NO. 96217-1
COA No. 49995-9-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Petitioner

vs.

DEAN IMOKAWA

Respondent

ON APPEAL FROM THE SUPERIOR COURT FOR CLARK COUNTY
The Honorable Scott Collier
Superior Court No. 15-1-01561-3

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. COUNTER STATEMENT OF THE CASE

Dean Imokawa, appellant below and respondent in this court, was charged by an information filed August 18, 2015 with vehicular homicide in violation of RCW 46.61.520, vehicular assault in violation of RCW 46.61.522 and reckless driving in violation of RCW 46.61.500. CP 1. The jury found him not guilty of reckless driving, and not guilty of the reckless driving prongs on both the vehicular assault and vehicular homicide counts. CP 74-78. He was found guilty only on the disregard for safety prong of each count.

Mr. Grier testified he was going northbound on SR 503 toward his home in Battle Ground. RP II 356. He was driving in the left-hand (passing) lane at about 40 to 45 MPH, which was below the speed limit of 50 MPH, when he first noticed a pickup truck come up behind and flash its lights at him. RP II 357, 380-81. It came close to his rear bumper. RP II 357. Grier "lit up" his brakes and made a hand gesture at the other driver. RP II 358-59. After he hit his brakes, the pickup backed off. RP II 360.

After cycling through the light at 149th, Grier continued north in the left-hand lane. He was still going only 40 to 45 MPH, although the speed limit had transitioned to 55 MPH north of the intersection. RP II 380, 387. The pickup came up close behind again at the railroad tracks, and Grier hit his brakes again. He wanted the other driver to "get off his butt." RP II 382-83. He knew the other driver still wanted to pass, and he could have moved over to the right lane to allow this, but again did not move over. RP II 382, 384-86.

In fact, Grier testified he never even considered moving over to let the pickup pass. RP III 390-91.[1]

The pickup ultimately moved into the right-hand lane to pass Grier as they went down the hill toward the Salmon Creek bridge. Grier saw the pickup overtaking him in the right-hand lane. He saw the pickup had its left turn signal activated as it passed him on the right. He noticed the turn signal because it was mounted and flashing on the left-side rearview mirror of the pickup as it went by. RP II 362.

The pickup was still signaling a left turn as it got ahead of the Rover, and as it began to merge back into the left-hand lane to complete the pass. Grier denied speeding up, or trying to "close the door", but did not slow down either. RP III 391, 395-96. The left rear of the pickup and the right front of the Rover made contact. After contact occurred Grier held on to his steering wheel and "slammed" on his brakes. RP III 393-94. The impact caused the pickup to rotate across the median and into the southbound lanes.

Mr. Imokawa testified that he was northbound on SR 503 following a black Dodge pickup in the left-hand lane. He saw the Dodge pull into the right-hand lane to pass a Land Rover that was traveling at less than the speed limit in the left-hand lane. RP IV 658. When he got up behind the Land Rover he turned on his headlights to let the Rover know he was there and

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[1] This was his duty under RCW 46.61.100, which provides motorists are required to **keep right except when passing,** and that it is a traffic infraction to drive continuously in the left lane of a multi-lane roadway when it impedes traffic.

wanted to pass. RP IV 658, 676. The Rover was still driving slower than the speed limit. RP IV 677.

The Rover did not increase its speed, or move over, but remained in the passing lane. RP IV 658-59. Imokawa backed away at that point. The traffic cycled through the 149th Street intersection. RP IV 659. After clearing the intersection, Imokawa pulled back up behind the Rover again to let him know that he still wanted to pass, and the driver of the Rover "brake-checked" him by slamming on his brakes. RP IV 659, 678. Imokawa thought this was dangerous, so he backed away again, and then moved into the right-hand lane to overtake the Rover. RP IV 660, 679.[2] As he passed the Rover he turned on his blinker to signal his intention to change back to the left lane. After he passed the Rover he checked his side-view mirror for space and was positive he had enough room to merge back safely. RP IV 660-62, 694. As he tried to merge back into the left-hand lane, the Rover sped up and hit him. RP IV 661, 663, 658-686, 693. This caused his pickup to rotate to the left across the median and into the southbound lanes. His pickup hit a guardrail and was ultimately impacted by a southbound vehicle. This resulted in the tragic death of Eleanor Tapani, and the injuries sustained by Linda Dallum.

The prosecutor's Statement of the Case *inaccurately* claims that "several witnesses" testified there did not appear to be enough room for the pickup to safely change lanes. Petition, at 3. Actually, other than Grier and Imokawa, only two other witnesses testified about whether or not there was

[2] Passing on the right is permitted on a two-lane roadway under conditions where it can be done safely. RCW 46.61.115.

enough room for the pickup to safely merge back into the left-hand lane. Those witnesses were Steven Wicklander, and John Gain. *Mr. Wicklander* acknowledged that he told the investigating trooper that "there was room to make a lane change but he didn't make it properly." RP II, 340. The other eyewitness, *Mr. Gain*, testified that he could not say there was *not* enough space for the pickup to merge back into the left lane in front of the Land Rover. RP II, 316.

The data obtained from the event recorder on the pickup indicated the pickup was traveling at 68 MPH. RP VI, 606, 611, 615-17, 627.

Trooper Jeff Hughes examined the scene for physical evidence. He testified that the only tire marks found in the northbound lanes were imparted by the pickup. These were yaw marks that started *inside* the left-hand lane - - not in the right lane - - and proceeded north *inside* the left-hand lane for some distance until the pickup rotated across the median and into the southbound lanes. RP II 256-57. There was no physical evidence at the scene indicating that the impact occurred in the right northbound lane. RP II 275. Contrary to Grier's testimony that he had "slammed on his brakes", the State Patrol found no evidence of brake marks from the Land Rover at the scene. RP II 254. According to Trooper Hughes, the physical evidence at the scene, including the roadway evidence and the vehicle damage, did not provide enough information to render a conclusive opinion as to who hit who. RP II 262. Nor was it possible to determine from the physical evidence whether the Land Rover sped up or not. RP II 262. The police were unable to obtain speed and

braking data from the Land Rover, RP III 500-501. But, from the deformation damage, it was evident that the pickup was *in front* of the Land Rover at the moment of initial impact. RP II 263.

II. ARGUMENT REGARDING ACCEPTANCE OF REVIEW

A. This Court should not accept review under RAP 13.4 (b) (3) or (4) where the Court of Appeals correctly interpreted this court's precedent on the allocation of the burden of proof of a defense which negates an element of the crime.

The Court of Appeals correctly held that due process of law requires that a jury be clearly instructed in a vehicular homicide/vehicular assault case that the state has the burden to disprove the existence of a supervening or intervening cause once there is evidence presented which raises that issue. The court also correctly held that the instructions given in the case at bar did not make that burden of proof clear. Hence, reversal of the convictions was required. Given that holding , which correctly interprets this court's previous due process jurisprudence, this court should not grant review of the Court of Appeals decision.

The state's petition does not appear to contest the correctness of the core holding of the Court of Appeals decision, namely that superseding cause negates proximate cause, and therefore the state has the burden of disproving superseding cause when that issue is presented. The state's petition never even cites the lead case which most recently considered the due process issue, *State v. W.R.* , 181 Wn. 2d 757, 336 P.3d 1134 (2014). The state's petition also does not even mention *State v. Acosta*, 101 Wn. 2d 612, 683 P.2d 1069 (1984), which established the principle that a jury must be *unambiguously* instructed

on the state's burden of proof where a defense negates an element of the offense. Basically, the whole thrust of the state's petition is directed at trying to establish that the error in the instructions in this case was somehow harmless *despite* the due process violation. That is not a basis for accepting review and this court should deny the state's petition.

B. If the court grants review, the Court of Appeals decision should be affirmed.

The trial court's instructions on proximate cause and superseding cause, Jury Instructions 10 and 15[3], were drawn from WPIC instructions. They begin by telling the jury that the act of another person is *not* a defense to the charges. The second paragraph introduces the concept of an intervening cause, but says nothing about which party has the burden of proving there was an intervening cause. The third paragraph addresses only whether the intervening cause was a hazard of which the defendant should have been aware. If so, it is not an intervening cause. That in turn suggests that the burden of proving there was an intervening cause rests with the defense, not the prosecution. The Court of Appeals elaborated on this problem with the pattern instructions as follows:

> (T)he instructions imply that a superseding cause is not considered until after the State has already met its burden to prove all of the essential elements. And the emphasis in the jury instructions on what is *not* a defense or what is *not* a superseding cause made it appear that a superseding cause has to be affirmatively proven by Imokawa rather than the actual burden of the State to prove the absence of a

[3] The instructions are functionally identical, but one covered the assault charge, and the other the homicide charge.

> superseding cause. Ultimately, the jury instructions in this case did not inform the jury 'in some unambiguous way' that the State had the burden to prove the absence of a superseding cause. *Acosta*, 101 Wn.2d at 621.
> Slip Op. at 11. (emphasis in original)

Without further direction from the court on the burden of proof, no juror would be able to correctly deduce that the state bore the burden of proving that the act of another, in this case Mr. Grier, was *not* an intervening cause of the accident. The instructions that were given fell far short of the *Acosta* court's directive that the jury must be informed "in some unambiguous way" that the state must prove the absence of the defense beyond a reasonable doubt. The Court of Appeals decision was correct in holding that the instructions violated due process of law because they did not *clearly* state that the state has the burden to disprove the existence of an intervening/superseding cause beyond a reasonable doubt.

The state attempts to argue that simply because the ordinary instruction on burden of proof was given (based on WPIC 4.01), and the "to convict" instructions reiterated that the state had the burden of proof on proximate cause, the jury could figure out for itself that the state had the burden of disproving the existence of an intervening cause, a concept that is not even mentioned in the "to convict' instructions.[4] Petition at 9-12.

[4]While the Court of Appeals held that the absence of a superseding cause is not an element of the crime, Washington law is clear that "a 'to convict' instruction must contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." *State v. De Ryke*, 149 Wn. 2d 906, 79 P.3d 1000 (2003); *State v. Smith,* 131 Wash.2d 258, 263, 930 P.2d 917 (1997). Absent an allocation of the burden of proof of superseding cause, the jury was not likely to deduce which party had the burden on this issue from the "to convict" instruction itself.

A similar argument was rejected by the court in *Acosta, supra.* There, the jury was instructed about the issue of self–defense, but was not instructed on which party had the burden to prove self-defense. The state argued that since the jury had been instructed it was a "complete defense" to the assault charge if it found that the defendant was acting in self–defense, the jury instructions were adequate. This argument was rejected by the *Acosta* court.

> A reasonable juror could have mistakenly believed that the State need not disprove self-defense, and that the defendant bore some burden of proof on this issue. The trial court's failure to inform the jury of the State's burden was therefore error.

101Wn. 2d at 623.

The court then also rejected the argument that the instructional error was harmless. 101 Wn. 2d at 624.

The state's petition recognizes the flawed nature of the instructions that were given on intervening cause, noting that they were "problematic", "inartful" and "clunky". Yet, the state claims that these deeply flawed instructions still somehow manage to clearly convey which party has the burden of proof on the issue of intervening cause. Obviously, both contentions cannot be true.

Acknowledging that previous Washington decisions which have analyzed the intervening cause instructions have found them "confusing", see *State v. Souther*, 100 Wn. App. 701, 998 P.2d 350, 355 (2000), the state nevertheless argues that the instructions here are somehow less confusing on

the issue of allocation of the burden of proof. Petition at 13-14. This argument should also be rejected by this court.

The only differences between the instruction given in *Souther*[5] and the ones given in Mr. Imokawa's case was the addition of the word "However" at the beginning of the second paragraph and the addition of a sentence at the end of the second paragraph: "An intervening cause is an action that actively operates to produce harm to another after the defendant's act has been committed." So while the WPIC has been modestly modified, the modification does nothing whatsoever to clarify *which party has the burden of proof* regarding superseding/intervening causes.

The state next argues that the confusion created by telling the jury that the acts of another are not a defense in the first paragraph, and then introducing the concept of superseding/ intervening cause in the second paragraph, merely "reflects the complexity of the interplay between proximate cause and superseding cause." Petition at 15. The state goes on to suggest that the order in which the instructions were given would inevitably lead the jury to the conclusion that the state bears the burden of proof to disprove the existence of a superseding cause. Because this argument is based on nothing more than supposition and wishful thinking it should likewise be rejected.

To the contrary, the jury was told in the introductory instruction, CP 45-47, "The order of these instructions has no significance as to their relative

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[5] As the State helpfully points out in a footnote, Petition at 14, the *Souther* court did not have to decide whether the instruction was improper because it found any error was harmless. It did so by concluding that the acts of the other driver in *Souther* were concurrent causes, rather than intervening causes, so the doctrine of intervening cause simply did not apply to the facts of the case.

importance. They are all important." This undermines the argument that from the order of the instructions, the jury could deduce who had the burden of proof. In addition, the Court of Appeals opinion points out that "considering the jury instructions *as a whole*, there [was] a distinct possibility that the burden of proof was unclear to the jury because the instructions imply that a superseding cause is not considered until after the State has already met its burden of proof...." Slip Op at 11(emphasis added).

The Court of Appeals decision correctly interpreted this court's previous due process decisions regarding allocation of the burden of proof. The state's argument that somehow a jury would figure out which party had the burden with only the confusing and flawed superseding cause/proximate cause instruction and WPIC 4.01 to guide it is unpersuasive. If this court grants review of this issue, it should affirm the Court of Appeals holding and reiterate that where there is evidence of superseding cause in a vehicular homicide or vehicular assault case, the jury must be instructed *in an unambiguous way* that the state bears the burden to disprove the existence of the superseding cause.

C. The instructional error was not harmless.

The state also explicitly waves the banner of "harmless error." This argument was rejected by the Court of Appeals, and should likewise be rejected by this court. The Court of Appeals cited *State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002), which appears to apply a "contribution" test as the test of harmless error in an instruction case. The *Brown* case relied on *Neder*

v. United States, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) which also used a "contribution" test for harmless error. The panel decision here reasoned that since there was contested evidence of a superseding cause, and the jury was not properly instructed on the burden of proof, there was a reasonable possibility that the improper jury instructions could have contributed to the verdicts. Slip Op. at 13. Consequently, the due process error was not harmless.

In *State v. Acosta, supra*, the court did not need to chose between the "overwhelming evidence" test or the "contribution" test, finding the error was not harmless under either version. *Acosta* at 624-625. In the present case, the record demonstrates that there was *not* overwhelming evidence of guilt. If there had been, the jury would not have found Mr. Imokawa "not guilty" on the substantive charge of reckless driving, and "not guilty" on the recklessness prong of the vehicular assault and homicide statutes.[6]

The state suggests that evidence that Mr. Imokawa was going 68 MPH in a 55 MPH zone and allegedly miscalculated his merger back into the left lane after overtaking Grier's car was "overwhelming" evidence of disregard for safety. This argument also fails.

Disregard for the safety of others means "an aggravated kind of negligence or carelessness, falling short of recklessness but constituting a more serious dereliction than ordinary negligence". "Ordinary negligence in

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[6] As discussed in Respondent's argument for cross–review, (Part III below), there is a fine line between disregard for the safety of others, which requires an aggravated quality of negligence and ordinary negligence, which would not support a conviction for vehicular homicide or vehicular assault.

operating a motor vehicle does not render a person guilty of vehicular homicide or assault." WPIC 90.05, given here as Court's Instruction 8, CP 55.[7]

The fact that that Mr. Imokawa was driving 13 miles per hour over the posted limit at the time he was attempting to pass Mr. Grier's Land Rover is *not* proof of aggravated negligence. A driver is allowed to exceed the speed limit briefly in order to overtake and pass another car going less than the posted speed limit, which Grier admitted he was doing. RCW 46.61.425.

Mr. Imokawa pulled into the right lane in order to pass Mr. Grier. A driver is allowed to use the right lane to overtake and pass another vehicle under certain circumstances. RCW 46.61.115. So the fact that Mr. Imokawa was passing using the right hand travel lane is *not* proof of aggravated negligence either.

The cause of Mr. Imokawa's collision with Ms. Dallum's car was the earlier collision between Mr. Grier's Land Rover and Mr. Imokawa's pickup truck, which occurred when Mr. Imokawa was trying to merge back into the left lane after passing Mr. Grier in the right lane. Although Grier testified the merge was made without sufficient space to do so, and denied accelerating to make this more difficult, the evidence about the safety of this passing

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[7] The comment to WPIC 90.05 reads in part as follows:
The second paragraph of this instruction is an adaptation of the majority opinion in *State v. Eike*, 72 Wn.2d 760, 435 P.2d 680 (1967), which has been cited with approval in several cases: *State v. Jacobsen*, 78 Wn.2d 491, 477 P.2d 1 (1970); *State v. Knowles*, 46 Wn.App. 426, 730 P.2d 738 (1986); and *State v. May*, 68 Wn.App. 491, 843 P.2d 1102 (1993). Evidence of some conscious disregard of the danger to others is necessary. *State v. Vreen*, 99 Wn.App. 662, 994 P.2d 905 (2000), affirmed 143 Wn.2d 923, 26 P.3d 236 (2001); see also *State v. A.G.*, 117 Wn.App. 462, 72 P.3d 226 (2003) (discussing vehicular homicide by disregard for the safety of others), affirmed in *State v. Graham*, 153 Wn.2d 400, 103 P.3d 1238 (2005).

maneuver was mixed. One of the witnesses to that collision, Steve Wicklander, told the police that he thought there *was* enough room for the pickup truck to make this lane change if it were done properly. RP II 340. A second witness, John Gain, who was behind both the Land Rover and the pickup, could not say there was *not* enough space for the pickup truck to merge back into the left lane in front of the Land Rover. RP II 316. Mr. Imokawa, an experienced driver, had signaled his intention to move back into the left lane, checked his left hand mirror and obviously thought there was enough space to do so. RP IV 661-662, 694. At most, the state's evidence showed a miscalculation on his part as to whether the passing maneuver could be done with safety. In other words, the evidence showed at most ordinary negligence.

Since there was *not* overwhelming evidence to meet the standard of "aggravated negligence" required to prove the "disregard for safety" prong of the vehicular homicide/assault statutes, the error regarding the allocation of the burden of proof was not harmless error under either standard of review.

III. The court should review the Court of Appeals holding that the evidence was sufficient to convict on the "disregard for safety" prong of the vehicular assault and vehicular homicide statutes.

Mr. Imokawa argued in the Court of Appeals that the evidence was insufficient to convict on the only prong of either driving statute that the jury reached guilty verdicts on, namely whether he had driven in "disregard for safety". The Court of Appeals held that there was sufficient evidence to

support the conviction. Slip Op. at 13-14. This court should review this holding pursuant to RAP 13.4 (b)(3).

In order to sustain a conviction, the state must prove every element of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S. Ct.1068, 25 L.Ed.2d 368 (1970). The standard of review when a challenge to the sufficiency of the evidence is made on appeal is whether a rational trier of fact could have found all of the elements of the crime beyond a reasonable doubt, giving the benefit of the inferences from the evidence to the non-moving party, the state. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Hoffman,* 116 Wn. 2d 51, 82, 804 P.2d 577 (1991); *State v. Green,* 94 Wn. 2d 216, 616 P.2d 628 (1980).

The jury rejected the prosecutor's argument that Mr. Imokawa had driven in a reckless manner on Counts I and II, and also rejected the substantive charge of reckless driving in Count III.

The jury was instructed that disregard for the safety of others meant "an aggravated kind of negligence or carelessness, falling short of recklessness but constituting a more serious dereliction than ordinary negligence" and that "ordinary negligence in operating a motor vehicle does not render a person guilty of vehicular homicide or assault." CP 55.

Mr. Imokawa's driving did not meet the required threshold of "aggravated negligence." While the state's evidence showed that he was

driving over the speed limit, at the time he was attempting to overtake Mr. Grier's Land Rover, which was blocking the passing lane.[8]

Steve Wicklander, one of the several drivers who saw the lead up to the collision, told the State Patrol trooper that he thought that there was room enough for the pickup to make the lane change if it were done properly. RP II 340. John Gain, who was behind both the pickup and Land Rover, could not say there was *not* enough space for the pickup to merge back into the left lane in front of the Land Rover. RP II 316. He also could not tell if the Land Rover had increased its speed as it was being overtaken by the pickup. Gain had not thought there was anything unusual about Mr. Imokawa's passing him on the right at the previous intersection since he (Gain) was going below the speed limit. He saw the pickup turn on its blinker to signal its intention to re–enter the left lane. He testified that as the pickup moved back into the left lane, the back of the pickup just "nicked" the Land Rover, sending it into the oncoming lane. Gain saw no vehicle directly in front of the Land Rover either, as Grier had claimed.

The physical evidence showed the damage to Mr. Imokawa's pickup truck was to the very left rear quarter panel. Ex. 22, 23. The damage to the Land Rover was to its very right front bumper. EX 41, 42, 43. Moreover, the roadway evidence showed that the pickup was almost entirely in the left hand lane and had almost completed its pass before any impact occurred. RP III

[8] Grier admitted he was not trying to pass slower traffic. See RCW 46.61.100 at FN 1, supra.

562, 572. Thus, even assuming Mr. Imokawa miscalculated the space available, the miscalculation was slight.

Mr. Imokawa was an experienced driver. The jury was entitled to credit his testimony that he checked his side view mirror before attempting to merge back into the left lane, and concluded there was adequate space to make the attempt.

There was nothing illegal or negligent about Mr. Imokawa using the right lane to overtake and pass another vehicle. RCW 46.61.115. While a driver making a lane change has the duty to do so only if the lane change can be made with safety and to signal his intention to do so, RCW 46.61.305, Mr. Imokawa had signaled his intention and clearly thought there was sufficient room to make his lane change with safety.

Once again, in Mr. Wicklander's view, there was room for the lane change. This demonstrates at most ordinary negligence in miscalculating the space available to make the lane change.

Slight miscalculations of judgment are common and therefore constitute ordinary negligence. On the other hand, gross miscalculations of judgment are uncommon, and thus constitute aggravated negligence. Because the margin of error in this case was so slight, it constitutes at most ordinary negligence. Consequently, there was insufficient evidence to support the jury's verdict, even under the deferential standard of review that applies here.

The flaw in the analysis of the Court of Appeals decision on this issue is that it considered testimony of Mr. Imokawa's driving which had allegedly occurred well before the accident:

> The state presented evidence that Imokawa was driving faster than other vehicles on the road. And Grier testified that Imokawa pulled up dangerously close behind him on two occasions prior to attempting the lane change. Within the entire context of Imokawa's driving the morning of the collision, there was sufficient evidence for the jury to find Imokawa operated his vehicle with disregard for the safety of others.
> Slip Opinion at 14.

Even if Mr. Imokawa had been driving faster than other vehicles earlier on the day of the accident, and even if he had tailgated Mr. Grier in an attempt to motivate him to pull over to the right lane, this would not be a basis for the jury to conclude Mr. Imokawa drove with culpable disregard for safety. The "to convict" instructions required the jury to find *"at the time of causing the injury"* Mr. Imokawa was driving his vehicle in disregard for safety of others. CP 58, 63[9] . As argued above, his driving at the time of his attempted pass and merge into the left lane did not violate any statute, and was at most, ordinary negligence. The Court of Appeals erred in considering driving conduct that occurred well in advance of the time of the collision, since the instructions required that the culpable driving be contemporaneous with the time of the collision.

This court should accept review of this issue, reverse the Court of Appeals holding that there was sufficient evidence to convict, and remand with directions to dismiss the prosecution.

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[9] Given as Court's instructions 11 and 16, reproduced in the Appendix.

IV. CONCLUSION

The state asks this court to grant review under RAP 13.4 (b)(3) and (b)(4). However, the state does not contend that the Court of Appeals decision was wrong in holding that where evidence of a superseding cause is present, it negates the element of proximate cause, and the state must shoulder the burden to disprove this defense. Instead, the state argues that the instructions that were given were somehow adequate to communicate the allocation of the burden of proof on the issue of superseding cause. Because the Court of Appeals decision correctly interpreted this court's past due process decisions on this issue, there is no significant constitutional issue or issue of importance for this court to review.

If this court accepts review, it should affirm the Court of Appeals holding on the due process/instructional issue. Mr. Imokawa's defense to the charge of vehicular homicide and vehicular assault rested chiefly[10] on the concept of superseding cause. Because the existence of a superseding cause negates proximate cause, due process of law required the state to assume the burden to disprove superseding cause when the defense presents evidence of this issue. Under *Acosta*, the jury must be told in an unambiguous way that the state bears the burden of proof on any issue where the existence of the defense negates an element of the state's case. The Court of Appeals correctly held that the instructions given in this case failed to do so, and were thus

[10] He also argued at trial that he was not reckless, nor criminally negligent.

constitutionally defective. On this basis, this court should affirm the Court of Appeals, and remand to the trial court for a new trial.

In addition, this court should grant review under RAP 13.4 (b)(3) with respect to the Court of Appeals holding on the sufficiency of the evidence. The Court of Appeals incorrectly considered all of the events preceding the the collision between Mr. Imokawa's pickup and Mr. Grier's Land Rover instead of focusing on Mr. Imokawa's driving at the time of the initial impact, as required by Instructions 11 and 16. Had the Court of Appeals correctly viewed the evidence for liability as required by the "to-convict" instructions, it would have properly concluded that the evidence was insufficient to sustain Mr. Imokawa's convictions on both counts. As a result, this court should grant review on this issue, reverse the Court of Appeals holding on this issue, and remand with directions to the trial court to dismiss both counts.

Dated this 14th day of SEPTEMBER, 2018

Mark W Muenster

Mark W. Muenster, WSBA 11228

Steven W. Thayer WSBA 7449

Of Attorneys for Respondent

INSTRUCTION NO. 11

To convict the defendant of the crime of vehicular homicide, each of the following five elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about April 2, 2015, the defendant drove or operated a motor vehicle;

(2) That the defendant's driving or operation of the motor vehicle proximately caused injury to another person;

(3) That at the time of causing the injury, the defendant was driving operating the motor vehicle

(a) in a reckless manner; or

(b) with disregard for the safety of others;

(4) That the injured person died as a proximate result of the injuries; and

(5) That the defendant's act occurred in the State of Washington.

If you find from the evidence that elements (1), (2), (4), and (5), and any of the alternative elements (3)(a) or (3)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (3)(a), or (3)(b), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), or (5), then it will be your duty to return a verdict of not guilty.

APPENDIX - 1

INSTRUCTION NO. 16

To convict the defendant of the crime of vehicular assault, each of the following four elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about April 2, 2015, the defendant operated or drove a vehicle;

(2) That the defendant's vehicle operation or driving proximately caused substantial bodily harm to another person;

(3) That at the time the defendant

(a) operated or drove the vehicle in a reckless manner; or

(b) operated or drove the vehicle with a disregard for the safety of others; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that elements (1), (2), and (4), and any of the alternative elements (3)(a), or (3)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (3)(a), or (3)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), or (4), then it will be your duty to return a verdict of not guilty.

APPENDIX - 2

September 14, 2018 - 4:40 PM

Transmittal Information

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Appellate Court Case Title:	State of Washington v. Dean Masao Imokawa
Superior Court Case Number:	15-1-01561-3

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