Supreme Court No. _____
COA No. 58297-0-II

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RYAN HALL,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Ryan Hall asks this Court to accept review of the Court of Appeals' decision terminating review in *State v. Hall*, 58297-0-II.

In its May 28, 2025, opinion, the court concluded that Mr. Hall was not entitled to a jury's determination of every fact increasing his sentence, in violation of United States Supreme Court precedent. It also invoked a procedural bar to prevent review of Mr. Hall's unlawful restraint in the very in-court holding cell at issue in this Court's decision in *Luthi*. Finally, it refused to employ the United States Supreme Court's new definition of "true threats" when evaluating Mr. Hall's sufficiency challenge. The court denied Mr. Hall's motion to reconsider on August 14, 2025.

B. INTRODUCTION

Mr. Hall's prosecution and trial violated his rights under three recent, landmark decisions of this Court and the United States Supreme Court. Yet, the Court of Appeals persisted in ignoring federal constitutional interpretation from the United States Supreme Court in *Erlinger v. United States*[1]; it misunderstood and misapplied RAP 2.5 to preclude review of Mr. Hall's unconstitutional courtroom restraint in the Cowlitz County jail's in-court holding cell despite *State v. Luthi*,[2] and it expressly held that the United State Supreme Court's true threats jurisprudence in *Counterman v. Colorado*[3] did not apply to Mr. Hall's sufficiency challenge to his harassment convictions. Given the fundamental nature

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[1] 602 U.S. 821 (2024).
[2] 3 Wn.3d 249, 549 P.3d 712 (2024).
[3] 600 U.S. 66 (2023).

of these constitutional errors, this Court should grant review and reverse the Court of Appeals.

C. ISSUES PRESENTED

1. Unless knowingly waived, the Sixth and Fourteenth Amendments require a jury to find all facts, other than the fact of a prior conviction, that increase the defendant's punishment. The Fourteenth Amendment and article I, section 22 require notice of those facts in the charging document. The United States Supreme Court has repeatedly delimited the reach of the prior conviction exception to the fact of the prior conviction alone, most recently in *Erlinger*. Despite this proscription, the judge increased Mr. Hall's sentence after finding that Mr. Hall was on community custody at the time of the charged offenses, even though this fact was never charged in the information and required evidence beyond the facts of

his prior convictions. Should this Court grant review to rectify Washington's caselaw expansively interpreting the prior conviction exception with clear Supreme Court precedent to the contrary?

2. Courtroom restraints on defendants undermine the presumption of innocence, the ability to consult with counsel, and the dignity of the proceedings. A defendant's right to due process under the Fourteenth Amendment and article I, section 22 of the Washington Constitution requires that the trial court conduct an individualized inquiry into the need for courtroom restraints before a defendant may be restrained during a hearing. The trial court failed to conduct this inquiry before holding multiple hearings in Mr. Hall's case, including sentencing, while he appeared from the in-court holding cell. The Court of Appeals failed to review this assignment of error due to its

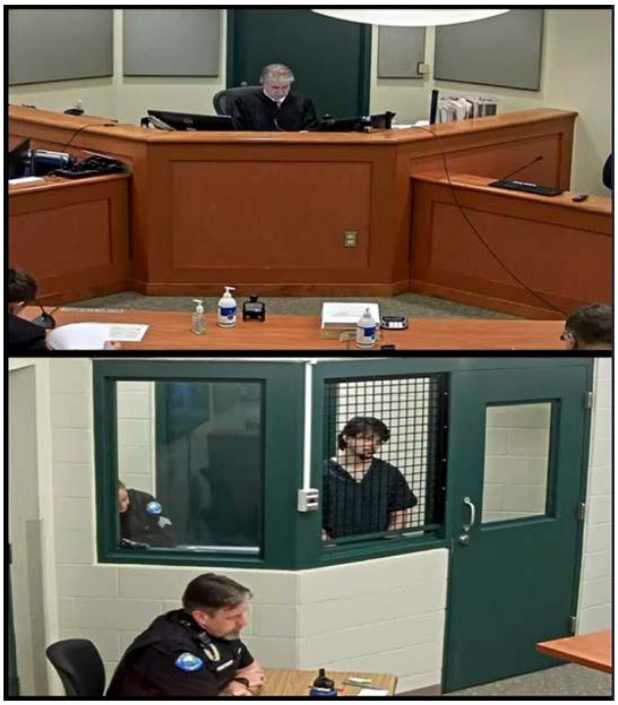
misunderstanding of RAP 2.5(a)(3) jurisprudence. This failure resulted in violation of Mr. Hall's due process right to benefit from new procedural rules before his appeal is final. Should this Court grant review to clarify its RAP 2.5(a)(3) jurisprudence and prevent its use to preclude review of new constitutional issues, such as *Luthi* error?

3. After Mr. Hall's trial concluded, the United States Supreme Court decided *Counterman*, clarifying that true threats require a *mens rea* of at least recklessness to pass constitutional muster. In light of *Counterman*, Mr. Hall challenged the State's evidence as insufficient and the court's jury instructions as erroneously prejudicial. The Court of Appeals refused to assess the sufficiency of the State's true threats evidence, instead measuring the sufficiency of the evidence against the constitutionally inadequate

harassment definition. Should this Court grant review to correct the Court of Appeals' novel and erroneous interpretations of sufficiency review in the wake of new constitutional law?

D. STATEMENT OF THE CASE

At Ryan Hall's first appearance, he appeared from an in-court holding cell inside the Cowlitz County jail. C●A Ex. A.



C●A Ex. E.

The court failed to conduct an individualized inquiry into the necessity of the use of the in-court holding cell. 2VRP 2-7.[4] The court denied Mr. Hall's request for bail, instead setting bail eight times higher. 2VRP 7.

The State charged Mr. Hall with two counts of felony harassment and one count of interfering with a healthcare facility. CP 1-3, 60-62. The State also charged, but later dismissed, one count of assault in the fourth degree, domestic violence. *Id.* The informations did not allege that Mr. Hall was on community custody at the time of the offenses. *Id.*

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[4] There are two filed verbatim reports of proceedings ("VRPs") in this case. The second (filed November 12, 2024) is not consecutively paginated after the first (filed November 21, 2023). For clarity, citations to the first will be designated as 1VRP, and citations to the second will be designated as 2VRP.

Mr. Hall appeared from the in-court holding cell inside the Cowlitz County jail without individualized inquiry or findings for at least two pretrial hearings: an arraignment on an amended information and a readiness hearing. 2 VRP 8-16; C●A Ex. B, C.

Mr. Hall never waived his right to a jury trial, and he had a jury trial. CP 94-97. Regarding the first charge of harassment, the State presented evidence that Mr. Hall made statements predicting a police officer's demise. RP 143-44. This officer, Ralph Hines, had Mr. Hall in his custody and took him to the hospital. RP 119. There, Mr. Hall was tied to a hospital bed at his wrists and ankles. Ex. 1. While tied down, a nurse, Brittany Lealao, cut off Mr. Hall's t-shirt instead of lifting it up to conduct an ultrasound. RP 121, 187. This angered Mr. Hall, who allegedly threatened to slit Ms. Lealao's throat. RP 121, 189. Ms.

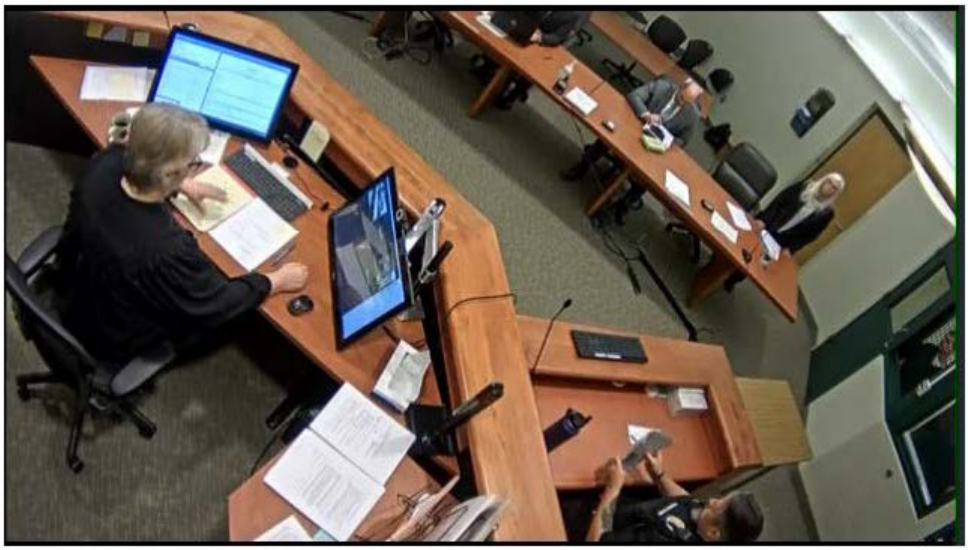
Lealao found out about the threat when another nurse told her about it later. RP 189.

Later, Mr. Hall called Officer Hines a "fat fuck" and predicted that he would be dead in two weeks. RP 143-44. Mr. Hall repeated a form of this statement multiple times, at the end adding "guaranteed," and "I swear to God." RP 143-45.

The trial court instructed the jury about the charges of harassment, using an ordinary negligence definition of true threats. CP 72, 75. The jury convicted Mr. Hall of felony harassment against Officer Hines, a lesser included charge of misdemeanor harassment against Ms. Lealao, and the charge of interference with a health care facility. CP 95-97.

At sentencing, Mr. Hall again appeared from the in-court holding cell inside of the Cowlitz County jail

without the court conducting a necessity inquiry beforehand. 1VRP 306-313.



CPA Ex. H.

The court rejected Mr. Hall's request for a DOSA sentence. RP 311. It instead sentenced Mr. Hall to 60 months of state prison, which was the high term of the standard range for the offense of felony harassment with an offender score of nine (51 – 60 months, because the statutory maximum for harassment is 60 months). *Id.*; CP 98. One of the nine offender score points was

due to the court's finding that Mr. Hall was on community custody at the time of the offenses. CP 98.

Mr. Hall's attorney orally "stipulated" to Mr. Hall's offender score of nine. RP 307. However, Mr. Hall never waived his right to a jury finding on his offender score, either orally or in writing.

E. ARGUMENT

1. Washington's Courts of Appeals are uniformly and unreasonably failing to follow United States Supreme Court precedent; this Court must act to preserve the right to a jury trial on every fact which increases a defendant's sentence

The United States Supreme Court issued another significant case in its 6th Amendment jurisprudence last year in *Erlinger*. 602 U.S. 821. Twenty-five years ago, the Court unambiguously declared that, pursuant to a defendant's rights to a jury trial and due process, only a jury may find facts that increase the prescribed range of penalties to which a criminal defendant is

exposed. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). "When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." *Alleyne v. United States*, 570 U.S. 99, 114–15 (2013).

The singular exception to this rule, first articulated in *Almendarez-Torres*, is that a judge may find the fact of a prior conviction. *Erlinger*, 602 U.S. at 837; *Almendarez-Torres v. United States*, 523 U.S. 224, 247, (1998). *Erlinger* clarified that this exception is extremely narrow: "[u]nder [this] exception, a judge may 'do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.'" *Erlinger*, 602 U.S. at 838, quoting *Mathis v. United States*, 579 U.S. 500, 511–12 (2016); *see also* Tobie Smith, *Calling*

Balls and Three Strikes, 63 San Diego L. Rev. 7 (forthcoming 2026), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5406266 ("*Erlinger* . . . confirms that while *Almendarez-Torres* remains good law, it is not good for much."). To the Supreme Court, the circumscription of the prior conviction exception is a settled question. *Erlinger*, 602 U.S.. at 838 ("We have reiterated this limit on the scope of *Almendarez-Torres* over and over, to the point of downright tedium." (internal quotations omitted)).

What facts are beyond the scope of the prior conviction exception is exemplified by *Erlinger*. There, the defendant faced more severe punishment for his offense of conviction if he had three prior qualifying convictions that were committed on different occasions. *Id.* at 825. The Supreme Court held that determining whether these offenses occurred on different occasions

was a "fact-laden inquiry," requiring consideration of the timing, the locations and their proximity, and the purpose and character of the offenses. *Id.* at 834. Because the resolution of this factual question increased the defendant's sentence, a judge was not permitted to find it by a preponderance of the evidence. *Id.* at 835.

Determining whether new offenses were committed while a defendant is on community custody is a similarly fact-laden inquiry, likewise requiring proof beyond a reasonable doubt to a jury under the Sixth and Fourteenth Amendments.

a. The Sentencing Reform Act permits judicial factfinding in violation of the Sixth and Fourteenth Amendments

The Sentencing Reform Act ("SRA") prescribes the sentence for all felony offenses. RCW 9.94A.505(1). The SRA defines a "standard sentencing range" for

each offense. RCW 9.94A.506, 9.94A.530(1). This range has a minimum and a maximum term of imprisonment that are determined by the seriousness level of the offense of conviction and the defendant's offender score. RCW 9.94A.510; 9.94A.525. The court must sentence within this range unless an aggravating circumstance is proven beyond a reasonable doubt to a jury (or freely and voluntarily admitted by the defendant). RCW 9.94A.535(2), 9.94A.530.

Although an offender score obviously includes prior convictions, it can also be increased by one point if the defendant was on community custody at the time of the instant offense. RCW 9.94A.525(19). A one-point increase in an offender score increases the minimum and maximum terms of imprisonment for a "standard range sentence." *See* RCW 9.94A.510.

Whether someone is on community custody at the time of their offense is a fact-laden inquiry requiring information beyond "what crime, with what elements, the defendant was convicted of.'" *Erlinger*, 602 U.S. at 838. The court must determine the timeframe of community custody to determine if the defendant was still on it. The date community custody begins depends on the date the person was released from incarceration. To determine a release date, one first must know the beginning date of incarceration. This fact is not in any sentencing document.

Even if the beginning date is known, the release date is variable because the defendant can reduce his sentence by good behavior, extraordinary medical placement, and other things. RCW 9.94A.728; 9.94A.729(1)(a). On the other hand, an inmate's release date can be extended for various reasons. RCW

72.09.712(a); 9.94A.728 (victim notification); RCW 9.94A.171(1) (escape or new conviction). Thus, the beginning date of community custody is a fact outside of the record of conviction because the end date of incarceration is so variable.

Additionally, the length of community custody can be similarly lengthened or shortened based on events occurring after the conviction and sentence. RCW 9.94A.171(2) (tolling for absconding); WAC 137-30-080(2)(f) (violations and return to custody); WAC 137-30-080(1) (reduction due to good behavior). Thus, the length of time that a person remains on community custody is not apparent from the conviction, either. A judge could not determine this fact consistent with the Sixth and Fourteenth Amendments.

b. The Courts of Appeals unreasonably refuse to apply Erlinger

Despite the clarity of the Supreme Court's reasoning, Washington's Courts of Appeals have concluded that *Erlinger* does not apply to sentencing under the SRA. *See, e.g.*, *State v. Frieday*, 33 Wn.App.2d 719, 565 P.3d 139 (2025), *rev. denied*, __ P.3d __, 2025 WL 2542014 (Sept. 1, 2025); *State v. Anderson*, 31 Wn. App. 2d, 552 P.3d 803 (2024), *rev. denied*, 3 Wn.3d 1034, 559 P.3d 1013 (2024); *State v. Herndon*, 33 Wn. App. 2d 1073, at *13-14 (2025); *State v. Monroe*, __ Wn. App. __, 2025 WL 2437705, at *9 (Aug. 25, 2025); *State v. Amsden*, __ Wn. App. __, 2025 WL 2223474, at *6 (Aug. 5, 2025).

Instead, the courts have chosen to follow precedent from this Court, which was always suspect but is now unsustainable after *Erlinger*. This puts our State out of touch with a growing and near uniform

consensus that probation or parole status is a fact that cannot be judicially found.[5] This Court must grant review because its body of law about the scope of the *Almendarez-Torres* exception conflicts with clear, constitutionally-grounded Supreme Court precedent. RAP 13.4(b)(3).

c. This Court's decision in Jones *is constitutionally unsustainable after* Erlinger

This Court's holding from nearly twenty years ago in *Jones* directly contradicts *Erlinger's* narrow

[5] *Butler v. Curry*, 528 F.3d 624 (9th Cir. 2008) (holding that probation status cannot be judicially found); *People v. Wiley*, 570 P.3d 436, 439 (Cal. 2025) (holding *Erlinger* required it to overturn prior decisions); *New Jersey v. Carlton*, 328 A.3d 944, 953 (N.J. Super. Ct. App. Div. 2024) (holding *Erlinger* abrogates New Jersey precedent); *Pennsylvania v. Shifflett*, 335 A.3d 1158, 1175 (Pa. 2025) (concluding the defendant's acceptance of a pretrial diversion agreement does not fall within the prior conviction exception."); *Jackson v. Florida*, 410 So. 3d 4, 10–11 (Fla. Dist. Ct. App. 2025) (holding "habitual felony offender" determinations must be made by a jury and found beyond a reasonable doubt post-*Erlinger*).

interpretation of *Almendarez-Torres*. 159 Wn.2d 231, 149 P.3d 636 (2006). *Jones* relied on an expansive interpretation of the *Almendarez-Torres* exception to conclude that community custody status may be found by judicial factfinding. *Id.* at 239-240. It reasoned that because a community custody determination rests on the interpretation of "documents," including DOC records or a presentence report, it was the kind of factfinding a judge can do. *Id.* at 239, 244-45.

This Court drew a distinction between sentencing enhancements based on facts related to the offense and those related to the defendant's recidivism. *Id.* at 241. It interpreted Supreme Court precedent to only require jury determination for the former, not the latter, in order to "give effect to the prior conviction exception" of *Almendarez-Torres*. *Id.* Whether the defendant was on community custody at the time of the instant offense

was related to recidivism and therefore could be found by a judge, this Court concluded. *Id.*

Far from sanctioning more exceptions to "give effect to" the only permissible one, the United States Supreme Court has gone to great lengths to "expressly delimit[]" the reach of *Almendarez-Torres*. *Erlinger*, 602 U.S. at 838 (citation omitted). It has not endorsed a distinction between "recidivism" and "offense" facts. It has expressly stated that the court is allowed to find only "what crime, with what elements, the defendant was convicted of." *Id.* at 838 (quotation omitted). Considering the presentence report or DOC records to determine the timeframe of a defendant's community custody, as this Court allows, is beyond that task. *See Jones*, 159 Wn.2d at 244-45. Instead, that is for a jury to find beyond a reasonable doubt.

Jones therefore directly contradicts *Erlinger* on an issue of federal constitutional interpretation, for which the United States Supreme Court's interpretation controls. *State v. Radcliffe*, 164 Wn.2d 900, 906, 194 P.3d 250 (2008). This Court must rectify its caselaw with clear Supreme Court precedent. RAP 13.4(b)(1), (b)(3). That requires reversing the Court of Appeals and granting Mr. Hall a resentencing.

d. On resentencing, the court cannot consider a point for community custody status because the State did not charge it in the information

Due process requires that any fact that increases the maximum penalty for a crime, other than the fact of a prior conviction, must be included in the charging document. *Apprendi*, 530 U.S. at 476; *see also State v. Recuenco*, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008) (*Recuenco III*) ("Our cases have required the State to

include in the charging documents the essential elements of the crime alleged.").

Historically, if an "'indictment or "accusation . . . lack[ed] any particular fact which the laws ma[d]e essential to the punishment," it was treated as "no accusation at all.'" *Erlinger*, 602 U.S. at 831, *quoting United States v. Haymond*, 588 U.S. 634, 642 (2019) (quotation omitted)). Due process requires these facts be included in the charging document because it "enables the defendant to predict the legally applicable penalty" from the face of the charging document. *Alleyne*, 570 U.S. at 113–14.

The informations in this case violated due process because they did not allege that Mr. Hall was on community custody at the time he committed the offenses. CP 1-3, 60-62. A defendant cannot be convicted, or in this case, have his punishment

increased, by a fact that was not charged. *Recuenco III*, 163 Wn.2d at 441-42; *see also Stirone v. United States*, 361 U.S. 212, 217 (1960) (reciting rule that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him."); *State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942) (holding it error to instruct jury on alternate means of crime not charged). To allow otherwise would render this due process protection meaningless. Therefore, on resentencing, the court cannot add a point to Mr. Hall's offender score due to his alleged community custody status at the time of this offense.

2. This Court should accept review to clarify its caselaw regarding RAP 2.5(a)(3) manifest error review because this Court of Appeals and others remain confused

The Court of Appeals invoked the procedural bar of RAP 2.5 to preclude review of Mr. Hall's *Luthi* error because it misunderstood this Court's jurisprudence

and improperly shifted the burden to Mr. Hall to show "prejudice" and "practical and identifiable consequences," without understanding what those terms really mean in this Court's jurisprudence. *State v. Hall*, 34 Wn. App. 2d 1056, 2025 WL 1517435 at *7 (2025).

Appellate courts can review manifest constitutional errors despite a party's failure to object below. RAP 2.5(a)(3). As this Court has explained, a "manifest" error requires a showing of "actual prejudice." *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). But "actual prejudice" here means "a plausible showing that the asserted error had practical and identifiable consequences." *Id.* But wait, there's more: practical and identifiable consequences means that "the trial record must be sufficient to determine the merits of the claim." *Id.*

After the appellant shows that an error is constitutional and manifest, a prejudice analysis generally occurs through the longstanding, constitutional harmless error analysis. *O'Hara*, 167 Wn.2d at 99. That test requires that the State show that the constitutional error was harmless beyond a reasonable doubt in order to avoid a reversal. *State v. Jackson*, 195 Wn.2d 841, 856, 467 P.3d 97 (2020).

Two unnecessary terms in this Court's manifest error jurisprudence have caused the Courts of Appeals much confusion and consternation: "actual prejudice" and " practical and identifiable consequences."[6] If this

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[6] S*ee, e.g., State v. Stengrund*, No. 85841-6-I, 2025 WL 33374 (Jan. 6, 2025) (unpublished) (interpreting "practical and identifiable consequences" to shift burden to defendant to show prejudice to gain review of constitutional error); *State v. Helms*, No. 86857-8-I, 2024 WL 4880777 (Nov. 25, 2024) (unpublished) (similar); *State v. Tramble*, No. 86845-4-I, 2024 WL 4880888, at *2–3 (Nov. 25, 2024) (unpublished) (same).

Court got rid of these unnecessary definitions, the end result would still be the same: a manifest error is one which is apparent from the face of the record. *See O'Hara*, 167 Wn. 2d at 99–100.

And because "actual prejudice" does not have its normal meaning, this Court has had to distinguish it from the harmless error standard to try to prevent the very confusion the Court of Appeals exhibited here. *Id.* ("In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review.").

In Mr. Hall's case, the Court of Appeals confused the "actual prejudice" language, thereby improperly shifting the burden to Mr. Hall to show prejudice before evaluating the merits of his *Luthi* assignment of error. *Hall*, 34 Wn. App. 2d 1056 at *6.

Erroneously shifting the burden to Mr. Hall to show "actual prejudice" from a *Luthi* error required him to prove the impossible. Indeed, this Court held that improper courtroom restraints may "unconsciously prejudice" the judge. *Luthi*, 3 Wn.3d at 261 (quotation omitted). Due to the confirmed and "unknown risks of prejudice from implicit bias," and because of the "practical impossibility" of a defendant proving this bias or prejudice, "the State bears the burden to prove beyond a reasonable doubt that the constitutional violation was harmless" in cases of unlawful courtroom restraint. *Jackson*, 195 Wn.2d at 856.

But here, the Court of Appeals shifted the burden to the defense to show prejudice before it would even review the error. This incorrect reading of RAP 2.5 undermines this Court's holding in *Luthi* because flipping the burden to the defendant, a burden that

rests on the State because of the practical impossibility of the defense proving prejudice, means that no *Luthi* error could ever be remedied on appeal. This Court should grant review to clarify its manifest constitutional error jurisprudence to avoid such mistakes in the future. RAP 13.4(b)(3), (b)(4).

3. As applied, the Court of Appeal's employment of RAP 2.5(a)(3) to preclude review of Mr. Hall's *Luthi* error violated Supreme Court precedent about the retroactivity of new constitutional rules to all cases on appeal

The Court of Appeals decided that the *Luthi* error in Mr. Hall's case was not "manifest" because the trial court could not have corrected the error, given what it knew at the time, because "*Luthi* had not yet been decided." *Hall*, 34 Wh. App. 2d 1056 at *7. It relied on language from this Court's decision in *O'Hara*, stating:

> It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the

> potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

167 Wn.2d at 100. But this language, when applied to new constitutionally-required procedural rules, such as the rule announced in *Luthi*, violates a defendant's right to due process. U.S. Const., amend. XIV; Const. art. I, § 3. This Court must grant review to correct this mistaken application of this language from its decision to new rules of constitutional procedure. RAP 13.4(b)(3).

"[F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Griffith v. Kentucky*, 479 U.S. 314, 322

(1987). After the Supreme Court has "decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review." *Id.* at 322-23.

In *Griffith*, the United States Supreme Court considered whether cases not yet final on appeal should benefit from the new procedural rule for challenges to racially-motivated peremptory challenges created in *Batson*. *Id.* at 316; *Batson v. Kentucky,* 476 U.S. 79 (1986). The Court reasoned that new constitutional rules must be applied to all cases not yet final because of "the principle that this Court does not disregard current law, when it adjudicates a case pending before it on direct review." *Griffith*, 479 U.S. at 326.

This rule also avoided treating similarly situated defendants differently: as illustration, while Batson

received the benefit of the rule because the Supreme Court randomly decided his case, all other defendant/appellants would not receive this benefit unless the rule applied to all cases not yet final. *Id.* at 327. The Court "therefore [held] that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Id.* at 328. The Court did not exempt rules where the judge or litigants could not have foreseen the change and therefore did not "preserve" the issue. *See id.*

Courts of this State have historically interpreted new Constitutional rules to apply to defendants, whether they objected at trial or not. The Court of Appeals has previously recognized that "[i]t is simply unfair, and a contradiction of the Supreme Court's retroactivity rule, to hold that an appellant cannot

challenge" an issue "made unlawful by intervening case law." *State v. Harris*, 154 Wn. App. 87, 98–99, 224 P.3d 830 (2010). In that case, the Court of Appeals cited the wisdom of Judge Richard Posner, who explained that "[a] party should be allowed to take advantage of a decision rendered during the pendency of his case, even if he had not reserved the point decided, if the decision could not have reasonably been anticipated." *Id.* at 95-96, *quoting McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 108 (7th Cir. 1990).

The Court of Appeals' decision in this case to employ RAP 2.5 to preclude review of Mr. Hall's *Luthi* error violated this Supreme Court precedent. Although the court properly determined that the trial court's error in requiring Mr. Hall to appear from the cell at the back of the Cowlitz County jailhouse courtroom was constitutional, *Hall*, 34 Wn. App. 2d 1056 at *6, it

failed to apply *Luthi's* new constitutional rule of criminal procedure to Mr. Hall on his direct appeal. *Id.* This violated *Griffith*. 479 U.S. at 325.

Regardless of whether the Court of Appeals properly understood the requirements of RAP 2.5(a)(3) (as addressed above), no Court Rule can violate a constitutional requirement. The constitution always trumps. U.S. Const. art. VI, cl. 2. This Court should grant review because the Court of Appeals' employment of a procedural bar to preclude review of a meritorious new issue is a serious issue of constitutional law. RAP 13.4(b)(3).

4. This Court should grant review because the Court of Appeals failed to apply controlling, intervening constitutional caselaw to Mr. Hall's sufficiency of the evidence argument

Mr. Hall was tried for the charges of harassment in this case prior to the United States Supreme Court's new true threats case of *Counterman v. Colorado*. 600

U.S. 66 (2023). The jury instructions in his case therefore included only a ***mens rea*** of negligence, when the Supreme Court has held that a true threat requires ***at least*** a ***mens rea*** of recklessness. CP 75. The he Court of Appeals held the instructions erroneous. *Hall*, 34 Wn. App. 2d 1056 at *5.

In addition to the instructional error, Mr. Hall challenged the sufficiency of the State's evidence underlying the harassment allegations for failing the requirements of a "true threat" after *Counterman*. Despite Mr. Hall's clear assignment of error, the Court of Appeals explicitly held that Counterman did not apply to Mr. Hall's sufficiency challenge. *Id.* at *4.

No party argued that this was the appropriate way to analyze the issue. The Court of Appeals cited no caselaw supporting its decision to only interpret the sufficiency claim in light of the given, constitutionally-

deficient instructions. A conviction for harassment which lacks sufficient evidence of the elements of harassment must be reversed and dismissed just as a conviction for harassment which violates the First Amendment because the alleged threats do not constitute "true threats" must be reversed and dismissed.

And when the version of a statute requires a definitional overlay of "true threats" in order to comply with First Amendment jurisprudence, as does the harassment statute, a sufficiency analysis must consider both the elements and the definitional overlay. If it did not, appellate courts could affirm harassment convictions which satisfied constitutionally inadequate elements but not the requirements of the First Amendment. The absurdity of this interpretation

is patent, yet this is the interpretation the Court of Appeals applied in Mr. Hall's case.

This interpretation also conflicts with Supreme Court precedent holding that due process requires that courts must apply new criminal procedural rules to all cases not yet final on appeal. *Griffith*, 479 U.S. at 322. Because this erroneous sufficiency review effectively prevents relief to any appellant, convicted with insufficient evidence before a landmark, constitutional case is issued, from obtaining relief, this Court should grant review to correct this mistaken analysis. RAP 13.4(b)(3), (b)(4).

F. CONCLUSION

For all of the foregoing reasons, Mr. Hall requests that this Court grant review and reverse.

Counsel certifies this brief contains approximately 4,978 words per Microsoft Word count.

DATED this 10th day of September, 2025.

Respectfully submitted,

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

May 28, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RYAN MCKENNA HALL, Appellant.	No. 58297-0-II UNPUBLISHED OPINION

MAXA, P.J. – Ryan Hall appeals his convictions of felony harassment and misdemeanor harassment and his sentence. After his arrest for an unrelated incident, Hall used threatening language against both his arresting officer and a nurse at the hospital where he received treatment.

The jury was instructed on the definition of "threat" based on existing Washington law that subsequently was rendered erroneous by a United States Supreme Court case, *Counterman v. Colorado*, 600 U.S. 66, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023). Hall appeared at pretrial hearings and at sentencing from an in-court holding cell in a jail courtroom. At sentencing, the trial court determined without a jury finding that Hall was on community custody when he committed the offenses, adding one point to his offender score.

We hold that (1) the State provided sufficient evidence to convict Hall for felony harassment and misdemeanor harassment under the trial court's jury instructions; (2) the court's

harassment jury instructions were rendered erroneous by *Counterman*, but the error was harmless beyond a reasonable doubt; (3) we decline to consider for the first time on appeal Hall's argument that the trial court violated his due process rights under *State v. Luthi*, 3 Wn.3d 249, 256, 549 P.3d 712 (2024), when it restrained him in an in-court holding cell during pretrial hearings and sentencing because Hall cannot show manifest error; (4) the trial court's finding at sentencing that Hall was on community custody when he committed his offenses was permissible despite the holding in *Erlinger v. United States*, 602 U.S. 821, 144 S. Ct. 1840, 219 L. Ed. 2d 451 (2024); (5) Hall's statement of additional grounds (SAG) claims are based on evidence outside the record and are unreviewable; and (6) as the State concedes, the crime victim penalty assessment (VPA) and the jury demand fee must be stricken from the judgment and sentence.

Accordingly, we affirm Hall's convictions and sentence, but we remand for the trial court to strike the VPA and the jury demand fee from the judgment and sentence.

FACTS

Background

On February 5, 2023, the Kelso Police Department took Ryan Hall into custody on an unrelated charge.[1] While he was being transported to jail, Hall told Officer Ralph Hines he had ingested fentanyl pills. He then was rerouted to a hospital. Hines was assigned to guard Hall as he was checked out medically.

During Hall's examination, nurse Brittany Lealao cut off his shirt to allow the doctor to conduct an ultrasound of his chest. This agitated Hall and he proceeded to repeatedly berate

[1] The State initially charged Hall with fourth degree assault – domestic violence. The State eventually decided to not pursue this charge because the victim was uncooperative.

Lealao, insulting her, calling her offensive names, and referring to her using racial slurs. Hall continued to yell at other hospital staff and told another nurse that when he got out the next day he would "see them on the streets." Report of Proceedings (RP) at 188. After Lealao left the room, Hannah Cathcart, an emergency room technician, heard Hall say, "I will slit her throat, the one that cut my shirt off." RP at 160. Nurse Joshua Bockman heard Hall make a similar threat about Lealao: "I'll cut your throat, you n***** bitch." RP at 178. Cathcart later told Lealao about the threat Hall had made. Further, Hall threatened to knock out both Hines and Bockman.

Hines, Cathcart, and Lealao all testified that they did not believe Hall was intoxicated. Hall denied drinking anything. The doctor discharged him and stated in his evaluation that he did not see any mental issues.

Once Hall was released, Hines transported him to the Cowlitz County Jail. According to Hines, Hall guaranteed that Hines would be dead in 14 days. The State played the video from Hines's body camera, but some of the words Hall said were indiscernible. Hines recounted the following in his report:

> [Hall] said, "You will take your last breath within two weeks. In 14 days, you will no longer be on this Earth." When I asked Hall what he meant by that, he said, "You will be deceased in 14 days. Guaranteed."

RP at 144.

After they arrived at the jail, Hall again threatened Hines, stating, "You're going to be dead within two weeks . . . I swear to God." RP at 145. Following this second incident, Hines told Hall that he would charge him for the threats.

The State charged Hall with felony harassment – criminal justice participant for his statements to Hines, felony harassment – threat to kill for his statements toward Lealao, and interference with health care facility.

Pretrial Proceedings

At Hall's first appearance, he appeared from an in-court holding cell in a jail courtroom inside of the Cowlitz County Jail. The trial court did not undertake an individualized inquiry into the necessity of the holding cell. But Hall did not object to appearing in the holding cell. The prosecutor informed the court of the alleged death threats and the fact that Hall had 18 prior warrants, nine prior felonies, and 17 prior misdemeanors. Hall requested bail be set at $5,000, but the court set bail at $40,000.

Hall appeared from the in-court holding cell again at an arraignment on new information and at a trial readiness hearing. The trial court again did not conduct an individualized inquiry into the necessity of the holding cell on either occasion. Hall did not object to either of these appearances.

Trial and Sentencing

At trial in April 2023, Hines, Lealao, Cathcart, and Bockman testified to the facts stated above.

Hines testified that he was placed in reasonable fear that Hall's threats would be carried out because Hall would be getting out of jail. Hines stated that although he had been threatened before, this instance stood out because Hall repeated the threat more than once and swore to God about it.

Lealao testified that Hall's threat that he was going to slit her throat left her "[f]earful, terrified, traumatized." RP at 190. She stated that she was in reasonable fear that Hall would carry out the threat.

The trial court instructed the jury that a person commits the crime of felony harassment when they "threaten[] to cause bodily injury immediately or in the future to another person," the

person is placed "in reasonable fear that the threat will be carried out," and the threat involves a threat to kill the person. Clerk's Papers (CP) at 72. The court gave jury instruction 10 regarding the legal definition of a threat:

> To be a threat, a statement or act must occur in a context or under such circumstances where *a reasonable person*, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

CP at 75 (emphasis added).

The jury found Hall guilty of felony harassment involving Hines, guilty of the lesser offense of misdemeanor harassment involving Lealao, and guilty of interference with a health care facility.

At his sentencing hearing, Hall again appeared from an in-court holding cell and the trial court did not conduct an individualized inquiry into the necessity of the holding cell. Hall did not object.

Hall's attorney stipulated to an offender score of 9, made up of eight points for prior felony convictions and an additional point for being on community custody when he committed the present offenses. The standard sentencing range for felony harassment given Hall's offender score was 51-60 months, and the State asked the trial court to impose the maximum sentence. Hall requested a 55.5 month prison based drug offender sentencing alternative (DOSA) sentence.

The trial court stated,

> [W]hen watching that video and listening to it at the hospital, and in the police vehicle, that one thing was very clear: that those people were there, especially at the hospital, to help you and to serve you. And instead, they were treated with absolute worst behavior.
>
> What you called people, what you said to people, and what you threatened to do -- I apologize, I don't recall her name -- the victim, that was nothing -- doing nothing but her job.

> And then Officer Hines, again, doing his job. He's there to protect the community, serve the community, and he has a right to do that, free from having his life threatened.
>
> . . . .
>
> But what I listened to and what I heard were clear threats. And it's for that reason that in Count II of the felony harassment I am going to impose the 60 months. I am not giving the prison based DOSA.

RP at 310-11.

The trial court sentenced Hall to 60 months for the felony harassment conviction and 364 days for the other two convictions, all to be served concurrently. The court waived most discretionary legal financial obligations, but imposed the $500 VPA and the $250 jury demand fee.

Hines appeals his felony harassment and misdemeanor harassment convictions and his sentence.

ANALYSIS

A. HARASSMENT CONVICTIONS

Hall argues that under *Counterman*, 600 U.S. 66, his harassment convictions must be reversed because (1) the State did not present sufficient evidence that his speech was a "true threat" and (2) the jury instruction defining a "threat" was erroneous. We disagree regarding sufficiency of the evidence. We agree that jury instruction 10 was erroneous, but we conclude that the error was harmless.

1. Sufficiency of Evidence

Hall argues that the State presented insufficient evidence to convict him of harassment in light of the new "true threat" standard announced in *Counterman*. We disagree.

a. Standard of Review

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the fact at issue beyond a reasonable doubt. *State v. Bergstrom*, 199 Wn.2d 23, 40-41, 502 P.3d 837 (2022). In a sufficiency of the evidence claim, the defendant admits the truth of the evidence, and we view the evidence and all reasonable inferences drawn from that evidence in the light most favorable to the State. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). We defer to the trier of fact's resolution of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *Bergstrom*, 199 Wn.2d at 41.

b. Legal Principles

RCW 9A.46.020(1)(a)(i) states that a person is guilty of harassment if they knowingly threaten to cause bodily injury. Because this statute criminalizes pure speech, to avoid violating the First Amendment Washington courts have interpreted RCW 9A.46.020(1)(a)(i) as prohibiting only "true threats." *State v. Allen*, 176 Wn.2d 611, 626, 294 P.3d 679 (2013).

Under Washington law existing at the time of trial, a true threat was a " 'statement made in a context or under such circumstances wherein a *reasonable person* would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life' of another person." *State v. Kilburn,* 151 Wn.2d 36, 43, 84 P.3d 1215 (2004) (emphasis added) (internal quotation marks omitted) (quoting *State v. Williams,* 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001)). A true threat is one that arouses fear in the person threatened, and that fear does not depend on the speaker's intent. *Kilburn,* 151 Wn.2d at 43. Therefore, a statement will be considered a true threat if a "reasonable speaker would foresee

that the threat would be considered serious." *State v. Schaler,* 169 Wn.2d 274, 283, 236 P.3d 858 (2010). Under this standard, the mens rea of harassment is simple negligence. *Id.* at 287.

After Hall was convicted but during this appeal, the United States Supreme Court decided *Counterman*, 600 U.S. 66. The Court held that the First Amendment requires that the true threat determination must include a "subjective mental-state requirement." *Id.* at 75. The State must prove the defendant made the threat at least recklessly. *Id.* at 69, 79. Specifically, "[t]he State must show that the defendant consciously disregarded a substantial risk that [their] communications would be viewed as threatening violence." *Id.* at 69. The defendant must be "aware 'that others could regard [their] statements as' threatening violence and 'deliver[ed] them anyway.' " *Id.* at 79 (quoting *Elonis v. United States*, 575 U.S. 723, 746, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015) (Alito, J., concurring in part and dissenting in part)).

c. Analysis

Hall argues that the evidence was insufficient to convict him of both counts of harassment because the State did not prove that his speech was a true threat under the recklessness standard imposed in *Counterman*.

Hall is mistaken that *Counterman* applies to his sufficiency challenge. Sufficiency of the evidence regarding a true threat necessarily must be determined based on the trial court's instruction 10, which defined "threat" under existing Washington law: whether "a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat." CP at 75. The trial court did not require the State to prove recklessness, and therefore the State had no reason to present evidence of recklessness.

Under the reasonable person standard in instruction 10, the State clearly presented sufficient evidence of a true threat. Hall conceded as much at oral argument. Hall threatened to slit Lealao's throat. Hines testified that Hall guaranteed that Hines would be dead within 14 days. Hall later swore to God that Hines would be dead in two weeks. No witness testified that Hall used any humorous language or that his threats were in jest.

Viewing the evidence in this case in a light most favorable to the State, we conclude that a reasonable person would foresee that the statement or act would be interpreted as a serious expression of intention to carry out these threats. Therefore, we hold that sufficient evidence supported both of Hall's harassment convictions under the trial court's instructions.

2. True Threat Jury Instruction

Hall argues that jury instruction 10 – which defined a threat – was erroneous under *Counterman*. The State concedes that the jury instruction was erroneous, but argues that the error was harmless. We agree with the State.

a. Erroneous Instruction

The trial court instructed the jury that to be a threat,

> [A] statement or act must occur in a context or under such circumstances where *a reasonable person*, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

CP at 75 (emphasis added).

Although this true threat instruction was correct under the existing law, under *Counterman* the instruction is erroneous. *State v. Calloway*, 31 Wn. App. 2d. 405, 421-22, 550 P.3d 77, *review granted*, 3 Wn.3d 1031 (2024). The instruction omitted the constitutional requirement that *Hall* – not just a reasonable person – " 'consciously disregarded a substantial

risk that [their] communications would be viewed as threatening violence.' " *Id.* at 421 (quoting *Counterman*, 600 U.S. at 69).

Accordingly, we agree that jury instruction 10 was erroneous.

b. Harmless Error

We review an error in the harassment jury instructions relating to the true threat requirement under a constitutional harmless error standard. *Calloway*, 31 Wn. App. 2d. at 423-24. We presume prejudice, and the State must prove beyond a reasonable doubt that the error was harmless. *Id* at 424. An error is harmless if we are convinced beyond a reasonable doubt that the jury would have reached the same verdict without the error. *Id.*

Omitting the required mens rea from the jury instructions " 'may be harmless when it is clear that the omission did not contribute to the verdict,' for example, when 'uncontroverted evidence supports the omitted element.' " *Id.* (quoting *Schaler*, 169 Wn.2d at 288). However, "an 'error is not harmless when the evidence and instructions leave it ambiguous as to whether the jury could have convicted on improper grounds.' " *Id.* (quoting *Schaler*, 169 Wn.2d at 288).

Here, Hall made unambiguous threats to both Hines and Lealao. Hines testified that Hall told him he would be dead within 14 days, guaranteed. Hall then said that Hines would be dead in two weeks, "I swear to God." RP at 145. Hall said that he would slit Lealao's throat after telling a nurse that he would see them on the streets when he got out the next day.

In concluding that harmless error applied in that case, the court in *Calloway* noted that no witnesses testified that "[the defendant's] statements were hyperbolic, that [the defendant] had a longstanding pattern of saying similar things without meaning them, or that intoxication or symptoms of a mental illness affected [the defendant's] state of mind on the day of the incident." 31 Wn. App. 2d at 425. The same is true here. Multiple witnesses testified that they did not

believe Hall was intoxicated, and Hall himself denied drinking. The doctor found no signs of mental illness during Hall's examination.

Given the repeated and adamant threats to kill Hines and the very specific threat to slit Lealao's throat, no reasonable jury would find that Hall did not consciously disregard a substantial risk that his statements would be viewed as threatening violence. Therefore, we hold that the jury instruction error was harmless beyond a reasonable doubt.

B. COURT APPEARANCE IN AN IN-COURT HOLDING CELL

Hall argues that the trial court forcing him to appear at multiple pretrial hearings and at sentencing in an in-court holding cell violated his due process rights under the Fourteenth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution. The State does not dispute Hall's claim on the merits, but argues that Hall's claim cannot be raised for the first time on appeal because the claim does not constitute a manifest error affecting a constitutional right under RAP 2.5(a)(3). We agree with the State.

1. Applicable Law

After Hall was convicted but during this appeal, our Supreme Court decided *Luthi*, 3 Wn.3d 249. In *Luthi*, the court addressed whether a criminal defendant can be required to appear at court proceedings from the same Cowlitz County in-court holding cell used in this case. *Id.* at 251.

In a matter of first impression, the court concluded that the in-court holding cell was a "restraint" on defendants that implicated due process protections. *Id.* at 260-61. The court emphasized that the in-court holding cell was a restraint on defendants because it "undermines the presumption of innocence, the ability to consult with counsel, and the dignity of the proceedings." *Id.* at 261. Therefore, the court held that the routine practice of requiring

defendants to appear from an in-court holding cell violates due process unless the trial court makes an "individualized finding that such a restraint is necessary for courtroom security reasons." *Id.* at 263.

The State does not argue that Hall's appearances from the in-court holding cell were lawful under *Luthi*.

2. Manifest Error

RAP 2.5(a) states that the "appellate court may refuse to review any claim of error which was not raised in the trial court." Here, Hall did not object to appearing from the in-court holding cell. Therefore, he did not preserve the error. However, a party may raise a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3).

There is no question that Hall's claimed error under *Luthi* is constitutional in nature. The question is whether the claimed error is manifest.

An error is manifest if the appellant shows actual prejudice. *State v. J.W.M.*, 1 Wn.3d 58, 91, 524 P.3d 596 (2023). The appellant must make a plausible showing that the claimed error had practical and identifiable consequences. *Id.*

Here, Hall argues manifest error regarding only his appearances when the trial court set bail and when the trial court sentenced him. Regarding bail, Hall notes that he requested bail of $5,000 but the court imposed a $40,000 bail. But Hall has not shown how appearing in an in-court holding cell made any difference. The court knew that Hall had been detained in jail on as-yet unproven charges, and the prosecutor informed the court of the alleged death threats and the fact that Hall had 18 prior warrants, nine prior felonies, and 17 prior misdemeanors. So it is hard to see how appearing in an in-court holding cell could have affected the court. And there is no indication that Hall needed to talk to his attorney during the bail hearing.

Regarding sentencing, Hall notes that he requested a court-based DOSA but the trial court imposed the maximum 60 month sentence. But at that point, Hall had been convicted, so there was no concern about presumption of innocence. And there is no indication that Hall needed to talk to his attorney during sentencing. Finally, the court explained in detail why it imposed the 60 month sentence rather than a DOSA.

Hall argues that under *State v. O'Hara*, actual prejudice refers to "whether the error is so obvious on the record that the error warrants appellate review." 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009). And "to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error." *Id.* at 100.

But the error was not manifest under this standard as well. At the time of Hall's pretrial hearings, trial and sentencing, *Luthi* had not yet been decided. No Washington court had held that a defendant's appearance at nonjury proceedings in an in-court holding cell constituted a restraint subject to due process protections. *See Luthi*, 3 Wn.2d at 258-61. Therefore, the trial court's error was not obvious on the record. In addition, the trial court could not have corrected the error given what the court knew pre-*Luthi*.

Hall also argues that this court should consider this issue under the rule set forth in *State v. Robinson*, 171 Wn.2d 292, 253 P.3d 84 (2011). In that case, the Supreme Court stated,

> [P]rinciples of issue preservation do not apply where the following four conditions are met: (1) a court issues a new controlling constitutional interpretation material to the defendant's case, (2) that interpretation overrules an existing controlling interpretation, (3) the new interpretation applies retroactively to the defendant, and (4) the defendant's trial was completed prior to the new interpretation. A contrary rule would reward the criminal defendant bringing a meritless motion to suppress evidence that is clearly barred by binding precedent while punishing the criminal defendant who, in reliance on that binding precedent, declined to bring the meritless motion.

Id. at 305.

However, the second requirement is not satisfied here. There was no binding precedent holding that having a defendant appear in an in-court holding cell did not violate due process. Hall was free to object – as the defendant did in *Luthi* – without being "clearly barred by binding precedent." *Id.* Therefore, the rule in *Robinson* does not apply.

We conclude that Hall cannot show manifest error. Therefore, we decline to consider Hall's argument regarding the in-court holding cell.

C. TRIAL COURT FINDING ON COMMUNITY CUSTODY

Hall argues that the trial court impermissibly found that he was on community custody at the time of his offenses, which added a point to his offender score. Hall claims that under *Erlinger*, 602 U.S. 821, the fact that he was on community custody was required to be found by a jury, not by the court. The State argues that the trial court properly considered Hall's placement on community custody and that *Erlinger* is not applicable to this case. We agree with the State.

The Fifth Amendment of the United States Constitution guarantees that no person should "be deprived of life, liberty, or property, without due process of law." The Sixth Amendment guarantees criminal defendants the right to a speedy trial by an impartial jury of their peers. The United States Supreme Court has interpreted these Amendments to generally require "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct 2348, 147 L. Ed. 2d, 435. There is a narrow exception to this rule: the trial court may "undertake the job of finding the fact of a prior conviction – and that job alone." *Erlinger*, 602 U.S. at 837.

Our Supreme Court has long adopted the prior conviction exception and held that sentence enhancements based on judicial findings of prior convictions are constitutional. *State v. Wheeler*, 145 Wn.2d 116, 123-24, 34 P.3d 799 (2001). Specific to this case, the Supreme Court in *State v. Jones* held that "[t]o give effect to the prior conviction exception, Washington's sentencing courts must be allowed as a matter of law to determine not only the fact of a prior conviction but also those facts 'intimately related to [the] prior conviction' *such as the defendant's community custody status*." 159 Wn.2d 231, 241, 149 P.3d 636 (2006) (emphasis added) (quoting *United States v. Moore*, 401 F.3d 1220, 1225 (10th Cir. 2005)). "[B]ecause community custody is directly related to and follows from the fact of a prior conviction and because the attendant factual determinations involve nothing more than a review of the nature of the defendant's criminal history and the defendant's offender characteristics, such a determination is properly made by the sentencing judge." *Id.* at 234.

Hall argues that we should disregard *Jones* in light of *Erlinger*. In *Erlinger*, the Court held that the fact determination of whether qualifying convictions were part of different occasions under the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(e)(1), was a question that must be sent to the jury. 602 U.S. at. 821. But the Court expressly limited its ruling to the ACCA. *Id.* at 835. The Court noted that there had been criticism of the prior conviction exception, but it did not revisit that rule. *Id.* at 837-38.

Both this court and Division One of this court have decided that the holding in *Erlinger* is limited to the "different occasions" inquiry under the ACCA and does not overrule existing Washington precedent. *State v. Frieday*, ___ Wn. App. 2d ___, 565 P.3d 139, 155 (2025); *State v. Anderson*, 31 Wn. App. 2d 668, 681, 552 P.3d 803, *review denied*, 3 Wn.3d 1034 (2024). We agree with these cases, and we conclude that *Erlinger* does not overrule *Jones*. Therefore, we

hold that the trial court did not err in finding that Hall was on community custody when he committed his offenses.[2]

D. SAG CLAIMS

In his SAG, Hall argues that the State's witnesses lied during trial and that the State's use of false testimony was unfair. But these assertions rely entirely on matters outside the record. As a result, we cannot consider them on direct appeal. *State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008). These assertions are more properly raised in a personal restraint petition. *Id.*

E. LEGAL FINANCIAL OBLIGATIONS

Hall argues, and the State concedes, the VPA and jury demand fee should be stricken. We agree.

Effective July 1, 2023, RCW 7.68.035(4) prohibits courts from imposing the VPA on indigent defendants as defined in RCW 10.01.160(3). *See State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023), *review granted*, 4 Wn.2d 1009 (2025). For purposes of RCW 10.01.160(3), a defendant is indigent if they meet the criteria in RCW 10.101.010(3)(a)-(c). Although this amendment took effect after Hall's sentencing, it applies to cases pending on appeal. *Ellis*, 27 Wn. App. 2d at 16. The trial court found Hall was indigent under RCW 10.101.010(3)(a)-(c), and therefore the VPA must be stricken.

[2] Hall also argues that the State was required to allege in the information that he was on community custody when he committed his offenses for the court to add a point to his offender score based on that fact. However, he cites no specific authority for this proposition. In light of our holding above, we reject this argument.

The trial court imposed the jury demand fee on Hall after finding him indigent. The jury demand fee may not be imposed on indigent defendants. RCW 10.46.190. Therefore, the jury demand fee must be stricken.

CONCLUSION

We affirm Hall's convictions and sentence, but we remand for the trial court to strike the VPA and the jury demand fee from the judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, P.J.

We concur:

PRICE, J.

CHE, J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

August 14, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RYAN MCKENNA HALL, Appellant.	No. 58297-0-II ORDER GRANTING MOTION TO STRIKE AND DENYING MOTION FOR RECONSIDERATION

Appellant moves for reconsideration of the court's May 28, 2025 opinion. Appellant also moves to strike portions of the State's response brief and appendices. Upon consideration, the court grants the motion to strike, but denies the motion for reconsideration. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Price, Che

FOR THE COURT:

Maxa, J.

MAXA, P.J.

WASHINGTON APPELLATE PROJECT

September 11, 2025 - 2:04 PM

Transmittal Information

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