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Division III
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NO. 35719-8-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DEREK WAYNE SCHILLING,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Due process requires the State to inform citizens of the conduct the State has proscribed and the standards for enforcing that proscription must also be clear. Our State's attempting to elude statute fails to meet both of these mandates and thus is unconstitutionally vague. Derek Schilling's conviction under the statute should be reversed, and the charge dismissed.

Alternatively, a new trial should be granted because the presentation of testimony that opined on Mr. Schilling's guilt violated his right to a trial by jury.

At a minimum, this Court should remand with instructions to strike the \$200 filing fee and \$100 DNA collection fee from the judgment and sentence, as these legal financial obligations are not authorized by statute.

B. ASSIGNMENTS OF ERROR

1. In violation of the Fourteenth Amendment to the United States Constitution and Article 1, Section 3 of the Washington State Constitution, "driving in a reckless manner" within RCW 46.61.024 is vague as it does not provide adequate notice of what constitutes proscribed conduct and permits arbitrary enforcement.

2. In violation of the Sixth Amendment to the United States Constitution and Article 1, Sections 21 and 22 of the Washington State Constitution, the State presented improper opinion testimony on Mr. Schilling's guilt.

3. The sentencing court exceeded its authority in imposing the \$200 criminal filing fee.

4. The sentencing court exceeded its authority in imposing the \$100 DNA collection fee.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Statutes must provide individuals with adequate notice of what constitutes proscribed conduct. *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). If an individual of ordinary reasoning has to guess what conduct is proscribed, then the statute is unconstitutionally vague. *State v. Branch*, 129 Wn.2d 635, 648, 919 P.2d 1258 (1996). "Driving in a reckless manner" is not defined within the statute, and courts have defined it as "to drive in a rash or heedless manner, indifferent to the consequences" but have not explained what "rash and heedless" and "consequences" means. Is RCW 46.61.024 unconstitutionally vague?

2. “The right to have factual questions decided by the jury is crucial to the right to trial by jury.” *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008) (citing *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989)). Accordingly, witnesses are barred from offering opinion testimony regarding a defendant’s guilt. *Montgomery*, 163 Wn.2d at 591, 594.

a. When Officer Rassier testified that Mr. Schilling drove “recklessly,” was that testimony an improper opinion on Mr. Schilling’s guilt, robbing him of his right to trial by jury?

b. Additionally, when Deputy Kullman testified that his K9 unit tracked Mr. Schilling through his “fear scent,” was that testimony an improper opinion on Mr. Schilling’s guilt, robbing him of his right to trial by jury?

3. Under RCW 36.18.020, the sentencing court must waive the \$200 filing fee as a mandatory legal financial obligation if the defendant is indigent. Because Mr. Schilling is indigent, should this Court order the imposition of the \$200 fee be struck?

4. Under RCW 43.43.7541, the sentencing court must waive the \$100 DNA collection fee as a mandatory legal financial obligation if the defendant previously had their DNA collected as a result of a

sentence. Because Mr. Schilling previously had his DNA collected as a result of a sentence, should this Court order the imposition of the \$100 be struck?

D. STATEMENT OF THE CASE

In the early hours of the morning on May 4, 2017, Spokane Valley Police Officer Spencer Rassier was on patrol when he saw a Mercury Cougar driving southbound on Farr road in Spokane County. VRP 6–7. Rassier, despite not using a radar gun, believed the Cougar was speeding. VRP 7. Rassier followed and observed the driver of the Cougar fail to signal. *Id.* Rassier also noticed the Cougar did not have a rear license plate. *Id.* Rassier activated the lights and sirens on his patrol car. *Id.*

The Cougar did not stop and instead continued west towards the I-90 on-ramp. *Id.* at 15. Rassier believed the vehicle was travelling at approximately eighty miles per hour. *Id.* Rassier followed the Cougar as it drove westbound on I-90, at a speed of seventy-five miles per hour, before exiting a few miles down the freeway. *Id.* at 16. After the Cougar exited from the freeway, Rassier continued to follow the car because he, after considering all the circumstances, believed the risk to community safety was “very low”. *Id.* at 17.

Rassier continued pursuit of the Cougar as it drove northbound off the freeway. *Id.* While following the Cougar, Rassier saw the car make a U-turn. *Id.* at 18. Despite the Cougar going approximately thirty 30 miles per hour and in the dark, Rassier believed he saw Mr. Schilling driving the Cougar. *Id.* at 17–18. After the pursuit continued for a while longer, Rassier decided to end the pursuit. *Id.* at 20. Rassier based his decision to end the pursuit on the impending risk of continuing the pursuit into the morning commuting hours and that the vehicles may get near a hospital. *Id.*

After ending the pursuit, Rassier received a radio communication that the Cougar crashed. *Id.* at 21. The accident occurred in an industrial area with no people present. *Id.* at 38. Another officer, Watts, saw the Cougar drive past him and skid onto railroad tracks after proceeding through a “tricky” intersection. *Id.* at 34–35. Even though Watts witnessed the accident, he was unable to see the driver exit because of a “giant cloud of dust.” *Id.* at 35. Soon after, Deputy Kullman arrived with his K9 unit. *Id.* at 60. Using what Kullman described at trial as the “fear scent,” Kullman’s K9 unit found Mr. Schilling on an embankment some distance away from the Cougar. *Id.* at 61, 64–66.

Mr. Schilling was arrested and charged with attempting to elude a police vehicle. CP 1. Mr. Schilling was convicted of the charge and, as part of his sentence, was ordered to pay the \$200 criminal filing fee and \$100 DNA collection fee. *Id.* at 36, 46.

E. ARGUMENT

1. The language of “driving in a reckless manner” within RCW 46.61.024 is unconstitutionally vague.

“Driving in a reckless manner,” and its definition within the accompanying jury instruction of “to drive in a rash or heedless manner, indifferent to the consequences” is overly broad and does not provide adequate notice of proscribed conduct. It also allows the police to enforce the statute in an arbitrary and discriminatory manner. Thus, under the vagueness doctrine, enforcement of the statute violated Mr. Schilling’s right to due process.

a. A statute is unconstitutionally vague when it fails to apprise citizens of proscribed conduct or is subject to arbitrary enforcement.

Due process under the Fourteenth Amendment and Article 1, Section Three requires that citizens have fair warning of proscribed conduct and that there are ascertainable enforcement standards to prevent arbitrary enforcement. *Bahl*, 164 Wn.2d at 752; U.S. Const. Amend. XIV; Const. Art. 1, § 3. If a statute fails to accomplish this,

then it is unconstitutionally vague. *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). A vagueness challenge may be raised for the first time on appeal as a manifest error affecting a constitutional right. RAP 2.5(a)(3); *City of Bellevue v. Lorang*, 140 Wn.2d 19, 30 n.6, 992 P.2d 496 (2000).

A statute fails for vagueness, and thus violates due process, when either (1) the statute does not “define the offense with sufficient definiteness that ordinary people can understand what conduct is proscribed” or (2) the statute does not “provide ascertainable standards of guilt to protect against arbitrary enforcement.” *Id.* (citing *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)). The test for making these determinations is whether a person of reasonable understanding must guess at the meaning of the statute. *Branch*, 129 Wn.2d at 648.

This State’s courts generally follow a two-track framework for vagueness challenges. If the challenged statute touches upon a First Amendment issue, then the court examines whether the statute is facially valid. *Douglass*, 115 Wn.2d at 182. If the challenged statute does not involve a First Amendment issue, then the Court examines

whether the statute is vague as applied to the facts of the case. *Id.* at 182–83.

However, this approach is inconsistent with U.S. Supreme Court Fourteenth Amendment case law. In *Johnson v. U.S.*, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), the Court struck down the residual clause in the Armed Career Criminal Act on due process grounds. The residual clause allowed the Government to seek an enhanced sentence when the alleged act was a “violent felony.” *Id.* at 2555. The Court reasoned that the broad definitional language of “violent felony” and the hopeless morass of previous judicial application attempts meant the clause did not provide adequate notice of proscribed conduct and was subject to arbitrary enforcement. *Id.* at 2557–61. In striking down the residual clause, the Court did not examine the facts of the specific case, but instead analyzed whether the clause was facially valid. *See id.* This was despite there being no First Amendment issue involved.

Thus, *Johnson* instructs court to assess vagueness based on the facial validity of the statute rather than as applied to the facts of the case. *Id.* at 2556–57 (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). Because the United States Supreme Court is the ultimate authority on the United States

Constitution, courts of this State must follow their rulings. *State v. Radcliffe*, 164 Wn.2d 900, 906, 194 P.3d 250 (2008). Therefore, with regards to due process under the Fourteenth Amendment, the approach in *Johnson*, not this state's two-track approach, is the law.

Furthermore, the Washington Courts' two-track approach to vagueness challenges is inconsistent with the underlying purpose of the vagueness doctrine and the Fourteenth Amendment. The vagueness doctrine was created to ensure that citizens are aware of proscribed conduct, so they may effectively avoid it and so that they may not be subjected to arbitrary enforcement. *State v. Halstein*, 122 Wn.2d 109, 116–17, 857 P.2d 270 (1993). Consequently, the legislature must establish ascertainable standards to determine whether conduct is prohibited. *Kolender*, 461 U.S. at 358 (citing *Smith v. Goguen*, 415 U.S. 566, 574, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974)).

The as-applied challenge approach fails to effectuate the purpose of this doctrine. Instead of determining whether the legislature enacted a sufficiently definite statute, a court determines that, regardless of whether the language is adequate, the defendant should have known that his or her conduct was proscribed. In essence, when a court dismisses an as-applied challenge, it is stating that even if the

legislature failed to adequately define the contours of proscribed conduct, the defendant's conduct would have fit within the definition if the legislature had drafted a clear statute. This approach is not compatible with the Fourteenth Amendment. It reads into the Fourteenth's due process clause an exception that lessens its protections when the conduct does not touch upon the First Amendment.

The due process clause does not allow for an any exception; the clause enshrines one's liberty, not merely one's liberty when it overlaps with their First Amendment rights. U.S. Const. Amend. XIV. To approach vagueness challenges differently based on the nature of the conduct, when the nature of the conduct does not change the proscription's effect on one's liberty, does not comport with the plain language of the Fourteenth Amendment's due process clause.

Finally, even our Supreme Court has not consistently applied the two-track framework. In *City of Spokane v. Neff*, the court invalidated Spokane's loitering for the purposes of prostitution ordinance for vagueness because the undefined term "known prostitute" invited an "inordinate amount of police discretion" and did not protect against arbitrary enforcement. 152 Wn.2d 85, 90–91, 93 P.3d 158 (2004). In *Neff*, despite no discussion of a First Amendment

issue, the court facially evaluated the constitutionality of the ordinance through a structural comparison against similar statutes that were upheld. *Id.* at 89–90. Hence, the two-track framework is not this State’s sole approach to vagueness challenges. This Court should follow the approach taken *Johnson* and *Neff*, an approach consistent with the Fourteenth Amendment, and analyze whether RCW 46.61.024 is facially vague.

b. RCW 46.61.024 fails to provide adequate notice of proscribed conduct and is subject to arbitrary enforcement.

“Driving in a reckless manner”, and its definition in the accompanying jury instruction, does not provide sufficient detail regarding what is proscribed conduct. This is because the inquiry into whether one’s operation of a vehicle is in a reckless manner is so context-dependent, it is impossible for anyone to know whether their conduct is prohibited. Furthermore, the lack of ascertainable standards in enforcing the statute invites arbitrary and discriminatory enforcement.

“Driving in a reckless manner” is not statutorily defined. Rather, its definition evolved from a series of court decisions. *State v. Roggenkamp*, 153 Wn.2d 614, 621–22, 106 P.3d 196 (2005). These

decisions settled on the definition where driving in a reckless manner meant “driving in a rash or heedless manner, indifferent to the consequences.” *Id.* at 622.

This definition, however, makes any enforcement of RCW 46.61.024 entirely context-dependent. The structure of the definition elucidates this fact. In order to “drive in a reckless manner,” you must be indifferent to the consequences. *Id.*; CP 33. Thus, each instance of enforcement of the attempting to elude statute must consider what are those consequences and if an individual was indifferent to them. This creates countless factors that no one would be able of completely conceiving. The time of day, the number of drivers on the road, the location, and several other considerations all work to establish what can be termed direct consequences, such as harm to others and property. Further, the definition does not answer whether indirect consequences may be considered. For example, without further clarity from the legislature, it is impossible to discern whether the legal consequences of failing to stop when signaled by an officer may also be considered a consequence. In other words, what constitutes a consequence is so ambiguous that, without clarification, it is impossible for an individual

to adequately understand if they are being indifferent to something that would subject them to enforcement of this statute.

Certainly, a statute is not invalid for vagueness because there is some variance in interpretation. *State v. Watson*, 160 Wn.2d 1, 7, 154 P.3d 909 (2007). However, when a statute is so inherently amorphous in meaning, it is not possible for an individual to know when his or her conduct is proscribed without guesswork. *Branch*, 129 Wn.2d at 648. The eluding statute falls into the latter category. Because there are no set standards for “reckless manner,” an individual is required to analyze and synthesize numerous considerations to determine if his or her conduct raises direct consequences. Moreover, the lack of a firm understanding of what constitutes a consequence means that individuals must guess as to whether indirect consequences, such as any legal or pecuniary ramifications, are implicated by their conduct. Accordingly, “driving in a reckless manner” lacks sufficient definiteness so as to warn people of proscribed conduct.

Additionally, “driving in a reckless manner” is highly vulnerable to arbitrary enforcement. The lack of a statutory definition and guidelines on police discretion evinces this fact. *Neff*, 152 Wn.2d at 91. Without discernible standards for what constitutes reckless manner,

this definition gives police unfettered discretion in determining if someone's driving was in a reckless manner. This is particularly true when considering how law enforcement judges what is "rash and heedless." Each individual officer will have their own subjective beliefs regarding when a risk transitions from acceptable to unacceptable. Their background, experience, general disposition, and numerous other factors guides their assessment of when driving is done in a "rash and heedless" manner. For instance, some people may think speeding is always "rash" or "heedless," while others would think speeding is only rash or heedless if the road is heavily trafficked.

This lack of guidelines leading to arbitrary enforcement is akin to the curfew ordinance in *City of Sumner v. Walsh*. In *Walsh*, the undefined terms of "linger" and "stay" were found unconstitutionally vague because they did not "provide ascertainable standards for locating the line between innocent and unlawful behavior. *City of Sumner v. Walsh*, 148 Wn.2d 490, 500, 61 P.2d 1111 (2003). Here, the same problems exists as there is a complete dearth of standards for determining the line between driving that acceptable and driving that is "rash and heedless."

The court-created definition only increases the risk of arbitrary enforcement. As noted above, previous court decisions have not articulated what constitutes a consequence. Therefore, police may arrest someone for eluding for anything they consider to be a consequence from eluding them, including the criminal penalties attached to such an action. No limitations exist to ensure the statute is enforced in a nonarbitrary, nondiscriminatory manner.

c. Even under the as-applied framework, RCW 46.61.024 fails for vagueness.

Although the as-applied framework is inconsistent with the Fourteenth Amendment, if this Court chooses to apply that framework, the conclusion is the same: “driving in a reckless manner” is so hopelessly vague that Mr. Schilling could not have known his conduct was proscribed.

The conduct in question occurred in the very early morning and there was no indication the roadways were anything but sparsely populated. Rassier even continued to follow the Cougar because he believed the risk to the community was low. VRP 17. Although he eventually abandoned the pursuit because of his perception of an increased risk, there was no evidence that other drivers or pedestrians were in the area. *Id.* at 20. In fact, the car ultimately crashed to a halt in

an unpopulated industrial neighborhood. *Id.* at 38. This combination of early morning hours and absence of pedestrians and vehicles all point to a single conclusion: Mr. Schilling could not have known his conduct was proscribed because there was no indication his driving threatened others. Because there were no consequences apparent to Mr. Schilling, there is no way he could have known that his manner of driving was proscribed.

d. The remedy is reversal of the conviction and remand for dismissal of the charge with prejudice.

When a statute is deemed unconstitutionally vague, the remedy is the reversal and ordered dismissal of the defendant's conviction. *Walsh*, 148 Wn.2d at 502. Accordingly, this Court should reverse Mr. Schilling's conviction and remand with an order for dismissal as RCW 46.61.024 is unconstitutionally vague both facially and as-applied.

2. The State offered improper opinion testimony on Mr. Schilling's guilt.

During the State's case-in-chief, Officer Rassier testified that Mr. Schilling was driving "recklessly." VRP 20. Additionally, Deputy Kullman testified that his K9 unit tracked Mr. Schilling by his "fear scent." *Id.* at 61. Each of these instances constituted improper opinion testimony on Mr. Schilling's guilt that infringed on his right to a trial

by jury. This testimony resulted in substantial prejudice against Mr. Schilling and, because this is an error of constitutional magnitude, the State must prove its presentation was harmless beyond a reasonable doubt. The State will be unable to meet this burden and therefore this court should reverse Mr. Schilling's conviction and remand for a new trial.

a. Improper opinion testimony about a defendant's guilt violates that defendant's right to a jury trial.

The role of the jury as arbiter is sacred in both the Federal and Washington constitutions. U.S. Const. amend. VI; Const. art. I, §§ 21, 22. "The right to have factual questions decided by the jury is crucial to the right to trial by jury." *Montgomery*, 163 Wn.2d at 590 (citing *Sofie*, 112 Wn.2d at 656). Accordingly, witnesses are generally barred from offering their opinion about a defendant's guilt. *Montgomery*, 163 Wn.2d at 591, 594. This bar includes personal expressions about whether a defendant's conduct satisfies a core element of the offense. *Id.* at 594. And, even if only inferential, opinions on a defendant's guilt constitute improper testimony. *Id.*

Although Mr. Schilling did not object to improper opinion testimony in the trial court, he may raise this issue on appeal because it is a manifest error affecting a constitutional right. RAP 2.5(a)(3).

“To meet RAP 2.5(a) and raise an error for the first time on appeal, an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension.” *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (citing *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007)). In other words, the appellant must “identify a constitutional error and show how the alleged error actually affected the [appellant]’s rights at trial.” *Kirkman*, 159 Wn.2d at 926–27. As the Supreme Court explained in *Gordon*:

To elaborate on the distinction between a manifest error and a harmless error, a manifest error is “so obvious on the record that the error warrants appellate review.” *O’Hara*, 167 Wash.2d at 100, 217 P.3d 756. It is the defendant’s burden to identify this type of error, but it is not the defendant’s burden to also show the error was harmful. Once the error is addressed on its merits, the State bears the burden to prove the error was harmless under the *Chapman* standard.

State v. Gordon, 172 Wn. 2d 671, 676 n.2, 260 P.3d 884 (2011).

Improper opinion testimony on a defendant’s guilt is a constitutional error as it infringes on that defendant’s right to trial by jury protected by the Sixth Amendment to the United States Constitution and Article 1, Sections 21 and 22 of the Washington State Constitution. *Montgomery*, 163 Wn.2d at 590. And it is manifest

because it is obvious on the record, as discussed below. Accordingly, this error is reviewable for the first time by this court. RAP 2.5(a)(3).

b. Officer Rassier expressed an opinion on Mr. Schilling's guilt when he testified that Mr. Schilling's conduct satisfied a core element of RCW 46.61.024.

During direct examination, the State asked Officer Rassier why he terminated the pursuit. VRP 20. Officer Rassier responded that it was because the driver was driving "recklessly." *Id.* Because driving in a reckless manner is a core element of RCW 46.61.024, this testimony was an improper opinion about Mr. Schilling's guilt.

The State was required to prove that Mr. Schilling drove his vehicle in a "reckless manner". RCW 46.61.024; CP 32. This was a factual determination and thus was within the sole province of the jury. *See Montgomery*, 163 Wn.2d at 590 (citing *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971)). However, Officer Rassier's testimony improperly treaded upon the jury's duty. His testimony was an unequivocal statement that the manner in which Mr. Schilling was driving was reckless. Further, Rassier's use of "driving recklessly" is troubling as it contains conclusory terms within the relevant legal standard. *See City of Seattle v. Heatley*, 70 Wn. App. 573, 581, 854 P.2d 658 (1993).

Finally, the concern with Rassier's testimony is similar to the concern expressed by the *Montgomery* court. In *Montgomery*, the court held that an officer's testimony that defendants, who were charged with possession with intent to manufacture, purchased pseudoephedrine for purpose of manufacturing methamphetamine was an improper opinion about the guilt the defendants. 163 Wn.2d at 588, 594. The court reasoned the use of conclusory statements that parroted the legal standard, the directness of the statement as it pertains to a core element, and the low probative value of a police officer's opinion on a defendant's guilt all worked to make the officer's testimony an improper opinion. *Id.* at 594–95.

These reasons are equally applicable to the present case. Officer Rassier used conclusory terms contained within the relevant legal standard. VRP 20; RCW 46.61.024. His testimony was a direct statement pertaining to a core element of the charge against Mr. Schilling. *Id.*; CP 32. And, as a police officer, his opinion about Mr. Schilling's guilt carries minimal probative weight. *Montgomery*, 163 Wn.2d at 595 (citing Deon J. Nossel, *Note: the Admissibility of Ultimate Issue Expert Testimony by Law Enforcement Officers in Criminal Trials*, 93 Colum. L. Rev. 231, 244 (1993)). This court should

find that Officer Rassier’s testimony was an improper opinion on Mr. Schilling’s guilt.

c. Deputy Kullman expressed an opinion on Mr. Schilling’s guilt when he testified that his K9 unit tracked Mr. Schilling by his “fear scent.”

During his direct examination, Deputy Kullman was asked how his K9 unit tracks an individual. VRP 60–61. Kullman replied,

“Our dogs are trained to find human odor, especially when someone is running from us or trying to hide, they produce something called a fear scent. They can’t not produce it. Your armpits start sweating, all this stuff starts happening, your adrenaline’s going, and a seasoned dog like Kahn, they pick up on that fear scent really quickly along with the human scent they’re trained from day one to track.”

VRP 61. The use of the term “fear scent,” especially as described by Deputy Kullman, was an improper opinion on Mr. Schilling’s guilt as it implied that Mr. Schilling ran and hid because he was afraid of getting caught.

There is a long-standing prohibition on law enforcement testifying a K9 unit tracked an individual by his “guilt scent.” *State v. Barr*, 123 Wn. App. 373, 381, 98 P.3d 518 (2004) (citing *State v. Carlin*, 40 Wn. App. 698, 703, 700 P.2d 323 (1985), *overruled on other grounds by Heatley*, 70 Wn. App. at 577). This type of testimony is

barred because it is equivalent to “opining that the defendant was guilty.” *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

While Deputy Kullman did not use the exact improper language, the message conveyed and received from using “fear scent” is the same as that of “guilt scent.” This is particularly true when considering how Depute Kullman describes the concept of a “fear scent”. Kullman notes the “fear scent” is an inevitable by-product of fleeing and hiding from the police. VRP 61. Moreover, the use of “fear” in this context implied Mr. Schilling was afraid of getting caught. This is, in no uncertain terms, equivalent to saying Mr. Schilling ran and hid because he was guilty.

Finally, it is important to note that “guilt scent” and “fear scent” are interchangeable terms. *See Carlin*, 40 Wn. App. at 702. In *Carlin*, the case originally barring the testimony of “guilt scent”, the prosecutor asked the officer if they were familiar with term “guilt or fear scent?”. *Id.* The officer replied “Yes, I am.” *Id.* Thus, when an officer is testifying that their K9 unit followed a “fear scent,” they are conveying the same message as if they were saying the dog followed a “guilt scent.”

No variance exists between Kullman's testimony and "guilt scent" testimony. "Fear scent," and Kullman's accompanying description of it, conveys a singular message: the K9 unit was able to track Mr. Schilling because he was guilty. This is wholly inappropriate, which is why it comes as no surprise that a leading K9 officer's manual discourages the use of "fear scent" when testifying because it conveys an opinion on a defendant's guilt. Robert S. Eden, *K9 Officer's Manual* 162 (1993).

d. Officer Rassier's and Deputy Kullman's improper opinion testimony was not a harmless error.

When a trial error is of constitutional magnitude, prejudice is presumed and the State bears the burden of proving the error was harmless beyond a reasonable doubt. *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013) (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). Improper opinion testimony about a defendant's guilt implicates a defendant's constitutional right to a jury trial. *Montgomery*, 163 Wn.2d at 590–94. Therefore, this error is of a constitutional magnitude and the State must prove that the error was harmless beyond a reasonable doubt.

The State will be unable to prove the error is harmless beyond a reasonable doubt. First, because Rassier and Kullman are police

officers, their testimony carries an aura of reliability. *State v. Demery*, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001). It is because of this “special aura” that it was increasingly likely that the jury foreclosed its critical thinking and relied on Rassier’s plain conclusion that Mr. Schilling was driving in a reckless manner. Further, the prejudicial effect of Rassier’s testimony was compounded by the vagueness inherent in the term “reckless manner” and its accompanying jury instruction. The breadth and ambiguousness of this language made it all the more likely that the jury improperly relied on Rassier’s opinion that Mr. Schilling was driving in a reckless manner.

Additionally, Kullman’s testimony was not harmless because it undercut Defense’s trial strategy. Mr. Schilling’s defense was that he not the driver of the Mercury Cougar. VRP 68–69. Deputy Kullman’s improper testimony cuts to the core of this defense by implying Mr. Schilling ran and hid from the police because he was guilty. Furthermore, the threat of prejudice from Kullman’s “fear scent” testimony was multiplied because juries are often influenced by the opinions of law enforcement. *Barr*, 123 Wn. App. at 381 (quoting *Carlin*, 40 Wn. App. at 703). The State will be unable to show that the introduction of Kullman’s “fear scent” testimony was not harmless

beyond a reasonable doubt because the improper testimony cut against the main thrust of Mr. Schilling's defense and was delivered by an individual whose opinion often unduly influence juries. The remedy is reversal and remand for a new trial. *State v. Burke*, 163 Wn.2d 204, 223, 181 P.3d 1 (2008).

3. The trial court exceeded its sentencing authority in imposing the \$200 filing fee and \$100 DNA collection fee.

The court, as a part of Mr. Schilling's sentence, imposed the \$200 criminal filing fee under RCW 36.18.020 and the \$100 DNA collection fee under RCW 43.43.7541. However, after recently passed reforms to the LFO system, the imposition of these LFOs is now improper as the \$200 filing fee cannot be imposed on someone who is declared indigent and the DNA collection fee cannot be collected from someone whose sample has been previously collected. Because Mr. Schilling was declared indigent, had his DNA sample previously collected, and the reforms apply retroactively, the trial court exceeded its authority in imposing the LFOs and this court should order them struck from Mr. Schilling's sentence.

a. The \$200 criminal filing fee cannot be imposed on Mr. Schilling as he was declared indigent.

The legislature recently amended the statute regarding cost payments to read, “The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.01.010(3)(a)–(c).” RCW 10.01.010(3); Laws of 2018, ch. 269, § 17. Within the same legislation, RCW 36.18.020, the criminal filing fee statute, was amended to bar the imposition of the \$200 filing fee on a defendant deemed indigent under RC 10.01.010(3)(a)–(c). RCW 36.18.020(2)(h); Laws of 2018, ch. 269, § 17.

Under subsection (a) through (c) of .010(3), an indigent individual is defined as someone who receives public assistance, is committed to a mental health facility against his will, or receives “an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level.” RCW 10.01.010(3). Because Mr. Schilling received public assistance, he was found indigent under RCW 10.01.010(3). CP 57, 59–60. Accordingly, the imposition of the filing fee was improper and must be struck.

b. The \$100 DNA collection fee cannot be imposed on an individual whose DNA was collected as a result of a previous conviction.

RCW 43.43.7541 orders a court to impose a \$100 DNA collection fee for every sentence stemming from an offense specified in RCW 43.43.751. However, the legislature amended RCW 43.43.7541 to provide that the DNA collection fee cannot be imposed on an individual whose DNA was previously collected as part of a sentence. RCW 43.43.7541; Laws of 2018, ch. 269, § 18.

Mr. Schilling was previously convicted of an offense specified in RCW 43.43.754. CP 41. Therefore, a court must have imposed the \$100 DNA collection fee as part of a previous sentence. According, the imposition of the DNA collection fee was improper and must be struck.

c. Because Mr. Schilling's judgment is not final, recent amendments must apply to this case.

Newly amended statutes can apply on direct appeal. *State v. Heath*, 85 Wn.2d 196, 197–98, 532 P.2d 261 (1975). In general, “where a controlling law changes between the entering of judgment below and consideration of the matter on appeal, the appellate court should apply the new or altered law, especially where no vested rights are involved, and the Legislature intended retroactive application.” *Marine Power & Equip. Co. v. Washington State Human Rights Comm'n Trib.*, 39 Wn.

App. 609, 620, 694 P.2d 697 (1985). Further, in applying new decisional law, our court has held that it is applicable “to all cases, state or federal, pending on direct review or not yet final, with no exceptions for cases in which the new rule constitutes a clear break from the past.” *State v. Evans*, 153 Wn.2d 438, 444, 114 P.3d 627 (2005) (quoting *In re Matter of St. Pierre*, 118 Wn.2d 321, 326, 823 P.2d 492 (1992)). “Final” is defined as “a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.” *St. Pierre*, 118 Wn.2d at 327. Therefore, as the case is on direct appeal, the amendments to the LFO system, specifically the amendments to RCW 36.18.020 and RCW 43.43.7541, apply to Mr. Schilling’s case.

Furthermore, the amendments apply to Mr. Schilling’s case because they are remedial and thus apply retroactively. Generally, remedial amendments apply retroactively when they “relate... to practice, procedure, or remedies, and [do] not affect a substantive or vested right.” *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 462-63, 832 P.2d 1303 (1992). Modifications to the mechanisms by which LFOs are collected have been deemed remedial. *See State v. Blank*, 131 Wn.2d 230, 250, 930 P.2d 1213 (1997).

The amendments to RCW 36.18.020 and RCW 43.43.7541 undoubtedly remedial. They do not create a new substantive right or liability for indigent defendants, but instead modify the discretion a court has in applying a liability. RCW 36.18.020; RCW 43.43.7541. Additionally, these amendments are far more remedial than those determined remedial in *Blank*. In *Blank*, changes to a statute allowed a court to impose appellate costs on indigent defendants. 131 Wn.2d at 234. These changes, despite increasing the financial liability of indigent defendants, were held remedial because they simply provided “a mechanism for recouping the funds advanced” to ensure the individuals’ right to appeal. *Id.* at 250. Here, the changes to the relevant statutes do not actually shift any burdens or create any rights, but merely further defined the legislature’s directive about not burdening indigent defendants. Because these changes provided guidance, did not create new liabilities, and were demonstrably more remedial than the changes in *Blank*, the amendments RCW 36.18.020 and RCW 43.43.7541 should apply retroactively.

F. CONCLUSION

Mr. Schilling’s conviction should be reversed and the charged dismissed because RCW 46.61.024 is unconstitutionally vague. In the

alternative, a new trial should be granted because the admission of improper opinion testimony on Mr. Schilling's guilt denied him his constitutional right to a trial by jury. At a minimum, because the imposition of the \$200 filing fee and \$100 DNA collection fee exceeded the sentencing court's authority, these fees should be struck from Mr. Schilling's sentence.

DATED this 7th day of September 2018.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

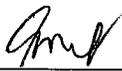
STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 35719-8-III
)	
DEREK SCHILLING,)	
)	
APPELLANT.)	

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