguous, the rule of lenity requires adoption of the construction that the prior convictions are elements. *See People v. Summers*, 208 P.3d 251, 258 (Colo. 2009) ("Under the rule [of lenity], ambiguity in the meaning of a criminal statute must be interpreted in favor of the defendant.") (internal citations omitted).

Ultimately, the statute's plain language and structure reveal that the prior convictions are elements of the felony offense.

2. The trial court violated Mr. Maestas's due process rights and right to a trial by a jury.

The United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), ruled that the prosecution must prove to the jury any fact that increases the penalty of a crime beyond the statutory maximum. *Id.* at 490. These facts then qualify as "an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99, 103 (2013); U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25. In this context, an "increase" is measured from "the maximum sentence a judge may impose solely

on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (emphasis omitted). Here, the prior convictions were an element because finding them made the crime a felony and authorized imprisonment. § 42-4-1301(2)(a), C.R.S.

The trial court here relied on the "prior-conviction exception," a carve-out from the rule that juries, not judges, find facts in criminal cases. TR 5/17/17, pp 7-11; *Blakely*, 542 U.S. at 301 (allowing prior convictions to be proved to the trial court instead of a jury, even where prior conviction increases sentencing penalty); *see also Lopez v. People*, 113 P.3d 713, 723 (Colo. 2005). The exception originally stems from *Almendarez-Torres v. United States*, 523 U.S. 224, 248 (1998). However, Justice Scalia, joined by three other justices, vigorously dissented from the holding in *Almendarez-Torres* and argued that there was no rational basis to make recidivism an exception to the requirement of proof of facts to a jury beyond a reasonable doubt. *Id.* at 258 (Scalia, J., dissenting). *Almendarez-Torres* has been criticized ever since. *See Shepard v. U.S.*, 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring) ("[A] majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided."); *Apprendi*, 530 U.S. at 487, 489-90 ("[I]t is arguable that *Almendarez-Torres* was incorrectly decided"); *Lopez*, 113 P.3d at 723 & n.9.

Not only has the prior conviction exception been criticized, these cases also did not address a situation where the prior convictions raised an offense from a misdemeanor to a felony. This Court should decline to apply the prior conviction exception where a misdemeanor offense is transformed into a felony. *See Schreiber*, 226 P.3d at 1225-27 (Bernard, J., concurring in part and dissenting in part).

Even if this Court finds that the trial court could find the prior convictions in place of a jury, this Court should still find that the trial court applied the wrong standard of proof. The trial court applied the preponderance of the evidence standard (TR 8/17/17, pp 35-36), but due process and the Sixth Amendment require all elements to be proven beyond a reasonable doubt. *Alleyne*, 570 U.S. at 104 (plurality opinion); *Apprendi*, 530 U.S. at 476-77; *In Re Winship*, 397 U.S. at 364. If a fact produces a higher sentencing range, that "conclusively indicates that the fact is an element." *Alleyne*, 570 U.S. at 115-16 (majority opinion). The prior convictions constitute an element under this test and so must be proven beyond a reasonable doubt.

While a division of this Court in *Gwinn* held that the prior convictions could be proven by a preponderance of the evidence standard, it only considered the claim under the defendant's "federal constitutional right to a jury trial." *Gwinn*, ¶

39. However, due process also dictates that the prosecution must prove all elements of a charged offense beyond a reasonable doubt. *See In re Winship*, 397 U.S. at 364; *People v. Dunaway*, 88 P.3d 619, 636-37 (Colo. 2004).

To protect Mr. Maestas's due process rights and right to a trial by jury, the prior convictions needed to be proven to a jury and needed to be proven beyond a reasonable doubt. The trial court erred on both of these fronts.

3. Remedy

Mr. Maestas's jury convicted him of the lesser-included offense of misdemeanor DWAI. Hence, this Court should remand for Mr. Maestas to be resentenced on the misdemeanor DWAI conviction that the jury's verdict authorized. *See Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993); *Medina v. People*, 163 P.3d 1136, 1141-42 (Colo. 2007).

Alternatively, if the trial court's violation of Mr. Maestas's right to a jury determination is reviewed under a constitutional harmless-error analysis, *see Neder v. United States*, 527 U.S. 1, 4 (1999) (majority opinion), this Court should reverse and grant Mr. Maestas a new trial. The trial court's removal of this element from the jury was not harmless because the prosecution proved to the court, and not the jury, that Mr. Maestas had three prior convictions. The prejudice was exacerbated because the court relied upon its familiarity with the county clerk's office to find

sufficient evidence for the prior convictions. TR 8/17/17, p 36:11-14; *supra*, pp 7-8, 12-16. In contrast, a jury would not have relied upon specialized knowledge and would have considered the evidence as presented. This Court should order a new trial where the prosecution is required to prove the prior convictions to a jury beyond a reasonable doubt, as the legislature intended and as the Constitution requires.

Finally, if this Court concludes the trial court was authorized to find the prior convictions under the prior-conviction exception, it still should vacate Mr. Maestas's sentence and remand for a new hearing where the prosecution must prove the prior convictions to the court beyond a reasonable doubt.

CONCLUSION

For the reasons and authorities presented in Arguments I and IV, Mr. Maestas asks this Court to vacate his felony DWAI conviction and enter a judgment for misdemeanor DWAI. For the reasons and authorities presented in Arguments II and III, Mr. Maestas asks this Court to reverse his conviction and remand for a new trial.

MEGAN A. RING
Colorado State Public Defender

JEANNE SEGIL, #50898
Deputy State Public Defender
Attorneys for MICHAEL MAESTAS
1300 Broadway, Suite 300
Denver, CO 80203
(303) 764-1400

CERTIFICATE OF SERVICE

I certify that, on April 4, 2019, 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.