

63442-9

63442-9

NO. 63442-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS S. JASPER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEBORAH FLECK

BRIEF OF RESPONDENT

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A. ISSUES

1. Are certified Department of Licensing (DOL) documents nontestimonial where a three-page exhibit simply recounts the status of Jasper's driving privilege, without opinion, and does not reference events that post-date the crime?
2. If some portion of the DOL document was testimonial, was any error harmless beyond a reasonable doubt where two documents clearly established that Jasper's license had been suspended, and where he admitted knowing of the suspension?
3. Was Jasper's right to be present at trial violated when the trial court consulted with counsel concerning a written jury inquiry?
4. Assuming, that neither Jasper nor his attorney were consulted by the court before responding to the jury's inquiry, was any error harmless?
5. Is a Gunwall analysis of a defendant's article I, section 22 right to be present at trial superfluous where any error is harmless beyond a reasonable doubt?
6. Does article I, § 22 of the Washington Constitution provide a defendant with greater right to be present at trial?

B. STATEMENT OF FACTS

1. PROCEDURAL FACTS

The State charged Douglas Jasper with one count of Felony Hit and Run (injury), and one count of Driving While License Suspended/Revoked in the Third Degree¹ after he struck another car driven by Choon Wong head-on. CP 1-4. The jury convicted Jasper of both counts. CP 53-54. The court imposed a standard range sentence of 22 months' confinement on the Felony Hit and Run count and 3 months' confinement on the Driving While License Suspended count, to be served concurrently. CP 95, 100; 8RP 9-11.²

2. SUBSTANTIVE FACTS

On February 14, 2008, Choon Wong and his wife Jenny Li were commuting home together from the park and ride in Li's silver Ford Focus. 3RP 25, 35. Wong was driving. 3RP 25, 35. At about 5:30 p.m., Wong and Li were traveling northbound on Military Road South toward South 216th Street in SeaTac when their car

¹ The State also charged Jasper with Negligent Driving in the Second Degree, a traffic infraction under RCW 46.61.525. The court found this infraction committed at the end of the trial. 5RP 28-31.

² The Verbatim Report of Proceedings consists of eight volumes. The State has adopted the following reference system: 1RP (03/05/09); 2RP (03/09/09); 3RP (03/10/09); 4RP (03/11/09); 5RP (03/12/09); 6RP (04/10/09); 7RP (05/01/09); and 8RP (05/04/09).

was struck head-on by a blue Ford Explorer driven by Douglas Jasper. 3RP 25-27, 35-37, 44, 55-56; 4RP 6, 12, 28, 33; Ex. 6, 13. The force of the impact caused the air bags to deploy and the Focus to spin around at least 180 degrees in the middle of the street. 3RP 27, 37, 44; Ex. 6. The Explorer slid up into an embankment approximately 75 feet away. 3RP 46; 4RP 6, 33; Ex. 10, 18.

After the Focus came to a rest, Li saw that her husband was covered in glass and unable to get out of the car because his arm was pinned by the crushed driver's side door. 3RP 29, 37-38; Ex. 6. The fire department arrived and was finally able cut Wong out of the car 30 to 40 minutes later. 3RP 30, 38, 44. Wong and Li were taken to the hospital where Wong was treated for a broken left arm. 3RP 31, 40. Neither of them recalled anyone approaching the car and identifying themselves as the driver of the Explorer and neither recognized Jasper in court. 3RP 30, 33, 39-40.

William Draper, who was driving behind Li and Wong's car, saw the collision and stopped. 4RP 6-7. Draper watched as Jasper climbed out the passenger side window, walked around his Explorer and over to the Focus. 4RP 7-8, 28; Ex. 12. Draper heard

Jasper ask Wong if he was okay. 4RP 8. A few moments later, he saw Jasper walking north, away from the accident scene. 4RP 9.

King County Sheriff Sergeant William Bridges was dispatched to an accident in the 22200 block of Military Road South and arrived within two minutes of the call. 4RP 15-16. As he approached the accident scene, Sergeant Bridges saw a man matching the description provided by dispatch walking northbound on Military Road South, six blocks from the accident. 3RP 55; 4RP 17. Bridges turned his car around and attempted to obtain Jasper's attention, but Jasper kept walking. 4RP 17-18. Bridges got out of his car and yelled at Jasper to come over to him, which Jasper did. 4RP 18. When Bridges told Jasper why he was being detained, Jasper responded by asking Bridges if he "could just give [him] a ticket and go home." 4RP 19. Bridges testified that during his interaction with him, Jasper did not have any difficulty speaking and appeared coherent and alert. 4RP 20-21. Bridges also stated that Jasper did not have any visible physical injuries. 4RP 20.

At the same time, King County Sheriff Sergeant Marcus Williams arrived at the accident scene near South 222nd Place and began his investigation. 3RP 44; Ex. 18. Sergeant Williams walked over to the Explorer, saw that no one was inside, and noted

that the engine was not running. 3RP 50-51; Ex. 12, 13. Williams then spoke with Draper, after which Williams drove Draper to South 216th Street where Bridges had detained Jasper. 3RP 54-55. Draper identified Jasper as the driver of the Explorer. 3RP 11-12; 4RP 20.

After advising Jasper of his Miranda³ rights, Jasper told Williams that he had informed the woman in the car that he was the other driver. 3RP 56. Williams asked Jasper why he left the scene. 3RP 56. Jasper replied that he was sorry. 3RP 56. When asked by Williams, Jasper admitted that he knew his driver's license had been suspended, and that that was the reason he left the accident scene. 3RP 56. Williams testified that during his contact with him, Jasper was fairly alert and did not appear confused. 3RP 58-59. Williams did not observe any visible physical injuries and recalled that Jasper had declined medical aid. 3RP 58-59, 61-62.

King County Sheriff Deputy Ryan Abbott transported Jasper to the SeaTac city hall building. 3RP 68. On the way there, Jasper told Deputy Abbott that "he was tired...from working so much and that he didn't mean to hit that person." 3RP 68-69. Abbott testified

³ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct.1602, 16 L. Ed. 2d 694 (1966).

that Jasper appeared coherent and alert while speaking to him, and that he did not notice any physical injuries while Jasper was in his custody. 3RP 68-69.

In addition to the witnesses' testimony, the State offered, and the court admitted over defense counsel's objection,⁴ a three-page certified document from the Washington Department of Licensing (DOL). 3RP 57; Ex. 16. The first page was a letter from DOL that stated that Jasper's license status on February 14, 2005 was "suspended in the third degree."⁵ 3RP 63; Ex. 16. The second and third pages, both dated May 14, 2007, were notices addressed to Jasper informing him that his driving privilege would be suspended effective June 28, 2007. Ex. 16.

The defense called two witnesses: Tina Gorrie and Jasper. Gorrie testified that when she went to the accident scene, she saw Jasper getting into a patrol car two blocks from the Ford Explorer. 4RP 24-25. Gorrie left without speaking to Jasper. 4RP 25.

Jasper testified that on that evening, he was driving his Explorer home from work and got into an accident with another car. 4RP 27-28. Jasper stated that he had hit his head "pretty hard" and

⁴ Defense counsel objected only on the ground that admission of the exhibit violated the right to confrontation. 3RP 57.

that he was "really dazed" after the accident. 4RP 28-31. Jasper said that he climbed out of the passenger window of his vehicle, walked over to the Focus, checked on the driver, and told Li that he was the one who had hit their car. 4RP 28. He did not provide Li with any insurance information or his driver's license because he did not possess either. 4RP 29. Jasper further testified that although he walked up the street a distance, he did not intend to leave the scene, and had even initiated the contact with Bridges. 4RP 30. Jasper further stated that he did not pay attention to what the officers said to him and that he was not offered any medical aid. 4RP 31. Jasper told the jury that at the time he "just wanted to close [his] eyes and forget about it" so he lay down in the back of the patrol car to sleep on the way to the jail. 4RP 31-32.

On cross examination, Jasper admitted knowing that he had been involved in an accident that he caused. 4RP 35-36, 38. Jasper could not recall whether he had provided Li or Wong with his address, nor what he said to Bridges and Williams about the accident. 4RP 35-38. Jasper further contended that although he had been detained as he was walking away from the accident scene, he had actually turned around and was walking back toward

the accident when he saw Bridges and approached him. 4RP
37-38, 39-40.

C. ARGUMENT

1. CERTIFIED DOCUMENTS FROM THE DOL WERE
PROPERLY ADMITTED.

Jasper argues that DOL documents admitted as exhibit 16 were “testimonial” evidence that must be presented by in-court testimony from a live witness. Br. of App. at 8-12. He also asserts that because the documents contained opinions they could not be admitted under the business records exception to the hearsay rules. Br. of App. at 13. Both arguments should be rejected. The DOL documents were not testimonial under recent Supreme Court authority, and the documents fall squarely under the public records exception since they contain only information derived directly from the records, without opinion, interpretation, or the exercise of judgment. Moreover, even if the cover letter was partly testimonial, any error was harmless because the defendant admitted his license was suspended and the certified documents corroborated that admission.

a. Relevant Facts.

Exhibit 16 was admitted to prove that Jasper's license was suspended on February 14, 2008. The exhibit is three-pages long.

The first page is a letter from DOL dated April 14, 2008 (*hereinafter* "certification" or "certification letter"). The letter contains Jasper's driver's license number, his full name, his address, his date of birth, gender, height, weight. The letter says that "[t]he information in this report pertains to the driving record of ... Jasper, Douglas Scott..." It also states that "after a diligent search, our official record indicates that the status [of Jasper's driving record] on February 14, 2005, was: Personal Driver License Status: Suspended in the third degree[.]" 3RP 63; Ex. 16. The letter then refers to "PDL Attachments" "Notice of Suspension June 28, 2007." At the bottom of the letter is an official seal of the State of Washington and a signed attestation from a custodian of records.

The second and third pages of exhibit 16 are certified copies of two documents kept by the DOL in Jasper's driving record. The documents are notices sent to Jasper alerting him that his license would be suspended as of June 28, 2007, because "you failed to respond, appear, pay, or comply with the terms of the citation listed below." Ex. 16. Each notice letter was dated May 14, 2007 and

lists Jasper's full name, driver's license number, and date of birth. The underlying infractions are listed by citation number, violation date, and type. One infraction was issued on January 15, 2007 for "REGISTRATION VIOL. / NO TABS" and was filed in Pierce County District Court. The other infraction was issued on April 26, 2007 for "DRIVING W/O LIABILITY INS" and was filed in Puyallup Municipal Court. Ex. 16. Both letters contain a certification under penalty of perjury that a true and accurate copy of the letter was mailed to Jasper on May 14, 2007.

There was no question that Jasper knew his license was suspended because he told the arresting officer that the reason he left the scene of the accident was that his license was suspended. 3RP 56. He also admitted at trial that he did not have proof of insurance or a driver's license in his possession on February 14, 2008, and he confirmed on cross-examination that knew his license was suspended as of that date. 4RP 29, 36.

b. Certified Copies Of DOL Records Do Not Contain Opinions And Are Admissible As Public Records.

RCW 5.44.040 provides that copies of records and documents filed in state departments are admissible if it is certified under the official seals of the records custodian.⁶ A public record certified in this manner is self-authenticated. ER 902(d); State v. Monson, 113 Wn.2d 833, 836-37, 784 P.2d 485 (1989) (upholding admission of a certified copy of a driver's record (CCDR) as a public record). To be admissible, certified public records must:

- (1) contain facts, rather than conclusions that involve the exercise of judgment or discretion or express an opinion,
- (2) relate to facts that are of a public nature,
- (3) [are] retained for the benefit of the public, and
- (4) there [is] express statutory authority to compile the report.

State v. C.N.H., 90 Wn. App. 947, 949-50, 954 P.2d 1345 (1998).

A driving record is "a classic example of a public record kept pursuant to statute, for the benefit of the public and available for public inspection." State v. Monson, 53 Wn. App. 854, 858, 771 P.2d 359, aff'd, 113 Wn.2d 833 (1989).

⁶ "Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state or any other state or territory of the United States, when duly certified by the respective officers having by law the custody thereof, under their respective seals where such officers have official seals, shall be admitted in evidence in the courts of this state." RCW 5.44.040.

The Washington Supreme Court and Court of Appeals have repeatedly held that a certification from DOL indicating the status of a defendant's driving privilege is an admissible public record. State v. Smith, 122 Wn. App. 699, 94 P.3d 1014 (2004), rev'd on other grounds, 155 Wn.2d 496 (2005), is controlling. In Smith, the defendant was charged with driving while his license was suspended or revoked. 122 Wn. App. at 701. The trial court admitted a document certifying that after a diligent records search by DOL, Smith's driving privilege was "suspended/revoked in the first degree." Id. at 704-05. This Court rejected Smith's argument that the certification contained an impermissible opinion on his guilt, concluding instead that the records custodian "simply communicated his driving status as reflected in DOL's computer records." Id. at 705. Similarly, in State v. Chapman, the court held that the DOL certification indicating that the defendant's driving privilege had been revoked "contained neither expressions of opinion nor conclusions requiring the exercise of discretion." 98 Wn. App. 888, 891, 991 P.2d 126 (2000) (quoting Monson, 53 Wn. App. at 858) (internal quotations omitted). See also: State v. Kronich, 160 Wn.2d 893, 903-04, 161 P.3d 982 (2007); and State v. Kirkpatrick, 160 Wn.2d 873, 886, 161 P.3d 990 (2007)

("Washington courts have long recognized the inherent reliability and admissibility of driving records from DOL.").

Jasper also asserts that the phrase "suspended in the third degree" is the expression of an opinion on the ultimate question before the jury. Br. of App. at 15. A similar argument has already been rejected by the Washington Supreme Court. In State v. Kirkpatrick, the defendant argued that "the document at issue in his case is not a driving record, but rather a statement of opinion regarding the existence thereof." Kirkpatrick, 160 Wn.2d at 887.

The Court rejected this argument, holding that

[t]he document at issue in the present case is indistinguishable from the documents at issue in Monson, Chapman, Gaddy, and Smith in terms of their being prepared by DOL records custodians for trial purposes. The documents were produced according to the same process, based on identical requests from the relevant prosecutorial authorities.

Id.

The documents admitted in Jasper's trial appear to be nearly identical to the cover letter and documents admitted in Smith, Chapman, Kronich, and Kirkpatrick. The documents pertain to the status of Jasper's driving privilege. The cover letter includes a neutral recitation of the facts contained in the department's records rather than "conclusions that involve the exercise of judgment or

discretion.” See C.N.H., 90 Wn. App. at 449. Jasper’s argument that the records contain opinion evidence is foreclosed by the cases cited above.⁷ Thus, the jury’s province as the ultimate finder of fact was not invaded because the DOL documents did not constitute opinion testimony as to the ultimate issue of whether Jasper was driving while his license was suspended or revoked.

c. Neither The Certificate Of Authenticity Nor The Attached Documents Were Testimonial.

Jasper argues that the recent Supreme Court decision in Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) has abrogated the Washington Supreme Court’s decisions in Kirkpatrick and Kronich, and precludes the use of certified public records like those admitted in exhibit 16. Br. of App. at 8-12. This argument should be rejected. An analyst’s laboratory report is fundamentally different from the DOL records at

⁷ Jasper appears to claim that the prosecutor’s assertion in closing argument that the certification letter contained a typographical error constituted an “opinion” and justifies reversal of his conviction. Br. of App. at 13-14. It is unclear how that result follows unless he were to argue that the trial court abused its discretion in denying the motion for mistrial. In any event, the traffic accident obviously occurred on February 14, 2008, so the date listed on certification letter – February 14, 2005 – is likely incorrect. Still, pages two and three of exhibit 16 show that Jasper’s license was suspended in 2007, and Jasper agreed with that point in his testimony. If the 2005 date is correct, then Jasper’s license had been suspended for years, rather than simply since 2007. Thus, it hurts Jasper if the 2005 date was *not* a typographical error.

issue here. The analyst's report attests to actions taken wholly after commission of the defendant's crime, whereas the DOL certification letter and attached documents simply attest to the state of the defendant's driving record at the time of the offense. But-for the crime, the analyst's report would not exist. The DOL records, on the other hand, existed independent of the crime.

Six years ago the Supreme Court held that a defendant's right under the Confrontation Clause was to confront those "who bear testimony" against him. Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The Court held that a witness's testimonial assertions are admissible only if the witness appears at trial or the defendant has some other opportunity to cross-examine the witness. Crawford, 541 U.S. at 54. The Court adopted the term "testimonial" to describe the class of statements covered by the Confrontation Clause. Testimonial evidence was said to include:

" ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," . . . ; "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," . . . ; "statements that

were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”

Id. at 51-52 (citations omitted).

However, not all out-of-court statements are testimonial. For instance, the Supreme Court had already indicated that business records are not testimonial. Crawford, 541 U.S. at 56. The Court had also implied that certified public records are not testimonial. See Id. at 76 (Rehnquist, C.J., concurring) (stating that the majority would find “official records” nontestimonial). The Court has held that statements made to resolve an on-going emergency are not testimonial. Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L.Ed.2d 224 (2006). Statements in “medical reports created for treatment purposes” are not testimonial. Melendez-Diaz, at 2533 n.2. And, dying declarations and statements made as part of an on-going conspiracy are not testimonial. Crawford, 541 U.S. at 55.

In Melendez-Diaz, the question was whether an analyst’s report of a laboratory drug test was testimonial. Melendez-Diaz was arrested and a white powdery substance was found in his possession. Police requested that the substance be tested. A laboratory analyst complied and found that the substance contained

cocaine. The analyst prepared a report which was admitted at trial. Melendez-Diaz was convicted of drug possession.

The Supreme Court concluded that there was “little doubt” that the report was testimonial because it was an affidavit attesting to the results of an analysis that had been conducted after the defendant’s arrest, and that “the sole purpose of the affidavit... was to provide prima facie evidence of the composition, quality, and the net weight of the analyzed substance.” Melendez-Diaz, at 2532. The Court had previously prohibited similar evidence. Id. at 2538 (citing Palmer v. Hoffman, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943) (trial court reversed for admitting an accident report prepared by a railroad company employee after an accident describing the events from the railroad employee’s perspective)). The Court contrasted true business records with this situation by saying, “a clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but [a clerk] could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant.” Id. at 2539.

In other words, the Court has held that an affidavit cannot be created after the crime, for purposes of proving the crime, and attesting to facts that occurred wholly after the crime. The Court

also rejected an argument that cross-examination of the drug analyst would be fruitless. Melendez-Diaz, at 2536-38. It noted that cross-examination could expose and/or deter incompetent or fraudulent analysts. Id.

At the same time, the Court has affirmed its well-established rule that true business or public records may be admitted without live testimony; such records are not testimonial.⁸ The Court said that “documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status,” Id. at 2538, and observed that early cases permitted the use of “records prepared for the administration of an entity's affairs, and not for use in litigation.” Id. at 2538 n.7 (citing King v. Rhodes, 1 Leach 24, 168 Eng. Rep. 115 (1742) (admitting into evidence ship's muster-book); King v. Martin, 2 Camp. 100, 101, 170 Eng. Rep. 1094, 1095 (1809) (vestry book); and King v. Aickles, 1 Leach 390, 391-92, 168 Eng. Rep. 297, 298 (1785) (prison logbook)). The Court also noted that “a clerk’s certificate authenticating an official record – or a copy thereof – was traditionally” admissible. Id. The clerk was

⁸ The Court had observed in Crawford that: “Most of the hearsay exceptions covered statements that by their nature were not testimonial – for example, business records or statements in furtherance of a conspiracy.” Crawford, 541 U.S. at 56.

“permitted to certify to the correctness of a copy of a record kept in his office but had no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect.” Id. at 2539 (internal quotation marks and citations omitted). The Court also observed that “documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.” Id. at 2532 n.1. And, the Court noted that a clerk or judge historically could certify to the conduct of a defendant’s prior trial and such certification would not be considered testimonial. Id. at 2539 n.8 (citing Dowdell v. United States, 221 U.S. 325, 31 S. Ct. 590, 55 L. Ed. 753 (1911)).

The records in Jasper’s case fit within this historical exception for business records or public records. As discussed supra at 11-14, Washington Courts have repeatedly held that DOL records are classic public records. Kirkpatrick, 160 Wn.2d at 886.⁹

⁹ An abstract of driving record contains: (a) An enumeration of motor vehicle accidents in which the person was driving; (b) The total number of vehicles involved; (c) Whether the vehicles were legally parked or moving; (d) Whether the vehicles were occupied at the time of the accident; (e) Whether the accident resulted in any fatality; (f) Any reported convictions, forfeitures of bail, or findings that an infraction was committed based upon a violation of any motor vehicle law; (g) *The status of the person’s driving privilege in this state*; and (h) Any reports of failure to appear in response to a traffic citation or failure to respond to a notice of infraction served upon the named individual by an arresting officer. RCW 46.52.130(6) (emphasis added).

The records are prepared and kept for the public benefit and to permit administration of the driving laws of the state of Washington.¹⁰ A certification as to the contents of that record is likewise admissible, even if the certification contains a terse summary of the relevant body of records, as the certification did in this case. Smith, 122 Wn. App. 704-05; Chapman, 98 Wn. App. 891. The certification does not contain an opinion and it does not involve the exercise of discretion or judgment. Id. The certification here met the criteria of Melendez-Diaz: “a clerk . . . by affidavit authenticate[d] [and] provide[d] a copy of an otherwise admissible record.” Melendez-Diaz, at 2539.

Jasper argues that the certification in this case was testimonial because it was prepared *after* the event in question, for the purposes of litigation. But *any* certification authenticating public records will be created after the fact of the event. The important point, for purposes of determining whether the document is

¹⁰ DOL records may be requested by statutorily specified recipients for specific public safety purposes. Those recipients include: an employer or prospective employer for purposes of determining whether the individual named in the record should be permitted to drive a commercial vehicle or school bus; an employee or agent of a transit authority checking prospective vanpool drivers for insurance and risk management purposes; an insurance carrier for underwriting purposes; and an alcohol drug assessment and treatment agency. See RCW 46.52.130(1), RCW 46.52.130(10) and RCW 46.52.130(11).

testimonial, is that the certification not contain opinions of the exercise of judgment, especially as to matters that post-date the crime. In other words, the certification must simply be a reflection of the “administration of an entity’s affairs” before the date of the crime. Melendez-Diaz, at 2538 n.7.

The documents admitted in Jasper’s trial are fundamentally different from the laboratory report in Melendez-Diaz or the railroad accident report in Palmer v. Hoffman. A laboratory report involves the exercise of scientific expertise, judgment and discretion. It is the product of a scientific testing process where an analyst examines a substance, performs steps to test that substance, and reports his or her results. It is the creation of new evidence rather than the simple reporting of evidence that existed before the request from law enforcement.

Finally, DOL records are different from lab reports in another way, to wit: DOL records available to defendants upon request from either the prosecution or from the DOL.¹¹ Armed with his own copy of his driving record, a defendant can dispute information contained

¹¹ DOL is also authorized to prepare a certified abstract of an individual’s driving record which can be provided to the person named in the abstract (RCW 46.52.130(1)(a)) and to city and county prosecuting attorneys (RCW 46.52.130(1)(h)).

in a certification, he can attack the completeness of the custodian's records search, and he can supplement the trial record with whatever additional, relevant information he wishes the judge or jury to consider. A defendant facing an affidavit attesting to the chemical content of a seized substance is unable to mount such a document-based defense. Thus, unlike the situation in Melendez-Diaz, cross-examination of the custodian of DOL records would truly be "an empty formalism." Id. at 2537 n.6.¹²

For these reasons, a certification from a DOL record custodian is fundamentally different than a report issued by a forensic laboratory analyst where the analyst conducted the test and prepared the report to prove the defendant's guilt. This court should hold that exhibit 16 was nontestimonial, and was properly admitted.

¹² In a cryptic paragraph, the Court seems to have opined that certificates of the non-existence of a record are testimonial. Melendez-Diaz, at 2539. No such certificate was at issue in the case, so any comments on that topic are properly considered non-binding dicta. See Pierre N. Leval, Judging Under The Constitution: Dicta About Dicta, 81 N.Y.U.L.Rev 1249 (2006).

- d. Even If A Portion Of The Certification Letter In Exhibit 16 Was Testimonial, Any Error Was Harmless In Light Of The Two Notices Of Suspension As Well As Jasper's Admissions.

Jasper argues that because the admission of the DOL documents violated his right to confrontation, and the State cannot show beyond a reasonable doubt that the impermissible evidence did not contribute to his conviction for Driving While License Suspended or Revoked this conviction must be reversed. Jasper further contends that because the State also used this evidence as the "central proof...to show Jasper was irresponsible and avoiding facing the consequences for his actions.....," his Felony Hit and Run, conviction must also be reversed. Br. of App. at 18. He is mistaken.

A violation of the confrontation clause may be harmless error. State v. Hieb, 107 Wn.2d 97, 109, 727 P.2d 239, 246 (1986); Delaware v. Van Arsdall, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (whether the limitation of cross-examination in a particular case was harmless error is determined by analyzing five factors). In determining whether the error was harmless, courts look to factors such as "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the

presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and ... the overall strength of the prosecution's case." Van Arsdall, 475 U.S. at 684.

The DOL documents in this case were not necessary to establish the elements of Felony Hit and Run. RCW 46.52.020. The documents simply corroborate Jasper's admissions that he left the scene because he knew that his license was suspended, an admission that Jasper confirmed at trial, and that he does not challenge on appeal. 3RP 56; 4RP 35-36, 38. Thus, the documents had no effect on the jury's verdict on the hit and run charge.

Admission of exhibit 16 was also harmless as to the DWLS 3 charge. To prove DWLS 3, the state needed to show that the defendant's privilege to drive was suspended on February 14, 2008 because he had failed to comply with his obligations to respond to traffic citations. The two notices of suspension dated May 14, 2007 -- which were clearly admissible even if the certification letter was not -- show that Jasper received citations for "REGISTRATION VIOL. / NO TABS" and "DRIVING W/O LIABILITY INS," and that he failed to appear in court and deal with these citations. Ex. 16.

These un-rebutted public records, together with Jasper's unequivocal admissions that he knew his license was suspended, clearly prove the elements of the crime and show that any error in admitting the certificate was harmless beyond a reasonable doubt.

2. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY, JASPER'S RIGHT TO BE PRESENT AT TRIAL WAS NOT VIOLATED AND ANY ERROR WAS HARMLESS.

Jasper contends that his constitutional right to be present at trial was violated when the trial court responded to a written jury inquiry outside his presence and without consulting his attorney. He further argues that the court's written response was substantively inadequate and coercive, contrary to CrR 6.15. These arguments fail because the trial court afforded Jasper's attorney the opportunity to be heard, and Jasper's presence was not required because the inquiry involved a legal issue. In the alternative, even if the court erred by failing to consult Jasper or his attorney before responding to the jury's questions, any error was harmless beyond a reasonable doubt because the court's response was correct, neutral, and conveyed no affirmative information. Rather, the court simply referred the jury back to its original

instructions, and Jasper's presence would have changed the court's approach.

a. Relevant Facts.

The jury began deliberations at 10:15 a.m. CP 110; 5RP 26.

Later that afternoon, at 1: 40 p.m., the jury submitted two written questions to the trial court:

1. What is the definition of the spirit of the law?
2. Regarding Instruction #8, Parts a-d, is a person's 'obligation to [fulfill] all of the following duties' dependent on their mental, emotional or physical condition?

CP 49, 51.

The trial court – “after affording all counsel/parties opportunity to be heard” – responded in writing. CP 50, 52, 111.

The trial court's response to each question was the same:

Please re-read your instructions [and] continue deliberating. No further instructions will be given to this question.

CP 50, 52, 111. The court's response was returned to the jury at 1:50 p.m. CP 50, 52, 111.

The record is clear that Jasper was not in custody during the trial and had difficulty attending court on time. 1RP 2-4; CP 115.

Jasper posted bond well before trial commenced and the omnibus

order indicates that he was out-of-custody. CP 116-21. Jasper was ultimately remanded into custody at sentencing. CP 149. The record is silent as to whether Jasper and/or his counsel were informed of the jury inquiry, except for the notation on the pre-printed form, which stated that all parties had been afforded the opportunity to be heard. CP 50, 52, 110-11.

b. Jasper Did Not Have A Constitutional Right To Be Present.

Defendants have a right under the confrontation clause of the Sixth Amendment, the due process clause of the Fourteenth Amendment, and article I, § 22 of the Washington constitution, to be present during all critical stages of trial.¹³ Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970); State v. Wilson, 141 Wn. App. 597, 603-04, 171 P.3d 501 (2007); CrR 3.4. The core of the constitutional right is the right to be present when evidence is being presented. United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985). Beyond that, the defendant has a “right to be present at a proceeding ‘whenever his presence has a relation, reasonably

¹³ Constitutional questions are reviewed *de novo*. State v. Castro, 141 Wn. App. 485, 490, 170 P.3d 78 (2007).

substantial, to the fullness of his opportunity to defend against the charge. . . .” Gagnon, 470 U.S. at 526, 105 S. Ct. at 1484 (quoting Snyder v. Massachusetts, 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934)).

But a defendant does not have the right to be present if legal matters are at issue rather than the resolution of facts. In the Matter of the Personal Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835, clarified on other grounds, 123 Wn.2d 737 (1994). Thus, a defendant has no right to be present during in-chambers or bench conferences between the court and counsel on legal matters where those matters do not require a resolution of disputed facts. See, e.g., In re Lord, 123 Wn.2d 306-07; United States v. Williams, 455 F.2d 361 (9th Cir. 1972); People v. Dokes, 79 N.Y.2d 656, 595 N.E.2d 836 (1992).

Communication between the trial court and counsel to discuss the jury inquiry is akin to a bench conference on a legal matter. Here, there was no resolution of disputed facts (and, of course, testimony was not being presented nor were jury instructions being read to the jury). Pursuant to Lord, Jasper’s

presence at such conference is not required. Lord, 123 Wn.2d at 306-07. This conference was not a “critical stage” of the trial.

That responding to a jury inquiry is not a critical stage of a criminal trial can be seen from the criminal rules, which explicitly allow a judge to respond to such an inquiry after providing the *parties* (not the defendant) with an opportunity to respond.

CrR 6.15 states:

The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. *The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response.* Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. *The court shall respond to all questions from a deliberating jury in open court or in writing.*

CrR 6.15(1) (emphasis added). The structure of this rule makes it clear that a judge may receive a written jury inquiry, notify the parties of its content – perhaps by telephone – and then, after providing the parties the opportunity to comment, provide a written response. This can be accomplished without the jury being present and, so long as defense counsel has been notified, outside of the

defendant's presence.¹⁴ The general procedure set forth in CrR 6.15 – that is, responding to a jury question after notice has been provided to the parties – has been approved by the courts. See State v. Jury, 19 Wn. App. 256, 270, 576 P.2d 1302, rev. denied, 90 Wn.2d 1006 (1978); State v. Brown, 29 Wn. App. 11, 16, 627 P.2d 132 (1981).

This procedure was followed here. The jury made two written inquiries. The court allowed counsel the opportunity to be heard before responding to them. The court then provided the same written response to each inquiry. CP 50, 52. This is equivalent to the trial court ruling on an evidentiary issue at a bench conference outside the defendant's presence.

For example, in State v. Brown, the jury submitted a question to the trial court and both the deputy prosecutor and the defense counsel were present to discuss possible answers. 29 Wn. App. 11. Brown himself was not present. Id. at 15-16.

¹⁴ As a practical matter, this procedure makes sense. Delaying deliberations while the parties are contacted and make their way to court, only to confirm that the jury needs to reread the instructions provides no systemic benefit and would only result in unneeded delay and expense. This burden would only increase if the defendant's presence was required as well. Of course, in some situations a jury inquiry might raise issues that would require the defendant's presence.

After considering all of the suggested answers, the trial judge answered the question in writing in a manner defense counsel objected to. Id. Brown asserted that he had a right to be present during the consideration of the jury's question, arguing that he could have aided counsel by suggesting additional arguments against the judge's response. Id. The Court of Appeals held that defense counsel's presence protected Brown's interests and that the trial court did not err in answering the jury's question in Brown's absence. Id.

Here, as in Brown, Jasper's presence during the communication between the trial court and counsel as to how to respond to the jury inquiry was not required because the communication did not bear "a reasonably substantial relation to the fullness of his opportunity to defend against the charge." Gagnon, 470 U.S. at 526. Rather, it is akin to a sidebar to discuss a legal issue. The trial court did not err in answering the jury's questions in Jasper's absence after consulting his counsel.

c. Any Error In Responding To The Jury Inquiry Is Harmless.

Assuming, *arguendo*, that the trial court's failure to consult Jasper or his counsel before answering the jury's questions was error, the error is harmless.

Communication between the judge and the jury in the absence of the defendant or defense counsel denies the defendant his right to be present at trial and constitutes error. State v. Caliguri, 99 Wn.2d 501, 508, 664 P.2d 466 (1983). The denial of a defendant's right to be present during criminal proceedings is a "trial error" (as opposed to a "structural" error¹⁵) and is therefore subject to harmless error analysis. In re Lord, 123 Wn.2d at 306-07; In re Benn, 134 Wn.2d 868, 921, 952 P.2d 116 (1998); Rice v. Wood, 44 F.3d 1396, 1441 (9th Cir. 1995), vacated in part, 77 F.3d 1138 (9th Cir. 1996); accord Hegler v. Borg, 50 F.3d 1472, 1476 (9th Cir. 1995); Rushen v. Spain, 464 U.S. 114, 117-18, 104 S. Ct. 453, 455, 78 L. Ed. 2d 267 (1983).

¹⁵ "Structural errors are those which create 'defect[s] affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" State v. Wise, 148 Wn. App. 425, 439, 200 P.3d 266 (2009) (quoting In re Det. of Kistenmacher, 163 Wn.2d 166, 185, 178 P.3d 949 (2008) (internal citations omitted)).

Prejudice to the defendant who alleges that his right to be present was violated will not simply be presumed. Rushen v. Spain, 464 U.S. 114, 117-20, 104 S. Ct. 453, 455-56, 78 L. Ed. 2d 267 (1983); see also State v. Rice, 110 Wn.2d 577, 615 n.21, 757 P.2d 889 (1988). The burden of proving harmlessness is on the State and it must do so beyond a reasonable doubt. State v. Saraceno, 23 Wn. App. 473, 475-76, 596 P.2d 297 (1979). Nonetheless, the defendant must first raise at least the possibility of prejudice. See, e.g., United States v. Ford, 632 F.2d 1354, 1379 n.28 (9th Cir. 1980); State v. Smith, 85 Wn.2d 840, 853, 540 P.2d 424 (1975); State v. Caliguri, 99 Wn.2d 501, 508, 664 P.2d 466 (1983).

Jasper relies on Linbeck v. State and State v. Beaudin to support his argument that he was prejudiced by the court's failure to consult him and his counsel before answering the jury's questions; however, these cases are distinguishable. In Linbeck, 1 Wash. 336, 338-39, 25 P. 452 (1890), the trial court not only re-read instructions to the jury, *but explained them*, without the defendant being present. Id. That error – expanding on the jury instructions outside the presence of the defendant – did not occur in the present case. Note also that in Linbeck the court also

reversed for failure to give a cautionary instruction concerning the defendant's right not to testify and there were "other errors are founded upon the manner in which the instructions were given." Id.

Likewise, in State v. Beaudin, 76 Wash. 306, 308-09, 136 P. 137 (1913), the court responded to a jury question by preparing and reading in open court new instructions without the defendant being present. This was held to be error, but significantly the court emphasized that under the facts of that case there was no way for the defendant to know what the trial court had actually said to the jury and that he could not be compelled to accept the trial judge's representation as to what transpired at the trial during the defendant's absence. Id. at 309. This problem does not occur when, as in the present case, the court responds to the jury's question in writing.

This case is unlike Linbeck and Beaudin and similar to State v. Langdon, 42 Wn. App. 715, 713 P.2d 120 (1986). In Langdon, the court instructed the jury on the elements of first and second degree robbery, as well as accomplice liability and theft. Id. at 717. The jury sent a note to the judge asking, "Does 'committing' mean aid in escaping?" The judge replied, without consulting with the parties, "You are bound by those instructions already given to you."

Id. Langdon contended this communication violated his right to be present at all stages of the proceedings. Id. The appellate court disagreed and found any error was harmless because the communication was neutral and simply referred the jury back to the previous instructions. Id. at 717-18.

Here, Jasper suffered no prejudice because the court's original instructions adequately instructed the jury on the law and the written response provided by the court correctly referred the jurors back to their instructions. Contrary to Jasper's argument, the court was under no obligation to answer the jury's inquiry or provide further instruction. Langdon, 42 Wn. App. at 718. Even if Jasper's counsel had been consulted, counsel could not have required the court to provide additional instructions to the jurors; especially in response to the second question because whether to give further instructions is within the trial court's discretion. Id.

Nonetheless, Jasper cites United States v. Southwell for the proposition that the trial court has "the responsibility to eliminate confusion when a jury asks for clarification of a particular issue." 432 F.3d 1050, 1053 (2005) (quoting United States v. Hayes, 794 F.2d 1348, 1352 (9th Cir. 1986)). In Southwell, the trial court failed to instruct the jury on whether they were required to reach a

unanimous decision on defendant's insanity before considering guilt or innocence. 432 F.3d at 1052. During deliberations, the jury sent a note to the court indicating that it was unclear on what to do if the jurors could not agree unanimously on the issue of insanity. Id. Over defense counsel's objections the court advised the jury to use their "best recollection" of the evidence and the instruction. Id. The Ninth Circuit found this response to be inadequate by reasoning that the court abused its discretion when failing to answer a jury's question on a matter that is not fairly resolved by the jury instruction. Id. at 1053. The court did not decide whether the original instructions were deficient and rendered their ruling entirely on the inadequacy of the jury's response. Id. at n.1.

Again this case is distinguishable because the "confusion" expressed by the Southwell jury bore directly on his right to a unanimous verdict. Here, there was no similar "confusion" about the requirement of unanimity because the original instructions sufficiently allowed the parties to argue their theories of the case and properly informed the jury of the applicable law. State v. Barns, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005).

Indeed, harmless error has been found in situations potentially more serious than the present case. See, e.g., State v.

Caliguri, 99 Wn.2d 501, 505, 664 P.2d 466 (1983) (error harmless when court played back tapes for the jury, without defense counsel or the defendant present, and despite the fact that certain portions of the tapes had been previously excluded).

Furthermore, though Jasper's counsel requested another instruction in addition to endorsing the State's proposed instructions, including the "to-convict" instruction for Felony Hit and Run, he did not request an instruction regarding the statutory defense of physical incapacity.¹⁶ CP 14-16, 23, 111. Nor did counsel object to the trial court's written response to the jury's inquiries. CP 111. Significantly, Jasper does not assert that his counsel was ineffective for failing to do so.

¹⁶ The evidence did not support the giving of an instruction on physical incapacity. Although Jasper stated multiple times during his testimony that his head hurt and that he was dazed after the accident, no other evidence corroborated his story. 4RP 28-32, 36-37, 40. On the contrary, all testified that they did not observe any physical injuries during their contact with Jasper and that he appeared alert and coherent. 3RP 58-59, 68-69; 4RP 20. In fact, Jasper, who was found six blocks away, had the presence of mind to ask Bridges to "just give [him] a ticket and [let him] go home." 3RP 55-56; 4RP 15-16, 19. Thus, there was substantial evidence rebutting Jasper's claim that he was too injured and confused after the accident to comply with the law.

d. The Trial Court's Response To The Jury's Inquiry Was Not Coercive.

Jasper relies on State v. Boogaard, 90 Wn.2d 733, 585 P.2d 789 (1978), to support his argument that the court's response to the jury's questions was coercive. In Boogaard, the jury deliberated from mid-afternoon until 9:30 p.m. when the judge called the jury into the court room and asked each juror if he or she thought it was possible to reach a verdict in a half an hour. Id. at 735. All but one juror answered in the affirmative and the trial court instructed the jury to continue deliberating for another half hour. Id. After the half hour passed, the jury returned a guilty verdict. Id. The Court of Appeals reversed, finding that the trial judge's questioning inevitably tended to suggest to the minority jurors that they should relinquish their position for the purpose reaching a verdict within a half hour. Id. at 736.

Here, the trial court simply stated that the jury should re-read the instructions and continue deliberating. CP 50, 52. Unlike Boogaard, the court did not individually question any jurors, did not direct the jury to reach a verdict, nor limit the time for deliberation. In sum, the trial court's response was proper and not coercive. Any

error in not consulting with Jasper before providing a written response to the jury inquiries is harmless.

3. A GUNWALL ANALYSIS IS NOT REQUIRED AND THE RIGHT TO BE PRESENT AT TRIAL UNDER ARTICLE I, SECTION 22 OF THE WASHINGTON STATE CONSTITUTION IS COEXTENSIVE WITH THE SIMILAR RIGHT UNDER THE UNITED STATES CONSTITUTION.

The State respectfully submits that because any error in providing a written response to the jury inquiry was harmless beyond a reasonable doubt, it is unnecessary to conduct a Gunwall¹⁷ analysis to determine whether the state constitution provides greater protection than the federal constitution in this context. Moreover, Jasper never clearly articulates what “greater protection” he is seeking under the Washington constitution. If Jasper is requesting the adoption of a “no harmless error” rule that argument has already been rejected. In re Lord, 123 Wn.2d at 306-07; In re Benn, 134 Wn.2d at 921; Rice v. Wood, 44 F.3d at 1441 (9th Cir.1995). Likewise, if Jasper is suggesting that a defendant must always be present whenever the trial court is

⁸ State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

considering a jury inquiry, that claim has also been rejected. See, e.g., State v. Jury, 19 Wn. App. 256, 270, 576 P.2d 1302 (1978); State v. Brown, 29 Wn. App. 11, 16, 627 P.2d 132 (1981). For the sake of completeness, however, the State responds to these arguments.

In determining whether the Washington constitution offers greater protection than the federal constitution, courts consider the “Gunwall” factors: (1) the textual language of the state constitution; (2) significant differences in the texts of the parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) whether the subject matter of the constitutional provision presents a matter of particular state interest or local concern. See State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986); see also State v. Foster, 135 Wn.2d 441, 458, 957 P.2d 712 (1998).

Applying these factors demonstrates that article I, § 22 of the Washington constitution does not offer greater protection of a defendant’s right to be present at trial than does the federal constitution.

a. The Language Of The Parallel Provisions:
Factors 1 And 2.

The Confrontation Clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .” Article I, § 22, provides similar protection: “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel” The language of the federal and state provisions is not exactly the same. However, the language of the federal constitution has been interpreted to mean that a defendant has the right to be present at all critical stages of the trial.

While the federal provision does not explicitly guarantee the “right to appear,” the right of a defendant to “confront” witnesses at a public trial necessarily implies the right to be present at trial. Indeed, the United States Supreme Court has long interpreted the protections of the Confrontation Clause to include a defendant’s right to be present at every stage of the trial proceedings. See, e.g., Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) (citing Lewis v. United States, 146 U.S. 370, 13 S. Ct. 136, 36 L. Ed. 1011 (1892))

Washington law is in accord. See, e.g., 4A Karl B. Tegland, WASHINGTON PRACTICE: RULES PRACTICE CRR 3.4, at 237 (6th ed. 2002) (Author's Comments) (criminal defendant's right under Wash. Const. Art. I, § 22 to appear and defend in person is "a basic right, derived from the common law and guaranteed by the confrontation clause of the Sixth Amendment"); State v. Maryott, 6 Wn. App. 96, 102-03, 492 P.2d 239 (1971) (accused's fundamental right to be present at his trial and to confront witnesses against him derives from common law, and is guaranteed by the Sixth Amendment and Wash. Const. Art. I, § 22).

Thus, the Washington Supreme Court has found no significant differences between these two provisions:

Although the language of the Sixth Amendment and this state's confrontation clause is not word-for-word identical, the meaning of the words used in the parallel clauses is substantially the same. . . . Additionally, the United States Supreme Court has consistently interpreted the language of the Confrontation Clause to mean "face-to-face" confrontation. . . .

We find no significant difference between the language used in the parallel provisions of the state and federal confrontation clauses.

State v. Foster, 135 Wn.2d 441, 459, 957 P.2d 712 (1998)

(citations omitted). While the language of the federal and state

provisions is different, they have been interpreted consistently. These factors do not support an independent state analysis.¹⁸

b. State Constitutional And Common Law History: Factor 3.

As Jasper concedes, there is no relevant evidence of the framers' intent in crafting the language of article I, § 22. See App. Br. at 30; see also Foster, 135 Wn.2d at 461 (review of the limited history of state confrontation clause does not reveal an intent on the part of the drafters to create a broader right than that stated in the Sixth Amendment).

c. Preexisting State Law: Factor 4.

To determine the scope of a right under the Washington constitution, courts look to Washington law in existence in 1889, at the time of the adoption of the constitution. State v. Smith, 150 Wn.2d 135, 151, 153, 75 P.3d 934 (2003). As Jasper points out, Washington law has long protected a defendant's right to be present at his trial. See App. Br. at 30-31. The State does not

¹⁸ Even if this court were to determine that the state provision is significantly distinctive, that fact alone would be insufficient to support independent state law interpretation. Foster, 135 Wn.2d at 459.

dispute this. As discussed above, however, the early cases present slightly different factual scenarios. Specifically, the cases appear to involve circumstances in which the court is providing additional (and new) instructions to the jury outside the defendant's presence. See App. Br. at 27-28, 30-31. Moreover, in the other early case relied upon by Jasper, the court explained the meaning of the instructions to the jury outside the defendant's presence. See App. Br. at 31. The State does not disagree that these scenarios are improper under both the federal and state constitutions. But Jasper can point to no case that involves the precise scenario here and the early case law provides no specific assistance in evaluating the scope of the Washington constitution.

d. Structural Differences Between The Federal And State Constitutions: Factor 5.

The United States Constitution is a grant of limited power to the federal government, while the state constitution limits the otherwise plenary power of the state. Gunwall, 106 Wn.2d at 66; Foster, 135 Wn.2d at 458-59. This difference in structure supports

an independent state constitutional analysis in every case. Foster, 135 Wn.2d at 458.

e. Particular State Interest Or Local Concern:
Factor 6.

This factor requires the court to determine whether the right at issue is a matter of such “singular” state interest or local concern that the Washington constitutional provision should be interpreted independently of its federal counterpart. Foster, 135 Wn.2d at 461. Jasper does not cite any cases that bear directly on the question of whether the right to be present, or even the right to voir dire, is a particularly local concern.¹⁹

The Washington Supreme Court, analyzing a different aspect of article I, § 22, found that “[t]he concern of this state in the

¹⁹ Jasper’s reliance on State v. Lanciloti, 165 Wn.2d 661, 667, 201 P.3d 323 (2009), is not on point. Lanciloti addressed a different provision of art. I, § 22:

The Washington constitution provides that “[i]n criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed.” CONST. art. I, § 22. . . .

Id. at 667 (emphasis added).

fundamental right of an accused to confront witnesses against him or her, in the context of child victim testimony, is not unique to the State of Washington.” Foster, 135 Wn.2d at 465. The court concluded that, because “Washington’s interest in the protection of a defendant’s confrontation right in this context is comparable to the national interest in this same right,” this Gunwall factor did not support independent state constitutional analysis. Id.

Similarly, there is no basis to conclude that Washington’s interest in protecting a defendant’s right to be present during a jury inquiry (or a side bar to respond to a jury inquiry) is somehow different from the national interest in protecting that same right. This factor does not support independent state constitutional analysis.

In sum, there is no support in Washington law for an independent state analysis of a defendant’s right to be present during a brief discussion of a jury inquiry.

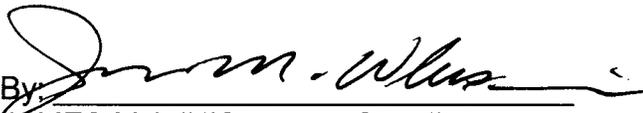
D. CONCLUSION

For the foregoing reasons, the State requests that Jasper's convictions be affirmed.

DATED this 8th day of March, 2010.

Respectfully submitted,

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