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State v. Skunkcap Appellant's Brief 2 Dckt. 34746

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. JAMES LEROY SKUNKCAP, Defendant-Appellant.	NOS. 34746, 34747, 38249 BANNOCK COUNTY NOS. CR-2006-20842, CR-2006-22110 APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

STATEMENT OF THE CASE

Nature of the Case

James Leroy Skunkcap asks the Idaho Supreme Court to review the opinion of the Idaho Court of Appeals, 2013 Opinion No. 37 (Ct. App. June 14, 2013) (*hereinafter*, Opinion). The Court of Appeals correctly determined that reversal was required in 34746 based upon the district court's failure to correctly instruct the jury in response to the jurors' question about an element of the charged offense of malicious injury to property. However, Mr. Skunkcap submits that the remainder of the Opinion, which affirmed his judgments of conviction and sentences in

34746, 34747 and 38249, is in conflict with previous decisions of this Court and the Court of Appeals, and is not supported by the record on appeal.

Idaho Supreme Court Case Nos. 34746, 34747, and 38249 have been consolidated for appellate purposes. In 34746, Mr. Skunkcap was convicted following a jury trial of felony eluding a police officer, malicious injury to property, and assault. On appeal, he asserts that the district court committed instructional error with regard to each of these charges, and that in each case the court's instructional error relieved the State of its constitutional burden of proof as to key elements of the charged offenses. He further asserts that the prosecutor committed misconduct, rising to the level of a fundamental error, when a police officer testifying for the State appealed to the passion and prejudice of the jurors.

In 38249, which arises out of the same prosecution as 34746, Mr. Skunkcap was permitted to withdraw a prior plea to a persistent violator sentencing enhancement in 34746, and proceeded to a jury trial on this allegation. He was subsequently found by a jury to be a persistent violator of the law. On appeal, he asserts that the district court committed reversible error when it failed to conduct a legally adequate inquiry into a conflict of interest alleged by both Mr. Skunkcap and his appointed counsel. In addition, the district court failed to resentence Mr. Skunkcap as to his underlying offense of felony eluding a police officer upon resentencing, leaving Mr. Skunkcap in the unusual position of being sentenced only to an enhancement with no underlying sentence being enhanced. Because Mr. Skunkcap's entire sentence – including his sentence for the felony offense of eluding an officer – was void upon his withdrawal of his plea to the persistent violator enhancement, Mr. Skunkcap asserts that his sentence must be vacated and his case remanded for resentencing.

In 34747, which arises out of a separate prosecution, Mr. Skunkcap was found guilty of grand theft following a jury trial. As in 38249, the district court in 34747 failed to conduct the legally required inquiry upon being informed by Mr. Skunkcap that he had a conflict with his appointed counsel. Mr. Skunkcap asserts that the trial court's failure to conduct the mandated inquiry is reversible error. Additionally, at Mr. Skunkcap's trial, the prosecutor and a police officer testifying on behalf of the State engaged in a series of questions and responses that elicited – over a dozen times – improper testimony as to Mr. Skunkcap's invocation of his constitutional right to remain silent. Mr. Skunkcap asserts that this use of his invocation of his right to remain silent as proof of his guilt of the charged offense constituted fundamental error that requires reversal of his conviction of grand theft in 34747.

Statement of the Facts & Course of Proceedings

Case No.34746

In 34746, Mr. Skunkcap was charged with felony eluding a police officer, felony malicious injury to property, possession of methamphetamine, grand theft by possession of stolen property, and aggravated assault upon a law enforcement officer. (34746 R., pp.78-80.) Shortly before trial, the State filed a motion to amend the information in this case to allege a persistent violator sentencing enhancement. (34746 Tr.,[1] p.19, Ls.4-12; 34746 R., pp.144-145.) Mr. Skunkcap objected to this amendment due to the untimely nature of the State's request. (34746 Tr., p.19, Ls.15-19, p.20, Ls.18-19.) The State claimed that its filing was delayed due to

[1] In this consolidated appeal, there are multiple volumes of transcripts of proceedings in each of the three cases consolidated before this Court. For ease of this Court's reference, citations to the transcripts and clerk's records in this appeal are made in accordance with the Idaho Supreme Court case number for which the transcript or record was prepared. Additionally, unless otherwise noted, the volumes of transcripts of proceedings refer to the primary volumes of transcripts that contain the trial transcript in each of Mr. Skunkcap's consolidated appeals.

the fact that it was having a difficult time obtaining certified copies of the judgments that formed the basis of the persistent violator allegation. (34746 Tr., p.19, L.22 – p.20, L.10.) The district court granted the State's motion to amend the information to add a persistent violator allegation. (34746 Tr., p.20, L.21 – p.21, L.1; 34746 R., pp.142-143, 221-223.)

At trial, the State presented the testimony of Detective Bill Collins of the Pocatello police department. (34746 Tr., p.74, Ls.16-21.) He testified that, on the day in question, he was observing a residence at a trailer park because he was looking for another individual who he believed might be present there. (34746 Tr., p.75, L.19 – p.76, L.7.) When he drove by the home, Detective Collins saw a truck parked at the mobile home. (34746 Tr., p.76, L.19 – p.77, L.2.) Upon running a check on the license plate, Detective Collins was informed that the truck had been reported as stolen. (34746 Tr., p.77, Ls.3-16.)

After watching the home for one or two hours, the detective saw a man and a woman leave the house; he did not recognize either individual. (34746 Tr., p.80, L.3 – p.81, L.10.) Detective Collins testified that the two loaded some lumber into a trailer and then got into the car that was reported to have been stolen. (34746 Tr., p.80, L.25 – p.83, L.3.) He testified that Mr. Skunkcap was driving the car. (34746 Tr., p.83, Ls.4-5.)

According to Detective Collins' testimony, Mr. Skunkcap initially pulled the car out onto a road traveling in a westward direction, although he appeared to be driving on the shoulder of the road rather than on the paved surface. (34746 Tr., p.83, L.15 – p.84, L.2.) At this point, other police cars in the area were alerted and two police cars began to approach the car driven by Mr. Skunkcap. (34746 Tr., p.84, Ls.3-16.) The detective testified that at least one of these two cars had the emergency lights activated. (34746 Tr., p.84, Ls.13-16.)

After Mr. Skunkcap pulled out onto the road, Detective Collins testified that he pulled his truck out onto the road so that it blocked the far lane of travel. (34746 Tr., p.84, L.17 – p.85, L.1.) Mr. Skunkcap had only travelled about 100 yards down the road when he executed a U-turn and began to drive in the opposite direction down the road. (34746 Tr., p.85, Ls.2-5, p.95, Ls.14-21.) The detective testified that Mr. Skunkcap then drove down the road at approximately 20-25 miles an hour, and ultimately struck the front bumper of the detective's truck while the officer was still inside it. (34746 Tr., p.85, L.2 – p.86, L.9.) When asked how he felt when Mr. Skunkcap collided with the bumper of his truck, Detective Collins testified that he was, "in fear of being hurt." (34746 Tr., p.86, Ls.1-4.)

On cross-examination, the detective admitted that was not dressed in a manner that would generally convey that he was a police officer and that the truck he was driving was an unmarked vehicle that was not equipped with any emergency or warning lights. (34746 Tr., p.91, L.18 – p.92, L.13, p.94, L.24 – p.95, L.2.) Detective Collins also testified that he received no injuries from the collision and that he did not even consult a doctor following the collision. (34746 Tr., p.96, Ls.15-22.)

The State next called Deputy Jeff Young, of the Bannock County Sheriff's Department, to testify. (34746 Tr., p.168, Ls.17-25.) Deputy Young was among the officers who responded to the scene following a report of a suspected stolen vehicle. (34746 Tr., p.169, L.15 – p.170, L.17.) While the officer was nearby the residence where the suspect car was located, he was actually parked about 100 yards away from the home. (34746 Tr., p.171, Ls.8-15.) The deputy was driving a police truck at the time. (34746 Tr., p.171, L.20 – p.172, L.6.)

After Deputy Young waited for about an hour, he received a report that the car the police suspected was stolen was leaving the home where it had been parked. (34746 Tr., p.172, Ls.7-

19.) When he saw the car pull out onto the road, the deputy activated his emergency lights and drove towards the car. (34746 Tr., p.173, Ls.18-23.) According to the deputy's testimony, Mr. Skunkcap was not traveling at a high rate of speed as he drove in the officer's direction – only 15 to 20 miles per hour in the officer's estimation - but Mr. Skunkcap was traveling in the wrong lane of travel and was partially on the shoulder of the road. (34746 Tr., p.173, L.1 – p.174, L.14, p.177, Ls.16-24.) He also testified that, as soon as the deputy activated his overhead lights, Mr. Skunkcap executed a U-turn on the road so that he was no longer approaching the detective. (34746 Tr., p.175, L.4 – p.176, L.3.) Although Deputy Young activated his overhead lights, he testified at trial that he did not have enough time to activate his siren before the collision between Mr. Skunkcap's car and Detective Collins' truck occurred. (34746 Tr., p.181, L.18 – p.182, L.4.)

As the deputy was attempting to pull alongside the car, Mr. Skunkcap struck Detective Collins' truck, which was pulled out across the road. (34746 Tr., p.177, L.25 – p.178, L.12.) He then put his vehicle in reverse and struck another officer's vehicle, and then struck Detective Collins' truck a second time as he attempted to maneuver around it. (34746 Tr., p.178, Ls.2-12.) After Mr. Skunkcap was taken into custody, Deputy Young executed a pat-down search but did not locate any weapons or contraband on Mr. Skunkcap. (34746 Tr., p.196, Ls.8-20.)

Also during Deputy Young's testimony, the State introduced and played for the jury a video recording made by the deputy of the collision between Mr. Skunkcap and the other vehicles. (34746 Tr., p.185, L.22 – p.186, L.10, p.188, Ls.24-25; *see also* State's Exhibit P.) The recording began only a few seconds before the initial collision occurred, and appears to show Detective Collins driving his truck into the lane where Mr. Skunkcap was attempting to navigate a U-turn. (State's Exhibit P.) The actual collisions are not captured on film, but it is

apparent from this video that Detective Collins' vehicle was also driving forward towards the direction of Mr. Skunkcap's car when the second collision with the truck occurred. (State's Exhibit P.) The total duration between when Mr. Skunkcap attempted to navigate a U-turn and the final collision with Detective Collins' vehicle is less than ten seconds. (State's Exhibit P.)

Officer Mike Dahlquist testified next on behalf of the State. (34746 Tr., p.202, Ls.4-12.) As with Deputy Young, Officer Dahlquist was also called in as back-up based upon reports of a suspected stolen vehicle. (34746 Tr., p.203, L.1 – p.204, L.2.) Officer Dahlquist was traveling directly behind Mr. Skunkcap when he collided with Detective Collins' unmarked truck. (34746 Tr., p.211, Ls.1-24.)

When asked about the distance between his car and Mr. Skunkcap at the time of the initial collision, Officer Dahlquist responded:

> The initial time he crashed, I was probably still three or four vehicle lengths behind the suspect vehicle.
>
> **Once I seen him crash into the vehicle, I go, I'm going to have to make some aggressive action here because this guy doesn't have any regard for my safety, Detective Collins, or anybody out on the street that day.**

(34746 Tr., p.211, L.25 – p.212, L.11 (emphasis added).)

When Mr. Skunkcap put the car he was driving into reverse, Officer Dahlquist testified that his car was only two to three feet behind him. (34746 Tr., p.213, Ls.3-8.) The officer also testified that Mr. Skunkcap had turned and looked at him before hitting the officer's truck. (34746 Tr., p.213, Ls.12-14.) According to Officer Dahlquist, the emergency lights on his vehicle were not activated at any point. (34746 Tr., p.220, Ls.14-17.) He further estimated that the entire course of events – from the time Mr. Skunkcap drove the car onto the road until when he first struck Detective Collins' truck – took place within a matter of only two to three seconds. (34746 Tr., p.220, L.21 – p.221, L.2.)

Following the presentation of the remainder of the State's witnesses, Mr. Skunkcap moved the district court for a judgment of acquittal on the State's charges of felony eluding a police officer, grand theft by possession of stolen property, and aggravated assault on a police officer.[2] (34746 Tr., p.402, L.24 – p.404, L.7; R., p.79.) The district court denied this motion. (34746 Tr., p.407, L.10 – p.408, L.21.)

Mr. Skunkcap then testified in his own defense. (34746 Tr., p.415, L.17 – p.416, L.10.) He informed the jury that, on the day of the charged offenses, he was doing some handyman work for his cousin at her trailer home. (34746 Tr., p.416, L.16 – p.420, L.4.) He had driven his own car to his cousin's house. (34746 Tr., p.418, Ls.2-5.)

Later that morning, Mr. Skunkcap and his cousin left the trailer home to get additional supplies for the construction work that Mr. Skunkcap was doing. (34746 Tr., p.420, Ls.5-23.) But they did not take Mr. Skunkcap's car. Instead, the two left in the car that was parked at his cousin's home. (34746 Tr., p.421, Ls.1-6.) Prior to that morning, Mr. Skunkcap had never been inside this car. (34746 Tr., p.421, Ls.14-16.) Mr. Skunkcap's cousin handed him the keys and asked him to drive. (34746 Tr., pp.4-24.)

According to his testimony, Mr. Skunkcap was going to take his cousin to the store. (34746 Tr., p.424, Ls.2-12, p.445, Ls.14-21.) However, a short while after Mr. Skunkcap and his cousin began to pull out onto the road, his cousin told him that she needed to pay her rent and asked if they could turn around. (34746 Tr., p.424, Ls.2-12, p.445, Ls.14-21.) Mr. Skunkcap denied ever having seen any police vehicle or Detective Collins' truck prior to executing the U-turn. (34746 Tr., p. 425, Ls.18-22, p.445, Ls.14-21.) He also denied having any intent to cause

[2] Given that Mr. Skunkcap was acquitted of the State's charges of grand theft and possession of methamphetamine, he does not iterate herein the testimony of witnesses that were solely related to these charges.

damage to any vehicle. (34746 Tr., p.426, Ls.1-5.) According to his estimate, Mr. Skunkcap believed that he was traveling at only 10 miles per hour at the time of the collision with Detective Collins' truck. (34746 Tr., p.426, Ls.9-12.)

Mr. Skunkcap likewise denied ever having backed the car he was driving into Officer Dahlquist's police vehicle. (34746 Tr., p.435, Ls.10-24.) He further asserted that his only intent on the day in question was to get away from the crash – and that he did not intend to injure any police officer or damage any vehicle. (34746 Tr., p.435, L.25 – p.436, L.4.)

Following Mr. Skunkcap's testimony, the district court read the jury instructions. (34746 Tr., p.468, Ls.20-21.) Among these instructions was an elements instruction for felony malicious injury to property. (34746 R., p.246.) The district court also provided the jury with the general definition of "malice" for purposes of this charge in a separate instruction. (34746 R., p.247.) In addition, the district court instructed the jury as to the general definition of assault, and further provided an elements instruction for the offense of simple assault. (R., pp.260, 262.) However, the elements instruction for simple assault that was provided by the district court erroneously bifurcated two parts of a single means of committing assault into alternate findings upon which an assault conviction could rest. (R., pp.260, 262.)

After hearing the jury instructions and closing arguments of the parties, the jury was left to deliberate. (34746 Tr., p.468, L.20 – p.508, L.14.) However, the jury submitted a question to the district court during the course of its deliberations. (34746 Tr., p.508, L.19 – p.509, L.7.) This question read as follows:

> Instruction 17, definition of maliciously
>
> If the act (the second hit of the Collins vehicle) was done due to an effort to escape is that malicious?, or does it mean that the damage was the intent, not the escape. (sic) When committing a wrongful act is any unintentional damage considered malicious?

(34746 Tr., p.509, Ls.1-10; 34746 R., p.281.)

Rather than instruct the jury that the intent element of malice must relate to the actual destruction of the property, as was requested by Mr. Skunkcap, the district court focused instead on the issue of whether the jury could bifurcate out the separate collisions alleged by the State within this charge in order to determine Mr. Skunkcap's guilt. (34746 Tr., p.517, Ls.17-22, p.522, L.20 – p.526, L.17.) The only response that directly addressed the jurors' questions was a statement by the court that, "[a]s far as law goes, all I can tell you is go back and look at the definition of 'malicious' again." (34746 Tr., p.525, L.24 – p.526, L.1.)

Mr. Skunkcap was acquitted of the charge of grand theft by possession of stolen property, possession of methamphetamine, and aggravated assault upon a law enforcement officer; but he was convicted of felony eluding a police officer, malicious injury to property, and simple assault. (34746 Tr., p.529, L.1 – p.533, L.9; 34746 R., pp.282-286.) The jury indicated on the verdict form for malicious injury to property that its finding of guilt was specific solely to the "second collision to 2003 Red Ford Escape." (34746 R., p.226.)

Immediately after the jury verdicts were read, Mr. Skunkcap indicated – through counsel – that he would plead guilty to the persistent violator enhancements alleged by the State. (34746 Tr., p.533, Ls.20-24.) After conducting a brief colloquy, the district court accepted his plea and entered its finding that Mr. Skunkcap was a persistent violator. (34746 Tr., p.534, L.2 – p.538, L.21.) The district court also found, at this time, that Mr. Skunkcap's conviction for malicious injury to property was a felony conviction. (34746 Tr., p.538, L.22 – p.539, L.11.)

Prior to sentencing, Mr. Skunkcap filed a motion with the district court seeking to reduce his conviction for malicious injury to property to a misdemeanor based upon the fact that the jury had factually acquitted him of two of the three collisions alleged by the State in relation to the

felony charge. (34746 R., p.291-292.) In the alternative, Mr. Skunkcap requested a new trial on this charge. (34746 R., p.291-292.) Following a hearing on this request, the district court took the matter under advisement. (34746 Tr., p.545, L.5 – p.552, L.24.) The district court ultimately granted Mr. Skunkcap's motion to reduce his conviction for malicious injury to property to a misdemeanor based upon the insufficiency of the State's evidence to establish that the cost of the damages from the second collision with Detective Collins' vehicle met that required to establish a felony offense. (34746 R., pp.295-300.)

Mr. Skunkcap was sentenced to 18 years, with eight years fixed, for his conviction for felony eluding a police officer with the persistent violator sentencing enhancement. (34746 Tr., p.601, L.23 – p.602, L.11; 34746 R., pp.305-307.) The district court clarified in a subsequent order that the court had enhanced the fixed portion of Mr. Skunkcap's sentence by four years, and the indeterminate portion by nine years, under the persistent violator sentencing enhancement. (34746 R., pp.322-323.) He was also sentenced to six months upon his conviction for misdemeanor malicious injury to property, and to three months upon his conviction for simple assault. (346346 Tr., p.602, Ls.17-22, p.604, Ls.12-20; 34746 R., p.306.) Mr. Skunkcap timely appealed from his judgment of conviction and sentence. (34746 R., p.313.)

Case No.38249

During the pendency of his appeal in 34746, Mr. Skunkcap filed a motion to withdraw his guilty plea to the persistent violator sentencing enhancement in that case on the basis that he was not informed, prior to pleading guilty, as to the consequences of his entry of such plea. (38249 R., pp.1-2.) Prior to the hearing on this motion, counsel for Mr. Skunkcap moved to withdraw from this representation based upon a potential conflict of interest in the case. (38249

R., pp.26-27.) This motion was denied by the district court based upon the court's finding that there was no actual conflict of interest. (38249 Tr., p.12, L.5 – p.16, L.4; 38249 R., p.28.)

After receiving transcripts of Mr. Skunkcap's arraignment in 34746, the district court held a hearing on Mr. Skunkcap's motion to withdraw his guilty plea to the persistent violator sentencing enhancement. (38249 Tr., p.33, L.5 – p.37, L.13.) Mr. Skunkcap was apparently not present at this hearing and therefore was not able to present to the district court his concerns regarding counsel's representation. (38249 Tr., p.12, Ls.9-11, p.74, Ls.17-24.) Following this hearing, the district court granted Mr. Skunkcap's motion and permitted him to withdraw his guilty plea to the persistent violator sentencing enhancement. (38249 Tr., p.36, L.18 – p.37, L.5; 38249 R., pp.31-32.)

Prior to the trial on the persistent violator enhancement, the State filed a motion in limine asking the district court to permit the State to introduce Mr. Skunkcap's guilty plea to the persistent violator sentencing enhancement in 34747, a separate prosecution (discussed *infra*), as evidence at his trial. (38249 R., p.36.) Specifically, the State sought permission to introduce into evidence those portions of the transcript from 34747 during which Mr. Skunkcap pleaded guilty to the persistent violator sentencing enhancement. (38249 R., p.36.) The State also filed a motion in limine seeking to introduce into evidence Mr. Skunkcap's admissions in the prosecution, 34746, as to the persistent violator enhancement despite the fact that the district court specifically permitted him to withdraw this plea. (38249 R., p.38.) Finally, the State filed a motion in limine with the district court seeking the court's permission to introduce evidence of Mr. Skunkcap's underlying conviction of felony eluding a police officer in 34746 so as to inform the jurors as to why they were considering the imposition of the persistent violator sentencing enhancement. (38249 R., p.40.)

The court held a hearing on these motions. (38249 Tr., p.38, L.5 – p.78, L.11.) The district court permitted the State to introduce evidence of Mr. Skunkcap's admission to being a persistent violator in the other prosecution, 34747, but denied the State's motion seeking to put into evidence Mr. Skunkcap's guilty plea to the persistent violator enhancement in this prosecution, 34746, which he was permitted to withdraw. (38249 Tr., p.56, Ls.7-5, p.60, Ls.7-24.) The court further granted the State's request to inform the jury of Mr. Skunkcap's underlying felony conviction for eluding an officer, which was the conviction to which the State was seeking to apply the persistent violator enhancement. (38249 Tr., p.62, L.3 – p.71, L.14.)

At this same hearing, the district court again took up the issue of a potential conflict arising between Mr. Skunkcap and his appointed counsel. (38249 Tr., p.74, L.7 – p.78, L.10.) When asked by trial counsel whether he was comfortable proceeding with appointed counsel's continued representation, Mr. Skunkcap stated unequivocally that he was not. (38249 Tr., p.75, Ls.1-4.) Mr. Skunkcap explained that his current attorney was part of the same office as his former trial counsel from his underlying trial for felony eluding, and was, in Mr. Skunkcap's estimation, under his former counsel's direction. (38249 Tr., p.75, Ls.4-20.) The district court did not question Mr. Skunkcap further on this matter, but instead called for the view of the State as to whether there was a conflict between Mr. Skunkcap and his attorney. (38249 Tr., p.76, Ls.5-6.) After the State opposed Mr. Skunkcap's request for appointment of conflict counsel, the district court denied this motion. (38249 Tr., p.76, L.7 – p.78, L.2.) In doing so, the court found that Mr. Skunkcap had not established a conflict based upon his concerns regarding trial counsel working in the same office as his former counsel. (38249 Tr., p.77, L.9 – p.78, L.2.)

In a letter dated the same day as the district court's denial of his request for appointment of conflict counsel, Mr. Skunkcap reiterated his concerns regarding the representation provided

by trial counsel and his desire for conflict counsel to be appointed. (38249 R., pp.50-55.) He attached letters that he asserted had been sent to trial counsel and were not responded to. (38249 R., pp.50-55.) Mr. Skunkcap informed the district court that he had concerns regarding counsel's preparation to defend against the motions in limine that were submitted by the State in this case. (38249 R., p.50.) Additionally, Mr. Skunkcap asserted that his former appellate counsel had told him that his trial counsel in both 34746 and 34747 had tendered ineffective assistance of counsel on multiple grounds.[3] (38249 R., p.51.)

On the day of trial on the persistent violation enhancement, Mr. Skunkcap stipulated to the fact that both crimes alleged by the State in support of its persistent violator allegation were felony offenses. (38249 Tr., p.82, Ls.3-11.) However, the State would still have to prove that Mr. Skunkcap was actually convicted of these offenses for purposes of the persistent violator trial. (38249 Tr., p.82, Ls.16-22.)

At trial, the State, through the testimony of Detective Matson of the Pocatello Police Department, introduced certified copies of Mr. Skunkcap's judgments of conviction for accessory to grand theft and theft without objection. (38249 Tr., p.133, L.24 – p.134, L.9, p.137, L.4 – p.140, L.17; 38249 R., pp.150-159.) The State further read into the record portions of Mr. Skunkcap's guilty plea to the persistent violator sentencing enhancement from the other prosecution, 34747. (38249 Tr., p.143, L.2 – p.145, L.10; 38249 R., p.171.) These admissions, although made in a separate prosecution, concerned the same convictions that were at issue in his persistent violator trial in this prosecution. (38249 Tr., p.143, L.2 – p.145, L.10; 38249 R., p.171.)

[3] Mr. Skunkcap was represented by different appellate counsel at the time of receiving this advisory. (38249 R., p.51.)

Following the presentation of this evidence, the State rested its case. (38249 Tr., p.146, Ls.7-8.) Mr. Skunkcap then moved the district court for a judgment of acquittal on the basis that none of the evidence presented by the State was actually sufficient to prove identity – *i.e.*, that Mr. Skunkcap was the same individual named in the documents put into evidence by the State. (38249 Tr., p.148, L.6 – p.149, L.12.) He further directed the district court to the case of *State v. Medrain*[4] in support of his contentions. (38249 Tr., p.148, L.6 – p.149, L.12.) The State objected and asserted that Mr. Skunkcap's prior admissions from his plea to being a persistent violator in the other prosecution, 34747, were sufficient to establish his identity as the individual subject to the same two prior convictions that were alleged in this case. (38249 Tr., p.150, L.15 – p.151, L.6.)

Based on the State's potential evidentiary deficiency, the district court *sua sponte* ruled that it would permit the State to re-open its case, over Mr. Skunkcap's objection. (38249 Tr., p.159, L.21 – p.160, L.6, p.161, Ls.17-23.) The district court also permitted the State additional time in order to attempt to secure witnesses who could provide testimony establishing Mr. Skunkcap's identity as the person who was the subject of the prior alleged convictions. (38249 Tr., p.162, Ls.12-19.)

However, the individual identified by the State as a potential witness was not disclosed by the State through discovery, and therefore Mr. Skunkcap objected to the presentation of any testimony by this witness. (38249 Tr., p.165, L.23 – p.166, L.11.) On the court's request, the State provided an offer of proof as to what the State anticipated that its undisclosed witness, Sergeant Ian Nelson, would testify to at trial. (38249 Tr., p.166, L.23 – p.167, L.22.) The State indicated that the detective was a case officer on Mr. Skunkcap's case in 34747, and could

[4] *State v. Medrain*, 143 Idaho 329 (Ct. App. 2006).

therefore identify him as the person who entered the plea to the persistent violator allegation that was made in conjunction with that case. (38249 Tr., p.167, Ls.1-22.)

When asked if he needed additional time to prepare to examine this witness, Mr. Skunkcap first iterated his request that this witness be excluded entirely from testifying in light of the fact that the witness had never been disclosed by the State. (38249 Tr., p.168, Ls.2-14.) However, when the district court indicated that it was not considering this option, Mr. Skunkcap asked for additional time to prepare for his examination of this surprise witness. (38249 Tr., p.169, Ls.9-13.) The court only provided Mr. Skunkcap with 30 minutes to prepare. (38249 Tr., p.169, Ls.14-15.) Mr. Skunkcap asserted that this was plainly inadequate to prepare for a witness that he had no notice of, but the district court held fast that it would only permit him 30 minutes. (38249 Tr., p.169, Ls.16-25.)

After the allotted 30 minutes of time, Mr. Skunkcap informed the court that he was not ready to proceed given the minimal amount of time he had to prepare to examine Sergeant Nelson. (38249 Tr., p.170, L.10 – p.171, L.15.) Despite this, the court ordered that the trial proceedings would continue. (38249 Tr., p.171, Ls.16-18.)

Sergeant Nelson testified that he was one of the police officers working on the criminal investigation of the grand theft allegation in 34747. (38249 Tr., p.193, L.19 – p.196, L.14.) He informed the jury – without objection – that Mr. Skunkcap had been convicted of the allegation of grand theft in that case. (38249 Tr., p.199, Ls.1-3.) Sergeant Nelson further testified that he was certain that Mr. Skunkcap was the same individual that was involved in 34747, and that he specifically remembered Mr. Skunkcap entering a guilty plea to the persistent violator allegation in 34747 because the officer was present at the time. (38249 Tr., p.198, L.8 – p.199, L.14.) Over Mr. Skunkcap's objection, the State was also allowed to introduce into evidence a

transcript of the guilty verdict relating to Mr. Skunkcap's conviction for grand theft in 34747. (38249 Tr., p.200, L.20 – p.207, L.6.)

Following the testimony of Sergeant Nelson, both the State and Mr. Skunkcap rested. (38249 Tr., p.219, Ls.2-10.) Mr. Skunkcap was convicted of the persistent violator sentencing enhancement. (38249 Tr., p.259, L.9 – p.263, L.5; 38249 R., pp.111-112.)

At the sentencing hearing, the district court appeared to misapprehend its authority at sentencing, and believed that Mr. Skunkcap's underlying sentence for felony eluding a police officer remained in force upon the withdrawal of his plea to the persistent violator sentencing enhancement that was part and parcel of his prior sentence. (38249 Tr., p.293, Ls.2-10, p.303, L.21 – p.306, L.18.) It is also clear under the record that the district court was inclined to revisit the underlying sentencing determination as a whole, had the district court believed it had the power to do so.

The court first noted that it had additional information about Mr. Skunkcap's positive performance while incarcerated that the court at his original sentence would not have known of. (38249 Tr., p.311, Ls.7-19.) The second indicator of Mr. Skunkcap's rehabilitative potential noted by the district court at his resentencing was the fact that he had accepted responsibility for his actions by the point of his resentencing. (38249 Tr., p.311, L.20 – p.312, L.8.) In the words of the court, Mr. Skunkcap didn't appear to really care about himself or anyone else when he was originally sentenced; and the court believed that this changed in Mr. Skunkcap at the time of his resentencing. (38249 Tr., p.312, Ls.3-8.) The district court at resentencing found that he did, "care about having some sort of life out there" upon his release. (38249 Tr., p.312, Ls.3-8.) At one point, the district court even characterized Mr. Skunkcap's behavior while incarcerated as "stellar." (38249 Tr., p.316, Ls.14-20.)

But the district court also was laboring under the false impression that Mr. Skunkcap's underlying prior sentence for felony eluding a police officer could not be altered by the court. (38249 Tr., p.312, L.9 – p.315, L.16.) In fact, the district court specifically held that it could not alter the five year fixed sentence that the prior sentencing court had imposed for felony eluding a police officer. (38249 Tr., p.314, L.21 – p.315, L.2.) However, it did modify both the fixed and indeterminate portions of the sentence that were previously imposed under the persistent violator sentencing enhancement, – reducing both by three years. (38249 Tr., p.314, L.21 – p.315, L.16.)

The district court thereafter entered a commitment order that treated the persistent violator sentencing enhancement as though it were a separate conviction, and sentenced Mr. Skunkcap to an indeterminate sentence of seven years for his "crime of persistent violator." (38249 R., pp.115-116.)

Following the entry of this order, Mr. Skunkcap filed an Idaho Criminal Rule 35 (*hereinafter*, Rule 35) motion seeking correction of an illegal sentence and further requesting lenience at sentencing. (R., pp.119-121.) Mr. Skunkcap noted that, upon the district court's granting of his motion to withdraw his plea to the persistent violator sentencing enhancement, his prior sentence for felony eluding a police officer that incorporated the persistent violator sentencing enhancement was rendered void. (38249 R., pp.119-121.) Accordingly, Mr. Skunkcap noted that resentencing for his underlying felony offense was required, as the persistent violator sentencing enhancement did not constitute a separate offense with a separate sentence to be imposed. (38249 R., pp.119-121.)

Following a hearing, the district court denied this motion. (38249 Tr., p.318, L.4 – p.327, L.19; 38249 R., pp.134-135.) The court ruled that "the length of sentences on both the Eluding charge and the enhancement charge for being a Persistent Violator will remain unchanged and

continue to run consecutive to Case No. CR-2006-22110-FE," despite the fact that the district court never resentenced Mr. Skunkcap for his underlying conviction of felony eluding and erroneously entered a separate judgment of conviction and sentence solely for Mr. Skunkcap's "crime" of persistent violator. (38249 R., pp.134-135.) Further, the district court appears to have treated Mr. Skunkcap's motion as one merely requesting lenience at sentencing. (38249 Tr., p.326, L.1 – p.327, L.2.)

Mr. Skunkcap timely appealed from the district court's order adjudicating him guilty of the persistent violator sentencing enhancement, as well as from the district court's order denying his Rule 35 motion. (38249 R., p.122.)

Case No.34747

In 34747, Mr. Skunkcap was charged with having committed grand theft based upon the allegation that he stole two saddles. (34747 R., pp.48-49.) The State further alleged that Mr. Skunkcap was eligible for a persistent violator sentencing enhancement. (34747 R., pp.151-152.)

Mr. Skunkcap's original jury trial proceedings were commenced on July 5, 2007. (34747 Tr., p.58, L.8 – p.203, L.15.) However, in the middle of the cross-examination of one of the State's witnesses, defense counsel had a medical emergency requiring the dispatch of paramedics and a mistrial had to be declared. (34747 Tr., p.200, L.6 – p.202, L.5.)

Prior to the retrial, defense counsel moved the district court to be permitted to withdraw from the case. (34747 R., pp.184-185.) Defense counsel informed the court that his relationship with Mr. Skunkcap had deteriorated to the point where, in his belief, continued representation would not be possible. (34747 R., pp.184-185.) Although Mr. Skunkcap opposed this request, the district court found there was good cause to permit the withdrawal. (34747 Tr., p.204, L.5 –

p.212, L.16.) The court appointed other counsel from the public defender's office to represent Mr. Skunkcap and provided new counsel just over one week to prepare the case for trial. (34747 Tr., p.212, Ls.13-19.)

The State's first witness at retrial was Lori Bowers, who was an employee at the store from which the saddles were allegedly stolen. (34747 Tr., p.242, Ls.1-17.) Ms. Bowers was working at the store on the day of the alleged theft. (34747 Tr., p.242, L.24 – p.243, L.11.) She testified that, on this date, she left the store sometime between 1:15 and 1:30 in the afternoon. (34747 Tr., p.243, L.21 – p.244, L.1) As she left the store, she went to the north side of the property, which is where employees of the store normally park. (34747 Tr., p.244, L.9 – p.245, L.21.) The owner of the store, Bill Vickers, would also regularly park his horse trailer in this same parking area. (34747 Tr., p.247, Ls.12-18.) This horse trailer would occasionally contain tack – items such as bridles, horse blankets, saddles and other items related to horseback riding. (34747 Tr., p.248, Ls.17-25.)

On that particular afternoon, Ms. Bowers noticed that there was a blue car parked next to the horse trailer, and a man next to the car who was struggling to put a saddle in the trunk. (34747 Tr., p.246, Ls.19-24, p.250, Ls.15-24.) She identified Mr. Skunkcap as the man who was next to the blue car and was attempting to put the saddle in the car trunk. (34747 Tr., p.251, L.9 – p.252, L.16.) Because she thought it was strange that someone would park their car so far away from the store in order to purchase a saddle when there was much closer parking available, Ms. Bowers wrote down the license plate number of the blue car. (34747 Tr., p.246, Ls.5-18, p.252, L.25 – p.254, L.23.) She also called the store to give them the license plate number. (34747 Tr., p.253, L.13 – p.254, L.2.)

The State also presented the testimony of the owner of the store from which the saddles were allegedly stolen, Bill Vickers. (34747 Tr., p.275, L.19 – p.176, L.7.) In conjunction with his business, Mr. Vickers had been in the business of buying and selling items such as saddles, as well as appraising the value of such items, for many years. (34747 Tr., p.276, L.19 – p.177, L.25.)

Mr. Vickers also stored items in a horse trailer next to his store. (34747 Tr., p.135, L.13 – p.136, L.19.) This trailer has a tack room within it, near the back of the trailer, which can hold three to four saddles. (34747 Tr., p.278, L.1 – p.279, L.22.) On the day of the alleged theft, Mr. Vickers testified that there were three saddles in the trailer, and two were stolen. (34747 Tr., p.281, Ls.15-21, p.296, Ls.17-24.) Mr. Vickers testified that, due to the distance from the area where his trailer was parked to the store, it would be unusual for a person to purchase a saddle in the store and park so far away. (34747 Tr., p.292, L.23 – p.293, L.18.) Upon being told that there was suspicious activity in the parking lot, Mr. Vickers came out of his office at the store and went outside to the check on his horse trailer. (34747 Tr., p.294, L.14 – p.296, L.24.) He saw that two of the three saddles were missing, and that the third had been moved to the floor of the trailer. (34747 Tr., p.296, Ls.17-24.)

Mr. Vickers testified that he was very familiar with the two saddles that were taken, as he purchased them himself for his wife and his mother-in-law. (34747 Tr., p.297, L.3 – p.298, L.16.) The fair market value of these saddles, including upgrades, was estimated by Mr. Vickers to be $1,200 - $1,300 and $1,400 - $1,600, respectively. (34747 Tr., p.303, Ls.7-11, p.307, Ls.6-10.)

Following the testimony of Mr. Vickers, the State called Officer Richard Sampson of the Pocatello Police Department to the stand. (34747 Tr., p.343, L.20 – p.344, L.2.) Officer

Sampson was the officer dispatched to Mr. Vickers' store based upon a report of a theft. (34747 Tr., p.345, L.7 – p.346, L.2.) The officer testified that, upon being given the license plate number written down by Ms. Bowers, he ran the plate number. (34747 Tr., p.348, L.14 – p.349, L.12.) The license plates returned the name of another individual, but upon contacting her and examining her car, officer Sampson discovered that her license plates were not on her vehicle. (34747 Tr., p.349, L.18 – p.350, L.25.) According to the officer's testimony, the owner of the vehicle testified that a man named "Don" had come by earlier and taken the license plates off her car. (34747 Tr., p.352, Ls.9-17.)

The State also called Clyde Dixey to testify. (34747 Tr., p.386, L.23 – p.387, L.1.) Mr. Dixey was a long-time friend of Mr. Skunkcap's. (34747 Tr., p.387, Ls.8-10.) On the afternoon of the alleged theft, Mr. Skunkcap came over to Mr. Dixey's house for a social visit. (34747 Tr., p.388, L.3 – p.389, L.3.) According to Mr. Dixey, during the course of their conversation in front of his home Mr. Skunkcap opened his car trunk and Mr. Dixey saw a saddle inside. (34747 Tr., p.389, L.9 – p.390, L.12.) Mr. Dixey testified that, at one point in the conversation, Mr. Skunkcap asked whether Mr. Dixey would help him sell a saddle. (34747 Tr., p.391, Ls.10-17.)

Mr. Dixey also testified that Mr. Skunkcap left for a time that day, but then returned to Mr. Dixey's house. (34747 Tr., p.393, Ls.18-24.) According to Mr. Dixey, he then went with Mr. Skunkcap to Mr. Skunkcap's sister's house. (34747 Tr., p.393, L.25 – p.394, L.3.) Mr. Dixey remained in the car, but testified that he heard the trunk being opened and some rustling sounds inside. (34747 Tr., p.394, Ls.4-11.) He stated that he did not see the saddles again after that. (34747 Tr., p.394, Ls.12-15.) However, on cross-examination, Mr. Dixey testified that Mr. Skunkcap's family had several horses and that it would not be unusual for them

to also own saddles. (34747 Tr., p.397, Ls.15-21.) He also admitted that Mr. Skunkcap never said where the saddle in his trunk came from. (34747 Tr., p.398, Ls.13-15.)

The final witness presented by the State was Detective Ian Nelson, who was the detective who investigated the alleged theft of the saddles. (34747 Tr., p.402, L.21 – p.404, L.17.) Very early on in the questioning of the detective, the following exchange took place:

Q: Okay. And what did you do next?

A: Detective Thomas and I were charged with **trying to interview** Mr. Edmo and his girlfriend -- I'm sorry, Mr. Skunkcap and his girlfriend, Miss Edmo.

Q: Regarding what?

A: Regarding the incident that had occurred over on Kraft Road.

Q: Okay. **And did you interview the defendant**?

A: No, I did not.

Q: **Did you attempt to?**

A: **Yes**.

Q: Where did you **attempt to interview** the defendant at?

A: At the Pocatello Police Department.

Q: And was that in an interview room?

A: Yes, Detective Interview Room A.

Q: And what did you say to him?

A: I just advised him that we would like to talk to him about the incident that had taken place. **That's about all I got out**.

Q: And that person that you interviewed was James Skunkcap -- **or attempted to interview**?

A: Yes.

(34747 Tr., p.405, L.9 – p.406, L.14 (emphasis added).)

The prosecutor then proceeded at great length to ask a series of questions all relating to Mr. Skunkcap's invocation of his right to remain silent. (34747 Tr., p.407, L.5 – p.408, L.408.) This questioning about Mr. Skunkcap's invocation of his right to remain silent included the following questions:

Q: **Did the defendant invoke his rights?**

A: **More or less. I didn't get to Mirandize him.**

Q: **You never got a chance to read the Miranda warnings**?

A: **No, sir.**

Q: **Okay. And at any point were you able to interview the defendant**?

A: **No.**

(34747 Tr., p.408, Ls.5-13 (emphasis added).)

After questioning Detective Nelson for pages within the transcript regarding Mr. Skunkcap's invocation of his Fifth Amendment rights, the prosecutor then attempted to question the detective about any admissions that Mr. Skunkcap's girlfriend may have made during the course of her interrogation by police. (34747 Tr., p.408, L.15 – p.409, L.5.) Although defense counsel failed to object to any of the State's questions, the district court finally intervened *sua sponte*. First, the district court instructed the jurors that it did not want them to "hold it against Mr. Skunkcap" that he invoked his constitutional right not to talk with police. (34747 Tr., p.409, Ls.6-14.) Second, the district court excused the jury and instructed the State that it would not be allowed to introduce any statements made by Mr. Skunkcap's girlfriend in light of Mr. Skunkcap's confrontation rights. (34747 Tr., p.409, L.11 – p.410, L.25.)

Detective Nelson further testified that none of the police officers ever recovered the saddles that were alleged to have been stolen. (34747 Tr., p.412, L.22 – p.413, L.1.) On cross-examination, the detective further admitted that Ms. Bowers identified an individual other than Mr. Skunkcap in the photo array that the officer provided her during his investigation. (34747 Tr., p.414, L.20 – p.415, L.2.) Mr. Skunkcap's photograph, although not identified by Ms. Bowers, was included in this photo array. (34747 Tr., p.415, Ls.3-7.)

After the State rested its case, Mr. Skunkcap moved the district court for a judgment of acquittal on the State's theft charge. (34747 Tr., p.430, L.18 – p.431, L.17.) The basis for this motion was that the charging document indicated Mr. Vickers was the owner of the saddles, but the evidence indicated that the saddles alleged to have been taken actually belonged to Mr. Vickers' wife and mother-in-law. (34747 Tr., p.430, L.18 – p.431, L.17.) The district court held that this was a question to be determined by the jury and denied Mr. Skunkcap's motion. (34747 Tr., p.433, Ls.3-13.)

The jury convicted Mr. Skunkcap of grand theft. (34747 Tr., p.465, Ls.1-15.) Following the reading of the jury's verdict, Mr. Skunkcap entered a guilty plea to the State's persistent violator sentencing enhancement. (34747 Tr., p.469, L.7 – p.475, L.18.) However, immediately after entering this plea, Mr. Skunkcap informed the district court that he was dissatisfied with his trial counsel's performance, and that he further believed his trial counsel had a conflict of interest that impacted his representation at trial. (34747 Tr., p.476, L.11 – p.478, L.24.) The district court did not inquire as to the basis of this conflict, other than to tell Mr. Skunkcap that he could discuss the matter with the court further at sentencing. (34747 Tr., p.478, Ls.19-24.)

Mr. Skunkcap was sentenced to 18 years, with eight years fixed, upon his conviction for grand theft with the persistent violator sentencing enhancement. (34747 Tr., p.515, L.17 – p.516,

L.2; 34747 R., pp.204-208.) The district court ordered that this sentence run consecutively to his sentences in 34746. (34747 Tr., p.516, Ls.3-7; 34747 R., pp.204-208.)

Thereafter, Mr. Skunkcap filed a Rule 35 motion seeking a reduction of his sentence. (34747 Rule 35 motion, augment.) At the hearing on this motion, counsel for Mr. Skunkcap pointed out to the district court that, under the terms of the sentence imposed, Mr. Skunkcap would not be released from incarceration until he was 57 years old at the earliest, and could be incarcerated until he turned 77 years old. (34747 Tr., p.519, L.19 – p.520, L.4.) Counsel for Mr. Skunkcap pointed out that he had a demonstrated history of gainful employment, and that both sets of charges in this case arose out of a very short period of time during which Mr. Skunkcap had relapsed into methamphetamine use. (34747 Tr., p.520, Ls.9-23.) In addition, Mr. Skunkcap pointed out to the court that his underlying offenses were not alleged to be violent crimes. (34747 Tr., p.520, L.24 – p.521, L.6.)

The State objected to Mr. Skunkcap's request for leniency. (34747 Tr., p.522, L.22 – p.524, L.6.) The district court denied his motion. (34747 Tr., p.525, Ls.1-8.) Mr. Skunkcap timely appealed from the district court's judgment of conviction and sentence. (34747 R., p.209.)

Prior Appellate Proceedings

On appeal, Mr. Skunkcap raised several challenges before the Idaho Court of Appeals regarding his judgments of conviction and sentences in 34746, 34747, and 38249. Although the Court of Appeals ultimately reversed Mr. Skunkcap's judgment of conviction and sentence for malicious injury to property in 34746, the Idaho Court of Appeals denied appellate relief on all of the other grounds asserted on appeal. (Opinion, pp.3-18.) Notably, however, the Court was divided on the question of whether the instructional error in 34746 regarding the elements

instruction for felony eluding a police officer warranted reversal as well. (Opinion, pp.3-20.) Judge Lansing authored a dissent regarding this issue, noting that the district court's non-pattern instruction was likely to mislead the jury and likely reduced the State's burden of proof as to this offense. (Opinion, pp.18-20.)

Mr. Skunkcap timely petitions this Court for review of his case.

ISSUES

1. Did the district court err in No.34746 when it failed to properly instruct the jury, in response to the jurors' question, that the *mens rea* of malice for the crime of malicious injury to property applies to the act of the destruction of the property?

2. Did the district court err in No.34746 where its instructions on felony eluding a police officer constituted a comment on the evidence and relieved the State of its constitutional burden of proof as to the material elements of this offense, and where the district court's instructions on simple assault relieved the state of its burden of proof as to all of the elements of the charged offense?

3. Did the prosecutor commit misconduct, rising to the level of a fundamental error, in No.34746 when a police officer provided irrelevant, non-responsive testimony designed to appeal to the passions and prejudice of the jury?

4. Did the district court err in denying Mr. Skunkcap's motion alleging an illegal sentence in No.38249 because Mr. Skunkcap's original sentence for felony eluding a police officer, with a persistent violator sentencing enhancement, became void upon the district court granting his motion to withdraw his plea to this enhancement and the district court never resentenced Mr. Skunkcap for the underlying offense?

5. Did the prosecutor commit misconduct, rising to the level of a fundamental error, in No.34747 when the prosecutor intentionally elicited testimony from a police officer regarding Mr. Skunkcap's exercise of his Fifth Amendment right to remain silent?

ARGUMENT

I.

The District Court Erred In No.34746 When It Failed To Properly Instruct The Jury, In Response To The Jurors' Question, That The *Mens Rea* Of Malice For The Crime Of Malicious Injury To Property Applies To The Act Of The Destruction Of The Property

A. Introduction

Mr. Skunkcap asserts that the Idaho Court of Appeals correctly determined that the instructional error in 34746 regarding the district court's response to the jurors' questions about the malicious injury to property charge requires reversal of that conviction.

The jury in Mr. Skunkcap's case asked the district court for clarification as to whether the *mens rea* of malice in the State's charged offense of malicious injury to property was limited to the injury to the property, or could be established based upon the commission of any wrongful act from which damage occurs. The district court did not directly answer the jury's question regarding this issue, but instead merely referred the jurors to the general definition of malice that was provided in the jury instructions. Because the district court failed to correctly instruct the jury that the intent of malice for the offense of malicious injury to property must relate to the injury of the property itself, the court's instructions to the jury relieved the State as to its burden of proof regarding the intent element for this offense. Accordingly, Mr. Skunkcap asserts that the court's instruction to the jury was reversible error.

B. Standard Of Review

In general, it is a matter of the trial court's discretion to determine whether and how to respond to questions posed by the jury during deliberations. *State v. Meira*, 132 Idaho 70, 71 (Ct. App. 1998); I.C.R. 30(c). However, issues of the propriety of the jury instruction provided

by the district court are questions of law that are reviewed *de novo* by this Court. *State v. Sheahan*, 139 Idaho 267, 273 (2003).

C. The Idaho Court of Appeals Correctly Determined That The District Court Erred When It Failed To Properly Instruct The Jury, In Response To The Jurors' Question, That The *Mens Rea* Of Malice For The Crime Of Malicious Injury To Property Applies To The Act Of The Destruction Of The Property

In the underlying Court of Appeals' Opinion in this case, the Court correctly determined that the district court committed instructional error that requires reversal of Mr. Skunkcap's conviction for malicious injury to property in 34746. (*See* Opinion, pp.3-6.)

During their deliberations, the jurors in this case sent the district court a written question regarding the charged offense of malicious injury to property. (34746 R., p.281.) The jurors were apparently confused as to whether the *mens rea* of malice, as set forth in a separate instruction from the elements instruction, could apply to any action by Mr. Skunkcap so long as the act was "wrongful," or whether the intent had to be formed with regard to the damage of the property. (34746 R., p.281.) The district court, after hearing arguments from both Mr. Skunkcap and the State, merely referred the jurors back to an instruction defining the term "maliciously" that was not incorporated into the court's elements instruction for malicious injury to property. (34746 Tr., p.508, L.19 – p.526, L.15.) Mr. Skunkcap had previously argued to the district court that the appropriate response would be to instruct the jurors that, "unless the damage was intended, it wouldn't be malicious." (34746 Tr., p.517, Ls.17-22.) Because the district court failed to properly instruct the jury that the *mens rea* of malice is specific to the intent to damage the property, and because the court's response did not fully and accurately instruct the jurors in this case, Mr. Skunkcap asserts this was instructional error.

Idaho Code § 18-7001 defines the offense of malicious injury to property, and provides in pertinent part that this offense is committed where an individual, "**maliciously injures or destroys** any real or personal property not belonging to the defendant." I.C. § 18-7001(1) (emphasis added). The *mens rea* of malice is clearly attached under this statute to the specific acts of injuring or destroying property.

Accordingly, case law interpreting this offense has determined that, in order to satisfy the malice element of malicious injury to property, there must be a showing that the defendant intended to injure the property of another. *State v. Nunes*, 131 Idaho 408, 408-410 (Ct. App. 1998). *State v. Nastoff*, 124 Idaho 667, 668-671 (Ct. App. 1993). The Idaho Court of Appeals' opinion in *Nastoff* is particularly instructive on this point.

In *Nastoff*, the State asserted a position that is expressly reflected in the jurors' question to the district court in this case regarding the malice element for malicious injury to property: *i.e.*, that the intent to do *any* wrongful act would suffice to establish malice for this offense, even if the resulting damage is inadvertent or unintended. *Nastoff*, 124 Idaho at 669. Notably, the question posed by the jurors in Mr. Skunkcap's case was: "When committing a wrongful act is any **unintentional** damage considered malicious?" (34746 Tr., p.281 (emphasis added). This position was clearly rejected by the *Nastoff* Court.

The court in *Nastoff* engaged in an extensive analysis of the language of I.C. § 18-7001 in ultimately concluding that the intent specifically to cause the resulting damage was required:

> Section 18-7001 established two components for commission of the crime of malicious injury to property – a culpable act or result (injury to the property of another) and a harmful state of mind (malice). The statute states that one is guilty of the offense who "maliciously injures or destroys ... property...." **The use of "maliciously" to modify the verbs "injures or destroys" indicates that the act that must be performed with intent is the injuring or destroying of property.** We do not perceive from the plain language of the statute any implication that the intent to do a *different* wrongful act may be engrafted upon the proscribed

> conduct of damaging property to provide the requisite malice for criminal liability under I.C. § 18-7011. **The words of the statute do not imply a legislative intent to create criminal liability under this section where the injury to the property was an unintended consequence of conduct that may have violated another statute. Hence, we conclude by its plain language, I.C. § 18-7002 creates culpability for malicious injury to property only where the defendant's conduct causing the injury is accompanied by an intent to injure the property of another.**

Nastoff, 124 Idaho at 669-670; *see also Nunes*, 131 Idaho at 409-410 ("The word 'maliciously' is used in the first clause of the statute and describes the requisite state of mind with which the injury or destruction of property is carried out.").

Under this legislative scheme, the State was required to prove beyond a reasonable doubt that Mr. Skunkcap had the specific intent to injure or damage the cars with which he collided. And this was the exact area of the jurors' confusion – whether they could find that the State had established malice from any "unintentional damage," or whether the finding of malice was limited to the damage itself. (34746 R., p.281.) However, the district court failed to correctly instruct the jurors as to the State's burden of proof at trial, instead merely telling the jurors that, "[a]s far as law goes, all I can tell you is go back and look at the definition of 'malicious' again." (34746 Tr., p.525, L.24 – p.525, L.1.) This response was error that both misled the jurors as to the State's burden of proof at trial and prejudiced Mr. Skunkcap.

There are two cases that are instructive as to what is an appropriate response to such questions from the jury and what is not. First, *State v. Armstrong* provides an example of an appropriate response to a question posed by the jury regarding the State's burden of proof at trial. *See State v. Armstrong*, 142 Idaho 62, 64-66 (Ct. App. 2005). The jury in *Armstrong*, a possession of methamphetamine case, asked the district court whether the defendant could still be convicted if the defendant believed that he did not have any methamphetamine left. *Id.* at 64. The district court responded by referring the jury to the instructions which defined possession;

and clarified that the jurors' hypothetical would not of itself preclude a finding of possession, so long as the jury determined that the State had otherwise established possession under the instructions. *Id.*

The Court of Appeals in *Armstrong* held that this was an appropriate response to the jurors' question for two primary reasons. First, the district court referred the jury back to the instructions (plural), and referenced each of the instructions that set forth the elements of the offense and defined the terms used therein. *Id.* at 65. Second, the district court correctly informed the jury that the hypothetical they posed would not legally eliminate criminal liability under the law defining his offense. *Id.* at 65-66. Accordingly, the court in *Armstrong* held that the trial court did not err in its response to the jurors' question.

This case is unlike *Armstrong*. Unlike the trial court in *Armstrong*, the district court in this case did not correct the jurors' misunderstanding of the law – *i.e.*, that a conviction could be sustained upon proof of any wrongful act if the damage caused was "unintentional damage." (*See* 34746 R., p.281.) Instead, the trial court in this case told the jurors that it could not provide them an answer to that question, "[a]s far as the law goes." (34746 Tr., p.525, L.24 – p.526, L.1.)

Second, and equally important, the trial court in this case did not refer the jury back to the complete instructions regarding the charged offense of malicious injury to property. The district court only instructed the jurors to, "go back and look at the definition of 'malicious' again." (34746 Tr., p.525, L.24 – p.526, L.1.) In the set of instructions provided by the district court, and unlike the model pattern instructions for the offense of malicious injury to property, the definition of "malicious" was only presented in a separate instruction, and was not incorporated into the instructions setting forth the elements for this offense. (34746 R., pp.246-247; *compare*

ICJI 1301, 1302.) If the jurors referred back – as they were instructed to do by the district court – to just this definition, it would appear to the jurors as though any unintended damage could be used as a basis to sustain a conviction, as this instruction merely provides that, "[t]he word 'maliciously' means the desire to annoy or injure another or the intent to do a wrongful act." (34746 R., p.247.) Nothing in this instruction would inform the jury that the malicious intent was specific to the damage to the property itself; therefore, the district court's response was likely to both confuse the jurors and to cause prejudice to Mr. Skunkcap by reducing the State's burden of proof at trial.

While this case is unlike *Armstrong*, the court's instructional error is akin to that which occurred in *State v. Folk* and, therefore, the same result is dictated. *State v. Folk*, 151 Idaho 327, 339-342 (2011). In *Folk*, the jury sent a question to the district court regarding the scope of the conduct that could be used as a basis to convict the defendant of the offense of lewd conduct. *Id.* at 339-340. In response, the district court provided the jury with a list of the statutory acts which could generally be used to sustain an allegation of lewd conduct – as opposed to the actual act alleged by the State in the information – and further grafted the word "etc." onto the end of this list. *Id.* at 340. The *Folk* Court held that this was error.

First, the *Folk* Court noted that this was not a direct, nor a legally accurate response. *Id.* Additionally, the Court held this response was error because it permitted the jurors to convict the defendant for conduct that was outside of that defined as part of the criminal offense by statute. *Id.* at 340-342. As was stated succinctly by the Court, "the jury instruction must not permit the defendant to be convicted of conduct that does not constitute the type of crime charged." *Id.* at 342.

The jury in this case was left with the impression that it could convict Mr. Skunkcap if damage to property occurred in the course of any wrongful act – regardless of whether he harbored the specific intent required to damage the property itself – based upon the trial court's instructions. Because this error had the obvious potential to confuse the jurors, and prejudiced Mr. Skunkcap by reducing the State's burden of proof as to the *mens rea* of his charged offense, the Idaho Court of Appeals correctly determined that reversal of Mr. Skunkcap's conviction for malicious injury to property is required.

II.

The District Court Erred In No.34746, Where Its Instructions On Felony Eluding A Police Officer Created An Unlawful Presumption In The State's Favor And Relieved The State Of Its Constitutional Burden Of Proof As To The Material Elements Of This Offense, And Where The District Court's Instructions On Simple Assault Relieved The State Of Its Burden Of Proof As To All Of The Elements Of The Charged Offense

A. Introduction

The district court in this case, employing non-pattern jury instructions regarding the elements of the charged offenses against Mr. Skunkcap, relieved the State of its constitutional burden beyond a reasonable doubt as to two of the charged offenses: felony eluding a police officer and assault. A divided panel of the Court of Appeals held that, because the non-pattern instruction employed statutory language from the statute governing the offense of felony eluding an officer, this modified instruction did not operate to relieve the State of its burden of proof at trial. Mr. Skunkcap asserts that this conclusion is in conflict with precedent from this Court, which looks to whether the effect of the language operates to reduce the State's burden of proof where the trial court presents statutory language in a manner that departs from the meaning of the statutory provision.

The Court of Appeals also held that the doctrine of invited error precludes Mr. Skunkcap from challenging an elements instruction that affirmatively relieves the State of its burden of proving all of the elements of an offense at trial. However, prior precedent from the Court of Appeals and from other jurisdictions indicates that there are limits on the application of the doctrine of invited error – specifically, where such an error plainly is made without any apparent strategic purpose. Mr. Skunkcap asks that this Court accept his petition for review and further asks this Court to clarify that, where the instructional error affirmatively relieves the State of its burden of proving disputed elements of a charged offense, the doctrine of invited error does not apply.

B. Standard Of Review And General Legal Standards

The question of whether the jury was properly instructed is a question of law that this Court reviews *de novo*. *State v. Pearce*, 146 Idaho 241, 247 (2008); *State v. Rolon*, 146 Idaho 684, 693 (Ct. App. 2008). This Court reviews the jury instructions as a whole in order to determine whether the instructions fully and accurately reflect applicable law. *Rolon*, 146 Idaho at 693.

Additionally, although Mr. Skunkcap does not appear from the record on appeal to have objected to the district court's jury instructions, this failure to object appears to be immaterial to this Court's standard of review pursuant to the Idaho Supreme Court's recent holding in *State v. Draper,* if the jury instructions relieved the State of its constitutional burden of proof. *See State v. Draper*, 151 Idaho 576, 587-592 (2011).

In *Draper*, it was abundantly clear that the defendant's challenges to the jury instructions in that case were raised for the first time on appeal. *Id.* at 587-588. Among the challenges raised was an assertion that the elements instruction provided to the jury for the charge of conspiracy to

commit murder omitted an essential element of the charged offense. *Id.* at 589-592. Despite the State's argument that a different standard applied to this claim on appeal, the *Draper* Court held that, not only did such claims always rise to the level of a fundamental error, but that the same standard of review for these claims would apply regardless of whether there was an objection at trial.

First, regarding the fact that such an assertion inherently raised a claim of a fundamental error, the *Draper* Court held:

> Draper's argument is that the jury instructions relieved the State of its duty to prove all elements of the charges beyond a reasonable doubt. If these arguments are correct, Draper has been denied his right to due process and those errors would rise to the level of a fundamental error. "The United States Supreme Court has held that in criminal trials, 'the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to this requirement.'" Here, if the instruction omitted a contested element of the crime, it would have violated Draper's due process rights and would consequently rise to the level of a fundamental error.

Id. at 588 (internal citation omitted).

The *Draper* Court did not engage in the three-part test for non-objected to trial error that is set forth in part of the Idaho Supreme Court Opinion in *State v. Perry*, 150 Idaho 209 (2010), which defines the standard of review for various types of errors on appeal, despite the fact that there was no objection at trial to the instructional error.[5] *See Draper*, 151 Idaho at 589-592. Instead, the *Draper* Court applied the singular standard articulated in *Perry* for **all** jury instruction errors. *Id.* at 591. And this standard, in turn, is taken from the U.S. Supreme Court Opinion in *Neder v. United States*, 527 U.S. 1 (1999). *Id.*; *see also Perry*, 150 Idaho at 223-224.

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[5] The *Draper* Court's treatment of jury instruction error is entirely consistent with its prior Opinion in *Perry,* which likewise analyzed instructional error separately than other trial errors within its discussion of the standards of appellate review, and did not distinguish between objected-to and non-objected-to jury instruction errors with regard to the appropriate standard of appellate review. *See Perry*, 150 Idaho at 223-224.

Neder, Draper, and *Perry* all hold that the test for whether the omission of an essential element from the jury instructions is harmless is whether a reviewing court can conclude, beyond a reasonable doubt, that the omitted element was supported by overwhelming and uncontroverted evidence, such that the jury verdict would be the same absent the error. *Neder v. U.S.*, 527 U.S. 1, 17 (1999); *Draper*, 151 Idaho at 591; *Perry*, 150 Idaho at 224. Put another way, where a rational jury could have found that the State failed to prove the omitted element, the instructional error cannot be harmless and the reviewing court shall vacate the conviction. *Neder*, 527 U.S. at 19; *Perry*, 150 Idaho at 228.

C. The District Court's Non-Pattern Elements Instruction Regarding Felony Eluding A Police Officer Both Relieved The State Of Its Burden Of Proof As To All Of The Elements Of This Offense, And Unlawfully Created An Evidentiary Presumption In The State's Favor; And This Error Rose To The Level Of A Fundamental Error

1. Contrary To The Conclusion Of The Idaho Court Of Appeals In This Case, The District Court's Non-Pattern Elements Instruction Improperly Created An Evidentiary Presumption In The State's Favor Regarding The State's Burden Of Proof Regarding Felony Eluding A Police Officer

In this case, the district court provided the jury with a non-pattern jury instruction setting forth what the court represented as the elements for felony eluding a police officer. This instruction provided that:

> In order for the defendant to be guilty of Fleeing or Attempting to Elude a Peace Officer, the State must prove each of the following:
>
> 1. On or about the 14th day of November, 2006
>
> 2. In the county of Bannock, State of Idaho;
>
> 3. Defendant JAMES LEROY SKUNKCAP, the driver of[6];

[6] This Court may wish to note that, by referring to Mr. Skunkcap directly as "the driver," of the motor vehicle in this case within the pattern instructions, the court was likewise relieving the State of its burden of proof that Mr. Skunkcap was actually driving the motor vehicle. *See* I.C. § 49-1404; ICJI 1032. However, given that it was uncontested at trial that Mr. Skunkcap

4. a Motor Vehicle; to wit: a blue Toyota Camry bearing Idaho license 1BF9120, in the Kraft Rd. and Main St. area;

5. Did willfully flee or attempt to elude a pursuing police vehicle;

6. when given a visual or audible signal to bring the vehicle to a stop; and

7. while doing so, causes damage to the property of another or bodily injury to another.

*** It is sufficient proof that a reasonable person who knew or should have known that the visual or audible signal given by a peace officer was intended to bring pursued vehicle to a stop.*

If each of the above has been proven beyond a reasonable doubt, you must find the defendant guilty. If any of the above has not been proved beyond a reasonable doubt, you must find the defendant not guilty.

(34746 R., p.245 (emphasis in the original).)

It is the above-quoted, italicized language that is at issue for this Court. This language, while similar to language appearing in I.C. § 49-1404, is presented by the district court in this non-pattern instruction as creating a presumption in the State's favor – *i.e.*, that it is sufficient proof for the charged offense of felony eluding if the jury believes that a reasonable person knew or would have known that he or she was being signaled to stop. However, the district court misunderstood the meaning and import of this language within I.C. § 49-1404, as this language actually sets up an evidentiary **burden** for the State regarding the nature of the signal given by police – it does not create a presumption in the State's favor.

The majority opinion in this case held that, because the italicized language from the district court's elements instruction contained similar language as that found in I.C. § 49-1404, there was no instructional error in this case. (Opinion, pp.6-9.) However, as correctly noted by

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was driving the vehicle at the time of the alleged felony eluding, he does not raise any issue herein regarding this infirmity with the district court's instructions.

the dissent in this case, the district court's instructions not only modified the statutory language, but presents the language at issue in a manner divorced from its context and further in a manner that "could well have been understood by a reasonable juror to mean that the State did not have to prove the defendant's actual knowledge of the signal to stop..." (Opinion, pp.18-20.)

The legislative history of the disputed language in I.C. § 49-1404 demonstrates why the district court's instruction was error. Idaho Code § 49-1404 defines the offense of fleeing or attempting to elude a police officer, and establishes that:

> Any driver of a motor vehicle who willfully flees or attempts to elude a pursuing police vehicle when given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a misdemeanor. The signal given by a peace officer may be by emergency lights or siren. The signal given by a peace officer by emergency lights or siren need not conform to the standards for decibel ratings or light visibility specified in section 49-623(3), Idaho Code. *It is sufficient proof that a reasonable person knew or should have known that the visual or audible signal given by a peace officer was intended to bring the pursued vehicle to a stop.*

I.C. § 49-1404(1) (emphasis added).

The italicized language was added to I.C. § 49-1404 in 1996. *See* S.L. 1996, ch. 255, § 1.

Prior to the July 1, 1996 amendment, the Idaho Supreme Court had determined that, in order to avoid constitutional infirmity due to vagueness, the provisions of I.C.§ 49-1404 were to be read in conjunction with the requirements for emergency lights and sirens that were contained in I.C. § 49-623(3) – *i.e.*, that the siren must have a decibel rating of at least one hundred (100) at a distance of ten feet and that the emergency lights must be visible in a 360 degree arc at a distance of 1,000 feet under normal atmospheric conditions.[7] *State v. Bedard*, 120 Idaho 869, 871 (1991). Therefore, in order to provide sufficient evidence that the defendant was guilty of

[7] After the time the defendant committed the alleged offense in *Bedard*, but prior to the opinion in that case, the provisions of I.C. § 49-1402 were renumbered to I.C. § 49-1404 and the provisions of I.C. § 49-606 were renumbered as I.C. § 49-623. *See Bedard*, 120 Idaho at 871.

fleeing or attempting to elude a police officer, the State was required to prove beyond a reasonable doubt that the visual or audible signal to stop was made in accordance with the requirements set forth in I.C. § 49-623(3). *Id.*; *see also State v. Miller*, 131 Idaho 288, 291 (Ct. App. 1997). The rationale behind this requirement was stated succinctly by the Court in *Bedard* – in order to comply with the statutory requirements to stop once given a visual or audible signal, "*the driver must actually be able to see or hear the emergency vehicle's signal.*" *Bedard*, 120 Idaho at 871.

The Idaho Legislature, in recognizing the infirmity of the prior version of I.C. § 49-1404, amended the language of the statute in an attempt to address the issue set forth in *Bedard.* While adding language that the "signal given by a peace officer need not conform to the standards for decibel ratings or light visibility specified in section 49-623(3), Idaho Code," the Legislature added an additional element to this statute, requiring that the visual or audible signal given is one that the driver would actually be able to see. *See* S.L. 1996, ch. 255, § 1. The Legislature also adopted a "reasonable person standard" providing that, "[i]t is sufficient proof that a reasonable person knew or should have known that the visual or audible signal given by a peace officer was intended to bring the pursued vehicle to a stop." *Id.* The Legislature noted in its Statement of Purpose for this amendment that the change in the statute, "would require prosecutors to prove beyond a reasonable doubt that a person knew or should have known that he or she was required to pull over and stop." *Id.*

The 1996 amendment to I.C. § 49-1404 did not change the core holding of *Bedard* that, in order to be convicted of fleeing or attempting to elude an officer, the driver must have actually been able to hear or see the visual or audible signal. *Bedard*, 120 Idaho at 871. What this amendment altered was the *manner* in which the State was required to make its proof – changing

the manner from a showing of strict compliance with I.C. § 49-623(3), to an alternate showing that a reasonable person would have been able to perceive the visual or audible signal and, therefore, would have known or should have known that he or she was required to stop.

Contrary to the perception of the district court in this case, the amended language of I.C. § 49-1404 did not create an evidentiary presumption in the State's favor that would permit the jury to convict Mr. Skunkcap for the offense of felony eluding if the jurors believed a reasonable person would have known that he or she was being given a signal to stop. Instead, this language was actually incorporating into the State's burden of proof as to the nature of the signal given the requirement that a reasonable person would have been able to perceive this signal.

This is further reflected in Idaho's model pattern jury instruction for felony eluding a police officer. "The pattern Idaho Criminal Jury Instructions are presumptively correct." *State v. Hopper*, 142 Idaho 512, 514 (Ct. App. 2005). Regarding the State's burden of proof for felony eluding a police officer, ICJI 1032 provides that, "[t]he signal to stop must be given by emergency lights or siren which a reasonable person knew or should have known was intended to bring the pursued vehicle to a stop." *See* ICJI 1032. This instruction appropriately and correctly makes it part of the State's burden of proof at trial to establish that the nature of the signal given by police must be of a nature that objectively would convey to a reasonable person that he or she is being signaled to stop. Because the district court's instruction not only failed to reflect this portion of the State's burden of proof at trial, but actually created an evidentiary presumption in the State's favor, the court's non-pattern instruction was erroneous.

Although the majority opinion from the Court of Appeals in this case focused primarily on the fact that the language at issue is found in the statute defining the offense of felony eluding

an officer, this conclusion ignores this Court's precedent in *State v. Draper*, as well as the correct reading of this provision as set forth by this Court in the model pattern instructions defining the elements of this offense.

The model pattern instructions make clear that, as part of the State's burden of proof at trial, the State must establish that the, "signal to stop **must be given** by emergency lights or siren which a reasonable person knew or should have known was intended to bring the pursued vehicle to a stop." *See* I.C.J.I. 1033 (emphasis added). Through setting out that the signal to stop "must be" of a particular nature – i.e. such that a reasonable person would have known that he or she was being signaled to stop – this instruction makes it clear to the jury that this finding is required along with all of the other remaining elements in order to find the defendant guilty.

In contrast, after setting out the statutory elements for this offense, the district court departed from the approved-of language and informed the jury in an entirely separate provision that, "** *It is sufficient proof that a reasonable person who knew or should have known that the visual or audible signal given by a peace officer was intended to bring pursued vehicle to a stop.*" (34746 R., p.245) (emphasis in the original). By setting this provision apart from the elements instruction physically, and further separating out this provision by marking it with two asterisks and italicized font, the court's language carries with it the clear import that, in order to convict the defendant "it is sufficient proof" for the offense if the jury were merely to find that a reasonable person knew **or should have known** that he or she was being signaled to stop. The difference in language between the model pattern instructions and that provided by the Court is that the pattern instructions make clear that the nature of the signal is part of the State's burden of proof at trial – i.e. the signal must be such that a reasonable person would have known that he or she was being signaled to stop – whereas the court's instructions implied that it was sufficient

proof for the offense standing alone that a reasonable person would have known that he or she was being signaled to stop.

Second, although the language provided by the district court is similar to that employed within the statute defining felony eluding an officer, the manner in which this language was presented to the jury had the effect of diminishing the State's burden of proof at trial. This Court in *Draper* has held that an elements instruction may still violate due process even if the instruction parrots the statutory language for the charged offense. The elements instruction provided to the jury for conspiracy in *Draper* did contain all of the elements for the charged offense. *See Draper*, 151 Idaho at 589-592. But it was the **manner** in which the court presented the statutory elements of the offense in *Draper* that resulted in a jury instruction that relieved the State of its burden of proof at trial.

In *Draper*, the district court presented the jury with an elements instruction that contained all of the elements of the charged offense, and therefore parroted the language of the relevant statute, but the court erroneously listed one of the essential elements as an alternate theory of demonstrating an overt act in furtherance of the conspiracy, rather than a free-standing element in its own right. *Id.* at 589-590. Because the trial court presented the separate element, that the action be undertaken in furtherance of the conspiracy, as being one of several alternative overt acts, rather than an element required **in addition to** the finding of an overt act, the *Draper* Court held that this instruction relieved the State of its burden of proof and violated due process. *Id.* at 590-592. This finding was predicated on the **manner** in which the statutory elements were presented to the jury, despite the fact that the statutory elements were technically present within the instruction.

Additionally, to the extent that the Court of Appeals' Opinion implies that the test for whether due process has been violated is whether an elements instruction merely contains the language within the statute, this misstates the standard. "The United States Supreme Court has held that in criminal trials 'the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to this requirement." *State v. Anderson*, 144 Idaho 743, 749 (2007) (quoting *Middleton v. McNeil*, 541 U.S. 433, 437 (2004)). Accordingly, whether a jury instruction violates due process by reducing the State's burden of proof of the elements of an offense is measured by the **effect** of the language used, not whether the instruction merely contains the language of the statute. As has been noted, if a jury instruction contains the language of the statute defining the offense, but presents this language in a manner that fails to clearly require the jury to find all of the elements of the offense beyond a reasonable doubt, this violates a defendant's right to due process. *Draper*, 151 Idaho at 589-592.

Moreover, to the extent that there exists another statement within this instruction that provided that the jury must find Mr. Skunkcap guilty "if each of the above has been proven beyond a reasonable doubt," this did not cure the error. This language followed both the list of the elements for eluding a police officer and the language that was separated out and improperly created an evidentiary presumption in the State's favor. (34746 R., p.245.) Because the language at issue, and the presumption in the State's favor that this language would appear to create, is likewise "above" the language relied upon by the State within the instruction, the same problem persists.

Because the majority opinion from the Court of Appeals in this case is likely contrary to established precedent from this Court and from the United States Supreme Court, Mr. Skunkcap

asks that this Court grant his petition for review and vacate his conviction for felony eluding a police officer.

2. The District Court's Erroneous, Non-Pattern Elements Instruction For Felony Eluding A Police Officer Improperly Relieved The State's Burden Of Proof To Establish That Mr. Skunkcap Willfully Fled Or Attempted To Elude Police

There is an additional constitutional infirmity to the court's non-pattern instruction regarding the elements of felony eluding a police officer in this case. The district court's general instruction to the jury that it could convict Mr. Skunkcap if it believed a reasonable person would have known that he was being signaled to stop actively relieved the State of its burden of proof of Mr. Skunkcap's *mens rea – i.e.*, that in order to show that Mr. Skunkcap was **willfully** fleeing or eluding a peace officer, he was aware at the time that he was being signaled by a police officer to stop.

Idaho Code § 18-114 requires that, "in every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence." I.C. § 18-114. In this case, the State was required to show that Mr. Skunkcap was willfully fleeing or evading the officers who had given him a visual or audible signal to stop. I.C. § 49-1404(1). This means that, in order to be convicted of this offense, the State was required to prove that Mr. Skunkcap had some knowledge that he was being signaled to stop by a law enforcement officer.

The plain language of I.C. § 49-1404 expressly requires that a defendant **willfully** either flees or eludes an officer.[8] I.C. § 49-1404(1). "Flee" is generally defined as "to run away from danger or evil," or "to hurry toward a place of security." MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/flee (visited August 25, 2013).

[8] Because the terms "flee" and "elude" are not defined by statute, they are accorded their plain meaning as can be ascertained through reference to a dictionary. *See, e.g., State v. Mead*, 145 Idaho 378, 381 (Ct. App. 2008).

"Elude" similarly means "to avoid adroitly," or "to escape the perception, understanding, or grasp of." MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/elude (website last visited August 25, 2013). Both of these terms imply knowledge and intent – that the person is aware of a pursuer and is actively seeking to avoid capture. *See also United States v. Jones*, 428 F.Supp.2d 497, 501 (W.D. Va. 2006) (plain meaning of "flee" in the context of statute referring to fleeing from an officer supports conclusion that person who is fleeing must have knowledge that he is fleeing from an officer). Given the plain meaning of the terms used in I.C. § 49-1404, it was therefore incumbent upon the State to prove that Mr. Skunkcap was personally aware that he was being pursued by a law enforcement officer and was further being signaled to stop.

The district court's statement, creating a presumption of guilt of the entire charged offense where the jury could conclude merely that a reasonable person would know that he or she is being signaled to stop, eliminated the requirement that the State prove that Mr. Skunkcap was personally aware of the signal given, and that he was willfully seeking to evade police in the face of this signal. Because the requirement that a defendant **willfully** flee or evade the police signal is an essential element of the offense of felony eluding a police officer, the district court's instructions in this case relieved the State of its constitutional burden of proof and therefore violated Mr. Skunkcap's right to due process. *See Draper*, 151 Idaho at 588.

3. The District Court's Erroneous Elements Instruction For Felony Eluding An Officer Was Not Harmless

Under the facts of this case, the district court's error in relieving the State of its burden of proof as to the elements of felony eluding an officer cannot be said to be harmless beyond a reasonable doubt.

First, the State's evidence in this case was not both overwhelming and uncontested that the signal given by police was such that a reasonable person would have, or should have, known that he or she was being signaled to pull over given the brevity of time that a visual signal was actually given. According to the evidence at trial, Deputy Young only activated his overhead lights immediately prior to the collisions between Mr. Skunkcap's car and the other vehicles. (34746 Tr., p.181, L.18 – p.182, L.4.) In fact, the lapse of time was so short that Deputy Young testified he did not even have enough time to activate his siren prior to the collision. (34746 Tr., p.181, L.18 – p.182, L.4.) When asked how much time had elapsed between turning on his lights and Mr. Skunkcap making a U-turn with his car, the deputy characterized the timing as "instantaneous." (34746 Tr., p.175, L.23 – p.176, L.3, p.181, L.24 – p.182, L.4.)

Further, the video recording of the collision further reflects the extreme brevity of time between Deputy Young activating his lights and the later collision. The video recording is automatically activated when the overhead lights of the deputy's police car are activated. (34746 Tr., p.182, L.13 – p.183, L.3.) Under a review of the video recording, there is at most a lapse of four to six seconds total between the activation of Deputy Young's overhead lights on his police vehicle and the collision between Mr. Skunkcap and the officers in this case. (34746 Exhibit P.) This evidence is not overwhelming proof that a reasonable person, given the extremely brief time frame during which any signal was given, would have been aware that he or she was being signaled to stop – particularly where the overhead lights were activity for mere seconds during daylight hours and without any accompanying siren.

Second, the evidence was highly disputed in this trial as to whether Mr. Skunkcap was aware at all that he was being signaled to stop. In fact, Mr. Skunkcap testified that he was not aware that he was being followed by a police officer, much less that the police had signaled for

him to stop. (34746 Tr., p.445, L.14 – p.446, L.6.) Therefore, he could not have been willfully fleeing from the officer. This issue is dispositive under the Idaho Supreme Court Opinion in *Draper*, where the Court remanded the case for a new trial because the defendant contested the evidence at trial regarding the omitted element. *Draper*, 151 Idaho at 592.

Because the district court's instructional error regarding the elements of felony eluding an officer relieved the State as to its burden of proof on this offense, and because this error was not harmless beyond a reasonable doubt, Mr. Skunkcap asks that this Court reverse his conviction for felony eluding an officer.

D. The District Court's Non-Pattern Instruction For The Offense Of Assault In This Case Erroneously Misstated The Essential Elements Of The Offense Of Assault, And Thereby Reduced The State's Burden Of Proof Beyond A Reasonable Doubt As To All Elements Of The Charged Offense; , And The Court Of Appeals Incorrectly Applied The Doctrine Of Invited Error To This Claim

Employing another non-pattern jury instruction, the district court provided the following instruction that purported to set out the elements for the offense of assault in this case:

> In order for the defendant to be guilty of Assault, the state must prove each of the following:
>
> 1. On or about the 14th day of November, 2006,
> 2. In the state of Idaho
> 3. the defendant, James L. Skunkcap, unlawfully attempted
> 4. with apparent ability
> 5. to commit violent injury to, Bill Collins
>
> or
>
> **6. intentionally and unlawfully threatened by word or act to do violence to Bill Collins,**
>
> **or**

7. **did some act which created a well-founded fear in the other person that such violence was imminent.**

If any of the above has not been proven beyond a reasonable doubt, then you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, you must find the defendant guilty.

(R., p.262 (emphasis added).)

This instruction does not comport with the legal definition for the offense of assault in Idaho. Idaho Code § 18-901 defines the offense of assault as follows:

An assault is:

(a) An unlawful attempt, coupled with apparent ability, to commit a violent injury on the person of another; or

(b) An intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, **and** doing some act which creates a well-founded fear in such other person that such violence is imminent.

I.C. § 18-901 (emphasis added); *see also* ICJI 1201, 1202.

In addition to being generally confusing, this instruction is legally erroneous for two reasons. First, the last clause of line 3, along with lines 4 and 5, should have been presented together as one of two theories of assault that are presented under Idaho's assault statute. With the manner in which this first theory of liability was presented to the jury, it would be entirely unclear to any juror that half of one line, and the two following lines, would need to be **all** be found together as a singular theory in order for Mr. Skunkcap to be guilty of the charged offense. *See* I.C. § 18-901; ICJI 1201, 1202.

But the second problem with this instruction is far more problematic. In its non-pattern instruction to the jury, the district court actually bifurcated two findings that must have been made together in order to find Mr. Skunkcap guilty of assault under I.C. § 18-901, and treated these two required elements as independent theories which – standing on their own – could

sustain a finding of guilt. As is evident from the statutory language of Idaho's definition of assault, to be guilty of the second theory of assault, an individual must **both** unlawfully threaten to do violence to another, **and** perform some act that creates a well-founded fear in the other person of such violence. I.C. § 18-901(b). The district court's instructions in this case permitted the jury to convict Mr. Skunkcap if **either** it found that he threatened Officer Collins **or** if he performed some act that created a well-founded fear of harm.

This is clear error, and the Court's Opinion in *Draper* is controlling on this point. In *Draper*, as here, the district court erroneously instructed the jury that a separately required element was one of several possible means of committing the charged conspiracy, rather than instructing the jury that it was a finding required in addition to the alternate means. *Draper*, 151 Idaho at 589-592. Unlike this case, the finding listed in the alternative was not an actual act, so there was at least the possibility that the jury might not have understood the element to set forth an alternate means of committing the crime. *Id.* However, this did not foreclose the *Draper* Court from finding reversible error based upon the fact that this instruction reduced the State's burden of proof of the charged offense. The Court in *Draper* held that, "it is impossible to say that a reasonable juror *could not* have read the instruction to omit the required element that an overt act occurred in furtherance of the conspiracy." *Id.* at 591.

Here, while the error that occurred is of the same kind, its effect was even more apparent given that the instruction provided by the district court appears to clearly set out three alternative means of committing an assault – *i.e.*, by an attempt to commit the injury, by an intentional threat, or by performing any act that creates a well-founded fear of violence. (R., p.262.) Under the instructions provided by the district court, the jury could have convicted Mr. Skunkcap on what is, in essence, a strict liability theory – so long as he did any act that caused Officer Collins

to have a reasonable fear of harm. This is very clearly not the law in Idaho regarding the criminal offense of assault.

Additionally, this error is not harmless given that Mr. Skunkcap contested at trial that he ever intended to strike Officer Collins' unmarked truck. According to his testimony, Mr. Skunkcap was attempting unsuccessfully to avoid the truck when the collision occurred, and did not even see the truck until it was too late to avoid the collision. (34746 Tr., p.446, L.10 – p.449, L.20.) Where the evidence as to the omitted element is actually contested at trial, then instructional error that omits this element is not harmless. *Draper*, 151 Idaho at 592. Moreover, "[i]f a rational juror could have found that the state failed to prove the omitted element, then the appellate court shall vacate and remand." *Perry*, 150 Idaho at 228. Given that the jurors had already acquitted Mr. Skunkcap of the greater offense of aggravated assault upon a law enforcement officer, there is indication on the record that the jurors in this case were not entirely persuaded by the State's evidence, and the disputed state of the evidence makes it entirely possible that a rational juror could have found the State failed to meet its burden of proof beyond a reasonable doubt.

Mr. Skunkcap concedes that the instruction provided to the jury regarding the elements of assault is substantially the same as that he had requested. (34746 R., pp.210, 262.) The underlying Court of Appeals opinion in this case therefore applied the doctrine of invited error and declined to entertain the merits of this issue. (Opinion, pp.9-10.) However, prior opinions from the Court of Appeals and this Court indicate that this doctrine is inapplicable in certain cases, such as where there is no apparent strategic or tactical basis for trial counsel's request. While this Court has yet to speak to where the outer boundaries lie with regard to the application of invited error, Mr. Skunkcap asks that this Court grant his petition for review and hold that

invited error does not apply to preclude review where trial counsel's error operates to relieve the state of its burden of proof and where there is no apparent strategic or tactical basis for trial counsel's actions.

Appellate courts have applied the doctrine of invited error to allegations of instructional error under certain circumstances, such as the failure of a trial court to tender a lesser included offense instruction where defense counsel has objected to the court doing so. *See, e.g., State v. Carlson*, 134 Idaho 389, 402 (Ct. App. 2000). However, case law indicates that there are limits to the applications of the invited error doctrine. The outer boundaries of the invited error doctrine have been set forth by the Idaho Court of Appeals in *State v. Griffith*:

> There are, of course, limits to this doctrine. It would not apply to a requested sentence that violates the court's statutory authority. Neither would it apply to a request made without an apparent tactical purpose. Moreover, relief might be appropriate if defense counsel heedlessly disregarded his client's legitimate interests, or otherwise provided ineffective assistance, in a sentencing proceeding.

State v. Griffith, 110 Idaho 613, 614 (Ct. App. 1986) (internal citations omitted); *see also State v. Carper*, 116 Idaho 77, 79-80 (Ct. App. 1989) (reiterating the above-quoted standard from *Griffith*).

Other courts applying similar limitations to the application of the invited error doctrine have held, in the context of a flawed jury instruction that omits an element of the charged offense, that the invited error doctrine does not apply even if defense counsel requested the instruction. *See U.S. v. Alferahin*, 433 F.3d 1148, 1154 n.2 (9th Cir. 2006); *U.S. v. Perez*, 116 F.3d 840, 843-846 (9th Cir. 1997); *People v. Williams*, 99 Cal.Rptr. 103, 121-122 (Cal. Ct. App. 1971). In those cases where the record does not reflect a conscious choice by counsel to forego a jury finding as to an essential element of a charged offense, but rather reflects inadvertence or

mistake on the part of trial counsel, these courts have held that the purposes behind the invited error doctrine are not served and therefore declined to apply this doctrine. *Id.*

The instructional error in this case falls outside of the boundaries established by Idaho case law for the application of the invited error doctrine. There is nothing in the record that shows, or could sustain a finding, of any strategic or tactical purpose in defense counsel submitting an instruction that substantially reduced the State's burden of proof at trial. In absence of such evidence, the instructional error in this case appears to fall within the exception carved out by the courts in *Griffith* and *Carper* for a "request made without an apparent tactical purpose." *Carper*, 116 Idaho at 79-80; *Griffith*, 110 Idaho at 614. Additionally, the erroneous instruction is affirmatively shown not to be part of a tactical strategy on the part of trial counsel, as Mr. Skunkcap vigorously disputed that he ever harbored any intention to strike or harm the officers or their vehicles with his car at trial. (34647 Tr., p.446, L.10 – p.449, L.20.)

Moreover, there appears to be at least one case in Idaho wherein this Court has declined to apply the doctrine of invited error to an erroneous jury instruction that relieved the State of its burden of proof of the elements of an offense. *See State v. Nunez*, 133 Idaho 13, 20 n. 3 (1999). In *Nunez*, the defendant was convicted of felony tax violations. *Id.* at 16. On appeal, he challenged his conviction for felony tax evasion because the jury instructions omitted the element that the defendant must intentionally seek to evade, defeat or avoid paying a sales tax – and it was this element that elevated the defendant's charge from a misdemeanor to a felony. *Id.* at 19-20. Although the State attempted to invoke invited error to bar judicial review of this alleged error, the *Nunez* Court declined to apply this doctrine, and instead held that, "There is no invited error, as the State asserts, when defense counsel submitted improper instructions that were ultimately given." *Id.* at 20 n.3.

Additionally, the Court of Appeals in *Gittins* likewise declined to apply the doctrine of invited error to a jury instruction that relieved the State of its burden of proof. *Gittins*, 129 Idaho at 58. Although the *Gittins* Court did so on the basis of a finding of ineffective assistance of counsel in trial counsel's consent to the erroneous instruction, Mr. Skunkcap asserts that a different, but related, rationale should be applied by this Court against the State's request on appeal to apply the invited error doctrine.[9]

The *Griffith* and *Carper* Courts recognized that, in addition to ineffective assistance of counsel, "a request made without an apparent tactical purpose" can also stand as an independent exception to the application of the invited error doctrine. Here, there was no apparent tactical purpose to the request for an elements instruction for assault that essentially permitted a finding of guilt on a strict liability basis. Based upon the erroneous instruction, the jury could find Mr. Skunkcap guilty of this offense if he did **any** act, so long as it resulted in some well-founded fear of harm in another, rather than what is required by statute: that Mr. Skunkcap intentionally and unlawfully threaten the officer **in addition to** the officer experiencing a well-founded fear of harm. *See* I.C. § 18-901. There is no conceivable tactical purpose for defense counsel to reduce the State's burden of proof at trial in this regard. Rather, this request appears to reflect a mistaken understanding on the part of trial counsel as to the elements of assault. Accordingly, Mr. Skunkcap respectfully submits that this Court should decline to apply the doctrine of invited error in this case.

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[9] Mr. Skunkcap does not assert any claim of ineffective assistance of counsel herein, but chooses to reserve any such claim for any future petition for post-conviction relief, should one be forthcoming. *See Matthews v. State*, 122 Idaho 801, 806 (1992) (defendant may raise claims of ineffective assistance of counsel either on direct appeal or through a petition for post-conviction relief, but not both).

III.

The Prosecutor Committed Misconduct, Rising To The Level Of A Fundamental Error, In No.34746 When A Police Officer Provided Irrelevant, Non-Responsive Testimony Designed To Appeal To The Passions And Prejudice Of The Jury; And The Court Of Appeals Erred When It Determined Otherwise

A. Introduction

Officer Dahlquist, testifying on behalf of the State, injected inflammatory testimony that negatively characterized Mr. Skunkcap personally when asked by the prosecutor to answer a question that simply called for the officer's estimation of distance between his car and the car driven by Mr. Skunkcap. Although the Idaho Court of Appeals found that the officer's remarks did not rise to the level of a due process violation, Mr. Skunkcap asserts that Officer Dahlquist's unsolicited response constitutes prosecutorial misconduct that rises to the level of a fundamental error under the standards articulated by this Court.

B. Standard Of Review

In cases of un-objected to allegations of prosecutorial misconduct, this Court applies a three-part test to determine whether a fundamental error has occurred. *State v. Perry*, 150 Idaho 209, 226 (2010). First, the defendant must demonstrate that the error rose to the level of a constitutional violation. Second, the error must be plain or obvious without the need for any additional information in the record. Last, the defendant must establish that the error affected his or her substantial rights, meaning that the defendant, "bear[s] the burden of proving there is a reasonably possibility that the error affected the outcome of the trial." *Id.*

C. The Prosecutor Committed Misconduct, Rising To The Level Of A Fundamental Error, When A Police Officer Provided Irrelevant, Non-Responsive Testimony Designed To Appeal To The Passions And Prejudices Of The Jury

In response to the State's question regarding the distance between Mr. Skunkcap's car and the officer's vehicle at the time of the initial collision with Detective Collins' truck, Officer

Dahlquist responded, "[t]he initial time he crashed, I was probably still three or four vehicle lengths behind the suspect vehicle. **Once I seen** (sic) **him crash into the vehicle, I go, I'm going to have to make some aggressive action here because this guy doesn't have any regard for my safety, Detective Collins, or anybody out on the street that day.**" (34746 Tr., p.211, L.25 – p.212, L.11 (emphasis added).) Although the Court of Appeals found that this testimony did not rise to the level of a fundamental error, Mr. Skunkcap submits that the above-emphasized portion of the police officer's testimony was irrelevant, non-responsive, and designed to appeal to the passions and prejudices of the jury. (*See* Opinion, pp,10-11.) Given this, Mr. Skunkcap asserts that this testimony constituted prosecutorial misconduct that rose to the level of a fundamental error.

First, this testimony constituted a violation of Mr. Skunkcap's constitutional right to a fair trial that is plain from the record. "Where a prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted at trial, including reasonable inferences that may be drawn from that evidence, this impacts a defendant's Fourteenth Amendment right to a fair trial." *Perry*, 150 Idaho at 227. Although our system of criminal justice is adversarial in nature, the prosecutor in a criminal case is nevertheless expected and required to be fair. *State v. Ellington*, 151 Idaho 53, 62 (2011). Accordingly, appeals to emotion, passion or prejudice of the jury through the use of inflammatory tactics are impermissible and constitute prosecutorial misconduct. *Id.*; *see also State v. Severson*, 147 Idaho 694, 715, 720 (2009); *State v. Gross*, 146 Idaho 15, 18 (Ct. App. 2008); *State v. Phillips*, 144 Idaho 82, 86-87 (Ct. App. 2007). This includes the use of inflammatory language that is calculated to arouse negative emotions from the jurors or to appeal to the jurors' fears. *State v. Beebe*, 145 Idaho 570, 575 (Ct. App. 2007); *Phillips*, 144 Idaho at 87. While a prosecutor "may

strike hard blows, he is not at liberty to strike foul ones." *Ellington*, 151 Idaho at 63 (*quoting Berger v. United States*, 295 U.S. 78, 88 (1935)).

In this case, Officer Dahlquist spontaneously and needlessly injected a series of inflammatory characterizations of Mr. Skunkcap as an individual who did not care about the safety of the officers or anyone else when asked a simple question about the distance between the officer's vehicle and that of Mr. Skunkcap. And the Idaho Supreme Court has recently made clear that it is of no moment that this improper appeal to the fears and emotions of the jurors was not directly at the behest of the prosecutor for purposes of assessing prosecutorial misconduct.

The Idaho Supreme Court in *State v. Ellington* made it clear that, where the witness testifying on behalf of the State is a police officer, any response made by such officer is attributed to the State for purposes of a claim of prosecutorial misconduct. *Ellington*, 151 Idaho at 61. In *Ellington*, the Idaho Supreme Court held that, "when an officer of the State gives any unsolicited testimony that is gratuitous and prejudicial to the defendant, that testimony will be imputed to the State for the purposes of determining prosecutorial misconduct." *Id.* The rationale for such a rule is that to do otherwise would undermine the purposes behind the prohibition against prosecutorial misconduct by superficially shifting the blame to another party who is, him- or herself, likewise a representative of the State. *Id.* Moreover, police officers, as representatives of the State, owe the defendant the same duty as prosecutors not to present improper testimony with the intent of securing a conviction. *Id.*

Accordingly, it is does not excuse the State of misconduct that the response made by Officer Dahlquist regarding Mr. Skunkcap's purported dangerousness to the community was non-responsive to the prosecutor's question. In fact, this renders the injection of invective even more inappropriate, as the inflammatory response bore no relevance to the factual issues relevant

at trial. *See also Phillips*, 144 Idaho at 86-87 (prosecutor may not use inflammatory remarks when describing the defendant, or appeal to the passions or prejudices of the jury through the use of inflammatory tactics).

Additionally, there is a reasonable possibility that the officer's inflammatory characterization of Mr. Skunkcap contributed to the verdict. The jury rejected outright many of the State's charges, and found Mr. Skunkcap guilty as to only lesser charges for multiple offenses. Such acquittals by the jury signal to a reviewing court that the jury did not entirely accept the State's evidence at trial. *See, e.g., State v. Lilly*, 142 Idaho 70, 73 (Ct. App. 2005).

And the State's evidence at trial as to all of the charges for which Mr. Skunkcap was convicted was highly disputed. The total elapsed time between the officer's initial attempts to stop Mr. Skunkcap's car and the ensuing collisions was a matter of mere seconds. Mr. Skunkcap denied being aware that he was being pursued by officers or ever intentionally striking Detective Collins' truck, so the State's evidence as to the charged offenses was disputed at trial. Given the near contemporaneous occurrence of the events underlying the charges in this case – thereby reducing the likelihood that Mr. Skunkcap had the requisite intent for each of the offenses for which he was convicted, the fact that the jury rejected nearly all of the charged offenses, and the inflammatory nature of Officer Dahlquist's testimony, there is a reasonable possibility that the misconduct in this case contributed to the jury's verdict.

In light of this, the Court of Appeals erred when it deemed this misconduct to fall short of the standards set forth by this Court to establish fundamental error. As such, Mr. Skunkcap respectfully requests that this Court grant his petition for review and reverse his convictions in 34746.

IV.

The District Court Erred In Denying Mr. Skunkcap's Motion Alleging An Illegal Sentence In No.38249 Because Mr. Skunkcap's Original Sentence For Felony Eluding A Police Officer, With A Persistent Violator Sentencing Enhancement, Became Void Upon The District Court Granting His Motion To Withdraw His Plea To This Enhancement And The District Court Never Resentenced Mr. Skunkcap For The Underlying Offense

A. Introduction

The district court in this case erroneously believed that, upon Mr. Skunkcap's motion to withdraw his guilty plea as to the persistent violator sentencing enhancement, his underlying sentence for his conviction for grand theft remained in place. Due to this misapprehension, the trial court only resentenced Mr. Skunkcap for his "offense" of persistent violator – leaving Mr. Skunkcap in the position of being sentenced to a sentencing enhancement with no underlying sentence to be enhanced. Additionally, when Mr. Skunkcap drew this defect to the court's attention through his Idaho Criminal Rule 35 motion to correct an illegal sentence, the trial court misperceived this motion as a request for leniency rather than a motion alleging an illegal sentence. Because the district court has not actually sentenced Mr. Skunkcap for his underlying offense of grand theft due to the fact that the court failed to recognize its authority – and the necessity – to do so, Mr. Skunkcap asks that this Court vacate his judgment of conviction and sentence in 38249.

B. Standard Of Review

The issues of whether a sentence is illegal and whether a sentence has been imposed in an illegal manner are both questions of law that this Court reviews *de novo*. *See, e.g., State v. Clements*, 148 Idaho 82, 84 (2009).

C. The District Court Erred In Denying Mr. Skunkcap's Motion Alleging An Illegal Sentence Because Mr. Skunkcap's Original Sentence For Felony Eluding A Police Officer, With A Persistent Violator Sentencing Enhancement, Became Void Upon The District Court Granting His Motion To Withdraw His Plea To This Enhancement And The District Court Never Resentenced Mr. Skunkcap For His Underlying Offense Of Felony Eluding A Police Officer

The Court of Appeals in this case, relying on the district court's remarks at a subsequent Rule 35 hearing, determined that the trial court had in fact resentenced Mr. Skunkcap after he had been permitted to withdraw his plea to the persistent violator sentencing enhancement. (Opinion, pp.17-18.) Because this conclusion is belied by the appellate record, Mr. Skunkcap submits that this conclusion was in error and therefore asks that this Court grant his petition for review.

The penalty authorized upon a persistent violator sentencing adjudication is not a separate sentence for a separate offense. *See, e.g., State v. Pierce*, 107 Idaho 96, 107 (Ct. App. 1984). Accordingly, the penalty for a persistent violator sentencing enhancement, "in embodied in one sentence upon the felony." *Id.* In other words, "[w]here a person is convicted of a felony and is also adjudged to be a persistent violator of the law there is only one conviction and only one sentence can be imposed." *State v. Martinez*, 107 Idaho 928, 929 (Ct. App. 1985). In cases where the sentencing provisions are clearly interdependent, as in the case of an underlying sentence that is enhanced due to a persistent violator adjudication, "if the sentence on one provision is unlawful, **the entire sentence is unlawful and may be amended**." *State v. Lopez*, 107 Idaho 826, 828 (Ct. App. 1984).

In this case, the district court permitted Mr. Skunkcap to withdraw his prior plea to the persistent violator sentencing enhancement. (38249 R., pp.31-32.) In such cases, the effect of the withdrawal of the plea is to set aside the underlying judgment, and therefore the sentence that was imposed as a result of that judgment. *See* I.C.R. 33(c). In cases where the persistent

violator sentencing enhancement has been vacated, the entire sentence is deemed void *ab initio*. *See Lopez v. State*, 108 Idaho 394, 396 (1985).

In the resentencing proceedings in this case, the district court appears to have misapprehended both the court's power to resentence Mr. Skunkcap for his underlying offense of grand theft, and the actual necessity that the court do so. The court stated that, because the term of five years fixed was ordered for Mr. Skunkcap's underlying offense of felony eluding a police officer, that portion of his sentence could not be revisited because Mr. Skunkcap had only withdrawn his plea as to the persistent violator sentencing enhancement and therefore the district court could only resentence Mr. Skunkcap as to that portion of his prior sentence. (38249 Tr., p.311, L.7 – p.315, L.10.) This is clearly reflected in the "judgment" entered by the district court, in which Mr. Skunkcap only received a sentence for the persistent violator enhancement, and did not receive any underlying sentence for his offense of felony eluding a police officer.[10] (38249 R., pp.114-116.) This leaves Mr. Skunkcap in the unusual position of serving time for a sentencing enhancement without any underlying sentence that is being enhanced.

Mr. Skunkcap brought the illegality of his sentence to the court's attention through a Rule 35 motion alleging an illegal sentence. (38249 R., pp.119-121.) In this motion, Mr. Skunkcap noted for the district court that, upon withdrawal of his plea, his entire sentence was rendered void, and that the court therefore was required to resentence Mr. Skunkcap both for his underlying felony offense of eluding an officer and for the persistent violator sentencing enhancement. (38249 R., pp.119-121.) He further noted that the court would also have the

[10] Because Mr. Skunkcap has already fully served his sentences for the misdemeanor offenses of malicious injury to property and assault, it is unclear as to whether resentencing on these offenses is required.

authority to revisit the determination as to whether Mr. Skunkcap's sentence in 34746 and 38249 should run consecutively to that previously imposed in 34747. (38249 R., pp.119-121.)

However, in denying this motion, the district court appears to have treated the motion to correct a request for leniency as a motion for reduction of sentence, and held that because Mr. Skunkcap had not presented new or additional information, the trial court would not disturb Mr. Skunkcap's "original" sentence for felony eluding a police officer. (R., pp.134-135.) Therefore, again without imposing an actual sentence on Mr. Skunkcap for the offense of felony eluding a police officer, the district court denied Mr. Skunkcap's Rule 35 motion.

This was clear error. Upon Mr. Skunkcap's withdrawal of his guilty plea to the persistent violator sentencing enhancement, his **entire** sentence for felony eluding a police officer was void at that point in time. *See Lopez*, 108 Idaho at 396; *Lopez*, 107 Idaho at 828. Not only did the district court have discretion to resentence Mr. Skunkcap for his conviction for felony eluding a police officer, the court was **required** to do so. The district court's failure to actually impose a sentence on Mr. Skunkcap for his underlying offense of felony eluding a police officer, and the court's denial of his motion alleging an illegal sentence based upon this infirmity, was error that necessitates reversal for resentencing.

Moreover, because Mr. Skunkcap's prior sentence for felony eluding a police officer, along with the persistent violator sentencing enhancement, were rendered void by the withdrawal of Mr. Skunkcap's plea to the persistent violator sentencing enhancement, the district court likewise had the authority to revisit the determination as to whether his sentence in 34746 and 38249 should be run consecutively or concurrently to his sentence in 34747. As with the court's misapprehension as to its authority to resentence Mr. Skunkcap for his underlying offense of felony eluding an officer, the district court likewise failed to recognize that it had the authority to

determine whether this sentence would be consecutive or concurrent to his sentence for grand theft in 34747. (38249 Tr., p.315, Ls.11-16.)

But the district court at sentencing has the inherent authority to determine whether to run a sentence consecutively or concurrently to a prior ordered sentence. *See* I.C. 18-308. Because Mr. Skunkcap's prior sentence in 34746 was vacated by his withdrawal of his plea to the persistent violator sentencing enhancement, the court's prior determination to order this sentence to run consecutively was likewise vacated. The district court abused its discretion when it failed to recognize that it had the discretion to make this determination upon Mr. Skunkcap's resentencing. *See, e.g., State v. Anderson*, 152 Idaho 21, 22 (Ct. App. 2011) (sentencing decisions are generally reviewed for an abuse of discretion, and this review includes whether the district court correctly perceived the issue as one that is discretionary with the court).

While the Court of Appeals relied on a single statement tendered by the district court in order to find that Mr. Skunkcap had, in fact, been resentenced, Mr. Skunkcap respectfully submits that a review of the entire record does not support the Court of Appeals' conclusion. After Mr. Skunkcap was permitted to withdraw his plea to the persistent violator sentencing enhancement alleged by the State, and subsequently found to be a persistent violator following a jury trial, the district court at sentencing failed to resentence Mr. Skunkcap for his underlying conviction of felony eluding an officer in addition to the sentencing enhancement.

"The only legally cognizable sentence in a criminal case is the actual oral pronouncement in the presence of the defendant." *State v. Dreier*, 139 Idaho 246, 254 (Ct. App. 2003). At the re-sentencing hearing in this case, the district court did not pronounce a new sentence for Mr. Skunkcap – and, in fact, stated that it had no authority to do so. The court stated, "The five years Judge McDermott gave you for the eluding charge, like I said, **I can't do anything about**

that." (38249 Tr., p.314, Ls.21-23 (emphasis added).) The fact that the district court was under the mistaken belief that it was not required to re-sentence Mr. Skunkcap for the underlying felony eluding charge is further borne out by the fact that his written judgment of conviction upon resentencing has **no** provision whatsoever for his sentence for this offense. (38249 R., pp.114-116.) The only sentence set forth at all was for the "crime" of persistent violator. (38249 R., pp.114-116.)

Had the district court intended upon reinstating the prior sentence, as opposed to erroneously being of the belief that it lacked the authority to resentence Mr. Skunkcap for his felony eluding conviction, than the district court's language at the sentencing hearing would have reflected the court's understanding that it had the power to address this sentence. And, beyond this, the actual judgment of conviction entered by the district court would have surely contained a provision wherein Mr. Skunkcap would actually have received a sentence for his underlying offense. Neither is the case here.

Nor does the court's order on Mr. Skunkcap's motion alleging an illegal sentence alter this fact. While the trial court stated it had the power to revisit Mr. Skunkcap's original sentence, and whether to order that sentence consecutive or concurrent, pursuant to its Rule 35 authority to grant leniency, the district court clearly was still of the mind that the sentence imposed on Mr. Skunkcap for felony eluding an officer was still extant and operative after he was allowed to withdraw his plea to the persistent violator enhancement. This is apparent in the fact that the district court stated that, "the **sentences imposed by both Judge McDermott and this court** were appropriate." (R., p.135 (emphasis added).) In addition, the district court referenced the fact that it had previously sentenced Mr. Skunkcap solely for "the enhancement charge of Persistent Violator," with no mention of the court even imposing any sentence for his

underlying offense of felony eluding an officer. (R., p.134.) Had the district court been aware that Judge McDermott's prior sentencing order was no longer operative upon Mr. Skunkcap withdrawing his plea, the district court would not have referenced Mr. Skunkcap's "sentences" issued by both judges and would further have noted that Mr. Skunkcap's sentence for felony eluding had been re-imposed.

The district court ignored in its entirety Mr. Skunkcap's allegation of an illegal sentence wherein he pointed out to the district court that the prior sentence was actually void and re-sentencing on Mr. Skunkcap's underlying criminal offense was **required**, not merely permitted. (R., pp.120-121.) In addition, even after reviewing the propriety of Mr. Skunkcap's sentence for felony eluding in light of the portion of Mr. Skunkcap's Rule 35 motion requesting leniency, the district court still failed to enter any corrected judgment of conviction that actually reflected a sentence for felony eluding. (R., pp.134-135.) The district court's order on this motion states, in pertinent part, that, "the length of the sentences on both the Eluding charge and the enhancement charge for being a Persistent Violator will **remain unchanged**." (R., p.135 (emphasis added).) But, as has been noted, Mr. Skunkcap had never actually been sentenced by the district court for his eluding offense following the withdrawal of his plea. Accordingly, the district court's recognition that it could reduce Mr. Skunkcap's sentence as part of a request for leniency did not alter the fact that Mr. Skunkcap had never actually been sentenced for his underlying offense.

Because the record reflects that Mr. Skunkcap was never actually resentenced upon being permitted to withdraw his guilty plea to the persistent violator sentencing enhancement, Mr. Skunkcap respectfully requests that this Court grant his petition for review and remand his case for resentencing in 38249.

V.

The Prosecutor Committed Misconduct, Rising To The Level Of A Fundamental Error, In No.34747 When The Prosecutor Intentionally Elicited Testimony From A Police Officer Regarding Mr. Skunkcap's Exercise Of His Fifth Amendment Right To Remain Silent

A. Introduction

In this case, the prosecutor and Detective Nelson, acting in tandem, introduced over a dozen questions and responses that commented on Mr. Skunkcap's invocation of his right to remain silent. Although the district court eventually intervened *sua sponte* instructing the jury as to this improper series of questions and responses, the court only did so after the State had finished engaged in its protracted exchange with Detective Nelson on this issue. Moreover, the district court failed to properly instruct the jury that they were not permitted to use this evidence as proof of Mr. Skunkcap's guilt, but instead merely informed the jurors that it was the court's preference that they not do so. Mr. Skunkcap asserts that both the State's intentional and extended questioning at trial regarding his invocation of his right to remain silent, and the district court's failure to adequately respond, constitute fundamental error that requires reversal of his conviction for grand theft.

On appeal, the State never contested that this was constitutional error that was plain from the face of the record. The State's sole contention, which the Court of Appeals adopted in its opinion, was that this constitutional error was harmless. (Opinion, pp.13-15.) Mr. Skunkcap asserts that, under the standards set forth by this Court for evaluating whether there exists a reasonable possibility that constitutional error contributed to a verdict, this was error.

B. Standard Of Review

As has been noted, this Court reviews un-objected to instances of alleged prosecutorial misconduct through a three-part inquiry: first, the defendant must establish that one or more of

his constitutional rights was violated; second, the error must be plain from the record; and third, the defendant must establish that there is a reasonable possibility that this error affected the outcome of the trial. *Perry*, 150 Idaho at 226. The question of whether a prosecutor violated a defendant's Fifth Amendment right to remain silent through arguing the invocation of this right as probative evidence of guilt is reviewed *de novo*, as it is a question of constitutional interpretation. *State v. Moore*, 131 Idaho 814, 820 (1998).

C. The Prosecutor Committed Misconduct, Rising To The Level Of A Fundamental Error, In Intentionally Eliciting Testimony From A Police Officer Regarding Mr. Skunkcap's Exercise Of His Fifth Amendment Right To Remain Silent

In this case, the prosecutor and Detective Nelson engaged in an extended exchange, the sole evidentiary purpose of which was to set forth before the jury – in various iterations – the fact that Mr. Skunkcap invoked his constitutional right to remain silent upon being brought in for an interrogation by police. In over a dozen questions and answers, both the prosecutor and the officer mentioned "trying" or "attempting" to interview Mr. Skunkcap, or otherwise outright discussed his invocation of his right to remain silent in the face of police questioning. (34747 Tr., p.405, L.9 – p.408, L.14.) There was absolutely no relevance to this evidence, other than to present the jury with a theme within the officer's testimony that implied Mr. Skunkcap's guilt of the charged offense of grand theft due to his invocation of his constitutional right to remain silent. Although defense counsel did not object to this barrage of inappropriate questions, Mr. Skunkcap asserts that this pattern of inappropriate questioning constitutes fundamental error that requires reversal of his conviction.

"The Fifth and Fourteenth Amendments of the U.S. Constitution, as well as Article I, section 13 of the Idaho Constitution, guarantee a criminal defendant the right not to be compelled to testify against himself." *Ellington*, 151 Idaho at 60. Both the U.S. Supreme Court and Idaho

appellate courts have interpreted this right to also "bar the prosecution from commenting on the defendant's invocation of that right." *Id.* at 60-61; *see also Phillips*, 144 Idaho at 86 (prosecutor may not directly or indirectly comment on a defendant's invocation of his constitutional right to remain silent for purposes of inferring guilt). Additionally, as has been previously noted, the Idaho Supreme Court has held that the responses provided by law enforcement officers testifying on behalf of the State are imputed to the prosecutor for purposes of this Court's review of a claim of misconduct. *Ellington*, 151 Idaho at 61.

Much of the prosecutor's questioning of Detective Nelson was similar to that found to constitute prosecutorial misconduct in *Ellington*, with one key difference: while the response made by the officer in *Ellington* made a single reference to his "attempts" to interview the defendant, the prosecutor in this case made a prolonged and repeated theme of Mr. Skunkcap's invocation of his right to remain silent. *See Ellington*, 151 Idaho at 59-61. In *Ellington*, after eliciting testimony as to the defendant's arrest, the prosecutor asked a police officer about the fact that the officer had not interviewed the defendant, to which the officer replied, "I attempted to." *Id.* at 59.

The *Ellington* Court found that this constituted prosecutorial misconduct, as the officer's response conveyed to the jury that the reason why the officer only "attempted" to interview the defendant was because the defendant invoked his right to remain silent. *Id.* at 61. Moreover, because there was no legitimate reason for the prosecutor to ask any questions at all regarding any attempts to interview the defendant, this evidence was deemed by the Court to be "undoubtedly both gratuitous and prejudicial." *Id.*

In this case, the prosecutor and Detective Nelson engaged in a protracted chain of questions and responses that were all directed at the fact that Mr. Skunkcap invoked his right to

remain silent as evidence of his guilt. These questions and answers ranged from references to the officer's "attempts" to interview Mr. Skunkcap, to questions calling for an outright mention of Mr. Skunkcap's invocation of his right to remain silent in the face of attempts to tender *Miranda* warnings. (34747 Tr., p.405, L.9 – p.408, L.14.) In each of these instances – in over a dozen questions and answers – the improper inference of Mr. Skunkcap's guilt was replayed before a jury. Not only was this error plain from the record, and a violation of Mr. Skunkcap's constitutional rights, it was reversible error given the prejudice that resulted from this protracted and improper line of inquiry.

The Idaho Court of Appeals has noted in the related context of the defendant's failure to testify at trial that each time a prosecutor reiterates a comment or question regarding the defendant's invocation of the right to remain silent, it "further increase[s] the likelihood that the jury would draw an improper inference." *See State v. McMurry*, 143 Idaho 312, 316 (Ct. App. 2006). In *McMurry*, the prosecutor made four remarks during closing arguments that indirectly commented on the defendant's failure to testify at trial. *Id.* at 315-316. In this case, the volume of comments are not only markedly greater, but they subsume direct testimony on Mr. Skunkcap's invocation of his right to remain silent in addition to indirect references thereto.

There was no dispute in this appeal that the prosecutor's questioning and the officer's responses violated Mr. Skunkcap's right to remain silent, or that this error was plain from the record. (*See* Opinion, p.14.) The sole issue that remained for the Court of Appeals was whether there was a reasonable possibility that this repeated series of improper questions and answers contributed to the jury's verdict. While the Court of Appeals held that it did not, Mr. Skunkcap respectfully submits that this conclusion was in error.

The evidence in this case was not so overwhelming or convincing that there is not a reasonable possibility that this misconduct contributed to the jury's verdict. The sole testimony that linked Mr. Skunkcap to any saddles on the day in question came from Ms. Bowers. Ms. Bowers testified that she saw a man she believed to be Mr. Skunkcap loading saddles into the trunk of his car while parked next to the store owner's horse trailer – which was an unusual distance from the store for customers to park. (34747 Tr., p.242, L.1 – p.254, L.2.) A friend of Mr. Skunkcap's also testified that he thought he saw a saddle in Mr. Skunkcap's truck that Mr. Skunkcap was interested in selling. (34747 Tr., p.386, L.23 – p.394, L.15.)

However, Ms. Bower's identification of Mr. Skunkcap is somewhat belied by the fact that she had never identified Mr. Skunkcap in a photographic lineup provided by police, despite the fact that Mr. Skunkcap's picture was among those presented to Ms. Bowers. (34747 Tr., p.414, L.20 – p.415, L.2.) The evidence at trial also showed that Mr. Skunkcap and his family had several horses, and that it would not be unusual for them to own their own saddles as well. (34747 Tr., p.397, Ls.15-21.) Finally, none of the saddles that Mr. Skunkcap was alleged to have stolen were ever recovered by police – either in Mr. Skunkcap's possession or otherwise. (34747 Tr., p.412, L.22 – p.413, L.1.)

Given the evidentiary gaps in the State's case, there is a reasonable probability that the verdict turned upon the State's presentation of a series of questions as to Mr. Skunkcap's refusal to answer police questions, each of which implied Mr. Skunkcap's guilt. Particularly when the prejudicial impact each of these questions is aggregated – as it would be in the minds of the jurors – there is every possibility that this improper testimony contributed to the jury's verdict. Accordingly, Mr. Skunkcap asserts that the Court of Appeals erred when it deemed the prosecutorial misconduct in this case to be harmless.

D. The District Court Erred In Failing To Properly Instruct The Jury That It Was Not Permitted To Consider Mr. Skunkcap's Invocation Of His Right To Remain Silent At Trial

Ultimately, after the litany of questions and answers by the State that were directed at nothing more than improperly implying Mr. Skunkcap's guilt based upon the invocation of his right to remain silent, the district court *sua sponte* made a brief attempt to ameliorate some of the harm of this questioning when the district court stopped the prosecutor and stated that, "people have the right not to talk with the police, and so **I don't want you to hold it against Mr. Skunkcap** that he wouldn't give a statement." (34747 Tr., p.409, Ls.6-14 (emphasis added).) While the district court correctly apprehended that it was incumbent upon the court to step in once it became apparent that the State was engaging in a protracted line of impermissible questioning, the court's response was inadequate for two reasons. First, the district court had a duty to intervene before the more than one dozen questions and answers regarding Mr. Skunkcap's invocation of his right to remain silent. Second, and more important, the district court's admonition to the jury was inadequate as a matter of law, as the court phrased its warning to the jury as a matter of the court's preference, rather than instructing the jury that it was legally impermissible for the jury to infer guilt from the improper testimony.

The exact parameters of when, and what conditions, mandate that a trial court *sua sponte* intervene in the face of protracted misconduct do not appear to be clearly articulated in Idaho law. However, several decisions from the Idaho Court of Appeals have indicated that the failure of the trial court to *sua sponte* intervene in the face of prosecutorial misconduct may constitute fundamental error that requires reversal of a defendant's conviction. *See Phillips*, 144 Idaho at 88 n.2; *Kerchusky*, 138 Idaho at 678. Mr. Skunkcap submits that this case represents one in

which the trial court had a duty, not only to intervene against the State's repetitious litany of questions regarding Mr. Skunkcap's right to remain silent, but also to do so in a timely fashion.

The district court in this case did not intervene after the first, or second, or fifth, or even tenth time that either the prosecutor or Detective Nelson placed before the jury the fact that Mr. Skunkcap invoked his right to remain silent. In fact, the trial court did not even intervene until the State attempted to elicit testimony about what a different witness said during her own custodial interrogation. (34747 Tr., p.405, L.9 – p.410, L.25.) Moreover, the district court was apparently aware of the prohibition against using Mr. Skunkcap's invocation of his right to remain silent as evidence of his guilt given the fact that the district court did eventually intervene at the conclusion of the improper questioning on this matter. Mr. Skunkcap asserts that the district court erred, and this error rose to the level of a fundamental error, when the court failed to **timely** intervene once it became apparent that the State was engaged in a repeated pattern of eliciting improper testimony regarding Mr. Skunkcap's invocation of his right to remain silent.

Additionally, once the district court did correctly perceive that it had a duty to intervene given the extensive and improper testimony, the court erred when it failed to correctly instruct the jury that it was not permitted to infer guilt from the impermissible testimony about Mr. Skunkcap's invocation of his right to remain silent, not just that it was the court's preference that it not do so. The prohibition imposed by the Fifth Amendment and under Idaho law is a categorical one – the State may not introduce evidence of the defendant's invocation of the right to remain silent for purposes of inferring guilt. *Ellington*, 151 Idaho at 60-61. The corollary to this prohibition is that the jury may not properly consider this evidence for the purpose of inferring guilt at all – not as a matter of judicial preference but as a matter of law. *See, e.g., State v. Carsner*, 126 Idaho 911, 914-915 (Ct. App. 1995) (finding that jury instruction directing

jurors that they **must not** draw any inference of guilt from failure of defendant to testify correctly informed jurors that they could not draw an adverse inference from the defendant's decision not to testify at trial).

The district court's admonition to the jury did not reflect an accurate statement of the law – *i.e.*, that the jurors **must** not use evidence of Mr. Skunkcap's invocation of his right to remain silent as proof of his guilt of the charged offense. The court merely expressed a preference that the jurors not do so. Accordingly, Mr. Skunkcap asserts that the district court erred in failing to correctly instruct the jury as to the prohibition against the use of a defendant's invocation of the right to remain silent as evidence of guilt. For the same reasons that the prosecutorial misconduct in eliciting the improper testimony was not harmless, so too the district court's error in failing to properly instruct the jury was not harmless.

CONCLUSION

Mr. Skunkcap respectfully requests that this Court grant his petition for review. If granted, he respectfully asks that this Court vacate his convictions of felony eluding an officer, assault, and malicious injury to property in 34746; his persistent violator sentencing enhancement in 38249, along with his sentence in 34746 and 38249; and his conviction of grand theft in 34747.

DATED this 26th day of August, 2013.

SARAH E. TOMPKINS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of August, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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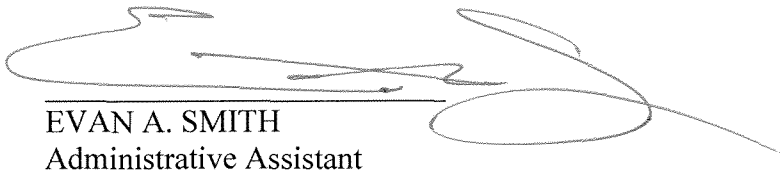

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