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STATE OF WASHINGTON  
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89666-6

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

RYAN R. QUAALE,

Defendant/Respondent.

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SUPPLEMENTAL BRIEF

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 ORIGINAL

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I. IDENTITY OF PARTY

Petitioner, State of Washington, was the plaintiff in the trial court and the respondent in the Court of Appeals.

II. STATEMENT OF RELIEF SOUGHT

The State respectfully requests that the decision of Division Three remanding this case for re-trial be reversed and the convictions of the defendant be affirmed.

III. ISSUES PRESENTED

(1) HAS DIVISION III MISAPPLIED THE LAW SUCH THAT THE OPINION IN THIS CASE CONTRADICTS ITSELF AND IMPROPERLY LIMITS RELEVANT OPINION EVIDENCE?

(2) HAS DIVISION THREE ISSUED AN OPINION IN CONFLICT WITH THIS COURT'S HOLDINGS AND THOSE OF OTHER DIVISIONS OF THE COURT OF APPEALS?

IV. STATEMENT OF THE CASE

The following facts were derived from *State v. Quaal*, 177 Wn. App. 603, 312 P.3d 726 (2013).

Ryan Quaale was charged with attempting to elude a pursuing police vehicle and felony DUI based on his detention and arrest in August 2011, following a pursuit by Washington State Patrol Trooper Chris Stone. Trooper Stone had seen Mr. Quaale's truck speeding in a residential neighborhood in Mead and activated his lights to pull him over. Mr. Quaale responded by turning off his truck's headlights and accelerating. Even after overshooting a corner and skidding off the road into a front yard, Mr. Quaale recovered, returned to the road, and persisted in speeding away. Trooper Stone continued to pursue, turning on his siren, and after several more blocks, Mr. Quaale stopped his truck and stepped out.

Trooper Stone handcuffed Mr. Quaale and, as he did so, he smelled alcohol. To assess whether Mr. Quaale was legally impaired, the trooper performed a field sobriety test for HGN. "Nystagmus is the involuntary oscillation of the eyeballs resulting from the body's attempt to maintain orientation and balance." *State v. Baity*, 140 Wn.2d 1, 991 P.2d 1151 (2000). HGN occurs in persons consuming alcohol. *Id.* at 12. The only field sobriety test that Trooper Stone performed on Mr. Quaale was the HGN test. He concluded from the test that Mr. Quaale was impaired and arrested him. He transported Mr. Quaale to a state patrol office, where Mr. Quaale refused to submit to a breath test.

When Mr. Quaale was first tried on the two charges, the jury found him guilty of attempting to elude a police vehicle but was deadlocked on the felony DUI charge. The trial court declared a mistrial on the latter count, and it is Mr. Quaale's second trial on that count that is the subject of this appeal.

At the second trial (as in the first) the State relied on the testimony of Trooper Stone to establish that Mr. Quaale had been driving while intoxicated and impaired. It established that the trooper had been trained as a drug recognition expert (DRE). DREs are trained to recognize the behavior and physiological conditions associated with certain psychoactive drugs and alcohol and, from that, to form an opinion whether a driver is impaired. *Id.* at 4. A full DRE examination of a suspect includes 12 steps, some involving observation and others involving questioning and testing. *Id.* at 6. HGN testing is one of the 12 steps. *See id.*

After having Trooper Stone describe the extent of his experience, explain HGN, the procedure for testing it, and tell the jury about his administration of the test to Mr. Quaale, the prosecutor asked, "In this case, based on the HGN test alone, did you form an opinion based on your training and experience as to whether or not Mr. Quaale's ability to operate a motor vehicle was impaired?" Report of Proceedings (Apr. 9 & May 17, 2012) at 33. Mr. Quaale's lawyer immediately objected that the trooper was being asked to provide an opinion on the ultimate issue determining guilt. The

objection was overruled. Trooper Stone answered, “Absolutely. There was no doubt he was impaired.” *Id.*

The jury convicted the defendant of attempting to elude a police vehicle. The jury deadlocked on the felony DUI charge and the trial court declared a mistrial. The defendant was tried again and the jury convicted the defendant of felony DUI.

The defendant appealed his conviction on the felony DUI charge and Division III, Court of Appeals reversed the conviction and remanded the case to Superior Court for re-trial. The State filed this petition seeking to reverse the Court of Appeals decision.

## V. ARGUMENT

1. DIVISION III MISAPPLIED THE LAW SUCH THAT THE OPINION IN THIS CASE CONTRADICTS ITSELF AND IMPROPERLY LIMITS RELEVANT OPINION EVIDENCE.

Division III apparently wanted to apply restrictions to the use of HGN that this Court did not in *Baity, supra*. Not finding support for its analyses in Washington caselaw, the Court of Appeals went outside Washington to rely upon the Illinois case of *People v. McKown*, 236 Ill.2d 278, 924 N.E.2d 941 Ill. (2010). Division III used the *McKown*, to restrict the use of HGN testing even though this Court did not make such restrictions

in deciding the admissibility of HGN in *Baity*. Caselaw in Washington from both this Court and the Courts of Appeals have set the framework for HGN and the admissibility of officer's opinions. Division III has chosen to bypass existing state law.

Division III essentially contradicts itself and reaches a conclusion that will impair the ability of the State to prosecute DUI cases. The opinion in this case states: "While not a direct opinion on guilt, it was an opinion on an ultimate issue and sufficiently equivalent to the key element in dispute to create a concern, in light of other factors, that the jury would be unduly influenced by the testimony. Pg. 6. If the trooper's statement was not a direct opinion then it was admissible. ER 704 states, "Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The issue here was whether or not the defendant was impaired. By the court's own reasoning, the trooper's statement was correctly admitted. Yet, the Court of Appeals held the trooper's statement improperly admitted.

2. DIVISION THREE ISSUED AN OPINION IN CONFLICT WITH THIS COURT'S HOLDING AND THOSE OF OTHER DIVISIONS OF THE COURT OF APPEALS.

In its response brief to the direct appeal, the State pointed Division III to *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993),

*rev. denied* 123 Wn.2d 1011, 869 P.2d 1085 (1994). *See also State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (*quoting State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)).

Even if the trooper's opinion *had* involved ultimate factual issues, the *Heatley* court noted:

Under modern rules of evidence, however, an opinion is not improper merely because it involves ultimate factual issues. ER 704 provides that “[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” Thus, *opinion testimony may not be excluded* under ER 704 on the basis that it encompasses ultimate issues of fact.

*Heatley, supra* at 579 (emphasis added)

Division III works backwards from what that court deemed an inadmissible opinion on the guilt of the defendant to examining the amount of observations and tests done by the arresting officer. The controlling rule of evidence for the admission of the trooper's statement is ER 704. Whatever arguments the court entertained, the simple fact is that the amount and type of testing done by the officer is related to foundation and has nothing whatever to do with admission under ER 704. Division III's reasoning for denial or admission of the trooper's statement under ER 704 is confused at best.

The Court of Appeals misinterprets and ignores parts of this Court's decision in *Heatley*. The Court of Appeals asserts that *Heatly* does not apply in this case. The court of appeals conflates its narrow view of the applicability of HGN (contrary to the *Baity* opinion) and bases part of its reasoning on the fact that the trooper in this case used the HGN alone while the trooper in *Heatley* used "detailed observations" of the defendant's condition. This part of the Division III's decision amounts to a rejection of the opinion in *Heatley*. By rejecting *Heatley*, the court opens a nebulous area which now requires the State to provide some unspecified proof prior to asking a trooper any questions about a defendant's intoxication.

For whatever reason, the Court of Appeals placed great importance on the fact that the trooper used the term "no doubt" when describing the defendant as impaired. The court contrasted the trooper's opinion here with that opinion stated in *Heatley*. The Court of Appeals itself acknowledges that the testimony of the trooper in this case *did not* encompass a direct opinion on the guilt of the defendant. The Court of Appeals first says that the testimony was not an opinion on the defendant's guilt, then the court cites to *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987) for the proposition that a witness cannot testify either directly or indirectly regarding the defendant's guilt. In its response brief, the State pointed the Division III to *City of Seattle v. Heatley*, 70 Wn. App. at 579. *See also*

*State v. Montgomery*, 163 Wn.2d at 591, (quoting *State v. Demery*, 144 Wn.2d at 759).

The State would respectfully ask the rhetorical question: How would DUI prosecutions based on a refusal to take the breath test be prosecuted if the police officer cannot express an opinion regarding the defendant's impairment? The purpose of everything the State presents is to convince a jury that a defendant is guilty of whatever charges are involved. Surely the defendant will claim he was not impaired. Division III would restrict the State to the officer stating only that the defendant had apparently consumed alcohol. The court held that the trooper could only testify the defendant's HGN was consistent with the consumption of alcohol. RP 33. Consuming alcohol is not an element of the crime of DUI. Without an officer's opinion testimony that the driver was "impaired" the State cannot meet its burden of proof. If officers are not permitted to form opinions based on HGN, the finding of probable cause will be difficult if not impossible in those cases lacking a breath or blood test.

Lastly, it should be noted that the defendant failed to object to the admission of the trooper's testimony. RP 33. Defense counsel objected to the prosecutor's original question on the grounds that the answer would go to the "ultimate issue." This was not a proper objection to the prosecutor's question under ER 704. The trial court properly overruled that objection and the

prosecutor again asked if the officer had formed an opinion. RP 33. The officer testified, “Absolutely. There was no doubt he was impaired.” The defense counsel did not object, ask for a limiting instruction or take any other action. The “ ‘failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.’ ” *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011), *quoting State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). Defense counsel might have objected to trooper’s testimony on other grounds, but defense counsel did not object nor ask for an admonition to the jury. Any objection to the trooper’s actual testimony was waived.

Division III, Court of Appeals ruling in this case, rejected *Heatley*, thus ruling in a manner so as to create a conflict with both the Washington State Supreme Court (which denied review of *Heatley*) and a conflict with Division I, Court of Appeals. *City of Seattle v. Heatley, supra*. The Court of Appeals also created a conflict with the Washington State Supreme Court when it relied on *People v. McKown* which is an out of state case that does not support the decisions of the courts in this Court.

This case raises issues of substantial public interest given that the decision in this case diminishes the ability of officers across the state to pursue and prosecute DUI cases.

Review is appropriate under RAP 13.4(b)(1); RAP 13.4(b)(2); and RAP 13.4(b)(4).

VI. CONCLUSION

The State respectfully requests that this Court reverse Division III's ruling regarding the officer's opinion as to the defendant's level of impairment. Since the defendant did not raise any issues pursuant to a cross-petition, the State respectfully requests that this Court remand the matter to Division III for that court to rule upon any remaining issues. *See generally* RAP 13.7(b)

Dated this 18<sup>th</sup> day of March, 2014.

STEVEN J. TUCKER  
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Deputy Prosecuting Attorney  
Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, )  
 )  
 ) Sup. Ct. No. 89666-6  
 )  
 ) Petitioner, )  
 )  
 ) v. )  
 )  
 ) CERTIFICATE OF MAILING  
 )  
 ) RYAN R. QUAALE, )  
 )  
 )  
 ) Respondent, )

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CERTIFICATE

I certify under penalty of perjury under the laws of the State of Washington, that on March 19, 2014, I mailed a copy of the Supplemental Brief in this matter, addressed to:

Dana Nelson  
Attorney at Law  
1908 East Madison St  
Seattle WA 98122

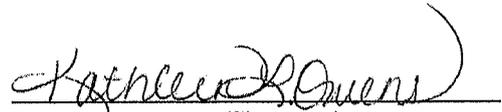
And to:

Jennifer Dobson  
Attorney at Law  
PO Box 15980  
Seattle WA 98115

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

3/19/2014  
(Date)

Spokane, WA  
(Place)

  
(Signature)

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Attached is the State's Supplemental Brief regarding Ryan R. Quaale #89666-6, with service attached.

Kathleen Owens, Legal Assistant  
for Mark E. Lindsey  
Sr. Deputy Prosecutor  
for Spokane County