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COA No. 35741-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW GAROUTTE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF GRANT COUNTY

The Honorable John Antosz

APPELLANT'S OPENING BRIEF

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A. SUMMARY

Matthew Garoutte's rights to a jury trial, to an effective lawyer, and to Due Process were violated in his prosecution for eluding a police vehicle, because he agreed to a bench trial, but then the next day the State untimely disclosed new evidence for trial involving a witness whose testimony and demeanor, including in her video-recorded Smith affidavit, would have been so unimpressive that a lay jury would have acquitted Mr. Garoutte. The trial court found CrR 8.3(b) mismanagement by the State, but refused to give an adequate remedy. Further, the State's mismanagement rendered the defendant's jury trial waiver invalid, and prevented his lawyer from serving him effectively.

At trial, the evidence was insufficient to prove that Mr. Garoutte was the driver of the white Honda that eluded police, rather than the backseat passenger, as Garoutte testified.

B. ASSIGNMENTS OF ERROR

1. The court's denial of Mr. Garoutte's CrR 8.3(b) motion violated his right to a fair trial guaranteed by the Fourteenth Amendment's Due Process clause.¹

¹ U.S. Const. amend. XIV mandates that no state shall "deprive any person of life, liberty, or property, without due process of law."

2. The Sixth Amendment² right of the defendant to a jury trial was violated.

3. The defendant's Sixth Amendment³ right to effective assistance of counsel was violated.

4. The defendant's jury trial waiver was not valid under the Sixth Amendment.

5. The evidence was insufficient to prove that the defendant was the driver of the car that eluded the police.

6. The trial court improperly imposed Legal Financial Obligations on an indigent defendant.

7. In support of its verdict that the defendant was the one driving the white Honda, but in the absence of substantial evidence, the bench trial court erred when it entered CrR 6.1 finding of fact at CP 54⁴ that

² U.S. Const. amend. VI provides that the defendant has a right to "trial by an impartial jury."

³ U.S. Const. amend. VI provides that the defendant has a right the assistance of counsel for his defense.

⁴ With the agreement of the parties, the trial court entered a copy of the pages of the transcript of its oral ruling as its CrR 6.1 written bench findings. 12/5/17RP at 35-36; CP 48-59; see 11/16/17RP at pages 187 to 195. Appellant has assigned error to the challenged findings by specifying the pertinent Clerks Papers page number of the document, which was filed as the transcript with an accompanying cover page. The challenges to the findings are supported by the citations to the record at Part E, infra.

“Officer McMillan . . . saw only one occupant of the vehicle that he was following, and he was the driver.”

8. In the absence of substantial evidence, the court erred when it entered CrR 6.1 finding of fact at CP 54-55 that “[i]t was approximately sundown, so it was dusk. There was only about an hour of light after sundown. So there was still some light on August 30 at about eight p.m.”

9. In the absence of substantial evidence, the court erred when it entered CrR 6.1 finding of fact at CP 55 that “[t]he person running, by way of time and distance, was the same person that Deputy Bushy arrested on the other side of the field, which was the defendant, Mr. Garoutte.”

10. In the absence of substantial evidence, the court erred when it entered CrR 6.1 finding of fact at CP 55 that “the person who was in the field running was also in the car that had just slid into the ditch [and] [n]o one else was in the car and this was an unpopulated, open remote and rural area where no other people were visible[.]”

11. In the absence of substantial evidence, the court erred when it entered CrR 6.1 finding of fact at CP 55 “[t]hat person who ran from the car would appear to be also the person who drove the car, as

Sergeant McMillan said he saw no one else in the car when following it,” and the finding that “when he came upon the car, seconds after it had been ditched, no one else was in that open area.”

12. In the absence of substantial evidence, the court erred when it entered CrR 6.1 finding of fact at CP 55-56 that “there was no evidence or testimony offered for why this cousin would feel the need to elude [or] that [alleged actual driver] Jesse would flee on foot after being stopped, other than I suppose to avoid being arrested for the felony eluding he would have just committed.”

13. In the absence of substantial evidence, the court erred when it entered CrR 6.1 finding of fact at CP 56 that “[t]here was no evidence of another person running from the vehicle or in the field or in that area.”

14. In the absence of substantial evidence, the court erred when it entered CrR 6.1 finding of fact at CP 56 that the officers “didn’t see a second person in this remote and open rural area.”

15. In the absence of substantial evidence, the court erred when it entered CrR 6.1 finding of fact at CP 56 that “the intensity and the desperation Mr. Garoutte displayed in running from Deputy Bushy . . .

matched the intensity and desperation of the person driving the vehicle while trying to elude Sergeant McMillan.”

16. In the absence of substantial evidence, the bench trial court erred when it entered CrR 6.1 finding of fact at CP 57 that it “was difficult to believe [that the defendant] was laying in the back of the car prior to Sergeant McMillan following the vehicle because he previously saw a police vehicle [,] [because] contact with law enforcement [vehicles] would be rare and not likely to occur [and] [y]ou wouldn’t just lay in the back of a car for hours.”

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. CrR 8.3(b) protects the right to a fair trial, which is guaranteed by Due Process. The trial court found that the State had committed mismanagement by failing to give timely notice of a witness who would be the only person that could provide a direct eyewitness claim that Mr. Garoutte was driving the car during the day in question.

By the time the defense was notified of this witness’s addition to the witness list, the defendant had waived jury trial, which he would not have done had he known the State was going to call Ms. Guinn, because Guinn’s poor appearance, including on a police interview video where she gave a Smith affidavit, and her multiple crimes of

dishonesty, would have persuaded the jury that Mr. Garoutte was not guilty.

Did the trial court err under CrR 8.3(b) by offering no adequate remedy for the loss of Mr. Garoutte's Due Process right to a fair trial, and the defendant's loss of his Sixth Amendment jury trial right, as a result of the State's mismanagement?

2. Did the State's mismanagement prevent Mr. Garoutte's counsel from providing effective assistance in his advice whether to waive a jury trial?

3. Was the defendant's jury trial waiver invalid?

4. Where the evidence was insufficient, did entry of judgment violate Due Process?

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

6. Mr. Garoutte's DNA sample was previously collected on the basis of statutory dictate. Should this Court order the DNA collection fee order to be stricken?

D. STATEMENT OF THE CASE

(1). State's case before trial, upon the basis of which Mr. Garoutte waived his constitutional right to a jury.

According to the affidavit of probable cause, Grant County Sheriff's Deputy John McMillan received a dispatch indicating that Mary Cobb had called 911 to report an erratically driven vehicle on Thomas Drive in Soap Lake, which was spinning its wheels on the gravel roadway. CP 6. Deputy McMillan proceeded to the area and observed a white passenger car with the reported license plate number driving on RD 20 NE. Deputy McMillan then followed the car as it traveled on various roads near Soap Lake. The car occasionally veered toward the edge of the roadway, and then took a sudden left turn without using a turn signal. CP 6.

Deputy McMillan activated his squad car's lights and sirens and pursued the car, which then accelerated, at one point crossing SR 28 at Sixth Avenue at a high rate of speed, and without observing a stop sign. The vehicle was traveling at approximately 70 mph on a gravel road, creating a dust trail. Soon thereafter, the Deputy found the car in a ditch near an intersection with RD 19 NE. McMillan saw a person running through a field, westbound. CP 6-7.

Deputy Alex Bushy, who had been dispatched to assist, set up a containment area on RD A NE. He later radioed to McMillan that he had a “suspect” in custody. McMillan drive to RD A NE, and observed the arrestee in the back of a squad car; he was subsequently identified at the Grant County Jail as Matthew Garoutte. Deputy McMillan could only report that his best view of the driver occurred at the beginning of the pursuit, when McMillan “could see it was a male driver.” CP 6-7.

(2). **Verdict and sentencing.** Following a bench trial, the court issued its oral finding of guilt to eluding, and subsequently denied the defense motion for arrest of judgment based on insufficiency of the evidence. 11/27/17RP at 31-33; 12/5/17RP at 38-39. The court sentenced Mr. Garoutte to 28 months incarceration 12/5/17RP at 43-44. The court imposed Legal Financial Obligations in the form of the \$500 victim assessment, the \$200 filing fee, and the \$100 DNA collection fee. 12/5/17RP at 43-45; CP 63-81.

E. ARGUMENT

(1). The court found CrR 8.3(b) mismanagement but abused its discretion in failing to order dismissal or a revocation of the jury waiver, where the defendant waived his jury trial right unaware that the State would be presenting its sole eyewitness claim of Garoutte driving the car through Amanda Guinn, a highly impeachable witness that a lay jury would find so non-credible that it would acquit the defendant.

(a). Waiver of jury trial.

Mr. Garoutte, represented by counsel Stephen Kozar, waived his Sixth Amendment jury trial right on November 13, 2017. See U.S. Const. amend. 6. During the oral colloquy, the trial court told the defendant, *inter alia*, that it needed to make sure he was “doing this knowingly and voluntarily.” 11/13/17RP at 27.

After further questions and the court’s indication it was “signing the waiver form,” the court inquired of the State as to how many witnesses it would be calling. 11/13/17RP at 27-28; CP 27 (waiver). The prosecutor stated, “Five.” 11/13/17RP at 28.

Before that date, Mr. Garoutte had filed motions seeking to compel the State to comply with discovery obligations per CrR 4.7, and Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and Giglio v. United States, 405 U.S. 150, 154–55, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). See CP 33-35 (September 28 motion); CP 36-37

(October 3 order). The State's first amended witness list listed five persons. Supp. CP ____, Sub # 28 (filed 10/13/2017).

(b). Trial court finds mismanagement by the State.

However, on the bench trial date of November 15, 2018 – after Mr. Garoutte waived his right to a jury trial – Mr. Garoutte filed a motion to dismiss the case and the charge outright, for CrR 8.3(b) mismanagement. 11/15/17RP at 3; CP 28-42. The State had not complied with the discovery order of October 3; rather, after Mr. Garoutte's jury waiver, the State provided an additional police report of an interview of one Amanda Guinn, the written "Smith affidavit" of Amanda Guinn, a Deputy's body-cam recording of Guinn's making of the Smith affidavit, and added Amanda Guinn to the witness list for trial. See CP 28-31; 11/15/17RP at 3-15; CP 39 (State's second amended witness list).⁵

⁵ Under ER 801(d)(1)(i) and Washington case law, a party may introduce a "Smith" affidavit - the prior statement of a witness - as substantive evidence, where certain conditions of the Rule are met. State v. Nieto, 119 Wn. App. 157, 161, 79 P.3d 473 (2003) (citing State v. Smith, 97 Wn.2d 856, 651 P.2d 207 (1982)).

Guinn had alleged, and assumedly would allege at trial, that she had seen Mr. Garoutte driving the white Honda on the same day as the eluding incident. 11/15/17RP at 13-23.

The defense argued that CrR 8.3(b) required dismissal, because of mismanagement by the State that had caused Mr. Garoutte to waive his Sixth Amendment right to a jury trial. CP 28-42; 11/15/17RP at 22-23.⁶ Counsel noted that under CrR 8.3(b), “[t]he court, in the furtherance of justice . . . may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused’s right to a fair trial.” CrR 8.3(b); see, e.g., State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997); State v. Sherman, 59 Wn. App. 763, 801 P.2d 274 (1990).

During argument on the motion, there were statements by the prosecutor, and testimony by Deputy McMillan regarding a plain failure to forward information and evidence between law enforcement

⁶ Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), requires the prosecution to timely disclose evidence that is exculpatory and favorable to the accused. This includes impeachment evidence. Giglio v. United States, 405 U.S. 150, 154–55, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

and the State during a known critical time period prior to trial. The court concluded that there had been “mismanagement” within the meaning of CrR 8.3(b), by virtue of the failure of the prosecutor and/or the police to timely provide material and notice to the defense.

11/15/17RP at 23-47.

The court stated, “[W]as there mismanagement? Yes.”

11/15/17RP at 47 (also stating, “And so there was mismanagement.”).⁷

(c). Trial court denies request for an adequate remedy for Mr. Garoutte’s loss of his constitutional right to a jury trial.

However, the trial court reasoned that Mr. Garoutte was not prejudiced because the State indicated it was now voluntarily choosing not to call Ms. Guinn or introduce the other evidence of her claim, see 11/15/17RP at 28-29, and the defendant had had not been forced to choose between effective, prepared counsel and speedy trial.

11/15/17RP at 46-47.

The court stated that it was formally striking Ms. Guinn as a witness “to make a point,” but said that less severe sanctions than

⁷ Under Brady, the government must disclose not only the evidence possessed by prosecutors but evidence possessed by law enforcement as well. Kyles v. Whitley, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

dismissal were warranted because the mismanagement was not willful or in bad faith. 11/15/17RP at 50-51.

Addressing the defense argument that Mr. Garoutte had waived his constitutional right to a jury trial, the court stated that the striking of Guinn as a witness meant that Mr. Garoutte's rights were not in peril. 11/15/17RP at 52-3. The court did also remark, "We could have also said, well, you can unwaive that." 11/15/17RP at 52. And, further responding to the defense's reminder that Mr. Garoutte indeed did give up his constitutional jury right based on false representations of the state of the evidence, the court noted that reversal of the waiver was another theory, and stated, "And that's a great point." 11/15/17RP at 52-53. But the court did not grant a remedy of "unwaiving" the waiver to cure the CrR 8.3(b) mismanagement, nor did it grant the remedy of dismissal.

(d). Jury trial – male or female driver observed.

At trial, Deputy McMillan stated that after he was dispatched based on a call of a car driving erratically or spinning its tires, he stationed his squad car, which was equipped with working lights and sirens, on Thomas Drive. He was in uniform. 11/15/17RP at 67-71, 1901. Deputy McMillan then observed the white vehicle, and "pulled

out and got in behind it and followed it.” 11/15/17RP at 73-74. The Deputy could only see that the driver was a male or a female, and seemed to be the only occupant. 11/15/17RP at 74-75.

While following behind the car about a length away, the Deputy observed the car veer off the traveled portion of SR 20.5 at times, and then make a turn onto Fern Drive without signaling, so he decided to stop it by activating his emergency lights. 11/15/17RP at 76-79. After he did so, the white car “accelerated[.]” 11/15/17RP at 78.

Deputy McMillan continued to pursue, but the white car accelerated to 40 or 50 miles per hour, crossed the intersection of Sixth Avenue and SR 28 without slowing down or stopping for the stop signs. 11/15/17RP at 79. Both vehicles were traveling at 70 to 80 miles per hour at one point. 11/15/17RP at 83-86.

Eventually, the white car began traveling on a gravel road, which made it difficult for the Deputy to see the vehicle, except to follow the dust trail that was being created. 11/15/17RP at 86-87. When Deputy McMillan next saw the vehicle, the driver had tried to turn right, and had slid into a ditch near a field. 11/15/17RP at 88-90.

Deputy McMillan stopped his car and looked for occupants of the vehicle, and there were not any. 11/15/17RP at 93. The Deputy

then “noticed the subject running across the field” on what the witness described as a diagonal angle about seventy-five yards from the car. 11/15/17RP at 94-96. Soon thereafter, Deputy Alex Bushy, who had arrived in the general area, radioed to McMillan that he had a person in custody. 11/15/17RP at 97-99.

Deputy Bushy later testified that he positioned himself near the area of the field, and shined his flashlight at a man running along a tree line. 11/15/17RP at 122-24. The man did not stop when ordered to, but the deputy was able to secure him when he fell. The man was the defendant. 11/15/17RP at 122-24.

According to K-9 officer Tyson Voss, who also arrived on the scene, his canine responded to the deputy’s call to “search” by urinating. 11/15/17RP at 136-37. At that point, Deputy Bushy had radioed in that he had located a “suspect,” who was later identified as Matthew Garoutte. 11/15/17RP at 137.

Defense witness Mary Cobb, who lives on Thomas Drive, testified that she called 911 on August 30, because the white car was driving recklessly up and down her private gravel road. 11/15/17RP at 148, 154-57. This had been happening so frequently that Ms. Cobb had

the Sheriff's office on her speed dial. 11/15/17RP at 148-49, 157. She called 911 because her boyfriend told her,

call the sheriff, he's back up here driving again, call them and tell them the guy's reckless driving again, see if we can get a sheriff dispatched.

11/15/17RP at 156.

Ms. Cobb emphasized said she had seen the car before, and that is how she knew its license plate. 11/15/17RP at 156. She had seen different people driving the car, "and I can't actually tell you if it was Mexican, white, 20's, 50's, I don't know. I just seen a man driving." 11/15/17RP at 156-57. When asked if she had ever seen *the defendant*, Mr. Garoutte, before, Ms. Cobb answered, "**I have never seen that guy in my life.**" (Emphasis added.) 11/15/17RP at 159.

Indeed, Mr. Garoutte testified in his defense that although he was involved in the events that day, the car owner – his uncle Ron Guinn -- had given his friend Jesse permission to drive the car. 11/15/17RP at 158-59; 11/16/17RP at 181 (closing argument); see CP 41-42. Matthew was laying down in the backseat because he had a DOC warrant "and I didn't want to get arrested," and that was why he also ran from the crashed car. 11/15/17RP at 161.

(e). The State’s mismanagement infringed on Mr. Garoutte’s Sixth Amendment right to a fair jury trial, to effective counsel, and to Due Process.

Under CrR 8.3(b), the State’s conduct need not be willful or in bad faith to require dismissal or meaningful sanction by return of the parties to the status quo. The conduct of the case “need not be of an evil or dishonest nature; simple mismanagement is sufficient.” Michielli, 132 Wn.2d at 239. The law does not require willfulness or bad faith in order to warrant the full scope of remedy authorized by CrR 8.3(b). See also State v. Dailey, 93 Wn.2d 454, 457, 610 P.2d 357 (1980).

However, in any event, the mismanagement in this case was severe because it caused the specific harm that CrR 8.3(b) seeks to protect – full prejudice to the constitutional rights of the accused. Here, Mr. Garoutte’s fundamental right, to a jury trial under the Sixth Amendment, was utterly abrogated. This is one of those “egregious cases of mismanagement or misconduct” that warrants more severe and less perfunctory sanction. State v. Duggins, 68 Wn. App. 396, 401, 844 P.2d 441, affirmed, 121 Wn.2d 524, 852 P.2d 294 (1993).

Importantly, the court accepted the defendant's statement that he would not have waived his Sixth Amendment right to a jury trial if he had believed the State would proffer evidence as to Amanda Guinn as the sole eyewitness claimant who could allege she saw Mr. Garoutte driving the vehicle on the day in question. 11/15/17RP at 18-19, 23.

This is not a case where the prejudice is hypothetical. Ms. Guinn indicated in her police body cam-recorded interview as she gave her Smith affidavit, and as reflected in Deputy McMillan's supplemental report, her assertion that her father's car was taken by her cousin, Mr. Garoutte, and "I just happened to walk up and see Matthew driving off." CP 41 (statement); CP 42 (supplemental report, writing that Guinn "saw [Matthew] backing out of the drive way at 201 Moses Lake Lake [sic] Avenue and leave in the car.") (and describing contemporaneous body cam recording to Guinn).

Before a lay jury, the defense would have prevailed based on the range of evidence surrounding Amanda Guinn for these reasons, such as her unimpressive appearance, along with the fact that it would

present to the jury her multiple ER 609 crimes of dishonesty.⁸

11/15/17RP at 22-23.⁹

(i). Mismanagement warrants dismissal of a criminal case or any other meaningful remedy to actually cure the violation suffered.

Mr. Garoutte sought a remedy for the mismanagement of the case that the court found under CrR 8.3(b). That rule provides in part:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.

The Washington Courts have recognized that Rule CrR 8.3(b) imposes two requirements. A defendant must show: (1) arbitrary action or misconduct, and (2) "prejudice affecting the defendant's right to a fair trial." State v. Barry, 184 Wn. App. 790, 797, 339 P.3d 200 (2014).

As to the first prong, a defendant need not show intentional

⁸ Ms. Guinn had prior convictions for crimes of dishonesty including welfare fraud and was agreed to be a person who presented personally in a poor manner. 11/15/17RP at 22-23.

⁹ The State did indicate during the CrR 8.3(b) hearing that the prosecution would *no longer be calling* Guinn as a witness, including because of circumstances of her having an active arrest warrant, and her reported location that could only be broadly stated as Ellensburg. 11/15/17RP at 28-29.

malfeasance; “simple mismanagement is sufficient.” State v. Dailey, 93 Wn.2d at 457. As to the second prong, a defendant demonstrates prejudice to his constitutional rights, for example, by showing the mismanagement adversely affected his right to a speedy trial or his “right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense.” State v. Michielli, 132 Wn.2d at 240; accord, Barry, 184 Wn. App. at 797; see also State v. Burri, 87 Wn.2d 175, 180, 550 P.2d 507 (1976) (dismissal appropriate where State impeded defense counsel’s ability to investigate alibi witnesses, because defense has a “right to make a full investigation of the facts and law applicable to the case” prior to trial).

(ii). Mr. Garoutte suffered prejudice from the mismanagement that required the remedy of dismissal or restoration of his jury trial right.

This case involves mismanagement by a violation of CrR 4.7, as the trial court held. 11/15/17RP at 47. Courts have indeed ruled that dismissal is an appropriate remedy when the State’s failure to comply with discovery rules and orders compromises the defendant’s right to a fair trial. Dailey, 93 Wn.2d at 459-60; State v. Martinez, 121 Wn. App. 21, 23-24, 86 P.3d 1210 (2004); State v. Sherman, 59 Wn. App. 763, 768, 801 P.2d 274 (1990); Barry, 184 Wn. App. at 796; see also CrR

4.7(h)(7)(i) (“if at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may ... dismiss the action ...”). The trial court was required to dismiss, or provide an effective remedy for the right abrogated, as the cure for the CrR 8.3(b) mismanagement.

a. First aspect of prejudice.

CrR 8.3(b) protects the defendant’s Fourteenth Amendment right to Due Process. State v. Starrish, 86 Wn.2d 200, 206 n.9, 544 P.2d 1 (1975) (“A dismissal under CrR 8.3(b) may be justified where the State’s misconduct violates the defendant’s right to due process.”); U.S. Const. amend. XIV; see In re Pers. Restraint of Glasmann, 175 Wn.2d 696,703-04, 286 P.3d 673 (2012) (the right to a fair trial is the core guarantee of the due process clause).

In addition, the right to a jury trial is guaranteed under the Sixth Amendment to the United States Constitution as well as article I, section 22 of the Washington State Constitution. Duncan v. Louisiana, 391 U.S. 145, 157-58, 88 S.Ct. 1444, 1452, 20 L.Ed.2d 491 (1968); Pasco v. Mace, 98 Wn.2d 87, 653 P.2d 618 (1982); U.S. Const. amend VI; Wash. Const. art 1, sec. 22. Washington law allows a defendant to

waive a jury trial. State v. Benitez, 175 Wn. App. 116, 127, 302 P.3d 877 (2013). But here, after the waiver he executed on November 13, 2017, 11/13/17RP at 26-28, CP 27, Mr. Garoutte lost that right to demand a jury trial. At the juncture where Mr. Garoutte decided to waive jury, he determined that the case would best be put before a court, which would assess the proofs or lack thereof in a formally technical manner. Had the defendant been given timely notice of Ms. Guinn, he would not have waived his right to present the case to a jury, for evaluation, by lay jurors that would have heavily weighted Ms. Guinn's non-credible demeanor, and her history of criminal dishonesty.

Employing the right to a jury so that 12 peers may assess a witness's credibility is a core purpose of the jury trial right –

compelling [her] to stand face to face with the jury in order that they may look at [her], and judge by [her] demeanor upon the stand and the manner in which [she] gives [her] testimony whether [she] is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242–43, 15 S.Ct. 337, 339, 39 L.Ed. 409 (1895) (discussing Sixth Amendment confrontation clause).

Mr. Garoutte waived his jury trial right, which he would not have done but for the CrR 8.3(b) mismanagement the trial court *found* below. He therefore suffered the prejudice of the loss of the right to a jury trial. City of Seattle v. Williams, 101 Wn.2d 445, 452, 680 P.2d

1051 (1984) (decision to grant or deny a motion to withdraw a previously executed jury waiver is discretionary). The violation was worked by the State's CrR 8.3(b) mismanagement.

b. Second aspect of prejudice.

When the State's mismanagement prevents counsel from acting effectively, it also violates the defendant's rights under the Sixth Amendment right to counsel. U.S. Const. amend. VI.

Thus, the second instance of prejudice is that the State's CrR 8.3(b) mismanagement prevented Mr. Garoutte's counsel from acting effectively. The criminal defendant is entitled to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This right is accorded him when his lawyer acts without deficiency, and without making unreasonable tactical decisions. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

It is well understood that the determination to advise the defendant to waive his right to a jury trial is one such tactical decision. State v. Likakur, 26 Wn. App. 297, 303, 613 P.2d 156 (1980).

Counsel's advice in this area is deemed within the area of judgment and

trial strategy, and as such the giving of that advice rests exclusively in the lawyer. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967).

But where counsel advised the defendant in this case to waive jury, based on a state of knowledge created by the mismanagement of the State, Mr. Garoutte's right to have an effective lawyer was violated. The mismanagement prevented counsel from acting effectively. Ms. Guinn had prior convictions for crimes of dishonesty including welfare fraud. She additionally had drug offenses, and in the defense's words, "looks like heck in the videotape." 11/15/17RP at 22. As a result, the court stated that it comprehended the defense argument as to the effect of the mismanagement on its tactical preparation to be based on "how she looks, and/or because of her criminal history." 11/15/17RP at 23. Courts understand these decisions of counsel to be well within the scope of what may be necessary and vital to *effective* representation:

We have recognized that competent defendants and experienced counsel may have good reasons to waive a jury trial, believing their defense would be better understood and evaluated by a judge than by jurors. State v. Pierce, 134 Wn. App. 763, 772, 142 P.3d 610 (2006).

State v. George, 192 Wn. App. 1044 (at p. 11) (Div. II, 2016)

(unpublished decision, cited for persuasive purposes per GR 14.1(a)).

For a jury, the demeanor of a witness is a prime indicator of credibility, so much so that it may be affirmatively argued by a party to be telling. State v. Ortega–Martinez, 124 Wn.2d 702, 714, 881 P.2d 231 (1994). The State’s mismanagement caused Garoutte’s counsel to be ineffective, rendering his decisions impotent so that Garoutte, in effect, had no lawyer. United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). His conviction must be reversed.

(f). Mr. Garoutte’s conviction must also be reversed because his waiver of the Sixth Amendment jury trial right was not knowing, intelligent, or voluntary.

Under the Sixth Amendment, a jury trial for serious offenses is a fundamental right. Duncan v. Louisiana, 391 U.S. at 157-58. And:

In Washington, every criminal defendant has a constitutional right to a jury trial, even when charged with a misdemeanor. Pasco v. Mace, 98 Wn.2d 87, 653 P.2d 618 (1982). A waiver of that right must be voluntary, knowing, and intelligent. State v. Forza, 70 Wn.2d 69, 422 P.2d 475 (1966).

City of Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957, 960 (1984); see also State v. Bugai, 30 Wn. App. 156, 157, 632 P.2d 917 (1981) (since all persons charged with a crime have a fundamental right to trial by jury, the waiver of this right may only be sustained if “knowingly, intelligently and voluntarily made.”). The absence of

these requirements invalidates a waiver. See generally State v. Lane, 40 Wn.2d 734, 737, 246 P.2d 474 (1952) (with respect to a 12-person jury, the right can be waived as long as the defendant “acts intelligently, voluntarily, [and] free from improper influences ...”).

If the defendant challenges the validity of the waiver on appeal, the State bears the burden of proving that the waiver was knowingly, intelligently and voluntarily made. State v. Donahue, 76 Wn. App. 695, 697, 887 P.2d 485 (1995); State v. Segall, 124 Wn.2d 719, 725, 881 P.2d 979 (1994); State v. Wicke, 91 Wn.2d 638, 646, 591 P.2d 452 (1979). Because it implicates the waiver of an important constitutional right, the appellate court reviews the waiver *de novo*. State v. Vasquez, 109 Wn. App. 310, 34 P.3d 1255 (2001).

The State must prove a valid waiver of any constitutional right. Acrey, 103 Wn.2d at 207; Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); State v. Forza, *supra*.

Thus, where the State commits mismanagement material to the defendant’s decision to waive jury, his waiver is neither voluntary, knowing, or intelligent. For example, a plea of guilty waives several constitutional rights, including the right to trial by jury as stated in Duncan v. Louisiana. Boykin v. Alabama, 395 U.S. at 243. And it is

well-established that misinformation renders a guilty plea invalid. In re Quinn, 154 Wn. App. 816, 836, 226 P.3d 208, 219 (2010) (citing State v. Miller, 110 Wn.2d 528, 531, 756 P.2d 122 (1988)).

Here, Mr. Garoutte decided to waive jury, in favor of a bench trial, based on the state of the prosecution's evidence as he understood it at that time. However, the State had failed in its discovery obligations to make clear what the state of that evidence actually was. His decision was not intelligent, knowing, or voluntary.

Misinformation such as this must void a jury waiver. State v. Ruppert, 375 N.E.2d 1250, 1255 (Ohio. 1978), certiorari denied, 439 U.S. 954, 99 S.Ct. 352, 58 L.Ed.2d 345 (1978) (waiver of trial by jury, in favor of trial to three-judge panel, was invalid where court misinformed the defendant that a unanimous opinion of the panel would required for guilt); see also State v. Sanchez, 182 Wn. App. 1022, at p. 12 (Div. II, 2014) (agreeing that a jury waiver would be invalid for ineffective assistance where lawyer told defendant that judge could evaluate the credibility of witnesses based on the judge having presided over a previous trial where they testified) (unpublished decision, cited for persuasive purposes only under GR 14.1(a)).

Mr. Garoutte's invalid jury waiver requires automatic reversal of his eluding conviction. United States v. Dominguez Benitez, 542 U.S. 74, 84 n.10, 124 S.Ct. 2333, 159 L.Ed. 2d 157 (2004) (citing Boykin v. Alabama, 395 U.S. at 243); United States v. Duarte–Higareda, 113 F.3d 1000, 1003 (9th Cir. 1997); see, e.g., State v. DeVries, 109 Wn. App. 322, 324, 34 P.3d 927, 928 (2001), reversed in part on other grounds, 149 Wn. 2d 842, 72 P.3d 748 (2003) (denial of constitutional right to present closing argument violated Sixth Amendment guarantee of counsel, requiring automatic reversal).

Alternatively, even if some other standard of reversal were required, the only other viable formulation would be to ask whether the defendant would have waived a jury if he had been fully informed. United States v. Williams, 559 F.3d 607, 614 (7th Cir. 2009). The record in this case that Mr. Garoutte would not have done so, as set forth by counsel in the pleadings and in argument, is undisputed. CP 28-32; 11/15/17RP at 6, 11-12, 18-19. Mr. Garoutte himself made it even more clear, although doing so was unnecessary, when he argued at sentencing, after his counsel's motion to arrest judgment for sufficiency was denied, that the State's mismanagement "robbed me of my right to

a jury trial,” and argued that his jury waiver should have been be stricken. 12/5/17RP at 41-42. Reversal is required.

(2). The State failed to prove that the defendant Mr. Garoutte was the driver of the Honda.

(a). A criminal judgment must be supported by sufficient evidence to support Due Process scrutiny.

The evidence that Mr. Garoutte was driving the car was inadequate to convict him. U.S. Const. amend. XIV. Evidence is sufficient to support a conviction only if, “after viewing the evidence and all reasonable inferences from it in the light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt.” State v. Homan, 172 Wn. App. 488, 490–91, 290 P.3d 1041 (2012); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The State has the burden of proving identity through relevant evidence. “It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of

the accused as the person who committed the offense. State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974).

(b). The State failed to prove its case.

Where, as here, the defendant is tried by the court sitting without a jury, appellate review is limited to determining whether substantial evidence supports the trial court's findings of fact and whether these findings support its conclusions of law. State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). “ ‘Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.’ ” State v. Solomon, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002).

Here, the State showed that Mr. Garoutte ran from the area where the car crashed into a ditch. Deputy McMillan could not say whether the driver's side door, or the passenger side door, or neither, or both, were open or closed. 11/15/17RP at 93, 109. The deputy could only say that he saw someone running from the car, but he in fact “lost visual contact” with the person as he ran through a knee-high alfalfa field, and could only advise Deputy Bushy of the direction the person appeared to have gone in. 11/15/17RP at 96-97, 108.

Further, the presentment of Voss as a dog tracking officer added nothing to the case. As noted, instead of picking up a scent, the dog engaged in common dog behavior after being let out of Deputy Voss's squad car. 11/15/17RP at 136-37 ("He's a dog."). Voss had to admit that the dog did this behavior *after* Voss had given him the command to "search," and Voss had to answer in the negative when asked whether the dog did actually track any suspect in any way. 11/15/17RP at 145 ("He did not.").

Deputy Voss did opine that there was only a single track of beaten-down alfalfa grass leading from the car in the ditch and through the field. 11/15/17RP at 137-38. That meant nothing about how many individuals beat down that path. Voss also conceded, of course, that it was dark at the time. 11/15/17RP at 139. (Both Deputies Bushy and Voss testified that they had to use their flashlights to see into the field that night. 11/15/17RP at 123, 129, 144-45.).

It is true that "[c]ircumstantial evidence and direct evidence are equally reliable." State v. Moles, 130 Wn. App. 461, 465, 123 P.3d 132 (2005) (citing State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)). However, in cases involving only circumstantial evidence and a series of inferences, the essential proof of guilt cannot be supplied

solely by a pyramiding of inferences where the inferences and underlying evidence are not strong enough to permit a rational trier of fact to find guilt beyond a reasonable doubt. State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999) (citing State v. Weaver, 60 Wn.2d 87, 89, 371 P.2d 1006 (1962)).

All of this evidence about presence in and proximity to the car does not mean Mr. Garoutte was the driver. See State v. Summers, 45 Wn. App. 761, 765, 728 P.2d 613 (1986) (possession of stolen property conviction reversed for insufficiency of evidence). And an element has not been proved beyond a reasonable doubt if the state presents only equivocal evidence, as here. State v. Vasquez, 178 Wn.2d 1, 14, 309 P.3d 318 (2013).

(c). Based on the record, numerous bench findings were erroneous.

In the absence of substantial evidence the court erred when it entered CrR 6.1 finding of fact stating that “Officer McMillan . . . saw only one occupants of the vehicle that he was following, and he was the driver,” where the officer testified at one juncture that he did not know whether the person in the car was male or female, thus indicating there may have been more than one person in the car. 11/15/17RP at 74-75.

The court erred when it entered CrR 6.1 finding of fact that “[i]t was approximately sundown, so it was dusk. There was only about an hour of light after sundown. So there was still some light on August 30 at about eight p.m.,” where the law enforcement witnesses who testified stated that it was dark and that they had to use flashlights to see into the alfalfa field and tree line where the occupant or occupants of the Honda fled into. 11/15/17RP at 123, 129, 144-45.

The court erred when it entered CrR 6.1 finding of fact that “[t]he person running, by way of time and distance, was the same person that Deputy Bushy arrested on the other side of the field, which was the defendant, Mr. Garoutte,” where McMillan lost sight of the person before Deputy Bushy radioed that he had secured someone. 11/15/17RP at 94-99.

The court erred when it entered the related CrR 6.1 findings of fact that “the person who was in the field running was also in the car that had just slid into the ditch [and] [n]o one else was in the car and this was an unpopulated, open remote and rural area where no other people were visible,” and “[t]hat person who ran from the car would appear to be also the person who drove the car, as Sergeant McMillan said he saw no one else in the car when following it, and when he came

upon the car, seconds after it had been ditched, no one else was in that open area.”

These findings fail where McMillan could not have seen the defendant hiding in the back seat, and did not testify that he came upon the car mere “seconds” after it had been ditched, and where McMillan simply did not *see* another person in that area.

The court erred when it entered CrR 6.1 finding of fact that “there was no evidence or testimony offered for why this cousin would feel the need to elude [or] that Jesse would flee on foot after being stopped, other than I suppose to avoid being arrested for the felony eluding he would have just committed,” where the court here itself finds the very reason why the driver, Jesse, *would* flee on foot.

The court erred when it entered CrR 6.1 finding of fact that “[t]here was no evidence of another person running from the vehicle or in the field or in that area,” where the defendant testified he was one of two occupants of the car. 11/15/17RP at 158-61.

The court erred when it entered CrR 6.1 finding of fact that the officers “didn’t see a second person in this remote and open rural area,” where it was dark and the officers needed flashlights and the one person seen was lost sight of at the tree line, and where a single track of

beaten-down alfalfa field does not mean that two people did not run along that track.

The court erred when it entered CrR 6.1 finding of fact that “the intensity and the desperation Mr. Garoutte displayed in running from Deputy Bushy . . . matched the intensity and desperation of the person driving the vehicle while trying to elude Sergeant McMillan,” where the defendant testified he ran because knew he had a warrant and did not want to be arrested. 11/15/17RP at 158-61.

Finally, the court erred when it entered CrR 6.1 finding of fact that it “was difficult to believe [Garoutte] was laying in the back of the car prior to McMillan following the vehicle because he previously saw a police vehicle [,] [because] contact with law enforcement [vehicles] would be rare and not likely to occur [and] [y]ou wouldn’t just lay in the back of a car for hours,” where the evidence showed that three police vehicles were in fact in the general vicinity that day, that Mary Cobb called 911, and that McMillan testified that he drove behind the Honda before signaling it to stop. 11/15/17RP at 73, 122, 136, 148.

(d). Reversal is required.

On this record, including the fact that the police lost sight of one person running from the vehicle, the fact that a beaten path through the

alfalfa field would look exactly the same whether trod by one, or two people, the affirmative evidence from Deputy McMillan that he initially thought the driver might be female, and the fact that Mary Cobb, who had seen the car being driven by a person driving multiple times before, but had never seen Mr. Garoutte, make it unreasonable to make the inference that the defendant was the driver. He was merely located running from the car, which is inadequate to equate to guilt beyond a reasonable doubt.

Matthew Garoutte admitted that he hid, then ran from the police, but he explained why he did so, and he was not the driver of the white Honda. 11/15/17RP at 159, 162-63. The defendant's conviction must be reversed, and the charge dismissed, with prejudice. Burks v. United States, 437 U.S. 1, 11, 18, 98 S. Ct. 2141 (1978); State v. Hescocock, 98 Wn. App. 600, 605, 989 P.2d 1251 (1999) (“[I]f an appellate court has held that evidence is insufficient to support the conviction, then retrial for that offense is prohibited.”).

(3). The court exceeded its authority by imposing costs on an indigent defendant, who also had had his DNA collected.

At Mr. Garoutte's sentencing, the court imposed the \$200 filing fee and the \$100 DNA collection fee as Legal Financial Obligations on the defendant. CP 70. However, under RCW 36.18.020, the criminal

filing fee statute, Mr. Garoutte cannot be ordered to pay the \$200 criminal filing fee if he is deemed indigent, as the the court below found. CP 83-87, 88-90. Further, Mr. Garoutte’s DNA sample was previously collected because of his record of earlier Washington felony convictions, which the prosecution made a part of the record. CP 65-66, 93-100. Under RCW 43.43.7541, the DNA collection fee could not be imposed. The recent Washington statutes that mandate the foregoing all apply to Mr. Garoutte, as they reduced his punishment while he is on direct appeal, and also because they are remedial and retroactive.

(a). The defendant’s indigence as found by the sentencing court prohibits imposition of the \$200 filing fee, and the \$100 DNA fee cannot be imposed where the record shows that Mr. Garoutte’s DNA has already been collected.

The sentencing court’s authority to impose court costs and fees is statutory. State v. Mathers, 193 Wn. App. 913, 917, 376 P.3d 1163 (2016) (citing State v. Cawyer, 182 Wn. App. 610, 619, 330 P.3d 219 (2014)) (citing RCW 10.01.160(3)), review denied, 186 Wn.2d 1015 (2016). Several statutes govern the imposition of court costs, including the “Criminal filing fee” and the “Biological Sample Fee.”

(i). The \$200 filing fee cannot be imposed on an indigent defendant.

The statute regarding costs payment was recently amended to provide, “The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c).” RCW 10.01.160(3); Laws of 2018, ch. 269, § 17. At the same time, the legislature amended RCW 36.18.020, the criminal filing fee statute. Pursuant to that amendment, RCW 36.18.020(2)(h) provides that the \$200 filing fee may not be imposed on an individual who is indigent under RCW 10.101.010(3) (a) through (c). Laws of 2018, ch. 269, § 17.

Pursuant to subsections (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 10.101.010(3). This definition of a person being indigent largely overlaps with the definition provided in the comment to GR 34, governing appeals and the like, which the Court has previously cautioned should make a judge seriously doubt whether the individual

has the ability to pay LFO's. State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015) (citing Katherine A. Beckett, Alexes M. Harris, & Heather Evans, Wash. State Minority & Justice Comm'n, The Assessment and Consequences of Legal Financial Obligations in Washington State (2008)).

Here, the parties' presentations and the trial court's findings at and surrounding sentencing demonstrate that Mr. Garoutte was indigent under RCW 10.101.010(3)(c). Mr. Garoutte had no income of any sort, had "maybe \$1.00" in a checking account, owed \$20,000 in Legal Financial Obligations, and was on DSHS food stamps. CP 84-85.

All indications from these multiple sources are that Mr. Garoutte's income, if any, is less than 125 percent of the currently established, 2018 federal poverty level, which is \$12,140 for a single person household. See <https://aspe.hhs.gov/poverty-guidelines>. Mr. Garoutte does not have enough annual income to pay anything. See also Jafar v. Webb, 177 Wn.2d 520, 527, 303 P.3d 1042 (2013) ("a finding of indigency [under GR 34] means a person lacks funds to pay anything" toward the cost of litigating for relief). The imposition of the filing fee must be stricken.

(ii). The \$100 DNA fee cannot be imposed on a person whose DNA has previously been collected as a result of a prior conviction.

In addition, the legislature amended the provisions of RCW 43.43.7541 to provide that the “fee of one hundred dollars” cannot be included as part of the imposition of a sentence if the DNA was previously collected as a result of conviction:

Every sentence imposed for a crime specified in RCW 43.43.7541 must include a fee of one hundred dollars unless the state has previously collected the offender’s DNA as a result of a prior conviction. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law. For a sentence imposed under chapter 9.94A RCW, the fee is payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. For all other sentences, the fee is payable by the offender in the same manner as other assessments imposed. The clerk of the court shall transmit eighty percent of the fee collected to the state treasurer for deposit in the state DNA database account created under RCW 43.43.7532, and shall transmit twenty percent of the fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.7541. This fee shall not be imposed on juvenile offenders if the state has previously collected the juvenile offender’s DNA as a result of a prior conviction.

(Emphasis added.) RCW 43.43.7541; Laws 2018, ch 269, § 18. Under this authority, this Court must order that the DNA collection fee of \$100 be stricken from the judgment.

(b). Because Mr. Garoutte’s judgment is not final, recent amendments must apply to his case.

Newly amended statutes can be applied to pending cases. See State v. Heath, 85 Wn.2d 196, 197-98, 532 P.2d 621 (1975) (holding that amendments to the Habitual Traffic Offenders Act applied to a pending case); State v. Grant, 89 Wn.2d 678, 683, 575 P.2d 210, 213 (1978) (finding that the statute applied to pending litigation after the effective date of the statute); State v. Abraham, 64 Wash. 621, 627–28, 117 P. 501, 503 (1911) (noting that curative statutes intended to be retroactive are applicable to cases pending on appeal).

(i). The new statutes apply on direct appeal.

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.” (Emphasis added.) Marine Power & Equip. Co. v. Washington State Human Rights Comm’n Hearing Tribunal, 39 Wn. App. 609, 620, 694 P.2d 697, 703–04 (1985).

In determining intent, the Supreme Court has made clear that “the statute [at issue] does not require that an intent to affect pending

litigation be stated in express terms but that it must be expressed in words that fairly convey that intention.” State v. Zornes, 78 Wn.2d 9, 13, 475 P.2d 109 (1970).

In conducting a similar analysis to new principles of law from court case decisions, courts have found that new decisional law can apply “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.” (Emphasis added.) State v. Evans, 154 Wn.2d 438, 444, 114 P.3d 627 (2005) (quoting In re the Matter of St. Pierre, 118 Wn.2d 321, 326, 823 P.2d 492, 495 (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. Thus, a statutory change can apply to pending cases not yet final ones pending on direct review.

Notably, when a statute reduces the penalty for a crime, “the legislature is presumed to have determined that the new penalty is adequate and that no purpose would be served by imposing the older, harsher one.” (Emphasis added.) Heath, 85 Wn.2d at 198. This is an

exception to the rule that statutory amendments apply prospectively.

State v. Humphrey, 139 Wn.2d 53, 57, 983 P.2d 1118 (1999).

Because the amended statutes reduce the punishment for Mr. Garoutte's crimes, they apply to his case. RCW 10.01.160(3), RCW 10.101.010(3), RCW 36.18.020 and RCW 43.43.7541 reduce the penalty incurred from a criminal conviction, by barring imposition of the DNA fee where the person has previously provided a DNA sample.

(ii). The new statutes are remedial, and apply “retroactively.”

In general, 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).

The Supreme Court has defined a right as “a legal consequence deriving from certain facts.” State v. McClendon, 131 Wn.2d 853, 861, 953 P.2d 1334 (1997). On the other hand, a remedy “is a procedure prescribed by law to enforce a right.” Id; see also Haddenham v. State, 87 Wn.2d 145, 148, 550 P.2d 9 (1976) (finding that the Crime Victims Compensation Act was remedial because its purpose was to compensate and assist victims); Addleman v. Board of Prison Terms and Paroles, 107 Wn.2d 503, 510, 730 P.2d 1327 (1986) (holding that a

sentencing statute that required the Board of Prison Terms and Paroles to consider the purpose, standards, and sentencing ranges of the Sentencing Reform Act of 1981 was remedial and applied retroactively); cf. Humphrey, 139 Wn.2d at 64 (determining that increasing the victim penalty assessment from \$100 to \$500 created a new liability so it was not remedial).

Remedial amendments apply retroactively even if they are “completely silent as to legislative intent for retroactive application.” Kane, 101 Wn. App. 607, 613, 5 P.3d 741 (2000). Statutes are enforced retroactively if they are “remedial in nature and retroactive application would further [their] remedial purpose.” State v. Pillatos, 159 Wn.2d 459, 473, 150 P.3d 1130 (2007) (quoting Macumber v. Shafer, 96 Wn.2d 568, 570, 637 P.2d 645 (1981)).

The courts, when determining whether a statute is remedial should “look to the effect, not the form of the law.” Humphrey, 139 Wn.2d at 63.

Here, the amendment to the criminal filing fee statute is purely procedural and remedial in nature. The language of RCW 10.01.160(3) previously directed the court should not order an individual to pay costs

unless he “is or will be able to pay them.” See Laws of 2018, ch. 269, § 6.

But in general, the Washington courts had been imposing LFO’s against defendants without adequately determining ability to pay. State v. Blazina, 182 Wn.2d at 836. The 2018 amendments to the statute eliminated this imprecise language and more emphatically required that no costs be ordered against any individuals found indigent pursuant to the specific criteria RCW 10.101.010(3) (a) through (c).

Similarly, the amendment to the DNA statute, RCW 43.43.7541 is also purely procedural and remedial in nature. The amendment’s purpose is to eliminate duplicative collection of DNA sample fees. The amendment does not take away any rights, but rather remedies a problem. Applying the amendment in this case furthers this remedial purpose. Since the amendment is remedial, this Court should find that it applies Mr. Garoutte’s case. Applying the amendment in this case furthers the remedial purpose.

(c). The Court should order the \$200 filing fee and the DNA fee to be stricken.

Under RCW 36.18.020 as amended, the sentencing court must waive the \$200 filing fee as a mandatory legal financial obligation if

the defendant is indigent. Further, the DNA fee must also be stricken.

This Court should so order.

F. CONCLUSION

Based on the foregoing, this Court should reverse Mr. Garoutte's judgment and sentence.

Respectfully submitted this 28th day of August, 2018.

s/ OLIVER R. DAVIS
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 35741-4-III
)	
MATTHEW GAROUTTE,)	
)	
APPELLANT.)	

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