No. 1000588

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE,

Petitioner,

v.

WILLIAM LANGE,

Respondent,

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

Court of Appeals No. 78071-9-I
King County Superior Court No.
18-2-00478-1 SEA & 18-1-01503-7 SEA

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A. IDENTITY OF RESPONDENT

William Lange is the defendant-respondent before this Court and asks that the Petition for Review be denied.

B. ISSUES PRESENTED FOR REVIEW

1. Is further review under RAP 13.4(b)(4) warranted where the Court of Appeals found that the City of Seattle ("City") failed to establish that the trial court acted illegally in suppressing a toxicology report under CrRLJ 4.7(g)(7)(i) for the City's discovery violations while simultaneously denying a motion to dismiss and permitting the City to call its expert witness at trial without the toxicology report?
2. Is additional review under RAP 13.4(b)(1) or (2) warranted where the Court of Appeals' decision is clear and consistent with the philosophy, intent, and plain text of CrRLJ 4.7 as well as *Hutchinson*, *Davila*, *Coe* and other appellate decisions?
3. Did the Superior Court even have jurisdiction under RCW 7.16.040 to grant the City's statutory writ where the City

simply failed to note it cross-appeal?

4. Under RAP 13.4(b)(1), (2), or (4), is further review warranted where the Court of Appeals affirmed the Superior Court's ruling because the City was not required to prove the validity of the ignition interlock device (IID) notation to the jury, many of Mr. Lange's prior convictions were irrelevant to the charge of driving while license suspended (DWLS), and the trial court erroneously denied Mr. Lange's motion to sever as untimely despite the fact that the interests of justice strongly favored consideration of its merits and it was made before opening statements?

C. STATEMENT OF THE CASE

Procedural Background: Discovery Violations

Two days after the City charged Mr. Lange with Driving Under the Influence (DUI), his appointed counsel filed a Notice of Appearance along with a detailed demand for discovery pursuant to CrRLJ 4.7. CP 511-518. Among other things, defense counsel requested information concerning each prosecution

witness, including expert witnesses, as well as "information that adversely reflects on the credibility of the witness." *Id.* at 513. Mr. Lange also sought information related to the qualifications and background of any expert witnesses and, specifically, "the name, curriculum vitae, professional training, experience, and knowledge or subject of expertise" of the witness. *Id.* at 515. Additionally, he requested "other documents [] relating to instruments and techniques used to conduct forensic analysis in this case." *Id.* at 517. Finally, he demanded that the prosecution "undertake every effort to discover the existence of all material or favorable evidence…that may be known to any law enforcement agency that is involved in this case…," pursuant to *Kyles v. Whitley*. *Id*. at 518.

Trial was initially set for September 19, 2017. *Id* at 505. Under the Trial Setting Order discovery required under CrRLJ 4.7 and any ER 404(b) or ER 609 evidence was to be disclosed 2 weeks before trial. *Id.*

On the morning of trial, the City disclosed a toxicology report indicating that David Nguyen had tested Mr. Lange's blood

sample for the presence of ethanol on August 22, 2017 and August 25, 2017. *Id.* at 393. Narrowing its initial witness disclosure, the City notified counsel that Mr. Nguyen, a forensic toxicologist employed at the Washington State Patrol Crime Lab, would testify in the trial. *Id.* at 339, 417-18. After this disclosure, trial was continued to provide defense an opportunity to prepare. *Id.* at 502.

Over the next several weeks, Mr. Lange's counsel made record requests and prepared for its interview with Toxicologist Nguyen. *Id.* at 394. A defense investigator assisted in interviewing him on October 19, 2017. *Id.* During that interview, Mr. Nguyen "spoke at length about how blood testing is performed and the importance of placing vials in the correct sequence so that the blood test results can be linked to a specific individual's blood." *Id.* Approximately a week after the interview and just before trial was set to recommence, the same investigator received documents from the crime lab through a public records request on an *unrelated* case. *Id.* Included in those documents was a "Corrective Action Report" (the "Report") that detailed actions taken against Mr.

Nguyen after his supervisor learned that he had switched blood sample vials in the lab during testing a few months prior to the processing of Mr. Lange's blood sample. *Id.* at 394-95, 410. The Report states that Mr. Nguyen first suspected, nine days after the error, that he had mistakenly swapped vials during the extraction process. *Id.* at 410-13. The Report further notes that Mr. Nguyen was not immediately forthcoming about the error, violating protocol by waiting nearly a week to come to his supervisor. *Id.*

The reviewing supervisor indicated that the "error was significant" and identified the root cause to be Mr. Nguyen's "lack of attention." *Id*. The supervisor apparently reviewed the same data sets that Mr. Nguyen had already acknowledged contained the swapped vials. *Id.* There is no indication that other sets of samples tested by Mr. Nguyen were ever audited after this discovery. *Id.* That is particularly alarming given the fact that the Report references, without further detail about the circumstances, "similar non-conforming work by David Nguyen on 2/27/17," less than a month before. *Id.* at 413.

Even though the City had, by that time, confirmed Mr. Nguyen would be called to testify as an expert in its case, at no time did the City inform defense counsel of this Report. *Id.* at 403-04. Indeed, the defense investigator only discovered it inadvertently. *Id.* at 394. The City conceded that this was, at a minimum, mismanagement. *Id.* at 350. The defense filed a Motion to Dismiss in response. *Id.* at 392. The trial judge permitted the City an opportunity to file a response and, therefore, the trial was continued to December 5, 2017. *Id.* at 391.

After considering briefing and argument from both parties, the trial judge refused to dismiss the case, but found the City had failed to disclose the Report and had not complied with its obligations under CrRLJ 4.7 and *Brady*. *Id.* at 606-11. As a lesser sanction, the trial judge suppressed the toxicology results and allowed the City to proceed on the alternative prong of DUI, indicating that Mr. Nguyen would still be permitted to testify. *Id.* at 609-11. The court made clear that he would be subject to cross-examination based on the Report. *Id.* The City chose to not call

Mr. Nguyen to testify.

Procedural Background: Licensing Charges and Severance

On September 19, 2017, the same day that the City provided Mr. Lange with the toxicology report and notice of Mr. Nguyen's expected testimony, it also filed an Amended Complaint alleging two additional counts: IID and DWLS3. *Id.* at 492. The motion to amend was granted over defense counsel's objection. *Id.* at 496.

At trial on December 5, 2017, Mr. Lange moved in limine to exclude reference to any prior bad acts or prior convictions, citing ER 609 and ER 404(b). *Id.* at 309-10. The City responded that it did not intend to introduce any prior bad acts or convictions but would reserve the right to use such evidence for impeachment only. *Id.* at 622. The court granted the motion. *Id.*

The next day, before opening statements, the City readdressed the issue and stated that it did intend to introduce evidence of Mr. Lange's prior convictions for DUI because they were "parts of the basis for Mr. Lange's ignition interlock requirement as well as his license suspension." *Id.* at 656-57. The

Court agreed that it was a "foundational issue" regarding the DWLS3 and IID charges. *Id.* Defense noted her surprise that the Court would not be redacting such information from any trial exhibits and suggested that less prejudicial language could be used, including "driving related convictions." *Id.* at 658-59.

The trial court indicated that Mr. Lange could stipulate that "the DOL validly required defendant to have an ignition interlock at all times while driving"; the defense responded that it would not make such a stipulation at that time, as it would essentially obviate the City of its burden to prove IID. *Id.* at 659-60. The trial court found that the City had to prove as a "foundational issue" that the ignition interlock notation on the driving record resulted from a conviction under RCW 46.20.720 (Ignition Interlock Statute), RCW 46.61.5055 (DUI), or RCW 10.05.140 (DUI Deferred Prosecution). *Id.* at 664. It found that if there was no stipulation by the defense, then "every conviction that [Mr. Lange] has had under the relevant RCWs or code would

play into the foundation of whether or not it was a valid notation that was put on his driving record." *Id.* at 664-65.

The trial court, ultimately, ruled that "without a stipulation, the Court would be inclined to allow an exploration of what were the statutes that were violated that triggered the DOL to make this requirement." *Id.* at 665. It later made an additional ruling under ER 403, determining that the probative value of the prior convictions outweighed the "substantial prejudice" to Mr. Lange. *Id.* at 668-69.

Following this ruling, Mr. Lange moved to sever the IID and DWLS 3 charges from the DUI charge, citing CrRLJ 4.4(a)(1). *Id.* at 665-66. He argued that the motion was both timely and required in the interests of justice because opening statements had not yet occurred, the issue of prior convictions as a foundational issue had just been raised by the City that morning, and because of the extreme prejudice to Mr. Lange's right to have a fair trial on the DUI case if the jury heard evidence of multiple prior DUI convictions. *Id.* at 666-67. The trial court

"agree[d] with counsel that there is significant prejudice issues here, but the motion to sever was not made timely." *Id.* at 667. The court then offered to give a limiting instruction. *Id.* Mr. Lange's proposed stipulation was denied and, therefore, he agreed to what was proposed by the court to lessen the prejudicial impact of Mr. Lange's prior DUI convictions being described at trial. *Id.* at 231, 236, 668.

Procedural Background: Post-Trial Proceedings

The jury convicted Mr. Lange of all three counts. *Id.* at 246. Sentencing took place on December 15, 2017. *Id.* at 191. Defense sought a stay of portions of the sentence pending appeal but was opposed by the City and denied by the Court. *Id.* at 209. Mr. Lange then timely filed his notice of appeal on January 3, 2018. *Id.* at 197.

The City did not immediately file for a writ of review on the trial court's suppression ruling. *Id.* at 1. Rather, the City waited until after sentencing to file its Writ in the Superior Court on January 4, 2018. *Id*. Mr. Lange was unaware of this petition and had already filed a notice of appeal the day before. *Id.* at 198.

The Writ alleged that the trial court "acted illegally by suppressing the toxicology test results" and claimed that cross-appeal was unavailable due to the City's belief that Mr. Lange's appeal was unlikely to be successful. *Id.* at 1, 21 ("While the defendant has been convicted at trial and may still appeal, it is unlikely that his conviction will be reversed"). The Superior Court ordered the parties to appear for argument and presided over the hearing on the Writ on January 10, 2018. *Id.* at 99, 101-03. It ruled against the City, finding that the undisclosed impeachment material "would tend to negate Mr. Lange's guilt" and "should have been disclosed," and that the remedy crafted by the trial court was appropriate. *Id.* at 101. The City sought reconsideration, *id.* at 104, but the Superior Court affirmed its ruling and clarified that the denial was based on the City's failure to establish that the trial court acted illegally. *Id.* at 172-73.

The City also noted a parallel cross appeal on January 18, 2018. *Id.* at 193. The RALJ court ultimately reversed Mr. Lange's convictions, *id.* at 1,022-26, and dismissed the cross-

appeal given the City's choice to litigate the same issues by way of Writ. *Id.*

D. ARGUMENT

1. Further review under RAP 13.4(b)(4) is not warranted as the City still cannot establish that the trial court acted illegally when it considered the facts and circumstances of the case and suppressed the toxicology report under CrRLJ 4.7(g)(7)(i) for the City's discovery violations, while simultaneously denying Mr. Lange's motion to dismiss the charge and permitting the City to call its expert witness at trial without the toxicology report.

In this case, to succeed in its Writ, the City needed to establish that the trial court acted illegally under RCW 7.16.040. *City of Seattle v. Holifield*, 170 Wn.2d 230, 240, 240 P.3d 1162 (2010). In seeking review by this Court, it does not reference RCW 7.16.040. Instead, it focuses on its disagressment with how the trial court applied the law to the particular facts of this case. It states that the scope of its discovery obligations under CrRLJ 4.7(a)(3) and (d) is an issue of substantial public interest but does not address how the Court of Appeals decision lacks clarity requiring further review. Brief of Petitioner at 4. It also suggests

that review is appropriate in this Court because the state toxicology laboratory may now be uncertain about what information they should or must share with the prosecution. *Id*. However, the issue in this case involves the *City's* obligation, pursuant to discovery requests and its own ongoing duties under the plain terms of our state's court rules, to provide criminal defendants with obvious impeachment evidence pertaining to a forensic expert it intended to call and regularly relies upon in trials. The City also seeks additional judicial review of this case under RAP 13.4(b)(4) because the "unnecessary suppression" of the prosecutor's evidence is contrary to the public's interest in a full disclosure of critical facts. *Id.* at 5. To remedy this, it argues that trial courts must apply the factors listed in *Hutchinson*[1] when considering whether to sanction a prosecutor's discovery violation by suppressing evidence, rather than dismissing the

[1] *State v. Hutchinson*, 135 Wn.2d 863, 959 P.2d 1061 (1998), *abrogated in part on other grounds*, *State v. Jackson*, 195 Wn.2d 841, 856, 467 P.3d 97 (2020).

charge, under CrRLJ 4.7(g)(7)(i). *Id.* at 5, 10-11. The Court of Appeals, however, correctly noted that the concerns underlying *Hutchinson* are not applicable to this case. Op. at 17.

Furthermore, if trial courts were required to engage with such factors when considering any sanction less severe than dismissal for a prosecutor's discovery violations, the results would almost always favor the prosecution and excuse, even incentivize, less-than-diligent work by our public emissaries. For example, the *Hutchinson* factors would require that a defendant establish prejudice as well as willful or bad faith conduct on the part of the prosecutor. 135 Wn.2d at 883.

The City also claims that further judicial review is appropriate because Mr. Lange's discovery requests were too vague to put it on notice that this clear impeachment evidence should have been obtained and disclosed. Brief of Petition at 8-9. It's reliance on *United States v. Agurs*[2] is inappropriate as that

[2] 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)

matter involved information pertaining to a civilian descendent, only a single request for "Brady material," and analyzed the prosecution's obligations under *Brady*. 427 U.S. at 103-07. Additionally, *Agurs* specifically noted that there would be cases where the evidence was so clearly exculpatory that the prosecutor's duty to obtain and provide the evidence arises "even if no request is made." *Id.* at 107. Regardless of the multiple requests for exculpatory and impeachment evidence that Mr. Lange made, the scenario envisioned in *Agurs* arguably applies in this case.

It is, in fact, somewhat alarming that a large prosecuting office within a major metropolitan area like the Seattle City Attorney's Office does not, without specific demands, request and maintain basic records of disciplinary and corrective actions taken against the relatively short list of forensic expert witnesses on whom it regularly relies in securing DUI convictions. The Court of Appeals accurately characterized the City's argument—that Mr. Lange should have known to take the additional step of

specifically requesting "any corrective action reports"[3]—as an unworkable standard requiring defendant's to know of the existence and specific nature of discoverable material in order to request it. Op. at 13. The Court of Appeals also correctly reasoned that even Mr. Lange's broader requests for impeachment evidence in this case only pertained to information held by the City or the entities working on its behalf and only to the City's intended witnesses, which included Toxicologist Nguyen. Op. at 13.

2. Further review is not warranted under RAP 13.4(b)(1) or (2) because the Court of Appeals decision does not conflict with any decision of the Supreme Court or any other published decision of the Court of Appeals.

The Court of Appeals decision correctly and concisely adresses how the City's argument relies on its own effort to conflate "the requirements for imposing sanctions for discovery violations under CrRLJ 4.7 with CrRLJ 8.3(b) or with *Brady* when each rule serves a different, although sometimes

[3] Brief of Petitioner at 9.

overlapping, purpose." Op. at 6-12. The City's reliance on *Blackwell* is misplaced as it states that a defendant is required to establish *Brady* materiality only when the material sought is otherwise not discoverable. *State v. Blackwell*, 120 Wn.2d 822, 826-28, 845 P.2d 1017 (1993). Consistent with *Yates* and the plain text of CrRLJ 4.7(a)(3), the Court of Appeal correctly noted that direct impeachment evidence pertaining to a forensic expert the City intends to call at trial is discoverable. Op. at 11 (citing *State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988) and *State v. Vavra*, 33 Wn. App. 142, 145, 652 P.2d 959 (1982)).

The Court of Appeals adequately addressed why the City's reliance on *State v. Bebb*[4] and *State v. Ervin*[5] is unpersuasive. Op. at 9-10. In particular, neither case directly considered CrR 4.7 to determine whether it places a broader duty on the prosecutor than the Constitution. Op. at 10.

The City incorrectly argues that the Court of Appeals

[4] 44 Wn. App. 803, 723 P.2d 512 (1986).
[5] 22 Wn. App. 898, 594 P.2d 934 (1979).

decision is in conflict with *Hutchinson*. Brief of Petitioner at 11. It advocates for the adoption of the *Hutchinson* factors, or something similar, when considering sanctions less severe than dismissal where the prosecutor has violated its discovery obligations. *Id.* at 10-11. The Court of Appeals decision properly states that the concerns expressly discussed in *Hutchinson*—that a criminal defendant's Sixth Amendment rights were implicated by the exclusion of his expert witness that supported his diminished capacity defense[6]—"are not present because the City, as the prosecuting authority, has no Sixth Amendment right to compulsory process of witnesses. Op. at 17.

The City also advocates for a test that would make it unlikely for defendants to receive any meaningful remedy where prosecutors violate discovery rules. The *Hutchinson* factors include consideration of even less severe sanctions than both dismissal and suppression, prejudice, and the willful or bad faith

[6] *See Hutchinson*, 135 Wn.2d at 880-81.

conduct of the violating party. 135 Wn.2d at 883. Application of such factors would result in very little remedy for any defendant faced with the extremely high burden of proving both prejudice and bad faith on the part of the prosecutor. Continuances in the face of a prosecutor's mismanagement, as in this case, would only serve to reward and further incentivize the violating party's lack of diligence.

Mandatory application of the *Hutchinson* factors, or anything similar, would also be contrary to the plain text of the discovery rules. "This court interprets court rules the same way it interprets statutes, using the tools of statutory construction." *State v. Hawkins*, 181 Wn.2d 170, 183, 332 P.3d 408 (2014). The first step is to begin with the plain language of the rule. *Id.* Additionally, courts in Washington must ""give[ ] effect to the plain language of a court rule, as discerned by reading the rule in its entirety and harmonizing all of its provisions." *State v. George*, 160 Wn.2d 727, 735, 158 P.3d 1169 (2007). A court must not add words where the drafters have chosen not to include

them. *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn. 2d 674, 682, 80 P.3d 598, 601–02 (2003).

Simply stated, CrRLJ 4.7(g)(7)(i) makes no mention, unlike other discovery rules, of prejudice or materiality.[7] It would also be absurd, considering other provisions in our discovery rules, to think that simple mismanagement is sufficient to warrant dismissal under CrRLJ 8.3(b), *see State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997), or that gross negligence would support dismissal under CrRLJ 4.7(g)(7)(ii), but a showing of willful suppression or bad faith would be necessary for a lesser sanction against an offending prosecutor under CrRLJ 4.7(g)(7)(i).

[7] *Compare* CrRLJ 4.7(g)(7)(i) *with* CrRLJ 4.7(g)(7)(ii) ("[] and the defendant was prejudiced") *and* CrRLJ 4.7(e)(1) ("Upon a showing of materiality") *and* CrRLJ 8.3(b) ("when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial").

3. Even if the City were able to establish that the trial court acted illegally in this case, a Writ was not appropriate as a cross-appeal was available but the City simply failed to timely note it.

Given that the Court of Appeals found that the City failed to show the trial court acted illegally, it did not consider whether an adequate remedy existed at law for the alleged illegality. Op. at 18, n. 62. However, the Superior Court would have only had jurisdiction to grant the City's statutory writ if the trial court acted illegally and there was no appeal or adequate remedy at law. RCW 7.16.040; *City of Seattle v. Keene*, 108 Wn. App. 630, 31 P.3d 1234 (2001).

Even though the Superior Court entertained the merits of the Writ, the City had failed to timely note a cross-appeal. That is the only reason it did not have other adequate remedies available to it.

Washington court rules provide the government a limited right to appeal, but that right is strictly construed. RALJ 2.2(c); *State v. Rook*, 9 Wn. App. 826, 829, 515 P.2d 830 (1973), *rev.*

denied, 83 Wn.2d 1007 (1974). "A party seeking cross-review must file a notice of appeal within the time allowed by rule 2.5(c)." RALJ 2.1(b). Pursuant to RALJ 2.5(c), a party seeking cross-appeal "must file a notice of appeal within the later of (1) 7 days after service of the notice of appeal filed by the other party, or (2) the time within which a notice of appeal must be filed as provided in section (a)." Section (a), requires that "a notice of appeal must be filed within 30 days after the date of entry of the final decision which the party filing the notice seeks to appeal." RALJ 2.5(a).

The City failed to note a cross-appeal in the time required by the RALJ rules. Mr. Lange was sentenced on December 15, 2017 at which time his motion to stay portions of the sentence pending appeal was opposed by the City, present at the time the motion was made, and denied by the trial court. CP 209. He, thereafter, timely filed his notice of appeal on January 3, 2018. *Id.* at 198. However, the City did not note its intent to cross-appeal until January 18, 2018. *Id.* at 193. It is apparent that the

City failed to comply with either of the requirements of RALJ 2.5(c). It filed its notice of cross appeal 15 days after Mr. Lange's notice of appeal, and 34 days after Mr. Lange was sentenced, the "final decision" referenced in 2.5(a). These requirements are fixed and binding upon the courts. RALJ 2.5(c) is a mandatory rule, holding that a cross-appellant "must" file notice within such timelines.

The City was certainly on notice of Mr. Lange's appeal prior to the deadline for noting its cross-appeal. It was present at his sentencing hearing when he announced his intentions and even objected to his motion to stay portions of the sentence pending appeal. It then stated in its Writ Application—filed a day after Mr. Lange filed his notice of appeal—that it simply believed his chances of success on appeal were low. CP 21. The City even still had time under RALJ 2.5 to file notice of a cross-appeal on January 10, 2018 before the Superior Court on the Writ issue—where the fact that an appeal had been filed was discussed. However, it chose to continue pursuing the Writ and

then, once denied, attempted to assert its claims again. *Id.* at 1,022. The cross-appeal was dismissed on RALJ, however, given that the City already litigated the issue unsuccessfully on Writ. *Id*. The City can provide no explanation for why it failed to timely note a cross-appeal in accordance with RALJ 2.5.

4. **Further judicial review of the licensing and severance issues is not warranted under RAP 13.4(b)(1), (2), or (4).**

The City's assertions regarding the frequency of cases involving repeat DUI offenders or those involving simultaneous licensing offenses do not address why the Court of Appeals decision lacks clarity requiring further review by this Court. Brief of Petitioner at 12-13. These factual assertions are also not supported by the record or basic inference from the record.

The Court of Appeals decision accurately and succinctly addresses many of the arguments raised by the City in its Petition regarding the licensing offenses and Mr. Lange's motion to sever. Op. at 18-28. It also concisely addresses the legal standard, relevant portions of the record, and how the

"municipal court's erroneous decisions left Lange a choice that was no choice at all" in considering stipulations offered by the trial court over his objection. Op. at 28.

The City now argues that the Court of Appeals decision conficts with *State v. Smith*[8] and *State v. Johnson*[9]. Brief of Petitioner at 13. It correctly parts with the trial court's express use of the term "valid." Mr. Lange's prior convictions had already been adjudicated and the validity of the underlying suspension was an issue for the court to consider pre-trial, rather than information necessary for the jury. *City of Bellevue v. Montgomery*, 49 Wn. App. 479, 481, 743 P.2d 1257 (1987).

However, the City simply relabels the issue of legal "validity" by arguing that the underlying convictions themselves must be proven to the jury as essential elements of the DWLS3 and IID charges. This argument is based on a flawed and over-expansive reading of *Smith* and *Johnson*.

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[8] 155 Wn.2d 496, 120 P.3d 559 (2005).
[9] 179 Wn.2d 534, 315 P.3d 1090 (2014).

Due process requires that the prosecution prove every element of the charge crime beyond a reasonable doubt. *Smith*, 155 Wn.2d at 502. As the Court of Appeals stated, the reason for the underlying license suspension is an essential element of a DWLS charge. Op. at 24; *Johnson*, 179 Wn.2d at 543. However, the reason underlying Mr. Lange's license suspension in the third degree was that he had (1) previously been suspended under SMC 11.56.320(C) for a period of time when his license was not eligible for reinstatement and then (2) failed to reinstate once he had become eligible.

In this case, the City was not required to present the jury with evidence of the prior driving convictions in order to establish the elements of DWLS3. Mr. Lange's position is supported by this Court's decision in *Smith* and consistent with the Court of Appeals decision here. The evidence presented at trial in *Smith* was insufficient to prove an essential element of DWLS 1st Degree. *Smith*, 155 Wn.2d at 498. In finding the evidence insufficient, this Court analyzed a narrow factual issue

that is not present in this case. Specifically, the prosecution failed to present *any* testimony of the relevant factual matter for that charge: that his license was revoked due to a finding that he was a "habitual traffic offender," rather than merely parroting the legal standard of "first degree." *Id.* at 502-03. This Court noted that the DWLS statute does not define revocations in terms of degrees. *Id.* at 503-04. "Under the statute's plain terms, the crime is driving with a license that has been suspended or revoked, the degree of which depends on the reason for the revocation. *Id.* at 504. The *Smith* decision goes on to state that "[h]ad the [prosecution] introduced evidence that contained a finding that Smith was an habitual traffic offender under chapter 46.65 RCW, e.g., the revocation order, this element would have been satisfied." *Id.* However, no such evidence was ever admitted and, therefore, no reasonable juror could find that Smith's license had been revoked due to being found a habitual traffic offender. *Id.*

Smith does not stand for the expansive proposition that the

City would like it to. This Court never indicated that there was insufficient evidence to convict Mr. Smith because the prosecutor failed to establish each of the underlying criminal convictions that made him a habitual traffic offender. RCW 46.65.020 lays out several specific combinations of criminal convictions that elevate a person's status to habitual traffic offender status. Regardless, *Smith* never discussed the convictions from Mr. Smith's record that presumably caused him to be designated as a habitual traffic offender. Similarly, it never suggested that the prosecutor was required to submit evidence of each of the actual convictions that, in relevant combination, made the defendant a habitual traffic offender.

As in *Smith*, the City was required to prove the reason underlying Mr. Lange's license suspension. The reason his license was allegedly suspended in the third degree was that he had (1) previously been suspended under SMC 11.56.320(C) for a period of time when his license was not eligible for reinstatement and then (2) failed to reinstate once he had become

eligible. The true reason for the specific degree in this case was the failure to reinstate while eligible. Arguing that *Smith* requires the prosecution to present evidence of each underlying conviction under SMC 11.56.320(C) is a misinterpretation and expansion of *Smith*.

For many of the same reasons as discussed above, the City was not required to present evidence of Mr. Lange's prior convictions to prove the underlying basis for the IID notation. In fact, the trial court's error is even clearer in this context. Unlike the DWLS provisions, there is no language that distinguishes between degrees of the IID offense based on differing levels of culpability. The City simply needed to prove that Mr. Lange was driving in Seattle without a working interlock device installed on a date when his driving record contained a notation indicating that he was required to have one equipped. CP 230.

E. CONCLUSION

For the foregoing reasons, this Court should not grant further review of this case.

[RAP 18.17(b) Certificate of Compliance – 4,990 words]

Dated this 1 October 2021.

Respectfully submitted,

/s/ John Marlow
John Marlow, WSBA # 49713
Counsel for Respondent

KING COUNTY DEPARTMENT OF PUBLIC DEFENSE

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